

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 118 OF 2018

CTRIP INVESTMENT HOLDING LTD

Plaintiff

-and-

EHI CAR SERVICES LIMITED

Defendant

IN CHAMBERS

Appearances:

Mr Nicholas Hoffman and Mr James Elliott of Harneys on behalf of the Plaintiff

Mr Stephen Atherton QC and Mr Jan Golaszewski of Carey Olsen on behalf of the Defendant (“the Company”)

Before: The Hon. Justice Kawaley

Heard: 25 July 2018

Date of Decision: 25 July 2018

**Draft Ruling
Circulated:** 28 August 2018

Ruling Delivered: 10 September 2018



HEADNOTE

Costs of strike-out summons-whether reasonable to issue strike-out summons together with Order 12 rule 8A notice before plaintiff afforded an opportunity to elect to discontinue the action-purpose of Order 12 rule 8A

EX TEMPORE RULING ON COSTS

Background

1. In this matter, the Plaintiff issued a Writ of Summons on the 27th of June 2018, which sought relief in respect of an anticipated issue of shares which it was feared might take place before an Extraordinary General Meeting to vote on a merger.
2. The form of endorsement broadly follows a similar prayer in the Petition which was struck out¹. The Court's decision in draft was circulated on the 25th of June and the Writ was issued two days later².

Findings: was the issuance of the Writ an abuse of process?

3. It is fair to say from the chain of correspondence that long before the Court's decision was circulated the Plaintiff's counsel, Harneys, were seeking undertakings from the Company's (the Defendant's) attorneys, Carey Olsen, in relation to the possible issue of new shares.
4. The first letter, I believe was sent on or about the 13th of June and was robustly rebuffed. Further correspondence was sent on the 20th of June and it was complained in that letter that any issuance of new shares which would dilute the Plaintiff's shareholding would be in breach of directors' duties. On the 22nd of June, Carey Olsen indicated that any proposal to issue new shares would be put to the Company's Board and the Board nominee of the Plaintiff would receive the requisite notice which, it emerged in the Petition proceedings, was 48 hours' notice.
5. And so it seems to me that it is less than clear that the Writ that when issued on the 27th of June was in fact primarily a response to the draft judgment sent out by the Court on the 25th of June. And I do not believe it would be appropriate for me to infer in all the circumstances, having regard to the material presently before me, that the issuance of the Writ was either an abuse of process or close to it, as Mr Atherton QC submitted, because it was based on an embargoed judgment.

Was the Defendant's response to the Writ reasonable? The critical question defined

6. The Defendant's response to the Writ, which was published by Offshore Alert and thus came to its attention, was to do two things. The two things were, as I understand it, steps that were taken simultaneously:

¹ Grand Court of the Cayman Islands, FSD 63 of 2018 (IKJ), In the Matter of EHI Car Services Limited, judgment dated June 29th, 2018 (unreported).

² The Writ was withdrawn by the Plaintiff on July 19th, 2018.



- (1) a Notice was served under O.12, r.8A of the Grand Court Rules (“GCR”) and;
- (2) a Strike-out Summons was issued.

7. The Strike-out Summons was at the urging of the Defendant listed for hearing today over the vigorous objections of the Plaintiff. The Plaintiff argued that because of the provisions of O.12, r.8A the issuance and requested listing of the Strike-out Summons was unnecessary. The essence of the dispute before me is whether the Defendant, in circumstances where the Plaintiff has discontinued the action within the time contemplated by O.12, r.8A in response to the Defendant’s Notice, should be able to recover its costs of the Strike-out Summons.
8. It is accepted that any other costs in relation to the Writ which flow from the discontinuance should be the Defendant’s in any event. It is also in issue whether or not those costs should be awarded on an indemnity basis.
9. In my judgment, the critical question is: how reasonable was it for the Defendant to issue the Strike Out Summons at the same time as the O.12, r.8A Notice and to effectively expose the Plaintiff not just to the costs of the Writ and such costs as might reasonably be incurred in relation to O.12, r.8A, but also the additional costs of the Strike-out Summons as well?

GCR Order 12, rule 8A

10. O.12, r.8A says this

“(1) Any person named as a defendant in a writ which has not been served on him may serve on the plaintiff a notice requiring him within a specified period not less than 14 days after service of the notice either to serve the writ on the defendant or to discontinue the action as against him.

(2) Where the plaintiff fails to comply with a notice under paragraph (1) within the time specified the Court may, on the application of the defendant by summons, order the action to be dismissed or make such other order as it thinks fit.

(3) A summons under paragraph (2) shall be supported by an affidavit verifying the facts on which the application is based and stating that the defendant intends to contest the proceedings and a copy of the affidavit must be served with the summons.



(4) Where the plaintiff serves the writ in compliance with a notice under paragraph (1) or with an order under paragraph (2) the defendant must acknowledge service within the time limited for so doing.”

Findings: the application of Order 12, rule 8A to the present case

11. In this case, I believe it is common ground that the action was discontinued within the fourteen day period. The Notice was handed up in the course of the hearing and Mr Hoffman attempted to make much of the fact that the Notice does not refer to discontinuance. The Notice merely requires the Plaintiff to serve the Writ within fourteen days and warns that if the Writ is not served, judgment may be sought against the Plaintiff, including an order for indemnity costs without further notice.
12. It is, it seems to me, somewhat speculative to suggest that the reason why the Strike - out Summons was issued was because O.12, r.8A was not understood and the discontinuance aspect of it was not appreciated. But be that as it may, it appears to me that the purpose of O.12, r.8A is to provide a mechanism whereby a Defendant to a writ is not left in limbo indefinitely by a plaintiff who chooses to issue proceedings without serving them.
13. There may well be a variety of scenarios in which the mere existence of a writ on the Court public file, particularly a writ that makes scandalous allegations or makes other averments which cause a listed company serious harm, may require a defendant to take urgent action to have the writ struck out before the plaintiff has been allowed to elect to discontinue under O.12, r.8A. Bearing in mind the practicalities of listing court hearings, it would take an exceptional case indeed for it to be viable to have a strike out application effectively heard before the Plaintiff has exercised its election within the 14 day period contemplated by O.12, r.8A.
14. In my judgment, the present case is not one that falls into the category of cases where a Strike-out Summons was required or was indeed reasonable.

Findings: award of costs

15. In looking at the question of costs, there are two rules that are relevant. One is O.62, r.11(2) which says:

“Where it appears to the Court in any proceedings that anything has been done or that any omission has been made improperly, unreasonably or negligently by or on behalf of any party, the Court may order that the costs of that party in respect of



the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by him to that other party.”

16. In addition to that Rule, which is of some antiquity, there is the Preamble to GCR which requires the parties to assist the Court to achieve the Overriding Objective³. And, as far as the present case is concerned, it is important to remember that litigants are required to act in a proportionate manner⁴.
17. In all the circumstances of the present case I find that it was not proportionate for the Defendant to issue the Strike-out Summons at the time when it did. Accordingly, I order that each party should bear their own costs in relation to the Strike-out Summons as Mr Hoffman invited the Court to order.

³ Paragraph 3 provides: “*The parties are required to help the Court to further the overriding objective. In applying these Rules to give effect to the overriding objective the Court may take into account a party’s failure to help.*”

⁴ Paragraph 1 of the GCR provides in salient part as follows:

“

1.1 *The overriding objective of these Rules is to enable the Court to deal with every cause or matter in a just, expeditious and economical way.*

1.2 *Dealing with a cause or matter justly includes, as far as is practicable-*

(a) *ensuring that the substantive law is rendered effective and that it is carried out;*

(b) *ensuring that the normal advancement of the proceeding is facilitated rather than delayed;*

(c) *saving expense;*

(d) *dealing with the cause or matter in ways which are proportionate-*

(i) *to the amount of money involved;*

(ii) *to the importance of the case; and*

(iii) *to the complexity of the issues; ...” [Emphasis added].*



18. It is common ground that the costs of the Writ otherwise, or generally, should be awarded to the Defendant in any event, to be taxed if not agreed and on the standard basis.



HON JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

