In The Supreme Court of Bermuda

CIVIL JURISDICTION

COMMERCIAL COURT

2011: No. 255

IN THE MATTER OF KINGBOARD COPPER FOIL HOLDINGS LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 1981, SECTION 111

BETWEEN:

ANNUITY & LIFE REASSURANCE LTD

Petitioner

-v-

(1) KINGBOARD CHEMICAL HOLDINGS LIMITED

(2) JAMPLAN (BVI) LIMITED

(3) KINGBOARD LAMINATES HOLDINGS LIMITED

(4) EXCEL FIRST INVESTMENT LIMITED

(5) KINGBOARD COPPER FOIL HOLDINGS LIMITED

Respondents

EX TEMPORE RULING ON COSTS

(in Court)

Date of hearing: January 11, 2016

Mr. Shannon Dyer, ASW Law Limited, for the Petitioners
Mr. Jeffrey Elkinson, Conyers Dill & Pearman Limited, for the Respondents

Introductory

1. This is an application by the Petitioner for the costs of a minority shareholder Petition where judgment was given in the Petitioner's favour on 10th November 2015.

2. The Respondents have invited the Court, while accepting that costs should follow the event, to discount the costs awarded to the Petitioner substantially because the pursuit of one issue was unreasonable.

3. In broad summary, this was a case which had two big issues. The first issue was the complaint about so called transfer-pricing. This was a question that turned on the price at which the copper foil was sold by the Company to a related party and it was complained that the prices were uncommercial. The other point was a complaint that the response of the Company to the minority shareholders vetoing the Interested Parties Transaction pursuant to which these sales took place, by adopting what was known as the Harvest Licence Agreement, constituted prejudicial conduct.

4. The first of those issues was resolved in the Respondents favour and the second of those issues was resolved in the Petitioner's favour.

Applicable costs principles

5. The Petitioner, represented at costs hearing by Mr Dyer, has urged the Court to avoid being tempted to engage in an issues-based approach to costs. It is rightly submitted that issues-based cost orders do not, as such, form part of the Rules of the Supreme Court. Reference was made to the case of *First Atlantic Commerce Limited-v-Bank of Bermuda Ltd* [2009] Bda LR 18, where the Court of Appeal overturned my decision to adopt such an issues-based approach.

6. The relevant passage in the Court of Appeal judgment upon which Mr Elkinson relied does in fact reveal that the Court, in assessing costs under our pre-CPR Rules, does have the power in appropriate cases to make some reduction to costs on the following lines:

> "*67. But it does not follow that he shall recover the whole of those costs. The award remains subject to the principle recognised in In re Elgindata Ltd. (No.2) [1992] 1 WLR 1207 : in short, the successful party's recoverable costs can be proportionately reduced when superfluous issues were raised unnecessarily, or for other good reason. The question here, in our judgment, is whether the principle applies in the present case.*"

7. The Petitioner's Counsel referred to two other authorities in particular to remind the Court that there is an important distinction between making a deduction in respect of costs unreasonably incurred and, in effect, punishing a litigant who has been successful overall for failing to win on a particular point. In *In re Elgindata Limited (No 2)* [1992] 1 WLR 1207 at page 1217 to which Mr. Dyer referred, Beldam LJ in criticising the general undesirability of a punitive costs order in respect of an unsuccessful issue said this:

> "*As Nourse L.J. has said, in Gupta v. Klito this court regarded such an order as an extreme sanction. Yet the judge made no finding that the petitioners had been guilty of improper or unreasonable conduct in the proceedings or were deserving of any penalty. His order was based solely on the ground that they had failed to establish some of the factual matters which they had alleged or in some cases had failed to show that the acts of mismanagement which they did establish were of a sufficient degree to warrant the statutory description of unfairly prejudicial conduct.*
>
> *If a penal order of this severity could be so justified, few litigants would recover any damages. It would add a hazard to the pursuit of justice which few, if any, would be prepared to risk…*"

