



Civil Appeal No. 15 of 2023  
No. 16 of 2023  
No. 17 of 2023

**IN THE COURT OF APPEAL (CIVIL DIVISION)  
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS CIVIL  
JURISDICTION (COMMERCIAL COURT)  
BEFORE THE HON. JUSTICE SHADE SUBAIR WILLIAMS  
CASE NUMBER 2017: No. 295  
2020: No. 89**

Sessions House  
Hamilton, Bermuda HM 12

**Before:**

**THE PRESIDENT, SIR CHRISTOPHER CLARKE  
JUSTICE OF APPEAL GEOFFREY BELL  
and  
JUSTICE OF APPEAL IAN KAWALEY**

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**CIVIL APPEAL No. 15 of 2023**

**BETWEEN:**

**MEXICO INFRASTRUCTURE FINANCE LLC**

**Appellant**

**- and -**

**TERRA LAW LIMITED**

**Respondent**

**CIVIL APPEAL No. 16 of 2023**

**BETWEEN:**

**TERRA LAW LIMITED**

**Appellant**

**- and -**

**MEXICO INFRASTRUCTURE FINANCE LLC**

**Respondent**

**CIVIL APPEAL No. 17 of 2023**

**BETWEEN:**

**MEXICO INFRASTRUCTURE FINANCE LLC**

**Appellant**

**- and -**

**(1) TERRA LAW LIMITED  
(2) THE CORPORATION OF HAMILTON**

**Respondent**

Mr. Keith Robinson and Mr. Oliver MacKay of Carey Olsen Bermuda Limited on behalf of Mexico Infrastructure Limited  
Mr. Changez Khan of Marshall Diel & Myers Limited on behalf of the Corporation of Hamilton  
Ms. Laura Williamson of Kennedys Chudleigh Limited on behalf of Terra Law Limited

**Hearing date(s):** On the papers  
**Draft Judgment circulated:** 21 August 2024  
**Date of Judgment:** 5 September 2024

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*Costs of cross-appeals-whether costs should follow the event*

**COSTS RULING**

**KAWALEY JA:**

**Introductory**

1. In this Court’s 10 May 2024 Judgment, the four separate appeals which were for convenience heard together were disposed of as follows:
  - (a) COH’s appeal against paragraph 2(a) of the Supreme Court’s 27 March 2023 Order and the finding that COH and MIF shared a joint interest privilege was allowed (the “COH Privilege Appeal”);
  - (b) MIF’s appeal against paragraph 1(a) of the Supreme Court’s 27 March 2023 Order (and the finding that MIF implicitly waived its right to claim privilege in respect of any independent legal advice it received in relation to the Guarantee and the Mortgage before it executed the loan documents) was allowed (the “MIF Waiver Appeal”);
  - (c) MIF’s appeal against paragraph 3(a) of the Supreme Court’s 27 March 2023 Order in respect of Questions 4, 5i and 5ii was allowed, but its appeal dismissed in relation to Question 3 (the “MIF Interrogatories Appeal”);
  - (d) Terra Law’s appeal against paragraph 1(c) of the Supreme Court’s 27 March 2023 Order (which dismissed Terra’s application for specific discovery of the Title Insurance Documents on the grounds of irrelevance) was allowed (the “Terra Title Insurance Appeal”).
2. Directions were given for the costs of the appeals to be determined on the papers. Terra Law filed its submissions on 29 May 2024 while MIF and COH filed their submissions on 31 May 2024. Their respective positions are considered below.

**The respective submissions**

**MIF**

3. MIF contended that costs should follow the event as regards each appeal (and the corresponding Supreme Court Summons, so that (in summary):
  - (1) MIF should pay COH’s costs of the COH Privilege Appeal and MIF’s 12 January 2021 Summons. Invited to file supplementary submissions to respond to Terra Law’s application for its costs at the Supreme Court level in relation to this issue, MIF essentially submitted that it was inappropriate for it to be

required to pay these costs because Terra Law had always adopted the position that the privilege was for COH to defend;

- (2) Terra Law should pay MIF's costs of the MIF Waiver Appeal and the related costs of Terra Law's 1 December 2020 Summons;
- (3) COH should pay MIF's costs of the MIF Interrogatories Appeal and COH's 29 June 2021 Summons;
- (4) MIF should pay Terra Law's costs of the Title Insurance Appeal and the related costs of Terra Law's 1 December 2020 Summons.

**Terra Law**

4. Terra Law's primary position was that there should be no order as to the costs of the appeals, because disentangling the costs of each appeal would likely be disproportionate. However (in summary):
  - (a) as regards the Privilege Appeal if any costs were ordered, it ought to recover its costs of the appeal (which it contested to protect its client's privilege) and at the Supreme Court level where it was initially the party against whom the application was made;
  - (b) no order for costs was appropriate as regards the Waiver Appeal which it admittedly lost, because its position was not unreasonable and the issue might have to be revisited at trial;
  - (c) no position was taken in relation to the Interrogatories Appeal in which it was not involved; and
  - (d) MIF should pay its costs of the appeal and below in relation to the Title Insurance Appeal.

**COH**

5. COH in principle opposed the notion of no order for costs as a whole proposed by Terra Law. COH's position in relation to each appeal was (in summary) as follows:
  - (a) COH was entirely successful on the Privilege Appeal and MIF should pay COH's costs at both levels with a certificate for two counsel (senior and junior);
  - (b) COH took no position in relation to the Waiver Appeal;

- (c) the Interrogatories Appeal outcome was evenly balanced, and realistically was a “score draw”. There should be no order as to costs of the appeal, but COH should be awarded its Supreme Court costs (alternatively no order as to costs overall);
- (d) COH took no position in relation to the Title Insurance Appeal.

**Findings: Privilege Appeal**

- 6. It is common ground between MIF and COH that MIF should pay COH’s costs in this Court and in the Supreme Court. Whether Terra Law should also recover its costs is the only controversial issue in relation to the costs of the Privilege Appeal.
- 7. Terra Law has not advanced any principled basis on which the Court should conclude that its elective intervention in support of COH’s appeal merits an adverse costs order against MIF in relation to the Privilege Appeal. As regards the corresponding costs in the Supreme Court, the relevant application was made by MIF in proceedings against Terra Law which Terra Law was required to respond to, at the very least, until COH ‘joined the party’.
- 8. Paragraph 2 (a) of the 27 March 2023 Order of Subair Williams J required Terra Law to produce the fruit of MIF’s successful joint interest privilege claim. This potentially supports the proposition that Terra Law properly participated in the Supreme Court proceedings and that, in light of COH’s successful appeal on this issue, should have its costs in relation to this issue in the Court below. However, what in my judgment is more significant is the way in which the matter was argued and the interests which were actually engaged.
- 9. The substantive legal position was correctly characterised by Terra Law’s counsel in the Supreme Court and reflected in the way the issue was argued in both this Court and the Court below. The privilege was indeed that of COH to defend, and it took the lead in contesting the point at both levels. This was not the usual case where an unsuccessful party is required to pay the costs of more than one opposing party whose interests in contesting the action or application are in substance indistinguishable. In all the circumstances of the present case, I would make no order as to the costs of the joint interest privilege issue as between MIF and Terra Law.

**Findings: Waiver Appeal**

- 10. MIF contends that costs should follow the event and Terra Law contends, without any convincing rationale, that there should be no order as to costs. Reasonably pursuing an application which does not succeed is no basis for displacing the strong presumption that costs should follow the event. Order 62 rule 2 of the Rules of the Supreme Court 1985 provides:

*“(3) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, 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 as to the whole or any part of the costs.”*

11. The same principle generally applies in this Court. On this basis, Terra Law should be ordered to pay MIF’s costs of the Waiver Appeal, and the corresponding costs of its 1 December 2020 summons in the Supreme Court, to be taxed if not agreed on the standard basis.

**Findings: Interrogatories Appeal**

12. MIF contends it has succeeded both in relation to the Interrogatories Appeal and in relation to COH’s Summons before the Supreme Court. COH accepts it has not clearly won at either level but implies that it more clearly won at the Supreme Court while achieving what amounted to a “score draw” before this Court. This is the sole application where it is necessary to decide the “result”.
13. The appeal was dismissed in relation to Questions 3i.-3vi, with very little argument indeed. The appeal was allowed in respect of Questions 4, 5i and 5ii. Argument focussed on Question 4 and a nuanced question of privilege; once this was resolved in favour of refusing the question, 5i. and 5.ii fell away without further analysis. A boxer wins on points based on the quality of blows he/she lands on his/her opponent, not merely based on numbers alone. In my judgment, MIF won this appeal on a very narrow points decision, but won nonetheless viewing the matter in real life and common-sense terms. As Evans JA stated in *First Atlantic Commerce-v-Bank of Bermuda Ltd* [2009] CA (Bda) 5 Civ:

*“26. The Judge directed himself, correctly in our view, in accordance with the judgment of Lightman J. in BCCI v. Ali [1999] NLJ 1734 where he said:*

*‘success is not in my view a technical term but a result in real life, and the question as to who succeeded is a matter for the exercise of common sense’, (adopted and followed by Bell J. in SCAL Ltd. v. Beach Capital Management Ltd. [2006] Bda L.R. 93).”*

14. As far as the costs of COH’s Interrogatories application in the Supreme Court are concerned, the result based on the Judgment (paragraphs 86-92, 95) and 27 March 2023 Order (paragraph 3) may be summarised as follows. Four questions were approved, three of which this Court has held were impermissible. (Questions 8 and 9 were reserved for the Judge’s decision when the costs of the application were determined and do not fall for

consideration by this Court at this stage). MIF far more clearly achieved substantial success at the Supreme Court level.

15. I find that MIF's costs of the Interrogatories Appeal and the related costs of the Supreme Court COH Summons should be paid by COH to be taxed if not agreed on the standard basis.

**Findings: Title Insurance Appeal**

16. It is common ground that the appropriate Order should be that MIF shall pay Terra Law's costs of the Title Insurance Appeal and the corresponding costs of Terra Law's 1 December 2020 Supreme Court Summons. Those costs are awarded to MIF to be taxed if not agreed on the standard basis.

**Summary**

17. I would accordingly dispose of the four costs applications as follows:

- (a) Privilege Appeal: MIF shall pay the costs of COH in this Court and the corresponding Supreme Court costs of COH, certified appropriate for two counsel (with no Order as to Terra Law's costs);
- (b) Waiver Appeal: Terra Law shall pay MIF's costs and the corresponding costs in the Supreme Court, certified appropriate for two counsel;
- (c) Interrogatories Appeal: COH shall pay MIF's costs and the corresponding costs in the Supreme Court;
- (d) Title Insurance Appeal: MIF shall pay Terra Law's costs and the corresponding costs in the Supreme Court.

18. I would make no Order as to the costs of the present costs application.

**BELL, JA**

19. I agree.

**CLARKE, P**

20. I, also, agree