

**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, with her Ms. Allana-J. Joseph for the First Defendant

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

2020: February 24;
May 19;
June 2.

JUDGMENT

- [1] **WALLBANK, J. (Ag.):** The Applicants were appointed as Administrators of the estate of the late Mr. Scherbakov (also respectfully referred to herein as the Deceased) in the Territory of the Virgin Islands ('BVI'). This judgment concerns an application by the Applicants, filed on 24th December 2019, for their remuneration, expenses and disbursements to be assessed in accordance with and pursuant to remuneration provisions incorporated in an Order of this Court whereby they were appointed and for the assessed amount to be charged to the Deceased's estate.
- [2] The first named Applicant, Mr. Roy Bailey, is a partner of the BVI office of Ernst & Young ('EY'). Mr. Bailey is based here. The second and third named Applicants, Mr. Simon Edel and Mr. Alan Hudson, are partners in EY's London office and are based in London.
- [3] Various legal proceedings are also on foot concerning the estate of the Deceased in England and Belgium. On 23rd July 2018 the Claimants issued an application for interim receivership and administration in the High Court of England and Wales. That application sought the appointment of the same professionals, who are the Applicants herein, as administrators and interim receivers over the United Kingdom estate of the Deceased.
- [4] In this jurisdiction, their appointment was effected by an Order of this Court dated 25th October 2018 ('the October 2018 Order'). That Order was in a wording agreed between the parties. This is apparent from the Order itself: it is a complex and lengthy Order, which memorializes five undertakings given by the Claimants and the First Defendant, respectively, as well as undertakings from the Seventh and Eighth Defendants; it contains a four page preamble. The October 2018 Order is clear from its terms that it was intended to dovetail with determination of the application brought in the English High Court. It was never appealed.
- [5] A dispute has arisen in this jurisdiction, mainly between the Applicants and the First Defendant, about the meaning of one of the terms of the October 2018 Order; specifically how reference to assessment on the 'trustee basis' should be interpreted in the BVI legal context. Learned Counsel for the First Defendant has gone so far as to submit at the hearing that the 'trustee basis' is no longer a basis for assessment existing under BVI law and so it should not be applied.

[6] The October 2018 Order made provision for payment of the Applicants' remuneration, expenses and disbursements. Clause 7 provided:

"The Administrators shall be entitled to charge reasonable remuneration at the hourly rates identified at Schedule A ..."

Clause 8 provided:

"The Administrators shall be entitled to raise and pay their proper and reasonable remuneration and any expenses or disbursements incurred by them in the exercise of their powers aforesaid from the Initial Sum pending their receipt of assets within the Deceased's estate and thereafter from the Deceased's estate. Such sums shall be assessed on the trustee basis if not agreed by the beneficiaries of the Deceased's estate."

[7] Some time after their appointment, the Applicants' tenure as Administrators was brought to an end in a phased manner, following agreement between various parties that other Administrators ('Successor Administrators') should be appointed. This was put into effect by an Order of this Court dated 28th February 2019 ('the February 2019 Order'). That Order was in broadly similar terms to the October 2018 Order and was again apparently agreed. A difference is that instead of the 'trustee basis', the February 2019 Order made provision for Administrators' remuneration to be assessed on the indemnity basis. For some reason (and I do not know what it was) the parties' thinking had evolved at least in this respect. Interpretation of the February 2019 Order is not in issue here.

[8] The Applicants assert they should be paid certain sums, under six heads. As stated in the Notice of Application, these were as follows:

- (1) Professional fees of Mr. Bailey of US\$216,140.12, to 20th May 2019;
- (2) Expenses of Mr. Bailey of US\$29,872.59, to 1st March 2019;
- (3) Professional fees of Mr. Edel and Mr. Hudson of GBP63,236.50, to 1st March 2019;
- (4) Expenses of Mr. Edel and Mr. Hudson of GBP11.00, to 1st March 2019;
- (5) Legal fees of Agon Litigation BVI of US\$29,140.00, to 1st March 2019;
- (6) Legal fees of DLA Piper LLP London of GBP54,367.50, to 1st March 2019.

[9] The First Defendant, Ms. Brigita Morina, actively takes issue with some of amounts claimed by the Applicants. The other Defendants do not agree them but express concerns or say nothing.

- [10] Mr. Scherbakov died in Belgium on 10th June 2017. I understand from this Court's Judgment delivered by the Honourable Justice Adderley on 25th October 2018 that the Deceased was under Russian criminal investigation at the time. I read there that the legal battles after Mr. Scherbakov's death began with a dispute between the Claimants and the First Defendant as to who should have burial rights.
- [11] The Claimants are his adult children by the Second Defendant, Mrs. Elena Nikolayevna Scherbakova. Mr. Scherbakov also had a relationship with Ms. Morina. From this were allegedly born the Third and Fifth Defendants. The Fourth Defendant is a child that Mr. Scherbakov purportedly wished to adopt. The Sixth Defendant, Mr. Chan, is understood by the Applicants to have been an old friend and business associate of Mr. Scherbakov, residing in Singapore. The Seventh and Eighth Defendants are BVI companies which may – or may not – form part of the Deceased's estate.
- [12] The extent and location of the Deceased's assets worldwide is, or was at the time of the application, still unknown with certainty. The Applicants say it is 'substantial, and subject to contested claims by the potential beneficiaries of his estate.' The potential assets of the estate include real property holdings in the United Kingdom and Italy. There is also a valuable bottled wine collection, worth between about Euros 400,000 to 500,000, in the United Kingdom, the storage costs for which have been funded by a company in a group of which the Seventh Defendant forms a part. As at the date of the application, I understand it was unclear whether or not that collection forms part of the Deceased's estate. The Applicants found that it was probable that the Deceased's estate might hold a considerable number of companies, incorporated in a number of jurisdictions, that had 'very complex ownership structures'. These involved, in a number of cases, 'a variety of inconsistent legal owners (friends, family, etc.)'.
- [13] An illustration of this is that the Eighth Defendant, or 'KPHL', has been asserted by the First Defendant not to be an asset of the estate, but to be a company that belongs to her. I also note from this Court's judgment delivered on 25th October 2018 at paragraph [27] that the Deceased's cleaning lady was found in documents to have been listed as the shareholder of KPHL at one time. As the Applicants stated in their First Report, at paragraph 25, they had requested additional information regarding this company from the First Defendant's London solicitors but this was not provided. The Applicants there stated that the First Defendant would need to establish how she came to be beneficially entitled to the shares, by reference to

documentation of title or transfer. In their Second Report, the Applicants indicated that no significant progress had been made on this front, but that they had, in effect, received resistance from lawyers acting for KPHL. Lack of progress to get to the bottom of the beneficial ownership, despite more correspondence with KPHL's lawyers, was again the order of the day in the Third Report. The Fourth Report noted no further substantive communication with KPHL since the Third Report.

- [14] More generally, it is apparent to me that the backdrop to the Applicants' work involved not an uncontentious paper audit exercise to reconstruct an asset holding structure, which could perhaps be done by a single accounting professional upon documents alone, but a complex web of assets and companies as well as of contentious sensibilities and emotions, differing degrees of cooperation from different parties, ambiguous ownerships and numerous assertions that would need to be tested. In short, it was a matrix of many moving parts, and of parts which should properly have moved but which were reluctant or simply unwilling to do so.
- [15] The Claimants provided the Applicants with approximately 450 pages of documents and information in the last week of November 2018.
- [16] The Applicants met with Ms. Morina's lawyers in the United Kingdom on 23rd November 2018 ('the UK meeting'). No information was received from Ms. Morina during the course of this meeting or the Applicants' administratorship. However, the Applicants explain that they spent significant time corresponding with Ms. Morina's lawyers during the entire course of their appointment. Indeed, it has been suggested by the Claimants that the First Defendant and her lawyers are the reason why the Applicants' costs were elevated to the degree that they were.
- [17] The Applicants had learned from the Claimants that Mr. Chan was likely to hold most of the information concerning the BVI part of the Deceased's estate. The Applicants sought to engage Mr. Chan in discussions. His initial position, communicated via lawyers, was that he would only be willing to discuss the BVI estate once the Applicants had been granted Letters of Administration. That was eventually achieved on 22nd November 2018. The Applicants then hoped to meet with him, in Singapore, but Mr. Chan took the position that he would only assist the Applicants with their inquiries through correspondence. Ultimately the Applicants, together with the Successor Administrators, met with Mr. Chan's lawyers in Singapore on 8th February 2019.

- [18] The Applicants met with considerably better cooperation from representatives of the Seventh Defendant, Messrs. Rawlinson & Hunter (Singapore). The latter provided an initial set of documents on 23rd November 2018. The Applicants then met with them in Singapore on 29th November 2018 ('the first Singapore trip') and then again on 7th February 2019, the latter together with the Successor Administrators ('the second Singapore trip'). It was during this latter meeting that the bottled wine collection came to light.
- [19] The Applicants received no significant information from anyone else.
- [20] The Applicants produced four reports between December 2018 and March 2019 and circulated these amongst the potential beneficiaries. These reports included a summary of the Applicants' time spent, and that of their colleagues working on the matter within EY, in both the BVI and in England, as well as of legal expenses.
- [21] The Applicants received no criticism nor comment on such fees and expenses from any of the potential beneficiaries. The First Defendant's United Kingdom solicitors, in a letter dated 4th March 2019 observed: '[h]owever, you did not indicate that you expected the parties to comment on those summaries'. This observation, though astute, has no traction. The Applicants observe in their evidence that if anything had struck the beneficiaries as unreasonable then they would have expressed a concern, particularly since the Applicants had been in regular contact with them. This is a far more realistic perspective and I accept it. They also observed that their work was intended to be informative and serve as a platform for engagement, otherwise there would have been no purpose whatsoever in providing such detailed information. That observation too seems right.
- [22] The Applicants first engaged with the potential beneficiaries in efforts to obtain their agreement on their remuneration, costs and expenses by a letter dated 25th February 2019. In this, the Applicants reminded the potential beneficiaries that 'such sums shall be assessed on the trustee basis if not agreed by the beneficiaries of the Deceased's estate'.
- [23] The First Defendant's English solicitors replied on 4th March 2019 stating:
"Moreover, to agree your costs, the parties would have to be satisfied that those costs are reasonable and proportionate, which it is not possible to consider based only on a

summary table listing the total amount of time spent by different fee earners. For example there is nothing in your cost summary to indicate whether the 183.6 total hours spent by senior managers is justified by the complexity of the tasks that were performed.

The summaries also do not include travel or accommodation expenses, of which we requested details in December. Do you intend to seek such expenses from the Estate? If so, please provide details.”

[24] The Applicants responded to this with a letter dated 26th March 2019. In this they provided a somewhat more detailed summary and an overall summary of expenses, including a broad headline summary listing the cost of accommodation at US\$8,149.10, flights at US\$24,081.19, miscellaneous expenditure of US\$682.70 and transport at US\$456.89.

[25] This prompted a long reply from the First Defendant’s London solicitors dated 9th April 2019. In this they expressed dissatisfaction in respect of the following:

- (1) A significant proportion of the costs sought appear to be disproportionate and unnecessary;
- (2) Insufficient information had been provided concerning the disbursements, such as the identity of the person for whom accommodation and flight expenses were being claimed, in what class and details of the accommodation;
- (3) To the extent those expenses included travel time of a Mr. Davies from EY’s Bermuda office, those were not agreed as necessary;
- (4) No details of time written off were included;
- (5) Senior managers and Directors of EY incurred a total of 219.1 hours as against only 29.4 hours by more junior staff. Detailed time narratives were requested to consider this imbalance further.
- (6) Overbilling in claiming US\$10,770 and GBP3,280 for reporting to stakeholders between 25th October 2018 and 30th November 2018.
- (7) 33.9 hours incurred by senior staff at a stated cost of US\$20,000 to prepare a mere 17 page report.
- (8) A query whether 26.9 hours of Mr. Bailey included travel time. If so, how much, and why this was considered necessary;
- (9) GBP1,258 claimed in the period from 1st December 2018 to 4th January 2019 for legal correspondence to and from the Claimants’ solicitors of a non-substantive nature was excessive.

- (10) In the period from 5th January to 1st February 2019 over US\$10,000 is claimed for preparing a mere 10 page report, which contained only five pages of information concerning the estate. The First Defendant's solicitors suggested that the report could have been produced for less than US\$5,000.
- (11) In the period 2nd February to 1st March 2019, the Applicants seek to recover \$16,022 for tasks in relation to the Seventh named Defendant, to do with long-term planning matters. The First Defendant's solicitors argued that this was not an efficient use of estate funds for an outgoing Administrator to incur such costs, where the work would inevitably need to be duplicated by the Successor Administrators.
- (12) The EY BVI office seeks to recover US\$8,834 and the EY United Kingdom office GBP6,585 for work in relation to EY's final report and covering letter. The report 'only' contained 44 paragraphs, of which 19 contain no new information.
- (13) Some arithmetic errors.

[26] The Applicants responded with a lengthy rebuttal letter dated 16th April 2019. In this they again adverted to the eventuality of an assessment on the trustee basis absent agreement. The headline points in this reply were as follows:

- (1) The travel expenses related to one trip to London by Mr. Davies to attend the UK meeting and the two Singapore trips for Mr. Bailey.
- (2) The accommodation was at 'reasonably priced' hotels. On the second Singapore trip the Applicants stayed at the same hotel as the UK estate Administrators.
- (3) The Applicants declined to provide detailed time narratives, on the basis (a) that they were not required to do so and (b) the detail provided thus far was sufficient to enable the potential beneficiaries to approve the remuneration.
- (4) Mr. Davies from the EY Bermuda office was familiar with the matter enabling him to lead the anticipated discussions with the First Defendant, which in the event did not take place since it was only very shortly before the UK meeting that the Applicants were advised that the First Defendant would not be attending the meeting. The Applicants note a similar non-availability on the part of the Claimants.
- (5) The Applicants defended their time costs as reasonable with various explanations, including that preparing reports is a costly exercise.

[27] The First Defendant's London solicitors replied on 18th April 2019, inviting the Applicants to 'rethink their refusal to answer' their questions. That response illustrates the degree of friction

between the First Defendant and the Applicants. In my view, the Applicants' perspective that they need not have provided the degree of detail sought was genuinely held. But that does not mean that they were necessarily right. In fact, I think they were wrong in that respect.

[28] The First Defendant's London solicitors observed that the Applicants had still not provided any details of the amount of travel time claimed, nor of the travel that was undertaken.

[29] The Applicants replied in a letter dated 18th April 2019. They explained that three overseas trips were undertaken. One trip was by Mr. Davies to London to take part in the UK meeting. He stayed at the Hilton London Tower Bridge. The other two trips related to Mr. Bailey's trips to Singapore. He stayed at the Conrad Centennial and Sofitel on the first trip for a total of six nights and at the Fullerton Hotel for a total of five nights during the second trip. Mr. Bailey excluded an overnight stay at a hotel in Miami as he saw another client during that stay. The trips were flown business class, except where that was not available in and out of Caribbean airports.

[30] In terms of travel time claimed, Mr. Davies charged eight hours in all for his return trip from Bermuda to London. He had travelled out on a Saturday. He returned via New York. Not including ground travel, his return trip took approximately 18 hours. For Mr. Bailey's two trips to Singapore, he charged a total of 33.5 hours for travel, although the actual travel time was at least 144 hours.

[31] This explanation still did not satisfy the First Defendant's solicitors. The First Defendant criticized, *inter alia*, the choice of hotels as being 'luxury' hotels in her skeleton argument for the hearing on 24th February 2020. She says that the price range for all of them was between GBP193 and GBP229 per night.

[32] She also criticized the fact that travel was undertaken in business class.

[33] On 21st January 2020 the First Defendant caused her BVI legal practitioners to file an affidavit of Ms. Jevgenija Fedotova. In this, the First Defendant put into evidence that it was still not clear which EY fee earner conducted each task or the precise time spent on each individual task by the relevant fee earner such that proportionality and reasonableness may be properly assessed.

- [34] Ms. Fedotova then embarked upon an exercise of comparing the hourly rates of the Successor Administrators with those of EY. She concludes that the rates of EY were higher. She also observes that the majority of time incurred by the Successor Administrators was carried out by more junior staff members than utilized by EY.
- [35] Ms. Fedotova's affidavit was countered by an affidavit of Mr. Davies, dated 31st January 2020. Mr. Davies makes a first point that the Applicants' hourly rates had been approved and set by the October 2018 Order; hence Ms. Fedotova's comparative exercise in this regard had no valid purpose.
- [36] He then embarked upon a statistical analysis to show that the percentage of partner time incurred between the Applicants and the Successor Administrators was broadly similar, and further, that the Successor Administrators' monthly billing was approximately 30% higher than that of the Applicants.
- [37] Mr. Davies exhibits a further breakdown of EY's time costs, (but not, as the First Defendant points out, for EY's United Kingdom office, for which they seek to recover GBP63,238 of fees) whilst pointing out that the cost of doing so was not insignificant. He is at pains to remark that such time recording is not a precise scientific exercise, with it often being very difficult to split fee earner time between tasks, particularly if some tasks overlap. He explains further that EY travel time was capped at 8 hours on a business day, even if it took much longer, and that it did not include any time travelled over weekends.
- [38] In this breakdown it is possible to see how much time has been incurred, at what level of seniority, how much this cost, and, in summary form, a narrative of what work was done.
- [39] He pointed out lastly that no evidence had been received from any of the other potential beneficiaries.
- [40] At the hearing on 24th February 2020, it was the First Defendant who led the attack upon the Applicants' remuneration and expenses. It was supported, in a somewhat milder manner, by the Next Friend of the Third to Fifth Defendants. The Next Friend's views were primarily set out

in a letter his BVI legal representatives wrote dated 6th February 2020 and his skeleton for the hearing.

[41] The Next Friend's first substantive point was that he had 'concerns' about the amounts of time charged for travel. He continued that it was 'by no means clear...that any travel was required at all', suggesting conference calls or even email correspondence would be all that would typically be required. The time charged for travelling (41.5 hours) exceeded the time spent in meetings. In the Next Friend's skeleton he observed that during the first Singapore trip Mr. Bailey spent six nights in Singapore hotels for the purposes of two meetings of 1.5 hours and 3.8 hours respectively. For the second Singapore trip Mr. Bailey spent five nights in Singapore for the purpose of two meetings that lasted four hours each. The Next Friend also considered that the 'very high cost of flights and hotels' is another reason for avoiding travel between the Caribbean and Asia unless paid for privately.

[42] The Next Friend then said that he shared the First Defendant's 'concerns' in respect of work allocation: work that could have been done at lower cost by a more junior member of EY's staff.

[43] He took issue with a number of other items appearing to him to have been excessive:

- (1) It was not clear why it was necessary for two fee earners to spend a total of 5.9 hours reviewing BVI Court documents in detail and then for a Senior Manager to spend a further 1.5 hours on a summary of the same papers;
- (2) It was not clear why a total of 1.9 hours was needed to review an organisational chart or charts;
- (3) EY should not have incurred 1.2 hours reviewing and considering a BVI Judgment and Court Order, when their local lawyers could have summarised these documents for them;
- (4) A Senior Manager should not have spent 1.2 hours reviewing a UK Court Order;
- (5) A Senior Manager should not have charged 4.7 hours completing company searches on BVI companies. When informed by the Applicants' BVI legal representatives that the number of companies involved was around forty, the Next Friend maintained that a qualified junior corporate lawyer could nonetheless have done them.

[44] The First Defendant supported and adopted the Next Friend's arguments. Additionally, the First Defendant reiterated her complaint that the Applicants had not provided sufficiently

detailed fee and expense breakdowns. The First Defendant submitted that much work had been done at too senior a staffing level; that the Applicants had charged too many hours for tasks; a disproportionate amount of time had been charged for travel and for undertaking company searches (it 'being unclear why the completion of company searches would take almost 5 hours').

[45] The First Defendant submitted in her skeleton that there had been no need for Mr. Davies to travel to the UK meeting from Bermuda. In her view, Mr. Edel alone could have handled the meetings, and if assistance was required to take notes, a secretary from EY's London office could have accompanied him.

[46] In terms of legal principles, the First Defendant's argument started from the proposition that the Applicants' entitlement to remuneration derives from the October 2018 Order. Her Learned Counsel cited clauses 7 and 8 of that Order. She submitted that the basis for allowing remuneration is that recoverable remuneration ought to be 'proper and reasonable'.

[47] She then cited the English High Court decision in **Pullan v Wilson**.¹ She drew particular attention to the following passages:

"56. I accept the evidence of Mr. Cotton and Mr. Bates that one must have regard to the nature and the value of the services which are performed, and to the propriety, reasonableness and proportionality of using the services of the level of fee earner who is providing them. In my judgment, it is no answer to a challenge to the level of fees charged by a professional trustee, or by an employee or consultant engaged by a professional trustee, that the trustee only retains the services of particularly skilled fee earners (including himself) who are charged out at a commensurately high (but appropriate) hourly rate if they are too highly skilled (and thus, too expensive) for the work which they are being required to perform. To hold otherwise would be inconsistent with the trustee's duty to avoid any conflict between his duties to the trust and his personal interests.

57. I acknowledge the utility of one's normal charging rates, and the number of hours spent, but only as an initial reference point. In closing, Miss Haren submitted that it was important to bear in mind that in taking an account, the court was not conducting an *inter partes* assessment of costs in litigation. But, in my judgment, this analogy has both relevance and utility. One has to have regard to the reasonableness, and the propriety, of the remuneration claimed; and this

¹ [2014] EWHC 126 (Ch).

imports elements of proportionality, in terms both of the time spent, and of the level of skill and expertise required.”²

[48] **Pullan v Wilson** was a case concerning a family trustee. It was decided with reference to provisions in the English Trustee Act 2000 which allow for a trustee to receive ‘reasonable remuneration’. As stated in that case at paragraph 22:

“By sub-section (3) of [section 29 of the Trustee Act 2000], “reasonable remuneration” means, in relation to the provision of services by a trustee, such remuneration as is reasonable in the circumstances for the provision of those services to or on behalf of that trust by that trustee. By sub-section (5), a trustee is not entitled to remuneration under section 29 if any provision about his entitlement to remuneration has been made (a) by the trust instrument, or (b) by any enactment or any provision of subordinate legislation.”³

[49] Learned Counsel for the First Defendant concluded that an ‘assessment of the propriety of tasks done and time spent by the respective fee earners is therefore both necessary and appropriate in assessing reasonableness’.

[50] Her skeleton however did not make submissions in relation to assessment on the ‘trustee basis’.

[51] It was only at the hearing that the First Defendant introduced an argument that the trustee basis had no application. This was not a point taken by the First Defendant or any of the potential beneficiaries when the Applicants repeatedly adverted to an assessment on this basis if their remuneration should not be agreed. Learned Counsel for the First Defendant submitted that the trustee basis as defined in the October 2018 Order was taken from an English statute which is no longer in force; consequently, there is no basis for its application and this Court should not do so.

[52] She proceeded to submit that what was referred to as the trustee basis should instead be understood as referring to the indemnity basis. Learned Counsel referred to the Jersey Royal Court decision in **In re Piedmont Trust and the Riviera Trust**⁴ and in particular paragraph 55 of the report:

“There is an important difference in principle between a trustee or other fiduciary being indemnified as to costs which he has incurred and costs which are awarded to a party

² Pullan v Wilson [2014] EWHC 126 (Ch) paragraphs 56 and 57 (Hodge J.).

³ Pullan v Wilson [2014] EWHC 126 (Ch). paragraph 22 (Hodge J.).

⁴ 2016 (1) JLR 14.

on the indemnity basis. The former arises as a matter of right (subject of course to the court's power to deprive a fiduciary of such indemnity as discussed earlier) and confers a full indemnity subject only to such costs being reasonably incurred and in a reasonable amount, whereas the latter is awarded by the court in exercise of its power to decide who pays the costs of litigation. Such costs are subject to taxation by the Greffier if not agreed. The former is commonly referred to in this jurisdiction as "costs on the trustee basis" whereas the latter is referred to as "costs on an indemnity basis."⁵

- [53] Learned Counsel for the First Defendant submitted that only reasonable remuneration should thus be allowed. She accepted at the hearing that the First Defendant has the burden of showing that the Applicants' fees were unreasonably incurred and in an unreasonable amount. She submitted that this was the effect of the passage cited above from **In re Piedmont Trust and the Riviera Trust**. Concerning the Applicants' expenses, Learned Counsel for the First Defendant also accepted at the hearing that the test is whether they were properly incurred.
- [54] The Claimants supported the Applicants' application for assessment of their costs on a trustee basis. They say they are neutral as to the dispute that has arisen between the Applicants and the First Defendant. That said, the Claimants submit that the absence of detailed time narratives means it 'is 'somewhat difficult' to assess whether any time ought to have been written off outside weekend and full business travel time. The Claimants say they do not understand why travel was 'necessary'.
- [55] The Claimants submit that the documents show that a primary driving force behind the Applicants' expenses has been the First Defendant. Whilst the Applicants said that the First Defendant provided no information, but 'much more time is shown to have been generated dealing with the First Defendant than any other party'. The Claimants submit that it is grossly unfair to the estate and the remaining beneficiaries for the First Defendant to have been afforded the opportunity to frustrate the Applicants in their endeavours, but to do so at the expense solely of the estate they were appointed to protect and preserve. The Claimants therefore ask for an order, pursuant to what they submit is the Court's general discretion to award costs, that the reasonable remuneration of the Applicants should be met with a contribution from the First Defendant. The Claimant proposes a proportion of 50% for such a contribution. The Claimants submit that the costs of the assessment ought to be met by the First Defendant in any event.

⁵ In re Piedmont Trust and the Riviera Trust 2016 (1) JLR 14 at paragraph 55 (Commissioner Birt).

- [56] The Applicants, through their Learned Counsel, submit that there are two categories of costs for which the Applicants seek assessment: (i) out of pocket expenses and (ii) remuneration.
- [57] The Applicants submit that it had been unnecessary on the part of the First Defendant to have repeatedly requested further information.
- [58] They say further that the First Defendant and her legal representatives have misunderstood the trustee basis of costs, in their insistence that the Applicants had to show the costs to have been reasonable, proportionate and necessary. The Applicants submit that the First Defendant is confusing the test for assessment with that which applies in the assessment of litigation costs.
- [59] The Applicants pin their case on application of the ‘trustee costs’ assessment basis. The bottom line to their submissions is that the trustee basis requires that all items be allowed and only items which fall outside the duty of the personal representative are to be excluded.
- [60] The Applicants reach this conclusion by the following route. Their starting point is to refer to the English High Court case of **Mussell v Patience**.⁶ That is a modern case which does not concern the trustee costs basis. What it does is consider the basis upon which a trustee or other fiduciary is entitled invoke his general right of indemnity under modern English law in respect of costs incurred by him in administering an estate. The English High Court’s analysis began by quoting a passage from paragraph 63-02 of Williams, Mortimer and Sunnucks: Executors, Administrators and Probate (21st edn., Sweet & Maxwell 2018).⁷ There, the learned authors stated:
- “The charges and expenses of executors or trustees are not costs incidental to proceedings in the High Court and are not within the discretion of the court unless misconduct is proven. The ‘contract’ between the author of a trust and his trustees (and presumably between a testator and his personal representatives) entitles them to receive out of the estate all proper costs incident to the execution of the trust. Costs should not be inflicted if they have done their duty or even if they have committed an innocent breach of trust. An administrator is in the same position as a trustee or executor and is entitled to be recouped in the same way.
- ...
- CPR r 46.3 provides that ...the general rule is that he is entitled to be paid the costs of ... proceedings out of the relevant ... estate, insofar as they are not recovered from or

⁶ [2019] EWHC 1231 (Ch.).

⁷ *Mussell v Patience* [2019] EWHC 1231 (Ch.) at paragraph 9 (Matthews J.).

paid by any other person, and that those costs will be assessed on the indemnity basis.”

[61] At paragraph 16 and 17 the English High Court continued:

“...the entitlement of trustees and executors to an indemnity for their costs (or any other trust or estate expenses) is concerned largely with whether they have acted properly (or reasonably) or not.

17. I cannot deprive executors of their indemnity out of the estate for costs or other expenses or liabilities which they have incurred for the estate unless they have incurred them *improperly*. ...in the caselaw before the CPR and the 2000 [Trustee] Act it was sometimes put (and is still sometimes put) in the form, had the executors or trustees behaved unreasonably, or committed misconduct? But I do not think the variation in words makes any difference in substance.”⁸ (Italics in the original.)

[62] The Learned Chancery Judge continued at paragraph 19:

“In my judgment the claimants have not behaved improperly or unreasonably.”⁹

[63] It would be remiss of me to omit reference to paragraph 21 of that judgment. The court observed:

“The nature and effect of the rights conferred by a charging clause are not necessarily the same as those conferred on trustees and executors by the general law concerning indemnity for costs and liabilities properly incurred. And in any event the exact effect of a particular clause would depend upon its terms.”¹⁰

[64] The fullest treatment of the ‘trustee basis’ that was referred to by the Applicants is to be found in the English High Court decision of Sir Robert Megarry V-C in **EMI Records Ltd v Ian Cameron Wallace Ltd et al.**¹¹ Although his observations there concerning the trustee basis were *obiter*, they are marked by clarity and detail. He made these comments in the context of an attempt to give a penetrable and penetrating explanation for the various assessment bases then found in the English Rules of the Supreme Court at Order 62. Sir Robert Megarry V-C described this Order as ‘an ungodly jumble’. His exposition of the five assessment bases followed the pattern of a stepped progression.

⁸ *Mussell v Patience* [2019] EWHC 1231 (Ch.) at paragraphs 16 and 17 (Matthews J.).

⁹ *Mussell v Patience* [2019] EWHC 1231 (Ch.) at paragraph 19 (Matthews J.).

¹⁰ *Mussell v Patience* [2019] EWHC 1231 (Ch.) at paragraph 21 (Matthews J.).

¹¹ [1982] 2 All ER 980.

[65] First, he described party and party costs. He said that the essence of this is that 'necessary and proper' costs are allowed under this head. He observed that this was the 'strictest' of the 'normal' heads of taxation.¹²

[66] Then he described the common fund basis. Under this, instead of only costs that are 'necessary and proper' being allowed, 'what is to be allowed is 'a reasonable amount in respect of all costs reasonably incurred'. He described this basis as 'little more than a party and party taxation conducted 'on a more generous scale''.¹³

[67] Thirdly, Sir Robert Megarry V-C described the trustee basis. He stated:

"...in such cases 'no costs shall be disallowed, except in so far as those costs or any part of their amount should not, in accordance with the duty of the trustee or personal representative as such, have been incurred or paid, and should for that reason be borne by him personally. ...here the thrust of the taxation has been shifted from what is to be included to what is to be excluded; it is no longer a question of allowing only those items which are necessary or proper, whether on a more generous scale or not, but instead has become a matter of prohibiting the disallowance of any item unless it falls within the words of exception.'"¹⁴

[68] Then followed solicitor and own client costs. Under this rubric 'all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred'.¹⁵ Sir Robert Megarry V-C stated that '[t]his resembles the trustee basis in that it allows everything except any items which fall within the words of the disallowance.'¹⁶

[69] Lastly Sir Robert Megarry V-C considered the indemnity basis. The principal difficulty he had to resolve was that the English Courts had developed a well-trodden practice of making indemnity costs orders, but there appeared to be no legislative basis for having done so. He summarized the position as follows:

"The litigant does not have to establish that the costs were necessary or proper, or that the costs were of a reasonable amount and reasonably incurred. Provided they are

¹² EMI Records Ltd v Ian Cameron Wallace Ltd et al. [1982] 2 All ER 980 at page 983 at d to e (Sir Robert Megarry V-C).

¹³ EMI Records Ltd v Ian Cameron Wallace Ltd et al. [1982] 2 All ER 980 at page 983 at e to g (Sir Robert Megarry V-C).

¹⁴ EMI Records Ltd v Ian Cameron Wallace Ltd et al. [1982] 2 All ER 980 at page 983 at h to j (Sir Robert Megarry V-C).

¹⁵ EMI Records Ltd v Ian Cameron Wallace Ltd et al. [1982] 2 All ER 980 at page 984 at a (Sir Robert Megarry V-C).

¹⁶ EMI Records Ltd v Ian Cameron Wallace Ltd et al. [1982] 2 All ER 980 at page 984 at a (Sir Robert Megarry V-C).

costs of and incidental to the proceedings, he is entitled to recover them, subject only to the qualification that they are liable to be reduced in respect of anything that the taxing master considers to fall within the headings 'unreasonable amount' and 'unreasonably incurred'. In a word, the difference is between including only the reasonable and including everything except the unreasonable. In any taxation there must be many items or amounts that are plainly allowable, and many others which are plainly not allowable. In between, there must also be many items or amounts which do not fall clearly within either extreme. On a party and party taxation, or on a taxation on the common fund basis, many such items may fail to be allowed; on a taxation on an indemnity basis, they will all be included."¹⁷

[70] He continued:

"I do not think it would be right to express this difference in terms of the burden of proof being shifted from the winner to the loser... it is more a question of who gets the benefit of any doubt in the mind of the taxing master. ... The indemnity basis, as I would construe it, is the other way round. Everything is included unless it is driven out by the words of exclusion, namely, 'except insofar as they are of an unreasonable amount or have been unreasonably incurred'.¹⁸

[71] It is in these ways, concluded Sir Robert Megarry V-C, that provision is made for items or amounts 'which stand on the borderline between reason and unreason'.

[72] The Applicants also rely upon the English High Court case of **In re Grimthorpe, Deceased**¹⁹ for a proposition that

"It is commonplace that persons who take the onerous and sometimes dangerous duty of being trustees are not expected to do any of the work at their own expense; they are entitled to be indemnified against the costs and expense which they incur in the course of their office; of course, that necessarily means that such costs and expenses are properly incurred and not improperly incurred. The general rule is quite plain; they are entitled to be paid back all that they have had to pay out."²⁰

[73] The Applicants then cite a different judgment in **Mussell v Patience**²¹ as authority that the rules for a detailed assessment of costs are not applicable to settling an account between executor and beneficiary; that an executor has only to show (1) that the sum concerned was indeed spent and (2) that it was spent in the fair execution of the estate administration.²² The English High Court there considered that such an exercise 'is about showing only that the

¹⁷ EMI Records Ltd v Ian Cameron Wallace Ltd et al. [1982] 2 All ER 980 at 989 at b to d (Sir Robert Megarry V-C).

¹⁸ EMI Records Ltd v Ian Cameron Wallace Ltd et al. [1982] 2 All ER 980 at page 989 at d to f (Sir Robert Megarry V-C).

¹⁹ [1958] 1 Ch. 615.

²⁰ In re Grimthorpe, Deceased [1958] 1 Ch. 615 at page 623 (Danckwerts J).

²¹ [2018] EWHC 430 (Ch).

