IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 162 OF 2019 (RPJ)

BETWEEN

RAIFFEISEN INTERNATIONAL BANK AG

Applicant / Plaintiff

AND

(1) SCULLY ROYALTY LTD
(a company incorporated in the Cayman Islands)

Respondent / First Defendant

(2) LTC PHARMA (INT) LTD.
(a company incorporated in the Marshall Islands)

Second Defendant

(3) MERKANTI HOLDING P.L.C.
(formerly MFC Holding Ltd, a company incorporated in Malta)

Third Defendant

(4)1178936 B.C. LTD.
(a company incorporated in British Columbia, Canada)

Fourth Defendant

(5) MFC 2017 II LTD.
(a company incorporated in the Cayman Islands)

Fifth Defendant

(6) 1128349 B.C. LTD.
(a company incorporated in British Columbia, Canada)

Sixth Defendant

(7) IEM SERVICES CO. LTD.
(a company incorporated in the Marhsall Islands)

Seventh Defendant

(8) LTCM ASSET PRIVATE LIMITED
(a company incorporated in the Marshall Islands)

Eighth Defendant

ON THE PAPERS

BEFORE: **THE HON. RAJ PARKER**

Draft Judgment Circulated: **18 March 2021**

Judgment Delivered: **25 March 2021**

Headnote

Costs-indemnity costs-Judicature Law (2017 Revision) s.24-Order 62 r 4(11)-application to proceedings commenced in Malta in context of anti-suit injunction-foreign lawyer fees-international nature of proceedings and application-Order 62 r 18 -Practice Direction 01/2001 s.6.5-interim payment-Order 62 r.4(7) (h) and Order 62 r.9.

Costs Judgment

Introduction

1. Pursuant to an order dated 29 September 2020, and filed on 7 October 2020, the parties submitted written arguments as to the costs of the Plaintiff (RBI)'s successful application for an anti-suit injunction (ASI) against the First Defendant (D1). The judgment was delivered on 28 October 2020 (the Judgment).

RBI's submissions

In summary RBI submits:

a) RBI has succeeded in full on its application and costs should follow the event in the usual way, subject to taxation if not agreed. This appears to be common ground;

b) in the circumstances of the application, and in particular in light of the findings of the court as to bad faith, costs should be taxed on the indemnity basis;

c) that as to such taxation of the costs of RBI's foreign lawyers *GCR O.62 r.18(3)-(7)* and *Practice Direction 01/2001(PD), Section 6.5* should not apply;

d) and further, and in any event:

i) costs should be payable forthwith, following taxation; and/or

ii) there should be an interim payment by D1 to RBI, of 50% of RBI's actual costs pending taxation, payable within 14 of the order of the Court as to costs.

D1's submissions

In summary D1 submits

a) The Court ought to be slow to make any order that would encourage extravagant and disproportionate spending by RBI. Its Cayman attorneys and Leading Counsel between them account for US$198,000 in respect of this application and it should not be allowed to recover the further US$169,000 that it spent on other English lawyers.

b) The claim for indemnity costs is based primarily on a misconceived view of the Grand Court Rules and in the alternative on a mischaracterization of the way in which the ASI application was resisted.

c) There should be no order for indemnity taxation.

d) Taxation itself should take place in the normal way, without directions disapplying protections under the rules and the PD.

e) If an order for payment on account is made it should be conservative, particularly in the light of the fact that no breakdown of costs has been provided.

Decision

2. It is common ground that costs should follow the event in the usual way.

Indemnity costs

3. The power to award indemnity costs arises pursuant to the Judicature Law (2017 Revision) Section 24 and GCR Order 62 rule 4(11):

> *'The court may make an inter parties 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 .'*[1]

4. Unreasonable or improper in this context does not mean merely wrong or misguided in hindsight [2]. The nature of such an order is exceptional, although the jurisdiction to make such an order is wide and flexible, allowing the court to exercise its discretion as the circumstances of the case may require [3].

5. As was said recently in this court, having reviewed the relevant authorities, in *Ritchie v Lancelot (unreported 4 March 2021, Parker J at §§6-9*):

> "*The assessment is not always divorced from the merits, as can be seen where the court has determined that a case has been pursued which is manifestly hopeless, or where it must have been appreciated to be very weak and highly speculative.*
>
> *The court in those cases was looking at a party conducting proceedings in the face of the apparent hopelessness of the case, which was regarded as unreasonable or improper in the circumstances. The focus was however on the party's conduct, not the intrinsic merits of the case.*
>
> *Examples of the conduct of proceedings falling into the exceptional type of case where an award of indemnity costs has been made, include where 'root and branch' opposition is pursued taking "every conceivable argument" especially if the case is an inherently weak one and where allegations of dishonesty are made, to avoid the "obvious injustice" of being out of pocket by being forced to defend "ill considered and unmeritorious allegations of fraud and conspiracy".*
>
> *The question for the court is whether a party has conducted the proceedings in such a way that takes it out of the norm so that a punitive measure of taxation should be applied. Put another way, was the case conducted improperly, unreasonably, or negligently to a sufficiently high degree to merit a mark of disapproval by the court?"*

[1] *See Al Sadik [2012] (2) CILR 33 per Jones J §§ 10-15*
[2] *AHAB v SAAD [2013] (2) CILR 334 per Smellie CJ § 17*
[3] *AHAB v SAAD [2012] (2) CILR 1 §§ 9-12 per Smellie CJ*

6. This application granted an ASI in respect of foreign proceedings. The decision of the Chief Justice in this court in *Ardent Harmony Fund*[4], is relevant in this regard. An ASI was granted to protect Cayman Islands' insolvency proceedings concerning a Cayman Islands' company, in circumstances where a creditor and member had applied to appoint an interim receiver over the company in Barbados[5] . Smellie C.J. decided that, in circumstances where an ASI has been granted concerning foreign proceedings: (a) the conduct of the paying party, such as to justify an award of indemnity costs against them by the Cayman Court, can concern the institution of proceedings other than the Cayman proceedings in question, and (b) that conduct, such as to justify such an award, can concern those foreign proceedings.

7. The Chief Justice awarded indemnity costs, the conduct that justified the award being: (i) the unjustified decision to issue the foreign proceedings unilaterally and without notice, and without any apparent or proper basis to do so, and (ii) the refusal to withdraw or dismiss those foreign proceedings, once the applicant's case as to them had been put to the paying party. Although a further factor in favour of the making of such an award on the facts of that case was (iii) that unless indemnity costs were awarded, the costs would be borne by other creditors of the claimant, the two more general propositions (a) and (b) that I have set out above are applicable here. I reject the submission by D1 that D1's conduct concerning the Malta proceedings does not give rise to any power to award indemnity costs in these proceedings. If I am wrong about that, the facts in any event show that D1 has conducted these proceedings improperly and unreasonably to a high degree.

Application to the facts

8. The findings in the Judgment as to D1's conduct concerning the Maltese proceedings, which are the subject of the ASI, make it clear in my view that D1's conduct was unreasonable. I set out relevant extracts below (my emphasis):

> *"[70] The court is entitled to look for an explanation for D1's motivation and conduct in relation to its case in Malta. In the absence of a satisfactory explanation the court may draw such inferences as are appropriate from all circumstances of the case . M Bank, D3 and D1 have or had common directors and officers. Mr Morrow is the CFO of D1 and was the CFO of D2 and is or was a director of M Bank. He has submitted affidavit evidence in this application.*
>
> *[71] Mr Dellemann in his seventh affidavit of 19 June 2020 sets out RBI's case on why it considers that the Malta claim was brought illegitimately and in bad faith. In particular he makes the assertion that the declarations sought in the Malta claim are really for the benefit of D1 alone.*
>
> *[72] Whilst Mr Morrow clearly took the view, on advice that a large part of Mr Dellemann's affidavit went beyond what was necessary or appropriate, this is a fairly short point and there is no evidence from Mr Morrow in response.*
>
> *[73] Nor indeed is there any evidence from Mr Morrow as to why D1 needs to participate in the Malta proceedings. Indeed, there is no evidence as to D1's motivation at all.*

[4] *(unreported 31 May 2016 Smellie CJ)*
[5] *Ibid §§1-7 and 46-48.*

[74] The only relevant evidence on this point that Mr Morrow gives is that at paragraph 24 of his sixth affidavit of 14 July 2020 in which he deals with timing and D3 only: ...

[75] The inference the court draws is that the Malta proceedings have been ***brought by D1 in bad faith to harass and vex RBI****. In this regard, I accept what is said by Mr Dellemann at §§ 97-110 of his seventh affidavit. I also accept what is said at Mamo 2 at paragraph 7.7 to the effect that* ***the relief sought is unnecessary as a matter of Malta law*** *and is* ***brought to cause damage or create obstacles to RBI*** *enforcing a judgment in Malta.*

[76] In sum the ***court is not persuaded that D1 has a good claim in Malta****, or that it* ***genuinely seeks relief in Malta****, or that it would suffer any real prejudice if restrained from proceeding in Malta. D1 has participated extensively in the Cayman proceedings, it is a central party, and should not be permitted to gain any* ***illegitimate advantage*** *by* ***bringing flawed proceedings in Malta****."*

9. In my view D1 illegitimately invoked the jurisdiction of the Maltese court in a way which should have a mark of disapproval of this court imposed by way of costs sanction.

10. Indeed, the court has found that D1 had no genuine motive to obtain relief from the Maltese Courts and acted with the "*ulterior motive*"[6] or "*collateral purpose*"[7] of harassing and vexing RBI, including by causing damage to RBI and/or creating obstacles to enforcement by RBI in Malta.

11. A great deal of evidence was filed to cover the multiple arguments that were made by D1: that in the interests of comity the application should be dismissed and RBI should be left to apply to the Maltese court, an ASI would be futile, that there was no prospect of an estoppel, that there was a strong connexion to Malta, that the conspiracy allegation was not a factor in favour of the grant of an ASI, that there was no injustice to RBI in the Maltese proceedings continuing, and that there was no bad faith.

12. However, in my view the work required to meet this case and the evidence was significantly increased by the conduct of D1. It at first filed only limited evidence in the form of a 4-page affidavit (Morrow 6) and a 5-page affidavit (Ganado 1). D1 then put almost every point relied upon by RBI in issue in its written argument.

13. Only sometime after the exchange of skeleton arguments did D1 then file Ganado 2 which was almost twice as long as Ganado 1.

14. D1 continued in its oral submissions to dispute almost every point on which RBI relied and which required RBI to fight every point. It made concessions on the expert evidence only in its oral submissions at the hearing. This approach led to a great quantity of expert evidence on the jurisdiction issue.

15. D1 then changed tack during the course of oral submissions. This was unreasonable conduct[8].

16. The argument must have been appreciated to have been inherently weak and it was pursued beyond the point at which it ought to have been realised that it was bound to fail.

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[6] see *Al Sadik [2012] (2) CILR 33 at § 14*

[7] see *Ritter [2018] (2) CILR 638 at § 38 Williams J*

[8] See *BDO Cayman [2018] (1) CILR 187 §§16-18 Parker J*

17. This aspect of D1's conduct combined with the findings in the Judgment justifies an exceptional order for indemnity costs.

Costs of foreign lawyers

18. In light of the findings in the Judgment as to D1's conduct in instituting the Maltese proceedings, the matters set out above as to D1's conduct in response to this application, the inherently international nature of the application on which RBI has succeeded, concerning, as it did, Maltese proceedings, and the international nature of these Cayman proceedings as a whole (see below), this is an exceptional case in which taxation of foreign lawyers' fees should be without regard to the constraints that would otherwise pertain to the taxation of such costs on the indemnity basis.[9]

19. I accept that the following matters have necessitated a high degree of coordination between a number of international legal teams in the case as a whole: (a) RBI's claims that a formerly Canadian and now Marshall Islands company has been asset stripped by way of transfers of inter alia Canadian, Maltese, Marshall Islands, Slovakian, Ugandan and German assets, to inter alia Cayman, Canadian, Maltese, Marshall Islands, Liberian and Chinese companies; (b) D1's defences and counterclaim as a matter of Austrian law, (c) the Maltese proceedings brought by D1, the Third Defendant and others, and (d) Canadian proceedings that have been filed (but had not at the time of the hearing of RBI's application, or the Judgment, yet been served on RBI) by the Fourth Defendant and Sixth Defendant (of which RBI was first given notice by D1).

20. D1 and/or its subsidiaries have caused the matters at b) to d) above to be in play and (c) is of course the matter at hand.

21. I therefore dispense with the application of GCR Order 62 rule 18 (3) – (7) and Practice Direction 01/2001 section 6.5 in the circumstances of this case.

Payment forthwith and Interim payment

22. It is now over four months since the Judgment.

23. I have decided that in the circumstances costs should be taxed and paid forthwith and that I should order an interim payment. As to taxation and payment forthwith GCR O.62, r.9 provides:

> *(1) Subject to paragraph (2), the costs of any proceedings shall not be taxed until the conclusion of the cause or matter in which the proceedings arise. (2) If it appears to the Court when making an order for costs that all or any part of the costs ought to be taxed at an earlier stage it may order accordingly. (3) In the case of an appeal the costs of the proceedings giving rise to the appeal, as well as the costs of the appeal, may be dealt with by the Court hearing the appeal. (4) Where it appears to the Court on application that there is no likelihood of any further order being made in a cause or matter, it may forthwith order the costs of any interlocutory proceedings which have taken place to be taxed."*

[9] *General Shopping (unreported 25 August 2020 Kawaley J)§§19-25 and Sagicor [2008] CILR 482 §§1-7 Henderson J.*

24. This application concerned discrete proceedings which are now resolved. There is no reason for the taxation or payment of these discrete costs to await the outcome of a trial on the merits, which may be some years away.

As to an interim payment:

25. GCR O.62, r.4 (7)(h) provides: "*The Orders which the Court may make under this rule include an order that a party must pay – where the Court orders the paying party to pay costs subject to taxation, a reasonable sum on account of costs, such sum to be assessed summarily*."

26. I have come to the view, in considering the court's discretion, that there is no good reason why an interim payment should not be made as to the costs of this application[10].

27. I consider that a reasonable estimate, adopting a conservative approach[11], of what would be likely to be awarded on a taxation is 50% of the total actual costs set out[12]. D1 must pay RBI US $196,425.56 within 14 days.

THE HON. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT

[10] *Al Sadik (no 2) §§24-25 18-25 and 28*
[11] *United Airlines [2011] EWHC 2411 per Vos J §26-27*
[12] *At § 5 Waldron 3*