23-02-01

# IN THE CAYMAN ISLANDS COURT OF APPEAL

Civil Appeal No. 34 of 1998
Grand Court Cause No. 7 of 1998

**BETWEEN:**

**ALLIED LEASING AND FINANCE CORPORATION**

**Appellant/Respondent**

**- and -**

**BANCO ECOMOMICO**

**Respondent/Petitioner**


BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Rt. Honourable Mr. Justice T. Georges, Justice of Appeal
The Honourable Mr. Justice G. Collett, Justice of Appeal

John Martin Q.C., Thomas Lowe and Linda DaCosta instructed by Myers & Alberga for the Appellant/Respondent.
Robert Hildyard Q.C., Guy Locke and Sara Collins instructed by Walkers for the Respondent/Petitioner.

Delivered February 23rd 2001

## RULING AS TO COSTS

The Appellant company's appeal against the order of Graham J. in the Grand Court, that the company should be wound up, was dismissed by a unanimous decision of this court handed down on 5th May, 2000.

The question of costs both in the Grand Court and on appeal was then reserved for further argument. In the event, written submissions were prepared by both teams of counsel and

submitted for our consideration and we are indebted to them for their assistance in that regard.

In his ruling as to costs delivered on 3rd December, 1998 Graham J had ordered that, although the costs of the Petitioner should be paid out of Allied Leasing as an expense of the liquidation, the costs of that company in resisting unsuccessfully the Petition to wind up should only be paid out of these assets after payment in full of all the debts of the company to the Petitioner and to all other unsecured creditors. Known as a "Bathampton order" this direction has the effect of ensuring that the estate available for distribution to creditors generally is not diminished by payment of the company's costs in priority to their claims and is an exceptional jurisdiction invoked only where opposition to the Petition is seen as wholly unjustified.

Graham J. also exceptionally made orders for payment of the Petitioner's costs against three individuals, Jose R. Azevedo, William J. Donnelly and Cesar Melo, perceived as being the persons formerly controlling Allied Leasing and responsible for the mounting of opposition to the Petition; as well as against White Lightening Inc. another corporate entity controlled by them. None of these individuals or entities was or had been joined as a party to the winding up proceedings. Moreover none of them was a resident within the Cayman Islands at the time that the ruling as to costs was delivered.

The successful Respondent/Petitioner now moves the Court to make similar orders in respect of the unsuccessful appeal of Allied Leasing to this Court while that company's

attorneys in turn move the Court to discharge the order of Graham J. and to substitute the more usual order that the costs of the company, like these of the Petitioner, be paid out of the available assets as an expense of the winding up in priority to creditors' claims. The key to a resolution of these questions is in my judgment clearly to be discovered by examining in the first place, whether or not the Grand Court has any jurisdiction to make orders for payment of costs in civil cases against individuals or entities which have not been made parties to the relevant proceedings.

The jurisdiction to make such orders did not exist at common law and there is no recorded case before this one of the making of such an order in the Cayman Islands. In England and Wales the jurisdiction to make such orders rests squarely upon section 51 of the Supreme Court Act, 1981. This section contains the phrase "and the Court shall have jurisdiction to determine by whom and to what extent the costs are to be paid" (my underlining). That phrase first found its way into the U.K. statute book by section 5 of the Supreme Court of Judicature Act, 1890.

Even so, for many years the English Courts held to the view that these words had not had the effect of creating a new jurisdiction to mulct non-parties in the costs of civil suits. It was only as a result of Aiden Shipping Co. Ltd. v. Interbulk Ltd. [1986] 1 A.C. 965 that the meaning of those sections was clearly laid down in the speech of Lord Goff at page 972 as encompassing jurisdiction, in exceptional cases and subject to rules of court, to subject non parties to orders for payment of costs.

Has a similar jurisdiction been conferred on the Grand Court of the Cayman Islands? The Respondents so contend but the difficulty which they face is that the all-important words relied upon by Lord Goff are wholly absent from the applicable statute, namely section 24(2) of the Judicature Law (1995 Revision). The phrase used there is merely "the awarding of such costs and charges shall be in the discretion of the court". This was the same phrase as appeared in the English legislation prior to 1890 and it is in my judgement wholly inadequate to create a new and exceptional jurisdiction of this kind unknown to common law. Moreover, if it had been sufficient to do so in England then the expanded and altered provision of section 5 of the 1890 Act would have been otiose: Parliament does not legislate unnecessarily.

Having considered the comparative legislation in point and the relevant authorities, we entertain no doubt that the jurisdiction to subject non-parties to payment of the costs of civil suits has yet to be introduced into the laws of the Cayman Islands. That being so, the orders of Graham J. subjecting the three individuals and one corporate entity to the liability for the Petitioner's costs of these windingup proceedings must be set aside. By the same token there is no jurisdiction in this Court to make any such order in respect of the Respondent's costs of appeal.

That being so, it is not necessary to pursue the further question, whether or not the absence of a non-party from the jurisdiction of our Courts should affect his putative liability for costs in such a case and if so under what conditions.

The absence of jurisdiction to make orders against non-parties also bears significantly upon the other order made by Graham J. in his ruling as to costs - the Bathampton order.

That order takes it names from the case of In re Bathampton Properties Ltd. (1976) 1 W.L.R. 168. Brightman J. there held that a Court should look critically at costs incurred by an insolvent company in unsuccessfully opposing a winding up Petition on the ground that the debt relied on is disputed, when the advantage and perhaps the purpose of delaying liquidation is a possible surplus for the beneficial owners of the company's capital. The object of the order was stated to produce a result which was just and fair as between these beneficial owners on the one hand and the general body of creditors on the other.

It is important to recall that this decision arrived at a time when the prevailing view in England and Wales, as laid down in John Fairfax & Sons Pty. Ltd. v. E.C. De Witt & Co. (Australia) Pty. Ltd. [1958] 1 Q.B. 323 was that no jurisdiction existed there to mulct non-parties in the cost of civil proceedings. Once that view was shown to be false, the climate changed and Bathampton orders fell out of favour in that jurisdiction. In Re Record Tennis Centres Ltd. [1991] B.C.C. 509 Hoffman J. (as he then was) observed (at page 516) "The court therefore now has power to do directly what Brightman J. tried to do indirectly in Bathampton. In these circumstances, I find it difficult to imagine a case in which it would be proper in future to make an order in the Bathampton form".

Somewhat naturally the Appellant relies on these dicta and has urged this Court to follow that line of authority. However, their submission ignores the absence of jurisdiction in the Cayman Islands to do what the courts in England are able to do by way of making orders for costs against a non-party to the proceedings.

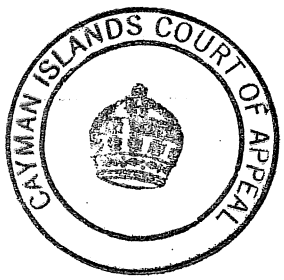
In the Cayman Islands therefore, in our judgement the making of Bathampton orders is still a beneficial jurisdiction in appropriate cases. Is this one of them? The Appellant company's attorneys have argued that it is not because no wrongdoing is imputed to themselves as distinct from the three individuals formerly in control of Allied Leasing. I accept that the attorneys cannot be blamed for the unjustified opposition to the winding up Petition. On the other hand, it must have been apparent to them that to mount a sustained opposition to the Petition, having regarded to the status of Allied Leasing as a mere subsidiary creation of Economico, was risky and all the more so since the individual principals of the company, giving them instructions to oppose, were all resident out of the jurisdiction of the Cayman Courts. This being so, there is considerable force in the argument that the Appellant's attorneys as prudent lawyers would have secured a fund in advance for the payment of their eventual fees and disbursements before accepting instructions to oppose.

If this is the case in relation to the Grand Court proceedings, it is even more strongly evident in relation to the appeal, a Bathampton order having already been made in the Court below. It is inconceivable that experienced firms of attorneys would have launched

an appeal in these circumstances without having adequately secured the eventual fees and disbursements from a source of assets outside Allied Leasing.

We, therefore, will allow the appeal to the extent only of discharging the orders of Graham J. for the payment of the Respondent Petitioner's costs in the Grand Court by Messrs. Azevedo, Donnelly and Melo, and by White Lightening. We will affirm his order for payment of the company's costs of these proceedings out of its assets only after all creditors' proved claims have been met in full. We will further make a similar order in respect of the Appellant company's costs of the appeal to this Court. The costs of procuring this ruling as to costs are to be treated as costs in the appeal generally.

**Collett, J.A.**




**Zacca, P.**

I agree.

**Georges, J.A.**

I agree.