²² Mussell v Patience [2018] EWHC 430 (Ch) at paragraphs 13 and 14 (Matthews J.).

executors have spent the estate's money on proper estate business'.²³ 'It would be plainly wasteful if, in every case, for their own protection, executors were to be obliged to engage the costs' assessment system down to the last penny before being able to enter the sum concerned in their accounts to their beneficiaries'.²⁴

[74] The Applicants submit therefore that they were in their rights to say that the First Defendant had not been entitled to require production of detailed time cost narratives. They also brought my attention to the observation at paragraph 15 of **Mussell v Patience**²⁵ that it 'will of course be open to the beneficiaries to rebut the inference [that sums had been properly incurred], but unless and until some other evidence is adduced by the beneficiaries to that end, the executor...need do nothing more [than refer to a voucher referring to the executor, to the administration of the estate or some good or service having a connection with the estate]'.²⁶

[75] The First Defendant argued in response that the Applicants were conflating assessment of remuneration with assessment of expenses. Her Learned Counsel argued that these were fundamentally different concepts. In relation to remuneration, she argued that a fiduciary could not be given the benefit of any doubt because that would offend against the fundamental principle that there should be no conflict between a fiduciary's duty and his own interests.

Discussion

[76] In my respectful view both the Applicants and the First Defendant adopt an erroneous emphasis. The Applicants submit that I ought to apply the trustee basis precisely as it emerges from the cases they have referred to. The First Defendant, on the other hand, says the trustee basis does not apply at all. She is at pains to translate reference to the trustee basis into the indemnity basis.

[77] Both sides overlook, I respectfully think, the express provisions of the October 2018 Order.

²³ *Mussell v Patience* [2018] EWHC 430 (Ch) at paragraph 17 (Matthews J.).

²⁴ *Mussell v Patience* [2018] EWHC 430 (Ch) at paragraph 16 (Matthews J.).

²⁵ *Mussell v Patience* [2018] EWHC 430 (Ch) at paragraph 15 (Matthews J.).

²⁶ *Mussell v Patience* [2018] EWHC 430 (Ch) at paragraph 15 (Matthews J.).

[78] It is trite to say that in the BVI an administrator does not have an automatic right to remuneration. This is squarely a case where the Applicants' right to remuneration and payment of expenses out of the estate was conferred by a Court Order.

[79] The charging provisions fall under two parts. The first, clause 7, provided that the Applicants are entitled to charge 'reasonable remuneration' at set rates. The First Defendant dropped her criticisms that the Applicants' rates were higher than those of the Successor Administrators, so this aspect needs no further treatment (although perhaps some costs of these proceedings turn on it).

[80] The second part was contained in clause 8. I will set out again the material parts:

"The Administrators shall be entitled to raise and pay their proper and reasonable remuneration and any expenses or disbursements incurred by them in the exercise of their powers aforesaid from ... the Deceased's estate. Such sums shall be assessed on the trustee basis if not agreed by the beneficiaries of the Deceased's estate."

[81] There is, in my view, an overlap between 'proper' and 'reasonable'. 'Proper' connotes that it is within the Administrators' powers to have incurred time or expenses, and also that such items have not been unreasonably incurred.

[82] Clause 8 speaks of both remuneration and expenses. The remuneration is required to be both proper and reasonable. Expenses are not so delimited. 'Any' expenses 'incurred ... in the exercise of their powers' are payable. Conversely, if expenses were incurred outside the exercise of the Applicants' powers they are plainly to be excluded.

[83] Then, importantly, clause 8 speaks of possible agreement by the beneficiaries. It implies an expectation that the Applicants should try to obtain the beneficiaries' agreement before coming to Court for an assessment. This must mean that the Applicants had to provide the potential beneficiaries with enough information in order for them to form a view as to whether the Applicants' costs were proper and reasonable.

[84] In the context of this Order I do not see that anything less than reasonably detailed time entries would suffice in relation to the Applicants' time costs. The beneficiaries would need to be able to see who (in terms of seniority or position) did what, when, and how long it took, subject of

course to issues of privilege and any genuine desirability to avoid giving away litigation or asset tracing strategies. The Applicants would need to provide sufficient narratives to communicate a reasonable understanding of the type and magnitude of the task involved. To that extent, the First Defendant was right to press for detailed time entries. The Applicants' various summaries and synopses were insufficient. Merely showing the total time incurred by various persons at various seniority levels, without correlating or allocating it to specific tasks, does not enable a person outside the administration of the estate to know if there has been unreasonable duplication, for example, or if a simple task has been undertaken too slowly by someone at too senior a level.

[85] The Applicants eventually produced narratives which do enable an outsider to understand whether time costs were properly and reasonably incurred, although I understand that such narratives have not as yet been supplied for EY's UK office staff time. It would be appropriate, I think, for the Applicants to be ordered to produce these.

[86] I do not think that this is unduly onerous. Accounting professionals within a firm such as EY charge on a time spent basis. It is a well-known fact, of which I can take judicial notice, that EY is one of the 'big four' firms of accountants. Some system must surely be in place within a firm of such stature to capture time adequately, both for internal accountability and billing purposes. Producing transparent and informative bills is the essence of accountability. It should not be difficult to do.

[87] The same hermeneutic of accountability applies to expenses. It makes no sense to provide a figure for travel and accommodation on its own and expect an outsider to agree without more that they are in order. An outsider to the administration would have no idea from such abstract information whether it includes items that fell outside the performance of the Administrators' duties. A breakdown of such expenses with an explanation of what the items were, who incurred them and how much they cost would normally be required for an outsider to see if they had been properly incurred.

[88] Finally, clause 8 expressly provides that '[s]uch sums' would be assessed on the trustee basis absent agreement. In my respectful judgment the term '[s]uch sums' here refers to both remuneration and expenses.

[89] I am afraid I was not taken with the submission by Learned Counsel for the First Defendant that there is no basis for application of the 'trustee basis' as had been used in English law because BVI law does not apply this concept. The fact of the matter is that the October 2018 Order was prepared with the agreement of the parties prior to endorsement by the Court and it was intended to dovetail with estate administration matters on foot in England and Wales. I think it is very probable that the parties had the English law concept of the trustee basis in mind when they chose that term. Learned Counsel for the First Defendant submitted that the Jersey usage of that term, basically equivalent to assessment on the indemnity basis, should be used. In the absence of any Jersey law involvement I know of pertaining to administration of the Deceased's estate in the BVI or the United Kingdom, that suggestion does not recommend itself. To do so would be arbitrary as another common law jurisdiction might mean something different by the term 'trustee basis'. It would be artificial for me to impose a different meaning onto that term merely because it happens no longer to be a current assessment basis in England (or the BVI).

[90] The concept of the trustee basis has been replaced in English law by a streamlined and simpler set of assessment bases. This does not of itself make it improper for this Court to have directed that assessment should occur on the trustee basis in the context of this estate. The term 'trustee basis' is, after all, merely shorthand for a methodology. Nobody has suggested that this Court would have fallen into error if it had expressly reflected in long-hand that an assessment should be conducted in the manner described by Sir Robert Megarry V-C in **EMI Records Ltd v Ian Cameron Wallace Ltd et al.**²⁷ under the heading of 'trustee basis'. For many years the trustee basis was considered a fair and just method of assessment and Learned Counsel for the First Defendant does not submit that there is anything unfair or unjust, or otherwise wrong, about it now.

[91] How, then, should the 'trustee basis' here be applied? First, the charging clauses in the October 2018 Order should in my view be read as imposing an overarching requirement in relation to the Applicants' time costs that they be 'reasonable'.

²⁷ [1982] 2 All ER 980.

- [92] I accept the observation in **Pullan v Wilson** that reasonableness ‘imports elements of proportionality in terms both of time spent, and of the level of skill and expertise required’.²⁸
- [93] Secondly, the trustee basis should be applied to the assessment of both time costs and expenses. As described by Sir Robert Megarry V-C in **EMI Records Ltd v Ian Cameron Wallace Ltd et al.**,²⁹ the ‘trustee basis’ as contemplated by the old English Rules of the Supreme Court applies to ‘costs’. In that context, which is the context of litigation, costs include remuneration of the professional, or time costs, as well as expenses or disbursements.
- [94] Thirdly, under the trustee basis, no costs shall be disallowed, except such costs as should not have been incurred or paid in accordance with the fiduciary’s duty. That is to say, improperly incurred costs are to be disallowed. We can call that the ‘improper costs exception’.
- [95] To the improper costs exception then, in the context of the October 2018 Order, should be added that an exception that ‘unreasonable’ time costs should be disallowed. I think this is so, because the qualification that the Applicants’ remuneration be ‘reasonable’ appears to me to be an overarching condition. We can call this the ‘unreasonable costs exception’.
- [96] A substantive reason why reasonableness here is an overarching condition is because the requirement of reasonableness cannot sensibly be side-stepped at the behest of the office holder, if he decides not to reach agreement about his costs with the beneficiaries. That would be unpalatable, and not, I think, what the Court or the parties intended.
- [97] As I have mentioned, the October 2018 Order does not make the Applicants’ expenses subject to a condition of reasonableness. The trustee basis, with no unreasonable costs exception, applies to expenses. By equating the trustee basis with the indemnity basis, Learned Counsel for the First Defendant initially suggested that costs – that is, both time costs and expenses – are subject to a requirement of reasonableness. During the hearing, though, I understood her to have accepted that expenses were subject only to the improper costs exception. That is, in my view, the correct position.

²⁸ *Pullan v Wilson* [2014] EWHC 126 (Ch) paragraph 57 (Hodge J.).

²⁹ [1982] 2 All ER 980 at page 983 g to j (Sir Robert Megarry V-C).

[98] So far, then, my own analysis of how the October 2018 Order works equates with the last position adopted by the First Defendant's Learned Counsel. But that is not the end of the analysis. There is a fourth and crucial point. The trustee basis also lays down a principle concerning who should get the benefit of any doubt whether an item falls within an exception. The First Defendant's Learned Counsel did not address this to any significant extent. The nub of the First Defendant's approach was that it was for the Applicants to show that their time costs (and indeed expenses) were reasonable. In the trustee basis, the thrust shifts from what is to be included to what is to be excluded.³⁰

[99] In my judgment, one of the reasons the October 2018 Order specified that costs would be assessed on the trustee basis was to lay down that in the case of any disagreement between the Applicants and the beneficiaries in relation to reasonableness or propriety, it is the Applicants who are to have the benefit of any doubt upon assessment by the Court. That does not place the Applicants in any conflict situation. It is not the Applicants who are giving themselves the benefit of any doubt. Rather it is the Court that must do so.

Application of principles

[100] In applying the principles summarized above, I shall take the areas of objection in the order set out in the First Defendant's skeleton.

[101] The First Defendant submits that an unreasonably high proportion of time was spent by senior members of the EY team on tasks which could have been delegated to more junior members. Of the various examples cited by the First Defendant, I accept that the preparation and finalization of fee schedules by a Senior Manager at a charge out rate of US\$570 per hour was not reasonable. This was largely, but not entirely, an administrative task which could, and reasonably should, have been done at a more junior level. I say it was not entirely an administrative task because it would have been reasonable for a senior member of the EY team to vet this work prior to circulation. The cost of this item was US\$3,819. The First Defendant suggests US\$1,306.50 of this be deducted (i.e. excluded). I agree US\$1,000.00 should be excluded as unreasonable.

³⁰ EMI Records Ltd v Ian Cameron Wallace Ltd et al. [1982] 2 All ER 980 at page 983 h to j (Sir Robert Megarry V-C).

- [102] Concerning the other items in this category which the First Defendant takes issue with (preparation and updating of schedules of companies and properties and preparation of monthly reports) I will give the Applicants the benefit of any doubt. I have slight, but not great, doubts that the time claimed was reasonable. Often it is most efficient for the persons conducting administration of an estate to do this type of work themselves. They often have the salient facts at their fingertips and have a good feel for their relative importance, and the appropriate level of detail that should or should not be shown. Such work also has the additional benefit of concentrating the minds of the administrators on tasks requiring their next attention and angles to be explored further. I am satisfied that this work done was not plainly unreasonable. The time objected to thus does not fall to be excluded.
- [103] The First Defendant says she has 'serious concerns' about the necessity and propriety of travel to Singapore and the UK, thus putting in issue the claim for travel time. The Next Friend of the Third to Fifth Defendants does likewise.
- [104] My view is that the travel was both proper and reasonable. I have no doubt about that. But if I should have a doubt about its reasonableness the Applicants should be given the benefit of the doubt. 'Necessity' is not a material consideration. In a sense, travel is never 'necessary'. Yet it can be reasonable to travel for in-person meetings, particularly where, as here, the Applicants needed to undertake a factfinding mission in relation to a complex and opaque estate. In such a case, having the persons with the most intimate knowledge in the same room together, real progress can often be made, without the pressures wrought by distance and/or virtual meeting circumstances. A case in point here appears to be the valuable bottled wine collection which came to light as a potential asset of the estate during one of the Singapore meetings. It is entirely possible (without my needing to make any findings on this, which I do not) that had discussions been conducted by telephone or video that the necessary depth of detail would not have been reached. Moreover, with such factfinding missions, I entirely accept the adage that 'two (or indeed more) heads are better than one'. I find the First Defendant's submission that the UK meeting could have been conducted by an EY London partner on his own with just a secretary to take notes as wholly unrealistic.
- [105] I note that the Applicants have already heavily discounted their travel time, that they have a travel time capping policy and implemented it. I do not see that even more of the time needs to be excluded. The travel time charged for is not plainly unreasonable. I do not accept that the

reasonableness of travel time needs to be considered in relation to the length of meetings that eventually took place. Before the travel was undertaken, the Applicants could not be sure how long those meetings would last, nor indeed whether their expected or hoped-for counterparts would decide to attend. Also, the length of meetings is not necessarily related to their productivity.

- [106] The travel time charged was undertaken in relation to the administration of the estate. It was properly incurred.
- [107] Concerning the length of the stays in Singapore, again, in my view, it was not plainly inordinate. To expect meetings to take place immediately after an air journey of around 36 hours, in a new time zone and climate, and then expect the person to turn around immediately and embark upon the return journey is unrealistic. Whilst I am not in any doubt that the time spent in Singapore was reasonable and proper, if there should be any lingering doubt the Applicants should have the benefit of it.
- [108] Whilst on the subject of travel and hotel accommodation, the only items that I do not consider to have been properly or reasonably charged to the estate is the inclusion of laundry services in the Singapore hotel bills. The trips were only for a few days. Sufficient fresh garments could easily have been taken. The Applicants' insufficient vestimentary provisioning is a personal matter. The estate should not be burdened with this cost.
- [109] Concerning the class of travel used, I do not see that economy class should have been used by these professional businessmen, particularly on long haul intercontinental flights. Business class travel, particularly in the context of the administration of a substantial and complex estate, is readily justified. Business class travel was both proper and reasonable.
- [110] So was the use of the hotels chosen. There is no evidence before me that the hotels were not professional business hotels, i.e. hotels of a higher grade than professional business hotels. Nor is there evidence before me to show that the room rates were inordinate compared to other professional business type hotels in Singapore and the City of London. In the same way that economy air travel should not be imposed on professionals such as the Administrators of this type of estate, there is no good reason for requiring them to be billeted in lower grade establishments. I see no reason to exclude part of these expenses.

- [111] The First Defendant objects to an entry of 4.7 hours by an EY Manager for carrying out company search activities. She proposes allowing 1.5 hours. I do not accept this. Without reference to the number of company searches carried out it is not possible to say that 4.7 hours was *unreasonable*. The contrary suggestion of 1.5 hours is mere speculation by an outsider with no idea of what the task in fact entailed. The Applicants should have the benefit of any doubt about it.
- [112] The First Defendant and the Next Friend take issue with what they submit is duplication associated with two EY fee earners reviewing and considering BVI court documents in detail for close to six hours and then additionally charging for a review of a summary of those papers prepared by Agon Litigation. The Next Friend submitted that Agon could have conducted this review and summarized the same for the benefit of the Applicants.
- [113] I do not agree that it was unreasonable for the EY staff members to review and consider these documents. Where an estate is complicated and numerous lines of inquiry are open in order to determine the assets, Administrators need an in depth, first-hand knowledge of factual materials. They need to know not just what documents say but how matters are expressed, and the Administrators need to be able to discuss these. Otherwise institutional knowledge cannot properly be built up and strategies devised. If the Administrators should be required to rely upon summaries from lawyers, who do not necessarily appreciate all the nuances and intricacies of an estate (because they are not the administrators), much vital information and valuable perspectives might not percolate through to the Administrators.
- [114] It also warrants observing that 'reviewing' and 'considering' are not the same thing as 'reading'. I would agree that it should not take 1.2 hours to 'read' the UK Court Order. But the Applicants do not charge for 'reading'. They seek to charge for reviewing and considering. 'Reviewing' and 'considering' are umbrella terms which can include a host of ancillary activities such as research, cross-checking, note taking, discussing list preparation, thinking matters through, discussions and tasks of that nature. It would be unduly burdensome to expect Administrators to record and list all the *minutiae* of work that they do.
- [115] Again, if there is any doubt about the reasonableness of this work (which I do not think there is), the Applicants should have the benefit of it.

- [116] The same applies to the other work objected to by the First Defendant and the Next Friend for the purposes of the hearing, which was the time spent and the seniority of the EY staff member(s) concerned in preparing and updating schedules of assets, reviewing structure charts and preparing and finalizing reports. It is easy for outsiders to level accusations that time spent is excessive from their position of ignorance, and easy to say that the tasks undertaken could have been undertaken at less cost than at senior levels. But that is not necessarily the case. A more junior staff member would need to be briefed. Junior persons may require more time to complete a task to the requisite high standard than a more experienced hand. They also often have a less of an appreciation of what is important, or not as the case may be. Their work product would then need to be reviewed and edited by the senior staff members. I fully accept that in such circumstances the most efficient and effective approach may well be for a senior staff member to do much of the work himself. Any doubt on these aspects should also be resolved in favour of the Applicants here.
- [117] Concerning the First Defendant's objections to the Applicants charging the estate for work in relation to long term planning matters, I am not certain whether she maintained her objection at the hearing. To the extent that she intended to, I do not see that this was either improper or plainly unreasonable. Clearly this type of work was within the Applicants' powers, and to that extent it was proper. The First Defendant's argument was predicated upon duplication that might or would occur when the Successor Administrators were to take over. First, I do not accept that significant duplication would necessarily occur. The Successor Administrators could adopt the work done and develop it from where the Applicants had left off. Secondly, it is reasonable for Administrators to work to a long-term plan, rather than to be merely reactive to immediate eventualities which could cause problems later. Indeed, they could be criticized for abrogating responsibility and perhaps even accused of a breach of duty if they were to take a short-term approach. Again, if there is any doubt here, it ought in my view to be resolved in favour of the Applicants.
- [118] Lastly, in respect of GBP1,258 claimed in the period from 1st December 2018 to 4th January 2019 for legal correspondence to and from the Claimants' solicitors of a non-substantive nature, it is not clear whether the First Defendant maintained her objection that this was excessive. I will also allow the Applicants this amount. The First Defendant has not shown me that the time charged for the correspondence concerned was plainly unreasonable. Just

because correspondence might concern matters that could be classified as 'non-substantive', does not mean that it was improper or unreasonable to have engaged upon it. 'Non-substantive' correspondence can concern aspects which are important in other respects. Such correspondence may also require care and be time-consuming to conduct.

[119] In respect of those items that the potential beneficiaries have not taken issue with, these will also be allowed in full.

[120] I should also state for the record that I do not find that the Applicants have misconducted themselves in any way.

The Claimants' request for a costs contribution from the First Defendant

[121] I see the force in the Claimants' submission that the First Defendant should be made to bear part of the Applicants' costs of administering the estate. But I do not think I should do so now. That is quite apart from the question whether I have jurisdiction in the sense of a power to do so. I am not sure that I have such a discretion, either by reason of the October 2018 Order or at law. What is before me is an application by the Applicants to have their time costs, expenses and disbursements assessed so that they can be charged to the estate. Absent an application by the Applicants for a contribution from another party, or a duly filed and served application by the Claimants, on notice to the First Defendant, I do not think it would be fair or just for the Court effectively to make such an order of the Court's own motion. That said, nothing herein should be taken as shutting the Claimants out from making such an application should they so wish.

Disposition

[122] The Applicants shall be allowed forthwith to charge to the estate all the remuneration, expenses and disbursements claimed in this application save as follows:

- (1) In respect of preparation and finalization of fee schedules by a Senior Manager for which the Applicants claimed US\$3,819, this shall be subject to a deduction of US\$1,000. The sum of US\$2,819.00 is allowed for this item.
- (2) The time incurred by EY's United Kingdom office shall not be charged to the estate pending provision of time entries, agreement (if any) of the potential beneficiaries of the

estate or failing such agreement, assessment. The reasonable cost of providing such entries shall be charged to the estate, with such costs being assessed in accordance with the terms of the October 2018 Order if not agreed. The said time entries shall show

- (a) Who has incurred the time;
 - (b) At what hourly rates;
 - (c) A description of each attendance for which remuneration is claimed.
- (3) Hotel laundry charges incurred during the Applicants' trips to the United Kingdom and Singapore shall not be charged to the estate.

[123] 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.

[124] The time for appeal from this judgment shall run from the date of delivery of the sealed, finalized version of this judgment.

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

Gerhard Wallbank
High Court Judge

By the Court

Registrar