



**Cause No: FSD 2023-0113 (JAJ)**

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

**IN THE MATTER OF HAMMER INTERNATIONAL FOUNDATION**  
**AND IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)**

**BETWEEN:**

**THE ARMAND HAMMER FOUNDATION, INC.**

**Plaintiff**

**-and-**

- (1) HAMMER INTERNATIONAL FOUNDATION**
- (2) MARK ALFANO**
- (3) SAMUEL 1 LTD**
- (4) REX ALEXANDER**
- (5) MISTY HAMMER**
- (6) JEFF KATOFSKY**
- (7) RANDALL BARTON**
- (8) RAISHA PARK**
- (9) CECIL KYTE**
- (10) ALEXANDER MENZEL**
- (11) THE ATTORNEY-GENERAL**

**Defendants**

**Appearances:**

**Mr Graeme McPherson KC instructed by Mr Matthew Dors of Collas Crill  
for the Plaintiff**

**Ms Alice Carver of Nelsons for the Second to Tenth Defendants**

**The First and Eleventh Defendants were not represented and did not  
appear**

**Before:**

**The Honourable Justice Jalil Asif KC**

**Heard:**

**4, 21 and 25 October 2024**

**Judgment**

**6 November 2024**

*Costs—whether to order payment on the indemnity basis*

*Costs—payment on account—amount of payment on account—time within which payment should be made*

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**JUDGMENT ON COSTS**  
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**A. Issues for determination**

1. This is my judgment on the various costs issues that arise following my judgment dated 14 August 2024 on the trial of this matter, to which I refer for the background facts and my findings and conclusions on the substantive issues. I adopt the abbreviations used in my judgment dated 14 August 2024 for the purposes of this judgment on costs. The Plaintiff continues to be represented by Mr Graeme McPherson KC and Mr Matthew Dors, and the Defendants by Ms Alice Carver and Mr John Harris.
2. The Defendants do not contest that they should pay the costs of the proceedings generally. They do not appear to contest that it would be appropriate for me to order the Defendants to make a payment on account of costs under GCR O.62, r.4(7)(h). The costs issues that were argued before me are as follows:
  - 2.1 Should the costs of the action generally be paid on the standard basis or the indemnity basis?
  - 2.2 Should a different order be made regarding the reserved costs of the interlocutory hearings on 9 May 2023 and 16 May 2023?
  - 2.3 Should the costs of the Plaintiff's US counsel, Nelson Mullins, be recoverable in whole or in part?
  - 2.4 What should be the amount of any payment on account of costs?
  - 2.5 How long should I allow the Defendants to make any payment on account of costs?

## B. Standard basis or indemnity basis costs?

### B.1 Principles to be applied

3. GCR O.62, r.4(11) provides:

*“(11) The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently.”*

4. It is important to bear in mind that an order for indemnity costs is compensatory, not punitive, in nature. An order that a party should pay costs on the indemnity basis does not allow the receiving party to be paid costs that are unreasonably incurred or unreasonable in amount, or indeed to recover sums that have not been incurred. The difference between standard basis costs and indemnity basis costs is twofold:

4.1 the presumption of reasonableness is reversed – for a standard basis taxation, any doubts as to the reasonableness of items claimed are resolved in favour of the paying party, whilst on an indemnity basis taxation, any doubts are resolved in favour of the receiving party: see GCR O.62, r.13(1) and (3); and

4.2 proportionality – for a standard basis taxation, costs must be proportionate to the amount in issue, the importance of the case and the complexity of the issues, whilst there is no such limitation for indemnity costs: see O.62, r.13(2).

The effect of an award of indemnity costs is therefore more closely to reimburse the receiving party for the actual costs that they incurred in the proceedings. However, whichever of these two bases of costs is ordered, the receiving party does not, in practice, receive a complete indemnity against all fees and expenses incurred because some fees or expenses are almost always determined to have been unreasonable.

5. The parties agree that the starting point when considering the application of GCR O.62, r.4(11) is *Ahmad Hamad Algosabi and Brothers v Saad Investments Company Ltd* [2012] 2 CILR 1 (“*AHAB*”). The Defendants rely on paragraph 9 in Smellie CJ’s judgment to argue that I should order costs on the indemnity basis only in an exceptional case:

*“9. There is guidance to be found in the case law as to the approach to be taken to an application for an award of costs on the indemnity basis in party and party litigation. In Bonotto v Boccaletti, the Court of Appeal held that this court has a discretionary jurisdiction (said to be founded in equity) to grant costs on the indemnity basis, but the discretion is to be exercised*

*only in the most exceptional cases (otherwise than where the costs are to be paid under contract or out of a fund)."*

6. The Plaintiff responds that *Bonotto v Boccaletti* [2001] CILR 292 did not concern the jurisdiction under GCR O.62, r.4(11) and is therefore of no relevance. I agree that it is clear from the judgment in that case that there was no express power in the GCR at that time to award costs on the indemnity basis. The case concerned whether or not the Court had an inherent jurisdiction to order indemnity costs nonetheless. The Court of Appeal's comment in *Bonotto v Boccaletti* that the power arising in equity to order costs on the indemnity basis is to be exercised in exceptional cases only is of no relevance to the exercise of the statutory power in the GCR in accordance with the terms of GCR O.62, r.4(11).
7. The Plaintiff invites me to consider the later passages in Smellie CJ's judgment quoted below, which Mr McPherson says provide more useful guidance on the approach that I should adopt:

*"10. ... the jurisdiction is wide and flexible, allowing the court to exercise its discretion as the circumstances of the case may require.*

*11. In Simms v Law Society [2006] Costs LR 245, Carnwath, L.J., in delivering the lead judgment on behalf of the English Court of Appeal, summarized the principle (by reference to the English equivalent of GCR, O.62, r.4) in the following terms ..., which I think are suitable to be adopted by this court:*

*"[16] The courts have declined to lay down any general guidance on the principles which should lead to an award of costs on the indemnity basis. However, the cases noted in the White Book (Vol. 1 p. 1085ff) show that costs will normally be awarded on the standard basis—*

*'... unless there is some element of a party's conduct of the case which deserves some mark of disapproval. It is not just to penalise a party for running litigation which it has lost. Advancing a case which is unlikely to succeed or which fails in fact is not a sufficient reason for the award of costs on the indemnity basis ...'*  
(p.1087- 8)

*Similarly, in Kiam v MGN (No.2) [2002] 2 All E.R. 242, 246 Simon Brown LJ, while agreeing that—*

*'... conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs ...'*

*added—*

*'to my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context does not mean merely wrong or misguided in hindsight ...'*

*Thus, when considering an application for the award of costs on the indemnity basis, the court is concerned principally with the losing party's conduct of the case, rather than the substantive merits of his position."*

*12. In Excelsior Comrn & Indus. Holdings Ltd v Salisbury Hammer Aspden & Johnson [2002] C.P. Rep. 67, Waller LJ had earlier expressed the view ... that the issue whether indemnity costs should be ordered depends on whether there is 'something in the conduct of the action or*

*the circumstances of the case which takes the case out of the norm in a way that justifies an order for indemnity costs ...'*

13. Mr Golaszewski cites, as an example of the kind of conduct of litigation that deserves being visited with an order for indemnity costs, the circumstances identified in and illustrated by the case of Three Rivers DC v Bank of England [2006] 5 Costs LR 714. In that case, Tomlinson J, (in his attempted categorization of principles), cited as his fifth 'principle' the following (... at para. 25):

*'Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.'*

...

14. While I do not regard Tomlinson J's 'principles' as being principles in the true sense, this, his fifth, does provide an illustration of one type of factual situation which a court may well conclude takes a case out of the norm such as to justify the imposition of indemnity costs. ...

15. The institution and maintenance of a patently speculative or weak case merely with the opportunistic intention of embarrassing or compelling an opposite party to comply with a claim will be conduct coming within the imbrue of GCR, 0.62, r.4(11) as being 'improper' and 'unreasonable.' But, to my mind, the exceptionalism of the indemnity costs principle is explained by the purpose for which an award of costs is made. What the case law clearly explains is that awards of indemnity costs will be the exception rather than the norm.

16. In the ordinary case, an award is not made to punish the unsuccessful litigant. The purpose is to reimburse an amount to the successful litigant to cover what may objectively be regarded as the reasonable costs of litigating in the case. ..."

8. The Plaintiff also relies on Woods Furniture and Design Ltd v James [2020] 2 CILR 543, particularly at paragraphs 78 and 79. However, I find it helpful to start with an earlier passage, at paragraph 75 of Field JA's judgment:

*"75. I accept Ms Carver's submission that in awarding indemnity costs the judge erred in law in pursuing a policy of enforcing the overriding objective of the GCR rather than confining himself to the requirements of GCR O.62, r.4(11). In my judgment, when deciding whether costs should be taxed on the indemnity basis, the court should have regard exclusively to whether the requirements of O.62, r.4(11) have been met. With respect to the judge, it was not open to him to come up with a policy of his own devising that glossed and thereby widened the reach of this rule. Whether there should be such a policy is a matter for those responsible for amending and updating the GCR."*

9. At paragraph 78, Field JA quoted paragraphs 9-12 of Smellie CJ's judgment from AHAB and continued in paragraph 79:

*"79. I respectfully agree with these observations of the Chief Justice. They should be followed and applied whenever a court is asked to award costs on the indemnity basis."*

10. Of relevance to this case, Field JA added at paragraph 80:

*"80. In Bennett v AG [2010] 1 CILR 478, Henderson J expressed the view that advancing a defence that was merely weak or unlikely to succeed would not warrant an indemnity costs order whereas the maintenance of a defence that was manifestly hopeless would. In my view, there may be cases where a defence does not fall within the category of manifestly hopeless but*

*is one that must have been appreciated to be very weak and highly speculative which in the context of the proceedings overall could justify such an indemnity costs order.”*

11. Field JA then concluded that the employer’s defence on liability for the accident in question was hopeless from the outset and was unreasonable to an even higher degree from the date when the employee had sought a split trial on the basis that he was impecunious and required liability to be established to fund further medical treatment: see paragraph 82. He therefore held that the employer should pay costs on the indemnity basis up to the date, approximately 8 years later, when the employer finally admitted liability. Beatson JA and the President agreed.
12. Lastly, the Plaintiff relies on *Vernon v Green* [2021] 1 CILR 62, a decision of Kawaley J concerning the disallowance of costs to the successful party under GCR O.62, r.11(2) which, in a sense, is the obverse to an award of indemnity costs. Having referred to paragraph 75 of the Court of Appeal’s judgment in *Woods* quoted above (which was an appeal from Kawaley J), the learned judge candidly indicated:

*“25. ... I construe that dictum as more a criticism of my legal reasoning in that case rather [than] a criticism of the functional or practical elements of my approach .... In my costs ruling in that case, I failed to clearly explain the basis upon which I felt it legally permissible to take into account the overriding objective in applying the indemnity costs rule. I attempt to set out below a clearer explanation of why it is appropriate to take into account the overriding objective when exercising jurisdiction conferred by GCR, O.62.”*

13. Kawaley J then explained his approach to the relevance of the overriding objective when considering costs issues over paragraphs 26-34 of his judgment. He concluded at paragraphs 35-37 as follows:

*“35. The term ‘unreasonably’ is ultimately a somewhat broad term which persuasive authority suggests should be narrowly construed ...: Lord Woolf [in *Burrows v Vauxhall Motors Ltd* [1998] PIQR P48] appears to me to have been suggesting that ‘unreasonably or improperly’ should be construed as synonymous rather than disjunctive terms. This was a tentative view, because he merely stated that to ‘label as ‘misconduct’ an act which is unreasonable but not improper – in the sense which those words convey in this context ... may lead to misunderstanding and should be avoided.’ For the purposes of the present application, I assume that where a successful party has to a relevant and material extent conducted proceedings ‘unreasonably’ but not ‘improperly,’ such ‘misconduct’ will not justify disallowing their costs under GCR O.62, r.11 (2).*

*36. The term ‘improperly’ under O.62, r.11(2) must include, more narrowly, conduct which to a material extent is inconsistent with the overriding objective of GCR O.62, which is that a successful party should recover the reasonable costs ‘incurred by him in conducting that proceeding in an economical, expeditious and proper manner.’ Litigating in a way which is wasteful of costs and/or which delays the ordinary course of litigation must constitute potential grounds for disallowing a successful party her costs. What costs penalty is appropriate in individual cases is a fact-sensitive consideration, as is assessing how serious the relevant*

*'misconduct' is. What is 'proper' is a somewhat more open-ended question. Improper conduct must include conduct analogous to abuse of process and non-compliance with the letter and/or spirit of this court's Rules. General support for this conclusion is provided by Autumn Holdings Asset Inc. v Renova Resources Private Equity Ltd where Chadwick, P. stated (2017 (2) CILR 136, at para. 266):*

*'266 The judge directed himself (at para. 3.11 of his costs ruling) that he should have some regard, in considering the overall costs of the proceedings, to the failure of the Renova parties to comply with their discovery obligations which, as he said (ibid.) he had found blameworthy and culpable. In giving himself that direction, he did not err in principle ...'*

