IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 255 OF 2021 (RPJ)

BETWEEN:

JIAN YING OURGAME HIGH GROWTH INVESTMENT FUND

(IN OFFICIAL LIQUIDATION)

PLAINTIFF

-and-

(1) XIONG HUI

(2) ZHANG JIAN

(3) POWERFUL WARRIOR LIMITED

(4) SHI KAIYI

(5) HU JING

(6) YANG DONGMEI

(7) OURGAME INTERNATIONAL HOLDINGS LIMITED

DEFENDANTS

AND IN THE MATTER BETWEEN

FSD CAUSE NO. 258 OF 2021 (RPJ)

JIAN YING OURGAME HIGH GROWTH INVESTMENT FUND

(IN OFFICIAL LIQUIDATION)

PLAINTIFF

-and-

(1) POWERFUL WARRIOR LIMITED

(2) SHI KAIYI

(3) HU JING

(4) YANG DONGMEI

DEFENDANTS

Before:	The Hon. Justice Parker
Heard:	On the papers
Date of Decision	27 January 2023
Draft Judgment Circulated	16 January 2023
Judgment Delivered	27 January 2023

HEADNOTE

Costs - indemnity costs - GCR O.62, r.4(2) and (11) - conduct of losing party - reliance on document the authenticity of which the Court found to be manifestly incredible - conduct attracting moral condemnation and unreasonable to a high degree - taxation forthwith - GCR Order 62, rule 9(2)

Introduction

1. On 21 December 2022, the Court delivered a judgment (the "Judgment") which indicated its provisional view that Powerful Warrior Limited ("PWL") should pay Jian Ying Ourgame High Growth Investment Fund's (the "Fund") costs of and occasioned by the Jurisdiction Summonses (in which PWL sought unsuccessfully to set aside permission to serve proceedings out of the jurisdiction) including the costs in connection with the hearing before Doyle J on 19 July 2022 (the "19 July Hearing") wherein Doyle J recused himself following a late application to do so by PWL.

2. The Court gave directions for the parties to file short written submissions on costs (no more than 5 pages) within 21 days of the Judgment in the event of a dispute in relation to costs and as to the basis of taxation.

3. Having reviewed the written submissions there are disputes as to:

a) whether any costs awarded against PWL in respect of the Jurisdiction Summonses should be taxed on the standard or on the indemnity basis;

b) whether any costs awarded against PWL in respect of the Jurisdiction Summonses should be taxed forthwith; and

c) what Order should be made concerning the costs of the 19 July Hearing.

Law

Indemnity basis

4. It is trite law in the Cayman Islands that:

(a) the costs of and incidental to all civil proceedings in the Grand Court are in the discretion of the relevant court[1] and that the Grand Court has the full power to determine by whom and to what extent the costs are to be paid[2]; and

(b) the general rule is that costs should "follow the event"[3].

5. GCR O.62, r.4(2) and (11) provide as follows:

"(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 successful party in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.

[1] *Judicature Act (2021 Revision)*, section 24(1).
[2] *Judicature Act (2021 Revision)*, section 24(3).
[3] Grand Court Rules ("GCR"), Order 62, rule 4(5).

> […]
>
> (11) The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently."

6. The usual costs order made against an unsuccessful party is that costs are taxed on the standard basis. That is the usual rule: see e.g. GCR O.62 r.4(10); *AHAB v Saad Investments Company Limited*[4].

7. It is only in exceptional cases that the Court should exercise its discretionary jurisdiction to order costs on the indemnity basis: *AHAB v Saad Investments Company Limited*[5]. The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide[6]. Conduct attracting moral condemnation is an *a fortiori* ground[7].

8. In considering the exercise of its discretion to make an order for indemnity costs, the Court should focus on the conduct of the losing party, not on the substantive merits of the case. To justify such an award there should normally be an element in the losing party's conduct which deserves a 'mark of disapproval' for conduct being unreasonable to a high degree [8].

9. Order 62 r 4(11) has been interpreted by the Court to mean that it must be satisfied that the unsuccessful paying party has conducted the part of the proceedings to which the Order relates: (a) improperly; (b) negligently; or (c) unreasonably "*to a high degree*"[9].

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[4] [2012] 2 CILR 1 at §15.
[5] Ibid at [§§ 9 and 15.
[6] *Three Rivers D.C. v Bank of England* [2006] 5 Costs L.R. 714 at §25 (Tomlinson J); and *AHAB v SICL* [2012 (2) CILR 1] at §10 (Smellie CJ).
[7] *Talent Business Investment Limited v China Yinmore Sugar Company Limited* [2015 (2) CILR 113] at §41.
[8] *AHAB v SAAD* [2013 (2) CILR 344].
[9] GCR, O.62 r.4(11) as explained in *AHAB v. Saad* [2013] 2 CILR at 346 – 347 and cited in *Talent Business Investments Ltd. v. China Yinmore Sugar Co. Ltd* [2015] 2 CILR 113 at §36.

10. It is accordingly not improper to advance a genuine case within the bounds of normal litigation which fails as a result of the Court's rejection of the evidence or its interpretation of the law and in such a case, standard costs ought to be ordered[10].

11. If there is nothing unusually unreasonable about the paying party's conduct, the appropriate order is for standard basis costs[11]. Even if the paying party's conduct can be rightly characterised as unreasonable, if it is not so unreasonable as to be 'out of the norm', a standard basis costs order is appropriate.[12]

12. In other words, in the ordinary case even when the paying party has conducted its case unreasonably, unless it has advanced a case outside the usual cut and thrust of litigation which may be viewed at the time (without hindsight) to be without merit, speculative or weak, a standard basis order will be appropriate[13].

13. There needs to be some conduct or circumstance which takes the case out of the ordinary which warrants an order for indemnity costs[14].

14. As Henderson J observed in *Bennett v Attorney General*[15] at §§ 6 to 9:

> "*Advancing a* [case] *which is merely weak or unlikely to succeed is to be distinguished from maintaining a* [case] *which is manifestly hopeless. The latter can be characterized as unreasonable. The former is a regular occurrence with which every barrister will be familiar. Many litigants, even after receiving a warning from their legal advisers that the claim or defence is likely to fail, prefer to have that determination made by the Court. That is not, in the typical case, unreasonable. Weak cases will succeed from time to time. The litigant is entitled to prefer a judicial determination based upon all of the evidence over the predictions of his advisers which are limited, as they usually are, by not having*

[10] *Al-Sadik v. Investcorp* [2012] 2 CILR 33 and *Asia Pacific Ltd. v ARC Capital LLC* [2015] 1 CILR 299, Chadwick P at §56; both cited in *Talent Business Investments Ltd. v China Yinmore Sugar Co. Ltd* [2015] 2 CILR 113 at §38.
[11] *Healy-Upright v Bradley & Another* [2007] EWHC 3161 at §17.
[12] *Ritter v. Butterfield* (unreported, 31 December 2018 at §69.
[13] *AHAB v SAAD* [2013 (2) CILR 344] at § 5.
[14] *Three Rivers D.C. v Bank of England* [2006] 5 Costs L.R. 714 at §25 (Tomlinson J).
[15] [2010 (1) CILR 478].

observed the other side's witnesses under cross-examination. 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 a defence. The usual result of such a finding is that the unsuccessful party will pay costs on the indemnity basis…..

The assessment of unreasonableness must avoid the wisdom of hindsight. The question is whether it was unreasonable to advance the claim or maintain the defence taking into account what should have been evident to the party concerned at the outset of the trial."

Taxation forthwith

15. Under GCR Order 62, rule 9(2) the Court may make an order that costs ought to be taxed earlier than at the conclusion of the cause or matter. The discretion is exceptional, but factors which may be relevant to the Court's decision include:[16]

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 Order 62.

Decision

[16] *Fortunate Drift Limited v. Canterbury Securities Limited* (Unreported, Kawaley J, 10 June 2020) at §24.

The basis of taxation of the costs occasioned by the jurisdiction summonses

16. PWL does not resist that it should pay the Fund's costs, but says such costs should be taxed on the standard basis. The Court rejects this submission.

17. This case was clearly outside the norm in the way in which it was conceived and advanced by PWL. It was not just a case unlikely to succeed or which failed for what could be described as normal litigation reasons judged at the time.

18. The question as to whether there was evidence of an agreement to arbitrate between the parties was obviously the critical precondition to deciding these applications.[17] It should have been evident to PWL that it needed to make good a case which clearly looked opportunistic and thin (at best).

19. The Court found:

> "*On the available evidence I have come to the clear view that an arbitration agreement was not made. The JOLs have put forward evidence which PWL has not answered regarding the authenticity of the Jian Ying SPA and the arguments as to contemporaneous material negating its existence have not been responded to. I accept Mr Goucke's numerous submissions on the contention that the Jian Ying SPA is not genuine which I have set out above*"[18].

20. Further, at §§ 60 and 61 of the Judgment the Court held:

> "*60. The evidence and circumstances surrounding the March Transfer are sufficiently compelling and the points Mr Goucke has rehearsed challenging the authenticity of the SPA so cogent that this cries out for evidence or explanation from PWL. In the absence of any engagement with these matters by PWL, I have formed the clear view that it is manifestly incredible that the Jian Ying SPA is genuine.*

[17] Judgment at §54.
[18] Judgment at §55.

> *61. The Court does not shut its eyes to the context, namely that the jurisdictional challenge has been enabled by a document produced in December 2021 (five months after service of proceedings on PWL) which conveniently supports the case to set aside service, without any sufficient explanation or good evidence concerning its provenance and likely authenticity.*"

21. The determination of the Court was that the applications under the Summonses were premised on a document the authenticity of which the Court has found to be manifestly incredible. That is an unusual finding.

22. In the Court's view this takes the overall conduct of PWL in relying on such a document without any adequate explanation or engagement as to its provenance into that which should attract moral condemnation, and this is *a fortiori* a ground for indemnity costs. It is also in the Court's view unreasonable conduct to a high degree.

23. PWL's conduct has clearly caused the JOLs to incur delay, legal fees and expenses that would not otherwise have been incurred. The Court finds that this a clear case where a 'mark of disapproval' needs to be applied by way of costs sanction.

Taxation forthwith

24. The Court accepts the JOLs' case in relation to taxation forthwith.

25. The question of whether the Court has jurisdiction is clearly a discrete issue within the wider proceedings. It is a threshold issue and relates to a challenge made before PWL submitted to the jurisdiction of the Court.

26. PWL's conduct in issuing and pursuing the Summonses has clearly in my view been unreasonable to a high degree for the reasons set out above.

27. The Summonses, and PWL's very late application for Doyle J to recuse himself have already resulted in a delay of over one year in respect of the Fund's claim against PWL.

28. Further, I accept the JOLs' submission that it is very likely, given that certain other Defendants are located in the PRC, that the proceedings as a whole have a long time to run.

29. In all the circumstances I find that there is no unfairness to PWL if it is ordered to meet the Fund's costs on a forthwith basis.

Costs of the hearing on 19 July 2022

30. The Court rejects PWL's submission that it should be awarded its costs of the hearing before Doyle J on 19 July 2022 to be taxed on the standard basis and set-off against any costs orders in favour of the Fund. This would not fairly reflect what occurred and the consequences.

31. In this regard the Court has considered the JOLs' submission that PWL's application that Doyle J recuse himself, although successful, resulted in significant wasted costs due to (i) the last-minute nature of the application,[19] and (ii) the conditional manner in which the application was pursued[20]. The Court has also reviewed what Doyle J said about the matter.[21] The JOLs say PWL should pay its costs of the 19 July hearing on the indemnity basis. These are strong arguments.

32. However, on balance I have come to the view that there should be "no order as to costs" of the 19 July Hearing, bearing in mind the Court's decision on the recusal application and the circumstances in which that determination came to be made. Notwithstanding the lateness and nature of the application, ultimately Doyle J came to the conclusion that the recusal test was met in all of the circumstances of the case and he was therefore duty bound to recuse himself and to order that the matters be re-assigned.

Conclusion

[19] The application was made in a second skeleton argument that was filed less than two business days before the hearing that had been listed since March 2022.
[20] PWL invited Doyle J to recuse himself only in the event that he was minded to dismiss the Summonses and not in the event that he was minded to grant PWL's relief. Accordingly, it was necessary on PWL's case for there to be a hearing on the substance of the Summonses at the July Hearing.
[21] See §§ 13 and 31 of Doyle J's Recusal Judgment.

33. PWL is to pay the Fund's costs of the Jurisdiction Summonses, with such costs to be taxed on the indemnity basis if not agreed, and with taxation to take place forthwith.

34. There is to be no order as to the costs of the 19 July Hearing.

THE HON. MR JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT