IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Neutral Citation Number: [2025] CIGC (FSD) 86

CAUSE NOs: FSD 268, 269 & 270 OF 2021 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2025 REVISION)

AND IN THE MATTER OF PRINCIPAL INVESTING FUND I LIMITED

AND IN THE MATTER OF LONG VIEW II LIMITED

AND IN THE MATTER OF GLOBAL FIXED INCOME FUND I LIMITED

IN CHAMBERS

Appearances:	Mr James Collins KC with Mr David Lee and Mr Zuhair Farouki of Appleby (Cayman) Limited for the Petitioner
Before:	The Hon. Justice Kawaley
Heard:	28 July 2025
Date of decision:	28 July 2025
Draft Reasons circulated:	19 August 2025
Reasons delivered:	26 August 2025

Ex parte application for non-party costs and leave to serve out of the jurisdiction orders-Judicature Act (2021 Revision), section 24- Companies Winding Up Rules (2023 Consolidation), Orders 1, 24 rule 8 - Grand Court Rules (2023 Revision), Order 11 rule 9 (2)

REASONS FOR DECISION

Introductory

1. Applications for leave to serve out made by three Summonses dated 14 July 2025 seeking corresponding relief in each of these three related causes, which have often been listed together, were heard on an ex parte basis on 28 July 2025. Non-party costs orders are sought against Mr Mutaz Otaibi, Mr Hussam Otaibi and Mr James Wilcox (the "Floreat Principals") by the Summonses, together with orders for leave to serve the non-party costs applications on them out of the jurisdiction.

2. The basis for these Summonses was, in brief, as follows. The Petitioner was granted the costs of the Petitions for the reasons set out in my Costs Ruling dated 27 July 2023 following a contested hearing on 12 July 2023. Costs Orders dated 27 July 2023 were filed on 19 September 2023. On 10 May 2024, the Clerk of the Court signed a Default Costs Certificate in FSD 268/2021 certifying:

> "*that the amount payable to the Petitioner by the Second Respondent (jointly and severally with the second respondents in FSD 269 and FSD 270 of 2021) pursuant to the Orders for Costs made on 19 April 2022, 21 April 2023, 16 May 2023 and 27 July 2023 is the sum of US$17,967,958.69.*

3. Further Certificates were signed in respect of subsequent Costs Orders in FSD 270/2021 (on 9 July 2023 re Costs Order dated 31 July 2021/US$203,243.84) and in FSD 268/2021 (on 29 July 2024 re Costs Order dated 12 April 2024/US$ 182,452.20). None of the Costs Orders have been paid by the three respective corporate 2nd Respondents (Floreat Principal Investment Management Limited (in Official Liquidation), LV II Investment Management (in Official Liquidation) and Floreat Investment Management Limited (in Official Liquidation)).

4. At the end of the hearing of the present applications on 28 July 2025, Orders were granted in each of the three matters in the following substantive terms:

> "*1) The Petitioner is hereby granted leave to serve the Summons on Mr Mutaz Otaibi, Mr Hussam Otaibi and Mr James Wilcox (**Floreat Principals**) out of the jurisdiction.*

> *2) Service shall be effected on each of the Floreat Principals by hand delivery at …. and the addresses set out below and/or by personal service and/or by such other means which are lawful under the laws of the jurisdiction in which they are to be served…*
>
> *3) The Floreat Principals shall notify the Court and the Petitioner in writing whether they oppose their joinder to these proceedings for the purposes of costs only (**Joinder Application**) by the date 21 days from the date on which they are served pursuant to paragraph 2 above.*
>
> *4) In the event that a Floreat Principal opposes the Joinder Application, then the following directions shall apply in relation to that Floreat Principal:*
>
> *a. The Floreat Principal shall file and serve any affidavit evidence in response to the Joinder Application along with their written notification given pursuant to paragraph 3 above.*
>
> *b. The Petitioner shall file and serve any affidavit evidence in reply within 14 days from the expiry of the period by which the Floreat Principal shall file and serve their responsive evidence.*
>
> *c. The Joinder Application shall be listed to be determined at a remote video hearing on the first available date after 7 days from the expiry of the period by which the Petitioner shall file and serve any reply evidence, with a time estimate of 1.5 hours.*
>
> *5) In the event that a Floreat Principal does not oppose the Joinder Application or does not confirm in writing either way, then the Joinder Application against that Floreat Principal shall be determined on the papers on the basis of the Petitioner's evidence alone.*"

5. These are the reasons for that decision.

Governing legal principles

Non-party costs orders

6. Mr Collins KC submitted that the statutory jurisdiction to grant non-party costs orders derived from the Judicature Act (2021 Revision), section 24, as applied in various Cayman Islands cases. I accepted that submission. Section 24 of the Judicature Act provides:

> "*(1) Subject to the provisions of this or any other Law and to rules of court, the costs of and incidental to all civil proceedings in —*
>
> *(a) the Court of Appeal; and*
>
> *(b) the Grand Court, shall be in the discretion of the relevant court.*"

7. In the Petitioner's Skeleton it was contended that this broad statutory jurisdiction supplemented the narrower procedural code set out in Order 44 rule 8 Companies Winding Up Rules (2023 Consolidation) (the "CWR"). The normal costs rules do not contemplate non-party costs orders at all, but rule 8 provides:

> "*(4) The Court shall make orders for costs in accordance with these general rules unless it is satisfied that there are exceptional and special circumstances which justify making some other order or no order for costs.*"

8. This submission dealt with a point which was not considered in local winding-up cases dealing with non-party costs orders. However its soundness was demonstrated in general terms by reference to *Dymocks Franchise Systems (NSW) Pty Limited v Todd and others* [2004] UKPC 39, where Lord Brown opined as follows (at paragraph 25):

> "*(1) Although costs orders against non-parties are to be regarded as 'exceptional', exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such 'exceptional' case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.*"

9. An additional gloss was placed on this technical analysis in oral argument when Mr Collins KC submitted that, more broadly, the same approach to non-party costs orders which applies to writ actions applied to the present case. That submission I accepted as sound as a matter of principle. It is well recognised that principles governing the incidence of costs under the Grand Court Rules (2023 Revision) (the "GCR") can be applied as appropriate in the winding-up jurisdiction.

10. Local cases cited in the Petitioner's Skeleton included *Re Cigna Worldwide Insurance Company*, FSD 96/2011 (PCJ), Judgment dated 13 May 2013 (unreported) (Creswell J), *Re VC Computers Holding Limited (in Official Liquidation)* 2015 (1) CILR 292 (Jones J), *Kenney and CC International Ltd-v-ACE Limited* 2015 (1) CILR 367 (Court of Appeal, Chadwick P) and *Banks-v-Parsons* 2020 (1) CILR 560 (Williams J).

11. In *Re VC Computers Holding Limited (in Official Liquidation,* Jones J applied principles applied in writ actions, including the Privy Council decision in *Dymocks*, to a winding-up matter. The Cayman Islands law position overall in my judgment was tolerably clear. In *Kenney*, the Cayman Islands Court of Appeal (Chadwick P) opined as follows:

> "*86. There is no dispute on this appeal that the Grand Court has jurisdiction to hold non-parties liable for costs incurred in proceedings which have been before it. The power to do so is conferred by s.24(3) of the Judicature Law (2007 Revision): 'The court shall have full power to determine by whom and to what extent the costs are to be paid.'*
>
> *87. The equivalent provision in the law of England and Wales is contained in s.51(3) of the Supreme Court Act 1981. The principles to be applied by a court when considering whether to make an order for costs to be paid by a non-party under that section were set out in the speech of Lord Brown of Eaton-under-Heywood when delivering the advice of the Judicial Committee of the Privy Council in Dymocks Franchise Systems (NSW) Pty. Ltd. v. Todd (7)…*"

12. The same Judgment went on to cite various passages from *Dymocks* with approval, including the following particularly helpful passage from Lord Brown's judgment:

> "*29. In the light of these authorities their Lordships would hold that, generally speaking, where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit, he should be liable for the costs if his claim or defence or appeal fails. As explained in the cases, however, that is not to say that orders will invariably be made in such cases, particularly, say, where the non-party is himself a director or liquidator who can realistically be regarded as acting rather in the interests of the*

company (and more especially its shareholders and creditors) than in his own interests."

