



Cause No: FSD 2023-0113 (JAJ)

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)
AND IN THE MATTER OF GRAND COURT RULES, ORDER 67, RULE 6

BETWEEN:

THE ARMAND HAMMER FOUNDATION, INC.

Plaintiff

-and-

- (1) HAMMER INTERNATIONAL FOUNDATION**
- (2) MARK ALFANO**
- (3) SAMUEL 1 LTD**
- (4) REX ALEXANDER**
- (5) MISTY HAMMER**
- (6) JEFF KATOFKY**
- (7) RANDALL BARTON**
- (8) RAISHA PARK**
- (9) CECIL KYTE**
- (10) ALEXANDER MENZEL**
- (11) THE ATTORNEY-GENERAL**

Defendants

Appearances: **Mr Graeme McPherson KC and Mr Matthew Dors instructed by Collas Crill for the Plaintiff**

Mr John Harris instructed by Nelsons for the Second to Tenth Defendants

Before: **The Honourable Justice Jalil Asif KC**

Heard: **18 April 2024**

Judgment: **24 April 2024**

CASE SUMMARY
(not part of judgment)

Payment on account of costs—principles to be applied—discount to be applied when assessing amount of payment on account—time for payment.

JUDGMENT

A. Introduction

1. This is my ruling on the costs issues that arise following my decision to adjourn the trial in this matter. In early January 2024, the trial was fixed to start on Monday 8 April 2024 (the first day being a reading day). On 4 April 2024, the Second to Tenth Defendants (referred to in this judgment as “*the Defendants*”) filed a summons to adjourn the trial. To accommodate the parties’ and the witnesses’ need to know whether the trial would go ahead as scheduled, I heard the summons on very short notice on Friday 5 April 2024 and indicated my decision that afternoon. The background to the adjournment and my reasons for granting it are set out in my substantive judgment dated 9 April 2024, and I do not repeat those matters in this judgment.
2. The three issues left open for decision following the hearing on 5 April 2024 and my previous judgment are:
 - a) What figure should the Defendants pay as a payment on account of the costs thrown away by the adjournment?
 - b) By what date should that payment be made?
 - c) What order should I make in relation to the costs of the summons to adjourn?
3. On 5 April 2024, I set a timetable for evidence and submissions to be filed and served addressing these three issues, which was formally recorded in my order dated 9 April 2024, so that they could be disposed of at a further hearing. On 18 April 2024, I heard oral argument, presented by Mr McPherson KC for the Plaintiff and Mr Harris for the Defendants.

4. The Plaintiff relies on the third affidavit of Thomas Wright sworn on 10 April 2024 to support its argument that the figure for the payment on account should be US \$200,000, that the payment on account should be made by 4.00 pm on 26 April 2024, and that the Defendants should pay the Plaintiff's costs of the summons to adjourn on the indemnity basis, with a payment on account of approximately US \$46,500, also to be made by 26 April 2024.
5. The Defendants have not served any evidence, but Mr Harris ably presented the Defendants' arguments to me on the law and the approach that I should take in determining the amount of the payment on account and in relation to the costs of the summons to adjourn. The Defendants' position is that: the evidence in support of the Plaintiff's application is insufficient to show what costs have actually been thrown away; I should only award a small sum to represent the likely logistical costs incurred – namely travel, accommodation and limited time for communicating with participants regarding the issues surrounding the potential adjournment of the trial; and I should award a modest allowance for counsel to re-familiarise themselves with the matter in advance of the re-listed trial. He says I should allow the Defendants 28 days to make any such payment and that I should make no order as regards the costs of the summons to adjourn the trial, but if I do make an order then it should be on the standard basis.

B. Amount of payment on account

B.1 General principles

6. The parties are essentially agreed as to the applicable law and practice. In summary:
 - a) On a taxation on the indemnity basis, the taxing officer should allow all costs that are reasonably incurred and reasonable in amount, with reasonableness being presumed in favour of the receiving party until proved otherwise by the paying party.

It is worth reiterating that an indemnity-basis taxation does not permit the receiving party to recover costs unreasonably incurred or in an unreasonable amount, it merely reverses the presumption of reasonableness on costs claimed.

- b) Where a taxation is ordered, GCR O.62 r.4(7) empowers the Court to order payment of “... *a reasonable sum on account of costs, such sum to be assessed summarily.*”

- c) Utilising the evidence presented, I must identify a reasonable sum within the range that I consider is the likely full amount which the Plaintiff will be allowed on taxation: see *Mars UK v Teknowledge Ltd (Costs)* [1999] 2 Costs LR 44 at 47, cited with approval in *Al Sadik v Investcorp BSC* [2019 (2) CILR 585] and forming part of Kawaley J’s reasoning, which was endorsed by the Court of Appeal in *Scully Royalty Ltd v Raiffeisen Bank International AG* [2022 (1) CILR 572]. The figure should not be the irreducible minimum that is likely to be awarded on taxation, but a reasonable estimate of the likely recovery: see *United Airlines Inc v United Airways Ltd* [2011] EWHC 2411 (Ch), also cited with approval by Kawaley J in *Al Sadik* and forming part of his reasoning in that case. The aim 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.
- d) The reasonable fees of “foreign lawyers”, as defined in GCR O.62 r.1, who have not been temporarily admitted in the Cayman Islands are potentially recoverable on a taxation on the indemnity basis, whereas they are not on a standard-basis taxation, since the court can disapply certain provisions within GCR O.62, r.18 for an indemnity-basis taxation. In principle, those fees can therefore be included in the assessment of an appropriate payment on account of costs.
- e) The assessment of an appropriate payment on account of costs is not a taxation. It is necessarily a summary exercise and will be imperfect in its outcome. In this case, for example, the Plaintiff’s claim for costs includes certain costs to be incurred, which are necessarily estimated figures. At the subsequent taxation, the taxing officer will scrutinise a detailed bill of costs in light of the parties’ submissions on recoverability of the amounts in fact incurred and claimed. The one certainty is that the final taxed figure will be different from whatever I assess as the likely recoverable costs.
7. On the practical front, *Re General Shopping Outlets do Brasil SA* [2020 (2) CILR 821] indicates that where there is to be an indemnity-basis taxation, the receiving party should generally obtain an order from the judge in advance of the taxation confirming that the normal restrictions in relation to foreign lawyers’ fees and expenses in GCR O.62, r.18(3)-(7) are to be disapplied on the taxation. In this case, Mr McPherson seeks an order disapplying GCR O.62 r.18(4) and (6) only.

B.2 *The discounting exercise*

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 Nominees Ltd v Principal Investing Fund I Ltd* (unreported, 26 January 2024), 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%.

B.3 Additional points of principle

14. There are three additional points of principle that arise.
15. First, Mr Harris submits that contested items in the costs claimed should be left for determination by the taxing officer. His argument seems to be that I should therefore omit them altogether when determining the amount of the payment on account. However, this ignores the presumption of reasonableness that applies in favour of the receiving party on a taxation on the indemnity basis. The approach I must take is to presume the reasonableness of the claimed costs, and therefore to include them when assessing the amount of the appropriate payment on account, unless and until the Defendants satisfy me otherwise.
16. Secondly, there is no suggestion in this case that there is a real risk that the Plaintiff will not be able to make any necessary repayment if a lower figure is allowed on taxation. Whilst this does not provide a licence for generosity in the Plaintiff's favour, since my task is to balance the interests of both sides, it does provide some comfort that the risk of injustice to the Defendants is likely to be reduced because it is likely that any overpayment can be repaid in due course, if necessary, with interest.
17. The last general point on quantification is that Mr Harris accepts that if the paying party wishes to argue that the hourly rates claimed are unreasonable, then it is incumbent on them to adduce evidence as to what they are paying their own attorneys: see Jones J in an earlier costs dispute in *Al Sadik v Investcorp Bank BSC* [2012] (2) CILR 33] at [7]:

"7. ... The legal fees scales do not apply with the result that the successful party may recover whatever hourly rates have been agreed with his attorneys unless the paying party can persuade the taxing officer that the contracted rates are unreasonably high (relative to those paid by the paying party). ..."
18. However, in this case, the Defendants have not adduced any such evidence. Mr Harris indicated that the Defendants are saving this to be argued at the taxation in due course. I simply note that, in light of Mr Harris' complaint that the Plaintiff's claimed fees overall are exorbitant, the hourly rates charged by the Plaintiff's attorneys appear to be within the guideline rates allowable since 1 January 2024.

B.4 Quantification of the payment on account of costs

19. In the relatively limited time available, Collas Crill have prepared a detailed analysis of the legal fees incurred on behalf the Plaintiff. Mr Wright stresses in his affidavit that the figures provided have been calculated on a cautious basis, with any doubt as to recoverability resolved in favour of the Defendants for present purposes, but reserving the Plaintiff's ability to include additional sums when the bill is eventually drawn for taxation. In addition, I was told during oral argument that the costs analysis went through a three-level internal review process within Collas Crill, including by the partner in charge. I accept that the analysis performed is, again, not a perfect exercise, but I am satisfied that it provides a reasonable basis on which to assess the costs likely to be awarded to the Plaintiff following a taxation on the indemnity basis.
20. I note here Mr Harris' complaint that the time records exhibited by Mr Wright are redacted to remove the descriptions of the work done. He says that, as a result, it is impossible for the Defendants and the court to form a view about the extent to which there may be duplication of effort. He invites me to consider whether the Plaintiff might be seeking to take advantage, in order to recover costs of the proceedings or the trial which have been wrongly badged as costs thrown away.
21. It is not surprising at this stage of the proceedings that Collas Crill's time entries have been redacted, since they are privileged and the main litigation is still very much alive. More significantly, it is correct that the absence of detailed time entries does not allow a line-by-line review of the time claimed. But such a review is inappropriate when performing the kind of assessment appropriate to determining a payment on account of costs: that is something that should occur during the taxation process. I note that Mr Harris draws this distinction himself in other aspects of his submissions. In my view, therefore, there is nothing of substance in Mr Harris' complaint.
22. Mr Wright's affidavit sets out details of the Plaintiff's approach to the calculation of its costs thrown away in three categories:
- a) costs of preparation for the adjourned trial and disbursements which have been wasted, approximately US \$93,200;

- b) costs that will need to be incurred again in relation to the re-listed trial in June 2024, approximately US \$122,112; and
 - c) costs incurred and to be incurred in relation to the application for a payment on account, reduced in the Plaintiff's skeleton argument from the original stated figure to approximately US \$68,745.
23. Strictly, the costs in the third category are not costs "thrown away" by the adjournment but have been incurred in relation to the linked application for a payment on account consequent on the adjournment having been ordered. However, this distinction does not seem to me to matter for present purposes.
24. The overall total which the Plaintiff claims for costs thrown away because of the adjournment is therefore approximately US \$284,057. Mr McPherson contends that this should be reduced to approximately 70%, for the reasons explained earlier, giving a net figure of approximately US \$198,840, which Mr McPherson invites me to round up to US \$200,000.
25. Mr Harris objects to the Plaintiff recovering the costs associated with Mr McPherson's travel to the Cayman Islands in advance of the intended trial. The Defendants' position is that the Plaintiff should have accepted that it was inevitable that the trial would be adjourned due to the obvious unfairness of requiring the Defendants to go ahead in the circumstances that faced them. As a result, the Plaintiff should have instructed Mr McPherson to cancel his travel arrangements, the parties could have submitted a consent order for the adjournment and Mr McPherson could have appeared remotely from the UK for any hearing regarding the adjournment that was necessary.
26. I reject this position for three reasons:
- a) The reality is that the Defendants first wrote by email sent at 17:57 Cayman time suggesting that Mr McPherson should not travel. This was at 23:57 UK time, when Mr McPherson was due to travel on the flight from London departing at 10.10 UK time the following morning. I accept the Plaintiff's argument that it is unreasonable to expect a decision to be made that Mr McPherson should not travel within the extremely limited time available, which was also outside normal working hours in both the Cayman Islands and in the UK.
 - b) I disagree with Mr Harris' submission that the court would have been willing to agree to an adjournment by consent. Given the timing of the Defendants' application, the last working

day before the 7-day trial was due to commence, I can say with confidence that I would not have agreed to a consent application from the parties to adjourn and would have required a full and detailed explanation of the reasons why an adjournment was necessary at such a late stage.

- c) I also disagree with Mr Harris' submission that it would have been appropriate for Mr McPherson to appear at any necessary application for an adjournment remotely from the UK. If Mr McPherson had stayed in the UK, that would effectively have been presenting the court with a *fait accompli*, since it would simply not have been practicable for Mr McPherson to travel for the trial if it were not adjourned. It seems to me to be entirely reasonable for the Plaintiff not to wish to take that position.

Thus, Mr McPherson had no alternative but to travel to the Cayman Islands as originally planned due to the late stage at which the Defendants raised the question of an adjournment of the trial.

27. Mr Harris complains about the totality of the time proposed for Mr McPherson to re-familiarise himself with the case before the commencement of the re-listed trial in June 2024 and to travel to the Cayman Islands for the trial. The Plaintiff seeks 5-6 days for the former and 3 days for the latter, making 8-9 days of Mr McPherson's time in total. Mr Harris suggests that Mr McPherson should need no longer than 1 day.
28. Mr McPherson responds that Mr Harris' assessment of 1 day for getting the case back up is seriously inadequate. He seeks to justify the travel time on the basis that he had a very bad experience late last year with a cancelled flight, so that he now travels further in advance of an impending hearing, to build in a safety margin.
29. On this point, I do not accept that it is unreasonable for Mr McPherson to want more than 1 day to prepare for the re-listed trial. However, I do consider that the overall total of 8-9 days is excessive and unreasonable. It also seems to me that there may be an element of double counting, in that Mr McPherson should be able to use at least some of the three days allocated to travel for trial preparation. In my judgment, a reasonable allowance for both preparation and travel is 5-6 days in total.

30. Mr Harris' next point on the constituent elements of costs claimed is that the fees of the Plaintiff's US attorneys, Nelson Mullins, ought not to be recoverable. He accepts that the case involves issues of US company law but submits that the Plaintiff has engaged an expert on US law who will give evidence on that topic. He says that, whilst it may have been necessary for the Plaintiff to involve Nelson Mullins at earlier stages of the case, it is not necessary now that the Plaintiff has engaged an expert and there is no need for Nelson Mullins to attend the trial or to be involved in preparation for trial.
31. Mr McPherson responds that Mr Wright's sworn evidence explains the role of Nelson Mullins in relation to the Cayman proceedings, which is a coordination role in relation to the parallel US proceedings. He says the Plaintiff's understanding is that the Sixth Defendant, who is a US-qualified litigation attorney, takes that role for the Defendants; however, the Plaintiff does not have that capability internally and neither does Collas Crill, which is what drives the need for Nelson Mullins to be involved in the Cayman proceedings.
32. For my purpose of determining the amount of a payment on account of costs, I am not satisfied that it is unreasonable in principle for Nelson Mullins to provide input and coordination between the US and Cayman proceedings, and so their fees are, in principle, recoverable. However, the Plaintiff's costs claim includes certain fees of Nelson Mullins in connection with the Plaintiff's application for a payment on account. I do not understand what role Nelson Mullins would have to play in that aspect of the Cayman proceedings – there is no obvious overlap with whatever is happening in the US proceedings. These fees therefore appear to be unreasonable on the material before me, and I conclude that Nelson Mullins' claimed fees should be reduced to this extent when assessing the appropriate sum for a payment on account of costs.
33. Finally, the Plaintiff's costs claim includes an estimated figure for the anticipated costs of dealing with the Defendants' evidence filed in respect of the application for a payment on account of costs. However, as Mr McPherson noted during oral argument in a different context, none has been served. In my judgment, the Plaintiff's costs claim must be reduced accordingly.
34. Making appropriate reductions to the Plaintiff's claim for costs thrown away by the adjournment and the application for a payment on account of costs, and then applying a 30% reduction to that total figure, gives approximately US \$179,470, which I round up to US \$180,000 as an appropriate payment on account.

C. Time for payment

35. Mr McPherson submits that I should order the payment on account to be made within 7 days. His reasons can be shortly recorded as follows:
- a) The authorities on payments on account are expressed in terms of the receiving party being entitled to payment “immediately”.
 - b) There is no evidence adduced by the Defendants that they need time to pay, and there is no justification for allowing them more than a short time to pay.
 - c) The fact that the Defendants have been able to put Mr Harris’ firm in funds so that he is able to appear on their behalf indicates that they can find the money if it is needed.
 - d) Finally, given that the re-listed trial is due to commence in six weeks’ time, the time for the Defendants to pay needs to be sufficiently soon that, if they do not pay, there is time enough for the court to make a debarring order, for the Defendants to have a chance to comply with it, and for any consequences for the conduct of the trial to be worked through before it starts if they fail to comply.
36. Mr Harris argues that what is a reasonable time for payment depends on what sum is ordered to be paid. He says that there are, in effect, nine different defendants and that there are likely to be logistical issues in coordination with all of them. He points out that in *Credit Suisse Nominees Ltd*, Kawaley J said at [20]:
- “20. In my judgment there is no practice in this Court of requiring interim payments to be paid within any specific period time. Each interim payment applicant identifies what they consider to be a reasonable payment period and the period determined by the Court will be either that period or such longer period as may be (1) agreed or (2) shown by the paying party to be properly required. The starting assumption ought to be, having regard to the policy underpinning the interim payment on account of costs jurisdiction, that the period for payment will be short, not longer than 14 to 28 days.”*
37. Mr Harris relies on this as supporting a period for payment of at least 14 days and invites me to allow the Defendants 28 days to make the payment on account.
38. I agree with Kawaley J’s statement that there is no established practice as to what period should be permitted. To repeat my earlier comment, every case is different – ultimately, the court should allow a reasonable period that is appropriate to the circumstances of the parties that are before it.

39. In this case, my conclusion is that the payment should be made within 7 days for the following reasons:
- a) On the Defendants' own case, they have known since no later than 2 April 2024 that they will have to make a payment on account of costs and that it is likely to be substantial. From 3 April 2024 onwards, the Plaintiff repeatedly stated that it estimated its costs thrown away would be about US \$500,000. In Mr Wright's affidavit sworn on 10 April 2024, a reduced figure of US \$350,516 was advanced for the total of the costs thrown away by the adjournment and the costs of the summons. The Plaintiff's skeleton argument filed on 17 April 2024 apportioned US \$284,057 of this as costs thrown away and US \$66,460 as costs of the summons to adjourn, before any discount and sought as a payment on account the discounted sum of US \$200,000 for the costs thrown away. The Defendants have therefore known for more than 14 days that the Plaintiff was seeking at least US \$200,000 and should have been making arrangements to amass a substantial sum to meet the likely order. I note that over this same period the Defendants have clearly been able to find money to put Mr Harris' firm in funds.
 - b) Mr McPherson is right that there is no evidence from any of the Defendants that they are unable to make a payment of around US \$200,000 or that they will need time to pay.
 - c) I do not accept Mr Harris' assertion that I should take into account possible difficulties for the Defendants in coordinating the payment – the Defendants are jointly and severally liable for the sum to be paid, the working out of how that sum is funded between them is something for them to address behind the scenes and to their own timeline – it should not impact on the payment to the Plaintiff.
 - d) Mr McPherson is also right that, on the facts of this particular case, it is necessary that the Plaintiff has the opportunity to seek a debaring order if the Defendants default in payment, and that sufficient time for that step and the potential follow-up needs to be factored into the assessment of a reasonable time for payment.

D. Costs of the summons to adjourn the trial

40. Mr Harris accepts that this is not a case where the costs of the summons to adjourn the trial should follow the event: he accepts that the Defendants should not recover their costs even though he argues that the Defendants effectively obtained everything they sought by the summons and the Plaintiff lost on nearly every aspect that it argued. He contends that the appropriate order is no order as to costs.
41. To expand on the above summary, Mr Harris repeats his submission that the application to adjourn could have been dealt with by consent or by way of a remote hearing and argues that the Plaintiff failed to engage with the Defendants regarding the adjournment and acted unreasonably. He says the Plaintiff should have accepted the inevitability of an adjournment, and discussed in correspondence with the Defendants what arrangements should be made so that the parties could put that agreed position before the court.
42. Mr Harris stresses that every point that the Plaintiff argued at the hearing on 5 April 2024 was decided in the Defendants' favour. He says it was completely open to the Plaintiff to oppose the application for an adjournment if it wished but that does not give the Plaintiff a free pass to avoid the usual rule that costs follow the event.
43. As to the basis on which costs should be assessed, if I am against him, Mr Harris notes that the Plaintiff must show unreasonable or improper conduct on the part of the Defendants. He says that there is none in relation to the adjournment application – and repeats that the Defendants won on every point argued. He says that this demonstrates that it is not possible to find that the Defendants' conduct was so unreasonable as to justify costs on the indemnity basis.
44. Mr McPherson submits that it is ridiculous to suggest that the Plaintiff should have agreed to an adjournment of the trial, in particular because the summons was not issued until 4 April 2024 and was heard on 5 April 2024. In the lead up, the Plaintiff was not given any information about the Defendants' situation apart from confirmation that they were changing attorneys, but with no explanation why.
45. He argues that it was clearly necessary that there should be a hearing regarding the adjournment:
- a) TTA did not make any application to come off the record, although they said they would make one;

- b) the Defendants were able to find Nelsons to act for them in place of TTA within 24 hours;
 - c) there was no explanation from the Defendants why this was not done earlier;
 - d) there was no explanation from the Defendants why a change in attorneys was needed at all;
and
 - e) the court would have wanted to understand why its time was being wasted in this way.
46. As a result, Mr McPherson argues, the Plaintiff could not simply have agreed to adjourn the trial.
47. Further, Mr McPherson notes with some justification, that neither TTA nor Nelsons were in fact able to help the court at the hearing of the summons as to what the case is about and what will be the issues at trial, beyond stating that the Defendants were asking for an adjournment. The Plaintiff had to carry that burden. He submits that it was entirely reasonable for the Plaintiff to come to court, to explain the situation to the court and to oppose the adjournment application.
48. Mr McPherson says that I should order that the Defendants pay the costs of the summons on the indemnity basis because the court was asked to adjourn the trial on the basis of very thin evidence and that having ordered that the costs wasted by the adjournment are to be paid on the indemnity basis, that should carry over to the costs of the summons itself. He says that I should consider the Defendants' conduct that led to the necessity for the summons rather than focus just on their conduct of the summons itself.
49. In response to Mr Harris' submission that the Plaintiff lost on every point argued, Mr McPherson counters that the Plaintiff obtained an order for a substantial payment on account of costs and also the early re-listing of the trial, neither of which had been offered by the Defendants, despite the Plaintiff having requested them in correspondence.
50. Finally, he submits that the Defendants should make a payment on account of the costs of the summons within the same period as the primary payment on account in respect of the costs thrown away by the adjournment.
51. The substantive question I must decide is therefore should the Plaintiff's costs of the summons be borne by the Plaintiff or by the Defendants – noting that the Defendants do not seek their costs and their position is that I should make no order for the Plaintiff's costs.

52. My conclusion is that in light of the stage at which the Defendants' request for an adjournment arose, the lack of any detailed explanation of the Defendants' reasons for seeking it, and the extremely compressed timeline facing the Plaintiff as a result, it was appropriate for the Plaintiff to take the position that it did in seeking to ensure that the court was fully apprised of the arguments surrounding the possible adjournment and in opposing the application.
53. I therefore conclude that the Defendants should pay the Plaintiff's costs of and occasioned by the summons to adjourn the trial.
54. However, I agree with Mr Harris that there was nothing about the Defendants' conduct regarding the summons that justifies making an order that those costs should be taxed on the indemnity basis rather than the standard basis. I do not agree that it is appropriate to look at the Defendants' wider conduct in considering the basis of taxation for the costs of the summons – the Plaintiff has already been compensated for that by the order that the costs thrown away by the adjournment are to be taxed on the indemnity basis.
55. I do agree with Mr McPherson that the Defendants should make a payment on account. As the eventual taxation will be on the standard basis, I discount the total costs claimed, as set out in Mr Wright's affidavit and refined in the Plaintiff's skeleton argument, by 50% and round that figure up to US \$33,000. The Defendants shall make that payment on account within the same period as the primary payment on account, i.e. by 4.00 pm on 26 April 2024.

Dated 24 April 2024



**THE HONOURABLE JUSTICE ASIF KC
JUDGE OF THE GRAND COURT**