



In The Supreme Court of Bermuda

COMMERCIAL COURT

2015: No. 346

IN THE MATTER OF STURGEON CENTRAL ASIA BALANCED FUND LTD

AND IN THE MATTER OF THE COMPANIES ACT 1981

BETWEEN:

CAPITAL PARTNERS SECURITIES CO LTD

Petitioner

-v-

STURGEON CENTRAL ASIA BALANCED FUND LTD

Respondent

EX TEMPORE RULING ON COSTS

(in Court)

Costs of withdrawn petition seeking to wind-up company on just and equitable grounds-usual rule-relevance of subsequent success in separate originating summons proceedings on rectification of register issue raised in petition proceedings

Date of hearing: October 9, 2017

Ms Katie Tornari and Mr Jonathan White, Marshall Diel & Myers Limited, for the Petitioner
Mr Steven White, Cox Hallett Wilkinson Limited, for the Respondent

Introductory

1. In this matter the Respondent to the Petition which was withdrawn by leave of the Court on 23rd February 2016 seeks the costs of the withdrawn Petition. The Order that I made on that date with respect to costs was as follows:

“2. Costs shall be reserved on the condition that CPS will secure the costs of the Petition in the sum of \$50,000 to the satisfaction of the Respondent Company within seven (7) days of the date of this Order.”

The circumstances in which the Petition was withdrawn

2. The Respondent relies on, at the end of the day, one simple set of facts. This Petition was presented on 17th August 2015 at a date when the Respondent contended that no standing to petition to wind-up the Fund existed because the Petitioner was not a registered shareholder. On 14th September, 2014, the Respondent’s lawyers responded to a conflict argument and advised the Petitioner that it had no standing to Petition. And ultimately the Petition was withdrawn in circumstances where the Petitioner still lacked standing.

Governing legal principles on costs of withdrawn proceeding

3. The legal principles relied on by Mr White can be summarised quite shortly. First of all, he referred the Court to the relevant rule, Order 23 rule 1 the Rules¹, which gives the Court the discretion to make such order as to costs on withdrawal with leave as the Court deems just. He then referred the Court to two authorities.
4. Firstly, *Butterfield Trust Ltd.-v- Rütli Stiftung and Salle Modulable* [2012] Bda LR 71, where Evans JA said this:

“9. The appeal raises the question for this Court as to what was the correct approach for the Learned Judge to adopt. Broadly, the Learned Judge had a discretion as to what costs order to make in a situation such as this. There is some support for the view that in a case of discontinuance, with or without leave to do so, the normal order would be to require the Plaintiff, who is discontinuing, to pay the Defendants' costs of the proceedings

¹ Order 21 rule 3 provides as follows:

“Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.”

unless there is some good reason why they should not do so. I would prefer to put it more broadly and ask, what is the appropriate order to make in all circumstances of the case, bearing in mind that the Plaintiff started the proceedings and caused the Defendant to incur the costs of defending them?...”

5. The next authority referred to was an older English Court of Appeal authority, *RTZ Pension Property Trust Ltd-v- ARC Property Developments Ltd and another* [1999] 1 All ER 532. Reference was made to the headnote which reads in relevant part as follows:

“Where a plaintiff discontinued an action with leave under Order 21 r 3 in circumstances tantamount to an acknowledgment of defeat, although the court had a wide discretion as to costs, the normal rule, namely that the defendant was entitled to an order for his costs of the action, applied, unless good reason could be shown to the contrary. For the purpose of justifying an order that the defendant pay the plaintiff’s costs, it would be necessary to demonstrate misconduct of the defence in the sense of some act, omission, or course of conduct on the part of the defendant which would be unreasonable or improper for the purposes of Ord 62 rule 10(1); and in order to justify an order that there be ‘no order as to costs in respect of the proceedings or any part of them, the test was what was fair and just in all the circumstances, the starting point, and the principal circumstance to be borne in mind, being that the plaintiff had abandoned all pleaded issues without argument or adjudication and had therefore prima facie to be regarded as having lost the day on all of them.”

Application of principles to the present case

6. Those principles suggested very strongly only one result as far as the present application is concerned. Ms Tornari, however, sought to persuade the Court that there was in fact, in this case, good reason for making an Order that there be no Order as to costs.
7. After careful analysis of the Chronology which she placed before the Court, she refined that argument somewhat to concede that it would only be appropriate for the Court to consider depriving the Fund of those parts of the costs to which the Petitioner’s argument specifically related. The argument was this. On or about 20th January 2016, the Petitioner filed a summons in the present Petition proceedings seeking to rectify the register. That issue was subsequently resolved in the Petitioner’s favour in subsequent proceedings which were commenced (Supreme Court of Bermuda Civil Jurisdiction 2016: No. 345²) and which were properly constituted rectification of share register proceedings.

² [2016] SC (Bda) 68 Com (27 June 2016).

8. It was argued that because the Petitioner achieved success on the rectification issue, it would be unfair for it to pay the Respondent's costs of dealing with that issue, which was a significant issue in the period after 20th January 2016 in the present proceedings. Mr White replied that the rectification issue, as it existed during the life of these proceedings, was different to the issue as it existed and was determined in the 2016 proceedings.
9. Properly analysed, it seems to me the rectification issue as it arose in the present proceedings was in fact different. More important than that, however, it was an issue which could not properly have been resolved as an interlocutory matter in the present proceedings because the relevant procedural requirements are that rectification of the register be dealt with in separate proceedings. That may be somewhat technical, but I think that Mr White was right in contending that in 2016: 345, the Court granted the rectification relief primarily on the basis that the three months period prescribed by the Companies Act 1981³ for making a decision to refuse to register a transfer had expired and no decision had been made. That period had not expired before the present Petition was withdrawn.

Decision

10. And so while it is tempting to seek to give the Petitioner some reward for its ultimate success, on careful scrutiny there is no proper justification for doing so. Accordingly, the appropriate Order which I am obliged to make is to award the Respondent the costs of the Petition to be taxed if not agreed on the standard basis.

[After hearing counsel for the Respondent]

11. Ms Tornari, you cannot seriously resist the award of the costs of today to the Respondent. You were quite bold and ambitious, and persuasive, in seeking to argue an almost impossible position.

Dated the 9th day of October, 2017

IAN RC KAWALEY CJ

³ Section 50 provides:

"Notice of refusal to register transfer

50. (1) If a company refuses to register a transfer of any shares or debentures, the company shall, within three months after the date on which the transfer was lodged with the company, send to the transferor and transferee notice of the refusal.

(2) If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine."