In The Supreme Court of Bermuda

COMMERCIAL COURT
CIVIL JURISDICTION

2019: No. 447

B E T W E E N:

ST JOHN'S TRUST COMPANY (PVT) LIMITED

Plaintiff

-and-

(1) JAMES WATLINGTON
(2) GLENN FERGUSON
(3) CABARITA (PTC) LIMITED
(sued in its personal capacity and in its capacity as trustee of The Waterford Charitable Trust)
(4) THE ATTORNEY GENERAL
(5) JAMES GILBERT

Defendants

(6) MEDLANDS (PTC) LIMITED
(7) CONYERS DILL & PEARMAN LIMITED

Non-Parties

RULING

Before: **Hon. Alexandra Wheatley, Registrar**

Appearances: **Mr Paul Harshaw of Canterbury Law Limited for the Third Defendant**
Mr Kevin Taylor of Walkers (Bermuda) Limited for the Fifth Defendant (Mr Gilbert)
Mr John Wasty of Appleby (Bermuda) Limited for Conyers Dill & Pearman Limited

Dates of Hearing: 21 February 2023
Date Draft Circulated: 31 July 2023
Date of Ruling: 2 August 2023

Taxation of Bill of Costs; Costs Awarded on Indemnity Basis; Reasonableness and Proportionality; Cost of Overseas Counsel

RULING of Registrar, Alexandra Wheatley

INTRODUCTORY

1. This is the taxation of the Amended Bill of Costs of Cabarita (PTC) Limited (**Cabarita**) dated 8 December 2021 (**Amended Bill of Costs**), in accordance with the Costs Order dated 14 December 2020.

2. Costs were awarded on an indemnity basis. The hearing in this case was an interlocutory hearing which lasted three days. The total costs being claimed by Cabarita are $1,252,286.05.

3. Counsel were most helpful in providing their respective skeleton arguments which I have largely incorporated into this ruling.

THE LAW

4. Order 62 Rule 12(2) of the Rules of the Supreme Court of Bermuda (**RSC**), addresses the basis for which a taxation occurs when costs are awarded on the indemnity basis:

> "*On a taxation on the indemnity basis all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the Registrar may have as to whether the costs were reasonably*

incurred or were reasonable in amount shall be resolved in favour of the receiving party."

5. In exercising my discretion as to the amount of costs to be allowed, pursuant to the RSC, Order 62, Part II, Division I, item 1(2) (hereinafter referred to as the **Order 62 Factors**), I must have regard to all the relevant circumstances and in particular to:

    (a) The complexity of the cause and the novelty of the questions involved;
    (b) The skill, specialised knowledge and responsibility required of and the time and labour expended by the attorney;
    (c) The number and importance of the documents prepared or perused;
    (d) The place and circumstances in which the business involved is transacted;
    (e) The importance of the cause to the client;
    (f) Where money or property is involved, the amount or value;
    (g) Any other fees payable to the attorney but only where work done in relation to those items have reduced the work which would otherwise have been necessary in relation to the item in question.

6. These principles apply equally to a costs assessment where costs are payable on an indemnity basis.

7. In the case of *Louis Dreyfus Company Suisse S.A v International Bank of St Petersburg* [2021] EWHC 1039 (Comm), Mr Justice Calver expanded on the approach to take in a taxation where costs are awarded on an indemnity basis. Paragraph 47, provides as follows:

    "*47. I bear in mind the word of Leggatt J (as he was) in Kazakhstan Kagazy plc v Zhunus [2015] EWHC 404 (Comm) at [13]*:

        "*In a case where very large amounts of money are at stake, it may be entirely reasonable from the point of view of a party incurring costs to spare no expense that might possibly help to influence the result of the proceedings. It does not follow, however, that such expense should be*

regarded as reasonably or proportionately incurred or reasonable and proportionate in amount when it comes to determining what costs are recoverable from the other party. What is reasonable and proportionate in that context must be judged objectively. The touchstone is not the amount of costs which it was in the party's best interests to incur, but the lowest amount which it could reasonably have expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party. This approach is first of all fair. It is fair to distinguish between, on the one hand, costs which are reasonably attributable to the other party's conduct in bringing or contesting the proceedings or otherwise causing costs to be incurred, and, on the other hand, costs which are attributable to a party's own choice about how best to advance its interests." [Emphasis added]

8. Mr Justice Calver additionally reiterated in paragraph 48 that reasonableness still must be considered even if costs were awarded on an indemnity basis:

> "*48. It is of course the entitlement of the Claimant (and any Claimant) to appoint Counsel of its choice and here to appoint leading counsel, Mr. Houseman QC, who has conducted and presented the case throughout with his customary skill, rather than instructing him with junior counsel and allowing the bulk of the work to be carried out by junior counsel. However, that does not mean that the Claimant should be entitled to recover from the Defendant, even on an indemnity basis, costs which are significantly greater in amount than it might otherwise reasonably have incurred, whilst still having its case conducted and presented proficiently.*" [Emphasis added]

9. Chief Justice Ground in *Golar LNG Ltd v World Nordic SE* [2012] Bda LR 2 at paragraph 16, expressed similar sentiment, quoting Floyd J in *Research in Motion UK Limited v Visto Corporation* [2008] EWHC 819 (Pat):

"*[17] The Court's function at this stage is not to stop the parties spending money on litigation; it has no power to prevent expenditure, although it will use its powers to ensure that litigation is run in a way that does not cause the parties to expend unnecessary sums…The Court does however have a function in preventing unnecessary and unreasonable costs being recovered by a party from its opponent…parties can be discouraged from enforcing or defending their rights if they face claims for unreasonable and unnecessary costs being allowed against them.*" [Emphasis added]

10. The approach of the Bermuda Courts to costs was considered in *Capital Partners Securities Co Ltd v Sturgeon* [2017] Bda LR 43, which also involved a dispute over the ownership of a company (dispute over its shares, rather than its board membership which is the case in this matter). The company, a fund, was valued in excess of $40,000,000. The litigation was a marathon involving three sets of proceedings. The first set of proceedings ended without a full hearing, but the costs incurred were substantial involving both Bermuda and Hong Kong attorneys. The costs claimed for the first set of proceedings exceeded $200,000. Registrar Subair Williams (as she was then) concluded that, in Bermuda, the principle of proportionality acted alongside the principle of reasonableness. She cited at paragraph 120 the following guidance of Kawaley CJ from *Lightbourne v Thomas* [2016] Bda LR 92:

> *"120. Both parties referred to the judgment of the learned Chief Justice, Ian Kawaley, in Lightbourne v Thomas [2016] Bda LR 92. In his judgment, the learned Chief Justice considered the overriding objective and its application in taxation hearings. Emphasis was placed on Order 1A/1(c) which centers on the 'proportionality' principle. The Court held as follows at paras 14-15:*
>
> *"…As a result in considering whether costs have been "reasonably incurred", the Court is duty bound to consider whether the amounts claimed are "proportionate" having regard to the following Order 1A/1(c) requirements:*

i. To the amount of money involved;

ii. To the importance of the case;

iii. To the complexity of the issues; and

iv. To the financial position of the parties.

In the final analysis therefore, the practical result must be that a Bermudian taxation is governed by a construct of reasonableness incorporating requirements of proportionality which broadly correspond to the proportionality requirements more explicitly expressed in CPR 44.3(2) and 44.4. In fact, Order 62 itself does incorporate most of the proportionality requirements of Order 1A/1(c), without attaching the 'proportionality label'…'" [Emphasis added]

11. These proportionality factors echo the statutory, Order 62 Factors as set out in paragraph 5 above.

12. Whilst considering the proportionality factors as well as the factors listed in the Rules, the Court must also consider "*all the relevant circumstances*" (see *Louis Dreyfus*). What this means is that the Court, at taxation, does not consider the reasonableness of particular steps taken in the litigation as that would be a matter for the Judge to deal with in any Costs Order. However, on taxation, I can and indeed am required to consider whether the litigation (in the round) was of genuine importance and concerned matters of genuine value, in order to carry out its assessment of reasonableness and proportionality.

13. Both Counsel for Mr Gilbert and Conyers submitted generally that the costs claimed by Cabarita should be heavily taxed on the basis that they are of an unreasonable amount and were unreasonably incurred.

14. Mr Harshaw for Cabarita, *inter alia*, submitted that the Chief Justice must have thought the costs now being claimed were reasonable as he had an indication of what those costs were

at the time of his 14 December 2020 Ruling and he specified precise amounts to be paid on account by Mr Gilbert within twenty-eight days. The Chief Justice could have ordered a lesser amount be paid on account or indicated that he thought that the costs indicated were excessive. As the Chief Justice did neither, Mr Harshaw submitted that, that is instructive.

15. I will address each of the grounds of objections provided by Mr Taylor for the Fifth Defendant (hereinafter referred to as **Mr Gilbert**) which also overlap with Mr Wasty's objections for Conyers Dill & Pearman Limited (hereinafter referred to as **Conyers**) so all points of objections are addressed. Mr Taylor helpfully produced an Excel Spreadsheet of all items being claimed by Cabarita which have the corresponding numbers and/or letters for the grounds of the objection listed for each item. The said spreadsheets are attached at the Appendices as follows:

    (1) Appendix 1: Schedule 1 and 2 of Profit Costs
    (2) Appendix 2: Schedule 1 Disbursements
    (3) Appendix 3: Schedule 2 Disbursements
    (4) Appendix 4: Schedule 3 and 4 Profit Costs

OBJECTIONS

Ground 1: Insufficient Narratives

16. Mr Taylor submitted there were some items which did not provide adequate descriptions. It is an obvious requirement that line items in a bill of costs must contain sufficient particulars to enable the attorney to the paying party to consider any objections. It is also required to allow the Court to readily identify the work performed in order to ascertain the reasonableness of the various items. In The White Book, The Supreme Court Practice 1999, the Taxing Officer Practice Direction (No.2 of 1992) item 1.11 provides that:

    "*Properly kept and detailed time records are helpful in support of a bill provided they explain the nature of the work as well as recording the time involved. The absence of such record may result in the disallowance or the diminution of the charges claimed. They cannot be accepted as conclusive evidence that the time*

recorded either has been spent or if spent, is "reasonably" chargeable." [Emphasis added]

Findings and Decision

17. Having reviewed the items marked in **Appendix 1**, I do not accept that the descriptions contain insufficient particulars in order to access their reasonableness. As such, I will allow all items marked with Objection "1" in **Appendix 1**.

Ground 2: Claim for two sets of solicitors

18. Both Mr Wasty and Mr Taylor submitted that it was not necessary, reasonable or proportionate for Cabarita to engage two sets of attorneys in order to have its case presented proficiently in accordance with the principles set out in *Louis Dreyfus Company Suisse S.A v International Bank of St Petersburg*. Further it was argued that the proceedings did not involve any factual or legal nexus with England and Cabarita is domiciled in Nevis which would require legal advice to be provided in each jurisdiction. Moreover, it was emphasized by both Mr Taylor and Mr Wasty that Cabarita was led by a Tier 1 QC, namely David Brownbill Q.C. (of XXIV Old Buildings) who was notably paid fees totalling over GBP200,000. There was also minimal evidence submitted by Cabarita who filed just one affidavit, an affidavit sworn by a Mr Padula, Mr Tamine's US criminal defence attorney. They therefore submitted, Mishcon's fees simply cannot be justified.

19. It was submitted by Conyers and Mr Gilbert that where additional expense is incurred by a party in excess of that which is required to proficiently present its case, it is not for the paying party to bear that expense. In *Re Extraordinary Mayoral Election (Taxation of Costs Review)* [2008] Bda LR 28, then Chief Justice Ground at paragraph 16 found that:

> *"16. …While the third respondent may have had good reasons of her own for talking to two sets of lawyers, the losing party should not be obliged to pay for that, even on a taxation of an indemnity basis. One set of these costs should, therefore, be disallowed..."* [Emphasis added]

20. This rationale was also followed by Registrar Subair Williams (as she was then) in *Colonial Insurance Company Limited v Thomson* (In the Court of Appeal for Bermuda, Appeal No. 14 of 2015).

21. Mr Harshaw for Cabarita relied on the late, former Chief Justice Ground's decision in *Re Electric Mutual Liability Insurance Company Ltd* [1997] Bda LR 24 at page 5:

> "*It is inevitable from Bermuda's position as an offshore business centre that many commercial cases will involve lawyers in other jurisdictions. Overseas lawyer are not, of course, "attorneys" within the meaning of the Bermuda Rules: see RSC Ord. 1, r. 4(1), which defines that term as a person admitted and enrolled as a Barrister and Attorney under the provisions of the Supreme Court Act. However, that is no reason in principle why their necessary or proper time should not be allowed.*"

22. Further, Mr Harshaw relied on the words of Ward CJ (as Sir Austin Ward then was) in *Bateman Engineering Inc. v. Nelson Gold Corporation Limited* [1999] Bda LR 48 at page 4:

> *"There is nothing in the Rule which delimits the Taxing Officer to work done in Bermuda. The question requiring her focus would be whether the actions taken by the claimant, whether in Bermuda or elsewhere, were necessary or proper for the attainment of justice or for enforcing or defending the claimant's rights. In reaching her decision she would have to take into account all the surrounding circumstances including the nature, complexity and location of the matter in dispute, the skill, specialised knowledge and responsibility required of the attorneys, where the files are kept and prospective witnesses reside. And having considered all relevant factors the ultimate amount would have to be in conformity with the Bermuda Scale unless the matter is a special case or falls within rule 29 or rule 31(2).*
>
> *If the Taxing Officer should decide that the engagement of foreign attorneys was necessary or proper for the attainment of justice or for enforcing or defending the rights of the claimant, the next question is what rates should be chargeable whether those charged by attorneys in Bermuda or those charged by attorneys elsewhere acting as agents for the Bermuda attorneys. Miss Cooper has argued that foreign attorneys' costs should be allowed at their usual rates. She relied on McCullin v. Butler [1962] 2 QB 309 in which, in an action in England, the legal work done by Scottish solicitors was allowed not as attorneys' fees but as disbursements to an agent on a taxation. I understand the reasoning in that case to be that such work*

as is necessary or proper which could not reasonably have been done in house by the local firm of attorneys may properly be contracted out to agents who may seek to be reimbursed their reasonable charges as disbursements. The Taxing Officer will have to use his or her judgment to determine the reasonableness of those charges. That would be a question of fact in each case."

