IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 47 OF 2009 (IKJ)

BETWEEN

RIAD TAWFIQ AL SADIK

Plaintiff

-and-

(1) INVESTCORP BANK B.S.C.
(2) INVESTCORP INVESTMENT ADVISERS LIMITED
(3) SHALLOT IAM LIMITED
(4) BLOSSOM IAM LIMITED
(5) INVESTCORP NOMINEE HOLDER LIMITED
(6) INVESTCORP TRADING LIMITED

Defendants

IN CHAMBERS

Appearances:

Ms Shelley White, Ms Sarah Gavin and Mr Jonathan Turner of Walkers, on behalf of the 1st Defendant ("Investcorp Bank")

Mr Tom Lowe QC of counsel and Ms Anya Park of Harney, Westwood & Riegels, on behalf of the Plaintiff

Before: **The Hon. Justice Kawaley**

Heard: 11 July 2019

Date of Decision: 11 July 2019

Draft Reasons Circulated: 1st August 2019

Reasons Delivered: 6 August 2019

HEADNOTE

Costs of successful application for anti-suit injunction-indemnity costs-GCR Order 62 rule 4 (11)-application for interim payment-Grant Court Rules Order 62 rule 4(7) (h)-award of damages reflecting costs of foreign proceedings-governing principles

REASONS FOR DECISION

Background

1. By a judgment and Order dated May 18, 2012, this Court (Jones J) dismissed the Plaintiff's claims herein. On May 30, 2012, the Plaintiff appealed against this judgment to the Cayman Islands Court of Appeal. The Court of Appeal dismissed the appeal on September 21, 2016. The Plaintiff's further appeal to the Judicial Committee of the Privy Council was heard on April 30 and May 1, 2018. On May 28, 2018, the Plaintiff commenced proceedings in the Dubai Court of First Instance (the "Dubai Proceedings"). The Dubai Proceedings asserted claims in respect of substantially the same dispute which was before the Privy Council. On June 18, 2018 (in *Al Sadik-v-Investcorp Bank and others* [2018 (1) CILR 606]; [2018] UKPC 15), the Privy Council delivered its advice that the Plaintiff's appeal should be dismissed. By Order dated June 27, 2018, the Plaintiff's final appeal was dismissed.

2. By a Summons dated August 31, 2018 (the "Anti-suit Injunction Summons"), the 1st Defendant applied for an anti-suit injunction to restrain the Plaintiff from pursuing the Dubai Proceedings and for other ancillary relief. On November 13, 2018, I granted the 1st Defendant an anti-suit injunction and declaratory relief in respect of the Plaintiff's commencement and continuance of the Dubai Proceedings: *Al Sadik-v-Investcorp Bank B.S.C and others*, FSD 42 of 2009 (IKJ), Judgment dated November 13, 2018 (unreported) (the "Judgment"). The primary finding was that the Dubai Proceedings had been brought in breach of an exclusive jurisdiction clause in a contract between the parties. Alternatively, I found that re-litigating the same issue which had been determined against the Plaintiff in the present action was an abuse of process.

3. By a Summons dated May 15, 2019 (the "Costs Summons"), the 1st Defendant applied for Orders that:

   (1) the Plaintiff pay the costs of the Anti-suit Injunction Summons on an indemnity basis;

   (2) interest at the rate of 2.375% be paid by the Plaintiff on the said costs;

(3) the Plaintiff pay an interim payment of 70% of the 1st Defendant's costs, or such other sum as the Court deemed just, pursuant to GCR Order 62 rule 4 (7) (h), within 14 days;

(4) the Plaintiff pay as damages on an indemnity basis with interest the 1st Defendant's costs in relation to the Dubai Proceedings.

4. The 1st Defendant's Costs Summons was heard on July 11, 2019. At the end of the hearing, I granted the following relief:

(1) I awarded the 1st Defendant its costs of the Anti-suit Injunction Summons on the indemnity basis;

(2) I awarded the 1st Defendant interest on its said costs at the rate of 2.375% from the date of the Judgment until payment;

(3) I ordered the Plaintiff to pay an interim payment of 40% of the 1st Defendant's estimate of its recoverable indemnity costs;

(4) I awarded the 1st Defendant damages measured by the costs of the Dubai Proceedings, with interest at the same rate from the date the Dubai Proceedings were commenced until payment.

5. These are the reasons for that decision. Investcorp Bank's counsel indicated that guidance would be welcome in particular in relation to the jurisdiction to order an interim payment on account of costs. The latter jurisdiction arises from the 2016 vintage GCR Order 62 rule 4(7) (h).

Findings: indemnity costs are appropriate

6. It was common ground that the relevant rule was GCR Order 62 rule 4(11) which provides as follows:

> *"(11) The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently."*

7. The crucial findings in the Judgment were summarized as follows:

> *"98. The application for an anti-suit injunction is granted in favour of Investcorp either (a) on a contractual basis by way of enforcement of the EJC*

in the SPA, or (b) on the grounds that it is an abuse of the processes of this Court for the Plaintiff to seek to re-litigate abroad an issue which could and should have been advanced in the present proceedings which he initiated in this forum but lost."

8. The 1st Defendant submitted that in these circumstances the starting point must be that as costs claimant it was entitled to an award on the indemnity basis: *Kyrgz Mobile Tel Limited & Ors.-v-Fellowes International Holdings Limited & Anor.* [2005] EWHC 1329 at paragraph 43 (Cooke J). However, Ms White relied most heavily on two local cases which suggested that indemnity costs will ordinarily be awarded where it is established that proceedings have been improperly brought abroad.

9. Firstly, in *Re Ardent Harmony Fund Inc (in Official Liquidation)*, FSD 54 of 2016 (ASCJ), judgment dated May 31, 2016 (unreported) which concerned improperly bringing foreign proceedings against a company in liquidation here, Smellie CJ held as follows:

> "*50. In light of ITTO's unilateral decision to issue the Barbados Proceedings without serving notice upon the JOLs, the lack of any apparent proper basis for doing so, and its refusal to dismiss or withdraw the Barbados Petition once the lack of utility of the Barbados Proceedings was brought to its attention and as was further explained in the referenced telephone conversations, the JOLs' costs of having to respond to the Barbados Proceedings, on the indemnity basis forthwith. It is submitted that an indemnity costs order is justified because ITO's conduct is 'improper' and 'unreasonable', within the meaning of the Grand Court Rules, Order 62, rule 4 (11) and because in the absence of an indemnity costs order , the other creditors of the Fund will bear the costs of ITTO's actions.*"

10. This case was clearly analogous to the present case to a material extent. Proceedings were improperly brought abroad and the costs consequences of the affected party being compelled to respond were held to create an entitlement to an award of indemnity costs. The misconduct here was more egregious because (a) there was an exclusive jurisdiction clause, and (b) the Dubai Proceedings were commenced just as the highest appellate Court in the agreed forum was finally determining the merits of the Plaintiff's claim.

11. More analogous still was *Re BDO* [2018 (1) CILR 187]. In this case Parker J granted an anti-suit injunction to restrain the pursuit of New York proceedings in breach of an arbitration clause. Dealing with the issue of the basis of taxation of costs, he held:

"9 I have been referred to no Cayman authority on the question of what an appropriate costs order should be in circumstances similar to this case. There are authorities on the point in England. The English courts have held that the general costs order in relation to a party which commenced proceedings in a non-chosen jurisdiction in breach of an arbitration or exclusive jurisdiction clause is one which indemnifies the party compelled to enforce the contractual bargain in both the foreign proceedings and anti-suit injunction proceedings (as a form of damages)— see Kyrgyz Mobil Tel Ltd. v. *Fellowes Intl. Holdings Ltd. (5) and A v. B (1) ([2007] EWHC 54 (Comm), at paras. 8–15).*

10 In Kyrgyz, Cooke, J. said ([2005] EWHC 1329 (QB), at para. 42):

> *'. . . [T]he correct approach where there has been a breach of a jurisdiction clause by a party in initiating proceedings in a non-chosen jurisdiction is that the costs should be awarded on an indemnity basis. The reason for that is plain. If a party has breached his agreement, then the damages which flow from the breach of that agreement are all the costs incurred by the party who successfully relies upon the choice of jurisdiction clause. In my experience, the Commercial Court in particular, but courts generally in this country adopt such an approach.'*

11 In A v. B, Colman, J. set out ([2007] EWHC 54 (Comm), at paras. 9–15), with similar reasoning, the fundamental injustice of a situation if a costs order was confined to costs on the standard basis, where an indemnified portion of costs would be a loss to the successful party that could only be recovered in proceedings for breach. To be placed in a position where the balance of the recoverable amount could not be quantified until after the costs had been formally assessed would involve delay in obtaining compensation properly due (and more costs and court time) and so the learned judge concluded that where there was a successful application for an anti-suit injunction as a remedy for breach of an arbitration or jurisdiction clause and that breach has caused the innocent party reasonably to incur legal costs, those costs should normally be recoverable on an indemnity basis.

12 These decisions, although not binding upon this court, are to my mind, especially in the absence of Cayman authority, persuasive in their reasoning and make for good policy. BDO Cayman has also referred me to an Australian authority Pipeline Services WA Pty. Ltd. v. ATCO Gas Australia Pty. Ltd. (6) ([2014] WASC 10, at paras. 17–25, per Martin, C.J. of the Supreme Court of Western Australia) which has recently followed A v. B (1).

13 It seems to me that this court should also follow this line of authority. Where a party has been compelled to apply for an anti-suit injunction to restrain the continuation of foreign proceedings brought against it in breach of the parties' contractual bargain, it is fair and reasonable that it is compensated as a party which has been forced to deal with the consequences of a breach of contract."

14 I do not accept the written submission of Argyle which argues that A v. B needs to be distinguished on the facts. Neither do I accept Argyle's submission that because the regime in Cayman as to indemnity costs is more restrictive (in the sense that conduct needs to be shown that is improper, unreasonable, or negligent) than in England (under Civil Procedure Rules, r.44) it should be applied so as to exclude such an award in the circumstances of this case.

15 In my view the evidence filed in this case shows that Argyle was seeking to obtain procedural and substantive advantages by commencing the New York proceedings which would not be available in the Cayman Islands (see paras. 96–97 of my judgment) and the costs order should discourage such conduct where there are clear contractual provisions which a party circumvents to obtain these tactical and other advantages. Moreover, such conduct in my view is also unreasonable." [Emphasis added]

12. Whilst this case was more analogous than *Re Ardent Harmony Fund Inc.* was to the present case in the sense that it dealt with the breach of an exclusive jurisdiction clause, it is again important to note that the facts of the present case were still more egregious as far as the degree of unreasonableness is concerned. *Re BDO* fell within the parameters of the more usual factual scenario in that the proceedings brought in breach of contract were commenced before the contractually agreed tribunal had determined the merits of the relevant claim. In the present case, the Dubai Proceedings were commenced shortly after the hearing of a final appeal against a first instance judgment on the merits against the Plaintiff, being a first instance decision on the merits made just over 6 years before the improper proceedings were commenced.

13. The Plaintiff submitted that his conduct in the present case did not meet the "*high threshold*" of establishing that it had conducted proceedings "*improperly, unreasonably, or negligently*" ('Plaintiff's Skeleton Argument on Costs', paragraph 21). This was, in light of the arguments arrayed against the proposition, a hopeless submission which Mr Lowe QC sensibly did not pursue vigorously in oral argument. He was ultimately unable to advance good reason for me to adopt a different approach to indemnity costs from other judges of coordinate jurisdiction in fully reasoned judgments: Smellie CJ in *Re Ardent Harmony Fund Inc (in Official liquidation)*, FSD 54 of 2016 (ASCJ), judgment dated May 31, 2016 (unreported) and Parker J in *Re BDO* [2018 (1) CILR 187].

Findings: damages claim

14. Damages measured by the costs of the improperly commenced foreign proceedings, as sought by Investcorp Bank, were clearly appropriate as additional relief. That this flowed from the granting of anti-suit injunction and was legally supported by reference to *Re BDO* [2018 (1) CILR 187] where Parker J held:

"22 Again, there is no Cayman authority to which I have been referred which is on point. However, I derive some assistance again from the English courts. The analysis is both logical and straightforward. Damages flow from the breach of contract because the costs of defending the New York proceedings have been incurred as a result of Argyle's breach of contract—see Union Discount Co. Ltd. v. Zoller (10) ([2002] 1 W.L.R. 1517, per Schiemann, L.J.) and Svendborg v. Akar (8) ([2003] EWHC 797 (Comm), per Flaux, Q.C. (as he then was) sitting as a Deputy High Court Judge).

23 It was made clear by Mr. Chapman, Q.C., in his skeleton argument of January 2nd, 2018, that he was seeking the costs of the New York proceedings on an indemnity basis as damages for the breach of contract committed by Argyle in commencing those proceedings.

24 I find that this is an appropriate case to award costs claimed in the Cayman proceedings, but incurred by BDO Cayman in the New York proceedings, in circumstances where those proceedings were brought in breach of jurisdiction and arbitration clauses and there has been no adjudication as to costs in the New York proceedings.

25 It seems to me in keeping with these principles, and as a matter of discretion, that BDO Cayman should have its costs and expenses concerning the New York proceedings on an indemnity basis together with interest from the date of commencement of those proceedings until payment and an indemnity as to any future costs and expenses of dealing with the New York proceedings. I note that BDO Cayman confirms that it will not seek its costs of the New York proceedings from the New York court if it recovers damages and an indemnity in these proceedings.

26 The costs of defending the New York proceedings in my view flow from the breach without the need for detailed evidence to support the principle that they should be recoverable. Argyle will be able to advance arguments in any taxation procedure as to whether those costs have been validly and properly incurred."
[Emphasis added]

15. The jurisdiction to make the damages award sought by the 1st Defendant could not sensibly be (and was not) disputed. In his oral submissions Mr Lowe QC invited me to rule that any such damages should be limited to the costs of the Defendant's Dubai lawyers, and should not include their overseas attorneys. I declined that invitation on the basis that the appropriate forum to determine what specific categories of legal costs should be recoverable was, for the reasons articulated by Parker J in *Re BDO* (at paragraph 26), the taxation of costs hearing.

Findings: the scope of the jurisdiction to order interim payments on account of costs

16. The jurisdiction to order an interim payment was apparently introduced as part of the new GCR Order 62 which came into operation on March 29, 2016. Order 62, rule 4 provides:

> "*(7) The orders which the Court may make under this rule include an order that a party must pay-*
>
> ...
>
> *(h) where the Court orders the paying party to pay costs subject to taxation, a reasonable sum on account of costs, such sum to be assessed summarily.*"

17. The current English CPR counterpart rule (CPR 44.2 (8) as of April 1, 2013) provides that:

> "*(7) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is a good reason not to.*" [Emphasis added]

18. Parker J in *Re BDO* described the current English provision as reversing the burden of proof:

> "*34 It seems to me that the relevant provision of the Grand Court Rules (O.62, r.4(7)(h)) gives the court a discretion to order litigants to make a payment on account of costs and in the exercise of its discretion the court is entitled to do justice on a principled basis. However, there is not the reversal of burden which pertains in England following the introduction of the CPR rule.*"

19. He declined to order an interim payment, but was clearly influenced by the fact that the paying party, a company in liquidation, complained that the effect of such an order would be to stifle its appeal (paragraph 35).

20. Ms White submitted that this Court should follow the old English CPR practice which was broadly consistent with the express terms of the modern CPR. She relied on two important cases to which Parker J was not apparently referred, a first instance decision

which was then approved by the English Court of Appeal. She relied upon the following passages from the judgment of Jacob J in *Mars UK Ltd-v-Teknowledge Ltd (Costs)* [1999] 2 Costs L.R. 598[1] at 600-601:

> *"I now turn to the second issue, whether or not there should be an order for interim payment. The first thing to do is to consider what the general rule should be, interim payment or not. There is no guidance given in the Rules other than that the court may order a payment on account. There is no guidance in the Practice Direction. So I approach the matter as a question of principle. Where a party has won and has got an order for costs the only reason that he does not get the money straightaway is because of the need for a detailed assessment. Nobody knows how much it should be. If the detailed assessment were carried out instantly he would get the order instantly. So 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. A payment of some lesser amount which he will almost certainly collect is a closer approximation to justice. So I hold that where a party is successful the court should on a rough and ready basis also normally order an amount to be paid on account, the amount being a lesser sum than the likely full amount...*
>
> *Thus I start from the proposition that there should be an interim payment in general. However, the court has a discretion. In exercising that discretion the court must take into account all the circumstances of the particular case. One of those is that the Defendant may wish to appeal. Another is dealing with the case in a way which is proportionate to the financial position of each party, one of the matters which one must consider in allowing the overriding objective of enabling the court to deal with the cases justly....*
>
> *What I do not want to see is the Defendants put in a position where they are unable to appeal if that is what they intend..."* [Emphasis added]

21. It is noteworthy that although Parker J was not referred to *Mars UK*, he placed a similar emphasis on the importance of avoiding stifling an appeal as Jacobs J did. In the *Re BDO* context, the need to consider with any particularity the correct general rule did not arise. However he expressly rejected the pre-Order 62 (2016 Revision) test for granting an interim payment on account of costs, which required "*rare and exceptional circumstances*": *Al Sadik-v-Investcorp Bank BSC* [2012 (2) CILR 33] (Jones J). The latter decision, ironically, dealt with the costs of the trial of the present action.

22. However, what is most significant about *Mars UK* is that Jacobs J expressly found that the starting position should in effect be that justice ordinarily requires that an interim payment on account of costs should be made to avoid the injustice of the receiving party having to await a detailed taxation. I say in effect, because it has been held by higher

[1] [1999] EWHC 226 (Pat) (at paragraphs 8-10); [2000] FSR 138.

authority that Jacobs J did not in fact go so far as to apply a presumption to that effect. In *Blakemore-v-Cummings* [2010] 1 WLR 983 (reported as a Practice Note),[2] the English Court of Appeal considered *Mars UK Ltd-v-Teknowledge Ltd.* Elias LJ held as follows:

> "*23. Mars UK Ltd-v-Teknowledge Ltd I agree with Jacob J that in determining whether or not to make an order on account under CPR 44.3(8) or, I would add, an interim costs order under CPR 47.15, it is an important consideration that a party should not be kept out of the moneys which will almost certainly be demonstrated to be due longer than is necessary. I would certainly not, however, give this the status of a presumption and nor did Jacob J. It is simply a factor which one would expect, in the normal way, to carry significant weight with a judge. It will, however, have to be considered along with all the other material factors, and they will vary from case to case. There is a wide discretion afforded by both CPR 44(3)(8) and CPR 47.15 to be exercised in the circumstances of the particular case, and all material factors have to be weighed in the balance. These will include those identified by Jacob J in the Mars case.*" [Emphasis added]

23. In the '*Written Submissions on behalf of Investcorp Bank*', the position under Cayman Islands law was summarised as follows (at 5.11):

> "*(c) following* Mars *and* Blackmore, *a party should not be kept out of the moneys which will almost certainly be demonstrated to be due longer than is necessary, and all material factors have to be weighed in the balance, including any prejudice which may be caused to a party's ability to fund an appeal;*
>
> *(d) following Mars, a payment of some lesser amount which the successful party will almost certainly collect is a closer approximation to justice…*"

24. This submission was clearly fundamentally sound. In contrast, in the Plaintiff's Skeleton Argument the following argument was advanced:

> "*33. Parker J did not expressly address Argyle's submission that the Cayman position is that interim payments are only to be ordered in 'rare and exceptional circumstances'. The Plaintiff submits that the Cayman decisions which precede the introduction of GCR Order 62, rule 4(7) (h) must remain a good indicator of how and when the discretion to order a reasonable amount on account of*

[2] BAILII publishes the transcript of this judgment under the name *Blackmore-v-Cummings* [2009] EWCA Civ 1276.

costs should be exercised, and accordingly, this discretion should only be exercised in rare and exceptional circumstances."[3]

25. This submission could only be rejected. In my judgment Parker J clearly rejected Argyle's submission on the test for exercising the discretion to award interim payments because he recorded the submission (at paragraph 33) and proceeded immediately (at paragraph 34) to articulate a more flexible test: "*...the relevant provision in the Grand Court Rules (O.62, r. 4(7) (h)) gives the court a discretion to order litigants to make a payment on account of costs and in the exercise of its discretion the court is entitled to do justice on a principled basis*". Applying the governing principles to the facts of the present case, I found that there was no good reason to deprive the 1st Defendant of an interim payment on account of costs. Building on Parker J's decision in *Re BDO* [2018 (1) CILR 187] and having due regard to the English authorities to which he was not referred which construe a similar CPR interim payment rule, I would summarise the governing principles under Cayman Islands law in a more robust pro-receiving party manner as follows:

(a) GCR Order 62 rule 4 (7) (h) confers an unfettered discretion on the Court to order the payment of "*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*";

(b) the governing principle underpinning this power, and the *raison d'etre* for the rule, is that "*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*": per Jacob J in *Mars UK Ltd-v-Teknowledge Ltd (Costs)* [1999] 2 Costs L.R. 598 at 601;

(c) in my judgment Jacob J's framing of the relevant principle is, with respect, more persuasive than the more cautiously expressed formulation of the English Court of Appeal in *Blakemore-v-Cummings* [2010] 1 WLR 983 (at paragraph 23), notwithstanding the fact that Investcorp's counsel was content to rely on this somewhat more restrictive formulation. In that case the principle that a successful party should not be kept out of their costs was described as "*an important consideration*". With respect, that understates the true weight the principle deserves. The principle that a successful party should be paid some of his costs immediately and before taxation is not simply "*an*

[3] *Al Sadik-v-Investcorp Bank BSC* [2012 (2) CILR 33] at [26].

important consideration", it is the governing and predominant principle articulated by the interim payment on account of costs rule;

(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. This is because the need to carry out a detailed assessment through taxation is "*not a good reason*" for not ordering some costs to be paid immediately. Whether or not the discretion should be exercised is not shaped by the need to do justice in an abstract sense, entirely untethered from the core purpose of the rule. Whether or not an interim payment on account of costs should be ordered will almost invariably require an assessment to be made of whether or not there is a good reason not to order an interim payment and/or a good reason for requiring the receiving party to be deprived of any costs until the taxation process is complete;

(e) GCR Order 62 rule 4 (7) (h), properly construed, contains an implicit starting assumption that an interim payment should be made. Obviously this starting assumption has somewhat less weight than an express statutory presumption. But the starting assumption arises from the indisputable fact that the core function of the rule is:

(i) to articulate the principle that the mere fact that a taxation hearing is pending is "*not... a good reason*" for depriving them of all of their costs, and

(ii) to empower the Court to summarily assess an appropriate partial costs payment which should immediately be made;

(f) the current English CPR rule 44.2 (8) in my judgment simply makes the implicit assumption in the earlier English rule explicit, giving express legislative approval to the approach of Jacobs J in *Mars UK* (which was, perhaps unintentionally, somewhat diluted by the Court of Appeal in *Blakemore* (or *Blackmore*) by providing that where taxation is ordered, the Court "*will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so*" [emphasis added]. To my mind it merely states more clearly and explicitly what is already implicit in the current Cayman Islands rule rather than articulating an entirely distinct and different jurisdictional approach;[4]

[4] There are other aspects of the modern English rule which introduce entirely new provisions designed to encourage the making of summary costs assessments (e.g. at the end of trials) which admittedly reflect a more distinct and global policy shift in favour of expediting the payment of costs.

(g) in concluding that GCR Order 62 rule 4(7) (h) contains an implicit starting assumption in favour of an interim payment on account of costs, I do not ignore the fact that power to make such an Order is clearly discretionary and that the strength of the starting assumption may be weaker or stronger depending on the circumstances of each case. It is important to remember however, that when Jacobs J in *Mars UK Ltd-v-Teknowledge Ltd (Costs)* [1999] 2 Costs L.R. 598 at 601 was discussing the overriding objective as applying "*as much to the exercise of the costs discretion as to any other discretion given under the Rules*", he was dealing with a somewhat different procedural code. The impact of the Overriding Objective in the Preamble to the Grand Court Rules may apply in a general sense to GCR Order 62 as much as it applies to other parts of the GCR code. But when construing the jurisdiction conferred by Order 62, it is important to have regard to GCR Order 62 rule 4 (2), which states in terms which provide in a general sense support for a more robust approach to construing GCR Order 62 rule 4 (7) (h):

> "*(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court*";[5]

(h) one recognised and significant reason for not ordering an interim payment on account of costs is the need to avoid stifling an appeal: *Re BDO* [2018 (1) CILR 187] (Parker J at paragraphs 37-38). Another is that the application for an interim payment should not be a disproportionate proceeding: per Jacobs J in *Mars UK Ltd-v-Teknowledge Ltd (Costs)* [1999] 2 Costs L.R. 598 at 601. Another circumstance which may displace the assumption that an interim payment on account of costs should be made is the mere fact of the pendency of an appeal, although the primary considerations might relate to the need to suspend any order (or secure repayment) rather than whether or not an order should be made;

(i) 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);

[5] This principle is merely stated as the "general rule" in the English CPR rule 44.2(2) (a).

(j) the Court's discretionary powers under the rule are sufficiently flexible to enable justice to be done on a case by case basis, being guided by both the letter and spirit of the relevant rule.

Findings: principles governing the practical exercise of summarily assessing the appropriate amount of interim costs orders

26. Ms White properly conceded that the Court "*should be conservative in making its* [summary] *assessment*" for the purposes of an interim costs order (Written Submissions, paragraph 5.10). She referred the Court to a helpful passage in the transcript of a costs hearing before Vos J (as he then was) in *United Airlines Inc-v-United Airways Limited* [2011] EWHC 2411 (Ch). A permanent injunction restraining the defendants from using certain signs by way of summary judgment in a passing off action. The entitlement of the plaintiff to an interim costs award was not challenged. The transcript concluded as follows:

> "*This is an application for an interim payment of costs in this case. The bill of costs provided by the Claimant shows that they have incurred in this whole action the total sum of $191,871, or £117,482. What Mr Jones says in answer to this application is that the bill is wholly disproportionate .... I think it would be very hard for me to say, looking at this bill, that it is in any way disproportionate or unreasonable.*
>
> *That said, there has not been an opportunity to consider the bill in detail, and there is always the possibility that on an assessment the Defendants will manage to establish that the bill is on the high side.*
>
> *What I have to determine is not the irreducible minimum that is likely to be ordered, but a reasonable estimate of what is likely to be awarded. I intend to take a fairly conservative view of that... I am going to assess the amount that should be paid by way of interim payment at the sum of £50,000, to be paid within 35 days.*"

27. In *United Airways*, just less than 50% of the total costs claimed was awarded by way of interim costs although the total costs claimed did not appear to the judge to be excessive. This guidance was particularly helpful because the principal challenge to the present application was also that in global terms the sum claimed was excessive. The principles governing the broad approach to summary assessment which the 1st Defendant commended to the Court were not challenged. I accordingly found that:

(a) the aim of summary assessment was to reasonably estimate the amount of the likely final award;

(b) in carrying out that assessment the Court should adopt a conservative approach, allowing for a reduction on taxation even if the instinctive feeling of the Court was that the impugned claim was not unreasonable.

The Interim Payment on account of costs ordered

28. I found no good reason why an interim payment on account of costs should not be made. Having regard to the principles the 1st Defendant itself relied upon, its claim for 70% of the indemnity costs the Court found it was likely to be awarded, was clearly on the high side. Mr Lowe QC invited the Court to err on the low side and to avoid sending a signal to the Taxing Master that a "Rolls Royce taxation" was being approved. Ms White wryly replied with a phrase that she attributed to a former Court of Appeal President: "*There are no widows and orphans here.*" I agreed. My eyes did not water at the size of total indemnity costs claimed ($668,472.41), bearing in mind the scale and history of the present litigation and the understandable importance of the application to the successful 1st Defendant. Mr Lowe QC's proportionality arguments were mainly focussed on the reasonableness of the total bill for a straightforward forum argument which lasted less than a full day. He suggested legal costs were being incurred at $12,000 a day over the period covered by the latest stage of this long-running dispute. Ms White countered that the true amount (excluding the damages claim and applying the correct time period) was only $4000 per day which was reasonable. The Plaintiff's counsel submitted that not more than 25% of the total bill would be appropriate, bearing in mind that would be "*an almighty argument on taxation*".

29. Following the conservative approach commended to me by Ms White on behalf of the 1st Defendant I awarded an interim payment of 40% of the discounted 85% which it was contended (and I accepted) would likely be recovered on an indemnity-based taxation. I have erred on the side of caution in making a modest interim payment award. This is the first order of this type which I have made and, unlike Vos J in *United Airlines Inc*, I did have an intuitive grasp of the sort of fees that would be viewed as usual in the context of a very unusual piece of litigation.

Conclusion

30. For these reasons, on July 11, 2019, I granted the relief summarised in paragraph 4 of this Judgment.

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