Leave to serve non-parties out of the jurisdiction

13. In *Kenney,* Chadwick P opined as follows:

"*88. In the light of the guidance given by the Privy Council in the Dymocks case, it seems to me, if I may respectfully say so, that Waller, LJ was plainly correct when he said, in The Ikarian Reefer (No. 2) (16) ([2000] 1 W.L.R. at 613–614) that—*

> *'. . . the English court does have jurisdiction to decide in relation to a non-party resident outside the jurisdiction whether they should be liable for costs under section 51 of the Act of 1981. It seems to me that it must be open to a party to serve a notice on someone outside the jurisdiction which in effect says: 'We have issued a summons in the action and we are going to contend that you have had such a connection with proceedings within the jurisdiction and, more clearly still, it is actually you that brought the action and that you have submitted to the jurisdiction, and we are going to seek an order for costs against you on that basis.' '*

The relevant question, as it seems to me, is not whether the court has jurisdiction to make an order for costs against a non-party who is outside its territory; the relevant question is by what process (if any) a non-party who is outside its territory is brought before the court so that that jurisdiction can properly be exercised.

89. In the Cayman Islands, the answer to that question must be found in O.11 of the Grand Court Rules..

> *107. It is clear that the House of Lords decided in Masri (No. 4) (14)—albeit, strictly, obiter—that Waller, L.J. had been wrong in The Ikarian Reefer (No. 2) (16) to take the view (if he did) that RSC, O.11, r.9(4)—in its amended form—gave any general power to authorize service of a summons in existing*

> *proceedings on a non party out of the jurisdiction. The rule was confined to the service of summonses and other notices on existing parties who were out of the jurisdiction. But there were, nevertheless, circumstances in which the rule could be relied upon as conferring power to serve a summons on a non-party; those were circumstances in which it was 'legitimate to assimilate the party and the non-party, and to treat any means of service available against the former as available against the latter.' In such circumstances, the non-party could be treated as if he were a party to the existing proceedings for the purposes of rule. In my view, this court should interpret GCR, O.11, r.9(2) in a manner consistent with that analysis of the decision of the House of Lords in Masri (No. 4) (14).*".[Emphasis added]

14. On the strength of this decision, which is binding on this Court, the Petitioner's counsel rightly submitted that GCR Order 11 rule 9(2) governed the present applications for leave to serve the Floreat Principals outside of the jurisdiction with a view to applying to join them for costs purposes. This rule provides:

> "*Service out of the jurisdiction of any summons, notice or order issued, given or made in any proceedings is permissible with the leave of the Court, but leave shall not be required for such service in any proceedings in which the writ, originating summons, motion or petition may by these Rules or under any Law be served without leave.*"

15. It was also clear from *Kenney* that the procedural requirements of GCR Order 11 rule 4 must be met. In addition, the following requirements of this rule had to be met:

> "*(2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.*"

16. In other words, the Court must be satisfied that there is (1) a serious issue to be tried on the merits of the joinder claim and that (2) this is the natural forum.

17. In terms of how this Court should approach the gateway test in relation to the present application, Mr Collins KC commended the following *dictum* of Chadwick P in *Kenney* to the Court:

> "*110. … the Grand Court should ask itself whether, on the material before it, the applicant has 'much the better of the argument' that the circumstances are such that it is legitimate to assimilate the party to the existing proceedings with the non party on whom the applicant seeks to serve the summons, and it would therefore be legitimate to treat the non-party as a 'party' for the purposes of GCR, O.11, r.9(2). I would add that, in my view, it is appropriate for the court, when addressing that question in circumstances where the applicant's case for an order that the non-party pay the costs is advanced under what I have described as the 'real party' head of the Dymocks case (7), to assess, as best it can at that stage, the strength of that case.*"

18. However, the "much the better of the argument" test was updated by reference to the more recent observations of Lord Sumption in *Four Seasons Holdings v. Brownlie* [2018] 1 WLR 192:

> "*7. The reference to 'a much better argument on the material available' is not a reversion to the civil burden of proof which the House of Lords had rejected in Vitkovice. What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the Court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word 'much', which suggests a superior standard of conviction that is both uncertain and unwarranted in this context.*"

Merits of leave to serve out application

19. It is a matter of record that each of the 2nd Respondents were wound-up on the grounds of their insolvency based on their failure to meet the costs orders made against them in each of the present just and equitable winding-up proceedings concerning the 1st Respondents (referred to in various Judgments by the acronyms "PIF", "Long View" and "GFIF").

20. The merits of the case for the grant of non-party costs Orders against the Floreat Principals will be established if they can be shown to have promoted or funded these proceedings "*solely or substantially*" for their own financial benefit: *Dymocks* (at paragraph 29).

21. The Summons was supported by the Second Affidavit of FFP Limited's Ms Trudy-Ann Scott ("Scott 2"). The most significant averments she made may be summarised as follows:

    (a) Floreat Holding Limited, 100% of the shares of which are held by the Floreat Principals who also served as the only directors, provided approximately US$9.2 million in funding for the defence of the Petitions (paragraph 47.1);

    (b) the millions spent on defending the just and equitable winding-up petitions were inconsistent with any benefit accruing to the 2nd Respondents from the relevant defences. The Management Shareholders' financial interests in the fund companies was extremely limited. This indicates the Floreat Principals who funded the litigation were the real beneficiaries of it (paragraphs 52-59);

    (c) the then Joint Provisional Liquidators of each 1st Respondent commenced proceedings against the Floreat Principals personally and other Floreat entities in England and Wales in 2022, whilst the Petition proceedings were pending. The Floreat Principals stood to personally benefit from defending the Petitions by seeking to stave off these claims against them (paragraph 60); and

    (d) the "*scorched earth*" litigation tactics deployed in defending the Petitions provided further evidence of the Floreat Principals' control over the defence of these proceedings (paragraph 64).

22. In oral argument, Mr Collins KC referred to selected supporting documentation to demonstrate that these averments had substance to them although, based on my familiarity with the history of these proceedings, I would have accepted the averments on their face:

(a) **control**: the attachment to a 22 October 2021 Herbert Smith Freehills retainer letter signed by the Management Shareholder of GFIF listed a "Core Team" for giving instructions comprised of the Floreat Principals and one other individual;

(b) **benefit**: the English pleading demonstrated that "damages and/or equitable compensation" was sought against each of the three Floreat Principals;

(c) **funding**: discovery provided by the Joint Official Liquidators provided underlying support for various payments of defence legal fees by Floreat Group and Mr Mutaz Otaibi.

23. This provided a very firm foundation for me to accept the main gravamen of the following submission:

> "*15. Applying the approach set out in Kenney, P submits that the case is a proper one for service out of the jurisdiction under GCR O.11 r.9(2) as:*
>
> *15.1. P has a good arguable case – i.e. the better argument on the material available - that it is legitimate to assimilate the 2Rs with the Floreat Principals for the purposes of leave to serve out of the jurisdiction; and*
>
> *15.2. The application is duly supported by an affidavit – Scott 2 – which complies with GCR O.11 r.4(1).*
>
> *15.3. The case is a proper one for service out of the jurisdiction (and likely the only forum in which a Court can determine whether the Floreat Principals should be made liable for the costs of the proceedings).*"

24. The Petitioner went in my view beyond the call of duty in terms of full and frank disclosure (Skeleton Argument, paragraphs 25-26; Scott 2, paragraphs 82-87). None of these matters actually (as opposed to potentially) undermined the merits of the various requirements the Petitioner had to meet. In my judgment it would have bordered on perverse to conclude that

there was no "plausible evidential basis" for exercising the non-party costs jurisdiction in all the circumstances of the present *ex parte* application.

Conclusion

25. For these reasons on 28 July 2025 I granted leave to serve the Summonses seeking to obtain non-party costs orders against the Floreat Principals out of the jurisdiction and gave consequential directions.

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THE HONOURABLE JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT