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Costs Orders in Winding up Petitions: *In the Matter of Abraaj Holdings*

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Justice McMillan's 4 January 2019 judgment in *In the matter of Abraaj Holdings*[1] confirms that no costs orders should be made against parties that take reasonable positions on winding up petition hearings. This is in contrast to the general rule in commercial litigation in the Cayman Islands that, a successful party to any proceeding is entitled to recover from the opposing party the reasonable costs incurred by him or her in conducting that proceeding.

In the case of insolvency proceedings, the Court is often required to consider what is best for the stakeholders of the Company as a whole. In such circumstances the Court should not be perceived as limiting or discouraging legitimate differences of opinion being presented to the Judge.

Application for adjournment

On 20 November 2018, the Grand Court heard the much discussed adjourned winding up petition ("Petition") presented by the Public Institution for Social Security ("PIFSS") against Abraaj Holdings (the "Company"). The Joint Provisional Liquidators ("JPLs") of the Company sought an adjournment of the Petition. PIFSS opposed the adjournment and sought an order that the Company be wound up. Mr Abudulhameed Jafar, a creditor of the Company and member of the Liquidation Committee, along with Mr Arif Naqvi, a director, shareholder and the founder of the Company, appeared in support of the adjournment sought by the JPLs.

After considering the submissions of the JPLs, PIFSS, Mr Jafar and Mr Naqvi in relation to the adjournment application, Justice McMillan agreed to adjourn the Petition as requested by the JPLs. The JPLs made clear that their request for a further adjournment was finely balanced, and conceded that they quite conceivably could have asked that PIFSS's relief be granted and the Company be wound up.

Upon the adjourning of the Petition, Mr Naqvi and Mr Jafar each applied for orders that PIFSS pay their costs, along with the costs of the JPLs in connection with the adjournment hearing. PIFSS and the JPLs considered that no costs orders should be made.

Application for costs

Having considered supplemental submissions filed by the parties, in determining whether to order costs against PIFSS as requested by Mr Naqvi and Mr Jafar, McMillan J applied the standard that a party must have acted unreasonably to be found liable for costs.

[1] Unreported, FSD 95 of 2018 (RMJ)

In the circumstances, there was no dispute that PIFSS was entitled to seek a winding up order and that the Company was insolvent. Although the Court decided to adjourn the Petition, PIFSS's position was not unreasonable.

Further, McMillan J noted that the matter was very complex, and that there was a genuine division of opinion on the part of the creditors on the adjournment issue. PIFSS made a valuable contribution to the ongoing debate upon important subjects and the Court was fully cognizant of that contribution. On the other hand, in relation to Mr Naqvi's submissions, McMillan J was not satisfied that Mr Naqvi was a proper party to the proceedings at all, let alone entitled to recover his costs.

McMillan J found that there was no merit in the submissions made on behalf of Mr Naqvi or Mr Jafar that PIFSS was so unjustified as to be unreasonable in presenting its application as it did. Indeed, in his judgment the Learned Judge seemed to encourage continued participation of the various stakeholders in this complex proceeding.

Conclusion

Justice McMillan's judgment will be welcomed by creditors and insolvency practitioners as it confirms the unique status of insolvency proceedings. Unlike the adversarial nature of most commercial litigation in which there is a winner and a loser, insolvency litigation routinely requires the Court to consider different views in making a decision which is best for the body of stakeholders as a whole. In such cases the Court will be reluctant to impose a costs order upon an unsuccessful (but not unreasonable) party, as this could be perceived as limiting or discouraging the expression of legitimate differences of opinion.

Conyers Dill & Pearman act for the Public Institution for Social Security. A copy of the judgment is available here.

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