



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO. 383 OF 2021 (RPJ)

B E T W E E N:

- (1) THE PORT FUND L.P.
(2) GENERAL RETIREMENT AND SOCIAL INSURANCE AUTHORITY**

Plaintiffs

- and -

WALKERS (DUBAI) LIMITED LIABILITY PARTNERSHIP

Defendant

Before: The Hon. Justice Parker

Date of hearing: 18 May 2022

Date of Ruling on costs on the papers following written submissions: 22 July 2022

Draft Ruling circulated: 25 July 2022

Ruling Delivered: 3 August 2022

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220803 - In the Matter of The Port Fund L.P. and another v. Walkers (Dubai) Limited Liability Partnership – FSD 383 of 2021 (RPJ) - Ruling on Costs

RULING ON COSTS

Section 24 (1) and (3) of the Judicature Act (2021 Revision)-O.62, r.4(2)-O.62, r.4(5)-costs considerations-no clear winner or loser-alternative cases run-costs in the cause does justice in all the circumstances of the application

Introduction

1. The application was heard on 18 May 2022. On 27 June 2022, the Court handed down its judgment, finding that the Plaintiffs' claims should be stayed pending the determination of FSD 97 of 2021 (Cause 97) on the following terms:
 - i. The proceedings should be stayed as a whole [§80];
 - ii. The parties have liberty to apply [§80];
 - iii. The Defendant (Walkers) would undertake to notify the Plaintiffs in writing 21 days in advance of any settlement in Cause 97 to allow for any concerns to be raised as to payment arrangements [§89]; and
 - iv. The Plaintiffs should be given the right to make submissions in respect of any relief that might be necessary if the Court finds the Defendant liable at trial in Cause 97 [§90].
2. The Court also indicated that it was minded to order that both parties' costs should be in the cause, inviting either party if they disagreed and wished to do so, to file short written submissions within 14 days from handing down of the Judgment [§92].

3. The Defendant has done so and seeks an award that the Plaintiffs should pay the Defendant's costs of the application on the standard basis, plus interest at the prescribed rate, such costs to be taxed at the conclusion of the proceedings, if not agreed.
4. It advances four main reasons: (i) the Defendant was the successful party; (ii) the Defendant offered in open correspondence to withdraw the application on the basis of an agreed stay on terms consistent with the terms of the stay ordered by the Court; (iii) an award in the Defendant's favour would be consistent with the Court's decision overall; and (iv) the application should not have been necessary in any event, because the present set of proceedings should not have been brought.
5. The Plaintiffs have responded and argue that the appropriate costs order in respect of the application is costs in the cause as the Court indicated it was minded to award.
6. The Plaintiffs say this is the appropriate outcome in circumstances where the primary relief which Walkers sought has been refused and instead a case management stay has been granted. They add that there is a very real prospect that at some point in the future, it may be necessary for the stay of these proceedings to be lifted (as the Court acknowledged at [§88] of the Judgment).
7. The Plaintiffs' alternative case is that Walkers should pay 50% of the Plaintiffs' costs of the Application, and Walkers should bear its own costs.

The law

8. As is well known, Section 24 (1) and (3) of the Judicature Act (2021 Revision) provides that costs are in the discretion of the Court and the Court shall have full power to determine by whom and to what extent costs are paid. That broad discretion is to be exercised subject to and in accordance with Order 62 of the Grand Court Rules.

9. O.62, r.4(2) provides that the overriding objective of the order is that a successful party should recover from the opposing party the reasonable costs incurred in conducting proceedings in an economical, expeditious and proper manner.
10. O.62, r.4(5) provides that if the Court sees fit to make any order as to the costs of any proceedings, it shall order for costs to follow the event, except when it appears that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

Decision

11. I accept the Plaintiffs' essential argument that depending upon the lens through which the outcome is viewed, it could be said that Walkers was not the only successful party. Indeed through their lens the Plaintiffs say they were the successful party. It seems to me that both sides could reasonably claim some victory and vindication from the Judgment.
12. I find that the outcome was not a simple case of winning or losing and Walkers was not the only party which can claim success. The Plaintiffs' claims survive, but have been stayed on case management grounds with the question of how they should be managed in the future dependent on the outcome of Cause 97.
13. It may be that the Defendant's key objective was to avoid defending materially the same claim on two simultaneous fronts against two separate legal teams and by the stay ordered they achieved that objective.
14. However even if it can be properly characterised as a success, the method by which they got there was to run two alternative cases, either to strike out, or in the alternative to stay the proceedings. The Plaintiffs successfully resisted the primary relief which Walkers sought, which was that all of the Plaintiffs' claims should be struck out and/or be dismissed. In the circumstances of the case, some order other than that Walkers should recover its costs of the application should be made.

This is not a case where costs naturally should follow an event where there is a clear overall winner and loser.

15. The Court decided:

" ... this matter can most conveniently and justly be disposed of by considering a case management stay rather than the Court's abuse of process jurisdiction by which Walkers seek to strike out the claims altogether. To debar the Plaintiffs from bringing these claims at all would not in all the circumstances be appropriate when there is another just and convenient remedy available" (see the Judgment at [§70]).

16. Walkers also sought, to the extent necessary, a declaration that the Plaintiffs do not have standing pursuant to section 33(3) of the Exempted Limited Partnership Act to bring derivative claims on behalf of the Fund.

17. In the result the Court decided that it was not necessary to reach a view on the section 33(3) question (see the Judgment at [§66]).

18. I do not accept that a costs award in the Defendant's favour would reflect and be consistent with the Court's decision overall.

19. The Plaintiffs during protracted negotiations offered at various times a partial stay but only on a number of terms which Walkers did not accept and which the Court has now rejected:

"To stay all the claims will in my view secure the just, most expeditious, and least expensive determination of the matter, and would in particular avoid duplication of substantial expense" (see the Judgment at [§84]);

"There seems to me to be no reason to have as a condition of this stay that Walkers should abandon the so-called plaintiff specific defences and its defence based on section

s.33(3). The section 33(3) point is currently awaiting determination by the CICA as I have said... ” (see the Judgment at [§86]); and

“Having reviewed the defences and Mr. Wood’s affidavit, they do not seem to me to be specific to [the Cause 97 Plaintiffs], may therefore be used more widely, and there is no basis to force [the Defendant] to abandon them.” (see the Judgment at [§87]).

20. Again, however, I am not persuaded having reviewed the inter-attorney correspondence that it is fair to penalise the Plaintiffs on the basis that Walkers offered to withdraw the application on terms consistent with the terms of the stay ordered by the Court, or that the Plaintiffs defended the application unreasonably.
21. The negotiations went back and forth on the ‘liberty to apply’ question which was not resolved until weeks after the application was issued and preparation for the hearing was well underway.
22. There was also a lot of back and forth detailed correspondence over the issue of ‘plaintiff specific defences’.
23. After many weeks of these negotiations Walkers decided to proceed with all aspects of its application on 10 May 2022, including its primary case that all of the Plaintiffs' claims should be struck-out. The Plaintiffs acted reasonably in my view in opposing this relief.
24. In the result, at the hearing the Court accepted (as the Plaintiffs had done prior to the hearing) that particular paragraphs of Walkers' Defence in Cause 97 (as clarified by Mr Wood in Wood 2) as pleaded were not plaintiff-specific:

"Having reviewed the defences and Mr Wood's affidavit, they do not seem to me to be specific to KPA and PIFSS in Cause 97, may therefore be used more widely, and there is no basis to force Walkers to abandon them" (see the Judgment at [§87]).

25. However, at the hearing the Plaintiffs also, reasonably in my view, agreed in principle to stay a large part of the claim subject to terms which dealt with protecting their interests in the context of the other limited partners pursuing their claims (see the Judgment at [§81]).
26. As I have recorded, Walkers' primary position at the hearing was that the Plaintiffs' claims should be struck out. The Court decided that to "*debar the Plaintiffs from bringing these claims at all would not in all the circumstances be appropriate*" (see the Judgment at [§70]).
27. It would in my view be unduly harsh to visit upon the Plaintiffs what can be seen in hindsight as the view the Court reached (after argument) that the breach of fiduciary duty claim in Cause 97 is likely to determine the relevant issues between the Plaintiffs in this case and the Defendant one way or another without the need for a separate claim (see the Judgment at [§65]). This was not an inevitable outcome.
28. As it turned out, the hearing may have clarified other issues relating to matters which had been disputed between the parties such as to whether the claims in Cause 97 could be susceptible to a causation defence which may not apply to the Plaintiffs' claims for dishonest assistance (see the Judgment at [§§60-61]) and whether there may be circumstances in which it is appropriate for the stay of the Plaintiffs' claims to be lifted (see the Judgment at [§88]).
29. For the reasons given above there were no clear winners or losers in this case and the Court approaches the matter on the basis of a broad discretion to achieve a fair outcome in all of the circumstances.
30. The Court has carefully considered whether in the circumstances a different order would be appropriate, particularly where Walkers say it will be out of pocket, either permanently or for a number of years, in respect of the application it brought, in circumstances where the Court has found that to put it to the time and expense of dealing with two actions was unjustified.

31. The Court is dealing with the costs of this application and has given Walkers relief from the significant costs risk faced in dealing with two actions.
32. The Court is of the view that a costs order which does justice in all the circumstances of the application is that the costs of the application should be in the cause, so that ultimately whoever prevails in the litigation may recover its costs.



THE HONOURABLE MR JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT