



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

CAUSE NO: FSD 121 OF 2016 (IKJ)

IN THE MATTER OF THE POULTON FAMILY TRUST

B E T W E E N:

- (1) MICHELE ALEXIA CANHAM**
- (2) JAMES ALEXANDER POULTON**
- (3) NICHOLAS JAMES POULTON**
- (4) JAMES MICHAEL POULTON**
- (5) DAISY ELIZABETH HOUGHTON-POULTON**

Plaintiffs

AND:

- (1) CUTTY SARK LAND COMPANY**
- (2) DEBORAH MCMULLAN POULTON**
- (3) WILSON MALCOLM MCMULLAN**
- (4) CHRISTINE JANE MCMULLAN**
- (5) CAYMAN NATIONAL TRUST CO. LTD.**
- (6) CNT (NOMINEES) LTD**

Defendants

IN CHAMBERS

Appearances: Mr. Neil McLarnon of Travers Thorp
Alberga for the Plaintiffs

Mrs Deborah Poulton, the 2nd Defendant (“D2”) in person

Before: The Hon. Justice Kawaley

Hearing: On the Papers

Ruling delivered: 13 March 2023

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Application for an interim payment on account of costs-application opposed on the grounds of impecuniosity-governing principles-GCR Order 62 rule 4 (7) (h)

RULING ON PLAINTIFFS' APPLICATION FOR AN INTERIM PAYMENT ON ACCOUNT OF COSTS

Background

1. By a Summons dated 14 December 2022, the Plaintiffs applied for an interim payment on account of costs in the amount of US\$ 3 million. Although the Summons makes reference to a Seventh Affidavit of Michele Poulton supporting it, the Sixth Affidavit of Nicholas James Poulton dated 14 December 2022 ("NJ Poulton 6") was actually filed in support of the application. On 16 December 2022, I directed that "*unless the 2nd Defendant requests an oral hearing on or before 16 January 2023, the Plaintiffs' Interim Payment Summons shall be dealt with on the papers and any submissions in opposition shall be filed in Court and served on the Plaintiffs' attorneys on or before 30 January 2022.*"
2. On 23 January 2023 D2 emailed the Court to advise that she would be representing herself and would file her own papers by 30 January 2023, implicitly agreeing that the Plaintiffs' Summons could be dealt with on the papers. At this juncture Kobre & Kim remained attorneys of record despite being described by D2 as her "former attorneys". On or about 30 January 2023, D2 filed her Affidavit (described as the "Second Defendant's Answer to Summons and motion for Interim Payment") ("D2's Answer"). It is unclear on the face of the electronic document forwarded to me when it was formally filed with the Court. On 20 February 2023, I made internal administrative enquiries as to whether D2

had made a filing. On 27 February 2023, Kobre & Kim filed an application to come off the record as attorneys for D2 which I granted on the same date. On that same day the Plaintiffs' counsel also wrote the Court requesting an update on the status of their application, and D2's Answer was forwarded to me for the first time. Although this may well have been entirely coincidental, it would have been procedurally odd for this Court to be adjudicating an opposed application in which D2 was in substance unrepresented at a time when her 'former attorneys' were still formally on the record.

3. For the reasons explained in my Ruling dated 30 August 2022, D2 was ordered to pay 65% of the Plaintiffs' costs of the present action. The Interim payment sought is based on this Court's 30 August 2022 Order.

Governing principles on interim payments on account of costs

4. Neither the Plaintiffs' counsel nor D2 advanced any submissions on the law relating to the present application. As far as the Plaintiffs' counsel is concerned, I have assumed that I am expected to apply established principles and that the application has been presented in an economical manner because of the accumulated burden of costs which have been building up over more than six years for litigants who are very far from having limitless resources. Because D2 is now a litigant in person, I feel obliged in the interests of open justice to set out the governing principles more fully than would otherwise be the case. It is clear from recent unreported judgments that it is not unusual for similar applications to be dealt with on the papers on a summary basis without any extensive articulation of the governing legal principles: see e.g. *Re Seahawk China Dynamic Fund Ltd*, FSD 23/2022 (DDJ), Judgment dated 27 September 2022 (unreported); *Re Aquapoint L.P. (in Official Liquidation)*, FSD 57/2021 (DDJ) Judgment dated 14 October 2022 (unreported)¹.
5. GCR Order 62 rule 4 (7) (h) provides as follows:

¹ This robust and practical summary approach appears to be the modern practice in England: see e.g. *Ballard-v-Sussex Partnership NHS Foundation* [2018] EWHC 527 (Ch); *Ashraf-v- Lester Dominic Solicitors et al* [2022] EWHC 2046 (Ch).

“(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.”

6. This is a comparatively modern rule, and the most recent reported case considering its application appears to be my own decision in *Al Sadik-v-Investcorp Corporation* [2019 (2) CILR 585] where I held (at 597-600):

“25...Applying the governing principles to the facts of the present case, I found that there was no good reason to deprive the first defendant of an interim payment on account of costs. Building on Parker, J.’s decision in In re BDO (2) and having due regard to the English authorities to which he was not referred which construe a similar CPR interim payment rule, I would summarize the governing principles under Cayman Islands law in a more robust pro-receiving party manner as follows:

(a) GCR O.62, r.4(7)(h) confers an unfettered discretion on the court to order the payment of [interim costs] “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”;

(b) the governing principle underpinning this power, and the raison d’être for the rule, is that (per Jacob, J. in Mars UK Ltd. v. Teknowledge Ltd. (5) ([1999] 2 Costs L.R. at 47))—

‘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) in my judgment, Jacob, J.’s framing of the relevant principle is, with respect, more persuasive than the more cautiously expressed formulation of the English Court of Appeal in Blakemore v. Cummings (3) ([2010] 1 W.L.R. 983, at para. 23), notwithstanding the fact that Investcorp’s counsel was content to rely on this

somewhat more restrictive formulation. In that case, the principle that a successful party should not be kept out of their costs was described as ‘an important consideration.’ With respect, that understates the true weight the principle deserves. 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. Whether or not the discretion should be exercised is not shaped by the need to do justice in an abstract sense, entirely untethered from the core purpose of the rule. Whether or not an interim payment on account of costs should be ordered will almost invariably require an assessment to be made of whether or not there is 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 is complete;

(e) GCR O.62, r.4 (7) (h), properly construed, contains an implicit starting assumption that an interim payment should be made. Obviously this starting assumption has somewhat less weight than an express statutory presumption. But the starting assumption arises from the indisputable fact that the core function of the rule is:

- (i) to articulate the principle that the mere fact that a taxation hearing is pending is ‘not . . . a good reason’ for depriving them of all of their costs, and*
- (ii) to empower the court to summarily assess an appropriate partial costs payment which should immediately be made;*

(f) the current English CPR r.44.2 (8) in my judgment simply makes the implicit assumption in the earlier English rule explicit, giving express legislative approval to the approach of Jacobs, J. in Mars UK (which was, perhaps unintentionally, somewhat diluted by the Court of Appeal in Blakemore (or Blackmore) by providing that where taxation is ordered, the court “will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.” [Emphasis added.] To my mind it merely states more clearly and explicitly what is already implicit in the current Cayman Islands rule rather than articulating an entirely distinct and different jurisdictional approach;

(g) in concluding that GCR O.62, r.4(7) (h) contains an implicit starting assumption in favour of an interim payment on account of costs, I do not ignore the fact that power to make such an order is clearly discretionary and that the strength of the starting assumption may be weaker or stronger depending on the circumstances of each case. It is important to remember however, that when Jacobs, J. in Mars UK ([1999] 2 Costs L.R. at 47) was discussing the overriding objective as applying ‘as much to the exercise of the costs discretion as to any other discretion given under the Rules,’ he was dealing with a somewhat different procedural code. The impact of the overriding objective in the preamble to the Grand Court Rules may apply in a general sense to GCR O.62 as much as it applies to other parts of the GCR code. But when construing the jurisdiction conferred by O.62, it is important to have regard to GCR O.62, r.4(2), which states in terms which provide in a general sense support for a more robust approach to construing GCR O.62, r.4(7)(h):

‘(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.’

(h) one recognized and significant reason for not ordering an interim payment on account of costs is the need to avoid stifling an appeal: In re BDO (2) (2018 (1) CILR 187, per Parker, J., at paras. 37–38). Another is that the application for an interim payment should not be a disproportionate proceeding: per Jacobs, J. in Mars UK (5) ([1999] 2 Costs L.R. at 601). Another circumstance which may displace the assumption that an interim payment on account of costs should be made is the mere fact of the pendency of an appeal, although the primary considerations might relate to the need to suspend any order (or secure repayment) rather than whether or not an order should be made;

(i) a summary assessment of the appropriate interim payment amount must obviously be possible and sufficient supporting material (e.g. a draft bill of costs or a breakdown of incurred costs) must be placed before the court;

(j) the court’s discretionary powers under the rule are sufficiently flexible to enable justice to be done on a case-by-case basis, being guided by both the letter and spirit of the relevant rule.” [Emphasis added]

7. In *In the Matter of an Application of BDO Cayman Limited Concerning Argyle Funds SPC Inc (in official liquidation)* [2018 1 CILR 187], Parker J declined to make an Interim Award on account of costs because the unsuccessful party was in liquidation and claimed that being ordered to pay costs would stifle an appeal. I adopted a more pro-judgment creditor approach in the later case of *Al Sadik* having heard, it seems to me, fuller argument on the jurisdictional point. There is no prospect of an appeal in the present case as D2’s Answer makes clear.
8. It is accordingly instructive to have regard to how the practical task of making a summary assessment was approached in *Al Sadik*:

“27 In United Airways, just less than 50% of the total costs claimed was awarded by way of interim costs, although the total costs claimed did not appear to the

judge to be excessive. This guidance was particularly helpful because the principal challenge to the present application was also that in global terms the sum claimed was excessive. The principles governing the broad approach to summary assessment which the first defendant commended to the court were not challenged. I accordingly found that—

(a) the aim of summary assessment was to reasonably estimate the amount of the likely final award;

(b) in carrying out that assessment, the court should adopt a conservative approach, allowing for a reduction on taxation even if the instinctive feeling of the court was that the impugned claim was not unreasonable.

28. *...Having regard to the principles the first defendant itself relied upon, its claim for 70% of the indemnity costs the court found it was likely to be awarded was clearly on the high side. Mr. Lowe, Q.C. invited the court to err on the low side and to avoid sending a signal to the Taxing Master that a “Rolls Royce taxation” was being approved. Ms. White wryly replied with a phrase that she attributed to a former Court of Appeal President: ‘There are no widows and orphans here.’ I agreed. My eyes did not water at the size of total indemnity costs claimed (\$668,472.41), bearing in mind the scale and history of the present litigation and the understandable importance of the application to the successful first defendant. Mr. Lowe, Q.C.’s proportionality arguments were mainly focused on the reasonableness of the total bill for a straightforward forum argument which lasted less than a full day. He suggested legal costs were being incurred at \$12,000 a day over the period covered by the latest stage of this long-running dispute. Ms. White countered that the true amount (excluding the damages claim and applying the correct time period) was only \$4,000 per day which was reasonable. The plaintiff’s counsel submitted that not more than 25% of the total bill would be appropriate, bearing in mind that would be “an almighty argument on taxation.” [Emphasis added]*

29. Following the conservative approach commended to me by Ms. White on behalf of the first defendant I awarded an interim payment of 40% of the discounted 85% which it was contended (and I accepted) would likely be recovered on an indemnity-based taxation. I have erred on the side of caution in making a modest interim payment award. This is the first order of this type which I have made and, unlike Vos, J. in United Airlines Inc. (6), I did [not] have an intuitive grasp of the sort of fees that would be viewed as usual in the context of a very unusual piece of litigation.” [Emphasis added]

9. More recently in *Re Seahawk China Dynamic Fund Ltd*, FSD 23/2022 (DDJ), Judgment dated 27 September 2022 (unreported), another case where indemnity costs had been awarded, David Doyle J granted an application for an Interim Payment on account of costs “*in the amount of the US\$1,000,000.00 requested, which is less than one third of the costs presently claimed in defending the misconceived and ill-founded Petition*” (at paragraph 5).

Merits of the Interim Payment Application

10. Two questions of principle arise out of the procedural rule under which the present application has been made: (1) is there any reason not to order an Interim Payment and (2) is there sufficient material before the Court to enable a summary assessment of the interim amount to be carried out? The first question involves an assessment of D2’s grounds for opposing the application and the second question involves assessing the Plaintiffs’ evidence in support of their Summons.
11. The substantive portions of D2’s Answer fall into two main categories, firstly an account of her financial constraints and secondly her challenge to the reasonableness of the amount claimed. Inability to pay in my judgment is relevant to questions of enforcement of a financial order and does not, at least in the circumstances of the present case, constitute grounds for not making the order at all. Nonetheless, it is averred:

“50. To require D2 to make an interim payment would be an affront to justice as it would leave D2 financially destitute and forced to consider the possibility of declaring bankruptcy at almost seventy years old.”

12. The reasonableness of the US\$3 million sought is challenged in two main ways. Most significantly it is argued that it *“is unfair and unjust to order D2 to pay two thirds of the full amount to which the Plaintiffs claim without evidence they are entitled, without a taxation officer of the court having made a final determination of the amount of their claim.”* Secondly, and only marginally less significantly, it is argued that the litigation was *“a ‘battle royale’ and, as such, there no reasonable fees...”* (paragraph 48). The second point is clearly an overstatement to the extent that it is intended to imply that a taxing master would be likely to include that no costs at all were reasonably incurred by the Plaintiffs. In this litigation they succeeded overall and have already been awarded only a proportion of their costs explicitly to take into account, in broad-brush terms, unreasonable litigation efforts on their part.
13. However, it is clearly valid to contend that any Interim Payment on account of costs should be assessed taking into account what sum the Plaintiffs would likely to be awarded on a taxation in relation to emotionally-charged family litigation in which the parties, understandably, did not often have the procedural requirement to advance their cases in an economical manner in the forefront of their minds.
14. The Plaintiffs’ evidence may now be considered. NJ Poulton 6 itemizes various heads of costs all of which appear on their face to be recoverable in general terms, including:
 - Leading and junior counsel’s fees;
 - Cayman attorneys’ fees;
 - English and US legal fees;
 - miscellaneous disbursements (e.g. accommodation, photocopying, transcripts travel and venue hire).
15. Approximately US\$5 million is attributable to legal costs out of total costs incurred to September 2022 of approximately US\$ 5, 350,000; the totals provided by the Plaintiffs

were US\$ 4,931,649.43 + UK £343,379.34². By my calculations, 65% of that gross figure is US\$3,477,500. So the US\$3 million proposed by the Plaintiffs is indeed close to the maximum amount the Plaintiffs would be likely to claim overall based on current figures (to September 2022). This a grossly overstated claim in all the circumstances of the present case. Unlike the position in *Al Sadik-v-Investcorp Corporation* [2019 (2) CILR 585] (at paragraph 28), the paying party is a widow and the total costs claim is an eye-watering one, not in terms of being disproportionate to the total amount in dispute but rather by reference to the comparatively modest scale of the respective parties liquid assets. Even though costs have only been awarded to the Plaintiffs to be taxed on the standard basis. While the applicant for an Interim Payment on account of costs, who had been awarded costs on the indemnity basis, sought an interim payment of less than 1/3rd of its total costs, the Plaintiffs in the present case have sought an interim award representing approximately 56% of its total costs. That is very close to the lower threshold of the 60-75% litigants are generally assumed to be likely to recover on a standard basis taxation.

16. In my judgment the reasonable expectation of the parties, if they applied their minds to it, would be that I would adopt an approach similar to the approach I adopted in *Al Sadik*, adapted to the particular circumstances of the present case. In that case where (a) costs were to be taxed on an indemnity basis, (b) the total costs claim seemed entirely reasonable on its face and (c) no questions about the paying party's ability to pay existed, I awarded a "cautious" 40% of the 85% I assumed the receiving party would recover on a taxation. In the present case it is self-evident that I can only rationally be even more cautious because (a) taxation will be on the less generous standard basis, (b) the total costs claim at first blush appears high, and (c) the paying party's claims to be cash-strapped are, *inter alia*, confirmed by the exit from the stage of her former lawyers.

Findings

17. I accordingly find that while the Plaintiffs are clearly entitled to an Interim Payment on account of costs, the award should be 25 % of the 60% (of US\$5,350,000) which I

² US\$412,942.84 on 10 March 2023. $4,931,649.43 + 412,942.84 = 5,344,592.27$, which I have rounded up to US\$5,350,000.

consider it is likely the Plaintiffs will recover on a standard basis taxation. 60 % of \$5,350,000 = \$3, 210,000. 30% of US\$3,210,000=US\$963,000,000, which I would round up to US\$1,000,000 and award to the Plaintiffs as an Interim Payment on account of costs.

18. My strong provisional view is that the Plaintiffs and D2, perhaps with the assistance of the newly appointed Trustee should seek to agree an equitable instalment payment Order taking into account the distributions that D2 is likely to receive from the Trust and her undoubted need to meet her reasonable living expenses. In default of agreement, the parties are at liberty to apply to the Court for a determination of payment terms.
19. Unless either party applies to be heard as to costs by letter to the Court within 21 days after the delivery of this Ruling, I would make no order as to the costs of the present application on the grounds that each side has achieved substantial success. I will also hear the parties, ideally in writing, in relation to the terms of the Order drawn up to give effect to this Ruling.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT