

**CICA (CIVIL) APPEAL No. 21 of 2017
(FORMERLY CAUSE NO FSD 30 of 2013 – AJJ)**

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION
THE HON SIR RICHARD FIELD JA
THE HON SIR MICHAEL BIRT JA
THE RT HON SIR JACK BEATSON JA**

BETWEEN:

PRIMEO FUND (IN OFFICIAL LIQUIDATION)

Appellant

-AND-

**(1) BANK OF BERMUDA (CAYMAN) LIMITED
(2) HSBC SECURITIES SERVICES (LUXEMBOURG) S.A.**

Respondents

Mr Tom Smith QC, Mr Richard Fisher and Mr Robert Amey instructed by Mr Peter Hayden, Mr Jonathon Milne and Mr Jonathan Moffatt of Mourant on behalf of the Appellant.

Mr Richard Gillis QC, Mr William Willson, Mr Toby Brown and Mr Simon Gilson instructed by Mr Andrew Pullinger, Mr Shaun Tracey and Mr Hamid Khanbhai of Campbells on behalf of the Respondents.

**RULING ON COSTS FOLLOWING THE DISMISSAL OF THE APPELLANT'S APPEAL
BY THE COURT'S JUDGMENT DATED 13 JUNE 2019**

Released: 15 November 2019

Sir Richard Field JA

1. This is the judgment of the Court determining what order as to costs both on appeal and below should be made following the dismissal of the appeal brought by the Appellant ("Primeo").
2. In accordance with directions given by the Court, we received sequential submissions first from the Respondents, then from Primeo and then reply submissions from the Respondents. Primeo then sought to serve a further round of submissions in answer to what they maintained were two misleading statements made by the Respondents in their reply submissions. In our judgment, justice does not require us to depart from

our direction as to the service of written submissions and we have not taken into account Primeo's further submissions.

3. The Respondents argue that they should be awarded their costs of the appeal without any deduction reflecting the issues on which they did not succeed. They further argue that the costs order made by the trial judge should not be disturbed. Under that order: (A) Primeo must pay (i) 80% of the Respondents' costs; (ii) US\$ 20 million on account of the costs due to the Respondents; and (iii) interest at the rate of 2.375% pa on the costs awarded from 23 August 2017; (B) The Respondents have liberty to apply for an order that Primeo shall also pay to the Respondents interest on costs in respect of the period prior to 23 August 2017; (C) in the event that Primeo is successful on appeal, Primeo has liberty to apply for the same order in relation to any interest payable by Respondents. (D) The deadline for commencement of any taxation proceedings be extended to no later than six months from the determination of any final appeal arising from the order of 23 August 2017, should not be disturbed.
4. Primeo contends that this is a case where the Court should take into account the fact that the Respondents lost on many of the issues decided in the appeal and they go on to propose that this Court should order that there be no order as to costs. Primeo also contends that the costs order below should be amended to reflect Primeo's success in the appeal on many of the issues decided against it by the trial judge.
5. The Respondents' principal submission in support of their contention that they should be awarded the whole of their costs of the appeal is that, since Primeo's appeal was dismissed, they were the winning party and there are no good reasons why costs should not follow the event. They maintain that the judgment on appeal has not altered the outcome of the proceedings as decided below.
6. To the extent relevant, O. 62 r.4(2), (5) and (7) provide:
 - (2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.
 - ...
 - (5) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.
 - ...
 - (7) The orders which the Court may make under this rule include an order that a party must pay –
 - (a) a proportion of another party's costs;
 - (b) a stated amount in respect of another party's costs;
 - ...
 - (e) costs relating to particular steps taken in the proceedings;

...

(g) interest on costs (at the prescribed rate for Cayman Island dollars) from or until a certain date, including a date before judgment; and

(h) where the Court orders the paying party to pay costs subject to taxation, a reasonable sum on account of costs to be assessed summarily.

7. The score sheet as to the issues lost and won by the parties as a result of this Court's judgment is essentially as follows:

A. Issues on which Primeo lost and the Respondents won

1. Whether BLMIS was R2's sub-custodian from the beginning of R2's appointment as Custodian.
2. Whether Primeo had a strict liability claim for the difference between the value of the assets held in the BLMIS account when R2 assumed responsibility as Custodian for BLMIS as Sub-Custodian following the 2002 Sub-Custody Agreement and the actual value of the assets held in that account, less recoveries.
3. Whether Primeo had a sustainable claim for loss of profit. (This claim was abandoned in the course of the hearing and took up very little time).
4. Reflective loss.
5. Whether R1 was grossly negligent pre-April 2005 in respect of the claim under the Administration Agreements.
6. Causation in respect of breach of the ongoing supervisory duties under Clause 16B of the Custody Agreement and in respect of the breach of the Administration Agreement as at August 2002.
7. Whether the judge was right to hold that Primeo's claim was not based on fraud or a deliberate breach of duty within s. 37 (2) of the Limitation Law.
8. Whether contributory negligence applied to Primeo's claim that R1 was in breach of the Administration Agreement and to Primeo's custodian claim against R2.

B. Issues on which Primeo won and the Respondents lost

1. Whether, on the wording of Clause 16B of the Custody Agreement, R2 was strictly liable for losses caused by BLMIS subsequent to the 2002 Sub-Custody Agreement down to the Herald Transfer.
2. Whether R2 had a duty of care to keep cash safe.
3. Whether Primeo's losses in the form of cash paid out less recoveries resulting from subscriptions being mis-used in the Ponzi Scheme were caused by BLMIS's default for which R2 was responsible.
4. Whether (as found by the judge) BLMIS's only obligation to Primeo was to satisfy Primeo's redemption requests which obligation had been discharged.

5. The Nykredit No2. point.
 6. The Tripartite Agreement issue.
 7. The Estoppel Issue in respect of the 2002 Sub-Custody Agreement.
 8. Rs' procedural/pleading objections to the Tripartite Agreement claim and the "loss of cash" claim.
 9. Whether the judge adopted the wrong approach to 2005 and 2007 causation and should have adopted the loss of a chance approach.
 10. Whether the judge was right to find that, if Primeo had withdrawn funds following the lack of a clean pre-withdrawal of funds audit opinion of EY, Primeo would nevertheless have reinvested the money with one or more of the Madoff feeder funds.
 11. Whether BLMIS was R2's "agent" within s. 37 (1) of the Limitation Law.
 12. Whether the level of discount for contributory negligence found by the judge was too high.
8. In our judgment, given Primeo's success on the issues listed under heading B, there are good reasons in this case to hold that costs should not follow the event. The appeal was dismissed only because the Respondents succeeded on the Reflective Loss issue. At the same time, the Respondents lost on: (i) Primeo's various challenges to the other grounds found by the judge for concluding that Primeo had suffered no recoverable loss by reason of BLMIS's misappropriation of the subscription monies for use in Mr Madoff's Ponzi scheme; and (ii) Primeo's challenges to the other grounds found by the judge for holding that Primeo had suffered no recoverable loss by reason of: (a) R2's breach of the duty of care owed when appointing a sub-custodian and as to the ongoing suitability of the appointee; and (b) R1's breach of the Administration Agreement.
9. Thus, in the appeal, Primeo successfully established in respect of its strict liability claim against R2 that: (i) R2 owed Primeo a duty of safekeeping in respect of Primeo's cash; (ii) Primeo suffered an immediate actual loss on each occasion it advanced cash to BLMIS; (iii) the Herald transfer did not nullify the losses Primeo had already suffered as a result of R 2's duty to keep its cash safe; and (iv) the claim is not time-barred.
10. And in respect of its breach of duty claims against each of the Respondents, Primeo established that: (i) the Respondents were in breach as custodian and administrator of the duties pleaded against them; (ii) breaches from 2005 to 2007 caused Primeo loss on the basis that Primeo would have withdrawn its investment in BLMIS and ceased placing further investments with BLMIS from the date of the breach; and (iii) there were fresh causes of action after 20 February 2007 that were not statute-barred to which the causation finding applied.
11. The Respondents submit that Primeo was guilty of unreasonable conduct in the course of the proceedings by delaying, and then resisting, a strike-out summons issued by the Respondents contending that no damages were recoverable by reason of the Reflective Loss doctrine and by refusing a Calderbank offer made on 25 July 2016 that each side should drop hands and pay their own costs.

12. We reject this submission. The strike-out summons was issued on 31 May 2016, less than six months before the trial and was heard on 3 to 5 August 2016 less than 3 months before the trial. In our view, Primeo's resistance to the summons on the basis that the judge would be in a better position to decide the Reflective Loss issue against the background of the whole case as it emerged at trial was reasonable and should not be held against Primeo on the question of costs.
13. We also find that, given the high arguability of Primeo's case overall, it was reasonable for Primeo to reject the Respondents' Calderbank offer and that this conduct too should not count against Primeo on the question of costs of the appeal.
14. Standing back and looking at the appeal in the round including the dispositive nature of the finding that the losses claimed by Primeo were irrecoverable by reason of the Reflective Loss principle, we find that the appropriate and just costs order on the appeal is that Primeo should pay 25% of the Respondents' costs.
15. In addition, pursuant to GCR O.62 r 4 (7) (h), we order Primeo to make an interim payment in the sum of US\$500,000 on account of the costs awarded to the Respondents and we direct that this sum shall be paid within 21 days of the date of this judgment.
16. We are also of the opinion that, following taxation of the costs, Primeo should pay interest on the costs awarded at the rate of 2.375% pa from the date the costs were incurred by the Respondents.
17. We further order that taxation of the costs awarded should be delayed until 6 months after the determination of Primeo's appeal to the Privy Council.
18. We turn now to Primeo's appeal against the costs order made below. The Respondents submit that it was agreed between the parties, as embodied in a Consent Order of 28 December 2017, that Primeo would not be required to file a separate Notice of Appeal against the trial costs order in exchange for Primeo's agreement that it would only seek to vary that order if it was "successful" on its substantive appeal. The Respondents say that since the appeal was not successful but was dismissed, Primeo is debarred from seeking to amend the trial costs order notwithstanding Primeo's success on appeal on many of the issues decided against it at trial. The Respondents further submit that it would be inappropriate to vary the costs order below because this was made after a contested one-day hearing by the judge who had managed the case since its inception and who had not given reasons for his costs order because Primeo had not issued a free-standing appeal in 2017 against the trial costs order.
19. The relevant emails passing between the parties *inter se* and between the parties and the Registrar of the CICA read as follows:

Campbells (the Respondents' solicitors) to Mourants (Primeo's solicitors)
November 20, 2017 at 7:06 pm.

Further to our discussions by telephone, please confirm that your clients are not seeking to appeal the costs order dated 9 November in any event and independently of your appeal from the order dated 23 August 2017 dismissing Primeo's claim; rather that your clients position is that, if your clients substantive appeal from the order dated 23 August 2017 is successful, then the costs order should be set aside and the question of costs above and below re-considered afresh. Subject to that confirmation being provided, our client will not insist on your clients filing a separate appellants notice, in relation to the order dated 9 November, if that approach is also acceptable to the court.

Mourants to Campbells, November 21, 2017 at 5:56 pm

The latter is correct. If our client's substantive appeal is successful, the costs order dated 9 November 2017 should be set aside. We have drafted the attached consent order to reflect the agreement between the parties. Please let me know if you have any comments or suggestions on the draft before we write to the CICA tomorrow afternoon.

The draft Consent Order attached:

BY CONSENT IT IS ORDERED THAT:

1. Having filed a Notice of Appeal in relation to the Judgment on 6 September 2017, the Appellant is not required to file a separate Notice of Appeal relation to paragraphs (1), (2) or (3) of the corresponding costs order.
2. If the Judgment is overturned on appeal, the costs order shall be set aside and the Cayman Islands Court of Appeal shall determine the position as to costs.
3. Costs in the cause.

Campbells to Mourants, November 22, 2017 at 9:22 am

With the deletion of paragraph 2, which is superfluous, the consent order is agreed. Whether and if so all the costs order is disturbed will be a matter for the CICA depending on the precise outcome of the substantive appeal (and submissions on costs). It may be, for example, that it is appropriate for the CICA to remit the matter to the Grand Court.

Mourants to the CICA Registrar 27 November 2017

Subject to it being acceptable to the CICA, the parties have agreed that Primeo may dispense with any requirement to file a separate Notice of Appeal in relation to the costs aspects of the Grand Court ruling at first instance.

...

The draft consent order attached, as signed by both sets of attorneys, provides that Primeo is not required to file a separate Notice of Appeal regarding costs. The parties acknowledge that the CICA shall determine the position as to costs at the conclusion of the appeal in the usual way.

...

20. The Consent Order dated 30 November 2017 stated:

1. Having filed a Notice of Appeal in relation to the Judgment on 6 September 2017, the Appellant is not required to file a separate Notice of Appeal in relation to paragraphs (1) [Primeo to pay 80% of the Respondents' costs]; (2) [Primeo to pay US\$ 20 million on account of the Respondents' costs; (3) [Primeo to pay interest at 2.375% on the costs] of the corresponding costs order....]

21. The conventional view is that, in the absence of a costs only appeal, the English Court of Appeal only has jurisdiction to alter a costs order made below if the appeal is allowed, see Rix LJ in *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2012] Civ 987 at [57]: "Where an appeal is dismissed, in the absence of a costs only appeal, the costs order below is not disturbed." We are confident that the position is the same in the Cayman Islands.

22. In our judgment, the emails and enclosures we have set out above must be construed on the basis that this Court, in the absence of a costs only appeal, cannot adjust a costs order made below unless it allows the substantive appeal. Construed in this way, we find the Respondents agreed that Primeo should be relieved from filing a separate Appeal Notice as to the trial costs order in exchange for Primeo's agreement that it would only seek to disturb the trial costs order if it succeeded on its substantive appeal in the sense that the appeal was allowed.

23. It follows that, since Primeo's appeal was dismissed, Primeo is unable to seek an adjustment of the trial costs order.

24. Now that it has become not uncommon for costs orders to be issue-based, we think that it is for serious consideration that this Court should be given jurisdiction to adjust costs orders made below where an appellant has not succeeded in having the substantive order appealed against set aside but has succeeded in reversing the trial judge's findings on a number of substantial issues that were decided against him at trial. Section 6 (h) of the Court of Appeal Law contemplates additions to the type of orders that can be appealed being prescribed by rules of court as, in the opinion of the authority having power to make such rules, are of the nature of final decisions. If, as it seems to us, albeit without having heard argument on the point, costs orders below are final decisions, it would be open to the authority responsible for making the Court of Appeal Rules to prescribe that an appeal could lie in the circumstances under discussion. Alternatively, the necessary jurisdiction could be conferred by amending the Court of Appeal Law itself.

Conclusion

25. Costs in the appeal

We order Primeo to pay: (i) 25% of the Respondents' costs of the appeal to be taxed on the standard basis if not agreed; (ii) within 21 days of the date of this judgment an interim payment in the sum of US\$500,000 on account of the costs awarded to the Respondents; (iii) interest on the aforementioned costs at the rate of 2.375% pa; (iv) taxation of the costs awarded be delayed until 6 months after the determination of Primeo's appeal to the Privy Council.

Primeo's appeal against the trial costs order is dismissed.

Post script

26. After the above judgment was provided to the parties on 18 October 2019, but before any consequential order had been sealed, Counsel for Primeo drew to the Court's attention the House of Lords' decision in *Cassell & Co Ltd v Broome and another* (No. 2) [1972] AC 1136 and submitted that the effect of this decision was that the Court of Appeal of England and Wales and hence the Cayman Islands Court of Appeal have jurisdiction to vary costs orders made below even where the appeal is dismissed and accordingly the Cayman Islands Court of Appeal had jurisdiction to adjust the trial costs order on Primeo's application.
27. In *Broome* the House of Lords decided that in lieu of its original order that "the [unsuccessful] appellants do pay the first respondent his costs in this House" it would be ordered that "the unsuccessful appellants must pay to the respondent one-half of his taxed costs in this House and in the Court of Appeal". The House of Lords made

this order because the respondent had raised a point of law that occupied the Court of Appeal and the House of Lords for several days but which turned to have been irrelevant.

28. In our judgment, it does not follow from the decision in *Broome* that in the absence of a costs only appeal either the Court of Appeal of England and Wales or the Cayman Islands Court of Appeal has jurisdiction to adjust a costs order made at first instance on the application of an unsuccessful appellant. The observation of Rix LJ in *Hawksford Trustees* that where an appeal is dismissed by the Court of Appeal, in the absence of a costs only appeal, the costs order below is not disturbed, has long been understood to be the position and the fact that there are no reported decisions of either Court of Appeal adjusting a first instance costs order on the application of an unsuccessful appellant strongly reinforces Rix LJ's observation.
29. Further and in the alternative, we think that *Broome* affords no basis for this Court to depart from its definitive finding that Primeo agreed with the Respondents that Primeo should be relieved from filing a separate Appeal Notice as to the trial costs order in exchange for Primeo's agreement that it would only seek to disturb the trial costs order if it succeeded on its substantive appeal in the sense that the appeal was allowed.

Field, JA

Birt, JA

Beatson, JA