IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 192 of 2021 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)
AND IN THE MATTER OF ICG I

ON THE PAPERS

Representation:	Mr. Spencer Vickers of Conyers Dill & Pearman LLP for Sean Wilson Baguley, the Petitioner
	Mr. Liam Faulkner of Campbells LLP for Lai Kar Yan (Derek) and Michael Green in their stated capacities as Receivers and Cheng Chi Kin in his stated capacity as the sole director of ICG I
Before:	**The Hon. Justice David Doyle**
Decision:	**On the papers**
Draft Judgment Circulated:	**9 August 2021**
Judgment Delivered:	**10 August 2021**

HEADNOTE

Costs in respect of an unsuccessful application to appoint joint provisional liquidators when there was no necessity to do so

JUDGMENT

Introduction

1. On 26 July 2021, I dismissed the Petitioner's application for the appointment of joint provisional liquidators of ICG I ("ICG i") and provided my brief reasons for doing so on 4 August 2021. I now determine the position as regards the costs of the failed application.

Submissions on Costs

2. I have considered the written submissions on costs and I thank the attorneys for their assistance to the court in this respect.

3. Spencer Vickers, on behalf of the Petitioner, submits that:

   (1) Costs should not follow the event in the present circumstances;
   (2) The Court should not make an adverse order for costs absent unreasonable conduct; and
   (3) There should be no order as to costs as the Court indicated it was minded to make, subject to submissions, on 26 July 2021.

4. Liam Faulkner on behalf of those stated to be the Receivers and also on behalf of the individual stated to be the sole director of ICG i (the "Respondents") submitted that the proceedings were *inter partes* proceedings and the unsuccessful Petitioner should pay his clients' costs.

Determination

5. The Court has a wide discretion in respect of costs but that discretion is exercised in accordance with well-established principles. Normally an unsuccessful party must expect to be ordered to pay the costs.

6. I have considered the relevant law, rules and authorities including *Abraaj Holdings* (Grand Court FSD unreported judgment 4 January 2019; McMillan J) and *Oakrun Precious Metals Fund Ltd* (Grand Court FSD unreported judgment 30 April 2019; Kawaley J) helpfully brought to the attention of the Court by the attorneys.

7. In my judgment, the application for the appointment of provisional liquidators does not attract any special costs rules but, of course, I consider it in the context in which it was presented noting that the hearing was not a hearing in respect of the substantive determination of a contributory's winding-up petition.

8. I am not persuaded that there are any special circumstances or distinctive characteristics of the overall winding-up context that would justify a departure, in the particular circumstances of this case, from the general rule that costs should follow the event, i.e. the successful party is normally entitled to an order for costs against the unsuccessful party.

9. Having considered the written submissions on reflection, I am not persuaded that no order for costs would be the correct order to make. The Petitioner was unsuccessful in his application and he must pay the consequences of his failed application. One of those consequences is an order that he pays the costs of the Respondents.

10. The costs in this case should be taxed on the standard basis in default of agreement.

11. In my judgment the Petitioner must pay the Respondents' costs of and incidental to his failed attempt to have joint provisional liquidators appointed when the evidence did not justify such appointment. On the evidence, the necessity hurdle had plainly not been jumped.

12. A potential liability in costs should in future focus the minds of those thinking of taking the serious step of applying for the appointment of provisional liquidators before a winding up petition has been determined. Such a serious step should not be taken unless there are strong grounds justifying the taking of such a step and advisers should also keep these words in their minds when advising clients as to the position.

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13. I take fully on board Kawaley J's wise guidance in *Oakrun Precious Metals Fund, Ltd* and accept that the court's discretion on costs "may be shaped by any distinctive characteristics of the winding-up context." (paragraph 45 of his judgment).

14. The circumstances of the case before me were many miles away from the circumstances which confronted McMillan J in *Abraaj Holdings* which involved a spat between creditors and others as to whether the hearing of a winding-up petition should be adjourned. I can understand the need not to limit or discourage the expression of entirely legitimate differences of opinion between the interested parties in that case in the context of an application to adjourn a winding up petition. I do however see the need in the case presently before me to discourage applications for the appointment of provisional liquidators which are not based on strong grounds and which are still persisted with in the face of reasonable opposition. Adverse costs orders are one way to deliver such discouragement.

15. I invite the attorneys to file a draft order reflecting my determination on costs for my approval.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT