IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 11 OF 2021 (RPJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF GRAND STATE INVESTMENTS LIMITED

Written Submissions from:	Ogier on behalf of the Company Harney Westwood & Riegels on behalf of the Petitioner
Before:	The Hon. Justice Parker
Heard:	On the papers
Date of Decision	17 March 2023
Draft Judgment Circulated	8 March 2023
Judgment Delivered	17 March 2023

HEADNOTE

Winding up petition- dispute on substantial grounds- arbitration agreement- application to appoint joint provisional liquidators- company successful- basis of taxation of costs award- standard or indemnity- analysis of indemnity costs-Section 24 Judicature Act (2021 Revision)- GCR order 62 rules 4 and 11- exercise of discretion- focus on conduct of losing party- conduct or circumstance which takes the case out of the norm

COSTS JUDGMENT

Introduction

1. The Petitioner was ordered to pay the Company's costs of or incidental to (a) the winding up petition presented by the Petitioner on 12 January 2021 (the "Petition"), (b) the Company's summons (the "Summons")[1], and (c) the ex parte summons filed some 3 business days prior to the hearing of the Petition and Summons, by which the Petitioner sought to appoint joint provisional liquidators to the Company (the "JPL Application") (together, the "Applications").

2. The Court also ordered that if the basis of taxation of the Company's costs (the "Taxation Issue") cannot be agreed, the parties shall be at liberty to apply to have the Taxation Issue determined by the Court on the papers. Written submissions were exchanged and the Company served a Reply on 2 March 2023.

3. The parties have been unable to reach agreement on the Taxation Issue. The Company applies for its costs of each of the Applications to be taxed on the indemnity basis. The Petitioner submits that costs should be assessed on the standard basis, in the usual way.

4. The Court concluded that the Petitioner had not satisfied it that there was a debt due which had not been paid and that the Company was insolvent. There were *bona fide* and substantial disputes in relation to those matters and so the Petition was struck out. The disputes regarding the debt claimed which were the subject of the Arbitration Agreement (see below) would in the alternative have been stayed. The Petitioner had not satisfied the conditions necessary for the appointment of joint provisional liquidators and that application was also dismissed.The Company therefore won in all material respects.

The Law on costs and indemnity costs

5. Section 24(1) of the Judicature Act (2021 Revision) provides that the costs of and incidental to all civil proceedings are entirely in the discretion of the Court with such discretion being "extremely

[1] *Which sought orders that (a) the Petition be struck out as an abuse of process on the basis that there is a genuine and substantial dispute as to the existence of the debt which formed the subject matter of the Petition ; or (b) in the alternative, the Petition be dismissed or stayed to permit the dispute as to the alleged Petition Debt to be referred to arbitration in Hong Kong pursuant to the terms of the Amended and Restated Shareholders Agreement dated 4 March 2013 .*

wide" and "not fettered or circumscribed"[2]. Notwithstanding the breadth of that discretion, it is only exercisable according to established principles.

6. The general rule is that costs should follow the event[3].

7. The Grand Court Rules (2023 Revision) (the "GCR") O.62, r.4 (2) and (11) provide:

> *"(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by successful party in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court …*
>
> *(11) 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."*

8. Guidance on the exercise of the discretion to award indemnity costs can be found in *AHAB v SAAD*[4]. The Court's focus should primarily be on the conduct of the losing party with regard to an award for indemnity costs. Such an order, whilst exceptional, could be made where the conduct was improper, negligent or unreasonable.

9. Whilst the Chief Justice in *AHAB* noted that the substantive merits are not the primary focus, an assessment of whether conduct is improper and unreasonable is not always divorced from the merits.

10. For example, *In the Matter of Ritchie Capital Management LLC et. al v Lancelot Investors Ltd et al (Unreported, Parker J, 4 March 2021)* at §6 the Court noted that an award of indemnity costs may be appropriate where "*a case has been pursued which is manifestly hopeless, or where it must have been appreciated to be very weak and highly speculative*".[5]

---

[2] *See Ritter and Geneva Insurance SPC Limited (in voluntary liquidation) v Butterfield Bank (Cayman) Limited [2018 (2) CILR 638] at §38*

[3] *GCR O.62 r.4(5)*

[4] [2013 (2) CILR 344]. *See also Abdulhameed Dhia Jafar v Abraaj Holdings & Ors (Unreported, Segal J, 17 January 2022) at §§28 –50 per Segal J*

[5] *See also Al Sadik v Investcorp Bank BSC [2012 (2) CILR 33 per Jones J at §14: A party who asserts a cause of action he knows that he has no legitimate basis for doing so acts improperly" and Valley Health System v Augusta Healthcare, Inc (Unreported, Ramsay-Hale CJ, 23 August 2022) at §13 "although the award*

11. The principles to be applied when dealing with this question were summarised in *Three Rivers D.C. v The Governor and The Company of the Bank of England*[6] at §25 as follows:

> (a) the court should have regard to all the circumstances of the case;
> (b) the critical requirement is that there must be some conduct or some circumstance which takes the case out of the norm;
> (c) the relevant conduct need not be immoral, but unreasonable; and
> (d) regard should be had to an unsuccessful claimant's conduct, including not only the reasonableness of the manner in which it pursued its case, but also whether it was reasonable to pursue particular allegations at all.

12. The court in *Three Rivers* considered the following to be the approach when applying the above[7] :

> (a) where a claim is speculative and weak, opportunistic or thin, a plaintiff who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails;
> (b) in addition, the following circumstances take a case out of the norm and justify an order for indemnity costs:
> (i) where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time; and
> (ii) where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end.

13. All of those features were present in the *Three Rivers* case.

14. To justify such an award there should normally be an element in the losing party's conduct that deserves a "mark of disapproval", involving conduct which is unreasonable to a high degree[8].

---

of indemnity costs is concerned with the party's conduct of the proceedings, the inquiry is not unconnected with the merits"

[6] *[2006] 5 Costs LR 714*

[7] *These principles have been considered and applied by Smellie CJ in Talent Business Investments Ltd v China Yinmore Sugar Co. Ltd [2015 (2) CILR 113] at §41*

[8] *AHAB v SAAD Investments Company Limited [2013] (2) CILR 344*

Determination

Indemnity Costs because the Petition was abusive

15. The Court is not persuaded that the arguments advanced by the Petitioner were abusive notwithstanding the outcome of the application. The Court has considered McPherson's Law of Company Liquidation, 5th Edition at [3-158], where it is said that "…*where the company always maintains that it disputes the petition debt, a court is likely to award indemnity costs against the Petitioner unless there are exceptional circumstances'*[9] and the approach taken in *Re a Company (No 2507 of 2013) [2003] EWHC 1484 (Ch) at §12-§14* where the English Court held that, where a petition is presented where the underlying debt is known to be a disputed debt, *"[i]t seems to [the court] that the presentation of this petition was a straightforward abuse of the process of the court which deserves the visiting upon the petitioner of indemnity costs".*

16. The question of whether to exercise its discretion to award indemnity costs on the ground that the presentation of a petition was abusive, often depends on the basis upon which the debt is disputed and the prior communications of the parties.[10]

17. In this regard it is to be noted that it is not, without more, improper to advance a genuine case which fails as a result of the Court's rejection of the evidence or its interpretation of the law and in such a case, standard costs ought to be ordered. The outcome of litigation does not lead to the conclusion that the losing party had no legitimate case and was abusing the Court's process in some way.[11]The position should not be any different in winding up petitions.

18. If there is nothing unusually unreasonable about the paying party's conduct, the appropriate order is for taxation of costs on the standard basis.

19. The Court has concluded that this was not a case where pressure was sought to be placed on a Company concerning a debt where there were clearly grounds to dispute it or where there was unreasonable conduct by the Petitioner to a high degree.

[9] *Citing TJ Ross 2000 SCLR 161 and 11/21re Sykes [2012]EWHC 1005 Ch.*
[10] *See re Sykes ibid; the Court has had regard to the correspondence of 29 December 2020 and 11 January 2021*
[11] *Al-Sadik v. Investcorp Bank BSC (2) [2012] (2) CILR 33, Jones J at §§16-17 and Asia Pacific Ltd. v ARC Capital LLC [2015] 1 CILR 299, Chadwick P at §56 both cited in Talent Business Investments Ltd. v China Yinmore Sugar Co. Ltd [2015] (2) CILR 113 at §§37 and 38*

20. As the Court also held in *Re Altair Asia Investments Limited* in the context of a winding up Petition the question as to whether to award indemnity costs depends primarily on the conduct of the Petitioner [12]*:*

> *"[16] …the fact that the petitioner knew that the debt was disputed and did not prevail in its arguments does not lead to the conclusion that the arguments should not have been brought in the first place*
>
> *[17] Simply because the petitioner knew that the company disputed the alleged debt and advanced a number of arguments as to why that was the case is not in my view sufficient to conclude that it behaved improperly or unreasonably in pursuing the Petition. It would not be just to award indemnity costs to a company which simply established that its defence had realistic prospects of success to cause the petition to be dismissed.*

21. The Petitioner issued the winding up petition on the basis that the redemption provisions of the Shareholders Agreement dated 4 March 2013 (the "Shareholders Agreement") imposed a current obligation on the Company to pay a debt, which could not be genuinely disputed, such that the Company was liable to be wound up.

22. The Petitioner took the view that at least one of the redemption events stipulated in the Shareholders Agreement had occurred, and that it was entitled to issue a written notice of redemption pursuant to the Shareholders Agreement, to demand that the Company redeem all of its Series C Preferred Shares for the total redemption price of US$71,098,887 by the redemption date (30 October 2020). The Petitioner issued a statutory demand demanding payment of the unpaid redemption debt on 9 December 2020 before filing the Petition on 12 January 2021 (the "Statutory Demand").

23. The Company's argument to defeat the Petition ,which was accepted by the Court, was that under the terms of the Shareholders Agreement (and the relevant provisions in the Company's Articles), the Company does not have to pay the redemption price by the redemption date if it does not have legally available funds with which to do so, and does not need to make payment until such funds become available.

24. The Petitioner also advanced a contention that on the Company's own evidence it had some available (albeit small) funds and was therefore indebted to the Petitioner irrespective of the true meaning of the "available funds" provision in the Shareholders Agreement.

---

[12] *Re Altair Asia Investments Limited (Unreported, 11 September 2020) Parker J*

25. The Court also rejected this contention holding: "…*the debt for these purposes is approximately US$71m as set out in the statutory demand following the redemption procedure. It is disputed bona fide and the Petitioner cannot succeed on the basis that US$3,128.66 has not been paid*"[13].This was a weak 'fall- back', but not a manifestly hopeless argument by the Petitioner. The Court is not persuaded that the Petitioner was acting unreasonably to a high degree in advancing it.

26. The Company in fact accepted that the Petitioner was a contingent creditor in that the Company may become liable in the future to pay the redemption price as and when it has legally available funds, but until such time as that condition was satisfied there was no presently due debt[14]. However, the main finding was that the Court accepted the Company's submission that it was arguable that the Company did not have to pay unless it has sufficient "*legally available"* funds to do so under the Shareholders Agreement.

27. The Court did not find that the Petitioner sought to assert any undue or improper pressure on the Company or had an ulterior motive in proceeding with the Petition. In the Court's view although the conduct of the Petitioner may be viewed as somewhat aggressive, it is not sufficiently unreasonable to warrant censure by way of an indemnity costs order.

Indemnity Costs because the Petition was brought in breach of the Arbitration Agreement

28. The Petitioner argued that although the Shareholders Agreement contained an arbitration clause, consistent with its general theme, there was no genuine controversy or claim raised by the Company as to whether the debt was due and owing. Again, in the Court's view this did not amount to improper or unreasonable conduct in the context of winding up proceedings for non-payment of a substantial debt. It was an alternative defence for the Company which would have been granted had it been necessary to do so.

29. On 15 March 2021, a few weeks before the hearing, the Company issued a notice of arbitration in the form prescribed by the HKIAC Administered Arbitration Rules[15].Apparently the Hong Kong arbitration is still ongoing and it is not yet clear whether or not the Petitioner's argument will prevail.

[13] *Judgment §60*
[14] *Judgment §37 ibid*
[15] *Judgment § 23* ibid

30. In circumstances where the Petitioner's position was that the debt was not *bona fide* disputed on substantial grounds, it was not unreasonable to high degree, in the Court's view, for it to pursue the winding up of the Company irrespective of the arbitration clause. Nor was its conduct in doing so improper or unreasonable to a high degree.

The JPL Application

31. The Court is not of the view that the JPL Application was made for an improper purpose or was manifestly hopeless such that the Company should be awarded indemnity costs[16].

32. It seems to the Court that the case for the appointment of joint provisional liquidators was weak, but not manifestly hopeless.

33. The Court said at §17 of the Judgment

> "*At the hearing I decided to hear the strike out application first, as one of the conditions for the appointment of provisional liquidators is that there is a prima facie case for making a winding up order. The Company argued that there is no such prima facie case and the Petition should be struck out or dismissed. If the court did not strike out the Petition it was likely that the court would make a winding up order and appoint official liquidators so the appointment of JPL's may not be necessary. Accordingly, it was necessary to determine the strike-out application which was likely to resolve a number of matters."*

34. It is important to avoid the wisdom of hindsight in this analysis. It was not in the Court's view unreasonable to a high degree to apply for the appointment of JPL's taking into account what should have been known by the Petitioner at the time.

35. The Court is of the view that the Petitioner seems to have had a genuinely held belief that there was a serious risk that the Company's assets had been and would continue to be dissipated based upon the fairly meagre evidence it had (concerning the alleged mismanagement of the Company relating to its failure to account for subscription monies and to submit its accounts ,which contained apparent inconsistencies, for audit.) In those circumstances the Court is not persuaded that an

application for the immediate appointment of JPL's was an unreasonable remedy to pursue, which takes this case out of the norm, albeit the evidence for the application was weak.

[16] *In the Matter of Avivo Group (Unreported, 25 January 2023, Parker J)*

36. As the Court said:

> *"..one would have expected to see evidence which demonstrates (i) a pattern of the Company attempting to deny the Petitioner its rights under the Share Purchase Agreement or the Shareholders Agreement; and (ii) a pattern of complaints made by the Petitioner to the Company which have gone unanswered. No such evidence is before the Court* [17]

37. In the result the Court decided that the Petitioner's allegations did not meet the threshold test established by the authorities for the appointment of JPLs[18].

38. The Court found "*….the Petitioner's evidence does not establish any risk of dissipation of assets and/or mismanagement, nor does it explain why the appointment of joint provisional liquidators is necessary to prevent that alleged dissipation or mismanagement*[19]*"*. However, as stated above the Court is not of the view that it was unreasonable to a high degree and/or improper for the Petitioner to have conducted the case as it did.

39. As to the urgency of the application the Court recognises that only two clear days' notice was given[20]. However, the Court accepts that in circumstances where the Petitioner's case was that the Company had not accounted to the Petitioner for the series C investment, the Petitioner did not have unreasonable concerns as to the risk to it, notwithstanding the provisions of the Shareholders Agreement which prevented the Company from spending those monies without consent[21]. The Court accepts the Petitioner's argument that it was only following the service of Fan 2 on 19 March 2021 (10 days before the issuance of the JPL Application) and in particular §31(c) where the Company admitted the Ledudu BVI (Precious Win Win) did not have funds, which precipitated the application.

---

[17] *Judgment § 99*
[18] *Judgment at §81*
[19] *Judgment at §81. The specific allegations raised by the Petitioner were addressed in §§ 94 to101 of the Judgment*
[20] *In breach of Order 4, rule 1 (2) of the CWR. In Joy Union Holdings Limited v Orient TM Parent Limited (FSD 299 of 2021), judgment dated 26 August 2022 Doyle J, no effective notice was given and no real justification for why the application was made on an ex parte basis was given see §§28,29 and 36*
[21] *See §§16 to 17 of Fung 2*

40. In addition, the Petitioner says Fan 2 stated that some of the funds had been used[22] and the accounts exhibited showed only a small remaining balance at the end of 2020. This apparently took the Petitioner by surprise as the cash position disclosed was different to and inconsistent with the consolidated management accounts for the offshore entities that had been provided to the Petitioner by the Company.

41. The Court finds that there was a reason for the Petitioner to have acted as it did, and it did not act improperly or unreasonably to a high degree in all the circumstances.

Foreign Attorney's Fees

42. GCR O. 62, r.18(1) provides that work done by foreign lawyers may be recovered on taxation on the standard basis provided that the foreign lawyer has been temporarily admitted in the Cayman Islands and the work was done after he or she was admitted. Where the foreign lawyer has not been admitted their fees cannot be recovered on taxation on the standard basis unless a dispensation is given[23].

43. In the circumstances of this case, the Court is satisfied that such a dispensation is appropriate since as can be seen from the Judgment, in order to properly defend the Petition, the Company was required to engage foreign attorneys to advise on the following issues:

> (a) the interpretation of the terms of the SHA (which is governed by Hong Kong law) and whether the Company could have been said to be in breach of its terms;
> (b) the ability of the Company to call for distribution from and/or to have access to the assets of the certain group companies in the PRC (which was governed, in part, by PRC law);
> (c) whether the Petitioner waived and/or was estopped from enforcing its redemption rights in circumstances where the Petitioner represented to the Company that it would be seeking to sell its shares instead of redeeming them (a matter governed by Hong Kong law); and
> (d) the impact of the Arbitration Agreement, including whether that Agreement covered the same subject matter as the Petition.

[22] *The Petitioner says it did not know what had happened to those funds after 30 November 2015-see Fung 2 §§16-17*
[23] *Sagicor v Crawford [2008 CILR 482].*

44. The Court accepts the Company's case that the purpose of the prohibitions as to the recoverability of foreign lawyers' fees is to avoid duplication[24], it was necessary to the Company's ability in this case to prepare its case to engage foreign counsel[25] and this was a matter of which the Petitioner would have been aware. In all the circumstances a dispensation is appropriate and will be granted.

Conclusion

45. This was not an application brought which was manifestly hopeless, or litigation conducted so unreasonably as to warrant a "mark of disapproval" from the Court by way of an indemnity costs order. There was nothing to take this case out of the norm to make it just to award indemnity costs. No "mark of disapproval" is appropriate. Costs will be awarded on the standard basis in the usual way consistent with the general approach under O.62 r.4. The Company's applications for indemnity costs for each of the Applications fail.

46. A dispensation from the usual approach is given to the Company in relation to GCR order 62 rule 18(1).

THE HON. MR JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT

[24] *Re General Shopping Investments Limited (Unreported, Kawaley J, 25 August 2020) at §24*
[25] *Ritchie Capital Management L.L.C et al and Lancelot Investor Fund Ltd & Anor (Unreported, Parker J, 4 March 2021)*