

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

Claim No. BVIHC (Com) 2014/0127, 2014/0128, 2014/0129

BETWEEN:

**(1) KANDY & KANDY LIMITED
(2) AL DOBOWI INVESTMENTS LIMITED
(3) KAYS GROUP LIMITED**

Intended Appellants

and

HARJEEV SINGH KANDHARI

Intended Respondent

Appearances:

Rowena Lawrence (by telephone) and Colleen Farrington of Walkers,
for Intended Appellants

Murray Laing of Conyers Dill & Pearman, for Intended Respondent

2016: May 13 and 25

JUDGMENT

This Judgment awards and assesses the costs of applications that were dismissed for (a) permission to appeal to Court of Appeal (from order that awarded costs of substantive proceedings (in shareholder dispute in large family business) to intended respondent), and (b) stay of costs order pending determination of intended appeal – Costs of applications had been reserved pending submissions on costs.

Permission application, which originally was sought to be determined on paper, was provided to intended respondent as “professional courtesy” given Court of Appeal “guidance” that leave to appeal applications are “without notice” applications (CAGE St Lucia Limited v Treasure Bay (St Lucia) Limited, HCVAP2011/045, 23 January 2012) – Intended respondent submitted that stay applications, however, are not ex parte, and also wrote to the Court “to address two materially misleading statements” in permission

application – Intended appellants objected to that submission being made, submitted it should “in principle be ignored”, and provided relatively lengthy responding submissions.

Court asked intended appellants for “short written submissions”, with authorities, on applicable test for leave to appeal and test that would/should have been applied by judge from which it was sought to appeal, and to attend “brief hearing” on same – In some manner, two-hour hearing was listed (which evolved into three hours on two days), with written submissions from both parties, lengthy bundles, and leading counsel for both parties attending by telephone from London – Issues on permission to appeal covered in written submissions and fully argued orally.

Costs of permission to appeal and stay applications awarded to intended respondent – No reason to depart from general rule that successful party should recover costs – Permission application took particular course because of things done or not done by both parties and Court – While intended appellants originally desired determination on paper without involvement of intended respondent, intended respondent was, at minimum, entitled to make (1) submissions on points in materials that he considered inaccurate, and (2) submissions that appeal would not meet relevant threshold test, and he was entitled to notice of and to be heard fully on stay application – Permission to appeal had been argued fully, to the benefit of the Court and the parties – To intended appellants’ benefit that their position received a full airing – Also intended appellants had been relieved of any burden of full and frank disclosure on ex parte application, and/or from needing to put points that absent party might have put if present.

Intended respondent submitted that may be difficult to distinguish between costs incurred on stay application and permission to appeal application as strength of intended appeal (i.e. prospect of success) relevant to both, even though bar at quite different heights – On stay application test is “prospect of the appeal succeeding, but only where there are strong grounds of appeal or a strong likelihood the appeal will succeed is shown” (C-Mobile Services Limited v Huawei Technologies Co. Limited BVIHCMAP2014/0017, 2 October 2014 (“C-Mobile”)) – Difficult if not impossible to separate relevance and value of submissions with respect to strength of intended appeal in relation to the two applications – To extent significant part of submissions in relation to permission to appeal application concerned whether “appeal appears to have a realistic (as opposed to a fanciful) prospect of success”, they were directly relevant to strength factor on stay application, “the prospect of the appeal succeeding” and whether “there are strong grounds of appeal or a strong likelihood the appeal will succeed.”

Costs assessed – Request by intended appellants that order for payment be stayed pending final determination of permission to appeal by Court of Appeal (that is, the relief denied by this Court) dismissed – Does not meet C-Mobile test for stay.

[1] **LEON J [Ag]:** On 13 May 2016, this Court handed down Judgment (“**Permission to Appeal and Stay Judgment**”) dismissing the application of the Intended

Appellants for permission to appeal to the Court of Appeal (**“Permission to Appeal Application”**) from an order awarding costs to the Intended Respondent (**“Costs Order”**), and for a stay of the Costs Order pending the determination of the appeal (**“Stay Application”**) (together, **“Permission to Appeal and Stay Application”**, which were contained in the same Amended Notice of Application).¹

- [2] The Permission to Appeal and Stay Judgment provided as follows with respect to costs of the Permission to Appeal and Stay Application:

Costs of the Permission to Appeal Application and the Stay Application shall be reserved to be determined following the parties’ submissions on costs.²

- [3] The parties filed written submissions respecting the order that this Court should make respecting costs; on the quantum of such costs if awarded to the Intended Respondent, which this Court would determine summarily; and on related matters. At the handing down of the Permission to Appeal and Stay Judgment, counsel made brief introductory overview submissions on costs of the Permission to Appeal and Stay Application.

Background

- [4] The background and proceedings leading to the Costs Order is set out in the Permission to Appeal and Stay Judgment.
- [5] The Costs Order, made on 17 March 2015 by the Honourable Justice Edward Bannister QC (Ag.) of this Court, ordered the Intended Appellants to pay:

¹ Amended Notice of Application Seeking Leave to Appeal and a Stay of Paragraph 4 of the Order made on 17 March 2016 Pending the Determination of the Appeal (Pursuant to [CPR] Part 62.2 and Part 62.19), originally dated 31 March 2015 and amended 23 April 2015 [following receipt of the transcript].

² Paragraph 95(2).

- (a) the Intended Respondent's costs of three originating applications, which sought a just and equitable winding up of the Intended Appellants ("**Liquidation Applications**"), and
- (b) the Intended Respondent's costs of an application by the Intended Appellants to strike out the Liquidation Applications ("**Strike Out Application**"), which Strike Out Application was granted by Justice Bannister's order made on 25 February 2015 (which order, for pragmatic reasons, stayed rather than struck out the Liquidation Applications).³

[6] Justice Bannister's judgment on the Strike Out Application was set out in his Note of Oral Judgment dated 24 February 2015 ("**Strike Out Judgment**"), and his Judgment on the costs of the Liquidation Applications and the Strike Out Application was handed down orally on 17 March 2015 immediately following submissions on costs ("**Costs Judgment**"). The Strike Out Judgment sets out the background to the Liquidation Applications in greater detail.⁴

Permission to Appeal and Stay Application

[7] The grounds for the intended appeal, and the Intended Appellants' criticisms of the Costs Judgment, were set out in the Permission to Appeal and Stay Application and in a witness statement⁵, and are summarized in the Permission to Appeal and Stay Judgment.⁶ The Intended Respondent's position also is summarized in the Permission to Appeal and Stay Judgment.⁷

³ Order dated 25 February 2015 as to orders 1 to 3 inclusive, and dated 17 March 2015 as to order 4.

⁴ Also the Permission to Appeal Application summarized the factual background under "Background", paragraphs 1 – 8 (save for a couple of places that apparently aim to characterize the background from the perspective of the Intended Appellants and are not material to this Judgment).

⁵ Second Witness Statement of Jasjeev Singh Kandhari [a director of each of the Intended Appellants], 31 March 2015.

⁶ Paragraphs 29 – 35.

⁷ Paragraphs 36 – 40.

- [8] The procedural history of the Permission to Appeal and Stay Application was submitted to be relevant to the order that this Court should make respecting costs, and to the quantum of such costs. Accordingly, it is summarized here.
- [9] The Permission to Appeal and Stay Application was commenced on 31 March 2015 and amended after the transcript was received.
- [10] The Intended Appellants submitted in respect of the award of costs determination that they served the Permission to Appeal and Stay Application on the Intended Respondent's legal practitioners "as a matter of professional courtesy", and that they gave notice notwithstanding "the guidance of the Court of Appeal, our client's applications are technically "without notice" applications." Their legal practitioners' letter to the Intended Respondent's legal practitioners stated that they were writing to put the Intended Respondent's legal practitioners:

... on notice of the fact that our clients have filed applications for permission to appeal ... even though, as is clear from the guidance given by the Court of Appeal, our client's [sic. clients'] applications are technically "without notice" applications".

The Intended Appellants' legal practitioners went on to say that they would advise the Intended Respondent's legal practitioners of the result of the permission to appeal application.⁸

- [11] The Intended Respondent's legal practitioners responded the same day asking to which court the application had been made, when the application was filed, about a hearing date, and the "guidance" that it was said would preclude the Intended Respondent from being represented on the Stay Application. The Intended Respondent submitted that in the response received the following day the question about the Stay Application was not addressed.

⁸ Letter from Walkers to Conyers Dill & Pearman ("**Conyers**"), dated 14 April 2015.

[12] The Intended Appellants sought that the Permission to Appeal and Stay Application be dealt with on paper, and their counsel asked that it “only be listed for an oral hearing in the event that the Judge is not minded to give our clients leave to appeal on the papers.”⁹

[13] The legal practitioners for the Intended Respondent wrote to the Court “to address two materially misleading statements” in the Permission to Appeal and Stay Application, and then in conclusion submitted as follows:

There are a number of other points which the Intended Respondent would wish to raise on the merits of an Appeal in the event that permission was granted. However, consistent with the guidance given in *Cage St Lucia Limited -v- Treasure Bay (St Lucia) Limited* HCVAP 2011/045 [23 January 2012 (“**CAGE St. Lucia**”)], those points are not ones which he proposes to make at this stage.¹⁰

[14] The legal practitioners of the Intended Appellants wrote to the Court objecting to the submissions by the Intended Respondent that sought to clarify the two matters, and submitted that the Permission to Appeal Application was “essentially ‘without notice’”, “an intended respondent should not file written submissions in advance of an application for permission to appeal”, and the submissions were impermissible and should “in principle be ignored.” The letter went on to respond to the two points in relatively lengthy (in this context) submissions contained in approximately four single-spaced pages.¹¹

[15] Without making any determination whether the statements were or were not misleading (beyond what may be taken from the Permission to Appeal and Stay Judgment), the issues addressed by the parties in their submissions did go to the heart of the issue that had been before Justice Bannister, as reflected in his Strike

⁹ Letters from Walkers to the Court, dated 23 April and 22 May 2015.

¹⁰ Letter from Conyers to the Court, dated 12 May 2015.

¹¹ Letters from Walkers to the Court, dated 22 May 2015.

Out Judgment and Costs Judgment, and which were material to this Court's Permission to Appeal and Stay Judgment.¹²

[16] When this Court reviewed the materials submitted by the Intended Appellants it noted that the Intended Appellants had not addressed the relevant tests. Accordingly, on 6 June 2015 this Court asked counsel to prepare "short written submissions" along with authorities, and then attend a "brief hearing", on the following matters:

- (a) the test for granting leave to appeal generally, and a costs order specifically, if there is any difference; and
- (b) the test that Justice Bannister would/should have applied, the way in which he did so, and the extent to which he exercised a discretion in accordance with established principles or otherwise.

[17] The legal practitioners for the Intended Respondent enquired whether the Court wished the parties to confine their submissions to the two matters (above) or whether they should deal more generally with the Permission to Appeal and Stay Application. The Court responded to the parties' legal practitioners that the request for an oral hearing was motivated by the Court's desire for assistance on the two specific areas "which are not addressed, or not addressed fully, in writing."

[18] The Court's desire for an oral hearing was so that it would have an opportunity to ask counsel for the parties any questions or seek clarification, if necessary, regarding what would be set out in the "short written submissions" and the authorities submitted. Generally, it is not efficient for the Court to receive written submissions on which, after consideration, there are questions, and then have a time delay while clarification is sought in writing, and received in writing, by which time the matter is no longer "top of mind" and there is a need to get back into it again. And should there be any follow up questions or clarifications needed, the process needs to be repeated, with the same inefficiency consequences.

¹² This illustrates the potential difficulties that may arise in the procedures for permission to appeal applications, a matter discussed further below.

- [19] The Court proposed a date for the brief hearing.
- [20] In some manner, a two-hour hearing was listed for 24 June 2015, presumably at the request or with the concurrence of both parties (neither the written submissions nor the record for this costs determination indicate exactly what transpired in this regard) with Leading Counsel for both parties attending by telephone.¹³
- [21] The two bundles for the hearing appear to be about 700 pages, plus a correspondence bundle (clip) and two authorities bundles with seven and six authorities, respectively. The Intended Appellants' written submissions were seven pages dealing with the issues requested, "[t]he errors made by Justice Bannister in the costs decision under appeal", and stay of execution pending appeal. The Intended Respondent's written submissions were eight pages, which included submissions that Justice Bannister exercised his discretion on costs correctly and why.
- [22] At the hearing, which commenced on 24 June 2015 and then, due to insufficient time, resumed and concluded on 26 June 2015, there were submissions at the outset on the role of an intended respondent on a permission to appeal application and then Leading Counsel for both parties fully argued the Permission to Appeal Application.
- [23] In the result, both of the parties and certainly the Court had the benefit of the written and full oral submissions.

Award of Costs

- [24] **Intended Respondent's Position.** The Intended Respondent's position was that the general rule in CPR 64.6(1) should be applied, and the Court should order the

¹³ It appears that the legal practitioners for the Intended Appellants had noted the desire for Leading Counsel to attend by telephone in an email to the Deputy Registrar on 9 June 2015.

Intended Appellants, as the unsuccessful party, to pay the costs of the Intended Respondent, as the successful party.

- [25] The Intended Respondent submitted with respect to the consideration of all the circumstances (CPR 64.6(5) and (6)) that, in essence, there was nothing that should lead the Court to depart from the general rule: he acted properly; he was entitled to be heard at least on the Stay Application even if the Permission to Appeal Application was able to be brought essentially without notice; he was wholly successful; the points raised by his legal practitioners were found by this Court to be correct; and he received no notice of the Permission to Appeal and Stay Application until two weeks after it was filed.
- [26] **Intended Appellants' Position.** The Intended Appellants' position was the parties should bear their own costs. They supported that submission on the bases that the Intended Appellants sought to keep costs to a minimum (64.6(6)(a)) and pursue their Permission to Appeal and Stay Application expeditiously (64.6(6)(b)); the Permission to Appeal and Stay Application was not unreasonable (64.6(6)(d)); and the Intended Appellants gave reasonable notice of the Permission to Appeal and Stay Application (64.6(6)(e)).
- [27] The Intended Appellants further submitted that because the Permission to Appeal Application was essentially without notice, the Intended Respondent should not have incurred any costs for it, and that the Court did not invite any submissions on the Stay Application and no such submissions were filed.
- [28] **Intended Appellants Should Pay Costs of Intended Respondent.** The Court does not see any reason to depart from the general rule. The Intended Appellants should pay the costs of the Intended Respondent in respect of the Permission to Appeal and Stay Application.
- [29] The points made by both sides with respect to CPR 64.6, as referenced above, are essentially correct in terms of their conduct and motivations.

- [30] The Permission to Appeal and Stay Application, like many court proceedings, took a particular course because of things done or not done by both parties and the Court.
- [31] While the Intended Appellants desired initially a determination of their Permission to Appeal and Stay Application on paper and without the involvement of the Intended Respondent, and while as a minimum it was completely appropriate for them to inform the legal practitioners of their applications, as they did, the Intended Respondent was, at a minimum, entitled to make (1) submissions on points in the materials that he considered inaccurate, and (2) submissions addressed to the appeal not meeting the relevant threshold test or tests¹⁴, and was entitled to notice of and to be heard fully on the Stay Application. These points are addressed more fully below.
- [32] While the Intended Appellants may have been motivated to be efficient, the process began to expand because they had not addressed in their initial materials the ‘test’ and related matters on which the Court then requested “short written submissions”, which ordinarily might be included in any submissions (whether ex parte or inter parties). However, in any event, for other reasons the proceeding took a course different from that which the Intended Appellants originally desired. The Intended Appellants had a role in that change of course, as did the Intended Respondent and the Court.
- [33] The Intended Appellants chose (as they were entitled to do) to engage Leading Counsel for the “brief hearing” that was directed to be for a limited purpose. The Court does not know how or why the “brief hearing” for a limited purpose escalated to both parties engaging Leading Counsel. Nevertheless, it did.

¹⁴ CAGE St. Lucia, paragraph 7, quoting Jolly v Jay [2002] All ER (D) 104; [2002] EWCS Civ 227: “a respondent should only file submissions at that stage of an application for permission to appeal if they are addressed to the point that the appeal would not meet the relevant threshold test or tests, or if there is some material inaccuracy in the papers placed before the court, such that the court might reasonably be led to grant permission when it would not have done so if it had received accurate information.”

- [34] In the result the Permission to Appeal Application was argued fully, to the benefit of the Court and the parties – even if at this stage, with the result known, the Intended Appellants may not see it as having been to their benefit. However, it was to their benefit – their position received a full airing and was fully and carefully considered by this Court, as was the case for the position of the Intended Respondent.
- [35] Also the Intended Appellants were relieved of any burden of full and frank disclosure that may exist on any ex parte application, and/or from being asked by the Court to put the points to the Court that the absent party might put if he were present.
- [36] There was nothing in the conduct of the Intended Respondent that should result in him not receiving the benefit of the general rule.
- [37] While the Intended Appellants submissions with respect to the basic process for the Permission to Appeal Application (which essentially was the same as the Intended Respondent's submissions) appear to be correct, save in respect of the right of the Intended Respondent to provide what he considered to be corrections, they do not appear to be correct respecting the Stay Application.
- [38] The Intended Respondent was correct that he was entitled to notice of the Stay Application (as a minimum), to make written submissions on it, and to be present and be heard if and when it was argued orally, even if his written submissions did not address it.
- [39] He should have his costs of the Stay Application as well as his costs of the Permission to Appeal Application, even if on the assessment the amount of costs payable in respect of the former may turn out to be negligible or small because little work was done that did not relate to that application or to overlapping issues

on both applications. But that is a question for the assessment process, not the entitlement process.

- [40] An application to this Court to stay should be on notice, not brought ex parte.
- [41] The Intended Respondent's submission is correct that there is no automatic stay (see CPR 62.19); the grant of a stay is the exception, not the rule; and a successful party should not be deprived of the fruits of the litigation pending appeal unless there is some good reason.
- [42] In addition to the authority cited by the Intended Respondent (*Leicester Circuits v Coates Brothers*¹⁵) the Court of Appeal more recently held as follows in *C-Mobile Services Limited v Huawei Technologies Co. Limited* ("**C-Mobile**") (as clearly summarized in the headnote to the Judgment, page 2):

There is no automatic right to a stay of proceedings pending appeal and a successful litigant should not normally be denied the fruits of its success pending appeal except for in exceptional circumstances. There are five relevant principles a court should apply when deciding whether to exercise its discretion to stay proceedings pending appeal. The first is that the court should take into account all of the circumstances of the case. Second, a stay is the exception rather than the general rule. Third, the party seeking stay must provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. Fourth, in exercising its discretion, the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered. The fifth is that the court should also take into account the prospect of the appeal succeeding, but only where there are strong grounds of appeal or a strong likelihood the appeal will succeed is shown (which would usually enable a stay to be granted).¹⁶

- [43] The Intended Respondent submitted that it may be difficult to distinguish between costs incurred on a stay application and a permission to appeal application as the

¹⁵ [2002] EWCA Civ 474.

¹⁶ BVIHCMAP2014/0017, 2 October 2014, Blenman, J.A., page 18, paragraphs. 49 and 50.

strength of the intended appeal – the prospect of success – is relevant to both, even though the bar is at quite different heights.

[44] As set out above, on a stay application, the fifth factor from C-Mobile is “the prospect of the appeal succeeding, but only where there are strong grounds of appeal or a strong likelihood the appeal will succeed is shown.”

[45] With respect to a permission to appeal application, the relevant principles were set out in the Permission to Appeal and Stay Judgment.¹⁷ Permission to appeal should be given only where (a) the appeal appears to have a realistic (as opposed to a fanciful) prospect of success or (b) there is some other compelling reason why the appeal should be heard (e.g.: in the public interest, the issue (such as a point of law or practice) should be examined by the appellate court because the law requires clarifying as a matter of general public or commercial importance).¹⁸

[46] With respect to a discretionary decision, such as an award of costs, an appellate court should only interfere when it considers that the judge “has not merely preferred an imperfect solution which is different from an alternative imperfect solution” which the appellate court might or would have adopted, “but has exceeded the generous ambit within which a reasonable disagreement is possible.”¹⁹ Put another way, the judge “erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations, and the result of the error or the degree of the error in principle is that the decision exceeded the generous ambit within which

¹⁷ Pages 10 – 11, paragraphs 26 – 28.

¹⁸ *Employers International and Others v Boston Life and Annuity Company Ltd.* (“**Employers**”) [2007] ECSC J0704-1, paragraph 23; *Swain v Hillman* [2001] 1 All ER 91 (per Lord Woolf MR); Notes to the CPR r 52.3.7 in Civil Procedure 2015 (the White Book).

¹⁹ *Tanfern Ltd. v MacDonald* [2002] 2 All ER 801 approving *G v G (Minor: Custody Appeal)* [1985] 1 W.L.R. 647; *Atack v Lee* [2005] 1 W.L.R. 2643 at 2653.

reasonable disagreement is possibly and therefore may be said to be clearly or blatantly wrong.”²⁰

[47] The English Court of Appeal held as follows:

In deciding whether an appeal against an order for costs has any reasonable prospects of success, the standard practice in this court, established over many years, is that it will only interfere with a discretion that a judge of first instance has on costs if it can be shown that his decision was plainly wrong. That means he has misunderstood the law, or has made a mistake of legal principle, or has misunderstood the facts by taking into account things that are not relevant or forgetting to take into account things that are relevant.²¹

[48] Accordingly, it is difficult if not impossible to separate the relevance and value of the Intended Respondent’s submissions, and of the Intended Appellants’ submissions, with respect to the strength of the intended appeal in relation to the two applications.

[49] To the extent a significant part of the submissions in relation to the Permission to Appeal Application concerned whether the “appeal appears to have a realistic (as opposed to a fanciful) prospect of success”, they were directly relevant, albeit with a diffident bar, to the fifth C-Mobile factor on a stay application, “the prospect of the appeal succeeding” and whether “there are strong grounds of appeal or a strong likelihood the appeal will succeed.”

Assessment of Costs

[50] The Intended Respondent invited the Court, if costs were awarded to him, to summarily assess his costs pursuant to CPR 69B.11(4). He filed a Schedule of Costs Claimed by the Intended Respondent dated 12 May 2016 (“**Costs**

²⁰ Employers, paragraph 24, citing Michel Dufour and Others v Helenair Corporation Ltd. Civil Appeal No. 4 of 1995 (12th February 1996), at pages 3 – 4.

²¹ The Queen on the Application of Evers v Uttlesford District Council [2010] EWCA Civ 48 at paragraph 3.

Schedule”) and the Intended Appellants included in their written submissions on costs both general and detailed submissions respecting the amount of costs claimed and the Costs Schedule’s time and work entries.

[51] **General Principles for Assessment of Costs.** 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.

[52] 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:

1. any order that has already been made;
2. the care, speed and economy with which the case was prepared;
3. the conduct of the parties before as well as during the proceedings;
4. the degree of responsibility accepted by the legal practitioners;
5. the importance of the matter to the parties;
6. the novelty, weight and complexity of the case; and
7. the time reasonably spent on the case.

[53] 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.²²

[54] The Costs Schedule claimed \$51,390.43 consisting of fees of Conyers (BVI legal practitioners) of \$35,220.00, general disbursements of Conyers of \$1001.33 (to which no objection was taken, and which are allowed in full), and disbursements by way of foreign legal practitioners costs for Leading Counsel of GBP 10,500.00, being \$15,169.10.

[55] The overall position of the Intended Appellants on the assessment of costs was that the costs claimed were “wholly disproportionate and should be heavily discounted.” They identified four categories of objection, and then set out line by line objections to many time and work entries to which they objected (which the Court has reviewed line by line).

[56] The four categories of objection were the following:

1. an amount in excess of \$51,000 incurred by a respondent to an ex parte application is grossly excessive;
2. it was wholly unreasonable for a senior associate charging \$730 per hour to undertake more than 34 hours of work in response to an ex parte application in circumstances where Queen’s Counsel for London was instructed;
3. five fee earners incurred fees on a file where Queen’s Counsel from London was instructed who charged more than \$15,000; and
4. there is considerable duplication.

²² BVIHCMAP 2013/0006 Andriy Malitskiy et al v Oledo Petroleum Ltd (Court of Appeal, Virgin Islands, per Michell, J.), 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)).

- [57] Before dealing with the specific line by line objections, with respect to the first general objection, the Court observes, as discussed above, that while the Permission to Appeal and Stay Application may have been intended initially to be ex parte, it became a full inter partes application, and the Intended Appellants contributed to that happening. The Stay Application was to be an inter partes hearing in any event. The costs must be viewed and assessed in this context.
- [58] **Consideration of General Principles for Assessment of Costs.** 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.
- [59] One factor should be specifically mentioned and discussed.
- [60] With respect to factor (e), the importance of the matter to the parties, it is clear from what this Court said in the Permission to Appeal and Stay Judgment, and what Justice Bannister said in the Strike Out Judgment and the Costs Judgment, that the dispute is of considerable importance to the parties. It was more than just about the money. Clearly the parties, and the other family members who owned the Intended Appellants, considered the matter important. Objectively and understandably, the Court considers that the matter was important to all of them.
- [61] The overall dispute was, in substance, a significant shareholder dispute that arose from a deterioration in the relationship between the Intended Respondent and other members of a successful mercantile family based in Dubai, United Arab Emirates, that owned the Intended Appellants. The Intended Appellants held, directly or indirectly, diverse businesses centred on the manufacture and sale of tyres and batteries, with factories or outlets in the Middle East, Europe, West Africa, the Americas and elsewhere.
- [62] The Intended Respondent had a 25% equity interest in the Intended Appellants. In sum and substance it was a very serious dispute within the family and its

businesses. The businesses had been started by the Intended Respondent's grandfather in the 1950's in India. As a result of the situation among the shareholders, the Intended Respondent, in the Liquidation Applications, had applied for a just and equitable winding up of the Intended Appellants and in the result obtained an offer from the other shareholders for the acquisition of his interest.

[63] The litigation appears to have been vigorously contested by both sides before Justice Bannister, and certainly was vigorously contested on the Permission to Appeal and Stay Application, including with the involvement of Leading Counsel in circumstances in which, at least initially, one might not have expected it. Reading between the lines, the animosity and bad blood within the family has not dissipated despite the result of the litigation before Justice Bannister and the share acquisition outcome.

[64] This importance factor is very significant in any assessment of reasonableness and proportionality.

[65] With respect to the line by line review of the Costs Schedule and the four categories of objection, the Intended Appellants raised the following objections which led this Court to disallow certain items:

1. **Work in the Nature of Deliveries, Service and Filing.** These tasks were performed by a litigation support assistant (not a legal practitioner) with an hourly rate of \$150. This type of work is arguably a general 'internal disbursement' for which the charge should be a reasonable amount for the service (reasonableness sometimes but not necessarily tested against the approximate cost of comparable services, if available, from a third party provider). In that regard, the amount claimed for each of the tasks was \$37.30, which does not appear to be an unreasonable charge for each of these tasks, particularly when likely there were timing and filing deadline concerns, and privacy concerns, as often is the case in litigation,

particularly in this Court. These items were not claimed as 'internal disbursements' and so it is for another day to consider the recovery of such items as 'internal disbursements' on an assessment. The disallowance is \$210.00.

2. **Work and Time in Relation this Costs Assessment.** The amount to which objection was taken on the basis that it related to this costs assessment was \$9,280.00. It appears that about \$1200.00 of that amount involved the review of the draft Permission to Appeal and Stay Judgment, arrangements for the handing down of that judgment, and an estimated amount for the attendance for the handing down of the judgment, so the disallowance as costs of the Permission to Appeal and Stay Applications is \$8,080.00. This amount is dealt with below in dealing with the costs of this assessment.

However, the second objection with respect to these work and time entries is that there was a change in personnel within the legal practitioners for the Intended Respondent which resulted in a 'new' legal practitioner on the matter needing to get up to speed (although it appears that the 'new' legal practitioner did have some initial involvement, in April 2015, so he was not starting from scratch). Therefore, in connection with costs of this assessment of costs, there will be a reduction of just of 25%, reducing the amount to \$6,000.00. As above, the disallowance here is \$8,080.00 but \$6,000.00 is included below as costs of this assessment.

[66] With respect to the BVI legal practitioners, the objections consisted largely of assertions of:

1. **Duplication.** It was submitted that it did not seem inappropriate for more than one person to have reviewed the Permission to Appeal and Stay Application at the outset or for there to be significant involvement of BVI legal practitioners when Leading Counsel was engaged as well.

There does not appear to this Court to have been an unjustifiable involvement of more than one person in any of the tasks. It was asserted by the Intended Appellants that there were five fee earners on the matter. First, one of those fee earners has been disallowed already as not being a legal practitioner. Second, the accounting for the legal practitioner who left the firm has resulted in the 'getting up to speed reduction' already made. Third, two legal practitioners worked only small amounts of time, presumably in one case because a bit of senior involvement was beneficial and in the other case because some tasks may have been more efficiently done by someone more junior (which the Intended Appellants say there should have been more of, and in any event is part of the work on the costs of the assessment which have been removed by virtue of a different objection).

The Court observes and confirms that appropriate involvement of BVI legal practitioners practising in BVI is desirable from the perspective of bringing necessary local input to matters (which unfortunately sometimes is notably missing), and further that it is the public policy of this jurisdiction for legal practitioners based in BVI to have appropriate input in matters in the courts here.

However, collectively the 34 hours' work a senior associate (at \$730 per hour), in light of the involvement of Leading Counsel, seems high (although, as noted above, this Court is not viewing this as having been an ex parte application because it was not). There will be a disallowance of 10 hours, being \$7300.00, which is a rough measure of what is reasonable having regard to the senior associate's work and Leading Counsel's work (for which no disallowance is made below).

2. **Inappropriate Staffing on Certain Tasks.** The objection that there was inappropriate staffing on certain tasks is an objection that is through the

eyes of a perfect world. Reasonableness, not perfection, is the touchstone. Also, had the staffing on those tasks been otherwise, presumably the objection would be that there was duplication or too many people on the file, as indeed was the objection in relation to other aspects of the Costs Schedule. That objection was discussed under subparagraph 1 above.

3. **Insufficient Particularization.** There are few items on the Costs Schedule about which the objection is that the work descriptions were insufficiently particularized. However, those few items are found by this Court to have been adequately detailed when read in context.

[67] The other objections with respect to the costs of the BVI legal practitioners are rejected.

[68] With respect to the disbursement cost for Leading Counsel, the objection is that he was dealing with “two discrete points” only, and attended a 3-hour hearing. However, as detailed above, both sides’ Leading Counsel dealt with all the issues on the Permission to Appeal Application generally, and the 3-hours of hearing time were on two different days. Also the Intended Appellants did not provide to this Court on the assessment what their Leading Counsel charged. While the Intended Appellants were not required to provide that information, and the Intended Appellants not doing so is not a ground for rejecting the objection, the information likely would have been a useful comparator (recognizing that different teams are structured in different ways and work in different ways). This objection is rejected.

[69] In summary, the claim for \$51,390.43 is reduced by \$210.00 + \$8,080.00 + 7300.00, being a total of \$15,590.00, so that \$35,000.43 is allowed as costs in respect of the Permission to Appeal and Stay Judgment.

[70] The sum is reasonable and fair both to the Intended Appellants and the Intended Respondent 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. The 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.

[71] The Costs of the Permission to Appeal and Stay Application are assessed at **\$35,000.43**.

[72] The Costs of of the Permission to Appeal and Stay Application shall be payable in 14 days.

Costs of This Assessment of Costs

[73] For the reasons described above, \$6,000.00 is an appropriate reduced amount to consider as the recoverable costs of this assessment of costs. The sum of \$6,000.00 is to be taken as the reasonable, fair and proportionate (particularly in the context of the overall dispute) costs of the Intended Respondent for this assessment of costs.

[74] As the Intended Respondent has been substantially successful on this costs assessment, which was conducted efficiently in writing, he should have his costs of this costs assessment which are summarily assessed at **\$6,000.00**.

[75] The costs of this assessment of costs shall be payable in 14 days.

Staying Costs of Permission to Appeal and Stay Application, and Costs Assessment

[76] The Intended Appellants asked that if costs were awarded to the Intended Respondent, the order for payment be stayed pending final determination of the Intended Appellant's intended appeal in that they are applying to the Court of Appeal for permission to appeal and a stay of the Costs Judgments (that is, the

relief which was denied by this Court in the Permission to Appeal and Stay Judgment).

[77] The test articulated by the Court of Appeal in *C-Mobile* (set out earlier in this Judgment) makes it difficult for this Court to grant the stay that is sought. The Intended Appellants cannot meet the test, as outlined below. Accordingly, the application to stay the order for payment of the costs which have been assessed herein is dismissed.

[78] The Court of Appeal stated in *C-Mobile* that there is no automatic right to a stay of proceedings pending appeal and a successful litigant should not normally be denied the fruits of his success pending an appeal except in exceptional circumstances. A stay is the exception, not the rule.

[79] Considering the relevant principles, articulated in *C-Mobile*, that this Court should apply when deciding whether to exercise its discretion to grant a stay, first, there is nothing in all of the circumstances of the case that favours a stay, particularly when this Court has denied permission to appeal.

[80] A comment of Justice Bannister that the Intended Appellants have quoted a few times in proceedings before this Court, that “the Court of Appeal may take a different view”, is not taken by this Court as any recognition by Justice Bannister that there will or should be an appeal. This Court views it simply a general recognition by Justice Bannister, as likely he remarked on several occasions in various cases, that a party may seek to appeal a judgment of this Court (as in fact the Intended Appellants are seeking to do), particularly given the importance of the matter to the parties (and in this case, to the parties and the ultimate shareholders of the Intended Appellants (discussed above)), and that if leave is granted, the Court of Appeal might take a different view when it hears the appeal. In other words, this Court does not take it that he was expressing doubt about his decision or suggesting that the test for permission to appeal would be met but rather just being realistic that in many cases appellate courts take a different view. Indeed, in

some cases the Privy Council may take a different view whether the Court of Appeal has agreed or disagreed with the court of first instance.

- [81] It was incumbent on the Intended Appellants to provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. There was no evidence, nor any submissions, that this will occur, or that if the costs are paid, and the entitlement later changes, recovery will not be possible.
- [82] In exercising its discretion, this Court needs to apply what is in effect a balance of harm test in which the likely prejudice to the Intended Respondent must be carefully considered. The only prejudice to either party is that during 'the period of uncertainty' one party or the other will be holding what is a relatively very modest sum having regard to what was in issue in the overall dispute.
- [83] The Court of Appeal held in C-Mobile that a court on an application to stay should also take into account the prospect of the appeal succeeding, but only where there are strong grounds of appeal or a strong likelihood the appeal will succeed is shown (which would usually enable a stay to be granted). Given the holding of this Court on the Permission to Appeal Application, this factor does not assist the Intended Appellants to obtain a stay.
- [84] The application for a stay of the requirement for payment of the costs assessed in this Judgment should be dismissed.

Orders

- [85] Accordingly, there shall be the following orders:
1. The Intended Appellants shall pay to the Intended Respondent, within 14 days, the sum of \$35,000.43 in respect of his Costs of the Permission to Appeal and Stay Application.

2. The Intended Appellants shall pay to the Intended Respondent, within 14 days, the further sum of \$6,000.00 in respect of his costs of the assessment of costs of the Permission to Appeal and Stay Application.
3. The Intended Appellants application for a stay of the above two orders pending the final determination by the Court of Appeal of their intended application to the Court of Appeal for permission to appeal the Costs Judgment and a stay of it pending the determination of such appeal shall be dismissed. The costs of the stay application are subsumed in the costs awarded to the Intended Respondent in subparagraph 2 immediately above, so there will be no further costs order in respect of the stay application.

Justice Barry Leon
Commercial Court Judge
25 May 2016