



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

Neutral Citation Number: [2025] CIGC (FSD) 10

FSD 236 of 2020 (RPJ)

B E T W E E N

- (1) KUWAIT PORTS AUTHORITY
(on its own behalf and on behalf of The Port Fund L.P)**
- (2) THE PUBLIC INSTITUTION FOR SOCIAL SECURITY
(on its own behalf and on behalf of The Port Fund L.P)**
- (3) THE PORT FUND L.P.**

Plaintiffs

and

- (1) PORT LINK GP LTD. (IN RECEIVERSHIP)**
- (2) MARK ERIC WILLIAMS**
- (3) WELLSPRING CAPITAL GROUP, INC**
- (4) KGL INVESTMENT COMPANY ASIA**
- (5) GOLDEN SHAHIN GENERAL TRADING & CONTRACTING COMPANY**
- (6) APACHE ASIA LIMITED**
- (7) RONALD HENRY AYLIFFE**
- (8) KGL INVESTMENT COMPANY K.S.C.C.**
- (9) APACHE ASIA LIMITADA**

DEFENDANTS

Before: The Hon. Justice Raj Parker

Appearances: Mr Dan McCourt Fritz KC instructed by Ms Jennifer Fox of Ogier (Cayman) LLP for the Plaintiffs

Mr Graham Chapman KC instructed by Mr Andrew Pullinger and Mr Harry Shaw of Campbells LLP for the Second, Third and Fourth Defendants

Heard: 17 December 2024

Draft Judgment circulated: 31 January 2025

Judgment Delivered: 7 February 2025

Indemnity costs - court's inherent jurisdiction to control its own procedure - GCR Order 41 rule 5 - jurisdiction to make an order which requires a party to file and serve affidavit evidence that affirms or corrects evidence which is misleading-application for corrective affidavit evidence - application for affidavit evidence to be only submitted by authorised representatives with direct personal knowledge of the facts rather than external lawyers-cogent reasons required.

JUDGMENT

Introduction

1. D2-D4 make three applications. First, D2-D4 seek indemnity costs for the Plaintiffs applications:
 - a) dated 5 February 2023 to join D8 to the proceedings and to serve it out of the jurisdiction (the “Joinder Application”);
 - b) dated 17 November 2023 to extend the validity of the Re-Re-Amended Writ of Summons dated 22 May 2023 (the “Extension Application”); and
 - c) the *ex parte* application dated 20 March 2024 for substituted service on D8 (the “Substituted Service Application”).
2. Secondly, D2-D4 seek an order that an authorised representative of the First Plaintiff, Kuwait Ports Authority (“KPA”), with direct personal knowledge of its claim against D8 in the Kuwaiti

Courts (the “Kuwaiti Civil Proceedings”) files and serves an affidavit that affirms or corrects the evidence given by Mr Marc Florent¹.

3. Thirdly, D2-D4 seek an order that, save with the agreement of all parties or leave of the court, all future affidavit evidence filed by the Plaintiffs or either of them in these proceedings shall be given by authorised representatives of the Plaintiffs with direct personal knowledge of the matters of the subject of their evidence, rather than the Plaintiffs external legal representatives.
4. The Summons is supported by the Fourteenth Affidavit of Mr Mark Eric Williams dated 7 November 2024 (“Williams 14”) and its exhibit.
5. The Plaintiffs resist all three applications. Mr Graham Chapman KC appeared for D2 to D4 and Mr Dan McCourt Fritz KC appeared for the Plaintiffs.

Background and D2-D4 arguments

6. On 11 October 2024, KPA filed a notice of discontinuance in respect of the whole of its action in these proceedings against D8. Mr Marc Florent is a partner in Baker McKenzie in London. He filed Florent 9 in connection with the discontinuance.
7. Mr Chapman KC submitted that Mr Florent had accepted that he had provided incomplete and/or misleading affidavit evidence to the court on behalf of KPA in Florent 5, Florent 7, and Florent 8. Those affidavits failed to disclose the existence of and developments in civil proceedings in Kuwait involving KPA and D8. The applications they were filed in support of, namely the Joinder, Extension and Substituted Service Applications were, according to Mr Chapman KC, therefore defective. The relevance of the omitted information had led to the complete discontinuance of the proceedings against D8 by KPA.

Systemic issues

8. Mr Chapman KC submitted that systemic issues appear, from Florent 9, to exist within KPA which impact on its ability to participate responsibly in these proceedings and give reliable evidence and instructions to its lawyers. He submitted that it is evident that KPA's legal team

¹ In his Fifth Affidavit filed on 6 February 2023 (“Florent 5”), Seventh Affidavit filed on 17 November 2023 (“Florent 7”), Eighth Affidavit filed on 20 March 2024 (“Florent 8”) and Ninth Affidavit filed on 11 October 2024 (“Florent 9”).

has failed to make proper inquiries of KPA, or whomever else was instructing them, with regard to the matters deposed to in Florent 5, Florent 7 and Florent 8.

9. Mr Chapman KC pointed to paragraph 20 of Williams 14 and its exhibit which showed that:
 - a) on 16 November 2023, the Kuwaiti Court gave judgment at first instance in KPA's favour in the amount of US\$553,418,974.90. The proceedings had been commenced in 2016;
 - b) on 5 March 2024, the Kuwaiti first instance judgment was upheld by the Kuwaiti Court of Appeal; and
 - c) D8 appears to have fully participated in the Kuwaiti Civil Proceedings, having been represented by local counsel. D8 defended the claim at first instance and appealed to the Kuwaiti Court of Appeal (with a further appeal to a higher court apparently pending).
10. Mr Chapman KC went on to submit that, but for the incomplete and or misleading evidence, the applications would not have been made or would have been dismissed, and D2 to D4 would not have incurred costs in connection with those applications.

Mr Florent's explanations

11. Mr Florent gave the following explanations for his and his client's failure to disclose these matters:
 - a) in paragraph 20 of Florent 9, it is said both he and the Plaintiffs legal team forgot about the existence of the Kuwaiti civil proceedings at the time that Florent 5, Florent 7, and Florent 8 came to be prepared; and
 - b) in paragraph 21 of Florent 9, it is said that Baker McKenzie and Ogier (KPA's Cayman attorneys) do not represent or advise KPA in connection with the Kuwaiti Civil Proceedings, nor did they play any part in relation to those proceedings. Domestic and international litigation on behalf of Kuwaiti state entities is said by Mr Florent to be handled by two separate and distinct departments within the Kuwaiti Department of Legal Advice and Legislation ("DLAL"). It follows that the team within DLAL

instructing Baker McKenzie and Ogier in these proceedings (which is the international team) do not handle the domestic litigation.

12. Mr Chapman KC submitted that these explanations were highly unsatisfactory because it was inherently improbable that one or more persons within DLAL or KPA who instruct Baker McKenzie and Ogier did not know about the Kuwaiti Civil Proceedings. Mr Chapman KC also submitted they were being advanced on an inconsistent basis to KPA's case in this court and have resulted in a substantial monetary award in Kuwait.

Incomplete and misleading record

13. Mr Chapman KC pointed to an incomplete and materially misleading record left at this court in the following respects:
 - a) in support of the Joinder Application, Mr Florent deposed in Florent 5 the basis on which it was said that D8 was a necessary and proper party. Meanwhile KPA had at that time already commenced and was pursuing claims against D8 in the Kuwaiti Civil Proceedings for losses which would have subsumed by a significant margin any alleged losses in this jurisdiction in respect of the same subject matter;
 - b) in support of the Extension and Substituted Service Applications, Mr Florent deposed in Florent 7 and Florent 8 that KPA was unable to effect service on D8 in Kuwait and /or that D8 was evading service. Mr Chapman KC submitted KPA and/or DLAL must have been in direct contact with D8's attorneys in Kuwait and able to serve D8 locally in Kuwait. The allegations that D8 was taking steps to deliberately evade service of these proceedings and that D2–D4 and possibly their lawyers were implicated in that, were, according to Mr Chapman KC, obviously inaccurate.

Earlier disclosure

14. Mr Chapman KC acknowledged that Mr Florent had expressly referred to the existence of the Kuwaiti Civil Proceedings under the 'full and frank disclosure' heading in his first affidavit. Mr Florent expressly recognised that the proceedings in this court, in light of the existence of the Kuwait Civil Proceedings, may be said to be an abuse of process². Mr Florent had pointed

² §121.

out that D8 was D4's parent and the Plaintiff's position in response to the abuse of process point was that the claims were distinct, albeit related, and the Plaintiffs would naturally give credit in the proceedings in this court for any relevant recoveries against D8 in the Kuwaiti Civil Proceedings and vice versa.

Irreconcilable factual cases

15. Mr Chapman KC submitted that KPA was also advancing irreconcilable factual allegations in the two sets of proceedings at the same time in relation to the same underlying subject matter and alleged loss. The facts relied on in the Kuwait Civil Proceedings included the quantification of damages claimed which failed to account for the Port Fund L.P's (the "Fund") very substantial liabilities when assessing KPA's limited partnership interest in the proceeds of the "Clark Asset" sale, and D8's alleged status as "Manager" of the Fund which was known to be untrue. He submitted that the Kuwait court's judgment was therefore given on a materially false basis, which was known by KPA to be false.

Summary

16. Mr Chapman KC submitted that Mr Florent gave no explanation as to how and why KPA made the applications it did where it had already commenced and was pursuing proceedings against D8 in Kuwait. In the result:
 - a) there has been misleading, incomplete, and inaccurate evidence given to the court previously, which remains uncorrected;
 - b) there have been serious breaches of the duty of full and frank disclosure on the part of KPA and that seriousness cannot and should not be downplayed; and
 - c) the unexplained position of how the Kuwait Civil Proceedings, their content and outcome were overlooked by the Plaintiffs and their legal team is unsatisfactory, as is the absence of any proposal as to what is now to be done by KPA with the judgments obtained in its favour before the Kuwait court.
17. Mr Chapman KC submitted that those matters give rise to entirely reasonable concerns as to how the evidence is being given in these proceedings on behalf of the Plaintiffs and on whose

instructions and more generally as to how these proceedings are being advanced by KPA and the Plaintiffs.

18. Mr Chapman KC argued that in circumstances where evidence is incomplete, misleading and in material part false, is provided in affidavits which do not comply with the rules and which give rise to multiple breaches of the duty of full and frank disclosure, then the first and most obvious thing that must be done is that that evidence must be corrected and the breaches of both the rules and the duty of full and frank disclosure remedied insofar as that is now possible.
19. Against that background and exposition of D2 to D4's arguments the court sets out below its assessment of the applications.

The application for an authorised representative with direct personal knowledge to file and serve an affidavit that confirms or corrects the evidence given by Mr Florent and his Fifth, Seventh, Eighth and Ninth Affidavits

22. Mr Chapman submitted that it can be inferred from his flawed evidence that Mr Florent does not have direct personal knowledge of the facts he has deposed to in Florent 9, nor has he identified the natural persons within KPA or DLAL that are the sources of his evidence.
23. That is why, submitted Mr Chapman KC, suitably authorised employees and other representatives of KPA and/or DLAL themselves (not external lawyers) with first hand knowledge of the relevant issues should provide updating and correcting affidavits to the court to correct the record. He also set out a number of matters which should be addressed in those affidavits and which are set out in detail at paragraphs 45 of his written argument.
24. He submitted that the court's inherent jurisdiction to control its own procedure included the jurisdiction to make an order which requires a party to file and serve affidavit evidence that affirms or corrects evidence which is admittedly misleading. The court should do so and call for a full and candid explanation, in all the circumstances.

Decision

25. By GCR Order 41, a deponent who is an attorney in the Cayman Islands can only give evidence of such facts as are within his own knowledge or, in interlocutory proceedings, which contains statements of information or belief where the sources and grounds are set out.
26. It is well known that in general an affidavit sworn by an attorney is not admissible unless the attorney has direct personal knowledge of the facts and matters to which he deposes³. These provisions are well known to attorneys practising in these islands.
27. Although Mr Florent is not a Cayman Islands attorney, the court confirms that foreign attorneys should have regard to GCR Order 41 rule 5 (paragraphs 1, 2 and 3) in the same way as would a Cayman attorney⁴.
28. Mr Florent admits that in obtaining *ex parte* orders in respect of service of proceedings on D8 KPA had inadvertently failed, in breach of the duty of fair presentation, to inform the court that KPA's claim against D8 was commenced in circumstances when it had already obtained judgment in Kuwait on overlapping issues.⁵
29. Although the court assesses this as a serious failure because the duty of fair presentation on *ex parte* applications is important, having realised the mistake KPA promptly discontinued its claim in its entirety against D8 to remove any illegitimate advantage gained. Mr Florent also properly brought the mistake to the court's attention and has candidly explained how it came about and has apologised for it. The net litigation result is that KPA has discontinued its claim against D8 and so does not seek to derive any benefit from the circumstances which led to the applications.
30. Given the number of affidavits filed so far in these proceedings by Mr Florent and other deponents on behalf of KPA, over many years, the court assumes that KPA and Mr Florent are well aware of their obligations. The court is not persuaded that the failure resulted from a misunderstanding of or failure to follow the rules.
31. Although D2-D4 have made much of the admitted oversight, the court accepts Mr Florent's explanation and apology. The court is not persuaded that there has been any deliberate

³ See GCR O.41, r.5 (3).

⁴ See *In the matter of MF Trust* (FSD 213 of 2021, Unreported 17 June 2022) per Doyle J at [15] and *Torchlight GP Limited v Millennium Asset Services Pty Ltd and Ors* [2018 (1) CILR 244] per Kawaley J at [83].

⁵ Having previously disclosed the existence of the Kuwaiti proceedings in his First Affidavit dated 8 February 2021§ 121.

concealment or consistent wrongdoing by KPA or Mr Florent such as would potentially justify any of the orders applied for by D2-D4. The error was corrected and no benefit was retained by KPA from the oversight.

32. Moreover, the admitted oversight has not, in the court's view, caused any real prejudice to D8 (the party principally affected) or to any other party, including D2-D4.
33. D2-D4 and this court were aware of the Kuwaiti Civil Proceedings because they were expressly drawn to their attention in the First Affidavit of Mr Florent on 8 February 2021 as set out above.
34. There was indeed an unfortunate omission by KPA to disclose the up to date and ongoing factual developments in the Kuwaiti Civil Proceedings, such as the status of the proceedings, the basis upon which the claims were advanced and defended, and the amounts in issue. However, the court also notes that there are links between D2-D4 and D8. D2 (Mr Williams) had been involved in the management of D8⁶. D8 also owns D4, and is D4's voluntary liquidator.
35. Moreover, as stated above, the court is not persuaded that any real prejudice has been suffered by D2-D4 in relation to the omission by KPA which primarily concerned the applications against D8 which it has now discontinued.
36. It is also notable to record in this regard that D8 had chosen not to enter an appearance in the case and has not participated.
37. Whilst the court recognises that in an appropriate case the court retains a discretion to prescribe the way a party may submit evidence, the court is not persuaded that a further corrective affidavit from another person with direct personal knowledge of the facts or further explanation of the circumstances is required in this case.

The application that, save with the agreement of all parties or leave of the court, all future affidavit evidence filed by the Plaintiffs or either of them in these proceedings shall be given by authorised representatives of the Plaintiffs with direct personal knowledge of the matters the subject of their evidence rather than the Plaintiffs external representatives

⁶ At least up until 1 January 2012 Mr Williams was an 'Investment Director Port Fund'.

Decision

38. It is commonplace for foreign lawyers engaged in Cayman litigation with an international element to give affidavit evidence in interlocutory proceedings. It is also commonplace for Cayman attorneys to do so.
39. As the court has made clear, in doing so foreign attorneys need to follow GCR Order 41, rule 5 in relation to the contents of affidavits. Where there are systemic or persistent issues with the evidence submitted by a party the court will of course intervene to ensure its processes are not abused. This is not such a case.
40. Whilst the court recognises that in an appropriate case the court retains a discretion to impose a restriction on the identity of deponents of future affidavit evidence, to do so in these well advanced, highly complex and contentious proceedings in relation to one party would require strong and cogent reasons. The court has not identified any on the facts of this case.
41. In this case the court finds that a partner of a reputable global law firm has made an unintentional omission and has corrected it. He has quite properly drawn the omission to the attention of the court and has explained and apologised for it. His client has removed any benefit derived from the applications which were granted. In the court's view the defective evidence has now been cured insofar as it affected the most concerned party, namely D8. There is no basis for any further order from the court.

*The application for indemnity costs**Decision*

42. It follows from the court's findings that the conduct of KPA in this case was not so unreasonable or improper as to meet the threshold for an award of indemnity costs. In addition, there is no evidence that the costs incurred by D2 to D4 would not have been incurred if the claim against D8 had been commenced by the second Plaintiff, PIFSS, alone and not together with KPA.
43. The court accepts Mr McCourt Fritz KC's submissions that absent KPA it is a fair inference that PIFSS would have sought permission to join D8 and serve it out of the jurisdiction, to apply to extend validity of the Writ because of difficulties in service, and to make an application for substituted service on D8.

44. In those circumstances there are no separate or additional costs that could be said to have been incurred by D2 to D4. The court is prepared to accept Mr McCourt Fritz KC's submissions that the costs identified by Mr Williams in Williams 14⁷ would have been incurred anyway if it had only been PIFSS which was prosecuting the claim against D8.
45. The court is not prepared to assume on the available evidence that the problems with service upon D8 which led to the Extension Application and the Substituted Service Application were self-inflicted because KPA could have simply chosen to serve D8 because it was litigating in Kuwait. There is no good evidence to support a conclusion that it had been in a position to do so and the court is not prepared to infer that was the case. The court accepts Mr McCourt Fritz KC's submission that the fact that D8 was represented by lawyers in Kuwait in different proceedings did not mean KPA could serve those lawyers and thereby effect service on D8. KPA still needed, unless D8 decided to accept service, to effect service by means that this court would recognise as effective.
46. The application for indemnity costs is also dismissed.



THE HON. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT

⁷ §35.