IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION

Claim No. BVIHC (Com) 2012/0011

BETWEEN:

(1) INNA GUDAVADZE
(2) LIANA ZHMOTOVA
(3) IYA PATARKATSISHVILI
(4) NATELA IYA PATARKATSISHVILI

Claimants/Respondents

and

(1) CARLINA OVERSEAS CORPORTATION
(2) IVANE CHKHARTISHVILI
(3) AZERBAIJAN (ACG) LIMITED

Defendants/
2nd Defendant/Applicant

Appearances:
Robert Nader of Forbes Hare for 2nd Defendant/Applicant
Jonathan Addo of Harney Westwood & Riegels for Claimants/Respondents
Matthew Neal of Walkers for 3rd Defendant (on 7 October 2015 only)

2015: October 7 and 30
2016: July 21

JUDGMENT

Judgment upon assessment of Applicant's costs against Respondents arising from proceedings concerning beneficial ownership of shares of substantial value and related issues.

Work Done by Non-BVI Legal Practitioners Generally Recoverable: Parties raised overriding general issues concerning work done by legal practitioners not admitted to practice in the Virgin Islands during the period before The Legal Profession Act, 2015, as

amended ("LPA"), came into force – 2016 Judgment of Court of Appeal in Garkusha v Yegiazaryan and Ors ("Garkusha") applied – Court of Appeal had held that fees of foreign legal practitioners for work done prior to LPA are "generally recoverable on assessments of costs as disbursements of BVI legal practitioners."

Court of Appeal did not impose the restriction or limitation that this Court had drawn from the authorities in Olive Group Capital Limited v Gavin Mark Mayhew (Assessment of Costs Judgment) and in Halliwel Assets Inc, Panikos Symeou and Marigold Trust Company Limited v Hornbeam Corporation, namely a preclusion for "work amounting to the general conduct of BVI litigation", "work that normally would be done by a solicitor instructed to conduct the matter" or "general assistance to counsel in the conduct of the matter".

A foreign (non-BVI) legal practitioner or anyone else, wherever located, can assist a BVI legal practitioner by doing work under the ultimate supervision of a BVI legal practitioner who is ultimately responsible for the final work product.

Ultimate Responsibility and Ultimate Supervision by BVI Legal Practitioner: The conduct of a BVI matter, in the sense of the ultimate responsibility for the matter, must be in the hands of a BVI legal practitioner and the work done under his or her general direction and ultimate supervision – At the end of the day he or she is responsible to the court, and the client, for the work – Phrases "ultimate responsibility for the matter" (meaning the BVI legal practitioner is responsible, in accordance with his/her professional obligations, to his/her client, and to the court, for all aspects of the case) and "ultimate supervision" convey the important and exclusive preserve of BVI legal practitioners.

Costs of a foreign legal practitioner cannot be recovered for performing those limited number but fundamental functions that distinguish a BVI legal practitioner and practising as a BVI legal practitioner – Without determining comprehensively what are those fundamental functions, the guiding principle for what only a BVI legal practitioner may do is "the buck stops here" functions – Those are the functions that distinguish a BVI legal practitioner, and practising as a BVI legal practitioner, and which only a BVI legal practitioner may undertake or perform – If performed by anyone else, they have not been recoverable before the LPA and are not recoverable now.

Law firm in Garkusha apparently performed predominately if not entirely ultimate responsibility functions and/or ultimate supervision functions which disentitled the receiving party from being compensated by the paying party for the firm's work.

Focus on assessment should be what tasks were performed, not so much by who or where, and whether the paying party should pay the receiving party for those tasks having regard to the CPR 65.2 considerations of reasonableness, proportionality and so forth.

International Commercial Litigation: Work in relation to international commercial litigation is done in a manner, in places and by an array of people who can do it most effectively and efficiently – Globally, particularly in significant commercial litigation centres, it is common for lawyers who are not practitioners of the jurisdiction's law and who are

located outside the jurisdiction of the litigation to be involved – Only natural given international nature of commercial activities involved and that the individuals involved often are located elsewhere in world – It is a reality and a practical and reasonable necessity – Even more so when proceedings are in multiple jurisdictions, and coordination overall not in the jurisdiction in question – Commercial parties will not be inclined to be involved in jurisdictions (commence proceedings; incorporate) where they are precluded from conducting their affairs, including dispute resolution, in a manner that is consistent with how they operate internationally, and consistent with operating efficiently and effectively – Ultimately, these choices have a profound collective impact on a particular jurisdiction, including but not limited to its economy.

Policy Reasoning Supporting Roles of Non-BVI Lawyers: Growth of the Territory as an international commercial dispute resolution centre of choice, based on the strength of its dispute resolution services, will help attract legal work to the Territory, and create work and opportunities for the people of the Virgin Islands in dispute resolution and in many related fields and many aspects of Territory's economy – In turn, this attracting of legal work and creation of work and opportunities will enable the legal profession in the Territory to create and foster opportunities to enhance and build capacity, consistent with the public policy of Territory.

Wide and deep involvement of BVI legal practitioners in BVI-based litigation adds value, including an appreciation of many aspects of how things work in relation to disputes resolved here – Engrained experience and knowledge, a "feel for things", will enhance (often materially) the prospects for the most effective presentation of a party's case.

This policy reasoning supports the law respecting work of non-BVI legal practitioners as stated by Court of Appeal in Garkusha.

Pre-Admission Work by Counsel: Counsel's costs incurred before admission in the Territory are recoverable in a matter where the counsel was admitted immediately before the hearing at which the counsel appeared – Not an infrequent occurrence as distance and logistics for counsel in London and elsewhere makes this a necessity – Cost-inefficient and illogical to take any other approach – Recoverability meets even pre-Garkusha tests.

Points of Dispute on Costs Schedules: Ill-conceived, ill-considered and mechanical points of dispute of work and time entries on costs schedule are not an efficient use of Court's or paying party's time.

Detail / Particularity: A common point taken is that the detailed record of tasks were lacking in detail or particularity – CPR 69B.11(3) requires that a schedule of costs particularise the time spent by a legal practitioner, specifying task or tasks undertaken and the precise time spent on each task – "Task" is not defined and must be read sensibly and contextually – Like all CPR provisions, it is to be interpreted in light of Overriding Objective of dealing with cases justly – "Justly" means just for both parties – Costs allowed must be fair both to the person paying and the person receiving costs – Time records need not meet a standard of perfection – Can and should be read in context by an informed reader

– Work and time records to be read with these considerations in mind and in contextual manner – Burden on receiving party must be realistic and have regard for the reasons a paying party should have the information for the assessment – Need sufficient contextual detail of task for the paying party to be able to submit, among other things, that particular work was not necessary or particular time was not "reasonably spent" – Exercise to be contextual and informed, not mechanical – Fairness to both parties does not mean giving the paying party a windfall by disallowing work and time where it is quite clear that work was done on the matter and done reasonably – Asking the court to say, based on bald assertions, that too much time was spent on a task is asking the court to draw lines too finely and to second guess too much unless the time was objectively disproportionate [see Olive Group Assessment of Costs Judgment].

Internal Discussions: Internal discussions in relation to a matter are recoverable if the work meets the general principles which guide the exercise of the court's discretion as to recoverable costs, and most particularly, that it was reasonable for a legal practitioner of reasonable competence to meet in such circumstances – Many reasons for two or more persons working on matter to meet – If work is to be done efficiently and at appropriate level, there needs to be briefing and instructing of people and reporting back – In complex litigation, there is considerable value to discussions of strategy and tactics, legal issues, organizational matters and so on – Brainstorming can add great value – Meeting, conference or internal discussion needs to have had a purpose in relation to case that made it reasonable.

"Duplication": Not unusual for partner and one or more associates to need to review the same material in a large commercial matter – Where parties are deploying large teams, it is not unreasonable – Team needs certain level of familiarization with the matter in order to add value, facilitate collaboration and result in overall efficiency and effectiveness – Likewise, when documents are being prepared, often it makes sense for one or more people to review a draft – Bring different perspectives and value – Lead counsel will have input on shape of a skeleton if drafted by someone at a lesser billing rate – Realistic reflection and explanation of how teams work on litigation in many law firms – Not "duplication' – However, sensible judgment does need to be brought to the management of teams and sensible judgment needs to be exercised by team members.

Costs Assessed and Allowed: Costs of $2,041,374.49 assessed and allowed – Sum is reasonable and fair both to Applicant and Respondents and is proportionate, particularly in context of the overall dispute – Each item claimed and not disallowed was reasonably incurred and the costs for each item not disallowed was reasonable – Work in relation to each item of costs claimed and not disallowed was necessary and cost of each item is was reasonable.

Draft Judgments: Prime purpose of providing a draft judgment to counsel and parties is so that they may provide corrections (typos, citation errors, grammatical and spelling errors, computational errors, double-counting, misnomers, and so forth) – Also on occasion counsel will suggest consideration of a wording clarification to make the expression of what has been decided and ordered, and/or the reasons therefor, clearer

and more intelligible or to make what has been ordered more workable mechanically – On odd occasion counsel may suggest that the court may have missed dealing with an issue that was to be decided by it – Having the draft judgment may have several benefits for counsel and parties (prepare for submissions such as with respect to costs; prepare to bring an appropriate application at the handing down of the judgment such as for an interim stay pending an application to the Court of Appeal and/or for leave to appeal; prepare internally in corporate party before judgment becomes public) – There may be other appropriate purposes – However provision of a draft judgment is not for purpose of inviting re-opening or re-argument of substance of matters decided in draft judgment before judgment is handed down – Important to maintain distinction in order to preserve integrity and value of draft judgment process – Any initiative to make further submissions on matters decided should be by application following handing down of judgment in accordance with the applicable tests for doing so.

[1] LEON J [Ag]: This Judgment concerns the assessment of costs of the 2nd Defendant/Applicant ("Applicant") against the Claimants/Respondents ("Respondents") pursuant to the Order of the Honourable Justice Edward Bannister QC [Ag] of this Court made 12 June 2012, the Consent Order of the Court of Appeal of 3 October 2012, and the Order of Justice Bannister dated 24 October 2012 (collectively, "Orders"). No costs order in respect of the Court of Appeal proceedings was made.

[2] The Order of 24 October 2012 provides that the Respondents pay the Applicant's "costs of and occasioned by the Claim incurred prior to October 4, 2013"[1] and "costs of and occasioned by the Counterclaims"[2].

The Dispute and the Litigation

[3] The claim giving rise to the Orders concerned 24.5% of the shares ("Shares") of the 1st Defendant then held by the Applicant and in respect of which the 3rd Defendant had a security interest. The Respondents' contention was that the Applicant held the shares in trust for the estate of a deceased Georgian billionaire, Badri Patarkatshishvili, in respect of which the Respondents purportedly were

[1] Order, 24 October 2013, paragraph 5.
[2] Order, 24 October 2013, paragraph 6.

heirs pursuant to the applicable laws of intestacy. The underlying asset held by the 1st Defendant was an oil terminal in the Black Sea, said to be worth $317 million.

[4] The claim as originally framed was for injunctive relief preventing dispositions or charging of the Shares. The Applicant obtained summary judgment in respect of the injunctive relief sought at a hearing on 15 – 17 May 2012 by a Judgment handed down at a substantive hearing on 12 June 2012, at which hearing an anti-suit injunction in respect of proceedings in Georgia was denied, and which Judgment (and the costs order in respect of it) was reversed by the Consent Judgment of the Court of Appeal.

[5] What eventually resulted after amendments to the pleadings was a claim by the Respondents and counterclaim by the Applicant as to the true beneficial ownership of the Shares and as to the Respondents' entitlement to the 'equity of redemption' attaching to them.

[6] The proceedings lasted almost two years and were discontinued by the Respondents shortly before the trial of the matter (which trial was listed for one week).

[7] There were multiple hearings including the three/four day hearing above, a case management conference that involved an application for a stay, other hearings relating to directions, and a substantial hearing relating to an attempted stay and joinder of the proceedings as well as a substantial hearing when the Judgment in respect of the first hearing was handed down.

[8] The proceedings were finally determined about twenty months following commencement, after the Respondents' discontinuance of the claim and consent as to the Applicant's counterclaim.

[9] By the time of discontinuance and settlement, it was said by the Applicant that largely all trial costs (presumably meaning trial preparation costs) had been incurred and briefs delivered to Counsel.

Overview of Costs Positions

[10] The costs claimed by the Applicant were $2,098,326.80 (consisting of $671,599.39 and GBP 886,166.21 (converted to $1,426,727.50 at the exchange rate when proceeding concluded of 1:1.61 ("Exchange Rate"))).

[11] The Respondents accepted $1,031,971.90 (consisting of $397712.10 and GBP 393,950.19 (converted to $634,259.80 at the Exchange Rate)) or approximately 49% of the amount claimed by the Applicant. The balance of the costs claimed was disputed on numerous grounds. The specifics of the costs which the Respondents submitted were not recoverable are detailed below.

[12] The Respondents paid $571,000.00 on account of costs.

Parties Written Submissions

[13] The parties filed various written submissions for the assessment and helpfully, following the oral hearings, filed a joint "Suggested Work Plan" dated 10 November 2015 outlining "five general principles" (five general issues) to be determined before the Court considered the lengthy costs schedules[3] and the submissions about them.

[14] The costs schedules set out descriptions of each item of work done by each of the various chargeable persons who worked on the matter, the date on which each item of work was done, and the time worked on each item. Through the back and forth process between the Applicant and the Respondents, versions of the costs

[3] The various versions of the costs schedules, with points of dispute and replies to points of dispute, total approximately 2000 pages (not all versions had numbered pages).

schedules came to set out the specific points of dispute and replies to those points of dispute.

[15] The "Suggested Work Plan" also set out the issues to be determined by this Court respecting each of the costs schedules, in particular the Forbes Hare Costs Schedule, the Forbes Hare General Disbursements Schedule, and the Forbes Hare's Disbursement Schedules for Counsel and for the London-based onshore international law firm Mishcon de Reya.

Five General Issues to be Determined

[16] There were five general issues that the parties agreed this Court should determine first, each of which is discussed and decided in turn, below.

[17] The first four general issues related to work done by "foreign lawyers" – that is, persons who were not admitted as legal practitioners in the Territory of the Virgin Islands.

[18] The five general issues were as are follows:

a) Is there is a blanket prohibition on the recovery of costs for foreign legal practitioners not admitted to practice in the Virgin Islands?
b) If the answer to (a) is "no', what general categories of tasks performed by lawyers in other jurisdictions are capable of being recovered and in what circumstances?
c) Are communications from a lawyer in the Territory to a lawyer not admitted in the Territory or conferences involving the same caught by any general prohibition on recoverability of costs?
d) Are counsel's costs incurred before admission (in the Territory) recoverable in respect of a matter where counsel is being admitted at the first substantive hearing of that manner?
e) Do the terms of the costs orders in the Orders encompass work performed in respect of the counterclaim after the discontinuance of the claim?

Issue (a): Is there is a blanket prohibition on the recovery of costs for foreign legal practitioners not admitted to practice in the Virgin Islands?

[19] The short answer is that there was no blanket prohibition on the recovery of costs for foreign legal practitioners not admitted to practice in the Virgin Islands during the period covered by the Costs Schedules (which was before the coming into force of The Legal Profession Act, 2015, as amended ("LPA")).

[20] Two recent judgments of this Court dealt with this issue, the second of which discussed and quoted at length from the former. In Halliwel Assets Inc, Panikos Symeou and Marigold Trust Company Limited v Hornbeam Corporation, ("Halliwel")[4] this Court held as follows:

> [90] Fifth Ground: Security for Costs Covering Foreign Lawyers. The fifth ground for the intended appeal is that the amount of security for costs ordered included amounts for foreign lawyers that would not be recoverable, or at least that the case had not been made by the Judgement Creditors that there are "special circumstances" that would make the incurring of such fees as disbursements recoverable.
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> [91] This, they submit, was an error that meets the test for permission to appeal.
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> [92] Bracha raised essentially the same issue on the Assessment of Costs of the Security for Costs Applications.
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> [93] Recently this Court considered the issue of foreign lawyers in the assessment of costs judgment in Olive Group Capital Limited v Gavin Mark Mayhew ("Olive Group Assessment of Costs Judgment") stating as follows:
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> > [88] In international commercial litigation, which is the vast majority of the work of the Commercial Court in the Virgin Islands, the involvement of lawyers who are not practitioners of the jurisdiction's law (in whatever way the

[4] 2014/0115 and 2014/0134, Judgment (Permission to Appeal and Stay), 17 May 2016.

particular jurisdiction regulates that) and who are located outside the jurisdiction of the litigation, is common. This is only natural given the international nature of the commercial activities involved and that the individuals involved with the parties often are located elsewhere in the world.

[89] Within the bounds of what is legally permissible under the laws of the relevant jurisdiction, they have a wide range of important roles to play even though they are not practising local law.

[90] This is neither a "luxury" in the circumstances of many cases nor duplication, as the Company submitted it was in this case – it is a reality and a practical and reasonable necessity.

[91] The costs system in this jurisdiction, certainly in relation to international commercial litigation in the Commercial Court, must recognize the realities of today's international commercial litigation.

[92] Subject to the same considerations that apply to all members of the legal team, the value of their work should be recognized and included in assessed costs (as a disbursement). While situations will differ, the kinds of roles played and work done by Mr. Ross are, in principle, acceptable in a costs assessment (as a disbursement).

[93] That said, a judicial officer doing an assessment will watch for inappropriate involvements, which may exist where for example there is neither a general nor a detailed explanation of why the foreign lawyer was involved in a particular aspect of the matter.

[94] In the words of Justice Bannister in Grand Pacific Holdings Ltd. v Pacific China Holdings Limited [BVIHC 2009/389, 3 December 2010]:

> The fees of instructed foreign lawyers are themselves treated as a disbursement in a BVI assessment. In other words, they have to be justified as a reasonable expense incurred by the BVI lawyers …
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> [95] Justice Bannister went on to refer to the roles of the foreign lawyer in that case and why they were a reasonable expense. This Court reads those roles and why they were reasonable as examples, not any limitation on the broad general principle. The circumstances of each case, of each client and client representative (location; language facility; sophistication; background; etc.), of each BVI legal team, of each foreign lawyer (expertise; background with the client; background with the events or matters leading to the BVI litigation; language facilities; location), and so on, will be different.

[94] Bracha relied on earlier authority, namely Michael Wilson & Partners Limited v Temujin International Limited ("Wilson") , a Judgment of Justice Hariprashad-Charles of this Court, which quoted Agassi v Robinson ("Agassi") , a judgment of the English Court of Appeal, that was referred to by counsel before Justice Hariprashad-Charles. Counsel's submissions on this issue to Justice Hariprashad-Charles are then summarized in a long paragraph in Wilson. Counsel submitted to Justice Hariprashad-Charles as follows:

- to be recoverable as a disbursement, work of a foreign lawyer should be "assistance in a specialist esoteric area" (words used in Agassi, along with "may be possible to characterise these specialist services as those of an expert", and distinguished from "work that would normally be done by the solicitor instructed in the appeals" and "general assistance to counsel in the conduct or the appeals").
- the mere fact that the litigation has an international dimension and the parties instruct lawyers in other jurisdictions does not mean that all the work done by those foreign lawyers are properly recoverable as such in England (or the BVI);

- English (and the same is true in the BVI) courts are very familiar with commercial proceedings which have an international dimension;
- the services of the foreign lawyer [need] "genuinely [to be] characterised as of an expert nature"; and
- "assistance of a general nature in English or BVI commercial litigation cannot property be characterized as assistance in a specialist esoteric area or as an expert".[5]

[95] It is important to note that those were submissions of counsel, not the Court's holding.

[96] The Court simply and clearly held as follows:

> Mr. Young [counsel for the paying party] correctly submitted that insofar as sums have been paid … to foreign lawyers for work amounting to the general conduct of BVI litigation … those sums are not as a matter of law recoverable as legal costs in the BVI proceedings.[6]

[97] The preclusion is for "work amounting to the general conduct of BVI litigation", a proposition with counsel for the Judgment Creditors did not dispute. This Court does not consider that it differs with the essence of what was held in the Olive Group Assessment of Costs Judgment.

[98] Agassi, which was referred to in Wilson only with reference to counsel's submissions, appears to have taken the same approach. Reading the relevant passage a whole, and not just the way counsel apparently summarized Agassi to Justice Hariprashad-Charles, is instructive – and important. Dyson LJ stated in Agassi as follows:

> [75] … the appellant is not entitled to recover costs as a disbursement in respect of work done by Tenon [who appears not be have been a foreign lawyer but it does not

[5] 45. Wilson, paragraphs 69 and 70.
[6] 46. Wilson, paragraphs 71

> appear to matter in relation to the court's holding] which would normally have been done by a solicitor who has been instructed to conduct the appeal. This means that the appellant is not entitled to recover for the costs of Tenon providing general assistance to counsel in the conduct of the appeals.
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> [76] But it seems to us that it does not necessarily follow that the appellant is not entitled to recover costs in respect of the ancillary services provided by Tenon on these appeals. … It may be appropriate to allow the appellant at least part of Tenon's fees as a disbursement. It may be possible to argue that the cost of discussing the issues with counsel, assisting with the preparation of the skeleton argument etc. is allowable as a disbursement because the provision of this kind of assistance in a specialist esoteric area is not the kind of work that would normally be done by the solicitor instructed to conduct the appeals. Another way of making the same point is that it may be possible to characterise these specialist services as those of an expert, and to say for that reason that the fees for those services are in principle recoverable as disbursement.

[99] The Court was discussing the particular third parties whose services were in question and the particular context of tax appeals. Some of what is said above was directed to which fees for services may be recoverable in that context, not to saying that to be recoverable the services must be "in a specialist esoteric area" or must be characterized as "specialist services … of an expert". It is one way in which third party, or in our case, foreign lawyers' services may be recoverable.

[100] What Agassi says may be recoverable as a disbursement in that case would be "the cost of discussing the issues with counsel, assisting with the preparation of the skeleton argument etc." The reason given for possible recoverability was because "the provision of this kind of assistance in a specialist area is not the kind of work that would normally be done by the solicitor instructed to conduct the appeals" or because it may be possible to characterise the specialist

services provided as those of an expert (on the footing that expert fees are in principle recoverable as a disbursement).

[101] The key general holding of Agassi is the type of foreign lawyer or other third party work that cannot be recovered as a disbursement.

[102] What is precluded by Agassi is work done by a third party that normally would be done by a solicitor instructed to conduct the matter and general assistance to counsel in the conduct of the matter.

[103] Agassi, Wilson, Grand Pacific Holdings Ltd. v Pacific China Holdings Limited, and the Olive Group Assessment of Costs Judgment, read together, make the point that to a material degree the assessment of recoverability of the work of foreign lawyers (or other third parties who assist on a matter) as a disbursement is context dependent. The assessing process needs to consider why the work of the third party generally, or more specifically on the various projects or tasks he or she undertook, in the context of the particular litigation, should be accepted as something other than the "general conduct of BVI litigation", "work that normally would be done by a solicitor instructed to conduct the matter" or "general assistance to counsel in the conduct of the matter".

[104] Of course the work must be "within the bounds of what is legally permissible under the laws of the relevant jurisdiction" – the person involved cannot be practising local law in doing the work. In line with what counsel for the Judgment Creditors submitted, the conduct of the matter must be in the hands of a BVI lawyer and the work done under his or her general direction, and of course at the end of the day he or she is responsible to the Court, and the client, for that work.

[105] Also as submitted by Bracha and as held by this Court in the Olive Group Assessment of Costs Judgment, work by the foreign lawyer "effectively as the clients of the BVI lawyers" ("receiving and interpreting BVI legal, strategic and tactical advice" in the Olive Group Assessment of Costs Judgment) is not recoverable.

[106] Accordingly, this Court rejects in principle the fifth ground of the intended appeal as having sufficient merit to meet the test for

permission. The fifth ground does not have a realistic prospect of success.

[21] Recently the Court of Appeal in Garkusha v Yegiazaryan and Ors[7] ("Garkusha") established that the fees of "overseas" (foreign) lawyers (non-BVI legal practitioners) for work done prior to the LPA are "generally recoverable" on assessments of costs as disbursements of BVI legal practitioners.

[22] The Court held as follows:

> [56] These cases[8] adequately and accurately set out the English position on the recovery of the fees of foreign lawyers – they are recoverable as a disbursement of the local solicitors and not as the fees of solicitors entitled to practise in England.
>
> The BVI position
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> [57] The BVI position, though not as clear in the past, is now settled along the lines of the English cases. In Finecroft Limited v Lamane Trading Corporation[9] Madam Justice Hariprashad-Charles followed the decision in Mccullie v Butler and allowed the fees of foreign lawyers as a disbursement of the local firm subject to reductions on issues of quantum. However, the judge took a different position in Michael Wilson & Partners Limited v Temujin International Limited et al[10] where she found that because foreign lawyers were not admitted to practise in the BVI their fees were not recoverable as fees for acting in the matter. Their fees were recoverable as disbursements and only for acting as experts on particular areas of foreign law. The portion of the fees relating to general care and conduct was disallowed.

[7] BVIHCMAP 2015/0010, Judgment, 6 June 2016 (Pereira, CJ and Webster and Kentish-Egan, JJ.A)
[8] The Garkusha Judgment cited, discussed and approved the following English judgments in the paragraphs preceding paragraph 56, under the heading "Pre-Act Position" (the Act being the LPA): Slingsby v Attorney General 1918] P 236; Mccullie v Butler [1962] 2 QB 309, at 312; Societa Finanziaria Industrie Turistiche SpA v Manfredi Lefebvre D'Ovidio De Clunieres Di Balsorano et al [2006] EWHC 90068 at para 42; Case No: AGS/0508384.
[9] 19 BVIHCV2005/0264 (delivered 31st August, 2006, unreported).
[10] 20 BVIHCV2006/0307 (delivered 11th August 2011, unreported). 18 At para. 42.

[58] Bannister J [Ag.] came to the opposite conclusion in Grand Pacific Holdings Limited v Pacific China Holdings Limited.[11] The learned judge found that:

> "The fees of instructed foreign lawyers are themselves treated as a disbursement in a BVI assessment. In other words, they have to be justified as a reasonable expense incurred by the BVI lawyers in and about the conduct of the case in the BVI. I accept Mr Forte's submission that in a case involving foreign clients where English is not the first language and where the clients will need to have matters explained to them by local lawyers and to give instructions through local lawyers, the retention of local solicitors is appropriate and proper."[12]

He did not refer to the English cases mentioned above but his conclusion is in line with the decisions in those cases. He also made the point that the fees of foreign lawyers are subject to the same scrutiny as those of local practitioners. He said at paragraph 20:

> "I should say that in the Commercial Division I regard CPR 69B.11(3) as applying as much to the fees of foreign lawyers as to those of lawyers practising within the jurisdiction."

Rule 69B.11(3) sets out the details that must be included in a bill of costs.

[59] The following principles relating to the fees of foreign lawyers in an assessment of costs under CPR are derived from the cases:

> (i) The fees of overseas lawyers are generally recoverable as a disbursement of the local legal practitioners.
>
> (ii) The fees must be justified and reasonable.
>
> (iii) The bill of costs must give full details of the charges incurred by the foreign lawyers, and in the case of matters in the Commercial Court, the bill must comply with the requirements for details in rule 69B.11(3).
>
> (iv) The fees should be calculated at the appropriate rates of charge in the foreign country, but, as with all disbursements, must be proportionate and necessary judged by local standards.

[11] 21 BVIHCV 2009/0399 (delivered 3rd December 2010, unreported).
[12] 22 At para. 22.

> [60] I have set out my findings on the relevant principles in detail because they form the basis of my opinion that there is an established common law principle in the BVI that the fees of foreign lawyers are recoverable as a disbursement of the local practitioner, and there are clearly defined principles, practices and procedures for recovering such fees.

[23] This Court reads the Garkusha as a clear statement (as set out in paragraph 59(i), quoted above) that the fees of overseas (foreign; non-BVI) lawyers are "generally recoverable" as disbursements of BVI legal practitioners.

[24] The Court of Appeal, in stating the principles relating to the fees of foreign lawyers (paragraph 59 of Garkusha), did not include the restriction or limitation that this Court had drawn from the authorities in the Olive Group Assessment of Costs Judgment and in Halliwel, namely a preclusion for "work amounting to the general conduct of BVI litigation", "work that normally would be done by a solicitor instructed to conduct the matter" or "general assistance to counsel in the conduct of the matter".[13] But for the prior authorities appearing to contemplate such a restriction or limitation, this Court would have been strongly in favour of adopting the principle stated by the Court of Appeal, for reasons explained below.

[25] It is the case, of course, that the conduct of the matter, in the sense of ultimate responsibility for the matter, must be in the hands of a BVI legal practitioner and the work done under his or her general direction and ultimate supervision, and of course at the end of the day he or she is responsible to the Court, and the client, for that work.[14]

[26] The words "ultimate responsibility for the matter" and "ultimate supervision" are important. Those words convey the important and exclusive preserve of BVI legal practitioners.

[13] Halliwel, paragraphs 103 and 104.
[14] Halliwel, paragraph 104.

[27] The costs of a foreign lawyer cannot be recovered for performing any of the limited number but fundamental functions that only a BVI legal practitioner can perform.

[28] Also it is the case that work by a foreign lawyer, if effectively as the client of the BVI lawyers ("receiving and interpreting BVI legal, strategic and tactical advice" on behalf of the client/party, as set out in the Olive Group Assessment of Costs Judgment), is not recoverable.[15] The rationale is that the foreign lawyer, when in that role, is not working on the BVI litigation but is a representative of the client in dealing with the BVI legal practitioner. If the client's time is not recoverable, there is no greater case for the client's representative's time to be recoverable when in that role.

[29] With respect to work done before the LPA came into force, which is the only period involved in this assessment of costs, Garkusha means that the focus on an assessment of costs should be what tasks were performed, not so much by who or where, and whether the paying party should pay the receiving party for those tasks having regard to the CPR 65.2 considerations of reasonableness, proportionality and so forth (discussed below).

[30] Of course there may be some tasks that will not be compensable, for example, because they were unlawful, even absent any law or regulation of what only a BVI legal practitioner may do -- an extreme and obvious example might be work done to arrange to bribe a witness: being unlawful in the extreme, a paying party should not have to pay for such work and a receiving party certainly should not be reimbursed for such work. But just as easily it would be precluded as not being a cost that it is reasonable for a paying party to have to pay.

[31] What Only a BVI Legal Practitioner May Do – Guiding Principle. Without determining comprehensively what are those fundamental functions that only a

[15] Olive Group Assessment of Costs Judgment, paragraph 96; Halliwel, paragraph 105.

BVI legal practitioner may perform[16], the guiding principle for what only a BVI legal practitioner may do appears to be that they are "the buck stops here" functions.

[32] As indicated above, in one way or another the BVI legal practitioner must take 'ultimate responsibility' for the matter – to his or her client, and/or to the Court – and the litigation must be under the BVI legal practitioner's 'ultimate supervision'.

[33] Those are the functions that distinguish a BVI legal practitioner, and practising as a BVI legal practitioner. Those are the functions which only a BVI legal practitioner may undertake or perform.

[34] If performed by anyone else, they have not been recoverable before the LPA and are not recoverable now.

[35] Taking 'ultimate responsibility' means that the BVI legal practitioner is responsible, in accordance with his/her professional obligations, to his/her client, and to this Court, for all aspects of the case. For example, with respect to a document prepared for the court proceedings (pleading; skeleton; witness statement; affidavit), the BVI legal practitioner is ultimately responsible for, as applicable, its accuracy, quality, completeness and forthrightness, to the same extent as if he/she had done all of the work in connection with it by him/herself.

[36] Only a legal practitioner can sign a BVI pleading or certificate that requires the signature or certification of a BVI legal practitioner; finally approve and/or put his/her name on a court document as legal practitioner of record; provide legal advice (which would include a legal opinion) on BVI law; and represent a party in court proceedings commenced in this Court (unless it were to be provided expressly otherwise).

[16] The phrase "BVI legal practitioner" now refers to a person who has been admitted in the Territory of the Virgin Islands and is entitled to practice as a legal practitioner. The requirement for a Practising Certificate in order to be permitted to practise arose only when the LPA came into force. A person admitted prior to January 2016 is deemed to have a Practicing Certificate up to February 2017.

[37] The discussion in Garkusha about the role of the non-BVI law firm (Berwin Leighton Paisner) was in the context of the LPA provisions and the definition of "practice law" in section 2(1) of the LPA which states "'practise law' means to practise as a legal practitioner or to undertake or perform the functions of a legal practitioner, as recognised by any law whether before or after the commencement of this Act."

[38] The question for this Court is whether that part of Garkusha sheds light on what is said above about what only a BVI legal practitioner may do – ultimate responsibility and ultimate supervision functions – and what others may do to assist, which are relevant to the period with which the present assessment is concerned.

[39] Garkusha has a limited description of the role of non-BVI law firm. It describes the firm's role in relation to an expert witness and goes on, under the heading "Other fees of Berwin Leighton Paisner", to describe briefly its other role:

> [49] Berwin Leighton Paisner has offices in Moscow where Mr. Garkusha lives, and in London. Mr. Khodykin is a partner in the firm. Apart from arranging and obtaining the expert evidence of Mr. Khodykin the lawyers at Berwin Leighton Paisner assisted Mr. Garkusha generally with his defence of the application for security for costs. The respondent objected to the fees for this additional work on the ground that the lawyers at Berwin Leighton Paisner are not licensed under the Act to practise Virgin Islands law and the recovery of such fees in the BVI is unlawful. [emphasis added]
>
> [50] The appellant's responses to this objection are on factual and legal grounds.
>
> [51] Factually, the appellant submitted that he was faced with a complex application for security for costs involving elements of Russian law and expert evidence of Russian law. He had to instruct his lawyers in Russia and the BVI, on short notice, to assist him in putting together a proper defence to the application. Therefore, it was necessary and proper for him to instruct the lawyers at Berwin Leighton Paisner.

…

> [74] In our case the statute has created an illegality in the work done by Berwin Leighton Paisner in advising and assisting Mr. Garkusha and his local lawyers. [emphasis added]

[40] Looking at the two roles of the non-BVI law firm in Garkusha, as stated above, "advising" on BVI law (which includes advising on the defence of BVI legal proceedings) is a function that always has been reserved to BVI legal practitioners exclusively. It is an ultimate responsibility and ultimate supervision function.

[41] Second, the Court of Appeal stated that the non-BVI law firm was assisting Mr. Garkusha and his local lawyers. There is no other description of the functions the firm performed in "assisting". There is no indication that the Court was told that the firm performed functions that were not ultimate responsibility or ultimate supervision functions.

[42] Certainly "assisting Mr. Garkusha" implies that the firm assisted the client/party directly as opposed to assisting the BVI legal practitioners charged with defending the BVI application on behalf of Mr. Garkusha.

[43] A consistent reading leads this Court to conclude that the law firm had performed predominately if not entirely ultimate responsibility functions and/or ultimate supervision functions which disentitled the receiving party from being compensated by the paying party for that firm's work.

[44] What Persons Who Are Not BVI Legal Practitioners May Do, and Why. As stated earlier, Garkusha makes clear that in relation to the assessment with which this Court is concerned in this Judgment, a foreign legal practitioner – as well as a BVI paralegal, law clerk or legal assistant, a lay person, or anyone else, wherever located – can assist by doing work under the ultimate supervision of a BVI legal practitioner who is ultimately responsible for the final work product.

[45] For example, it is increasingly common for large law firms and corporate law departments in some jurisdictions to outsource labour-intensive work to lower-cost jurisdictions such as India, including document review and legal research.

[46] Work in relation to litigation is done in the manner, in the place and by an array of people who can do it most effectively and efficiently. This is true for domestic litigation and even more true for international litigation.

[47] In the Olive Group Assessment of Costs Judgment, quoted above, this Court highlighted that in international commercial litigation globally, particularly in the significant commercial litigation centres, it is common for lawyers who are not practitioners of the jurisdiction's law and who are located outside the jurisdiction of the litigation to be involved. This is only natural given the international nature of the commercial activities involved and that the individuals involved with the parties often are located elsewhere in the world. This is a reality and a practical and reasonable necessity. It is even more so the case when there are proceedings in multiple jurisdictions, and the coordination of the litigation overall is not in the jurisdiction in question. There will be efforts to organize various roles rationally, so that strategies and tactics are coordinated, duplication is minimized, and so forth.

[48] Commercial parties will not be inclined to be involved in jurisdictions where they are precluded from conducting their affairs, including their dispute resolution, in a manner that is consistent with how they operate internationally, or inconsistent with efficiency and effectiveness.

[49] The parties' choices can be direct – whether to commence proceedings in the particular jurisdiction or elsewhere, when there is a choice.

[50] The parties' choices also can be indirect – whether to establish a company or other entity in the particular jurisdiction for the conduct of, or as part of the conduct of, their commercial or other affairs.

[51] Ultimately, these choices have a profound collective impact on the particular jurisdiction – in this case, the Territory of the Virgin Islands – including but not limited to its economy.

[52] The growth of the Territory as an international commercial dispute resolution centre of choice, based on the strength of its dispute resolution services, is what will help to attract legal work of all types to the Territory, and create work and opportunities for the people of the Virgin Islands in dispute resolution and many related fields and many aspects of the Territory's economy (right through to the hospitality and tourist industries – accommodation, transportation, restaurants and shops).

[53] In turn, this attracting of legal work to the Virgin Islands and this creation of work and opportunities, will enable the legal profession in the Territory to create and foster opportunities to enhance and build capacity in the Virgin Islands, consistent with the public policy of the Territory.

[54] It is this Court's strong view that the wide and deep involvement of BVI legal practitioners in BVI-based litigation adds value. Parties to BVI-based litigation and foreign lawyers should be under no misapprehensions about that and will recognize that.

[55] The legal practitioners who practise litigation based in the Territory are first-rate on a world scale in all aspects of the litigation process, including advocacy. Importantly, they appreciate so many aspects of how things work in relation to disputes resolved here – things that even BVI legal practitioners unconnectedly practising elsewhere cannot truly appreciate – that engrained experience and knowledge, that "feel for things", will enhance (often materially) the prospects for the most effective presentation of a party's case.

[56] Absent that involvement, too often things done, tactics adopted, positions taken, approaches followed, styles used, that may work well elsewhere but do not work well in this Court and in this Territory.

[57] Parties in litigation, corporate counsel and lawyers outside the Territory who work with BVI legal practitioners on BVI disputes must and will – in their self-interest – appreciate this and take advantage of it. Those who do not already appreciate this will come to appreciate it and to take advantage of it.

[58] This policy reasoning supports the law respecting the work of non-BVI lawyers as stated by the Court of Appeal in Garkusha.

[59] Implications for Assessments of Costs. Garkusha means that in the case of work done by a non-BVI lawyer that are not 'ultimate responsibility functions' and not 'ultimate supervision functions', the receiving party does not have a greater burden than in the case of work done by a BVI legal practitioner to explain to the paying party and the Court what tasks were done and why.

[60] The provision of explanations serves the same functions both for the work of BVI legal practitioners and the work of non-BVI legal practitioners and others, and is part of assessing reasonableness and proportionality.

Issue (b): What General Categories of Tasks Performed by Lawyers in Other Jurisdictions Are Capable of being Recovered and in What Circumstances?

[61] The short answer is that there no limitations on the work performed by lawyers in other jurisdictions that are capable of being recovered, except as described and discussed under Issue (a).

[62] However, even if this Court is incorrect in that conclusion, there are simply examples, derived from decided cases, of general categories of tasks performed by lawyers in other jurisdictions that are capable of being recovered in the Territory, subject to the general considerations in CPR 65.2 (set out below). These

examples are discussed in the quotations from Halliwel and the Olive Group Assessment of Costs Judgment.

[63] However, there is no limited or closed list of categories and there are no particular "circumstances" that make the categories of tasks recoverable or not.

[64] This pre-Garkusha position was summarized in paragraph 103 of Halliwel (quoted above but repeated here as a matter of convenience), as follows:

> [103] Agassi, Wilson, Grand Pacific Holdings Ltd. v Pacific China Holdings Limited, and the Olive Group Assessment of Costs Judgment, read together, make the point that to a material degree the assessment of recoverability of the work of foreign lawyers (or other third parties who assist on a matter) as a disbursement is context dependent. The assessing process needs to consider why the work of the third party generally, or more specifically on the various projects or tasks he or she undertook, in the context of the particular litigation, should be accepted as something other than the "general conduct of BVI litigation", "work that normally would be done by a solicitor instructed to conduct the matter" or "general assistance to counsel in the conduct of the matter".

Issue (c): Are Communications from a Lawyer in the Territory to a Lawyer Not Admitted in the Territory or Conferences Involving the Same Caught by Any General Prohibition on Recoverability of Costs?

[65] The short answer is that communications from a lawyer in the Territory to a lawyer not admitted in the Territory or conferences involving the same are not caught by any general prohibition on recoverability of costs.

[66] If the communications or conferences relate in any way to the recoverable work to be, being, or that was performed by the foreign lawyer (including enquiries as to the availability or ability of the foreign lawyer to assist), the cost of the communications and conferences are recoverable, subject to the general considerations in CPR 65.2 (set out below).

Issue (d): Are Counsel's Costs Incurred Before Admission (in the Territory) Recoverable in respect of a Matter where Counsel is being Admitted at the First Substantive Hearing of that Manner?

[67] The short answer is that counsel's costs incurred before admission in the Territory are recoverable in respect of a matter where counsel is being admitted immediately before a hearing in the matter.

[68] It is not infrequent that counsel will be admitted just prior to the hearing on which he or she is to appear. Distance and logistics for counsel in London or elsewhere makes this a necessity. Unless the person is otherwise coming to the Territory earlier, it would be cost-inefficient and illogical to take any other approach.

[69] Counsel for the Applicant pointed out that this has been the settled practice in the Commercial Court and that "to adopt the Respondents' logic now would do serious and lasting damage to the jurisdiction." This Court concurs.

[70] The policy reasons for maintaining the practice is reflected in what this Court said in relation to the First General Principle (Issue (a)) respecting foreign legal practitioners and international commercial litigation,

[71] There are at least two possible ways of analyzing the situation from a legal perspective, if this practicality needs to be put into a 'box'.

[72] The first possible analysis is that it is recoverable as foreign lawyer work.

[73] Even if this Court is wrong in its reading of Garkusha about the scope of what work a foreign lawyer may do that is recoverable, in this situation it is specialized work in the sense that there is nobody else in the world who could be doing what an un-admitted counsel is doing by way of preparing him/herself for a case that he/she will argue post-admission to the BVI Bar, and doing work incidental thereto.

[74] Referring to paragraph 103 of Halliwel quoted above, it is not the "general conduct of BVI litigation", "work that normally would be done by a solicitor instructed to conduct the matter" or "general assistance to counsel in the conduct of the matter".

[75] Another possible analysis is that as an intended member of the BVI Bar, the work is being done is a special "safe harbour", and becomes recoverable as the work of a BVI legal practitioner upon the person being admitted in the Territory and gaining the ability to practice in the Territory (or to practice in the Territory for the particular case if limits come into force of that nature).

[76] This might be described as a "relation back" or a ratification of the work done pre-admission in the Territory. This analysis might be seen by some to be a bit metaphysical but it is a route to a pragmatic and necessary result.

[77] To be clear, this discussion and holding relate to counsel who appears on a matter. Counsel for the Respondents submitted that this could mean "that anybody whilst not qualified as a BVI practitioner can purport to dispense BVI legal services and if such a person is eventually called they can retroactively recover their fees when they practised as an unqualified person." That is not what this Court is holding when referring to a relation back or a ratification and that is not the case.

[78] For the reasons described above, counsel who is to be admitted and then appear on a matter is in a special situation. There is no need to decide if there is any other kind of comparable situation but what is clear is that this is not a holding of general application as counsel for the Respondents submitted it might be read.

[79] Under either theory, before being admitted as a BVI legal practitioner, the person who is to be counsel on the matter still is restricted, before admission, from performing the functions that only a BVI legal practitioner may perform, as discussed above. The ultimate responsibility and ultimate supervision functions must at all times be performed by a BVI legal practitioner.

Issue (e): Do the Terms of the Costs Orders Encompass Work Performed in Respect of the Counterclaim After the Discontinuance of the Claim?

[80] The short answer is that the terms of the costs orders in the Orders encompass work performed in respect of the counterclaim after the discontinuance of the claim.

[81] As set out near the beginning of this Judgment, the words of paragraphs 5 and 6 of the Order of 24 October 2012 provide that the Respondents pay the Applicant's "costs of and occasioned by the Claim incurred prior to October 4, 2013" and "costs of and occasioned by the Counterclaims".

[82] This Court can see no other meaning to the latter phrase, even if it stood alone. The existence of a cut-off date for the costs of and occasioned by the Claim appear to remove any doubt.

[83] The Applicant explained that during the period from 4 October 2013 (the cut-off date for costs of the Claim, as provided in paragraph 5 of the Order of 24 October 2013) to 24 October 2013 (the date of the said Order), the parties were preparing for trial of the various counterclaims brought by the Defendants, which was scheduled for 30 and 31 October 2013.

[84] Accordingly, the work done and costs incurred on the Counterclaim until 24 October 2013 are to be included in principle in the reimbursable work and time, subject to any specific reasons for disallowance of any particular entries.

[85] The Applicant conceded that one work/time entry after 4 October 2013 did not relate to the Counterclaim and should be disallowed.

General Principles for Assessment of Costs

[86] The general principles which guide the exercise of the Court's discretion as to the amount of costs to be recovered, as prescribed in CPR 65.2(1) as:

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

[87] In assessing whether the costs claimed by a party are reasonable the Court is required by CPR 65.2(3) to have regard to all the circumstances and the following factors in particular:

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

[88] When assessing costs, effect should be given to the requirement of proportionality by adopting a two-stage approach: a global approach and an item-by-item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate, having particular regard to the considerations set out above. If the costs as a whole are not disproportionate according to that test, all that is normally required is that each item should have been reasonably incurred and the costs for each item should be reasonable. It is only if the costs as a whole appear to be disproportionate that the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable. If the global costs are disproportionately high, reasonable costs will only be recovered for the items which were necessary if the litigation had been conducted in a proportionate manner.[17]

[17] BVIHCMAP 2013/0006 Andriy Malitskiy et al v Oledo Petroleum Ltd (Court of Appeal, Virgin Islands, per Michell, JA.), 6 March 2014, adopting (at paragraph 8) the guidelines set out by Chief Justice Woolf as a judgment of the Court in Lownds v Home Office Practice Note [2002] EWCA Civ 365; [2002] 1 WLR 2450 (Court of Appeal (Civil Div)).

Work and Costs of Non-BVI Legal Practitioners in this Case

[89] The work and costs of the non-BVI legal practitioner must be considered in light of the above determination of General Issues (a) – (d), and also on the alternative basis, discussed above, that the pre-Garkusha limitations still apply.

[90] Mishcon de Reya. Mishcon de Reya is a London-based onshore international law firm of non-BVI legal practitioners (with one exception in respect of this matter, Anthony O'Loughlin, an associate). The firm's work was predominately performed by a partner Joel Adler and Mr. O'Loughlin.

[91] The firm was present in the same jurisdiction as the parties and counsel and were well placed to take instructions in the U.K. and liaise with persons in Georgia.

[92] The firm did not perform ultimate responsibility work or ultimate supervision work.

[93] Subject to specific points of dispute and disallowances, discussed below, the costs of Mishcon de Reya are recoverable based on Garkusha.

[94] If the pre-Garkusha criteria were required to be applied, the work the firm did, and more particularly the work done by Mr. Adler and to a minor extent other non-BVI legal practitioners, was not the "general conduct of BVI litigation", "work that normally would be done by a solicitor instructed to conduct the matter" or "general assistance to counsel in the conduct of the matter".[18]

[95] The Respondents' submitted that "[b]ased on the schedule costs submitted by the Applicants [sic. Applicant] it is apparent that the work carried out by Mishcon de Reya was 'general assistance'. This Court disagrees.

[96] The work done by and roles played by the non-BVI legal practitioners in Mishcon de Reya, and the value they (largely Joel Adler) brought to the Applicant's case, were generally comparable to the work done by and roles played by, and the value

[18] Olive Group Assessment of Costs Judgment, paragraph 103.

brought to the case, by the non-BVI legal practitioner (Timothy N. Ross of the Bennett Jones LLP law firm) in the Olive Group Assessment of Costs Judgment[19] which this Court found met the pre-Garkusha test.

[97] Mr. Ross had the direct non-BVI lawyer-client relationship (from a legal and business perspective). He had experience in the matter and understood the context, as well as having familiarity with the client, so that he could provide continuity, input into the strategy and tactics, and services including client liaison support as a foreign agent, thereby reducing costs from what they otherwise may have been.

[98] Mr. Adler appears to have had those kinds of involvements, generally-speaking, working under the general direction of Forbes Hare, with Forbes Hare having ultimate responsibility to this Court and to the Applicant.

[99] It is clear from the work and time records that Mr. Adler had the client relationship. He dealt directly and frequently with the client (many communications and many meetings – in that latter case he appears to have been able to have numerous in-person meetings which legal practitioners in the BVI could not have had). Also Mr. Adler dealt with the Georgian lawyer (there was a relevant Georgian claim) and other non-BVI participants on the Applicant's side.

[100] Mr. Adler appears to have played a coordinating role outside the Virgin Islands to assist Forbes Hare with the litigation in the Virgin Islands. They liaised with the other legal teams (including counsel), assisting Forbes Hare to do things that it could not have done, or done as readily, as well or as efficiently operating on its own. Mr. Adler's contribution was not fungible.

[101] To be clear, this is not a criticism or weakness of Forbes Hare – it is that Mishcon de Reya had different natural advantages and different strengths – that can be termed "specialized" or "expertise" – which it brought to the table to assist Forbes

[19] Olive Group Assessment of Costs Judgment, paragraphs 83 – 87.

Hare. Forbes Hare – or any one firm in a particular jurisdiction – could not have done it alone or as well, as efficiently, and so forth. These observations harken back to what this Court stated above and in the prior judgments about the nature of complex international commercial litigation.

[102] Also Mr. Adler appears to have brought the special background he had and obtained to his review throughout of various draft documents (that is, documents prepared by others and for which Forbes Hare were ultimately responsible) such as the client's and other affidavits.

[103] A good number of Mr. Adler's work and time entries reflect those various important and appropriate roles.

[104] For these reasons, in the context of this litigation and the dispute, the parties and the others involved, the work of Mr. Adler and the other non-BVI legal practitioners at Mishcon de Reya who worked on the matter was not the "general conduct of BVI litigation", "work that normally would be done by a solicitor instructed to conduct the matter" or "general assistance to counsel in the conduct of the matter".[20]

[105] One difference in principle with the situation in the Olive Group Assessment of Costs Judgment is that unlike Mr. Ross, it does not appear that Mr. Adler or other non-BVI legal practitioners at Mishcon de Reya played the role of the "client representative" in dealing with BVI legal practitioners, which led to a 25% reduction in the amount assessed for Bennett Jones to reflect Mr. Ross' work in that role as "part of the client" as opposed to part of the legal team.[21]

[106] This Court accepts the Applicant's submission that there exists no principle that requires non-BVI legal practitioners' fees to be reduced because of any particular relationship in amount they may have to the fees of the BVI legal practitioners who

[20] Olive Group Assessment of Costs Judgment, paragraph 103.
[21] Olive Group Assessment of Costs Judgment, paragraphs 96 – 97.

were on the record and among other things, did the ultimate responsibility work and the ultimate supervision. (In this case, as noted, part of Mishcon de Reya's work was done by a BVI legal practitioner who was an associate lawyer in the firm.)

[107] Finally, this Court considered whether the involvement of Mishcon de Reya assisting Forbes Hare meant there must have been some overlap or duplication that should lead to a general reduction in the recoverable costs in respect of Mishcon de Reya.

[108] First, the Court notes that the Respondents did not point to anything specific in the work and time records of the two firms that illustrated such overlap or duplication in a sense that the paying party should not be required to pay for it.

[109] Second, and more importantly, absent such specific examples, the benefits and synergies such as were seen in the work and role of Mishcon de Reya in this large complex international litigation cannot be obtained if the necessary participating legal practitioners are not actively involved, aware of the big picture and what is going on in the case, and engaged in the case. It will not be the case every time a non-BVI legal practitioner is assisting – in some cases there will be discrete, isolated and specialized roles that mean they can and should work more or less in a silo. However, this case and cases like it are not that type of situation.

[110] Jonathan Crow QC. Jonathan Crow QC, before he was admitted in the Virgin Islands on 14 May 2012, engaged in preparation of this case in the expectation that his application to be admitted in the Territory would be heard and granted immediately before a proceeding in this case would be heard and then he would appear in the Territory as a counsel on this case. It was not practical or cost effective for him to make a special trip to the Territory from London to be admitted. He did what many counsel who have not been admitted but intend to seek admission and appear on a case have done commonly over the years, without question so far as this Court is aware.

[111] Prior to his admission, Mr. Crow QC was doing specialized work in the sense that there was nobody else in the world who could have been doing what he, a then un-admitted counsel, was doing by way of preparing himself to be counsel in this case post-admission to the BVI Bar, and doing work incidental thereto.

[112] Mr. Crow QC did not perform ultimate responsibility work or ultimate supervision work before being admitted.

[113] There is no issue about recoverability applying the Garkusha test. If the pre-Garkusha criteria were to be applied, the work Mr. Crow did before being admitted in the Territory, because of his special situation, was not the "general conduct of BVI litigation", "work that normally would be done by a solicitor instructed to conduct the matter" or "general assistance to counsel in the conduct of the matter".

[114] The costs incurred in respect of Mr. Crow's work on this case in the period before his admission in the Territory are recoverable, subject to any specific points of dispute that may be upheld.

Parties' Overall Positions in Addition to the Five General Issues

[115] In addition to the five general issues, the overall position of the Respondents on the assessment of costs was that the costs claimed were "a truly staggering sum".

[116] The Applicant submitted that, to the contrary, the sum claimed was "wholly ordinary in the context of the Commercial Court" for a very substantial proceeding of high value, with a novel legal issue, with large and high-powered legal teams on both sides, that settled on the eve of trial after almost two years.

Nine Types of Points of Dispute

[117] The points that the Respondents raised in their specific points of dispute (the line by line review of recorded work and time in the Applicant's costs schedules) were

boiled down by the Applicant to essentially nine types (not counting two points encompassed in the two of the General Issues).

[118] Those nine types of specific points of dispute of the Respondents, and the Applicant's attempts to answer them, are set out below along with this Court's general observations and holdings.

[119] First, Work and Time Entries Insufficiently Particularized. There were a vast number of work and time entries disputed by the Respondents on the basis of "insufficient detail" or the like.

[120] The Applicant submitted additional information for entries where the Applicant either accepted the concern or otherwise saw fit and was able to provide additional information.

[121] Even so, a vast number of such disputed entries remained for this Court to review line-by-line. (Some further mention of this is made below in dealing with the "excess time" points of dispute.) Largely disputing that vast number of entries was ill-conceived, ill-considered and mechanical.

[122] An example of the ill-conceived, ill-considered and mechanical use of this point of dispute was a work and time entry for a senior legal practitioner for the Applicant of 1.00 hour that was worded "Prep for CMC". The point of dispute was worded (using the Respondents' "standard issue" wording) as "Insufficient details and break down of time spent on the respective matters in order to determine the reasonableness of the time spent." One wonders exactly what additional detail would be needed for the Respondents to assess if that one hour worked to prepare for the case management conference was reasonable and proportionate. One wonders if even a video recording of the legal practitioner preparing for the one hour could lead a judge or master to conclude that the hour of preparation was not appropriate.

[123] There are many comparable examples of work for a relatively short period of time (an hour or less) on one task (or part of a task, if the 'task' is defined appropriately broadly) where the dispute is "insufficient breakdown and detail". Examples of such time records include ones where the only work for the entry was 'reviewing the Respondents' written submissions'; 'email correspondence regarding terms of an order'; 'email X regarding availability of person Y for trial'; and 'prepare amended case summary'. Many other examples were found.

[124] Another puzzling point of dispute was in relation to an entry of 0.30 hour for "Email correspondence with other parties re trial dates". The point of dispute read:

> Insufficient detail and breakdown of time spent on the respective matters in order to determine the reasonableness of the time spent. In particular there is no clear indication of the nature of the call [it was an email] and how they helped to progress the case.

One might have thought that having a trial date would help to progress the case.

[125] These kind of ill-conceived, ill-considered and mechanical points of dispute are not an efficient use of the Court's time and not an efficient use of the paying party's time.

[126] In the Olive Group Assessment of Costs Judgment, this Court held as follows, which is generally applicable to this assessment:

> Issue 4: Detail/Particularity Issue
>
> [109] No detailed assessment of costs would be complete without the party that is to pay the assessed costs raising in its points of dispute that detailed record of tasks submitted by the party that is to recover costs were lacking in detail or particularity.
>
> [110] Both parties appeared to accept that the requirement that must be met is the requirement in CPR 69B.11(3) that the schedule of costs "particularise the amount of time spent upon the application by the legal practitioner or his partners or employees, specifying in each

case – (b) the task or tasks undertaken by the [person], and (c) the precise time spent upon each such task by the relevant [person].

[111] This requirement, like all provisions in the CPR, is subject to being interpreted in light of the Overriding Objective of dealing with cases justly. "Justly" means here that the requirement must be interpreted in a manner that is just for both parties. This is reinforced by CPR 65.2(1)(b) which requires that the amount of costs to be allowed "be fair both to the person paying and the person receiving such costs."

[112] Time records, particularly in an intensive or expedited proceeding, need not meet a standard of perfection. They can and should be read in context by an informed reader. This is particularly so when the assessment is being conducted by the Commercial Court Judge who heard all proceedings in the matter and who, to a reasonable degree, knows from his or her recollection and from the evidence in the proceeding what was going on at various stages.

[113] Also it must be remembered that there are applicable legal advice and litigation privileges which militate against certain information being provided to the opposite party lest, particularly in an ongoing situation (which this is, even though the Claim is over, save for appeals), the assessment provides some tactical or other advantage to the opposite party by directly or directly disclosing (to an informed reader of the time records) advice, strategy, tactics or other matters.

[114] If the objective of a detailed assessment in this respect simply were to be to go through time records one-by-one-by-one to mechanically determine if each particular entry on its face, standing on its own, has a detailed description of each task and a record time worked on it, a judge or master is not required. A clerical person could be trained to do the job without regard to the contextual interpretation referred to above. Indeed, large corporate legal departments engage specialist firms [sic].

[115] that use computers to review law firms' invoices to their own client for 'non-compliant' time entries.

[116] Time records need to be read with the above considerations in mind and in a contextual manner.

[117] Justice to the party to receive costs means that this is not to be a 'game of gotcha' in which not having a perfect or near perfect time record leads to its disallowance even though from the context it is reasonably clear to all concerned what was done. While it may be for the party that is to receive costs to meet a certain burden or suffer the consequences, that burden needs to be realistic and should have regard for the reasons the paying party should have the information for assessment purposes.

[118] On the other hand, as counsel for the Company reminded the Court, justice to the party paying the costs requires that the paying party and the paying party's counsel have sufficient contextual detail of the task to be able to submit, among other things, that the particular work was not necessary or the particular time was not "reasonably spent" .

[119] Accordingly, in the detailed assessment, many of the time records to which the Company objected were sufficiently clear and were allowed. This is discussed further below.

. . . . .

[162] General Observations and Conclusions. Viewed in the context of the chronology and context of this litigation, and the Court's general appreciation, referred to above, for the way in which teams in law firms can work efficiently on litigation matters, and the way in which work and time records are created during intensive (particularly 'real time') litigation and the way in which they can be read in the context of surrounding entries, short form words and what was going on at the time, the Court finds that almost all work and time entries are satisfactory with the explanations provided in writing and orally by counsel who was personally involved.

[163] This exercise was contextual and informed, not mechanical. Its objective was to disallow time spent and work done for which the paying party should not be required to pay. For that reason, certain administrative tasks were disallowed. It would not aid cost-effective litigation to each person doing work and recording time to take an inordinate amount of time to create time records of perfection. It is doubtful that any law firm's time records would meet consistently the somewhat unrealistic 'under a microscope test' that the Company sought to apply. The time records here meet generally accepted practice in commercial (and likely other) litigation.

[164] Fairness to both parties does not mean giving the paying party a windfall by a process of disallowing work and time, and the associated costs, where it appears quite clear that the work was done on the matter and done reasonably.

[165] Likewise, asking the Court to say, based on bald assertions, that too much time was spent on a skeleton (or other document) is asking the Court to draw lines too finely and second guess too much unless the time is objectively disproportionate. Even if the paying party were to provide its records of how much time it spent on a skeleton, it would not necessarily be of much value without consideration of its contextual factors, although it would be one piece of relevant data to consider. Different parties have different challenges in their cases, adopt different written advocacy and overall strategies, and so on.

…..

[168] With respect to descriptions in the records of work and time, CPR 69B.11(3)(c) states that "the precise time sent upon each such task ["such" being a reference back to CPR 69B.11(3)(b) which requires the task or tasks undertaken by the person to be specified] undertaken by the relevant practitioner, partner or employee" to be specified.

[169] Dictionaries generally define "task" along the lines of "a piece of work to be done or undertaken". What does that mean in a litigation context?

[170] Staying with the drafting of a skeleton as an example, is the task preparing a skeleton, so that each entry could be "preparing skeleton", or is it each subsidiary piece of work as part of the execution of that task, which could include writing (or writing a particular section), revising the document or a section of it, research (or research of issue X), reviewing documents in the bundles, discussion with others on the team, an email to get information (and if so, need the information be specified or would it be "information for skeleton"), and so on?

[171] In most cases, page upon page of "engaged in file" would not suffice. Indeed, unless the context made it clear, "engaged in file" might never suffice. But would it not be sufficient to record "preparing

skeleton" as the description of the task? This Court considers that at least in some – perhaps many – contexts, that would be sufficient.

[172] If a person is preparing for a telephone call, does need he or she have three entries, such as "prepared for telephone call", engaged in telephone call", and "prepared note of telephone call", with a time entry for each. But what if the call was less than three minimum units of time that the law firm uses, even if a 6 minute (0.1 hour) unit? Would it be disallowed because three activities were described together as say a 12 minutes (0.2 hour) entry? Or perhaps some timekeepers would simply put "engaged in telephone call" as covering preparation for it and a follow up file note. This Court considers that either approach at least in some – perhaps many – contexts, that would be sufficient.

[173] If the purpose of the requirement for descriptions of tasks is to give a court and a paying party a means to see if the costs claimed meet the requirements of the CPR and the case law ("each item should have been reasonably incurred and the costs for each item should be reasonable") to be recoverable, the rule – like all rules – should be interpreted with the mandate of the Overriding Objective of enabling the court to deal with cases justly. The purpose of the task description requirement is not to deprive a receiving party of cost recovery which is reasonable. It would make no sense, and would not itself be proportionate, for excessive time to be invested in creating the work and time records that are foundation for the costs claim.

[174] The objective is not an audit to find errors due to inadvertent mischarging, although occasionally that will occur, of course, and should result in the claim for that time being withdraw, or disallowed. Nor is it a process of 'gotcha', whereby some lack of detail would result in non-recovery even though contextually, and/or with an informed explanation, an experience and informed judge, particularly one who knows the case from having lived with it, can appreciate sufficiently what was being done and why it is reasonable and fair that the cost of doing it should be paid by the paying party and recovered by the receiving party.

[127] Counsel for the Applicant pointed out that "counsels' fee notes often lack the particularity associated with solicitor's invoice and this is rarely queried in costs assessments". He added that particularity has been supplied where possible.

[128] Keeping in mind the purposes for providing detail, as described above in the portions of the Olive Group Assessment of Costs Judgment cited, the lesser need for particularity in counsels' fee notes, as a general matter, does not seem inappropriate so long as the court and the paying party can assess – as an informed reader of the fee note and in the context of the case and the overall fee note – that each item was reasonably incurred and the costs for each item is reasonable").

[129] Put another way, each item (entry) for counsel, and indeed for any legal practitioner, need not as an isolated and free-standing entry, be able to meet the test independently so long as it can meet the test by being read by an informed reader (someone who knows what the case is about and what went on) and in the context of the case (what was going on around that point in time; what was involved in the case in terms of issues, work product or whatever is relevant in the particular instance) and in the context of the overall fee note or costs schedule (the reader must read about and below, and read the related entries of other team members working at that time on the task).

[130] This Court reiterates that the purpose of the task description requirement is not to deprive a receiving party of cost recovery which is reasonable. Nor is it a process of 'gotcha', whereby some lack of detail would result in non-recovery even though contextually, and/or with an informed explanation, an experience and informed judge or master can appreciate sufficiently what was being done and why it is reasonable and fair that the cost of doing it should be paid by the paying party and recovered by the receiving party.

[131] This Court has applied those approaches in its line by line review of the costs schedules and disallowances were denied or made accordingly.

[132] Second, Entries Combine Tasks. The Applicant submitted that the Respondents' point of dispute about entries combining tasks was made not only for large block entries but was been deployed generally, including for entries of 0.1 and 0.2 hours. The Applicant attempted to split the time for the larger block entries where it was considered by the Applicant to be warranted.

[133] The Court's discussion and holdings in the Olive Group Assessment of Costs Judgment quoted above, being paragraphs 168 – 173, concerning the meaning of "task" in the context of CPR 69B.11(3)(c), relate to this general point.

[134] This Court has applied that approach in its line by line review of the costs schedules and disallowances were denied or made accordingly.

[135] Third, Internal Discussion with No Obvious Impact on Case's Progression. The Applicant responded in part to the Respondents' general point that the costs schedules show internal discussions that had no obvious impact on the case's progression by submitting that internal discussions should be allowed where they took the place of something that might be recoverable if reduced to writing rather than done in a meeting.

[136] This Court is of the view that any internal discussion in relation to a matter is recoverable if it meets the general principles which guide the exercise of the Court's discretion as to the amount of costs to be recovered, as prescribed in CPR 65.2, and most particularly, that it was reasonable for legal practitioner of reasonable competence to meet in such circumstances.

[137] There are many reasons for two or more persons working on a matter to meet. If work is going to be done efficiently and at an appropriate level, there needs to be briefing and instructing of people and reporting back. In the types of complex litigation seen in the Commercial Court, there is considerable value to discussions

of strategy and tactics, legal issues, organizational matters and so on. Brainstorming can add great value.

[138] Law firms and parties use the term "teams" for a reason – usually the persons working on a case in a law firm cannot be persons working entirely independently.

[139] The Court simply needs to be able to see that the meeting, conference, or internal discussion (whether in person or by phone) had a purpose in relation to the case that made it reasonable.

[140] Sometimes junior legal practitioners may be invited to sit in on a discussion (or attend a meeting, or watch a court proceeding) for their education and training only or mainly. Likely the person will not record the time, or if for other reasons it is recorded, it likely is not charged to the client and hence no recovery by the receiving party is sought from the paying party. It should not be, of course.

[141] This Court has applied the above approach in its line by line review of the costs schedules and disallowances were denied or made accordingly.

[142] Fourth, Excessive Time for the Task. The Respondents submitted for many work and time entries that the time worked was excessive.

[143] The Applicant submitted that this point was taken for most work and time entries over 3 hours without regard to the nature of the tasks being performed. In this Court's view it was taken as well for many work and time entries regardless of the amount of time worked. This is another type of ill-conceived, ill-considered and mechanical point of dispute in many instances.

[144] In fact, by way of example, there is the same point – "Time is excessive" – taken item after item after item, page after page after page. On one page, for consecutive entries with various tasks, the objection is taken for times ranging from 0.10 to 0.80 to 1.70 to 8.10 to 11.40 hours. The Court can see no basis, on

the available information and submissions, to conclude for any of the particular entries that the time was excessive.

[145] The Respondents' ill-conceived, ill-considered and mechanical approach to the use of "time is excessive" and "insufficient detail and breakdown of time spent on the respective matters" for points of dispute was illustrated by an extreme example. In one case, those phrases were used to dispute a short work/time entry for photocopying done by a lawyer. (In the result, the cost was disallowed in its entirety even though the mechanical approach led to a submission that the Court should cut back the $580 to $400.)

[146] Another example of the ill-conceived, ill-considered and mechanical approach, and the impossibility of this type of line-by-line process (at least in a large matter), was the dispute on the ground of "time is excessive" of a 0.10 hour entry by a senior legal practitioner for the Applicant for dealing with an email received from the senior legal practitioner for the Respondents. (It is noted that 0.10 hour surely is the minimum time unit in any law firm billing system – certainly this Court has never encountered a smaller minimum unit, and it is hard to conceive that the full process of doing almost anything actually would take less time.) There were many similar points of dispute taken by the Respondents (not all necessarily dealing with 0.10 hours but to like effect).

[147] In any event, without seeing the email, how can a judge or master possibly have any clue whether 0.10 hours was excessive time for dealing with the email? And is it really proportionate or cost-effective for two counsel and a judge to try to decide the question?

[148] While these were extreme examples, and likely at least the former was an inadvertent example, it assists in illustrating how nonsensical a line-by-line detailed assessment in a large matter can become when ill-conceived, ill-considered and mechanical points of dispute are utilized.

[149] The above illustration aside, often asking a judicial officer to determine, based on the materials available on an assessment of costs, whether a narrowly defined task took too much time or not is like asking him or her "how long is a piece of string?".

[150] Ask how long it takes an average runner to complete a 10K or a marathon and there will be objective data against which to compare. Or ask someone intimately familiar with a case, and the particular document that a lawyer drafted, and that person may be in a position to say it took too long. But can an outsider really have a sense in most instances for whether the reasonable time for a particular task is 5 or 10 hours, for example?

[151] Of course there will be instances where the judicial officer has enough experience with the particular type of task, if broadly defined, to say that he or she has a strong impression that the total time involved appears to be considerably beyond what seems a reasonable range for a legal practitioner of reasonable competence.

[152] The challenge of concluding that excessive time was spent increases when two or more people have been involved in a meaningfully-described task or activity (say, preparing a skeleton) and there has been no presentation of the aggregate time of all those who worked on the task or activity. That is, this Court was and is suggesting a chart showing the name and experience level of each person who worked on the task or activity with the total of each person's time on the task or activity, the person's hourly rate, and the cost of the person's total time on the task or activity (hours multiplied by hourly rate).

[153] The individual totals are then added up to produce the total cost of the task or activity.[22] When referring to this manner of presentation in the past, this Court has used the modifier "meaningful" before "activity". The tasks or activities appropriate for this presentation will vary from case to case, and must be neither too small nor too large. So for example, "preparing for hearing of Y application" may be useful

[22] Olive Group Assessment of Costs Judgment, paragraphs 208 – 212.

for a 2 hour or one-half day application but may be too broad for a five-day application with multiple independent reliefs sought or multiple discrete issues. As with all advocacy, it is question of determining the most effective manner of presentation.

[154] Several times this Court has pointed out that this additional manner of presenting data for a costs assessment can be useful in assessing whether there has been excessive time on the task or activity. The judicial officer can see that it cost $X to produce a pleading or a skeleton, for example.

[155] As explained in the Olive Group Assessment of Costs Judgment:

> [165] Likewise, asking the Court to say, based on bald assertions, that too much time was spent on a skeleton (or other document) is asking the Court to draw lines too finely and second guess too much unless the time is objectively disproportionate. Even if the paying party were to provide its records of how much time it spent on a skeleton, it would not necessarily be of much value without consideration of its contextual factors, although it would be one piece of relevant data to consider. Different parties have different challenges in their cases, adopt different written advocacy and overall strategies, and so on.

[156] This Court conducted its line by line review of the costs schedules with the above considerations in mind and disallowances were denied or made accordingly.

[157] Fifth, Duplication of Tasks. The Respondents submitted that on some occasions two or more people had reviewed the same document so that there was "duplication".

[158] "Duplication" is often used pejoratively for asserting that two people did the same thing when only one needed to do it.

[159] The Applicant's response was that it "would not be unusual for a partner and associate to review the same material in the context of a large commercial matter

or even for several associates to conduct the same review. Where all parties are deploying large teams there is nothing unreasonable about multiple persons reviewing evidence or judgments or similar important documents." This Court concurs.

[160] Similar to what this Judgment states above that when a party's legal team includes more than one person, everyone or most people on the team needs to have a certain level of familiarization with the matter in order to add value, facilitate collaboration and result in overall efficiency and effectiveness.

[161] Likewise, in the case of documents being prepared, often it makes sense for one or more people to review a draft that someone on the team has prepared. Certainly this would be true for important documents.

[162] In the Olive Group Assessment of Costs Judgment this was discussed as paragraphs 166 – 167 with reference to a senior partner / lead counsel reviewing a draft skeleton. The response of the senior partner / lead counsel in that case has general application, namely that the lead counsel will always have input on the shape of the skeleton after it has been initially drafted in a cost-efficient manner by someone at a lesser hourly billing rate. This Court characterized that response as "a realistic reflection and explanation of how teams work on litigation in many law firms."

[163] It is not duplication when two or more people review a draft document because they can bring different perspectives and value to it. There may be times when it is unreasonable or disproportionate but it is not per se duplicative in the pejorative sense. For example, in a large important case, one would find it appropriate for several persons to review a draft document, each for different purposes and with different perspectives, and a paying party may be required to pay for it, generally speaking. But generally speaking, in a small case, as much as the same types of multiple reviews would result in a better and more effective document, it would not

be proportionate or reasonable for a paying party to be required to pay for such multiple reviews.

[164] Of course sensible judgment needs to be brought to the management of teams, and need to be exercised by team members. Presumably, each person on a team will consider whether it makes sense for him or her to review a particular document (or group of documents) or in the case of a team leader, to ask someone else to review a particular document (or group of documents) that he or she also has reviewed or intends to review. This type of common sense should apply to all types of document received or being prepared.

[165] This Court has applied that approach in its line by line review of the costs schedules and the disallowances denied or made.

[166] Sixth, Task Irrelevant to Case. The Respondents fairly raised a concern about a task being irrelevant to the case. The Applicant responded by explaining the relevance, which appeared to be satisfactory. The specific point of dispute was dismissed.

[167] Seventh, Partner Undertook Work More Suitable for an Associate. The Respondents submitted that during 2013 a partner undertook work that would have been more suitable for an associate to do. The Applicant responded that the partner was at that point essentially the only fee earner on the file and second, that the rate charged was less than that of most senior associates at the Respondents' law firm.

[168] Those are satisfactory explanations in this Court's view. None of work / time was disallowed on the basis of this type of specific point of dispute.

[169] Just as there is value in teams and the collaboration that comes with a cost, there can be efficiency and cost-savings when one person is doing many tasks, even if the work on some of the tasks could be done by a more junior person in an ideal

world. But of course, even if that person existed, he or she would need to get up-to-speed on the case, with the attendant costs. Also it may be the case that a senior person, with experience in the task, can do the task more efficiently, at a lower overall cost.

[170] An objection that there was inappropriate staffing on certain tasks often is an objection that is through the eyes of a perfect world. Reasonableness, not perfection, is the touchstone.

[171] Eighth, Travel Expenses Excessive. Counsel for the Applicant again made the sensible and practical point, based on accepted practices for litigation in this jurisdiction, that "the Court has always approved the cost of a return business class ticket from Gatwick to Antigua and then a charter for the return flight to [sic. from] Antigua to Beef Island. The Applicant [presumably meaning counsel for the Applicant] is not aware of this ever being refused in a commercial matter and there is no reason to resile from that now to the detriment of the reputation of the jurisdiction." This Court concurs.

[172] The policy reasons for maintaining the practice is reflected in what this Court said above in relation to the First General Principle (Issue (a)) respecting foreign legal practitioners and international commercial litigation, and in relation to the Fourth General Principle (Issue (d)), respecting counsel's costs incurred before admission in the Territory.

[173] Ninth, Counsel's Brief Fees Excessive. The Respondents' point of dispute that the Applicant's counsel's brief fees were excessive is subject to the same view of this Court expressed above regarding excessive time worked on a task.

[174] To reach such a conclusion, generally speaking the Court would need more than the Respondents' submitted, including possibly information on their costs generally and the brief fees they paid in particular (see below).

[175] That is not to say that a receiving party cannot recover from the paying party more than the paying party expended for a comparable resource or on a comparable task, or overall. As explained below in the quotation from the Olive Group Assessment of Costs Judgment, it may be a useful data point.

[176] The Applicant added that a substantial discount had been negotiated on the brief fee for trial which redounds to the Respondents' benefit.

[177] Further the Applicant drew the Court's attention to the Honourable Justice Edward Bannister QC's comments on the brief fee in Artemis Trustees & Others v KBC Partners L.P.[23], which provided this Court with a useful and objective date point. Among the factors considered by Justice Bannister in assessing the reasonableness of the brief fee in that matter were the seniority and "popularity" (presumably referring to a strong reputation and being in-demand) of counsel and the size of the matter. Justice Bannister confirmed that it is not just reasonable for the receiving party to have paid the brief fee in question but the paying party should reasonably have expected to be faced with such a brief fee if costs were awarded against it. Put another way, in substantial and complex international commercial litigation, "it comes with the territory".

Respondents' Costs and Inference to be Drawn

[178] The Applicant pointed out that it was unlikely that the Respondents' costs were substantially less than the sum claimed by the Applicant. This point also was made in respect of counsel's brief fees (discussed above). The Respondents' chose not to file any information about their costs.

[179] As this Court noted in the Olive Group Assessment of Costs Judgment:

[23] BVIHC(COM) 2012/0137, Transcript, 15 May 2013, pages 34 – 36 and also see page 6, lines 22 - 23. The brief fee was GBP 50,000 for a 2-3 hour hearing (in the result) on a "short legal point" (as described by counsel for the paying party) although Justice Bannister described it as "a big matter" that Involved "hundreds of millions of dollars".

> [147] However, in this alternative consideration, the fact the Company did not indicate in any way that its costs were less (or otherwise) than Mayhew's costs can and does lead this Court to the inference that they were not less. The inference is merely confirmatory of what the Court has concluded independently.
>
> [148] While the Court must still be satisfied that the costs of the receiving party are reasonable, where the paying party's costs are not lower, and there are no 'big picture' indications that either party did not devote appropriate time, care and attention to the case (that is, neither too much nor too little), ordinarily it may indicate generally to a court that the overall costs claimed are reasonable and that it is not unfair to the paying party to compensate the receiving party below or to a level commensurate with what the paying party spent, and the time, care and attention that its legal team gave to the case.
>
> [149] A recent report on costs awards in the context of international arbitration by the Commission on Arbitration and ADR of the International Chamber of Commerce ("ICC")[24] reviews the ways in which costs are assessed in different jurisdictions. In paragraph 65(iv), the ICC Costs Report states that a consideration in determining whether the costs sought are reasonable is "any disparity between the costs incurred by the parties as a general indicator of reasonableness as opposed to a separate factor in itself." This seems logically sound, for the reasons noted above.

[180] As this Court did in the Olive Group Assessment of Costs Judgment, the Court arrived at its conclusions without regard to any inference it may draw about the costs incurred by the Respondents. However on its alternative approach, this Court inferred that they were not less than the costs claimed by the Applicant. The inference is merely confirmatory of what the Court has concluded independently about the Applicant's costs, as adjusted, being reasonable and proportionate.

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[24] Decisions on Costs in International Arbitration" ("ICC Costs Report"), ICC Commission on Arbitration and ADR Report, ICC Dispute Resolution Bulletin 2015, Issue 2, http://www.iccwbo.org/Data/Policies/2015/Decisions-on-Costs-in-International-Arbitration/; "Awarding Costs in International Arbitration", Lawrence W. Newman and David Zaslowsky, New York Law Journal, 28 January 2015.

[181] As this Court did in the Olive Group Assessment of Costs Judgment, the Court arrived at its conclusions without regard to any inference it may draw about the costs incurred by the Respondents. However on its alternative approach, this Court inferred that they were not less than the costs claimed by the Applicant. The inference is merely confirmatory of what the Court has concluded independently about the Applicant's costs, as adjusted, being reasonable and proportionate.

Consideration of General Principles for Assessment of Costs

[182] The Court has considered the general principles for the assessment of costs discussed above and has had regard to all of the circumstances, and the seven particular factors listed in CPR 65.2(3) as applicable.

[183] One factor should be specifically mentioned and discussed.

[184] With respect to factor (e), the importance of the matter to the parties, it is clear that the dispute was of considerable importance to the parties. Clearly the parties considered the matter important. Objectively and understandably, the Court considers that the matter was important to them.

[185] The litigation appears to have been vigorously contested by both sides before Justice Bannister.

[186] This importance factor is very significant in the assessment of reasonableness and proportionality.

[187] The total sum claimed does not appear to be, and is not disproportionate having particular regard to the considerations set out in CPR 65.2(3). Save for those items on the costs schedules which have been denied, each item was reasonably incurred and the costs for each item was reasonable.

[188] Alternatively, even if the costs as a whole had appeared to be disproportionate, the Court is satisfied that, save for those items on the costs schedules that have

been denied, the work in relation to each item was necessary and that the cost of the item was reasonable.

[189] With respect to schedules of costs, in a line-by-line review of the schedules of costs, this Court has (a) applied the Five General Principles (Issue), which did not result in any reduction of the costs claimed (save for one in respect of the Fifth General Principle (Issue), and (b) considered the specific points of dispute and the replies to the points of dispute, being the nine types of specific points of dispute and others not neatly fitting into those categories. It has accepted a limited number of point of dispute (some of which were conceded by the Applicant) and disallowed the costs to which they related.

[190] Forbes Hare. In the result, Forbes Hare's costs claimed of $604,478.00 shall be reduced by $15,332.50 (to take account of items that were conceded, that related to an appeal not covered by the Orders, that were administrative or clerical and so forth) to $589,145.50 and assessed at that sum.

[191] Forbes Hare's general disbursements claimed of $67,121.39 shall be reduced by $565.00 (for items that the Respondents should not be required to reimburse the Applicant, which the Applicant accepted) to $66,556.39 and assessed at that sum.

[192] Jonathan Crow QC. Forbes Hare's claimed disbursement for Jonathan Crow QC was GBP 259,385.90 (which included work done by him prior to his admission in the Virgin Islands, as described above, and in accordance with the decision in this Judgment under Issue (general principle) (d)).

[193] Mr. Crow QC's brief fee and refreshers for in relation to injunction matters for 15 – 17 May 2012, his brief fee for a hearing on 15 April 2013, his brief fee for an application on 19 September 2013 and his brief fee for the trial which was to be on 30 October 2013 (which fee was reduced between him and the Applicant from GBP 75,000 to GBP 50,000 in light of the discontinuance) were disputed by the Respondents using the Respondents' standard "insufficient details" point of

dispute in respect of all four proceedings, and also "fee is excessive" for the latter three proceedings (although it was implicit for the former as well), with the out-of-thin-air submission that there should be 30% reductions for three instances and a 10% reduction for the fourth. There is no basis to reduce these brief fee amounts – they were reasonable. Likewise, there is no basis to reduce the recoverable amounts for Mr. Crow QC's travel expenses.

[194] It was not unreasonable for Mr. Crow QC, rather than a more junior person as submitted by the Respondents, to prepare various written submissions – presumably his seniority and knowledge of the case made it sensible for him to do this work.

[195] Generally, respecting the Respondents' points of dispute regarding Mr. Crow QC's work and time, there is not "insufficient detail" in the context of his work and this case, in the sense discussed above respecting the necessary detail in work and time records. His hourly rates were not problematic. Moreover, there was no basis for the arbitrary 30% reduction – or any reduction – that the Respondents submitted should be made respecting much of his work.

[196] The disbursement for Mr. Crow QC shall be reduced by GBP 2,165.00 (for two charges that the Applicant submitted may have related to an appeal not covered by this assessment pursuant to the Orders) to GBP 257,220.90, assessed at that sum, and converted from GBP at the exchange rate prevailing when proceedings concluded (which has not been disputed) of 1:1.61) to $414,125.65.

[197] Stephen Midwinter. Forbes Hare's claimed disbursement for Stephen Midwinter was GBP 110,202.70.

[198] Mr. Midwinter's work on this case included preparation of pleadings, applications and evidence, advice throughout and attendance on two hearings.

[199] Mr. Midwinter's brief fee and refreshers in relation to injunction matters for 15 – 17 May 2012, his brief fee for a hearing on 15 April 2013, and his brief fee for the trial which was to be on 30 October 2013 were disputed by the Respondents using the Respondents' standard "insufficient details" and "fee is excessive" point of dispute, with the out-of-thin-air submission that there should be what appear to be 30% reductions. There is no basis to reduce these brief fee amounts – they were reasonable. Likewise, there is no basis to reduce the recoverable amounts for Mr. Midwinter's travel expenses.

[200] Generally, respecting the Respondents' points of dispute regarding Mr. Midwinter's work and time, there is not "insufficient detail" in the context of his work and this case, in the sense discussed above respecting the necessary detail in work and time records. His hourly rates were not problematic. Moreover, there is no basis for the arbitrary 30% and in some cases apparently 40% reductions – or any reduction – that the Respondents submitted should be made respecting much of his work.

[201] The disbursement for Mr. Midwinter shall be reduced by GBP 2,725.00 (for three charges that the Applicant submitted may have related to an appeal not covered by this assessment pursuant to the Orders) to GBP 107,477.70, assessed at that sum, and converted from GBP at the exchange rate prevailing when proceedings concluded (which has not been disputed) of 1:1.61) to $173,039.10.

[202] Mishcon de Reya. Forbes Hare's disbursement for Mishcon de Reya of GBP 516,557.61 (which, as stated above, included the work of Anthony O'Loughlin, a BVI legal practitioner (solicitor)), shall be reduced by GBP 20,590.00 (to take account of items that appear to be related to an appeal not covered by the Orders, that were administrative or clerical, that were excessive, that related to preparation of the costs schedules (which may be recoverable as costs of the assessment if awarded to the Applicant) and so forth) to GBP 495,967.61, assessed at that sum, and converted from GBP at the exchange rate prevailing when proceedings concluded (which has not been disputed) of 1:1.61) to $798,507.85.

[203] In summary, the claim for $2,098,326.80 in costs is reduced to $2,041,374.49, which amount is assessed and allowed as costs payable by the Respondents to the Applicant pursuant to the Orders.

[204] The sum is reasonable and fair both to the Applicant and the Respondents and is proportionate, particularly in the context of this overall dispute. Each item of costs claimed and not disallowed was reasonably incurred and the costs for each item not disallowed is reasonable. This Court is satisfied that the work in relation to each item of costs claimed and not disallowed was necessary and the cost of each item is reasonable.

[205] Accordingly, costs are assessed and allowed at $2,041,374.49.

[206] As noted at the outset of this Judgment, the Respondents have paid $571,000.00 on account of costs.

[207] Accordingly, the Respondents shall pay to the Applicant, within 14 days, the sum of $1,470,374.49 (being the costs assessed and allowed of $2,041,374.49 less the sum of $571,000.00 already paid on account of costs).

Footnote on the Disproportionality of Detailed Costs Assessments

[208] This was a detailed assessment of costs involving, as noted above, various versions of costs schedules, with points of dispute and replies to points of dispute, appearing to total approximately 2000 pages (not all versions had numbered pages).

[209] The detailed assessment of costs process, as practised, based on this Court's observations in several assessments of costs in this Court, has become a disproportionately expensive and time-consuming exercise for the parties and the Court.

[210] Without any comment on the conduct of the Applicant and the Respondents, in costs assessments there seem to be no incentive for taking reasonable positions or for compromise. The approach often seems to be to dispute as much as possible, including endless numbers of line by line items, with the hope that some of the points of dispute may stick.

[211] In the Olive Group Assessment of Costs Judgment, the Court include a "Footnote on Costs Assessments in the Commercial Court"[25]. This Court stated the following, and repeats it here:

> [201] There are various methods for the determination of costs in a 'loser pay' system. Each has its advantages and disadvantages. They range from summary processes to the detailed assessment conducted in this jurisdiction, and for these Assessments.
>
> [202] Costs can be significant in absolute terms, and relative to what was in dispute, and their assessment needs a certain level of care and attention.
>
> [203] The "basis of quantification" in CPR 65.2 is generally in line with the prevailing criteria for the assessment of costs elsewhere. Recent evidence of this can be seen from a review of the ways in which costs are assessed in different jurisdictions, as reported in the context of international arbitration in the ICC Costs Report.[26]
>
> .....
>
> [205] Commonly counsel on assessments refer to the extensive work done to compile the time records and for the paying party to review them and provide points of dispute. It can be a disproportionately expensive exercise. As noted above, in this case the Assessments required disproportionate time.

[25] Paragraphs 201 – 212.

[26] ICC Costs Report, especially paragraphs 15. 63, 65 and 68 – 70. A further point of interest in relation to the matters in this Judgment is found in the ICC Costs Report. In paragraph 77 it is stated that "Copies of invoices will rarely be appropriate if they show details of work done, as they will often contain information that is confidential, of no relevance to the case itself, and may also be subject to legal privilege."

> [206] A detailed assessment can be, for all concerned a painful and in some ways disproportionate means of assessing costs.
>
> [207] How much is gained by the line-by-line review of time records? On a cost-benefit basis, is the time and effort worth the gain to either the paying or the receiving party?

[212] The Court and the Bar need to find a better way to deal with costs. A way that is efficient, cost-effective and proportionate, and ideally a way with incentives for parties to take reasonable positions, and where appropriate, to make reasonable compromises.

Draft Judgments

[213] This is the second time in the past few months which this Court has considered it necessary to address the circulation of draft judgments process.[27]

[214] In accordance with a common practice is this jurisdiction, a draft of this Judgment was sent to counsel for limited purposes, and on the basis that it could be disclosed to the parties, but was otherwise confidential (embargoed) until handed down.

[215] The Court received from counsel for the Respondents on the day prior to the handing down of this Judgment a skeleton argument the largely submitted that this Court was wrong in its approach to this assessment of costs and in the result ("the Court has clearly failed to discharge its duty to protect the paying party"; [t]his Court has failed to apply the Lownds test[28] before assessing proportionality and has quite clearly erred in law in permitting disbursements that have not been evidenced by invoices"). Some submissions were repetitive of submissions made

[27] The first time was in Halliwel Assets Inc, Panikos Symeou and Marigold Trust Company Limited v Hornbeam Corporation, BVIHC(COM) 2014/0115, Judgment on Security for Cost, 22 April 2016 ("**Halliwel Security for Costs Judgment**"), perhaps coincidentally involving the same main firms of legal practitioners.

[28] See paragraph 88 and Footnote 17 of this Judgment.

during the assessment and some points were new or at least differently emphasised and presented.

[216] These are matters for an appeal, if so advised, not for this Court, unless they somehow may meet the applicable tests, referenced below, for asking a court to reconsider a matter before the formal order arising from the judgment is sealed. In that latter event, they must be raised in the appropriate manner.

[217] While this Court is always keen to deal with matters efficiently and pragmatically, accepting the approach sought to be taken by counsel for the Respondents will undermine the circulation of draft judgments process.

[218] Two other types of matters were raised.

[219] The first other matter raised was that one of the Orders provides for a setoff of costs due to the Respondents from the Applicant. The setoff is not a matter encompassed by the role of the Court on this assessment but if a setoff has been ordered, it is outside the ambit of this Judgment and is not affected by it.

[220] The second other matter raised was that the Court used an exchange rate between GBP and US dollars which was submitted by the Applicant and not disputed by the Respondents at the time of the hearings and written submissions but the post-Brexit the exchange rate has shifted materially (it was submitted from 1:1.61 to 1:1.32) so that the Respondents paying more and the Applicant receiving a "windfall". This is a matter that the Court could be asked to reconsider before the formal Order arising from this Judgment is sealed but it must be done in the appropriate manner, and based on the appropriate tests, referenced below.

[221] The draft judgment process is not a practice followed in many other jurisdictions or by many arbitral tribunals and institution, perhaps primarily because of a concern it may lead one or more parties to seek to reargue, or argue further, matters already decided in the draft judgment or award.

[222] The prime purpose of the Court providing a draft judgment is so that counsel and the parties may review it and provide to the Court corrections such as typos, citation errors, grammatical and spelling errors, computational errors, double-counting, misnomers, and so forth. It is helpful to all concerned to receive such input, which the Court has found uniformly is done diligently by counsel and is always much appreciated by the Court.

[223] Also on occasion counsel will suggest that a wording clarification should be considered by the Court to make the expression of what has been decided and ordered, and/or the reasons therefor, clearer and more intelligible or to make what has been ordered more workable mechanically.

[224] On the odd occasion counsel may suggest that the Court may have missed dealing with an issue that was to be decided by it. While that goes beyond the standard enquiry of counsel described above, it is helpful to the process and in line with securing an efficient and just result.

[225] Having an opportunity to consider a draft judgment enables counsel and the parties to prepare for any submissions to be provided thereafter in relation to the judgment, such as with respect to costs if costs will be address with written submissions before the handing down of the judgment or orally at the handing down of the judgment. It may enable counsel to bring an appropriate application at the handing down of the judgment such as for an interim stay pending an application to the Court of Appeal and/or for leave to appeal. From the parties' perspective, it enables them to prepare internally before the judgment becomes public, if it will become public.

[226] In the Halliwel Security for Costs Judgment, counsel for a party advised the Court of a misunderstanding of the process of written submissions that had been followed so that it did not address a particular issue. In that case, in the Court's discretion, the Court concluded that it was not inappropriate to raise the concern

so the Court could ensure that due process took place, as the misunderstanding was said to be due to no fault of the affected party. Because of the manner in which submissions had been made, the matter could be and was resolved without undue disruption to an orderly process. The alternative might have been an appeal based on a lack of due process, which would not be in the interest of any party or the Overriding Objective (equal footing; saving expense; expedition – all of which are part of dealing with cases justly). This Court so stated in the Halliwel Security for Costs Judgment.

[227] There may be other appropriate purposes for providing a draft Judgment not listed here and other appropriate responses from parties.

[228] However, one matter is clear. The provision of a draft judgment is not for the purpose of inviting a re-opening or re-argument of the substance of matters decided in the draft Judgment before the Judgment is handed down.

[229] It is important to maintain that distinction in order to preserve the integrity and value of the draft judgment process.

[230] Otherwise matters could carry on indefinitely, which is not the intended nature of the judicial process. The law enabling reconsideration by a court of its judgment provides the appropriate basis to seek reconsideration, and provides appropriate restrictions on the ability to do so.[29]

[231] Any initiative to seek to reopen and make further submissions on matters decided in the draft judgment, and then in the judgment as handed down, should be by application following the handing down of the judgment in accordance with the applicable tests for doing so.

[29] BVIHIC 2015/0008 Malitskiy and Filpenko v Stockman Interhold S.A., 21 October 2015, paragraphs 79 – 99.

[232] While a court can be more liberal in admitting additional evidence or hearing additional submissions before judgment has been rendered, where there is no question of the court changing its mind or a successful party being deprived of a judgment already rendered, once the parties receive a draft judgment they are in a form of 'time warp' – effectively for these purposes the position is that the post-handing down situation is applicable. The court is being asked to change its mind.

[233] In this case, the Court suggests to counsel for the Respondents that matters which it seeks to raise regarding the draft Judgment be sought to be raised, in an appropriate manner and subject to the applicable restrictions, at an appropriate point after the Judgment has been handed down.

Costs of This Assessment of Costs

[234] In the Work Plan the Applicant and the Respondents agreed that once this Court has assessed costs, it should invite brief written submissions on the costs of the assessment.

Orders

[235] Accordingly, there shall be the following orders:

1. The Respondents shall pay to the Applicant, within 14 days, the sum of $1,470,374.49.

2. The costs of the assessment of costs are reserved pending brief written submissions from the Applicant and Respondent.

Justice Barry Leon
Commercial Court Judge
21 July 2016