IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 74 of 2020 (MRHJ)

BETWEEN:

(1) BDO CAYMAN LTD

(2) BDO TRINITY LTD

PLAINTIFFS

-AND-

ARDENT HARMONY FUND INC. (IN OFFICIAL LIQUIDATION)

DEFENDANT

Appearances: Mr. Graham Chapman QC and with him, Mr. Shaun Tracey and Mr. Andrew Pullinger of Campbells for the Plaintiffs
Ms Claire Stanley QC and with her, Mr. Sam Keogh and Mr. William Jones of Ogier for the Defendant

The Court considered the written submissions on costs filed by the parties on 3 December 2020

Draft Circulated: 22 April 2021

Judgment Delivered: 27 April 2021

Headnote

Civil procedure - costs- principles - GCR Order 62, rule 4 (11) - indemnity costs the exception rather than the norm- not the merits but the party's conduct of the case deserving some mark of disapproval

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COSTS JUDGMENT

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1. This is the decision on costs following the judgment of this Court delivered on 19 November 2020 (the "Judgment") dismissing an application for leave under section 97(1) of the **Companies Act** (2020 Revision) to commence proceedings against a company in liquidation, made by the Plaintiffs BDO Cayman Ltd. ("BDO Cayman") and BDO Trinity Ltd ("BDO Trinity" (jointly "BDO")) against, the Defendant, Ardent Harmony Fund Inc. (in Official Liquidation)("Ardent"). The factual background to BDO's application is set out in the Judgment. I set out below a brief summary of the background to and the chronology of these proceedings and adopt those definitions used in the Judgment.

2. On 18 November 2019, with leave of the Grand Court, Ardent commenced the New York Proceedings alleging gross negligence and wilful default against BDO Trinity in respect of the work it did in relation to Ardent's statutory audits pursuant to Engagement Letters made between BDO Cayman and Ardent. The New York Proceedings were formally served on BDO Trinity on 30 December 2019.

3. On 24 April 2020, BDO filed an Originating Summons in which they sought section 97 leave to commence proceedings against Ardent and an anti-suit injunction to restrain Ardent from continuing the New York proceedings on the grounds that the proceedings had been commenced in breach of (a) the exclusive jurisdiction and sole recourse clauses in the Engagement Letters which provided that, in respect of any claim, the Cayman courts had jurisdiction and that Ardent had recourse against BDO Cayman only and of (b) a Tolling Agreement under which the limitation period for Ardent's intended claim against BDO Trinity was tolled until 14 days after the final resolution of any appeal in the proceedings brought by BDO against Ardent's sister fund, Argyle.

4. Argyle had instituted proceedings in New York against BDO Trinity and other BDO entities and affiliates in which it made mirror allegations of negligence so gross as to be "*wilful or intentional*" and "*fraudulent conscious concealment of red flags signifying the indicia of fraud*" against the defendants as those made by Ardent in the New York Proceedings. BDO sought to restrain those proceedings as being in breach of the Engagement Letters which were in the same terms as those under which Ardent contracted with BDO Cayman. The question, of whether the allegations made by Argyle in those proceedings fell within the carve-out to the sole recourse clause in respect of claims "*founded on an allegation of fraud or wilful misconduct or other liability that cannot be excluded under applicable law*" and therefore outwith the exclusive jurisdiction and arbitration clauses, was answered by the Court of Appeal in the affirmative in a judgment handed down on 8 October 2018.

5. BDO's appeal to the Privy Council was not pursued and was formally dismissed on 25 November 2019. The Tolling Agreement therefore came to an end 14 days later, on 9 December 2019. The New York proceedings were therefore instituted in breach of the agreement, as Ardent accepted.

6. The Court rejected BDO's proposition that section 97 leave was not necessary (but should be granted) because the proceedings were "*effectively defensive*" in nature and refused leave on the grounds that:

   (i) BDO did not have an arguable case that the New York proceedings were commenced by Ardent in breach of contract in the circumstances where the Court of Appeal had found that the mirror claims in *Argyle's* case were founded on allegations of fraud or wilful misconduct within the wording of the carve-out; and

   (ii) BDO's application to restrain the proceedings for breach of the Tolling Agreement had not met the threshold for the grant of leave as BDO had suffered no loss.

The Jurisdiction of the Court to award Costs

7. Section 24 (1) of the **Judicature Law** (2017 Revision) provides:

> *"Subject to the provisions of this or any other Law and to rules of court, the costs of and incidental to all civil proceedings in*
> ...
> *(b) the Grand Court, shall be in the discretion of the relevant court."*

8. GCR O.62, r.4 (2) provides:

> *"The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court."*

9. GCR O.62, r.4 (5) provides:

> *"If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."*

10. Pursuant to GCR O.62, r. 4(11), the Court may make an 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".*

11. The principles to be applied by the Court are well established. In *AHAB v Saad*[1] the Chief Justice noted that the discretion to grant indemnity costs is to be exercised only in the most exceptional cases[2]. He went on to cite Carnwath L.J. in *Simms v Law Society*[3] in which the English Court of Appeal summarised the principles in relation to indemnity costs as follows:

> *"The courts have declined to lay down any general guidance on the principles which should lead to an award of costs on the indemnity basis. However, the cases noted in the White Book (Vol. 1 p. 1085ff) show that costs will normally be awarded on the standard basis-*

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[1] 2012 (2) CILR 1
[2] At paragraph 9
[3] [2005] EWCA Civ 849

". . . unless there is some element of a party's conduct of the case which deserves some mark of disapproval. It is not just to penalise a party for running litigation which it has lost. Advancing a case which is unlikely to succeed or which fails in fact is not a sufficient reason for the award of costs on the indemnity basis . . ." (p. 1087–8)

"Similarly, in Kiam v. MGN (No. 2) [2002] 2 All E.R. 242, 246 Simon Brown, L.J., while agreeing that-

"...conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs . . ."

"added-

"to my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context does not mean merely wrong or misguided in hindsight . . ."

"Thus, when considering an application for the award of costs on the indemnity basis, the court is concerned principally with the losing party's conduct of the case, rather than the substantive merits of his position."

12. The Chief Justice went on to conclude at paragraph 15 in *AHAB v Saad* that,

"the exceptionalism of the indemnity costs principle is explained by the purpose for which an award of costs is made. What the case law clearly explains is that awards of indemnity costs will be the exception rather than the norm."

13. As noted by Parker J in *In The Matter of Ritchie Capital Management LLC et.al v. Lancelot Investors Fund, Ltd et al* [4], the assessment of what is improper or unreasonable is not always divorced from the merits.

14. Citing the judgment of Henderson J in *Bennett v AG*[5], the learned Judge noted that indemnity costs will be awarded where the Court has determined that a case has been pursued which is manifestly hopeless and also where, per Field JA in *Wood v James,*[6] it must have been appreciated that the case was very weak and highly speculative. As Parker J observed at para 7:

"The court in those cases was looking at a party conducting proceedings in the face of the apparent hopelessness of the case, which was regarded as unreasonable or

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[4] FSD 88 of 2019 (Unreported, 4 March 2021, Parker J)
[5] 2010 (1) CILR 478
[6] CICA (Unreported, Appeal No 1 of 2020, 30 July 2020 at para 80)

improper in the circumstances. The focus was however on the party's conduct, not the intrinsic merits of the case."

Ardent's position

15. Ms Stanley QC submits that the costs of the proceedings should be taxed on the indemnity basis and that, in respect of the costs of Ardent's foreign lawyers, GCR O.62 r. 18(3)-(7) and Practice Direction 01/2001, Section 6.5 should not apply.

16. The application for indemnity costs is put on two bases: the first, that BDO's conduct of the leave application was egregious, the second is that its application for leave to commence proceedings for an anti-suit injunction and damages was wholly without merit in light of the decision of the Court of Appeal in *Argyle* and in the circumstances that BDO had not suffered any loss as a result of Ardent's breach of the Tolling Agreement.

17. With respect to the first limb, Ms Stanley submits that BDO's repeated threats to seek indemnity costs if Ardent failed to agree a Consent Order that BDO should have section 97 leave and again when Ardent proposed the question of leave be determined as a preliminary issue, were entirely tactical and improper and part of the attritional approach adopted by BDO throughout, which was to use its superior financial position to make the JOLs run out of money and fear the risk of indemnity costs.

18. Ms. Stanley makes the point that even though BDO knew section 97 leave was required - and that the application should be made to the Court supervising Ardent's liquidation - they proceeded to file and serve an Originating Summons seeking adverse relief against Ardent without first obtaining the Court's leave, in clear breach of section 97.

19. She says further that, having sought Ardent's agreement that BDO have leave to issue the proceedings, BDO contended in later correspondence and in argument that section 97 leave was not required for effectively defensive proceedings without any explanation as to how these two conflicting positions could be reconciled.

20. Ms Stanley also deplored the allegations made by BDO in correspondence and in their written submissions that the JOLs and their legal advisers were acting improperly in opposing the grant of leave. These allegations, she said, took this case out of the norm. She drew the Court's attention to

    (i) BDO's assertion that Ardent was seeking to *"hide behind section 97(1)"* made at paragraph 6 of their skeleton which Ms Stanley submits was a tendentious and pejorative accusation which sought to imply that the JOLs were behaving improperly;

(ii) BDO's assertion that Ardent's position *"is untenable, appears to be tactically motivated and would lead to a result that would be manifestly unfair"* which again implied that the JOLs were behaving improperly; and

(iii) the characterisation of Ardent's wish to have the section 97 leave determined as a preliminary issue as *"tactical," "seeking to maintain the New York Proceedings for as long as possible*" and deliberately *"driving up the Plaintiffs' defence costs in the hope of achieving a commercial settlement."* [7]

21. This last allegation, Ms Stanley says, was a remarkable assertion as she contends that it was BDO which had adopted an attritional/scorched earth approach to the dispute and had sought to *"drive up costs"* in the hope that the JOLs would run out of money and be forced to do a deal on terms which involved BDO paying nothing or next to nothing to settle Ardent's multi-million dollar claims.

22. Ms Stanley submits that BDO, in its assertions that Ardent had adopted an *"irreconcilable and unreasonable (indeed, untenable) position,"* employed hyperbolic language and made accusations which were entirely unjustified, particularly where the Court had found that Ardent's position was correct.

23. Ms Stanley draws the Court's attention to what she says was a baseless allegation of misconduct made against the JOLs and those advising them, that they did not fulfill their duty of candour when seeking sanction from the Grand Court to commence the New York Proceedings. She also deprecated what she characterised as *ad hominem* attacks made against Counsel for advising the JOLs that the grant of section 97 leave not be agreed, contrary to their advice in different circumstances to another insolvent company which had done so.

24. Ms Stanley submits that unsubstantiated allegations of professional misconduct against officers of the Court have no place in litigation, and the Court should express, in no uncertain terms, its disapproval of such tactics by awarding indemnity costs against BDO.

25. Ms Stanley also contends that BDO's application was brought with the collateral purpose or ulterior motive of seeking to stifle Ardent's claims by causing Ardent's estate to incur costs so it would no longer be able to sustain the actions it had brought against BDO.

26. This, she submits, is evidenced by BDO's repeated threats that it would seek indemnity costs from Ardent, that BDO sought to drag Ardent into extended correspondence regarding minor issues which it promptly abandoned, solely for the purpose of driving up costs, and maintaining arguments it knew to be hopeless up to and throughout the hearing, so as to force Ardent to continue to respond to them. She also relies on the fact that BDO resisted Ardent's application for

[7] Paras 47 and 48

section 97 leave to be determined as a preliminary issue in circumstances where BDO was aware that Ardent's reason for so doing was to avoid incurring costs of obtaining expert evidence regarding New York law to meet the substantive application for an anti-suit injunction if leave was not granted.

27. On the merits, she submits that indemnity costs were appropriate as the proceedings were plainly hopeless in the circumstances where BDO asserted claims in respect of breaches of the Engagement Letters and Tolling Agreement, and sought damages in respect thereof, despite the fact that their contention in respect of the sole recourse and exclusive jurisdiction clauses in the Engagement Letters had been rejected by the Court of Appeal in the Argyle proceedings and they had suffered no loss as a result of the breach of the Tolling Agreement.

