In The Supreme Court of Bermuda

No. 101 of 2016

Between:

CAPITAL PARTNERS SECURITIES CO. LTD

Plaintiff/ Entitled Party

And

STURGEON CENTRAL ASIA BALANCED FUND LTD

Defendant/ Paying Party

RULING

Date of Hearings: 18 January 2017 and 1 March 2017
Date of Decision: 1 May 2017

Plaintiff/Entitled Party: Katie Tornari, Marshall Diel & Meyers Ltd (MDM)
Defendant/Paying Party: Steven White, Cox Hallet Wilkinson Ltd (CHW)

Taxation of Bill of Costs

(Originating Summons Action for Retroactive Share Rectification)
(Section 50 of the Companies Act 1981 Refusal to Register Share Transfers)

RULING of Registrar S. Subair Williams

Introduction:

1. This is a contested taxation of a Bill of Costs filed by the Plaintiff on 13 September 2016 pursuant to a costs award made by the Learned Hon. Chief Justice, Ian Kawaley, on 27

June 2017. The costs award with which I am concerned is made under Originating Summons proceedings for share rectification. The relevant background to these proceedings is inextricably linked, however, to the proceedings which arose out of a petition filed by the Plaintiff to wind up the Defendant.

Background Litigation under the Winding-Up Proceedings:

2. The Plaintiff in this case is a securities company whose registered office is in Tokyo, Japan.

3. The Defendant company, a fund ("the Fund"), was incorporated as a Bermuda exempted company on 20 March 2007. The Fund's objectives were to invest in equity and debt securities.

4. The share capital of the Fund comprised of management shares (where voting rights were mostly vested) and participating shares. Participating shareholders did not have rights of redemption under the operation of the Fund. Further, the sale or purchase of participating shares required the consent of the Board of the Fund.

5. The Plaintiff invested in the Fund and came to hold a beneficial interest in 7,561,000 participating shares[1]. On the Plaintiff's case, the purchase of these shares was on the marketed basis that the Fund would be voluntarily liquidated between 31 December 2015 and 31 December 2017. By 2015 the share value depreciated significantly from its offering price and the Plaintiff became keen to redeem its shares.

6. However, in 2014 a management shareholder resolution was approved which had the effect of amending the company Bye-laws as they related to the redemption of participating shares. The amended Bye-law provided that a participating shareholder could only redeem 5% of its shares every two years.

7. Aggrieved by the amendment to the Bye-laws, on 17 August 2015 the Plaintiff[2] filed a petition with the Bermuda Supreme Court to wind-up the Fund on just and equitable grounds seeking relief[3] under section 111 of the Companies Act 1981 (alternative remedy to winding up in a case of oppressive or prejudicial conduct).

8. A return date was fixed for 20 November 2015 when an Unless Order contingently dismissing the Petition was made on the strength of the Defendant's argument that the Plaintiff (Petitioner) lacked standing to windup the Fund on the grounds that it was not a registered shareholder. The Court then adjourned the Petition to 22 January 2016.

[1] The Plaintiff initially had a legal interest in the shares in 2012

[2] At the time Plaintiff was represented by Hurrion Associates Ltd

[3] Alternative remedies to liquidate the Plaintiff's shares were sought under a summons dated 20 January 2016 for leave to amend the petition.

9. To meet the standing objection, the Plaintiff (Petitioner) transferred legal title to the 7,561,000 shares back into its own name. The instruments of transfer were two stock transfer forms (one for 319,000 shares and the other for 7,242,000) dated 30 December 2015. However, the Fund's Board of Directors refused to register the shares.

10. The Plaintiff (Petitioner) subsequently filed a summons dated 20 January 2016 for leave in the following terms, *inter alia*:

"*3. Leave be granted to amend the Petition, as in the copy annexed hereto ("the Amended Petition") on condition that:*
(a) The transfer of 7,561,000 participating shares in the Fund to CPS is recorded on the share register of the Fund by no later than 12 February 2016…"

11. The summons was listed to be heard together with the adjourned hearing date for the Petition on 22 January 2016.

12. On 22 January 2016 the Court adjourned the Petition to 5 February 2016 and the summons for share rectification was adjourned to be mentioned at the same time. On 5 February 2016 both the Petition and the summons were adjourned to 23 February 2016 for substantive hearing and the parties were at liberty to file further affidavit evidence under the summons on or prior to 18 February 2016.

13. On 15 and 18 February 2016 the Plaintiff (Petitioner) filed the Fourth and Fifth Affirmations from Mitsugu Saito, the Deputy General Manager of Capital Securities Co. Ltd, in support of the summons for share rectification. Two days prior, on 16 February 2016 the Defendant filed a strike out summons as a measure of enforcing the 20 November Unless Order.

14. The preparation undergone by both parties for the 23 February 2016 hearing of the petition and summonses filed was evidenced by (1) the Plaintiff (Petitioner's) filing of a hearing bundle under a cover letter dated 19 February 2016 and (2) the Respondent's filing of a skeleton argument and authorities bundle under cover letter dated 22 February 2016, the eve of the fixed hearing.

15. However, on 23 February 2016 the Plaintiff (Petitioner) advised the Court of its intention to withdraw the Petition and to file an Originating Summons for redress against the Fund's refusal to transfer the shares. The Court accordingly issued leave for the withdrawal of the Petition and a Notice of Withdrawal was filed on 10 March 2016.

The Originating Summons Proceedings

16. These are the proceedings to which this taxation relates.

17. On 21 March 2016 the Plaintiff filed an Originating Summons claiming declaratory relief validating the transfer of the 7,561,000 participating shares from the Fund to the Plaintiff. The Plaintiff also sought, *inter alia*, an order (pursuant to section 67 of the Companies Act 1981) to compel the directors of the Fund to procure the rectification of the share register(s).

18. By Consent Order dated 7 April 2016 directions for the further filing of evidence were agreed between the parties and the hearing of the Originating Summons was fixed for 6 June 2016.

19. The 6 June 2016 hearing proceeded and a ruling in favour of the Plaintiff was delivered on 27 June 2016. Costs followed the event.

20. By letter dated 18 July 2016, the Plaintiff wrote to the Court seeking a hearing date to settle the terms of an order to give effect to the 27 June ruling in the absence of common ground between the parties. Subsequently, an agreed order dated 30 August 2016 (back-dating the share transfers to 10 January 2016) was obtained without the need for a hearing.

