Neutral Citation Number: [2023] EWHC 2828 (Ch)
Case No: CR-2021-000832

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 10/11/2023

Before : **I.C.C. JUDGE JONES**

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Between :

CHRISTIAN MARK RICHARD EVANS

Appellant

- and -

(1) ANDREW McTEARE
ANTHONY DAVIDSON
(In Their Capacity as Joint Liquidators of the Second Respondent)
(2) PVE CAPITAL LLP (In Liquidation)
(3) PVE CAPITAL LIMITED

Respondents

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Ms Daria Gleyze (Direct Access Counsel) for the Appellant
Mr Sebastian Kokelaar (instructed by **Penningtons Manches Cooper LLP**) for the **Third Respondent**

Hearing date: 17 October 2023

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment is handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 11:00am on Friday 10 November 2023

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I.C.C. JUDGE JONES

I.C.C. JUDGE JONES:

1. The question before me is: what order for costs, if any, should be made after Mr Evans settled his appeal against the rejection of his proof of debt with the Liquidators/PVE Capital LLP (In Liquidation) but not with the Third Respondent, PVE Capital Limited?

2. Mr Evans's case is that there should be no order as to costs on the Appeal as between him and the Third Respondent. In the alternative, the costs of the Appeal as between them should be reserved to the judge hearing a trial of the ***CPR, Part 7*** Claim that he has begun and in which the Third Respondent is one of the defendants. That is because, to a large extent, that claim overlaps the facts and arguments in the appeal.

3. In contrast, the Third Respondent asks for a costs order against Mr Evans on the bases that: (i) the appeal has been discontinued as against the Liquidators/PVE Capital LLP upon terms of a settlement which effectively reflect abandonment of Mr Evans's claim to be a debtor of PVE Capital LLP; (ii) the Third Respondent is to be treated as a successful party, having had a financial interest in the outcome of the appeal because of an obligation (in summary) to indemnify the Liquidators for the payment of creditors and the costs and expenses of the liquidation, and the appeal having been dismissed against it.

4. As to the financial interest, there was some dispute whether that was factually correct during the hearing but without either side having presented evidence to address the (as I understood it) unanticipated dispute by Mr Evans. Mr Kokelaar on instructions explained on behalf of the Third Respondent that within the context of an issue whether it should return a sum in the region of £8 million, the Third Respondent had agreed with the Liquidators to return the amount required to pay the liquidation creditors, the costs and expenses but to retain the balance.

5. I noted during the hearing that those facts were taken from the information supplied by the solicitors acting for the Third Respondent. I decided to accept it as correct based upon the duties they owe the court and the inherent reliability of the solicitors. However, I recognised there could always be innocent error. Therefore I explained that the information was accepted subject to the solicitors double checking its accuracy and informing the Court if it was in fact otherwise. That has not occurred and I proceed on the basis of the financial interest asserted.

6. The settlement between Mr Evans and the Liquidators/PVE Capital LLP is contained in a consent order. It requires Mr Evans to discontinue: (a) his appeal in return for payment of £10,000, in full and final settlement of all and any claims against the Liquidators/PVE Capital LLP, with no order as to costs; and (b) his ***Part 7*** proceedings insofar as it is brought against them and PVE Capital Holdings Limited. It is fair, therefore, to describe the £10,000 payment as a nominal sum when compared with a proof of debt for over £2.3 million.

7. The ***Part 7*** proceedings also include the Third Respondent, a Maltese company, and a connected Respondent, Mr Pucci as parties. However, the claim form has not yet been served on either, there being no permission to serve at the registered office in Malta as against the Third Respondent. The ***Part 7*** claim, which post-dated the appeal, was

stayed pending determination of this appeal (at least as between Mr Evans, the Liquidators/PVE Capital LLP and PVE Capital Holdings Limited). It is agreed for the purposes of the question I have to decide that the factual issues in the ***Part 7*** claim mirror those that would have been heard on the appeal.

8. The task of answering the question identified at the beginning of this judgment is complicated by the fact that during the appeal the parties agreed consent orders addressing (a) the joinder of the Third Respondent as a Respondent to the appeal and (b) case management of the appeal without in either case addressing the roles to be taken by the Liquidators/PVE Capital LLP and the Third Respondent respectively in the proceedings, including at the final hearing. In addition, the joinder consent order left costs reserved.

9. The difficulties this causes can be explained as follows:

   a) Ms Gleyze (only recently instructed by direct access) in her skeleton argument for Mr Evans submits: The reservation of costs was "*primarily for two reasons: (1) to enable the Liquidators and the Applicant to secure disclosure of documents and information from the Maltese Company which would better enable the Appeal to be resolved; and (2) to enable the Liquidators to sort any issues between themselves and the Maltese Company [961-966]. The Applicant specifically reserved its position to argue that the Maltese Company should bear its costs in any event as it was not a necessary Respondent."*

   b) To the extent that is factually correct, it means the parties proceeded to incur costs resulting from the joinder without knowing whether the Third Respondent was to be treated as a respondent or an interested person, and without knowing which of those roles it would have at the trial.

   c) The parties lost the opportunity for the case management hearing to address the issue of who would be doing what at the trial in circumstances of the Liquidators adopting a traditional, neutral stance, and the Third Respondent wanting to pursue active opposition to the appeal because in practice it would be the Third Respondent who would have to pay the debt and costs if the appeal succeeded.

   d) There is now argument in regard to costs as to whether the Third Respondent is to be treated merely as an interested party and/or in any event whether their role should/would have been to simply attach to the coat tails of the Liquidators by merely supporting the case the Liquidators presented through their counsel.

   e) It is an argument which has produced the submission that the Third Respondent is excluded from claiming costs or that their costs should be severely limited by reason of their limited role. Thus Ms Gleyze submits that the fact that the Liquidators claimed to have incurred costs of over £100,000 demonstrates their full commitment to ensuring the appeal was opposed, and it follows that there must be duplication when the Third Respondent also claims costs of over £100,000.

f) That is a submission which would not have arisen had the parties addressed such matters of role summarised above rather than enter into the consent orders without doing so.

g) At the hearing before me, I did not even have consensus as to whether the Third Respondent would have been allowed to take an active part and/or whether the Liquidators would or would not have advanced opposition at the final hearing of the appeal, with or without cross-examination of the evidence relied upon by Mr Evans. Nor did I have bills or schedules of costs from the Liquidators to potentially (but certainly not necessarily) assist identifying the position.

h) An example of the divergence caused by the difficulties is provided by the submission of Ms Gleyze when she pointed to the fact that the witness evidence for the Liquidators included a statement from Mr Pucci, who is in practice the person behind the Third Respondent (it being owned by a discretionary trust of which he is the sole beneficiary). She submitted that the Liquidators would have advanced the Third Respondent's case and tested Mr Evans's evidence based upon the facts and matters relied upon by the Third Respondent. That, as a result, the Third Respondent would have played little, if any, role in the process. In contrast, Mr Kokelaar contended for the Third Respondent that Mr Pucci's evidence is derived from his opposition to the proof of debt and that any active opposition, including cross-examination of Mr Evans, would have needed to come from the Third Respondent at the final hearing, the Liquidators have expressed neutrality.

10. Looking at the overall position, I agree with Ms Gleyze that the Court must be astute to avoid duplication of costs so that Mr Evans, to the extent that he should otherwise pay costs, must not be ordered to pay costs which the Third Respondent should not have occurred because those costs were unnecessary or disproportionate due to the role of the Liquidators.

11. I also agree with Ms Gleyze that the Court should be concerned, as a result, to identify the role of the Third Respondent, and that this involves considering whether the Third Respondent should be treated as an interested party or as a real Respondent.

12. I should stress two points, however, in that context of agreement: (i) the issue is one of substance not of nomenclature; and (ii) there is also an issue of when such consideration will arise; when answering the question or when assessing the quantum of any costs ordered. My agreement, therefore, is subject to applying those matters to the facts relevant to the costs question.

13. I will address this further below but should now mention that there have been numerous other submissions concerning the question of costs including whether the ***CPR*** applies and, if so, which ***Rules*** can be applied. I consider that both counsel advanced their cases to the fullest extent and wish to make clear that I was particularly impressed with Ms Gleyze's advocacy in the face of the difficult points and principles she had to meet. However, the "numerous submissions approach" of counsel meant that the time estimate proved inadequate and judgment had to be reserved for want of time. Without criticising counsel and whilst appreciating the financial importance of costs, I should urge in accordance with the overriding

objective that arguments on costs must normally focus on the main points rather than address each and every possible argument. I will only address those submissions that need consideration within this judgment.

14. The starting point must be to return to the observation made at "(ii)" within paragraph 12 above and observe that the question of who should pay the costs is to be distinguished from the question whether the costs to be claimed are to be assessed as reasonable and proportionate. True there will be grey areas of cross-over from time to time but that can often be addressed by ensuring the costs ordered to be paid are properly described, as opposed to arguing that this grey area needs to be resolved when determining who should pay the costs; a task that may be impractical at that stage in any event because of the absence of the information required to be consider duplication (whether in the context of reasonableness and proportionality or otherwise).

15. In this case, there is a dispute over the role to be taken by the Third Respondent which can be addressed and a dispute that the costs sought might give rise to duplication which will have to await assessment and depend upon the description of the costs that can be recovered, if any, by the Third Respondent; for example, as the only opposing Respondent or as only an interested party.

16. That leads, therefore, to the role of the Third Respondent. Absent its determination prior to the final hearing of the appeal, the Judge hearing the appeal would have addressed the issue at the beginning to avoid duplication. That has not occurred because Mr Evans chose to settle with the Liquidators/PVE Capital LLP, including on terms of "no order as to costs", without addressing the issue of the costs of the Third Respondent. He was entitled to do so but it means that in the absence of further information, the Court must approach this issue of role based upon its knowledge of normal practice applied in the context of the issues evident from the appeal hearing bundle. For that purpose I have the advantage of a list of issues but I have also borne in mind the witness statements (which I have considered without addressing the voluminous exhibits) and the Orders of the Court.

17. It is apparent from the following facts and matters that the Court would have been asked and would have agreed to the Third Respondent adopting an active role whilst the Liquidators took a traditional, neutral approach. In particular:

    a) The Consent Orders anticipated that the Third Respondent would file and serve evidence in answer, as well as the Liquidators.

    b) Resolution of the issues would have involved decisions of fact based upon conflicting evidence between Mr Evans and Mr Pucci, and therefore taking into consideration the evidence from cross-examination. Mr Pucci was connected with the Third Respondent and in real/practical terms its witness.

    c) The Liquidators intended to adopt a "neutral approach" in accordance with their role as office holders. Namely a role to ensure that all relevant facts and matters were before the Court, whether for or against the appeal, and to assist the appeal without having an interest to advance for determination of the outcome. Their interest being to ensure that all creditors are identified including Mr Evans if he could establish that he is a creditor.

d) In contrast, the Third Respondent actively opposed the appeal.

e) The Consent Orders required the Third Respondent to prepare the bundle.

18. In addition, based on the agreement that the issues of fact to be decided mirrored the ***Part 7*** claim, and the fact that Mr Evans agreed to the Third Respondent being a participant in the appeal, it is apparent that Mr Evans and the Third Respondent would or should have been concerned that judgment on the appeal would create issue estoppel(s) for the ***Part 7*** claim to their potential advantage or detriment depending upon the findings. Indeed those issue estoppels might determine the cause(s) of action in the ***Part 7*** claim. As a result, it is also apparent for the purpose of this judgment that both Mr Evans and the Third Respondent would have approached the appeal on the basis that they needed (at least potentially) to succeed as against each other's cases. In other words, on the basis that the role of the Third Respondent would be an active one.

19. The conclusion I have drawn is that whilst there was no cause of action between Mr Evans and the Third Respondent on the appeal, the Third Respondent would have wanted (as is submitted) to take the lead role and the Liquidators would have adopted their neutral role in that context. I also reach the conclusion, without hesitation, that as the Judge hearing the appeal I would have allowed the Third Respondent to take the lead in opposition, and the Liquidators to assist the Court in their neutral role as office holders.

20. Therefore, whether the Third Respondent should have had the nomenclature of an interested party or not, it was joined as a Respondent to the appeal in circumstances of that joinder giving it the opportunity to actively oppose the appeal. There is no doubt it would have taken that opportunity, whilst the Liquidators would have adopted the neutral approach explained above.

21. That does not mean there may not be a duplication of costs, although query if any duplication may be attributable to the Liquidators' bill rather than the Third Respondent's (I know not, the information not being before me). However, it means issues of duplication concern the question whether the costs incurred by the Third Respondent (if a costs order is made in its favour) were reasonable and proportionate for the active role it adopted in the context of that role being carried out with the neutral participation of the Liquidators. That is a potential matter for assessment based upon the Third Respondent's statement of costs.

22. I should also mention, however, Ms Gleyze's reliance when submitting that the Third Respondent should be treated as an interested party not a Respondent upon the following passage in the White Book addressing the costs of interested parties:

> *"Where the claimant is unsuccessful, generally the court does not order that Respondent to pay two sets of costs, that is to say, the costs of the defendant and the costs of the interested Respondent. The court may award two sets of costs where the interested Respondent deals with a separate issue not dealt with by the defendant or where the defendant and the interested Respondent have separate and distinct interests which require separate representation (Bolton MDC v Secretary of State for the Environment (Practice Note) [1995] 1 W.L.R. 1176, HL, R. (Luton BC) v Central Bedfordshire Council [2015] EWCA Civ 537; [2015] 2 P. & C.R. 19, CA, at [80], affirming [2014] EWHC 4325 (Admin), (Holgate J) at [221])." (White Book commentary at 44.2.33)*

23. That passage, and those cases specifically concern judicial review claims. There needs to be some caution before treating proceedings seeking that remedy as analogous to an appeal against a proof of debt decision. There are many differences between the two procedures, their subject matters, and their statutory purposes and backgrounds. Nevertheless, this passage makes the point already made. When addressing costs and the issue of duplication, the court should be concerned to enquire whether the Third Respondent was advancing a positive case which was needed in the context of the liquidator adopting a neutral approach whilst drawing relevant facts and matters and principles of law to the court's attention whether for or against the case of Mr Evans.

24. I conclude that it is plainly correct in this case to address the issue of costs from the perspective of the Third Respondent being entitled and intending to take an active role in the appeal so that it has incurred costs which will not necessarily duplicate those of the Liquidators. As a result, it is proper to consider an order for the payment of their costs by Mr Evans.

25. That conclusion is based upon the assumption that the factual position identified above, namely that the parties had not addressed the issue of role, is correct. To ensure or at least investigate further the factual truth in case matters had been inadvertently omitted from the hearing before me, I asked counsel to prepare a "Note" addressing the circumstances in which the parties agreed the order for cross-examination of witnesses at the final appeal in case there were relevant discussions/agreement concerning the Third Respondent's which counsel were unaware of during the hearing.

26. The Note I have received supports my conclusion to the extent that it appears that: the Liquidators had not intended cross-examination; it was the Third Respondent who sought the direction; and that, in any event, the Liquidators were aware that the Third Respondent was intending to take an active role in the context of their neutral approach.

27. That conclusion leads to the next point. Ms Gleyze also submits that even if it can be argued that the Third Respondent had separate interests and that it was entitled to obtain separate representation, this would be insufficient to justify an order for costs where (a) there were no separate arguments which were referable only to the Third Respondent; and/or (b) there was no conflict of interest between the LLP/Liquidators and it.

28. Without trespassing upon any issue of duplication that may arise on assessment, I disagree for the reasons set out above. In essence, the submission fails because of the distinction in roles and, therefore, approach to the appeal between the Liquidators and the Third Respondent as described. It also fails to recognise the importance of the outcome to the Third Respondent, and the fact that the outcome would probably be determinative of important factual issues relevant to the ***Part 7*** claim and, indeed, would potentially be determinative of the claim.

29. Based upon the list of issues and the matters referred to above, I am satisfied that there would inevitably have been (but for the discontinuance of the appeal) different arguments presented for the Third Party and for the Liquidators. Differences that would be attributable to the distinction between neutrality and active opposition. There was no conflict of interest but only in the sense that or because the Liquidators

were neutral. There were nevertheless different interests. The Third Respondent wanted the appeal to be dismissed, the Liquidators wanted to establish whether Mr Evans was a creditor entitled to share in a distribution. I consider these conclusions sustained by the Note.

30. As for the appropriate costs order, Mr Evans cannot claim to be the successful Respondent as a result of the settlement. The fact that he is to receive £10,000 and no costs out of a claim for £2.3 million speaks for itself. The reality of this settlement is that he has received a nominal sum in return for the end of this appeal and all and any other claims against the Liquidators/PVE Capital LLP without them having to pay his costs.

31. The fact that the appeal is at an end may or may not have ramifications for the ***Part 7*** claim insofar as it remains and is pursued against the Third Respondent. That is not a matter for me to decide. However, for the purposes of the appeal, there will now be no consequential liability on the part of the Third Respondent to pay the £2.3 million odd to the Liquidators and no consequential liability for any costs to be paid by the Liquidators to Mr Evans. Whilst they may need to pay £10,000 and the Liquidators' costs, that is plainly a successful outcome for them even if successful opposition by them at the hearing of the appeal might have produced an even better result by reason of Mr Evans having to pay costs. (As to that, it is to be noted, however, that I am informed that Mr Evans has little financial resources. I infer that the Third Respondent would always have had the potential responsibility for the Liquidators' costs without recovery of them from Mr Evans if that is correct.)

32. In any event the Third Respondent must be seen as the successful Respondent in the context of a dismissal of the appeal when they would have taken the active role described above had the appeal proceeded.

33. Turning now to ***the Insolvency Rules*** concerning the costs of appeals: The only express ***Rule*** is ***14.9*** concerning the costs of the Official Receiver and Office Holders. It was submitted by Ms Gleyze that the existence of a jurisdiction to order costs against a creditor would be inconsistent with the existence of their right to withdraw a proof at any time under ***Rule 14.10***. However, plainly that is not so because withdrawal of a proof when an appeal is extant will still leave the jurisdiction to address the costs of the proceedings.

34. For the purpose of deciding costs, ***the Rules*** are to be read with ***the CPR*** in accordance with the requirements of ***Rule 12.1***. ***The CPR*** is to be applied subject to the disapplication of any of its ***Rules*** by or resulting from any inconsistency with ***the Insolvency Rules***, and subject to the need to make any necessary modifications to apply them in the context of an ***Insolvency Rule***.

35. Although issue was drawn with that proposition in Ms Gleyze's submissions, the fact that ***the CPR*** applies as stated above is apparent from the terms of ***Rule 12.1*** itself in the context of ***Rule 14.1(1)*** providing that ***Part 14 of the Rules*** applies to winding up. Whilst it is correct that the statutory procedure for the making of the Rules is to be found in ***Part XV of the Insolvency Act***, outside, therefore, the express ambit of ***Rule 12.1***, that obviously does not mean ***the Rules*** themselves are outside its ambit when they concern the implementation of provisions and rules concerning ***Parts 1A to Chapter XI of the Insolvency*** Act, which are expressly within the ambit of ***Rule 12.1***.

In other words when addressing the appeal procedure applicable to proofs of debt in a liquidation.

36. In all the circumstances, therefore, Mr Evans by seeking dismissal of the appeal is leaving the adversarial arena having commenced proceedings in which the Third Respondent was entitled to be heard and to take the role of active opposer to the appeal against the rejection of the proof of debt. Dismissal was inevitable because Mr Evans settled the appeal with the Liquidators/PVE Capital LLP but he cannot rely upon that fact to successfully oppose the Third Respondent's application for costs. That is because the settlement plainly represented abandonment of his claim to be a creditor subject only to a nominal payment and the avoidance of having to pay the costs of the Liquidators/PVE Capital LLP. He gave up far, far more than he gained.

37. The reality is that Mr Evans has caused the Third Respondent to incur costs opposing an appeal which he commenced only for him to decide to discontinue that appeal without its final determination. In addition, the Third Respondent is to be viewed as the successful party because of Mr Evans's decision to settle on the terms he did resulting ultimately in this dismissal.

38. In all the circumstances considered above, I have decided in the exercise of my discretion that Mr Evans should pay the costs of the Third Respondent to be assessed if not agreed. Insofar as there will be arguments of duplication or arguments that costs for which payment is sought should not have been incurred, that will be a matter for assessment for which the Third Respondent will be treated as an active Respondent opposing the appeal.

39. It follows that I have rejected the further submission that costs should be left to the Judge determining the ***Part 7*** claim. There is the feature that it has not been served upon the Third Respondent and an issue whether determination will ever be reached which rails against this submission. However, it is also to be rejected when: (i) the question of costs addresses this specialist jurisdiction and its appeal procedures and rules; (ii) the costs order can be determined now; and (iii) it should be determined now because the issues arising address the principles to be applied and decisions to be made as a result of Mr Evans deciding not to pursue the appeal against the Third Respondent by reason of the settlement of this appeal as described.

40. Following dissemination of this judgment in draft, I received submissions in writing concerning assessment which I have been asked to determine without a hearing. The Third Respondent asks for a detailed assessment and a payment on account of £50,000 in respect of a total bill of £104,119.17 (there being no VAT). Mr Evans asks for the detailed assessment to be postponed until the ***Part 7*** claim is concluded when the costs for both proceedings can be assessed together to avoid the risk of duplication. Alternatively because he is impecunious and a payment at this stage would risk stifling the ***Part 7*** claim for which he expects to recover *"largely in excess of the costs sought"* by the Third Respondent. As an alternative the payment of £10,000 on account within 42 days is proposed by him. The submissions are to be found in a series of emails sent to me in a bundle within an email attachment. I will not repeat them.

41. My decision is this for the following reasons:

a) A costs order having been made without a trial having taken place, I would have expected normally to summarily assess the costs. However, in this case I have not been concerned with the substance of the appeal and do not have the necessary knowledge to enable me to summarily assess bearing in mind, in addition, the size of the total costs sought.

b) In those circumstances there should be an order for detailed assessment with a payment on account unless good reason(s) lead to the opposite conclusion (***CPR Part 44, Rule 44.2(8)***). It may be noted that this requirement was introduced from 1 April 2013 to replace the broader discretion using the words *"may order an amount to be paid on account before costs are assessed"*. There is now, in effect, a presumption in favour of an interim payment.

c) The object of ***Rule 44.2(8)*** is to enable the party awarded their costs to recover part of their expenditure before the process of carrying out a detailed assessment and bearing in mind that process can be protracted (see ***Days Healthcare (UK) Ltd v Pihsiang Machinery Manufacturing Co Ltd*** [2006] EWHC 1444 (QB); [2006] 4 All E.R. 233 (Langley J)). It may also: save unnecessary costs when the payor's financial position means they will be unable to pay all the costs in any event; avoid the need for an interim costs certificate; and may reduce the points that might otherwise be argued on assessment (see ***Allason v Random House UK Ltd***, 27 February 2002, unrep., (Laddie J)) and ***Mars UK Ltd v Teknowledge Ltd*** [2000] F.S.R. 138(Jacob J) at 153).

d) Impecuniosity is not a good reason to refuse a payment on account. In ***Bank St Petersburg PJSC v Arkhangelsky*** [2018] EWHC 2817 (Ch) (Hildyard J) at 41-42, the judge rejected the payor's submission that their inability to pay could constitute good reason for not making an interim payment order under ***r.44.2(8)***. Not only am I bound to follow this principle but it is clear that impecuniosity does not alter the obligation to pay costs or for them to be assessed.

e) That does not mean that means is irrelevant when considering how much should be paid and when (see **Excalibur Ventures LLC v Texas Keystone Inc** [2015] EWHC 566 (Comm), Christopher Clarke LJ at [24]). However, in this case there is no evidence before the Court of Mr Evans's financial means. No evidence, for example, of assets, liabilities, income, expenditure and ability to raise funds. A mere statement of impecuniosity is inadequate both generally and when there is an alterative offer of £10,000 in 42 days without explanation as to how that sum can be paid in that time period.

f) The existence of the ***Part 7*** claim is not a good reason for not making an order. The Third Respondent is entitled to their costs attributable (in summary) to their role in the appeal. The existence of other proceedings does not alter that entitlement or their right to ask for an assessment. Insofar as there are grounds for asserting that the interim payment should be reduced because of, for example, duplication, that is a matter for quantum when addressing the interim payment not for a decision whether to order a payment on account.

g) The existence of the ***Part 7*** claim should not cause a stay of the assessment. There is a right to an assessment and any issues concerning duplication are matters to be addressed before the assessor. It may in principle be relied upon, however, to ask for a stay of enforcement of the order for costs.

h) Strictly there is no application for a stay of the costs order made. However, as mentioned above, impecuniosity is a ground presented for a stay of the assessment in the context of an assertion that judgment is likely to stifle the ***Part 7*** claim. It is right, therefore, to address this but only on the following bases:

> First, there is no application for permission to appeal and in any event it is apparent that the tests would not be satisfied. The default position is that there should be no stay. Second, there is no evidence before the Court of Mr Evans's financial means as mentioned above. Third, assuming it can be shown that bankruptcy will result, a trustee can pursue the litigation provided the trustee considers such an approach would be in the interests of creditors. That is an important consideration which would need to take into account available assets, merits, costs and impact upon distribution. In contrast a stay would simply leave Mr Evans to decide whether to dissipate his current assets and/or borrow funds.

i) None of those points have been addressed on behalf of Mr Evans as they would need to be. In addition, the fact that there is an alternative offer of payment of £10,000 within 42 days emphasises the need to address them before an application under ***CPR Part 3, Rule 3.2(2)(f)*** could be considered. It would be wholly inappropriate for a stay of enforcement to be ordered.

j) In all the circumstances an order for payment under ***CPR Part 44, Rule 44.2(8)*** should be made.

42. As to quantum, there have been no costs budgets. In **Excalibur Ventures LLC v Texas Keystone Inc** [2015] EWHC 566 (Comm), Christopher Clarke LJ made the following observations for the purpose of assessing a *"reasonable sum on account of costs"*:

a) There is no "irreducible minimum" test. A reasonable sum depends upon all the relevant circumstances but in particular it will normally be an estimate based on recognition of the fact that the final sum to be ordered to be paid is uncertain.

b) There should be *"an estimate of the likely level of recovery subject … to an appropriate margin to allow for error in the estimation"*.

c) The Judge also said this at paragraph [24]:

> *"In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in*

> *recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment."*

43. In this case I consider it right at this stage to treat the statement of costs presented on behalf of the Third Respondent as high bearing in mind costs are being assessed on a standard basis and that the court will not allow costs unreasonably incurred or that are unreasonable in amount (see ***CPR Part 44, Rule 44.3***). In reaching that view I have taken into consideration in particular the hourly rates used, the time spent on documents, and the size of Counsel's fees.

44. I do so, however, recognising the disadvantage that I have of not having heard the substance of the appeal and bear that in mind. I also do not have the ability to test whether costs claimed should in fact be related to the ***Part 7*** claim, although on the other hand I should and do rely upon the fact that this statement is presented and signed by solicitors, officers of the Court. Nor can I assess (as raised on behalf of Mr Evans) whether there has been any overlap with the costs incurred by the Liquidators, the grey area of overlap relevant to assessment referred to above. On the other hand, the same point arises concerning the presentation of the statement together with the fact that this judgment has identified the role of the Third Respondent in respect of which costs are awarded. As to the alternative offer of £10,000 within 42 days, there is no evidence to explain how that sum can be paid and why 42 days is required.

45. Taking into account all of the matters addressed above and my overview of the statement of costs, I consider a reasonable sum on account of costs to be between £35,000 and £45,000. I will order payment of £40,000. I will allow 28 days which will enable an application to be made, if chosen and if justified, for further time to pay based upon the usual full disclosure of assets, means and ability to pay within any extended time sought.

Order Accordingly