

## CAYMAN ISLANDS GRAND COURT

### ***Weaving Macro Fixed Income Fund Limited (In Official Liquidation) -v- Ernst and Young Chartered Accounts (a Firm) and Others (5 May 2015)***

### JUDGMENT ON COSTS - COSTS THROWN AWAY AND OCCASIONED ON PLAINTIFF'S AMMENDMENT TO STATEMENT OF CLAIM - COSTS OF AND THROWN AWAY BY ABANDONED CLAIMS IN DECEIT - INTERIM PAYMENT ON ACCOUNT PENDING TAXATION

The Judgment concentrated on three key issues relating to costs: (i) costs thrown away and occasioned by amendments to the Plaintiff's statement of claim; (ii) costs thrown away by the abandoned claims in deceit and (iii) an invitation for the Court to exercise its discretion and to award an interim payment on account pending taxation.

On the first issue the Court took guidance from Order 20 Rule 8 of the Supreme Court Practice, 1999 where Paragraph 20/8/52 states that:

*"The usual penalty imposed on a term for giving leave to amend is that the party seeking the amendment should pay in any event all the costs incurred and thrown away by the amendment and the costs of any consequential amendment"*.

The Defendants argued that the Plaintiff should pay costs of and occasioned by preparing, issuing and serving of the summons. Justice Quin ordered that the Plaintiff pay the costs of, thrown away and occasioned by the amendments to its amended statement of claim up to and including the first day of the hearing (10 February 2015) in any event and further that these costs be taxed on the standard basis if not agreed.

The Defendants' second submission related to costs thrown away by abandoned claims in deceit against Ms. Allen and Mr. Barber. They argued that the costs should be paid by the Plaintiff in any event and further that these costs should be assessed on an indemnity basis. The Plaintiff took the position that the claim

in deceit in relation to the 2006 audit would continue and the claim in negligence in relation to the 2007 audit would continue but the deceit claim be abandoned. As a result, the Plaintiff submitted that they could not say that none of the costs incurred in relation to the original case were of no value to the amended case, but also that the Defendants could not say that all the costs incurred in relation to the original case were of no value to the amended case and therefore useless.

Justice Quin agreed that there must be a high degree of overlap between the work done in relation to the withdrawn allegations and the work which will be necessary for the Claim as amended, however, separating what work would be of value would be incredibly difficult. Furthermore, Justice Quin believed this exercise would be unjust to both parties due to the time and expense involved. The Defendants' followed the position as in *Sagikor General Insurance (Cayman) Ltd. -v- Corporate Adjusters (Cayman) Ltd.* [2008] CILR 482, contending that an award as to their costs of the abandoned claims in deceit be on an indemnity basis.

The Court held that "...such an award should be made only in exceptional circumstances, such as where the losing party has behaved improperly, negligently or unreasonably". It found no exceptional circumstances, in this case and at this stage of proceedings, and decided to reserve the question of any costs in relation to the abandoned allegations of deceit - whether on a standard or on an indemnity basis - until the outcome of the trial of this action. However, in relation to the abandoned allegations

of deceit against Mr. Barber and the Plaintiff's discontinued claim in deceit relating to the 2007 audit, the Defendants were awarded costs to be taxed on a standard basis if not agreed. The question of indemnity costs remains a live issue.

The third point that Justice Quin considered was the Defendants' application for an interim payment. The Defendants' contended that the costs of dealing with the abandoned claims were substantial and would need to be taxed. Consequently, they were seeking a payment on account of those costs, pending taxation. The Defendants submitted that it would be unjust to keep the Defendants out of their costs of the abandoned Claims until the conclusion of the proceedings. Relying on the decision in *Al Sadik -v- Investcorp Bank BSC (2012) (2) (CILR) 33* the Defendants maintained that an award on an interim basis would be justified on the facts. The Court held that an interim award of costs was not within the inherent jurisdiction of the Court, not following *Al Sadik -v- Investcorp Bank* (unreported) 3 July 2012, and found no basis for making an interim order in this case, and ordered costs to be costs in the case.

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