



In The Supreme Court Of Bermuda

CIVIL JURISDICTION

2021: No. 56

BETWEEN:

AML CREDITOR RECOVERY VEHICLE PTC

Plaintiff

-and-

(1) MADISON PACIFIC TRUST LIMITED

(2) SHANDONG IRON & STEEL GROUP CO., LTD

(3) SHANDONG STEEL INTERNATIONAL INVESTMENT LIMITED

(4) SHANDONG STEEL HONG KONG RESOURCES LIMITED

(5) SHANDONG STEEL HONGKONG ZENGLI LIMITED

(6) MR CUI JURONG

(7) MR LI QIANG

Defendants

Before: The Hon. Chief Justice Hargun

Representation: Keith Robinson and Oliver MacKay of Carey Olsen Bermuda Limited for the Plaintiff

Justin Fenwick KC, Rhys Williams and Britt Smith of Conyers Dill & Pearman Limited for the 1st Defendant

Ben Valentin KC, Kevin Taylor and Tim Molton of Walkers (Bermuda) Limited for the 2nd to 5th and 7th Defendants

**Warren Bank of Cox Hallett Wilkinson Limited for the 6th
Defendant**

Date of Hearing: 3 - 6 July 2023

Date of Judgment: 17 August 2023

Date of Ruling on Costs: 9 October 2023

RULING ON COSTS

HARGUN CJ

Introduction

1. On 17 August 2023 the Court handed down its Judgment in this matter and held that (i) the causes of action pleaded by the Plaintiff against the Defendants in the Statement of Claim are causes of action which could not be assigned having regard to Clause 27.1 of the PXF Agreement and Clause 14.3 of each of the Share Charges with the result that the Plaintiff lacks the title to sue in respect of the cause of action pleaded against the Defendants in the Writ; and (ii) on the proper construction of the agreements and the jurisdiction clauses the Plaintiff's claims fall within the scope of Clause 41 of the PXF Agreement, the umbrella agreement and consistent with Clause 18 of the Share Charges, the Plaintiff was obliged to bring its claims in England and Wales and was not entitled to bring its claims in Bermuda.
2. In light of the above findings, the Court directed that the present proceedings be stayed, and the Plaintiff be at liberty to pursue these claims against the Defendants in England. Further, having regard to the Court's rulings in relation to the issue of assignment under the PXF Agreement and the Share Charges, and the issue of jurisdiction under Clause 41.1 of the PXF Agreement and Clause 18 of the Share Charges, the Court set aside the Order dated 27 January 2022 giving leave, under RSC order 11 rule 1, to serve the Plaintiff's Specially Endorsed Writ of Summons out of the jurisdiction on the Defendants.

3. The Court advised the parties that the issue of costs will be determined on the papers. The Court has received written submissions from the Plaintiff, the First Defendant and on behalf of the Shandong Defendants, all dated 31 August 2023.
4. The approach of the Court in relation to the issue of costs is set out in the decision of Kawaley CJ in *Kentucky Fried Chicken (Bermuda) Ltd v Minister of Economy Trade and Industry (Costs)* [2013] Bda LR 34, at [13]-[14]:

“13... Firstly, this Court’s jurisdiction to make issues-based costs orders finds no express support in the Rules unlike the position under the English CPR (paragraph 44.3(6)(f)); the Court of Appeal for Bermuda has cautioned this Court against playing fast and loose, as it were, with the basic principle that costs follow the event and that success should be measured in practical terms. In First Atlantic Commerce v Bank of Bermuda Ltd [2009] Bda LR 18, Sir Anthony Evans JA (giving the Judgment of the Court) opined as follows:

“65. The Judge rightly indicated that the fact that the recovery, regarded as equivalent to US\$4 million was less than the amount claimed was not, of itself, a good reason for holding that the successful claimant could recover only a proportion of its costs (paragraph 29). However, he reduced the proportion to one-third on the ground that that was a generous estimate of the costs incurred in relation to the recoverable loss issue, as distinct from liability issues (paragraphs 30 and 32).

66. We do not follow why the costs recovery should be limited in this way. The recoverable loss issue was concerned with causation and the measurement of quantum, questions that did not arise unless liability was first established. The position was complicated in the present case by the fact that the outcome was essentially an agreed settlement, though embodied in the first Order (7 November 2007), and the Court could not assess the chances of success on that issue alone (Judgment para 7, ref para 48 above). In our judgment, however, if the claimant is entitled to costs on the basis that he has achieved substantial success, as FAC is, he should recover the costs of establishing liability, as well as causation and damages.

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]

[...]14. In Binns v Burrows [2012] Bda LR 3, after considering the quoted passage and other authorities, I summarised the relevant Bermudian costs principles as follows:

“6. The above authorities suggest that, unless the Court or the parties have identified discrete issues for determination at the trial of a Bermudian action, the Court's duty in awarding costs will generally be to:

i. determine which party has in common sense or "real life" terms succeeded;

ii. award the successful party its/his costs; and

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.”

5. The Plaintiff accepts that the Court will apply the general principle that costs follow the event and in this case the costs should be awarded to the Defendants. The Plaintiff also does not resist the proposition that the Court has a discretion to order an interim payment on account of costs. However, the Plaintiff submits that the Defendants’ costs should be reduced by a proportionate amount to reflect the significant proportion of the evidence, argument and hearing time dedicated to matters on which the Defendants were unsuccessful.
6. The Plaintiff submits that large swathes of the Defendants’ evidence were directed to whether there were serious triable issues (84 paragraphs of the Defendants’ affidavit evidence and 51 paragraphs of their skeleton arguments). The Plaintiff prevailed on that question including on the question of whether the case was adequately pleaded.
7. The Plaintiff also contends that there was significant evidence and argument on the Defendants’ positions on the jurisdictional gateways. However, the Defendants failed on each and every one of the arguments advanced on the gateways.

8. The Plaintiff also relies on the fact that the Defendants failed to persuade the Court that the “notice of assignment” argument dealt with at paragraphs 90 to 97 of the Judgment would have made the assignment invalid. Likewise, the Defendants failed to persuade the Court that the Order giving leave could have been set aside on the basis of material non-disclosure.
9. Finally, the Plaintiff contends that the Shandong Defendants also ran arguments based on the application of the law of the People's Republic of China (“**PRC**”). They filed expert evidence on the applicability of the limitation periods under PRC law, as well as initiating the question of the effectiveness of service under Hong Kong law. These foreign law issues turned out to have no bearing on the outcome of the Judgment.
10. In considering these submissions by the Plaintiff the Court kept firmly in mind that the Defendants have succeeded on two fundamental issues: (i) the Plaintiff’s lack of title to sue based upon the assignment relied upon; and (ii) the exclusive jurisdiction clause mandating that these proceedings be pursued, if at all, in England. Having regard to the critical nature of these two issues, the remaining issues are properly to be considered as minor and subsidiary. Secondly, the Court does not apply a discount in relation to costs in relation to every subsidiary issue on which the overall successful party may not have succeeded. There has to be a degree of unreasonableness in raising that issue and the Court has to be satisfied that absent an appropriate discount in respect of that issue there would be injustice to the parties.
11. The Court notes that in relation to the issue of material non-disclosure, the Court found that there was in fact material non-disclosure but that it was inadvertent. The Court does not consider that it would be appropriate to apply a discount in relation to that issue. Indeed, the Court does not consider it appropriate to apply a discount in relation to any of the other issues relied upon by the Plaintiff save for the issue of whether the Plaintiff’s pleaded case had raised a serious issue to be tried. In addition to the lack of standing due to the ineffective assignment and exclusive jurisdiction clause, the Defendants did rely upon other matters in support of their contention that there was no serious issue to be tried on the pleaded case. These additional matters required the parties to file significant affidavit evidence and a significant amount of time in presentation before the Court. In all the circumstances the Court

considers it just that the Defendants' entitlement to taxed costs on the standard basis, in relation to this application, should be reduced by 10% and the Court so orders.

12. In relation to the issue of interim payment the Court has the jurisdiction to make such an order at this stage (see *Bidzina Ivanishvili v Credit Suisse* [2022] SC (Bda) 56 Civ at [106]). Indeed, the Plaintiff does not resist that the Court should exercise the jurisdiction to make such an order but contends that the interim payment should be proportionately reduced as the reduction in the overall costs.
13. Having considered the respective submissions and the second affidavit of Mr Rhys Williams, the Court orders that the Plaintiff is required to make the following interim payments on account of costs within the next 30 days: (i) payment in the amount of \$300,000 to the First Defendant; and (ii) payment in the amount of \$400,000 to the Shandong Defendants.
14. The Court makes no order as to costs in relation to this application for costs and interim payments.

Dated this 9th day of October 2023

NARINDER K HARGUN

CHIEF JUSTICE