8. Those observations were made, it must be said, in circumstances where the successful Petitioner had not only been deprived of their own substantial costs altogether, but was also being ordered to pay the Respondents' costs. The other case which I found of assistance in practical terms was *Stiftung Salle Modulable-v-Butterfield Trust Bermuda Limited* [2011] Bda LR 11. And in this case the Court was invited to reduce the amount of costs because, in effect, of 'over-litigating' or conducting litigation in a disproportionate manner. At paragraph 36, I made the following finding;

> "*The Plaintiffs' case on feasibility was shown to be quite unmeritorious and involved a considerable amount of Court time and preparatory costs. I agree that a 10% discount is appropriate in this regard;*

> *(a) the Plaintiffs' best shot at establishing feasibility was through establishing that funding was withdrawn in bad faith. Although this claim failed, the Court nevertheless found that the purported termination was not legally valid or justified, on the basis of largely overlapping facts. I see no justification for any discount in this regard;*
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> *(b) the Plaintiffs succeeded in establishing that the contract was governed by Swiss law. The need to determine the Bermuda law position flowed from the Defendant's rejected assertion that Bermuda law governed the parties' relationship. I see no justification for any discount in this regard;*
>
> *(c) I see no justification for any costs reduction because the alternative and clearly subsidiary trust claims failed. These legal claims were advanced in a proportionate manner. The Plaintiffs should be entitled to recover as part of their overall costs the costs of successfully defending the Counterclaim.*"

Application of guideline principles to the facts

9. In the present case Mr Elkinson has reminded the Court that, from the start, this was a case where the issues were clearly defined. This was also a case where the transfer pricing allegation very narrowly survived a strike-out application on 16th January 2012. In my ruling on the strike-out application[1], while it is true that the allegations were not struck-out, I said this:

> "*13. In my judgment these complaints, standing by themselves, did not disclose a reasonable cause of action because the Petitioner (and other minority shareholders) at all material times possessed the power to regulate the terms upon which the related transactions took place. The SGX Rules prohibited the majority from voting on this issue. It is unsurprising that the Singapore High Court declined to grant pre-action discovery on the grounds that no arguable minority prejudice or oppression claim had been disclosed.*
>
> *14. However, the decision to strike-out falls to be determined in the light of the Amended Petition and the related allegations made about the Harvest License Agreement.*"

10. While it is true that the transfer pricing issue survived strike-out, the Court made it clear at the strike-out stage that it felt that these allegations, standing by themselves,

[1] *Re Kingboard Copper Foils Holding Ltd* [2012] Bda LR 5.

did not disclose a reasonable cause of action. In these circumstances it seems to me that the Petitioner needed to be proportionate in the extent to which it pursued this particular point.

11. The broad argument that Mr. Dyer advanced in opposition to the cost deduction argument of his opponent was that this was an unprecedented case with a high threshold of proof. In my judgment, it cannot be right that any litigant has *carte-blanche* to occupy as much time as the litigant considers appropriate merely because the litigant has a high threshold of proof.

12. The governing principles in considering the Court's exercise of any discretion under the Rules of the Court are contained in the Overriding Objective in Order 1A, and those rules impose a duty on litigants to assist the Court to achieve the Overriding Objective. And the Overriding Objective includes the goal of managing litigation in a way that is proportionate in terms of the value of the claim and, it also seems to me by necessary implication, the merits of the issues as well. It cannot be right that a litigant can expend huge amounts of costs on non- meritorious issues simply because overall, he has a good claim.

13. So in my judgement against the unusual background of this case where the transfer pricing allegation narrowly survived strike-out and the expert evidence that was adduced at trial fell clearly short of supporting the allegation, it is appropriate for the Court to make some discount; but a discount which does not undermine the important point that Mr. Dyer urged upon the Court, namely that the Petitioner has succeeded overall.

Award of costs

14. In the exercise of my discretion I find that an appropriate discount in this case is not the 50% that Mr. Elkinson boldly contended for, but the more modest amount of 10%. That in my judgement steers a middle path between encouraging litigants to conduct litigation in a proportionate manner, having regard to the merits and importance of issues to the case as a whole, and also rewarding a successful litigant for having succeeded in their claim overall.

15. Costs of the present application in the Petition (i.e. to the Petitioner).

Dated this 11th day of January, 2016 ________________________

IAN RC KAWALEY CJ