



IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 112 OF 2020 (MRHJ)

BETWEEN

(1) GUY KWOK-HUNG LAM

(2) CP GLOBAL INC

PLAINTIFFS

AND

(1) TOR ASIA CREDIT MASTER FUND LP

(2) JOHN HOWARD BATCHELOR

(3) ANDREW MORRISON

DEFENDANTS

IN CHAMBERS via ZOOM

Coram: Hon. Mrs. Justice Ramsay-Hale

Appearances: Mr. Guy Lam in person and on behalf of CP Global with leave of the Court
Mr. Jayson Wood and Mr. Niall Dodd of Harneys for the First Defendant
Mr. Ulrich Payne and Mr. Thomas Wright of Kobre & Kim for the Second and Third Defendants

Date of Hearing: 28 October 2020

Draft Circulated: 5 March 2021

Ruling Delivered: 11 March 2021

COSTS RULING

Headnote

Order 62 - Costs on Discontinuance - application for costs under contract pursuant to O 62, r.4 (3) - award of Indemnity costs where conduct unreasonable



INTRODUCTION

1. The First Plaintiff, Mr. Guy Kwok-Hung Lam, is a businessman and the Chairman of the CP Homes Group of Companies, a global business founded by him which provides aged care and healthcare services primarily in the United States of America and the People's Republic of China ("CP Homes").
2. The Second Plaintiff, CP Global Inc ("CP Global") is an exempted company registered under the laws of the Cayman Islands. CP Global is part of the CP Homes Group.
3. The First Defendant, Tor Asia Credit Master Fund LP ("Tor Asia") is an exempted limited partnership formed and registered under the laws of the Cayman Islands. It is an investment fund registered with the Cayman Islands Monetary Authority. Through its managers and affiliates, Tor Asia raises capital from outside investors and seeks to achieve returns for its investors by investing those funds in bonds and other securities, and lending those funds to borrowers.
4. The Second and Third Defendants are Receivers and Managers appointed by Tor Asia over certain assets that were pledged as security for a loan made by Tor Asia to CP Global which was personally guaranteed by Mr. Lam.
5. On 1 June 2020, Mr. Lam and CP Global filed an Originating Summons seek, *inter alia*,
 - (1) A declaration that the purported appointment of the Receivers and Managers over:
 - (i) all the shares in CP Global pursuant to an equitable mortgage entered into between Mr. Lam and Tor Asia,
 - (ii) all of CP Global's assets pursuant to a Debenture made between CP Global and Tor Asia and
 - (iii) all the shares in CP Assets Limited held by CP Global, pursuant to an equitable mortgage made between CP Global and Tor Asiawas invalid; and
 - (2) A declaration that the actions taken and the rights exercised by the Receivers/Managers in reliance on the purported appointment are ineffective and unenforceable.
6. The action was discontinued by the Plaintiffs on 21 October 2020. The Defendants made applications for costs which were resisted by Mr. Lam. At the end of the hearing, the Court held that the Defendants were entitled to costs and expressed the provisional view that Tor Asia should have its costs on a standard basis and the Receivers on an indemnity basis, but indicated it would take further time for consideration and put its reasons in writing.
7. This is the decision on the costs applications.



BACKGROUND

8. I have endeavoured to set out the background as briefly as possible as an exhaustive review of the evidence is not necessary to resolve the question of costs.
9. On 11 July 2017, CP Global, as a borrower, and a number of other entities related to CP Homes, entered into a Credit and Guaranty Agreement (“the Credit and Guaranty Agreement”) with Tor Asia as lender. Pursuant to the Credit and Guaranty Agreement, Tor Asia agreed to lend a principal sum of US \$29,500,000 to CP Global which was at that time controlled by Mr. Lam. Mr. Lam and several other entities controlled by him guaranteed the loan.
10. The Credit and Guaranty Agreement has been amended and restated in writing from time to time, most recently pursuant to a Waiver, Third Amendment and Joinder to Credit and Guaranty Agreement dated 22 June 2019 (the “Third Amendment”). The Third Amendment was entered into a following a series of breaches and Events of Default.
11. Under Section 2.04 and 2.05 of the Credit and Guaranty Agreement (as amended by the Third Amendment), CP Global was required to pay the total outstanding principal amount of the loan to Tor Asia on 31 December 2019 (the “Maturity Date”) together with any cash interest accrued between 29 March 2019 and 30 December 2019.
12. The obligations of CP Global were secured by a number of separate agreements, including the equitable mortgages over shares and assets as set out in the originating summons.
13. Each of the Security Documents contained express terms providing that the relevant security would become immediately enforceable if an Event of Default occurred under the Credit and Guaranty Agreement and, when the security became enforceable, that Tor Asia would have the power to appoint one or more receivers over the relevant security assets granted under the Credit and Guaranty Agreement.
14. Tor Asia asserts that CP Global was unable to make certain interest payments which would have allowed it to benefit from a waiver of the Payment Default and various breaches of the Credit and Guaranty Agreement contemplated by the Third Amendment, unable to pay certain cash sums which would have allowed it to exercise an option to extend the Maturity Date for the loan and unable to repay the principal amount by the Maturity Date and that they were entitled, in the circumstances, to enforce their security by appointing Receivers/Managers.
15. On 15 April 2020, Tor Asia appointed John Batchelor and Andrew Morrison as joint Receivers/Managers over the shares of CP Global, in exercise of its rights to enforce its security in the event of default. It is Tor Asia’s case that FTI Director Services Limited was appointed as sole director of CP Global by written resolution made by Mr. Lam as the sole shareholder of CP Global and Mr. Lam’s resignation as director was approved and accepted with immediate effect. CP



Global was given notice of the appointment of the Receivers and of the Written Resolution by way of a Notification of Appointment of Receivers.

16. Tor Asia asserts that, before appointing the Receivers, it had allowed the Plaintiffs time to secure additional financing to repay the loan and had engaged in good faith discussions with Mr. Andrew Oksner, the President of CP Holdings, who was leading the effort to find a new avenue for funding. Ultimately, however, Tor Asia decided to enforce its security.
17. Mr. Lam says he believed, based on information received from Mr. Oksner, who he had charged with keeping Tor Asia informed of progress made in securing this funding and with negotiating an extension of the loan, that a deferral of interest, waiver of defaults and an extension of the Tor Asia facility had been finalised. He says further that Mr. Stone of Tor Asia explicitly conveyed to Mr. Oksner that Tor Asia was working with CP Global to get a loan from a third party lender to replace Tor Asia.
18. He challenges Tor Asia's right to appoint the Receivers in the circumstances and also on the grounds that neither the Notice of Appointment nor the Statutory Demand, served by Tor Asia on him as the Guarantor of the loan, identified any Event of Default in the Credit and Guaranty Agreement on which Tor Asia relied and that any events of default had been waived by Tor Asia.
19. Mr. Lam says further that the written resolution on which Tor Asia relies was forged and that he made no such resolution and did not resign as CP Global's director.
20. In May 2020, Mr. Lam caused proceedings to be issued against Tor Asia in the District Court of Dallas County, Texas, USA (the "Texas Proceedings") seeking relief which included, among other things, declarations that his personal guarantee obligations under the Credit and Guaranty Agreement were invalid, that Tor Asia was not entitled to remove the managers and directors of CP Holdings or any of the US subsidiaries or to appoint any person as the entity's manager and director to his detriment as guarantor under the Credit and Guaranty Agreement, and that any receivers appointed under Cayman Islands law were not entitled to act as receivers over any property or entity in Texas.
21. Mr. Lam later joined Mr. Oksner to the Texas proceedings being of the view that Mr. Oksner had breached his fiduciary duties owed to Mr. Lam by failing to close the loan GP Global had been pursuing, which would have precluded Tor Asia from taking the actions it had taken. He reframed his claim to allege breach of fiduciary duty, aiding and abetting and knowing participation in a breach of fiduciary duty and civil conspiracy, among other claims.
22. On 1 June 2020, Mr. Lam caused these proceedings to be issued against Tor Asia and the Cayman Receivers seeking, *inter alia*, a declaration that the appointment of the Receivers over various assets was invalid and that any actions taken by the Receivers in reliance on their purported appointments as Receivers/Managers were ineffective and unenforceable. These actions include



the exercise of the shareholder rights in respect of Mr. Lam's 100% shareholding in CP Global and the exercise of CP Global's 100% shareholding in CP Assets Ltd to pass the shareholder resolutions removing all existing Directors and appointing FTI Director Services as the new sole director of CP Global and CP Assets Ltd. The Receivers' appointment was challenged on the grounds that Tor Asia failed to give notice of breach prior to appointing them, that there was no event of default in any event and, to the extent that such events of default did exist, they were waived by Tor Asia. Mr. Lam also alleged improper conduct by Tor Asia,¹ which would include the civil conspiracy he believed Tor Asia and Mr. Oksner were engaged in.

23. On 27 August 2020, the attorneys for the Plaintiffs applied for leave to withdraw. That leave was granted as Mr. Lam stated that he was unable to continue instructing attorneys for himself and CP Global, as a result of the appointment of the Receivers by Tor Asia and the consequent seizure of all their assets.
24. Mr. Lam subsequently sought and was granted leave to appear on behalf of CP Global in the exercise of its discretion and in the interests of justice, to permit a person other than a legal practitioner to appear before it on behalf of a corporate entity. The principle on which the discretion should be exercised was set out in *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd & others*² where the Court, while accepting that the normal rule that a body corporate must appear by counsel, recognised that in certain exceptional circumstances, a director who is a party to litigation to which a company is also a party may be allowed to appear in person for purposes which are also those of the company.
25. In the circumstances where Mr. Lam was asserting that the appointment of Receivers by Tor Asia over the Company's assets had resulted in CP Global having no (further) funds with which to instruct Counsel and where the proceedings were brought to challenge the *bona fides* of their appointment, the Court considered that Mr. Lam should be permitted to appear on behalf of the Company. As a party to the action, he would be able to adduce evidence relevant to the issues before the Court and make submissions on his own behalf which would include evidence and submissions for the benefit of the Company.
26. On the 21 October 2020, Mr. Lam gave Notice in correspondence of his intention to discontinue the proceedings. He explained that Tor Asia had commenced proceedings against him in Hong Kong which raised the same issues as were raised in these proceedings and that he couldn't afford to pursue the proceedings in Cayman and defend the proceedings in Hong Kong. Given that he was competent to appear in the Hong Kong proceedings by virtue of having been admitted to the Hong Kong Bar and was at a disadvantage in the Cayman proceedings, being unfamiliar with Cayman law, he considered it was in the Plaintiffs' best interests to discontinue these proceedings.

¹ Para 67 First Affirmation of Guy Lam

² [1991] 1 ALL ER (CH D), at 597 to 598 a-h, 599 a e g.

THE SUBMISSIONS

27. Mr. Lam considered that no order should be made for costs based on a letter written on 16 October 2020 by Tor Asia's attorneys in the following terms:



"It is our client's view that the Proceedings in this matter are misconceived as a matter of fact and of law and are bound to fail. We invite you again to reconsider your application in order to avoid incurring further unnecessary costs. Please note that if you do not withdraw the summons, we will proceed to seek an order for costs against the Plaintiffs, jointly and severally, in this proceeding.

We think that it is prudent to emphasise that in the event that your application is successful, which we do not believe it will be, that the debt is due and owing to the First Plaintiff and our client reserves its right to enforce the debt by any legal mechanism available to it.

Please provide us with a response to this letter by close of business Monday 19 October 2020 to avoid further avoidable cost and expense." [emphasis mine]

28. Mr. Lam submitted that the line, ***"Please note that if you do not withdraw the summons, we will proceed to seek an order for costs against the Plaintiffs, jointly and severally, in this proceeding,*** was an unequivocal offer not to seek costs if the matter were withdrawn.
29. Mr. Wood who appeared for Tor Asia in these proceedings invited the Court to find that, on a proper reading, no such offer was made and that Mr. Lam could not have been misled in light of the previous correspondence between Harneys and himself. The invitation in the letter of 16 October 2020 was an invitation to withdraw now and avoid incurring *further* costs as stated. He referred to Harneys' letter of 8 September 2020 in which it was made clear that, if the matter were not withdrawn, they would seek costs on an indemnity basis. This was repeated in their letter of the 25 September 2020. In the circumstances, he said, it was clear that the reference to costs in the 20 October letter was intended to be a reference to indemnity costs, as set out in the previous correspondence.
30. Mr. Wood's primary position on costs was that Tor Asia was entitled to its costs pursuant to GCR O.62 r.4 (3) which provides for costs pursuant to a contract.
31. The Rule is in the following terms:

"A person who claims to be entitled pursuant to a contract to recover the legal fees and expenses incurred in enforcing that contract shall be entitled to judgment for the amount found due under the contract and such amount shall not be subject to taxation pursuant to this Order."



32. Mr. Wood drew the Court's attention to the Amended and Restated Credit and Guaranty Agreement made between Tor Asia, CP Global and Mr. Lam and to Article 12 of the Agreement which at para 12.04(b) requires a loan party

"to pay or reimburse the Lender for all reasonable and documented out-of-pocket expenses incurred in connection with the enforcement, attempted enforcement or preservation of any rights or the exercise of remedies under this agreement or the other Loan Documents including all such costs and expenses incurred during any workout or restructuring in respect of the Obligations and during any legal proceedings, including any proceeding under any Insolvency Law) including all Attorneys Costs."

33. Mr. Wood submitted that Tor Asia's contractual entitlement to costs was a complete answer to the costs issue. He invited the Court to hold that the Plaintiffs were contractually liable in costs and set a date for the parties to return to Court for the costs to be assessed.
34. If the Court was not satisfied that Tor Asia was entitled to its cost pursuant to para 12.04 of the Agreement then, Mr. Wood submitted that, in the circumstances where CP Global commenced this action and forced Tor Asia to incur legal costs to respond to a claim that was bound to fail, it was only fair and just that the Plaintiffs pay Tor Asia's costs on an indemnity basis. In support of his submission, Mr. Wood relied on the decision of *Beverly Hemmings v. P.M.C. Ltd (trading as Chrissie Tomlinson Hospital)* (Unreported) 4 June 2013 where Williams J awarded indemnity costs against a Plaintiff as the Judge considered that her case was doomed to fail on the face of her claim and should have been withdrawn at a much earlier stage of the proceedings.
35. Mr. Payne for the Receivers also sought costs on a contractual basis. He relied on various clauses within the several agreements between the Plaintiff and Tor Asia as giving rise to a contractual obligation to pay the Receivers' costs, including, *inter alia*,

- (i) Clause 12.4(a) of the Share Mortgage Agreement which provides:

"The Chargor [Mr. Lam] shall promptly on demand pay all costs and expenses (including legal fees) incurred in connection with this Mortgage by the Lender or any Receiver..."

- (ii) Clause 12.4(a) of the Security Agreement, headed **Agent of the Chargor**, which provides:

"A Receiver will be deemed to be an agent of the Chargor [CP Global] for all purposes. The Chargor alone is responsible for ... liabilities incurred by the Receiver..."



which, Mr. Payne submits, would include the Receiver's liability in fees and disbursements to his attorneys.

36. Mr. Payne also relies on various clauses within the Deed of Appointment of Receivers and Managers over Certain Assets of CP Global Inc. and the Deed of Indemnity executed between Tor Asia and the Receivers which entitles the Receivers to be indemnified by the Plaintiffs and/or Tor Asia, at their election.
37. In the alternative, Mr. Payne seeks indemnity costs on the basis that there was no benefit from joining the Receivers as Defendants to the action. They have no case to answer on the Plaintiffs' pleadings and are innocent bystanders who have been merely observers in the proceedings, unable to provide any pertinent evidence or give any assistance to the Court with respect to the events relied on by the Plaintiffs. Counsel submits that there could be no basis for suggesting that the Receivers would have ignored any relevant findings by the Court, and if the Plaintiffs had succeeded, the Receivers would have acted accordingly. He submits that in the circumstances where the Plaintiffs would have known that the Receivers would incur costs if they were made parties to the proceedings and that by electing to include them the Plaintiffs accepted the costs risks.
38. In response, Mr. Lam submitted that the case was not about a breach by the Plaintiffs of a loan agreement but about a conspiracy between the lenders and his own manager to steal his company and further, in the circumstances where the Defendants, or some of them, had instituted 15 separate proceedings against him to wrest his company away from him, the Court should make no order for costs.

THE LAW

Costs on Discontinuance

39. GCR O.62, r.5 (2), headed **Cases where order for costs deemed to have been made**, provides that where a party by notice in writing and without leave discontinues an action or counterclaim or withdraws any particular claim made by him as against any other party that other party shall be entitled to his costs of the action or his costs occasioned by the claim withdrawn. The presumption then, is that a defendant should have his costs where he has been put to the expense of defending proceedings - in this case, filing responsive affidavits and preparing for the substantive hearing - up to the date the action is discontinued.
40. In *Hemmings* on which Mr. Wood relied, Williams J considered the principles applicable to costs where matters are discontinued. The learned Judge adopted the guidance set out by the Court of Appeal in *Brookes v HSBC*.³ The Court was concerned with the application of CPR r 38.6 which is not in the same terms as our rule but the principles are nonetheless applicable. Moore-Bick LJ,

³ *Erica Brooks v HSBC Bank Ltd* [2011] EWCA Civ 354.



giving the judgment on behalf of the Court, stated that the following principles were not in dispute:

- (1) When a claimant discontinues the proceedings, there is a presumption by reason of CPR 38.6 that the defendant should recover his costs; the burden is on the claimant to show a good reason for departing from that position;
- (2) The fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so;
- (3) However, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption;
- (4) The mere fact that the claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption;
- (5) If the claimant is to succeed in displacing the presumption he will usually need to show a change of circumstances to which he has not himself contributed;
- (6) However, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule.

41. Moore-Bick LJ provided the following summary at para 10:

"It is clear, therefore, from the terms of the rule itself and from the authorities that a claimant who seeks to persuade the court to depart from the normal position must provide cogent reasons for doing so and is unlikely to satisfy that requirement, save in unusual circumstances. The reason was well expressed by Proudman J in Maini v Maini: a (plaintiff) who commences proceedings takes upon himself the risk of the litigation. If he succeeds he can expect to recover his costs, but if he fails or abandons the claim at whatever stage of the process, it is normally unjust to make the defendant bear the costs of proceedings which were forced upon him and which the claimant is unable or unwilling to carry through to judgment. That principle also underlies the decision of this court in Messih v Macmillan Williams. There may be cases in which it can be said that the defendant has brought the litigation on himself, but even that is unlikely to justify a departure from the rule if the claimant discontinues in circumstances which amount to a failure of the claim."

42. It follows then that the costs of these proceedings up to the point they were discontinued then will have to be borne by Mr. Lam unless he can persuade the Court there is good reason for departing from the normal rule.

Basis of Costs

43. As to the basis of those costs, the Courts ordinarily order costs on the standard basis and on the indemnity basis only if the Court is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently: GCR O.62, r.4 (11).
44. In *Hemmings*, Williams J cited the decision of Henderson J in *Daniel Alexander Bennett v The Attorney General of the Cayman Islands* Cause No. 512/06, May 10, 2010 in which he canvassed the various circumstances in which indemnity costs might be awarded. At paragraph 9 of the judgment Henderson J said this;

"9. The principle is described well in a recent decision of the Technology and Construction Court in Fitzpatrick Contractors Limited v Tyco Fire and Integrated Solutions (UK) Limited [2008] EWHC 1391. At paragraph 3, Justice Coulson set out his summary of the principles relating to an award of indemnity costs in the United Kingdom. Item 5 is pertinent:

*"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 *Wales Construction Ltd v HGP Greentree Allchurch Evans Ltd [2006] NLR 45*, and *EO 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 realised 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* 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 of the case now being known, the position adopted by the party may be thought to have been unreasonable."*

45. The principal consideration, then, is not the substantive merit of the unsuccessful party's case, but his conduct in advancing a claim that he knew was meritless.



Costs pursuant to a contract

46. In this matter, the Defendants' primary position is that they are entitled to contractual costs and they make application for those costs pursuant to GCR O.62, r.4 (3). The rule is in the following terms:



"A person who claims to be entitled pursuant to a contract to recover the legal fees and expenses incurred in enforcing that contract shall be entitled to judgment for the amount found due under the contract and the amount shall not be subject to taxation pursuant to this Order."

47. In *Weaving v Peterson and Ekstrom*⁴, the Court of Appeal considered the effect of GCR O.62 r. 4(3). The action was brought by the Joint Official Liquidators against the former Directors of the company in liquidation for breach of their duties of care and skill to the company. The Directors prevailed in their appeal against the finding of the Grand Court that they had breached their duties as directors and sought an indemnity costs order pursuant to a provision in the company's articles which provided that:

"182. Every Director, agent or officer of the Company shall be indemnified out of the assets of the Company against any liability incurred by him as a result of any act or failure to act in carrying out his functions other than such liability (if any) that he may incur by his own wilful neglect or default."

48. The submissions of the former Directors, as summarised by Chadwick P, were to the effect that that they had incurred liabilities for legal fees and disbursements to their attorneys in resisting the proceedings brought, that this liability was incurred *as a result of acts, or failures to act, in carrying out their functions as directors* as alleged in the proceedings and that they were entitled to be indemnified under Article 182 on the basis that, but for their acts or failures (or alleged failures) to act, they would not have been sued by the company acting through its liquidators. Chadwick P observed that,

*"Properly analysed, therefore, the directors' claim to be reimbursed their costs is a contractual claim to an indemnity."*⁵

49. The learned President then referred to GCR O.62 r.4(3) and said this⁶:

"The effect of that rule, it seems to me, is that where a claim is advanced pursuant to a contract to recover legal fees incurred pursuant to an indemnity in the contract, the court is not asked to exercise the discretion that it would otherwise

⁴ CICA 10 of 2011 4 May 2015, unreported

⁵ At paragraph 6

⁶ At paragraph 7



have under section 24 of the Judicature Law which gives the court power, pursuant to the Rules, to make such order to costs of proceedings as it thinks the justice of the case requires. A contractual claim does not invite the court to exercise any discretion. It requires the court to consider whether the contractual right relied upon has been established - both as a matter of construction of the contract and on the facts - then to enter judgment for the amount found due under the contract. Determination of the amount due under the contract may of course, require an assessment in the nature of an assessment of damages.”

50. At paragraph 8 the learned President stated:

“Further, a claim to costs within GCR Order 62, rule 4(3) may require the court to adjudicate upon contractual issues raised in circumstances in which - as in this case - those issues have not been pleaded in the action. The consequences are helpfully discussed in the judgment of Mr Justice Ferris in John and others v Price Waterhouse and another (Costs) [2002] 1 WLR 953. In that case, the court had already exercised its discretion, under what was then section 51 of the Supreme Court Act 1981; and it considered that its powers under that section were exhausted. Mr Justice Ferris held that the right course was to require the successful defendants to commence fresh proceedings to enforce their indemnity.”

51. The Court of Appeal determined on the facts of the case that:

“...it would be unsatisfactory to require the institution of fresh proceedings in a case such as this. The more sensible course is to consider an application on behalf of the directors, if and when made, for leave to amend their defence in these proceedings so as to add a counterclaim seeking a declaration as to their right to the contractual indemnity on which they seek to rely;”⁷

52. Alternatively, the successful party may claim indemnity costs where the contractual entitlement to costs is clear. The point was made by Ferris J in *John’s* case. The learned Judge said at paragraphs 17 and 18 of the judgment:

“17. The interaction of a contractual right to indemnity costs and the jurisdiction of the court under section 51 was considered by the Court of Appeal in Gomba Holdings (UK) Ltd v Minorities Finance Ltd (No 2).⁸ That case concerned a dispute between a borrower and a mortgagee ... A subsidiary issue was the extent, if at all, to which the mortgagee's contractual right to its costs,

⁷ At para 9

⁸ [1993] Ch 171.



charges and expenses on an indemnity basis was affected by the fact that during the course of proceedings orders had been made for the borrower to pay some of the mortgagee's costs taxed on the standard basis. The judgment of the court, delivered by Scott LJ, was to the effect that the contractual right was unaffected.

"18. In the course of its judgment the Court of Appeal stated a number of principles which emerged from the authorities which it considered. So far as material these were as follows [1993] Ch 171, 194:

"(i) An order for the payment of costs of proceedings by one party to another party is always a discretionary order: section 51 of the 1981 Act.

"(ii) Where there is a contractual right to the costs, the discretion should ordinarily be exercised so as to reflect that contractual right..."

53. This Court's discretion to order indemnity costs under a contract was affirmed by the Court of Appeal in *Bonotto v. Boccaletti*, 2001 CILR 292, where Taylor JA said this at para 64 of the judgment:

"The discretion as to costs is, of course, to be exercised only in accordance with principles, as established by the modern authorities. As was 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."

54. The decision was cited by the learned Chief Justice in *AHAB v SAAB investment and others*⁹ in which the defendants were seeking costs taxed on the indemnity basis following the discontinuance of the action. In the course of his review of the Court's discretion to award costs, the Chief Justice said this:

"8. Under the Grand Court Rules, O.62, r. 4(6), the amount of costs which a successful party will be entitled to recover from any other party is ... the amount allowed after taxation either on the standard or on the indemnity basis- "indemnity basis," in this context, meaning on the basis of whatever was agreed as between the successful party and its attorney...

"9. There is guidance to be found in the case law as to the approach to be taken to an application for an award of costs on the indemnity basis in party and party litigation. In *Bonotto v. Boccaletti* (1), the Court of Appeal held that this court has a discretionary jurisdiction (said to be founded in equity) to grant costs on the indemnity basis, but the discretion is to be exercised only in the

⁹ [2012] (2) CILR 1



most exceptional cases (otherwise than where the costs **are to be paid under contract** or out of a fund).

“10. In more categorical terms, GCR, O.62, r. 4(11) states:

“The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently.”

It is nonetheless recognized that the jurisdiction is wide and flexible, allowing the court to exercise its discretion as the circumstances of the case may require.” [emphasis mine]

DISCUSSION

55. Tor Asia’s position is that it is contractually entitled to be indemnified in costs under contract and, alternatively, entitled to indemnity costs where the proceedings were hopeless at inception.
56. *Weaving* suggests that a claim for contractual costs pursuant to GCR O.62, r.4(3) would have to be pleaded and proved and the amount of costs properly incurred adjudged by the Court. In the circumstances where this matter has been discontinued, such a claim would have to be made in separate proceedings.
57. I am of the view, however, that Tor Asia would be entitled to an award of indemnity costs under a contract in the exercise of the Court’s discretion as set out in *Gomba Holdings* and affirmed in *Bonnoto* as Tor Asia’s contractual entitlement to costs is clear and is better reflected in an indemnity rather than standard basis of assessment.
58. I am also of the view that Tor Asia would not be entitled to conduct based indemnity costs as Mr. Lam did not conduct the proceedings improperly or unreasonably nor persist in what Mr. Wood has characterised as a hopeless claim as did the plaintiff in *Hemmings’* case.
59. All that said, in its correspondence with Mr. Lam (paragraphs 27 - 29 *supra*), Tor Asia indicated that it would seek indemnity costs *if* the matter were not discontinued. The way I read them, the clear import of those letters was that, if the matter were discontinued, costs would be sought on a standard basis. In the circumstances, then, where Mr. Lam discontinued the proceedings, the appropriate order is that Tor Asia’s costs be assessed on the standard basis.
60. With respect to the Receivers’ application for contractual costs pursuant to GCR O.62, r. 4(3) the same procedural considerations apply.

61. With respect to their application for conduct based indemnity costs, I accept Mr. Payne's submissions. The Receivers are under a contractual obligation to act diligently pursuant to their appointment until it is set aside by a Court or otherwise terminated. There was no good reason to make them defendants in the proceedings. If their Receivership was terminated by the Court, there was no reason to believe that they would not have immediately ceased acting. Mr. Lam made no complaint that they acted outwith their powers and he sought no relief against them. His only complaint was that they should not have been appointed at all.
62. The challenge was to the *bona fides* of their appointment by Tor Asia which was a matter between Tor Asia, Mr. Lam and CP Global. While the Receivers would have been entitled to Notice of the proceedings seeking to terminate their receivership, they were not necessary parties to the proceedings.
63. In the circumstances I consider it right that the Plaintiffs pay the Receivers' costs on the indemnity basis, such costs to be taxed if not agreed.
64. While I have some sympathy for Mr. Lam, who at the date of hearing was a defendant to 15 proceedings brought by Tor Asia and/or the Receivers against him, that he is defending a multiplicity of actions is not a cogent reason to deprive Tor Asia or the Receivers of their costs in these proceedings.
65. It only remains for me to thank the parties for their patience in awaiting the decision in this matter.

DATED 11 MARCH 2021



RAMSAY-HALE J