Summary of Bill of Costs:

21. The Plaintiff now claims $227,968.00 in costs, which includes the following:

    (i) $116,525.00 in profit costs for MDM and
    (ii) $111,443.00 in profits costs for Harney Westwood & Riegels in Hong Kong[4] ("Harneys")

22. The Defendant argues that the costs claimed are excessive, generally and specifically in relation to the following:

    (i) The Plaintiff's fees for legal research are not commensurate to the narrow legal points to which they relate;

    (ii) The claim for preparation of the Originating Summons and the First Affirmation of Mr. Saito totals 43.6 hours: 19.6 hours from MDM and 23 hours from Harneys;

[4] The Fee Note back-page states a British Virgin Islands firm address. However, throughout the taxation proceedings, both parties referred to the firm as "*Harneys (Hong Kong)*"

(iii) The claim for preparation of the Second Affirmation of Mr. Saito totals 20.5 hours: 7.8 hours from MDM and 12.7 hours from Harneys;

(iv) The claim for preparation of the Third Affirmation of Mr. Saito totals 18 hours: 6 hours for MDM and 12 hours for Harneys;

(v) The claim for pre-hearing preparation totals 75.15 hours: 61.1 hours from MDM and 14.5 hours by Harneys; and

(vi) The claim for the settling of the final order totals 48.76 hours: 29 hours for MDM and 19.6 hours for Harneys.

23. Additionally, Mr. White made the following objections to the Plaintiff's bill of costs:

(i) The Plaintiff's employment of a team of six attorneys (Mark Diel ($625 p.h), Katie Tornari ($575 p.h) and Dantae Williams ($450 p.h) of MDM in Bermuda and Ian Mann ($720-900 p.h), Deirdre MacNamara ($440-675 p.h) and Vincent Lee ($300-350 p.h) of Harneys was overkill;

(ii) The engagement of the foreign attorneys was unjustifiable because this case does not qualify as cross-border litigation given that the litigation was confined to Bermuda; and (alternatively)

(iii) The hourly rates claimed by Harneys are excessive.

24. I now turn to address each of these objections and the relevant principles of law under which I have been guided in making my decisions. A summary of my decisions is provided in the Conclusion.

Legal Research by Counsel:

Legal Research on Procedural Matters:

25. The Defendant took issue with the Plaintiff's charges for research of the Originating Summons procedure.

26. In *Golar LNG Ltd v World Nordic SE No. 163 of 2009 (Commercial List) (para 13-14)* the learned Chief Justice Richard Ground (as he then was), citing Cook on Costs Butterworths 2004, p. 230 with approval, held: "*Time spent considering the law and procedure is usually non-chargeable- and the higher the expense rate, the more law and procedure the fee earner is expected to know*…" Ground CJ continued as follows, "*I do accept that this case had some novel*

elements- the statutory provisions seem to be unique to Bermuda, and the Applicant raised a series of potentially difficult issues which had to be dealt with. Nonetheless, legal research as an element of charge should be constrained, particularly for high fee earners who are entitled to charge a high fee precisely because they are experienced and presumed to know the law."

27. In *Moulder v CHW and ors (Taxation Review) 2012Bda LR 1* Ground CJ disapproved a 4 hours claim by Counsel for legal research: "*I do not think that that was properly allowable at all: lawyers are assumed to know the law and cannot normally charge for researching it. I take that to be self-evident…*"

28. In this case, the Plaintiff is arguing that an exception arises because Mr. White expressed his objection to the Originating Summons procedure through party correspondence. Ms. Tornari also stated that Mr. White referred her to *Nilon Limited v Royal Westminster Investments SA* [2015] UKPC 2 in support of his objection, thereby requiring her to undergo legal research on procedure.

29. Ms Tornari explained that she had to review this Privy Council decision in order to 'ascertain and demonstrate how that case was not relevant to these circumstances'. She said that she wrote back to CHW after her review of the authority to say that she did not see the relevance of the decision and she confirmed the Plaintiff's continued prosecution of the claim under the Originating Summons.

30. Ms Tornari said that the issue regarding the form by which the Plaintiff commenced these proceedings was never again raised by CHW and no further mention was made that the Originating Summons procedure was inappropriate.

31. *Nilon Limited v Royal Westminster Investments* was essentially a case about the power of the Courts to rectify the share register of a BVI company. In my view, it is reasonable to expect that a senior litigator specializing in this area of commercial litigation to be ofay with Privy Council decisions of this kind. Given the context of Mr. White's referral to *Nilon Limited v Royal Westminster Investments,* a narrowed and focused search for the parallel or distinction should have been undertaken within a half-hour time span. Use of a word-find feature to search the word "Originating Summons" or the like would have also been a reasonable short-cut in establishing that *Nilon Limited v Royal Westminster Investments* did not address the issue on which procedural form to use in commencing share rectification proceedings.

32. In any event, I do not see any justification for senior Counsel with post qualification experience in civil and/or commercial litigation to recover costs for reviewing procedural matters set out in the Rules of the Supreme Court of Bermuda.

33. The non-compliance with the three month notice period under section 50 of the Companies Act 1981 for refusal to register a transfer was the heart, brain and lungs of this case.

34. According to Mr. White, no particularly complexities in law arose. He advised that a total of 8 authorities were relied upon by the Fund, 3 of which were duplicated in the Plaintiff's list of authorities. He said the majority of those authorities went to the undisputed general principles of share rectification.

35. Attorney, Mark Diel, who appeared as leading Counsel in the 6 June 2016 hearing, relied on *In re Swaledale Cleaners Ltd [1968] 1 WLR 1710 (Court of Appeal)*. In the learned Chief Justice's judgment, passages from *In re Swaledale* were recited amply. I do not propose to repeat those passages in this ruling. Suffice to say, Harman LJ sitting in appeal of Pennycuick J, upheld his decision in holding that the right to register the transfer had become absolute once the statutory period had lapsed. This analysis was supported by Dankwerts LJ and Sachs LJ sitting with Harman LJ.

36. In *obiter dictum* Sachs LJ observed a rigid provision creating a criminal offence for a failure to give notice of a refusal within the statutory timeframe. The Plaintiff, of course, argued that this makes the 3 month period absolute and subject to no exceptions. The Defendant opposed this argument by highlighting that these points made by Sachs LJ did not form any part of the *ratio* of the case. The Court, as seen in the judgment[5] handed down, drew a distinction between a civil regulatory penalty and a criminal offence.

37. The learned Chief Justice in interpreting the true intent behind section 50 found that: "*…share transfers should ordinarily be given effect to in a prompt manner because any delays interfere with the shareholder's fundamental right to enjoy and freely dispose of his property*[6]*… Section 50 imposes a time period within which a transfer registration decision must be made and section 67 provides a remedy for a shareholder or other person (either a transferor or transferee) who is aggrieved by a refusal. These two provisions, in my judgment, envisage that routine transfers must be registered within the time period mandated by Parliament and, save in exceptional circumstances, the company will lose the right to refuse to register the transfer if it does not do so within the statutory period. A shareholder can seek summary relief under section 67 if neither registration nor refusal occurs within 3 months' period…*"

38. The Plaintiff also placed Carnwath J's reasoned decision in *Re Inverdeck Ltd [1988] B.C.C. 256* before the Court. This ruling was essentially consistent with the Court of Appeal's position in *In re Swaledale* supra. The Court, however, distinguished the nature of the time limit imposed by section 50 from the more procedural genres of time limits considered by the House of Lords in *R v Soneji [2005] UKHL 49*.

[5] See paragraphs 10-13
[6] See paragraph 14

39. Ms. Tornari insisted in the taxation hearings that these section 50 issues were complex. She said that she was not previously familiar with either *Re Inverdeck* or *In re Swaledale*. She relied on the following wording employed in the learned Chief Justice's judgment to support her categorization of the legal point as 'complex':

"*The position should in principle be no different in <u>non-routine</u> cases where, as here, the company is unwilling to register a transfer because it has regulatory concerns*[7]…"

40. I do not accept that the Court's characterization of this case as '*non-routine*' was intended to mean that the arising legal issues and principles were complex. Even if the Court was observing that the position was novel to Bermuda, I think this is still distinct from complexity. On my review of the judgment, the Court merely stated that even in non-routine cases, the principle outlined in approaching section 50 should be the same. In my view, the law on this area was indeed simplified by the learned Chief Justice. In the end, section 50 was interpreted to prevent a company from ordinarily refusing to register a transfer but for exceptional circumstances. I see no real complexity in that.

41. Ms. Tornari referred me to the following passage in the judgment:

"…*There are strong grounds for suspicion that just as the primary motivation of the Plaintiff was to force the Defendant to make a quick decision in advance of the Plaintiff's litigation strategy, so the Defendant's own litigation strategy was advanced by delaying the transfer process. Moreover, the construction of section 50(1) as creating a time limit which was not an inflexible one was supported, potentially at least, by respectable persuasive authority*." [8]

42. Ms. Tornari also referred to paragraph 41 of the learned Chief Justice's ruling where he stated:

"…*Not only do the requests seem highly technical in the share transfer registration context. They have been raised at a time when the transferee is involved in litigation with the Fund and the due diligence requests have the obvious consequence of impeding the Plaintiff's ability to pursue that litigation*."

43. The Court's observation that the Board's requests were 'highly technical' does not in my view provide a pathway to prolonged legal research. The requests related to a tedious AML and KYC fact-finding exercise which had the intended or unintended effect of thwarting the winding up proceedings. This did not alter the legal principles which arose under section 50 of the Companies Act.

44. For these reasons, I find that the legal research done in aid of interpreting section 50 of the Companies Act should not exceed 3 ½ hours of legal research time.

[7] See paragraph 17 of the 27 June 2016 ruling
[8] See paragraph 25

Legal Research on the Plaintiff's Alternative Case:

45. I have had regard to the Court's consideration of the Plaintiff's alternative case that '*a refusal decision which was prima facie valid was in fact made*'[9]. The learned Chief Justice looked to the principles stated in *Smith v Fawcett Limited [1942] Ch 304-308* on the invitation of Mr. White. The Court also observed that *Smith v Fawcett* was approved by the Privy Council in *Village Cay Marina v Acland [1998] 2 BCLC 327 at 335*. These are the only two authorities referenced in the Court's judgment.

46. It seems to me that the Court's examination of the Plaintiff's alternative case simply called for a review of known legal principles on share rectification under section 67 of the Companies Act 1981. Accordingly, a maximum of 3 hours on legal research of these principles of share rectification is allowed.

Legal Research on the principles of Retroactive Share Rectification:

47. Following the Court's 27 June 2016 ruling, by letter dated 18 July 2016 the Plaintiff wrote to the Court to request a one hour hearing to settle the terms of the order which was needed to give effect to the ruling, given the parties' inability to agree this.

48. This point of contention related to the operative date for share rectification. The discord led to MDM's preparation for a hearing before the Court. A skeleton argument was drafted by MDM (although not exchanged). However, an agreed order dated 30 August 2016 was obtained without the need for a hearing.

49. The Plaintiff now claims the recovery of total claim for 48.76 hours: 29 hours for MDM and 19.6 hours for Harneys. This is grossly excessive in my opinion. The Court was already acutely aware of all the relevant factual and even legal issues. In all likelihood, MDM would have simply argued that the Court had an unfettered discretion in deciding the operative date and then taken the Court through the relevant factors for consideration in determining the appropriate commencement date. Any factual considerations would have surely been already known to the Court through the filed affidavit evidence. In any event, Ms. Tornari did not direct my attention to any specific legal or factual points discovered through the preparation for this hearing which would persuade me to conclude otherwise.

50. For these reasons, I find that a reasonable period of preparation time for the 30 August 2016 hearing would not exceed 5 hours in total.

[9] See paragraph 29 of the 27 June 2016 ruling

Recovery of Fees for The Originating Summons and Mr. Saito's Affirmations

The Preparation of the Originating Summons

51. On the face of the Court documents and in consideration of the background to this litigation, the drafting and preparation of the Originating Summons in my view does not justify more than the expenditure of 1 hour by senior Counsel at Ms. Tornari's claimed rate of $575.00.

Comparing the Plaintiff's Evidence filed in the 2015 and 2016 Proceedings

52. Mr. White argued that evidence filed under the Originating Summons was essentially the same affidavit evidence as that which was filed in the 2015 winding-up proceedings.

53. Mr. White was forceful in his submission that there was very little difference in content between the affidavit evidence filed in the winding up proceedings (under the share rectification) and the evidence filed in support of the Originating Summons. He pointed me to the judgment delivered by the Chief Justice as confirmation that the Court made no findings of fact.

54. Ms. Tornari, however, submitted that there were additional issues for inclusion in drafting the affidavit evidence supporting the Originating Summons. She said that she exhibited the affidavits filed in the first proceedings to save costs, but that other matters had to be addressed which were not a subject of the earlier proceedings. Ms Tornari submitted that the 2016 proceedings were new proceedings addressing new facts. She accepted, however, that the parties "*may have addressed the issues relating to the Share Transfer in the 2015 Proceedings… (and) To the extent possible the previous Affidavits from the 2015 Proceedings were exhibited to the Plaintiff's Affidavits to save costs*[10]."

The Evidence filed in support of the Share Rectification Summons in the Winding-Up Proceedings

55. The Third, Fourth and Fifth affirmations of Mitsugu Saito were filed in support of the Plaintiff's 20 January 2016 summons under the winding-up proceedings.

56. Paragraphs 10-27 of the 30 paragraphs in the Third Affirmation of Mr. Saito speak to the *locus standi* issue arising under section 163(1)(a) of the Companies Act 1981. Mr. Saito stated in his affidavit that a detailed investigation carried out by his lawyers revealed that the legal owner of the 7,561,000 shares (before the litigious transfer) was one Citivic Nominees Limited ("Citivic"). He spoke to the technical and unfair nature of the objection on standing given the actual structure of the Fund and the fact that the participating shareholders had sole economic interest in the Fund. Mr. Saito, through his

[10] See Para 17 of the Plaintiff's 13 January 2017 Skeleton Argument

affirmation, disclosed that '*detailed and protracted negotiations*' with Citvic, at a cost no less, were necessary to the securing of the transfer agreement.

