Neutral Citation Number: [2024] CA (Bda) 22 Civ

Civil Appeal No. 2 of 2024

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION (COMMERCIAL COURT)**
**BEFORE THE HON. JUSTICE SHADE SUBAIR WILLIAMS**
**CASE NUMBER 2023: No. 162**

Date: 05/12/2024

**Before:**

**THE PRESIDENT, THE RT HON SIR CHRISTOPHER CLARKE**
**JUSTICE OF APPEAL, THE HON SIR ANTHONY SMELLIE**
**and**
**JUSTICE OF APPEAL, THE HON IAN KAWALEY**

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**Between:**

**AFINITI, LTD.**

**Appellant**

**- and -**

**MUHAMMAD ZIAULLAH KHAN CHISHTI**

**Respondent**

**Appearances:**
Mr Conor Doyle of Conyers Dill & Pearman Limited, Counsel for the Appellant
Mr. Alex Potts KC and Mr Richard Horseman of Wakefield Quin Limited, Counsel on behalf of the Respondent

**On the papers**:
**Submissions filed:** 2 October 2024
**Date of Judgment:** 5 December 2024

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*Costs of appeal reference Indemnification Deed-appropriate award- whether Respondent entitled to award on a contractual basis in an event*

**COSTS RULING**

**KAWALEY JA:**

## Introductory

1. On 16 September 2024, we disposed of the appeal delivering a Judgment (the "Judgment") which sets out the relevant background and summarised the result as follows:

   "*77…*

   *(a) Ground 1 is allowed in part. The IC Determination was admissible as evidence of what occurred in the first stage of the contractually agreed process for determining whether the Trade Secrets Proceedings are indemnifiable. To the extent that the Appellant contended that it had binding effect (its primary argument), Ground 1 is dismissed;*

   *(b) Ground 2 is allowed. The Judge ought to have ruled that the Award was admissible in evidence pursuant to sections 40 and 41 of the BICA and that it was arguably an abuse of process to relitigate the issues determined against the Respondent by the Award. However, the Court declines to make abuse of process findings which will have to be determined by the Supreme Court in future proceedings;*

   *(c) Ground 3 is refused. The Judge correctly rejected the argument that the Award gave rise to an issue estoppel.*

   *78. The Respondent's Cross-Appeal is dismissed. The Judge rightly declined to strike-out Logan 2* [a relevant affidavit]*and no grounds have been made out for this Court to order the Appellant to make an interim payment on account of the Respondent's advance of expenses claim.*"

2. Each party claimed victory and an entitlement to costs of the appeal and in the Court below. However, the Respondent's primary position was that under the Deed of Indemnity (the "Deed") he was entitled contractually to his costs in any event.

Accordingly, the application turns on the adjudication of two main issues which can conveniently be dealt with in the following order:

(a) whether the Respondent is entitled to contractual costs in any event; or

(b) (if not) how should the usual discretion in relation to costs be exercised.

**Contractual costs**

3. The disposition of the appeal and cross-appeal results in the Supreme Court proceeding to adjudicate the merits of the Respondent's substantive application for indemnification under the Deed. In my judgment any application for contractual costs on the basis of a claimed entitlement under the Deed should in the first instance be made in the Supreme Court. The issue is not straightforward and is not in any event suitable for determination on the papers in the context of an application which was intended to deal with the incidence of costs applying the standard principles.

**The incidence of costs**

4. It is sometimes a strong indication of a contest with no decisive winner when each side has the temerity to claim overall victory. However, it is also often the case that while it is clear that one party has 'won', they were unsuccessful on time consuming issues so that their costs should be reduced by a proportionate amount. The present case is illustrative of the latter situation. In First Atlantic Commerce v Bank of Bermuda Ltd [2009] Bda LR 18 at [66], this Court found that the award of costs to a successful party may be modified by the principle in *In re Elgindata Ltd (No 2)* [1992] 1 WLR 1207, so that "*the successful party's recoverable costs can be proportionately reduced when superfluous issues were raised unnecessarily, or for other good reason*". There are two levels of analysis:

   (a) was a disproportionate amount of time expended on issues upon which the overall winner did not prevail; and

   (b) were the issues "superfluous" in the sense that they ought not reasonably to have been pursued.

5. The Appellant had three grounds of appeal. It achieved partial success on one (losing its primary point), succeeded on ground 2 and lost ground 3. The Respondent's cross-appeal was unsuccessful. That clearly represents substantial success overall for the Appellant.

6. It is however necessary to evaluate the import of each ground in terms of time and costs deployed in the appeal. As far as the Appellant's opening written submissions are concerned:

   (a) Ground 1 is dealt with in approximately four pages;

(b) Ground 2 (effect of the award/abuse of process) is dealt with in approximately 15 pages, much of which supports the unsuccessful contention that an abuse of process finding should have been recorded by the Judge;

(c) Ground 3 (issue estoppel the effect of *Munni Bibi*) occupied approximately 18 pages.

7. Roughly half of the Appellant's Reply Submissions addressed the Respondent's Cross-Appeal and the relief he unsuccessfully sought from this Court, however. As far as the Respondent's written submissions are concerned, at least half of the submissions addressed points on which the Appellant did not prevail:

   (a) Ground 1 was addressed in two pages;

   (b) Ground 2 was addressed over some five pages; and

   (c) Ground 3 was addressed in less than three pages.

8. Another rough and ready measure of the time spent on particular issues can be the way in which they were addressed by the Court's Judgment. In this case the Judgment does not to my mind reflect the time and costs incurred in addressing these issues by the parties in an entirely convincing manner:

   (a) Ground 1 was considered over some three pages;

   (b) Ground 2 occupied some two pages;

   (c) Ground 3 occupied some two pages; and

   (d) the Cross-Appeal was addressed in around two pages.

9. One cannot ignore how much hearing time was devoted to the relevant issues. By this measure, it is clear that the *Munni Bibi* issue estoppel point (Ground 2) received more attention than any other single issue. It remains to consider whether these issues may fairly be classified as "superfluous", and if so what reduction is appropriate and proportionate.

10. The issue estoppel point was most significant in terms of costs, justifying a reduction in the order of 40% of the Appellant's costs if it was completely superfluous in the requisite sense. In my judgment it is difficult to say it was entirely unreasonable to pursue the point, because it is clear from this Court's Judgment that the point was not resoundingly rejected. Both I and the President rejected the point on the grounds of precedent "*with some reluctance*" (paragraphs 55, 82). Smellie JA felt that the generality of the principle established by the Privy Council in *Munni Bibi* "*is brought into question by circumstances such as those presented here*" (paragraph 80). Nonetheless, the proposition that this Court was not bound by the Privy Council decision was firmly rejected and was superfluous to the extent that it consumed time

and costs which were disproportionate in relation to the costs of adjudicating the issues upon which the Plaintiff was successful.

11. The abuse of process argument involved less time and costs but was firmly rejected on the basis that it was misconceived to complain that the Judge ought to have recorded abuse of process findings at that stage of the proceedings. The pursuit of this point and the issue estoppel point warrants a reduction of the costs the Appellant should be awarded for its substantial success overall.

12. Looking at matters in the round, I would award the Plaintiff 70% of its costs of the appeal and all its costs in relation to the Cross-Appeal.

**SIR ANTHONY SMELLIE JA**

13. I agree.

**SIR CHRISTOPHER CLARKE, P**

14. I, also, agree.