



**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**FINANCIAL SERVICES DIVISION**

**CAUSE NO: FSD 201 OF 2021 (RPJ)**

**IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)**

**IN THE MATTER OF PADMA FUND L.P.**

**IN CHAMBERS**

**Written Submissions on Costs by: Mr. Peter Sherwood and Tim Baidam of Carey Olsen on behalf of the Petitioners**

**Mr Liam Faulkner of Campbells LLP on behalf of Padma Fund LP (acting by its General Partner)**

**Before: The Hon. Justice Parker**

**Written submissions filed: 20 October 2021**

**Draft Judgment Circulated: 26 October 2021**

**Judgment Delivered: 28 October 2021**

#### **HEADNOTE**

*Costs in respect of successful application based upon jurisdiction to dismiss a winding up petition-usual rule ,costs follow the event, Order 62 r4-indemnity costs, Order 62 r11-no grounds made out that Petitioner pursued 'manifestly hopeless' application.*

#### **COSTS JUDGMENT ON WRITTEN SUBMISSIONS**

##### **Introduction**

1. Parallax Capital Management (the “General Partner”) acting on behalf of Padma Fund LP (the “Partnership”) and CCP Henderson Capital Limited seek an order that the Petitioners, San Miguel Holdings Corp ("SMHC") and Atlantic Aurum Investments B.V. ("AAIBV"), pay the costs on a joint and several basis , of and incidental to the Petition. They ask for these costs to



be paid on the indemnity basis as a result of the Petition having been dismissed summarily for lack of jurisdiction.

2. The General Partner filed written submissions on behalf of itself and CCP Henderson Capital Limited ('the successful parties') in support of their application. They opposed the making of a winding up order at a hearing on 14 September 2021 and were successful on one of the grounds which they advanced as to jurisdiction. As a result it was not necessary to consider the other grounds and the Petition was dismissed.
3. The Petitioners exchanged written submissions with the General Partner simultaneously and argue that in the specific circumstances of this case the court should make no order as to costs.

### **The law**

4. Section 24(1) of the Judicature Act (2021 Revision) provides that, subject to the provisions of the Act or any other Law and rules of court, the costs of and incidental to all civil proceedings in the Grand Court shall be in the discretion of the Court. Sub-section 24(3) provides that the court shall have full power to determine by whom and to what extent the costs are to be paid.
5. Whilst the Court's power is discretionary, the discretion must be exercised in accordance with well established principles: *In the matter of ICG I*<sup>1</sup>.
6. The general costs rules under GCR Order 62 continue to apply in this case by virtue of GCR Order 1, rule 2(4). The dismissed Petition does not fall within one of the special cost rules under CWR O.24, r.8, which are only engaged in respect of a successful petition.
7. As Kawaley J held in *Re Oakrun Precious Metals Funds Ltd*<sup>2</sup> at §45:

*“The effect of these parallel provisions is that GCR Order 62 applies to winding up proceedings save to the extent that special costs rules under the CWR are engaged. Even where Order 62 does apply, the way in which the Court's discretion is exercised may be shaped by any distinctive characteristics of the winding-up context.”*

8. Accordingly the general principles of GCR O.62, r.4 as to entitlement to costs should apply.

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<sup>1</sup> Per Doyle J unreported 10 August 2021

<sup>2</sup> Unreported 3 May 2021



9. GCR O.62, r.4(2) provides that:

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

10. GCR O.62, r.4(5) provides that:

*“If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or part of the costs.”*

### **Indemnity costs**

11. Pursuant to GCR O.62, r.4 (11), the Court may make an *inter partes* order for costs to be taxed on the indemnity basis if it is satisfied that the paying party has conducted the proceedings improperly, unreasonably or negligently.

### **Decision**

12. Notwithstanding the Petitioners’ written submissions which argue that there should be no order as to costs, in my view there are no circumstances to justify a departure from the general rule that the loser pays the costs of the successful party, which in this case is the costs of both the General Partner and CCP Henderson Capital Limited.
13. The Petition was dismissed as the court did not have jurisdiction to grant the relief sought. The only question for resolution is whether costs should be awarded on the standard or the indemnity basis.
14. Notwithstanding the written submissions of the successful parties, I do not accept that this is a case for indemnity costs as a result of the Petitioners having conducted the proceedings improperly, unreasonably and/or negligently. There was no such conduct to a high degree in my view, as is required.<sup>3</sup>

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<sup>3</sup> *Zhongzhi v Geopay, unreported, 12 March 2021*

15. In particular, I do not accept that the skeleton argument which was served on the Petitioners on 9 September 2021 should have been the trigger for the Petitioners to have concluded that the Petition was defective and was inevitably going to be dismissed.
16. It cannot be fairly said in my view, even with the benefit of hindsight, that the Petitioners should have realised that their claim was manifestly hopeless<sup>4</sup>. In the result the court concluded that it had no jurisdiction over a creditor's winding up petition against an exempted limited partnership. The creditor had an available statutory alternative remedy to commence proceedings against the general partner, which accorded with the commercial and legal position.
17. However, in coming to this decision the Court was persuaded that it was necessary to depart from the reasoned decision of Kawaley J in *Xio Diamond*.<sup>5</sup> It was clear that in that case the court had not been referred to the relevant statutory provisions.<sup>6</sup>
18. The Petitioners should pay the costs of the successful parties on the standard basis, to be taxed if not agreed.



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**THE HON. JUSTICE PARKER**  
**JUDGE OF THE GRAND COURT**

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<sup>4</sup> *Bennett v AG [2010] (1) CILR 113 §§35-41*

<sup>5</sup> *Unreported, 30 April 2020*

<sup>6</sup> *In the matter of Padma Fund LP, unreported, 8 October 2021 §§79, 80 and 85*