57. Mr. Saito, in his Third Affirmation, outlined the correspondence which passed between the directors of the Fund in relation to the request for approval of the transfer. Mr. Saito also addressed the concern raised by Michael Carter (one of the three directors of the Board) that KYC and AML requirements had to be performed before approval could be confirmed.

58. In Mr. Saito's Fourth Affirmation he recounted the Board's meeting of 28 January 2016 and the refusal of Mr. Carter and Mr. Taco Sieburgh Sjoerdsma, another director of the Fund, ("Mr. Sieburgh") to vote on the share transfer. Paragraphs 7-12 addressed the *locus standi* point again to support the Plaintiff (Petitioner's) case that the share transfers ought to be approved by the Board. The impartiality of Mr. Sieburgh is also alleged in paragraph 9 of the affirmation. Generally, this affirmation sets out in detail a response to Mr. Sieburgh's reasons for the Board's refusal to approve the transfers.

59. Additionally, Mr. Saito explained in his Fourth Affirmation the background facts on the legal shareholding held by the Plaintiff in 2012 before the transfer was made to Citvic. The Directors' assertion on the restriction of Japanese Investors was also addressed in paragraph 19. Mr. Saito also responded to the other objections raised against approving the share transfer which included concerns for the impact on the secondary market or liquidity of the participating shares and the AML/KYC requirements.

60. In paragraph 23 Mr. Saito stated that the net asset value ("NAV") of the Fund had declined from the offering price of US$10.00 to US$4.575 as of 30 June 2015 and further down to US$3.416 as of 31 December 2015.

61. Mr. Saito's Fifth Affirmation gives another summary of Mr. Sieburgh's refusal for Board approval of the share transfer request and follows that up with updated responses to each objection. Principally this again related to the objections arising out of the restriction against Japanese investors in the Fund, secondary sale market concerns and AML/KYC concerns.

62. In paragraph 13, the same NAV observations are made as outlined in paragraph 19 of the Fourth Affirmation.

The Evidence filed in support of the Originating Summons Proceedings

63. The affidavit evidence filed by the Plaintiff under the Originating Summons came only from Mr. Saito. Three affirmations were filed.

64. The First Affirmation provides a useful background narrative of the earlier proceedings and the facts set out in the affirmations filed in the winding-up proceedings. Significant

portions of the 20 page affidavit were obviously drafted with a significant cut and paste advantage.

65. The only real update in position provided by this First Affirmation is seen in paragraphs 58- 60 as it deals with March 2016 correspondence between the parties. The 866 page exhibit to the First Affirmation is essentially the previous affidavit evidence filed in the earlier proceedings.

66. The Second Affirmation, like the Fourth and Fifth Affirmations in the earlier proceedings, repeats the summary of Mr. Sieburgh's refusal for Board approval of the share transfer request. Again, this relates to the objections arising out of the restriction against Japanese investors in the Fund, secondary sale market concerns and AML/KYC concerns.

67. Paragraphs 8-10 of the Second Affirmation duplicate the evidence given in the Fifth Affirmation in relation to the advice of the Fund's Japanese lawyer, Mr. Shimazaki and related email correspondence leading up to 18 February 2016. Paragraph 11 is an update on Mr. Shimazaki's email correspondence post-dating Mr. Saito's final affirmation in the winding-up proceedings. However, nothing particularly novel is stated in paragraphs 12-15 of the Second Affirmation in these proceedings.

68. Paragraphs 16-21 in my view do touch on new material which did not form part of the winding-up proceedings. In paragraphs 17-19 Mr. Saito criticized the Fund of employing further delay tactics. Paragraphs 20- 21 make reference to a "comfort letter" and an "Oyster" report. This is indeed new material. However, it is mostly referenced in the context of delay.

69. The remainder of the Mr. Saito's Second Affirmation in these proceedings provides responses to various allegations made by Mr. Sieburgh in his First Affirmation in these proceedings.

70. The Third Affirmation of Mr. Saito does not stand as a repeat to the earlier proceedings. Mr. Saito responded to points arising out of recent party correspondence and much of the affidavit dealt with the "Oyster" report.

Decision on Fees for Preparation of Affirmations

71. Having carefully considered the Affirmations filed in this case and having cross-referenced them with the Affirmations filed in the winding-up proceedings, I take the view that the following fee allowances should not be exceeded:

    (i) The First Affirmation: 5 hours for drafting and preparation and 2 hours for the taking of Client instructions;

(ii) The Second Affirmation: 3 hours for drafting and preparation and 1 hour for the taking of Client instructions; and

(iii) The Third Affirmation: 6 hours for drafting and preparation and 3 hours for the taking of Client instructions

Recovery of Costs for Preparation of Hearing:

72. Mr. White calculated that the total sum claimed for preparation for Court was 75.15 hours (61.1 hours from MDM and 14.5 hours by Harney). On my review of the Bill of Costs, I found that it was MDM who billed some 14 hours for hearing preparation alone. There were two other charges for hearing-prep billed on 6 June 2016. However, it is unclear what portion of time was allocated to case preparation as these two charges were each fused in with Ms. Tornari's and Mr. Diel's attendance to Court.

73. Fees for MDM's hearing preparation are otherwise distinguished in the Plaintiff's Bill of Costs from legal research; fees related to the preparation of the Plaintiff's skeleton; fees related to the preparation of the Plaintiff's chronology and the reviewing of the affirmations and the Oyster report.

74. Given the litigation background of this case, in my view the 61.1 hours (which works out to be over 8 ½ days on 7 hours per day) would be excessive in any event on the basis that this calculation excludes the other heads of costs addressed and considered separately in this Ruling. In my view a 14 hour total of hearing preparation time (at leading Counsel's hourly rate of $625) is the reasonable limit.

75. (The charges billed by Harneys are addressed further below where I come to deal with Overseas Counsel.)

Settling of the Final Order of 30 August 2016:

76. Counsel for the Defendant argued that 90% of the final order was agreed between the parties. Mr. White advised that the only dispute which arose was in relation to the effective date of the share of rectification. The question was whether the share rectification should commence on the date of the order or if it should operate retroactively. He said that limited email correspondence passed between the parties in July and August dealing with this issue.

77. Mr. White also emphasized that hearing requested for the settling of the order was estimated to last only one hour. He said this illustrated the narrowness of the disputed issue. In any event the Order was agreed without the need for a hearing as the share transfers were back-dated by agreement to 10 January 2016.

78. In an attempt to justify the reasonableness of the 49 hours charged for the settling of this order, Ms Tornari invited me to look at the chronology of events leading up to the agreed order which came at the eleventh hour and at the doorstep of the Courtroom. Ms Tornari showed me a copy of the Plaintiff's un-used skeleton argument to support the charges for drafting of a skeleton.

79. Ms. Tornari explained the importance of the operative date for the registration of the share-transfers and the impact it would have on the Plaintiff's standing to reissue winding-up proceedings. However, the importance of the decision alone does not explain the volume of work vested in preparation of such a narrow point. At best, the frame of the puzzle has been assembled but the full picture is still missing. In resolving my grave doubt as to the reasonableness of these costs, I must resolve such doubt in favour of the Defendant. For these reasons, I rule that 5 hours of preparation (at leading Counsel's hourly rate of $625) is the maximum allowance appropriate for the preparation of the 30 August 2016 hearing.

Recovery of Costs for Six Counsel:

80. In deciding whether or not to allow the costs of more than one Counsel, I must apply my mind to RSC O. 62 Part II Division I Item 2 (2):

> *"Except in taxations under rule 14[11], 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 circumstances of the case."*

81. This provision came into effect on 1 January 2006, post-dating the ruling delivered by the learned Justice Richard Ground (as he then was) in *Electric Mutual Liability Insurance Company Ltd [1997] Bda LR 24*, a case cited by both parties.

82. Electric Mutual Liability Insurance Company Ltd ('EMLICO') was a Massachusetts registered company, incorporated as a captive mutual insurer of General Electric Company (GE). EMLICO insured GE under a series of general liability policies. GE made substantial claims under the policies for environmental clean-up liabilities. In 1995 EMLICO deregistered in Massachusetts and re-domesticated in Bermuda where it declared itself insolvent and petitioned to be wound-up. This provoked much controversy and allegations of fraud by GE. Litigation in this case continued for years leading up to and beyond a winding up order made on 26 July 1996.

83. The liquidation proceeded in the hands of joint liquidators appointed by the Court. During the course of the liquidation, GE submitted proof of its claim for coverage from EMLICO for a sum in excess of $3billion for sites throughout the United States and Canada.

[11] Rule 14 pertains to costs payable to a trustee or estate representative out of a fund

84. EMLICO's reinsurers interposed in the winding-up proceedings which resulted in further disputes between the reinsurers and the joint liquidators. This was against the background of years of arbitration proceedings which ran parallel to the wind-up proceedings. The arbitration related to the reinsurers' application to rescind the reinsurance contracts on the grounds of fraud in the re-domestication on the basis that the regulators had been deceived as to EMLICO's solvency.[12]

85. At the close of the winding-up proceedings, the reinsurer's argued that the normal costs order should apply where the insolvent company is made to pay the legal costs. However, Ground CJ, in his ruling delivered on 19 February1997, treated the matter as if it were an action between the reinsurers and EMLICO and held that costs should follow the event. The costs of the Petition, which would have been incurred in any event, were ordered to be paid from the estate as per the usual course.

86. EMLICO then queried whether any special direction or certificate was necessary in order for the Registrar, at the anticipated taxation stage, to allow for the use of three Counsel and an additional attorney's attendance in Court.

87. Ground J held at page 195 of his ruling:

"*However, although there is nothing in the rules[13] which requires a certificate to be given for more than one counsel where two or more appear at the hearing, a long established practice has grown up that this should be done, and I do not seek to derogate from that. The effect of such a practice is that it amounts to an indication by the trial Judge to the taxing officer that the case was one which merited two counsel at trial. On a practical basis this is a sensible procedure, as the Judge is well placed to express a view on what was necessary in Court…*

That rationale does not extend to out of Court preparation, where the reasonableness or otherwise of the time spent may be better judged by someone with the Registrar's practical experience. I therefore see no reason to extend the practice of certifying the appropriate number of counsel to cover out of court preparation by other attorneys, and every reason not to.

In my view, therefore, there is no requirement that the Judge certify the appropriateness of the involvement of attorneys other than counsel, and it would be wrong of him to attempt to do so. It is for the Registrar on taxation to allow it or disallow it at the appropriate rate in her discretion in accordance with the rules. In doing so she will simply ask herself the question implicit in any party and party taxation: was the

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12 The three man arbitration panel made a unanimous finding of deceit on this claim. (However, the panel refused to rescind the reinsurance contracts.) After appeals to vacate and set aside the award, the matter was remitted to a judge for reconsideration. Thereafter, it was agreed by the joint liquidators and the reinsurers that the litigation determining the underlying coverage dispute should be transferred to the United States. A dispute on forum then arose as to whether that litigation should take place in Massachusetts or in New York. The Court decided in favour of a Massachusetts Court which was upheld by the Court of Appeal on *forum conveniens* grounds.

13 RSC O. 62 Part II Division I Item 2 (2) came into effect 1 January 2006

work for which the allowance is claimed necessary or proper for the attainment of justice, or for enforcing or defending the rights of the party whose costs are being taxed."

88. This approach was followed in *Golar LNG Ltd v World Nordic SE No. 163 of 2009 (Commercial List) (para 7*): Ground CJ in referring to the rule requiring the Court to certify the appropriateness of two Counsel attending Court, "*I do not think that applies to pre-trial work and I do not think that it operates to debar a team approach to the preparatory work*."

89. In my opinion, it is clear that the requirement for the adjudicator to certify a case as appropriate for more than one Counsel is applicable only to Counsel's appearance in Court. It does not under the rules or previous cases require such a certificate for preparatory work. The assessment of the costs for preparatory work is my function alone as the Taxing Master sitting in the original jurisdiction.

90. That being the case, no certificate was obtained from the Court for the costs approval of more than one Counsel's appearance. For that reason, I disallow the 6 June 2016 charge for Ms. Tornari's attendance to Court. Only leading Counsel (Mark Diel) may recover the costs of attending Court on that date. Notably, Ms Tornari did not pursue her costs for Court attendance.

91. As for the preparatory work component, I find that the tag team approach to a case is generally unobjectionable where each step advances the action in a reasonable and necessary way (eg. drafting of Court documents and correspondence). Generally speaking, the number of Counsel assigned to work on parts of this case is immaterial. However, where more than one Counsel charges duplicitously for tasks which do not advance the action (eg. the reviewing of documents) the merits of an objection to recovery of those costs are likely to increase.

92. In any event, the preferred approach in assessing costs is to look at the particular task and to decide whether the amount of time expended is reasonable. After all, it is possible to find two attorneys collectively billing for a task which was performed more expensively by another attorney performing the same task alone.

