Al Sadik v Investcorp: Cayman Grand Court provides guidance on interim payments and orders consequent upon the grant of an anti-suit injunction

The August 2019 judgment of Kawaley J, sitting in the Grand Court of the Cayman Islands (the "**Grand Court**"), in *Riad Tawfiq Al Sadik v Investcorp Bank B.S.C & Ors* (FSD 47 of 2009) has provided litigants with judicial guidance of general application concerning interim payments on account of costs. The reasons provided are the most detailed since the introduction of the interim payments jurisdiction into the Grand Court Rules in 2016, concluding that the Rules contain *"an implicit starting assumption that an interim payment should be made*". This is in stark contrast to the approach taken prior to the introduction of the rule, when the inherent jurisdiction to order interim payments was exercised only in *"rare and exceptional circumstances"*.

The judgment also reinforces the position in the Cayman Islands concerning costs and damages orders consequent upon the grant of an anti-suit injunction. Kawaley J confirmed that a party which successfully applies for an anti-suit injunction to restrain wrongfully commenced foreign proceedings will ordinarily be entitled to its costs of both the anti-suit injunction and foreign proceedings on the indemnity basis, payable as costs and damages respectively.

Background

The Plaintiff's substantive claims were dismissed by the Grand Court, the Court of Appeal and the Privy Council in 2012, 2016 and 2018 respectively. Less than two weeks before the Privy Council issued its judgment dismissing the final appeal in June 2018, the Plaintiff issued proceedings in Dubai relating to substantially the same dispute. The first defendant ("**Investcorp**") applied to the Grand Court in August 2018 for an anti-suit injunction to restrain the Dubai proceedings. Kawaley J granted the injunction, determining that the Dubai proceedings were commenced in breach of an exclusive jurisdiction clause and, in any event, an abuse of process.

Following the grant of the anti-suit injunction, Investcorp applied for its costs of the Cayman injunction proceedings payable on the indemnity basis, together with an interim payment on account. Investcorp also sought an award of contractual damages reflecting the costs it had incurred defending the Dubai proceedings.

Indemnity Costs

Under GCR O. 62 r. 4(11), the Court's jurisdiction to order indemnity costs is limited to circumstances in which a party has conducted proceedings "*improperly, unreasonably or negligently*". Kawaley J confirmed that the Dubai

proceedings were brought improperly within the meaning of this rule given they were filed in plain breach of an exclusive jurisdiction clause. The timing of the filing the Dubai proceedings made the misconduct "*more egregious*" because they were commenced shortly after the Privy Council had heard the Plaintiff's final appeal.

Kawaley J's judgment affirmed the earlier decision of Parker J in *Re BDO* 2018 (1) CILR 187 in which BDO, represented by Campbells, successfully obtained an order for indemnity costs following the grant of an anti-suit injunction in respect of New York proceedings which had been filed in breach of an arbitration clause.[1] Parker J, following a string of English authorities, confirmed that an indemnity costs order was appropriate and would serve to discourage parties from commencing proceedings in breach of contract to obtain some advantage.

Costs as Damages

Parker J's judgment in *Re BDO* was also relied upon by Kawaley J in determining Investcorp's application for its costs of the Dubai proceedings payable as damages for breach of contract. Kawaley J followed the decision in *Re BDO* to award Investcorp its costs of defending the foreign proceedings on the indemnity basis as damages flowing from the breach. Kawaley J concluded that there was no sensible basis to dispute the Court's jurisdiction to make such a damages award.

There is no distinction between exclusive jurisdiction and arbitration clauses in this regard; each will be a contractual bar to the commencement of foreign proceedings from which costs and damages consequences will ordinarily flow if it is necessary for the Cayman court to restrain such proceedings.

Interim Payment on Account

In his 2012 judgment in *Al Sadik v Investcorp Bank BSC & Ors* [2012 (2) CILR 33], prior to the introduction of GCR O. 62, r. 4(7), Jones J held, at [26], that the Grand Court had inherent power to make an interim payment order but that this inherent jurisdiction would be exercised only in *"rare and exceptional circumstances"*.

In March 2016, GCR O. 62, r. 4(7) was introduced, which provides that "*where the Court orders the paying party to pay costs subject to taxation*," the court may order payment of "a *reasonable sum on account of costs, such sum to be assessed summarily".* However, there has been little judicial consideration of the jurisdiction to order an interim payment on account of costs following the introduction of this rule.

The corresponding English Civil Procedure Rule grants the English courts the same power but includes the important proviso "*unless there is a good reason not to*", thus reversing the burden so as to require the unsuccessful party to justify why an interim payment should not be ordered. The principle underlying the rule in England is that a successful party is entitled to its costs and ought to receive an appropriate proportion as soon as possible, with the balance to be determined following taxation of the bill of costs (or agreement between the parties) in due course.

Kawaley J concluded in this case that, following the introduction of GCR O. 62, r. 4(7), the Cayman rule "*contains an implicit starting assumption that an interim payment should be made".* Accordingly, while the court retains the discretion not to order an interim payment where, for example, doing so would have the effect of stifling an appeal, this judgment brings Cayman more into line with the English position whereby a successful party will

ordinarily be entitled to a payment on account.

When setting the appropriate amount of any interim payment, the court is not required to determine the irreducible minimum that might be ordered on a worst case basis, but a *"reasonable sum"* based on what is likely to be awarded, adopting a conservative approach. In accordance with the Rules, this determination is made summarily, without detailed evidence.

Comment

This judgment, in conjunction with *Re BDO*, lays down a clear marker for parties contemplating proceedings that are or may be in breach of their contractual bargain. Applicants for an anti-suit injunction that are required to defend proceedings commenced in breach of a Cayman exclusive jurisdiction or arbitration clause can proceed with greater confidence that they will recover their reasonable costs of both the wrongfully commenced and anti-suit injunction proceedings on the indemnity basis. Conversely, prospective litigants would be wise to carefully review the dispute resolution provisions in their contracts before commencing proceedings, as an anti-suit injunction to restrain such proceedings is likely to attract an indemnity costs liability.

With applications for interim payments already being a mainstay in Cayman Islands costs applications, this judgment will be welcome news to costs applicants and is likely to feature prominently in costs submissions going forward. With the onus now squarely on paying parties to shift the starting assumption away from an interim payment, we might see an increased willingness to agree interim payments outside the courtroom.

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Campbells has a wealth of experience advising on all matters addressed in this judgment, including having represented the successful applicant in *Re BDO*. Should you have any questions, please feel free to contact the authors.

[1] Campbells' client advisory concerning *Re BDO* can be read here: https://www.campbellslegal.com/client-advisory/cayman-fund-liquidation-ordered-pay-costs-cayman-new-york-proceedings-indemnity-basis-3862/

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