



IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD NO. 203 OF 2020 (NSJ)

BETWEEN:

ABDULHAMEED DHIA JAFAR

Plaintiff

and

(1) ABRAAJ HOLDINGS

(in official liquidation)

(2) GHF GENERAL PARTNER LIMITED

(in its capacity as general partner of GHF Fund LP (formerly Abraaj Growth Markets Health Fund LP) and GHF Fund (B) LP (formerly Abraaj Growth Markets Health Fund (B) LP))

(3) THE GHF GROUP LIMITED

(formerly The Abraaj Healthcare Group Limited)

(4) ABRAAJ GENERAL PARTNER VIII LIMITED

(in its capacity as general partner of Neoma Private Equity Fund IV LP (formerly known as Abraaj Private Equity Fund IV LP))

Defendants

IN CHAMBERS

Appearances: Mr Michael Bloch QC instructed by Nelsons on behalf of the Plaintiff

Mr Peter Sherwood of Carey Olsen on behalf of the First Defendant

Mr Stephen Atherton QC and Sarah Tresman instructed by Walkers on behalf of the Second and Third Defendants

Mr Andrew Ayres QC instructed by Ogier for the Fourth Defendant

Heard: 29-30 November 2021

Further evidence filed: 13 December 2021

Draft judgment circulated: 11 January 2022

Judgment delivered: 17 January 2022



HEADNOTE

Costs orders to be made following leave to amend (by way of a complete redrafting of) the Plaintiff's statement of claim – should costs be taxed on the indemnity or standard basis? – the proper approach to be taken where allegations of fraud, dishonesty and conspiracy are withdrawn otherwise than shortly before the trial – whether a percentage-based costs order should be made – whether to order that taxation take place forthwith – whether to order a payment on account and if so on what basis

JUDGMENT

Introduction

1. This is my judgment dealing with the costs and other consequential issues arising on the Plaintiff's application for leave to amend his SOC in these proceedings. In my judgment dated 15 December 2021 I explained why I would grant the Plaintiff's application for leave to amend (on condition that two amendments be made to the Plaintiff's Concise Statement of Claim) and set out the form that the amendment should take. This judgment deals with the remaining issues that arise on the Plaintiff's application, namely whether the Court should order that the undertakings sought by the Plaintiff should be given and the appropriate costs orders. In this judgment I use the same defined terms as those set out in my earlier judgment.
2. The Plaintiff has agreed to pay to the Defendants, to be taxed on the standard basis if not agreed, their costs of and occasioned by the amendments and any costs which are only referable to those claims which the Plaintiff no longer wishes to pursue. As I understand it, there was also no dispute that if the Court decided to order the Plaintiff to pay costs, the Court should order that interest on costs be paid at the rate of 2.375% per annum from the date of payment by the relevant Defendant of the fees and expenses covered by the order until the date of the Court's order and thereafter at the judgment rate of interest of 2.375% per annum until the date of payment (in accordance with the Judgment Debts (Rates of Interest) Rules (2021 Revision)). However, the Defendants do not consider this to be sufficient. They seek different and additional orders. The following issues arise for determination:



- (a). can and should the Court dispose of the costs issues now or wait, as the Plaintiff argued was necessary, until the CMC scheduled for 23-24 March 2022?
- (b). if the Court is satisfied that the costs issues should be dealt with now, should the Defendants' costs be taxed on the indemnity basis?
- (c). whether or not costs are to be taxed on the standard or indemnity basis, should the Court order that the GHF Parties and the Fourth Defendant be paid a percentage of their taxed costs incurred to date in the whole proceedings in the action, or, as the Plaintiff contended, only those taxed costs referable to the claims (or facts and allegations) made in the SOC which the Plaintiff had withdrawn and no longer wished to pursue (or rely on)? On this issue, Mr Sherwood, acting for the joint official liquidators of the First Defendant, pointed out at the hearing that he did not have instructions as to whether to seek a percentage-based costs order and noted that the First Defendant had not filed evidence of its costs to date. Mr Sherwood requested that if I decided to make a costs order on that basis, the First Defendant be given leave to make an application for such an order at a later date and after the handing down of this judgment.
- (d). should the costs be taxed forthwith?
- (e). should the Plaintiff be ordered to make a payment on account of the costs of the GHF Parties and the Fourth Defendant, and if so, what is a reasonable sum which the Plaintiff should be required to pay?
- (f). if a payment on account is ordered, should the GHF Parties and the Fourth Defendant be required to undertake to the Plaintiff that they will exercise all reasonable care, and take all reasonable steps, to ensure that they are at all times in a position to meet their liabilities and contingent liabilities including their contingent liabilities relating to any judgment that the Plaintiff may be awarded on his claims as well as any overpayment of costs paid on account?



3. I have decided that:
- (a). the costs issues can and should be disposed of at this stage and it is both unnecessary and undesirable to wait until the CMC in March next year.
 - (b). the Plaintiff must pay the Defendants' costs to be taxed on the standard and not the indemnity basis, if not agreed.
 - (c). the Plaintiff must pay (i) the Defendants' costs of and occasioned (or caused) by the amendments and (ii) the Defendants' costs in respect of the withdrawn claims, and of investigating and pleading to the facts and allegations which were included in the SOC but which are not included or restated in the Concise Statement of Claim, to the extent that those costs were and can be treated as wasted.
 - (d). taxation of these costs shall take place at the end of these proceedings and there shall be no order for taxation forthwith.
 - (e). the Plaintiff shall make a payment on account of these costs to the GHF Parties in the sum of US\$338,235.66 and to the Fourth Defendant in the sum of US\$236,544.13 (calculated as 25% of 50% of the GHF Parties' and the Fourth Defendant's historic costs claimed on this application on the assumption that costs are to be taxed on the standard basis). These payments shall be made within 28 days of the date of the order made to give effect to this judgment.
 - (f). no such undertaking is required.

The nature and extent of the amendments

4. Since the question of which costs orders are to be made are affected by the nature and extent of the amendments made to the Plaintiff's case, it is convenient to start by considering the parties' submissions on this point.

5. The Plaintiff said that there were three main factual topics which arose on the SOC which will not arise on the Concise Statement of Claim. First, there was what was referred to in the SOC as the systematic fraud, a fraud which was pleaded as relating to the Abraaj Group as a whole and dating back to 2014 (see [2] and [3] of the SOC). Secondly, there were the activities of the Abraaj Leadership (see [44] of the SOC). Thirdly, there were the dealings between the Abraaj Group and the Plaintiff which were relevant to the issue of the cancellation of the loans under UAE law (see [27] to [236] of the SOC). The Plaintiff noted that a positive case was pleaded as regards the relevant UAE law, which the GHF Parties had not admitted in their defence (at [270(4)]). The Plaintiff said that he hoped that it will not be necessary to investigate any of these three factual topics on the basis of this amended case, although he accepted that whether this proved to be correct would at least in part depend on how these and the related proceedings were subsequently conducted and developed.

6. The GHF Parties argued that as a result of his amendments to the SOC and reliance on the Concise Statement of Claim the Plaintiff had:
 - (a). discarded (i) his cause of action in unlawful means conspiracy; (ii) the previous articulation of the cause of action in deceit; (iii) his proprietary claim, said to have arisen under UAE law, to monies received by the Third Defendant; (iv) his claim to monies received by the Defendants, which monies were said to be subject to a constructive trust as being the fruits of a fraud, (v) the claim to monies received by the Defendants, which monies were said to be subject to a constructive trust following rescission of the loans he alleged he had made and (vi) the cause of action based upon knowing or unconscionable receipt (the GHF Parties labelled these and I shall define them as the ***Withdrawn Claims***).

 - (b). amended and re-articulated the claim against the GHF Parties based in deceit and amended the claim against the Third Defendant in unjust enrichment (the GHF Parties labelled these, and I shall define them, as the ***Pursued Claims***).

 - (c). introduced a new cause of action in unjust enrichment, which was now asserted against the Healthcare Fund (the GHF Parties labelled this, and I shall define it, as the ***New Claim***).



7. The GHF Parties submitted that there was only a limited overlap between the Withdrawn Claims and the Pursued and New Claims. This was because (a) while the claim based in deceit had been one of the many elements of the Plaintiff's previous claim in unlawful means conspiracy (as the alleged unlawful means), the unlawful means conspiracy claim had been withdrawn and the vast majority of the elements of that claim no longer appeared in the Concise Statement of Claim (that is all the elements save for the alleged deceit were withdrawn); (b) the claim in deceit was now premised on a different factual matrix (including reliance on a different implied oral misrepresentation, different particulars of falsity, different allegations of reliance, and different allegations of loss); (c) while the alleged unlawful means conspiracy had been one means by which the Plaintiff had sought to impose a constructive trust over the monies received by the Third Defendant, the Plaintiff no longer alleged that a constructive trust arose on this basis, such that those issues no longer appear in the Concise Statement of Claim; (d) the allegation that the Plaintiff had rescinded the loans, and that a constructive trust had been imposed on the loan monies as a consequence of the alleged rescission, was no longer pursued and there was no material overlap between those (withdrawn) allegations and the Pursued Claims and the New Claim; and (e) while the personal and proprietary claims had in common the Third Defendant's receipt (allegedly) in bad faith of monies said to constitute the traceable proceeds of the loans, the Plaintiff no longer made a proprietary claim to the monies received by the Third Defendant (as a matter of UAE or Cayman Islands law).
8. The Fourth Defendant's and the First Defendant's submissions reflected those made by and the position of the GHF Parties. The Fourth Defendant noted that the Plaintiff had withdrawn five of the seven claims relied on in the SOC, and that the unlawful means conspiracy claim had been the most complex. The deceit claim had been recast to such an extent that it bore little resemblance to the original claim in deceit and only the unjust enrichment claim under UAE law was close to what was originally pleaded. The combined effect of the withdrawal of the Withdrawn Claims and the amendments to the factual matrix and legal basis for the deceit claims meant that the majority of the SOC had been abandoned. The First Defendant also argued that the withdrawal of the proprietary claims against the First Defendant was of particular significance (mainly to the indemnity costs issue). The Plaintiff now was limited to, and had reverted to, claiming against the First Defendant only as an unsecured creditor.



The proprietary claims against the First Defendant had arguably resulted in the Plaintiff competing with the First Defendant to recover sums received by the fund defendants, and had been based on the Plaintiff's claimed right to rescind the loans allegedly made by him (which the First Defendant considered to be a hopeless claim after the Plaintiff had participated in the First Defendant's winding up), and had resulted in the joint official liquidators being put to substantial expense in investigating and resisting those claims.

Costs to be taxed on the indemnity basis?

The Defendants' submissions

9. The GHF Parties, the Fourth Defendant, and the First Defendant all submit that the Plaintiff has conducted these proceedings to date unreasonably and improperly.
10. There was no dispute about the general principles to be applied in determining whether to award costs on the indemnity basis. The Court may make an *inter partes* order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings or has conducted that part of the proceedings to which the order relates improperly, unreasonably, or negligently (GCR O.62, r.4(11)). The nature of such an order is exceptional, although the jurisdiction is wide and flexible, allowing the Court to exercise its discretion as the circumstances of the case may require (*AHAB v SICL* [2012 (2) CILR 1] at [10], *Ritchie Capital Management L.L.C. et Al v Lancelot Investors Fund, Ltd* (unreported, 4 March 2021, *per* Parker J at paragraph [4])). Pursuing a weak claim will not ordinarily, on its own, justify an order for indemnity costs, whereas the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) will justify such an order (*Bennett v Attorney General* [2010] (1) CILR 478). The principal consideration is not the substantive merits of the unsuccessful party's case, but his conduct in advancing a claim that he knew was meritless (*Ritchie Capital* at [11]).
11. The GHF Parties submitted that although the Plaintiff had pursuant to the Amended Summons only sought leave to amend the SOC, in substance he was discontinuing most of the claims that had formed the basis of his action and that indemnity costs will usually be appropriate where a claim in fraud had been discontinued.

12. They noted that in O'Hare & Browne *Civil Litigation* (20th ed, 2021 at [35-001]) it was stated that if, “*the relevant costs incurred have been entirely wasted, discontinuance has most probably occurred, even if the claimant has not given notice of that*”. In *RG Carter Projects Ltd v CUA Property Ltd* [2020] EWHC 2417 (TCC) (***RG Carter Projects Ltd***) at [10]-[11] Pepperall J said as follows (my underlining):

“10. *In many instances, an order for the costs of and caused by (or, as we used to say, occasioned by) an amendment or (as PD 17 puts it) the costs of and arising from the amendment, will meet the justice of the case. There will, however, be cases where the amendment abandons a particular cause of action that the defendant has spent a significant sum defending. Even in such cases, sometimes the amended statement of case will still pursue other causes of action arising out of the same facts, or the amendment will essentially just put a new label on previously pleaded facts such that the earlier costs have not been entirely wasted: see, for example, Begum v Birmingham City Council [2015] EWCA Civ 386; [2015] HLR 33.*

11. *Yet in other cases, the cause of action is simply abandoned, and substantial costs will have been wasted. An award of costs on the conventional basis would, in such cases, cover the defendant's costs of amending his defence to delete the now redundant answer to the abandoned plea, but would not recompense such defendant for the costs of investigating the original case or of pleading the first defence. On such facts, the usual order would not be just and the appropriate order will often be to award the defendant not just the costs of and caused by the amendment, but also the costs in respect of the abandoned cause of action.*

12. *Accordingly, in my judgment the just order in this case is that RG Carter should pay both:*

12.1 *the costs of and caused by the amendment; and*

12.2 *the costs of the abandoned claims in misrepresentation and for an extension of time for the alleged change in the height of the roof.”*

13. I note the order as set out and formulated at [12] that the paying party should pay both the costs of and caused by the amendment and the costs of the abandoned claims.

14. The GHF Parties also relied on the judgment of Mr Justice David Richards (as he then was) in *Clutterbuck and Paton v HSBC* [2015] EWHC 3233 (Ch), [2016] 1 Costs LR 13 (***Clutterbuck***) at [18]-[20]. This was a case in which the entirety of the relevant proceedings (which included a claim in deceit) had been discontinued (“*without explanation and without apology*”).

The proceedings had been discontinued shortly before a hearing listed to deal with the defendant's application to strike out the particulars of claim and the claimant's application to amend the particulars. I set out below the paragraphs relied on together with paragraphs [16] and [17] which seem to me to provide helpful context (again, with my underlining):

- “16. Mr Ilyas on behalf of the claimants submits that an allegation of fraud being made in the proceedings which are then discontinued is not of itself reason to order indemnity costs. The general provision in relation to cases in which allegations of fraud are made is that, if they proceed to trial and if the case fails, then in the ordinary course of events the claimants will be ordered to pay costs on an indemnity basis. Of course, the court retains a complete discretion in the matter and there may well be factors which indicate that notwithstanding the failure of the claim in fraud indemnity costs are not appropriate, but the general approach of the court is to adopt the course that I have indicated.
17. The underlying rationale of that approach is that the seriousness of allegations of fraud are such that where they fail they should be marked with an order for indemnity costs because, in effect, the defendant has no choice but to come to court to defend his position.
18. In circumstances where, instead of the matter proceeding to trial and failing, the claimant serves a notice of discontinuance, thereby abandoning the case in fraud, it is in my judgment appropriate for the court to approach the question of costs in the same way.
19. The defendant has been put in this case to considerable expense in defending to date the allegations made. As I mentioned earlier a defence was served, applications were made to strike out the particulars of claim and the applications to amend were resisted in circumstances where the amendments would maintain the allegations of fraud.
20. I therefore consider that allegations of fraud will in general justify the court in ordering costs upon an indemnity basis where the claimant serves notice of discontinuance. In a case to which I drew the attention of counsel, Jarvis plc v PricewaterhouseCoopers [2000] 2 ECLC 368, Lightman J took the same view.
21. I therefore hold that on that ground alone it is appropriate to order the claimants to pay the eleventh defendant's costs of these proceedings on the indemnity basis and to order an assessment on that basis if the costs are not agreed.”
15. The GHF Parties relied on a number of factors as demonstrating that this was an appropriate case for an award of indemnity costs. They said that, as was clear from the correspondence referred to in Mr Lewis' Eighth Affidavit, the Plaintiff had been told since May 2019 that the Withdrawn Claims were bound to fail and ought never to have been brought.



The Plaintiff had cast his claims in the SOC in a disproportionately wide way. The original SOC had advanced a multiplicity of factual allegations, alleging the GHF Parties' participation in a systematic fraud on investors, over a number of years, which fraud was not alleged to have been practised on the Plaintiff but was said to have given the GHF Parties the motive to combine with others to defraud the Plaintiff into making the Loans. It subsequently transpired, the GHF Parties asserted, that the Plaintiff did not have the majority of the documents on which he relied for pleading that widely cast case and therefore lacked an admissible evidential basis for the allegations that he had made. The lack of merit in and evidential basis for the Withdrawn Claims had been exposed by the robust and diligent responses of the Defendants to the SOC. Furthermore, the lack of merit of the Plaintiff's claim in rescission had been made plain by the Defendants' defences and the requests for further and better particulars and in correspondence and the Plaintiff's replies had failed to grapple with his knowledge of his right to rescind. In addition, notwithstanding the fact that on 20 August 2021 the Plaintiff communicated an intention to withdraw two of his claims, he did not communicate the true extent of his proposed amendments until 14 October 2021. In the meantime, he encouraged the Defendants to continue to incur the costs of seeking to agree a list of issues for the purposes of discovery by reference to the SOC. Finally, since the Withdrawn Claims had been abandoned before the exchange of witness statements, and prior to discovery, this was not a case in which the claims were discontinued by reason of something unexpected emerging during the course of the litigation that had forced a re-evaluation of the claim.

16. The GHF Parties also sought the payment of the costs they have incurred in respect of foreign lawyer fees that have been occasioned and thrown away by the fundamental change in the basis of the Plaintiff's case. They noted that where costs are awarded on the indemnity basis, there was no limitation, as there was on a taxation on the standard basis, on recovery of the costs of foreign lawyers, subject to the test of reasonableness, the onus being on the paying party to establish unreasonableness (citing *BDO Cayman Ltd v Ardent Harmony Fund Inc. (In Official Liquidation)*, unreported, 27 April 2021, Parker J) (**BDO**).
17. The Fourth Defendant also submitted that the Defendants were entitled to their costs of and associated with the Withdrawn Claims on the indemnity basis. Indemnity costs were appropriate, as in this case, where there had been the zealous pursuit of a hopeless case and the Court was entitled, in determining whether indemnity costs were justified, to assess the



Plaintiff's conduct of this litigation more broadly so that factors which may individually fall short of the threshold justifying the Court's disapproval by an award of indemnity costs were relevant, such as the wider general failings in the Plaintiff's conduct of this litigation including the pleading of an unnecessarily wide and disproportionate case, and the pleading of wide-ranging allegations of fraud that were subsequently abandoned. A substantial proportion of the Fourth Defendant's costs to date had been incurred unnecessarily and were now wasted by reason of the Plaintiff's conduct. Accordingly, the Fourth Defendant sought the costs thrown away by reason of the abandonment of the Withdrawn Claims and its costs incurred to date, or at least a high proportion of those costs, of pleading to the Pursued Claims as previously set out in the SOC (the Fourth Defendant sought the costs thrown away by reason of the abandonment of much of the Plaintiff's pleading in the SOC, including the parts of the SOC that dealt with the historic wrongdoing at the Abraaj group, what was referred to in the SOC as the Abraaj Leadership and the Plaintiff's original case dealing with deceit). Not only had the Plaintiff's conduct of the proceedings to date been unreasonable but the four Withdrawn Claims based on rescission were always bound to fail.

18. As regards the Plaintiff's conduct of the proceedings, the Fourth Defendant argued that he had pursued unnecessary claims in the SOC. There was no good reason why the Withdrawn Claims had been brought and the Plaintiff had acknowledged that they were unnecessary (Nelsons in their letter dated 14 October 2021 which enclosed the first draft of the ASOC and the Concise Statement of Claim, had said that the Plaintiff had "*simplified his case substantially, reducing it to the essential core...*"). The Plaintiff had also pursued hopeless claims. The claims relying on rescission were bound to fail and despite this fundamental problem having been raised on numerous occasions, the Plaintiff had issued and maintained those claims until the draft ASOC. Furthermore, the Plaintiff had pursued unnecessary factual enquiries. The Plaintiff pleaded a wide-ranging case as to financial wrongdoing within the Abraaj group prior to December 2018 and with one narrow exception, that material had been excised as unnecessary. He had also put forward a manifestly inappropriate pleading. The SOC was overly long, often unclear and in large part consisted of pleading evidence. Its deficiencies led to the Plaintiff abandoning that document and repleading his case – effectively from scratch – in the ASOC and Concise Statement of Claim. The Plaintiff had also failed to alert the parties to the planned amendment despite continuing and lengthy correspondence as to discovery and lists of issues for discovery. As a result, the correspondence continued on a false basis.



Finally, the Plaintiff had failed to provide a draft ASOC promptly after having indicated an intention to abandon some claims.

19. As regards the Withdrawn Claims based on rescission:
 - (a). it was clear that the Plaintiff had acted so as to affirm the four Withdrawn Claims based on rescission.
 - (b). these claims depended on the Plaintiff being able to prove that he had validly rescinded the First Loan Agreement and the Second Loan Agreement (as defined in the SOC) by the letter dated 30 April 2019. The claims were based on two representations on which the Plaintiff had allegedly relied and which he claimed to have been false. But the Plaintiff's conduct in 2018 and before the letter dated 30 April 2019 was only consistent with an intention to affirm and amounted to an affirmation of the First Loan Agreement and the Second Loan Agreement and the falsity of these representations must have been known to the Plaintiff long before 30 April 2019.

The Plaintiff's submissions

20. The Plaintiff submitted that it would be premature for the Court to decide that costs should be taxed on the indemnity basis or, if the Court considered that it was in a position to form a reliable view on the Plaintiff's conduct, an award of indemnity costs was unjustified and inappropriate.
21. The Plaintiff argued that the Court was unable at this stage to decide whether indemnity costs should be awarded. The issue should be dealt with at the next CMC, currently listed for 23-24 March 2022, by which time the remaining issues (at least for the purpose of discovery) will have been clarified and hopefully agreed (and the Defendants' amended defences should have been served).



22. The Plaintiff submitted that the Court could not deal satisfactorily with the issue of indemnity costs just as a matter or at the level of principle, because the Court needed to have a proper appreciation of what Mr Bloch QC described as “*the shape of the case going forward*” in order to be able to form a view on the conduct of the Plaintiff and the merits and residual relevance of the Withdrawn Claims. The Plaintiff argued that, for example, it would be unsafe to award indemnity costs before the Court had formed a view as to the strength of the Plaintiff’s case relating to the systematic fraud and the Abraaj Leadership which at this stage could not be done. It might be that following the filing of the Defendants’ amended defences and discovery in connection with the issues that remained live (in these proceedings or the related proceedings), it becomes clear that the Court will be obliged to make findings in relation to that fraud or as regards the Abraaj Leadership (and it appeared from the draft list of issues in respect of one of the related proceedings annexed to the First Defendant’s skeleton that those will be live issues) and it would obviously be highly undesirable for the Court to make an order for indemnity costs on the basis that there was a particular weakness in the Plaintiff’s case in relation to those issues, when there remained a possibility that the Court would go on and make findings which were inconsistent or irreconcilable with such a decision. The Plaintiff also argued, as regards the issue of whether the Plaintiff had only a very weak or hopeless case on rescission, it would be unsafe and unsatisfactory for the Court to form a view as to the strength of that case without hearing expert evidence as to UAE law, since the Plaintiff asserted that the loans and the issue of rescission were governed by UAE law.
23. The Plaintiff submitted that if, however, the Court was prepared to decide the indemnity costs issue at this stage it was important to remember that the jurisdiction was to be exercised sparingly and cautiously, particularly at an early stage or relatively early stage in the proceedings. Even if the Court were to accept that the Plaintiff had abandoned a substantial part of his case, it did not follow that it was improper for the Plaintiff to have pleaded the Withdrawn Claims. Mr Bloch QC invited the Court to bear in mind that reputable counsel had put their names to the original SOC and that these were not proceedings in which a weakness in the case was within the knowledge of the Plaintiff. Many of the issues which the Plaintiff was no longer seeking to pursue were never within his direct knowledge and he had been forced to work on the publicly available information. Furthermore, Mr Bloch QC said that the Plaintiff’s reason for amending his case at this stage and in the manner set out in the Concise Statement of Claim was to simplify his case and that there were good reasons for making the amendments that would benefit and significantly reduce the costs of conducting these proceedings. Mr Bloch QC noted that the Plaintiff’s reasons for



amending his case were explained in a letter from Nelsons dated 1 September 2021 which stated (at [3]) as follows:

"At the outset we wish to emphasise that the purpose served by those intended amendments is to simplify the case so that it can be resolved more promptly, efficiently and at more proportionate cost. We anticipate this this will achieve benefits for all parties, including each of your clients who are engaged in numerous proceedings, including the related proceedings. Our client's aim is simply to progress these proceedings as efficiently as possible and as set out below we are content to agree any reasonable proposal to enable your clients time to file and serve amended defences, as well as to enable discovery to be addressed in time efficient and cost-efficient manner."

24. Mr Bloch QC argued that this was a case which, in his words, “*cried out for simplification*” and that the Plaintiff’s amended pleading will simplify the case, reduce the costs of all parties, and reduce the length of the trial. He noted the estimated costs of conducting standard discovery, based on the case as constituted under the SOC, was US\$52 million, which all parties regarded as unacceptable and that these costs should be substantially reduced as a result of the Plaintiff’s amendments. Mr Bloch accepted that it was too early to tell whether all the hoped for simplification and costs savings would be achieved, since a number of the factual issues that are removed from these proceedings might still need to be resolved and dealt with by the Court in the related proceedings (for example, there were some aspects of the alleged conspiracy and fraud involving the Abraaj Leadership which were still in issue in the related proceedings and which may be the subject of findings in those proceedings). Having said that, it was reasonably to be expected that there would be substantial savings of expense and Court time.
25. While the Defendants did not accept that the Plaintiff wished to make the amendments in order to simplify the case, Mr Bloch QC submitted that they could not and did not dispute that the amendments should substantially simplify the case. The Defendants, in particular the GHF Parties, were wrong to dismiss as incredible the Plaintiff’s assertion that the reason for the amendments was to simplify and reduce the costs of this complex case. The Defendants’ approach was profoundly misguided because it failed to allow for the possibility that a litigant might choose to focus his case for reasons other than that the withdrawn case was hopeless or bound to fail. A litigant might well have had a proper basis for initially adopting a belt and braces approach to his pleading but then have, to use Mr Bloch’s words, the “*confidence to proceed with braces alone when he realise[d] that the belt [was] causing unnecessary delay or expense.*” The Defendants’ approach would mean that whenever a party dropped a cause of

action in the course of proceedings, he would be laying himself open to a claim for indemnity costs. While the circumstances of a particular case might show that claims had been abandoned because they were hopeless, it was fallacious to infer that every abandoned claim was withdrawn because it was understood to be bound to fail and that there were no other good and genuine reasons for abandoning a claim. There were, Mr Bloch QC submitted, good reasons in this case. The Plaintiff did not waive the legal professional privilege in the legal advice he had received regarding the prospects of success of the Withdrawn Claims, and therefore did not purport to show that the Withdrawn Claims were not hopeless. Rather he argued that having regard to the circumstances in which the amendments have been made, the Court should conclude that there were reasons why the amendments were being made other than those for which the Defendants contend. The Plaintiff argued that not only were the reasons given by Nelsons objectively good reasons, and therefore not reasons which the Court should simply dismiss, but that considered objectively a reasonable litigant in the Plaintiff's position could reasonably adopt the approach which the Plaintiff had adopted. It was reasonable for a litigant faced with the course that these proceedings have taken to conclude that it was absolutely essential to do something to narrow the issues and to enable the case to progress more quickly and more cheaply. Mr Bloch QC submitted in this context that the burden of proof to show that indemnity costs were justified was on the Defendants, and that they had failed to discharge it.

26. The Plaintiff also argued that the Defendants had failed to demonstrate that there was a proper basis for concluding that the Withdrawn Claims were hopeless or bound to fail. The Defendants had failed to identify with precision the aspects of the SOC that they said were hopeless or put in evidence that showed that there had been no conspiracy involving or wrongdoing on the part of the Abraaj Leadership, on which the Plaintiff had relied. There had, in fact, been admissions of guilt by Mr Abdel-Wadood and Mr Vettivetpillai, and although the evidential status of those admissions may be disputed in due course, there was no evidence before the Court to suggest that those admissions were false and that they will not be shown to be true in due course following discovery. It was also of no assistance to the Defendants to rely on their own protestations to the Plaintiff that the Withdrawn Claims were hopeless. Parties to litigation were always challenging the opposition's case in such terms but the existence of such challenges did not allow the Court to infer that they were soundly based.



Discussion and decision

27. The Defendants have argued that there is sufficient evidence before the Court to support and justify a finding that the Plaintiff has, by bringing and prosecuting the Withdrawn Claims, conducted the proceedings, unreasonably (I also take the GHF Parties and the Fourth Defendant to have argued that the Plaintiff has conducted the proceedings to date improperly).
28. It is clear that (a) the Court may only make an *inter partes* order for costs to be taxed on the indemnity basis where it is satisfied that the paying party has conducted the proceedings (or relevant part of the proceedings) improperly, unreasonably, or negligently, and (b) that such an order is exceptional. As the Chief Justice noted in *Algoasibi Bros v Saad Investments Company Limited* [2012(2) CILR 1] (**Saad**) at [8] “*In Bonotto v. Boccaletti* [2001 CILR 292], the Court of Appeal held that this court has a discretionary jurisdiction (said to be founded in equity) to grant costs on the indemnity basis, but the discretion is to be exercised only in the most exceptional cases.” The Chief Justice also commented (at [18]) in that case that (underlining added):

“The difference between indemnity costs, as thus defined in the case law, and full indemnity costs, is one of both principle and scale—in the former, the ordinary case, the objective is to reimburse the costs which have been reasonably incurred and proportionate in amount to the cause of action and (in our jurisdiction) by reference to a prescribed scale of hourly rates; in the latter, the exceptional case, the conduct of the unsuccessful party is such as to justify requiring it to repay all the costs actually incurred by the successful party on the attorney-and-own-client basis, without regard to such concerns as the scale of fees or proportionality, provided only that the rate or scale of fees is not plainly unreasonable in the sense of being exorbitant.”

29. *Clutterbuck* is authority in England and Wales for the proposition that where a claimant raises allegations of serious dishonesty and fraud against a defendant and discontinues those claims without explanation, an order for indemnity costs should *usually* (but not always) follow. David Richards J said, following the approach of Lightman J in *Jarvis*, that “*the seriousness of allegations of fraud are such that where they fail, they should be marked with an order for indemnity costs*” and that “*where, instead of the matter proceeding to trial and failing, the claimant serves a notice of discontinuance, thereby abandoning the case in fraud, it is in my judgment appropriate for the court to approach the question of costs in the same way.*” He also noted however that the court retains a complete discretion and that “*there may well be factors*

which indicate that notwithstanding the failure of the claim in fraud indemnity costs are not appropriate, but the general approach of the court is to adopt the course that I have indicated.”

30. This approach was followed by Rose J (as she then was) in *PJSC-Aeroflot Russian Airline v Leeds* [2018] EWHC 1735 (*PJSC-Aeroflot*) (a case that was not cited to me, but which helpfully discusses *Clutterbuck*). This was a case in which the plaintiffs discontinued their claim immediately before the start of the trial. Rose J said as follows (underlining added):

“53. *In my judgment that is no basis for distinguishing Clutterbuck from the present case. On the contrary, the present case is stronger given that the allegations of fraud were pursued over eight years and the proceedings were prosecuted vigorously up to a few hours before the whole claim was abandoned the afternoon before the trial. I accept Mr Davenport’s submission that it would be going too far to refer to “the rule in Clutterbuck” as Mr Tregear did. But I respectfully consider that the approach in Clutterbuck is sound. Where a claimant makes serious allegations of fraud, conspiracy and dishonesty and then abandons those allegations, thereby depriving the defendant of any opportunity to vindicate his reputation, an order for indemnity costs is likely to be the just result, unless some explanation can be given as to why the claimant has decided that the allegations are bound to fail.*

59. *I therefore hold that on the basis that these proceedings made serious and consistent allegations of fraud against the defendants and that those allegations have been entirely abandoned without explanation, the defendants are entitled to costs on an indemnity basis.”*

31. Accordingly, the approach adopted by David Richards J was described as sound but was not to be elevated to the status of a formal rule. David Richards J (and Rose J) said in effect that subject to considering any explanation for it, the withdrawal of allegations of wrongdoing should be equated, when considering costs, with a finding that they were not well-founded. The withdrawal of such allegations without a sufficient “*explanation*” (or I would add justification) will satisfy the need for exceptional circumstances. It seems to me that the reference in Rose J’s judgment to “*some explanation*” is not intended to limit the Court’s inquiry to the plaintiff’s subjective intentions or evidence as to his reasons for discontinuing the relevant claims (which as in this case risks putting the plaintiff in an invidious position as he cannot disclose his actual reasons for withdrawing his claims without disclosing and waiving the privilege attached to his legal advice). David Richards J referred to “*factors which indicate that notwithstanding the failure of the claim in fraud indemnity costs are not appropriate*” and it seems to me that the Court should consider the actual procedural context and circumstances surrounding the withdrawal or

discontinuance of the claims and the conduct that a reasonable litigant in the plaintiff's position could be expected to adopt, when deciding whether there has been a sufficient justification for the withdrawal or discontinuance so as to make it unjust to award indemnity costs.

32. The Court's general *practice* will be to follow this approach, so that where allegations of fraud, conspiracy or dishonesty are withdrawn, the Court will start by considering whether the circumstances surrounding the withdrawal mean that that it would be inappropriate to treat the withdrawal as entitling the Court to infer and proceed, for costs purposes, on the basis that there has been a finding that the fraud allegations were not well-founded. But because this is only the starting point in the Court's analysis, in an appropriate case, the Court may still decline to order that indemnity costs be paid. The Court must ultimately exercise its discretion as to costs with a view to determining what, in all the circumstances, is the just result (applying the requirements of GCR O.62, r.4(11)). As Rose J said, an order for indemnity costs is likely to be the just result in such a case but that is not necessarily the case. The Court must still consider whether in the circumstances of the case, the just outcome is that the receiving party should be paid only "*costs which are not only reasonable but are also proportionate to the matters in issue*" with any doubts being resolved in favour of the paying party or all costs "*except insofar as they are of an unreasonable amount or have been unreasonably incurred*" with any doubts being resolved in favour of the receiving party.
33. *Clutterbuck* has not been referred to and the approach adopted by David Richards J has not been adopted in any of the Cayman authorities cited to me. It was not however submitted that the decision is inconsistent with the requirements of GCR O.62, r.4(11) or the Cayman jurisprudence on the award of indemnity costs. The failure to cite *Clutterbuck* is not surprising since it is a relatively recent decision that was handed down after judgment was delivered in many of the Cayman cases dealing with applications for indemnity costs in cases involving failed or discontinued fraud claims or because the authorities in this jurisdiction which were handed down after *Clutterbuck* (such as *Al Sadik v Investcorp Bank* [2019 (2) CILR 585], *BDO, Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP*, *Hemmings v P.M.C. Ltd* (unreported, 11 March 2021, Ramsay-Hale J) and *Fortunate Drift Limited v Canterbury Securities, Ltd* (30 October 2020, Kawaley J) did not involve such fraud claims (*Al Sadik* at this stage in the proceedings involved the costs of an anti-suit injunction in respect of proceedings brought abroad in breach of an exclusive jurisdiction clause; *BDO* involved a failed application for leave under section 97(1) of the Companies Act; *Guy Kwok-Hung Lam* involved a claim that

receivers had not been validly appointed; *Hemmings* involved a breach of contract claim and *Fortunate Drift* involved a withdrawn interlocutory summons seeking interim relief).

34. *Saad* was a fraud case in which fraud claims against some of the defendants (the third and twentieth defendants) were discontinued after the plaintiff's worldwide freezing order had been discharged because it had been obtained in breach of the plaintiff's duty of full and frank disclosure and after those defendants had been awarded their costs in relation to the worldwide freezing order on the indemnity basis. The Chief Justice accepted that if a claim was patently speculative and brought merely to compel the defendant to comply, the plaintiff's conduct would justify taxation on the indemnity basis. However, he decided that in this case, the maintenance of the plaintiff's claim had not been unreasonable, particularly as the defendants' principal had persistently failed to meet his discovery obligations, making it difficult for the plaintiff to particularise its claim against the defendants. The Chief Justice did not say though that the fact that fraud claims had been discontinued meant that the usual or general approach that would be followed by the Court would be to award indemnity costs. However, in my view, his decision is not inconsistent with that approach. In *Saad* there were circumstances that meant that indemnity costs were not appropriate or just.
35. *Sagicor General Insurance (Cayman) Limited v Crawford Adjusters (Cayman) Limited* [2008 CILR 482] (*Sagicor*) was another fraud case. Henderson J awarded indemnity costs where the plaintiffs had on the eve of the trial withdrawn and abandoned a claim against the defendants based on allegations of fraud and conspiracy, which had been maintained by the plaintiffs for over two years. He said as follows (at [2]) (underlining added):

“It goes without saying that such allegations [of fraud and conspiracy] have a detrimental effect on the reputations of those involved and that such allegations should never be made lightly. Every attorney in the Cayman Islands has a positive obligation to refrain from making allegations of fraud and dishonest conduct unless there is a case of substance which gives rise to a reasonable expectation that the allegations can be proved. From the failure of these plaintiffs to prosecute their case, I infer that they have never been in possession of a body of evidence capable of establishing fraud or conspiracy. These few comments, without more, provide ample justification for an award of indemnity costs. I award such costs to each defendant now”



Henderson J’s approach is close to that adopted by David Richards J in *Clutterbuck*. Absent an explanation (or I would say context) which requires a different conclusion, the withdrawal of allegations of wrongdoing will be equated for costs purposes with a finding that they were not well-founded. Jones J in *Al Sadik v Investcorp Bank BSC* [2012 (2) CILR 33] at 11, said it was *implicit* that Henderson J concluded that the plaintiffs must have known that there was “*no legitimate basis for asserting fraud or conspiracy*” but he did not address the plaintiffs’ state of mind explicitly and in my view, he did not need to go that far. Henderson J was prepared to infer in the circumstances (involving a last minute and complete abandonment of claims based on fraud) that the plaintiffs’ fraud claims were not well-founded and would have failed at trial, so that the usual rule that indemnity costs will be ordered was to be applied. This approach seems to me to be entirely consistent with that adopted by David Richards J in *Clutterbuck*.

36. Accordingly, in my view, this Court should follow (recognising of course that each case must be decided on its own facts) the approach set out in *Clutterbuck* as explained in *PJSC-Aeroflot*. However, in case I am wrong on this point, I shall also consider the claim for indemnity costs without reference to the *Clutterbuck* approach.
37. Having carefully considered the aspects of the Plaintiff’s conduct of which complaint is made, procedural context and circumstances surrounding the withdrawal or discontinuance of the Withdrawn Claims and the conduct that a reasonable litigant in the Plaintiff’s position could be expected to adopt, I have concluded that this is not an appropriate case in which to award indemnity costs, whether or not the *Clutterbuck* approach is applied.
38. This is clearly a case in which claims based on fraud, conspiracy, and dishonesty have been withdrawn and discontinued. The Withdrawn Claims include the unlawful means conspiracy claim. This alleged and depended on the Plaintiff establishing that a number of individuals other than Mr Naqvi were parties to a conspiracy and had acted fraudulently and dishonestly, and that their knowledge and conduct be attributed to the Defendants. But the circumstances surrounding the discontinuance of the Withdrawn Claims including the unlawful means conspiracy claim are very and, in my view, critically different from the circumstances in *Clutterbuck*, *PJSC-Aeroflot* and *Sagicor*. This is not a case of a plaintiff completely abandoning a fraud-based claim at a late stage in the proceedings (let alone shortly before trial).



In those circumstances, the inference naturally and obviously arises that the plaintiff was unable to make out his case. But the position is different where a plaintiff at a relatively early stage of the proceedings, in this case before discovery, chooses to reformulate and narrow down his claim and in the process removes causes of action and their factual substrata. Where the plaintiff so decides, it will certainly follow that he must pay the defendants' costs. As Moore-Bick LJ said in *Brookes* at [10] “...if [a claimant] fails or abandons the claim at whatever stage in the process it is normally unjust to make the defendant bear the costs of proceedings which were forced upon him and which the claimant is unable or unwilling to carry through to judgment”. However, it does not necessarily follow that an order for indemnity costs must or should be made.

39. In my view, the procedural context and circumstances surrounding the Plaintiff's withdrawal of the Withdrawn Claims mean that it would not be just to award indemnity costs. The Plaintiff's conduct seems to me not to be unreasonable or improper, consistent with what a reasonable litigant in the Plaintiff's position could be expected to adopt, and it seems to me that in the circumstances the Court should not equate the withdrawal of the allegations of wrongdoing with a finding that they were not well-founded.
40. I accept that, as the Plaintiff submitted, a decision by a litigant faced with the course that these proceedings have taken that it was necessary to reformulate his claim so as to narrow the issues in the case and to enable the proceedings to progress more quickly and more cheaply, could not be characterised as unreasonable or improper. I also accept that in view of the timing of the Plaintiff's amendments to his SOC, it would be wrong to conclude and that there is an insufficient basis for concluding, that the unlawful conspiracy claim was not well-founded and was bound to fail. The Defendants might be right that the Plaintiff had concluded that the Withdrawn Claims including the unlawful means conspiracy claim were hopeless or unlikely to succeed but they have not demonstrated that such a conclusion was the only reasonable conclusion which a litigant in the Plaintiff's position could reach or that the pleadings on their face established this. Indeed, as the Plaintiff pointed out, the Defendants did not seek to analyse the relevant parts of the SOC for this purpose.
41. The unlawful means conspiracy claim alleged and depended on establishing that a number of individuals other than Mr Naqvi were parties to a conspiracy and had acted fraudulently. It relied on the Plaintiff establishing that the fraudulent misrepresentations which the Plaintiff

alleged had been made to him by Mr Naqvi were made pursuant to and as part of a wider conspiracy, to which Mr Naqvi and other officers of the relevant Abraaj entities (who were referred to as the “*Abraaj Leadership*” and defined in [44] of the SOC) were parties, and that the conduct of the parties to the conspiracy was to be attributed to the Defendants. As the SOC states:

“1. *This claim arises in the context of a sustained and systematic fraud perpetrated by key figures within the leadership of the Abraaj Group (together ‘the Abraaj Leadership’ as defined below) on third-party investors in various investment funds within the corporate group (‘the Abraaj Group’)*”

.....

3. *Pursuant to that systematic fraud, from 2014 until around May 2018, the Abraaj Leadership – which operated the Abraaj Group as a single unit – fraudulently induced investments in each of [Abraaj Private Equity Fund IV LP, the Healthcare Fund (being GHF Fund LP, GHF Fund (B) LP)] by representing to third-party investors that those entities would make and/or had made investments that they never intended to make and/or did not make.*

4. *The members of the Abraaj Leadership subsequently misappropriated, misapplied to other entities within the Abraaj Group, or otherwise dissipated the sums that third-party investors had invested in APEF IV and the Healthcare Fund and/or acquiesced in the same.*

5. *The Abraaj Leadership concealed, and thus sustained, this systematic fraud by various fraudulent and dishonest practices, which included repeatedly issuing incorrect statements of (i) investments made, (ii) investment values and (iii) uninvested monies held.”*

.....

10. *Mr Naqvi made [the] fraudulent misrepresentations to Mr Jafar pursuant to a combination, plan, understanding and/or agreement amongst the members of the Abraaj Leadership, to have Mr Naqvi and, as required, other members of the Abraaj Leadership, fraudulently seek to induce third parties including Mr Jafar to lend monies to entities within the Abraaj Group by making misrepresentations that they knew to be false ...”*



42. The facts averred in support of the unlawful means conspiracy claim were set out in detail at [168] – [175] and [244] – [261] of the SOC (and these paragraphs cross-refer to other paragraphs of the SOC). It is true that in setting out the factual basis for the claim that the members of the Abraaj Leadership were parties to the alleged conspiracy, the SOC relied substantially on inference, however facts relating to the activities of members of the Abraaj Leadership were pleaded in the sections of the SOC dealing with APEF IV and the Healthcare Fund under the headings “*Use of Investor’s Monies*” and “*Treatment of Investors*” (see [57] – [108] and [116] – [167] of the SOC) and the factual basis for the claim while limited does not appear to be in, or anywhere near, the hopeless category. In my view, an examination of the SOC indicates that there are insufficient grounds for concluding at this stage that the unlawful means conspiracy claim was bound to fail.

43. Furthermore, the pleaded case against the Abraaj Leadership was based on facts and evidence referred to in indictments and documents issued, and on facts obtained by and relied on, by various well-respected regulators and prosecuting authorities and the reasons why the Plaintiff was only able prior to discovery to formulate his claims by reference to a limited factual base were clearly set out and explained. The SOC deals with this, and further details are provided in the Plaintiff’s Response to Request for Further and Better Particulars of the Statement of Claim dated 10 September 2020. The SOC states as follows:

ii Liquidations and Regulatory Action

.....

231. *In or around August 2018, Mr Jafar and Mr Naqvi agreed as follows:*

- (1) *Mr Jafar agreed not to pursue certain criminal charges against Mr Naqvi in the UAE; and*
- (2) *in exchange, Mr Naqvi agreed to transfer, or procure the transfer of, certain personal assets held by parties or entities associated with him and/or his family. These assets are estimated to be worth between US\$35-55 million as at the date of this Statement of Claim.*



232. *On 11 April 2019, the United States Securities and Exchange Commission charged Mr Naqvi and AIML in the United States District Court for the Southern District of New York, inter alia, with the misappropriation of funds from the Healthcare Fund.*
233. *Subsequently, Mr Naqvi and Mr Vettivetpillai were arrested in the United Kingdom, and Mr Abdel-Wadood was arrested in the United States.*
234. *On 23 May 2019, a superseding indictment was submitted to the United District Court for the Southern District of New York naming each of the Abraaj Leadership as defendants.*
235. *Prior to reviewing the facts and evidence set out in the SEC's Summary of Allegations, dated 11 April 2019 (as amended on 16 August 2019), and the superseding US Indictment, dated 23 May 2019, Mr Jafar did not know and/or understand, and could not reasonably have been expected to know and/or understand:*
- (1) *The depth and scale of the mismanagement and misfeasance within the Abraaj Group over a number of years;*
 - (2) *The true nature and extent of Mr Naqvi's dishonesty in relation to both the fraud on investors and his dealings with Mr Jafar, as particularised above; and/or*
 - (3) *The involvement of the other members of the Abraaj Leadership, whose acts and intentions are to be attributed to the Defendants, in both the fraud on investors and Mr Naqvi's dealings with Mr Jafar, as particularised above.*

iii Notices of Rescission

236. *Following the actions by the SEC described above, Mr Jafar instructed Jones Day LLP to send notices of rescission and claims to AH, AIML, AHO and GP8 on 30 April 2019.*
44. Substantial elements of the fraud claim have been discontinued but for the purpose of deciding whether the circumstances surrounding the withdrawal are indicative of an acceptance or require the inference to be made that the withdrawn fraud claims were without foundation it is relevant that significant parts of the fraud claims remain. The remaining claim in the Concise Statement of Claim is based on deceit and arises out of essentially the same overall factual matrix and context as the unlawful means conspiracy and deceit claims set out in the SOC. It is true that the allegations against, and reliance on the allegedly fraudulent conduct of, the Abraaj Leadership have now been completely removed from the Concise Statement of Claim and that the fraudulent misconduct on which the Plaintiff's remaining claims are based is now that of Mr Naqvi alone, but the Plaintiff maintains his case that he was defrauded by an officer and

controller of the Abraaj Group in circumstances related to those on which the unlawful conspiracy claim was based. There has been no abandonment of the whole of the Plaintiff's fraud-based case, and this at least lends support to the argument that in the circumstances the Plaintiff should be treated as having refocussed and reformulated his case on the part of the fraud claim that can most cost effectively be pursued without necessitating an inference that the unlawful means conspiracy claim is to be treated as without foundation.

45. It is also of *some* (albeit limited) relevance that the dishonesty allegations in the unlawful means conspiracy claim were made against and related to third parties whose connection with the Defendants is only historic. As David Richards J said in *Clutterbuck* the underlying rationale of the approach which generally requires indemnity costs to be paid by a party whose fraud claim has failed at trial is that the allegations of fraud are serious, require a defendant to rebut them to clear his reputation and hang over and have a damaging impact on the defendant until the relevant claim is dismissed. Here, where the Defendants are well known to have been part of the Abraaj Group and the Abraaj Group is well known to have been involved in a substantial fraud, it is not clear that fraud allegations against the Defendants can be said to have the same damaging impact that they would have against parties who were outsiders and not part of a corporate group that was connected with the fraud (although of course I accept that the Defendants consider that they were and claim to be the victims of and not the perpetrators of the fraud).
46. I am also not satisfied that the Withdrawn Claims based on rescission can properly be characterised as bound to fail (and it seems to me that the rescission-based claims should be treated as claims based on fraud, dishonesty, and conspiracy for the purposes of applying the *Clutterbuck* approach). The rescission based claims were clearly subject to serious difficulties on the facts from the outset but the issue of whether the Plaintiff had affirmed the loans depended on disputed issues of fact which, as it seems to me, cannot be characterised on the pleadings as without foundation and unarguable (even though the Defendants think that they would have been able to show at trial that the Plaintiff had sufficient knowledge before taking the steps said to amount to an affirmation of the loans to preclude and require the dismissal of the claims based on rescission). Paragraph 235 of the SOC, as noted above, avers that the Plaintiff did not know or understand and cannot reasonably have been expected to know or understand matters critical to an awareness and understanding of the fraud and dishonesty on which he relied until he reviewed "*the facts and evidence set out in the SEC's Summary of*



Allegations, dated 11 April 2019 (as amended on 16 August 2019), and the superseding US Indictment, dated 23 May 2019.” The Defendants (see for example [148.2] of the Fourth Defendant’s Amended Defence) relied on various steps and action taken by the Plaintiff before those dates (although the date of Plaintiff’s conduct with respect to the winding up of the First Defendant and AIML and the liquidation committee of the First Defendant is not pleaded and specified). It seems to me that on the face of the pleadings there were clear and material factual disputes that go to Plaintiff’s knowledge and state of mind and it cannot be assumed at this stage in the proceedings that the Plaintiff was bound to fail on these matters. It also appears that the UAE law is relevant and arguably applies to at least some of the elements of the rescission-based causes of action (see [240] – [243] of the SOC and for example [150] – [153] of Fourth Defendant’s Amended Defence) and no evidence of UAE law was placed before the Court (although summaries of the applicable law are included in the parties’ pleadings). While it might be possible in some circumstances for the Court to conclude that a claim based on or subject to issues governed by foreign law was hopeless or to be treated as bound to fail, even without evidence of such foreign law, where the legal issues in dispute were clear and unarguable, this does not seem to me to be one of those cases.

47. Accordingly, in these circumstances, it seems to me that applying the *Clutterbuck* approach to the Withdrawn Claims based on fraud, dishonesty, and conspiracy, it would not be just to order the Plaintiff to pay costs taxed on the indemnity basis. The Plaintiff’s withdrawal of these claims (a) cannot be treated as justifying the conclusion that the allegations on which they were based were not well-founded and (b) in the circumstances is to be regarded as justifiable and not unreasonable. I would note in this context the following comments of Kawaley J in *Fortunate Drift*:

“19. I indicated at the beginning of the hearing that it appeared to me to be an important consideration that FDL had elected to withdraw its Summons, purportedly for “commercial” reasons, after Canterbury’s evidence was served. Indemnity costs would not be appropriate because it would serve as a disincentive for parties considering withdrawal. Mr Asif QC resisted this suggestion. I accept that a withdrawal decision will not automatically have a dispositive impact in each and every case on whether the relevant application was unreasonably or improperly made, for indemnity costs purposes. The withdrawal decision may only have an impact on the costs incurred after the withdrawal decision has been made. Where applications are unreasonable and/or abusive because they are obviously bound to fail, the normal costs consequences cannot automatically be escaped”

through a subsequent withdrawal. But just as there are rules of war for military conflict, even in the secular sphere of civil litigation ‘repentance’ will always at least potentially count for something.

20. A litigant which withdraws an application which on one view is hopeless before it is heard is required by the relevant costs principles to do precisely that. This will make it appear more plausible that the withdrawing party is not the sort of litigant which is inclined to pursue unreasonable applications. Unreasonable litigants typically pursue unmeritorious applications to the bitter end. In the present case, the initial impression that FDL has not acted unreasonably or improperly overall is confirmed by a closer scrutiny of the material before the Court. Canterbury is entitled to its costs of the Summons generally, but only on the standard basis.
48. The *Clutterbuck* approach focusses on the circumstances surrounding and the justifications for the withdrawal and discontinuance of fraud-based claims. The approach taken outside the fraud context, considers the conduct of the proceedings by the party concerned prior to withdrawal and discontinuance. In my view, even on this approach, it would not be just to order that the Plaintiff pay the Defendants’ costs taxed on an indemnity basis.
49. For the reasons I have already explained, I do not consider that the Defendants have established that the Plaintiff was pursuing hopeless claims (or claims which he should have realised were hopeless). The unlawful means conspiracy claim and the rescission-based claims might be characterised as weak but not hopeless. Nor, in my view, are the criticisms of the Plaintiff’s conduct of the proceedings made by the Defendants, even considering the Plaintiff’s conduct broadly and as a whole as the Fourth Defendant submitted was appropriate, sufficient to justify an award of indemnity costs.
50. The Plaintiff did initially adopt, to use Mr Bloch QC’s own terminology, a belt and braces approach and decided to include the claims based on the alleged wrongdoing of members of the Abraaj Leadership and not just the alleged wrongdoing of Mr Naqvi, in circumstances where the Plaintiff only had access to very limited documents and materials on which to base such claims. In some circumstances, proceeding with a broadly based and factually complex case without a sufficient factual base can be seen as high-risk and likely to result in an award of indemnity costs. As Christopher Clarke J (as he then was) said in *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] All ER (D) 183 at [1] “Unreasonableness in the conduct of the proceedings and the raising of particular allegations, or in the manner of



raising them may suffice. So may the pursuit of a speculative claim involving a high risk of failure or the making of allegations of dishonesty that turn out to be misconceived, or the conduct of an extensive publicity campaign designed to drive the other party to settlement. The making of a grossly exaggerated claim may also be a ground for indemnity costs” (and see Tomlinson J (as he then was) in *Three Rivers DC v Bank of England* [2006] EWHC 175 at [25]). But for the reasons I have given, this is not one of these types of case. In my view it was not unreasonable or improper for the Plaintiff initially to include the Withdrawn Claims pending discovery or prior developments in the proceedings which indicated that the pursuit of such claims could no longer be justified. As I noted in my judgment dated 15 December 2021, the Plaintiff was in difficulty in not having access to the key documents and was dependent on discovery to obtain documents and further evidence to support and substantiate his claim. But he did have proper and reasonable grounds for at least initially including the Withdrawn Claims. So, for example, the SOC (see [233-235]) refers to the fact that *each* of the members of the Abraaj Leadership were indicted and, as I have already noted, [235] indicates that the Plaintiff’s knowledge and understanding of the involvement of the members of the Abraaj Leadership was based on the SEC’s Summary of Allegations dated 11 April 2019 (as amended) and the subsequent US indictment. Furthermore, as is set out in the Plaintiff’s Response to Request for Further and Better Particulars of the Statement of Claim dated 10 September 2020, one member of the Abraaj Leadership has already pleaded guilty in the US criminal proceedings to conspiracy and fraud (see response F to the requests 4.1 to 4.10 relating to paragraph 8 of the SOC).

The type of costs order to be made

51. The GHF Parties submitted that they were entitled to their costs of and occasioned by the Pursued and New Claims and the costs thrown away as a consequence of the abandonment of the Withdrawn Claims. The GHF Parties noted that under GCR O.62, r.4(7), there was jurisdiction to make various different types of costs order, including an issues-based costs order under GCR O.62, r.4(7)(f) and an order that a party pays a proportion (by way of a percentage) of the costs of the receiving party (a percentage-based costs order) under GCR O.62, r.4(7)(a). The GHF Parties submitted that the just and appropriate costs order in the present case was a percentage-based order. They sought an order that the Plaintiff pays 70% of their costs incurred to date in this action (to be assessed on taxation if not agreed).



52. The GHF Parties explained that they had arrived at the 70% figure as follows. They argued that 70% of the Plaintiff's causes of action (five of seven claims) had been deleted by the amendments and that a further 15% of his causes of action (his claim in deceit) had been amended and re-articulated and were now pleaded on the basis of a totally different factual matrix, meaning that the GHF Parties' costs of investigating the Plaintiff's original deceit claim, interrogating it, pleading to it and engaging with matters relating to discovery predicated upon it, such as a draft List of Issues, will very largely have been thrown away. 85% of the Plaintiff's SOC (i.e., the Withdrawn Claims) had therefore been withdrawn by the amendments. To this figure, the GHF Parties had applied a 15% discount to reflect any residual overlap between the costs incurred in respect of the Withdrawn Claims and the costs spent on the issues that were raised by the Pursued and New Claims, which are continuing to trial.
53. The GHF Parties argued that in the case of partial discontinuance, such as the present case, a percentage-based costs order had the benefit of avoiding the cost and complexity of seeking to untangle costs on an issue-by-issue basis in detailed assessment proceedings. The GHF Parties noted that in *RTZ Pension v ARC Ltd* [1999] 1 All ER 532 Potter LJ had said (at page 541j) that where, "*the plaintiff has abandoned all the pleaded issues without argument or adjudication [he] must therefore prima facie be regarded as having lost the day on all of them*" and submitted that the position was the same where a plaintiff had abandoned some (in this case, the majority) of its pleaded claims. Although Potter LJ in *RTZ Pension v ARC Ltd* did not refer to "*part of the action*", they submitted that the same approach followed as a matter of principle where what was discontinued (or struck through) was a "*part of the action*" or (as here) where the majority of the claims contained in the SOC are to be struck out (*per* GCR O. 21, r.3(1)).
54. The Fourth Defendant also sought a percentage-based costs order for the same percentage for the same reasons using essentially the same calculus. It also pointed out that as regards the costs of and occasioned by the Plaintiff's amendments, 55% of the Plaintiff's pleading had been excised and just 25% remained entirely unamended. Given that 75% of the pleading had been excised or amended, including the bulk of the part raising the contentious issues, an order providing for payment of 70% of the Fourth Defendant's historic costs was justifiable and fair.
55. The Plaintiff, as I have noted, accepted that, as Mr Bloch QC said during his oral submissions, the costs that were "*truly thrown away on those claims which [the Plaintiff was] no longer seeking to pursue [were] costs to which the Defendants [were] entitled.*" However, the Plaintiff



argued that it was inappropriate for the Court to make a percentage-based order in the current circumstances. The Defendants sought to quantify the portion of the whole case represented by the Withdrawn Claims not by reference to factual enquiries but by claims or causes of action. A claim or cause of action was a set of facts which entitled a party to relief. It could not however be assumed that if there were five claims, a fifth of the costs incurred at any one time will have been incurred on each of them. The Plaintiff submitted that it would be unsafe and unsatisfactory to assume that any of the costs spent on, for example, the unlawful means conspiracy cause of action, apart from those spent specifically on pleading to it, will have been wasted as the result of the Plaintiff no longer pursuing that claim. Mr Bloch QC argued that the connections between Mr Naqvi and the Abraaj Leadership relied on by the Plaintiff in the unlawful conspiracy cause of action were also relied on in and relevant to the revised deceit claim in the Concise Statement of Claim, for the purpose of attributing Mr Naqvi's acts and knowledge to the Defendants and establishing vicarious liability. Mr Bloch QC submitted that the appropriate way of viewing the withdrawal of the conspiracy claim was to see it as removing and avoiding a duplicative argument. In any event, he said, it would be wrong for the Court to adopt the broad-brush approach argued for by the Defendants and order at this stage that the Plaintiff pays 70% of the Defendants' total costs in the action to date. If it really was the case that 70% of the costs that have been incurred to date have been expended on matters which are wholly attributable to the Withdrawn Claims, then it ought to follow that the estimated and actual costs going forward should be 70% or substantially less than previously forecast but the Defendants had not suggested that this would be the case or offered to reduce the amount of the security for costs already ordered based on the previous estimates, and the draft list of issues prepared for the purpose of discovery suggested that even after the Plaintiff's amendments, the Defendants' anticipated that many of the factual enquiries required by and issues arising on the SOC would remain to be dealt with.

56. In my view, the appropriate order to be made is that the Plaintiff pay the Defendants' costs of and occasioned (or caused) by the amendments and the Defendants' costs in respect of the Withdrawn Claims, and of investigating and pleading to the facts and allegations which were in the SOC but are not included or restated in the Concise Statement of Claim, to the extent that those costs were and can be treated as wasted. In my view, it is clear, in view of the scope and extent of the amendments, that it will be established that the Defendants have wasted some, and probably a substantial proportion, of the costs incurred to date in investigating and pleading to the Withdrawn Claims (and the factual matters included in the SOC on which they were based). But I am not satisfied that I can at this stage finally fix a percentage of those costs which should

be treated as wasted. I do not consider that I can or should at this stage, summarily, form a firm and final view, reduced to a definitive percentage of what part of the Defendants' costs incurred to date can be treated as wasted and caused by the Plaintiff's amendments. Ultimately, the determination of the just and proper quantification of the wasted costs will probably need to await the trial of the action. If the Plaintiff fails completely at trial, he will presumably pay all the costs of the action. If he succeeds, but solely on the new particulars relied on in his modified deceit claim as set out in the Concise Statement of Claim, the Defendants will be entitled to all, or a substantial part, of their costs incurred up to the time of the amendments. If, however, the Plaintiff were to succeed at trial at least in part because of an allegation or the factual matrix which was included in and goes back to the SOC or arguably is only included in the Concise Statement of Claim but is based on and closely related to the allegations or the factual matrix in the SOC, then the amount of the Defendants' costs for which the Plaintiff is responsible will need to be adjusted and reduced.

An Order for Costs to be Taxed Forthwith

57. GCR O.62 provides as follows:

"Stage of proceedings at which costs to be taxed

- (1) *Subject to paragraph (2), the costs of any proceedings shall not be taxed until the conclusion of the cause or matter in which the proceedings arise.*
- (2). *If it appears to the Court when making an order for costs that all or any part of the costs ought to be taxed at an earlier stage it may order accordingly."*

58. Accordingly, costs will be taxed at the end of the proceedings unless it appears to the Court that such costs ought to be taxed at an earlier stage. The terms of O.62 do not establish any conditions that need to be satisfied before an order for taxation forthwith can be made. The Court's discretion is unfettered.

59. The basis on which the Court should exercise its discretion to order that costs be taxed forthwith was reviewed by Mr Justice Kawaley in *Fortunate Drift Ltd v Canterbury Securities Ltd* (unreported, 10 June 2020) (*Fortunate Drift*). He summarised his analysis as follows (at [24]):



“24. To summarize, I found that not ignoring the fact that each case falls to be determined on its own facts, the factors likely to be relevant in many cases to determining whether or not to order that interlocutory costs should be taxed and paid forthwith under GCR Order 62 rule 7(2) were the following:

- (1) *whether the relevant interlocutory costs were incurred in relation to a discrete issue within the wider proceedings viewed as a whole;*
- (2) *whether the paying party has acted unreasonably in any relevant way in relation to the application to which the interlocutory costs order relates;*
- (3) *whether the proceedings as a whole have a long time to run; and*
- (4) *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 Order 62.”*

60. Both the GHF Parties and the Fourth Defendant relied on Kawaley J’s judgment and argued that the application of the four factors to the facts of the present case indicated that an order for taxation forthwith was the appropriate order. In substance, they made the same points. First, the costs were incurred in relation to a discrete issue within the wider proceedings, namely in respect of claims abandoned by the Plaintiff and costs thrown away by reason of the broader excision of material from the SOC. These costs were limited to those matters and a distinct phase of the proceedings, namely the pleading phase together with some initial work in respect of discovery based upon those pleading. Secondly, the Plaintiff had acted unreasonably for the reasons which the GHF Parties and the Fourth Defendant had set out in their submissions on indemnity costs. They reiterated their argument that the SOC was manifestly deficient as a pleading and noted that in correspondence, the Plaintiff had relied upon the Admiralty and Commercial Court Guide and the observations of Leggatt J in *Tchenguiz v Grant Thornton* [2015] EWHC 405 (Comm) to justify providing a more concise pleading and replacing the SOC with a clean document. However, the SOC had extended far beyond what was necessary or appropriate, as was recognised in both the ASOC and the Concise Statement of Claim and was not compliant with the guidance of Leggatt J in *Tchenguiz*. Thirdly, these proceedings as a whole have a long time to run. The parties have yet to commence discovery, which was likely to be a time-consuming process. It was possible that the matter may not be listed for trial until 2023, and even then, judgment was unlikely to be handed down until sometime after that. Fourthly, there was no reason why it would be unfair to the Plaintiff to make payment of costs now. As the Plaintiff emphasised at the hearing of the Defendants’ application for security for



costs, he is a man of very substantial means. An order for payment forthwith will not deprive the Plaintiff of necessary funds nor stifle his claim. In addition to these points, the Fourth Defendant submitted that the Court should take into account the fact that the circumstances of the Plaintiff's application for leave to amend were exceptional. Having pleaded an expansive and inappropriate SOC alleging widespread fraud and wrongdoing the Plaintiff had now withdrawn the overwhelming majority of his pleaded case, both in terms of causes of action and in terms of pleaded material.

61. The Fourth Defendant also submitted that an order for costs forthwith can be made whether or not the Court ordered costs to be taxed on the indemnity basis. It appears that the Plaintiff did not contest this or argue that this proposition was wrong in law (despite an argument to that effect having been made previously).
62. The Plaintiff argued that an order that costs be taxed forthwith was both inappropriate and unnecessary. It was inappropriate because the grounds for making such an order were not made out and taxation should take place at the end of the case when the progress of the case and the effects of the amendments had become clear. It was unnecessary because the Defendants already had the benefit of an order for security for costs up to discovery and were therefore protected. If they considered that the amount of security was inadequate (although in view of the amendments, as I have already noted, the Plaintiff argued that the security was now likely to be too generous) they could apply for further security.
63. In my view, an order that costs be taxed forthwith is not appropriate. The issues arising on the Plaintiff's application to amend the SOC are, as I have explained, closely connected with the continuing proceedings, and cannot be considered as discrete, or sufficiently separated from, the conduct of the proceedings as a whole. A forthwith order is appropriate where the costs order is relevant to a discrete, separately identifiable aspect of the proceedings. In my view, this is not such a case, and it would not be just to make such an order. Interlocutory proceedings relating to the discovery of documents are an instance of an application dealing with a discrete issue quite separate to the principal proceedings. The costs relating to the enforcement of the AML Order, which Kawaley J ordered to be taxed forthwith in *Fortunate Drift*, arose "*in relation to a discrete issue which [was] itself a sub-issue arising under [the defendant's interlocutory summons for production of documents] which itself raised a discrete issue within but being merely tangential to the ... proceedings as a whole*" (see Kawaley J's judgment at



[32] and at [2] where the learned judge described the AML Order as “*highly unusual*” and as arising “*out of an excursion off the main road that a contractual dispute over a brokerage agreement was expected to travel.*”) I also, for the reasons explained above in dealing with the application for indemnity costs, do not consider that the Plaintiff has acted unreasonably so as to justify an order for immediate taxation. I accept that these proceedings are likely to continue for some considerable time but in my view taxation of the costs orders I have made against the Plaintiff is best done at the end of the proceedings. The quantification of costs in this case, to adopt an expression used by Hamblin J (as he then was) in *GB Gas Holdings Ltd v Accenture (UK)* [2010] EWHC 2928 (Comm) at [28], involves an “*issue of disentanglement*” which is an important factor against an immediate taxation. In my view it will not be unfair to the Defendants to decline to order taxation forthwith particularly where they already have security for costs and a payment on account will be ordered. As I explain below, I have decided that I can and should make such an order in this case.

Payment on account

The Defendants’ evidence and submissions

64. GCR O.62, r.4(7)(h) provides (underlining added by me):

“(7) *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.*”

65. The GHF Parties relied on the judgment of Kawaley J in *Al Sadik v Investcorp Bank BSC* [2019] (2) CILR 585 where the learned judge summarised (at [25]) the “*governing principles under Cayman Islands law*” and said (at [25(e)]) that GCR O.62, r.4(7)(h) contained an:

“implicit starting assumption that an interim payment should be made. Obviously, this starting assumption has somewhat less weight than an express statutory presumption. But the starting assumption arises from the indisputable fact that the core function of the rule is (i) to articulate the principle that the mere fact that a taxation hearing is pending is “not...a good reason” for depriving [the relevant party] ... of all of their costs, and (ii) to empower the Court to summarily assess an appropriate partial costs payment which should immediately be made”.

66. GHF Parties submitted that accordingly, although the provisions of the GCR O.62, r.4(7)(h) did not contain a statutory presumption, the rule contained an implicit starting assumption that an interim payment should be made, although the power to make such an order was clearly discretionary and the strength of the starting assumption may be weaker or stronger depending on the circumstances of each case.
67. The GHF Parties drew to my attention the fact that that Kawaley J's formulation of the proper approach to be adopted differed from that adopted by Parker J. in *Re BDO Cayman Ltd* [2018] (1) CILR 187 and the Court of Appeal of England and Wales in *Blakemore v Cummings* [2010] 1 WLR 983. In *BDO* Parker J had said (at [34]) that "*It seems to me that the relevant provision of the Grand Court Rules (O.62, r.4(7)(h)) gives the court a discretion to order litigants to make a payment on account of costs and in the exercise of its discretion the court is entitled to do justice on a principled basis. However, there is not the reversal of burden which pertains in England following the introduction of the CPR rule*" and held (at [38]) that "*It seems to me as a matter of discretion, taking all these matters into account and balancing the interests between the litigants, that it would not be fair to order an amount to be paid on account in this case.*" The headnote in the report had interpreted Parker J as deciding that "*It could not be said that an interim payment would ordinarily be ordered unless there were good reasons not to do so.*" As regards *Blakemore*, Kawaley J had said (following Jacob J's judgment in *Mars UK Ltd v Teknowledge Ltd (Costs)* [1999] EWHC 226 (Pat)), as follows (at [25(c)]):

"In that case, the principle that a successful party should not be kept out of their costs was described as "an important consideration." With respect, that understates the true weight the principle deserves. The principle that a successful party should be paid some of his costs immediately and before taxation is not simply "an important consideration," it is the governing and predominant principle articulated by the interim payment on account of costs rule."

68. The Fourth Defendant supported the GHF Parties' submissions and submitted that in light of the judgment of Kawaley J in *Al Sadik* ([16] to [25]) the following were the applicable principles:
- (a). the Court had a discretion whether to order a payment on an account and, if so, in what amount. The discretion was unfettered.



- (b). the governing principle was that the successful party was entitled to its costs and, in principle, ought to receive such as soon as possible. It was not a good reason to keep a successful party out of some of his costs because time was needed to work out the total amount.
 - (c). the purpose of the rule was to enable the Court to avoid the injustice of delayed payment until the total amount had been determined. Whether to order a payment will require an assessment of whether there was a good reason not to order an interim payment.
 - (d). there was an implicit starting assumption that an interim payment should be made.
69. The GHF Parties also submitted that the Court should have regard to all relevant factors in deciding whether to order a payment on account and, if a payment is to be made, the quantum of that payment and relied on the judgment of Lord Clarke in *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 in which he summarised the relevant factors (at [72(c)]) as including (a) the likelihood (if it can be assessed) of the costs claimants being awarded the costs that they seek or a lesser amount, and if so what proportion of them; (b) the difficulty, if any, that may be faced in recovering those costs; (c) the means of the parties; (d) the imminence of any assessment; (e) any relevant delay; and (f) whether the paying party will have any difficulty in recovery in the case of any overpayment.
70. The GHF Parties submitted, in reliance on the evidence adduced in Mr Lewis' Eighth Affidavit, that in this case there was no good reason for refusing to order an interim payment. It would, they said, be unjust to require and there was no justification for requiring the GHF Parties to wait for a payment towards their costs until the taxation process had been completed. They relied in particular on the following matters: (a) in view of the detailed evidence before the Court, and the amount sought by the GHF Parties, the Court should conclude that the likelihood of the GHF Parties being awarded costs in a lower amount than the amount they sought to be paid on account was negligible and any residual risk could be ameliorated by a suitable percentage discount being applied by the Court; (b) when the Court had awarded the GHF Parties security for costs, it had accepted that there existed a real risk of non-enforcement of any costs order that is made against the Plaintiff after the proceedings had been determined; (c) there had been no delay in the application for a payment on account; (d) the Plaintiff will have no difficulty in recovering any overpayment to the GHF Parties, both of which are solvent



entities based in this jurisdiction. As regards the assessment of a reasonable sum, the GHF Parties said in their written submissions that, based on Mr Lewis' evidence, a reasonable estimate of what was likely to be awarded to them on a detailed taxation on the indemnity basis was US\$3,005,160.18. This was 60% of their aggregate actual costs, covering the fees of their Cayman attorneys, Leading Counsel, Junior Counsel, their foreign lawyers (US\$961,468.22) and disbursements incurred in this action up to 19 November 2021 calculated on the assumption that costs would be taxed on the indemnity basis (Mr Lewis at [81] states that the total is US\$5,008,600.31 although on my calculation the correct figure is US\$5,008,601.31). They sought a payment on account, assessed summarily, in that amount (US\$3,005,160.18). However, as I note below, Mr Lewis also provided details of the costs incurred if calculated on the assumption that costs would be taxed on the standard basis. This would exclude the costs of the GHF Parties' foreign lawyers and reduced the total to US\$2,705,885.29, and 60% of that amount would be US\$1,623,531.17.

71. The Fourth Defendant also argued that there was no good reason in this case why an interim payment should not be ordered. The default rule was not displaced. Moreover, there were good reasons to order an interim payment. The Fourth Defendant was entitled to a substantial sum by way of costs and ought to receive at least part of that sum as soon as possible. There was sufficient evidence before the Court to make an appropriate assessment of an interim payment. Evidence in support of the Fourth Defendant's application had been filed by way of the Second Affirmation of Jessica-Leigh Knowles (*Knowles 2*), an associate at Ogier. She confirmed that the Fourth Defendant's costs incurred in these proceedings up to 31 October 2021 (excluding all costs of the Fourth Defendant's onshore counsel and all costs on the application for security for costs) were US\$1,892,353.04 on the standard basis (of which 70%, being US\$1,324,647.13, could properly be classified as wasted due to the Plaintiff's discontinuance of the Withdrawn Claims and the amendment or abandonment of his prior pleaded case more generally) and US\$2,225,679.63 on the indemnity basis (of which 70% could once again properly be classified as wasted due on the same basis). The Fourth Defendant sought what it claimed to be a conservative proportion of those costs, namely 80% of that 70% if costs were awarded on the indemnity basis, or 60% of that 70% if costs were awarded on the standard basis. 70% of the historic costs calculated on the indemnity costs basis was US\$1,557,975.74 so that 80% of that amount was US\$1,246,380.59. 70% of the historic costs calculated on the standard basis was US\$1,324,647.13 and 60% of that was US\$794,788.28.



72. The Fourth Defendant submitted that an interim payment ought to be made regardless of whether a forthwith order was made. Indeed, the justification for ordering an interim payment was all the more compelling if the Court declined to order taxation and payment forthwith. The Plaintiff had argued in correspondence that a payment on account could only be made if the Court ordered costs to be taxed forthwith. Nelsons had argued in their letter to Walkers dated 1 September 2021 that "... it [was] clear from the wording of GCR Order 62, Rule 4(7)(h) that the court will only exercise its powers pursuant to that Rule where costs and their taxation have been ordered. The decision in *Al Sadik* is consistent with that Rule, as the case concerned proceedings that had concluded and there was no issue as to whether a taxation should take place." The Fourth Defendant submitted that this was incorrect. The power to order a payment on account arises, "where the Court orders the paying party to pay costs subject to a taxation" and GCR O.62, r.4(10) states that "When used in an order of the Court, the expression *Costs, Order for costs and Costs to be taxed if not agreed shall mean costs to be taxed on the standard basis.*" Accordingly, whenever the Court ordered a party to pay costs, it was ordering that they be paid "subject to taxation," even if it was not ordering them to be taxed forthwith. An order for costs, either expressly or by implication, includes an order that they be taxed; a costs order was therefore an order "to pay costs subject to taxation" and it did not matter whether the taxation is to take place "forthwith" or at the conclusion of the case. However, since the Plaintiff did not argue in his written or oral submissions that the Court was unable to order an interim payment unless an order for taxation forthwith was made, I take it that he did not rely on this argument for the purpose of this application and therefore that he accepts that the Court can do so.

The Plaintiff's evidence and submissions

73. The Plaintiff opposed any order for a payment on account. He submitted, elaborating on the arguments made in relation to the indemnity costs issue, that at this stage the Court could not safely form a view about and assess the quantum of costs that would be payable to the Defendants in relation to the costs wasted as a result of the Plaintiff's amended case (because it remained unclear how much of the costs incurred to date will ultimately be wasted as this depended on further developments in the proceedings including seeing the Defendants' amended defences and also on the extent to which facts relied on for the purpose of the Withdrawn Claims remained relevant in and needed to be dealt with for the purpose of the other related proceedings). Furthermore, even if the Court considered that an estimate of such costs



could properly be made at this stage, the evidence filed by the Defendants was insufficient to allow the Court to form a proper view on a reasonable sum to be paid on account and summarily to assess the quantum of such a payment. The Plaintiff argued that the broad-brush basis on which a payment on account was sought was not a safe way to proceed; an order for an interim payment on account would create a risk of overpayment and the GHF Parties and the Fourth Defendant had offered no undertaking as their solvency.

74. At the hearing, the Plaintiff said that he had not had sufficient time to file evidence in response to and to make submissions on the GHF Parties' and the Fourth Defendant's evidence (Mr Lewis' Eighth Affidavit and Knowles 2 respectively) regarding the quantum of legal fees incurred by them in these proceedings and claimed by way of a payment of account. I decided that it would be appropriate to give the Plaintiff a short further period in which to do so and accordingly at the end of the hearing I directed that the Plaintiff be permitted to file by 13 December 2021 such evidence in response and further submissions. On that date, the Plaintiff filed and served Mr Steven Barrie's Third Affidavit (*Barrie 3*) and the First Affidavit of Mr William Helfrecht. Mr Barrie is a director at Nelsons and Mr Helfrecht has since 2014 been a sitting taxing officer in this jurisdiction for this Court (and is also qualified as a Cayman Islands attorney and a non-practising barrister in England and Wales). Following the filing of this evidence, and with my permission, Walkers on behalf of the GHF Parties (on 16 December 2021) and Ogier on behalf of the Fourth Defendant (on 15 December 2021) wrote to the Court setting out their submissions on the Plaintiff's evidence.
75. Mr Barrie reviewed the costs claimed by the GHF Parties and the Fourth Defendant and made a number of points. He said that the sums claimed were "*very substantial*" and "*were the highest [he] had seen.*" He said that there were items in the Defendants' evidence of the costs incurred which were "*difficult to understand*" for example the GHF Parties appeared to indicate that since 1 July 2021 US\$271,052.50 had been incurred on "*Investigative/Forensic Review*" while the Fourth Defendant had suggested that a meaningful part of their costs were for their forensics experts, Alvarez & Marsal. Mr Barrie said that "*he could not see basis on which such substantial costs had been incurred.*" He also questioned whether the costs on which the GHF Parties had based their claim for a reasonable sum related only to costs incurred in these proceedings rather than the related proceedings. He said that "*the broad-brush approach of seeking at this stage to attribute a percentage of the total costs incurred to date to the claims or allegations withdrawn by [the Plaintiff] is potentially inaccurate*", particularly in light of the

fact that the Defendants had yet to serve their amended defences. He also said that the information provided by the Defendants regarding the costs claimed was inadequate (for example, there was no “*real breakdown*”) and that there was a risk of irreconcilable judgments if the Court made an order for a payment on account at this stage of the proceedings. He further reiterated that the Plaintiff had sought an undertaking from the GHF Parties and the Fourth Defendant as to their solvency which they had not provided.

76. Mr Helfrecht provided an overview of the taxation process and evidence of his experience of taxation in large cases and offered his opinion on aspects of the taxation of the Defendants’ costs in this case. For example, at [16] he said that “*If I were asked to conduct a taxation (or assessment) – whether for the purpose of an interim payment or final taxation – on the basis of Lewis 8 and Knowles 2, I must say that I would find that a very difficult task to perform.*” He then went on to opine as follows:

“24. *In light of my experience, as summarised above (so far as is pertinent) I would find it very difficult indeed to conduct any form of assessment either for the purpose of an interim payment on account of costs or a final taxation, on the basis of the information that has been provided to me, or over a short period of time.*

25. *Whilst I can do no more than provide a preliminary comment, the information contained in Lewis 8 and Knowles 2 seems very generalised. That level of generality might make sense, and be appropriate for, a security for costs application where the Court is projecting future costs, with the result that a party must pay monies into court. It is very different, I believe, where the Court is considering solely incurred costs, and is contemplating an order that monies be paid directly into the hands of another party, which would be much harder to recover in the event of overpayment.*

26. *I would also note that, if an interim payment were to be made without a detailed bill of costs being prepared, not only would the Judge or taxing officer be deprived of then opportunity to review in detail the breakdown of the allegedly incurred costs, the paying party would also be deprived of the opportunity of conducting a review and potentially agreeing those elements that are considered to be unreasonable.”*

77. The GHF Parties and the Fourth Defendant submitted that most of Mr Barrie’s affidavit amounted to submissions (and was inadmissible under GCR O.41, r.5(3) given that the affidavit constituted opinion evidence from an attorney on matters which are not within his direct personal knowledge). They argued that whether or not the affidavit was treated as inadmissible, the submissions were generalised and of little weight. For example, Mr Barrie



says (at [9]) that the Defendants' costs *"are amongst the highest I have seen,"* but that revealed nothing unless Mr Barrie provided details of his experience. In paragraph 10 of Barrie 3 he refers to the GHF Parties costs as being *"extremely high,"* and the Fourth Defendant's costs as being *"also substantial,"* but bald and generalised statements such as these were to be given no or very little weight. Mr Barrie had questioned (at [11]) the costs incurred by Alvarez & Marsal for the Fourth Defendant, he also said (at [13]) that he acknowledged that work would have had to have been undertaken investigating the financial position of the Abraaj Funds, including issues of liquidity and alleged commingling as well as loans, which was precisely the type of work that the forensic experts for the Fourth Defendant have undertaken. Mr Barrie had also criticised the proposed broad-brush approach to costs and noted the potential inaccuracies of such an approach, yet he had (at [19]) accepted that it was difficult to disentangle his own firm's costs and neatly to compartmentalise them. He had then asserted that it was impossible to perform the compartmentalisation exercise that the Fourth Defendant had undertaken but he had failed to understand the Fourth Defendant's (and the GHF Parties') submissions. The point made by these Defendants was that the broad-brush approach was appropriate precisely because of the difficulties in determining exactly how much time was spent on the specific issues or causes of action covered by the Withdrawn Claims, even if a lengthy, granular review of all invoices, narrative by narrative, line by line, was undertaken by the parties. It was, they submitted, simply a feature of the way that attorneys bill for their work (for example, work on a statement of claim was not broken down into each and every cause of action or issue therein). The GHF Parties and the Fourth Defendant had recognised that there were difficulties with their proposed approach but submitted that a broad-brush approach was still just and appropriate given that these proceedings remained at an early stage and that the Plaintiff was effectively starting again with his proposed amendments and also that the Court was able to form a view on the quantum of costs to be awarded or estimated.

78. The GHF Parties and the Fourth Defendant submitted that Mr Helfrecht's evidence was of no assistance to the Plaintiff:
- (a). Mr Helfrecht had approved (and eventually sworn I assume) an affidavit which was premised upon his position as a current taxing officer of the Grand Court, in which he opined that the Court should not exercise its jurisdiction to order an interim payment on account of costs. The GHF Parties questioned the appropriateness of a sitting taxing officer of the Court being retained by a party to litigation to provide an opinion in favour



of such party to the Court on matters of costs for the purpose of an interlocutory application. Although Mr Helfrecht had stated that he was not instructed to "*advocate on [the Plaintiff's] behalf*", that appeared to be precisely what he had done.

- (b). Mr Helfrecht had referred to himself as an expert on costs and it was clear that his First Affidavit was intended to be a form of expert evidence, which, in the absence of leave from the Court, was inadmissible.
- (c). Even if the Court decided to take Mr Helfrecht's evidence into account, his opinion was based on a misunderstanding as to what a payment on account, "*summarily assessed*," involves and the relief that the Defendants are seeking. Mr Helfrecht had said (at [16]) that "*If [he was] asked to conduct a taxation (or assessment) – whether for the purpose of an interim payment or final taxation – on the basis of Lewis 8 and Knowles 2, [he] must say that [he] would find that a very difficult task to perform.*" But the Defendants were not suggesting that the taxing officer should be asked to do either of these things. If the Court were to order the Plaintiff to pay a reasonable sum on account of costs it would assess the costs, "*summarily*" as required by GCR O.62, r. 4(7)(h). The Court would not tax the costs itself or order them to be taxed by a taxing officer (even if the Court were to order costs to be taxed forthwith, taxation would proceed in the normal way and the taxing officer could be provided with all the additional information that Mr Helfrecht says would be necessary for a taxation.)

Discussion and decision

- 79. In my view, it is appropriate to order the Plaintiff to make a payment on account and the Court has sufficient material before it to allow a summary assessment of a reasonable sum. Furthermore, the fact that there remains an issue and some doubt as to precisely what part of the Defendants' costs of dealing with the Withdrawn Claims will ultimately be shown to be wasted, does not prevent me, in this case, from fairly assessing a reasonable sum to be paid. In my view, as I have said, it is likely that it will be established that the Defendants have wasted some, and possibly a substantial proportion, of the costs incurred to date in investigating and pleading to the Withdrawn Claims and in these circumstances, I am satisfied that I can fairly and properly summarily assess a suitable reasonable sum to be paid on account. This is not one of those cases where it is likely or seriously arguable that there will ultimately be no payment due to the Defendants at all. As is made clear in *Mars*, the premise of the reasoning of Jacob J was



that a payment for some reduced amount was justifiable where and because the receiving party was almost certainly going to collect that amount at the end of the day.

80. There are four main issues that arise. First, is there sufficient information before the Court to enable me fairly and properly to assess a reasonable sum? Secondly, what is the proper approach to the exercise of the Court's discretion to order a payment on account? Thirdly, should the discretion be exercised in this case so as to make such an order? Fourthly, if so, what is the reasonable sum to be paid? I shall deal briefly with each of these issues in turn.
81. The relevant standard was neatly summarised by Kawaley J in his judgment in *Al Sadik* (at [25]). He noted that *"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."* In this case, the GHF Parties and the Fourth Defendant referred to the cost estimates put in evidence in support of their earlier and successful application for security for costs (see Mr Lewis' Eighth Affidavit at [56] and Knowles 2 at [6]) and updated these to 19 November and 31 October 2021 respectively. In my judgment on that application (at [74(b)]) I concluded that:
- "as regards the estimated costs put in evidence by the GHF Parties and the Fourth Defendant, I consider that they were carefully and properly prepared according to an appropriate methodology, were adequate for these applications and represent the legal teams' best estimates at this stage of their likely future fees."*
82. The updated estimates were set out in Mr Lewis' Eighth Affidavit at [61] – [81]) and Knowles 2 at [7] – [8].
83. Mr Lewis provided details of the fees of Walkers, Leading Counsel, Junior Counsel, and the GHF Parties' foreign lawyers Cleary Gottlieb Steen & Hamilton LLP. Since I have held that the GHF Parties are only entitled to their costs taxed on the standard basis they are not entitled to include the cost of their foreign lawyers, and I shall ignore the estimates for Cleary Gottlieb for this purpose. Mr Lewis confirmed that the methodology used to calculate the actual time costs incurred by Walkers, Leading Counsel and Junior Counsel was the same as had been applied for the purpose of the security for costs application and was in Lewis 6 at [9] and [11]. Mr Lewis said that 70% of the fees charged by Walkers (calculated on the basis that costs were to be taxed on the standard basis) was US\$1,578,447.24 (US\$946,546.65 to 30 June 2021 and US\$631,900.59 from 1 July to 19 November 2021).



The total fees charged by Counsel for the same period (once again calculated on the basis that costs were to be taxed on the standard basis) was US\$470,102.36 (US\$360,854.30 to 30 June 2021 and US\$ 109,248.06 from 1 July to 19 November 2021). Mr Lewis also included details of the disbursements claimed by the GHF Parties for the same period and allocated to this action totalling US\$657,305.69. Of this, US\$454,385 related to the fees charged by FFP (Cayman) Limited (**FFP**) (the company which employs Mr Lewis - Mr Lewis is and gives his evidence as a director of the Second Defendant, which is itself a director of the Third Defendant) and US\$149,010.75 related to Deloitte and AIML. As regards FFP, Mr Lewis said as follows (at [79(b)]):

“(b). Having carefully considered the forensic work done by FFP, including a detailed manual review of the narratives in relevant billing codes, I confirm that the following methodology has been implemented to calculate the quantum of FFP's forensic work:

- (i) all time (totaling US\$51,735) on the "Investigations/ Forensic Review - Jafar" billing code is included. For the avoidance of doubt, checks were conducted of the narratives of individual time entries recorded under this billing code to ensure that they were directly referable to forensic work in the Jafar Proceedings;*
- (ii) all time (totaling US\$70,380) on the "Legal/ Litigation - Jafar" billing code is included. This followed a detailed manual review of the narratives in each individual time entry. These constitute litigation management/support work that was billed to this billing code; and*
- (iii) 50% of time (totaling US\$106,335) on the "Legal/ Litigation (General)" and 50% of time on (totaling US\$212,700) on the "Investigations/ Forensic Review (General)" billing codes is included as set out below. This followed a detailed manual review of the narratives in each individual time entry. FFP has implemented the following methodology in respect of these two billing codes only;*
- (iv) where a time entry was identifiable as forensic and litigation management/support work generally (but not in respect of any one particular proceeding), the time entry was attributed at 50% to the Jafar Proceedings. This time split is based on FFP's reasonable assessment of the relevance and utility to each proceeding of the general investigative work undertaken;*
- (v). In addition, FFP has incurred US\$13,235.00 in disbursements. Of this, US\$3,663.00 is directly attributable to the Jafar Proceedings. The remaining US\$9,571.00 relates to the "Legal/ Litigation (General)" and*



"Investigations/ Forensic Review (General)" billing codes, where a 50% reduction has been applied to the total figure. These figures have been combined with the US\$441,150 incurred by FFP which has been allocated to the Jafar Proceedings to give the final FFP figure of US\$454,385 in the table below.

- (c). *Where disbursements were incurred in respect of all of the active proceedings (i.e. (i) Walkers' miscellaneous disbursements; (ii) Consilio's discovery hosting costs and (iii) the Deloitte/AIML disclosure) and are therefore required to be split, I understand that Walkers has reduced the disbursement to 75%, being the same percentage used in respect of Walkers costs calculations for all of the reasons provided in the methodologies in Lewis 6."*

84. Mr Lewis confirmed (at [61]) that Walkers had used four separate billing codes from 22 October 2020 in order to allocate time to each of the different sets of the related proceedings.

85. Ms Knowles said as follows:

- “6. *As explained in my First Affirmation of 27 August 2021 adduced in support of the Fourth Defendant's application for security for costs, the total costs incurred in these FSD 203 of 2020 (NSJ) proceedings (the "Jafar Proceedings") up to 30 June 2021 for: (i) Ogier's fees at the capped hourly rates, (ii) the fees of the Fourth Defendant's Leading Counsel (Andrew Ayres QC) at the capped hourly rates as applicable after currency conversions; and (iii) for fees of the Fourth Defendant's forensic accountants Alvarez & Marsal ("A&M"), were in total US\$1,571,047.70.*
7. *Between 1 July 2021 and 31 October 2021, an additional US\$321,305.34 of costs has been incurred on the Jafar Proceedings by the Fourth Defendant, consisting of: (i) Ogier's fees at the capped hourly rates; (ii) Leading Counsel's fees at the capped hourly rates as applicable; and (iii) A&M's fees.*
8. *This means that, on the capped hourly rates, the Fourth Defendant's total costs of the Jafar Proceedings up to 31 October 2021 are US\$1,892,353.04.*
9. *The total amount set out in paragraph 8 above includes fees for work: (i) considering Mr Jafar's original claims, (ii) on the defence, review of the replies to the defence, and on amending the defence (iii) commenting on the draft list of issues in the Jafar Proceedings, (iv) on relevant inter partes correspondence, (v) to prepare for discovery, (vi) on requests for documents and requests for further and better particulars. These amounts do not include costs of the application for security for costs which were dealt with separately as indicated in my First Affirmation. The Fourth Defendant's legal team and forensic accountants record time*

separately for the Jafar Proceedings and the related proceedings in FSD 15 of 2020 (NSJ) (the "AH JOLs' NPEF IV Clawback Proceedings"), and therefore the figures in paragraphs 6 - 8 above do not include fees billed separately for work on the AH JOLs' NPEF IV Clawback Proceedings."

86. As will be apparent from these extracts, the Defendants have not provided a detailed analysis by allocating fees charged to the different workstreams they had identified or by identifying the number of hours charged and at least the seniority of the fee earners who had recorded time. It would have been helpful and preferable for them to have done so (recognising that in the case of continuing litigation the Defendants would quite properly wish to avoid providing a breakdown that would reveal either their litigation strategy or the focus of their advisers' work). Nonetheless, I consider that they have provided a sufficient breakdown of the costs claimed. On this occasion, I consider that the aggregate figures put in evidence, together with the assurances and explanations provided by Mr Lewis and Ms Knowles as to the methodology used to calculate the fees incurred to date and to identify albeit broadly the workstreams involved are sufficient for the purpose of a summary assessment and to enable me to form a reasonably reliable, albeit preliminary, view of the costs charged and the extent to which they are likely to be recoverable on a taxation. I note that in *United Airlines Inc. v. United Airways Ltd* [2011] EWHC 2411 (Ch) (discussed by Kawaley J in *Al Sadik* at [26]), (*United Airlines*) Vos J (as he then was) awarded an interim payment despite not having had an opportunity to consider the draft bill of costs put in evidence in that case. However, the absence of the kind of detail I have just referred to means in my view that it is appropriate to apply an additional discount to the figures provided by the Defendants. I also note that in the security for costs judgment I applied a discount to the amounts attributable to forensic advice (from FFP or others) in part because of uncertainties regarding the extent of the work they would need to do for and connected with discovery but also because of the concerns raised by the Plaintiff regarding the Defendants' entitlement to claim for and the quantum of such costs.
87. In my view, I do not need to form a view as to whether Mr Justice Kawaley was right to conclude in *Al Sadik* that there was an implicit starting assumption that an interim payment should be made. The Plaintiff did not mount a challenge to Mr Justice Kawaley's decision, and I am satisfied that in this case I should exercise my discretion, having regard to all the circumstances, to make an order for a payment on account even if the principle that a successful party should be paid some of his costs immediately and before taxation was simply "*an*

important consideration” to be taken into account when the Court is exercising its discretion and there is no implicit starting assumption to be applied. I would note what I said in *Lea Lilly Perry v Lopag* (unreported, 1 December 2020) (*Perry*), where Mr Justice Kawaley’s implicit assumption analysis was not debated in submissions:

“the jurisdiction to order a payment on account is based on GCR O.62, r.4(7)(h) which states: “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”. As confirmed by Mr Justice Parker in BDO [2018 (1) CILR 187] the provisions of the GCR give the Court a discretion (without any presumption) to order that litigants make payments on account in order to do justice on a principled basis.”

88. The matters to be taken into account were helpfully summarised by Lord Clarke in *Excalibur* where he identified, as I have noted, six factors as being of particular relevance (but of course not the only matters to be taken into account). These were (a) the likelihood (if it can be assessed) of the costs claimants being awarded the costs that they seek or a lesser amount, and if so what proportion of them; (b) the difficulty, if any, that may be faced in recovering those costs; (c) the means of the parties; (d) the imminence of any assessment; (e) any relevant delay and (f) whether the paying party will have any difficulty in recovery in the case of any overpayment. In this case, the Defendants are clearly entitled to costs flowing from the Plaintiff’s substantial amendments to his pleaded case and, since I have decided that taxation will take place only at the end of these proceedings, they will be required to wait for a considerable period of time before being able to have a taxation and recover what is held to be owed to them. I consider that it would be unjust to require them to do so without receiving a payment on account. I am satisfied that the risks of the Plaintiff having a difficulty in recovering any overpayment from the Defendants to the GHF Parties are remote and have not been established by the Plaintiff (he simply relied on an unparticularised and unsubstantiated allegation that the Defendants might become unable to repay such an overpayment) and in any event I have taken this risk into account when fixing the percentage discount to be applied to the Defendants’ figures for costs incurred. I also note that, as the Defendants submitted, they are both solvent entities based in this jurisdiction which should be able to repay any overpayment and against whom a judgment could be enforced if necessary. Furthermore, I reject the Plaintiff’s submission that the Court cannot safely conclude that at least some costs will be payable to the Defendants in relation to the costs wasted as a result of the Plaintiff’s

amended case. It seems to me that the Plaintiff has rather overstated his case on this point. I have accepted that it would be inappropriate at this stage *finally* to fix a percentage of those costs which should be treated as wasted, and that ultimately the determination of the just and proper quantification of the wasted costs will probably need to await the trial of the action. But it seems to me that, having regard to the extent of the Plaintiff's amendments and the nature and scope of the Plaintiff's retained case as set out in the Concise Statement of Claim, there is no doubt that a material and probably a substantial proportion of the Defendants' costs to date in investigating and pleading to the Withdrawn Claims will be held to be payable by the Plaintiff, even if he were to succeed at trial.

89. The approach which the Court should take when determining a reasonable sum (and the quantum of the payment on account) was clearly summarised by Kawaley J in *Al Sadik* by reference to the judgment of Vos J in *United Airlines*, as follows (underlining added):

"26 Ms. White properly conceded that the court "should be conservative in making its [summary] assessment" for the purposes of an interim costs order (written submissions, para. 5.10). She referred the court to a helpful passage in the transcript of a costs hearing before Vos, J. (as he then was) in United Airlines Inc. v. United Airways Ltd. (6). A permanent injunction restraining the defendants from using certain signs by way of summary judgment in a passing-off action. The entitlement of the plaintiff to an interim costs award was not challenged. The transcript concluded as follows:

"This is an application for an interim payment of costs in this case. The bill of costs provided by the Claimant shows that they have incurred in this whole action the total sum of \$191,871, or £117,482. What Mr Jones says in answer to this application is that the bill is wholly disproportionate . . . I think it would be very hard for me to say, looking at this bill, that it is in any way disproportionate or unreasonable.

That said, there has not been an opportunity to consider the bill in detail, and there is always the possibility that on an assessment the Defendants will manage to establish that the bill is on the high side.

What I have to determine is not the irreducible minimum that is likely to be ordered, but a reasonable estimate of what is likely to be awarded. I intend to take a fairly conservative view of that . . . I am going to assess the amount that should be paid by way of interim payment at the sum of £50,000, to be paid within 35 days."

- 27 In United Airways, just less than 50% of the total costs claimed was awarded by way of interim costs, although the total costs claimed did not appear to the judge to be excessive. This guidance was particularly helpful because the principal*

challenge to the present application was also that in global terms the sum claimed was excessive. The principles governing the broad approach to summary assessment which the first defendant commended to the court were not challenged. I accordingly found that—

- (a) *the aim of summary assessment was to reasonably estimate the amount of the likely final award;*
- (b) *in carrying out that assessment, the court should adopt a conservative approach, allowing for a reduction on taxation even if the instinctive feeling of the court was that the impugned claim was not unreasonable.”*

90. In *United Airlines Vos J* awarded 42.5% of the total sum claimed by the claimant. In *Al Sadik Kawaley J* awarded, erring as he said on the side of caution, an interim payment of 40% of 85% of the amount of indemnity costs claimed by the first defendant. In *Perry I* decided (at [72(e)]) that the payment on account should be 20% of the sums claimed. But these decisions are merely indicative of the approach to be followed and not precedents since each case is fact sensitive and must be decided on its facts having regard to the relevant circumstances and a balancing of the risks of prejudice to both the Plaintiff and the Defendants.
91. In their written submissions, as I have noted, the GHF Parties sought a payment on account in the sum of US\$3,005,160.18, which represented 60% of their historic costs in this action incurred up to 19 November 2021 calculated on the assumption that costs would be taxed on the indemnity basis. But Mr Lewis’ evidence was that the total amount claimed on the assumption that costs are to be taxed on the standard basis was US\$2,705,885.29 being US\$1,578,447.24 for Walkers, US\$470,102.36 for Leading Counsel and Junior Counsel, and disbursements of US\$657,305.69. The figure for Walkers’ and Counsels’ fees without disbursements is therefore US\$2,048,549.60. The Fourth Defendant seeks a payment on account of US\$794,788.28. This represents 60% of US\$1,324,647.13, which is 70% of the Fourth Defendant’s total historic costs up to 31 October 2021 calculated on the assumption that costs will be taxed on the standard basis (of US\$1,892,353.04). The Fourth Defendant included for this purpose Ogier’s fees (capped at the applicable hourly rates for standard taxation); Leading Counsel’s fees at the capped hourly rates as applicable and the fees of Alvarez & Marsal, the Fourth Defendant’s forensic accountants (without a breakdown between these) (see Knowles 2 at [6] – [9]).



92. In my view, having considered all the circumstances, the parties' submissions and the evidence filed, and applying the approach explained in *Al Sadik*, the reasonable sum to be paid by the Plaintiff on account of his liability to pay the costs I have awarded in this judgment is 25% of 50% of the GHF Parties' and the Fourth Defendant's historic costs claimed on this application on the assumption that costs will be taxed on the standard basis (the GHF Parties have put in evidence of their costs to 19 November 2021 while the Fourth Defendant has put in evidence of its costs to 31 October 2021 and it seems to me that the amount of the payment of account should be calculated by reference to these figures and these dates). In the case of the GHF Parties, this will be US\$338,235.66 and in the case of the Fourth Defendant it will be US\$236,544.13. These sums should be paid within twenty-eight days of the date of the order drawn up to give effect to this judgment.
93. The methodology applied by the GHF Parties, and the Fourth Defendant fails to give proper weight to the uncertainties relating to the quantum of costs that will (a) ultimately be determined as having been wasted and (b) payable on a taxation on the standard basis. It also fails to give proper weight to the need for the Court to adopt a conservative approach on an application of this kind. The Fourth Defendant's approach was more conservative and closer to what is appropriate but was, in my view, still too aggressive. I consider that a suitably cautious and conservative approach is to be found by discounting by a significant amount the total costs claimed (and a discount of one half seems to me to be appropriate) and then by applying a further and substantial discount to the figure thereby produced (and 25% seems to me to be appropriate).
94. I have considered whether to adopt a different approach to the discounting of the sums included as disbursements and for the Fourth Defendant's forensic accountants but have concluded that in this case it is unnecessary to do so as the discounting percentages I have decided to use apply equally well to the disbursements having regard to the various uncertainties and challenges for which the discounts are intended to adjust.
95. I consider that the challenges and criticisms made by the GHF Parties, and the Fourth Defendant of the evidence of Mr Helfrecht and Mr Barrie were justified. Barrie 3 was almost entirely submissions. I did give the Plaintiff leave to file submissions and have taken into account the submissions made by Mr Barrie on behalf of the Plaintiff, but I do not regard Barrie 3 as containing much by way of admissible evidence and consider that it would have been



preferable for the submissions to have been made by way of supplemental written submissions rather than of affidavit. Mr Helfrecht's evidence was of little assistance for the reasons given by the GHF Parties and the Fourth Defendant. It was inappropriate in my view for this Court to be given a teach-in on the taxation process in this jurisdiction by a sitting taxing officer of this Court.

Should the GHF Parties and the Fourth Defendant be required to give the undertaking required by the Plaintiff?

96. On 27 November 2021, the Plaintiff's Cayman attorneys, Nelsons, wrote to Ogier and Walkers in response to the GHF Parties' and the Fourth Defendants' application for a payment on account and service of Knowles 2 and Mr Lewis's Eighth Affidavit. Nelsons referred to the statement in Mr Lewis' Eighth Affidavit (at [53(g)]) that in the event that the payment on account turns out to be too high and contains an element of overpayment "[The Plaintiff] will have no difficulty in recovery [because the GHF Parties] are solvent entities and are based in this jurisdiction" and said that they assumed that the Fourth Defendant was taking the same position. They went on as follows:

“3. By implication, [the GHF Parties and the Fourth Defendant are] saying that [they] will ensure that [they each] will hold sufficient assets to meet all of [their] liabilities including contingent liabilities in respect of any judgment [the Plaintiff] may be awarded on his claims, as well as any overpayment of costs that may be received by way of interim payments. However, neither [Knowles 2 nor Mr Lewis's Eighth Affidavit] provides any detailed evidence in support of this.

4. Accordingly, we request that [the GHF Parties and the Fourth Defendant] confirm that [they] will [each] provide an undertaking to the Court that they will exercise all reasonable care, and take all reasonable steps, to ensure that they are at all times in a position to meet their liabilities and contingent liabilities including those referred to in paragraph 3 above.”

97. The Plaintiff argued that the Court should make it a condition of any order for payments on account of costs that the GHF Parties and the Fourth Defendants provide such an undertaking. I decline to do so.

98. It seems to me that such a requirement, and an undertaking in the terms proposed by the Plaintiff, is unnecessary and disproportionate in the circumstances, particularly having



regard to the relatively small sums which I have ordered be paid on account. The GHF Parties have confirmed, and evidence filed on their behalf avers, that they are solvent (and therefore able to pay all their liabilities) and as I understand it, the Fourth Defendant also claims to be solvent (Mr Ayres QC during his oral submissions said, noting that Mr Atherton QC had made the same point in respect of the GHF Parties, that there was no suggestion that the Fourth Defendant was not good for repayment, or no sensible suggestion to that effect so that there was no basis for requiring the proposed undertaking). Furthermore, to the extent that there is a theoretical risk, this is covered by the substantial discounts I have applied when setting the quantum and level of the payment on account.

Mr Justice Segal

Judge of the Grand Court, Cayman Islands

17 January 2022