



In The Supreme Court of Bermuda

COMPANIES (WINDING UP)

COMMERCIAL JURISDICTION

2018: No. 024

IN THE MATTER OF FULL APEX (HOLDINGS) LIMITED (PROVISIONAL
LIQUIDATORS APPOINTED)

AND IN THE MATTER OF THE COMPANIES ACT 1981

Before: Hon. Assistant Justice Duncan

Appearances: Mr Benjamin McCosker, Walkers, for the Petitioner
Mr Rhys Williams, Conyers, for the Company

Dates of Hearing: 19 & 20 November 2019

Date of Judgment: 13 December 2019

JUDGMENT

(in relation to costs)

Winding-up petition - abuse of process – collateral purpose – whether contractual agreement to pay costs precludes the court making an additional award of costs – test for the award of indemnity costs claimed by petitioners – taxation of contractually agreed costs

Introduction

1. In these proceedings, Standard Chartered Bank (Hong Kong) Limited (the "Petitioner") seek costs against Full Apex (Holdings) Limited ("the Company") in connection with the petition presented to this Court on 8 February 2018 (the "Petition").
2. Originally, the Petitioner's costs application was set down for hearing before me at 2:30 pm on 18 September 2019, pursuant to paragraph 3 of the Order I made in these proceedings on 21 June 2019, which provided that:

"Counsel for the Company and the Petitioner are to submit to the Registrar mutually convenient dates and times for a one hour hearing as to the Petitioner's entitlement to its costs of the Petition".
3. On 18 September 2019, the Court was closed due to Hurricane Humberto. The parties proposed that the matter be addressed by way of written submissions only. The Court confirmed by email dated 23 September 2019 that written submissions were to be submitted electronically and filed with the Registry on 4 October 2019 in order to resolve the question of the Petitioner's entitlement to its costs.
4. The part-heard hearing of the substantive application in this matter was fixed for 19 and 20 September 2019. That hearing was also adjourned due to the closure of the Court as a result of Hurricane Humberto. The substantive hearing was rescheduled for hearing on 19 and 20 November 2019. The claim for indemnity costs in this application touches upon outstanding issues in the substantive application. For that reason, I thought it prudent to deliver this judgment after the hearing on 19 and 20 November 2019.

Background

5. Paragraphs 2 through 6 of the Company's written submissions conveniently set out the uncontroversial background of this application. I reproduce those paragraphs below:

"2. The Company was a guarantor of a loan facility ("Loan") provided by the Petitioning lenders ("Lenders") to a subsidiary of the Company. Upon the failure by the subsidiary to make payment of the Loan, the Lenders called on the guarantee and subsequently served a statutory demand. The Company failed to pay the demand.

3. The Petition was therefore presented on 8 February 2018 along with an Ex Parte Summons seeking the appointment of JPLs. The Petition returned to Court on 9 March 2019 when it was adjourned. The Petition was then adjourned repeatedly

4. On 15 June 2018 the Lenders entered into a loan transfer agreement ("LTA") pursuant to which, upon completion, the Loan was to be assigned to Skyblue Global International Limited ("Skyblue"), the Petition was to be withdrawn, and the costs of the Petition were to be paid by the Chairman of the Company, Guan Lianxiang.

5. 15 May 2019 the "Completion Date" as defined in the LTA occurred. On 16 May 2019, the Petitioner filed a summons seeking leave to withdraw the Petition conditional upon meeting his obligations under clause 9.3 of the LTA ("Contingent Withdrawal Application"). On 17 May 2019 directions were given for the hearing of the Contingent Withdrawal Application.

6. *On 13 June 2019, the Company applied for the dismissal of the Petition. At the hearing of the Petition on 21 June 2019, the Petitioner abandoned its Contingent Withdrawal Application, and sought unconditional withdrawal. That application was granted, and the issue of the costs of the Petition was adjourned."*

Summary findings

6. The LTA binds the Chairman of the Company to pay the Petitioner's costs, including legal costs. In some instances, the costs are capped. The central argument, in this case, concerns whether the LTA and specifically section 9 of the LTA prohibits the Petitioner from claiming additional costs over and above the costs provided for in the LTA, or whether, in the ordinary course of an application for costs, the Petitioner can claim costs against the Company in excess of the costs identified in the LTA. My findings are as follows:

- I. I find the Petitioner is entitled to its costs of the Petition against the Company.
- II. I also find the Petitioner is entitled to the costs of the Petition on an indemnity basis.
- III. The Petitioner's costs should be taxed if not agreed.
- IV. I find that the Petitioner is entitled to claim 25% of its additional costs against the Company which have been incurred in excess of the costs paid under the LTA. These costs are awarded on the standard basis.

Material Terms of the LTA

7. Before addressing the parties' submissions, I set out the material sections of the LTA:

Section 1.1, "Completion Date" means the date of the notice referred to in Clause 7.1.1 (Completion Date).

Section 1.1, "Costs Amount" means the amount payable by the Chairman pursuant to paragraph 2 of Schedule 3 (Payment Schedule).

Section 2 Third-party rights

2.1.1 Save as provided in Clause 2.1.2, a person who is not a Party has no right under the Contracts (rights of Third Parties) Ordinance (Cap. 623) to enforce or to enjoy the benefit of any term of this Agreement.

2.1.2 The Liquidators (in their capacities as joint and several liquidators of Jetzen) and the Provisional Liquidators (in their capacity as joint and several provisional liquidators of Full Apex Holdings) shall have the benefit of, and shall be entitled to enforce, the obligations of the Obligors under Clause 9 (Bermuda Petition and the BVI Liquidation) and the obligations of the Chairman under Clause 11.2.1 (Undertakings).

2.1.3 Notwithstanding any terms of this Agreement, the consent of any person who is not a Party is not required to rescind or vary this Agreement at any time.

Section 9 Bermuda Petition and the BVI Liquidation

9.1 Subject to Clause 12 (Termination) and to compliance by the Obligors with all of the obligations under this Agreement, the Lenders shall take steps to apply (or instruct the Agent to apply), promptly after the date of this Agreement, for an adjournment of the Bermuda Petition to a date no earlier than 10 October 2018

(the “return Date”), provided that the parties to this Agreement agree that in the event that the Termination Date occurs or there is any breach by an Obligor of its obligations under this Agreement prior to the Return Date, there will be liberty to apply on not less than 3 days’ notice to have the Bermuda Petition heard.

9.2 *Provided that the Chairman has complied with his obligations Under Clause 9.3 (whether by providing security against costs to be incurred or otherwise), the Nominee irrevocably hereby instructs the Agent to take (provided the Agent has not resigned in accordance with Clause 7.2.1 (Resignation of Agent following Completion Date) such steps as are reasonably necessary to seek a withdrawal of the Bermuda Petition, the discharge from office of the Provisional Liquidators, and a termination of the BVI Liquidation as soon as reasonably practicable following the completion of the transfer of the Loans pursuant to Clause 5.1 (Transfer). The Nominee gives such instructions in its capacity as Lender under the Facility Agreement.*

9.3 *The Chairman shall pay promptly upon demand, to the extent the same are not paid from the Costs Amount:*

9.3.1 *all costs of the BVI liquidation and the provisional liquidation of Full Apex Holdings accrued during the period after 27 April 2018 and on or prior to the Completion Date, to the extent such costs do not exceed US\$15,000 per week; and*

9.3.2 *any of the following accrued during the period after the Completion Date:*

- (i) any costs of each Lender and the Agent associated with any withdrawal of the Bermuda Petition, the discharge of the Provisional Liquidators and/or a termination of the BVI Liquidation in accordance with Clause 9.2;*

- (ii) reasonable costs of the BVI Liquidation and the provisional liquidation of Full Apex Holdings, to the extent such costs are associated with the discharge of the Provisional Liquidators and/or the termination of the BVI Liquidation; and*

- (iii) all other costs of the BVI Liquidation and the provisional liquidation of Full Apex Holdings, to the extent costs falling under this item (iii) (not including, for the avoidance of doubt, costs falling under item (ii) above) do not exceed US\$15,0000 per week.*

The Provisional Liquidators and the Liquidators may rely on and enforce this Clause 9.3.

9.4 The Costs Amount shall be applied in the following order:

9.4.1 firstly, to meet the following costs of the Lenders and the Agent, incurred at any time whatsoever:

- (i) all costs of each Lender and the Agent in connection with the enforcement and protection of rights under the Finance Documents (including without limitation in connection with the Bermuda Petition,*

the provisional liquidation of Full Apex Holdings and the BVI Proceedings) and/or with the negotiation, documentation and implementation of any proposed restructuring or settlement (including this Agreement); and

(ii) (without prejudice to the generality of (i) above) all costs of each Lender and the Agent associated with the adjournments contemplated by Clause 9.1;

9.4.2 secondly, to meet costs of the provisional liquidation of Full Apex Holdings, incurred at any time whatsoever; and

9.4.3 thirdly, to meet costs of the BVI Liquidation incurred at any time whatsoever,

with any surplus distributed between the Lenders pro rata their respective Loan Participations as at the end of this Agreement. The Lenders acknowledge that the Chairman has previously paid Hong Kong Dollars 1,500,000 to the Lender Solicitors to meet certain costs of the Liquidators.

Schedule 3, paragraph 2, Chairman

No later than the date that is 12 weeks from the date of this Agreement, the Chairman shall pay US\$1,500,000 to the Lender's Solicitors

Schedule 5, Completion Conditions Precedent, paragraph 1

Evidence that all costs and expenses of the BVI Liquidation, and the provisional liquidation of Full Apex Holdings, up to and including the Completion Date have (to the extent any Lender is under any potential liability in respect of the same) been paid by the Chairman.

I. The Award of Costs

The Law

8. Costs are always in the discretion of the Judge. Order 62, Rule 3(3) 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.”

9. The Petitioner relied upon the following extract at page 2733 of *Blackstone's Civil Practice 2013* in support of the proposition that a Petitioner is successful and will be entitled to its costs even if the petition debt is paid before the petition hearing:

"If a creditor petitioner's debt is paid before the hearing and no winding-up order is asked for at the hearing then, provided the petition has been advertised, the company will be ordered to pay the petitioner's costs (Re Alliance Contract Co.[1867] WN 217) even if the company does not appear (Re Shushella Ltd [1983] BCLC 505). The petitioner is regarded as having effectively succeeded (Re Nowmost Co. Ltd [1996] 2 BCLC 492. However, the court may make no order as to part or all of the petitioner's costs as a penalty for unreasonable pre-action behaviour" (CPR, r. 44.3(4)(a) and (5)(a))".

10. In support of the argument that the Petitioner succeeded in the legal proceedings and therefore should be entitled to its costs, the Petitioner also relies upon the judgment of Kawaley J (as he then was) in *Binns and Others v Burrows* [2012]

Bda LR 3, where he summarised the Bermuda law position in the following terms:

"...the Court's duty in awarding costs will generally be to:

- i. determine which party has in common sense or "real life" terms succeeded;*
- ii. award the successful party its/his costs; and*
- iii. consider whether those costs should be proportionally reduced because e.g. they were unreasonably incurred or there is some other compelling reason to depart from the usual rule that costs follow the event".*

11. The Company does not challenge the legal propositions advanced by the Petitioner but argues the Petitioner should not be awarded costs for two reasons. First, as a result of the provisions of the LTA, which set out the terms and extent of the legal costs the Petitioner is entitled to be paid because the Chairman agreed to pay the Petitioner's costs. Second, as a consequence of the conduct of the Petitioner.
12. The Company relies upon the authority *Rabilizirov v A2 Dominion and Ors* [2019] EWHC 863 (QB) per Farbey J at paragraph 16 in support of the proposition that when exercising the overriding discretion to award costs, the discretion should ordinarily be exercised to reflect any contractual agreements. The judgment of Farbey J in *Rabilizirov* is based upon the seminal decision in this area of the law, *Gomba Holdings (U.K.) and Others V Minorities Finance Ltd. and Others* (No.2) 1993 Ch.171. At page 193 of the *Gomba Holdings* judgment the Court of Appeal found:

"Where there is a contractual right to the costs, the discretion should ordinarily be exercised so as to reflect that contractual right."

13. *Gomba Holdings* concerned a contractual right to costs in a mortgage action. The case of *Fairview Investments Ltd V Sharma* 1999 WL 1071265 concerned the right of forfeiture under a lease. In that case, the Court of Appeal held:

"The lease clearly put responsibility onto A for all F's costs, from service of notices up to and including the proceedings. Although an order for forfeiture was not in fact granted this was created for by the specific provisions of the lease. F therefore had a contractual right to costs which the court should exercise its discretion to uphold, Gomba Holdings (U.K.) and Others v Minorities Finance Ltd. and Others (No.2) 1993 Ch.171 applied."

14. In *Forcelux Ltd V Binnie (Costs)* 2009 WL 3197494, at paragraph 12 the Court of Appeal held that the principle in *Gomba Holdings* is of general application:

"As I have said he accepts the jurisdiction of the court to make a different order notwithstanding the contractual position as he states it, but submits that the general principle is that the discretion should be exercised in line with the contract. He relies on Gomba Holdings (UK) Ltd v Minorities Finance Ltd (No 2) [1993] CH 171 (a mortgage case) and Church Commissioners for England v Ibrahim [1997] 1 EGLR 13 (a lease case) to demonstrate that principle. I do not dissent in any way from the proposition that the general principle is as he states. But the general principle is not a rule of law and it may well be that in a particular case, or even in a class of case, the court's discretion should be used to override the contractual right. "

15. I now turn to the question of whether the conduct of the Petitioner disentitles it to an award of costs. The Company's written submissions rely upon the decision of Lord Wilson in *Ebbvale Ltd v Hosking* [2013] 2 BCLC 204 at [26] and assert the

conduct of the Petitioner amounted to an abuse of process. For this limb of its submissions, the Company makes the following arguments:

"The Petitioner sought to utilise the proceedings as leverage to force payment by a third party, Skyblue, with the constant threat of winding up against the Company. This is evidenced by the fact that the Petitioner would only consent to an adjournment of one or two weeks at a time, even after the LTA had been executed.

Secondly, the Contingent Withdrawal Application was wholly misconceived. The Petitioner no longer had any interest in the Loan, and as such no longer had any standing to petition. The application for leave to withdraw ought to have been unconditional from the outset, and to the extent that the Petitioner believed the Chairman was in breach of his contractual obligations, the Petitioner ought to have pursued the Chairman. To issue an application for 'conditional' withdrawal was therefore unreasonable, and the Petitioner ought not to be awarded its costs of and occasioned by that application. Any order in favour of the Petitioner ought, therefore, to be limited to the Completion Date, i.e. 15 May 2019 when the Loan was assigned to Skyblue and the Petitioner ceased to have any interest."

16. Chief Justice Kawaley considered the decision in *Ebbvale Ltd v Hosking* and the abuse of process jurisdiction of the court in respect of winding-up petitions in *Emerging Markets Special Solutions 3 Ltd v Laep Investments Ltd* [2017] SC Bda 78 Com para 25-27 where he said:

"25. The cases demonstrate two broad categories of improper purpose: (1) where there is no genuine intention of obtaining winding-up order at all, and (2) where the petitioner is not acting in the interests of the class of creditors he purportedly represents. As to the first

category, in my judgment caution is necessary to appreciate that the range of legitimate purposes for winding-up proceedings in Bermuda is today broader than it was in England in the 1980's. It is now well settled under Bermudian insolvency law that a company or a creditor may present a winding-up petition where the primary goal is to restructure a company's debts and not to wind-up the company at all. For instance in Re Z-OBEE Holdings Limited [2017] Bda LR 19, I noted that:

•“13 ... Even if a petition is presented by the company with the specific purpose of pursuing a restructuring which if successful will result in the petition being dismissed, it will rarely if ever be the case that there is no possibility at all that the plan will fail and that a winding-up order will still result. In such circumstances, the winding-up jurisdiction is still being used to fulfil the primary purpose of the winding-up jurisdiction: protecting the best interests of the general body of unsecured creditors.”

26. *In either category of collateral purpose case, where a debt is undisputed, there is almost a presumption that the petitioner's reasons for invoking the winding-up jurisdiction are at least partially legitimate. The Company in the present case must therefore demonstrate that there was no legitimate purpose at all to justify a finding that the Petition was presented for improper collateral purposes. This point is illustrated by the following passage from the leading judgment in Ross -v- Stonewood Securities Limited [2000] BPIR 636 where Nourse LJ concluded as follows:*

•“28one of the considerations which has led to the presentation of Stonewood's petition is was that Mr Ross would

not be able to pursue the claim against Miss Jeffs himself....we cannot in my view proceed on the footing that it was presented solely for the purpose of stifling the action. What has to be considered is the purpose of Stonewood, which had obtained a regular judgment against Mr Ross...It must therefore be assumed that part at least of Stonewood's purpose in presenting the petition was the lawful purpose of seeking to obtain a dividend in the bankruptcy.

•29. Accordingly, though I remain suspicious of Miss Jeff's motives, I do not think that this case can confidently be treated as one of abuse of process. But it does not at all follow from that that it was appropriate for the bankruptcy order to be made."

27. This Court should also in either category of improper purpose case be reluctant to investigate the commercial motivations of the petitioner with an undisputed debt save in clear-cut cases where there is no legitimate reason for the petition at all. The latter point was explicitly made by Rose J in Maud -v- Aabar Block and Edgworth Capital [2015] EWHC 1626".

Findings on the Award of Costs

17. Relying upon the persuasive authority of *Re Nowmost Co. Ltd* [1996] 2 BCLC 492 and the judgement of Kawaley J in *Binns and Others v Burrows* [2012] Bda LR 3, I find that the Petitioner is entitled to its costs. The Petitioner had to present and pursue a winding-up order to achieve payment of the debt it was owed. The mere fact that the Petition was ultimately withdrawn is irrelevant in a proper assessment of which party succeeded "in real-life terms". Unquestionably, the Petitioner was the successful party in the litigation.

18. I acknowledge that in *Forcelux Ltd V Binnie (Costs)* 2009 WL 3197494, at paragraph 12 the Court of Appeal held that the principle in *Gomba Holdings* does not tie the hands of the Court to make an order for costs strictly in accordance with any prior contractual arrangement entered into by the parties. However, I accept the submission made by the Company that the terms of the LTA, particularly sections 9.1, 9.2, 9.3 and 9.4 set out a regime for the Chairman of the Company to pay costs which include the Petitioner's costs of the Petition and the Withdrawal Application. I do not accept the regime for payment of litigation costs contained in the LTA obviates my obligation to make a finding who is entitled to the costs of this litigation. It may be that the Company's actual submission is that any award of costs should be limited to the terms of the LTA. I will address that submission later in this judgment.
19. I do not find there is evidence to support the Company's argument that the conduct of the Petitioner amounted to an abuse of the process of the court. The Company's allegation of improper purpose falls into the first of the two broad categories of improper purpose identified by Chief Justice Kawaley in *Emerging Markets Special Solutions 3 Ltd v Laep Investments Ltd* [2017] SC Bda 78 namely no genuine intention of obtaining a winding-up order at all.
20. I have already found that the Petitioner presented and to the extent necessary, prosecuted the winding-up Petition in order to secure payment of the outstanding debt it was owed. In paragraph 26 of the *Emerging Markets Special Solutions 3 Ltd v Laep Investments Ltd* [2017] SC Bda 78 Com decision, relying upon the judgment of Nourse LJ in *Ross v Stonewood Securities Limited*, Chief Justice Kawaley states that where a debt is undisputed as is the present case, there is almost a presumption that the Petitioner's reasons for invoking the winding-up jurisdiction are at least partially legitimate. Consequently, I do not find there is evidence to support the argument that the Petitioner prosecuted the Petition with or for a collateral purpose.

II. Is the Petitioner entitled to Costs on an Indemnity basis

The Law

21. The terms of the LTA and section 9 in particular, must be considered to determine whether by its terms the LTA directs that the Petitioner is to be paid legal costs on what effectively amounts to an indemnity basis. *Gomba Holdings (U.K.) and Others v Minorities Finance Ltd. and Others (No.2)* 1993 Ch.171 provides helpful guidance on how a contract should be construed to determine whether the parties have agreed costs would be paid on an indemnity basis. At page 179, Scott LJ said the following:

"By clause 2 of this mortgage, the mortgagor guaranteed to pay to the first defendant on-demand:

"(c) All costs charges and expenses howsoever incurred by the bank or any receiver under or in relation to this mortgage . . . on a full indemnity basis including (but without prejudice to the generality of the foregoing) all costs charges and expenses which the bank or any receiver may incur in enforcing this security . . ."

Under clause 7 the first defendant was given power to appoint a receiver and "either at the time of his appointment or any time thereafter [to] fix his remuneration . . ." Clause 8 provided:

"All moneys received by the receiver shall be applied by him in the following order of priority; (1) In satisfaction of all costs charges and expenses of and incidental to the appointment of the receiver and the exercise of any of his powers and all outgoings paid by him and his remuneration. (2) In or towards satisfaction of the indebtedness hereby secured."

So the first defendant was entitled to "all costs charges and expenses . . . on a full indemnity basis" and the receivers were entitled to retain out of the mortgaged property their remuneration as fixed by the first defendant.

"

22. Separate and apart from the wording of the contract, the jurisdiction of the court to order that a party to winding-up proceedings pay costs on an indemnity basis was considered in *Emerging Markets Special Solutions 3 Ltd v Laep Investments Ltd* [2017] SC Bda 78 Com paras 37 to 39 where Chief Justice Kawaley said:

"37. Order 62 rule 10 of the Rules confers a discretion to award costs on the indemnity basis and explains what that basis is. It does not indicate when such an award is appropriate, but it is implicit that it is more favourable to the receiving party and is not intended to be the "standard" basis of taxation:

"62/12 Basis of taxation

- *(1) On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party; and in these rules the term 'the standard basis (2)' in relation to the taxation of costs shall be construed accordingly.*

- *(2) 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 Registrar may have as to whether the costs 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.

- *(3) Where the Court makes an order for costs without indicating the basis of taxation or an order that costs be taxed on a basis other than the standard basis or the indemnity basis, the costs shall be taxed on the standard basis.”*

38. The present local practice position appears to be that indemnity costs are awarded for serious misconduct rather than as a general rule because an abuse of process has been made out: see e.g. Phoenix Global Fund Ltd -v- Citigroup Fund Services (Bermuda) Ltd [2009] Bda LR 70 at paragraphs 9–13 (Bell J, as he then was); Majuro Investment Corp -v- Timis (Ruling on Costs) [2016] Bda LR 23 (Kawaley CJ at paragraphs 8–14).

39. In my judgment the traditional local approach to indemnity costs in relation to abusive winding-up proceedings is far too lenient. It serves as no real deterrent against the misuse of the Court's winding-up jurisdiction and provides no meaningful support to the obligation of the Court and the parties to further the overriding objective. I see no reason why the English approach (which is in no way dependent on the CPR regime which does not apply here) should not in future cases be followed here. Where further prosecution or the presentation of a petition is restrained on abuse of process grounds, the usual rule should be that costs are awarded against the actual or prospective petitioner on an indemnity basis.”

23. The Petitioner argues it is entitled to an award of indemnity costs because the Company has:

- (a) defaulted in its obligations as guarantor under the original Facility Agreement;
 - (b) failed to satisfy the statutory demands subsequently issued;
 - (c) fully contested the winding-up petition; and
 - (d) breached orders of the Court during the course of the winding-up.
24. The Company did not specifically address the issue of indemnity costs other than in its submission that the Petitioner should not be awarded any costs as a result of its abusive conduct in the winding-up proceedings.

Findings on the Petitioner's claim for indemnity costs

25. Sections 9.4.1 (i) and 9.4.1 (ii) of the LTA provide that out of the "Costs Amount" of \$1.5M the Chairman has agreed to pay the Petitioner the following Petition costs:
- (i) *All costs of each Lender and the Agent in connection with the enforcement and protection of rights under the Finance Documents (including without limitation in connection with the Bermuda Petition, the provisional liquidation, of Full Apex Holdings and the BVI Proceedings) and/or with the negotiation, documentation and implementation of any proposed restructuring or settlement (including this Agreement); and*
 - (ii) *(without prejudice to the generality of (i) above) all costs of each Lender and the Agent associated with the adjournments contemplated by Clause 9.1."*
26. The Chairman agreed to pay the following costs incurred by the Petitioner after the Completion Date:

9.3.2 *any of the following accrued during the period after the Completion Date:*

(i) any costs of each Lender and the Agent associated with any withdrawal of the Bermuda Petition, the discharge of the Provisional Liquidators and/or a termination of the BVI Liquidation in accordance with Clause 9.2;

27. I find the reference to "all costs" of the Lenders Petition in section 9.4.1 of the LTA and "any costs" of each Lenders withdrawal application of the Petition in section 9.3.2 (i) of the LTA is an agreement by the Chairman of the Company to pay the Petitioner's costs on an indemnity basis. Alternatively, I find the Petitioner is entitled to an award of indemnity costs based upon the court exercising its jurisdiction to make such an award.
28. *Emerging Markets Special Solutions 3 Ltd v Laep Investments Ltd [2017] SC Bda 78 Com* is local authority establishing the test for indemnity costs payable to a Company resisting a petition which is determined to have been improperly presented and or prosecuted. The question arises whether the case is also authority for the proposition that a Petitioning creditor alleging the conduct of a company in the winding-up is an abuse of process can claim indemnity costs against a Company.
29. In my view, the decision of Chief Justice Kawaley in *Emerging Markets Special Solutions 3 Ltd v Laep Investments Ltd [2017] SC Bda 78 Com* concerning the award of indemnity costs in relation to abusive winding-up proceedings is of general application in winding-up proceedings irrespective of whether the allegation of abusive conduct is made by the Petitioner or, as is more traditionally the case, by the Company. *Emerging Markets Special Solutions* considered the jurisdiction of the court to award indemnity costs in the context of the proposition

that the Court will supervise misuse of its winding-up jurisdiction in furtherance of the overriding objective.

30. The language used by former Chief Justice Kawaley in *Emerging Markets Special Solutions 3 Ltd v Laep Investments Ltd [2017] SC Bda 78 Com* strongly suggests that an important aspect of the role the court plays in supervising the winding-up jurisdiction is to ensure the jurisdiction of the court is not abused. It makes no difference whether the court is facing allegations of abuse of process committed by the Petitioner or the Company. The court must be satisfied the particular conduct in question amounts to an abuse of process. In my view, the decision in *Emerging Markets Special Solutions 3 Ltd v Laep Investments Ltd [2017] SC Bda 78 Com* does support the proposition that a Petitioner is entitled to seek indemnity costs against a Company if the Petitioner can establish the Company has committed an abuse of process.

31. I find that the Company did breach various orders of the Court during the course of the winding-up proceedings. To some extent, the Company accepts it has violated Court orders and makes a plea of confession and avoidance. In light of these breaches, I rule that in the alternative to my finding that the Petitioner is entitled to indemnity costs under the LTA, the Petitioner is entitled to indemnity costs under the jurisdiction of the court to make that award in respect of the costs paid by the Chairman under the LTA.

III. Taxation of costs

32. The fact that the LTA sets out the costs the Chairman has contractually agreed to pay the Company does not remove the procedural requirement for the Petitioner's costs to be taxed in the normal way. In *Gomba Holdings (U.K.) and Others V Minories Finance Ltd. and Others (No.2) 1993 Ch.171* at page 189 the Court said:

"Whatever the extent of the contractual right of recovery to which a mortgagee is entitled under the mortgage deed some means of quantification must be adopted. It is clear that the court has jurisdiction to quantify the amount recoverable both under its inherent jurisdiction as well as pursuant to such statutory provisions and rules as may apply to a particular case. This familiar process of quantification must take place not only in respect of litigation costs but also in respect of non-litigation costs as well as in respect of damages claims and a variety of other claims. The Rules of Court provide machinery for the quantification. They provide, in particular, for accounts to be taken and inquiries to be made. And they provide, also, for costs to be taxed by the taxing masters.

It is accepted by Mr. Potts, for the defendants, that the quantification of litigation costs must be by means of a taxation carried out by a taxing master and that the taxation must be conducted on one or other of the two bases prescribed by Ord. 62, r. 12. But he has submitted that non-litigation costs are not subject to taxation and can only be quantified by the taking of an account, with or without supplementary inquiries. Mr. Cullen, for the plaintiffs, accepted that this was correct and that non-litigation costs could not be subjected to a process of taxation, whether on the standard basis or on the indemnity basis. This view seems to have been shared by Vinelott J."

IV. Does the LTA contain the maximum award of costs the Petitioner is entitled to be paid.

Positions of the Parties

33. The Company contends that the Petitioner entered into the LTA, accepting that it would be paid its costs by the Chairman of the Company, not by the Company. Further, the corollary of being paid by the Chairman of the Company pursuant to

the LTA as opposed to being paid by the Company was that the Petitioner agreed the maximum legal costs it would be paid were contained in the LTA. The Company also asserts that the entire premise of the LTA was to release the Company from any obligations to the Petitioner/Lenders, and thereby remove the threat of winding up given the Company's apparent insolvency.

34. The Petitioner relies upon the privity of contract clause contained in the LTA. The Petitioner's contention is that the Company is not party to the LTA therefore there is no bar to the Petitioner pursuing the Company for the additional legal costs it has incurred. The Petitioner contends that despite the payments it has received from the Chairman of the Company, it remains out of pocket. The Petitioner's final argument is that any concerns the court may have that an award of costs would duplicate payments to the Petitioner could be resolved when the award of costs is taxed.

Findings

35. As previously stated, I find the reference to "all costs" of the Lenders Petition in section 9.4.1 of the LTA and "any costs" of each Lenders Withdrawal Application of the Petition in section 9.3.2 (i) of the LTA is an agreement by the Chairman of the Company to pay the Petitioner's costs on an indemnity basis.
36. I accept that certain costs of the Petitioner are capped at US\$15K per week. For example pursuant to section 9.3.1, of the LTA "the costs of the provisional liquidation of the Company accrued during the period after 27 April 2018 to the Completion Date" are subject to a cap of US\$15k per week, as are "all other costs" of the Lenders, again subject to a cap of US\$15k per week. (See section 9.3.2(iii) of the LTA).
37. Nothing in the LTA suggests the Petitioner is not entitled to seek costs from the Company. As a matter of law and common sense, any costs paid to the Petitioner

by the Company could not duplicate costs paid to the Petitioner by the Chairman of the Company. It is difficult to dismiss the argument made by the Petitioner that the Company is not a party to the LTA and as such is not shielded from a separate application to pay the Petitioner's costs. Further, there is nothing in the LTA stating payment of the Petitioner's costs by the Chairman is in full and final settlement of the costs the Petitioner is entitled to claim in the litigation.

38. Importantly there was no argument before me that it was an implied term of the LTA that upon the Chairman of the Company paying the Petitioner's costs the Petitioner would not pursue the Company for any additional costs.
39. However, the Company does make a compelling argument that the entire premise of the LTA was to release the Company from any obligations to the Petitioner/Lenders and thereby remove the threat of winding up given the Company's apparent insolvency. The LTA appears to have been designed to resolve once, and for all the financial indebtedness the Company had with its Lenders. To that end, the Chairman of the Company agreed to pay the Petitioner's costs for the benefit of the Company. An arrangement the Petitioner not only entered into but under which it also received payments for its costs over a period of time. It is hard to conceive the Chairman of the Company would have paid the costs of the litigation knowing the Company could potentially be in further financial difficulties with the parties with whom he agreed the LTA, concerning the issue of costs which is specifically dealt with in the LTA.
40. Perhaps the fact that the Company was in provisional liquidation prevented it being a party to the LTA. Whatever the reason, the net result is that there are no words in the LTA upon which I can accept the Company's argument to insulate the Company from an application for costs. In its written submission the Company argues the Petitioner could now seek its additional costs of the Petition against the Company and thereby potentially expose the Company to a further

statutory demand in the event that any costs order is not met. This the Company argues would defeat the whole purpose of the LTA.

41. I also note the Company's point that in the Contingent Withdrawal Application, the Petitioner did not seek an order that the Company pay the costs of the Petition, only the costs of the Withdrawal Application. In my view, this is of marginal relevance. I certainly wouldn't base my decision on this point alone.

42. I do accept and order that the Petitioner is entitled to seek costs against the Company in respect of claims unpaid by the Chairman of the Company. However, for the reasons stated in paragraphs 37 through 41 of this judgment, in the exercise of my discretion, I order that the Petitioner is entitled to claim and the Company pays 25% of the Petitioner's additional costs on the standard basis. These costs are awarded on the standard basis because they do not fall under the LTA.

Dated 13 December 2019

DELROY DUNCAN
ASSISTANT JUSTICE