IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No.: FSD 143 of 2017 (IMJ)

BETWEEN:

DAEWOO INTERNATIONAL CORPORATION

Plaintiff

AND

(1) AMERICA METALS TRADING LLP
(2) LUIS GUILHERME MARIANO MONTEIRO
(3) LUIS EDUARDO MARIANO MONTEIRO
(4) LUIS CLAUDIO MARIANO MONTEIRO
(5) LUIS FERNANDO MARIANO MONTEIRO

Defendants

IN CHAMBERS

Appearances: Ms. Ashleigh Dixon of Carey Olsen on behalf of EFG Bank, the Applicant in this matter
Mr. Lachlan Greig of Harneys on behalf of the Plaintiff/Respondent in this matter

Before: **The Hon. Justice Ingrid Mangatal**

Heard: **14 February 2019**

Draft Judgment Circulated: **16 April 2019**

Judgment Delivered: **24 April 2019**

HEADNOTE

Costs – Undertaking given in injunction proceedings – Whether costs of non-party incurred in complying with order matter for taxation, or simply what Court considers reasonable.

RULING

Introduction

1. On 17 December 2018 EFG Bank AG (Cayman Branch) ("**EFG**") filed a Summons (the "**Summons**") seeking that the Company, Daewoo International Corporation ("**Daewoo**") comply with its undertaking given to the Court to pay EFG's reasonable costs incurred in complying with an Injunction Prohibiting Disposal of Assets dated 25 June 2017 (the "**Injunction**").

Costs Incurred

2. Pursuant to Schedule 1 of the Injunction, Daewoo gave certain undertakings to the Court including that "*the Applicant will pay the reasonable costs of anyone other than the Respondents which have been incurred as a result of this Order including the costs of ascertaining whether that person holds any of the [Injunction] Respondents' assets....*" (the "**Costs Undertaking**").

3. The purpose of the Costs Undertaking is to indemnify innocent third parties, like EFG, against their costs, limited only by reasonableness. It is to be noted that there are no allegations of wrongdoing made by Daewoo against EFG in the Injunction Proceedings or otherwise.

4. EFG incurred costs in a certain amount representing Carey Olsen's fees and disbursements for the period 27 July 2017 to 21 August 2017. To the extent that EFG incurred costs internally, EFG says that it is not seeking repayment of such costs.

5. It is not in dispute that Daewoo is liable to pay EFG's reasonable costs pursuant to the Costs Undertaking. The issue is whether the amount claimed by Carey Olsen, is reasonable. Daewoo made a certain offer, which was rejected by EFG.

6. Despite Daewoo stating it could not make any assessment of reasonableness of EFG's costs until being provided with unredacted invoices, having now been provided with the unredacted invoices, the offer remains unchanged. Accordingly EFG maintain that it made no difference whatsoever (and therefore it is irrelevant when the invoices were provided) and that therefore the Summons was necessary. Further, it was submitted by Ms. Dixon on behalf of EFG that no coherent reasons have been given by Daewoo for

refusing to pay the full amount of the costs claimed. Unredacted invoices were exhibited and produced to the Court.

Whether Taxation is appropriate

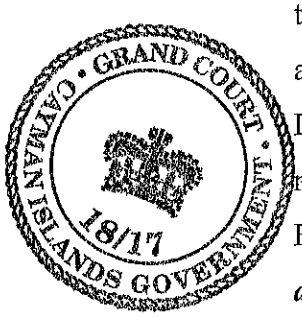
7. EFG submits that it is a matter for the Court to determine the quantum for what it considers the reasonable costs are and that this is not a matter for taxation. This is simply, the submission continues, a determination of quantum for which Daewoo is liable, in the same way as a party may be liable under a contract, but where the quantum of liability is in dispute. The fact that it relates to "*costs*" is irrelevant, Ms. Dixon submits, and the jurisdiction under GCR Order 62 is not engaged.

8. On behalf of Daewoo, Mr. Greig submits that although Daewoo is ready, willing and able to make good on its undertaking, the true dispute on this application is quantum. He poses the question are EFG's costs of US $17,709.67 "*reasonable*" for the purpose of the undertaking, such that Daewoo should pay that amount to EFG?

9. Daewoo suggest that on the evidence served by EFG, the Court cannot be satisfied that every dollar and cent of the claimed amount is "*reasonably*" incurred as a result of the freezing order. He draws the court's attention to a number of genuine concerns about EFG's costs.

10. He submits that it is not clear how EFG's summons application is intended to resolve this dispute and suggests that EFG is asking the Court to perform a taxation of its costs but without regard to the procedures set out in Order 62 of the GCR or to the well-established practice in this jurisdiction that taxations are not ordinarily performed by a Judge: He referred to ***In re Dyoll Insurance Company Limited*** [2006 CILR Note 19].

11. Mr. Greig further submits that there does not appear to be any express mechanism, whether under the GCR or otherwise, by which a dispute as to the reasonableness of the costs incurred by a third party recipient of a mareva order may be resolved. Nor had there been any local decision of relevance up to the date of the hearing.



12. In seeking to clarify the position Mr. Greig refers to two English cases, as authority for the proposition that in England, the courts resolve such disputes by referring the matter to a taxing officer with specific directions as to how the taxation should be conducted. Daewoo recommends that a similar approach should be adopted here. Reference was made to ***Project Development Co Ltd SA v KMK Securities Ltd and Others*** [1983] 1 All ER 465, a decision of Parker J, as he then was, and to ***Westminster City Council v Porter and Weeks and others*** [2005] 2 Costs LR 186, a decision of Lightman J, applying the reasoning in ***Project Development.***

13. In ***Project Development***, the innocent third party who was affected by the grant of a mareva injunction actually applied to the Court successfully for a variation of the order. That is not the factual situation here. It seems to me that it was in the circumstances of an application being made, that Parker J went into an analysis of the correct basis upon which costs should be taxed. It was not a case where the innocent third party, as here, is simply asking that it be paid its costs, which it says were reasonably incurred. It was held that, the costs incurred in respect of the application should be taxed on the solicitor and own client basis, but with a special direction that, notwithstanding the terms of RSC Order 62, Rule 29, the burden of establishing the reasonableness of incurring the costs and of their amount should be on the third party to whom the costs have been awarded. (My emphasis).

14. Order 62, Rule 29 of the 1982 Supreme Court Practice provides as follows:

> *"Rule 29, so far as material provides:*
>
> *(1) On the taxation of a solicitor's bill to his own client (except a bill to be paid out of the legal aid fund under the Legal Aid Act 1974 or a bill with respect to non-contentious business) all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred.*
>
> *(2) For the purposes of paragraph (1), all costs incurred with the express or implied approval of the client, subject to paragraph (3), be conclusively presumed to have been reasonably incurred and, where the amount thereof has been expressly or impliedly approved by the client, to have been reasonable in amount.*

(3) For the purpose of paragraph (1), any costs which in the circumstances of the case are of an unusual nature and such that they would not be allowed on a taxation of costs in a case to which rule 28(2) applies shall, unless the solicitor expressly informed his client before they were incurred that they might not be so allowed, be presumed, until the contrary is shown, to have been unreasonably incurred..."

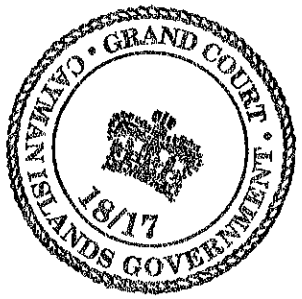
15. To get a proper understanding, I think pages 467b- 468 are worthy of quotation in full, as follows:

> *"There appears to me no logic and no justification for saying that the innocent third party shall have his expenses in complying with the order so long as reasonable, but shall not be entitled to have his costs of setting aside the order so long as reasonable. The choice, in my view, lies between a common fund basis and the indemnity basis as explained by Sir Robery Megarry V-C in the very recent case of EMI Records Ltd v Ian Cameron Wallace Ltd [1982] 2 All ER 980, [1982] 3 WLR 245, or possibly by a special variation of one or other basis of taxation, the possibility of making which was expressly recognised by the Vice-Chancellor. The common fund basis is more generous than the party and party basis, and covers, on the wording, a reasonable amount in respect of all costs reasonably incurred. On the fact of it, that would appear to give the innocent third party everything to which he is entitled, but a taxation on a common fund basis, if no special direction is made, leaves the taxing master fettered by the provisions of RSC Ord 62, App 2 and results in a comparatively small uplift over the party and party basis.*
>
> *The indemnity basis, as explained by Sir Robery Megarry V-C, results in the application of RSC Ord 62, r 29(1), but without the presumptions included in Order 62, r 29(2) and (3). Rule 29(1) provides that on the taxation of a solicitor's bill to his own client, except a bill to be paid out of the legal aid fund under the Legal Aid Act 1974 or a bill with respect to non-contentious business, all costs shall be allowed, except in so far as they are of an unreasonable amount or have been unreasonably incurred. On the wording of the two provisions, it would appear that the only difference between the common fund basis and the solicitor and own client basis is that in a common fund taxation it is for the successful party to establish the reasonableness, whereas on the solicitor client basis the reverse applies and the costs will be taken to be reasonable, unless they are shown to be of an unreasonable amount or to have been unreasonably*

incurred. But in practice the position is different, in that on a common fund basis the taxation is done under the constraint of App 2.

It appears to me that, whilst the successful third party intervener should be allowed all his reasonable costs, it is right that he should have to establish, as he does on the common fund basis, the reasonableness of the costs for which he is contending. There appear to be two substantially similar ways of achieving that result, one of which is to direct that the costs should be taxed on the solicitor and own client basis, with a special direction that, notwithstanding the terms of Ord 62, r 29(1), the burden of establishing the reasonableness of the incurring of the costs and the reasonableness of the amount should be on the third party to whom the costs have been awarded. The other is to order costs to be paid on a common fund basis, with a direction to the taxing master to exercise his discretion under Ord 62, r 32(2), a method which was expressly referred to by Sir Robery Megarry V-C in his judgment. The effect of such a direction is to remove the restriction which would otherwise apply under App 2.

It appears to me that the only satisfactory course is the former, inasmuch as if the taxation is directed to be made on a common fund basis, coupled with a direction to the taxing master to exercise his discretion under r 32(2), the decision as to the extent to which that discretion will be applied will be left to the taxing master, whereas, if the special provision is attached to an indemnity basis order then the result which appears to me to be desirable will certainly be achieved. That will result in the plaintiffs having to pay to the intervener all costs which would be allowed under Ord 62, r 29(1) with the exception or with the qualification only that despite the wording of Ord 62, r 29(1) it will be for the interveners to establish that the costs are not unreasonable in amount and have not been unreasonably incurred. Such a special direction, counsel for the plaintiffs submits, will cause great difficulty or may cause great difficulty to the taxing masters. It may be that it will, in so far as it is something different from anything which has previously been ordered. But I can see no reason why such a simple variation should cause any serious difficulty, the more particularly when taxing masters have already to deal with taxations on a common fund basis, where the burden of proof is as I have stated it shall be in the present case. I am concerned only to see that the result of the taxation is that the intervening third party has those costs which I have indicated it appears to me in Mareva cases, save in exceptional circumstances he out to have.



It should, I think, be stressed that a plaintiff who resorts to the Mareva jurisdiction must expect to pay, and should in justice pay, all reasonable expenses and all reasonable costs to which innocent third parties may be put by his actions; and it is on that basis that I make the order which I do."

16. Following the hearing of this summons and before I had delivered my ruling, Mr. Greig sent an email for my attention, referring to the recent decision of Kawaley J ***Discover Investment Company v Vietnam Asset Management Limited and Saigon Asset Management Corporation*** (Cause No. FSD 76 of 2018 (IKJ) delivered 7 March 2019. In his email, Counsel indicated the following:

> *"We do not propose to make any submission on it unless invited by Her Ladyship, other than to observe that one of the issues that the Court considers in that judgment is the same issue ventilated by counsel at the hearing of this matter in circumstances where counsel was not then aware of any precedent in this jurisdiction. In particular we draw Her Ladyship's attention to the following paragraphs 21, 27, 31, 32, 34, 40 and 48."*

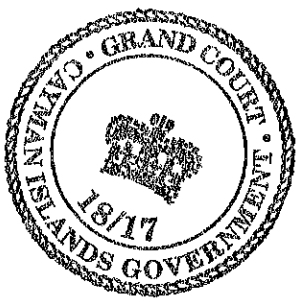
17. Counsel for EFG has also not considered it necessary to make any further submissions. I have now had the benefit of seeing the useful decision of Kawaley J. It would seem to me that the factual circumstances were somewhat different from those in the instant case. Also, the case does not appear to have been argued in the same way, in particular as to whether taxation is necessary. However, there are dicta from other cases, which are useful for the present case.

18. In ***Discover Investment,*** Kawaley J had held that the applicant Discover Investment were entitled to a Norwich Pharmacal Order against the Respondents VNHAM and SAMC. Both Respondents participated in the hearing. As the learned judge described the circumstances in paragraph 5 of his Judgment dated 5 November 2018, and quoted at paragraph 2 of the judgment delivered 7 March 2019:-

> *"5. The Respondents' position was not to positively oppose the application but rather to raise such principled objections as they could identify with a view to ensuring that they did not in substance consent to the making of an Order which ought not be made..."*

19. In that case, no argument was raised concerning the issue of whether costs should be taxed or not because the issue was as to what was the appropriate order for costs for the court to make, and not as to the significance or effect of a costs undertaking such as that given by Daewoo to EFG in the instant case. The ***Discover Investment*** decision is therefore quite different and distinguishable.

20. In his decision, Kawaley J refers (at paragraph 30) to the decision of Lord Neuberger in ***Miller Brewery Co v Mersey Docks and Harbour Co*** [2004] FSR 5 which was cited with approval by Lord Sumption in ***Cartier International AG v British Telecommunications Plc*** [2018] 1 WLR 3259. At paragraph 30, Lord Neuberger stated as follows:-



> *"The logic behind that general rule is that, where an innocent third party has reasonably incurred legal costs to enable a claimant to obtain relief, then, as between the innocent third party and the innocent claimant, it is more unjust if the innocent third party has to bear his own legal costs than it is for the innocent claimant to pay them. After all, it is the claimant who is invoking the legal process to obtain a benefit, and the fact that the benefit is one to which he is legally entitled is not enough to justify an innocent third party having to be out of pocket."*

21. At paragraph 9, Kawaley J also refers to paragraph 29 of the decision in ***Totalise v The Motley Fool*** [2002] 1 WLR 1233 where Aldous LJ provided useful guidance as follows:

> *"29...In general, the costs incurred should be recovered from the wrongdoer rather than an innocent party. That should be the result, even if such a party writes a letter to the applicant asking him to draw to the court's attention matters which might influence a court to refuse the application. Of course such a letter would need to be drawn to the attention of the court. Each case will depend on its facts and in some cases it may be appropriate for the party from whom disclosure is sought to appear in court to assist. In such a case he should not be prejudiced by being ordered to pay costs."*

22. As stated at page 691 of Gee 5th Edition Commercial Injunctions:-

> *"Normally, if the person giving the disclosure is not himself a wrongdoer, the Claimant will have to indemnify him against his costs incurred in assisting him.* ***Totalise Plc v The Motley Fool*** *[2002] EMLR 20, page 358*

at paragraph 30. The costs may be recoverable in due course as damages against the wrongdoer or as legal costs."

Conclusion

23. I accept EFG's submissions that there is no need for taxation given the nature of the undertaking, and the analogy to contractual obligations. I do consider (although the point is not free from difficulty), that the fact that it relates to "*costs*" is irrelevant, and does not engage GCR, Order 62. It does seem to be unfair and unnecessary for a party to whom an undertaking has been given, to have to tax costs with a taxing master, rather than simply having a Judge (in the first instance) assess their entitlement. A similar concept is captured in Order 62, Rule 4 (3), "*General Principles*" which states -

> "*A person who claims to be entitled pursuant to a contract to recover the legal fees and expenses incurred in enforcing that contract shall be entitled to judgment for the amount found due under the contract and such amount shall not be subject to taxation pursuant to this order of the Court."*

24. In my view it is appropriate for the Court to order that pursuant to paragraph 6 of the Discovery Order, Daewoo "*reimburse the Discovery Respondents for their reasonable costs and expenses, including legal costs"* as claimed, which I am satisfied and assess as reasonable in the circumstances.

25. I also award EFG the costs of, and incidental to, the Summons to be paid by Daewoo forthwith, on the standard basis, to be taxed if not agreed.

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT