IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 22 OF 2024 (IKJ)

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP ACT (2021 REVISION)

AND IN THE MATTER OF ONE THOUSAND & ONE VOICES AFRICA FUND I, L.P. (IN VOLUNTARY LIQUIDATION)

BETWEEN:

AFRICA INVESTMENTS, LLC

Petitioner

-and-

ONE THOUSAND & ONE VOICES AFRICA FUND I INVESTORS, LTD., AS GENERAL PARTNER FOR AND ON BEHALF OF ONE THOUSAND & ONE VOICES AFRICA FUND I INVESTORS, L.P., AS GENERAL PARTNER FOR AND ON BEHALF OF ONE THOUSAND & ONE VOICES AFRICA FUND I, L.P. (IN VOLUNTARY LIQUIDATION)

Respondent

IN COURT

Before: The Hon. Justice Kawaley

Appearances:

Mr David Allison KC of Counsel with Mr Rupert Bell, Ms Siobhan Sheridan and Mr Sam Hall of Walkers (Cayman) LLP, for the Petitioner

Mr Ben Hobden and Ms Rhiannon Zanetic of Harney Westwood & Riegels, for the Respondent

Heard: On the papers

Draft Ruling circulated: 15 July 2024

Ruling delivered: 23 July 2024

Costs-basis of taxation-conduct warranting indemnity costs-whether processes of the court can be abused by steps taken by a litigant abroad rather than within the relevant local proceedings -Grand Court Rules (2023 Revision) Order 62 rule 4 (11)

RULING

Introductory

1. The Petition was presented on 25 January 2024 and sought to replace the Respondent as General Partner ("GP") and Liquidating Agent for the Limited Partnership ("LP") under section 36 (13) of the Exempted Limited Partnership Act (2021 Revision) (the "Act"). It sought to replace the GP as Liquidating Agent on grounds of misconduct but, in response to attempts to adjourn the 11 April 2024 hearing altogether for an extensive factual inquiry, the Petitioner neatly trimmed its sails and relied essentially on loss of confidence grounds.

2. Nonetheless the GP launched a jurisdictional challenge which I rejected in a Ruling dated 24 April 2024 (the "Jurisdictional Ruling"). The balance of the Petition was adjourned, and the costs of the jurisdictional challenge were awarded to the Petitioner to be taxed if not agreed on the standard basis. On 11 April 2024, the Petitioner also sought a Freezing Order, which I ultimately granted on a hybrid (neither fully *inter partes*, nor fully *ex parte*) basis on the papers on 15 April 2024.

3. On 2 May 2024, I summarily (without hearing further oral argument after an initial oral hearing of the Petition) granted an Order appointing Alexander Lawson and Christopher Kennedy of Alvarez & Marsal Cayman Islands Limited as the persons responsible for winding-up the affairs of the LP, under section 36 (13) of the Act. My Summary Ruling provided as follows:

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"***SUMMARY RULING***

1. In this case, the Petitioner supported by the overwhelming majority of economic stakeholders in an exempted limited partnership in voluntary liquidation, seeks to replace the GP as the Liquidating Agent. The GP, seemingly unable to face the commercial reality of the ordinary legal consequences which flow from the loss of confidence which has obviously occurred, raised a technical jurisdictional challenge to the Petition.

2. In rejecting this challenge in a Ruling dated 24 April 2024, I observed:

'34. In summary, at this juncture, the likelihood that this Court can find a rational basis for declining to grant the relief sought by the Petitioner seems quite fanciful in all the circumstances of the present case.'

3. The Petitioner, which had hoped to obtain a final order on the first return date of the Petition, sought interim injunctive relief pending the hearing of the Petition on the merits. On 15 April 2024 I granted that relief on a de facto ex parte basis because, in an unrelated matter, I had recently wrongly assumed that a party contesting an injunction application would not undermine the efficacy of any order that might not be granted. On balance, I was not prepared to give the GP the benefit of the doubt, having regard to my provisional views of the merits of the Petition set out in the Ruling on Jurisdiction and my concerns that the very fact that the Petition was being opposed by the GP was indicative of a detachment from commercial and legal reality.

4. The 15 April 2024 Injunction Order was clearly designed to preserve the status quo pending the final hearing of the Petition. It explicitly mandated the preservation of assets; it implicitly mandated that no other steps be taken to prejudice the Limited Partners' interests pending the determination of the Petition on its merits. On 1 May 2024, the GP's attorneys requested a hearing of the Petition and indicated that the GP had recently:

(a) purportedly removed the Petitioner from the partnership;

(b) now wished to contest the Petitioner's standing on these grounds.

5. The GP has also filed a Complaint in the US District Court (SDNY) seeking to challenge the legality of the Petitioner's attempts in these proceedings to 'remove' the GP. These actions are a flagrant collateral attack on this Court's jurisdictional Ruling and contrary to spirit of the Injunction Order. As the Petitioner's counsel points out, it would alternatively have status as a creditor. In

my judgment the GP's conduct provides irrefutable grounds for the Court preventing any further abuse of its processes and summarily granting the Order the Petitioner seeks as of today's date.

6. Fuller reasons can be provided in due course if required.

KAWALEY J, 2 May 2024." (the "Summary Ruling")

4. Fuller reasons for that decision were in fact delivered on 9 May 2024. In those Reasons, I observed:

> "*3.It was easy to understand the GP wishing to avoid the Court replacing the GP with independent voluntary liquidators based on positive findings of misconduct on its part. It was impossible to understand why the GP could legitimately insist on remaining in office over the wishes of 97% of the stakeholders. Had seriously arguable grounds for opposing the Petition on its merits existed, the GP would surely not have occupied the hearing initially designated for the Petition itself with an intellectually teasing, but ultimately meritless, jurisdictional challenge.*"

5. Accordingly, without expressly adverting to the question of costs, on 2 May 2024 and 9 May 2024, respectively, I have:

   (a) expressly found that the Respondent has abused the processes of this Court by contesting the present proceedings on their merits while taking steps in New York to (1) deprive the Petitioner of its standing to petition and (2) contest under New York law this Court's competence to grant the Order which was ultimately made on 2 May 2024; and

   (b) implicitly found that the Respondent acted reasonably in contesting the Petition as originally framed and pursuing its jurisdictional challenge.

6. Costs were directed to be dealt with on the papers. Each party sought to undermine one of these costs-relevant findings. The Petitioner submitted that indemnity costs should be awarded for the entirety of its costs. The Respondent contended primarily that there should be no order as to the costs of the Petition and, in the first alternative, that it was not properly open to the Court to find

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that actions it had taken abroad constituted an abuse of this Court's processes. In the second alternative, the Respondent contended that any indemnity costs should be limited to period after 29 April 2024 when the disputed abuse of process was found to have occurred.

7. In addition, the Respondent invited the Court to rule that under the indemnity to which it was entitled in respect of its work in relation to the LP under the governing Limited Partnership Agreement ("LPA"), no costs liability properly arose. The Petitioner contended that this issue was not properly before the Court.

Indemnity costs: governing legal principles

8. GCR Order 62 rule 4 is the governing rule. Paragraph (11) provides:

> "*(11) The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently.*"

9. On a straightforward reading of this rule, whether a party has conducted all or part of a proceeding "*improperly, unreasonably or negligently*" will require a fact-sensitive and contextual evaluation rather than the mechanical application of a rigid legal formula. Judicial pronouncements about what sort of conduct is likely to warrant an indemnity basis of taxation costs award are deliberately broad. The Petitioner's counsel referred to *Talent Business Invs. Ltd. v. China Yinmore Sugar Co. Ltd* where Smellie CJ opined as follows:

> "*41 Whilst the jurisdiction to award indemnity costs in England is thought to be somewhat wider than that in the Cayman Islands, some of the leading English authorities nevertheless remain of assistance. In Three Rivers D.C. v. Bank of England (9), Tomlinson, J. summarized ([2006] 5 Costs L.R. 714, at para. 25) the principles upon which the court should determine any question of indemnity costs, elaborating upon the test of unreasonableness as follows:*
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> *'(1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.*
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> *(2) The critical requirement before an indemnity order can be made in the successful [party's] favour is that there must be some conduct or some circumstance which takes the case out of the norm.*

> *(3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an a fortiori ground, but rather unreasonableness.*
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> *(4) The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations…*"

10. The only controversial legal issue which was joined on the present costs application was whether conduct in overseas proceedings, or steps taken outside of the present proceedings, could be taken into account as abuses of the process of this Court. The Respondent submitted:

> "*44. …It is self-evident that the Court should not consider the conduct of a litigant other than in the proceedings before it. Such a task would be devoid of principle, outside of this Court's jurisdiction and plainly impossible to undertake in practice.*"

11. I have already concluded that such conduct does qualify as an abuse of process in granting the final substantive Order on the Petition on 2 May 2024 for the reasons delivered on 9 May 2024. The central findings focussed on the impact of the Respondent's overseas actions on the present proceedings in practical terms without, it might fairly be said, setting out any full reasoned legal foundation for those findings.

12. In my judgment there are two main grounds of principle which justify having regard to conduct external to a proceeding before this Court as an abuse of the processes of this Court and therefore "unreasonable" for the purposes of GCR Order 62 rule 4 (11):

    (a) abuse of process both generally and in the specific context of indemnity costs is a fluid concept which focusses on the impact of a party's conduct on the relevant proceedings rather than the precise form the impugned acts or omissions take (see *Talent Business Invs. Ltd.*, above); and

    (b) it is well recognised that steps taken in foreign proceedings which amount to a collateral attack on decisions of the local court, or the integrity of proceedings before it, can potentially qualify as an abuse of the processes of the local court.

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13. Ground (a) requires no elaboration. Ground (b) requires little elaboration. A recent illustration of this principle being applied in England and Wales is provided by *WWRT Limited-v-Tyshchenko* [2023] EWHC 2043 (Ch) where Bacon J held:

> "*17. There is no doubt that the court has personal jurisdiction over both of the defendants in this case, and I am satisfied that the claim brought by Mr Tyshchenko against Dr Tsiura in Ukraine is very clearly both vexatious and oppressive. It is abundantly clear that the sole purpose of that claim is to interfere with the English proceedings by seeking to prevent Dr Tsiura from maintaining the evidence that he has given in these proceedings. Indeed, it is quite an extraordinary collateral attack on the due process and the integrity of the English proceedings, which have been ongoing since September 2020.*"

14. That was an instance of proceedings having been initially commenced before the local court, and the commencement of foreign proceedings designed to undermine expert evidence which had been given before the local court being found to be an abuse of the process of the local court. A more common form of recognised abuse is the initiation of foreign proceedings which amount to a collateral attack on judgments of this Court. For instance, in my own judgment granting indemnity costs (in relation to a successful application for an anti-suit judgment), in *Al Sadik-v- Investcorp Bank* [2019 (2) CILR 585], I stated:

> "*8 The first defendant submitted that in these circumstances the starting point must be that as costs claimant it was entitled to an award on the indemnity basis: Kyrgyz Mobile Tel Ltd. V. Fellowes Intl. Holdings Ltd. (4) ([2005] EWHC 1329 (Comm), at para. 43, per Cooke, J.). However, Ms. White relied most heavily on two local cases which suggested that indemnity costs will ordinarily be awarded where it is established that proceedings have been improperly brought abroad.*
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> *9 First, in In re Ardent Harmony Fund Inc. (1), which concerned improperly bringing foreign proceedings against a company in liquidation here, Smellie, C.J. held as follows:*
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> > *'50. In light of ITTO's unilateral decision to issue the Barbados Proceedings without serving notice upon the JOLs, the lack of any apparent proper basis for doing so, and its refusal to dismiss or withdraw the Barbados Petition once the lack of utility of the Barbados Proceedings was brought to its attention and as was further explained in the referenced telephone conversations, the JOLs' costs of having to respond to the Barbados Proceedings, on the indemnity basis forthwith. It is submitted that an indemnity costs order is justified because*

ITO's conduct is 'improper' and 'unreasonable', within the meaning of the Grand Court Rules, Order 62, rule 4 (11) and because in the absence of an indemnity costs order, the other creditors of the Fund will bear the costs of ITTO's actions."

10 This case was clearly analogous to the present case to a material extent. Proceedings were improperly brought abroad and the costs consequences of the affected party being compelled to respond were held to create an entitlement to an award of indemnity costs. The misconduct here was more egregious because (a) there was an exclusive jurisdiction clause, and (b) the Dubai proceedings were commenced just as the highest appellate court in the agreed forum was finally determining the merits of the plaintiff's claim.

11 More analogous still was In re BDO (2). In this case Parker, J. granted an anti-suit injunction to restrain the pursuit of New York proceedings in breach of an arbitration clause. Dealing with the issue of the basis of taxation of costs, he held (2018 (1) CILR 187, at paras. 9–15):

> *'9 I have been referred to no Cayman authority on the question of what an appropriate costs order should be in circumstances similar to this case. There are authorities on the point in England. The English courts have held that the general costs order in relation to a party which commenced proceedings in a non-chosen jurisdiction in breach of an arbitration or exclusive jurisdiction clause is one which indemnifies the party compelled to enforce the contractual bargain in both the foreign proceedings and anti-suit injunction proceedings (as a form of damages)—see Kyrgyz Mobil Tel Ltd. V. Fellowes Intl. Holdings Ltd. . . . and A v. B . . . ([2007] EWHC 54 (Comm), at paras. 8–15)…'"*

15. More recently, in *Re G Trust*, FSD 270/2023 (IKJ), Judgment dated 9 February 2024 (unreported), another anti-suit injunction case where technically no breach of this Court's Order (as infelicitously drafted) had occurred, I observed:

> "*11. …at the heart of the application which the Applicants made in response to the HK Receivership Application was the proposition that, in effect, the common law is cleverer than that. The fluid and nimble abuse of process principle prevents mischievous litigants from using the infelicities of drafting, or other technicalities, to undermine the efficacies of the Orders of this Court by which such litigants are undisputedly bound…*
>
> *13. It is only necessary to refer to one authority relied upon by Ms Reynolds KC to illustrate why I found the proposition that the B Beneficiaries' conduct was abusive uncomplicated on the facts of the present case. In Star Reefers Pool Inc v JCF Group Co Ltd [2012] EWCA Civ 4, Rix LJ stated:*
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> > *'30. …it has been recognised that the unconscionability of the foreign claimant is often to be found, mainly or substantially, in the very reason that he has first*

> *submitted to English jurisdiction as the forum where the parties' dispute will be resolved and then sought vexatiously to extricate himself from the consequences of that submission, or oppressively to prolong or multiply the litigation by commencing further proceedings abroad. Examples of that recognition can be founded in cases such as Glencore v. Exter Shipping itself (at [67]), CAN Insurance Co v. OD Inc [2005] EWHC 456 (Comm) at [27] (cited in Dicey, Morris and Collins on The Conflict of Laws, 14th ed, 2006, at para 12-078, footnote 48), Tonicstar Ltd v. American Home Assurance Co [2005] 1 Ll Rep I R 32 at [13] (where Morison J spoke of the attempt "to hijack the decision which is presently before this court"), and Trafigura Beheer BV v. Kookmin Bank Co [2007] 1 Lloyd's Rep 669 at [48]-[51] (Field J).'* " [Emphasis added]

16. Analysing whether the pursuit of overseas proceedings constitutes an abuse of process generally is in my judgment not materially different to analysing whether or not an abuse has occurred which justifies an anti-suit injunction, save that in the latter context a higher threshold is surely required to be met. The views expressed by Rix LJ (as he then was) in *Star Reefers Pool Inc.* provide the most cogent support for the proposition most pertinent to the present costs application. Those pronouncements support the legal finding that it is potentially an abuse of the processes of this Court to submit to its jurisdiction, lose and then seek to undermine the efficacy of this Court's orders through foreign proceedings which have that purpose or effect. Accordingly, I reject the Respondent's submission that steps taken abroad, outside of the present proceedings, cannot as a matter of principle validly form the basis for awarding indemnity costs.

Findings: merits of costs application

The issues

17. Summarily rejecting the Respondent's suggestion that no order should be made as to the costs of the Petition, and having rejected the Respondent's legal submission that its conduct in New York cannot validly be taken into account as a basis for an indemnity basis costs award, the following issues remain to be determined:

    (a) whether the Respondent has acted "unreasonably" in relation to the whole or any part of the present proceedings as contemplated by GCR Order 62 rule 4 (11); and

(b) if (a) is answered affirmatively, should the scope of the indemnity costs award be the entirety of the Petition proceedings (apart, of course, from those costs dealt with in relation to the Jurisdiction Ruling), or simply that part of the proceedings after the relevant unreasonable conduct occurred.

Did the Respondent act "unreasonably"?

18. The Respondent is a Cayman Islands company subject to the personal jurisdiction of this Court. It did not in these proceedings contest the right of this Court to:

(a) decide whether the Liquidating Agent could be replaced pursuant to section 36 (13) of the Exempted Limited Partnership Act (the "Act"); and/or

(b) adjudicate the merits of the Petition if this Court determined that the disputed jurisdiction did exist.

19. It contested the Court's jurisdiction, and its objections were rejected in the Jurisdictional Ruling dated 24 April 2024. The Respondent could only reasonably have proceeded by either contesting the Petition (in its less contentious form) on the merits or electing not to contest the Petition (as I sought to encourage it to do in the Jurisdictional Ruling - at paragraphs 32-35). Instead, the Respondent chose to:

(a) purportedly remove the Petitioner as a Limited Partner on or about 29 April 2024, creating a new standing ground for opposing the Petition;

(b) commenced proceedings against the Petitioner in New York on or about 30 April 2024, which sought to impugn the validity of the Jurisdictional Ruling;

(c) and then confirmed that the Respondent intended to contest the Petition on its merits on the grounds that, inter alia, the Petitioner lacked standing as it was no longer a limited partner.

20. Actions (a) and (b), individually and cumulatively, were quite patently "beyond the norm". As regards (a), it is noteworthy that immediately after the Petition was presented, the Respondent did not oppose it on the basis that, although at the date of the presentation of the Petition the Petitioner had standing, the Petitioner was shortly liable to be removed as a limited partner so would at that juncture lack the standing to prosecute the Petition any further. This would have provided, assuming valid grounds for removal existed a far more straightforward basis for opposing the Petition than an expensive and complicated argument about its merits.

21. The fact that the purported removal only took place, with no apparent forewarning, (1) after the LP's voluntary liquidation had commenced and (2) after the Jurisdictional Ruling had been delivered justified the obvious inference that the Respondent was using the removal power with a view to depriving the Petitioner of standing to pursue proceedings this Court had strongly signified appeared to be meritorious. It required no complicated analysis to justify the summary conclusion that the LPA did not authorise the Respondent to compulsorily extinguish the legal rights of one of the largest economic stakeholders in such a manner. Moreover, these actions merely served to concretise the previously somewhat intangible anxieties I had about the threat to the LP's assets, anxieties which had prompted me to grant a Freezing Order on 15 April 2024.

22. It will almost invariably be an abuse of the processes of the Court, and unreasonable for GCR Order 62 rule 4 (11) purposes, for a defendant or respondent to initiate action after proceedings have been commenced against them to deprive the claimant of the ability to pursue those proceedings, absent some pre-existing contractual or other factual and legal basis for doing so. It was in the present case a very obvious and blatant abuse because the relevant steps were initiated after the Court has rejected the Respondent's jurisdictional challenge and provisionally opined that there appeared to be no valid substantive basis for contesting the proceedings on their merits.

23. Challenging the Jurisdictional Ruling which the Respondent was bound by in foreign proceedings (step (b)) was also obviously improper in the sense which was recognised by Rix LJ in *Star Reefers Pool Inc v JCF Group Co Ltd* [2012] EWCA Civ 14. This conduct clearly justified the award of indemnity costs; the only question was whether this impacted upon the whole or only a part of the proceedings. Suing the Petitioner in New York and alleging, *inter alia*, that it had improperly

presented the Petition this Court had just ruled was meritorious was arguably the most blatant collateral attack on an Order of this Court imaginable.

The scope of the Respondent's unreasonable conduct

24. I am bound to reject the Petitioner's contention that the costs of the Petition as a whole should be awarded on the indemnity basis. The unreasonable conduct commenced on or about 29 April 2024. There is no rational basis for relating this misconduct (as extreme as it may be) back to the initial decision of the Respondent to oppose the Petition as it was originally drafted. There is no proper basis for inferring that the Respondent intended from the outset to take the abusive steps it took in late April 2024 from the outset. Viewing the Respondent's litigation strategy holistically and realistically, its New York actions appear more plausibly to be an opportunistic response to the Jurisdictional Ruling and the perhaps unexpectedly swift manner in which the Petitioner side-stepped the need for a fully contested hearing of the more intractable original averments in the Petition. Indemnity costs awards must be informed by objective analysis, not by emotive "off with his head"-type imperatives.

25. I find that the Petitioner is entitled to an award of its costs to be taxed if not agreed on the indemnity basis only after 29 April 2024. As regards the costs of the Petition before that date, the Petitioner is awarded its costs to be taxed if not agreed on the standard basis.

Costs of the costs application: provisional view

26. The Respondent adopted the unrealistic primary stance that no order should be made at all as to the costs of the Petition. The Petitioner has accordingly achieved substantial success overall, albeit that the Respondent successfully resisted the application for all costs of the Petition to be awarded on the indemnity basis. How does this impact on the costs of the present application? My strong provisional view is that the Petitioner should be awarded its costs of the costs application to be taxed if not agreed on the standard basis. The Respondent does not appear to me to have conducted the costs application "*unreasonably*" in the requisite GCR Order 62 rule 4 (11) sense, so no basis for indemnity costs appears warranted.

Summary

27. The Petitioner is granted the costs of the Petition on the standard basis until 29 April 2024. Thereafter, the Petitioner's costs of the Petition shall be taxed, if not agreed, on the indemnity basis. Unless either party applies within 14 days of the date of delivery of this Ruling by letter to the Court to be heard as the costs of the present application, those costs are awarded to the Petitioner to be taxed if not agreed on the standard basis.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT