



IN THE CAYMAN ISLANDS COURT OF APPEAL ON
APPEAL FROM THE GRAND COURT OF THE CAYMAN
ISLANDS FINANCIAL SERVICES DIVISION

CICA (Civil) APPEAL No. 0009 of 2023
(Formerly Cause No. FSD 0329 of 2022 (DDJ))

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF OAKWISE VALUE FUND SPC

AND IN THE MATTER OF ENHANCED FIXED INCOME SP

BETWEEN:

CMB INTERNATIONAL SECURITIES LIMITED

Appellant

-and-

OAKWISE VALUE FUND SPC

Respondent

BEFORE:

The Rt Hon Sir John Goldring, (President)
The Hon Sir Richard Field, JA
The Rt Hon Sir Alan Moses, JA

Representations:

Ms Harriet Ter-Berg of Walkers (Cayman) LLP
for the Appellant.
Mr Erik Boddén, Ms Alecia Johns and Mr Jordan McErlean
of Conyers Dill & Pearman LLP for the Respondent.

Heard on the papers

Draft Circulated: 18 November 2024

Ruling delivered: 29 November 2024

RULING ON COSTS

Introduction

1. In this Ruling the same abbreviations are used as were adopted in the judgment of this Court (“the Judgment”) dated 13 June 2024.

2. The result of CMBI's appeal was: (i) the appeal was allowed; (ii) the judge's orders dated 2 June 2023 and 30 June 2023 dismissing with costs CMBI's petition for the appointment of Receivers over the SP were set aside; (iii) CMBI's receivership petition was ordered to be reheard by another FSD judge with liberty to adduce further evidence to take account of relevant events occurring since 11 May 2023 and to amend the petition accordingly; and (iv) Oakwise (a Cayman Islands exempted segregated portfolio company ("the SPC")) was ordered to pay CMBI's costs both on appeal and below.
3. CMBI's petition has not yet been reheard but in the meantime, on 24 September 2024, Oakwise has presented a winding up petition in respect of the SPC as a whole and applied for the appointment of provisional liquidators on the basis that the SP is arguably insolvent from a cash flow standpoint. After the issuance by this Court of a certificate of order dealing with both the outcome of the appeal and this ruling on costs, it is the intention of CMBI to invite the Grand Court to list its receivership petition to be heard alongside Oakwise's winding up petition and application for the appointment of provisional liquidators.

CMBI's costs submissions

4. CMBI contends that they are entitled now before any receivership or winding up order has been made in their favour to an order for the payment of their costs both on appeal and below, to be paid out of the segregated assets of the SP, taxed on an indemnity basis and paid in priority to any receivership or related insolvency proceedings and before any other expenses. The basis of this contention has three limbs. The first limb is "an express general rule" said to be contained in GCR O. 24, r. 8 and O. 20 r. 1 of the Companies Winding Up Rules, namely: that the petitioning creditor in a winding up should have their costs "*paid out of the assets of the company, such costs to be taxed on the indemnity basis unless agreed with the official liquidator*" and further, that those costs should rank in priority to other expenses in the liquidation. In CMBI's submission, it is well established that a receivership order is a class remedy and clearly analogous in general terms to a winding up order.
5. The second limb is reliance on the costs orders made by Kawaley J in *Re Green Asia Restructure Fund SPC and others* (unreported, 3 August 2022, FSD 112 and 113 of 2022) and Jones J in *Wyser-Pratte Eurovalue Fund Limited* [2010 (2) CILR 233].
6. In *Green Asia*, a petitioning creditor for the appointment of receivers over two separate portfolio funds was awarded its "*costs of the Petitions [to] be paid out of the segregated*

assets of the Funds, and [to] be paid in priority to all other claims save for the Receivers' fees and expenses properly incurred."

7. In *Wyser-Pratte*, a winding up case, Jones J awarded the petitioner costs on the indemnity basis since *"it would be wrong in principle to apply the standard basis because that would have the effect of making a petitioning shareholder subsidise the other members of the class who will benefit equally from whatsoever order has been made on the petition"*.
8. The third limb is section 51(3) of the English Senior Courts Act 1981 as applied in the Cayman Islands¹: *"The court shall have full power to determine by whom and to what extent the costs are to be paid."* This provision is particularly relied on for the proposition that where a receivership order is yet to be made, the Court can and should make a prospective and conditional order that CMBI's costs will rank as a priority in any receivership or related insolvency proceedings, before any other expenses.
9. Alternatively, CMBI submits that if this Court is not minded to make a pre-emptive order regarding priority in respect of a receivership or otherwise, it seeks an order for costs, to be taxed on the indemnity basis if not agreed, with liberty to apply to the Grand Court in any related insolvency proceedings for a direction that those costs be treated as a priority expense in the applicable insolvency process (whether that is a receivership, a provisional liquidation or an official liquidation).
10. In support of their proposed costs order, CMBI maintains that: (i) they pursued both the Receivership Petition and the appeal on behalf of and for the benefit of all creditors of the SP (with the support of at least one additional creditor); (ii) it has succeeded on appeal and demonstrated that it ought to have succeeded at first instance such that the receivership order ought to have been made in May 2023; and (iii) the costs order now sought was specifically pleaded in the Petition and would have been sought from Doyle J had the judge not erred in dismissing the Petition.

Oakwise's submissions in reply

11. Oakwise submits that since no receivership order was made below or by this Court which instead directed that CMBI's receivership petition be reheard by another FSD judge, there is no sound basis for the costs order that CMBI seeks. They contend that this is not a "payment

¹ Under s. 11 of the Grand Court Act (2015 Revision) in the case of the Grand Court and under s. 5 of the Court of Appeal Act (2023 Revision) in the case of the CICA.

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out of a fund” case because GCR O. 62, r 6 (2) and GCR O. 62, r 14 do not apply since CMBI is not acting in the capacity of trustee, personal representative, or mortgagee, or any other sort of office-holder itself holding a fund in that capacity for payment of its legal costs and expenses. Nor is there any support for the proposition that in the absence of a receivership or winding up order, or an order for the appointment of liquidators, CMBI should be paid in priority, or in preference to any other debts and liabilities of the SP, as a segregated portfolio. Further, section 228 of the Companies Act only provides for the costs of receivers over segregated portfolios to be payable on a priority basis after they are appointed, which was the position in *Green Asia*. And as to CMBI’s suggestion that in making the observation in *Green Asia* that “[a] receivership order is clearly analogous in general terms to a winding up order,” Kawaley J had in mind the position of a successful (creditor) petitioner for a winding up order being entitled to their costs, Oakwise submits that in that scenario, the petitioner has no right to costs on an indemnity basis unless it (they) successfully secure the appointment of joint official liquidators.

12. Turning to what costs CMBI should actually be awarded, Oakwise accepts that CMBI should have their costs of the appeal but argue that costs below should be limited to the cost of the hearing on 11 May 2023, with all other costs at first instance (including any costs associated with any further evidence or amendments) being reserved for future determination by the Grand Court after the final determination of the receivership proceedings. Oakwise further submits: (i) the aforementioned costs should be assessed on the standard basis, there being no proper basis for an award of indemnity costs both because no receivership order has yet been made on CMBI’s petition and because Oakwise’s conduct of the proceedings has not been such as to justify indemnity costs; and (ii) the costs should be ordered to be paid only out of the assets of the SP, the sole subject of the receivership proceedings and appeal, this being consistent with the segregation principle enshrined in Part XIV of the Companies Act and with the basic principle that a costs order made in adversarial litigation ordinarily represents no more than an unsecured, non-preferential contingent claim until determined by taxation.
13. Finally, Oakwise seeks the costs of their submissions if those submissions are preferred to those advanced by CMBI

Discussion and decision

14. In my judgment, for the reasons submitted on behalf of Oakwise, there is no proper and sound basis for making the costs order contended for by CMBI in the face of the fact that their receivership petition has not yet been determined in their favour, it being a fundamental precondition that a receivership, winding up or administration order was being made to the applicability of the decisions, Grand Court Rules, Winding Up Rules and section 51 (3) of the Senior Courts Act, relied on by CMBI. Thus, in none of *Re Gosscott (Groundworks Ltd)* (1988) 4 BCC 374; *Unadkat & Co (Accountants) Ltd v Bhardwaj* [2007] BCC 452; *Irish Reel Productions Ltd v Capitol Films Ltd* [2010] Bus LR 854; and *Rohl v Bickland (In Administration)* [2012] EWHC 706 (Ch) cited by CMBI in favour of the postulated broad reach of section 51 (3), was a prospective order made for costs incurred in other insolvency proceedings in advance of the making a receivership, winding up or administration order.
15. In my opinion, CMBI is entitled to its costs incurred below and on appeal assessed on the standard basis to be paid only out of the assets of the SP. There is no basis for concluding that there has been any conduct by or for and on behalf of Oakwise that takes the case sufficiently out of the ordinary to warrant indemnity costs. Accordingly, I reject Oakwise's submission that the costs below should be limited to the hearing on 11 May 2023. That said, if CMBI succeeds in the fresh hearing of its receivership petition, it will be unable to recover the costs incurred below first-time round in producing materials, pleadings and written submissions etc that are used second time round.
16. In my judgment, it is not appropriate for this Court to grant CMBI liberty to apply to the Grand Court in any related insolvency proceedings for a direction that the costs it is awarded by this Court be treated as a priority expense in the eventual insolvency process, be it receivership, provisional liquidation or an official liquidation. Instead, CMBI will in any event be free to inform the Court on its application to be joined in to the hearing of Oakwise's winding up petition and application for the appointment of provisional liquidators that it will be applying for an order that the costs hereby awarded and any costs made in its favour on the rehearing of its receivership petition be treated as a priority expense in the those insolvency proceedings.
17. Finally, turning to Oakwise's application for the costs of their submissions, I estimate that 70% of Oakwise's submissions were taken up responding to CMBI's unsound and misconceived submissions. Accordingly, I award Oakwise 70% of the costs of its submissions to be assessed on the standard basis and I reject CMBI's application for the costs of its submissions.

Moses, JA

I agree

Goldring (President)

I also agree