IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 134 OF 2022 (NSJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)
AND IN THE MATTER OF UPHOLD LTD

BETWEEN:

1. WILLIAM LAGGNER
2. BEARING VENTURES LLC
3. WEST END CAPITAL II LLC
4. CHARLES SIMMONS
5. PETER KEARNS
6. MICHAEL ZAITSEV

Petitioners

- and –

1. UPHOLD LTD
2. ADRIAN STECKEL
3. UPHOLD HOLDINGS LLC
4. ASP CAPITAL SUB I INC
5. AMHERST HOLDINGS LIMITED

Respondents

SUMMARY
(not part of the judgment)

Winding up petition - liability for costs of strike-out applications – applications for indemnity costs and payment on account of costs

JUDGMENT ON COSTS ISSUES

Introduction

1. On 25 April 2024 I handed down my judgment (the ***Judgment***) dismissing the Second Respondent's, the Third Respondent's and the Fourth Respondent's (***R2 – R4***) summons (the ***R2-R4 Summons***) to strike out the Petitioners' petition (the ***Petition***) to wind up the First Respondent and granting the Fifth Respondent's (***R5***) summons (the ***R5 Summons***) for an order that the application in the Petition for a buy-out order against it be struck out but directing that R5 remain a party to the Petition because R5 may be affected by the relief which may be granted on, and so as to be bound by the Court's ultimate decision on the issues raised by, the Petition (to allow the Court to make orders against R5 ancillary to and consequential upon any orders subsequently made on the Petition in relation to R2-R4).

2. On 10 June 2024 I made an order (the ***Order***) giving effect to the Judgment. [8]- [10] of the Order deal with costs as follows:

> *"8. Whereas the Petitioners have indicated their intention to apply for (i) costs of the R2-4 Summons against the Second to Fourth Respondents, and (ii) an interim payment on account of such costs under GCR Order 62, rule 4(7)(h), the Petitioners and the Second to Fourth Respondents shall have 7 days from the date of this Order to file evidence which is strictly relevant to the Petitioners application for an interim payment on account of costs of the R2-4 Summons (the "Interim Payment Application").*
>
> *9. All parties wishing to do so shall file costs submissions (including relating to the Interim Payment Application) within 14 days of the date of this Order, limited to seven pages.*
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> *10. The costs of the R2-4 Summons (including the Interim Payment Application) and the R5 Summons shall thereafter be determined by the Court on the papers without an oral hearing if the Court considers it appropriate to do so following receipt of the costs submissions."*

3. On 24 June 2024 the Petitioners filed their written submissions on the costs of the R2-R4 Summons and the R5 Summons and a bundle of documents which included the Petitioners' evidence in support of their application for an interim payment, being the Second Affidavit of Ms Tia Whittaker (***Whittaker 2***), a paralegal with the Petitioners' attorneys, Travers Thorp Alberga, which exhibited

a breakdown of the Petitioners' total legal costs relating to the R2-R4 Summons and correspondence between the parties' attorneys on costs.

4. On the same day R2-R4 filed their written submissions on the costs of the R2-R4 Summons. R2-R4 relied on the First Affidavit of Ms Rosie Offord, a legal secretary with Campbells, the attorneys for R2-R4, to which was exhibited a bundle of correspondence between Campbells and Travers Thorp Alberga. Also on 24 June, R5 filed its written submissions in relation to the costs of the R5 Summons.

5. There are three main issues to be dealt with:

(a). the costs of and associated with the R2-R4 Summons. The Petitioners seek an order that R2-R4 pay their costs to be taxed on the standard basis if not agreed. R2-R4 seek an order that the costs of the R2-R4 Summons be reserved or be costs in the Petition.

(b). the costs of and associated with the R5 Summons. R5 seeks an order that the Petitioners pay their costs to be taxed on the indemnity basis if not agreed. The Petitioners' position is that the Court should either make no order as to costs or an order that the Petitioners pay R5's costs insofar as they relate to the strike out application and that R5 pay the Petitioners' costs insofar as they relate to R5 remaining a party to the Petition. R5 seeks an order for immediate taxation of these costs.

(c). the Petitioners' application for an interim payment. The Petitioners seek an interim payment from R2-R4 in the sum of US$175,000, representing 50.55% of the total amount of their costs to be assessed at taxation, and on order for payment within 14 days of the Court's order. R2-R4 say that if the Court rejects their primary submissions as to the costs order to be made on the R2-R4 Summons and makes an order that they pay the Petitioners' costs on the standard basis, those costs should be taxed at the conclusion of the proceedings with no interim payment ordered. If the Court is against R2-R4 as to the need for an interim payment, they submit that any interim payment should be no more than 25% of the Petitioners' costs claimed.

6. As I have noted, [10] of the Order stipulated that the costs issues be determined by the Court on the papers without an oral hearing "*if the Court considers it appropriate to do so following receipt of*

the costs submissions." In circumstances where none of the parties has requested a further oral hearing and where costs and Court time will be saved, it seems to me to be appropriate to dispense with a further hearing and to deal with the costs issues on the papers.

7. I have concluded that:

(a). R2-R4 shall pay the Petitioners' costs of and associated with the R2-R4 Summons to be taxed, if not agreed, on the standard basis (on the usual basis, at the end of the proceedings).

(b). the Petitioners shall pay R5 its costs of and associated with the R5 Summons to be taxed on the indemnity basis if not agreed. There will be an order for immediate taxation.

(c). R2-R4 shall make an interim payment to the Petitioners (in respect of the costs of the R2-R4 Summons) in the sum of $83,546. Payment is to be made within 28 days of the date of the order giving effect to this judgment.

The costs of and associated with the R2-R4 Summons

8. The Petitioners submit that they succeeded (the R2-R4 Summons was dismissed) and that the usual rule that costs follow the event should apply. They only seek an order for costs on the standard basis.

9. R2-R4 submit that a decision on who should pay the costs of the R2-R4 Summons should be deferred until after the trial and the Court's decision on the Petition. The Court should either leave the decision on costs until then (by reserving costs) or tie the entitlement to costs to the outcome of the Petition (by ordering that costs be costs in the Petition). They say that it will be open to the Court following trial to find that even though the Petitioners succeeded in resisting the strike-out application, they should not be entitled to such costs because the factual allegations upon which such resistance was founded were baseless or the proceedings were an abuse as the pleaded concerns were not legitimately held by the Petitioners.

10. I accept the Petitioners' submissions on this issue. The strike out application made in the R2-R4 Summons involves a discrete and separate application (independent of the Petition) which the Petitioners won. The strike-out application involved an assessment of whether the Petition should

be allowed to go to trial. I decided that it should be allowed to do so. Even if the Petition is ultimately dismissed that would not affect the fact that the Petitioners have successfully defended a discrete application to stop the Petition in its tracks. They should have their costs of and associated with the R2-R4 Summons to be taxed, if not agreed, on the standard basis.

The costs of and associated with the R5 Summons

11. R5 submits that costs should follow the event and that it was the successful party on the R5 Summons. The substantive relief sought by it in its strike-out application was an order for the Petitioners' claim for alternative relief against it to be struck out and it was clearly and completely successful in this. R5 said that this was made clear by [2] of the Order ("*the R5 Summons is granted*").

12. The Petitioners argue that the net outcome of R5's Summons was a partial victory for R5 and a partial victory for the Petitioners. They say that they succeeded in resisting R5's application that it be removed as a party to the Petition. Therefore, there should be no order as to costs. Alternatively, there should be two separate costs orders. They should be entitled to their costs insofar as they relate to the element of the R5 Summons that sought R5's complete removal from the Petition.

13. I agree with R5 that they were the successful party and that they should be paid their costs of and associated with the R5 Summons. R5 achieved substantially all it sought by having the application for a buy-out order against it struck out. The claim for relief against it has, as it sought, been removed. It only remains a party to the Petition for the limited purpose of being subject to orders ancillary to any relief ultimately granted against R2-R4 and to be bound as a shareholder by any issues decided.

14. R5 says that the Petitioners' conduct in relation to the R5 Summons comes within the threshold for indemnity costs in GCR O.62, r 4(11). R5 submits that the Petitioners conducted themselves "*improperly, unreasonably or negligently*" and should be liable for costs on the indemnity basis. R5 accepts that it needs to show that the Petitioners' conduct has been "*out of the norm*" (see Chief Justice Smellie's judgment in *Talent Business Investments Ltd v China Yinmore Sugar Co Ltd* [2015 (2) CILR 113] at [41]).

15. R5 argues that the Petitioners adopted and pursued a hopeless claim for relief against R5 despite repeated warnings from both R5 and importantly the Court as to the flaws in the Petitioners' claim as pleaded and despite several opportunities to amend the Petition to address those issues. Their conduct can be characterised as unreasonable and out of the norm. The hopelessness of the Petitioners' position was clearly identified, R5 submits, at [179] of the Judgment where I said that *".... in my view the Petitioners' claim, based on the facts asserted in the Amended Petition, for a buy-out order against the Fifth Respondent is plainly unsustainable as the likelihood of the Court exercising its discretion to grant the relief claimed is so remote that the case can be described as hopeless.*" R5 also noted that I had said at [178] of the Judgment that the Petitioners' case in relation to the buy-out order was "*far too thin and limited*."

16. R5 says that the fact that the Petition did not establish any basis for a buy-out order against R5 had been clearly raised by R5 with the Petitioners repeatedly including in the context of the hearing of the summons for directions in 2023 (the ***SFD Hearing***).In giving judgment after the SFD Hearing on 16 February 2023 (the ***SFD Judgment***) the Court had acknowledged the serious issues with the Petitioners' claim against R5 and made it clear that the Petition did "*not plead facts from which it could be concluded that [R5] (or Mr Chen) were parties to the alleged conspiracy or plan to acquire control of the Company, or facts which establish the terms and nature of Mr Chen's alleged agreement with Mr Steckel. It would therefore be wrong, in my view, to treat [R5] (let alone Mr Chen) as a party to the underlying dispute*" (at [55]) and that it did "*not adequately make out a case relating to the involvement of Amherst (or Mr Chen) in the alleged takeover plan to justify treating it as a party to the proceeding*" (at [6(c)]). At the Directions Hearing, the Court had agreed with the Respondents' submissions that the Petition was in need of further particularisation and was "*in parts unclear and unspecific, such that…the Proposed Respondents reasonably struggle to understand the case made against them*." The Court had given the Petitioners the opportunity to amend the petition on the basis that "*the most cost effective and fair way to proceed is to require the Petitioners…to deal with the deficiencies*" and gave clear judicial guidance (at [66] of the Directions Judgment) as to the amendments required to the Petition, including detailed guidance in relation to the claim against R5 and complaints about Mr Chen. Despite the clear, detailed guidance given by the Court the amended Petition when filed on 28 March 2023 failed adequately to address these matters. Instead, it introduced a new, unparticularised allegation that R5 had participated in the conduct of which the Petitioners complained.

17. R5 submits that this conduct took this case out of and beyond the norm for GCR O.62, r 4(11) purposes. Unusually in this case the Petitioners, having been provided with clear judicial guidance as to the specific failings of their case against R5 which needed to be addressed and given repeated opportunities to remedy those failings unreasonably chose to press ahead with a very thin and ultimately hopeless case and put R5 to the expense of having the hopeless claim for relief against it removed and struck-out from the Petition.

18. The Petitioners cited the judgment of Justice Parker in *Frabran Holdings Limited and Ors.v Daventree Trustees Limited and Ors* (unreported, 27 March 2024) where he had said that "*indemnity costs are only awarded in cases where the conduct of a party or the circumstances of the case are such that the matter can fairly be viewed as 'outside of the norm'*" and that "*it is not fair to penalise a party because a case has been advanced which was comprehensively lost, or which was unlikely to succeed*." They also relied on the judgment of Justice Carter in *Velma Sully & Louis-Heratd Sully v Fidelity Bank (Cayman) Limited* (unreported 27 May 2024) in which she had said that "*The Court must find some special or unusual conduct on the part of the losing party in order to justify a departure from the ordinary costs order*" and that "*In order to award costs on the indemnity basis this court would have to be satisfied that the conduct complained of was unreasonable to a high degree. Indemnity costs should be awarded only in the most severe circumstances. Such costs are not awarded where the conduct is merely wrong or misguided in hindsight or even to be implied from a tenuous claim being brought before the Court… The Plaintiffs are not to be penalised for having the audacity to initiate or oppose proceedings.*"

19. The Petitioners submit that their claim against R5 was not unusual, unreasonable or out of the ordinary in any way. They say that it is important to remember that the question of whether R5 should be joined and remain as a party was in issue at the SFD Hearing on 30 January 2023 and that the Court had directed in the SFD Judgment that R5 be joined and remain as a party despite R5's opposition. The Petitioners submit that had the claim for a buy-out order against R5 been clearly flawed it would have been obvious to the Court at the SFD Hearing and the claim would and should not have been allowed to proceed at that stage.

20. I agree with R5.

21. It is not the claim which is the focus of the inquiry but the Petitioners' conduct in the proceedings and when pursuing the claim. This is an unusual case because, as R5 points out, the serious

weaknesses in the Petitioners' claim for buy-out relief against R5 were clearly spelled out by me in the SFD Judgment but despite that, in order to give the Petitioners the opportunity to reconsider their position and remedy the deficiencies in their pleaded case, and not wishing to form a final view on the merits of the Petition before the Petitioners were given the chance to reflect further and make appropriate amendments, I allowed them the opportunity (and they were therefore directed) to prepare an amended Petition.

22. Since the Petitioners were to be given the opportunity to amend the Petition and it remained possible that they would do so in a manner that justified seeking a buy-out order against R5 it was necessary for R5 at that stage to remain a party to the Petition. The failure to strike out the claim for relief against R5 upon hearing the summons for directions therefore does not assist the Petitioners.

23. The deficiencies in and my concerns regarding the Petitioners' pleaded case in relation to R5 could not have been more clearly and starkly explained. R5 has referred to and I have already quoted from the key passages in the SFD Judgment (see [6(c)] and [55] in particular).

24. The Petitioners were, as I say, given the chance to reflect upon and reconsider their case against R5 and, in light of the deficiencies identified by the Court, decide whether they could plead a case based on reasonable grounds. As the Judgment makes clear, the Petitioners were unable to do so:

> *"178. .....But it seems to me that the Amended Petition should have been explicit about what the Petitioners allege as to Mr Chen's and the Fifth Respondent's state of knowledge and awareness, why their conduct was sufficient to justify a buy-out order and what facts are relied on for this purpose. The Amended Petition's treatment of this aspect is far too thin and limited. The Fifth Respondent's role in the account of the alleged misconduct in the Amended Petition is only indirect and peripheral.*
>
> *179. Accordingly, in my view the Petitioners' claim, based on the facts asserted in the Amended Petition, for a buy-out order against the Fifth Respondent is plainly unsustainable as the likelihood of the Court exercising its discretion to grant the relief claimed is so remote that the case can be described as hopeless. That claim must therefore be struck out."*

25. Despite the clearest warnings from the Court, the Petitioners chose to press ahead with a case which they were unable properly to support. In my view this constitutes unreasonable conduct justifying an award of indemnity costs in relation to the costs of and associated with the R5 Summons. The Petitioners' conduct can fairly be viewed as outside of the norm and unreasonable to a high degree

that justifies a departure from the ordinary costs order. An order for costs on the indemnity basis is justified and required to protect R5 (as Justice Asif noted at [4] in *The Armand Hammer Foundation Inc v Hammer International Foundation and Others* (unreported 6 November 2024) *"….. an order for indemnity costs is compensatory, not punitive, in nature…..The effect of an award of indemnity costs is therefore more closely to reimburse the receiving party for the actual costs that they incurred in the proceedings*").

26. R5 seeks an order for immediate taxation. It notes that GCR O.62, r. 9(1) provides that in the ordinary course costs are to be taxed at the conclusion of the cause or matter in which the proceedings arise but that GCR O.62, r.9(2) permits the Court to depart from that general rule if it appears that all or any part of the costs ought to be taxed at an earlier stage. R5 submits that because it is no longer required to actively participate in the Petition and the claim against R5 has been struck out, r.9(2) is engaged and there are very clear reasons why any costs awarded in favour of R5 should be taxed at this stage.

27. R5 says that making such an order is in accordance with the approach set out by Justice Kawaley in *Fortunate Drift Limited v. Canterbury Securities Limited* (unreported, 10 June 2020) (***Fortunate Drift***). Justice Kawaley considered when a forthwith order will be appropriate in the case of a costs order made on an interlocutory application and identified the following factors as relevant (to be considered against the specific facts of each case): (a) whether the relevant interlocutory costs were incurred in relation to a discrete issue within the wider proceedings viewed as a whole; (b) whether the paying party has acted unreasonably in any relevant way in relation to the application to which the interlocutory costs order relates; (c) whether the proceedings as a whole have a long time to run and (d) whether being required to pay the interlocutory costs forthwith before the end of the litigation would be for any reason unfair, having regard to the overriding objective of GCR O. 62. R5 submits that each of Justice Kawaley's factors are engaged in the present case since R5's strike-out application related to a discrete issue; the Petitioners' conduct has been unreasonable; the wider proceedings are at an early stage and have a long time to run (the Petition has already been on foot for 2 years and has not progressed at speed) and there would be no unfairness to the Petitioners if a forthwith order is made.

28. I agree. There will be an order that in the absence of agreement of the amount to be paid the taxation of R5's costs of and associated with the R5 Summons shall take place immediately.

The Petitioners' application for an order against R2-R4 for a payment on account of the costs of the R2-R4 Summons

29. GCR O.62, r.4(7) provides that "*The orders which the Court may make under this rule include an order that a party must pay ….. (h) where the Court orders the paying party to pay costs subject to taxation, a reasonable sum on account of costs, such sum to be assessed summarily.*"

30. The Petitioners, in reliance on this sub-rule and the figures provided in Whittaker 2 (to which is exhibited a summary schedule (the ***Summary Schedule***) of the Petitioners' costs prepared after having carried out an initial review of their incurred costs limited to those that relate to the R2-R4 Summons), seek an interim payment from R2-R4 of US$175,000. This sum represents 50.55% of the total amount of the costs claimed by the Petitioners, being US$346,220.74. The Petitioners seek an order for payment to be made within 14 days of the Court's order.

31. The Petitioners note that the Court's jurisdiction to order an interim payment has been considered by Justice Kawaley in his judgment in *Al Sadik v Investcorp Bank BSC* (unreported, 6 August 2019) at [16]-[25], by the Court of Appeal *in Scully Royalty Ltd v Raiffeisen Bank International AG* [2022 (1) CILR 572] and in a number of subsequent cases. They say that orders for the payment on account of costs have been made in cases involving a just and equitable winding up petition following an unsuccessful strike out application (citing Justice Doyle's judgment in *In the matter of Aquapoint LP* (unreported 14 October 2022)). The Petitioners rely on the judgment of Justice Asif in *The Armand Hammer Foundation Inc v Hammer International Foundation and Others* (unreported 24 April 2024) (***Armand Hammer***) as setting out the proper approach and methodology to be adopted when assessing the quantum of a payment on account.

32. The Petitioners submit that a payment on account is appropriate and justifiable in this case. They note that taxation of their costs will (absent an order of the Court to the contrary, which they do not seek) not take place until after the trial of the Petition (per GCR O.62, r.9(1)) which they say will at the earliest only occur during next year and that they should not have to wait until then to be paid at least a proportion of the costs which the Court has ordered be paid to them.

33. R2-R4 make two main responses. First, they argue that this is not a proper case for ordering a payment on account. Second, they say that even if it is, the amount of the interim payment should be substantially reduced below the sums claimed by the Petitioners.

34. R2-R4 argue that this is not a proper case for a payment on account for a number of reasons. First, given the interlocutory nature of the R2-R4 Summons, the general rule that interlocutory costs be taxed and paid at the conclusion of the cause or matter applied, so that the Petitioners could not say they are being kept out of their money only by reason of the need to undertake a taxation, since they may lose at trial and face a considerable adverse costs order. Further, the Petitioners will suffer no prejudice as their claim is funded by a third-party funder and there is no suggestion of an interim payment being necessary to avoid stifling their claim.

35. In addition, R2-R4 say that if the Petitioners fail at trial, there is a real risk that R2-4 will not be able to recover costs against the Petitioners (none of whom are resident in the Cayman Islands). The Petitioners' only known assets in the jurisdiction are their shares in the Company (which may be disposed of or drop in value by the time of a taxation following trial). Although the Petitioners have indicated that an after-the-event insurance policy is in place they have refused (despite repeated requests) to provide any particulars as to the insurer, the insured parties, the quantum and scope of such coverage. The Court cannot therefore be satisfied on the evidence before it that the Petitioners will be able to meet an adverse costs award following trial, even if there is a set-off against any interim (over) payment. In such circumstances, an interim payment was inconsistent with GCR O.62 r.4(2) (see *Fortunate Drift No. 1* at [23]). R2-R4 argue that this is also not an exceptional case like *Kuwait Ports Authority* (where only 25% of the total costs were ordered) since none of the factors relevant to the exercise of the Court's discretion in that case are present here. Indeed, a trial is expected within 6-9 months, the costs in question are modest, and there is a substantial risk the Petitioners will be unable to meet any adverse costs after trial. By contrast, R2-4 have assets of significant value in the jurisdiction being their shares in the Company.

36. As regards quantum, R2-R4 submit that the amount of any interim payment should be heavily discounted in light of:

(a). the risk (which R2-R4 say gives rise to a real prospect) that the Petitioners will face a substantial adverse costs liability following trial (R2-R4 noted that at [153] of the Judgment I had warned the Petitioner "*that they remain subject to a substantial costs risk if they press ahead and ultimately fail to establish their case at trial*") and that it would be wrong in this case – even if the Court decides not to reserve all costs until after and pending the outcome of the trial – to require R2-R4 to make an interim payment before the trial.

(b). the wholly inadequate evidence relied upon by the Petitioners, which does not satisfy the evidential burden set by this Court in *Al Sadik* at [25(i)] (*"a summary assessment of the appropriate interim payment amount must obviously be possible and sufficient supporting material (e.g. a draft bill of costs or a breakdown of incurred costs) must be placed before the Court)*"). They say that the Summary Schedule (at page 1 of exhibit TW-2) contains no particulars as to the work performed by any of the attorneys for the Petitioners (as is required in a bill of costs), nor does it attempt to apportion time between work-streams for which costs are not recoverable (including notably the R5 Summons and the validation summons filed by the Company). R2-R4 submit that the Petitioners have failed to discharge the evidential burden in relation to their costs incurred.

37. As regards the first issue, it seems to me that this is a proper case for making an order for an interim payment.

38. I note and apply the principles applicable to the jurisdiction, and the exercise of the Court's discretion, to order an interim payment so clearly and elegantly articulated by Justice Kawaley in *Al Sadik* at [25]. As Justice Kawaley said, the principle that a successful party should be paid some of his costs immediately and before taxation is the governing and predominant principle articulated by the interim payment on account of costs rule and the purpose of the rule is to enable the Court to avoid the injustice of delayed payment of all costs until the total amount is determined upon taxation. GCR Order 62 rule 4 (7) (h) contains an implicit starting assumption that an interim payment should be made, which implicit assumption has less weight than an express statutory presumption and can be displaced on the facts and by the circumstances of a particular case.

39. It seems to me that the fact that the costs to be taxed arise in relation to an interlocutory application is not determinative. R2-R4 are clearly right that it remains possible that the Petitioners may lose at trial and face a considerable adverse costs order and that the reason why the costs of interlocutory applications are generally taxed only at the conclusion of the proceedings is to allow the parties' cross-liabilities to pay costs incurred during the course of and at the end of the proceedings to be set off. But the risk of an adverse costs order at trial does not, in my view, of itself justify a refusal to order an interim payment. The costs order against R2-R4 has been made and the starting assumption is that an interim payment should be made. There need to be facts and circumstances which displace the assumption and show why making an interim payment order would in all the

circumstances be unjust and unfair, in particular because of the prejudice, or risk of prejudice, to the paying party (R2-R4).

40. I note that Mr Roger Ter Haar QC, sitting as a deputy High Court judge, dealt with this issue in his judgment in *Benyatov v Credit Suisse Securities (Europe) Ltd* [2020] 1 W.L.R. 2913 and rejected the paying party's submission that an interim payment order should not be made:

> *"27. The defendant submits that in the event that the claimant succeeds in his amendment application it is highly likely that he will be required to pay the defendant's costs of, and occasioned by, the amendments.*
>
> *28. In my view, it would be wrong for me to deny the claimant his entitlement to an order for an interim payment now because of a costs order which may be made in the future. It seems to me that the appropriate course is to deal with the implications of any costs order which may be made in future as and when that order is made."*

41. This judgment was not cited by the parties in their written submissions in this case and so I do not place reliance on it, save to note that Mr Ter Haar QC adopted a similar approach to the approach that I consider to be appropriate.

42. I am not satisfied that there is evidence before the Court as to the prejudice that R2-R4 will suffer that justifies a refusal to make an order for an interim payment now. R2-R4 have raised concerns in correspondence and their written submissions as to the Petitioners' financial resources and ability (and the availability of assets in the jurisdiction) to pay an adverse costs order made after trial of the Petition. I agree with the Petitioners that the risk that the Petitioners will be unable to satisfy an adverse costs order made following the trial of the Petition does not justify a refusal to make an interim payment order in respect of the costs of the R2-R4 Summons. Impecuniosity or irrecoverability risk is, however, relevant in relation to the risk that the amount of the interim payment turns out to be too high and the Petitioners are required to repay the overpayment of interim costs (pursuant to GCR O.29, r.17).

43. I dealt with this issue in my judgment in *Re Trina Solar Limited* (unreported, 9 August 2024) (not cited by the parties on this application). At [35] I concluded that:

> *"I accept that the Court has the power to impose or attach terms and conditions to an interim payments order to address the Irrecoverability Risk. Irrecoverability Risk is not just relevant to quantum, although it can be taken into account and addressed by fixing an*

> *appropriate amount for the interim payments so as to remove or minimise the risk that there will be an overpayment. If Irrecoverability Risk can be addressed by fixing the interim payments at an appropriate amount then there will be no need to go on to consider whether additional protections for the party paying them are needed and whether to require the interim payments to be paid into Court (as explicitly permitted by GCR O.29, r.13(1)) or paid subject to other terms such as for the payments to be held in another type of escrow account."*

44. In *Trina* I followed Justice Mangatal's characterisation in *Re Qunar Cayman Islands Limited* (Unreported, 8 August 2017) of what had to be shown to establish irrecoverability risk. She had held (at [90]) that in that case there was no "*genuine risk that the Applicants [the Dissenters in this case] would not be able to repay any interim amounts ordered*."

45. In the present case, R2-R4 have not adduced any evidence on these issues. In any event, the Petitioners have (albeit once again only in correspondence and in written submissions) answered these concerns and challenges by stating that they have an after-the-event insurance policy and that they own between them approximately 5.5m shares in the Company which can fairly be valued, by reference to the "*recent*" trading price of the shares on the secondary market, at approximately of $3 per share, at over $16m (representing assets within the jurisdiction). While R2-R4 have complained that they have not been provided with particulars as to the after-the-event insurer, the insured parties, the quantum or the scope of such coverage, it seems to me that the Petitioners have done enough to show that there is no genuine or material risk that they will be unable to repay an overpayment of the interim payment. Further, the concerns raised by R2-R4 can be taken into account when determining the quantum of the interim payment, to which issue I now turn.

46. I have recently set out my view on the proper approach to be adopted by the Court when determining the proper quantum of an interim payment in a judgment handed down after the parties filed their written submissions in this case. This is my judgment in *Jafar v Abraaj Holdings and others* (FSD 203 of 2020, unreported, 1 November 2024) (***Jafar***). At [69]-[71] I explained the position as follows:

> *"69. GCR O.62 r.4(7)(h) empowers the Court to order payment of "… a reasonable sum on account of costs, such sum to be assessed summarily." Utilising the evidence presented, the Court must identify a reasonable sum within the range that it considers to be the likely full amount which the receiving party will be allowed on taxation. The figure should be a reasonable estimate of the likely recovery and the aim of the exercise of the Court's discretion is to balance the injustice of the*

receiving party being kept out of money to which it is entitled against the risk of prejudice to the paying party of an overpayment.

70. The Court must assess whether and if so what percentage discount should be applied to the total sums claimed by the receiving party. There is no hard and fast rule. It depends on the evidence. It is likely that there will be some reduction on the basis that the full amount will not be recovered on an assessment. The discount to be applied will depend on the view and impression that the Court forms as to the reasonableness and nature of the total costs claimed and of particular cost items that are likely to be subject to a discount on an assessment.

71. As the quotation above from [13] of Justice Asif's judgment [in Armand Hammer] sets out, the learned Judge concluded that the better approach was to apply the discount to the total costs claimed rather than to a figure which was already discounted to reflect potential reductions on taxation. The core question remained what the Court considered to be on a summary assessment a reasonable estimate of the likely recovery that the receiving party will make on taxation (on the standard basis). This could best be done by assessing the matters and factors that would result in a reduction on taxation from the total costs claimed and determining an appropriate discount percentage to capture these and take them into account. The practice of discounting costs by 35% where taxation was to be on the standard basis was based on a rough rule of thumb view of what could be expected in most taxations on such basis. If there were no particular reasons for concluding that in the case before the Court the costs claimed were likely to result in an out of the ordinary reduction on a taxation it would probably be appropriate to apply that discount. But the Court will always wish to be cautious so as to protect the position of the paying party (although there is no suggestion in this case that Fund IV would be unable to repay any overpayment) and to take account of the summary nature of the assessment which it is making. This is why Justice Asif was right in my view to caution against using the two-stage approach since doing so requires the Court at the second stage to focus on the additional matters and factors that justify (only) an increased discount above those covered and catered for by the rule of thumb discount applied at the first stage.

47. [5] of Whittaker 2 states that the Summary Schedule "*is a breakdown of the Petitioners' legal costs and disbursements relating to the [R2-R4 Summons]*." The Summary Schedule contains two tables: one for professional services and one for disbursements. In the former, the table contains the name of three fee-earners, and for each fee-earner their charge-out rate, the number of hours spent and the total charged by each fee-earner (and the aggregate for all fee-earners). It states that Mr Patel spent 139.90 hours at a charge-out rate of $750 per hour; Mr Huskisson spent 141.40 hours at the same charge-out rate and Mr Valentin KC spent 136.90 hours at the hourly rate of $900 per hour. The total amount for fee-earner time is $334,185.00 (with disbursements of $12,035.74). But the Petitioners have not provided any commentary on or further explanation of the fee-earners' work to allow the Court to form a view on the relationship between time spent and the task being undertaken. I would usually expect to see, if an itemised draft bill of costs is not available with a

record of each time recording and what task the relevant fee-earner had undertaken (which I accept is not necessary), a breakdown and explanation of the work done at least by reference to workstreams or the tasks undertaken under broad headings. There needs at least to be a summary of the work undertaken (broken down into separate periods if the fees were incurred over a long period). In *Jafar*, for example, the party claiming the interim payment adduced in evidence a fee summary broken down into different periods which identified which fee earner worked during the relevant period and which contained for each period a narrative listing the tasks undertaken during each period. Without such assistance the Court is unable to test the reasonableness (whether reasonably incurred and reasonable in amount) and proportionality of the fees incurred, save at a very high level of generality by reference to its understanding of the issues in dispute and the documents filed with the Court. In these circumstances, the Court needs to adopt a cautious and conservative approach. I can accept that dealing with the R2-R4 Summons, for the reasons given by the Petitioners, would legitimately have involved a substantial amount of time but in my view in the absence of the further breakdown of the costs claimed as I have mentioned, I consider that in the present case, applying a summary assessment, a reasonable estimate of the likely recovery that the receiving party will make on taxation (on the standard basis) is 25% of the total costs ($334,185.00) claimed by the Petitioners. This is the maximum sum that R2-R4 submitted should be ordered and yields a figure of $83,546. I have considered whether to adjust this further to take account of the irrecoverability risk raised by R2-R4 but consider that in light of what the Petitioners have said regarding the value of their shareholding in the Company (and the amount of the interim payment to be made) there is no genuine or material irrecoverability risk and a further downward adjustment is not in all the circumstances required.

48. The Petitioners seek an order for payment within 14 days. It seems to me that 28 days is in this case a reasonable and more appropriate period.

The Hon. Justice Segal
Judge of the Grand Court, Cayman Islands
5 December 2024