In The Supreme Court of Bermuda

COMMERCIAL COURT

2016: No. 345

IN THE MATTER OF STURGEON CENTRAL ASIA BALANCED FUND LTD

AND IN THE MATTER OF THE COMPANIES ACT 1981

BETWEEN:

CAPITAL PARTNERS SECURITIES CO LTD

Petitioner

-v-

STURGEON CENTRAL ASIA BALANCED FUND LTD

Respondent

EX TEMPORE RULING ON COSTS

(in Court)

Costs of petition seeking to wind-up company on just and equitable grounds-fund-whether costs awarded to successful respondent should be reduced because petitioner succeeded in establishing that the respondent acted unlawfully

Date of hearing: September 14, 2017

Mr Mark Diel and Ms Katie Tornari, Marshall Diel & Myers Limited, for the Petitioner
Mr Steven White and Mr Samuel Riihiluoma, Cox Hallett Wilkinson Limited, for the Respondent

Introductory

1. On 14th July 2017 I ruled that the Petition for a just and equitable winding-up should be refused and indicated that unless an application was made to be heard as to costs, the Petitioner should be required to pay the Respondent's costs.

2. Mr Diel has applied to the Court to be heard as to costs and has argued that either the Court should make no order as to costs or that there should be a 90% reduction of the costs to be paid by the Petitioner, because the Petitioner has succeeded on an issue which consumed a very substantial amount of the Court's time.

Governing legal principles

3. The legal principles are largely agreed and they are found in several cases. But the leading case which has been followed by the Bermuda Court of Appeal[1] and this Court[2] on a number of occasions is *In re Elgindata Ltd. (No.2)* [1992] 1 WLR 1207. Both counsel referred me to the following passage at page 1219 A-B in the judgment of Nourse LJ, where he said this:

> "*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 circumstances 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*

---

[1] *First Atlantic Commerce-v-Bank of Bermuda Ltd* [2009] Bda L.R. 18, where Evans JA held:

> "*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.*" [Emphasis added]

[2] *Binns-v-Burrows*[2012] Bda LR 3 at paragraph 6 ("*the Court's duty in awarding costs will generally be to…(iii) consider whether those costs should be proportionately reduced because e.g. they were unreasonably incurred or there is some other compelling reason to depart from the usual rule that costs follow the event")*[emphasis added]*; Kentucky Fried Chicken(Bermuda) Limited-v- Minister of Trade and Industry (Costs)* [2013] Bda LR 34, paragraphs 15-19.

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."

The 'result' of the present proceedings

4. The Judgment in this case can best be understood in terms of the result by reflecting on paragraph 78, which reads as follows:

> *"78. In my judgment there is no room for sensible doubt in the present case that if CPS's central complaint were to be fully made out, it would be, prima facie, just and equitable for the Fund to be wound up. The central complaints are that (1) the Management Shareholder unlawfully amended the Bye-Laws to deprive the Participating Shareholders of their contractual right to vote on when the Fund should be wound up, and (2) unlawfully deprived the Participating Shareholders of their contractual right to exit the Fund through a winding up no later than December 31, 2017 (the so-called Long-Stop Date). CPS further (and crucially) complains that this action was carried out by the Fund's management in bad faith in the knowledge that CPS's share rights were being modified without its consent. In light of the construction I have placed on Bye-Law 78, the position is that:*
>
> *(1) CPS has succeeded in establishing that Bye-Law 78 conferred voting rights on Participating Shareholders which the Management Shareholder unlawfully expropriated through the 2014 amendments;*
>
> *(2) CPS has failed to establish that Participating Shareholders were deprived of a positive right to a winding up by December 31, 2017; and*
>
> *(3) the voting rights which CPS and other Participating Shareholders were deprived of in substance were consultative voting rights in the sense that unless the Management Shareholder also voted in favour of winding up, the Participating Shareholders' Special Resolution alone was insufficient to carry the day and enable them to actually exercise the winding up option."*

5. In reaching the conclusion that CPS and other Participating Shareholders were deprived of voting rights, it is correct as Mr Diel argued that the finding that the Management Shareholder had a veto right was a finding reached by the Court on its own and that this represented a departure from the main argument of the Fund. The Fund had contended that only the Management Shareholder had the right to vote on the winding-up issue. Nevertheless, the practical result is little different because in real world terms it seems clear and I found, that had the Participating Shareholder been given their voting rights the Management Shareholder would have blocked them and the result would be no different.

6. It is also important to understand the limited nature of the success which the Petitioner CPS achieved by reminding oneself that even if CPS had succeeded in full in establishing that its right to win a vote had been taken away, I also "*crucially*" found that the Fund had not acted in bad faith. So the bad faith finding which CPS sought (but did not obtain) was crucial to the overall success of the Petition.

Relevance of Petitioner's limited success to the award of costs

7. That said, it cannot be ignored that CPS did succeed in establishing that its voting rights were taken away. And despite the technical nature of the unlawfulness which was made out, it would be somewhat odd if the Court were to give no recognition to that finding when it comes to costs. Such an approach might encourage managers to feel that they can ignore the strict legal position and avoid adverse consequences by simply demonstrating that they did not act in bad faith. And so it seems to me that although the quality of success which CPS has achieved is not nearly as great as CPS has suggested, when one properly analyses the significance of that success, some discount to the costs the successful Respondent is entitled to is required.

8. Looking at things in the round, it is difficult to justify making more than a somewhat nominal discount and I therefore award the Respondent 90% of its costs and discount 10% for the limited success which the Petitioner has achieved.

Costs of the present application

[Having heard counsel]

9. I feel there is only one logical outcome in light of the ruling which I have made as to costs overall. That is that as far as the present application is concerned, the Respondent should have 90% of the costs of the present application.

Dated the 14th day of September, 2017 _____

IAN RC KAWALEY CJ