IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO FSD 108 of 2019 (NSJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF DIRECT LENDING INCOME FEEDER FUND, LTD. (IN OFFICIAL LIQUIDATION)

Before:	**The Hon. Justice Segal**
Appearances:	**Richard Millett KC with Simon Dickson and David Ramsaran of Mourant Ozannes (Cayman) LLP for Eiffel eCapital US Fund**
	Tom Smith KC with Mathew Dors and Rupert Stanning of Collas Crill for the JOLs
Heard:	**17 July 2024**
Draft judgment circulated:	**18 July 2024**
Judgment delivered:	**22 July 2024**

HEADNOTE

Application for leave to appeal – in circumstances where a recent decision of another Grand Court Judge had reached a different conclusion and adopted different reasoning on the same issues determined by the judgment under appeal and where permission to appeal that other decision had already been granted – application for a pre-emptive costs order in respect of the appeal if permission granted

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JUDGMENT ON EIFFEL'S SUMMONS FOR LEAVE TO APPEAL AND FOR A PRE-EMPTIVE COSTS ORDER

Introduction

1. This is my judgment following the hearing yesterday (17 July 2024) of the summons dated 21 May 2024 (the ***Summons***) filed by Eiffel e-Capital US Fund (***Eiffel***). The Second Affidavit of Mr Olivier Villedey was filed in support of the applications made in the Summons.

2. The Summons relates to the winding up of Direct Lending Income Feeder Fund, Ltd. (in official liquidation) (***DLIFF***) and my order dated 8 May 2024 (the ***Order***) which gave effect to my judgment dated 13 March 2024 (the ***Judgment***). I use the same definitions as appear in the Judgment.

3. The Summons raises two matters for determination by the Court:

   (a). whether Eiffel should be granted leave to appeal the Order.

   (b). if so, whether a pre-emptive costs order should be made in favour of Eiffel.

4. The Joint Official Liquidators of DLIFF (the ***JOLs***) oppose in part Eiffel's application for permission to appeal. They also oppose Eiffel's application for a pre-emptive costs order and DLIFF's liquidation committee (the ***LC***) support the JOLs' position in relation a pre-

emptive costs order. The Twenty-Fifth Affidavit of Mr Chrsitopher Johnson (***Johnson 25***), one of the JOLs, was filed in response to the Summons.

5. Mr Richard Millett KC appeared on behalf of Eiffel and Mr Tom Smith KC appeared for the JOLs. Since they had filed written submissions the LC was not represented.

6. The context in which Eiffel's application for leave to appeal is made is unusual:

(a). first, many (although not all) of the issues dealt with in the Judgment were also considered and adjudicated upon by Justice Doyle in his judgment in *Re HQP Corporation Ltd* (unreported 7 July 2023) (***HQP Judgment***). The application before Justice Doyle was heard shortly before the application before me in these proceedings and his judgment was handed down before and was referred to in the Judgment. My concerns arising from the listing of two almost simultaneous hearings relating to the same subject matter before two different Grand Court Judges without, at least in my case, the issue being raised with the Court before the hearing of the application were explained at the hearing (I raised the issue at the start of the hearing – by which time substantial sums had been incurred in preparing for the hearing - see the transcript of day 1 of the hearing) and in the Judgment. As I explain in the Judgment, I considered whether simply to follow Justice Doyle's decisions and adopt his reasoning but decided reluctantly that I should not do so. This was because I felt unable to agree with Justice Doyle's decisions or his reasons for these decisions and therefore did not consider that, in accordance with the practice of this Court, I was required to or should, on highly contested points of law, simply follow Justice Doyle's judgment. In consequence, there are currently two recent first instance decisions of this Court which have reached different conclusions and adopted different reasoning on the issues of whether the claims of shareholders for damages for deceit arising out their share subscription are admissible (or are barred) in a winding up and whether, if such claims are admissible, they are subordinated by and subject to section 49(g) of the Companies Act (2023 Revision) (the ***Act***).

(b). secondly, Justice Doyle has already granted leave to appeal in respect of the HQP Judgment (see his judgment dated 11 August 2023). He decided that the there were two issues which in the public interest should be examined by the Court of Appeal, namely whether the decision in *Houldsworth* should be followed in the Cayman Islands and generally the status of foreign (including English) authorities in the law of the Cayman Islands.

(c). thirdly, the appeal of the HQP Judgment has been allowed to proceed independently of an appeal in these proceedings and the HQP appeal was listed to be heard and an attempt was made to open the appeal before the Court of Appeal, before the Order had been sealed (the sealing of the Order had been delayed because of disputes between Eiffel and the JOLs) and before a decision had been made in these proceedings as to whether an application for leave to appeal would be made and if made granted. The Court of Appeal (understandably, in my respectful view, expressing some consternation at the position it had been put in) refused in the circumstances to permit the HQP appeal to proceed and adjourned the appeal to allow any appeal of the Order (and Judgment) to be conjoined with and heard at the same time as the HQP appeal. Eiffel has filed and relied on a copy of the transcript of the hearing before the Court of Appeal on 1 May 2024.

7. At the end of the hearing I informed the parties that I had decided to grant Eiffel's application for leave (subject to clarifying the relevance of and arguments to be made in relation to section 37(7)(b) of the Act) but to dismiss its application for a pre-emptive costs order (leaving it open to Eiffel to apply to the Court of Appeal for such an order if it wished to do so). I said that I would promptly provide a written judgment explaining my reasons for these decisions which I now do.

The Judgment and the Order

8. In the Judgment I decided that the Misrepresentation Claims are admissible to proof and, if admitted, are payable *pari passu* with any admitted Redemption Claims.

9. The relevant parts of the Order provide that:

> *"1. The JOLs may exercise their function of adjudicating claims on the basis that any claims from investors of DLIFF based upon asserted misrepresentations by DLIFF in relation to their subscriptions for shares in DLIFF (Misrepresentation Claims) are not barred as a matter of law solely due to the fact that DLIFF is in liquidation.*
>
> *2. Before any such claims from investors of DLIFF based on asserted misrepresentations are adjudicated, claims by external non-shareholder creditors must first be adjudicated upon and if admitted to proof, be suitably provided for or paid in full by the JOLs.*
>
> *3. In the event that any Misrepresentation Claims are admitted the JOLs are directed to pay such claims pari passu with any admitted redemption claims."*

The application for leave to appeal

The applicable law

10. There is no dispute as to applicable principles to be applied on an application for leave to appeal.

11. The general test is whether the appeal has a real (i.e. realistic, not fanciful) prospect of success. In exceptional circumstances, leave will be granted even where no such prospect exists if the appeal involves an issue which should be examined by the Court of Appeal in the public interest, e.g. when a public policy issue arises, or a binding authority requires reconsideration. If the Court is unsure whether leave should be granted it should refuse leave and allow the Court of Appeal to decide the matter (see *Telesystem International Wireless Incorporated v CVC/Opportunity Equity Partners L.P* [2001 CILR Note 21] per

Sanderson J and Morrison J.A in *Select Vantage Inc v Cayman Islands Monetary Authority* at [26], CICA, unreported, 21 September 2017).

The basis on which Eiffel seeks leave

12. Eiffel now seeks leave to appeal, with a view to seeking an order from the Court of Appeal that either the Order be set aside or alternatively that paragraph 3 of the Order be varied so that any admitted Redemption Claims are paid in priority to any admitted Misrepresentation Claims.

13. Eiffel has filed a draft Memorandum of Grounds of Appeal (the ***Memorandum***). Eiffel asserts and relies on two grounds of appeal. The first ground (***Ground 1***), which Eiffel labels the Proof Point, relates to the admissibility of Misrepresentation Claims (see [5] and [6] of the Memorandum). In summary, Eiffel asserts that I erred in law in holding that the applicable common law rule only precluded a shareholder with a damages claim in deceit from proving in the winding up to the extent that external (non-member) creditors had not been paid in full or provided for. Eiffel maintains that there is an absolute bar on the admission of such shareholder claims. The second (***Ground 2***), which Eiffel labels the Priority Point, relates to the relative priority of Misrepresentation Claims and Redemption Claims (see [7]-[14] of the Memorandum). Eiffel claims (once again, in summary) that I erred in law in holding that Misrepresentation Claims and Redemption Claims rank *pari passu* in the winding up. Eiffel maintains that Redemption Claims have priority since the holders of such claims are at the date of the winding up creditors and no longer members (they are former members) while the Misrepresentation Claimants remain members of DLIFF, and creditors rank ahead of members (and former members who are creditors rank ahead of continuing members). Eiffel argues that section 49(g) should be applied so as to give higher priority to former members (the redemption creditors) over continuing members and this approach was supported by *dicta* in both the decision of the Eastern Caribbean Supreme Court in *Somers Dublin Ltd v Monarch Pointe Fund Ltd* and of the Court of Appeal and the Privy Council in *Re Herald Fund SPC* ([2016] 2 CILR 330 and [2017 (2) CILR 75). Eifel relies on its interpretation of the operation and effect of section

37(7)(b) in support of its position and submissions as to the proper construction of section 49(g).

14. Ground 1 raises issues (the Proof Point) to be dealt with in the HQP appeal. The issues raised by Ground 2 (whether, assuming Misrepresentation Claims are admissible to proof, the redemption creditors including the Late Redeemers rank ahead of or *pari passu* with the Misrepresentation Claimants) do not arise in the HQP appeal.

15. Eiffel submits that it has a real prospect of success on both grounds. It says that Ground 1 and Ground 2 raise difficult points of law which do not yield clear answers and that Eiffel's grounds are at least arguable. The different decision and reasoning on the Proof Point contained in the HQP Judgment demonstrated that the arguments supporting Ground 1 are at least arguable. Furthermore, the arguments relied on by Eiffel in respect of Ground 2 are also at least arguable.

16. Furthermore, Eiffel argues that there are in any event exceptional circumstances which justify the granting of leave on both grounds. The proposed appeal involves issues which should be examined by the Court of Appeal in the public interest. Justice Doyle had already accepted that it was in the public interest for the Court of Appeal to review the status of *Houldsworth* in this jurisdiction and while this only directly covered Ground 1, Ground 2 was closely related to and connected with (and arose out of) Ground 1 so that the public interest in this jurisdiction in having clarity as to the rights of Misrepresentation Claimants to prove in the winding up must be understood as extending to obtaining clarity, if their claims were admissible, as to the ranking of such claims. All the issues covered by Ground 1 and Ground 2 were of real importance to the Cayman Islands' funds industry and to investors and merited review by the Court of Appeal in the public interest. Eiffel also submits that the Court of Appeal had, as was demonstrated by the lengths to which the Learned Justices of Appeal went to in order to adjourn the HQP appeal, given a good indication that the Court of Appeal regards the issues in this case as sufficiently arguable and of importance to merit leave being granted here (and the appeals being conjoined).

17. Eiffel accepts that the appellants in the HQP appeal will in effect be arguing in favour of Ground 1 and therefore that if leave is given it should only be permitted to repeat arguments in respect of which it makes common cause with the appellants in *HQP* if and to the extent that the Court of Appeal gives it permission to do so. It says that it only seeks leave in respect of Ground 1 in case the *HQP* appeal is settled or something unexpected emerges during the appeal which requires Eiffel to take a position on the Proof Point. Eiffel also proposes that the appeal should be case managed (and subject to the Court of Appeal's direction, heard jointly) with the HQP appeal.

The JOLs' position

18. In respect of Ground 1, the JOLs do not oppose Eiffel's application for leave.

19. In respect of Ground 2, the JOLs consider that this ground does not meet the necessary threshold test for granting leave to appeal. This is because, the JOLs say, Ground 2 does not have a real prospect of success. Furthermore, they submit, there are no exceptional circumstances such that leave should be given on the basis that there is an issue which needs to be examined by the Court of Appeal in the public interest.

20. The JOLs argue that the Judgment was right to conclude that Misrepresentation Claims and Redemption Claims rank *pari passu* and that Eiffel's arguments to the contrary were unarguable. It is, the JOLs submit, clear that there is no basis in the Act for giving the Redemption Claims priority over Misrepresentation Claims. Section 49(g) is silent as to their priority of members *inter se* and clearly does not establish such priority and in the absence of another statutory provision creating such priority section 140(1) of the Act governed and provided that the rights of all creditors ranked *pari passu*. The fact that the redemption creditors were former members and that the Misrepresentation Claimants remained members in addition to being creditors was, in the absence of a statutory provision that gave priority to the former over the latter, irrelevant. In addition, the JOLs submit that to the extent that it is necessary to go further, I had been right to conclude that

there is no material difference in principle between the Misrepresentation Claims and the Redemption Claims.

21. The JOLs submitted that it was not appropriate to grant leave to determine the relative ranking of members with redemption rights under 37(7)(b) of the Act and members with creditor claims under section 49(g) (the ***Section 37(7)(b) Point***). This issue did not arise for decision in this case (as I had held) and should be dealt with in a case where such a competition between the claims of redemption creditors and unredeemed preference shareholders with rights under section 37(7)(b) actually arises. It would be inappropriate for leave to appeal to be given in relation to what is a hypothetical issue in the present case.

22. In Johnson 25, Mr Johnson said (at [22]) that as far as the JOLs understood the position, the Court of Appeal's decision to adjourn the hearing of the HQP appeal was not based on any inherent importance of an appeal in these proceedings but rather the understandable desire to avoid sequential appeals that risked duplication of the Court of Appeal's resources and inconsistent appellate decisions. The Court of Appeal's decision was no more than a neutral factor in the determination of whether there should be an appeal in these proceedings.

23. As regards the parties' roles in the event that leave to appeal is granted, the JOLs submitted that it would be appropriate for them to take the position that the Judgment was correct (save that they reserved the right to take a different position from that set out at [168] of the Judgment where I discuss whether there should continue to be a common law rule as I had formulated alongside the statutory subordination effected by section 49(g) of the Act).

24. The JOLs in their written submissions had noted that Eiffel had not confirmed whether, if permission to appeal is granted, it will pursue the appeal if it does not have the benefit of a pre-emptive costs order. The JOLs raised the question as to what would happen in the event that Eiffel withdraws its appeal in view of the continuation of the *HQP* appeal. Mr Johnson (at [14] – [17] of Johnson 25) had identified what he referred to as the Inconsistency Issue. The JOLs' concern arises because of the risk, if there is no appeal to the Court of Appeal

in these proceedings, of an inconsistency between the directions set out and given in the Order (to reflect the decisions in the Judgment) and the decision of the Court of Appeal in the *HQP* appeal. For example, the Court of Appeal might decide that the Misrepresentation Claims are not admissible to proof. However, during the hearing Mr Millett confirmed his instructions that Eiffel intended to proceed with its appeal, if and to the extent that leave was granted whether or not its application for a pre-emptive costs order was granted (albeit that circumstances could change which might cause Eiffel to revisit its decision and approach to the appeal).

Discussion and decision

25. It seems to me to be clear that Eiffel should be granted leave to appeal, in reliance on both Ground 1 and Ground 2, against paragraphs 1, 2 and 3 of the Order and to seek an order from the Court of Appeal setting aside those paragraphs in the Order or alternatively an order that paragraph 3 of the Order be varied to provide that any admitted Redemption Claims be paid in priority to any admitted Representation Claims, but that the permission to appeal on Ground 2 should not be treated as requiring a decision on the Section 37(7) Point (so that the relative ranking of members with redemption rights under 37(7)(b) and members with claims subject to and subordinated by section 49(g) is not a separate issue for determination on the appeal).

26. I have considered the Memorandum and the submissions made by Eiffel both in writing and orally (and the JOLs written and oral submissions). In my view, Grounds 1 and 2, and the arguments relied on by Eiffel in support of its application for leave on these grounds, are clearly arguable. The relevant law is, self-evidently, unsettled and the arguments that Eiffel have raised, while they did not find favour with me and I considered them to be unconvincing, are not fanciful or hopeless. I do not accept the JOLs' characterisation of Eiffel's case on Ground 2 as hopeless.

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27. Furthermore, and in any event, it seems to me that Ground 2 raises issues of general importance which should be considered by the Court of Appeal such that there are exceptional circumstances in this case justifying the grant of leave on both grounds. I accept Eiffel's submissions on this point. It seems to me that Ground 2 is closely related to Ground 1 and naturally falls to be considered by the Court of Appeal when dealing with the appeal on Ground 1. The issues (and the rules regulating) admissibility to proof and priority of the Misrepresentation Claims are in this case closely linked. In my view there is a clear public interest in this jurisdiction in having clarity on (and therefore an authoritative appellate level determination of) both the question of whether the Misrepresentation Claims are admissible and if they are their priority in relation to holders of redeemable shares that have exercised their right to redeem.

28. However, I agree with the JOLs' submissions as to the Section 37(7)(b) Point. In granting leave to appeal on Ground 2 I am not deciding that the relative ranking of members with redemption rights under section 37(7)(b) and members with claims subject to and subordinated by section 49(g) is a separate issue for determination on the appeal. I accept that, as Mr Millett KC made clear during his oral submissions, Eiffel wishes to make submissions as to the proper construction of section 37(7)(b) and as to implications of that construction for the proper interpretation of section 49(g) *for the purpose* of showing that the Redemption Claims rank above the Misrepresentation Claims, and I regard the permission I am granting as covering this. But I do not intend the permission I am granting to permit Eiffel to raise as a separate issue for determination by the Court of Appeal whether members with redemption rights under section 37(7)(b) rank in priority to or *pari passu* with members who are owed sums covered by section 49(g). In this case there are no holders of redeemable preference shares with rights under section 37(7)(b) and the Order under appeal does not address their position and ranking. It would therefore in my view be wrong, as the JOLs submit, to give permission for that issue to be determined on the appeal. Of course, if the Court of Appeal considers that leave to raise and determine this issue is appropriate, or necessary for the proper conduct of the appeal, it will be open to them to grant leave.

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29. Eiffel referred to and relied on what the Court of Appeal had decided (and what in particular the President had said) at the 1 May hearing in the HQP appeal. I have read the transcript of that hearing (which somewhat bizarrely refers to remarks made by Justice of Appeal Beatson *or* Justice of Appeal Birt). It seems to me that the Court of Appeal's decision to adjourn the hearing and those remarks do not assist Eiffel. I do not take the President or the other Justice(s) of Appeal who expressed a view to have been dealing with the substance and merits of an appeal in these proceedings. They were simply not prepared to permit the HQP appeal to be heard when it remained possible (indeed likely) that there would also be an appeal in these proceedings. Doing so would risk procedural chaos – wasted costs and Court time and the risk of the Court of Appeal having to rehear arguments on points submitted during or decided in the HQP appeal.

30. I must say, as I made clear at yesterday's hearing, that I have been troubled by what appears to me to have been a general failure to coordinate these two sets of proceedings (in HQP and DLIFF) so as to minimise expense and to avoid duplication and the wasting of Court time and resources. This failure appears to have resulted in the Court of Appeal being faced with an unsatisfactory position at the 1 May hearing. It is obviously not for me to comment on the conduct of the HQP proceeding and appeal (which is properly a matter for the parties to that proceeding) or on the position of the Court of Appeal, but as the judge with responsibility for these proceedings I am concerned to avoid the Court of Appeal's valuable time being wasted as a result of the status and conduct of these proceedings. I heard from Mr Smith KC at yesterday's hearing as to the steps taken by the JOLs to ensure that the Court of Appeal was informed as to the status of the drawing up of the Order and of a possible application for leave to appeal the Judgment and from Mr Millett KC as to the position of his instructing attorneys regarding the need to ensure that the Court of Appeal was properly informed. It will suffice for current purposes for me to quote from my email to the parties dated 8 May 2024:

> *"I am pleased to see that the parties have at last cooperated to ensure a resolution to the dispute over the terms of the order. But I must say that I cannot understand how the HQP appeal came to be listed and opened before at least a decision had been made as to whether there would also be an appeal in these proceedings. While I appreciate that my judgment initially awaited, and then was only delivered*

sometime after, the handing down of Justice Doyle's judgment, there should have been coordination between the parties in both HQP and these proceedings so as to avoid the wasted cost and expense of the appeal in HQP being prepared and then adjourned (the resolution of the issues regarding an appeal of my judgment in these proceedings could also have been expedited). The Court of Appeal has I suspect been put to considerable inconvenience. It was to ensure that the Court of Appeal was at least fully informed of the position in these proceedings before the start of the appeal that I had suggested writing to the President (a letter could have been sent via the attorneys in the appeal). In any event, going forward I will expect counsel and the attorneys in these proceedings to liaise and cooperate with counsel and the attorneys in HQP to ensure that there is now proper coordination and that I am regularly kept up to date with developments."

The application for a pre-emptive costs order

Eiffel's position

31. Eiffel seeks the same order for the funding of its proposed appeal as the order made in respect of its participation in the hearing before me (the ***First Instance Hearing***). My judgment dated 10 November 2022 (the ***CMC Judgment***) and the orders of 20 February 2023 and 24 May 2023 dealt with the basis on which Eiffel should participate in the adjudication of the Misrepresentation Issues (as defined in the CMC Judgment). [6] of the 20 February order stated that Eiffel's reasonable costs of and occasioned by its opposition to the Misrepresentation Orders were payable out of the assets of DLIFF as an expense of the liquidation.

32. Eiffel submits that given that the putatively conjoined appeals will cover the entire ground occupied by the legal submissions in both cases, nothing has changed from the position at the First Instance Hearing. Eiffel says that it must remain for the benefit of the DLIFF estate to have clarity and certainty on the issues affecting the liquidation following full argument, and especially on the Priority Point which affects the redemption creditors, Unredeemed Investors and Misrepresentation Claimants alike. Eiffel says that put simply there is no difference so far as the concerns the benefit to the estate between having Eiffel

argue the points before the Court of Appeal and its having done so at the First Instance Hearing.

33. Eiffel says that it is relevant that in this case, unlike in *HQP*, the JOLs argued for the Misrepresentation Orders for the benefit of the Unredeemed Investors (at the expense of the estate) while Eiffel was permitted to argue against the making of those orders in the interests of the estate. The position, Eiffel says, will be the same on the appeal, in that the JOLs would seek to defend the Judgment, to the benefit of the Unredeemed Investors and Eiffel will challenge parts of it. Eiffel submits that the JOLs should not be entitled to change the costs regime on appeal merely because they are content with the outcome of the First Instance Hearing.

34. Eiffel argues that the JOLs should not be permitted to seek to prevent an appeal and block funding to the Late Redeemers for the benefit of the Unredeemed Investors. The fact that the JOLs were permitted to argue in favour of the Misrepresentation Orders does not mean that their role was to act for all purposes as the representatives of the Misrepresentation Claimants (or the Unredeemed Investors).

35. Eiffel accepts that it is open to the Court to make no order on costs and direct that Eiffel seeks a pre-emptive costs order from the Court of Appeal as part of the case management of the conjoined appeals. But Eiffel submits that this should be unnecessary given that the Court has already decided that Eiffel's costs of participating in the adjudication of the Misrepresentation Issues should come out of the estate and given that the issues on the appeals will be the same as those at the First Instance Hearing (Eiffel submits that the Court retains a supervisory jurisdiction which allows it to make orders regulating, and is not *functus* on the question of, the costs of an appeal).

The JOLs' position

36. The JOLs submit that the costs of any appeal should be dealt with by the Court of Appeal at the conclusion of the appeal in the usual way.

37. The JOLs argue that it is well established that a pre-emptive costs order for the costs of an appeal from an order made to give guidance to trustees or liquidators will only be made in exceptional circumstances, even though the costs of the first instance hearing were payable out of the estate. There is a significant difference between the approach to the costs of the first instance application and an appeal.

38. The JOLs relied on the following statement of the applicable law in *Lewin on Trusts* (20th ed) at [48-050]: "*A beneficiary who is protected by a prospective costs order at first instance will obtain a prospective costs order for an appeal against the decision at first instance only in truly exceptional circumstances*."

39. The JOLs noted that the legal analysis was explained by Carnwath J (as he then was) in *Laws v National Grid* [1998] Pens LR 205 at [64]-[65] as follows (underlining added):

> *"However, as Mr Warren says, <u>in the Buckton type of case the same considerations do not normally apply to an appeal</u>. He referred me to what was said in Re Earl of Radnor's Will Trusts (1890) 45 Ch.D 423 . The Master of the Rolls at 423 referred to the right of the trustees in that case to seek the opinion of the judge as to what was right to be done, but he continued: .... but when they appeal to this court from him, being absolutely protected as trustees by his decision — I do not say they are wrong in appealing, but they appeal to this Court under the ordinary conditions of Appellants, and they fail in the appeal; therefore this appeal must be dismissed with costs. <u>So one sees that where there is a genuine difficulty, trustees, and by analogy beneficiaries, may be able to seek authoritative guidance of the High Court at the expense of the fund, but once such guidance has been obtained from the High Court's decision, then in the absence of some special circumstances, such for example as difficulties arising from that decision itself, the parties have the authoritative guidance they need. The fact that they do not like it is not a reason for litigating further at the expense of the fund. That principle would apply equally in this case. The judgment provides the sort of clear guidance which is required under the Buckton approach, and the fact that some of the parties do not like it would not justify the cost of the appeal</u>."*

40. The JOLs say that the rationale for Eiffel receiving its costs of the First Instance Hearing was that its role and function was to assist the JOLs and the estate as a whole resolve certain legal issues which had to be determined in order to enable the liquidation to be progressed.

The application made by the JOLs was a sanction application seeking directions as to how they should exercise their powers and perform their functions. The JOLs consider that they now have the benefit of the Court's determination of these issues and that the guidance provided by the Court is clear, cogent and provides all the necessary assistance required by them in order to progress the liquidation. Any substantive appeal is not necessary nor in the interests of the estate. To the contrary, any such appeal is contrary to the interests of the estate to the extent that it would expose the estate to further unnecessary costs. The JOLs say that the position is not materially affected by the existence of the HQP Judgment and the HQP appeal since absent any appeal in these (the DLIFF) proceedings by Eiffel, the issue of ensuring that the directions in this case were consistent with the appellate ruling in HQP could be dealt with at minimal cost either by the JOLs formally appealing but adopting a passive role or by a directions application being made to the Court after the final appellate decision in HQP had been handed down to bring the directions made in this case into line with that appellate decision.

41. The JOLs submit that in circumstances where the interests of the estate did not require any substantive appeal to be brought there was no justification for making a pre-emptive costs order in favour of Eiffel.

42. The JOLs also argued that any appeal in the present case by Eiffel would be to promote Eiffel's own commercial interests as a Late Redeemer. This was particularly apparent in relation to Ground 2. The JOLs say that since Eiffel is seeking to appeal the Judgment in circumstances where this Court had already disposed of the issue in a way which was clear and cogent and which had provided the JOLs with all the guidance that they needed, it must be seen as seeking to further and promote its own interests and not those of the estate as a whole. The JOLs submit that it would be inappropriate for the estate to pre-fund an appeal which Eiffel was bringing in advancement of its own commercial interests.

43. The JOLs also said that it was relevant to note and take into account the fact that in HQP there is no pre-emptive order being made as to the costs of the appeal. Rather, the CICA will decide on the incidence of costs at the conclusion of the appeal in the normal way.

Accordingly, to avoid inconsistent approaches, it would be preferable for the same approach to be adopted in both appeals. At the hearing, Mr Smith KC confirmed that the two representative parties to the HQP appeal (one appealing and the other supporting the HQP Judgment) do not have funding from the HQP estate and that the HQP official liquidators (for whom Mr Smith KC acts) will be arguing that orders be made which are consistent with the decisions made in the Judgment (in this case).

44. In Johnson 25 (see [32]) Mr Johnson said that the JOLs' concerns regarding the costs of the appeal were, at least in part, informed by the costs incurred by Eiffel in relation to the First Instance Hearing. They noted that Eiffel's agreed costs from May 2022 to August 2023 were approximately US$680,000 and in the period after the First Instance Hearing (from February to mid-July 2023) the costs of Eiffel's Cayman attorneys had been approximately US$380,000 (which had substantially exceeded the costs of the JOLs' Cayman attorneys). The JOLs also say that Eiffel's approach to the proceedings to date has included the adoption of several unsuccessful and self-interested positions.

The LC's position

45. The LC (made up of Unredeemed Investors) supports the JOLs' submissions in relation to Eiffel's application for a pre-emptive costs order. The LC's position is that the Order provides the necessary certainty that was sought by the JOLs for the benefit of the DLIFF estate in relation to the treatment of the various creditor and contributory claims in the liquidation. Therefore, whilst it is a matter for Eiffel whether to seek leave to appeal and then whether to pursue an appeal should leave be granted, the LC submits that such an appeal cannot sensibly be seen to be in the interests of the DLIFF estate so as to justify a pre-emptive costs order being made.

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Discussion and decision

46. As Mr Justice Carnwath said in *Laws*, in the *Buckton* type of case the same considerations that justify a preemptive costs order at first instance do not normally apply to an appeal.

47. In litigation relating to a trust or liquidation estate where it is, on the facts, appropriate for the costs of all parties to the proceedings to be paid out of the estate to allow the trustee or official liquidator to obtain authoritative guidance from the Court on an issue relating to the administration and conduct of the trust or liquidation (the estate representing a fund being administered by the trustee or official liquidators, and the litigation being, for the benefit of all beneficiaries or creditors and members), there is usually no need or justification for an appeal, and therefore for the costs of the appeal to be paid out of the estate. This is because (once again as Carnwath J said in *Laws*) once such guidance has been obtained from the first instance decision then in the absence of some special circumstances (such as difficulties with the decision itself) the parties have the authoritative guidance they need and the fact that they do not like the result is not a reason for litigating further at the expense of the fund.

48. A number of issues arise on Eiffel's application for a further pre-emptive costs order. First, is an appeal necessary or justified in the circumstances? Secondly, if an appeal is necessary and justified, should Eiffel's costs be paid as an expense out of the estate. Thirdly, should this Court be making the decision on these issues, and any orders with respect to the costs of the appeal, or should costs of the appeal (including a pre-emptive costs order) be left to (and for) the Court of Appeal to decide?

49. The third issue seems to me to be the most important. But before dealing with it, I shall make a few comments on the first two issues. For an appeal to be necessary and justified there must be grounds which have a realistic prospect of success. The threshold for leave to appeal must be satisfied. There would then be difficulties with the decision itself (to use Carnwath J's phrase). But this may be insufficient on its own to justify an order that the costs of an appeal by a beneficiary/creditor should be paid out of the estate. They will also

need to demonstrate that the guidance provided by the first instance decision is materially deficient such that it would not be proper for the trustee/official liquidator to rely and act on it (so that the appeal is needed in the interests of all beneficiaries or creditors/members). In this case, Eiffel argue (as I understand it) that the unusual circumstances resulting from there being two conflicting Grand Court decisions on unsettled points of law of clear difficultly means that exceptionally there are proper grounds for concluding that the Judgment alone is not the last word and cannot be relied on. In view of the uncertain state of the law on the core legal issues dealt with in the Judgment (and by Justice Doyle in the HQP Judgment) material and real uncertainties remain even after the handing down of the Judgment which mean that it would be unsafe and improper for the JOLs to rely on the Judgment (and the Order) and that since at least the Priority Point (concerning the relative priority of the Misrepresentation Claimants and the redemption creditors) is an important issue in this case and one that is not directly addressed by the HQP Judgment it is important for the estate to have the benefit of (and only to act on) an appellate level decision. Furthermore, Eiffel submit that to ensure procedural fairness and to respect the equality of arms principle, it should be funded by the estate in circumstances where the JOLs are participating in and opposing the appeal at the expense of the estate and in substance for the benefit of the Misrepresentation Creditors/the Unredeemed Investors (who have refused to participate and have not had to pay any of the costs of the proceedings).

50. As a general matter, it is well established that there is a high threshold for obtaining a pre-emptive costs order. To justify the making of such an order the beneficiary/creditor must show that the relevant Court's discretion as to the costs of the relevant proceedings can only be exercised in one way and that an order that the costs of the beneficiary/creditor be paid out of the estate is bound to be made (see my discussion of this issue in the CMC Judgment and the judgment of Hoffmann LJ, as he then was, in *McDonald v Horn* [1995] 1 All ER 961 at 970-972).

51. In relation to an appeal, the beneficiary/creditor (and Eiffel in this case) needs to demonstrate that *the Court of Appeal's* discretion as to the costs of the appeal could only be exercised in one way and that an order that their costs be paid out of the estate is bound

to be made *by the Court of Appeal*. Eiffel submitted, and the JOLs did not dispute, so for the purpose of this application I accept that this Court could, as a matter of jurisdiction make a pre-emptive costs order in respect of an appeal (and therefore make an order governing the costs of the appeal – which itself would be subject to an appeal to the Court of Appeal). However, in my view, for this Court to make such a determination and to seek to make an order (that could be seen as trespassing into the Court of Appeal's domain and on to its power to regulate its own proceedings) would require the clearest case where there were no grounds which could justify an order not being made for the costs of the beneficiary/creditor to be paid out of the estate. In my view, this is not such a case. While I can see that Eiffel's case has some force, the proper approach to the payment of its costs is arguable and it is not possible to say with certainty that the Court of Appeal is bound whatever the outcome of the appeal to order that Eiffel's costs will be paid as an expense of the liquidation. As Mr Smith KC pointed out during his submissions, one example illustrates the point. If Eiffel loses its appeal on Ground 2, it cannot be said at this point that the Court of Appeal would be bound to and could only make an order that Eiffel's costs as the losing party should be paid out of the estate.

52. As Hoffmann LJ pointed out in *McDonald v Horn* it is always necessary to adopt a cautious approach when attempting to pre-judge costs orders that fall to be made by another judge or court and in my view, it would be particularly presumptuous of a first instance judge to seek to pre-judge the approach that the Court of Appeal will consider to be appropriate following the conclusion of the appeal. If Eiffel wishes to maintain its application for a pre-emptive costs order it must make its case to the Court of Appeal which, at least in this case, is the proper court to decide that application and make orders regulating the costs of an appeal.

The Hon. Justice Segal
Judge of the Grand Court, Cayman Islands