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

**Cause No. FSD 270 OF 2021 (IKJ)**

**IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)**
**AND IN THE MATTER OF GLOBAL FIXED INCOME FUND I LIMITED**

**B E T W E E N:**

**CREDIT SUISSE LONDON NOMINEES LIMITED**

**Petitioner**

**-v-**

**GLOBAL FIXED INCOME FUND I LIMITED**

**First Respondent**

**-and-**

**FLOREAT INVESTMENT MANAGEMENT LIMITED**

**Second Respondent**

**-and-**

**ABDUL KHALEK JALLAD**

**KARIMA SHAKER**

**SHERIN SHAKER**

**MARIE-LOUISE STOFFEL**

**Intervenors (Series 7 Investors)**

**-and-**

**HIS HIGHNESS SHEIKH RASHID BIN HUMAID AL NUAMI**

**HIS HIGHNESS SHEIKH AMMAR BIN HUMAID AL NUAMI**

**HIS HIGHNESS SHEIKH HUMAID AL NUAMI**

**Intervenors (Series 8 Investors)**


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**IN CHAMBERS**

**Before:** The Hon. Justice Kawaley

**Appearances:**

Mr James Collins KC, Mr David Lee and Mr David Lewis-Hall of Appleby (Cayman) Limited for the Petitioner

Ms Laura Hatfield of Bedell Cristin for the Series 7 Investors

Mr Alistair Abbott and Mr Alan Quigley of Forbes Hare for the Second Respondent

**Heard:** On the papers

**Close of submissions:** 12 December 2023

**Draft Ruling circulated**: 19 December 2023

**Ruling Delivered:** 8 January 2024

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*Costs of hearing related to the identity of joint official liquidators-incumbent joint provisional liquidators appointed-whether costs should follow the "general rule" for just and equitable petitions or the rules applicable to applications in an existing winding-up-grounds for departing from usual rule in relation to a hearing in relation to the appointment of liquidators-Companies (Winding-Up) Rules, Order 1 rule 2(4), Order 24 rules 2, 8*


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**COSTS RULING**

**Introductory**

1. On 26 July 2023, I heard full argument on the question of whether the JPLs, Cosimo Borrelli of Kroll (H&K) Limited and Mitchell Mansfield of Kroll (Cayman) Ltd, should be appointed as Joint Official Liquidators ("JOLs") of the First Respondent ("GFIF") as proposed by the Petitioner (the "Further Hearing"). The Series 8 Investors proposed alternative candidates, broadly on independence grounds. They were supported in this regard actively by the Series 7 Investors and, more passively (for obvious tactical reasons) by the Second Respondent. On 31 July 2023, I granted an Order in terms of the draft Order (the "JOLs Order") (there being no apparent dissent to its form at the Further Hearing) and indicated I would provide reasons for my decision as soon as possible. The reasons for that decision were delivered on 18 August 2023. The final paragraph of the JOLs Order provided as follows:

> "*15. The Second Respondent, the Series 7 Investors and the Series 8 Investors do pay the Petitioner's costs of the Further Hearing on the standard basis, to be taxed if not agreed, such liability for costs to be joint and several.*"

2. Having signed the Order, counsel for the Series 7 and 8 Investors protested that they had expected to be heard as to the terms of the JPLs' appointment as JOLs and costs in the usual way after the present Judgment had been delivered. I indicated in the 18 August 2023 Judgment that I would hear counsel as to costs under the liberty to apply provisions if required. Directions were subsequently agreed for submissions to be filed and for the issue of the costs of the Further Hearing to be determined on the papers. In the event, only the Series 7 Investors and the Second Respondent challenged paragraph 15 of the JOLs Order which required them to pay the Petitioner's costs of the Further Hearing.

3. The general rule in relation to the hearing of just and equitable winding-up petitions where the company is a nominal respondent is that costs are borne by the unsuccessful contending shareholders. The general costs rule under GCR Order 62 rule 4 (5) is that costs follow the event. The Second Respondent and the Series 7 Investors seek to contend that the general rule does not apply to them in the context of the present case.


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**Disposition of the Further Hearing**

4. The Second Respondent, whose primary interest was that of a manager with no standing to nominate a liquidator, having initially signified support for the Investors' opposition to the JPLs' permanent appointment sagely decided to take no active part in the Further Hearing. As I noted in the Reasons for Decision:

> "*36…I saw no need to formally consider the written case advanced by the Second Respondent in opposition to the appointment of the JPLs as JOLs. If the scales had been evenly balanced, which in my judgment they were not, the fact that the Second Respondent sought to replace the JPLs would have tipped the scales against their being replaced.*"

5. The Series 7 and Series 8 Investors raised various objections to the JPLs' independence as set out in my Reasons for Decision at paragraphs 14 to 15. They were all rejected. The following extracts from the 18 August 2023 Judgment illustrate the nature of the objections raised and the outcome of the Further Hearing:

> "*10. However, even in the present context, in my judgment there is at least a starting assumption that the JPLs should be allowed to continue unless there are "clear and cogent" reasons for appointing alternative JOLs. It must be remembered of course that the majority stakeholders have sat on their hands for almost 2 years while the JPLs have been progressing the provisional liquidation. In these circumstances and having regard to established liquidation practice in this jurisdiction, I decline to accept that the JPLs ought to have played a more limited 'holding' role…*
>
> *19. Both the Series 8 and Series 7 Investors' most significant objections were grounded in the assertions that the JPLs had to date (a) given primacy to Mr Wang's interests and/or (b) created an impression that primacy had been given to those interests. After Mr Rubin KC had romped through these objections in his typically robust manner, I was satisfied that there was no basis to the first limb of these complaints. I reserved judgment to reflect on precisely what the appearance of a lack of independence legal test was and how it ought properly to be applied to the facts of this case…*


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> *29. Overall, the Series 8 Investors and Series 7 Investors appeared to be consistently straining to identify objectively credible perceptions of lack of independence which ultimately fell short of constituting valid grounds for appointing alternative JOLs in place of incumbents of almost 2 years' standing who were well aware of the potential conflicts and capable of resolving them as they arose…*"

6. As regards the Series 7 Investors, I noted that "*the Series 7 Investors were admittedly close allies of Floreat Parties. This meant that less weight could be attached to their views as being representative of those of a reasonable well-informed stakeholder*" (paragraph 34 (a)). The only unusual feature of the proceedings as a whole was mentioned in relation to a point raised by the Series 8 Investors:

> "*17. <u>This point would likely not have been advanced had the hearing of the Petitions not to a significant extent taken place in private hearings the Series 8 and 7 Investors as non-parties did not attend</u>. I encouraged the Petitioner to abandon that point in the grounds of economy on the express basis that it was easier to establish the need to investigate, inter alia, whether or not the Funds were a fraud from inception than it was to establish such a fraud as a ground for winding-up. The need for an investigation accordingly clearly had an increased rather than a narrower ambit by the time the Winding-Up Order was made and the accumulated knowledge the JPLs had acquired was quite obviously undiminished by the Petitioner's narrowing of its pleaded grounds.*" [Emphasis added]

**The Second Respondent's submissions on costs**

7. The Second Respondent in its Written Submissions advanced the following most significant arguments as to why it should not be the subject of an adverse costs order in relation to the Further Hearing:

   (a) "*6. Counsel for FIML, while in attendance at the Identity and Terms Hearing, elected to make no oral submissions, with Kawaley J commenting 'I don't know if any counsel has more effectively assisted their client's position by electing to say nothing'*";

   (b) "*11…in circumstances where the Court had already determined the petition and ordered the winding up of the Company, the Identity and Terms Hearing was and must be considered an application in existing liquidation proceedings dealing with matters*


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*ancillary to or consequential on the Winding Up Order, and not an extension of the petition itself*";

(c) "*20. As regards FIML specifically, this was not a situation where FIML, as the management shareholder, sought to assert its views over stakeholders with an economic interest. Rather, FIML played a more passive role, supporting the Series 7 Investors and Series 8 Investors in circumstances where they comprised the majority investors of the Company holding the majority of the economic interest.*"

**The Series 7 Investors' submissions on costs**

8. Two main arguments were advanced as to why the Court was wrong to make the usual costs order:

(a) the "*general rule*" under CWR Order 24 rule 8 did not apply because the Series 7 Investors were not formally made parties to the Petition on the hearing of the Summons for Directions; alternatively

(b) the present case did not fall within any of the special categories applicable to costs under the CWR, GCR Order 62 applied, and to avoid penalising stakeholders from participating in such applications there should be no order as to costs.

**The Petitioner's responsive submissions on costs**

9. The Petitioner essentially responded to these points most pertinently as follows:

(a) whether the Further Hearing is viewed as part of the Petition or an application within an existing winding-up, the governing principles are essentially the same and the unsuccessful parties should pay the successful parties' costs;

(b) "*23. In short, R2 should never have entered into the fray and by doing so they put themselves at risk not only of costs, but of indemnity costs. By firmly opposing the appointment of the JPLs as official liquidators in both their lengthy witness evidence from Mr Mutaz Otaibi and their skeleton argument R2 put P to cost. The usual order, that costs follow the event, cannot be ducked simply as a result of R2's leading counsel at the hearing saying that nothing could be added orally*";

(c) "*24. Whilst there may be cases where stakeholders act proportionately to simply put before the Court their proposals for the official liquidators and it would be right that this should not bring with it a costs risk, this is not one of those cases. S7 vociferously*


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> *opposed the appointment of the incumbent JPLs as the official liquidators of GFIF. S7 filed three affidavits in support of their opposition – one from Mr Jallad and two from Ms Sherin Shaker – which in total ran to 27 pages, with over 340 pages of exhibits.”*

**Findings**

**Governing rules**

10. Although what costs rules apply does not affect the result of the application, in my judgment the following provisions of CWR Order 24 rule 8 apply to an application which can only sensibly be viewed as part of the hearing of the Petition:

> “*(2) In the case of a contributory's winding up petition under Order 3, Part III, the general rules are that —*
>
> *(a) if the Court has directed that the company itself is properly able to participate in the proceeding, the general rule is that the costs of a successful petitioner be paid out of the assets of the company; or*
> *(b) if the Court has directed that the winding up petition be treated as an inter partes proceeding between one or more members of the other members or members of the company as respondents, the general rule is that none of the costs should be paid out of the assets of the company and the unsuccessful parties should pay the costs of the successful party, such costs to be taxed on the standard basis unless agreed.*” [Emphasis added]

11. This general rule in CWR Order 24 rule 8(b) is clearly based on the fundamental principle that shareholders should pay for disputes *inter se*. Its purpose is to avoid a situation where disinterested shareholders indirectly fund disputes in which they are not involved. When a particular shareholder joins a dispute is less relevant than the question of whether they participated in a hearing relating to a contributory’s winding-up petition. The Series 7 Investors actively participated in the Further Hearing *qua* members and that hearing concerned what Order should be made for the purpose of disposing of the Petition. The “*general rule*” clearly applies to them.

12. The Second Respondent’s Skeleton Argument for the Further Hearing did not elucidate the capacity in which its submissions were being advanced and did not make any reference to the evidence it had originally filed in opposition to the JPLs’ appointment as JOLs. My recollection is that Mr Bloch KC, at some point in the proceedings before the Further Hearing and in response to my


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queries as to what interest his clients had in that hearing, indicated that they did in fact hold a small quantity of shares in the Company. If I am wrong, it makes no difference because under GCR Order 62 rule 4 (5) the usual rule is that costs follow the event.

**<u>Costs as between the Petitioner and the Second Respondent</u>**

13. The Second Respondent unsuccessfully opposed the appointment of the JPLs as joint official liquidators. It filed evidence and a skeleton argument in opposition to their appointment which the Petitioner had to deal with in preparing for the Further Hearing. However, the position it ultimately adopted at the hearing cannot properly be regarded as having no impact on the outcome as regards to costs. Otherwise, parties who act reasonably with a view to saving costs and/or escaping an adverse costs order will be dis-incentivised from conducting litigation in a reasonable and proper manner.

14. I do not accept the Petitioner's suggestion that it suffices for the Second Respondent to escape an indemnity costs award. The Second Respondent's passive role at the hearing itself means that it did not to any material extent add to the costs incurred by the Petitioner in relation to the hearing itself. Accordingly, I modify the original Costs Order as regards the Second Respondent to the following extent:

    (a) the Second Respondent shall pay the Petitioner's costs of preparing for the Further Hearing;

    (b) there shall be no order as to the costs of the Further Hearing itself.

**<u>Costs as between the Petitioner and the Series 7 Investors</u>**

15. The Series 7 Investors advanced no valid case for dis-applying the general rule. The logical consequence of their argument would extinguish the general rule altogether, because every application about what order should be made at the conclusion of a contributory's winding-up petition could be characterised as simply an exchange of stakeholder views rather than an adversarial hearing. As regards the cases upon which reliance was placed:

    (a) *Re Performance Insurance Company* SPC (FSD 70 of 2021 (RPJ), Judgment dated 29 December 2022, Unreported), concerned a dispute between a company and a stranger to the company to which CWR Order 24 rule 8(b) did not apply;


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(b) *Re Oakrun Precious Metals Funds*, Ltd (FSD 9 of 2019 (IKJ), Judgment dated 30 April 2019, Unreported) is also distinguishable. There I concluded: "*Rule 8 2(a) is concerned with the costs of a successful petitioner as against the company; rule 8(2) (b) is concerned with the costs as between disputing members. The present costs dispute is between the Petitioner and a stranger to the Fund*" (paragraph 42); and

(c) *Re Abraaj Holdings* (FSD 95 of 2018 (RMJ), Judgment dated 4 January 2019, Unreported) is also distinguishable because it merely decided that a petitioning creditor (a Kuwaiti statutory corporation) should not bear the costs of opposing an application for an adjournment of its petition sought by the provisional liquidators.

16. McMillan J's approach was entirely orthodox in making no order as to costs in relation to what was effectively a case management decision. In a creditor's winding-up proceedings, there is a need to encourage interested stakeholders to express their views on whether or not a winding-up order should be made or an adjournment granted to explore alternative options to a winding-up. The Judge's following observation (at paragraph 20) must be understood in the context in which it was made:

> "*…the Court is most reluctant to discourage open debate on matters which individual creditors may believe to be of substantial importance. For this reason, if indeed for no other, the Court would be most hesitant and reluctant to deter relevant parties from stating* [what] *they consider they need to state by imposing costs orders upon them for doing so.*"

17. *Re Abraaj Holdings* provides no meaningful support for the proposition that a member which belatedly and unsuccessfully objects to the suitability of JPLs as permanent appointees, (a) after a winding-up order has been made and (b) following a freestanding hearing convened specifically to adjudicate the appointment issue on a contested basis, should not bear the costs of the successful parties if that objection is unsuccessful.

18. As between the Petitioner and the Series 7 Investors, paragraph 15 of the JOLs Order stands and they and the Series 8 Investors are liable to pay the Petitioner's costs of the Further Hearing on a joint and several basis, to be taxed if not agreed on the standard basis.


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**Conclusion**

19. The Costs Order made on 31 July 2023 is confirmed as regards to the Series 7 Investors but modified so that the Second Respondent is only required to pay the Petitioner's costs of preparing for the Further Hearing, with no order being made against the Second Respondent in relation to the hearing costs.

20. Subject to hearing counsel, if required, as to the costs of the present costs application, the Series 7 Investors shall pay the Petitioner's costs to be taxed if not agreed on the standard basis. It appears to me that the Second Respondent has achieved substantial success, but in quantum terms half of the relief it sought. The Petitioner should accordingly pay 50% of the Second Respondent's costs of the present costs application. Unless any party applies by letter to the Court to be heard as to these modest costs within 14 days of the date this Ruling is delivered, an Order shall be made in those terms.

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**THE HONOURABLE MR JUSTICE IAN RC KAWALEY**
**JUDGE OF THE GRAND COURT**


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