IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION
IN CHAMBERS

CAUSE NO. FSD 30 OF 2010 (RMJ)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND

IN THE MATTER OF THE PRIMEO FUND (IN OFFICIAL LIQUIDATION)

Appearances:	**Mr. Christopher Harlowe and Mr. Jonathon Milne of Mourant for the Official Liquidators of Primeo Fund** **Mr. Barry Isaacs Q.C instructed by Mr. Paul Kennedy of Appleby for Ernst & Young Cayman** **Mr. Richard Gillis Q.C., Mr. William Willson and Mr. Toby Brown instructed by Mr. Hamid Khanbhai of Campbells for Bank of Bermuda (Cayman) Ltd and HSBC Securities Services (Luxembourg) SA, as non-parties**
Before:	**The Hon. Mr. Justice Robin McMillan**
Heard:	**Heard and decided upon consideration of affidavit evidence and written submissions**
Draft Judgment Circulated:	**28 July 2017**
Judgment Delivered:	**1st August 2017**

HEADNOTE

Availability of an award of costs against a Non-Party in the Cayman Islands – Circumstances in which a Non-Party has instigated proceedings - Scope of a sanction application under CWR O.11 r 1 (a) – Justification for awarding indemnity costs to innocent party.

JUDGMENT

Introduction

1. This matter arises from a Summons Application dated 13 April 2017 whereby the Joint Official Liquidators ("JOLs") of the Primeo Fund ("Primeo") seek a non-party costs order against Bank of Bermuda (Cayman) Ltd. and HSBC Securities Services (Luxembourg) SA ("the HSBC Defendants") to be taxed on the standard basis if not agreed (the "Non-Party Costs Summons").

2. In addition, there is a related application by Ernst & Young Cayman ("EY" and "EY Cayman") for indemnity costs against the JOLs of Primeo pursuant to Order 24 r 9 (4) (a) of the Companies Winding Up Rules 2008 ("CWR") that its costs of successfully opposing the application of the JOLs upon which the Court ruled on 21 November 2016 be paid out of Primeo's assets, such costs to be taxed on an indemnity basis.

3. For immediate purposes the Court will address the issues raised by paragraph 1 above, and the issues raised by paragraph 2 will then be dealt with separately.

4. The Summons dated 13 April 2017 seeks an order that

1. *"Pursuant to section 24(3) of the Judicature Law (2013 Revision), in relation to the hearing of a Summons dated 22 April 2016 (the EY Cayman Summons), having been refused leave to appear and as non-parties to the Summons, Bank of Bermuda (Cayman) Limited and HSBC Securities Services (Luxembourg) SA are together liable for all of the costs incurred by Primeo in relation to the EY Cayman Summons; and*

2. *Such costs are to be taxed on the standard basis if not agreed."*

5. In relation to the various costs arguments arising, the Court has received the following written submissions:

a) Written submissions of Primeo dated 26 May 2017;

b) Written submissions of the HSBC Defendants dated 2 June 2017;

c) Written reply submissions of Primeo dated 7 June 2017;

d) Written submissions of EY dated 15 June 2017;

e) Written submissions of Primeo in reply to EY dated 28 June 2017;

f) Written submissions of EY in reply to Primeo dated 7th July 2017.

6. In addition, Primeo has filed the Thirteenth Affidavit of Gordon MacRae sworn on 12 April 2017 with Exhibit GIM 13 thereto and the Fourteenth Affidavit of Gordon MacRae sworn on 17 May 2017 with Exhibit GIM 14 thereto.

7. The HSBC Defendants have filed the Affidavit of Anita Hewey sworn on 5 May 2017 and Exhibit AAH1 thereto.

8. The material which has been submitted for consideration without an oral hearing is substantially in excess of what might have been expected in all the circumstances. In any event, with the consent of the parties the Court has agreed to decide these issues on the basis stated.

THE BACKGROUND

9. The principal application, the EY Cayman Summons which this Court decided upon on 21 November 2016, emanated from an order of Mr. Justice Jones dated 16 December 2015 and a subsequent direction in April 2016 in which the HSBC Defendants sought an Order compelling the JOLs to seek documents from EY Cayman (Primeo's statutory auditors) and, by extension, EY Luxembourg (the entity which carried out certain audit fieldwork) so that any documents so produced could be disclosed by the JOLs to the Defendants in *Primeo Fund (in Official Liquidation) v Bank of Bermuda (Cayman) Limited & Anor, Cause No.* FSD 30 of 2013 ("the HSBC litigation").

10. Despite the fact that the EY Cayman Summons was issued in the Primeo liquidation and related to the use of the JOLs' powers, the HSBC Defendants sought leave to appear and be heard in relation to the EY Cayman Summons and they made submissions for the majority of a day on 13 July 2016 ("the Leave to Appear Summons"). The HSBC

Defendants also filed extensive skeleton arguments and evidence in respect of both the Leave to Appear Summons and the EY Cayman Summons.

11. Both the Leave to Appear Summons and the EY Cayman Summons failed and the JOLs accept that EY Cayman is entitled to recover at least the reasonable costs it incurred in successfully defending both Summonses. The award of costs is a discretionary matter and the usual approach is for the losing party to be ordered to pay the costs of the successful party. It seems that the HSBC Defendants initially resisted, but subsequently accepted, liability for the costs of both EY Cayman and the JOLs incurred in successfully resisting the Leave to Appear Summons itself.

12. It is unnecessary to re-state the terms of this Court's Ruling (the "EY Cayman Judgment"). Following the EY Cayman Judgment and correspondence between the respective attorneys regarding costs, the JOLs issued a summons seeking non-party costs against the HSBC Defendants in respect of all the costs incurred in relation to the EY Cayman Summons on 13 April 2017, the Non-Party Costs Summons, to which reference has previously been made above.

13. In summary, the JOLs submit that the appropriate costs order is for the HSBC Defendants to pay all of the costs relating to both the unsuccessful Leave to Appear Summons and the EY Cayman Summons (including the JOLs' liability to EY Cayman as well as their own costs) for at least the following reasons:

(1) The HSBC Defendants are the real parties and driving force behind the EY Cayman Summons. As the HSBC Defendants made clear in written and oral submissions, the EY Cayman Summons originated in applications which the HSBC Defendants made in the HSBC litigation and the only reason it was issued was because of the HSBC Defendants' desire to obtain further documents in discovery;

(2) They argue that the HSBC Defendants conflated two entirely separate regimes (i.e. civil discovery obligations and liquidation powers) by interposing in the Primeo liquidation. The JOLs argue that this conflation of duties and conduct by the HSBC Defendants would have been improper and abusive irrespective of which path the JOLs took (i.e. a letter of request process directed abroad, or alternatively bringing an application in Cayman, as in the EY Cayman Summons); and

(3) The JOLs state that they made well-reasoned and sensible decisions and were vindicated. Therefore they should not have to pay any of the costs incurred by the unsuccessful attempt by HSBC to circumvent the rules in order to obtain a benefit for itself.

14. Based on the leading English and Cayman authorities and the factual position set out at length in Mr. MacRae's Thirteenth and Fourteenth Affidavits, the JOLs respectfully submit that the Non-Party Costs Summons must succeed.

15. The HSBC Defendants put forward a number of contrary arguments and alternatively submit that, if the Court is not minded to dismiss the Non-Party Costs Summons, this

Court should order that costs be reserved to Mr. Justice Jones to be determined in the HSBC proceedings. It is however not seriously disputed that Jones J recused himself from hearing the Summons on the basis of having previously advised EY in respect of various matters.

16. The HSBC Defendants contend that, having lost the application before the Court, Primeo is simply the losing party, and that costs should follow that event. They argue that these costs are the costs of a losing party and not a winning party.

17. They argue in some detail that if the relief sought did fall within the ambit of the exceptional non-party costs jurisdiction, nonetheless the HSBC Defendants lacked control of the Summons nor were they parties to the Summons.

18. They point out that in *In the Matter of Primeo Fund (In Liquidation)* CICA Application No. 8 of 2016, the Cayman Islands Court of Appeal decided only upon a question of inter-party costs and gave neither consideration to the non-party costs jurisdiction nor guidance as to the applicable principles.

19. They claim, perhaps surprisingly, that it is not open to the JOLs to seek a costs order in their favour to encompass the costs of EY, stating that an order for costs does not extend to indemnify a party from its liability to satisfy an adverse costs order to another party.

20. The HSBC Defendants respectively deny that they are the real parties to the EY Cayman Summons or that they exercised substantial control over its conduct.

21. Conversely they say the JOLs were under no compulsion to file the Summons or incur the attendant costs.

22. In addition, they complain that they were not warned that they might be subject to a non-party costs order application. This position is taken by them notwithstanding the fact that they were legally represented at all material times.

23. Therefore for a variety of reasons, to only some of which I have expressly alluded, the HSBC Defendants invite this Court to dismiss the Non-Party Costs Summons both as a matter of jurisdiction and as a matter of the exercise of its discretion, or alternatively to reserve the costs to Jones J for determination in the HSBC proceedings.

THE ORIGINS OF THE EY CAYMAN SUMMONS

24. Relevant information as to the facts upon which Primeo rely is found in the Thirteenth Affidavit of Mr. MacRae. At paragraphs 4-12 he states:

"Purpose of the Application

4. *By this application, the JOLs seek an order from the Grand Court of the Cayman Islands (the Court) that Bank of Bermuda (Cayman) Limited and HSBC Securities Services (Luxembourg) SA (together, **the HSBC Defendants**) should be held jointly and severally liable for Primeo's costs incurred of its Summons dated 22 April 2016 (the **EY Cayman Summons**), notwithstanding the fact that the HSBC Defendants were not parties to the EY Cayman Summons, for the reasons explained below.*

5. *Primeo issued proceedings against the HSBC Defendants in the Financial Services Division of the Grand Court in 2013, (namely, Primeo Fund (in Official Liquidation) v Bank of Bermuda (Cayman) Limited & Anor- FSD 30 of 2013) claiming, in summary, that the HSBC Defendants breached certain duties they owed to Primeo whilst acting as both custodian and administrator of the fund (the **Main Proceedings**). The first instance trial in the Main Proceedings concluded on 21 February 2017 and the parties await judgment.*

6. *Ernst & Young Cayman (**EY Cayman**) had acted as Primeo's statutory auditor from its incorporation in 1993 to its liquidation in 2009, and had delegated certain audit "fieldwork" (that is, the practical gathering, analyzing and evaluation of the financial information that would ultimately be summarised in the resulting audit report) to Ernst & Young Luxembourg (EY Lux). In discharge of their obligations as Plaintiffs in the Main Proceedings, Primeo sought, and were given, documents by EY Cayman in 2012. These documents were in turn disclosed by Primeo to the HSBC Defendants in the Main Proceedings in 2014.*

7. *Despite that disclosure, the HSBC Defendants did not accept that Primeo had met its disclosure obligations in relation to documents held by EY Cayman and/or EY Lux. At a case management conference on 15 and 16 December 2015 (the* ***December CMC****) the HSBC Defendants applied for an Order that the JOLs (rather than Primeo) should use their statutory liquidation powers under sections 103 and/or 138 of the Companies Law (2013 revision) to compel EY Cayman to take any and all necessary steps, using best endeavours, to obtain and provide to the JOLs the documentation specified in the EY Cayman Summons held by EY Lux. The JOLs resisted that application, unsuccessfully, on the basis that, inter alia, documents had already been retrieved from EY Cayman in 2012 and that it was not evident that any additional responsive documents existed.*

8. *On 16 December 2015, the JOLs were ordered by the trial judge to seek to obtain from EY Lux, through EY Cayman, certain categories of documents specified in paragraph 24 of the December CMC Order. The JOLs proceeded to make the request as ordered and certain further documents were provided by EY Cayman. Many of the documents provided in this second tranche of EY Cayman material were duplicative or irrelevant to the Cayman proceedings. The HSBC Defendants were dissatisfied and called for further action to be taken to recover documents from EY Lux.*

9. *Subsequently, in the course of another application in April 2016, the primary subject of which was the issuance of a Letter of Request to the Austrian authorities, counsel for the JOLs updated the Court on the status of this matter. Following submissions by both sides, the JOLs proceeded to issue the EY Cayman Summons on 22 April 2016.*

10. *At the conclusion of the hearing of the EY Cayman Summons, the relief sought was refused, and the costs of that summons were expressly reserved. The JOLs would not have issued the EY Cayman Summons but for the HSBC Defendants' demands and applications requiring them to do so.*

11. *The EY Cayman Summons was dismissed on several grounds. The Court described the application as misconceived and held that it wrongly conflated the JOLs statutory powers with their role as ordinary civil litigants. Prior to the issue of the EY Cayman Summons, the JOLs had argued against the making of the application on the basis that it was improper, unnecessary and highly speculative. Although directed by the Court to do so, the JOLs were effectively forced by the HSBC Defendants to make an application that the JOLs considered was doomed to fail.*

12. *In seeking to compel the JOLs to seek documents from EY Cayman and in subsequently continuing to demand that the JOLs seek those documents, the HSBC Defendants were improperly attempting to obtain an unjustified advantage in the Main Proceedings. All costs that the Primeo estate incurred as a result of that improper application should not have been incurred and Primeo's creditors should not have to bear the costs of the application. Therefore, the JOLs seek an Order that the HSBC Defendants should bear the JOLs' costs of an application improperly made at their instigation."*

25. Mr. MacRae continues at paragraph 16, and 37-40:

"16. The HSBC Defendants ignored the JOLs' views on how they should conduct the liquidation and sought to dictate to the JOLs which powers they should exercise. The CICA confirmed that such interference was improper: the test to be applied when questioning or otherwise challenging the conduct of a liquidator is whether or not he has done something so utterly unreasonable and absurd that no reasonable man would have done it (page 7 of the Pioneer Judgment). Based on both the Pioneer and EY judgments, it is clear that the JOLs' initial views, as expressed in sworn affidavits after considerable deliberation, were entirely reasonable. The CICA noted that Leading Counsel for the JOLs correctly characterized the request as a "fishing" exercise (page 4 of the Pioneer Judgment), which was precisely how the JOLs described the HSBC Defendants' Pioneer and EY applications in December 2015. The CICA also

observed that at no time have the JOLs resiled from the contention that the exercise was speculative and likely to be very expensive (pages 4 to 5 of the Pioneer Judgment)."

37. *At the hearing on 5 April 2016, the matter was raised again with the trial judge. The judge was informed that, in compliance with his December CMC Order, the JOLs had threatened an application against EY Cayman to compel production of further documents from EY Lux.*

38. *The judge's response was as follows:*

> *It seems to me you probably need to adopt the same procedure that you adopted in respect of [Pioneer], in other words, make an application in the liquidation proceeding of whatever its going to be either an order against Ernst & Young Cayman, or an issue of a letter of request in respect of Ernst & Young Luxembourg, or both. It would be helpful, I think, to put them both on notice.*

39. *It is worth emphasising that the circumstances with regards to the Pioneer and EY applications are materially the same (see, in particular, pages 1 to 16 of the Pioneer judgment). The trial judge appeared to be conscious of the parallels and suggested that a similar approach should be adopted. In both instances, of*

course, it was subsequently held that the applications referred to were misconceived and improper.

40. *Furthermore, the HSBC Defendants' Leading Counsel then took the opportunity to stress to the trial judge, in his words, that it is undoubtedly an important issue in the action and spoke of the significance of this issue in the Main Proceedings..."*

26. In the Affidavit of Ms Hewey she states at paragraphs 52-55:

"52. *Mr. Justice Jones QC then made observations about different procedural possibilities:*

"It seems to me you probably need to adopt the same procedure that you adopted in respect of Primeo [sic], in other words, make an application in the liquidation proceeding [for] whatever its going to be ***either an order against [EY Cayman], or an issue of a letter of request in respect of [EY Lux], or both.*** *It would be helpful, I think, to put them both on notice". (Emphasis added)*

53. *Until this point in the hearing, leading counsel for the HSBC Defendants had not addressed the Court* ***at all*** *on the issue of documents from EY Lux.*

54. *Mr. Justice Jones QC later raised the possibility of another judge dealing with any application that might be made by the JOLs on account of His Lordship having previously advised Ernst & Young while in private practice. His Lordship*

then reiterated what he had already said, namely that "[whichever judge deals with the application], probably the appropriate course is for you to make an application in the liquidation proceeding, put the Ernst & Young firms on notice. They may or may not choose to participate, but put them on notice, put HSBC on notice and take it from there"

55. *No Order was made at the 5 April Hearing (or at any subsequent time) compelling the JOLs to issue the JOLs' EY Summons or make any other application against EY Cayman or EY Lux."*

27. Ms. Hewey continues at paragraphs 71-76:

"Hearing of the JOLs' EY Summons

71. *The HSBC Defendants did not participate in the JOLs' EY Summons, and were not invited to participate in the formulation of the summons itself or the JOLs' submissions. Nor, for the avoidance of doubt, did they fund or contribute to the cost of the summons being brought.*

72. *The JOLs' EY Summons was dismissed. The grounds on which the JOLs' EY Summons was dismissed included the jurisdictional basis for the application and how it was worded. At paragraph 25 of the Written Reasons, Mr. Justice McMillan wrote "The wording of the Summons itself is of particular significance as that wording relates to section 138 because it has given rise to a number of legal issues which ultimately have led the Court to dismiss the Summons in its entirety". Amongst other findings, the Court found that there was no statutory*

power permitting the Court to order that a person use "best endeavours" to obtain documents from another (paragraphs 27-28 of the Written Reasons). Concern with the formulation of the JOLs' EY Summons is also evident from the transcript of the hearing itself.

73. *Mr. Justice McMillan remarked that an application for a letter of request to issue to Luxembourg for the assistance of the Luxembourg Court might have been an appropriate procedural route. For example, the learned judge said that "If in fact the [JOLs] think there is something to follow here, there is nothing to stop them from issuing or seeking to issue a letter of request at any time" and that doing so would "take the onus away from me having to guess what is in the possession of [EY Lux]". Indeed, it was EY Cayman's position that Primeo had engaged EY Cayman and EY Lux both as principals, that the letter of request procedure could have been used, and it was submitted on behalf of EY Cayman that "it may well be that there is a good argument for getting those documents [from EY Lux]". Amongst other things, EY Cayman submitted that it should not be compelled to take proceedings against EY Lux in circumstances where the JOLs had not done so (by not applying for the issue of a letter of request). Mr. Justice McMillan was "mystified" by the procedure actually chosen by the JOLs.*

74. *In relation to the 5 April 2016 hearing Mr. Justice McMillan said that "[Mr. Justice Jones QC's] Order does not preclude a letter of request being made...maybe something can be done but is this the way it should be done?" Moreover, Mr. Justice McMillan remarked that he had the impression that "there was no actual order...more an expectation or an encouragement" from Mr. Justice Jones QC, which was also EY Cayman's position.*

75. *Had the JOLs application been for the issue of a letter of request to issue to Luxembourg for the assistance of the Luxembourg Court to compel EY Lux to produce documents belonging to Primeo or to which Primeo and/or the JOLs were otherwise entitled, such an application may well have been granted by the Court. This is the route that had been suggested by Mr. Justice Jones QC, as well as both the HSBC Defendants and EY Cayman.*

76. *The decision not to make an application for the issue of a letter of request in relation to documents held by EY Lux, whether as a standalone application or within the JOLs' EY Summons, was a decision taken by the JOLs alone. Having failed, they now seek an Order that the HSBC Defendants bear the costs of their application."*

28. Ms Hewey later concludes her account at paragraphs 88- 89:

"Conclusion

88. *The JOLs were not compelled by Court Order to make the JOLs' EY Summons. The HSBC Defendants were not invited by the JOLs to participate in the making and formulation of the summons. For example, the JOLs refused to include an application for the issue of a letter of request, which was suggested by Mr. Justice Jones QC and mentioned by the HSBC Defendants more than once in correspondence as an appropriate procedural route. The HSBC Defendants were ultimately not entitled to be heard on the JOLs' EY Summons - they were found not to be a proper party to that summons. Accordingly, the HSBC Defendants were not heard at and played no role in the hearing of the JOLs' EY Summons.*

89. *The JOLs took their own course in making, formulating, and arguing the JOLs' EY Summons; and their application was ultimately unsuccessful. The HSBC Defendants should not be compelled to bear costs of the JOLs' failed application to which they were not even a party. In the circumstances, I respectfully invite the Court to dismiss the Non-Party Costs Application."*

29. The contentions of Primeo on the issue of responsibility are summarized at paragraphs 39- 41 of Primeo's written submissions dated 26 May 2017. There the JOLs state:

"39. *It is clear that, contrary to what the HSBC Defendants now assert, they pushed the JOLs and, in turn, Primeo's Leading Counsel to seek further directions from Mr. Justice Jones QC on 5 April 2016. It was not a proposal emanating from the*

JOLs and it is not the case that the HSBC Defendants were merely innocent bystanders. The evidence demonstrates clearly that had the JOLs chosen to take no action pursuant to the December CMC Order, the HSBC Defendants would have immediately complained to Mr. Justice Jones QC to compel compliance. In the HSBC Defendants' Leading Counsel's own words, the JOLs were required to take action (see pages 89 and 90 of AAH1).

40. *The fact that the HSBC Defendants considered that they were entitled to be involved in every step in the process, such as drafting letters to EY Cayman's attorneys, demanding copies of the hearing bundle for the EY Cayman Summons, applying to be heard and still demanding to be present when that application failed, all demonstrate and confirm that the HSBC Defendants' aim was to force the JOLs to run particular arguments and take certain points in the interests of obtaining an advantage in the HSBC litigation. Any opposition by the JOLs in relation to the HSBC Defendants' involvement in the process, which fell on deaf ears until the EY Cayman Summons was dismissed, was voiced because to allow them to be involved would conflate discovery obligations and powers of the JOLs. If the HSBC Defendants had adopted a reasonable stance before, during or even after the December CMC, these costs would not have been incurred.*

41. *On any view, and in accordance with the English and Cayman authorities, Primeo submits that the HSBC Defendant must be liable for the significant costs incurred by both EY Cayman and Primeo in relation to the EY Cayman Summons made at the HSBC Defendants' behest. The HSBC Defendants are the archetypal intermeddlers in this scenario, as referred to in Nordstern, and the JOLs submit that they must be held accountable for their conduct."*

30. In contrast, the HSBC Defendants state for example in their written submissions dated 2 June 2017:

"HSBC is not the "real party" to the EY Cayman Summons

42. *Even if the Court were to conclude that the non-party costs jurisdiction could theoretically be applied in relation to the costs orders sought by the JOLs, the Non-Party Costs Summons should in any event be dismissed.*

43. *In particular, the HSBC Defendants are not, as the JOLs contend, the "real parties" to the EY Cayman Summons, nor is this a case where the HSBC Defendants "substantially controlled" the EY Cayman Summons such that there is a "general requirement "that they should pay the costs. Indeed, it is difficult to envisage a case that is further from being a "paradigm case" of the situation envisaged by Lord Brown in* ***Dymocks****.*

44. *<u>First</u>, the HSBC Defendants did not fund or contribute to the cost of the EY Cayman Summons in any way.*

45. *<u>Secondly</u>, it cannot be said that the HSBC Defendants controlled or had any management of the EY Cayman Summons. In this case, the EY Cayman Summons was formulated, prepared and prosecuted by the JOLs alone. In particular:*

(a) *The JOLs did not include the HSBC Defendants in the formulation of the summons, which was served on them only after it had been prepared and filed;*

(b) *The "best endeavours" language in the EY Cayman Summons was formulated solely by the JOLs. It did not feature in any prior summons or correspondence in the HSBC Proceedings in relation to Ernst & Young. Nor was it proposed by Jones J or anyone else. Rather, it appears first to have been used by the JOLs' leading counsel at the hearing on 5 April 2016, which he described as the "only option".*

(c) *Further, the JOLs refused to include in their summons an application for a letter of request, which was a procedural option suggested by Jones J and which the HSBC Defendants referred to in correspondence;*

(d) *The JOLs did not include the HSBC Defendants in the preparation of the evidence for the JOLs' EY Cayman Summons;*

(e) *The JOLs did not include the HSBC Defendants in the preparation of their written skeleton argument for the JOLs' EY Cayman Summons, or their oral submissions;*

(f) The JOLs and EY Cayman excluded the HSBC Defendants from the preparation for the hearing, including the preparation of the bundle and exchange of skeleton arguments.

(g) The HSBC Defendants applied for but were refused permission to appear on the EY Cayman Summons. When making the Leave to Appear application, the HSBC Defendants had not seen the evidence or argument prepared or relied on by the JOLs or EY Cayman for the JOLs' EY Cayman Summons.

46. *In these circumstances, there was no element of control exercised by the HSBC Defendants over the EY Cayman Summons at any stage from its inception to its determination.*

47. *Nor were Primeo or the JOLs a "nominal claimant" or mere "creature" or "man of straw" in thrall to and under the power of a non-party controller.*

31. By way of rebuttal, in Mr. MacRae's Fourteenth Affidavit he states for example at paragraphs 14-19:

"14. At the hearing of the Leave to Appear Summons on 13 July 2016, Mr. Gillis QC stated that the HSBC Defendants:

a. *are wanting to serve evidence and make submissions in support of the relief that the liquidators are seeking against EY Cayman; and*

b. *the importance of our support is because of the analysis we want to put before the court to ensure that the liquidators' application is put as fully and as effectively as it can be.*

15. *Therefore, it is untenable for the HSBC Defendants now to argue that they did not support or encourage an application to be made in the form that it was. The HSBC Defendants expressly supported the EY Cayman Summons.*

16. *The HSBC Defendants are now attempting to distance themselves from the process. However, this is nothing more than a transparent and disingenuous attempt to avoid any responsibility whatsoever for the huge amount of costs that have been wasted as a result of their improper conduct. The fact that the HSBC Defendants were initially unwilling even to accept any liability for the wasted costs of their own failed Leave to Appear Summons is a classic example of their unreasonable conduct.*

17. *For example, at paragraph 47 of her first affidavit, Ms Hewey states that raising the matter at the 5 April 2016 hearing in the main litigation was not something that had been requested by the HSBC Defendants. I do not believe that this is a fair representation of the facts. Several days earlier, on 29 March 2016, the HSBC Defendants, via Campbells, had demanded that the JOLs*

forthwith apply to the Court for an Order compelling the production of the documents (page 151 of GIM – 13).”

32. The Court has reviewed the evidence and the relevant portions of the written submissions. The Court has also taken into account the matters which were considered by it in the Reasons for Judgment dated 21 November 2016 as well as the circumstances which had led to the making of that Judgment.

33. Accordingly the Court accepts as factually correct Primeo’s proposition that the JOLs would not have issued the EY Cayman Summons but for the HSBC Defendants’ demands and applications requiring them to do so. They caused the proceedings to take place.

34. The HSBC Defendants were not innocent bystanders. Their counsel made submissions lasting for a number of hours on 13 July 2016 in relation to their Leave to Appear Summons, which was ultimately unsuccessful. They lodged Skeleton Arguments in relation to both the EY Cayman Summons and the Leave to Appear Summons and representatives from the HSBC Defendants also filed evidence in support of both Summonses.

35. All of these circumstances support and validate the factual conclusion to which the Court has come upon this threshold issue.

36. The Court will now consider whether in light of this finding of fact costs consequences properly flow both as a matter of law and in the appropriate exercise of the Court's discretion.

THE GOVERNING LAW IN RELATION TO NON-PARTY COSTS

37. The governing statute for the costs regime in civil proceedings in Cayman is the Judicature Law (2013 Revision). Section 24 of the Judicature Law states:

" (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.

(2) *Without prejudice to any general power to make rules of court, such rules may make provisions for regulating matters to the costs of those proceedings including, in particular, the entitlement to costs, the taxation of costs, the power of taxing officers and the powers of judges to review decisions of taxing officers.*

(3) The court shall have full power to determine by whom and to what extent the costs are to be paid."

38. The Grand Court has a wide discretion with respect to allocating costs liability in civil proceedings and there is no bar as such to an order for costs against a non-party in the Cayman Islands. The Cayman legislation is based on its English predecessor statute. Section 51 of the Supreme Court Act 1981 (the "Act") in England contains similar wording. The English case law relating to section 51 of the Act is therefore important relevant authority when considering how that section is to be interpreted and construed. The Court accepts that it has the benefit of a number of guiding common law authorities therefore when exercising its discretion in this jurisdiction, as well as there being local authorities.

39. Following enactment of the Act, the House of Lords held that section 51 of the Act gave jurisdiction to make orders for costs against non-parties (*see Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965). Having considered that authority, this Court takes the view that the Court has, so far as possible, freedom of action. Subject to such control as the Rules Committee may exercise, no formal limitation in regard to non-party costs has been identified (see Lord Goff at page 975 E-H).

40. Lord Justice Balcombe, in *Symphony Group Plc v Hodgson* [1994] 1 QB 179, suggests that there are primarily six groups which may be susceptible to non-party costs orders. For present purposes the JOLs submit the relevant categories he identifies are: (i) a person who has some management of the action (he labels this category '*controllers*'); (ii) a person who has caused the action ('*causative persons*'); (iii) a person who is a

party to a closely related action (*'related persons'*); and (iv) a person who has maintained or financed the action *('funders'*).

41. The JOLs submit that English authorities and Balcombe LJ's categories show that non-party costs orders are most commonly made against interested parties driving proceedings from behind the scenes. That may be for example in the context of a third-party litigation funder or, as alleged in the present case, a third party causing another entity to prosecute proceedings for its own gain or benefit.

42. In the Privy Council decision *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807, Lord Brown summarizes the core principles governing the exercise of discretion in relation to non-party costs order at page 2815 D- H :

" (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.*

> (2) *Generally speaking the discretion will not be exercised against "pure funders"... [i.e.] "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs...*
>
> (3) *Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, [the non-party] will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation...."*

43. The reasoning in the *Dymocks* case has since been followed by Mr Justice Jones QC in the Cayman Islands. In *In the Matter of VC Computer Holdings Limited (in Official Liquidation)* [2015] (1) CILR 292 Jones J applied the principles set out in the Privy Council decision. He held that the beneficial owner and sole director of the company subject to a winding up petition had defended the petition improperly and in their own interests. They were therefore ordered to be jointly and severally liable for the petitioners' costs.

44. The Cayman Islands Court of Appeal also applied the principles set out in the *Dymocks Case* in determining whether a costs application against a non-party (which had played a significant role in instigating and directing proceedings brought by a receiver of a company) could be served on that non-party out of the jurisdiction (see *Kenney and CC International Limited v Ace Limited* [2015] CILR 367).

45. It may helpfully be pointed out that the Court of Appeal there addressed the situation where a non-party has instigated proceedings or was the *"real party"* to the litigation (see Chadwick P. at paragraph 109).

46. Having reviewed these various authorities and considered the relevant passages of the written submissions, the Court concludes that in appropriate circumstances there is no impediment to awarding costs against a non-party in the Cayman Islands.

The Application of the Legal Principles

47. The Plaintiffs have contended that the HSBC Defendants forced the JOLs' hand and that *"the HSBC Defendants orchestrated and, ultimately, hoped to benefit from the EY Cayman Summons."* In other words, they were the real parties. They claim that the JOLs, however, were reluctant participants.

48. While appearing to accept the general principles of law which the Court has outlined above, the HSBC Defendants contend that as non-party orders are exceptional the Court should tread very carefully. Nevertheless, this means only that such costs are outside the ordinary run of cases and not that they should never or almost never be granted.

49. The HSBC Defendants vigorously dispute this application for costs, claiming that it is unprecedented and unprincipled, but this contention is at variance with both case law and indeed established practice.

50. Furthermore, in regard to the proposition that the JOLs were ultimately unsuccessful and as the losing party have no basis whatsoever for relief, with great respect that is an unduly narrow measurement of the Court's approach to costs entitlement. By way of an example, O.62, r3 (1) defines *"successful party"* as meaning a party in whose favour an order for costs is made or who is otherwise entitled to receive costs from another party or out of a fund. In other words, this was not a loss to which any criticism should be attached.

51. The JOLs further rely upon *in the Matter of Primeo Fund (In Liquidation)* CICA Application No. 8 of 2016 at page 21, paragraph 30, where Sir George Newman J.A states:

"Whilst prejudice of a particular nature can arise for a party ordered to deliver up documents the concept of abuse is derived from legal principle not specific facts. One must start by considering the extent of the power conferred by the Companies Law. The relevant abuse arises when a statutory power conferred for certain purposes is deliberately used to obtain a result outside the contemplation of the Law creating the power."

52. This conclusion is clearly one that is identical to that of which this Court has also arrived in its Reasons for Judgment dated 21 November 2016.

53. Additionally in the Court of Appeal's Judgment on Costs dated 18 November 2017 the Court makes the following extremely important and critical comments at paragraphs 3-6:

"3. *HSBC expressly disregarded the likely costs to which the pursuit of its application would give rise on the basis that it had spent a considerable sum and could see no reason why Primeo should not be put to the costs and expense of obtaining disclosure for HSBC's benefit. As this Court has already stated the only purpose which could be served by the disclosure was that it would assist HSBC in the conduct of the litigation.*

4. *The Court accepts that the JOLs were placed in a difficult position. Once the judge had concluded that there was jurisdiction to require the JOLs to issue a Letter of Request and had not been persuaded that he should exercise his*

discretion against making the order on the ground that it was unreasonable and disproportionate, it was reasonable for Primeo to anticipate that further resistance was capable of being misinterpreted.

5. *In the circumstances although it was Primeo which issued the summonses which failed, it did so because it was clear that the application by HSBC had found favour with the judge and it was not unreasonable, having regard to the tenor and content of the issues being raised, for Primeo to adopt a pragmatic approach to this interlocutory application.*

6. *This Court is satisfied that the underlying stakeholders in the Primeo estate, being the victims of the Madoff fraud, should not have to pay any of the costs incurred by the unsuccessful attempt by HSBC to circumvent the rules in order to obtain a benefit for itself."*

54. The HSBC Defendants argue that in the instant case, in which the question of non-party costs has arisen for consideration, the circumstances are entirely different and that no assistance may be derived from the Court of Appeal case.

55. While there was no consideration by the Court of Appeal of the non-party costs jurisdiction (which as a matter of law is well established in any event), nonetheless the Court must place serious emphasis on the matter of fairness. The JOLs have not acted in any way that was unreasonable or disproportionate or which was frankly even avoidable.

56. As the Court of Appeal has found in what is called for convenience the *Pioneer Case*, the only purpose which could be served by the proposed disclosure was that it would assist HSBC in the conduct of its litigation. In that sense, there is no conceptual or functional distinction to be made between that case and indeed this one.

57. The Court reminds itself of the principles of law which it has identified and addressed and their application to the facts and circumstances of this particular case, including the specific finding of fact which the Court has earlier set out. The HSBC Defendants caused and were exclusively responsible for the proceedings in question. No other conclusion may be drawn.

58. Accordingly, the HSBC Defendants shall bear the costs incurred by the JOLs in their unsuccessful attempt to obtain third party disclosure. The costs of the JOLs shall be taxed on the standard basis if not agreed. The HSBC Defendants shall also bear the costs of the JOLs as incurred in relation to their obligations to EY. The basis on which those costs in turn should be assessed will now be addressed, having given rise as it does to further distinct legal argument.

THE COSTS OF EY CAYMAN

59. EY seek an order, pursuant to Ord 24 r 9 (4)(a) of the Companies Winding Up Rules 2008 ("CWR"), that its costs of successfully opposing the sanction application ("the Application") made by the Joint Official Liquidators of Primeo Fund (in Official Liquidation) on 22 April 2016 are now paid out of Primeo's assets, such costs to be taxed on an indemnity basis.

60. They claim that by the Application the JOLs unsuccessfully sought an order pursuant to sections 103 and/or 138 of the Companies Law (2013 Revision) (the "Law") that EY use its best endeavours to obtain and provide to the JOLs documents alleged to be held by Ernst & Young SA.

61. The Court dismissed the Application in its entirety.

62. The Argument originally set out in their written submissions dated 15 June 2017 proceeds as follows:

"4. *CWR Ord 11 r 1 (a) provides as follows:*

"Any application to Court made by the official liquidator for an order sanctioning his exercise or proposed exercise of any power conferred upon him by Part 1 of the Third Schedule of the Law or otherwise...is referred to in these Rules as a 'sanction application'."

5. *By the Application, the JOLs applied for an order sanctioning the exercise of their powers. The Application was therefore a sanction application within the meaning of CWR Ord 11 r 1 (a).*

6. *The costs of every sanction application are governed by CWR Ord 24 r 9, which provides, so far as relevant, as follows:*

"(1) This Rule applies to every sanction application under Order 11...

(4) In the case of a sanction application which is made or opposed by a creditor or contributory, the general rule is that – (a) his costs of successfully making or opposing the application should be paid out of the assets of the company, such costs to be taxed on an indemnity basis if not agreed with the official liquidator...

(5) The Court shall make orders for costs in accordance with these general rules unless it is satisfied that there are exceptional circumstances and special reasons which justify making some other order or not order for costs."

7. *EY is a creditor of Primeo within the meaning of CWR Ord r 9 (4)(a) in two respects.*

8. *First, Primeo has a contractual liability to EY in respect of EY's costs and expenses of the Application. This liability arises under EY's letter of engagement with Primeo, pursuant to which Primeo indemnified EY against (inter alia) its*

costs and expenses incurred in connection with any claim by Primeo relating to willful default by Primeo's management or agents. In proceedings (the "HSBC Proceedings") brought by Primeo against Bank of Bermuda (Cayman) Ltd and HSBC Securities Services (Luxembourg) SA (together, "HSBC"), Primeo claims damages from HSBC as Primeo's administrator and custodian arising from HSBC's willful default. Primeo's costs of the Application therefore fall within the indemnity.

9. *Secondly, Primeo has a contingent liability to EY in respect of EY's costs of the Application. This liability arises because the issue of the Application resulted in Primeo being vulnerable to liability for EY's costs of opposing it, such that there would be a real prospect of that liability being incurred (Re Nortel GmbH [2014] AC 209 at [77]).*

10. *It follows that EY's costs of successfully opposing the Application should be paid out of Primeo's assets, such costs to be taxed on an indemnity basis, pursuant to CWR Ord 24 r 9 (4)(a)."*

63. An initial concern arises, however, as to whether in fact in relation to the Application, even if it were to be considered a sanction application, EY in any event participated as a creditor or whether that status was functionally irrelevant to the character of the particular application. In the other words, did EY oppose the application in the actual

capacity of a creditor? It would appear on a common sense basis that EY in reality did not do so on that basis, but on a different basis entirely.

64. Quite apart from that special consideration to which the Court shall later return, however, the JOLs contend that their application was not a sanction application. Their written submissions dated 28 June 2017 proceed as follow:

"3. *By the EY Cayman Summons, the JOLs were not seeking the Court's sanction nor was there any requirement for them to do so.*

4. *The relief sought did not fall within Part 1 of the Third Schedule of the Companies Law (2013 Revision) (i.e. 'Power of Liquidators: powers exercisable with sanction').The EY Cayman Summons was drafted as follows:*

Pursuant to sections 103 and/or 138 of the Companies Law (2013 Revision), Ernst & Young Ltd (located in the Cayman Islands) use its best endeavours to obtain and provide to the Joint Official Liquidators of the Fund the following documentation held by Ernst & Young S.A. (located in Luxembourg)...

5. *First, the JOLs are not required to obtain sanction to take possession of, collect and get in property of the company. Furthermore, without sanction, the JOLs are entitled to take proceedings to collect such property. Paragraph 4 of the Order dated 8 April 2009 appointing the JOLs states that they have all the*

powers set out in the Third Schedule of the Companies Law and may exercise such powers without further sanction of the Court.

6. *Second, even if prior sanction was required to collect documents from EY Cayman (which was not the case), the JOLs had already been ordered to take certain steps by Mr Justice Jones QC on 16 December 2015 (the December Order).*

7. *The exact wording of the December Order is as follows:*

[Primeo] shall request that EY Cayman conduct searches for and delivers up to [Primeo] as soon as practicable all documents belonging to [Primeo] or to which [Primeo] (including its Official Liquidators) is otherwise entitled pursuant to its contractual, statutory and/or common law rights or containing or recording information belonging to [Primeo] insofar as not already delivered up to [Primeo] including (without limitation) the following categories of documents...(6)... documents held by EY Luxembourg in connection with the audit of [Primeo] (which documents EY Cayman shall request from EY Luxembourg)...

8. *Third, the order sought pursuant to EY Cayman Summons required EY Cayman to take steps to assist the JOLs, not for the JOLs to take additional steps. If the JOLs were successful, they would not have been required to do anything. In other words, there was nothing to sanction.*

9. *Therefore, for at least the above reasons, the JOLs submit that costs in the present case are not governed by Order 24 rule 9 of the Companies Winding Up Rules 2008 (CWR) for the simple reason that this plainly was not a sanction application.*

10. *If the JOLs are correct that the EY Cayman Summons was not a sanction application, pursuant to the Companies Law (2013 Revision) or otherwise, there is no basis for an indemnity costs order.*

11. *The JOLs and EY Cayman await the Court's determination of the JOLs' summons dated 13 April 2017 seeking a non-party costs against Bank of Bermuda (Cayman) Ltd and HSBC Securities Services (Luxembourg) SA (together, the HSBC Defendants).*

12. *The HSBC Defendants and the JOLs both accept that EY Cayman's costs of successfully opposing the EY Cayman Summons should be recoverable and taxed on the standard basis (if not agreed)."*

65. In addressing this submission EY reply by emphasising the precise terms of CWR O.11 r 1 (a). They accordingly state in their reply submissions dated 7 July 2017:

"2. *Ord 11 r 1 (a) provides that a sanction application is any application to Court made by the official liquidator:*

"for an order sanctioning his exercise or proposed exercise or any power conferred upon him by Part 1 of the Third Schedule of the Law or otherwise."

3. *The Application was a sanction application because it was an application made by the JOLs:*

   i. *for an order sanctioning their exercise or proposed exercise of a power conferred upon them;*

   ii. *by Part I of the Third Schedule of the Law <u>or otherwise</u> (emphasis added).*

4. *The Application sought an order sanctioning the exercise of three powers conferred upon the JOLs, namely the powers conferred by:*

   i. *paragraph 1 of Part 1 ("Part 1") of the Third Schedule of the Law ("Schedule 3");*

   ii. *s 103;*

   iii. *s 138.*

5. *Schedule 3 is headed "Powers of Liquidators". It contains two Parts: Part I lists powers exercisable with sanction, and Part II lists powers exercisable without sanction. Paragraph 1 of Part II lists powers exercisable without sanction. Paragraph 1 of Part II ("Paragraph 1") states as follows:*

"The power to take possession of, collect and get in the property of the company and for that purpose to take all such proceedings as he considers necessary."

6. *It follows that Paragraph 1 confers a power on the liquidator to get in the property of the company and to take proceedings for that purpose.*

7. *Section 103 (3) (b) provides, so far as relevant, as follows:*

"the official liquidator may...apply to the Court for an order...that a relevant person transfer or deliver up to the liquidator any property or documents belonging to the company."

8. *It follows that s 103(3) (b) confers a power on the liquidator to apply for an order that a relevant person deliver up to the liquidator any property belonging to the company.*

9. *Section 138(1) provides as follows:*

"Where any persons have in his possession any property or documents to which the company appears to be entitled, the Court may require that person to pay, transfer or deliver such property or documents to the official liquidator."

> 10. *It follows that s 138 (1) confers a power on the liquidator to apply for an order requiring a person who has in his possession any property to which the company appears to be entitled to deliver such property to the liquidator."*

66. The argument to how and why the Court should take a broad as distinct from a narrow view of what constitutes a sanction application is an attractive one, especially where, as this Court has found, there has been an unsuccessful attempt on the part of the HSBC Defendants to *"circumvent the rules"*. It would follow from that argument therefore that EY should be entitled to recover its full costs incurred as a result of that application attempt, subject to any further considerations.

67. The construction which the Court accepts is that the term *"or otherwise"* broadens out the scope of what a sanction application can encompass.

68. In summary the Court accepts as correct the broad and purposive construction put forward by EY, as providing a mechanism whereby an innocent creditor can be amply and properly protected in costs where the creditor should be so protected.

69. The claim for costs had been made solely pursuant to CWR O.24 r.9 on the premise that a successful creditor should not be left out of pocket.

70. In relation to the legal status of EY as an actual creditor however the JOLs contend:

"13. *Any claim under a contractual indemnity is a claim that must be made in the liquidation, by the filing of a proof of debt. Such a claim could not be advanced outside the context of the liquidation without an order having first been obtained from the Court. No such order has been sought or obtained by EY Cayman and, in any event, there are no grounds for any such order.*

14. *The 2007 letter of engagement between Primeo and EY Cayman (which is referred to at paragraph 8 of the EY Cayman submissions) contains an indemnity provision which EY Cayman is entitled to seek to enforce. Should a proof of debt be filed by EY Cayman in due course, the JOLs will consider the submitted proof and it will be adjudicated fairly in the normal manner at the appropriate time."*

71. The resolution of this narrow technical issue is a difficult one with two aspects. First, was EY in law a creditor at the time of successfully opposing the Summons Application? Secondly, even if it was in law a creditor, did EY actively oppose the Summons in that precise capacity for the purposes of O.24, r 9 (4) (a)?

72. The Court ultimately concludes that EY was not a creditor as contemplated and that alternatively even if it was a creditor it did not oppose the application on that basis as a creditor in any event.

73. Nonetheless, in this context there remains one final issue to examine. As it will be recalled O.24, r 9 (5) states:

> *"(5) The Court shall make orders for costs in accordance with these general rules unless it is satisfied that there are exceptional circumstances and special reasons which justify making some other order or not order for costs."*

74. The circumstances which have been set out both in this Judgment and in the EY Cayman Judgment dated 21 November 2016 are highly exceptional, and in my view they also give rise to special reasons as to why EY should be awarded indemnity costs in any event. There is no justification for EY being left out of pocket to any degree at all because of these proceedings as the facts have amply demonstrated.

75. Therefore the Court acting in its discretion awards indemnity costs in favour of EY in relation to the EY Cayman Summons.

76. As far as the Leave to Appear Summons is concerned, the Court notes in conclusion the statement of the HSBC Defendants at paragraph 8 of their written submissions dated 2 June 2017, viz., that the HSBC Defendants have already agreed to pay the costs of Primeo and the EY Cayman in relation to that Summons on the basis that they were unsuccessful on their application to be joined as a party and to be heard on the EY Cayman Summons.

77. Orders for costs shall be made accordingly.

Robin McMillan

The Hon. Mr. Justice Robin McMillan
Judge of the Grand Court