Neutral Citation Number: [2026] CICA (CIV) 13

IN THE CAYMAN ISLANDS COURT OF APPEAL
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CICA CIVIL APPEAL No. 0007 and 0021 of 2024
(formerly FSD 0113 of 2023 (JAJ))

BETWEEN

(1) MARK ALFANO
(2) SAMUEL I LTD
(3) REX ALEXANDER
(4) MISTY HAMMER
(5) JEFF KATOFSKY
(6) RANDALL BARTON
(7) RAISHA PARK
(8) CECIL KYTE
(9) ALEXANDER MENZEL

Appellants/
Second to Tenth Defendants

and

THE ARMAND HAMMER FOUNDATION, INC.

First Respondent/Plaintiff

HAMMER INTERNATIONAL FOUNDATION

Second Respondent/First Defendant

and

THE ATTORNEY GENERAL

Third Respondent/Eleventh Defendant

Before:	**The Hon John Martin KC, Justice of Appeal** **The Hon Sir Richard Field, Justice of Appeal** **The Rt Hon Sir Jack Beatson, Justice of Appeal**
Appearances:	**Tom Lowe KC and John Harris for the Appellants / Second to Tenth Defendants** **Graeme McPherson KC and Matthew Dors for the First Respondent/Plaintiff**
Heard:	**3 and 4 November 2025**
Draft circulated:	**11 June 2026**
Judgment Released:	**18 June 2026**

JUDGMENT

Martin JA:

1. These are appeals against orders dated 13 May 2024 and 16 August 2024 of Asif J. By the first of those orders, the judge debarred the appellants (the second to tenth defendants to the proceedings) from defending the proceedings or prosecuting their counterclaim; and by the second order, made following a trial at which the appellants were not permitted to participate because of the debarring order, the judge granted the relief sought by the plaintiff.

2. The appeals arise out of a dispute about the control of Hammer International Foundation, Inc ("HIF"), a not-for-profit charitable association incorporated in the Cayman Islands under what is now section 80 of the Companies Act. HIF is the first defendant to the proceedings, and the second respondent to the appeals. The contest was between The Armand Hammer Foundation, Inc, a Florida corporation ("AHF Florida") as plaintiff (and first respondent to the appeals) on the one hand and on the other hand the persons who are now the appellants. The eleventh defendant is the Attorney General, joined to protect the interests of charity.

3. At the outset of the hearing, we made plain that we would consider the appeal against the debarring order first, with argument on the second appeal (against the trial order) to follow only if the first appeal succeeded. That was on the basis that if we upheld the debarring order the only ground of the second appeal, namely that the appellants were wrongly prevented from participating in the trial and had thereby suffered irremediable injustice, fell away.

4. At the conclusion of oral argument on the first appeal, we stated that we would give the appellants leave to appeal but would dismiss the appeal for reasons to be provided later. The second appeal accordingly did not require to be heard.

5. These are my reasons for dismissing the first appeal.

Background

6. As I have said, the basic issue in the proceedings concerned the control of HIF – in other words, which of two competing interests was properly authorised to give instructions on behalf of HIF. Ancillary issues included the identity of the member or members of HIF and the identity of its directors.

7. HIF was incorporated in 1995 on the instruction of Mr Michael Hammer. HIF's founding member was a non-profit public benefit corporation incorporated in California on 30 November 2020 also (like the plaintiff) called The Armand Hammer Foundation, Inc ("AHF California"). AHF Florida's position was that as the result of a 2021 merger between it and AHF California it had become and remained the only member of HIF. The appellants' position was that since 19 October 2022 the only members of HIF had been the second and fourth to sixth defendants Misty Hammer (Michael Hammer's second wife and widow), Rex Alexander, Mark Alfano and/or Jeff Katofsky.

8. At the time of Michael Hammer's death on 20 November 2022, he and the third defendant Samuel 1 Ltd were the directors of HIF. The position of AHF Florida was that from 29 March 2023 Viktor Hammer (Michael Hammer's son by his first wife) and Jim Fraser (and until his death on 16 October 2023 Peter Sansone) were the directors of HIF. The position of the appellants was that from Michael Hammer's death Samuel 1 Ltd was the sole director of HIF, alternatively that at various dates the second, fourth to sixth and eighth to tenth defendants Misty Hammer, Rex Alexander, Mark Alfano, Jeff Katofsky, Raisha Park, Cecil Kyte and Alexander Menzel had become and remained the directors of HIF.

9. As I have indicated, the judge ultimately found in favour of AHF Florida on these issues.

Procedural history leading to the order of 13 May 2024

10. An understanding of the procedural background is essential to resolution of the appeals.

11. The trial of the action was initially listed to start on Monday 8 April 2024 and estimated to last seven days. On the preceding Thursday (4 April 2024) the attorneys then representing the appellants applied by summons to come off the record and for the trial to be adjourned. On Friday 5 April 2024 the judge granted the adjournment sought by the appellants, relisted the trial for 3 June 2024, and ordered the appellants to pay the costs thrown away by the adjournment on the indemnity basis.

12. By a further order dated 19 April 2024 the judge ordered the appellants to pay the costs of the adjournment summons on the standard basis, and ordered the appellants to make payments totalling US$213,000 on account of those costs and the indemnity costs previously ordered. Payment was to be made by 4pm on 26 April 2024.

13. AHF Florida's skeleton argument for the 19 April hearing, dated 17 April, had said the following.

> "And so that D2-D10 are in no doubt, if the Payment on Account is not then made by D2-D10 timeously, AHF FL intends
> a) To issue a Summons seeking a Debarring Order i.e. an Order that, unless the Payment on Account is made by a particular date, (1) D2-D10 are debarred from defending the Originating Summons, and (2) D2-D6 are debarred from prosecuting the Re-Amended Counterclaim
> b) To have that Summons determined expeditiously (and certainly sufficiently far in advance of the June trial date that, if any Debarring Order that is then made is not complied with by D2-D10 (1) the Court and AHF FL will know well in advance that the June trial will be unopposed, (2) the Court can be told well in advance that the trial will be far shorter than currently estimated, and (3) AHF FL can save costs".

14. One of the judge's reasons for allowing only seven days for payment of the US$213,000 was stated by him, in a judgment dated 24 April 2024 giving reasons for his order, as follows (at paragraph 39(d)):

> "Mr McPherson is also right that, on the facts of this particular case, it is necessary that the Plaintiff has the opportunity to seek a debarring order if the Defendants default in payment, and that sufficient time for that step and the potential follow-up needs to be factored into the assessment of a reasonable time for payment".

15. The appellants did not make the required payment by 26 April 2024. On 29 April 2024 AHF Florida issued and served a summons for an unless order barring the appellants from further participation in the proceedings if they did not make payment. The payment on account of costs was made by the appellants on 1 May 2024, and AHF Florida did not pursue its summons.

16. On 6 May 2024 HIF filed a voluntary Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Central District of California. The petition was signed by Misty Hammer as the president and "authorized representative" of HIF. It estimated the value of HIF's assets as US$91,042,694.00 and the value of its liabilities at the much lower figure of US$995,926.37. It listed AHF Florida as an unsecured contingent creditor with a disputed

claim subject to pending litigation, but did not otherwise refer to the Cayman proceedings or identify the issues in them.

17. Included in the petition was a copy of a minute of a purported EGM of the board of directors of HIF held on 18 March 2024. Those recorded as attending were Rex Alexander, Misty Hammer, Mark Alfano, Raisha Park, Jeff Katofsky, Cecil Kyte and Alexander Menzel. The only item of business discussed was the option of filing for Chapter 11 bankruptcy, which those attending unanimously resolved to do after Jeff Katofsky had updated them "on the outstanding legal issues in California, Florida and the Cayman Islands".

18. Notice of the petition was given to AHF Florida on 6 May 2024 and a copy supplied on the same day. On 7 May 2024 Katofsky Law, Jeff Katofsky's law firm, wrote to AHF Florida's US attorneys in the following terms:

> "Hammer International Foundation, Inc., has filed for protection under Chapter 11, Sub-chapter 5 of the Bankruptcy Code. Any resolution of matters between our respective clients is likely subject to approval by the Bankruptcy Court.
> My client wants to express its intentions if matters are not quickly resolved between our respective clients. HIF intends, through the Bankruptcy Court, to orderly sell everything, piece by piece, until it is all gone, then give all the money away to eligible and deserving charities.
> The final chance for resolution is now. The following must occur:
> 1. A stipulation to adjourn the Caymans matters for 120 days;
> 2. A mediation in my office (with or without a mediator) in May of 2024. In-person attendance shall be Viktor Hammer, two lawyers of his choosing, Misty Hammer, Mark Alfano, Gary Salomons and myself;
> 3. If an agreement is reached at mediation, a binding agreement shall be signed prior to the end of the mediation for review and approval by the Bankruptcy Court, if required;
> 4. A written notice of acceptance of the above by noon Friday, May 10, 2024. There will be no turning back after this deadline.
> If you think HIF is bluffing, call. HIF is all in."

19. Also on 7 May, AHF Florida's Cayman attorneys wrote to Nelsons, the appellants' new Cayman attorneys, among other things seeking "confirmation that your clients do not intend

to rely on the Petition to disrupt or delay the trial listed for 3-7, 12 and 13 June 2024, and that the trial should proceed as listed".

20. Nelsons responded on 9 May 2024, giving notice of the automatic stay under the US Bankruptcy Code and saying among other things: "We are presently taking instructions as regards the correct course of action with regard to the trial. We are however advised that if your clients participate in the trial without the prior sanction of the Bankruptcy Court they would risk liability for contempt for, at a minimum, violating the stay".

21. On 10 May 2024 AHF Florida issued a summons seeking an injunction restraining the appellants from acting or purporting to act on behalf of HIF in any jurisdiction.

The 13 May 2024 order

22. The application was heard on Monday, 13 May 2024 and resulted in the first order under appeal. The order contained the following relevant elements.

(1) An injunction restraining the appellants until further order and subject to defined exceptions from acting or purporting to act in any way whatsoever on behalf of HIF whether in the jurisdiction of the Cayman Islands or any other jurisdiction anywhere in the world ("the injunction order");
(2) Orders that the costs of the summons be paid by the appellants on the indemnity basis; that GCR O62 r18(4) and (6) (relating to fees of foreign lawyers) be disapplied on taxation; and that the appellants make a payment of $45,000 on account of the costs by 4pm on 21 May 2024 ("the costs orders"); and
(3) An order that if the appellants did not comply with the order for payment on account they would without further order be debarred from defending the claim and prosecuting their counterclaim ("the debarring order").

Subsequent events

23. On 14 May 2024 the appellants filed an emergency motion in the US bankruptcy proceedings claiming confirmation that the automatic stay applied to the Cayman proceedings.

24. The payment on account of costs was not made by 21 May 2024 and the debarring order thereupon took effect.

25. On 24 May 2024 a "tentative ruling" was made in the US bankruptcy proceedings that the Cayman proceedings over the appropriate directors and members of HIF were not stayed and might proceed without order of the bankruptcy court.

26. The trial commenced on 3 June 2024 and resulted in the order of 16 August 2024. That order recited the debarring of the appellants and attendance at the trial of counsel for them "but not being permitted to advance any positive case nor to call any witnesses or make submissions on the merits of the claim or of the … counterclaim on their behalf as a result of the order dated 13 May 2024"; and it made orders and declarations finding in favour of AHF Florida.

Notice and grounds of appeal

27. The notice of appeal relating to the order of 13 May 2024 appealed all aspects of that order. The grounds of appeal initially related also to all aspects; but by amendment dated 27 August 2025 the challenge to the injunction order was withdrawn, leaving the appeal nominally effective only as to the debarring order and the costs orders. In the event, the appellants' skeleton made plain that they were also abandoning the appeal against the costs orders, leaving as the only live issue in the first appeal the correctness of the judge's decision to make the debarring order.

28. The amendment to the grounds of appeal gave rise to a preliminary point as to whether leave to appeal was necessary. So long as the appeal related to the injunction order the appeal lay as of right by virtue of section 6(f)(ii) of the Court of Appeal Act, which exempts appeals against orders granting or refusing injunctions from the general requirement of leave for appeals against interlocutory judgments. Once the appeal against the injunction order was abandoned, however, the appeal became one against an interlocutory judgment to which the requirement of leave on the face of it applied. AHF Florida raised the point, but Mr McPherson KC sensibly accepted that it was not the most important part of the appeal. We saw no need to decide the point and proceeded to hear the substance of the matter on the basis that the outcome of the appeal was likely in practice to determine the point: failure of the appeal would render the question of leave redundant, and success would mean that leave should obviously be granted. In the end, as I have mentioned, we gave leave to appeal in case it was necessary but dismissed the appeal.

29. We raised a second preliminary point at the outset of the hearing, which was that since the $45,000 payment on account ordered by the costs orders had still not been paid the appellants were in contempt of court and we should not hear the appeal while that remained the position. There was some discussion of this issue, in the course of which Mr Lowe KC contended that there was an established rule that a litigant might appeal the very order of which he was in contempt without first complying with it, and Mr McPherson KC pointed out that the abandonment of the appeal against the costs orders meant that the appeal was no longer in fact against the very order of which the appellants were in contempt. We again deferred any decision on the point and proceeded with the appeal; and shortly before the conclusion of the hearing we were informed that the payment on account had just been made. In the circumstances there was no need to pursue the matter further.

Content of grounds of appeal

30. The grounds of appeal relevant to the first appeal are grounds 2 and 5. They are in the following terms.

> (1) Ground 2: The Learned Judge should not have made a Debarring Order for non-compliance with a Costs Order made at the same time as the Debarring Order. It was unfair and disproportionate for him to do so:
>
> a. The Debarring Order was not made on the basis of any contumelious or wilful failure to comply with the Costs Order or with any other order;
>
> b. Hypothetical non-compliance with the Costs Order could not have been an impediment to justice such as to warrant the Debarring Order; and
>
> c. The Second to Tenth Defendants were not given any sufficient warning that the Debarring Order would be sought against them and it was unfair for the Judge to make the Debarring Order without them having fair and adequate notice that the Court was minded to make the Debarring Order.
>
> (2) Ground 5: The Judge erred in the making of the Debarring Order which was unfair unduly onerous and disproportionate in that:-
>
> a. the Debarring Order was draconian and wholly unnecessary to secure payment of an on account of costs order.
>
> b. the Second to Tenth Defendants had not been guilty of any previous default or substantive or wilful or contumelious default of the Costs Order itself or of any other Court order such as to warrant the Debarring Order;

c. a party should not be automatically deprived of the right to be heard at trial by virtue of a non-contumelious or non-wilful default in the payment of costs;

d. it was not reasonable to assume that the hypothetical failure of the Second to Tenth Defendants complying with the Costs Order impeded the Plaintiff from pursuit of the action or defending the Counterclaim;

e. a failure to make the payment on account would not have impeded the Court's ability to determine the substantive claim in which the remedies sought by the Plaintiff were limited to declarations and rectification of the register of members of the Eleventh Defendant; and

f. a failure to make the payment on account would not have impeded the Court's ability to enforce the final orders made on the matters in dispute.

31. It will be apparent that there is substantial overlap between these grounds. In essence, they raise the following points. (a) The debarring order should not have been made in the absence of any previous culpable breach of a relevant order (2a, 5b, 5c); (b) Failure to comply with the order to pay costs on account would not create an impediment to justice sufficient to justify debarring the appellants (2b, 5d, 5e); (c) The debarring order was a disproportionate way of ensuring payment of the costs ordered to be paid on account (5a); and (d) the appellants had insufficient notice of AHF Florida's intention to seek a debarring order (2c).

Adequacy of notice

32. It is convenient to deal first with the last of these points, namely that the appellants had insufficient notice of the application for the debarring order. This is a procedural point, whereas the others are contentions that the judge erred in principle. Mr Lowe's assertion was that the appellants had not had a fair opportunity to be confronted with the debarring order and reasons for it. They were given only the most limited notice of the intention to seek the debarring order.

33. The relevant history is as follows:

(1) On Thursday 9 May 2024 Collas Crill for AHF Florida wrote to the court asking for an urgent hearing on 13 or 14 May. Early on Friday 10 May the court indicated that 13 May was available but 14 May was not.

(2) A little later on 10 May Mr Harris of Nelsons informed the court that "While I cannot comment on the Plaintiff's proposed application until I see the nature of

the order being sought, please note that I have a prior commitment on the morning of the 13th, but would be available in the afternoon".

(3) Shortly afterwards Mr Harris wrote to Collas Crill saying "I am in Court on another matter this afternoon, and dealing with a deposition on Monday morning. If I am to have any opportunity to consider your application then you need to indicate the nature of the relief you will be seeking now. I reserve the right to object to the listing of your application on Monday, and/or to seek an adjournment of it to allow me sufficient opportunity to take instructions".

(4) Still on the morning of 10 May Collas Crill replied, saying: "The relief that is being sought is explained in our recent letters to you, but please see attached our draft Summons". The draft summons sought an injunction, costs on the indemnity basis, and such further and other relief as the court might consider appropriate. It said nothing about a debarring order.

(5) In the evening of 10 May Mr Harris confirmed that he was available for the hearing at 2pm on 13 May.

(6) Late on the evening of Sunday 12 May Collas Crill served a draft core bundle and other documents and enquired when skeleton arguments could be exchanged. Early on the morning of Monday 13 May Mr Harris replied, saying he would not be in a position to serve a skeleton and asking for provision as soon as possible of the plaintiff's skeleton.

(7) At 9.11 on 13 May Collas Crill emailed documents including the plaintiff's skeleton to the court and copied in Mr Harris by way of service. The skeleton was concerned solely with the injunction and did not mention costs or a debarring order.

(8) At 11.06 on 13 May Collas Crill emailed to the court a draft order, copying in Mr Harris. The draft order included a debarring order.

(9) At 11.13am on 13 May Mr Harris wrote again to Collas Crill saying "My clients are not presently seeking any variation in the Cayman trial timetable. They are however, as are your clients, subject to any order which the US courts may make. My clients will not stand in the way of an early hearing in the US bankruptcy court".

(10) The hearing started at 2pm on 13 May.

34. In light of this history, I do not consider that there is anything in the procedural point. Mr Harris had been involved in the case since the adjournment application on 5 April 2024, which he had attended. The possibility of a debarring order had been in the background since the costs hearing on 19 April, which Mr Harris had again attended. AHF Florida's skeleton

for that hearing had warned of an intention to apply for such an order if an order for payment on account was not complied with, and the judge cited the need to allow for such an application when deciding how long the appellants should have for the payment he then ordered. When that payment was not made on time, the plaintiff issued and served a summons for a debarring order but did not need to pursue it. It can hardly have come as a surprise to Mr Harris that the topic recurred in the context of the injunction and costs orders. It is true that he was given little specific notice of that aspect of the application; but he was able to correspond on a separate point with Collas Crill very shortly after receiving the draft order which identified that a debarring order was sought, did not seek the adjournment presaged in his email to Collas Crill of 10 May, and was able to make submissions to the judge in opposition to the order. What he said in those submissions was this: "Debarring here would be a disproportionately draconian response. We are very close to trial and, my Lord, there's simply no justification for it. It's out of all proportions to the issue at hand. So, my Lord, I'll leave it at that". There was no suggestion that he had had insufficient time to consider an aspect of the relief sought. Moreover, the urgency was attributable to the conduct of his clients in filing and relying on the bankruptcy petition. In the circumstances, I do not consider that the shortness of notice provides any separate ground of challenge to the debarring order.

The judge's reasons

35. Before dealing with the rest of the points arising on the grounds of appeal, it is necessary to identify the judge's reasons for making the debarring order (and the costs orders which are no longer appealed). They are set out in one of two extempore judgments delivered on 13 May 2024. The other judgment gave the judge's reasons for granting the injunction, and it is convenient to start with it because it gives a clear indication of the judge's attitude and formed part of his overall consideration. Having referred to the adjournment application, the bankruptcy petition, the inability of Mr Harris to explain the reasons for the petition, the fact that nothing had been said about the resolution to petition for bankruptcy when the adjournment application was made, and Jeff Katofsky's letter of 7 May, the judge said this.

> "9. It is of real concern to me that, having had an informal truce over the last 12 months between the two factions as to what should happen in relation to HIF pending the determination of the trial in the Cayman Islands, the Second to Tenth Defendants now appear to have decided that they will no longer consider themselves bound by that arrangement and, as a result, have instituted the Chapter 11 proceedings in the US. It seems to me that that is an attempt by them to prejudge the outcome of the trial in the Cayman Islands, and to take steps which are potentially inconsistent with, and

certainly likely to be damaging to, the working out of whatever decision I make in due course at the end of the trial".

36. The judgment giving reasons for the costs orders and the debarring order is short (a matter of which Mr Lowe complained, as I say below). After indicating what it was that the plaintiff sought, including a debarring order (but without reciting any arguments made in support of any of that relief), he recorded an argument on behalf of the defendants that "this is not a case which is within the indemnity costs jurisdiction at all, on the basis that the complaints do not concern the conduct of these proceedings and, instead, the plaintiff's application is concerned with the conduct of proceedings in the United States and the activities by the second to tenth defendants in relation to those proceedings". He recorded a second argument against indemnity costs namely "that there was nothing contumelious or reprehensible about the second to tenth defendants' conduct in causing HIF, the first defendant, to file Chapter 11 proceedings". He then said this:

> "4 As to the requested debarring order, Mr Harris says that it would be a disproportionately draconian response given the proximity to trial, there is no justification for it and it would be out of all proportion to the issue at hand.
> 5 I think it is a finely balanced judgment as to whether the costs in this case should be payable on the indemnity basis or the standard basis. Ultimately, I have come to the view that I think they should be paid on the indemnity basis and, particularly, I am influenced by the content of Mr Katofsky's letter which does seem to me to demonstrate a contempt, almost, for the process that is to take place in the Cayman Islands and, essentially, his letter invites the plaintiffs "to bring it on" and he and the defendants will respond. It seems to me that, in those circumstances, that approach to what the second to the tenth defendants have caused the first defendant to do does go quite some way outside the ordinary course of the conduct of litigation.
> 6 It seems to me it does involve contempt for the existing court process and the intention to take action that is intended to frustrate the proper resolution of the dispute between the parties in the Cayman Islands. So, whilst I was initially hesitant, I have come to the view that this is an appropriate situation to make an indemnity cost order.
> 7 Mr McPherson is right that I will need to see the figures that he described in submissions verified by affidavit. Subject to that verification, it seems to be that a payment on account of US $45,000 should be made by the second to the tenth defendants. Today is already 13 May 2024, and it is getting close to close of business. I will give them until 21 May 2024 to make that payment, which is just over a week from now.

> 8 If they do not make that payment …, I will make it a debarring order, the second to tenth defendants just having escaped one on the previous occasion, I make a debarring order in the terms of paragraph 10 of the draft order in front of me."

The appellants' arguments

37. Consistently with the points identified in the grounds of appeal, Mr Lowe's primary arguments on behalf of the appellants were that the debarring order ought not to have been made for the following principal reasons: (1) there had been no prior material, contumelious or wilful non-compliance with any order by the appellants; (2) there was no threat to the fairness or effectiveness of the trial or none that was addressed by the making of the debarring order; (3) the debarring order was unfair and disproportionate; and (4) the judge did not conduct an evaluation of the relevant factors because he was not warned to do so, and did not give adequate reasons for his decision.

38. Mr Lowe asserted that the position was governed by the following principles:
(1) a debarring order marks the Court's last chance to secure compliance;
(2) the main purpose of such an order is to ensure that contempt does not impede the course of justice;
(3) even in the exceptional circumstances where peremptory orders are capable of being made, it is highly unusual to make an order when there has been no history of disobedience or noncompliance; and
(4) non-compliance with a court order should be met only by a fair and proportionate response: the Court should not act out of a sense of outrage.

39. The starting point of Mr Lowe's argument was the judgment of Denning LJ in *Hadkinson v Hadkinson* [1952] 2 All ER 567, a decision of the English Court of Appeal which concerned removal by a mother of a child from the jurisdiction in breach of a court order. The mother sought to appeal against an order for the child's return, but was prevented from prosecuting or being heard on her appeal until she had purged her contempt by returning the child to the jurisdiction.

40. At 574-5 Denning LJ said this:

> "It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other

> effective means of securing compliance. … I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

41. Mr Lowe drew from this support for his first two propositions – namely that a debarring order should be made only if there is no other means of ensuring compliance and only if continued failure to comply with the underlying order impedes the course of justice.

42. To similar effect was the statement of Chadwick LJ in *Arrow Nominees v Blackledge* [2000] 2 BCLC 167, a decision of the English Court of Appeal concerning an unfair prejudice petition in which one party had admittedly disclosed documents it knew to be forged. The trial judge held that there was a serious risk that other documents had also been forged but that a fair trial was still possible, and refused to strike out the petition. An appeal was allowed on two grounds, one related to the specific facts of the case and the other expressed by Chadwick LJ as follows (at [54]):

> "I adopt, as a general principle, the observations of Millett J in *Logicrose Ltd v Southend United Football Club Ltd* (1988) Times, 5 March, that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules, even if such disobedience amounts to contempt for or defiance of the court, if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled, indeed, I would hold bound, to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be

> used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke".

43. In relation to the third point, that even in the exceptional circumstances where a debarring order was otherwise available it should not be made unless there was a history of deliberate non-compliance, and the fourth point, namely that a fair and proportionate response is required, Mr Lowe relied principally on the following cases.

(1) *Saad Investments Company Limited (in liquidation) v Samba Financial Group* [2020] EWHC 853 (Ch), a decision of Fancourt J in the English High Court. He said this:

> "An order striking out a defence and debarring a defendant from defending (or striking out a claim) is the ultimate sanction that the court can impose for a breach of its order that does not amount to a contempt of court. It therefore must be a sanction of last resort and is likely only to be imposed for a serious and deliberate breach. The sanction must be necessary and proportionate to the circumstances. Lord Clarke said in *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 WLR 2004 at [61], giving the judgment of the Supreme Court that: "the test in every case must be what is just and proportionate", and he emphasised the draconian nature of the strike out sanction and the flexibility of remedies available to the court to fashion a proportionate remedy. Rix LJ similarly emphasised in *Aktas v Adepta* [2010] EWCA Civ 1170; [2011] QB 894 [92] the flexible remedies that the court had at its disposal to make the sanction fit the breach. If a breach, though serious, is excusable, an order striking out a party's case and debarring it from proceeding further may well be disproportionate, at least if another sanction is sufficient to achieve the ends of justice notwithstanding the breach."

(2) *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463, an English Court of Appeal decision in which Moore-Bick LJ said the following (at [36]):

> " … before making conditional orders, particularly orders for the striking out of statements of case or the dismissal of claims or counterclaims, the judge should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case. Of course, it is impossible to foresee the nature and effect of every possible breach and the party in default can always apply for relief, but a conditional order striking out a statement of case or dismissing the claim or

counterclaim is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified";

(3) *Orb v Ruhan* [2016] EWHC 850 (Comm) an English High Court case concerning a failure to comply with disclosure orders in the context of a freezing injunction. As Mr Lowe pointed out, there had been previous breaches which the judge (Popplewell J) described as particularly serious (see [190]). At [178] Popplewell J said this:

"The Court's orders are made with a view to promoting a fair and effective trial. In the context of freezing orders, the emphasis is on an effective trial, so as to enable the applicant's rights to be vindicated by enforcement, not merely judgment. The interest of a party in seeking an effective and realistic outcome to his litigation, if he succeeds, may be as important in the balance of things as the interest of the other party in preserving his right of access to trial despite his refusal to abide by orders of the court: see *JSC BTA Bank v Ablyazov (No 8)* [2013] 1 WLR 1331 per Rix LJ at paragraphs [182]-[185]. Moreover, the Court's orders are to be obeyed. The administration of justice depends on it. Maintaining public confidence in the Court's ability and willingness to secure compliance with its orders is an important and legitimate objective of an unless order in itself: *ibid* at paragraph [188]. The Court regularly makes debarring orders where the failure does not directly impact on the substantive issues which fall to be decided at trial. It does so, for example when it stays proceedings for failure to provide security for costs."

(4) *de Gafforj v de Gafforj* [2018] EWCA Civ 2070, a decision of the English Court of Appeal. This was a dispute between husband and wife in which the order sought was a debarring order to prevent the husband from pursuing an appeal. There was a history of failures by the husband to comply with various financial orders, including a failure to meet an order to make a legal services payment which was essential to the wife's ability to resist the appeal (see para 17). At [11] Peter Jackson LJ said this:

"For present purposes, it is enough to note the exceptional nature of the order and to record the conditions that are necessary before it can be made. I would summarise these as follows:

1. The respondent is in contempt.
2. The contempt is deliberate and continuing.
3. As a result, there is an impediment to the course of justice.

> 4. There is no other realistic and effective remedy.
> 5. The order is proportionate to the problem and goes no further than necessary to remedy it".

(5) *Canterbury Securitites Ltd v Winczura* FSD 133 of 2024, unreported, 17 October 2024, a decision of Doyle J in the Grand Court which contains a useful statement of the principles at para 124(1)-(12), including the following:

> "The applicant in addition to proving non-compliance may also have to persuade the court that the defaulting party's breach gives rise to a continuing risk of injustice. This may involve the risk of fairness to the legal proceedings either the trial itself or the enforcement of an order such as an asset freezing and disclosure order. Injustice can arise even if the fairness of the trial process itself is unaffected. It may arise where the default consists in failure to disclose assets under a freezing order making it more difficult to enforce any judgment and it may arise from a failure to comply with an order to provide information and deliver up documents, made in order to safeguard a proprietary claim. …
> The court should take a fair, just, necessary and proportionate approach and the court should consider if another less draconian sanction is sufficient to achieve the ends of justice notwithstanding the breach. The seriousness of the breach, the extent if at all which it is excusable and the consequences of the breach are all very important factors, but the overriding criterion is the requirement for the sanction to be proportionate and just. …
> Unless orders are orders of last resort usually only made if there is a history of failure to comply with previous orders".

44. Mr Lowe drew a distinction between disclosure orders, particularly those attached to Mareva (or freezing) orders, and orders related to costs. In the former case it was easier to see that a failure to comply would prejudice either the trial itself or enforcement of a resulting order, enforcement being the entire focus of a freezing order. The context of virtually all the Mareva cases was much more serious than non-compliance with a relatively minor costs order. They all showed a kind of deliberate, cynical attempt to circumvent the court's orders, which the court could reasonably then see was going to be repeated.

45. But in the case of a costs order, there were ordinarily other means of enforcement; and failure to pay the costs could not ordinarily be said to have an adverse effect on the conduct of the

trial or enforcement of any order resulting from it. To make a debarring order in relation to a costs order, it was necessary for there to be a pattern of non-compliance with costs orders; and there was none in this case, the short failure in compliance with the previous order for a much more substantial payment on account of costs – a matter of four or five days - being of no significance. Breach of a costs order was not, per se, as serious as anything else: it did not necessarily show contumelious misbehaviour. There had to be something to cause the court to believe that the costs order would not be paid without the unless condition. Mere disapproval of the behaviour of the person subject to the underlying costs order was not enough: it might justify an order for immediate payment, or payment on the indemnity basis, but could not justify the addition of an unless order, whose only proper purpose was to protect the course of justice.

46. Mr Lowe claimed that there was no reported case in which an unless order had been attached to a costs order without there having been a previous failure to comply with a costs order. As Mr McPherson pointed out, however, *Ogiehor v Belinfante* [2018] EWCA Civ 2423, again a decision of the English Court of Appeal, was such a case. It concerned a personal injury claim, during the trial of which the claimant disclosed a without prejudice offer. The trial had to be adjourned; and the claimant was ordered to pay the costs thrown away, with the proviso that if he did not pay them his action would be automatically dismissed. There was no history of default by the claimant in compliance with costs or other orders. The order was upheld on appeal. Mr Lowe's response was that the case was to be understood as having been decided on the basis that it was equivalent to an application for summary judgment against the claimant. He referred in particular to the extensive citation from *M.V. Yorke Motors v Edwards* [1982] 1 WLR 444, which is indeed directed to the test for summary judgment, and to the emphasis on the merits of the claimant's case. It is nevertheless a case in which an unless order was made without prior default of any kind, let alone in payment of costs orders.

47. Specifically in relation to the order under appeal, Mr Lowe's headline points were that there was no history of default, there was no risk to the effectiveness of the trial, and there was a failure by the judge to consider the fairness of his order. His essential thesis was that the judge had no reason to suppose that the payment on account would not be made, and no reason to suppose that the trial would be prejudiced if it were not made. In terms of the facts, at the adjournment hearing the judge had himself concluded that "this is not obviously a case of a party trying to drag matters out for tactical reasons or to put off the inevitable"; and although the previous order for a payment on account, in the very substantial amount of $213,000, had been paid slightly late, the important point was that it had been paid. As to effect on the trial, there was no basis on which it could be said that a failure to make a payment of US$45,000

would have any adverse effect on AHF Florida's ability to prosecute the case or the court's ability to determine the matters in dispute. There was no factual basis for a conclusion that the payment on account might not be made, and no principled basis for a conclusion that a debarring order was a proportionate way to recognise the effect of a failure to pay if that indeed occurred. The judge had not identified the principles he applied when making his order; and his only apparent reason for doing so, that the appellants had only just avoided an unless order on the previous occasion, was difficult to understand (because no such order had then been sought) and in any event insufficient.

Discussion

48. Debarring orders form part of the court's nuclear arsenal. To prevent a party from advancing its case or defending its position denies its right to access to justice. It follows from that that such an order should only be made in exceptional circumstances and as a last resort, and with the clear objective of preventing an impediment to the course of justice or when there is no other satisfactory means of procuring compliance with the underlying order. The interest of justice in ensuring that court orders are obeyed has to be balanced against such considerations.

49. It should be noted that there is no suggestion in the present case that the appellants were unable to make the payment the subject of the underlying order. The question of access to justice is particularly important where the person against whom a debarring order is sought asserts an inability to comply with the underlying order, usually an order to pay money, since such an order would have the effect of stifling the ability to participate in the proceedings. Ordinarily in such circumstances proven incapacity to comply will be a compelling factor against granting the order.

50. Nevertheless, the circumstances in which such an order may be made are not defined and are fact dependent. There is no special rule concerning costs orders. Moore-Bick LJ said as much in *Huscroft v P&O Ferries Ltd* [2010] EWCA Civ 1483, a case of an unless order attached to a security for costs order, at [19]:

> "I do not think that the power to attach a condition to an order can be exercised only if there is a history of repeated failures to comply with orders of the court or the party in question is not conducting the litigation in good faith. I do think, however, that before exercising the power given by [the English Civil Procedure Rules] rule 3.1(3) the court should identify the purpose of imposing a condition and satisfy itself

that the condition it has in mind represents a proportionate and effective means of achieving that purpose having regard to the order to which it is to be attached".

51. I accept that it is ordinarily likely to be appropriate first to make what Mr McPherson described as a vanilla order for costs, in other words an order with no attached sanction for non-compliance. That is because there are other means of procuring compliance with a costs order than debarring a defaulter from continuing to litigate, and often a failure to comply with a costs order will have little or no effect on the conduct of the trial or the resolution of the issues. But that will not by any means always be so: *de Gafforj v de Gafforj* is an example of a case where a failure to comply with a costs order may directly impact the trial, in that case because the wife's ability to resist the husband's appeal depended on his satisfying the legal services payment order. There will also be cases in which a history of non-payment leads to the conclusion that the only effective or appropriate way to procure compliance with a costs order is to make continued participation in the litigation dependent on payment. There is, however, no exception in costs cases to the general ability to make an unless order if the applicable principles so dictate. I regard this proposition as supported by *Ogiehor v Belinfante:* although I agree that the outcome was influenced by consideration of the merits of the claimant's case, the decision illustrates that there is no rule against making an unless order in relation to a costs order in the absence of previous default. If such a rule existed, the decision in that case must have been different.

52. Accordingly, the appellant's primary case, that the judge was not as a matter of principle entitled to make a debarring order in the absence of a significant prior breach, cannot be supported. But in any event, the appellants' focus is too narrow in its concentration on the payment history. It is true that the appellants had made the previous substantial payment on account of costs, and that the fact that it was paid slightly late was capable of being seen as of little significance; and if those facts had stood alone it would have been difficult for the judge properly to conclude that the relatively minor sum of US$45,000 would not itself be paid, and that therefore it was necessary to make the entire participation in the trial dependent on its being paid. But they did not stand alone. As the judge identified in both of his judgments given on 13 May 2024, there was a challenge to the entire judicial process in the Cayman Islands. The appellants had made it clear that they regarded the bankruptcy proceedings in the United States as the proper forum for resolution of the issues and that participation by AHF Florida in the Cayman Proceedings would be a breach of the bankruptcy stay and a contempt of the US court.

53. In this context, it is worth emphasising that a debarring order does not automatically prevent further participation in the proceedings. It merely applies a sanction to non-performance of an underlying order, which is why it is commonly referred to as an unless order. In effect, it gives a last chance for compliance, with a warning of the consequence of non-compliance. Because the consequence is pre-ordained (subject to the possibility of relief from the sanction), the court must have regard to the consequence; but it is nevertheless the case that a chance to comply is built into the process. That is significant in the present case, because the problem here was the extent to which the appellants were committed to a trial in the Cayman Islands.

54. In the course of argument Mr Lowe was driven to accept that a debarring order could be made if a party expressly stated that it would not obey any order made by the court; but he contended that such a statement could not be inferred from conduct. The concession must be correct: the court does not need to see whether the party is true to its word before attaching a sanction to non-compliance. Nor does it need to see a history of non-compliance in such a case. Once that is accepted, there is no reason why an intention to disregard an order cannot be inferred; and in the present case there was more than enough material for the judge to conclude that the appellants had decided that the dispute should be resolved in the United States, not in the Cayman Islands. What the judge was faced with was a course of conduct by the appellants, including the filing for bankruptcy in circumstances capable of suggesting that bankruptcy was not the appropriate course and Katofsky Law's letter of 7 May 2024 indicating that America not Cayman was the right place for resolution of the dispute, from which it was possible to deduce that the appellants were determined not to participate in the Cayman proceedings if they could possibly avoid it. The judge regarded their conduct as contemptuous of the Cayman proceedings. When Mr Lowe was asked in argument whether that was not a legitimate reason to grant an unless order, his answer was that it was not, because the appellants had met the previous costs order even though they were preparing the bankruptcy petition. But the petition had not by then been issued, and it was only when it was that the appellants were able to use the automatic stay as a basis for contending that the Cayman proceedings could not or should not continue.

55. The threat to the interests of justice in these circumstances was plain. The trial was imminent. AHF Florida needed to know what form the trial would take in order to prepare properly. So did the judge. The court needed to know how long the trial was likely to take so that it could properly allocate resources and minimise the impact on other litigants. None of these things was clear: the correspondence from the appellants' American lawyers and from Nelsons was at best ambivalent. There was a risk that if the appellants did attend the trial they would seek

to disrupt it by relying on the effect of the bankruptcy proceedings and thereby cause further delay. There was also a risk, specifically identified by the judge in the injunction order judgment, that the appellants would try to take steps potentially inconsistent with and damaging to the working out of whatever decision the judge might ultimately make after trial. There was thus also obvious uncertainty as to the willingness of the appellants to make the US$45,000 payment on account of costs.

56. The judge did not express matters in this way. Mr Lowe complained that there was no attempt by AHF Florida to address the judge on the principles relevant to debarring orders, and no attempt by the judge to state what principles he had applied. Both of these things are true. In my judgment, however, the judge's reasons are clear on a fair reading of his judgments. The basic requirement is that it must be apparent to the parties why one has won and the other has lost: *English v Emery Reimbold & Strick (Practice Note)* [2002] EWCA Civ 605 at [16]. I consider that requirement to be satisfied. The judge set out clearly his concerns about the appellants' conduct, saying that it amounted in effect to contempt of the Cayman court and action that was intended to frustrate the proper resolution of the dispute between the parties in the Cayman Islands. This was not merely disapproval of the appellants' conduct: it was recognition of the potential disruption to the proceedings caused by that conduct. The threat to the trial did not need to be spelled out. Nor did the consequences for preparation for and conduct of the trial: they were obvious. In my view, the appellants can have been in no doubt why it was that they had been subjected to the debarring order.

57. For these reasons, I do not consider that it can be said that the judge's order offended any principle. The order was exceptional, but so were the circumstances. There was a clear risk that the costs order would not be met because of the appellants' attitude; and that in itself was sufficient to justify the unless order, since court orders are to be obeyed. But that risk was emblematic of the greater risk to the trial, and the interests of justice lay in ensuring so far as possible that the trial was not disrupted. The only available means of mitigating the risk was by attaching the debarring order to the costs order. In the circumstances, the judge's order was a proportionate response to the appellants' conduct and the threat it posed to the trial. It cannot validly be criticised.

58. Two minor matters remain to be mentioned. First, I record that there was a respondent's notice seeking to uphold the judge's order on further or alternative grounds, but it is not necessary to deal with it. Secondly, Mr Lowe suggested that if the appeal were allowed and the matter remitted to the Grand Court the Attorney-General should be encouraged to take a

more active interest in the proceedings and the underlying dispute, which at bottom related to charity. This suggestion now falls away.

Field JA:

59. I agree.

Beatson JA:

60. I also agree.