Neutral Citation Number: [2024] CA (Bda) 26 Civ

Civil Appeal No. 37 of 2022

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. CHIEF JUSTICE
CASE NUMBER 2015: No. 290

Dame Lois Browne Evans Building
Hamilton, Bermuda HM 12

Date: 22/11/2024

Before:

THE PRESIDENT, THE RT HON SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL, THE RT HON DAME ELIZABETH GLOSTER DBE
and
JUSTICE OF APPEAL, THE HON SIR ANTHONY SMELLIE

- -

Between:

GLOBAL DISTRESSED ALPHA CAPITAL I LIMITED
Appellant

- and -

(1) CHRISTIAN MICHELSEN HERMAN
(2) WALTON LAW EDDLESTONE

Respondents

Appearances:
Gregory Banner KC and Lilla Zuill of Zuill & Co for the Appellant
Graham Chapman KC, Katie Tornari of Marshall Diel & Myers Limited and Jai Pachai of Wakefield Quin Limited for the Respondents

Decided on the papers:
Formal hand down date: 22 November 2024

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JUDGMENT ON COSTS

JUDGMENT OF THE COURT DELIVERED BY JUSTICE OF APPEAL, THE RT HON DAME ELIZABETH GLOSTER DBE

Introduction and procedural background

1. This judgment, which is the judgment of the Court, relates to the costs of these appeals, following the Court's judgment originally circulated to the parties on 18 July 2024, but formally handed down on 12 November 2024 ("the 2024 Judgment").

2. It is necessary to set out a brief summary of these proceedings in order to understand the issues which arise for determination in relation to costs. We refer to the Appellant, Global Distressed Alpha Capital I Limited, as "the Appellant" and to the Respondents, Christian Michelsen Herman and Walton Law Eddlestone, as "the Respondents".

3. Following the hearing before this Court on 21 March 2023 ("the Bye-Laws Hearing"), on 23 June 2023 this Court handed down its judgment, with citation [2023] CA (Bda) 12 Civ ("the 2023 Judgment"), on the Appellant's appeal against the order of the Honourable Chief Justice Hargun ("the Chief Justice") made on 13 October 2021. The Chief Justice's order had, pursuant to RSC Ord. 18, r. 19., struck out the Appellant's Amended Specially Endorsed Writ of Summons dated 5 January 2016 ("the Amended Statement of Claim") against the Respondents, who are respectively the Third and Fourth Defendants to the action. Bell JA had granted leave to appeal the Chief Justice's order at the conclusion of a hearing of this Court on 14 December 2022.

4. In summary the Chief Justice's reasons, as stated in his judgment ("the CJ Judgment"), for striking out the Amended Statement of Claim were that the Respondents could rely on the Appellant's Bye-Laws ("the Bye-Laws") to defeat the claim, and that, in any event, no claim was pleaded in the Amended Statement of Claim which fell within that part of the Bye-Laws relied on by the Appellant.

5. By the 2023 Judgment, the Court allowed the Appellant's appeal in relation to the question of construction of the Bye-Laws but agreed with the Chief Justice that the Amended Statement of Claim was demurrable in its then present form and that the Appellant's claim as pleaded did not fall within the proviso to Bye-Law 42.5 of the Bye-Laws. That was for the reason that the proposed Amended Statement of Claim was demurrable because it did not contain any adequate allegation or positive pleading that the Respondents had personally

profited or benefited, as a result of the breach of any fiduciary obligation owed by them to the Appellant. The Court however provided the Appellant with an opportunity to make an application to the Court to re-amend the draft Amended Statement of Claim to bring the claim within the proviso to Bye-Law 42.5.

6. The Appellant duly made its application to re-amend and the Court heard that application on 26 January 2024.

7. By the 2024 Judgment, the Court dismissed the Appellant's application to re-amend its Amended Statement of Claim. Reference should be made to the 2024 Judgment for its full terms and effect. However, for present purposes, it is sufficient to note that that decision was, in summary, based on the grounds that:

7.1. The essential facts as pleaded by the Appellant in the proposed Re-Amendments to the Amended Statement of Claim to support a cause of action relied on a different "*factual situation the existence of which entitles one person to obtain from the court a remedy against another person." (Letang v Cooper* [1965] 1 QB 232, *Mulalley & Co Ltd v Martlet Homes* [2022] EWCA Civ. 32 at [40]) from the situation as pleaded in the Amended Statement of Claim. The essential facts as pleaded therefore proposed a new cause of action.

7.2. It was reasonably arguable by the Respondents that the new cause of action as made in the proposed Re-Amendments was time-barred on limitation grounds.

7.3. It was therefore reasonably arguable that the Appellant was pleading a new cause of action after the expiry of the limitation period current at the date of issue of the Writ applicable to such cause of action.

7.4. However, such new cause of action arose "*out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action".* That was because the Appellant's claim had always been based on allegations that the Respondents were liable for breach of their fiduciary or other duties in their capacity as directors of the Appellant in relation to the pleaded Payments. Accordingly, the Court had power to allow the Re-Amendments under RSC Ord. 20. R.5.

7.5. However, the Court decided that it should not, as a matter of discretion, permit the Appellant to re-amend the existing Amended Statement of Claim to raise claims which were statute barred as against the Respondents. This was not a case where allegations of dishonesty or misappropriation were currently being made against the Respondents, where the Court's approach might well have been different. There was not even currently a claim against the Respondents for damages or equitable compensation for breach of their fiduciary duties.

Although serious, the claims to account for profits allegedly made in breach of the self-dealing rules were claims that should have been investigated and pursued diligently within the limitation period. That had not been done. On the contrary there had been excessive delay in the prosecution of the claim against the Respondents.

7.6. Accordingly, the Court, in the exercise of its discretion, declined to give permission to amend and dismissed the application.

8. The result was that, in the Court's judgment, the appeal fell to be dismissed and the order of the Supreme Court striking out the Appellant's claim stands. The Court directed that the parties should file their submissions in relation to costs and the form of the order, which would be dealt with on the papers. The parties duly filed their respective submissions in relation to costs and the form of the order.

9. There is a large measure of agreement between the parties both as to the question of costs and as to the form of the order. Thus, the parties agree on the following matters that should be set out in the proposed order, viz that:

9.1. the Appellant's application to re-amend its Statement of Claim is dismissed;
9.2. the Appellant's appeal is dismissed;
9.3. no order as to costs shall be made in respect of the Respondents' application for leave to appeal to the Judicial Committee of the Privy Council; however there seems to be a dispute between the parties as to whether the costs of the preparation of such application should be included in the Respondents' costs of the appeal;
9.4. the costs of the underlying strike out proceedings should stand (the Respondents were awarded their costs of the underlying proceedings, on the indemnity basis pursuant to Bye-Laws 42.1 and 42.6, by Order of the Supreme Court of Bermuda dated 13 October 2021);
9.5. the Appellant shall pay the Respondents the costs of and occasioned by the appeal hearing before this Court on 26 January 2024 on the indemnity basis pursuant to Bye-Laws 42.1 and 42.6, to be taxed if not agreed; and
9.6. the Respondents shall each be granted a certificate for two counsel for the hearing on 26 January 2024.

10. The outstanding dispute relates to the costs of, and occasioned by, the hearing before this Court on 21 March 2023, namely the Bye-Laws Hearing, when, as stated above, the Court held in favour of the Appellant in relation to the construction and application of Bye-Laws 42.1 and 42.5.

11. In summary, the Appellant contends that the Court should adopt an issues-based approach to the issue of costs. It contends that the Respondents should pay the Appellant's

costs of and occasioned by the Bye-Laws Hearing on the standard basis, which related to the true construction of bye-law 42 of the Appellant's Bye-Laws; and that, in the alternative, if the Court were to be against the Appellant on that submission, then the proper order in respect of the costs of the appeal would be that the Respondents should have their costs on the indemnity basis, save for the costs of the Bye-Laws Hearing.

12. On the other hand, the Respondents' position is that they were the successful parties in the appeal, and, as a result, the Appellant should pay all of the Respondents' costs of the appeal (including the costs that relate to the Bye-Laws Hearing) on an indemnity basis, pursuant to the indemnity contained in Bye-Law 42 of the Appellant's Bye-Laws.

Discussion and determination

13. The applicable procedural rules in relation to the Court's power to award costs are as follows:

13.1. Pursuant to Order 2 rule 25 of the Rules of the Court of Appeal for Bermuda, the Court has the power to make any order as to costs as the case may require. Thus, the Court's powers on appeal include a power *"to give any judgment or make any order that ought to have been made, and to make such further or other order as the case may require including any order as to costs"*.

13.2. Order 62 rule 3 of the Rules of the Supreme Court 1985 provides:

"62/3 General principles
3(1) This rule shall have effect subject only to the following provisions of this Order.
(2) No party to any proceedings shall be entitled to recover any of the costs of those proceedings from any other party to those proceedings except under an order of the Court.
(3) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

14. In *First Atlantic Commerce v Bank of Bermuda Ltd* [2009] Bda LR 18, the Court (Zacca P, Nazareth JA and Evans JA) considered whether the Supreme Court had been correct to reduce the costs payable to a successful appellant. Evans JA stated at [6] that:

"*overall it is clear that the task of the Court is to apply the provisions of Order 62 Rule 3 of the Rules of the Supreme Court in the circumstances of the case.… The judge correctly described this as the fundamental guiding principle.*"

15. At [26] the Court emphasised the importance of the exercise of common sense in the approach to costs. It stated:

"The Judge directed himself, correctly in our view, in accordance with the judgment of Lightman J. in BCCI v Ali (No. 4) [1999] NLJ 1734 where he said "success is not in my view a technical term but a result in real life, and the question as to who succeeded is a matter for the exercise of common sense." adopted and followed by Bell J. in SCAL Ltd. v Beach Capital Management Ltd. [2006] Bda. LR 93).

16. And further at [67] the Court said:

"But it does not follow that [the substantially successful party] shall recover the whole of those costs. The award remains subject to the principle recognised in In re Elgindata Ltd (No.2)[1]*: in short, the successful party's recoverable costs can be proportionately reduced when superfluous issues were raised unnecessarily, or for other good reason."*

17. The relevant principles as set out in *In re Elgindata Ltd (No.2),* as per Nourse LJ, at page 1213, are the following:

"In order to show that the judge erred I must state the principles which ought to have been applied. They are mainly recognised or provided for, it matters not which, by section 51 of the Supreme Court Act 1981 and the relevant provisions of R.S.C., Ord. 62, in this case rules 2(4), 3(3) and 10. They do not in their entirety depend on the express recognition or provision of the rules. In part they depend on established practice or implication from the rules. The principles are these: (i) Costs are in the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs. Of these principles the first, second and fourth are expressly recognised or provided for by rules 2(4), 3(3) and 10 respectively. The third depends on well established practice.

[1] A decision of the English Court of Appeal reported at [1992] 1 WLR 1207.

Moreover, the fourth implies that a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the unsuccessful party's costs. It was because of his disregard of that principle that the judge erred in this case."

18. In his written submissions, Mr Gregory Banner KC, counsel for the Appellant, engaged in a detailed analysis of various decisions of the Supreme Court and this Court[2] in order to support a submission that:

"*16. The position in Bermuda is therefore that as a matter of practice, the Court generally exercises its discretion as to costs in accordance with the first three Elgindata principles, but it does not adopt the fourth Elgindata principle. Wong, Wen-Young[3] provides support for the adoption of a glossed version of the fourth Elgindata principle only at the conclusion of a claim, but does not appear to have gained traction in Bermuda.*

17. However, there is no good reason for the Court to reject the fourth Elgindata principle in its unglossed form, in an appropriate case, and the neglect of the fourth Elgindata principle ought to cease, for the following reasons."

19. Likewise, in his written submissions, Mr Graham Chapman KC, counsel for the Respondents, appeared to be suggesting that in Bermuda the practice was more likely to be that costs followed the event. At paragraph 14 he referred to the decision of the Supreme Court of Bermuda in *Kentucky Fried Chicken (Bermuda) Ltd v Minister of Economy Trade and Industry (Costs)* [2013] Bda LR 34, where Kawaley CJ stated at [13] - [14]:

" *..this Court's jurisdiction to make issues-based costs orders finds no express support in the rules unlike the position under the English CPR (paragraph 44.3(6)(f)); the Court of Appeal for Bermuda has cautioned this Court against playing fast and loose, as it were, with the basic principle that costs follow the event and that success should be measured in practical terms.*"

20. Both submissions are incorrect, as is the statement of Kawaley CJ cited above. It is clear from this Court's decisions in *First Atlantic Commerce v Bank of Bermuda Ltd (supra)* and in *Credit Suisse Life (Bermuda) Limited v Ivanishvili* (Ruling on costs dated 8 December 2023) that the *Elgindata* principles indeed apply in this Court and that there is no basis for restricting their application. Moreover, whilst the English CPR Rules as set out at CPR 44.2 are far more detailed than the equivalent Bermuda rule contained in Order 62 rule 3 of the Rules of the Supreme Court, the scope of the Bermuda rule is sufficiently wide in the discretion which it confers to enable the Supreme Court, and indeed this Court, to apply *Elgindata*

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[2] *Binns v Burrows* [2012] Bda LR 3; *Kentucky Fried Chicken (Bermuda) Limited v Minister of Economy Trade and Industry* [2013] Bda LR 34; *Wong, Wen-Young v Grand View Private Trust Company Limited* [2022] SC (Bda) 60 Com; *Re Jardine Strategic Holdings Limited* [2023] Bda LR 44.

[3] [2022] SC (Bda) 60 Com (22 June 2022).

principles and to make orders for issue-based costs, in appropriate circumstances. There is accordingly no need for this Court to indulge in any analysis of the arguably different approaches adopted in the cases referred to by counsel. The position is clearly stated by Bell JA in *Credit Suisse Life (Bermuda) Limited v Ivanishvili (supra)* as follows:

> "*1. The court gave its judgment ("the Judgment") in this matter on 23 June 2023, in which it dismissed the appeal. However, in relation to the claim made by the Respondents in the first instance proceedings identified in the judgment as the Misrepresentation Claim (in this ruling I will use the defined terms used in the Judgment), we allowed the appeal made by the Appellant on grounds 4,5 and 6 of the Notice of Appeal. We then noted that we expected that there would have been very significant costs spent on this issue, such that some reduction in costs might be appropriate,* ***on the basis of the principles set out in the case of First Atlantic Commerce v The Bank of Bermuda [2009] CA Bda 5 Civ., which gave effect in this jurisdiction to the principles laid down in the case of In re Elgindata (No 2) [1992] 1 WLR 1207.*** *In Elgindata, it was held that where superfluous issues were raised unnecessarily, the successful party's recoverable costs could be proportionately reduced."* (My emphasis).

See also [4], [9] and [16] of the judgment in *Credit Suisse Life* which make it quite clear that in that case this Court was exercising its discretion in accordance with all of the *Elgindata* principles.

21. If, and to the extent that, there is any need to do so, the Court confirms that such approach is indeed the correct one. Accordingly, the Supreme Court and this Court should apply the *Elgindata* principles in their entirety, in relation to applications where an unsuccessful party is submitting that it should not pay all the costs of a hearing at first instance in the Supreme Court and/or all the costs of an appeal hearing in this Court. Given that that is the case, the guidance contained in paragraph 44.2.10 (page 1383) in relation to issue-based costs order as set out in the 2024 White Book used in England and Wales may be useful in such circumstances. On any basis, the discretion under Order 62 rule 3 of the Rules of the Supreme Court is an extremely wide one.

22. The issue before this Court is whether it appears to us that, in the circumstances of the present case, where the Respondents have succeeded on the appeal, and the Appellant's claim has been struck out, some other order should be made as to the whole or any part of the costs of and incidental to the Bye-Laws Hearing.

23. The Appellant submitted that this was an appropriate case in which to award the Appellant its costs of the Bye-Laws Hearing (either in whole or in very substantial part) for the following reasons:

> 23.1. The appeal had two elements: an appeal against the Chief Justice's construction of Bye-Law 42 and an appeal against his construction of the Appellant's pleading.

23.2. The Appellant won the Bye-Laws Hearing, which disposed of the first of these elements.

23.3. The two elements of the appeal were standalone points and the decision-making analyses for each of them were wholly discrete (albeit some understanding of the background was needed for each).

23.4. The construction of the Bye-Laws was not a point which could be properly characterised as an "every last issue" point of the sort that would or could lead the Court into a sterile attempt to tally up each and every last point on which a party had won or lost. It was one of two pillars of the appeal.

23.5. It was right to take into account that the Chief Justice's reasoning on the construction of the Bye-Laws was self-evidently flawed and internally inconsistent. Whilst in hard fought commercial litigation there will always be a reluctance to concede points, nevertheless, the Respondents lost a major, but ultimately obviously wrong, point on the appeal, despite their trenchant opposition.

23.6. The costs of the Bye-Laws Hearing could and should have been avoided: a concession would have been reasonable - and sensible - in light of the evident flaws in the Chief Justice's reasoning, reflected in the judgment of this court handed down on 23 June 2023. Nevertheless, the Bye-Laws Hearing proceeded with a consequent draw on the parties' resources and the Court's valuable time. It was fair and appropriate to characterise the Respondents' stance at the Bye-Laws Hearing as unreasonable, such as to engage the fourth *Elgindata* principle.

23.7. Whilst the costs of the Bye-Laws Hearing could be easily identified, that was a matter of consequential convenience rather than a point of principle going to the exercise of the Court's discretion: because of the discrete nature of the two points in the appeal and the Chief Justice's obvious errors in approach to the construction of the Bye-Laws, this was an occasion on which an issue-based costs order is and would have been appropriate had both issues on the appeal been dealt with at a single hearing.

23.8. The justice of this appeal warranted - in respect of the costs of the Bye-Laws Hearing - a departure from a unitary approach to costs following the overall outcome of the appeal. Instead, the Appellant ought to be awarded its reasonable costs of that hearing, either in whole or very substantial part.

24. In the alternative, the Appellant submitted, as its secondary case, that, if the Court was not prepared to award the Appellant its costs of, and incidental to, the Bye-Laws Hearing, nonetheless the Respondents' recoverable costs should not include the costs of the Bye-Laws Hearing - i.e. the Respondents should have their costs of the appeal save for the costs of and

occasioned by the Bye-Laws Hearing. The Bye-Laws Hearing added significantly to the costs and length of the appeal, and it was a discrete issue that the Respondents lost.

25. That, submitted Mr Banner, was a fair and just outcome: it would not be right that the Appellant had to pay the Respondents' costs of a critical element of the appeal when it, the Appellant, won that element. In opposing the Appellant's appeal on the construction of the Bye-Laws, the Respondents caused the length and costs of the appeal to be significantly increased. It would be neither just nor fair for the Appellant to have to pay the Respondents' costs of the Bye-Laws Hearing which the Respondents lost and which made the appeal more expensive and lengthier. Accordingly, on the Appellant's secondary case, the appropriate order for costs was that the Appellant should pay the Respondents' costs of this appeal save for the costs of the Bye-Laws Hearing.

26. On the other hand, Mr Chapman, on behalf of the Respondents, submitted as follows:

26.1. There could be no doubt that the Respondents were the successful parties on this appeal. As was agreed between the parties, the appeal falls to be dismissed and the order of the Supreme Court striking out the Appellant's claim and awarding the Respondents their costs on an indemnity basis remains in place. The appeal was concerned with the Appellant's attempt to overturn those orders. In practical, substantive (and in no uncertain) terms, the Appellants failed in that endeavour. Accordingly, the Respondents are to be regarded as the successful parties before the Court of Appeal, including at the hearings on 21 March 2023 and 26 January 2024. Whilst the Respondents recognise that the Court of Appeal in the 2023 Judgment agreed with the Appellant's construction of Bye-Laws 42.1 and 42.5, this had no real value in circumstances where the Court of Appeal ultimately agreed with the former Chief Justice and the submissions of the Respondents, that the proposed Amended Statement of Claim was demurrable in its present form and did not contain any adequate allegation or positive pleading that the Respondents had personally profited or benefited, as a result of the breach of any fiduciary obligation owed by them to the Appellant. As a result, the Appellant was unable to fall within the terms of the B ye-Laws and its claim remains struck out. The appeal was of no substantive value to the Appellant, as is demonstrated by the fact that the order of the Supreme Court striking out its claim remains undisturbed.

26.2. This was not a case where the success on a particular issue was of any value to the successful party on that issue. The Appellant was not the successful party at the hearing on 21 March 2023 (because the Court held that the proposed Amended Statement of Claim was demurrable) but the Court was prepared to allow the Appellant an opportunity to re-amend its Amended Statement of Claim in light of the different view that the Court of Appeal took

from the former Chief Justice as to the construction of Bye-Law 42. In the end however, even after being provided with the opportunity to seek to re-amend its Amended Statement of Claim by the Court of Appeal, the Appellant was not successful in obtaining leave to re-amend its Amended Statement of Claim and failed at bringing a claim within the proviso to Bye-Law 42.5 and articulating an intelligible case[4]. Put another way, there was only ever any point in the Appellant seeking to appeal the Supreme Court's construction of the Bye-Laws if it could show that its pleaded case was consistent with the construction of the Bye-Laws for which it contended. However, the Appellant steadfastly refused to engage or grapple with the deficiencies in its pleaded case and, even when given a yet further opportunity to do so, failed to obtain leave to re-amend. Accordingly, the outcome of the Appellant's appeal was that its claim remained struck out as against the Respondents.

27. In our judgment, taking all the relevant facts into consideration, and applying the approach cited above in the judgment of Lightman J. in *BCCI v Ali (No. 4) supra* namely that: "*success is not in my view a technical term but a result in real life, and the question as to who succeeded is a matter for the exercise of common sense",* the common sense reality here is that the Respondents succeeded in preventing the Appellant from re-amending its Statement of Claim to plead a statute barred claim against the Respondents for loss of profits. Although the Appellant overcame the hurdle of the construction of Bye-Law 42.5, it was nonetheless unable adequately to plead a claim for loss of profits that satisfied the Court that it should exercise its discretion to permit the Appellant to re-amend the existing Amended Statement of Claim to raise claims which were statute barred as against the Respondents. Such claims as it did put forward were "*woefully thin*" and there had been extensive delay in the prosecution of such claims; see in particular [41] – [44] and [48] – [50] of the 2024 Judgment. In the event there was no utility in the Appellant's success on the construction point. It has to bear the responsibility for the fact that ultimately, in the event, it was not given leave to bring its statute barred claims.

28. In all circumstances, in our judgment the appropriate result is that the Appellant must pay the Respondents' costs of, and incidental to, the Bye-Laws Hearing, on the indemnity basis pursuant to Bye-Law 42 of the Bye-Laws.

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[4] The Court comments, however, that, in fact, in the 2024 Judgment the Court concluded that, although it had power to allow the Re-Amendments under RSC Ord. 20. R.5, it declined as a matter of discretion to permit the Appellant to make the proposed Re-Amendments as contained in the draft RASC, because they were made so late. However, the Court did **not accept** the Respondents' argument that the proposed Re-Amendments were demurrable. At paragraph 42 of the 2024 Judgment, Gloster JA said: "*Even now, the amended pleadings in relation to the alleged personal benefit or advantages received by the Defendants, said to support the claim for an account of profits, are woefully thin. Although I do not accept Mr Chapman's submission to the effect that the pleading on its face is demurrable (because it does not adequately allege personal benefit), I do accept Mr Chapman's criticisms that the generic paragraph relied on by the Appellant as to the alleged benefit or advantage is devoid of particularity and does no more than assert – entirely speculatively – a number of different ways in which the impugned payments might have benefited the Defendants or indeed any director."*

29. Accordingly, the Court determines that the Appellant is to be liable for the entirety of the Respondents' costs of, and occasioned by, the Appellant's appeal (including the costs of and occasioned by the hearings before the Court of Appeal on 14 December 2022, 21 March 2023 and 26 January 2024) on the indemnity basis. In addition, the Court orders that there is to be no order for costs in respect of the Respondents' application for leave to appeal to the Judicial Committee of the Privy Council by Amended Notice of Motion for Leave to Appeal to his Majesty in Council and Stay dated 18 July 2023 ("the Privy Council Application"). That order that there should be no costs includes the Respondents' costs of the preparation and submission of the Privy Council Application. Whilst it may indeed have been the case that the Respondents took the view that they needed to prepare an application to appeal to the Privy Council in order to protect themselves against the possibility that the Appellant might succeed in persuading this Court to grant leave to re-amend its statement of claim, the Court does not consider that any such application for leave to appeal, or indeed any subsequent appeal, would have been meritorious or successful. That was because, as our 2023 Judgment held, the Chief Justice was wrong on the construction of the relevant Bye-Laws; and, in any event, any subsequent decision of this Court on re-amendment would have been discretionary and therefore unlikely to lead to permission to appeal being given by this Court on the construction issue.

30. The parties are required to submit a draft form of order reflecting this decision on costs within seven days of the handing down of this judgment.

JUSTICE OF APPEAL, THE HON SIR ANTHONY SMELLIE

31. I agree.

THE PRESIDENT, THE RT HON SIR CHRISTOPHER CLARKE

32. I also agree.