EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 2015/0092

IN THE MATTER OF ASIA COAL ENERGY VENTURES LIMITED
AND IN THE MATTER OF THE BVI BUSINESS COMPANIES ACT, 2004 (AS AMENDED)
AND IN THE MATTER OF THE INSOLVENCY ACT, 2003

BETWEEN:

RAIFFEISEN BANK INTERNATIONAL AG

Applicant

and

ASIA COAL ENERGY VENTURES LIMITED

Respondent

Appearances:

Stuart Cullen (on April 29, 2016) and Jayesh Chatlani (May 6, 2016 Submissions) of Harney Westwood & Riegels for the Applicant
Richard Evans and Adam Hinks of Conyers Dill & Pearman for the Respondent

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2016: April 29
May 30

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JUDGMENT

This judgment awards costs of a liquidation application, brought by applicant bank to wind up respondent company, that was dismissed – Application based both on insolvency grounds and just and equitable grounds – Court found that alleged $70 million debt disputed on genuine and substantial grounds and held that it would not be just or equitable

to wind up company based on ground asserted by bank as company's grant of a debenture on which bank relied had been for bona fide purpose.

Bank requested that award of costs be reserved on basis that it was considering appealing and in its view there were reasonable merits for success on an appeal – Submitted that if ordered to pay costs and appeal is successful, "there is a real risk that the Company will not be in a position to pay back the costs" and that that "there is little prejudice" in reserving costs to later date.

Held: While there may be some unusual situation in which would be just and appropriate to reserve costs indefinitely, or reserve costs pending the determination of appeal or intended appeal, this is not even close to such a case – Bank's submission would apply to significant number of cases – Often unsuccessful party considers appealing – Unless appeal is taken for tactical reasons, presumably intended appellant will consider there are "reasonable merits for success on an appeal" – Not uncommon for unsuccessful party ordered to pay costs to assert concern about recovery if judgment, and costs order, reversed on appeal – No evidence of real risk that company will not be able to pay back costs if potential appeal succeeds.

Appeal does not operate to stay judgment appealed from – Party seeking stay must apply and meet a test that is not easily met [see Court of Appeal judgment in C-Mobile Services Limited v Huawei Technologies Co. Limited, BVIHCMAP2014/0017, 2 October 2014] – Successful litigant should not normally be denied fruits of its success pending appeal except in exceptional circumstances – Stay is exception, not general rule – Having regard to C-Mobile principles by analogy, or to illustrate what bank would need to show after costs order made and appeal commenced, no evidence here that potential appeal as affects costs would be stifled or rendered nugatory if no stay – While always some risk that money paid may not be recovered, no particular risk shown here – Balancing harm, successful party would be prejudiced by not being able to recover its costs, and nothing to show that appeal, if taken, has any prospect of succeeding, never mind that "strong grounds of appeal or a strong likelihood the appeal will succeed."

No reason to depart from the general rule that company, as wholly successful party, should be paid its costs by bank, as the unsuccessful party.

Company requested order for payment by bank on account of costs, and in support submitted indicative costs schedule – Reasonable and fair that payment by bank on account of company's costs should be ordered.

[1] LEON J [Ag] On 29 April 2016, this Court handed down Judgment ("Liquidation Application Judgment") dismissing the application of the Applicant, Raiffeisen Bank International AG ("Bank"), for an order that the Respondent, Asia Coal Energy Ventures Limited ("Company"), be wound up and liquidators appointed

("Liquidation Application") pursuant to the Insolvency Act, 2003 ("Insolvency Act").

[2] The Liquidation Application had been brought on two grounds.

[3] First, the Bank claimed that the sum of approximately $70 million was due and owing to it by the Company, the Company was "unable to pay its debts as they fall due", and was "insolvent"[1], and that a liquidator should be appointed and the Company wound up[2].

[4] Second, the Bank claimed that the Company had "purported" to grant fixed and floating charges over all of its assets and that "there is a serious concern" that the it was for the purposes of putting the Company's assets out of reach of the Bank, so that it was "just and equitable" that a liquidator should be appointed and the Company wound up[3].

[5] This Court concluded in the Liquidation Application Judgment, with respect to the first ground, that there was a bona fide dispute between the Bank and the Company on substantial grounds; the Company had met the factual and legal requirements of showing a "substantial dispute" as to whether the debt alleged was owing or due; and the alleged debt was disputed on genuine and substantial grounds.

[6] The Court further concluded, with respect to the second ground, that the Company had explained that charging its assets was for a bona fide purpose so that it would not be just or equitable to wind up the Company on the basis asserted by the Bank.

[7] The Liquidation Application Judgment provided as follows with respect to costs of the Application:

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[1] Within the meaning of Section 8(1)(c)(ii) of the Insolvency Act.
[2] Pursuant to Sections 159(1)(a) and 162(1)(a) of the Insolvency Act.
[3] Pursuant to Sections 159(1)(a) and 162(1)(b) of the Insolvency Act.

> The award of costs of the application is reserved to be determined following submissions as to costs which shall be heard either immediately following the handing down of this Judgment, or at a time and place and in a manner to be ordered following submissions in that regard, which submissions will be heard immediately following the handing down of this Judgment.[4]

[8] When the Liquidation Application Judgment was handed down, the Bank sought and was granted more time in which to prepare and file submissions respecting the costs of the Liquidation Application, having submitted that it required more time because its submissions would need to be "more nuanced" given the general rule that costs follow the event. In prior correspondence, the Bank's legal practitioners told the Company's legal practitioners that the Bank intended to make detailed costs submissions.

[9] The parties filed written submissions respecting the order that this Court should make respecting costs of the Liquidation Application.[5] The Company's submissions included an "Indicative Costs Schedule" in support of its request for an order that, if it is awarded costs, the Bank make a payment to it on account of costs in advance of an agreement on or assessment of the amount of the costs.

[10] **Company's Position** on Costs. The Company's position with respect to costs of the Liquidation Application was that it was entirely successful and the general rule in CPR 64.6(1) should be applied: the Court should order the Bank, as the unsuccessful party, to pay the costs of the Company, as the successful party.

[11] It submitted that there was no basis to depart from the general rule; that there was nothing in all of the circumstances (CPR 64.6(5)) or any of the particular considerations in CPR 64.6(6) that should lead this Court to depart from the general rule.

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[4] Liquidation Application Judgment, paragraph 77(2).

[5] Respondent's Costs Submissions dated 28 April 2016; Applicant's Costs Submissions dated 6 May 2016; Respondent's Reply Costs Submissions dated 12 May 2016, with "Indicative Costs Schedule".

[12] The Company further submitted that the Bank had brought "the most draconian form of proceedings available against a company – liquidation proceedings" and that the Bank "did not first serve a statutory demand (which may be considered a more measured approach)." The Company continued that while the Bank was entitled to play "hard-ball", "there is a price to pay if its claims fails". The Company had to defend two grounds for a winding up, which it did successfully. The Bank did not succeed on any issue so there would be no basis to adopt an "issues-based" approach in this case.

[13] **Bank's** Position. The Bank's submission was, first, that this Court "must have regard to all the circumstances" (CPR 64.6(5)) and that the Court has discretion to depart from the general rule.[6]

[14] It then stated that it was considering appealing the Liquidation Application Judgment (which it has until 10 June 2016 to do). It did not say anything more about its contemplated appeal, or the grounds therefor, other than that the Bank "is concerned that insufficient consideration was given to various factual matters that were before the Court at the hearing", and "it is of the view that there are reasonable merits for success on an appeal", and that "cost of the proceedings should therefore be reserved." In the event that the Applicant appeals, "the costs can be determined at that stage, failing which by application by either party."[7]

[15] The Bank further submitted that if it is ordered to pay costs and the appeal is successful, "there is a real risk that the Company will not be in a position to pay back the costs."[8] It submitted that "there is little prejudice in the Court reserving the issue of costs to a later date."[9]

[6] Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2008] EWHC 2280 (TTC).
[7] Applicant's Costs Submissions dated 6 May 2016, paragraph 6.
[8] Applicant's Costs Submissions dated 6 May 2016, paragraph 7.
[9] Applicant's Costs Submissions dated 6 May 2016, paragraph 8.

[16] The Bank did not go on to submit, in the alternative for its request that the costs judgement be reserved further, specifically what form of costs order, if not the order contemplated by the general rule, should be made. Nor did it make any submission regarding the Company's request for a payment on account of costs in advance of an agreement on or assessment of the amount of the costs.

[17] The Bank did not make the detailed costs submissions that it said it was going to make, nor did it make submissions that, at least in this Court's view, were "more nuanced" given the general rule that costs follow the event.

[18] **Company's Reply.** The Company did not warm to the Bank's submission that there should be a further reserving of cost, to say the least, submitting that it "borders on the ludicrous".

[19] The Company submitted that the Court is bound to determine the costs liability now, and that there is "no warrant, precedent or logic in deferring a costs determination until a disgruntled litigant has decided whether or not to launch an appeal." Further, a "failure to (i) determine costs now and (ii) by that determination to fail to order that the Bank must pay [the Company's] costs of the proceedings would be perverse."

[20] Decision on **Bank's Request for Court to Continue to Reserve** on Costs. This Court agrees with the substance of the Company's submissions on the Bank's request that the Court reserve further its judgment on costs.

[21] While there may be some unusual situation in which it would just and appropriate for a court to reserve its decision on costs indefinitely, or to reserve pending the determination of an appeal or intended appeal – a matter that need not be decided in this Judgment – this is not even close to such a situation.

[22] The Bank's submission on the basis for this Court not making a decision on costs at this time would apply to a significant number of cases in this Court. Often an unsuccessful party considers, and then takes an appeal, or if permission is

needed, seeks permission. Unless the appeal is taken for tactical reasons, presumably the intended appellant will consider that there are "reasonable merits for success on an appeal" (whatever level of possible success that may translate into).

[23] Even if a possible appeal having "reasonable merits for success" is a factor that could lead this Court to reserve on costs, which it is not, despite having been afforded time to do so, the Bank did not particularize much about the grounds for its possible appeal. Its bald statement in its belief is hardly of assistance.

[24] The other basis submitted for this Court to reserve was that "there is a real risk that the Company will not be in a position to pay back the costs." Apart from that bald statement, the only thing to which the Bank could point was a statement in the Liquidation Application Judgment that the affidavit on behalf of the Company which said "the Company is not insolvent … did not provide enough factual information for the Court to make an assessment regarding either form of insolvency under the Insolvency Act." The Bank submitted no evidence on this point.

[25] Even if a real risk that the receiving party will not be in a position to pay back the costs paid to it in the event of a successful appeal is a factor that could lead this Court to reserve on costs, which it is not, despite having been afforded time to do so, the Bank did not provide meaningful evidence of the risk. Its bald statement is hardly of assistance.

[26] Taken at its highest for present purposes, the statement in the Liquidation Application Judgment referred to by the Bank in support of its assertion of risk simply was a statement that there was insufficient information before the Court, which in any event dated back to the time of the affidavit submitted by the Company, for an objective assessment to have been made about the Company's

solvency. However, the bottom line in respect of 'risk' is that there was sworn evidence on behalf of the Company that it was not insolvent.[10]

[27] It is not uncommon for an unsuccessful party ordered to pay costs to a successful party to assert that it is concerned about recovery of the costs paid if the judgment, and hence the costs order, is reversed on appeal.

[28] The potential remedies available to a party in the Bank's position ought not to include asking the Court to continue to reserve on its costs award. The party should make its substantive submissions on what the costs order should be and then, if costs are awarded against it and it considers it can meet the test for doing so, seek a stay of the judgment awarding costs.

[29] The system in this jurisdiction is that an appeal (which has not yet been taken so far as this Court is aware, although it would matter not, for this purpose, if an appeal had been taken) does not operate to stay the judgment appealed from.

[30] A party seeking a stay must apply for a stay and meet a test that is not easily met.

[31] The Court of Appeal held as follows in C-Mobile Services Limited v Huawei Technologies Co. Limited ("C-Mobile") (as clearly summarized in the headnote to the Judgment, page 2):

> There is no automatic right to a stay of proceedings pending appeal and a successful litigant should not normally be denied the fruits of its success pending appeal except for in exceptional circumstances. There are five relevant principles a court should apply when deciding whether to exercise it discretion to stay proceedings pending appeal. The first is that the court should take into account all of the circumstances of the case. Second, a stay is the exception rather than the general rule. Third, the party seeking stay must provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. Fourth, in exercising its discretion, the court applies what is in effect a balance of harm test

[10] Liquidation Application Judgment, paragraph 57.

> in which the likely prejudice to the successful party must be carefully considered. The fifth is that the court should also take into account the prospect of the appeal succeeding, but only where there are strong grounds of appeal or a strong likelihood the appeal will succeed is shown (which would usually enable a stay to be granted).[11]

[32] Regard could be had to the C-Mobile principles by way of analogy, or to illustrate what the Bank would need to show after a costs order is made against it (and which it has not even come close to showing on its request that the judgment on cost be reserved). The Bank has not provided any evidence, never mind cogent evidence, that its potential appeal, as it relates to or affects costs of the Liquidation Application Judgment, will be stifled or rendered nugatory unless a stay is granted. While there is always a risk that money paid may not be recovered, as stated above there has been no particular risk shown here, and meanwhile, in balancing the harm, the successful party which presumptively would be awarded costs given the general rule, is being prejudiced by not being able to recover its costs, and apart from the bald view of the Bank's legal practitioners on success of any possible appeal, there is nothing to show that an appeal, if taken, has any prospect of succeeding, never mind there "strong grounds of appeal or a strong likelihood the appeal will succeed".

[33] Judgment on Costs of the Liquidation Application. This Court agrees with the substance of the Company's submissions on the appropriate costs order in the circumstances.

[34] The Bank chose not to make alternative submissions on any basis for the general rule not to be applied, despite its early indication that it intended to do so. It simply noted that the Court has a discretion to depart from the general rule – which of course would need to be on a principled basis – and referred to the requirement that the Court have regard to all the circumstances.

[11] BVIHCMAP2014/0017, 2 October 2014, Blenman, J.A., page 18, paragraphs. 49 and 50.

[35] There is no reason to depart from the general rule. The Company, as the wholly successful party, should be paid its costs by the Bank, to be assessed if not agreed, within 14 days.

[36] For the avoidance of doubt, those costs shall include all costs in connection with the submissions on costs, including those made at the handing down of the Liquidation Application Judgment, and the handing down of this Judgment on costs.

[37] Payment on Account of Costs. The Company has requested, if it is awarded costs, that an order be made for a payment by the Bank on account of costs in advance of an agreement on or assessment of the amount of the costs. In support submitted an Indicative Costs Schedule.

[38] The Bank chose not to make alternative submissions on the request for a payment on account, which was made originally in the Company's initial Costs Submissions on 28 April 2016.

[39] It appears reasonable and fair that a payment by the Bank on account of the Company's costs should be ordered.

[40] The Company's submission was that the appropriate sum would cover all of Leading Counsel's fees and 50% of the fees of the Company's legal practitioners. Conceptually that is reasonable and fair to both the Company and the Bank.

[41] The Indicative Costs Schedule sets out the fees and general disbursements of the Company's legal practitioners, Conyers Dill & Pearman as $98,685.75 and $5,669.49 respectively, with the latter being itemized.

[42] Leading Counsel's fees and disbursements, which together are "further disbursements" on the Indicative Costs Schedule are GBP 35,000.00 as fees and GBP 5788.33 as disbursements, which equate to $51,123.50 and $8,456.03. In

addition, there are "English lawyers' fees" estimated to be GBP 20,000.00, being $29,227.35, being total further disbursements of $193,160.00.

[43] The initial submission did not refer to "English lawyers' fees". It seems appropriate that the payment on account should include only 50% of those fees, consistent with what was sought for Conyers' fees.[12]

[44] Accordingly, the payment by the Bank to the Company on account of costs should consist of the following:

a) Conyers' fees: $49,342.88
b) Conyers' disbursement: $5,669.49
c) Leading Counsel's fees: $51,123.50
d) Leading Counsel's disbursements: $8,456.03
e) "English lawyers' fees": $14,613.68

being a total of $129,205.58.

ORDERS

[45] Accordingly, for the reasons set out above in this Judgment, this Court orders as follows:

1. The request by the Bank for this Court to further reserve its Judgment on the award of costs of the Liquidation Application pursuant to the Liquidation Application Judgment is denied.

2. The Bank shall pay to the Company its costs of the Liquidation Application, to be assessed if not agreed, within 14 days.

3. For the avoidance of doubt, the costs of the Liquidation Application shall include all costs in connection with the submissions on costs of the Liquidation Application (including the request by the Bank to this Court to

[12] See respecting the work of foreign lawyers: Halliwel Assets Inc, Panikos Symeou and Marigold Trust Company Limited v Hornbeam Corporation, 2014/0115 and 2014/0134, Judgment (Permission to Appeal and Stay), 17 May 2016, paragraphs 93 – 108, and in connection with the assessment, paragraphs 107 – 108 in particular (suggesting a "summary of the reason(s) for the involvement of the foreign lawyer or other third party on the particular role(s) or task(s)").

further reserve its Judgment on the award of costs, and the request by the Company for an order for payment on account of costs), including the submissions made at the handing down of the Liquidation Application Judgment, and at the handing down of this Judgment on costs (if any).

4. The Bank shall pay to the Company, on account of the costs of the Liquidation Application, the sum of $129,205.58 within 14 days.

Justice Barry Leon
Commercial Court Judge
30 May 2016