



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 226 OF 2021 (DDJ)

**IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)
AND IN THE MATTER OF PORTON CAPITAL INC
AND IN THE MATTER OF PORTON CAPITAL LIMITED**

BETWEEN:

ENIGMA DIAGNOSTICS LIMITED (IN LIQUIDATION)

Petitioner

-and-

HARVEY ERIC BOULTER

Respondent

Before: The Hon. Justice David Doyle

Heard: On the papers

Draft Judgment Circulated: 11 May 2022

Judgment Delivered: 13 May 2022



HEADNOTE

Judgment on costs – Order 62 rule 4 (11) of the Grand Court Rules – indemnity costs in respect of unsuccessful petition alleging fraud

JUDGMENT

1. I have considered:
 - (1) the Petitioner’s submissions on costs dated 19 April 2022 together with authorities;
 - (2) Mr Boulter’s undated submissions on costs together with authorities; and
 - (3) The Petitioner’s and Mr Boulter’s further submissions on costs each dated 3 May 2022 together with authorities.

2. I agree that the order dated 3 February 2022 deals with the costs of the summons filed on 14 December 2021. I leave any issues of set-off to the taxing officer pursuant to Order 62 rule 23.

3. In respect of the costs of the petition, I do not accept that the costs relating to the issues of causation and injury (including standing) and acquiescence should be dealt with as separate issues.

4. The Petitioner was unsuccessful and costs should follow the event. The Petitioner should pay the Respondent’s costs of its failed petition. It does not appear to the court that in the circumstances of the case some other order should be made as to the whole or part of the costs.



5. An order does not need to be made as requested by the Petitioner for the avoidance of any doubt that the Respondent “shall not be entitled to recover the fees of his English attorneys.” Such issues can be dealt with during the taxation process if costs are not agreed. I note Order 62 rule 18 (foreign lawyers) and Practice Direction 1 of 2001 but leave any issues as to the recoverability of foreign lawyers’ costs to the taxing officer.
6. I note the Respondent’s reference to the English (*Clutterbuck and Paton v HSBC* [2015] EWHC 3233 (Ch)) and local case law (*Jafar v Abraaj* FSD unreported judgment 17 January 2022 Segal J) that if allegations of fraud are withdrawn or do not succeed then in the ordinary course of events those making the allegations will be ordered to pay costs on an indemnity basis. The court however retains a “complete discretion”. The Petitioner refers to the judgment of Cheryll Richards J in *Traded Life Policies Fund (in official liquidation) v Leach* (FSD; unreported judgment 26 January 2021) at paragraphs 104 – 105 and I note the contents of that judgment.
7. The general position in the Cayman Islands in respect of indemnity costs is covered by Order 62 rule 4 (11) of the Grand Court Rules where it is provided that “the Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently”. I have considered the judgment of the Court of Appeal in *Wood Furniture and Design Ltd v Gary Jones* (unreported judgment 30 July 2020) at paragraph 75 and Smellie CJ’s judgment in *AHAB v SAAD* 2012 (2) CILR 1. The Chief Justice at paragraph 9 states that the discretionary jurisdiction to award costs on an indemnity basis should generally only be exercised “in the most exceptional cases” but recognises at paragraph 10 that “the jurisdiction is wide and flexible, allowing the court to exercise its discretion as the circumstances of the case may require.”
8. I note the Petitioner’s opposition to costs on the indemnity basis.



9. In my judgment the way in which the proceedings were advanced and the conduct of the proceedings by the Petitioner was unreasonable to a high degree and “outside the norm.” The Petitioner did not initially plead proper particulars of fraud and the particulars which were provided following a court order proved to be unsatisfactory. Moreover it was wrong for the Petitioner to seek to persuade the court to make orders at the first hearing without joining in Mr Boulter and without proper particulars of fraud being pleaded in the petition.
10. At the first hearing it appeared that the Petitioner was attempting to rush the court into granting the relief claimed in the absence of Mr Boulter.
11. There was also the unreasonable attempt by the Petitioner to have Mr Boulter recalled after I had released him as a witness. This was on the ground in effect that counsel for the Petitioner had failed to put certain questions to him in cross-examination. I accept that minimal time and costs were wasted in that respect but it was indicative of the unreasonable attitude of the Petitioner in respect of the proceedings.
12. It was also clear to me after hearing the evidence presented on behalf of the Petitioner that the Petitioner had not made full and comprehensive enquiries prior to launching the proceedings. It is unreasonable for a petitioner to launch proceedings involving serious allegations of fraud without making full and comprehensive enquiries.
13. At paragraph 29 of my judgment delivered on 24 March 2022 I referred to the Petitioner’s “somewhat unsatisfactory “kitchen sink/scattergun” approach”. It is quite wrong for the Petitioner at paragraph 11 of its skeleton argument dated 3 May 2022 to suggest that this was only “in relation to one aspect of the Particulars of Fraud” as if to imply that it was an insignificant complaint that should not influence the court in its determination to award costs on a standard or indemnity basis. The “one aspect” was, by far, the most important aspect of the case namely the allegation that when Mr Boulter signed the Declarations of

Solvency and the Letters he knew of the existence of various claims by reason of certain specified matters and such was evidence of the falsity and fraud. It is disingenuous of the Petitioner to attempt to belittle this obviously fundamental and major aspect of the case.

14. In all the circumstances, I am satisfied that the costs should be assessed on the indemnity basis.
15. I am also satisfied, taking a cautious approach as to the amount, that an interim payment in the sum of \$300,000.00 should be made and such sum to be paid within 28 days.
16. Counsel should within the next 72 hours email a draft order for my approval.

THE HONOURABLE JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT