



Guide to the Costs of Litigation in the Cayman Islands

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PREFACE

Generally speaking a successful litigant can expect to recover some or all of his legal costs from the losing party in legal proceedings in the Cayman Islands. This Appleby Guide outlines the process that litigants must follow, in the absence of agreement about costs, to determine the amount that the losing party should pay and how this is enforced.

This Guide is for information purposes only. Readers who are concerned about their exposure to costs, whether their own or those of another party, in connection with litigation in the Cayman Islands are encouraged to consult Appleby directly.

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INTRODUCTION: RECOVERABILITY OF LEGAL COSTS

A successful litigant in the Cayman Islands in inter partes proceedings will generally be entitled to recover from the losing side his/her reasonable costs, legal and other, incurred in conducting the proceedings in an economical, expeditious and proper manner. The principle that the ‘loser pays’ will apply by default unless the Grand Court orders otherwise. The Grand Court has power to determine whether, by whom, and to what extent costs are to be paid.

Special considerations apply in relation to the recoverability of the costs incurred by trustees, personal representatives and those involved in company liquidation proceedings (such as an official liquidator, or a creditor petitioning to wind-up an insolvent company). To the extent that these office holders are party to any proceedings in their capacity as such, they will generally be entitled to payment of their costs out of the fund of assets held by the trust, the estate or the company as the case may be.

BASES FOR RECOVERING COSTS

Where the Grand Court has made an order in respect of costs, the actual amount recoverable will be ascertained in one of the following ways:

- By agreement between the parties. This is the most straightforward basis if it can be achieved: the parties simply agree between themselves the amount of costs that will be paid pursuant to a costs order without further involvement of the court (though there are exceptions, such as the situation where proceedings have been brought on behalf of a person under a disability – in which case the costs agreed must be sanctioned by the court). Parties can also make contractual provision for how the costs of litigating any future dispute between them will be met, and the Grand Court will generally exercise its discretion to give effect to that contractual provision (there is a presumption that costs payable pursuant to such contractual provision are reasonably and properly incurred and payable on the indemnity basis).
- By the plaintiff claiming fixed costs where this is available, that is, a sum that is prescribed by the Grand Court rules. Fixed costs can be claimed, for example, where the court has given a judgment in default, and certain debt actions. The prescribed amounts recoverable by way of fixed costs are so small that the right to claim them will usually be waived in favour of assessment or ‘Taxation’ (see further below).
- By assessment by the court. The party in whose favour a costs order is to be made is entitled at his option either to an order that such costs shall be assessed by the Judge or on Taxation if not agreed between the parties. Where the party opts for assessment by the court the Judge will make his own assessment of the amount of legal fees and disbursements which a reasonable litigant is likely to have incurred and award that amount. The Grand Court Rules set modest upper limits on the amount of costs that can be awarded on assessment, and for this reason a successful party will generally opt for Taxation of its costs on any substantial piece of litigation.
- By a process called Taxation. In any sizeable piece of litigation the Taxation process will be invoked in the absence of agreement on costs between the parties. The Judge will usually make a declaration of entitlement to costs in favour of a party, and leave the detailed assessment generally to a court official appointed by the Chief Justice called the Taxing Officer (though all Judges of the Grand Court, as ex officio Taxing Officers, may also conduct detailed assessments). The Judge has a discretion, however, to

tailor an order for costs as (s)he sees fit, and can give directions on how some or all of the costs are to be paid and by whom.

TAXATION ON THE 'STANDARD' AND 'INDEMNITY' BASES

In general there are two distinct bases of Taxation provided for in the Grand Court Rules: the standard basis and the indemnity basis. The difference between them relates to how the Taxing Officer resolves any doubt over the recoverability of an item of cost. On the standard basis the benefit of the doubt is in favour of the losing party, while on the indemnity basis the successful party gets the benefit of the doubt.

In inter partes litigation a successful litigant's costs will be taxed on the standard basis by default, and the indemnity basis will only apply if expressly ordered by the court. Indemnity costs orders are exceptional in inter partes litigation, and are reserved for circumstances where the party against whom the costs order is made has conducted the proceedings improperly, unreasonably or negligently, and the court wishes to express its disapproval. On the other hand, where the costs of proceedings are to be met out of a fund (for example, in respect of certain office holders in liquidation proceedings or in a probate or trusts context) the court will usually make an order that the costs be taxed on the indemnity basis.

ITEMS RECOVERABLE AS 'COSTS'

Items of expenditure incurred by a litigant that can be recovered as 'costs' include attorney's fees, court fees, fees charged by expert witnesses and reasonable traveling and hotel expenses for any witness traveling to Cayman to give evidence. However, any expense is claimable as a disbursement under the Grand Court Rules so long as it was reasonably and properly incurred by the successful litigant's attorney in the course of conducting the proceedings, and it was not an expense which would customarily be included in the overheads reflected in an attorney's hourly rates (the latter is subject to detailed provision in the costs rules).

There are, however, the following important restrictions on recoverability under the Rules:

- caps on the recoverable hourly rates of attorneys (this restriction applies only to Taxations on the standard basis). The rules allow recovery of attorneys' fees at rates prescribed by reference to the attorneys' post-qualification experience. These rates are significantly below prevailing market rates.
- foreign attorneys' fees are not generally recoverable unless incurred in obtaining expert evidence of foreign law (this restriction does not apply where costs are to be paid out of a fund on the indemnity basis). The fees of leading counsel admitted to practise in the Cayman Islands will be recoverable, subject to the restrictions on hourly rates and any duplication of work done by local attorneys, but they are not recoverable if incurred prior to the date of admission to practise in the Cayman Islands.
- the costs of local attorneys communicating with foreign attorneys, including leading counsel prior to the date of their admission, are not recoverable.
- travel and hotel expenses of any foreign counsel, whether or not admitted to practise in the Cayman Islands, are not recoverable (though in exceptional circumstances the court may disapply this restriction).

The overriding principle behind these restrictions, set out expressly in the rules, is that a paying party should not have to pay more because the successful litigant has engaged foreign attorneys than (s)he would have been required to pay if the successful party had employed only local lawyers.

The upshot of the foregoing restrictions on standard basis Taxations is that a successful litigant will, as a rule of thumb, recover in the region of 40 to 50% of the legal costs (s)he incurs in the proceedings.

THE TAXATION PROCESS: THE BILL OF COSTS, APPLICATION TO THE TAXING OFFICER AND THE COSTS CERTIFICATE

The rules provide that Taxation of a party's Bill of Costs must be commenced within 3 months of perfection (sealing) of the order for costs. Time does not start to run for these purposes from the date the order for costs was made, unless that also happens to be the date on which it was perfected. In outline the procedure leading up to and including Taxation involves the following steps:

- The successful litigant submits a detailed Bill of Costs to the paying party, who has 21 days within which to respond with any objections to the items of cost claimed. Failure to respond within 21 days entitles the claimant to apply to the Taxing Officer for a costs certificate in default for the full amount claimed. Because of the 3 month deadline for commencing Taxation, the Bill of Costs should be submitted by the claimant more than 21 days before the deadline to enable the paying party to respond within the period prescribed by the rules.
- In responding to the Bill of Costs the paying party sets out which items of cost are agreed and which s(he) objects to, and gives any detailed reasons for such objection.
- If the parties cannot agree on the amount of costs recoverable following this response, the claimant commences formal Taxation by making an application to the Taxing Officer and paying the necessary court fees (one set by the rules and also an ad valorem fee based on the amount in dispute). The claimant may also submit to the Taxing Officer written submissions in response to any detailed objections provided by the paying party to the Bill of Costs, and the paying party in turn may submit written submissions in reply to those of the claimant.
- The Taxing Officer proceeds to conduct the Taxation of the Bill of Costs by making an examination of the claimant's attorneys' files. The process is inquisitorial, and the Taxing Officer may request further information and supporting material for any particular item of cost.
- Following review of the files and the materials submitted by the parties, the Taxing Officer issues his decision in the form of a Costs Certificate setting out the figure that the paying party must pay. The Taxing Officer does not provide reasons for his decision as set out in the Costs Certificate.

REVIEW OF TAXATION BY A JUDGE

If any party is dissatisfied with the amount of the Costs Certificate issued by the Taxing Officer (s)he may apply to a Judge to review the Taxing Officer's decision. The application for review must be made within 14 days after the decision to be reviewed or within such other period as may be fixed by the Taxing Officer, and the

applicant must deliver to the Judge and all parties affected a concise written statement of objections. Thereafter affected parties have 14 days within which to submit a reply to the applicant's statement of objections.

The Judge's review of the Taxation is inquisitorial, and the Judge may receive further evidence and may exercise all the powers which he might have exercised on an original taxation.

APPEALS TO THE COURT OF APPEAL

Any party that is dissatisfied with the decision of the Judge following his/her review of the Taxation can apply to the Judge for leave to appeal to the Court of Appeal, but only on points of construction of general importance.

FEES/COSTS OF TAXATION

Costs incurred on the Taxation procedure itself are in principle recoverable but are strictly capped in the rules. The maximum recoverable on a Taxation conducted by the Taxing Officer is CI\$1,000, and CI\$2,500 on Taxations conducted by a Judge (in his/her ex officio capacity as a Taxing Officer). These caps often do not reflect the legal costs involved in preparing for a Taxation which must be met by the parties themselves.

Where a dissatisfied party has applied for review of a Taxation by a Judge the rules expressly provide that the Judge has the power to award costs in respect of the proceedings before him or her.

ENFORCEMENT

The Costs Certificate issued by the Taxing Officer is enforceable in the same way that an order of the Grand Court for the payment of money is enforced as a judgment debt. There are a variety of methods including: a writ of fieri facias (addressed to the court bailiff requiring him to seize the property of the debtor in order to pay the debt, interest and costs), garnishee proceedings, attachment and charging orders, the appointment of a receiver, a writ of sequestration and, in rare cases, an order of committal for contempt of the Grand Court.

WASTED COSTS ORDERS

The Grand Court also has power to make 'wasted costs' orders against litigants (and their attorneys in suitable cases) where it appears that anything in the proceedings has been done (or omission made) improperly, unreasonably or negligently by or on behalf of that party.

ALTERNATIVE FUNDING ARRANGEMENTS: CONDITIONAL FEE AGREEMENTS AND ATE INSURANCE

The promotion or support of litigation by a third party who has no legitimate interest in the proceedings, and the support of litigation by a third party in return for a share of the proceedings, are prohibited in the Cayman Islands (known as 'the rule against maintenance and champerty'). As a result 'contingency fee agreements' or any kind of agreement whereby an attorney shares in the proceeds of any monetary award made by the court are prohibited. 'Conditional fee agreements', on the other hand, whereby an attorney's fees are only paid in the

event of a successful claim, either at the attorney's standard rates or subject to a reasonable 'uplift', are permissible with the prior approval of the Grand Court.

It may in principle be possible for a litigant to obtain insurance at or after the start of proceedings to cover his exposure to the costs of those proceedings (so-called 'after the event' or 'ATE' insurance), but there is no developed market among local insurance providers for the provision of such coverage.

SECURITY FOR COSTS

A defendant to proceedings brought against him who is concerned about the plaintiff's willingness and/or ability to satisfy any costs order in the defendant's favour can apply to the court for an order that the plaintiff provide security for the defendant's costs. Where an order for security for costs is made the plaintiff will usually have to deposit a specified sum with the court which would be available to meet any future costs awards in favour of the defendant.

APPEALS

The costs rules for civil proceedings in the Grand Court also apply in respect of proceedings before the Court of Appeal. In general, a successful appellant can expect to receive an award for payment of his costs from his opponent in respect of both the appeal and the proceedings before the court below.

CONCLUSION

Litigation is not cheap, and a litigant's exposure to costs, whether his or her own or those of the opposing party, is an important factor to be borne in mind in any cost-benefit analysis informing overall strategy in litigation of any complexity.

For more specific advice on the costs of litigation in the Cayman Islands, we invite you to contact the following:

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