

The Cayman Grand Court's Financial Services Division: one year on

One year ago, the Cayman Islands introduced a specialised court division to handle financial disputes. *Jeremy Walton* and *Marit Hudson* of *Appleby* assess its progress so far.

On 2 November 2009, the Grand Court of the Cayman Islands commenced the operation of a Financial Services Division (FSD). The aim of the FSD is to more efficiently handle high-profile, complex and document-heavy commercial disputes arising out of the financial services industry in the Cayman Islands. Proceedings in the FSD are governed by the Grand Court (Amendment) Rules 2009 (the Rules).

The FSD was set up in response to an increase in the number of such cases that require dedicated case management tailored to the types of parties, facts and legal issues involved. Since it commenced operations, there have been 349 cases issued in or transferred to the FSD. In addition, there are another 30 awaiting transfer from the Civil Division. The credit crunch and worldwide recession have significantly increased the extent and scale of such litigation.

Implementation of the FSD was also expected to improve the Grand Court's capacity for cases assigned to its other divisions – civil, family, admiralty and criminal.

Following a period of construction and renovation, the FSD now boasts a suite of modernised courtrooms, judges' chambers and party conference rooms, with up-to-date technology mirroring those in onshore jurisdictions. This enables participants to make use of Livenote or similar software systems and videoconferencing facilities.

The registrar of the FSD, a new post established by the Rules, assigns a specific judge to deal with each case within the FSD's commercial caseload from the start to the finish of that case. This has allowed that judge to become more intimately involved with the facts and the issues in dispute and be much more hands-on in the management and adjudication of disputes.

In addition to the assignment of a judge

to each case, the Rules provide wide-ranging responsibilities for the registrar to maintain records and documents within the FSD. The registrar has the power to request attorneys (and any foreign lawyers they instruct, of which they must notify the registrar) to attend before the assigned judge for a case management conference (CMC) at any time. This power has also been extended to the judges themselves (see more below).

The three new judges of the FSD, who were appointed shortly before its commencement, are Angus Foster QC, who has been serving in the Grand Court for a number of years; Andrew Jones QC, who is a long-standing member of the Grand Court Rules Committee; and Sir Peter Cresswell, who is a retired English Commercial Court judge. Together with the Hon Chief Justice Smellie, Mr Justice Henderson and Mr Justice Quin, there are now six judges available to hear cases assigned or transferred to the FSD, reflecting the volume of complex

commercial disputes that now take place in this jurisdiction.

The allocation of a dedicated judge who rapidly becomes intimately familiar with the parties and issues in dispute enables a party in need to seek an expedited litigation timetable when a normal timetable would render a result worthless. In one notable case, the court appreciated the commercial implications that would follow if a claim were not determined before a particular date: it was able to accommodate an exceptionally expedited timetable, determining a number of hotly contested interlocutory applications and running the case through to trial in a matter of months after the action was commenced.

Further, a dedicated judge can force the parties to become more focused on the strengths and weaknesses of their particular case, which in turn can reduce the number of ill-founded applications and costly satellite litigation. This is a welcome step at a time when parties have understandably become more sensitive than ever about the cost of pursuing (or defending) litigation.

Which types of commercial cases have been issued in the FSD?

The Rules provide that various categories of proceedings are deemed “financial services proceedings” and therefore must be issued in the FSD:

(a) mutual funds;

(b) an exempted insurer;

(c) claims for CI\$1million (€938,000) or more arising from breach of a contract of insurance;

(d) certain financial services regulatory laws;

(e) certain applications under the Trust Law, and claims for breaches of trust or fiduciary duty, where the trust is worth CI\$1million or more;

(f) the winding up of companies and other applications pursuant to the Companies Law;

(g) any application for the dissolution of a mutual fund formed as a partnership;

(h) certain breach of contract or breach of duty proceedings by or against a professional service provider;

(i) applications for evidence pursuant to a letter of request issued by a foreign court;

(j) applications concerning local and international bankruptcies;

(k) enforcement of a foreign judgment or arbitral award.

Pursuant to transitional provisions, during the course of 2010 a number of pending cases falling within one of the above categories were compulsorily transferred to the FSD by the registrar. (The chief justice may review transfer decisions and their terms, and has the power to substitute or vary the decision of the registrar.) In other cases, the

registrar invited parties to apply to transfer existing cases to the FSD; following such an invitation, it has frequently been the case that the parties have agreed between themselves that a matter should be transferred to the FSD and the costs of doing so be split between them as permitted by the Rules.

Court fees and any *ad valorem* fees already paid are deducted from the fixed fee of CI\$5,000 due for issuing in or transferring to the FSD. These fixed fees credit the parties with three days of court hearings in the case, for which a daily fee of CI\$750 is otherwise payable. In the event that the parties cannot agree upon transfer, the registrar has been proactive in determining the transfer and fees split in accordance with default provisions set out in the Rules.

Parties issuing proceedings in the FSD have enjoyed the benefit of not being required to pay *ad valorem* fees, which represents a significant saving of up to CI\$15,000 in applicable cases.

In addition, some litigants of their own motion invoked a catch-all discretion in the court to transfer to the FSD matters which, although not strictly within the definition of financial services proceedings, were considered appropriate in all the circumstances to be tried by a judge in the FSD. These instances demonstrate a recognition by litigants of the cost

benefits afforded by FSD-style case management for significant commercial disputes.

Appeals from the FSD

Cases in the FSD were also affected by the Court of Appeal (Special Sittings) Rules 2009 which came into force on 1 January 2010. These Rules allow any party to any civil proceedings (which includes those in the FSD) to apply for a direction that allows a special sitting of the Court of Appeal. Presently, the Court of Appeal only sits in Cayman for three weeks, three times per year. However, a party may now apply in writing to the Court of Appeal for a special sitting outside of these periods. If the court agrees to direct a special sitting, it attracts a fee of CI\$20,000.

This procedure allows significant commercial matters to incorporate the hearing of interlocutory appeals without significantly disrupting the underlying proceedings in the Grand Court. It has already been invoked by appellants on several occasions, most notably in the multi-billion-dollar fraud case *AHAB v Saad Investments Company Limited and Others*.

Practice Direction No 1 of 2010

In September 2010, a Practice Direction was issued to allow for the registrar to fix a hearing date at the request of an applicant and simply notify the parties of

it, rather than fix a hearing date in deference to the availability of the parties or their attorneys. It means that the FSD judges' diaries take precedence over those of the instructed attorneys, which ensures maximum efficiency. This was also a significant step in ensuring that recalcitrant defendants are not able to abuse the usual listing process for the Grand Court to delay the occurrence of hearings.

The Practice Direction provides that the assigned judge may convene a CMC whenever he thinks fit and this can take place by videoconference or even by telephone, especially if foreign lawyers and leading counsel have been retained by any of the parties – which is more than likely in complex commercial disputes. The Practice Direction also helpfully empowers an FSD judge to hear parties' interlocutory applications by videoconference or telephone when he is away from the Cayman Islands.

In this connection, during 2010 there have been various demonstrations of FSD judges delivering hands-on justice to ensure that everyday business and external events do not hinder the timetables they have set for disputes to progress through the FSD.

One example relates to the Icelandic ash cloud fiasco in May 2010, which resulted in various European countries shutting down their airports for safety reasons: the court agreed to hear opening submissions from

counsel in London and cross-examination of witnesses who were stuck in Europe and were unable to travel to the Cayman Islands. This saved the parties from losing their trial dates altogether due to reasons outside their control which would have resulted in considerable wasted costs and inconvenience.

Conclusion

The FSD has been a welcome addition to the Grand Court from a litigant's perspective and following its one-year anniversary has shown marked changes to the delivery of justice in the Cayman Islands in complex commercial disputes. The separation of heavy commercial matters for management by a specific judge has proved to be a success and has increased overall efficiency. At the same time, the FSD judges have already produced a considerable body of jurisprudence through the timely delivery of reasoned judgments on significant legal issues. Litigants have been encouraged by seeing the FSD judges dedicate significant time and attention to the management and disposal of their assigned cases, which has also promoted the settlement of cases and reduced the overall time and cost of litigation in this jurisdiction.

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