

Cayman Court provides clarity on costs

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In a costs ruling delivered on 12 March 2021, the Honourable Justice Ramsay-Hale provided welcome clarity on the circumstances in which the Grand Court of the Cayman Islands will make a costs award on the indemnity basis.^[1] A successful party can expect to recover a higher proportion of its costs when an award is made on the indemnity basis (rather than the standard basis) since only costs that are unreasonably incurred or are of an unreasonable amount will be disallowed on taxation, and any doubts as to reasonableness are resolved in favour of the successful party.^[2]

In this case, Zhongzhi Capital (HK) Company Ltd ("ZZHK") had succeeded in its substantive application to rectify the register of members of Geopay Holding Limited ("Company") so as to register ZZHK as the holder of certain shares in the Company in place of Geoswift Holdings Limited ("Geoswift"). Geoswift had pledged its shares in the Company as security in return for a loan advanced to Geoswift by ZZHK. After defaulting on the loan, Geoswift resisted ZZHK's attempts to enforce its security. Pursuant to the terms of the loan, ZZHK also had a contractual entitlement to recover its costs of the rectification application from Geoswift.

Justice Ramsay-Hale concluded that: "*the Court can, in the exercise of its discretion to award costs, where the contractual entitlement is self-evident, order costs on the indemnity basis*"^[3] and indeed, in such circumstances, the Court's discretion "*should ordinarily be exercised so as to reflect that contractual right*".^[4] An indemnity costs award in these circumstances avoids the need for a successful party to pursue its litigation costs in a separate contractual claim.^[5]

In reaching this conclusion, Ramsay-Hale J considered the Court of Appeal's decision in *Weaving Macro Fixed Income Fund Ltd v Peterson*^[6] in which the Court of Appeal made a standard costs award, notwithstanding that the successful parties - the directors of Weaving - had sought an indemnity costs order in reliance on an indemnity provision in the company's articles of association. Justice Ramsay-Hale explained that the Court of Appeal's decision was that "*where the contractual entitlement to be indemnified is not clear, and there was no misconduct on the part of*

the unsuccessful party, costs should be taxed on the standard basis".^[7] In the present case, unlike in *Weaving*, ZZHK's right to be indemnified was clear and the Court therefore awarded ZZHK's costs to be taxed on the indemnity basis.^[8]

Justice Ramsay-Hale's ruling on costs provides helpful guidance as to when an unsuccessful party's conduct of the litigation may result in an indemnity costs award. Her Ladyship observed that while an indemnity costs award usually signifies the Court's disapproval of "*conduct deserving moral condemnation*", the Court may also order a party to pay costs on the indemnity basis "*even if the [party's] conduct was not of such a degree and there had been no moral lack of probity.*"^[9]

Justice Ramsay-Hale referred to the decision of Justice Henderson in *Bennett v The Attorney General of the Cayman Islands*^[10] in which his Lordship distinguished between "[a]dvancing a defence which is merely weak or unlikely to succeed" and "*maintaining a defence which is manifestly hopeless*", confirming that "*the latter can be characterised as unreasonable*". Justice Henderson further observed that a finding that a party's claim or defence to a claim was unreasonable will usually result in an order that the party pay the successful party's costs on the indemnity basis.

Justice Ramsay-Hale concluded that Geoswift, having accepted that an event of default had occurred and that it had delivered the necessary documents to allow ZZHK to enforce the share pledge, had no grounds to challenge ZZHK's application for rectification of the register of members of the Company and its defence was therefore "*utterly meritless*".^[11] Geoswift's decision to challenge ZZHK's application was therefore unreasonable to the requisite degree, and warranted the making of an indemnity costs award.^[12] Accordingly, Justice Ramsay-Hale having found that ZZHK's contractual right to be indemnified in costs was clear, exercised her discretion to award ZZHK its costs on the indemnity basis. Such an outcome was consistent with the overriding objective to deal with matters justly.

Ogier acted for the plaintiffs in these proceedings.

[1] *Zhongzhi Capital (HK) Company Limited v Geopay Holding Limited* (FSD 132 of 2020 (MRHJ), unreported, 12 March 2021).

[2] *Cayman Islands Grand Court Rules 1995*, Order 62, rule 13(2).

[3] *ZZHK v Geopay* [46].

[4] *ibid* [59] (emphasis added).

[5] A judgment upon a contractual claim for costs would not, however, be subject to taxation: *Cayman Islands Grand Court Rules 1995*, Order 62, rule 4(3).

[6] (CICA 10 of 2011, unreported, 23 June 2015).

[7] ZZHK v Geopay [56].

[8] Ibid [60].

[9] ZZHK v Geopay [40] citing AHAB v SAAB investment [2012] (2) CILR 1 and Reid Minty (a firm) v Taylor [2001] EWCA Civ 1723.

[10] [2010 (1) CILR 478].

[11] ZZHK v Geopay [39].

[12] ibid [43].

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Key Contacts



Victoria King

Senior Associate

Cayman Islands

E: victoria.king@ogier.com

T: [+1 345 815 1849](tel:+13458151849)



Oliver Payne □□□

Partner □□□

Hong Kong

E: oliver.payne@ogier.com

T: [+852 3656 6044](tel:+85236566044)



Marc Kish

Partner

Cayman Islands

E: marc.kish@ogier.com

T: [+1 345 815 1790](tel:+13458151790)

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