

New court fees in the Financial Services Division of the Grand Court of Cayman

Two significant amendments to the procedural rules of the Grand Court of the Cayman Islands (“GCR”) were gazetted on 28th September 2009 by Extraordinary Gazette No. 63/2009. The Court Fees Rules, 2009 set out new rules both as to when Court fees are payable, and the amount of such fees, and the Grand Court (Amendment) Rules, 2009 create a new Financial Services Division (“FSD”) Court, as part of the new 5 division structure¹ of the Grand Court. Both provisions come into effect on 1 November 2009.

The Court Fees Rules, 2009 are applicable to all proceedings in the Grand Court and in the Court of Appeal but are of principal interest in respect of the new FSD. There are two primary points of note: not only will proceedings brought in the FSD attract a significantly higher fee than ordinary civil proceedings (*i.e.* those brought in the Civil Division) but those fees will apply not just to proceedings brought in the FSD after its creation on 1st November but they will also apply to proceedings already commenced prior to the creation of the FSD, by setting out a mandatory transfer procedure with an applicable transfer fee.

The quantum of the fees payable on issue in the FSD is set out at Part B of the First Schedule to the Court Fees Rules, 2009. There are three levels of fee depending upon the particular type of originating process and the nature of the proceeding:

- A \$200 fee is payable in respect of originating applications to restore companies to the register and by trustees for directions;
- A \$5,000 fee is payable in respect of originating summons issued under GCR O. 102, r.2, that is for orders to inspect the register of members of a company, for rectification of the register of members, for inspection of a company’s register of mortgages and charges, for approving changes to charter documents of a registrant and for rights attaching to bearer shares to be restored.
- The highest level of fee, \$15,000, is payable upon (i) issuing any originating notice of motion or petition issued under issued under GCR O.102, rr.3 or 4, which include applications for the appointment of inspectors under section 64 of the Companies Law and for reduction of share capital and schemes of arrangement, and also (ii) “upon issuing every other writ, petition originating summons or originating notice of motion”.

¹ The new 5 division structure is set out at Rule 2 of the Grand Court (Amendment) Rules, 2009

This catch-all applicable to the highest level of fee is likely to include the majority of cases brought in the FSD. The Grand Court (Amendment) Rules, 2009 add a new Order 72 of the GCR² which will apply to all such proceedings³ and which prescribes the cases that must be brought in the new division.⁴ They are defined as “*financial services proceedings*” and include any application under the Companies Law including any application to wind-up a company, and also a very wide raft of other financial services proceedings including proceedings relating to partnerships, mutual funds, exempted insurers, actions for breach of trust, for the enforcement of foreign judgments and arbitral awards, applications under regulatory laws, and any action for breach of duty by professional service providers.

However, not only does the new substantial level of fees apply to originating process issued *after* the establishment of the FSD (*i.e.* 1st November 2009)⁵ but by way of transitional provisions in GCR Order 72 to any proceedings already issued *prior* to the creation of the FSD and which are transferred into the new division.⁶ Those transitional proceedings effectively require any existing proceedings which would be financial services proceedings under GCR Order 72 (no matter how long ago they may themselves have been commenced) in which any further step is taken to be transferred into the new division with a transfer fee equivalent to what would be paid were the proceeding to have been issued in the FSD after the 1st November 2009 (*i.e.* \$15,000, \$5,000 or \$200 as the case may be) minus the fee paid when the proceedings were originally issued.⁷ Accordingly, the transfer fee could be substantial. Notably the transfer fee will be payable by the party making a transfer application⁸ or, as seems more likely, if the transfer is made by the Court absent such application by the parties,⁹ by the party who seeks to take any further step in the proceedings.¹⁰ Unless and until the transfer fee has been paid no step may be taken in the transferred proceedings.¹¹ There is the obvious possibility in those circumstances that a procedural impasse may result as both parties may be reluctant to take a further step and accordingly be held responsible for the payment of the fee. The transitional provisions, however, do provide for a mechanism

² By Rule 5(1) of the Grand Court (Amendment) Rules, 2009.

³ By GCR O.72, r.1(1).

⁴ By GCR O.72, r1(2).

⁵ The Commencement Date of 1st November 2009 is set out at GCR O.72, r.6(1).

⁶ The transitional provisions are at GCR O.72, r.6. They state at r.6(1) that the transitional provisions apply to every financial services proceeding (*i.e.* as defined at r.1(2)) commenced prior to the Commencement Date.

⁷ See GCR O.72, r.6(3). The quantum of the fee is provided for by Rule 3(5) of the Court Fees Rules, 2009.

⁸ A transfer application is made by a party to a financial services proceeding under GCR O.72, r.6(2). The application is made to the Registrar of the FSD Court using Form 73. The parties will be invited by the Registrar to apply for a transfer wherever a party seeks to “*issue an interlocutory summons or an application is made for a hearing date of a trial and it appears to the Registrar that the cause or matter is a financial services proceeding*” – see GCR O.72, r.6(3).

⁹ The Registrar will make a transfer order of his own motion if the parties have failed to apply for a transfer order within 14 days of being invited to do so by the Registrar – see GCR O.72, r.6(3)(b). The transfer order itself should be in accordance with Form 74.

¹⁰ The procedure for determining who is liable for payment of the transfer fee is set out at GCR O.72, r.6(5).

¹¹ GCR O.72, r.6(10).

whereby the parties can apply (i) to reduce the amount of the transfer fee payable, (ii) to vary the paying party or parties and indeed (iii) to challenge the decision to make a transfer order.¹² That jurisdiction provides a welcome discretion to alleviate what may be in some circumstances the otherwise harsh consequences of the rule. It may also operate to prevent a procedural impasse if a party who would primarily be liable for the transfer fee but would otherwise be reluctant to take a step in the proceedings is confident that the Court may ultimately reduce the fee and/or order some other party to pay it or part of it.

In addition to the fees payable on the issue of originating process and on transfer,¹³ the Court Fees Rules also provide for Court hearing fees to be paid.¹⁴ In the FSD the fee will only be payable where a hearing “*or a series of hearings*” lasts more than 20 days in total. In that case the rule specifies that the “*parties*” will be liable to pay a court hearing fee of \$750 for each additional day or part of a day. Although the rule refers to the “*parties*” being liable for the fee it appears that it will in fact be the party responsible for the hearing, i.e. the applicant in the case of an application or summons and the plaintiff or petitioner in the case of a trial, who will in fact be

¹² See GCR 0.72, r.6(7)-(9). An application must be made to the Chief Justice “within 7 days”. It is made in writing by way of Form 75 and on notice to the other parties. The 7 days are presumably calculated by reference to the date of service of the transfer order on the parties by the Registrar, that service being provided for by GCR 0.72, r.6(6). The rules provide that the Chief Registrar will review the matter *de novo*. In respect of applications challenging the decision to make a transfer order r.6(7) provides that the Chief Justice “*may substitute his own decision for that of the Registrar*”. It would appear that there is no discretion on the part of the Chief Justice as to whether to a transfer order should be made – it is simply a question of properly determining whether a “*cause or matter is a financial services proceeding*”. If it is such a proceeding then it would appear that transfer to the FSD is mandatory (see r.6(3)). However, it appears that there may be a discretion on the part of the Chief Justice to depart from the rules where the application is made under r.6(8) by a party who is dissatisfied not with the decision to make the order itself but with its terms. In that case the rule provides that the Chief Justice shall “*review the matter de novo and may vary the transfer order by ... reducing the amount of the transfer fee and/or varying the paying party or parties*”. This must be taken to mean that the Chief Justice has a discretion as to the amount of fees payable and who they shall be paid by as otherwise presumably the wording of r.6(7) would have been followed – i.e. a simple expression that having reviewed the Registrar’s decision the Chief Justice was able to “*substitute his own decision*”.

¹³ As well as providing for a fee payable on transfer where the financial proceeding was commenced *prior* to the creation of the FSD Court by way of the transitional provisions described above and set out in GCR 0.72, r.(6), the Court Fees Rules, 2009 – understandably – also provide for a transfer fee to be payable in the event that a financial services proceeding commenced *after* the establishment of the FSD Court on 1st November is commenced in the wrong division but then transferred to the FSD. In that case transfer is provided for by GCR 0.72, r.3(1). The fee payable on such transfer is provided for by Rule 3(5) of the Court Fees Rules, 2009, i.e. \$15,000, \$5,000 or \$200 as the case may be less any sums already paid on issue. Although the rule refers to the “*parties*” paying the transfer fee, there would seem little doubt that the fee should be payable in this case by the party who had issued the proceedings in the wrong division. Interestingly, GCR 0.72, r.3(1)(b) also allows for the transfer to the FSD of matters which are **not** financial services proceedings within the meaning of GCR 0.72, r.1(2), but where “*the Court is satisfied upon the application of any party that it would be appropriate in all the circumstances for the cause or matter to be tried by a Commercial Judge*”. As for the meaning of Commercial Judge see the last paragraph in the main body of text.

¹⁴ Rule 5(2) of the Court Fees Rules, 2009.

responsible for the fee. No guidance is given as to the meaning of “series of hearings” but it would appear, in effect, to give the parties the equivalent of 20 hearing days’ credit with the Court in respect of the proceedings as a whole. When the totality of the credit has been used up, by adding up the total number of hearing days in any set of proceedings, the hearing fees will become payable. In the case of ordinary civil proceedings brought in the Civil Division hearing fees are payable for any hearing lasting more than 3 days but at the rate of only \$200 a day.¹⁵

The fees applicable to appeals from financial services proceedings will be \$5,000 in respect of written applications for leave and \$10,000 for every notice of appeal.¹⁶

Proceedings in the FSD will be heard by a Commercial Judge.¹⁷ Two initial appointments have been made to the post of Commercial Judge: Justice Quin (who was appointed a Judge of the Grand Court in September 2008) and Andrew Jones QC who was previously head of litigation at Maples & Calder. It is thought that a third Commercial Judge will be appointed, possibly to be recruited from the United Kingdom, in due course.

FURTHER INFORMATION

For more information on this subject contact Sarah Dobbyn, Head of Harneys’ Litigation & Insolvency practice in the Cayman Islands.

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¹⁵ Rule 5(1) of the Court Fees Rules, 2009

¹⁶ Rule 3(6) of the Court Fees Rules, 2009. The amount of the fees payable on appeal are provided for at paragraph 2 of Part B of the First Schedule to the Rules.

¹⁷ As defined by GCR O.1, r.7(1) as amended by Rule 4(1) of the Grand Court (Amendment) Rules, 2009.