

RULING

1. This ongoing and now protracted litigation arises entirely from the unusual circumstance of the defendant ABCI seeking to force the plaintiffs to arbitrate in proceedings before the International Commercial Court in Paris.
2. The background to the litigation is described in a written summary judgment of this Court of 27 September 2007 and in which judgment it was decided that ABCI will be restrained from seeking to force the plaintiffs to arbitrate.
3. ABCI did not seek to appeal against that judgment. Instead it filed a summons on 29 February 2008 seeking an order to set aside the summary judgment but which summons it did not seek to pursue until September 2008, some 8 months later.
4. The result was a further written decision given on 22 September 2008, in which ABCI's application to set aside was denied.
5. The reason for that decision are very relevant to the question before me now, which is whether ABCI should be required to pay the plaintiffs' costs of the application on the indemnity basis, rather than on the standard basis.
6. Those reasons included findings that ABCI had throughout the conduct of these proceedings including up until that very application heard in September 2008, engaged in a course of delay and prevarication.
7. This course of conduct appears to be ongoing even now, in light of Mr. Freeman's very belated instructions (his firm being at least the 4th set of attorneys engaged by ABCI in this action) to seek leave to appeal against the decision of 22nd September 2008. Given the history of the matter, the suggestion by Mr. Freeman this morning, that whatever reasons ABCI may have to explain its dilatory

behaviour in this action are to be reserved for explanation to the Court of Appeal, rings very hallow indeed.

8. When viewed as a whole, I am satisfied that ABCI's conduct in these proceedings has been unreasonable. It is conduct which can aptly be described – to adopt the words of Mance J. (as he then was) – as “...*a highly opportunist and tactically motivated approach to litigation which [is] unreasonable, and which this court should strongly discourage.*” See Cepheus Shipping v Guardian Royal Exchange Assistance Plc. [1995] 1 Lloyd's Rep. 647.

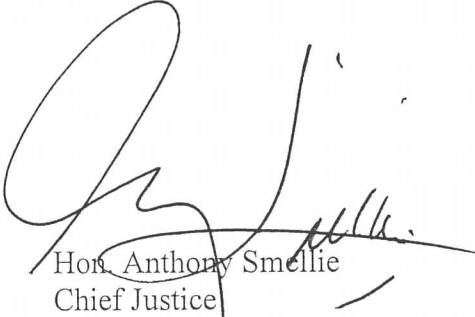
9. Findings from my earlier ruling of 22nd September 2008 are also illustrative of this conclusion:

At paragraph 2: *“I am satisfied that ABCI has been seeking improperly to delay the due disposition of these proceedings; up to and including the trial of the summary judgment application on 27th September 2007.”*

paragraph 3: *“I have in mind, in particular, ABCI's failure to bring this application in a timely manner and to pursue it without the promptings of the plaintiffs.... I also have in mind ABCI's failure to appeal – as it could have – against the summary judgment itself and the total absence of any explanation why it did not seek to pursue that more obvious course.”*

paragraph 6: *“Given [the] history of the matter, if this application were to succeed before me, it would achieve only the setting back down for trial of the plaintiffs' claims to be determined afresh, leaving ABCI free in the meantime to press on with the arbitration claims. Thus, ABCI would have gained for itself the position by which it may perpetuate the very mischief which the plaintiffs have sought and have managed to restrain by obtaining summary judgment.”*

10. It is now clear from the case authorities, not only that the jurisdiction exists in this Court to make an award of indemnity costs (*Bonotto v. Boccaletti (C.A.), 2001 CILR 292*) but also that it is appropriate to do so where the liable party has behaved in the unreasonable manner in which ABCI has been found to behave in this case. Such an award was the means by which the impugned conduct attributed by Mance J. to the unsuccessful party in *Cepheus Shipping* (above), was to be “strongly” discouraged.” See for further instance the decision of Kellock Actg J. in *Nike Real Estate v De Bruyne et al, 2002 CILR 31*.
11. When put to the expense of litigation as a consequence of such unreasonable behaviour, it would be unjust for the successful party to find itself substantially out of pocket in having itself to absorb the difference, often substantial difference, between the costs which it may recover on the standard basis and its actual reasonable costs of responding to the unreasonable conduct.
12. In my view, that would be the position in which the plaintiffs would be placed here were they to be denied the recovery of their costs on the indemnity basis.
13. I therefore grant their application for their costs of the application of September 2008 and of this application on the indemnity basis (earlier orders for costs having been made on the standard basis).


Hon. Anthony Smellie
Chief Justice

March 5 2009