*37. Conducting litigation improperly, for the purposes of GCR O.62, r.11(2) as read with GCR O.62, r.4(2), must include failing to comply with the obligation imposed on civil litigants by para. 3 of the Preamble to the Grand Court Rules to assist the court to further the overriding objective. ..."*

14. Based on these cases, the Plaintiff submits that, whilst compliance with the overriding objective is not to be treated as equivalent to *"the norm"*, comparison with what is properly expected as compliance with the overriding objective provides a way of benchmarking a party's conduct. The Plaintiff suggests that the court ask itself, is this the way in which I would expect litigation to be conducted in accordance with the overriding objective, and if not then that it is an indication that the conduct could be treated as being outside *"the norm"*.
15. The Defendants accept that running a hopeless case can give rise to an order for indemnity costs. They refer me to Henderson J's judgment in Bennett v AG [2010] 1 CILR 478, where the learned judge said:

*"6. Advancing a defence which is merely weak or unlikely to succeed is to be distinguished from maintaining a defence which is manifestly hopeless. The latter can be characterized as unreasonable. The former is a regular occurrence with which every barrister will be familiar. Many litigants, even after receiving a warning from their legal advisers that the claim or defence is likely to fail, prefer to have that determination made by the court. That is not, in the typical case, unreasonable. Weak cases will succeed from time to time. The litigant is entitled to prefer a judicial determination based upon all of the evidence over the predictions of his advisers which are limited, as they usually are, by not having observed the other side's witnesses under cross-examination. There are also cases which are hopeless and which appear that way to anyone with the requisite legal training. It is open to a judge to determine that it was unreasonable to bring such a claim or advance such a defence. The usual result of such a finding is that the unsuccessful party will pay costs on the indemnity basis. ..."*

*9. The assessment of unreasonableness must avoid the wisdom of hindsight. The question is whether it was unreasonable to advance the claim or maintain the defence taking into account what should have been evident to the party concerned at the outset of the trial. ..."*

16. In my judgment, the starting point and the ending point is the wording of GCR O.62, r.4(11). In order to obtain an order for costs on the indemnity basis, the applicant must persuade the Court that the paying party has conducted the proceedings, or that part of the proceedings to which the order



relates, improperly, unreasonably or negligently. The Court should not seek to apply a gloss to the plain words of the Rule. The cases cited seem to me to provide examples of the kinds of considerations that the Court might take into account in a particular case and the kinds of situations where an order for indemnity costs may be appropriate. But, ultimately, each case must be considered individually and a decision made whether or not the threshold test in the Rules has been met, before the Court then considers how to exercise its discretion as to costs. Whether or not the proceedings have been conducted improperly, unreasonably or negligently is much easier to determine in the context of the particular case before the Court than trying to describe those characteristics in the abstract.

B.2 The Plaintiff's submissions on the exercise of the costs discretion

17. The Plaintiff's first submission is that the Defendants' defence was not just weak but was hopeless at all times because it was manifestly inconsistent with the contemporaneous documents. The Defendants had sight of the relevant documents from a very early stage of the proceedings, if not before, because they were exhibited. But the Defendants persisted in their position nonetheless. At no stage before the Defendants were debarred from participating did they put forward any cogent defence on the three central issues raised by the Plaintiff: (a) Michael Hammer had always intended that Florida Hammer should succeed to California Hammer's role as the sole member of Cayman Hammer and acted on the basis that that had occurred; (b) the Defendants themselves had treated Florida Hammer initially as the sole member of Cayman Hammer and then as being a member, until spring of 2023; and (c) there was no evidence that Cayman Hammer's Memorandum and Articles of Association had been varied to allow it to have more than one member, with the result that the purported appointments of the Defendants as members in October 2022 were invalid, and all actions taken on the basis that they were validly appointed members of Cayman Hammer were invalid in consequence.
18. Secondly, the Plaintiff says that the Defendants took this course, and sought to obfuscate and to delay the court looking into what had happened, rather than to agree that they had made errors in corporate governance and seek to correct them, because they had embarked upon a process of asset stripping of Florida Hammer in 2022 in favour of Cayman Hammer, which they did not wish to be revealed. The Plaintiff relied on a number of examples of the Defendants' conduct before and during the proceedings to support this submission, which I do not need to set out. The following example is, in my view, particularly egregious. The trial was initially listed to commence on 8 April



