



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2024: No. 112

**BETWEEN:**

**AFINITI, LTD**

Plaintiff

**-AND-**

**MUHAMMED ZIAULAH KHAN CHISHTI**

Defendant

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## COSTS RULING

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**Date of Hearing:** 3 February 2025  
**Date of Ruling:** 12 February 2025

**Appearances:** Mr. Chishti in person  
*Rhys Williams* of Conyers Dill & Pearman Limited for Afinity, Ltd (In liquidation)

## **RULING of MARTIN J**

### **Introduction**

1. This Ruling relates to the determination of costs following the trial of the Originating Summons in these proceedings.
2. Judgment was given on 1 October 2024 following a one-day trial involving an application by Afiniti, Ltd (“Afiniti”) for a declaration that Mr. Chishti was not entitled to appoint independent counsel under the terms of a Deed of Indemnity executed between Mr. Chishti and Afiniti dated 1 January 2020 (the “Indemnity”).
3. The Court ruled in favour of Afiniti and granted the declaration in the terms sought. As part of the Court’s judgment an Order *nisi* was made awarding the costs of the proceedings to Afiniti on the standard scale, such order to take effect unless either of the parties applied to be heard on costs within 14 days. Mr. Chishti made an application to be heard on the costs Order *nisi*, and the matter came on for hearing on 3 February 2025.

### **Summary and disposition**

4. For the reasons explained below, the Court has decided that the terms of the Costs order *nisi* are appropriate and confirms that the costs of the proceedings are to be paid by Mr. Chishti on the standard scale, to be taxed if not agreed. In addition, the funds held by Afiniti to fortify its cross-undertaking as to damages are to be released to the Joint Liquidators without further delay, and Afiniti and its counsel are hereby released from their undertakings in that regard. The reasons for these decisions are set out below.

### **The Originating Summons**

5. It is not necessary to set out the whole of the background to this matter for the purposes of the costs ruling, but it is relevant to explain that the substance of the case was that Mr. Chishti had sought to appoint his own independent counsel to determine whether a number

of proceedings in which he was involved were “*Indemnifiable Proceedings*” for the purposes of the Indemnity.

6. Afiniti brought these proceedings to obtain a declaration that the purported appointments of independent counsel by Mr. Chishti were in breach of the Indemnity and invalid. In support of that application Afiniti also sought (a) an interim injunction to restrain Mr. Chishti from proceeding with his appointments pending determination of the trial and (b) a permanent injunction if Afiniti was ultimately successful. As part of the relief to be sought at the trial, Afiniti also sought a declaration that Afiniti’s own appointment of independent counsel under the Indemnity was valid.

### **The trial**

7. At the trial Afiniti did not pursue the application for the declaration that its own appointment of independent counsel was valid and indicated it would not pursue the application for a permanent injunction if it was successful in obtaining the declaration. Afiniti also indicated that the interim injunction was no longer required. This was essentially because Afiniti had gone into provisional liquidation for restructuring purposes and these aspects of the relief sought were no longer considered necessary.
8. These details are relevant because Mr. Chishti made submissions based upon the fact that Afiniti had decided not to pursue these other claims at the trial.
9. Mr. Chishti’s submissions on how the Court should approach the allocation of liability for costs were divided into two parts: (i) submissions based upon the Rules of the Supreme Court 1985 (“RSC”) and (ii) submissions based upon the meaning and effect of the Indemnity itself.

### **Mr. Chishti’s costs claim under the RSC**

10. Mr. Chishti’s first submission was that because Afiniti withdrew three out of the four claims for relief in the Originating Summons, he said that he was therefore the substantial winner

of the proceedings and consequently claimed that he was entitled to the costs of the proceedings overall.

11. Mr. Chishti's second submission was based on RSC Order 62 Rule 5 (3). This rule provides that where a party discontinues an action without leave or withdraws any particular claim as against (in this case) the defendant, then the defendant is automatically entitled to the costs of the action or the costs of the claim withdrawn.

*Loser pays*

12. The general rule is that the party who is substantially successful in the proceedings is normally entitled to an order for payment of the costs of the proceedings to be paid by the losing party.
13. This general rule is subject to exceptions where there are unusual circumstances or where one party may be disentitled to the payment of some or all of the costs of the proceedings due to their conduct of the proceedings or some aspect of the case justifies the court in exercising its discretion to make a different assessment of where the costs liability should fall. No such circumstances exist or are said to exist in this case, so the general rule applies<sup>1</sup>.
14. The short question is which party was the substantially successful party "in real life terms"<sup>2</sup>? Although Mr. Chishti says three out of the four claims were resolved in his favour, he was plainly not the substantially successful party.
15. All of the substantive issues in the case were resolved against Mr. Chishti, including all of the issues and sub-issues his counsel had advanced, as well as the dispute over the grant of the interim injunction. The Court also held that it would not have set aside the interim injunction *ab initio*.

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<sup>1</sup> This is the effect of RSC Order 62 rule 3 (3): "...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..." (emphasis added).

<sup>2</sup> See Kawaley J (as he then was) in **Binns v Burrows** [2012] Bda LR 3 at paragraph 6.

16. The fact that Afiniti did not pursue the declaration that its own appointment of independent counsel was valid is irrelevant. Afiniti did not lose on this point.
17. The fact that Afiniti no longer needed to pursue a permanent injunction is also irrelevant. It is plain from Judgment that had Afiniti sought it, it would have been granted, because a permanent injunction would have followed from the result of the Court's decision, namely the declaratory relief.
18. Moreover, no additional costs were incurred by Mr. Chishti in relation to these claims that were not pursued. They were ancillary to the main claim for declaratory relief.
19. Therefore, the suggestion that Mr. Chishti was the substantially successful party in the action is completely unfounded.
20. Secondly, the fact that Afiniti decided that it was not necessary to maintain the interim injunction or to seek the additional items of relief does not engage the *'loser pays'* rule.
21. RSC Order 65 Rule 5 (3) relates to the situation where a party issues a claim (or raises a claim within an existing proceeding) and later abandons it, leaving the defendant in the position of having incurred costs defending a claim which otherwise would be incapable of recovery because they were not determined on their merits.
22. Here, Afiniti sought a declaration against Mr. Chishti which it succeeded in obtaining. This was the substantive claim. The fact that it did not pursue the additional (and collateral) prayers for relief in respect of that claim does not mean that Mr. Chishti (i) incurred costs in defending a claim that was thrown away because Afiniti decided not to pursue it or (ii) that Afiniti abandoned a substantive claim. A party is entitled to elect not to pursue all the types of relief that might be available if they decide that the relief is not required to give effect to the substantive claim.

23. Therefore, the provisions of RSC Order 62 Rule 5 (3) are not applicable, and Mr. Chishti's claim to costs under this ground also fails.

**Mr. Chishti's costs claim under the Indemnity**

24. The main part of Mr Chishti's application for costs was made on the grounds that because the Indemnity provides for him to be indemnified to fullest extent of the law in relation to any proceedings that are brought by him or Afiniti to determine the validity or enforceability of the Indemnity, he says he is entitled to an indemnity costs order from this Court. He submitted that the Indemnity provides that it does not matter if he wins or loses, and the fact that Afiniti withdrew three of its claims, and did not pursue the interim injunction, means that he was partially successful.

25. It is therefore necessary to examine those parts of the Indemnity on which Mr. Chishti relies in support of those submissions. In essence, Mr. Chishti relies on four provisions of the Indemnity: section 3, section 5, section 8 and Article 1f of Appendix A.

26. Section 3 provides:

*"Indemnification for Proceedings by or in the name of the Company*

*(a) Eligibility. Except as limited by section 10, Indemnatee shall be entitled to the indemnification rights provided in this section 3 if Indemnatee, after the effective date hereof, was or is a party or is threatened to be made a party to any Proceeding brought by or in the name of the Company to procure a judgment in the Company's favor by reason of the fact that Indemnitees is or was an Officer of the Company, or is or was serving at the request of the Company as a director, officer.....or by reason of anything done or not done by Indemnatee in any such capacity, whether or not Indemnatee is actually serving in such capacity at the time any liability or expense is incurred for which indemnification or advancement is sought under this Agreement.*

*(b) Indemnity. Except as limited by section 10, pursuant to this section 3, Indemnatee shall be indemnified to the fullest extent permitted under Bermuda law against all judgments, fines, amounts paid in settlement and Expenses incurred by Indemnatee in connection with a Proceeding described in Section 3 (a) if Indemnatee acted in good faith and in a manner Indemnatee reasonably believed to be in or not opposed to the best interests of the Company...*”

27. Section 5 provides:

*“Indemnification for Expenses of Successful party. Notwithstanding the limitations of sections 3, 4 or 10 (d), to the fullest extent permitted by Bermuda law and whether or not the Indemnatee has been successful, on the merits or otherwise, in whole or in part, in defense of any Indemnifiable Proceeding, or in defense of any claim, issue or matter therein (other than in respect of fraud or dishonesty) or if it is determined in a final and non-appealable judgment by a court of competent jurisdiction that Indemnatee is otherwise entitled to be indemnified against Expenses, the Company shall indemnify Indemnatee against all expenses incurred in connection with such Indemnifiable Proceeding.”*

28. Section 8 provides:

*“Expenses to Enforce Agreement. In the event that Indemnatee is subject to or intervenes in any Proceeding in which the validity or enforceability of this Agreement is at issue or seeks a Proceeding to enforce Indemnatee’s rights under or to recover damages for breach of, this Agreement, if Indemnatee prevails in whole or in part in such Proceeding Indemnatee shall be entitled to recover from the Company and shall be indemnified by the Company against any Expenses incurred by Indemnatee in connection with such proceeding.”*

29. Section 10 (d) provides:

*“Limitations on Indemnification and advancement of Expenses. The rights of Indemnatee to indemnification and advancement of Expenses under this agreement shall be as set forth herein except that no indemnification ...shall be paid hereunder...*

*(d) with respect to any proceeding that is authorised by the Board and brought by or on behalf of the Company against Indemnatee, except as provided in sections 3, 5 and 6.”*

30. Appendix A Article 1f provides:

*“Any Expenses incurred by Indemnatee in connection with a request for indemnification or payment of Expenses hereunder, under any other agreement with the Company, any provision of the Company Governing Documents or any director’s and officer’s liability insurance, shall be borne by the Company. The Company shall indemnify Indemnatee for any such amounts referred to in the immediately preceding sentence and agrees to hold Indemnatee harmless therefore irrespective of the determination of Indemnatee’s entitlement to indemnification.”*

31. Mr. Chishti’s arguments can be summarised briefly.

32. First Mr. Chishti relies upon section 3 and says he was a party to the claim that Afiniti brought against him to determine the extent of his rights under the Indemnity so section 3 entitles him to indemnification to the fullest extent permitted by Bermuda law.

33. Second, Mr. Chishti submits that section 5 says that it does not matter that he was the unsuccessful party, he is still entitled to full indemnification.



34. Third, Mr. Chishti submits that section 8 gives him an express right to indemnification where the validity or enforceability of the Indemnity is in issue.
35. Fourth, Mr. Chishti says that all the expenses (as defined) were incurred “*in connection with*” his original request for indemnification which was the dispute that generated the litigation, and therefore Article 1f entitles him to recovery of his expenses, “*irrespective of the outcome of the determination of*” his entitlement to indemnification.
36. Mr. Chishti relied upon a number of authorities, most of which are not relevant to the matter the Court has to decide. These authorities and the written submissions he adopted had been prepared by his prior counsel<sup>3</sup>. The most relevant authority was **Gomba Holdings Ltd v Minorities Finance (No 2)**<sup>4</sup>. Mr. Chishti submitted that this case was authority for the proposition that where there is a contractual right to the costs, the court’s discretion should ordinarily be exercised so as to reflect that contractual right.
37. As a result, Mr. Chishti submitted that the Court’s order *nisi* was wrong and that he ought to be entitled to an order for costs that reflected his contractual rights under the Indemnity—i.e. an indemnity costs order.

### **Afiniti’s response**

38. Mr. Williams opposed Mr. Chishti’s application on the following grounds: (i) there was no contractual right to entitlement to indemnification under the Indemnity because it did not apply to the present circumstances (ii) in any event sections 5 and 8 of the Indemnity do not apply (iii) the relevant provisions are excluded as a result of the limitations in section 10 (d) (iv) on a proper construction of the Indemnity, section 5 does not afford Mr. Chishti any relief and (v) Article 1f only applies to the process of making a request for indemnification, not the proceedings that followed.

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<sup>3</sup> Mr. Chishti’s counsel at the hearing of the Originating Summons were Alex Potts KC and Lilla Zuill of Zuill & Co.

<sup>4</sup> [1993] Ch 171

### The Court's assessment

39. The short point made by Mr. Williams was that section 3 of the Indemnity sets out the extent of Mr. Chishti's rights to indemnity. That section provides that the Indemnity is in relation to proceedings that are brought "*by reason of the fact that Indemnatee is or was an Officer*" of Afiniti (emphasis added)<sup>5</sup>. He submitted that these proceedings were brought because Mr. Chishti had stepped outside the terms of the Indemnity and had appointed two independent counsel to determine if he was entitled to indemnification in breach of the terms of the Indemnity which did not permit him to do so.
40. In the Court's view, this point is plainly right. These proceedings did not arise out of anything done or omitted by Mr. Chishti in his capacity as an officer or director and he was not a director or officer at the time he made the wrongful appointments of independent counsel. Therefore, the terms of the Indemnity are not engaged at all. This means that there is no contractual entitlement to costs and Mr. Chishti's claim to an entitlement to contractual costs fails. As a result, the point of principle discussed in **Gomba Holdings** does not apply.
41. In light of that conclusion, it is strictly unnecessary to consider the various arguments to contractual entitlement that Mr. Chishti has advanced, nor the written arguments of his previous counsel that were adopted by him. However, in case I am found to be wrong, I shall briefly address the other points that were raised.
42. Section 3 provides that Mr. Chishti's entitlement is limited by the requirement that in order to be entitled to indemnification, he must have acted in good faith and in a manner he reasonably believed to be in or not opposed to the interests of Afiniti. Mr. Williams submitted that Mr. Chishti fails to meet this requirement because he took action in breach of the Indemnity which was directly opposed to Afiniti's interests. These proceedings were taken by Afiniti to prevent Mr. Chishti from pursuing a course that Afiniti opposed.

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<sup>5</sup> The recitals to the Deed also explain that this is the context in which the Indemnity was being entered into.

43. It seems to me that this must also be correct. Therefore, no indemnification would have been available to Mr. Chishti under this provision.
44. Section 5 provides for indemnification in respect of “*Indemnifiable Proceedings*” which are defined as proceedings under sections 3, 4 or 8 of the Indemnity. Mr. Williams submitted that these proceedings (i) do not relate to anything done by Mr Chishti as an Officer under section 3 (ii) they are not proceedings brought otherwise than by Afiniti under section 4 (iii) no question arose as to the validity or enforceability of the Indemnity under section 8. The proceedings were taken by Afiniti to enforce the terms of the agreement. There was no dispute over the validity of the Indemnity nor its enforceability as a matter of law.
45. The Court accordingly accepts Mr. Williams’ submission that these provisions are not engaged, and holds that no claim to indemnification arises under them because they were not within the definition of “*Indemnifiable Proceedings*”.
46. Section 8 provides for indemnification for Mr. Chishti’s Expenses where the expenses are incurred where the validity or enforceability of the Indemnity is in issue, or where he seeks to enforce his rights under the Indemnity or recover damages for breach of the Indemnity. Mr. Chishti did not issue the proceedings and did not seek damages for breach of it by Afiniti, and the proceedings did not involve a question over the validity or enforceability of the Indemnity. Therefore the provisions of the section are not engaged. Furthermore, in order to claim under this section Mr. Chishti must have been successful in whole or in part. For the reasons already explained, Mr. Chishti was not successful in whole or in part. Therefore, the Court rejects Mr. Chishti’s submissions on these points.
47. In addition, section 10 (d) disallows Mr. Chishti from recovering under the Indemnity if Afiniti brings proceedings against Mr. Chishti, which happened in this case. The exceptions provided for proceedings under sections 3 and 5 do not apply for the reasons already explained.

48. Finally, it seems to me that Article 1f is only relevant to a ‘request’ for indemnification, notwithstanding the wide interpretation given to the words “*in connection with*”. This is because the Indemnity makes elaborate and detailed provisions for the costs of the indemnification for proceedings as distinct from a ‘request’, and on the normal principles of interpretation, that distinction must be given meaning and effect. It can only have meaning if it is a separate and independent aspect of the right to contractual indemnification. The costs of these proceedings obviously did not relate to the original ‘request’ for indemnification. The Court also rejects Mr. Chishti’s submissions on this point.

49. Therefore, in conclusion, Mr. Chishti has no valid contractual claim to the recovery of his costs.

#### **Afiniti’s application for indemnity costs**

50. Mr. Williams submitted that the appropriate order would be to award indemnity costs against Mr. Chishti because unfounded allegations of professional misconduct were made by Mr. Chishti’s counsel against Afiniti’s counsel in relation to the interim *ex parte* injunction.

51. It is true that a good deal of time was spent and much ink was spilled in determining these issues<sup>6</sup>, and that the Court held that the allegations made were both serious and unjustified<sup>7</sup>.

52. However, the Court does not consider it appropriate on this occasion to award indemnity costs against Mr. Chishti on this ground. This is not because the Court does not consider the allegations to have been sufficiently serious to warrant it. Although no doubt Mr. Chishti agreed to the allegations being made, the allegations were made by his counsel.

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<sup>6</sup> Counsel on both sides devoted many pages in their written submissions to the arguments on this point and spent about half of the hearing addressing it. The Court devoted 39 paragraphs considering the arguments in the judgment.

<sup>7</sup> See paragraph 77 of the judgment.

53. Matters concerning the conduct of proceedings in court are more appropriately directed at counsel who must take ultimate responsibility for the presentation of the case. It is to be hoped that the expression of the Court's disapproval in this case will serve as guidance for the future.

### **Conclusion**

54. As a result, the Court's decision on costs remains that Mr. Chishti shall pay Afiniti's costs of the proceedings on the standard scale, such costs to be taxed if not agreed.

### **Release of the funds provided by Afiniti to fortify the cross-undertaking in damages**

55. After Afiniti had obtained the *ex parte* injunction restraining Mr. Chishti from proceedings with his appointments of independent counsel, Mr. Chishti sought fortification of Afiniti's cross-undertaking in damages and in response, Afiniti arranged for a sum of US\$100,000 to be held by its attorneys against its cross-undertaking.

56. In the Costs order *nisi*, the Court directed that the funds were not to be released during the period in which the parties were given to seek a costs hearing. This was for administrative convenience. It was anticipated by the Court that the costs hearing would follow shortly after the time allowed for making application, but it has unfortunately taken four months to come on for a hearing.

57. On reflection, it was wrong for the Court to include the directions for the fortification of the cross-undertaking in the directions for a costs hearing, as the two issues are entirely distinct. The Court ordered that there was to be no enquiry as to damages, and ought at that point to have given the immediate direction that the funds held to secure that cross-undertaking should be released. The US\$100,000 fund has nothing to do with the costs of the proceedings.

58. Mr. Chishti however objected to the release of the funds saying that the funds would be irrecoverable. Afiniti is now in liquidation and although his general claims will fall as

unsecured claims, he says the costs claim will be a priority claim in the liquidation because the Joint Provisional Liquidators adopted the litigation, and so he says the costs will fall as a preferred claim in the liquidation. Mr. Chishti has evinced an intention to appeal and says he will be prejudiced if the funds are released.

59. The Court disagrees. As already stated, the funds held to fortify the cross-undertaking are held exclusively for that purpose and are not intended to secure Afiniti's (potential) liability for costs in the event of a successful appeal. The Court has no jurisdiction to make such an order.

60. Therefore, the Court hereby discharges Afiniti from its obligation to retain those funds to fortify the cross-undertaking and those funds are hereby released to the Joint Liquidators. It follows that Afiniti's attorneys are also released from their undertakings in respect of the funds.

### **Order**

61. Afiniti's counsel is to draw an Order to reflect the terms of this Ruling for entry on the Court Record.

Dated this 12<sup>th</sup> day of February 2025



  
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**THE HON. JUSTICE MR. ANDREW MARTIN**  
**PUISNE JUDGE**