Cayman Litigation & Dispute Resolution Q2 2017 Review

Welcome to the Q2 2017 Stuarts litigation and dispute resolution review. Stuarts' litigation and dispute resolution team acts in a wide range of company, commercial and insolvency related disputes arising under Cayman Islands law. The Q2 2017 Quarterly Review addresses Non-Party Costs Orders.

Non-Party Costs Orders

The ability of the Court to make Costs Orders against persons other than the actual parties to proceedings may be a particularly important tool in the recovery of costs and has recently been re-affirmed by a Grand Court decision in a Costs application heard in the Primeo Fund Liquidation, handed down on 1 August 2017.

Background to the Court's Jurisdiction

This is a comparatively new remedy available to the Cayman Islands Court and was first introduced by The Judicature (Amendment) (Costs) Law 2001 which repealed and substituted Section 24 of the Judicature Law (1995 Revision). The relevant provision is now Section 24(3) of the Judicature Law (2017 Revision), which provides:

> "The court shall have full power to determine by whom and to what extent the costs are to be paid" (emphasis added).

This provision mirrors the position under English law (section 51(1)(3) of the Senior Courts Act 1981 (previously the Supreme Court Act)) and it follows that English case law construing that section is relevant in determining the position under Cayman Islands law.

The House of Lords held in the English case of Aiden Shipping Co. Ltd. -v- Interbulk Ltd. [1986] AC 965 that there was no justification for implying a limitation to the Court's afore-mentioned powers to the effect that costs could only be ordered to be paid by the actual parties to the proceedings. Hence was borne the Non-Party Costs Order jurisdiction.

When may a Non-Party Costs Order be made in principle?

The underlying rationale of the rules relating to Non-Party Costs Orders is that it is wrong in principle to allow a person to fund and control litigation in the hope of gaining a benefit without a corresponding risk that that person will share in the costs of the proceedings if they ultimately fail.[1]

The above principle needs to be properly balanced against, in the case of companies, principles of limited liability and separate legal personality. As such, a person's position merely as a shareholder or director in a company will not justify a Non-Party Costs Order, there needs to be more; the critical element, in the Court's discretion, traditionally often being one of funding. It is clear that, perhaps unsurprisingly, an Order will only be made where there is a substantial or close connection between the Non-Party and the proceedings.[2]

In practice, the need for a Non-Party Costs Order may be more likely to arise where the party ordered to pay costs is either insolvent or where there may be difficulties in enforcing a Costs Order. Accordingly, a number of Cayman Islands authorities address the ability to obtain such Orders in an insolvency context, but the availability of this relief is clearly not itself limited to such cases and there are many different circumstances in which the jurisdiction is exercised, as

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1 Arklow Investments Ltd -v- Maclean (unreported), High Court of New Zealand, 19 May 2000, Fisher J.
2 See also: The Ikarian Reefer (No.2) [2000] 1 WLR 603 at 611B, Lord Justice Waller.

demonstrated below.[3] An example being the recent decision in the Primeo Fund Liquidation, where there was no question of "funding" and the level of "control" or "responsibility" for the application in issue was in dispute.

Two of the leading English cases that act as guidance in the exercise of the Court's jurisdiction to order a Non-Party to pay costs are first, Symphony Group PLC –v- Hodgson, [1994] QB 179 and secondly, Dymock's Franchise Systems (NSW) Pty Ltd -v- Todd, and Others (Costs) [2004] 1 WLR 2807.

Symphony Group PLC –v- Hodgson, [1994] QB 179

The English Court of Appeal set out in Symphony Group PLC –v- Hodgson, a range of guidelines as to when a Non-Party Costs Order may be made, as follows:

1. "Where a person has some management of the action, e.g., a director of an insolvent company who causes the company improperly to prosecute or defend proceedings";
2. "Where a person has maintained or financed the action";
3. " ... the power of the court to order a solicitor to pay costs";
4. "Where the person has caused the action";
5. "Where the person is a party to a closely related action which has been heard at the same time but not consolidated"; and
6. "Group litigation where one or two actions are selected as test actions".

The English Court of Appeal emphasised that these categories of case were "neither rigid nor closed"[4] and that:

1. an order will "always be exceptional" and "the Judge should treat any application with ... considerable caution" – albeit this must be read in light of the Privy Council's guidance below that "exceptional" means no more than "outside the ordinary run of cases" which was applied as sound principle by the Grand Court in the Primeo Fund Costs decision of 1 August 2017[5];
2. it will be more exceptional to make a Non-Party costs Order against an entity that could have been made a party to the proceedings;
3. as a matter of good practice, any applicant for a Non-Party Costs Order should warn the Non-Party at the earliest opportunity of the possibility that he may seek to apply for costs against him, although that does not appear to be a rule that would preclude in any sense the Court from making such an Order [6]; and
4. the application should be normally determined by the Trial Judge.

Dymocks Franchise Systems (NSW) Pty Ltd -v- Todd, and Others (Costs) [2004] 1 WLR 2807

The Privy Council in Dymock's Franchise Systems (NSW) Pty Ltd -v- Todd, and Others (Costs), further considered when a Costs Order may be made against a Non-Party.

The Dymocks case concerned a dispute relating to a franchise of bookshops in New Zealand. The proceedings, which went to the Privy Council, ultimately resulted in a Costs Order being made against a John Todd and Alicia Todd and their associated companies who were parties to the proceedings. The Todds were unable to meet the Costs Order and were made bankrupt before the Order could be enforced. The Privy Council was then asked, after the conclusion of the proceedings, to make a Supplemental Order against, a Non-Party, Associated Industrial Finance Pty Ltd. (**"Associated"**).

The factual context was that (i) Associated was a private company beneficially owned by Mrs. Todd's family; (ii) Mrs. Todd was a director of Associated; (iii) Associated advanced funds to enable the litigation against Dymocks; (iv) there was substantial evidence before the Court as to Associated's "involvement in, and control over" the proceedings; and (v) after the Privy Council Advice, the Todds were made bankrupt.

This decision set out a number of important principles as follows:

1. "Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against";

3 Cigna Worldwide Insurance Company -v- ACE Limited, 26 April 2013, Grand Court/Cresswell J. at page 26.
4 As recently re-confirmed in Deutsche Bank AG –v- Sebastian Holdings Inc. [2016] EWCA Civ, 23.
5 See paragraph 48 of the Honourable Justice McMillan's 1 August 2017 decision.
6 See, for example, Weatherford Global Products Ltd. –v- Hydropath Holdings Ltd. [2014] EWHC 3243, Akenhead J

2. "Generally speaking the discretion will not be exercised against "pure funders", described in para 40 of Hamilton v Al Fayed (No 2) [2003] QB 1175, 1194 as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights"; and
3. **"Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for this own purposes. He himself is "the real party" to the litigation ..."** (emphasis added).

In addition, the Privy Council in Dymocks also confirmed that:

1. a Non-Party could not ordinarily be made liable for costs if those costs would in any event have been incurred without such Non-Party's involvement in the proceedings;
2. it is not necessary that the Non-Party be "the only real party" to the litigation provided that he is "a real party in ... very important and critical respects"; and
3. whilst any impropriety or the pursuit of speculative litigation may of itself support the making of an order against a Non-Party, its absence does not necessarily preclude the making of such an order.

The Privy Council concluded (at page 2817):

> "In the light of these authorities their Lordships would hold that, generally speaking, where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit, he should be liable for the costs if his claim or defence or appeal fails. As explained in the cases, however, that is not to say that orders will invariably be made in such cases, particularly, say, where the non-party is himself a director or liquidator who can realistically be regarded as acting rather in the interests of the company (and more especially its shareholders and creditors) than in his own interests",

and approved the approach adopted by the High Court of Australia in Knight -v- FP Special Assets Ltd (1992) 174 CLR 178, 192-193 where Mason CJ and Deane J said:

> "For our part, we consider it appropriate to recognise a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. The category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made".[7]

Recent Cayman Islands Case Law

The above principles have been considered in a number of Cayman decisions including at 1st instance in Cigna Worldwide Insurance Company -v- ACE Limited, Grand Court, 26 April 2013 which went to appeal in Martin Kenney, CC International Limited -v- ACE Limited, Cayman Islands Court of Appeal, 6 May 2015.

At 1st instance in Cigna Worldwide Insurance Company -v- ACE Limited, Cresswell J confirmed that the Cayman Court would look to the above-mentioned English and Commonwealth authorities to determine whether a Costs Order may be made against a Non-Party.

The Court concluded that where (i) the Non-Party "instigated, controlled and financed" the proceedings; (ii) the Non-Party "... in reality brought these proceedings"; and (iii) the actual plaintiff was a "nominal plaintiff",[8] all of those factors supporting the making of such an Order.

7 This is also cited in the Cayman Islands Court of Appeal decision in Kenney, CC International Limited -v- ACE Limited, 6 May 2015.

8 "Nominal Plaintiff" being defined in the Grand Court Rules relating to security for costs as follows: "A nominal plaintiff is a plaintiff (not being a plaintiff who is suing in a representative capacity) who is suing for the benefit of some other person or persons and there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so" (GCR Order 23, rule 1(1)(b)).

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The Cigna case went to appeal and in Martin Kenney, CC International Limited -v- ACE Limited, Cayman Islands Court of Appeal, 6 May 2015, the Court of Appeal again held that the principles set out above derived from the Dymocks decision were to be applied when considering whether a Non-party Costs Order should be made.[9]

In the Matter of the Primeo Fund (In Official Liquidation), 1 August 2017

That the guidance set out in, Aiden Shipping Co. Ltd. -v- Interbulk Ltd., Symphony Group PLC –v- Hodgson, and Dymock's Franchise Systems (NSW) Pty Ltd -v- Todd, and Others (Costs) is applicable in the Cayman Islands was expressly re-affirmed in the above-mentioned recent costs decision in the Primeo Fund Liquidation.

That decision concerned an application, by the Joint Official Liquidators of the Primeo Fund seeking a Non-Party costs Order against Bank of Bermuda (Cayman) Ltd. and HSBC Securities Services (Luxembourg) SA (together the **"HSBC Defendants"**).

The factual background was unsurprisingly involved but in short order concerned disclosure applications made by the JOL's at the very least on the basis of demands made by the HSBC Defendants, albeit their involvement or lack thereof was hotly disputed. The Disclosure applications made by the JOL's were unsuccessful. The JOL's sought orders that the HSBC Defendants, although not parties to the application, pay the costs incurred by Primeo, where the JOL's had been unsuccessful. The Grand Court concluded:

1. the Court has a wide discretion on the issue of Costs and the above-mentioned cases were "important relevant authority";
2. the Court's wide discretion was emphasised by the Court's findings that the Court has "freedom of action" and that "no formal limitation in relation to Non-Party costs has been identified";
3. the Court re-affirmed that "… in appropriate circumstances there is no impediment to awarding costs against a Non-Party in the Cayman Islands";
4. although the Court should recognise that such costs awards are "exceptional", "this means only that such costs are outside the run of ordinary cases and not that they should never or almost never be granted"
5. in assessing whether the circumstances warrant a Non-Party costs Order being made, the Court "must place serious emphasis on the matter of fairness";
6. where (i) the HSBC Defendants were found by the Court to have "caused and were exclusively responsible" for the proceedings; (ii) the only purpose of the application was to assist the HSBC Defendants in separate litigation where it appears from the Judgment (albeit not expressly stated) that the application was considered by the Court to be technically abusive in that it was an attempt to obtain discovery in what was found to be a procedurally incorrect manner; and (iii) where the underlying stakeholders in the Liquidation should not in "fairness" be responsible for the costs incurred by the JOL's, it was appropriate to make a Non-Party costs Order.

Interestingly, the Order was made despite the fact that there was no suggestion that the HSBC Defendants were funding the application, which is often a key gateway into obtaining a Non-Party costs Order.

To conclude, when considering the genesis of the relief and the decision in Symphony Group PLC –v- Hodgson, the wide variety of circumstances in which a Non-Party Costs Order may be made should not be forgotten despite, in practice, the circumstances often involving funding and control. Instead, the appropriate approach is to consider the Court's powers under Section 24 (3) of the Judicature law as conferring a discretion which is not confined by specific limitations.[10]

The Court's recent decision in the Primeo Fund Litigation may therefore be portrayed as an example of how wide the Court's jurisdiction to make Non-Party Costs Orders is.

Further, the underlying approach of the Grand Court is demonstrated by its own finding that it enjoyed "freedom of action" when making the Costs Order, albeit also recognising as persuasive and important authority the English cases referred to above.

This publication is for general guidance only and it is not intended to be a substitute for specific legal advice. Advice should be sought about specific circumstances. This review relates to Cayman Islands Law only as at 4 December 2017. No advice is given herein as to the laws of other jurisdictions and case law from other jurisdictions is referred to only for illustrative purposes. If you would like further information please contact Richard Annette or Farrah Sbaiti of Stuarts Walker Hersant Humphries

9 Paragraph 86 of the Court of Appeal Judgment.
10 See, by way of analogy, Petromec Inc. –v- Petroleo Brasiliero SA Petrobras [2006] EWCA Civ 1038.

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