



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 105 OF 2014 (DDJ)

BETWEEN:

- (1) ARNAGE HOLDINGS LIMITED**
- (2) BROOKLANDS HOLDINGS LIMITED**
- (3) EAST FARTHING HOLDINGS LIMITED**
- (4) MS KATIA RABELLO**
- (5) MR FERNANDO TOLEDO**

Plaintiffs

AND

WALKERS (A FIRM)

Defendant

Appearances:

Harry Matovu KC and Stuart Diamond of Diamond Law
Attorneys for the Plaintiffs

Mark Simpson KC, Sebastian Said, Nico Leslie and Daniel
Coelho of Appleby (Cayman) Ltd for the Defendant

Before:

His Hon. Justice David Doyle

Heard:

11 and 12 July 2023

Draft Judgment circulated:

24 July 2023

Judgment delivered:

27 July 2023

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HEADNOTE

Determination of application for leave to appeal; application for disclosure of identity of funders and details of funding arrangements; jurisdictional issues; factors to consider when disclosure orders are sought; application for indemnity costs; application for interim payment; joint and several liability in respect of costs and set-off

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JUDGMENT

Introduction

1. As long ago as 8 November 2022 I made an Order dismissing the claims of the First to Fourth Plaintiffs (“P1-P4”) for failure to comply with an Order of the Cayman Islands Court of Appeal dated 4 October 2021 making P1-P4 jointly and severally liable to pay security for the Defendant’s costs in the amount of US\$4.25 million by no later than 18 November 2021 (the “CICA Security Order”). I also ordered that P1-P4 shall be jointly and severally liable to pay the Defendant’s costs of the Summons of P1-P4 dated 5 September 2022 and of the Defendant’s Summons dated 28 July 2022 together with the Defendant’s cost of the action referable to the claims brought by P1-P4 to be taxed on the standard basis if not agreed. The Judicial Committee of the Privy Council on 19 July 2022 had refused permission to appeal in respect of the CICA Security Order because the application raised no arguable point of law. On 31 January 2023 the Registrar of the Privy Council certified that pursuant to an Order dated 19 July 2022 the costs of the Defendant in respect of the application for permission to appeal were assessed on the standard basis and the sum of £39,128.22 was allowed, but they still have not been paid.
2. On 11-12 July 2023 I heard two long days of legal submissions in respect of the following issues consequential to my Order of 8 November 2022:

Application for Leave to Appeal

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- (1) whether leave to appeal should be granted in respect of the Order made on 8 November 2022 made consequent to my judgment delivered on 28 October 2022 (the “Application for Leave to Appeal”);

Application for disclosure of funders and details of funding arrangements

- (2) whether pursuant to section 24(3) of the Judicature Act (2021 Revision) and Order 62 rule 1 of the Grand Court Rules P1-P4 should disclose the following information within 7 days of the date of the court’s Order:
 - (a) the identity of all individuals, companies or other entities that have provided funding to P1-P4 since September 2011;
 - (b) the amount of such funding in each case;
 - (c) the terms on which such funding was provided;
 - (d) the extent of such party’s involvement in the conduct of the action;
 - (e) the nature and extent of that party’s interest (financial or otherwise) in the outcome of the action (the “Application for disclosure of funders and details of funding arrangements”);

P5’s Costs

- (3) whether the Fifth Plaintiff (“P5”) is entitled to his costs of the proceedings and if so whether those costs should be taxed on the indemnity or standard basis (“P5’s Costs”). The Defendant agreed to pay the costs of P5 incurred by him after 30 November 2021 which are attributable to his account of profits claim to be taxed on the standard basis if not agreed;

Application for Interim Payment

- (4) whether P1-P4 should be made liable, on a joint and several basis, to make an interim payment on account of the costs of the Defendant in respect of the proceedings up to and including 3 October 2021 in the amount of US\$4,091,830 or on an alternative basis in the amount of US\$3.3 million (the “Application for Interim Payment”);

Application for Joint and Several Liability

- (5) whether P5 should be made jointly and severally liable along with P1-P4 to pay the Defendant’s costs of defending the action up to and including 30 November 2021 (when the Defendant abandoned his multi-million-dollar damages claim and elected for an account of profits worth US\$358,000 plus interest) (the “Application for Joint and Several Liability”);
- (6) whether P5 should be made liable, jointly and severally, along with P1-P4 to make any interim payment ordered; and

Application for Set Off

- (7) whether the Defendant is entitled to set off against any costs that P5 may be and/or has been ordered to pay to it (i) the sum which it has agreed to pay to P5 under “the settlement agreement” and (ii) any costs which it has agreed to pay and/or which it has been or may be ordered to pay to P5 (the “Application for Set Off”);

Documentation and Submissions

3. I record that I have considered all the documentation provided to the court in the five, helpfully colour coded, hearing bundles and the authorities in the agreed authorities bundle and the additional bundle of authorities on disclosure.
4. I have considered all the written and oral submissions put before the court. I do not record them all in detail in this judgment but have full regard to them.

Determination

5. I now turn to the determination of the various applications and issues before the court.

Application for Leave to Appeal

6. I have considered the draft grounds of appeal and the submissions put before me in support of leave being granted.
7. As I think Mr Matovu realistically recognised at its core the Order dismissing the claims was in effect a discretionary case management Order, albeit with serious consequences for the Plaintiffs.
8. Mr Matovu referred to *BPP Holdings Ltd v Commissioners for Her Majesty's Revenue and Customs* [2017] UKSC 55 which concerned an appeal against a debaring Order. Lord Neuberger (with whom Lord Clarke, Lord Sumption, Lord Reed and Lord Hodge agreed) at paragraph 33 stated:

“... the issue whether to make a debaring order on certain facts is very much one for the tribunal making that decision, and an appellate judge should only interfere where the decision is not merely different from that which the appellate judge would

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have made, but is a decision which the appellate judge considers cannot be justified.”

9. Lord Neuberger referred to comments made by another judge in another case as follows “[A]n appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge.”
10. In Lord Neuberger’s words: “... before they can interfere, appellate judges must not merely disagree with the decision: they must consider that is unjustifiable. HMRC cannot in my view cross that high hurdle in this case.”
11. Lord Neuberger added at paragraph 34 that the “decision to impose a debarring order (unlike case management decisions of a more routine nature) can often have the effect of determining the substantive case ... [t]here must be a limit to the permissible harshness (or indeed the permissible generosity) of a decision relating to the imposition or confirmation (or discharge) of a debarring order ... I do not consider that it was on the wrong side of the line ...”
12. At paragraph 163 of my judgment delivered on 28 October 2022 I stated:

“I appreciate that dismissal of an action without consideration of the merits may be regarded as a harsh result but there comes a time when a court must conclude that enough is enough. That time has arrived.”
13. P1-P4 had on 4 October 2021 been ordered by the Court of Appeal to provide security for costs by no later than 18 November 2021. They had sought to appeal such order all the way up to the Privy Council. The Court of Appeal and the Privy Council had refused leave. By the date of the hearing

before me in October 2022, P1-P4 had nearly had a whole year to comply with the CICA Security Order. P1-P4 had had more than enough time to provide the security but in breach of the CICA Security Order had failed to do so. Enough was indeed enough. I acknowledged that my decision to dismiss the claims of P1-P4 may be regarded as a harsh decision but having heard further from Mr Matovu I am of the opinion that it was not arguably the “wrong side of the line”. I am not persuaded that such was arguably outside the limits of “permissible harshness”. I do not accept Mr Matovu’s extravagant submission that the decision arguably “went beyond the bounds of reason” (paragraph 29 of the Plaintiffs’ skeleton argument dated 5 July 2023).

14. I note that the Court of Appeal in refusing leave to appeal to the Privy Council against its reversal of the former Chief Justice’s judgment on security for costs stated in its reasons dated 1 November 2021 that: “The application raises no point of great general and/or public importance which ought to be reviewed by the Privy Council; on the contrary, the issues raised are entirely *ad casum* ...”. On 19 July 2022 the Privy Council itself refused permission to appeal “because the application does not raise an arguable point of law.” I appreciate that my decision dismissing the claim was of a different nature to an order for security for costs but the views of the Court of Appeal and the Privy Council in respect of applications for leave to appeal are nevertheless of some interest and assistance.
15. It is a difficult process in effect trying objectively to mark your own first instance homework but even with the fresh points raised by Mr Matovu I am not persuaded that leave should be granted.
16. I have considered carefully all that has been written and said on behalf of P1-P4 but I am not persuaded that the proposed appeal has a real prospect of success or exceptionally that the proposed appeal involves an issue which should be examined by the Court of Appeal in the public interest.
17. Accordingly I am duty bound to refuse leave to appeal. I refuse leave to appeal.

Application for disclosure of funders and details of funding arrangements

18. All the Plaintiffs said in their skeleton argument dated 5 July 2023 was that the Court had no jurisdiction to make the disclosure Orders sought (paragraph 37) and at paragraph 38, without reference to any authority in support, added:

“Even if Walkers were able to establish jurisdiction, the Court should not exercise it in this case. Walkers has forfeited the discretionary assistance of the Court by pursuing non-parties to recoup costs which it has incurred by unreasonable and discreditable conduct of this litigation.”

19. Mr Matovu in his skeleton argument at paragraph 36 referred to section 24 (3) of the Judicature Act (2021 Revision) and Order 62 rule 1. He quoted briefly from Order 62 rule 1 (2) but not from section 24 (3).

20. At paragraph 37 of his skeleton argument Mr Matovu raised the following jurisdictional point:

“GCR O.62 does not contain any provisions giving the Court power to make orders for costs against non-parties or to make the disclosure orders sought by Walkers. Accordingly, the Court has no jurisdiction to make these Orders.”

21. Mr Matovu boldly developed this jurisdictional point in his oral submissions. In effect, insofar as I understood the point, Mr Matovu submitted that section 24 (3) of the Judicature Act (2021 Revision) must be read subject to section 24 (1) which provides:

“Subject to the provisions of this or any other Law [now Act] and to rules of court, the costs of and incidental to all civil proceedings in (a) the Court of Appeal; and (b) the Grand Court, shall be in the discretion of the relevant court.”

His argument continued to the effect that as Order 62 did not contain any power for the Court to make orders against non-parties then the court's ancillary jurisdiction to order disclosure of the identity of the funders and details as to the funding arrangements does not exist under the laws of the Cayman Islands.

22. Mr Matovu in effect says that the judgments of at least four fellow Grand Court judges (Cresswell J, Jones J, McMillan J and Williams J) and three members of the Court of Appeal (Chadwick P, Mottley and Campbell JJA) are wrong and I should not follow them as jurisdiction was simply wrongly assumed in those cases rather than properly decided after full argument.

The jurisdiction of the Grand Court

23. As this appears to be the first case in the Cayman Islands in which the jurisdiction of this Court to make non-party costs Orders and ancillary disclosure Orders has been disputed, I am afraid I will have to deal with the position at some length.

Section 24(3) of the Judicature Act (2021 Revision)

24. Section 24 (3) of the Judicature Act (2021 Revision) expressly provides that this Court shall have full power to determine by whom and to what extent the costs are to be paid. In my judgment that subsection provides this Court with jurisdiction to make, where appropriate, Orders against non-parties in the same way that an English Court can. Moreover, I am also satisfied that this Court has an ancillary jurisdiction to make where appropriate, Orders requiring the disclosure of the identity of funders and details of the funding arrangements. The following authorities clearly establish this jurisdiction.

Dymocks

25. Lord Brown delivering the Board's judgment in *Dymocks Franchise Systems (NSW) Pty. Ltd. v Todd* [2004] UKPC 39 (JCPC on appeal from New Zealand) at paragraph 23 referred to a great

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number of authorities being put to the Board decided in the United Kingdom, Australia and New Zealand without suggesting any difference of approach between them.

26. At paragraph 7 Lord Brown recorded that the non-party in that case did not dispute the court's power under New Zealand law to make Orders for costs against non-parties. Lord Brown referred to rule 46 of the New Zealand High Court rules, section 51(1) of the Supreme Court Act 1981, Order 91 rule 1 of the Queensland Supreme Court rules, section 15 of the Judicial Committee Act 1833 and section 12 of the Judicial Committee Act 1843.
27. At paragraphs 25-28 Lord Brown listed a number of the main principles governing the proper exercise of the discretion to order costs to be paid by a non-party including the following:
 - (1) costs Orders against non-parties are to be regarded as "exceptional" in the sense of outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question is whether in all the circumstances it is just to make the Order;
 - (2) generally speaking the discretion will not be exercised against "pure funders" namely "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights;
 - (3) where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, "the defendants

in all but name”. Nor indeed, is it necessary that the non-party be “the only real party” to the litigation provided that he is “a real party in ... very important and critical respects.”;

- (4) perhaps the most difficult cases are those in which non-parties fund receivers or liquidators (or, indeed, financially insecure companies generally) in litigation designed to advance the funder’s own financial interests;
- (5) if a non-party funds proceedings for his own financial benefit it may, depending upon the circumstances, be appropriate to make an Order for costs against that person. The relevant factors will include the financial position of the party through whom the proceedings are brought or defended and the likelihood of it being able to meet any order of costs, the degree of possible benefit to the non-party and whether, in all the circumstances, the bringing or defending of the claim – although in the end unsuccessful – was a reasonable course to adopt;
- (6) where a person is a major shareholder and dominant director in a company which brings proceedings, that alone will not justify a third party costs Order. Something additional is normally warranted as a matter of discretion. The critical element will often be a fresh injection of capital for the known purpose of funding litigation;
- (7) it is not sufficient to render a director liable for costs that he was a director of the company and caused it to bring or defend proceedings which he funded and which ultimately failed. Where such proceedings are brought *bona fide* and for the benefit of the company, the company is the real plaintiff. If in such a case an Order for costs could be made against a director in the absence of some impropriety or bad faith on his part, the doctrine of the separate liability of the company would be eroded and the principle that such Orders should be exceptional would be nullified;

English White Book

28. The latest English White Book at page 1489 states:

“The court necessarily has the ancillary power to order a party to proceedings, or the solicitors who had been on record for that party, to disclose to the other party the names of those who have financed the litigation. Where a power exists to grant a remedy there must be, inherent in that power, the power to make ancillary orders to make the remedy effective: see *Abraham v Thompson* [1997] 4 All E.R. 362, *Raiffeisen Zentralbank Osterreich AG v Crossseas Shipping Ltd* [2003] EWHC 1381 (Comm) (Morrison J) (sic). For examples of the exercise of the power see *Flatman v Germany* [2013] EWCA Civ 278; [2013] 1 W.L.R. 2676, CA, *Thomson v Berkhamsted Collegiate School* [2009] EWHC 2374 (QB); [2010] C.P. Rep. 5.”

Abraham v Thompson

29. The Court of Appeal of England and Wales in *Abraham v Thompson* [1997] 4 All ER 362 dealt with a case where certain defendants suspected that the costs of the action were being provided for out of offshore trusts with which the plaintiff was connected. The defendants applied to the court for an Order disclosing the identity of the funders so that they could apply for the proceedings to be stayed unless the third parties provided security or agreed to accept liability for the defendants' costs in a satisfactory manner. It was held on appeal that the court had an inherent jurisdiction to grant a stay where the situation amounted to an abuse of process. In the case before the court the defendants' application was merely a fishing expedition to see if a case of abuse could be made out. The judge should have left the matter to be dealt with by means of an application for costs against a third party under section 51 (1) of the Supreme Court Act 1981.

30. The court appears to have proceeded on the assumption that a third party costs Order could be made under section 51 (1) and the identity of the funder ordered at the appropriate time (namely at the stage when the costs have been incurred and the question arises as to who should be ordered to pay them). Potter LJ at pages 367 – 368 referred to jurisdiction and *Singh v Observer Ltd* [1989] 2 All ER 751 and the defendants’ contention that “the court also has ancillary jurisdiction to make an order against the plaintiff requiring him to disclose whether there is such a third party funder.” Potter LJ seems to have accepted at page 368 that once the appropriate time has been reached “the court, in order to enable it [the power to award costs] to be fully and appropriately exercised, will investigate so as to establish the identity of a third party maintainer of the unsuccessful party, and the liability of that maintainer in respect of the successful party’s costs”.

Raiffeisen

31. Morison J in *Raiffeisen Zentralbank Osterreich AG v Crossseas Shipping Ltd* [2003] EWHC 1381 (Comm) dealt with an application for a defendant and his former solicitors to disclose the name of the parties which maintained another defendant’s defence. Morison J stated:

“7. Section 51 of the Supreme Court Act 1981 confers on the High Court a discretion in relation to the payment of costs of and incidental to all proceedings commenced there. Subsection (3) confers on the High Court “full power to determine by whom and to what extent the costs are to be paid”. This subsection gives the court power to order that a person who is not a party to the proceedings to pay costs and in a number of reported and unreported decisions it has been held that the court necessarily has an ancillary power to order a party to proceedings, or solicitors who have been on the record for that party, to disclose, to the opposing party, the name or names of those who financed the litigation for the benefit of that party: see, for example

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Singh v Observer Limited [1989] 3 All ER 777 at 777j-778b;
McFarlane v EE Caledonia Limited (No 2) [1995] 1 WLR 366 at 373C;
Abraham v Thompson [1997] 4 All ER 326 [CA] at 367j-368b;
Hamilton v Al Fayed [unreported] 21 December 1999 at transcript pages 7-11.

None of these authorities is entirely satisfactory, for a variety of reasons, but the reasoning of Potter LJ in the *Abraham* case is directly applicable namely, “where the power exists to grant the remedy, there must also be inherent in that power the power to make ancillary orders to make that remedy effective”. Therefore, since section 51 empowers the court to make an order for costs against a person who is not a party to the action, the power would be ineffective unless there was an inherent power to discover who such persons might be. It does not, of course, follow that once the identities are revealed the Court will go on to make an order against anyone who has been identified. That is a matter for the discretion of the court at the second state. I am satisfied that I have the power to make the order which is sought.”

32. *Raiffeisen and Abraham v Thompson* were applied in *SC DG Petrol SRL v Vitol Banking Ltd* [2014] EWHC 3900 (Comm) and Walker J, having regard to the interests of justice and the overriding objective, ordered a firm of solicitors to answer questions in order to assist in identifying whether there was some other person apart from the claimant against whom an order for costs may be made.

Automotive Latch Systems

33. Flaux J in *Automotive Latch Systems Ltd v Honeywell International Inc* [2008] EWHC 3442 (Comm) dealt with an application similar in terms to the one presently before me. Honeywell sought an Order that ALS serve a witness statement setting out:
- (1) the identity of all individuals, companies or other entities that have provided funding to the Claimant;

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- (2) the amount of such funding in each case;
 - (3) the terms on which such funding was provided;
 - (4) the extent of each such party's involvement in the conduct of the action;
 - (5) the nature and extent of that party's interest (financial or otherwise) in the outcome of the action (see paragraph 3 of the judgment).
34. At paragraph 13 Flaux J referred to "the jurisdiction which the court undoubtedly has ancillary to section 51 of the Supreme Court Act to order disclosure of the names of funders" and whether it extends "to whatever ancillary orders will make the section 51 remedy effective, so that in an appropriate case the court may exercise a discretion to order more against the party who has funded than simply the disclosure of the names of those individuals who have funded the litigation."
35. Flaux J at paragraph 14 referred to Morison J's judgment in *Raiffeisen Zentralbank* and at paragraph 16 stated that he could "see nothing objectionable, in an appropriate case, in making an order requiring a party in the position of ALS to disclose more than just the names of the investors." Flaux J was "satisfied that the court has jurisdiction to make the order sought". Flaux J at paragraph 19 stressed the need for "full and frank" disclosure.

Flatman v Germany

36. In *Flatman v Germany* [2013] 1 WLR 2676 the Court of Appeal of England and Wales considered an appeal against a decision of a High Court judge in an appeal against a County Court's refusal of an application for disclosure of how the actions had been funded. The Court of Appeal held that since a solicitor who funded his client's disbursements in a certain way was not acting in circumstances which were outside the ordinary run of cases such a solicitor would not, without more, be the real party to the litigation and so potentially be liable to a third party costs Order under section 51 of the Senior Courts Act 1981 and accordingly the basis on which the High Court judge had ordered disclosure was not justified in law.

37. Leveson LJ at paragraph 1 referred to the appeals focusing on “applications for discovery as to funding arrangements”. From paragraph 24 onwards under the heading “Third party costs” Leveson LJ dealt with the court’s jurisdiction and at paragraph 25 referred to *Dymocks*. At paragraph 26 reference was made to an Australian High Court authority and the quote:

“Where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made.”

38. Leveson LJ helpfully added:

“Disclosure

48 The starting point is the test set out by Blake J in *Thompson v Berkhamsted Collegiate School* [2009] 6 Costs LR 859 based on the observations of Lord Brown in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807. Having observed [2009] 6 Costs LR 859, para 17 that if the case was inherently weak, it was inherently improbable that an order would be made and that if overwhelming, it was unlikely that ancillary orders for disclosure, inspection or cross-examination would be necessary, he summarised in the following principles at para 18:

- (i) The order for payment of costs by a non-party would always be exceptional and any application should be treated with considerable caution.
- (ii) The application should normally be determined by the trial judge who could give effect to any views he had expressed as to the conduct of the non-party without constituting bias or the appearance of bias.
- (iii) The mere fact that someone has funded proceedings would generally be insufficient to support an application that they pay the costs of the

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successful party. Pure funders, as described at the case of *Hamilton v Al-Fayed (No 2)* [2003] QB 1175, para 40, will not normally have the discretion exercised against them. That definition of ‘pure funders’ means those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business and in no way seek to control its course.

- (iv) It is relevant but not decisive that the defendant has warned the non-party of the intention to seek costs or that the non-party’s funding has caused the defendant to incur the costs it would not otherwise have had to incur.
- (v) The conduct of the non-party in the course of the litigation and other than as a pure witness of material fact is of relevance and potential weight.
- (vi) Most of the decided cases on the exercise of the court’s discretion under section 51 concerned commercial funders or corporate bodies closely associated with the party who incurred the costs liability which they were unable to satisfy. In the family context, the courts have been reluctant to impose third party costs orders against those family or friends who in the interests of access to justice assist a party to come to court for philanthropic and disinterested reasons.
- (vii) In determining these applications the court must exercise its case management powers to ensure that the application does not turn into satellite litigation that results in prolonged, complex and over-extended arguments about costs about costs. For that reason, the inherent strength of the application is always a relevant factor.”

49 Blake J then at para 19 commendably summarised the factors to be considered when considering whether disclosure was necessary for the fair determination of the application in these terms:

- “(i) the strength of the application as it now appears unassisted by disclosure;
- (ii) the potential value to the fair determination of the application of the documents of which the claimant seeks disclosure and whether they are likely to

elucidate considerations highly probative of the exercise of the court's discretion, or threaten to drag the application into a side alley of satellite litigation with diminishing returns for the overall issue; (iii) whether on a summary assessment it is obvious that the documents for which disclosure is sought will be the subject of proper legal professional privilege; (iv) whether the likely effect of any order the court might be minded to make will be proportionate and just in all the circumstances.” ”

39. At paragraph 51 Leveson LJ referred to the Court having pressed counsel “to justify why an order for disclosure might be justifiable on grounds other than speculation” and plainly was not impressed with counsel's response. Speculation or mere suspicion must be avoided. Reasonable and appropriate inferences are permissible. The Court is expressly directed to have regard to the strength of the application unassisted by disclosure and must try to avoid the risk of going down “a side alley of satellite litigation” on costs and funders and “prolonged, complex and over-extended arguments about costs about costs.”

Thomson

40. In *Thomson* Blake J devoted a number of paragraphs under the heading “Strength” and at paragraph 21 stated:

“21. All in all, there is a quantity of material indicating that the parents were not merely funders but were directly concerned with the facts of the claim, and promoting the remedies that they identified at various points in the history of this matter by way of vindication of their complaints as well as what they perceived to be the damage done to John.”

41. Blake J concluded:

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“50. In the circumstances I conclude that there is a good arguable case for a third party costs order; that the correspondence sought is likely to be probative and not privileged, at least not in its entirety; and that it is not disproportionate for the material to be sought, at least for the period from February 2005.

51. In my judgment it would be unjust for the defendant to be deprived of the use of such material in pursuit of its application if it proves to be probative and admissible. This is not a fishing expedition, but a pertinent inquiry in the light of the history revealed above.”

Rudd v Bridle

42. The headnote to *Rudd v Bridle* [2019] Costs LR 1067 reveals that the court dismissed the claimant’s application for disclosure by the defendant of the identify of any third party funders. Neither the defendant nor anybody funding them could have had any expectation of financial gain from the litigation. The best outcome that could have been achieved would have been to ward off the claim. There was no evidence that any third party was or may have been controlling, managing or directing the conduct of the defence. The evidence about third party funding did not reveal any impropriety. There was also no evidence of any real risk of non-payment by the defendant who had substantial assets and had already complied with two orders made against him.
43. It appears from paragraph 6 of Warby J’s judgment in *Rudd* that the application was for disclosure of the identity of the funders “and related documents”.
44. Warby J at paragraph 8 stated that the legal framework was not in dispute:

“The court has power to make orders for costs against non-parties. This is part of the general power to make orders as to the costs of proceedings which is conferred by s51 (3) of the Senior Courts Act 1981 ...”

45. At paragraph 9 Warby J referred to various authorities including *Symphony Group, Hamilton and Dymocks* and extracted the following general principles:

- (1) the power to make a costs order against a non-party is exceptional in the sense that such orders are not usually made. Such an order may only be made where there has been conduct by the non-party such as to render the order just and reasonable;
- (2) the power will not generally be used against “pure funders”.

46. Warby J felt that the modern jurisprudence was well summarised in *Turvill v Bird* [2016] EWCA Civ 703 where Hamblin LJ (with whom Gross LJ agreed) at paragraph 24 stressed that it is a jurisdiction which must be exercised in the interests of justice and that its exercise should not be overcomplicated by authority. It has been emphasised that the only immutable principle is that the discretion must be exercised justly.

47. Warby J added:

“12. Procedurally, a court considering whether to exercise the power to make a third party costs order must add the third party to the proceedings for the purposes of costs only, and give the person a reasonable opportunity to attend a hearing at which the court will consider the matter further: CPR 46.2(1). There may of course be a need to identify third parties, as a preliminary step towards engaging them in this process. Funders may be covert, or anonymous. It is clear that the court has a discretionary power, ancillary to its costs jurisdiction, to require a party to disclose to the other party the names of those who have financed the litigation: *Abraham v Thompson* [1997] 4 All ER 362, 368 (CA), *Raiffeisen Zentralbank Osterreich AG v Crossseas Shipping Ltd* [2003] EWHC 1381 (Comm) [7] (Morison J). This is the power relied on by the claimant on this application.

13. There is authority that this power extends to directing the disclosure of information going beyond the mere identity of the third-party funder. The court can make whatever

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ancillary orders will make the s 51 remedy effective, so that in an appropriate case the court may exercise a discretion to order more against the party who has been funded than simply the disclosure of the names of those individuals who have funded the litigation: see *Automotive Latch Systems Ltd v Honeywell International Inc* [2008] EWHC 3442 (Comm) [13], [16] (Flaux J).

14. The disclosure sought and ordered in the *Automotive Latch* case extended to the identities of any funders; the amount of such funding; the terms on which it was provided; the extent of each such party's involvement in the conduct of the action; and the nature and extent of the third party's interest (financial or otherwise) in the outcome of the action: see *ibid.* [3] and [17]. The order sought on this application tracks the form of order granted in that case."

48. On the facts of the case before him Warby J at paragraph 22 referred to his finding that Mr Bridle was a liar whose word must not be trusted unless corroborated by reliable independent evidence and statements about the defendants' plans for settling their costs liabilities were opaque and not easy to reconcile with each other.

49. Warby J stated:

"23. All of this being said, I remind myself that the onus lies on the claimant to demonstrate a basis for exercising the discretion to order disclosure. It is not sufficient to point to things that could have been said, or explanations that could have been given. That would be to reverse the burden of proof. The receiving party has a right to be paid but that does not come with a right to interrogate the paying party. As Mr Fairbairn submits, the mere fact that a costs order has been made does not entitle the receiving party to full disclosure of the paying party's assets, or a full explanation of how that party proposes to meet his obligation. And there are other important points about the defendants' role, the funding of their defence, and the asset position that seem clear, or sufficiently clear for present purposes, and are unhelpful to the claimant."

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50. Warby J summarised his conclusions at paragraph 38:

“(1) The evidence does not establish a risk of non-payment by Mr Bridle. He has no history of default, but rather a history of compliance. He has substantial assets. The evidence suggests he has realised those assets in part, to meet the costs order I made at the time I gave judgment. He has embarked on the process of realising the remainder. I have not been persuaded that the proceeds would be insufficient to meet his outstanding liabilities, once the claimant’s costs have been properly assessed.

(2) There has been some third-party funding of Mr Bridle’s defence of this case, by insurers and, to a more limited extent, by the Company and the Partnership. Otherwise the claimant has failed to establish any basis for the proposition that there has been third-party funding of the defence of this case. He has not pressed any such contention.

(3) The third-party funding that has been established and admitted could not justify a third-party costs order. The funding was legitimate, and the contrary is not tenable.

(4) For the reason given at (1) above, there would be no practical need for a third party costs order. Further, on the evidence, a third-party costs order against the Company or the Partnership would be pointless. There is no reason to believe or suspect that there are hidden sources of wealth. For these reasons it would be contrary to the overriding objective to make an order which would in all probability lead to a further waste of resources to no useful purpose.”

Tomlinson

51. In *Tomlinson* (High Court of the Isle of Man judgment 2 March 2006) in my capacity as a Deemster sitting at first instance I dealt at paragraph 32 with the question as to whether the court has jurisdiction to compel a party to disclose the identity of the funder of legal proceedings and at

paragraph 33 answered that question with an “unambiguous yes”. I referred to Matthews and Malek on *Disclosure, Singh and another v Observer Ltd* [1989] 2 ALL ER 751, and section 53 (1) of the High Court Act 1991 which provides:

“Subject to the provisions of this or any other Act and to rules of court, the costs of and incidental to all proceedings in the High Court, including the administration of estates and trusts, shall be in the discretion of the court, and the court shall have full power to determine by whom and to what extent the costs are to be paid.”

52. I also mentioned *Dymocks* and some of the other authorities and, without digging deeply into the detail of the jurisdictional foundation, added at paragraph 39 of my 9-page judgment:

“In addition to disclosing the name of the funders I am persuaded that it would also be appropriate to order disclosure of the basis and conditions of such funding. Without such additional information the name of the funder would be of little assistance to achieving justice on the question of costs at the end of the day. In my judgment it would be unjust in all the circumstances of this case for the Companies not to be able to know who was behind the legal proceedings and who was funding the Petitioner and on what basis and on what conditions. If the court is to do justice in respect of costs that information needs to be made available.”

53. Having reviewed some of the English, New Zealand, Australian and Manx authorities let us now turn to some of the local Cayman cases which follow the English authorities.

Kenney

54. In *Kenney v ACE* 2015 (1) CILR 367 Chadwick P (with whom Mottley and Campbell JJA concurred) at paragraph 86 of the reported judgment delivered on 6 May 2015 stated:

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“There is no dispute on this appeal that the Grand Court has jurisdiction to hold non-parties liable for costs incurred in proceedings which have been before it. The power to do so is conferred by s.24 (3) of the Judicature Law (2007 Revision): “The court shall have full power to determine by whom and to what extent the costs are to be paid.””

55. Chadwick P at paragraph 87 referred to section 51 of the Supreme Court Act 1981 which he described as the “equivalent provision in the law of England and Wales”. Chadwick P said that the relevant principles to be applied had been set out in *Dymocks*. The issue in *Kenney* was how an overseas non-party could be brought before the Grand Court in the Cayman Islands. The Court of Appeal plainly accepted that the Grand Court had jurisdiction to order costs against non-parties and it is not open to me sitting at first instance to decline to follow that judgment which accepts the jurisdiction even though Mr Matovu attempted to persuade me not to follow it on the basis it was *per incuriam*. It is not open to a judge of the Grand Court sitting at first instance to decline to follow the *ratio* of a Cayman Islands Court of Appeal judgment even if he thinks it is wrong. For the avoidance of doubt I do not think that the assumption of jurisdiction in *Kenney* was wrong. In my judgment the Grand Court does have jurisdiction to make non-party costs and ancillary disclosure Orders.

56. Chadwick P appeared untroubled by any jurisdictional concerns and at paragraph 88 stated:

“The relevant question, as it seems to me is not whether the Court has jurisdiction to make an order for costs against a non-party who is outside its territory; the relevant question is by what process (if any) is a non-party who is outside its territory brought before the court so that that jurisdiction can properly be exercised.”

VC Computer Holdings

57. The month before the Cayman Islands Court of Appeal handed down their judgments in *Kenney*, Jones J on 17 April 2015 handed down his judgment in *VC Computer Holdings Limited (in official*

liquidation) 2015 (1) CILR 292. Jones J was plainly of the view that he had jurisdiction to make costs Orders against non-parties under section 24(3) of the Judicature Law (see paragraph 2 of the judgment). He relied on *Taylor v Pace Devs Ltd* [1991] BCC 406 and *Dymocks* which he considered was good Cayman law. Jones J proceeded to make joint and several costs Orders against non-parties.

Primeo Fund

58. About two years later on 1 August 2017 McMillan J in *Primeo Fund (in official liquidation)* 2017 (2) CILR 99 had little hesitation in making a non-party costs Order against various HSBC entities. From paragraph 37 onwards under the heading “The governing law in relation to non-party costs” McMillan J helpfully set out the position under the law of the Cayman Islands. Reference was made to section 24 (1), (2) and (3) of the Judicature Law and section 51 of the English Supreme Court Act 1981 with McMillan J at paragraph 38 stating:

“The English case law relating to s.51 of the Act is therefore important relevant authority when considering how that section is to be interpreted and construed. The court accepts that it has the benefit of a number of guiding common law authorities therefore when exercising its discretion in this jurisdiction, as well as there being local authorities.”

59. McMillan J at paragraph 39 stated:

“Following enactment of the Act, the House of Lords held that s.51 of the Act gave jurisdiction to make orders for costs against non-parties (see *Aiden Shipping Co. Ltd. v. Interbulk Ltd.* (1)). Having considered that authority, this court takes the view that the court has, so far as possible, freedom of action. Subject to such control as the Rules Committee may exercise, no formal limitation in regard to non-party costs has been identified (see Lord Goff ([1986] 1 A.C. at 975)).”

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60. McMillan J reviewed the authorities including *Symphony Group plc v Hodgson* [1994] QB 179, *Dymocks, VC Computers, Kenney* and at paragraph 46 concluded:

“Having reviewed these various authorities and considered the relevant passages of the written submissions, the court concludes that in appropriate circumstances there is no impediment to awarding costs against a non-party in the Cayman Islands.”

61. On the facts and circumstances of the case before him McMillan J concluded at paragraph 57 that the “HSBC defendants caused and were exclusively responsible for the proceedings in question” and at paragraph 58 “Accordingly, the HSBC defendants shall bear the costs ...”

Banks v Parsons

62. Williams J in *Banks v Parsons* 2020 (1) CILR 560, in the context of a personal injuries claim, held that the Court had a wide discretion to make an Order against a non-party and the interests of justice were paramount. Williams J relied upon Order 15 rule 6 (2) (b) (i) of the Grand Court Rules and section 24 of the Judicature Law (2017 Revision) as it then was.

Cigna Worldwide

63. Three years before the Court of Appeal decided *Kenney*, Cresswell J in *Cigna Worldwide Insurance Company v ACE Limited* 2012 (1) CILR 55 at paragraph 59 referred to ACE seeking an Order that Mr Sesay identify the persons who were funding him in the proceedings so that any unsatisfied Order for costs made against Mr Sesay may be enforced against them. At paragraph 60 Cresswell J referred to the fact that no formal application for such an Order was before the court. Cresswell

J nevertheless referred to the duty of the parties and their legal advisers to help the court to follow the overriding objective and also referred to *Abraham v Thompson* and *Dymocks*.

64. Having reviewed the authorities in some detail, it is clear in my mind that there is absolutely nothing in Mr Matovu's jurisdictional arguments.
65. Despite Mr Matovu's bold and persistent efforts to persuade me otherwise, I do not regard the four Grand Court Justices and the three Justices of Appeal as wrong on the jurisdictional issues and I proceed on the basis (as the CICA in *Kenney* did) that this Court has jurisdiction. Indeed I go further. Having considered full argument I decide that this Court has the necessary jurisdiction to grant the disclosure Orders requested. Section 24 (3) of the Judicature Act (2021 Revision) provides the statutory platform for the Court's jurisdiction. The fact that section 24 (1) refers to the Court's discretion as to costs being subject to the rules of court and the fact that the local rules do not make provision for costs against non-parties does not mean that the Court has no jurisdiction to make a non-party costs Order. Interesting arguments as to the supremacy of primary legislation over secondary legislation may have arisen if the rules had expressly prohibited non-party costs but they do not do so.

Section 11(1) Grand Court Act (2015 Revision)

66. Mr Matovu did not mention it in his written or oral submissions, but during exchanges I referred to the Grand Court Act (2023 Revision), section 11 (1) of which provides:

“Jurisdiction vested in the Court 11. (1) The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to this and any other law, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by - (a) Her Majesty's High Court of Justice; and (b) the Divisional Courts of that Court, as constituted by the Senior Courts Act,

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1981[U.K. Act], and any Act of the Parliament of the United Kingdom amending or replacing that Act.”

67. That section is also an answer to Mr Matovu’s misplaced jurisdictional challenge. The English High Court plainly has jurisdiction in relation to the type of disclosure Orders applied for in this case and so does, in my judgment, the Grand Court of the Cayman Islands.
68. I note also section 18 of the Grand Court Act (2015 Revision). Section 18(1) provides that subject to that or any other Act the jurisdiction of the Court shall be exercised in accordance with any Rules made under the Act. Section 18 (2) provides:

“In any matter of practice or procedure for which no provision is made by this or any other law or by any Rules, the practice and procedure in similar matters in the High Court in England shall apply so far as local circumstances permit and subject to any directions which the Court may give in any particular case.”

69. In the case presently before me the position is covered by section 24 (3) of the Judicature Act (2021 Revision) which clearly provides the Court with jurisdiction and it is not reasonably arguable to the contrary. Such jurisdiction includes the power to make ancillary disclosure Orders as the extensive caselaw referred to above confirms.

The exercise of the jurisdiction

70. Having satisfied myself that this Court has the jurisdiction to make costs Orders against non-parties and ancillary disclosure Orders in respect of the identity of funders and details of the funding arrangements, I now turn to the question as to whether the relevant disclosure jurisdiction should be exercised on the facts and in the circumstances of this particular case.

71. Mr Matovu rightly says that the burden is on the Defendant. Mr Said, who dealt with this aspect of the hearing on behalf of the Defendant, in effect submitted that the Defendant had discharged the burden upon it.
72. The Defendant says that:
- (1) it has incurred substantial costs of over US\$14 million to date in the 9 years it has been defending these proceedings;
 - (2) P1-4 are bankrupt and on the basis of P5's own evidence he is of limited means and unlikely to be able to pay more than a proportion of the costs if held jointly and severally liable for them;
 - (3) P1-P4 have failed to pay the costs awarded by the Privy Council against them in the sum of £39,128.22;
 - (4) nonetheless as noted by Sir Bernard Rix JA in the CICA's judgment on security for costs dated delivered on 2 August 2021 at paragraph 51, P4 and the other plaintiffs have conducted extremely expensive proceedings over many years and their costs (some US\$15 million) form part of the claim in the proceedings: "It is reasonably clear therefore that Ms Rabello is, or has at some time been, able to find the means, possibly through an international network of arrangements, to dispose of funds located in several jurisdictions in the world"; and
 - (5) Despite repeated requests P1-P5 have never provided a proper account of the source of the huge sums that they have spent pursuing these proceedings other than to say that "[s]ince 2013, [P1-P4] have managed to meet their own costs of the action to date with the assistance of family and friends." (Macaulay 14 at [26]).
73. Mr Said on behalf of the Defendant in his oral submissions referred to P1-P4 not having any assets upon which costs Orders could be enforced and that P1-P4 have not paid costs ordered by the Privy Council or provided the security as ordered by the CICA. Mr Said referred to the admission of receipt of funding from family and friends and from one dissolved Rural Group company's bank

account and says that the Plaintiffs have not been full and frank in respect of funding as held in the dismissal judgment delivered on 28 October 2022.

74. Mr Said emphasised that the claim of the Plaintiffs if successful would have resulted in a massive recovery of hundreds of millions of dollars for the Rabello family. Mr Said submitted that (1) the claims were based on, amongst others, the general Rabello family retainer with a claim of over US\$300 million of Rabello family assets; (2) there was a *prima facie* case and a real prospect of a non-party costs order being made against any Rabello family member who has funded the case; and (3) the Rabello family stood to benefit from the claim for the recovery of what the Plaintiffs describe as family assets. This is not a case of pure funders.
75. Mr Said referred to paragraph 48 of Mr Macaulay's fourteenth affidavit to the effect that he offered the claim as an "investment opportunity" to a number of individuals and said it was a reasonable inference that it was possible that a similar approach was taken with friends and a financial interest given.
76. Mr Said relied on *Kazakhstan Kagazy plc v Zhunus* [2019] EWHC 2630 (Comm) where the claimants applied for a non-party Order against two family related defendants. Mr Said said that such case is an example of a family using distributions from a trust to achieve funding of litigation while leaving the party to the litigation judgment proof. In that case non-party costs Orders were made against family members.
77. In answer to Mr Matovu's submissions, Mr Said submitted that the Defendant has not by its conduct forfeited the right to seek the court's discretionary assistance. Mr Said referred to the Plaintiffs' reliance on the former Chief Justice's comments but asked the court to note that the former Chief Justice's judgment was overturned on appeal and only a standard Order as to costs was made so even the former Chief Justice did not see the conduct as warranting disapproval by way of an indemnity costs Order.

78. Mr Said stressed that the Plaintiffs' claim was based on a family retainer and was for the recovery of family assets. There is a prima facie case on family funding and family benefitting. It is admitted that affiliated companies have paid legal fees (page 10 of the Plaintiffs' Reply dated 8 September 2014 to a request for further and better particulars of the Statement of Claim). It is common ground that an offshore structure was in place and Mr Said adds that it was used to fund legal costs. The Plaintiffs have incurred "millions of dollars of legal fees" (page 3 of an email dated 15 December 2022 from Diamond Law Attorneys to Appleby).
79. Mr Said repeatedly stressed, with some considerable force, that this was a family case and the family stood to benefit if successful and family members funded the proceedings on the Plaintiffs' own admission.
80. Mr Matovu in his oral submissions stressed that if jurisdiction exists, which he disputed, when considering the exercise of it you have to look at whether funders are the "real party to the litigation". Mr Matovu said that P5 in his ninth affidavit at paragraph 10 makes it clear that the funders (the "friends and family who have financially supported the claims") have done so on the "condition of confidentiality" and if any disclosure orders are made the names should, at least in the first instance, be redacted. Mr Matovu said that as a matter of discretion the Court should not make an Order which defeats that confidentiality.
81. Mr Matovu said that with an appeal pending, and noting that the Defendant has not yet had its costs taxed, the disclosure application was premature.
82. Mr Matovu stressed that the Defendant cannot go on a fishing expedition and before it can get disclosure Orders an assessment needs to be made as to the strength or weakness of its case, based on existing evidence, for non-party costs Orders. The Defendant needs to establish a *prima facie* case that it will obtain an Order for non-party costs. Mr Matovu emphasised that the jurisdiction was exceptional and should be treated with considerable caution.

83. Mr Matovu rightly submitted that the strength of the application as it appears unassisted by the proposed disclosure is a relevant factor, and I take that fully into account.
84. Mr Matovu submitted that (1) there was no evidence that the funders were controlling the litigation or that the funders are the real parties; (2) there was no evidence that the funders were likely to benefit from the litigation; (3) the Defendant was seeking to go down the route of satellite litigation – costs about costs; (4) the Defendant cannot rely on pure speculation and the fact that the Plaintiffs have never explained the source of their funding does not justify a disclosure Order; and (5) it was speculative to seek to infer that the fact investment opportunities have been offered to potential professional funders means that similar investment opportunities were offered to family and friends.
85. Standing back and taking an overview of the position, it is plain to me from the pleadings and the proceedings to date that this is in effect a Rabello family case based in the main on, amongst other retainers, the Rabello family general retainer. If successful the Rabello family would have benefitted by way of a judgment in excess of US\$300 million. On the Plaintiffs' own admission the claims have been funded by Rabello family members. P1-P4 have not been successful. Their claims have been dismissed. P5 has not been successful in respect of his significant primary damages claim. Costs Orders have been made against P1-P4. P1-P4 deliberately did not rely on a stifling point at first instance or in the Court of Appeal. They did not suggest at that stage that they could not pay or that an Order for security would stifle the proceedings. The Court of Appeal ordered them to pay security in the sum of US\$4.25 million. They failed to do so. Their claims were dismissed in view of that failure. P5's claims were in two main parts. A multi-million dollar primary claim for damages and a relatively modest secondary claim for an account of profits in the sum of about US\$358,000. At a late stage he abandoned his significant damages claim and the Defendant, without any admission of liability, agreed to pay him US\$358,000 plus interest and costs since the date of his election to proceed only with his relatively insignificant account of profits claim.

86. It appears that P1-P4 are not in a position to pay the costs awarded against them. The Plaintiffs say that “P1-3 are companies with no assets and P4 is an undischarged bankrupt” (paragraph 33(3) of their skeleton argument dated 5 July 2023). They have failed to discharge the costs Order made against them by the Privy Council. They have failed to put up security for costs. There appears little likelihood that they will be in a position to discharge the costs Orders made against them.
87. They admit that they have been funded by family and friends. The Defendant’s case is not a fishing expedition based on mere speculation. It is based on the evidence before the Court and reasonable and appropriate inferences. It is reasonable to infer from the evidence before the Court that there is a *prima facie* case that the funders in this case were not mere pure funders but may have stood to benefit financially from the proceedings if the Plaintiffs were successful. The Defendant is, just as the defendant in *Thomson* was, justifiably seeking a “pertinent inquiry in the light of the history.”
88. I also note Warby J’s conclusions at paragraph 38 in *Rudd*, a case very different to the case before me. In our case there are legitimate concerns that P1-P4 will not pay costs Orders against them. Moreover there are reasons to believe that there are hidden sources of wealth. In particular see the comments of Sir Bernard Rix JA in the CICA’s judgment on security for costs delivered on 2 August 2021 at paragraph 51 “[P4] and the other plaintiffs in these proceedings have had the wherewithal to conduct extremely expensive proceedings over many years (in circumstances where it is not said that an order for security would stifle these proceedings in the Cayman Islands); and such litigation has not only been conducted in the Cayman Islands but elsewhere, and its costs form part (some USD15 million) of the claim in these proceedings. It is reasonably clear therefore that Ms Rabello is, or has at some time been, able to find the means, possibly through an international network of arrangements, to dispose of funds located in several jurisdictions in the world.” At paragraph 52 Rix JA added:

“In sum, there is a real risk that enforcement of a Cayman Islands costs award would be not only delayed, but substantially obstructed or ultimately frustrated, even though

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(and/or in part because) Ms Rabello appears able to draw on assets to support her litigation in spite of her bankruptcy.”

89. Nothing I say in this judgment should be construed as prejudging any subsequent applications for non-party costs and I, of course, keep a mind open to persuasion. Suffice to say I am satisfied on the basis of the evidence and arguments presently put before me that the Defendants have established the requisite *prima facie* case. The case is not inherently weak nor is it inherently improbable that they will get an Order. I apply Blake J’s check list of relevant factors as outlined at paragraph 19 in *Thomson*. I take into account the apparent strength of an application for non-party costs unassisted by the requested disclosure. I regard the potential value to the fair determination of the application of the documents and information of which the Defendant legitimately seeks as high. In my judgment once provided they are likely to elucidate considerations highly probative to the exercise of the court’s discretion. I accept, taking into account the history of these proceedings, that there is a risk that matters may be dragged into a side alley of satellite costs litigation but the Court, assisted by the parties, will have to do its best to avoid that. No issues as to legal professional privilege have been raised but I take into account Mr Matovu’s confidentiality arguments. Moreover I take fully into account considerations of proportionality and justice in all the circumstances of this case.
90. There is nothing in the conduct of the Defendant that “forfeits” (to use Mr Matovu’s word) their right to seek the “discretionary assistance of the court”. Moreover, the fact that the funding provided may have been provided on a “confidential basis” does not prevent this Court from ordering the disclosure of the names of the funders. Funders cannot legitimately attempt to hide behind a blanket of self-created confidentiality, if justice requires the removal of that blanket. Those who fund litigation must be aware that where justice so requires their identities will have to be revealed together with details of the funding arrangements they have entered into.
91. I appreciate that the jurisdiction the Court is exercising is “exceptional” and should be exercised with great caution. In the somewhat exceptional circumstances of this case, however, in my

judgment it is appropriate, proportionate and just to make an Order requiring disclosure of the identity of the funders and the funding arrangements. P1-P4 should be full and frank in complying with the disclosure ordered.

92. The Order I make is as follows:

P1-P4 should disclose, on a full and frank basis, the following information within 28 days from the date of the delivery of this judgment:

- (1) the identity and addresses of all individuals, companies or other entities that have provided funding to P1-P4 since 1 September 2011 (the month during which the letter before action was issued);
- (2) the amount of such funding in each case;
- (3) the terms on which such funding was provided;
- (4) the extent of such party's investments in the conduct of the action;
- (5) the nature and extent of that party's interest in the outcome of the action.

Costs

93. I now turn to consider the various remaining issues in respect of costs.

P5's costs

94. P5 says that he should be awarded "the costs of his action against the Defendant in this cause on the indemnity basis."

95. The Defendant agrees that it should pay the costs of P5 incurred by him after 30 November 2021 (the date of his election) which are attributable to his account of profits claim, to be taxed on the standard basis if not agreed.

96. By consent Order dated 8 November 2022 it was recorded that P5 and the Defendant (the “Settlement Parties”) had agreed the terms of settlement set out in a confidential schedule dated 3 November 2022 copies of which are held by the parties’ attorneys. There was reference to a joint email from the attorneys for the Settlement Parties dated 3 November 2022.
97. Paragraph 1 of the Order provided that all further proceedings in the action brought by P5 be stayed on the terms set out in the schedule except for the purpose of (1) enforcing the terms of that Schedule, and (2) resolving any questions as to the Settlement Parties’ respective entitlement to or liability for costs, with the Settlement Parties reserving all of their rights in respect of costs issues, without limitation.
98. Paragraph 3 of the Order referred to the Defendant having provided information as to the costs it seeks and the set-off it claims.
99. Paragraph 4 of the Order provided that in the event that no agreement is reached by 14 November 2022, the parties (or each of them) may apply to the Court for an order as to their respective alleged costs entitlements, if any.
100. In P5’s List of Documents dated 30 November 2021 at paragraph 5 it is stated:
- “Damages are not in question as to the Fifth Plaintiff and therefore no documents relating to damages are being produced because the Fifth Plaintiff has elected to claim an account of profits instead of damages in accordance with paragraph 94 of the Plaintiffs’ Substituted Statement of Claim.”
101. Paragraphs 93 and 94 of the Plaintiffs’ Substituted Statement of Claim read as follows:

“The position of Mr Toledo

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93. By reason of the breaches of duty on the part of the Defendant, Mr Toledo has suffered loss and damage including:
- (1) The loss, including the loss of income, relating to the insolvency of the Rural Group, including Banco Rural.
 - (2) Loss suffered as a consequence of his loss of privacy and confidentiality, including losses related to the need to seek to defend himself in the various jurisdictions where the Cayman Disclosure was deployed as set out above.
 - (3) Loss suffered as a result of his time and expenditure in seeking to mitigate the effect of the misuse and deployment of the Cayman Disclosure both against himself and the other Plaintiffs.
 - (4) Loss of reputation, which impeded his ability to do Brazil-related business.
94. Further or alternatively, each and all of the Plaintiffs are entitled to and claim equitable compensation and/or equitable relief in respect of the Defendant's breaches of fiduciary duty, including an account of profits."

102. I do not think it misleading to describe P5's abandoned significant primary damages claim as unsuccessful. I very much doubt that P5 would have been punching the air in victory as he abandoned his primary multi-million-dollar damages claim and settled his relatively modest secondary account of profits claim with interest and costs. P5 says in effect that he decided to elect to claim an account of profits because he had limited financial resources to continue with his main damages claim and "did so with great reluctance". Those are not the words of a "winner". I do not think that P5 can properly be categorised as a "winner" in respect of his abandoned primary damages claim.

103. P5 is, however, entitled to the costs he has personally incurred in respect of the pursuit of his successful modest secondary account of profits claim such costs to be taxed on the standard basis in default of agreement but not to include the costs of his pursuit of his abandoned and unsuccessful primary damages claim.
104. In support of the application for indemnity costs, Mr Matovu placed particular reliance on the criticisms of the former Chief Justice in his 8 August 2020 judgment on security for costs at paragraph 12. It is important to note that such judgment was overturned in the Court of Appeal by judgment delivered on 2 August 2021 and Sir Bernard Rix JA delivering the judgment of the Court of Appeal made no criticisms of the Defendant. On 2 November 2021 the Court of Appeal refused leave to appeal to the Privy Council and within the reasons dated 1 November 2021 and expressly stated: "... the views of the Chief Justice on the right of summary judgment and the merits of the claim cannot survive the Court's appeal decision." Moreover, the Court of Appeal (Sir Alan Moses JA, Sir Bernard Rix JA and John Martin JA) in its judgment delivered on 1 February 2021 had overturned the former Chief Justices's 149-page judgment delivered on 24 July 2019 granting summary judgment after a 16 day hearing. The Court of Appeal made no criticisms of the Defendant in that judgment. Indeed it is clear that the Court of Appeal was of the view that the Defendant had been unfairly treated (see for example paragraphs 49, 51 and 178 of the judgment). Since my involvement as the assigned judge I have not made any criticisms of the conduct of the Defendant that would go anywhere near justifying costs against the Defendant on an indemnity basis.
105. P5, in support of his application for indemnity costs, also relies on the "facts and matters" referred to in his ninth affidavit. There is nothing in P5's ninth affidavit which leads me to conclude that the limited costs Order in his favour should be on the indemnity basis.
106. I am not persuaded that the costs should be taxed on the indemnity basis. I am not persuaded that the Defendant's conduct was, to use the language of the authorities on indemnity costs,

unreasonable or improper to a high degree or otherwise impermissibly outside the norm. The Defendant, as it was entitled to do, took proper steps to robustly defend the very significant claims made against it and, on the basis of the material and submissions before me, I do not criticise it for that.

Application for Interim Payment

107. Order 62 rule 4 (7) (h) of the Grand Court Rules provides that the Court may make an Order that a party must pay “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.”
108. Mr Matovu in his skeleton argument dated 5 July 2023 on behalf of the Plaintiff accepts (at paragraph 32) that the Court will generally make an Order for an interim payment pursuant to its discretion under Order 62 rule 4 (7) (h) unless there is a good reason not to order an interim payment and/or to deprive a successful party of any costs until the taxation process is completed (see *Poulton Family Trust* FSD: unreported judgment of Kawaley J 13 March 2023).
109. I have also considered *Performance Insurance Company SPC (in official liquidation)* (FSD Parker J unreported judgment 24 March 2023) and *Scully Royalty Limited v Raiffeisen Bank International AG* (CICA unreported judgment 8 April 2022). In *Scully* Birt JA at paragraph 54 referred with approval to the principles to be applied in this jurisdiction in relation to interim payments as helpfully summarised by Kawaley J in *Al Sadik v Investcorp Bank BSC* 2019 (2) CILR 585 at paragraph 25.
110. At paragraph 58 Birt JA states “Courts often award 50% of the total costs on the basis that this is a conservative approach which should not lead to an overpayment.” I take an even more conservative approach in the particular circumstances of the case presently before me.

111. In my judgment there is no good reason not to order an interim payment. Mr Matovu submitted that the application was premature. I do not agree. Mr Matovu attempted to rely on the former Chief Justice's comments in his judgment of 8 August 2020 on security for costs. I remind myself again that such judgment and Order declining to provide security was overturned by the Court of Appeal. I do not accept as suggested by Mr Matovu that the Defendant is using the interim payment application as a "tactical device to try to block P1-P4 from seeking to exercise their legal rights in these courts". The application is far from an abuse.
112. In this case I have refused leave to appeal. In *Kuwait Ports Authority v Port Link GP Ltd* (FSD unreported judgment 19 January 2022) Parker J did not think that the mere fact that an appeal was pending made it somehow premature to order an interim payment. Parker J at paragraph 31 stated: "... if it turns out there has been an overpayment, the Defendants should have no difficulty in recovering from the Plaintiffs". In the case presently before me if it turns out there has been any overpayment to the Defendant, there can be no doubt that the Defendant, with assets in the jurisdiction and backed by insurers, will be in a position to refund it and no prejudice will arise to the Plaintiffs. I take into account the possibility of an appeal but such does not lead me to conclude that ordering an interim payment would somehow be unjust.
113. I note Kawaley J's comments at paragraph 25 (h) of his "robust pro-receiving party" judgment on interim payments in *Al Sadik v Investcorp Bank BSC* 2019 (2) CILR 585 in respect of stifling and appeals but based on the evidence and arguments put before me I see no good reason not to order an interim payment in the circumstances of this case.
114. I have considered the evidence in respect of the quantum of costs and in particular have focused on the Costs Summary. I note that the Defendant's total actual costs up to and including 3 October 2021 (the date when the claims of P1-P4 were stayed due to their failure to comply with the CICA Security Order) is stated as about US\$12.5 million (the "Total Actual Costs"). I further note that the Defendant estimates approximately US\$10 million to be potentially recoverable on the standard basis (the "Reduced Total Costs"). The Defendant's application is for an Order for a payment on

account of about US\$4 million which represents just under 40% of its Reduced Total Costs or if the Court decides to take another approach sometimes taken in the authorities then 32% (or 50% of 65%) of the Reduced Total Costs which Mr Said said amounted to about US\$3.3 million.

115. I am satisfied that there is before the Court sufficient material to enable a summary assessment of the interim amount to be carried out. I take into account that material and submissions placed before the court. Adopting a somewhat cautious and broad brush approach I determine that the appropriate amount for an interim payment is the sum of US\$3,000,000.00. The interim payment should be made within 42 days from the delivery of this judgment.

Application for Joint and Several Liability

116. In its skeleton argument dated 5 July 2023 the Defendant makes, amongst others, the following points:
- (1) the starting point where parties join together to advance a common cause is that they will typically face joint and several liability for the costs of that claim when it is unsuccessful;
 - (2) similarly where an action is brought by a litigant acting under the control and for the benefit of a third party, that third party may be held liable for the costs of the action. This may include a controlling/funding director of a company where the director was seeking to benefit from the company's pursuit of the litigation;
 - (3) P1-P5 started and pursued the claim as a joint enterprise;
 - (4) the starting point for P5's damages claim was the contention that a retainer existed between the Defendant and the "Rabello family" (including each of P1-P5);
 - (5) P5's claim was advanced as a joint enterprise with P1-P4;

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- (6) P5 owned and controlled each of P1-P3 and he has managed and controlled the litigation on behalf of all of them and by extension on behalf of the Rabello family of which he is a *de facto* member and he stood to benefit if the claims were successful;
 - (7) P1-P5 have been jointly represented throughout by the same firm of attorneys and the same leading counsel (even though that firm and those counsel have changed over time); and
 - (8) P1-P5 financed a part of their costs by transferring for their own benefit US\$1,036,000 that had been held in the name of a dissolved Rural Group company (a Rabello family enterprise) but have failed to respond to requests for an explanation.
117. In his oral submissions Mr Simpson referred to the pleadings and what he described as the six fundamental areas of overlap between P5's case and the cases of P1-P4 namely (1) retainer; (2) duties owed pursuant to that retainer; (3) breach of duty; (4) causation; (5) loss and (6) illegality. Mr Simpson stressed that the foundation of the whole case was a retainer by the Rabello family of which P5 is said to be a member. The Plaintiffs are all "family entities".
118. In their skeleton argument dated 5 July 2023 the Plaintiffs make, amongst others, the following points:
- (1) it is misleading to describe P5's claim for damages as "unsuccessful (because abandoned)". P5 took a decision to focus on his claim for an account of profits because it would be less costly for him to pursue it;
 - (2) P5's claim against the Defendant was based on independent causes of action. He advanced a personal claim for compensation for loss which he had suffered;

- (3) the Defendant treated P5's claim as independent from those of the other Plaintiffs and after the claims of P1-P4 were stayed the Defendant insisted that P5's claim should continue alone;
 - (4) it is entirely unsurprising that P5 filed a number of affidavits on behalf of the Plaintiffs as he was and is a director of P1-3;
 - (5) the fact that P5 is a director of P1-P3 cannot properly be relied on to make him personally liable for any adverse costs made against those companies;
 - (6) the fact that P5 was a "*de facto* member of the Rabello family" proves nothing;
 - (7) P5's claims were not identical to or reliant on those of the other Plaintiffs; and
 - (8) The Etienne Blake engagement letter was with Arnage and Brooklands and P5 was not personally liable for the costs incurred by all the Plaintiffs in the action.
119. The Plaintiffs say that there is no basis for making P5 jointly and severally liable for all or any part of the adverse costs orders against the other Plaintiffs.
120. Mr Matovu in his oral submissions stated that each plaintiff has a different cause of action, a different claim, a different argument on retainer and a different loss. Mr Matovu pointed out that the Defendant denied that there was ever a general retainer covering the Plaintiffs. That in itself does not detract from the way in which all the Plaintiffs' pleaded their case on the general family retainer.
121. Mr Matovu said that the claims of P1-P4 had not been unsuccessful on the merits. They had been stopped because they did not come up with the security for costs. The claims had not been determined on the merits after a trial. Mr Matovu submitted that P5 had won.

122. Mr Matovu submitted that P5 should not be penalised for exercising his legal right of making an election between remedies and going for an account of profits only. P5 was successful in respect of his account of profits claim.
123. Mr Matovu submitted that the Plaintiffs were seeking separate relief in respect of separate claims each of which had separate risks as to liability, whether one could establish the relevant retainer or not and each of which had the possibility of different outcomes so although the Plaintiffs may be interconnected and affiliated they did not seek the same relief for the same reasons nor were the defences against each of them the same. There were different arguments as to causation and the major defence of illegality affected different plaintiffs differently and certainly did not affect P5's personal claim.
124. Parker J in *Kuwait Ports Authority v Port Link GP Ltd* (FSD unreported judgment 19 January 2022) at paragraphs 9 and 10 stated (footnotes omitted):

“9. The GCRs do not specifically address the circumstances in which a costs order will be made will be made requiring parties to be jointly and severally liable for the costs of another party or parties, however GCR o.62, r.27(2) does contemplate such an order being made.

10. The basis for joint and several costs liability generally is that the arguments that are run by different parties are linked in such a way as to make it just that they each be jointly and severally liable for the winning party's costs, which generally means that they made 'common cause' in the litigation.”

125. In the circumstances of the case before him Parker J stated:

“19. In my view, such an order in the circumstances of this case would not be just or appropriate. D1 and D2-D4 made separate applications seeking separate relief in

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respect of separate claims. There were some common issues of law and fact relied on by all Defendants. However, the degree of overlap between the applications is not such as to warrant the Defendants being jointly and severally liable for the Plaintiffs' costs of the distinct applications. They did not make sufficient common cause. The Defendants are interconnected and affiliated but the interests of the two Defendants' camps are not wholly aligned, nor did they seek the same relief for the same reasons. They ran different cases with different risk and potential outcomes.

20. The fact that the Applications were heard and determined together so as to reduce costs does not mean that liability for the Plaintiffs' costs should be borne by the Defendants jointly and severally.”
126. Warby J in *Ontulmus v Collett* [2014] EWHC 4117 (QB) at paragraph 64 stated: “... the general rule where several parties combine to advance an unsuccessful case is that each is liable for the common costs incurred by the successful party in resisting the case” and at paragraph 65 such rule “would clearly be equally applicable in the reverse situation, where a number of claimants sue a single defendant, as here.”
127. Nugee J in *Rowe v Ingenious Media Holdings Plc* [2020] EWHC 235 (Ch) at paragraph 11 cited the comments of Warby J and had no difficulty with the proposition that the general rule applies to “many cases where the claimants technically have several claims, but, as very commonly happens ... a number of claimants join forces to bring what is in affect a single claim, or to be more precise a single group of claims. Very often in such cases the claimants will be connected parties (for example companies in the same group; members of the same family; individuals, their trustees and their corporate vehicles; and the like), and there will in effect be only one case being made, even if, due to the complexity of the facts, technically different claimants have different causes of action and claim different relief ...”

128. Nugee J at paragraph 13 referred to the appropriate approach in respect of applications for several liability as follows:

“... the Court should simply consider, as an exercise of its wide discretion over the costs of the proceedings, whether it is an appropriate case for a several liability order to be made or not. That does not mean starting from any particular starting point, or requiring the claimants to justify departing from any particular default position. It simply turns on what is just in all the circumstances. ...”

129. It is clear from the pleadings that P5’s case was a materially similar case to that of P1-P4 on issues of retainer, breach of duty and causation. The case of the Plaintiffs was based on, amongst others, the Rabello family retainer. Various retainers are pleaded culminating in paragraph 37 of the Plaintiffs’ Substituted Statement of Claim headed “The General Retainer” which expressly pleads that the Defendant “served as the exclusive Cayman Islands legal counsel for the Rabello family (including for these purposes, Mr Toledo) and their Cayman Islands entities, companies and affiliates (including Arnage, Brooklands, TLB and EFHL following their respective incorporations)”. The Court of Appeal, when overturning the former Chief Justice’s judgment granting summary judgment, in its judgment delivered on 1 February 2021 at paragraph 24, at the commencement of its section dealing with “The factual background”, expressly acknowledged that “The Statement of Claim relies upon a Rabello family retainer”, amongst others. All Plaintiffs rely on this general Rabello family retainer which was important to their case. I accept that one of the sub-retainers was said to also be a personal retainer by P5 but the overall claim of all Plaintiffs is based on, amongst others, a common general family retainer.

130. I accept that P5 appears to have been the key figure and driving force behind the entirety of these proceedings. This is apparent from his evidence and the issues which have been put before the court for determination. P5 has provided much evidence in support of all Plaintiffs in the numerous bitter interlocutory skirmishes between the Plaintiffs and the Defendant. Those affidavits

represented the core of the Plaintiffs' case on the evidence and P5 was plainly the main witness for the Plaintiffs. On the Plaintiffs' own case (admitted by the Defendant) P5 was a *de facto* member of the Rabello family. P5 has been at pains to stress (see for example in paragraphs 13-14 of his sixth affidavit sworn on 4 November 2021) that his claims were "inextricably connected" and "intertwined inexorably" with the claims of P1-P4. P5 refers to the "extensive affidavit evidence" he has filed from which it is evident that he was a "key witness as to the claims of *all* the plaintiffs" (paragraph 28, P5's emphasis).

131. In his skeleton argument dated 10 November 2021 at paragraph 3 (5) P5 himself expressly states that his claims against the Defendant are "(a) pursued jointly and severally with the claims of the First to Fourth Plaintiffs and/or (b) whose claims overlap inextricably with the claims of the First to Fourth Plaintiffs (both legally, factually and evidentially) ..."
132. I accept that P5's claims were not identical to all of those of the other Plaintiffs. The main evidential and legal foundation of the claims was however common. Mr Simpson stressed that the interests of all five plaintiffs were "completely aligned" and if that were not the case Mr Matovu could not represent them all. The fact that Mr Matovu continues to represent all Plaintiffs is a factor in support of the conclusion that they are pursuing a common cause. It is notable that P1-P4 are not supporting joint and several liability of P5. It appears that they are all in this together and have been from the outset. In reality, this battle is and always has been a battle between the Rabello family (of which P5 is a *de facto* member) and the Defendant.
133. Diamond Law Attorneys, who are the present attorneys on the record for all five Plaintiffs, in an email sent on 15 December 2022 realistically recognised the common cause of the Plaintiffs when it referred to "all the Plaintiffs" being in "the same boat", with claims "based on the same set of facts."

134. I do not need to determine the weaker secondary arguments raised by the Defendant in respect of P5's capacity as director of P1-P3 and in respect of the outstanding sums due to Etienne Blake. The Defendant has other far stronger and more persuasive arguments.
135. In my judgment, all Plaintiffs in these proceedings have sufficient and significant common cause. Moreover, P5 played a crucial role in the proceedings pursued by P1-P4. All Plaintiffs have pursued the claims as a joint enterprise. It is just, fair and proportionate that the Plaintiffs should each be jointly and severally liable for the Defendant's costs. The case for joint and several liability is overwhelming in the circumstances.
136. P5 should be jointly and severally liable alongside P1-P4 for all of the Defendant's costs of defending the action up to and including 30 November 2021 (the date of P5's election) and also liable on a joint and several basis for the interim payment I have ordered.

Application for Set Off

137. In *Ennismore Fund Management Limited v Fennis Consulting Limited* 2020 (2) CILR 489 (CICA) Field JA (with whom Rix JA and Goldring P agreed) stated, at paragraph 26, that the flexible discretionary approach should be adopted "when deciding whether costs and/or damages can be set off against costs and/or damages incurred or awarded in the same or different proceedings". The modern test to determine whether there should be an equitable set-off is whether the cross-claim is so closely connected with the claim that it would be manifestly unjust to allow the claimant to enforce payment without taking into account the cross-claim.
138. At paragraph 27 Field JA, applying the discretionary approach, was of the view that justice in that case required that EFML be entitled to set-off against the compensation payable to Fenris the costs both below and of the appeal awarded in EFML's favour since both entitlements had arisen in the same set of proceedings and because if no set-off was ordered it is highly likely that EFML would

not recover its costs. The court therefore considers if the liabilities are ordered in the “same set of proceedings” and the likelihood of non-recovery is a relevant factor.

139. Field JA (at paragraph 28) added:

“I would equally grant the set-off claimed if EFML had to show that it was entitled to an equitable set off. In my view, the award of compensation and the award of costs are so closely connected that it would be manifestly unjust to allow Fenris to be paid the compensation awarded without netting off EFML’s entitlement to costs. I am of the opinion because the costs awarded to EFML were incurred in proceedings brought by Fenris in the course of which Fenris, through its counsel, indicated that it had no objection to this court deciding whether to award compensation in respect of a generic investment loss rather than on the pleaded basis of a portfolio of investments in Small Caps.”

140. Field JA also made it helpfully clear that the set-off can extend both to immediately payable costs and to costs that are payable but where quantum is as yet undetermined by stating at paragraph 29:

“It is true that the costs payable by Fenris to EFML have not yet been determined but this is no problem where equitable, as distinct from legal, set-off is in play.”

141. There is nothing, in this context, of significance in Mr Matovu’s point in effect that any arguments on set off should be left to the taxing officer under Order 62 rule 23. This Court has jurisdiction to deal with set off. I have heard the arguments and considered the relevant evidence and law and it is appropriate that I determine the set off issues.

142. I agree that an Order setting off P5’s liability to the Defendant against any liability in the other direction would be equitable and appropriate. This will cover his joint and several liability in respect of the costs of P1-P4 including the interim payment I have ordered. The costs have all been incurred in the same proceedings. The amount payable to P5 in respect of the agreed settlement of

his modest secondary account of profits claim has also arisen in the same proceedings. Such sums and liabilities are very closely connected. Moreover there is sufficient evidence before the Court (in particular noting P5's residence out of the jurisdiction, his dispute with former attorneys in respect of costs, the outstanding sum of US\$1.5 million in unpaid fees to the US attorneys and the apparent funding of his costs to date) to justify the concern that it is highly likely that any joint and several liability of P5 for costs and the interim payment and his liability for the costs of his failed recusal application will be undischarged and unrecoverable. I agree that in such circumstances it would be inequitable and potentially unjust for the Defendant to be required to make a payment to D5 without a set-off. In such circumstances I am content to grant the Application for Set Off.

Summary

143. In this judgment I have arrived at the following determinations for the reasons stated:

Application for Leave to Appeal

(1) I have refused to grant leave to appeal.

Application for disclosure of funders and details of funding arrangements

(2) I have granted the application for disclosure of funders and details of funding arrangements, such to be provided within 28 days from the date of delivery of this judgment.

P5's Costs

(3) I have refused P5's application for indemnity costs. I have however awarded P5 the costs he has personally incurred in respect of the pursuit of his successful secondary account of profits claim such costs to be taxed on the standard basis in default of agreement and not to include the costs of his pursuit of his abandoned unsuccessful primary damages claim.

Application for Interim Payment

- (4) I have granted the application for an interim payment on a joint and several basis in the sum of US\$3,000,000.00 such sum to be paid within 42 days from the delivery of this judgment.

Application for Joint and Several Liability

- (5) I have granted the application for joint and several liability and determined that P5 should be jointly and severally liable alongside P1-P4 for all of the Defendant's costs of defending the action up to and including 30 November 2021 (the date of P5's election) and also liable on a joint and several basis for the interim payment I have ordered.

Application for Set Off

- (6) I have granted the application for set off. Any liability of the Defendant to P5 in respect of costs and the agreed settlement of his modest account of profits claim may be set off against any liabilities of P5 to the Defendant including his liability in respect of the costs of P1- P4 and the interim payment I have ordered.

Ancillary Applications

144. I am minded to deal with any ancillary applications (such as costs) on the papers. Any party wishing to file and serve an application should do so within 21 days of the delivery of this judgment together with concise written submissions (no more than 5 pages) in support and any party wishing to oppose any such applications should do so by filing and serving concise written submissions (no more than 5 pages) within 14 days thereafter.

Orders

145. Counsel should provide within 7 days of the delivery of this judgment a draft Order reflecting the determinations contained in this judgment.

David Doyle

**THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT**