



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

**CICA (Civil) APPEAL No. 0024 of 2023
(Grand Court Cause No. FSD 0059 of 2023 (AWJ))**

BETWEEN

JUNIPER LIFE SCIENCES LTD

APPELLANT

AND

RBH HOLDINGS

RESPONDENT

Before:

The Rt Hon Sir Jack Beatson, Justice of Appeal
The Hon Sir Anthony Smellie, Justice of Appeal
The Hon Clare Montgomery KC, Justice of Appeal

Appearances:

Mr. Denis Olarou and Ms Kalyani Dixit of Carey Olsen for the Appellant

Mr. Jonathon Milne and Mr. Jordan McErlean of Conyers Dill and Pearman
LLP for the Respondent

On the Papers

**Draft Judgment
circulated:**

8 November 2024

**Judgment
delivered:**

27 November 2024

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JUDGMENT

Beatson, JA

1. This judgment on costs is supplemental to a judgment dated 11 October 2024 (“the Main Judgment”) whereby this Court dismissed the Appellant’s appeal against the order of Walters J (Acting) dated 30 June 2023 (“the Order”) reflecting his judgment of 8 June 2023 (“the Judgment”). Words and expressions defined in the Main Judgment have the same meaning where they are used in this judgment.

Background

2. Reference should be made to the Main Judgment for the full background.
3. In summary, the underlying dispute concerns an application by RBH in the Grand Court (“the Rectification Action”) that a resolution by JLS to redeem shares held by RBH at the par value pursuant to Article 9(1)(c) of JLS’s Articles of Association constituted an exercise of a power for an improper purpose. RBH sought an order pursuant to section 46 of the Companies Act (2023 Revision) to rectify JLS’s share register. JLS applied to stay those proceedings on the ground that, pursuant to the terms of a share subscription agreement between JLS, RBH and Sylvan MF, the dispute was to be arbitrated in Singapore (“the Stay Application”). Walters J refused JLS’s application for a stay. JLS’s application for leave to appeal was granted by an order dated 23 May 2024 but, as stated in [1] above, its appeal was dismissed for the reasons given in the Main Judgment.
4. In the Main Judgment, this Court also rejected RBH’s Respondent’s Notice dated 29 May 2024. That claimed that JLS had submitted to the jurisdiction of the courts of these Islands as a result of its application dated 21 November 2023 for RBH’s claim to be struck out on the merits or for directions as to a trial on the merits: see Main Judgment [100] – [101] and [129].

Costs

5. In the Main Judgment, at [130], Smellie JA, with whom Montgomery JA and I agreed, stated:

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“My provisional view is that 95% of the costs of the appeal should be borne by [JLS] the Appellant who did not succeed on the substantive issue (to be taxed on the standard basis if not agreed); but if either party wishes to propose a different order, they may do so in writing to be filed within 10 working days from the circulation in draft of this judgment”.

6. The Appellant and Respondent emailed the Court Office between 9 and 11 October 2024 seeking clarification on a number of points and filed written submissions respectively dated 10 and 11 October 2024. On 18 October 2024 they also filed a Joint Costs Bundle containing the submissions on costs, authorities, and the relevant orders and pleadings that were not in the core and record appeal bundles. The previous orders of the Grand Court and this Court dealing with the costs of the applications by JLS for a stay of the Rectification Action, leave to appeal and an extension of time to serve its defence are:
- (a) **8 January 2024: Walters J** ordered that the costs of the Leave Summons were to be in the Fresh Leave Application and were to be dealt with by the Court of Appeal.
 - (b) **23 May 2024: The Court of Appeal**, granting leave to appeal, ordered the costs of the application for leave to be costs in the appeal.
 - (c) **25 June 2024: Walters J**, refused JLS an extension of time to file its defence, (ii) leave to appeal and a stay of the Directions Order which he had earlier made in the proceedings; and ordered (i) JLS to pay RBH’s costs arising from the application for an extension of time, and (ii) that the costs of the Leave Application were to be in the renewed application for leave and to be dealt with by the Court of Appeal.
 - (d) **21 August 2024: The Court of Appeal** stayed the rectification proceedings in the FSD of the Grand Court pending judgment on the Stay Appeal and ordered that the costs of the interim Stay Application be determined upon the outcome of the Stay Appeal.
7. The Respondent, RBH, has stated that it is content to accept the Court’s provisional view as set out above. It also seeks an interim payment on account of costs of 50% of the total recoverable costs, for interest of 2.375% per annum on all costs awarded to it from the date the costs were incurred until the date of payment, and for clarification that it is entitled to:

- (a) all its costs associated with JLS's failed stay application including those incurred in the court below, and
 - (b) the costs of an application by JLS dated 27 June 2024 arising from Walters J's refusal to grant it an extension of time to serve its defence which was rendered nugatory by the dismissal of the appeal.
8. The Appellant, JLS, submitted that it ought to bear less than 95% of the costs of the appeal. It claimed that it should bear only 70% subject to taxation on the standard basis. It accepted that RBH is entitled to the costs of the appeal. It, however, maintained that it is entitled to the costs it incurred in dealing with the Respondent's Notice which it argued should be set off against the costs of the appeal. It submitted that dealing with the Respondent's Notice demanded considerable attention in both written and oral submissions at the appeal hearing. It relied on the percentages of the skeleton arguments, oral submissions derived from the transcript, and additional documents and authorities that deal with the Respondent's Notice. These, it estimated are approximately 24% of the total submissions, documents, and authorities. Although ultimately claiming a 30% reduction, it submitted that a reduction of up to 48% might be justified.
9. The percentages of pages of written and oral submissions, documents and authorities dealing with the Respondent's Notice point are a somewhat crude basis for assessment of the appropriate proportion of the costs to be paid by JLS to reflect its success on the point. I recognise that work had to be done to respond to the Respondent's Notice point. JLS's case on the substantive stay issue was, however, the main focus of the appeal and it was dismissed in its entirety. I have concluded that in the light of all the circumstances of this case, in particular that the main focus of the appeal was dismissed in its entirety, and that the starting point and the usual costs order is that costs follow the event, the appropriate deduction to reflect JLS's success on the Respondent's Notice point, should be 10%. Accordingly, JLS should be ordered to pay 90% of RBH's costs of the appeal, to be taxed if not agreed.
10. The matters on which RBH sought clarification are the costs of the applications which either this Court or Walters J ordered were to be costs in the appeal. In my judgment, RBH should have all the costs of those applications to be taxed if not agreed and the 10% deduction should not be applied to those orders. The first two of the four orders listed at [6] were made before the service of the Respondent's Notice on 29 May 2024, and the second two did not concern

the Respondent's Notice. They concerned JLS's application for an extension of time to file its defence and stays of the Directions Order and the rectification proceedings in the FSD.

Interim Payment

11. GCR O.62 r. 4(7)(h) provides that "*where the Court orders the paying party to pay costs subject to taxation, a reasonable sum on account of costs, such sum shall be assessed summarily*". The principles and authorities were discussed by Kawaley J in *Al Sadik v Investcorp Corporation* [2019 (2) CILR 585] ("*Al Sadik*"). That decision has been approved and widely followed in this jurisdiction, including by this Court in *Scully Royalty v Raiffeisen Bank CICA (Civil) Appeal 21 of 2020* (Unreported, 8 April 2022) at [54]. The result is that it is well settled that there is a starting assumption that an interim payment on account of costs in favour of the winning party ought to be ordered in ordinary circumstances.
12. JLS accepted this but submitted that the assumption ought to be displaced in the present case or should only take effect once JLS's rights to appeal to the Privy Council have been fully exhausted. It did so on the ground that "*there is no evidence that RBH has any assets, and indeed none within the Cayman Islands ...*", that it had refused a request by JLS dated 10 November 2023 to identify what assets it has to pay costs in these proceedings, thus turning down an opportunity to show that it is able to pay. In these circumstances, JLS submitted, it is not certain that RBH will ultimately be entitled to the costs of the appeal and the lack of information about its ability to repay an interim payment means that it might not do so.
13. JLS relied on the statement of Kawaley J in *Al Sadik* at [25(h)] that a circumstance which "*may displace the assumption that an interim payment... 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 reject JLS's primary submission that no order should be made because there is no evidence that RBH has any assets. That submission ignores the concluding words of the passage set out above as to what the "*primary considerations*" might relate. Those words suggest a way of addressing a successful litigant's potential inability to repay while recognising the *prima facie* entitlement of that litigant to an interim payment.
14. In a case such as this, a potential inability to repay can be addressed in one of two ways. The first is to suspend the obligation to make the payment pending the outcome of any appeal to

the Privy Council, while providing that interest is to accrue from the date the order is made if JLS does not appeal to the Privy Council or an appeal by it is dismissed. The second is to require RBH to provide security for the repayment of any interim payment. I consider that both these routes would protect the position of the party making the interim payment, here JLS, and that RBH should be given the option of choosing which to take.

15. In *Al Sadik* it was stated at [25(2)(i)] that “*a summary assessment of the appropriate interim payment 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*”. Reflecting this, §17 of Conyers' submissions on behalf of RBH stated that if the Court was minded to order an interim payment on account of costs, they would put together a breakdown of incurred costs in table form to assist it in arriving at an appropriate sum. Before reaching any decision on the question of an interim payment, we informed Conyers we wished to have such a breakdown, stating that it should be copied to JLS's attorneys, Carey Olsen, who were given the opportunity of commenting on the figures.
16. The summary Schedule of Costs filed on behalf of RBH totalled US\$759,435.10. Conyers' fees totalled US\$427,537.25; US\$91,097.50 in the Grand Court, and US\$ 336,439.25 for the Court of Appeal stage. Conyers' times are 153.35 hours for the Grand Court stage and 538.125 hours for the Court of Appeal stage. The disbursements claimed, mainly leading counsel's fees, totalled US\$331, 897.85. Carey Olsen's comments on the summary Schedule of Costs do not maintain that the actual costs claimed are disproportionate and/or excessive. Rather, it is submitted that the summary Schedule contains items which Practice Direction No 1/2001 to GCR Ord. 62 r. 17 show it is clear will not be recoverable on taxation, including brief fees and refreshers, fees unrelated to the Stay Application, and unrecoverable disbursements. They submitted that, on the assumption that the Court accepts its submission that a 30% reduction in taxable costs is appropriate in respect of the rejected Respondent's Notice point, the maximum recoverable costs are US\$313,336.79. On that basis, they submitted that, if an interim payment is ordered, the correct 50% amount would be US\$ 156,668.40.
17. In response to JLS's comments, on 1 November 2024, RBH submitted a Supplementary Summary Schedule of Costs. This:

- (1) stated that its leading counsel's hourly rate was £850, "*a significant discount to [leading counsel's] his usual hourly rate(s)*" and "*on hours worked*";
 - (2) contains a breakdown of hours worked and fees claimed by leading counsel preparing for and appearing in the stay summons hearing before Walters J, opposing JLS's renewed application for leave to appeal, and the hearing before this Court on 10 July 2024;
 - (3) reproduces the list of fee charges in the original Summary Schedule identifying which related to the hourly fee breakdowns and stated that, save where specifically addressed in the breakdown, all amounts were charged at the hourly rate of £850 given, and
 - (4) states that it does not accept, "*as asserted by [JLS] in some instances that any of the fees*" in the list of leading counsel's fee charges in the Summary Schedule and the Supplementary Summary Schedule "*are unrelated to the stay brought by the Appellant*".
18. Having, for the reasons at [13] – [14] above, rejected JLS's submission that no order for an interim payment on account of costs should be made, I turn to the determination of the amount of such payment on a summary assessment under GCR Ord. 62 r. 4(7)(h). I note that in *Re Poulton Family Trust* 13 March 2023, FSD 121 of 2016 Kawaley J observed at [4] that "*it is clear ... that it is not unusual for applications for interim payments of costs to be dealt with on the papers on a summary basis without any extensive articulation of the governing legal principles*". However, because the second defendant in that case was a litigant in person, he felt "*obliged in the interests of open justice to set out the governing principles more fully than would otherwise be the case*".
19. Although that reason does not apply in the present case where both parties were represented by experienced commercial lawyers and leading counsel, I note below the range of orders of interim payments on account of costs in recent cases. A higher percentage of the actual costs claimed is likely to be ordered where costs are ordered on an indemnity basis (which is not the case in this appeal) than where they are ordered on the standard basis. That will be reflected in the percentage of costs claimed ordered as an interim payment. So, in *Al Sadik*, which involved costs on the indemnity basis, Kawaley J ordered an interim payment of 40% of the discounted 85% of the actual costs claimed which were likely to be recovered on an indemnity basis. But in *Re Poulton Family Trust* where the costs were to be on the standard basis, he stated that 60-75% of the actual costs claimed are likely to be ordered and, because

he considered that in that case the “*total costs claim at first blush appears high and the paying party to be cash-strapped*”, he ordered an interim payment representing approximately 25% of 60% of the costs claimed. A larger 43% proportion of the actual costs claimed was ordered by Parker J in *Re Performance Insurance Company SPC (in Official Liquidation)* 24 March 2023. I note that in *United Airlines Inc. v. United Airways Ltd United Airways* [2011] EWHC 2411 (Ch) (approved in *Al Sadik* at [26] – [27]), the interim payment ordered by Vos J (as he then was) was just less than 50% of the costs claimed. In *Re Seahawk China Dynamic Fund Ltd.* FSD 23/2022 (DDJ), 27 September 2022, where indemnity costs were awarded, the payment on account ordered was “*less than one-third of the costs claimed in defending*” what was described as a “*misconceived and ill-founded petition*”.

20. Taxation of the total figure claimed by Conyers on behalf of RBH will be on the less generous standard basis than in *Al Sadik* where indemnity costs were claimed. I bear in mind Kawalay J’s statement in *Al Sadik* at [27(b)] that the court should adopt a conservative approach, allowing for a reduction on taxation even if the instinctive feeling of the court was that the impugned costs claim was not unreasonable. Where the total claim appears high, a lower percentage seems appropriate, particularly because the amount of the interim payment is assessed summarily. In the present case, in my view, (adapting Kawalay J’s words), “*the total costs claim at first blush appears high*”, particularly for the Court of Appeal stage. I bear in mind that the points raised in the comments made on behalf of JLS focus on the irrecoverability of items in the summary Schedule rather than their disproportionality. Moreover, in the light of RBH’s statement that it does not accept that any of the fees in the list of leading counsel’s fee charges in the Summary Schedule and the Supplementary Summary Schedule “*are unrelated to the stay brought by the Appellant*”, the dispute about their recoverability is one that can only be resolved by taxation rather than in a summary assessment. I have concluded that in the circumstances of this case, taking account of the sort of reduction from the costs claimed that is commonly made on taxation and subject to the *caveat* in the next paragraph, this Court should order an interim payment on account of costs that is 35% of the total amount claimed.
21. The *caveat* arises because, while RBH has a *prima facie* entitlement to an interim payment on account of costs, if JLS appeals to the Privy Council, RBH may ultimately not be entitled to the costs, and the Court has no information about its ability to repay an interim payment. I have concluded that RBH’s *prima facie* entitlement can be recognised in one of the two ways set out at [14]. An order for an interim payment should be made but RBH should be given

the option of: (i) JLS's obligation to make the payment being suspended pending the outcome of any appeal to the Privy Council, while providing that interest is to accrue from the date the order is made if JLS does not appeal to the Privy Council or an appeal by it is dismissed, or (ii) providing security for the repayment of any interim payment.

Interest

22. The position about from and until when interest should be paid and the rate of interest, is set out in GCR Order 62 rule 4(7)(g) and discussed by this Court in *Cayman Shores Development Ltd. and Palm Sunshine Ltd. v The Registrar of Lands, The Proprietors, Strata Plan No 79 (known as Lions Court) and Others* 4 July 2023 at [15] – [17] (“*Cayman Shores*”) and *Re Virginia Solution SPC* 10 October 2023 at [16] – [17] (“*Virginia Solution*”). It is clear from Order 62 rule 4(7)(g) that the court has power to order a party to pay interest on costs "*from or until a certain date, including a date before judgment*", that is from the date costs were incurred until payment. As to the rate of interest, it is clear from *Cayman Shores* and *Virginia Solution* that the appropriate annual rate of interest is 2.375% pa. That was the rate sought by Conyers on behalf of RBH on all costs ordered to be paid by JLS from the date those costs were incurred until the date of payment.
23. The only potential issue between the parties was whether, in seeking 2.375% pa "*accruing daily*", RBH was inviting the court to order compound interest. That is because Rule 4(a) of the Judgment Debt (Rates of Interest) Rules 2021 concerning pre-judgment interest provides that the Court may order "*simple interest*". However, that issue evaporated when it was accepted on behalf of RBH that it was only entitled to simple interest on costs incurred and it was confirmed on behalf of JLS that there was no point in contention between the parties with regard to interest. Accordingly, RBH is entitled to interest of 2.375% pa on all costs ordered to be paid to it by JLS from the date those costs were incurred until the date of payment.

Conclusion

24. For the reasons I have given, I have concluded that JLS should be ordered:
- (a) to pay 90% of RBH's costs of the appeal, to be taxed if not agreed.

- (b) to pay all the costs of the applications which either this Court or Walters J ordered were to be costs in the appeal (i.e. without a deduction of 10% in respect of these orders), to be taxed if not agreed.
- (c) to pay RBH an interim payment on account of costs that is 35% of the amount claimed, provided that RBH either (i) agrees that JLS's obligation to make the payment be suspended pending the outcome of any appeal to the Privy Council, while providing that interest is to accrue from the date the order is made if JLS does not appeal to the Privy Council or an appeal by it is dismissed, or (ii) provide security for the repayment of any interim payment.
- (d) to pay RBH interest of 2.375% pa on all costs ordered to be paid to it from the date those costs were incurred until the date of payment.

Smellie, JA

I agree.

Montgomery, JA

I also agree.