



**Neutral Citation Number: [2026] CICA (Civ) 6**

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

**CICA CIVIL APPEAL No. 0006 of 2025  
(formerly FSD No. 0028 of 2025 (JAJ))**

**BETWEEN**

**(1) IGCF GENERAL PARTNER LIMITED**

**-AND-**

**(2) THE INFRASTRUCTURE AND GROWTH CAPITAL FUND L.P.**

**APPELLANTS**

**-AND-**

**WHITE CRYSTALS LIMITED**

**RESPONDENT**

**Before:** The Hon. Sir Michael Birt, Justice of Appeal  
The Right Hon. Sir Jack Beatson, Justice of Appeal  
The Right Hon. Sir Anthony Smellie, Justice of Appeal

**Appearances:** Mr Graham Chapman, KC instructed by Mr Conal Keane, Mr Niall Dodd  
and Mr Alan Quigley of Dillon Eustace for the Appellants

Mr Iain Quirk, KC instructed by Mr Jonathan Stroud and Ms Vered Mazin  
of Bedell Cristin for the Respondent

*CICA (Civil) Appeal 0006 of 2025 – IGCF General Partner Limited and The Infrastructure and Growth Capital Fund L.P. v White Crystals Limited*

**Heard:** On the papers  
**Draft circulated:** 26 March 2026  
**Judgment delivered:** 09 April 2026

### **JUDGMENT ON COSTS**

**Sir Michael Birt, JA**

1. For the reasons set out in its judgment dated 3 February 2026 (“the Judgment”), this court dismissed the appeal of the Appellants against the decision of Asif J on 23 May 2025 to stay proceedings brought in the Grand Court by the Appellants against the Respondent (“WCL”) in favour of arbitration.
2. As the successful party in the appeal, WCL now applies for costs to be awarded on the indemnity basis and also applies for an interim payment. The Appellants accept that costs should be awarded against them, but contend that this should be on the standard basis rather than the indemnity basis. They accept that there should be an interim payment but dispute the amount requested by WCL.
3. The background to the proceedings appears from the Judgment, to which recourse should be had as necessary, and expressions defined in the Judgment have the same meaning where used in this judgment.
4. There were four issues raised in the appeal summarised at [35] of the Judgment as follows:
  - i) Are the claims in the Second Arbitration derivative claims?
  - ii) Ignoring for the moment that the Fund has been wound up, should the proceedings be stayed in favour of the Second Arbitration?
  - iii) Does the fact that the Fund has been wound up mean that the claims in the present proceedings and the Second Arbitration are non-arbitrable?
  - iv) Should the application for a stay of the present proceedings be dismissed on the ground of bringing the Second Arbitration is an abuse of process?

The Court resolved all four of these issues in favour of WCL.

### **Indemnity or standard costs?**

5. The general approach in relation to whether costs should be ordered on the indemnity basis is well-established and does not need to be set out in detail. GCR O.62, r.4(11) provides for indemnity costs in the following terms:

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

6. It follows that the starting position is that costs should be awarded on the standard basis and there has to be something exceptional to justify an award of indemnity costs. This may occur if the paying party has conducted the proceedings or the part to which the order relates improperly, unreasonably or negligently (as specified in O.62, r.4(11) to such extent as to take the case out of the norm and justify, in the court’s discretion, an award of costs on the indemnity basis.
7. One well-established example of a party conducting proceedings unreasonably is where the case put forward is manifestly hopeless. However, care must be taken not to view the matter with the benefit of hindsight. The correct approach was helpfully summarised by Field JA in *Bobulinski v China Branding Group Limited (In Official Liquidation) (Unreported)*, Civil Appeal 26 of 2021, 14 June 2023 at [5]-[8] in the following terms:

*“5. As was held by this court in Asia Pacific Limited v Arc LLC [2015] (1) CILR 299, the Court of Appeal’s power to order indemnity costs is restricted to cases covered by the wording of GCR O.62, r.4(11) (“O.62, r.4”). That said, it is clear from the wording of O.62, r.4 that it will only be in an exceptional case that indemnity costs will be awarded (cf Ahab v Saad Investments Co Limited [2012] 2*

*CILR 1), for instance where the Court is of the view that the conduct of the paying party is such as deserves a mark of disapproval (AHAB v SAAD [2013] 3 CILR 344).*

*6. In agreement with the view of Smellie CJ expressed at p.353 in the latter case, I too am of the opinion that for conduct to be unreasonable or negligent within O.62, r.4 it must be more than simply wrong or misguided in hindsight.*

*7. I agree with the following view expressed by Henderson J in Bennett v Attorney General [2010] (1) CILR 478 at paras 6-9:*

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

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

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

*“There are a number of decisions, both of the TCC and of other courts, which make plain that the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, whereas the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) will lead to such an order. In both Wates Construction Ltd v HGP Greentree Allchurch Evans Ltd [2006] BLR 45 and EQ Projects Limited v Javid Alavi [2006] BLR*

*130 this court was persuaded that, in the circumstances of those cases, an order for indemnity costs was appropriate because the claimant should have realised that their claim was hopeless and should not have taken the matter on to trial. However, in Healy-Upright v Bradley & Another [2007] EWHC 3161 (Ch), the court reiterated that an order for indemnity costs was not justified by the mere fact that the paying party had been found to be wrong, either in fact or in law or both, or by the fact that in hindsight, the result of the case now being known, the position adopted by that party may be thought to have been unreasonable.”*

8. A second example of a party conducting proceedings unreasonably can be where the party has commenced proceedings in breach of an exclusive jurisdiction or arbitration clause in a contract. In *Kyrgyz Mobil Tel Limited v Fellows International Holdings Limited* [2005] EWHC 1329 (QB), Cooke J made the following observation:

*“42.... the correct approach where there has a breach of a jurisdiction clause by a party in initiating proceedings in a non-chosen jurisdiction is that the costs should be awarded on an indemnity basis. The reason for that is plain. If a party has breached his agreement, then the damages which flow from the breach of that agreement are all the costs incurred by the party who successfully relies upon the choice of jurisdiction clause. In my experience, the Commercial Court in particular but courts generally in this country adopt such an approach.*

*43.... The starting point therefore must be that the claimants are entitled to indemnity costs in relation to this action, subject to any particular reasons which would detract from that.”*

9. In *A v B* [2008] EWHC 54 (Comm), Colman J quoted [42] and [43] of Cooke J’s judgment in *Kyrgyz Mobil* and went on to state:

*“10. ....There can be no question but that the procedural consequence of conduct by a party to an arbitration or jurisdiction agreement which amounts to a*

*breach of it and causes the opposite party reasonably to incur legal costs ought to be that the innocent party recovers by a costs order and/or by an award of damages the whole, and not merely part, of its reasonable legal costs....*

*11. In my judgment, provided that it can be established by a successful application for a stay or an anti-suit injunction as a remedy for breach of an arbitration or jurisdiction clause that the breach has caused the innocent party reasonably to incur legal costs, those costs should normally be recoverable on an indemnity basis.*

....

*15. The conduct of a party who deliberately ignores an arbitration or a jurisdiction clause so as to derive from its own breach of contract an unjustifiable procedural advantage is in substance acting in a manner which not only constitutes a breach of contract but which misuses the judicial facilities offered by the English courts or a foreign court. In the ordinary way it can therefore normally be characterised as so serious a departure from “the norm” as to require judicial discouragement by more stringent means than an order for costs on the standard basis. However, although an indemnity costs will usually be appropriate in such cases, there may be exceptional cases where such an order should not be made....”*

10. This approach has been considered in the Cayman Islands. Thus, in *Re BDO Cayman Limited* [2018] 1 CILR 187, Parker J awarded the costs of obtaining an anti-suit injunction in the Grand Court on the indemnity basis against a party who had sued in New York in breach of an arbitration agreement and specifically adopted the policy reflected in *Kyrgyz Mobil and A v B*. At [9], [11], [12] and [13], he said as follows:

*“9. I have been referred to no Cayman authority on the question of what an appropriate costs order should be in circumstances similar to this case. There are authorities on the point in England. The English courts have held that the general*

*costs order in relation to a party which commenced proceedings in a non-chosen jurisdiction in breach of an arbitration or exclusive jurisdiction clause is one which indemnifies the party compelled to enforce the contractual bargain in both the foreign proceedings and anti-suit injunction proceedings (as a form of damages) – see *Kyrgyz Mobil Tel Limited v Fellows Intl Holdings Limited and A v B*....*

*11. In A v B, Colman J set out ....., with similar reasoning, the fundamental injustice of a situation if a costs order was confined to costs on the standard basis, where an indemnified portion of costs would be a loss to the successful party that could only be recovered in proceedings for breach. To be placed in a position where the balance of the recoverable amount could not be quantified until after the costs had been formally assessed would involve delay in obtaining compensation properly due (and more costs and court time) and so the learned judge concluded that where there was a successful application for an anti-suit injunction as a remedy for breach of an arbitration or jurisdiction clause and that breach has caused the innocent party reasonably to incur legal costs, those costs should normally be recoverable on an indemnity basis.*

*12. These decisions, although not binding upon this court, are to my mind, especially in the absence of Cayman authority, persuasive in their reasoning and make for good policy. BDO Cayman has also referred me to an Australian authority (*Pipeline Services WA Pty. Ltd v ATCO Gas Australia Pty. Ltd [2014] WASC 10 at paras 17-25 per Martin CJ of the Supreme Court of Western Australia*) which has recently followed *A v B*.*

*13. It seems to me that this court should also follow this line of authority. Where a party has been compelled to apply for an anti-suit injunction to restrain the continuation of foreign proceedings brought against it in breach of the parties' contractual bargain, it is fair and reasonable that it is compensated as a party which has been forced to deal with the consequences of a breach of contract."*

11. Similarly, in his costs decision in the present case dated 17 December 2025, Asif J awarded indemnity costs and said that he was guided towards that conclusion by what was said in *Kyrgyz Mobil, A v B* and *BDO*.
12. Unlike in England and Wales (where there is no equivalent) the position in this jurisdiction is governed by O.62, r.4(11). It follows that, even where a party has instituted proceedings in breach of an exclusive jurisdiction or arbitration clause, he may only be ordered to pay costs on the indemnity basis if the court concludes that, in doing so, he has acted improperly, unreasonably or negligently. For my part, I think it likely that in many, if not most, cases of a party acting in breach of such a clause, he will be found to have acted unreasonably and the policy considerations articulated in the above three cases would point strongly towards indemnity costs being awarded. However, it will, as always, depend on the facts and the exercise of the court's discretion. For example, if the party had a tenable, although ultimately unsuccessful, argument that he was not in breach of the exclusive jurisdiction or arbitration clause and the court concluded as a result that he had not acted unreasonably then costs could only be awarded on the standard basis.
13. WCL relies on both of the above approaches in submitting that costs should be awarded on the indemnity basis. First it submits that the appeal was manifestly hopeless; and secondly it submits that the case falls within the circumstances envisaged in the cases discussed above, in that by seeking to proceed before the Grand Court, the Appellants were acting contrary to the agreement to arbitrate.
14. In relation to the first argument, I do not consider that the appeal was manifestly hopeless. It is true that all four issues listed in para 4 above were determined against the Appellants, but this does not of itself mean that the points were hopeless. It is of note that Martin JA, as a single judge, granted leave to appeal on all the grounds identified in the draft grounds of appeal (which were essentially similar to the finalised grounds of appeal) on the basis that the Appellants had a reasonable chance of success in establishing that the judge's decision to stay involved an impermissible ouster of the court's supervisory jurisdiction and that the claims sought to be arbitrated were derivative claims and for that reason were not amenable to arbitration. It is true, as WCL points out, that Martin JA had not seen the judge's full

judgment explaining his reasoning, but the fact remains that he saw enough in the draft grounds of appeal to grant leave.

15. Some of the arguments put forward by the Appellants were stronger than others but, bearing in mind the guidance in *Bobulinski* that there is a distinction between advancing a case which is merely weak or unlikely to succeed and one which is manifestly hopeless, I do not consider that any of the arguments put forward by the Appellants in the present case reach the level of being manifestly hopeless.
16. WCL is on stronger ground in relation to its second argument. This was a case where the Grand Court (upheld by this court) has found that the proceedings in this jurisdiction were brought by the Appellants in breach of their agreement to arbitrate. The case therefore falls within the principles adopted in *BDO* and the English cases referred to, so that there are strong grounds for thinking that costs should be awarded on the indemnity basis; and indeed Asif J awarded indemnity costs in relation to the proceedings before the Grand Court.
17. However, as discussed above, the facts of the individual case must be considered and an award of indemnity costs is not the invariable order. The question therefore is whether this is a case where, despite the normal order being for indemnity costs, costs should only be awarded on the standard basis on the basis that the Appellants did not act unreasonably in pursuing the appeal.
18. I do not consider that issues (i), (ii) and (iv) as listed in para 4 above are sufficient to depart from the normal order for indemnity costs. If they stood alone, there would be no question but that indemnity costs should be ordered.
19. However, on balance, I am persuaded that it was reasonable for the Appellants to pursue issue (iii) to the extent that it would not be just to penalise them with indemnity costs. I accept that there is a potential for tension between the court's supervisory jurisdiction over the winding up of an ELP and any agreement by the parties to arbitrate and that there is no clear authority as to how this potential tension should be managed and in what circumstances an arbitration agreement might have to give way to the court's supervisory jurisdiction. In

the absence of any such authority, it was reasonable for the Appellants to submit that, on the facts of this case, the supervisory jurisdiction should take precedence. Although the court rejected that submission, it was a tenable submission to put forward. The case is very different from the normal case where it is perfectly obvious that a party has instituted proceedings in breach of a jurisdiction or arbitration clause.

20. In all the circumstances, I think that the fair outcome in respect of the appeal – there is no challenge to the Grand Court’s award of indemnity costs – is that costs should be awarded on the standard basis.

### **Interim payment**

21. In view of the approach to interim payments in respect of costs as set out in the judgment of Kawaley J in *Al Sadik v Investcorp Bank BSC* [2019] (2) CILR 585 as approved by this court in *Scully Royalty Limited v Raiffeisen Bank International AG* [2022] (1) CILR 572 at [54], the Appellants sensibly accept that there should be an order for interim payment. The sole dispute is as to the amount of such payment.
22. WCL has produced a costs summary showing the time spent by Bedell Cristin fee earners and by Mr Quirk KC, who has been given limited admission for these proceedings. The time recorded for Bedell Cristin comes to US\$69,351.50 and for Mr Quirk US\$71,455.02. When added to disbursements in connection with the transcription of the appeal of US\$3,262.50, the total comes to US\$144,069.02. WCL submits that, if costs are awarded on the standard basis (as they have been pursuant to the decision above), there should be an interim payment of 50%, i.e. US\$72,034.
23. The Appellants point out that WCL instructed English solicitors, Steptoe, in connection with this appeal and that, whilst it has not claimed for any fees charged by Steptoe, there are numerous entries recording time spent by members of Bedell Cristin liaising or corresponding with Steptoe. They submit that these sums would be disallowed on taxation and that, in order to make allowance for this, only one-third (rather than one-half) of the time recorded by Bedell Cristin should be allowed by way of interim payment.

24. As has been frequently stated, the court adopts a broad brush approach when considering the level of any interim payment. In my judgment, a deduction of 50% of the total costs (i.e., including Mr Quirk's fees) builds in a substantial margin for possible reduction upon taxation. I see no reason to increase the deduction for the reasons put forward by the Appellants. Accordingly, I would order an interim payment of US\$72,000 (being a rounded down figure), such sum to be paid within 28 days.
25. In relation to the costs of the costs proceedings, I would order that they form part and parcel of the appeal as a whole and that accordingly WCL is awarded its costs in this respect on the standard basis.
26. As to interest, I would order interest at the rate of 2.375% per annum on all of the costs in respect of the appeal from the date on which those costs were paid.

### Summary

27. In summary, I would order as follows:
  - i) The Appellants to pay WCL's costs of and occasioned by the appeal on the standard basis, to be taxed if not agreed.
  - ii) The Appellants shall make an interim payment to WCL of US\$72,000 within 28 days of the handing down of this judgment.
  - iii) The costs of these costs submissions and the applications made thereby (including the evidence filed in support of the application) be considered part and parcel of the appeal, such that the Appellants shall pay WCL's costs thereof on the standard basis, to be taxed if not agreed.
  - iv) Interest at the rate of 2.375% per annum shall be payable on the costs of the appeal from the date on which those costs were paid.

### Sir Jack Beatson, JA

28. I agree.

**Sir Anthony Smellie, JA**

29. I also agree.