ND COURT OF THE CAYMAN ISLANDS
SERVICES DIVISION

NEUTRAL CITATION NUMBER [2025] CIGC (FSD) 26

CAUSE NOS. FSD 54 of 2021 (CRJ)
FSD 155 of 2020 (CRJ)
FSD 46 of 2021 (CRJ)

IN THE MATTER OF THE COMPANIES ACT (2025 REVISION)

AND IN THE MATTER OF MADERA TECHNOLOGY FUND (CI), LTD

Appearances:	**Mr. Laurence Aiolfi of Mourant for the Petitioner**
	Mr. Quentin Cregan and Mr. Justin Naidu of Maples and Calder (Cayman) LLP for the Respondent
Before:	**The Hon. Justice Cheryll Richards KC**
Heard:	**19th March 2025**
Draft Judgment:	**27th March 2025**

Grand Court Rules (2023 Consolidation) O.62, r4 (7) (g), O.62, r4 (7) (h), – Application for the payment of interest and interim costs, exercise of discretion where further application pending.

JUDGMENT

1. This is an application by the Petitioner, Fideicomiso F/000118 for the payment of interim costs and interest. It is made by Summonses filed on the 9th January 2025 in respect of Cause FSD 54 of 2021, the Main Proceedings, and Causes FSD 155 of 2020 and FSD 46 of 2021, the Related Proceedings.

2. By Order dated 17th December 2024, made in the Main Proceedings the Court ordered that pursuant to s.95 (3) (d) of the ***Companies Act***, as an alternative to a winding up order, Madera Technology Fund (CI), Ltd ("the Respondent", "the Company") is to purchase the Petitioner's Shares in the Company. These are Shares held by way of an investment in Accolade Inc. By paragraph 2 of that Order, the Company was ordered to pay the costs of the Petitioner, to be taxed on the standard basis if not agreed.

3. By a second Order dated 17th December 2024, in respect of the Related Proceedings, the Company was ordered to pay the costs of the Petitioner, to be taxed on the indemnity basis if not agreed.

4. The Petitioner's Summons in the Main Proceedings seeks the following: -

> "1. Pursuant to GCR O. 62, r 4(7) (g) the Company shall pay interest on the Petitioner's taxed costs calculated at the prescribed rate of 2.375% from the date [of] upon which they were paid by the Petitioner.
>
> 2. Pursuant to GCR O. 62, r 4(7) (h) the Company shall make a payment in the sum of US $460,000 on account of the costs payable to the Petitioner, within 14 days of this order."

5. The Summons in the Related Proceedings seeks the following: -

> "1. Pursuant to GCR O. 62, r 4(7) (g) the Company shall pay interest on the Plaintiff's taxed costs calculated at the prescribed rate of 2.375% from the date [of] upon which they were paid by the Plaintiff.

2. Pursuant to GCR O. 62, r 4(7) (h) the Defendant shall make a payment in the sum of US$190,000 on account of the costs payable in the Proceedings, within 14 days of this order."

THE GRAND COURT RULES

6. The ***Grand Court Rules***, ("GCR") O. 62, r 4(7) (g) provides for the payment of interest on costs at the prescribed rate from or until a certain date including a date before the judgment.

7. With respect to the payment of interim costs GCR O. 62, r 4(7) (h) provides that:

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

THE APPLICABLE PRINCIPLES

8. It is accepted in this case that the Court has a discretion to order the payment of interim costs depending on the circumstances of the case. It is also accepted that the principles which should govern the exercise of such a discretion are well established. They are detailed by the Grand Court (Kawaley J) in ***Al Sadik v Investcorp Bank B.S.C. and Others***[1] which case was referenced with approval by the Cayman Islands Court of Appeal in ***Scully Royalty Limited and MFC 2017 II Limited v Raiffeisen Bank International A.G.***[2] .

9. The Court held in ***Al Sadik v Investcorp Bank*** that the governing principle which underpins the interim payment on account costs rule is that a successful party is entitled to have its money as soon as possible. The party should be paid some of its costs immediately and before taxation. The Court also held that the rule properly construed contains an implicit starting assumption that an interim payment should be made. Following a review of several cases, Kawaley J summarised the governing principles under Cayman Islands law in part as follows: -

[1] [2019] 2 CILR 585
[2] [2022] (1) CILR 572.

"Building on Parker, J.'s decision in *In re BDO* (2) and having due regard to the English authorities to which he was not referred which construe a similar CPR interim payment rule, I would summarize the governing principles under Cayman Islands law in a more robust pro-receiving party manner as follows:

(a) GCR O.62, r.4(7)(h) confers an unfettered discretion on the court to order the payment of "where the Court orders the paying party to pay costs subject to taxation, a reasonable sum on account of costs, such sum to be assessed summarily";

(b) the governing principle underpinning this power, and the *raison d'être* for the rule, is that (*per* Jacob, J. in *Mars UK Ltd.* v. *Teknowledge Ltd.* (5) ([1999] 2 Costs L.R. at 47))—
"the successful party is entitled to the money. In principle he ought to get it as soon as possible. It does not seem to me to be a good reason for keeping him out of some of his costs that you need time to work out the total amount."

(c) …The principle that a successful party should be paid some of his costs immediately and before taxation is not simply "an important consideration," it is the governing and predominant principle articulated by the interim payment on account of costs rule;

(d) the purpose of the rule is to enable the court to avoid the injustice of delayed payment of all costs until the total amount is determined upon taxation through a summary partial assessment. This is because the need to carry out a detailed assessment through taxation is "not a good reason" for not ordering some costs to be paid immediately. Whether or not the discretion should be exercised is not shaped by the need to do justice in an abstract sense, entirely untethered from the core purpose of the rule. Whether or not an interim payment on account of costs should be ordered will almost invariably require an assessment to be made of whether or not there is a good reason *not* to order an interim payment and/or a good reason for requiring the receiving party to be deprived of any costs until the taxation process is complete;"

10. The learned Judge said that in making a summary assessment of the costs payable on an interim basis the court should aim at arriving at a reasonable estimate of the likely final award and should adopt a conservative approach allowing for a reduction on taxation:

> "The principles governing the broad approach to summary assessment which the first defendant commended to the court were not challenged. I accordingly found that—
>
> (a) the aim of summary assessment was to reasonably estimate the amount of the likely final award;
> (b) in carrying out that assessment, 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 claim was not unreasonable."

11. In that case, the Court adopted the recommended conservative approach and awarded an interim payment of 40% of the discounted 85% of costs claimed.

12. In ***Scully Royalty Limited and MFC 2017 II Limited*** the Court of Appeal applied the principles espoused following a conclusion that there was nothing unusual about the case on appeal which would suggest that a costs contribution should not be awarded at the earliest opportunity.

THE ISSUES

13. The issues joined in respect of the instant application are limited in scope. The Respondent submits that in open correspondence on the 4th March 2025 to the Petitioner it agreed to the payment sought in respect of the Related Proceedings. The Respondent has maintained that any hearing on this part of the application is unnecessary and that an order could have been executed to give effect to the agreement.

14. Similarly, there is no issue joined as to the payment of interest sought by the two Summonses.

15. By reference to Affidavit evidence which produces a series of communications between the parties[3], Counsel for the Respondent notes that on the 27th December 2024 both parties agreed not to launch an appeal against the December Order. On 2nd January 2025, the Respondent asked the Petitioner to provide additional particulars of the costs with a view to settling the overall costs to avoid the need to proceed to taxation. The reason for this request was said to be so that the Respondent could form a "…*view on the reasonableness/recoverability of the claimed* costs..." By correspondence to the Court and the Respondent dated 18th October 2024, the Petitioner had provided an Excel spreadsheet of costs and requested the inclusion of an order for the payment of interim costs in the December Order. No formal application had then been filed. The spreadsheet did not include narratives for the time entries. The Respondent objected to the Petitioner's request. On the 6th January 2025 the Petitioner provided to the Respondent an updated Excel spread sheet which included narratives for the time entries. The two Summonses were issued three days later on the 9th January 2025.

16. The primary issue raised by the Respondent is that on the 10th March 2025 the Petitioner filed a further Summons which seeks a variation of the Order of the 17th December 2024. The variation sought is an order that payment of the Purchase Price of the Shares shall be made by way of a distribution in kind of the underlying shares in Accolade Inc. Counsel submits that the Petitioner is thereby seeking to reopen the Main Proceedings. Counsel says that the Petitioner brought the application for interim payment of costs on the basis that the Main Proceedings had come to an end and has now resiled from that position.

THE SUBMISSIONS

17. Counsel for the Respondent therefore makes two factual submissions. Firstly, that the 10th March Summons is in fact an appeal which has caused the Main Proceedings to be extant and secondly that in any event this Summons has the potential to materially shift the net costs position. Counsel argues that given the nature of the application which is to be made and what is said to be the applicable legal position, there is a realistic prospect of an indemnity costs award being made in favour of the Respondent.

[3] Second Affidavit of Maria Giglioli sworn 10th March 2025,
Fourth Affidavit of Rachel Baxendale sworn 13th March 2025

18. The submission is that the Main Proceedings are therefore not concluded, and no taxation can be imminent. Reliance is placed on the statement made by Kawaley J in the case of ***Al Sadik v Investcorp Bank B.S.C.*** that the pendency of an appeal can displace the assumption that an interim payment on account of costs ought to be made.

19. Counsel also referenced the judgment of the Court in the case of ***Neoma Manager (Mauritius) Limited v Abraaj ABOF IV SPV limited and Others***[4]**.** In that case Parker J declined to make an interim costs order noting that the Respondent had been granted leave to appeal by the Court of Appeal in respect of the Order made. The learned Judge noted that the appeal had been heard in early September 2024 and a decision from the Court may well be imminent. The conclusion was that this was a good reason not to make an interim payment order: -

> "(18) In the circumstances of this case, it seems to the court that there is a good reason not to make an interim payment order pending the decision of the Court of Appeal. It is not safe to predict with any certainty which aspects of the appeal, if any, will be allowed and which, if any, will be dismissed. There are three costs orders to be assessed and each of those orders is apparently affected by the appeal. There are potentially different prospects of success which may be relevant to a costs outcome.
>
> (19) The simplest and safest course and one which will give least opportunity for further disputes is to defer the application until the appeal is determined."

20. The Petitioner's argument in the instant case is that GCR O.62 r. 4 (7) (h) is not limited to final orders and relates to any order where a party is to pay costs which are subject to taxation. Counsel submits that the fact that there may be further and potentially adverse costs orders does not justify refusing an interim costs order.

21. Counsel relies on several cases in support of this submission. In the English case of ***X v Hull & East Yorkshire Hospitals NHS Trust***[5] the Claimant appealed against a refusal to make an order for interim costs in a clinical negligence case. In allowing the appeal the Court noted that while the

[4] [2025 CIGC FSD 4
[5] [2019] WL 02123527

case had not been concluded, the argument was that the Claimant was almost certain to recover costs. An interim payment was ordered pursuant to CPR 44.2(8).

22. In the English case of ***Benyatov v Credit Suisse Securities (Europe) Ltd***.[6] the Defendant advanced four reasons why payments should not be ordered on account. With respect to the first reason which was the possibility of costs orders in both directions, the Court noted that no application had been made by the Defendant for an interim payment and the Court was being asked to consider contingent and uncertain entitlements to costs.

23. As to the likelihood of a further costs order in the defendant's favour the Court said this:

> "(27) The Defendant submits that in the event that the Claimant succeeds in his amendment application it is highly likely that he will be required to pay the Defendant's costs of, and occasioned by, the amendments.
>
> (28) In my view, it would be wrong for me to deny the Claimant his entitlement to an order for an interim payment now because of a costs order which may be made in the future. It seems to me that the appropriate course is to deal with the implications of any costs order which may be made in future as and when that order is made."

24. On the third issue of permission to appeal which was being sought, the Court ordered that the time for interim payment would not start to run until the issue of permission to appeal was determined.

25. The fourth and final reason was that the Claimant may not be able to repay any sums received. The Court rejected this submission holding that there was no evidence that the Claimant would not be able to repay the interim amount.

26. In the Grand Court case of ***Laggner v Uphold Ltd***[7], Segal J referred to the case of ***Benyatov*** and stated that the fact that the costs sought relate to an interlocutory application is not determinative. The learned Judge referred to possible cross liabilities at the end of a trial but said that the risk of an adverse costs order at trial does not justify a refusal to order an interim payment. The learned Judge stated:

[6] [2020] EWHC 682
[7] FSD 134 of 2022 Unreported 5 December 2024

> "39 It seems to me that the fact that the costs to be taxed arise in relation to an interlocutory application is not determinative. R2-R4 are clearly right that it remains possible that the Petitioners my lose at trial and face a considerable adverse costs order and that the reason why the costs of interlocutory applications are generally taxed only at the conclusion of the proceedings is to allow the parties' cross-liabilities to pay costs incurred during the course of and at the end of the proceedings to be set off. But the risk of an adverse costs order at trial does not, in my view, of itself justify a refusal to order an interim payment. The costs order against R2-R4 has been made and the starting assumption is that an interim payment should be made. There need to be facts and circumstances which displace the assumption and show why making an interim payment order would in all the circumstances be unjust and unfair, in particular because of the prejudice, or risk of prejudice, to the paying party (R2-R4)."

27. I have considered the submissions made and the factual circumstances of the instant case against the background of the authorities cited. There is nothing to suggest that an order for interim payment of costs would stifle an appeal. The Parties before this Court have given no indication that there is an appeal as to the essence of the Order made in December 2024. There is no appeal against the terms of the Order as to which party should bear the costs.

28. The cases cited suggest that the fact that there may be further litigation is not determinative of the issue. Even if it is as the Respondent argues that the 10th March Summons may amount to an attempt to re-open the matter, I note the views expressed by Kawaley J. in ***Al Sadik v Investcorp Bank:***

> "Another circumstance which may displace the assumption that an interim payment on account of costs should be made is the mere fact of the pendency of an appeal, **although the primary considerations might relate to the need to suspend any order (or secure repayment) rather than whether or not an order should be made."**
> (my emphasis)

29. My understanding is that an interim order may still be made notwithstanding the pendency of an appeal with a primary consideration being the securing of repayment. In this regard it is noted that concern as to recoverability is not a consideration in this case. There is no point raised as to inability to pay on either side.

30. In my view this is a case which positively cries out for an interim payment. The proceedings have been ongoing for some five years. I conclude that in all the circumstances as raised and considered, there is no good reason for the Petitioner to be kept out of its costs until the taxation process is complete.

QUANTIFICATION OF THE AMOUNT

31. The Petitioner referenced the application of the quantification method discussed in the case of ***The Armand Hammer Foundation, Inc v Hammer International Foundation et al*** [8]. It is agreed that as a first step the Court would arrive at a reasonable estimate of what is likely to be awarded on taxation. Counsel for the Petitioner submits that the usual practice is to assume a recovery of 65% of costs on the standard basis and thereafter to apply a further 15% discount for an award of 50% on an interim payment. The submission is that the interim costs figure requested by the Summons amounts to 50% of the total claimable costs.

32. The Respondent does not disagree with the formula identified from the cases but submits that there ought to be a substantial reduction in the instant case. Counsel submits that of the total costs claimed some US$300,000 are disallowable on the face of the claim. This amount relates to leading Counsel's fees which are stated to be brief fees and refresher fees and are not itemised as well as other claims. They are therefore expressly excluded by Grand Court Practice Direction 1 of 2001, paragraphs 7.2 and 9.4. Counsel for the Petitioner in reply said that the summary assessment process does not require an itemised bill of costs and that to suggest that the entire amount for Counsel's fees should be discounted is not reasonable.

33. Counsel for the Respondent said further that if the initial overclaim was 50% then one ought to make allowance for a possible similar level of overclaiming with respect to the balance of $625,000. It is argued that not only should this amount be reduced by another 50% or $213,000 but that there should also be deducted from this, the costs likely to be incurred in respect of the hearing of the 10th March Summons. The interim payment figure proposed by the Respondent is thus in the range of US$100,000.

[8] FSD 2023-0113 Unreported 24th April 2024

34. For my part, for litigation of such a scale and history the arguments as to overclaiming at the high level suggested by the Respondent appear doubtful. There will of course be matters of detail for the Taxing Officer to address in due course. At this stage I am required to make a summary assessment on the material which is before the Court. While I can accept the Petitioner's submission that plainly the challenged fees for lead Counsel are capable of being reduced to time spent charges, there is at present no record of this time. It is difficult to make an assessment even a broad one in these circumstances. I think that doing so would require more of a guess than an assessment.

35. Applying the guidance provided by Asif J in ***The Armand Hammer Foundation Inc***[9] and allowing for the deductions raised by the Respondent there would be a balance of US$625,000. 50%, of this is $312,000, rounded down to $300,000. I consider that this is a conservative amount to be paid on account given the scale of the litigation and the likely total costs to be awarded on taxation.

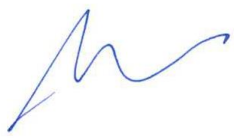
36. The Petitioner asks for this to be paid in 14 days. The Respondent ask for 21 days. I am satisfied given the amount to be paid, that 21 days is a reasonable period.

37. The Order in respect of the Related Proceedings which Summons was not contested is that the Respondent is to pay the Petitioner interest at the prescribed rate and interim costs of US$190,000 in 21 days.

38. The Order in respect of the Main Proceedings is that the Respondent is to pay the Petitioner interest at the prescribed rate and interim costs of US$300,000 in 21 days.

39. The Respondent has already foreshadowed that it may wish to be heard on the costs of this application. Should either party wish to be heard on the costs of this application, written submissions may be provided in 14 days from receipt of the judgment in final form.

Dated this the 10th day of April 2025



The Hon. Justice Cheryll Richards KC
Judge of the Grand Court

[9] Paragraphs 12 and 13