IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD 186 of 2020 (MRHCJ)

BETWEEN

GIBSON CONSULTANTS LTD

Plaintiff

-and-

THE EMIRATES CAPITAL LIMITED

Defendant

IN CHAMBERS AS OPEN COURT

Appearances:	Mr. Brett Basdeo of Walkers for the Plaintiff
Before:	Hon. Chief Justice Margaret Ramsay-Hale
Heard:	9 November 2022 and 9 February 2023
Draft Judgment circulated:	3 April 2023
Judgment Delivered:	14 April 2023

HEADNOTE

Summary Judgment – GCR O.14, r.4 - no defence to claim. Costs - Section 24 Judicature Act (2021 Revision) – indemnity costs – GCR O.62, r.4(2) and O.62, r.11 - whether conduct taking case out of the norm - settlement offers *'without prejudice as to costs'* - whether court has power to vary interlocutory costs order.

REASONS FOR DECISION

INTRODUCTION

1. On the 9 February 2023, I entered judgment for the Plaintiff, Gibson Consultants Ltd ("Gibson") and ordered that the Defendant, The Emirates Capital Limited ("Emirates") pay the costs of this action on the indemnity basis, varying the standard costs orders made on the interlocutory applications in which Gibson had prevailed. I gave brief *ex tempore* reasons for my decision and promised to deliver fuller written reasons in writing which I do now.

The Background

2. The background to these proceedings is set out fully in the judgment of this Court dated 15 March 2022, which determined a preliminary point of law in Gibson's favour, and in the unreported judgment of the Court of Appeal CICA (Civil) Appeal 5 of 2002 dated 9 September 2022, dismissing Emirates' appeal against the decision of this Court.

3. In setting out a brief background to the dispute to provide the context for the orders made by me on 9 February 2023, I have borrowed liberally from the summary of facts set out in the judgment of Beatson JA who delivered the judgment of the Court of Appeal.

4. The proceedings arose out of the failure of a Cayman Islands fund, Fulcrum Diversified Income Note Fund (the "Fund"). Emirates, a company incorporated under the laws of the Dubai International Financial Centre, was the Fund's investment manager under an Investment Management Agreement ("IMA"). Gibson was the investment adviser to Emirates in respect of the Fund under an Investment Advisory Agreement ("IAA") made between them. Both the IMA and the IAA were originally entered into on 6 September 2017 and amended and restated on 1 July and 11 October 2018. The IAA provided that if Emirates earned management fees of up to US$150,000 in any month in which Gibson had provided investment advisory services to Emirates, then Emirates would pay Gibson US$50,000 a month.

5. On 9 April 2019, Emirates served termination notices on the Fund and on Gibson pursuant to the IAA, giving the contractually required 9 months' notice of termination. The Fund was subsequently put into voluntary liquidation. Emirates submitted a proof of debt for management fees under the IMA. The Joint Official Liquidators (the 'JOLs') admitted part of the claim and paid Emirates a total dividend of US $735,041.19.

6. The JOLs allocated the payment of the outstanding management fees on a monthly basis. In their Final Report, the JOLs stated that Emirates' management fees for the months of May through to August 2019 were paid in full, there was a partial payment on the invoice for the fifth month and no payments were made in respect of the remaining months.

7. The Fund was dissolved on 29 May 2020. Gibson instituted these proceedings against Emirates on 19 August 2020 claiming fees of US$50,000 a month for each of the 4 months for which Emirates' invoices had been paid in full.

8. Despite not taking any objection to the allocation of the dividend and the basis upon which the distribution payment was made, Emirates took the position in these proceedings that the JOL's were not entitled to allocate the dividend as they had. In support of its position, Emirates asserted that it was "*Insolvency 101*." Emirates contended that the true position was that the JOLs declared a dividend of 67.164% on the dollar such that Emirates only received management fees of $100,747.29 per month. In the circumstances, its obligation to pay Gibson for its advisory work had not been triggered and no payments were due.

9. Emirates took that position in an application to set aside service out of the Writ, again in an application for summary judgment and raised it once more for the consideration of this Court as a preliminary question of law under GCR O.18, r.11 and O.33, r.3. On each occasion, the issue was decided in Gibson's favour.

10. The judgment of the Court determining the preliminary issue in Gibson's favour was handed down on 15 March 2022. At the hearing to settle the form of order, directions were given for the trial of the remaining issues which were whether Gibson had provided any services to Emirates for which it was entitled to be paid and if so, whether Gibson could claim damages for the loss of the opportunity to invest the advisory fees that should have been paid to it. Emirates was ordered to pay *"the costs of and incidental to the hearing of the preliminary issue, to be taxed if not agreed."* The Order was made with liberty to apply.

11. I refused Emirates' application to stay the directions for trial, pending its appeal against the decision of this Court on the ground that it would increase costs.

12. On Emirates' renewed application for a stay of the directions for trial, Counsel for Gibson indicated that Gibson would not be pursuing the claim for damages for loss of opportunity if it succeeded in the Court of Appeal and Emirates indicated that it would treat the decision of the Court of Appeal as determinative of all issues between the parties. I granted the stay.

13. In its judgment dismissing Emirates' appeal, the Court of Appeal recorded at para. 7 that Emirates accepted that there were no other issues between the parties to be resolved at a trial because Gibson had provided Emirates with services and noted that,

> *"... irrespective of which party succeeds, the outcome of the appeal should bring a substantive end to the Grand Court proceedings."*

14. Following its success before the Court of Appeal, Gibson applied by summons dated 6 September 2022 to this Court for judgment to be entered in the sum of US$200,000 in damages for breach of contract, as claimed in the Writ, with interest thereon, and for costs to be awarded on the indemnity basis.

15. Before the matter came on for hearing on 29 September 2022, the attorneys for Emirates sought and were granted leave to withdraw on the ground that there had been such a complete and irretrievable breakdown in trust and confidence between Emirates and its attorneys, it was no longer possible for their attorneys to continue in the matter.

16. Gibson's application for summary judgment and indemnity costs was adjourned to await an indication from Emirates as to who their new attorneys would be and for Gibson to file submissions on what was, in part, an application to vary or set aside earlier interlocutory costs orders made on the standard basis. Although Emirates were given notice of the new hearing date, Emirates did not attend the hearing, nor did it appoint new attorneys to represent it.

17. The Court proceeded in its absence to hear, determine and grant Gibson's application for summary judgment and ordered the costs of the entire action to be paid by Emirates on the indemnity basis.

Summary Judgment

18. The test for Summary Judgment is set out in GCR O.14, r.1(1) which states as follows:

> *"Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against the defendant."*

19. As made plain in the judgment of the Court of Appeal, Emirates conceded that, beyond the preliminary issue raised, it had no defence to the issues which remained between the parties at the date the matter was taken on appeal.

20. Gibson was accordingly entitled to the judgment on its claim and judgment was entered in the sum of US$200,000 with post-judgment interests at the statutory rate.

Indemnity Costs

21. Gibson relied on two separate strands of Emirates' conduct in support of its application for indemnity costs. The first was that that Emirates advanced a defence that was entirely without merit and pursued it relentlessly in multiple failed interlocutory applications which caused the costs of the litigation to escalate to the extent that the costs exceeded the sums in issue.

22. The second was that Emirates had unreasonably rejected the several overtures made by Gibson to settle this matter in *"Without Prejudice as to Costs"* correspondence.

23. The Court's discretion to award costs pursuant to section 24 of the Judicature Act (2021 Revision) is wide and unfettered. The rules regulating the exercise of the Court's power to award costs are set out in GCR O.62. The overriding objective of GCR O.62 is that the reasonable costs of the successful party, incurred by the expeditious, economical and proper conduct of the suit, should be recovered from the unsuccessful party - unless the Court orders otherwise. The Court may order that the costs be taxed on the indemnity basis.

24. GCR O.62, r.4 (11) provides that,

> *"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."*

25. In moving Gibson's application for costs to be awarded on the indemnity basis, Mr. Basdeo referred to the decision of Smellie CJ in *Ahmad Hamad Algosaibi & Bros. Co. v. Saad Invs. Co. Ltd.* (Grand Ct.), 2012 (2) CILR 1, in which the learned judge considered the principles on which an award of indemnity costs will be made. I set out the relevant passages from the judgment at some length as they provide a comprehensive summary of the applicable principles:

> *"9. [...] this court has a discretionary jurisdiction (said to be founded in equity) to grant costs on the indemnity basis, but the discretion is to be exercised only in the most exceptional cases [...]*
>
> *10. In more categorical terms, GCR, O.62, r. 4(11) states:*
>
> *"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.*
>
> *It is nonetheless recognized that the jurisdiction is wide and flexible, allowing the court to exercise its discretion as the circumstances of the case may require.*
>
> *11. In Simms v. Law Society (6), Carnwath, L.J., delivering the lead judgment on behalf of the English Court of Appeal, summarized the principle (by reference to the English equivalent of GCR O.62, r. 4) in the following terms ([2006] 2 Costs L.R. 245, at para. 16), which I think are suitable to be adopted by this Court:*
>
> *'The courts have declined to lay down any general guidance on the principles which should lead to an award of costs on the indemnity basis. However, the cases noted in the White Book (Vol. 1 p. 1085ff) show that costs will normally be awarded on the standard basis—*

> *... unless there is some element of a party's conduct of the case which deserves some mark of disapproval. It is not just to penalise a party for running litigation which it has lost. Advancing a case which is unlikely to succeed or which fails in fact is not a sufficient reason for the award of costs on the indemnity basis... (p. 1087–8)*

Similarly, in Kiam v. MGN (No. 2) [2002] 2 All E.R. 242, 246 Simon Brown, L.J., while agreeing that-

> *'... conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs...'*
>
> *added—*
>
> *'...to my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context does not mean merely wrong or misguided in hindsight ...'*

26. Thus, when considering an application for the award of costs on the indemnity basis, the court is concerned principally with the losing party's conduct of the case, rather than the substantive merits of his position.

> *"12.* In *Excelsior Comm. & Indus Holding Limited* v. *Salisbury Hammer Aspden & Johnson* (2), Waller, L.J. had earlier expressed the view ([2002] C.P. Rep. 67, at para. 39) that the issue whether indemnity costs should be ordered depends on whether there is "something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way that justifies an order for indemnity costs..."
> **[Emphasis mine]**

27. The availability of indemnity costs where speculative, weak, opportunistic or thin claims are advanced was considered by Henderson J in *Bennett v. Attorney General* [2010 (1) CILR 478] who said this:

> *"6. Advancing a defence which is merely weak or unlikely to succeed is to be distinguished from maintaining a defence 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 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.

7. *The principle is described well in the recent decision of the Technology & Construction Court in Fitzpatrick Contractors Ltd. v. Tyco Fire & Integrated Solutions (UK) Ltd. (1). Coulson, J. set out ([2008] EWHC 1391 (TCC), at para. 3) his summary of the principles relating to an award of indemnity costs in the United Kingdom. Item 5 is pertinent:*

> *"There are a number of decisions, both of the TCC and of other courts, which make plain that the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, whereas the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) will lead to such an order. In both Wates Construction Ltd. v. HGP Greentree Allchurch Evans Ltd. [2006] BLR 45 and EQ Projects Ltd. v. Javid Alavi [2006] BLR 130 this court was persuaded that, in the circumstances of those cases, an order for indemnity costs was appropriate because the claimants should have realised that their claim was hopeless and should not have taken the matter on to trial. However, in Healy-Upright v. Bradley & Another [2007] EWHC 3161 (Ch), the court reiterated that an order for indemnity costs was not justified by the mere fact that the paying party had been found to be wrong, either in fact or in law or both, or by the fact that in hindsight, the result of the case now being known, the position adopted by that party may be thought to have been unreasonable."*

28. Turning now to the Emirates' conduct of the litigation, the sum of Emirates' argument was that the JOLs did not have the power to allocate the dividends the way they did. It was supported by the submission that this was *"Insolvency 101."* The absence of any lack of authority provided by Emirates for this proposition was highlighted by Beatson JA in the judgment of the Court of Appeal at para. 23. Beatson JA noted further that the proposition was inconsistent with the fact that the

Companies Winding Up Rules, 2018 ("CWR") does not prohibit the allocation of Final Dividends and the recognition by Henderson J in *Re Parmalat Capital Finance Ltd* [2011] (1) CILR 112 at 113 -114 that JOLs have the same flexibility as any other *"judicial, quasi-judicial or administrative decision-maker."*

29. In any event, as Beatson JA observed, Emirates had not objected to the allocation but rather, had accepted and received a distribution payment by the JOLs made on the basis that it was receiving 100% of its admitted claims for the first four months, a partial payment for the fifth month and nothing in respect of the remaining months of the period of notice. It could not now challenge the allocation and basis of distribution because the JOLs became *functus officio* on their discharge.

30. The Court dismissed Emirates' appeal, but not before commenting at para. 30 that Emirates' position was *"unattractive"* in that it had sought to hide behind *"the vicissitudes of insolvency law to avoid its obligations"* to Gibson. Having taken the benefit of services provided by Gibson in assisting it to prepare its claim in the liquidation and taken the benefit of the clause in the IMA *vis-a-vis* the JOLs that it be paid management fees, it sought to avoid its obligation to Gibson under the substantially identically worded term in the IAA.

31. I considered that in the circumstances where Emirates advanced a defence which was hopeless and wholly unsupported by authority Gibson's costs should be taxed on the indemnity basis.

32. The second factor relied on was its offer to settle in *"without prejudice save as to costs"* correspondence in the circumstances where Gibson had recovered more on judgment being entered in its favour than it had been prepared to accept in an attempt to settle the proceedings and save costs. The authorities establish that the refusal to accept an offer to settle is a factor to take into account when deciding whether a party's conduct was unreasonable and took the conduct of the litigation *"out of the norm."*

33. The seminal case regarding common law offers to settle is *Calderbank v Calderbank* 1975] 3 All ER 333 which established that a party may bring offers made *without prejudice save as to costs* to the Court's attention to improve the basis upon which such costs is assessed.

34. As Mr. Basdeo noted in his written submissions, the procedure in *Calderbank* is codified in the

GCR O.22,r.14(1), which provides that:

> *"[a] party to proceedings may at any time make a written offer to any other party to those proceedings which is expressed to be "**without prejudice save as to costs**" and which relates to any issue in the proceedings."*

35. GCR O.62, r.10(d) which provides that the Court, when exercising its discretion to make an order for costs, shall take into account any written offer made under GCR O.22, r.14.

36. The Cayman Islands approach to without prejudice offers was considered by Kawaley J in *Ehi Car Services Limited* [2018 (1) CILR 641]. The learned judge stated at paras. 29-30 and 33:

> *"As Mummery LJ stated in Butcher v Wolfe and Wolfe [1999] 1 FLR 334 at 340: 'The proper approach to a Calderbank offer, when it is taken into account on a later argument on costs, is to ask whether the party to whom the offer was made 'ought reasonably to have accepted the proposal in the letter?'*
> *[...]*
> *Henderson J in G v. G [2010] (1) CILR 365 also opined (at 371-372) as follows in this Court: 'It is therefore clear that Calderbank offers require to have teeth in order for them to be effective ... as Ormrod, LJ said in McDonnell v. McDonnell [1977] 1 W.L.R. 34, 38 [:] 'the Calderbank offer should influence but not govern the exercise of discretion ...'*
>
> *Under Cayman Islands law, the reasonableness of the refusal comes into play at the preliminary stage of deciding whether or not cost consequences should flow from refusing an offer that the paying party was subsequently able to 'beat'.... To 'give teeth' to GCR Order 22, rule 14, the Court should generally adopt a simple approach which leans heavily towards making it unreasonable to refuse an offer which is not bettered at 'trial'. This approach should not ordinarily be complicated by an analysis of the legal arguments used to buttress a W/P offer, unless the commercial merits of the offer and the legal basis for it are inextricably intertwined."*

37. In assessing *Calderbank* offers and their impact on the determination of costs then, the Court must first assess whether the offers made were more or less advantageous than the corresponding award or judgment delivered by the Court.

38. On 19 January 2021, after Emirates filed to set aside the grant of leave to serve the writ out of the

jurisdiction, Gibson offered to settle these proceedings for US$175,000 with each party bearing its own costs. The offer remained open until 22 January 2021. At the 16 February 2021 hearing of Emirates' summons seeking to set aside the Court's order granting leave to serve outside of the jurisdiction, the issue was decided in Gibson's favour with Emirates ordered to pay the cost of an incidental to that summons, to be taxed if not agreed.

39. On 2 March 2021, Gibson repeated the offer, which remained open until 5 March 2021. The offer was made in anticipation of the hearing of Emirates' application for the trial of a preliminary issue. The preliminary issue was heard on 10 June 2021 and determined in Gibson's favour on 15 March 2022 with costs.

40. On 25 March 2022, Gibson offered to settle these proceedings for payment of US$200,000 plus 60% of its legal fees at the time (being US$135,046.00). This third and last offer remained open to acceptance until 29 March 2022.

41. In the circumstances, where Emirates lost in the Court of Appeal and judgment was subsequently entered for Gibson in the full sum of the US$200,000.00 claimed plus interest, there was no question that Gibson ultimately did better than the offers made to Emirates to settle the proceedings.

42. As to whether it was unreasonable for Emirates' to refuse the offers, I adopted and applied Kawaley J's statement in *Ehi* that the Court should lean heavily towards it being unreasonable to refuse an offer which is not bettered at 'trial,' rather than undertake an analysis of the legal arguments used to buttress the offer.

43. No significant analysis was required in the instant case to determine that it was unreasonable for Emirates to refuse offers to settle made on the back of an argument that Emirates had no prospect of succeeding on the sole legal proposition on which it relied - that the JOLs did not have the power to allocate the dividends the way they did - supported only by the submission that it was *"Insolvency 101."* Emirates' refusal in the circumstances was conduct out of the norm which separately justified an order for indemnity costs.

Varying an Interlocutory Costs Order

44. The more difficult question was whether the Court could set aside the orders for costs on the

standard basis made when it decided Emirates' application to strike out Gibson's claim and determined the preliminary point in Gibson's favour.

45. The question arises because Gibson was not entitled to seek costs on the indemnity basis as the interlocutory orders did not dispose of the claim and Emirates did not concede, that it had no defence to the claim if it lost on the preliminary issue, until after it had appealed the decision of this Court. So long as any other matters remained in issue between the parties, Gibson was not permitted to disclose the without prejudice correspondence by virtue of GCR O.22, r.14(2) which provides,

> *"... the fact that such an offer has been made shall not be communicated to the Court until the question of costs falls to be decided and the Court shall take into account any offer which has been brought to its attention when making an order for costs."*

46. The following costs orders were made during the course of the proceedings:

(a) costs in the cause on Gibson's application for leave to serve out (17 September 2020);

(b) costs to be taxed if not agreed on Emirates' unsuccessful application to set aside the grant of leave to serve out (16 February 2021);

(c) costs in the cause on Emirates' application for trial of the preliminary issue (3 May 2021);

(d) costs to be taxed, if not agreed on the determination of the preliminary issues in Gibson's favour (15 March 2022); and

(e) costs in the cause in respect of the defendant's application to stay the proceedings pending appeal (9 May 2022).

47. Pursuant to GCR O.62, r.4(9) where an order for costs in the cause is made, the party in whose favour the Court makes an order for costs at the end of the proceedings is entitled to the party's costs of the part of the proceedings to which the order relates. It follows that the orders made on 17 September 2020, 3 May 2021 and 9 May 2022 were not, as Mr. Basdeo suggested in his written submissions, orders for costs on the standard basis but orders that the costs of those discrete applications would form part of the costs of the successful party at the conclusion of the

proceedings.

48. The orders made on 16 February 2021 and 15 March 2022 were by contrast, orders for costs on the standard basis pursuant to GCR O.62, r.10 which provides that, when used in an order of the Court, the expressions "Costs, Order for costs and Costs *to be taxed if not agreed*" shall mean "*costs to be taxed on the standard basis.*"

49. In addressing the question of whether the Court was entitled to revisit these earlier orders for costs to be taxed on the standard basis, Mr. Basdeo submitted that an award of costs to be "taxed if not agreed" inescapably relies on a further judgment and is, therefore, not final. Those orders could only be considered final if they had been made forthwith, leading to an enforceable costs certificate.

50. He referred to GCR O.62, r.9(4) which provides the Court with the discretion to order the costs of any interlocutory proceedings to be taxed forthwith "*where it appears to the Court [...] that there is no likelihood of any further order being made in a cause or matter*". He submitted that the Court did not make any forthwith order in this matter as the matter of costs was still to be determined in its totality at the end of the cause of action.

51. He submitted further, that as the orders were interim only, the Court had the inherent power to set aside its earlier order that the costs be taxed on the standard basis and order the costs be allowed on the indemnity basis given that Gibson had been precluded at the earlier stages from relying on the *without prejudice* correspondence.

52. In support of this proposition, Counsel relied on the decision of Kawaley J in *ArcelorMittal North America Holdings LLC v Essar Global Fund Limited*. At para. 42 Kawaley J accepted the submission that the Grand Court's power to set aside its own orders must be viewed as deriving from its inherent jurisdiction and rejected the contrary submission that this Court's Rules are, in effect, an exhaustive code in this regard. He went on to observe that,

> *"In the absence of any express power conferred by the Rules to set aside a judgment on specified or general grounds, the Rules cannot be read as codifying*

the broad inherent jurisdiction this Court undoubtedly possesses to maintain the integrity of its processes.

In any event, section 11 of the Grand Court Act (2015 Revision) provides:

11. (1) The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to this and any other law, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by -

(a) Her Majesty's High Court of Justice; and

(b) The Divisional Courts of that Court,

as constituted by the Senior Courts Act, 1981, [U.K. Act] and any Act of the Parliament of the United Kingdom amending or replacing that Act."

53. At para. 43 Kawaley J also went on to observe that the English High Court's inherent jurisdiction and current practice is available to fill any gaps in the local statutes and rules, subject to the caveat that English practice must be read subject to relevant local statutes and rules.

54. He referred to the decision of Zacaroli J in *Sangha v. Amicus Finance plc* [2020] EWHC 1074 (Ch) (May 5, 2020) with respect to the operation of the English rule, CPR rule 3.1(7) which codifies the inherent jurisdiction of the court to vary or revoke its own orders and provides the Court with a general power to revisit any order made by it. At para. 34 Zacaroli J:

"The most recent authoritative statement of the test to be applied under Rule 3.1(7) is to be found in the judgment of Hamblen LJ, giving the judgment of the Court, in Terry v BCS... at [75]:

"In summary, the circumstances in which CPR 3.1(7) can be relied upon to vary or revoke an interim order are limited. Normally, it will require a material change of circumstances since the order was made, or the facts on which the original decision was made being misstated."

55. Kawaley J also considered the decision of Rix LJ in *Tibbles v SIG Plc* [2012] EWCA Civ 518 on the Court's exercise of the rule 3.1 power to vary orders and the observations of the learned judge made at para. 40:

> *"The revisiting of orders is commonplace where the judge includes a 'Liberty to apply' in his order. That is no doubt an express recognition of the possible need to revisit an order in an ongoing situation: but the question may be raised whether it is indispensable."*

56. At para. 65 Kawaley J concluded that,

> *"[...] this Court has a flexible jurisdiction to vary interlocutory orders to respond to material changes of circumstances or misrepresentations (and possibly mistakes which cannot be cured under the slip rule as well), particularly in relation to what may broadly be termed "case management orders" or "procedural orders" but also in relation to "continuing" orders which are made expressly or impliedly subject to "liberty to apply"."*

57. I do not take Kawaley J to be saying that the exercise of the discretion is limited to the purely procedural orders made in case management directions but that it might apply to other procedural orders dealing with matters such as costs. That said, as costs orders play an essential role in case management notwithstanding their primary purpose to compensate the person in whose favour the orders are made, they would seem in principle to fall within the rubric of case management orders. The authorities establish that the Court has the inherent power to revisit such orders if there were a material change in circumstances.

58. The concession on appeal, that Emirates had no defence to the claim other than the legal argument it had up until then unsuccessfully pursued, was a material change in circumstances. Because of the stance taken by Emirates before this Court, Gibson was precluded from relying on without prejudice correspondence at the time the earlier orders for costs be taxed on the standard basis were made. Had the concession been made when the preliminary issue was determined and the without prejudice correspondence brought to my attention, I would have ordered that that the costs of, and incidental of that application be awarded to Gibson on the indemnity basis.

59. For these reasons I set aside/vary the basis of the taxation and order Emirates to pay all of Gibson's costs incidental to and occasioned by the proceedings, on the indemnity basis. This includes the costs of foreign lawyers incurred by Gibson in pursuing its claim against Emirates which is domiciled in the DIFC, which would otherwise be irrecoverable pursuant to GCR O.62,

r.18: see Henderson J in *Sagicor General Insurance (Cayman) Limited and another v. Crawford Adjusters (Cayman) Limited And Six Others* [2008] CILR 482, subject only to those costs being reasonably incurred.

DATED THE 14th APRIL 2023

RAMSAY-HALE CJ