

FILE/DIRECTION/ORDER

BEFORE JUDGE MYERS

ACTION: CV-17-118 22-CL

KSV KOFMAN INC.

v.

AEOLIAN INVST. LTD ET AL.

(UNOFFICIAL TRANSCRIPT OF ENDORSEMENT OF JUSTICE MYERS DATED OCTOBER 3, 2017)

The Defendants object to my endorsement awarding substantial indemnity costs to Plaintiffs before they had an opportunity to make submissions. The costs award is set aside. I have the Defendants' submissions now on the merits. They argue that costs should be in the cause to avoid ending the litigation.

Mr. Davies' evidence is that he has no assets to fund an order for costs. But that's the whole point of the litigation. Plaintiffs allege that he improperly dealt with investor funds to enrich himself, his family, their trusts, and others rather than building buildings. Although he disputes the merits, I found that his own description of his business model was akin to a Ponzi scheme. I found that there was a real risk of dissipation of assets given that he and Mrs. Davies have sold their cottage and tried to sell their house in face of the Mareva injunction. The fact that corporate funds may now be in a property in Arizona in the name of a trust and that Mr. Davies is so fortuitous to have a willing lender – who advances funds to him despite his alleged lack of assets – and that the lender is not a bank or a financial player but just happens to be the architect of non-built buildings – was more than suspicious.

Mr. Davies argues that he has committed no reprehensible conduct to attract a punitive level of costs. I do not agree. The evidence against him raises a strong case that his defence is a sham and his behavior indeed is scandalous. In fact, there is a public scandal that has received notoriety. I do not accept that Mr. Davies does not have access to funds to pay a costs award. He has not sought to lift the Mareva to fund legal or living expenses despite several months under its terms. His ability to borrow and pay living and legal expenses appears to belie counsel's submissions.

I do not see this as a close call. The thrust of Defendants' submissions is to reassert evidence that I rejected on the merits already.

I have approached the matter anew but find myself reaching the same conclusion based on (a) my findings on the motion; (b) considering Defendants' submissions; and (c) considering s. 131 of the CJA, R. 57.01, and *Boucher* considerations – especially access to justice for all interested parties.

The Plaintiff relies as well on Mr. Davies' efforts to deny liability including providing new versions of financial records that differ from contemporaneous records as an indication that his response to

the motion unreasonably raised costs and lengthened the litigation. It points out as well that it has calculated its costs at 80% rather than 90% of full fees as is allowed for substantial indemnity claims. The award is therefore a hybrid rather than a maximum. Finally, I accept that the Receiver/Plaintiff had to perform very substantial effort to unbundle the financial web woven by Mr. Davies in the borrower corporations and their dealings with the Defendants. In the circumstances, costs claimed of \$61,782.82 all-in are fair and reasonable. Costs of \$61,782.82 are payable by John Davies, Judith Davies and Aeolian Investments Ltd. jointly and severally to the Plaintiff fixed at \$61,782.82 all-in payable within 30 days. Unlike my prior order, no costs are awarded against the other Defendants

Date: October 3, 2017