



**IN THE SUPREME COURT OF
THE TURKS AND CAICOS ISLANDS**

RO 1/2020

IN THE MATTER OF AN APPLICATION FOR A RESTRAINT ORDER BY THE DIRECTOR OF PUBLIC PROSECUTIONS PURSUANT TO SECTIONS 41(1) AND 42 OF THE PROCEEDS OF CRIME ORDINANCE CHAPTER 3:15

AND IN THE MATTER OF AN APPLICATION BY THE APPLICANTS FOR THE DISCHARGE OR VARIATION OF THE RESTRAINT ORDER

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT/ RESPONDENT

AND

1. CARLINE CHARITE

2. AUDELIN CHARITE

3. PAULENE BOUTIQUE

4. ISLAND BROKERAGE CONSULTANCY

RESPONDENTS/APPLICANTS

CORAM: AGYEMANG CJ

MR. OLIVER SMITH FOR THE 1, 3, AND 4 RESPONDENTS/APPLICANTS

MR. KEITH JAMES FOR THE 2 RESPONDENT/APPLICANT

**MS. LATISHA WILLIAMS OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS FOR
THE APPLICANT/RESPONDENT**

DELIVERED ON 19TH MAY 2020

RULING

1. The respondents/applicants (applicants) have got judgment in the application they brought before the court. The application was for either a discharge or a variation of the restraint order of this court of 20th February 2020 against the applicants.
2. In making the order of variation, the court granted the alternative prayer of the applicants. The restraint order was varied upon the recognition that in seeking the order, there was no justification for depriving the applicants of their ability to pay household and other living expenses as well as business expenses including the payment of salaries because of the first applicant's dealings that had resulted in a yet to be concluded investigation for corruption.
3. There is therefore no controversy over the outcome of that application despite the attempt of counsel for the applicant/respondent (respondent) to suggest the contrary.
4. The question now is, should the applicants be entitled to costs at all, and if so, on what basis of assessment?
5. Learned counsel for the applicants: Mr. Smith and Mr. James, have both applied for costs to follow the event. They additionally seek that such costs be assessed on an indemnity basis.
6. In response to this, learned counsel for the respondent argues for costs not to be ordered at all, and certainly not on the basis sought. It is her submission

that the instant matter is not one in which costs ought to be ordered. She relies on Ss 55, 100 and 114 of the Proceeds of Crime Ordinance Cap 3:15, (POCO), to contend that as the present circumstances do not fall within such as are provided for in those provisions, no costs may be ordered.

7. The said provisions of POCO relate to compensation to an aggrieved person who suffers loss by reason of wrongful prosecution and restraint of property, including cash which is the result of the act of the public body.
8. In my judgment, and as pointed out by Mr. Smith, the said provisions are inapplicable to the present circumstance as they are concerned with compensation for such as the act of wrongful or unfair prosecution, or the wrongful restraint of property.
9. It seems to me that learned counsel has misapprehended the principle and concept of the award of costs in a civil suit. I will therefore in short measure, set out the purpose of the award of costs.
10. The best definition of costs is found in Blacks Law Dictionary 4th Ed. 415 as:
“A pecuniary allowance, made to the successful party, (and recoverable from the losing party,) for his expenses in prosecuting or defending a suit ...”

As was succinctly put by Bradford J in *Tisdall v Omeros & Anor [2019] QSC 236*: “The purpose of any costs order is to protect a successful party from the undue depletion of its resources from the pursuit of its lawful rights or the defence of its lawful conduct. It is not to punish an unsuccessful (or insufficiently successful) party”

11. Except in the circumstances set out in Order 62 r 6 and in Order 62 r 4 of the Supreme Court Rules 2000, costs follow the event, which is to say: ordinarily,

the losing party pays the costs of the successful litigant. By its very nature, it is aimed at recompensing in some measure, expense incurred for and by reason of litigation.

12. The award of costs is an exercise of discretion by the court which shall have regard to pertinent matters set out in Order 62 r. 9 and 10, of the Supreme Court Rules, which deal with the conduct of the parties during the proceedings including: matters of attempts and overtures by the successful party, such as payment of money into court and the amount of such payment or a written offer to accept liability up to a specified proportion where an order is made for liability to be tried before any other issue. On the other hand, improper or unreasonable behaviour by a party in the course of the proceedings may lead to the deprivation of costs.
13. While costs have been described as compensatory, rather than punitive, see *McPhilemy v Times Newspapers Ltd and Ors. [2002] WLR 934*, there is a clear distinction between the award of costs and the order of compensation provided for in the POCO. The former deals with expenses for and by reason of litigation, the latter: recompense for loss suffered from the unjustifiable infringement of a person's rights including wrongful prosecution or deprivation of property.
14. In my judgment, in there is no circumstance speaking against costs deserved by the applicants. I am reinforced in my opinion by the dictum of Lord Bingham in *Bradford Metropolitan District Council v Booth (2000) 164 JP 485* in which he urged the balancing of competing interests where the suit is brought against a public authority. They are consideration of: the "financial prejudice to the particular complainant in the particular circumstances if he is

not awarded his costs, and (b) the need to encourage public bodies to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged.”

15. As aforesaid, in having regard to all the matters placed before me in the application, while I was unwilling to discharge the restraint order for stated reasons, I was of the view that the order was unduly harsh and should have made an allowance for living and other expenses under S. 42(1) of the Ordinance.

16. I do not consider the failure to seek an order that made allowance for such, a reasonable or sound administrative decision. By reason of this, the applicants have been put to expense to bring the application for relief. They are entitled to their costs.

17. The only question is: ought it to be on indemnity basis (as argued by Mr. Smith and concurred in by Mr. James: learned counsel for the first, third and fourth and second respondents respectively), or on standard basis.

18. It has been held that indemnity costs are not penal in nature but achieve a fairer result. Per Lord Woolf MR in *Petrotrade Incorporated and Texaco Ltd [2000] WLR 947 at 949 (63)* “Its practical effect is to avoid his costs being assessed at a lesser figure. When assessing costs on the standard basis the court will only allow costs which are proportionate to the matters in issue... On the other hand, when the costs are assessed on an indemnity basis the issue of proportionality does not arise”.

19. Yet indemnity costs are ordered when there has been unreasonable conduct on the part of the losing party which often results in unnecessary expense and takes the award of costs out of the norm. These include unreasonableness in the conduct of the proceedings the particular allegations and the manner of raising them. Per Waller LJ in *Excelsior Commercial and Industrial Holdings Ltd v. Salisbury Hammer Aspden and Johnson* [2002] EWCA Civ. 879: “The question will always be: is there something in the conduct of the action or the circumstances of the case which takes it out of the norm in a way which justifies an order for indemnity costs?”

20. In making their application for indemnity costs, both counsel cite various irritations and frustrations encountered by their clients and themselves by reason of the conduct of the respondent.

These are:

- 1) The already censured failure of the respondent who had given an undertaking to the court to serve the applicants with the restraint order until they pursued it themselves.
- 2) The said failure resulted in avoidable embarrassment to the second applicant who was prevented from conducting his business at the Bank of Nova Scotia on 4th March 2020.
- 3) The failure was due to no forgivable circumstance, for ASP Charles on his own showing, simply forgot to do what had been promised before the court.

21. But apart from this conduct, everything else complained of by learned counsel as the basis of their application for indemnity costs, relates to the conduct of counsel for the respondent.

They are the following:

- 1) When the applicants who duly complied with the order to file assets, brought the instant application for discharge or variation, the

respondent failed to file any affidavit challenging the matters sworn to as facts in several affidavits by the applicants. Rather, learned counsel for the respondent sought to challenge the said matters in her written submissions.

- 2) When she would not be allowed to do so, she sought, after arguments had been closed by counsel for the applicants, permission to do the needful. The court obliged her with an adjournment.
- 3) To obviate the hardship that would have been caused to the applicants who deserved to have their matter determined expeditiously, the court upon deciding to grant the adjournment, made an interim order varying the restraint order for the month of April 2020.

That order was nearly frustrated by learned counsel for the respondent who asked for clarification in another proceeding. The court had to reassemble for that purpose.

- 4) When the court next sat over the matter, it was found that the order permitting the respondent a late filing of an affidavit was breached, when a third affidavit of ASP Charles was filed out of time, and no application was made to have same accepted as duly filed pursuant to the order of the court. In consequence, learned opposing counsel who had been taken by surprise and had not had time to take instructions from their clients were inconvenienced and brought this to the attention of the court. The court had to grant a short adjournment to permit them consult their clients and take further instructions.

22. These matters cannot be ignored, and I have little difficulty in agreeing with learned counsel: Mr. Smith and Mr. James, that these were unfortunate circumstances indeed. Relying on these matters, both have cited weighty authority for my consideration in support of the order they seek.

23. Yet while I endorse their justifiable censure of opposing counsel's dilatory conduct in the hearing of the application, I will not go so far as to order costs to be assessed on an indemnity basis.

24. This is because granted that the respondent's failure to serve the order of 20 February 2020 timeously, caused some embarrassment and distress to the applicants, and furthermore, that learned counsel for the respondent occasioned an avoidable adjournment among other unfortunate conduct aforesaid, there has been no demonstration that these matters took the costs out of the norm, being so unreasonable that it caused the applicants additional expense to pursue their application.

25. As aforesaid, indemnity costs are not meant to punish the losing party but to achieve a fairer result where some expense has been incurred by reason of unreasonable conduct. I have not found it to be so.

26. The applicants are entitled to their costs: on standard basis.



A handwritten signature in blue ink, appearing to read "M.M. Agyemang".

M.M. Agyemang CJ