



**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**CAUSE NO: FSD 227 OF 2018 (IKJ)**

**BETWEEN:**

**FORTUNATE DRIFT LIMITED**

**Plaintiff**

**AND**

**CANTERBURY SECURITIES, LTD.**

**Defendant**

**IN CHAMBERS**

**Appearances:**

Mr Stephen Atherton KC of counsel and Ms Katie Pearson of Claritas Legal Limited, for the Plaintiff (“FDL”)

Mr Ben Tonner KC and Ms Sally Bowler of McGrath Tonner, on behalf of the Defendant (“CSL”)

**Before:** The Hon. Justice Kawaley

**Heard:** 9 March 2023

**Date of Decision:** 9 March 2023

**Draft Reasons circulated:** 23 March 2023

**Reasons Delivered:** 30 March 2023

### HEADNOTE

*Plaintiff's application for specific discovery-documents sought relevant to liability and remedy-onus of showing discovery is "not necessary"-Grand Court Rules Order 24 rules 3, 7-8*

### REASONS FOR DECISION

#### Introductory

1. FDL, by its Summons dated 16 December 2022, in addition to trial timetable directions, sought an Order that:

*"1. Within fourteen days of the date of this Order the Defendant shall give discovery by list, verified by affidavit, of the documents listed in schedule A hereto, pursuant to O. 24 r.3 and/or r.7."*

2. At the hearing on 9 March 2023, I granted the relief sought requiring compliance by 4pm on 6 April 2023 and proceeded immediately to deal with pre-trial directions and the Defendant's application (by Summons dated 3 March 2023) to adjourn the trial.
3. I now give the brief reasons I promised to give for my decision in relation to the Specific Discovery application.

#### The application

4. The present action is based on, *inter alia*, hotly disputed allegations of breaches of fiduciary duties owed by CSL to FDL in connection with the sale of certain Shares in Yangtze River Port and Logistics Ltd ("YRIV") held by CSL on behalf of FDL to a company referred to as "PFS" in August 2018 (the "Purchased Shares") and shares held by CSL after this sale ("FDL's Shares"). The relief

sought includes an account, an inquiry into dealings with the various shares and equitable tracing. On 7 December 2018, I granted an Order restraining CSL from dealing with the Plaintiff's Shares. Around the same time, some of FDL's shares were sold by CSL for apparently entirely rational market-related reasons. CSL subsequently gave an undertaking which replaced the 7 December 2018 Order which was discharged on 13 December 2018. CSL was released from those undertakings by Order dated 20 April 2020, but only after (in response to the Court's request for clarification as to what would happen to FDL's shares as a result of the Order) CSL's then attorneys confirmed by letter dated 17 April 2020 to the Court: "*Canterbury intends to keep the assets secure pending the outcome of the litigation.*"

5. Schedule A to FDL's Summons sought five categories of documents:
  - (1) all communications between CSL and PFS in relation to the Purchased Shares sold by FDL to PFS;
  - (2) any other documents in CSL's possession, custody or power relating to dealings by CSL or PFS with the Purchased Shares;
  - (3) all documents relating to dealings with all YRIV Shares held by CSL for FDL from 9 May 2018 to date;
  - (4) documents showing the current position of FDL's Shares from 7 December 2018 to the date of production; and
  - (5) all documents relating to dealings with the proceeds of sale of the FDL Shares sold by CSL in early December 2018.
6. Recently retained Mr Tonner KC did not oppose his client disclosing the documents referred to in paragraph 1 of Schedule A to FDL's Summons. Argument centred on whether other documents were relevant at this stage of the litigation when the need for relief such as an account had yet to be established. The 10<sup>th</sup> Affidavit of Dominic Sin explained credibly why the documents sought ought reasonably to be in CSL's possession, custody or power. CSL filed no evidence in opposition to the application.

**Findings**

7. The following relevant Rules were set out in FDL's Skeleton Argument:

***“Order for Discovery (O.24, r.3)***

*(1) Subject to the provisions of this rule and of rules 4 and 8, the Court may order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.*

*(2) Where a party who is required by rule 2 to make discovery of documents fails to comply with any provision of that rule, the Court on the application of any party to whom discovery was required to be made may make an order against the first mentioned party under paragraph (1) of this rule or, as the case may be, may order him to make and file an affidavit verifying the list of documents he is required to make under rule 2 and to serve a copy thereof on the applicant.*

*(3) An order under this rule may be limited to such documents or classes of documents only or to such only of the matters in question in the cause or matter, as may be specified in the order.*

...

***Order for discovery of particular documents (O.24, r.7)***

*(1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of documents so specified or described is, or has at any time been in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.*

*(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavit under rule 2 or 3.*

*(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession custody or power the document, or class of documents specified or described in the application and that it relates to one or more of the matters in question in the cause or matter.*

***Discovery to be ordered only if necessary (O.24, r.8)***

*On the hearing of an application for an order under rule 3 or 7 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.* [Emphasis added]

8. Reference was also made to the following terms of this Court’s Directions Order dated 25 October 2019:

*“2. The parties shall give discovery by list of all documents relevant to the issues raised on the parties’ respective pleadings, save that they shall not be required to give such discovery in respect of those documents which relate solely to the issue of the exercise by PFS Management Ltd (PFS) of the ‘put provision’ at clause 3.11 of the Stock Purchase Agreement entered into between the Plaintiff and PFS dated 16 August 2018 (the Validity Issue) on the basis that such Issue will be determined in the concurrent proceedings issued by PFS before the Nevada Court under case no A-18-783981-C.*

*3. For the avoidance of doubt:*

*i. if a document relates to the Validity Issue as well as any other issue in the action, the parties shall give discovery of that document ...”*

9. It was submitted in the ‘Defendant’s Position’:

*“18. FDL’s requests for information are either premature (since they are relevant to relief not liability i.e. tracing/ accounting that may be ordered only if a breach of fiduciary duty is established at trial) or, as Kobre & Kim observed in their letter responses, to attempts by FDL to obtain injunctive relief ‘through the back door’, FDL having lost the benefit of any pre-trial undertakings by virtue of its own non-compliance with the AML Order....*

*To the extent that FDL seeks information as to CSL's dealings with shares, or the proceeds of their sale, post 7<sup>th</sup> December 2018, such matters are relevant to relief not liability. CSL is not required to embark on an accounting/tracing exercise until FDL establishes at trial that CSL owed, and breached, a fiduciary duty...."*

10. Mr Tonner KC buttressed these submissions by reference to the terms of GCR Order 24 rule 8 and the general case management need for the parties to focus their efforts on necessary trial preparation. However, there was no evidence to suggest it would be onerous to produce the documents sought. CSL's counsel also argued that a narrower relevance test applied on a specific discovery application. Mr Atherton KC submitted that because the basic discovery obligations had not been complied with, the Peruvian Guano test applied to the present application. The documents sought clearly fell within the ambit of documents which ought to have been disclosed under the Directions Order. In addition, they were relevant to an assessment of whether CSL had breached the 7 December 2018 Order, the undertakings which replaced them and/or had complied with the informal undertaking given to the Court through its former attorneys on 17 April 2020.
11. I found that the disputed categories of documents FDL sought were all necessary for the fair disposal of the proceedings bearing in mind that a split trial on liability and relief had not been ordered. They were relevant even applying a narrower specific discovery relevance test, which seemed appropriate having regard to the late stage at which the application was being made. As regards the categories:
  - (a) the documents sought under paragraphs 2 and 3 of Schedule A to the FDL Summons were clearly relevant to both liability and relief;
  - (b) the documents sought under paragraphs 4 and 5 of Schedule A to the FDL Summons were clearly relevant to relief.
12. As a matter of principle, I decided that it was not an answer to a specific discovery application made in proceedings where liability and quantum were formally being tried together and the Plaintiff asserted proprietary claims to object that all or some of the documents sought related only to matters to be explored, if necessary, at the liability stage. Mr Tonner KC was right to contend that GCR Order 24 rule 8 conferred the power to refuse to require discovery which was not necessary at a particular stage of proceedings and this power could potentially be exercised in

CSL's favour. In my judgment, however, it was appropriate to grant the present application as regards all categories sought, because CSL's dealings with the FDL Shares and their proceeds, against the background of an injunction, its own formal undertakings and its informal undertakings to this Court were not only relevant to liability. These matters were both closely connected with and potentially relevant to the fair appraisal of the merits of the breach of fiduciary duty claim.

13. In the final analysis, FDL advanced a *prima facie* case for the specific discovery it sought and CSL did not satisfy me that the relief sought was "not necessary" within GCR Order 24 rule 8. According to the *Supreme Court Practice 1999* Volume 1 paragraph 24/8/2:

*"Under this rule, in contrast to r.13, it is for the party objecting to the order for discovery under rr.3, 7 or 7A to satisfy the Court that the discovery is not necessary, or not necessary at that stage the cause or matter has reached. (Dolling-Baker v. Merrett [1991] 2 All E.R. 890, C.A.; Ventouris v. Mountain [1991] 2 All E.R. 472 at 486, per Parker LJ). Where a split trial had been ordered so that the issue of liability was to be determined separately from the issue of quantum, discovery on the issue of quantum would not normally be ordered, and only special circumstances going beyond a plaintiff or defendant's interest in learning the amount in issue for the purpose of making informed decisions on whether to negotiate a compromise or to proceed with the action or defence would justify making such an order..."* [Emphasis added]

### Conclusion

14. For these reasons, on 9 March 2023 I granted the relief sought under paragraph 1 of FDL's Specific Discovery Summons.



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**THE HONOURABLE MR JUSTICE IAN RC KAWALEY**  
**JUDGE OF THE GRAND COURT**