CICA 10/2011

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT
FINANCIAL SERVICES DIVISION
(Justice Andrew Jones QC)
(Cause No 113 of 2010 AJJ)

BEFORE

The Rt Hon Sir John Chadwick, President
The Rt Hon Sir Bernard Rix, Justice of Appeal
The Hon Sir George Newman, Justice of Appeal

BETWEEN

WEAVERING MACRO FIXED INCOME FUND LIMITED
(IN LIQUIDATION)

Claimant/Respondent to Appeal/
Applicant for leave to appeal

-and-

(1) STEFAN PETERSON
(2) HANS EKSTROM

Defendants/Appellants/
Respondents to Application

Ms. Kirsten Houghton of Campbells for the Appellants and Respondents to Application, Stefan Peterson and Hans Ekstrom
Mr Shaun Folpp of Ogier for the Respondent to the Appeal and Applicants for leave to appeal to the Privy Council, Weavering Macro Fixed Income Fund Limited (in liquidation)

Hearing: 4 May 2015
Judgment : 4 May 2015

RULING
on application for leave to appeal to the Privy Council

and

JUDGMENT ON COSTS

Revised from transcript and Approved released 23 June 2015

Sir John Chadwick, President:

1 On 12 February 2015 this Court handed down its judgments allowing the appeal of the defendants, Stefan Peterson and Hans Ekstrom, against an order made by Justice Andrew Jones QC on 26 August 2011 by which he awarded damages against them in

the sum of US$111 million. In those judgments the Court indicated a provisional view that there was no reason why the costs in this Court and below should not follow the event; but directed that either party might, if so advised, seek a different order as to costs by lodging representations in writing. Representations as to costs have been lodged both by the appellants and by the claimant, Weavering Macro Fixed Income Fund Limited, respondent to the appeal, acting by its Joint Official Liquidators. Further, by notice of motion issued and filed on 5 March 2015, the respondent has sought leave to appeal to the Privy Council.

Leave to appeal to the Privy Council

2 Section 3(1) of the Cayman Islands (Appeals to the Privy Council) Order 1984 is in these terms (so far as material):

> "Subject to the provisions of this Order, an appeal shall lie as of right from decisions of the Court to Her Majesty in Council in the following cases —
>
> (a) final decisions in any civil proceedings, where the matter in dispute on the appeal to Her Majesty in Council is of the value of £300 sterling or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards."

3 This, then, is a case in which an appeal to Her Majesty in Council lies as of right. Nevertheless, this Court understands it to be the practice of the Privy Council to require an order from this Court that it is satisfied that the matter does, indeed, fall within 3(1)(a) of the 1984 Order. The Court being satisfied in that respect, we make an order in these terms:

> "Upon being satisfied that pursuant to section 3(1)(a) of the Cayman Islands (Appeals to the Privy Council) Order 1984 an appeal to the Privy Council from the order of the court dated 12 February 2015 lies as of right the appellant is formally granted final permission to appeal from that order."

4 Section 5 of the 1984 Order provides that:

> "Leave to appeal . . . in pursuance of the provisions of the Order shall, in the first instance, be granted by the Court only —
>
> (a) upon condition of the appellant, within a period to be fixed by the Court but not exceeding ninety days from the date of the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the Court in a sum not exceeding £500 sterling for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for

non-prosecution, or of the Judicial Committee ordering the appellant to pay the costs of the appeal (as the case may be); and

(b) upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for the purposes of procuring the preparation of the record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose."

In order to give effect to the requirements in section 5 of the 1984 Order, we will add to the order to be made by this Court a paragraph in these or similar terms:

> "The appellant shall, within 14 business days of the date of this certificate, procure some sufficient person on its behalf to give security in such as may be agreed between the parties (or, in default of agreement, be fixed by further order of the Court), to answer costs in the case should any be ordered to be paid by the appellant to the respondents on the appeal and a sum of £500 sterling for the due prosecution of the appeal as required by section 5(a) of the 1984 Order."

And we will also provide in the order of this Court that:

> "In default of the appellant so providing such security within the time limited, and upon the attorneys for the respondent certifying such fact in writing to the court, the appeal should thereupon be struck out without further order and that the appellant shall pay to the respondents their costs occasioned by the appeal, including their costs of this order, and such costs shall be taxed by the taxing officer on the indemnity basis, if not agreed."

and that:

> "Subject to any further order the Court of Appeal or the Judicial Committee of the Privy Council may make to the contrary, the appellant shall be liable to pay the respondents' costs of the motion to be taxed by the taxing officer on the indemnity basis, if not agreed."

5 The parties are encouraged to agree the directions that are needed in relation to the time for taking the various steps needed to bring the matter before the Privy Council; and also to agree, if they can, the amount of the security to be provided pursuant to section 5(a) of the order. If there is difficulty in agreeing those matters, application can be made to a single judge of this court in writing for finalisation of the order.

Costs

6 The principal representation as to costs made on behalf of the successful appellants, was that the court should order that they should have their costs of the proceedings, both in this court and in the court below, on an indemnity basis. In making that submission, they relied – as former directors of the claimant company - upon the first

sentence in article 182 of its articles of association of the company, which was in these terms:

> "182. Every Director, agent or officer of the Company shall be indemnified out of the assets of the Company against any liability incurred by him as a result of any act or failure to act in carrying out his functions other than such liability (if any) that he may incur by his own willful neglect or fault."

It is submitted that, in applying that provision, the relevant liability incurred by each of the respondents – and against which each claims, as a director, to be indemnified by the company - is the liability to pay the legal fees charged by their advocates and advisers (and the disbursements made) in resisting these proceedings. It is said, in effect, that the liability to pay those costs was incurred by the respondents as a result of acts, or failures to act, in carrying out their functions as directors as alleged in the proceedings; and that they are entitled to be indemnified under article 182 on the basis that, but for their acts or failures (or alleged failures) to act, they would not have been sued by the company acting through its liquidators. Properly analysed, therefore, the directors' claim to be re-imbursed their costs is a contractual claim to an indemnity.

7 Order 62 rule 4(3) of the Grand Court Rules is in these terms:

> "4(3) A person who claims to be entitled pursuant to a contract to recover the legal fees and expenses incurred in enforcing that contract shall be entitled to judgment for the amount found due under the contract and such amount shall not be subject to taxation pursuant to this Order."

The effect of that rule, as it seems to me, is that, where a claim is advanced pursuant to contract to recover legal fees incurred pursuant to an indemnity in the contract, the court is not asked to exercise the discretion that it would otherwise have under section 4 of the Judicature Law which gives to the court power, pursuant to the Rules, to make such order as to costs of proceedings as it thinks the justice of the case requires. A contractual claim does not invite the court to exercise any discretion. It requires the court to consider whether the contractual right relied upon has been established - both as a matter of construction of the contract and on the facts - and then to enter judgment for the amount found due under the contract. Determination of the amount due under the contract may, of course, require an assessment in the nature of an assessment of damages.

8 Further, a claim to costs within GCR Order 62, rule 4(3) may require the court to adjudicate upon contractual issues raised in circumstances in which - as in this case –

those issues have not been pleaded in the action. The consequences are helpfully discussed in the judgment of Mr Justice Ferris in *John and others v Price Waterhouse and another (Costs)* [2002] 1 WLR 953. In that case, the court had already exercised its discretion, under what was then section 51 of the Supreme Court Act 1981; and it considered that its powers under that section were exhausted. Mr Justice Ferris held that the right course was to require the successful defendants commence fresh proceedings to enforce their indemnity.

9 It seems to us that it would be unsatisfactory to require the institution of fresh proceedings in a case such as this. The more sensible course is to consider an application on behalf of the directors, if and when made, for leave to amend their defence in these proceedings so as to add a counterclaim seeking a declaration as to their right to the contractual indemnity on which they seek to rely; or, perhaps, seeking an order that they be entitled to judgment for the amount found under the contractual right. Counsel for the directors was unable to take instructions as to whether or not to make such an application. In those circumstances, the Court will stand over the contractual claim for indemnity costs so that she can take such instructions.

10 If such an application is made and the Court gives leave to amend, then it may need to go on to order service of points of claim and points of defence directed to the question whether such a contractual right does exist under article 182; and, if so, whether reliance can be placed upon it and what part, if any, of the costs liability which the directors have incurred can be said to be a result of any act or failure to act in carrying out their functions as directors. The answer to questions of that nature may not be self- evident; as can be seen from the discussion in the judgment of Mr Justice Ferris in *John v Price Waterhouse* (*ibid*, [27] – [34]); but further consideration of those matters must await an application to amend and the decision of the court upon that application.

11 The question for this Court is whether - in the absence of a claim being advanced by way of amendment that the directors are entitled to recover legal fees and expenses by way of indemnity pursuant to contract - it should make an order, provisionally at least, under the discretion conferred by section 24 of the Judicature Law. In that context, it

is important to have in mind a restriction on the Court's discretion which is imposed by GCR Order 62 rule 4(11). The rule is in these terms:

> "The Court may make an *inter partes* order for costs to be taxed on the indemnity basis only if it 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."

Counsel for the directors accepted that this was not a case in which it could be said that the company, through its liquidators, had conducted the proceedings, or any part of the proceedings, improperly or unreasonably or negligently. She accepted, also, that in those circumstances the Court could not make an order for costs to be taxed on the indemnity basis in the exercise of its jurisdiction under section 24 of the Judicature Law. But, as I have indicated, if the directors were to be successful on their contractual claim, then the restriction imposed by GCR Order 62, rule 4(11) would have no application: GCR Order 62 rule 4(3) provides that the amount payable in respect of costs to which a party is contractually entitled shall not be subject to taxation.

12 In my view it follows that we must approach the applications for costs which are before the Court on the basis that – at this stage and in the circumstances of this case - we cannot be asked to do more than make orders for costs to be taxed on the standard basis. The matter which requires decision is whether, as indicated by the provisional view expressed by this Court in the judgments allowing the appeal, we should follow the usual practice – set out in GCR Order 62, rule 4(5) - that the costs should follow the event; or whether this is a case in which some other order should be made as to the whole or any part of the costs.

13 On behalf of the company, counsel submits that this is a case in which the successful directors should have 35% of their costs of the proceedings, and that the company should have 65 % of its costs of the proceedings. That would produce a situation in which the successful parties - having resisted a claim made against them for damages on the basis of willful default - will end up paying to the unsuccessful party a sum amounting to 30% (more or less) of its costs of the proceedings. The authorities show that such a result is not conceptually impossible; but the Court must give careful consideration as to the basis upon which it is advanced before accepting that it would be an appropriate order to make.

14 It is said is that there were essentially two issues in these proceedings: first, whether the directors were in breach of their duties of care and skill to the company; and, secondly, whether in committing such breach they were acting in willful default or neglect.

15 As the judgments of this Court allowing the appeal make clear, the only breaches of duty on the part of the directors which gave rise to the liability (as the judge held) to pay to the company damages in the sum of US$111 million were their failure to read, with sufficient care, a report made by the Administrators in relation to the third quarter of 2008; and so failing to appreciate, from information in that report, that the counter-party to substantial interest rate swap transactions was an affiliate or associate of the fund. Had the directors read the Q3 2008 Report with sufficient care, they would have appreciated that what shown in financial statements as very substantial profits made under those interest rate swap contracts were illusory; because the counter-party had no funds to meet its liabilities. It was that breach which led to the judgment in the court below.

16 It was, however, reasonably plain that the company, through its liquidators, would have had very great difficulty in persuading the trial court that failure to pick up information in a document - which on the evidence the directors had read (albeit without sufficient care) - was the result of willful default; rather than the result of negligence, however gross. Had reliance been placed on those breaches alone, it would have been most unlikely that the company (on whom the burden fell) would have been able to demonstrate that they were attributable to willful neglect or default. In those circumstances, the company conducted the litigation on the basis of inviting the judge to look at a substantial history, from 2003 when the company was incorporated, of failures or alleged failures on the part of the directors to carry out their duties as such; which, it was said, gave rise to the inference that they had positively decided from an early stage that they would not perform any of their duties as directors. Such a decision, it was said, was to be taken as constituting of willful default in relation to all subsequent breaches of duty. The judge accepted that that was a proper inference to draw. This court differed from the judge on that point; and, in substance, on that point alone.

17 In those circumstances it is, to my mind, impossible to say that there were two distinct issues in the trial: the first, breach of duty, and the second, willful default. On a true analysis, in order to establish willful default, the company had to persuade the judge as to the earlier - or, in some cases, later - breaches of duty on which they relied to support the inference which they asked him to draw. For the directors to have admitted breaches of duty in relation to the earlier matters - which they did not - would not have advanced the company's case because it needed to show not only that those breaches had occurred but also that the directors were aware as to what their duties required them to do in relation to those earlier matters and made a deliberate decision not to do what their duties did require. Those matters were all in issue and it was necessary for them to be the subject of investigation and cross-examination at the trial if the judge were to be persuaded to reach the result for which the company was contending. Properly analysed, this is not a case in which it can be said that the directors lost on one issue and won on another. There was, in reality, only one issue: whether the failure to pick up the information in early November 2008 was a result of willful neglect and default. On that issue the directors were successful.

18 There is, therefore, in my view, no reason in this case to depart from the general rule that costs should follow the event. In the exercise of the discretion conferred by section 24 of the Judicature Law and in accordance with the Rules, that is the order which I would make.

19 In order to avoid it being said that the court is *functus officio* in relation to any claim to payment on the basis of a contractual right, I would defer the drawing of an order, awarding costs on the standard basis as a matter of discretion under the Law, until after the directors have had an opportunity to make an application to amend; and, if they do make such an application, until after the court has determined that application. I take that view that that would be an appropriate course for the obvious reason that, if the directors were successful in their contractual claim, they would be entitled to their costs as a matter of contract without a taxation; and that there can be no purpose in having a taxation on a standard basis in the interim, before that issue has been determined.

Sir Bernard Rix, Justice of Appeal:

20 I agree. I would only add this by reference to the liquidators' submission before us this morning that, even though ultimate losers in this action, nevertheless that they should receive a net 30 percent of costs here and below. In my judgment, it would take most unusual circumstances, even in circumstances where an issue-based or proportionate approach was adopted to costs, for the loser to end up receiving a net payment of costs in its favour. (See The Kastor Too (Costs) [2004] EWCA Civ 277).

Sir George Newman, Justice of Appeal:

21 I agree with both judgments.