

BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHCV 2009/389

BETWEEN:

GRAND PACIFIC HOLDINGS LIMITED

Applicant

and

PACIFIC CHINA HOLDINGS LIMITED

Respondent

Appearances: Mr Mark Forte and Ms Tameka Davis for Pacific China Holdings Limited
Mr Jack Husbands and Ms Julie Engwirda for Grand Pacific Holdings Limited
Mr Jeremy Scott for the former Liquidators of Pacific China Holdings Limited

JUDGMENT

[2010: 24 November; 3 December]

(Litigation – costs – whether applicant liable to indemnify company against costs of liquidation where order appointing liquidators set aside on appeal)

- [1] Bannister J [ag]: On 11 January 2010 on the application of Grand Pacific Holdings Limited ('Grand Pacific') I appointed Liquidators to Pacific China Holdings ('Pacific China'). On 20 September 2010 the Court of Appeal reversed my decision, discharging the Liquidators and making various ancillary orders. In particular, the Court of Appeal ordered Grand Pacific to pay Pacific China's costs of the appeal in accordance with the scale of prescribed costs and referred the costs of the proceedings below back to me for assessment 'including all questions regarding the fixing of the remuneration, costs and expenses of the Liquidators.' Although the Court of Appeal did not in terms order that Grand Pacific pay Pacific China's costs below, that is clearly the

sense of its order and the parties have proceeded on that basis accordingly. In this judgment I will deal first with the assessment of Pacific China's costs of the hearing before me.

Pacific China's costs

(1) Conyers Dill & Pearman ('CDP')

[2] There was no dispute on the quantum of leading Counsel's fees and I accordingly allow those at US\$85,886.30.

[3] CDP have submitted a Statement of Costs claiming a total of US\$95,185 for their own practitioners' fees; and the following disbursements: (1) US\$4,065.48 for photocopying, printing, telephone, etc; (2) US\$265 for courier services; and (3) legal fees for Sidley Austin, Hong Kong Solicitors, in the sum of US\$204,780. I shall deal first with CDP's own claim.

[4] The first item queried by Mr Husbands, who appeared together with Ms Engwirda for Grand Pacific, was an item for one hour of Ms Davis' time on 30 October 2010. The supporting text is: 'Register matter. Email M Chan regarding terms of engagement. Amend engagement letter: US\$515.' This work was done twelve days before service of the liquidator application and is in any event administrative work which does not properly fall within the category of claimable costs. Ms Davis, who argued CDP's claim with great skill, accepts that it must be disallowed and I do so.

[5] There are two further entries for 12 and 25 November respectively totaling US\$901.25, explained respectively as 'Draft email to client; discussion with M Forte; organize folder' and 'Telephone conversation with M C[han] [of Sidley Austin]; email re fees and agenda; draft agenda.' Mr Husbands complains about these charges. He says that there is nothing in the narrative to suggest that they were not concerned with the instructions received on 30 October 2009, which he submits were instructions to give advice on the enforcement of arbitral awards in the BVI (rather than any defence of the liquidator application which, as I have already said, had yet to be served.

[6] It is clear from the narrative of the Statement of Costs that the initial instructions must have been to provide that advice and Ms Davis set about preparing it on 4 November 2009. Such advice is independent of the issues that arose in the liquidator application and Ms Davis rightly accepts that the four hours which she spent upon it on 4 November 2009 cannot be claimed. I therefore disallow the sum of US\$2,060. In my judgment, the 12 and 25 November entries were concerned

with the same advice. That fits tolerably well with the narrative of a schedule of costs provided by Sidley Allen, about which I shall have to say more in a moment, and I accordingly disallow the sum of US\$901.25 referable to 12 and 25 November.

- [7] Mr Husbands also complains about entries for 16, 18, 19, 24, 26 and 27 November and 1 and 3 December 2009 which he submits, from the narrative, all represent further work on the same piece of advice. Bearing in mind that the burden is on the payee party to prove that work done was done in respect of the matter in which it claims and having regard to the narrative (and comparing that with the corresponding narrative in the Sidley Austin schedule) it seems to me on a balance of probability that Mr Husbands is right. I accordingly disallow a further US\$7,844.05 in respect of those entries. I should mention that the entry for 3 December 2009 mistakenly gives a figure of US\$5,103 for one hour's work. This is an obvious error for US\$510.30 and it is the latter figure which I have used in calculating the deduction of US\$7,844.05.
- [8] Ms Davis accepts that a claim for US\$850 for research done on 1 December 2009 on 'possible arrangement/strategy' is not claimable as costs in the liquidator application and I disallow that sum accordingly.
- [9] Mr Husbands suggests that two entries totaling US\$1,655 dated 1 December 2009 were related to the same 'arrangement/strategy/item, but there is nothing to support that. There seems to be a chronological mis-match between CDP's references to conference calls and those of Sidley Austin, but it seems to me that the probability is that by this stage the focus was on the liquidator application. Indeed, Mr Allen, of Sidley Austin started drafting his affidavit in opposition on 2 December 2009. So that I decline to disallow these items.
- [10] Mr Husbands complains about an entry for one and a half hours work by Mr Forte on 9 December 2009 in and about 'internal supervision and settling of final exhibit to serve' and 'drafting letter re service.' He says that this was not partner level work. I accept that submission and reduce this entry to US\$772.50 (1.5xUS\$510) accordingly.
- [11] Mr Husbands next complains that both Mr Forte and Ms Davis were instructed as Junior Counsel to Mr Richard Millett QC on the hearing of the application. Ms Davis points out, rightly, that this was a grave moment for Pacific China and she says and I accept that her particular role was to prepare an accurate note of the hearing that could be sent to the Clients in Hong Kong speedily

after the hearing. She also says that she was more familiar with the bundles. I have hesitated about this, but I think on balance that the gravity of the matter justified the attendance of a senior Junior, so I decline to disallow Mr Forte's fee of US\$5,437.50 for attending the hearing.

[12] In fact, Ms Davis did not finalise her note of the hearing until 4 January 2010. Mr Husbands complains about this. He says the fact that this task was undertaken so long after the hearing (which was attended by Mr Allen of Sidley Austin) shows that it must have been done for internal record or, perhaps, tidying up purposes, rather than for the purpose of rapid transmission to the Clients. I accept this criticism and disallow the sum of US\$901.25 for this item accordingly.

[13] There is an entry for 6 January 2010 (the day after I distributed my judgment in draft) described as 'Internal discussions regarding permission to appeal stay application' (sic). Mr Husbands says that insofar as this item relates to the appeal, it cannot form part of the costs below and should be disallowed accordingly. I accept this submission in principle, but since discussing the prospects for an appeal is integral to any discussion of the prospects of obtaining a stay (which, for reasons I will give in a moment, I consider to be allowable) it seems to me that this item should not be disallowed.

[14] An entry for 10 January 2010 charges US\$850 for 'internal discussions regarding appeal' and 'revisions to stay documents.' While I have accepted above that some discussion of appeal prospects is integral to the making of a stay application, this entry seems to me to be concerned at least in part with the substantive preparations for the appeal itself. Such work is not claimable as costs in the application and for want of any guidance on apportionment I shall reduce this item by one half, or US\$425.

[15] Mr Husbands complains about a number of entries for 11 and 12 January 2010, which in my judgment are attributable solely to the appeal. They total US\$2,225 and I disallow this sum accordingly.

[16] When judgment was formally handed down on 11 January 2010 Mr Forte made an application for a stay. That application was not granted as asked for, although I did make modifications to the usual form of winding up order intended to mitigate, so far as possible, the effects of such an order pending hearing of the appeal. Mr Husbands submits that the stay application failed; that that failure (or at any rate the costs element of the stay application – which were included in the costs

awarded to Grand Pacific) was not appealed and that accordingly he should have the costs of it or at any rate he should not have to pay the costs of it. It seems to me that the answer to this submission is that the application for a stay was properly made as part of the proceedings before me and that the Court of Appeal's order requires me to assess Pacific China's entire properly allowable costs of the proceedings as a whole, including the application for a stay. I do not, therefore, propose to disallow any items insofar as they are properly attributable to the stay application.

- [17] As I have already indicated, however, work done solely in and about the appeal cannot be claimed. I accordingly disallow (roughly) one half of the item for 6 January 2010 ('teleconference re next steps; further discussion on stay; consider Bannister J'), or US\$190; and all entries in Part K of Grand Pacific's Points of Reply Schedule other than the entry for MJF of US\$2,537 on 13 January 2010, totaling US\$8,621.25, or, together with the US\$190, US\$8,811. 25.
- [18] The total of these deductions comes to US\$24,847.80, thus reducing the amount claimed by CDP from US\$95,185 to US\$70,337.20, a reduction of some 25%.
- [19] Although it is a very rough and ready method, it seems to me that that percentage reduction should be reflected in the amount claimed for photocopying, etc, which I accordingly reduce to US\$3,000. I bear in mind that it was CDP who prepared the hearing bundles.

(2) Sidley Austin

- [20] I now turn to the Sidley Austin fees. When the hearing opened all that was before the Court was a breakdown of hours spent by six fee earners giving a total amount on a time spent basis of US\$204,780, or very nearly three times the amount which I have allowed to CDP. After the hearing had been going for some minutes, Ms Davis, who was dealing with this part of the case, produced from among her papers one copy of a document headed 'Sidley Austin – Time Detail', showing in some detail the amount of time alleged to have been spent by that firm in and about this matter. The document was copied and then seen for the first time by Mr Husbands and by the Court. In the judgment distributed to the parties in draft, I expressed disquiet at the late production of this critical document, but I understand that it results from a hitherto prevailing practice not to particularise the make up of the bills of foreign lawyers. Ms Davis was, therefore, merely following established practice. I should say that in the Commercial Division I regard CPR 69B.11(3) as

applying as much to the fees of foreign lawyers as to those of lawyers practising within the jurisdiction. They should be itemised in the same manner. Mr Husbands chose not to ask for an adjournment and dealt with the matter on the hoof, but given the very short time within which he had to consider and respond to the document, I must scrutinise the Sidley Austin costs with particular care so as to ensure that Mr Husbands' Client is ordered to pay only such sums as can be justified.

[21] The disproportionate size of the Sidley Austin fees was rightly recognized by Ms Davis by her immediate concession that they should be reduced by 30%. In my judgment, that is nothing like enough. As a start, it seems to me that since the Sidley Austin fees largely (although not entirely) reflect work done by Sidley Austin in parallel with CDP, the first step must be to reduce the Sidley Austin fees by 25% to reflect the reduction which I have made to CDP's fees. Accordingly, I disallow US\$50,000 before going any further. Next, there is a claim for disbursements of approximately US\$20,000. There is no material explaining the composition of those disbursements, let alone justifying them, and I propose to disallow them in full accordingly.

[22] The fees of instructed foreign lawyers are themselves treated as a disbursement in a BVI assessment. In other words, they have to be justified as a reasonable expense incurred by the BVI lawyers in and about the conduct of the case in the BVI. I accept Mr Forte's submission that in a case involving foreign clients where English is not the first language and where the clients will need to have matters explained to them by local lawyers and to give instructions through local lawyers, the retention of local solicitors is appropriate and proper. I also accept that in the present case Mr Allen of Sidley Austin had first hand knowledge of the arbitration proceedings which were at the centre of the application and that it was accordingly sensible and reasonable to instruct him to prepare the affidavit in opposition. The time sheets show that the preparation of that document took three fee earners (Mr Allen, Ms Chan and Ms Tse) an unspecified number of hours over some nine days.

[23] More work was done in making arrangements for and drafting a guarantee to be deployed at the hearing in an attempt to persuade the Court that this was a sufficient security to justify dismissing the petition. The document did not stand scrutiny, but it seems to have involved Mr Allen, Ms Chan and Ms Tse in an unspecified number of hours of work spread over five days. That work is not a recoverable disbursement.

- [24] Further, Mr Wong spent some nine hours at a cost of approximately US\$2,660 doing research on the law relating disputed debts with reference to Article 5 of the New York convention. That work cannot be justified as a proper disbursement by BVI lawyers.
- [25] Next, Mr Allen spent three days in travel from Hong Kong to the BVI and three days getting back, having done 7.5 hours work on the way out and a further 5.25 hours on the way back. The short schedule at page 12 of Tab 2 of the application bundle indicates that Mr Allen charged for twenty six hours of travelling time (which presumably included the hours actually worked) at his then charge out rate of approximately US\$616 per hour, or US\$16,016. Mr Allen also charged CDP for 13.25 hours spent on 21 December 2009 in 'preparing for hearing, including reviewing skeletons and meetings with Counsel and Conyers; attending hearing emails and telephone discussion with Ms Chan. In my judgment, none of this is a proper disbursement or chargeable to Grand Pacific. Of course his Clients were entitled to have Mr Allen present at the hearing. They are not entitled, in my judgment, to charge Grand Pacific for his having been there. Mr Allen's travelling and attendance on 21 December 2009 represents just over US\$24,000.
- [26] Finally, Sidley Austin charged some US\$11,704 (approximately) in post hearing costs. In my judgment, that cannot stand as a proper and recoverable disbursement in the application.
- [27] I shall accordingly disallow the figure of US\$38,364 (being the aggregate of the figures identified in paragraphs [24] to [26] above). Together with the other sums which I have disallowed, that reduces the overall figure to a little over US\$96,000, less some appropriate deduction in respect of the guarantee. If one hazards that probably involved time costing some US\$5,000, these disallowances reduce the amount claimed to just over US\$90,000. That leaves it for me to assess what of the other work done by Sidley Allen is a justifiable disbursement which it is reasonable and fair for Grand Pacific to pay.
- [28] The justifiable costs, it seems to me, are general client liaison and care and attention (including liaising with CDP) and the production of Mr Allen's affidavit, which would obviously involve consultation with Mr Millett QC. Bearing in mind that from start to finish the matter took a little over two months and assuming that client liaison, etc, justifies eight hours per week of partner time (including keeping up to date with the progress of the matter), one arrives at a figure in the region of US\$40,000. Given that other fee earners would necessarily have been engaged, I propose to

allow a figure of US\$50,000 to cover this element. I am also going to assume that preparation of Mr Allen's affidavit and ancillary consultation justifies 25 hours of partner time, which gives a figure of US\$15,400. I am going to add a further US\$2,500 for other fee earners in respect of that task and award a round figure of US\$18,000 for preparation of the affidavit. That gives an overall figure of US\$68,000, which is similar to the amount which I have awarded to CDP. It is also roughly 75% of the amount claimed by Sidley Austin after the disallowances made in paragraphs [21] to [26] above. These comparisons seem to me to afford a rough check that the figure at which I have assessed the Sidley Allen disbursement is proportionate and reasonable and fair for Grand Pacific to pay.

The Liquidator's remuneration

[29] By the second part of paragraph [6] of its order of 12 October 2010 the Court of Appeal ordered that the Liquidators' remuneration, costs and expenses, including the costs and expenses of complying with the order, should, until fixed by the Court below and paid, operate as a lien on the assets of [Pacific China]. By paragraph 8 of the same order the Court of Appeal ordered that within seven days following the production to Pacific China of an account of what had been paid out to Grand Pacific or to the Liquidators after they were appointed, Grand Pacific must repay to Pacific China all sums so paid out. The account required was duly produced and showed that no sums had in fact been paid out either to Grand Pacific or to the Liquidators.

[30] It emerged at the hearing that the Liquidators and Pacific China had already agreed the amount of remuneration for which Pacific China's assets were to be liable, so that there was no need, as between the Liquidators and Pacific China, for me to assess the Liquidators' remuneration. But it was the primary submission of Mr Forte, who argued this part of the application on behalf of Pacific China, that Grand Pacific should be ordered either to pay the remuneration directly to the Liquidators or (which I think was where the submission finally ended up) to provide Pacific China with an indemnity against it, so that Pacific China could recoup what it was obliged to pay out under the order. I indicated that I would decide that point first but that should I hold that Grand Pacific was obliged to pay or provide an indemnity, I would give it an opportunity to challenge the quantum of the figure agreed between the Liquidators and Grand Pacific, while commenting that I would need some persuading to disturb the figure agreed between Pacific China and the Liquidators.

- [31] By ordering that the Liquidators' remuneration should be secured by a lien on the assets of Pacific China until paid, the Court of Appeal was, in my judgment, ordering that that remuneration was to be paid out of the assets of Pacific China. Although Mr Forte, who argued this part of the application, did not, I think, formally concede as much he rightly did not make any submissions to the contrary. Indeed, the very imposition of a lien necessarily implies an underlying debt and Mr Scott produced authority to that effect¹ during the course of the hearing. It follows that the primary liability for the Liquidators' remuneration, etc, under the Court of Appeal's order rests upon Pacific China.
- [32] Mr Forte does not argue that the order of the Court of Appeal provides for Grand Pacific to meet the remuneration, etc, of the Liquidators between the date of my order and its discharge by the Court of Appeal. He submits, however, that paragraph 8 of the order shows that the Court of Appeal 'conceptually had no problem in ordering the Liquidators' costs to be met by Grand Pacific.' I cannot accept this submission. I read paragraph 8 as being remedial, in the sense that any money paid out to Grand Pacific after my order, primarily in satisfaction of the liability under the arbitration award, but also in respect of the Liquidators' remuneration, was to be repaid to Grand Pacific, in the former case because the award remains under challenge and in the latter case to abide the outcome of the assessment of the Liquidators' remuneration provided for by paragraph 6. Paragraph 8 is not concerned with the *incidence* of liability for the Liquidators' remuneration.
- [33] I do not think that I have any jurisdiction to make an order now fixing Grand Pacific with ultimate liability for the Liquidators' remuneration. I am, after all, with the exception of the matters specifically remitted to me by the Court of Appeal, *functus officio*. All that the Court of Appeal required me to do was to assess the costs and the proper amount to be allowed to the Liquidators by way of remuneration and expenses. It would be very bold of me to assume that that direction permitted me to make an order governing the incidence of the Liquidators' remuneration.
- [34] Nevertheless, in deference to the excellent arguments addressed to me, I shall briefly give my reasons why, if I had been persuaded that I had jurisdiction to do so, I would not have made an order that Grand Pacific should be the party ultimately responsible for the Liquidators' remuneration and expenses.

¹ **Shirlaw v Taylor** [1991] FCA 415 at para [39]

- [35] In the absence of specific statutory provision, there appears to be no inherent jurisdiction in the Court to award compensation (or 'damages') against one party in favour of another for losses (other than litigation costs) suffered as a result of what turns out to be the erroneous grant of final relief by the Court and no authority has been cited to me to the contrary. As I understand it, the Court awards damages or compensation only in respect of actionable wrongs committed by a defendant. This would appear to be the reason why it has been the long standing practice of the Court to extract a cross undertaking in damages (given to the Court, not to the opposing party) when granting interim relief. If the Court was possessed of an inherent jurisdiction to award compensation for losses suffered as a result of orders which it turns out should not, for whatever reason, have been made, there would be no need to insist on cross undertakings. For a history of the origins and purposes of the cross undertaking see *Smith v Day*² (which has to be read together with *Griffith v Blake*³).
- [36] In the case of final orders the court below or the appellate court may order a stay pending appeal, but I know of no case and none has been cited to me where, following a successful appeal, the unsuccessful party has been ordered to compensate the successful appellant for losses flowing, not from the conduct of the unsuccessful party, but from the very existence of the order which has been successfully appealed. Nor is it the practice of courts of first instance, when making a final determination of an issue in favour of one party, to insist upon his undertaking to be liable for losses consequential upon the making of the order in case it is successfully appealed. The explanation appears to lie in the firmly established principle that a final order is treated as determinative until successfully appealed, so that the successful party can safely act upon it, in the sense that all acts done pursuant to the order are valid and effective as done. It does not seem to be the case that the party obtaining the order is liable to the other if the existence of the order itself or acts done pursuant to it, turn out to have caused him loss or prejudice. That is what seems to distinguish the consequences which flow from the grant of a final, as opposed to an interim injunction.

² (1882) LR 21 Ch D 421

³ (1884) 27 CH D 474

[37] Mr Forte relied heavily on the decision of the Inner House of the Court of Session in *Graham v John Tullis (Plastics) Limited*⁴. In that case the appointment of a provisional liquidator had been discharged because the winding up petition in respect of which it had been made was dismissed. The relevant Scottish legislation provided that

'Without prejudice to any order that the court might make as to *expenses*, the provisional liquidator's remuneration should be paid to him . . .and the amount of any expenses incurred by him should be reimbursed:

- (a) if a winding up order is not made, out of the assets of the company;
- (b) if a winding up order is made, as an expense of the liquidation.'

Having approved counsel for the company's recognition of the fact that the reference to expenses which I have italicized in the opening line of the quotation above meant what in the BVI would be described as legal costs, rather than the provisional liquidator's remuneration and disbursements, the Inner House went on to say that 'in an appropriate case' the charges incurred by the company to the provisional liquidator may form part of the legal costs recoverable by the company if the petition for winding up is dismissed. Although the decision as a whole received the approval of Carnwath J in *Re UOC Corporation*⁵, it was not necessary for the purposes of Carnwath J's decision that he approve the passage which I have referred to above.

[38] I would not have derived any assistance from *Tullis* even had I thought that I had jurisdiction to make an order in the terms sought by Mr Forte. For one thing, it deals with a provisional, not a final appointment and turns upon the proper construction of foreign legislation. That part of the decision which treats the remuneration of a provisional liquidator as part of litigation costs appears to me to be unpersuasive. First, because, although the assets of a company stand available to satisfy it, the remuneration of a provisional liquidator is in no sense 'incurred' by a company. Instead, the assets of the company are made liable for its discharge by statutory force. On that basis alone it cannot amount to an expense or disbursement of the company. Secondly, costs ('expenses' in Scotland) means litigation costs. One has only to glance at the relevant provision of the CPR to see that that is so. Collateral loss suffered in consequence of and subsequent to a court order cannot properly be described as a litigation cost.

⁴ [1991] BCC 398

⁵ [1998] BCC 191

- [39] This conclusion seems to me to be reinforced in this jurisdiction by the fact that sub-section 172(4) of the Insolvency Act, 2003 ('the Act'), dealing with provisional liquidators, makes express provision for the Court, where a provisional liquidator has been appointed, but where no liquidator is subsequently appointed on the hearing of the originating application, to order the person on whose application the provisional liquidator was appointed to pay or contribute to the remuneration and expenses of the provisional liquidator. This power exists in addition to the power under sub-section 170(5) of the Act to insist, when the application for the appointment of a provisional liquidator is made, upon the provision of security for his remuneration. The power under sub-section 172(4) may, however, be exercised only where the Court is satisfied either that the applicant misled the Court when making the application or acted unreasonably in making the application. Presumably, the same principles would apply when the Court is invited to enforce any security provided under sub-section 170(5).
- [40] Two conclusions may be drawn from the enactment of sub-section 172(4). The first is that if there was a general power in the Court to compensate for losses flowing from the very making of a court order once that order is set aside, the provision would be unnecessary. The second is that the fact that the Act insists that particular misconduct must be established before the jurisdiction conferred by the sub-section reinforces the conclusion that there is no inherent power to compensate for the direct consequences of orders which turn out to have been wrongly made. If there were such a power, it would be surprising for the Act to go out of its way to put restrictions upon its exercise in the case of provisional liquidator appointments.
- [41] The Act makes no similar provision dealing with the final appointment of liquidators. That seems to me to indicate that it was not intended that the Court should have any such power in respect of final orders. Even if that is wrong, it seems to me to be implicit in the language of sub-section 172(4) that the legislature did not envisage any party coming under any obligation to pay or reimburse a liquidator's remuneration (provisional or final) unless the party at whose instance the order was made had misled the Court or acted unreasonably in making the application. There is no good reason why an applicant obtaining a final order for the appointment of a liquidator should be under any wider liability for his remuneration if the order is set aside than an applicant who obtains a provisional appointment.

- [42] Mr Forte says that because the making of a liquidator application upon a disputed debt is often described as an abuse of the process, Grand Pacific must be taken to have acted unreasonably in the present case. That submission fails to distinguish between error of law and unreasonable conduct in the making of the application, which is what the subsection is plainly directed at – i.e. conduct *in pari materia* with misleading the Court. So that if I thought that there was some power to order compensation when a final liquidator appointment is set aside (which I do not), I would not be persuaded to make such an order unless satisfied at least that the Court had been misled or that there had been unreasonable conduct in the making of the application. Neither applies here.
- [43] For these reasons, even if I was not *functus*, I do not consider that I would have had any jurisdiction to order Grand Pacific to indemnify Pacific China against the fact that the Liquidators' costs and expenses were ordered to be paid out of the assets of Pacific China as part of my order in this case.

Commercial Court Judge

3 December 2010