IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION
IN CHAMBERS

CAUSE NO. G49 OF 2018

BETWEEN

MCGLYNN ENTERPRISES LTD

Plaintiff

AND

MAGDA-ZOE EMBURY

Defendant

Appearances:	Mr A. Jackson and Miss A. Martin of Appleby for the Plaintiff Mr J. Chapman and Miss L. Clemens of Chapmans for the Defendant
Present:	Miss Embury
Heard:	22 January 2019
Date Ruling circulated:	13 March 2019
Plaintiff's further submissions:	9 April 2019
Defendant's further submissions:	16 April 2019
Final Ruling[1]:	25 June 2019

HEADNOTE

Wasted Costs - Attorneys – proceedings commenced of the Court's own motion
Wasted Costs - O.62, r.12(5) - need for supporting affidavit to be served on attorney personally
Indemnity costs - summary judgment - hopeless cases

[1] See Endnote.

RULING AS TO COSTS

1. This is my ruling on the Plaintiff's application for costs arising from their successful application for summary judgment (see judgment of 22 January 2019). The Plaintiff has two summonses as to costs before the court.

2. The Plaintiff's primary application is for a wasted costs order against Chapmans, alleging that Chapmans' conduct of the case, from the time that they came on record for the Defendant (at the filing of the Acknowledgment of Service) up to, and including, the costs hearing, was unreasonable and negligent (summons dated 14th January 2019). In addition, they argue that the Defendant shall pay the Plaintiff's costs preceding Chapmans' involvement on the indemnity basis.

3. In the alternative, the Plaintiff seeks an order that the Defendant pays all of its costs on the indemnity basis (summons dated 30th May 2018). This ruling should be read together with my earlier judgments-

   i. granting the Plaintiff summary judgment (22 January 2019).
   ii. refusing the Defendant leave to appeal the judgment (29 Jan 2019).

THE COMPLAINTS

The Complaint Against Chapmans

4. The complaint against Chapmans was set out in paragraph 17 of the Plaintiff's supplemental skeleton argument –

"17.1 The position taken by Chapmans in inter parties correspondence since the commencement of the action, and then advanced at the hearing of the summary judgment application, were unsustainable by reference to any authority..."

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 12/17

17.2 ...the correspondence was intemperate; and its only objectives appear to have been obstruction and abuse (seeking to employ scare tactics to discourage pursuit of the action).

17.3 Such conduct has at all times betrayed a complete (and, in any event, undoubtedly negligent and/or unreasonable) failure on the part of Chapmans to engage with the Plaintiff's pleadings and evidence in the case and consider the applicable legal principles. Had they done so, it would have been entirely clear that the Defendant had no defence to the claim, and that they could not properly be resisted...

17.4 The extreme lateness of the Defendant's affidavit in response to the summary judgment application, and her exhibited draft defence (particularly in circumstances where the Plaintiff's prior requests for the same had been rejected out of hand), introduced at a late stage a conflict of evidence which necessitated a substantial change to the Plaintiff's preparation for the hearing of the application and the obtaining and filing of further evidence...

17.5 No skeleton argument was produced by Chapmans for the summary judgment hearing, thus requiring the Plaintiff's counsel to prepare to deal, and deal at the hearing with every spurious argument which had been foreshadowed in their prior correspondence.

17.6 Mr Chapman further purported (inappropriately) to give an extraordinary amount of evidence (indeed, largely on matters of his own opinion) from the bar in his oral submissions at the hearing, which appreciably increased the length of the hearing (including by reason of the need which that created for the Plaintiff's counsel to make much more extensive submissions in reply."

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 12/17

5. Additionally, the Plaintiff complains that Chapmans' failure to reply to their written requests for an indication of whether the Defendant intended to appeal the judgment of 22 January 2019 and on the issue of costs, as well as the lack of skeleton argument in respect of the Defendant's application for leave to appeal is "fresh misconduct".

The Complaint Against The Defendant

6. At paragraph 17 of the Plaintiff's skeleton argument (dated 3 September 2018), the Plaintiff alleges that the Defendant acted unreasonably and improperly because –

> *17.1 ...the facts underlying the Quistclose trust claim had been known to her since early June 2016... and the inevitability of the professional negligence claim arising should also have been clear from shortly thereafter, owing to her inability to rectify the situation and avoid McGlynn suffering further loss.*
>
> *17.2 ...Miss Embury claimed to be incapable of serving a Defence in anything less than seven weeks [from the service of the Writ of Summons]"*
>
> *17.3 [The application for summary judgment] was issued following [Ms Embury's] refusal to swear an affidavit deposing to the basic facts on which she intends to rely by way of defence, McGlynn having concluded as a result that there was nothing amounting to a defence to which she could truthfully depose.*
>
> *17.4 In the five months since this action was commenced, the efforts properly to progress this action have been completely one-sided...Ms Embury has done little more (through her attorneys) than send intemperate correspondence to Appleby making wild assertions as to the merits and bona fides of the claim, and idly threatening strike out applications, a claim for libel, appeals to all higher courts and to seek costs on the indemnity basis...*

GRAND COURT · CAYMAN ISLANDS GOVERNMENT · 12/17

17.5 Ms Embury repeatedly ignored, and then rejected, McGlynn's further request that she serve evidence in response, whilst aggressively maintaining her opposition to this application … the responsive evidence and draft Defence which she eventually produced …raises matters which Ms Embury was entirely capable of raising within the appropriate timeframe long ago. Moreover, the purported defences set out, to which it appears that no consideration (let alone proper consideration) has been given.

17.6 … In [the Plaintiff's] pursuit of such judgment, its principle, Mr McGlynn Sr, and his agents have now become the subject of entirely baseless allegations of dishonesty… the fact that Ms Embury has sought to level them at a former client, as she seeks to avoid liability to repay funds which were never to be for her benefit (and also to compensate loss which was plainly caused by her negligence), makes the transgression considerably worse.

7. While the Defendant accepts that, as the unsuccessful party, she is liable to pay the Plaintiff's costs, she denies that there is any justification for an order for the Plaintiff's costs to be taxed on the indemnity basis. Likewise, Mr Chapman denies any unreasonable or improper behaviour which would warrant a wasted costs order being made against Chapmans.

8. I do not intend to set out the many comments in the correspondence that the Plaintiff takes issue with, and instead, I will focus on those upon which the Plaintiff placed most weight.

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 12/17

Response On Behalf Of Chapmans

9. While Mr Chapman accepted that indemnity costs should not be used as a threat, in his email of 9 April 2018 he references indemnity costs in these terms *"If you want your current mistaken application dismissed with indemnity costs to be taxed and paid forthwith then send me that consent order and I will CONSIDER IT and we can get on to closing the pleadings."*[2]

[2] 9 April 2018

10. Both in correspondence[3] and his oral submissions at the summary judgment hearing, Mr Chapman alleged that Mr McGlynn Snr was involved in a tax avoidance/evasion scheme. He did not proffer any evidence or even a basis for such a serious allegation. Mr Chapman did also insinuate in correspondence that the Plaintiff's claim might be a deliberate libel[4]. Mr Chapman has maintained that these are legitimate allegations.

11. With regards to the tone of his emails, Mr Chapman stated to the court that, *"I am sorry if my emails caused offense. That was not my intention. I was trying to get across to [Mr Jackson] that the quickest and least expensive method to get a resolution is to go to trial and appeal."*

12. Regarding the allegation that Chapmans failed to engage in meaningful correspondence with Appleby, Mr Chapman stated –

> *"I think that is the best way of dealing with [Mr Jackson]"*
> *"I only wrote 3 letters. That was intentional."*
> *"To avoid further costs we stopped corresponding."*
> *"I wrote my letters to take to taxation to get their bill down, especially if they pleaded on the wrong basis."*

13. Mr Chapman denied giving evidence from the bar, asserting that he was simply trying to get his point across.

GRAND COURT · CAYMAN ISLANDS GOVERNMENT · 12/17

Response on behalf of the Defendant

14. Mr Chapman's reply to the complaints made against the Defendant that, *"the Plaintiffs [sic] don't have a claim. That was my advice and [the Defendant's] instructions."*

[3] 9 April 2018
[4] 8 April 2018

15. Much of Mr Chapman's submissions focused on the assertion that the Plaintiff's application for summary judgment was misguided and that the decision to grant summary judgment was erroneous. While I have refused the Defendant leave to appeal, I am cognizant that the Defendant intends to apply to the Court of Appeal for leave to appeal the summary judgment, which is why many of the Defendant's arguments concerning costs overlapped with the arguments in the original application and the subsequent application for leave to appeal. These arguments are set out in detail in both previous judgments and there is nothing to be gained from rehearsing them again, although I do take them into consideration in making my determination on the Plaintiff's application for costs.

16. In addition to the allegations of dishonesty and libel against the Plaintiff and Mr McGlynn Snr, Mr Chapman also alleged that the Plaintiff's application for wasted costs "*is motivated by the thought that they had a better chance of getting their costs from Chapmans than from the Defendant.*"

17. Finally, Mr Chapman alleged that Appleby had been negligent, asserting that they had been in possession of the email receipt from the Lands and Survey Department ("LSD") and yet positively asserted that there was no record at the LSD that the documents were submitted to the LSD. Mr Jackson denied that the questioned email was in the file supplied by the Plaintiff. Mr Chapman did not elaborate on what basis he asserts that Appleby had been in possession of the email.

The Law - Wasted Costs

18. The application for wasted costs against Chapmans is governed by GCR O.62, r. 11 and r.12. R.11(3) provides that –

"Subject to the following provisions of this rule, where it appears to the Court that costs have been incurred improperly, unreasonably or negligently in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition, the Court may order –

GRAND COURT · CAYMAN ISLANDS GOVERNMENT · 12/17

(a) the attorney whom it considers to be responsible (whether personally or through an employee or agent) to repay to his client costs which the client has been ordered to pay to any other party to the proceedings; or

(b) the attorney personally to indemnify such other parties against costs payable by them.

19. In order to ensure fairness to the attorney subject to an application for wasted costs, r. 12(3) mandates that the attorney be given "*a reasonable opportunity to appear and show cause why an order should not be made*".

20. R. 12(4) provides that unless the investigation is on the court's own motion "*the application … shall be made by summons setting out the grounds of the application which shall be supported by an affidavit containing full particulars of all the facts and matters relied upon by the applicant.*" R. 12(5) provides that –

> *"A copy of a summons issued under this rule and the supporting affidavit must be served –*
>
> *(a) on the attorney personally; or*
>
> *(b) in the case of an application against Crown Counsel or any other attorney acting on behalf of the Attorney General, on the Attorney General."*

We are concerned with subsection (a).

21. While the Plaintiff served a summons on Chapmans on 14 January 2019[5], they did not serve an affidavit in support specifically setting out the conduct alleged to have been negligent and/or unreasonable. Mr Chapman submitted that the Plaintiff has failed to comply with r.12(5). The Plaintiff countered that argument, stating –

GRAND COURT CAYMAN ISLANDS GOVERNMENT 12/17

[5] An unsealed copy was provided electronically on 11 January 2019

(a) The Plaintiff had foreshadowed the application at the summary judgment hearing;

(b) The material they rely upon for the application is set out in the affidavit of Miss Lucenti and Mr Hayward-Hughes which formed part of the Plaintiff's application for summary judgment.

(c) The affidavits of Ms Lucenti and Mr Hayward-Hughes were served on Chapmans on 30 May 2018 and 3 September 2018 respectively; and, consequently, Chapmans were aware of their content.

(d) The Plaintiff's attorneys advised Chapmans by letter dated 11 January 2019 that they intended to rely on the previous affidavits in support of their application for wasted costs –

> *"As you will appreciate, the correspondence upon which we will be relying in support of this application has been included in the evidence which is already before the Court, and we do not consider it necessary to serve any further affidavit in support."*

(e) The Plaintiff also summarized the arguments they intended to make in the letter of 11 January 2019.

22. Justice requires that an attorney responding to an application for wasted costs has a clear understanding of the allegations made against them. As Lord Wright stated in **Myers v Elman** [1940] A.C. 282 (at 318) and cited with approval by the Chief Justice in **Al-Ibraheem v Bank of Butterfield (International (Cayman) Limited and others** [2000] CILR 277 -

> *"All that is necessary is that the judge should see that the solicitor has full and sufficient notice of what is the complaint made against him and full and sufficient opportunity of answering it. Thus, formal amendments of the complaint are not necessary, so long as the variations of the charge are sufficiently defined and the solicitor is given sufficient liberty to make his answer. The summary jurisdiction thus involves a discretion both to the procedure and as to substantive relief, though there was and is an appeal."*

GRAND COURT CAYMAN ISLANDS GOVERNMENT 12/17

23. Mr Chapman submitted that in **Al-Ibraheem** the Chief Justice erroneously took the case of **Mylers v Elman** into consideration, arguing that the latter case was not concerned with costs, rather an inquiry into the trust fund. Mr Chapman did not expand on the argument or provide authorities to support his argument. I am not persuaded by Mr Chapman's incredibly limited submissions that the Chief Justice did fall into error.

24. The procedure for investigations commenced on the court's own motion is flexible and should be conducted as the court deems appropriate for the nature of the allegation. The court should begin by clearly setting out the complaint. In complex matters, the court may deem it appropriate to issue a written notice such as was done in **Al-Ibraheem** *(ibid)*.

25. R.12(4) and r.12(5) are intended to achieve this same fairness for applications commenced by someone other than the court.

26. I find that the Plaintiff's argument that it has complied with r.12(5) is flawed. While the Lucenti and Hayward-Hughes affidavits were served on Chapmans, I find that this does not meet the strict requirements of the rule because –

(a) the affidavits were served on Chapmans' as attorney's for the Defendant, not upon them personally as the Respondent to the application for wasted costs;

(b) the affidavits were served many months before the summons for wasted costs was issued;

(c) while the affidavits exhibit most of the material, such as correspondence, which was referred to during the hearing of the application, the affidavits do not set out the specific allegations made against Chapmans so that they are on notice as to what is alleged to be their actions causing costs to be wasted rather than actions by their client.

(d) Given the clear wording of r.12(5), a letter advising that the Plaintiff would be relying on the earlier affidavits and setting out the allegations is simply insufficient to meet the explicit requirements of the rule.

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 12/17

27. Given the Plaintiff's failure to comply with r.12(5) in totality, their application must fail and their summons is dismissed.

28. During these proceedings, the Plaintiff invited me several times to make an order for wasted costs of my own motion. **The Supreme Court Practice 1999 Vol 1** at 62/11/3 helpfully summarized the test into three questions –

(a) Had the legal representative of whom complaint was made acted improperly, unreasonably or negligently?

(b) If so, did such conduct cause the applicant to incur unnecessary costs?

(c) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or part of the relevant costs.

29. It is helpful at this juncture to compare the principles of wasted costs against counsel with the principles governing the more common application for a party to the proceedings to pay costs on the indemnity basis (*as is being sought in the alternative in this instance also*). GCO. 62, r.4(11) provides –

"The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently.

30. In **Al Sadik v Investcorp Bank BSC and others** [2012(2) CILR 33] Jones J reviewed the differences between the two rules :-

> *"The application of both rules depends upon establishing that a party has behaved improperly, unreasonably or negligently in some way, but I think that they are aimed at dealing with misconduct in two different contexts. Rule 4(11) is aimed at substantive misconduct on the part of a party personally which results in the court expressing its disapproval by making an order for indemnity costs against him. Rule 11 (as a whole) is aimed at procedural misconduct by a party and/or his attorney which causes their opponent to waste money on legal fees and expenses which would not otherwise have been incurred. In both cases the result is an order for indemnity costs ... r.4(11) deals with substantive misconduct committed by the party, for which his lawyer is not responsible....In contrast, r.11 is aimed at procedural misconduct of a kind which is likely to be committed by attorneys, for which their clients should not necessarily be held responsible. Orders can be made against attorneys for the purpose of compensating the opposing party and/or compensating their own clients." (at paragraph 9).*

> *"It follows from this analysis that r.11(2) and (3) are compensatory in nature. The court can only make a wasted costs order if it is satisfied that the misconduct of the defaulting party and/or his attorney has caused their innocent opponent to waste money on legal fees and disbursements which would not have been incurred but for their default. The purpose and effect of an order for indemnity costs under r.4(11) is to express the court's disapproval of a party's misconduct by stripping him of the protections which would otherwise apply."*

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 12/17

31. The words "unreasonably", "improperly" and "negligently" are all found in both r.4 and r.11. **The Supreme Court Practice (1999)** at 16/11/4 provides a helpful summary of the Court of Appeal's review in **Ridehalgh v Horsefield** [1994] AC 205 on the meaning of these words in the context of O.62:

- "Improper" is not confined to conduct which would ordinarily justify disbarment, striking off, suspension from practice or other serious professional penalty.
- "Unreasonable" is conduct which is vexatious, designed to harass the other side, rather than to advance the resolution of the case, and it is immaterial whether the conduct was as a result of excessive zeal rather than improper motive.
- "Negligence" means a failure to act with the competence reasonably expected of ordinary members of the profession.

32. Jones J in **Al Sadik (2)** (*ibid*) at paragraph 14 held that a party has acted "improperly" if -

> *"...[the] party has invoked the court's jurisdiction illegitimately or abused the process in a way which attracts moral condemnation. A party who asserts a cause of action when he knows that he has no legitimate basis for doing so is acting improperly".*

33. Finally, and importantly, the court's jurisdiction to make a wasted costs order against counsel is discretionary: even if I am satisfied that counsel acted improperly, unreasonably or negligently so that costs were wasted, I am not bound to make an order. Many of the complaints made against Chapmans are also made against the Defendant, with the Plaintiff alleging that one or the other acted improperly, unreasonably or negligently and is therefore liable to pay their costs on the indemnity basis.

34. I am satisfied that while the Plaintiff's application against Chapmans was procedurally flawed, Mr Chapman himself has known as early as the summary judgment application, the details of the complaints being levied against him and his client, and he has now had the opportunity to respond to these on behalf of his firm and his client. Consequently, I could, if warranted, make a wasted costs order against Chapmans of my own motion.

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 12/17

The Law - Indemnity Costs

Hopeless Case/Unreasonably conducting a case

35. The Plaintiff's alternative application was that it should be awarded costs of the cause to be taxed on the indemnity basis and payable by the Defendant because she had acted improperly, unreasonably or negligently (see paragraph 6 above). The Plaintiff focused on their argument that the Defendant had pursued a hopeless case which had no real or bona fide defence.

36. In **Bennett v Attorney General** [2010(1) CILR 478] at paragraph 6, Henderson J helpfully summarised the principles which apply in "hopeless cases" –

> *"Advancing a defence which is merely weak or unlikely to succeed is to be distinguished from maintaining a defence which is manifestly hopeless. The latter can be characterized as unreasonable. The former is a regular occurrence with which every barrister will be familiar. Many litigants, even after receiving a warning from their legal advisers that the claim or defence is likely to fail, prefer to have that determination made by the court. That is not, in the typical case, unreasonable. Weak cases will succeed from time to time." (at paragraph 6)*

37. Henderson J continued his analysis –

> *"7 The principle is described well in the recent decision of the Technology & Construction Court in Fitzpatrick Contractors Ltd. v. Tyco Fire & Integrated Solutions (UK) Ltd. (1). Coulson, J. set out ([2008] EWHC 1391 (TCC), at para. 3) his summary of the principles relating to an award of indemnity costs in the United Kingdom. Item 5 is pertinent:*
>
> > *"There are a number of decisions, both of the TCC and of other courts, which make plain that the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, whereas the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) will lead to such an order. In*

GRAND COURT · CAYMAN ISLANDS GOVERNMENT · 12/17

both Wates Construction Ltd. v. HGP Greentree Allchurch Evans Ltd. [2006] BLR 45 and EQ Projects Ltd. v. Javid Alavi [2006] BLR 130 this court was persuaded that, in the circumstances of those cases, an order for indemnity costs was appropriate because the claimants should have realised that their claim was hopeless and should not have taken the matter on to trial. However, in Healy-Upright v. Bradley & Another [2007] EWHC 3161 (Ch), the court reiterated that an order for indemnity costs was not justified by the mere fact that the paying party had been found to be wrong, either in fact or in law or both, or by the fact that in hindsight, the result of the case now being known, the position adopted by that party may be thought to have been unreasonable."

8 I agree with and adopt that statement of principle, to which I would add the following from Kiam v. MGN Ltd. (2) ([2002] 1 W.L.R. 2810, at para. 12):

> *"I for my part understand the court there to have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An indemnity costs order made under Part 44 (unlike one made under Part 36) does, I think, carry at least some stigma. It is of its nature penal rather than exhortatory."*

GRAND COURT · CAYMAN ISLANDS GOVERNMENT · 12/17

9 The assessment of unreasonableness must avoid the wisdom of hindsight. The question is whether it was unreasonable to advance the claim or maintain the defence taking into account what should have been evident to the party concerned at the outset of the trial."

38. While summary judgment is a finding that the unsuccessful party has no real or bona fide case, this does not *ipso facto* mean that their case was hopeless in the terms contemplated by Henderson J in **Bennett**.

Other circumstances

39. The Chief Justice in **Talent Business Investment Limited** [2015(2) CILR 113] extensively reviewed the authorities applicable to such applications which I adopt in their entirety. Of particular relevance is his approval of the English test of unreasonableness, as summarized in **Three Rivers D.C v Bank of England** [2006] 5 Costs LR 714, namely -

> *"(1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.*
> *(2) The critical requirement before an indemnity order can be made in the successful [party's] favour is that there must be some conduct or some circumstance which takes the case out of the norm.*
> *(3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an a fortiori ground, but rather unreasonableness.*
> *(4) The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations.*
> *(5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.*
> *(6) A fortiori, where the claim includes allegations of dishonesty, let alone allegations of conduct meriting an award to the claimant of exemplary damages, and those allegations are pursued aggressively inter alia by hostile cross examination.*

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 12/17

(7) Where the unsuccessful allegations are the subject of extensive publicity, especially where it has been courted by the unsuccessful claimant, that is a further ground.

(8) The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a defendant has discontinued only at a very late stage in proceedings;

(a) Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time;

(b) Where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end;

(c) Where the claimant actively seeks to court publicity for its serious allegations both before and during the trial in the international, national and local media;

(d) Where the claimant, by its conduct, turns a case into an unprecedented factual enquiry by the pursuit of an unjustified case;

(e) Where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched;

(f) Where the claimant pursues a claim which is irreconcilable with the contemporaneous documents;

(g) Where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant, and during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat."

GRAND COURT • CAYMAN ISLANDS GOVERNMENT 12/17

Analysis

The Correspondence

40. I find Chapmans did overstep the mark when, in correspondence, they threatened to apply for indemnity costs, and I am sure that this was done in an attempt to cause the Plaintiff to abandon its application for summary judgment. That particular email to Appleby is inexcusable. This threat of indemnity costs as a scare tactic in litigation is unacceptable and deserves the court's denunciation.

41. Overall, the tone of Chapmans' correspondence was unhelpful to the progression of the case, albeit I accept that this was due to Chapmans being steadfast in their views that the Plaintiff's application was unmeritorious and wished to progress the matter to trial without delay. I accept that this was also the reason that they subsequently terminated all correspondence, which was equally inexpedient.

42. However, despite my views on the correspondence, I was not persuaded that the Plaintiff incurred additional costs as a direct result of Chapmans actions.

Skeleton arguments/statements from the bar

43. While the use of skeleton arguments is encouraged in all but the most simple of cases they are not mandated for summary judgment hearings. No criticism can be made of Mr Chapman for not preparing a skeleton argument. However, counsel is nevertheless expected to present arguments succinctly and in an orderly fashion. Brevity is to be encouraged. Unfortunately, due to the many strands to the Defendant's submissions, Mr Chapman's presentation was unduly long and at times unstructured. Yet, this is not unusual and does not warrant an order against Chapmans.

44. Mr Chapman did make a number of remarks and assertions of fact which were not supported by evidence, which gave the impression that Mr Chapman was attempting to give evidence from the bar, but, these were swiftly identified and clarified. I do not consider that Mr Chapman acted improperly, unreasonably or negligently, which would amount to misconduct. Nor did his statements significantly increase costs so as to warrant an order against Chapmans.

Late service of the Defendant's affidavit/draft defence

45. I considered the correspondence and submissions as to why the Defendant needed some 7 weeks to prepare and serve her draft defence. I conclude that this delay was as a result of the Defendant's failure to accept that she did not have a bona fide defence to offer, rather than any actions or omissions by her counsel.

Misconduct

46. Mr Chapman repeatedly accused the Plaintiff's director of dishonesty and other improprieties. The Defendant has not resiled from this position but has not offered any legitimate basis for the accusations. I am satisfied that Mr Chapman was acting on instructions.

47. During submissions, Mr Chapman accused Appleby of negligently (possibly deliberately) failing to disclose the LSD email. Mr Jackson denied this and there is no evidence of such negligence or deliberate act before me upon which such a finding could be made. Should the Defendant wish to pursue that allegation she is at liberty to make a complaint in the usual way.

48. I found that Mr Chapman's assertion that the wasted costs application was motivated by the likelihood of payment rather than merit to be entirely speculative, but does not itself merit a costs order against Chapmans.

49. There are no other matters raised by the Plaintiff or that I noted during these proceedings that would cause me to find that a wasted costs order against Chapmans is warranted.

50. My conclusion is entirely different with regards to the complaints against the Defendant. As can be seen from my judgment of 22 January 2019 and my conclusions above, the manner in which the Defendant has conducted these proceedings, was both unreasonable and improper, because–

(i) the Defendant mounted a challenge to the application for summary judgment which contradicted undisputed evidence, much of which was contemporaneous and within her own knowledge;

(ii) The Defendant's case was not merely a weak one; it was truly hopeless in the face of the law and undisputed evidence;

(iii) The Defendant caused unnecessary delay by failing, without good cause, to file a defence or her affidavit in response to the summary judgment application within a reasonable period.

(iv) The Defendant, through her counsel, made unsupported allegations of dishonesty and impropriety which she maintains.

51. The Defendant's actions were unreasonable and improper to such a high degree that it calls for the Defendant to pay the Plaintiff's costs with respect to the proceedings up to and including the conclusion of the summary judgment application on the indemnity basis and I so order.

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 12/17

Other Costs

52. Turning to the hearing on 23 and 24 January 2019 concerning the Plaintiff's application for costs and the Defendant's application for leave to appeal. The two applications should have taken no longer than two to three hours in total, rather than the one and a half days that it did. I take the opportunity to remind both counsel that unnecessary long hearings are to be avoided.

53. The manner in which Mr Chapman presented the Defendant's application for leave to appeal was unhelpful. Firstly, it was an unnecessarily detailed rehearsal of most of the points argued at the substantive application. This application should have lasted no longer than 45 min in total. Secondly, Mr Chapman's refusal to provide the court with what he described as pertinent authorities supporting his client's defence was contrary to his obligations to assist the court to further the overriding objective. At this stage, I am unable to assess whether those authorities may have affected the outcome of the application.

54. It was evident at the hearing that the Plaintiff's counsel had made considerable efforts preparing for the costs application. That application could have been briefer also. Fortunately, late service of the Plaintiff's submissions meant that Mr Chapman did not waste much time preparing for the application. While the Plaintiff's application against Chapmans was dismissed it has succeeded with regards to the Defendant. The Plaintiff also successfully defended the application for leave to appeal. As the successful party, the Plaintiff is entitled to recover its costs arising from the hearing on 22 and 23 January. However, the Defendant should not have to pay for the Plaintiff's costs of the application against Chapmans, particularly as the Plaintiff had failed to comply with the GCRs itself. An adjustment must be made to the costs recoverable to reflect this feature. The costs shall be assessed on the indemnity basis and taxed if not agreed. If the matter is referred to the Taxing Officer, I direct that such of the Plaintiff's costs as are associated with the application against Chapmans shall be disallowed.

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 12/17

ORDER

(1) The Plaintiff's summons dated 14 January 2019 for a wasted costs order against Chapmans is dismissed.

(2) The Defendant shall of the Plaintiff's costs associated with the hearing on 22 and 23 January 2019 on the indemnity basis. Costs associated with the application for wasted costs against Chapmans shall not be allowed.

(3) The Defendant shall pay the Plaintiff's other costs arising from these proceedings on the indemnity basis.

(4) Costs are to be taxed if not agreed.

Dated this 26th day of June 2019

Hon Mrs Kirsty-Ann Gunn
Acting Judge of the Grand Court

ENDNOTE:

Following the circulation of my initial ruling to the parties, the Plaintiff invited me to reconsider my decisions set out at paragraph 54, asserting that it was inconsistent with my decision to award indemnity costs for the substantive hearing, I made an error or, alternatively, further clarification was necessary. Both parties provided written submissions. The decisions in **Smith v Smith [2004-2005] CILR 225** and **In re L [2013] 1 WLR 634**, confirm that I am able to withdraw, modify or change my decision as long as an order has not been drawn up, entered and perfected. The court's duty is to do justice to the parties. On reflection I accept that (i) for the reasons I had already outlined, costs on the indemnity basis is warranted, including the leave to appeal and the costs hearing itself; and (ii) in order to ensure fairness to the parties, if they are unable to agree costs, then it is more appropriate for the Taxing Officer to settle costs in accordance with my directions. My ruling is that which is now set out in paragraph 54.