



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

**CAUSE NO: FSD 145 OF 2022 (RPJ)**

**IN THE MATTER OF SECTION 64 OF THE COMPANIES ACT (2022 REVISION)  
AND IN THE MATTER OF THE AVIVO GROUP**

**Before:** The Hon. Raj Parker

**Heard:** On the papers

**Date of Judgment:** 11 January 2023

**Draft Judgment circulated:** 13 January 2023

**Judgment delivered:** 25 January 2023

**HEADNOTE**

*Appointment of Inspectors by the Court-s.64 Companies Act (2022 Revision)-costs-indemnity costs-s.24  
Judicature Act (2021 Revision)-GCR Order 62, rule 4-exercise of discretion-focus on conduct of losing  
party-unreasonable conduct to a high degree-conduct or circumstance which takes the case out of the  
norm-settlement offers.*

## Introduction

1. Avivo Group (the “Company”) applies for indemnity costs following the Court declining to appoint inspectors to examine the affairs of the Company pursuant to section 64 of the Companies Act (2022 Revision). Agricultural Development Fund (“ADF”) resists the application.
2. This decision deals with the order as to costs in respect of ADF’s notice of originating motion dated 1 July 2022 for the appointment of inspectors pursuant to section 64 of the Companies Act (2022 revision). The related Company’s costs of the directions and strike out and ADF’s evidence summonses are to be treated as ‘costs in the proceedings’.
3. The Court has determined this matter on the basis of written submissions.

## Law

4. It is trite law in the Cayman Islands that:
  - (a) the costs of and incidental to all civil proceedings in the Grand Court are in the discretion of the relevant court<sup>1</sup> and that the Grand Court has the full power to determine by whom and to what extent the costs are to be paid<sup>2</sup>;
  - (b) the general rule is that costs should "follow the event"<sup>3</sup>.

5. GCR O.62, r.4(2) and (11) provide as follows:

---

<sup>1</sup> *Judicature Act (2021 Revision), section 24(1)*

<sup>2</sup> *Judicature Act (2021 Revision), section 24(3)*

<sup>3</sup> *GCR Order 62, rule 4(5)*

"(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court ...

(11) The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently."

6. The usual costs order made against an unsuccessful party is that costs are taxed on the standard basis. That is the usual rule: see e.g. GCR O.62 r.4(10); *AHAB v Saad Investments Company Limited*<sup>4</sup>.
7. It is only in exceptional cases that the Court should exercise its discretionary jurisdiction to order costs on the indemnity basis: *AHAB v Saad Investments Company Limited*<sup>5</sup>. The Court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide<sup>6</sup>.
8. In considering the exercise of its discretion to make an order for indemnity costs, the Court should focus on the conduct of the losing party not on the substantive merits of the case. To justify such an award there should normally be an element in the losing party's conduct which deserved a 'mark of disapproval' which involved the conduct being unreasonable to a high degree<sup>7</sup>.

---

<sup>4</sup> [2012] 2 CILR 1 at §15

<sup>5</sup> *Ibid* at [2012] 2 CILR 1 at §§ 9 and 15

<sup>6</sup> *Three Rivers D.C. v Bank of England* [2006] 5 Costs L.R. 714 at §25 Tomlinson J

<sup>7</sup> *AHAB v SAAD* [2013 (2) CILR 344]

9. GCR O.62, r.4(11) has been interpreted by the Court to mean that it must be satisfied that the unsuccessful paying party has conducted the part of the proceedings to which the Order relates: (a) improperly; (b) negligently; or (c) unreasonably ‘to a high degree’<sup>8</sup>.
10. It is not improper to advance a genuine case in what could be said to be in the way of usual litigation which fails as a result of the Court’s rejection of the evidence or its interpretation of the law and in such a case, standard costs ought to be ordered<sup>9</sup>.
11. If there is nothing unusually unreasonable about the paying party’s conduct, the appropriate order is for standard basis costs<sup>10</sup>. Even if the paying party’s conduct can be rightly characterised as unreasonable, if it is not so unreasonable as to be ‘out of the norm’, a standard basis costs order is appropriate.<sup>11</sup>
12. In the ordinary case even when the paying party has conducted its case unreasonably, unless it has advanced a case outside the usual latitude afforded to parties to argue cases which may be seen at the time to be without merit, speculative or weak, a standard basis order will be appropriate<sup>12</sup>.
13. There needs to be some conduct or circumstance which takes the case out of the ordinary which warrants an order for indemnity costs<sup>13</sup>.

---

<sup>8</sup> GCR O.62, r.4(11) as explained in *AHAB v. Saad* [2013] 2 CILR at 346 – 347 and cited in *Talent Business Investments Ltd. v. China Yinmore Sugar Co. Ltd* [2015] 2 CILR 113 at §36.

<sup>9</sup> *Al-Sadik v. Investcorp* [2012] 2 CILR 33; and *Asia Pacific Ltd. v ARC Capital LLC* [2015] 1 CILR 299, *Chadwick P* at §56; both cited in *Talent Business Investments Ltd. v China Yinmore Sugar Co. Ltd* [2015] 2 CILR 113 at §38

<sup>10</sup> *Healy-Upright v Bradley & Another* [2007] EWHC 3161 at §17§

<sup>11</sup> *Ritter v. Butterfield* (unreported, 31 December 2018 at §69)

<sup>12</sup> *AHAB v SAAD* [2013 (2) CILR 344] at § 5

<sup>13</sup> *Three Rivers* *ibid* at §25

14. As Henderson J observed in *Bennett v Attorney General*<sup>14</sup>, § 6:

*"Advancing a [case] which is merely weak or unlikely to succeed is to be distinguished from maintaining a [case] which is manifestly hopeless. The latter can be characterized as unreasonable. The former is a regular occurrence with which every barrister will be familiar. Many litigants, even after receiving a warning from their legal advisers that the claim or defence is likely to fail, prefer to have that determination made by the Court. That is not, in the typical case, unreasonable. Weak cases will succeed from time to time. The litigant is entitled to prefer a judicial determination based upon all of the evidence over the predictions of his advisers which are limited, as they usually are, by not having observed the other side's witnesses under cross-examination. There are also cases which are hopeless and which appear that way to anyone with the requisite legal training. It is open to a judge to determine that it was unreasonable to bring such a claim or advance such a defence. The usual result of such a finding is that the unsuccessful party will pay costs on the indemnity basis....."*

*The assessment of unreasonableness must avoid the wisdom of hindsight. The question is whether it was unreasonable to advance the claim or maintain the defence taking into account what should have been evident to the party concerned at the outset of the trial."*

15. In relation to settlement offers, even where it can be said, with hindsight, that a party was wrong to reject a settlement offer, the mere rejection of the settlement offer will not amount to unreasonable conduct sufficient to justify indemnity costs unless the case being pursued was manifestly hopeless (to use the language of Henderson J), and demonstrably so at the time of the making of the offer.

---

<sup>14</sup> [2010 (1) CILR 478]

16. In *Kiam v MGN Ltd (No 2)*<sup>15</sup> (referred to by Henderson J in *Bennett* (above)), the Court of Appeal declined to award indemnity costs, and instead awarded standard costs, noting at §13:

*“it will be a rare case indeed where the refusal of a settlement offer will attract... not merely an adverse order for costs, but an order on an indemnity rather than standard basis”.*

17. Similarly in *F&C Alternative Investments (Holdings) Ltd*<sup>16</sup>, in response to a submission that the mere rejection of a reasonable offer of settlement had itself been unreasonable conduct, the English Court of Appeal said (at § 69):

*“That is a non sequitur. The position has to be judged at the time of the offer not only by reference to the maker of the offer but also by reference to the recipient. At that time, the claimants were optimistic as to their prospects: and there was no finding by the judge that that was an unwarranted or unjustified view to take. In the event, their high hopes were dashed-a common-place of litigation generally. It transpired that the claimants had assessed the position wrongly. But that is a hindsight call.”*

#### *Determination*

18. ADF’s application traversed novel ground in relation to section 64 of the Companies Act. The Judgment delivered on 15 December 2022 set out some guidance<sup>17</sup>.
19. The Court decided that the grounds which would lead to an order for inspection had not been clearly established. ADF had not shown that its concerns had been ignored or that the Company

---

<sup>15</sup> [2002] 1 WLR 2810

<sup>16</sup> [2013] 1 WLR 548

<sup>17</sup> §§45-62

had concealed material matters<sup>18</sup>. The remedy of appointing inspectors was reserved for cases in which there is a strong likelihood, well founded on a solid and substantial basis, of serious misconduct and /or mismanagement, or concealment, which had not been clearly established by ADF on the evidence.<sup>19</sup>

20. Moreover, there was no demonstrable objective which the Court could see was to be achieved, where alternative remedies were available to ADF<sup>20</sup>.
21. The Company therefore successfully resisted the application and should have its costs paid by ADF.
22. The Court has considered the Company's arguments in support of its case that these costs should be awarded on an indemnity basis.
23. In summary, these arguments were: ADF did not provide the Company sufficient time to respond before filing; ADF did not adequately particularise its concerns so that the Company could adequately respond to such concerns; ADF prosecuted the application unreasonably and procedurally wrongly which led to the incurrence of unnecessary time and costs by the Company; the Company provided fulsome responses to the concerns raised by ADF; ADF had access to all information by virtue of the ADF nominee director; the Company made a number of offers in open and without prejudice correspondence to appoint the inspectors ADF had proposed as independent directors of the Company and to establish a subcommittee formed of directors independent from Regulus to address ADF's concerns; the application was calculated to exert commercial pressure for a renegotiation of constitutional arrangements at the Company and was fundamentally misconceived; and the appointment of inspectors was not the appropriate way in which ADF should have sought relief and the application should not have been proceeded with.

---

<sup>18</sup> § 67

<sup>19</sup> § 73

<sup>20</sup> §74

7

24. The Court has come to the clear view, having considered these arguments, that this was not an application brought which was manifestly hopeless, or litigation conducted so unreasonably as to warrant a 'mark of disapproval' from the Court by way of an indemnity costs order.
25. Having reviewed the evidence concerning settlement offers made by the Company, the Court is not persuaded that ADF behaved unreasonably to a high degree in failing to accept offers.
26. As to the development of the affidavit evidence and the provision of particulars in relation to the application, the basis of the application was not in the Court's view manifestly hopeless, and it was not advanced unreasonably to a high degree.
27. ADF should therefore pay the Company's costs, to be taxed on the standard basis.



---

**THE HON. MR JUSTICE RAJ PARKER**  
**JUDGE OF THE GRAND COURT**