

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2016/0030

BETWEEN:

[1] SHEIKH MOHAMED ALI M ALHAMRANI
[2] SHEIKH SIRAJ ALI M ALHAMRANI
[3] SHEIKH KHALID ALI M ALHAMRANI
[4] SHEIKH MOHAMED ALI M ALHAMRANI (as representative of the
estate of the late SHEIKH ABDULAZIZ ALI M ALHAMRANI)
[5] SHEIKH AHMED ALI M ALHAMRANI
[6] SHEIKH FAHAD ALI M ALHAMRANI

Appellants

and

SHEIKH ABDULLAH ALI M ALHAMRANI

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Mario F. Michel
The Hon. Mr. Paul Webster

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Lynton Tucker and Mr. James Brightwell for the Appellants
Ms. Elizabeth Jones, QC for the Respondent

2017: January 31;
February 1;
November 24.

Commercial appeal – Assessment of costs – Burden of proof in cost assessment proceedings – Whether the learned judge effectively reversed the burden of proof and required the paying party to prove that the disputed items of the claim were unreasonable and should not be allowed – Whether the learned judge made errors in principle in conducting the cost assessment proceedings – Whether the learned judge improperly exercised his discretion during the cost assessment proceedings

This is an appeal regarding costs awards amounting to US\$9,361,244.02 plus interest of US\$1,172,000.96 made by a judge of the Commercial Court in favour of the respondent,

Sheikh Abdullah Ali M Alhamrani ("Sheikh Abdullah"), in respect of proceedings between the appellants and Sheikh Abdullah in the Commercial Court and the Court of Appeal. The appellants were dissatisfied with the awards made by the learned judge and have appealed to this Court.

The appellants and Sheikh Abdullah are the children of the late Sheikh Ali M. Alhamrani (collectively referred to as "the siblings") who died in 1976. The family carried on various businesses in the United Arab Emirates, including a joint-venture with a German lubricants manufacturer called Fuchs Petroleum Saudi Arabia ("Fuchs"). Fuchs Oil Middle East Limited ("Fomel"), a British Virgin Islands company, was one of the companies used by the joint-venture. Chemtrade Limited ("Chemtrade"), another BVI company, owns 50% of the shares of Fomel, and Fuchs owns the remaining 50% of the shares. The siblings owned the shares in Chemtrade.

In or about 2000 unhappy differences developed between Sheikh Abdullah and the appellants. The disputes were referred to a court in Saudi Arabia and the proceedings in that court resulted in an agreement between the siblings in April 2008 regarding the distribution of the assets of the joint-venture. Essentially the agreement provided that Sheikh Mohamed, one of the siblings, would value the businesses and Sheikh Abdullah would have the option of either purchasing the appellants' shares or selling his shares to them, in either case at the value determined by Sheikh Mohamed. Sheikh Abdullah opted to purchase the appellants' shares. A further dispute then developed between the siblings as to whether the shares that the appellants owned in Chemtrade were included in the sale.

Sheikh Abdullah's position was that the disputed shares were included in the sale to him and, when completed, would make him the majority shareholder of Chemtrade. In January 2010, he commenced proceedings in Saudi Arabia claiming ownership of the disputed shares. He also excluded the appellants from Fomel's affairs. In November 2010, Chemtrade commenced an unfair prejudice claim against Fomel in the BVI Commercial Court seeking an order that either Fomel or Fuchs purchase its shares in Fomel ("the unfair prejudice claim"). In July 2011, Sheikh Abdullah commenced separate ownership proceedings in the Commercial Court in respect of the disputed shares ("the ownership claim").

At a directions hearing for both cases before the judge of the Commercial Court in November 2011, Sheikh Abdullah agreed to pursue the BVI ownership claim instead of the extant ownership proceedings in Saudi Arabia. The learned judge entered a consent order that the ownership claim and the unfair prejudice claim be tried together, and that each party in either action shall give standard disclosure to all the other parties ("the Consent Order"). The two claims were not consolidated.

The trial of the joint claims took place over a period of 32 trial days between September and November 2012. The learned judge delivered his judgment in December 2012. He dismissed Sheikh Abdullah's claim and allowed Chemtrade's unfair prejudice claim but did not order a buyout of its shares. Instead, he ordered that the articles of association of Fomel be amended to avoid any future deadlock in the company's board of directors.

The learned judge heard submissions on costs in February 2013 and delivered his decision in March 2013. The judge ordered Sheikh Abdullah to pay 100% of 40% of the appellants' overall costs of the joint trial, but he reduced Sheikh Abdullah's share of the responsibility for the costs to 70% of the 40% on account of certain aspects of the appellants' conduct during the litigation. Sheikh Abdullah was therefore required to pay 28% (70% of 40%) of the appellants' agreed or assessed costs of the combined proceedings.

Sheikh Abdullah appealed against the judge's order refusing his claim to the disputed shares. The appeal was heard by the Court of Appeal over a period of five hearing days in July 2013. In a judgment delivered in September 2013, the Court of Appeal allowed Sheikh Abdullah's appeal and set aside the judgment in the court below, and, having found that the disputed shares were included in the buy-sell agreement, ordered that they be transferred to Sheikh Abdullah or his order within 28 days. The Court of Appeal also ordered that the appellants pay Sheikh Abdullah's costs of the appeal and of the trial in the court below, to be assessed if not agreed. The Court of Appeal made a further order in November 2013 staying the execution of its judgment until the final disposal of the appellants' appeal to the Privy Council.

The appellants' appeal to the Privy Council was dismissed and they were ordered to pay Sheikh Abdullah's costs before the Privy Council and in the Court of Appeal, both on a standard basis. The Privy Council also affirmed the Court of Appeal's order for the costs at first instance.

The hearing of the assessment of Sheikh Abdullah's costs took place before a judge of the Commercial Court over a period of four days in June 2016. The learned judge was presented with a list of 28 disputed points and it was agreed he would hear counsel on each point and then make rulings on the points as the hearing progressed. The judge did not produce a written judgment.

At the end of the costs hearing the learned judge ordered that:

- a. The appellants pay Sheikh Abdullah's costs of the High Court proceedings in the sum of \$7,804,361.20 with interest in the sum of \$1,086,196.02, continuing at the daily rate of \$1069.09.
- b. The appellants pay \$934,026.83 in respect of Sheikh Abdullah's costs of his appeal to the Court of Appeal and \$436,697.33 in respect of Sheikh Abdullah's costs of the stay application, together with interest of \$72,479.39 and continuing at the daily rate of \$187.77.
- c. The appellants pay Sheikh Abdullah's costs of \$186,158.66 together with interest of \$13,325 and continuing at the rate of \$20.89 per day in respect of an application for a freezing injunction made by Sheikh Abdullah to the Court of Appeal.

The appellants appealed against these orders. The notice of appeal lists 20 grounds of appeal. Grounds 1 to 4 deal with different aspects of the burden of proof in costs assessment proceedings, in particular the appellants' complaint that the learned judge effectively reversed the burden of proof and required them, as the paying party, to prove that the disputed items of the claim were unreasonable and should not be allowed.

Grounds 5 to 20 allege errors of principle in the assessment not just in the exercise of the judge's discretion.

Held: allowing the appeal on grounds 9 to 13 to the extent of reducing the amount awarded from £600,000 to £480,000, and on ground 18 by ordering that the amount awarded for travel time be recalculated at the rate of one-half of each fee earner's normal hourly rate, to be assessed by a judge of the Commercial Court if not agreed by the parties within 21 days, dismissing the appeal on all other grounds and making the orders in paragraph 87 numbered 4-6 of this judgment, that:

1. The assessment of the costs in this matter was undoubtedly one of, if not the largest and most complicated assessments ever undertaken in the BVI. The judge was faced with a difficult task and had to find sensible and practical means to complete the detailed assessment within the four days allocated for the hearing. The judge was entitled to employ a broad-brush approach to the assessment rather than a line by line assessment.
2. It is settled law in the Eastern Caribbean that section 11 of the **Eastern Caribbean States Supreme Court (Virgin Islands) Act** can be used to import the law and practice in the High Court of Justice in England but only where there is no local law or practice covering the point. Part 65.2 of the **Civil Procedure Rules 2000** ("**CPR 2000**") sets out where the burden of proof lies in an assessment of costs and outlines the basic principles that the assessor should follow when carrying out an assessment. Rule 44.3 of the **English Civil Procedure Rules 1998** covers substantially the same ground as Part 65.2. Therefore, there is no room for the application or operation of rule 44.3 of the English CPR in the BVI.

Leeward Islands Resorts Limited v Charles Hickox ANUHCVP2008/003 (delivered 22nd March 2010, unreported) followed; Part 65.2 of the **Civil Procedure Rules 2000** applied; section 11 of the **West Indies Associated States Supreme Court (Virgin Islands) Ordinance** applied; Rule 44.3 of the **English Civil Procedure Rules 1998** distinguished.

3. The finding that rule 44.3 of the English CPR does not apply in the BVI means, for example, that the English rule that in an assessment on a standard basis any doubt as to whether any costs were reasonably and proportionately incurred or were reasonable and proportionate in amount should be resolved in favour of the paying party does not apply in the BVI. The position in the BVI is captured by the learned judge's finding that in the BVI there is no bias one way or the other and the burden of proof rests throughout on the receiving party to prove that the costs claimed are reasonable and fair to both the paying party and the receiving party. If the receiving party proves on a balance of probabilities that the claim is reasonable and fair, he or she is generally entitled to that item in full or to so much of it as the court finds to be reasonable and fair. If he or she does not discharge this burden the claim will fail.

4. The judge proceeded on the basis for assessing costs under the **CPR 2000** by determining what was reasonable and fair between the parties. In carrying out this exercise he found that some or most of the items in the bills were reasonable and proportionate and therefore there was no reason not to allow the full amount of such fees. This is a proper way to proceed in an assessment in the BVI and it does not amount to applying an indemnity basis.
5. The learned judge satisfied himself that Sheikh Abdullah had discharged the burden of proving the reasonableness of the fees claimed. The allowance of 100% recovery on some items occurred when the judge was satisfied that those fees were reasonable and fair to both parties. Had he stopped at that point there could be no complaint because he had by then done all that the **CPR 2000** required of him. The fact that he then gave the appellants an opportunity to give examples of what they claimed were unreasonable fees, and they failed to do so, is not reversing the burden of proof.
6. There are very limited circumstances when an appellate court will interfere with the exercise of the trial judge's discretion. It is settled law that an appellate court will not interfere with the exercise of the learned judge's discretion unless it is satisfied that he committed an error and that as a result of that error his decision exceeded the generous ambit within which reasonable disagreement is possible, and was clearly or blatantly wrong. Reductions made by the trial judge for counsel liaison fees were matters entirely within his discretion and based on the general principles regarding how this Court should approach reviewing the exercise of a judge's discretion, there is no basis to interfere with the judge's findings and reductions. It would have been different had the judge not taken account of the client representative principle as such a failure may have given rise to an error of principle.

Dufour and others v Helenair Corporation and others (1996) 52 WIR 188 followed.

7. The Consent Order is consistent with the position that the parties had taken in correspondence. The Order required each party to give standard disclosure to all other parties which means disclosure of all documents in the possession or control of a party. The learned judge was correct in finding that Sheikh Abdullah was directed and required by the Consent Order to disclose all documents in both proceedings over which he had control. These documents included the Fomel documents which were undisputedly under Sheikh Abdullah's control. The judge then went on, as he was required to do, to find that it was entirely fair and reasonable for the appellants to pay such costs without reduction.
8. A court can take into account any conduct that has the effect of unnecessarily increasing the time and costs of the proceedings and can order the party responsible for the conduct to pay the increased costs. What the court should not do is to conclude, without more, that as a result of the conduct of the paying party the receiving party should receive the full amount of dealing with the issues

affected by the conduct. The court must still carry out the additional exercise of deciding what amount of the increased costs is reasonable and fair for the paying party to pay. The conduct displayed by the appellants did not obviate the need for the judge to investigate the amount of the claim and order the appellants to pay only the reasonable and fair amount of the additional costs incurred by Sheikh Abdullah. The learned judge having failed to carry out a proper assessment of the costs of the Fomel disclosure, it falls to this Court to do the assessment. This Court will therefore allow this ground of appeal and assess the claim using a broad-brush approach by reducing the claim for these costs of approximately £600,000, which the judge allowed without reduction, by 20% to £480,000.

9. The judge's finding that Sheikh Abdullah's representatives incurred expenses in dealing with Fomel's business licence to operate in Sharjah in order to protect the underlying assets in dispute (Fomel) because of the position taken by the appellants in the litigation was a generous interpretation of the entitlement to costs on the facts. However, it was a finding of fact by the judge that these costs were recoverable as part of ownership proceedings to preserve the underlying assets and an exercise of his discretion in allowing recovery. There being no discernible error in the judge's findings there is no basis for interfering with his decision.
10. The learned judge's findings on the evidence that the indemnity agreements and liaising with Fuchs and Fuchs' lawyers related to the ownership claim and his ruling that the costs were therefore recoverable in full was an exercise of his discretion and this Court has no basis to interfere with this decision.
11. In determining the amount to be awarded for pre-action costs, it is a settled principle that the costs must be relevant in the sense that they were incurred to produce material that ultimately proves to be of use and service in the subsequent action. Once the claimed costs meet the test of recoverability, the amount of costs incurred must also be reasonable. The learned judge considered the time period covered by the claim for pre-action costs and went on to find that that the claim was not unreasonable and allowed it in full. The judge considered the evidence and submissions of counsel, the relevant principles, applied the proper test and did not err in his treatment of the assessment of these costs. There is no basis for interfering with his decision.

Olive Group Capital Limited v Mayhew BVIHC(COM)2015/115 (delivered 21st January 2016, unreported) applied; **Roach and another v Home Office** 2009] EWHC 312 (QB) considered.

