[2009] CA (Bda) 5 Civ

The Court of Appeal for Bermuda

CIVIL APPEAL No. 22 of 2007

Between:

FIRST ATLANTIC COMMERCE LTD.

Appellant

-V-

BANK OF BERMUDA LIMITED

Respondent

Before: **Hon. Justice Zacca, President**
Hon. Justice Nazareth, JA
Hon. Justice Evans, JA

Date of Hearing: **10th & 12th November 2008**
Date of Judgment: **19th March 2009**

Appearances: Mr. Victor Lyon, Q.C. with Mr. Nathaniel Turner for the Appellant
Ms. Barbara Dohmann, Q.C. with Mr. Andrew Martin for the Respondent

JUDGMENT

Evans, JA

Bermuda FAC judgment

1. This Appeal is concerned with the costs of a major piece of litigation which began in 2004. The Plaintiff was First Atlantic Commerce Ltd. ("FAC") who is now the Appellant. The Defendant in the action, and the Respondent to the Appeal, is The Bank of Bermuda Ltd. ("the Bank").

2. The action was fixed for trial on 5 November 2007, estimated length four weeks. It ended with a Consent Order dated 7 November 2007 which was made "without prejudice as to costs". The remaining costs issue was decided by Kawaley J. on the following day. He awarded FAC one-third of its costs of the action, and made no order as to the costs of the Bank's Counterclaim.

3. Both parties now appeal. FAC contends that the Judge should have awarded it the whole of its costs, both on the Claim and the Counterclaim. (Its claim for these to be assessed on an indemnity basis was refused by the Judge, and has not been renewed on the appeal). The Bank submits that the Judge was wholly wrong and that FAC should have been ordered to pay all of its costs of defending the claim.

4. The amounts are very large. We were told that FAC's costs up to trial total about $3 million, the Bank's about $1.2 million. Bearing in mind that these figures do not include the likely costs of a four week trial, they bear comparison with the amount of the claim, even if that was as great as FAC contends, namely about $6million. The Bank contends that it was very much less, even worthless.

5. The Judge's Order regarding costs was made on the basis that FAC was seeking leave to discontinue the action, and the Bank likewise to discontinue its Counterclaim. Hence, paragraph 38 of his Judgment reads as follows –

> "38. The Plaintiff is granted leave to discontinue its action, and is awarded one-third of its costs, to be taxed if not agreed, on the standard basis. The Defendant is granted leave to discontinue its Counterclaim, but no order is made with respect to the costs of the Counterclaim."

6. Whether that is a correct basis on which to proceed may be questioned, but overall it is clear that the task of the Court is to apply the provisions of Order 62 Rule 3 of the Rules of the Supreme Court in the circumstances of the case. This provides –

> "(3) If the Court in the exercise of its discretion sees fit to make any order as to the costs of the proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

The Judge correctly described this as the "fundamental guiding principle".

7. We consider first the history of the matter and the nature of the dispute. Although the details are complicated, the outline is clear and relatively straightforward. FAC offered a service to the Bank which enabled it to process credit card transactions between credit card companies and retailers who sold goods on the internet. The service involved a 'Payment Gateway' which linked the retailer's website, the Processor which communicated with the Card Association, the customer's bank (the Issuing Bank) and the retailer's bank (the Acquiring, or Receiving Bank). Under the scheme, the Bank held accounts not only for FAC ("the Merchant") but also for individual retailers ("sub-Merchants"), and the sub-Merchants` accounts were credited with sums received as payments made on behalf of its customers. They were also debited with amounts which were paid to customers who claimed repayment for goods not supplied or which they were entitled to return under the credit card payment rules.

8. These arrangements were set out in an Ecommerce Visa and MasterCard Master Merchant Agreement ("MMA") dated 18 February 1999. Under its terms, FAC identified particular internet merchants as potential customers for the Bank, and the Bank carried out 'due diligence' on them before accepting them as clients under the scheme. More than 50 retailers were approved in this way as sub-Merchants, each becoming a customer of the Bank. The accounts of nine of these became heavily overdrawn because of the large number of repayments etc. which was debited to them. It emerged that, in

four cases, this was the result of fraudulent trading by the sub-Merchant concerned. The total amount debited to these accounts by October 2000 was $5.4 million, and the Bank demanded payment of that amount from FAC, the Merchant, also.

9. That claim by the Bank brought FAC to the verge of insolvency. It led to a series of Agreements between them, collectively called The Refinancing Agreement , under which the Bank agreed to become a shareholder in FAC, purchasing common stock for $1 million and Preference Shares for $3million, and FAC agreed to use the $4 million proceeds to discharge the sub-Merchants` overdrafts to that extent. FAC also agreed to discharge the remaining $1.4 million of the overdrafts using a new lending facility from the Bank, which it drew down in the sum of $1.437 million for that purpose.

10. The facility which enabled FAC to pay off the remaining $1.4 million approx. was secured by an assignment to the Bank of recoveries which FAC expected to make from certain of the sub-Merchants in Nevis. FAC's action against them was successful, and in 2002 FAC transferred the proceeds totalling about $1.6 million to the Bank, thus repaying the special lending facility which was granted for that purpose.

11. Crucially, the 'debt for equity' transaction described above, whereby the Bank became a shareholder in FAC, was subject to the Bank's right to redeem the Preference shares for a price of $3 million on or after 1 November 2010. In addition, those shares carried interest at 10 per cent. p.a. accruing from 1 November 2003, and in the event that the Bank exercised its right to sell the shares back to FAC, the accrued interest totalling became payable also. By 1 November 2010, the interest would amount to $2.4 million, and a total of $5.4million would become due to the Bank.

12. On 10 February 2004, FAC issued proceedings against the Bank, claiming (in short) that the Bank was grossly negligent in its vetting of the sub-Merchants who became overdrawn with the Bank to the extent of $5.4 million, and was

thereby in breach of its obligations to FAC under the MMA. FAC claimed damages for that breach which it quantified as the total amount of the overdrafts, alleged to be $5,828,236, and in addition claimed the total of legal and other costs incurred in Nevis and Bermuda as losses incurred in mitigation, producing a total claim of $6,488,436.

13. The Bank's Defence raised an issue as to whether the Financing Agreements debarred FAC from making the allegation of gross negligence, and it also contended that the effect of the Agreements was to replace FAC's previous liabilities under its overdrawn accounts with its obligation to repurchase the Preference shares, and to pay interest thereon, which would not arise until 2010.

14. In its Reply to the allegation that its claim for damages was barred by the terms of the Financing Agreement, FAC contended that the Agreements could be rescinded (set aside) on the grounds that they were procured by duress, and later (17 September 2007) as having been concluded under a common mistaken assumption of fact.

15. Throughout the long interlocutory processes of amended and re-amended pleadings, FAC failed to give any clear explanation of why it was entitled to quantify its losses, if liability was established, by reference to the amount of the sub-Merchants` overdrafts, which had been repaid with money provided by the Bank (as regards both the $4 million and the $1.4 million payments; moreover, the latter been recovered through the proceedings in Nevis). The Bank applied to strike out the Statement of Claim as disclosing no reasonable cause of action, partly on the basis that FAC had suffered no recoverable loss. The application was heard by Deputy Judge John Riihiluoma, who observed in his Judgment dated 24 August 2004 that "the Statement of Claim is lacking in a properly pleaded case that informs the Defendant of the basis on which the Plaintiff claims to have suffered loss". He ordered FAC to give full particulars of its damages claim, and he gave leave to the Bank to restore the strike-out application "if [it] takes issue with the adequacy of the

particulars". Particulars were served which recited the history of the Financing Agreements and the issue of Preference shares to the Bank pursuant thereto, but they stopped short of alleging, in terms, that the loss caused to FAC could be measured by reference to its contingent liability to repurchase the shares and to pay accrued interest in 2010. The Bank did not restore the strike-out application and therefore impliedly withdrew its contention that the Statement of Claim did not allege any recoverable loss.

The Bank's initiative

16. Following some correspondence which was "without prejudice save as regards costs", the Bank wrote to FAC, through solicitors, an open letter dated 10 October 2007. This included –

> "We are instructed that in order to try and end this lengthy and extremely expensive litigation, our client will forthwith return to FAC the 500,000 common shares (for which it paid US$1 million on October 31st. 2000) together with the 3 million Class A convertible preference shares (for which it had paid US$3 million on the same date). Our client has no liability to return these shares, but no longer wishes to be a shareholder in FAC. The shares have no value, and our client has absorbed US$4 million of the losses claimed in any event, although it had and has no liability for these losses."

17. FAC's solicitors replied on 15 October 2007, contending that, by unilaterally returning the shares for cancellation, the Bank was in fact making good 70% of FAC's losses ($4 million out of $5.4 million) and was abandoning its Counterclaim for dividends, and FAC considered that it was "no longer sensible to incur the costs of a four week trial". They proposed therefore seeking an order striking out the counterclaim and for the Bank to pay FAC's costs of the proceedings.

18. The Bank's solicitors replied, contending that the shares had no value and therefore their return could not have the effect of making good 70% of the claim. They would seek directions, they said, for the trial of FAC's claim for legal and other costs (the residual items, which were said to total $792,135).

FAC's solicitors replied that these further claims could not be resolved without a full trial of issues, which "did not make sense" for those claims alone.

Subsequent proceedings

19. No settlement agreement was concluded by the above correspondence, but both parties issued Summonses consequent upon the Bank's return of the shares and the implied withdrawal of its counterclaim to be paid dividends. FAC issued a Summons dated 17 October 2007 seeking orders as follows: judgment in the sum of $4million, to be satisfied by the surrender of the Preference and the common shares, for leave to discontinue the residue of the claim, for the counterclaim to be dismissed, for the Bank to pay FAC's costs of the proceedings, and for the trial date to be vacated.

20. Two days later, on 19 October 2007, the Bank sought orders that FAC's claim be dismissed, for leave to withdraw its counterclaim, for FAC to pay the Bank's costs of the action, and for the trial date to be vacated.

21. On 29 October 2007 served a Re-Re-Amended Defence and Counterclaim, withdrawing the counterclaim for dividends and contending that FAC had not suffered any loss by reason of any breach of contract alleged against the Bank. On 1 November 2007 amended its Summons, withdrawing the claim for judgment for $4 million and claiming indemnity costs.

22. The parties appeared before Kawaley J. on 5 and 6 November 2007. They worked out the terms of an Order giving effect to the Bank's relinquishing of its rights in the shares, and this became the Consent Order dated 7 November 2007. It read as follows –

> "(1) The Defendant shall be at liberty to transfer 500,000 common shares in the Plaintiff Company represented by Share Certificate #18 and 3,000,000 Class A Preferred shares in the Plaintiff Company represented by Share Certificate #11 to Edmund Gibbons Limited for nil consideration and for nil value to be held upon trust for the benefit of the Plaintiff.

> (2)Upon the transfers set out in paragraph (1) the Plaintiff shall have no further liability to the Defendant and the Defendant shall have no further liability to the Plaintiff, without prejudice to any order for the costs of the action which the Court may make and in respect of which Judgment has been reserved."

23. The Judge heard argument on the costs issues, and his judgment is dated 8 November 2007. As noted above, the Costs Order under appeal was in terms that granted FAC leave to discontinue its action, and the Bank leave to discontinue its Counterclaim. It is not apparent why the Judge was asked, or found it necessary, to give leave to discontinue to either party, when the action had been concluded, save as for costs, by the Order made on the previous day. However, the apparent inconsistency can be disregarded, because the reality of the situation was that both parties were seeking leave to withdraw their claims; that was the basis for the Order dated 7 November 2007 which brought the action to an end, and the Judge made the costs order on that basis also.

Settlement Agreements "apart from costs"

24. Among other authorities, we were referred to BCT Software Solutions Ltd. v. C. Brewer & Sons Ltd. [2003] EWCA Civ.939 where Mummery LJ said this –

> "4. The arguments advanced on this appeal have demonstrated the real difficulties inherent in asking a judge to exercise his discretion in respect of the costs of an action, which he has not tried. There are, no doubt, straightforward cases in which it is reasonably clear from the terms of the settlement that there is a winner and loser in the litigation…..
> 5. There are, however, more complex cases ……..in which it will be difficult for the judge to decide who is the winner and who is the loser without embarking on a course, which comes close to conducting a trial of the action which the parties intended avoid by their compromise…….
> 6. In my judgment, in all but straightforward compromises, which are, in general, unlikely to involve him, a judge is entitled to say to the parties "If you have not reached an agreement on costs, you have not settled your dispute. The action must go on, unless your compromise covers costs as well."

25. We heartily and respectfully agree. True, the parties reached a compromise position in the present case, though without a formal settlement agreement, which avoided a trial of factual issues. But the Judge and now this Court have been compelled to explore the issues at some length and at considerable further expense. We hope that Mummery LJ's observations will be noted and borne in mind by parties` representatives in Bermuda.

The Judgment

26. The Judge directed himself, correctly in our view, in accordance with the judgment of Lightman J. in BCCI v. Ali (#4) [1999] NLJ 1734 where he said

> "success is not in my view a technical term but a result in real life, and the question as to who succeeded is a matter for the exercise of common sense",

(adopted and followed by Bell J. in SCAL Ltd. v. Beach Capital Management Ltd. [2006] Bda. LR 93).

27. He then made a careful examination of the procedural history which led up to the *de facto* settlement agreement in October 2007. He referred to a Note which appeared in the company's 2006 balance sheet and commented –

> "This emphasizes the reality that, irrespective of how fuzzy the pleadings and Particulars were on this issue, cancellation of the shares formed part of FAC's intended relief long before the recent formal pleas were added in September 2007. And the Bank as a shareholder had actual or constructive notice of this." (para.25)

28. He concluded –

> "27. As long as the Bank held these shares, it was potentially open to this Court to hold that FAC had suffered loss by reason of the Bank's breach of contract. Throughout most of the litigation, FAC's claim for damages was based on the implicit premise that it had suffered substantial loss because the Bank was properly liable for the offset losses but had extracted the preference shares from FAC as consideration for funding these losses. This was necessarily the case irrespective of how the case was explicitly pleaded. Because the Bank's suggestion in the October 10, 2007b open letter that it was "self evident" that FAC had suffered no recoverable loss only became self-evident when the Bank offered to relinquish the preference shares and for the first

> time "*absorbed the US$4 million losses in any event.*" This ingeniously simple stratagem on the Bank's part was only conjured up when, with the full financial and public relations implications of a four week trial coming into clearer focus, a high-level executive decision was reached to make FAC an offer it could not rationally refuse. The Bank could have assumed the risks of going to trial, and hopefully winning and gaining an automatic award of its costs of the action. Instead, at a comparatively late stage, it made an offer (which could have been made at any earlier point in the action) which in practical terms made it uncommercial for the Plaintiff to pursue its remaining claims."

29. Then he summarised the outcome as follows –

> "28……..But the parties have essentially been litigating over whether FAC or the Bank was legally responsible for paying the approximately $5.8 million of losses which was partially funded by a refinancing scheme consummated seven years ago. FAC contended that the Bank was liable, and the Bank contended FAC was liable. The Bank, without admission of liability, has agreed to accept responsibility for $4million of those losses by returning to FAC, *in specie*, the principal consideration given by FAC in return for the Bank funding payments to the tune of $4 million made on FAC's part."

30. The Judge therefore departed from the "usual rule" that "on discontinuance ….. the claimant pays the defendant's costs" (paragraph 8) and proceeded to consider "the ticklish question" – "to what extent has FAC succeeded, and how should the recovery made be assessed as a proportion of FAC's total claim". In "purely numerical terms" the proportion might be assessed as 70 per cent, but the "relevant question is not so much what percentage of the claim has been recovered [again citing Bell J's judgment in SCAL Ltd. v. Beach Capital Management Ltd.]……..but what percentage of the total costs has been expended on the issues that were decided in favour of the successful party" (paragraph 29). He then considered what proportion of FAC's costs incurred in relation to the "very issue of recoverable loss" which the Bank had in substance conceded (paragraph 29) as distinct from "the various manifestations of the contractual liability issue" (paragraph 30). He assessed "the importance of this issue at one-third of the total costs" (paragraph 32) and he added "the loss issue has never in reality been the

largest in this litigation; rather, it has always been a significant minor issue" (paragraph 33).

31. In summary, therefore, the Judge awarded FAC its costs of the "recoverable loss" issue, and otherwise made no order in respect of the parties` costs of the claim. He expressly made no order as to the costs of the counterclaim, though he added slightly puzzling footnote "FAC's costs of dealing with the Counterclaim, if any, may be claimed as part of its costs of the action" (paragraph 34).

Submissions for the Appellant (FAC)

32. Victor Lyon QC for FAC submitted, quoting from paragraph 9 of the judgment-

> "..the crucial question is: How should the substantial costs burden of the present action be borne in circumstances where a voluntary act by [the Bank] has substantially reduced [FAC's] recoverable loss making the further pursuit of its claim uncommercial, and prompting its application to discontinue",

but that the Judge erred in principle in answering the question he had correctly formulated. The proper approach, he submitted, was to ask the question "how much of the legal costs has the Plaintiff incurred in preparation for the resolution of issues that would have had to be resolved in the Plaintiff's favour for him to be entitled to recover ……the benefit the Defendant decided at the last moment to confer on him for free" (skeleton argument para.4). It was accepted that the Judge was correct to depart from the "normal" on discontinuance, but Mr. Lyon submitted that the Defendant should have been ordered to pay all FAC's costs "since [FAC] had to incur the very substantial costs of preparing to establish liability, causation and quantum", adding "to recover by way of legal proceedings the benefit that the Defendant, at the last moment, unilaterally decided to confer on it" (para.5).

33. Further reasons why FAC should recover all of its costs, Mr. Lyon submitted, were that FAC had achieved "substantial" meaning "real-life" success in the action as a whole, subject only to deducting the costs of discrete issues on

which the claimant had failed (cf. SCAL's case, after a trial), and secondly, that in comparable situations, where the claimant accepts a payment into court though less than the amount of the claim, he usually recovers the whole of his costs; similarly, where a *Calderbank* offer is accepted, the claimant would expect to recover his costs up to the date of the offer, likewise if he refuses the offer but succeeds in the action, though for a lesser amount. Mr. Lyon also relied upon the judgments in In re Walker Wingsail Systems [2006] 1 WLR 2194 and upon the facts *inter alia* that FAC had recovered the equivalent of 70% or even 83% of its claim, that the balance which it had not pursued involved very little in the way of additional costs, and that the "recoverable loss" issue had been found unsuitable for trial as a separate or preliminary issue.

34. Regarding the Counterclaim, Mr. Lyon submitted that the normal rule for discontinuance should apply, and there is no reason why the Bank should not be ordered to pay FAC's costs of defending it.

Submissions for the Bank

35. Although the Respondent to the Appeal, the Bank by Cross-Appeal challenged the Judge's Order regarding the costs of the claim more extensively than did FAC. Its contention in essence was that the Judge was wrong to depart from the general rule that the party who discontinues or withdraws proceedings should pay the costs of the other party. That rule applies here, Barbara Dohmann QC submitted, because FAC's claim throughout was for damages and monetary amounts, and that claim was misconceived and was finally withdrawn.

It did not relate to the shares issued to the Bank under the Refinancing Agreement and it could not have led to the Order finally made regarding the shares. It was, she submitted, only when the Bank made its offer to relinquish its rights under and in relation to the shares that FAC sought to amend its claim so as to recover US$4 million "to be satisfied by cancellation of the shares". Therefore, the Bank's costs were incurred in defending the damages and monetary claims, which FAC had formally discontinued and withdrawn.

36. Miss Dohmann also submitted that the Judge was wrong in particular to hold that FAC suffered any loss by reason of the Bank's alleged breaches of the MMA, because those losses were absorbed by the Bank pursuant to the Refinancing Agreement. Issuing the Ordinary Shares did not cause any loss to the issuing company, FAC, which in any event was insolvent, so that they and the Preference Shares were worthless. Because they were worthless, the Bank could not be said to have acknowledged that $4 million was due to FAC by waiving its rights under the shares in the final settlement.

37. It was also wrong, she submitted, to regard the Bank's offer to relinquish its rights under the shares as the reason why FAC ultimately abandoned its monetary claims – the so-called "trigger" which led to the trial being abandoned. The real reason, she suggested, was that FAC "realised belatedly that it had not suffered a loss leading to the recovery of millions of dollars – the Bank had (back in 2000) absorbed the major part of the loss and had paid it with its own funds" (Skeleton Argument para.43).

38. She further submitted that the relevant "event" for the purposes of RSC Order 62 Rule 3(3) (quoted above) was FAC's discontinuance of its claims, which were monetary throughout, not the Bank's offer to cancel the shares, as the Judge held.

39. The Bank's reasons for opposing the appeal and supporting its cross-appeal were summarised as follows –

> "The exercise of commonsense by the reasonable observer leads to the conclusion that FAC obtained not a penny of its large damages claim, that the Bank's voluntary transfer of shares, given FAC's massive insolvency, conferred no economical value, and that FAC's strenuous cries of "victory" are hollow indeed." (Skeleton Argument para.44.4)

40. The Bank accepted that the Judge was correct to make no order with regard to the costs of the Counterclaim, which he gave leave to the Bank to withdraw.

General Observations

41. (1) Both parties contend that the Judge's order as to the costs of the claim was wrong and that this Court should set it aside and exercise its own discretion, as it is entitled to do if the order was clearly wrong or "manifestly unjust" in its results. We bear in mind that, notwithstanding this common approach, we should not set aside the Judge's Order unless we are justified in doing so.

42. (2) The Bank's contentions depend heavily on its assertion that FAC's overdraft of about.US$5.4 million was not paid off by FAC but by the Bank itself. Therefore, it was argued, FAC could not contend that it had suffered loss by reason of that payment. However, the contemporary documents show clearly that the Bank paid US$4 million to FAC by means of cheques drawn on itself payable to 'FAC or Order', and that FAC acknowledged receipt of the cheques "in full satisfaction of the subscription price payable by the Bank to the undersigned in respect of" the two tranches of shares. FAC then endorsed the cheques back the Bank to be applied in reduction of its overdraft, and the Bank acknowledged receipt "as partial payment of the amounts" owing from FAC. Similarly, the balance was paid from the proceeds of the Facility granted by the Bank in connection with the Nevis transactions.

43. The substance of the transaction undoubtedly was the "FAC equity injection" referred to on the Bank's cheque counterfoils, and as described by the Judge:

> "Being sympathetic (it seems to me) to FAC's plight, the Bank lent $4million to FAC and converted that debt into equity. So FAC did legally pay the relevant offset losses with monies advanced by the Bank, but assumed roughly corresponding liabilities under the redeemable preference shares."(paragraph 26).

However, the fact remains that the overdraft was repaid by FAC with money it had received from the Bank as the price of the shares. The Bank cannot contend that it made the payment itself nor dispute that the payment was made by FAC.

44. (3) We do not find it helpful to assume that there is a “normal” or “usual” rule in cases where a claim or counterclaim is discontinued or withdrawn. As the present case amply demonstrates, it remains necessary for the Court to exercise its discretion in accordance with Order 62 Rule 3 and to have regard, first, to the relevant “event”, and secondly to “the circumstances of the case” in order or decide whether some other order should be made. Of course, if there are no relevant circumstances, in a straightforward discontinuance case, the nature of the event will be clear. Here, the parties are in dispute as to what the “event” was.

“Event”

45. FAC contended that the relevant event was the Bank’s without liability share offer, the Bank that it was FAC’s application to discontinue the claim (see the Judge’s summary, paragraph 6). Both were steps in the process which led to the final outcome, but neither in our view was the relevant “event” referred to in the Rule. The action was ended (save as to costs) by the Order dated 7 November 2007, and it is the terms of that Order which define the “event” to which reference is required by the Rule.

46. The Order, already quoted in paragraph 22 above, gave the Bank “liberty to transfer” the shares for nil consideration to a trustee for FAC, and provided that “upon the transfers [being executed]” both parties were released from all liability to the other, save as regards costs. The transfer took place and the releases were effective. That was the outcome of the action and, in our view, the relevant “event”.

47. The matter can be tested in this way. If FAC had claimed such an order, it would be clear that the claim had succeeded to that extent, and FAC would expect to recover its costs of that claim. Here, there are two complications. Until a very late stage, FAC made no claim relating to the shares, and then only that the shares should be “cancelled” and the subscription price of $4 million set-off against its monetary claims. Secondly, the consequent mutual releases from all liability were based on the parties` willingness to withdraw

their respective claims. The substantive issues were not to be tried, and neither party admitted liability to the other.

48. (It may be noted that this was not strictly a case of discontinuance, in any event. Neither party could have brought fresh proceedings in respect of any of its claims, given the comprehensive releases contained in paragraph 2 of the Order.)

The Judge's approach

49. The Judge recorded his provisional view that, when the central issues had not gone to trial, it was inappropriate for him to attempt to determine how they would have been decided, when it was not obvious what the outcome would have been (cf. Brawley v. Marczynski [2003]1 WLR 813), and that it would be appropriate to make no order as to costs (judgment paras. 6-7). When he gave judgment he preferred to consider "in more broad terms which party (if any) may be said to have substantially won"(paragraph 7), and neither party before us supported the "no order" outcome. Nevertheless, we bear in mind that the central allegation of "gross negligence" by the Bank was never tried, and it would be wrong to make any assumption as to what the outcome on that issue would have been.

50. In our view, in the unusual circumstances of this case, where the outcome was an Order which FAC has not claimed in terms, which resulted from the Bank's offer to "return" the shares, the Judge was correct to assess whether the claimant (FAC) had achieved substantial or 'real life' success, and was entitled to regard the Bank's offer as an example of "something the defendant had done of his own initiative" which had the effect of transforming the claim, if not rendering it totally worthless (cf. In re Walker Wingsail Systems plc [2006] 1 WLR 2194 per Chadwick LJ at 2205D, quoted in paragraph 8 of the judgment).

Substantial success

51. FAC contends that the Bank's return of the shares had the same effect as if it had succeeded as to $4 million of its monetary claims. The balance of the original overdraft had been paid off by proceeds of the Facility which enabled it to make its Nevis recoveries, and the remaining claims totalling about $790,000 had not justified incurring the costs of a four-week witness action. Overall it had achieved a 'real life' success.

52. The Bank's contention that FAC had suffered no loss regarding repayment of $4 million has been referred to above. The repayment was made by FAC using money paid to it by the Bank. Adopting a 'real life' approach, the Bank's view was that the FAC shares were worthless throughout, as were its undertakings to redeem the Preference Shares and to pay dividends on them. FAC's monetary claims were withdrawn because they were, and always had been misconceived, and the share transfer gave it nothing of value.

53. The Judge concentrated on the question whether FAC suffered recoverable loss, and he held that FAC had done so, whilst the Bank remained the holder of the shares. It is implicit in his judgment that this loss was, or would have been recoverable as damages for the alleged breaches of contract, if liability had been established. He said that the return of the shares, representing $4 million of the $5.8 Million claimed, though without admission of liability, meant that FAC "had clearly achieved substantial success" (paragraph 28), equivalent to about 70 per cent of the monetary claim (paragraph 29). However, he limited FAC's costs recovery to one-third because that was the most that "could fairly be attributed to the recoverable loss issue" (paragraph 30).

54. We agree with the Judge's views on the "recoverable loss" issue and that FAC achieved substantial success, to the extent of $4 million i.e. about 70 per cent of its damages claim, when the shares were "returned" to it. We should set out here our own analysis of these complex, and certainly unique transactions.

55. In October 2000, before the Refinancing Agreement, FAC's accounts showed an indebtedness to the Bank in excess of $5.4 million. If FAC's allegations of gross negligence had been raised then, and had succeeded, the overdraft would have been reduced accordingly. FAC's liability to the Bank would have been the *prime facie* measure of the loss suffered by it caused by the Bank's breaches of contract.

56. The effect of the Refinancing Agreement was that FAC repaid the overdraft, as to $4million by the proceeds of the share sales to the Bank, and as to the balance by funds received under the separate Facility granted by the Bank, and subsequently repaid from the proceeds of the Nevis litigation.

57. Also pursuant to the Refinancing Agreement, FAC incurred future contingent liabilities to redeem the Preference Shares and to pay accumulated dividends thereon, totalling $4 million. These liabilities were owed to the Bank.

58. Those liabilities became the measure of the loss caused to FAC by the Bank's breaches on contract, if the breaches were proved.

59. When FAC brought proceedings claiming damages for the alleged breaches, it claimed the amount of its original (2000) overdrafts, effectively ignoring the Refinancing Agreement and the consequent share issue to the Bank. It was left to the Bank to rely upon the Refinancing Agreement as a bar to claims under the MMF (Defence paragraphs 2.1-2). FAC pleaded in its Reply that its claims were not barred by the Refinancing Agreement and that moreover the Refinancing Agreement itself should be set aside (by reason of economic duress, later abandoned). From the outset, therefore, though for reasons which were not clearly or fully explained, FAC made monetary claims by reference to the original overdraft amounts.

60. The Bank on the other hand expressly endorsed the Refinancing Agreement by counterclaiming dividends which it alleged were due under the Preference Shares it had acquired pursuant to it.

61. FAC's claim that the Refinancing Agreement was voidable for economic duress was withdrawn by re-amendment in September 2007, but replaced by a plea that the agreement was void *ab initio* by reason of a mutual mistake of law.

62. The pleadings showed, therefore, that FAC did not accept that the Refinancing Agreement was binding or that it barred its monetary claims assessed as if the Agreement was never made. However, when FAC made the initial settlement approach on 28 September 2007, whilst maintaining the monetary claim, it recognised that the Bank would have to cancel its shares. This led to the Bank's response on October 4 2007 in which it offered to return all the shares, which it stated was equivalent to reducing FAC's claim by $4 million followed by these significant words "the Bank having absorbed that part of the loss permanently" (judgment paragraph 20).

63. This was significant, in our view, because it recognised that the Bank was not merely surrendering its shares; it was offering to do so without seeking either repayment of the $4 million for which it had bought them, or to reinstate the overdraft which had been repaid by FAC with the proceeds of the sale. It was absorbing $4million of the loss (caused by the sub-merchants` defaults) "permanently", by also releasing FAC from the substitute obligations it had undertaken in October 2000. Even if the shares were regarded as worthless by the Bank, then and in 2007, this was equivalent to accepting liability for $4 million of the loss which the Bank originally imposed on FAC alone. And if the Refinancing Agreement had been avoided (one of the issues in the proceedings, though possibly an unlikely result), one consequence might have been that the overdraft was re-instated. The Bank offered in effect to waive its rights to receive dividends and to redeem the Preference Shares, and together with any potential right it might have acquired to reinstate $4million of the overdraft.

64. In our judgment, the Judge was correct and certainly was entitled to regard this as a substantial or real-life success for FAC, and to make a costs order in its favour.

Proportion

65. The Judge rightly indicated that the fact that the recovery, regarded as equivalent to US$4 million was less that the amount claimed was not, of itself, a good reason for holding that the successful claimant could recover only a proportion of its costs (paragraph 29). However, he reduced the proportion to one-third on the ground that that was a generous estimate of the costs incurred in relation to the recoverable loss issue, as distinct from liability issues (paragraphs 30 and 32).

66. We do not follow why the costs recovery should be limited in this way. The recoverable loss issue was concerned with causation and the measurement of quantum, questions that did not arise unless liability was first established. The position was complicated in the present case by the fact that the outcome was essentially an agreed settlement, though embodied in the first Order (7 November 2007), and the Court could not assess the chances of success on that issue alone (Judgment para.7, ref. para. 48 above). In our judgment, however, if the claimant is entitled to costs on the basis that he has achieved substantial success, as FAC is, he should recover the costs of establishing liability, as well as causation and damages.

67. But it does not follow that he shall recover the whole of those costs. The award remains subject to the principle recognised in In re Elgindata Ltd. (No.2) [1992] 1 WLR 1207 : in short, the successful party's recoverable costs can be proportionately reduced when superfluous issues were raised unnecessarily, or for other good reason. The question here, in our judgment, is whether the principle applies in the present case.

68. In our judgment, it should be applied, and we hold that FAC shall recover two-thirds of its costs of the proceedings, including its costs of the Counterclaim (if

any, because this is subject to special costs orders already made). The essential reason for the one-third reduction is that FAC never made it clear how it contended that its monetary claims were to be reconciled with the Refinancing Agreement, which it ignored in its claims, or with the Bank's shareholding. Even when FAC pleaded, in its Defence to Counterclaim, that the Financing Agreement was voidable (or later, void ab initio), it conspicuously failed to make clear what its position would be in relation to the shareholding, if those pleas were to succeed. It was only when the Bank made its offer that the shares came to be recognised as a central issue, as they could and should have been from the start. Neither party identified and isolated this issue at an early stage, and their costs undoubtedly were greatly increased by their failure to do so. Overall, we consider that a one-third reduction of FAC's costs is appropriate in the circumstances of this case.

69. Regarding the Counterclaim, the Judge made "no order". Paragraph 3 covers FAC's costs of "the proceedings", and if paragraph 2 was intended to refer to its costs of defending the counterclaim, there is some inconsistency between them. We would, if necessary, be prepared to hold that FAC is entitled to recover its costs of the counterclaim for dividends which, in the result, the Bank voluntarily withdrew (if not by agreement with FAC, by acquiescing in the terms of the Order dated 7 November 2007). The appropriate course, in our judgment, is to delete the costs reference from paragraph 2 of the second (8 November) Order.

70. For these reasons –

(1) The Appeal is allowed in part: the Judge's Costs Order dated 8 November 2007 is varied by substituting "two thirds" for "one third" in paragraph 3, and the words "with no order as to costs" are deleted from paragraph 2;

(2) The Cross-Appeal is dismissed;

(3) (Subject to (4) below), the Bank shall pay FAC's costs of the Appeal and Cross-Appeal, to be taxed if not agreed; and

(4) Liberty to both parties to apply with regard to paragraph 3 of this Order.

71. There remains the difficulty that the second (8 November) Order purports to give leave to both parties to discontinue "the proceedings" (FAC) and the Counterclaim (the Bank) notwithstanding the terms of the first Order dated the previous day. We suggest that the words "is granted leave" could be deleted and replaced by "having been granted leave" in paragraphs 1 and 2, and that "above-captioned proceedings" in paragraph 1 should be replaced by "its claim herein", in the interests of accuracy and in order to avoid any conflict with "the proceedings herein" in paragraph 3.

Signed

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Evans, JA

Signed

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I Agree Zacca, President

Signed

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I Agree Nazareth, JA