

**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**

**Appearances:**

Ms Katie Pearson, Harneys, for the Plaintiff (“FDL”)

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

**Before: The Hon. Justice Kawaley**

**Heard: 1<sup>st</sup> October 2020**

**Draft Reasons**

**Circulated: 20 October 2020**

**Judgment Delivered: 30 October 2020**



## HEADNOTE

*Costs of withdrawn interlocutory summons-indemnity or standard basis of taxation-whether costs should be payable forthwith-whether payment on account of costs should be ordered-Preamble to the Grand Court Rules-Grand Court Rules Order 62 rule 4 (2), rule 11*

## RULING

### Introductory

1. On July 15, 2020, FDL issued a Summons primarily seeking an Order that:
  - (a) Canterbury transfer the “Shares and Proceeds” to an Escrow Agent to be held pending the determination of these proceedings;
  - (b) Canterbury and FDL should jointly appoint FFP (Cayman) Limited (“FFP”) as Agent to hold the Shares and Proceeds; and
  - (c) seeking an explanation as to the location of US\$3,701,851.85 said in the supporting Sixth Affidavit of Dominic Sin to be unaccounted for.
2. Canterbury filed the Fifth Affidavit of Eric Miller sworn on August 11, 2020 in response. By letter dated August 20, 2020 “Without Prejudice Save as to Costs”, Harneys signified FDL’s willingness to conditionally withdraw the Summons having reviewed Canterbury’s evidence in order to save costs. Kobre & Kim communicated the position adopted at the present hearing on September 9, 2020, namely that Canterbury would consent to the withdrawal of the Summons but sought their costs on the indemnity basis and to be payable forthwith. In the last pre-hearing exchange, Harneys indicated that FDL’s position remained what had been communicated on August 28, 2020. FDL would pay Canterbury’s costs to be taxed on the standard basis and payable at the end of the hearing.
3. The issues which fall to be determined were addressed by counsel with typical persuasiveness and welcome economy:
  - (a) whether an indemnity basis award justified because the Plaintiff’s Summons was always “doomed to fail” and was improperly issued, or whether the Summons was merely unmeritorious, and properly agreed to be withdrawn once the merits of Canterbury’s responsive evidence had been assessed;



- (b) whether costs should be ordered to be payable forthwith because the application raised a discrete issue and FDL had acted unreasonably in making it; and
  - (c) if costs were ordered to be taxed and payable forthwith, whether a payment on account of costs should be ordered.
4. The first question was the most difficult one to readily resolve because it turned on a nuanced analysis of the correspondence preceding the application and an assessment of, in particular, the interaction between the Plaintiff's Summons and an Order of the Eight Judicial District Court, Clark County, Nevada dated February 14, 2019 (the "Nevada Order").

#### **Indemnity costs or standard basis costs?**

5. FDL submitted in its Skeleton Argument that the mere fact that an application or action was discontinued did not amount to conduct warranting an indemnity costs award, a legal proposition with which Canterbury did not dissent. It was common ground that indemnity costs may be awarded on the basis the Court being "*satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently*": GCR Order 62 rule 4 (11). Reliance was also placed on *Bennett-v-Attorney General* [2010(1) CILR 478 where Henderson J opined as follows:

*"6. Advancing a defence which is merely weak or unlikely to succeed is to be distinguished from maintaining a defence which is hopeless. The latter can be characterised as unreasonable. The former is an occurrence with which every barrister will be familiar....There are also cases which are hopeless and which appear that way to anyone with the requisite legal training. It is open to a judge to determine that it was unreasonable to bring such a claim or advance such defence. The usual result of such a finding is that the unsuccessful party will pay costs on the indemnity basis."*

6. Since FDL agreed to withdraw the Summons before it was heard, the case for indemnity costs necessarily focussed on whether the Summons was from the outset patently hopeless. Mr Asif QC submitted the Plaintiff's Summons was "doomed to fail" from the outset because of three main roadblocks:
- (a) the Summons sought relief this Court had no jurisdiction to grant;
  - (b) the Summons sought relief which FDL could not seek by virtue of the Nevada Order; and



- (c) the Summons sought relief which was inconsistent with the undertaking given by FDL pursuant to this Court's December 13, 2018 Order.

7. Ms Pearson responded as follows:

- (a) although the draft Order attached to FDL's Summons sought relief in terms the Court could not grant (compelling Canterbury to enter into an agreement with FFP), the substantive relief sought could properly be granted on other terms, such as FFP holding the Shares and Proceeds;
- (b) although the relief sought could not be granted without an application to vary the Nevada Order (which prohibited FDL from taking "any action whatsoever" to transfer the Shares and Proceeds from Canterbury if it was released from its undertaking to this Court), such application could properly have been made at any stage after the Summons was issued, even after a provisional Order had been made; and
- (c) although the Summons did not expressly seek a release from FDL's December 13, 2018 undertakings, such relief could also have been sought at any stage after the Summons was filed.

8. In my judgment it is ultimately clear that the substantive relief sought by FDL was to have the Shares and Proceeds (which it contends in this action constitute its property) transferred to a third party escrow agent. It has been a longstanding gripe of FDL's in this action that its litigation adversary cannot be trusted to manage these assets. FDL has been pursuing a consensual transfer from an early stage. The 'no jurisdiction' argument is in reality a technical point about the form of the application. This Court clearly has jurisdiction to direct that the subject matter of the dispute should be preserved by being held to the Order of the Court by an appropriate third party escrow agent. GCR Order 29 rule 2 provides as follows:

*"(1) On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter."*

9. FDL's Summons (paragraph 3) and the draft Order attached to it (paragraph 7) each sought "Such further or other orders as the Court thinks fit." So FDL is able to swerve around the first roadblock.

10. As far as the Nevada Order is concerned, Mr Asif QC accepted that he could not contend that the issuance of FDL's present Summons contravened the Nevada Order.



Nor could he contend that FDL lacked standing to issue its Summons. The complaint, properly understood, was that since varying the Nevada Order was essential to obtaining the relief sought from this Court, the only proper way of proceeding was to first go to the Nevada Court. This seemed at first blush an insubstantial submission, but it was one which it was difficult to summarily reject on clearly articulated grounds.

11. The Nevada Court is adjudicating a dispute between FDL and PFS, a US entity connected to Canterbury's principal. FDL, as Plaintiff, undertook to this Court on December 13, 2018:

*“that it will make no attempt to, withdraw or transfer from the Defendant any shares in Yangtze River Port and Logistics Ltd. held for it by the Defendant pending further order of the Court or agreement by the Defendant.”*

12. The Nevada Order provides:

*“...that in the event that the Cayman Islands Order is varied, overruled, superseded, or otherwise altered so as to allow the withdrawal, transfer or other removal of the remaining Additional Shares or the Proceeds from Canterbury, FDL shall be immediately enjoined and prohibited from taking any action whatsoever to withdraw, transfer or otherwise remove the remaining Additional Shares or the Proceeds from Canterbury unless expressly authorized to do so by further order of this Court or by written agreement with PFS.”*

13. The combined effect of the December 13, 2018 Order of this Court and Nevada Order is to require the Shares and Proceeds to be held by Canterbury and not transferred without either (a) the agreement of Canterbury and PFS, or (b) an Order of this Court and the Nevada Court. Since it was clear when the FDL's Summons was issued that Canterbury's consent was not forthcoming, it was self-evident that the transfer required the approval of both this Court and the Nevada Court. In my judgment it is clear that it would have been improper for FDL to seek relief on its Summons concealing from this Court the fact that it was required to seek similar relief from the Nevada Court.

14. However, I can identify no principled basis for concluding that the failure to expressly refer to the Nevada Order in the Summons (and/or in the annexed draft Order) means that the Summons was “doomed to fail”. Canterbury would undoubtedly have raised the issue of the Nevada Order (as it has done in the context of the present costs application). The matter would in due course have been addressed appropriately by this Court in any event. Subject to considering other subsidiary points, I find that FDL's path is not impeded by Canterbury's second roadblock.



15. Mr Asif QC fairly conceded that his third roadblock was less imposing than the first two. It is an even more abstract technical point. Clearly the Summons cannot be said to have been from the outset doomed to fail because it failed to explicitly seek a release from the December 13, 2018 undertakings given to this Court by FDL. That relief was surely sought by necessary implication. The need for express reference to be made to the release would have been a drafting point to be addressed when the final Order was settled, assuming that FDL actually obtained the substantive relief it sought.
  
16. With those headline complaints rejected as fatal flaws, the remaining makeweight points can be quickly disposed of. Mr Asif QC further submitted that in assessing the reasonableness of the filing of the application, account should be taken of the following considerations:
  - (a) in my Ruling of April 15, 2020 granting Canterbury's application to be released from their December 13, 2018 undertakings on the grounds of FDL's failure to comply with AML Order dated October 25, 2019, I expressed concern about "*a disproportionate amount of costs [being] expended on this issue which is collateral to the main issues in controversy in the present action*". At the hearing on May 20, 2020, I reiterated my concerns orally;
  - (b) in an email dated April 22, 2020, my provisional view that there was no risk of Canterbury disposing of the Shares and Proceeds was recorded, and there had been no change of circumstances since then;
  - (c) in a letter dated May 25, 2020, Kobre and Kim had referred to this provisional view and warned that in the event of any application by FDL to change the custodianship of the assets Canterbury would seek indemnity costs;
  - (d) the concerns raised by FDL were old matters and no change of circumstances had occurred;
  - (e) the Sixth Dominic Sin Affidavit and the FFP letter were seriously misleading about Canterbury's apparent involvement in discussions about retaining FFP; and
  - (f) FDL's Summons was improperly supported by expert evidence without leave.



17. As I observed in the course of the hearing, it was difficult to avoid the distinct impression that at least part of the motivation for the present application was a ‘tit-for-tat’ response to Canterbury’s April 15, 2020 application to be released from their undertakings victory, and the related June 10, 2020 costs victory which resulted in an award of indemnity costs to be taxed and payable forthwith against FDL in favour of Canterbury. However, there is no proper basis for me to positively find that this was the sole or primary motivation behind its present Summons, particularly since FDL sought to withdraw it soon after Canterbury’s responsive evidence was served.
18. It is therefore important to scrutinise the record carefully to form a fair and reliable view of whether FDL’s present Summons was in merits terms obviously bound to fail or, alternatively, whether its merits were merely weak and had some prospects of success, prospects which were weakened further still by the evidence which Canterbury subsequently filed. In my judgment this necessarily nuanced analysis points to the conclusion that this application was not so clearly hopeless as to make it unreasonable for FDL to have made it at all. The main reasons for this conclusion are as follows:
- (a) having regard to the nature of the claims FDL asserts in the present proceedings, which essentially complain that Canterbury wrongly retained FDL’s assets and improperly liquidated some of them after FDL terminated the brokerage contract, it seems likely that FDL’s principals genuinely distrust Canterbury;
  - (b) my explicitly “provisional” view that the Shares and Proceeds were safe with Canterbury was just that: provisional;
  - (c) it is common ground that Canterbury did not produce the documentary evidence which FDL sought in relation to the allegedly “Missing Funds” sought by, *inter alia*, in Harneys’ letter dated May 19, 2020, in the form requested (copies of statements or photo-shots). It was partly explained (in Kobre and Kim’s May 25, 2020 response) that FDL already had the ability to track the custodians of shares and partly explained (in the course of argument) that Canterbury did not trust FDL to properly handle sensitive material. This concern was, it seemed to me somewhat weakly, based on the December 2018 correspondence from FDL’s US attorneys mischaracterising this Court’s initial Ex Parte Freezing Order in letters sent to various brokers. The combative course of recent correspondence does not make it obvious that Canterbury fully allayed FDL’s concerns;
  - (d) FDL’s concerns mostly related to post-December 13, 2018 matters. And despite raising concerns about Canterbury’s retention of the Shares and Proceeds in passing in the course of other hearings before



the Court (when I expressed reticence about making such an Order absent consent), this was the first formal application to have the assets moved by Order of the Court. The Sixth Affidavit of Dominic Sin (paragraph 13) complained, *inter alia*, about the failure to provide the requested screen shots or to explain why screen shots need not be provided and expressed concerns about Canterbury's current business status;

- (e) the FFP instruction letter was on superficial analysis potentially misleading. However, on closer analysis it was simply a letter written in contemplation of a joint instruction by FDL and Canterbury. And, as Ms Pearson pointed out, the Sixth Sin Affidavit (paragraph 8) made it clear that Canterbury had refused to even consider instructing FFP;
- (f) the First Affidavit of Nicholas Corsetti of Paradigm Governance Partners sets out what appear to be the deponent's opinions about Canterbury's regulatory status. Mr Asif QC was arguably right that this was expert evidence which should have been filed with leave of the Court in the form of an Expert Report. Assuming that this criticism is well-founded, this procedural irregularity had no impact on the application which was withdrawn before the Affidavit was deployed or had to be responded to. Moreover, the contents of the Affidavit in substantive terms on their face lent support to FDL's Summons, further undermining the hypothesis that the Summons was from the outset bound to fail.

19. I indicated at the beginning of the hearing that it appeared to me to be an important consideration that FDL had elected to withdraw its Summons, purportedly for "commercial" reasons, after Canterbury's evidence was served. Indemnity costs would not be appropriate because it would serve as a disincentive for parties considering withdrawal. Mr Asif QC resisted this suggestion. I accept that a withdrawal decision will not automatically have a dispositive impact in each and every case on whether the relevant application was unreasonably or improperly made, for indemnity costs purposes. The withdrawal decision may only have an impact on the costs incurred after the withdrawal decision has been made. Where applications are unreasonable and/or abusive because they are obviously bound to fail, the normal costs consequences cannot automatically be escaped through a subsequent withdrawal. But just as there are rules of war for military conflict, even in the secular sphere of civil litigation 'repentance' will always at least potentially count for something.

20. A litigant which withdraws an application which on one view is hopeless before it is heard is required by the relevant costs principles to do precisely that. This will make it



appear more plausible that the withdrawing party is not the sort of litigant which is inclined to pursue unreasonable applications. Unreasonable litigants typically pursue unmeritorious applications to the bitter end. In the present case, the initial impression that FDL has not acted unreasonably or improperly overall is confirmed by a closer scrutiny of the material before the Court. Canterbury is entitled to its costs of the Summons generally, but only on the standard basis.

**Should costs be taxed and payable forthwith and should a payment on account of costs be ordered?**

21. Should costs be payable forthwith? In my June 10, Costs Ruling in this action, in a passage upon which Ms Pearson relied I held as follows:

*“42... 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.”*

22. Based on the findings I have reached above, it follows that I see no justification for ordering the costs to be taxed and payable forthwith. Misconduct is not the only basis for ordering costs to be taxed and paid forthwith. But Canterbury is not a withdrawing party who it would be unjust to require to wait until the end of the case to receive its costs. The fact that the application arguably raised a discrete issue is not enough (by itself) to justify the exceptional Order that Canterbury seeks. In this context where the receiving party will be involved in the litigation until it ends, awarding costs on the indemnity basis is effectively a necessary precondition for consideration of a “forthwith” Order.
23. It follows that no justification for a payment on account of costs has been shown to exist in a case where, unlike in *Al Sadik-v-Investcorp Bank B.S.C.* [2018(2) CILR 464], it is not known who the winner overall is. I ordered a payment on account of costs in relation to the AML Order only because I had also made a “forthwith” Order.

**Costs of the present costs application**

24. FDL has achieved substantial success overall in relation to the present costs application. The Court has made the award it apparently first sought (as an incident of an Order granting leave for it to withdraw its Summons) in its letter of August 28,



2020, which it reserved the right to bring to the attention of the Court in relation to costs. This position was reiterated in its letter of September 24, 2020.

25. Although I was not addressed as to the costs of the present costs application, it is difficult to see how Canterbury can resist this Court concluding that it acted unreasonably in the requisite costs sense in refusing FDL's costs offer and should not recover the costs of the present application as part of the costs of the withdrawn Summons. The normal rule ought in principle to be that when an interlocutory application is proposed to be withdrawn before it is heard on terms that the applicant will pay the respondent's costs on the standard basis, such an offer should be accepted. The costs of a very weak and/or unmeritorious application which is sought to be withdrawn will generally be awarded on the standard basis. Exceptional circumstances will usually be required to warrant punishing the withdrawing party with indemnity costs. The factors which might justify such an award will likely include:
- (a) applications which are liable to be struck-out because it is plain and obvious that they are bound to fail for legal or evidential reasons;
  - (b) applications raising scandalous or commercially damaging allegations which the applicant publicizes before the application is heard;
  - (c) applications which require the respondent to expend an unusually large amount of time and/or costs to respond to, before withdrawal occurs; and
  - (d) applications which are to some material extent prosecuted in an improper, negligent and/or unreasonable manner.
26. Against the background of the present litigation, it is easy to understand how Canterbury and its legal advisors could genuinely have perceived that FDL's present Summons had entered indemnity costs territory. Viewing an adversary's application objectively in highly contentious litigation is difficult indeed; but it is a goal that the overriding objective in GCR Order 62 rule 4(2) requires parties to strive to reach. In the event, I have found, but only after careful consideration, that the Plaintiff's application did not enter indemnity costs territory. In these circumstances, my provisional view is that it would not be just to award FDL the costs of the costs application in any event. FDL created the potential for the costs controversy by issuing the Summons it has decided to withdraw. My strong provisional view is that the appropriate award is that the costs of the present application should be FDL's costs in the cause.

## Conclusion

27. FDL is granted leave to withdraw its July 15, 2020 Summons on terms that it shall pay Canterbury's costs of the Summons to be taxed if not agreed on the standard basis. Unless either party applies by letter to the Court within 21 days of the date of delivery of the present Ruling to be heard as to costs, the costs of the present costs application shall be the Plaintiff FDL's costs in the cause. As regards future applications, the parties are reminded of their obligations under paragraph 3 the Preamble to the GCR "*to assist the Court to further the overriding objective.*"

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

