



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

FSD 184 of 2020 (RPJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF FGL HOLDINGS

ON THE PAPERS

Before: The Hon. Justice Raj Parker

**Written Submissions from: Maples and Calder (Cayman) for the Company
Carey Olsen for the Dissenters**

Draft Ruling Circulated: 2nd November 2023

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HEADNOTE

Costs-costs of leave to appeal application-GCR Order 62-stage at which costs to be taxed-renewed application to Court of Appeal for leave to appeal in prospect-taxation forthwith-exceptional circumstances-appropriate costs order in all the circumstances-costs in the cause.

RULING

Introduction

1. On 13 September 2023, the Court dismissed the Dissenters' application for leave to appeal

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Paragraphs 2 and 3 of the Costs Order of 9 May 2023 (the "Application").

2. The Court's Costs Order of 9 May 2023 provided:
 1. *The Dissenters pay the Petitioner's costs of the proceeding including those occasioned by its discovery exercise, to be taxed on the standard basis if not agreed.*
 2. *The Petitioner costs of and occasioned by its e discovery provider and its first level document review are to be recoverable on taxation from the Dissenters in accordance with Order 62, rule 18 of the Grand Court Rules.*
 3. *The Dissenters pay US\$4m in respect of the Petitioner's costs summarily pending taxation, such payment to be made within 7 days from the date of the filing of this order.*
 4. *The Dissenters pay the Petitioner interest on its costs from the date of this order until the date of payment, at a rate of 2.375% per annum, in accordance with the Judgment Debts (Rates of Interest) Rules (2021 Revision).*
 5. *The Dissenters are liable to the Petitioner for the costs of the proceeding on a joint and several basis.*
 6. *There be no order in respect of the costs of the Application.*
3. In respect of the application for leave to appeal paragraphs 2 and 3 of that Order ,the Court on 13 September 2023 determined on the papers that:

“...the Dissenters do not have realistic prospects of successfully appealing either paragraph and permission is therefore refused. The Court is also not persuaded that there is a general principle upon which the opinion of the Cayman Islands Court of Appeal is required.”
4. It is not disputed that the Company was the successful party on the Application.
5. In respect of the Application (and this ruling on the papers), the Company argues for a costs order in its favour on the standard basis, to be taxed forthwith, if not agreed.
6. The Dissenters argue that costs should be in the cause.

7. The Dissenters having been refused leave by this Court, intend to renew their application before the Court of Appeal. The Dissenters submit that the determination of the paying party and the taxation of costs should only take place once the Dissenters' application for leave to appeal has been finally determined by the Court of Appeal.
8. This ruling is again made on the basis of written submissions.

Applicable Law

9. ***Stage of proceedings at which costs to be taxed (O.62, r.9)***

9. (1) *Subject to paragraph (2), the costs of any proceedings shall not be taxed until the conclusion of the cause or matter in which the proceedings arise.*

(2) *If it appears to the Court when making an order for costs that all or any part of the costs ought to be taxed at an earlier stage it may order accordingly.*

(3) *In the case of an appeal the costs of the proceedings giving rise to the appeal, as well as the costs of the appeal, may be dealt with by the Court hearing the appeal.*

(4) *Where it appears to the Court on application that there is no likelihood of any further order being made in a cause or matter, it may forthwith order the costs of any interlocutory proceedings which have taken place to be taxed.*

10. O.62, r.9(1) generally mandates costs to be taxed at the conclusion of the cause or matter in which the proceedings arise. That makes obvious sense as it is not until the end of a matter that costs can be properly assessed.
11. However, in the exercise of its discretion, when making an order for costs, the Court may order immediate taxation under GCR O.69. r.9(2) where there are "*exceptional circumstances*"¹.

¹ *Re The SPhinX Group Of Companies [2009] CILR 178 (paragraphs 9 and 10),as approved by the Court of Appeal in Scully Royalty Limited v Raffaisen Bank International AG(unreported) 8 April 2022, at paragraphs 45 – 50)*

12. *Smellie CJ held in Sphinx :*

'8........The normal costs order to be made in respect of an interlocutory proceeding such as the present is that the costs be taxed if not agreed in the usual way, and be paid at the conclusion of the case.

9. An order for payment forthwith would therefore be exceptional and was so acknowledged by the other parties. The rules of court would clearly so regard such an order. Order 62, r.9(1) of the Grand Court Rules provides that "the costs of proceedings shall not be taxed until the conclusion of the cause or matter in which the proceedings arise" unless, subject to r.9(2), earlier taxation is deemed suitable by the court.

10. A cause or matter is concluded when the court in question has finally determined the matters in issue, whether or not there is an appeal from that determination. So said Saville, J. in Rafsanjan Pistachio Producers Co-op. v. Bank Leumi (UK) Ltd. (3) (cited in 1 Supreme Court Practice 1999, para. 62/8/1, at 1136) indicating that an interlocutory application, such as the one being discussed here as to the incidence of its costs, would not ordinarily be a proper stage at which to make an order for costs to be taxed forthwith. In the absence of any exceptional circumstances, I take the same approach here and refuse to order that there should be taxation and payment forthwith."

13. The Court respectfully agrees with this analysis.

14. In addition, the Court would always have to assess the likelihood of any further order being made in the cause or matter by O.62 r 9 (4).

15. It is also recognised in Order 62, Rule 9 (3) that a Court hearing an appeal may determine the costs of the proceedings giving rise to the appeal, as well as the costs of the appeal itself.

Determination

16. In this case the Company argues for costs to be taxed forthwith on the basis that the proceedings are at an end. The Company argues that the "cause" or the "matter" here is the s.238 appraisal

proceeding, which has concluded. The Company argues that the leave to appeal application in respect of the costs of those proceedings has also concluded in this Court.

17. The Company refers to *Trina Solar*, where the Court awarded the costs of the proceeding even though an appeal was being brought to the Court of Appeal, and similarly the Court of Appeal made an order for the costs of the proceeding even though the Company was bringing an appeal to the Privy Council².

18. It also relies on the following ‘exceptional circumstances’ for a taxation forthwith:

a) The Company's costs of dealing with the Dissenters' Application are not immaterial. Failing to make an award of costs now enables, and may encourage, the Dissenters to take bad points without consequences.

b) The Dissenters have disregarded the Costs Order. Not a single cent of the joint and several interim payment has been paid. No stay of execution has been sought, and no explanation offered.

c) The Company brought an application under GCR O.48 against the only Dissenter incorporated in the Cayman Islands, Kingstown Partners Master Ltd ("KPM"). The documents provided in response to that application show that from 2021 onwards, steps were taken by the directors of KPM to return capital to its investors without making any provision for its potential liability for costs, such that it is not now capable of paying its liabilities to the Company under the Costs Order³; and

d) The Dissenters have previously caused their Cayman Islands attorneys to misrepresent their ability and/or readiness to pay any costs order made against them⁴.

19. Having considered the legislation and the authorities relied on, the Court is of the view that the Company is correct: the relevant cause or matter for these purposes, the s.238 appraisal case, has concluded. There are no appeals from that appraisal.

² *In Re Trina Solar*, unreported, Grand Court, 8 December 2021; *In Re Trina Solar*, Court of Appeal, unreported, 10 August 2023, p.44-45

³ Letter from Carey Olsen to Maples dated 25 August 2023

⁴ 11 January 2023 Carey Olsen letter

20. The Dissenters submit at paragraph 8 of their written submissions:

The Dissenters intend to renew their application for leave to appeal at the earliest available opportunity. In accordance with Order 21(3) of the Court of Appeal Rules that renewal will be made ex parte to a single Judge of the Court of Appeal within seven days of the sealed Order from this Honourable Court. Although it is not anticipated that the Company will participate in or incur any costs in relation to the renewed application, the application remains 'on foot' (i.e.; the cause or matter is ongoing) and the Dissenters have committed to promptly advising the Company of the outcome.

21. It is undoubtedly the case that if the Court of Appeal refuses the Dissenters' application for leave to appeal, the Company would be entitled to its costs of the Dissenters' application for leave to appeal and the Company could then immediately commence taxation proceedings.
22. However, if the Dissenters' application for leave is granted, either by a single Judge or the full CICA, the appeal would proceed and the costs of the leave application - including in this Court - would likely be costs in the appeal. No doubt if the appeal is successful, the Dissenters will seek their costs of the appeal, including the leave applications.
23. Having considered the matters advanced by the Company said to amount to exceptional circumstances, the Court is of the view that these matters do not warrant the imposition of a 'forthwith' order at this stage in respect of the Application.
24. In the Court's view an order for 'Costs in the Cause' is the appropriate order in all the circumstances.
25. Such an order provides the Company with a degree of certainty as to its costs entitlement if leave is refused by the Court of Appeal, while at the same time managing the risk that a taxation process may later be unwound by a superior court.



THE HON. MR. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT