IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 227 OF 2018 (IKJ)

BETWEEN:

FORTUNATE DRIFT LIMITED

Plaintiff

AND

CANTERBURY SECURITIES, LTD.

Defendant

IN CHAMBERS-VIA ZOOM

Appearances:

Ms Katie Pearson and Mr Lachlan Greig, Harneys, for the Plaintiff ("FDL")

Mr Jalil Asif QC, Kobre & Kim (Cayman), on behalf of the Defendant ("Canterbury")

Before: **The Hon. Justice Kawaley**

Heard: **20th May 2020**

Date of decision: **20th May 2020**

Draft Reasons Circulated: **5 June 2020**

Judgment Delivered: **10 June 2020**

HEADNOTE

Indemnity costs to be taxed and payable forthwith-governing principles-Grand Court Rules Order 62 rules (1)-(2)

RULING

Introductory

1. On October 25, 2019, I granted an Order (the "AML Order") that, *inter alia*:

> "*1. The Plaintiff shall provide to the Defendant the documents and information requested by the Defendant at sub-paragraphs (a) (unsigned), (b), (e), (i), (k), (l) and (m) of its letter to the Plaintiff dated 20 March 2019 ('**the March Letter**') within 14 days; in default, the Defendant shall be at liberty to apply to the Court forthwith on paper to be released from the undertakings given by the Defendant to the court at paragraphs (i) to (iii) (inclusive) of the Order dated 13 December 2018 ('**the Undertakings**')...*"

2. This highly unusual Order arose out of an excursion off the main road that a contractual dispute over a brokerage agreement was expected to travel. The Plaintiff contended that it was no longer required to provide information which a client would ordinarily have to supply to the Defendant under the anti-money laundering ("AML") statutory scheme. The Defendant complained that it should not be required to hold assets pursuant to the Undertakings in circumstances where the Plaintiff was not supplying information it would normally be required to supply.

3. I made the AML Order on the public policy ground that the Plaintiff ought not to benefit from a Court Order embodying the Undertakings without complying with the letter and spirit of the AML regime. FDL's technical legal objection that the AML statutory regime did not entitle Canterbury to compel FDL to produce the relevant information was, however, vindicated.

4. By letter dated December 17, 2019, Kobre & Kim applied to the Court on behalf of Canterbury pursuant to paragraph 1 of the AML Order for Canterbury to be discharged from the Undertakings on the following grounds:

> "*Whilst the Plaintiff has provided documents which purport to comply with paragraph 1 of the AML Order, the documents do not constitute bona fide compliance for the reasons set out in the Affidavit of Eric L. Miller enclosed with this letter.*"

5. That application was heard on February 15, 2020. On April 15, 2020, I delivered a Ruling which concluded as follows:

66. Subject to hearing counsel, if required, on the terms of the final Order and as to how Canterbury proposes to deal with the assets presently preserved by the December 13, 2018 Order, Canterbury is entitled to be released from its undertakings...

68. Unless either party applies within 21 days to be heard as to costs, Canterbury's costs of the present application shall be paid by FDL to be taxed if not agreed on the indemnity basis and payable forthwith." [emphasis added]

6. The Order giving effect to the April 15, 2020 Ruling was made on April 20, 2020 paragraph 5 of which awarded costs to the Defendant to be taxed and payable forthwith on the indemnity basis, unless the Plaintiff applied under paragraph 6 to vary the costs award within 21 days (the "Provisional Costs Order").

7. Shortly thereafter FDL's initial attorneys applied to come off the record, an application which was granted on the papers on or about April 27, 2020. On April 30, 2020, Harneys filed a Notice of Change of Attorney and came on the record on behalf of the Plaintiff. On May 7, 2020, FDL applied by Summons seeking an extension of time for, *inter alia*, applying to vary the Provisional Costs Order. The variation application, astutely, did not seek to challenge the appropriateness of the indemnity basis of taxation. Instead, solely the more unusual requirement that costs should be payable before the end of the litigation was challenged.

8. On May 6, 2020, Canterbury had already applied by Summons for payments on account of the costs awarded in its favour on October 25, 2019 by the AML Order (which costs it now sought to be payable forthwith) and the costs awarded by the Provisional Costs Order. It was agreed that both Summonses should be heard together. I summarily refused the Defendant's application to reopen the basis on which costs were awarded under the AML Order. I ordered that $75,000 be paid on account of the costs dealt with by the Provisional Costs Order, after hearing argument on quantum. The principles governing payments on account of costs were not in dispute[1].

9. On May 20, 2020, I also granted FDL the requested extension of time but refused the application to vary the Provisional Costs Order, after hearing argument on the principles governing the exceptional jurisdiction to order the costs of an interlocutory application to be payable forthwith, before the end of the litigation. I now give reasons for that decision.

[1] It was agreed that the approach adopted in *Riad Al Sadik-v-Investcorp Bank*, FSD 47/2009 (IKJ), Judgment dated August 6, 2019 (unreported) should be followed. This case applied GCR Order 62 rule 4 (7) (h), operative with effect from March 29, 2016.

Governing legal principles: the general rule

10. It was correctly submitted in FDL's Skeleton Argument:

> *"The usual rule in the Cayman Islands is that the costs of proceedings shall be taxed at the conclusion of the cause or matter in which the proceedings arise. The purpose of this rule is to enable interlocutory costs orders to be set off against one another."*

11. The governing rule is GCR Order 62 rule 9 which provides as follows:

> **"Stage of proceedings at which costs to be taxed**
>
> ***9.*** *(1) Subject to paragraph (2), the costs of any proceedings shall not be taxed until the conclusion of the cause or matter in which the proceeding arise.*
>
> *(2) If it appears to the Court when making an order for costs that all or any part of the costs ought to be taxed at an earlier stage it may order accordingly."*

12. FDL's counsel relied upon the decision of Smellie CJ in *Re Sphinx* [2009 CILR 178] to illustrate the content and application of the general rule:

> "8...*The normal costs order to be made in respect of an interlocutory proceeding such as the present is that the costs be taxed if not agreed in the usual way, and be paid at the conclusion of the case.*
> *9 An order for payment forthwith would therefore be exceptional and was so acknowledged by the other parties. The rules of court would clearly so regard such an order. Order 62, r.9 (1) of the Grand Court Rules provides that "the costs of proceedings shall not be taxed until the conclusion of the cause or matter in which the proceedings arise" unless, subject to r.9 (2), earlier taxation is deemed suitable by the court.*
>
> *10 A cause or matter is concluded when the court in question has finally determined the matters in issue, whether or not there is an appeal from that determination. So said Saville, J. in Rafsanjan Pistachio Producers Co-op. v. Bank Leumi (UK) Ltd. (3) (cited in Supreme Court Practice 1999, para. 62/8/1, at 1136) indicating that an interlocutory application, such as the one being discussed here as to the incidence of its costs, would not ordinarily be a proper stage at which to make an order for costs to be taxed forthwith. In the absence of any exceptional circumstances, I take the same approach here and refuse to order that there should be taxation and payment forthwith."*

13. The general rule was also applied in *Ahmad Hamad Algosaibi and Brothers-v-Saad Investments Company Limited et al* [2013(2) CILR 344]. Immediate taxation was not ordered in relation to parties still involved in the litigation; immediate taxation was ordered in favour of a party whose involvement was at an end.

14. In a recent judgment delivered after the present costs application was heard, *Re eHi Car Services Limited*, FSD 115 of 2019 (RJP), Judgment dated May 26, 2020 (unreported), Parker J also applied the general rule. The respondents in that case asked for the costs of the summons for directions to be taxed and payable forthwith; the petitioner contended there were no exceptional circumstances and relied upon *Sphinx* and *Saad Investment.* Parker J concluded *in eHi*:

> *"34. In all the circumstances I do not consider that it would be just to order the company to pay the respondents' costs (nor, had I so decided, that there were exceptional circumstances such that they should be taxed forthwith)..."*

15. In summary, the general rule is that interlocutory costs should be taxed and payable at the end of the proceedings in which they arise. Exceptional circumstances are required to justify a departure from the usual approach.

Governing legal principles: exercising the discretion to order interlocutory costs to be taxed and paid forthwith

16. GCR Order 62 rule 9 (2) confers an unfettered discretion to order that costs be taxed and paid "*at an earlier stage*" than the end of the case. But because this is subsidiary to the general rule prescribed by rule 9 (1), this Court has rightly previously decided that exceptional circumstances were required to engage the subsidiary rule. Pointing out that this Court had not previously considered what circumstances would qualify for applying GCR Order 62 rule 9(2), Ms Pearson commended relevant persuasive authorities to the Court.

17. In FDL's Skeleton Argument, it was submitted that:

> *"22. The Australian case of Fiduciary Limited v Morningstar Research Pty Limited [2002] NSWSC 432; 55 ALR 1 sets out the principles which should be considered when ordering costs forthwith in interlocutory proceedings:*
>
> *(1) the subject matter of the interlocutory application is discrete and self-contained making it a suitable vehicle for a separate order for costs;*
>
> *(2) whether some of the conduct of the unsuccessful party to the motion may be seen as being unreasonable; and*
>
> *(3) that there is still some considerable distance to go in the litigation so that it may be appropriate that the successful party obtain the fruits of its costs order now.*
>
> *23. These principles have been cited in a number of Australian cases, including First Debenture Ltd v Vangory Holdings Pty Ltd [2015]*

NSWSC 801 where the court stated: 'In summary, an order that costs be payable forthwith is an exception, which will only be made in a case that is out of the ordinary, and it should be recognised that such an order has the capacity to stultify proceedings, particularly brought by persons with limited resources, and also has the risk of operating unfairly where, over the course of proceedings, there may be orders which are made that one or other party should pay the costs of the other from time to time. Nonetheless, the Court may order that costs be payable forthwith, at least if there is an element of unreasonableness in the conduct of the unsuccessful party, and it is likely there will be a long delay between the interlocutory proceedings and the conclusion of the principal proceeding.'

24. The Court in that case made an order for costs payable to the Third and Fourth Defendants to be payable forthwith, but declined to make such an order in relation to another party, Vangory. Its reasoning for so doing was that: "the range of disputes between FDL and Vangory raises a real prospect that there will be costs orders made as between those parties which may be capable of being set-off against each other in the ordinary course."

18. Mr Asif QC pointed out that the rules of court under consideration in these New South Wales Supreme Court cases were somewhat different to the relevant Cayman Islands rules. However, he accepted that they provided valuable guidance as to the correct approach to GCR Order 62 rule 9(2). I agreed. The reason why the distinction is immaterial to the governing principles is that although the New South Wales rules gave examples of when costs could be ordered forthwith, Reginald Barrett J in *Fiduciary Limited v Morningstar Research Pty Limited* [2002] NSWSC 432; 55 ALR 1 was addressing a similar contextual question:

> *"6. The "unless the court otherwise orders" exception in rule 9(1) existed before rule 9(3) was added and was an acknowledged source of jurisdiction to order that costs be payable forthwith. That being so, I find it very difficult indeed to think that the new rule 9(3) was intended to cover the field in any restrictive way. The more likely intent, in my judgment, is that rule 9(3) would, by way of emphasis, identify particular circumstances intended to be within the discretionary power to depart from the principle that costs are payable at the conclusion of proceedings by ordering that they be payable forthwith. I see no basis on which it would be safe to assume that the "unless the court otherwise orders" qualification in rule 9(1) was confined by the introduction of rule 9(3) in such a way that it could no longer be the source of a separate and independent power to order that coasts be payable forthwith, that, clearly enough, having been the main form of exception to the general rule in sub-rule (1) for a considerable time, as is confirmed by the commentary on Part 52A rule 9 in Ritchie's Supreme Court Procedure NSW."*

19. In other words, although a new rule (which we do not have) specified examples of when the "forthwith" jurisdiction existed, that rule did not apply. Barrett J was accordingly considering the older general discretion to depart from the usual rule which corresponds to our own rule 9(1) with the words "*unless the court otherwise orders*" substituted for "*subject to paragraph (2)*". In doing so, the Judge looked back at case law when the relevant rules were substantially the same as the current Cayman Islands rules. The analogy with construing our own GCR Order 62 rule 9 (2) is put beyond doubt by the following passage in the same judgment:

> *"8 That the demands of justice determine how an exception of the kind in rule 9(1) should be approached is borne out by the following observation of Olney J in* ***Thunderdome Racetiming and Scoring Pty Ltd v Dorian Industries Pty Ltd*** *[1992] FCA 291; (1992) 36 FCR 297, a decision on the provision of the rules of the Federal Court similar to that in rule 9(1):*
>
> > *'The rule does not suggest any particular criteria by which the court should be guided in approaching such an application, and accordingly I take the view that the discretion should be exercised in favour of a party who establishes that the demands of justice require that there be a departure from what appears to be the general practice envisaged by the rule, namely, that an order for costs of an interlocutory proceeding should not entitle a party to have a bill of costs taxed until the principal proceeding in which the interlocutory order was made is concluded.'"*

20. Barrett J identified three categories of cases based on appellate and first instance State (primarily) and Federal case law:

(1) "*where the application or aspect in respect of which the particular costs order is made before conclusion of the proceedings represents the determination of a separately identifiable matter or may be viewed as the completion of a discrete aspect*";

(2) "*some unreasonable conduct on the part of the party against whom costs have been ordered*";

(3) "*that 'there is much to come in the proceedings" and "one can see a fairly long time before the proceedings are disposed of*"'.

21. I found that those principles would be a useful guide to the application of the discretion conferred by GCR Order 62 rule 9(2). I also accepted an important gloss to that analysis.

22. The decision in *Fiduciary Limited v Morningstar Research Pty Limited* was still being cited with approval by courts of coordinate jurisdiction over 10 years later. In *Re Vangory Holdings Pty Ltd.* [2015] NSWSC 801, Black J (after citing *Fiduciary* and subsequent cases) summarised the guiding principles as follows:

> "*In summary, an order that costs be payable forthwith is an exception, which will only be made in a case that is out of the ordinary, and it should be recognised that such an order has the capacity to stultify proceedings, particularly brought by persons with limited resources, and also has the risk of operating unfairly where, over the course of proceedings, there may be orders which are made that one or other party should pay the costs of the other from time to time. Nonetheless, the Court may order that costs be payable forthwith, at least if there is an element of unreasonableness in the conduct of the unsuccessful party, and it is likely there will be a long delay between the interlocutory proceedings and the conclusion of the principal proceeding.*" [emphasis added]

23. I also accepted that a forthwith order should not be made if it would operate unfairly in relation to litigants of limited or uncertain means. The "*overriding objective*" of GCR Order 62 is "*that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner.*" Stifling a claim is merely one way in which a "forthwith" order may be unfair. In a case where there is a risk that at the end of the case the successful party may be unable to recover all their costs because the losing party has limited financial resources, a "forthwith" order would be inconsistent with GCR Order 62 rule 4(2). In any case where the parties have limited financial resources, a "forthwith" order may well carry a real risk of unfair results.

24. To summarize, I found that not ignoring the fact that each case falls to be determined on its own facts, the factors likely to be relevant in many cases to determining whether or not to order that interlocutory costs should be taxed and paid forthwith under GCR Order 62 rule 7(2) were the following:

    (1) whether the relevant interlocutory costs were incurred in relation to a discrete issue within the wider proceedings viewed as a whole;

    (2) whether the paying party has acted unreasonably in any relevant way in relation to the application to which the interlocutory costs order relates;

(3) whether the proceedings as a whole have a long time to run; and

(4) whether being required to pay the interlocutory costs forthwith before the end of the litigation would be for any reason unfair, having regard to the overriding objective of GCR Order 62.

The context in which the AML Order and the Provisional Costs Order were made

25. FDL commenced proceedings in early December 2018. On December 7, 2018, I granted an ex parte injunction in favour of the Plaintiff restraining the Defendant from disposing of certain assets in a brokerage account it had set up for the Plaintiff's benefit in or about May 2018. The Plaintiff claims, *inter alia*, that it has terminated the brokerage relationship and is entitled to the assets it placed in the account. The Defendant counterclaims that the Plaintiff is liable for substantial sums under the terms of a contractual indemnity clause. I refused to discharge the ex parte injunction altogether and instead on December 13, 2018 replaced the original injunction terms with an undertaking given by the Defendant not to dispose of the disputed assets pending the determination of the present proceedings and a cross-undertaking by the Plaintiff not to seek to remove the assets.

26. The Defendant is a regulated financial service provider which was being audited by the Cayman Islands Monetary Authority ("CIMA") in early 2019. The effectiveness of its Know Your Client ("KYC") and Customer Due Diligence ("CDD") processes were under scrutiny. By letter dated March 20, 2019, it wrote to FDL seeking, *inter alia*, particulars of an undisclosed January 2019 change in its beneficial ownership. FDL's initial response was to decline to provide the information sought on the grounds that it had terminated the client relationship and that the information was sought by Canterbury to achieve a collateral litigation advantage. Canterbury, now represented by its current attorneys, issued a Summons for Directions in relation to the AML issue on April 4, 2019. This Summons was heard on August 6, 2019 and the judgment which resulted in the AML Order was delivered on September 16, 2019.

27. By the date of the hearing FDL agreed to comply with some of the KYC/CDD requests in any event and the main controversy was whether it could be legally compelled to produce any information at all. The central finding was the following:

> *"66. The POCL and AML Regulations do not positively require Canterbury to continue to seek nor oblige FDL to produce KYC/CDD information. Compelling FDL to produce the information is not required to immunize Canterbury from potential criminal liability in circumstances where (a) the service provider/client relationship has broken down and is subject to litigation before this Court; (b) Canterbury's continuing custody of the assets*

is pursuant to a Court Order, and (c) Canterbury has sought directions from the Court.

67. However, the December 13, 2018 Order, which in substance grants discretionary injunctive relief, cannot properly be continued until trial unless FDL additionally undertakes to comply with the valid information requests. Failure to do so would undermine the important public policy objects of the legislative scheme and would not be a course of conduct that should be rewarded by a Court of equity which has been asked to grant discretionary interim relief. It bears repeating, however, that FDL gave every indication in the course of argument that it would be willing to supply whatever information this Court determined it was or could be legally required to produce."

28. The parties were unable to agree the terms of the AML Order, and a further hearing took place to decide precisely what form the Order should take. At the heart of the dispute was precisely what documents or information should be supplied. Paragraph 1 of the AML Order eventually provided as follows:

> "*1. The Plaintiff shall provide to the Defendant the documents and information requested by the Defendant at sub-paragraphs (a) (unsigned), (b), (e), (i), (k), (l) and (m) of its letter to the Plaintiff dated 20 March 2019 ('**the March Letter**') within 14 days; in default, the Defendant shall be at liberty to apply to the Court forthwith on paper to be released from the undertakings given by the Defendant to the court at paragraphs (i) to (iii) (inclusive) of the Order dated 13 December 2018 ('**the Undertakings**')*..." [Emphasis added]

29. The purpose of the underlined words was to signify to FDL that if, contrary to its indications that it intended to cooperate fully and supply the information sought, the Court would give short shrift to any non-compliance with the AML Order by releasing Canterbury from its undertakings and in practical terms discharging the injunction granted in FDL's favour. When Canterbury sought to enforce the default provision in paragraph 1 of the AML Order, FDL protested that in fact it had substantially complied and the consequences of granting the application were sufficiently serious to require an oral hearing. I acceded to this request. A third hearing took place on February 25, 2020 which resulted in my Ruling dated April 15, 2020 (the "Ruling") which resulted in my finding that Canterbury should be released from its undertakings and also resulted in the Provisional Costs Order being made.

30. The most pertinent findings in the Ruling were the following:

> "*32. In summary, the AML Order was made to protect the integrity of the Court's own processes by avoiding a situation in which a Court Order was being used by FDL as a shield to escape complying with the KYC/CDD*

obligations it became subject to when it entered into a contractual relationship with Canterbury.

33. The entire tenor of the Ruling made it clear that the Court considered that the relevant obligations were important in public policy terms and should be substantively complied with as a fundamental condition of the December 13, 2018 Order being continued...

49. I am bound to find, based on the material properly before the Court pursuant to the directions given for the hearing that FDL has failed to substantively comply with paragraph 1 of the AML Order as regards the most important request about beneficial ownership. Its fundamental obligation was to clarify the position. Its response added more confusion...

50... At the heart of FDL's non-compliance is an apparent and possibly genuine (but clearly misguided) belief that neither Canterbury nor the Court has the right to inquire into this matter. The AML Order was not appealed. There is an apparent assumption that whatever FDL chooses to say from time to time on the beneficial ownership question should be uncritically accepted even if it is inherently incredible on its face (at worst) or unintelligible (at best)...

63. I do not accept that releasing Canterbury from their undertakings would be a disproportionate penalty for FDL's breach. Canterbury was in my judgment fully justified in making the present application and has clearly demonstrated its prima facie entitlement to be released from its undertakings on the basis that they were originally proffered to the Court. That was as an alternative to the terms of the interim injunction initially granted to FDL, together with additional cross-undertakings being required of FDL ..." [emphasis added]

31. It was against this background that the Provisional Costs Order provided for FDL to pay the costs of Canterbury's application to be released from its undertakings, which costs should be taxed if not agreed on the indemnity basis and payable forthwith.

Findings: why a forthwith Order was appropriate in the present case

Discrete issue

32. The costs under consideration arise in relation to a discrete issue, the enforcement of the AML Order, which is itself a sub-issue arising under Canterbury's AML Summons, which itself raised a discrete issue raised within but being merely

tangential to the present proceedings as a whole. This requirement for ordering costs to be payable "forthwith" was clearly *prima facie* met.

33. Ms Pearson submitted that the fact that other costs orders had been made in favour of the Plaintiff which costs had not yet been taxed was ground for deferring all taxation until the end of the case. Reliance was placed on a case where a forthwith order was granted in relation to parties whose participation in the proceedings was at an end and refused in relation to a party (coincidentally, another "FDL") who remained in the proceedings: *Re Vangory Holdings Pty Ltd.* [2015] NSWSC 801. In particular, reference was made to Black J's pivotal finding (at paragraph 24) that:

> "*the range of disputes between FDL and Vangory raises a real prospect that there will be costs orders made as between those parties, which may be capable of being set-off against each other in the ordinary course.*"

34. Clearly, the mere fact that there are or will be various interlocutory costs orders capable of being set off against each cannot be an automatic bar to a "forthwith" costs order being made as this bar would exist in every case, including the present one. In fact, the pivotal finding in *Re Vangory*, must be understood in its context, which a fuller extract from the judgment illumines:

> "*1. On 4 March 2015, the First Defendant, Vangory Holdings Pty Limited ("Vangory") filed an Interlocutory Process seeking leave under s 459S(1)(b) of the Corporations Act 2001 (Cth) to oppose a winding up application brought by the Plaintiff, First Debenture Limited ("FDL"), relying on a failure to comply with a creditor's statutory demand, on a ground that the relevant debt was disputed. That leave was required because Vangory had not filed an application to set aside the creditor's statutory demand, on the basis of any genuine dispute as to the debt, within the time permitted under s 459G of the Corporations Act. I heard that application on 21 and 22 April 2015 and delivered judgment on 12 May 2015 ([2015] NSWSC 546). I declined to grant that leave, where I was not satisfied that Vangory had established that the debt was material to proving its solvency for the purposes of s 459S(2) of the Corporations Act. I therefore ordered that the application for leave under s 459S of the Corporations Act should be dismissed with costs. The parties subsequently sought the opportunity to make further written submissions as to costs and this judgment deals with the costs of the application....*
>
> > *24. Vangory submits that, so far as FDL is concerned, the assessment of costs should await the determination of the proceedings on a final basis, on the basis that any costs order could be offset against any order for costs against FDL, if Vangory is successful in establishing its*

> *solvency. There is force in that submission so far as costs ordered in favour of Vangory, rather than the Third and Fourth Defendants, is concerned. I would not make an order for costs to be paid forthwith in respect of Vangory, where the range of disputes between FDL and Vangory raises a real prospect that there will be costs orders made as between those parties which may be capable of being set-off against each other in the ordinary course.*"

35. The context was that the plaintiff in *Re Vangory* (FDL) was seeking to wind-up Vangory on the grounds of insolvency. Although the plaintiff had won an interlocutory costs order with costs to be taxed on the indemnity basis, although the application's result was independent of the final result at trial, the application was very much part of the rough and tumble of the proceedings. It was not in any exceptional sense a discrete application at all. It would also have been extremely odd in proceedings designed to establish that a defendant is insolvent and should be wound-up for the applicant/plaintiff/petitioner to be paid the costs of an interlocutory application before the decision to wind-up or dismiss the application has been made.

36. I accordingly accepted the general principles propounded in *Re Vangory*, but considered that the context in which those principles were applied were quite different to the circumstances of the present case. Here, both the AML Order and the application to enforce it were wholly collateral to the contractual dispute which lies at the heart of the present proceedings. It was quite exceptional for an otherwise standard commercial dispute to branch off into an inquiry into the parties' AML obligations. I found that the discrete issue requirement was very clearly sufficiently met in all the circumstances of the present case. Indeed, at the end of the Ruling I observed:

> "*67. I would otherwise stay the AML Order until further Order to avoid a disproportionate amount of costs be expended on this issue which is collateral to the main issues in controversy in the present action.*"

37. The "*main issues in controversy in the present action*" (although pleadings are not closed) appeared to me to involve ascertaining the terms of the parties' brokerage contract, a task likely to primarily involve the comparatively dry task of construing documents.

Acting unreasonably

38. FDL's counsel in conceding that indemnity costs were appropriate tacitly accepted that her client had acted "*improperly, unreasonably or negligently*" to some extent. GCR Order 62 rule 4 provides:

> "*(11) The Court may make an inter partes order for costs to be taxed on the*

indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently."

39. Some attempt was made to mitigate the weight of the unreasonable conduct factor through the Fifth Affidavit of Dominic Sin sworn on May 14, 2020. This Affidavit exhibited documents by way of compliance with paragraph 2 of the April 20, 2020 Order and apologized for the confusion caused by FDL's poor corporate record-keeping and FDL's principals' lack of appreciation of legal technicalities such as the distinction between legal and beneficial ownership. These at first blush somewhat eyebrow-raising averments went further towards explaining the various inconsistent positions on beneficial ownership upon which adverse comment had been made by the Court rather than mitigating FDL's non-compliance with the AML Order.

40. As Mr Asif QC pointed out, FDL had access to legal advice when the AML Order was made. I found that no satisfactory explanation was advanced for the non-compliance with the AML Order which in turn prompted the making of the Provisional Costs Order. On the contrary, the distinct impression given by the Fifth Affidavit of Dominic Sin is that the AML Order was only taken seriously after the Provisional Costs Order was made, because documents which could (seemingly) have been produced months ago were only requested from FDL's corporate administrators in May of this year after the Provisional Costs Order was made.

41. To my mind, this potentially vindicated rather than undermined the appropriateness of viewing the non-compliance with the AML Order as being sufficiently serious to warrant a "forthwith" costs order. However, I took the view that whether Canterbury's costs of enforcing the AML Order should or should not be payable forthwith fell to be determined by reference to how FDL conducted the application itself. Its post-Ruling conduct was simply irrelevant.

42. As I observed in the course of the hearing, it is ultimately a matter of subjective judgment for the judge whether or not a particular course of litigation misconduct is viewed as sufficiently serious to warrant not simply an award of costs to be taxed on the indemnity basis, but also to be payable forthwith. Having said that, the basis for such a finding must be objectively verifiable and must probably involve deliberate as opposed to accidental misconduct.

43. This view finds support in another authority which was helpfully placed before the Court: *In Re Rightway China Real Estate Limited and Re Dash Limited,* FSD Nos 130 and 131 of 2013, Judgment dated February 3, 2014 (unreported). In that case Henderson J (without finding it necessary to elaborate on why a "forthwith" order was required) held as follows in relation to an instance of material non-disclosure prompting him to discharge an ex parte order:

> *"20. This is not a case where relaxation of the usual rule would be appropriate. The installation of provisional liquidators is a grave interference with the affairs of a company. The deliberate failure ... to disclose this material fact to the Cayman attorneys cannot be described as an innocent mistake. My ex parte order appointing the Joint Provisional Liquidators is set aside. The Petitioners jointly and severally are ordered to pay the costs of the provisional liquidation to date. I award the Respondents 25% of the costs of this hearing, to be paid forthwith on the indemnity basis."*

44. I found that the non-compliance with the AML Order which occurred in the present case was a sufficiently serious and unjustifiable breach of the litigant's duty to the Court to warrant awarding costs to be both taxable on the indemnity basis and payable forthwith.

Whether the proceedings have a long time to run

45. On May 17, 2020, shortly before the present hearing on May 20, 2020, a Consent Order directed that FDL should file its Re-Amended Reply and Defence to Counterclaim by May 29, 2020 and that Canterbury should file its Amended Reply to Defence to Counterclaim, if so advised, by June 26, 2020. It seemed unlikely to me that the trial would take place before the end of the current calendar year. It seemed more likely that the trial would take place at some point next year and that the costs of the action would at the earliest be taxed towards the end of 2021.

46. In all the circumstances of the present case, I found that the end of the proceedings was not so obviously imminent as to make it irrational to order that the costs of the present application should be taxed and paid before the end of the litigation.

Whether a "forthwith" order would be unfair because of either party's financial status

47. FDL sensibly conceded that no financial unfairness would flow from ordering the relevant costs to be paid on a "forthwith" basis. It was unable to complain either that its claim would be stifled or that Canterbury might not at the end of the case be able to pay any net costs awards payable in FDL's favour.

Conclusion

48. For the above reasons on May 20, 2020, I ordered that Canterbury's costs of enforcing the AML Order should not just be taxed on the indemnity basis, but also should be payable forthwith.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT