16-7-12

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 47 OF 2009 (AJJ)

The Hon Mr. Justice Andrew J. Jones QC
In Chambers, 3rd July 2012

BETWEEN:

RIAD TAWFIQ AL SADIK

Plaintiff

- and -

(1) INVESTCORP BANK BSC
(2) INVESTCORP INVESTMENTS ADVISERS LIMITED
(3) SHALLOT IAM LIMITED
(4) BLOSSOM IAM LIMITED
(5) INVESTCORP NOMINEE HOLDER LIMITED
(6) INVESTCORP TRADING LIMITED

Defendants

Appearances:

Lord Charles Falconer of Thoroton QC and Mr Deepak Nambisan instructed by Ms. Colette Wilkins and Ms Shelley White of Walkers for the Defendants/Applicants

Mr Marcus Staff instructed by Ms Alexia Adda of Harneys for the Plaintiff/Respondent

RULING ON COSTS

Introduction

1. A draft of my judgment, by which all of Mr Al Sadik's claims were dismissed, was delivered to the parties' attorneys on 24th April 2012 with the intention that any argument about costs would be dealt with shortly thereafter. On 2nd May the Defendants gave notice of their intention to seek an order for costs against Mr Al Sadik on the indemnity basis and the

grounds for this application were set out in a detailed written submission. Counsel for Mr Al Sadik concedes that the Defendants, as the successful parties, are entitled to an order for the costs of the action in the ordinary way pursuant to GCR O.62, r.4(5), but opposes the application for indemnity costs which can only be awarded against him and/or his attorneys pursuant to r.4(11) and/or r.11(2) on the grounds that his case has been conducted "improperly, unreasonably or negligently". On 20th May Mr Al Sadik's attorneys served a written submission in response and on 15th June Investcorp's attorneys served a reply submission.

2. When it became apparent that there would be some delay in fixing a date for the hearing of this contested application my judgment was formally delivered and perfected on the basis that the costs of the action be reserved to a date to be fixed. On 14th June Investcorp issued a summons, which is more than a formality for the purpose of fixing the hearing date, because it includes an application for an interim payment on account of costs, irrespective of the basis upon which the costs are ordered to be taxed. This additional application is supported by a separate written submission limited to the threshold issue of whether or not this Court has jurisdiction to require a party to make an interim payment in respect of his un-quantified liability arising under an *inter partes* order for costs made pursuant to GCR O.62. On 26th June Mr Al Sadik's attorneys served a written submission in reply, by which they argue that no such jurisdiction exists.

3. In their written submission served on 20th May, Mr Al Sadik's attorneys submitted that the application for indemnity costs should be adjourned or stayed on case management grounds to await the outcome of his appeal. Whatever its merit, this approach has been overtaken by events. Having incurred the costs of preparing for a substantive hearing and bringing counsel from London, an adjournment would now be counter-productive. For this reason, Mr Staff did not pursue this application. Instead, the Plaintiff has issued a summons seeking an order that the Defendants shall

not commence the taxation of their costs (whether on the standard or indemnity basis) until after the conclusion of the pending appeal which is unlikely to occur for at least nine months.

4. It having been accepted that the Defendants are entitled to an order that the Plaintiff pay their costs of the action, there are now three consequential issues to be determined by the Court. First, was the whole or any part of the Plaintiff's case conducted improperly and/or unreasonably, such that the Defendants should have the whole or part of their costs taxed on the indemnity basis? Second, should taxation of the Defendants' order for costs be stayed pending appeal and, if so, should the stay be granted unconditionally or on terms that an appropriate sum is paid into court? Third, does the Court have jurisdiction to require the Plaintiff to make an interim payment on account of his liability for costs? This third issue arises only if I refuse to grant a stay of taxation pending appeal.

The distinction between "standard" and "indemnity" costs

5. The Court's jurisdiction to make *inter partes* orders for costs is a statutory one based upon section 24 of the Judicature Law (as amended in 1995) and GCR O.62, which was not enacted until 2001 and applies with effect from 1st January 2002. The general principle stated in r.4(2) is that a successful party to any adversarial proceeding such as the present case should recover from the opposing party the reasonable costs incurred by him in conducting the proceeding in an "economical, expeditious and proper manner", unless otherwise ordered by the Court. It follows that the paying party's liability should be limited to that which is objectively reasonable in the circumstances of the case. When orders for costs are made on what is called the "standard basis" the paying party is protected from the financial consequences of any tendency on the part of his opponent to conduct his litigation in a manner which is regarded as extravagant in the following ways. First, r.13(1) puts the onus on the receiving party to establish that the costs claimed by him were both

reasonably incurred and reasonable in amount. Any doubts which the taxing officer may have must be resolved in favour of the paying party. Second, r.13(2) imposes a proportionality test by requiring the taxing officer to have regard to the amount of money involved in the case, its importance to the parties and the complexity of the issues. Third, the paying party's liability for legal fees is capped by the maximum hourly rates prescribed in the Guidelines made by the Grand Court Rules Committee under GCR O.62, r.17. For work done up to and including 31st May 2011, the scale of hourly rates is that prescribed by paragraph 7.3 of the Guidelines issued on 22nd October 2001. Because this scale applied to all types of cases pending before the Court, it was widely considered that it did not properly reflect market rates charged by law firms in connection with international commercial litigation. This anomaly has been cured by the revised Guidelines issued on 14th April 2011 which prescribe separate scales applicable to proceedings pending in (a) the Civil and Family Divisions and (b) the Financial Services and Admiralty Divisions. The scales of hourly rates prescribed by these new Guidelines are intended to reflect current fair market rates for the provision of legal services in this country. Fourth, r.18 protects the paying party from the financial consequences of his opponent's decision to engage both local attorneys and foreign lawyers, which is inherently likely to result in extra and/or duplicated expense.

6. In principle, an order for costs to be taxed on the "standard basis" in accordance with these Rules and Guidelines will compensate the successful party in respect of the reasonable legal fees and expenses incurred in conducting his action in an "economical, expeditious and proper manner". The effect of an order for taxation on the indemnity basis is that the paying party is deprived of the protections which apply in the ordinary case. The onus of proof is reversed. The proportionality rule does not apply. The legal fees scales do not apply, with the result that the successful party may recover whatever hourly rates have been agreed with his attorneys unless the paying party can persuade the taxing officer that the contracted rates are unreasonably high (relative to those paid by the

paying party). Most importantly in the context of proceedings pending in the Financial Services Division, the paying party will not have the protection of Rule 18, thereby exposing him to the risk of having to reimburse all the legal fees payable by the successful party to any foreign lawyers engaged by him, in addition to his local attorneys. [1]

The claim for indemnity costs

7. The Court's power to make an *inter partes* order for costs to be paid on the indemnity basis is contained in GCR O.62, rules 4(11) and 11(2) which provide as follows –

> *4(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.*
>
> *11(2) Where it appears to the Court in any proceedings that anything has been done or that any omission has been made improperly, unreasonably or negligently by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by him to that other party.*

The interplay between these two rules is not immediately obvious. The application of both rules depends upon establishing that a party has behaved improperly, unreasonably or negligently in some way, but I think that they are aimed at dealing with misconduct in two different contexts. Rule 4(11) is aimed at substantive misconduct on the part of a party personally, which results in the Court expressing its disapproval by

[1] *Sagicor General Insurance (Cayman) Ltd. v Crawford Adjusters (Cayman) Ltd* [2008] CILR 482, and *Re Wyser-Pratte Eurovalue Fund Limited* [2010(2)] CILR 233.

making an order for indemnity costs against him. Rule 11 (as a whole) is aimed at procedural misconduct by a party and/or his attorney which causes their opponent to waste money on legal fees and expenses which would not otherwise have been incurred. In both cases the result is an order for indemnity costs. Because r.4(11) deals with substantive misconduct committed by the party, for which his lawyer is not responsible, the order for indemnity costs can be made only against the party personally. In contrast, r.11 is aimed at procedural misconduct of a kind which is likely to be committed by attorneys, for which their clients should not necessarily be held responsible. It follows that Rule 11 is wider than r.4(11) in that it enables the Court to make wasted costs orders against a party under sub-rule (2) or against his attorney under sub-rule (3). Orders can be made against attorneys for the purpose of compensating the opposing party and/or compensating their own clients

8. It follows from this analysis that Rules 11(2) and 11(3) are compensatory in nature. The Court can only make a wasted costs order if it is satisfied that the misconduct of the defaulting party and/or his attorney has caused their innocent opponent to waste money on legal fees and disbursements which would not have been incurred but for their default. On the other hand, I accept Lord Falconer's submission that causation is not a necessary element of liability under r.4(11), which implies that it must be penal in nature. The purpose and effect of an order for indemnity costs under Rule 4(11) is to express the Court's disapproval of a party's misconduct by stripping him of the protections which would otherwise apply. It follows that if the Court is satisfied that Mr Al Sadik is guilty of substantive misconduct in this sense, I have power to express the Court's disapproval by making an order for indemnity costs whether or not his misconduct has caused Investcorp to incur any costs which would otherwise have been avoided.

9. Lord Falconer put Investcorp's application under r.4(11), rather than r.11(2), on the basis that Mr Al Sadik had conducted the action as a whole in a manner which was both "improper" and "unreasonable". It is not said

that it was conducted negligently in any way. There appears to be only one reported case in which this Court has made an *inter partes* order for indemnity costs under r.4(11). In *Sagicor General Insurance (Cayman) Limited v. Crawford Adjusters (Cayman) Limited* [2008] CILR 482 an order for indemnity costs was made against plaintiffs who had pursued a case of fraud and dishonesty for over two years and then abandoned it on the eve of the trial. Henderson J. said, "From the failure of these plaintiffs to pursue their case, I infer that they have never been in possession of a body of evidence capable of establishing fraud or conspiracy. These few comments, without more, provide ample justification for an award of indemnity costs". Because the learned judge obviously took the view that it was a plain and obvious case, he did not find it necessary to embark upon any analysis of r.4(11). The argument appears to have been focused upon the application of Rule 18 and I think this is probably the reason why the decision has been reported. However, I think it is implicit in this decision that Henderson J. concluded that the plaintiff must have known that there was no legitimate basis for asserting fraud and conspiracy. The decision of Kellock Ag.J in *Nike Real Estate Limited v. De Bruyne* [2002] 2002 CILR 31 was made in January 2002 but it related to a case which was concluded at the end of the previous year before r.4(11) came into force. Nevertheless, I think that it is an illustration of substantive misconduct which would be regarded as "improper" within the meaning of r.4(11). An order for indemnity costs was made against the defendant. The judge found that the defendant's evidence was not credible and that a key witness had lied to the court. He found that the defendant company had abused the process of the court because its witnesses had colluded together in advance of the trial and put forward a deliberately dishonest case. On this basis, an order for indemnity costs was made in favour of the successful plaintiff.

10. I was also referred to a number of English cases which I did not find particularly helpful. Whilst GCR O.62 and the associated *Guidelines Relating to the Taxation of Costs* do use some words and expressions which are to be found in the English Civil Procedure Rules, it is perfectly

clear that the Grand Court Rules Committee did not intend to replicate the English law. The purpose of making an order for indemnity costs under r. 4(11) is to express the Court's disapproval of a party's substantive misconduct, whether or not he has caused any financial loss to his opponent. It is clear from the language of Rule 44.4 of the Civil Procedure Rules and the authorities to which I have been referred, that the English courts have a much wider jurisdiction to grant orders for indemnity costs. The English jurisdiction is not limited to circumstances in which a party is held to have conducted the whole or part of the proceeding in a manner which is improper, unreasonable or negligent. For these reasons, the English decisions do not assist me to determine what constitutes "improper" or "unreasonable" conduct within the meaning of Rule 4(11).

11. In my judgment a proceeding, or some identifiable part of it, can only be said to have been conducted "improperly" within the meaning of r.4(11) if the Court is satisfied, in all the circumstances of the case, that a party has invoked the Court's jurisdiction illegitimately or abused the process in a way which attracts moral condemnation. A party who asserts a cause of action when he knows that he has no legitimate basis for doing so is acting improperly. Pursuing an action for some ulterior motive is an abuse of the process which may be categorised as improper. I refer to the facts of *Amoco UK Exploration Co v. British American Offshore Ltd*[2] as an illustration of this point. It was ostensibly a case in which the plaintiff asserted that it was entitled to terminate a commercial contract because of the defendant's breach. In reality, the plaintiff had no legitimate basis for asserting this cause of action and the judge found that the proceeding had actually been commenced for the purpose of pressurising the defendant to re-negotiate the terms of the contract which had become economically unattractive from the plaintiff's point of view. This factual scenario would amount to improper conduct within the meaning of the Cayman Islands rules. Unreasonable conduct falling short of impropriety usually leads to a wasted costs order under r.11(2) or (3), but it can also lead to an indemnity

[2] An unreported decision of Langley J. in the English High Court dated 22nd November 2001.

costs order under r.4(11) if it can be characterised as substantive misconduct. For example, one can envisage a case in which it was not improper to have asserted a particular cause of action, but the court might nevertheless conclude that it was unreasonable to have pursued it beyond the point at which the party must have realised that it was bound to fail.

The Plaintiff's conduct

12. Lord Falconer's submission is that there are particular features about this case which, taken together, lead to the conclusion that Mr Al Sadik is guilty of conducting his entire case in a manner was both improper and unreasonable within the meaning of r.4(11). In substance, his principal argument is that my adverse findings about the reliability and truthfulness of the evidence of both Mr Al Sadik and Mr Zaidi lead to the conclusion that the case was conducted "improperly and unreasonably". He complains that Mr Al Sadik made wide-ranging and obviously flawed allegations of fraud and conducted the preparation in a manner which generated unnecessary work. The outcome of litigation frequently turns upon the Court's findings of fact and it is not unusual for such findings to depend upon the Court's assessment of the creditability and truthfulness of the witnesses. By itself, this outcome does not lead to the conclusion that the losing party had no legitimate case and was abusing the Court's process in some way. It can only be said that Mr Al Sadik is guilty of substantive misconduct to the extent that he advanced a case which he knew to be false.

13. Whilst I think that there is some merit in many of Lord Falconer's specific criticisms, I have come to the conclusion that the conduct of Mr Al Sadik's case was "improper and unreasonable" only in one respect. His claim to have the benefit of a guaranteed return was raised after the market crash triggered by the Lehman Brothers bankruptcy and pursued relentlessly to the bitter end, notwithstanding that he knew in his own mind that he had not been given any enforceable guarantee. In this respect, I conclude that Mr Al Sadik's case was conducted improperly and unreasonably within

the meaning of r.4(11). Since this false claim constituted a significant part of the case, to which a huge amount of time, effort and money was devoted, I have come to the conclusion that I should express the Court's disapproval by making an order for indemnity costs in respect the 1st Claim (Breach of Collateral Contract).

Application for a stay of taxation

14. A stay of taxation in respect of an order for costs is the equivalent of a stay of execution in respect of a money judgment. By virtue of the Court of Appeal Rules, r.20, the Plaintiff's appeal does not operate as a stay of taxation in respect of the Defendants' order for costs, but I have a discretionary power to grant a stay.[3] In deciding how to exercise this power the essential question is whether there is a risk of injustice to one or other of the parties if a stay is granted or refused. Having regard to Mr Al Sadik's financial status, the refusal of a stay will not adversely impact upon his ability to pursue his appeal. Similarly, there is no suggestion that Investcorp's financial condition is such that Mr Al Sadik would have any difficulty recovering the sum paid if his appeal succeeds and the order for costs is reversed. In my judgment no circumstances have been identified by Mr Al Sadik's counsel which would justify the grant of a stay of taxation.

Jurisdiction to make an interim order for the payment of costs

15. Having refused to grant a stay of taxation, I now turn to the final question, which is whether this Court has jurisdiction to make an "interim payment order" in favour of Investcorp. This question necessarily leads me to ask what is meant by an "interim payment order" and how it differs from an "interim certificate". As I understand it, the argument is that an "interim payment order" can be made by the Judge when making the order for

[3] A stay of taxation does not prevent the receiving party from serving his bill of costs if he wishes to do so. It merely suspends the paying party's obligation to respond and prevents the receiving party from applying for a default certificate.

costs, whereas an interim certificate is issued by the Taxing Officer whose jurisdiction arises only upon commencement of the taxation proceeding.[4] Upon receipt of a completed bill of costs, the Taxing Officer routinely issues an interim certificate pursuant to r.22(1)(b) in respect of the agreed amount reflected in the bill.[5] The taxation relates only to the balance of the bill which is in dispute. It follows that a receiving party who delivers his bill of costs at the earliest opportunity, immediately after the order for costs is made, can expect to obtain an interim certificate for the agreed amount within a month or so, if no extension of time is granted to the paying party.[6] In principle, the amount of an interim payment order made by the Judge ought to equate to the amount of the first interim certificate issued by the Taxing Officer. The advantage of the former appears to be twofold. First, it would enable the receiving party to obtain a payment on account without having to prepare any bill of costs. Second, it would accelerate his right to receive a first payment on account by at least a month and possibly as much as three months.[7]

16. Lord Falconer's argument is that the Court's inherent jurisdiction to control its own procedure includes jurisdiction to make an interim payment order in respect a party's liability for costs. The nature and extent of the inherent jurisdiction was analysed by the Court of Appeal in *Re*

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[4] By GCR O.62, r.28(1) a taxation proceeding is commenced by lodging with the Taxing Officer a completed bill of costs, together with certain supplementary documents. The bill of costs takes the form of a composite spreadsheet containing particulars of both the receiving party's claim and the paying party's objections and it must be signed by both parties. The effect of r.28 (2) is that this exercise must be completed within three months from the date upon which the order for costs is perfected and filed. A failure on the part of the receiving party to prepare his part of the bill of costs in a timely manner will result in his right to enforce the order for costs becoming statute barred and an application for taxation made out of time will be summarily dismissed under r.28(3). Conversely, a failure on the part of the paying party to make his objections in a timely manner will result in the issue of a default certificate under r.22(3).

[5] It is not open to the paying party to "put the receiving party to proof" by making a general objection to the entire bill. He is required to give bona fide reasons for his objections, failing which the Taxing Officer will issue a default certificate. It follows, in principle, that the paying party will never be in a position to avoid having to pay, upon commencement of the taxation, a sum equivalent that which he would have been required to pay by the Judge pursuant to an interim payment order.

[6] The mere fact that this was a long and complex action which continued for more than two years from December 2009 (when the writ was issued) until March 2012 (when the trial was concluded) does not, by itself, suggest that the paying party should be given an extension of time in which to respond to the bill of costs, even if Rule 18 does not apply.

[7] The receiving party's right to enforce his order for costs is subject to a strict three month limitation period calculated from the date upon which the order is filed. Any application for taxation made out of time is liable to be summarily dismissed.

HSH Cayman I GP Limited et al v. ABN AMRO Bank N.V. London Branch [2010(1)] CILR 114 at paragraphs 21-26. It was held that the powers of the Court under its inherent jurisdiction are complementary to its powers under the rules of court. It follows that the inherent jurisdiction may supplement the Grand Court Rules but cannot be used to lay down procedure which is contrary to or inconsistent with the rules validly made by the rule making body. In my judgment the rule making power contained in sections 19(3)(d) of the Grand Court Law and 24(2) of the Judicature Law (as amended in 1995) is wide enough to enable the grand Court Rules Committee to have made rules about interim payment orders. It has not done so.

17. The inherent jurisdiction can be invoked in a way which (a) usefully supplements the rules and is not inconsistent with their overall scheme or (b) is necessary to give effect to the rules. The inherent power contended for by Lord Falconer is not inconsistent with GCR Order 62 but, given the way in which the taxation process works, it could be said that a power on the part of the Judge to make interim payment orders is an unnecessary duplication of the Taxing Officer's power to issue interim certificates. However, I cannot rule out the possibility that some wholly exceptional circumstances may arise in which it will serve the ends of justice for the Judge to make an interim payment order prior to, or conceivably instead of, the delivery of a bill of costs.

18. Mr Staff's first argument, as I understand it, is that any inherent jurisdiction to make interim payment orders for costs is excluded by section 20 of the Grand Court Law which deals with the Court's power to make orders for interim payments "on account of any damages, debt or other sum (excluding costs) which a party to any proceedings may be held liable to pay...". Sub-section 20(3) specifically says that "Nothing in this section shall be construed as affecting the exercise of any power relating to costs, including any power to make Rules relating to costs". However, he relies upon a comment in the *Supreme Court Practice 1999* about similar

English statutory provisions which suggested that interim orders for costs could only be made pursuant to an express rule and that the rule making power had been excluded by the legislation. Whatever the law of England may have been at that time, it has no bearing upon the proper construction of the Grand Court Law. Section 19(3)(a) (read with section 20) empowers the Rules Committee to make rules in relation to the circumstances in which the Court may order payments on account of damages, debts and other sums adjudged to be payable by one party to another. It has done so in the form of GCR O.29, r.9-18. Section 19(3)(d) (read with section 24 of the Judicature Law) empowers the Rules Committee to make rules relating to costs. It has done so in the form of GCR O.62. There is no overlap or inconsistency between these two provisions. The Rules Committee has power under sub-section (3)(d) to make rules for interim payment orders in respect of costs, but has not done so with the result that it cannot be said that the Court's the inherent jurisdiction in this regard has been excluded.

19. Mr Staff's second point is that the Court's inherent jurisdiction relates only to matters of procedure. This is correct. He says that the Court's statutory jurisdiction to make *inter partes* orders for costs is a matter of substantive law. This is also correct. However, rules dealing with the circumstances in which a paying party may be ordered, either by the Judge or the Taxing Officer, to make payments on account, and the circumstances in which such orders may be discharged or varied are clearly matters of procedure which fall within the jurisdiction of the Rules Committee and within the scope of the Court's inherent power.

20. There is no merit in either of Mr Staff's points. In my judgment the Court does have an inherent power, exercisable by the Judge, to make an interim payment order prior to the lodgement of a bill of costs with the Taxiing Officer. However, given the way in which the taxation process works, the inherent jurisdiction will be exercised by the Judge only in rare and

exceptional circumstances leading to the conclusion that the issue of an interim certificate by the Taxing Officer will not be sufficient to do justice between the parties.

Conclusions

21. I will order the Plaintiff to pay the Defendants' costs of the action, such costs to be taxed on the standard basis in the absence of agreement, except that the costs relating directly to the 1st Claim (Breach of Collateral Contract) shall be taxed on the indemnity basis. The Plaintiff's application for a stay of taxation is dismissed.

22. I declare that the Court does have an inherent jurisdiction to make an order against the Plaintiff for an interim payment of costs and I will make directions designed to ensure that any such application is dealt with in an expeditious and economical manner.

23. The costs of this application are to be paid by the Plaintiff.

DATED the 16th July 2012

The Hon Mr. Justice Andrew J. Jones QC
JUDGE OF THE GRAND COURT