



Neutral Citation Number: [2026] CIGC (Civ) 15

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

Cause no: G 2024-0177

BETWEEN

- (1) ALAAEDDINE MUSTAPA SAHIBI
- (2) HANS HEINEKEN
- (3) HELGA HEINEKEN
- (4) JENS BIERTUMPEL
- (5) BOBAN KOSTICH
- (6) WILLIAM MERVYN
- (7) ANNE MERVYN
- (8) MATTHEW CARMINE BERNARDO
- (9) ALEXANDRE KOTCHERGUINE
- (10) JENNIFER RAE CHAILLER
- (11) AZEEZ AJIBOLA
- (12) JOSIE FRAZER
- (13) BARTLOMIEJ JESKE
- (14) GEMMA COWAN
- (15) HUSSAIN ALHASANI
- (16) REBECCA LESTER

Plaintiffs

AND

ELEVEN PARC LIMITED

Defendant

IN CHAMBERS

Coram: Hon. Mrs. Justice Marlene Carter

Appearances: Mr. Guy Dilliway-Parry and Ms. Rachel Kelly of Priestleys, Attorneys for the Plaintiffs
 Mr. Pramod Joshi of McGrath Tonner, Attorney for the Defendant

Date of Hearing: 13 November 2025

Draft Ruling Circulated: 9 April 2026

Ruling Delivered: 16 April 2026

Civil Law – GCR O.62 r.9(2) – application for costs to be paid forthwith

RULING

1. The Plaintiffs' summons dated 23 September 2025 sought inter alia, an order for taxation of its costs of the Defendant's summons of 14 March 2025 forthwith, pursuant to GCR O.62 r.9 (2).

Introduction

2. The Defendant's summons seeking summary judgment dated 14 March 2025 was dismissed by this court by order dated 03 July 2025. The Plaintiffs were awarded their costs. The Plaintiffs state that they have made repeated and consistent efforts to engage with the Defendant to agree directions for further progress of the trial, which efforts have proved futile due to the lack of engagement.
3. The Plaintiffs have had notice from the Defendant's attorneys that the Defendant's insurer has declined to cover the Plaintiffs' claim; the Defendant has no income as it does not trade, and it would be unable to satisfy any judgment in favour of the Plaintiffs or any cost order made.
4. The Plaintiffs sought, inter alia, an explanation why "*having previously confirmed that the Defendant was insured, it is now asserted that the present claim is not covered by insurance and ... evidence to support the assertion that the Defendant's purported impecuniosity and lack of insurance is in fact genuine,*"
5. The Plaintiffs submit that the court has a discretion to order that costs be taxed before the end of the proceedings pursuant to GCR Order 62 r. 9 (2). The Plaintiffs submit that each of the principles identified by Kawaley J. in *Fortunate Drift Limited v Canterbury Securities Ltd*¹ as being the relevant considerations for a court asked to exercise its discretion under the rule, are present in this case:
 - (i) Costs were incurred due to the Defendant's summons seeking summary judgment or that the Plaintiffs' claim be struck for a lack of capacity in the Plaintiffs to bring the claim. The Summons was grounded on a poor point, and its prospect of success was limited.
 - (ii) The Defendant acted unreasonably in respect of the summons in:
 - (a) Issuing the summons in circumstances where it would have been aware of its impecuniousness and failing to disclose the same.

¹ Cause No. FSD 227 of 2018 (IKJ)

- (b) Issuing the summons where it was insolvent or at risk of becoming insolvent. This was in breach of its director(s) fiduciary duties, in circumstances where the Plaintiffs allege that the encumbrance now resulting in the Defendant's insolvency was taken after the issuance of the claim by the Plaintiffs.
 - (c) Continuing to make substantial monthly payments to a third party in circumstances where because of impecuniously it may not be able to meet the adverse costs of and associated by the summons. It is submitted that this was evidence of unreasonableness on the part of the Defendant, and part of the Defendant's overall unreasonable behaviour in seeking to delay the progress of the matter.
 - (iii) The Defendant's actions in refusing to agree directions to trial on numerous occasions and attempts to delay progress of the claim have resulted in the proceedings continuing for a further significant period. The result is that *"the end of the proceeding was not so obviously imminent as to make it irrational to order that the costs...be paid before the end of the litigation"*
 - (iv) There could be no financial unfairness to the Defendant from the order sought. However, unfairness to the Plaintiffs could result from the Plaintiffs being unable to recover their costs while the Defendant makes payments to other creditors.
6. The Plaintiffs contend that the court's discretion under GCR O.62 r. 9 (2) should be exercised in favour of the Plaintiffs, considering the new information regarding the Defendant's finances. They contend that this constitutes exceptional circumstances which have materially changed the position since the costs order was granted.

The Defendant's position

7. Counsel for the Defendant submitted that the court should ignore any perception of the Defendant being deliberately obtrusive. Counsel stated that it was misleading to go back to what transpired in September 2024, before the action was filed, to find support for this proposition. The Defendant submits that costs should follow the event and be taxed in the usual way.
8. Counsel for the Defendant argued that the Defendant has made attempts to advance the matter and pointed to the issue of the Scott Schedule and the failure to the Plaintiffs to provide the Schedule up to the time of the hearing of the instant application. Counsel stated that the Schedule was a key element to the defence as it was essential that the Defendant's expert be provided with same before inspection of the property. While acknowledging that the Plaintiffs' expert report had already been

served, counsel stated that this report does not identify the nature of the damage to the individual units and thus the necessity for the expert to have both at the time of inspection of the units.

9. Counsel submitted that there were 3 reports that formed the Plaintiffs' case and that these ran collectively to over 100 pages. He stated that while urgency was necessary, this should not be at the expense of the Defendant having a fair and reasonable time to respond.
10. Regarding the present financial position of the Defendant, counsel for the Defendant noted that this matter had been addressed in correspondence since the 21st of August 2025.
11. Counsel opposed the application for taxation forthwith submitting the following:
 - (i) It is an unusual application. The Plaintiffs did not seek such a provision at the time that the order was made.
 - (ii) Referring to *Al Jomaih Power Limited v IGCF SPV 21 Ltd (no.2)*² and *Fortunate Drift*, counsel submitted that this was not an exceptional case where taxation should take place forthwith.
 - (iii) Counsel submitted the circumstances of *Fortunate Drift* involved a “*highly unusual order*” which distinguished it from the factual position in the instant case.
 - (iv) The Defendant has complied with the duty of candor and there is no basis for concerns about the directors of the Defendant
 - (v) That the court must consider the expected length of the proceedings. In *Fortunate Drift* 18 months was not considered a long time. It is contended that this is a trial on expert evidence and that proceedings should reach trial by June-July 2026, far less than the 12-15 months contemplated in *Al Jomaih* and 18 months in *Fortunate Drift*.
12. Counsel for the Plaintiffs countered that the Defendant was not in the dark or hampered as much as claimed because of the lack of the Scott Schedule, that there was no ambiguity as to the exact nature of the claim regarding the separate units of the Plaintiffs, and that this was merely an artifice being employed by the Defendant.
13. Regarding the judgment in *Fortunate Drift*, and specifically paragraph 45, counsel for the Plaintiffs re-iterated that the parties are in exactly the position as envisaged in that case.

² [2026] CIGC (FSD) 8

Law and considerations

14. The Plaintiffs rely on GCR O.62, r.9 which states inter alia:

“(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 proceedings arise.

(2) If it appears to the Court when making an order for costs that all or any party of the costs ought to be taxed at an earlier stage it may order accordingly”

15. In *Fortunate Drift* Kawaley J examined the legal principles relevant to the “*unfettered discretion*” in the court at GCR O.62 r.9 (2) to allow costs to be taxed at an earlier stage than at the end of the proceedings in which they arose. These he identified as:

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

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

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

(d) 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 O.62.

16. Each of the authorities referred to herein consistently states that an order under GCR Order 62 r.9 (2) should only be made in exceptional circumstances. In *Al Jomaih*, while the Learned Judge was constrained by the absence of detailed submissions from the parties on this issue, he noted that he was “*not willing to conclude that this was an exceptional case where taxation of...costs should take place forthwith.*”

17. Kawaley J in *Fortunate Drift* referred to the “*exceptional circumstances*” required to justify a departure from the usual approach.

18. In *Re Sphinx*,³ Smellie Chief Justice, (as he then was) outlined the following regarding the stage at which taxation of costs is usually ordered:

“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

³ [2009 CILR 178]

determination. So said Saville, J. in Rafsanjan Pistachio Producers Co-op. v. Bank Leumi (UK) Ltd. (3) (cited in 1 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.”

19. While this court has an unfettered discretion on this issue, it must engage with the individual case in a robust manner before deciding whether an order for costs adjudged on an interlocutory application should be taxed and paid forthwith.
20. On the instant application the Plaintiffs state that the Defendant’s actions amount to litigation misconduct sufficient to warrant an order for the costs to be paid forthwith. While the Defendant could be faulted for not informing the Plaintiffs earlier about the new financial position in which it finds itself, I find that this is not a sufficiently exceptional case to warrant the court exercising its discretionary jurisdiction to order that the costs of the March 2025 interlocutory application should be taxed and paid forthwith.
21. I do not find that the manner in which the Defendant conducted the application itself was such as to rise to the level of litigation misconduct to justify the order sought. The application for summary judgment proved to have been misguided. The order for the Defendant to pay the Plaintiffs’ costs of that summons is an indication that the court did not find favour with the Defendant’s arguments. However, a finding which amplifies this to being deliberate misconduct of the sort necessary to constitute exceptional circumstances and so lead to an order for payment of costs forthwith is not supported by the facts. This was not such unreasonable conduct in relation to the application in which the costs order was made to justify such an order.
22. This is a claim that was filed on 11 July 2024. It is anticipated that there shall be expedited directions that take account of the urgency of the matters that the Plaintiffs state have necessitated the claim. There is no reason to prevent the trial window from being accommodated in the summer this year. The issue of the length of time before the matter comes to trial turns in favour of the Defendant. I also bear in mind that the outcome of the claim will rest heavily on expert evidence.
23. The Plaintiffs submitted that the court has wide discretion under GCR Order 62, r.9 (2) to make an order for taxation of costs at any stage on the application of the receiving party, not just at the time of making an order for costs. This, it was argued, could be inferred from the Overriding Objective

as well from the dicta in *Fortunate Drift*. It was submitted that the new information regarding the Defendant's impecuniously has materially changed the position since the Costs Order was granted.

24. This to my mind is not consistent with the Learned Judge's comments in the *Fortunate Drift* matter. At paragraph 22 the court noted this issue of the capacity of an order that costs be payable forthwith to "stultify proceedings"⁴. At paragraph 23 the Learned Judge addressed the issue in this way:

"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 objection" of GCR Order 62 is "that a successful party to any proceedings should recover from the opposing party the reasonable costs incurred by hm 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."

25. In this case the Defendant argues if the court were to make the order sought this would be unfair to the Defendant. The Plaintiffs submitted that there could be no financial unfairness to the Defendant from the order sought, however unfairness to the Plaintiffs could result from the Plaintiffs being unable to recover their costs while the Defendant makes payments to other creditors. In this context and bearing in mind the reservations of Kawaley J. as set out above, the ordinary rule, that the interlocutory costs orders should be taxed at the conclusion of the proceedings, should be followed allowing for any costs orders to be set off against each other as may prove necessary.
26. The Plaintiffs' application for an order for taxation of its costs of the Defendant's summons of 14 March 2025 forthwith, pursuant to GCR O.62 r.9 (2) is dismissed. Costs of the instant application will be costs in the cause.



Hon. Mrs. Justice Marlene Carter
Judge of the Grand Court

⁴ In *Re Vangory Holdings Pty Ltd* [2015] NSWSC 801, per Black J.