In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
CONSOLIDATED ACTIONS
2017 : No. 467
2018 : No. 38
2018 : No. 66

IN THE MATTER OF CLEARWATER DEVELOPMENT LTD.
AND IN THE MATTER OF THE COMPANIES ACT 1981

BETWEEN:

PAUL AND TERESA RODRIGUES
(Trading as Rodrigues Pools)

Petitioners/Plaintiffs

-and-

CLEARWATER DEVELOPMENT LTD.

Respondent/Defendant

RULING ON COSTS

Valuation, Offers to settle, Calderbank Letters, Refusal to accept offer being unreasonable and out of the norm, Application for costs on an indemnity basis

Date of Hearing: **6, 21 March 2023**
Date of Judgment: **5 July 2023**

Appearances: **Grant Spurling of Chancery Legal Ltd, for the Petitioners/Plaintiffs**
Richard Horseman of Wakefield Quin limited, for the Defendant/Respondent

RULING of Mussenden J

Introduction

1. By a Summons dated 19 July 2022, the Respondent/Defendant Clearwater Development Ltd ("**CDL**") applied for its costs of the Petition matter. CDL has paid the Petitioners for its shares at the value determined by accounting expert Deloitte, namely $437,000 (the "**$437K Deloitte Valuation**") and the shares have been repurchased. Thus, CDL now applies for an order that the Petitioner pay CDL's costs in the Petition on an indemnity basis including all disbursements associated with the Petition including its accountancy fees in complying with the numerous requests for disclosure and its share of the Deloitte valuation costs.

2. CDL's application is supported by the Eighth Affidavit of John Bush ("**Bush 8**"). Mr. Rodrigues filed an affidavit in reply on behalf of the Petitioners.

3. It will be necessary to make references to the Judgment dated 13 January 2021 that I issued in respect of the strike-out application in the Petition matter (the "**Judgment**").

Background

4. The Petitioners total investment in CDL amounted to $650,000 by 27 October 2016[1].

5. The Petitioners issued a Petition on 20 February 2018. On 3 October 2018 CDL offered to purchase 974 of their shares for $440,000 (the **"$440K CDL Offer**") in accordance with a Letter of Agreement and indicated it would entertain any reasonable offer to purchase the

[1] Paragraph 10 of the Judgment.

remaining 609 shares. The Petitioners refused to accept the $440K CDL Offer. I note here that CDL argued that the $440K CDL Offer was already in excess of the Deloitte Valuation thus the Petitioners should be ordered to pay CDL's costs from the date of the offer of October 2018.

6. CDL continued to make offers to settle. By an open letter dated 13 August 2019 CDL offered to purchase the Petitioners' shares for $800,000 (the "**$800K CDL Offer**"), such offer remaining open until 30 August 2019. It was not accepted by the Petitioners. Justice Subair-Williams, in her Ruling of 6 September 2019 made reference to a repeated offer of $800,000 during the directions hearing of 14 August 2019. I note here that CDL argue that the Petitioner could have and should have accepted the $800K CDL Offer or alternatively moved straight to an independent valuation further arguing that substantial costs on both sides would have been saved if the Petitioner availed themselves of either offer.

7. By a Summons dated 1 October 2019, CDL applied to strike out the Petition on the basis that CDL had consented to the purchase of the Petitioners' shares at fair market value to be determined by an independent valuation.

8. On 5 November 2019, the Petitioners informed CDL that they were prepared to accept $1.3 million for the purchase of the shares on the basis that the Petition was wholly discontinued with no order as to costs (the "**$1.3M Rodrigues Offer**"). The offer was open for 14 days. CDL did not accept that offer now arguing that that offer was devoid of reality and wholly unreasonable being three times the actual value of the shares.

9. On 21 January 2020, CDL offered to pay $750,000 for the Petitioners' shares (the **"$750K CDL Offer**"). In a corresponding letter CDL highlighted that a recent KPMG audit (the "**Audited Accounts**") confirmed the Petitioners' shares were worth approximately $506,074.17 yet CDL was willing to pay a premium of $750,000 for the purchase of the shares. The Petitioners rejected that offer.

10. On 12 August 2020, the Petitioners offered to sell 974 shares for $481,331.65 (the **"$481K Rodrigues Offer**") but intended to retain the balance of the shares and continue on with

the Petition. CDL argued that they were not interested to purchase a partial block of shares that left the litigation ongoing. Thus, they were justified to refuse such an offer.

11. On 24 November 2020, the Petitioners made an offer as follows: (a) the shares be purchased for $1 million (the **"$1M Rodrigues Offer**"); (b) the sum be held in escrow pending the determination of the other litigation matter; (c) the parties use best efforts to reach a compromise on the other two matters; (d) the Petitioners agree a stay of the Petition while the other litigation matters are settled; (e) upon conclusion of the proceedings the funds will be released and the shares transferred; and (f) no order as to costs. CDL declined the offer, arguing that the Petitioners' shares were not worth $1million and no shareholder nor CDL would be willing to risk putting up $1 million for it to sit in escrow while the company faced other Court actions brought by the Petitioners.

12. At the start of the hearing of the strike-out application on 8 December 2020 the Court allowed some time for the parties to try to reach an agreement on the offers, but no agreement was reached[2].

13. CDL argues that the Petitioners failed to beat any of the CDL Offers.

14. In my Judgment, I found that the Petitioners were acting unreasonably in pressing for a trial of the Petition in light of the CDL Offers and the Petitioners conduct amounted to an abuse of process. I rejected the arguments of the Petitioners for a trial of the matter. Thus, I struck out the Petition after which the parties jointly instructed Deloitte to value the Petitioners' shares. In June 2022, Deloitte completed the $437K Deloitte Valuation.

CDL's Submissions

15. Mr. Horseman submitted that for the two years leading up to the strike-out application, CDL did all it possibly could to settle the Petition. The company made offers far in excess of the actual value of the shares in an effort to save legal costs and bring the expensive litigation to an end to no avail. However, the Petitioners refused many opportunities to end

[2] Paragraph 38 of the Judgment.

the litigation, preferring instead to have a trial which was doomed to fail. Further, the conduct of the Petitioners was inexcusable having gained nothing as their stubbornness cost them over $350,000 being the amount offered in excess of the $437K Deloitte Valuation. In doing so, they caused CDL great financial harm and reputational damage by filing the Petition seeking a winding up order. Mr. Horseman argued that the Court cannot condone this type of conduct which was a complete and utter waste of scarce resources as well as CDL's limited resources.

16. Therefore, CDL was requesting that the Petitioners pay all its costs from 3 October 2018 onwards when CDL first offered to purchase the Petitioners' shares at an amount in excess of the final valuation amount on an indemnity basis. The costs should include all legal costs through the valuation process including CDL's share of the valuation costs as well as moneys paid to its accountants to deal with the Petitioners' numerous disclosure requests.

17. Mr. Horseman also submitted that the Petitioners, despite having the benefit of the Audited Accounts, forced CDL and its accountants to embark on numerous roving inquiries to answer further disclosure questions. He poured scorn on the Petitioners' counsel's statements made during the hearing that "*We need to check to make sure every concrete block is accounted for.*"

18. Mr. Horseman submitted that the Petitioners' conduct in continuing to pursue the Petition and refusing to accept the many offers to purchase their shares was out of the norm. They fought to take the matter to trial when all they could have hoped for was a purchase order. Thus, not only was it out of the norm, it was wholly and utterly unreasonable in the face of clearly generous offers in excess of what the shares were ultimately valued.

The Petitioners' Submissions

19. Mr. Spurling submitted that in the particular circumstance of this matter there should be no order for costs against either party, but if the Court took the view that CDL should be

granted its costs then there should be a significant discount. The main reasons for this approach were as follows:

a. The Petitioners repeatedly complained that CDL's Offers could not be properly considered as there had not been adequate disclosure and transparency of information to enable them to reach a decision on whether the offers were reasonable or not;
b. No AGM had been convened nor audited accounts produced by CDL from its inception in September 2016 until September 2019 when the Audited Accounts were produced, only covering the period to 2018;
c. The $440K CDL Offer and the $800K CDL Offer and later offers were the subject of debate and lengthy correspondence which were met by counter offers based upon the Petitioners' accountant's own assessment of limited and questionable data provided in spite of repeated request for more detail;
d. The Petitioners were willing to agree a share valuation buy out but the lack of cooperation by CDL on disclosure and transparency made it impossible to consider the offers properly in the context of CDL's financial data;
e. The Petitioners' fears that an independent valuer would be unable to obtain all the relevant information from CDL for the purpose of a valuation were well founded as it took almost 12 months for Deloitte to secure information, dates, and documents from them to enable them to conclude their final report;
f. There were numerous and complex issues and although a full valuation was provided, there were numerous complications to overcome; and
g. The Deloitte fees were ordered by the Court to be shared equally between the parties. Thus, it was wrong to expect the Court at this stage to alter a fundamental condition attached to the Judgment – a condition which they relied upon in their strike-out application.

The Law

Costs

20. Order 62 rule 3(3) states as follows:

> *"(3) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."*

21. In *Binns v Burrows* [2012] Bda LR 3, Kawaley CJ (as he then was) stated as follows:

> *"6. The above authorities suggest that, unless the Court or the parties have identified discrete issues for determination at the trial of a Bermudian action, the Court's duty in awarding costs will generally be to: (a) determine which party has in common sense or "real life" terms succeeded; (b) award the successful party its/his costs; and (c) consider whether those costs should be proportionately reduced because e.g. they were unreasonably incurred or there is some other compelling reason to depart from the usual rule that costs follow the event."*
>
> *...*
>
> *8. I am fortified in reaching this conclusion by the following passage from the Judicial Committee of the Privy Council decision in Seepersad v. Persad & Anor (Trinidad and Tobago) [2004] UKPC 19 (per Lord Carswell):*
>
> > *"[24] The Court of Appeal gave the appellant only half costs of his appeal and the cross-appeal brought by the respondents against the amount of the award for pain and suffering and loss of amenity. In so ordering it must have treated the assessment of damages under this head as if it were a separate issue on which the appellant had lost, while succeeding on the other issues. In their Lordships' view this was an erroneous approach. The award of costs in Trinidad and Tobago is in the discretion of the court, as is usual in most common law jurisdictions. The general rule which should be observed unless there is sufficient reason to the contrary is that costs will follow the event. Where the party who has been successful overall has failed on one or more issues, particularly where consideration of those issues has occupied a material amount of hearing time or otherwise led to the incurring of significant expense, the court may in its discretion order a reduction in the award of costs to him, either by a separate assessment of costs attributable to that issue or, as is now preferred, making a percentage reduction in the award of costs: see, eg, In re Elgindata (No 2) [1992] 1 WLR 1207. The Court of Appeal's order was predicated upon the proposition that the assessment of damages for pain and suffering and loss of amenity was a separate issue from the assessment of the other heads of damage. This was an incorrect assumption. An issue for these purposes must be something so distinct and separate in itself that the decision of it constitutes an "event". The "event" was the quantum of damages to which the appellant was entitled and he succeeded on his appeal in obtaining a higher award than the judge had given him: even though one head was decreased, another was increased and one which the judge had omitted was added to the total. Their Lordships accordingly consider that the Court of Appeal had insufficient ground for reducing*

the award of costs made to the appellant and that he should have been awarded full costs in that court, without separating out any element attributable to the cross-appeal, which was only a means of putting in issue the quantum of all the items of damage in the judge's award." [emphasis added]

Offers to Settle

22. In *Francis v Carruthers* [2007] Bda LR Kawaley CJ was dealing with competing submissions as to whether written offers could be taken into account where parties had not made a payment into court. He referred to Order 62 rule 9 for the factors which may be taken into account in exercising the general discretion to award costs. He emphasised that Order 62 Rule 9(d) meant the Court was entitled to take into account written offers except where the party making the written offer could have protected his position as to costs by means of payment into court under Order 22. At paragraph 17, Kawaley CJ found that the strict English law position was that '*Calderbank*' letters can only be used where payment into court was not procedurally feasible because (i) it was not legally possible in relation to a claim that is neither in debt nor for damages or (ii) payment in would not for other fact-specific reasons be effective to settle the entire action.

23. Kawaley CJ found that the Bermudian law position can hardly be different as our Rules are based on identical statutory provisions. However, he cited the Privy Council Case of *Director of Buildings and Lands v Shun Fung Ironworks* ELR [1995] 2 AC 111 finding that it suggested that a more flexible approach to settlement offers may be taken despite the rigid strict legal position. At paragraph 19 Kawaley CJ stated:

"19. In my judgment when an offer of settlement has been made and rejected by a litigant following the "Calderbank" form, the Court has the discretion to take the reasonableness of the rejection of the offer into account in two key ways. Firstly, where a defendant recovers as much or more than the sum offered, the Court may consider awarding the costs after the offer to the defendant, as would occur with payment in. In addition, and this point is not explicitly supported by the above authorities, it must be permissible for the Court to take into account a rejected offer of settlement where a plaintiff has recovered more than the offered sum, but acted unreasonably in not either (a) accepting the offer or (b) otherwise seeking to settle the action on commercially reasonable terms. Because order 62 rule 10 explicitly empowers the Court to have regard to any unreasonable acts or omissions on a litigant's part. When the Court takes a "Calderbank" letter into account:

"Where an offer has been made, whether by payment into court or by way of another form of offer permitted by the Rules of the Supreme Court or by way of a Calderbank letter, the ultimate liability of the person making such an offer turns, first, upon a comparison of what was offered and what was achieved. It is obviously necessary to look at the outcome… Where an offer has been made, whether by payment into court or by way of another form of offer permitted by the Rules of the Supreme Court or by way of a Calderbank letter, the ultimate liability of the person making such an offer turns, first, upon a comparison of what was offered and what was achieved. It is obviously necessary to look at the outcome."

"20. In addition, and of broad general relevance, I have regard to the provisions of Order 1A of this Court's Rules, which embody (with effect from January 1, 2006) the Overriding Objective. These new guiding principles for the conduct of civil litigation were introduced at the same time as the new Order 62, which itself introduces the modern concept that successful litigants should be able to recover nearly all their actual costs, even on a standard basis taxation. The parties are obliged to assist the Court to achieve the Overriding Objective, which requires the Court to manage cases in a way which, inter alia, (a) saves expense and (b) is proportionate to the amount of money involved. In non-commercial cases involving litigants of limited means, the parties are positively required to conduct litigation in a way which does not waste costs. These factors are also relevant in deciding whether and, if so, to what extent, justice requires the usual "winner takes all" approach to costs to be modified or displaced."

24. In *Butcher v Wolfe* [199] 1 FLR 334 the UK Court of Appeal considered a Calderbank Offer which related to the basis of a valuation and a payment into court was not appropriate. The Court stated that as follows:

"*The proper approach to a Calderbank offer, when it is taken into account on a later argument on costs, is to ask whether the party to whom the offer was made 'ought reasonably to have accepted the proposal in the letter?' Or, to put it another way, account must be taken of the reasonableness or otherwise of the refusal to accept the offer."*

Law on Indemnity Costs

25. The case of *De Sena and another v Notaro and others* [2020] EWHC 1366 (Ch) cited various authorities indicating when the Court might award indemnity costs. The Court referred to the Court of Appeal case of *Lejonvarn v Burgess* [2020] 4 WLR 43, in respect of a case that was speculative, weak or opportunistic, and stated as follows:

"43. In short, therefore, taking the CPR and these authorities together, the position is that, in contrast to the position of a claimant, a defendant (such as the appellant in the present case) who beats his or her own Part 36 offer, is not automatically entitled to indemnity costs. But a defendant can seek an order for indemnity costs if he or she can show that, in all the circumstances of the case, the claimant's refusal to accept that offer was unreasonable such as to be 'out of the norm'. Moreover, if the claimant's refusal to accept the offer comes against the background of a speculative, weak, opportunistic or thin claim, then an order for indemnity costs may very well be made. That is what happened in Excelsior. (Emphasis added)

44. There is a separate strand of authority concerned with speculative, weak, opportunistic or thin claims. It has long been the position that a defendant's eventual defeat of such claims can give rise to an order for indemnity costs. (emphasis added) In Three Rivers District Council v The Governor and Company of the Bank of England [2006] EWHC 816 (Comm), at paragraph 25, Tomlinson J (as he then was) summarised the position:

> *'(5) where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.'*

45. There are a number of cases where costs have been awarded on an indemnity basis because of the weakness of the claimant's underlying claims: see by way of example Wates Construction Limited v HGP Greentree Alchurch Evans Limited [2006] BLR 45. In my summary of these principles in Elvanite Full Circle Limited v AMEC Earth and Environmental (UK) Limited [2012] EWHC 1643 (TCC), I referred to Wates as an example of a 'hopeless' claim, because on the facts of the case, that is what it was. I did not intend by that shorthand to indicate any sort of gloss on the conventional description of claims which were 'speculative, weak, opportunistic or thin' giving rise to the possibility of indemnity costs.

26. Also in *De Sena*, in respect of a case being outside of the norm, the Court stated as follows:

"14. So although it is clear that the over-arching principle is that indemnity costs may be awarded where the case is "out of the norm", this case deals in particular with two situations. One is the case where a defendant seeks an order for indemnity costs on the basis that, in all the circumstances of the case, the claimant's refusal to accept that offer was unreasonable such as to be "out of the norm". The other is the case of an application for indemnity costs on the basis of a defendant's defeat of a speculative, weak, opportunistic or thin claim.

...

"27. The claimants first of all say that there is no rule that a failure to accept an offer of settlement should result in an award of indemnity costs: see F&C Alternative Investments (Holdings) Ltd v Barthelemy [2013] 1 WLR 458, CA, at [70], per Davis LJ. I accept that. But a refusal to accept a reasonable offer of settlement is nevertheless a factor which, added to other factors, may take the case out of the norm, and thus justify an award of indemnity costs. It is therefore necessary to consider such offers, and the circumstances in which they came to be made and refused.

27. Again in *De Sena*, in respect of a party making serious unwarranted allegations calculated to tarnish the reputation of a defendant, the Court cited the case of *Hosking v APAX Partners LLP* [2019] 1 WLR 3347 where it stated as follows:

> *"43. The cases cited show that amongst the factors which might lead to an indemnity basis of costs are: (1) the making of serious allegations which are unwarranted and calculated to tarnish commercial reputation of the defendant; (2) the making of grossly exaggerated claims; (3) the speculative pursuit of large-scale and expensive litigation with a high risk of failure, particularly without documentary support, in circumstances calculated to exert commercial pressure on a defendant; (4) the courting of publicity designed to drive a party to settlement notwithstanding perceived or unaddressed weaknesses in the claims."*

28. Recently, there have been a line of Bermuda cases culminating in the Court of Appeal case of *David Bhagwan v Commissioner of Bermuda Police Service et al* [2022] CA (Bda) 20 Civ which now sets the test for indemnity costs as the lower standard of 'out of the norm'. Smellie JA stated that the purpose of indemnity costs was to give a more fair result for the party in whose favour a costs order is made.

Analysis

29. In my view, CDL should have its costs on a standard basis up to a specific date and then thereafter on an indemnity basis for several reasons. First, it is clear that CDL were the successful party in real life terms in that the Petitioners action was struck out as I found that the Petitioners were acting unreasonably in pressing on for a trial in light of the offer by CDL to purchase their shares. Thus, per Order 62 Rule 3(3) and the principles set out in *Binns v Burrows* costs should follow the event in favour of CDL.

30. Second, in my view the costs should not be reduced as argued by the Petitioners, as I do not find that they were unreasonably incurred or that there is some other reason to depart from the usual rule. In the Judgment, this Court ordered the valuation of the shares. Thereafter, Deloitte, as independent valuer, embarked on the tasks of valuing the shares. This took place over considerable time and required Deloitte to seek relevant information in order to produce its valuation. It should have been to no party's surprise that Deloitte

would require information from both sides. Thus, I reject the Petitioners' arguments that the award of costs should be reduced because CDL took some time to provide information to Deloitte.

31. Third, I now turn to the offers to settle. In my view, CDL could not protect its position by way of a payment into court as the claim in this matter was neither in debt nor for damages. Thus, guided by *Francis v Carruthers* I am of the view that I am entitled to take into consideration the written offers or Calderbank letters in this matters.

32. Fourth, in respect of the CDL Offers, in my view the start point is that the Petitioners had made a significant investment in CDL by 27 October 2016. Thereafter, there was significant development in the hotel construction and thus the value of the investment would have likely changed one way or the other. I accept the evidence that there were no AGMs or financial reports before the Audited Accounts were issued. Thus, the Petitioners had no proper means to assess the CDL Offers against the value of CDL. However, the issuance of the Audited Accounts in September 2019 was a significant turning point. Thus, I do not find that it was unreasonable for the Petitioners to refuse CDL's Offers (the $440K CDL Offer and the $800K CDL Offer), up to the point of the Audited Accounts because from the Petitioners' point of view, they had no information to assess the offers.

33. Fifth, in my view, after the date of the issue of the Audited Accounts in September 2019, it was unreasonable for the Petitioners to reject the $750K CDL Offer. At that time, the Audited Accounts, prepared by an independent audit firm, showed that the Petitioners' shares were valued at $506,074.17 and thus on any calculation it was clear that the Petitioners would obtain a premium on the value of their shares as at that date, albeit a loss on their initial investment.

34. Sixth, in light of the Audited Accounts, in my view it was wholly unreasonable for the Petitioners to have made the $481K Rodrigues Offer on 12 August 2020 for a partial purchase whilst continuing with the Petition. It was similarly unreasonable for them to have made the $1M Rodrigues Offer on 24 November 2020 including the escrow aspect pending determination of the other matters. To my mind, these offers by the Petitioners were akin

to ‘Hail Mary’ passes in American football which are typically made in desperation with no chance of achieving a completion.

35. Seventh, in my view, the conduct of the Petitioners to refuse the CDL Offers after the date of the Audited Accounts was, in applying *De Sena,* unreasonable such as to be ‘out of the norm’. I agree with Mr. Horseman that there was little chance of the matter proceeding to a hearing or to a winding up of CDL. I also agree with Mr. Horseman that the conduct of the Petitioners aligned with the factors set out above in *Hosking v APAX* in particular making grossly exaggerated claims – in this case grossly exaggerated offers and pursuing expensive litigation with a high risk of failure calculated to exert commercial pressure on CDL.

36. In following *Bhagwan v Bermuda Police Service,* to my mind, granting indemnity costs to CDL achieves a more fair result for CDL. I agree with Mr. Horseman that the Petitioners conduct sought to drag out the Petition matter for an extended period, involved refusing the reasonable CDL Offers even at the start of the strike-out hearing and pressed for a trial of issues which did not need to be resolved in that way in order to produce a valuation. There is some mitigation for the Petitioners in that they had agreed to a valuation but only after a trial of the issues, but this mitigation is outweighed by the refusals to accept the reasonable CDL Offers. So too were the objectives proffered that CDL be wound up or that Mr. Rodrigues be granted a place on the Board of CDL, both conceded as not serious contentions by Mr. Pettingill at the strike-out hearing. Thus this course of conduct by the Petitioners was ‘out of the norm’, which would have been to evaluate the CDL offers on the basis of the Audited Accounts and make a decision that had the effect of stopping the Petition action well before it was struck out.

37. Eighth, In respect of the application by CDL to vary my order that the parties bear an equal share of the costs of the valuation, I am not inclined to vary that order. In paragraph 68 and 69, I found that the Petitioners were entitled to make submissions to the independent valuer about certain allegations they held against CDL. I used that reasoning as a basis for not

having a trial of the issues. Also, in the Conclusion section of the Judgment[3], I made several orders in respect of the valuation including the parties had a right to make submissions to the expert valuer, the parties had a right to ask questions and make submissions on the draft valuation and CDL was required to make available to the Petitioners complete access to its books, records and documents. Therefore, it was unsurprising that the Petitioners sought information to assist Deloitte in coming to a valuation. Thus, in light of these reasons, I am not inclined to vary the order that the parties equally share the costs of the valuation.

Conclusion

38. In summary I make the following orders:

    a. In respect of the Petition matter No. 38 of 2018, I direct that costs shall follow the event in favour of CDL against the Petitioners on a standard basis except that after the date of the 21 January 2020, costs are to be on an indemnity basis, costs to be taxed by the Registrar if not agreed;
    b. I decline the application to vary my order that the parties equally share the costs of the independent expert for the valuation; and
    c. Costs of this application granted to CDL on a standard basis to be taxed by the Registrar if not agreed.

Dated 5 July 2023

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT

[3] Paragraph 72/4 and 5 of the Judgment