

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHC (COM) 2020/165

BETWEEN:

IsZo CAPITAL LP

Claimant

and

[1] NAM TAI PROPERTY INC

(a company incorporated in the British Virgin Islands)

First Defendant/Ancillary Defendant

[2] GREATER SAIL LIMITED

(a company incorporated in the British Virgin Islands)

Second Defendant

[3] WEST RIDGE INVESTMENT COMPANY LIMITED

(a company incorporated in Hong Kong)

Third Defendant/Ancillary Claimant

IN OPEN COURT

Appearances:

Mr. John Machell, KC with him Mrs. Kimberly Crabbe-Adams and Ms. Jhneil Stewart
for the Ancillary Claimant

Mr. David Chivers, KC with him Miss Arabella di Iorio, Mr. Jack Rivett, and Miss
Jodi-Ann Stephenson for the Ancillary Defendant

2023: March 28;
September 20; 28.

JUDGMENT

- [1] **Mangatal J:** This matter came on for hearing before me on 28 March 2023 pursuant to the order of Jack J (Ag.) dated 8 June 2022 (“**the June Order**”) to assess the loss and damage recoverable by the Applicant, West Ridge Investment Company Limited (“**the Applicant**”) from Nam Tai Property Inc (“**the Company**”), pursuant to a Deed of Indemnity dated 14 December 2020 (“**the Deed**”) and to deal with interest.

Procedural Background

- [2] There have been various related proceedings, and different stages to this matter, but the essential procedural background is as follows.
- [3] The underlying proceedings concern a requisition for the holding of a meeting of the Company’s shareholders and the validity of two private investments in public equity entered into by the Company (“**the Placements**”):
- (1) The allotment of 16,051,219 shares by the Company to Greater Sail Limited (“**Greater Sail**”) for a subscription amount of US\$150 million; and
 - (2) The allotment of 2,603,366 shares to the Applicant for a subscription amount of US \$23,820,798.90 (“**the Subscription**”).
- [4] On 13 October 2020, IsZo Capital LP (“**IsZo**”), a shareholder in the Company, issued proceedings challenging the validity of the Placements and seeking an order requiring the Company to convene a meeting of members.

- [5] On 26 November 2020, the Applicant issued an Ancillary Claim against the Company by which the Applicant sought an indemnity and/or restitution and/or equitable compensation in the event of the Subscription being set aside.
- [6] On 14 December 2020, the issues between the Applicant and the Company were compromised on the terms of the Deed. In one of the Recitals to the Deed, it is set out (at (l)) that “*West Ridge does not wish to participate further in the Proceedings and proposes that the Proceedings against it and the Ancillary Claim be stayed on terms that Nam Tai will indemnify West Ridge*” on the terms set out in the Deed. Also that Nam Tai has agreed to indemnify West Ridge on those terms.
- [7] On 15 December 2020, the parties filed a Tomlin Order by Consent dated 14 December 2020 which provides that the Ancillary Claim be stayed except for the purpose of bringing into effect the terms of the Deed.
- [8] On 3 March 2021, the Commercial Court, Jack J (Ag.), ordered that the allotment of shares to the Applicant and Greater Sail be set aside and that the share register be rectified (“**the First Instance Judgment and Order**”).
- [9] The setting aside of the subscription triggered liability under the Deed. Following the hand down of the First Instance Judgment and Order, the Applicant served demands on the Company for payment of the money due pursuant to the Deed. The Company did not satisfy the demands and the Applicant issued an application for judgment on 17 May 2021 (“**the Judgment Application**”).
- [10] This application was adjourned by the Court pending the outcome of an appeal against the First Instance Judgment and Order. On 4 October 2021, the Court of Appeal upheld the First Instance Judgment and Order and dismissed the appeal.
- [11] Following the decision of the Court of Appeal, the Application was listed to be heard on an urgent basis on 6 December 2021. At the hearing on 6 December 2021, the

Court granted the Company's request for an adjournment. The Application was relisted for 27 January 2022 but the Company requested a further adjournment so it could challenge the validity of the Deed.

[12] By order dated 27 January 2022, Jack J (Ag.) directed the Company to file and serve Points of Claim challenging liability under the Deed by no later than Friday 25 February 2022. On 25 February 2022, the Company filed a Defence and Counter-claim. Following a hearing on 16 March 2022, Jack J (Ag.) gave judgment on 7 April 2022 ("**the Judgment**") upholding the validity of the Deed. On 8 June 2022, the Court entered judgment against the Company for the subscription amount ("**the Subscription Sum**") and ordered that the issues of costs and expenses (together, "**Costs**") and interest be resolved at a damages assessment hearing. The Company appealed against the Judgment.

[13] The appeal was heard on 10 February 2023, with judgment reserved. Prior to the hearing before me, the Company had invited the Applicant to agree to adjourn the hearing until after the parties had received judgment in that appeal. This was on the basis that, in the Company's view, if the appeal were allowed, the time and costs involved in this hearing would have been wasted. The Applicant rejected that proposal.

Procedural Points

[14] I enquired about this point in Court and Mr. Machell KC's position was that the Company had not made an application before me for an adjournment, and that in any event, even were the appeal to succeed, the points raised in this hearing and the application before me would nevertheless need to be resolved. Further, that the Applicant would not wish to have this application delayed. I decided that the assessment should proceed.

[15] As it turns out, before I was able to deal with my ruling in this matter, on 27 July 2023 the Court of Appeal delivered its reserved judgment, dismissing the Appeal, with costs to the Applicant to be assessed by the court below unless agreed within 21 days.

[16] It should be noted that references to the CPR here are to the ECSC CPR 2000, which were the Rules applicable at the time of the hearing. Part 75 of the CPR 2023, expressly seems to preserve the applicability of the 2000 Rules. In any event there has been no change / material change to the terms of either Rule 65.2(1) or Rule 8.6(4) and (5), or to any of the other CPR Rules referred to in this judgment.

Issues to be Determined

[17] The issues at this hearing are essentially as follows:

- (1) Whether the Company should be ordered to pay interest on the Subscription Sum and/or Costs pursuant to (a) the Court's inherent jurisdiction or (b) as damages, and, if so, at what rate and from what date or dates. This issue arises from the fact that on 8 June 2022, judgment was entered on the Judgment Application in favour of the Applicant against the Company for the Subscription Sum; and
- (2) The quantum of Costs payable by the Applicant to the Company pursuant to the Deed. In that regard, this will require the Court to construe the terms of the Deed. The main dispute is whether the burden is on the Company to establish unreasonableness, or whether the burden is on the Applicant to prove reasonableness. There is also a very important dispute as to the interplay between the Deed and the CPR Rules on costs. The Company has raised a number of objections to a large proportion of the Costs claimed. These objections can be succinctly grouped into the following bases (referred to in the Company's skeleton argument as "headline points"):

- (a) the costs claimed by the Applicant are disproportionate, such that costs should only be allowed insofar as the Applicant satisfies the Court that they were both necessary and reasonable;
- (b) the Applicant's claim for the costs of the hearing on 7 June 2021 should be refused, in accordance with paragraph 3 of the Order of Jack J (Ag.) dated 28 June 2021;
- (c) the Applicant's claim for the costs of its amendments to the Judgment Application and for making its application to amend the Judgment Application should be refused, pursuant to paragraph 3 of the Order of Jack J dated 3rd November 2022;
- (d) The costs of related proceedings are irrecoverable;
- (e) Excessive number of fee earners, duplication of costs, excessive costs and charge-out rates;
- (f) Administrative and unnecessary costs; and
- (g) Counsel's Fee Notes, Sidley Austin's Fees and Harneys' Professional Fees and Disbursements.

[18] It was conceded by the Applicant that its claim regarding the costs of the Company's appeal against the decision of Jack J (Ag.) should be dealt with after the decision of the Court of Appeal and dealt with separately. As the decision of the Court of Appeal has now been delivered, I would ask the parties to discuss and deal with this issue themselves, based upon my rulings on other relevant headline points. The parties need only revert to the Court if they are unable to work those costs out. This is in the interests of ensuring a proper allocation of the Court's resources, and in acknowledgement of the parties' duty to cooperate with the Court in fulfilling the overriding objective of dealing with cases justly.

Issue (1): Interest

The law on Pre-Judgment Interest

[19] It is settled law that the BVI Court has jurisdiction to award pre-judgment interest on general damages at a rate it considers appropriate from the date of the loss to the date of judgment. Interest payable under the Court's jurisdiction is awarded to compensate claimants for being kept out of money which ought to have been paid to them.

The Applicant's Arguments

[20] The Applicant suggests that interest should be awarded at the rate at which persons with the general attributes of the Applicant could be taken to have borrowed, which has been taken to be one percent above the base lending rate. This follows a long line of cases, such as ***Tate & Lyle Food and Distribution Ltd. v Greater London Council***.¹ Learned Counsel for the Applicant referred the Court to the decision of the Court of Appeal of England and Wales, per Hamblen LJ (as he then was) in ***Carrasco v Johnson***.²

[21] The Applicant suggests that the U.S. Prime Lending Rate should be used, and that interest at 5% is an appropriate rate in the circumstances.

[22] It is noted that originally, and up to and including in the Applicant's skeleton argument, the Applicant was claiming compound interest. However, Mr. Machell KC indicated that that claim is no longer being pursued, and thus the claim for interest as damages also falls away.

[23] Learned Counsel points out that previously the Company had challenged the Applicant's reliance on prime rates adduced in the Second Witness Statement of Romane Duncan, and the First Affidavit of Jhneil Stewart. However, on 3 November 2022 Jack J (Ag.) made an order that the Court will take judicial notice of interest

¹ [1982] 1 WLR 149.

² [2018] EWCA Civ 87.

rates that are publicly available. Thus, it is common ground that the rates provided do not require further proof.

[24] In respect of the date from which interest should run, Mr. Machell KC suggests that there are, (of course subject to the Court retaining a discretion as to the date from which interest should run), two main contenders. One is 5 October 2020, being the date on which the Subscription Sum was paid. The other is 12 March 2021, being five business days after demand was made, as provided for in Clause 6 of the Deed. Learned Counsel submits that the most appropriate rate in respect of the Subscription Sum is 5 October 2020.

[25] As regards the claim for loss and damage, learned Counsel submits that the two contenders are still apposite. However, he candidly observed that costs were incurred over a period of time. He suggests a pragmatic approach could be taken by the Court and to therefore take a starting point mid-way between the two dates. The date suggested was 1 December 2021.

The Company's Arguments

[26] The Company submits that the Applicant's claim for interest is defective for the following two reasons:

- (1) The Applicant has failed to comply with the procedural requirements for a claim for interest set out in Rule 8.6 (4) and (5) of the CPR; and
- (2) The Applicant claims interest on the Subscription Sum from 5 October 2020, which, learned Counsel Mr. Chivers KC in his skeleton argument argued, pre-dates (by approximately 17 months) the earliest date upon which it became entitled to that sum, i.e. 12 March 2021.

[27] Mr. Chivers KC submits that the claim to the Subscription Sum and Costs is made under the Deed. Reference was made to paragraph 12 of the grounds of the Judgment Application.

[28] In the case of the Subscription Sum, the Applicant, it was pointed out, first requested payment on 5th March 2021-Thorp 1/23, and Harneys' letter of 5 March 2021. Therefore, the submission continues, according to the Applicant's own evidence, the Company only became obliged to make payment on 12 March 2021. In the circumstances, the earliest date from which pre-judgment interest on the Subscription Sum could start to run is 13 March 2021, it was submitted, not 5 October 2020.

[29] It was submitted that the same analysis applies in respect of the Costs claimed by the Applicant. The argument continues that, in so far as those sums are claimed pursuant to the Deed, interest could only run from the date by which the Company became obliged to make payment (i.e. 5 business days after a request for payment).

[30] As regards the rate, it was submitted that the Applicant is not a commercial entity that has to borrow money to carry on its business and that there is no evidence to suggest that it is any more than a special purpose vehicle whose business was limited to holding the shares in the Company-Cricenti 3. During oral submissions, once it was clear that the Applicant had abandoned its claim for compound interest, the Company submitted that where the Court has evidence of the actual rate at which the relevant party can borrow, that should be the rate to be applied. Reference was made to the evidence at Duncan 2, paragraph 8, that there are intra company loans within the Group and where it is stated that Haitong charges its subsidiaries, including the Applicant, interest at the rate of 2.9% per annum for such loans.

Post- Judgment Interest

[31] The Company accepts that, pursuant to section 7 of the Judgments Act, post-judgment interest accrues at the rate of 5% per annum on a judgment debt from the entering of the judgment to the date of payment and that interest runs from the 8 June 2022 Order. It is common ground that, pursuant to the incipitur rule, interest

will run from the date of the 8 June 2022 Order on any quantum awarded by the Court at this hearing in respect of the claim for loss and damage, liability having been established for costs pursuant to the 8 June Order.

Issue (2): The quantum of the Costs payable by the Company to the Applicant pursuant to the Deed

The Applicant's Arguments

[32] Mr. Machell KC pointed out that the ECSC CPR, unlike the CPR in England and Wales, or for example, the Cayman Islands, do not refer to costs on an indemnity basis (nor, indeed, do they refer to costs on a standard basis). He further argued that it is irrelevant that in this jurisdiction there is no express basis for the particular assessment. It was learned Counsel's submission that the Court will therefore have to "fashion a judge-made Rule" in relation to the situation where there is a contractual right to costs under an indemnity.

[33] It was argued that, as a matter of principle, where there is a contractual right to costs under an indemnity, the Court should give effect to the parties' contractual indemnities. However, the submission continued, the Court retains a discretion to assess whether the costs claimed were unreasonably incurred or are unreasonable in amount, provided that the indemnifier has objected on either or both of these grounds.

[34] Reference was made to the decision in **Chaplain Ltd. v. Kumari**³, where Arden LJ (as she then was), referred to the leading and oft-cited decisions in **Gomba Holdings Ltd. v Minorities Finance Ltd. and others (No. 2)**⁴ and **Church Commissioners v. Ibrahim**⁵ At paragraphs [33] – [35] of **Chaplain**, Arden LJ discussed the relevant issues.

³ [2015] EWCA Civ 798.

⁴ [1993] Ch 171.

⁵ [1997] E.G.L.R. 13.

[35] The Applicant's primary position is that, in deciding whether to make an order in the present case, the Court is not exercising its usual discretion pursuant to the CPR, rather it is exercising its discretion in the context of what has been agreed between the parties, i.e. the Deed.

[36] Reference was made to paragraph [18] of **Chaplain**, where Arden LJ opined as follows:

"It is common ground that the judge exercised the power to determine costs under the lease and not simply the court's power under the CPR to award costs."

[37] It was submitted that the Court will therefore be required to construe the language of the indemnity clauses when making its determination.

[38] In relation to quantum, Mr. Machell KC posited that the applicable principles are as set out in **Gomba**, namely, that the objector must prove a clear case of unreasonableness. If there are any doubts as to whether the challenged item is reasonable, the costs should be resolved in favour of the indemnitee by virtue of the fact that the costs being claimed are pursuant to a contractual indemnity.

[39] It follows, according to Mr. Machell KC, that this is therefore not the "usual position" of an assessment of costs in the context of assessing party and party costs of proceedings, i.e. where the burden of proof usually rests on the applicant to prove the reasonableness of the costs claimed.

[40] As to the appropriate approach for the Court to adopt, it was submitted that this ought to be that the Applicant is entitled to an indemnity for its costs unless the Court is satisfied that the item or items are unreasonable, with the burden being on the Company to demonstrate unreasonableness. Learned Counsel submitted that it is the contractual entitlement to indemnity which passes the burden to the paying

party, and that in other words, this Court should find that the burden is on the paying party in the same way as it would be where an order for indemnity costs is made (in jurisdictions that expressly provide for such an order).

[41] Covering all of his bases, learned Counsel submitted that, if, contrary to that primary position, the Court considers that the appropriate approach is by way of the usual costs assessment, then the Court is required to consider a two-stage test as outlined in the oft-cited decision in **Lownds v Home Office** [2002] EWCA Civ 365.

[42] Mr. Machell KC went on to argue that, on either approach, the Court is entitled to use a broad-brush approach as it is a “*sensible and practical means to complete the exercise*”.

[43] Applying the law to the facts of the case, learned Counsel submitted that, pursuant to sub-clauses 2.1 and 2.2, the Applicant is contractually entitled to an indemnity in respect of its costs (in full), damages, claims, losses and associated expenses and any other liability whatsoever that it incurs in relation to (i) the purchase of the shares by the Subscription, (ii) its consideration for the shares, (iii) Sidley Austin’s Fees; (iv) the First Instance Proceedings, (v) any step taken or to be taken as a result of the First Instance Proceedings, (vi) Harneys’ fees, and (vii) costs incurred by the Applicant for compliance with any order in relation to the treatment of the shares.

[44] In relation to the Company’s objections to a substantial proportion of the costs claimed, Mr. Machell KC addressed these points as follows:

(1) The costs claimed by the Applicant are disproportionate, such that costs should only be allowed insofar as the Applicant satisfies the Court that they were both necessary and reasonable.

It was submitted that, in keeping with its primary argument as to the approach that the Court should take on the facts of this case, the two-step approach taken in

Lownds, and as adopted in the BVI decision in *Andriy Malitskiy v Oledo Petroleum Ltd* BVIHCMA 2013/0006, is inapplicable to cases where by reason of an indemnity agreement, the burden is on the paying party. He argued that it was clear that in England, the two-stage approach is only appropriate where costs are dealt with on the standard basis, where the burden is on the receiving party.

In relation to the question of proportionality which is considered in the first stage of the two-stage approach, Mr. Machell KC submitted that proportionality is irrelevant, as it is a claim under an indemnity. However, if wrong on that point, learned King's Counsel said that in any event, the claim for costs is not disproportionate, it being a claim for costs of just over US \$1.2 Million in respect of a claim of over US\$23 Million. He submitted that this matter arises within the ambits of complex international litigation, playing out in various countries.

(2) The Applicant's claim for the costs of the hearing on 7 June 2021 should be refused, in accordance with paragraph 3 of the Order of Jack J (Ag.) dated 28 June 2021.

(3) The Applicant's claim for the costs of its amendments to the Judgment Application and for making its application to amend the Judgment Application should be refused, pursuant to paragraph 3 of the Order of Jack J (Ag.) dated 3 November 2022.

[45] Mr. Machell KC submitted that the previous costs orders made by Jack J (Ag.) were based upon the ordinary costs rules, and not the indemnity, and therefore this does not prevent the Court from recognizing the indemnity, and ordering costs based upon those contractual rights. Reference was made to *Gomba* at pages 194 H -195 A.

(4) Whether the costs of related proceedings are irrecoverable.

[46] Mr. Machell KC's over-arching submission on this issue was that this objection by the Company is misconceived as the Court has jurisdiction to order an indemnifier to pay costs of related proceedings where the indemnity clause is sufficiently broad to cover these costs. It was submitted that this obtains in the instant case. Reference

was made specifically to the Greater Sail related proceedings as well as the Hong Kong related proceedings. He further argued that this was not simply bilateral litigation between the Applicant and the Company.

(5) Excessive number of fee earners, duplication of costs, excessive costs and charge-out rates

[47] In relation to the objections about the number of fee earners, it was submitted that it is not unusual for a team of attorneys to work on a commercial matter of this nature and to substitute attorneys where the designated team members are unavailable. Reference was also made to the decision in ***Gudavadze v Carlina Overseas Corporation***⁶ where Leon J stated that it may be appropriate “*for several persons to review a draft document, each for different purposes and with different perspectives*”.

[48] As it relates to Harneys’ charge-out rates, reference was made to the decision in ***Dammerman v Lanyon Bowdler LLP*** [2017] EWCA Civ 269, as acknowledging the proposition that reasonableness is highly fact sensitive. The argument continued that the reasonableness of a law firm’s charge out rate is fact sensitive and subjective. It was pointed out that the Company has adduced no evidence of comparative rates or ‘reasonable rates’ and has simply offered a rate. It was submitted that there is no merit in this argument.

[49] In relation to Leading Counsel’s fees, there has ultimately been no objection. In relation to Sidley Austin’s fees and Harneys’ professional fees and disbursements it was asserted that Clause 2.1.1 of the Deed makes clear that these costs are recoverable. In response to the Company’s claim that no evidence had been adduced as to the amount or breakdown of the Sidley Austin fees, reference was made to Thorp 1 where a bill of costs of the fees charged by Sidley Austin can be found.

⁶ BVIHC (Com) 2012/0011.

The Quantum of Costs Claimed

[50] As I understand it, the parties in the main wish me to decide the points of principle, and the seven headline points, and they will then flesh out and finalize the figures in accordance with my rulings. The Company has a position in relation to items other than the headline points, which I will discuss below.

[51] However, in any event, subject to adjustments, the following is the breakdown of the Applicant's total Costs claim in the sum of US \$1,295,803.05:

- (1) The fees and disbursements of Harneys up to 7 April 2022 in the amount of US\$904,933.58;
- (2) The fees and disbursements of Sidley Austin as Counsel to the Applicant in respect of the purchase of its shares in the amount of US\$12, 875.32;
- (3) The fees and disbursements of Harneys from 8 April to 24 June 2022 in the amount of US \$121,877.00;
- (4) The fees and disbursements of Harneys from 25 June 2022 to 7 March 2023 in the amount of US\$181,591.45;
- (5) Harneys' anticipated fees and disbursements for preparing and attending the damages assessment hearing in the amount of US\$38,448.00; and
- (6) Counsel's brief fee for preparing and attending the damages assessment hearing in the amount of US\$36,077.71.

[52] The Applicant points out in its skeleton argument that the Company has made an offer to pay only US\$424,099.00 of Harneys' costs.

The Company's Arguments

[53] Mr. Chivers KC, unsurprisingly, also referred to the decision in **Gomba**. He referred to Clause 2.1, and submitted that the first question is therefore whether the sums claimed by the Applicant fall within the scope of clause 2.1 of the Deed. This in turn, continues learned Counsel, depends upon the proper construction of that provision.

Reference was made to the well-known decision in **Wood v Capita Insurance Services Ltd.**⁷ as to the proper approach to the construction of contracts.

[54] It was further posited that it is well established that contracts of indemnity are to be construed strictly in favour of the indemnifier, i.e. in this case, the Company. Reference was made to the work of Andrews and Millett, *Law of Guarantees* (7th Edition: 2015), at paragraph 4-003.

[55] Learned Counsel argued that, on the proper construction of clause 2.1 of the Deed, it is clear that the costs for which the Company may be held liable are those which would be allowed by the Court in the exercise of its discretion under CPR, r.65.2(1), which provides as follows:

“If the court has a discretion as to the amount of costs to be allowed to a party, the sum to be allowed is-

- (a) the amount that the court deems to be reasonable were the work to be carried out by a legal practitioner of reasonable competence; and*
- (b) which appears to the court to be fair both to the person paying and the person receiving such costs.”*

[56] Mr. Chivers KC goes on to proffer that the reasons why this is the proper construction of clause 2.1 (or why alternatively there must be an implied term that the Indemnity only extends to costs allowable under CPR r.65.2(1)) are as follows:

- (1) If, instead of the parties staying the litigation on the terms of the Deed, the Company had simply consented to judgment on the Ancillary Claim, the Applicant’s entitlement to costs would have been subject to the discretion of the Court, including as to the quantification of those costs under CPR 65.2(1); and
- (2) By entering into the Deed, the Company essentially consented to the principal relief sought by the Applicant in its Ancillary Claim, which was

⁷ [2017] A.C. 1173.

repayment of the Subscription Sum. In adopting this approach, the parties cannot have intended that the Applicant would be entitled to recover more of its costs than it would have been able to do if the Company had simply consented to judgment on the Ancillary Claim. To hold otherwise would defy business common sense.

[57] It was submitted that this suggested construction is consistent with the other terms of the Deed, in particular Clause 6 (see paragraph 80 below).

[58] The terms of the Indemnity thus, asserts learned Counsel, expressly recognise the role of the Court in determining the quantum of costs recoverable by the Applicant.

[59] It was submitted that, furthermore, the Company plainly cannot be liable to the Applicant for more than the Applicant is liable to Harneys. Learned Counsel observed that the Applicant has not disclosed Harneys' terms of engagement, but it is to be assumed that it was open to the Applicant to challenge Harneys' fees if they were unreasonable (eg. if Harneys used an excessive number of fee earners). Accordingly, even if the Court were to find against the Company on the issues of construction identified above, it would still not be open to the Applicant to claim unreasonable fees from the Company under the terms of the Deed. On the contrary, submits the Company, if and to the extent that the Applicant failed to challenge Harneys' fees, that is a loss arising out of the Applicant's own fault and/or does not relate to steps which the Applicant was required to take as a result of the First Instance Proceedings, and therefore not a loss which it can pass on to the Company.

[60] Mr. Chivers KC then referred to what is described in the skeleton argument as "*the Court's approach to the assessment of costs under CPR, r.65.2*". He referred to the decision of the ECSC in **Andriy Malitskiy v Oledo Petroleum**⁸, which in turn referred to and applied the guidelines in **Lownds v Home Office**. At paragraph [8],

⁸ [2014] BVIHCMAP2013/0006

Mitchell J.A. adopted the following approach to the assessment of costs in the case before the Court:

“Following the guidelines in Lownds v Home Office Practice Note, I apply a two-stage approach in assessing these costs. First I shall assess whether, on a global approach, the costs claimed are proportionate, having regard to any relevant considerations identified in the Civil Procedure Rules 2000. If I conclude that the costs claimed are not, overall, disproportionate, I shall satisfy myself that each item was reasonably incurred and the cost of that item was reasonable. In performing this exercise, I must resolve any doubt as to whether any item was reasonably incurred, or was reasonable in amount, in favour of the paying party, the appellants.”

[61] It was submitted that if the Court finds at the global stage that the costs are disproportionate, the receiving party, i.e. the Applicant, will be required at the item-by-item stage to satisfy the Court that each item of costs was necessarily incurred and, if so, that the amount charged is therefore reasonable. However, alternatively, it was suggested that if the costs are disproportionate, it appears that the Court may take a “broad -brush” approach and simply knock a quarter off the costs incurred – as per the decision of Jack J (Ag.) in ***Pacific Fertility Institutes Holding Co. Ltd. v Pacific Fertility Institutes (HK) Holding Co. Ltd.***⁹

[62] Learned Counsel submitted that the costs claimed by the Applicant are disproportionate, such that costs should only be allowed insofar as the Applicant satisfies the Court that they were both necessary and reasonable. The Court was also referred to CPR, Rule 65.2(3) in relation to the question of reasonableness.

The Headline Points

⁹ [2020] BVIHC (COM) 142 of 2019, at [11].

(1) The costs claimed by the Applicant are disproportionate, such that costs should only be allowed insofar as the Applicant satisfies the Court that they were both necessary and reasonable.

[63] It was posited that it is readily apparent that the Applicant's claim for costs is not proportionate. Many points have been set out in detail in the Company's skeleton argument, but it is not necessary for me to set them out here, though I have considered their contents thoroughly. In summary, the Company's position was that neither the nature of the Applicant's involvement in the First Instance Proceedings, nor the hearings which it has attended, nor the evidence which it has filed, can possibly justify the level of fees charged by Harneys and the involvement of 28 fee-earners (including four partners).

(2) The Applicant's claim for the costs of the hearing on 7 June 2021 should be refused, in accordance with paragraph 3 of the Order of Jack J (Ag.) dated 28 June 2021.

(3) The Applicant's claim for the costs of its amendments to the Judgment Application and for making its application to amend the Judgment Application should be refused, pursuant to paragraph 3 of the Order of Jack J (Ag.) dated 3 November 2022.

[64] In relation to (2) Learned Counsel commented that it appears that the Applicant is claiming costs of the first hearing of the Judgment Application on 7 June 2021. However, he continues, Jack J (Ag.) directed the Applicant to pay the costs of the Company, IsZo and Greater Sail, in respect of that hearing-paragraph 3 of the Order of Jack J (Ag.) dated 28 June 2021. It was submitted that there was no appeal against that order, and accordingly the Applicant is not now entitled to claim those costs against the Company. Reference was made to **Gomba** at page 194 D-E.

[65] In relation to (3), the point made was that the Applicant also appeared to be making a claim for the costs of making its application for permission to amend the Judgment Application. However, learned Counsel sought to draw the Court's attention to paragraph 3 of the Order of Jack J (Ag.) dated 3 November 2022, where he directed

that the Applicant pay its own costs of its amendments to the Judgment Application and the making of its application for permission to amend the Judgment Application.

[66] The submission went further, and it is asserted that the Applicant ought to identify and strip out from its claim any costs covered by these costs orders, the incidence of which is *res judicata* between the parties.

[67] The alternative position advanced by Mr. Chivers KC is that the Applicant is not entitled to recover the costs of the hearing on 7 June 2021 or 3 November 2022 (insofar as it was ordered to bear its own costs), because they were self-inflicted. Necessarily, therefore, goes the argument, the Applicant's own conduct is the cause of its loss and/or the Applicant failed to mitigate its loss- in the case of the June 2021 hearing, by insisting upon a hearing which could and should have been avoided, and in the case of its amendments, by applying to amend the Judgment Application to introduce a claim for interest which it could and should have included in the Judgment Application when issued.

(4) The costs of related proceedings are irrecoverable.

[68] There are a number of disputed costs that fall under this category, but I agree with learned Counsel Mr. Machell KC's submission, at paragraph 53 of the Applicant's skeleton argument, that to extract every single disputed cost in this category would not be a good use of judicial time. However, I have looked at them, as suggested by learned Counsel Mr. Chivers KC in the preliminary paragraph of his skeleton argument, by skimming through them. There are objections taken to certain items relating to, for example considering information and pleadings in relation to the Hong Kong proceedings, and also in relation to emails about the Greater Sail application.

(5) Excessive number of fee earners, duplication of costs excessive costs and charge-out rates.

[69] It is to this issue that a substantial part of the Company's submission is directed. One of the main complaints is directed at the number of fee earners, and also the number of senior fee-earners.

[70] At paragraph 70 of its skeleton argument the Company suggests what in its view would have been an appropriate number of fee earners at various stages of the matter.

[71] At paragraph 71 the Company also proposes what in its opinion would be reasonable charge-out rates, and makes reference to the decision of Jack J (Ag.) in ***Willock v Hickinbottom***.¹⁰

(6) Administrative and unnecessary costs.

[72] The Company claims that the Applicant's claim contains a number of items that relate to administrative work for which Harneys has sought to charge it. One example given was, where part of the work invoiced for Andrew Thorp on 18 October 2020 included "access to portal". Mr. Chivers referred to the decision of Jack J (Ag.) in ***In the Matter of Summer Fame Ltd (in Liquidation)***¹¹ at paragraph [8], for the proposition that administrative work is ordinarily an overhead of the firm and not something which can be charged separately.

(7) Counsel's Fee Notes, Sidley Austin Fees and Harneys Professional Fees and Disbursements.

[73] The Harneys fees have already been dealt with under a different head. In relation to the Sidley Austin fees, the position taken is that no evidence as to the breakdown has been provided. As I understand it, King's Counsel's fees have now been agreed.

¹⁰ [2021] BVIHCV 2021/0210.

¹¹ BVIHC(COM) 2020/0055.

DISCUSSION AND ANALYSIS

INTEREST

Pre-Judgment Interest

[74] As stated earlier, the parties are agreed that post-judgment interest will run at the rate of 5% per annum from 8 June 2022, based upon the incipitur rule. I therefore first turn to a consideration of the matter of pre-judgment interest. I reject the Company's argument that there is a procedural defect in the claim to interest by virtue of not complying with Rule 8.6 of the CPR. That argument is a technical one, and I entirely accept the Applicant's argument that CPR 8.6 does not apply to the Notice of Application for judgment pursuant to a Tomlin Order in the circumstances of this case. Further, I accept that sufficient was stated in the Notice of Application to conform with procedural fairness, and that no practical purpose would have been served by stating the precise quantum (on the Subscription Sum) before the rate was determined by the Court.

[75] In relation to the date from which the pre-judgment interest should run, as regards the Subscription Sum, I accept Mr. Chivers KC's submission that the claim to the Subscription Sum, was made under the Deed. It seems to me that the Applicant's rights with regard to interest for being kept out of its money based on its claim arises from its rights under the Deed. In my judgment the earliest date from which the entitlement to interest could run in those circumstances, is from 5 days after the request by the Applicant for payment, i.e. from 12 March 2021. The date from which interest runs is a matter in any event within the discretion of the Court. However, in the circumstances that appears to me to be a fair date from which interest should run given the basis on which the Applicant has mounted its claim, i.e. under the Deed.

[76] As regards the date from which interest on the costs should run, I find Mr. Machell KC's suggestion as to a mid-point start date between 12 March 2021 and 8 June 2022, eminently practical, and I award pre-judgment interest from 1 December 2021.

[77] In turning now to the rate of interest, as the parties acknowledge this is a matter within the discretion of the Court. The Applicant has suggested a rate of 5% per annum, having referred to the U.S. prime rate specifically in oral argument, and in particular the rate as at October 2020, extracted from the JP Morgan Chase Rates provided in evidence, which is taken to be 3.25%. The evidence that the Applicant was a special purpose vehicle limited to holding the shares in the Company has not been challenged by the Applicant. Albeit with no documentary proof behind it, the evidence is that the Applicant borrowed money intra group at the rate of 2.9% per annum. In my judgment, taking all relevant factors into account that is the rate that should be applied for pre-judgment interest, i.e. 2.9% per annum.

The Quantum of Costs

The Deed

[78] It is common ground that one of the Court's tasks on this aspect of the case is to place a proper construction on the Deed. Here, the following guidance, provided by Lord Hodge in **Wood v Capita Insurance** at paragraphs 10-12, is a useful starting point:

“10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning...”

11. Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky* case [2011] 1 WLR 2900, para 21f. In the *Arnold* case [2015] A.C. 1619 all of the judgments confirmed the approach in the *Rainy Sky* case.....Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of the drafting of the clause....; and it must also be alive to the possibility that one side may have agreed to something which in hindsight did not serve his interest....Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated.....To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.”

[79] It is also, indeed, as Mr. Chivers KC pointed out, well established that contracts of indemnity are to be construed strictly in favour of the indemnifier, in this case the Company.

[80] Clause 2 of the Deed provides as follows:

“ UNDERTAKING AND INDEMNITY

2.1. Nam Tai hereby irrevocably undertakes, covenants and agrees that, on the basis of all acknowledgements, confirmations and undertakings set out in this Agreement, in the event that IsZo succeeds in its claim, or in any part of its claim made within the Proceedings, it will indemnify, compensate and hold harmless the West Ridge Parties from and against **all costs, damages, claims, losses, Associated Expenses and any other liability whatsoever that may be incurred in relation to or arising out of:**

2.1.1 the purchase of the Shares (in the instance of West Ridge's title to the Shares being affected by the relief granted by the Court), including but not limited to the payment of the Consideration and all Associated Expenses, **including the fees of Sidley Austin as counsel to the West Ridge Parties in respect of the West Ridge Parties' participation in the Placement;**

2.1.2 the Proceedings and any steps which West Ridge or the West Ridge Parties may have to take or have taken as a result of the Proceedings, including without limitation, the costs of West Ridge's BVI counsel, Harney Westwood & Riegels LP (Harneys) **in full**, which include for avoidance of doubt Harneys' costs in the Ancillary Claim or such Harneys' costs that are not recoverable from IsZo; and/or

2.1.3 the compliance by West Ridge with any order of the Court as to the treatment of the Shares.

2.2 Nam Tai hereby irrevocably undertakes, covenants and agrees that, on the basis of all acknowledgements, confirmations and undertakings set out in this Agreement, in the event that IsZo fails in its claim or any part of its claim it will indemnify West Ridge in respect of such amount of Harneys' costs **in full** as is not recoverable from IsZo pursuant to an order of the Court.

2.3 Nam Tai agrees that it will not enter a Defence in the Ancillary Claim.

2.4. Nam Tai further agrees that it will:

2.4.1 keep West Ridge reasonably informed of the progress of the Proceedings and of any material developments in relation to the Proceedings;

2.4.2 if requested by West Ridge, provide to West Ridge and/or its legal Counsel (if so directed) copies of any material correspondence, pleadings, disclosure, or other documents and information relating to the Proceedings (subject to legal professional privilege and any obligations of confidence that are binding upon Nam Tai); and

2.4.3 without prejudice to the foregoing, notify West Ridge without delay upon it becoming aware of any material non-public information which is reasonably likely to cause damage to the assets, business or reputation of West Ridge and/or any of the West Ridge Parties. “

(my emphasis)

Clause 6 also provided as follows:

“6. PAYMENT.

Upon request by West Ridge, Nam Tai shall pay to West Ridge the indemnified amount as requested by West Ridge (the Indemnified Amount) within five (5) business days to the following account: -

.....

If any costs incurred by West Ridge as adjudicated by the Court shall be less than the costs included in the Indemnified Amount as requested by West Ridge, West Ridge shall return the difference to Nam Tai within fourteen (14) business days upon demand.”

(my emphasis)

Clause 7- The Interpretation clause of the Deed, Clause 1, at Clause 1.1 defined the term “Associated Expenses” as follows:

*“Associated Expenses’ means any and **all costs and expenses** including transaction costs connected with or arising out of the Placement and its setting aside (if so ordered)”.*

(my emphasis)

[81] In my view, the decision in **Gomba**, cited by both parties, is germane to the issues at hand. This is because there is a clear discussion about contractual rights of indemnity and the inter-play, if any, with the Court Rules as to costs. It is important to understand that an agreement to pay costs on an indemnity basis is a completely different creature from an order for costs made on an indemnity basis, which latter creature, the ECSC CPR does not expressly deal with.

[82] In **Gomba**, at pages 183 H – 184A, the issues that the Court of Appeal of England and Wales were concerned with, were set out as follows:

“There are, in our opinion, three interlocking and overlapping issues. First, there is an issue of construction. What level of recovery, or retention of costs and expenses actually incurred do the mortgage deeds, including the guarantee and the debenture, permit? Second, there is the issue of the manner in which the defendants’ entitlement is to be quantified in relation to (a) litigation costs and (b) non-litigation costs. Third, there is the issue as to the extent to which, if at all, the court’s powers as to costs under section 51(1) of the Supreme Court Act 1981 and the rules of Order 62 can curtail the recovery, or retention to which the defendants are contractually entitled.”

[83] Having examined the language of the mortgage, Scott L.J. continued the Court’s analysis as follows at pages 186H-187B, as follows:

“The language used does, in our opinion, justify an approach that would hold the mortgagee prima facie entitled to recover or retain the full amount of its actual costs, charges and expenses; but the language leaves open, in our opinion, the right of the mortgagor to have excluded any costs, charges and expenses that were incurred in bad faith or were unreasonably incurred or were unreasonable in amount. Vinelott J., in the passages from his judgment that we have cited, used the adjectives “wholly” and “plainly”. He intended by this, we are sure, to indicate that the mortgagor must show a clear case of unreasonableness if actual costs, charges and expenses are to be excluded. We agree with this. We do not think the criteria can be put any better or more clearly than it is put in R.S.C. Ord. 62, r. 12(2) and would hold that, on the true construction of the 18 February 1985 mortgage, the defendants are entitled to be paid or to retain out of the mortgaged property all their actual costs, charges and expenses (including the receiver’s remuneration) except in so far they are of an unreasonable amount or have been unreasonably incurred and with any doubts as to whether the costs have been reasonably incurred or are reasonable in amount being resolved in favour of the defendants. We would give the same construction to the other mortgage deeds.”

(my emphasis)

See also page 182 D-G where the Court discusses Rule Order 62, r.12 and how it came into being following the judgment of Megarry J in ***E.M.I. Records v Ian Cameron Wallace*** [1983] Ch 59.

[84] The Court distilled the principles on pages 194A- 195A as follows:

“In our opinion, the following principles emerge from the cases and dicta to which I have referred.

- (i) *An order for the payment of costs of proceedings by one party to another party is always a discretionary order: section 51 of the Act of 1981.*
- (ii) *Where there is a contractual right to the costs, the discretion should ordinarily be exercised so as to reflect that contractual right.*
- (iii) *The power of the court to disallow a mortgagee's costs sought to be added to the mortgage security is a power that does not derive from section 51 but from the power of courts of equity to fix the terms on which redemption may be allowed.*
- (iv) *A decision by a court to refuse costs, in whole or in part, to a mortgage litigant may be a decision in the exercise of the section 51 discretion or a decision in the exercise of the power to fix the terms on which the redemption will be allowed or a decision as to the extent of a mortgagee's contractual right to add his costs to the security or a combination of two or more of these things. The pleadings in the case and the submissions made to the judge may indicate which of the decisions to which we have referred has been made.*
- (v) *A mortgagee is not, in our judgment, to be deprived of a contractual or equitable right to add costs to the security merely by reason of an order for payment of costs made without reference to the mortgagee's contractual or equitable rights and without any adjudication as to whether or not the mortgagee should be deprived of those costs.*

We must now try to draw the threads together. For the purposes of this present appeal the following propositions can, in our judgment be stated.

- (1) ***The defendants have a contractual right to retain out of the mortgage funds in hand their costs, charges and expenses, including the receivers' remuneration, on an indemnity basis.***

- (2) *On the taking of the account the plaintiffs are entitled to object to items therein contained on the ground that they have been unreasonably incurred or are of an unreasonable amount.*
- (3) *To make good any particular objection, the plaintiffs must satisfy the Chancery Master, or the taxing master, as the case may be, of the unreasonableness contended for with any doubts being resolved in favour of the defendants.*

....

(5) In respect of any orders for payment of standard basis costs by the plaintiffs to the defendants that have already been made it is, as we understand it, common ground that the court was not thereby purporting to deprive the defendants of any costs which they are contractually entitled to add to their security. Accordingly, in our judgment, the defendants remain entitled on the taking of the account to their costs on an indemnity basis.”

(my emphasis)

[85] It is useful to refer to the **Chaplain** decision. **Chaplain** concerned a lease, and at paragraphs 33-35, Arden LJ referred also to the decision in **Church v Ibrahim**¹², where Roch LJ had held that the principles in **Gomba** were not confined to mortgage cases and applied in other cases where a party claiming costs had a contractual right to recover those costs. The **Chaplain** case also discussed Rule 27.14 of the English CPR, which concerns fixed costs. At paragraph 45, Patten LJ had this to say:

“45. What the decision in Gomba Holdings seems to establish is that a contractual claim for a costs indemnity should ordinarily be given effect to through the machinery of what is now CPR 44.5 according to the principles set out by Scott LJ in the passage from his judgment

¹² [1997] 1 EGLR 13.

quoted by my Lady. But that does not alter the fact that it remains a contractual entitlement which the court will enforce subject to its equitable power to disallow unreasonable expenses. There is nothing in the rule making powers in respect of the CPR which enable the rules to exclude or override that contractual entitlement and I therefore agree with Arden LJ that the judge had jurisdiction to assess the costs free from any restraints imposed by CPR 27.14.”

(my emphasis)

- [86] Reference was also made by Mr. Machell KC to ***Littlestone v McLeish***.¹³ After setting out in paragraph 40 the relevant terms of the Lease under consideration, Briggs L.J (as he then was), had this to say at paragraph 41:

“41. In my judgment, although that phraseology does not refer expressly to an indemnity, it corresponds more closely with an assessment upon the indemnity basis than upon the standard basis. This is because of the obligation on the lessee to pay ‘all costs and expenseswhich may be incurred’. The principal difference between the standard basis and the indemnity basis is that, on the standard basis, costs are recoverable only if proportionately incurred and proportionate in amount, whereas the indemnity basis is not concerned with proportionality and nor is the contract.”

- [87] In ***Ibrahim***, Roch LJ, on page 14, construed the relevant clause in a tenancy agreement as proscribing indemnity costs. He reasoned as follows:

“In this appeal, [Counsel for the Respondent Tenant] , has raised the question of the construction of Clause 9 of schedule 2 of the tenancy agreement. His submission is that on a proper reading of that clause the

¹³ [2016] EWCA Civ 127.

appellants are only entitled to costs on the standard basis and that the clause does not entitle them to costs on an indemnity basis. This interpretation, in my view, does not attribute meaning to the words ‘fully for any costs’ or to the later words ‘to indemnify’ which appear in this clause”.

[88] In my judgment, having regard to the plain language of the Deed, including the expressions “in full”, particularly in relation to Harneys’ fees, and the expression “any and all costs” in the definition of “Associated Expenses”, and the language of Recital (I), which expressly speaks of the Company indemnifying the Applicant, it is plain that the parties agreed that the Company would pay the Applicant’s costs on an indemnity basis.

[89] Mr. Chivers KC has submitted that it is clear that on a proper construction of clause 2.1 of the Deed, the costs for which the Company may be held liable are those which would be allowed by the Court, in the exercise of its discretion under CPR, r. 65.2(1). He submitted that this construction would also be consistent with the terms of Clause 6 of the Deed.

[90] Rule 65.2(1), provides as follows:

“Basis of Quantification

(1) If the court has a discretion as to the amount of costs to be allowed to a party, the sum to be allowed is:

(a) The amount that the court deems to be reasonable were the work to be carried out by a legal practitioner of reasonable competence; and

(b) Which appears to the court to be fair both to the person paying and the party receiving such costs.”

[91] In my judgment, there is no dispute as to whether the costs must be reasonable; that was clearly accepted by Mr. Machell KC. Indeed, even in jurisdictions where there are provisions for costs whether on a standard basis or an indemnity basis, the costs must be reasonable. See for example, **Gomba** page 182 H where it is stated that “*Both the standard basis and the indemnity basis of taxation under rule 12 are based on concepts of reasonableness or unreasonableness*”. See also **Ibrahim** at page 15, per Hobhouse LJ where he stated that the criteria under both bases of taxation still remain whether the costs were reasonably incurred and reasonable in amount. Unreasonableness is the other side of the coin to reasonableness. Thus, accepting that Rule 65.2(1) is the applicable Rule that deals with the Court’s discretion, this does not answer the question upon whom the burden lies, or what the burden is, in a case where there is an agreement to indemnify and pay costs on an indemnity basis.

[92] In a usual case in the BVI, i.e. one where costs assessment does not involve an agreement as to indemnity, it is common ground that the burden would be on the receiving party to prove reasonableness. At paragraph [29] of the ECSC Court of Appeal decision in **Sheikh Mohamed Ali M Alhamrani et al v Sheikh Abdullah Ali M Alhamrani**¹⁴, Webster J.A., pointed out that in the BVI, the ECSC’s CPR is different from that of the UK and he stated as follows:

“Ground 1-Resolving Doubts

[29] The finding that Rule 44.3 of the English CPR does not apply in the BVI means, for example, that the English rule that in an assessment on a standard basis any doubt as to whether any costs were reasonably and proportionately incurred or were reasonable and proportionate in amount should be resolved in favour of the paying party (sub-rule 44.3(2)(b)) does not apply in the BVI. The position in the BVI is captured by the learned Judge’s finding set out at paragraph 21 above that in the BVI there is no bias one way or the other and the burden of proof rests throughout on the

¹⁴ BVIHCMAP 2016/0030.

receiving party to prove that the costs claimed are reasonable and fair to both the paying party and the receiving party. If the receiving party proves on a balance of probabilities that the claim is reasonable and fair, he or she is generally entitled to that item in full or to so much of it as the court finds to be reasonable and fair. If he does not discharge this burden the claim will fail."

- [93] It will also be seen from the above judgment that it was acknowledged that in an ordinary case, under the BVI Rules, the costs would not be assessed on an indemnity basis. However, in my judgment, such a situation is plainly distinguishable from the instant case. In **Sheikh Alhamrani** the Court was not concerned with a contractual indemnity as to costs. Further, it is plain that the learned Judge of Appeal's holding at paragraph [29] relates to a state of facts that is distinguishable from the instant case i.e. there was no contractual indemnity provision or agreement.
- [94] I accept Mr. Machell KC's submission that the fact that there is no express basis in the rules for this particular assessment is wholly irrelevant. Indeed, I also accept that the Court may have to fashion a rule to deal with the case justly. However, it may be more accurate to say that the Court should, on a proper construction of Rule 65.2(1), find that although the Court has a discretion, as the case law commencing with **Gomba** amply demonstrates, where there is a contractual right to the costs on an indemnity basis, the discretion should ordinarily be exercised to reflect that contractual right. It is to be noted that sub-section 65.2(1) commences with the word "*if*".
- [95] In my judgment, the phrase in sub-paragraph (b) of Rule 65.2(1), viz. "*appears to the court to be fair both to the person paying and the person receiving*" is wide enough to include the Court looking at what the parties agreed in relation to costs. In other words, it must be just and sensible for the Court to have regard to what the parties agreed in relation to costs, -in this case, under the Deed of Indemnity- in

order to determine what is fair between them. I note, by analogy, that in Rule 65.2 (3) (h), in deciding on the question of reasonableness in the case of costs charged by a legal practitioner to the client (in many jurisdictions understood to be an exercise usually conducted on an indemnity basis), the Court is required to take into account any agreement or contract that might have been made as to the basis of charging.

[96] In my judgment, based upon the line of cases such as **Gomba, Ibrahim** and **Chaplain**, it is the language of the Deed itself, and the agreement to indemnify as to costs that leads to a finding that the Court retains a discretion to assess whether there are aspects of the costs that were unreasonably incurred or are unreasonable in amount. This will only arise if the indemnifier has objected on either of these grounds. In this case, it is the Company that has the burden to make good any objection, and it is for it to satisfy this Court as to the unreasonableness contended for. Further, any doubts are to be resolved in favour of the Applicant. Although this wording exists in the English Rules, the principle has a life of its own, and arises from the language expressing the intention of the parties, as contained in the Deed. - See **Gomba**-186-187, 194, and **Chaplain**, paragraph 45. Further, it is because there is a contractual entitlement, but the Court retains its power to disallow unreasonable expenses, that this burden is on the indemnifier. Clause 6 of the Deed, in conjunction with Clause 2, and indeed a proper construction of the entire Deed, supports this view. The obligation of the Company under the Deed is to pay over the Indemnified Sum in the time specified under the Deed and it is only "*If any costs incurred by West Ridge as adjudicated by the Court shall be less than the costs included in the Indemnified Amount as requested by West Ridge*", that the Applicant would be required to return the difference to the Company fourteen days after demand by the Company.

[97] Mr. Chivers KC sought to argue that the Deed must be taken as meaning that the Company had agreed only reasonable costs in the sense of such as would have been recovered had the Company simply consented to judgment on the Ancillary

Claim. I must say that I initially found this to be a very alluring argument. However, in relation to this rival construction, as Lord Hodge reminds in **Wood v Capita** at paragraph 11, the Court “*must ...be alive to the possibility that one side may have agreed to something which in hindsight did not serve his interest*”. That possibility gains even more strength when seen against the backdrop of the basis of the Company’s challenge to the Deed in the (now unsuccessful) appeal. Further, the Court cannot lose sight of what parties have agreed to, or may have agreed to as a result of a negotiated compromise.

(1) The costs claimed by the Applicant are disproportionate, such that costs should only be allowed insofar as the Applicant satisfies the Court that they were both necessary and reasonable.

[98] In my judgment, since the basis upon which I am assessing the costs is on the indemnity agreed under the Deed, the question of proportionality does not arise. This was readily recognised in **Lownds**, at paragraphs 6 and 7. Even though the discussion takes place after reference to the English Rule 44.5, which specifically refers to costs on a standard basis taking proportionality into account, it is in my view nevertheless relevant. It is stated as follows:

“6. The fact when costs are to be assessed on an indemnity basis there is no requirement of proportionality and, in addition, that where there is any doubt, the court will resolve that doubt (as to whether costs were unreasonably incurred or were reasonable in amount) in favour of the receiving party, means that the indemnity basis of costs is considerably more favourable to the receiving party than the standard basis of costs.

7. Prior to the CPR coming into force it was already possible for a court to make an indemnity order for costs. This did no more, however, than to reverse the burden of proof in respect of disputed items of costs. The

advantages of an indemnity order over a standard order are now far more significant.

See also paragraph 41 of **Littlestone** , referred to earlier in this judgment.

[99] In my judgment, the decision in **Andriy Malitskiy** is, as argued by Mr. Machell KC, distinguishable, because proportionality is not relevant where by reason of agreement there is an indemnity. Further, it is plain that the two-stage approach is not required here, and is only applied in England when costs are being dealt with on the standard basis.

However, even if I am wrong on the question of the irrelevance of proportionality in the circumstances of this case, I accept the Applicant's position, that overall, and globally its claim for costs in the sum of just over US\$1.295 Million is not disproportionate considering the nature of the litigation and that the substantive sum claimed was over US\$23 Million.

(2) The Applicant's claim for the costs of the hearing on 7 June 2021 should be refused, in accordance with paragraph 3 of the Order of Jack J (Ag.) dated 28 June 2021.

(3) The Applicant's claim for the costs of its amendments to the Judgment Application and for making its application to amend the Judgment Application should be refused, pursuant to paragraph 3 of the Order of Jack J (Ag.) dated 3 November 2022.

[100] As previously discussed, even though there is an agreed indemnity, the claim is subject to a requirement of reasonableness and the Deed is required to be strictly construed in favour of the Company. There would in any event be an implied term of reasonableness based on the terms of the Deed, particularly the wording in Clause 6. In my judgment, although in **Gomba** the Court indicated that costs awarded by the Court to the indemnitee on a standard basis would not prevent it

seeking costs on an indemnity basis, the orders disputed by the Company here are distinguishable. In (ii), the Applicant was ordered to pay costs, so there was no order in its favour. Further, it was ordered not only to pay the Company's costs, but that of other parties. In (iii), the Applicant was ordered to bear its own costs. In my judgment, neither of these sets of costs are recoverable by the Applicant as they would as a result of the previous cost orders, appear to have been unreasonably incurred, or alternatively, did not amount to steps the Applicant had to take, as contemplated in the Deed. In the further alternative, as argued by Mr. Chivers KC, the incidence of these costs orders is *res judicata* between the parties.

[101] I agree with the Company that those portions of the claim for costs covered by those cost orders should be stripped out from the claim under consideration.

(4) The costs of related proceedings are irrecoverable.

[102] In my judgment, this objection fails. The Company has not demonstrated that these were unreasonable expenses and I accept the Applicant's rationale as to the inter-relatedness of the matters, and complexity of this international litigation, playing out in a number of jurisdictions.

(5) Excessive number of fee earners, duplication of costs excessive costs and charge-out rates.

[103] Though a lot of effort and detail went into this objection, I think that the Applicant's submissions as to it not being unusual in a commercial matter such as this to see a number of fee earners and substitution when unavailable, are to be preferred. Additionally, the reasoning in **Gudavadze** referred to in the Applicant's submissions is apposite. Further, it is the case that the charge -out rate point is not supported by any evidence of comparative rates, and I reject this objection also. I bear in mind that the Deed spoke specifically of Harneys' fees "*in full*" and bearing all factors in mind, it is not clear to me that the fees were unreasonable. It follows that the

Company has not made good this objection, and in any event, any doubts on this issue I am prepared to resolve in favour of the Applicant.

(6) Administrative and unnecessary costs.

[104] The Company has not shown these costs to be unnecessary and any doubt about the reasonableness of costs under his head, I resolve in favour of the Applicant.

(7) Counsel's Fee Notes, Sidley Austin's Fees and Harneys' Professional Fees and Disbursements.

[105] I have already dealt with the Harneys fees, and Counsel's fees have been agreed. Insofar as the Deed expressly contemplated the Sidley Austin fees, and there is a bill of costs in relation thereto, seen by the Court, I do not find that there is anything of substance to support the Company's objection.

[106] I have made my rulings on the points of principle involved in the application, including the Headline points, and I invite the parties to submit an Order/ formal Judgment on this Assessment, based on, and in accordance with my resolution of these main issues.

Ingrid Mangatal (Ag)
High Court Judge

By the Court

Registrar