

## CAYMAN ISLANDS COURT OF APPEAL

### ***Aramid Entertainment Fund Limited -v- KBC Investments V Limited,, per Chadwick J.A. Campbell J.A. Martin J.A. (5 May 2014)***

### WASTED COSTS - WITHDRAWAL OF WINDING UP PETITION

This was a successful appeal from a judgment digested in the Conyers' Offshore Case Digest Issue No. 6 and concerns liability for costs on the withdrawal of a creditor's winding up petition. At first instance the judge had not ordered costs against the petitioning creditor and held that the Court has a broad discretion to depart from the usual rule that a petitioner of an unsuccessful winding up petition should pay the costs of that failure. The Judge found that the appropriate question for the Court to consider in those circumstances was whether the presentation of the petition was reasonable.

The decision was overruled by the Court of Appeal, where the general rule (found in *Re Fernforest Ltd* [1990] BCLC 693) was interpreted strictly. Chadwick J.A. found that, "*save in exceptional circumstances, the reasonableness, or otherwise, of the petitioners' conduct, in a case where the debt is known to be disputed at the time when the petition is disputed, is not a matter for enquiry. In a disputed debt case, the petitioner presents his petition at his own risk*".

The Court of Appeal indicated that the reason for this is that if the Court was required to go into the history of each case to assess whose conduct was reasonable or unreasonable, a great deal of the court's time and costs would be wasted. The present case provided a clear illustration of this point, as Foster J had conducted a two day hearing, substantial affidavit evidence was prepared and filed, and the judgment itself was some 28 pages in length.

The Court of Appeal did, however, cite *Re Sykes & Sons Ltd* [2012] EWHC 1005 (Ch) as an example of an exceptional case where the court would depart from the general rule in *Fernforest*.

In that case the Judge took into account communications between the parties prior to the presentation of the petition and found the fact that the company did not give any meaningful account of its defense prior to the petition and only belatedly produced unauthenticated documents in support of its case, to be enough to justify departing from the usual order as to costs.

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