Neutral Citation Number: [2025] CIGC (FSD) 13

Cause No: FSD 2023-0378

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF A COMPANY

In Private and in Chambers

Appearances:	**Mr Barry Isaacs KC instructed by Jennifer Fox and Nour Khaleq of Ogier (Cayman) LLP for the Petitioner**
	Mr Vernon Flynn KC instructed by Reece Jones of McGrath Tonner and James Eldridge and Ryan Hallett of Maples and Calder (Cayman) LLP for the Company
Before:	**The Honourable Justice Jalil Asif KC**
Heard:	**3-4 February 2025**
Judgment:	**18 February 2025**

Civil procedure—inherent jurisdiction—whether court has power to order cross-examination of deponent overseas

Civil procedure—costs—whether to order cross-examination where evidence potentially relevant to conduct issues and basis of taxation

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JUDGMENT

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A. Introduction

1. I heard argument on this summons on 3 and 4 February 2025. The summons was heard in private. Following circulation of a draft of this judgment, the parties indicated that they were content for the judgment to be published on the basis that it is anonymised and provided me with written submissions in support of that position. Having read those submissions, I have decided that it is appropriate to anonymise the judgment as requested.

2. The issues relate to the consequences of a winding up petition that was filed and then withdrawn by the Petitioner in the face of an application by the Company to strike out the petition. The Petitioner concedes that it should pay the Company's costs of the winding up petition on the standard basis. The Company has applied by summons for an order that the Petitioner should pay its costs on the indemnity basis, and that summons is listed for hearing on 1 April 2025.

3. In support of its application for indemnity costs, the Company wishes to argue that the evidence of an officer of the Petitioner or an associated entity, was dishonest in certain respects. This person was the deponent of an affidavit that the Petitioner intended to rely upon in the substantive proceedings in response to the Company's strike out application but which, because of the withdrawal of the petition, was not in fact ever deployed in the proceedings by the Petitioner. I will refer to him as the Deponent. The Deponent is not present or resident in the Cayman Islands.

4. The Company considers that it is necessary for the Deponent to be cross-examined both to make good its allegations of dishonesty and also as a matter of fairness to the Deponent to give him the opportunity to respond to the allegations that it intends to make. The Company therefore filed the current summons on 25 November 2024 seeking an order that the Deponent to be cross-examined on his affidavit.

5. I record that in addition to this winding up petition, there were separate proceedings between the parties, which were assigned to Kawaley J, in which the Company obtained an *ex parte* injunction to prevent the Petitioner from proceeding on the winding up petition on the ground that there is a binding arbitration agreement between them, but which Kawaley J then discharged following the *inter partes* hearing. The Company apparently intends to raise certain aspects of the Petitioner's conduct in relation to the injunction proceedings as the second ground for seeking indemnity costs on the Petition. Finally by way of background, I am told that an arbitration has been commenced to resolve the issues between the parties, which is ongoing, and I have been shown some of the memorials from the arbitration submitted by the Company.

6. The Company's summons raises two distinct issues:

   6.1 does the Court have jurisdiction to make the order for cross-examination; and

   6.2 if so, should I exercise my discretion in favour of the Company and make an order.

The Company says that this is a very straightforward application. The Petitioner disagrees and raises a number of issues regarding both jurisdiction and the exercise of the Court's discretion.

7. The Company is represented by Vernon Flynn KC instructed by Reece Jones of McGrath Tonner and James Eldridge and Ryan Hallett of Maples and Calder. The Petitioner is represented by Barry Isaacs KC instructed by Jennifer Fox and Nour Khaleq of Ogier. I am grateful for their cogent and helpful submissions.

B. Jurisdiction

8. The parties agree that the issue raised in this case is not covered by either the Companies Winding-up Rules or the Grand Court Rules, so far as the GCR apply to a winding up petition.

   8.1 CWR O.3, r.9(2) provides that a petitioner has a right to require a company's witnesses to attend for cross-examination:

   > *"The petitioner may serve a notice … requiring that any deponent attend the hearing for cross-examination".*

   This application is not made by the Petitioner but by the Company, so it is not within the scope of CWR O.3, r.9(2). Counsel are agreed that there is no other relevant provision in the CWR that might apply in this situation.

8.2 GCR O.38, r.2(3) does not apply to winding up proceedings. But in any event, it too does not address the issue raised by this summons. GCR O.38, r.2(3) provides:

> *"... evidence may be given by affidavit ..., but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, the person's affidavit shall not be used as evidence without leave of the Court."*

Under GCR O.38, r.2(3), the consequence of the Deponent not attending for cross-examination would be that the Petitioner would not be permitted to rely on his evidence. However, the Petitioner does not intend or wish to rely on his evidence; rather it is the Company who wishes to do so.

9. The question therefore arises whether the Court has inherent jurisdiction to make the Order sought by the Company.

10. The Company relies on three cases to argue that the Court has power under the inherent jurisdiction to make the order sought:

10.1 *HSH Cayman I GP Limited v ABN AMRO Bank N.V.* (CICA) [2010] 1 CILR 114;

10.2 *Banco Economico S.A. v Allied Leasing and Finance Corporation* [1998] CILR 92; and

10.3 *Re China Branding Group Limited* (unreported, 5 October 2017, McMillan J).

11. The Petitioner accepts that the Court has inherent jurisdiction to control its processes but argues that the Company is trying to push the breadth of the inherent jurisdiction too far. The Petitioner relies upon its interpretation of the limits of what was said by Smellie CJ in *Banco Economico S.A*.

12. Taking these three authorities in the above order, the principle to be derived from the Court of Appeal's judgment in *HSH Cayman I GP Limited v ABN AMRO Bank N.V.* [2010] 1 CILR 114 is that the inherent jurisdiction may supplement but cannot be used to lay down procedure which is contrary to or inconsistent with a valid rule of the Grand Court.

13. At paragraph [21] of *HSH Cayman I GP Limited*, Chadwick P commenced his consideration of the nature and extent of the court's inherent jurisdiction, referring to the English Court of Appeal's judgment in *Raja v van Hoogstraten* [2008] EWCA Civ 1444. At paragraph [22], Chadwick P said:

> *"22. The court then went on to say this (ibid., at para. 74):*
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> *'The relationship between the inherent powers of the court to control proceedings and the RSC was considered by Sir Jack Jacob in his Hamlyn lecture* 'The Inherent Jurisdiction of the Court' *[1970] Current Legal Problems, 23, 50-51. He said that the powers of the court under its inherent jurisdiction-*
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> *'are complementary to its powers under rules of court; one set of powers supplements and reinforces the other ... [W]here the usefulness of the powers under the rules ends, the usefulness of the powers under inherent jurisdiction begins.'*
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> *In an illuminating article entitled* 'The Inherent Jurisdiction to Regulate Civil Proceedings' *(1997) 113 LQR 120, 128, the late Professor Martin Dockray said that the RSC may limit the inherent powers of the court where there is a conflict between them. Thus 'the inherent jurisdiction may supplement but cannot be used to lay down procedure which is contrary to or inconsistent with a valid rule of the Supreme Court.' In our judgment, this last statement was correct in law, being supported by the authorities cited in the article which included* Moore v Assignment Courier Ltd. *... and* Langley v North West Water Authority *...'*
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> *23. ... the court continued ([2009] 1 W.L.R. 1143, at paras. 76- 78):*
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> *'76. The position pre-CPR, therefore, was that the inherent powers of the court could not be invoked to do something which was inconsistent with a rule. Thus, if a rule gave a wide discretion to the court to decide whether or not to make a particular order, the court could not exercise its inherent powers to make such an order ex debito justitiae as if it had no discretion, or a discretion which could only be exercised one way in accordance with the rules."*

The English Court of Appeal confirmed in paragraph 77 of *Raja v van Hoogstraten* that the introduction of the CPR in England did not affect the pre-CPR position described, and then continued in the passage quoted by Chadwick P:

> *"78. In our judgment, therefore, where the subject matter of an application is governed by rules in the CPR, it should be dealt with by the court in accordance with the rules and not by exercising the court's inherent jurisdiction. There is no point in exercising the court's inherent jurisdiction if that would involve adopting the same approach and would lead to the same result as an application of the rules. And it would be wrong to exercise the inherent jurisdiction of the court to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules.'"*

14. Chadwick P endorsed that approach but then concluded at [27] that the situation in *HSH Cayman I GP Limited* was covered by the CWR so that there was no scope for application of the inherent jurisdiction on the facts. The other members of the Court of Appeal agreed.

15. In *Banco Economico S.A.*, which concerned a winding up petition, the company applied to cross-examine the liquidator of the petitioning company on his affidavit in support of the petition. The affidavit made allegations of systematic fraud within the debtor company, which the company denied. In the face of the company's application for cross-examination, the petitioner considered it could proceed on the petition based on the documentary evidence alone and therefore elected no longer to rely upon the liquidator's affidavit. The application to cross-examine the liquidator was therefore dismissed.

