IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 132 OF 2020 (MRHJ)

IN THE MATTER OF SECTION 46 OF THE COMPANIES LAW (2020 REVISION)
AND IN THE MATTER OF THE GRAND COURT RULES 1995, ORDER 102(2)(1)(B)
AND IN THE MATTER OF GEOPAY HOLDING LIMITED

BETWEEN:

(1) ZHONGZHI CAPITAL (HK) COMPANY LIMITED
(2) DRAGON OCEAN DEVELOPMENT LTD

PLAINTIFFS

AND

(1) GEOPAY HOLDING LIMITED
(2) GEOSWIFT HOLDING LIMITED

DEFENDANTS

CONSIDERED ON THE PAPERS

Coram: Hon Mrs. Justice Ramsay-Hale

Date draft circulated: 5 March 2021

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Headnote

Costs - claim for costs pursuant to a contractual indemnity pursuant to O.62, r.4 (3) - restriction on indemnity costs in O.62, r.4 (11) - availability of indemnity costs where successful party entitled to costs under a contract - exercise of discretion to deprive a successful party of his costs

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COSTS RULING

Introduction

1. The substantive judgment in this matter was delivered on 28 October 2020 and an order made in terms of the successful application by the First Plaintiff, Zhongzhi Capital (HK) Company Ltd. ("ZZHK") for the Register of Members of the First Defendant, Geopay Holding Limited ("Geopay"), to be rectified pursuant to section 46 of the Companies Law (2020) Revision, by including ZZHK as the holder of 6,302 ordinary shares in Geopay in place of the Second Defendant, Geoswift Holdings Limited ("Geoswift").

2. The Court was satisfied on the facts that ZZHK had a right to be registered as a shareholder of Geopay pursuant to a validly executed share transfer certificate of those shares. Those facts were that the shares

had been pledged to ZZHK under a security agreement over shares made between the parties to secure a loan of $64,000,000 from ZZHK to Geoswift to facilitate the acquisition of shares in a third-party company by Geopay. Under the loan agreement, the executed share transfer certificate and divers resolutions and undertakings were delivered to ZZHK by both Geoswift and Geopay to allow ZZHK to enforce its security in the event of default. Subsequent to Geoswift's default on the loan, Geopay, which is controlled by Geoswift, refused to register ZZHK in its register of members in place of Geoswift as agreed, causing ZZHK to issue these proceedings.

3. The claim of the Second Plaintiff, Dragon Ocean Development Ltd ("Dragon") to be registered in place of Geoswift in Geopay's Register of Members was dismissed.

4. The facts are that Dragon was seeking to enforce the rights of a related lender, ZZCI Corporate Services Ltd ("ZZCI"), which had also lent money to Geoswift on the same terms and for the same purpose. Subsequent to Geoswift's default, ZZCI assigned its rights under the loan agreement and the share pledge agreement to Dragon by a Deed of Assignment dated 7 September 2017. The Court dismissed Dragon's claim, holding that it was not entitled to an order for rectification in the circumstances where the share transfer certificate, on which it sought to rely, transferred the pledged shares from Geoswift to ZZCI.

5. In a draft order that the Plaintiffs put before the Court, which had been shared with the attorneys for Geoswift in advance, the Plaintiffs proposed that Geoswift should pay 75% of the Plaintiffs' costs to be taxed on the standard basis if not agreed. At the hand-down hearing, Geoswift asked for time to seek to agree costs. The Plaintiffs submitted that the Court should make an order for costs there and then but ultimately did not resist Geoswift's request and the following order was made in respect of costs:

> *"5. Costs reserved. The parties shall endeavour to agree on costs and, in the absence of agreement, the parties shall submit written submissions on costs within 7 days of the date of this Order".*

6. No agreement was reached and written submissions on costs were submitted to the Court.

The Plaintiffs' Position

7. The offer that Geoswift should pay 75% of their costs being rejected, the Plaintiffs now first seek an order that Geoswift should pay all of their costs pursuant to their contractual rights to that effect but, if that application is rejected, they seek an order in terms of their original offer.

Costs under the contract

8. Mr. Clifford seeks contractual costs pursuant to O.62, r.4 (3) which provides that:

"A person who claims to be entitled pursuant to a contract to recover the legal fees and expenses incurred in enforcing that contract shall be entitled to judgment for the amount found due under the contract and such amount shall not be subject to taxation pursuant to this Order."

9. Mr. Clifford submits that, pursuant to divers clauses in the finance documents, Geoswift is contractually bound to pay ZZHK its untaxed costs of the proceedings (including the costs of preparing these written submissions), as the costs were incurred by ZZHK in connection with the enforcement of its rights under the finance documents.

10. Among the clauses to which he has referred the Court as conferring this contractual right to costs is Clause 11.3 of the ZZHK Loan Agreement which provides as follows:

> "*The Borrower shall promptly indemnify the Lender and every Receiver and Delegate against any costs, loss or liability incurred by any of them (acting reasonably) as a result of …*
>
> *(d) any failure by the Borrower to comply with its obligations under clause 13 (Costs and expenses);*
>
> *(e) taking, holding, protection or enforcement of the Transaction Security; "*

11. Clause 13.3 of the same agreement provides:

> "***13.3 Enforcement and preservation costs***
>
> *The Borrower shall, within three Business Days of demand, pay to each Secured Party the amount of all costs and expenses (including legal fees) incurred by that Secured Party in connection with the enforcement of, or the preservation of any rights under, any Finance Document or the Transaction Security and with any proceedings instituted by or against that Secured Party as a consequence of it entering into a Finance Document or taking or holding the Transaction Security, or enforcing those rights".*

12. Mr. Clifford has also drawn the Court's attention to the provisions of the Share Charge including clause 17.1 which he submits give ZZHK a contractual right to its costs of the proceedings. Clause 17.1 states as follows:

> *"The Chargor shall, within three Business Days of demand, pay to the Chargee the amount of all costs, losses, liabilities and expenses (including legal fees) incurred by the Chargee or any Receiver in relation to any Finance Document (including the administration, protection, realisation, enforcement or preservation of any rights under or in connection with this Deed, or any consideration by the Chargee as to whether to realise or enforce the same …)."*

13. In his submissions on costs on behalf of Dragon, Mr. Clifford relies on clauses in the ZZCI finance documents which are substantially in the same terms as those in the ZZHK finance documents. He contends that, although Dragon was not successful in its application, Dragon is nonetheless entitled to its costs and expenses incurred in seeking to enforce the Share Charge Agreement pursuant to GCR O.62 r.4(3).

14. He says further that, in the circumstances where the Court has no power to tax the costs incurred by the Plaintiffs as they are a matter of contract, it would be in the interests of both parties to agree contractual costs, if those costs are ordered by the Court.

15. If the costs cannot be agreed, then he invites the Court to insert a provision within the Order that the Plaintiffs have liberty to apply so that the costs incurred by the Plaintiffs, which Geoswift is contractually bound to pay, can be determined in these proceedings.

Costs in the discretion of the Court

16. Alternatively, Mr. Clifford invites the Court to award the Plaintiffs 75% of their costs in the exercise of its jurisdiction to award costs. Counsel submits that such an order would substantially reflect the principle in the Rules that a successful party is ordinarily entitled to his costs.

17. In making this submission he relies on GCR O.62 r.4 which states, *inter alia*:

> *"(2) The overriding objective of this Order is that a successful party to any proceeding 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.*
>
> ...
>
> ...
>
> *"(5) 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 any part of the costs.*
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> *"(6) The amount of the costs which a successful party shall be entitled to recover from any other party is -*
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> *the fixed costs prescribed in rule 7;*
> *the amount assessed by the Judge in accordance with rule 8;*
> *the amount allowed after taxation on the standard basis; or*
> *the amount allowed after taxation on the indemnity basis.*

"(7) The orders which the court may make under this rule include an order that a party must pay-

(a) a proportion of another party's costs;..."

18. Mr. Clifford submits further that such an order would award Dragon a proportion of its costs if that was the effect of the Order. He says further that, if the effect of the Order is that Geoswift pays any of Dragon's costs - and he does not suggest that this will indeed be the effect of the Order - then such an Order is permissible pursuant to GCR O.62 r. 4(7) which provides that the Court may make an order that a party pay a proportion of another party's costs.

19. He also submits that the Court is entitled to refuse to order Dragon to pay Geoswift's costs in order to achieve the overall costs order that the Plaintiffs seek, in the event that their application for contractual costs is rejected.

20. In support of his proposition that Geoswift pay 75% of the Plaintiffs' costs, Mr. Clifford submits that such an order would reflect the overall merits of the case. ZZHK succeeded in the larger tranche of shares and the majority of the skeleton arguments and the hearing was spent on ZZHK's case or on issues that were common to both Plaintiffs' cases and although he accepts the preparation of the evidence was more evenly split, he suggests that it was not split in such a way that would suggest that an order awarding the Plaintiffs 75% is wrong.

Geoswift's Response to the application for contractual costs

21. In response to the Plaintiffs' application for contractual costs pursuant to GCR O.62, r.4(3), Mr. Sherwood draws the Court's attention to the decision of the Court of Appeal in *Weavering v Peterson and Ekstrom*[1] in which the rule was considered. The action was brought by the Joint Official Liquidators against the former directors of the company for breach of their duties of care and skill to the company. The directors prevailed in their appeal against the finding of the Grand Court that they had breached their duties as directors and sought an indemnity costs order pursuant to the company's articles which provided at Article 182 that:

> *"Every Director, agent or officer of the Company shall be indemnified out of the assets of the Company against any liability incurred by him as a result of any act or failure to act in carrying out his functions other than such liability (if any) that he may incur by his own wilful neglect or fault."*

22. The former directors' submissions, as summarised by Chadwick P, were to the effect that they had incurred liabilities for legal fees and disbursements to their attorneys in resisting the proceedings brought, that they had incurred that liability *as a result of acts, or failures to act, in carrying out their functions* as

[1] CICA 10 of 2011 23 June 2015, unreported

directors, as alleged in the proceedings, and that they were entitled to be indemnified under Article 182 on the basis that, but for their acts or failures (or alleged failures) to act, they would not have been sued by the company acting through its liquidators.

23. Chadwick P stated that:

> *"Properly analysed, therefore, the directors' claim to be reimbursed their costs is a contractual claim to an indemnity."*[2]

24. The learned President then referred to GCR O.62 r.4(3) and said:

> *"7 ...The effect of that rule, as it seems to me, is that, where a claim is advanced pursuant to a contract to recover legal fees incurred pursuant to an indemnity in the contract, the court is not asked to exercise the discretion that it would otherwise have under section 24 of the Judicature Law which gives the court power, pursuant to the Rules, to make such order as to costs of proceedings as it thinks the justice of the case requires. A contractual claim does not invite the court to exercise any discretion. It requires the court to consider whether the contractual right relied upon has been established - both as a matter of construction of the contract and on the facts – and then to enter judgment for the amount found due under the contract. Determination of the amount due under the contract may, of course, require an assessment in the nature of an assessment of damages."*

> *"8. Further, a claim to costs within GCR Order 62, rule 4(3) may require the court to adjudicate upon contractual issues raised in circumstances in which - as in this case -those issues have not been pleaded in the action. The consequences are helpfully discussed in the judgment of Mr Justice Ferris in* John and others v Price Waterhouse and another (Costs) *[2002] 1 WLR 953. In that case, the court had already exercised its discretion, under what was then section 51 of the Supreme Court Act 1981; and it considered that its powers under that section were exhausted. Mr Justice Ferris held that the right course was to require the successful defendants to commence fresh proceedings to enforce their indemnity."*

25. The indemnity in Article 182, and whether it was applicable on the facts, had not been pleaded by the directors or otherwise addressed in the proceedings, prior to the costs stage. The Court of Appeal determined that it was not necessary to require the appellants to commence fresh proceedings to recover their legal expenses under the indemnity but rather that:

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[2] *ibid* para 6

> *"...the more sensible course is to consider an application on behalf of the directors, if and when made, for leave to amend their defence in these proceedings so as to add a* ***counterclaim seeking a declaration as to their right to the contractual indemnity on which they seek to rely...****"*[3]

26. The Court of Appeal noted that it may be necessary for points of claim and points of defence to be ordered where the applicability and the extent of the indemnity *"may not be self-evident"*[4].

27. Mr. Sherwood submits that the Plaintiffs have misconstrued the rule and that it is not an alternative basis on which to award costs, as Mr. Clifford suggests, but a general principle that Order 62 will not prejudice a party's contractual right to be paid its legal fees and expenses by overlaying a taxation procedure on those fees and expenses. Where the party has such a contractual right, it is entitled to "**judgment"** for the amount due, not an order for costs granted in the exercise of the Court's discretion which is liable to be taxed. [emphasis supplied by Counsel]

28. Mr. Sherwood also notes, no doubt in response to Mr. Clifford's submission that ZZHK was not pursuing costs under section 46 of the **Companies Law**[5] because recovering their costs from Geopay would amount to them paying their own costs, that although ZZHK may ultimately be entitled to its costs on a contractual basis, the non-recourse provisions in clause 17.14 (a) of the ZZHK Facility Agreement means those costs can only be recovered from ZZHK's security, i.e. the Geopay shares.

29. Clause 17.14(a) is in the following terms:

> *"Subject to paragraphs (c) and (d) below, but otherwise notwithstanding anything to the contrary in this Agreement, in the Event of Default or when the Lender exercises its overriding right of withdrawal and immediate repayment on demand, the Lender hereby agrees that its recourse to the Borrower's assets will be limited to the Security Assets and that no other assets of the Borrower [...] shall be subject to levy, execution or other enforcement procedure...."*

30. In the event the Court is minded to award costs under the contract to ZZHK, Mr. Sherwood submits that any award should be expressly subject to the non-recourse provisions.

31. With respect to Dragon, Mr. Sherwood submits that it is not at all clear that they have a contractual right to costs in respect of their unsuccessful application and that any such right would have to be pleaded and proved as set out in *Weavering.*

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[3] para 9

[4] At para 10

[5] Section 46 provides that the Court *"may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application or petition, and any damages the party aggrieved may have sustained."*

Costs pursuant to the Court's discretion

32. Mr. Sherwood relies on the Court of Appeal's further observation in *Weavering* that, until the contractual claim for costs has been brought by the Plaintiffs and determined, there was no basis to depart from the usual order that, in the absence of any indication that the proceedings had been conducted improperly, unreasonably or negligently, costs should be awarded on the standard basis.

33. He submits that there has been no suggestion that Geoswift's conduct of the proceedings was in any way improper and says further that, to the extent that the Court considers the conduct of the parties prior to the commencement of the proceedings to be relevant, it should be noted that the responsibility to update the register of members to record the transfer of shares to ZZHK fell on Geopay and/or its directors and service providers, and not on Geoswift. He concludes that ZZHK's costs should be on the standard basis.

34. With respect to the Plaintiffs' submissions that a costs order be made that would have the effect of awarding costs against Geoswift, Mr. Sherwood accepts that a successful party may be denied its costs or even have costs awarded against it, but he submits that the Court exercises this jurisdiction *"only rarely, and only in the clearest of cases,"* citing Henderson J in *Sagicor General Insurance (Cayman) Limited et al v Crawford Adjusters (Cayman) Limited et al*[6] as for instance where a successful party gave false evidence or acted oppressively in the action.

35. In the circumstances where Geoswift successfully opposed Dragon's claim and acted properly, there is no reason to award Dragon any part of its costs and no reason not to award Geoswift its costs.

36. In the circumstances where ZZHK was entirely successful in its application and Dragon entirely unsuccessful in theirs, and where they had common legal representation, he submits that the following principles set out 1221 in the White Book[7] apply:

(a) The successful plaintiff is only permitted to recover its own legal costs from the defendant, and not the costs of the unsuccessful plaintiff. In the absence of evidence of any agreement as to how the costs of the shared legal representation should be apportioned, the successful plaintiff should be awarded half of the shared legal costs. This principle is drawn from *Keen v Towler*[8], a case in which only one of four plaintiffs was successful:

> "*One must assume, in the absence of evidence to the contrary, that all these four plaintiffs are solvent, and that no special arrangement was made between them as to their liability to their solicitor for costs. On this assumption, although each of the four plaintiffs may be*

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[6] [2011] 2 CILR 471

[7] The Supreme Court Practice 1999 Sweet & Maxwell at note 62/B/115 on page 1221

[8] *Keen v Towler* (1924) 41 TLR 86

liable to the solicitor for the whole of the costs common to all of them, still, as between themselves, each is liable to contribute one-fourth. From this it follows that ultimately each of the plaintiffs is only liable to pay one-fourth of the common costs, and that, therefore, as costs are given as an indemnity only, one-fourth of the costs is all that the defendant should be called upon to pay to the plaintiff. ***To order the defendant to pay to the successful plaintiff more than one-fourth would be to order him to pay an amount in relief of the amount that the unsuccessful plaintiffs ought to pay;***" and

(b) The defendant is entitled to its costs of defending the unsuccessful plaintiff's claim, and may in appropriate circumstances be entitled to set them off against the costs payable by the defendant to the successful plaintiff. [emphasis supplied by Counsel]

37. Mr. Sherwood submits further that though not directly on point, the cases on apportionment of costs where the parties have a shared degree of success are instructive as they make clear that any perceived difficulty in establishing what costs are due on each side is **not** a reason for the Court to retreat from a mixed cost award. He refers to the recent decision of the Court of Appeal in *Millicent Coban v Kurt Josephs*[9], in which the Court at first instance declined to make a costs award on an issue by issue basis where there were good reasons to do so because this would result in the parties incurring the expense of determining which costs were payable by each side. This was overturned by the Court of Appeal. Morrison JA who gave the judgment of the Court noted at [51] that:

> "*As has been seen, the judge's stated reason for not dealing with the matter in this way was that it would involve the parties in the further expense of taxation of the costs due on either side. But taxation is the mechanism which the law provides for the fixing of the costs of civil litigation in cases in which the parties cannot agree them. There was no evidence, nor was there any reason to suppose, that the cost of taxation in this case was likely to make it an uneconomic proposition for the parties. In my respectful view, therefore, the judge took into account a plainly irrelevant consideration in deciding not to order costs on what he obviously thought was the most appropriate basis in the very special circumstances of this case.*"

38. He invites the Court to make an order that Geoswift pays 50% of the Plaintiffs' costs on a standard basis, such costs to be taxed if not agreed.

Discussion and decision

39. As both Counsel have referred to the preliminary view I expressed on the question of costs before it was agreed that the parties make written submissions, I offer this further comment. When Mr. Clifford proposed that costs be on a standard basis, I considered it generous as Geoswift had, in my view, acted unreasonably in opposing ZZHK's application for rectification of the register, in light of their necessary

[9] CICA (Civ) Appeal No 23 of 2019, 28 September 2020, unreported

acceptance that there had been an event of default under the Facility Agreement. I considered that Geoswift had advanced a defence that was wholly inconsistent with the agreement made between the parties and with the various undertakings and other deliverables given by both Geoswift and Geopay as security for the loan, including the executed share transfer certificate. The defence advanced was utterly meritless. Geoswift's actions subsequent to the default were also unreasonable and led to the proceedings being instituted.

40. While it is undoubtedly correct that the imposition of indemnity costs usually expresses the Court's disapproval of conduct deserving of moral condemnation as the learned Chief Justice observed in *AHAB v SAAB investment and others*[10] to which Mr. Sherwood referred in the course of his submissions, the Court of Appeal in *Reid Minty (a firm) v Taylor [2001] EWCA Civ 1723* determined that a party can be ordered to pay costs on the indemnity basis even if the conduct was not of such a degree and there had been no moral lack of probity.

41. In *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson (a firm)*[11], Lord Woolf cited the following passage from the judgment of Simon Brown LJ in *Kiam v MGN Ltd (No 2)*[12], with which the other members of the Courts agreed:

> *"12. I, for my part, understand the court there to have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight."*

42. Also apposite are the examples given with respect to the exercise of the Court's jurisdiction to award costs on an indemnity basis in another decision of Henderson J in *Daniel Alexander Bennett v The Attorney General of the Cayman Islands.*[13] The learned Judge said this:

> *"6. Advancing a defence which is merely weak or unlikely to succeed is to be distinguished from maintaining a defence which is manifestly hopeless. The latter can be characterised as unreasonable. The former is a regular occurrence with which every barrister will be familiar. Many litigants, even after receiving a warning from their legal advisers that the claim or defence is likely to fail, prefer to have that determination made by the Court. That is not, in the typical case, unreasonable. Weak cases will succeed from time to time. The litigant is entitled to prefer a judicial determination based upon all of the evidence over the predictions of his advisers which*

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[10] [2012] (2) CILR 1
[11] [2002] EWCA Civ 879,
[12] [2002] 2 All ER 242
[13] [2010 (1) CILR 478]

are limited, as they usually are, by not having observed the other side's witnesses under cross-examination. There are also cases which are hopeless and which appear that way to anyone with the requisite legal training. It is open to a judge to determine that it was unreasonable to bring such a claim or advance such a defence. The usual result of such a finding is that the unsuccessful party will pay costs on the indemnity basis.

"7. The principle is described well in the recent decision of the Technology & Construction Court in Fitzpatrick Contractors Ltd. v Tyco Fire & Integrated Solutions (UK) Ltd. Coulson, J. set out ([2008] EWHC 1391 (TCC), at para. 3) his summary of the principles relating to an award of indemnity costs in the United Kingdom. Item 5 is pertinent:

> *"There are a number of decisions, both of the TCC and of other courts, which make plain that the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, whereas the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) will lead to such an order. In both Wates Construction Ltd V HGP Greentree Allchurch Evans Ltd [2006] BLR 45, and EQ Projects Ltd v Javid Alavi [2006] BLR 130 this court was persuaded that, in the circumstances of those cases, an order for indemnity costs was appropriate because the claimants should have realized that their claim was hopeless and should not have taken the matter on to trial. However, in Healy-Upright v Bradley & Another [2007] EWHC 3161 (Ch), the court reiterated that an order for indemnity costs was not justified by the mere fact that the paying party had been found to be wrong, either in fact or in law or both, or by the fact that in hindsight, the result of the case now being known, the position adopted by that party may be thought to have been unreasonable."*

43. In my judgment, in the circumstances where Geoswift accepted that there was an event of default and that it had delivered an executed share transfer certificate to ZZHK as part of its security documentation for the loan and procured the requisite board resolutions to allow the share pledge to be enforced, it had no grounds for challenging the substitution of ZZHK for itself in Geopay's Register and its decision to do so was unreasonable to the requisite degree. Mr. Qu sought to rely on his resignation as a director of both Defendants to impugn the efficacy of the resolutions which he signed and avoid the consequences for which Geoswift had bargained. The point was without merit. The status of the resolutions and whether they were effective to transfer the shares to ZZHK would be a matter for Geopay in any event, and not Geoswift. The argument advanced by Geoswift's attorneys, which suggested that Geopay's refusal to register the shares was somehow ZZHK's own fault because ZZHK had not tendered the resolutions or the share certificate to Geopay's directors, was equally meritless as the documents had all been presented to Geopay's registered office, and thereby to its directors, pursuant to the agreement.

44. Mr. Clifford does not, however, seek an indemnity costs order in terms. Although costs are in the discretion of the Court, the process is adversarial and, in the circumstances, where ZZHK has not made an application for indemnity costs grounded in Geoswift's conduct, I do not consider that I should order indemnity costs be paid on that basis.

45. Mr. Clifford seeks instead to be permitted to prove in these proceedings all the costs incurred by ZZHK and Dragon in enforcing and/or seeking to enforce this agreement. The decision of the Court of Appeal in *Weavering* suggests that a claim to contractual costs under GCR O.62, r.4 (3) would have to be pleaded and proved and the costs properly incurred adjudged. I cannot think of any rule that would permit the Plaintiffs to plead a new cause of action in the context of concluded proceedings in order to advance a contractual claim for costs. Further, although ZZHK has succeeded in the action and would be entitled to make a claim for its costs under the agreements, such a course would not be open to Dragon. As Ferris J observed in *John*, the contractual right to costs, if it exists, does not arise until the Court has given judgment in the action.

46. I consider, however, that the Court can, in the exercise of its discretion to award costs, where the contractual entitlement is self-evident, order costs on the indemnity basis of taxation. There is a long line of authority that, where parties agree that the cost of enforcing the terms of an agreement rests with a particular party, the Court in exercising its discretion to award costs, should order that costs be assessed on the indemnity basis.

47. In *John v Price Waterhouse*,[14] which Chadwick P cited with approval in *Weavering*, Ferris J was asked to award indemnity costs under what he referred to as the Court's ordinary jurisdiction to award costs or, alternatively, on what he termed the "Articles basis" which was a claim to indemnity costs pursuant to contract.

48. Ferris J refused to entertain the application under the Court's ordinary jurisdiction as the successful party had previously stated that he was not seeking indemnity costs and the Court had accordingly ordered costs on the standard basis. He held that the Court's general jurisdiction under section 51 of the Supreme Court Act to make an order for the applicant's costs was *"exhausted"*, the order for costs having been perfected.

49. With respect to the claim to be entitled to contractual costs, Ferris J held that the Court could give effect to the right to an indemnity without the need for fresh proceedings if there was clearly no defence to it so that, if fresh proceedings were commenced, summary judgment would be given in favour of the party claiming the indemnity. In the case before him, it was far from clear that there was an entitlement to costs under the Articles. As the issues raised were not appropriate for determination on a summary application, the learned Judge held that the successful defendant would have to bring fresh proceedings.

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[14](2002) 1 WLR 953

50. In the course of his judgment, Ferris J set out the principle for ordering an assessment on an indemnity basis under contract:

> "17. *The interaction of a contractual right to indemnity costs and the jurisdiction of the court under section 51 was considered by the Court of Appeal in* Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2*) (1993) Ch 171, (1992) 4 All ER 588 … A subsidiary issue* [in Gomba's case] *was the extent, if at all, to which the mortgagee's contractual right to its costs, charges and expenses on an indemnity basis was affected by the fact that during the course of proceedings orders had been made for the borrower to pay some of the mortgagee's costs taxed on the standard basis. The judgment of the court, delivered by Scott LJ, was to the effect that the contractual right was unaffected.*
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> "18. *In the course of its judgment the Court of Appeal stated a number of principles which emerged from the authorities which it considered. So far as material these were as follows [1993] Ch 171, 194:*
>
> > *"(i) An order for the payment of costs of proceedings by one party to another party is always a discretionary order: section 51 of the 1981 Act.*
> >
> > *"(ii)* ***Where there is a contractual right to the costs, the discretion should ordinarily be exercised so as to reflect that contractual right…"*** [my emphasis]

51. There have been several decisions since *Gomba* where the Courts have ordered litigation costs be assessed on an indemnity basis because it was what the parties bargained for. The principle was applied by Mrs Justice Moulder in *Alafco Irish Aircraft Leasing Sixteen Ltd v. Hong Kong Airlines Ltd* [2019] EWHC 3668 (Comm) construing a provision in a lease that provided that:

> *"the Lessee shall pay to the Lessor on demand all reasonable costs and expenses (including reasonable legal expenses) incurred by the Lessor …….".*

52. Moulder J was satisfied that the defendant had agreed to pay all reasonable costs and expenses incurred in relation to the preservation of rights under the lease, and held that would extend to the costs of any litigation. She ordered that the costs of the proceedings be assessed on the indemnity basis. In her decision she applied the decision of Briggs LJ in *Macleish v. Littlestone.*[15]

53. In *Macleish*, Briggs LJ, giving the judgment of the Court of Appeal with which the rest of the Court agreed, stated that:

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[15] [2016] EWCA Civ 127.

"38 ...It is well settled that when exercising discretion as to the basis of assessment of costs under the CPR, the court should normally do so in a way which corresponds with any contractual entitlement agreed between the parties: see Gomba Holdings (UK) Ltd and Others v Minories Finance Ltd and Others (No 2) [1993] Ch.171 at 190-1 and 194-5. In that case, the relevant contractual basis was set out in a mortgage deed between the parties, and ***was better reflected in an indemnity rather than standard basis of assessment.*** *But the contractual basis may equally appear from a lease between the parties, as in the present case.*

"39. The judge was alert to this general principle. At paragraph 45 of her judgment on interest and costs, she said:

> *"Further, that there is a contractual right to costs incurred in the recovery or attempted recovery of sums due from the Lessee. Under clause 2.12 of the lease, and in principle the discretion should be exercised to reflect the contractual right."*

She then referred to the Gomba Holdings case as authority. But in awarding costs on the standard basis, the judge appears not to have taken on board the need to consider whether the relevant contractual entitlement would best be reflected in standard or indemnity costs.

"40. Clause 2.12 of the Lease provides, so far as is relevant, the following covenant by the defendants as Lessees:

> *"To pay to the Lessor all costs and expenses (including legal costs and fees payable to a surveyor) which may be incurred by the Lessor*
>
> *2.12.1 in or in contemplation of any proceedings under Sections 146 and 147 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court or*
>
> *2.12.2 the recovery or attempted recovery of arrears of rent or other sums due from the Lessee or*
> *..."*

"41. In my judgment, although that phraseology does not refer expressly to an indemnity, it corresponds more closely with assessment upon the indemnity basis than upon the standard basis. This is because of the obligation on the lessee to pay "all costs and expenses .... which may be incurred". The principal difference between the standard

basis and the indemnity basis is that, on the standard basis, costs are recoverable only if proportionately incurred and proportionate in amount, whereas the indemnity basis is not concerned with proportionality and nor is the contract."

54. Although His Lordship expressed the matter of awarding indemnity costs as being well-settled under the CPR, which expressly entitles the court in the exercise of its statutory discretion to award costs to have regard to the costs payable under a contract,[16] the guidance in *Gomba* pre-dates the CPR.

55. In *Weavering*, Chadwick P, in response to the alternative application by the directors for their costs on the indemnity basis, said this:

> *"... it is important to have in mind a restriction on the Court's discretion which is imposed by GCR Order 62 rule 4 (11). The rule is in these terms:*
>
> > *"The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently."*
>
> *"Counsel for the directors accepted that this was not a case in which it could be said that the company, through its liquidators, had conducted the proceedings, or any part of the proceedings, improperly or unreasonably or negligently. She accepted, also, that in those circumstances the Court could not make an order for costs to be taxed on the indemnity basis in the exercise of its jurisdiction under section 24 of the Judicature Law.*
>
> *But, as I have indicated, if the directors were to be successful on their contractual claim, then the restriction imposed by GCR Order 62, rule 4(11) would have no application: GCR Order 62 rule 4(3) provides that the amount payable in respect of costs to which a party is contractually entitled shall not be subject to taxation."*

56. Mr. Sherwood's submissions to the contrary, I do not consider that, in saying that GCR O.62 r. 4(11) restricts the exercise of the Court's discretion to award indemnity costs to cases where the unsuccessful party has conducted the proceedings "*improperly, unreasonably or negligently*", Chadwick P in *Weavering* was deciding that, in the absence of such conduct, an assessment on an indemnity basis could never be ordered. In my view, what *Weavering,* like *John,* decided is that where the contractual entitlement to be indemnified is not clear, and there was no misconduct on the part of the unsuccessful party, costs should be taxed on the standard basis.

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[16] CPR r 44.6

57. This Court's jurisdiction to order indemnity costs under a contract was affirmed by our Court of Appeal in *Bonotto v. Boccaletti*, 2001 CILR 292, where Taylor JA said this at para 64 of the judgment:

> *"The discretion as to costs is, of course, to be exercised only in accordance with principles, as established by the modern authorities. As was observed in this case by the trial judge, only in most exceptional cases will an award of indemnity costs be made,* ***otherwise than under contract or out of a fund."*** [emphasis mine]

58. *Bonnoto* was referred to by the learned Chief Justice in the *AHAB* case, on which Mr. Sherwood relied, in the context of an application by the defendants for costs to be taxed on an indemnity basis following the discontinuance of the action. The Chief Justice stated:

> *"8. Under the Grand Court Rules, O.62, r. 4(6), the amount of costs which a successful party will be entitled to recover from any other party is … the amount allowed after taxation either on the standard or on the indemnity basis - "indemnity basis," in this context, meaning on the basis of whatever was agreed as between the successful party and its attorney…*
>
> *"9. There is guidance to be found in the case law as to the approach to be taken to an application for an award of costs on the indemnity basis in party and party litigation. In* Bonotto v. Boccaletti *(1), the Court of Appeal held that this court has a discretionary jurisdiction (said to be founded in equity) to grant costs on the indemnity basis, but the discretion is to be exercised only in the most exceptional cases (otherwise than where the costs* ***are to be paid under contract*** *or out of a fund).*
>
> *"10. In more categorical terms, GCR, O.62, r. 4(11) states:*
>
> > *"The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently."*
>
> *It is nonetheless recognized that the jurisdiction is wide and flexible, allowing the court to exercise its discretion as the circumstances of the case may require."*
> [emphasis mine]

59. The cases establish that where there is a contractual provision covering all costs, charges and expenses in enforcing an agreement, the discretion should ordinarily be exercised so as to reflect that contractual right. In my view, there is no tension between the provision in O.62, r.4 (11), that litigation costs in the conventional case should not be awarded on an indemnity basis unless there is some conduct justifying it, and the exercise of the Court's statutory *"power to determine by whom and to what extent the costs*

are to be paid" to give effect to an agreement made between the parties that the costs of enforcing that agreement should rest with a particular party. It is consistent with the overriding objective of the Rules to deal with matters justly.

60. In the present case, unlike the cases of *Weavering* and *John,* ZZHK's right to be indemnified in costs is clear. Indeed, Geoswift has not suggested that it would have any defence to such a claim. I consider the appropriate order to be one that reflects ZZHK's contractual entitlement and I order that Geoswift pay ZZHK's costs on an indemnity basis, including the costs of the costs application.

61. With respect to Geoswift's application for the costs of successfully defending Dragon's application, I say that Geoswift's conduct since defaulting on the loan and its opposition to ZZHK's application make it plain that even if Dragon had an executed share transfer document entitling it to be registered in Geopay's Register of Members in substitution for Geoswift, its application to be so registered would have been challenged.

62. In the circumstances, I think the right order is that there be no order for costs.

DATED THE 12th DAY OF MARCH 2021

RAMSAY-HALE J