

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
1996/CLE/GEN/00648

between

- (1) THE CENTRAL BANK OF ECUADOR
 - (2) BANCO PACIFICO
(formerly BANCO CONTINENTAL SA)
 - (3) BANCO CONTINENTAL OVERSEAS NV
 - (4) INTERAMERICAN ASSET MANAGEMENT FUND LIMITED
- Plaintiffs

and

- (1) ANSBACHER (BAHAMAS) LIMITED
 - (2) LEX HOLDING LIMITED
(formerly known as INTERBAN HOLDING COMPANY LIMITED)
 - (3) CONTICORP SA
 - (4) LEONIDAS ORTEGA TRUJILLO
 - (5) LUIS A ORTEGA
 - (6) JAIME ORTEGA
- Defendants

BEFORE: His Lordship The Honourable
Mr Justice K Neville Adderley

APPEARANCES: Mr Richard Salter, QC; Ferron Bethell and Camille
Cleare with him, for the Plaintiffs

Mr Julian Malins, QC; for the Third to Sixth
Defendants

No Appearance on behalf of the First and Second
Defendants

24 September and 6 October 2010

DECISION ON COSTS

Adderley, J

1. On 3 June 2010, I dismissed the claim and the counterclaim in this action and adjourned the hearing on costs. This is my decision from that adjourned hearing. The expressions herein are as defined in my previous Decision.

2. Under Order 59, Rule 3(1) of the Rules of the Supreme Court, no party is entitled to recover costs of or incidental to any proceedings except under the authority of the court. Under Rule 3(2) the court has sole discretion in granting costs. The standard order will be that the costs follow the event unless it appears to the court that in the circumstances, some other order should be made as to the whole or any part of the costs.

3. In this case the standard order would be that the claim and the counterclaim are dismissed with costs.

4. The defendants submit that the standard order should be made. They also claim that the defendants are entitled to be paid such costs on an indemnity basis, that is to say, all costs of the claim save in so far as they were of an unreasonable amount or unreasonably incurred and as elucidated by case law.

5. Their argument is based on the behaviour of the plaintiffs which they say was oppressive. As examples of oppressive behaviour they point to the extensive private investigations launched against the defendants by the plaintiffs, their large legal team and apparent limitless litigation funds, the detailed and lengthy cross examinations relating to historical transactions not related to their primary claim but solely for the purpose of trying to demonstrate a tendency towards dishonesty in the defendants, significant changes in their claims (e.g. dropping the issue of piercing the corporate veil, and standard of proof at a very late stage and changing their claim that only some of the transferred loans were valuable to

the position that all were valuable), bringing the action in The Bahamas instead of the natural forum, Ecuador, and apparently joining Ansbacher for improper motives including making the third through fifth defendants necessary and proper parties in The Bahamas in order to obtain discovery and then settling with them for no monetary payment.

6. The plaintiffs argue that there should be no order as to costs each side being left to bear their own costs. Their argument is that the plaintiffs were wholly successful in defeating the counterclaim which sought to show breach of the Subordinated Loan and the Trust Agreement, but the defendants were only partially successful in defending the claim because they pleaded but did not prove that they provided “full” value for the loans transferred to Conticorp as the court only ruled that the GDR’s had “some” value. The plaintiffs also claim that it would be unfair to make the standard order for costs because there were common issues such as the legality of the capitalization of Banco Continental and the value of the GDR’s which, they contend, were common to both claim and counterclaim and since the court declined to rule on the issues the costs ought properly be apportioned between claim and counterclaim.

7. In *Millican v Tucker* [1980] 1 WLR 640 Donaldson LJ correctly summarized the meaning of the standard order in an outcome such as this at page 653 letters G-H as follows:

“...Where a court orders that claim and counterclaim be dismissed, or allowed with costs, the rule of taxation is that the claim should be treated as if it stood alone and the counterclaim should bear only the amount by which the costs of the proceedings have been increased by it. This is the rule in *Saner v Bilton* [1879] 11 Chd 416 which was approved by the House of Lords in *Medway Oil and Storage Co. Ltd. v Continental Contractors Ltd.* [1929] AC 88.”

8. The plaintiffs argue that such an order would not be fair, but as stated by Vicount Haldane in *Medway Oil* at 104:

“The successive decisions, down to **Christie v Platt** established a principle which in individual cases may seem a hard one. But it is a clear one, and in most cases will operate justly, as was pointed out by Fry J, while in others the Taxing Master can correct the effect of applying it in isolation as an abstract rule, by dividing items as distinguished from apportioning general costs.”

9. In this regard the Taxing Master is given guidance in **Medway Oil** :

“...in determining for the purposes of taxation in such case as this whether a particular issue is an issue on the claim or on the counterclaim or on both the claim and the counterclaim, the Taxing Master is not by any rule in **Saner v Bilton** to be enslaved by the form of the pleadings. The question must be determined as one of substance and not of form - the manner in which the action was fought and in which the issues were dealt with by the parties and the court not being disregarded,” (per Lord Blanesburgh at p.108)

10. Furthermore the court can make special directions. In **Medway Oil** Lord Blanesburgh offered the following dicta at p.112:

“There is no obligation on the judge in such cases to dismiss both claim and counterclaim with costs. For the future he will presumably only do so when he is satisfied that an order in that form when worked out will in substance effect the result he desires. As Fry J said in **Saner v Bilton** “the court can in every case give special directions which may vary the rules.”

11. Mr Malins seemed to concede in passing that special directions could be made such as, for example, to disallow the costs of Mr Abboud, the expert witness for the defendants who was not a disinterested witness but this was not disclosed to the court.

12. On the question of indemnity costs, having regard to the submissions of counsel for the plaintiffs and all the circumstances including, but not limited to, the residence of the defendants at the time of trial, I am not persuaded that costs should be assessed on an indemnity basis. Mr Malins’ reliance on ‘oppression’ does not appear to accord with current authority and as submitted by Mr Salter appears to be the wrong test. On the authorities costs are assessed on an

indemnity basis only if the behaviour of the party is egregious (see e.g. judgment of Sawyer, C.J., as she then was, in *Levine v Callenders & Co.* [1998] BHS JN 75); or comprise conduct which is unreasonable to such a high degree that it can be categorized as exceptional (see judgment of Newman, J. as he then was, in *Wailes v Stapleton Construction and Commercial Services Ltd.* [1997] 2 Lloyd's Rep 112. The plaintiffs' behaviour, in my view, does not reach that threshold.

RULING

13. For the foregoing reasons, I exercise my discretion and order that the claim and counterclaim are dismissed with costs on the standard basis subject to the direction following. I direct that the costs of the expert witness Mr Abboud be disallowed.

14. Costs shall be taxed if not agreed and I extend the period from three (3) months under Order 59, Rule 19(2) of the Rules of the Supreme Court to one hundred and eighty (180) days from today in which to begin proceedings for the taxation of such costs.

Adderley, J