23. Mr Harshaw also relied on *Capital Partners* where he noted that Registrar Subair Williams (as she then was) relied on both the *Bateman Engineering* and *EMLICO* cases, and found that:

> "*I am satisfied that the above reasons provided in the Plaintiff's skeleton argument are sufficient to establish that it was reasonable and even necessary for the Plaintiff to engage Harneys and Japanese Counsel. The question is to what extent.*"

24. In contrast, Mr Wasty submitted that in *Capital Partners*, the lay client was in Hong Kong and thus, there were good reasons for Harneys Hong Kong to be involved as co-counsel in order to act as a conduit to the client. However, Registrar Subair Williams (as she then was) only permitted costs which related to their work as conduit or client liaison. No time was allowed which was in any way duplicative of the work carried out by MDM. The Court did not allow time which involved:

i. discussing internally;

ii. reviewing correspondence;

iii. reviewing Court documents;

iv. agreeing strategy;

v. analysis of correspondence,

since all such work—

> *'was duplicitous and/or excessive for costs to be assessed on the standard basis'.*

25. In any event, whether assessing "*the lowest amount which it could reasonably have expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances*" (as per Leggatt J in *Louis Dreyfus*), which is the block of hours

approach, or in going through the bill of costs in a granular fashion, the same result should likely result. Mr Wasty submitted that this is due to the following:

(a) Other than time spent acting as conduit, the vast majority of Mishcon's time cannot be allowed since it is duplicative;

(b) The use of multiple attorneys is fine, as long as there is no duplication; and

(c) Time spent on research and such matters cannot be allowed (and especially where leading counsel is used).

26. Additionally, Mr Harshaw submitted that it is simply not good enough for Mr. Gilbert or Conyers to say that the costs claimed here are excessive without the court knowing the level of costs incurred by Mr. Gilbert's team of lawyers in prosecuting this claim against Cabarita. It was noted that large legal teams were used by both Mr Gilbert and Conyers in this matter. However, Mr Wasty relied on *Capital Partners* where the court refused to consider (when considering the receiving party's bill of costs) the bill of costs of opposing parties. Registrar Subair Williams (as she then was) stated at paragraph 117 as follows:

> "*I think any comparison between the fees of the opposing parties should be generally avoided or done broadly or cautiously when appropriate.*"

27. Albeit, Mr Wasty submitted this was the general position and it is also not a factor of reasonableness required to be considered, in this matter the court has the bill of costs of an aligned party, namely the First and Second Defendants. The First and Second Defendants' interests, and arguments, were identical to those of Cabarita. The First and Second Defendant's total costs were $330,000. Mr Wasty emphasized in comparison to the costs being sought by Cabarita, Cabarita's claim is an award of multiples of this figure and as such cannot be justified as reasonable or proportionate.

Findings and Decision

28. Taking into consideration the above as well as reviewing the time entries of Mishcon, it appears that Mishcon did a large portion of the drafting and preparation for this matter and

as such it would be difficult to disallow the entirety of the costs claimed in relation to their fees. Generally, I take no issue with Cabarita employing overseas Counsel in this matter which has become a more frequent occurrence over the last decade. Therefore, in these circumstances, I do not accept that all of Mishcon's fees should be disallowed in their entirety. Having said this, I do accept that Mishcon's fees should be taxed down, but should be done so in considering other grounds of objections which will be addressed below.

Ground 3: Duplication of work within Mishcon

Ground 3a: Excessive time spent by Mishcon and Canterbury

29. In the alternative to Ground 2 above, Mr Taylor and Mr Wasty both submitted that any duplication of fees charged for work performed by both Mishcon and Canterbury as a result of engaging two sets of attorneys should be disallowed (see *Colonial Insurance*).

30. Mr Taylor further submitted that Mishcon's fees include work performed by a team of seven fee earners, which is entirely disproportionate (particularly considering Cabarita also had local Bermuda counsel). It was noted that of the seven fee earners at Mishcon, two are partner level solicitors, two are associate solicitors and three are paralegals which are all in addition to Bermuda based attorneys, Canterbury Law, with Mr Harshaw as a Director and Ms Harvey as an associate. Mr Taylor emphasized that the bill of costs is riddled with examples of duplication of charges among Mishcon fee earners attending to the same task, such claims for at least one partner and one associate should be disallowed.

31. In addition to duplication, Mr Taylor submitted that the time spent by fee earners both at Mishcon (even after assuming reduction for duplication of work by disallowing two fee earners) and Canterbury were unreasonable and unnecessary. Mr Taylor provided the below table showing the tallied hours spent by each fee earner on certain (but not all) categories of itemised tasks.[1]

[1] Mr Taylor noted the table is not an exact calculation but an approximate tally from the bill of costs line items. Where narrations indicate several tasks within a single line item, an estimate of time split between tasks was applied. Not all categories of work are tallied (for example attending to *inter partes* correspondence, attendance on other side, liaising with the Court, attendance at Court).

Fee earner	Work on/ review documents	Emails (Mishcon/ Canterbury/ counsel)	Work on bundle	Attendances on team / counsel
Ashley Patterson	40		15	8.5
Hazel Chambers	50.5			48
Clare Freshwater	34	32.5	1.5	79
Kathryn Garbett		1.4		.3
Shaistah Akhtar	25.5	41		30
Louisa Keech	7.5		53.5	.7
Su Yun Chai	3.5			
Paul Harshaw	134			116
Total hours	**471.5**	**74.9**	**70**	**376.9**

32. I repeat paragraphs 24 to 25 above as it relates to Mr Wasty's submissions regarding the duplication of hours worked within Mishcon. Mr Harshaw's responding submissions are the same as those referenced under "Ground 2: Claim for two sets of solicitors" above.

Findings and Decision

33. I am reminded that albeit a party may have good reason to retain a number of attorneys to have conduct of a case, *Re Extraordinary Mayoral Election* emphasizes that even when costs are awarded on an indemnity basis this does not mandate the paying party to cover these costs. Further, I accept the principle set out in *Louis Dreyfus* that I must consider what would have been the minimum costs incurred in order for Cabarita to have "*its case conducted and presented proficiently*".

34. Having reviewed the time entries for Mishcon and considering the summary of hours produced by Mr Taylor and applying the principles cited above, I accept there are a significantly large numbers of hours spent by the fee earners at Mishcon which are duplicative as well as unreasonable for Cabarita to have incurred in order to conduct its case proficiently. This also takes into consideration the time billed by Mr Harshaw. As such, line items noted in Schedules 1 and 2 Profit Costs (**Appendix 1**) with Objections "3" and/or "3a" shall be taxed down by fifty percent.

35. Whilst this is an overall taxation of Mishcon's time, there are additional time entries for Mishcon which are addressed under different objection categories. For the avoidance of doubt, should other time entries be taxed down in their entirety under different grounds of objection, then the complete disallowance of the time entry shall take precedence.

Ground 4: Objection to Brief Fees and work permit

36. Cabarita has sought costs for the fees of four barristers, including two Queen's Counsel and two junior barristers at a total cost of GBP454,961.44 which can be broken down as follows:

(a) Mr Todd QC (Erskine Chambers)	GBP107,000.00
(b) Mr Brownbill QC (XXIV Old Buildings)	GBP206,786.44[2]
(c) Mr Warents (XXIV Old Buildings)	GBP140,675.00
(d) Mr Blake (Erskine Chambers)	GBP500.00

37. Counsel for Conyers and Mr Gilbert reminded me of the passages quoted from *Louis Dreyfus* at paragraph 7 above, and from *Extraordinary Mayoral Election* cited at paragraph 19 above. It was submitted that expenditure on four barristers is not reasonable or proportionate in the circumstances and was excessive for the purposes of proficient presentation of Cabarita's case. Further, Mr Wasty and Mr Taylor emphasized that whilst Cabarita may have had good reason to engage four barristers; however, Mr Gilbert should not be obliged to pay for that, even on an indemnity basis.

38. In addition, the issue as to how many counsel were granted a certificate to appear at the hearing by the Court was raised. It is accepted that in accordance with the RSC, Part II, Division I, Item 2(2) no costs shall be allowed in respect of more than one counsel appearing before the court unless the judge or registrar hearing the matter has certified the attendance as being proper in the circumstances of the case. In this matter the Chief Justice granted a certificate for two counsel at the hearing, covering Mr Brownbill QC and Mr Harshaw.

[2] Mr Taylor submitted that he was unsure if this is the correct sum as the fee notes dated 31 January 2020, 25 February 2020 and 30 March 2020 which have been provided all appear to overlap.

39. Mr Taylor submitted that as only Mr Brownbill QC and Mr Harshaw were granted a certificate for the appearance at the hearing, all costs ought to be disallowed for the fees and expenses incurred by Mr Todd QC, Mr Warents and Mr Blake. This would include any costs for the preparation for and attendance at the hearing on the basis that they are both disproportionate in their entirety as well as the fact that there was no provision by the Court for more than two counsel.

40. It was Mr Wasty's position that a claim for over $1 million in legal costs for pursuing these proceedings is out of all proportion. It cannot be in keeping with the overriding objective to reward Cabarita for conduct which has been the subject of such criticism by the Court of Appeal. Therefore, any award above $500,000 would also be disproportionate given the academic nature of the proceedings.

41. Mr Harshaw for Cabarita submitted that in exercising my discretion, I must have regard to all the relevant circumstances, and in particular to all of the **Order 62 Factors** (see paragraph 5 above). Mr Harshaw argues that each of those factors favours allowing Cabarita the costs of David Brownbill Q.C., Michael Todd Q.C., Daniel Warents, Andrew Blake, Mishcon and Canterbury Law Limited for the purposes of this taxation.

42. It was also raised that Mr Gilbert also had a large legal team for this matter where he instructed two QC's in addition to seven other legal counsel in both Bermuda and the UK. Mr Harshaw emphasised that these were proceedings where both sides had an army of lawyers fighting their corner as these were exceptionally fiercely contested proceedings involving a plethora of highly contentious issues of fact and law.