Employment of Overseas Counsel:

93. The Plaintiff claimed Harneys' fees as a disbursement. A summary description of the work carried out by Harneys is set out in their fee note in the following terms:

    (i) "… *includes correspondence between the parties in respect of the applications made inclusive of the services of documents on the petition.*" (Ian Mann: 3.5hrs = US$2,790.00 and Deirdre MacNamara 13.7hrs = US$6,516.50 totaling US$9,306.50)

(ii) "*work done on documents to include reviewing the evidence and documents on behalf of the Plaintiff for the purpose of its applications with the Court, taking instructions from and consulting with the client regarding court documents, researching relevant law with a view to drafting originating summons, affirmation in support and other court documents, filing and / or lodging of court documents and bundles, and internal conferences in relation to matters raised in correspondence and/or court documents filed on behalf of the Plaintiff*." (Ian Mann: 21.45hrs = US$18,495.00, Deirdre MacNamara 95.84hrs = US$53,010.50 and Vincent Lee 40.91hrs = US$13,550.00 totaling $85,055.50)

(iii) "*attendance to all correspondence between the client, Counsel, Legal Practitioners and / or Solicitors for the Plaintiff and related third parties which includes review of documents received form the client, considering and advising on the next steps for the client, drafting and issuing documents on behalf of client to third parties such as the other shareholder and nominee shareholder*." (Ian Mann: 4.77hrs = US$4,279.50 and Deirdre MacNamara 21.00hrs = US$12,783.50 totaling $17,063.00)

94. The grand total in profit costs for Harney claimed as a disbursement came to $111,443.00.

95. The Defendant took issue with the employment of foreign Counsel and their near 50% share of the total legal fees claimed. Mr. White argued that this case did not classify as cross-border litigation as there was no actual or threatened litigation outside of Bermuda. Mr. White encouraged me not to attach any importance to the Plaintiff's prior representation by Harneys' Bermuda office[14] and the Plaintiff's likely familiarity with Harney as their firm of choice.

96. Mr. White emphasized that the Plaintiff, being a Japanese company, derived no real benefit from the representation of Hong Kong attorneys, language-wise or other. He opposed all fees claimed were the Hong Kong office advised the Plaintiff on Bermuda law. Mr. White further criticized MDM for over-complicating the fee arrangement by taking instructions directly from both the Japanese Client and the Hong Kong law firm.

97. Ms. Tornari, however, corrected Mr. White in clarifying that MDM never had direct contact with any principals of Capital Partners Securities Ltd. She said that any references to 'Client' on the Bill of Costs for MDM referred to Harneys.

98. Mr. White submitted that the Plaintiff nevertheless bore the burden of showing that the costs were necessary and proper for the attainment of justice. The cases cited on this point were *Electric Mutual Liability Insurance Company Ltd [1997] Bda LR 24, page 196* and *Bateman Engineering Inc v Nelson Gold Corporation Ltd & Ors [1997] Bda LR 48, page 4*. Mr. White also relied on *McCullie v Butler [1962] 2 QB 309*. I have considered each of these cases.

[14] Harney's Bermuda law firm withdrew as Counsel of record to these proceedings due to a conflict of interest.

99. In *Electric Mutual Liability Insurance Company Ltd*, the insolvent company made a request for certification that it was "*necessary and/or proper and/or reasonable for the Company to incur the costs of retaining overseas law firms in England and the United States, with the effect that the Registrar should consider what amounts to allow in respect of the costs of so doing*". Ground CJ held as follows:

"*It is inevitable from Bermuda's position as an offshore business centre that many commercial cases will involve lawyers in other jurisdictions. Overseas lawyer (sic) are not, of course, "attorneys" within the meaning of the Bermuda Rules: see RSC Ord. 1, r.4 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.*

Although the proper basis for such an allowance was not argued in detail before me, my provisional view is that such fees should be allowed as disbursements, following the reasoning of Diplock J, as he then was, in McCullie v Butler [1962] 2 QB 309 at 313. Disbursements are, of course, within the definition of "costs" in Order 62, r. 1(1). They are not provided for within the scale, but I do not think that that in any way inhibits their allowance, as Ord. 65, r. 25(1) expressly contemplates the inclusion of disbursements in all bills of costs submitted for taxation…In any event, notwithstanding Ord. 62, r. 32(2)(a), the Registrar has a general discretion to allow fees not provided for in the scale under Part II, item 97…the only contingency being that the fees are such as the Registrar "thinks proper". Where no fee is specified the Registrar is required to have regard to English practice, and that brings us back to the McCullie v Butler (supra).

I therefore have no doubt that the Registrar has power to allow sums in respect of the charges of overseas lawyers, and that this is not contingent upon any finding that the matter is not a special case, or any direction or certification from the trial Judge. Indeed, on general principle it would be wrong for the trial judge to seek to fetter the Registrar's discretion by such a direction.

In considering what to allow in respect of the costs of overseas lawyers it is for the Registrar to judge them according (to) the criteria established by the applicable basis of taxation. On a party and party taxation that will be whether they were necessary or proper for the attainment of justice. In general, when dealing with the costs of commercial litigation with a foreign element, the Registrar will no doubt approach this element in a taxation realistically, and with the offshore aspects of the litigation firmly in mind. Thus in this case, the Registrar will of course want to take into account the overseas genesis and ramifications of this matter. The applicant should assist her in this:

"To avoid any difficulty for the taxing master in making up his mind on what the proper rate of charge for services is, it seems to me to be very desirable that when an item of this kind is included in the bill of costs there should be a detailed statement of the circumstances which required the services of the foreign lawyer…and that there should be a detailed charge for the individual items." Per Diplock J, McCullie v Butler (supra).

In summary, therefore, I consider that there is no reason in principle why costs incurred by the Company in respect of the services of the London solicitors, Freshfields, and the New York lawyers, Shearman & Sterling, should not be allowed. Whether, in the circumstances of this case, it is appropriate to do so, and in what amount, is a matter for the Registrar in the first instance, and I do not think it proper for me to seek to pre-empt her judgment in that respect."

100. In *Bateman Engineering Inc v Nelson Gold Corp Ltd & Ors [1997] Bda LR 205* Ground CJ held as follows:

"*The question for determination is whether the discretion granted is sufficiently wide to embrace the engagement of foreign attorneys and, if so, to what extent should work done outside the jurisdiction be covered by the order?*

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, specialized knowledge and responsibility required of the attorneys, where the files are kept and prospective witnesses reside..."

101. In this case, MDM were instructed by Harneys. While Harneys' fees are claimed as a disbursement, the reality is that Harneys acted as both MDM's Client and a member of its legal team. Professional Clients, such as this, are most common in the practice of commercial litigation in Bermuda.

102. Paragraph 21 of the MDM's taxation skeleton argument reads as follows:

"*Harneys Hong Kong had the direct relationship with the instructing client for the Plaintiff and instructions to MDM came via Harneys Hong Kong at all times. Harneys Hong Kong have the benefit of being in the same time zone as the client and have been instructed on this matter since July 2015. Harneys Hong Kong had detailed knowledge of the claim before Harneys Bermuda became conflicted and even when Harneys Bermuda were instructed, Harneys Hong Kong was heavily involved in this matter and instructions to the client to Harneys Bermuda came via Harneys Hong Kong.*

Harneys also has a Tokyo office, not far from where the client is based. The Japanese partner whom the client first approached for assistsance splits her time between Hong Kong and Tokyo, although more time is spent in Hong Kong, and accordingly the matter is primarily run out of the Hong Kong office. Nevertheless that Japanese partner can still meet with the client and take instructions when working in Tokyo. Further, due to the fact that there are suitably qualified associates in the Hong Kong office, whose charge out rates are less than that of a partner, and there are Japenese speaking lawyers and support staff based in the Hong Kong office who can assist with the interpretation and translation of documents, that office undertakes the majority of the work. MDM has never had any direct contact with the client and there has never been a duplication of work. Contrary to CHW who have two English speaking director

clients who are sophisticated in the topics in dispute, the client is not as sophisticated in the issues and is not a native English speaker.

Contrary to CHW's suggestion, this was not simply a matter which related to Bermuda law. There is a close nexus with Japan. All of the underlying investors (approximately 1,669) are based in Japan. Questions relating to Japanese regulatory requirements and the existence of a Secondary Market for the shares arose as can be seen from the chronology attached, CHW itself sought advice from Japanese lawyers. Furthermore the issues at the heart of the 2016 Proceedings related to whether AML procedures and checks conducted in Japan were sufficient. These issues required careful consideration and consultation with Japanese lawyers in Harneys Hong Kong.

Significant further time and costs would have been incurred by MDM had Harneys Hong Kong not been instructed. The Plaintiff is based in a completely different time zone which would have made it extremely cumbersome to take instructions from Bermuda.

It is clear that MDM and Harneys Hong Kong have been undertaking different aspects of the work involved…"

103. 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. In my view, the role of overseas Counsel in this case would have most reasonably been confined to the overseas attorney operating as a conduit for instructions and advice passing between Bermuda Counsel and the Japanese Plaintiff. Therefore, the reasonable costs associated with Harneys carrying out those conduit functions are allowed.

104. Harneys' fee note for my assessment contains charges for the following heads of costs, *inter alia,* each of which I find are allowable in principle:

(i) Liaising with Plaintiff re drafting of documents;

(ii) Liaising with Bermuda Counsel re drafting of documents and hearing dates;

(iii) Liaising and advising Plaintiff by email and telephone;

(iv) Reviewing Plaintiff email correspondence and instructions; and

(v) Emailing instructions to Bermuda Counsel

105. However, the below categories of fees are not allowed by overseas Counsel in this case as they are duplicitous and /or excessive for costs to be assessed on a standard basis:

(i) Internal Counsel discussions;

(ii) Reviewing and approving correspondence;

(iii) Reviewing and approving Bermuda Court documents;

(iv) Agreeing strategy for next steps; and

(v) Analysis of the Fund's correspondence and proposals

106. Harneys also assisted in advancing the preparation of this case in areas where I have imposed an overall time limit for the fees to be allowed. MDM and Harneys are jointly subject to those recovery limits. Accordingly, I leave it to the Plaintiffs' lawyers to decide between their selves as to how the recovered costs will be divvied. For example, Harneys participated in the preparation of the Originating Summons. It will, therefore, be a matter for the two teams of lawyers to decide whether or how the 1 hour /$575 sum allowed will be split between them.

107. In respect of the charge for the review of the NAV report as received by Plaintiff, its use was to merely state in the affidavit evidence that the net asset value of the Fund had decreased at a particular dollar value. I do not think that the review of the report to obtain and re-state this information should exceed 30 minutes at the hourly rate of $575.

Hourly Rates for Overseas Counsel:

108. The Defendant suggested that the rates employed by Harneys' lawyers should be proven to be in line with the prevailing 2016 scales in Hong Kong. However, Mr. White's dominant argument was that these hourly rates should be consistent with the guideline rates which I set out in *Practice Direction No.15 of 2016* which in material part reads:

"*…the below revised guideline rates are broad approximations and "post qualification experience" remains distinct from mere length of call:*

1-3 years post qualification experience	*- $300 - $400 per hour*
4-9 years post qualification experience	*- $350 - $500 per hour*
10+years post qualification experience	*- $500 per hour and upwards*"

109. For Counsel who have more than 10 years post qualification experience, the rates allowed in previous cases (post PD 15 of 2016) have followed the below general pattern:

11-15 years post qualification experience	*- $500 - $575 per hour*
16-25 years post qualification experience	*- $575 -$650 per hour*
25+years post qualification experience	*-$650 -$700 per hour*

110. Harney's fee note provides commentary on their hourly rates as follows: "*The hourly rates have been revised in accordance with the annual internal review of Harney Westwood & Reigels (Harneys) effective 1 June 2016 and / or agreement reached between the client and Harneys.*"

111. At paragraph 22 of the Plaintiff's skeleton argument it reads: "*Harneys Hong Kong is not a local Hong Kong firm and it is not regulated by the Hong Kong Law Society. The fee earners are not subject to the scaled charge out rates. Harneys Hong Kong is an offshore law firm (BVI Cayman and Bermuda) and Harneys Hong Kong's hourly rates are entirely consistent with those regimes. Their hourly rates are in line with the Defendant's rates.*"

112. In *Bateman Engineering Inc v Nelson Gold Corp Ltd & Ors [1997] Bda LR 205* Ground CJ held as follows:

> "*... 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 McCullie 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 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."*

113. Having ruled that it was necessary and proper for foreign counsel to be engaged to act as a conduit for advice and instructions to pass between the Plaintiff and Bermuda Counsel, I think it is only fair that the Plaintiff should be permitted to recover the actual costs of all fees related to those conduit steps. However, where Harney participated in case preparation beyond the conduit nature, I think the hourly rate should not exceed the rate allowed for by Ms. Tornari ($575) as these were steps to be actioned by Bermuda Counsel.

114. I think the same result is achieved if I apply the suggested approach of assessing Ian Mann's hourly rate in accordance with the Bermuda taxation guidelines on hourly rates. At 15 years+ post-qualification experience, Mr. Mann's rate ranged between $720 and $900. There was no specification from Ms. Tornari how far beyond the 15 year post-qualification bracket he exceeds. However, it seems unlikely to me that he would describe his years of experience at the 15 year point if he had attained up to 20 years post-qualification. Accordingly, I take the view that the hourly rate which would show

consistence with the Bermuda guideline rates is $575 per hour in any event. (This is the same rate charged by Ms. Tornari. It is noted that no objection was taken by Mr. White to Ms. Tornari's hourly rate at $575).

Comparing the Bill of Costs for Opposing Parties

115. Mr. White stated that CHW's fees, totaling $52,008.07, representing 22.8% fraction of the Plaintiff's total bill. He urged me to consider this contrast in my overall assessment of the Plaintiff's Bill of Costs. This approach to assessing a Bill of Costs is potentially misleading.

116. Generally, a comparative analysis of this kind would not likely take into account the many plausible factors which would explain the difference in fees charged by the opposing parties, such as:

(i) Varying hourly rates and levels of expertise of the attorney preparing the case;

(ii) Differing tasks, instructions and focus by the attorney preparing the case;

(iii) A difference of opinion on the level of importance to be given to various components of the case;

(iv) Unequal tiers of firm resources and support;

(v) Special fee allowances or arrangements between Client and Attorney which may be relevant to a Client's financial position;

(vi) Different Client expectations on the extent of legal services to be rendered and differing levels of case involvement/participation from the Client;

(vii) Differences in Client-type: ease of communication, levels of education, skill, and expertise; and

(viii) Differences in Client sophistication and use of modern forms of communication (eg. telephone and email access and use)

117. Other considerations may also be relevant. For this reason, I think any comparison between the fees of the opposing parties should be generally avoided or done broadly and cautiously when appropriate.

118. In this case, I decline to use this approach to the assessment of the Plaintiff's costs.

A Global Assessment of the Bill of Costs:

119. Part II Division I to Order 62 of the Rules of the Supreme Court 1985 outline general considerations to which the Registrar must have regard. Particularly, I have considered:

- Complexity of the matter and the asserted difficulty and novelty of the issues;
- Skill, specialized knowledge, responsibility and the time and labour required;
- Volume and importance of documentation prepared and perused;
- The importance of the matter to the client;
- Place and circumstances in which the business involved was transacted;
- The amount of money involved; and
- Any other fees and allowances payable to the attorney in the same cause or matter which results in the reduction of work which would otherwise have to have been done.

120. Both parties referred to the judgment of the learned Chief Justice, Ian Kawaley, in *Lightbourne v Thomas [2016] SC (Bda) 80 App (23 August 2016)*. 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 each party

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'…"

121. Effectively, Mr. White's principal argument is that the fee totals charged by the Plaintiff are disproportionate to the circumstances and demands of the case. He largely relies on the short-cut opportunity provided by the Plaintiff's previous preparation of the 20 January 2016 summons for share rectification relief.

122. Ms. Tornari's big-picture perspective was advanced through her assertions of unfair and unnecessary delay tactics on the part of the Defendant. She accused that Defendant of provoking and prolonging the litigation without cause.

123. I do not think it is my function to assess the reasonableness of the Defendant's decision to refuse the registration of the share transfers nor is it my function to penalize the Defendant for having faulted on the 3 month notice period related thereto. This function was amply discharged by the Court which tried the issues and determined the appropriate costs award. My role is merely to assess the reasonableness of the costs incurred by the Plaintiff throughout the proceedings as they actually occurred.

124. In assessing the Plaintiff's fees, I have looked that the bill in whole, applying the proportionality test and the RSC Order 62 factors for my consideration in exercising my discretion. I readily accept that the Plaintiff's recent preparation of the previous summons for share rectification in the aborted winding-up proceedings created a fast-track lane in this action. I take that into consideration in assessing the overall reasonableness and proportionality of the Plaintiff's fees.

125. In my view, the fees claimed for case preparation were excessive which made the overall claim for recovery disproportionate. I am satisfied that the deductions decided by this Ruling bring the overall costs in line with the standard basis of costs which requires that a reasonable amount in respect of all costs reasonably incurred to be allowed. I have resolved all doubts on whether the costs were reasonably incurred in favour of the Defendant.

Conclusion

126. A summary of my decisions in respect of allowable fees is as follows:

(i) The total time for legal research done in aid of interpreting section 50 of the Companies Act should not exceed 3 ½ hours.

(ii) The total time for legal research done in relation to the general principles of share rectification pursuant to section 67 of the Companies Act 1981 should not exceed 3 hours.

(iii) No period of time for legal research on the Originating Summons procedure shall be allowed.

(iv) The total time billed for the drafting and preparation of the Originating Summons shall not exceed 1 hour at the hourly rate of $575.00.

(v) The total time billed for the drafting and preparation of the First Affirmation of M. Saito shall not exceed 5 hours and the procurement of Client instructions related to the preparation of the said affirmation shall not exceed 2 hours.

(vi) The total time billed for the drafting and preparation of the Second Affirmation of M. Saito shall not exceed 3 hours and the procurement of Client instructions related to the preparation of the said affirmation shall not exceed 1 hour.

(vii) The total time billed for the drafting and preparation of the Third Affirmation of M. Saito shall not exceed 6 hours and the procurement of Client instructions related to the preparation of the said affirmation shall not exceed 3 hours.

(viii) The total time billed for hearing preparation of the Originating Summons shall not exceed 14 hours at the non-contentious hourly rate allowed for leading Counsel Mark Diel ($625.00).

(ix) The total time billed for the preparation of the 30 August 2016 hearing shall not exceed 5 hours at the non-contentious hourly rate allowed for leading Counsel Mark Diel ($625.00).

(x) Harneys' actual fees for the following heads of costs are allowed:

- Liaising with Plaintiff re drafting of documents;
- Liaising with Bda Counsel re drafting of documents and hearing dates;
- Liaising and advising Plaintiff by email and telephone;
- Reviewing Plaintiff email correspondence and instructions; and
- Emailing instructions to Bermuda Counsel

(xi) Harneys' fees for the following heads of costs are not allowed:

- Internal Counsel discussions;
- Reviewing and approving correspondence;
- Reviewing and approving Bermuda Court documents;
- Agreeing strategy for next steps; and
- Analysis of the Fund's correspondence and proposals

(xii) Where Harneys assisted in advancing the preparation of the case in areas where I have imposed an overall time limit for the allowable fee, I leave it to the Plaintiffs' lawyers to decide between their selves as to whether or how the recovered costs will be divvied.

(xiii) The total time billed for the review of the NAV report shall not exceed 30 minutes at the hourly rate of $575. (ie. $287.50 allowed).

127. The Court fee of $100 for a contentious taxation pursuant to Schedule to Order 62 R.32 Part I (Item 53) shall be paid by the Defendant.

128. I will hear Counsel, if necessary, on the balance of any outstanding items for my determination or on the terms of the Certificate to be drawn up. Otherwise, an agreed amended Bill of Costs giving effect to this Ruling may be filed for my signature.

129. Unless either party applies within 14 days by letter filed in the Registry to be heard on costs of the taxation hearings or interest on the costs award I make no order as to costs of the taxation and I order that interests at the statutory rate shall accrue from the date of delivery of this Ruling.

Monday 1 May 2017

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SHADE SUBAIR WILLIAMS
REGISTRAR OF THE SUPREME COURT