

**EASTERN CARIBBEAN SUPREME COURT  
BRITISH VIRGIN ISLANDS**

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

**CLAIM NO. BVIHCM 2018/0134**

**BETWEEN:**

[1] **OLGA VLADIMIROVNA SCHERBAKOVA**  
[2] **ALEXANDER SCHERBAKOV**

Claimants

**and**

[1] **BRIGITA MORINA**  
[2] **ELENA NIKOLAYEVNA SCHERBAKOVA**  
[3] **LUCA ALEXI MORINA (a minor)**  
[4] **MATEO NATHANAEL MORINA (a minor)**  
[5] **OLIVYA DARIA MORINA (a minor)**  
[6] **CHAN SEE KHOW**  
[7] **TOPMAX WORLDWIDE LIMITED**  
[8] **KEY PLATINUM HOLDINGS LIMITED**

Defendants

**and**

[1] **ROY BAILEY**  
[2] **SIMON EDEL**  
[3] **ALAN HUDSON**

Applicants

**Appearances:**

Mr. Shane Quinn for the Applicants

Mr. Nicholas Brookes for the Claimants

Dr. Alecia Johns for the First Defendant

Mr. Christopher Bromilow for the Next Friend of the Third to Fifth Defendants

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2020: September 16.  
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**JUDGMENT**

- [1] **WALLBANK, J. (Ag.):** On 24<sup>th</sup> December 2019, the Applicants as Administrators of the estate ('the Estate') of the late Mr. Scherbakov filed an application ('the Application') for their remuneration, expenses and disbursements to be assessed for payment out of the Estate. The Application was heard, on a contested basis, on 24<sup>th</sup> February 2020. Following a further hearing on 19<sup>th</sup> May 2020, the Court issued a written judgment on 2<sup>nd</sup> June 2020 ('the Judgment'). The matter of costs of the Application was reserved. The parties have proposed that it be dealt with on paper upon further written submissions of the parties. The Court agreed and, with the parties' consent, directed the submissions to be filed and served by 28<sup>th</sup> August 2020. This is now the Court's judgment on the issue of the costs of the Application.
- [2] Paragraph [123] of the Judgment stated the following:
- "The issue of the incidence and quantum of costs shall be adjourned to a further hearing for further submissions. Whilst the Applicants were very largely successful, their position in relation to provision of detailed time entries and details of their travel and accommodation expenses and disbursements was in my respectful judgment erroneous. This is likely to have caused both their own and other parties' costs to have been increased. By the same token, the First Defendant and the Next Friend did not approach the assessment hearing on the basis that the Applicants should have the benefit of any doubt as to reasonableness, as the trustee basis entails. Similarly, they sought to introduce qualifications of necessity, which is not a factor that falls for consideration. The number of items objected to on erroneous grounds was considerable, increasing costs."
- [3] There is no dispute between the parties as to the law on costs. Rule 64.6 of the Civil Procedure Rules 2000 ('CPR') that applies here in the Territory of the Virgin Islands ('BVI') provides that costs are generally to follow the event (by sub-part (1)) and that the Court retains a discretion to make appropriate costs orders (by sub-part (2)), having regard to all the circumstances (sub-part (5)) and five listed factors (sub-part (6)). Moreover, as the Claimants submit (and none of the other parties dispute), the question of who is the successful party is to be determined in a common-sensical way, and not as a technical term, following *dicta* in **Fairfield Sentry Limited v Farnum Place LLC**.<sup>1</sup>
- [4] There is also no controversy between the parties that, in general, administrators of an Estate can charge their costs of such an application to the Estate on the same basis as the costs of other things done by them as administrators, with the same exceptions applying. In this regard

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<sup>1</sup> BVIHCPMAP2014/0026 (unreported, delivered 13<sup>th</sup> June 2018 at [31] (Blenman JA)).

the Applicants have referred the Court to the English cases of **Green v Astor and Others**<sup>2</sup> and **In re Buckton**.<sup>3</sup>

- [5] In practical terms there is also no dispute that:
- (1) The Claimants should bear their own costs of the Application;
  - (2) The First Defendant should bear her own costs; and
  - (3) The Next Friend's costs of the Application should be borne by the Estate, subject to assessment if the quantum is not agreed by the current administrators within 28 days.
- [6] There are three areas of disagreement. They concern the Applicants' costs of the Application:
- (1) Should the First Defendant be required to pay the Applicants' costs?
  - (2) If so, how much?
  - (3) How much, if any, of the Applicants' costs of the Application should be charged to the Estate?
- [7] The Applicants do not mind who pays their costs, as long as they can recover them from the Estate or from someone else. In this regard they are clearly looking at the First Defendant, as it was the First Defendant who most vehemently, widely and comprehensively disputed the Application.
- [8] I understand from the parties' submissions, including from the Applicants, that the Applicants have indicated that they are prepared to take a reduction of 10% of their costs on account of extra work they may have caused by not providing sufficiently detailed narratives or travel cost details. The Applicants are however seeking to recover the totality of their legal costs of their legal practitioners in this jurisdiction, which have been submitted in the amount of US\$27,821.50 plus some further Court filing fees.
- [9] The Claimants submit that the Applicants' costs should be paid by the First Defendant, and not by the Estate. This is on the basis that it was the First Defendant who offered the most resistance to the Application and caused the Applicants to run up most of their costs. The Claimants submit that viewed sensibly, the First Defendant lost and, as costs in litigation should ordinarily follow the event, the First Defendant should be required to pay the Applicants' costs

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<sup>2</sup> [2013] EWHC 1857 (Ch).

<sup>3</sup> [1907] Ch. 406.

of their successful prosecution of the Application. It is pellucid that as potential beneficiaries of the Estate, the Claimants feel strongly that the Estate should not be depleted by reason of wrongfully pressed litigation. There is good sense in that.

[10] The Claimants take the following positions. The Application has been vehemently opposed by the First Defendant. This litigation was in truth "hostile litigation" (per **Green v Astor**), which was waged by the First Defendant alone. The First Defendant's objections to the Application were not supported by all the other beneficiaries. While the Claimants and the Next Friend raised some queries and concerns, the First Defendant pursued this attack of her own accord and in no way acted on behalf of the Estate. The First Defendant has acted unreasonably, in that she has opposed the Application at great expense and yet to no real financial benefit to the Estate and all parties involved. She cannot now expect costs run up because of her conduct to be met by the Estate. It would be highly prejudicial to the other beneficiaries should the Estate be forced to bear the costs of this misguided venture. Of the many issues taken by the First Defendant, the vast majority of them were rejected by the Court. The Court upheld only one specific objection by the First Defendant, for which it deducted a mere US\$1,000 from the total billed cost of this item at US\$3,819 – notably less than the US \$1,306.50 suggested by the First Defendant (at [101] of the Judgment). In total, the sums claimed that were expressly disallowed by the Court amounted to less than US\$1,279.31– a figure that is dwarfed by the total assessed costs of US\$287,273.20 and GB£141,135.80.

[11] Moreover, the First Defendant consistently failed to cooperate with the Applicants, and in pursuing her line of opposition, the First Defendant's conduct has caused yet further costs to be incurred and to no end. The First Defendant's conduct caused much work to be done in terms of correspondence and considerable additional material was generated thereby in preparation for the hearing. At the hearing itself the First Defendant maintained a sustained attack against the Application.

[12] The Next Friend's position is that the Applicants' costs should be borne by the Estate, although he says that he is neutral whether or not the First Defendant should bear any of them.

[13] The First Defendant opposes the making of a costs order against her, but has a secondary position that if one is to be made she should not have to pay all of the Applicants' costs. She is

willing to bear her own costs and does not seek any costs order in her favour. The First Defendant submits the following.

- [14] The First Defendant submits that whilst the Applicants were largely successful with respect to the quantum of costs recovered, the Court ruled against the Applicants on important points of principle including the need for the provision of detailed time entries and details of travel and accommodation expenses and disbursements. Detailed time entries were requested of the Applicants from as early as 4<sup>th</sup> March 2019 and subsequently on 29<sup>th</sup> October 2019. The Applicants belatedly provided these detailed time narratives in respect of their BVI office on 31<sup>st</sup> January 2020, ten months after they were initially requested. Even then, the Applicants still failed to provide detailed time entries in respect of their UK office. These were not provided until after the hearing of the Application when the Court ordered that this be done at paragraph [122] of the Judgment. As outlined at paragraph [123] of the Judgment, the Applicants' conduct in this respect likely served to increase costs. This is undoubtedly the case given that a major point of dispute at the hearing of the Application (and leading up to it) was whether such detailed entries were required. The provision of the same in a timely manner would have decreased the costs incurred. Indeed, following the provision of the Applicants' UK time narratives, the parties were able to agree the quantum of professional fees without the need for a further hearing or application. In all of the circumstances, the First Defendant does not consider that an issue-based cost assessment is proportionate or cost-effective. Instead, the First Defendant submits that a one-off 10% discount on the Applicants' costs ought to be applied, the remainder of which are to be recovered from the Estate as sought in the Applicants' Notice of Application.
- [15] The First Defendant further submits that it is important to note that none of the potential beneficiaries consented to the Applicants' costs in advance of the Application. The Application for assessment was therefore necessary in any event.
- [16] Furthermore, all potential beneficiaries (including the Claimants) made submissions as to the Applicants' fees and all stood to benefit (and did benefit) from any deductions made. There is therefore no basis upon which the First Defendant ought to bear the costs of the Application in their entirety when the Application was required on account of all beneficiaries' lack of consent and in circumstances where all stood to benefit from any deductions made.

[17] The First Defendant submits that she reasonably raised important points of principle regarding a requirement of reasonableness as it related to the Applicants' remuneration (as distinct from expenses) and on the need for detailed fee narratives in order to assess such reasonableness. The First Defendant says she was vindicated by the court on these points.

[18] In the round, says the First Defendant, she cannot be said to have acted unreasonably in pursuing her objections to the Application such that she ought to be penalised in costs. There is no basis upon which the First Defendant ought to bear all the Applicants' costs, particularly given that she was partially successful.

### **Discussion**

[19] The first matter I must be clear about is what costs the Court is primarily concerned with today. They are the Applicants' BVI legal costs and disbursements.

[20] The Applicants, in their written submissions, seek an order concerning payment of their BVI legal practitioners' costs of the assessment in the sum of US\$27,821.50 plus Court filing fees. They do not in terms ask for an order concerning their own time costs and other expenses in those submissions. It is not entirely clear from the other parties' submissions whether their submissions concerned both sets of costs, or just the legal costs.

[21] In such circumstances, in order to avoid that there is a category of costs that has no direction as to who should pay it, I will rule that the Applicants' own reasonable time costs of the Application and other properly incurred expenses shall be borne by the Estate, without prejudice to any subsequent application for a contribution from any other party.

[22] We will thus be concerned further here only with the Applicants' legal costs and expenses sought. I will not interfere with the uncontroversial aspects – that the Next Friend's costs be paid out of the Estate, subject to assessment absent agreement with 28 days, and that the other parties should otherwise bear their own costs.

[23] The Applicants' BVI legal costs are being sought from 4<sup>th</sup> March 2019. As recounted at paragraph [22] of the Judgment, that was the date upon which the First Defendant replied to

the Applicants' letter of 25<sup>th</sup> February 2019 in which they had first approached the potential beneficiaries seeking agreement in respect of their remuneration, costs and expenses.

[24] The First Defendant's letter of 4<sup>th</sup> March 2019 was relatively short, and queried the Applicants' figures, citing lack of detail. The correspondence and exchanges that ensued are recounted in summary form in paragraphs [22] to [39] of the Judgment. In essence, what started out with that letter of 4<sup>th</sup> March 2019 as a 'lowly mushrump'<sup>4</sup> escalated and expanded into a plethora of objections.

[25] Many of the First Defendant's objections were maintained by her up to and throughout the assessment hearing. From even as early as March, and certainly April 2019, it is objectively clear from the adverse mindset of the First Defendant apparent from the contemporary correspondence that it was going to be impossible for the Applicants to obtain the First Defendant's agreement to the Applicants' figures, even if they provided full details. Indeed, the more information the Applicants provided, the more the First Defendant's objections multiplied. Although the First Defendant points out that she agreed the Applicants' remuneration and expenses that were clarified after the Judgment, that was not at all the First Defendant's approach prior to the Judgment. Her approach was to challenge much of what the Applicants claimed. She simply did not accept or agree with the way they discharged their duties. The First Defendant considered that their *modus operandi* was too expansive and expensive. She considered a much more etiolated approach would have been appropriate: work being done by an administrator working alone, more work being delegated to more junior assistants, travel not undertaken, or, if undertaken, using economy class flights and cheaper-grade hotels and so forth. She had a fundamentally different vision of what should be considered reasonable than the Applicants (and ultimately the Court as well) had. I do not accept that had the Applicants provided more detailed narratives and information the degree of opposition from the First Defendant would have been less.

