

Civil Appeal No. 27 of 2019 (Consolidated)
On appeal from the Grand Court
Cause No. FSD 232 of 2018 (RMJ)
Civil Appeal No. 26 of 2019
On appeal from the Grand Court
Cause No. FSD 72 of 2019 (IKJ)

**IN THE MATTER OF SECTION 131 OF THE COMPANIES LAW (2018) REVISION
AND IN THE MATTER OF ASIA PRIVATE CREDIT FUND LIMITED
(IN VOLUNTARY LIQUIDATION)**

BETWEEN:

ADAMAS GLOBAL ALTERNATIVE INVESTMENT MANAGEMENT INC

Appellant/Cross Respondent

-and-

(1) THE PUBLIC INSTITUTION FOR SOCIAL SECURITY FOR THE STATE OF KUWAIT

First Respondent/Cross Appellant

(2) MR RUSSELL SMITH

(3) MR KENNETH YEO

Respondents

AND

**IN THE MATTER OF SECTION 131 OF THE COMPANIES LAW (2018) REVISION
AND IN THE MATTER OF ADAMAS ASIA STRATEGIC OPPORTUNITY FUND LIMITED**

BETWEEN:

ADAMAS CAPITAL PARTNERS LIMITED

Appellant

-and-

(1) THE PUBLIC INSTITUTION FOR SOCIAL SECURITY FOR THE STATE OF KUWAIT

First Respondent

(2) MS MARGOT MACINNIS

(3) MR DAVID BENNETT

Respondents

Before:

The Hon Sir Richard Field, JA

The Hon C Dennis Morrison JA

The Rt Hon Sir Jack Beatson, JA

RULING ON COSTS AND THE ORDER TO BE MADE
BY THIS COURT IN APPEAL NO. 17 OF 2019 December 13 2019

Sir Richard Field JA

1. This is the judgment of the Court.

COSTS

Appeal No 26/2019 (the second appeal)

2. Justice Kawaley's Supervision Order dated 23rd July 2019 ordered that: (i) the costs of The Public Institution for Social Security for the State of Kuwait ("the Petitioner") of and incidental to the Petition prior to the directions hearing on 22 May 2019 should be paid out of the assets of Adamas Asia Strategic Opportunity Fund Ltd ("the Company") as an expense of the liquidation to be taxed on the indemnity basis (para 11); (ii) costs as between the Petitioner and Adamas Capital Partners Ltd ("the Manager") be reserved, with the question of such costs to be determined separately on the basis of written submissions from each side (para 12); and (iii) the fees and expenses of the Joint Voluntary Liquidators ("the JVLs") incidental to the voluntary liquidation of the Company, including but not limited to the JVLs' fees and expenses of and incidental to the Petition, be paid in full out of the assets of the Company as an expense of the liquidation (para 13).
3. The appellant, Adamas Capital Partners Limited ("ACPL") does not seek alternative orders to those set out in (i) and (iii) and in respect of (ii) seeks a direction that the costs as between the Petitioner and the Manager be determined in the Grand Court on the basis of submissions made to that Court.
4. With respect to the proceedings that followed the determination of the Petition namely:
 - (a) the failed application for leave to appeal made to Kawaley J;
 - (b) the successful application for a stay and leave to appeal to this Court, the costs of which were reserved; and
 - (c) the unsuccessful appeal to this Court,

ACPL submits that the Petitioner should pay ACPL's costs in respect of (a) and (b) because the Petitioner resisted both applications and ACPL ultimately succeeded in obtaining a stay and leave to appeal from this Court.

5. ACPL further contends that in respect of (c) there should be no order as to costs for the following reasons. The public interest was served by the appeal which involved a novel point of law, namely the meaning and effect of section 131 (b) of the Companies Law this point being at the centre of the other appeal in related section 131 (b) proceedings (17 of 2019). The situation was also one in which different stakeholders in a liquidation could legitimately take different views on the effect of s. 131 (b) and, where a stakeholder acts

reasonably in expressing views that do not ultimately prevail with the Court, the usual costs order is no order as to costs, with the stakeholder's costs being paid out of the company's assets as an expense of the liquidation, see eg the dictum of Henderson J *In re Parmalat Capital Finance* [2004 – 2005] CILR Note 35, set out below:

In an insolvency proceeding, the rule that costs usually follow the event is of limited application. Liability to pay a costs award would create an unnecessary disincentive to creditor participation in the process, contrary to the rationale of the English Insolvency Rules 1986. When a creditor has acted reasonably in making its views known on a subject in which it has a legitimate interest, including by means of a formal application to the court, and it fails to get what it asks for, it should not be liable to an award of costs.

Where joint provisional liquidators are appointed by an order made *ex parte* pursuant to a petition for winding up by petitioning creditors and the objecting creditors are unsuccessful in challenging the identity of the joint provisional liquidators appointed (see 2004-05 CILR 22), the objecting creditors, provided they have acted reasonably, will not be liable for the costs of the petitioning creditors, which should be paid without delay from the assets of the company as costs in the provisional liquidation.

6. Additionally, although the appeal was dismissed, the appeal judgment upholds certain aspects of ACPL's submissions, namely: (i) that there was no residual discretion over and above the evaluative exercise that must be taken in respect of s. 131 (b); (ii) the standard of proof was not the balance of probabilities; and (iii) there were no relevant public policy considerations independent of the statutory language of s. 131 (b).
7. The Petitioner seeks an order that ACPL should pay the costs of the appeal from Kawaley J's order on the indemnity basis on the ground that ACPL acted unreasonably in pursuing a hopeless and speculative appeal. The Petitioner submits that ACPL acted unreasonably in: (i) unilaterally resolving to appoint the Grant Thornton liquidators as voluntary liquidators rather than the FTI liquidators nominated by the Petitioner which was effectively the sole stakeholder in the proposed liquidation; (ii) opposing the wish of the Petitioner to have the liquidation supervised by the Court in view of matters that made a supervised liquidation more appropriate than a voluntary liquidation; (iii) proceeding with the appeal when, ACPL must have known it was likely to fail despite after having had the benefit of Kawaley J's judgment that was described by this Court as being "wide ranging and impressive" in circumstances; (iv) seeking a costs order in respect of the appeal that is entirely without merit.

8. The Petitioner further contends that, for the following reasons, there is no basis for any order which would require it to pay any costs to ACPL.

(1) This Court rejected the following submissions advanced by ACPL: (i) Kawaley J had proceeded on the basis that s. 131 (b) conferred on the Court the same broad discretion as was conferred by the former s. 150 of the Companies Law; (ii) the Petition was an abuse of process; (iii) Kawaley J erred in giving pre-eminent weight to the views of the Petitioner as to the identity of the liquidators; (iii) there was insufficient evidence for the finding that a supervised liquidation would be more effective than a voluntary winding up.

(2) The unreasonableness of the conduct of ACPL took the case outside the dictum of Henderson J in *In re Parmalat Capital Finance Ltd* (above).

(3) The case did not involve a novel point of law: it has long been held that liquidation proceedings, solvent or insolvent, should be conducted in the interests of those who are financially interested in the liquidation process.

9. In respect of ACPL's contention that it should be awarded the costs of its failed application to Kawaley J for leave to appeal, the Petitioner submits that Kawaley J's order that the costs of the summons be paid by ACPL in any event must stand because the costs of the application have been finally determined and are not the subject of a separate costs appeal.
10. As to the costs of ACPL's successful application to the Court of Appeal for leave to appeal and a stay (the costs of which were reserved), the Petitioner argues that since it was wholly successful in the appeal, ACPL should not have obtained leave and the costs of this application should be costs in the appeal.

Discussion and decision

11. We are of the clear opinion that ACPL should pay the costs of the appeal. The situation is quite different from that contemplated by Henderson J in *In re Parmalat Capital Finance Ltd* (above). Here, ACPL fiercely opposed the Petition notwithstanding that the Petitioner was effectively the sole interested party in the liquidation and in circumstances where the Petitioner's grounds raised questions over the ACPL's management of the fund and wider concerns with respect to the Petitioner's investments in funds managed by ACPL and its affiliates.
12. We reject the submission that the few differences this Court had with certain general observations made by Kawaley J constitute a reason for making no order as to costs on the appeal. As was said in paragraphs 123 and 124 of the lead appeal judgment:

In a few instances I have differed from some of Kawaley J's general observations as to the principles in play when a Petition is presented under s. 131, but I am entirely satisfied that none of Kawaley's specific findings on the Petition were crucially based on any of the few general observations with which I have disagreed.

In my judgment, the cogent reasons Kawaley J gave for finding that a supervised liquidation should be ordered and the FTI liquidators appointed to conduct the same were compelling and involved none of the errors of law contended for on behalf of ACPL.

13. We are not, however, persuaded that the pursuit of the appeal was so unreasonable and "out of the norm" that the costs to be paid by ACPL should be assessed on the indemnity basis. As was held on ACPL's application to this Court for leave to appeal, ACPL's grounds of appeal had a real, as opposed to a fanciful, prospect of success. ACPL must therefore pay the costs of appeal 26 of 2019 to be taxed on the standard basis, if not agreed.
14. Turning to the question of the costs of the proceedings at first instance, in accordance with paragraph 12 of Kawaley J's supervision order we direct that this question should be determined by Kawaley J in accordance with such case management directions as the learned judge might order.
15. With respect to the costs of ACPL's failed application to Kawaley J for leave to appeal, we accept the Petitioner's submission that, in the absence of a separate costs only appeal, there is no basis for disturbing Kawaley J's order that ACPL should pay those costs "in any event".
16. The question of the costs of ACPL's successful application to this Court for a stay and leave to appeal stands on a different footing because these costs were reserved. In our view, it is appropriate to take into account the wholesale dismissal of the appeal when deciding what the costs order on this application should be and we direct that on this application there be no order as to costs.

Appeal No. 17 of 2019 (the first appeal)

The costs of the appeal

17. In respect of this appeal, the costs order sought by the Appellant ("AGAIM") is no order as to costs, alternatively, each side should bear their own costs. In support of these proposed orders, AGAIM submits that it and the Petitioner were equal victors. AGAIM won on the hotly contested issue whether McMillan J's judgment could stand given the judge's failure to identify which of the jurisdictional bases provided for in s. 131 (b) were being upheld and the reasons for so finding. The Petitioner won on the issue whether, on the facts before the Court of Appeal, the Petition should be granted and a supervised liquidation ordered. That said, the Petitioner strenuously sought to uphold the

reasoning of McMillan J on the basis that his written judgment contained sufficient reasons for it to stand, the jurisdiction under s. 131 (b) was discretionary and the judge's approach was correct. Further, it had never been the Petitioner's case that this Court could set aside McMillan J's supervision order and find *de novo* on the evidence before the Court that a supervised liquidation should be granted. The Petitioner also resisted AGAIM's applications at first instance and to the Court of Appeal for a stay and leave to appeal, the latter application having been successful.

18. As it submits in respect of the second appeal (see paragraphs 5 and 6 above), AGAIM contends that account should be taken of the facts that the Petition involved a new question of law concerning the meaning and effect of s. 131 (b) and the circumstances were such that AGAIM should be treated as having reasonably expressed their views so as to fall within the observations of Henderson J in *In re Parmalat Capital Finance Ltd* (above). The proceeding had arisen out of a dispute between the parties as to the identity of the liquidators, not the need for a supervised liquidation. AGAIM's view had been that the retention of the existing BDO nominees was more effective, economic and expeditious. The incumbent liquidators had made it clear that they would not be inhibited in investigating AGAIM from which they were seeking information and facts. AGAIM was also of the view that it was acting in accordance with its express contractual rights. The dispute over a compulsory liquidation was therefore a corollary of the antecedent disagreement and AGAIM had unquestionably expressed its views reasonably.
19. The Petitioner adopts the same position it maintains in regard to Appeal 26 of 2019 and submits that AGAIM should pay the costs of the appeal on the indemnity basis on the ground that AGAIM acted wholly unreasonably in pursuing a hopeless and speculative appeal in the face of Kawaley's authoritative judgment in Cause No. FSD 72 of 2019. It is also submitted that AGAIM acted unreasonably in: (i) appointing the BDO liquidators contrary to the express wishes of the Petitioner which was effectively the sole stakeholder in the proposed liquidation; and (ii) opposing the Petition which was founded on complaints about the way in which AGAIM had managed the AASOF fund.
20. In the Petitioner's submission, the case falls far short from being within Henderson J's dictum in *In re Parmalat Capital Finance Ltd* (above) because AGAIM did not act reasonably and did not have a legitimate interest in the proceedings since the sole stakeholder in the liquidation was the Petitioner.

Discussion and decision

21. We accept the Petitioner's submission that the situation in this appeal does not fall within Henderson J's dictum *In re Parmalat Capital Finance Ltd* (above). In our judgment, subject to a downward adjustment to reflect AGAIM's success on the issue whether McMillan J's judgment failed for lack of adequate reasons, the Petitioner should pay the costs of the appeal. Our reasons track

those given above for ordering ACPL to pay the costs in appeal No. 17 of 2019. AGAIM strenuously contested the Petition notwithstanding that the Petitioner was effectively the sole interested party in the liquidation and in circumstances where some of the Petitioner's principal grounds for a supervised liquidation were serious concerns over AGAIM's management of the fund.

22. In our judgment, AGAIM's success in having McMillan J's judgment set aside for lack of adequate reasons should be recognised by ordering AGAIM to pay 85% rather than 100% of the Petitioner's costs of the appeal.
23. As in the case of appeal No. 17 of 2019, we are not persuaded to order that the costs payable by AGAIM should be taxed on the indemnity basis. AGAIM succeeded on its challenge to the sustainability of McMillan J's judgment and, as reflected in the grant of permission to appeal, AGAIM's grounds of appeal were not so unreasonably hopeless as to justify taxation of the costs on the indemnity basis. The order we make therefore is that AGAIM must pay 85% of the costs of appeal 17 of 2019 to be taxed on the standard basis, if not agreed.

The costs of appeal No. 27 of 2019 (the cross appeal)

24. AGAIM submits that the Petitioner should pay AGAIM's costs of the cross-appeal or alternatively, there should be no order as to costs or each side should pay their own costs.
25. AGAIM contends that it was not necessary for the Petitioner to cross-appeal to obtain the exclusive appointment of the FTI liquidators. Instead, the Petitioner should have conceded that McMillan J's judgment was insufficiently reasoned and then have asked this Court in the course of AGIM's appeal make the desired appointment by considering the matter *de novo*.
26. Further and in the alternative, AGAIM submits that the reality is that McMillan J exercised a separate discretion he undoubtedly had as to the appointment of additional liquidators so that if the judgment had not been set aside, the cross appeal would almost certainly have failed.
27. The Petitioner submits that it was the victor on the cross appeal since this Court set aside McMillan J's order appointing the FTI liquidators in addition to the BDO liquidators and appointed the FTI liquidators in place of the BDO liquidators. It follows that AGAIM should be ordered to pay the costs of the cross appeal and since AGAIM's opposition to the appeal was hopeless, the costs should be taxed on the indemnity basis.
28. In our view, the Petitioner was undoubtedly the victor on the cross appeal and AGAIM's opposition to the appeal does not fall within Henderson J's dictum in *In Parmalat Capital Finance Ltd* (above) for the reasons we have given when ordering AGAIM to pay the costs of appeals nos. 26 and 17 of 2019. It follows that the costs of the cross-appeal should follow the event. We have already

deducted 15% of the costs of the appeal payable to the Petitioner in recognition of AGAIM's success on the issue of the unsustainability of McMillan J's judgment for lack of sufficient reasons. In our judgment no further deduction stands to be made from the costs of the cross appeal since the argument on the sustainability issue was largely made in the course of appeal no. 17 of 2019.

