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UPDATE

Non-party costs in Cayman: the real loser must pay

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The Grand Court has confirmed that, like the English Courts, it can vary the usual "loser pays" costs rule and order a third party, who is not a named party in the litigation but who has forced the issue of litigation for its own improper benefit, to pay some or all of the costs incurred.

Mr Justice McMillan has provided useful commentary on the purpose and scope of the Cayman costs regime generally. This is a prime example of improper conduct and an abuse of process being castigated through the exercise of the Grand Court's discretion in costs.

Background

As is well known, Primeo Fund (in Official Liquidation) (**Primeo**), acting through its Joint Official Liquidators (**JOLs**), issued proceedings in the Cayman Islands against Bank of Bermuda (Cayman) Ltd and HSBC Securities Services (Luxembourg) SA (together, the **HSBC Defendants**) alleging various breaches of duty in their capacities as administrator and custodian of Primeo (the **HSBC Litigation**).

In the course of the HSBC Litigation, the HSBC Defendants compelled the JOLs, as opposed to Primeo as the plaintiff, to exercise *liquidator's* powers to obtain documents from EY Cayman (as Primeo's former statutory auditor) and, by extension, EY Luxembourg (which carried out certain fieldwork), so that any documents obtained could be disclosed to the HSBC Defendants in the HSBC Litigation. Unsurprisingly, the application failed because the JOLs had no entitlement to such documents. In pressing the JOLs to make the application, the HSBC Defendants had confused two entirely separate regimes – discovery in civil litigation, and the powers of liquidators to recover company property. This may sound familiar.

The Cayman Islands Court of Appeal (CICA) judgment in Pioneer

The CICA recently ordered costs against the HSBC Defendants in relation to another application instigated by the HSBC Defendants requiring the JOLs to seek disclosure of documents from third parties so they could be made available to the HSBC Defendants in the HSBC Litigation (please see our briefing here). Mr Justice Jones QC, the presiding trial judge in the HSBC Litigation and Primeo liquidation judge, acceded to the HSBC Defendants' applications in relation to both Pioneer and EY Cayman documents.

He was overruled by the CICA in relation to the first example and, having ordered the JOLs to take certain steps, then recused himself due to a conflict in relation to the EY Cayman application. In both cases, Mr Justice Jones QC was found to be wrong. Both Mr Justice McMillan and the CICA were satisfied that the Primeo estate should not have to pay any of the costs incurred by the unsuccessful attempts by the HSBC Defendants to circumvent the rules in order to obtain benefits for themselves.

Mr Justice McMillan noted that the HSBC Defendants' conduct had been described by the CICA as *improper* and *abusive* and such findings mirrored his own conclusion. As His Lordship confirmed, there was *no conceptual or functional distinction* to be made between the Pioneer case and the present one.

The JOLs' arguments

In broad terms, the JOLs made the following arguments in support of an order against the HSBC Defendants for non-party costs:

1. The HSBC Defendants, and not the JOLs, were the real driving force behind the EY Cayman application. As the HSBC Defendants initially argued in written and oral submissions in seeking leave to appear, the application originated in applications which the HSBC Defendants made in the HSBC Litigation and the only reason it was issued was because of the HSBC Defendants' desire to obtain further documents in discovery;
2. Both of the applications which the HSBC Defendants insisted that the JOLs took (either a letter of request process directed abroad, or an application against EY Cayman) were equally flawed because they arose from the HSBC Defendants' improper conflation of two entirely separate regimes – the litigation and the liquidation regimes; and
3. The JOLs are experienced professionals who had concluded at an early stage that the application the HSBC Defendants were demanding was misconceived. The JOLs' decisions were well-reasoned and sensible, and the HSBC Defendants should have respected the autonomy and professionalism of their decisions. Consequently, they should not have to pay any of the costs incurred by the unsuccessful attempt by the HSBC Defendants to circumvent the rules in order to obtain a benefit for themselves.

The HSBC Defendants' arguments

In response, the HSBC Defendants argued that:

1. The costs of the EY Cayman application were not so *exceptional* as to come within the jurisdiction that allowed costs to be paid by non-parties;
2. The CICA ruling was neither binding nor persuasive as it only related to inter party costs and gave neither consideration to the non-party costs jurisdiction nor guidance as to the applicable principles;
3. It was not open to the JOLs to seek a costs order requiring the HSBC Defendants to meet the JOLs' costs liability to EY, as an order for costs does not extend to indemnify a party from its liability to satisfy an adverse costs order to another party;
4. The HSBC Defendants never had substantial control of the application and were not the real parties; and
5. Despite having legal representation at all times, the HSBC Defendants submitted that they were not warned that they might be subject to a non-party costs application.

Decision

In rejecting the HSBC Defendants' arguments, His Lordship confirmed that the Grand Court has a wide discretion to allocate costs in civil proceedings and there is no bar to an order for costs against a non-party in Cayman.

McMillan J accepted the JOLs' submissions and relied upon the leading Privy Council decision in *Dymocks Franchise Systems (NSW) Pty v Todd*, emphasising two core principles in particular: (i) *although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases*; and (ii) *where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, the non-party will pay the successful party's costs … [the party controlling or benefitting from the litigation is] himself … "the real party" to the litigation….*

The HSBC Defendants claimed that the JOLs' application was *unprecedented* and *unprincipled*. However, as McMillan J confirmed, that view is unsupported by both case law, including CICA authority[1], and established practice. Mr Justice McMillan accepted that non-party costs order are only exceptional in that they are outside the ordinary run of cases. Although the JOLs technically lost the application, they were not the real losing party – the HSBC Defendants were – and, as His Lordship confirmed, this was not a loss to

[1] (see *Kenney and CC International Limited v Ace Limited* [2015] CILR 367).

which any criticism of the JOLs should be attached. Accordingly, it was held that the HSBC Defendants must bear the JOLs' costs and any costs liability which the JOLs owe to EY as a result of the application.

The Grand Court agreed that the JOLs would not have made the application but for the HSBC Defendants demands requiring them to do so. Despite submissions from the HSBC Defendants to the contrary, the Grand Court held that the JOLs had not acted in any way that was *unreasonable*, *disproportionate* or which was *frankly even avoidable*. His Lordship confirmed that the HSBC Defendants *caused and were exclusively responsible* for the proceedings in question. He stated definitively that *no other conclusion may be drawn*. In those circumstances, fairness dictated that the Primeo estate should not have to bear any of the costs of the unsuccessful application driven by the HSBC Defendants.

Such was the degree of impropriety by the HSBC Defendants, in connection with the award of EY's costs, His Lordship made clear that the circumstances in this case were *highly exceptional* and he stated that there was *no justification for EY being left out of pocket to any degree at all*. Therefore, the Grand Court chose to exercise its discretion and award indemnity costs in favour of EY, such costs being payable by the HSBC Defendants.

Conclusion

The judgment makes clear that the Grand Court has a wide discretion in relation to costs and will apply principles of fairness in exercising that discretion. Where parties abuse the court process or use improper conduct to take advantage of a particular set of circumstances, the Grand Court will not hesitate to admonish that behaviour.

Non-parties are not immune from costs orders simply because they are not formally named as a party. Consistent with English authorities, the Grand Court will look to the 'real' party to the proceedings and make an order to the effect that the 'real' loser must pay.

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