IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD 161 of 2018 (NSJ)

IN THE MATTER OF THE COMPANIES ACT (2018 REVISION)
AND IN THE MATTER OF CHINA SHANSHUI CEMENT GROUP LIMITED

BETWEEN:

TIANRUI (INTERNATIONAL) HOLDING COMPANY LIMITED

Petitioner

AND

CHINA SHANSHUI CEMENT GROUP LIMITED

First Respondent

ASIA CEMENT CORPORATION

Second Respondent

CHINA NATIONAL BUILDING MATERIAL CO. LTD

Third Respondent

Before:	**The Hon. Mr Justice Segal**
Heard:	**22 November 2022** **Final skeleton arguments submitted 3 February 2023**
Appearances:	**Mr Tom Lowe KC instructed by Mr Corey Byrne of Ogier appeared for the Petitioner** **Mr Vernon Flynn KC and Mr Jern-Fei Ng KC instructed by Mr Denis Olarou of Carey Olsen appeared for the First Respondent** **Mr David Allison KC instructed by Ms Shelley White of Walkers appeared for the Second Respondent** **Mr Peter McMaster KC, Mr Daniel Coelho and Mr Damon Booth of Appleby appeared for the Third Respondent**
Draft judgment circulated:	**23 October 2023**
Judgment handed down:	**30 October 2023**

JUDGMENT ON COMPANY'S COSTS OF DISCOVERY

Introduction

1. This judgment deals with the application of the First Respondent (the "Company") for an order that its costs of giving discovery be paid by the Petitioner, the Second Respondent ("ACC") and the Third Respondent ("CNBM").

The Company's position

2. The Company submits that it should be entitled to its costs in full and seeks an order that its costs be taxed, to the extent not agreed by the Petitioner, ACC and CNBM, on the "*payment out of a fund*" indemnity basis pursuant to CWR O.24 r.8(1) (as opposed to in GCR O.62 r.4(11)) so that its foreign lawyer fees, disbursements and third-party provider costs will be recoverable subject to the usual indemnity basis reasonableness test.

3. The Company has also proposed a process for the submission, review and payment of its costs as follows:

(a). it will provide the parties with regular fee estimates and prior notification in the event the estimates are to be exceeded.

(b). the Company will provide the parties with periodic invoices and the parties will have 30 days from receipt of the invoices to communicate any objections to the Company. Any objections must identify specific items/entries against which the party objects and be supported by reasons.

(c). if no objections are made within 30 days, the invoices are payable in full within a further 30 days (so 60 days from original receipt).

(d). if objections are made within the prescribed time and the parties are unable to resolve their differences by agreement, the resulting disputes are to be resolved in taxation at the end of the discovery exercise (i.e. when the Company confirms to the parties that it has disclosed all the documents that it is required to disclose). The discovery exercise will be treated as having come to an end for the purpose of determining the timing of the said taxation exercise notwithstanding (i) the progress or lack of progress of the discovery made by the other parties; (ii) any subsequent change to the scope of discovery; (iii) any challenge in respect of the sufficiency of the discovery given; and (iv) any subsequent discovery application made by any of the parties. The undisputed portion of the invoices shall be paid within 60 days from the date of the invoice.

4. The Company submits that it is settled that a company should not fund *inter partes* disputes between its shareholders out of the company's assets (*Re Freerider Ltd* [2009] CILR 604, at [37]) and that the inevitable corollary of this fundamental principle is that where shareholders involved in an *inter partes* dispute require a company to assist them by giving discovery, the costs of this discovery should be funded by the shareholders involved in the *inter partes* dispute and not by the company.

5. The Company relied on the judgment of Justice Ramsay-Hale (as she then was) in *Re Virginia Solution SPC Ltd* (unreported, FSD 5 of 2020, 23 August 2022). In that case a winding-up order had been made on the petition of one shareholder, which petitioner had been opposed by the other shareholder. The successful petitioner sought costs orders against the unsuccessful respondents in respect of the petitioner's costs and also of the company's costs of and incidental to the petition. The company's costs related to discovery, courtroom presentation services, trial transcription services and costs associated with arranging a neutral venue for witnesses to give evidence. Justice Ramsay-Hale ordered the company's costs (including costs of discovery) to be paid on the indemnity basis. At [37] – [38] she said this (underlining added):

> *"37. Mr Potts contends that these costs should be borne by the Company (through its Segregated Portfolio A), which would result in Valley Health indirectly bearing those costs in proportion to its 69% interest in the portfolio. I consider that this would be wrong in principle as such an order would penalise Valley Health on costs even though it was the successful party, as Mr. Faulkner submits. I also accept Mr. Faulkner's submission that the prohibition in the Rules against costs being paid out of the assets of the Company, where the matter proceeds on an inter partes basis, necessarily includes the costs incurred by the Company in those proceedings.*
>
> *38. In making the order that Augusta pay the Company's costs to be taxed on the indemnity basis, I also take into account the fact that it was agreed between the parties during the course of the proceedings, contrary to the position now*

advanced by Mr. Potts, that the unsuccessful party would pay the Company's costs."

6. So Justice Ramsay-Hale accepted that the prohibition in CWR O.24, r.8(2)(b) against the costs of *inter partes* proceedings being paid out of the assets of the company "*necessarily includes the costs incurred by the Company*" in relation to the petition. The Company submits that in the present case to leave the Company to bear *any* of its own costs of the proceedings (including discovery) would amount to financing indirectly the *inter partes* litigation between the Petitioner, ACC, and CNBM out of the Company's assets. For this reason, the Company submits, taxation must be on the indemnity basis. Taxation on the standard basis would be wholly inappropriate since the Company is not in *inter partes* proceedings against any of the Petitioner, ACC, or CNBM.

7. The Company submits that the jurisdictional basis for the Company's costs to be paid on the indemnity basis, as is demonstrated by Justice Ramsay-Hale's reasoning at [37] of *Re Virginia Solution*, lies not in GCR O.62, r.4(11) (for the Company does not say that any party is conducting these proceedings "*improperly, unreasonably or negligently*") but rather in CWR O.24, r.8 (which governs the basis of taxation in liquidation proceedings). CWR O.24, r.8(2) states as follows:

> *"2) In the case of a contributory's winding up petition under Order 3, Part III, the general rules are that—*
>
> *a) if the Court has directed that the company itself is properly able to participate in the proceeding, the general rule is that the costs of a successful petitioner be paid out of the assets of the company; or*
>
> *b) if the Court has directed that the winding up petition be treated as an inter partes proceeding between one or more members of the other members or members of the company as respondents, the general rule is that none of the costs should be paid out of the assets of the company and the unsuccessful parties should pay the costs of the successful party, such costs to be taxed on the standard basis unless agreed . . ."*

8. The Company says that the importance of the distinction between the two jurisdictions was explained by Jones J in *Re Wyser-Pratte Eurovalue Fund Limited* [2010 (2) CILR 233]. That case involved a contributory's winding-up petition. Justice Jones held that the petitioner had made out a case for relief on the just and equitable ground but declined to make an immediate winding-up order, instead making alternative orders and adjourning the petition. He also ordered that the petitioner's costs incurred up to the date of the case management hearing be paid out of the assets of the company to be taxed on the indemnity basis if not agreed. A dispute then arose as to whether the legal fees payable by the petitioner to its US lawyers were in principle recoverable under that order. In deciding that they were, Justice Jones said this at [8]-[13] (underlining added):

> *"8 In order to understand the true purpose and effect of the various rules relating to taxation contained in Part IV of GCR, O.62, it is important to remember that the rules relate to bills of costs rendered pursuant to two quite different types of order. Orders for costs fall into two distinct categories, namely:*
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> *(1) orders for the payment of costs out of a fund; and*
> *(2)* inter partes *orders whereby one party is ordered to reimburse costs incurred by his opponent.*
>
> *9. Orders of the first type are routinely made in favour of fiduciaries responsible for administering assets and often also made in favour of the beneficiaries on whose behalf the assets are being administered. The Financial Services Division of this court frequently makes orders in favour of trustees and official liquidators to the effect that their costs of proceedings be paid out of the assets under administration. The court may make similar orders in favour of a beneficiary of a trust, a creditor of an insolvent company or a shareholder of a solvent company in liquidation. The court's jurisdiction to make such orders is not derived from GCR, O.62. In the case of the examples I have cited, the jurisdiction derives from the Trusts Law and the rules made pursuant to the Companies Law. <u>The general principle is that the</u>*

fiduciary (or the beneficiary, if he is acting in the interest of the beneficial class as a whole) is entitled to be indemnified in respect of the legal fees and expenses incurred in respect of any legal proceedings except insofar as they are incurred improperly or unreasonably. Given the nature of this country's financial services industry, fiduciaries routinely instruct foreign lawyers for a huge variety of different reasons, and it would be wholly inappropriate for the Grand Court Rules Committee or the Insolvency Rules Committee to make any attempt to regulate the sources from which an official liquidator or any other fiduciary might properly seek legal advice which will be paid for out of the funds under administration. This principle applies equally to the case of a beneficiary whose legal fees are being paid out of the fund in circumstances where he is deemed to be acting in the interests of the beneficial class as a whole. In my judgment, the order for costs which I made in favour of the petitioner pursuant to CWR, O.24, r.8(2)(a) falls into this category. Such orders are always made on the indemnity basis.

10. *The rationale for making orders for costs of the second type is fundamentally different. The general principle is that a successful party to any proceeding should be able to 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. By definition, such parties are acting against each other's interest. They are incurring legal fees for the purpose of advancing their own case and damaging their opponent's case. The jurisdiction to make such orders for costs is derived from s.24 of the Judicature Law (2007 Revision) and Part II of GCR, O.62. The policy reasons for regulating* inter partes *orders (sometimes referred to as "party-and-party orders") are different from the reasons for regulating orders for the payment of costs out of a fund. Absent misconduct,* inter partes *orders are always made on the standard basis.*

11. *GCR, O.62, r.18 applies to* inter partes *orders. Its purpose and effect is to protect the unsuccessful party from the financial consequences of the successful party's decision to engage both local lawyers and foreign lawyers.*

The overriding objective, expressed in GCR, O.62, r.4(2), is that the successful party should recover from the opposing party the reasonable costs incurred in conducting the litigation in an "economic, expeditious and proper manner." The opposing litigant's expectation of recovery and risk of payment are complementary. The successful party's expectation of recovery is limited to the reasonable amount necessary to conduct his case economically, expeditiously and properly. Engaging foreign lawyers is not improper and will not necessarily cause delay, but it is inherently uneconomic. Engaging foreign lawyers, who are not admitted as attorneys in the Cayman Islands, inevitably results in some duplication of work and some extra cost. Rule 18 is intended to protect a party from the financial consequences of his opponent's decision to conduct his case in an extravagant manner by engaging foreign lawyers in addition to local lawyers. Rule 18 is also intended to deter litigants from conducting their case through unqualified persons who are not subject to the disciplinary regime applicable to Cayman attorneys, including those who are temporarily admitted. The limitation upon recovering the cost of engaging foreign lawyers is intended to apply to inter partes *orders which are always liable to be taxed on the standard basis (absent misconduct on the part of the paying party). The same policy considerations do not apply, or at least with the same force, in the context of orders for the payment of costs out of a fund, made in favour of a person having a fiduciary responsibility for administering the fund or in favour of a person having a beneficial interest in the fund.*

12. *An* inter partes *order for costs to be taxed on the indemnity basis can only be made under Part II of GCR, O.62 if the court 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."…*

13. *The petitioner's order for costs was made pursuant to CWR, O.24, r.8(2)(a). Such orders are properly characterized as orders for payment out of a fund. It follows that the order was made on the indemnity basis, and the limitations which would be imposed by GCR, O.62, r.18 upon an* inter partes *order do*

not apply. The petitioner is entitled, in principle, to claim reimbursement of fees paid to its foreign lawyers whether or not they were temporarily admitted as Cayman attorneys."

The Petitioner's position

9. The Petitioner, ACC and CNBM agree that in principle the Company is entitled to reimbursement of its costs incurred in giving discovery. However the Petitioner argues that:

(a). the Company should only be entitled to reimbursement of these costs where it can show that they were necessarily and properly incurred and that it has in fact and in substance acted neutrally. The question whether and to what extent the Company is entitled to indemnification (including whether taxation is to be on the standard or indemnity basis) should be left to the conclusion of the proceedings or until the Company's participation is definitively concluded. The extent to which the Company has properly and reasonably incurred the costs it claims and acted neutrally can be determined at the trial and after the event but cannot easily be determined before the discovery exercise is completed and reviewed.

(b). a pre-emptive costs order is not appropriate in the circumstances of this case. The Court should adopt the approach taken in cases where a trustee seeks a pre-emptive costs order and should only make a prospective costs order if it is satisfied in advance that it is bound to exercise its discretion to award an indemnity in respect of costs at the conclusion of the proceedings. The Petitioner noted that the principles on prospective or pre-emptive costs orders are set out in *Re Biddencare* [1994] 2 BCLC 160 and *McDonald v Horn* [1995] 1 All ER 961 and that in *Alsop Wilkinson v Neary* [1996] 1 WLR 1220, Lightman J held (at 1226) that: "*it must appear that the judge at the trial could properly exercise his discretion only by ordering that the applicants' costs be paid out of the trust estate."*

(c). in this case, the Court cannot be confident that such an order will be made because the experience of the Company's conduct to date suggests that it will not act

neutrally during discovery and the costs it has incurred thus far cannot be said to have been properly and necessarily incurred or even reasonable. The costs which the Company has been incurring and for which it seeks advance payment so far have nothing to do with neutral participation and are in themselves unreasonable and disproportionate.

(d). in these circumstances, the Court should not decide at this stage the basis on which the Company is entitled to its costs of discovery and should not make an order for interim payments. In the alternative, if the Court decides that some interim payments should be ordered, the Company's proposed orders and process are inappropriate. Instead:

(i). the Company should only be paid 60% of the total incurred costs per invoice, even where the Petitioner raises no objections, as would be ordered where costs are to be taxed on the ordinary standard basis. The invoices will be reviewed at the conclusion of discovery when any disputes regarding the level of fees incurred are resolved. The Company should not benefit from an order which entitles it to all of its costs pre-emptively given that there are outstanding questions regarding the reasonableness of its costs and the basis of taxation.

(ii). the Company should only be entitled to be paid for costs incurred above its fee estimate with the agreement of the Petitioner (and ACC and CNBM).

(iii). the Petitioner should be allowed more than 30 days in which to review interim invoices and given 90 days to arrange payment of undisputed invoices (or the undisputed parts of an invoice).

(iv). the Petitioner should not be bound to pay an invoice merely because it has failed to lodge an objection within the 30 day (or other) period.

(v). the Company should not be entitled to reimbursement of its costs of instructing foreign lawyers who have not been granted limited admission in

this jurisdiction for the purpose of these proceedings (save that the costs of PRC advice obtained in respect of any documents that engage the PRC's secrecy laws would be covered). These costs are completely unnecessary and there is no justification for the Petitioner (or ACC and CNBM) to meet them. To the extent that the Company wishes to instruct an additional set of attorneys then it is at liberty to do so but it cannot expect the Petitioner (or ACC and CNBM) to meet those costs.

(e). it should only be responsible for one-third and not 50% of the Company's costs. An equal apportionment is the equitable approach. It would be unfair for the Petitioner to have to bear 50% of the total costs when there are three distinct parties to the Petition Proceedings each of which has generated their own work for the Company. The Petitioner, ACC and CNBM have each generated distinct and significant workflows for the Company. In particular, the extent of the Company's discovery obligation is directly correlated to the issues arising from the pleadings, which were significantly broadened by ACC and CNBM's lengthy Defences which introduce separate and related narratives, much of which is irrelevant to the Petitioner's central contention. The fact that the Petitioner has sought discovery from the Company in respect of a number of issues which were introduced by the other parties is nothing to the point. The Petitioner has been required to deal with the allegations raised by ACC and CNBM and would not be seeking that discovery otherwise.

10. The Petitioner argued (in its skeleton argument dealing with the Company's application for a costs order rather than in evidence adduced for that purpose) that the Company has to date failed to act neutrally even when it professed to do so. The Company is not represented by an independent professional or an insolvency practitioner who is an officer of the Court. There is nothing axiomatic about the Company's independence: it remains under the control of ACC and CNBM and has a vested interest in the outcome of the Petition Proceedings and is not a mere bystander (as is evidenced by the fact that it commenced proceedings in Hong Kong shortly after the Petition Proceedings were started in which its statement of claim largely duplicates its Defence, to which the Defences of ACC and CNBM also refer) in the Petition Proceedings. The Company's

participation at the most recent case management conference in the Petition Proceedings on 22 November 2022 was entirely partisan and non-neutral. The Petitioner submitted that the discovery costs order to be made on the Company's application must reflect and take into account these circumstances.

11. The Petitioner in its skeleton argument argued that the Company's reliance on the decision in *Re Wyser-Pratte Eurovalue Fund* to justify interim payments of indemnity costs in this case was misconceived because of what the Petitioner claimed was the failure by the Company to act neutrally and properly such that it could not be said that the Company had been and would be acting in the interests of the shareholders as a whole. The Petitioner also referred to the reasons given in Ogier's 19 January 2023 letter to the attorneys for the Company, ACC and CNBM (see SCM-5 at 14). In that letter Ogier said that the Petitioner did not accept that *Re Wyser-Pratte Eurovalue Fund* supported the Company's application for costs on an indemnity basis because the costs award there had been made after trial and involved an award of costs to the petitioner who had invoked a class right. Here the Company is unable to show at the interlocutory stage that it is acting in the interests of the beneficial class, namely the shareholders, as a whole.

The Company's response to the Petitioner's position on the authorities

12. The Company submitted that the fact that the order in *Re Wyser-Pratte Eurovalue Fund* was made after trial was irrelevant. The Company was either entitled to have its costs taxed on the indemnity basis or it was not. The time and stage in the proceedings when the decision as to basis for the payment of costs was taken was irrelevant. To the extent that the Petitioner wishes to argue that the Company has incurred costs in a partisan manner inconsistent with its neutral role, the appropriate time and place for that argument was on taxation by putting forward a case that certain costs were unreasonably incurred. The Petitioner's various allegations that the Company had already incurred unreasonable costs (which the Company rejected) were equally irrelevant to the decision as to the appropriate basis of taxation. The appropriate forum for any such allegations was once again the taxation process.

13. In addition, the Company submitted that the Petitioner was wrong to claim that the decision and reasoning in *Re Wyser-Pratte Eurovalue Fund* could be distinguished because the case related to a claim to costs by a petitioner invoking a class right. In the context of discovery, the Company is in fact acting "*in the interests of the beneficial class* [i.e. the shareholders] *as a whole*" (see *Re Wyser-Pratte Eurovalue Fund* at [9]) and that justified an order that the Company be indemnified fully for its costs. Since the Company is not itself defending (or pursuing) the Petition Proceedings, the Company has no private interest in giving discovery. It is merely assisting the shareholders who are engaged in an *inter partes* dispute and, in that sense, acting for the benefit of that shareholder class as a whole. Therefore the Company is effectively in the same position in this case in respect of discovery as the petitioner was in *Re Wyser-Pratte Eurovalue Fund* in respect of its costs of the case.

14. The Company also argued that the Petitioner was wrong to claim that the Company's costs should be taxed on the same basis as a trustee's costs. No authority had been offered for this proposition and there were none. The Company is not a trustee. This is not trust litigation. The costs issues are governed by CWR O.24, r.8.

ACC and CNBM's position

15. ACC adopts a neutral stance as to the detail of the arrangements by which the Company is to be indemnified on an interim basis for its costs of complying with any orders that the Court makes for its discovery in the Petition Proceedings. In the event that the Court makes orders for the indemnification of the Company, ACC has proposed that liability for the payment of those costs ought to be apportioned so that 50% is paid by the Petitioner and 50% is shared equally between itself and CNBM. ACC argues that its proposal, at this stage and in principle, appears to be the most likely distribution of costs at the end of the Petition Proceedings. In the event that the Petitioner is successful, then it is likely that ACC and CNBM would be ordered to pay the Company's costs of its compliance with its discovery obligations, and would share that obligation to pay. If the Petitioner were to be unsuccessful then it is most likely that it would be required to pay the costs of the Company. As such, there is an inherent asymmetry in the likely incidence of costs at the conclusion of the proceedings. ACC submits that the obligation to make

interim payments ought to mirror, insofar as is possible, the parties' respective risk of incurring those costs at the conclusion of the proceedings. Accordingly, ACC and CNBM ought to share any liability to indemnify the Company on an interim basis, with the result that the Petitioner ought to bear 50% of the costs, and ACC and CNBM ought to share the remaining 50%. ACC's proposal that 50% of the interim costs ought to be borne by the Petitioner also reflected the fact that the Petitioner was the party who had pressed for extensive discovery from the Company.

