In The Supreme Court of Bermuda

COMMERCIAL COURT
CIVIL JURISDICTION

2018: No. 359

B E T W E E N:

(1) ANNUITY & LIFE RE LTD
(2) POPE ASSET MANAGEMENT LLC

Plaintiffs

-and-

(1) KINGBOARD COPPER FOIL HOLDINGS LIMITED
(2) JAMPLAN (BVI) LIMITED
(3) KINGBOARD LAMINATES HOLDING LIMITED
(4) EXCEL FIRST INVESTMENT LIMITED
(5) KINGBOARD CHEMICAL HOLDINGS LIMITED

Defendants

RULING

Before:	**Hon. Alexandra Wheatley, Registrar**
Appearances:	**Sam Stevens of Carey Olsen for the Plaintiffs**
	Jeffrey Elkinson and Britt Smith of Conyers for the Defendants

Date of Hearing:	27 September 2023
Date of Further Submissions:	2 and 9 February 2024
Date of Circulation of Draft:	28 November 2024
Date of Ruling:	29 November 2024

Taxation of Bill of Costs; Costs Awarded for Costs Thrown Away; Indemnity Costs; Reasonableness and Proportionality; Cost of Overseas Counsel

RULING of Registrar, Alexandra Wheatley

INTRODUCTION

1. This is the taxation of the Revised Bill of Costs of the Defendants filed with the Court on 13 September 2023 (**Revised BOC**).

2. These proceedings arise out of a settlement agreement entered into by the parties on 5 April 2018 (**Settlement Agreement**) pursuant to which (among other things) the Third and Fourth Defendants agreed to purchase the Plaintiffs' shares in the First Defendant at $0.45 per ordinary share. The Settlement Agreement was entered into by the parties following protracted litigation before the Bermuda Supreme Court and Court of Appeal.

3. Clause 7 of the Settlement Agreement provided as follows:

> "*In the event that any of the Kingboard Respondents, the Company, or any of their Affiliates (as defined above in Clause 4) enters into a transaction within 12 (twelve) calendar months from the date herein to the effect that the ordinary shares of the Company are offered to be purchased or are issued at a price exceeding $0.45 per ordinary share, the Purchasers shall pay the Petitioner and Pope respectively an additional payment of an amount which equals to:*
>
> *(Transaction price per ordinary share - $0.45) x number of ordinary shares being sold under this Agreement (i.e. 17,361,000 in the case of the Petitioner; and 20,928,344 in the case of Pope).*"

4. The commercial purpose of clause 7 was to ensure the Plaintiffs received an improved price for their shares if the Defendants or their Affiliates (as defined at clause 4 of the Settlement Agreement) purchased or announced an offer to purchase ordinary shares in the Company at more than $0.45 per share within twelve months of the Settlement Agreement being executed.

5. The Plaintiffs filed an Amended Specially Endorsed Writ of Summons on 27 November 2019 alleging various breaches of the Settlement Agreement which inter alia engaged clause 7. On 2 January 2020, the Defendants filed an Amended Defence. In December 2021, the parties exchanged lists of documents. The Defendants disclosed no relevant documents which related to a transaction of 42,177,400 ordinary shares in the First Defendant that occurred on 10 July 2018 (**10 July 2018 Transaction**). The Plaintiffs have good reason to believe that the purchaser of the shares in the 10 July 2018 Transaction was an Affiliate of the Defendants as defined at clause 4 of the Settlement Agreement. The parties filed witness statements in March 2022 and the matter was set down for a five-day trial which was due to commence on 16 January 2023.

6. In the interim, the parties sought to agree a list of questions to be put to their respective Singapore law experts. Failing an agreement, the Defendants filed a Summons on or about 9 September 2022 which sought directions from the Court on the issue. Subsequently, by way of a Consent Order dated on or about 17 October 2022 the parties agreed the list of questions to be put to the Singapore law experts and reports were then filed and exchanged in November 2022, following which the respective experts prepared a joint declaration setting out the matters on which they agreed and disagreed. The expert evidence will be tested at trial.

7. As a result of the lack of documents disclosed by the Defendants relating to the 10 July 2018 Transaction on 2 December 2022 the Plaintiffs applied for a Letter of Request to issue to the Singapore courts to compel the production of documents relevant to the 10 July 2018 Transaction from the third-parties (**LOR**). Due to the proximity to the trial date, the Plaintiffs recognized that if the Letter of Request was granted it would ultimately result in the trial being adjourned. The Plaintiffs' counsel (**Carey Olsen**) therefore wrote to the Defendants' counsel, Conyers Dill & Pearman Limited (**Conyers**) and requested their consent to the issuance of the LOR and the adjournment of the trial for a short period of time. The Defendants did not consent.

8. On 14 December 2022, the parties appeared before Justice Larry Mussenden (as he was then) and made contested submissions on the LOR and adjournment application. Justice Mussenden acceded to the Plaintiffs' application and made an order granting the LOR and adjourned the trial. The Defendants were awarded their costs as follows:

> "*The Defendants' costs of the Plaintiffs' application are to be paid by the Plaintiffs forthwith on and indemnity basis, to be taxed in default of agreement.*
>
> *The Defendants' costs thrown away by the adjournment of the trial are to be paid by the Plaintiffs forthwith on an indemnity basis, to be taxed in default of agreement.*"

9. In accordance with the order, the Revised BOC should therefore be limited to only those costs which have been incurred in relation to the LOR application and those costs which were "*thrown away*" by the adjournment of the trial. It is to be noted that the substantive trial of this action is still pending before the Supreme Court. The total costs being claimed by the Defendants in the Revised BOC are $338,213.59.

THE LAW

10. The Court's approach to assessing costs on an indemnity basis was recently summarized in *St. John's Trust Company (PVT) Limited* v *(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* [2023] SC (Bda) 62 Civ. (2 August 2023) at paragraphs 7 to 12. In any assessment the court must consider, "*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*". There was no contention between counsel as it relates to these principles.

11. The principal purpose of "*costs thrown away*", is provided for at Order 62, rule 3(6) of the Rules of the Supreme Court 1985 (**RSC**) as follows:

> "*Where proceedings or any part of them have been ineffective or have been subsequently set aside, the party in whose favour this order is made shall be entitled to his costs of those proceedings or that part of proceedings in respect of which it is made.*"

12. Carey Olsen for the Plaintiffs also relied on the recent case of *Siemens Gamesa Renewable Energy AS* v *GE Energy (UK) Ltd* [2023] EWHC 254 (Pat), at paragraph 6, where Justice Meade stated that "*costs thrown away*":

> "…*captures the essence of the idea that costs that have already been spent on something which will not be adjudicated because of the events that have transpired.*" [Emphasis added]

13. Costs thrown away are patently not all preparation costs incurred but rather limited to those costs which have been reasonably incurred and which will have to be repeated before the new trial[1].

14. Therefore, before assessing the reasonableness of each time entry in the Revised BOC, the court must first consider whether each specific entry is one which will have to be repeated before the relisted trial.

15. Again, the legal principle surrounding the definition was not contested, but rather it is the nature of the actual entries that fall within this category of *"costs thrown away*" which is being disputed.

16. There are several objections raised by Carey Olsen to the Revised BOC, each of which I will address in their respective categories which have been defined by objection type, i.e. A through F.

OBJECTIONS

Ground A: Not *"costs thrown away"*

17. Mr Stevens for the Plaintiffs asserts that all trial preparation work being recoverable from the Plaintiffs under the costs order is obviously wrong. For example, the Defendants' attempts in the Revised BOC to claim costs relating to the scope of questions to be addressed by the expert witness in this action. Mr Stevens says in doing so, the Defendants seek to abuse the costs order made by treating it as an order granting them all their costs incurred since 31 May 2022 (being the date the matter was set down for trial).

18. During the hearing it was conceded by Mr Elkinson that costs incurred for agreeing the scope of questions to be put to the appointed experts remained to be tested under cross-examination

[1] *Fern Trading Ltd* v *Greater Lane Ltd* [2021] EWHC 1939 (Comm) at paragraph 28.

at the substantive trial and as such should not be included as "*costs thrown away*". Therefore, it was agreed that in relation to any entries in the Revised BOC that relate the questions to be put to the experts, Counsel would correspond out of court to agree these exclusions. Counsel were to subsequently notify the court once an agreement had been reached.

19. Mr Stevens wrote to Mr Elkinson on 10 October 2023 proposing to exclude 78 time entries with a total value of $37,787.75. On 2 February 2024 (**Carey Olsen's Letter**) and 9 February 2024 (**Conyers' Letter**), the parties' respective Counsel wrote to the court advising that they had been unable to reach a comprehensive agreement regarding the exclusion of the expert costs.

20. In Conyers' Letter it is confirmed that the Defendants agreed to exclude 41 of those time entries, either in full or in part which had a total value of $16,738.75. Attached to the Conyers' Letter was table setting out the identified time entries and the position as to whether they were agreed or not between Counsel. If not agreed, the reason for not excluding was provided.

21. Additionally, Conyers' Letter noted that the portion of time entries which were not agreed to be excluded totalled $14,155.25 and provided Mr Elkinson's confirmation that in the interests of compromise the Defendants are prepared to agree the exclusion of these costs; however, this concession was made without prejudice to the Defendants' entitlement to claim such costs in the main proceedings.

Findings

22. I agree with Mr Stevens that the costs incurred in relation to the Defendants' Directions Summons does not fall within the definition of "*costs thrown away*" for the adjournment application. Whether an adjournment of the trial was granted or not, the necessity for the experts' questions to be resolved between the parties would not have been impacted. Therefore, for all items in the table attached to Conyers' Letter, I will accept the exclusions that were agreed between the parties as well as exclude all those items where agreement was unable to be reached in their entirety.

Ground B: Multiple lawyers/duplication of time

23. Mr Stevens submitted that this is not a complex matter as it is a claim for breach of contract. He noted that two Barristers were instructed, two senior partners at Conyers along with Associates and Paralegals in both jurisdictions which he says is unreasonable and disproportionate. Mr Elkinson argued that Carey Olsen at one point during the proceedings had instructed a KC which supported the complexity of this case. Mr Stevens, however, reminded the Court that the costs orders that are the subject of this taxation were made in relation to an adjournment application and for costs thrown away due to the adjournment being granted. As such, the number of attorneys and administrative staff for the two-hour adjournment hearing is disproportionate and should be heavily taxed. Mr Stevens also

reminded the Court that whilst there was a KC at one point instructed by the Plaintiffs, the Plaintiffs subsequently determined it was not necessary to proceed with instructing a KC.

Findings

24. I am reminded of the case of *Louis Dreyfus*[2] referenced in *St John's* where the legal principle confirmed to apply to taxations where costs were awarded on an indemnity basis is, "*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*".

25. I accept that is it unreasonable and disproportionate for overseas counsel as well as the full team of Bermuda attorneys to be involved at the level they each were respectively.

Ground C: Administrative time

26. There are a number of entries which Mr Stevens asserted were merely administrative tasks which should not have been completed by fee earners, consequently making these costs unreasonable and disproportionate. Some examples of such entries are "*preparing budget for trial*", "*Emails with Hamilton Princess regarding reservation for JFNQC*", "*Exchange emails with client, B. Smith and H Tijo re flights and accommodation for expert to attend hearing in Bermuda;…*", etc.

Findings

27. Having reviewed the time entries assigned to this category of objection, I accept Mr Stevens' position that these fall outside of allowable costs to be paid at taxation given the long standing legal precedents of such fees to be considered to be encompassed in overhead costs. Similarly, the costs of "*Courier services*" and "*Telephone/Fax/Copying/Printing*", a total of cost of $1,581.50, fall outside of the scope of recoverable costs.

Ground D: Excessive and non-chargeable time; and
Ground E: Inflated hourly rates

28. The Defendants are claiming USD178,240.01[3] for lead counsel, Jern-Fei NG KC. Mr Elkinson confirmed that Jern-Fei Ng KC had been paid in full prior to the adjournment application being heard as such is recoverable under these costs orders. Mr Stevens rejected this position as he says that this does not fall within the definition of "*costs thrown away*" as the bulk of the work will not need to be redone. As such, Mr Stevens says these fees should be taxed down by seventy to eighty percent. In response, Mr Elkinson argued that there is a possibility that lead counsel may never be used and brief fees are payable under the Bar Rules.

[2] *Louis Dreyfus Company Suisse S.A v International Bank of St Petersburg* [2021] EWHC 1039 (Comm)
[3] This figure has been converted from GBP based on the exchange rate on the dates when the bills were paid.

29. Mr Stevens also noted that the trial was six weeks out when the adjournment was granted and suggested that there still would have been a great deal of work to be completed by the KC and all other counsel to be trial ready. Mr Elkinson rejected this stating that the six-week period fell over the Christmas holiday which gave an over-exaggerated time estimate as firms would be closed for significant periods during this time.

30. It was also reiterated by Mr Stevens that the excessive number of barristers and attorneys instructed by the Defendants has resulted in a vast number of the entries in the Revised BOC showing examples of duplication of charges among fee earners attending to the same task. In these instances, it was submitted that such claims should be disallowed in accordance with the legal principle referenced in paragraph 24 above.

Findings

31. Having reviewed the time entries labelled "D" or "E" (or both) and applying the principles set out in *St John's*, I accept there was significant time billed by the fee earners in Bermuda and overseas which are duplicative as well as unreasonable for the Defendants to have incurred to conduct its case proficiently. In particular, I analyzed groups of time entries which were of particular interest such as those entries that appear to be time billed to calculate "*thrown away costs*" which totalled 11.1 hours of work and the equivalent of $5,500. Notably, a total of 84.5 hours, with a value of approximately $57,410 (which does not include the fees billed by overseas counsel in the sums of $3,894.98 and $5,842.97 respectively) is being claimed in relation to the adjournment hearing. Therefore, the Defendants are claiming approximately a total sum of $67,150 for the adjournment application which remarkably does not include the $5,500 referenced for the calculation of "*thrown away costs*".

32. I also rely on paragraph 33 of *St John's* where I state the following:

> "*I am reminded that albeit a party may have good reason to retain several 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 for Cabarita to have "its case conducted and presented proficiently"*." [Emphasis added]

33. Additionally, it is not disputed that in accordance with the RSC O. 62, Part II, Division I, Item 2(2) no costs shall be allowed in respect of more than one counsel appearing before the court unless a certification for two counsel has been granted. Therefore, I must have regard to the fact that a certificate for two counsel was not granted for the adjournment application and therefore Ms Smith's time entries in respect of preparation and attendance at the hearing should be removed.

34. As it relates to the travel costs expended for lead counsel (when set against the refund), this does fall within the definition of "*costs thrown away*" and as such shall remain in the sum of $4,119.97.

35. In relation to the brief fee payable, in the sum of USD178,240.01, the fee notes were particularly unhelpful as there was no narrative that would have summarized what work would have been covered in each payment request.

Ground F: Vague narration

36. It was also Mr Stevens' position that various narrations throughout the Revised BOC are considerably vague which makes it impossible for the Plaintiffs as well as for the Registrar to determine what the work pertains to, to decide whether the costs are reasonable and necessary in the circumstances.

Findings

37. This is a difficult argument to successfully challenge. As it was stated in *St John's*, "*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 to ascertain the reasonableness of the various items*." The relevant practice direction states as follows:

> "*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]

38. Accordingly, and having reviewed the items marked "F" which have yet to be taxed off by falling into one of the above categories, I find, should be taxed off in their entirety due to inadequate narratives.

CONCLUSION

39. Taking into account my findings above, I set out below the sums which I will allow on taxation:

Total Costs Sought **$338,213.50**

a. $37,787.75 has been resolved in accordance with paragraphs 19 to 21 above which results in the Plaintiffs being required to pay $6,893.75. This leaves a total of $300,425.80 remaining to be taxed.

b. $67,150 is in relation to the costs of the adjournment application referenced in paragraph 31 above. I will allow $30,000 of these costs to be paid by the Plaintiffs which were granted to the Defendants on an indemnity basis.

c. $178,240.01 Brief Fee for of Jern-Fei NG KC. I will allow $20,000 to be covered under the costs awarded on an indemnity basis for "*costs thrown away*" due to the adjournment of the trial as well as $4,119.97 for the non-refundable airfare.

d. The remaining $50,915.78 which falls into each of the categories of objections, I will tax this sum to $30,000.

Therefore, the total sum payable by the Plaintiffs is:

$6,893.75
$30,000.00
$20,000.00
$4,119.97
$30,000.00

$91,013.72

40. Taking into consideration all the decisions made herein, I invite Mr Elkinson to draft the order for my consideration as well as to submit a red-lined version of the Revised Bill of Costs showing which items have been taxed down as well as the total sums allowed.

POSTSCRIPT

41. It should be noted that the task of analyzing bills of costs entries is unnecessarily burdensome on the Registrar. A more proactive approach of attorneys to categorize and summarize the time spent on specific tasks would be incredibly useful not just for the Registrar, but also for the parties in being able to obtain much swifter decisions in high value taxations.

DATED this **29th** day of **November 2024**

THE SEAL OF THE SUPREME COURT OF BERMUDA
SIGNED

ALEXANDRA WHEATLEY
REGISTRAR OF THE SUPREME COURT