IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 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

Appearances:

Mr James Collins KC instructed by Mr David Lee and Mr David Lewis-Hall of Appleby (Cayman) Limited for the Petitioner and the Non-Party Applicant

Mr Michael Bloch KC instructed by Mr Alan Quigley of Forbes Hare for the Second Respondents

Before: The Hon. Justice Kawaley

Heard: 12 July 2023

Draft Ruling circulated: 18 July 2023

Judgment Delivered: 27 July 2023

HEADNOTE

Costs of petition and reserved interlocutory costs orders-basis of taxation-when indemnity costs appropriate- whether the same standard of taxation should be applied to the proceedings as a whole- costs of abandoned allegations-costs of amendments-costs of successful recusal application- Companies Winding Up Rules Order 24 rules 7-8- Grand Court Rules Order 62 rule 4 (11) and Preamble-

COSTS RULING

Introductory

1. Winding-Up Orders were orally granted on the final day of the hearing of the Petitions in open Court in respect of two of the three Funds on the following dates:

   (a) Principal Investing Fund I Limited ("PIFL"): 12 May 2023;

   (b) Long View Fund II Limited ("Long View"): 12 May 2023. (The Orders were not filed until 30 May 2023 and were, whether by accident or design, dated 29 May 2023 when I approved the final form of the Orders).

2. The hearing of the Petition in relation to Global Fixed Income Fund I Limited ("GFIF") was adjourned on 12 May 2023 to a date to be fixed. A Winding-Up Order was granted on a consensual basis without a further hearing in respect of GFIF on 12 June 2023, the date when I approved a final version of that Order and which counsel agreed should be assigned that date.

3. All applications in relation to costs were listed for hearing on 12 July 2023. The parties creditably agreed much of a proposed draft Order. I determined the following disputed issues in the course of the hearing:

(a) the costs of Doyle J's 31 January 2022 Order adjourning the Petitioners' application for an injunction, which was effectively abandoned, I ordered should be paid by the Petitioners;

(b) I ordered that the costs of the Petitioners' Confidentiality Summonses should be payable by the 2nd Respondents as part of the costs of the Petitions on the grounds that the Petitioners' application was substantially successful; and

(c) I approved the recovery of foreign lawyers (including paralegals) costs pursuant to GCR Order 62 rule 18 (1), (4) and (6) on the grounds that the financial and legal scale and multi-jurisdictional reach of these cases justified the deployment of foreign legal capacity.

4. I reserved judgment on the following issues which I now decide:

(a) whether the costs of the Petition should be ordered to be taxed if not agreed on the standard basis, or on the indemnity basis;

(b) whether the costs of the issues abandoned through re-re-amendments made by the Petitioner at trial should be recovered by the Petitioner or the 2nd Respondents;

(c) whether the costs of the Petitioners' amendment application reserved by Doyle J's Order dated 31 May 2022 should be paid by the 2nd Respondents as part of the costs of the Petition, or whether there should be no order as to those costs;

(d) (only because this item was in the same paragraph of the draft Order as (c)) whether the clearly *de minimis* costs of the 2nd Respondents' extension of time application which were reserved by the Consent Order of 26 January 2023 should be in the Petition or paid by the Petitioner. I indicated during the hearing that I could see no reason why these costs should not be in the Petition; and

(e) whether the costs of the 2nd Respondents' recusal application reserved by Doyle J's Orders dated 19 August 2022 and 21 November 2022 should be paid by the Petitioners, or whether the 2nd Respondents should pay 50% of the Petitioners' costs.

Standard basis or indemnity basis costs

Preliminary

5. In the course of the hearing, I expressed anxiety about whether I was sufficiently well-placed to assess the appropriateness of ordering indemnity costs in relation to these proceedings as a whole. Doyle J had conduct of them between September 2021 and November 2022, and my active involvement began with a discovery application in December 2022 and culminated in presiding over the trial which commenced on 3 April 2023.

6. My preliminary view was that the case for indemnity costs was stronger in relation to the trial phase of the proceedings than it was in relation to the earlier phases of the proceedings, and that careful consideration was required to determine whether a composite or bifurcated approach should be taken to the costs of the Petition.

Governing principles: the submissions

7. There was no significant dispute as to the governing general principles in relation to when costs may be awarded on the indemnity basis. It was common ground that GCR Order 62 rule 4 (11) applied. This provision provides:

> "*(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.*"

8. There was some nuanced debate as to whether, as Mr Bloch KC for the 2nd Respondents seemed to suggest, unusual litigation conduct at trial which did not add to the length of the trial or the overall costs engaged this rule. Mr Collins KC submitted that any conduct which warranted the Court's condemnation would justify an indemnity costs award, even if the impropriety did not entail any wastage of costs. In the Petitioner's Skeleton Argument it was submitted:

> "*24. The principles governing the application of this test were recently reviewed by Richards J in KOA Capital LP v China Index Holdings Limited (unreported, 14 April 2023) at [12] to [22]. The touchstone is whether there is something in the conduct or circumstances to take the case out of the norm. This includes (a) some element of the paying party's conduct of the case which deserves some mark of disapproval; (b) conduct which is either deserving of moral condemnation or is unreasonable to a high degree. It also includes the question of whether it was reasonable for the paying party to raise and pursue*

particular allegations and the manner in which they did so: Talent Business Investments Limited v China Yinmore Sugar Company Limited [2015] (2) CILR 113 at [41], citing English authority, Three Rivers D.C. v Bank of England [2006] 5 Costs L.R. 714. The discretion is 'extremely wide' (Ibid.)."

9. In the 2nd Respondents' Skeleton Argument, essentially the same principles were recited:

"*64. The principles regarding awards of indemnity costs under GCR O.62 were set out in Koa Capital L.P. & Anor. v. China Index Holdings Limited (Unreported, FSD 235 of 2022 (CRJ), dated 14 April 2023) at §§13-22 by reference to the authorities. In particular, 'when considering an application for the award of costs on the indemnity basis, the court is concerned principally with the losing party's conduct of the case, rather than the substantive merits of his position': Koa §15. 'It is important to avoid the wisdom of hindsight in this analysis': In the Matter of Grand State Investments Limited (Unreported, FSD 11 of 2021 (RPJ), dated 17 March 2023) at §34. Indemnity costs would be awarded where 'There is some element of a party's conduct of a case which deserves some mark of disapproval'. In that regard, 'If the conduct falls short of moral condemnation, it would need to be unreasonable to a high degree to justify an award of indemnity costs. Unreasonable in this context does not mean wrong or misguided in hindsight.' (Koa §15)*"

10. In the Petitioner's Skeleton Argument, reference was rightly made to the distinction between the CWR regime and the GCR Order 62 regime. However, the following point was on further analysis a partly misconceived one:

"*14… The CWR expressly retain the Elgindata principle without the modification in GCR O.* [62] *r.4 (2) which was introduced in 2002 and which requires a party to show that he has conducted 'proceedings in an economical, expeditious and proper manner'. The fact that the CWR did not make this change, and apply an unmodified version of the Elgindata principles to winding up, no doubt reflects the fact that just and equitable petitions often cover a multitude of issues, not all of which need to be addressed in disposing of a petition…*"

11. In fact, CWR Order 24 has provision which corresponds to GCR Order 62 rule 4 (2), albeit surprisingly 'hidden' in an interpretation clause. 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.*"

12. This highlights the need for a careful approach to the way in which CWR and the GCR intersect in relation to the costs' regime.

Findings: governing legal principles

13. CWR Order 1 rule 4 makes general provision for the application of the GCR to winding-up proceedings without mentioning Order 62 at all. CWR Order 24 rule 7 (1) (reproduced above) defines costs in a way which implies that litigants are obliged to conduct winding-up proceedings "*in an economical, expeditious and proper manner.*" These words must be read into CWR Order 24 rule 8 when it says:

> "*(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.*"

14. The first reference to GCR Order 62 in the CWR is in Order 24 rule 7 (3) which provides:

> "*Words and expressions defined in GCR Order 62, rule 3 shall have the same meaning when used in Part II of this Order.*"

15. The next references to Order 62 in the CWR are found in the following provisions:

> "*11. (1) In the event that an order for costs made in a liquidation proceeding is required to be taxed, it shall be taxed by the taxing officer in accordance with the provisions of GCR Order 62, Parts IV, V and VI except that Rules 14 and 15 shall not apply.*
>
> *(2) The Guidelines issued by the Grand Court Rules Committee pursuant to GCR Order 62, rule 16(3) shall apply to every taxation under this Order.*

(3) Any party who is dissatisfied with the amount of any costs certificate may apply to a Judge to review the taxing officer's decision in accordance with the provisions of GCR Order 62, Part VII."

16. Accordingly, as was common ground in the present case, the GCR approach to taxing costs on the standard and indemnity bases expressly applies to winding-up proceedings. There are further references to GCR Order 62 in relation to taxation in CWR Order 25 rule 3. However, it is impossible to find any straightforward basis for concluding that GCR Order 62 rule 4 (11) is the source of the jurisdiction to award indemnity costs in relation to winding-up proceedings, as opposed to the more obvious candidate, CWR Order 24 rule 8 (4), which sets out the basis for departing from the general standard basis taxation rule set out in paragraph (2) of the same rule 8 of CWR Order 24. It makes practical sense to apply the test for awarding indemnity costs in ordinary civil litigation in winding-up proceedings because there is a stream of authority to draw on and the general test is well understood. Finding a basis for recourse to this resource requires one to draw on common sense and judge-made law.

17. The suggestion that GCR Order 62 rule 4 (11) applies directly to the CWR is not simply the consensus of counsel in the present case. It was seemingly common ground in a case decided on the papers by Parker J recently, *Re Grand State Investments Limited*, FSD 11 of 2021 (RPJ), Judgment dated 17 March 2023 (unreported). This apparent consensus has been formulated in a somewhat imprecise or incomplete manner, but the practical end result (in terms of the test to be ultimately applied) is the same. The more precise analysis of Ramsay-Hale J (as she then was) in *Re Virginia Solution SPC Ltd,* FSD 5 of 2020 (MRHJ), Judgment dated 23 August 2022 (unreported) more accurately describes the strict jurisdictional position. She critically held:

"*6. The award of costs on a contributory's petition is governed by Order 24, Part II of the Companies Winding Up Rules, 2018 ("CWR"). O 24, r.8 (2) states as follows:*
"General Rules as to Costs (O. 24, r. 8)

8. (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."

7. In this matter the Court directed that the winding up petition be treated as an inter partes proceedings. It follows, despite Augusta's submissions to the contrary, that the costs fall to be paid by Augusta as the unsuccessful party.

Exceptional and Special Circumstances

8. The issue is whether there are exceptional and special circumstances which justify a departure from the general rule that costs be taxed on a standard basis. The parties agree that, in considering whether exceptional circumstances exists justifying a grant of indemnity costs, the Court should apply the same test as under GCR O. 62 r (4)(11) …which provides that:

'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.'

9. The authority for this proposition is the decision of Jones J in Wyser-Pratt Eurovalue Fund [2010] (2) CILR 233, who stated that where the Court makes a direction that a contributory's petition should be treated as an inter partes proceeding between the petitioning shareholder as applicant and the other shareholder as respondent, as here, then the purpose and effect of CWR O.24 r 8(2)(b) is that the opposing parties will be subjected to the same costs regime as that which applies to any other ordinary inter partes litigation governed by GCR O. 62." [Emphasis added]

18. Against this background, one can turn to the recognised approach under the parallel GCR regime. In *Three Rivers D.C. v Bank of England* [2006] EWHC 816 (QBD), Tomlinson J (as he then was) held:

> "*14. The significance of costs being ordered to be paid on an indemnity as opposed to the standard basis is that, although the beneficiary of such an order will still only be paid costs which have been reasonably incurred, there is no requirement of proportionality and in cases of doubt on assessment it is for the payer to show that the costs were not reasonably incurred. Whilst an indemnity costs order does carry at least some stigma the purpose of such an order is not to punish the paying party but to give a more fair result for the party in whose favour a costs order is made: - see Petrotrade Inc v. Texaco Ltd (Note) [2002] 1 WLR 947, per Lord Woolf MR, at p.949 and Victor Kermit Kiam II v. MGN Ltd [2002] EWCA Civ 66 at paragraph 12 per Simon Brown LJ…*
>
> *25… following principles should guide the Court's determination whether the* [paying party] *should be required to pay the* [receiving party]*'s costs of the action on an indemnity basis:-*
>
> *(1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.*
>
> *(2) The critical requirement before an indemnity order can be made in the successful defendant's favour is that there must be some conduct or some circumstance which takes the case out of the norm.*
>
> *(3)Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an a fortiori ground, but rather unreasonableness.*
>
> *(4) The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations.*

> *(5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails…*" [Emphasis added]

19. As far as GCR Order 62 rule 4 (11), being applied to winding-up proceedings by analogy, is concerned, the critical requirements for the present case are whether the 2nd Respondents have been shown to have acted so "improperly" or "unreasonably" as to justify the award of indemnity costs. These terms are in my judgment interchangeable in the sense that they really represent different ways of describing what might broadly be described as 'litigation misconduct'. Tomlinson J's citation of, *inter alia*, Lord Woolf in support of the proposition that an award of indemnity costs is primarily intended to achieve a fair result for the receiving party makes a significant point which is often overlooked.

20. The need to deliver costs justice to the successful party is a distinctly significant factor in the winding-up context because of the strong starting assumption that the petitioner should recover all of its costs, without regard to issues upon which it may have lost: *Re Virginia Solution SPC Ltd* (at paragraph 3 upon which the Petitioner's counsel aptly relied and to which I return below) Margaret Ramsay-Hale J (as she then was) also opined as follows:

> "*32… the steer in the CWR is that the successful party should have the whole of its costs of the proceedings, including the costs of an issue on which it has failed, unless there are 'exceptional and special circumstances' that justify the making of some other order … The Court should not depart from the general rule unless the successful party has improperly or unreasonably increased the costs by pursuing an issue which it has lost…*"

21. The definition of "*costs*" in CWR Order 24 rule 7(1) (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*") is essentially the same as the overriding objective in GCR Order 62 rule 4(2). It makes sense in light of these 'good litigation guides' that where a successful party has incurred costs in relation to a proceeding (or part thereof) in which their opponent has conducted the case in an uneconomic, dilatory or improper manner, that the successful party's ability to recover all of their costs should be easier than it would be on a standard basis taxation. In evaluating whether a party has acted "improperly" for the purposes of GCR Order 62 rule 4 (11) and/or CWR Order 24 rule 8, in my judgment some account must be taken of the guidelines set out in the

Overriding Objective in the Preamble to the GCR as to how civil litigation should be conducted. However, it is important to sound two preliminary notes of caution.

22. Firstly, does the Preamble to the GCR apply to the CWR? The Petitioner's Skeleton Argument made reference to the FSD Users' Guide, which explicitly proclaims that FSD Judges will apply the Overriding Objective to all FSD matters. Mr Collins KC was keen to embrace the Overriding Objective as obviously applying to the recent proceedings. His opponent, understandably, was not. Issue was not formally joined on the point, however, with the 2nd Respondents' Skeleton not using the words "overriding objective" even once. Doyle J has had little difficulty in concluding in these and other winding-up proceedings that the Overriding Objective in the GCR applies. Nicholas Segal J applied the Overriding Objective in winding proceedings where an interaction between the GCR and the CWR in relation to service occurred: *Re China Shanshui* [2021 (1) CILR 253] at paragraph 33 (z). Subject to my second note of caution, therefore, it seems in principle safe to assume that if under the GCR the Overriding Objective applies to the interpretation and application of every rule, then if one is required to interpret and/or apply GCR Order 62 rule 4(11), either directly or by analogy, the Overriding Objective potentially comes into play.

23. I have always considered this general proposition to be self-evident until the Cayman Islands Court of Appeal apparently suggested otherwise in correcting my framing of the law governing indemnity costs in *Woods Furniture and Design Limited-v- James* [2020 (2) CILR 543]. Sir Richard Field JA critically held as follows:

> "*75. I accept Ms Carver's submission that in awarding indemnity costs the judge erred in law in pursuing a policy of enforcing the overriding objective of the GCR rather than confining himself to the requirements of GCR O.62, r.4 (11). In my judgment, when deciding whether costs should be taxed on the indemnity basis, the court should have regard exclusively to whether the requirements of O.62, rule 4 (11) have been met. With respect to the judge, it was not open to him to come up with a policy of his own devising that glossed and thereby widened the reach of this rule. Whether there should be such a policy is a matter for those responsible for amending and updating the GCR.*"

24. Exercising the costs discretionary jurisdiction afresh, however, the Cayman Islands Court of Appeal concluded that the indemnity costs I awarded in that case were ultimately appropriate, applying the correctly framed legal test, and the appeal was dismissed. The substantive result

implies that in practical terms, as opposed to in legal form, there is (as one would expect) considerable alignment between:

(a) GCR Order 62 rule 4 (11), which sets out the "exclusive" jurisdictional test for granting indemnity costs;

(b) GCR Order 62 rule 4 (2), which sets out the overriding objective of Order 62; and

(c) the Preamble to the GCR, which (at an even higher level) sets out the Overriding Objective of the Rules as a whole.

25. My unhappily expressed legal formulation in *James-v- Woods Furniture and Design Ltd*, G 511 of 2009, Judgment dated 15 October 2021 (unreported), failed to correctly articulate the primacy of the sole true jurisdictional basis for potentially granting costs on the indemnity basis in that case. I have attempted to avoid falling into a similar error in the present case by striving to correctly identify the jurisdiction for making an indemnity costs award under the CWR. In my judgment, however, it is impossible to sensibly construe the Cayman Islands Court of Appeal decision in *Woods* as holding that in deciding whether or not a litigant has acted "*improperly, unreasonably or negligently*" for the purposes of Order 62 rule 4 (11), a Court may not have any regard to either:

(a) what type of litigation conduct entitles a successful party to recover their costs under the overriding objective of Order 62 itself ("*conducting that proceeding in an economical, expeditious and proper manner*"-Order 62 rule 4 (2));

(b) the fact that the Overriding Objective of this Court's Rules as a whole is "*to enable the Court to deal with every cause or matter in a just, expeditious and economical way*"-Preamble, paragraph 1.1;

(c) the fact that parties to civil litigation are "*obliged to help the Court to further the overriding objective*"-Preamble, paragraph 3; and/or

(d) the fact that in practical content terms, litigants' duty to help the Court to deal with cases "*justly*" includes:

> "*(a) ensuring that the substantive law is rendered effective and that it is carried out;*
>
> *(b) ensuring that the normal advancement of the proceeding is facilitated rather than delayed;*

> *(c) saving expense;*
>
> *(d) dealing with the cause or matter in ways which are proportionate*
>
> *(i) to the amount of money involved;*
>
> *(ii) to the importance of the case; and*
>
> *(iii) to the complexity of the issues;*
>
> *(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other proceedings.*" (Preamble, paragraph 1.2)

26. Each Court cannot possibly be free to pluck its own peculiar notion of what constitutes improper or unreasonable litigation conduct for Order 62 rule 4 (11) purposes from the sky. Nor should it be necessary for applications for indemnity cost awards to be garnished with lashings of extracts from previous cases where indemnity costs awards were, or were not, made. The procedural matrices of the present case, at trial at least, are so unprecedented that reference to past cases sheds no significant light on whether or not the jurisdictional requirements of the relevant rule have, or have not been, met. It must, therefore, be permissible to note that the Overriding Objective of the statutory procedural regime as a whole is to enable each Court to deal with cases "*justly*" and that the parties are obliged to facilitate this goal.

The pre-trial phase of the proceedings

27. The Petitioner sought indemnity costs in relation to the entire proceedings, but made the following submissions in relation to the pre-trial phase which most notably entailed the Petitioner's ex parte application to appoint the Joint Provisional Liquidators ("JPLs"):

> "*27. 2Rs pursued their discharge application by means of an 'inappropriate scattergun/kitchen sink approach' which led to the application lasting 3.5 days, with 34 volumes of bundle documents, behaviour which was also deprecated by the CICA when refusing leave to appeal.*
>
> *28. In May 2022, Justice Doyle observed presciently that he did not detect from 2Rs 'any genuine desire to progress these proceedings to a hearing in a reasonable time'.*

> *29. Having failed to achieve further delay notwithstanding Justice Doyle's decision not to sit following 2Rs' recusal application (another scattergun application), they then waited until the day of already-extended deadline for exchange of responsive affidavits, 16 December 2022, before seeking an extension of time. Given the proximity to the vacation, they thereby secured a de facto extension to which P had no choice but to agree.*"

28. As regards Doyle J's Judgment of 8 April 2022 refusing the 2nd Respondents' discharge application, it suffices to note that he commended the 2nd Respondents' counsel for eventually abandoning an initial "*scattergun approach*" (at paragraph 24) and his initial view was that the 2nd Respondents should pay the costs of their unsuccessful application on the standard basis (paragraph 63). That initial view was confirmed in paragraph 3 the Order made by Doyle J on 19 April 2022 giving effect to that Judgment. It is also noteworthy that by Order dated 6 May 2022, following written submissions, Doyle J ordered that the JPLs' costs of that application should be costs in the provisional liquidation, as opposed to being paid by the 2nd Respondents. There is no suggestion that the Cayman Islands Court of Appeal awarded indemnity costs in relation to the unsuccessful leave to appeal application.

29. As regards the "prescient" observations of Doyle J in May 2022 about the 2nd Respondents apparent lack of interest in progressing the Petitions to trial, these observations were made in his 31 May 2022 Ex Tempore Judgment setting out reasons for a Case Management Order made on the same date. Doyle J also made typically trenchant observations about the duties of the parties to assist the Court to achieve the Overriding Objective. The costs of that Order were substantially awarded as costs in the Petition, so these remarks also provide very weak support for an indemnity costs award. However, it bears noting (in light of what transpired at the trial, which will be considered below) that Justice Doyle also delivered the following cautionary, and no less prescient, advice to the respective legal teams:

> "*37. I do not want any tactical games to be played by the parties. I want the attorneys to rise above any undue pressure placed upon them by those who instruct them. I want the parties and their attorneys, as they are duty bound to do, to constructively assist this court in the fair and just determination of the petitions.*"

30. As regards the complaint that the pre-Christmas extension of time application (for the filing of responsive evidence by the 2nd Respondents) to which the Petitioner felt compelled to agree reflected another illustration of unreasonable delaying tactics, I have now ruled that those costs

should be in the Petition. This therefore provides little or no support for the view that the costs of the pre-trial phase of the proceedings should be awarded on the indemnity basis because of unreasonable conduct overall by the 2nd Respondents.

31. Accordingly, appreciating that I ought still to consider whether the final outcome at the end of the trial justifies awarding indemnity costs in relation to the proceedings as a whole, it is clear that there is no basis for such an award if the pre-trial phase of the proceedings is viewed as a discrete part of the proceedings.

The trial

32. The main features of the trial, which was fixed to commence on 3 April 2023 and conclude on 12 May 2023, may be summarised as follows:

(a) the 2nd Respondents' Trial Skeleton dated 24 March 2023 contained references to a substantial number of previously undisclosed documents, apparently obtained from affiliates which had provided other services to Mr Wang, of a confidential and personal nature and advanced for the first time an unpleaded case on "*unclean hands*";

(b) on 31 March 2023, the Petitioner filed its Confidentiality Summons, which sought directions as to how potentially confidential and/or privileged material should be dealt with at trial;

(c) on 3 April 2023, it was agreed that the Petitioners' Opening Submissions would take place on 3-4 April, the 2nd Respondents' evidence in response to the Confidentiality Summons would be served by Thursday 6 April, the Petitioner and Mr Wang's evidence would be served by Saturday 8 April, skeleton arguments would be served by Tuesday 11 April, the application would be heard in private on Thursday-Friday 13-14 April, and the 2nd Respondents' Opening Submissions would take place after the Court had given directions;

(d) in the first week of the trial, three sitting days were lost. In the second week of the trial, three sitting days were lost;

(e) the Confidentiality Summons was heard on 13-14 April and my judgment was delivered on Sunday 16 April 2023;

(f) on Tuesday 18 April, Mr Bloch KC completed his Opening Submissions in just over ½ a day. At around 2.45 pm, the trial was adjourned until Monday 24 April 2023;

(g) meanwhile the 2nd Respondents filed their Amendment Summons dated Saturday 15 April 2023, seeking leave to give Further Voluntary Particulars of their unclean hands defence. The new case advanced alleged, most dramatically (and ultimately incredibly) that one of the JPLs had been engaged approximately a year before their appointment in September 2020 and that Mr Wang had said that he wanted to "*bring them* [i.e. Floreat] *down*". The JPLs were on this basis said not to be impartial and (it followed) their various Reports which supported the need for winding-up orders were not reliable;

(h) the critical evidence supporting these new averments was based on covert surveillance said to have been carried out in relation to Mr Wang and the JPLs by private investigators from 2020 through 2021. This Summons was heard on 17 April 2023, so the first day of the third week of the trial was not entirely wasted;

(i) I reluctantly granted the application on 17 April 2023, despite its lateness, primarily because I felt there was a public interest in having serious allegations against an officer the Court publicly aired rather than stifled. However, the prospect of an interlocutory appeal which would effectively have resulted in the trial being adjourned altogether, was also waved as a sword of Damocles over my head, as I pointed out in the course of argument;

(j) three further sitting days were lost in the third week of the trial;

(k) witness evidence was heard on 24, 25, 26, 27 and 28 April 2023, with two comparatively minor witnesses being called for the 2nd Respondents on the last day of the week;

(l) on Monday 1 May 2023 concerns (which I subsequently found to be valid) were raised in Chambers about a document it was proposed to cross-examine one of the private investigator witnesses on. The evidence of the 2nd Respondents' third witness was completed in just over ½ day;

(m) on 2 May 2023 the 2nd Respondents indicated they did not propose to call any further evidence and would instead rely on a strike-out application. On 5 May 2023, the Strike-Out Summons was filed and directions were ordered for the hearing of that application on Thursday 11 May 2023;

(n) approximately three sitting days were lost in the fifth week of the trial and three days in the sixth week; and

(o) the Strike-Out Summons was heard on 11 May and dismissed on 12 May 2023. The 2nd Respondents called no further evidence and, as previously signified, did not oppose Winding-Up Orders being made. The trial concluded on the last scheduled day. However, only roughly three of the six weeks assigned to the trial were actually used as sitting days.

33. There were two significant applications made in the course of the trial, each of which was necessitated by the 2nd Respondents' stratagems, which caused major disruption to the scheduled course of the trial which resulted in, *inter alia*:

(a) half of the assigned trial period being wasted to the detriment of other litigants;

(b) much of the Court time which should have been in Open Court taking place in Chambers, compromising open justice and limiting the ability of the Series 7 and Series 8 Investors to fully participate in the hearings;

(c) largely irrelevant confidential information about the Petitioner's beneficial owner being deployed by the 2nd Respondents in 'trial by ambush' fashion on the eve of the trial in an apparent follow-through of a pre-litigation threat to make any proceedings brought, against the 2nd Respondents and/or their affiliates and/or principals, unpleasant for Mr Wang;

(d) a late amendment application by the 2nd Respondents to advance a new 'unclean hands' case alleging serious misconduct on the part of one of the JPLs (an officer of the Court in these proceedings), directly, and indirectly the Receiver of the shares in the Petitioner (an officer of the Court in other proceedings). The allegation in essence was conspiring with Mr Wang to wind-up the investment funds that are the subject of the three winding up petitions for collateral reasons. The only credible evidence said to support it was based on covert surveillance carried out by private investigators of

private communications between Mr Wang and the Receiver in September 2021 which were not on their face incriminating. However, on or about 25 April 2021, after the Petitioner sought discovery of the original surveillance notes, the 2nd Respondents filed an Affidavit asserting that the original notes had been destroyed on the eve of the trial;

(e) the new conspiracy defence was abandoned without a jot of evidence being called in support of it (although the 2nd Respondents' case was put to Mr Pearson, the Receiver, in cross-examination), after the 2nd Respondents' opportunistic strike-out application was decisively dismissed on the final day of the scheduled trial; and

(f) the Petitioners were required, in preparing for and/or during the trial, to expend effort which was wholly or substantially wasted e.g. filing responsive evidence to that filed by the 2nd Respondents' main factual witnesses, in relation to their original case and the new expanded case; preparing to cross-examine witnesses of the 2nd Respondent who were never called; preparing their own witnesses for cross-examination which never took place; and preparing submissions in support of points which were never ultimately challenged.

34. In my Judgment dated 16 April 2023 on the Confidentiality Summons, referencing an April 2022 letter sent to Mr Wang by one of the Floreat Principals, I made the following observations about the material which caused that Summons to be brought, and upon which Mr Collins KC relied at the costs hearing:

> "*…In light of this unsolicited promise to deploy damaging information against Mr Wang, I am bound to scrutinise the 2nd Respondents' attempts to deploy belated disclosed material emanating from a parallel commercial relationship with considerable care to avoid what appears on its face to be a very obvious attempt to abuse the processes of this Court in purported service of what would in reality reflect a dystopian view of the open justice principle…*"

35. One of the factors which caused me to postpone my judgment on the 2nd Respondents' motivations in deploying this material was their Amendment Summons, which I alluded to in my Judgment on the Petitioners' Confidentiality Summons in the following terms:

> "*Prior to the hearing, the 2nd Respondents abandoned any purported reliance on a freestanding 'clean hands' defence. However by their Amendment Summons dated 12 April*

2023, filed the day before the Petitioners' Confidentiality Summons was heard, leave was sought to file Further Voluntary Further and Better Particulars to particularise the existing un-particularised collateral purposes defence to advance an extraordinary new case. It is alleged that private investigators hired to observe suspicious conduct on the part of Mr Wang and Mr Pearson (one of the Receivers) overheard conversations in September 2020 and September 2021 suggesting that one of the Joint Provisional Liquidators appointed by this Court on 17 September 2021 ("JPLs") had been retained to help Mr Wang over a year before his appointment and was not impartial. This pending application potentially brings back into play the character and credibility of Mr Wang in the context of deciding whether the Petitions were presented for a collateral purpose. More significantly still for my part, it potentially undermines the reliance which this Court would otherwise have been able to comfortably place on the findings recorded in the JPLs Reports…"

36. The 2nd Respondents' Amendment Summons was directly addressed in my Judgment of 17 April 2023. The pivotal reasons for my acceding to the application clearly assumed that the application was going to be pursued until it was determined on its merits:

"*8. Looking at the question of the seriousness and significance of the delay, there is no question that in this case there is no reasonable explanation for the delay. However, in considering why the default has occurred, this new claim is not a standard and routine one. It seeks to advance a case of a serious misuse of the processes of this Court using evidence obtained in a very unorthodox, although not unfamiliar, way. In these circumstances, in my judgment, it is not as straightforward as it might otherwise be to simply conclude that, because this application has not been brought forward earlier, it is being brought forward for the predominant purpose of disrupting the Court proceedings.*

9. As far as evaluating all the circumstances of the case in regard to admitting new evidence, the Court is bound to have regard to the question of not just will justice be done, but will justice be seen to be done. As regards will justice be done, any disruption to the trial timetable will obviously diminish the Petitioner's right to have their civil rights determined within a reasonable time. But equally, ignoring these allegations and allowing the 2nd Respondents to be left with the impression that the Court is keen to sweep unpleasant allegations under the carpet, will diminish their fair hearing rights and very arguably diminish the standing of this Court for upholding not just justice, but also the appearance of justice.

> *10. In my judgment, the most pivotal consideration as to whether this application should be granted or refused is the materiality of the allegations that have been raised to the disposition of the Petitions. Mr Bloch KC beguilingly proposed that the entire trial going forward should actually be devoted to considering this issue. What that submission did is to indicate that if this new allegation were to succeed, it would quite possibly be dispositive of the Petitions; and if these allegations were to fail, it would likely be dispositive of the Petitions in the other direction.*" [Emphasis added]

37. It goes without saying that I granted leave to the 2nd Respondents to pursue these serious allegations on the assumption that they would be dealt with in the normal way and that either the allegations would be proved, or they would be rejected based on a full analysis of the oral and documentary evidence. It would be one thing if they had been made and then unreservedly withdrawn. In fact, the allegations were made and then simply not pursued, with the apparent intent that they should be left hanging in the air. However, Mr Bloch KC was entirely forthright with the Court. He foreshadowed the possibility, as early as 17 April 2023, almost 4 weeks before the final denouement on 12 May 2023, that the 2nd Respondents might not ultimately contest the Petition on its full merits. The fact that Leading Counsel manifests an exemplary appreciation of his duty not to mislead the Court does not necessarily mean that the litigation strategy he is advancing may not itself be improper and/or unreasonable in indemnity costs terms. The strike-out application was grounded on what I considered to be a justifiable initial complaint of witness intimidation which did not ultimately make a fair trial impossible. In preparing for cross-examination, the Petitioners' attorneys supplied the 2nd Respondents' attorneys with an article which one of the 2nd Respondents' private investigator witnesses felt revealed that his supposedly secret connection with a historic event of alleged military misconduct was known and might be used against him. Although he elected not to give evidence at trial, I concluded that the witness' absence would not make a fair trial impossible. In my Ruling dated 12 May 2023, I held as follows in another passage upon which Mr Collins KC relied at the costs hearing:

> "*13. Further and in any event, striking-out would be a disproportionate penalty for accidental intimidation in circumstances where the 2nd Respondents have from the beginning of the trial engaged in what can only be viewed as a skilfully executed strategy of disrupting the scheduled course of the trial and preventing the Court from making findings disposing finally of the Petition. The highlights of this strategy are:*

(a) including highly confidential and marginally relevant submissions in their trial Skeleton Argument relying in part on belated disclosed documents obtained from affiliates. This delayed the start of the trial by forcing the Petitioners to file a Confidentiality Summons which the Court had to determine in the first week of the allotted trial instead of hearing witness evidence;

(b) applying after the commencement of the trial to serve Further and Better Particulars of Defence to belatedly rely upon the surveillance evidence of Mr X and Mr Y (the Witness) despite the surveillance reports purportedly having been prepared (at the earliest) 18 months before the trial. I felt obliged to grant an application which might potentially have been refused in part because of a 'threat' to further disrupt the trial by seeking leave to appeal if the application was refused;

(c) applying to strike-out the Petitions (gratefully seizing upon a faux pas on the part of the Petitioners' attorneys in relation to the Article) before the end of the trial on the express basis that 'in the event that the Court…declines to strike out the Petition or dismiss the Petition or otherwise summarily determine the Petition against the Petitioner, then the Second Respondent will [not] oppose the Petition and a winding-up order being made thereon, subject to its right to seek leave to appeal against the decision…"

14. The way in which the 2nd Respondents have leaped upon the Petitioners' hapless deployment of the Article with thinly-veiled glee betrays a lack of conviction in their belatedly particularised collateral purpose defence. After all, its success depends upon the Court:

(a) disbelieving, inter alia, two longstanding officers of the Court, whose stock-in-trade is integrity and transparency;

(b) believing the evidence of Mr X and the Witness whose stock in trade (when carrying out surveillance work) inevitably involves subterfuge. Mr X has admitted to destroying the original notes upon which their Affidavits were based, depriving the Petitioners (and the Court) of the ability to forensically verify their authenticity3; and

(c) (implausibly) find that the sole or predominant purpose of the present Petitions was not to obtain a winding-up.

15. Mr Bloch KC rightly submitted that even litigants with weak cases are entitled to a fair hearing. I agree. But the Court can only deprive a litigant with a strong case of their own fair hearing rights if a fair trial overall is genuinely impossible. The circumstances of the present case are, fairly considered, a world away from such a scenario." [Emphasis added]

38. I am unable to accept the following submission of Mr Bloch KC in oral argument, despite the attractive manner in which it was put:

"*My Lord, the result of the course that the second respondents took did not increase the costs in any way. The course that we took did not delay the outcome of the proceedings in any way. The decisions that were taken in the trial were taken in the trial and the trial ended when it was anticipated the trial would end and with the result that my Lord raised as a possibility at an early stage.*

So my Lord, we would say that there was no adverse consequence as a result of the course that we took. The course that we took we took in circumstances where we had to decide which of the options available to us gave us the best chance of success. We may have chosen the right one, we may have chosen the wrong one, what is clear is we didn't succeed, but there's nothing malign in having to make a decision of that sort. There is no disruption to the trial as a result of that. By disruption of the trial one could mean two things. One could mean that we interfered with the trial in such a way that the outcome or the ability to come to a finding at the end of the trial was jeopardised, or simply that the trial took a different course from that which it was anticipated it would take.

We did not do the former. The trial in that sense was never in jeopardy and there was nothing that we did in the course of the trial that can be pointed to as an attempt to put it in jeopardy. It's true that the trial didn't take the course that it might have been expected to take, but that cannot be seen as something for which the second respondents should be condemned either."

39. Accordingly, looking at the way the 2nd Respondents approached the 6-week trial overall, with a view to evaluating whether they acted "improperly, unreasonably" within the meaning of GCR Order 62 rule 4(11), the following conclusions can confidently be reached:

(a) they disrupted the "*normal advancement of the proceeding*", even though the proceeding was not delayed (a significant but non-dispositive mitigating factor for which, in my judgment, the 2nd Respondents' legal team should be commended);

(b) the disruption took the form of running roughshod over the traditional trial process where the proceedings were determined based on pleaded issues following a fixed timetable by unilaterally deciding to contest the proceedings solely on the ground of belated articulated collateral purposes pleas;

(c) this disruption meant that substantial costs were wasted on preparing for issues which the 2nd Respondents only formally signified they were not contesting on the last day of the scheduled six-week trial;

(d) this disruption meant that 3 weeks of sitting time was wasted and lost to other Court users;

(e) this disruption included advancing allegations of serious misconduct against two officers of this Court and abandoning them (without formally withdrawing the allegations), thus depriving the 'accused' of the chance to be fully exculpated on the merits; and

(f) while it might have been entirely legitimate to deprive the Petitioner of the chance to obtain adverse findings from this Court for deployment in other proceedings, the strategy of disruption was a manifestly improper and unreasonable way of pursuing this otherwise legitimate goal. The proper approach would have been to make an open offer before or at the beginning of the trial to the Petitioner to consent to winding-up orders on comparatively neutral grounds (e.g. the need for an investigation).

40. There is of course no need to "condemn" a litigant for "malign" conduct to justify an indemnity costs award. It suffices to conclude that the paying party has acted in a way which is so improper or unreasonable as to justify compensating their opponent with a more generous basis of taxation than the standard basis. In my judgment, as regards the trial phase of the present proceedings, the

2nd Respondents' conduct falls clearly on the indemnity costs side of the line. In reaching this conclusion, I entirely accept that the 2nd Respondents' principals had cause to vigorously defend themselves against serious allegations of misconduct. When passions run high, in litigation as in cricket, it is often difficult for the players to comply with both the spirit and the letter of the rules of the game.

41. My findings therefore do not ignore the fact that it would be entirely understandable if the Otaibi brothers may have perceived some of the allegations made against them as an existential threat to the business 'empire' which they had built after eventually moving to England after challenging early years in the Middle East. They now appear to be, to some extent at least, part of the British 'Establishment'. Even those steeped in the best English-derived cricketing traditions find it difficult to balance the desire to win at all costs with the encouragement provided by the Preamble to the Marylebone Cricket Club's Rules to view adherence to the "Spirit of Cricket" as equally important as compliance with "the Laws". Likewise, even civil litigants steeped in the best of English-derived litigation traditions often find it difficult to balance the desire to win at all costs with adherence to the more esoteric requirements of litigating in a proper and reasonable manner, as is required by GCR Order 62 rule 4 (11), understood in light of the "spirit" of the Rules (articulated in the Preamble to the GCR). Bearing in mind the vigour of the present litigation battle, it is unsurprising that the 2nd Respondents' legal team, while acting in a professionally unimpeachable manner throughout, were unable to entirely vindicate Justice Doyle's forlorn hope that they would not be pressured by their clients into playing "tactical games".

42. No matter how understandable the motivations for such tactics may be, in choosing to disrupt the normal course of the trial in the root and branch manner which occurred, the 2nd Respondents ought to have known that if they failed to prevail on the merits of the Petitions, they were at risk of indemnity costs orders.

Conclusion: costs of the Petitions

43. It remains to consider whether indemnity costs should be awarded only in relation to the trial phase or, alternatively, in relation to the entire proceeding. I can identify no rational basis for concluding that the disruptive strategy which first became apparent with the service of the 2nd Respondents' Trial Skeleton dated 24 March 2023 had any material retrospective effect. There was no sufficiently broad improper or unreasonable conduct before that date which justifies awarding the entire costs of the Petitions to the Petitioner on the indemnity basis.

44. The circumstances which unfolded at the trial of these Petitions ought not to have happened and ought never to happen again. It was, to use the language of CWR Order 24 rule 8 (5), "*exceptional circumstances and special reasons which justify making some other order*" other than the usual order for costs to be taxed in the standard basis. In these circumstances I award the costs of the Petitions (a) from (i.e. on or after) 24 March 2023 to the Petitioner to be taxed, if not agreed, on the indemnity basis, but (b) before that date to be taxed if not agreed on the standard basis.

Costs of the re-re-amendments to the Petitions

45. The Petitioner seeks its costs of re-re-amendments to the Petitions made at trial on the grounds that as regards four matters, two were deleted at the prompting of the Court to limit the scope of the issues to be determined and the other two were not being pursued and caused the 2nd Respondents no identifiable wasted costs. The 2nd Respondents sought what they contended was the usual costs order that the Petitioner should pay the costs of defending the abandoned claims up to the date of their abandonment.

46. This was quite a nuanced application which I consider had clear merit to it. In the Petitioners' Skeleton, the following attractive 'jury point' was made:

> "*6. The re-re-amendments then reflected this sensible and pragmatic case-management approach.*
>
> *7. This approach was entirely consistent with the overriding objective – which is now fundamental to both the GCR and FSD Guide:*
>
> *7.1. The overriding objective includes 'ensuring the normal advancement of the proceeding is facilitated rather than delayed', 'saving expense' and 'dealing with the cause or matter in ways which are proportionate'. Paragraph 3 obliges the parties "to help the Court to further the overriding objective" and the Court to take into account a party's failure to help in this respect.*
>
> *7.2. These provisions require parties to take steps to narrow issues, and reduce the burden on the court, if this can be done without prejudicing that party's interests. That is exactly what P did in this case. As a result of the disclosure, affidavits and expert reports, it was clear – by the time it came to preparation of P's trial skeleton argument – that the case for winding up was so strong that there was (as stated in the skeleton) 'no need' to consider all of the grounds.*

8. This approach by P should be commended, rather than punished (as the 2Rs suggest)…"

47. This was really a subsidiary point. The more substantive point advanced was that the scheme of winding-up proceedings was inconsistent with the notions of what amounted to an issues-based cost order. The latter point was more significant because the 2nd Respondents most importantly submitted as follows:

> "*42. The ordinary rule when claims are abandoned is that the claimant should pay the costs down to the date of the amendment. Where a misrepresentation claim is abandoned by way of amendment rather than discontinuance, the same consequence follows: see RG Carter Projects Ltd v CUA Property Ltd [2020] Costs LR 1781. It is not necessary that the abandoned allegations constitute an independent cause of action in the strict sense, if it is 'sufficiently discrete in many of its aspects': Skatteforvaltningen v Solo Capital Partners LLP [2022] Costs LR 1751 at §11. Where the abandoned claims are claims alleging fraudulent wrongdoing, the ordinary rule is that the costs should be awarded on the indemnity basis.*
>
> *43. There is no reason to depart from that ordinary rule in this case. R2s do not press for their costs on the indemnity basis, in view of the fact P did not abandon its claims of deliberate wrongdoing in their entirety. However, those allegations that P did abandon were discrete and substantial, and the appropriate order is that P pay R2s' costs of and occasioned by them, as well as by their late abandonment.*"

48. Does this principle apply in the context of just and equitable winding-up proceedings where winding-up orders are ultimately made? Firstly, the two cases relied upon are clearly distinguishable having regard to a different factual and legal context. *RG Carter Projects Ltd v CUA Property Ltd* [2020] Costs LR 1781 concerned "*the proper approach to costs where a party in effect discontinues a number of claims by a radical amendment to its Particulars of Claim*" (paragraph 1). The value of a damages claim was reduced by 87%. *Skatteforvaltningen v Solo Capital Partners LLP* [2022] Costs LR 1751, where the RG Carter case was cited, concerned the point that "*the court has a discretion when a party ceases to pursue part of its case that it was previously pursuing, but without any determination by the court as to the merits of the abandoned case, as to whether to make any costs order at that point, and if so, what order to make*".

49. Neither of those cases to my mind properly applies where, at the end of a case, the court is in reality being invited to determine that the successful party ought not to recover the costs of issues which it is contended (based on their abandonment at trial) they acted unreasonably in pursuing at all. Mr Collins KC was in my judgment substantially correct to contend that under the CWR the *Elgindata* principles continue to apply. In the public law context, the Cayman Islands Court of Appeal has described the GCR Order 62 general position as follows in *Deputy Registrar and Attorney General-v- Day and Bush* [2020 (1) CILR 2012] (Sir John Goldring, P):

> "*15 As both parties accept, the rule that costs follow the event, albeit stated in firm terms, is only the starting point. The court is required to consider all the circumstances of the case (as the Cayman Islands case of* Campbells *v.* Josephs *(3) illustrates).*
>
> *16 Moreover, a party may be denied all or part of its costs if it has caused a significant increase in the length or cost of the proceedings:* Sagicor General Ins. (Cayman) Ltd. *v.* Crawford Adjusters (Cayman) Ltd. *(6) (2011 (2) CILR 471, at para. 13, citing* In re Elgindata Ltd (No. 2) *(4) ([1992] 1 W.L.R. at 1214)).*"

50. In the winding-up context, however, the most pertinent and valuable guidance on the approach to the costs in relation issues on which a generally successful party has lost may be found in the current Chief Justice's following statement in *Re Virginia Solution SPC Ltd,* FSD 5 of 2020 (MRHJ), Judgment dated 23 August 2022 (unreported):

> "*32… the steer in the CWR is that the successful party should have the whole of its costs of the proceedings, including the costs of an issue on which it has failed, unless there are 'exceptional and special circumstances' that justify the making of some other order … The Court should not depart from the general rule unless the successful party has improperly or unreasonably increased the costs by pursuing an issue which it has lost…*"

51. My only quibble with the Petitioners' counsel's submissions on this point is that the term "costs" is defined by CWR Order 24 rule 7(1) in a way which imports a general duty to litigate in an economical, expeditious and proper manner; these words were not omitted altogether as was suggested. However, this merely makes the CWR analogous to the GCR costs regime under which the same *Elgindata* principles continue to apply as well. With these principles in mind, one can now turn to the "claims" abandoned through the re-re-amendments at trial which fall into two

distinct categories. It was common ground that in relation to both sets of re-re-amendments, no consequential costs arose, so the usual costs rule in this respect was not engaged.

52. The first category of "claims" are the two which were set out in paragraph 10 (b) and (d) of the Petitions, the contention that the investment vehicles had been set up from the outset with a view to defrauding the Petitioner and the quasi-partnership point. It is unarguably clear that these were not analogous to separate claims or causes of action but were simply discrete allegations which were relied upon in support of the overall plea that it was just and equitable that the Funds be wound-up. As the Petitioner's counsel submitted, these pleas were deleted as a result of encouragement I gave to narrow the issues to minimize the disruption caused by the need to deal with confidentiality and privilege concerns, encouragement alluded to in paragraph 5 of my 16 April 2023 Ruling on the Petitioner's Confidentiality Summons.

53. The abandonment of these allegations or specific complaints did not in any way signify that they lacked merit. My encouragement to the Petitioner to concentrate its attack on grounds which focussed on less egregious forms of lack of probity was not based on any assessment that these claims were of dubious merit. I merely signified that it seemed likely that if the Court was able to accept that grounds for winding-up were made out which did not require findings of deliberate misconduct, the need to make findings of a more serious nature might not arise. In these circumstances, and bearing in mind that the 2nd Respondents have not even contended that significant costs were wasted in relation to the pursuit of these points, I find that these costs should be recovered by the Petitioner as part of the costs of the Petition.

54. As regards the other two grounds which were abandoned, complaints about technology valuations and the Holbox transaction, these were more analogous to the discontinuance of a claim which was unlikely to succeed. However, again, there is no basis for concluding that the pursuit of these matters caused any significant waste of costs. I accordingly find that the costs of these re-re-amendments should be awarded to the Petitioner as costs of the Petition.

Costs of re-amendments made by the Petitioner which were reserved by Doyle J on 31 May 2022

55. These arose pursuant to the Order drawn up to give effect to Justice Doyle's 31 May 2022 Judgment which dealt with the amendments in the following terms:

> "*4. I have no hesitation in granting leave to re-amend the petitions. The Second Respondents did not object to the application for leave to re-amend but made such agreement subject to their costs being paid and the giving of further and better particulars.*

5. I reserve costs as I think the court will be in a better position to determine costs after the hearing of the winding up petitions.

6. The Re-Amended Petitions shall be deemed to be served on the Second Respondents today 31 May 2022 and the finalised pleading should be filed in court before 4pm tomorrow.

7. The Second Respondents shall file and serve their Amended Defences before 4pm on 21 June 2022 and if so advised the Petitioner shall file and serve Amended Replies before 4pm on 5 July 2022.

8. I make no orders in respect of further and better particulars as no such applications are before the court and in any event the Second Respondents can plead to the Re-Amended Petitions without further particulars."

56. Why was the usual costs order not made? The Petitioner submitted that had Justice Doyle considered the usual order to be appropriate he could easily have granted it. The re-amendments were largely based on information which had come to light in the course of the proceedings or made with a view to providing further particulars of matters already pleaded. In their Skeleton Argument the 2nd Respondents submitted as to the correct legal approach:

"*14. The ordinary rule is that the amending party must pay the costs of and occasioned by the amendments. The reason for the usual rule was explained by Mann J in Various Claimants v MGN Ltd [2021] 4 WLR 55 at §§34-35. A departure from it would only be justified where 'new information is important and comes to light only as a result of disclosure by the amended against party and the amending party cannot be expected to have pleaded it at the outset': at §35.*"

57. Mann J's exposition of the relevant principles in an area which is not usually controversial merits fuller recitation:

"33. *The normal or usual rule as to costs of amendments appears in Taylor v Burton [2014] EWCA Civ 21, as applied by Mr Roger Ter Haar QC in Beynatov v Credit Suisse Securities (Europe) [2020] EWHC 3328 (QB). In the former case Rimer LJ said, at para 30:*

'Mr Butler reminded us that the general rule is that those who obtain permission to amend are ordered to pay the other parties' costs of and occasioned by the amendment. He referred us to paragraph 17.3.10 in the notes to Volume 1 of Civil

Procedure, which records that such orders are 'often' made; and to paragraph 8.5 of The Costs Practice Direction, which records that such orders are 'commonly' made. Both references reflect judicial practice with which anyone with experience of contentious litigation will be familiar.'

34. Mr Ter Haar's judgment repeats the extent to which that is a common order.

35. It is not, however, an inevitable order. Practically all costs are ultimately within the discretion of the judge - CPR 44.2. If it is the case (and it is) that the normal order is that the amended against party should have the costs of and occasioned by the amendment then there must be some reason for it. I have been unable to find that reason articulated in authority, but in my view it must be that in the normal case a party's change of tack in the course of litigation is of that party's own volition, and it is right that the other party should have the costs of that voluntary change, particularly where the amending party might have included the amendments in the initial pleading. Where the amended claim might have been made at the outset then the amended against party would have had to plead only once. That seems to have been the case on the facts of both Taylor v Burton and Benyatov. As a result of the amendment extra costs are incurred in having to revisit the pleading which would have been avoided had the pleading been in the amended form in the first place, and it is right that the amending party should bear those costs.

36. However, in my view that reasoning would not necessarily apply if the reason that the amending party seeks to amend is because the new information is important and comes to light only as a result of disclosure by the amended against party and the amending party cannot be expected to have pleaded it at the outset, particularly where it is said that there has been a cover-up of the activity in question. In those circumstances what seems to me to be the underlying rationale of the common rule does not necessarily apply. Some other order might well be appropriate."

58. In that case Mann J reserved the costs of the amendment to trial because their basis was at that stage seemingly largely dependent on disclosures to be made by the opposing party. The 2nd Respondents rightly distinguished the present case on the grounds that the amendments were not based on disclosure. It was argued that the basis on which Doyle J was persuaded to reserve costs

("*it cannot be said now that any of the amendments will waste costs because they will be abandoned or fail*") was misconceived. I agree.

59. I find no basis for departing from the usual rule that the costs of and occasioned by the amendments should be paid by the applicant. These consequential costs are accordingly awarded to the 2nd Respondents.

Costs of the Petitioner's extension of time application reserved by the 26 January 2023 Consent Order

60. I confirm my provisional view expressed in the course of the hearing that these costs, attributable to a case management application which was in the end agreed, ought simply to be part of the costs of the Petition.

Costs of the recusal application

61. The 2nd Respondents seek their costs on the grounds that their application for Doyle J to recuse himself succeeded. The Petitioner contends that, properly analysed, the application did not in fact succeed on its merits. Justice Doyle did not recuse himself, but declined to sit further on precautionary grounds. Further and in any event, those grounds have since been found to have no merit, because the matters which the 2nd Respondents suggested might give rise to conflict concerns at trial in fact were never truly in issue at all. The Petitioner asks that the 2nd Respondents pay 50% of their costs. The following factors are in my judgment the most significant:

(a) Doyle J agreed to recuse himself on the papers when initially asked to recuse himself on the grounds that Mr Wang had been a client of Cains at a time when he had been a consultant attached to the leading Isle of Man firm;

(b) Doyle J, at the prompting of the Petitioner, decided to reconsider his decision and hear a contested recusal application;

(c) Doyle J did not find that formal grounds for recusal were made out, but decided to step down on a precautionary basis on the grounds that a document said to have been prepared by Cains while they were acting for Mr Wang was likely to be in issue in the present proceedings at trial;

(d) the relevant document was not in fact in issue at trial; and

(e) Doyle J expressly reserved the costs of the recusal application to trial. Was that because he felt account should be taken of whether the need for recusal was borne out or not at trial?

62. *In the Matter of Principal Investing Fund I Limited et al*, FSD 268,269, 270 of 2021(DDJ), Judgment dated 21 November 2022 (unreported) was a 61 page treatise on the law relating to recusal. The issue arose in relation to the following "connection". The Judge was an employee of Cains between November 2018 and May 2021, and was thereafter a consultant. Cains advised Mr Wang in relation to an apparently unrelated matter in or about 2019. The Judge never met Mr Wang or advised on the matter although it may have been mentioned to him and it was certainly contemplated early on in the retainer that he might be involved. However, the 2nd Respondents contended that there might be an issue raised at trial in relation to advice provided by Cains during the time the Judge was employed there. The potential conflict was first apparently raised by Forbes Hare in a letter dated 9 August 2022, and by email dated 10 August 2022, the Judge's initial and presumably largely intuitive response was communicated in the following concise terms:

> "*Justice Doyle has never met Mr. Wang and has no recollection of ever advising him. However, based on the facts stated in your letter to the effect that Justice Doyle was employed by Cains at a time when Cains were advising Mr. Wang, Justice Doyle feels obliged to recuse.*"

63. However, as a result of submissions subsequently advanced by Appleby on behalf of the Petitioner, the Judge's instinctive initial decision was withdrawn, and a formal recusal application was heard on 10 November 2021. Doyle J's conclusion merits recitation in full:

> "*147. In conclusion I am not satisfied that taken separately or together Grounds One, Three and Four relied upon by the Second Respondents are good grounds for recusal. However, applying the precautionary principle and the wise guidance of Mummery LJ in Morrison and Rix LJ in JSC and there being no certainty as to how the Long View and RAGOF issues surrounding Ground Two may pan out at trial, I have decided it is better to be safe than sorry and decline to sit further in respect of 268, 269 and 270 of 2021. This decision is also consistent with paragraph 19 of the Cayman Judicial Code. To refuse to stand down now and to continue with the trial only to discover say in week 4 or 5 of a 6 week trial that the way in which issues in respect of Long View and RAGOF had developed*

meant that I must recuse would be a terrible waste of time, money and limited judicial resources.

148. In small compact jurisdictions that attract high quality financial services litigation (such as the Financial Services Division of the Grand Court of the Cayman Islands) there are, I would suggest, in addition to the duty to sit, the need to guard against the abuse of judge-shopping and the precautionary principle, at least three other factors to have regard to when considering recusal applications. First, in small compact jurisdictions there is a limited pool of specialist judges dealing with financial services litigation. Second, the litigation in such courts, perhaps because of the amounts and issues at stake, is frequently (as Moses JA touched upon in this case) hard fought. The temperature and hostilities run high on occasions and the parties take all conceivable (and indeed some inconceivable) points which they think may assist their respective cases. Judges dealing with recusal applications in such a context must carefully bear this in mind. To put it mildly, the words mediation and settlement do not unfortunately appear to be at the forefront of the minds of the combatants or their well-resourced legal teams in such cases. Third, special regard must be had to the contents of the relevant local judicial codes of conduct. In this case the applicable Cayman Judicial Code reinforces and gives particular weight to the precautionary principle

149. In small compact jurisdictions there is perhaps a need to take an even more cautious approach in respect of recusal applications. See in particular paragraphs [16] and [19] of the Cayman Judicial Code. Paragraph [16] includes the following wording 'The appearance of partiality may be impossible to dispel leaving the litigant- and the informed observer- with a sense of injustice which is destructive of confidence in judicial decisions'. Paragraph [19] includes the following wording 'If the issue of apparent bias is raised before the judge has embarked upon the hearing, it may be sensible for the judge to decline to sit in order to avoid adding that issue to the other contentious issues in the case.'

150. It is of fundamental importance, as I endeavoured to stress in Jian Ying Ourgame, that the local and international community's trust and confidence is maintained in the administration of justice and that justice is not only done but is seen to be done. Perception in this context is just as important as reality.

151. The parties and their attorneys should liaise with court administration and the Chief Justice for these cases to be assigned to another judge. As the recusal applications have been made and determined well in advance of next April's hearing hopefully the hearing dates can be kept.

152. Costs and any other ancillary applications should be reserved to the judge assigned to deal with these matters." [Emphasis added]

64. It is far from clear from paragraph 152 that the issue of the costs of the recusal application was reserved to enable consideration to be given to how the alleged conflict developed at trial. It is easier to infer, when paragraph 152 is read together with paragraph 151 of the Judgment (and the Judge's early pronouncements in May 2022 about the importance of expedition), that the Judge was mainly concerned to have the case reassigned as quickly as possible so that the trial dates could be preserved and/or considered that another judge ought to deal with costs in light of the conclusions that he reached on the merits of the recusal application. Those conclusions critically were that:

(a) even though an actual conflict might not emerge at trial, the Judge should step down on a precautionary basis in any event; and

(b) there was "*perhaps*" a need to take a more cautious approach to recusal applications in "small compact jurisdictions" than in larger ones.

65. The ultimate decision reached by the former First Deemster (Chief Justice) of the Isle of Man on the recusal application was that the objection raised, despite a technical lack of merit, justified *de facto* recusal on precautionary grounds. This was simply a more fulsome and formally articulated version of his initial instinctive decision that he should step down, implicitly on precautionary grounds. The approach he adopted at the beginning and end of the recusal process is entirely consistent with what I understand to be the predominant approach taken by Judges in jurisdictions like the Cayman Islands when connections between a judge's former law firm and present litigants emerge. It was the Petitioner which sought to "push the envelope" and insisted on a full-blown recusal application which they in practical terms clearly lost. In these circumstances, in my judgment, the fact that the potential conflict did not crystallize at trial (and may well from the outset have been an instance of 'over-egging the pudding') does not undermine the substance of the practical result of the recusal application. It was in substance won by the 2nd Respondents.

66. For these reasons the costs of the recusal application are awarded to the 2nd Respondents.

Conclusion

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 area awarded to the 2nd Respondents.

68. I will hear counsel if required on the terms of the final Costs Order and any other matters arising from the present Costs Ruling.

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