

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Hon Mr Justice Andrew J. Jones QC

In Chambers, 16th November 2010

Cause No. FSD 167 of 2010 (AJJ)

IN THE MATTER of the Companies Law (2009 Revision)

AND IN THE MATTER of Wyser-Pratte Eurovalue Fund Ltd



Appearances:

Mr Tom Lowe QC with Mr Sam Dawson of Solomon Harris for the Petitioner

Ms Collette Wilkins of Walkers for the Company

RULING ON COSTS

Introduction

1. On 9th September 2010 I made an order that the Petitioner's costs of and incidental to the petition (up to and including 1st September 2010) be paid out of the assets of the Company such costs to be taxed on the indemnity basis if not agreed. The issue which I am now asked to determine is whether the legal fees payable by the Petitioner to its US lawyers in connection with this proceeding are irrecoverable to the extent that they fall outside the limitations imposed by GCR. O.62, r.18.
2. The issue was presented as a pure point of law. I was not shown any bill of costs. Nor was I asked to make any determination about the reasonableness of engaging foreign lawyers or the reasonableness of the work done and fees paid. These will be matters for the taxing officer to determine in the absence of agreement.

3. I was invited to put my reasons into writing on the basis that there is apparently some uncertainty amongst the profession about the purpose and effect of GCR O.62, r.18, at least in the context of winding up petitions. .

Rules as to costs in liquidation proceedings

4. The general rules as to costs in liquidation proceedings are contained in the Companies Winding Up Rules, Order 24, Part II.
5. The effect of CWR O.24, r.8(1) and (4) is that a creditor who successfully presents a winding up petition on the grounds of insolvency is entitled to have his costs paid out of the assets of the company unless the Court is satisfied that there are exceptional and special circumstances which would justify making some other order or no order for costs. The successful petitioning creditor's costs are an expense of the liquidation which, by virtue of CWR O.20, r.1(1)(a), rank ahead of all other expenses. The amount of his costs must be agreed with the official liquidator, failing which the petitioning creditor is entitled to have his bill of costs taxed on the indemnity basis. The principle underlying this rule is that, by presenting a winding up petition, the petitioner is invoking class rights. Every creditor is entitled to be heard on the petition; in the event that the petitioner decides not to pursue his petition for whatever reason, any other creditor may be substituted; and any winding up order takes effect for the benefit of and is binding upon the creditors as a whole, whether or not they participated in the proceeding. CWR O.24, r.8 is designed to ensure that a successful petitioning creditor is not left out of pocket or put in a position in which he is effectively subsidizing other members of the creditor class.
6. In the case of a contributory's petition presented on just and equitable grounds, the general rule as to costs depends upon what direction is made by the Court pursuant to CWR O.3, r.11. If the Court characterizes the petition in question as a proceeding against the company in which it can properly participate as a defendant, CWR O.24, r.8(2)(a) puts a petitioning contributory in the same position as a petitioning creditor. I made such a direction in this case. Having successfully obtained relief, which takes effect for the benefit of the shareholders as a whole, the Petitioner is entitled to have its costs paid out of the assets of the Company. Whilst Rule 8(2)(a) does not actually say that such costs should be taxed on the indemnity basis, it would be wrong in principle to apply the standard basis because that would have the effect of making the successful petitioning shareholder subsidize the other members of the class who will benefit equally from whatever order has been made on the petition. This is the basis upon which the order for costs was made in favour of the Petitioner.

7. Different policy considerations apply when the Court makes a direction pursuant to CWR O.3, r.11(2) that a contributory's petition should be treated as an *inter partes* proceeding between the petitioning shareholder(s) as applicant and the other shareholder(s) as respondent. Typically, the Court will give a direction to this effect if the petition pleads that the company is a "quasi-partnership". If the proceeding is characterized as ordinary adversarial litigation between individual shareholders, none of them will be allowed to finance their case out of the company's assets. By virtue of CWR O.24, r.8(2)(b), the general rule in this type of case is that the unsuccessful shareholder(s) should pay the costs of the successful shareholder(s), such costs to be taxed on the standard basis if not agreed. The purpose and effect of this rule is that the opposing parties will be subjected to the same costs regime as that which applies to any other ordinary *inter partes* litigation governed by GCR O.62.

Taxation of costs in liquidation proceedings

8. The rules relating to the taxation of costs contained in Parts IV (Taxation of Costs), V (Powers of Taxing Officers) and VI (Procedure on Taxation) of GCR Order 62 apply to liquidation proceedings by virtue of CWR O.24, r.11 which states :-

In the event that an order for costs made in a liquidation proceeding is required to be taxed, it shall be taxed by the taxing officer in accordance with the provisions of GCR Order 62, Parts IV, V and VI except that Rules 14 and 15 shall not apply.

The heading of this rule is *Taxation of Costs and Appeals* (emphasis added), yet the rule itself does not refer to Part VII (Review of Taxation and Appeal on Points of Construction), which must be a mistake. The Insolvency Rules Committee must have intended that the taxing officer's decision be subject to review by a judge, with a limited right of appeal to the Court of Appeal on points of construction. Rule 11 talks about *orders* for costs being taxed, which must also be a mistake. It is the litigant's bill of costs which is taxed, not the judge's order. Rule 11 also states that the Guidelines (contained in Practice Direction #1 of 2001) shall apply to taxations of bills of costs rendered pursuant to orders made in liquidation proceedings.

9. In order to understand true purpose and effect of the various rules relating to taxation contained in Part IV of GCR Order 62, it is important to remember that the rules relate to bills of costs rendered pursuant to two quite different types of order. Orders for costs fall into two distinct categories, namely (1) orders for the payment of

costs out of a fund and (2) *inter partes* orders whereby one party is ordered to reimburse costs incurred by his opponent.

10. Orders of the first type are routinely made in favour of fiduciaries responsible for administering assets and often also made in favour of the beneficiaries on whose behalf the assets are being administered. The Financial Services Division of this Court frequently makes orders in favour of trustees and official liquidators to the effect that their costs of proceedings be paid out of the assets under administration. The Court may make similar orders in favour of a beneficiary of a trust, a creditor of an insolvent company or a shareholder of a solvent company in liquidation. The Court's jurisdiction to make such orders is not derived from GCR Order 62. In the case of the examples I have cited, the jurisdiction derives from the Trusts Law and the rules made pursuant to the Companies Law. The general principle is that the fiduciary (or the beneficiary if he is acting in the interests of the beneficial class as whole) is entitled to be indemnified in respect of the legal fees and expenses incurred in respect of any legal proceedings except insofar as they are incurred improperly or unreasonably. Given the nature of this country's financial services industry, fiduciaries routinely instruct foreign lawyers for a huge variety of different reasons and it would be wholly inappropriate for the Grand Court Rules Committee or the Insolvency Rules Committee to make any attempt to regulate the sources from which an official liquidator or any other fiduciary might properly seek legal advice which will be paid for out of the funds under administration. This principle applies equally to the case of a beneficiary whose legal fees are being paid out of the fund in circumstances where he is deemed to be acting in the interests of the beneficial class as a whole. In my judgment the order for costs which I made in favour of the Petitioner pursuant to CWR O.24, r.8(2)(a) falls into this category. Such orders are always made on the indemnity basis.
11. The rationale for making orders for costs of the second type is fundamentally different. The general principle is that a successful party to any proceeding should be able to recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court. By definition, such parties are acting against each other's interest. They are incurring legal fees for the purpose of advancing their own case and damaging their opponent's case. The jurisdiction to make such orders for costs is derived from section 24 of the Judicature Law (2007 Revision) and Part II of GCR Order 62. The policy reasons for regulating *inter partes* orders (sometimes referred to as "party and party orders") are different from the reasons for regulating

orders for the payment of costs out of a fund. Absent misconduct, *inter partes* orders are always made on the standard basis.

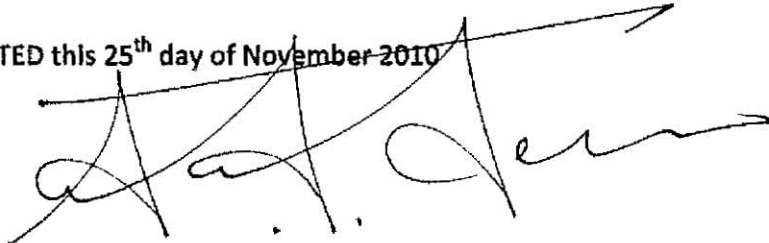
12. GCR O.62, r.18 applies to *inter partes* orders. Its purpose and effect is to protect the unsuccessful party from the financial consequences of the successful party's decision to engage both local lawyers and foreign lawyers. The overriding objective, expressed in GCR O.62, r.4(2), is that the successful party should recover from the opposing party the reasonable costs incurred in conducting the litigation in an "economic, expeditious and proper manner". The opposing litigants' expectation of recovery and risk of payment are complimentary. The successful party's expectation of recovery is limited to the reasonable amount necessary to conduct his case "economically, expeditiously and properly." Engaging foreign lawyers is not improper and will not necessarily cause delay, but it is inherently uneconomic. Engaging foreign lawyers, who are not admitted as Cayman Islands attorneys, inevitably results in some duplication of work and some extra cost. Rule 18 is intended to protect a party from the financial consequences of his opponent's decision to conduct his case in an extravagant manner by engaging foreign lawyers in addition to local lawyers. Rule 18 is also intended to deter litigants from conducting their case through unqualified persons who are not subject to the disciplinary regime applicable to Cayman Islands attorneys, including those who are temporarily admitted. The limitation upon recovering the cost of engaging foreign lawyers is intended to apply to *inter partes* orders which are always liable to be taxed on the standard basis (absent misconduct on the part of the paying party). The same policy considerations do not apply, or at least with the same force, in the context of orders for the payment of costs out of a fund, made in favour of a person having a fiduciary responsibility for administering the fund or in favour of a person having a beneficial interest in the fund.
13. An *inter partes* order for costs to be taxed on the indemnity basis can only be made under Part II of GCR Order 62 if the Court 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". The decision of Henderson J. in *Sagicor General Insurance (Cayman) Limited -v- Crawford Adjusters (Cayman) Limited* [2008] CILR 482 is such a case. The plaintiff made allegations of fraud and conspiracy, which were maintained for over two years and then abandoned on the eve of the trial. Henderson J. inferred that the plaintiff had never been in possession of a body of evidence capable of establishing its pleaded case. Although he did not say so in terms, it is clear that Henderson J. made an order on the indemnity basis because he was satisfied that the case had been conducted improperly or unreasonably. This

had a very fortuitous result for one of the defendants who had engaged foreign lawyers without having them temporarily admitted as Cayman Islands attorneys in a timely manner. But for the misconduct of the plaintiff and the consequential order for costs on the indemnity basis, he would not have been able to recover any part of the fees paid to his foreign lawyers and the difficulty which he encountered in finding local lawyers willing and able to act for him would have been no answer to the limitation imposed by GCR O.62, r.18. The paying party under an *inter partes* order loses the protection of Rule 18 only if he is guilty of conducting his proceeding improperly, unreasonably or negligently.

Conclusion

14. The Petitioner's order for costs was made pursuant to CWR O.24, r.8(2)(a). Such orders are properly characterized as orders for payment out of a fund. It follows that the order was made on the indemnity basis and the limitations which would be imposed by GCR O.62, r.18 upon an *inter partes* order do not apply. The Petitioner is entitled, in principle, to claim reimbursement of fees paid to its foreign lawyers whether or not they were temporarily admitted as Cayman Islands attorneys.

DATED this 25th day of November 2010



The Hon. Mr Justice Andrew J. Jones QC