43. Mr Harshaw noted that the basis of the application to strike out the Writ of Summons was the lack of authority, as a matter of law, of Mr.Gilbert to commence an action in the name of St John's Trust Company Limited when he was only one of three directors of that company. The issue of authority had to be considered as a preliminary issue because it addressed the very nature of the proceedings.

44. On 26 March 2020 the Chief Justice issued a 122 paragraph (39 page) judgment that Mr Harshaw summarized can be broken down into the following categories:

(a) Introduction: paragraphs 1 through 19 (pages 2 through 7 — 6 pages).

(b) The nature of the application and why it must be dealt with as a preliminary issue: paragraphs 20 through 22 (pages 8 and 9 — 2 pages).

(c) Company law issues, primarily the proper scope and application of the so-called "Duomatic" principle: paragraphs 23 through 83 (50 paragraphs) (pages 10 through 27 — 17 pages).

(d) Trust law claims: paragraphs 84 through 105 (21 paragraphs) (pages 27 through 34 — 7 pages).

(e) Standing under the Trustee Act 1975: paragraphs 106 through 113 (pages 35 and 36 — 2 pages).

(f) Conclusion and relief: paragraphs 114 through 122 (pages 37 through 39 — 2 ½ pages).

45. Given the summary above, Mr Harshaw submitted that, the lion's share of the judgment was devoted to company law issues, on which Mr Todd QC was advising. That is why he was granted a work permit for this case and that is why he came to Bermuda to observe the proceedings and assist in the case preparation.

46. Mr Harshaw also argued that the complexity and importance of the matter is also demonstrated in the number of authorities relied on in this application. The First to Third Defendants relied on 123 authorities in support of the claim to strike out the action and the Plaintiff relied on an additional 39 authorities. In all there were more than 160 authorities cited to the Court in the hearing that took place over 3 days in February 2020. Those authorities are in addition to the 836 pages of court documents (pleadings, summonses, evidence and orders) before the Court.

47. Mr Harshaw submitted that to say that the matters was "hard-fought" does not do the matter justice. At the commencement of the February 2020 hearing (which was an interlocutory hearing) there was cross-examination of the witnesses, including Mr Gilbert. That is an extraordinary feature for an interlocutory hearing. Taking all of this into consideration, Mr Harshaw submitted the fees incurred were more than reasonable given the Order 62 Factors.

Findings and Decision

48. Mr Todd QC had two brief fees paid in the sums of GBP40,000 and GBP60,000 on 14 and 20 February 2020 respectively. The descriptions of these entries state "*Reading hearing bundles, settling skeleton argument with co-counsel and preparation for attending hearing (preparation in UK)*" and "*Attending application in Bermuda (Bermuda 16-21 Feb).*" Based on the dates of payment as well as the contents of the time entry descriptions, it is clear that these fees are in relation to the February 2020 hearing.

49. It is accepted that there are aspects of both company law and trust law which mean that it would ordinarily have been reasonable for Cabarita to retain QC specialists in these areas. However, it cannot be ignored that a significant portion of these fees relate to the reading of the hearing bundles, drafting of the skeleton argument with "co-counsel" where a great number of hours have already been charged for these same actions by Mr Brownbill QC, Mishcon and Canterbury Law. Furthermore, whilst Mr Todd QC may have been providing advice prior to and during the hearing, I must have regard to the fact that a certificate for two counsel was granted for the hearing as well as whether those costs incurred were reasonable and proportionate in order for Cabarita to proficiently put its case before the court. It should be noted that Mr Todd QC was also paid GBP7,000 in November 2019 for advice in relation to this hearing. With this said, my view is that I must consider all of the barrister's fees (inclusive of brief fees) as a whole in order to properly consider the reasonableness and proportionality of each fee earner's respective costs.

50. Mr Brownbill QC who was the lead Counsel for this matter was paid over GBP200,000 in total for having conduct of this hearing. Of this total, GBP110,000 was the brief fee agreed for Mr Brownbill QC to appear at and be lead Counsel at the hearing, with the remaining

being items billed in the usual manner at his hourly rate. A significant number of the individual time entries included discussions and emails with the solicitors at Mishcon as well as with Mr Warents (in the same Chambers).

51. Mr Warents, of XXIV Old Buildings, was paid a total of just over GBP140,000. Of this, GBP50,000 was a brief fee for the period 2 to 21 February 2020 which had the following time entry description in the fee note, "*Fee agreed to cover assisting, advising and supporting the legal team in the UK and Bermuda for the upcoming application listed on 19 and 20 February led by David Brownbill QC*". Of the remaining fees of approximately GBP90,000, there are a significant number of entries with descriptions such as, "preparing bundle"; "*discussion with*" or "*liaising with Mr Brownbill QC*"; "*liaising with Mishcon*"; and "*working on skeleton argument*".

52. Having regard to the principle set out in *Louis Dreyfus* and in *Extraordinary Mayoral Election* as well as the Order 62 Factors, I accept that that expenditure on four barristers is not reasonable or proportionate in the circumstances and was excessive for the purposes of proficient presentation of Cabarita's case. I therefore will allow the following fees in respect of each barrister:

a. Mr Todd QC (Erskine Chambers) GBP27,000.00

This sum represents GBP7,000 for fees incurred in November 2019 in relation to providing advice on this matter as well as GBP20,000 of the GBP90,000 charged in fees. I have disallowed the brief fee of GBP50,000 in its entirety.

b. Mr Brownbill QC (XXIV Old Buildings)GBP140,000

I have allowed all of the costs of the brief fee of GBP110,000 and allowed GBP30,000 in relation to all other fees billed outside of the brief fee.

c. Mr Warents (XXIV Old Buildings) GBP20,000

Being that Mr Brownbill QC was leading counsel (as a specialist) as well as Mr Harshaw and taking into consideration that Mishcon were also retained as solicitors, I find that the majority of Mr Warents' work was simply unnecessary and can be categorized as none other than overkill.

d. Mr Blake (Erskine Chambers) NIL

TOTAL: GBP187,000

Ground 5: Fees for attendance/travel to Court; and
Ground 6: Fees and Costs of English Solicitors and Barristers travel to/from Bermuda

53. As already addressed in paragraphs 38 to 39 above, a certificate for two counsel was granted by the Chief Justice for the attendance at the hearing.

54. Cabarita has claimed the fees and expenses of two fee earners from Mishcon to travel to Bermuda and attend the hearing on 19 and 20 February 2020. Costs and expenses have also been claimed for Mr Todd QC and Mr Warents to travel to Bermuda and attend the hearing.

55. Further fees have been claimed for Ms Harvey of Canterbury to prepare for and attend the hearing on 19 and 20 February 2020.

Findings and Decision

56. In accordance with *Louis Dreyfus* and *Extraordinary Mayoral Election* and RSC, Part II, Division I, Item 2(2) which provides that no costs shall be allowed in respect of more than one counsel appearing before the court unless the judge or registrar hearing the matter has certified the attendance, I find that the travel costs and associated fees and expenses of the English attorneys and barristers to attend the hearing in Bermuda, and for additional local

counsel to prepare for and attend the hearing, were unnecessary, unreasonable and disproportionate in the circumstances of the case.

57. Further, and in any event, where a certificate for two counsel was granted for attendance at the hearing, all fees and expenses shall be disallowed, other than for the two counsel appearing on behalf of Cabarita, that is, Mr Brownbill QC and Mr Harshaw. Therefore, all line items noted in Schedule 1 Disbursements, Schedules 1 and 2 Profit Costs and Schedule 2 Disbursements (**Appendices 1, 2 and 3**) with Objections "5" and/or "6" shall all be disallowed. As it relates to Item 633 in Schedule 1 Disbursements falls within this category and shall also be disallowed.

Ground 7: Disbursements for photocopying and stationery

58. It is well established law in Bermuda that photocopying costs are not allowable, being already included in the overhead element embodied in the hourly rate (see *Golar*).

59. Reference was made by then Chief Justice Ground in *Golar* to SC Practice 1999 note 62/A2/35A and the Practice Direction at 62/C/4, para 1.15, which provide, respectively that:

> (a) *In normal circumstances the making of copy documents is part of the solicitors overhead expense*; and
> *(b) The making of copies of documents is part of the solicitor's normal overhead expense.*

60. In *Colonial Insurance,* then Madam Registrar Subair Williams determined that allowable disbursements are to be distinguished from purely administrative tasks or overhead, with the latter being disallowed.

Findings and Decision

61. I accept that Cabarita's claims for *'stationery'* costs fall into the same category of overhead as photocopying and as such shall be disallowed. Therefore, all disbursements claimed for photocopying and stationery; i.e. all items in marked in both Schedules 1 and 2

Disbursements set out in **Appendices 2 and 3** with Objection "7", save for Item 633 in Schedule 1 which appears to not fall within this category, shall be disallowed as overhead.

Ground 8: Disbursements for courier charges

62. In *Colonial Insurance* Registrar Subair Williams (as she then was), disallowed items described as "*Delivery Charges*" as overhead, which, it is submitted, are similar if not the same as courier charges. At paragraph 52, she stated:

> "*Where objections were made on the ground of 'overhead', I distinguished allowable disbursements from purely administrative tasks which I did not allow.*"

63. Similarly, delivery chargers were disallowed by then Chief Justice Ground *in Moulder v Cox Hallett Wilkinson and ors (Taxation Review)* [2012] Bda LR 1.

Findings and Decision

64. I therefore accept that all disbursements claimed for courier charges; i.e. all items in marked in both Schedules 1 and 2 Disbursements set out in **Appendices 2 and 3** with Objection "8"; shall be disallowed as overhead.

Ground 9: Incomplete, vague, or illegible narration

65. Various narrations in the bill of costs are considerably vague. It is impossible for Mr Gilbert or the Registrar to determine what the work pertains to in order to make a determination as to whether the costs are reasonable and necessary in the circumstances, and should therefore be disallowed.

66. Furthermore, disbursement charges for "*Services*" are insufficiently particularised to decide whether they comprise overhead or are allowable disbursements pursuant to the principles in *Golar* and *Colonial Insurance*, and accordingly should be disallowed.

Findings and Decision

67. I therefore accept that all disbursements claimed for "*Services*"; i.e. all items in marked in both Schedule 1 Disbursements set out in **Appendix 2** with Objection "9"; shall be disallowed as overhead.

Ground 10: Costs of preparing Cabarita's Bill of Costs

68. Canterbury and Mishcon have charged $13,260.00 and GBP13,338.50 respectively for the preparation of the bill of costs.

69. The RSC in Order 62, Rule 27(1) provides that the party whose bill is being taxed shall be entitled to his costs of the taxation proceedings and Part II Division II Item 5 allows for costs of preparation of the bill of costs. However such costs must be in keeping with the overriding principles of reasonableness and necessity.

70. Approximately 35 hours were spent by Mishcon and over 20 hours by Canterbury in preparing the bill of costs.

71. In *Re Extraordinary Mayoral Election* at para 24, then Chief Justice Ground in considering objections to costs (on the indemnity basis) attributable to the taxation, stated:

> "*I would have disallowed any costs for actually preparing the bills, regarding that as properly within the overhead element within the hourly rate Part II Division II Item 5 allows for costs of preparation of the bill of costs.*"

72. Then Chief Justice Ground made the same finding in *Moulder* at paragraph 10. Further, in *Colonial Insurance*, Registrar Subair Williams (as she was then) heavily reduced the sums claimed for preparation of the bill of costs to a total of 2 hours.

Findings and Decision

73. Having regard to the above, I find that the claims for the preparation of the bill of costs are extraordinarily excessive and as such unreasonable and disproportionate. I will allow 7 hours of Mr Harshaw's time and all other items shall be disallowed in Schedule 3 and 4 Profit Costs (**Appendix 4**).

Ground A: Work related to Mr Tamine's Personal Circumstances/Other Proceedings

Findings and Decision

74. It cannot be disputed that any costs related to the proceedings and judgment of *Medlands et al. v Commissioner of the Bermuda Police Service et al.* [2020] SC (Bda) 20 Civ (**BPS Proceedings**), and any other simultaneous proceedings are not allowable costs in this matter. This relates to all costs incurred in relation to Mr Tamine's personal circumstances in connection with the BPS Proceedings or any other matter as well as any costs associated to corresponding with Counsel and parties involved. Therefore, all items marked with Objection "A" in Schedule 1 and 2 Profit Costs (**Appendix 1**) shall be disallowed[3].

Ground B: Other Unpermitted Costs

Findings and Decision

75. Profit Costs in relation to the preparation of bundles, research, creation of structure charts, KYC due diligence and updating contact lists are not permitted costs allowable on the basis that it forms part of the solicitors' overhead expense. Therefore, all items marked with Objection "B" in Schedule 1 and 2 Profit Costs (**Appendix 1**) shall be disallowed[4].

Fifth Defendant's Bill of Costs

76. When this taxation was first listed on 24 November 2021, I awarded costs thrown away by the adjournment of the hearing, including for the preparation of the hearing, on an indemnity basis. Mr Taylor submitted a bill of costs totalling $35,705.

[3] Mr Harshaw did not provide any response to this objection.
[4] Mr Harshaw also did not provide any response to this objection.

77. Mr Harshaw firstly objected to Mr Taylor and Ms Tovey's hourly rate of $950 as being excessive and suggested that a reasonable hourly rate would be $700 per hour. Mr Taylor's response was that $950 per hour was the market rate at that time and is in fact now $1,000 per hour.

78. Secondly, he noted that there appeared to be a number of duplicative entries between Ms Tovey and Ms Arnold. Mr Taylor conceded that if there were duplicative entries that these should be removed.

Findings and Decision

79. Having reviewed each line entry, there are a vast number of duplicative entries which are between Ms Tovey, Ms Arnold and Mr Taylor. Needless to say, I will not rehash the findings made in relation to Cabarita's substantive bill of costs as it relates to being awarded costs on an indemnity basis as the principles apply equally.

80. Additionally, as this bill is for the taxation hearing rather than for the actual substantive hearing, I do accept that a more appropriate hourly rate for both Mr Taylor and Ms Tovey is $700.

81. In light of the above, I will allow $20,000 for Mr Gilbert's costs thrown away.

82. I invite Mr Harshaw to draft the order for my consideration as well as the taxed, Amended Bill of Costs showing which items have been taxed down as well as the total sums allowed. Mr Taylor should do the same in relation to the taxation ruling of the Fifth Defendant's Bill of Costs dated 21 January 2022. The order should reflect a set off of the costs awarded to the Fifth Defendant in accordance with the taxation ruling above.

DATED: 31 July 2023

ALEXANDRA WHEATLEY
REGISTRAR OF THE SUPREME COURT