**Cause No: FSD 2023-0113 (JAJ)**

**IN THE GRAND COURT OF THE CAYMAN ISLANDS**
**FINANCIAL SERVICES DIVISION**

**IN THE MATTER OF HAMMER INTERNATIONAL FOUNDATION**
**AND IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)**

**BETWEEN:**

**THE ARMAND HAMMER FOUNDATION, INC.**

**Plaintiff**

**-and-**

**(1) HAMMER INTERNATIONAL FOUNDATION**
**(2) MARK ALFANO**
**(3) SAMUEL 1 LTD**
**(4) REX ALEXANDER**
**(5) MISTY HAMMER**
**(6) JEFF KATOFSKY**
**(7) RANDALL BARTON**
**(8) RAISHA PARK**
**(9) CECIL KYTE**
**(10) ALEXANDER MENZEL**
**(11) THE ATTORNEY-GENERAL**

**Defendants**

| | |
|---|---|
| **Appearances:** | **Mr Graeme McPherson KC instructed by Mr Matthew Dors of Collas Crill for the Plaintiff** |
| | **Mr John Harris of Nelsons for the Second to Tenth Defendants** |
| | **The First and Eleventh Defendants were not represented and did not appear** |
| **Before:** | **The Honourable Justice Jalil Asif KC** |
| **Heard:** | **4 and 5 November 2024** |
| **Judgment** | **13 December 2024** |

*Court of Appeal Act, s.19(2)—security for costs of appeal—construction of s.19(2)—scope of Grand Court Judge's power to order security—whether security can include unpaid costs orders at first instance*

# JUDGMENT

## A. Introduction

1. By a summons filed on 6 September 2024, the Plaintiff seeks security for its costs in relation to the Second to Tenth Defendants' intended appeals against: (a) my Order dated 13 May 2024 on the Plaintiff's summons filed on 10 May 2024 for an urgent interim injunction; and (b) my Order dated 16 August 2024, following the trial of this action. This case raises a novel question of the proper construction and effect of s.19(2) of the Court of Appeal Act (2023 Revision), on which there appears to be no decided authority. This is my judgment on that application for security for costs.

2. The Plaintiff continues to be represented by Mr Graeme McPherson KC and Mr Matthew Dors, and the Defendants by Mr John Harris, and I am grateful to them for their helpful submissions.

3. I refer to my judgment dated 14 August 2024 following the trial of the originating summons, which sets out my findings on the facts and my conclusions on the substantive issues. I adopt the abbreviations used in my judgment dated 14 August 2024 for the purposes of this judgment, in particular that *"the Defendants"* means the Second to Tenth Defendants in the action. I refer also to my judgment dated 16 May 2024 on the Plaintiff's application for an injunction and my judgment dated 6 November 2024 on allocation of the costs of the action for the background context.

## B. Relevant procedural history

4. I can briefly summarise the relevant procedural history as follows:

   4.1 On Friday 5 April 2024 I adjourned the trial of this matter that was listed to commence on Monday 8 April 2024 on terms that it was to be re-listed on 3 June 2024 (recorded in my order dated 9 April 2024). Prior to and during the hearing of the Defendants' application for the adjournment, the Defendants volunteered that they would pay the Plaintiff's costs thrown away by the adjournment of the trial on the indemnity basis. I adjourned the question of the amount of the payment on account of costs that the Defendants should pay.



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4.2 On Friday 19 April 2024, having heard further argument on the costs issues, I ordered that the Defendants should make a payment on account of the Plaintiff's costs thrown away and of the application for the payment on account in the total sum of US $213,000 by 26 April 2024. I rejected the Plaintiff's application for a debarring order if the Defendants did not make that payment on account in time. In the event, the Defendants made the payment on account approximately one week late.

4.3 On Monday 13 May 2024, I acceded to the Plaintiff's application filed on Friday 10 May 2024 for an urgent interim injunction until after trial to restrain the Defendants from acting or purporting to act on behalf of Cayman Hammer without the express agreement of Viktor Hammer and Jim Fraser. The context for the Plaintiff's application was a US Chapter 11 bankruptcy filing by Cayman Hammer in California, alleged by the Plaintiff to have been initiated by or on behalf of the Defendants with the intention of interfering with the progress of the Cayman proceedings. I ordered that the Defendants should make a payment on account of the Plaintiff's costs of that application in the sum of US $45,000 by 4.00 pm on 21 May 2024. On this occasion, I was persuaded by Mr McPherson to make a debarring order if the Defendants did not make the payment on account in time. My reasons for these orders were given in an *ex tempore* judgment delivered on 13 May 2024 which was perfected on 16 May 2024 in relation to the issue of the injunction order only. My reasons included the Defendants' conduct leading up to that Order and the imminent date of the trial. The Defendants did not make the payment on account within the time permitted and have still not done so. They have never applied to me to vary or stay the order for a payment on account nor for more time to comply with it.

4.4 As a result of the Defendants' default, the debarring provision in the Order came into effect on 22 May 2024, so that the Defendants were not permitted at trial to advance a positive case in defence of the Plaintiff's originating summons nor to prosecute their counterclaim. Again, the Defendants have never applied to me to vary or stay the debarring provision in the Order.

4.5 Following the trial in June 2024, I gave judgment on 14 August 2024, finding in favour of the Plaintiff, and made an Order dated 16 August 2024 dealing with the immediate outcome of the trial.

4.6 On 4 October 2024, I made an Order dealing with consequential matters, requiring the Defendants to deliver up Cayman Hammer's assets, books and records, to provide accounts of



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Cayman Hammer's financial position from 1 January 2020 onwards, and to swear affidavits confirming the truth of those accounts by 18 October 2024.

4.7 Following hearings on 4, 21 and 25 October 2024, at which the Defendants were permitted to play a full role, I gave a further judgment dated 6 November 2024 dealing with the costs of the proceedings, by which I ordered the Defendants to pay the Plaintiff's costs of the action on the indemnity basis and to make a payment on account of those costs in the sum of US $1.3 million within 28 days, i.e. by 4 December 2024, which was embodied in an Order dated 7 November 2024.

5. On 23 May 2024, the Defendants filed a Notice of Appeal against my Order dated 13 May 2024. The Defendants have also filed Grounds of Appeal dated 26 June 2024. As already mentioned, the Defendants have not made any application to vary or stay my Order dated 13 May 2024.

6. On 2 September 2024, the Defendants filed a Notice of Appeal against my Order dated 16 August 2024. The Defendants have not so far filed any Grounds of Appeal. They have not made any application to vary or stay my Order dated 16 August 2024 either.

7. The Defendants have not so far filed any Notices of Appeal against my Orders dated 4 October 2024 and 7 November 2024.

8. As a response to the Defendants' intended appeals, the Plaintiff has filed the summons now before me seeking security.

## C. Jurisdiction

9. I was told in argument that the Defendants did not initially accept that I have jurisdiction to determine the Plaintiff's summons. Notwithstanding that the originating summons is now the subject of appeals to the Court of Appeal, I clearly have jurisdiction to determine the question of security for the appeals. The source is s.19(2) of the Court of Appeal Act (2023 Revision), which provides:

> *"19(2) The appellant shall, at the time of lodging the notice of appeal required by subsection (1), deposit in the Grand Court the sum of fifty dollars as security for the due prosecution of the appeal together with such further sum as security for costs of the appeal as* ***a Judge of the Grand Court*** *may direct, and such security for costs may be given by the appellant entering into a bond by themselves and such sureties and in such sum as the Judge of the Grand Court may direct,*

*conditioned for the payment of any costs which may be awarded against the appellant and for the due performance of the judgment of the Court."* (emphasis added)

10. As a fallback position, the Plaintiff relies on s.33 of the Court of Appeal Act, which states:

> *"33. All the powers conferred by this Act, any other law or rules of court on a single Judge may, for all purposes, be exercised by a judge of the Grand Court in the same manner as they may be exercised by a single Judge and subject to the same provisions and such exercise shall, for all purposes, be as valid as if that power had been exercised by a single Judge:*
>
> *Provided that, on the application of a party aggrieved by it, the Court, as duly constituted for the hearing and determination of appeals under this Act, may review and discharge or vary any exercise of any of such powers by a judge of the Grand Court under this section."*

By virtue of s.2 of the Act, a "single Judge" means a single judge of the Court of Appeal.

11. In my judgment, this provision does not avail the Plaintiff. This is because neither the Court of Appeal Act nor the Court of Appeal Rules confers any power on a judge of the Court of Appeal to order security for the conduct of a civil appeal. There is therefore no power *"conferred by this Act ... or rules of court on a single Judge ..."*, as required by s.33 of the Act, which power can then be exercised by a Grand Court Judge "sitting up" as a judge of the Court of Appeal. The position is different for criminal appeals, where the Court of Appeal does have express power under Rule 42(4) of the Court of Appeal Rules to order an appellant to give security in respect of any payment ordered by the court below, and so a Grand Court Judge could properly exercise that power under s.33 of the Act.

## D. Issues for determination

12. The Plaintiff seeks US $300,000 as security in respect of the Defendants' appeal against my Order dated 13 May 2024 and a further US $500,000 as security in respect of the Defendants' appeal against my Order dated 16 August 2024 following the trial. However, the Plaintiff's application is not limited to security for its anticipated costs of the intended appeals. The Plaintiff additionally seeks security in respect of the costs it has already incurred at first instance, and in particular the two outstanding payments on account of costs which I have ordered the Defendants to make but which they have not, totalling US $1.345 million. Thus, overall, the Plaintiff seeks security in respect of the appeals in the global sum of US $2.145 million.

13. In considering whether to order security for the costs of the appeal, and in what sum, the Plaintiff argues that the court has a general discretion. This comes from the use of *"may direct"* in s.19(2) of the Court of Appeal Act. The Plaintiff contends that the task of the court is to do what is *"just"*

between the parties. The Defendants do not appear to dispute that this is the appropriate test, subject to the proper scope of s.19(2) of the Act.

14. Notwithstanding the existing debarring order, the Plaintiff has taken the pragmatic position that the Defendants should be permitted fully to defend the application for security for costs and the Defendants have done so.

15. Shortly before the hearing of the Plaintiff's summons, the Defendants confirmed that they do not oppose orders for security for the costs of the intended appeals in principle. The Defendants also indicate in their skeleton argument that they accept that the appeals should be stayed pending their compliance with any order for security for costs, and also that the Defendants should be debarred from pursuing the appeals if they fail to provide the security ordered within the time allowed.

16. Where the parties diverge is in relation to the Plaintiff's submission that the effect of s.19(2) of the Court of Appeal Act is that I have power to order security as to costs already incurred and outstanding between the parties within the first instance proceedings.

17. In addition, the Defendants take issue with the quantum of the security sought by the Plaintiff in respect of its costs of the appeals. The Defendants' position is that the Plaintiff's costs estimates are manifestly excessive in amount.

18. The issues for determination can therefore be summarised as follows:

    18.1 Does the court have power under s.19(2) of the Court of Appeal Act, or on another basis, to order security in respect of costs already incurred at first instance?

    18.2 Should the court order security in this case?

    18.3 What should be the quantum of any order for security in this case?

    18.4 What should be the time-period within which the Defendants should provide the security ordered?



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## E. Is there power to order security for costs already incurred at first instance?

### *E.1 Jurisdiction under section 19(2) of the Court of Appeal Act*

19. The relevant clause within s.19(2) of the Court of Appeal Act provides that the security should be:

> *"… for the payment of any costs which may be awarded against the appellant and for the due performance of the judgment of the Court."*

20. By contrast, GCR O.23, r.1(1), which deals with the power to order security for costs at first instance, provides:

> *"… having regard to all the circumstances of the case, the Court … may order the plaintiff to give such security for the defendant's **costs of the action** or other proceedings as it thinks just."* (emphasis added)

The terms of GCR O.23, r.1(1) are thus significantly broader than those of s.19(2) of the Court of Appeal Act in that they encompass the *"costs of the action"* without limitation as to whether those are costs already incurred or to be incurred.

21. Within s.19(2) of the Court of Appeal Act there are two elements to the security that may be ordered: (a) security for the costs that may be awarded against the appellant – in other words, prospective security for the costs likely to be incurred in responding to the appeal, analogous to the security that can be ordered under GCR O.23, r.1 for proceedings at first instance; and (b) security for *"the due performance of the judgment of the Court"*, which means the judgment of the Court of Appeal: see the definition of *"Court"* in s.2 of the Act. The dispute between the Plaintiff and the Defendants concerns the meaning and effect of the second element of the security that the Court may order under s.19(2) of the Act.

22. The gist of the Plaintiff's argument is that the second limb of s.19(2) of the Act must mean something and must have a purpose, otherwise the words would not have been included. The Plaintiff contends that *"the judgment of the Court [of Appeal]"* can include an order upholding the decision of the Grand Court judge, including any orders for costs made by that judge, so that *"security for the due performance of the judgment of the Court [of Appeal]"* is broad enough to include security for payment of any outstanding costs orders made at first instance.

23. The Defendants respond that if *"the due performance of the judgment of the Court [of Appeal]"* was intended to cover security for the costs incurred at first instance, s.19(2) of the Act could easily have

included words to achieve that result such as *"or other proceedings"* as is used in GCR O.23, r.1(1). The fact that Parliament did not draft s.19(2) of the Act in that way is an indicator that it did not intend s.19(2) to extend to obligations arising out of the first instance proceedings, and that I should be very slow to conclude that it should be construed so as to do so.

24. In support of its position, the Plaintiff relies on the judgment of Parker J in *Re Performance Insurance Company SPC (in official liquidation)* (unreported, 4 October 2023). This was a decision made by the learned judge on the papers, without hearing oral argument. The judgment does not summarise the parties' arguments as to the power to order security for incurred costs, so I do not have any insight into how their positions were advanced. For the reasons that I now set out, I have concluded that there are a number of difficulties with *Re Performance Insurance Company SPC* that have the result that, whilst the outcome was undoubtedly correct, in my judgment it should not be considered to be authoritative as to the power to order security for costs in respect of an appeal.

25. The relevant passage in Parker J's judgment concerning jurisdiction is extremely short, and simply says at paragraphs [8] and [9]:

> *"8. The OL seeks to appeal on behalf of a company that is in liquidation. There is insufficient evidence before the Court to show that the shareholders' outstanding costs as awarded by the Court will be met, as well as their costs to be incurred in resisting the appeal.*
>
> *9. The Court has jurisdiction to award security for costs in respect of a prospective appeal from a Cayman Islands company. There is also jurisdiction to award security, not just as to future costs, but those already outstanding between the parties. The Court has concluded that it would be just to do so in this case."*

It is necessary to analyse paragraph [9] carefully.

26. In a footnote to the first sentence of paragraph 9, Parker J referred to s.33 of the Court of Appeal Act as the source of his jurisdiction to make an order for security for costs. Parker J makes no reference to s.19(2) of the Act in his judgment, and there is no indication that that provision was drawn to his attention by counsel, either in relation to jurisdiction or as to the circumstances in which security can be ordered. It therefore appears that Parker J considered that he was sitting as a single judge of the Court of Appeal for the purpose of determining the application for security for costs, notwithstanding the express terms of s.19(2) of the Court of Appeal Act.

27. In my judgment, that was jurisdictionally incorrect for the reasons set out earlier in this judgment. In summary: first, because the power to order security for costs of an appeal is bestowed by s.19(2) of

the Act on a Grand Court Judge alone; and secondly, because the Act and the Court of Appeal Rules do not expressly give the Court of Appeal any power to order security for costs of a civil appeal and so s.33 of the Act does not encompass any such power that can be exercised by a Grand Court Judge sitting as a judge of the Court of Appeal.

28. Thus, it appears that Parker J proceeded on a flawed jurisdictional and procedural basis in *Re Performance Insurance Company SPC*, both as to the jurisdiction he was exercising and the capacity in which he was doing so.

29. As to the substantive proposition expressed in the second sentence of paragraph [9] of Parker J's judgment, namely that the power to order security for costs in an appeal covers incurred costs, the learned judge cited *Walkers v Arnage* [2021] (2) CILR 277 at paragraphs [54]-[57] (CICA). However, I agree with the Defendants' contention before me that *Walkers v Arnage* was an appeal concerning the exercise of the power to order security for costs under GCR O.23, r.1 within first instance proceedings, and not the jurisdiction under s.19(2) of the Court of Appeal Act (or under s.33) to order security in respect of an appeal.

30. In *Walkers v Arnage*, the Court of Appeal accepted, without any discussion, that security for costs under GCR O.23, r.1 can include incurred costs as well as future costs. That is not controversial in light of the broad terms of GCR O.23, r.1 set out earlier in this judgment, and is confirmed in the editorial commentary at paragraph 23/3/39 of *The Supreme Court Practice 1999* as having a long pedigree:

> *"Security for costs is not necessarily confined to future costs, but may, when applied for promptly, be extended to costs already incurred in the suit (*Brocklebank v King's Lynn Steamship Co. *(1878) 3 CPD 365);* Massey v Allen *(1879) 12 Ch.D. 807;* Procon (Great Britain) Ltd v Provincial Building Co. Ltd *[1984] 1 W.L.R. 557; [1984] 2 All E.R. 368, CA)."*

31. However, I agree with the Defendants that *Walkers v Arnage* is not applicable to and does not shed any light on the scope of the differently worded power to order security for costs of an appeal under s.19(2) of the Court of Appeal Act. I therefore conclude that *Re Performance Insurance Company SPC* provides no assistance on the question whether security for costs in relation to an appeal under s.19(2) of the Act can include costs already incurred at first instance.

32. The parties have not been able to identify any Cayman authority on the construction and effect of s.19(2) of the Court of Appeal Act nor any case where there was detailed consideration of the approach to ordering security for costs of an appeal.

33. Counsel's research indicates that the phrase *"… the due performance of the judgment of the Court"* in s.19(2) of the Act was inherited from or based on wording within s.256 of the Judicature (Resident Magistrates) Act, which is a Jamaican statute first enacted in 1928 and revised or amended on various dates since then. This Act applied within the Cayman Islands before 1975, when the Court of Appeal Law 1975 was enacted. What is now s.19(2) of the Court of Appeal Act was included within that Law as s.16(2). Whilst the Court of Appeal Act has gone through a number of amendments and revisions since 1975, it appears that the only change to s.16(2) has been its renumbering as s.19(2) of the current revision of the Act.

34. It is not clear when the relevant wording in s.256 of the Judicature (Resident Magistrates) Act was introduced in Jamaica, but it is clear from counsel's researches that it was before 1975. Section 256 of that Act remains in force in Jamaica. However, counsel have not put before me any materials from Jamaica indicating whether the wording in question has been considered by the courts in Jamaica. Nevertheless, what this historical and geographical diversion does make clear is that the reference in s.19(2) of the Court of Appeal Act to the *"judgment of the Court"* is not an accidental error that should read *"the Grand Court"* but was intentional.

35. Finally, in terms of potential guidance on the construction question, the law and Rules in England & Wales and in Hong Kong are in quite different terms from the Cayman Islands, so they are not a source of useful assistance. The former RSC O.59 r.10(5) permitted the English Court of Appeal to order security for costs *"in special circumstances"*. This language is preserved in RHC O.59, r.10(5) in Hong Kong. However, there is no equivalent to RSC O.59 in the Grand Court Rules because the Court of Appeal Rules apply instead. Further, *"special circumstances"* is clearly a different test to that in s.19(2) of the Court of Appeal Act.

36. I therefore have to construe the words of s.19(2) of the Court of Appeal Act without the benefit of any guidance from previously decided cases on this or similarly worded statutory provisions. In doing so, I remind myself of the following general rules of construction:

36.1 Words should be given their ordinary and natural meaning in context. This includes that ordinary words should be given their ordinary meaning and technical terms given their technical meaning; and that they should be construed within the relevant Act as a whole, to avoid internal inconsistencies.

36.2 Where this gives an absurd result, then the sense of the word can be modified, as minimally as possible, to give sense to the provision in question.

36.3 When the wording is ambiguous, and there is evidence that the statutory provision was aimed at a particular mischief, the court can resolve that ambiguity to support that aim, i.e. to avoid the mischief which the Act is intended to address. Ambiguities and absurdities may also be resolved by referring to Hansard in appropriate cases (*Pepper v Hart* [1993] AC 593 (HL).

36.4 Under the modern approach to construction, the court may be willing to take a more purposive approach to interpretation of the provision in question, where there is ambiguity in the drafting.

37. In my judgment it is not an ordinary and natural meaning of the phrase *"... the due performance of the judgment of the Court [of Appeal]"* that it should embrace the performance of all outstanding judgments or orders of the Grand Court in the first instance proceedings. This is for the following reasons:

37.1 Section 2 of the Act defines *"Court"* as meaning the Cayman Islands Court of Appeal. It is not an ordinary and natural meaning of those words that they should include the Grand Court, which is a different, sub-ordinate, body. Section 2 of the Act includes a separate definition of *"Grand Court"* to mean the Grand Court for the Cayman Islands, which indicates that Parliament was well aware of the difference between the two bodies. *"Court"* therefore means, and is intended to mean, the Court of Appeal and does not include the Grand Court. The focus of s.19(2) of the Act should therefore be on what orders the Court of Appeal may make in relation to the appeal, not on what happened before the Grand Court.

37.2 The fact that Parliament intended the focus of s.19(2) to be on the judgment of the Court of Appeal is a strong pointer against the Plaintiff's contention that enforcement of Grand Court orders should come in through the backdoor for the purpose of security for costs by the potential affirming of such orders by the Court of Appeal.

37.3 In the majority of cases, when the Court of Appeal determines an appeal, it gives a judgment either allowing or dismissing the appeal. If it dismisses the appeal, the relevant orders of the



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Grand Court Judge stand and the only orders made by the Court of Appeal are likely to be as to leave to appeal to the Judicial Committee of the Privy Council and as to the costs of the appeal. In this situation, *"... the due performance of the judgment of the Court"* does not obviously or naturally include performance of any judgments or orders made by the Grand Court Judge, which are separate and distinct from the judgment of the Court of Appeal.

37.4 On the other hand, if the Court of Appeal allows an appeal, then the Court of Appeal may set aside the orders of the Grand Court Judge appealed against and will either remit the matter to the judge or to a different judge, or may make orders itself, either as the Court of Appeal or by constituting itself as the Grand Court for the purpose. To that extent, *"... the due performance of the judgment of the Court"* may widen the scope of the orders potentially open to the Court of Appeal. However, this remains conceptually different from performance of the outstanding judgment(s) or orders of the Grand Court.

37.5 In addition, if it allows the appeal, the Court of Appeal will usually overturn any costs orders at first instance that are encompassed within the appeal and is unlikely to make a costs order on the appeal itself in favour of the respondent. Thus, if any security were ordered to be provided by the appellant it would probably be returned. Accordingly, consideration of *"... the due performance of the judgment of the Court"* in the case of a successful appeal for the purpose of security for the appeal also points against enforcing performance of outstanding judgment(s) or orders of the Grand Court.

38. There is also a significant practical difficulty with the Plaintiff's proposed interpretation that *"... the due performance of the judgment of the Court"* includes all outstanding judgments and orders of the Grand Court. This is because the Court of Appeal can logically only consider and affirm or set aside orders to the extent that those orders are the subject of an appeal. If they are not part of the subject matter of the appeal, then I do not see how *"the judgment of the Court"* can be said to embrace such orders.

39. Further, limiting the meaning of *"the due performance of the judgment of the Court"* to the specific orders of the Grand Court that are subject to appeal, which is not the Plaintiff's case before me but would be an intermediate position, still has the consequence that what can or cannot be considered when determining what security for the appeal can be ordered would be entirely dependent on the scope of the appeal and would be inconsistent from case to case. This can be illustrated by considering the situation in this case:

39.1 The Defendants are appealing both my Order dated 13 May 2024 and my Order dated 16 August 2024. Theoretically, on this narrower construction of s.19(2), this puts in play that the Court of Appeal might affirm my Order dated 13 May 2024 that the Defendants should make a payment on account of costs of US $45,000. However, neither of the Defendants' current appeals is against my Order dated 7 November 2024 by which I ordered the Defendants to make a further payment on account of costs of US $1,300,000. This outstanding Order for a payment on account of costs, in respect of which the Plaintiff does seek security, is not part of the subject matter of the appeals and would therefore be outside the matters in respect of which I could order security under s.19(2) of the Court of Appeal Act if this construction were correct.

39.2 The Plaintiff could respond that the 7 November 2024 Order is dependent on the validity of my Order dated 16 August 2024 and could be affected consequentially by the judgment of the Court of Appeal. However, extending *"the judgment of the Court"* to other orders affected consequentially, but which are not directly appealed against, is not an ordinary or natural meaning of the words and requires a further stretching of meaning that takes it past breaking point.

39.3 The argument can be tested further in the following way: suppose the Defendants had not appealed my Order dated 13 May 2024 and had only appealed against my Order dated 16 August 2024. No decision of the Court of Appeal on an appeal limited in that way could overturn the 13 May 2024 Order for a payment on account of costs. The Plaintiff therefore could not include the unsatisfied payment on account of costs as part of the security sought for the appeal despite that it remains outstanding and, on the Plaintiff's approach, is something in respect of which the Court should be able to order security under s.19(2) of the Act.

40. In my judgment, the inconsistent outcome depending on what is under appeal is a strong pointer that the Plaintiff's broad construction of s.19(2) of the Court of Appeal Act is incorrect.

41. Mr McPherson argues forcefully that if s.19(2) of the Court of Appeal Act were not construed in the way contended for by the Plaintiff, then that would leave a serious lacuna for non-resident appellants to exploit, and which the Plaintiff says the Defendants are exploiting. The Plaintiff's argument is as follows:



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41.1 Section 19(3) of the Court of Appeal Act provides that, in the normal case, an appellant who wishes to obtain a stay of the orders of the Grand Court must pay into court *"the whole sum ... found due upon such judgment and the amount of any costs awarded ..."*

41.2 In the absence of a stay, the respondent to the appeal can proceed with execution of the judgment notwithstanding the appeal and, where the appellant is or has assets in the Cayman Islands, that process will be straightforward.

41.3 However, where the appellant is outside the Cayman Islands, enforcement of the orders of the Grand Court is a much more involved, lengthy and costly process for the respondent. Thus, an appellant such as these Defendants (other than the Third Defendant, which is a Cayman company but apparently with no assets) can simply ignore the orders of the Grand Court, can choose not to apply for a stay pending appeal and as a result can avoid the necessity of paying the amount of the judgment and costs into court. The Plaintiff argues that this gives a non-resident appellant a significant unintended procedural advantage over a resident appellant, and leaves the respondent exposed to an additional enforcement risk that they would not face if dealing with a resident appellant.

42. I agree with the Plaintiff that this appears to be the consequence of the wording of s.19 of the Court of Appeal Act and Rules. I have some sympathy with the Plaintiff's complaint that this seems to be an unfair consequence of the drafting, in that a respondent dealing with a non-resident appellant will have to pursue enforcement overseas to achieve the same protection it would obtain under s.19(3) of the Act if the appellant, or its assets, were within the Cayman Islands. However, I do not consider that it is right for me to strain the wording of s.19(2) of the Act to seek to cure this, where doing so requires a reading of s.19(2) that is not its ordinary and natural meaning in context.

43. I therefore conclude that *"... the due performance of the judgment of the Court"* in s.19(2) of the Court of Appeal Act does not include the performance of outstanding orders made by the Grand Court when considering the scope of the security that can be ordered in respect of an appeal to the Court of Appeal.



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*E.2 Jurisdiction under section 5 of the Court of Appeal Act*

44. As a fallback, the Plaintiff argues that I can order security for costs, to include the unpaid costs orders made by the Grand Court, under s.5 of the Court of Appeal Act and applying *Re BTU Power Company* [2015] 1 CILR 222. I disagree for the following reasons.

45. In *Re BTU Power Company*, the liquidators of a company in winding up proceedings sought security for costs against the intended appellant, a disgruntled former director. Smellie CJ, sitting as a judge of the Court of Appeal, noted that s.19(2) of the Court of Appeal Act was not available to the respondents because the intended appellant had not yet filed a Notice of Appeal and was still at the stage of seeking leave to appeal. The learned Chief Justice referred to the Court of Appeal's judgment in *Dyxnet Holdings v Current Ventures II Ltd* [2015] 1 CILR 174, holding that the Grand Court has inherent power to order security for costs in winding up proceedings (which are not subject to GCR O.23, r.1). He then held that this inherent power was transferrable to and could be exercised by the Court of Appeal by virtue of s.5 of the Court of Appeal Act. This provides:

> *"5. … for all purposes of and incidental to the hearing and determination of any such appeal and the amendment, execution and enforcement of any judgment made thereon, the Court shall, subject as aforesaid, have all the powers, authority and jurisdiction of the Grand Court …"*

46. However, the learned Chief Justice cautioned that:

> *"11. … In light of the Privy Council decision in* In re Bancredit Cayman Ltd *(as discussed and applied by the Court of Appeal in* Dyxnet Holdings*), it is now settled principle that the inherent jurisdiction, although not extinguished or displaced by statutory rules, will be curtailed in its applicability to any situation to which the rules apply. …"*

47. In my judgment any inherent jurisdiction of the Grand Court to order security for costs in this case is displaced and replaced by GCR O.23, r.1 and s.19(2) of the Court of Appeal Act. There is therefore no residual inherent jurisdiction of the Grand Court regarding security for costs outside those provisions that can be exercised by the Court of Appeal under s.5 of the Court of Appeal Act.

48. In *Re BTU Power Company*, Smellie CJ went on to consider the interaction between s.33 and s.36 of the Court of Appeal Act. However, it is clear that this was not the basis of his finalised judgment, albeit he had considered that those provisions were relevant when expressing his *ex tempore* decision:

> *"10. … I should, however, add that this holding, on the basis of s.5 of the Court of Appeal Law and the decision in* Dyxnet Holdings*, does not reflect the arguments made by either side in the application before me, and it was not the basis of the short judgment I gave during the course of*

> *the hearing, in which I found the basis of the Grand Court's jurisdiction in s.33 and s.36 of the Court of Appeal Law …"*

Whilst Smellie CJ's approach to s.33 and s.36 is therefore persuasive, it does not form part of the *ratio* of his decision in Re BTU Power Company.

49. In any event, the current version of s.36 (revised since Re BTU Power Company was decided) provides as follows:

> *"36. Where, in any case, there is no special provision contained in this or any other Act, or in rules of court, which relate to that case, any jurisdiction in relation to appeals in criminal and civil matters shall be exercised by the Court as nearly as may be in conformity with the law and practice for the time being observed by the Court of Appeal which has equivalent jurisdiction in England and Wales.*

In my judgment, borrowing from the law and practice of the Court of Appeal in England & Wales under s.36 of the Act is not permissible in the situation of this case because the Court of Appeal Act does make express provision for the question of security of costs.

50. Finally, I record that s.5 of the Court of Appeal Act addresses the powers of the Court of Appeal, not the powers of a judge of the Grand Court. In order to exercise any power within s.5 of the Act, I would have to reconstitute myself as a single judge of the Court of Appeal for this purpose. No one in this case has asked me to do so.

*E.3 Jurisdiction under GCR O.23, r.1*

51. For completeness, I record that the wording *"or other proceedings"* in GCR O.23, r.1 might cover appeal proceedings, so that a respondent to an application for leave to appeal could potentially make a cross-application under GCR O.23, r.1 for security for costs to include the intended appeal proceedings. However, that avenue is not available to the Plaintiff in this case because, apart from the current summons for security for costs under the specific jurisdiction of s.19(2) of the Court of Appeal Act, I am now *functus* so far as the first instance proceedings are concerned, having heard the trial, given judgment, recorded that judgment in an order and dealt with all consequential orders and costs.

## F. Should the court order security in this case?

52. The Plaintiff's starting point is that the court has a broad and unfettered discretion when considering security for costs of an appeal under s.19(2) of the Court of Appeal Act. Mr McPherson supports this



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by contrasting the situation of security for costs in respect of an appeal with situations where the question of security for costs arises in other contexts. For example:

52.1 under GCR O.23, r.1 and the authorities on that provision, in particular *Walkers v Arnage Holdings Limited* [2021] 2 CILR 277 at paragraphs [47]-[51], concerning security from individuals ordinarily resident outside the jurisdiction;

52.2 security from a Cayman incorporated company in accordance with s.74 of the Companies Act (2023 Revision), where there is reason to believe that the company's assets would be insufficient to pay its potential liability for costs; and

52.3 the former RSC O.59 r.10(5), which permitted the English Court of Appeal to order security for costs *"in special circumstances"*, and which is preserved in RHC O.59, r.10(5) in Hong Kong, as I have already indicated, and is construed as including insolvency / impecuniosity of the appellant, potential delay or difficulty for the respondent in enforcing a costs order against an appellant out of the jurisdiction, or where the appeal is vexatious or hopeless.

53. The Plaintiff therefore submits that I do not need to consider whether ordering security might be discriminatory against the Defendants, whether or not the Plaintiff would find it more difficult or more costly to have to enforce against the Defendants overseas, whether the Defendants are impecunious and whether an order for security might stifle the appeal – all of which may be relevant factors in other situations. The sole criterion under s.19(2) of the Court of Appeal Act is what is *"just"*.

54. The Plaintiff contends that the court should order the Defendants to give security for the costs of the appeal, including the outstanding payments on account of costs ordered by the Grand Court, for the following reasons.

54.1 The Defendants other than the Third Defendant are resident abroad, and the Third Defendant is a company with no assets.

54.2 The non-Cayman resident Defendants have not put in any evidence to show that enforcement of the Grand Court's orders against them will be no less easy than enforcement would be within the Cayman Islands. The Defendants bear the burden of showing this: see *Elliott v CIHSA* [2007] CILR 163 at [14]-[18], where the respondent to the application put substantive material before the Court to demonstrate that enforcement in the United States would not be significantly more difficult than in the Cayman Islands, and in addition offered an undertaking

not to raise in the United States any of the available grounds for non-recognition of an order or judgment of the Grand Court.

54.3 Whilst the Defendants assert that they are impecunious, the evidence to demonstrate that is very thin or missing. The Defendants have not provided any detailed particulars of their assets and means. Mr Katofsky is the only Defendant who has given any potentially relevant evidence, and he merely says:

> *"I understand that [the Plaintiff is] seeking an order for security in the order of about US$2.2 million. There is no prospect of [the Defendants], again unpaid volunteers for a charity, and all but one of whom are private individuals, being able to find anything close to such a sum."*

The Plaintiff submits that this does not satisfy the requirements for establishing impecuniosity. The Plaintiff relies on the following passages in the speech of Lord Diplock in the House of Lords in MV Yorke Motors v Edwards [1982] 1 WLR 444 at 449C-E and 449H-450A:

> *"... the respondent's written case ... contained the following submissions ...:*
>
> > *(i) Where a defendant seeks to avoid or limit a financial condition by reason of his own impecuniosity the onus is upon the defendant to put sufficient and proper evidence before the court. He should make full and frank disclosure.*
> >
> > *(ii) It is not sufficient for a legally, aided defendant to rely on there being a legal aid certificate. A legally aided defendant with a nil contribution may be able to pay or raise substantial sums.*
> >
> > *(iii) A defendant cannot complain because a financial condition is difficult for him to fulfil. He can complain only when a financial condition is imposed which it is impossible for him to fulfil and that impossibility was known or should have been known to the court by reason of the evidence placed before it.'*
>
> *I see no reason to dissent from those submissions. ... as Brandon L.J. pointed out:*
>
> > *'The fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need.'*
>
> *All that Mr. Edwards himself had sworn was: 'I do not have £12,000 nor is there any likelihood of my raising that* or any similar sum*' (my emphasis). I can see no reason why the Court of Appeal should not be entitled to infer that, although it might be difficult, it would not be impossible for Mr. Edwards to find security, if his defence were put forward in good faith ..."*

Although that case concerned conditional leave to defend on a summary judgment application, Lord Diplock's statement of principle regarding what is needed to demonstrate impecuniosity applies with equal force in the context of an application for security for costs. This approach was followed and applied by Smellie CJ in Ahmad Hamad Algosaibi and Brothers Company v Saad Investments Company Ltd [2016] 2 CILR 208 at [80]-[91].

54.4 The Plaintiff says that the obvious inference to be drawn from Mr Katfosky's statement set out earlier is that the Defendants can provide *some* security but they have failed to put forward any

figure, and have failed to give full and frank disclosure to the Court of their resources and ability to raise funds from their own and other sources so that the Court can ascertain an appropriate figure based on those resources.

54.5 Neither appeal has any real prospect of success.

54.6 The Defendants have not addressed the myriad procedural issues affecting the appeals, which the Plaintiff has raised with them.

54.7 The Defendants have not progressed the appeals in accordance with the Court of Appeal Rules and timetable.

54.8 Neither appeal is being pursued for *bona fide* reasons, and the Court should infer that each appeal is instead motivated by the Defendants' desire to frustrate the judgment and order, and to delay further the consequences of their misconduct coming home to roost.

54.9 Unless the Defendants are ordered to provide security, there is no realistic prospect of the Plaintiff receiving its costs before the Grand Court and in respect of the appeals from the Defendants.

54.10 For all of these reasons, as it was put in *Walkers v Arnage* at paragraph 52, *"there is a real risk that enforcement of a Cayman Islands costs award would be not only delayed but substantially obstructed or ultimately frustrated."*

55. Mr McPherson argues that, ultimately, the court should ask itself whether it is just in all the circumstances that the Defendants should now be able to pursue their appeals: (a) without first having to provide security for the costs liabilities that have already been ordered against them; and (b) without ensuring that the Plaintiff is able to recover its costs from the Defendants when the appeals fail. I infer that the Plaintiff also relies on Mr McPherson's argument about the Defendants' ability to circumvent the requirement of s.19(3) of the Court of Appeal Act to pay the amount of the judgment into court because they are not resident in the Cayman Islands.

56. As indicated earlier in this judgment, the Defendants concede in principle that security should be ordered for the costs of the appeals. Mr Harris reminds me that whatever order I make cannot be discriminatory because of the operation of the Bill of Rights. Subject to that, he agrees that the question is what is *"just"*. He argues that the court should take into account the following features in determining that question:



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56.1 My costs order following the trial is directly attributable to the judgment being appealed. The effect of the debarring order was to exclude the Defendants from participation in the trial, and the final adverse costs order against the Defendants was the ultimate consequence of that interlocutory order.

56.2 The Defendants have not sought a stay of enforcement of the costs order pending appeal, and the Plaintiff is free to pursue enforcement if it wishes to do so.

56.3 Whilst the Defendants are resident abroad (apart from the Third Defendant), the Plaintiff has not put forward any evidence that enforcement will be more onerous in the United States than it would be in the Cayman Islands. I pause here to note that there is a dispute between the Plaintiff and the Defendants as where the burden lies on the question of ease of enforcement – whether it is for the Defendants to show that it will be no more onerous or whether it is or the Plaintiff to show that it will be so.

56.4 The Defendants are impecunious, and I should give credence to Mr Katofsky's statement in his (unsworn) affidavit that they will find it difficult to find US $2 million at short notice.

56.5 The appeals have real merit. The debarring order was not justified and was disproportionate to the Defendants' minor procedural breaches that had occurred and had the draconian effect of shutting out the Defendants from participating in the trial.

57. There was no dispute between the parties that I should order security in respect of the Plaintiff's costs of responding to the appeals. I therefore do so.

58. The issue is whether I should order security in respect of the outstanding payments on account of costs. If I had concluded that s.19(2) of the Court of Appeal Act does permit security to be ordered in respect of outstanding orders of the Grand Court, I would have determined that the exercise of my discretion should be in favour of including the unpaid orders for payments on account of costs within the security for the appeals, essentially for the reasons advanced by the Plaintiff.



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## G. What should be the quantum of any order for security for costs?

*G.1 Appeal costs*

59. The Plaintiff contends that the Notices of Appeal indicate that the Defendants intend to attack every aspect of the orders in question, and that the extensive scope of the appeals has a direct effect on the Plaintiff's likely costs of resisting the appeals.

60. The Plaintiff has adduced evidence that its anticipated costs of the appeals are:

60.1 US $442,000 in respect of the appeal against my order dated 13 May 2024; and

60.2 US $651,000 in respect of the appeal against my order dated 16 August 2024.

61. However, there is a repeated calculation error in the Plaintiff's document setting out its estimated costs of the appeals in that the figures for disbursements have been omitted from the totals. The true figures for the Plaintiff's anticipated costs of the appeals, including disbursements, are therefore:

61.1 US $467,000 in respect of the appeal against my order dated 13 May 2024; and

61.2 US $676,000 in respect of the appeal against my order dated 16 August 2024.

62. The Defendants have not put forward their own analysis of the likely costs to be incurred or a critique of the Plaintiff's estimates. Instead, the Defendants have asserted in correspondence dated 17 October 2024 put before me that:

> *"... The two appeals are intimately connected and will inevitably be heard as a single appeal, which will not require a hearing of more than one day. Leading counsel's fees should not be in excess of US $100,000, with the same amount allowed for instructing attorneys."*

The Defendants' skeleton argument dated 25 October 2024 makes a similar point.

63. Mr Katofsky asserts in his (unsworn) affidavit that:

> *"4. ... the amounts claimed [are] manifestly excessive. The appeals are inter-related and should be disposed of in a single hearing, which is unlikely to occupy the Court for more than a day ... I have personally handled many appeals as a lawyer and am familiar with the time, effort and costs of such matters. Typically, appeals of this type for a managing partner like myself (close to 40 years of experience) cost less than US $100,000."*

Whilst that might be Mr Katofsky's experience in the United States, I take judicial notice that appellate practice in the United States is very different from the approach in the Cayman Islands. In the United States, the Courts of Appeal generally expect extensive pre-hearing written briefing and



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limited oral argument – often as little as 15 minutes. The opposite is the case in the Cayman Islands, with skeleton arguments expected to be short and to the point, with the issues to be explored and developed during oral argument. I therefore do not give any credence to Mr Katofsky's assertions as to the likely length and cost of the appeals in the Cayman Islands.

64. The Plaintiff responds to the Defendants' position that the appeals are unlikely to be heard on one day and are unlikely to be heard together, increasing the time and work required to respond to them. The Plaintiff suggests that the Court of Appeal will first have to consider whether or not to set aside the debarring order and will then separately consider the substantive appeal against my judgment and order following the trial. I am sceptical that this would be the approach of the Court of Appeal, because, even if the Court of Appeal considers that there is merit in the Defendants' appeal against the debarring order, the Court of Appeal could still conclude that the proviso in s.5 of the Court of Appeal Act applies, namely:

> *"… provided that no judgment of the Grand Court shall be altered or reversed in any case in which the Court is satisfied that the effect of the judgment is to do substantial justice between the parties."*

I consider there is a real prospect that the Court of Appeal will wish to hear both appeals together so that, if persuaded there is merit in appeal against the debarring order, it can consider whether the overall outcome nevertheless does substantial justice between the parties, having regard to the findings made at trial.

65. In addition, I have sympathy for the Defendants' submission that the total time anticipated by the Plaintiff to be devoted to the appeals is excessive. As Mr Harris stated in argument, the Plaintiff's total projected time to be spent on both appeals is 1,135 hours, which is equivalent to more than 141 days' work (assuming 8 hours per day), and more than 28 weeks (assuming a 5-day working week).

66. Doing the best that I can to review the Plaintiff's estimated costs and disbursements, I conclude that reasonable figures as security for the two appeals are as follows:

66.1 US $150,000 in respect of the appeal against my Order dated 13 May 2024; and

66.2 US $200,000 in respect of the appeal against my Order dated 16 August 2024.

I have determined these figures by considering the Plaintiff's costs estimates and reducing the number of hours proposed for each fee-earner, for each phase and for each appeal to figures that I consider are more reasonable.



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*G.2 Outstanding costs in the Grand Court*

67. The Plaintiff seeks security in respect of both of the outstanding payments on account of costs that I have ordered, totalling US $1.345 million.

68. For the reasons expressed earlier in this judgment, I do not consider that s.19(2) of the Court of Appeal Act encompasses the outstanding payments on account of costs that I ordered the Defendants to make. Nevertheless, if I am wrong on that, then I would have ordered the Defendants to make those payments as part of the security required for the appeals.

68.1 As Mr McPherson argued, it does not strike me as being "just" that the Defendants should be permitted to pursue their intended appeals without having to comply with the orders for payments on account or, at least, to pay those sums into court to await the outcome of the appeals.

68.2 The evidence adduced by the Defendants falls a long way short of demonstrating their impecuniosity. I agree with Mr McPherson that the Defendants have failed to provide the Court with the information that it is entitled to see regarding their financial positions and their ability to raise funds before determining that they are genuinely impecunious.

## H. What should be the time period within which the Defendants should provide the security ordered?

69. The Defendants have not put forward any specific proposal as to the time that they will require to provide the security ordered. In his unsworn draft affidavit dated 16 October 2024, Mr Katofsky says:

> *"6. I understand that the [Plaintiff] are seeking an order for security in the order of about $2.2 million. There is no prospect of the [Defendants], again, unpaid volunteers for a charity, and all but one of whom are private individuals, being able to find anything close to such a sum. ...*
>
> *7. Each [Defendant], as well as [Cayman Hammer] itself, may have personal, business and/or umbrella insurance coverage to defend and/or indemnify these matters. There is very little understanding of Cayman law in the US, either procedurally or factually for this matter. For a US lawyer and/or insurance broker or adjuster, it is almost incomprehensible. Complicated insurance evaluations and analysis need to take place, which each carrier likely to have to obtain outside legal counsel, possibly in both countries in order to determine applicability and coverage. To my knowledge, thus far, more than a dozen insurers on the same number of policies have been tendered by each party to the various insurers to evaluate for coverage. There are more to follow in the coming days. Based upon my over three decades of experience in legal insurance matters, the coverage analysis and inevitable fights between carriers over responsibility and priorities of coverage will take many many months to unfold. ..."*

70. As noted earlier in this judgment, the Defendants have not put any information before me regarding their financial standing and ability or inability to pay beyond bare assertion. They have had ample opportunity to do so and to make arrangements to raise funds whilst this application for security has been on foot.

71. There is no basis to justify delaying the time within which the Defendants should provide security. My order is that the Defendants shall do so within 28 days.

## I. Stay of appeals and debarring order

72. As I noted earlier in this judgment, the Defendants concede that their appeals should be stayed pending provision of the security ordered, and that the appeals should automatically be dismissed if my order for security is not complied with. I will therefore include those provisions in the order on this application.

## J. Costs etc

73. Within 14 days of handing down of this judgment, counsel should indicate: (a) whether they wish to be heard on costs and any consequential matters, providing their agreed available dates and time estimate for a hearing; or (b) whether they will submit written submissions on those points within 14 days. In either case, counsel should provide a draft order, agreed if possible, in advance of the hearing or with their written submissions.

**Dated 13 December 2024**

**THE HONOURABLE JUSTICE JALIL ASIF KC**
**JUDGE OF THE GRAND COURT**