

9/12/11

Henderson

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO: 78 OF 2006

10 BETWEEN:

- 11 (1) SAGICOR GENERAL INSURANCE (CAYMAN)
- 12 LIMITED
- 13 (2) THE PROPRIETORS OF STRATA PLAN NO. 151
- 14 (KNOWN AS WINDSOR VILLAGE)

Plaintiffs

-AND-

- 23 (1) CRAWFORD ADJUSTERS (CAYMAN) LIMITED
- 24 (2) BOULD PATERSON LIMITED
- 25 (3) ALASTAIR PATERSON
- 26 (4) HURLSTONE LIMITED
- 27 (5) HURLSTONE GENERAL CONTRACTORS LIMITED
- 28 (6) JOHN HURLSTONE
- 29 (7) ROBERT HURLSTONE

Defendants

-AND-



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5 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**

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8 **CAUSE NO. 573 of 2008**

9 **BETWEEN:**

- 10 (1) HURLSTONE LIMITED
11 (2) HURLSTONE GENERAL CONTRACTORS LIMITED
12 (3) JOHN HURLSTONE
13 (4) ROBERT HURLSTONE
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Plaintiffs

-AND-

- (1) SAGICOR GENERAL INSURANCE (CAYMAN) LIMITED
(2) THE PROPRIETORS OF STRATA PLAN NO. 151
(KNOWN AS WINDSOR VILLAGE)

Defendants

Coram: The Hon. Mr. Justice Henderson

Appearances: Mr. Michael Roberts instructed by
Mr. Nick Dunne of Walkers for the 1st and
2nd Plaintiffs

Mr. Thomas Lowe, Q.C. instructed by Mr. Chris McDuff
of Thorp Alberga for the 4th to 7th Defendants

Mr. Graham Hampson of Hampson and Company
for the 1st and 3rd Defendants

Heard: September 15 & 16, 2011

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RULING

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Introduction

1. After giving Judgment in this pair of consolidated actions on February 14, 2011 I have conducted a hearing on costs. Each side in the action has claimed indemnity costs against the other.

Facts

2. An understanding of the procedural history is necessary.

3. Sagicor General Insurance (Cayman) Limited (“Sagicor”) and the Proprietors of Strata Plan No. 151 (“Windsor Village”) commenced an action (“the original action”) in fraud and conspiracy in 2006 under Cause number 78/06 against all seven defendants. Sagicor then obtained a Mareva injunction against the fourth to seventh defendants (collectively, “the Hurlstone parties”). Its request for a similar injunction against the first to third defendants (collectively, “the Crawford parties”) was dismissed. Windsor Village did not associate itself with the injunction application.

1 4. At the outset of the original trial in December, 2008 the plaintiffs abandoned their
2 claims entirely. I dismissed the claims and awarded indemnity costs to the
3 Hurlstone and Crawford parties. At the request of the Hurlstone parties I then
4 ordered an inquiry for the purpose of assessing their damages (“the damages
5 inquiry”) arising from the Mareva injunction pursuant to the usual undertaking
6 given by Sagicor.
7

8 5. Well before the start of the damages inquiry, the Hurlstone parties started a fresh
9 action under Cause number 573/08 (“the new action”) against Sagicor and
10 Windsor Village claiming damages for the torts of abuse of process and malicious
11 prosecution of a civil action. Essentially, they said that the original action was
12 based upon facts known by Sagicor to be false and motivated by malice, a
13 circumstance which entitled them to damages quite apart from their separate
14 entitlement arising from the undertaking.
15

16 6. The Crawford parties amended an existing counter-claim in the original action to
17 advance a claim for damages for abuse of process and defamation on essentially
18 the same grounds as the Hurlstone parties were relying upon in the new action. I
19 consolidated the two actions and heard all of the claims at the same time as the
20 damages inquiry.
21

1 7. After a lengthy trial, I awarded the sum of \$7,078,064 to the Hurlstone parties as
2 general damages to which they were entitled because of the harm caused by the
3 Mareva injunction and a further \$100,000 as aggravated damages.
4

5 8. I held that the claim of abuse of process had not been made out because an overt
6 act “not within the scope of the process” had not been established. I found that
7 there was no justification for an extension of the law to embrace a new tort of
8 malicious prosecution of a civil action. I dismissed the counter-claim of the
9 Crawford parties and, in effect, the claim of the Hurlstone parties in the new
10 action.
11

12 **Positions of the Parties**
13

14 9. The Hurlstone parties say that they are entitled to their costs of the damages
15 inquiry and of the trial of the new action because they were “in form and
16 substance” one single proceeding in which they were the successful parties. They
17 also say they were successful on all of the issues of fact in the new action and,
18 because Sagicor extended the duration of the trial unreasonably, the Hurlstone
19 parties should receive an award of indemnity costs.
20

21 10. The Crawford parties say that they had “no alternative but to continue the
22 proceedings which Sagicor had commenced” to “show the world that there was
23 not a shred of truth” in the fraud and conspiracy allegations; it was “essential” that

1 this be done so that Mr. Paterson could “clear his good name”. They claim the
2 costs of their counter-claim from Sagicor, the successful party, on the indemnity
3 basis.

4
5 11. Sagicor accepts that it has a liability for costs in the damages inquiry but says they
6 should be on the standard basis and reduced to reflect its own success on some
7 individual issues. It claims an entitlement to costs in the new action and says
8 these should be on the indemnity basis because the new claims “were legally and
9 factually misconceived from the start”. It argues that most of its time at trial was
10 devoted to refuting the new claims.

11
12 12. Sagicor claims its costs of the counter-claim from the Crawford parties on the
13 indemnity basis because the claim was “legally and factually flawed” and had no
14 chance of success.

15
16 **Law**

17
18 13. Costs ordinarily are awarded to the successful party because they “follow the
19 event”. The permissible exceptions are summarized in *Re Elgindata Ltd.* [1992] 1
20 WLR 1207 (CA) at page 1214:

21 The principles are these. (i) Costs are in the discretion of the court.
22 (ii) They should follow the event, except when it appears to the
23 court that in the circumstances of the case some other order should
24 be made. (iii) The general rule does not cease to apply simply
25 because the successful party raises issues or makes allegations on

1 which he fails, but where that has caused a significant increase in
2 the length or cost of the proceedings he may be deprived of the
3 whole or a part of his costs. (iv) Where the successful party raises
4 issues or makes allegations improperly or unreasonably, the court
5 may not only deprive him of his costs but may order him to pay the
6 whole or a part of the unsuccessful party's costs. Of these
7 principles the first, second and fourth are expressly recognised or
8 provided for by rules 2(4), 3(3) and 10 respectively. The third
9 depends on well established practice. Moreover, the fourth implies
10 that a successful party who neither improperly nor unreasonably
11 raises issues or makes allegations on which he fails ought not to be
12 ordered to pay any part of the unsuccessful party's costs.
13

14 14. In *Elyindata* the petitioners were minority shareholders complaining of unfairly
15 prejudicial conduct and seeking a compulsory order that their shares be
16 purchased. Many of their complaints were not established but they did succeed in
17 obtaining the requested order. The trial judge was held to have erred when he
18 apportioned his award of costs according to the individual issues upon which the
19 petitioners failed and succeeded. Overall, there was just 1 "event" – the
20 petitioners' success in obtaining the order – so they were entitled to all of their
21 costs.
22
23 15. Difficulty may be encountered in identifying the "event" or, as in the present case,
24 determining whether a trial resulted in one event or two. Some guidance is found
25 in the decision of the Privy Council in *Seepersad v. Persad & another* [2004]
26 UKPC 19 at page 389:

27 The Court of Appeal gave the appellant only half costs of his
28 amount of the award for pain and suffering and loss of amenity. In
29 so ordering it must have treated the assessment of damages under
30 this head as if it were a separate issue on which the appellant had
31 lost, while succeeding on the other issues. In the Board's view this

1 was an erroneous approach. The award of costs in Trinidad and
2 Tobago is in the discretion of the court, as is usual in most
3 common-law jurisdictions. The general rule which should be
4 observed unless there is sufficient reason to the contrary is that
5 costs will follow the event. Where the party who has been
6 successful overall has failed on one or more issues, particularly
7 where consideration of those issues has occupied a material
8 amount of hearing time or otherwise led to the incurring of
9 significant expense, the court may in its discretion order a
10 reduction in the award of costs to him, either by a separate
11 assessment of costs attributable to that issue or, as is now
12 preferred, making a percentage reduction in the award of costs;
13 see, for example, *Re Elgindata* (No 2) [1992] 1 WLR 1207. The
14 Court of Appeal's order was predicated upon the proposition that
15 the assessment of damages for pain and suffering and loss of
16 amenity was a separate issue from the assessment of the other
17 heads of damage. This was an incorrect assumption. An issue for
18 these purposes must be something so distinct and separate in itself
19 that the decision of it constitutes an 'event'. The 'event' was the
20 quantum of damages to which the appellant was entitled and he
21 succeeded on his appeal in obtaining a higher award than Lucky J
22 had given him; even though one head was decreased, another was
23 increased and one which the judge had omitted was added to the
24 total. The Board accordingly consider that the Court of Appeal
25 had insufficient ground for reducing the award of costs made to the
26 appellant and that he should have been awarded full costs in that
27 court, without separating out any element attributable to the cross-
28 appeal, which was only a means of putting in issue the quantum of
29 all the items of damage in the judge's award.
30

31 **Apportionment between the Two Actions**

32
33 16. Was the result of my decision one event or two? Mr. Lowe said in argument that
34 the new action was brought primarily to meet the anticipated argument from
35 Sagicor that damage caused by the Mareva injunction could be the subject of
36 compensation only if the injunction was the sole cause. That argument was made
37 and rejected so, in the result, the new action proved to have been unnecessary.

1

2 17. When the new action was initiated I consolidated the proceedings. In describing
3 his justification for the new action at that time, Mr. Lowe said no more than
4 “there might also be overlapping damages arguments”. He observed that his
5 claim on abuse of process was “the same” as that of the Crawford parties and
6 referred to the “added dimension” of the Mareva injunction.
7

8 18. In the opening skeleton argument of 47 pages submitted by the Hurlstone parties,
9 the first 21 pages are devoted to the damages inquiry and the balance to the new
10 action. In the closing argument of the Hurlstone parties the facts material to the
11 two actions are for the most part addressed together but there is a separate 20-
12 page section on the law which is relevant only to the new action. A reply to
13 Sagicor’s closing argument also contains a short separate section relevant only to
14 the new action. Sagicor’s arguments addressed the two actions separately. I am
15 satisfied that the new action was not simply a hedge against the possibility of an
16 adverse ruling on the Mareva causation issue but a separate and distinct action
17 which lengthened the trial (and counsel’s preparation for it) to an extent which
18 was more than trivial. Fairness requires that the result of the new action be
19 treated as a separate event.
20

21 19. It follows that the Hurlstone parties are entitled to their costs of the damages
22 inquiry and Sagicor is entitled to its costs of the new action. The overall cost

1 must be apportioned. The apportionment will be based upon the time spent upon
2 each of these two subjects.

3
4 20. My assessment is complicated by the fact that much of the Hurlstone parties'
5 evidence and argument was equally material to the claim for aggravated damages
6 in the damages inquiry (which succeeded) and to the new action (which failed).
7 Where evidence or argument was material to both claims, the Hurlstone parties
8 are entitled to recover their costs unless they "caused a significant increase in the
9 length or cost of the proceedings"; that is the third principle set out in *Elgindata*,
10 *supra*. The time analysis presented in argument by Sagicor seems to assume
11 erroneously that evidence relevant both to aggravated damages and to the new
12 action must be attributed to the latter.

13
14 21. The damages inquiry resulted in an award of \$100,000 in aggravated damages to
15 John and Robert Hurlstone. Although this award pales in comparison to the
16 compensatory damages award of \$6,938,064 (plus an additional \$70,000 for loss
17 of personal reputation), much of the evidence led by the Hurlstone parties was in
18 support of the aggravated damages claim and not the compensatory claim. The
19 former occupied more trial time than the latter. I proceed on the basis that it
20 would be wrong in principle to deprive the Hurlstone parties of any part of their
21 costs simply because trial time was distributed disproportionately between the
22 lengthy dispute over aggravated damages and the relatively succinct argument
23 about compensatory damages.

1
2 22. The Hurlstone parties presented lengthy evidence and argument in support of the
3 proposition that the Mareva injunction had been obtained by material non-
4 disclosure. I found against them with respect to most of their many complaints
5 but did agree that three of their allegations had merit. Because there had been
6 three instances of material non-disclosure I made my aggravated damages award.
7 The fact that a large majority of their complaints about the obtaining of the
8 injunction were not persuasive cannot of itself reduce their entitlement to costs.
9 In the words of *Elgindata*, “the general rule does not cease to apply simply
10 because the successful party raises issues or makes allegations on which he fails”.
11 The only ground for a reduction in the Hurlstone parties’ costs of the damages
12 inquiry would be a conclusion that they “caused a significant increase in the
13 length or cost of the proceedings”.

14
15 23. To arrive at my decision I have reviewed the list of witnesses and the arguments
16 of counsel to estimate the percentage of trial time taken up with matters relevant
17 only to the new action. All of the witnesses called by the Hurlstone parties gave
18 evidence which was not only relevant to the new action but influenced my
19 decision on the damages inquiry and led to the award of aggravated damages.
20 However, the time devoted during argument to the new action was substantial and
21 must be apportioned. I am satisfied that an appropriate reduction from the overall
22 cost to reflect time spent only on the new action is a reduction of 15%.

23

1 **Indemnity Costs**

2

3 24. Costs may be awarded on the indemnity basis if the court is “satisfied that the

4 paying party has conducted the proceedings, or that part of the proceedings to

5 which the order relates, improperly, unreasonably, or negligently”: *Grand Court*

6 *Rules*, O. 62 r. 4(11).

7

8 25. I am not persuaded that the Hurlstone parties caused any significant increase in

9 the length or cost of the new action or conducted it improperly, unreasonably or

10 negligently. That proceeding was inherently difficult and all parties laboured

11 under the difficulty in more or less equal measure. The fact that the claim was

12 novel and not very likely to succeed is not, in and of itself, a justification for

13 awarding costs on the indemnity basis.

14

15 26. The same conclusion applies to the counter-claim advanced by the Crawford

16 parties. Although it was a novel and difficult claim it was not advanced

17 improperly, unreasonably or negligently. Sagicor is not entitled to indemnity

18 costs.

19

20 27. Similarly, I am satisfied that Sagicor did not cause any significant increase in the

21 length or cost of either the damages inquiry or the new action and did not conduct

22 them improperly, unreasonably or negligently. The documents contained in what

23 has been called the X file were disclosed by Sagicor towards the end of the trial

1 but that is because it took the position they were privileged. My ruling to the
2 contrary was made after most witnesses had given evidence. When disclosure of
3 these documents was made, it was incomplete. Mr. Dickson, a former Sagicor
4 attorney, referred while giving evidence to documents which should have been,
5 but were not, disclosed but I am not satisfied that his failure to disclose these
6 documents at the appropriate time was the fault of Sagicor.

7
8 **Costs of the Counter-claim**

9
10 28. Sagicor was the successful party in the trial of the counter-claim. Ordinarily, it
11 would be entitled to its costs on the standard basis because costs follow the event.
12 Sagicor can be denied part or even all of its costs if I am satisfied that it caused a
13 significant increase in the length or cost of the proceedings. I am not satisfied of
14 that, for reasons which are essentially the same as those given above.

15
16 29. I accept that I have a broader jurisdiction as well. I am entitled to deny costs to a
17 successful party, or even to award costs against it, where the justice of the case
18 demands that. This broader jurisdiction is exercised only rarely, and only in the
19 clearest of cases. Some examples are given in the White Book (*Supreme Court*
20 *Practice*, 1999, Vol. 1, para. 62/2/11):

21 A successful party may be deprived of his costs if he presents a
22 false case or false evidence, or acts oppressively in the action
23 (*Baylis Baxter Ltd v. Sabath* [1958] 1 W.L.R. 529; [1958] 2 All
24 E.R. 209, CA). See also *Anglo-Cyprian Trade Agencies Ltd. v.*
25 *Paphos Wine Industries Ltd.* [1951] 1 All E.R. 873 and *Jones v.*

Railing – Sagicor General Insurance (Cayman) Ltd et al v. Crawford Adjusters (Cayman) Ltd et al Cause Nos. 78
of 2006 and 573 of 2008 09.12.11

1 *McKie and Mersey Docks and Harbour Board* [1964] 1 W.L.R.,
2 960, CA; [1964] 2 All E.R. 842, CA, where a successful defendant
3 was deprived of costs and in *Hobbs v. Marlowe* [1978] A.C. 16,
4 [1977] 2 All E.R. 241 the costs of a successful plaintiff were cut
5 because the action had been continued not for the benefit of the
6 plaintiff, but so that the A.A., of which he was a member, could
7 recover full costs, but in *Smith v. Springer* [1987] 1 W.L.R. 1720;
8 [1987] 3 All E.R. 252, the Court of Appeal allowed an appeal
9 against striking out proceedings where there had been an offer to
10 pay the claim in full but a refusal to pay costs. In *Cable v.*
11 *Dallaturca* (1977), 121 S.J. 795 a successful defendant was
12 deprived of half the costs of the hearing because of his solicitor's
13 failure to secure a copy of his expert's report in accordance with
14 O.38, rr.36 and 40; and in *Blue Bell Inc v. Falmer International*
15 *Ltd* (1980) 130 New L.J. 5948, CA, the plaintiffs were deprived of
16 their costs of a motion because before its issue they knew that steps
17 were being taken by the defendants to remedy the complaint; and
18 see also *Knight v. Clifton* [1971] Ch. 700; [1971] 2 All E.R. 378,
19 CA, where it was held that the court had jurisdiction to award costs
20 of a proceeding against a wholly successful defendant but such
21 order should only be made in exceptional cases. In *Polydodr Ltd. v.*
22 *Sandu* (1980) 130 New L.J. 18, the Court of Appeal held that the
23 judge erred in principle when he made no order for costs as a result
24 of considering an issue which did not fall to be considered. A trial
25 judge who wished to reflect disapproval of the way in which a
26 plaintiff (who recovered more than nominal damages) had
27 conducted the litigation, by ordering him to pay the defendants'
28 costs, erred in principle. In that case justice could be done by
29 making no order as to the costs of the action (*Gupta v. Kiito* (1989)
30 *The Times*, November 23, CA).

31
32 30. In argument, the Crawford parties cited *Othway v. Jones* [1955] 1 WLR 706 (CA)
33 and *Knight & another v. Clifton & others* [1971] 1 Ch 700 (CA).
34

35 31. *Othway* involved a landlord and tenant dispute governed by the "very special
36 provisions" (p. 714) of the Rent Acts. The plaintiff proved the facts he was
37 asserting and established an entitlement to possession. The court however
38 exercised a discretion to withhold the relief because it seemed to be overly harsh

1 in the circumstances. An order that the successful defendant pay the costs of the
2 unsuccessful plaintiff was upheld by the Court of Appeal. The court observed
3 that in the “ordinary case” such an order would not be a proper exercise of
4 judicial discretion.

5
6 32. In *Knight*, the plaintiffs were unsuccessful in establishing their allegation that the
7 third defendant had breached an injunction and committed a civil contempt. The
8 trial judge awarded costs against the successful defendant, who then appealed.
9 The Court of Appeal reversed the costs order because it was “not a proper
10 exercise of judicial discretion”. The third defendant conceded on the appeal that
11 he was not claiming his costs from the plaintiffs, a fact which was noted with
12 approval by two members of the court.

13
14 33. The decisions in *Orway* and *Knight* confirm that I have jurisdiction to award
15 costs to an unsuccessful party but it is a jurisdiction to be exercised only in “the
16 most exceptional cases” (per Russell, LJ, in *Knight* at p. 713) or in “occasional
17 rare cases” (per Sachs, LJ, *ibid.*). An order which simply denies a successful
18 party its costs is more common but still exceptional.

19
20 34. The argument of the Crawford parties emphasizes that their unsuccessful counter-
21 claim was brought within the confines of the original action. They say that my
22 dismissal of the fraud and conspiracy claims and the resulting newspaper
23 publicity was insufficient to repair the damage to reputations caused by the

1 publicity about the original allegations. They assert that Mr. Paterson had “no
2 choice” but to proceed with a trial to restore his reputation in the community.
3 “There was no hearing before a judge at which matters could be investigated and
4 the assertions against Mr. Paterson could be judicially and objectively shown to
5 the world to have been malicious and utterly false”. Crawford Parties’ Argument,
6 para. 14. They assert (correctly) that the Crawford parties were successful on a
7 number of the individual factual issues but could not establish that the present
8 state of the law gives them an entitlement to damages. They cleared most of the
9 hurdles but stumbled at the finish line.

10
11 35. The trial of the counter-claim occurred subsequent to the dismissal of Sagicor’s
12 claims in the original action and can only be viewed as a separate event. The only
13 counter-claim which was extant before my dismissal of Sagicor’s claims was a
14 claim for unpaid fees. The abuse of process and malicious prosecution claims
15 were advanced after the dismissal, in fact, the dismissal was itself an important
16 element in the factual matrix supporting the new claims. There is no air of reality
17 to the assertion that trial of the claim and counter-claim constituted a single event.
18

19 36. In my judgment dismissing the original action I awarded indemnity costs to the
20 Crawford parties and said that:

21 From the failure of these plaintiffs to prosecute their case, I infer
22 that they have never been in possession of a body of evidence
23 capable of establishing fraud or conspiracy.
24

1 37. One of my reasons for awarding indemnity costs was the unjustified and unfair
2 reputational damage suffered by Mr. Paterson. My finding quoted above was
3 intended to assist in repairing the damage.
4

5 38. My judgment in the original action received at least as much media attention
6 locally as did the commencement of the action. After my judgment, Mr.
7 Hampson (Counsel to the Crawford parties) was quoted as saying:

8 Mr. Hampson spoke about the judgment in favour of the plaintiffs
9 after Wednesday's proceedings.
10

11 'On Alastair's behalf, I can say we are greatly pleased that his
12 reputation emerges unscathed as a result of today's action,' he said.
13 'No doubt we'll have further comment once the matter is
14 concluded.'
15

16 39. Viewed against this background, the assertion that the Crawford parties had no
17 choice but to proceed as they did is unconvincing. Moreover, when Mr. Todd,
18 Q.C., sought leave to amend his counter-claim he made no reference to what is
19 now advanced as the primary justification for it. The counter-claim was
20 introduced as a claim for substantial damages based upon a novel cause of action.
21 It was a speculative venture which failed. Mr. Paterson's reputation was restored
22 by my judgment in the original action, aided by the ensuing publicity. I see no
23 justification for an award of costs to the Crawford parties.
24

25 40. A substantial majority of the facts asserted by the Crawford parties and denied by
26 Sagicor were decided in favour of the former. On the other hand, the propositions
27 of law in dispute were resolved in Sagicor's favour, as were a few of the factual

1 questions. A balancing of these factors does not justify depriving Sagicor of its
2 costs.

3
4 41. There can be no doubt that Sagicor's conduct before and during the original
5 action was worthy of censure. They have been censured, and indemnity costs
6 were awarded against them. That book is closed. At this juncture, Sagicor is
7 entitled to be treated like any other litigant in any ordinary proceeding. It is
8 entitled to its costs of the new action on the standard basis.

9
10 42. One of the many unusual aspects of this proceeding is that the three witnesses of
11 substance called by the Crawford parties (Msrs. Paterson, Hampson and
12 Harrigan) all gave evidence relevant to both the aggravated damages claim in the
13 damages inquiry and the new action. Several other witnesses called by the
14 Crawford parties gave only brief evidence. All witnesses called by Sagicor gave
15 evidence of relevance to both actions. In these circumstances, and for reasons
16 given above, I consider that Sagicor is entitled to recover from the Crawford
17 parties a sum representing only 15% of the cost of the proceeding overall.

18
19 **Order**

20
21 43. For these reasons, I find that Sagicor must pay 85% of the costs and
22 disbursements of the consolidated trial to the Huristone parties on the standard
23 basis and the latter must pay 15% of Sagicor's costs and disbursements to it on

1 the standard basis. The Crawford parties are jointly and severally liable with the
2 Hurlstone parties for the payment of 15% of Sagikor's costs and disbursements.

3
4
5 Dated this 9th day of December, 2011
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8 *H Henderson, J.*

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10 Henderson, J.
11 Judge of the Grand Court
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