



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

**CICA (CIVIL) APPEAL No. 26 of 2021
(Formerly FSD 52 of 2016 (RMJ))**

IN THE MATTER OF CHINA BRANDING GROUP LIMITED (IN OFFICIAL LIQUIDATION)

BETWEEN:-

TONY BOBULINSKI

Appellant

-and-

CHINA BRANDING GROUP LIMITED (IN OFFICIAL LIQUIDATION)

Respondent

Before: **The Rt Hon Sir John Goldring, President
The Hon John Martin KC, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal**

Hearing on the Papers: **5th June 2023**

Judgment handed down: **14th June 2023**

RULING ON COSTS

Field, JA

Introduction

1. The abbreviations adopted in the judgment dated 31 March 2023 (“the Judgment”) continue to be used in this Ruling.
2. At the conclusion of the Judgment, the Court declared, inter alia, as follows:

“100. (1) The appeal is allowed with costs.

(2) ...

(3) The sum paid into court by the appellant to stand as security for the costs of this appeal should forthwith be paid out to him together with any interest that has accrued thereon.”

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“101. The preliminary view of the Court is that:

(a) Having regard to the JOLs’ failure to disclose the AAA in the appeal, the costs order made by the Grand Court below should be varied so as to order:

(1) that the JOLs be paid 70% of their costs (reflecting their success on Issues 1 and 2) and the appellant be awarded 30% of his costs (reflecting the failure of the JOLs to disclose the AAA); and

(2) that the JOLs must restore to the appellant 30% of the costs he has paid to the JOLs under the Grand Court Order.

(b) In light of the failure to disclose the AAA in the appeal below, the following costs shall be met from the JOLs’ own resources and not the insolvent estate

(i) The costs incurred by the JOLs in resisting this appeal;

(ii) 30% of the costs incurred by the JOLs in the appeal below;

(iii) The costs ordered to be paid to the appellant in [100(1)] above;

(iv) The reimbursement to the appellant of 30% of the costs he has paid to the JOLs under the costs order made below as contemplated in (a) above; and

(v) The order that the JOLs pay 30% of the costs incurred by the appellant below as contemplated in (a) above”.

3. On 6 April 2023, the appellant was granted liberty to advance submissions as to the basis on which those costs that were to be awarded to him were to be assessed and on 21 April 2023, he served his opening submissions on costs. Also on 21 April 2023, the JOLs served their submissions in respect of the basis on which the costs to be awarded to the appellant should be taxed and their submissions on the preliminary views expressed by the Court in [2. (101)] above. On 1 May 2023, the appellant served submissions in reply to the JOLs’ opening submissions and on 11 May 2023, the JOL’s served their reply submissions on the preliminary view expressed in paragraph [2 (101)] above.

The Court's jurisdiction to order indemnity costs.

4. GCR O.62, r.4 (11), that is applicable to this Court pursuant to Rule 28 of the Court of Appeal Rules, provides: *"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."*
5. As was held by this Court in *Asia Pacific Limited v Arc Capital LLC* [2015] (1) CILR 299, the Court of Appeal's power to order indemnity costs is restricted to cases covered by the wording of GCR O.62, r.4 (11) ("O.62, r4"). That said, it is clear from the wording of O.62, r.4 that it will only be in an exceptional case that indemnity costs will be awarded (cf *Ahab v Saad Investments Co. Ltd* [2012] 2 CILR 1), for instance where the Court is of the view that the conduct of the paying party is such as deserves a mark of disapproval (*AHAB v SAAD* [2013] 3 CILR 344).
6. In agreement with the view of Smellie CJ expressed at p. 353 in the latter case, I too am of the opinion that for conduct to be unreasonable or negligent within O 62, r. 4 it must be more than simply wrong or misguided in hindsight.
7. I agree with the following view expressed by Henderson J in *Bennett v Attorney General* [2010] (1) CILR 478] at paras 6 - 9:

"Advancing a [case] which is merely weak or unlikely to succeed is to be distinguished from maintaining a [case] which is manifestly hopeless. The latter can be characterized as unreasonable. The former is a regular occurrence with which every barrister will be familiar..."

The assessment of unreasonableness must avoid the wisdom of hindsight. The question is whether it was unreasonable to advance the claim or maintain the defence taking into account what should have been evident to the party concerned at the outset of the trial."

8. I note that in making these observations Henderson J justifiably cited with approval the following passage from the judgment of Coulson J (as he then was) in *Fitzpatrick Contractors Ltd. v. Tyco Fire & Integrated Solutions (UK) Ltd.* ([2008] EWHC 1391 (TCC), at para. 3):

*“There are a number of decisions, both of the TCC and of other courts, which make plain that the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, whereas the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) will lead to such an order. In both *Wates Construction Ltd. v. HGP Greentree Allchurch Evans Ltd.* [2006] BLR 45 and *EQ Projects Ltd. v. Javid Alavi* [2006] BLR 130 this court was persuaded that, in the circumstances of those cases, an order for indemnity costs was appropriate because the claimants should have realised that their claim was hopeless and should not have taken the matter on to trial. However, in *Healy-Upright v Bradley & Another* [2007] EWHC 3161 (Ch), the court reiterated that an order for indemnity costs was not justified by the mere fact that the paying party had been found to be wrong, either in fact or in law or both, or by the fact that in hindsight, the result of the case now being known, the position adopted by that party may be thought to have been unreasonable.”*

The case advanced by the appellant for indemnity costs.

9. The appellant contends that the costs orders made in his favour by this Court should be on the indemnity basis and that certain of those costs should be paid out of the JOLs’ own resources and not out of the liquidation estate. In support of these contentions, he prays in aid the following:
 - 9.1 The JOLs at the outset refused to accept that he was a secured creditor and proceeded to sell CBG’s assets without reference to him in breach of the Pledge.
 - 9.2 The JOLs rejected the appellant’s first proof of debt in which he claimed he was a secured creditor without giving reasons, contending, on highly dubious legal advice, that the Pledge was ineffective by reason of not having been perfected.
 - 9.3 In response to an expert legal opinion provided on the appellant’s behalf by Mr Jeff Valle of Valle Makoff, the JOLs served an expert opinion of Mr Mark Dosker of Squire Patton Boggs who opined that CBG did not own any assets constituting “collateral” under the Pledge at the point that CBG went into liquidation on 2 June 2016. At the same time the following documents were in the possession of the JOLs that individually and collectively controverted the position taken by Mr Dosker and the JOLs:

- (a) the AAA (executed by Mr Dickson, transferring ownership of the licences from CBG to RAAD);
- (b) the APA (executed by Mr Dickson, listing the license agreements in the Disclosure Schedule);
- (c) the license agreements themselves,
- (d) email exchanges which made clear to the JOLs that such licenses were held at CBG level;
- (e) email exchanges which discussed the considerable value of the licenses;
- (f) the CIM prepared by Houlihan Lokey Financial referencing the income stream attributable to the licenses.

9.4 Notwithstanding that the JOLs' files contained the above documents, the JOLs resisted the appellant's disclosure summons in the course of which Mr Dickson swore an affidavit stating that CBG had no US assets and that there was no further material to disclose. The JOLs also submitted that the appellant had the burden of proving that he was a secured creditor under the Pledge and that the Company Winding Up Rules ("CWRs") did not confer jurisdiction on the Grand Court to order disclosure.

9.5 In paragraph 84 of the Judgment, this Court said that it had no hesitation in finding that the JOLs, as officers of the Court, were seriously amiss in failing to disclose the AAA and the Disclosure Schedule in the Grand Court appeal proceedings ("the Grand Court appeal").

9.6 In the light of the JOLs' failure to disclose the AAA and the Disclosure Schedule in the Disclosure Summons proceedings, the "no order as to costs" order made by McMillan J on the that summons reflecting the appellant's success on his application for cross examination but his failure to obtain a disclosure order, should be varied so as to award him his costs on both applications on the indemnity basis and to order that these costs are paid by the JOLs out of their own resources.

9.7 As a result of the JOLs' failure to disclose the AAA and the Disclosure Schedule the appellant's appeal in the Grand Court proceeded on a false basis resulting in a deeply flawed decision and an order for costs against the appellant.

- 9.8 The entirety of the costs associated with the appellant seeking to enforce his secured rights would have been saved if the JOLs had recognised his security in 2016. Accordingly, the appellant's primary submission is that he should have 100% of his costs of the Grand Court appeal on the indemnity basis given that the JOLs acted so as to deprive him of the security expressed in the Notes and the Pledge and the negotiating leverage arising therefrom.
- 9.9 The appellant's secondary position is that since the main issue of the Grand Court appeal was whether he was a secured creditor he should be awarded 50% of the costs of the appeal on the indemnity basis, rather than 30% as contemplated in the preliminary view expressed in the Judgment.
- 9.10 Mr Dickson did not alert the appellant to the existence of the AAA after it was put to him when he was deposed in California. Instead, the appellant independently became aware of it during discovery in the Californian proceedings and the JOLs made no attempt to explain or apologise for not having disclosed the AAA when they replied to the letter sent on the appellant's behalf dated 20 September 2021 seeking answers. Instead, the JOLs continued to try to uphold McMillan J's decision in the Grand Court by opposing the appellant's application for leave to appeal, maintaining that the AAA was of no relevance, and advancing new arguments including the contention that the DCP licenses were not US but Chinese assets, only to abandon this argument in their skeleton argument for the appeal to this Court.
- 9.11 The JOLs' response to the order made by this Court that they disclose the emails of instruction to Mr Dosker, including whether he was made aware of the DCP licenses in 2017, lamentably failed to provide the information ordered. In his first affidavit Mr Peter Bigwood stated: *"I note in respect of Category C that the Discovery Order requires the JOLs to confirm whether Mr Dosker 'was made aware of the Dick Clark Licenses or any other licenses' (a) in respect of Dosker's first report: I understand that there were a number of license agreements held by the various entities within the Company's structure, many of which had already expired. I also understand that Mr Dosker, in the course of preparing his first report, was aware of this and the fact that some of those licenses were held by the Company."* As the President of the Court of Appeal observed in the course of the appeal, this was not a satisfactory answer.

9.12 The JOLs should not have resisted the appellant’s appeal to this Court. His case was overwhelming. By fighting an unwinnable appeal, the JOLs caused the appellant to incur unnecessary delay and legal fees and expenses and wasted the Court’s time.

The JOLs’ response on indemnity costs

10. The JOLs submit:

10.1 The focus must be on how the JOLs conducted the litigation, not on how they conducted the liquidation and, adopting this approach, there is no proper factual basis for finding that the JOLs withheld the AAA. Instead, as this Court held, the JOLs had forgotten the AAA and DCP licenses until Mr Dickson was presented with a copy of the AAA when being deposed in the Californian proceedings.

10.2 Moreover, the JOLs’ conduct of the appeal to the Grand Court was in accordance with: (a) their understanding of the Company's position from Mr Roseman; and (b) legal advice from Californian counsel, and on this basis it cannot be said that the JOLs conducted the Grand Court appeal improperly, negligently or unreasonably to the necessary “high degree” (cf *Jian Ying Ourgame High Growth Investment Fund (in Official Liquidation) v Xiong & Ors* (unreported, 27 January 2023) per Parker J.

10.3 With respect to the instant appeal, the JOLs’ conduct of these appellate proceedings cannot be remotely characterised as improper, negligent or unreasonable. On the contrary, the JOLs accommodated the appellant by:

(a) consenting to extend the time by which the appellant was to comply with the payment of the previously unpaid Grand Court costs orders (the "Grand Court Costs Orders") from 18 July 2022 (as ordered by this Court pursuant to the Certificate of Order dated 16 June 2022) to 19 August 2022;

(b) consenting to a further extension of time for the appellant to pay the Grand Court Costs Orders from 19 August 2022 to 2 September 2022;

(c) working with the appellant in relation to the release of the bond that he had to post in the California court as a condition of appealing the JOLs' successful application for summary judgment in that court;

(d) providing various tranches of documents to the appellant prior to any order (or even application) for discovery; and

(e) conducting an extensive discovery exercise and acceding to most of the discovery directions sought by the appellant by his summons dated 9 September 2022.

10.4 In addition, the JOLs' opposition to the appeal:

(a) resulted in the final recovery from the Appellant of a substantial amount of the Grand Court Costs Orders (as varied by this Honourable Court) that had remained unpaid for several years;

(b) narrowed the scope of the Appeal to exclude broader issues such as the 2.5x multiplier claim, which was a large focus of the appeal to the Grand Court; and

(c) narrowed the scope of security to exclude a purported security interest against 95+ social media contracts (see paragraph 95 of the Judgment).

10.5 The claim for indemnity costs must be kept separate from the claim that costs should be paid by the JOLs personally and not out of the liquidation estate.

The JOLs' response to the Court's preliminary view set out in para 2 [101] above

10. The JOLs accept that this Court has jurisdiction to order non-parties, such as liquidators, to be liable for costs incurred in proceedings pursuant to section 24(3) of the Judicature Act (2021) Revision, which provides:

24. (1) Subject to the provisions of this or any other Law and to rules of court, the costs of and incidental to all civil proceedings in —

(a) the Court of Appeal; and

(b) the Grand Court,

shall be in the discretion of the relevant court.

(2)

(3) The court shall have full power to determine by whom and to what extent the costs are to be paid.

(4) – (7) ...

12. The JOLs also accept that, whilst the general rule is that adverse costs should be borne by the company’s liquidation estate and not its liquidators, an order may be made that a liquidator must pay the costs personally if there are “exceptional circumstances” justifying such an order, for instance where there is some form of aggravating conduct. They cite part of paragraph 25 of the judgment of the Privy Council in *Dymocks Franchise Systems (NSW) Pty v Todd (no. 2)* [2004] UKPC 39 where there is a distillation of some of the applicable principles:

"A number of the decided cases have sought to catalogue the main principles governing the proper exercise of this discretion and their Lordships, rather than undertake an exhaustive further survey of the many relevant cases, would seek to summarise the position as follows: (1) Although costs orders against non-parties are to be regarded as 'exceptional', exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such 'exceptional' case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against..."

13. The JOLs also refer to paragraph 101 of the judgment of Mr Richard Snowden QC (as he then was) in *Capitol Films Limited (in administration)* [2010] EWHC 3223 (Ch) which reads:

“The circumstances in which the court might exercise its discretion to deprive an office-holder of a right of recoupment have, in the case of liquidations, been said to include cases in which the office-holder has been guilty of misconduct (see *Re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274 at 286f-g); where he has made a “blunder” or serious mistake (see *Re Silver Valley Mines* (1882) 21 Ch D 381 at 385-386); or where it would be unjust for other reasons to permit such recoupment (see *MC Bacon Ltd (No.2)* [1990] BCLC 607 at 615-616). In the latter case, Millett J held that it would plainly be unjust for a liquidator to recover his costs of an unsuccessful challenge to the validity of a floating charge from the very property which was subject to that charge in priority to the holder of the charge”.

14. In addition, citing *Re Bolton & Co* [1895] 1 Ch 333 and *Re Wilson Lovatt* [1977] 1 All ER 274, the JOLs correctly submit that there is an important distinction between circumstances in which a liquidator has commenced proceedings and circumstances in which a liquidator is a respondent to proceedings. In the first situation, a liquidator exposes himself to the possibility of personal costs whereas in the latter situation the general rule is that the successful party is only entitled to costs out of the assets of the liquidation unless the liquidator has done something to make himself personally liable for costs. In the submission of the JOLs, were the general rule otherwise, insolvency practitioners would be very unwilling to resist a claim brought against an insolvent company and it would be impossible for the Court to supervise liquidations.
15. The JOLs further submit that there are no exceptional circumstances justifying a personal costs order in that:
- a. they did not commence the proceedings that led to the appeal to this Court;
 - b. there has been no finding of misconduct against them and nor is there evidence to support such a finding;
 - c. their non-disclosure, whilst regrettable, does not reach the high threshold of a serious mistake” or “blunder” or “gross blunder” referred to in *Re Silver Valley Mines*; and
 - d. they did not act unreasonably or irrationally but always in good faith and in the interests of CBG and its stakeholders.
16. In addition, the JOLs contend that there is no injustice for CBG to bear the costs for the following reasons:
- (a) the overwhelming majority of the appellant’s security is traceable only into the Warrants and not in cash;
 - (b) CBG’s liquidation estate currently has approximately US\$ 692,000 in cash available to meet the expenses of the liquidation and the JOLs estimate that CBG should additionally recover approximately US\$500,000 from the costs orders made by the Grand Court; and
 - (c) the JOLs recognise that the appellant’s costs in the appeal should be paid out of the liquidation estate before they are paid their fees which totalled US\$ 797,000 as at 15 March 2023 which includes US\$ 150,996.66 already approved by the Grand Court for the period 1 October 2017 to 31 October 2018;

