



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024 No 112

BETWEEN:

AFINITI LTD

PLAINTIFF

-and-

M Z CHISHTI

DEFENDANT

AND

COMPANIES (WINDING UP) JURISDICTION

2024 No 265

IN THE MATTER OF AFINITI LTD (IN LIQUIDATION)

AND

IN THE MATTER OF THE BERMUDA COMPANIES ACT 1981

RULING AND ORDERS

(In Chambers)

Combined rulings on costs in relation to proceedings the same parties in different actions and application for stay pending appeal

Date of Hearing: 27 May 2025

Date of Ruling: 10 June 2025

Appearances: *Devon Luca and Precious Smith* of Walkers (Bermuda) Limited for the Joint Provisional Liquidators (the “JPLs”)

John Riihiluoma and Lalita Vaswani of Appleby (Bermuda) Limited for VCP Capital Markets LLC as Term Loan Agent and authorised representative of the secured lenders (the “Secured Lenders”)

Lilla Zuill of Zuill & Co for Mr Chishti in Action 2024 No 112

Kyle Masters and Jonathan Marion of Carey Olsen (Bermuda) Limited for Mr. Chishti in action 2024 No 265

RULING AND ORDERS of Martin, J

Introduction

1. This matter relates to the costs in relation to two sets of different proceedings involving Mr. Chishti and Afiniti Ltd (the “Company”). The applications were combined by consent by the parties reflected in a Consent Order dated 6 March 2025 (as amended) and 15 May 2025. There are in fact 6 separate applications. These are:
 - i. The application dated 29 April 2025 by the Joint Provisional Liquidators of Afiniti Ltd (in liquidation) (the “JPLs”) for an interim costs payment of US\$110,199.10 in relation to the standard costs award made against Mr. Chishti in Action 2024 No 112 which related to declaratory relief sought by Afiniti Ltd against Mr. Chishti in relation to the Indemnity Agreement (the “Declaration proceedings”).
 - ii. The application dated 19 February 2025 by the JPLs for an interim costs payment of US\$544,472.85 in relation to the additional costs incurred by the JPLs and the Company¹ in relation to (a) the application Mr. Chishti made to adjourn the application for the court’s sanction of the Restructuring Transaction and (b) the increased costs attributable to Mr. Chishti’s application to adjourn and opposition to the application for the court’s sanction of the Restructuring Transaction (the “JPLs’ sanction hearing”).
 - iii. The application dated 30 April 2025 by the JPLs for an interim costs payment of US\$292,341.91 in relation to the costs incurred by the

¹ The Company was separately represented at the JPLs’ sanction hearing as a result of the fact that the JPLs’ appointment was supervisory in nature and that the board retained operational control of the Company subject to the JPLs’ supervision by Order of the Court dated 19 September 2025.

JPLs and the Company in resisting the application made by Mr. Chishti for leave to appeal against the decisions made at the JPLs' sanction hearing (the "leave to appeal" application).

- iv. The application dated 21 February 2025 by the Secured Lenders for (i) the Secured Lenders' costs associated with Mr. Chishti's application to adjourn the sanction application and his opposition to the sanction application and (ii) an interim costs payment of US\$317,134.59 in relation to those costs (the "Secured Lenders' sanction hearing costs")
 - v. The application dated 2 May 2025 by the Secured Lenders for an interim costs payment of US\$110,905.00 in relation to the Secured Lenders' costs in opposing the leave to appeal application (the "Secured Lenders' leave to appeal costs").
 - vi. The application dated 27 May 2025 by Mr. Chishti for a stay of the interim costs payment application in Action 2024 No 265 pending Mr. Chishti's application for leave to appeal to the full Court of Appeal. This application had not been issued and served on the other parties by the time of the hearing and the Court heard Ms Zuill's submissions on it *de bene esse*.
2. The JPLs are seeking interim payment orders in respect of 60% of the costs incurred by the Company and the JPLs in relation to the Declaration proceedings, and 60% of the costs they have attributed to the increase in the costs incurred as a result of Mr. Chishti's opposition to the JPLs' sanction hearing and leave to appeal hearing. The Secured Lenders are seeking interim payment orders in respect of 70% of their costs of the JPLs' sanction hearing and the leave to appeal hearing. These applications amount to approximately US\$1.2 million against the total amount of costs that the JPLs, the Company and the Secured Lenders intend to claim as their respective full entitlements on taxation.
 3. There is no dispute that the court has the inherent power to make an interim costs payment order, following the decisions in **Bidzina Ivanishvili v Credit Suisse**² and **AML Recovery Vehicle PTC v Madison Pacific Limited et al**³ by Hargun CJ. The question for the court to decide is whether it is appropriate to make such an order in the circumstances of these cases.

Disposition

4. For the reasons explained in the Ruling below, the Court has acceded to the applications for interim payment orders in respect of the costs awarded against Mr. Chishti, with some modifications. The orders for interim payments to be made by Mr.

² [2022] SC Bda 56

³ [2023] SC Bda 77

Chishti in respect of each the categories of claim referred to in paragraph 1 above are as follows:

- i. **US\$110,199.10** in respect of the Company's costs of the Declaration Proceedings;
 - ii. **US\$544,472.85** in respect of the Company's and the JPLs' additional costs of the JPLs' sanction hearing;
 - iii. **US\$271,829.65** in respect of the Secured Lenders' additional costs of the JPLs' sanction hearing;
 - iv. **US\$205,447.89** in respect of the JPLs' costs of the leave to appeal hearing to the Supreme Court and single Justice of the Court of Appeal;
 - v. **US\$95,061.42** in respect of the Secured Lenders' costs of the leave to appeal hearing before the Supreme Court and the single Justice of Appeal.
5. For the avoidance of doubt, Mr. Chishti is to pay the Company's portions of the interim costs to the JPLs.
 6. The Orders for interim payments are subject to the terms and conditions also set out in detail in the body of the Ruling. The effect of these conditions is summarised briefly below.
 7. The interim payment orders in favour of the Company and the JPLs will become effective upon the giving of an undertaking to the Court by the JPLs to retain the funds paid to them by Mr. Chishti in a separate interest-bearing account pending the hearing of (a) Mr. Chishti's appeal in Action 2024 No 112 in November 2025 and (b) Mr. Chishti's application for leave to appeal to the full Court of Appeal in Action 2024 No 265 in November 2025.
 8. The interim payment orders in favour of the Secured Lenders will become effective upon the giving of an undertaking to the Court by VCP Capital Markets LLC as Term Loan Agent for the Secured Lenders to repay any amounts paid by Mr. Chishti in respect of the interim payments within 28 days of being ordered to do so by this Court or the Court of Appeal.
 9. Mr. Chishti is ordered to make the interim payments specified below within 28 days of this Ruling. The interim payments ordered will carry interest at the statutory rate with effect from 28 days of the date of this Ruling until payment in full in accordance with section 11 of the Interest and Credit Charges (Regulation) Act 1975.

10. In the event that Mr. Chishti's Appeal in 2024 No 112 and his application for leave to appeal to the full Court of Appeal in Action 2024 No 265 do not proceed in November 2025 session, the JPLs and the Secured Lenders are given liberty to apply to the Court for further directions in relation to the release of the funds paid by Mr. Chishti.
11. In the event that Mr. Chishti fails to make any of the payments ordered within 28 days of the date of this Ruling, the JPLs and the Secured Lenders are to be automatically released from their respective undertakings.

The Declaration proceedings (Action 2024 No 112)

12. The Declaration proceedings were brought by the Company before it went into provisional liquidation. These proceedings involved a dispute between the Company and Mr. Chishti as to whether Mr. Chishti was entitled to nominate and appoint independent counsel under the terms of an Indemnity Agreement dated 1 January 2020 to determine his right to be indemnified against expenses he had incurred or was going to incur in relation to several sets of legal proceedings and arbitration proceedings then pending between Mr. Chishti and the Company and other parties.
13. The Court determined that Mr. Chishti had no right to do so and made a declaration to that effect and awarded the costs of the proceedings to the Company on a standard basis to be taxed if not agreed, unless Mr Chishti made application to be heard on costs (the "Costs Order").
14. Mr. Chishti so applied and sought an Order for his own costs against the Company on the grounds that he had prevailed and that the terms of the Indemnity Agreement gave him the right to reclaim his costs even if he was unsuccessful. The Court ruled against Mr. Chishti on those points and confirmed the Court's original Costs Order.
15. Mr. Chishti applied for leave to appeal against the Costs Order. The Court refused him leave to appeal.
16. Mr. Chishti appealed against the substantive ruling in the Declaration proceedings and his appeal is scheduled to proceed in the November 2025 session of the Court of Appeal.
17. Ms Zuill submitted on behalf of Mr. Chishti that there is an application for stay⁴ in the Notice of Appeal and indicated that she had also filed an application for a stay of the interim costs payment proceedings pending appeal. These applications had not been served on the parties and the Court did not have a copy of any of the materials filed in support of that application at the time the hearing took place on 27 May 2025.

The interim costs application in relation to the Declaration proceedings

⁴ Ms. Zuill's written submissions at footnote 1 and paragraphs 26-8.

18. Ms Luca submitted on behalf of the that the costs of the Company and JPLs in the Declaration proceedings were reasonable and proportionate and that there was little doubt that the Registrar exercising her jurisdiction as taxing officer would be likely to award at least 60% of the costs claimed in the schedule of costs exhibited by the JPLs in support of the application for an interim payment.
19. Ms Luca referred to the following factors which she submitted supported the JPLs' application:
- i. Mr. Chishti is a foreign litigant with no known assets within the jurisdiction
 - ii. Mr. Chishti has not provided any evidence of his means but has not suggested that an order for immediate payment would have the effect of stifling his appeal to the Court of Appeal in relation to the Declaration proceedings.
20. In opposing the making of an interim costs payment order, Ms Zuill relied upon five main points:
- i. Mr. Chishti's substantive appeal is scheduled to be heard in November 2025 and if he is successful, the payment of the interim costs will be for nought and the costs will have to be refunded. The delay to the JPLs is slight, in the scheme of things.
 - ii. The JPLs are administering the estate of a wholly insolvent company and Mr. Chishti will not be able to recover the payment of any costs paid on an interim basis. The potential prejudice to Mr. Chishti is great.
 - iii. Even if Mr. Chishti is unsuccessful in his appeal, there is a risk of overpayment which also might not be recoverable.
 - iv. Mr. Chishti has various cross claims which he would be able to offset against the obligation to pay any costs to the JPLs.
 - v. The amount of the costs claimed is not agreed. It needs to be taxed. The cases in which interim costs payment awards were made were cases where there was no substantial dispute over the quantum of costs. The matter should proceed to taxation. The court should not "shoot from the hip" by making an interim payment order until after the taxation process had determined the correct amounts to be allowed.
21. In answer to these points, Ms Luca made it clear that the JPLs were prepared to offer an undertaking to 'ring fence' the funds received from Mr. Chishti as interim payment on account of the costs and not to put those funds in the general fund of the assets pending the outcome of Mr. Chishti's appeal. She also queried the evidence that suggested that Mr. Chishti had a potential set off against the costs he was obliged to

pay. She said that the 60% allowance was sufficient leeway to ensure that the amount of costs ordered would not be likely to exceed the amount that would ultimately be allowed on a taxation.

The JPLs' application for an interim payment in respect of the Declaration proceedings Costs Order (Action 2024 no 112)

22. The Court is not making any determination of the quantum of costs that will be assessed by the Registrar on a full taxation.
23. The Court is satisfied that the sum claimed by the JPLs is a reasonable estimate of an amount which will likely represent a significant proportion of the recovery the JPLs will receive on a full taxation.
24. The purpose of the interim payment is to ensure that the successful party is not kept out of recovery of the costs of the proceedings any longer than necessary⁵. In my view, a 60% payment gives a margin of appreciation for the possibility of reduction on taxation which is proportionate and reasonable.
25. Taking a 'bird's eye view' of the total amounts claimed overall, the Court considers that they appear to be within the broad range of the likely costs the Court would expect to be recoverable in a case of this kind. The fact that Mr. Chishti has not agreed the costs is not relevant. If his agreement were necessary before the Court could make an interim payment order, then every litigant could obstruct the court from making an interim payment award by simply disagreeing with the costs claim. There has been no challenge to any particular element of the claim made that would give rise to a concern that the Court is endorsing allowance of recovery of a claim, for example, that is outside the normal kind of costs that are recoverable in a case of this kind.
26. The fact that the substantive appeal is scheduled for hearing in November 2025 is not persuasive. This could easily change. It is also over a year since the costs were actually incurred. There is no good reason to keep the JPLs out of a reasonable proportion of the costs associated with these proceedings until then. The Court will address the effect of Mr. Chishti's cross claims under the Indemnity Agreement in the section dealing with Mr. Chishti's stay application below.

⁵ **Dyson Ltd v Hoover Ltd (No 4)** [2004] 1 WLR 1264,1267 per Laddie J applying **Mars UK Ltd v Teknowledge Ltd** [2000] FSR 136,153 *"If the detailed assessment were carried out instantly, he would get the order instantly. So 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. A payment of some lesser amount which he will almost certainly collect is a closer approximation to justice. So I hold that where a party is successful the court should on a rough and ready basis also normally order an amount to be paid on account, the amount being a lesser sum than the likely full amount."* per Jacob J.

27. However, the Court agrees that appropriate measures need to be put in place to prevent the possibility that the costs paid may not be recoverable if they are mixed in the general funds of the liquidation available to the JPLs to meet costs and expenses or available for dividend to creditors.
28. The Court therefore allows the JPLs' application and hereby makes an interim costs order in the amount of **US\$110,199.10** in respect of Action 2024 No 112 on the undertaking of the JPLs not to mix or apply the interim costs paid by Mr. Chishti in the general funds of the liquidation, but to hold those funds in a separate interest-bearing account pending the outcome of Mr. Chishti's appeal in these proceedings. Should Mr. Chishti's appeal in Action 2024 No 112 not proceed in November 2025 as presently scheduled, liberty is given to the JPLs to apply for further directions in relation to the release of the costs paid by Mr. Chishti.

The JPLs' sanction proceedings (Action 2024 No 265)

29. The Company went into provisional liquidation in September 2024. At that time, the Company was balance-sheet insolvent and quickly running out of liquidity. It had been engaged in negotiations to refinance its debt or attract inward investment for some considerable time, without success. The Company engaged in restructuring negotiations with its lenders (who are referred to as the Secured Lenders) from about March 2024 and arrived at terms of an agreed provisional restructuring package.
30. In order to ensure that the terms were appropriate and represented a fair assessment of the likely recovery of value compared to a distressed sale or a liquidation, Teneo FA were engaged to prepare a report on the Enterprise Value of the Company (which included its ownership of a wide group of subsidiary companies and IP and other assets).
31. By the end of October 2024, final terms had been agreed in principle and the JPLs had reviewed those terms and were satisfied as to the scope of and conclusions reached in the report from Teneo FA. They sought the approval of the court to enter into the Transaction as a compromise and a sale and sought the court's sanction under section 175 (1) and 175(2) of the Companies Act 1981.
32. Mr. Chishti applied to adjourn the JPLs' sanction hearing on the grounds that further evidence was needed as to value and argued that rolling discovery of the Company's financial and business records would be required to enable the court to make a determination of the JPLs' application. The Court granted an adjournment to enable Mr. Chishti to put in further evidence and present his application for a full adjournment and/or to oppose the JPLs' applications.

33. At the adjourned hearing the Court was not satisfied that there was any substance to the objections put forward by Mr. Chishti's expert valuation witness to justify a further adjournment of the sanction hearing and proceeded to determine the sanction application. The reasons for the Court's refusal of the application to adjourn and the grant of the Court's sanction are set out in full in the Court's Ruling of 20 November 2024.
34. The Court allowed the JPLs costs of the sanction applications out of the assets of the Company and made provision for the parties to apply for the costs incurred in the sanction applications as follows⁶: *"The costs of the Sanction Applications were necessarily substantially increased by the adjournment application made by Mr. Chishti. I will hear the parties upon application as to whether and how the Court should deal with the costs Order (if at all)."* (This will be referred to as the "Sanction Applications Costs Order").
35. The terms of this aspect of the Court's Sanction Applications Costs Order will be examined in further detail below, in the light of the submissions that were made by Mr. Chishti's counsel about its meaning and effect.

The interim costs application in relation to the adjournment application and the sanction hearing

36. The JPLs have made an application for an interim payment on account of the costs the Company and the JPLs incurred directly as a result of the application by Mr. Chishti to adjourn the sanction hearing and to oppose the sanctions being granted. The hearing lasted two days, but there was a substantial amount of material filed and all parties were represented by local counsel and leading counsel from overseas, with supporting teams of lawyers involved in the background. Detailed billing records have been produced showing the work done, the time spent and the cost incurred. The JPLs have redacted out of the billing records the work that the JPLs consider would have been incurred in any event so that the fees and disbursements shown on the billing statements reflect only the work that the JPLs consider was the additional time and expense that was directly attributable to the adjournment and dealing with the opposition to the sanctions, both by the Company and by the JPLs.
37. In order to be clear, the Company was still at that time operating under the direction of the Board, and were represented by their own counsel, and the JPLs were represented by separate counsel.
38. It is not for the Court at this stage to review in any detail the items claimed by the JPLs as part of their application for an interim payment: the Court can only look at the matter in a broad manner and take a high-level 'bird's eye view' of the costs overall. The detailed assessment will be undertaken by the Registrar on the full taxation

⁶ Paragraph 191

hearing, and it would be wrong for this Court to trespass on that territory on this application, save to acknowledge that the interim costs payment might need to be adjusted once the full taxation has taken place, in case an overpayment has occurred.

39. Ms Luca made essentially the same points in support of the interim payment of these costs as she made in relation to the interim payment application for the costs of Action 2024 no 112, so they do not need to be repeated. Ms Luca's position on some additional points which were taken is considered below.
40. Mr. Masters made all the same points that Ms Zuill had made in relation to her opposition to the interim payment order, and those will not be repeated. However, Mr. Masters raised three new points that were relevant to the interim payment application of the sanction hearing costs which had not been raised in relation to Action 2024 No. 112 (because the circumstances differed).
41. The first supplemental point was that the Court was not concerned with the costs of the sanction hearing at all, just the additional costs of the adjournment application. Mr. Masters submitted, with characteristic polish, that the effect of the Court's Sanction Applications Costs Order allowing the Company's costs and the JPLs' costs out of the estate meant that no element of those costs could be recovered from Mr. Chishti, and that meant only the costs of the adjournment were under consideration. However, with respect, that is to misunderstand the meaning and effect of this part of the Sanction Applications Costs Order.
42. It is a general rule of insolvent liquidation that the costs associated with the administration of the Company after it has entered liquidation (which includes provisional liquidation) are a priority claim on the assets of the estate, paid before all other claims. The petitioner is invariably awarded the costs of presenting the petition out of the estate and the costs of the JPLs are obviously costs necessarily incurred in their role as administering the insolvent estate. In this case, the Court also allowed the Company's costs of the sanction applications as a priority claim because they were necessarily incurred in respect of the Restructuring Transaction, and the application for sanction to enable that transaction to proceed within the provisional liquidation (for which purpose the JPLs had been appointed). These are not costs awarded as part of an adversarial proceeding on a 'party and party' basis, but are generally allowed on a full indemnity basis, and are assessed and approved by the court as part of the approval process of liquidation expenses under the Winding Up Rules 1982⁷.
43. The second part of the Sanction Applications Costs Order quoted above expressly contemplated that the Court would hear the parties on the award of costs that were incurred as additional costs of the sanction hearing as a result of Mr. Chishti's unsuccessful application to adjourn it. This includes the costs of dealing with Mr.

⁷ See *Applications to Wind Up Companies* (4th Ed) para 5.180 for a general statement of the principles.

Chishti's opposition, which was based on the same grounds and occupied the same court fixture. It is not possible to parse out the costs that were related to the adjournment from the opposition of the sanctions: they were one and the same hearing⁸.

44. Therefore, the submission that when undertaking the task of taxing the bills of costs the Registrar will be asked to assess which part of the application the particular line item related to is misplaced and is rejected. The sole question will be whether the costs claimed related to the increased costs (i.e. over and above the costs that would have ordinarily been incurred by the Company and the JPLs in making the application for sanction) were associated with Mr. Chishti's application to adjourn and to oppose the grant of the court's sanction.
45. The second point that Mr. Masters made (in addition to the points that have been summarised above) was that there were several complications involved in the assessment of the costs attributable to the sanction hearing which made the making of an interim payment order inappropriate.
46. Mr. Masters submitted that a detailed review of each item of the bill of costs was required before the Court could make a proper assessment of the appropriate level of an interim payment order that reflected a reasonably accurate assessment of the costs that would ultimately be allowed. Mr. Masters drew attention to some examples of the items in the bill of costs to illustrate his point. In substance, this was a more fully developed submission that the Court should not "shoot from the hip". He submitted that the point of an interim payment order was to encourage agreement of the bill of costs rather than having a two-stage taxation where the interim award might prejudice Mr. Chishti in having to reclaim costs "overpaid". Where the costs were agreed in substance, as in **Ivanishvilli**, he submitted there was less risk of this occurring, but in this case it was not possible to untangle the costs attributable to each aspect of the case at this stage.
47. The Court has already addressed the point about 'untangling' the two aspects of the hearing costs, so it is not necessary to consider this element of Mr. Masters' objection further.
48. The third additional point Mr. Masters urged was that the Court should not make any costs award against Mr. Chishti, but that Mr. Chishti's costs should also be allowed as an expense of the liquidation. This submission was made on the basis that although Mr. Chishti was indeed objecting on his own account, he was also doing so in the

⁸ The court will not generally deal with costs awards on an "issue by issue" basis: see **First Atlantic Commerce Ltd v Bank of Bermuda Limited** [2009] Bda LR 18, 65; **Kentucky Fried Chicken (Bermuda) Ltd v Minister of Economy Trade and Industry (Costs)** [2013] Bda LR 34 (13-4); **Ivanishvilli v Credit Suisse Life (Bermuda) Ltd** [2020] Bda LR 79 at 74. **Wong v Grand View Trust Company Limited** [2022] Bda LR 76.

interests of all unsecured creditors. Mr. Masters said that if Mr. Chishti was right, then the unsecured creditors (and indeed possibly the shareholders) would have benefited from his arguments. He relied upon the general principle that a party who properly acts in the interests of the insolvent estate is entitled to have his costs met out of the assets of the estate⁹.

49. Ms Luca's response to these points was (i) the increased costs associated with Mr. Chishti's opposition had been carefully separated from the other costs already (ii) the 60% assessment was sufficient margin to protect Mr. Chishti from a risk of overpayment and the risk of not being able to recover the costs was addressed by the proposed undertaking by the JPLs to 'ring fence' the payment pending the outcome of Mr. Chishti's outstanding application for leave to appeal to the full Court of Appeal, and (iii) Mr. Chishti's application to adjourn and his opposition to the sanction orders was hostile litigation and did not qualify for treatment as an application for directions as if it were made in the interests of the insolvent estate.

50. In support of this last submission, Ms Luca pointed to Mr. Chishti's own description of the application¹⁰ which was in these terms:

"The Transaction is not a standard financial restructuring. It is happening in the midst of hostile worldwide litigation between (on the one hand) those now in control of the Company and its majority shareholder and (on the other hand) Mr. Chishti, over whether Mr. Chishti should continue to have a stake in the Company and the Group that he founded. It is in that context that the appointment of the JPLs has arisen, and the Transaction has been advanced. The Transaction seeks to denude Mr. Chishti of his rights as both a creditor and a shareholder. It does not appear similarly to affect the rights of any other creditor, all of whom are kept whole or invited to participate in the equity of the restructured company. Nor does it affect the indemnification rights of every officer and director of the Company, who will be given new indemnity rights in the new company....To accomplish this outcome, the JPLs seek wide ranging orders under the Sanction Application."

51. Ms Luca submitted that this showed that Mr. Chishti's application was (i) hostile litigation and (ii) was directed at protecting Mr. Chishti's personal interests, which he claimed were being treated uniquely in a different way from all other creditors. Furthermore, serious (and unjustified) allegations of misconduct were levelled at the management team, and allegations of apparent bias were levelled at the JPLs, all of which supported the conclusion that this was 'hostile' litigation in every sense of the term¹¹.

⁹ See e.g. **Emergent Capital Limited (In Liquidation)** [2012] GIGC J10105-1.

¹⁰ Paragraph 4-5 of Mr. Chishti's skeleton argument in relation to the 6 November 2024 hearing.

¹¹ Although serious allegations of misconduct were made which the Court found to be unjustified, the JPLs and the Secured Lenders did not press the Court to award indemnity costs.

52. Before addressing the merits of these arguments, it is also convenient to deal with the Secured Lenders' claim for costs since they substantially mirror the points made by the JPLs.

The Secured Lenders' claim for the sanction hearing costs

53. The Secured Lenders seek (i) an order for their costs of the sanction hearing and (ii) an interim payment order, essentially on the same basis as has been set out above in relation to the JPLs' applications.
54. Mr. Riihiluoma submitted on behalf of the Secured Lenders that Mr. Chishti's application to adjourn the JPLs' sanction hearing and to oppose the sanction hearing was as clear an example of hostile litigation as it is possible to find, for the reasons explained by Ms Luca. In the context of this restructuring, which involved vast sums of money, Mr. Riihiluoma submitted that the Secured Lenders had an immediate and vital interest in the outcome of the applications such that it was necessary for the Secured Lenders to participate and file evidence in respect of various assertions that Mr. Chishti had made in opposition to the sanction applications.
55. The Secured Lenders were accused of participating in a scheme to deprive Mr. Chishti of his rights and serious accusations were made against not only the JPLs and the Company management, and were said to be behind the wrongful scheme being advanced by the Company. This was what the Secured Lenders referred to as the 'conspiracy theory' and was dealt with in the Court's Ruling.
56. Accordingly, it was submitted that the Secured Lenders had every justification in appearing by separate counsel at the sanction hearing and to oppose the adjournment, and being successful, they were entitled to recover their costs of so doing.
57. The Secured Lenders seek an interim payment order for 70% of their estimated taxed costs (as opposed to the 60% sought by the JPLs) and they say there is no need to 'ring fence' any funds as they are sufficiently solvent to be able to meet any requirement to repay costs that have been overpaid, or refund the costs in the event that a higher court overturns this Court's decision.

