In The Supreme Court of Bermuda

(COMMERCIAL COURT)

CIVIL JURISDICTION

2011 No: 179

IN THE MATTER OF HIGHLAND CRUSADER FUND II, LTD.
AND IN THE MATTER OF THE COMPANIES ACT 1981

EX TEMPORE RULING

(In Court)

Date of Hearing: August 12, 2011
Date of Ruling: August 12, 2011

Mr. Rod Attride-Stirling, Attride-Stirling & Woloniecki, for the Petitioner (the Company)
Ms. Nicole Tovey, Trott & Duncan, for the Objectors

Introductory

1. This is my decision on an application for costs in relation to the hearing of a sanction application in respect of a Scheme of Arrangement where an order sanctioning the Scheme was given in favour of the company over the objections of UBS on July 15, 2011. The issue of costs was adjourned for practical reasons until today when Reasons for that sanction decision were handed down.

The Petitioner's submissions

2. The first submissions were made on behalf of the Company by Mr. Attride-Stirling and the principles relating to the issue of costs in relation to sanction hearings were set out in detail in his skeleton argument and were not, as I understood it, challenged by Ms. Tovey for the Objector significantly or at all. The broad principles that were relied upon were those set out in the judgment of Nourse L.J. in *In re Elgindata Ltd. (No 2) [1992]* 1 WLR 1207, 1213-14:

> "*In order to show that the judge erred I must state the principles which ought to have been applied. They are mainly recognised or provided for, it matters not which, by section 51 of the Supreme Court Act 1981 and the relevant provisions of R.S.C., Ord. 62, in this case rules 2(4), 3(3) and 10. They do not in their entirety depend on the express recognition or provision of the rules. In part they depend on established practice or implication from the rules. The principles are these. (i) Costs are in the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstance of the case some other order should be made. (iii)The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs. Of these principles the first, second and fourth are expressly recognised or provided for by the rules 2(4), 3(3) and 10 respectively. The third depends on well established practice. Moreover, the fourth implies that a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the unsuccessful party's costs. It was because of his disregard of that principle that the judge erred in this case."*

3. Mr. Attride-Stirling's submissions go on to deal with the principles applicable to the grounds of indemnity costs. This is because he contended that the conduct of the Objector in the present case justified the grant of indemnity costs. One of the judicial citations which delineate the principles applicable to indemnity costs which I found to be helpful is that set out in *Disney –v- Plummer et al*. [1991]F.S.R. 165, in the judgment of Lord Justice Kerr at page 2 of the transcript, where he said:

> "*I do not accept as Mr. Mackay submitted, that indemnity costs are only appropriate if there is some deception or underhand conduct on the part of the losing party, but not if the litigation is merely fought bitterly or even unreasonably. In the latter type of cases judges can still exercise their discretion under 0.62 r.3 (4) (c).*"

4. The main bulk of the legal argument focused on an issue which has not before to my knowledge been considered in the Bermudian courts. And that is the distinctive principles which apply to the grant of costs in cases involving the sanctioning of schemes of arrangement. Mr. Attride-Stirling conceded that the normal 'costs follow the event' principles do not apply. However, the cases that he referred to, he submitted, demonstrated that there was a clear distinction to be drawn between objections raised by the parties bound by a scheme be they members or creditors and cases where the objector was a third party. In *Re B.A.T. Industries plc et al* 1998 WL 1076712, Mr. Justice Neuberger[1] at page 18 of the transcript described the distinction in this way:

> *"The difference between those cases and the present case is that those cases were concerned with members whose rights were being, as it were, compulsorily changed, or whose shares were being compulsorily acquired, whereas in the present case we are concerned with the potential creditors of the company whose rights are not being directly interfered with. Furthermore, as Mr. Richards points out, this is much closer to the normal sort of hostile litigation where the objectors are fighting really for their own commercial interests.*
>
> *I find it difficult on the facts of this case to decide whether to make no order as to costs or to accede to Mr. Richards' argument, bearing in mind that this is the first case other than Re MB Group plc (where, in the end, matters were settled) where the objectors have not been members. I bear in mind that the objections were well founded in the sense that they required, to my mind, careful consideration and raised points of importance and that the objectors succeed on the points of principle. Bearing in mind that this is the first occasion where the question of costs in relation to objectors who are not members has been considered, and bearing in mind that the members who object do so normally for their commercial reasons, I have decided that I should not make any order for costs; but that I should couple that (bearing in mind what Mr. Richards has said) with a clear statement that this should not be taken as an indication that, where people who are not member oppose schemes in the future, they can expect to be treated with the same arguable leniency with regard to costs as has been shown in the past towards members. But in this case and on these facts I think it right (very much on balance) to make no order for costs."*

5. It was submitted on behalf of the Petitioner that the circumstances in *Re B.A.T. Industries* were quite distinguishable from the position in the present case. The other significant case which was relied upon by the Petitioner was in *Re*

[1] As he then was.

Peninsular and Oriental Steam Navigation Co (2007) Bus LR at page 544. This was another case where a third party objector was involved in opposing the sanction of a scheme. In this case Warren J observed at page 564:

> "47. *For my part I declined to elevate to some great principle of public policy the idea that, save in exceptional cases, objectors must, in order to ensure proper scrutiny of a scheme, always be immune from the normal costs rules, provided only that their objections are genuine and not frivolous. It seems to me that, as in any other litigation, the courts are perfectly capable of deciding on a case by case basis what the justice of the case demands in relation to costs. Mr. Downes suggests that a more proscriptive regime is required otherwise individual objectors such as Mr. Elkington in the present case run the risk that they will be ordered to pay costs.*"

6. But in the result, Warren J in that case decided (at page 565) that the appropriate disposition was to award the additional costs incurred by the objectors to the company.

The Objectors' submissions

7. In response to these submissions Ms. Tovey sought to do two broad things. Firstly, she sought to challenge not the principles applicable to indemnity costs, but to challenge the appropriateness of the award of indemnity costs and, having regard to the provisional view that I formed on that issue, I did not hear her at length on that issue.

8. On the other hand, the main weight of her arguments were directed towards persuading the Court that the general principles relating to the award of costs in scheme cases suggested that the Court should be reluctant to award costs against any objector. As regards to her own clients, she submitted that the application was in large part necessitated by what she characterized as the unreasonable disposition of the Company in failing to respond to a detailed request for information about the Scheme, which her firm sent to the Petitioner's Bermuda attorneys not long before the sanction hearing. She also argued that a number of issues were in fact effectively resolved in her client's favour. Firstly, the issue of standing which she assessed as amounting to perhaps as much as 30% of the costs involved. Secondly, she said that the issue of releases which were of great concern to her clients was only clarified by way of concession in the course of the hearing. Finally, she mentioned the fact that the class issue and the concerns raised by her clients about whether the classes were adequately constituted were only clarified in the course of the hearing.

Findings: application for indemnity costs

9. Having regard to all of the submissions, I find that this is not a case that is an appropriate one for the award of indemnity costs. It is true that the application was decisively and firmly rejected, but that in and of itself is not a ground for indemnity costs. It is also true that the dominant rationale of the application appears to have been to gain a commercial advantage arising out of the Objectors' claims against affiliated companies which advantage might have been procured if the sanction hearing had been adjourned and the approval of this Scheme cast into doubt. On balance, it seems to me that where a litigant is able to construct a case for objecting that survives being summarily dismissed on the grounds of an obvious lack of standing, it would be wrong to find that their conduct justifies the award of indemnity costs[2].

10. It seems to me that in the present case, although the connections that the Objectors had with the Scheme where ultimately found to be tenuous, the matters that they raised <u>just</u> fell within the bounds of making their objection one that was not so unreasonable as to justify their being punished by way of indemnity costs.

Findings: application for costs

11. On the other hand, having regard to the principles alluded to by Mr. Attride-Stirling and to which I have just referred, there can be no justification for depriving the Petitioner of its costs altogether.

12. Ms. Tovey came very close to persuading me that there should be some reduction in the costs awarded to the Petitioner having regard to the partial success that was achieved by the Objectors. However, looking at the matter in the round and bearing in mind that at the end of the day the Court found that the Objector was really seeking to obtain relief from this Court to which it was not properly entitled and which should properly be sought elsewhere, the position is in my judgment as follows. Any success which was achieved was *de minimis* and there is no justification for making any deduction in the costs that the Petitioner is entitled to.

13. I therefore award the Petitioner its costs attributable to the objection (the additional costs occasioned by the objection), to be taxed if not agreed on the standard basis.

14. In the course of the present hearing Mr. Williams made an application on behalf of the Scheme Creditors that he represented for their costs. I rejected that

[2] As occurred in the present case. Obviously there may be cases where full argument reveals that the objection was improperly motivated.

application on the grounds that in my judgment there was no real necessity for those Scheme Creditors to actively participate in the proceedings and that no distinct issues were raised by the Objector which required them to advance any submissions over and above the submissions advanced by the Petitioner.

Dated this 12th day of August, 2011 _____

KAWALEY J