



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

**CICA (Civil) APPEAL No. 0011 of 2023
(Grand Court Cause No. FSD 0236 OF 2020 (RPJ))**

BETWEEN

MARK ERIC WILLIAMS

FIRST APPELLANT

-AND-

WELLSPRING CAPITAL GROUP, INC.

SECOND APPELLANT

-AND-

KGL INVESTMENT COMPANY ASIA (IN VOLUNTARY LIQUIDATION)

THIRD APPELLANT

-AND-

KUWAIT PORTS AUTHORITY

(on its own behalf and on behalf of The Port Fund L.P)

FIRST RESPONDENT

-AND-

THE PUBLIC INSTITUTION FOR SOCIAL SECURITY

(on its own behalf and on behalf of The Port Fund L.P)

SECOND RESPONDENT

Before: The Hon. John Martin KC, Justice of Appeal
The Hon. Sir Richard Field, Justice of Appeal
The Hon. Sir Michael Birt, Justice of Appeal

Appearances: Mr Graham Chapman KC and Mr Andrew Pullinger,
Mr Harry Shaw and Ms Katie Logan of Campbells LLP on behalf of the
Appellants

Mr David Allison KC and Ms Jennifer Fox and Ms Deborah Barker
Roye of Ogier (Cayman) LLP for the Respondents

Heard: On the papers

Draft circulated: 8 November 2024

Judgment delivered: 27 November 2024

JUDGMENT ON COSTS

Birt, JA

1. On 2 June 2023, Parker J (“the Judge”) made an order joining the Respondents as defendants to the crossclaim brought by the Appellants in complex proceedings concerning The Port Fund L.P. which is an exempted limited partnership (an “ELP”).
2. The Appellants appealed against the Judge’s decision on two grounds, namely (i) that the Judge lacked jurisdiction to join the Respondents as defendants to the crossclaim because of section 14(1) and/or section 33(1) and (3) of the Exempted Limited Partnership Act (2021 Revision) (“ELPA”) and (ii) that, if he did have jurisdiction to make the order for joinder, the Judge exceeded the margin of discretion afforded to him under GCR O.15, r.6. in doing so.
3. In its judgment dated 15 August 2024 (“the Judgment”), this court upheld the Judge’s decision in both respects and accordingly dismissed the appeal. The court now has to address the issue of costs. In accordance with this court’s directions, the parties have filed written submissions and the court has considered the matter on the papers.
4. Pursuant to the submissions, the following issues now fall for consideration:

- (i) The costs of the appeal.
 - (ii) The special sitting costs.
 - (iii) Should there be an interim payment of costs?
 - (iv) If so, for what sum?
 - (v) Interest.
5. The background to the matter is set out in the Judgment (to which reference should be made as necessary) and is not repeated in this judgment. Words and expressions defined in the Judgment have the same meaning in this judgment.

(i) The costs of the appeal

6. Rule 28 of the Court of Appeal Rules (2014 Revision) provides that *“the powers and discretion of the Court under section 24 of the Judicature Act...[relating to costs] shall be exercised subject to and in accordance with GCR Order 62”*.
7. The starting point is that costs should follow the event. This is emphasised in GCR O.62, r.4 as follows:
- “(2) The overriding objective of this Order is that a successful party to any proceedings should recover from the opposing party the reasonable costs incurred by the successful party in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.*
- ...
- (5) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.”*
8. On the face of it, the appeal having been dismissed, this would appear to be a case where costs should follow the event and the Appellants should be ordered to pay the costs of the appeal. However, the Appellants submit that there should be a discount of 25% to reflect the fact that the Respondents relied upon arguments which were not accepted by this court.

9. Firstly, the Judge held that section 33(1) did not prevent the joinder because the Respondents were not seeking to defend the crossclaim as limited partners but in their individual capacities as plaintiffs in the proceedings. That reasoning, the Appellants submitted, played no part in this court's decision.
10. Secondly, the Judge considered that where, as in this case, a limited partner is given permission under section 33(3) to bring a derivative claim on behalf of a partnership, this permission will include defending any counterclaim or crossclaim raised in the proceedings. Whilst this court agreed with the Judge in respect of any counterclaim, it did not do so in respect of a crossclaim, holding that it all depended upon the circumstances.
11. The decision of this court, submitted the Appellants, was that, for the reasons set out at [30] of the Judgment, section 33(1) is not an absolute prohibition on a limited partner participating in any way in litigation concerning an ELP. As this court put it at [31], the focus of section 33(1) is on the institution of proceedings. It does not prevent or limit the ordinary power of the court to join parties under GCR O.15, r.6 once proceedings have commenced in compliance with section 33(1). Furthermore, whereas standing alone the crossclaim might properly be regarded as a separate *lis*, the defence of set-off raised by the Appellants made it a facet of the existing proceedings and it was therefore not to be regarded as falling within section 33(1). These were not the same reasons as those relied upon by the Judge.
12. It is correct that, as the Appellants submit, an otherwise successful party may be deprived of some of its costs if it raises issues upon which it has failed. However, there are limits to where this is appropriate. In particular, the issue(s) must be such as to have caused a significant increase in the length or cost of the proceedings.
13. In *Scully Royalty Limited v Raiffeisen Bank International AG* 22 (1) CILR 572, this court explained at [25]-[26] that the general rule that costs should follow the event does not cease to apply simply because the successful party raises issues upon which it has failed. As the court observed, citing *Sycamore v Breslin* [2013] EWCA 583 (Ch) at [12], in any litigation, especially complex litigation, any winning party is likely to fail on one or more issues in the case. It follows that the fact that a party has not won on every issue is not, of itself, a reason for depriving that party of part of its costs.

14. As the court made clear in *Maso Capital Investments Limited v Trina Solar Limited* (Unreported, 4 August 2023, Civil Appeal 9 of 2021) at [23], while courts may be more willing than in the past to make orders which reflect success or failure on particular issues, the principles summarised in the case of *Re Elgindata (No 2)* [1993] 1 All ER 232 continue to be applicable in this jurisdiction. The relevant extract from the judgment of Nourse LJ in *Elgindata* says at follows at 237:

*“The principles are these. (1) Costs are in the discretion of the court. (2) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (3) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, **but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or part of his costs.** (4) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but order him to pay the whole or a part of the unsuccessful party’s costs.”* [emphasis added]

15. In my judgment, no deduction should be made in the present case. The main issue before this court was whether the Judge had jurisdiction to make the order which he did or whether section 33(1) and/or section 14(1) meant that he could not make the order. Whilst it is true that the reasoning which led this court to uphold the Judge’s decision that he had jurisdiction was not identical to the reasoning of the Judge himself or to the reasoning relied upon by the Respondents, this court did agree with the Judge and the Respondents that jurisdiction existed. I do not consider that this is a case where an otherwise successful respondent unsuccessfully raised one or more issues which caused a significant increase in the length or costs of the appeal. The Respondents were successful in upholding the Judge’s decision on jurisdiction and the Appellants were unsuccessful on this issue. Standing back and looking at the matter globally (see *Sycamore v Breslin* at [12(iv)] approved in *Scully Royalty* at [27]), I do not consider that it would be just to deprive the Respondents of any part of their costs.
16. As to the second issue in the appeal, namely whether the Judge’s decision to order joinder exceeded the margin of discretion afforded to him, it was not suggested to us that the Respondent had raised any unsuccessful arguments in this respect. This court’s conclusion was

clear, namely that it could not be said that the Judge took into account any irrelevant consideration or failed to have regard to any relevant one or that his decision was perverse.

17. Accordingly I consider that there should be no deduction. The Respondents should be awarded the costs of and incidental to the appeal jointly and severally against the Appellants, such costs to be on the standard basis and to be taxed if not agreed.
18. I should at this stage deal with an additional point. Although it was addressed by the parties under the heading of the interim payment, it seems to me that the point should be dealt with under the current heading. It relates to the costs of the application to this court for leave to appeal. The application was heard on 6 November 2023. It was opposed by the Respondents but this court granted leave to appeal on the two specified grounds described in paragraph 2 above. It appears from the certificate of order that nothing was said about the costs of and incidental to that hearing.
19. The Appellants submit that, as the Respondents opposed the application for leave to appeal but leave was granted, they should not be awarded their costs. I cannot accept that argument. The application for leave to appeal was part and parcel of the appeal itself and in my view falls within the costs of the appeal. The normal order in such cases, if any order for costs is specifically made, is '*costs in cause*'. Accordingly I would order that the costs of the application to this court for leave to appeal are comprised within the costs of the appeal.

(ii) The special sitting costs

20. The appeal was heard at a special sitting on 6 March 2024. The Appellants accept that, as they requested the special sitting and the appeal has been dismissed, they should not recover any of the fees payable for the special sitting from the Respondents.
21. However, they submit that, as the Respondents opposed a special sitting but the court nevertheless acceded to the application for such a sitting, the Respondents should not be able to recover the costs of opposing the special sitting as part of their costs of the appeal.
22. It is true that it was initially the court which indicated that the appeal should be heard promptly and raised the question of a special sitting. However, it became clear that the appeal could be heard during the course of the ordinary spring session of the court. The Respondents were

content that it should be heard at that time but the Appellants did not wish it to be heard then as their leading counsel was not available during the spring session. They then applied for a special sitting. By the time the court came to consider that application, there was no longer any availability during the spring session. The Respondents were content for the matter to be deferred but the Appellants wished it to be heard at a special sitting. Given the lack of continuing availability at the spring session, the court acceded to the application for a special sitting.

23. In the circumstances, I do not consider the Respondents' opposition to the application for a special sitting to have been in any way unreasonable. The appeal could have been heard at the spring session if the Appellants had agreed to this at the outset. In the circumstances, I do not think it would be right to deprive the Respondents of their costs (which should be fairly minimal) of opposing the application for the special sitting. Accordingly, they may recover such costs as part of the costs of and incidental to the appeal.

(iii) Interim payment

24. In *Scully Royalty*, this court at [54]-[55] specifically approved the observations of Kawaley J in *Al Sadik v Investcorp Bank B.S.C.* [2019] (2) CILR 585 at [25]. Key extracts from those observations are as follows:

“(b) The governing principle underpinning this power, and the raison d’être for the rule, is that (per Jacob J in Mars UK Limited v Teknowledge Limited...):

“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..."

25. On behalf of the Appellants, Mr Chapman KC submits that this principle does not apply – or at any rate does not apply with similar strength – in the case of the costs of interlocutory hearings. That is because GCR O.62 r.9 provides that, unless the court orders otherwise, the costs of interlocutory proceedings are not to be taxed until the conclusion of the cause or matter in which the interlocutory proceedings arise. He submits that if taxation is not to be carried out until the end of the case, it would be wrong to order interim payments which would, in effect, have a contrary effect.
26. I do not accept this submission. The reasons for making an interim payment, as described above, are just as applicable to costs of interlocutory hearings as they are to costs of final hearings. If a court has seen fit to make an award of costs in relation to an interlocutory matter – rather than, for example, costs in the cause – the court has decided that the successful party is entitled to be paid its costs. As set out in *Al Sadik*, a successful party is entitled to the costs which the court has awarded and should be paid as soon as possible. The need for taxation is not a good reason for keeping him out of some of his costs. There may of course be cases where it would not be right to order an interim payment in respect of an award of interlocutory costs; for example, if there are other costs orders going in the opposite direction, which should therefore be netted off. But the fact that, at the end of the case, the party who has won an interlocutory hearing and been awarded costs may turn out to have lost the main action and be ordered to pay costs is not, in my view, sufficient reason to keep him out of that which the court has awarded him in the meantime. Although, as Mr Chapman pointed out, *Al Sadik* was concerned with a final decision, it is of note that *Scully Royalty* was itself an interlocutory hearing concerning a freezing injunction, but there is no suggestion in that judgment that the principle in favour of interim payments was not applicable for that reason.
27. In summary, I see no reason why the normal principle should not apply and I consider that the court should make an interim payment on account of the costs awarded to the Respondents.

(iv) Quantum of the interim payment

28. Ogier (Cayman) LLP has produced a schedule of costs as an exhibit to the affidavit sworn on behalf of the Respondents by Ghita Moyle. It shows the time spent by various fee earners and by counsel and the rates charged, together with a high level summary of the work performed. The schedule states that it has been prepared in accordance with the rates for attorneys and counsel permitted in Practice Directions 1 of 2011 and 1 of 2024.

29. The schedule is divided into four parts as follows:

Part 1

Costs before the Grand Court 28 February – June 2023	US\$145,047.90
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Part 2

Application for leave to appeal 15 June 2023 – 2 February 2024	US\$101,713.07
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Part 3

Costs of the appeal 3 February – 2 August 2024	US\$143,652.91
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Part 4

Estimated costs of consequential matters post CICA Judgment (including costs) 3 August 2024 to date	US\$20,700.00
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<u>Total</u>	<u>US\$411,113.88</u>
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30. The Respondents seek an interim payment of 60% of \$411,113.88. The Appellants contend that, if an interim payment is to be ordered at all, it should be limited to the part 3 costs and should be fixed in the region of 30%-40% of that sum. In the Grand Court, Parker J awarded costs against the Appellants on the standard basis but there was no application for an interim payment and accordingly the Judge made no order for such a payment.

31. The Appellants raise a preliminary point in relation to part 1 of the schedule. They submit that this court cannot order an interim payment in respect of costs before the Grand Court because there is no costs only appeal and, the substantive appeal having been dismissed, there is no jurisdiction to vary a costs order made by the Grand Court. The Respondents submit that this is not so.

32. In my judgment, the Appellants are correct. In *Primeo Fund (In Official Liquidation) v Bank of Bermuda (Cayman) Limited* (15 November 2019) CICA (Civil Appeal No 21 of 2017), this court said at [21]:

“The conventional view is that, in the absence of a costs only appeal, the English Court of Appeal only has jurisdiction to alter a costs order made below if the appeal is allowed, see Rix LJ in Hawksford Trustees Jersey Limited v Stella Global UK Limited [2012] Civ 987 at [57]: “Where an appeal is dismissed, in the absence of a costs only appeal, the costs order below is not disturbed”. We are confident that the position is the same in the Cayman Islands.”

33. The Respondents submit that the decision in *Hawksford* was confined to its own special facts, but the observation of Rix LJ was in general terms and has been generally accepted as being of general application.

34. The Respondents also submit that the decision in *Primeo* was based on the correspondence between the parties rather than any legal principle as to costs. I cannot accept this. Whilst there is reference to the agreement between the parties as being an additional reason for the court’s decision, the court’s observations as to the legal position are in general terms, not only at [21] in the passage quoted above but also in the first sentence of [22], [24] and [28]. In the latter paragraph the court stated:

“The observation of Rix LJ in Hawksford Trustees that where an appeal is dismissed by the Court of Appeal, in the absence of a costs only appeal, the costs order below is not disturbed, has long been understood to be the position and the fact that there are no reported decisions of either Court of Appeal adjusting a first instance costs order on the application of an unsuccessful appellant strongly reinforces Rix LJ’s observations.”

35. The decision in *Primeo* is consistent with the legislation. Section 6(e) of the Court of Appeal Act (2011 Revision) provides that no appeal lies to the Court of Appeal in civil matters from an order as to costs only without the leave of the Grand Court or the Court of Appeal. Where a substantive appeal has been dismissed, there is in effect no remaining appeal before this court and it is as if there had been no appeal. In those circumstances an appeal against costs only

may only be brought if the requisite leave has been obtained. In my judgment, the position as stated in *Primeo* is of general application.

36. The Respondents' fall-back position is that an order for interim payment in respect of a costs order made in the Grand Court is not an adjustment of the costs order of that court. It is an original order by the Court of Appeal and is therefore not caught by the principle articulated in *Primeo*.
37. I cannot accept that argument. If an application for an interim payment is made to but refused by the Grand Court, it would clearly be necessary to obtain leave to appeal against the refusal as it would be a matter relating to costs only. Where there is no order for an interim payment by the Grand Court, not because it has been refused but because there has been no application, the position is in my view the same. If this court were then to make an interim payment in respect of the costs before the Grand Court, it would in effect be varying the costs order made below by ordering an interim payment when none has existed before.
38. In this connection, it is of note that section 24 of the Judicature Act (2021 Revision) provides that the costs of and incidental to all civil proceedings in (i) the Court of Appeal and (ii) the Grand Court are in the discretion of '*the relevant court*'. The costs before the Grand Court are therefore in the discretion of that court, not the Court of Appeal. This court may only make an order in respect of costs before the Grand Court (i) where leave is granted for a costs only appeal or (ii) where the substantive appeal is allowed so that the orders (including ancillary orders such as costs), made by the Grand Court have to be revisited.
39. Even if, contrary to my view, there is jurisdiction in this court to make an order for interim payment in respect of costs incurred before the Grand Court, it would not be right to do so. A decision to order an interim payment is an ancillary aspect of a costs order and the appropriate court to consider whether to make an interim payment is the court making the costs order in the first place.
40. Accordingly, I would reject the Respondents' application for an interim payment in respect of the costs set out in part 1, which relate to costs before the Grand Court. If the Respondents wish to apply for an interim payment in respect of such costs, they should apply to Parker J.
41. As to part 2, namely the costs of the application for leave to appeal, the Appellants argue that there should be no interim payment in respect of this aspect as the Respondents unsuccessfully

opposed the application for leave to appeal. As I have pointed out earlier at paras 18-19, it seems to me that the prior question is what order is made in respect of the costs of the application for leave and I have held that such costs fall within the costs of the appeal. It follows that there is no valid ground not to make an interim payment in respect of part 2.

42. As to part 4, I consider that, as set out at the conclusion of this judgment, the costs of this costs application should be awarded against the Appellants. It follows that I see no reason not to include the part 4 sum as part of the schedule of costs in respect of which an interim payment can be ordered.
43. In summary, I consider that an interim payment should be awarded in respect of parts 2, 3 and 4 of the schedule of costs. The Appellants submit that these costs are excessive and are likely to be reduced substantially upon taxation. For example, they contend that, given that leading counsel was instructed, the time spent by partners of Ogier was excessive.
44. This is disputed by the Respondents and this court is not in a position to resolve such matters, which will need to be dealt with on taxation. However, the approach to the quantum of interim payments is intended to allow for the fact that costs may well suffer reduction during the process of taxation.
45. Turning to the approach to quantum, we were referred to a helpful discussion in the judgment of Asif J in *The Armand Hammer Foundation Inc v Hammer International Foundation* (Unreported, Grand Court, 24 April 2024). Asif J pointed out that there were two approaches to the quantum of interim payments.
46. The first was that applied by this court in *Scully Royalty*, namely to take a percentage of the total costs (being the costs as in the schedule of costs in this case setting out the total amount claimed at the rates allowed by the Practice Directions). In *Scully Royalty*, which concerned an order for standard costs, this court said that 50% of the total costs was often awarded on the basis that this was a conservative approach which should not lead to an overpayment. However, this observation was not intended to establish any fixed percentage, as all the circumstances of the particular case have to be considered.
47. The alternative approach discussed in *Armand Hammer* was first to make a discount to reflect what Asif J referred to as a useful rule of thumb, namely that 85% of the total costs will be recovered in taxation on an indemnity basis and 65% in taxation of costs on the standard basis.

The court then makes a further discount to minimise the risk of overpayment, which Asif J considered should normally be in the region of 10% to 20%.

48. Asif J preferred the first approach, as taken in *Scully Royalty*. It is not for this court to be over prescriptive as to the exact method of quantifying any interim payment. The task of the Judge when fixing a figure is simply to achieve a fair balance between the injustice of the receiving party being kept out of money to which he is entitled on the one hand and the risk of ordering an overpayment by the paying party on the other.
49. However, for my part, I agree with Asif J that the simpler approach is to take a single discount from the total costs, not least because it avoids the risk of a double discount as described by Asif J at [13] of his judgment.
50. The Appellants submit that any interim payment in this case should be less than 50% because of the excessive level of costs coupled with the fact that the Respondents have not produced a detailed bill of costs for taxation but only the high level schedule referred to earlier. I reject this latter criticism. The whole point of the interim payment process is that it is not a form of taxation of costs; it is a summary assessment on a reasonably rough and ready basis. The level of information contained in the schedule in this case is necessary, but nothing more is required. On the facts of this case I see no reason not to take a figure of 50%.
51. The total costs of parts 2, 3 and 4 of the schedule come to \$266,065.98. 50% of that sum comes to \$133,032.99, which I would round up to \$135,000. The Appellants must therefore make an interim payment in respect of the costs of the appeal in the sum of \$135,000, such sum to be paid within 28 days of the handing down of this judgment.

Interest

52. In accordance with GCR O.62 r.4(7)(g), the court may order a paying party to pay interest on costs at the prescribed rate from or until a certain date, including a date before judgment. In *Perry v Lopag Trust* (Unreported, Grand Court, 1 December 2020), Segal J reviewed the position in some detail and ordered that interest should be charged at the rate of 2.375% per annum from the date of payment of each amount by the receiving party until the date of service of the certificate of taxation and thereafter interest should run at the same rate in accordance with what is now the Judgment Debts (Rates of Interest) Rules (2021 Revision).

53. In my judgment, that is an appropriate order for interest in the present case. Accordingly interest will be charged on the outstanding costs (after interim payment) at a rate of 2.375% per annum from the date of payment of each amount by the Respondents until the date of service of the certificate of taxation and thereafter at a rate of 2.375% per annum until date of payment in accordance with the Judgment Debts (Rates of Interest) Rules (2021 Revision).

Costs of this hearing

54. In my judgment, the Respondents have been successful in that they have been awarded costs together with an interim payment on account. The costs of and incidental to this costs application should therefore be paid by the Appellants jointly and severally on the standard basis.

Summary

55. In summary:

- (i) The Appellants jointly and severally shall pay the costs of and incidental to this appeal (including the costs of the application for leave to appeal), such costs to be on the standard basis and to be taxed if not agreed.
- (ii) The Appellants shall be responsible for the special sitting costs.
- (iii) The Appellants jointly and severally shall make an interim payment on account of (i) and (v) in the sum of US\$135,000, such sum to be paid within 28 days.
- (iv) Interest shall be payable as set out above.
- (v) The Appellants jointly and severally shall pay the costs of and incidental to this costs application, such costs to be on the standard basis, and to be taxed if not agreed.

Field, JA

I agree.

Martin, JA

I also agree.