



**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS  
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**CICA (Civil) Appeal No. 21 of 2020  
(Formerly Cause No. FSD 162 of 2019 (RPJ))**

**BETWEEN**

**SCULLY ROYALTY LIMITED  
FIRST APPELLANT / FIRST DEFENDANT**

**MFC 2017 II LIMITED  
SECOND APPELLANT / FIFTH DEFENDANT**

**-AND-**

**RAIFFEISEN BANK INTERNATIONAL AG  
RESPONDENT / PLAINTIFF**

**CONSIDERED ON THE PAPERS**

**Before:** The Hon Dennis Morrison, Justice of Appeal  
The Right Hon Sir Alan Moses, Justice of Appeal  
The Hon Sir Michael Birt, Justice of Appeal

**Appearances** John Wardell QC instructed by Nicholas Fox and Harry Rasmussen of Mourant for the Appellants  
Tim Penny QC instructed by William Jones and Christopher Levers of Ogier for the Respondent

Draft circulated: 30 March 2022

Judgment Delivered: 08 April 2022

**JUDGMENT ON COSTS**

**Birt, JA**

1. This judgment deals with the issue of costs following the judgment of the Court dealing with the substantive appeal which was handed down on 30 December 2021 (“the Judgment”). Terms and expressions defined in the Judgment have the same meaning in this judgment.

2. The brief background to the Judgment is as follows. In the Grand Court, Parker J granted freezing orders against the Appellants in support of RBI's claim against the Appellants and other companies as defendants. The Appellants appealed against that decision and listed seven Grounds of Appeal. The first six Grounds were directed towards the Appellants' contention that the freezing order should not have been granted. Ground 7 was different. It argued that if, contrary to the Appellants' main contention, it was appropriate to grant the freezing order, Parker J had wrongly failed to impose a cap on the order. The Appellants contended that the cap should be at a figure of €44m whereas the Respondent contended that, if there was to be a cap at all (which it did not accept), the cap should be a figure of €153m.
3. For the reasons set out in the Judgment, the Court rejected Grounds 1-6. It acceded to the Appellants' submission on Ground 7 that there should be a cap, but fixed that cap at the figure put forward by the Respondent of €153m rather than the figure put forward by the Appellants of €44m.
4. The Court now has to resolve the issue of costs, having received written submissions on that topic from the parties and having considered the matter on the papers.

#### **Summary of the parties' positions**

5. The parties have sub-divided the costs into five parts namely:
  - (i) The Appellants' appeal against the judgment of Parker J (the "Appeal");
  - (ii) The Appellants' application, by summons dated 23 September 2020, to stay an order of the Grand Court that the Appellants pay the Respondent's costs before Parker J pending the outcome of the appeal (the "Stay Application");
  - (iii) The Appellants' application, by summons dated 6 July 2021, to adduce further evidence on the appeal, namely the 9<sup>th</sup> and 11<sup>th</sup> affidavits of Mr Morrow ("Morrow 9" and "Morrow 11") (the "Appellants' Evidence Application");
  - (iv) The Respondent's application, by summons dated 6 August 2021, to adduce further evidence on the appeal, namely certain paragraphs of the 13<sup>th</sup> affidavit of Mr Dellemann ("Dellemann 13") (the "Respondent's Evidence Application"); and

(v) The Appellants' application by summons dated 12 August 2021, to adduce further evidence on the appeal, namely the 13<sup>th</sup> affidavit of Mr Morrow ("Morrow 13") (the "Appellants' Further Evidence Application").

6. The Respondent seeks the following costs orders in relation to the above five matters:

- (i) As to the Appeal, costs on the standard basis.
- (ii) As to the Stay Application, costs on the standard basis.
- (iii) As to the Appellants' Evidence Application, costs on the indemnity basis.
- (iv) As to the Respondent's Evidence Application, costs on the standard basis.
- (v) As to the Appellants' Further Evidence Application, no order as to costs.

The Respondent also seeks orders that (i) restrictions on the recovery of foreign lawyer costs should be disappplied, (ii) there be an order that any costs awarded by this Court should be taxed and paid forthwith, and (iii) there be an interim payment on account of any costs the Court may order.

7. The position of the Appellants is as follows:

- (i) As to the Appeal, the Appellants accept that costs should follow the event, but submit that there should be a 15% reduction in the costs awarded to the Respondent to reflect the Appellants' success on Ground 7.
- (ii) As to the Stay Application, the Appellants accept that they should pay these costs on the standard basis but with a similar reduction to reflect their success on Ground 7.
- (iii) As to the Appellants' Evidence Application, there should be no order as to costs or, if that submission is not successful, costs should be on the standard basis, not the indemnity basis as sought by the Respondent.
- (iv) As to the Respondent's Evidence Application, there should be no order as to costs.
- (v) As to the Appellants' Further Evidence Application, there should be no order as to costs.

The Appellants object to an order for immediate taxation and payment of any costs ordered, but accept that there should be an interim payment, albeit at a lesser sum than that

contended for by the Respondent. They also submit that the normal prohibition on recovery of the costs of foreign lawyers should be adhered to.

### **The Appellants' Evidence Application**

8. I think it is convenient to deal with this topic first. The background to the application was summarised in the Judgment as follows:

*“29. In essence, Morrow 9 and Morrow 11 seek to fill gaps in the evidence which the judge identified.... However, it is clear that all of this was available to the Appellants at the time of the hearing before the judge and could have been adduced at that time.*

*30. The manner in which the Appellants sought to adduce this additional evidence is most irregular. Despite the fact that the affidavits were sworn for other purposes in the main proceedings as long ago as the end of 2020 and the appeal has been on foot since July 2020, the summons for leave to adduce this additional evidence was only filed on 6 July 2021. The Appellants' skeleton in support of the appeal was filed the same day. The skeleton deals with the application to adduce additional evidence at paras 10-14 by reference to the decision of this Court in Columbraria Limited v Beteta [2000] CILR Note 2 and, having done so, the rest of the skeleton assumes that the application has been successful, in that it refers to and relies heavily on the contents of Morrow 9 and Morrow 11.*

*31. I have to say that this was a most unsatisfactory method of proceeding. If the application were to be refused, it would be extraordinarily difficult to disentangle those parts of the Appellants' argument which rely on Morrow 9 or Morrow 11 from those parts which are referable to the material before the judge, mainly Smith 5. It is not acceptable for an appellant to assume that an application to adduce additional evidence will be successful and to frame its arguments entirely by reference to the additional evidence. What should have occurred is that the Appellants' skeleton should have been in two parts, with one part referring to the material before the judge and the other written on the assumption that the application to adduce further evidence was successful. The Court would then have been in a position easily to appreciate the relevant arguments of the Appellants by reference to whether or not it had granted the application for additional evidence.”*

9. Having considered the case of Columbraria and having decided that the approach in that case should no longer be followed, the Court went on to say at para 43 that, had the matter rested there, the Appellants' Evidence Application would have been rejected because no good reason had been shown for the failure to adduce the evidence before the judge.
10. However, the Court decided that the best course, in the unusual circumstances of the case, was to allow the further evidence on the basis that:
- (i) because of certain errors on the part of the judge, the Court would exercise its own discretion;
  - (ii) the fact that, because of the way in which the Appellants had presented their appeal, it would be difficult to extract from the Appellants' submissions those parts which were referable to the original evidence and those parts which were referable to the further evidence; and
  - (iii) no real prejudice would be suffered by the Respondent as it had been aware of the additional evidence since late 2020 and had responded to that evidence by means of Dellemann 11.
11. The Respondent submits that not only should it be awarded its costs in relation to the Appellants' Evidence Application, but these costs should be on the indemnity basis rather than the standard basis. It submits that the conduct of the Appellants in relation to this application was unreasonable, thereby justifying the imposition of indemnity costs. They point to the lateness of the application, to the erroneous reliance on Columbraria, to the failure to meet the Ladd v Marshall criteria, and to the muddling up of the original evidence with the further evidence in their skeleton argument, which really left the Court with little option but to grant an otherwise unmeritorious application.
12. In response, the Appellants submit that there is no basis upon which they should be ordered to pay the costs of the Appellants' Evidence Application, let alone on the indemnity basis. As to the point that the application was made very late, they say that until July 2021, it was anticipated that the Appeal and an application for leave to appeal against a decision in the challenge to the jurisdiction by two other defendants, D3 and D6 ("the Jurisdiction Challenge") would have been heard together, in which event Morrow 9 and Morrow 11, which had been adduced in evidence in the Jurisdiction Challenge, would have been before

the Court in any event and there would have been no need to apply for fresh evidence to be adduced in the Appeal. It was only when it became clear that the two matters could not be heard together in this Court that it was necessary to make an application to adduce the evidence in relation to this appeal and that was why it was made so late. This also explained why the skeleton was written as if Morrow 9 and Morrow 11 were before the Court.

13. I do not accept that this excuses the late application and muddling up of the original and further evidence in the skeleton. Even if the Appeal and the application for leave to appeal in the Jurisdiction Challenge had been heard together, it would still have been necessary for the Appellants to apply for leave to adduce Morrow 9 and Morrow 11 in connection with the Appeal. The Appeal would have to be considered on the basis of the material before Parker J in relation to the freezing orders unless or until leave was given for further evidence to be adduced in the Appeal. Accordingly, the fact that it was hoped that the two matters could be heard before this Court together provides no excuse for the lateness of the application and the consequent muddling up of evidence.
  
14. In response to the other points made by the Respondent, the Appellants submit as follows:
  - (i) The application was in fact successful, as leave to adduce Morrow 9 and Morrow 11 was granted. It would not be appropriate to award costs against the Appellants in relation to a successful application.
  - (ii) The application was not granted just because of the difficulties of segregating Morrow 9 and Morrow 11 from the remaining evidence. The first reason given by the Court for admitting the further evidence was that the Court of Appeal would be exercising its own discretion rather than simply reviewing that of the judge and it would be appropriate to allow in the evidence so that the Court could exercise its discretion having regard to all the material.
  - (iii) It was perfectly reasonable for the Appellants to have relied on Columbraria as reflecting the correct approach to the admissibility of further evidence on an appeal in interlocutory matters. It was only as a result of the Judgment that Columbraria was no longer to be followed and that the Ladd v Marshall criteria should now be considered.

15. Grand Court Rules (2022 Revision) ("GCR"), O.62, r.4(11) deals with when the Court may award costs on the indemnity basis in the following terms:

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

16. For our purposes, the question is whether the Appellants’ Evidence Application was conducted unreasonably such that it would be right to award indemnity costs. Whilst the Court was critical of the manner in which the Additional Evidence Application had been conducted by the Appellants, the fact remains that the application was granted. Furthermore, it was clearly not unreasonable for the Appellants to rely on the approach in Columbraria, as it is only following the Judgment that the Columbraria approach is no longer to be considered appropriate. In all the circumstances, I do not think that it would be right to award indemnity costs in connection with the Appellants’ Evidence Application.
17. In my judgment, the Appellants’ Evidence Application should be regarded as part and parcel of the Appeal itself and not hived off to be dealt with separately. It is often the case that applications for further evidence are made in connection with an appeal and it is common for such costs simply to form part of the overall costs of the appeal. I consider that in this case that would be a fair outcome. It will mean that, despite being successful in the application, the Appellants will have to pay the costs of the application, albeit on the standard basis and subject to any deduction the Court may decide upon in relation to the Appeal. This would fairly reflect the fact that, although ultimately successful in the application, the very unsatisfactory manner in which they conducted the application was undoubtedly a factor in the Court’s decision (albeit only one of three).
18. I should add that the Respondent submitted that, if an order for indemnity costs was made in respect of the Appellants’ Evidence Application, the Respondent’s costs should cover not only the usual costs of the Respondent in responding to the application in its skeleton and preparing for oral argument on the point, but also to time spent in addressing the submissions of the Appellants which were based upon the material in Morrow 9 and Morrow 11. The Respondent conceded that it was difficult to isolate the precise further costs that this occasioned but it submitted that 25% of all its costs after 6 July 2021 would

be a fair estimate. Accordingly, it sought an order that 25% of all its costs after 6 July 2021 should be taxed on the indemnity basis rather than the standard basis.

19. In view of the Court's decision not to grant indemnity costs, this point no longer arises. However, had indemnity costs been awarded, they would, in my judgment, have been confined to responding to the application in the skeleton and preparing to do so orally. The costs of responding to submissions based on the material in Morrow 9 and Morrow 11 are simply costs of the Appeal because the Court granted the Appellants' Evidence Application, so that Morrow 9 and Morrow 11 became part of the material before the Court.
20. The Respondent also suggested that the costs of preparing Dellemann 11 should be regarded as costs incurred in connection with the Appellants' Evidence Application. I cannot accept that submission. Morrow 9 was filed as part of the Jurisdiction Challenge and Dellemann 11 was filed in response in those proceedings well before there was any application for Morrow 9 or Morrow 11 to be adduced as evidence in connection with the Appeal.

#### **The Respondent's Evidence Application and the Appellants' Further Evidence Application**

21. For my part, I would regard both of these applications – on which very little time and effort was spent – as being part and parcel of the Appeal, with the result that the costs of the applications would be dealt with as part of the decision on the costs of the Appeal itself. However, in relation to the Appellants' Further Evidence Application, the Respondent has not applied for costs. It is suggested that there should be no order for costs and this has been agreed to by the Appellants. I do not think it would be right to go behind this common ground and there should therefore be no order as to costs in relation to the Appellants' Further Evidence Application. The costs of the Respondent's Evidence Application should be dealt with as part of the costs of the Appeal.

#### **Costs of the Appeal**

22. The Respondent submits that costs should follow the event and that the Appeal essentially failed. The challenge to the imposition of the freezing order (Grounds 1-6) failed completely. The only point on which the Appellants succeeded was in relation to the imposition of a cap (Ground 7), but, even on that aspect, the Respondent was partially successful because the Court accepted its submission as to the amount of the cap and

rejected the Appellants' case that the cap should be limited to €44m. In all the circumstances, the Respondent should either be awarded all of its costs on the standard basis or, at worst, there should be a deduction of no more than 5%.

23. The Appellants accept that costs should follow the event but submit that there should be a deduction of 15% in order to reflect the Appellants' success on Ground 7. Ground 7 was an important aspect of the Appellants' appeal because of the practical difficulties which the lack of a cap caused and the Respondent's opposition to the imposition of any cap was unreasonable. Furthermore, the Respondent's case as to the amount of any cap kept changing and it only came up with a figure of €153m very late in the day. 15% was a better approximation than 5% of the time and effort spent on matters pertaining to Ground 7 and of the significance of the lack of a cap to the Appellants' overall case on appeal.
24. O.62, r.4 of the GCR provides as follows (so far as relevant):

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

....

***(5) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.”***

25. It is well established that the general rule that costs should follow the event does not cease to apply simply because the successful party raises issues on which he fails, but the Courts are more willing than in earlier times to make separate orders which reflect the outcome of different issues. As Lord Woolf MR said in A.E.I Rediffusion Music Limited v Phonographic Performance Limited [1999] 1 WLR 1507 at 1523:

***“It is now clear that too robust an application of the ‘follow the event principle’ encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your***

*costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so.”*

26. We were referred to a helpful summary of the position by Mann J in the English Chancery Division in Sycamore v Breslin [2013] 4 Costs LO 572; [2013] EWC 583 (Ch) at [12] where he said:

*“In addition:*

*(i) 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.*

*“There is no automatic rule requiring reduction of a successful party’s costs if he loses on one or more issues. In any litigation especially complex litigation such as the present case, any winning party is likely to fail on one or more issues in the case. As Simon Brown LJ said in Budgen v Andrew Gardner Partnership [2002] EWCA Civ 1125 at para 35: ‘The court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues’. (Gloster J in Kidsons v Lloyds Underwriters [2007] EWHC 2699 (Comm).)”*

*(ii) The reasonableness of taking a failed point can be taken into account (Antonelli v Allen, The Times 8 December 2000 per Neuberger J).*

*(iii) The extra costs incurred with the failed points should be considered (Antonelli).*

*(iv) One still has to stand back and look at the matter globally, and consider the extent, if any, to which it is just to deprive the successful party of costs (Antonelli).*

*(v) The conduct of the parties, both before and during the proceedings, is capable of being relevant (CPR 44.3 (5)).”*

27. We were not referred to any local authority on this topic but in my judgment the guidance to be obtained from the above cases is of equal assistance in this jurisdiction.

28. I would add that, where a deduction is to be made, it is, in my view, generally preferable to adopt a broad and reasonably robust approach and estimate a percentage deduction rather than ordering a deduction by reference to the exact time spent on the unsuccessful issue,

which can only be ascertained following what may be complex and expensive taxation proceedings; see also the observation to like effect of Robert Walker J in United Wire Limited v Screen Repair Servs (Scotland) Limited [1997] TLR 467.

29. In my judgment, Ground 7 was of sufficient significance and the time and effort devoted to it was such that there should be a deduction. The question of whether there should be a cap was of importance to the Appellants and the Respondent's argument that there should be no cap was not a strong one. However, the time and effort necessary to deal with Ground 7 was materially less than some of the other grounds, such as Grounds 1 to 3. Furthermore, although successful on the principle of a cap, the Appellants were unsuccessful on the level of the cap and on other arguments within Ground 7, all of which took up a material proportion of the time and effort in relation to Ground 7.
30. Putting these matters together and standing back to take an overall view, I conclude that a deduction of 5% would be fair and reflect the justice of the case.

#### **Costs of the Stay Application**

31. Parker J ordered that the costs in connection with the hearing before him should be taxed and paid forthwith. Taxation subsequently took place and the amounts due by the Appellants were ascertained. Thereafter the Appellants sought a stay of their obligation to pay these sums by summons dated 23 October 2020, on the basis that they were appealing against the grant of the freezing orders. The parties agreed by consent that (i) the Appellants would pay the taxed sums into court, to be held until the outcome of the Appeal was determined or further order; and (ii) the costs of the Stay Application would be reserved to the Court of Appeal following the Appeal.
32. The Respondent seeks an order that the sums paid into court should now be released to the Respondent and that the Appellants should pay the costs of the Stay Application because the Appeal has failed.
33. The Appellants accept that they should pay the costs of the Stay Application on the standard basis but submit that they should be subject to the same reduction as the Appeal itself.

34. In my judgment, the fair outcome is that the costs order in relation to the Stay Application should reflect the decision we have reached on the Appeal itself so as to mark the success of the Appellants on Ground 7. Accordingly, I would order that the Appellants pay the costs of the Stay Application on the standard basis subject to a deduction of 5% and that the sums held in court should be released to the Respondent.

**Foreign lawyers' costs**

35. GCR O.62, r.18 provides as follows (so far as relevant):

***“(1) Work done by foreign lawyers may be recovered on taxation under these rules on the standard basis provided that:***

- (a) the foreign lawyer has been temporarily admitted as an attorney; and***  
***(b) the work was done after he was admitted.”***

36. Practice Direction No. 1/2001, Guidelines relating to the Taxation of Costs, provides at section 6.4:

***“6.4 Legal fees paid to foreign lawyers cannot be claimed as disbursements unless the foreign lawyer is engaged to give an opinion on a point of foreign law which is in issue in the proceedings.”***

37. We were referred to a number of cases which have held that, when costs are awarded on the indemnity basis, r.18(1) does not apply and the costs of a foreign lawyer who has not been admitted locally may be recovered; e.g. Sagicor v Crawford [2008] CILR 482 per Henderson J at [5]; In Re General Shopping E Outlets do Brasil SA, FSD 58 and 59 of 2019 (25 August 2020) per Kawaley J at [19] – [25].

38. The Respondent submits that, to the extent it is awarded costs on the indemnity basis, it should be authorised to recover the costs of its foreign lawyers, namely London junior counsel and its London solicitors.

39. In the light of the Court’s decision not to award any costs on the indemnity basis, the point no longer arises. Pursuant to r.18(1), the costs of foreign lawyers who have not been

temporarily admitted are not recoverable where costs are awarded on the standard basis and the Respondent did not seek to argue otherwise.

40. I would add one comment, although this point also no longer arises. The Respondent submits that, if it were to be awarded costs on an indemnity basis and the Court allowed the costs of foreign lawyers, the Court should also make an order disapplying the provisions of r.18(3) and r.18(5) which provide respectively:

*“(3) Whenever a claim is made for work done by foreign lawyers, the taxing officer will investigate whether it has resulted in a duplication or increase in the cost of the proceedings and any such increase shall be disallowed...”*

*“(5) The taxing officer shall disallow any item which appears to have been incurred, or the costs of which appears to have been increased, because the successful party has engaged both local attorneys and foreign attorneys.”*

41. It is not clear to me that, even where costs are on the indemnity basis, these provisions should be disappplied. For my part, I would agree with the observation of Ramsay-Hale J in BDO v Ardent, FSD 74 of 2020 (27 April 2021) at [63] where she said:

*“Sub-rules (3) and (5) are aimed at avoiding duplication. The fact that costs have been awarded on the indemnity basis does not give rise to a right to recover costs which the payee has incurred unreasonably. Duplicated costs, as a matter of principle, are irrecoverable both on the standard and the indemnity basis as not being reasonably incurred. For that reason, sub-rules (3) and (5) ‘are still germane’ as Henderson J suggested in the Sagicor case.”*

#### **Immediate taxation and payment**

42. The Respondent submits that the costs awarded by this Court should be taxed and payable forthwith.
43. GCR O.62, r.9 provides:

***“(1) Subject to paragraph (2), the costs of any proceedings shall not be taxed until the conclusion of the cause or matter in which the proceedings arise.***

***(2) If it appears to the Court when making an order for costs that all or any part of the costs ought to be taxed at an earlier stage it may order accordingly.***

***(3) .....***

***(4) Where it appears to the Court on application that there is no likelihood of any further order being made in a cause or matter, it may forthwith order the costs of any interlocutory proceedings which have taken place to be taxed.”***

44. R.9 was considered by Smellie CJ in In Re The Sphinx Group of Companies [2009] CILR 178. In that case, the chief justice had considered the interlocutory issue of whether there should be a direction for the trial of a preliminary issue. Having made an order for costs against the party who had lost on that particular issue, he considered the request of the successful party that there should be an order that such costs be taxed and paid forthwith.

45. The chief justice held that the normal expectation was that costs should only be taxed at the conclusion of the cause or matter pursuant to r.9(1) and that there needed to be exceptional circumstances for an order to be made under r.9(2) for earlier taxation. He also concluded that a cause or matter was not concluded merely because an interlocutory matter had been determined.

46. He expressed the matter thus at paragraphs 8 – 10:

***“8. The second question is whether DPM should be ordered to pay these costs forthwith. DPM’s further contention is that even if, as I have determined, a dispositive costs order should now be made, the further exceptional requirement that it be paid forthwith – which is contended for by the joint official liquidators and the committee – cannot be justified. The normal costs order to be made in respect of an interlocutory proceeding such as the present is that the costs be taxed if not agreed in the usual way, and be paid at the conclusion of the case.***

**9. *An order for payment forthwith would therefore be exceptional and was so acknowledged by the other parties. The rules of court would clearly so regard such an order. Order 62, r.9(1) of the Grand Court Rules provides that ‘the costs of the proceedings shall not be taxed until the conclusion of the cause or matter in which the proceedings arise’ unless, subject to r.9(2), earlier taxation is deemed suitable by the court.***

**10. *A cause or matter is concluded when the court in question has finally determined the matters in issue, whether or not there is an appeal from that determination. So said Saville J in Rafsanjan Pistachio Producers Co-op v Bank Leumi (UK) Limited...indicating that an interlocutory application...would not ordinarily be a proper stage at which to make an order for costs to be taxed forthwith. In the absence of any exceptional circumstances, I take the same approach here and refuse to order that there shall be taxation and payment forthwith.***”

47. The Respondent’s primary submission is that the present case falls within r.9(1). The issue of whether there should be a freezing order has been finally determined by the Judgment. Alternatively, in accordance with r.9(4), there is no likelihood of a further order being made in relation to the freezing order given that this Court has ruled definitively on whether the Respondent has a good arguable case and whether there is a risk of dissipation.

48. I cannot accept either of these submissions. I respectfully agree with Smellie CJ that r.9(1) draws a distinction between the ‘*cause or matter*’ and the ‘*proceedings*’ in which the costs order has been made. The ‘*cause or matter*’ in this case is the claim by the Respondent against the Appellants and others for certain transactions to be set aside or for damages in relation to the alleged disposal of assets by D2, one of the defendants. That will only be concluded after the main trial. The present proceedings relate to the subsidiary issue of whether there should be a freezing order pending determination of the cause or matter. The situation therefore prima facie falls within r.9(1) and the costs of the proceedings in relation to the freezing order (including this Appeal) should not be taxed until after the conclusion of the Respondent’s claim against the various defendants. Nor can it be said that there is no likelihood of any further order being made in the main proceedings so as to bring the matter within r.9(4).

49. The Respondent’s secondary argument is that the Court should make an order under r.9(2). It submits that there are exceptional circumstances in this case on the basis of the

unreasonable conduct of the Appellants in connection with the Appellants' Further Evidence Application.

50. I do not accept that argument. Whilst the Court was critical of the actions of the Appellants in respect of that application, I do not see that it is relevant to the issue of whether there are exceptional circumstances pointing towards immediate taxation.
51. I would add that there is an argument for thinking that the threat of a losing party in an interlocutory matter having to pay the costs of that matter forthwith may discourage unnecessary or over-optimistic interlocutory jousting and consequent incurring of unnecessary expense. But it is a matter for those with responsibility for the GCR to decide whether r.9(1) in its present form remains appropriate or whether it should be made more discretionary. Neither party sought in this case to argue that the decision of Smellie CJ in Re Sphinx requiring exceptional circumstances should not be followed.

#### **Interim payment**

52. Finally, the Respondent applies for an order that the Appellants make an immediate interim payment on account of costs.
53. GCR O.62, r.4(7)(h) provides:

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

54. The principles to be applied in this jurisdiction in relation to interim payments were helpfully summarised by Kawaley J in Al Sadik v Investcorp Bank B.S.C. [2019] (2) CILR 585 at [25]. The relevant extracts for present purposes (omitting references) are as follows:

*“25.... Building on Parker J’s decision in In Re BDO and having due regard to the English authorities to which he was not referred which construe a similar CPR interim payment rule, I would summarize the governing principles under Cayman Islands law in a more robust pro-receiving party manner as follows:*

- (a) *GCR O.62, r.4(7)(h) confers an unfettered discretion on the court to order the payment of ‘where the Court orders the paying party to pay costs subject to taxation, a reasonable sum on account of costs, such sum to be assessed summarily’;*
- (b) *The governing principle underpinning this power, and the raison d’être for the rule, is that (per Jacob J in Mars UK Limited v Teknowledge Limited...):*  
*‘the successful party is entitled to the money. In principle he ought to get it as soon as possible. It does not seem to me to be a good reason for keeping him out of some of his costs that you need time to work out the total amount’;*
- (c) *In my judgment, Jacob J’s framing of the relevant principle is, with respect, more persuasive than the more cautiously expressed formulation of the English Court of Appeal in Blakemore v Cummings..., notwithstanding that Investcorp’s counsel was content to rely on this somewhat more restrictive formulation. In that case, the principle that a successful party should not be kept out of their costs was described as ‘an important consideration’. With respect, that understates the true weight the principle deserves. The principle that a successful party should be paid some of his costs immediately and before taxation is not simply ‘an important consideration’. It is the governing and predominant principle articulated by the interim payment on account of costs rule;*
- (d) *The purpose of the rule is to enable the court to avoid the injustice of delayed payment of all costs until the total amount is determined upon taxation through a summary partial assessment. This is because the need to carry out a detailed assessment through taxation is ‘not a good reason’ for not ordering some costs to be paid immediately. Whether or not the discretion should be exercised is not shaped by the need to do justice in an abstract sense, entirely untethered from the core purpose of the rule. Whether or not an interim payment on account of costs should be ordered will almost invariably require an assessment to be made of whether or not there is a good reason not to order an interim payment and/or a good reason for requiring the receiving party to be deprived of any*

*costs until the taxation process is complete; [original emphasis]*

*(e) GCR O.62, r.4(7)(h), properly construed, contains an implicit starting assumption that an interim payment should be made....*

*(f) ....*

*(g) In concluding that GCR O.62, r.4(7)(h) contains an implicit starting assumption in favour of an interim payment on account of costs, I do not ignore the fact that power to make such an order is clearly discretionary and that the strength of the starting assumption may be weaker or stronger depending on the circumstances of each case....But when construing the jurisdiction conferred by O. 62, it is important to have regard to GCR O.62, r.4(2), which states in terms which provide in a general sense support for a more robust approach to construing GCR O.62, r.4(7)(h):*

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

*(h) One recognised and significant reason for not ordering an interim payment on account of costs is the need to avoid stifling an appeal.... Another is that the application for an interim payment should not be a disproportionate proceeding.... Another circumstance which may displace the assumption that an interim payment on account of costs should be made is the mere fact of the pendency of an appeal, although the primary considerations might relate to the need to suspend any order (or secure repayment) rather than whether or not an order should be made;*

*(i) A summary assessment of the appropriate interim payment amount must obviously be possible and sufficient supporting material (e.g. a draft bill of costs or a breakdown of incurred costs) must be placed before the court;*

*(j) The court’s discretionary powers under the rule are sufficiently flexible to enable justice to be done on a case-by-case basis, being guided by both the letter and spirit of the relevant rules.”*

We were not referred to any Court of Appeal authority in relation to interim costs payments and I therefore take this opportunity of saying that I respectfully agree with the sentiments expressed by Kawaley J in these passages.

55. The Respondent has prepared a bill of costs which sets out the costs it has incurred in connection with the Appeal, the Appellants' Evidence Application, the Respondent's Evidence Application and the Stay Application. It has left out only the Appellants' Further Evidence Application where it has conceded that no order for costs should be made. The total costs come to US\$362,688.11. The Respondent seeks an interim payment of 50% of this amount, namely US\$181,344.06.

56. The Appellants accept that it would be appropriate for the Court to order an interim payment on account of costs. However, they submit that, on the basis that no costs should be payable in relation to the Evidence Applications and that the costs should be reduced by 15%, the interim payment should be US\$120,453.43.

57. In my judgment, an order for an interim payment on account of costs is clearly appropriate. There is nothing unusual about this case which would suggest that the Respondent should not receive a substantial contribution towards its costs at the earliest opportunity. However, the figures for the Respondent's costs do not take into account the findings reflected earlier in this judgment. Thus:

(i) The bill of costs includes the sum of US\$10,635.02 for junior counsel and English solicitors in relation to the Appellants' Evidence Application. As the Court is not awarding indemnity costs, these sums in respect of foreign lawyers are not recoverable and must be deducted.

(ii) The bill of costs includes US\$38,848.98 in respect of junior counsel and English solicitors in relation to 25% of the costs incurred after 6 July 2021. As outlined above, the Court has not agreed to indemnity costs and this sum must therefore also be deducted.

58. Deducting the sums of US\$10,635.02 and US\$38,848.98 from US\$362,688.11 leaves US\$313,204.11. One then has to deduct 5% leaving US\$297,543.90. Courts often award 50% of the total costs on the basis that this is a conservative approach which should not

lead to an overpayment. 50% of US\$297,543.90 is US\$148,771.95. I would round that sum up to US\$150,000.

**The costs of this costs application**

59. In my judgment, this application should be treated as part and parcel of the Appeal. Accordingly, I would order the Appellants jointly and severally to pay 95% of the costs of this application on the standard basis.

**Summary of conclusions**

60. I would summarise the orders which I would propose as follows:

- (i) The Appellants jointly and severally to pay 95% of the costs of the Respondent in relation to the Appeal on the standard basis. The costs of the Appeal are to include the costs of the Appellants' Evidence Application, the Respondent's Evidence Application and this costs application.
- (ii) The Appellants jointly and severally to pay 95% of the costs of the Respondent in relation to the Stay Application on the standard basis and the sums held in court in this respect to be released to the Respondent forthwith.
- (iii) There be no order as to costs in relation to the Appellants' Further Evidence Application.
- (iv) The Appellants jointly and severally to make an interim payment on account of the above costs in the sum of US\$150,000 within 28 days of the handing down of this judgment.

**Moses, JA**

61. I agree.

**Morrison, JA**

62. I also agree.