



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

CAUSE NO. FSD 132 OF 2024 (DDJ)

**IN THE MATTER OF SECTION 92 OF THE COMPANIES ACT (2023 REVISION)
AND IN THE MATTER OF TFKT TRUE HOLDINGS**

Before: The Hon. Justice David Doyle

Heard: On the papers

Draft Judgment circulated: 21 November 2024

Judgment delivered: 26 November 2024

Determination of application for costs

JUDGMENT

Introduction

1. On 15 October 2024 I made an order (the “Order”), for the reasons stated in a judgment delivered on 3 October 2024, that:

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- (1) insofar as the Respondent's summons dated 14 June 2024 (the "Summons") sought the striking out or dismissal of the Petitioner's petition dated 25 April 2024 (the "Petition") it was refused;
- (2) insofar as the Summons sought a temporary stay of the Petition on case management grounds it was granted;
- (3) the Petition was stayed pending the determination of proceedings pending before the Hong Kong High Court which bear case numbers HCA 1469 of 2019 and HCA 1942 of 2021;
- (4) liberty to apply in relation to the stay;
- (5) in relation to costs the parties have liberty to file and serve (no more than 5 pages) written submissions by 4pm on 24 October 2024 and the court shall make a determination on the papers without a further hearing.

Documents considered

2. I have considered:

- (1) the written submissions of Active Gains Universal Limited (the "Petitioner") dated 24 October 2024 filed pursuant to the Order;
- (2) the written submissions of Fester Global Limited (the "Respondent") dated 24 October 2024 filed pursuant to the Order;
- (3) a summons dated 24 October 2024 whereby the Respondent sought an order that the Petitioner pay the Respondent's costs of and occasioned by the Summons to be taxed forthwith on the standard basis if not agreed, alternatively that the Petitioner pay the Respondent the sum of US\$249,185 within 21 days by way of interim payment under Order 62 rule 4(7) of the Grand Court Rules on account of its costs, such costs to be taxed at the conclusion of the proceedings;

- (4) an email dated 25 October 2024 from my PA to the attorneys for the Petitioner and the Respondent indicating that I was “minded to direct that the Petitioner has 7 days to provide concise written submissions (no more than 3 pages) on the interim payment application and the Respondent has 7 days thereafter to provide any concise written submissions (no more than 3 pages) in reply.”
- (5) the written submissions of the Petitioner dated 1 November 2024;
- (6) the written reply submissions on costs of the Respondent dated 8 November 2024.

The position of the parties

3. I deal firstly with the parties’ general position on costs and then the parties’ position in respect of the interim payment application.

The parties’ general position on costs

4. The Petitioner’s position is that both parties had a measure of success in respect of the Summons and where neither party is the only “successful party” and in light of the general costs rules which apply to liquidation proceedings (Order 24 rules 7(1), 8(2)(b) and 8(4) of the Companies Winding Up Rules) an order for costs in the cause is appropriate. Alternatively the Petitioner says that if the court is not minded to make an order for costs in the cause then the appropriate costs order would be that costs follow the event, namely the Respondent pays the costs of the Petitioner in respect of the Respondent’s failed strike out application and the Petitioner pays the Respondent’s costs in respect of the Respondent’s successful case management stay application.
5. The Respondent says that the general rule is that costs should follow the event (Order 62 rule 4(5) of the Grand Court Rules). The Respondent says as a matter of common sense it was the successful party overall and it should have all of its costs of and occasioned by the Summons or alternatively the bulk of its costs.

The parties' position on the interim payment application

6. The Respondent seeks an order that the Petitioner pays 65% of its overall costs put at US\$383,362.72 on account.
7. Despite the wording of its summons dated 24 October 2024 the Respondent says that its position is that the court should (a) order an interim payment in the sum of US\$249,185 such payment to be made within 21 days and/or (b) order a taxation forthwith. The Respondent says that should the court be minded to make a forthwith order for taxation then it should be accompanied with an order for an interim payment pending conclusion of the taxation. The Respondent adds that should the court not be minded to order a taxation forthwith then an order for an interim payment should nonetheless be made.
8. The Petitioner's position is that it would be inappropriate to make an interim payment order for the same reasons that it would be appropriate to make an order for costs in the cause.
9. I have attempted above to summarise the position of the parties on the costs issues raised. I have considered all they have written in their written submissions.

Determination

10. In my judgment in the particular circumstances of this case it would not be appropriate to make an order that costs be costs in the cause.
11. I do not accept the Petitioner's submission that in light of the general costs rules which apply to liquidation proceedings an order for costs in the cause is appropriate. The Petitioner refers to Order 24 rule 8(2)(b) of the Companies Winding Up Rules and the reference to the "general rule" 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." The Petitioner also prays in aid Order 24 rule 8(4) of the Companies Winding Up Rules. In this case I am not making an order that costs should be paid out of the assets of the company. I am making an order that the unsuccessful party should pay the costs of the successful party and that such costs be taxed on the standard basis unless agreed. I am also making a "forthwith" order and an interim payment order and the general rules in liquidation proceedings do not prevent this

court from making such orders. There is no need to justify such orders by reference to “exceptional or special circumstances” but the particular circumstances of this case, as should be apparent from my judgments, fully justify the imposition of such orders.

12. I should add that in respect of the costs position the attorneys have referred to a large number of authorities. It is trite that each case depends on its own facts and circumstances and this is especially so when dealing with costs. I have full regard to the general guidance provided by the authorities, especially those at appellate level but my decisions on costs in this case are informed also by the particular facts and circumstances of this case.
13. In my judgment costs, in the particular circumstances of this case, should follow the event and the Respondent was the clear winner in respect of the overall result of the Summons. As the judgment was read, objective readers would have regarded the overall result as a victory for the Respondent and a defeat for the Petitioner.
14. Although I accept that the courts are more willing than in earlier times to make separate orders which reflect the outcome of different issues, I do not think such an order is appropriate in the particular circumstances of this case. The well established general rule that costs should follow the event does not cease to apply simply because the successful party raised an issue on which he has failed (Birt JA in *Scully Royalty Limited v Raiffeisen Bank International AG* 2022 (1) CILR 572 at paragraph 25).
15. Birt JA in *Trina Solar* (CICA unreported judgment delivered on 4 August 2023) at paragraph 20 referred to the English case of *Re Elgindata (No 2)* [1993] 1 ALL ER 232 at [237] and Nourse LJ’s comments that the general rule that costs should follow the event does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or costs of the proceedings he may be deprived of the whole or part of his costs. Nourse LJ also commented that where the successful party raises issues or makes allegations improperly or unreasonably the court may not only deprive him of his costs but order him to pay the whole or a part of the unsuccessful party’s costs. Birt JA at paragraph 22 noted that the English Civil Procedure Rules had not been enacted in this jurisdiction and the courts have continued to refer to *Elgindata*. Birt JA added:

- “23. Accordingly, whilst courts may be more willing than in the past to make orders which reflect success or failure on particular issues, the principles summarised in *Elgindata* remain applicable in this jurisdiction. In particular, before a successful party is ordered to pay the costs of the other party in relation to a particular issue upon which the successful party has failed, it must be shown that the issue has been raised [im]properly or unreasonably. However, there is no requirement for an issue on which the successful party has failed to have been raised improperly or unreasonably for the court to deprive the successful party of the costs of that issue.
24. Nevertheless, as stated in *Elgindata*, it must be an issue which has caused a significant increase in the length or cost of the proceedings. As this Court stated in *Scully Royalty Limited v Raiffeisen Bank International AG* (Unreported, 8 April 2022) at [26] by reference to the decision of Mann J in *Sycamore v Breslin* [2013] 4 Costs LO 572, in any litigation, especially complex litigation, any winning party is likely to fail on one or more issues in the case. The fact that a party has not won on every issue is not, of itself, a reason for depriving that party of part of its costs...”
16. The Respondent did not make an application or raise an issue or allegation that was improper or unreasonable. Moreover, the request for a strike out did not cause a significant increase in the length or costs of the proceedings. There was a large overlap in respect of the issues raised in the Summons. All in all it would be wrong to deprive the Respondent of its costs of its substantially successful Summons, especially in the context of the court having made serious criticisms against the approach adopted by the Petitioner.
17. The Respondent is right to refer to the parts of the judgment where the Petitioner was criticised as was the delay and the timing of the Petition.
18. The Petitioner should pay the Respondent’s costs of and incidental to the Summons to be taxed on the standard basis in default of agreement.
19. Furthermore, in the particular circumstances of this case and noting the delays of the Petitioner and the further time that will elapse until the eventual determination of its Petition, it is fair and just that costs should be taxed forthwith and not wait until the conclusion of the proceedings. In the

circumstances of this case the Respondent should not be without the payment of its costs for any longer than is necessary.

20. Segal J in *Jafar v Abraaj Holdings (in official liquidation)* (FSD unreported judgment delivered 1 November 2024) at paragraph 67 noted the comments of Birt JA in the particular context of *Trina Solar* at paragraph 36 that it is now well-established that the courts in this jurisdiction will normally make an order for an interim payment unless there is reason not to do so. There is no cogent reason not to make an interim payment order in this case. Indeed, there are cogent reasons for making such an order.
21. It is fair and just that the Petitioner make an interim payment on account of costs within 21 days of an order following this judgment being issued. I am content to assess such interim payment in the sum of US\$249,185.00.
22. The attorneys should provide the court for my approval a draft order agreed as to content and form within 7 days of the delivery of this judgment.

David Doyle

**THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT**