

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

Cause No.: FSD 174 of 2017 (IMJ)

BETWEEN:

DAEWOO INTERNATIONAL CORPORATION

Plaintiff

AND

(1) BANCO BTG PACTUAL S A – CAYMAN BRANCH

(2) EFG BANK (CAYMAN)

Discovery Respondents

IN CHAMBERS

Appearances: Mr. Lachlan Greig of Harneys on behalf of the Plaintiff
Ms. Ashleigh Dixon of Carey Olsen on behalf of EFG Bank (Cayman) the
2nd Discovery Respondent

Before: The Hon. Justice Ingrid Mangatal

Heard: 14 February 2019

Draft Judgment

Circulated: 16 April 2019

Judgment Delivered: 24 April 2019



HEADNOTE

Costs – Undertaking in Discovery Proceedings – Whether costs of Discovery Respondents incurred in considering and responding to complying with the Discovery Order – matter for taxation, or simply what the Court considers reasonable.

RULING

Introduction

1. EFG Bank AG (Cayman Branch) (“EFG”) has issued a Summons dated 17 December 2018 (“the Summons”) seeking an order that Daewoo International Corporation (“Daewoo”) comply with paragraph 6 of the Order dated 25 August 2017 (the “Discovery Order”) to pay EFG’s reasonable costs and expenses incurred in (i) considering and responding to the application made by Daewoo which resulted in the Discovery Order; and (ii) complying with the Discovery Order.



Background to the Summons and Discovery Order

2. On 27 July 2017, EFG was served with an injunction which was issued by this court on an *ex parte* basis in FSD 143 of 2017 (IMJ) (the “Injunction Proceedings”). The injunction was sought by Daewoo in an effort to, secure the assets of America Metals Trading LLP, Luis Guilherme Mariano Monteiro, Luis Eduardo Mariano Monteiro, Luis Claudio Mariano Monteiro and Luis Fernando Mariano Monteiro (“Injunction Respondents”) to avoid dissipation of those assets so they could be enforced against to satisfy a significant arbitral award owed by the Injunction Respondents to Daewoo.
3. EFG is a third party bank which was served with the Injunction based on Daewoo’s investigations leading to a belief that there were Cayman Islands bank accounts in the name of, or in the control of, the Injunction Respondents held at EFG, EFG not being named a party to the Injunction Proceedings.
4. It is noted that there are no allegations of wrongdoing made by Daewoo against EFG in these proceedings, the Injunction Proceedings or otherwise.
5. The Injunction did not contain any orders that specific discovery be provided by third party banks nor were any requested. Therefore, in order for Daewoo to legally obtain confidential banking information from EFG in relation to the Injunction Respondents’ accounts (and for EFG not to be in any breach of its confidentiality obligations to its customer), Daewoo considered that it was necessary that these proceedings be commenced by it, naming EFG as a party (the “Discovery Proceedings”).

6. On 25 August 2017, the Court made the Discovery Order requiring EFG to search its records and produce to Daewoo account information and documents which were responsive to the Discovery Order. The Discovery Order also provided that, if it was considered necessary, EFG could make an application to the Court pursuant to the *Confidential Information Disclosure Law* prior to disclosing any document.
7. The terms of the Discovery Order were heavily negotiated between EFG, Daewoo and Banco BTG Pactual SA – Cayman Branch (“**Banco**”) (the other Discovery Respondents) in the two days leading up to the hearing of the Discovery Proceedings on 25 August 2017. EFG did not attend the hearing and took a neutral position. The Discovery Order made by this Court was in the form which, the Court was advised, was acceptable to both EFG and Banco.
8. EFG complied with the terms of the Discovery Order and requested by letters dated 22 September 2017, 17 October 2017 and 30 November 2017 that Daewoo pay its reasonable costs of doing so. Daewoo refused to pay what was requested and that has led to this application.
9. It is noted that EFG has filed a similar summons in the Injunction Proceedings seeking to enforce Daewoo’s undertaking to the Court to pay EFG’s reasonable costs incurred in complying with the Injunction. Given the interconnection of the two proceedings, the two Summonses were listed for hearing together.

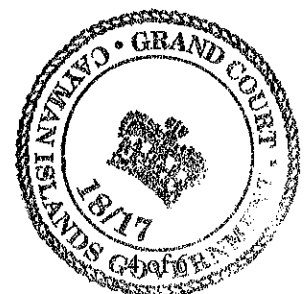
The Costs Incurred

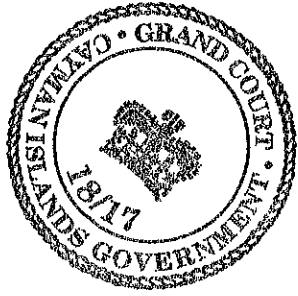
10. Pursuant to paragraph 6 of the Discovery Order:

“[Daewoo] will reimburse the [Applicant and Banco] for their reasonable costs and expenses, including legal costs, properly incurred in (i) considering and responding to the application made by the Applicants which resulted in the [Discovery Order] and (ii) complying with this Order.”



11. EFG claims that it incurred costs in a certain sum representing Carey Olsen's fees and disbursements for the period 22 August 2017 to 31 October 2017. To the extent that EFG incurred costs internally, it says that it does not seek repayment of such costs.
12. As at 22 August 2017, being the date that EFG say it was first clear to EFG that Daewoo would be filing the Discovery Proceedings against it, EFG had already engaged Carey Olsen as legal counsel to advise it in connection with the Injunction Proceedings.
13. EFG argue that the Discovery Proceedings raised serious matters for it, which required legal advice including (i) ensuring it complied with its confidentiality obligations owing to the customer; (ii) that the scope of the proposed discovery order was reasonable and did not constitute a fishing expedition; (iii) that the discovery order could be complied with in terms of scope and timing; and (iv) that as a matter of basic procedure issues such as timing and form of the Discovery Proceedings were properly dealt with.
14. EFG first sought payment of its costs incurred pursuant to the Discovery Order on 22 September 2017 and then sought additional costs as they were incurred on 17 October 2017 and 30 November 2017. A summary of the tasks performed during the period 22 August 2017 to 31 October 2017 for which legal fees were incurred, was set out in letters to Daewoo as follows:
 - (a) considering EFG terms of business and advising on confidentiality issues;
 - (b) considering the Discovery Proceedings and dealing with the various procedural issues including the improper commencement of the Discovery Proceedings;
 - (c) considering the evidence in support of the Discovery Proceedings;
 - (d) considering the draft discovery order and negotiating the same;
 - (e) dealing with the urgent correspondence in the lead up to the Discovery Proceedings
 - (f) various correspondence





- (g) Drafting an application in accordance with *Confidential Information Disclosure Law* ("*CIDL Application*") and supporting evidence;
- (h) various correspondence between Carey Olsen and the Court regarding the *CIDL Application*;
- (i) preparing for and attending the hearing of the *CIDL Application*;
- (j) reviewing disclosure under the Discovery Order and advising EFG regarding the same;
- (k) producing disclosure to Daewoo in accordance with the Discovery Order;
- (l) various correspondence between Carey Olsen and EFG in respect of the Discovery Proceedings, Discovery Order, *CIDL Application*, discovery and costs;
- (m) various correspondence between Carey Olsen and Harneys (on behalf of Daewoo) in respect of the Discovery Order, the *CIDL Application*, discovery and costs.

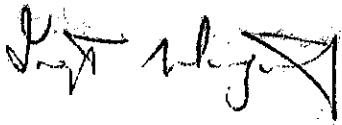
Whether Taxation appropriate

15. EFG submits that it is a matter for this Court to determine the quantum of what it considers EFG's reasonable costs are. This, it was submitted, is not a matter for which it is appropriate for taxation. This is simply a determination of quantum for which Daewoo is liable, in the same way as a party may be liable under a contract but the quantum of that liability is in dispute. The fact that it relates to "*costs*" it was argued, is irrelevant and the jurisdiction under GCR Order 62 is not engaged.
16. On behalf of Daewoo, Mr. Grieg submits that although Daewoo is ready, willing and able to make good on its undertaking, the true dispute on this application is quantum. The question for the Court he submits is whether the costs being requested by EFG are

“reasonable” for the purpose of the undertaking, such that Daewoo should pay that amount to EFG?

Conclusion

17. Reference should be made to my judgment in the related Injunction Proceedings FSD 143 OF 2017. The same reasoning applies here. Although in this case, EFG is a named Respondent, in essence the Discovery order which was made on 25 August 2017, was an order negotiated between Daewoo EFG and Banco. EFG did not attend the hearing, and the Order made was in the form which was acceptable, after the substantial negotiations, to both EFG and Banco.
18. I accept EFG’s submissions that there is no need for taxation given the nature of the order, and the analogy to contractual obligations. I am of the view that Order 62 is not engaged. I have looked at the unredacted invoices made available to the Court. As I said in my judgment in FSD 143 of 2017, these are difficult points. However, in my view it is appropriate for the Court to order that pursuant to paragraph 6 of the Discovery Order, Daewoo pay EFG’s costs as claimed in the Summons, which in my view appear and I assess as being reasonable in the circumstances. It is neither fair nor necessary for EFG to have to go to taxation when its costs can be assessed (in the first instance) by a Judge.
19. In contrast, in respect of EFG’s application for costs of, and, incidental to the Summons, I order the same to be paid forthwith by Daewoo, on the standard basis, to be taxed if not agreed.



**THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT**

