IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 115 OF 2019 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND

IN THE MATTER OF EHI CAR SERVICES LIMITED

IN OPEN COURT

APPEARANCES:

Ms. Caroline Moran, Ms. Allegra Crawford and Mr. Adam Huckle on behalf of the Petitioner.

Mr. Robert Levy QC, Mr. Rupert Bell and Mr. Patrick McConvey on behalf of the Walkers Dissenters.

Mr. Jeremy Goldring QC, Mr. Marc Kish, Ms. Marie Skelly on behalf of the Ogier Dissenters.

Mr. Adrian Beltrami QC, Mr. Rocco Cecere and Ms. Farrah Sbaiti on behalf of the Collas Crill Dissenters.

Mr. Hamid Khanbhai and Mr. Morgan Brennan on behalf of the Campbells Dissenters.

BEFORE: THE HON. RAJ PARKER

HEARD: 20 January 2020

Draft Ruling Circulated: 22 May 2020

Ruling Delivered: 26 May 2020

Headnote

Summons for directions – s.238 of the Companies Law - costs of application - principles to be applied - cost to follow the event - costs forthwith - purpose of directions hearings GCR Order 62 - s.24 Judicature Law (2017 Revision)

Ruling on Costs

Introduction

1. By a summons dated 24 June 2019 the Petitioner (the company) applied for directions in these proceedings brought pursuant to s.238 of the Companies Law (as Revised). The summons was heard over a full day on 20 January 2020. There had been an earlier case management conference (CMC) on 25 October 2019. Following the hearing in January I directed that the parties could address the court on costs once the decision was delivered.

2. There are two issues which the court is asked to determine. The first is whether it should exercise its discretion to order that the company pays the Dissenters' (the respondents') costs of and occasioned by the summons and which resulted in a judgment dated 24 February 2020 (and the costs of the CMC on 25 October 2019, where the order was that the costs of that hearing be costs in the summons for directions). The second is that if the court determines that the respondents should have their costs, in whole or in part, whether those costs should be taxed forthwith.

Submissions

3. The respondents provided opening written submissions on 15 April 2020 and the company provided responsive written submissions on 6 May 2020. The respondents provided written reply submissions on 13 May 2020.

Company

4. The company does not deny that the court in the result preferred the directions proposed by the respondents over its own on the contested issues, but submitted that there is an important difference between failing to persuade the court to agree to proposed directions to trial and acting in such a way that costs should be awarded against it. The company submits that the usual costs order on summonses for directions is for costs to be in the cause, especially where, as here, a Practice Direction[1] provides for such a hearing in s.238 cases. The reason for that is that these hearings are important for the future course of the action so that directions

[1] PD No 1 of 2019.

are made to secure a just, expeditious and economical disposal for the benefit of all parties[2].

5. The company submits that to accept the respondents' application for their costs to be paid and to be paid forthwith is unjustified. The company submits that it would be the first time in a contested summons for directions in a s.238 case that the court has ordered a company to pay a respondent's costs, let alone that they should be paid forthwith (and not assessed as is usual at the end of proceedings)[3].

6. There are no exceptional circumstances to necessitate this in relation to the company's conduct. Therefore the usual order should be made, namely 'costs in the cause.'

7. The company submits that such an order is an expression of the costs 'follow the event' principle and is not a departure from it, as the overall winner at trial will ultimately recover the costs of the summons for directions.

8. It accepts that the court has a discretion to order that the company pay the respondents' costs, but that there is no justification for making such an order, which would be exceptional. In particular 'forthwith orders' are not appropriate on an interlocutory application such as a summons for directions and the general rule should apply: that the costs should not be taxed until the conclusion of the proceedings (i.e. at the end of the trial whether or not there is an appeal from that determination).

9. The company also accepts that the court does have the power to order immediate taxation, but that such an order should again only be made in exceptional circumstances[4]. The respondents have a high bar to demonstrate that the company's conduct merits the court's 'disapproval' and they do not meet it in the circumstances of the application the company made.

10. In terms of the application itself, the company rejects the complaint that it acted improperly in applying for directions that were contrary to the 'standard directions' that had been made in s.238 proceedings, or that in doing so it re-litigated hopeless and decided points with no prospect of success, as the respondents contend. The company goes on to give detailed reasons why it did not behave improperly with reference to previous cases.

11. It points to the decision in this case where I stated that previous s.238 directions have to some extent become fairly standard, and are the best starting point, but do

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[2] GCR Order 25 r.1.

[3] There is no evidence filed in support of this, but the court is prepared to accept that the usual order would be costs in the cause.

[4] In re *Sphinx* [2009] CILR 178 per Smellie CJ at §§ 9 and 10 and *SAAD* [2013] (2) CILR 344 per Smellie CJ at § 26.

not generally carry the weight of precedent and that the court must look at each case[5].

12. The company also gives detailed reasons as to why the orders it sought were not a radical departure from previous cases. With regard to management meetings, there had not been detailed consideration given to the question of jurisdiction in previous decisions and the court had expressed different views on the status of information obtained at and the conduct of management meetings. The company submits that I had considered it necessary to provide a written ruling and that in the result the decision provided some clarity as to the status of the transcripts of, and oral statements at, the management meetings and laid down guidance as to how such meetings are to be conducted. The company had sought similar protections as had been made in previous cases in relation to the number of management meetings and documentation in support of any proposed corrections to the transcript. There was nothing, the company submits, improper in that.

13. As to expert information requests, the company was seeking to limit the duplication of work and to regulate the information request process in a manner that was fair, appropriate and consistent with the overriding objective. It was not designed to limit access to information by the experts.

14. This was not a case where the company was seeking to limit discovery or where the company's directions in this regard should be considered hopeless from the outset as contended for by the respondents. Up until the hearing, the respondents were prepared to agree to many of the company's directions on information requests. In the result the court did not determine it necessary to include those safeguards and emphasised the working assumption that the experts would act reasonably and proportionately and that the parties would have liberty to apply where that was not the case. That did not mean the company's concerns were baseless or the proposed directions improper.

15. Similarly it was not improper for the company to seek information outside the non-exhaustive *Qunar* categories of information, even though it ultimately failed to persuade the court to so order.

16. The company also points to the fact that by the time of the directions hearing, as a result of a considerable amount of communication between the company and the respondents, the parties had agreed the majority of the directions and only six key issues remained outstanding. The court recognised that the matters in dispute (which related to information requests, management meetings, dissenter disclosure and dissenter collaboration) were best addressed in person in court in the Cayman Islands rather than on video link. Both at the CMC and the directions hearing the company's oral submissions were made by one partner from Maples and Calder. By contrast, three partners from three different law firms made oral submissions at the

[5] Directions Judgment §§ 17 and 18.

CMC and three Leading Counsel addressed the court at the directions hearing. The fair and usual order which should be made is that costs be in the cause.

Respondents

17. The respondents argue that costs should follow the event and that 'the event' was the making of the Directions Order which rejected each and every one of the company's arguments and there are no circumstances in this case which would justify a departure from the general rule that the winner should have their costs. The fact that a party may be compelled to issue a summons does not of itself immunise that party from a costs order, nor does it displace the presumption that the winners should have their costs.

18. This case involved an approach by the company that took the directions hearing well outside of what can be deemed to be a 'neutral' directions hearing in a s.238 case where the predominant practice may have been for there to be an order that 'costs be in the cause'[6] so that the loser at trial should pay the costs of the directions hearing. This is because the court rejected the two submissions underpinning the company's case: that the 'standard directions' operated in a duplicative and prejudicial way to companies; and that professional experts and attorneys may not conduct themselves in a reasonable and proportionate manner.

19. The argument was hopeless because it relied on a root and branch jurisdictional attack on the s.238 directions regime which ignored the twelve reasoned and detailed previous rulings by this court and indeed Practice Direction 1 of 2019. In particular the company's case sought to re-argue a number of points dealt with in the authoritative ruling in *JA Solar* (unreported 18 July 2019) by the Chief Justice. This important judgment reinforced the findings in previous cases and resolved residual ambiguities. This was not a case where some of the issues were decided in favour of one party and some in favour of the other. All 19 directions in dispute were decided in favour of the respondents.

20. The respondents contend that the company's case was a misguided attempt to rewrite the standard directions regime in s.238 cases, unsupported by evidence[7] and which wholly failed. The company's approach and conduct led to a significant increase in the complexity and costs of the hearing which is inconsistent with the overriding objective. In direct contrast to the overriding objective it sought to challenge the substantive law on tenuous and unsubstantiated grounds, frustrated the normal advancement of the proceedings and increased costs.

21. The respondents submitted that a costs order against the company would act as a powerful deterrent to companies from taking a similarly misguided approach to

[6] As per Kawaley J in *Nord Anglia* as approved by Parker J in *KongZhong*.

[7] Except in respect of dissenter discovery, in relation to which, the evidence adduced by the company was rejected.

what is meant to be a neutral directions hearing for the mutual benefit of the parties and the court.

Decision

22. The court's jurisdiction to make orders for costs is derived from the Judicature Law (2017 Revision). The court has a discretionary power to determine the extent to which costs are paid in civil proceedings - see section 24. The discretion has to be exercised in accordance with Order 62 of the GCR.

23. The parties are agreed that in practice and as a matter of law the court has a broad discretion in relation to costs, both as to which party should pay and as to taxation[8].

24. There is a general principle that costs should follow the event - see GCR O.62, rule 4(5) but that is subject to the court's discretion to make some other order.

25. As stated in the decision delivered on 24 February 2020:

> *"Section 238 litigation is hard fought, often for high stakes and involves large teams of lawyers as well as highly experienced experts and their teams. Case management issues which might be thought capable of agreement are sometimes not agreed and the court is often asked to resolve such issues. These cases are without doubt very expensive for the parties to resolve.[9]"*

26. This comment was not intended to support an excuse for s.238 litigants to re-litigate decided or hopeless issues with impunity without fear of costs consequences, which would be inconsistent with the overriding objective and unconscionable.

27. It was intended to convey that such cases are by their nature particularly prone to complex interlocutory disputes and contested case management and directions hearings.

28. Kawaley J said that summonses for directions in s.238 cases are *"conceptually at least"* to be *"an essentially neutral and necessary case management mechanism aimed at advancing the proceeding to trial for the mutual benefit of all parties[10]."* In practice it is not likely that these hearings will be truly 'neutral' in the sense that the parties will always have certain outcomes that they wish to achieve to advance and protect their cases. However, in furthering the overriding objective these hearings afford an opportunity for the parties to take stock and prepare the way for a fair trial and are, in that sense, not meant to be unnecessarily contentious. In this case the

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[8] S.238 (14) of the Companies Law (2020 Revision) and s.24 Judicature Law (2017 Revision) and GCR O.62.
[9] At §9.
[10] Unreported 24 October 2018 at § 32 and Parker J *KongZhong* (unreported 18 December 2018) at §30.

parties did manage to iron out all but six issues between them, albeit these six issues were fully argued out.

29. I do not consider that the 'winner and loser' analysis is of straightforward application to contested summonses for directions in s.238 cases, or indeed in this case. This was not a freestanding application where the parties would have been aware that the costs would be dealt with on a distinct basis. Inevitably there will be partial wins and partial losses and complete wins and losses, judged objectively. I accept that the court should not view success as a technical term, but a result in real life as a matter of common sense[11].

30. It is true that in this case the company sought to depart from previous directions made and employed novel legal arguments which were unsuccessful, as they had been in other recent cases. However, whilst providing general guidance, these 'standard directions' are capable of being modified on a case by case basis. There is a value to the testing of the thinking behind the procedural issues in the developing s.238 jurisprudence to ensure that the disposition of s.238 cases is and remains fair. This is all part of the mix.

31. There should not be a disincentive to test in a specific case whether the system is working. I would say however that the court should ordinarily be provided with evidence (not just submission) to justify material changes.

32. There are also many practical matters which are canvassed at these hearings which are of assistance to the parties and the court to have aired and debated. That is why I ordered that there should be an in-person hearing (as that was then possible) which in the event was much more productive over the course of a day in person rather than dealing with the competing positions over a video link.

33. Although in this case the respondents did succeed on all of the main points of contention and did indeed obtain the directions they were seeking in relation to all 19 points (in the Appendix to the respondents' submissions), it cannot be said that the hearing was not of benefit to all parties (and the court) in the future conduct of the case. Moreover, although the company did put forward arguments which the court rejected to support its case that the regime was not working fairly for companies and that the experts and attorneys needed to be 'reined in', as well as novel and ambitious arguments as to jurisdiction itself, these were not deployed in a way which in my view was unreasonable or improper. Nor were the arguments, even though they sought to persuade me to depart from directions made in previous decisions, hopeless or devoid of some merit.

34. In all the circumstances I do not consider that it would be just to order the company to pay the respondents' costs (nor, had I so decided, that there were exceptional circumstances such that they should be taxed forthwith). The costs of the summons

[11] *BCCI v Ali (No 4)* [1999] NLJ 1734.

for directions and at the CMC can be determined at the conclusion of the trial and the overall successful party can recover those costs. This in my view is consistent with the 'costs follow the event' principle.

35. A fair and reasonable outcome in all the circumstances would be for costs to be in the cause.

THE HON. RAJ PARKER
JUDGE OF THE GRAND COURT

GRAND COURT CIV-03 CAYMAN ISLANDS