



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

CAUSE NO: FSD 204 OF 2022 (RPJ)

BETWEEN

(1) FRABRAN HOLDINGS CO LIMITED

(2) HUSKY TRADING CO LIMITED

Plaintiffs

AND

DAVENTREE TRUSTEES LIMITED

Defendant

CAUSE NO: FSD 280 OF 2022 (RPJ)

BETWEEN

KESTREL STOCK TRADING CO LIMITED

Plaintiff

AND

(1) DAVENTREE TRUSTEES LIMITED

AND 10 OTHERS

Defendants

CAUSE NO: FSD 112 OF 2023 (RPJ)

BETWEEN

(1) FRABRAN HOLDINGS CO LIMITED

AND 12 OTHERS

Plaintiffs

AND

DAVENTREE TRUSTEES LIMITED

Defendant

Before: The Hon. Justice Raj Parker

Appearances: Mr Guy Manning, Mr Shaun Tracey and Mr Jordie Fienberg of Campbells LLP for the First Defendant

Mr Vernon Flynn KC and Mr Nicholas Dunne of Walkers for the Cypriot Plaintiffs

Heard: On the papers

Date of decision: 18 March 2024

Draft Ruling Circulated: 18 March 2024

Ruling Delivered: 27 March 2024

HEADNOTE

Costs-indemnity costs-O. 62, r.4(11)-application of test - O. 62 r.4(7)(h)-payment on account-O. 62, r.9-payment forthwith-interest on costs-exercise of discretion

RULING

Introduction

1. This is the Court's decision concerning the costs consequences of the Court's judgment of 17 January 2024, following a hearing on 21-24 November 2023, which considered (a) in the Kestrel Proceedings, the Discharge Application; (b) in the Fresh Injunction Proceedings, the Plaintiffs' Fresh Injunction Application and DTL's Fresh Injunction Application; and (c) in the Cayman Enforcement Proceedings, the Stay Application. It also determined an Investment Application against DTL.
2. The Court dismissed both the Discharge Application and the Stay Application. Determination by the Court of the applications in the Fresh Injunction Proceedings did not arise because of the dismissal of the Discharge Application.

3. This decision follows the exchange of written submissions¹, which the Court has reviewed as well as the evidence and authorities provided.
4. The Cypriot Plaintiffs seek orders that DTL pay Kestrel's costs of the Discharge Application and the Cypriot Plaintiffs' costs of the Fresh Injunction application on the indemnity basis, to be taxed forthwith if not agreed.
5. They also ask for Husky's and Frabran's costs of the Stay Application and the Cypriot Plaintiffs' costs of the Investment Application on the standard basis, to be taxed forthwith if not agreed.
6. They ask for the sum of U.S.\$1.5 million on account of those costs to be paid within 14 days.
7. Finally, they ask for interest on costs at the prescribed rate for Cayman dollars (at 2.375%) from the date of the Court's order until final payment.
8. DTL accepts that it was unsuccessful in all material respects. It accepts that it should be ordered to pay the costs of the applications on the standard basis, but otherwise resists the orders sought seeking costs to be taxed on the indemnity basis, to be paid forthwith, or paid on account.

Indemnity costs

9. The principles are well known. Costs are normally ordered to be taxed on the standard basis if they cannot be agreed. Indemnity costs are only awarded in cases where the conduct of a party or the circumstances of the case are such that the matter can fairly be viewed as 'outside of the norm.'
10. The test the Court applies for an award on the indemnity basis is whether DTL "*conducted*" the applications "*improperly, unreasonably or negligently*" (O. 62, r.4(11)).
11. The Court must be satisfied that there was:
 - a) impropriety (which includes invoking the court's jurisdiction illegitimately, or abusing its process, e.g. by deliberately putting forward a case which is dishonest, false or known to have no legitimate basis, or pursuing a case for an ulterior purpose); or

¹ filed in accordance with paragraph 299 of the Judgment

- b) conduct which was unreasonable to a high degree (which includes advancing or maintaining a case which is manifestly hopeless or spurious in the sense of being speculative, weak, opportunistic or thin, or pursuing a case after realising that it is bound to fail), or
 - c) conduct which otherwise deserves the Court's disapproval (whether or not it also deserves moral condemnation).
12. It is not necessary to demonstrate that the conduct caused costs to be incurred which would otherwise have been avoided. The jurisdiction is penal². Each case is fact specific.

Decision

13. The Court is persuaded that the test is met because there is shown to be the necessary degree of unreasonable conduct deserving of indemnity costs in respect of certain matters.
14. The Court bears in mind that it is not fair to penalise a party because a case has been advanced which was comprehensively lost, or which was unlikely to succeed. It is also not fair to penalise a losing party because it can be said to have been misguided in hindsight.
15. The Court is satisfied that the following matters tip the case squarely into one deserving of indemnity costs. The other matters advanced by the Cypriot Plaintiffs³, whilst showing that DTL's arguments were without merit for the purposes of the Discharge Application, do not cross the conduct threshold as warranting a 'mark of disapproval' from the Court.

Original grounds for the Discharge Application

16. The Court is of the view that the original grounds upon which DTL relied for the Discharge Application were obviously unsound⁴.

² *AHAB v SAAD* [2013] (2) CILR 344 per Smellie CJ at para [5]-[16]; *Bennett v Attorney-General* [2010] (1) CILR 478, per Henderson J at para [6]; *Al Sadik v Investcorp* [2012] (2) CILR 33 per Jones J at paras [10]-[17]

³ relating to the Czech criminal proceedings, giving 'dishonest evidence' concerning intention in relation to Trust assets, and concerning ownership of the Cypriot Plaintiffs

⁴ Judgment §§142-151, 169-173, 202-204, 218-219.

17. Those grounds were in short form: that the Cayman Proprietary Injunction had been granted in aid of Kestrel's claims in the Cypriot proceedings; at the time that the Discharge Application was filed, Kestrel's underlying claim in Cyprus that it was entitled to distributions as a beneficiary of the Trusts had been dismissed more than five years earlier, and that dismissal had not been appealed or otherwise challenged; the value of Kestrel's claim was very small relative to the total value of the injunctioned assets; and that Kestrel's cross-undertaking was insufficient.
18. Of those grounds, it was manifestly hopeless and spurious to argue that the injunction had been granted in aid of Kestrel's claims in the Cypriot proceedings and that Kestrel was not entitled to obtain an injunction in respect of the entirety of the Trust assets when the value of its own interests was very small. The Court also held that any application for fortification of the cross undertaking by DTL would be both without merit and an abuse of process. The Court is satisfied that it was in all the circumstances unreasonable to a high degree to pursue them.
19. Moreover, the Court also found that it was an abuse of process for DTL to seek to discharge the injunction at this late stage⁵.

The Barden affidavit evidence (allegations concerning the misappropriation of Trust assets)

20. The correspondence shows DTL was given details from January 2023 of the Cypriot Plaintiffs' intentions regarding a proprietary injunction to safeguard Trust assets and why they believed that there was a serious risk of misappropriation given the conduct that they alleged against DTL and those associated with it.
21. DTL denied the allegations in so far as they are concerned its own conduct, and challenged the Cypriot Plaintiffs to provide sworn evidence in respect of the other allegations. DTL confirmed that the Discharge Application would be pursued and insisted that there was no basis for the imposition of a fresh injunction.

⁵ Judgment §205-206.

22. Given that response, the Court considers that the Cypriot Plaintiffs acted reasonably in preparing a full factual case concerning the risk to Trust assets. The correspondence shows that DTL was on notice from March 2023 that this would be detailed and would take time to prepare.
23. A very substantial affidavit indeed was provided on 4 May 2023 in the form of Barden 1. When DTL responded, no engagement with the detailed allegations was undertaken save for a high level denial. Given the nature of the allegations and the extensive documentary evidence in support provided by Barden 1 this was, in the Court's view, a highly unreasonable way to proceed and takes into account Mr Barden's evidence in this regard⁶.
24. In order to determine the applications, it was necessary to examine the available evidence to see if there was a serious issue to be tried as to whether the Trust assets are at risk. The Court observed that it is clear from Mr Barden's evidence that he and his team have reviewed a huge amount of relevant material. The Court also rejected DTL's explanations as to why it had not engaged with the allegations, even at a high level.
25. The Court decided that, if there were no injunction, the Trust assets would be in jeopardy because there would be a real risk that DTL and Mr Jirik would misappropriate them. It also found that the Bahamian ASOC raises a serious issue to be tried in relation to the historical misappropriation of assets⁷.
26. In the Court's view it does not matter that the allegations were not advanced in the Cypriot proceedings as DTL points out. They needed to be engaged with on the application made to discharge the injunction which was resisted on the basis that it was necessary in order to safeguard Trust assets.
27. The Court also held that any application for fortification of the cross undertaking by DTL (which the Cypriot Plaintiffs submitted was an illegitimate reason behind DTL's strategy) would be both without merit and an abuse of process⁸.

⁶ *Barden 2* §9-23, 55-57, 74-130; *Barden stay affidavit* §15-20.

⁷ *Judgment* §§21, 23-24, 179-200, 219.

⁸ *Judgment* §§163- 168, 223-224.

28. DTL argues that the material in Barden 1 would have had to be collated in any event for the purposes of the Bahamas proceedings. Whether or not that is the case, as a result of the approach taken by DTL, the work had to be done for the purposes of these proceedings. The Court notes that the Cypriot Plaintiffs rightly point out that they will not attempt to recover in the Bahamian proceedings costs which they have already recovered in these proceedings

Full and frank disclosure

29. Shortly before written arguments were exchanged, DTL advanced a case based upon evidence which had been available to it but which it had not pursued 18 years earlier. These arguments occupied a substantial amount of time at the hearing, and admittedly had ‘troubled the Court’ during DTL’s oral submissions⁹. The Court does not take the view that those arguments were manifestly hopeless or spurious. However, on analysis the Court not only found that the arguments were without merit, but that it was an abuse of process for DTL to advance them at this late stage¹⁰.
30. The Court has reviewed *Rawlinson & Hunter Trustees SA (in its capacity as trustee of the Tchenguiz Settlement) v ITG Ltd and another* [2015] EWHC 1924 (Ch) which is relied upon by DTL. The Court does not find that the Cypriot Plaintiffs responded in a way that was not proportionate, as Morgan J found in that case, as a reason for not awarding indemnity costs to the successful party notwithstanding a finding of abuse. Each case turns on its own facts.
31. The Court is satisfied that DTL’s conduct of the Discharge Application and Fresh Injunction Application was unreasonable to a high degree with regard to these matters.

Taxation forthwith

32. The Court has found that DTL’s conduct has been unreasonable to a high degree in respect of certain matters. Pursuant to O. 62 r.9(2), the Court has power to order that the Cypriot Plaintiffs’ costs be taxed forthwith, by way of departure from the general rule in O. 62 r.9(1).
33. It has decided to exercise its discretion to do so because there is an injustice which the Cypriot Plaintiffs (and the 84-year-old Dr Chvatik) have already suffered as a result of being kept out of

⁹ At Day 1, page 113, line 10 to page 114, line 6, in the context of a discussion about the non-discretionary nature of the GCR gateways and At Day 1, page 143, lines 20-21.

¹⁰ Judgment §§174-176, 206-222, 225-234.

funds to which they say they are entitled for more than 20 years (a period which the Court described as an “*unconscionable length of time*”¹¹).

34. This would be further increased if they are unable to recover, for an indefinite period of time, the substantial costs which they have incurred as a result of DTL’s applications, all of which have been dismissed and all of which were incurred in relation to discrete issues which the Court has determined. In relation to the Fresh Injunction proceedings, in which the Fresh Injunction Application and the Investment Application were made, there is “*no likelihood of any further order being made*” (O. 62 r.9(4)).
35. Even if DTL was to succeed in the Cypriot proceedings the Court takes the view that a forthwith order is appropriate. The Court decided to keep the injunction in place because of the risk of misappropriation of Trust assets. It seems most unlikely that any further issues will arise for the Court to determine in the Kestrel Proceedings which could affect the overall incidence of costs. The basis for the rejection of the Discharge Application would remain.
36. If the Cypriot Stay Applications and then the Cypriot Appeals are upheld, then the Cayman Enforcement Proceedings may fail, but this is likely to take many years. Accordingly, the appropriate order is also that the costs of the Cayman Stay Application be taxed forthwith, leaving the remaining costs of the Cayman Enforcement Proceedings to be dealt with in the future.
37. The Court has found no good reason why it would be unfair to DTL for costs to be taxed forthwith in all the circumstances.

Payment on account

38. Pursuant to O. 62 r.4(7)(h), the Court has power to order DTL to pay a reasonable sum on account of costs, with such sum to be assessed summarily.

¹¹ See Judgment §293

39. In the exercise of its discretion the Court is entitled to do justice on a principled basis¹². The main reason for doing so is that the receiving party is entitled to its money and ought to get it as soon as possible¹³.
40. The Cypriot Plaintiffs estimate that their total costs of the four applications are approximately US\$3.5 million. The schedule annexed to the affidavit of Ms Moseley provides a breakdown of that figure by reference to fee earner and identifies the principal tasks in respect of which the costs were incurred.
41. The vast majority of the costs were incurred in respect of the Discharge Application and the Fresh Injunction Application.
42. DTL is ordered to pay Kestrel's costs of the Discharge Application and the Cypriot Plaintiffs' costs of the Fresh Injunction Application on the indemnity basis.
43. In all the circumstances, the Court will order DTL to pay the sum of U.S.\$1.5 million on account which amounts to approximately 43% of the Cypriot Plaintiffs' total costs.
44. The Court is of the view that this would be a reasonable estimate of the likely final award, adopting a conservative approach, and allowing for a reduction on taxation.
45. The Court does not accept DTL's arguments that there is a good reason not to order a payment on account because each set of proceedings continues; costs orders may be made in favour of DTL which would necessitate a setting off exercise; and, in those circumstances, the Court cannot assess whether DTL will ultimately be required to make any payment to the Cypriot Plaintiffs, let alone \$1.5 million.
46. The Court has considered DTL's arguments about the size and makeup of the Cypriot Plaintiffs' legal team and does not see any force in the arguments directed at duplication, "non-admitted foreign lawyers" or the instruction of Mr Flynn KC in a case of such complexity. The Court does not consider it unreasonable for the Cypriot Plaintiffs to have used their English team to perform

¹² *BDO Cayman Ltd concerning Argyle Funds SPC Inc [2018] (1) CILR 187, per Parker J at paras [29]-[34] [16/128-139]*

¹³ *Al Sadik v Investcorp [2019] (2) CILR 585*

most of the work in relation to the Cayman applications given their involvement in the litigation in Cyprus, the Bahamas, and New York.

47. On a taxation on the indemnity basis, DTL will still have the opportunity to satisfy the taxing officer (in the first instance) that particular costs are of an unreasonable amount or have been incurred unreasonably (O.62 r.13(3)).
48. A consequence of the paying party conducting itself in a manner that is deserving of an award of indemnity costs is that it may lose the protection against liability for the fees of foreign lawyers which it would otherwise enjoy¹⁴. However, taxation of such costs is still subject to the provisions of GCR O.62 r.18(3) to (7).

Conclusion

49. The Court grants the Cypriot Plaintiffs' application for:
- (a) an indemnity costs order in the Discharge Application and Fresh Injunction Application, to be taxed forthwith if not agreed;
 - (b) costs of the Stay Application and Investment Application on the standard basis, to be taxed forthwith if not agreed;
 - (c) US\$1.5m on account of their costs payable within 14 days; and
 - (d) interest on costs at the rate of 2.375% from the date of the order until final payment.



THE HON. MR. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT

¹⁴ see *Al Sadik v Investcorp* [2012] (2) CILR 33 at para [7].