The 'additional costs' applications by the Company, the JPLs and the Secured Lenders

58. The Court has evaluated the submissions made in relation to the additional costs of the sanction hearing incurred as a result of the adjournment application and has come to the following conclusions:
- i. The adjournment application and the opposition to the sanctions sought by the JPLs were in the nature of 'hostile' commercial litigation and do

not fall within the category of cases where the costs of the application fall to be borne by the insolvent estate¹².

- ii. The additional costs incurred by the Company and the JPLs in opposing the adjournment application and the presentation of the application for sanction are to be borne by Mr. Chishti on the standard scale of taxation, to be taxed if not agreed.
- iii. As to the Secured Lenders' standard costs of the adjournment application and the sanction hearing, the Court considers that these costs were properly incurred in connection with the determination of the issues raised by Mr. Chishti and the Secured Lenders are entitled to recover them from Mr. Chishti.
- iv. Taking a 'bird's eye view' the Court considers that the costs claimed by each of the Company, the JPLs and the Secured Lenders are not out of proportion to the scale of the litigation. It was high stakes, high value, high pressure, hostile international litigation undertaken in a compressed time scale, with teams working around the clock for a four-week period.
- v. The Company and the JPLs' costs have been adjusted to exclude costs that would have been incurred in any event. The claim for additional costs will be assessed by the Registrar as part of the taxation process and it would be inappropriate for the Court to make any assessment of what falls within that description at this stage.
- vi. The Secured Lenders are not in the same position as the Company or the JPLs in respect of deducting a portion of their costs as costs incurred in the administration of the insolvent estate, and so no adjustment is necessary (subject always to the taxation of those costs in the ordinary way). However, the Court notes that the Secured Lenders have indicated that care has been taken to reflect the more limited role the Secured Lenders would have taken if Mr. Chishti had not sought the adjournment or opposed the sanction applications.

¹² See **Re Lehman Brothers International (Europe) (in administration)** [2018] EWHC 924 (Ch) and **Pearson & Ors v Lehman Brothers Finance SA & Ors** [2010] EWHC 3044 (Ch) which explain that costs follow the event is the starting point for the analysis, and a departure from that basic rule is only justified where special circumstances justify it. In a case where the proceedings have been initiated by the trustee or administrator of an insolvent estate and the other parties' involvement has been part of a 'necessary judicial inquiry', the court can depart from the general rule.

The interim payment orders in relation to the additional costs of the JPLs and the Company and the Secured Lenders' standard costs of the adjournment and sanction hearing

59. The Court considers that it is appropriate and just for Mr. Chishti to pay a significant proportion of the costs incurred in relation to the adjournment application and his opposition to the sanction hearing on an interim basis. There is no justification for allowing a delay in paying these costs on the basis that Mr. Chishti may obtain leave to appeal from the full Court of Appeal. That application will not be heard before November 2025, namely a year after the costs were actually incurred. In the Court's view, the Court should as far as possible give effect to the general principle that a party should be entitled to the fruits of the litigation as soon as reasonably practicable after the entry of the Court's decision. There is no evidence that an order for an interim payment of the costs will have the effect of stifling Mr. Chishti's application for leave to appeal to the full Court of Appeal¹³.
60. The interim payment of costs can be repaid in the event that the Court of Appeal reverses the decision of this Court in relation to the sanction hearing. The JPLs have offered their undertaking to 'ring fence' the funds until after the determination of the appeal, which protects Mr. Chishti from the risk of being unable to recover the funds in the event his appeals are successful.
61. The Court considers that the appropriate discount rate for the interim payment of those costs is 60%. This will give a reasonable margin in the event that the costs are ultimately taxed down or refused by the Registrar. The Court therefore will adjust the interim payment order for the Secured Lenders costs down from 70% to 60%.
62. The Court therefore orders Mr. Chishti to make an interim payment of the costs of the Company and the JPLs in respect of the additional costs incurred in relation to the adjournment application and his opposition to the sanctions in the amount of **US\$544,472.85**. This payment is to be made to the JPLs upon their undertaking not to mix the funds with the other assets of the Company and to hold those funds in a separate interest-bearing account pending the outcome of Mr. Chishti's application for leave to appeal to the full Court of Appeal in November 2025. In the event that Mr. Chishti's application is not made in the November 2025 session, or is withdrawn in the meantime, the JPLs are given liberty to apply to the Court for further directions in relation to the release of the interim costs paid by Mr. Chishti.
63. The Court also orders Mr. Chishti to make an interim payment of the costs of the Secured Lenders in the amount of **US\$271,829.65** namely 60% of the total costs

¹³ See paragraph 73 below in relation to the equivocal position taken by Mr. Chishti's counsel that it "*might*" have a stifling effect.

incurred and claimed in respect of the costs of the adjournment application and sanctions hearing.

64. In order to protect Mr. Chishti from the risk of having to recover those costs from the Secured Lenders by taking action outside this jurisdiction in the event the Court of Appeal reverses this Court's decision and awards costs to Mr. Chishti or there is an overpayment of taxed costs, the Court will require an undertaking from VCP Capital Markets LLC as Term Loan Agent for the Secured Lenders to repay any sums paid by Mr. Chishti on account of the costs awarded within 28 days of being ordered to do so by this Court or the Court of Appeal.

The costs of the leave to appeal applications to the Supreme Court and the single Justice of the Court of Appeal

65. The Court has already dealt with the various arguments addressed by the parties in respect of the other aspects of the several applications, and it is not necessary to repeat them. It follows from what has been said that the Court will take the same approach to the applications made in respect of the leave to appeal costs, with one exception.
66. Mr. Masters submitted that it would be inequitable for Mr. Chishti to have to pay the costs of the expert on foreign law on an interim basis when the parties did not refer to that evidence and there is a dispute as to whether that evidence was necessary. The Court agrees. It will be a matter for the Registrar to determine whether the cost of that evidence was necessary for the fair disposal of the issues on the leave to appeal application, and to decide if it is appropriate to include it or refuse it as an allowable expense. If it is allowed, then it can be recovered. In my view it would not be just to require Mr. Chishti to pay for this element of the costs until its recoverability has been determined by the Registrar.
67. It is relatively easy to deduct the sum of US\$106,377.45¹⁴ representing the disbursement cost of the expert report on US law from the JPLs' claim for the leave to appeal expenses. However, it is less easy to parse out the individual time charges of the legal team spent reviewing and addressing the issues of US law. It seems to the Court that it is only reasonable to make a further percentage deduction of the time and cost charges to reflect that element of the claim of a further 10%.
68. Therefore, the Court orders Mr. Chishti to make an interim payment in respect of the of the JPLs' claim for the leave to appeal costs in the amount of **US\$205,447.89** being 60% of US\$342,413.15. The figure of US\$342,413.15 is broken down as US\$216,762.50 (Walkers) discounted by 10% to US\$195,086.25 and US\$163,696.50 (counsel) discounted by 10% to US\$147,326.90. A factor of 60% has then been applied to that combined total figure.

¹⁴ HB 432.

69. The Court also orders Mr. Chishti to make an interim payment of the Secured Lenders' costs of the leave to appeal application in the amount of **US\$95,061.42** namely, 60% of the Secured Lenders' total claim of US\$158,435.70.
70. The same conditions are to apply to the payments of these costs, namely that they are to be subject to the undertakings requiring (i) the JPLs to retain the funds in a separate interest-bearing account pending the November 2025 appeal hearings, and (ii) the Secured Lenders to repay Mr. Chishti the interim costs paid within 28 days of being ordered to do so by this Court or the Court of Appeal.

Mr. Chishti's application for a stay of the application for interim costs pending appeal

71. Mr. Chishti's counsel indicated that an application had been made to the Court for a stay of these applications pending the determination of Mr. Chishti's appeal in respect of Action 2024 no 112 and the application for leave to appeal to the full Court of Appeal in Action 2024 No 265. No papers were before the Court and the Court proceeded to hear Ms Zuill's submissions *de bene esse*.
72. The Court's first concern is that no evidence is before the Court in respect of the grounds on which Mr. Chishti advances his application. This means that there is no evidential material upon which the exercise of the Court's discretion could bite. However, Ms Zuill's submissions were to the effect that there was likely to be a relatively short delay between now and the hearing of Mr. Chishti's appeal and his application for leave to appeal to the full Court of Appeal, which she indicated are expected to proceed in November 2025. The Court has already indicated that this is not (of itself) persuasive.
73. There is no evidence that an interim payment of the costs incurred already would stifle Mr. Chishti's ability to pursue his appeal(s). Ms Zuill's submissions say that "*if excessive costs are awarded, this will likely have a stifling effect on Mr. Chishti's Appeal*"¹⁵. This is clearly an equivocal position to take and is entirely unsupported by an evidential foundation.
74. Mr. Chishti has given no disclosure of the extent of his assets or their location, i.e. that there are assets within the jurisdiction which could be made available to meet the payment of the award of costs. This leaves the Court in an uneasy position.

Mr. Chishti's Cross claims

75. In Mr. Masters' and Ms Zuill's written arguments, it is asserted that Mr. Chishti has several cross claims against the Company which should be taken into account, and which would offset any liability Mr. Chishti has to the Company and the JPLs in costs.

¹⁵ Paragraph 79 of Ms Zuill's skeleton.

76. These claims are:

- (i) a cross claim in respect of awards that he is expecting in proceedings in this jurisdiction (Action 2023 No 162). It is not said who the parties to these proceedings are. Mr. Chishti relies upon the Indemnity Agreement¹⁶;
- (ii) a cross claim pending in the US in the District of Columbia. It is said that these proceedings were commenced against Mr. Chishti by the Company and that he is entitled to claim under the Indemnity Agreement for the costs of those proceedings¹⁷.
- (iii) a cross claim for the costs of the adjournment application (and his opposition to the sanctions) which were directed at preserving his rights under the Indemnity Agreement and he therefore claims that he can recover those costs under the Indemnity Agreement¹⁸.

77. A right of automatic set-off arises in insolvent liquidation when there are mutual debts and credits or other mutual dealings between the creditor and the insolvent company at the date of the winding up Order¹⁹, such that the creditor is entitled to set off the full amount of his claim against any debt he or she owes the company at that date. If the quantification of the claim can only be made after the date of the winding up Order in relation to a liability which was incurred before the winding up Order, then the liquidator will require the creditor to value the amount of the claim²⁰. That claim can be admitted by way of proof of debt in the liquidation, and the creditor can assert a right of set off against the whole of the company's claim against that creditor.

78. Mr. Chishti will need to establish each of his cross claims by submitting a proof of debt explaining how each claim falls within the Indemnity Agreement. If his entitlement is disputed, or his proofs of debt are rejected by the JPLs, Mr. Chishti will have a right of appeal to the court. Alternatively, he may have to seek leave to commence proceedings to determine his entitlement if that issue cannot be resolved within the framework of the Winding Up Rules 1982.

79. However, as matters stand at present, Mr. Chishti's various cross claims are contingent, unliquidated and unsecured claims in respect of which no estimation of value has yet been attributed by the JPLs. It is right to note that Mr. Masters' skeleton

¹⁶ See paragraphs 67-8 of Mr. Master's skeleton and 67-8 of Ms. Zuill's skeleton. The Court assumes that Action 2023 No 162 involves other parties, because Mr. Chishti would not be able to progress a claim against the Company without the leave of the court.

¹⁷ See paragraphs 63-66 of Mr. Masters' skeleton and 63-8 of Ms. Zuill's skeleton.

¹⁸ See Paragraphs 69 of Mr. Master's skeleton and 69-71 of Ms. Zuill's skeleton.

¹⁹ 16 December 2024: HB 36.

²⁰ Section 37 of the Bankruptcy Act 1989 incorporated by reference by section 235 of the Companies Act 1981, the history and effect of which is explained in the speech of Lord Hoffman in **Stein v Blake** [1986] AC 243.

puts forward a cumulative figure of US\$2 million²¹, but there is no support for that figure in the evidence, and (as yet) there has been no assessment or estimation of the present value of those contingent claims in the liquidation.

80. The Court does not therefore consider that the existence of these potential cross claims affords a sufficient reason to stay the interim payment Orders in favour of the Company and the JPLs.
81. However, in the event that Mr. Chishti submits proofs of debt which are accepted by the JPLs as evidencing claims which would be admissible to proof in the liquidation, then the 'ring fence' applied to the sums paid by Mr. Chishti to the JPLs will enable Mr. Chishti to preserve his right of insolvency set off. It behooves Mr. Chishti to establish the admissibility of these cross claims before November 2025.
82. The existence of these potential cross claims obviously affords no basis for a stay of the interim payment Orders in favour of the Secured Lenders.
83. As described above, the JPLs have offered undertakings to keep any funds paid by Mr. Chishti in respect of the interim costs order in a separate interest-bearing account pending the outcome of Mr. Chishti's appeal in Action 2024 No 112 and his application for leave to appeal to the full Court of Appeal in November 2025 in Action 2024 No. 265, which the Court has accepted.
84. The Secured Lenders are more than sufficiently solvent to be able to meet any order the Court may make to repay any sums overpaid, or in the event the Court of Appeal reverses the Court's decision and awards the costs of the appeal and the proceedings below to Mr. Chishti. The Court considers that an undertaking from the Secured Lenders' Loan Agent to repay any interim costs paid by Mr. Chishti within 28 days of being ordered to do so by this Court or the Court of Appeal is sufficient to protect Mr. Chishti from the risk of having to pursue recovery against the Secured Lenders overseas.
85. The Court considers that these protections are sufficient to guard against any potential prejudice to Mr. Chishti in the event his appeals are successful. However, Mr. Chishti must pay the interim costs orders in the meantime. Mr. Chishti's application for a stay is therefore refused.

Further directions

86. In the event Mr. Chishti fails to pay the interim costs ordered within 28 days of the date hereof, for the avoidance of any doubt, the JPLs and the Secured Lenders are at liberty to take such other enforcement actions as they may deem appropriate, in

²¹ See paragraph 62 of Mr. Master's skeleton; in addition, he asserts that Mr. Chishti will 'comfortably' be able to claim advancement of expenses for the DC proceedings of US\$1 million (paragraph 68).

Bermuda or elsewhere, to recover those sums, and/or take such other action in relation to the pending appeals as may be necessary or appropriate.

87. In the event that Mr. Chishti fails to pay the amounts ordered in this Ruling, the JPLs and the Secured Lenders are to be automatically released from their respective undertakings to the Court.
88. The amounts so ordered will carry interest at the statutory rate with effect from 28 days from the date of this Order until payment in full in accordance with section 11 of the Interest and Credit Charges (Regulation) Act 1975.
89. The costs of the JPLs' and the Secured Lenders' applications for the interim costs orders are to be paid by Mr. Chishti on the standard basis, to be taxed if not agreed.
90. The JPLs are directed to perfect an Order to reflect the terms ordered above for the Court's signature and seal.

Dated this 10 June 2025



THE HON. MR. ANDREW MARTIN

PUISNE JUDGE