BDO's Position

28. Mr. Chapman QC submits that this is a normal case where the Plaintiffs have reasonably pursued their case and that case has failed insofar as leave was not granted for BDO to continue the proceedings. BDO, as it was entitled to do, sought to enjoin Ardent from continuing proceedings it instituted in New York which BDO considered had been brought against BDO Trinity in breach of contract which, with respect to the Tolling Agreement at least, Ardent accepts. He makes the point that there was no determination of the substantive merits of BDO's claim to be entitled to restrain the New York proceedings for breach of the Engagement Letters. He maintains, as he has throughout the proceedings, that the claims were effectively defensive in nature.

29. Mr. Chapman submits further that nothing in BDO's claims or the pursuit of them takes this case out of the norm and into the exceptional categories set out in the case law where an award of indemnity costs might be justified.

30. With respect the judgment of the Court of Appeal in the Argyle Proceedings, he says that the decision did not provide a complete answer to BDO's claims, so that it could not be said that BDO's claims and their application for leave was doomed to fail, to the point of being pursued unreasonably.

31. In developing that proposition, he submits that:

    (i) The existence alone of an adverse decision in the Argyle Proceedings did not move this application into the realms of unreasonableness or impropriety, particularly where the Plaintiffs genuinely contend that the expert evidence of Mr Devorkin set this case apart from the decision in *Argyle*. Although the Court, in refusing section 97 leave, was unwilling to hear and consider the independent expert evidence of Mr Devorkin, BDO had reasonably considered that the facts of this case, supported by independent expert opinion, properly justified their decision to commence these proceedings and supported

the grant of leave under section 97. Being "*merely wrong or misguided in hindsight*" does not meet the threshold for indemnity costs.

(ii) In the Argyle Proceedings, the Grand Court agreed with BDO's position regarding breaches of the Engagement Letters and granted the injunctive relief sought by BDO Cayman.

(iii) Certain findings were overturned on appeal, which were then the subject of a further appeal by BDO Cayman to the Privy Council. Those proceedings were discontinued by consent, as part of a commercial settlement, but it is at least arguable that:

a. the Privy Council could have allowed the appeal and reversed the Court of Appeal's decision in *Argyle*; and

b. this Court could have distinguished *Argyle* on the footing of Mr Devorkin's independent expert evidence and/or revisited the issue as to what the appropriate threshold is for pleading a claim so as to fall within the carve out in the Sole Recourse Clause, which was not or at least arguably not determined by the Court of Appeal in *Argyle*; and

(iv) Ardent's admitted breach of the Tolling Agreement provided BDO with an additional basis upon which to seek injunctive relief. The *Argyle* judgment had no bearing on the determination of issues relating to the Tolling Agreement, and it was both reasonable and proper for the Plaintiffs to seek to enforce their contractual rights under that contract by way of the Originating Summons.

32. Mr. Chapman urges the Court to find that indemnity costs are unjustified in the circumstances and that the appropriate order is that BDO pays Ardent's costs on the standard basis.

33. Mr. Chapman submits, however, that Ardent's costs of and occasioned by paragraphs 43-88 of the First Affidavit of Casey Laffey, Ardent's New York attorney, and the Second Affidavit of Mr. Devorkin, should be disallowed.

34. He suggests that Mr. Laffey's evidence was either inadmissible opinion evidence, or evidence that would be given little weight by the Court because of his lack of independence, and for that reason should not have been adduced. As the evidence was adduced, BDO was obliged to respond by filing Mr. Devorkin's Second Affidavit in reply. He contends that the costs of the impugned paragraphs of Mr. Laffey's affidavit and Mr. Devorkin's reply could have been avoided had Ardent agreed a timetable for filing its own expert evidence, as it was invited to do by BDO. In the circumstances Ardent should not be allowed to recover those costs.

35. I disagree. Given that BDO filed expert evidence relating to the adequacy or otherwise of Ardent's pleadings in the New York proceedings, without the Court's leave, and put Ardent to the expense of adducing evidence in response, Ardent is entitled to recover its costs.

Decision

36. The only question for resolution is whether the costs should be awarded on the standard or the indemnity basis.

37. In my judgment, this is a clear case for costs to be assessed on the indemnity basis. Mr. Chapman's statement, that *"**leave to continue** the proceedings was refused,"* really sums up why. ***Leave to continue*** is only required where proceedings are already on foot when the winding up order is made. These proceedings were not. Rather, they were instituted by BDO in clear breach of the statutory regime designed to protect the liquidation estate for the benefit of creditors.

38. In explaining BDO's decision to file first and apply later, Mr. Chapman stated that it was standard practice, where there are no viable grounds for opposing section 97(1) leave, for the question of leave to be determined in a *"rolled up"* hearing of the application for leave and the application for substantive relief.

39. That approach might be appropriate where the JOLs do not oppose the grant of leave but, in the ordinary case, such an approach is contrary to the rationale for the requirement for leave which is that a company in liquidation is not to be harassed and have its assets wasted by unnecessary litigation. The leave of the Court is the safeguard which ensures that the prospective claim is an arguable one.

40. Ardent properly resisted BDO's proposal which would have required Ardent to incur unnecessary costs to prepare and file expert evidence in response to the Report of BDO's expert in the event, as it transpired, section 97 leave was not granted. Ardent sensibly invited BDO to agree that the question of section 97 leave be decided as a preliminary issue. In response, BDO persisted in seeking a timetable for the filing of evidence in response to BDO's expert evidence and threatened to seek indemnity costs if Ardent applied for directions in terms.

41. Again, BDO's evidence, to which it demanded a response, was served without leave in breach of the Rules of Court. This was also improper and indicative of the cavalier approach to this litigation taken by BDO.

42. That approach also found expression in BDO's about-face when, having invited Ardent to agree section 97 leave, they later contended that such leave was not required on the ground that their application was essentially *"defensive"* in nature, this despite the fact that they were seeking an award of damages against a company in liquidation.

43. BDO's position was manifestly insincere and lends some weight to Ms Stanley's complaint that they were seeking to run up Ardent's costs so it would no longer be able to sustain the actions it had brought against BDO Trinity in New York.

44. Whether that was their intent or not, BDO's conduct was plainly outside the norm as being *"outside the ordinary and reasonable conduct of proceedings"*[8] against a company in liquidation.

45. Although the Courts are concerned with the conduct of the litigation and not its merits, the authorities establish that the pursuit of a hopeless claim is conduct that may be met with an award of indemnity costs.

46. This is not a case where the hopelessness of the claim could only be discovered in hindsight. In the Argyle proceedings, on the conclusion of which Ardent's New York proceedings pended, the Court of Appeal decided that, whatever pleading points might be taken, it was *"manifest that these claims [were] founded on an allegation of fraud or wilful misconduct within the wording of the carve-out."*

47. It should have been clear to BDO Cayman, in the light of that decision, that it could not be argued that BDO's New York proceedings were in breach of the Engagement Letters.

48. The decision did not hinge on the Court's observation that the evidence in the application was that Argyle's claims complied with the pleading requirements as a matter of New York law and there was *"no admissible evidence to the contrary".* BDO's application for leave to seek an anti-suit injunction against Ardent, on the basis they now had admissible evidence to show that the pleadings were defective, was hopeless.

49. With respect to BDO's claim that the New York proceedings should be restrained because they were commenced by Ardent in breach of the Tolling Agreement, BDO ought to have recognised that it was a forgone conclusion that they would not be granted leave to pursue an anti-suit injunction in circumstances where no loss was occasioned by the breach. It was, in my judgment, plainly unreasonable to pursue the application.

50. A further consideration in favour of the making of an award of costs on the indemnity basis is that the costs of BDO's inherently weak application for leave will otherwise be borne by Ardent's creditors. This further basis for an award of indemnity costs was accepted by the Chief justice in *Re Ardent Harmony Fund Inc (In Official Liquidation)*.[9]

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[8]Williams J in *Ritter v Butterfield Bank* 2018 (2) CILR 638 at para 51, citing Waller LJ in *Esure Servs. Ltd.* v. *Quarcoo* [2009] EWCA Civ 595

[9] FSD 54 of 2016 (Unreported, 30 May 2016, Smellie CJ).

51. I therefore order that the costs of the Summons for Directions, which Ardent was required to take out, and the costs of and occasioned by the application be paid by BDO to Ardent on an indemnity basis.

52. Ardent seeks to recover the costs of its foreign lawyer of, and occasioned by, this application. These are the costs of the work done by its Leading Counsel prior to her limited admission to practice in the Cayman Islands. Ms. Stanley submits that in the circumstances where BDO instructed Leading Counsel from London, it was reasonable for Ardent to have engaged Leading Counsel based overseas as well: see Henderson J, *CVC/Opportunity Equity Partners v. Almeida*[10].

53. GCR O.62, r.18(1) provides that:

> *"Work done by foreign lawyers may be recovered on taxation under these rules on the standard basis provided that . . .*
>
> *(b) the work was done after he was admitted."*

54. Ms Stanley submits, and I accept, that while such costs would not be recoverable under taxation on the standard basis pursuant to GCR O.62 r. 18(1)(b) they are recoverable under indemnity taxation. The authority for this proposition is *Sagicor General Insurance (Cayman) Limited and another v. Crawford Adjusters (Cayman) Limited And Six Others* [2008] CILR 482, in which Henderson J. held that

> *"5. By the opening words of r.18 (1), it is made applicable only to a taxation of costs on the standard basis. This language is not accidental. Clearly, the intent was to exclude such considerations from any award of indemnity costs. Accordingly, that rule will have no application to any taxation of my costs award on the indemnity basis. Although some of the considerations mentioned in the rule (such as duplication of work) are still germane, O.62, r.18 (1) (b) is not applicable to the present case."*

55. I, therefore, order that the costs incurred by Leading Counsel for Ardent before her admission to the Bar be allowed on taxation.

56. Ms Stanley goes further and makes an application for GCR O.62, r. 18(3)-(7) and section 6.5 of Practice Direction 01/2001 to be disapplied. The application is made in response to the observation by Kawaley J in *General Shopping E Outlets Do Brasil S.A.* and *General Shopping Investments Limited* [11] that,

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[10] 2012 (2) CILR Note 2

[11] FSD 58 and 59 of 2019 considered together (Unreported, 25 August 2020, Kawaley J).

"Read in light of the restrictive terms of the Practice Direction, Sagicor General Insurance (Cayman) Limited and another-v- Crawford Adjusters (Cayman) Limited and others [2008 CILR 482] supports the following principle. If the receiving party wishes to displace the usual rule of practice that foreign lawyers' fees are only recoverable where the lawyer is giving an opinion as to foreign law, not to mention the restrictive policies in GRC Order 62, rule 18 (3)-(7) aimed at avoiding duplication of effort, an application for a dispensation from the usual approach should ordinarily be sought before the costs order is actually made."

57. Rule 18 provides as follows:

> *"(3) Whenever a claim is made for work done by foreign lawyers, the taxing officer will investigate whether it has resulted in duplication or increase in the cost of the proceedings and any such increase shall be disallowed.*
> *(4) Work done by local attorneys for the purpose of instructing foreign lawyers and vice versa shall be disallowed.*
> *(5) The taxing officer shall disallow any item which appears to have been incurred, or the costs of which appears to have been increased, because the successful party has engaged both local attorneys and foreign attorneys.*
> *(6) Time spent and disbursements incurred in respect of written and oral communication between foreign lawyers and local attorneys will be disallowed.*
> *(7) The overriding principle is that a paying party should not be required to pay more because the successful party has engaged a foreign lawyer than he would have been required to pay if the successful party had employed only local attorneys."*

58. The provisions are described by Kawaley J as *"restrictive policies…aimed at avoiding duplication of effort."*

59. In *Re Wyser-Pratte EuroValue Fund,*[12] Jones J said this about the purpose of O.62, r 18:

> *"GCR, O.62, r.18 applies to inter partes orders. Its purpose and effect is to protect the unsuccessful party from the financial consequences of the successful party's decision to engage both local lawyers and foreign lawyers. The overriding objective, expressed in GCR, O.62, r.4(2), is that the successful party should recover from the opposing party the reasonable costs incurred in conducting the litigation in an "economic, expeditious and proper manner." The opposing litigant's expectation of recovery and risk of payment are complementary. The successful party's expectation of recovery is limited to the reasonable amount necessary to conduct his case economically, expeditiously*

[12] 2010 (2) CILR 233

and properly. Engaging foreign lawyers is not improper and will not necessarily cause delay, but it is inherently uneconomic. Engaging foreign lawyers, who are not admitted as attorneys in the Cayman Islands, inevitably results in some duplication of work and some extra cost. Rule 18 is intended to protect a party from the financial consequences of his opponent's decision to conduct his case in an extravagant manner by engaging foreign lawyers in addition to local lawyers. Rule 18 is also intended to deter litigants from conducting their case through unqualified persons who are not subject to the disciplinary regime applicable to Cayman attorneys, including those who are temporarily admitted. ***The limitation upon recovering the cost of engaging foreign lawyers is intended to apply to inter partes orders which are always liable to be taxed on the standard basis*** *(absent misconduct on the part of the paying party)."* [emphasis added]

60. Time spent instructing leading counsel is properly billable to the client and would be recoverable but for the limit on recovery in sub-rule (4). I consider that the sub-rule should be construed as disallowing those costs *if costs are awarded on the standard basis* and that it does not apply where the costs are awarded on an indemnity basis. This would be consonant, in my judgment, with the decision in *Sagicor*: If work done by a foreign lawyer before he or she is admitted is recoverable where costs are on the indemnity basis, then the costs incurred in instructing the foreign lawyer should also be recoverable.

61. Such a construction of the Rule would also be consistent with the observation made by Jones J in *Wyser-Pratte* that Rule 18 is intended to limit recovery of costs for foreign lawyers where taxation is on the standard basis because, as a matter of policy, the paying party should not bear the cost consequences of his opponent's decision to engage a foreign lawyer. Such considerations do not arise where, as here, the successful party has instructed foreign counsel in response to the paying party's decision to do so and the paying party's conduct merits an award of costs on the full, attorney-and-client, indemnity basis.

62. For the same reasons, I hold that the costs covered by sub-rule (6) are also recoverable.

63. Sub-rules (3) and (5) are aimed at avoiding duplication. The fact that costs have been awarded on the indemnity basis does not give rise to a right to recover costs which the payee has incurred unreasonably. Duplicated costs, as a matter of principle, are irrecoverable both on the standard and the indemnity basis as not being reasonably incurred. For that reason sub-rules (3) and (5) *"are still germane"* as Henderson J suggested in the *Sagicor* case.

64. Of course the question of whether costs are duplicated and therefore unreasonably incurred will be a matter for the paying party to prove, as set out in GCR Order 62, rule 13(3) which provides:

> *"(3) On a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred*

and any doubts which the taxing officer may have as to whether they were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party; and in these rules the term 'the indemnity basis' in relation to the taxation of costs shall be construed accordingly."

65. Practice Direction No 1/2001 which Ardent's application is also concerned with provides at section 1.5 that the Guidelines apply to taxations on both the standard basis and the indemnity basis. The Guidelines are intended, as set out in section 1.1, to be *"a comprehensive code relating to the procedure in respect of taxation … and the nature and amount of fees, charges, disbursements …which may be allowed."*

66. Section 6.5 provides:

> *"6.5 Admission fees and work permit fees paid in respect of foreign lawyers are not recoverable on taxation on the basis that such expenses are part of the overhead reflected in the foreign lawyer's hourly rates. "*

67. As the section makes clear, these fees are not allowed on taxation, even though incurred for the purpose of appearing in the Cayman Islands, because they are the costs of practicing law and not, properly speaking, litigation costs.

68. I decline Ms Stanley's invitation to disapply section 6.5. The work permit fees and admission fees paid in respect of Ardent's Leading Counsel will not be allowed on taxation.

DATED 27th APRIL, 2021

RAMSAY-HALE J