

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 195 OF 2018 (IKJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)
AND IN THE MATTER OF CHINA CVS (CAYMAN ISLANDS) HOLDING CORP.

IN CHAMBERS

Appearances:

Mr Tom Lowe QC instructed by Mr Marc Kish and Ms Gemma Lardner of Ogier for Family Mart China Holding Co., Ltd (“the Petitioner”)

Mr Mac Imrie, Ms Natascha Steiner-Smith and Mr Ryan Hallett of Maples and Calder for Ting Chuan (Cayman Islands) Holding Corporation (“Ting Chuan”)

Before: The Hon. Justice Kawaley
Heard: On the papers
Submissions filed: 11/25 March 2019
Draft Ruling circulated: 19 June 2019
Ruling Delivered: 24 June 2019



HEADNOTE

Just and equitable winding-up petition - strike out application refused - mandatory arbitration stay granted under 95(2) - Foreign Arbitral Awards Enforcement Law section 4 - whether successful respondent's costs should be reduced proportionately because its costs were significantly increased by raising allegations which failed - approach to determining appropriate amount of reduction

RULING ON COSTS OF STRIKE-OUT/STAY APPLICATIONS

Background

1. The present Ruling deals with the costs of the strike-out and/or stay application of Ting Chuan, the Majority Shareholder in dispute with the Petitioner, the Minority Shareholder of China CVS (Cayman Islands) Holding Corp ("the Company"). The strike-out application was refused but the mandatory stay application was granted on February 25, 2019. I made the following provisional costs Order:

“Unless either party applies by letter to the Court within 21 days to be heard as to costs, the costs of the present application shall be payable by the Petitioner to be taxed if not agreed on the standard basis.”

2. My provisional view was that Ting Chuan had achieved substantial success in ‘real world’ terms overall, because the overarching dispute was whether or not the Petitioner should be permitted to proceed to have the Petition heard on its merits. That question was resolved in favour of Ting Chuan, even though the Petition was not actually struck-out.
3. When judgment was handed down, Mr Lowe QC applied orally for the Petitioner’s costs of the strike-out Summons. I gave directions for the filing of written submissions, it being agreed that the application should be determined on the papers.
4. The Petitioner essentially contends that the strike-out application was a separate event which was resolved in the Petitioner’s favour while Ting Chuan contends that the Court should view the matter on a global basis and, at worst, grant it only 70% of its costs to reflect any success the Petitioner may have achieved.
5. For present purposes, the substantive application can only sensibly be characterised as follows. There was a single application which sought two distinct and alternative forms of relief in connection with the same underlying commercial dispute. Ting Chuan applied under a single Summons for the following alternative heads of relief:

“3. The Petition shall be struck out on the grounds that the Petition is an abuse of the process of the Court.

4. In the alternative, if the Petition is not struck out, that the Petition be dismissed or stayed pursuant to section 4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) and/or the inherent jurisdiction of the Court...”



Governing legal principles

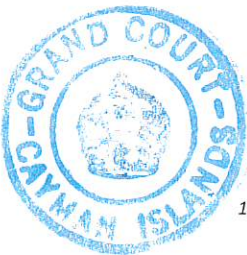
6. The Petitioner simply relied upon the usual rule that costs follow the event and submitted:

“5. There is no basis or precedent for treating the two applications as if they were one composite application. There were two entirely separate applications with different outcomes. The mere fact that the applications were heard together in the interests of efficiency should not, in the Petitioner’s respectful submission, disentitle the Petitioner to the costs order which would otherwise have been made if the applications had been heard on separate occasions.”

7. I reject this submission. In my judgment there was one composite application with two different strands to it. One strand involved seeking to argue that the allegations made in the Petition should be struck-out. The other strand involved arguing that the same allegations, if not liable to be struck-out, should be tried by way of arbitration, not in the present proceedings. Both applications related to the same underlying commercial dispute. It was entirely logical that both strands of the application should be determined together.
8. In my judgment it would be an unprecedented approach to treat these two limbs of the Ting Chuan Summons as entirely discrete applications for costs purposes. It routinely happens that a litigant pursues multiple claims within a single action in relation to a composite dispute and succeeds on some but not all of the claims. Absent a statutory framework for dealing with costs on an issues-related basis, it is well recognised that failing on some issues does not mean that a party has not won overall. Here, the composite controversy was whether or not the Petitioner could properly pursue its complaints in the present proceedings because either (a) the Petition was liable to be struck-out, or (b) the Petition should be stayed.
9. It was common ground that the following provisions of Order 62 rule 4 applied:

“(5) 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.”

10. Mr Imrie placed two further authorities before the Court. He relied primarily, it seems to me, on *F&C Alternative Investments (Holdings) Ltd.-v-Barthelemy & Anr* [2011] 2807 (Ch) where Sales J stated:



“22... where costs have been incurred on issues which are common to a claim which has succeeded and to a claim which has failed, it will often be appropriate simply to make a costs order in favour of the winning party which covers those common issues...”

11. I adopt and am guided by this principle, although it has limited import in the circumstances of this case. Ting Chuan’s counsel’s primary position was that no account had to be given at all to the success achieved by the Petitioner, and that no discount of Ting Chuan’s costs was required. However, his fall-back position (which I adopt) was that the relevant costs principles applicable to whether credit should be given for partial success were to be found in *In re Elgindata Ltd.*[1992] 1 W.L.R. 1207 at 1214 :

“The principles are these. (i) Costs are in the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party’s costs.” [Emphasis added]

12. There was no suggestion that Ting Chuan raised issues “*improperly or unreasonably*” and nothing in the Judgment hints at that. Accordingly, the question which arises for determination in the present case is whether the issues unsuccessfully raised by Ting Chuan involved so significant an amount of time or costs that there should be a proportionate reduction in its award of costs.

The strike-out issues and how they were resolved

13. The strike-out application was based on the following principal grounds which were dealt with in the following portions of the Ruling:

- (a) the Petition failed to disclose a reasonable cause of action (Ruling, 6-28);
- (b) the Petition was an abuse because the Petitioner could adduce no evidence to support a finding that the key grounds for winding-up were made out (a justifiable loss of confidence in management) (Ruling, 29-38);



- (c) the Petition was an abuse because it was a “rehash” of an earlier application for the appointment of inspectors (Ruling, 39-48);
 - (d) the Petition was an abuse because it was being prosecuted for a collateral purpose as illustrated, in particular, by its presentation before the Petitioner had even inspected certain ‘Additional Materials’ provided in the Inspection Application (Ruling, 49-55);
 - (e) the Petition was an abuse because the Petitioner had failed to pursue alternative and more appropriate remedies, both under the SHA and by way of a derivative action (Ruling, 56-60).
14. Ting Chuan did not succeed on issues (b)-(e), to which some 28 paragraphs of the Ruling were devoted. It did succeed in part as regards (a), to which some 22 paragraphs were devoted. Part of the Petition was liable to be struck-out. The remaining claims were found to have been defectively pleaded with a view to sidestepping the arbitration stay application which ultimately prevailed (and to which a further 13 paragraphs of the Ruling were devoted). As it happens, it was this point which overlapped most significantly with the arbitration stay limb of the application. Because it highlighted that the Petitioner’s most viable case properly arose out of the contract containing the arbitration agreement. The other points cannot fairly be viewed as raising common issues in the sense contended by Ting Chuan in reliance upon the above-cited *dicta* from *F&C Alternative Investments (Holdings) Ltd.–v-Barthelemy & Anr* [2011] 2807 (Ch) (at paragraph 22).
15. Mr Lowe QC invited the Court to take into account the extent to which Ting Chuan’s Skeleton addressed issues upon which it failed (paragraphs 39-106) as contrasted with attention given to the statutory stay application (paragraphs 107- 148). This is indeed a valuable tool for assessing the amount of effort which was expended on points which failed.
16. It is clear from this analysis that a significant amount of costs were incurred in addressing points on which Ting Chuan failed.

Should Ting Chuan’s costs be proportionately reduced?

17. My provisional assessment of the appropriate costs order, summarily stated at the end of a judgment which dealt with a full menu of appetising legal points, clearly reflected an unduly superficial assessment of the relevant position. It is ultimately obvious that some reduction in Ting Chuan’s costs is required because the costs of the proceedings were significantly increased by the raising of issues upon which Ting Chuan failed. How does one decide how much the relevant deduction should be? Nourse LJ in *In re Elgindata Ltd.* [1992] 1 W.L.R. 1207 at 1215H-1216A held as follows:

“In my judgment the only fair basis for deciding the part of their costs of which the petitioners should be deprived is to ask how much time and expense



was taken up in dealing only with the allegations on which they failed, I acknowledge the difficulties with which we are confronted in answering that question. An apportionment made by us is bound to be even more rough and ready than one made by the judge.”

18. A very rough and ready way of measuring the increase in global terms is to consider what percentage of the argument was devoted to the issues unsuccessfully pursued by the party which succeeded overall. This approach was found not to be useful in *Elgindata*, but here its utility is essentially common ground. And for these costs purposes it is quite obviously the effort the receiving party deployed in pursuit of points which were rejected which is most relevant, not the effort deployed by the paying party. The most easily accessible indicators of the time spent by Ting Chuan on the failed points are the following:
- (a) **the Judgment:** 28 out of 77 paragraphs dealt almost exclusively with strike-out grounds which failed (36%);
 - (b) **Ting Chuan’s Skeleton:** 67 out of 149 paragraphs dealt almost exclusively with strike-out grounds which failed (45%).
19. This computation takes into account the fact that introductory and background matters were of mixed utility in terms of setting the scene for an analysis of both the points which prevailed and those which did not. The selected range takes into account both the Court’s assessment of the significance of the strike-out points which failed and the actual time spent by Ting Chuan’s counsel in preparing to argue these points. Ting Chuan’s canny concession that if any discount is made to its costs the amount should be 30% falls, as one might expect, below the objectively ascertainable range. In my judgment the appropriate discount in all the circumstances of the present case is the mid-range position between the percentages of the Judgment and Ting Chuan’s Skeleton which dealt with points which failed. And that is 40%.

Conclusion

20. Ting Chuan is awarded the costs of its Summons which succeeded in part. As its costs were significantly increased in the pursuit of points which failed, a proportionate discount of 40% is required. The successful Respondent is accordingly awarded 60% of its costs.



HONOURABLE MR JUSTICE IAN RC KAWALEY CJ
JUDGE OF THE GRAND COURT