

BERMUDA SUPREME COURT

(1) *Stifton Salle Modulable* (2) *Rütli-Stiftung -v- Butterfield Trust (Bermuda) Limited* [2014] SC (Bda) CIV 42 (28 May 2014)

STAY PENDING APPEAL - RULING ON COSTS AND TERMS OF FINAL ORDER – INDEMNITY COSTS - MISCONDUCT - RETURN OF MONIES HELD AS SECURITY FOR COSTS

This ruling followed on from a five-week trial that concluded in December 2013. The matter was listed to enable the parties to consider what conditions should be attached to a stay pending appeal (which it was common ground that the Defendant was entitled to seek) and, in particular, to hear submissions on costs.

In considering costs, the Judge held that the Plaintiffs had achieved substantial success in their claim and should be awarded their costs. The Judge considered the dictum of Devlin J in *Anglo-Cyprian Trade Agencies Ltd -v- Paphos Wine Industries Ltd*. [1951] 1 All ER 873 at 874, cited with approval by Hellman J in *Williams -v- Bermuda Hospitals Board* [2013] Bda LR 14 which set out that: (1) A successful Plaintiff ought not to be deprived of costs unless he is found to be guilty of misconduct; and (2) A plaintiff who recovers nominal damages ought not to be regarded in the ordinary sense as 'successful'. In considering this test, the Judge held that the success of the Plaintiff was more than 'pyrrhic' and they should be awarded their costs.

The Judge went on to consider the principle articulated by the Court of Appeal in *First Atlantic Commerce Ltd. -v- Bank of Bermuda Ltd*. [2009] Bda LR 18 which provided for a reduced proportion of costs when 'superfluous' issues were raised unnecessarily. In considering the various arguments advanced by the Defendants as to why costs should be reduced, the Judge awarded a 10% reduction in costs for failure to establish a particular argument on feasibility. The Defendants had submitted that the feasibility argument had been advanced through five witnesses who consumed 20% of the trial.

Having succeeded on costs, the Plaintiffs sought return of the monies paid into Court as security for costs. The Defendant objected on the grounds that it proposed to appeal and would have no convenient way to enforce any costs orders which may be obtained in its favour as a result of its proposed appeal. The Plaintiffs cited authority in support of their right to payment out; the Defendant cited no authorities supportive of their opposition. In reviewing the unanimous decision of the English Court of Appeal in *Tristan Investments Ltd -v- Methdrell Industries et al* [1965] EWCA Civ JO111-3, it was held that the monies held should be returned to the Plaintiffs.

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