17. The JOL's further contend that:

- 17.1 The order issued by this Court dated 25 July 2022 requiring the appellant to pay forthwith the costs on an indemnity basis of a late application for the extension of time to comply with an “unless order” should be excluded from the costs of the appeal.
- 17.2 If this Court orders the restoration to the appellant of the 30% of the costs he paid under the Grand Court Order this should not come from the JOL's personal resources but from the ring-fenced account holding the full amount of the costs paid by the appellant under the Grand Court Order.
- 17.3 The appellant has not been granted the necessary liberty to seek unilateral variations to the preliminary view set out in [2 (101)] above. The contentions related in [17.4] and [17.5] below are advanced without prejudice to this submission.
- 17.4 The appellant's claim that he should be awarded 100% of the costs of the disclosure summons (see [9.8] above) is misconceived because there is no evidence to support his contention that he would have been awarded his costs on the disclosure summons if the AAA had been disclosed earlier. The evidence is that on that summons he sought six broad categories of discovery with the licenses being relevant to only one of the categories. The likelihood is therefore that if the AAA had been disclosed before or as a result of the disclosure summons, it would have been appropriate to make the order that McMillan J made, namely “no order as to costs”.
- 17.5 The appellant's claims that he should be entitled to 100%, alternatively 50%, of the costs of the Grand Court appeal are also unsustainable since on that appeal he justifiably lost on the major issues of waiver and promissory estoppel, both of which related to his hopeless 2.5x multiplier claim.

Discussion and decision

18. I reject the JOL’s submission that there is no proper basis on which they can be ordered to pay part of the costs of these proceedings from their own resources, or forgo part of their fees, because their failure to disclose the AAA and the Disclosure Schedule in the course of the Grand Court appeal proceedings did not amount to an “exceptional circumstance” (*Dymocks Franchise Systems (NSW) v Todd (No. 2)* [2004] UKPC 39) or a “serious mistake”, “blunder” or “gross blunder” as contemplated in *Re Silver Valley Mines* (1882) 21 Ch D 381.

19. The key finding of this Court in paragraph [84] of the Judgment concerning the JOL’s failure to disclose the AAA and the Disclosure Schedule reads as follows:

“... for the purposes of this appeal ... at all material times the AAA and the licenses assigned thereunder were forgotten by Mr Dickson until he was presented with a copy of the agreement by the appellant’s US counsel when being deposed in the Californian proceedings ... That said, [the Court has] no hesitation in finding that the JOLs, as officers of the Court, were seriously amiss in failing to disclose the AAA and the Disclosure Schedule in the appeal proceedings. [The Court] accept[s] the appellant’s submission founded on the citation from the judgment of James LJ in Gooch’s Case that it was incumbent on the JOLs to review the few copies of the agreements they had signed dealing with the sale of CBG’s business and assets to Remark to satisfy themselves that there was nothing therein that suggested that any assets destined to be sold under the APA had belonged to CBG as at 24 April 2016 and thereafter down to 20 September 2016. Undoubtedly, had such a simple step been taken they would have scrutinised the AAA that was there in their files and seen that the DCP licenses identified therein had belonged to CBG immediately prior to the AAA and the APA”.

20. The citation from the judgment of James LJ in *Gooch’s Case (In re Contract Corporation, sub nom. Gooch’s Case* (1871) L.R. 7 Ch App 207) is related in [60] of the Judgment. It reads:

*“In truth, it is of the utmost importance that the liquidator should, as an officer of the Court, maintain an even and impartial hand between all the individuals whose interests are involved in a winding-up. It is his duty to the whole body of the shareholders, and to the whole body of the creditors, and to the Court, **to make himself thoroughly acquainted with the affairs of the company**, and to suppress nothing, and to conceal nothing, which has come to his knowledge in the course of his investigation, which is material to ascertain the exact truth in every case before the Court. And it is for the*

Judge to see that he does his duty in this respect.” [Emphasis supplied]

21. The finding of this Court was therefore that the JOLs were in breach of the fundamental obligation to make themselves thoroughly acquainted with the affairs of CBG, at the latest when they were faced with the Grand Court appeal, by perusing the agreements signed by them (the AAA and APA) by which the sale to Remark of CBG’s assets was effectuated to ensure that none of CBG’s assets (including any licenses), as at the declaration of insolvency and when CBG went into liquidation, could reasonably be argued to constitute “Collateral” for the purposes of the Pledge. If, as they should have done, the JOLs had carefully perused these files they would have been reminded that at these points in time CBG owned 5 DCP Licenses which very arguably were covered by the Pledge. But this they did not do, with the result that vital evidence contradicting the JOLs’ case in the Grand Court appeal that at no relevant time did CBG own any assets falling within the definition of “Collateral” was never put before McMillan J.
22. Given this finding, I am of the clear view that the failure of the JOLs to disclose the AAA and the Disclosure Schedule to the APA in the Grand Court appeal proceedings was the result of a serious breach of duty which, notwithstanding that the proceedings were not brought by them but were brought by the appellant, justifies the orders I set out in paragraphs [26] and [31] below.
23. I turn to the appellant’s claim that the “no order as to costs” order made on the disclosure summons should be varied so that he is awarded 100% of his costs on that matter to be assessed on the indemnity basis and that the JOLs should be debarred from recovering their fees from the liquidation estate for the work they did on this proceeding. I reject this claim for the reasons advanced by the JOLs that are set out in paragraph [17.4] above. Even if the AAA had been disclosed prior to or during the disclosure summons, it is more likely than not that the costs order would have been “no order as to costs” given that the appellant was unsuccessful in seeking six broad categories of discovery with the licenses being relevant to only one thereof.
24. I now consider the Court’s preliminary view that: (1) the Grand Court appeal costs be varied so that the JOLs shall be paid 70% of their costs (reflecting their success on Issues 1 and 2) and the appellant be awarded 30% of his costs (reflecting the failure of the JOLs to disclose the AAA); and (2) the JOLs must restore to the appellant 30% of the costs he paid to the JOLs under the Grand Court costs order. (I refer to this preliminary view hereafter as “the Grand Court appeal costs preliminary view.”)

25. I reject the appellant's claims that: (a) he should be awarded 100% of the costs of the Grand Court appeal on the ground that the JOLs acted so as to deprive him of the security expressed in the Notes and the Pledge together with the negotiating leverage arising therefrom; and (b) alternatively, he should be awarded 50% of the costs of proceedings on the basis that his claim that he was a secured creditor was the principal claim before the Court. I have come to this view because it is manifest that the appellant's claims based on waiver, promissory estoppel and the 2.5x multiplier, which were rejected with good reason by McMillan J, featured to a large extent in the appeal.
26. In my judgment the Grand Court appeal costs preliminary view should be upheld, subject to the following modifications. I accept the JOLs' submission that the restoration to the appellant of 30% of the costs he paid under the Grand Court costs order should be paid out of the ring-fenced costs paid by the appellant, rather than from the JOL's personal resources. However, I think it right to order that the JOLs be debarred from seeking more than 70% of the fees for the work they did on the Grand Court appeal which they would otherwise charge to the liquidation estate.
27. I am also of the opinion that the 30% of the appellant's Grand Court appeal costs that are now to be payable to him should be assessed on the indemnity basis on the ground that the failure of the JOLs to disclose the AAA and the Disclosure Schedule amounted to gross negligence.
28. I turn to the costs of the appeal to this Court. The JOLs accept that the appellant should have his costs of the appeal, subject to the order issued by this Court dated 25 July 2022 (see [17.1] above) being excluded from "the costs of the appeal". I agree with this proviso contended for by the JOLs. The order dated 25 July 2022 should remain on foot.
29. Two issues remain to be addressed. (1) Should the costs payable to the appellant be assessed on the indemnity basis? (2) Should the JOLs pay these costs from their own resources rather than from the liquidation estate?
30. In my opinion, the JOLs' conduct of the appeal does not warrant an order for indemnity costs. The respondent's principal contention that the appeal should fail on discretionary grounds, including in particular the submission that the appellant's claim to trace into the proceeds of the Warrants was effectively worthless, was reasonably arguable and certainly not so weak as to be marked by an indemnity costs order.

31. Turning to issue (2), I have concluded that the appeal costs payable to the appellant should not be paid out of the liquidation estate but by the JOLs personally. If, when confronted by the Grand Court appeal, the JOLs had complied with their duty to make themselves thoroughly familiar with the affairs of CBG by scrutinising the agreements signed by them by which the sale of CBG's assets to Remark was achieved, the AAA and the Disclosure Schedule would have been disclosed showing that, until the execution of the AAA, CBG owned the 5 DCP licenses held in the US and I find on the balance of probabilities that this would have led to a finding by McMillan J that the appellant was a secured creditor who could trace into the proceeds of the APA constituted by the Warrants under Section 2.01 (iii).
32. I say this notwithstanding McMillan J's statement in paragraph [232] of his judgment that on all of the matters that were in contention between the experts on US law (Mr Valle for the appellant and Mr Dosker for the JOLs), he accepted what he considered "to be the impartial and objective expert evidence of Mr Dosker over that of Mr Valle". My reasons are as follows. It was common ground, as McMillan J recognised in paragraphs 220 – 221 of his judgment, that the Pledge was capable of attaching to the operative part of the definition of "Collateral" viz "content library", "license agreements" and "production equipment" located "in the United States," but he held at [221] that there was no evidence that CBG had ever had any assets within these operative words of the definition of "Collateral" in the Pledge, this being a complete answer to the appellant's claim that he was a secured creditor with an entitlement to trace into the proceeds of sale arising under the APA. Faced with this apparent state of the evidence, Mr Valle was left to contend that: (i) on the basis of *Wachovia v WL Homes* 534 F Appx 165 (3rd Cir 2013), under Californian law a pledge could extend to assets held by an affiliate of the pledgor where the pledge was signed by an officer of the affiliated entity; (ii) the claim based on waiver; and (iii) the claim based on promissory estoppel, all of which were justifiably rejected by McMillan J. If, however, copies of the AAA and the Disclosure Schedule had been before him showing that CBG owned and possessed the 5 DCP licenses from the inception of the Pledge down to the execution of the AAA, there is a strong probability that the consequences thereof would have been : (i) a decision by McMillan J holding that the appellant had been a secured creditor since the inception of the Pledge down to the time of the execution of the AAA and that the appellant was therefore entitled to trace into the identifiable APA proceeds attributable to the DCP licenses, namely the Warrants provided for in Section 2.01 thereof; and (iii) there never would have been an appeal to this Court.

Conclusions

33. The JOLs must restore to the appellant the equivalent of 30% of the costs he paid pursuant the Grand Court costs order.
34. The sum ordered to be paid in (1) above should be paid out of the costs received from the appellant pursuant to the Grand Court costs order which costs are held in a ring-fenced account.
35. The JOLs may only seek to be paid out of the liquidation estate up to 70% of the fees they would otherwise be entitled to charge to the liquidation estate for work done on the Grand Court appeal after the completion on their work on the discovery summons.
36. The appellant is entitled to be paid 30% of his costs incurred in the Grand Court appeal to be assessed on the indemnity basis.
37. The appellant is entitled to be paid his costs of the appeal to this Court to be assessed on the standard basis but there shall be no reversal of the costs order made against him by this Court dated 25 July 2022 referred to in [17.1] and [28] above.
38. The appellant's costs of the appeal payable under [28] above shall be paid out of the JOL's personal resources and not out of the liquidation estate.

The Hon John Martin KC

39. I agree.

The Right Hon. Sir John Goldring (President)

40. I also agree.