

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2020**

Claim Number: AXAHCV2016/0032

BETWEEN:

**1. NATIONAL BANK OF ANGUILLA (PRIVATE BANKING AND TRUST) LIMITED
(In Administration)**

**2. CARIBBEAN COMMERCIAL INVESTMENT BANK LIMITED
(In Administration)**

CLAIMANTS/REPOUNDENTS

AND

- 1. NATIONAL BANK OF ANGUILLA LIMITED (In receivership)**
- 2. CARIBBEAN COMMERCIAL BANK (ANGUILLA) LIMITED (In receivership)**
- 3. NATIONAL COMMERCIAL BANK OF ANGUILLA LIMITED (Applicant/Third Defendant)**
- 4. EASTERN CARIBBEAN CENTRAL BANK**
- 5. MARTIN DINNING**
- 6. HUDSON CARR**
- 7. SHAWN WILLIAMS**
- 8. ROBERT MILLER**

DEFENDANTS

Appearances:

Ms. Eustella Fontaine with her Ms. Yanique Stewart, Counsel for the Claimants/Respondents

Ms. Navine Fleming Counsel for the 1st, 2nd, 4th, 5th, 6th & 7th Defendants

Mr. William Hare, with him Mr. Alex Richardson for the 3rd named Defendant/Applicant

2019: November 19th;

2020: December 18th.

JUDGMENT

- [1] **Burnett, M (Ag.):** This is an application filed by the National Commercial Bank of Anguilla Limited, third-named defendant for assessment of costs pursuant to CPR 64 and 65.12 of the Civil Procedure Rules 2000 for the following orders:
- (i) an order that its costs payable by the respondent (PBT) pursuant to paragraph 37(4) of the Judgment of the Court of Appeal delivered on the 28th February, 2017 are assessed in the sum of US\$209,089.09 and are to be paid within 14 days.
 - (ii) further or alternatively, National Commercial Bank of Anguilla Limited ('NCBA') applies for an order that there be an interim payment on account of costs in the sum of US\$69,696.36 or any other amount as the court sees fit pursuant to Section 22 of the Legal Profession Act 2015.
 - (iii) that the Respondent pay the Applicant's cost of this application which are to be assessed summarily and forthwith and paid within 14 days.

The Applicant's Case

- [2] The grounds for the application are:
- (a) on the 28th February, 2017, the Court of Appeal delivered a judgment allowing the interlocutory appeal by NCBA ("the Appeal") against a judgment of the High Court of 18th August, 2016 ("the High Court Judgment"). In the High Court Judgment, the High Court refused NCBA's application for a mandatory injunction against National Bank of Anguilla Limited (Private Banking and Trust) Limited (In Administration) "PBT" ordering it to write to the Bank of America in New York instructing that the Bank release a freeze on NCBA's account there.
 - (b) in a unanimous judgment the Court of Appeal made the following order:
 - (i) that the Appeal was allowed.
 - (ii) that PBT's Counter-Notice of Appeal on various discreet issues were dismissed; and

- (iii) that PBT be ordered to write to the Bank of America requesting a freeze on the Bank of America account to be lifted i.e.: the mandatory injunction sought by NCBA against PBT was granted; and
- (iv) that PBT is to pay the costs of both the Appeal and the High Court proceedings.

[3] On the 27th December, 2017 solicitors for NCBA wrote to solicitors for PBT setting out an estimate of the costs of both the Appeal and the High Court proceedings and invited PBT to make an interim payment in the sum of one third of the estimated amount incurred. Despite this, PBT has not taken any steps to satisfy any portion of its cost's liability to NCBA, it is against this background that NCBA now applies to the Court for the assessment of its costs pursuant to the order made in the Court of Appeal on 28th February, 2017.

[4] The applicant relies on the second affidavit of Ms. Sharmaine Francois filed on 25th September, 2019.

[6] Exhibited to the affidavit of Ms. Francois are:

- (a) a letter dated 27th December, 2017 from Alex Richardson & Associates (AR&A), solicitors for NCBA to Fontaine & Associates, solicitors for PBT, summarizing the quantum of costs and seeking interim payment in relation thereto;
- (b) a schedule of costs incurred by NCBA in connection with the injunction application and the Appeal setting out the cost incurred amounting to US\$209,089.09 by reference to:
 - (i) AR&A fees and disbursement in respect of the High Court proceedings (US\$42,985.58);
 - (ii) AR&A fees and disbursements in respect of the Court of Appeal proceedings (US\$10,343.95);
 - (iii) Mr. William Hare's fees and disbursement in respect of the High Court proceedings (US\$81,717.57);
 - (iv) Mr. William Hare's fees and disbursement in respect of Court of Appeal proceedings (US\$29,580.00);
 - (v) Browne Rudnick's fees and disbursement in respect of their provision of foreign legal

assistance on matters of New York Law (US\$44,461.99).

- [7] NCBA's legal team brought to the Court a copy of full bundle of document presented to the Court of Appeal and the general hearing bundles used in the High Court hearing and bundles of authorities relied upon at the High Court and Court of Appeal.

Submission by the Applicant/Third Defendant

The Law

- [8] The applicant submits that the costs of the injunction proceedings fall to be considered under CPR 65(12) of CPR 2000.
- [9] The applicant submits that an application for an injunction is not procedural in nature but rather it is substantive interlocutory relief and proffers that it is not a situation where prescribed costs as described in CPR 65(5) apply as those deal with the overall cost of any proceedings and not interlocutory applications which forms a part of a matter or proceedings but are in turn not procedural in nature.
- [10] The applicant states that CPR 65(12) requires that the application must be accompanied by a bill or other document showing the sum in which the court is being asked to assess the cost and how such sum was calculated.
- [11] The applicant submits that this document is before the Court in the costs schedule as "Ex.SF.2".
- [12] The applicant contends that CPR 65.12(5) contains a general power to assess costs: "On hearing any such application the Master or Registrar must either:
a) assess the costs if there is sufficient material available to do so; or
b) fix a date, time and place for the assessment to take place."
- [13] It is the contention of the applicant that Ex SF2 and the detailed costs scheduled in it, provides more than sufficient material to enable the court to properly assess the costs.
- [14] The applicant relies on CPR 65.2 which states:

Basis of quantification

65.2(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 person receiving such costs.*

- (2) *If the court has a discretion as to the amount of costs to be paid to a legal practitioner by his or her client the sum allowed is –*
 - (a) *the amount that the court deems to be reasonable; and*
 - (b) *which appears to be fair both to the legal practitioner and the client.*

- (3) *In deciding what would be reasonable the court must take into account all the circumstances, including –*
 - a) *any order that has already been made;*
 - b) *the care, speed and economy with which the case was prepared;*
 - c) *the conduct of the parties before as well as during the proceedings;*
 - d) *the degree of responsibility accepted by the legal practitioner;*
 - e) *the importance of the matter to the parties;*
 - f) *the novelty, weight and complexity of the case;*
 - g) *the time reasonably spent on the case; and*
 - h) *in the case of costs charged by a legal practitioner to his or her client –*
 - (i) *any agreement about what grade of legal practitioner should carry out the work;*
 - (ii) *any agreement that may have been made as to the basis of charging; and*
 - (iii) *whether the legal practitioner advised the client and took the client's instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the case.*

- [15] The applicant submits that the injunction proceedings were fiercely contested, as can be gleaned from the evidence and submissions averred to in exhibit SF2. The matter was of urgent importance, high value and was complex in nature, involving an analysis of detailed point of

commercial law in the US and Anguilla, raising numerous novel points and that the time spent on the case was reasonable and significantly discounted rates were applied.

[16] The applicant submits that NCBA costs are reasonable and proportionate in all the circumstances.

Further or Alternatively, Interim Payment

[17] Further or alternatively, NCBA applies for an Order that there be an interim payment on the account of costs in the sum of US\$69,696.36 or any other amount as the Court sees fit.

[18] Section 22 of the **Legal Profession Act 2015** states that “the law and practice relating to solicitors, and the taxation and recovery of costs in force in England shall extend to and be in force in Anguilla and shall apply to all persons lawfully practicing therein as legal practitioners.”

[19] Rule 44.2(8) of the English Civil Procedure Rules provides that “Where the Court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed.”

[20] The Eastern Caribbean Supreme Court of Appeal has held in **Norgulf Holdings Limited and Incomeborts Limited v Michael Wilson & Partners Limited**¹ that the Eastern Caribbean Supreme Court has both a statutory and an inherent jurisdiction to make an order for interim costs.

Costs of this Application

[21] CPR 65.12(6) states:

“The master or registrar may direct that the party against whom the bill is assessed pay the costs of the party whose bill is being assessed and, if so, must assess such costs and add them to the costs ordered to be paid.”

Whether Assessment should be made under CPR 65.12.

[22] The applicant submits that the costs should be assessed pursuant to CPR 65.12 on the ground that an application for an injunction is not a procedural application.

¹ BVI Civil Appeal No. 8 of 2007

[23] The applicant posited that the applicant's case should 65.12 be applied. A summary of the Applicant's argument is as follows:

- 1) The specific examples in CPR 65.11 of "procedural applications" all relate to applications for orders concerning the process by which litigation is conducted; not orders affecting rights. CPR 65.11(3) lists as procedural applications "an application to amend a statement of case", "an application to extend time", and application for relief from sanctions imposed by the Court in exercise of its case management powers, and general applications appropriate for case management purposes. Unsurprisingly, these examples of "procedural applications" all relate to the 'process-management' of litigation, not to adjudication that affects substantial rights as between the parties, such as the grant of an injunction.
- 2) A precursor of CPR 62 examined by Mathurin M. at paragraphs 21 onwards of IPOC, defined "procedural appeals" in a manner that specifically excluded an application for an interim declaration or injunction.
- 3) In that regard, Mathurin M. noted at paragraph 24 that, as a matter of interpretation, "where a word is defined in an enactment, other parts of speech and grammatical variations and cognate expressions of that word have corresponding meanings in that enactment." This observation is equally applicable to point (1) above.
- 4) The balance of Eastern Caribbean jurisprudence envisages that an interim injunction should not be regarded as a "procedural application", notwithstanding some decisions made to the contrary (in a context where, it is submitted, in those decisions of the Court was influenced by particularly exorbitant or, as Wallbank J put it, "stratospherically luxuriant". costs-claims):
 - (a) In IPOC as noted above, Mathurin M. pointed out that the CPR's (former) definition of "procedural appeal" excluded interim injunctions.
 - (b) In **Michael Wilson v Temujin**, interim applications were dealt with under CPR 65.12.
 - (c) In **Rusal** Wallbank J. did apply a test as to whether an application was procedural or substantive not by reference to whether the application decided the substantive issue

in the claim – if that the application did not so do, it was procedural – hence, on that analysis, an interim injunction application would generally be procedural (at paragraph 46 (ii)). It is submitted that this approach was perhaps based on the peculiar facts of that case and not intended to have general application (but, to the extent that it was, the Court should decline to follow it). The Court was plainly influenced in its approach by the extreme nature of the case before it: The Court noted that the applicant’s “lawyers spent an extravagant amount of time preparing for the hearing” such that “it is an understatement to say that the costs claimed are stratospherically luxuriant” (amounting to some US\$1,300,000 million for a hearing that took place “over parts of three days”) “and indeed, other, less delicate, epithets come to mind.” In any event, as a fellow Court of first instance, the doctrine of stare decisis does not compel this Court to follow it.

- (d) The most recent decision in this area, **Paradise Beach v Nevis Paradise et al** expressed serious doubts about the correctness of the **Rusal** approach. However, **Paradise Beach** followed **Rusal** nonetheless, but in a similarly extreme context where exorbitant costs were sought. Master Moise stated at paragraph 19 that “I have my doubts as to whether an application for an interim injunction is procedural” and “expressed my doubts as to the correctness of these decisions”. Master Moise was clear that he was not compelled to follow **Rusal**, but reluctantly did so in any event. He stated that “although I have expressed my doubts as to the correctness of these decisions, for reasons which will be apparent later, I will adopt the lines of authorities as the proper course of action to pursue.” The decision then reveals that these reasons relate to the fact that this was, like **Rusal**, another case where exorbitant costs had been claimed. Moise M. ultimately reduced them by some 85%. It is submitted that it was this factor, and the obvious desire on the part of the tribunal, and not any jurisprudential correctness (which Moise M. firmly and expressly doubted), that influenced the Court in following **Rusal**.

- 5) The generally understood use of the word “procedural” in litigation is by reference to the procedures or processes that apply to the conduct of the litigation, not applications which affect

substantive rights of parties. This is the “natural or ordinary meaning of the word or phrase in its context in the statute”. So, for example

- a) The definition of “procedural” in the **Merriam Webster dictionary** is ‘of or relating to procedure.’ Especially: ‘of or relating to the procedure used by courts or other bodies administering substantive law.’ Plainly this understanding does not encompass an application for an interim injunction, which results in an order which has an immediate, and often (as in this case) dramatic, practical effect on the substantive rights of parties (so much so, that rules of law and a vast body of jurisprudence have been developed to mitigate the prospect of undue damage to those rights – for example, the requirement that an undertaking in damages be provided.
 - b) This is the context in which Courts generally understand the term “procedural”. For example, in **Hoult v North West Health Authority** a case on the power of the Court to amend orders, the English Court of Appeal took it as read that an interlocutory injunction was non-procedural. Hughes LJ. commented as follows “There may possibly be examples of non-procedural but continuing orders which may call for revocation or variation as they continue – an interlocutory injunction may be one.”
 - c) Similarly, as noted in the submissions, in IPOC at paragraph 8, “The Chancery Guide 2005, issued by the Chancellor of the High Court in England, provides, in Para 5.2, “It is most important that applications which need to heard by a judge (e.g. most applications for an injunction) should be made to a judge. Any procedural application (e.g. for directions) should be made to a Master unless there is some special reason for making it to a judge” so the Guide considers that a “procedural application” is akin to an application for directions (which would include such matters as an extension for time for service of a defence, or evidence, a request for further information etc.).
- 6) Seen in that light, the Court should be cautious about deeming an injunction application (and particularly one such as in the instant case) a “procedural application”. To do so would make a mockery of the natural meaning of the word and the obviously substantive and complex rights and obligations in issue.

[24] NCBA requests that its costs of this application be assessed summarily under CPR 65.12(6) as US\$10,000.00 or such other amount as the Court sees fit, having regard to the work involved and the manner of calculation of costs in the Injunction Proceedings. NCBA does not propose to minutely particularise the individual costs of preparing this application at this point, as the relevant bills have not been issued and it does propose to expend further costs on the costs of applications about costs. However, as can be seen from the extent of the work involved in issuing and drafting the Notice of Application, detailed affidavits and costs schedule, these costs would comfortably exceed US\$10,000.00.

Reply Submission of Applicant

I. Summary

VI. Costs of this hearing

[25] It is usual practice that the costs of this hearing be awarded to the Applicant (NCBA): see, for example, **Nevis Paradise** at paragraph 55. The only reason that the costs are being assessed in hearing at all is that PBT is challenging the costs sought, on (it was submitted) specious and spurious grounds, notwithstanding the provision of a detailed costs schedule.

[26] Prior to this hearing, PBT had made no offer to pay any costs in open correspondence. PBT has since apprised the Court (quite improperly) of a letter marked “without prejudice” which made a derisory offer for costs. However, as a matter of law, communications expressly made on a “without prejudice” basis are inadmissible, even for the purpose of costs arguments; and the court has no general discretion to disapply the “without prejudice” rule: see **Computer Machinery Co Ltd v Drescher [1983] 1 W.L.R. 1379** and **Reed Executive Plc v Reed Business Information Ltd [2004] EWCA Civ 887**. PBT’s conduct in this regard is to be deprecated, and the letter should simply be ignored.

[27] In NCBA’s original submissions, NCBA suggested that the costs of this hearing should be summarily assessed, as they were in **Nevis Paradise**. Such an approach avoids the time consuming and costly exercise of using further Court time to argue about the costs of costs hearings — a particularly lamentable form of satellite litigation. NCBA originally suggested a figure

of US\$10,000.00 for this exercise (although it does not cover the cost of preparing for the hearing). However there has now been a need for external counsel to come twice to Anguilla for the purposes of this assessment, and to deal with the Claimants' arguments (including arguments that verge on suggesting impropriety on the part of the legal practitioners for the Third Respondent).

VII. Interest

- [28] Unless the court has ordered otherwise, interest on an award of costs runs from the date of the order for costs (see **Hunt v RM Douglas (Roofing) Ltd** [1990] AC 398 and **Simcoe v Jacuzzi UK Group plc** [2012] EWCA Civ 137). The Court has not ordered otherwise and so interest should be awarded from 28 February 2017, the date of the order of costs.
- [29] Save for the minor concessions noted in the applicant's written submissions, the Costs Schedule sets out costs that are reasonably incurred and reasonable in amount, resulting in an overall costs figure that is reasonable and proportionate relative to the subject matter, urgency and importance of the injunction applications.

The Respondent's Case

- [30] The respondent submitted that the Court of Appeal in its Order of 28th February, 2017 did not outline how the costs in the matter ought to be quantified.
- [31] The Certificate of Results of Appeal stated: "Appeal allowed. Counter Notice of Appeal dismissed."
- [32] Counsel however proffered that in examining CPR 65.3 that the cost should be quantified by assessment in accordance with CPR 65.11 and 65.12 as fixed costs.
- [33] Counsel submitted that the Certificate of Result of interlocutory Appeal did not state whether the Application would obtain its costs in the court below with regard to the injunction and the anti-suit.
- [34] The respondent submitted that the starting point for the court's consideration to be CPR 65.2.
- [35] CPR 65.2 states: **Basis of quantification**
65.2(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 person receiving such costs.*

(2) If the court has a discretion as to the amount of costs to be paid to a legal practitioner by his or her client the sum allowed is –

- (a) the amount that the court deems to be reasonable; and*
- (b) which appears to be fair both to the legal practitioner and the client.*

(3) In deciding what would be reasonable the court must take into account all the circumstances, including –

- a) any order that has already been made;*
- b) the care, speed and economy with which the case was prepared;*
- c) the conduct of the parties before as well as during the proceedings;*
- d) the degree of responsibility accepted by the legal practitioner;*
- e) the importance of the matter to the parties;*
- f) the novelty, weight and complexity of the case;*
- g) the time reasonably spent on the case; and*
- h) in the case of costs charged by a legal practitioner to his or her client –*
 - (i) any agreement about what grade of legal practitioner should carry out the work;*
 - (ii) any agreement that may have been made as to the basis of charging; and*
 - (iii) whether the legal practitioner advised the client and took the client's instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the case.*

[36] Counsel submitted that CPR 65.11 and 65.12 outline the approach that the court should take in assessing cost.

65.11- ASSESSED COST - PROCEDURAL APPLICATIONS

- (1) *On determining any application except at a case management conference, pre- trial review or the material, the Court must-*

 - (a) decide which party, if any, should pay the cost of that application;*
 - (b) assess the amount of such costs; and*
 - (c) direct when such costs are to be paid.*
- (2) *In deciding which party, if any, should pay the costs of the application the general rule is that the unsuccessful party must pay the costs of the successful party.*
- (3) *The Court must take into account all the circumstances including the factors set out in rule 64.6(6) but where the application is –*

 - (a) an application to amend a statement of case;*
 - (b) an application to extend the time specified for doing any act under these Rules or an order or direction of the Court;*
 - (c) an application for relief under the rule 26.8 (relief from sanctions); or*
 - (d) one that could reasonably have been made at a case management conference or pre- trial review;*

the Court must order the applicant to pay the costs of the respondent unless there are special circumstances.
- (4) *In assessing the amount of costs to be paid by any party the Court must take into account any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing and must allow such sum as it considers fair and reasonable.*
- (5) *A party seeking assessed costs must supply to the Court and to all other parties a brief statement showing –*

 - (a) any counsel's fees incurred;*
 - (b) how that party's legal representative's costs are calculated; and*
 - (c) the disbursements incurred.*
- (6) *The statement under paragraph (5) must comply with any relevant practice direction.*
- (7) *The costs allowed under this rule may not exceed one tenth of the amount of the prescribed costs appropriate to the claim unless the Court considers that there are special circumstances of the case justifying a higher amount.*
- (8) *On the other hand, Rule 65.12 states the following:*

CPR 65.12 - ASSESSED COSTS - GENERAL

- (1) *This rule applies 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.*
- (2) *If the assessment relates to part of Courts proceedings it must be carried out by the judge, master or registrar hearing the proceedings.*
- (3) *If the assessment does not fall to be carried out the hearing of any proceedings then the person entitled to the costs must apply to a master or the registrar for directions as to how the assessment is to be carried out.*
- (4) *The application must be accompanied by a bill or other document showing the sum in which the Court is being asked to assess the costs and how such sum was calculated.*
- (5) *On hearing any such application the master or registrar must either –*
 - (a) *assess the costs if there is sufficient material available to do so; or*
 - (b) *fix a date, time and place for the assessment to take place.*
- (6) *The master or registrar may direct that the party against whom the bill is assessed pay the costs of the party whose bill is being assessed and, if so, must assess such costs and add them to the costs ordered to be paid.*

[37] The respondent joins issue with the applicant who has submitted that the applicable Rule for this assessment is CPR 65.12 as they assert that an application for an injunction is not procedural but rather substantive interlocutory relief.

[38] The respondent submitted that the position of the applicant is inconsistent with the current state of the law.

[39] Counsel relied on **Paradise Beach Holdings Limited v Nevis Paradise Limited Claim No – NEVHCV2017/0093/SKBHCVAP2017/0010** Moise M. (as he then was) cited with approbation, the test outlined by Justice Wallbank (Ag) in **United Company Rusal PLC et al v Corbiere Holdings Ltd (Claim No. NEVHCV2011/0030)**, where he stated at paragraph 19 of his decision “whilst I do have my doubts as to whether an application for an interim injunction is procedural, there is, for now, a clear line in authority which establishes that it is. As Wallbank J stated in **United Company Rusal PLC** “the test, for the purposes of assessment of costs, is... whether the application decided the substantive issue in the claim” (emphasis added).

- [40] It is submitted by the respondent that the applicant's applications for an injunction and an anti-suit injunction did not decide the substantive issues in the claim which was a claim for proprietary interest by the respondent, in the premises the respondent urges the court to disregard the tenuous distinction that the applicant is drawing by describing the injunction application as substantive interlocutory relief as opposed to a procedural application.
- [41] It is the submission of the respondent that the injunction application was ancillary to the proprietary claim and a determination of the ancillary application did not determine the issues raised on the proprietary claim.
- [42] The respondent opined that the schedule of costs prescribed by the applicant in the sum of US\$209,089.09 is excessive and unreasonable and invited the court to rely on CPR 65.2 which outlines the factors to be taken into consideration to make a determination as to reasonable costs.
- [43] The respondent submitted the following:
- i. That the injunction application was not a complex matter and did not raise any novel issues which detained much of the court's time.
 - ii. On a review of the judgment of the Learned Trial Judge it was clear the matter engaged the usual issues raised on an application for an injunction as such costs in excess of US\$200,000.00 is excessive and urged the court not to allow the full amount.
 - iii. Should the court accept its submission that the matter ought properly to be decided pursuant to CPR 65.11; then CPR 65.17 applies in respect of the amount of costs of application.
 - iv. The respondent's claim was for certain declaratory reliefs and for the taking of an account to establish the extent of the funds and their traceable proceeds to which the respondent is entitled. Accordingly, no specific sum of money was being claimed by the respondent in its amended claim form.
 - v. The respondent posited that at Paragraph 21(1) and (4) of its Amended Statement of claim states "creditors of PBT who deposited funds during the relevant period have outstanding claim in respect of deposits made during the relevant period of US\$9,100,000.00 and not US\$20 million as asserted by the applicant.

- [44] Accordingly, at the highest PBT's claim is for US\$9,100,000.00 and the prescribed costs calculations for those claims if awarded would be as follows:

Claim for \$9,100,000 for PBT (First Claimant)

First \$100,000	\$15,000
Next \$150,000	\$18,750
Next \$250,000	\$25,000
Next \$500,000	\$35,000
Next \$1.5 million	\$45,000
Next \$6.6 million	\$33,000
Total Costs	\$171,750

- [45] The above being said at present no value has been attributed to the respondent's claim for the calculation of prescribed costs, however the applicant would not be entitled to more than 1/10th of the prescribed costs of US\$171,750.00 so no more than US\$17,175.00 on its injunction application.

[46] **Items Being Claimed**

The applicant has produced a schedule for the Court's consideration. The respondent submits that there are several items that ought to be excluded.

[47] **Costs Sought for Adjournment Application – Ordered and Paid**

It was submitted that the Court should not allow the claim for the payment of costs in relation to the adjournment application heard on 3rd August, 2016. Further to the Affidavit of William Tacon (**See Exhibit WT1 of William Tacon's Affidavit**), those costs were paid by the respondent. Therefore, to allow the same in these proceedings would be tantamount to double recovery.

[48] **Costs for Post Application Actions by Counsel for the Applicant**

The matters relating to the application for the injunction concluded on 10th August, 2016, however, the applicant has made claims for the costs of actions which occurred from 11th August, 2016 to

29th August, 2016. Upon a review of the costs being claimed, it will be observed that some items being claimed relate to a leave application (page 6) which has no relevance to the injunction matter. The items are also very vague and in large part include items which are particularized as “**emails between Counsel**”. It was submitted that these items ought not to be allowed as there is no clarity that these matters refer to the Applicant’s Anguilla injunction application.

[49] **Amounts claimed by Alex Richardson**

The applicant is seeking to claim an amount for times allocated to Mr. Richardson which amount to approximately 142 hours with a total in excess of US \$50,000.00. It was submitted that these amounts are excessive and unreasonable and ought to be reduced significantly. Particularly, at page 2 of the schedule of costs there are amounts being claimed for the period 1st to 18th July 2016 which do not appear to relate to the injunction application. It was submitted that these costs, allocated for a period of 10 hours, should not be allowed.

[50] Further, the Applicant claimed an amount of US \$2,100.00 for work done by Mr. Richardson on 19th July 2016. However, when one examines the general description, for the most part it consists of reviewing of the documents in relation to the application. This amount appears excessive and as such the Court was invited to reduce same.

[51] **Costs for time spent travelling by Mr. Hare**

The costs being claimed on behalf of Mr. Hare amount to US\$107,270.00 (High Court and Court of Appeal) which would be approximately 126 hours at a rate of US \$850.00 per hour. Of this amount there are approximately 39 hours being claimed for travelling by Mr. Hare. This amount is approximated as the schedule of costs is not sufficiently particularized in parts as it relates to the actual amount of time spent travelling as some of these costs are claimed on items on the schedule presented with times of 8.50 and 12.50 and include drafting declaration and emails along with attendance at hearing of adjournment application. It was noted that no declaration was filed in the Anguilla injunction application and therefore this no doubt relates to another matter.

[52] The Court was asked to disallow any costs as it relates to the travelling expenses of counsel Mr. Hare. In **Paradise Beach Holdings Limited** the learned Master disallowed the claims for time spent travelling.

[53] At paragraph 44 of that judgment the Learned Master stated:

“Regarding the costs of travels for the discharge application, the issue is whether it would be reasonable to allow these expenses. Whilst it is entirely within the Applicant’s right to select an attorney of its choice, it must do so with the knowledge that there is no specific right to be reimbursed for the travel expenses of counsel residing abroad. The Applicant in its written submissions argues that Mr. Walwyn is called to the bar in Nevis and can be considered a local attorney with a practice within the jurisdiction. I agree with that submission. However, in those circumstances, I do not think it is reasonable to pass on the expense of travel to the 1st respondent as costs in these proceedings. What is required is the reasonable costs had the work been done by a reasonably competent attorney. I would disallow the travel expenses. I also disallow the costs claimed for ground transportation and hotel accommodation for the same reasons”.

[54] Further, there are disbursements being claimed for Mr. Hare in the sum of US\$4,027.57 related to his travels. The Court was asked to disallow all claims for disbursements related to the travels of Mr. Hare.

[55] Costs associated with the hearing of the adjournment application on 3rd August 2016 were ordered in the sum of US\$2000.00 and that the same was paid by the Respondent.

[56] For the hourly rates of Mr. Richardson and Mr. Hare the Court was ask to limit costs as in **Paradise Beach Holdings v Nevis Paradise Limited** where the Court asserted that rates of EC\$600.00 for senior counsel(over 18 years call) and EC\$400.00 for junior was reasonable.

[57] **Fees for foreign Counsel**

Attached to the Affidavit of Sharmaine Francois is Exhibit-“**SF2**” which includes a schedule of the costs being claimed by the applicant. At pages 14-16 of the schedule the applicant has outlined

the fees of Brown Rudnick (US Attorneys) - for their provision of foreign legal assistance on matters of New York Law. The amount being claimed for the foreign counsel is US\$44,461.99. The Applicant is claiming fees for six (6) attorneys with the following rates:

Cunningham – US\$355.00 per hour

Cicero - US\$490.00 per hour

Burkhart – US\$625.00 per hour

Moxley – US\$750.00 per hour

Saval – US\$905.00 per hour

Molton – US\$1,190.00 per hour

[58] It was submitted that all these costs should be excluded.

[59] In **JIPFA Investments Limited v Natalie Brewley et al** at paragraph 24 of the decision the position in relation to foreign counsel outlined in **Astian Group Limited et al v TNK Holdings Limited** was recited where at paragraph 42 and 46 the Court stated “it is trite law that a party to proceeding can only recover legal fees in respect of services provided by persons entitled to practice in this Territory. It therefore follows that legal fees incurred by persons not entitled to practice in this territory are no recoverable”.

[60] The Court was urged to adopt the position asserted in Astian and order that the applicant is not entitled to recover the US\$44,461.99 for foreign Counsel.

[61] An alternative course of action was suggested that the Court should not allow the fees for all six (6) Attorneys as the same is unreasonable in the circumstances. That the court should set a cap on the hourly rates considering that the fees claimed are as high as US\$1,190.00 per hour.

[62] **Interim Payment of Costs**

The applicant has sought an order for the interim payment of costs in the sum of US\$69,696.36 and has based this request on the Legal Profession Act, Rule 44.2(8) of the English Civil Procedure Rules and the Courts inherent jurisdiction to make an order for interim costs.

- [63] There is no dispute that the Court has the jurisdiction to make an order of the interim payment of costs as CPR 17.1(1)(g) that – **“the Court may grant interim remedies including: (g) and order for interim costs”**.
- [64] There must be some proper basis on which the Court can make such an order.
- [65] In **Grenada Electricity Services Limited v Issac Peters CIVIL APPEAL No. 10 of 2002** the court considered the matter of possible delay in the assessment of damages when making a determination on the issue of an interim cost order. In that matter the court made the order for interim costs on the basis that the applicant was an applicant in person with limited resources and the fact that the assessment of damages would have possibly been delayed.
- [66] It was submitted that the issue of delay ought not to be an operative factor in the case at bar. The order of the Court of Appeal awarding costs to the applicant was made in February, 2017. However, the applicant only approached the respondent on the issue of costs (attempt to have agreement) in December, 2017. Having failed to secure any agreement on the issue of costs, the applicant took no further action thereafter, prior to the filing of the current application in September, 2019. It would therefore be unreasonable for the applicant to now benefit from their inaction in seeking an interim payment of costs. The Court was urged to resist the making of an order for interim costs.
- [67] **Legal Profession Act and English Civil Procedure Rules**
The applicant has invited the court to apply Rule 44.2(8) of the English Civil Procedure Rules via Section 22 of the Legal Professions Act 2016 in making an order that there be an interim payment on account of costs in the sum of US\$69,696.36. Rule 44.2(8) states **“where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so”**.
- [68] It was submitted that this provision is similar in effect to CPR 17.1(1)(g) (supra) which makes provision for an interim costs order. There is provision in the Eastern Caribbean Supreme Court –

Civil Procedure Rules 2000 (as amended) which sufficiently deals with the issues and as such there is no need to import the provisions of the English Rules in the case at bar.

Applicant's Reply to Cost

[69] NCBA's primary argument on costs is that they fall to be considered under CPR 65.12 as "proceedings ... other than a procedural application". As a fallback argument, NCBA contends that, in the event the Court determines that CPR 65(11) applies, there are plainly "special circumstances of the case justifying a higher amount" than the guidance in CPR 65.11(7).

[70] There is no dispute that the touchstone for costs assessments is reasonableness, as set out in CPR 65.2(3). Whether the exercise of the Court's discretion is invoked by means of CPR 65.11 or CPR 65.12, however, is unlikely to make a great practical difference, since the factors to be considered in determining the reasonableness of the costs will be the same factors that would be considered under CPR 65.11 (for example, in considering whether there is scope for exceeding the nominal one-tenth cap) or under CPR 65.12 in any general assessment of costs.

[71] Whichever procedural avenue is adopted, the specific features of the injunction applications and their appeal, in particular the urgent nature of the applications in the context of complex, high value, multi-jurisdictional overlapping proceedings requiring detailed consideration of foreign law questions, amply justify an order being made for NCBA, as the successful party, to recover its reasonable costs. That is plainly what justice requires, and in interpreting the provisions of the rules, the Court will obviously be mindful of promoting this overriding objective.

II. The context of the debate on assessment under CPR 65.11 or CPR 65.12

[72] The debate on whether CPR 65.11 or 65.12 is the appropriate avenue of assessment, will in many cases (including this one) be sterile. This is because, ultimately, the Court must allow such sum that is reasonable, taking into consideration the matters set out in CPR 64.6(6) and CPR 65.2(3).

[73] The apparent relevance of the differing approaches was summarised by Master Mathurin (as she then was) in **IPOC International Growth Fund Limited v LV Finance Group** at paragraph 4 as follows:

“The distinguishing factor between the two Parts for the purpose of these proceedings quite frankly being, the ten percent of appropriate prescribed costs cap that procedural applications attract in the absence of special circumstances as opposed to an assessment based upon a bill of costs presented to the Court.”

[74] However, as Master Mathurin stated, and PBT in paragraph 18 of its submissions notably declines to address, the CPR 65.11 assessment process does provide for the ostensible 10% cap to be exceeded where (per CPR 65.11(7)) *“the court considers that there are special circumstances of the case justifying a higher amount”*.

[75] It is important to note that, in such circumstances, the Court has discretion to award costs in excess of, potentially to the degree of many multiples of, the “prescribed costs” formula which might otherwise apply. In **Michael Wilson v Temulin International et al**, cited with approval by Wallbank J in **United Company Rusal v Corbiere**, the High Court of the British Virgin Islands found as follows (at paragraphs 30 and 38):

“CPR 65.11 (7) empowers the Court to award a higher amount than the normal cap of one tenth of the amount of the prescribed costs appropriate to the claim if there are special circumstances justifying exceeding the cap. CPR 65.11 confers a discretion on the court to determine the amount of costs to award on hearing an application, so I see no reason why a successful party cannot be awarded costs of 200% of the prescribed costs appropriate to the claim if the Court determines that that is fair and reasonable in the circumstances.
[at paragraph 38]. ... the end result is that the Court has the power to disapply the cap in cases where special circumstances exist and will do so in this case. As I opined in paragraph 30 [supra], I see no reason why a successful party cannot be awarded costs of 50%, 75%, 200% or 300% of the prescribed costs appropriate to the claim. I do not think that the cap limits the costs award to a sum between 10% and 100% of the prescribed costs. After all, costs are discretionary and have to be fair and reasonable in all the circumstances of the case.”

[76] The threshold for finding that there are “special circumstances” that justify a higher amount is not onerous. In this case, the threshold is comfortably exceeded as there are overwhelming reasons

for disapplying the cap should the Court determine (contrary to NCBA's primary submission) that CPR 65.11 applies.

III. Whether assessment is under CPR 65.11 or 65.12

[77] While NCBA accepts that the authorities are not entirely aligned, the balance of analysis in the cases, taken with the ordinary meaning of the word “procedural” and an appreciation of the overarching framework and intentions of the CPR auger in favour of 65.12 being the applicable avenue of analysis, on the grounds that, whilst often interlocutory, applications for injunctions should not be viewed as “procedural” in nature. Indeed, experience informs us that the relative paucity of Caribbean authority on this point over the years in commercial litigation is because the point is simply unargued: if the injunctive relief sought forms a substantive part of the disputed rights and obligations between the parties (as is often the case in commercial litigation), then assessed costs are invariably ordered and it is simply never contended that, because of rules which have to provide for a wide variety of civil disputes in nine jurisdictions, the “prescribed costs” regime should apply.

[78] In any event, as noted, both approaches ultimately culminate in an application of the test of reasonableness of costs.

(IV) NCBA's primary case: CPR 65.12 applies

[79] NCBA's case is that the costs should be assessed under CPR 65.12 on the grounds that an application for an injunction is not a “procedural application”.

[80] In support of this:

(i) The CPR plainly envisages “procedural” applications to be those which relate to the conduct of litigation. Thus:

(a) The specific examples in CPR 65.11 of “procedural applications” all relate to applications for orders concerning the process by which litigation is conducted; not orders affecting rights. CPR 65.11(3) lists as procedural applications “an application to amend a statement of case”, “an application to extend time”, an application for relief from sanctions imposed by the Court in exercise of its case management

powers, and general applications appropriate for case management purposes. Unsurprisingly, these examples of “procedural applications” all relate to the process management of litigation, not to adjudications that affect substantial rights as between the parties, such as the grant of an injunction.

- (b) An earlier version of Part 62 of the CPR, examined by Master Mathurin at paragraphs 21 onwards of IPOC, defined “procedural appeals” in a manner that specifically excluded an application for an interim declaration or injunction.
 - (c) In that regard, Master Mathurin noted at paragraph 24 that, as a matter of interpretation, “where a word is defined in an enactment, other parts of speech and grammatical variations and cognate expressions of that word have corresponding meanings in that enactment.” This observation is equally applicable to point (a) above.
- (ii) The balance of Eastern Caribbean jurisprudence envisages that an interim injunction should not be regarded as a “procedural application”, notwithstanding some decisions made to the contrary (in a context where, it is submitted, in those decisions the Court was influenced by particularly exorbitant or, as Wallbank J put it, “stratospherically luxuriant” costs-claims):
- (a) In **IPOC**, as noted above, Master Mathurin pointed out that the CPR’s (former) definition of “procedural appeal” excluded interim injunctions.
 - (b) In **Michael Wilson v Temujin**, interim applications were dealt with under CPR 65.12.
 - (c) In **Rusal** Wallbank J. did apply a test as to whether an application was procedural or not by reference to whether the application decided the substantive issue in the claim — if the application did not so do, it was procedural — hence, on that analysis, an interim injunction application would generally be procedural (at paragraph 46(u)). It is submitted that this approach was perhaps based on the peculiar facts of that case and not intended to have general application (but, to the extent that it was, the Court should decline to follow it). The Court was plainly influenced in its approach by the extreme nature of the case before it: the Court noted that the applicant’s lawyers spent an extravagant amount of time preparing for the hearing such that it is an understatement to say that the costs claimed are stratospherically luxuriant” (amounting to some US\$1,300,000 million for a hearing that took place “over parts of

three days”) “and indeed, other, less delicate, epithets come to mind”. In any event, as a fellow Court of first instance, the doctrine of stare decisis does not compel this Court to follow it.

- (d) The most recent decision in this area, **Paradise Beach v Nevis Paradise et al**, expressed serious doubts about the correctness of the **Rusal** approach. However, **Paradise Beach** followed **Rusal** nonetheless, but in a similarly extreme context where exorbitant costs were sought. Master Moise stated at paragraph 19 that “*I have my doubts as to whether an application for an interim injunction is procedural*” and “*expressed my doubts as to the correctness of these decisions*”. Moise M. was clear that he was not compelled to follow **Rusal**, but reluctantly did so in the event. He stated that “*although I have expressed my doubts as to the correctness of these decisions, for reasons which will be apparent later, I will adopt the line of authorities as the proper course of action to pursue.*” The decision then reveals that these reasons relate to the fact that this was, like **Rusal**, another case where exorbitant costs had been claimed. Moise M. ultimately reduced them by 85%. It was this factor, and the obvious desire on the part of the tribunal, and not any jurisprudential correctness (which Moise M. firmly and expressly doubted), that influenced the Court in following **Rusal**.

- (iii) The generally understood use of the word “procedural” in litigation is by reference to the procedures or process that apply to the conduct of the litigation, not applications which affect substantive rights of parties. This is the “natural or ordinary meaning of the word or phrase in its context in the statute”. So, for example:

- (a) The definition of “procedural” in the Merriam Webster dictionary is “‘of or relating to procedure.’ Especially: ‘of or relating to the procedure used by courts or other bodies administering substantive law’”. Plainly this understanding does not encompass an application for an interim injunction, which results in an order which has an immediate, and often (as in this case) dramatic, practical effect on the substantive rights of parties (so much so, that rules of law and a vast body of jurisprudence have been developed to mitigate the prospect of undue damage to those rights — for example, the requirement that an undertaking in damages be provided).

- (b) It is clear that this is the context in which Courts generally understand the term “procedural”. For example, in **Hoult v North West Health Authority**, a case on the power of the Court to amend orders, the English Court of Appeal took it as read that an interlocutory injunction was non-procedural. Hughes LJ. commented as follows “There may possibly be examples of nonprocedural but continuing orders which may call for revocation or variation as they continue — an interlocutory injunction may be one.”
- (c) Similarly, as noted in the submissions in IPOC at paragraph 8, “The Chancery Guide 2005, issued by the Chancellor of the High Court in England, provides, in Para 5.2, ‘It is most important that applications which need to be heard by a judge (e.g. most applications for an injunction) should be made to a judge. Any procedural application (e.g. for directions) should be made to a Master unless there is some special reason for making it to a judge’ So the Guide considers that a “procedural application” is akin to an application for directions (which would include such matters as an extension for time for service of a defence, or evidence, a request for further information etc.).

Seen in that light, the Court should be cautious about deeming an injunction application (and particularly one such as in the instant case) a “procedural application”. To do so would make a mockery of the natural meaning of the word and the obviously substantive and complex rights and obligations in issue.

[81] In the event that the Court determines that CPR 65.12 applies, it need not concern itself with the prescribed costs regime and can proceed to assess the costs by reference to reasonableness, as set out in CPR 65.2(3).

(ii) NCBA’s alternative case: CPR 65.11 applies but “special circumstance” justify lifting the 10% cap

[82] If, contrary to NCBA’s primary position, the Court finds that CPR 65.11 is the applicable rule, there can be no doubt that this is a case in which special circumstances apply, with the result that the claim for costs should not be limited to one tenth of the prescribed costs appropriate to the claim.

[83] This was not a run-of-the-mill case but a large, complex, high value, multi-jurisdictional matter requiring the involvement of many lawyers with varying degrees of skill and expertise. These are the very same grounds in which special circumstances were held to apply in **Michael Wilson v Tumifin et al.**

[84] **Michael Wilson** involved the discharge of a receivership order against the backdrop of a case based on dishonest assistance and breach of fiduciary duties, not greatly unlike these current proceedings. Despite the matters in dispute being settled through dialogue without any need for a hearing, the Court was quick to reach the conclusion that “special circumstances” existed for the recovery of costs. The instant case contains similar ingredients to justify such a conclusion, and many more:

- (i) The matter was extremely urgent, as NCBA’s funds were frozen, with all the immediate difficulties for NCBA’s contractual obligations and reputation that this entailed, which included the extremely adverse impact on NCBA’s commercial operations and bank services that it provides in Anguilla. It is no understatement to say that PBT’s actions threatened the availability of retail banking in Anguilla;
- (ii) The matter was high value. Although unparticularised, on one reading of the Claimants’ statement of case, at one extreme, the underlying claim was for as much as US\$201 million. Mathurin J. in the High Court records at paragraph 13 “that Mr. Tacon makes specific reference [in the transcript of the U.S. Proceedings] to a damages suit filed in Anguilla and a US\$175 million claim”. PBT now asserts that the claim amounts to US\$9.1 million. Whatever the figure, however, the case clearly has a high value.
- (iii) The matter concerns issues of overwhelming public and economic importance for Anguilla as it centres on the manner of recovery of pillar banks at the centre of Anguilla’s banking sector following their collapse, with all the consequences that has for the customers of those banks, their employees and the reputation of Anguilla’s banking sector internationally.

- (iv) The matter involved difficult and important points of Anguillian and U.S. law, as well as the application of principles of private international law to a multitude of difficult legal issues. A non-exhaustive list of the issues include:
 - (a) the true jurisprudential character of an injunction and circumstances in which it can go beyond being prohibitory to mandatory;
 - (b) issues of recognition of insolvency proceedings as foreign main proceedings under Chapter 15 of the U.S. Bankruptcy Code;
 - (c) interpretation of aspects of U.S. contract law in relation to banking deposit agreements;
 - (d) procedural requirements under Anguillian law for leave to bring proceedings against an officer of the Court;
 - (e) the appropriate use of an insolvency officer's powers;
 - (f) issues of private international law and, in particular, issues of forum non conveniens where an underlying claim is appropriately founded in one country, but allegedly the impugned assets are located in another and are subject to foreign law contracts;
 - (g) the application of the balance of convenience test in circumstances that are not straightforward. That those circumstances were difficult is evidenced by the fact that the considered decision of respected judge, Mathurin J. was reversed on appeal; and
 - (h) the law in relation to anti-suit injunctions sought against steps in foreign insolvency proceedings.
- (v) Expert evidence on matters of U.S. law was required and presented by both sides instructing U.S. counsel well-versed in multi-jurisdictional banking insolvency matters. The reports are detailed and bear review by the Court. The experts produced them in the form of well-researched and thorough witness statements that addressed U.S. law questions such as:
 - (a) the effect and procedures surrounding commencing U.S. bankruptcy proceedings on foot of a foreign insolvency and the powers of the Court and foreign officeholder in that regard;

- (b) the availability of U.S. avoidance actions for that (foreign) officeholder;
 - (c) the application of U.S. rules of discovery against the backdrop of the Federal Rules of Bankruptcy Procedure and the duties this imposes on related parties;
 - (d) whether the BOA Account fell under the U.S. Bankruptcy Court's jurisdiction and was caught by the automatic stay;
 - (e) the impact of various orders of the U.S. Bankruptcy Court;
 - (f) the juridical nature of the "freeze" on the BOA Account under U.S. law;
 - (g) the effect of certain alleged misrepresentations by PBT to BOA; and
 - (h) other detailed aspects of U.S. bankruptcy law.
- (vi) As the law and evidence described above implies, the Anguillian injunction applications took place against the backdrop of complex on-going contested litigation involving the parties in overlapping bankruptcy proceedings in the U.S.;
- (vii) PBT clearly regard the case as important, complex and high-value litigation, as their U.S. proceedings were commenced by PBT using their New York-based team at Reed Smith, one of the largest international law firms in the world, and locally they have, in addition to Ms Fontaine, engaged the assistance of an external senior litigator, Mr Patrick Patterson, former Senior Crown Counsel of Anguilla.

[85] It will be noted that the threshold for finding "special circumstances" has not proven particularly high in the past.

[86] In **Nevis Paradise**, the Court was content to find there had been "special circumstances" justifying a higher award in the case of an injunction stopping the building of five two-bedroom villas against the backdrop of a judicial review challenge to the grant of planning permission. Planning disputes are commonplace, particularly on beachfront property, and the Court suggested in paragraph 53 that the case was "not particularly complex or multi-jurisdictional" and that it "was not of the view that these circumstances are such as to render the issues novel, weighty or complex to any significant extent". Nonetheless the Court deemed that "special circumstances" applied enabling it to lift the 10% cap in light of "the nature of the application, the urgency with which it was filed and

prosecuted and the evidence presented by the applicant regarding the number of documents filed and court appearances made in the matter”.

[87] By comparison, the present proceedings involve cross-border insolvency and the complex interplay of two distinct but simultaneous regimes on the rights of the litigants and innocent third parties (including a large number of businesses in Anguilla). As noted, this required amongst other things sophisticated foreign law expert evidence from leading foreign counsel. On any view, million-dollar values were at stake and the applications were exceptionally urgent.

[88] This demonstrates that there are ample “special circumstances” — should they be needed (contrary to NCBA’s primary contention) - to exceed any cap, and indeed justify a costs award of multiples of any prescribed costs calculation.

(iii) **NCBA’s alternative case in the event the Court determines that: (a) CPR 65.11 applies; but (b) there are no “special circumstance” that justify lifting cap**

[89] If the Court deems that CPR 65.11 applies, but there are no “special circumstances” that would justify lifting the cap, the Court would carefully need to examine PBT’s evaluation of its claim.

[90] PBT now contrives to argue that the claim is worth only US\$9,100,000.00. It seems that this figure emanates from the amount of money which was lodged with the BOA account (see paragraph 10 of the Court of Appeal Judgment), not the professed value of the entire claim. That is a disingenuous argument if the injunction is said to be “procedural” in the substantive claim. PBT cannot have it both ways: if the matters are procedural, it is a procedural application on its whole claim; by contrast, if the relevant “value of the claim” is confined to the sum in correspondent bank account in New York, then this suggests that this was in truth the substantive argument all along, for which assessed costs are appropriate.

[91] NCBA would naturally welcome this acute diminution in the professed value of PBT’s claim, PBT should be held to the valuation that Mr. Tacon is recorded by Mathurin J. in the High Court

judgment as outlining to the U.S. Court, namely the US\$174,959,675.75 set out in paragraph 18 of its Amended Statement of Claim.

- [92] On that analysis, and applying the one tenth cap, the prescribed costs calculations for the High Court proceedings are as follows:

Claim for US\$174,959,675.75 for PBT (First Claimant)

First US\$100,000	US\$15,000
Next US\$150,000	US\$18,750
Next US\$250,000	US\$25,000
Next US\$500,000	US\$35,000
Next US\$1,500,000	US\$45,000
Next US\$172,459,675	US\$862,298.38
Total costs	US\$1,001,048.38

- [93] This would put the one-tenth figure for the High Court proceedings at US\$100,104.83.
- [94] The Court of Appeal proceedings would attract costs at the rate of two-thirds of those awarded for the High Court proceedings in accordance with CPR 65.13(1). This amounts to US\$66,736.55. (Incidentally, the costs of the Court of Appeal aspect of the claim under a prescribed costs regime are inexplicably ignored in PBT's consideration of the point at paragraph 20 and 21 in its submissions.)
- [95] Therefore, the costs allowable under a strict approach applying a 10% cap would amount in total to US\$166,841.38, subject to reasonableness.

IV. Reasonableness of costs incurred

- [96] Having determined the appropriate overarching procedural avenue to apply in assessing the costs, the Court should assess reasonableness of costs against all the circumstances of the case including those set out in CPR 65.2(3).

[97] In so doing, the words of Woolf LJ. in **Lowndes v Home Office** are apposite:

“[W]hat is required is a two-stage approach. There has to be a global approach and an item-by-item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which CPR r44.5(3)18 states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable.”

[98] It is proposed to adopt this two-stage approach to the analysis of reasonableness.

(I) Global analysis

[99] Applying the first stage of that test, the cost sought are in the region of US\$200,000.00. It is submitted that these are not excessive in the context of the complexity and value of the case. That rough sum is within 20% of the costs awardable if calculated on the restrictive approach of a strict capped prescribed costs assessment. This is further indication of their reasonable nature from a global perspective.

[100] Ultimately, the Court must allow such sum that is reasonable taking into consideration the matters set out in CPR 64.6(6) and CPR 65.2 (3). The latter sets out the non-exclusive list of factors that the court is required to take into account in assessing costs namely:

- a) any order that has already been made;
- b) the care, speed and economy with which the case was prepared;
- c) the conduct of the parties before as well as during the proceedings;
- d) the degree of responsibility accepted by the legal practitioner;
- e) the importance of the matter to the parties;
- f) the novelty, weight and complexity of the case; and
- g) the time reasonably spent on the case.

- [101] It is proposed to address these factors, as appropriate, in turn. The care, speed and economy with which the cases were prepared
- [102] PBT wrote to BOA to impose a freeze by 8 July 2016, around which time NCBA became aware of the freeze. NCBA issued the injunction application on 20 July 2016 and the anti-suit injunction application followed a couple of weeks later. Both applications were heard on 10 August 2016 with judgment given by Mathurin J on 18 August 2016.
- [103] This timeline demonstrates the urgency with which NCBA treated this matter and the speed with which its legal team acted. Moreover, the fact that the Court entertained and quickly ruled on these applications during the Court's summer vacation speaks for itself as to the urgency.
- [104] Despite the care and speed demanded by the complexity and urgency of the matter, NCBA only seeks to claim in respect of two Anguillian lawyers.
- [105] That NCBA's legal team conducted itself in a professional and competent manner is self-evident by reference to the fact that it won on all points in the Court of Appeal. The degree of responsibility accepted by the legal practitioner figures discussed in Michael Wilson, where the bill for Counsel for a single receivership discharge application came to between US\$200,000.00 and US\$300,000.00 is indicative of the value of Mr Hare doing the advocacy himself.

The importance of the matter to the parties and the novelty, weight and complexity of the case

- [106] In addition to the points mentioned above, there can be no doubt that the matter was of utmost significance to the parties. From NCBA's perspective, as Webster JA noted in paragraph 23 of his judgment in the Court of Appeal:

As a result of the freeze, when its customers make payments into the Account those funds cannot be released and the appellant has to use its own funds to process the transactions. Failure to do so would result in the transactions being dishonoured and further losses to the appellant including reputational losses. The appellant also incurred additional losses by having to finance these transactions and also by deductions made by Bank of America

from the Account to cover the cost of its legal fees relating to the dispute between the parties. The appellant also claims to have suffered serious inconvenience in operating its business by having to make alternative arrangements for dealing with its customers' transactions.

- [107] Equally, the issues were complex as a review of the affidavits, expert evidence, skeleton arguments and two judgments themselves demonstrate.
- [108] The matter was also a matter of high value: some US\$2,501,975.20 frozen against the backdrop of the discrete aspect of the claim involving BOA of US\$9,100,000.00 and a broader claim for US\$174,959,675.75 (as Mr. Tacon informed the U.S. Bankruptcy Court and as set out in paragraph 18 of the Statement of Claim).
- [109] Plainly, the financial, operational, and reputational exigencies justified a mobilisation of resources to protect those interests.
- [110] The Costs Schedule shows that Mr. Hare spent approximately 91 hours in the High Court proceedings and 34 hours in the Court of Appeal proceedings in respect in total advising the client, formulating strategy, drafting for the hearings, preparing for the hearings and appearing at them, as well as advising in relation to their immediate aftermath.
- [111] The only other Anguillian lawyer on the case was Mr. Richardson, whose billing rates were also discounted. The Costs Schedule shows that he was engaged for some 127 hours in respect of the High Court proceedings and 25 hours for the Court of Appeal proceedings.
- [112] Therefore, the entire number of hours sought to be recovered in respect of Anguillian legal advice and representation in respect of both the High Court proceedings and Court of Appeal proceedings was approximately 277 hours.

[113] This number bears very favourable comparison with the number of hours sought to be recovered in other, often less complex or valuable legal matters. So, for example, by reference to the cases already considered by this Court:

(i) **Rusal** concerned an application to discharge an interim injunction at High Court level in a straightforward case that had no “special circumstances”. There was no appeal to the Court of Appeal. The applicant sought costs of over US\$1.3 million in relation to the discharge application. Whilst the judge did not direct a final figure (which was a task for the Master), he directed that for the purposes of the cap of one tenth of the prescribed costs, the value of the claim should be considered as US\$ 1billion. We do not know if the Master granted the full extent of the cap, but if he did, the costs award would have been in the region of US\$512,625.00.

(ii) **Michael Wilson** is perhaps the case with greatest similarity to the fact profile here. This case involved similar allegations of breach of fiduciary duty, although it centred on the discharge of a receivership order. The case was settled on the day it was to go to hearing. There was therefore no appeal. The Court awarded costs of US\$395,000.00.

[114] This case concerned two contested hearings. NCBA seeks to recover the costs of two legal practitioners in relation to Anguillian legal representation and advice. The work was performed efficiently and effectively.

Expert evidence on matters of U.S. law, not Anguillian legal representation

[115] It should be noted that the charges of the U.S. lawyers are not for Anguillian legal representation or advice, but rather for the provision of expert advice and evidence in respect of the many U.S. law matters that are set out in greater detail in the witness statements thereon. PBT in paragraph 34 of its submissions clearly misapprehends the position in its assertion that because the U.S. lawyers “are not licensed to practice law in Anguilla... the Applicant should not be able to recover the amounts being claimed”. The expert evidence on U.S. law was not, nor held itself out to be, Anguillian legal representation or advice: it simply was a necessary disbursement and a key part of the preparation for the hearings and falls within the general order for costs.

[116] PBT's submissions also complain that some six different U.S. lawyers had input into the U.S. law expert evidence at different stages. There is no mystery or anything untoward in this. Large international law firms typically allocate work according to the most cost-effective appropriate level, so that each task is done as efficiently as possible, from both a pricing and quality perspective. This is to the client's benefit. A quick consideration of the alternative scenario confirms this. Had the senior partner, Mr. Molton, performed every aspect of preparing the advice himself, including basic initial research and drafting, the cost of the advice would obviously have been vastly greater.

(ii) Item-by-item concerns raised by PBT

[117] Following what appears to be a forensic analysis of NCBA's Costs Schedule, PBT listed its specific concerns from paragraph 22 onwards in PBT's submissions. NCBA notes that this appears to be an exhaustive list and so will not comment further, unless required, on other items in the Costs Schedule.

[118] Cost sought for Adjournment application: PBT correctly points out these costs should not have been included in the Costs Schedule. NCBA accepts that the time entries for the adjournment hearing of 3rd August 2016 should be disregarded.

[119] Cost for post-application actions by NCBA's Anguillian lawyers: Plainly the work on an application does not cease from the moment the Court hearing ends. There will be various tasks that come directly out of that hearing, including arranging for orders to be perfected, following up with the client and considering the outcome of the hearing, and possible strategies attendant upon that. Such work is reasonable and the costs of it are perfectly recoverable. However, the narrative relating to the leave application was included by oversight and should be discounted.

[120] Amounts claimed by Alex Richardson: the time spent by Mr. Richardson is set out above, his work can be readily discerned from the narratives he has provided, and his work is both reasonable in overall amount and reasonably incurred. In some instances, these narratives lack some detail, but that is in part a consequence of seeking to avoid inadvertently disclosing potentially privileged or strategic material, so the narratives have been redacted accordingly to remove some specifics. Furthermore, the level of narrative is sufficient for the purposes of assessing the reasonableness of

the items in light of there being no obvious inflation of time records and the fact that it was clearly necessary for Mr. Richardson (as the lawyer resident in Anguilla).

[121] The criticism that Mr. Richardson spent time on 16th July 2016 “reviewing documents in relation to the application” is surprising and firmly rejected. Reviewing the papers, understanding the case, and preparing for the hearing and reacting accordingly is at the core of Mr Richardson’s professional duty.

[122] Costs for time spent travelling by Mr Hare and hourly rates: this is obviously an allowable disbursement in a high value, commercial case such as this: see **Michael Wilson** at paragraph 82. The **Paradise Beach** case where such costs were disallowed does not, it is submitted, assist, because, as discussed above, the Court found that it was a straightforward case generally free of complex or novel issues.

[123] PBT criticises the hourly rates charged by Messrs Hare and Richardson, with Mr. Tacon describing Mr. Hare’s hourly rate of US\$850 as “wholly exorbitant” at paragraph 14 of his Affidavit. It is submitted that this criticism is unfounded and should not have been made.

[124] In **Halliwell Assets et al. v Hornbeam Corporation** the BVI Court considered an objection to an hourly rate of US\$725-750 of a then junior partner of Forbes Hare, Mr. Robert Nader, in an insolvency matter (in which he was led by a very senior London QC). Leon J commented at paragraphs 153 to 156 as follows:

“[153] Fourth, Hourly Rate Charged by Supervising Partner in Judgment Creditors’ BVI Legal Practitioners. Bracha objected that the hourly fee of Robert Nader, a Forbes Hare Partner and the supervising partner on this matter, was “too high and is worryingly flexible (\$725 here but \$750 in the security for costs schedule): using a rate of \$600 would have been generous.”

[154] This Court finds this objection to be quite objectionable and petty, and wholly lacking in merit.

[155] This Court has seen enough assessments to have a sense of the hourly rates charged by law firms in the BVI, including Bracha’s BVI legal practitioners,

Harneys. The Judgment Creditors pointed out the Partner at Harneys who had a comparable role charged his time at \$795 per hour (his ordinary rate being \$895 it was submitted) and that \$600 per hours is less than the rate charged for two Harneys' associates (\$625). While there may be some internal differences among firms, the overall rate structures are reasonably comparable. Mr. Nader's rate at \$725, or if it had been at \$750 (which was explained as being his 2016 rate), was well within the bounds of reasonableness and well within the range of hourly rates for legal practitioners at his experience and seniority level doing litigation work. Also it was pointed out that Justice Bannister, in relation to the Orders, had allowed Mr. Nader's work and time at \$725 per hour. Whether it was objected to by the Judgment Debtor at the time or whether it accepted the rate as reasonable, Justice Bannister did not reduce it.

[156] The fourth objection should not have been made and is rejected. This is not the type of objection that should be raised without a sound basis. Gratuitous and overly aggressive objections of this kind unnecessarily prolong assessments of costs, and does nothing to aid in a just determination of what is reasonable for a paying party to pay. [emphasis added]"

[125] NCBA makes these further observations in relation to hourly rates:

- (i) Halliwell relates to rates in 2015. Mr. Nader was a junior litigation partner at the time, and some ten years' junior to Mr. Hare in call.
- (ii) The partner at Harneys in Halliwell who was in 2015 charging US\$895 per hour was also more junior and less experienced than Mr. Hare.
- (iii) Forbes Hare's rates are described as being "well within the bounds of reasonableness".
- (iv) No Caribbean court has ever accepted in a costs assessment a challenge to the hourly rates of Forbes Hare since the establishment of the firm in 2005, nor to Mr. Hare's hourly rates since commencing practice in the Eastern Caribbean in 1999.
- (v) If he was familiar with the rates charged in cross-border insolvency matters in the Eastern Caribbean (as he ought to be, having practised as an insolvency practitioner in the BVI from around 2005 for a number of years), Mr. Tacon should know that Forbes Hare rates are reasonable by market standards. If Mr. Tacon is going to allege that Forbes Hare are

charging “wholly exorbitant” rates (which is otherwise quite obviously a “gratuitous and overly aggressive objection”), he needs to have a “sound basis” for that assertion. Mr. Tacon has not elucidated what that basis might be.

- (vi) Mr. Hare’s hourly rate of US\$850 is challenged, but that is in fact a discounted rate, which Forbes Hare has furthermore kept discounted throughout this case because NCBA is publicly owned. In fact, that rate (US\$850) was the rate that was previously approved for Mr Hare by the BVI Commercial Court in insolvency matters (which requires an assessment of “reasonableness”) some 10 years ago, in 2009. This rate subsequently increased, but to say that this rate is “wholly exorbitant” is “gratuitous and overly aggressive” when:
 - (a) That rate, or higher rates, have been approved in respect of Mr Hare’s recoverable time charges on numerous occasions by the BVI Court over the last 10 years;
 - (b) It is discounted; and
 - (c) Other commercial firms in the Caribbean charge higher rates for more junior and less experienced lawyers, as Mr. Tacon is (or should be) aware.

[126] PBT also takes issue with the hourly rates charged by the U.S. lawyers.

[127] In that regard, it would be interesting to see the costs bills charged by PBT’s U.S. lawyers, who are from a similarly eminent firm and no doubt would have similar bills — this is simply the market rate. The Courts have recognised this in the context of complex, multi-jurisdictional litigation such as this. In **Michael Wilson**, the Court approved rates for associate lawyers of US\$550 per hour. These lawyers were not partners and that was over 13 years ago.

[128] Fees for foreign Counsel: Brown Rudnick provided expert evidence on U.S. law (as PBT’s U.S. law experts did) which was received without criticism by the Anguilla Court. This is a reasonable and necessary cost recoverable as an ordinary disbursement.

V. Interim payment of costs

[129] NCBA makes an application for interim payment of costs in the alternative, out of an abundance of caution, in case the Court does not award full payment of costs now. NCBA does not foresee why

that might happen in a context of costs awards dating back over three years now, but nonetheless prudence dictates such an approach. As PBT accepts, the Court has jurisdiction to make such interim payments.

[130] PBT seeks, however, to frustrate any application for interim payment by reference to NCBA's so-called "delay" in applying for costs.

[131] This point is poorly taken. The reason for the apparent delay in applying for costs is that, in line with the overriding objective, NCBA sought to avoid wasting court time and further costs in applying for a costs assessment in a stand-alone hearing.

[132] Therefore, NCBA waited until the first available opportunity where issues arising in these proceedings would be considered. The Claimants delayed in proceeding with their case as they attended to their own ancillary procedural issues (such as joining new defendants). This meant that the first Case Management Conference in which the costs assessment issue could be addressed was that in October this year. The desire to act in accordance with the overriding objective, by avoiding causing more costs in seeking a stand-alone hearing solely to argue about costs, is what underpins the "delay" that PBT now seeks to criticise. It is a criticism without merit.

[133] It is usual practice that the costs of this hearing be awarded to the Applicant (NCBA): see, for example, **Nevis Paradise** at paragraph 55. The only reason that the costs are being assessed in hearing at all is that PBT is challenging the costs sought, on (it is submitted) specious and spurious grounds, notwithstanding the provision of a detailed costs schedule.

[134] Prior to this hearing, PBT had made no offer to pay any costs in open correspondence. PBT has since apprised the Court (quite improperly) of a letter marked "without prejudice" which made a derisory offer for costs. However, as a matter of law, communications expressly made on a "without prejudice" basis are inadmissible, even for the purpose of costs arguments; and the court has no general discretion to disapply the "without prejudice" rule: see **Computer Machinery Co Ltd v Drescher** [1983] 11 W.L.R. 1379 and **Reed Executive Plc v Reed Business Information Ltd** [2004] EWCA Civ 887. PBT's conduct in this regard is to be deprecated, and the letter should

simply be ignored.

- [135] In NCBA's original submissions, NCBA suggested that the costs of this hearing should be summarily assessed, as they were in **Nevis Paradise**. Such an approach avoids the time consuming and costly exercise of using further Court time to argue about the costs of costs hearings — a particularly lamentable form of satellite litigation. NCBA originally suggested a figure of US\$10,000 for this exercise (although it does not cover the cost of preparing for the hearing). However there has now been a need for external counsel to come twice to Anguilla for the purposes of this assessment, and to deal with the Claimants' arguments (including arguments that verge on suggesting impropriety on the part of the legal practitioners for the Third Respondent).

VII. Interest

- [136] Unless the court has ordered otherwise, interest on an award of costs runs from the date of the order for costs (see **Hunt v RM Douglas (Roofing) Ltd** [1990] AC 398 and **Simcoe v Jacuzzi UK Group plc** [2012] EWCA Civ 137). The Court has not ordered otherwise and so interest should be awarded from 28 February 2017, the date of the order of costs.
- [137] Save for the minor concessions noted herein, the Costs Schedule sets out costs that are reasonably incurred and reasonable in amount, resulting in an overall costs figure that is reasonable and proportionate relative to the subject matter, urgency and importance of the injunction applications.
- [138] The respondent submits that the court rejects the applicant contention that the assessment to determined pursuant to CPR 65.12 and adopt the position on the **Rusal** case (supra) and proceed under CPR 65.11.
- [139] The respondent submitted that with regards to assessment of costs, having perused cases from our courts the courts only allow costs that the courts deem reasonable.
- [140] The respondent relies on the case of **Paul Webster et al v The Attorney General (For the Government of Anguilla)** Claim No. AXAHCV 2008/0015 the Learned Master Lanns (as she then

was) stated at paragraph 22 “And in **Peter Maxymych v Global Convertible Megatren Ltd and Anor Claim No 246 of 2006**. Olivetti J found it necessary to refer to the Privy Council decision in **Horsford v Bird 43/2004 (28th November, 2006)**, for the principle that no party can be expected to be fully indemnified for costs; he is only entitled to reasonable costs.

In Horsford v Bird supra, Lord Hope of Craighead stated:

“It has to be borne in mind in judging what was reasonable and proportionate in this case, that the basis of the award was not that the appellant was to be indemnified for all his costs. The respondent was to be required to pay only such costs as were reasonably incurred for the conduct of the hearing before the judge and were proportionate.”

Court's Analysis

[141] The applicant argues that CPR 65.12 is the applicable rule for the assessment of cost. In the alternative CPR 65.11 but that special circumstances should justify lifting the 10% of Cap.

Costs

[142] The applicant argues that the applicable rule for the assessment of costs in this matter is CPR 65.12 or alternatively 65.11.

[143] 65.11(1) on determining any application except at a case management conference, pre-trial review or the trial, the court must –

- (a) *decide which party, if any, should pay the costs of that application;*
- (b) *assess the amount of such costs; and*
- (c) *direct when such costs are to be paid.*

(2) In deciding which party, if any, should pay the costs of the application the general rule is that the unsuccessful party must pay the costs of the successful party.

[144] However, sub rule (7) is of consideration in this application. The rule states “the cost allowed under this rule may not exceed one tenth of the amount of the prescribed cost appropriate to the claim unless the court considers that there are special circumstances of the case justifying a higher

amount.” The applicant is contending that if the court applies the alternative position there are special circumstances of the case to justify a higher amount.

[145] If the court were to apply CPR 65.11; then the costs allowed in this application must not exceed 10% of the prescribed costs in the claim. The court will be required to assess the actual value of the claim and then determine whether the assessed costs exceed 10% of what would be prescribed.

[146] However, the court has a discretion to award a higher sum if the circumstances so require.

Rule 65.12

[147] CPR 65.12 provides:

- (1) *This rule applies 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.*
- (2) *If the assessment relates to part of court proceedings it must be carried out by the judge, master or registrar hearing the proceedings.*
- (3) *If the assessment does not fall to be carried out at the hearing of any proceedings then the person entitled to the costs must apply to a master or the registrar for directions as to how the assessment is to be carried out.*
- (4) *The application must be accompanied by a bill or other document showing the sum in which the court is being asked to assess the costs and how such sum was calculated.*
- (5) *On hearing any such application the master or registrar must either –*
 - (a) *assess the costs if there is sufficient material available to do so; or*
 - (b) *fix a date. Time and place for the assessment to take place.*
- (6) *The master or registrar may direct that the party against whom the bill is assessed pay the costs of the party whose bill is being assessed and, if so, must assess such costs and add them to the costs ordered to be paid*

[148] CPR 65.11 and 65.12 were discussed in the judgment of Barrow J in the case of **Norgulf Holdings Limited and Another v Michael Wilson Partners Limited**².

² BVIHCVAP2007/0008 (29th October, 2009)

- [149] With regards to the purport and effect of the two rules the discussion in the Norgulf judgment ought to be considered.
- [150] CPR 65.12 complements and overlaps CPR 65.11 but it is much broader in scope. CPR 65.12 applies to all assessments of costs, not just costs of an application. The rule opens by stating in paragraph (1) that this rule applies where costs fall to be assessed in relation to any matter or proceedings, or part or part thereof, other than a procedural application. These two words, “matter” and “proceedings”, both terms of art, together extend the rule to virtually every proceedings that could come before the court. In the Eastern Caribbean Supreme Court (British Virgin Islands) Act, in the interpretation section, section 2, “matter” includes every proceeding in court not in a cause”, “‘proceeding’ includes action, cause or matter”; and “‘cause’ includes any action, suit or other original proceedings between a plaintiff and defendant, and any criminal proceedings by the Crown”. The effect of paragraph (1), in stating that this rule applies to any matter or proceedings or part thereof, is to apply this rule to proceedings generally, not just application. But the rule does cover applications generally, which are necessarily part of proceedings, save for procedural application, which are specifically excepted. Put another way, by excluding only procedural application this rule includes all other application.
- [151] The amplitude of its operation having been established in paragraph (1), the rule proceeds in its other paragraphs to set out the procedure to be followed for an assessment to be carried out. That is what CPR 65.12 does – it lays down the procedure for assessment. This is in contrast with the provisions of CPR 65.11, which lays down the principles to guide the court in making an assessment of costs on determining applications.
- [152] Thus paragraph (2) of CPR 65.12 extends to proceedings generally the proposition relating to applications that appears in CPR 65.11(1) (b), which was that on determining an application the court must assess the amount of costs. Paragraph (2) of CPR 65.12 states that if the assessment relates to part of court proceedings it must be carried out by the judge or master or registrar hearing the proceedings it must be carried out “at the hearing” (see CPR rule 65.12(3)). By identifying the range of judicial officers who would be ‘hearing the proceedings’ paragraph (2) also confirms that this rule applies to the whole range of proceedings that can come before a court. The

rule applies to proceedings that are heard by the registrar, which are minor application; to proceedings that are heard by the Master, which are almost all applications that a judge could hear in chambers; and to proceedings that are heard by the judge, which are “any” proceedings, whether in chambers or open court, including trials.

- [153] Paragraphs (3), (4) and (5) of CPR 65.12 provide the procedure for obtaining an assessment of costs when the assessment does not fall to be carried out at the hearing of proceedings. These paragraphs provide that an application must be made, the documentation to be filed and the way in which the master or registrar must proceed. It is only when the assessment is not carried out “at the hearing of any proceedings” (CPR 65.12(3)) that the procedure contained in these paragraphs becomes applicable. If the assessment of costs is carried out at the hearing of the claim, that is, at the trial, then the assessment the court must make is of costs of the claim. Pursuant to CPR 65.3 the costs of proceedings will be fixed costs or prescribed costs or budgeted costs or, if none of the foregoing is applicable, costs assessed in accordance with CPR 65.11 and 65.12.
- [154] In the case of **United Company PLC et al v Corbiere Holdings Ltd et al**, Wallbank J, in this case had to address the question of whether an assessment of costs should be conducted pursuant to CPR 65.11 or 65.12. If the former, whether special circumstances apply to the case such that rule 65.11(7) that limits the award of costs to one tenth of the prescribed costs should not apply.
- [155] In his judgment Wallbank J stated three primary authorities from this jurisdiction give guidance and set out principles of general application.
- [156] In **Norgulf** at paragraph 8[6] Barrow JA stated as follows with regard to CPR 65.11 a good starting point for appreciating this rule is not to be misled by its heading. The rule clearly applies to more than just procedural applications because paragraph (1) of the rule says that “on determining any application” other than at a case management conference, pre-trial review or at the trial, the court must: decide whether to award costs of that application and which party should pay them: assess the amount of such costs; and direct when they are to be paid. These are decisions the court must make on applications generally, and not just for procedural applications. Paragraph (2), similarly,

is of general application in providing that the general rule is that the unsuccessful party must pay the costs of the successful party.

[157] In summary CPR 65.11 applies to any applications, except those made at a Case Management Conference, a Pre-trial Review or at a Trial, whether they are procedural, substantive or both.

[158] Whereas CPR 65.12 applies to any matter or proceedings, or part of a matter or proceedings, other than a procedural application.

[159] In short, if an application is a procedural application, it is to be excluded from CPR 65.12 and the costs fall to be assessed under 65.11 except the instances specially excluded in that rule.

[160] In **Norgulf**, at paragraph 15, Barrow JA contrast CPR 65.11 and 65.12 as follows:
“This is what CPR 65.12 does it lays down the procedure for assessment. This is in contrast with the provisions of CPR rule 65.11, which lays down the principles to guide the court in making an assessment of costs on determining applications.”

The Case at Bar

[161] The applicant contends that the application for an injunction is not procedural but rather substantive interlocutory relief and proffers that it is not a situation where prescribed costs as described in CPR 65(5) apply.

[162] Whereas the respondent joins issue with the applicant who asserts that an application for injunction is not procedural but rather substantive interlocutory relief.

[163] In perusing the authorities on the issue the Court found the **United Company Rusal PLC et al v Corbierie Holdings Ltd et al** case persuasive where Wallbank J. stated at para 47 of his judgment “the injunction was an interim remedy within the meaning of CPR 17.1(1)(b) “interim injunction”, and possibly CPR 17.1(1)(j)(i) “an order restraining a party from dealing with any asset whether located within the jurisdiction or not.” The injunction was interim pending determination of a claim, as then pleaded. Discharge of the injunction did not decide the substantive issue in the claim. It

was therefore “procedural” for the purpose of CPR 65.11 and 65.12. I am not taken with the defendant’s clever submission that discharge of the injunction determined the injunction proceedings, and should therefore be treated as not procedural. The “injunction proceedings: were ancillary to a substantive claim, and not proceedings in their own right, which continued notwithstanding discharging of the injunction. Furthermore, I do not consider that the fact that interim injunctions are treated like final relief for the purposes of not requiring leave to appeal assists the defendant here. The common denominator in that situation is that interim injunctions affect a party’s substantive rights in the same manner as final relief and therefore it is right and just to allow immediate access to review by the Court of Appeal. The test, for the purposes of assessment of costs, is not whether the interim relief affected substantive rights, but whether the application decided the substantive issue in the claim. It would appear to be clear in the present case that it did not. Equally, the defendants’ submission that costs assessments in respect of interim application have in practice been dealt with under **CPR 65.12** rather than **CPR 65.11**, their citing Michael Wilson as an example, does not withstand close scrutiny, as set out above. There is nothing about interim applications necessarily that direct them to be dealt with under CPR 65.12.

The Assessment

- [164] Having determined that the assessment of costs is to be made pursuant to CPR 65.11; the Court has to determine the value of the claim.
- [165] The applicant is seeking assessed cost of US\$209,089.09 further or alternatively then an interim payment of cost in the sum of US\$69,696.36 or any amount that the court sees fit pursuant to section 22 of the Legal Profession Act 2015.
- [166] The applicant has alleged that there are varying values to the claim. The applicant stated that on one reading of the claim the value is approximately US\$201,000,000.00 in the submission filed on 19th November, 2019. The applicant is asserting that the value of the claim is approximately US\$175,000,000.00 (one hundred and seventy five million).

- [167] The respondent on the other hand is asserting that the value of the claim should be determined based on the value outlined in their claim that of US \$9,100,000.00 as outlined in the amended statement of claim.
- [168] Having held the applicable rule to be applied is CPR 65.11. The court notes that both sides appear at variance as to the value of the claim.
- [169] Further, no application has been made to establish the value of the claim, but the Court notes that the applicant has had a cost order made in its favor.
- [170] Against that background the Court is of the view that an interim order may do justice to the applicant at this stage of the proceedings.
- [171] In the **Norgulf Holdings Limited et al v Michael Wilson and Partners Limited** it was held that the Court had both an inherent jurisdiction to order interim payment of cost and jurisdiction conferred by CPR 17.1(1) (g) to grant interim remedies including “ an order for interim costs”.
- [172] The Court is satisfied with the ground for an interim payment of cost order to be made in the applicant’s favor.
- [173] The Court notes that on the 27th December, 2017 solicitors for NCBA wrote to solicitors for PBT setting out an estimate of the cost and invited PBT to make an interim payment. This was stated in the affidavit of Sharmaine Francois.
- [174] PBT took no steps to satisfy any portion of its cost liability to the applicant.
- [175] In deciding what order (if any) to make about costs, the Court will have regard to all the circumstances including-
- (a) The conduct of all the parties including conduct before as well as during the proceedings.

[176] The Court will not make an award for an interim payment on account of cost simply because an applicant asks for it.

[181] On an application for interim payment of cost, a good starting point is for the Court to consider how much of an interim payment is reasonable in the circumstances, as opposed to whether an interim payment should be made at all.

[182] What is sought here is a costs order in respect of an ongoing dispute which may not be determined for many years. In determining what is reasonable costs in the matter the Court had to consider the amount of time spent on the matter to date, the novelty and difficulty of the question involved and the skill requisite to perform the legal service properly, the experience, reputation and ability of the Counsel performing the services.

[183] The Court also addressed its mind to the time and labor required, whether any order has already been made, the degree of responsibility accepted by legal practitioners, the importance of the matter to the parties.

Award

[184] Taking into account the principles outlined above, I find the sum of US\$50,000.00 to be a reasonable interim payment for costs and I so order:

(1) I therefore award interim costs to the applicant in the sum of US\$50,000.00.

(2) Costs of the application to be paid by the respondent to the applicant in the sum of US\$3,000.00.

(3) I acknowledge the assistance of Counsel in the matter and I apologize for the delay in the delivery of judgment.

Rickie Burnett

Master (Ag.)

By the Court

Registrar