2024. Not having engaged with the Plaintiff on trial preparation, on 4 April 2024 the Defendants issued an application to adjourn the trial due to a change of attorneys, which I heard on 5 April 2024. The Defendants represented to the Court that they were ready for trial and wished to proceed. I granted an adjournment of 8 weeks to 3 June 2024 on the ground that it would be unfair to the Defendant to require them to proceed on 8 April 2024. Shortly thereafter, the Defendants caused Cayman Hammer to file for Chapter 11 bankruptcy in California on 6 May 2024, having previously passed a resolution to that effect on 18 March 2024, which was not disclosed to me when I heard the adjournment application. Mr McPherson described the bankruptcy filing as an attempt to derail the Cayman trial due to the Defendants' position that the automatic stay of other proceedings was triggered, including the action before the Grand Court. The Plaintiff obtained an injunction from me on 13 May 2024 to restrain the Defendants from acting on behalf of Cayman Hammer. Despite the Defendants having submitted to me in opposition to the injunction application that they did not intend to disrupt the trial before the Grand Court, the Defendants then immediately applied to the US bankruptcy court on 14 May 2024 by emergency motion seeking, amongst other things, confirmation that the automatic stay did bite on the Cayman proceedings, and that the Cayman proceedings should not advance to a hearing. The California court rejected that application.

19. In summary, the Plaintiff's complaints are that the Defendants: opposed the quick and easy route to determination of the issues offered at the start; they failed to comply with court orders; they obstructed the prompt and smooth progress of the proceedings; they opposed actions that would assist the Plaintiff to expose the flaws in their case in refusing to provide documents and objecting to cross-examination; and they sought to delay or derail the proceedings by applying under O.14A, by obtaining the adjournment of the trial in April 2024, and by pursuing the US bankruptcy proceedings with a view to preventing the Cayman proceedings from being able to move forward.
20. The Plaintiff urges me to bear in mind that the effect of the Defendants' conduct is aggravated by the fact that the dispute concerns control of a charity and that Cayman Hammer has not been able to fulfil its charitable purposes whilst the dispute as to its control has been live.
21. Finally, Mr McPherson draws to my attention that the Plaintiff made an offer on a without prejudice save as to costs basis on 4 April 2024 to settle the proceedings. The offer was that the parties would consent to the relief claimed by the Plaintiff and the dismissal of the Defendants' counterclaims, and the Defendants would make a contribution of US \$500,000 towards the Plaintiff's costs, which

were said at that time to exceed US \$1.5 million. The offer was stated to be open until the commencement of the hearing on 5 April 2024 of the Defendants' application to adjourn the trial – in other words there was a very short window to accept. The Defendants did not respond to it within that window or thereafter.

22. The Plaintiff submits that, for all these reasons, the Defendants' conduct is "out of the norm" and properly deserves a "mark of disapproval".

B.3 The Defendants' submissions on the exercise of the costs discretion

23. The Defendants submit that they have been punished already and that ordering them to pay costs on the indemnity basis would amount to punishing them twice for the same conduct. Ms Carver argues that:

23.1 the Defendants were ordered to pay costs on the indemnity basis in relation to the adjournment of the trial ordered on 5 April 2024 – however the Defendants in fact volunteered to submit to an indemnity costs order as the "price" for the adjournment, as I recorded in my judgment on that application;

23.2 the Defendants were ordered to pay costs in respect of the Plaintiff's application for the injunction on the indemnity basis; and

23.3 the Defendants were made subject to the debarring order, effectively preventing them from participating in the trial with a virtual certainty that they would lose on the merits and be subject to a costs order – however this ignores that the Defendants could easily have avoided that outcome by complying with my order to make the payment on account of costs.

The Defendants contend that so far as there is any relevant "conduct" on their part, it has already been addressed by these specific orders and outcomes.

24. Ms Carver submits that I should be exceedingly slow to make an indemnity costs order in respect of the action as a whole. She says that before doing so, I should be satisfied that there is no evidence that the Defendants could have adduced and no submission that could have been made on their behalf that might have altered the Court's view. The Defendants argue that the Plaintiff is seeking to portray them in a bad light, and that it is notable that the Chief Justice did not make any adverse costs orders in relation to the interlocutory hearings about which the Plaintiff now complains.

25. Finally, the Defendants ask me to recognise that they were not remunerated for their roles and to take that into account when determining what costs order to make.

B.4 Decision

26. In my judgment, this is a case where it is appropriate to order that the Defendants should pay the Plaintiff's costs of the action on the indemnity basis on the ground that there has been unreasonable or improper conduct of the proceedings within the meaning of GCR O.62, r.4(11). There are four reasons that persuade me to make such an order:

26.1 The first is that I agree with Mr McPherson's submission that the Defendants' defence was not just a weak one that failed, but was hopeless at all times because it was manifestly inconsistent with the contemporaneous documents. The high-water mark of the Defendants' case is the evidence that they had submitted for the trial that was intended to proceed on 8 April 2024. That evidence simply did not address the three core issues that Mr McPherson identified, and which I have set out earlier in this judgment. The Defendants' suggestion that there might be evidence that they could have adduced or submissions that they could have made which could have resulted in a different outcome seems to me to be completely unrealistic.

26.2 Further, I made findings in my judgment that on five occasions relating to the purported plan of merger between Florida Hammer and Cayman Hammer, the Defendants, or certain of them, put forward positions that they must have known at the time were false: I refer to paragraphs 120, 122, 124-125, 133 and 148-149 of my judgment dated 14 August 2024. I therefore conclude that the Defendants must have known, not just that their defence was weak, but that it was based upon false premises and was completely hopeless for that reason.

26.3 I am not willing to find that the Defendants sought to obfuscate and delay the prompt resolution of this claim from the outset of this action because I was not the judge involved at that time and I consider it would be disproportionate for me to try to go back and read the submissions, correspondence and transcripts of hearings to reach a conclusion in respect of that time period. However, I do find that the Defendants sought to delay and disrupt the prompt resolution of this claim during April and May 2024. I make that finding for the following reasons:

- (a) At the hearing on 5 April 2024 of the application to adjourn the trial, the Defendants' position was that they were ready to proceed to trial and wished to do so with the minimum delay necessary for their new attorneys to read into the case. However, on 6 May 2024, the Defendants caused Cayman Hammer to file for Chapter 11 bankruptcy in California, clearly with the intention of relying on the automatic stay to prevent the Cayman action from proceeding.
- (b) When the Plaintiff then applied to me on 13 May 2024 for an injunction to restrain the Defendants from purporting to have authority to act on behalf of Cayman Hammer, in particular in respect of the US bankruptcy proceedings, the Defendants again submitted to me through their counsel that they did not intend to disrupt the hearing of the trial, then set for 3 June 2024. However, the following day, they made an emergency motion in the US bankruptcy proceedings seeking an express confirmation that the automatic stay was effective and prevented the trial of the Cayman proceedings.

26.4 Further, it is apparent from the above that the Defendants sought to mislead the Court as to their intentions regarding the trial of the Cayman action on both these occasions.

27. Finally, I accept the Plaintiff's submission that the Defendants' conduct is aggravated by the fact that it has disrupted and delayed Cayman Hammer's ability to fulfil its charitable purposes whilst resolution of the dispute as to its control has been delayed, although this would be unlikely to be a sufficient feature to attract an order for indemnity costs if it stood alone.

28. I do not agree with the Plaintiff's submission that I should take into account its offer to settle the litigation made on 4 April 2024. Given the very short time allowed for acceptance by the Defendants, less than 24 hours, I do not consider that it would be fair or just to take this offer into account in the exercise of my discretion on costs.

29. I have carefully considered the Defendants' submission that making an order for costs to be paid on the indemnity basis would amount to punishing them twice for the same conduct. I disagree.

29.1 First, I do not accept the Defendants' submission that I should be satisfied that there is no evidence that the Defendants could have adduced and no submission that could have been made on their behalf that might have altered the Court's view before considering making such an Order. I have to approach the case on the basis of the evidence that was before Court

– it would be wrong for me to speculate about the evidence the Defendants might have given and the submissions they might have made, and to decide costs on that basis. Having said that, the Defendants had fully prepared the case for trial and were ready for trial and the proper inference is that they had put forward the best case that they were able to, as discussed at paragraph 63 of the judgment dated 14 August 2024. The Defendants could have avoided the consequence of the debarring order and fully participated in the trial by making the payment on account of costs that I ordered. At no time have the Defendants put forward any evidence to show that they were unable to do so rather than that they chose not to.

29.2 Secondly, the first two factors listed above are the ones that weigh most heavily in the balance in favour of making an order for indemnity costs. As to the first, there was no answer from the Defendants to the argument that Cayman Hammer was only permitted to have one member, and the Defendants never engaged with that difficulty in their position. Similarly, the Defendants never confronted the obstacle to their “two stage merger” case that it was contrary to all of the contemporaneous evidence. Nor did they address that the contemporaneous evidence was strongly consistent with the idea that Michael intended that there was to be a seamless replacement of California Hammer by Florida Hammer: see, for example, paragraphs 92.2 and 102.2 of the judgment dated 14 August 2024.

### C. The reserved costs

30. The parties agree that I need positively to make an order regarding the previously reserved costs, otherwise each of those hearings will be treated as being subject to no order as to costs: see *Supreme Court Practice 1999* at paragraph 62/3 and *Hong Kong Civil Procedure 2024* at paragraph 62/1/3(5).
31. Ms Carver accepts that the costs ordered to be reserved on 6 October 2023 and 12 December 2023 should be treated as costs in the cause. However, she submits that the costs of the applications determined on 9 May and 16 May 2023 should be treated differently, and she proposes that I should make no order in respect of the costs of those applications.
32. Ms Carver’s submission is predicated on the assumption that I have ordered that the costs of the action should be paid on the standard basis only. Given that I have reached the conclusion that it is appropriate to order the Defendants to pay the costs of the action on the indemnity basis, there

would need to be some feature about the hearings on 9 May and 16 May 2023 that differentiates them from the remainder of the proceedings and justifies making some different order on costs. I do not consider that there is anything about the Plaintiff's approach to those two hearings that should have the result that, in effect, I disallow or reduce the Plaintiff's costs recovery in respect of those hearings from indemnity basis to standard basis or no order as to costs.

33. In the course of obtaining proposed corrections to the draft of this judgment, it became apparent that there was a misunderstanding regarding the position in respect of the costs of the hearing on 28 July 2023 as a result of an error in the Plaintiff's written submissions. Helpfully, Ms Carver accepted that in light of my conclusion above, I would have reached the same conclusion as regards the costs of that hearing if I had been separately addressed upon it, and I therefore formally do so.

**D. Costs of the Plaintiff's US counsel**

34. The Defendants submit that there was no need for the Plaintiff to engage Nelson Mullins as their US counsel in light of Ms Hellmuth's engagement as an expert on US law, and that I should therefore refuse to allow the Plaintiff to recover any costs associated with the involvement of Nelson Mullins. The Plaintiff responds that Nelson Mullins' role was completely different from that of an expert on US law in that they were responsible for coordinating the Plaintiff's position in relation to the various pieces of litigation in the United States with the litigation in the Cayman Islands. The Plaintiff says this became even more important once the Defendants caused Cayman Hammer to seek US Chapter 11 bankruptcy protection.
35. The question of principle was addressed by the parties and considered on 24 April 2024, when I ruled on the question of costs following the adjournment of the trial. The arguments and my conclusion at that time were as follows:

*"30. Mr Harris' next point ... is that the fees of the Plaintiff's US attorneys, Nelson Mullins, ought not to be recoverable. He accepts that the case involves issues of US company law but submits that the Plaintiff has engaged an expert on US law who will give evidence on that topic. He says that, whilst it may have been necessary for the Plaintiff to involve Nelson Mullins at earlier stages of the case, it is not necessary now that the Plaintiff has engaged an expert and there is no need for Nelson Mullins to attend the trial or to be involved in preparation for trial.*

*31. Mr McPherson responds that Mr Wright's sworn evidence explains the role of Nelson Mullins in relation to the Cayman proceedings, which is a coordination role in relation to the parallel US proceedings. He says the Plaintiff's understanding is that the Sixth Defendant, who is a US-qualified litigation attorney, takes that role for the Defendants; however, the Plaintiff*

*does not have that capability internally and neither does Collas Crill, which is what drives the need for Nelson Mullins to be involved in the Cayman proceedings.*

*32. For my purpose of determining the amount of a payment on account of costs, I am not satisfied that it is unreasonable in principle for Nelson Mullins to provide input and coordination between the US and Cayman proceedings, and so their fees are, in principle, recoverable. ...”*

36. No new arguments were put before me on this occasion and I see no reason to reach a different conclusion. Nelson Mullins’ fees are therefore in principle recoverable as part of the Plaintiff’s costs of the action, and I order that GCR Order 62 rules 18(4) and (6) shall be disapplied.
37. To the extent that the Defendants take issue with certain aspects of Nelson Mullins’ role, or that their involvement in particular aspects of the Cayman proceedings was not reasonably required, those are points that can be taken on taxation in due course.

#### **E. Quantum of payment on account**

38. The Plaintiff’s evidence is that it has incurred at least US \$2.319 million by way of costs of the action. The Defendants complain that that figure is excessive and say that the case was only listed for three days. In fact, until the Defendants became debarred from defending on 22 May 2024, just over 1 week before the trial commenced on 3 June 2024, the trial was listed for 8 days. The length of the hearing was only reduced from 8 days to 3 days on 24 May 2024, one week before the trial started. Of course, by that time the majority of the costs would already have been incurred. The Defendants have not put forward any alternative figure as to what they contend would be a reasonable payment on account of costs. In those circumstances, there is no reason for me to adopt a different figure as the starting point. However, that total figure does need to be reduced to reflect the payments on account of costs that I have already ordered the Defendants to make, the first of which they complied with and the second of which they have not. The Plaintiff therefore proposes that the starting figure should be US \$1.9 million, which I accept.
39. I adopt the approach to the determination of the amount of the payment on account of costs that I set out in my judgment on costs dated 24 April 2024. The appropriate reduction to the figure of US \$1.9 million to reflect that costs have been ordered on the indemnity basis is 15%. The appropriate further reduction to reflect that I am dealing with a payment on account of costs is 15%. This gives a net figure of US \$1.373 million, which I reduce further to US \$1.3 million as proposed by the



Plaintiff. Thus, I order that the Defendants jointly and severally make a payment on account of the Plaintiff's costs of the action in the sum of US \$1.3 million in addition to the payments on account of costs which I have already ordered.

**F. Time for payment**

40. The Plaintiff contends that the Defendants should be ordered to make the payment on account of costs within 28 days. The Defendants contend for 90 days. This is on the basis of the following assertion in the signed but unsworn draft affidavit of Mr Katofsky dated 16 October 2024, intended to be relied on in opposition to a separate application by the Plaintiff for security for the costs of the Defendants' intended appeals:

*"6. I understand that the [Plaintiff] are seeking an order for security in the order of about \$2.2 million. There is no prospect of the [Defendants], again, unpaid volunteers for a charity, and all but one of whom are private individuals, being able to find anything close to such a sum. ...*

*7. Each [Defendant], as well as [Cayman Hammer] itself, may have personal, business and/or umbrella insurance coverage to defend and/or indemnify these matters. There is very little understanding of Cayman law in the US, either procedurally or factually for this matter. For a US lawyer and/or insurance broker or adjuster, it is almost incomprehensible. Complicated insurance evaluations and analysis need to take place, which each carrier likely to have to obtain outside legal counsel, possibly in both countries in order to determine applicability and coverage. To my knowledge, thus far, more than a dozen insurers on the same number of policies have been tendered by each party to the various insurers to evaluate for coverage. There are more to follow in the coming days. Based upon my over three decades of experience in legal insurance matters, the coverage analysis and inevitable fights between carriers over responsibility and priorities of coverage will take many many months to unfold. ..."*

Mr Katofsky's reference to "many many months" is not easy to reconcile with the Defendants' request to me for 90 days for payment.

41. In addition, it is unclear whether Mr Katofsky is referring to claims that the Defendants intend to make on existing insurance policies that might provide them with coverage or whether he is addressing some kind of intended after the event insurance coverage in respect of the Defendants' proposed appeal. If it is the former, then that is not relevant to the liability as between the Plaintiff and the Defendants – it is *res inter alios acta*. If Mr Katofsky is instead intending to refer to some new after the event insurance coverage, then the suggestion that such insurers would include within their coverage the Defendants' existing liability to pay the costs of the action seems extremely uncommercial and therefore unlikely to be correct.

42. Apart from this material, the Defendants have not put any information before me regarding their financial standing and ability or inability to pay. They have had ample opportunity to do so and to make arrangements to raise funds, as they have known since 14 August 2024 that they had lost the trial, and probably guessed from 24 May 2024 onwards that that was a likely outcome. They must also have known and been advised that the Plaintiff was likely to seek a payment on account of its costs, having previously done so in respect of both the adjournment of the trial on 5 April 2024 and the application for the injunction on 13 May 2024.
43. There is no evidence before me to justify a significant delay in the time within which the Defendants should make the payment on account of costs. I therefore conclude that the payment on account should be made within 28 days.

**Dated 6 November 2024**



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**THE HONOURABLE JUSTICE JALIL ASIF KC**  
**JUDGE OF THE GRAND COURT**