

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0019

BETWEEN:

[1] LAU MAN SANG, JAMES
[2] LUNG HUNG CHEUK
[3] CHEUNG WING SUM, ALBERT
[4] NGAI HIN KWAN, ALBERT
[5] YEUNG YIU CHONG
[6] ZHANG GUO WEI

Appellants

and

[1] KING BUN LIMITED
[2] KENCY LTD
[3] KAR KWONG DEVELOPMENT LIMITED (TRADING AS
KAI KWONG TRADING COMPANY)
[4] KHI CAPITAL LIMITED
[5] KENTRUE COMPANY LIMITED
[6] HUI PAK KONG (SUIING IN THE NAME AND ON
BEHALF OF THEMSELVES AND ALL OTHER
SHAREHOLDERS IN VANWAY INTERNATIONAL
GROUP LIMITED, EXCEPT THE FIRST AND SECOND
DEFENDANTS)
[7] CHAU CHEUK WAH, ANGUS
[8] VANWAY INTERNATIONAL GROUP LIMITED

Respondents

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Vicki Ann Ellis	Justice of Appeal
The Hon. Mr. Gerard St C Farara	Justice of Appeal [Ag.]

Appearances:

Mr. Olivier Kalfon, with him Mr. Richard Hacker KC, Mr. John Carrington KC, and Ms. Reisa Singh for the Appellants
Mr. James Bailey, with him Mr. Jern-Fei Ng KC, Dr. Alecia Johns and Mr. Jerry Samuel for the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents
No appearances for the 7th and 8th Respondents

2023: February 8;
2024: January 17.

Interlocutory Appeal – Costs – Commercial matters – Discretion to order costs in split trials – Whether the judge has a discretion to order costs at the conclusion of the liability phase of a split trial – Whether the judge erred in exercising his discretion to make the costs order

This is an appeal against an order of Wallbank J in which the judge, upon the determination of the liability phase in a split trial, ordered the appellants to pay the respondents' costs. The background to this appeal begins with the 1st to 6th respondents ("the respondents") in their capacity as minority shareholders in Vanway International Group Limited commencing derivative proceedings against the appellants. Wallbank J made an order for a split trial, deciding that the hearing and determination of the liability issue would be split from the hearing and determination of the issues of relief and quantum.

The liability issue was decided in favour of the respondents and the appellants appealed ("the Substantive Appeal"). They were, however, unsuccessful, the Substantive Appeal being dismissed by this Court on 7th July 2022. Two further appeals were lodged by them against two orders of Wallbank J: the first was an appeal against a decision on a consequential application; and the second was an appeal against the judge's directions made at a case management conference. These appeals have since been consolidated; however, the judgment has not yet been delivered.

On 16th February 2022, Wallbank J awarded costs to the respondents ("the Costs Order") as follows: (1) the appellants pay the respondents' reasonable costs on the trial on liability; (2) the appellants make an interim payment on account of costs to the respondents in the sum of US\$1.9 million; and (3) the appellants pay the respondents' costs on the stay application, the consequential application, the further hearing, and the further costs hearing.

The appellants, being dissatisfied with the Costs Order, filed a Notice of Appeal on 11th March 2022. The appeal raises the following two issues for determination: (1) whether the judge has a discretion to order costs at the conclusion of the liability phase of a split trial; and (2) whether the judge erred in exercising his discretion to make the Costs Order.

Held: dismissing the appeal and affirming the order of the trial judge, and awarding costs to the respondents to be assessed if not agreed within 21 days from the date of this judgment, that:

1. CPR 69B.12 contains the regime for awarding costs in commercial matters. By its clear language, CPR 69B.12 excludes any applicability of CPR 65.12. It states that after a trial or earlier conclusion of the proceedings, the court will determine the entitlement and quantification of costs. A "trial", in its ordinary meaning, means the conclusion by a competent tribunal of questions in issue in legal proceedings,

whether civil or criminal. By that definition of “trial”, the determination of liability by a judge in a split trial is classified as a trial and therefore falls within the ambit of CPR 69B.12. It follows that, when an order for a split trial is made, the judge has a discretion to award costs upon the completion of the liability stage of the proceedings. The judge is not confined to wait until the completion of the quantum and relief stage to award costs.

Part 69B of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** applied; **Friar Truck Ltd et al v International Tax Authority** BVIHCVAP2017/0003 (delivered 12th March 2019, unreported) followed; Daniel Greenberg, **Strouds Judicial Dictionary of Words and Phrases** (7th edn, Sweet and Maxwell 2006) applied; **Shepherds Investments Ltd. V Andrew Walters and others** [2007] EWCA Civ 292 followed; **Langer v McKeown** [2022] 1 WLR 1255 followed.

2. Further and imperatively, complex commercial matters can span the course of many years, it would be incorrect and illogical to limit a judge to wait until the determination of the entire proceedings before awarding costs. Such a proposition runs contrary to the ethos of the CPR and the overriding objective.
3. In order for this Court to interfere with the judge’s decision, it must be shown that the judge erred in principle and as a result, his decision exceeded the generous ambit of reasonable disagreement or was blatantly wrong. The Court is of the view that the judge correctly applied CPR 69B.12, recognising that it could not be read in a vacuum considering its express reference to CPR 64.6. He correctly had regard to the fidelity which must be given to the general principle that costs follow the event. He also considered the overriding objective of the CPR and the court’s case management powers adumbrated in part 26 of the CPR. More specifically, the judge considered relevant matters, namely, that the costs were large, that the appellants spent a lot of time on post-sale matters, and that the conduct of the litigation fell far short of what was proper. Ultimately, the judge found that there was utility in ordering costs at the end of the trial on liability, as it would not be fair to deprive the respondents of their costs at that stage. Having regard to the foregoing, the Court finds that the judge could not be said to have been plainly wrong such that his decision could be regarded as being outside of the generous ambit of the discretion entrusted to him.

Dufour and others v Helenair Corporation Limited and others (1996) 52 WIR 188 followed; **Emmerson International Corp and Another v Viktor Vekselberg** BVIHCMAP2020/0011 (delivered 8th October 2021, unreported) followed; **Ted Baker Plc v AXA Insurance UK Plc** [2012] EWHC 1779 (Comm) considered; **Weill v Mean Fiddler Holdings Ltd** [2003] EWCA Civ 1058 considered.

JUDGMENT

- [1] **MICHEL JA:** This is an appeal against an order of Wallbank J dated 16th February 2022 in which the learned judge, upon the completion and determination of the liability phase in a split trial, ordered the appellants (who were the 1st – 5th and 7th defendants in the court below) to pay the respondents' costs on the liability trial.
- [2] A comprehensive background to this and three related appeals is set out in detail in the judgment of this Court in BVIHCMAP2021/0034¹ which judgment was delivered by Farara JA (Ag.) on 7th July 2023.

Brief Background

- [3] Briefly, on 22nd May 2017 the 1st to 6th respondents ("the respondents") - as minority shareholders in Vanway International Group Limited ("the Company") - commenced derivative proceedings against the appellants in the name of and on behalf of the Company. At a case management conference held on 19th November 2018, Wallbank J ordered that the issue of liability was to be determined at a split trial and that the issues of relief and quantum should be stood over for direction of the trial judge. The trial on liability took place over 22 sitting days, from 19th November 2019 to 6th December 2019 and from 20th July 2020 to 31st July 2020. Closing submissions were heard on 2nd and 3rd February 2021. A written judgment determining the issue of liability in favour of the respondents was delivered on 11th August 2021, with an order on judgment being entered on 6th October 2021.
- [4] The appellants appealed against the decision of the learned judge contained in the written judgment delivered on 11th August 2021 ("the Substantive Appeal"). By judgment dated 7th July 2023, this Court dismissed the Substantive Appeal and awarded costs to the respondents.

¹ Lau Man Sang James et al v King Bun Limited et al BVIHCMAP2021/0034 (delivered 7th July 2023, unreported).

- [5] The appellants also appealed against two further orders of Wallbank J. In the first of these appeals, which was lodged on 24th January 2022, the appellants challenged Wallbank J's order made in respect of a consequential application ("the Consequential Appeal"). The second appeal took issue with the directions made by the learned judge at a hearing on 10th December 2021 ("the Directions Appeal"). These appeals were consolidated by the Court.
- [6] By order dated 16th February 2022 ("the Costs Order"), Wallbank J awarded costs to the respondents in more or less the following terms:
- (1) the 1st to 7th defendants shall pay the claimants' reasonable costs of the trial on liability (paragraph 1 of the Costs Order);
 - (2) the 1st to 7th defendants shall make an interim payment on account of costs to the claimants in the sum of US\$1.9 million (paragraph 2 of the Costs Order); and
 - (3) the 1st to 7th defendants shall pay the claimants' costs of the Stay Application, the Consequential Application, the further Hearing, and the further Costs Hearing (paragraph 3 of the Costs Order).

The Appeal

- [7] On 11th March 2022, the appellants filed their notice of appeal against the Costs Order on two primary grounds of appeal that both place reliance on this Court's determination of the Substantive Appeal and the Consequential and Directions Appeals. Firstly, if the appellants are successful in the Substantive Appeal, and the decision of the learned judge is set aside, the Costs Order should logically be set aside. Secondly, in the event that the appeals against the Consequential Order and the Directions Order are successful and these orders are set aside, it follows that the order made at paragraph 3 of the Costs Order should be set aside.

[8] In addition to the two primary grounds of appeal which are dependent on the Court's disposition in the Substantive Appeal and the Consequential and Directions Appeal, the appellants also sought to impugn the Costs Order by advancing the following grounds of appeal:

(1) The learned judge erred in his construction of rule 69B.12 of the Civil Procedure Rules 2000 ("the CPR") which, on its correct construction, prevents an order being made at the conclusion of the trial on liability that the appellants pay the reasonable costs of the respondents.

(2) Further or in the alternative, the learned judge erred in the exercise of his discretion, by excluding as irrelevant (or of minimal weight) circumstances which are relevant to the question of when a court should exercise its costs powers, and thereby exceeded the generous ambit within which reasonable disagreement is possible.

[9] At the heart of this appeal are the following issues for determination: (1) whether the learned judge has a discretion to order costs at the conclusion of the liability phase of a split trial ("the Construction Issue"); and (2) whether the learned judge erred in the exercise of his discretion in making the Costs Order ("the Discretion Issue").

Appellants' Submissions

[10] The essence of the submissions of learned counsel for the appellant, Mr. Olivier Kalfon, on the construction issue was that the learned judge erred in his construction of rule 69B.12 of the CPR which, on its true construction, prevented a costs order being made on one part of proceedings or the first part of a split trial, until after the conclusion of the proceedings by trial or other means. In other words, the learned judge is precluded from ordering costs at the liability stage of proceedings in a split trial. Mr. Kalfon submitted that the reference to "trial" in the phrase "trial or earlier conclusion of the proceedings" as contained in rule 69B.12, in its plain and natural meaning, means the trial concluding proceedings.

- [11] Mr. Kalfon also submitted that rule 65.12 contemplates a split trial and expressly makes provision for such a situation through its reference to “or part of a matter or proceedings”. As such wording was omitted in rule 69B.12, the overall inference is that a different meaning was intended for the word “trial” in rule 69B.12. He relied on **Bennion, Bailey and Norbury on Statutory Interpretation**² and **Weill v Mean Fiddler Holdings Ltd**³ to undergird this submission.
- [12] Further, Mr. Kalfon argued that the court’s powers under rule 26.1(2)(e) of the CPR, which may give the court jurisdiction to order a split trial, could not override the plain language of rule 69B.12. By specifically choosing to depart from the form of words in rule 65.12, which made provision for costs immediately following the first part of a trial, it must mean that rule 69B.12 is not authority for the making of such an order. Wallbank J, upon noting that he has to consider the overriding objective, did not deliberate on how or why the overriding objective favoured his conclusion.
- [13] It was also Mr. Kalfon’s submission that the learned judge erred in coming to a general proposition that normally costs were to be resolved after each phase, each segment, each application, in interlocutory matters and that there could be no difference between interlocutory matters and substantive trial matters in that regard. That proposition, Mr. Kalfon argued, failed to appreciate the difference between interlocutory matters and substantive trial matters which is created by rule 69B.11. A preliminary issue as a split trial is not the same as the determination of an interlocutory application. Moreover, no assumption about what the court ordering a split trial intended is necessary when construing rule 69B.12. In all the circumstances, the argument runs, the learned judge erred in the construction of rule 69B.12 and the court is constrained to wait until the conclusion of the relief trial or the earlier conclusion of the proceedings to order costs.

² Francis A. R. Bennion, Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis UK 2023) 23.1.

³ [2003] EWCA Civ 1058.

- [14] As an alternative argument, the appellants urged that if indeed the learned judge was correct in his construction of rule 69B.12, the Costs Order ought to be set aside as the learned judge erred in the exercise of his discretion in making the said order. The appellants relied on the cases of **Dufour and Others v Helen Air Corporation Ltd and Others**⁴ and **Emmerson International Corp and Another v Viktor Vekselberg**⁵ to ground that submission and argued that the judge erred by excluding as irrelevant (or of minimal weight) circumstances which were relevant to the question of when the court should exercise its powers to order costs, and thereby exceeded the generous ambit within which reasonable disagreement is possible.
- [15] Mr. Kalfon also relied on **Ted Baker Plc v AXA Insurance UK Plc**⁶ and submitted that the magnitude of the costs is relevant to the question of whether costs should be ordered before the court has determined the related questions of relief and quantum, contrary to the learned judge's opinion. Furthermore, the learned judge erred in finding that the issue of election does not have too much effect on whether or not the costs should be put off until later or now when it is the case that the respondents have sought multiple inconsistent remedies including account for profits, and compensation or damages and need to elect between them. Moreover, this relief has been sought against multiple defendants, and there will be a question of ensuring the election is consistent as between the multiple defendants in order to prevent double recovery. The net effect is that there may well not be a financially significant remedy against particular defendants, depending on what relief is elected for. This is highly material to the question of costs and suggests that the question of costs on the liability trial should be dealt with after the relief trial.

⁴ (1996) 52 WIR 188.

⁵ BVIHCMAP2020/0011 (delivered 8th October 2021, unreported).

⁶ [2012] EWHC 1779 (Comm).

- [16] Finally, Mr. Kalfon argued that the learned judge was wrong in his conclusion that there was no relevance of without prejudice correspondence save as to costs as where it ultimately does transpire that a party to any proceedings has made a perfunctory or ridiculous offer, then this itself is a factor to be assessed (against the party) when costs are ultimately considered. Further, Mr. Kalfon argued that the learned judge's approach is to prejudice the innocent party making a genuine offer, by laying down a blanket rule. The learned judge's decision, he argued, is also inconsistent with the position taken by the editors of the English White Book and the authorities cited therein.

Respondents' Submissions

- [17] In his submissions in response to the appeal, learned counsel for the 1st to 6th respondents, Mr. Jern-Fei Ng KC, accepted that if the Substantive Appeal is successful, with the result being the setting aside of the learned judge's order, then the Costs Order ought to be set aside. However, if the Substantive Appeal fails but the Consequential Appeal and/or the Directions Appeal succeed(s), a more complicated situation emerges.
- [18] Mr. Ng KC submitted that an analysis of the construction issue began with the general rule embodied in rule 64.6(1) that a successful party is ordinarily entitled to costs. He argued that by virtue of rule 64.6(3), the court is permitted to make orders from a certain date relating only to a distinct part of proceedings or only a specified proportion of another person's costs. In a split trial, the court can make an order in relation to the liability phase separately from the quantum phase and it can make an issue-based order in accordance with that rule. Mr. Ng KC submitted that rules 64.6(1), (2) and (3) were applicable in the Commercial Court and thus in a split trial the BVI Commercial Court may conclude that claimants are entitled to their costs of the trial on liability but not with respect to the trial on quantum.
- [19] Mr. Ng argued further that rule 69B.12 did not mandate that there could be no order for costs at the end of the liability phase of a split trial. On this issue, Mr. Ng KC

submitted that there were two ways in which rule 69B.12 could be read sensibly in the context of a split trial. Firstly, rule 69B.12(1) could be read as applicable to each phase which culminates in a trial, such that costs are determined after the trial in each phase. Secondly, is that it is directed at the proceedings that culminate in a single trial, such that the conclusion of the trial would ordinarily bring the proceedings to an end and thus costs must be determined after trial.

[20] It was the respondents' argument that when one considers the general principle that the unsuccessful party pays costs, it would be strange if the court would not be entitled to make an order for costs until the very end of the proceedings as a whole, which in some cases may be several years after. The respondents, however, admitted that in some rare cases, it may be an appropriate exercise of the judge's discretion to defer the question of costs until after the quantum phase of proceedings, such as where nominal damages are claimed.

[21] Mr. Ng KC further argued that both the case management powers of the learned judge pursuant to rule 26.1(2)(w) and the overriding objective of CPR 2000 empower the learned judge to order costs after a liability trial. To buttress the applicability of the latter, learned counsel relied on the decision of English Court of Appeal in **Langer v McKeown**⁷ and argued that the overriding objective favoured such an interpretation because this is an interpretation which favoured the parties making good points and assisting the court in that way.

[22] The respondents acceded to the learned judge's view that the policy consideration for costs awards following individual applications was to deter litigants from running unmeritorious points and generally being less than satisfactory in their conduct of proceedings, and that this was consistent with the fact that the Commercial Court typically makes costs orders following the determination of interlocutory matters. The policy consideration applied equally to interlocutory matters and substantive trial matters.

⁷ [2022] 1 WLR 1255.

[23] On the discretion issue, Mr. Ng KC submitted that the learned trial judge did not err in exercising his discretion to award costs. The learned judge noted that the appellants' conduct and that of their local solicitors fell far short of what was proper. The size of the respondents' costs, the issue of election, and any without prejudice correspondence, save as to costs, had little or no relevance to whether costs should be awarded at the conclusion of the liability stage of the trial.

[24] Mr. Ng KC submitted that although the learned judge did not elaborate on the consideration of the size of the costs, this cut both ways in that the greater the amount of the costs, the greater the burden on the appellants if they have to pay, but also the greater the hardship to the respondents if they were to be left out of pocket. As a result of this, the size of the costs was largely neutral. In relation to the question of election, Mr. Ng KC urged that in a case where none of the remedies available to the respondents would have any financial value, then the question of election might conceivably have some relevance to the learned judge's discretion. This he submitted was the key point in **Weill**, which noted that if "only nominal damages are awarded" this "may constitute grounds for refusing the claimant his costs or his full costs of the issue of liability". The appellants have never suggested that there is any prospect that the respondents will only be entitled to nominal damages. In any event, the argument runs, nothing in the quantum stage will change the finding that the appellants were held to be part of a fraudulent scheme designed to sell the Target Group to the first appellant at liquidation value. Each appellant played a part in injuring the respondents' financial interests, regardless of which of them ultimately foots the bill. Thus, the learned judge was entirely right to find that on the facts of this case, the issue of election has little bearing on when costs should be ordered.

Discussion

Relevant Civil Procedure Rules

[25] As indicated, it was the appellants' submission that the learned judge did not have a discretion to make an order for costs to the respondents upon the completion of

the liability phase of the split trial and he did so upon a misconstruction of rule 69B.12. Though rule 69B.12 is the main rule in contention, this appeal also brings into focus other provisions of the CPR which are set out as follows:

Part 64

“64.1 This Part contains general Rules about costs and the entitlement to costs.”

...

“64.6 (1) Where the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.”

“(2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.

(3) This rule gives the court power in particular to order a person to pay –

- (a) costs from or up to a certain date only;
- (b) costs relating only to a certain distinct part of the proceedings;

or

- (c) only a specified proportion of another person’s costs.

...

(5) In deciding who should be liable to pay costs the court must have regard to all the circumstances.

(6) In particular it must have regard to –

- (a) the conduct of the parties both before and during the proceedings;

(b) the manner in which a party has pursued –

- (i) a particular allegation;
- (ii) a particular issue; or
- (iii) the case;

(c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings;

(d) whether it was reasonable for a party to –

- (i) pursue a particular allegation; and/or
- (ii) raise a particular issue; and

(e) whether the claimant gave reasonable notice of intention to issue a claim.”

Part 65

“65.12(1) This rule applies in cases where costs fall to be assessed in relation to any matter or proceedings, or part of a matter or proceedings, other than a procedural application.

Part 69B

“69B.12 (1) Rule 65.12 does not apply in commercial matters. After trial or earlier conclusion of the proceedings the court will (in the absence of agreement) determine –

- (a) which (if any) party should pay costs to another party; and
- (b) how much in principle (taking into account the provisions of rule 64.6 and any other matter appearing to the court to be relevant in all the circumstances to the incidence of costs in the proceedings) of the costs of the receiving party are to be paid by the paying party.”

Construction Issue

[26] In my view, the interpretation which the appellants sought to place on rule 69B.12 is unmerited. It is common knowledge that a judge has a general discretion to award costs in civil proceedings. This of course is circumscribed by the different costs regimes contained in the CPR. In **Friar Truck Ltd et al v International Tax Authority**⁸ this Court stressed the importance of maintaining separate costs regimes where the CPR so provides. In that case, Michel JA stated that: “whereas there is some overlap between the regimes for the quantification of costs under the CPR, it is not open to a judge to assimilate costs regimes where the CPR expressly requires that a particular regime be utilized”. Although made in the context of quantification of costs, this statement also obtains in the exercise of a discretion to award costs.

[27] CPR 69B regulates trials in commercial proceedings in the BVI, including the making of cost awards for trials. By its clear language, rule 69B.12 excludes any applicability of rule 65.12 (which outlines the general rules for assessment of costs) to

⁸ BVIHCVAP2017/0003 (delivered 12th March 2019, unreported).

commercial proceedings. The effect of this is that rule 69B.12 contains the regime for costs in trials in commercial matters.

[28] In determining this issue, it is also perhaps helpful to define “trial”. In its ordinary meaning, a trial is defined as, “the conclusion, by a competent tribunal, of questions in issue in legal proceedings, whether civil or criminal.”⁹ By this definition, the determination of liability made by a judge in a split trial would be classified as a trial and therefore falls within the ambit of rule 69B.12. Rule 69B.12 therefore authoritatively envisages costs awards upon the completion of a trial, which would include the completion of one phase in a split trial, or where proceedings come to an end before trial. The latter plainly refers to those instances where proceedings come to an end before there has been a determination of the issues by trial. In any event, even if this view is not accepted and one considers that the reference to trial means the completion of both the liability and quantum stages in a split trial, then the rule can be said not to contain any guidance in respect of split trials.

[29] What then is the governing regime? Clearly, the matter of costs in a split trial will remain a matter for the discretion of the judge. In this regard, fidelity must also be given to the general principle that costs follow the event. This Court has in different instances confirmed that a departure from the general rule that “costs follow the event” occurs only in exceptional circumstances.¹⁰

[30] Further, and in any event, though rule 69B.12 contains the regime for trials in commercial proceedings, it cannot be read in vacuo. In fact, the rule goes as far as referring to rule 64.6, thereby including it in its regime. It is also trite that the overriding objective is to be considered when exercising any discretion or interpreting any rule. Thus, consideration must be given to the overriding objective of the CPR 2000 and the wide case management powers under part 26, including the ability to take any other step, give any other direction, or make any other order

⁹ Daniel Greenberg, *Strouds Judicial Dictionary of Words and Phrases* (7th edn, Sweet and Maxwell 2006.)

¹⁰ See *Throne Capable Investment Limited v Agile Star Group Limited* BVIHMAP2020/0014 (delivered 14th January 2021, unreported).

for the purpose of managing the case and furthering the overriding objective. The learned judge was therefore correct in applying these rules in making his determination. If the learned judge is vested with the authority to make an order for a split trial, which is usually done for the purposes of better case management, coupled with the fact that costs normally follow the event, it would be illogical to conclude that the learned judge is prohibited from ordering costs upon the completion of the liability phase in the said split trial.

[31] That costs follow the event is true in the determination of when costs are to be ordered as it is in the determination of who is to pay costs. That being the case, it would be more than passing strange that the court is given authority to award costs in different phases of proceedings by virtue of rule 65.12 (as contended by the appellants), and also to order a split trial, but is prohibited from awarding costs to a successful party following the completion of a trial of liability, and must wait instead until the completion of the entire trial determining both liability and quantum. Consideration must also be given to the fact that commercial litigation, especially complex ones, usually involve lengthy proceedings and can span the course of many years. I agree with counsel for the respondents that in all the circumstances it would be incorrect to hold that a judge is confined to wait until the determination of the entire proceeding before awarding costs. Such a proposition runs contrary to the very ethos of the CPR and the overriding objective.

[32] Further, and in any event, and as was rightly indicated by counsel for the respondents, the authorities relied on by the appellants are clear that a trial judge has a discretion to award costs at the liability stage of a split trial. Although there is no BVI equivalent to rule 69B.12 in the UK CPR, I am of the view that the UK authorities confirm that the wide discretion given to a judge as it pertains to costs awards extends to costs in a split trial. In **Shepherds Investments Ltd. v Andrew Walters and others**,¹¹ Mummery LJ stated that:

¹¹ [2007] EWCA Civ 292.

“The width of the discretion conferred by Part 44 entitles a judge to make a variety of orders where there is a split trial. After the trial on liability is over the judge will often make an immediate order that the party who has lost the issues on liability should pay all or part of the costs of the liability trial, order an inquiry as to damages or account of profits and reserve the costs of the inquiry or account. The judge is not, however, required by the CPR to make an immediate decision on costs at that stage. He has a discretion to put it off until quantum has been finally determined. There may be circumstances in which it is premature to make an order for costs ahead of the findings on an inquiry on damages or an account of profits.”

- [33] Similarly, in **Weill v Fiddler** the England and Wales Court of Appeal had to determine whether the judge erred in refusing the claimant's application for an immediate order for costs in his favour following the conclusion of a trial on liability. The Court held at paragraph 32:

“Whilst in the exercise of his discretion the Judge could have made, **and indeed might well have been expected to make, an immediate order for the payment to the claimant of the costs of the trial of the issue of liability** or at least a proportion of those costs (leaving the question of entitlement to the remainder over until later) with some hesitation I reach the conclusion that on this appeal it is not possible to say that the Judge's decision was clearly one which he was not entitled to reach.” (emphasis mine).

- [34] The cases are clear that when an order for a split trial is made, the learned judge has a discretion to award costs upon the completion of the liability stage of the proceedings and is not confined to wait until the completion of the quantum and relief stage of proceedings to award costs. Indeed, I have examined this issue from different lenses and the ineluctable conclusion is reached in each instance that there exists a power in the court to award costs upon the completion of the liability stage of a split trial. The learned judge did not therefore err in his construction of rule 69B.12 and the appellants' first ground of appeal therefore fails.

Discretion Issue

- [35] Having found that the learned judge had a discretion to award costs to the respondents upon the conclusion of the liability phase in the split trial, this Court

must now consider whether the learned judge erred in the exercise of his discretion. This naturally invokes the established principles of appellate interference.

- [36] In **Dufour and others v Helenair Corporation Limited and others**,¹² Floissac CJ expressed, in what are now the guiding principles of appellate interference with the exercise of judicial discretion, that:

“We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that, as a result of the error or the degree of the error, in principle the trial judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

- [37] More recently, these principles were affirmed in **Emmerson International Corp and Another v Viktor Vekselberg**, in which Webster JA held:

“[13] In short, an appellate court should not interfere with the decision of the trial judge unless the judge erred in principle and as a result his or her decision exceeded the generous ambit of reasonable disagreement or was blatantly wrong....

In the absence of the kind of error contemplated by the dictum of former Chief Justice in *Dufour v Helenair*, the appellate court should not substitute its view for that of the judge because its members would have exercised discretion differently. There is no place for judicial activism when reviewing the exercise of discretion by the trial judge.”

- [38] Accordingly, to justify this Court’s interference with the learned judge’s decision to award costs to the respondents following the completion of the liability phase and before the completion of the quantum phase of the proceedings, the appellants must show that the judge erred in principle and that, as a result of the error, the judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

¹² (1996) 52 WIR 188.

[39] The appellants placed reliance on the decision of the High Court of England in **Ted Baker v AXA Insurance** to support their submissions on this issue and pointed to the factors outlined in that case as relevant to the exercise of the trial judge's discretion. More particularly, they relied on the following passage:

"[28] First, the claimants' costs are very substantial. Second, as stated above, it is common ground that I cannot exclude the possibility that a CPR Part 36 offer has been made and that any such offer might, at the very least, affect the court's discretion in relation to the costs of the preliminary issues. Third, notwithstanding the general desirability of dealing with costs at the conclusion of this part of the case, it seems to me that it would be most unjust to make an order for costs in favour of the claimants in ignorance of any offer that might have been made in circumstances where, if a Part 36 offer has in fact been made and the court were aware of such offer, the court would make a different order. Fourth, the order for a "split trial" was essentially a matter of case management. In my judgment, this should not have an effect on the substantive rights of the parties, or at the very least, the court should, if possible, strive to avoid such a result. In my view, this is consistent with the passage from the judgment of Lightman J in *Weill Mean v Fiddler Holdings* cited above ie that there was much to be said for the view that the incidence of costs should be the same whether or not there has been an order for a split trial. Fifth, although the decision to reserve costs is, of course, of some prejudice to the claimants, in exercising the discretion under CPR part 44.3, it is, in my view, important to bear in mind the interests of the defendants as well as the claimants and, so far as possible, to balance such interests having regard, in particular, to the overriding objective. Here, the claimants constitute a significant trading group and there is no suggestion that the absence of an immediate order for costs and an order for an interim payment in their favour would cause the claimants any irreparable damage. Further, the defendants conceded that if the court decided not to make any immediate order, the judge who determined costs at the end of the case would have the power and discretion to order the defendants to pay interest on any costs payable to the claimants from today's date at such rate as the court thinks just. In particular, the defendants accepted that it would be open for the court in the exercise of its discretion to order interest to be paid at the "ordinary" rate up to the judgment rate ie 8%. In my judgment, such concession goes a long way to reducing if not eliminating the prejudice which might be suffered by the claimants not having the benefit of an immediate order for costs and an interim payment in their favour."

- [40] Many of the authorities which were cited while addressing the construction issue are also relevant in determining the discretion issue. The most important point which can be gleaned from these authorities, however, is that the matter of ordering costs in a split trial is ultimately the decision of the trial judge. Much would depend on the individual circumstances of the case and accordingly, it would be inappropriate to blindly adopt the considerations which were taken into account in those cases to the case at bar.
- [41] In **Weill**, the Court of Appeal considered that where there is a split trial and it is left uncertain until conclusion of the trial on quantum whether the claimant will recover more than nominal damages, it may be proper for the trial judge to defer making any order for the costs of the trial of the issue of liability until the final outcome of the action is known. This was later clarified as not having laid down any general principle. In **Ted Baker**, Eder J stated in relation to **Weill**, that: "However, in my judgment, it would be quite wrong to regard that case as establishing any general rule that in the case of a split trial the court should ordinarily reserve the question of costs until the end of the case..."
- [42] In relation to the judge's holdings on the issue of election, I agree with the respondents' argument. The appellants did not argue before the learned judge that there is any prospect that the respondents would only be entitled to nominal damages, but instead they argued that there may not be a financially significant remedy against particular defendants depending on what relief is elected for.
- [43] Having looked at the record and having considered the submissions of counsel, I am not of the view that there was any error on the part of the learned judge which warrants this Court's interference. The learned judge considered the general rule that costs follow the event and that rule 69B.12 did not mandate that the court must wait until the end of all the trials on all the issues in a particular set of proceedings for a costs order to be made.

- [44] More cogently, Wallbank J considered the arguments which were made by counsel for the appellants that the costs were large, that there was a “without prejudice save-as-to-costs correspondence” on the file and also that the appellants spent a lot of time on post-sale matters. It was well within the judge’s purview to consider that there was no relevant without prejudice correspondence which would affect the costs order. He was of the view that there was utility in ordering costs at the end of the liability phase and not waiting until the end of the quantum phase.
- [45] Due to the finding that the sale of the company was at a gross undervalue, the learned judge was of the view that there may be a financially significant remedy which will be open to the respondents. His guiding point was that in all the circumstances of the case it would not be fair to deprive the respondents of their costs. He considered that the conduct of the litigation fell far short of what was indeed proper and he gave several examples of such conduct. Inasmuch as the learned judge made these determinations, he was entitled to exercise his discretion to award costs to the respondents.
- [46] In all the circumstances of the case, the learned trial judge could not be said to have been so plainly wrong that his decision could be regarded as being outside of the generous ambit of the discretion entrusted to the judge. The second ground of appeal therefore also fails.

Disposition

- [47] For these reasons, I would make the following orders:

(1) The appeal is dismissed and the order of the learned trial judge is affirmed.

- (2) Costs are awarded to the respondents to be assessed by a judge of the commercial court, if not agreed within 21 days from the date of this judgment.

I concur.
Vicki Ann Ellis
Justice of Appeal

I concur.
Gerard St. C Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar