

UPDATE

Just how does a lender recover costs under a contractual costs indemnity?

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Justin Harvey-Hills, Mathew Cook and Katie Phillips of Mourant Ozannes recently acted for the lender in *Tygres Investments Limited and Ors v Jersey Home Loans Limited and Ors* [2016] JCA 173. The Court of Appeal considered how to apply the standard term found in loan agreements and in bonds that a lender has the contractual right to recover all costs of enforcement from the defaulting borrower.

Sir Michael Birt JA, sitting as a single judge, refused the debtors leave to appeal against judgments entered and ordered that the borrowers should pay the lender's costs of the application. The lender had the benefit of the contractual indemnity. Should costs be awarded in their entirety or subject to taxation and, if the latter, should they be taxed on the standard basis or on the indemnity basis?

It is not generally possible (save in certain limited circumstances) to claim for amounts that are not due and owing at the date of the claim. The court's ability to award costs and interest is an exception to that rule. However, a court will almost never award a specific amount by way of costs, save in cases where summary assessment of costs is permitted. It will only award costs on the basis that they are to be taxed on either the standard basis or the indemnity basis.

The lender could issue new proceedings seeking judgment on the actual amount of the costs. However, this was not practical as the new proceedings themselves would give rise to costs which would then have to be claimed in yet more proceedings. Or, it could seek an order for its costs to be taxed on the indemnity basis in the current proceedings, which would achieve a similar result in terms of quantum.

We argued, on the basis of the English Court of Appeal authority of *Gomba Holdings (UK) Limited v Minories Finance Limited (No.2)* [1993] Ch 171, that, although the court had a discretion as to the award of costs and the basis of such award, it should, where a contractual right to indemnity existed, generally exercise that discretion so as to award costs on the indemnity basis. In *Gomba*, the Court of Appeal had held that the discretion should ordinarily be exercised so as to reflect that contractual right, although if the lender had acted unreasonably or if, in the course of proceedings, it had lost on a particular issue, it should not be entitled to its indemnity in respect of those costs. We submitted that these principles were equally applicable in Jersey, not least because it would avoid subsequent proceedings.

Birt JA said that he could see the force of the submission. However, the borrowers were not legally represented and the court had not had the benefit of full adversarial legal argument on the legal point or on the terms of the indemnity. He was therefore reluctant to make a ruling which might have widespread implications. However, his view, which was provisional and subject to amendment if necessary, was that:

1. where the lender had the contractual right of indemnity, it extended to all costs other than those which had been unreasonably incurred or which were unreasonable in amount. As stated in *Gomba*, the effect of such a contractual right was equivalent to a right to taxation on the indemnity basis;
2. the Royal Court and Court of Appeal had full discretion to award costs. They could deprive a party of its contractual right to costs as set out in *Gomba* (see above). However, in the absence of a specific decision by the court to that effect, an order for taxation on the standard basis did not remove the contractual right indemnity costs.

In the particular circumstances, Birt JA declined to order that costs should be awarded on the indemnity basis and instead ordered costs on the standard basis. However, this was without prejudice to the lender's right to pursue a further contractual claim to claim the full costs under the contractual right or to recover the full amount as part of any enforcement process.

Comment

The Court of Appeal has given a strong indication that it believes that the rationale of *Gomba* should apply in Jersey and that it should be possible for a lender who has the benefit of a contractual costs indemnity to recover the costs of litigation on the indemnity basis in the course of the proceedings. In our view, this is correct and a practical answer to a practical problem. There can be a significant difference between recovery on the standard basis and recovery on the indemnity basis. It makes no practical sense for a lender to have to commence separate proceedings to recover costs on the correct basis, such proceedings in turn generating further costs. However, definite confirmation of this point will be for another day. The court made it clear that the lender would still have the right to claim the full costs under the contractual provision and so a lender should still obtain full recovery, subject to any costs being unreasonable.

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