[26] It is also fair to say that the vast majority of the Applicants' lawyers' efforts to deal with the First Defendant's objections in correspondence were carried out by their London solicitors, and not by their BVI legal representatives. The Applicants quite correctly are not seeking to recover from another party their London solicitors' costs as costs of these proceedings.

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<sup>4</sup> Robert Southwell SJ, 'Scorn Not the Least', 1595.

- [27] Whilst the Applicants' BVI legal representative's schedule of costs does not allow a precise computation of time spent by them in relation to the pre-hearing exchanges concerning the First Defendant's objections (and no criticism is meant thereby), it would appear that in financial terms such costs were small. They appear to be less than 10% of the total. That is commensurate with most of the work being done on this aspect by the Applicants' London solicitors. Of such time spent by the BVI legal practitioners, given the multiplicity of objections raised by the First Defendant, the time spent by them arising out of the issue whether further information should be provided would probably have been a small fraction of that.
- [28] Most of the BVI legal costs being claimed appear to pertain to preparation for the hearing and related correspondence and attendances. It does not appear to me that lack of detail provided by the Applicants to support their figures increased their BVI legal representatives' costs significantly or beyond a *de minimis* level. I can see that this aspect might well have increased the Applicants' London solicitors' costs, but the Applicants are not claiming those from the First Defendant. Equally, I can see that it quite probably also increased the First Defendant's costs, but she is not seeking any issue-based costs order against the Applicants. When I reserved the issue of costs for further determination, I did not know that the First Defendant would not seek a costs order. I also had no indication how the labour was divided between the Applicants' BVI legal representatives and their London solicitors on how the First Defendants' objections were responded to.
- [29] At the hearing itself, whilst the issue whether the Applicants should have been, or be required to, provide further detail was contested, I am unable to gauge upon the materials before me how much time was taken up on this aspect. I have no specific recollection of it. It was one of many issues all addressed and dealt with on the same occasion.
- [30] Consequently, I am not persuaded that the Applicants' costs claimed should be reduced by 10% in respect of this aspect.
- [31] That said, it is right that the Applicants would have had to make the Application anyway because the other potential beneficiaries had not agreed the Applicants' figures. The hostile litigation approach adopted by the First Defendant merely served to make the Application much heavier than it otherwise could and should have been. At least a portion of the costs claimed



should therefore be borne by the Estate, rather than by the First Defendant. Recognising that assessment of costs is most often not an exact science, it appears to me that 10% (US\$2,782.15) is an appropriate figure for costs of preparing and filing a basic application in this case, with a short affidavit in support, a short draft order and a short skeleton, in the face of silence from the potential beneficiaries. The First Defendant need not pay this, and the Applicants will be entitled to charge this to the Estate.

[32] Other than this, I am of the view that the First Defendant should pay the balance to the Applicants. Thus, the First Defendant gets the benefit of the 10% reduction she proposed, but on a different basis.

[33] Whilst the First Defendant is correct that the Court ruled against the Applicants on important points of principle, including the need for the provision of detailed time entries and details of travel and accommodation expenses and disbursements, the effect of this was very largely overridden by the First Defendant's erroneous position in relation to which party should have the benefit of any doubt. Contrary to the First Defendant's submissions, the thrust of which were that it was incumbent upon the Applicants to show that their costs were reasonable, the Court found that the Applicants were entitled to the benefit of any doubt – see paragraphs [98] and [99] of the Judgment. The practical effect was that no significant deductions flowed from the Applicants' own errors of principle.

[34] Whilst the First Defendant is correct that all potential beneficiaries (including the Claimants) made submissions, it is plain that the Application was fought as a piece of hostile litigation between the Applicants and very predominantly the First Defendant. The First Defendant was almost entirely unsuccessful in her multi-faceted opposition to the amounts claimed by the Applicant. Not only were her objections largely overruled, but the Court did not accept the First Defendant's submissions on how the legal principles for an assessment should be applied. She did not accept that the Applicants should receive the benefit of any doubt. In relation to the 'trustee basis' of assessment, and how it should be interpreted, the First Defendant's position shifted from no submissions on the point in her skeleton argument (see paragraph [50] of the Judgment), to denial of its application altogether during the hearing (see paragraph [51] of the Judgment), to conflating it with the indemnity basis for assessment (see paragraph [52] of the Judgment), to an acceptance that the First Defendant had the burden of showing that the Applicants' fees had been unreasonably incurred and in an unreasonable amount (see

paragraph [53]). This mobility, if I can respectfully call it that, made the First Defendant's position in relation to the 'trustee basis' difficult to follow and I do recall that this took up considerable time at the hearing. The bottom line, however, is that the First Defendant's interpretations as to legal principle did not result in any, or any significant, reductions. Costs should in principle therefore follow the event; in other words, that the First Defendant should pay the Applicants' costs.

