IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No. FSD 163 of 2017 (RPJ)

IN THE MATTER OF GRAND COURT LAW (2015 REVISION)

AND IN AN APPLICATION OF BDO CAYMAN LTD CONCERNING ARGYLE FUNDS SPC INC (IN OFFICIAL LIQUIDATION)

RULING

1. On 13 February 2018 I delivered a written judgment granting an anti-suit injunction in the terms sought by BDO Cayman in its originating summons dated 8 August 2017.

   BDO Cayman now seeks the following consequential orders:

   I) costs of and occasioned by the summons from Argyle to be taxed on the indemnity basis if not agreed;

   II) payment by Argyle of US $300,000 on account of such costs within 14 days;

   III) interest at a rate of 2.375% from 13 February 2018 until final payment;

   IV) damages from Argyle assessed by reference to its costs and expenses of and occasioned by the New York proceedings on an indemnity basis in an amount to be assessed if not agreed together with interest at a rate of 2.375% per annum from the date of commencement of the New York proceedings (21 June 2017) until final payment and an indemnity in respect of its future costs and expenses of the New York proceedings;

   V) liberty to apply for damages for any loss suffered as a result of the adverse publicity generated by the commencement of the New York proceedings.

2. I invited the parties to provide their written submissions in writing on costs relating to the summons and the costs of the New York proceedings in paragraph 101 of the

judgment and those submissions were duly submitted and exchanged on 2 March 2018. I have reviewed them and the authorities relied upon by each party. I have also reviewed further written submissions (which I permitted) exchanged on 13 March 2018 together with various other material relied upon, including further authorities and inter-attorneys correspondence.

3. In the result the court has had submitted to it a large amount of material concerning consequential orders following a contested hearing. It is not necessary for me to give my detailed reasoning on every point in the context of a costs ruling which involves the court in an exercise of principled discretion. However, given that Argyle are in official liquidation and may yet be considering an appeal of the judgment, and in deference to the lengthy written submissions, some of which raise novel points, which I have received from both parties I do set out my brief reasons for the decisions I have reached below.

4. The court has found that Argyle commenced the New York proceedings in breach of the express terms of the Engagement Letters and the arbitration agreements contained therein. BDO Cayman's attorneys pointed out these terms and agreements in June 2017 and that they would, if necessary, be seeking their costs of preventing such proceedings from continuing on the indemnity basis. The New York proceedings were not discontinued and BDO Cayman instructed New York attorneys to defend them. The application in Cayman for an anti-suit injunction was vigorously resisted, culminating in a two-day hearing on 8 and 9 January 2018, with Leading Counsel appearing on both sides, together with teams of attorneys.

5. Argyle does not oppose an order to pay the costs of the summons to be taxed on the standard basis if not agreed (although it reserves its position as to whether it has been made a party), but does oppose an order that those costs be taxed on the indemnity basis if not agreed. It also opposes an order that it should pay the costs (and interest) of the New York proceedings on any basis, whether incurred or to be incurred. It also contests any payment on account of costs (interim payment), interest on any costs awarded, or that there should be liberty to apply in relation to any damage or loss suffered by BDO Cayman as a result of adverse publicity.

Analysis

Indemnity costs

6. Costs are in the discretion of the court which is exercised taking into account all relevant circumstances. The court has a wide and flexible discretion as to costs which can be exercised as the circumstances require – see Smellie CJ in *AHAB v SAAD* [2012] (2) CILR 1 at [10] and also in *re AB Trust* 16 June 2013 (unreported).

7. Costs are not awarded as a matter of course on the indemnity basis. They will normally be awarded on the standard basis and will usually follow the event.

8. GCR Order 62 r 4 (11) provides that the court may make an order for costs to be taxed on the indemnity basis 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.

9. I have been referred to no Cayman authority on the question of what an appropriate costs order should be in circumstances similar to this case. There are authorities on the point in England. The English courts have held that the general costs order in relation to a party which commenced proceedings in a non-chosen jurisdiction in breach of an arbitration or exclusive jurisdiction clause is one which indemnifies the party compelled to enforce the contractual bargain in both the foreign proceedings and anti-suit injunction proceedings (as a form of damages) - see *Kyrgyz Mobil Tel Ltd v Fellowes International* [2005] EWHC 1329 (QB) *and A v B* [2007] EWHC 54 (Comm) at 8-15.

10. In *Kyrgyz* Cooke J said at paragraph 42:

> *"... the correct approach where there has been a breach of a jurisdiction clause by a party in initiating proceedings in a non-chosen jurisdiction is that the costs should be awarded on an indemnity basis. The reason for that is plain. If a party has breached his agreement, then the damages which flow from the breach of that agreement are all the costs incurred by the party who successfully relies upon the choice of jurisdiction clause. In my experience, the Commercial Court in particular, but courts generally in this country, adopt such an approach."*

11. In *A V B,* Colman J set out at paragraphs 9 - 15, with similar reasoning, the fundamental injustice of a situation if a costs order was confined to costs on the standard basis, where an indemnified portion of costs would be a loss to the successful party that could only be recovered in proceedings for breach. To be placed in a position where the balance of the recoverable amount could not be quantified until after the costs had been formally assessed would involve delay in obtaining compensation properly due (and more costs and court time) and so the learned Judge concluded that where there was a successful application for an anti-suit injunction as a remedy for breach of an arbitration or jurisdiction clause and that breach has caused the innocent party reasonably to incur legal costs, those costs should normally be recoverable on an indemnity basis.

12. These decisions, although not binding upon this court, are to my mind, especially in the absence of Cayman authority, persuasive in their reasoning and make for good policy. BDO Cayman have also referred me to an Australian authority *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10 (S) (per Martin CJ at [17-25] of the Supreme Court of Western Australia) which has recently followed *A v B*.

13. It seems to me that this court should also follow this line of authority. Where a party has been compelled to apply for an anti-suit injunction to restrain the continuation of foreign proceedings brought against it in breach of the parties' contractual bargain it

is fair and reasonable that it is compensated as a party which has been forced to deal with the consequences of a breach of contract.

14. I do not accept the written submission of Argyle which argues that *A v B* needs to be distinguished on the facts. Neither do I accept Argyle's submission that because the regime in Cayman as to indemnity costs is more restrictive (in the sense that conduct needs to be shown that is improper, unreasonable, or negligent) than in England (under Civil Procedure Rule 44) it should be applied so as to exclude such an award in the circumstances of this case.

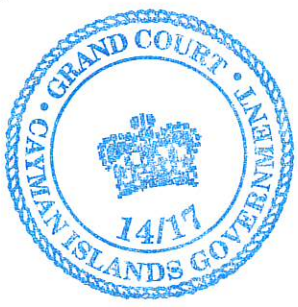
15. In my view the evidence filed in this case shows that Argyle was seeking to obtain procedural and substantive advantages by commencing the New York proceedings which would not be available in the Cayman Islands (see paragraphs 96-97 of my Judgment) and the costs order should discourage such conduct where there are clear contractual provisions which a party circumvents to obtain these tactical and other advantages. Moreover, such conduct in my view is also unreasonable.

16. Following the evidence filed by BDO Cayman, Argyle's continued "root and branch" opposition to the application became questionable. I should make it clear in this regard that I do not find that the joint official liquidators of Argyle at any time sought to mislead the court or to advance a case which they believed to be untrue. However I do recognise BDO Cayman's description of the "dogged defence" of the anti-suit injunction in the light of the terms of the Engagement Letters and evidence, and the pursuit of "every conceivable argument" which to my mind meant that Argyle's conduct became unreasonable.

17. Conduct is a more important factor on this issue than the substantive merits of a party's case and I am aware that at no stage during the hearing did I criticise Argyle's case or indicate that any argument advanced was manifestly bad. Indeed I would have made it clear to Leading Counsel for Argyle if any point had been to my mind unarguable. I am also conscious not to apply hindsight to my analysis.

18. However, I am bound to say that I find that some of the arguments advanced by Argyle were weak and unlikely to succeed (but not as I say manifestly hopeless). These are additional factors which added to the risk Argyle took to argue them and go to the exercise of my overall discretion - see decision of Smellie CJ in *Talent Business v China Yinmore* [2015] (2) CILR 113 from [30].

19. I have in mind in particular the arguments relating to the involvement of BDO USA and Schwartz and the evidence of Mr Laffey, which I found to be "thin and unconvincing" (see paragraph 61 of my Judgment), and the imaginative arguments advanced by Argyle concerning sections 7 and 8 of the Arbitration Law. It follows that, for all of these reasons, this is an appropriate case for indemnity costs.



Costs in New York proceedings

Damages

20. This court may order damages reflecting the costs of and occasioned by the New York proceedings. Section 11 of the Grand Court Law (2015 Revision) gives the court a like jurisdiction to that vested in the High Court of Justice and Divisional Courts in England, under the Senior Courts Act1981. Pursuant to section 50 of the Senior Courts Act 1981 there is power to award damages as well as, or in substitution for, an injunction or specific performance. This court's jurisdiction is not limited to only awarding costs in relation to the domestic proceedings before it in circumstances where the costs of foreign proceedings (here the New York proceedings) can be fairly characterised as damages suffered by reason of a breach of contract which the court has found proven.

21. I do not consider that it is right to force BDO Cayman to resolve the issue in relation to its New York costs by way of arbitration. That would add to costs and delay on both sides. This is a matter which can and should be dealt with by this court as a consequence of the decision made on the anti-suit injunction.

22. Again there is no Cayman authority to which I have been referred which is on point. However, I derive some assistance again from the English Courts. The analysis is both logical and straightforward. Damages flow from the breach of contract because the costs of defending the New York proceedings have been incurred as a result of Argyle's breach of contract - see *Union Discount Co Ltd v Zoller & Ors* (2002) 1 WLR 1517 per Schiemann LJ and *Svenborg v Akar & Ors* [2003] EWHC 797 per Flaux QC (as he then was) sitting as a Deputy High Court Judge.

23. It was made clear by Mr Chapman QC in his skeleton argument of 2 January 2018 that he was seeking the costs of the New York proceedings on an indemnity basis as damages for the breach of contract committed by Argyle in commencing those proceedings.

24. I find that this is an appropriate case to award costs claimed in the Cayman proceedings, but incurred by BDO Cayman in the New York proceedings, in circumstances where those proceedings were brought in breach of jurisdiction and arbitration clauses and there has been no adjudication as to costs in the New York proceedings.

25. It seems to me in keeping with these principles and as a matter of discretion that BDO Cayman should have its costs and expenses concerning the New York proceedings on an indemnity basis together with interest from the date of commencement of those proceedings until payment and an indemnity as to any future costs and expenses of dealing with the New York proceedings. I note that BDO Cayman confirms that it will not seek its costs of the New York proceedings from the New York Court if it recovers damages and an indemnity in these proceedings.

26. The costs of defending the New York proceedings in my view flow from the breach without the need for detailed evidence to support the principle that they should be recoverable. Argyle will be able to advance arguments in any taxation procedure as to whether those costs have been validly and properly incurred.

27. The authorities relied on by BDO Cayman (in particular *Union Discount* and *Svenborg)* which I have referred to above seem to me to be apposite and should be followed in this jurisdiction.

28. It is irrelevant, as Argyle assert, that this is unfair because they would have won the New York case and obtained their costs. There has been no determination on the merits of Argyle's claim in New York by this court. Indeed this court has expressed its doubts as to the merits of that claim as pleaded. More importantly, this court has decided that it should never have been brought in that forum.

Interim payment

29. Jurisdiction to order a payment on account is afforded by GCR Order 62 r.4 (7) (h).

30. In *Primeo (FSD 30 of 2013 unreported)* Jones J recently made a substantial order against the unsuccessful party. There is a dispute between the parties as to the basis upon which Mr Justice Jones's order was made.

31. BDO Cayman submits that the modern practice of the Commercial Court in England is that an interim payment will ordinarily be ordered, unless there are good reasons not to do so. Since 1 April 2013 the Civil Procedure Rules (CPR rule 44.2(8)) were amended to provide that costs to be subjected to a detailed assessment would include an order for interim payment *unless* there is a good reason not to do so. In this case BDO Cayman submits they should not have to wait for a good portion of the money which will inevitably become payable.

32. Argyle argues that following the decisions in *AHAB v SAAD* 2013 (2) CILR 344, *Al Sadik v Investcorp Bank BSC* 2012 (2) CILR 33 and *Weavering Macro Fixed Income Fund Limited (in Official Liquidation) v Ernst & Young Chartered Accountants (A Firm) et al* FSD 160/2012 (unreported) (5 May 2015) that the test is different in Cayman.

33. Argyle submits from these authorities that the position in Cayman is that interim payments are only to be ordered in 'rare and exceptional circumstances'.

34. It seems to me that the relevant provision of the Grand Court Rules (Order 62, r. 4(7) (h)) gives the court a discretion to order litigants to make a payment on account of costs and in the exercise of its discretion the court is entitled to do justice on a principled basis. However, there is not the reversal of burden which pertains in England following the introduction of the CPR rule.

35. BDO Cayman have submitted that the legal costs they have incurred to date, including the New York proceedings, are approximately US $500,000, approximately US $425,000 of which relate to the Cayman proceedings. BDO Cayman seek 70% of those costs amounting to US$300,000 as a payment on account.

36. Argyle argues that in the absence of a properly itemised costs schedule verified by evidence and a full breakdown it is not appropriate for the court to summarily evaluate what a reasonable sum should be.

37. Argyle also submits that the application for an interim payment is plainly an attempt to stifle an appeal and asks for a stay of any order (were I minded to make one) pending appeal. That is of course a consideration in circumstances where Argyle is in official liquidation and funds are limited.

38. It seems to me as a matter of discretion, taking all these matters into account and balancing the interests between the litigants, that it would not be fair to order an amount to be paid on account in this case.

Interest

39. As to interest, jurisdiction derives from GCR Order 62 r 4(7) (g) and section 34 of the Judicature Law (2017 Revision). As an exercise of discretion, in my view it would be fair to order interest to be paid on the costs incurred and damages awarded at the applicable rate (which is 2.375% as per the Judgment Debts (Rates of Interest) Rules 2012) from the date of the judgment until payment is received in full. That rate should also be applied from the date of commencement of the New York proceedings until the date of payment in relation to the New York costs and expenses.

Liberty to apply

40. BDO Cayman also claims that it has suffered reputational damage and loss as a result of adverse publicity generated by the New York proceedings which should never have been brought in a way which allowed for publicity (as they should only have been brought in a private and confidential arbitration in the Cayman Islands). For the reasons set out by Argyle, in particular with reference to:

    a) the difficulties of obtaining damages for breach of contract for alleged loss other than financial loss; and

    b) because Argyle could have commenced proceedings pursuant to the 2012 and 2013 Engagement letters in the courts of the Cayman Islands (which unless a special Order was made) would have heard the matter in open court,

I do not think it is right that there should be liberty to apply in relation to reputational damage.

Result

41. As a consequence I grant the consequential orders BDO Cayman seeks that it should have its costs:

    a) on the indemnity basis if not agreed together with interest from 13 February 2018 until final payment; and

    b) of the New York proceedings together with interest from 21 June 2017 until final payment and any future costs of disposing of those proceedings.

42. I dismiss the orders BDO Cayman seeks in relation to:

    a) the payment on account; and

    b) liberty to apply for damages for any loss suffered as result of adverse publicity.

43. Argyle's submission seeking an order in its favour for costs incurred since 8 February 2018 also fails.

RAJ PARKER
JUDGE OF THE GRAND COURT
27 March 2018