

## BERMUDA SUPREME COURT

### ***IN THE MATTER OF LAEP INVESTMENTS LTD AND IN THE MATTER OF THE COMPANIES ACT 1981***

### ***EMERGING MARKETS SPECIAL SOLUTIONS 3 LTD -v- LAEP INVESTMENTS LTD***

### ***RULING ON APPLICATION TO DISMISS PETITION***

***[2017] SC (Bda) 78 Com (2 October 2017)***

WINDING-UP PETITION – ENFORCEMENT OF ARBITRATION AWARD – PROSECUTION OF PETITION AFTER SUSPENSION OF AWARD – DISMISSAL OF PETITION – ABUSE OF PROCESS – COLLATERAL PURPOSE – DISPUTED DEBT – INDEMNITY OR STANDARD COSTS

#### **Background**

This application formed part of multi-jurisdictional legal battle between the parties in Bermuda and Brazil over the last four years.

#### **The Enforcement Action**

In Bermuda, these winding-up proceedings followed proceedings to enforce a Brazilian arbitration award obtained by the Petitioner against the Respondent (“the Company”) in 2013 requiring the Company to pay sums in excess of US\$73 million (“the Award”) in Civil Jurisdiction 2013:No.84.

#### **The Winding-up Proceedings**

The main events in the winding-up proceedings prior to this action were as follows:

- September 2013: the Petition was presented based upon the Company’s failure to pay the sums due under the Award which the Petitioner was entitled to enforce as a local judgment. JPLs are appointed.
- [December 2013: In Brazil, the Company obtains a Suspension Order staying the Award, which is still in force pending the determination of an annulment application filed by the Company in June 2013.]

- 4 April 2014: the Company is wound up.
- May 2014: the Company files Notice of Appeal. The Official Receiver is appointed as Liquidator of the Company.
- March 2015: Court of Appeal for Bermuda sets aside Orders of September 2013 and April 2014, stays the Enforcement Order and remits the matter back to the Supreme Court.
- April 2015: Court of Appeal delivers Reasons for Decision.
- December 2015: Judicial Committee of the Privy Council refuses leave to appeal.
- [October 2016: In Brazil, the Court of Appeals rules that the Company’s annulment application may be entertained by trial court.]

#### **The Application**

In June 2017, the Company sought an Order:

1. That the amended Petition of Emerging Markets Special Situations 3 Ltd be dismissed;

2. That the Petitioner pay the Company's costs of the Petition up to 4 April 2014.
3. That the Petitioner pay the costs of the provisional liquidation.
4. That the Petitioner pay the Company's costs of the present application.

At the hearing, counsel for the Petitioner had no instructions to oppose the application to dismiss, but only to address the Court on the issue of costs. Accordingly, Kawaley CJ dismissed the Petition on 19 September 2017, but reserved judgment on the legal basis for the dismissal.

The main question in controversy on costs was not whether the Petitioner was liable to pay the Company's costs, but whether the Petition was dismissed on one of three potential grounds, each of which would result in potentially different costs consequences:

1. If the Petition was dismissed on the grounds that it was presented for improper motives, the Company would in principle be entitled to its costs from the date of the presentation of the Petition on an indemnity basis.
2. If the Petition was dismissed on the grounds that it was based on a disputed debt, the Company would only be entitled at best to its costs from the date when the Award was stayed in Brazil (19 December, 2013), but in principle also on an indemnity basis.
3. If the Petition was dismissed on the grounds that it was an abuse for it to remain on the Court's file by reason of non-prosecution, the Company conceded that it would at best only be entitled to the costs of the dismissal application and merely on the standard basis.

### Summary of Judgment

The Court rejected the Company's argument that the Petition was presented for an improper purpose (i.e. to prevent the Company from attacking the Award) because the argument was "*evidentially and legally fundamentally unsound*".

Kawaley CJ concluded that the appropriate ground on which to base the dismissal of the Petition was that its further prosecution became an abuse of process after 19 December, 2013. "*The validity of both the Enforcement Order and statutory demand was parasitic on the effectiveness of the underlying Award, which was suspended on that date under the curial law of the arbitration.*"

He concluded that after 19 December 2013 "*the Petitioner was determined to continue to prosecute the Petition, even though the legal basis for its standing to do so (the Enforcement Order and the statutory demand) had already (as the Court of Appeal held) effectively fallen away.*"

It followed that the Company was entitled to its costs in relation to the Petition (including the costs of the application to dismiss) starting from 20 December, 2013.

With regard to whether the costs should be awarded on an indemnity or a standard basis, Kawaley CJ concluded that in this case they should be awarded on a standard basis. He said "*The present local practice appears to be that indemnity costs are awarded for serious misconduct rather than as a general rule because an abuse of process has been made out.*" Finding no serious misconduct in this case, he awarded costs on a standard basis in accordance with local practice.

However, he offered the following opinion on the approach to be followed in future cases: "*In my judgment, the traditional local approach to indemnity costs in relation to abusive winding-up proceedings is far too lenient. It serves as no real deterrent against the misuse of the Court's winding-up jurisdiction and provides no meaningful support to the obligation of the Court and the parties to further the overriding objective. I see no reason why the English approach...should not in future cases be followed here. Where further prosecution or the presentation of a petition is restrained on abuse of process grounds, the usual rule should be that costs are awarded against the actual or prospective petitioner on an indemnity basis.*"

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.