IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No.: FSD 236 of 2020 (RPJ)

BETWEEN:

(1) KUWAIT PORTS AUTHORITY
(2) THE PUBLIC INSTITUTION FOR SOCIAL SECURITY

Plaintiffs

AND:

(1) PORT LINK GP LTD.
(2) MARK ERIC WILLIAMS
(3) WELLSPRING CAPITAL GROUP, INC.
(4) KGL INVESTMENT COMPANY ASIA

Defendants

ON THE PAPERS

Before: **The Hon. Justice Parker**

Judgment Delivered: **19 January 2022**

Costs Judgment

1. A hearing in this matter was held on 13 - 19 October 2021 to determine the strike out summonses filed by the First Defendant ("D1") and the Second to Fourth Defendants ("D2-D4") (the "Strike Out Summonses), as well as the security for costs summonses filed by D1 and D2-D4 (the "Security Summonses", and jointly with the Strike Out Summonses, "the Applications").

2. Save for one aspect of D1's strike out application, the Court dismissed the orders sought in the Applications by written judgment dated 25 November 2021 (the "Judgment").

3. As a result, none of the Plaintiffs' causes of action were struck out, and security for costs was not awarded. The Plaintiffs therefore succeeded.

4. The Court ordered that the Defendants should pay the Plaintiffs' costs of the Applications, to be taxed if not agreed, and indicated that, if not agreed between the parties, it would deal with the matter of costs on the basis of written submissions.

5. As the parties were unable to agree to the form and detail of any costs order to be made in favour of the Plaintiffs, on 13 December 2021 the Court ordered that:

(a) The Plaintiffs pay the First Defendant's costs of paragraph 1(d) of the First Defendant's strike out summons (together with interest on such costs);

(b) The Plaintiffs pay the Defendants' costs of and occasioned by the amendments to the Amended Writ of Summons and Statement of Claim (and interest on such costs);

(c) The Plaintiffs are otherwise to be paid their costs of the Security Summonses and the Strike Out Summonses (along with interest on such costs); and

(d) The parties shall file and serve short written submissions as to the appropriate form and detail of any costs order to be made in favour of the Plaintiffs.

6. Following the filing and service of the written submissions of the Parties as to the appropriate form and detail of any costs order, the issues for determination are:

(a) Whether the Defendants should be jointly and severally liable for the Plaintiffs' costs of the Strike Out Summonses and Security Summonses.

(b) Whether there should there be an order for immediate taxation.

(c) Whether there should there be an interim payment (the Plaintiffs filed affidavit evidence on 15 December 2021, seeking an interim costs order for 50% of their costs and disbursements associated with the proceedings, which 50% portion is said to amount to US$692,716.19, to be payable within 14 days of the Order as to costs).

The law

7. Section 24, subsections (1) and (3) of the Judicature Act (2021 Revision) provides that costs are at the discretion of the Court and the Court shall have full power to determine by whom and to what extent costs are paid. That broad discretion is to be exercised subject to and in accordance with Order 62 of the Grand Court Rules ("GCRs").[1]

8. Order 62 makes clear that its overriding objective is that a successful party to any proceedings should recover from the opposing party the reasonable costs incurred in conducting those proceedings in an economical, expeditious and proper manner, unless otherwise ordered by the Court.[2] The Court has a broad discretion to do justice to achieve this objective.

Joint and several costs liability

9. The GCRs do not specifically address the circumstances in which a costs order will be made requiring parties to be jointly and severally liable for the costs of another party or parties, however GCR O.62, r.27(2) does contemplate such an order being made.[3]

10. The basis for joint and several costs liability generally is that the arguments that are run by different parties are linked in such a way as to make it just that they each be jointly and severally liable for the winning party's costs, which generally means that they had made 'common cause' in the litigation.[4]

Time at which costs are to be taxed

11. GCR O.62, r.9 (1) and (2) provide that the costs of any proceedings shall not be taxed until the conclusion of the cause or matter in which the proceedings arise, unless 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.

[1] GCR Order 62, rule 1(2).
[2] GCR Order 62, rule 4(2).
[3] See also Lord Esher MR in *Stumm v Dixon & Co* (1889) 22 QBD 529:*"As a general rule I conceive that at law all the defendants to an action are jointly and severally liable for all costs awarded against the defendants."*
[4] Mark Friston, *Friston on Costs* (3rd Ed, Oxford University Press, 2019) at paragraphs 7.32-33.

12. In *Sphinx* [2009 CILR 178], Chief Justice Smellie said that, pursuant to GCR O.62, r.9, it would be exceptional to make an order that costs be paid part way through proceedings after an interlocutory hearing. The Chief Justice said that costs would not become due until the Court had finally determined the matters in issue (whether or not there is an appeal).[5]

13. More recently Kawaley J held that the 'general rule' of practice is that "*interlocutory costs should be taxed and payable at the end of proceedings in which they arise. Exceptional circumstances are required to justify a departure from the usual approach*."[6] The purpose of this 'general rule' is to enable interlocutory costs orders to be set off against one another.[7]

14. If the Court, notwithstanding the general rule, decides interlocutory costs should be taxed and payable forthwith, factors likely to be relevant for taking such an approach under GCR O.62, r.9(2) were identified in *Fortunate Drift*[8] by Kawaley J 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.

Interim payment on account of costs

15. GCR O.62, r.4(7)(h) gives the Court a discretion to order an interim payment on account of costs. It provides:

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[5] §§ 8-10, citing Saville J in *Rafsanjan v Bank Leumi,* noted in Supreme Court Practice 1999 § 62/8/1.
[6] *Fortunate Drift Limited v Canterbury Securities Ltd* (unreported 10 June 2020) per Kawaley J at § 15 and Parker J *Re Ehi* (unreported 26 May 2020).
[7] *Fortunate Drift ibid at § 10.*
[8] *(unreported 10 June 2020) at §24.*

> *"The orders which the Court may make under this rule include an order that a party must*
>
> *pay – ...*
>
> *(h) where the Court orders the paying party to pay costs subject to taxation, a reasonable sum on account of costs, such sum to be assessed summarily*."

16. The application of this rule was extensively considered in *Al Sadik v Investcorp Bank BSC*[9] by Kawaley J, who held at §25:

(a) GCR O.62, r.4(7)(h) "*… confers an unfettered discretion on the Court …*" (§25(a));

(b) *"the governing principle underpinning this power, and the raison d'etre for the rule, is that the successful party is entitled to the money. In principle he ought to get it as soon as possible. It does not seem to me to be a good reason for keeping him out of some of his costs that you need time to work out the total amount': per Jacob J in Mars UK Ltd -v-Teknowledge Ltd (Costs) [1999] 2 Costs L.R. 598 at 601;"* (§25(b));

(c) "*… The principle that a successful party should be paid some of his costs immediately before taxation is not simply 'an important consideration', it is the governing and predominant principle articulated by the interim payment on account of costs rule;*" (§25(c));

(d) *"The purpose of the rule is to enable the Court to avoid the injustice of delayed payment of all costs until the total amount is determined… Whether or not an interim payment on account of costs should be ordered will almost invariably require an assessment to be made of whether or not there is a good reason not to order an interim payment and/or a good reason for requiring the receiving party to be deprived of any costs until the taxation process is complete;"* (§25(d));

(e) *"GCR Order 62 rule 4(7)(h), properly construed, contains an implicit starting assumption that an interim payment should be made. Obviously this starting assumption has somewhat less weight than an express statutory presumption. …"* (§25(e));

[9] [2019 (2) CILR 585]

(f) *"… I do not ignore the fact that power to make such an Order is clearly discretionary and that the strength of the starting assumption may be weaker or stronger depending on the circumstances of each case. …"* (§25(g));

(g) "*… when construing the jurisdiction conferred by Order 62, it is important to have regard to GCR Order 62 rule 4(2), which states in terms which provide in a general sense support for a more robust approach to construing GCR Order 62 rule 4(7)(h):* '(2) *The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court'*;" (§25(g));

(h) *"One recognised and significant reason for not ordering payment on account of costs is the need to avoid stifling an appeal*: *Re BDO [2018 (1) CILR 187] (Parker J at paragraphs 37-38). Another is that the application for an interim payment should not be a disproportionate proceeding: Teknowledge Ltd (Costs) [1999] 2 Costs L.R. 598 at 601. Another circumstance which may displace the assumption that an interim payment on account of costs should be made is the mere fact of the pendency of an appeal, although the primary considerations might relate to the need to suspend any order (or secure repayment) rather than whether or not an order should be made;"* §(25(h);

(i) *"A summary assessment of the appropriate interim payment amount must obviously be possible and sufficient supporting material (e.g. a draft bill of costs or a breakdown of incurred costs) must be placed before the Court);"* (§25(i)); and

(j) *"The Court's discretionary powers under the rule are sufficiently flexible to enable justice to be done on a case by case basis, being guided by both the letter and spirit of the relevant rule."* (§25(j)).

17. Kawaley J explicitly rejected the submissions (i) that reliance can be placed on Cayman Islands decisions prior to the introduction in 2016 of GCR O.62, r.4(7)(h) *(Al Sadik* [§16] and [§§24-25]) and (ii) that the discretion should only be exercised in "*rare and exceptional circumstances*" (*Al Sadik* [§§24-25]), on both these points following the decision in *Re BDO*.[10]

[10] [2018 (1) CILR 187] Parker J.

18. Pursuant to §25(h) of *Al Sadik* the appeal and proportionality question are clearly relevant factors in the exercise of the Court's discretion. As Jacob J said in the case upon which Kawaley J relied:

> "*Thus I start from the proposition that there should be an interim payment in general. However, the court has a discretion. In exercising that discretion the court must take into account all the circumstances of the particular case. One of those is that the Defendant may wish to appeal. Another is dealing with the case in a way which is proportionate to the financial position of each party, one of the matters which one must consider in allowing the overriding objective of enabling the court to deal with the cases justly. The overriding objective applies as much to the exercise of the costs discretion as to any other discretion given under the Rules*".[11]

Decision

Should the Defendants be jointly and severally liable for the Plaintiffs' costs of the Strike Out Summonses and Security for Costs Summonses?

19. In my view, such an order in the circumstances of this case would not be just or appropriate. D1 and D2-D4 made separate applications seeking separate relief in respect of separate claims. There were some common issues of law and fact relied on by all Defendants. However, the degree of overlap between the applications is not such as to warrant the Defendants being jointly and severally liable for the Plaintiffs' costs of the distinct applications. They did not make sufficient common cause. The Defendants are interconnected and affiliated but the interests of the two Defendants' camps are not wholly aligned, nor did they seek the same relief for the same reasons. They ran different cases with different risks and potential outcomes.

20. The fact that the Applications were heard and determined together so as to reduce costs does not mean that liability for the Plaintiffs' costs should be borne by the Defendants jointly and severally.

21. D1 may have more limited resources and may seek to rely on the indemnity provisions of the limited partnership agreement in respect of the Fund to discharge any costs order (which may well ultimately be for the Plaintiffs' account, having the majority economic interest), but that is not a good reason to visit D1's costs liability onto D2-D4.

[11] *Mars v Teknowledge* [1999] EWHC 226, Jacob J at §9 of costs judgment.

22. There should be an Order that D1 and D2-D4 be separately liable for the Plaintiffs' costs of their respective Security and Strike Out Summonses.

Should there be an order for immediate taxation (a 'forthwith' Order)?

23. It is the case that the Applications involved some discrete issues within the wider proceedings which have now been resolved:

(a) The proper construction of section 33(3) of the Exempted Limited Partnership Act ("ELPA") was a discrete issue which has been resolved by the Judgment (§98-100 and 122 of the Judgment).

(b) The argument as to whether the only remedy for a limited partner is to request an account was also determined by the Judgment (§§79-87 of the Judgment).

(c) The question of whether security for costs should be given, or whether the parts of the Statement of Claim which were the subject of the unsuccessful Strike Out Summonses may be allowed to proceed, has been decided in the Plaintiffs' favour.

24. Although the Defendants lost on these issues I do not accept the Plaintiffs' argument that this was simply a strategy to frustrate and delay the efficient progress of the case contrary to the Overriding Objective. No doubt the Defendants saw some wider tactical benefit in having the matters argued out, but the points they raised were properly brought.

25. The Strike Out Summonses raised matters of broad importance. There was no previous authority on s.33(3) of the ELPA. The Defendants intend to and now have sought leave to appeal.

26. Furthermore, given the relative financial positions of the parties I do not accept that as a matter of fairness costs should be taxed forthwith. As outlined above, costs of interlocutory applications are usually taxed at the conclusion of, rather than during, proceedings even where proceedings take some years to conclude. This developed practice is to save the additional time and expense to the parties of taxing costs forthwith. It also avoids the risk of unnecessary satellite litigation and saves court, judicial and taxing officer time.

27. Importantly, the conclusion of the proceedings is also the logical time for all costs liabilities to be netted off against one another, rather than paid on an interim piecemeal basis. In this case there are already some costs which fall to be netted off given the costs order in favour of the Defendants relating to the amendments to the Amended Statement of Claim.

28. There are no circumstances in this case which justify a departure from the usual approach. The Plaintiffs have the protection of an order for interest on their costs of the Applications pending taxation.

Should there be an interim payment?

29. As I have pointed out above, it is the case that the Applications turned on discrete issues within the wider proceedings which have now been resolved.

30. Starting from the proposition that there should be an interim payment as a general matter,[12] there seems to me to be no good reason not to order a reasonable interim payment as to the costs of those Applications. The Plaintiffs are entitled to a substantial sum by way of costs, having succeeded, and ought to receive at least part of that sum as soon as possible, especially since taxation is likely to be years in the future. The Plaintiffs should, in principle, not be totally deprived of their costs until the taxation process has been completed.

31. As a matter of discretion I am satisfied that an order for a reasonable interim payment pending taxation will not deprive the Defendants of necessary funds nor stifle their potential appeals and the defence of the proceedings. There has been no relevant delay by the Plaintiffs in seeking a payment on account. Consistent with the Court's decision on security for costs,[13] if it turns out there has been an overpayment, the Defendants should have no difficulty in recovering from the Plaintiffs. The Plaintiffs are both reputable state entities and have substantial financial resources. In addition, one of the Plaintiffs, The Public Institution for Social Security, has assets in the jurisdiction.

[12] In accordance with Kawaley J's reasoning in Fortunate Drift ibid

[13] *Judgment §§ 163-180*

32. As to the amount, the Court needs to alight upon some reasonable estimation of the costs that the receiving party is likely to be awarded from the taxation process or as a result of a compromise of the proceedings. I have adopted a conservative approach.[14]

33. The third affidavit of Oliver Green[15] is sufficient in providing the Court with a basis to "summarily" assess what percentage of the Plaintiffs' total costs (US$1,385,432.37) should be paid on an interim basis pending taxation. Whether all the legal and other fees are recoverable are a matter for the taxation officer and I make no direction in that regard.

34. Having reviewed the Defendants' challenges (both in principle and amount) to the Plaintiffs' costs, having regard to a reasonable summary estimate and what is fair in all the circumstances, the amount I have arrived at is 25% of the Plaintiffs' claimed costs: US$346,358.09; which should be paid within 21 days of the Order.

Conclusion

35. D1 should pay the Plaintiffs' costs of D1's Security and Strike Out Summonses on the standard basis, plus interest at the prescribed rate, such costs to be taxed at the conclusion of the proceedings if not agreed.

36. D2-D4 should pay the Plaintiffs' costs of D2-D4's Security and Strike Out Summonses on the standard basis, plus interest at the prescribed rate, such costs to be taxed at the conclusion of the proceedings if not agreed.

37. The Defendants should pay the Plaintiffs US$ 346,358.09 as an interim payment in respect of the costs of the Applications within 21 days of the Order.

I have also decided that the costs of this written application should be in the cause.

THE HON. JUSTICE PARKER
JUDGE OF THE GRAND COURT

[14] Following the approach in *Ritchie v Lancelot 4 March 2021* at § 40 Parker J citing Al Sadik §§ 26 and 27.
[15] *Dated 15 December 2021.*