



IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD No. 203 of 2020

BETWEEN

ABDULHAMEED DHIA JAFAR

Plaintiff

AND

(1) ABRAAJ HOLDINGS
(in official liquidation)

(2) GHF GENERAL PARTNER LIMITED
(in its capacity as general partner of GHF Fund LP (formerly Abraaj Growth Markets Health Fund LP) and GHF Fund (B) LP (formerly Abraaj Growth Markets Health Fund (B) LP))

(3) THE GHF GROUP LIMITED
(formerly The Abraaj Healthcare Group Limited)

(4) ABRAAJ GENERAL PARTNER VIII LIMITED
(in its capacity as general partner of Neoma Private Equity Fund IV LP (formerly known as Abraaj Private Equity Fund IV LP))

Defendants

ON THE PAPERS

Application for indemnity costs – failure by party to disclose document relevant to security for costs application – application for interim payment – the approach to be adopted by the Court on such an application

JUDGMENT

Introduction

1. This is my judgment dealing with Fund IV’s application for an order for indemnity costs, and an order for an interim payment, in respect of its costs incurred in connection with its successful application for further security for costs in these proceedings. The parties have agreed that the Court should decide these applications on the papers.
2. By an order dated 19 October 2021, the Court ordered (the **Original Security Order**) that Mr Jafar provide security for costs to the Second Defendant, the Third Defendant (together with the Second Defendant, the **GHF Parties**) and the Fourth Defendant (**Fund IV**) (the GHF Parties and Fund IV being referred to as the **Fund Defendants**). The basis for that order was set out in my judgment dated 10 August 2021 that (a) there was a real risk that a Cayman costs order in favour of the Fund Defendants would not be enforced in the UAE and (b) it was just for security to be ordered.
3. The Original Security Order provided for security in respect of anticipated costs through to the conclusion of the discovery process with liberty to apply for further security. By a summons dated 6 February 2023 (the **Fund IV Top-Up Summons**) Fund IV applied for further security to reflect actual costs through to discovery and estimated costs for the further stages of the proceedings. A similar summons had previously been issued by the GHF Parties on 3 February 2023 (collectively with the Fund IV Top-Up Summons, the **Top-Up Summonses**).
4. Mr Jafar opposed the Top-Up Summonses. He argued that as a result of a change of circumstances the Fund Defendants were no longer entitled to security for costs. He

contended that no security should be ordered because there had been material developments in the UAE which meant that there was no longer any real risk that a Cayman costs order against Mr Jafar would not be enforced.

5. On 28 to 29 July 2023, a contested two-day hearing was conducted in respect of the Top-Up Summonses (the *Top-Up Hearing*). The principal focus of that hearing was whether there had been a material change in circumstances such that there was no longer a real risk of non-enforcement of a Cayman costs order. By a judgment delivered on 2 October 2023 I ruled that further security was required (the *Top-Up Judgment*). I decided that there had been no material change in the UAE and that the real risk of non-enforcement remained. Mr Jafar's challenges to the quantum of security sought largely failed. At [10] of the Top-Up Judgment I said that despite Mr Jafar's "extensive" challenges "some but not substantial" reductions were made to the quantum of the security sought by the Fund Defendants.
6. Fund IV now seeks its costs of the Fund IV Top-Up Summons (despite various negotiations and offers and counter-offers, it has not been possible to reach agreement). It seeks:
 - (a). pursuant to GCR O.62, r.4(11), its costs on the indemnity basis.
 - (b). pursuant to GCR O.62, r.4(7)(h), an interim payment on account in the sum of US\$359,377.42 (assuming taxation is ordered on the indemnity basis – being 65% of 85% of Fund IV's costs) or, alternatively, US\$247,406.13 (if taxation is to be carried out on the standard basis – being 65% of 65% of Fund IV's potentially recoverable costs on the standard basis). Fund IV also seeks and order that the interim payment be made within 21 days of the date of the Court's ruling on costs (see paragraphs 9(b) and 50(c) of the revised written submissions of Fund IV).
7. In summary, Fund IV argues that an order for indemnity costs is justified because:
 - (a). Mr Jafar had failed to inform the Fund Defendants or the Court until shortly before the handing down of the Top-Up Judgment that he had on 30 November 2022 submitted to the prosecuting authorities in the Emirate of Sharjah a criminal complaint against

Mr Arif Naqvi (the *Sharjah Criminal Proceedings*) or that the Sharjah Federal Court of First Instance had on 4 January 2023 delivered a judgment convicting Mr Naqvi of fraudulent seizure of money (the *Sharjah Judgment*). The Sharjah Criminal Proceedings concerned an allegation by Mr Jafar that he had been deceived by Mr Naqvi into making the same loans which are the subject of these proceedings. Fund IV argues that the existence of the Sharjah Criminal Proceedings and the Sharjah Judgment should have been disclosed before, and were highly relevant to the Top-Up Hearing. Fund IV was prevented from relying on them at the Top-Up Hearing and Fund IV's costs of the Fund IV Top-Up Summons were significantly increased as a result since evidence of the filing of the Sharjah Criminal Proceedings and the delivery of the Sharjah Judgment would have at least substantially supported one of Fund IV's main grounds for saying that a material risk of non-enforcement of a Cayman costs order remained and thereby reduced the need to spend any or a significant amount of time on its other contentions.

- (b). Mr Jafar had failed in these proceedings to provide discovery of documents concerning the Sharjah Criminal Proceedings or the Sharjah Judgment.
 - (c). Mr Jafar's failures to provide discovery of these documents or to bring them to the attention of the Fund Parties or Court were improper, unreasonable and/or negligent within GCR O.62, r.4(11). Each of those failings independently justified an order for indemnity costs. Even if Mr Jafar's failure to provide discovery of the Sharjah Judgment or to refer to the Sharjah Judgment was inadvertent, Mr Jafar's conduct or that of his legal team was so negligent as to warrant an order for indemnity costs.
8. As regards its application for an interim payment Fund IV said that it had incurred substantial costs in respect of the Fund IV Top-Up Summons and, on established principle, should receive an interim payment pending taxation. There was no reason why an interim payment should not be ordered and Mr Jafar had very belatedly accepted this. The dispute between the parties now was as to the quantum of payment. Fund IV argued that it should be paid by way of an interim payment at least 65% of its total costs to date.

9. Mr Jafar opposes Fund IV's applications. He argues that there is no justification for an award of indemnity costs. Costs should be on the standard basis. He had already offered to pay Fund IV's reasonable costs on the standard basis in a sum he had proposed. If, as Mr Jafar invited the Court to do, the Court ordered that only standard costs should be awarded, bearing in mind Mr Jafar's agreement to costs being awarded on this basis and the offer he had made in respect of an interim payment, then he sought his costs of having to defend these applications. Mr Jafar accepted that there should be an order for an interim payment but argued that the amount awarded should be substantially below that claimed by Fund IV.
10. On 11 March 2024 Fund IV, and on 12 March 2024 Mr Jafar, filed written submissions. Mr Jafar also filed with his written submissions a supplemental report and exhibits (the ***Supplemental Expert Report***) from Dr Ahnish (Mr Jafar's expert on UAE law) on the effect of the Sharjah Judgment on the enforcement in the UAE courts of any costs order made by this Court and sought permission to rely on the further report.
11. Fund IV responded by noting that they had not been given advance notice that Mr Jafar would be adducing further expert evidence and said that it was a matter for the Court to determine whether to grant the permission sought but that if the Court was minded to give permission Fund IV requested the opportunity to file and serve limited material dealing solely with the contents of the Supplemental Expert Report. On May 2024 I informed the parties that having had a chance to review the correspondence, while I was not convinced that it was necessary or appropriate for the Court to adjudicate on or make findings as to further points of UAE law for the purpose of dealing with Fund IV's applications and my current view was that Dr Ahnish's supplemental report only confirmed that the UAE law issue raised would have been and is disputed, since the further report had been filed and was said by Mr Jafar to be important, I was prepared to grant Mr Jafar the permission he sought on the basis that Fund IV was permitted to file and rely on such UAE law expert evidence in response to Dr Ahnish's report as it wished to be filed and served within 21 days. On 31 May 2024 Ogier on behalf of Fund IV filed and served a copy of Mr Fox's Fourth Affidavit (***Fox 4***) (Mr Fox was Fund IV's expert on UAE law).

12. In their letter dated 31 May 2024 Ogier, in addition to filing Fox 4, noted that since the filing of the parties' written submissions there had been a further decision of this Court dealing with the method for quantifying interim payments. This was the judgment of Justice Asif in *The Armand Hammer Foundation, Inc v Hammer International Foundation* (unreported, 24 April 2024) (*Armand Hammer*) (at [8]-[13]). Ogier said that Fund IV had provided a copy of Justice Asif's judgment in *Armand Hammer* in order to ensure that all relevant authorities had been provided to the Court. They also provided brief submissions on Justice Asif's judgment and the extent to which it affected their position as set out in their earlier written submissions. None of the other parties wrote to the Court in response to Ogier's letter or provided any comments on the impact of Justice Asif's judgment on their submissions. However, when preparing this judgment and reviewing Justice Asif's judgment it seemed to me that it would be wrong to determine Fund IV's interim payment application without drawing to the attention of the parties that I regarded Justice Asif's judgment in *Armand Hammer* as significant and that I would be referring to it in my judgment and giving them a brief opportunity to file further submissions with respect to it if they wished to do so. Accordingly, at the beginning of October 2024 I gave the parties until 11 October 2024 to file further submissions. On 11 October 2024 Fund IV confirmed that it was content to rely on its original written submissions and the points made in Ogier's letter dated 31 May 2024 and Mr Jafar filed brief supplemental submissions.
13. I have decided that:
- (a). Fund IV is entitled to its costs of and occasioned by the Fund IV Top-Up Summons to be assessed on the standard and not the indemnity basis.
 - (b). Mr Jafar shall pay to Fund IV within 21 days of the date of the order giving effect to this judgment the sum of US\$351,345.98 being 60% of Fund IV's total costs to 30 September 2023 on the standard basis (US\$585,576.64).
 - (c). in the absence of submissions from Fund IV as to the order to be made with respect to the costs of dealing with its applications for indemnity costs and an interim payment I will not at this stage formally decide that question but I have indicated that my

preliminary view, subject to hearing further submissions from the parties if they wish to make them, is that there should be no order as to costs.

The application for indemnity costs – Fund IV’s submissions

14. Fund IV noted that the Court's power to award indemnity costs arises pursuant to section 24 of the Judicature Act (2021 Revision) and GCR O.62 r.4(11). The Court’s jurisdiction expressly encompassed cases where a party had conducted proceedings negligently (i.e., without the care to be expected of litigants), along with instances of improper or unreasonable conduct.
15. Fund IV cited well known passages from the judgment of Justice Richards in [14]-[19] of her judgment in *KOA Capital LP v China Index Holdings Limited* (unreported, 20 April 2023). At [14] Justice Richards had noted that Chief Justice Smellie in *Ahmad Hamad Algozaibi and Brothers Company v Saad Investments Company Ltd* [2012] 2 CILR 1 had said that (a) the jurisdiction to order costs on the indemnity basis was “*wide and flexible*”; (b) the overriding principle to be applied was that the award of indemnity costs will be the exception, not the norm; (c) in cases warranting the award of indemnity costs the conduct of the unsuccessful party justifies requiring it to repay all the costs actually incurred by the successful party and (d) when considering an application for indemnity costs the Court is principally concerned with the unsuccessful party’s conduct of the case, rather than the substantive merits of its position.
16. Fund IV submitted that as regards unreasonable or negligent conduct it was not necessary for the Court to conclude that the conduct in question lacked moral probity or deserved moral condemnation. It was sufficient that the conduct of the litigation by the unsuccessful party warrants disapproval by the Court. The conduct must be more than simply wrong or misguided in hindsight. They noted that Field JA at [6] of his judgment in *Bobulinski v China Branding Group Limited (In Official Liquidation)* (unreported, 14 June 2023, CICA) had approved Chief Justice Smellie’s statement to that effect in *AHAB v SAAD* 2013 3 CILR 344. Fund IV submitted that in respect of negligence, the question was whether the conduct in

question fell below the standard of general competence expected of litigants and professional attorneys in litigation.

17. In *Bobulinski*, the Court of Appeal had decided that the conduct of joint official liquidators (*JOLs*) justified the award of indemnity costs and a personal costs order against the *JOLs*. In this case following the *JOLs*' rejection of Mr Bobulinski's claim to be a secured creditor Mr Bobulinski appealed the *JOLs*' decision and issued a disclosure summons seeking the disclosure of documents that would support his claim. Notwithstanding that the *JOLs*' file contained relevant documents showing that Mr Bobulinski was a secured creditor, the *JOLs* resisted Mr Bobulinski's appeal and the disclosure summons and in the course of doing so one of the *JOLs* swore an affidavit stating that the company had no assets subject to Mr Bobulinski's pledge and that there was no further material to disclose. The *JOLs* were eventually ordered to disclose relevant documents but still failed to provide the information ordered. The Judge (McMillan J) had found that:

“the JOLs as officers of the Court were seriously amiss in failing to disclose the relevant documents in the appeal proceedings [and accepted that] it was incumbent on the JOLs to review the few copies of the agreements they had signed to satisfy themselves that there was nothing therein that suggested that any assets [were subject to the pledge]. Undoubtedly, had such a simple step been taken they would have scrutinised the documents in their files and seen that [there were assets covered by the pledge].”

18. The *JOLs* were in breach of a fundamental obligation as officeholders to make themselves acquainted with the company's affairs at the latest when the appeal was filed. If they had done so they would have been reminded that there were assets that were very arguably covered by the pledge. As a result, as Field JA held (at [21]) *“vital evidence contradicting the JOLs' case in the ... appeal .. was never put before”* the Judge. Field JA said (at [22]) that *“Given this finding I am of the clear view that the failure of the JOLs to disclose [the relevant documents] in the appeal proceedings was the result of a serious breach of duty which ... justifies”* an order that the *JOLs* be prevented from recovering the costs awarded to Mr Bobulinski out of the liquidation estate. Field JA also went on to hold (at [27]) that in these circumstances the *JOLs*' conduct of the appeal proceedings before this Court

“amounted to gross negligence” so that the 30% of the costs of those proceedings payable to Mr Bobulinski were to be assessed on the indemnity basis.

19. Fund IV submitted that Mr Jafar had failed to disclose (to the Fund Defendants, the Court and his UAE law expert) vital evidence that was relevant to the Court’s decision on the Top-Up Summonses and contradicted his case. Mr Jafar’s failures to make any mention of the Sharjah Criminal Proceedings or the Sharjah Judgment in the context of his opposition to the Top-Up Summonses along with his failure to provide discovery of these documents were improper, unreasonable or negligent and took his conduct outside the norm, thereby warranting the censure of an order for indemnity costs (in the absence of any proper and reasonable justification for his conduct, which had not been forthcoming).
20. Fund IV argued that it had been common ground on the original security summonses that one reason why a foreign costs order would not be enforced in the UAE was that it conflicted with a prior judgment or order issued by a UAE Court. Mr Jafar had simply denied that there was any UAE judgment that might conflict with a Cayman costs order and asserted that there were no relevant UAE proceedings on foot (Fund IV referred to Mr Jafar’s skeleton argument at [86]). Fund IV argued that Mr Jafar had not departed from that position at the Top-Up Hearing (Dr Ahnish’s evidence was that a foreign judgment would only be recognised if five conditions were satisfied, the fifth being that the foreign judgment or order “*does not conflict with a judgment or order already made by a Court in the State, and contains nothing that conflicts with morals or public order in the State*” and had confirmed that he was aware “*that Mr Jafar has previously commenced proceedings against Mr Naqvi (personally) in relation to some of the factual matters that are in issue in these proceedings. However, I am not aware of any judgment or order arising from those proceedings which might be said to conflict with a costs award against Mr Jafar in relation to his Cayman Islands claims*”).
21. Accordingly, the Sharjah Judgment was obviously relevant to the Top-Up Hearing being a prior judgment of a Sharjah Court that was conceivably inconsistent with a Cayman costs order (for example, if that order was based on a finding Mr Jafar was not in fact deceived by Mr Naqvi). As a result, had the Sharjah Judgment been disclosed as it should have been, the

Top-Up Hearing would not have been limited to a consideration of the enforcement of foreign judgments in the UAE. Rather, Fund IV would have relied upon the Sharjah Judgment as demonstrating why, even if there were further relevant examples of foreign judgments being enforced by the UAE courts, there in any event remained a real risk of a Cayman costs order in this litigation not being enforced against Mr Jafar (given the risk of a finding of inconsistency). Mr Jafar's conduct in failing to provide discovery of or refer to a known adverse development deprived Fund IV of this argument. Furthermore, the lengthy and detailed submissions on the enforcement of foreign judgments in Sharjah would have fallen away because of the risk arising from the Sharjah Judgment – as reflected in the fact Mr Jafar positively relied at trial on the Sharjah Judgment being a relevant determination and finding of fraud by the Sharjah courts for the purpose of the UAE law of vicarious liability. Fund IV submitted that any reasonable litigant in Mr Jafar's position would in that situation have accepted that security was justified and limited his opposition to quantum (with Mr Jafar ultimately being unsuccessful on that front).

22. Had Mr Jafar provided discovery of the Sharjah Judgment and documents from the Sharjah Criminal Proceedings, the ambit of the Top-Up Summonses and the Top-Up Hearing would have been considerably narrower, reducing costs for the Fund Defendants and freeing up the Court's limited resources and hearing time for other users. If the Sharjah Judgment had been provided prior to the Top-Up Hearing, the lengthy and costly evidence and submissions concerning whether there had been material changes in UAE law would likely have been unnecessary (alternatively very substantially curtailed) since the focus would have been on the risk that a UAE Court would find that a Cayman costs order premised on the dismissal of the Jafar Proceedings conflicted with a prior judgment. The dispute would then have been reduced to short points concerning quantum. Instead of requiring a two-day oral hearing focusing on whether there remained a real risk of non-enforcement, it was likely that the matter of quantum could have been dealt with on the papers in a proportionate and cost-effective manner through submissions on the Fund Defendants' further costs and future projections.
23. Fund IV said that it was remarkable that Mr Jafar and/or his legal team did not draw the Sharjah Judgment to the Court's attention in circumstances where Mr Jafar was asserting

that there was no real risk of non-enforcement; it was common ground on both the original security summonses and Top-Up Summonses that a prior inconsistent judgment from a Sharjah court would preclude enforcement; Mr Jafar's approach on the original security summons was to rely on evidence that there were no prior inconsistent judgments; Mr Jafar relied on evidence from Dr Ahnish that he was not aware of any prior judgments that might be inconsistent; the Top-Up Hearing was attended by individuals who were undoubtedly aware of the Sharjah Judgment, specifically Mr Jafar and Mr Nasrallah and it was likely that further members of Mr Jafar's legal team were aware of the judgment at the time of the Top-Up Hearing, and certainly before the Top-Up Judgment was delivered (although Mr Jafar has not provided an explanation of the position).

24. Fund IV argued that in the absence of evidence adduced by Mr Jafar it was unclear whether the omission was deliberate or inadvertent. If deliberate, indemnity costs were clearly justified. If inadvertent, indemnity costs were still justified because Mr Jafar (and his legal team) had been negligent within the meaning of GCR O.62, r.4 (11). The failure to bring the Sharjah Judgment to the Court's attention created a risk of the Court determining the Top-Up Summonses on an incorrect basis, to the prejudice of the Fund Defendants. That risk was the consequence of multiple failings on the part of Mr Jafar and his legal team.
25. Fund IV submitted that Fox 4 showed that Dr Ahnish's opinion that Article 222(2)(e) of the UAE Civil Procedure Law incorporated by analogy the requirements of *res judicata* was incorrect. Rather, Article 222(2)(e) applied according to its terms where a foreign judgment conflicted with a prior judgment of a UAE Court. It followed that Dr Ahnish was incorrect to assert that there was no risk of non-enforcement of a Cayman judgment dismissing Mr Jafar's claim and awarding Fund IV its costs, and that, as Fund IV submitted, the existence of the Sharjah Judgment was a material matter for the purposes of Fund IV's Top-Up Summons.

The application for indemnity costs – Mr Jafar's submissions

26. Mr Jafar said that he had consented to a costs order in Fund IV's favour given that Fund IV's application for further security was successful and that costs should follow the event.

However, the appropriate order was for costs on the standard basis (not on an indemnity basis). Mr Jafar had not acted improperly or unreasonably and his conduct does not meet the high threshold for indemnity costs. Indemnity costs were exceptional. They were rare and reserved for cases where a party's conduct was "*totally unusual*" such as where a party had pursued a hopeless or false case or conducted the litigation in a manner which was wholly unreasonable.

27. In *Koa Capital* Justice Richards had noted (at [14]) that "*The overriding principle to be applied is that such awards of costs will be the exception rather than the norm. In exceptional cases, the conduct of the unsuccessful party justifies requiring it to repay all the costs actually incurred by the successful party*" and made an indemnity costs order where the defendant's conduct in causing the plaintiff to file an action which would have been completely unnecessary had the defendant responded in a timely manner was unreasonable to a high degree.
28. Mr Jafar relied on the explanation for the failure to disclose the Sharjah Judgment set out in Forbes Hare's letter dated 30 September 2023 to Ogier. This stated that:

"The inadvertent omission of documents relating to the criminal conviction arose because of a misunderstanding between members of our client's legal team. Members of the team who were involved in the criminal proceedings against Mr Naqvi mistakenly believed that documents relating to the criminal proceedings had already been disclosed by our client."

29. Forbes Hare had previously written to Ogier on 22 September 2023 to provide a copy of the Sharjah Judgment (and what was described as a copy of the Sharjah court file) and explain when Mr Jafar had first learned of the Sharjah Criminal Proceedings and the Sharjah Judgment:

"Our client became aware of the Court proceedings on 30 November 2022 Our client became aware of the judgment/conviction when it was handed down in open Court on 4 January 2023. Our client understands that the judgment has been a matter of public record, and available to you and your client (and their UAE law advisors), since that time."

30. Fund IV disputed that the Sharjah Judgment had been publicly available and noted that this was inconsistent with the evidence of Dr Ahnish at trial that the Sharjah Judgment was not published as a first instance decision and could not be located despite his efforts to search for relevant judgments (Fund IV argued that even if the document was publicly available, Mr Jafar was not thereby released from his obligation to give discovery of it and relevant related documents). But Mr Jafar has not in his submissions on this application maintained the argument that the Sharjah Judgment was publicly available.
31. Mr Jafar submitted that the explanation provided by Forbes Hare showed that the documents had not previously been disclosed by Mr Jafar due to a misunderstanding. Members of Mr Jafar's team who were involved in the Sharjah Criminal Proceedings against Mr Naqvi mistakenly believed that documents relating to the criminal proceedings had already been disclosed. It was an error but there was no basis for saying that Mr Jafar knew that the documents had not been disclosed or that there was any deliberate withholding. The error in discovery by Mr Jafar did not warrant him being penalised in indemnity costs (*a fortiori* when the relevant error occurred outside the ambit of the Top-Up Summonses and the security for costs applications).
32. Mr Jafar also said that while he accepted that the documents from the Sharjah Criminal Proceedings (including the Sharjah Judgment) should have been disclosed earlier, the failure to do so had no material effect on the conduct of the Top-Up Hearing since as a matter of UAE law the Sharjah Judgment was incapable of conflicting with a costs award made by this Court in these proceedings in a way which would prevent it from being enforced in the UAE. The existence of the Sharjah Judgment could and would not have been determinative or removed the need for the Court to consider Mr Jafar's other grounds for opposing the Top-Up Summonses.
33. Dr Ahnish had explained in his Supplemental Expert Report that Courts of the highest authority in the UAE had confirmed that in order for Article 222(2)(e) of the UAE Civil Procedure Law to apply to prevent enforcement of a foreign judgment (because of the existence of a UAE judgment) the UAE and foreign proceedings must be identical in terms of subject matter, parties and cause of action and the matter/issue in question in the foreign

judgment must have been examined and adjudicated upon on the merits in the UAE judgment. Mr Jafar submitted that none of those conditions applied in this case (comparing the Sharjah Judgment and a costs order against Mr Jafar in these proceedings showed that the subject matter was different, the parties were different, the cause of action was different and the matter/issue in question in the two proceedings was different). As a matter of UAE law the Sharjah Judgment would not conflict with a costs award made in Fund IV's favour in these proceedings and would not be a barrier to enforcement of such an award in the UAE.

34. Mr Jafar submitted that the Court was in a position to determine, based on the Supplemental Expert Report, that there was no risk of the Sharjah Judgment preventing or affecting the ability of Fund IV to enforce a costs order against Mr Jafar made by this Court. But, even if the Court felt unable to make a finding to that effect, it was clear that the mere existence of the criminal conviction against Mr Naqvi in Sharjah did not resolve the dispute as to the existence and extent of the risk of non-enforcement. Had the Sharjah Judgment been disclosed, at the very least there would have been a dispute between the parties' experts as to whether and, if so, why the risk of non-enforcement remained, irrespective of the Sharjah Judgment. The hearing would still have been contested (indeed, there may have been more contested issues, not fewer) and it would not simply have focused on quantum. Mr Jafar would still have made all of the same points about the developments in the UAE.
35. Mr Jafar submitted that the Court of Appeal's decision in *Bobulinski* was distinguishable. In the present case the Fund Defendants had not been not forced to bring an application for security as a result of the late disclosure of the Sharjah Judgment and the application was fought on the grounds that there were relevant developments in the UAE. This defence would not fail in light of the Sharjah judgment. In *Bobulinski*, Mr Bobulinski had also sought to vary the no order as to costs order made on his failed disclosure summons. That application failed. The Court of Appeal held that even if the relevant documents had been disclosed prior to the disclosure summons, it was more likely than not that the costs order would have been no order as to costs given that Mr Bobulinski was unsuccessful in seeking six categories of discovery.

The application for indemnity costs – discussion and decision

36. As Chief Justice Smellie made clear in *Algozaibi* (and as was not in dispute) when considering an application for indemnity costs the Court is principally concerned with the unsuccessful party's conduct of the case rather than the substantive merits of its position. The primary issue on Fund IV's application for indemnity costs is therefore whether Mr Jafar's conduct in and when opposing the Fund IV Top-Up Summons, and in particular his failure to disclose the Sharjah Judgment, was (in the language of GCR O.62 r.4(11)) improper, unreasonable or negligent (justifying an order that he pay all the costs actually incurred by Fund IV).
37. It seems to me that the Sharjah Judgment was clearly relevant to the Top-Up Summonses for the reasons given by Fund IV and should have been disclosed at least promptly after the Top-Up Summonses had been served. It certainly should have been disclosed by the time at which written reply submissions on Fund IV's Top-Up Summons were filed by Mr Jafar (21 June 2023) (see U2/177/61). The Fund Defendants (and the Court) needed to be aware of the Sharjah Judgment well in advance of the Top-Up Hearing (they needed sufficient time to obtain UAE law advice on its impact and to tailor their submissions appropriately).
38. But I do not accept Fund IV's argument that disclosure of the Sharjah Judgment would have resulted in the dispute requiring adjudication being reduced to short points concerning quantum or that the ambit of the Top-Up Summonses and the Top-Up Hearing would have been considerably narrower with a substantial reduction of costs and Court time. The reality, as Mr Jafar submitted, in the context of these fiercely contested proceedings, is that the impact of the Sharjah Judgment and the proper interpretation of applicable UAE law, would have been highly contested and have become another issue for debate at the Top-Up Hearing.
39. But I equally do not accept Mr Jafar's submission that I am in a position on this application to reach a concluded view on the applicable UAE law and as to whether Dr Ahnish's or Mr Fox's opinion is to be preferred (on the issue of whether the Sharjah Judgment would result in, or increase the risk of, a UAE court refusing to enforce a Cayman costs order against Mr Jafar pursuant to Article 222(2)(e) of the UAE Civil Procedure Law). What the two opposing

opinions reveal is that the issue, as I have said, is and would have been at the Top-Up Hearing highly contested and taken some time to review and resolve.

40. Fund IV is right to say that Mr Jafar has failed to adduce affidavit evidence explaining the failure to disclose the Sharah Judgment in the main proceedings pursuant to his general discovery obligations or for the purpose of the Top-Up Summonses. However, he relies on the explanation given by Forbes Hare in their letter dated 30 September 2023, which has been included in the hearing bundle.
41. Fund IV also said that Mr Jafar's Leading Counsel, Lord Falconer, had in effect undermined the credibility of this explanation by giving a different explanation in oral submissions at the Pre-Trial Review. Lord Falconer had said that "*the problems about discovery that occurred earlier were to do with the effectiveness of various IT processes, in effect, which are not unusual ... It was certainly not intentional that the conviction was not disclosed before. Inevitably, once talking to one's experts then the significance of the conviction became more apparent and in the light of that disclosure was made in relation to it.*" However, Fund IV accepted that when pressed by the Court as to the evidential basis for his explanation, Lord Falconer KC reverted and directed the Court to the explanation given in Forbes Hare's letter of 30 September 2023.
42. The fact that neither Mr Jafar nor anyone in his legal team has been prepared to go on oath to confirm the position and provide further details is relevant (it reduces the weight to be given to the explanation) and in my view unhelpful but I do not think, particularly in a case where Fund IV's application for indemnity costs is being dealt with (with their consent) on the papers and therefore in a summary fashion, that I can properly ignore the explanation provided. Fund IV has not invited me to infer from Mr Jafar's failure to file affidavit evidence to support the explanation given by Forbes Hare that the explanation should not be believed. Nor do I take Lord Falconer's alternative oral explanation to undermine or stand as a substitute for the explanation given by Forbes Hare, to which Lord Falconer in any event reverted when pressed. In the circumstances, the Court is left to form a view, as best it can, on the facts as they appear from the parties' submissions and the correspondence filed on the application.

43. Forbes Hare said that the failure to disclose the Sharjah Judgment (and other relevant documents) was inadvertent and resulted from a misunderstanding between members of Mr Jafar's legal team. I can see that this could be characterised as a serious failure by the legal team(s) to co-ordinate and communicate properly evidencing conduct below the standard of general competence expected of litigants and professional attorneys in this kind of multi-jurisdictional litigation, particularly when what was not disclosed was a self-evidently important judgment of a foreign court that was highly relevant to an issue in dispute on the long-running security for costs applications. Mr Jafar's legal team should have had in place robust systems for ensuring that such developments were communicated to all who needed to know of them and that there was proper oversight and coordination of the discovery process to ensure that everything that needed to be disclosed was disclosed (to ensure that Mr Jafar's important disclosure obligations were discharged).
44. However, on balance, it seems to me that the failure (by Mr Jafar's legal team) was not so substantial or serious as to justify treating it as improper, unreasonable or negligent conduct which is out of the norm and requiring the Court's disapproval by an award of indemnity costs. Assuming the explanation provided by Forbes Hare to be true, the failure to appreciate that the Sharjah Judgment (and other documents) had not been disclosed was unintentional and the result of an oversight made by a large and busy team. I accept that mistakes can sometimes be made by the most well organised and efficient legal teams, particularly in multi-jurisdictional cases with large teams of legal advisers. The lapse, while it raises some concerns about the adequacy of the procedures put in place by Mr Jafar's legal team, does not of itself show a fundamental failure (to the necessary high degree) to conduct the discovery process and the opposition to the Top-Up Summonses with proper or reasonable care or in a manner consistent with proper and reasonable professional standards.
45. I have considered whether Mr Jafar's failure to provide details of and to explain the procedures that his legal team put in place (to ensure that the core members of the wider legal team were alerted to and informed about important developments in other relevant jurisdictions and to manage the discovery process) justifies an inference that the non-disclosure of the Sharjah Judgment (and other documents) was the result of a systemic and

fundamental failure in the conduct and management of the proceedings (such that it could be said that Mr Jafar's legal team's management of the disclosure and communication process fell below the standard of reasonably competent legal advisers). I have not found this to be straightforward but have concluded (after noting and giving weight to Fund IV's submissions as to what can be considered to be inherently likely in the circumstances and their repeated complaints and allegations as to the long-term inadequacies in Mr Jafar's compliance with his disclosure obligations) on balance that it would not be appropriate to do so, particularly on an application dealt with on the papers where there is an explanation given in correspondence included in the hearing bundle which has only been challenged by reference to inherent possibilities and some speculation.

46. *Bobulinski* was also a case involving a failure to locate and disclose relevant documents (which gave rise to two separate issues – whether the JOLs' conduct justified an order that costs be assessed on the indemnity basis and an order that they be precluded from recovering the costs payable to Mr Bobulinski from the liquidation estate). But there the JOLs had been guilty of a fundamental and repeated failure to take the simple and basic steps required of them to respond to Mr Bobulinski's claim. They were not only in possession of the relevant documents but some of them had been signed by one of the JOLs. Furthermore, one of the JOLs had sworn an affidavit confirming that there was no further material to disclose. It is hard to conceive of a more fundamental failure to conduct proceedings properly and with due care. The present case involves an admittedly significant failure to disclose documents that were relevant and would have had a material, but not a substantial or determinative, impact on the proceedings. The non-disclosure of the Sharjah Judgment (and other related documents) did not evidence a failure going to the heart or core of Mr Jafar's conduct of his opposition to the Top-Up Summonses (he conducted other aspects of the proceedings properly) which tainted his conduct of the proceedings to such an extent that overall his conduct is to be treated as improper, unreasonable or negligent.
47. I would add that it seems to me to be clear that as a general matter Mr Jafar's opposition to the Top-Up Summonses was reasonably arguable and certainly not so weak as to be marked by an indemnity costs order. As the Top-Up Judgment shows, even without the added issues

raised by the existence and impact of the Sharjah Judgment, the issues raised and to be decided were substantial and complex.

48. Accordingly, I have concluded that Fund IV is entitled to its costs of and occasioned by the Fund IV Top-Up Summons to be assessed on the standard basis.

The application for an interim payment – Fund IV’s submissions

49. Fund IV sought an order for an interim payment of at least 65% of the relevant headline costs figure.

50. Fund IV in its initial written submissions had referred to GCR Order 62 rule 4(7)(h) and the statement of the applicable legal principles set out by Justice Kawaley in *Credit Suisse Nominees Limited v Principal Investing Fund I Limited* (unreported, 26 January 2024) (*Credit Suisse*) at [3]-[9].

51. As regards the applicable law prior to *Armand Hammer*, Fund IV submitted that:

- (a). the Court’s task was not to assess the irreducible minimum that is likely to be ordered but a reasonable estimate of what was likely to be awarded through taxation albeit that the Court will often, but not necessarily, introduce an appropriate margin of error through adopting the lowest figure in a likely range. That was to ensure the jurisdiction to order an interim payment was not exercised in a way which would prejudice the paying party by overestimating the final amount recoverable on taxation (see *Credit Suisse* at [5]).
- (b). the greater the ability of the Court reliably to assess the likely outcome of taxation, the higher the payment on account would be and *vice versa* (*Credit Suisse* at [9(c)]).
- (c). it had been observed that in the exercise of discretion Courts often award 50% of the total costs by way of interim payment as a conversative approach that should not lead to overpayment (see *Credit Suisse* at [6] and [9(d)]) but this was merely an empirical

statement as to what tended to be awarded. Higher interim awards could be made and should be made where the Court was confident that the sum will not exceed the likely outcome of taxation.

- (d). there was in effect a two-stage process. First, the Court should work out what percentage of the total costs could be assumed to be recoverable on taxation. That will depend, *inter alia*, upon the basis of taxation and the level of costs. There was support in the case law for an assumption that 85% of the total costs will be recovered where taxation was to be on an indemnity basis and 65% on a standard basis (see *Credit Suisse* at [8] and [9(e)]). Second, the Court should calculate what percentage of that assumed recovery should be used to determine the interim payment.
- (e). the Court may, particularly where significant sums are claimed, take into account the proportionality of the total sum claimed, viewed in the round, along with other considerations material to the likely final taxation award (*Credit Suisse* at [8] and [9(e)]).

52. Fund IV noted that in *Armand Hammer* Justice Asif had commented on the methodology adopted by Justice Kawaley in *Credit Suisse* and the proper approach to the discounting of costs as follows:

“8. *It is common ground that the court must apply a discount to the costs claimed as part of the exercise of balancing the potential prejudice to the paying party when ordering a payment on account. However, there is a point of principle that arises in relation to the determination of that discount.*

9. *Mr McPherson argues that I should order the Defendants to pay 70% of the total costs claimed by the Plaintiff. His argument is that in Scully Royalty Ltd, the Court of Appeal stated at [58] that:*

“58. ... Courts often award 50% of the total costs on the basis that this is a conservative approach which should not lead to an overpayment.”
(*Mr. McPherson’s emphasis*)

This was said in the context of a taxation that was to take place on the standard basis. Drawing on a statement in Al Sadik, Mr McPherson says it is usual practice to assume that 85% of the costs claimed will be recovered for a taxation on the indemnity basis and 65% for a taxation on the standard basis. He infers from this starting point that the Court of Appeal in Scully Royalty Ltd were

saying that an additional discount should be added, when the court is considering making a payment on account of costs, of around 15%, this being the difference between 50% of the total costs and the assumed recoverable costs on a standard-basis taxation of 65%. I interject at this point that I would describe the 65% / 85% recovery rates as being more a useful rule of thumb rather than amounting to an established practice – every case must be determined on its own facts. Mr McPherson continues that this indicates that the appropriate overall discount where the costs are to be taxed on the indemnity basis should be about 30% (15% discount for indemnity basis and 15% for payment on account).

10. Moving on, Mr McPherson submits that, whilst Kawaley J said that he was adopting this approach in the recent case of [Credit Suisse] in fact he fell into error in that he applied a 50% discount after reducing the total costs claimed to reflect the likely impact of taxation (in that case, some costs were payable on the standard basis and some on the indemnity basis): see [15]. Mr McPherson describes this as a “double discount”, and argues it was wrong and that the learned judge misapplied Scully. Mr McPherson urges me not to fall into the same error.
11. I note that in *Al Sadik*, Kawaley J said at [27]:

“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 ...” (emphasis added).

However, in making his actual decision in that case, the learned Judge applied a 40% discount to the discounted figure for costs after allowing for indemnity - basis taxation, rather than applying the 40% discount to the total costs claimed: see [29]:

“29. Following the conservative approach commended to me by Ms White on behalf of the first 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 ...”

This difference of approach has the potential to result in a significant impact on the amount of the payment on account, depending on the starting figure for costs claimed: 50% of 85% of that starting figure equates to 42.5%, which may be a material difference from 50% if the starting figure is big enough.

12. This can also be analysed as follows: applying a discount of 50% to a costs figure already discounted to 85% is equivalent to the court concluding that an additional 50% of the costs claimed is likely to be disallowed on the indemnity - basis taxation in addition to the 15% rule of thumb amount. A reduction around that level seems to me to be significantly more than taking a “conservative”

approach to assessment of the payment into account, and likely to result in serious injustice to the receiving party, unless there is good reason on the facts to apply such a steep reduction.

13. *Having regard to the Court of Appeal's statement, quoted earlier, together with the approach in United Airways, as endorsed by Kawaley J in Al Sadik, in my judgment the better approach is to apply the discount to the total costs claimed rather than to a figure which is already discounted to reflect potential reductions on taxation. This avoids the risk of inadvertently applying a double discount of the kind identified by Mr McPherson. Alternatively, if the court decides to apply the discount in two stages, then the second discount should be substantially below 50% since its purpose is to reflect the chance that the taxing officer may reduce the receiving party's bill by more than the 15% rule of thumb figure. The appropriate percentage, if this approach is taken, should be assessed by the judge having regard to the claim for costs actually put forward, but in my judgment is far more likely to be in the region of 10-20% rather than 40-50%."*

53. Fund IV accepted that Justice Asif in *Armand Hammer* had given a clear indication that the double discount method was either not to be adopted or that any second discount was likely to be modest. Fund IV submitted that nonetheless its position was broadly consistent with the approach taken in *Armand Hammer* given that Fund IV had invited the Court to make an interim payment of at least 65% of the relevant headline costs figure. To the extent that the double discount methodology was appropriate, a discount of at most 35% was consistent with the observations in *Armand Hammer*.

54. Fund IV's Cost Schedule particularised its costs up to 30 September 2023 in the sum of US\$585,576.64 when calculated on a standard basis. Ogier confirmed that the Costs Schedule on the standard basis only used the capped hourly rates for relevant fee earners in accordance with the Practice Direction No. 1 of 2011 which sets out the range (and maximum) hourly rates for fee earners of different seniority that may be applied on a taxation on the standard basis for work undertaken before January 2024. Applying these prescribed rates results in a reduction from the fees payable when calculated on the indemnity basis (without the prescribed limits). There are lower hourly rates for Ms King, Ms Fox, Ms Sbaiti, Ms Findlay, Mr Miller and Mr Ayres KC.

55. Fund IV submitted that these costs were reasonable having regard in particular to the following matters:

- (a). the Fund IV Top-Up Summons was a substantial interlocutory hearing within complex high-value litigation being conducted at considerable speed.
- (b). the evidence for the Fund IV Top-Up Summons was extensive. The additional bundle for new evidence ran to 592 further pages including an expert report from Dr Ahnish of 286 pages (including exhibits). That material itself made extensive reference to the bundles for the original security for costs hearing which ran to some 2,522 pages (being a two-day hearing resulting in a 61-page judgment).
- (c). the skeleton arguments for the Top-Up Hearing ran to 137 pages and that hearing took place over two days with all parties being represented by leading and junior counsel. The primary focus of the Top-Up Hearing was the issue of whether there had been a material change in circumstances in the UAE with the issues of quantum largely being dealt with in writing.
- (d). the Fund IV team was appropriately structured. Within Ogier the work was carried out from 29 November 2022 to 24 October 2023 by a senior associate with periodic supervision and assistance from a partner and consultant and additional resource from two managing associates and two paralegals.
- (e). the equivalent costs schedule for the GHF Parties set out costs in the sum of US\$755,446.29. The costs incurred by both Fund IV and the GHF Parties were therefore broadly similar albeit that Fund IV's costs were somewhat lower.
- (f). the sums incurred by Fund IV were proportionate to the matters in issue. Mr Jafar was ordered to provide a further US\$4,592,417.63 by way of security for Fund IV's costs and US\$5,925,478.49 for the GHF Parties' costs. Moreover, the logical corollary of Mr Jafar's opposition in principle to further security was that the original security was liable to be set aside on the basis of a material change in circumstances, such that the US\$3,561,319.24 of existing security for Fund IV was imperilled on the Fund IV Top-Up Summons (as well as the existing security of US\$4,147,951.59 for the GHF Parties).

56. Fund IV submitted that the Court was able reliably to assess the likely outcome of taxation and that, given the factors identified above, the likely outcome of taxation was that Fund IV will recover nearly all of the costs claimed. Nevertheless, Fund IV was content to adopt an assumption that 65% of its costs will be recovered on the standard basis. The relevant headline figure was therefore US\$380,624.81.
57. As to the proportion of this amount that should be paid by way of payment on account, Fund IV invited the Court to order a payment of at least 65% of the headline figure. Although the Court often awards just 50% of headline costs by way of interim payment, that was not a rule. Higher awards were made and the appropriate percentage should be determined by reference to the circumstances of each individual case. A higher percentage was appropriate in this case given the proportionality of the sum claimed to the value of the security awarded (pursuant both to the Fund IV Top-Up Summons and the original security summonses), the value of the claim, and the complexity of the case and issues. Even at this stage, the Court could be confident that Fund IV will receive the lion's share of its costs on taxation.
58. On this basis Fund IV invited the Court to make an order for an interim payment of at least US\$247,406.13.
59. Fund IV argued that the Court should make an order for payment within 21 days. It noted that Justice Kawaley in *Credit Suisse* at [20] had said that the issue was what is a reasonable time for payment, and the starting assumption was – given the policy underpinning the interim payment jurisdiction – that the period for payment will be short, not more than 14 to 28 days. Further, the more notice that the paying party had the heavier the burden will be to demonstrate through cogent means (supported by evidence unless the position is obvious), that more time should fairly be given. There was no good reason why Fund IV should remain out of pocket for the entirety of its costs of the Fund IV Top-Up Summons. Fund IV has already been out of pocket for some time. Mr Jafar had doubtless been aware that an interim payment to the Fund Defendants was due and owing for some time and was a man of substantial means well able to pay the requisite amount without delay.

The application for an interim payment – Mr Jafar’s submissions

60. In his initial written submissions, Mr Jafar noted that in *Credit Suisse Justice Kawaley* had held that the correct amount of an interim payment was 50% of the likely recoverable costs, with the recoverable costs being 65% of sums claimed on the standard basis. At [15] he had said that:

“Giving due account to the parties’ respective positions, I consider that I should follow what the Court of Appeal in Scully Royalty Limited v Raiffeisen Bank, CICA 21 of 2020, Judgment dated 8 April 2022 (unreported) implied was the standard approach of assessing the interim payment on account of costs on the basis of 50% of the likely recoverable costs, which are 65% of the sums claimed on the standard basis ...”

61. Mr Jafar argued that an interim payment of US\$195,966.43 was appropriate to be paid within 28 days of the Court’s order.

62. Mr Jafar argued that the sums claimed by Fund IV were excessive and relied on the reasons given in Forbes Hare’s letter to Ogier dated 10 March 2024. In summary, Forbes Hare argued that:

- (a). the relevant principles of Cayman law were materially unchanged from the time at which the Court had made the Original Security Order so that the areas of controversy were limited.
- (b). the relevant principles of UAE law in dispute were narrow, especially since the governing provisions had been ventilated previously.
- (c). the Fund IV Top-Up Summons only took up part of the time of the hearing so the amount of time spent should have been less.
- (d). the amount of Fund IV’s costs (of US\$585,576.64) was “*staggering*” and clearly excessive. It was not possible to justify spending 545.1 hours of time between November 2022 to 30 September 2023 or to justify the time spent by Ogier’s fee earners none of whom were qualified in UAE law and so could only have been

peripherally involved in assisting the preparation of Fund IV's UAE law evidence." Mr Jafar also took issue with the involvement of Master's Legal Costs Services to analyse costs.

- (e). the costs of the Fund IV Top-Up Summons were likely to have been significantly increased by Fund IV's amendment to the Fund IV Top-Up Summons and the provision of updated evidence on incurred costs and anticipated costs shortly before the hearing.
63. In light of these objections and concerns, the Court should adopt a cautious approach to determining the likely quantum of Fund IV's recoverable costs to be taxed on the standard basis and the figure of US\$195,966.43 was reasonable and appropriate in all the circumstances.
64. In his supplemental submissions, taking into account the judgment in *Armand Hammer* Mr Jafar maintained his position as set out in the previous paragraph. He argued that in any event the maximum that the Court should award was the sum claimed by Fund IV, namely US\$247,000. Mr Jafar argued that Fund IV had sought an interim payment of at least 65% of the headline figure of costs which on its calculation was US\$247,000. As Justice Asif had confirmed at [6 (c)] of *Armand Hammer* it was well-established that the figure to be awarded in respect of an interim payment should be a reasonable estimate of the likely recovery with the Court needing to identify a reasonable sum within the range that it considered to be the likely full amount which the receiving party will be allowed on taxation. The Court in this case could therefore be confident that Fund IV considered that US\$247,000 was a reasonable estimate of its likely recovery of costs on the standard basis.
65. Mr Jafar argued that as regards timing the sum awarded should be payable within 28 days.

Fund IV's response to Mr Jafar's challenges to the reasonableness of Fund IV's fees

66. In its initial written submissions Fund IV responded to the criticisms and challenges to the reasonableness of its fees raised in Forbes Hare's letter of March 2024. Fund IV said, in responding to the five main criticisms I have set out above, as follows:

- (a). the fact that Cayman law was materially unchanged from the time at which the Court had made the Original Security Order was irrelevant to the question of whether the amount of time spent by Fund IV’s legal advisers was reasonable (and proportionate) because neither the original security summons nor the Fund IV Top-Up Summons involved extensive dispute as to the relevant principles of Cayman law concerning security for costs. The summonses concerned the application of those principles in circumstances where Mr Jafar had refused to confirm the location of assets for enforcement and there were disputes as to whether a UAE Court would recognise a costs order of a Cayman Court.
- (b). Mr Jafar was wrong to argue that the relevant principles of UAE law in dispute were narrow and limited. There were a series of disputes between the parties, with Mr Jafar contending that the position in the UAE had “*moved on considerably since 2021.*” As a consequence of the position taken by Mr Jafar a substantial volume of expert evidence was adduced on UAE law and extensive submissions made.
- (c). it was irrelevant that the Fund IV Top-Up Summons occupied only part of the hearing. A two-day hearing for security for costs was a substantial hearing, particularly in the context of these proceedings and the quantum of security in issue. The entirety of the two days was devoted to the issue of security – there was no other matter considered at the hearing.
- (d). the generalised challenges to the justifiability of the aggregate time spent and the involvement of Ogier attorneys were rejected. The role of Cayman attorneys on a substantial and hotly contested summons before a Cayman Court was not peripheral. The Ogier team consisted of highly qualified individuals with expertise on matters of Cayman law and procedure who had conduct of the main proceedings on behalf of Fund IV. It was incorrect to suggest that Ogier would have no substantial role on the Top-Up Summons because the Ogier team were not UAE qualified lawyers. That was a *non-sequitur*. It also ignored the substantial work required outside of the preparation of the expert evidence for the Fund IV Top-Up Summons. The charges raised by

Masters were small (\$14,875) but necessary and reasonable. Their role had been to prepare the costs schedule for costs already incurred and did not obviate the need for extensive involvement by Ogier on the Top-Up Summons even as regards costs (not least because projected future costs of litigation needs to be assessed by the attorneys conducting the litigation). Furthermore, it was necessary to take into account the fact that the costs of the Fund IV Top-Up Summons had been increased due to the protracted nature of the dispute.

- (e). it was wrong to argue that Fund IV's amendment to the Fund IV Top-Up Summons had amounted to a change of case on the part of Fund IV. The amendment and supporting evidence simply updated the costs position in circumstances where a significant period of time had passed between the Fund IV Top-Up Summons being filed (in early February 2023) and heard (at the very end of June 2023). Updating Mr Jafar and the Court on the costs position was necessary in order for the Court to determine the matter on the basis of the actual costs incurred and updated estimates for prospective costs. The timing of Mr Hayward's Sixteenth Affidavit, while admittedly late and unfortunate, did not materially increase the costs.

The application for an interim payment – discussion and decision

67. There is no dispute that in this case an interim payment is justified (and I note what Birt JA said in his judgment in the Court of Appeal in *Trina Solar* (unreported, 4 August 2023) that it is now well-established that the courts in this jurisdiction will normally make such an order unless there is reason not to do so).
68. As regards quantum, it seems to me that Justice Asif's comments in *Armand Hammer* as to the proper approach to be adopted are right.
69. GCR O.62 r.4(7)(h) empowers the Court to order payment of "... a reasonable sum on account of costs, such sum to be assessed summarily." Utilising the evidence presented, the Court must identify a reasonable sum within the range that it considers to be the likely full amount which the receiving party will be allowed on taxation. The figure should be a

reasonable estimate of the likely recovery and the aim of the exercise of the Court's discretion is to balance the injustice of the receiving party being kept out of money to which it is entitled against the risk of prejudice to the paying party of an overpayment.

70. The Court must assess whether and if so what percentage discount should be applied to the total sums claimed by the receiving party. There is no hard and fast rule. It depends on the evidence. It is likely that there will be some reduction on the basis that the full amount will not be recovered on an assessment. The discount to be applied will depend on the view and impression that the Court forms as to the reasonableness and nature of the total costs claimed and of particular cost items that are likely to be subject to a discount on an assessment.
71. As the quotation above from [13] of Justice Asif's judgment sets out, the learned Judge concluded that the better approach was to apply the discount to the total costs claimed rather than to a figure which was already discounted to reflect potential reductions on taxation. The core question remained what the Court considered to be on a summary assessment a reasonable estimate of the likely recovery that the receiving party will make on taxation (on the standard basis). This could best be done by assessing the matters and factors that would result in a reduction on taxation from the total costs claimed and determining an appropriate discount percentage to capture these and take them into account. The practice of discounting costs by 35% where taxation was to be on the standard basis was based on a rough rule of thumb view of what could be expected in most taxations on such basis. If there were no particular reasons for concluding that in the case before the Court the costs claimed were likely to result in an out of the ordinary reduction on a taxation it would probably be appropriate to apply that discount. But the Court will always wish to be cautious so as to protect the position of the paying party (although there is no suggestion in this case that Fund IV would be unable to repay any overpayment) and to take account of the summary nature of the assessment which it is making. This is why Justice Asif was right in my view to caution against using the two stage approach since doing so requires the Court at the second stage to focus on the additional matters and factors that justify (only) an increased discount above those covered and catered for by the rule of thumb discount applied at the first stage.

72. In this case, I have considered and taken into account the objections and issues raised by Mr Jafar. But it seems to me that Fund IV's explanations of the reason for the level of fees charged and its responses to Mr Jafar's substantive challenges as to the overall quantum of its fees are, in general terms, persuasive. It seems to me that the issues raised at the Top Up Hearing, as evidenced by the length and detail of the Top-Up Judgment, were complex and involved a large number of difficult and disputed points of UAE law which required a substantial amount of time to be spent by the legal teams including their experts on UAE law. On the face of it the total amount claimed by Fund IV does not seem to be unreasonable or disproportionate (and I note that the sums claimed are in line with the GHF Parties' fees and disbursements).
73. I accept that the issues raised by Mr Jafar will require careful consideration and Fund IV's fees will be subject to scrutiny in the taxation process and some of the challenges may prove to be successful. But for the purpose of Fund IV's interim payment application, having regard to the amount of and justifications proffered by Fund IV for its costs and the nature of the underlying application, it seems to me that a reasonable estimate of Fund IV's likely recovery (balancing the injustice of Fund IV being kept out of its money against the risk of prejudice to Mr Jafar of an overpayment) is 60% of Fund IV's total costs to 30 September 2023 on the standard basis (US\$585,576.64), namely US\$351,345.98. This involves a discount of 40% which is 5% above the rule of thumb discount of 35% applied in the case of taxation on the standard basis. While it appears to me, as I have explained, that Fund IV's responses to Mr Jafar's objections are reasonable, the substantial challenges raised by Mr Jafar (albeit that they have not been set out in detail or fully particularised at this stage) are significant and in my view justify an additional but small additional discount.
74. This is in excess of the US\$247,406.13 referred to in Fund IV's submissions but I accept that this figure was expressed to be the minimum and not the maximum amount of the award.
75. That sum should be paid within 21 days of the date of the order giving effect to this judgment. That seems to me to be a reasonable period in the circumstances particularly in view of the time taken to determine this issue and the advance notice that Mr Jafar has had that an interim payment (which he previously offered to make) would be required.

Costs of this application

76. In their written submissions Mr Jafar and Fund IV made extensive references to the offers made by Mr Jafar with respect both to the amount of the interim payment and the overall costs of the Fund IV Top-Up Summons and Fund IV's counter offers.
77. Mr Jafar argued that if the Court ordered that Fund IV was only entitled to costs to be assessed on the standard basis and made an order for an interim payment in an amount below US\$ 195,966.43, then Mr Jafar was entitled to his costs of defending both of Fund IV's applications (for indemnity costs and an interim payment). Mr Jafar would then be the successful party on the application for indemnity costs and the amount of the interim payment awarded would not have exceeded the amount of his earlier offer to Fund IV.
78. Fund IV did not address this issue in its written submissions, no doubt wishing to await the Court's decision on its applications.
79. In those circumstances I do not propose to make a final decision on the issue of the costs of this application. However it may assist the parties if I express my preliminary view. Since Mr Jafar can be treated as the successful party in relation to Fund IV's application for indemnity costs but the unsuccessful party in relation to Fund IV's application for an interim payment, and both applications involved, broadly speaking, the same or a similar amount of time, the right result is to make no order as to costs.



The Hon. Justice Segal
Judge of the Grand Court, Cayman Islands
1 November 2024