IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No.: FSD 95 of 2018 (RMJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND IN THE MATTER OF ABRAAJ HOLDINGS

IN OPEN COURT

Appearances:	**Mr. Ben Hobden of Conyers, Dill & Pearman for The Public Institution for Social Security**
	Ms. Jan Golaszenski and Mr. Peter Sherwood of Carey Olsen for the Joint Provisional Liquidators of Abraaj Holdings
	Mr. Gabriel Moss Q.C. instructed by Mr. Stephen Leontsinis of Collas Crill for Mr. Arif Masood Naqvi,
	Lord Falconer of Thoroton Q.C. instructed by Ms. Rebecca Hume of Kobre & Kim for Mr. Abdulhameed Dhia Jafar
Before:	**The Hon. Justice Robin McMillan**
Heard:	**20 November 2018**
Judgment Delivered:	**4 January 2019**

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HEADNOTE

Unsuccessful Application by petitioning creditor - In considering a costs order Court must have regard to whether Applicant has acted unreasonably - Reasonableness and unreasonableness considered – Court should not be perceived as limiting or discouraging legitimate differences of opinion.

JUDGMENT

Introduction

1. At the hearing on 20 November 2018 of the winding up petition presented in respect of Abraaj Holdings ("the Company") by the Public Institution for Social Security ("PIFSS") on 25 May 2018 ("the Petition")

   (a) the Joint Provisional Liquidators ("the JPLs") sought an adjournment of the Petition for a further period of three months;

   (b) PIFSS opposed the adjournment and sought an Order that the Company be wound up; and

   (c) Mr Abudulhameed Jafar (a creditor and member of the Liquidation Committee) ("Mr. Jafar") and Mr Arif Naqvi (a director, shareholder and the Company's founder) ("Mr Naqvi") appeared and made submissions in support of the adjournment sought by the JPLs.

2. The Court ordered a further adjournment of the Petition and gave leave to PIFSS, Mr Jafar, Mr Naqvi and the JPLs to make short written submissions in relation to the costs of the hearing.

3. As the Court understands it, each of Mr Jafar and Mr Naqvi is seeking an Order that PIFSS pay: (i) their costs; and (ii) the JPL's costs.

4. The JPLs state that they are not aware that any party (other than the JPLs themselves) is seeking an Order that their costs are to be paid out of the Company's assets. The JPLs reserve the right to make further submissions in this regard if necessary.

5. The position of the JPLs in summary form is set out as follows at paragraphs 6-10 of their Written Submissions:

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"6. *The JPLs' position is that no further Order is appropriate in the circumstances and oppose the making of an Order that PIFFS pay the JPLs' costs of the hearing on 20 November 2018.*

7. *Order 24, rule 8(1) of the Companies Winding Up Rules 2018 ("CWR") provides:*

"The general rule is that the costs incurred by a person who successfully presents a creditor's winding up petition under Order 3, Part II or creditor's petition for a supervision order under Order 15, rule 3 should have his costs paid out of the assets of the company, such costs to be fixed on an indemnity basis unless agreed with the official liquidator."

8. *The CWR does not provide for the present circumstances in which a petitioner has been unsuccessful not because the grounds for the making of a winding up order have not been established, but because the Court has concluded, having considered the views of the provisional liquidators and the majority of the Liquidation Committee, that it is in the best interests of the Company's creditors for the Company to remain in provisional liquidation for the time being.*

9. *However, CWR 0.24, r.9(4) provides for the situation in which a creditor or contributory opposes a sanction application (emphasis added):*

"In the case of a sanction application which is made or opposed by a creditor or contributory, the general rule is that-

(a) his costs of successfully making or opposing the application should be paid out of the assets of the company, such costs to be taxed on an indemnity basis if not agreed with the official liquidator; and

(b) no order for costs should be made against a creditor or contributory whose application or opposition is unsuccessful, unless the Court is satisfied that his position was wholly unreasonable or he is guilty of having misled the Court or otherwise acting improperly in connection with the application."

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10. While the hearing on 20 November 2018 was not the hearing of a sanction application, the Court was being asked to consider matters concerning the conduct of the provisional liquidation and whether it should proceed. The JPLs therefore submit that the Court should follow this approach in the present case, and should only make an order for costs against PIFSS if its conduct was wholly unreasonable, misleading or improper in some way."

The Written Submissions of Mr. Naqvi

6. Mr. Naqvi is not a creditor of the Company and according to PIFSS he has no interest in the economic outcome of the liquidation. He was involved in senior management and apparently owns one common share.

7. Mr. Naqvi's central contention is stated at paragraph 3 of Mr. Moss Q.C.'s Written Submissions:

> *"3. The conduct of PIFSS in seeking a winding up order in the face of opposition from the JPLs, Mr Naqvi and the majority of AH's liquidation committee was unreasonable and resulted in Mr Naqvi being put to the expense of attending the Hearing by Leading Counsel to oppose the winding up of AH, which it considers would have been greatly to the detriment of the Companies' creditors. Had PIFSS not opposed the adjournment, no attendance on behalf of Mr Naqvi would have been necessary and there need only have been a very brief, unopposed hearing, as in the case of AIML. Accordingly, Mr Naqvi seeks an order that PIFSS pay its costs of the Hearing. Mr Naqvi's submissions were cited with approval in the judgment granting the adjournment and played a significant part in persuading the Court to adjourn in the interests of creditors."*

8. It is submitted by Mr. Naqvi that although the costs of a winding up petition are in the discretion of the Court, nonetheless the general rule is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding.

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9. Quite apart from the issue of what course is unreasonable for a party to take, as the Court has previously indicated there is in fact a question as to whether Mr. Naqvi on 20 November 2018 was actually a party at all. The Court is not adequately satisfied that this was even the case.

10. In addition, Mr Naqvi appears to accept that an exception to the normal rule that the loser pays the costs *"is only applicable when the petitioning creditor has acted reasonably in presenting and prosecuting the petition."*

11. Mr Moss adds in paragraph 8 of the Submissions that if a petitioning creditor has acted unreasonably then it will be ordered to pay the costs of the company and the opposing creditors (*A E Hayter & Sons (Porchester) Ltd.* [1961] I WLR1008, 1012).

12. Notwithstanding the preference of the JPLs' for a higher threshold test in terms of a position being taken that was "*wholly unreasonable*", the Court in principle prefers to adopt by way of general guidance the more conservative test as to whether a person has acted unreasonably.

13. The submissions then record that at the hearing the JPLs, Mr. Naqvi and Mr. Jafar successfully opposed the application by PIFSS that the Company be wound up.

14. The following arguments are also made at paragraph 11:

> *"11. The conduct of PIFSS in pressing for a winding up order was unreasonable in the circumstances:*
>
> *(1) A majority of AH's liquidation committee, of which PIFSS is a member, opposed a winding up order on the grounds that it could have an adverse effect on the sales process of the company's assets that is currently underway and thus would have an adverse effect on AH's creditors. It would also prevent any chance of a restructuring.*

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(2) Investigation (and, potentially prosecution) of claims that AH might have can be adequately undertaken by the AH JPLs and so the placement of AH into official liquidation was unnecessary.

(3) AH is already in provisional liquidation and under the control of the AH JPLs who have a duty to act in the interests of all of AH's creditors. While PIFSS was entitled to enforce the debt owed by AH by way of winding up proceedings, once AH was placed into a collective insolvency process it was no longer reasonable of PIFSS to seek to pursue its own interests against the wishes of the AH JPLs and of AH's other creditors.

(4) PIFSS provided no evidence to justify its application for an immediate winding up order and so the only basis on which it seeks a winding up order is the mere existence of a debt owed to it. As was explained by Pennycuick J in In re Riviera Pearls Ltd, this is insufficient justification for a winding up order when a company is already in an insolvency process and resulted in a costs order being made against the petitioning creditor in that case.

(5) In its skeleton argument for the hearing, PIFSS presented a distorted view of provisional liquidation based on out-of-date quotations from cases that have since been superseded. Its skeleton argument failed to acknowledge that provisional liquidators are commonly granted wide powers in order to manage the affairs of insolvent companies and this had to be brought to the court's attention by Mr Naqvi's counsel at the Hearing. PIFSS' conduct in this regard hindered the ability of the Court to deal with the matter in a "just, expeditious and economical way" (which includes, "ensuring that the substantive law is rendered effective and that it is carried out") as required by the Overriding Objective (paragraphs 1.1 and 1.2 (a) of the Preamble to the GCR)."

15. While the Court has had no difficulty in concluding that the application by PIFSS should fail, the much narrower question in relation to costs is whether PIFSS acted unreasonably

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in making that application. The Court is far from satisfied on these issues before it that it did act unreasonably.

The Written Submissions of Mr. Jafar

In his Written Submissions on behalf of Mr. Jafar Lord Faulkner of Thoroton Q.C. states that Mr. Jafar applies for his costs against PIFSS. He does not apply for his costs against any other person, or for an order that his costs be paid from the estate of the companies. The costs that he seeks are not limited to his attendance at the hearing 20 November 2018 but relate to all his costs in relation to that hearing of the adjourned petition of PIFSS for the winding up of the Company.

16. Mr. Jafar's position is then comprehensively stated at paragraph 3 of the Submissions:

"*3. In summary, Mr. Jafar seeks the above costs against PIFSS for the following reasons:*

(1) In a dispute in relation to a creditor's winding up petition, the court has jurisdiction to make a costs order in favour of a creditor who opposes a winding up order.

(2) PIFSS applied for an order for official liquidation on its petition on 20 November 2018. In this, PIFSS was opposed by:

(a) The JPLs of AH; and

(b) Mr Jafar, whose opposition was consistent with the views of the majority of AH's creditors by number and by value.

(3) But for PIFSS's application for an order for official liquidation, AH would not have been placed into official liquidation and PIFSS's petition would have been adjourned on the terms proposed by the JPLs. There would have been no need for a contested hearing had PIFSS not opposed the proposed adjournment for its own reasons and contrary to the views expressed by the majority of AH's creditors and

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the JPLs, who are the officers of the court and whose views should normally be accorded substantial weight.

(4) A hearing was, therefore, necessitated by PIFSS's opposition to the proposed adjournment. The adjournment proposed by the JPLs was ultimately ordered only after this court considered and rejected PIFSS's written and oral submissions.

(5) In responding to PIFSS's opposition, the JPLs played an important part at the hearing, but their role was necessarily limited and did not respond directly to PIFSS's reasons for seeking an official liquidation:

(a) First, the JPLs' focus was the explanation of their practical reasons for seeking a short further adjournment, principally a concern about the potential impact on asset realisations by AH (as to K Electric, amongst other assets) and also by AIML (as to the Platform).

(b) Secondly, the JPLs could not explain the views of the majority of creditors, which was a role undertaken primarily by Mr Jafar.

(c) Thirdly, it was Mr Jafar who engaged directly with the substance of PIFSS's submissions for an official liquidation. As to this:

(i) PIFSS had submitted, in essence: that AH was insolvent (a matter of common ground); that the purpose of the JPLs' appointment was to propose a restructuring; and that there was no prospect of a restructuring because PIFSS held a "blocking position".

(ii) Mr Jafar, in response, submitted: that the affairs of AH were complex and there were a variety of legal means by which a restructuring might be implemented; that Mr Naqvi and the Board of AH had developed a restructuring proposal and were seeking to respond to the JPLs' and creditors' preliminary views on that proposal; that it was, therefore, "premature" for PIFSS to assert a "blocking position" (because that

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expression is meaningful only in relation to a crystallised proposal to be voted on); and that, in any case, a "blocking position" is a concept relevant to a scheme of arrangement only, whereas, in this context, the court might sanction a relevant "compromise" or "arrangement" between group companies even in the face of opposition from a company's creditors' committee (as in fact happened in the BCCI litigation)."

17. In this context, however, the Court also carefully reminds itself of the countervailing Written Submissions of PIFSS, at paragraph 22:

"*22. As to Mr. Jafar, he was not obliged to attend: he was not the applicant or respondent in any application before the Court. If her had not been represented, the JPLs would have made legal argument on his (and the other creditors') behalf. Further, it is to be noted that Mr. Jafar is a member of the LC, which could have chosen to appoint its own counsel. Counsel to the LC would have been paid out of the assets of the Company, and not paid for by the individual creditors. Nonetheless, Mr. Jafar has instructed Leading Counsel to attend on previous occasion (in particular, on 18 July, as to which see paragraph 28.2 below) and he would no doubt have attended the hearing, regardless of the position adopted by PIFSS.*"

18. Mr. Jafar appears to accept that the practice should be not to make a costs order provided the relevant creditor acts reasonably, albeit a narrower proposition than Mr. Naqvi as a non-creditor has been obliged to adopt.

19. There is no doubt that PIFSS's opposition to the proposed adjournment was the expressed view of a minority creditor, and that its position was contrary to the views expressed by the JPLs. Equally, PIFSS failed to establish or even to identify any immediate tangible benefit to be derived from an official liquidation, as distinct from the very wide ranging scope of the provisional arrangements already in place.

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20. Nonetheless, the Court is most reluctant to discourage open debate on matters which individual creditors may believe to be of substantial importance. For this reason, if indeed for no other, the Court would be most hesitant and reluctant to deter relevant parties from stating where they consider they need to state by imposing costs orders upon them for doing so. Once again, the Court is not convinced by Mr. Jafar's submissions that PIFSS has acted unreasonably.

The Written Submissions of PIFSS

21. As previously indicated, PIFSS had unsuccessfully argued at the hearing that the current provisional liquidation should come to an end and that the Company should be placed into provisional liquidation.

22. In the exercise of its discretion to decide to continue with the provisional liquidation, the Court expressly took into account the following factors:

(i) The complexity of the underlying matters;

(ii) The nature of what might be termed " *a substantial period of time*" in directly addressing that considerable complexity;

(iii) The genuine division of opinion on the part of creditors on this issue;

(iv) The potential prejudice to proposed or contemplated divestments which could otherwise result from an immediate official liquidation;

(v) The reluctance of the Court to pre-empt any scheme of arrangement or restructuring proposal that might be forth coming;

(vi) That there was no immediate benefit of an official liquidation at that time; and

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(vii) It was advantageous for the Court to await developments.

23. The Court has set out this reasoning in order to emphasise that PIFSS made a spirited and valuable contribution to an on-going debate upon these important subjects and that the Court is fully cognizant of that contribution.

24. In Mr Hobden's Written Submissions he states at paragraphs 5-7:

"*5. PIFSS opposes the Costs Applications in the strongest possible terms. In summary:*

(i) It would be highly unusual, and contrary to principle, to order one creditor to pay the costs of another creditor or contributory on the adjournment of a winding up petition. No such order should be made absent unreasonable conduct.

(ii) Although the Court decided to adjourn the petition, PIFSS's position that a winding up order should be made was not unreasonable. Different creditors could legitimately take different views on the question.

(iii) Neither Mr. Jafar no Mr. Naqvi have been put to any additional costs by reason of PIFSS's opposition to the adjournment.

(iv) An order that PIFSS should meet the costs of any other creditor or contributory would be inconsistent with the approach taken to date in these proceedings.

6. The basis for Mr. Jafar's and Mr. Naqvi's application for costs has not yet been properly explained, and PIFSS reserves the right to respond, if necessary, to their written submissions.

7. It is understood that the JPLs do not seek an order that PIFSS pays their costs. That being the case, PIFSS will make no submissions in that regard. PIFSS expressly reserves its right to make submissions in response if the JPLs seek any such order. It

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is therefore evident that the JPLs are of the opinion that PIFSS's position at the Hearing was justified."

25. Mr. Hobden also indicates at paragraph 10 that there appears to be no instance in the reported cases where one creditor has been ordered to pay the costs of another creditor on the adjournment of a winding up.

26. Then at paragraph 11 (ii) Mr. Hobden helpfully relies upon French, Applications to Winding Up Companies, Third Edition 2015, at 5. 188:

"*If the petition of an unpaid creditor whose debt is undisputed is refused only because the court accepts the view of opposing creditors that there should not be a compulsory winding up, no order as to costs will be made, unless the petitioner was acting unreasonably, for example, where the petitioner ought to have known that the petition would fail."*

27. Turning to the question of whether there is a basis for any finding of unreasonable conduct, Mr. Hobden properly submits at paragraphs 13, 14, and 15:

"*13. There is no dispute by any party that at the Hearing that the Honourable Court could have made a winding up order. Nor is there any dispute in respect of PIFSS's debt, which is due and owing. PIFSS is the single largest creditor of the Company with amounts owing in excess of $200 million.*

14. PIFSS took the view that the continuation of the provisional liquidation served no useful purpose, and argued at the Hearing that the Company should be placed into official liquidation. Whilst the majority of the Company's liquidation committee ("LC") sought a continuation of the provisional liquidation, it was not PIFSS alone that took a contrary position. Commercial Bank of Dubai took a neutral approach as to whether the Company continued to provisional liquidation or official liquidation.

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15. The Position of PIFSS was not unreasonable. The question whether the provisional liquidation should be continued was one on which different creditors could reasonably take different views. In saying that the Company should be placed into official liquidation, PIFSS was advocating the course that it considered would benefit the body of the Company's creditors as a whole: it was not seeking to gain for itself some illegitimate sectional advantage. It is respectfully submitted that in a complex proceeding such as this, the Learned Judge benefits from hearing the views of competing creditors."

28. The Court most readily concurs in the merits of these comments. They reflect and describe reasonable conduct as distinct from unreasonable conduct.

29. Finally, at paragraph 25 the Court is reminded of the historical background to these proceedings:

"*25. An order that PIFSS should meet the costs of any other creditor or contributory would depart from the approach taken to date in these proceedings. At a number of hearings, adversarial positions have been taken, and significant legal teams engaged, but no costs orders have been made to date. Against that background, it would be inconsistent and unfair to make a costs order against PIFSS, even if it were otherwise appropriate to do so.*"

30. Once again, Mr. Hobden makes an excellent point.

The Written Submissions of the Joint Provisional Liquidators

31. Having set out their legal arguments as to unreasonableness, the JPLs then continue at paragraphs 11 and 12 of their Written Submissions in this manner:

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"*11. PIFSS conduct was clearly none of these things:*

(a) as petitioner, PIFSS was entitled to seek a winding up order and the grounds for making of a winding up order (i.e. the insolvency of the Company) is not in dispute;

(b) as the JPLs' submitted at the hearing, the question of whether the Company should stay in provisional liquidation for a further short period or be placed into official liquidation was finely balanced;

(c) the JPLs have sympathy for PIFSS' position, but on balance determined that the best approach was to seek a further adjournment. However, the JPLs do not consider that it was unreasonable for PIFSS to ask the Court to test the case for a further adjournment; and

(d) the JPLs would have needed to persuade the Court of the case for a further adjournment of the Petition regardless of whether there was any opposition from PIFSS or any other creditors. PIFSS' opposition therefore did not cause the JPLs' to incur any significant additional cost.

12. The JPLs therefore respectfully submit that PIFSS should not be ordered to pay the JPLs' costs of the hearing."

32. The Court considers this argument to be correct, and in particular the Court would approve the point made at paragraph 11 (d).

Conclusion

33. The Court has considered all of the submissions made. In this regard the Court accepts and applies a general standard in this context as to whether a relevant party has acted unreasonably in determining that party's liability for costs.

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34. The Court finds that there is no merit in the submissions made on behalf of Mr. Naqvi and Mr. Jafar that PIFSS was so unjustified as to be unreasonable in presenting its application as it did.

35. The fact that PIFSS did not prevail in its arguments is in no way an adverse conclusion as to whether the arguments in the first place should have been placed before the Court.

36. 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.

37. To impose upon an unsuccessful creditor a costs order where its arguments have failed in these circumstances could be perceived as limiting or discouraging the expression of entirely legitimate differences of opinion.

38. Accordingly Mr. Naqvi and Mr. Jafar must bear their own costs of the hearing.

Robi McMillan

THE HON. JUSTICE McMILLAN
JUDGE OF THE GRAND COURT

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