

BERMUDA SUPREME COURT

Majuro Investment -v- Vasile Timis et al **[2016] SC (Bda) 22 Com**

**COSTS - INDEMNITY COSTS - THIRD PARTY
COSTS ORDER - DISCLOSURE OF UNIDENTIFIED
LITIGATION FUNDERS - ORDER 11 RULE (1)(C) -
JURISDICTION**

This was a case which sought to ascertain whether a Defendant (“D1”) was entitled to costs on an indemnity basis from a Plaintiff that had brought unmeritorious litigation, and whether an interested third party, Mr. Memarian, should be liable for costs as a third party funder of the litigation. Kawaley CJ awarded indemnity costs on the basis that Mr. Memarian had incorporated the Plaintiff Company for the specific purpose of commencing the original unmeritorious litigation in order, the court inferred, to provide a judgment-proof special purpose vehicle for avoiding adverse cost orders.

Kawaley CJ found that proceedings had been commenced where no funding was available from the Plaintiff for meeting the costs of D1, and that in earlier, *ex parte*, proceedings where the Plaintiff secured an injunction against another (unrepresented) Defendant (D6) and leave to serve out on D1 and D6, Mr. Memarian gave an implied representation that he was willing to meet the Plaintiff’s financial obligations in relation to litigation generally. He found that if the Plaintiff had litigated in a manner designed to evade the Rules of Court, as the evidence suggested, it would amount to a misuse of the Court’s processes. When the hearing of D1’s costs application resumed nearly six weeks later, no further instructions had been given on the matter to the Plaintiff’s Counsel. Kawaley CJ therefore awarded costs to D1 on the indemnity basis because the Plaintiff had obtained and defended the, *ex parte*, order in a manifestly abusive fashion, in that the case was unmeritorious and that the Plaintiff itself had been specifically formed to pursue the present litigation under immunity from the costs regime under the Rules of the Supreme Court.

As to the liability of Mr. Memarian as a third-party funder, Kawaley CJ found that in light of his prior representations, Mr. Memarian was unable to contend that he would not be liable to a third party costs order. He found that it was not necessary to show that the third party in question has actually provided funding, but rather it is sufficient to show that proceedings were brought for the benefit of that third party or that the third party was effectively in control. In his own evidence in an Affidavit, Mr. Memarian denied attempting to financially benefit from the proceedings but all but expressly admitted bringing them for a collateral purpose. Counsel for D1 also relied upon case law which denotes a growing fluidity in the test for ascertaining whether third parties behind Companies may be amenable to third party costs orders: *Petromec Inc -v- Petroleo Brasileiro SA Petrobras* [2006] EWCA Civ 1038. On the basis of the judgment in *Phoenix Global Fund Ltd. -v- Citigroup Fund Services (Bermuda) Ltd.* [2007] Bda LR 61, Kawaley CJ found no need to formally join Mr. Memarian to the proceedings for the purpose of making the requisite order. He therefore awarded D1 costs on an indemnity basis and the Plaintiff and Mr. Memarian were ordered to disclose the identity of such other persons (if any) who had been funding the litigation. Finally, he ordered that on the basis that D6’s case was substantially the same and their potential case for indemnity costs appeared even stronger, that unless the Plaintiff applied within 14 days to be heard as to D6’s costs, the Plaintiff should pay D6’s costs on an indemnity basis.

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