16. ACC also submitted that the Petitioner was wrong to claim that ACC (and CNBM) should bear an increased liability for interim costs relating to discovery because the Petition had sought to wind up the Company on relatively narrow grounds whereas ACC (and CNBM) had filed voluminous defences which the Petitioner considered to be irrelevant and which had increased the scope and cost of discovery. ACC maintained that each of the issues on the List of Issues was properly an issue for discovery and reflected a factual question upon which the parties had joined issue in their pleadings. The Petitioner had joined issue in its pleadings in respect of each of the 37 issues and there was no basis for characterising individual issues as arising solely on "the Petition" or "the Defences". ACC also denied that it controls the Company. The question of whether, and to what extent, ACC and CNBM exert influence over the affairs of the Company was a matter that was in dispute in the present proceedings.

17. CNBM argues as follows:

(a). the Company should be entitled to recover its reasonable costs of providing discovery.

(b). the party ultimately liable to pay these costs should be identified at the conclusion of the Petition Proceedings (when it would be clear who had been successful).

(c). the quantification of the Company's costs should take place in a single assessment at the conclusion of the Petition Proceedings (to the extent not agreed).

(d). the Petitioner, ACC and CNBM should, in the interim, make interim payments towards the Company's costs.

(e). the liability for such payments should be apportioned in the manner proposed by ACC. If it turns out that the Petitioner is ordered to pay the Company's costs, if it is only required to pay one third by way of interim payments it will have benefitted from most of the interim payments having been made by ACC and CNBM.

(f). interim payments should be made without prejudice to a paying party's right to raise disputes at a later stage. CNBM says that if a paying party has to raise objections at the time each invoice is presented it will have to apply careful scrutiny to each bill, perhaps in as much detail as would have to be applied for the purpose of a taxation. This would generate unnecessary and disproportionate costs.

(g). interim payments should also be made pursuant to a process that does not involve a presumption that the Company's costs were reasonably incurred (and requiring the paying party to prove that they were unreasonably incurred). The Company will be in possession of most if not all of the relevant information and it would be unfair to adopt a process in which the Company's costs are paid in full unless the paying party objects and proves that the costs are unreasonable.

(h). the Company should not be entitled to interim payments in respect of overseas lawyers (who have not been granted limited admission in the Petition Proceedings). It should only be paid the costs of its Cayman Islands attorneys (and others granted limited admission in the Petition Proceedings). While the Company should be entitled (in a taxation on the indemnity basis) to be paid the costs of foreign lawyers where and to the extent that it can demonstrate that their costs were in the circumstances reasonably incurred, a determination as to reasonableness should be left until the assessment on taxation following the conclusion of the Petition Proceedings.

Discussion and decision

18. Five main issues arise for decision:

(a). what is the basis on which an order for payment of the Company's costs is to be made?

(b). should an order be made at this stage determining the basis on which the Company's costs are to be paid?

(c). if so, what type of costs order should be made?

(d). how should responsibility for payment of the Company's costs be apportioned as between the Petitioner, ACC and CNBM?

(e). should the order provide for interim payments and if so on what basis?

19. It seems to me that the Company is entitled to an order for costs on the indemnity basis. This is because of the rule governing the Company's entitlement to incur (and for the payment of the Company's) costs in respect of a contributory's winding up petition where the matter proceeds on an *inter partes* basis between shareholders. That rule requires that the Company must not spend its own money on costs relating to such proceedings. If it is to be required to take steps in or in relation to the proceedings to assist the other parties then it must be fully indemnified and its costs must be fully covered and reimbursed.

20. This rule is set out in CWR O.24, r.8 (2)(b) (which codifies and reflects the common law rule: see *Re Freerider Ltd* [2009] CILR 604 at [37] and my judgment in *Re China Shanshui Cement Group Limited* [2021 (1) CILR 253] at [34]-[39]). CWR O.24, r.8 (2)(b) stipulates as a general rule subject to a different approach in exceptional and special cases where circumstances justify a departure (see CWR O.24, r.8 (4)) that "*none of the costs*" should be paid out of the assets of the company. This is a clear and unqualified prohibition on any of the costs of and relating to the Petition Proceedings being paid by the company. If a company is to be required to participate in the proceedings to a limited extent by giving discovery, provision must be made for the payment of the costs of doing so by the other parties in full.

21. This was the approach adopted by Justice Ramsay-Hale at [37] of *Re Virginia Solution* (in the sentence I have underlined in the quotation above) which I follow and with which I agree.

22. It seems to me that it is unnecessary and inappropriate to base the power to award indemnity costs to a company that is ordered to participate in, and provide assistance to the other parties in, an *inter partes* contributory's petition on the jurisdiction to award indemnity costs to third parties who bring proceedings for the benefit of all those (or the class of those) interested in the company (such as all shareholders or creditors). The critical principle engaged here is that the Company's assets must not be used to pay the costs of a dispute between its shareholders (and therefore must not be used for the benefit of some only but not all shareholders). The Court will only order the Company to take steps in the proceedings (for the benefit of the other parties) if those parties agree to pay the Company's costs in full.

23. It follows in my view that the Court should only order the Company to give discovery (in relation to the issues requested by the Petitioner, ACC and CNBM and to the extent I have ordered the Company to do so: see my email dated 17 October 2023 setting out my ruling on the disputes regarding the scope of discovery to be given by the Company) on terms that provide for its full costs to be paid by the parties. I see no reason or justification for deferring a decision to that effect.

24. However, since the ultimate responsibility for the payment of the Company's costs cannot be determined at this stage (and must await the conclusion and outcome of the Petition Proceedings) the order to be made at this stage must be that the Company's costs of and occasioned by giving discovery shall be paid by the Petitioner, ACC and CNBM on the indemnity basis in the amounts and proportions subsequently agreed by them and the Company or as ordered by the Court (so that following the conclusion of the Petition Proceedings the Court shall determine which of the parties is to be liable to pay the Company's costs on the indemnity basis and if more than one of the parties then in what proportions subject to taxation on the indemnity basis).

25. It seems to me that the Court should also require that the parties make interim payments in respect of those costs from time to time. The Petitioner argued that this was unnecessary since the Company had failed to adduce evidence that it was unable to pay its costs. But in my view the Company is entitled to interim payments not because of impecuniosity but so as to minimise the use of its own money pending reimbursement in full (to reflect and give effect to CWR O.24, r.8 (2)(b) and the common law rule).

26. It also seems to me that the mechanism and process for making interim payments needs, as CNBM in particular emphasised, to avoid unnecessary expense while balancing the need for the Company to receive rapid reimbursement of as much of its costs as is reasonable without relieving the Company of its obligation to provide adequate information concerning its costs and to justify their reasonableness and proportionality and without prejudicing the Petitioner's, ACC's and CNBM's right to challenge the reasonableness and proportionality of the costs incurred by the Company.

27. In my view, the most appropriate approach is as follows:

(a). the Company shall provide to the Petitioner, ACC and CNBM (the ***Paying Parties***) monthly fee estimates in respect of its costs and expenses (the ***Costs and Expenses***) incurred and to be incurred in relation to and for the purpose of giving discovery in accordance with the orders made by the Court (including the costs of foreign lawyers instructed by the Company for that purpose) explaining in reasonable detail the Costs and Expenses it expects to be incurred, by whom and for what purpose.

(b). the Company will deliver to the Paying Parties each quarter an interim invoice in respect of the Costs and Expenses incurred during the previous three months including Costs and Expenses relating to such foreign lawyers (together with an explanation in reasonable detail of the Costs and Expenses incurred, by whom and for what purpose).

(c). the Petitioner shall pay 50% and each of ACC and CNBM shall pay 25% of 70% of such invoices within 35 days of receipt of the invoice (provided that any of the

Petitioner, ACC or CNBM may object to the fees incurred and payable or paid to such foreign lawyers within 21 days of receipt of the interim invoice and in the absence of agreement with the Company, refuse to pay its share of such fees).

(d). the liability of a Paying Party to pay, and the extent of the Paying Parties' obligations to pay, the Company's Costs and Expenses shall be determined by the Court following the conclusion of the Petition Proceedings and the payment of interim invoices by the Paying Parties shall be without prejudice to and not waive or affect the right of the Paying Party (or Paying Parties) who is (or are) ultimately held by the Court to be responsible for such costs to object to all or part of the Costs and Expenses included in an interim invoice in any taxation or dispute concerning the amount of the Costs and Expenses which it (or they) are required to pay to the Company. In the event that a Paying Party has made payments in respect of interim invoices in excess of the amounts for which it is subsequently held liable to contribute to the Company's Costs and Expenses the other Paying Parties shall reimburse it as ordered by the Court.

(e). the Paying Parties and the Company shall each have liberty to apply (a) in relation to the payment of foreign lawyers' fees included in interim invoices and (b) in the event that circumstances change or these arrangements when implemented can be shown to be operating unfairly.

28. It seems to me that the Paying Parties should be paying a substantial proportion but not all of the interim invoices. A discount of 30% seems to me to be reasonable to take account of the likely discount to be applied on a subsequent taxation on the indemnity basis and potential disputes regarding the reasonableness and proportionality of the Costs and Expenses incurred by the Company. This will reduce the extent to which the Company receives a rapid reimbursement of its costs but this is justifiable where it will be paid a substantial proportion of its costs on a timely basis and is entitled to full reimbursement at the conclusion of the Petition Proceedings subject to the Company establishing that the Costs and Expenses were reasonably and proportionately incurred.

29. It also seems to me that the fairest approach to the apportionment of the interim costs is to split them equally between the competing sides in the Petition Proceedings. Half should be paid by the Petitioner and half by ACC and CNBM. I do not see that there are adequate grounds for imposing a higher burden on one side rather than the other. This is a cash-flow burden as there has been no suggestion that any of the Paying Parties will not be able to repay any overpayment.

30. I note the Petitioner's concerns regarding the manner in which the Company is participating in the Petition Proceedings. But the Petitioner's criticisms and objections to the Company's conduct, and its allegation that ACC and CNBM are controlling and interfering with the Company's decision making in relation to the Petition Proceedings are disputed and are incapable of being resolved at this stage (leaving aside the absence of any evidence being adduced to substantiate them). The Petitioner will be able to raise these (and any other) objections and concerns if it is ultimately held to be liable to pay the Company's costs in the taxation process and the Company will clearly need to be careful to ensure that it is, and can demonstrate that it is, acting impartially and properly. The 30% discount which I have required to be applied to the Company's interim invoices will also accommodate these concerns.

31. I have noted the position taken by the Petitioner and CNBM with respect to the payment of foreign lawyers' fees. There are clearly substantial concerns regarding the extent to which the Company can justify using and requiring the Paying Parties to pay the costs of foreign lawyers although the Petitioner has accepted that there is probably a genuine need for the Company to obtain advice and assistance from PRC lawyers (at least in respect of issues connected with PRC secrecy laws). I do not have any evidence before me as to who the Company is using or who it proposes to engage and on what basis it will seek to be reimbursed for the costs of foreign lawyers. I am therefore not in a position to rule on what approach is reasonable and justifiable. I accept that the Company is likely to be able to justify the use and instruction of at least some foreign lawyers (who have not been admitted in the Petition Proceedings, particularly from the PRC) but consider that the most appropriate approach to adopt at this stage, in the absence of any relevant evidence, is to allow the Paying Parties to object to paying their share of foreign lawyers' fees and to give the Company liberty to apply (with suitable evidence as to which foreign lawyers

it has engaged and for whose costs it seeks reimbursement explaining why they are necessary and its approach is reasonable and proportionate) for an order that the costs of particular foreign lawyers be included in interim invoices and paid by the Paying Parties. I would hope (although in this case without high expectations) that all the parties could reach a sensible agreement on the issue so as to avoid the need for a further application but if that proves to be impossible the dispute can be resolved by the Court on the basis of proper evidence and focussing on the particulars of what has been proposed and the issues in dispute.

32. I shall invite the parties to prepare and seek to agree the form of order to give effect to this judgment. If they are unable to do so within 14 days from the date on which this judgment is handed down, they should file with the Court a form of order identifying the paragraphs which are agreed and those which are disputed with brief submissions supporting their respective positions and I shall settle the order on the papers.

The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
30 October 2023