29. We are also of the view that AGAIM's opposition to the cross appeal was not so hopeless and lacking in the merit that the costs awarded should be taxed on the indemnity basis. The order we make is therefore that AGAIM must pay the costs of the cross appeal (appeal no. 27 of 2019) to be taxed on the standard basis, if not agreed.

The costs of AGAIM's ex parte application to this Court for a stay and leave to appeal

30. This Court reserved the costs of AGAIM's successful *ex parte* application to this Court for a stay and leave to appeal. AGAIM seeks an order that the Petitioner must pay, the costs of this application on the ground that by reason of the Petitioner's opposition to the prior application for a stay and leave to appeal made to McMillan J, it was caused to incur the expense of making the subsequent application.
31. In our judgment, AGAIM having in large part comprehensively lost the resulting appeal, the appropriate costs order in respect of this application is no order as to costs.

The costs of and incidental to the Petition in FSD 232 of 2018

32. Paragraph 15 of the supervision order made by McMillan J dated 18 June 2019 provides: "The Petitioner's costs of and incidental to the Petition incurred on and after the directions hearing on 14 January 2019 shall be paid by the Manager (AGAIM), such costs to be taxed on the standard basis if not agreed."
33. AGAIM submits that if the setting aside of McMillan J's judgment on the Petition ordered by the Court of Appeal involves the whole of the supervision order of 18 June 2019 falling away to be replaced by a new order, this Court would have jurisdiction to consider the costs of the Petition afresh and on such a consideration should order that there be no order as to costs for the reasons, *mutatis mutandis*, that AGAIM advances in support of its contention that it should not have to pay the costs of appeal no. 17 of 2019.
34. The Petitioner argues that if the supervision order dated 18 June 2019 falls away in its entirety, this Court should make an order in the terms of paragraph 15 of the supervision order save that the costs awarded against AGAIM should be taxed on the indemnity basis.

35. In our judgment, the consequence of setting aside McMillan J's judgment is that the whole of the 18 June 2019 supervision order falls away to be replaced by an order of this Court.

36. In our view it follows from the dismissal of appeal no. 17 of 2019 by this Court for the reasons given for that outcome that AGAIM must pay the costs of and incidental to the Petition incurred after the directions hearing on 14 January 2019. We are also of the opinion that the costs awarded should be taxed on the standard basis, if not agreed. AGAIM's opposition to the Petition was not so hopeless and speculative as to justify an order for taxation on the indemnity basis.

THE ORDER TO BE MADE BY THIS COURT IN APPEAL NO. 17 OF 2019

37. The parties should submit to the Registrar drafts of the orders to be made in appeals nos. 17, 26 and 27 of 2019 within 10 days of the issuance of this Ruling.

38. In addition to capturing the orders as to costs made in paragraphs 22 and 23 above, the order in respect of appeal no. 17 of 2019 should:

(1) declare that the supervision order dated 18 June 2019 is set aside in its entirety;

(2) order the continuation of the winding up under the supervision of the Court;

(3) order the appointment of the FTI liquidators on terms identical or substantially similar to the terms contained in paragraphs 5 to 10 of supervision order made by Kawaley J dated 23 July 2019 in FSD 72 of 2019;

(4) order in substantially the same terms as are contained in paragraphs 1, and 14 – 19 of the supervision order dated 18 June 2019 made in FSD 232 of 2018.

Field, JA

Morrison, JA

Beatson, JA