

BERMUDA SUPREME COURT

***Annuity & Life Re -v- Kingboard et al* [2016] SC (Bda) 5 Com**

APPLICATION FOR COSTS - PETITION TO DISCOUNT COSTS - RULES OF COURT - OVERRIDING OBJECTIVE

In this case it was found that a Petitioner which, although successful in its overall Petition, had pursued an unmeritorious argument to a disproportionate extent during the proceedings, should have its costs discounted by 10%. In considering the Court's exercise of discretion under the Rules of the Supreme Court, Kawaley CJ stated that the governing principles are to be found in the overriding objective in Order 1A. He found that those rules impose a duty on litigants to assist the Court in achieving the overriding objective, including the goal of managing litigation in a manner proportionate to the value of the claim and, implicitly, the merits of the issues.

In so finding, Kawaley CJ cautioned that the Court should avoid engaging in an issues-based approach to costs, but noted that the Court does have power in appropriate cases to make some reduction to costs where superfluous issues were raised unnecessarily or for other good reason (*First Atlantic Commerce Limited -v- Bank of Bermuda Ltd* [2009] Bda LR 18). He also relied upon *In re Elgindata Limited (No 2)* [1992] 1 WLR 1207 in highlighting the important distinction between deducting for costs unreasonably incurred and, in effect, punishing a litigant who had been successful overall for failing to win on one point of their case. However, he also noted other precedent suggesting that there may be an appropriate deduction in costs where 'over-litigating' or conducting litigation in a disproportionate manner had taken place (*Stiftung Salle Modulable -v- Butterfield Trust Bermuda Limited* [2011] Bda LR 11).

Kawaley CJ was careful to note the 'unusual' elements of the present case, in which the Petitioner had pursued a point which had been held in previous proceedings to disclose no reasonable cause of action. However, because the Petitioner had succeeded in its overall claim, in allowing a discount in costs of 10%, the

Judge sought to strike a balance between encouraging proportionate litigation with regard to the merits of the issues and rewarding litigants for having succeeded in their Claim.

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