IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 133 OF 2024 (DDJ)

BETWEEN:

(1) CANTERBURY SECURITIES, LTD. (IN OFFICIAL LIQUIDATION)

(2) KAREN SCOTT AS JOINT OFFICIAL LIQUIDATOR
OF CANTERBURY SECURITIES, LTD.

(3) RUSSELL HOMER AS JOINT OFFICIAL LIQUIDATOR
OF CANTERBURY SECURITIES, LTD.

Plaintiffs

AND:

(1) ERIN WINCZURA

(2) PFS LTD.

(3) CANTERBURY GROUP

Defendants

Before:	The Hon. Justice David Doyle
Appearances:	Alice Carver and John Harris of Nelsons Attorneys at Law Ltd for the Plaintiffs
	Richard Annette of Stuarts Humphries for the Second and Third Defendants
Heard:	12 July 2024

Ex Tempore Judgment delivered:	12 July 2024
Draft Transcript of Ex Tempore Judgment circulated:	16 July 2024
Transcript approved:	22 July 2024

Civil procedure – continuation and variation of asset freezing and disclosure order – substituted service – dismissal of application for declaration of validity of service – adjournment of application for a preliminary assessment of damages – directions in respect of any application to set aside default judgment

JUDGMENT

Introduction

1. In addition to a belated application for an adjournment made on behalf of the Second and Third Defendants, there are 4 main issues before the court namely:

   (1) whether the freezing and disclosure order sealed 26 April 2024 (the "Asset Freezing and Disclosure Order") should be continued and varied in effect to include all the assets of the Second and Third Defendants up to the value of US$30 million ("Issue 1");

   (2) whether an order for substituted service on the First Defendant should be made ("Issue 2");

   (3) whether a declaration that the writ of summons was validly served on the First Defendant by email on 29 April 2024 should be made ("Issue 3"); and

   (4) whether there should be a preliminary assessment of damages payable by the Second and Third Defendants pursuant to a "default interlocutory judgment" dated 3 June 2024, made against the "Defendant", and signed by Shiona Allenger, Clerk of the Court. In the Summons dated 24 June 2024 the Plaintiffs refer to the sum of US$18,056,465.20 ("Issue 4").

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2. It appears that the 4 issues were listed before Kawaley J for hearing on 4 July 2024 but on 2 July 2024 Kawaley J's PA sent an email to the relevant attorneys at Stuarts and Nelsons stating:

> "Since it is apparent that the present proceedings may be contested, the Judge is of the view that it is desirable that this matter be reassigned to another FSD judge. Although there is no automatic impediment to the liquidation judge presiding over contentious proceedings brought by a liquidator, the Judge considers the best practice in most cases will be that, subject to available judicial resources, the liquidation judge should not preside over contentious liquidation in relation to which the liquidators may have to seek confidential directions."

3. By email dated 8 July 2024, 3:21pm I was informed that the matter had been reassigned to me. The attorneys having indicated that they had no non-availability issues before the commencement of the long vacation and because I had a docket packed with hearings in the weeks commencing, 15, 22 and 29 July and in view of the need to act with expedition, by email dated 8 July 2024, 4:05pm, the attorneys were notified that the matter was listed for 10am on Friday, 12 July 2024.

4. Today, Ms Carver and Mr Harris of Nelsons Attorneys at Law Ltd appeared for the Plaintiffs.

5. Mr Annette of Stuarts Humphries appeared for the Second and the Third Defendants.

6. There was no appearance by or on behalf of the First Defendant. The First Defendant has made no application for an adjournment and has not presented any opposition to the relief sought by the Plaintiffs.

7. It appears that the Summons of 26 April 2024 indicating a return date of 10 am, 4 July 2024 was served on the Second Defendant and Third Defendant on 30 April 2024 and notified to the First Defendant by email on 29 April 2024. In respect of the Summons of 24 June 2024 this was served on the Second Defendant and the Third Defendant, on 25 June 2024 at 10:46am and notified by email to the First Defendant on 24 June 2024 and on 27 June 2024 the Plaintiffs' skeleton argument dated 27 June 2024 was emailed to the First Defendant.

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8. I am satisfied that all three Defendants have had notice of today's hearing. Stuarts have plainly been liaising with the First Defendant for some time. By email from Mr Annette of Stuarts to Mr Harris dated 30 May 2024 Mr Annette stated that he had been approached to "potentially act as Cayman Counsel on behalf of" the First Defendant. Stuarts were made aware of today's hearing on 8 July 2024 and I reasonably infer they would have notified the First Defendant of the hearing. Moreover, the First Defendant is intimately connected with the Second and Third Defendants and I reasonably infer that the knowledge of the Second and Third Defendants of the hearing can be imputed to the First Defendant. Indeed, Stuarts in their emails made references to the First Defendant and in their email dated 10 July 2024, 2:58pm, appeared to make representations on her behalf (see the last two paragraphs). See also Stuarts letter of 11 July 2024 to Nelsons which I will come to in a moment.

Bundles

9. I have considered:

    (1) Bundles marked for hearing on 12 July 2024 but I think the larger bundle was in fact for the 24 April 2024 hearing; and

    (2) Bundle for hearing on 4 July 2024.

Submissions

10. I have considered the skeleton argument of the Plaintiffs dated 27 June 2024, the updated skeleton argument of the Plaintiffs dated 10 July 2024 and the oral submissions of Ms Carver.

11. I have also considered the oral submissions of Mr Annette on behalf of the Second and Third Defendants.

12. No submissions were put before the court by or on behalf of the First Defendant.

13. The First Defendant in her email dated 1 May 2024, 1:56pm, to Mr Harris indicates in effect that she needs to find a new attorney as "Ben is not our attorney any more" and adds (errors included) "Also the house in Cayman is joint owned with my husband is our primary residence …. not sure how things got off the rails. Pls take this as our notice to appose the new order."

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14. On 1 May 2024, 4:26pm, the First Defendant indicated by email to Mr Harris that she would probably need 2 – 3 weeks to get counsel "on and up to speed". We are now at 12 July 2024. She has had plenty of time to engage attorneys to appear on her behalf but has failed to do so. Moreover she has failed to appear today. Frankly, I am not impressed with her lack of timely and positive engagement.

Determination

15. I now turn to the determination of the various issues before the court.

The application on behalf of the Second and Third Defendants for an adjournment

16. Before I turn to the specific issues properly raised in the two summonses (one dated 26 April 2024 covering Issue 1 and one dated 24 June 2024 covering Issue 2, Issue 3 and Issue 4) filed by the Plaintiffs, I deal with a belated application for an adjournment filed on behalf of the Second and Third Defendants.

17. By email dated 10 July 2024, 2:58pm, Mr Annette on behalf of the Second and Third Defendants attached a summons dated 10 July 2024 (the "Adjournment Summons") seeking an order that "the hearing of the Plaintiffs' Summons in respect of a return date for the Freezing Order dated 26 April 2024 and paragraph 3 of the Plaintiffs' Summons dated 24 June 2024 for a preliminary assessment of damages against the Second and Third Defendants, which are listed for 10am on 12 July 2024, be adjourned."

18. The court was left guessing as to the grounds of the proposed adjournment as no grounds were specified in the Adjournment Summons and it was not supported by any evidence or a skeleton argument. Mr Annette in an email dated 9 July 2024, 8:07pm, had informally hinted that the adjournment was sought because he had "only very recently been instructed in this matter".

19. This morning Mr Annette made the following points in support of the Adjournment Summons:

(1) he has only very recently been instructed;

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(2) the Second and Third Defendants have been disabled from advancing a defence because of a "total freeze on their assets";

(3) time is required to take full and proper instructions and for the Second and Third Defendants to take advice and depending on the advice make an application to set aside the default judgment entered against them. Mr Annette says that the Asset Freezing and Disclosure Order was very unusual because it did not include the standard paragraph 3 of Forms 64 and 65 of the Grand Court Rules in respect of legal expenses.

18. Ms Carver on behalf of the Plaintiffs opposed the Adjournment Summons. In the updated skeleton argument dated 10 July 2024 on behalf of the Plaintiffs the following points are made:

(1) The First Defendant has known of the existence of the writ and the return date on the injunction since 29 April 2024 – more than 2 months. If she failed to properly instruct Cayman attorneys then she must bear the consequence.

(2) The First Defendant is not entitled to the Court's sympathy or indulgence and the adjournment requested should be refused.

(3) There is no real prejudice to the First Defendant from the refusal of an adjournment as the only consequence is that she will have to engage in the proceedings. No final orders will be made against her and the ability of the Second and Third Defendants to apply to set aside the default judgment, should they have grounds to do so, will be unaffected.

20. At paragraph 16 of the updated skeleton argument dated 10 July 2024 it is stated:

> "By Mr Annette's email of 9 July, Stuarts on behalf of the defendants request the adjournment of this hearing on the ground that they 'have only very recently been instructed in this matter'."

21. In fact that email indicated that Stuarts had been instructed to act for the Second Defendant and the Third Defendant and not for the First Defendant. The opening sentence of the penultimate paragraph read:

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> "We have only very recently been instructed in this matter and will respectfully be seeking, on behalf of the Second and Third Defendants, an adjournment of the Hearing listed for Friday 12 July 2024…"

22. There is no application by the First Defendant for an adjournment.

23. This morning Ms Carver stressed that the Defendants have had since early May to instruct attorneys and there is no good reason for an adjournment of the application to continue and vary the Asset Freezing and Disclosure Order.

24. I indicated that I was minded to adjourn Issue 4 and I will come to that in a moment. I also indicated that I was not minded to adjourn Issue 1 and heard argument on it. I did not adjourn Issue 1 because the Defendants have had more than sufficient time to prepare for the hearing and there was no good reason to adjourn the hearing in respect of Issue 1. The fact that attorneys were instructed late in the day by the Second Defendant and the Third Defendant is not, in the circumstances of this case, a good reason for an adjournment.

25. The Second and Third Defendants were served as long ago as 30 April 2024 and they could well before now have made an application for a variation of the Asset Freezing and Disclosure Order in an endeavour to obtain access to funds for legal expenses. They have not done so. I was unimpressed with their grounds for an adjournment. They should have instructed attorneys expeditiously. Moreover I was unpersuaded by Mr Annette's submission in effect that the whole purpose of a return date hearing would be defeated because the Second and Third Defendants are not in a position to fully engage in it. If the Second and Third Defendants had acted expeditiously then they would have been in a position to fully engage. No evidence has been put before the court to justify the long delay in the Second and Third Defendants instructing attorneys.

26. Issues 2 and 3 related to the First Defendant and she made no application for an adjournment. I now turn to my determination of Issues 1, 2 and 3.

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Issue 1

Continuation and variation of the Asset Freezing and Disclosure Order

27. There is no application by the First, Second or Third Defendants to discharge or vary the Asset Freezing and Disclosure Order. There is an application by the Plaintiffs to continue and vary it.

28. I have considered Kawaley J's judgment delivered on 4 June 2024. The Plaintiffs say that the disclosure provisions of the Asset Freezing and Disclosure Order have not been complied with and the assets must remain frozen pending further order. I am content to continue the Asset Freezing and Disclosure Order.

29. In respect of Issue 1 and the proposed variation Ms Carver says:

(1) since the Asset Freezing and Disclosure Order was granted (a) default judgment has been entered against the Second and Third Defendants and (b) there has been non-compliance with the disclosure requirements of the Order and the Defendants have showed an unwillingness to engage with the Order;

(2) the First Defendant who controls the Second and Third Defendants has shown a willingness to cause her companies to breach court orders and engage in blatant acts of asset dissipation.

30. In respect of Issue 1 and the proposed variation Mr Annette says that the basis of the application for a variation is the entering of the default judgment and as there could be an application to set the default judgment aside it is premature to grant the variation sought.

31. It is a fact that default judgment has now been entered against the Second and Third Defendants albeit it appears from Mr Annette's submissions that there may be an application to set it aside lodged in the near future. The lack of compliance with the Asset Freezing and Disclosure Order by all three defendants is a serious concern. On the basis of the evidence presently before the court I think it just to grant the variations sought.

32. In addition to continuing the Asset Freezing and Disclosure Order I am content to vary paragraphs (2) and (3) on page 3 of it so that they read as follows:

> "(2) The Second Respondent shall not in any way dispose of or deal with or diminish the value of any of its assets wheresoever located up to the value of US$30 million
>
> (3) The Third Respondent shall not in any way dispose of or deal with or diminish the value of any of its assets wheresoever located up to the value of US$30 million."

33. In the particular and developing circumstances of this case it is proportionate and just that all of the assets of the Second and Third Defendants up to the value of US$30 million are caught.

Issue 2

Substituted service in respect of First Defendant

34. Mr Annette, although not appearing for the First Defendant, in his email dated 10 July 2024, 2:58pm says:

> "We will be writing shortly to Nelsons in respect of service and providing an address for service, outside the jurisdiction, for the First Defendant which should obviate the need for a substituted service Order in any event. Instead, we respectfully consider that the Plaintiffs should now be applying (in due course) for leave to serve the Writ outside the jurisdiction."

35. In respect of the application for substituted service the Plaintiffs have helpfully referred to Order 65 rule 4 of the Grand Court Rules ("GCR") and *Chile Holdings (Cayman) Limited v Santiago de Chile Hotel Corporation SA* 1997 CILR 319 and my judgment in *Maples FS Ltd v BB Protector Services Limited* 2022 (2) CILR 59.

36. Under Order 65 rule 4 of the GCR if it appears to the court that it is impracticable for any reason to serve a document personally the court may make an order for substituted service of that document.

37. Part way through the hearing Ms Carver brought to my attention a letter from Stuarts (who have been careful not to appear for the First Defendant today) dated 11 July 2024 to Nelsons which reads:

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"We refer to our email dated 10 July 2024 to the Court in which we stated that we would be writing to you regarding service.

We are instructed that the First Defendant's address for service is:

Isabella Boutique Hotel
1 Norte Esquina
Calle 14 Norte Centro,
77710 Playa del Carmen, Q.R.,
Mexico

We are further instructed to confirm that we are instructed (in the event that appropriate orders are obtained) to coordinate with you to facilitate the service of the Writ on the First Defendant at the above address.

Given that your clients now have an address for service on the First Defendant, we suggest that it cannot be impracticable to effect service on the First Defendant. Accordingly your clients' application for an order permitting service by substituted means is no longer appropriate.

In response to your email of this morning, the First Defendant is not evading service. She is outside of the jurisdiction as you were already aware. If your clients wish to serve the Writ on her, your clients are obliged to apply for permission to serve her outside the jurisdiction, as is the ordinary course.

Please bring this letter to the Court's attention on any application relating to service."

38. In my judgment personal service upon the First Defendant is impracticable in the circumstances of this case. It appears from the evidence that the First Defendant is evading service. She says she is in Mexico but cannot be traced. The Plaintiffs have taken steps to locate her but have been unsuccessful. I am unimpressed with the belated provision of an address of a hotel in Mexico as

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an adequate service address. A hotel room is normally a transient address. It is not normally a permanent residential address.

39. I am not impressed with the First Defendant's belated and somewhat desperate attempt to defeat the application for substituted service and to further delay this matter.

40. The First Defendant has a PO Box number and a residential property in Cayman but it appears that she left the Island on 4 January 2024 and has not since returned. She has agreed to come back to Cayman on a number of occasions (Ms Carver refers to 7, 13 and 30 May 2024) but apparently has not done so. Sending documents to the personal gmail email address which she has used to communicate with the JOLs and their attorneys in respect of this matter is likely to bring the documents to her attention. Substituted service by email is just and appropriate in the circumstances of this case. It is also in furtherance of the overriding objective.

Issue 3

Declaration of validity of service on First Defendant

41. The Plaintiffs in their skeleton argument under the heading "Validity of Email Service to Date" refer to Order 2 rule 1(1) of the GCR and accept the fact that service to date has not been effected by way of personal service is an irregularity. In the skeleton argument dated 27 June 2024 no authority is provided to persuade the court that it in effect has jurisdiction to make an order for substituted service by email retrospectively.

42. In the updated skeleton argument dated 10 July 2024 apparently filed to take account of (1) the reassignment of the matter and (2) the request for an adjournment, reference is made to *Abela and others v Baadarani and others* [2013] UKSC 44 and it is stated that in that case "the Supreme Court held that an order retrospectively accepted as good service steps taken to effect substituted service of a claim form, was valid". The court in that case was dealing with CPR rule 6.15(2) which does not have any equivalent in the GCR. The Plaintiffs say however that the principle should apply in the Cayman Islands. Reference was made to paragraphs 25 and 35 of Lord Clarke's judgment.

43. CPR rule 6.15(1) provides that where it appears to the court that there is good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.

44. CPR rule 6.15(2) provides:

> "On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

45. Order 65 of the GCR provides no similar provision.

46. Under Practice Direction 2 of 2024 we are directed to have regard, in addition to the notes to 1999 English White Book, to notes to the Rules of the Hong Kong High Court. The notes to Order 65 rule 4 of 1999 English White Book make no reference to retrospective substituted service and neither do the notes to the Rules of the Hong Kong High Court.

47. Roye on *Civil Litigation in the Cayman Islands* (3rd edition) at pages 20 – 22 deals with substituted service and Order 65 rule 4 and nowhere does the word "retrospectively" appear.

48. The Plaintiffs, in this fast moving commercial litigation, did not provide me with an official law report version of *Abela*. In the limited time available I have dug certain reports out myself.

49. The headnote to [2013] 1 WLR 2043 states that it was held that in a case not involving the Hague Service Convention or a bilateral service treaty, CPR r.6.15(2) could be used retrospectively to validate a party's actions as constituting good service on a defendant who was outside the jurisdiction subject to certain provisos. The headnote to [2013] 4 ALL ER 119 at 121 indicates that it was held that CPR 6.15(2) could be used retrospectively to validate alternative service where the defendant was outside the jurisdiction.

50. The Plaintiffs did not refer to *Bridge Global* (FSD unreported judgment 10 May 2022). In that case in a judgment delivered "on the papers" Kawaley J at paragraph 13 referred to a submission that *Abela* was "a leading authority which has been applied by the Cayman Islands courts" and cited paragraph 37 of Lord Clarke's judgment but that was not on the retrospective point. Lord Clarke

at paragraph 37 simply commented that service had a number of purposes but the most important was to ensure that the contents of documents served including claim forms are communicated to the defendant. I respectfully concur.

51. The Plaintiffs have, however, referred me to no Cayman judgment where *Abela* has been applied to support their submission that the principle that "an order retrospectively accepting as good service steps taken to effect substituted service of a claim form was valid" is a principle of Cayman law. That "principle", if it can be described as such, appears to be based on a rule which is not to be found in the GCR.

52. *Bridge Global* does not appear to have been a retrospective substituted service case. In fairness to Ms Carver I should add that she did not press the retrospective substituted service point with any great force and she was wise not to do so. On the basis of the limited argument I have seen and heard I am not presently persuaded that I have jurisdiction to grant a retrospective substituted service order. I am not presently persuaded that *Abela* gives this court jurisdiction to, in effect, grant an order for substituted service with retrospective effect.

53. The Summons dated 24 June 2024 seeks a declaration that the writ of summons was validly served on the First Defendant on 29 April 2024. The writ of summons was not validly served on 29 April 2024.

54. I do not make a declaration that there has been valid service of the writ of summons on the First Defendant by email on 29 April 2024. The Plaintiffs in fact accept that there was no such valid service and request the court to correct the irregularity by way, of in effect, a retrospective substituted service order. I make no such order and I do not make the declaration requested by the Plaintiffs. Valid service has not been proved and I am not persuaded that I can or should make in effect a retrospective order for substituted service.

55. No doubt the Plaintiffs can now proceed to serve any relevant documents, including the writ of summons, by way of the substituted service order I have made.

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Issue 4

Preliminary assessment of damages

56. I turn now to Issue 4 which I will not be determining today. I will be adjourning it for reasons which follow.

57. The Plaintiffs have obtained default interlocutory judgment dated 3 June 2024 as no notice to defend was filed by the Second and Third Defendants. The Plaintiffs say that their claim against the First Defendant remains extant.

58. Mr Annette in an email dated 9 July 2024, 8:07pm, says that he has been instructed to act in the proceedings by the Second Defendant and the Third Defendant and says they have "now completed the Acknowledgement of Service of the Writ." Such also purports to state that the Second Defendant and the Third Defendant intend to contest the proceedings. That is somewhat strange as the email from Mr Harris copied to Stuarts Law, 2 July 2024, 2:56pm, referred to default judgment already being entered against "two company defendants" (the Second and Third Defendant). Mr Annette in his email made no reference to any application being made to set the default judgment aside and no such application has been brought to my attention, but presumably that will be the next step.

59. Although I was not referred to it by either of the attorneys I note that Order 12 rule 6(1) of the GCR concerns "Late acknowledgement of service" and provides that "Except with leave of the Court, a defendant may not give notice of intention to defend an action after judgment has been obtained therein."

60. The Plaintiffs in their skeleton argument dated 27 June 2024 at paragraph 16 referred to what they described as Order 27 rule 3 of the GCR. I think that was an error as such provision relates to judgment on admissions. In the document dated 10 July 2024 and entitled "Updated Skeleton Argument of the Plaintiffs for hearing on 12 July 2024" at paragraph 37 it is stated:

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"Order 37, rule 3 of the GCR states:

> *Where any such judgment as is mentioned in rule 1* [i.e. for damages to be assessed] *is given for failure to give notice of intention to defend or in default of defence, and the action proceeds against other defendants, the damages under the judgment shall be assessed at trial unless the Court otherwise orders.*"

61. The Plaintiffs in their two skeleton arguments referred to no law in respect of the preliminary assessment of damages or any commentary on Order 37 rule 3 of the GCR. There is at paragraph 38 of the skeleton argument dated 10 July 2024 simply reference to "at a minimum" the "amount of damages awarded to Fortunate Drift Limited in cause no. 277 of 2018." I think that is another error and the reference should be to 227 of 2018.

62. I note the commentary at footnote 10 on page 221 of Roye on *Civil Litigation in the Cayman Islands* (Third edition):

> "See GCR, Order 37 r.3. Where an action is to proceed against other defendants, the usual practice is not to award damages against the defaulting defendant separately, however the court retains discretion to order otherwise. This discretion was exercised in favour of the plaintiff in the case of *Ahmad Hamas Algosaibi v Saad Inv Co Ltd* 2012 (1) CILR 336."

The report in fact starts at page 335.

63. That case seems to have been a case under Order 29 rule 11 in respect of interim payments. That provision is not referred to in the Plaintiffs' skeleton arguments. There is no commentary in the English White Book 1999 or in the Hong Kong White Book on Order 37 rule 3.

64. The Writ of Summons dated 25 April 2024 included under tab 5 in the Bundle for hearing on 12 July 2024 provides the following general indorsement:

> "1. The First Plaintiff claims (a) as against the First Defendant damages and/or compensation for breach of duties owed at common law and /or fiduciary duty arising from the Plaintiff's sale of shares subject to an agreement dated August

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2018 between the First Plaintiff and Fortunate Drift Limited and/or damages for the wrongful dissipation of the First Plaintiff's assets and/or an account and (a) as against the First, Second, and Third Defendants damages for unlawful means conspiracy and/or account.

2. The Second and Third Plaintiffs claim as against the First, Second and Third Defendants orders pursuant to section 147 of the Companies Act that each of them is liable to make a contribution to the assets of the First Plaintiff as persons who were knowingly parties to the carrying on of business with intent to defraud credits of the First Plaintiff.

3. The Plaintiffs also claim interest pursuant to statute and costs."

65. Kawaley J described the context of the claims at paragraph 9 of his judgment delivered on 4 June 2024 as follows:

> "9. The context for these claims primarily arises out of the commercial interactions between FDL, the Company and PFS in 2018 which resulted in FSD 227/2018 (the "FDL Proceedings"). These claims are to a material extent grounded in the fact that this Court has already found that the Company breached its fiduciary duty to FDL by, inter alia, failing to return YRIV shares the Company agreed to hold for FDL and found that the Company owes FDL approximately US$18 million. After the JOLs' appointment, and contrary to numerous sworn averments by EW that the Company had retained sufficient assets to meet any judgment that might be entered against it, the JOLs discovered that the Company's cupboard, like Old Mother Hubbard's, was bare."

66. Paragraphs 10-13 are also worth noting and make reference to Canterbury Securities Ltd (in Official Liquidation) as the Company, the First Defendant as EW, the Second Defendant as PFS and the Third Defendant as CG. They read as follows:

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"10. EW had not cooperated to any meaningful extent with the JOLs' attempts to locate assets which ought to be held by or for the benefit of the Company. However, it appeared that the proceeds of the sale of the YRIV shares in relation to which FDL was found by the Court to have a proprietary claim have been dissipated, seemingly with the involvement of CG. Scott 1 said little explicitly about the role of PFS, perhaps because due deference was being given to the fact that the relationship between FDL and PFS is under consideration of the Nevada Proceeding. Taking judicial notice of matters of record in the FDL Proceedings, a plausible basis for inferring that PFS was implicated in the alleged misconduct under the direction of EW could be found without the need for explicit analysis.

11. One jaw-dropping bit of evidence was placed before the Court, although I was rightly cautioned not to place too much reliance on it because of its provenance. The Company under EW's control in the FDL Proceedings had sought to reassure the Court that the proceeds of sale of the YRIV shares were safely under the Company's control by producing a Confirmation Letter from Canadian Escrow Company Ltd ("Canadian Escrow") dated 12 April 2023 asserting that Canadian Escrow was holding "*in trust cash equivalent US$15,500,000 value, in the name of Canterbury Securities Ltd*". The purported signatory of the Confirmation Letter had when contacted by the JOLs:

    (a) denied signing or issuing that letter and asserted that it is not even printed on that Company's letterhead; and

    (b) denied having any dealings with EW or the Company.

12. The Confirmation Letter had, curiously, been placed before the Court not by EW herself, but exhibited to an Affidavit sworn by her Kenya-based Personal Assistant. EW had thereafter been ordered to provide a screenshot of the account as further confirmation that the funds existed, which EW was not able to produce. In the 14 September 2023 Reasons for Decision in the FDL Proceedings, it was made clear that that the Court had arrived at no conclusions about Canadian Escrow's reported position in relation to the Company. Instead the Court felt bound to assume that the funds said by EW to be there were not in fact there:

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> *"21. In these circumstances (which I elaborate upon further below), the Court could only properly proceed on the assumption that Canadian Escrow Ltd does not in fact hold the funds the Defendant contended the escrow agent holds for its sole benefit. This was on the simple basis that the Court has sought verification of the existence of the relevant funds through granting paragraph 1.2 of the Information Order which the Defendant has for whatever reasons failed to provide. Verification was sought because the Court determined that verification was required..."*

13. In 2022 the "Black Gold" proceedings were issued against, *inter alia*, the Company and CG seeking relief for the diversion of funds that group of investors placed with the Company. The JOLs' analysis was accordingly not an exclusively 'FDL-centric' one. It was also clear that there was a close connection between the substantive claims asserted, broadly alleging the misappropriation of funds, and the grounds for asserting that a serious risk of further dissipation existed."

67. The Plaintiffs summarise the background at paragraphs 6-15 of the updated skeleton argument as follows (footnotes omitted):

"6. The First Plaintiff ("CSL") is a company whose sole beneficial owner is Ms Winczura. The Second and Third Plaintiffs (the "JOLs") are the joint official liquidators of CSL. PFS and CG are also companies of which Ms Winczura is the sole beneficial owner.

7. In 2018 Ms Winczura, acting through CSL and PFS, entered into agreements with Fortunate Drift Ltd ("FDL") whereby CSL would hold certain shares (valued in excess of $20m) on FDL's behalf. Having obtained custody of the shares Ms Winczura sold them and misappropriated the proceeds, utilizing each of PFS, CG and CSL. FDL brought proceedings against CSL and in August 2023 and January 2024 obtained judgments on liability and quantum. In December 2023 CSL was placed into provisional liquidation on the petition of FDL, and a winding up order was made in January 2024.

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8. Since the commencement of FDL's claim against CSL, and through the subsequent winding up proceedings, Ms Winczura has employed perjury, forgery and persistent contempt of the Court to conceal the whereabouts of the proceeds of her theft.

9. During the course of the FDL proceedings, the Court made various orders requiring Ms Winczura to provide sworn evidence as to the whereabouts of the proceeds of sale of the shares, and freezing those proceeds. Notwithstanding the making of those orders (in most cases with penal notices attached) Ms Winczura has not complied with them. She did swear various affidavits asserting that CSL held funds (i) in a treasury bill held by Canaccord; and (ii) in an account with a firm called Canadian Escrow, but neither of these assets in fact existed and the documents produced by Ms Winczura to evidence them were forged.

10. Following their appointment the JOLs obtained an order pursuant to section 103 Companies Act for Ms Winczura to be examined on oath and to provide full information in respect of CSL's affairs. Although a number of video calls took place, Ms Winczura has never attended an in-person meeting with the JOLs and has provided no substantive information as to CSL's affairs or the whereabouts of the funds.

11. On 24 April 2024 the JOLs issued proceedings in their own name and that of CSL against Ms Winczura, PFS and CG. In essence, the claim is that Ms Winczura caused CSL to incur a liability to FDL as a result of the misappropriation of the shares, and that PFS and CG conspired with her to do so. The Plaintiffs seek damages and/or an account together with relief under the fraudulent trading provisions of the Companies Act.

12. Also on 24 April 2024, Kawaley J made a freezing order against each of Ms Winczura, PFS and CG. The order against Ms Winczura extends to all of her assets, while that against PFS and CG covers only their bank accounts. The Order also required each of the defendants to provide full details of their assets, and of the whereabouts of the share proceeds (in the latter case, mirroring exactly orders previously made by the Court in the FDL proceedings).

13. The existence of the writ and the freezing order were brought to Ms Winczura's attention on 29 April, but she has never made any effort to comply with the disclosure provisions of the order.

14. On 3 June 2024, the writ having been validly served on PFS and CG at their registered office and the time for acknowledging service having expired, default interlocutory judgment was entered against them.

15. On 24 June 2024 the Plaintiffs issued a summons, to be listed with the return date of the freezing injunction, for orders for substituted service on Ms Winczura, a declaration that she has been validly served with the writ, and for an order for interim payment against PFS and CG."

68. Apart from the brief Writ of Summons, I have been provided with no other pleading and I have not been directed to any evidence in respect of the amount of "damages and/or compensation". The Plaintiffs simply refer to the position of Fortunate Drift.

69. Karen Scott in her affidavit sworn on 23 April 2024 at paragraph 17 says that on 31 January 2024 Kawaley J awarded Fortunate Drift Limited ("FDL") damages of $14,375,336.58 and interest of $1,707,071.22 together with 75% of its costs. At paragraph 18 she adds that Canterbury Securities Ltd (in official liquidation) has been ordered to pay FDL:

(1) US$18,056,465.20 by way of damages and interest;
(2) costs to be assessed;
(3) further damages contingent on the outcome of the Nevada proceedings in respect of which FDL claims an additional US$19,082,407.80.

70. I do not consider it appropriate at this stage today to "make a preliminary assessment of damages payable by the Second and Third Defendants as being, at a minimum, the amount of the damages awarded to Fortunate Drift Limited in cause no. 277 of 2018", as suggested at paragraph 38 of the Plaintiffs' 10 page skeleton argument dated 10 July 2024.

71. Even if there had been no application for an adjournment I would not have been content to proceed with a determination of Issue 4 as insufficient evidence, law and argument has been presented to the court.

72. I have been referred to no law or evidence in support of the application for a preliminary assessment of damages and written submissions on Issue 4 were skeletal to say the least. Further notice needs to be given to the Second and Third Defendants. If the Plaintiffs wish to proceed with an application for what they are describing as a "preliminary assessment of damages" in the sum of US$18,056,465.20 against both the Second and Third Defendants then they will need to file and serve appropriate evidence and the Second and Third Defendants should have an opportunity of filing and serving evidence in response and then appropriate skeleton arguments outlining the relevant law and relevant arguments should be filed. Issue 4 must therefore be adjourned. Subject to a point I will make in a moment, I am minded to suggest that the Plaintiffs file and serve their evidence within 28 days, the Second and Third Defendants 28 days thereafter and duly paginated bundles, together with skeleton arguments be exchanged and filed 21 days thereafter and the matter be listed for hearing upon the application of the parties. I leave open for consideration of argument at a future date if need be as to whether it is appropriate to proceed at this stage or at trial as the claim against the First Defendant remains extant.

73. The Plaintiffs may however, to save time and costs, wish to wait and see if there is to be an application to set aside the default judgment. If the Second and Third Defendants are to file and serve an application to set aside the default judgment they should do so within the next 14 days, together with their evidence in support. Plaintiffs' to have 14 days to file and serve any evidence in response, paginated bundle(s) and skeleton arguments to be exchanged and filed 14 days thereafter and the matter can then be listed for hearing upon the application of the parties. It would seem a waste of time and costs to prepare for a damages hearing if there is to be an application to set aside the default judgment. I therefore expect the attorneys to co-operate sensibly in that respect.

74. I adjourn Issue 4 to 10am on 31 July 2024 for mention and directions but hopefully the sensible attorneys involved in this case can agree draft directions for the hearing of any application to set aside the default judgment or in respect of the determination of Issue 4 and the timing of such determination and present such draft directions within the next 14 days for my approval.

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75. Counsel to produce a draft order reflecting the determinations I have made in this judgment before 3pm, Monday, 15 July 2024.

David Doyle

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THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT