FEBRUARY 2019

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UPDATE

Should a petitioning creditor who presses for an immediate winding up order be penalised in costs?

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In typical adversarial proceedings brought in the Cayman Islands, the Court will usually order that the unsuccessful party bears the successful party's costs. This is often referred to as the 'loser pays' model. However, in a recent judgement *In the matter of Abraaj Holdings* (FSD 95 of 2018, Unreported 4 January 2019), the Grand Court confirmed that the test is different in insolvency proceedings. The Grand Court has confirmed that a petitioning creditor who unsuccessfully argues for an immediate winding up order should not be penalised in costs unless he acted unreasonably.

The Grand Court was clear that it does not wish to discourage a petitioning creditor from expressing entirely legitimate views. Therefore, in an insolvency context, petitioning creditors who have not acted unreasonably should not be subject to an adverse costs order, even if they pursue an unsuccessful application.

Picture this factual situation: A creditor issues a winding up petition against the debtor company. The company resists a winding up order by successfully seeking the appointment of joint provisional liquidators to investigate the possibility of a restructuring. At subsequent hearings, the joint provisional liquidators seek extensions of the provisional liquidation to allow them to realise company assets, arguing that a better price may be achieved for those assets in a provisional liquidation than in an official liquidation. The petitioning creditor presses, unsuccessfully, for an immediate official liquidation. The provisional liquidators accept that the petitioning creditor's debt is undisputed and that it is accordingly entitled to a winding up order. The provisional liquidators also accept that the creditor's objection to the extension is not unreasonable and proposes that the parties should bear their own costs (with the liquidators' costs being paid out of the company's assets in the usual way). However, a different creditor and a shareholder, who both attended the hearing and resisted the petitioning creditor's application for an immediate winding up, seek an order that the petitioning creditor should pay their, and the company's, costs of the hearing on the basis that the petitioning creditor has acted "unreasonably" in resisting the provisional liquidators' extension request.

Question: What order for costs should be made?

Answer: In typical adversarial proceedings brought in the Cayman Islands, the Court will usually order that the unsuccessful party bears the successful party's costs. This is often referred to as the 'loser pays' model. However, in a recent judgment *In the matter of Abraaj Holdings* (FSD 95 of 2018, Unreported 4 January 2019), the Grand Court confirmed that the test is different in insolvency proceedings. The Grand Court has confirmed that a petitioning creditor who unsuccessfully argues for an immediate winding up order should not be penalised in costs unless he acted unreasonably. The Grand Court was clear that it does not wish to discourage a petitioning creditor from expressing entirely legitimate views. Therefore, in an insolvency context, petitioning creditors who have not acted unreasonably should not be subject to an adverse costs order, even if they pursue an unsuccessful application.

Background

This issue arose out of the high-profile provisional liquidations of Abraaj Holdings and Abraaj Investment Management Limited. As many readers will be aware, the Abraaj Group was a major emerging-market social impact investor and one of the largest private equity groups in the world, with more than US$13 billion of assets reportedly under management at its peak. Winding up petitions were presented against both companies by creditors, and both companies were placed into provisional liquidation in June 2018 to facilitate investigations into possible restructurings. The winding up petitions were adjourned for the duration of the provisional liquidations.

At a subsequent hearing, the Joint Provisional Liquidators of Abraaj Holdings sought a further adjournment of a winding up petition to allow them to continue to market and sell assets and also remain in step with the Joint Provisional Liquidators of Abraaj Investment Management Limited. Despite the majority of Abraaj Holdings' liquidation committee supporting the adjournment, it was opposed by the petitioning creditor, the Public Institution for Social Security of Kuwait (**PIFSS**). After hearing arguments, the Grand Court decided to permit the adjournment of the petition. Certain creditors and/or interested parties argued that PIFSS had been unreasonable in resisting the adjournment application, and that had PIFSS agreed to the adjournment, their costs and those of Abraaj Holdings could have been avoided. On that basis, they sought their legal costs from PIFSS, and also sought an order that PIFSS should pay the Joint Provisional Liquidators' costs of the hearing despite the fact that the liquidators themselves were not seeking such a cost order against PIFSS. The Joint Provisional Liquidators were content to seek no order as to costs, save that their own costs should be paid by Abraaj Holdings in the usual way.

The Cayman Companies Winding Up Rules do not expressly deal with how costs should be borne where a petitioner has failed because the Court has determined that it would be in the best interests of creditors for the relevant company to remain in provisional liquidation, or who should be entitled to seek their costs in that scenario if it arose.

Ruling

The applicants appeared to accept that to recover their costs, they had to show that PIFSS had acted unreasonably, which the Court preferred to the "*wholly unreasonably*" test suggested by the Joint Provisional Liquidators.

In reaching his decision, it is clear that Mr Justice McMillan had in mind the particularly complex nature of the Abraaj situation and the various competing interests at play. The Judge observed that "*in matters of so complex a nature the Court must be fully receptive to weighing such arguments as a relevant party may wish to put forward*." He took into account the fact that adversarial positions had been taken at a number of previous hearings in relation to the Abraaj provisional liquidations without adverse costs orders being made against "unsuccessful" parties: indeed at an earlier hearing, one of the applicant's had argued that the provisional liquidation should be terminated as early as possible to avoid incurring costs unnecessarily. The Judge was clearly concerned by the stifling effect that making a costs order against PIFSS could have in other cases, inhibiting a petitioning creditor from raising legitimate arguments and genuinely held views that a provisional liquidation should be terminated in favour of an official liquidation.

It was held that PIFSS' stance was not so unjustified as to be unreasonable. The Court agreed that expressions of contrary views are often helpful to the Court in reaching its decisions and robust debate is to be encouraged to facilitate this. Accordingly, to guard against discouraging interested parties putting forward entirely legitimate opinions, McMillan J ordered the relevant parties to bear their own costs of the hearing.

Comment

The decision is clearly right, and is to be very much welcomed. Making PIFSS pay the costs of parties who simply disagreed with their views would have had a chilling effect on open and robust debate in Court in winding up petitions. The fact that the Joint Provisional Liquidators did not support the application, even though it would have resulted in their costs being met other than out of company assets, speaks eloquently of their views of the merits of the application – views which we strongly share.

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