



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

**FSD CAUSE NOS. 268, 269, 270 OF 2021 (IKJ)**

**IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)  
AND IN THE MATTER OF PRINCIPAL INVESTING FUND I LIMITED  
AND IN THE MATTER OF LONG VIEW II LIMITED  
AND IN THE MATTER OF GLOBAL FIXED INCOME FUND I LIMITED**

**CREDIT SUISSE LONDON NOMINEES LIMITED**

**Petitioner**

**- and -**

**PRINCIPAL INVESTING FUND I LIMITED  
LONG VIEW II LIMITED  
GLOBAL FIXED INCOME FUND I LIMITED**

**First Respondents**

**- and -**

**FLOREAT PRINCIPAL INVESTMENT MANAGEMENT LIMITED  
LV II INVESTMENT MANAGEMENT LIMITED  
FLOREAT INVESTMENT MANAGEMENT LIMITED**

**Second Respondents**

**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

*240417- In the matter of Principal Investing Fund I Limited et al. – FSDs 268, 269 & 270 of 2021 (IKJ)-Ruling on  
Costs of Interim Payment Application*

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

**Heard:** On the papers

**Close of submissions:** 19 February 2024

**Draft Ruling Circulated:** 28 March 2024

**Ruling Delivered:** 17 April 2024

### Index

*Costs of interim payment on account of costs application disputed solely as to quantum- amount of award midway between the amounts contended for by each side- whether costs should be treated as part of costs in the petitions-governing principles and appropriate approach-Companies Winding Up Rules (2023 Consolidation), Order 24 rule 8 (2) (b), (4)*

## RULING ON COSTS OF INTERIM PAYMENT APPLICATION

### Introductory: the interim costs application

1. In my Ruling of 26 January 2024, I adjudicated a dispute as to the amount which should be assessed by way of an interim payment on account of costs in favour of the Petitioner. That there should be an interim payment was not in dispute. This is clear from the following portion of my Ruling:

*“2. The parties filed evidence and written submissions. The controversial issues can be concisely distilled to the following points:*

*(a) The Petitioner seeks US\$6,350,000 (rounded down from US\$6,500,000 and taking into account the costs the Second Respondents are likely to recover) on the following basis and terms:*

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- (i) 60% of 65% of the standard basis costs it expects to recover and 60% of 85% of the indemnity basis costs it expects to recover;
- (ii) payable within 28 days.

(b) *The Second Respondent contends:*

- (i) *the Petitioner should only be awarded 40% of the costs it is likely to recover because at first blush the sum it seeks seems unusually high (a total amount of no more than US\$4 million);*
- (ii) *payable within 42 days.”*

2. The result of the application, putting aside the issue of the timing of the payment, was summarised in the following terms:

*“15. Giving due account to the parties’ respective positions, I consider that I should follow what the Court of Appeal in Scully Royalty Limited v Raiffeisen Bank, CICA 21 of 2020, Judgment dated 8 April 2022 (unreported) implied was the standard approach of assessing the interim payment on account of costs on the basis of 50% of the likely recoverable costs, which are 65% of the sums claimed on the standard basis and 85% of the sums claimed on the indemnity basis, respectively. This happens to be midway between the 40% contended for by the Second Respondents and the 60% contended for by the Petitioner.” [Emphasis added]*

3. The timing of payment issue (dealt with in three paragraphs of a Ruling comprising a total of 21 paragraphs) was resolved in favour of the Petitioner.
4. In the final paragraph of the 26 January 2024 Ruling, I made the following conditional or provisional determination as to how the costs of the costs application should themselves be borne:

*“21. Subject to hearing counsel if required as to the terms of the Order and costs, the Petitioner is awarded an Interim Payment on Account of Costs in the sum of*

*US\$5,600,000.00, to be paid within 28 days, with no order being made as to the costs of the present application.* [Emphasis added]

5. In brief, my provisional view was that no order should be made as to the costs of the interim payment application because it was primarily a dispute about the amount of the payment which (having regard to the appropriate percentage figure to be used) neither side could be said to have ‘won’ overall.

### **The contending positions as to the correct approach to the relevant costs**

#### **The Petitioner’s submissions**

6. Understandably, the Petitioner sought to displace my provisional views while the 2<sup>nd</sup> Respondents embraced them. The Petitioner’s submissions as to the governing principles were most importantly articulated as follows:

*“7. CWR O.24 r.8 provides that where the petition proceeds inter partes between members then:*

*‘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)

*8. CWR O.24 r.8 (4) provides that the Court shall follow the general rule unless:*

*‘it is satisfied that there are exceptional and special circumstances which justify making some other order or no order for costs.’* (emphasis added)

*9. The costs of the Petitions were, in the usual way, expressly sought on the face of each Petition. Therefore, the determination of costs properly forms part of the determination of the Petition. This includes the Interim Payment Determination.”*

7. The application of the Rules was illustrated by reference to the approach adopted in relation the costs of an interim payment application in *In the Matter of Porton Capital Inc* (FSD 226 of 2021 (DDJ)), Order dated 20 May 2022.
8. However, dealing with the merits of the costs issue in a more granular way, the Petitioner's counsel submitted most significantly that the \$4 million figure was only suggested by the 2<sup>nd</sup> Respondents in their written submissions, by which time the Petitioner had already prepared both its evidence and its written submissions. Neither quantum nor timing was addressed in the 2<sup>nd</sup> Respondents' evidence, and many complaints made in the 2<sup>nd</sup> Respondents' evidence which were rejected by the Court had to be addressed in the Petitioner's written submissions. If the Court rejected the primary submission that the costs of this application were simply a subset of the costs of the Petition which should in principle be awarded to the Petitioner, it was submitted that the Petitioner had won the application in any event because:

*“16.1. P was awarded US\$5.6m. This was US\$1.6m (40%) higher than the sum contended for by 2Rs but only US\$750,000 (about 12%) lower than the sum it had sought.*

*16.2. P contended for payment to be made within 28 days; 2Rs contended for 56 days. The Court agreed with P and ordered payment within 28 days.”*

9. Finally it was argued that if any discount at all was required from the costs which would otherwise be awarded to the Petitioner, the discount should be very modest indeed.

### **The 2<sup>nd</sup> Respondents' submissions**

10. As regards whether or not the costs of the application should be treated as part of the costs in the Petitions, the 2<sup>nd</sup> Respondents submitted:

*“5. The first matter to consider is what is the event. In this regard, the event is plainly the Interim Payment Determination and the costs to be determined are the costs of that discreet [sic] application, whether the Interim Payment Determination is considered an extension of the Petition presented in these proceedings or not. This is consistent with the position*

*this Court has already adopted in respect of subsequent consequential applications heard following the hearing of the Petition.”*

11. As regards success, it was argued that I was correct to have regard to the difference between the “Percentage Multiplier” contended for by the respective parties as opposed to the raw monetary amount of the award. A purely monetary evaluation was not always required: By any measure neither side had achieved real success overall: *Kupeli & Ors v. Kibris Turk Hava Yolları Sirketi (trading as Cyprus Turkish Airlines) & Anor.* [2019] 1 WLR 1235, approved by Segal J in *In the Matter of Cayman Shores Development Ltd and Palm Sunshine Ltd*, FSD 143 of 2019 (NSJ), Judgment dated 28 January 2022 (unreported). The payment timing issue was merely a passing reference in the 2<sup>nd</sup> Respondents’ evidence and was not addressed by way of submission at all. As regards the costs incurred by the Petitioner in preparing its evidence, the following point of principle was made:

*“13. It is also important to note that, aside from the Directions requiring P to file evidence in respect of the Interim Payment sought, it was obliged to do so in any event. Pursuant to paragraph 25(i) of Al Sadik v. Investcorp Bank B.S.C. & Ors [2019] (2) CILR 585, where a party seeks an interim payment on account of costs, ‘a summary assessment of the appropriate interim payment amount must obviously be possible and sufficient supporting material (e.g. a draft bill of costs or a breakdown of incurred costs) must be placed before the court.’”*

12. Finally reference was made to various local cases which were said to have followed the approach “ordinarily” adopted by this Court of making no order as to costs in relation to matters where there was no clear winner:

*“14...See, for example: paragraph 19 of In the Matter of Poulton Family Trust (Unreported, FSD 121 of 2016 (IKJ), delivered on 13 March 2023); paragraph 94 of Zonia Lolita Pearson Gooding v. Juliette Gooding (as Executor of the Estate of David Archibald Gooding, Deceased) (Unreported, Cause No. 108 of 2020, delivered 1 April 2022, Walters J (Acting)); paragraphs 89 to 91 of CTMH Holdings Ltd v The Government of the Cayman Islands (Unreported, G 55 of 2021, delivered on 14 February 2023, Williams J) and paragraph 56 of CTMH Holdings Ltd v The Government of the Cayman Islands*

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*(Unreported, G 55 of 2021, delivered on 16 June 2023, Williams J); and paragraphs 147 to 155 of In the Matter of Qunar Cayman Islands Limited (Unreported, FSD 76 of 2017 (RPJ), delivered 29 March 2021)."*

## Findings

### Governing costs principles

13. The main legal controversy is whether or not the usual 'costs follow the event' rule applies in relation to the present application or whether the Petitioner is *prima facie* entitled to its costs as part of the costs it is clearly entitled to in the Petitions, absent exceptional circumstances. The Petitioner contended that it was entitled to its costs as the successful party in the Petition by virtue of Order 24 rule 8 (2) (b) as read with rule (8) of the Companies Winding Up Rules (2023 Consolidation) ("CWR"). The 2<sup>nd</sup> Respondents contended that the incidence of the costs of the present application fell to be determined having regard to the merits of the present application. I accept the latter proposition and reject the former.
14. CWR Order 24 rule 8 provides as follows:

*"(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.*

...

*(4) The Court shall make orders for costs in accordance with these general rules unless it is satisfied that there are exceptional and special circumstances which justify making some other order or no order for costs." [Emphasis added]*

15. It was common ground in *Re Principal Investing Fund I Limited et al*, FSD 268-270/2021 (IKJ), Judgment dated 27 July 2023 (unreported)), that GCR Order 62 applied to these proceedings in tandem with the CWR (see paragraphs 16-17). Notwithstanding the fact that the Petitioner had succeeded in obtaining Winding-Up Orders, the costs of different applications and/or issues were dealt with on an issue by issue basis. My Costs Ruling in relation to the costs of the Petition concluded as follows:

*“67. Hopefully all of the disputed costs issues placed before the Court at the 12 July 2023 Costs Hearing have been addressed above. They have been resolved in summary as follows:*

*(a) basis of taxation for costs in the Petition: costs before 24 March 2023 shall be taxed if not agreed on the standard basis, but thereafter on the indemnity basis;*

*(b) costs of the allegations the Petitioner withdrew by re-re-amendment at trial: these costs are awarded in the Petition;*

*(c) costs occasioned by the Petitioner’s re-amendments reserved by Doyle J on 31 May 2022: these costs are awarded to the 2nd Respondents applying the usual rule on amendments;*

*(d) costs of the extension of time application reserved by the 26 January 2023 Consent Order: these costs shall be costs of the Petition; and*

*(e) costs of the recusal application: these costs are awarded to the 2nd Respondents.”*

16. Although the point was not the subject of full argument, in *Re Global Fixed Income Fund Limited*, FSD 270/2021 (IKJ), Judgment dated 8 January 2024 (unreported), I observed:

*“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...”*

17. That application was an application concerning the identity of the joint official liquidators, whose appointment was very much a central part of the Final Order made in relation to that Petition. However, I went on to set out my view of what the underlying purpose of the “general rule” was:



*“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.”*

18. As the 2<sup>nd</sup> Respondents correctly argued in the present context, my finding that the general rule applied as between the shareholder participants in the hearing did not lead me to automatically award all costs to the Petitioner without further analysis. I expressly rejected that approach in *Re Global Fixed Income* for the following reasons:

*“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 disincentivised from conducting litigation in a reasonable and proper manner.” [Emphasis added]*

19. After all, CWR Order 24 rule 7 provides:

*“(1) ‘Costs’ shall mean the reasonable legal fees and expenses incurred by a person in conducting or participating in a liquidation proceeding in an economical, expeditious and proper manner.”*

20. In my judgment CWR Order 24 rules 8 (2) (b), (4) read in a straightforward way in that the relevant statutory context operates, broadly, in the following manner:

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- (a) as a general rule, when a contributory's petition proceeds as a controversy between shareholders, "*none of the costs shall be paid out of the assets of the company*" and the costs shall be borne exclusively by the shareholders, save in "*exceptional and special circumstances*";
- (b) where the general rule applies, costs follow the event and the successful shareholders' costs are paid by the unsuccessful shareholders to be assessed on the standard basis, save for "*exceptional and special circumstances*". Success is evaluated according to the normal Grand Court Rules Order 62 principles, as is the appropriateness of the exceptional indemnity basis taxation jurisdiction;
- (c) where discrete applications are made or issues canvassed within a petition proceeding, the Court will in the ordinary way be required to determine whether to assess the costs of the application or issue on its own merits or instead to treat the relevant costs as being costs in the petition as a whole (see e.g. *Re Principal Investing Fund I Limited et al*, FSD 268-270/2021 (IKJ), Judgment dated 27 July 2023 (unreported));
- (d) success in relation to the petition as a whole does not entitle the winner to automatically recover their costs of every interlocutory application related to the petition without regard to the merits of each application.

21. Accordingly where CWR Order 24 rule 8 applies, as it clearly does in relation to an application very closely connected with the costs Orders made at the conclusion of the hearing of the Petitions, the rule does not automatically entitle the Petitioner to its costs merely because it has been awarded the costs of the Petition. That would be a bizarre legal result. I reject the Petitioner's primary basis for undermining my provisional view that there should be no order as to costs in relation to the interim payment on account of costs application heard on the papers and disposed of by my Ruling dated 26 January 2024.

**Appropriate costs award in relation to the costs of the interim payment on account of costs application**

22. The alternative ground relied upon by the Petitioner for an award of costs of the relevant application was the straightforward contention that it achieved substantial success. The Petitioner applied for an interim payment on account of costs and succeeded in obtaining the substance of the relief it sought. The 2<sup>nd</sup> Respondents accept that the scheme of the GCR required an application to be made and supported by evidence, in the context of contending they did not cause the Petitioner to waste these costs. However, this point helps to illustrate that even if the application had not been positively contested, this portion of the Petitioner's costs would have to be incurred in any event unless the parties had at the outset agreed a consent order. Had the application not been opposed, the Petitioner would have been entitled to recover those costs.
23. Because the present application was dealt with on the papers, once evidence was filed and submissions were prepared, there were no further hearing costs. Nor were there any settlement offers which bear on how the application costs dispute should be resolved. The critical question in my judgment is whether the partial success of the opposition mounted by the 2<sup>nd</sup> Respondents justifies either disallowing the Petitioner's costs altogether in accordance with my preliminary views, or making some other reduction. When the application is properly analysed, there is no justification for making no order as to these costs. The Petitioner made a meritorious application which in monetary terms generated an award only 12% less than the amount it initially sought. My provisional order failed to take the monetary degree of the Petitioner's success into account. The "percentage multiplier" figures which I relied upon were, in the circumstances, a poor proxy for the 'real world' result of the application. The Petitioner clearly obtained substantial success in 'real world' terms and my contrary provisional views were simply misconceived.
24. It remains to consider whether there is any basis upon which some deduction should be made because the Petitioner has to any material extent acted unreasonably in conducting the interim payment on account of costs application. The Petitioner is only entitled to recover costs incurred "*in an economical, expeditious and proper manner*" (CWR Order 24 rule 7). The 2<sup>nd</sup> Respondents have not advanced any positive case for such a disallowance, and no such case could have been formulated. A substantial lack of success might have sufficed; a minor shortfall between the sum sought and the amount awarded in relation to an application which was economically prosecuted overall does not justify a proportionate reduction to the successful party's costs.

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25. The 2<sup>nd</sup> Respondents did not open the door to settlement by proposing a competing interim payment figure, let alone make any formal settlement offers. Ordinarily, open or ‘without prejudice save as to costs’ offers of compromise are made where parties wish to protect their costs position. This (perhaps understandably in view of the litigation strategies apparently being deployed), presumably did not happen in the present case.
26. In these circumstances, it was hardly improper for the Petitioner to proceed to file its written submissions after the 2<sup>nd</sup> Respondents’ evidence was filed without initiating any settlement offers of its own. It follows that there is no justification for disallowing any part of the costs of the interim payment on account of costs application which the Petitioner is entitled to recover as the successful party in relation to this application.

### Summary

27. The 2<sup>nd</sup> Respondents shall pay the Petitioner’s costs of the interim payment on account of costs application to be taxed, if not agreed, on the standard basis.



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