[35] I do not accept the First Defendant's submission that she cannot be said to have acted unreasonably in pursuing her objections to the Application such that she ought to be penalized in costs. This, for two reasons:

- (1) The general rule that costs should follow the event applies even where a party reasonably but unsuccessfully puts a case. It is a broad rule (to which there are of course exceptions) intended to make a party think carefully before he takes a particular line: he should reflect upon what he might say and how he should say it. The rule underlines that a litigant inherently faces risks. The litigant is reminded by the rule that he must weigh the risks of his desired approach before he adopts it. He must constantly bear at the forefront of his mind that he might have to bear the other side's costs. That thought is intended to act as a deterrent against cavalier arguments, or those that are poorly prepared, scurrilous, vexatious, perverse, hopeless or just plain wrong. As the loser of even a reasonable argument must, as a general rule, pay the winner's costs, the rule acts as an effective goad to encourage quality case preparation and deters recklessness. One could mutter that it is 'not fair' that a litigant with a reasonable case should have to pay his opponent's costs, but it is a feature of our litigation landscape that applies to all litigants without distinction, because there is a strong public policy that there should be an end to litigation. In the context of the present case, the approach advocated for by the First Defendant is that the Estate, and not she, should meet the Applicants' legal costs. In effect that would give her *carte-blanche* to trammel the administrators of an estate, and the Court, with objections and arguments of every hue that she could call reasonable, from her own subjective perspective, without costs consequences other than those which she chooses to run up for herself. That is a most unattractive and indeed unfair proposition and would rightly revolt other beneficiaries of an estate. There is good sense in the policy that a litigant must, as is said in the popular

idiom, put his money where his mouth is. I see absolutely no reason to depart from this here.

- (2) I am respectfully of the view that the majority of the First Defendant's objections were not reasonable. They were either not reasonable from a practical or commercial point of view (such as the First Defendant's submission that a meeting should appropriately have been conducted by a sole professional with only a secretary in attendance to take notes, or that economy flights only should have been used for long-haul travel, or that cheaper grade hotels should have been used, to give but three examples), or legally unreasonable, in that the First Defendant relied upon incorrect interpretations for the bases of assessment and/or failed to take into account that as a matter of law the office holders should be given the benefit of any doubt whether certain costs should be allowed. This was not a case where the Court might acknowledge that the arguments were so finely balanced, or devoid of authority, or novel, or the Applicants' conduct sufficiently lamentable, that the Court should consider displacing the general rule.

### **Disposition**

[36] The Order of the Court will therefore be as follows:

- (1) The First Defendant shall pay the Applicants' costs of the Application, being US\$27,821.50 plus any further Court filing fees incurred to the date of the Order upon this Judgment, less an amount of US\$2,782.15, by 2<sup>nd</sup> October at 4 p.m. BVI time.
- (2) The Applicants shall be entitled to charge to the Estate the said US\$2,782.15 as well as their own reasonable time costs of the Application and their properly incurred disbursements and expenses pertaining thereto, without prejudice to any eventual application for a contribution from any other person(s) or entity.
- (3) The Next Friend shall be entitled to have his costs of the Application paid out of the Estate; such costs to be assessed if not agreed by the current administrators within twenty-eight (28) days.
- (4) All other parties shall bear their own costs of the Application.

[37] In relation to the costs of this determination on paper, since the parties were in agreement that this would be an appropriate procedure to resolve these aspects, I consider it most just and convenient for all parties other than the Applicants and the Next Friend to bear their own costs.

The Applicants and the Next Friend will be entitled to recover their costs, including their own time costs, of this determination from the Estate. The Order of the Court should reflect this.

[38] For the purposes of any appeal from this ruling, the time for appeal shall run from the date this written judgment is sealed and communicated to the parties' legal representatives.

[39] I take this opportunity to thank learned counsel for their assistance during this matter.

**Gerhard Wallbank**  
High Court Judge

**By the Court**

**Registrar**