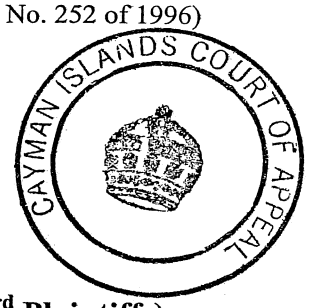
24-08-01

IN THE CAYMAN ISLANDS COURT OF APPEAL

Civil Appeal No. 9 of 2000
(Grand Court Cause No. 252 of 1996)



Between:

CESARE BONOTTO
FIN IVONNE BONOTTO
ELENA BONOTTO

Appellants (1st, 2nd and 3rd Plaintiffs)

- and -

GIANNI BOCCALETTI
SPHINX CORPORATION
HELGA BOCCALETTI

Respondents (1st, 4th and 5th Defendants)

BEFORE: The Rt. Hon. Mr. Justice E. Zacca, President
The Hon. Mr. Justice I. D. Rowe, J. A.
The Hon. Mr. Justice M. Taylor, J. A.

Stephen Phillips and Diarmad Murray instructed by Walkers for the Appellants.
Cherry Bridges instructed by Rich & Conolly for the Respondents.

Heard: April 9th 2001

Delivered: August 24th 2001

JUDGMENT

ZACCA P.

The appellant was successful in an action in the Grand Court which resulted in a declaration of trust, delivery of shares held in trust, an accounting of monies due to the plaintiffs

and assets purchased with the plaintiffs' money, payment to the plaintiffs of monies had and received to the plaintiffs' use and interest thereon.

The appellant made an application to the Grand Court judge for an order for costs on an indemnity basis. In his ruling the Grand Court judge held that he had no jurisdiction to make such an order but that if he had the power to do so, he would have so ordered. At the outset I, too, would have made an order for indemnity costs, if the Grand Court had the jurisdiction to do so. The appellant now appeals to this court against the order of Graham J., as it relates to costs.

The issue therefore on appeal before this court, is "does the Grand Court have jurisdiction to order indemnity costs?"

For the appellant it is submitted that s. 24(2) of the Judicature Law (1995 Revision) gave the Grand Court judge a discretion to order such costs. It was also submitted that in equity cases, the court had a wide discretion to so order and the courts in England have in equity cases made orders for indemnity costs. Reliance is placed on the case of *Andrews v. Barnes* (1888) 39 Ch. D. 133.

It was also submitted that, by virtue of s. 11(1) of the Grand Court Law, the court can look to the law relating to costs in England.

Section 11 (1) of the Grand Court Law (1995 Revision) states:

> 11. (1) The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any

other law for the time being in force in the Islands, shall possess and exercise, subject to this and other law, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by –

(a) Her Majesty's High Court of Justice; and

(b) The Divisional Courts of that Court,

as constituted by the Supreme Court of Judicature (Consolidation) Act, 1925, and any Act of the Parliament of the United Kingdom amending or replacing that Act.

This section was considered by Summerfield C.J. in the case of *McCallister v. Tortuga Club* 1985 C.I.L.R. 411 where a similar submission was made. He states at p. 414:

"In my view, that provision does not import any of the English substantive law into these Islands. The use of the expression "jurisdiction" in that sub-section does not have that effect. That expression is confined to its technical meaning, namely, range of judicial power, e.g. actions in admiralty, matrimonial causes, jurisdiction in civil and criminal matters, prerogative writs, etc. It defines the scope of the Grand Court's jurisdiction. Other sections amplify this provision and also specifically import some of the law of England, e.g. common law and equity. But s. 13(1) does not import the substantive law contained in O.62 (i.e. those parts specifying what may be recovered by way of party and party costs and solicitor and client costs) any more than it imports the English company laws, trade union laws or revenue laws.

Further, s. 20 of the Grand Court Law (or r. 62 of the Grand Court (Civil Procedure) Rules) does not assist in this direction either. Section 20 reads:

"(1) Subject to the provisions of this or any other Law, the jurisdiction of the Court shall be exercised in accordance with any Rules made under this Law.

(2) In any matter of practice or procedure for which no provision is made by this or any other Law or by any Rules, the practice and procedure in similar matters in the High Court of England shall apply so for as local circumstances permit and subject to any directions which the Court may give in any particular case."

> Sub-section (2) imports the English *practice and procedure* where our law is silent on a matter – not the substantive law. Furthermore, our law is not silent on the matter. Specific provision is made in s. 30 of the Judicature Law, read with the Schedule, and that ousts the operation of s. 20 (and r. 62)".

In the case of *Ingersoll Rand v. Banco Portugues Do Atlantico* 1988-89 C.I.L.R. 189 Collett C.J. (as he then was) accepted the interpretation placed on s. 13(1) by Summerfield C.J.

Section 13(1) is now s. 11(1) of the Grand Court Law and s. 30 of the Judicature Law is now s. 24.

In my opinion no reliance can be placed on s. 11(1) of the Grand Court Law to allow for the award of costs on an indemnity basis.

I agree with the views expressed by Summerfield C.J. and Collett C.J. that s. 11(1) does not import any of the English substantive law into the Cayman Islands. Section 11(1) is expressly made "subject to this and any other law". Section 24(2) of the Judicature Law (1995 Revision) is one of those Laws. Section 24(2) states:

> "Where in any proceedings in any Court an advocate has been employed or other costs or charges have been incurred then, subject to any other provision of this Law or any other law and to any rule, the awarding of such costs and charges shall be in the discretion of the court which may, by its judgment, award them to the successful party in accordance with the prescribed scale."

For the respondent, it was submitted that costs can only be awarded under the provision of s. 24(2) of the Judicature Law (1995 Revision) and that there is no discretion in the Grand Court judge to award indemnity costs.

There are a number of Grand Court decisions in which three different Chief Justices held that there was no statutory or inherent jurisdiction to award costs outside of s. 24(2) of the Judicature Law (1995 Revision). That s. 24(2) does not allow for an award of indemnity costs. *In re: Ansbacher (Cayman) Ltd.* 1998 C.I.L.R. N - 7; *McCallister v. Santa Cruz Investment Company Ltd.* 1985 C.I.L.R. 411; *Ingersoll-Rand v. Banco Portugues Do Atlantico* 1988-89 C.I.L.R. 189.

The cases of *Andrews v. Barnes* (1888), 39 Ch. D. 133 and *E.M.I. Records Ltd. v. Ian Cameron Wallace Ltd.* [1983] 1 Ch. 59 were cited to Collett C.J. in the *Ingersoll* (*supra*) case.

Counsel for the appellant submits that the decisions in the Grand Court cases were *per incuriam* and should not be followed. This is the first time that this court has been asked to interpret s. 24(2) and whether or not indemnity costs can be awarded in the Cayman Islands.

In *Andrews v. Barnes* (1888), 39 Ch. D. 133, it was held that there was an inherent jurisdiction in the Court of Chancery at the time of its abolition and a general and discretionary power to award costs as between solicitor and client to a successful party as and when the justice of the case requires it.

Garnett v. Bradley (1878) 3 A.C. 944 was an action for slander in which one farthing damages was awarded to the plaintiff. The Act of James provided that anybody bringing an action for slander who does not recover more damages than 40 s. shall not recover more costs than damages. The learned judge refused to make any order for costs. Before the master the plaintiff was awarded his costs. The ruling of the master was confirmed by the Exchequer Division but was reversed by the Court of Appeal. The House of Lords restored the order of the master. Reliance was placed on the Judicature Act 1875 which provided:

> "Subject to the provisions of the act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the court; but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular fund to which he would be entitled according to the rule hitherto cited upon in Courts of Equity. Provided, that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shown, the judge, before whom such action or issue is tried, or the court shall otherwise order".

Lord Hatherley at p. 954 states:

> "Now when the Judicature Act was passed, this difficulty was got rid of forever, once and for all, as regards the Common Law Courts. The two jurisdictions were mingled, and the same powers and authorities were given to what were formerly the Common Law Court, - that is to say, to those who had to try what previously

were Common Law actions – the same authority was given to them as had always existed on the part of the Courts of Equity. The legislature gave its sanction distinctly, as a part of the Judicature Act of 1875, to this Order LV. in the schedule. By the Judicature Act the Legislature gave a direct authority to all the Judges of the courts constituted under the Judicature Act, and vested in them a discretion which was to guide and determine them, according to the circumstances of each case, in the disposition of costs."

Lord O'Hagan in his judgment at p. 958 said:

"Formerly the rule as to costs was different in courts of Common Law and Courts of Equity. In the latter they were in the discretion of the Judge; in the former, with some statuable exceptions, they followed the event, and the successful party took them as of course. The statutes making the exception was difficult of construction, and not always capable of satisfactory reconcilement with each other, and I will remember how often they embarrassed counsel and puzzled judges, and how great was the conflict of decision upon them, whilst I practiced at the Bar and sat upon the bench in a Court of Common Law.

The purpose of the Judicature Act was to establish one great tribunal, with consistent and homogeneous action in all its parts, and, as far as possible, one assimilation of practice and procedure. The matter of costs was one of the most important with which the legislature had to deal in carrying out this purpose and in entire harmony with it, the order we are considering, which has the full force of law, declares that "the costs of and incident to all ***proceedings in the High Court*** (my emphasis) shall be in the discretion of the Court". The operation of that rule is as large as words can make it, and it was apparently designed to extend to all proceedings the discretionary process which had before governed only those in Equity. "It is expressly qualified as to mortgages and trustees..."

Again in *E.M.I. Records Ltd. v. Ian Cameron Wallace Ltd.* [1983] 1 Ch 59 the court held that in a case of contempt, there was jurisdiction to order payment of costs on an indemnity

basis. This was achieved by applying s. 51(1) of the Supreme Court Act and R.S.C. Order 62 rule 29(1).

In his judgment Sir Robert Megarry V.C. set out the provisions of s. 51(1) of the Supreme Court Act. He said at p.63:

> "Before turning to the rival contention, I think it is convenient to set out the main bases of taxation and their principal features. The starting point must be s. 50(1) of the Supreme Court of Judicature (Consolidation) Act 1925, which is now reproduced, without any amendment material to this case, by s. 51(1) of the Supreme Court Act 1981. In the Act of 1925, the subsection runs: "Subject to the provisions of this Act and to rules of court and to the express provisions of any other Act, the costs of and incidental to all proceedings in the Supreme Court, including the administration of statutes and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent the costs are to be paid".
>
> I shall have to return to this subsection, but for the present I need do no more than observe, first, that the power is very wide, particularly having regard to the words – **"full power"** and **"to what extent"**; second, that the width is nevertheless confined by the words "costs of and incidental to all proceedings in the Supreme Court", so that nothing outside this phrase can be included; and third that the power is made "subject to rules of court".

The Vice Chancellor then sets out the four rules of Court. It was also noted that the R.S.C. contain no express mention of any indemnity basis although the courts have for many years made such orders.

It is to be observed that the 1925 Act includes words which are not in the 1875 Act. These are:

> "Subject to rules of court"; "and the court or judge shall have full power to determine by whom and to what extent the cost are to be paid....."

At p.65, the Vice Chancellor then states:

> "These five heads do not of course, exhaust the possibilities, for there are other orders that can be made in special cases: See, e.g. rules 28A, 30. I think, however, that they cover the general orders for costs that are to be found in litigious practice. As I have mentioned, the starting point is s. 50(1) of the Judicature Act 1925; and this is in very wide terms. Not only are the costs in the discretion of the court, but the court is to have "full power" to determine to what extent the costs are to be paid."

Then at p.69, the Vice Chancellor states:

> "Where there are rules which express a plain prohibition, as in *Thomason* case (1954) 1 W.L.R. 1220 then the discretion cannot be exercised so as to disregard that prohibition. On the other hand, where there is no express prohibition, but merely an affirmative provision in the rules, then even if that affirmative is expressed in imperative terms, as by the word "shall" the court is not deprived of its statutory discretion to order costs on some basis other than that set out in the affirmative provisions".

The Vice Chancellor then stated that he did not see why the basic rule for solicitor and own client costs which is set out in rule 29(1) should not be applied, thereby giving to the successful party, the indemnity that the court is seeking to give him.

In my view the exercise of the discretion to award costs in all proceedings in England is now governed by the provisions of s. 51(1) of the Supreme Court Act 1981. The words in the section, **"full power"** and to **"what extent"** indicated that there was a very wide power in the exercise of that discretion.

It is therefore necessary to examine s. 24(2) of the Judicature Law (1995 Revision) which provides for the award of costs in the Cayman Islands. There is no rule which provides for an award of indemnity costs.

Does s. 24(2) provide for this wide discretion to allow for the court to award costs on an indemnity basis?

There are significant differences between the wording of s. 24(2) of the Judicature Law (Revised) and s. 51 of the English Supreme Court Act 1981. In England the court shall have "full power" to determine "by whom and to what extent" the costs are to be paid. There is no

prohibition expressed in s. 51 of the Supreme Court Act 1981 and therefore the court has a very wide discretion as to the award of costs.

In Cayman s. 24(2) gives the court a discretion whether or not to award costs to the successful party and if it does, to award such costs on the prescribed scale. There is therefore a prohibition expressed in the section to limit costs on the prescribed scale.

In my opinion costs in the Cayman Islands are governed by s. 24(2) of the Judicature Law (1995 Revision) and does not provide for costs to be awarded on an indemnity basis. The Grand Court, therefore, has no jurisdiction to award costs on an indemnity basis.

I would dismiss the appeal and affirm the order of Graham J.

ZACCA P.

ROWE, J.A.

Cesare Bonotto and Gianni Boccaletti, both Italian nationals, were once firm friends. Mr. Bonotto gave to Mr. Boccaletti 1.6 billion lira in cash to transfer from Italy to Grand Cayman. This was accomplished. However, by elaborate schemes, Mr. Boccaletti defrauded Mr. Bonotto of all his money. In the litigation that ensued, Graham J. entered an order in favour of Mr. Bonotto against the defendants including Mr. Boccaletti and his wife. The order included a provision that Mr. Boccaletti should forthwith pay to Mr. Bonotto's attorneys the sum of U.S.$1,433,932.20. Further the first, fourth and fifth defendants, including Mr. Boccaletti and his wife Helga Boccaletti, were ordered to pay the costs of the action to be taxed if not agreed. An application was made to Graham J. to order indemnity costs in favour of Mr. Bonotto, the successful party. He refused the application but granted leave to appeal on that point. An appeal was also taken by the unsuccessful defendants against the judgment in the cause. That appeal has been withdrawn.

From the decision of Graham J. denying indemnity costs this appeal has been taken. The learned trial judge considered that costs on an indemnity basis ought not to be granted save in exceptional circumstances, *Bartlett v. Barclays Bank Trust Co. Ltd. (No. 2)* [1980] Ch 515; *Bowen-Jones* [1986] 3 All E.R. 103, and concluded that if he had jurisdiction, he would have awarded indemnity costs in this case. There were, he said, a whole series of fraudulent and dishonest acts on the part of Mr. Boccaletti, who was in a fiduciary relationship to Mr. Bonotto. Before us there was no challenge to the litany of dishonest acts set out in paragraph 14 of the appellant's skeleton argument and although the respondents filed a Respondent's Notice in

which it was contended that even if the court had jurisdiction to award indemnity costs this was not a proper case for its exercise, that argument was only developed in respect to Mrs. Boccaletti. There was no challenge that if the court had jurisdiction this would be a proper case for the award of indemnity costs against Mr. Boccaletti.

Graham J. adopted and followed the decision of Collett C.J. in *Ingersoll Rand v. Banco Portugues Do Atlantico* 1988-89 CILR 189, where it had been held that s. 30 of the Judicature Law (Revised) was confined to authorizing the court to use the scales prescribed in the Schedules to that Law for the assessment of costs and no other.

The grounds of appeal may be summarized as follows. The learned trial judge ought to have held that s. 24 of the Judicature Law (1995 Revision) confers on the court a wide discretion as to costs and the section is not limited by the power to award costs to the successful party in accordance with the prescribed scale. Further, that s. 11 of the Grand Court Law (1995 Revision) confers jurisdiction upon the Grand Court, which includes the jurisdiction conferred by s. 51 of the Supreme Court Act 1981, to award costs on any basis the court may consider fit, including indemnity costs. As further alternatives, it was submitted that the court has inherent power to order costs to the extent necessary to meet the justice of the case and/or that the court has an inherent equitable power to award costs against a defaulting trustee in favour of his beneficiary. As a yet further alternative, it was submitted that the judge should have held that the court has inherent jurisdiction established by custom and usage to make orders in relation to costs on such basis as is necessary to do justice, including orders for indemnity costs.

Mr. Phillips submitted that the Grand Court Law (Law 8 of 1975) and the Judicature Law (Law 11 of 1975) were passed within a few months of each other and were *in pari materia*. The Judicature Law of 1975, he said, deals with the same or similar subject matter as the Grand Court Law and the two Laws are to be taken together as forming one system. I accept that these two statutes are to be taken as forming one system and as interpreting and enforcing each other. I proceed on the basis contended for by Mr. Phillips, and on the canon of construction referred to in Hals. Laws, 4th Ed. Para. 1485, that where two statutes are *in pari materia* they should, so far as practicable, be read together, and where the provisions in the two laws deal with the same subject matter, they are to be construed and read together and every part of each of them must be construed as if they had been contained in one law.

The earlier of the two Cayman statutes is the Grand Court Law. As the Memorandum of Objects show, this Law removed the Grand Court from the Judicature (Administration of Justice) Law by which it had been constituted and established as a new kind of court, with increased powers, so as to make it a Superior Court. Its jurisdiction is contained in s. 11 of the 1995 Revision. Section 11 provides that:

> "11(1) The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to the provisions of this and any other law, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by –
>
> (a) Her Majesty's High Court of Justice; and
>
> (b) The Divisional Courts of that Court,

as constituted by the Supreme Court of Judicature (Consolidation) Act, 1925, and any Act of the Parliament of the United Kingdom amending or replacing that Act."

Section 18 of the Judicature (Consolidation) Act, 1925, in pertinent part, provided:

"18(2) There shall be vested in the High Court:

(a) Subject as otherwise provided in this Act, the jurisdiction which was formerly vested in, or capable of being exercised by, or in any of the courts following –

(i) The High Court of Chancery, both as a common law court and as a court of equity, including the jurisdiction of the Master of the Rolls as a judge or master of the Court of Chancery and any jurisdiction exercised by him in relation to the Court of Chancery as a common law court;

(ii) The Court of Queen's Bench;

(iii) The Court of Common Pleas at Westminster;

(iv) The Court of Exchequer, both as a court of revenue and a common law court;

(v) The Court of Common Pleas at Lancaster;

(vi) The Court of Pleas at Durham;

(vii) The courts created by commissions of assize."

It becomes clear that pursuant to s. 11(1) of the Grand Court Law, the Grand Court was given the plenitude of jurisdiction that is a common feature of a superior court of record. Mr. Phillips submitted with force, that the jurisdiction that was conferred upon the Grand Court in 1975 expressly included the equitable jurisdiction previously exercised by the Court of Chancery

and that the Grand Court could exercise the same general equitable jurisdiction as the Court of Chancery.

In 1886 Kay J. was asked to award indemnity costs against unsuccessful plaintiffs who had sought improperly to get their hands on a trust fund. It was a small fund but became the occasion for the re-statement of a great principle. He awarded indemnity costs and said he always understood that the court had power to protect trust funds from being denuded by having to pay costs incurred in protecting the trust funds. Fry L.J. reviewed the authorities and said:

> "From the consideration of the earliest authorities we conclude that there was inherent in the Court of Chancery at the time of its abolition, a general and discretionary power to award costs as between solicitor and client to a successful party, as and when the justice of the case might so require ..." *Andrews v. Barnes*, (1888) 39 Ch. D. 133, 141.

Roxburgh J. in *Reed v. Gray* [1952] Ch 337, expressly based his jurisdiction to award costs on a solicitor and client basis on *Andrews v. Barnes* (*supra*). I therefore accept the submissions of Mr. Phillips that if s. 11(1) of the Grand Court Law stood alone it would be clear that the Grand Court would have a wide general discretion to award costs to a successful party on a solicitor and client basis in a proper case.

Section 24 of the Judicature Law (1995 Revision) provides in three subsections for the award of costs and court fees. Section 24(2) is in these terms:

> "24 (2) Where in any proceedings in any court an advocate has been employed or other costs or charges have been incurred then, subject to any other provision of this Law or any other law and to any rule, the awarding of such costs and

> charges shall be in the discretion of the court which may, by its judgment, award them to the successful party in accordance with the prescribed scale."

This subsection is made subject to any other law or rule. This would clearly include s. 11(1) of the Grand Court Law and the Grand Court (Taxation of Costs) Rules 1995. Rule 2 of those Rules provides that:

> "2. Inter partes orders for costs
>
> Whenever the Court makes an inter partes order for costs to be taxed, the amount of advocates' fees and costs shall be determined in accordance with the scales contained in the Schedule hereto."

Section 24(2) of the Judicature Law in very plain terms states that costs shall be in the discretion of the court. That broad general discretion is undoubtedly necessary to give the court a power to do justice between the parties in the multiplicity of circumstances that can arise during the conduct of a case. The subsection also empowers the court to grant to a successful party its advocates' fees on the prescribed scale. The subsection does not mandate that the court do so in every circumstance. In my opinion, the wide general jurisdiction that s. 24(2) of the Judicature Law confers upon the court to order costs is in every respect similar to the wide general jurisdiction to award costs that existed pursuant to s. 11(1) of the Grand Court Law. These two statutes were made subject to each other. They are complimentary. In my opinion they provide in the Cayman Islands jurisdiction to the Grand Court over costs awards similar to that which existed in England in 1925.

The true meaning to be given to the subordinate provision in s. 24(2) of the Judicature Law, i.e. "which may, by its judgment, award them to the successful party in accordance with the prescribed scale", is to indicate to the court that costs normally follow the event and that in the ordinary case advocates' fees should be on a prescribed scale. The legislature was in the ordinary way entrusting to the sound judicial discretion of the judge the award of costs but at the same time the legislature was indicating the monetary limits to be applied in normal cases. There is no specific regime for the award of costs following a payment into court, pursuant to Grand Court Rules Order 2, rules 7(2) and 14(2) and there is no specific provision for a court to award to a successful party anything other than its full costs. In my judgment it would be burdensome on the legislature to set out in the statute or in rules of court the myriad variety of circumstances in which a court can make an award for costs and it is therefore fully understandable that the legislature should use hallowed language in conferring jurisdiction upon the superior court to award costs. In *Aiden Shipping Ltd. v. Interbulk Ltd.* [1986] A.C. 985, the House of Lords reaffirmed the principle that where the legislature expressed the discretion to award costs in wide terms, leaving it to the rule making authority to control it by rules of court, if it saw fit to do so, and for the appellate courts to establish principles for its exercise, there was no justification for implying that the trial court's discretion could be limited in any particular way. There, the statute involved was s. 51(1) of the Supreme Court Act of 1981 and Lord Goff of Chievely expressed the view that courts of first instance are well capable of exercising their discretion under the statute in accordance with reason and justice – *Aiden* (*supra*), at page 986.

This is the first time that the construction of s. 24(2) of the Judicature Law has come before this court. However, in 1985, Summerfield C.J. in *McCallister v. Santa Cruz Investment*

Co.Ltd. (No. 2) 1985 C.I.L.R. 411, in construing the exact provision which was then contained in s. 30(2) of the Judicature Law held:

> "Therefore, in my opinion, there is but one basis for the taxation of costs in these Islands and that is contained in the Judicature Law, s. 30 read with the Schedule. There is no such thing as party and party costs, solicitor and client costs, or solicitor and own client costs. There are just costs or, if one must append a description, scale costs. That scale is set out in the Schedule."

There was no appeal from that decision. Then came the case of *Ingersoll-Rand v. Banco Portugues Do Atlantico* 1988-89 C.I.L.R. 189, in 1988 before Collett C.J. He considered and approved the decision in *Ingersoll-Rand* (*supra*) and distinguished s. 30(3) of the Judicature Law from the provisions of s. 51 of the Supreme Court Act 1981 of England. I have already shown that both s. 13(1) of the Grand Court Law [now s. 11(1)], and s. 30(3) of the Judicature Law [now s. 24(2)], were each made subject to the other and were complementary to each other. I am required to construe and to give meaning to every part of s. 24(2) of the Judicature Law. If I simply say that the court has power to order costs to the successful party on the scalar basis, I would be failing to construe what I regard as the primary provision of the section which is the jurisdictional empowerment of the court to award costs in its discretion. I would be stripping the court of that plenitude of judicial discretion which I have determined is the heartbeat of the term "the awarding of such costs shall be in the discretion of the court". I adopt the argument of Mr. Phillips that in the case of costs, the jurisdiction vested in the court and the judge in the Cayman Islands and in England is to award costs in their discretion.

Collett C.J. considered the possible effect of the decision of Megarry V.C. in *E.M.I. Records Ltd. v. Ian Cameron Wallace Ltd.,* [1983] Ch. 59, [1982] 2 All E.R. 980 and concluded

that the principle enunciated by the Vice-Chancellor did not fit with Cayman Islands legislation and there was no room for its application in the face of the Cayman Islands legislation. It is well to set out the principle established by *E.M.I. Records Ltd.* at page 69:

> "The wide general discretion given by section 50(1) of the Judicature Act 1925 can be curtailed by rules of court because the section is expressed to be subject to them. Where there are rules which express a plain prohibition as in *Thompson's* case then the discretion cannot be exercised so as to disregard that prohibition. On the other hand, where there is no express prohibition, but merely an affirmative provision in the rules, then even if that affirmative is expressed in imperative terms, as by the word "shall", the court is not deprived of its statutory discretion to order costs on some basis other than that all taxation "shall" be on a party and party basis operates as a provision that all taxation shall be on that basis unless the court either exercises the express powers given by the rules to direct some other basis of taxation, or else exercises its statutory discretion to go outside the rule 28. In my judgment, the wording of the rules is not strong enough to confine the courts to making orders within rule 28 and exclude their statutory discretionary power to make orders on other bases."

I am inclined to think that the dictum in *E.M.I. Records Ltd.* can be of general application in this branch of the law. Megarry V.C. did not confine himself to a narrow interpretation of the statutory provisions before him. He reviewed the decisions of the Court of Appeal including *Andrews v. Barnes* (*supra*) and he concluded that the circumstances of litigation are so various that it is a matter of high importance that the judge should have a wide discretion as to the basis of costs. This dictum is congruent with the principle set out in Halsbury's Laws Vol. 44(1) para 1442 that the law should be just and fair:

> "It is a principle of legal policy that law should be just and fair and that court decisions should further the ends of justice. The court when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the

legislator intended to observe this principle. The court should therefore strive to avoid adopting a construction that leads to injustice or unfairness."

With great diffidence I come to a different conclusion than that reached by Collett C.J. as to the relevance of *E.M.I. Records Ltd.* to Cayman Islands legislation. In my opinion the interpretation of s. 24(2) of the Judicature Law as stated by Summerfield C.J. in *McCallister v. Santa Cruz Investment Co. Ltd.* is too restrictive. The plain meaning of that section is that all costs are in the discretion of the court and in a proper case the court may award indemnity costs.

For the sake of completeness I accept the submissions of Mr. Phillips that the respondent has failed to show that there is any basis for splitting the costs order between the various defendants. For that reason I find no merit in the submissions advanced in support of the Respondent's Notice.

Collett C.J. was mindful of the fact that the scale fees current in 1988 did not meet the reasonable advocate costs that were incurred by litigants in ordinary cases and that this injustice was magnified in complicated commercial cases. Kay J. was of the opinion that in a trust case the trust fund should not be denuded by the payment of costs that had been incurred for the protection of the trust. Graham J. tried this complicated case in which he found massive dishonesty, bribery and a gross attempt to obstruct justice by trustees of a fund and would have awarded indemnity costs if he had jurisdiction to do so. In my view, this is an appropriate case for the award of indemnity costs.

I would also order costs to the appellant of this appeal and of the application in the court below on the ordinary basis.

Rowe, J.A.

TAYLOR, J.A.

The only issue remaining to be decided in these proceedings is whether the Grand Court can award costs on an "indemnity" basis in a successful action by a beneficiary against a trustee for fraudulent appropriation of trust property.

By reasons for judgment of May 9th 2000, and June 2nd 2000, Mr. Justice Graham granted judgment in favour of the appellant Cesare Bonotto directing transfer to him by the respondent Gianni Boccaletti of shares in a private company which the judge found were held in trust by Boccaletti for Bonotto and directed an accounting of certain monies misapplied and entry of judgment for the amount found due. Mr. Justice Graham's main reasons for judgment are reported at 2000 C.I.L.R. 147 and reference to them is necessary only to say that they make findings of dishonest conduct on the part of Boccaletti both in the transactions which led to the claim and in his efforts to mislead the Court at trial. The circumstances were such as justify an award of costs on an indemnity basis should the Grand Court have authority to make such an award.

In further reasons for judgment on the issue of costs dated June 2nd 2000, (unreported) Mr. Justice Graham said, in part, as follows:

> "If I had jurisdiction to do so I would have awarded indemnity costs in this case as the terms of judgment make it clear.
>
> I am quite satisfied however that I have no such jurisdiction. I have carefully read the judgment of Collett CJ (as he then was) in the case of *Ingersoll Rand v. Banco Portugues Do Atlantico [1988-89] CILR 189.* I respectfully agree with his

> Lordship's reasoning and whilst not bound by it, I express my respectful agreement with it. I cannot at the moment envisage that the Court of Appeal would come to any conclusion, other than he did, but it might, as the present limitations on the Court's powers are unsatisfactory and unjust as his Lordship said in *Ingersoll Rand* (ibid).
>
> > "... very far in practice from according to successful litigants the full recovery of even their minimum proper and necessary expenditure in and about the conduct of their cases before the Court. This is particularly so in protracted and complicated commercial actions such as the present one has been.""

The present respondents having abandoned their appeal against Mr. Justice Graham's judgment on the merits, there remains before us only that of the successful plaintiffs on the quantum of costs issue, for which Mr. Justice Graham granted leave.

(a) Previous Grand Court Decisions

In his reasons for judgment on costs Mr. Justice Graham quoted from one of four previous decisions of the Grand Court which deal with limitations on the extent of the powers and discretion of the Grand Court in this regard.

The first is the decision of Chief Justice Summerfield in *McCallister v. Santa Cruz Investment Co. Ltd. (trading as Tortuga Club) (No. 2)* 1985 C.I.L.R. 411, in which the Chief Justice rejected the contention that the broad discretion concerning costs legislatively granted to the Supreme Court in England is conferred also on the Grand Court by the words of the then s. 13(1) [now s. 11(1)] of the Grand Court Law:

> 13(1) The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to the provisions of this and any other laws of the Islands, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by B
>
> (a) Her Majesty's High Court of Justice; and
>
> (b) the Divisional Courts of that Court,
>
> as constituted by the Supreme Court of Judicature (Consolidation) Act, 1925, and any Act of the Parliament of the United Kingdom amending or replacing that act.

The Chief Justice held that the word "jurisdiction", as used in s. 13(1), should be interpreted so as to include the exercise of judicial power in civil matters, but not to incorporate substantive law, including that created by rules of court, saying (at page 414):

> "In my view, that provision does not import any of the English substantive law into these Islands. The use of the expression "jurisdiction" in that sub-section does not have that effect. That expression is confined to its technical meaning, namely, range of judicial power, *e.g.* actions in admiralty, matrimonial causes, jurisdiction in civil and criminal matters, prerogative writs, *etc.* It defines the scope of the Grand Court's jurisdiction. Other sections amplify this provision and also specifically import some of the law of England *e.g.* common law and equity. But s. 13(1) does not import the substantive law contained in O.62 (*i.e.* those parts specifying what may be recovered by way of party and party costs and solicitor and client costs) any more than it imports the English company laws, trade union laws or revenue laws."

The Chief Justice rejected also the submission that s. 20 of the Grand Court Law, which deals with practice and procedure, covers the question, saying that the matter was one of substantive law and adding (at p. 415) that s. 20(2) [now s. 18(2)] in any event imports English practice only where "no provision is made by this or any other law or any Rules" and costs are a matter for which specific provision is made by s. 30 of the Judicature Law and the schedule there referred to. Section 30(1) and (3) then read:

> 30.(1) The scale of general court fees, advocates costs and Bailiff's fees shall be on the scale laid down in schedules "A", "B" and "C" respectively and by any rules and the Governor in Council may, on the recommendation of the Judge of the Grand Court, at any time amend the said schedules.
>
> . . . .
>
> (3) Where in any proceedings in any court an advocate has been employed or other costs or charges have been incurred then, subject to any other provision of this Law or any other law and to any rule, the awarding of such costs and charges shall be in the discretion of the court which may, by its judgment, award them to the successful party in accordance with the prescribed scale.

The scale referred to in s. 30(3) was therefore the only basis, the Chief Justice said, on which costs could be awarded in the Cayman Islands -- there was "no such thing as party costs, solicitor and client costs or solicitor and own client costs".

In the following year, in *Tower Corporation Ltd. v. Hadsphaltic International Ltd.* 1986 C.I.L.R. 40, Mr. Justice Hull, in dealing with an application for security for costs, said (at p. 57) that costs are "a creation of statute" and that "the primary source of our substantive law as to the award of costs is s. 30, read with the relevant schedules".

Thereafter Chief Justice Summerfield dealt further with the issue in the same case: see *Tower Corporation Ltd. v. Hadsphaltic International Ltd.* (unreported), November 17, 1987. The Chief Justice there said (at pp. 1-2):

> "I am now satisfied that the award of costs is governed solely by s. 30 of the Judicature Law read with the schedule thereto and that nothing in rule 52(2) of the Grand Court (Civil Procedure) Rules alters the position. Although s. 30(3) of the Judicature Law expresses itself to be subject "to any rule" nothing in rule 52(2) purports to vary the application of section 30. Rule 52(2) appears to assume that there is some substantive provision of special costs, but there is no

> such provision - unless one reads such a provision into one or other item in the schedule to the Judicature Law."

While no mention is made of the *McCallister* decision, it is apparent that the Chief Justice followed his reasoning in that case.

The fourth decision is that of Chief Justice Collett (as he then was) in *Ingersoll Rand*, referred to by Mr. Justice Graham in this case. While Mr. Justice Graham expressed doubt that this Court would depart from the reasoning of Chief Justice Summerfield adopted by Chief Justice Collett in *Ingersoll Rand*, he nevertheless granted leave to appeal, noting as does Chief Justice Collett in *Ingersoll Rand* that the resulting costs awards, particularly in protracted and complex litigation, are often inadequate.

In *Ingersoll Rand* Chief Justice Collett again considered s. 13(1) of the Grand Court Law in making the following observations (at p. 192):

> "Since by virtue of these provisions the High Court in England has jurisdiction to award costs in its discretion as well as an inherent jurisdiction derived from the old Court of Chancery - see *Andrews v. Barnes* - counsel submitted that the Grand Court in the Cayman Islands also possesses similar jurisdiction to award costs of and incidental to all proceedings before it, to the extent necessary to meet the justice of the case.
>
> Even if counsel's basic premise as to the broad effect of s. 13(1) of the Grand Court Law were accepted there are several difficulties inherent in this reasoning. Section 13(1) is expressly made subject to "the provisions of this and any other laws of the Islands." Section 30 of the Judicature Law (Revised) is one of those laws. Sub-section (1) refers to the scale of fees specified in the Schedules. Sub-section (2) then deals with award of court fees. Finally, sub-section (3) reads as follows:
>
> > "Where in any proceedings in any court an advocate has been employed or other costs or charges have been incurred then,

> subject to any other provision of this Law or any other law and to any rule, the awarding of such costs and charges shall be in the discretion of the court which may, by its judgment, award them to the successful party in accordance with the prescribed scale."
>
> There are significant differences between the wording of s. 30(3) of the Judicature Law (Revised) and s. 51 of the English Supreme Court Act 1981. While in England the court is specifically invested with full power to determine by whom and to what extent the costs are to be paid, in the Cayman Islands the court has, according to the ordinary meaning of s. 30(3), only been given a discretion whether or not to award costs to the successful party in the proceedings, and, if it does so, power to award upon the prescribed scale. In England there are no prescribed scales."

Chief Justice Collett goes on to refer to the discussion by Vice Chancellor Megarry in *E.M.I. Records Ltd. v. Ian Cameron Wallace Ltd.* [1983] 1 Ch. 59 of the English jurisdiction over costs, and rejects its application to the Cayman Islands.

(b) The Equitable Jurisdiction

While the equitable jurisdiction over costs of the Court of Chancery, as discussed in *Andrews v. Barnes* (1888), 39 Ch. D. 133, is mentioned by Chief Justice Collett in the *Ingersoll Rand* decision (at p. 192), the subject is not discussed further there, nor is it dealt with in any other of the Grand Court decisions mentioned.

This may well have been because, unlike the present case, none appears to have involved a claim in equity, and so the matter was not raised. In *Andrews v. Barnes*, an action against trustees for recovery of a small trust fund was dismissed at trial with costs as between solicitor and client. In upholding the award of solicitor-client costs on appeal, Lord Justice Fry said (at p. 138):

> "The jurisdiction of the Lord Chancellor in costs was essentially different from that at common law. "The giving of costs in equity", said Lord *Hardwicke* in *Jones v. Coxeter* (1) "is entirely discretionary, and is not at all conformable to the rule at law." "Courts of Equity", said the same great Judge in another case, "have in all cases done it" (*i.e.*, dealt with costs) "not from any authority" (*i.e.*, as we understand, from any statutory or delegated authority) – "but from conscience and *arbitrio bone viri*, as to the satisfaction on one side or other on account of vexation": *Corporation of Burford v. Lenthall* (2).
>
> An examination of the older General Orders of the Court made, not under any statutory authority, but from the general and inherent authority of the Lord Chancellor, will show that the Court exercised a most wide discretion not only as to the circumstances under which costs were to be awarded, but apparently as to the measure and fullness of the costs. These General Orders will be found to use very varied language expressing different measures of estimation."

Lord Justice Fry gives reasons for rejecting the suggestion that the broad discretion over costs exercised in equity is based on statute.

In *McCallister*, Chief Justice Summerfield observes, in the passage reproduced above (from p. 414), that while s. 13(1) of the Grand Court Law "does not import any of the English substantive law into these Islands" other sections of the act "specifically import some of the law of England *e.g.* common law and equity". The reference must be to what is now s. 16 of the act, which provides, in part, that the Court "in the exercise of the jurisdiction vested in it shall have power to grant and shall grant . . . all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim or defence". Those words invest the Grand Court with complete and substantive authority to grant all such *remedies* as could be granted by the English courts either at common law or in equity.

There can be no doubt that a court of equity could grant costs on a solicitor-client - or what may be called today "indemnity" - basis to beneficiaries against trustees found guilty of fraudulently appropriating trust assets. The question here is whether the granting of such costs may fairly be described as one of the remedies available in equity, so as to fall within the expression "all such remedies whatsoever" in s. 16 of the Grand Court Law. That the expression is intended in this context to be given a broad construction is emphasized by use of the word "whatsoever". I am of the view that it encompasses everything capable of falling within the concept of "relief", the expression used in the companion s. 17 in dealing with counterclaims. Costs are, of course, customarily claimed as relief in an action, and sought in the "prayer for relief". In *Andrews v. Barnes* solicitor-client costs were granted to a successful trustee as reimbursement of legal expenses which would otherwise have been borne at the expense of the beneficiaries. Mr. Justice Graham would in this case have awarded indemnity costs to prevent a similar result in more culpable circumstances. It seems to me that the granting of indemnity costs in cases such as the present can properly be considered the granting of a remedy "in respect of" the equitable claim advanced, for the purposes of s. 16 of the Grand Court Law. Such costs are, of course, awarded to relieve the beneficiary of expenses borne as a consequence of the wrong found to have been done for which the Court is required to provide redress.

As noted in the above cases, s. 11(1) [formerly s. 13(1)] of the Judicature Law which confers on the Grand Court the jurisdiction of the High Court and Divisional Courts of England is expressed to be "subject to the provisions of this and any other laws of the Islands". No such proviso is contained in ss. 16 and 17, which confer and impose on the Court the authority and the duty to grant all common law and equitable remedies.

What was previously s. 30(1) and (3) of the Judicature Law has now been amended and re-enacted as s. 24(1) and (2), as follows:

> 24. (1) In every case in which any party recovers judgment against another, such party shall have judgment for the court fees payable under this Law or any rule which may be requisite to obtain such judgment.
>
> (2) Where in any proceedings in any court an advocate has been employed or other costs or charges have been incurred then, subject to any other provision of this Law or any other law and to any rule, the awarding of such costs and charges shall be in the discretion of the court which may, by its judgment, award them to the successful party in accordance with the prescribed scale.

The prescribed scale now appears in the Grand Court (Taxation of Costs) Rules 1995, rather than, as before, in the act itself. Those rules provide, by rule 2:

> Whenever the Court makes an *inter partes* order for costs to be taxed, the amount of advocates' fees and costs shall be determined in accordance with the scales contained in the Schedule hereto

Since s. 24(2) is expressly made subject to other statutory provisions, however, and these include ss. 16 and 17 of the Judicature Law, it cannot be taken to cut down the Court's equitable authority under those sections, including its broad equitable discretion regarding both the award of costs and their amount.

(c) Construction of Section 24

While this conclusion deals sufficiently with the issue raised in the present case, it is, I think, proper to deal also with its impact on the proper construction of s. 24 of the Judicature Law, as it applies in my view to all cases.

As noted above, s 16 of the Grand Court Law is what may be referred to as a "dominant" provision of the statutory scheme created by that law and the Judicature Law, which was enacted contemporaneously. Unlike the "servient" s. 24(2) of the Judicature Law, s. 16 of the Grand Court Law is not declared to have effect subject to any other statutory provision. It reads in full, as follows:

> In every civil cause or matter law and equity shall be administered concurrently. The Court in the exercise of the jurisdiction vested in it shall have power to grant and shall grant, either absolutely or on such reasonable conditions as shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim or defence properly brought forward by them respectively in such cause or matter, so that so far as possible all matters in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters be avoided. In all matters in which there is any conflict or variance between the rules of law and the rules of equity with reference to the same matter, the rules of equity shall prevail.

The section not only vests in the Grand Court authority to grant legal and equitable relief but gives effect to the important late 19th century legal reforms which resulted in the "fusion" of the two systems. Other provisions of the Grand Court Law and Judicature Law, and particularly

servient provisions such as s. 24(2) of the Judicature Law, must be construed with the fundamental objective of s. 16 of the Grand Court Law in mind. In particular, s. 24 of the Judicature Law should not readily be taken as intended to establish a different rule as to the discretion of the Court over the award or amount of costs in actions at law from that which the legislature must be taken to know would apply in proceedings in equity, that is to say if such a result can reasonably be avoided.

In my view s. 24(2) of the Judicature Law is reasonably capable of being construed as granting to the Court an unfettered discretion both as to the award of costs and their amount - that is to say, that this meaning may reasonably be given to the words "the awarding of such costs shall be in the discretion of the Court" - and it should be so construed. The following words, "which may by its judgment award them to the successful party in accordance with the prescribed scale", are capable of being and should in my view be construed as providing *one option* open to the Court when granting costs in the exercise of its discretion, rather than the *only such option*. While the words of rule 2 of the 1995 costs rules might be thought to contemplate no exception from the scale there referred to in the taxation of costs as between litigants, and s. 24(2) is itself made subject to any rule, I am of the view, for the reason already stated, that it should not be so interpreted. It should, in my view, be read in harmony with s. 24(2) itself as establishing the tariff to be applied where the Court chooses to make an award in accordance with the prescribed scale, or awards costs without reference to any measure or amount.

The discretion as to costs is, of course, to be exercised only in accordance with principles, as established by the modern authorities. As is observed in this case by the trial

judge, only in most exceptional cases will an award of indemnity costs be made, otherwise than under contract or out of a fund. So far as final judgments are concerned, as opposed to interlocutory judgments, it is difficult to conceive of a case in which costs would be awarded to a wholly "unsuccessful" party, but it may be that a party not strictly "successful" could be entitled to costs as well as truly successful parties.

(d) Conclusion

The Grand Court decisions mentioned, like others which have followed them, appear to have been reached without the benefit of full consideration of the extent and implications of the equitable discretion of the Court with respect to the award and amount of costs, and this is indeed understandable since none, so far as I can discover, involved any claim in equity; it is only with the benefit of a full review of the continuing equitable authority of the Court in this regard that I have come to a different conclusion, and have been persuaded that the Grand Court has broader discretion, under both the Grand Court Law and the Judicature Law, than has previously been thought the case.

I conclude that both in equity and under s. 24(2) of the Judicature Law the trial judge had in this case authority to grant indemnity costs, and would have been right to grant such costs. I find no basis on which a distinction can properly be drawn for this purpose between Gianni Boccaletti and his co-defendants, Sphinx Corporation and Helga Boccaletti, all of them having maintained the same defence.

I would allow the appeal with costs of the appeal on the ordinary scale.

TAYLOR J.A.

ZACCA P.

By a majority the appeal is allowed. Order for indemnity costs in the Court below granted. Costs of the appeal and of the application in the Court below to be on the ordinary basis to be taxed if not agreed.