

Cayman fund in liquidation ordered to pay costs of Cayman and New York proceedings on the indemnity basis

In a Ruling that will be of interest to users of the Cayman courts, the Grand Court has ordered a Cayman fund in liquidation to pay (i) as damages, the costs of foreign proceedings commenced in breach of contract and (ii) on the indemnity basis, the costs of the Cayman anti-suit proceedings brought to restrain the continuation of the foreign proceedings.

The Ruling provides further guidance as to the circumstances in which the Court will order costs of Cayman proceedings to be paid on the indemnity basis and is understood to be the first time that the Grand Court has awarded as damages the costs of foreign proceedings commenced in breach of contract.

Background

As we reported on 15 February 2018,^[1] the Grand Court granted an anti-suit injunction sought by BDO Cayman to restrain the joint official liquidators of Argyle Funds SPC (in Official Liquidation) (“**Argyle**”) from continuing litigation commenced by Argyle in the Supreme Court of New York against BDO Cayman (Argyle’s former statutory auditors) and three related parties. Specifically, the Grand Court was satisfied that the New York proceedings had been commenced in breach of Cayman arbitration and exclusive jurisdiction clauses (among others) in the audit engagement letters between the parties.

In summary, BDO Cayman sought consequential orders including:

1. Its costs of the Cayman proceedings payable on the indemnity basis, to be taxed if not agreed, plus interest;
2. Damages assessed by reference to its costs of the New York proceedings on a full indemnity basis, together with interest, and an indemnity in respect of its future costs of the New York proceedings; and
3. A payment on account equal to 70% of its costs of the Cayman proceedings.

Argyle contended that BDO Cayman was entitled only to its costs of the Cayman proceedings on the standard basis and opposed all of the consequential orders sought by BDO Cayman.

BDO Cayman's case

Indemnity costs

BDO Cayman argued that Argyle's conduct of the Cayman anti-suit proceedings was "*improper, unreasonable or negligent*" within the meaning of GCR O. 62, r. 4(11) such as to warrant the award of indemnity costs.

BDO Cayman's position was that, consistent with English authority, the commencement by a party of proceedings in a foreign jurisdiction in breach of an arbitration or exclusive jurisdiction clause is inherently unreasonable conduct deserving of an award of indemnity costs. Compounding this conduct, BDO Cayman said that there were additional features of Argyle's conduct which justified an award of indemnity costs and in of themselves. For example, Argyle had:

- refused to discontinue the New York proceedings when the unambiguous express terms of the engagement letters were drawn to its attention;
- joined two US parties to the proceedings on the strength of evidence that Mr Justice Parker described as speculative and "*thin and unconvincing*", and maintained its position as to the involvement of the US parties in light of sworn evidence from two deponents on behalf of BDO Cayman that neither US party was involved;
- in its evidence, made a baseless assertion that BDO Cayman may have sought to mislead the Court; and
- pursued every conceivable argument in opposition to the Summons, many of which were at best "*speculative, weak, opportunistic or thin*" and made no attempt to narrow the issues in dispute.

Damages

BDO Cayman also sought its costs of the New York proceedings from the Cayman court as damages for breach of contract, which would not be recoverable as costs in New York (where the 'loser pays' principle does not apply).

This appears to be novel relief in this jurisdiction, however English authority on point is to the effect that such relief is both available and should generally be awarded.

Payment on account

BDO Cayman sought a payment on account of costs pursuant to GCR O.62, r.4(7)(h), which was introduced in 2016. It argued that, consistent with the modern practice in England (where, unlike in Cayman, there is a presumption under the CPR that a payment on account will be ordered), Argyle should be ordered to make a payment on account and that 70% of BDO Cayman's indicative costs was a "*reasonable sum*" for the purposes of the rule.

Argyle's case

Indemnity costs

Argyle's position was that GCR Ord. 62, r. 4(11) sets the high bar of conduct which is "*improper, unreasonable or*

negligent” for the award of indemnity costs.

Argyle said that, although it had lost, its conduct did not rise to the level of warranting an order for indemnity costs because, for example, it had not advanced a claim it knew to have no legitimate basis or deliberately given false evidence. Significant reliance was also placed on the fact that Argyle had obtained the sanction, on *ex parte* applications, of a different judge of the Grand Court to both commence the New York proceedings and defend the anti-suit proceedings, and that Argyle had consistently acted on legal advice.

Damages

Argyle made a number of threshold arguments, including that the Court was unable to award damages because it was *functus officio*. In any case, Argyle argued, there were no Cayman authorities supporting an award of the costs of foreign proceedings as damages and the English authorities on point were not binding, were of limited precedent value and should not be followed. Argyle further submitted that, as the Court had held that there was a valid arbitration agreement between the parties, BDO Cayman was bound to commence arbitration to pursue any award of damages.

Payment on account and interest

Argyle argued that the reasoning of the Grand Court in *Al Sadik*[2], prior to the introduction of the specific power in the GCR, that the Court would order a payment on account only in “*rare and exceptional circumstances*”, was applicable and that this was not an appropriate case in which to do so. Argyle also asserted that such an order may stifle any appeal on account of Argyle’s limited resources.

As to interest, Argyle’s position was that the Court has no power to order interest on costs and damages, and in any event should not do so in this case.

The Court’s Ruling

The Court ordered Argyle to pay BDO Cayman’s costs of the Cayman proceedings on the indemnity basis and New York proceedings as damages, with interest at the statutory rate payable on both from the date of judgment and the commencement of the New York proceedings respectively. Argyle was also ordered to indemnify BDO Cayman in respect of its future costs of the New York proceedings.

In reaching these conclusions, the Court specifically endorsed the approach taken by the English Courts with regard to indemnity costs where proceedings have been commenced in breach of contract and the award of the costs of the foreign proceedings as damages.

Commentary

This Ruling addresses a number of novel issues in this jurisdiction.

It establishes that the Grand Court will follow the approach taken in England generally to order a party which

commenced proceedings in a foreign jurisdiction in breach of an arbitration or exclusive jurisdiction clause to pay (i) the contractual counterparty's costs on the indemnity basis of Cayman proceedings to enforce its contractual rights and (ii) costs of the foreign proceedings as damages.

The ruling on the application for a payment on account of costs suggests the Grand Court may continue to take a reserved approach to the grant of such relief.

Taken together with the Judgment granting the anti-suit injunction sought by BDO Cayman, this Ruling confirms that the Grand Court will act robustly to protect Cayman arbitration and exclusive jurisdiction clauses, and to penalise parties seeking to obtain an advantage by breaching such clauses.

[1] campbellslegal.com/.../court-restrain-cayman-liquidators-continuing-new-york-litigation/

[2] *Al Sadik v. Investcorp Bank BSC* 2012 (2) CILR 33

Campbells represented BDO Cayman in these proceedings. Please do not hesitate to contact the author should you have any questions.

For more information concerning arbitration in the Cayman Islands, and its potential advantages, please [click here](#).



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