



Neutral Citation Number: [2025] CIGC (FSD) 4
CAUSE NO: FSD 322 OF 2020 (RPJ)

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

BETWEEN:

NEOMA MANAGER (MAURITIUS) LIMITED
in its capacity as the Manager of
NEOMA PRIVATE EQUITY FUND IV L.P.

PLAINTIFF

AND:

(1) ABRAAJ ABOF IV SPV LIMITED
(2) MARK LONGBOTTOM AND
GEOFFREY VARGA, AS TRUSTEES
OF THE CREDITORS OR MEMBERS
OF ABOF IV FUND INVESTOR
LIMITED, DISSOLVED

DEFENDANTS

AND:

ABRAAJ GENERAL PARTNER VIII LIMITED,
in its capacity as the General Partner of
NEOMA PRIVATE EQUITY FUND IV L.P.

ADDITIONAL DEFENDANT

Appearances:

Ms. Clare Stanley KC instructed by Mr. Barnaby Gowrie and Mr. Blake Egelton of Walkers (Cayman) LLP on behalf of the First Defendant

Mr. James Kennedy and Mr. Kai McGrielle of KSG on behalf of the Plaintiff and Additional Defendant

The Second Defendant did not seek to be heard

Before:

The Hon. Justice Raj Parker

Heard:

Written submissions and other materials (on the papers)

Draft Judgment Circulated: 13 January 2025

Judgment Delivered: 20 January 2025

Decision on interim costs

O.62, r.4(7)(h) of the Grand Court Rules (2023 Revision) - application for interim costs - Court of Appeal decision awaited - discretion - risk that court of appeal may unwind previous costs orders

Introduction

1. The First Defendant (the "Applicant") applies pursuant to paragraph 5 of the Order dated 27 November 2024, which provided for the Applicant to make an application for an interim payment in respect of its costs of:
 - (1) the Summary Judgment Applications (pursuant to paragraph 11 of the Order made in these proceedings on 27 June 2023 (the "Section 22 Order"))¹;
 - (2) the Leave to Appeal Applications (pursuant to paragraph 2 of the Order made in these proceedings on 27 October 2023 (the "Leave to Appeal Order"))²; and
 - (3) the summons for directions issued on 13 February 2024 (the "Summons for Directions") (the "Section 22 Costs")³.
2. The Applicant seeks orders for an interim payment of 50% of the Section 22 Costs, or US\$493,401.55 on certain proposed terms.
3. The Respondents oppose the orders sought by the Applicant and submit that an order for an interim payment of costs is not appropriate. If the Court disagrees, and considers that an interim payment should be made, in the alternative to their principal submission, the Respondents submit that the order should be in the percentage and the form of the interim costs order for the Summary Judgment Application previously made in respect of the Fourth and Sixth Defendants.

The test for interim payment

4. O.62, r.4(7)(h) of the Grand Court Rules (2023 Revision) (the "GCR") provides as follows:

¹ "The First, Fourth and Sixth Defendants' respective costs of and incidental to the Summary Judgment Applications shall be payable by the Plaintiff and the Additional Defendant on a joint and several basis, to be assessed if not agreed. The First, Fourth and Sixth Defendants each have liberty to apply for an interim payment on account of such costs."

² "The First, Fourth and Sixth Defendants' respective costs of and incidental to the Leave to Appeal Applications shall be paid by the Plaintiff and Additional Defendant on a joint and several basis, to be taxed on the standard basis if not agreed."

³ "2. The First and Second Defendants' respective costs of the Summons for Directions shall be payable by the Plaintiff and the Additional Defendant on a joint and several basis, to be taxed if not agreed..."

5. If any Defendant wishes to apply for an interim payment in respect of its costs of the Summary Judgment Applications (pursuant to paragraph 11 of the Order made in these proceedings on 27 June 2023); the Leave to Appeal Applications (pursuant to paragraph 2 of the Order made in these proceedings on 27 October 2023); and the Summons for Directions it shall make such application by filing written submissions of no more than 5 pages within 14 days of the date of this Order."

‘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.’

5. In *Al Sadik v Investcorp Bank B.S.C and others* [2019 (2) CILR 585] the following principles were set out at §25 by Kawaley J:

- (a) *"the principle that a successful party should be paid some of its costs immediately and before taxation was not simply "an important consideration," it was the governing and predominant principle articulated by the interim payment on account of costs rule";*
- (b) *"Whether an interim payment on account should be ordered would almost invariably require an assessment to be made as to whether there was 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 was complete";*
- (c) *"in concluding that GCR O.62, r.4(7)(h) contained an implicit starting assumption in favour of an interim payment on account of costs, the court did not ignore the fact that the power to make such an order was clearly discretionary and the strength of the starting assumption might be weaker or stronger depending on the circumstances of each case and*
- (d) *"one recognized and significant reason for not ordering an interim payment on account of costs was the need to avoid stifling an appeal"*

The test to be applied in determining the quantum of an interim payment

6. The quantum typically awarded for interim payments on account of costs will ultimately turn on the total recoverable costs claimed by the Applicant and what the Court considers to be an appropriate sum.
7. In *FGL Holdings FSD 184 of 2020 (RPJ)*⁴, the court noted at [118] that *"It would be fair in all the circumstances for an interim payment to be ordered of the likely minimum safe level of recoverable costs. This sum should be significantly below an amount that is likely to be determined on taxation. Such a sum is to be assessed summarily in order that the successful party should be paid some of its costs well before taxation is concluded"*.
8. In *Scully Royalty*⁵, the Court of Appeal stated at [58] in respect of a costs order on the standard basis that *"... Courts often award 50% of the total costs on the basis that this is a conservative approach which should not lead to an overpayment"*.

Discussion

9. The question of whether to order an interim payment on account of costs is a discretionary matter. It is not available as of right. However, in deciding whether or not to exercise its discretion the court starts from the proposition that an interim payment should be made in order

⁴ 19 April 2023

⁵ [2022] 1 CILR 572

not to keep a receiving party out of its costs pending a taxation, unless there is a good reason not to do so.

10. In this case the question of an appeal has arisen as the main reason not to make an interim payment order. The Respondents were granted Leave to Appeal by the Court of Appeal from the Section 22 Order, and the appeal was heard in early September 2024. There has been no decision from the Court of Appeal as yet, but it may well be imminent.
11. To address the risks of prior costs orders being reversed, and the concerns raised by the Respondents in correspondence as to the Applicant's ability to repay interim payment sums that may be ordered to be refunded, the Applicant suggests that the interim payment is made into an escrow account whereby the funds will either be (a) released to the Applicant should the appeal be dismissed or if the appeal does not amend or alter the position as to costs, or (b) released to the Respondents, to the extent so required, if the appeal is successful and the orders in respect of the Section 22 Costs are overturned, as the case may be.
12. The Respondents argue that this gives rise to potential complexity, confusion and disputes.
13. The Respondents argue that there is a reasonable prospect that the Section 22 Order and the Summons for Directions Order will be reversed on appeal and that in those circumstances, the application should be dismissed or at least be deferred⁶.
14. The Court of Appeal, in granting leave, took the view that the appeal had a realistic prospect of success. The Respondents submit that it cannot be said with any degree of certainty that the costs the Applicant claims will be demonstrated to be due. The starting assumption is therefore weak in the circumstances of this case. If the Court of Appeal allows the appeal it will be invited to rule on the costs of the hearings below.
15. The Respondents also argue that the Applicant is bound to wait until the conclusion of the proceedings related to the Summary Judgement Applications for the costs under the Leave to Appeal Order to be taxed and paid because the provisions of the Leave to Appeal Order made no reference to an interim costs order.
16. The Respondents finally argue that the court is not in a position to assess the costs because there is an insufficient breakdown of information set out in the application. In the alternative they propose that if the court decides to make an interim payment order, it should be made on terms consistent with those previously made in these proceedings with the 4th and 6th defendants (other limited partners) as reflected in the order dated 15 June 2023, where 33.3% of the amount claimed in the cost schedule could be put into escrow.

Decision

17. It is only necessary to deal with the Respondents' argument regarding the awaited Court of Appeal decision as this is dispositive of the application.

⁶ See *FGL Holdings* 8 November 2023 at §25 Parker J

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 Applicant's proposal of putting an amount in escrow does not seem to the court to be appropriate. The Applicant will not receive any funds 'due' pending taxation, if they are held in escrow.
21. The Respondents have agreed that if they fail on the appeal, they will make an interim payment on account of costs. They state that they are solvent, and no point is taken by the Applicant in this regard.
22. Once the Court of Appeal's decision has been received and any application with regard to costs has been determined by the Court of Appeal, including in relation to the costs below, the matter can be finally resolved.



The Hon. Justice Parker
Judge of the Grand Court, Cayman Islands
20 January 2025