IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 200 of 2019 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2020 REVISION)

AND IN THE MATTER OF ALTAIR ASIA INVESTMENTS LIMITED

ON THE PAPERS

BEFORE: THE HON. RAJ PARKER

HEARD: 2 July 2020

Draft Judgment Circulated: 4 September 2020

Judgment Delivered: 11 September 2020

HEAD NOTE

Winding up petition - disputed debt - costs - principles - Order 62 rule 4 (11) -s.24 (1) Judicature Law (2017 Revision) - CWR (2018 Revision) - Ord 1 rule 2(4) - indemnity costs -unreasonable conduct-petitions presented in Hong Kong and Cayman Islands - abuse of insolvency procedure for debts - abuse of procedure where petition disputed - discretion.

RULING ON COSTS

1. Pursuant to an Order dated 30 July 2020 the parties have provided written submissions on costs.

2. The petitioner presented a winding up petition in this court against the company on 11 October 2019 (the "Petition"). Following a contested hearing of the Petition on 2 July 2020 it was dismissed on the basis that the company had persuaded the court that it was disputed *bona fide* on substantial grounds[1].

[1] See Judgment of 28 July 2020 per Parker J

3. This followed a hearing on 21 January 2020 where the Petition was adjourned pending the determination of earlier insolvency proceedings commenced by the petitioner in Hong Kong where judgment was expected.

4. The company argues that the conduct of the petitioner in presenting the Petition in circumstances where it knew that the underlying debt was disputed and where the Petition was dismissed should be regarded as unreasonable and improper and in accordance with the relevant authorities warrants an order that the company's costs of defending the Petition be paid by the petitioner on an indemnity basis[2]. As an alternative case it argues for indemnity costs for a limited period of time.

5. The incidence of costs in respect of both the January and July hearings is not in issue. The petitioner agrees that it should pay the company's costs having been the unsuccessful party on both occasions but says they should be awarded on the standard basis.

The law

6. The costs of and incidental to all civil proceedings are in the discretion of the court: see section 24(1) of the Judicature Law (2017 Revision).

7. The court has specific jurisdiction to make an order for costs to be taxed on the indemnity basis if it is satisfied that the paying party has conducted the proceedings improperly unreasonably or negligently[3]. The court's focus should be primarily on the conduct of the losing party and not on the substantive merits of the case and an award of indemnity costs should be made only in exceptional circumstances where the losing party's conduct deserved a 'mark of disapproval' on the basis that it is unreasonable to a high degree[4].

The company's case

8. The company argues that the petitioner, as a consequence of the earlier and related winding up and bankruptcy proceedings it brought in Hong Kong, was fully aware at the time of the presentation of the Petition in this court that the debt on which the Petition was based was disputed. Rather than issuing a claim to establish liability in the ordinary course and as a consequence of not being immediately successful in the Hong Kong proceedings, the company asserts that the petitioner sought to exert maximum pressure by way of the presentation of the Petition.

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[2] *Mann v Goldstein [1968] 1 WLR 1019*, *Re Banco Economico [1998 CILR 292* per Graham J at pp 302-303, *In re a Company of 1991 [1992] 1 WLR* 351 per Hoffmann J (as he then was).See also *McPherson's Law of Company Liquidation 4th Edition Chapter .3-158 p 213.*

[3] GCR Order 62 rule 4(11) which applies to liquidation proceedings governed by the Companies Winding Up Rules (2018 Revision) by CWR Order 1 rule 2(4)-see also *Oakrun (FSD 9/2019 30 April 2019)* at § 44 and 45 per Kawaley J.

[4] See *AHAB v SAAD [2013 (2) CILR 344]*

9. The Hong Kong petitions were heard on 27 September 2019 and judgment was reserved. Two weeks later the petitioner decided to pursue essentially the determination of the same issues on the same debt before this court and presented the Petition on 11 October 2019. According to the company this was a high risk strategy and conduct deserving of an order for indemnity costs being made against the petitioner where it had been unsuccessful.

10. The company argues that the conduct to proceed by way of petition was abusive in and of itself and the petitioner should have sought to enforce its rights under contract by way of a writ action.

11. The company says it has succeeded in its contention that the petition debt is disputed *bona fide* on substantial grounds and it follows that the Petition should never have been brought. The company also argues that its commercial interests have been significantly prejudiced as a consequence of the petitioner's aggressive strategy in Hong Kong and in the Cayman Islands[5].

Analysis

12. The company's written submissions raise the questions as to whether it was appropriate for the petitioner to invoke the Companies Winding Up procedure at all and the effect, if any, on the petitioner's case of when it became clear to the petitioner that the debt was indeed disputed *bona fide* on substantial grounds.

13. The court is not satisfied that the presentation of the Petition was improper or an abuse of the process of the court on the basis that it was founded on debts which were disputed and known to be disputed, or that the procedure used was calculated to put improper pressure on the company.

14. In its two reasoned decisions to date the court has not taken the view that the procedure invoked by the petitioner was improper or unreasonable. No application was made by the company to restrain the petitioner from pursuing the Petition. There was no order made for the strike out of the Petition. The order ultimately made was for the Petition to be dismissed.

15. Having examined the matter again in light of the written submissions of the parties and from the evidence reviewed in this case, it is clear that the petitioner was entitled to bring its case by way of petition in this court. In view of the history of this matter from when the petitioner first demanded payment and the evidence concerning the financial condition of the company[6], the petitioner's conduct in invoking this court's insolvency jurisdiction was not in all the circumstances abusive.

[5] See §25 (c) of the third affidavit of Frank Dominick dated 29 April 2020
[6] See first affirmation of Liu Yao §§ 31, 32 and 35,36 and second affirmation of Liu Yao §9-24

16. Moreover, the fact that the petitioner knew that the debt was disputed and did not prevail in its arguments does not lead to the conclusion that the arguments should not have been brought in the first place[7].

17. Simply because the petitioner knew that the company disputed the alleged debt and advanced a number of arguments as to why that was the case is not in my view sufficient to conclude that it behaved improperly or unreasonably in pursuing the Petition. It would not be just to award indemnity costs to a company which simply establishes that its defence had realistic prospects of success to cause the petition to be dismissed.

18. To award indemnity costs is in the court's discretion and requires unreasonable conduct.

19. It seems to me that the essential question is whether the relevant conduct of the petitioner in this case is unreasonable to a degree which takes it out of the norm so as to make it just as between the parties to award the company indemnity costs for all or part of the period for which it claims.

20. The petitioner decided to invoke the insolvency jurisdiction of two courts to seek orders to wind up the company and its guarantors in their respective home jurisdictions in circumstances where it had previously unsuccessfully attempted to recover its debt for several months. The company has not persuaded the court that the petitioner had no proper basis for doing so in all the circumstances. In this regard the court noted in its July judgment that the company's arguments could be *"fairly described as technical*" and had been "*taken late by the company after a long period of not raising any defence to the debt*" [8].

21. Neither has the company persuaded the court that the petitioner has behaved improperly or unreasonably by proceeding by way of petition because, according to the company, it deliberately chose an inappropriate procedure to put pressure on the company to pay up.

22. As to the merits of the arguments, if the petitioner had asserted a cause of action when it knew that it had no legitimate basis for doing so it could fairly be said to have acted improperly. I do not accept that the petitioner knew and appreciated, or should have known and appreciated, that the points of dispute raised by the company meant that it should not present or proceed with the Petition.

23. Nor did there come a point where I could conclude that it was unreasonable to have pursued the Petition because the petitioner must have realised that it was bound to fail[9]. As a matter of fact I do not believe that time ever came in light of the petitioner's success in Hong Kong.

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[7] See *Abraaj (unreported 4 January 2019* per McMillan J) and *Ahab v SAAD [2013 (2) CILR per Smellie CJ §17*.
[8] §§ 75 and 76 of Judgment dated 28 July 2020 per Parker J
[9] See *Al Sadiq v Investcorp [2012(2) CILR 33 §14-15* per Jones J

24. The controversy in this case involved a number of finely balanced factual and legal arguments which were not easy to reconcile and upon which two courts reached different conclusions[10].

25. There was nothing abusive, improper or unreasonable in my view in the petitioner's conduct. It would therefore not be just in my discretion to award indemnity costs against it.

The company's alternative case

26. As an alternative case the company submits that the petitioner should at least pay the company's costs to be taxed on the indemnity basis (if not agreed) for the period from 26 October 2019 to 16 March 2020 and otherwise to be taxed on the standard basis.

27. This is because it is said that immediately following the presentation of the Petition, the company (by way of Walkers' letter dated 18 October 2019), invited the petitioner to agree to stay the petition pending the determination of the Hong Kong proceedings. The company's position in respect of the proposed adjournment was that the existence or otherwise of the debt upon which the petition was based was the key issue and in respect of which the contested hearing in Hong Kong had already taken place in September 2019 and judgment was awaited. The Hong Kong judgment would determine the matter and so it was premature and inappropriate to proceed with the Petition which should be stayed pending the determination of the Hong Kong Court.

28. That invitation was rejected on behalf of the petitioner by Ogier's letter of 25 October 2019 as a consequence of which the parties were put to the cost of preparing for and attending the 21 January 2020 hearing. The company says such costs were entirely avoidable.

29. In its judgment on 16 March 2020 the court accepted the company's position (which it only argued at the substantive hearing and not before) that it was appropriate to grant a short adjournment of the Petition pending the awaited outcome of the Hong Kong proceedings. The company says this shows that the petitioner's conduct is of the kind that should warrant an order for indemnity costs.

Analysis

30. The court has found that prior to the Hong Kong proceedings commencing on 7 March 2019 there was no dispute by the company as to the petitioner's status as a creditor (rather than a shareholder) and as to its obligations to pay under the redemption requests made and the redemption process[11]. This despite the fact that there had been ongoing communications between the parties in the preceding months.

[10] The Hong Kong court found that there was no *bona fide* and substantial dispute as to the underlying debt.
[11] Judgment 28 July 2020 §§75 and 76 per Parker J

31. However, by the time the petition was presented in this court, seven months later, it was clear that the company did indeed dispute the alleged debt, although the company only served evidence to support its case on 3 January 2020. Does that knowledge mean the petitioner behaved unreasonably in all the circumstances in pursuing the Petition and not agreeing to an adjournment?

32. The petitioner can fairly say in response that when Ogier's letter was sent on 25 October 2019 there was no indication as to when the Hong Kong Court intended to hand down its judgment, which it did not do until 16 March 2020. The petitioner did not consider there to be any basis to agree an adjournment without a court determination.

33. The company has not persuaded the court that the petitioner acted unreasonably by pressing ahead to have the Petition determined in the jurisdiction of the company's incorporation and by refusing to agree to an adjournment, or in pursuing the Petition between October 2019 and March 2020. There are no circumstances which justify invoking the court's jurisdiction to award costs on the indemnity basis for this period.

Decision

34. The company's costs of the Petition are payable by the petitioner, to be taxed on the standard basis if not agreed (other than in relation to these written submissions on costs).

35. The petitioner's costs of these written submissions on costs are payable by the company, to be taxed on the standard basis if not agreed.

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HON. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT