**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

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

**Heard:** On the papers

**Date of submissions**: 17 November 2023

**Ruling Circulated:** 15 January 2024

**Ruling Delivered:** 26 January 2024

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*Quantum of interim payment on account of costs-timing of payment-governing principles and appropriate approach*

## RULING ON INTERIM PAYMENT ON ACCOUNT OF COSTS

### Introductory

1. On 27 July 2023, I ordered in each proceeding that the "*Second Respondent shall make a payment to the Petitioner on account of the costs that it has been ordered to pay in these proceedings, the amount and timing of such payment to be determined*".

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:

      (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.

**Governing principles: determining the quantum of interim payments in respect of costs**

3. GCR Order 62 rule 4 (7) empowers the Court to make various orders in relation to costs and sub-paragraph (h) provides:

> "*(h) where the Court orders the paying party to pay costs subject to taxation, a reasonable sum on account of costs, such sum to be assessed summarily*."

4. The principles which inform the Court's discretionary jurisdiction to quantify an interim payment in respect of costs award were not in dispute. In *Scully Royalty Limited v Raiffeisen Bank*, CICA 21 of 2020, Judgment dated 8 April 2022 (unreported), Birt JA (at paragraph 54) approved, *inter alia*, the following overarching principles summarised by this Court in *Al Sadik v Investcorp Bank B.S.C. & Ors.* [2019] 2 CILR 585 at paragraph 25:

> "*(b) The governing principle underpinning this power, and the raison d'être for the rule, is that (per Jacob J in Mars UK Limited v Teknowledge Limited….): 'the successful party is entitled to the money. In principle he ought to get it as soon as possible. It does not seem to me to be a good reason for keeping him out of some of his costs that you need time to work out the total amount';*
>
> …

*(d)The purpose of the rule is to enable the court to avoid the injustice of delayed payment of all costs until the total amount is determined upon taxation through a summary partial assessment…*"

5. As I noted in *Al Sadik v Investcorp* (at paragraph 26), the Court's task is to assess "*not the irreducible minimum that is likely to be ordered, but a reasonable estimate of what is likely to be awarded*". Ramsay-Hale J (as she then was) stated in *Valley Health v Augusta Healthcare* FSD 5 of 2020 (MRHJ), Judgment dated 23 August 2022 (unreported) (at paragraph 46):

"*With respect to the quantum of the interim payment, a reasonable sum will often be an estimate of the likely final figure subject to an appropriate margin for error, which might be done by taking the lowest figure in a likely range, or making a deduction from a single estimated figure: see Excalibur Ventures v Texas Keystone [2015] EWHC 566 (Comm) in which 80% of the sum claimed was considered reasonable*".

6. In *Scully Royalty Limited v Raiffeisen Bank*, where the Cayman Islands Court of Appeal considered a variety of both Caymanian and English cases on this topic, Birt JA noted (at paragraph 58):

"*Courts often award 50% of the total costs on the basis that this is a conservative approach which should not lead to overpayment.*"

7. The Second Respondents' counsel placed particular reliance on my decision in *In the Matter of Poulton Family Trust* FSD 121 of 2016 (IKJ), Judgment dated 13 March 2023 (unreported), where having referred to my earlier decision in *Al Sadik*, I concluded:

"*16. …In that case where (a) costs were to be taxed on an indemnity basis, (b) the total costs claim seemed entirely reasonable on its face and (c) no questions about the paying party's ability to pay existed, I awarded a "cautious" 40% of the 85% I assumed the receiving party would recover on a taxation. In the present case it is self-evident that I can only rationally be even more cautious because (a) taxation will be on the less generous standard basis, (b) the total costs claim at first blush appears high, and (c) the paying party's claims to be cash-strapped are, inter alia, confirmed by the exit from the stage of her former lawyers.*" [Emphasis added]

8. There is also support in the case law cited for the proposition that the usual practice is to assume that 85% of the total sum claimed will be recovered on an indemnity basis taxation compared with 65% on a standard basis taxation. This approach is not in issue in the present case. Controversy centres on what percentage of the presumed recovery amounts should be used to determine the interim payment, 60% as the Petitioner contends or 40% as the Second Respondents contend. The appropriate percentage is informed by the degree of confidence the Court has in the evidence relating to the interim payment claim.

9. In summary:

(a) the jurisdiction to summarily assess an amount to be paid on account of costs in advance of taxation is designed to avoid injustice to the receiving party by delaying enforcement of the primary costs order;

(b) the jurisdiction must not be exercised in a way which will prejudice the paying party by overestimating the final amount recoverable on taxation;

(c) the greater the ability of the Court to reliably assess the likely outcome of taxation at the summary assessment phase, the higher the level of the payment on account of costs will be (and vice versa);

(d) a level of payment on account of costs award often made is 50 % of the total sum likely to be recovered by the receiving party;

(e) it is often assumed that 65% of the sum claimed will be awarded on a taxation on the standard basis, and 85% on an indemnity basis taxation. What percentages of the likely recoverable sum thus computed is the central question in this case, as in many other similar cases;

(f) the Court may, particularly where significant sums are claimed, take into account the proportionality of the total sum claimed, viewed in the round, along with other considerations material to the likely final taxation award.

**The merits of the application**

**Overview of the case**

10. The following factual assertions are supported by the 11th Affidavit of David Lewis-Hall (at paragraph 10):

(a) the proceedings lasted 20 months from commencement until the making of winding-up orders;

(b) there were four interim hearings in relation to which the Petitioner was awarded costs;

(c) the discovery process was extensive. The Petitioner's attorneys reviewed over 400,000 documents and the Petitioner disclosed nearly 50,000 documents. The Second Respondents disclosed over 50,000 documents and the Joint Provisional Liquidators over 20,000;

(d) over 80 affidavits were filed in the proceedings, over 40 for trial;

(e) expert evidence running to over 2,400 pages and spanning six disciplines was filed;

(f) the trial bundle consisted of 100 folders consisting of more than 6,000 documents running to roughly 60,000 pages, prepared so they could be hyperlinked on the Opus platform;

(g) the trial was listed for six weeks and the case was clearly complex, high-value litigation.

11. The 7th Affidavit of Andrew Cooke sought to undermine these assertions on the following main grounds:

(a) because of the unusual way in which the Petitions were pursued through Receivers, the Second Respondents will put the Petitioner to strict proof that they are liable for all costs incurred;

(b) the discovery exercise was not exceptionally large and took place over a comparatively short period (discovery was ordered in May 2022 to be given by November 2022). The disparity between the number of documents reviewed and the number disclosed by the Petitioner suggests, in the absence of a clear explanation of what steps were taken to carry out a proportionate review, that the exercise was carried out in an inefficient manner;

(c) it will be argued at taxation that the breadth of evidence filed was attributable to the Petitioner pleading overly broad Petitions;

(d) the Second Respondents will challenge the reasonableness of the trial bundle preparation process and the apparent personal involvement of a senior lawyer in the process;

(e) the Second Respondents will challenge the reasonableness of significant time spent by the Petitioner's attorneys in reviewing the JPLs' Reports. The JPLs' investigations should have significantly reduced the amount of time the Petitioner had to spend establishing alleged wrongdoing;

(f) the Petitioner appears to be claiming more than 10 times the level of certain trial preparation costs than the corresponding amount incurred by the Second Respondent (assessed admittedly by taking a high-level view);

(g) the way in which costs have been apportioned between the three Petitions and/or in relation to overlapping issues in relation to the LCIA arbitration are inadequately explained.

**The amount likely recoverable on a taxation**

12. The Petitioner's Costs Summary is over 36 pages long. It identifies fee earners and their hourly rates and the time spent in relation various stages of the proceedings. As explained in the 11th Affidavit of David Lewis-Hall and the Petitioner's Written Submissions, the Interim Payment application assumes that US$16.5 million will be claimed on taxation although the maximum amount recovered could be closer to US$20 million. The potentially recoverable costs not relied upon at this stage include:

(a) a claim for interest;

(b) any proportion of costs incurred by at least one fee-earning entity in relation to matters which were in issue both in BVI (relating to RAGOF) and the Cayman proceedings;

(c) the costs of the Further Hearing; and

(d) the Receivers' (FFP) discovery costs.

13. I accept that the Petitioner has left out of account some costs items which might ultimately be found to be recoverable upon taxation although I have no reliable basis to evaluate their likely amount. The only figure the Court is invited to positively rely upon is the supposedly "conservative" US$16.5 million estimate. The Court is then invited to order on account of costs (a) 60% of 65% of the standard basis taxation proportion of that gross estimate and (b) 60% of 85% of the indemnity basis taxation proportion of that gross estimate. It is accordingly clear that the Petitioner accepts, for present purposes at least, the US$16.5 million sum should be treated as the gross amount of its costs claim, as the figure against which cited case law suggests that a 35% and 15% discount should be made to take into account sums likely to be disallowed upon taxation on the standard and indemnity basis respectively.

14. It remains to consider whether the Second Respondents' criticisms, which are understandably mostly matters of argument rather than positive factual assertions, of the way the Petitioner has assessed the sums likely to be recoverable on taxation justify a greater percentage discount than the 65% (as regards standard basis costs) and 85% (as regards indemnity basis costs) which the Petitioner contends for. As regards each of the principal complaints:

(a) in general terms, the involvement of the Receivers in prosecuting the Petitions is in my judgment more likely to have had a restraining influence on costs in that they were far better equipped to make rational judgments about litigation strategy than the beneficial owner. It seems obvious this is why they were appointed. I accepted (Reasons for Decision dated 12 June 2023, paragraph 28) that Mr Wang had genuine difficulty with lawyerly questions;

(b) the somewhat speculative criticisms of the discovery process conducted by the Petitioner do not appear to have any obvious substance to the extent that it is contended that any significant costs reduction is likely to occur;

(c) it will not be properly open to the Second Respondents to relitigate the issue of the supposed inappropriateness of the breadth of the Petition. As the Petitioner's counsel submitted, I rejected this very complaint in the 27 July 2023 Costs Ruling (at paragraphs 53-54);

(d) the criticisms of the Trial Bundle preparation process do not appear to have any obvious substance to the extent that it is contended that any significant costs reduction is likely to occur;

(e) it is difficult to evaluate the complaint that there is a dramatic disparity between the parties' respective trial preparation costs. However I reach the following conclusions in relation to this issue:

(1) some disparity might seem to be unremarkable as proving a case often requires more litigation effort than defending a claim. Here, however, the Petitioner's counsel on 8 March 2023 suggested that more time should be allocated to the Second respondents' evidence at trial;

(2) the suggestion that the Petitioner's preparation costs are 10 times more than the Second Respondents' corresponding costs at first blush beggars belief, but that assertion is admittedly only based on an incomplete view taken by a party which has for several months been aware that it is the paying rather than the receiving party;

(3) it is also not a fair comparison as the Second Respondents' rough and ready estimate is limited to evidence for trial and excludes counsel's fees which the Petitioner's Costs Summary includes;

(4) it is possible, but there is no basis for finding it to be probable, that a decision not to oppose the Petitions on their merits was taken long before trial. If this were to be the case, it would explain why the Second Respondents' preparation costs were far less than the Petitioner's;

(5) I am ultimately unable to fairly reject out of hand the purely factual assertion by a Herbert Smith Freehills Ltd. partner that "[i]*t is clear from the Petitioner's claim… that its costs far exceed the Second Respondent's*." I accept for present purposes (i.e. ignoring the fact that the Petitioner will likely be able to make a recovery in respect of some matters it has invited the Court not to presently take into account) that it is possible that the Petitioner's claim might be reduced to a material extent on the grounds that its trial preparation claim is disproportionate.

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.

16. The Petitioner's Costs Summary concludes with the following table:

"***SUMMARY OF PETITIONER'S COSTS FOR INTERIM PAYMENT QUANTIFICATION***
*The following table sets out the totals of the various Parts of this Costs Summary, the total figure of US$16,243,923.72 being the figure that is to be used to calculate the interim payment on account sought by the Petitioner.*

| *Costs Summary Part* | *Amount (USD)* |
|---|---|
| *Part 1.1* | *$246,348.87* |
| *Part 1.2* | *$954,389.43* |
| *Part 1.3* | *$4,471,323.94* |
| *Part 1.4* | *$6,493,293.54* |
| ***Total Part 1 (standard basis):*** | ***$12,165,355.78*** |
| *Part 2* | *$3,487,244.67* |
| ***Total Part 2 (indemnity basis):*** | ***$3,487,244.67*** |
| *Part 3.1* | *$533,415.11* |
| *Part 3.2* | *$57,908.16* |
| ***Total Part 3 (standard basis):*** | ***$591,323.27*** |
| ***GRAND TOTAL****:* | ***$16,243,923.72***". |

17. The Interim Payment on Account of Costs is accordingly assessed as follows:

(a) the standard basis costs claimed are US$12,165,355.78 + US$591,323.27 = $12,756,679.05. The likely recoverable costs are 65% of that sum which is US$8,291,841.38;

(b) the indemnity basis costs claimed are US$3,487,244.67, and the likely recoverable costs are 85% of that sum which is US$2,964,157.97;

(c) subject to rounding off, the Petitioner is awarded 50% of US$8,291,841.38 (being US$4,145,920.69) and 50% of $2,964,157.97 (US$1,482,078.98) = US$5,627,999.68. I round off the award to US$5,600,000.

**Timing of Payment**

18. The Second Respondents have been on notice of the requirement to make an interim payment since 27 July 2023. The 11th Affidavit of David Lewis-Hall sworn on 9 October 2023 quantified the sum sought by the Petitioner on terms that payment should be made in 28 days (without setting out any rationale for that period of time). The 7th Affidavit of Andrew Cooke contested the quantification of the interim payment but not the proposed time for payment. In the Second Respondents' Written Submissions (at paragraph 27), 56 days was said to be appropriate on the following grounds:

> "*a. The Court has adopted a practice (in relation to payments on account whose quantum is less than that sought by the Petitioner) that at least 42 days should be permitted. See Ren Ci & Anor v. Nebula (Cayman) Limited (Unreported, FSD 210 of 2022 (DDJ), 1 August 2023) and Arnage Holdings Limited & Ors v. Walkers (a Firm) (Unreported, FSD 105 of 2014 (DDJ), 27 July 2023).*
>
> *b. The Court has already ordered that the Second Respondents should pay interest on the costs between the date on which those costs were paid by the Petitioner and*

*the date of payment by the Second Respondent (Lewis-Hall 12 §19). In those circumstances, interest will accrue throughout the period in which the Second Respondents are permitted to pay.*

*c. It is already over six months since the conclusion of the trial. The Petitioner does not suggest that it has suffered any prejudice as a result of its costs not yet having been paid and no evidence has been adduced to suggest that 28 days is appropriate: Lewis-Hall 11 §28.*"

19. David Doyle J did order payment within 42 days in respect of smaller sums in *Arnage Holdings Limited & Ors v. Walkers (a Firm)* and *Ren Ci & Anor v. Nebula (Cayman) Limited* in July and August of last year. In *Arnage*, no explanation is given for the decision to fix 42 days as the payment period. In *Ren Ri* the applicant initially (in its Summons) sought payment within 14 days, but the timing of payment does not appear to have been in dispute as, again, no reasons were given for the decision to require payment within 42 days. The timing of payment issue was not addressed in my judgment in *Al Sadik v Investcorp* [2019] 2 CILR 585 either. However, it is a matter of record that the Order in that case dated 11 July 2019 and perfected nearly 14 days later on 24 July 2019 required the interim payment (just over $225,000) to be made within 14 days. Reading paragraphs 3 and 4 of the Judgment in *Al Sadik* together, it is clear that 14 days was the payment time requested by the receiving party in its Summons filed a mere two months before the interim payment ruling was made and this was the period adopted by the Court, without any apparent dissent from the paying party.

20. In my judgment there is no practice in this Court of requiring interim payments to be paid within any specific period time. Each interim payment applicant identifies what they consider to be a reasonable payment period and the period determined by the Court will be either that period or such longer period as may be (1) agreed or (2) shown by the paying party to be properly required. The starting assumption ought to be, having regard to the policy underpinning the interim payment on account of costs jurisdiction, that the period for payment will be short, not longer than 14 to 28 days. The more notice the paying party

has of the likely amount to be paid, the heavier the burden will be on that party to demonstrate through cogent reasons (supported by evidence unless the position is obvious) that more time for payment should fairly be given. The fact that interest will accrue on any delayed payment is only relevant if arguable grounds for extending the time for payment are made out. The Second Respondents have been on notice of the likely order of the interim payment and the 28 day time for payment sought for more than three months. It has filed no evidence to the effect that it will be unable to make whatever payment is ordered within this period. Accordingly, the payment shall be made within 28 days of the date the Order giving effect to this Ruling is filed. I consider this to be an appropriate time for payment to fix in all the circumstances of the present case.

**Conclusion**

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.

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