Down, but not out
so who picks up the tab?

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Landmark ruling for Cayman Islands

In a landmark ruling for the Cayman Islands jurisdiction, the Honourable Chief Justice Smellie of the Grand Court, on 31 May 2018, emphatically dismissed a multi-billion dollar claim in the case of Ahmad Hamad Algosaibi & Brothers Company v SICL & Ors, involving allegations of fraud arising from one of the largest corporate collapses of the financial crisis.

The case not only showcased the ability of the Cayman Islands Court to manage high profile and complex litigation, but emphasised the jurisdiction's flexibility to manage seamlessly a year-long, multi-jurisdictional trial.

Who pays for the proceedings?

As can be expected in proceedings of this magnitude, legal costs to date have been significant and are estimated to have run to several hundred million dollars – but who foots the bill for these costs?

It is well known that the Cayman Islands is a creditor friendly jurisdiction where the prevailing principle is that the "loser pays". Under the Grand Court Rules (GCR) (O.62), the Court may make such an order as to costs as it thinks just, the starting point for which is that costs follow the event and a party can expect to be penalised for pursuing a claim it should not.

In any sizeable litigation, the quantum of costs, once a party's entitlement has been established, will usually be submitted to be taxed by a specialist Court official appointed by the Chief Justice called a Taxing Officer. The GCR provides for two distinct bases of taxation: the standard basis and the indemnity basis. In practice, the former usually comprises an award of approximately 70% of the costs incurred and the latter, an enhanced award often in the region of 85-90%. Usually, costs awarded will be taxed on the standard basis and a Court will resort to ordering taxation on the indemnity basis only where it is satisfied that the paying party has conducted the proceedings improperly, unreasonably or negligently (GCR, O.62, r.4 (11)).

The issue of the costs of these proceedings came before the Grand Court recently in September 2018 where it was submitted on behalf of the Defendants that the costs ought clearly to be awarded on the indemnity basis as AHAB's resounding defeat at trial was uncontroversial, with the Court finding, variously, that it created one of the "biggest Ponzi schemes in history", "wallowed in its own culture of dishonest accounting practices" and tried "in vain to make a fraud case which did not fit the facts." The Grand Court agreed that in light of AHAB's conduct of the proceedings, the case was a paradigm example of a case justifying an award of indemnity costs. In light of AHAB's impending appeal of the proceedings (listed for hearing in May 2019), no steps towards taxation of these costs will commence for some time.

How can a successful party to litigation be sure its costs will be paid when the time comes?

In order to protect a party from the pursuit of potentially spurious claims, the Cayman Islands Court has jurisdiction to award a party security for its costs. This is a critical deterrent which the jurisdiction will continue to uphold. This jurisdiction was invoked by the Defendants under Order 23 r.1 (a), AHAB being a foreign plaintiff having no assets in the Court's jurisdiction. To date, following hearings in 2013, 2016 and 2017 respectively, AHAB has been ordered to post in excess of US$85 million as security for the Defendants' costs. In making these awards, the Court has endorsed use of a "broad brush" approach when assessing the level of security to be posted. The Court also confirmed the importance of the "balance of prejudice," weighing the likely prejudice caused to each party depending on the

amount awarded, in line with Popplewell J's reasoning in the 2012 case of Stokers SA v IG Market Ltd.

Having obtained an order for indemnity costs, the Defendants also applied in September 2018 for payment of "top-up" security in the combined sum of US$77 million, on the basis that the award left the Defendants significantly under-secured for costs actually incurred, the awards previously made having been calculated on the standard basis. The Defendants argued that there had been a material change in circumstances in the period since the original orders for security were made, which the Court, in its 2017 judgment, had previously recognised as warranting an order for top-up security. In doing so, the Court cited with approval the guidance set out in Stokers, providing that "a defendant will generally have to show a material change in circumstances from those which pertained or were envisaged when the matter was before the court making the order." The Defendants argued that the award of indemnity costs represented a material and significant change in circumstances such that the previous awards for security should be revisited by the Court.

Stifling – recent consideration in the Cayman Islands

Contesting the applications, AHAB argued that ordering the "top-up" security sought would stifle its appeal. This was on the basis that AHAB did not have sufficient assets available and would be forced to breach any such order, thereby prejudicing its ability to pursue the appeal. In support of its position, AHAB argued that both AHAB's and its partners' assets were frozen by a Saudi Royal Order in 2009 and that AHAB did not have access to any assets which could readily be liquidated in order to provide security in cash, save for security it offered over various properties it held in London.

The Court's judgment in respect of the above applications is eagerly awaited, having heard nearly three days of argument.

Security for costs in the Cayman Islands Court of Appeal

In the meantime, the Defendants have also pursued successful applications for security for costs as Respondents to AHAB's appeal. Those applications were brought pursuant to section 19(2) of the Court of Appeal Law (2011 Revision) at a Case Management Hearing held before the Cayman Islands Court of Appeal in November 2018. AHAB again contested the applications, arguing that payment of the appeal security would stifle the appeal unless the Court directed that the security be provided by way of charges over its London properties. It further argued that the Court could not determine the issue of appeal security until the Grand Court's judgment on the "top-up" security was handed down, in view of the limited assets available: in brief, this was a novel circumstance of issues being debated before the Court of Appeal before the Court of first instance had rendered its decision on similar issues.

In its decision of 16 November 2018, the Court of Appeal granted the Respondents'

applications, ordering AHAB to post a total amount of US$10.6 million in cash by 1 February 2019, failing which the appeal will be struck out via an unless order. In doing so, the Court decided that AHAB's appeal would not be stifled if it was ordered to provide security, as the Court was not satisfied on the balance of probabilities that the provision of security would not be forthcoming upon an order being made. The Court also held that charges over AHAB's London properties would not constitute adequate security, concluding that it was always possible for AHAB itself to offer those properties to a lender as security for an advance which would be available in cash for the purposes of payment of the security sought. Fundamentally, the Court was of the view that the party which obtains security for costs should not have to bear the risk of having security for costs ordered on the back of properties with pre-existing charges over them, as is the case with the London properties. In our view, this is an important demarcation from the Court of Appeal on what constitutes adequate security.

The approach taken by the Court of Appeal, not only in the expeditious manner in which this judgment was handed down, but also in the proactive stance being taken to case-managing the directions leading up to the appeal, further showcases the fact that the Cayman Islands is very much open for business as a large-scale trial jurisdiction.

Since the commencement of the litigation in 2009, the authors of this article have acted for the Joint Official liquidators of SIFCO5, a defendant to the proceedings.

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