16. The existence of the inherent jurisdiction was agreed in that case, see page 98, line 1, so it is of limited value as an authority on that proposition:

> *"It is agreed that the court has the discretion to order cross-examination upon the statutory affidavit filed in support of a petition, even if no affidavit evidence is filed in opposition. If authority needs to be cited for that basic proposition, some of persuasive value is to be found in the Hong Kong case of* In re Canton Trust & Comm. Bank Ltd. (No. 2)*. If, in the exercise of that discretion, cross-examination is ordered and the deponent is not presented for cross-examination, the court then also has a discretion to refuse reliance on the affidavit: see* Tay Bok Choon v Tahansan Sdn. Bhd. *..."*

17. Smellie CJ, in a passage that is strictly *obiter* in the circumstances, and which addresses the question of discretion rather than the issue of jurisdiction, went on to express the view at pages 98, line 37, to page 99, line 22, that if the petitioner had continued to rely on the affidavit, the Court would have ordered cross-examination:

> *"Once Mr Locke had made the concession on behalf of the petitioner that reliance would not be placed on the allegations of fraud, it seemed obvious that it was not for the court to compel Mr Cunha's attendance for cross-examination in support of the petition. ... Were it the continued intention to proceed with the petition upon those allegations, my ruling would have been different. I would have been inclined to take the well-advised approach adopted in* In re A.B.C. Coupler & Engr. Co. Ltd. *and considered by Templeman, J. in* ln re Armvent Ltd. *([1975] I W.L.R, at 1684-1685) which is that-*
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> > *'where grave charges were levelled against individuals the court would not in the exercise of its discretionary jurisdiction be satisfied with prima facie evidence but require the petitioner to substantiate his case more fully; that in such cases it would require where practicable the evidence of witnesses with direct knowledge of the matters to which they were testifying and upon which they could be cross-examined and which conformed to the ordinary rule of admissibility.'*
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> *Now that Mr Cunha's first affidavit is to be excluded and as the petition itself raises no allegations of fraud, it can no longer be said to be necessary for the proof of the petition that cross-examination of Mr Cunha upon his affidavit should be ordered over the objections of the petitioner, bearing in mind that it is not for the judge to say what evidence should be presented, see* Tay Bok Choon.

> *Cross-examination is to be ordered where it is necessary for fairly disposing of the issues before the court and that will obviously depend upon the circumstances of the particular case …"*

18. Smellie CJ's test can therefore be summarised as whether cross-examination is necessary in order that the court can fairly determine the issue raised. The Company relies on this to argue that the key question is not whether a party continues to rely on the affidavit in question, but whether the evidence is relevant to an issue. The Company contends that if it is, then the Court has jurisdiction to order cross-examination even if the affidavit is no longer relied upon by the other party.

19. Finally, there is *Re China Branding Group Limited*, which the Company says is factually comparable to this case. The judgment is very short, with a pithy analysis as follows:

> *"3. Having considered this matter, I am of the view that it comes down at this stage to one narrow point of law and, in determining that point of law, I have taken into account not only the Court of Appeal case to which we have been referred (*HSH Cayman Limited I GP Ltd. v ABN AMRO Bank NV *[2010 (1) CILR 114]) but also the case in which the learned Chief Justice indicated how, other than in substantive matters, the Court may use its inherent jurisdiction to fill what would otherwise be a lacuna (*In the Matter of Saad Investments Company Limited *[2010 (2) CILR 422]). Considering the nature of the matter under consideration and the fact that cross-examination may well be appropriate in many instances, the Court is of the view that, in this instance, it would be appropriate to allow cross-examination as requested in paragraph 2 of the Summons dated 28 September ….*
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> *4. I say that both as a matter of jurisdiction, because I see nothing at variance with or that contradicts the scheme laid down by making this order, and as a matter of discretion in the circumstances of what appears to be a complex and difficult matter where the Court considers that it would be assisted by having an opportunity to see these witnesses cross-examined and, indeed with the particular issue of expert witness evidence firmly in mind, to test and see tested their propositions of law …. Therefore, given that this is an unusual matter and that expert evidence is to be adduced, it is very important that the Court has the tools available to make an informed and considered decision after those experts have been, as appropriate, duly tested."*

20. The Petitioner points out in response that in *China Branding*, the Order sought was that unless the particular deponents were tendered for cross-examination, their evidence could not be relied upon, and that was the Order made by McMillan J. The Petitioner argues that the rationale was to avoid the unfairness in allowing a party to rely on contested affidavit evidence, without the ability for the opponent to cross-examine to explore the accuracy of that evidence. In this case, Mr Isaacs submits,

the Petitioner is not relying on the Deponent's evidence. He argues that this excludes the jurisdiction to order cross-examination, and refers back to what Smellie CJ said in *Banco Economico S.A.*:

> *"Once Mr Locke had made the concession on behalf of the petitioner that reliance would not be placed on the allegations of fraud, it seemed obvious that it was not for the court to compel Mr Cunha's attendance for cross-examination in support of the petition. …"*

21. Drawing the above threads together, in my judgment, the correct position is that the inherent jurisdiction is in principle available to fill a gap in the applicable procedural rules, provided that the approach to be taken is consistent with the law and existing Rules, and their spirit and intention. In general, as expressed by Smellie CJ in *Banco Economico S.A.*, an order for cross-examination of a deponent on their affidavit can properly be made where cross-examination is necessary for fairly disposing of the issues before the court. However, built into that statement is the underlying assumption that the affidavit is being relied upon by the other party and forms part of the evidence before the court and that the witness is properly before the court.

22. In order to determine the jurisdiction question in this case, it is useful to consider what it is, in jurisprudential terms, that the Company is asking the Court to order. The order sought is to compel the Deponent to make himself available for cross-examination on his affidavit. However, the petition was withdrawn without a substantive hearing of the issues and, as a result, the Deponent's affidavit has never formally been deployed in the proceedings or relied upon by the Petitioner and is not relied upon now. The order now sought by the Company would therefore implicitly require that the Petitioner is compelled to put the Deponent's affidavit in evidence when the Petitioner no longer wishes or needs to do so.

23. In my judgment, that is a step too far. If the affidavit is not relied upon as evidence, it is simply a document like any other, with no status within the proceedings. It is not part of the evidence properly before the Court on the issues that remain in play. I do not consider that the Court has power to compel a non-party, whose evidence is not relied upon and is not before the Court, to attend for cross-examination. Nor does the Court have power to require the Petitioner to put the Deponent's affidavit in evidence, when the Petitioner no longer wishes to rely upon the affidavit, in order to found a basis for the Company to cross-examine the Deponent. This is consistent with Smellie CJ's statement in *Banco Economico S.A.*, that it is not for the Court to compel attendance for cross-examination when the evidence is no longer relied upon.

24. If the Deponent were to be called as a witness by the Petitioner or his affidavit put into evidence on the costs issues, the court could order that he be cross-examined about his affidavit, just as he could be cross-examined about any other relevant document. However, if the Deponent is not called by the Petitioner and his affidavit is not formally in evidence, I do not see how the court's inherent jurisdiction to order him to be cross-examined upon the affidavit is triggered.

25. I see the force of the Company's argument that it does not want to cross-examine the Deponent regarding the petition or the strike out application, but on issues said to be relevant to the Petitioner's conduct in order to support its arguments relating to costs. But those arguments, and the potential relevance of the evidence that the Deponent could give on those issues, do not overcome the jurisprudential objections to jurisdiction raised by the Petitioner.

26. In addition, whether the Court would have power to compel the Deponent to give evidence as a witness if he does not agree to do so voluntarily was raised in correspondence between the parties but did not feature in the oral argument before me. Nevertheless, in my judgment it is a relevant consideration. It is a well-established principle of international law that a court's power to issue a subpoena to compel an unwilling witness to give evidence is limited to the territorial limits of the country where the court is situated. It is this limitation that led to the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters (1970). An example from England, where the issue of the court's power to compel a witness overseas arose is *Vitol SA v Capri Marine Ltd* [2008] EWHC 378 (Comm). Judgment had been entered against the defendant company. The plaintiff sought an order that one of the defendant's officers, who was out of the jurisdiction, attend for examination as to the defendant's assets. Tomlinson J, sitting in the Commercial Court, held at [10] that:

> *"… the question arises on what basis the court can assume an exorbitant jurisdiction to permit service of such an order out of the jurisdiction? The closest analogy is a witness summons issued under CPR 34.2, which, in the language of that rule, 'is a document issued by the court requiring a witness to (a) attend court to give evidence or (b) produce documents to the court.'* ***It is axiomatic that a party cannot compel a witness in a foreign country to attend a trial in England and Wales*** *— see the note to that effect at CPR 34.13.1."* (emphasis added)

27. A similar point was made by the House of Lords the following year in *Masri v Consolidated Contractors International Company SAL* [2009] UKHL 43. Lord Mance, with whom the other Law Lords agreed, said at [23]:

> *"… A fair and efficient legal system is of course a cornerstone of the rule of law, and it can also be said that there is a public interest in a court getting to the bottom of litigation and ensuring that parties have the means of obtaining full information to enable it to do so. Yet the parties have no right to ask the court to summon witnesses from abroad for that purpose. …"*

Lord Mance expressly agreed with Tomlinson J's decision in *Vitol*.

28. Thus, in my judgment, given that the Deponent is not within the Cayman Islands, unless he consents to make himself available for cross-examination, the Court does not have any power to compel him to do so and does not have any mechanism by which it can enforce such an order. This supports my conclusion that the Court does not have jurisdiction to order the Deponent to attend before the Court (in person or remotely) for cross-examination.

29. Of course, there is nothing to prevent the Petitioner from deciding that it is in its own interests for the Deponent voluntarily to agree to be cross-examined to rebut the arguments that the Company has indicated that it intends to put forward regarding the veracity of the statements in the Deponent's affidavit. And it is not difficult to predict that the Company will invite the Court to draw adverse inferences if the Petitioner does not tender the Deponent for cross-examination. However, my conclusion is that the Court does not have jurisdiction to force the Petitioner to do so against its wishes.

C. Discretion

30. If I had concluded that I do have jurisdiction to order the Deponent to attend for cross-examination upon his affidavit, the question would arise whether I should exercise my discretion to make such an order. The parties addressed me in detail on this, so I will set out my decision notwithstanding that the question of the exercise of my discretion does not strictly arise in light of my conclusion on jurisdiction.

31. The Company's position, based on the passages in *Banco Economico S.A.* that I have already set out, is that the key question is what is necessary in order fairly to dispose of the issue whether the Deponent's affidavit was untruthful, which is at the heart of the first ground of the Company's application for costs on the indemnity basis.

32. The Company accepts that the Court should be very hesitant about inferring dishonesty. This is the reason why the Company wants to be able to cross-examine the Deponent, so that it can attempt to demonstrate that the Deponent's conduct tips past negligence or carelessness and into dishonesty. The Company says that cross-examination of the Deponent is clearly necessary, and therefore the Court should exercise its discretion in the Company's favour.

33. The Petitioner relies on a number of grounds why the Court should not exercise its discretion to order cross-examination. I will focus on those which, in my judgment, are of most significance when considering the exercise of the Court's discretion.

34. The Petitioner contends that whether or not a petitioner acted reasonably in presenting a petition is simply not relevant to the determination of costs issues (save in exceptional circumstances), and hence whether the Petitioner acted unreasonably or dishonestly, as the Company contends, is similarly not relevant.

35. In support of this argument, the Petitioner relies firstly on *GlaxoSmithKline v UK (Aid) Ltd* [2003] EWHC 1383 (CH), a decision of Blackburne J concerning the costs of a winding up petition, following its dismissal after a full hearing. The petitioner invited the learned judge to reserve the costs of the petition to the hearing of substantive proceedings that the petitioner intended to bring to demonstrate that the company's grounds for disputing the debt were invalid. Blackburne J said at [6] and [7]:

> *"[6]. Attractively though he puts it, I am not persuaded that I should follow his suggestion. I say that for these reasons. In my experience, very often where there is a contested winding-up petition, there is an issue of credibility: one side is telling the truth and the other side is probably telling lies. It is only when the matter comes to trial and it is possible for the witnesses in the case to be cross-examined that the court is in a position to say where the truth lies and in particular who is telling the truth and who is not. That is in my experience fairly common in the case of contested winding-up proceedings. But it is a risk the petitioner runs when without the benefit of judgment he launches winding-up proceedings, there are assertions which are irreconcilable and it is likely that one side is telling the truth and the other is not.*
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> *[7] ... I do very much have in mind what Warner J said at 695 of his judgment where he said this:*
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> *'Another material consideration is that experience in this court shows that, if in every case of the withdrawal or dismissal of a winding-up petition the court is to go into the whole history of the case to assess whose conduct at which stage was reasonable and who is unreasonable, an enormous amount of the court's time and consequent costs will be spent on disputes of this kind.'*

He then said:

> *'I think the principle should be adhered to that unless there be exceptional circumstances a petitioner whose petition fails on the ground that that is bona fide disputed on substantial grounds should pay the costs of that failure.'*

Then he said this:

> *'If I adopted the suggestion of counsel for the petitioners that I should here order the costs to be costs in the action, I would really be saying that someone who has a claim against a company can always try first to enforce that claim by serving a statutory demand and presenting a petition. If he succeeds he will be paid or the company will go into liquidation; if he fails the costs of the winding-up proceedings will simply be added to the costs of the writ action that he will then have to bring to establish his claim. It seems to me that that cannot be a proper view of the winding-up procedure.'"*

The judgment of Warner J, from which Blackburne J quoted, is from *Re Fernforest* [1990] BCLC 693.

36. In *Aramid Entertainment Fund Ltd v KBC Investments V Ltd* [2014] 1 CILR 455, the Court of Appeal approved and applied in the Cayman Islands the statements of Warner J in *Re Fernforest* and Blackburne J in *GlaxoSmithKline*.

37. Overlapping with the argument that reasonableness is irrelevant, the Petitioner's submission is that it is inappropriate to embark on a determination of disputed facts solely in order to put the court in a position to make a decision about costs. The Petitioner says that winding up petitions often involve issues of credibility, which are matters for trial. Cross-examination to resolve such issues for the purpose of determining the basis of taxation of the costs of a winding up petition that has been compromised or withdrawn, so that there has not been a determination on the merits, is wrong in principle and is not justified. Mr Isaacs relies on a trio of cases to support this proposition.

38. The first is the English case of *BCT Software Solutions Ltd v C Brewer & Sons Ltd* [2003] EWCA Civ 939, where the parties had settled a copyright claim during trial but were unable to resolve the issue of costs and asked the trial judge to do so. The claimant then appealed against the judge's decision on costs. Mummery LJ, giving the first judgment and dismissing the appeal expressed the following cautionary words at [4]:

> *"The arguments advanced on this appeal have demonstrated the real difficulties inherent in asking a judge to exercise his discretion in respect of the costs of an action, which he has not tried."*

Chadwick LJ expanded on this aspect at [23]-[27] of his concurring judgment as follows:

> *"[23] ... the court must have regard to the need (if an order about costs is to be made) to have a proper basis of agreed or determined facts upon which to decide, in the light of the principles set out under the other provisions in CPR 44, what order should be made. ...* ***Unless the court is satisfied that it has a proper basis of agreed or determined facts*** *upon which to decide whether the case is one in which it should give effect to 'the general rule'—or should make 'a different order' (and, if so, what order)—****it must accept that it is not in a position to make an order about costs at all****. That is not an abdication of the court's function in relation to costs. It is a proper recognition that the course which the parties have adopted in the litigation has led to the position in which the right way in which to discharge that function is to decide not to make an order about costs.*
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> *[24] In a case where there has been a judgment after trial, the judge may be expected to be in a position to decide whether one party or the other has been successful overall; whether one party or the other has been successful on discrete issues; whether the fact that the party who has been successful overall but unsuccessful on some issues calls for an order which reflects his lack of success on those issues; and whether—having regard to all the circumstances (including conduct) as CPR 44.3(4) requires—the order for costs should be limited in one or more of the respects set out in CPR 44.3(6).* ***But where there has been no trial—or no judgment—the judge may well not be in a position to reach a decision on those matters. He will not be in a position to decide those matters if they turn on facts which have not been agreed or determined. In such a case he should accept that the right course is to decide that he should not make an order about costs.*** *As the arguments on the present appeal demonstrate, it does the parties no service if the judge—in a laudable attempt to assist them to resolve their dispute—makes an order about costs which he is not really in a position to make.*
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> *[25] It does not, of course, follow that there will be no cases in which (absent a judgment after trial) the judge will be in a position to make an order about costs. There will be cases (perhaps many cases) in which it will be clear that there was only one issue, that one party has been successful on that issue, and that conduct is not a factor which could displace the general rule. But, in such cases, the answer to the question which party should bear the costs of the litigation is likely to be so obvious that, as Mummery LJ has pointed out, the judge will not be asked to decide that question. It will be agreed as one of the terms of compromise.*
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> *[26] The cases in which the judge will be asked to decide questions of costs—following a compromise of the substantive issues—are likely to be those in which the answer is not obvious. And it may well be that, in many such cases, the answer is not obvious because it turns on facts which are not agreed between the parties and which have not been determined.* ***The judge should be slow to embark on the determination of disputed facts solely in order to put himself in a position to make a decision about costs.*** *As Mummery LJ has put it, the better course may be to require the parties to confront the realities of their litigation situation; to point out to them that, if they have not reached an agreement on costs, they have not settled their dispute and the action must proceed to judgment.*
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> *[27] I share Mummery LJ's view that this is a case in which the judge could not have been criticised if he had taken that course. For my part, I think he would have been wise to do so. But it is not open to the appellant to complain that the judge set out to do what both parties had asked him to do—that is to say, to make an order about costs and to decide what order to make on the material before him and without determining disputed facts. Nor is it open to the appellant to complain that, in seeking to perform that task, the judge adopted an approach which he, himself, described as 'broad brush'. It is difficult to see what other approach the judge could have adopted in the circumstances."* (emphasis added)

39. The second English case relied upon by Mr Isaacs is *Promar International Ltd v Clarke* [2006] EWCA Civ 332, where the Court of Appeal roundly rejected a "floodgates" type argument, similar to one of My Flynn's arguments in this case, and emphasised its general application. During trial, the defendant offered an undertaking in lieu of an injunction, which the claimant accepted and then abandoned its claim for damages. The parties requested the judge to decide costs, which he reluctantly did in ignorance of *BCT Software Solutions Ltd*, ordering the defendant to pay 75% of the claimant's costs. The defendant's counsel then became aware of the judgment in *BCT Software* and invited the judge to reconsider his decision on costs, which he did, substituting a decision to make no order as to costs. The claimant appealed. Having cited extensively from the judgments of Mummery and Chadwick LJJ in *BCT Software*, the Court of Appeal added:

> *"30. [The claimant's counsel] further submitted that if the decision of 17 February stood it would send the wrong signal to litigants and their advisors. Defendants in similar cases, could wait until trial, offer an undertaking in lieu of an injunction, and, if accepted, escape paying the claimant's costs.*
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> *31. In my judgment the judge was correct to take into account the guidance given by the Court of Appeal in* BCT Software*.* BCT Software *is an authority of general applicability to cases which have settled or been resolved without a judgment being delivered and the judge is asked to adjudicate on the issue of costs."*

40. Thirdly, Mr Isaacs relies on the recent judgment of Kawaley J in *In the Matter of the G Trust* (unreported, 24 December 2024), where the learned judge applied *BCT Software* in the Cayman Islands, indicating that he found Chadwick LJ's statements in [25] and [26], set out above, helpful in determining his approach to the costs issues that arose in that case.

41. In light of these judgments, I agree with Mr Isaacs that where a petition has been withdrawn, the usual consequence is that the petitioner will be ordered to pay the debtor company's costs of the petition. Except in exceptional circumstances, the petitioner will not be excused from that liability on the basis that the petitioner acted reasonably in instituting the petition, for the reason expressed by Warner J in the third extract from his judgment in *Re Fernforest* quoted by Blackburne J in *GlaxoSmithKline*.

42. However, it does not follow that a petitioner's unreasonable or dishonest conduct cannot be relevant on costs, namely the basis on which taxation will take place: it clearly can be and there are many cases in the Cayman Islands and elsewhere where the petitioner has been ordered to pay indemnity costs because the court has taken a dim view of the petitioner's conduct.

43. In my judgment, the principle to draw from *GlaxoSmithKline*, *Re Fernforest* and *BCT Software* is best expressed as being that it is inappropriate for the Court to embark on a determination of disputed facts solely in order to put the court in a position to make a decision about costs, save in exceptional circumstances.

44. I do not consider that there are any exceptional circumstances that tip the balance towards the Company. Applying that principle in this case therefore provides a strong pointer against exercising my discretion in the Company's favour and instead supports approaching the question of the basis of taxation on the usual "broad brush" approach that applies to most determinations of costs issues.

45. The Petitioner argues that cross-examination is properly reserved for trial, with certain limited exceptions that do not include applications regarding costs. Mr Isaacs directed my attention to *Stokoe Partnership Solicitors v Grayson* [2021] EWCA Civ 626, where Bean LJ said at [17]:

> *"English law does not generally permit, save by consent, depositions, in other words oral interrogation of an opposing party, except at a trial where that party has chosen to give evidence. Examination of a judgment debtor is an obvious and long-standing exception; and it should be noted that an order for a judgment debtor to attend for examination can be endorsed with a penal notice (CPR r 71.2). So too, since the 1980s, is the jurisdiction to order cross-examination on an affidavit sworn in answer to an application for a freezing injunction containing an order for disclosure of the whereabouts of assets. But there the court is not assisting the claimant to establish its substantive case against the defendant: it is merely seeking to protect the assets from being concealed, dissipated or transferred abroad so as to frustrate the effectiveness of any judgment which the claimant will obtain at trial."*

46. Neither counsel has found any case where an order similar to the one sought here has been made. The Company replies that this is akin to a box-ticking exercise: just because other cases have not been identified is not a good reason why the Court should not make the order sought; and if cross-examination is necessary in order to dispose of the issues before the court fairly, it should be ordered.

47. I conclude that whilst the general rule is that cross-examination is reserved for trial, oral examination of judgment debtors and for respondents to freezing orders, as Mr Isaacs submits, it is not a box-ticking exercise. There may be exceptional circumstances in which the overall justice requires that cross-examination is ordered to take place at some other point in ongoing proceedings. This is something that is best considered on a case-by-case basis, as situations arise. However, determining

questions of costs, even where there are otherwise untested allegations of dishonesty, is unlikely to be exceptional.

48. Mr Isaacs argues next that an order for the Deponent to be cross-examined will result in unfairness in two key respects. First, in order to determine the question of the Deponent's honesty fairly, the Court has to look at all the surrounding circumstances and evidence. However, he says the Court will not be able to do so because at least two other relevant witnesses and relevant documentary evidence will not be before the Court. He submits that it would be inappropriate and unfair to the Deponent for the Court to attempt to determine whether he was dishonest in those circumstances.

49. I consider that there is merit in this submission, which is another pointer against exercising my discretion in the Company's favour.

50. Secondly, the Petitioner argues it would be unfair to order cross-examination of the Deponent because it will potentially provide the Company with an unfair forensic advantage in the arbitration. The issues that the Company wishes to raise before the Court regarding the Deponent's honesty significantly overlap the issues that the Company raises in the arbitration. Mr Isaacs complains that the Company will be able to rely on any findings made by the Court as to the Deponent's dishonesty; that the Company will be able to use the cross-examination before the Court as a "dry-run" for the Deponent's cross-examination in the arbitration; and the Company will also gain a forensic advantage for its cross-examination of other witnesses in the arbitration.

51. In response to these points, the Company submits that the pre-emption and overlap of issues is entirely the Petitioner's responsibility, in that the Petitioner elected to commence the winding up proceedings in flagrant breach of the arbitration agreement between the parties.

52. I conclude that the Petitioner's complaints on this aspect should not be given significant weight in circumstances where the Petitioner now accepts that the issues should be resolved by arbitration.

53. A further point arises in that it appears from the memorials in the arbitration that I have been shown that part of the Company's claim before that tribunal is for any shortfall in the costs recovery that it

may make in these proceedings in the Cayman Islands. The Company appears to be claiming the full amount of its legal costs as part of its damages claim. It therefore appears that whatever I decide regarding the basis on which the Company's costs should be taxed may not have real significance in the wider battle between the Company and the Petitioner. This is an additional factor relevant to the exercise of my discretion whether to order the Deponent to be cross-examined in that it suggests that such cross-examination is unlikely to have any real-world consequences.

54. The Petitioner contends that the Company's costs application and application to cross-examine the Deponent are disproportionate having regard to both the time required to determine them, and the costs incurred and to be incurred and the potential difference to the Company's recovery between standard basis and indemnity basis costs.

54.1 As to the use of court time, Mr Isaacs notes that the determination of the summons to cross-examine the Deponent was listed for 1 day (including half a day pre-reading) – in fact it took nearly 1½ days and further time has been occupied in preparing this judgment and addressing the question of anonymisation – and the summons for indemnity costs is listed for a further 1½ days (including pre-reading), making more than 3 days in total. This is to be contrasted with the time estimate for the summons to strike out the petition, which was listed for 1 day.

54.2 Mr Isaacs took me through various calculations intended to demonstrate a significant mismatch between the amount to be spent and the difference in recovery for the Company between standard basis costs and indemnity basis costs. Mr Flynn replied that the only reason the application has become disproportionate is because the Petitioner has raised a number of bad points, which have unnecessarily driven up costs.

55. I consider that there is considerable mileage in Mr Isaacs' criticisms that this exercise has become disproportionate, both in terms of the use of court time and the work needed on both sides, but also in terms of cost / benefit. The time and work required from attorneys will only increase, and the cost / benefit will only decrease further if I order cross-examination of the Deponent, which is another factor against making such an order.

56. In this context, it is pertinent to note Chadwick P's comment at [29] in *Aramid Entertainment Fund Ltd*:

> *"29. … The present case provides a striking illustration of the consequence of departing from that wise advice [of Warner J in* Re Fernforest Ltd*]. Foster, J embarked upon two days of hearing in order to decide whether the petitioner had acted reasonably in pursuing its petition. Substantial affidavit evidence was prepared and filed. The judge prepared a ruling extending to 56 paragraphs over 28 pages. In the course of that ruling, he decided disputed questions of fact on the basis of untested affidavit evidence. We were told that the amount of costs thrown away by the abandoned petition was of the order of US $20,000-US $30,000 and that the amount of further costs (excluding the costs of this appeal) incurred in arguing about who should pay the costs thrown away is of the order of US $250,000-US $300,000. It is appropriate to ask whether the judge's decision to disregard the advice given by Warner, J. some 25 years ago-and consistently applied in the courts in England and Wales-has served the interests of justice."*

57. The Petitioner argues that the merits of the Company's arguments that the Deponent's evidence was dishonest are weak when considering what he actually said in his affidavit, and the issue as to the accuracy of the Deponent's affidavit was raised very late, suggesting it is a makeweight. I do not express a view on this, which is better dealt with at the hearing of the costs application. I do not consider that the alleged weakness of the case affects the exercise of my discretion.

58. Finally, on a practical note, the Petitioner submits that the country where the Deponent is located does not permit evidence by videolink to be given to courts in other territories without permission, which has not been obtained and is unlikely to be obtained in time for the hearing of the Company's application for costs on 1 April 2025. This point arises because on 13 January 2025 I made a consent order in which I gave leave for the Deponent to give evidence by videolink, rather than having to attend the Cayman Islands in person, if leave to cross-examine him were granted. The Company responds that the Deponent could easily travel to a neighbouring country that does permit such evidence to be given, which would not involve significant inconvenience for him.

59. In light of my conclusions on the weight to be given to the other matters raised by the Petitioner, I do not consider that the potential need for the Deponent to travel to another country to give evidence affects my overall conclusion. However, it may well be of significance in other cases.

60. As is apparent from my indications during the course of this part of my judgment, I have unhesitatingly come to the view that I would not exercise my discretion to make the order for cross-examination that is sought by the Company.

61. In the circumstances, and for the reasons I have set out, I conclude that the Court does not have jurisdiction to order the Deponent to be cross-examined upon his affidavit and, if I do have jurisdiction to make an order that the Deponent should be cross-examined, I should not exercise my discretion in the Company's favour.

62. I will hear the parties further, if necessary, on the issue of the costs of this summons. Within 14 days of handing down of this judgment, counsel should indicate: (a) whether they wish to be heard on costs and any consequential matters, providing their agreed available dates and time estimate for a hearing; or (b) whether they will submit written submissions on those points within 14 days. In either case, counsel should provide a draft order, agreed if possible, in advance of the hearing or with their written submissions.

Dated 18 February 2025

THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT