[2020] JMSC CIV. 229

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV02257

BETWEEN	**KNIGHTSMAN LIMITED**	**CLAIMANT/ APPLICANT**
AND	**WESTERN REGIONAL HEALTH AUTHORITY**	**1ST RESPONDENT**
AND	**THE ATTORNEY GENERAL**	**2ND RESPONDENT**

Mrs. Carolyn Reid-Cameron Q.C and Mr. Chukwuemeka Cameron instructed by Carolyn Reid & Co Attorneys-at-law for the Claimants

Ms. Tamara M. Dickens and Ms. Shaniel Hunter instructed by the Director of State Proceedings for the Defendants

13th August 2020, 27th August 2020, 4th September 20202, 13th November 2020

Costs – Indemnity Costs

BROWN BECKFORD J,

BACKGROUND

[1] The Claimant KNIGHTSMAN LIMITED was an unsuccessful bidder under the government procurement rules for a contract to provide security services to the 1st

Defendant WESTERN REGIONAL HEALTH AUTHORITY. The 1st Defendant as the procuring entity, was required to issue a Standstill Notice to the unsuccessful bidders.

[2] The Claimant contended that the 1st Defendant failed to issue the Standstill Notice as required by Section 44 of the Public Procurement Act. This was disputed by the 1st Defendant. The Claimant then sought and received leave to apply for Judicial Review of the 1st Defendant's actions. An ex parte interim injunction was also granted against the 1st Defendant preventing it from dispensing with the Claimants services then being rendered to it.

[3] After hearing submissions at the *inter partes* hearing of the application for interim injunction, the 1st Defendant was ordered to produce the Standstill Notice. By way of letter addressed to the court and confirmed by Affidavit filed on the 4th September 2020 the 1st Defendant conceded that the Standstill Notice was not issued and evinced an intention to commence the procurement exercise afresh. As a result, the following order was made inter alia:

i. By consent, interim injunction granted against the 1st Defendant (Western Regional Health Authority) restraining it from bringing to an end or otherwise terminating, suspending or interfering with private security services currently being rendered by the Claimant Knightsman Limited to Western Regional Health Authority) and in particular the Savanna-la-Mar Public Hospital until this claim is determined or further ordered by the Court;

This substantially brought the action to an end. The Claimant applied to have its costs.

APPLICATION FOR COSTS

[4] The general rule is that where the court decides to make an order for costs, it must order the unsuccessful party to pay the costs of the successful party, Civil Procedure Rules 2002 Rule 64.6(1). There is no dispute that the Claimant is entitled to costs against the 1st Defendant.

[5] The Claimant has asked the court to make the following orders:

1) Costs of the application for the interim injunction and leave to apply for Judicial Review be granted to the Claimant on an indemnity basis.

2) Special costs certificate granted for two counsel

3) Taxation authorized and the Attorney General is directed to pay the said costs within 30 days failing which the defence will stand struck out and Judgment on the claim will be entered for the Claimant without further order.

(a) *INDEMNITY COSTS*

[6] I adopt the Claimant's exposition of the applicable law set out in paragraphs 10 and 12 of the Claimant's submissions which state:

*"***12.** *We wish to adopt the principles outlined by the UK High Court of Justice, Queens Bench Division in the case of* ***Fitzpatrick Contractors Limited v Tyco Fire and Integrated Solutions (UK) Limited*** *wherein Justice Coulson detailed at paragraph 3, outlined the principles for indemnity costs: -*

*"**Principles Relating to Indemnity costs***

i. *Indemnity costs are no longer limited to cases where the court wishes to express disapproval of the way in which the litigation has been conducted. An order for indemnity costs can be made even where the conduct could not properly be regarded lacking in moral probity or deserving of moral condemnation in* ***Reid Minty v Taylor [2002] 1 WLR 2800).***

ii. *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" Simon Brown LJ (as he then was) in* ***Kiam v MGN Limited No. 2 [2002] 1 WLR 2810).***

iii. *It is always important for the court to consider each case on its facts and to decide whether there is something in the conduct of the action or the circumstances of the case in question which takes it out of the norm in a way which justifies an order for indemnity costs (see Waller LJ in* ***Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson [2002] EWCA (Civ) 879).***

iv. *Examples of conduct that has led to such an order for indemnity costs include the use of litigation for ulterior commercial purposes (see* ***Amoco (UK) Exploration v British American Offshore Ltd*. [***2002 BLR and the making of an unjustified and personal attack on one party by the other (see* ***Clark v Associated Newspapers*** *(unreported) 21st September 1989).*

*v. 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 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 realized 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 for the case now being known, the position adopted by that party may be thought to have been unreasonable."*

[7] The Claimant's exposition of the applicable law are also adopted, set out in paragraph 12 of the Claimant's submission "In 2006, Tomlinson J, in the pursuit of the Bank of England in the **Three Rivers District Council v the Governor and Company of the Bank of England** (No.6) paragraph 25 that in order to justify an award for indemnity costs then the following should be evaluated: -

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 defendant's favour is that there must be some conduct or some circumstances 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.*

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."

[8] These principles have been applied in this jurisdiction in the case of **Michael Distant and Anor vs Nicoroja Limited et al**[1] cited by Counsel for the 1st Defendant. Paragraphs 9 & 10 of the 1st Defendant submissions contextualises the position as follows:

> ***9.*** *In the case of* ***Michael Distant & Anor v Nicroja Limited*** *et al, Brooks J, (as he then was) cited with approval the authority of* ***Noorani v Calver [2009] EWHC 592*** *(QB) where Coulson J stated that:*
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> > *"In any dispute about the appropriate basis for the assessment of costs, the court had to consider each case on its own facts.* ***If indemnity costs were sought, the court had to decide whether there was something in the conduct of the action, or the circumstances of the case in question, which took it out of the norm in a way which justified an order for indemnity costs:*** *see Waller LJ in Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson* [2002] EWCA Civ 879. *Examples of conduct which has led to such an order for indemnity costs include the use of litigation for ulterior commercial*

[1] Unreported decision of the Supreme Court delivered 8th March 2011, Claim No. 2010 HCV 1276 at pages 9-10

purposes (see Amoco (UK) Exploration v British American Offshore Ltd *[2002] BLR 135); and the making of an unjustified personal attack by one party by the other (see* Clark v Associated Newspapers *[unreported] 21 September 1998). Furthermore, whilst the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) may well lead to such an order: see, for example, Wates Construction Ltd v HGP Greentree Alchurch Evans Ltd* [2006] BLR 45(*Emphasis supplied)"*

***10**. Brooks J, then went on to further state at page 10, in relation to the above extract from Noorani that:*

*The portion of the quotation, which has been emphasized, makes it clear that it is not only misconduct which will justify an award of indemnity costs. The circumstances of the case may also be considered for that purpose. That was also the finding in **Reid Minty (a firm) v Taylor**, cited above. In order to warrant an order for indemnity costs on the basis of misconduct, 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" see (**Kiam v MGN Ltd (No.2) [2002] 1 WLR 2810** per Simon Brown LJ at paragraph 12).*

[9] The question for the court now is whether in continuing to insist that the Standstill Notice was in fact given, the conduct of the 1st Defendant was so out of the norm that it justifies awarding costs on an indemnity basis. In this regard the conduct of the 1st Defendant bears greater scrutiny.

[10] It is not contended that the 1st Defendant misconducted itself but that its actions were unreasonable. The 1st Defendant was notified by letter dated the 6th of October 2020 from the Claimant's Attorneys-at-law that the Standstill Notice was not given and requesting that they comply with Section 44(2) of the Public Procurement Act.

[11] The 1st Defendant insisted that this was done to include in the Affidavit of Abigail Whittaker-Clarke filed July 22nd 2020. Up to the *inter partes* hearing of the application for interim injunction Counsel, standing on instructions, insisted that it was done. Only when the order was made by the court to produce same did the 1st Defendant seek to confirm that the Notice had been given. The Further Affidavit of Abigail Whittaker-Clarke filed September 4th 2020 states in paragraph 7 of her affidavit) "…(a) after the court ordered disclosure of the standstill notice, I further consulted with the Office of Public Procurement and Policy at the Ministry of Finance and Public Service and a team of us accessed a test site and ran some test procurement opportunities."

[12] The 1st Defendant asked the court to accept that the 1st Defendant's insistence that the Standstill Notice was given was a mistake and not an egregious error.

[13] With that, respectfully, I cannot agree. Having been notified, the 1st Defendant should have conducted the verification exercise at that time. At the very least, having been notified that the Claimant had commence of action in the courts, the 1st Defendant would have been expected to put itself in a position to prove its contention. However, the 1st Defendant stubbornly and steadfastly held to its position, up to the full *inter partes* hearing of the application for the injunction.

[14] There is no doubt in my mind that such action in the circumstances was beyond being wrong or misguided but unreasonable to a high degree. This justifies an order for costs on an indemnity basis.

SPECIAL COSTS CERTIFICATE

[15] Special Costs Certificate was sought for two counsel. CPR Rule 64.12 provides that a special costs certificate may be granted for a counsel where: -

> *12(2) In considering whether to grant a special costs certificate the court must take into account –*

(a) whether the application was or was reasonably expected to be contested;

(b) the complexity of the legal issues involved in the application; and

(c) whether the application reasonably required the citation of authorities and skeleton arguments.

[16] In **Gorstew Ltd v Her Hon Lorna Shelley-Williams et al**[2] referred to by the Claimant, Attorney, Beswick J, in addressing the question considered CPR Rule 65.17(3) as to the circumstances to be taken into account in deciding what would be a reasonable amount for costs.

[17] In the instant case, Mrs. Carolyn-Reid Cameron Q.C and Mr. Chuckwuemeka Cameron appeared. Mr. Cameron is a senior Attorney-at-Law. Having heard the parties on the *inter partes* hearing for the injunction, the issues in my mind were not so involved, novel or complex so as to require the attention of more than one counsel.

[18] I note the opinion of Brooks J (as he then was in **Distant** case where he said that

"An order for costs to be taxed on an indemnity basis would obviate the need for a special costs certificate"

(c) IMMEDIATE TAXATION

[19] As said before, the matter is to all intent and purposes at an end. In the circumstances where due diligence and not intransigence on the part of the 1st Defendant could have resolved the issues before litigation commenced, it is just that the costs of the proceedings to date be taxed immediately.

ORDERS

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[2] **[2016] JMSC Civ 71**

1) Costs awarded to the Claimant against the 1st Defendant on an indemnity basis.

2) The Claimant is entitled to tax its costs immediately.

3) Costs if not agreed to be taxed by the Registrar.

4) Application for Special Costs Certificate is refused.