12. It was not disputed that the overseas based lawyers in these proceedings were entitled to charge full hourly rates for work done while travelling. However, the issue of the amount that should be allowed for "down time" while travelling, i.e., sleeping and other not working activities associated with overseas travel, is an important issue in the context of the Commercial Court in the BVI, as the lawyers appearing in the court quite often have to travel across the Atlantic and even from as far as Asia. As such there is potential for significant amounts of down time on

each trip. Having reviewed how the learned judge came to his decision on this issue, he should have had more regard to the differences between attending court in England and travelling overseas to attend the Commercial Court in the BVI. Such journeys can take up to two working days each way resulting in very long periods of down time. In the circumstances, the judge's decision of allowing the full rate for down time should be varied to a more reasonable rate of one half of the fee earner's regular hourly rate.

JUDGMENT

- [1] **WEBSTER JA [AG.]:** This appeal concerns costs awards totalling US\$9,361,244.02 plus interest of US\$1,172,000.96 made by a judge of the Commercial Court in favour of the respondent, Sheikh Abdullah Ali M Alhamrani ("Sheikh Abdullah"), in respect of proceedings between the appellants and Sheikh Abdullah in the Commercial Court and the Court of Appeal. The appellants were dissatisfied with the awards made by the learned judge and appealed to this Court.
- [2] The appellants and Sheikh Abdullah are the children of the late Sheikh Ali M. Alhamrani who died in 1976. The family ran various businesses that were involved in the production and sale of oil in the United Arab Emirates. They carried on business through joint-venture companies with a German lubricants manufacturer called Fuchs Petroleum Saudi Arabia ("Fuchs"). One of the companies used by the joint-venture was Fuchs Oil Middle East Limited ("Fomel"), a British Virgin Islands company. Chemtrade Limited, another BVI company ("Chemtrade"), owns 50% of the shares of Fomel, and Fuchs owns the remaining 50% of the shares. The siblings, including their two sisters who played no part in the court proceedings, owned the shares in Chemtrade.
- [3] In or about 2000 unhappy differences developed between Sheikh Abdullah, supported by the two sisters, and the appellants. I will refer in this judgment to the appellants with no disrespect meant as "the Brothers". The disputes were referred to a court in Saudi Arabia and the proceedings in that court resulted in an agreement between the siblings dated 12th April 2008 regarding the distribution of the assets of the joint-venture. The essence of the agreement was that Sheikh

Mohammed, one of the Brothers, would value the businesses and Sheikh Abdullah would have the option of either purchasing the shares of the siblings or selling his shares to them, in either case at the value determined by Sheikh Mohammed. Sheikh Abdullah opted to purchase the Brothers' shares. A further dispute then developed between the siblings as to whether the shares that the Brothers owned in Chemtrade were included in the sale.

- [4] Sheikh Abdullah's position was that the disputed shares were included in the sale to him and, when completed, would make him the majority shareholder of Chemtrade. In January 2010, he commenced proceedings in Saudi Arabia claiming ownership of the disputed shares. He also excluded the Brothers from the affairs of Fomel.
- [5] In November 2010, Chemtrade commenced an unfair prejudice claim under section 184I of the **British Virgin Islands Business Companies Act**¹ against Fomel in the Commercial Court seeking an order that either Fomel or Fuchs purchase its shares in Fomel ("the unfair prejudice claim"). In July 2011 Sheikh Abdullah commenced separate ownership proceedings in the Commercial Court in respect of the disputed shares ("the ownership claim").
- [6] At a directions hearing for both cases before a judge of the Commercial Court on 8th November 2011 at which all parties in both cases were represented by counsel and solicitors (except Fomel which took no active part in the proceedings), Sheikh Abdullah agreed to pursue the BVI ownership claim instead of the extant ownership proceedings in Saudi Arabia. The learned judge entered a consent order that the ownership claim and the unfair prejudice claim be tried together, and that each party in either action shall give standard disclosure to all the other parties ("the Consent Order").² The two claims were not consolidated.

¹ Act No. 16 of 2004, Laws of the Virgin Islands (as amended by the BVI Companies Act 2005, Act No. 26 of 2005)

² Appeal Bundle 6/3/10. Further details of the consent order are set out at paragraphs 44 and 48-54 below.

- [7] The trial of the joint claims took place over a period of 32 trial days before Bannister J between 20th September and 27th November 2012. The learned judge delivered his judgment on 21st December 2012. He dismissed Sheikh Abdullah's claim that the disputed shares were included in the buy/sell agreement and allowed Chemtrade's unfair prejudice claim but did not order a buyout of its shares. Instead he ordered that the articles of association of Fomel be amended to avoid any future deadlock in the company's board of directors.
- [8] Bannister J heard submissions on costs on 27th February 2013 and delivered his decision on 12th March 2013. The judge was faced with the difficult task of apportioning the costs between two claims that were heard together. He decided that 40% of the joint trial was dedicated to the ownership claim and 60% to the unfair prejudice claim. As such he ordered Sheikh Abdullah to pay 100% of 40% of the Brothers' overall costs of the joint trial, but he reduced Sheikh Abdullah's share of the responsibility for the costs to 70% of the 40% on account of certain aspects of the Brothers' conduct during the litigation. Sheikh Abdullah was therefore required to pay 28% (70% of 40%) of the Brothers' agreed or assessed costs of the combined proceedings.
- [9] Sheikh Abdullah appealed against the judge's order refusing his claim to the disputed shares. There was no appeal against the order made in the unfair prejudice claim. The appeal was heard by the Court of Appeal over a period of five hearing days in July 2013. In a judgment delivered on 18th September 2013, the Court of Appeal allowed Sheikh Abdullah's appeal and set aside the judgment in the court below, and, having found that the disputed shares were included in the buy-sell agreement, ordered that they be transferred to Sheikh Abdullah or his order within 28 days. The Court of Appeal also ordered that the Brothers pay Sheikh Abdullah's costs of the appeal and of the trial in the court below, to be assessed if not agreed. The Court of Appeal made a further order on 14th November 2013 staying the execution of its judgment until the final disposal of the Brothers' appeal to the Privy Council.

- [10] The Brothers' appeal to the Privy Council was dismissed and they were ordered to pay Sheikh Abdullah's costs before the Privy Council and in the Court of Appeal, both on a standard basis. The Privy Council also affirmed the Court of Appeal's order for the costs at first instance.
- [11] The hearing of the assessment of Sheikh Abdullah's costs took place before Sir Bernard Eder, QC, a judge of the Commercial Court, over a period of four days in June 2016. The learned judge was presented with a list of 28 disputed points and it was agreed he would hear counsel on each point and then make rulings on the points as the hearing progressed. The judge did not produce a written judgment. Insofar as his decisions are challenged by the Brothers, details of the disputed points and the decisions made on each point will be dealt with when I come to deal with the grounds of appeal.
- [12] At the end of the costs hearing the learned judge ordered that:
- (a) The Brothers pay Sheikh Abdullah's costs of the High Court proceedings in the sum of \$7,804,361.20 with interest in the sum of \$1,086,196.02, continuing at the daily rate of \$1069.09.
 - (b) The Brothers pay \$934,026.83 in respect of Sheikh Abdullah's costs of his appeal to the Court of Appeal and \$436,697.33 in respect of Sheikh Abdullah's costs of the stay application, together with interest of \$72,479.39 and continuing at the daily rate of \$187.77.
 - (c) The Brothers pay Sheikh Abdullah's costs of \$186,158.66 together with interest of \$13,325 and continuing at the rate of \$20.89 per day in respect of an application for a freezing injunction made by Sheikh Abdullah to the Court of Appeal.

The Brothers were granted leave to appeal against these orders.

The Notice of Appeal

- [13] I am constrained to comment on the form of the notice of appeal. Part 62.4 of the Civil Procedure Rules states that the notice of appeal must give details of the decision being appealed, the grounds of appeal and the orders sought. The grounds of appeal must be set out concisely under distinct heads without any

argument or narrative. The notice of appeal in this matter shows scant regard for the provisions of Part 62.4. The document runs 37 pages. The bulk of the document is in Part 1 which sets out the decisions and orders appealed. The draftsman set out long extracts from the transcript of the hearing of the various decisions made by the judge. It would have been far simpler and more in keeping with the practice regarding the drafting of notices of appeal to have summarised each finding of fact and law that is appealed. In fact, this was done in Part 2 of the notice. The 20 grounds of appeal are set out in reasonable detail in Part 3 of the notice.

- [14] A notice of appeal is meant to be a concise document directing the respondent and the court to the issues in the appeal, leaving the details of the argument for the skeleton argument. The notice of appeal in this appeal was overburdened with 28 pages of findings made by the judge before getting to the part of the notice dealing with the matters required by Part CPR 62.4. This form of notice of appeal should be avoided.
- [15] There are three issues of general application that I will deal with before analysing the grounds of appeal.

Test on Appeal

- [16] Several of the grounds of appeal in this matter question the exercise of the discretion of the learned judge during the assessment hearing and it is accepted that there are very limited circumstances when this Court will interfere with the exercise of the trial judge's discretion. Insofar as the grounds of appeal allege wrongful exercise of discretion by the learned judge, this Court will apply the well-known principles in cases such as **Dufour and others v Helenair Corporation and others**³ where Chief Justice Sir Vincent Floissac said –

“We are thus here concerned with an appeal against a judgment by the trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his

³ (1996) 52 WIR 188.

or her judicial discretion, the judge erred in principle 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 (2) that as a result of the error or degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

Applying these principles, I will not interfere with the exercise of the learned judge's discretion unless I am satisfied that he committed an error and that as a result of that error his decision exceeded the generous ambit within which reasonable disagreement is possible, and was clearly or blatantly wrong.

Broad-Brush Approach

- [17] The assessment of the costs in this matter was undoubtedly one of, if not the largest and most complicated assessments ever undertaken in the BVI. The learned judge had to deal with Sheikh Abdullah's bill of costs which contained 20,725 lines, ran 857 pages and claimed over US\$10 million for the High Court and Court of Appeal proceedings. The judge was faced with an obviously difficult task and had to find sensible and practical means to complete the exercise within the four days allocated for the hearing. It did not help that this was a detailed assessment. One of the tools that he employed was to apply a broad-brush approach to the assessment rather than a line by line assessment. The judge was entitled to use this approach and there are several places in the transcript where the Brothers' counsel submitted that it was the correct approach on the facts. In the circumstances, I would hesitate to interfere with any of the judge's findings on the ground that he applied a broad-brush approach.

Lack of Detail in the Bills

- [18] Ironically, the Brothers complain that the schedules to the bills of costs were lacking in detail and that there was insufficient evidence before the court to make a proper assessment, even applying a broad-brush approach. On my review of the record of appeal, I find that there was sufficient evidence in the bills of costs supplemented by the affidavit evidence and counsel's oral and written submissions

for the learned judge to carry out a proper assessment of the costs. In other words, Sheikh Abdullah had discharged the evidential burden.

Grounds of Appeal

[19] The notice of appeal lists 20 grounds of appeal. In summary form:

Grounds 1 to 4 deal with different aspects of the burden of proof in costs assessment proceedings, in particular the Brothers' complaint that the learned judge effectively reversed the burden of proof and required them, as the paying party, to prove that the disputed items of the claim were unreasonable and should not be allowed.

Ground 1 - The learned judge should have found that any doubt regarding the reasonableness of any element of the costs claimed by Sheikh Abdullah was to be resolved in favour of the Brothers as the paying party.

Grounds 2 and 3 - The learned judge erred by carrying out a detailed assessment of Sheikh Abdullah's costs on an indemnity basis and in allowing 100% recovery of items unless the Brothers showed that the claimed items were unreasonable.

Ground 4 – The learned judge effectively reversed the burden of proof and required the Brothers to prove the unreasonableness of the disputed items.

Grounds 5 and 20 – The appeal is against errors of principle in the assessment not just in the exercise of the judge's discretion.

Grounds 6 and 7 – Counsel liaison fees - the role of Forster's, English solicitors for Sheikh Abdullah.

Ground 8 – The costs of the unfair prejudice proceedings.

Grounds 9 to 13 - The costs of disclosure in the unfair prejudice proceedings.

Ground 14 – The costs associated with FOMEL's licence to operate in Sharjah.

Ground 15 – The costs of the indemnity agreements.

Grounds 16 and 17 – Pre-action costs.

Ground 18 – Foreign lawyers travel time.

Ground 19 - The judge's reliance on the judgment of Leon J in **Olive Group Capital Limited v Mayhew**.⁴

⁴ BVIHC(COM)2015/115 (delivered 21st January 2016, unreported).

Ground 20 – See ground 5 above.

I will now deal with the grounds of appeal though not in the order set out above.

Grounds 1 to 5 – Issues Relating to the Burden of Proof

[20] The starting point in determining where the burden of proof lies in an assessment of costs and how the assessor should approach the assessment is the **Civil Procedure Rules 2000** (“CPR 2000” or “the Rules”). Part 65.2 of the Rules under the heading “Basis of quantification” sets out the basic principles that the assessor should follow:

“65.2 (1) If the court has a discretion as to the amount of costs to be allowed to a party, the sum to be allowed is –

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

(2) [Not relevant to this appeal]

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

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

[21] Ms. Elizabeth Jones, QC who appeared for Sheikh Abdullah relied on this provision and submitted that the relevant test and guiding principle is that the amount awarded should be reasonable were the work to be carried out by a legal practitioner of reasonable competence and which appears to the court to be fair to both the person paying (the Brothers) and the person receiving the costs (Sheikh Abdullah). Further, that the burden of proving reasonableness of the costs rests

squarely on Sheikh Abdullah as the receiving party, and that this was clearly and unequivocally accepted by the judge. She referred to the transcript of the first day (27th June 2016) where the learned judge said –

“Here, Ms. Jones again drew to my attention and emphasized that the rule in the BVI is as it is stated in 65.2, and I am not going to read that out again. But the important point is that there appears to be no bias, if I describe it in that way, one way or the other. It is fair to say that the burden lies generally on the claimant who is seeking its costs, to persuade the court that the relevant amount is reasonable. The wording in fact says it’s an amount that the court deems to be reasonable. But it does seem to me that as a matter of principle the burden lies on the claimant, or should lie on the claimant. But importantly, in 65.2(1)(b), the test is what appears to the court to be fair in effect to both parties and therefore, it seems to me, as I said, that there is no necessary bias one way or the other.”⁵

[22] Mr. Lynton Tucker who appeared for the Brothers submitted that part 65.2 should be read in conjunction with rule 44.3 of the **English Civil Procedure Rules 1998** and that rule 44.3 should be preferred to part 65.2. Rule 44.3 is headed “Basis of assessment” and covers in substance the same ground as part 65.2. It reads –

“(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –

- (a) on the standard basis; or
- (b) on the indemnity basis, but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

(2) Where the amount of costs is to be assessed on a standard basis, the court will –

- (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
- (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.”

⁵ Appeal Bundle 2A/1/235-236.

[23] It is immediately apparent that although part 65.2 and rule 44.3 cover the same ground, namely the method for assessing costs, they have different provisions in form and in substance. It follows that the two sets of provisions cannot operate side by side – one must prevail over the other.

[24] It is settled law in the Eastern Caribbean that section 11 of **Eastern Caribbean States Supreme Court (Virgin Islands) Act**⁶ can be used to import the law and practice in the High Court of Justice in England but only where there is no local law or practice covering the point. Section 11 reads –

“The jurisdiction vested in the High Court in civil proceedings, and in probate, divorce, and matrimonial causes, shall be exercised in accordance with the provisions of this Ordinance and any other law in operation in the Territory and rules of court, and where no special provision is therein contained such a jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice in England.”

[25] Section 11 or its equivalent is a provision that applies throughout the states and territories of the Eastern Caribbean and it has been interpreted by this Court to mean that a provision of English law or practice cannot be imported if the law or practice conflicts with a local law or practice.⁷ Even if it is arguable that rule 44.3 was imported into the BVI by section 11 (and I make no such finding) it would have given way to CPR part 65.2 when the CPR became law in the BVI. If there was any doubt about this point it was resolved by this Court in **Leeward Islands Resorts Limited v Charles Hickox**⁸ when Edwards JA summed up the position on the issue of costs at paragraph 121 of the judgment –

“Regarding costs, our rules contain no provisions for indemnity costs and establish its own regime for awarding costs which is different from the regime under the English Civil Procedure Rules, and therefore not applicable.”

⁶ Cap. 80, Revised Laws of the Virgin Islands 1991.

⁷ See for example Barrow JA in *Dominica Agricultural and Industrial Bank v Mavis Williams* Dominica Civil Appeal No. 20/2005 (delivered 29th January 2007, unreported)

⁸ ANUHCVP2008/003 (delivered 22nd March 2010, unreported).

- [26] CPR Part 65.2 is a “special provision” within the meaning of section 11. It deals with the method of assessing costs and there is therefore no room for the application or operation of rule 44.3 of the English CPR in the BVI.
- [27] This finding is sufficient to dispose of the submission that rule 44.3 applies in the BVI, but I would also add that the “law and practice” that section 11 speaks of refers only to procedural law and practice and not substantive law. This was made clear by this Court in the case of **Veda Doyle v Agnes Deane**,⁹ which held that the English law intended to be imported by section 11 of the Supreme Court Act is the procedural law administered in the High Court of Justice in England and not English substantive law, nor English procedural law that is purely ancillary to English substantive law. In so holding, the Court was following and applying its previous decision in the case of **Panacom International Inc. v Sunset Investments Ltd.**¹⁰
- [28] Having made these general comments about the method of assessing costs in the BVI, I now turn to the specific grounds of appeal dealing with the burden of proof.

Ground 1 – Resolving Doubts

- [29] The finding that rule 44.3 of the English CPR does not apply in the BVI means, for example, that the English rule that in an assessment on a standard basis any doubt as to whether any costs were reasonably and proportionately incurred or were reasonable and proportionate in amount should be resolved in favour of the paying party (sub-rule 44.3(2)(b)) does not apply in the BVI. The position in the BVI is captured by the learned judge’s finding set out at paragraph 21 above that in the BVI there is no bias one way or the other and the burden of proof rests throughout on the receiving party to prove that the costs claimed are reasonable and fair to both the paying party and the receiving party. If the receiving party proves on a balance of probabilities that the claim is reasonable and fair, he or she

⁹ (2012) 82 WIR 287.

¹⁰ (1994) 47 WIR 139.

is generally entitled to that item in full or to so much of it as the court finds to be reasonable and fair. If he does not discharge this burden the claim will fail.

Ground 4 – Effective Reversal of the Burden of Proof

[30] Mr. Tucker submitted next that even though the judge correctly found that the burden of proof was on Sheikh Abdullah, he nonetheless effectively shifted the burden to the Brothers to prove the unreasonableness of the disputed items by inviting them to state their three best objections to some of the disputed items. This had the effect of reversing the burden of proof and placed it squarely on the Brothers to prove the unreasonableness of the disputed items.

[31] This submission is superficially attractive but it is not borne out by the transcript. For example, during the hearing on 27th June 2016, in giving his decision on liaison fees between fee earners for Sheikh Abdullah in London and in the BVI, the judge referred to the principles involved in assessing liaison fees and the evidence and the submissions of counsel, reminded himself that the burden lies on Sheikh Abdullah to persuade the court that the fees were reasonable, and concluded –

“I readily accept that in certain cases excessive liaison may be open to criticism. However, having looked at the schedule here and given the nature of the proceedings which is important to bear in mind, that the complexity of the case that I have referred to earlier, it does not seem to me that the sums claimed and the individual items are unreasonable. On the contrary, it seems to me in the context of this kind of litigation that those figures are reasonable.”¹¹

This is a good illustration of how the system works in the BVI. The assessing judge analysed the principles and the evidence relating to the disputed item and satisfied himself that Sheikh Abdullah had discharged the burden of proving that his fees for liaison between counsel were reasonable. Having done that, the judge invited Mr. Tucker to give three examples of unreasonable liaison fees. He found that the examples given “...fall far wide of the mark”.¹² The judge went on to remind himself that the burden of proof was on Sheikh Abdullah to prove reasonableness

¹¹ Appeal Bundle 2A of/1/236-237.

¹² Appeal Bundle 2A of/1/237, line 13.

and repeated his conclusion that the fees were "... indeed reasonable and fair within the relevant rule in this jurisdiction. The position that might otherwise obtain in England seems to me to be irrelevant."¹³

- [32] I do not see this exercise by the judge as reversing the burden of proof in any way. The judge satisfied himself that Sheikh Abdullah had discharged the burden of proving the reasonableness of the fees claimed. Had he stopped at that point there could be no complaint because he had by then done all that CPR required of him. The fact that he then gave the Brothers an opportunity to give examples of what they claimed were unreasonable fees, and they failed to do so, is not reversing the burden of proof. This was an example of the receiving party satisfying the judge that the disputed item was reasonable.

Ground 2 – Alleged Application of Indemnity Basis of Assessment

- [33] The Brothers complain in ground 2 that the judge effectively carried out the assessments on an indemnity basis and made only minimal reductions in the amounts claimed. They reproduced a table in the notice of appeal which shows that the overall reduction in the claims was only 6.83%. This is an unusual way to determine if an indemnity basis has been effectively applied and certainly not a way to determine reasonableness and fairness of the items in a bill of costs. The judge proceeded on the basis for assessing costs under the CPR by determining what was reasonable and fair between the parties. In carrying out this exercise he found that some or most of the items in the bills were reasonable and proportionate and therefore there was no reason not to allow the full amount of such fees. This is a proper way to proceed in an assessment in the BVI and it does not amount to applying an indemnity basis.

¹³ Appeal Bundle 2A of 1/237, lines 20-23.

Ground 3 – Alleged Reversal of Burden of Proof by Applying Indemnity Basis

- [34] Ground 3 follows from the complaint in ground 2. In ground 3, the Brothers complain that the effect of allowing 100% recovery of the majority of the disputed items was tantamount to placing the burden on them to prove irrecoverability or alternatively resolving doubts about the recoverability of disputed items in favour of Sheikh Abdullah. Based on my analysis regarding the procedures adopted by the judge in his handling of the burden of proof, I do not think that the Brothers have made out any of these two allegations. The allowance of 100% recovery on some items occurred when the judge was satisfied that those fees were reasonable and fair to both parties. These findings were not based on a reversal of the burden of proof nor on resolving doubts in favour of Sheikh Abdullah.
- [35] Based on my findings in the preceding paragraphs, I would dismiss grounds 1 to 4 of the notice of appeal.

Ground 5 – The Learned Judge’s Approach

- [36] Ground 5 as a stand-alone ground is not a ground of appeal in the strict sense. It complains that the judge’s approach led to errors of principle and not merely errors in the exercise of his discretion as to what amount should be awarded. Where necessary, this complaint is dealt with in other grounds of appeal.

Grounds 6 and 7 – Counsel Liaison Fees – The Role of Forsters

- [37] Forsters is the firm of solicitors in England who advised Sheikh Abdullah in these proceedings. Ms. Caroline Bassett, a partner in the firm, held a power of attorney from Sheikh Abdullah and generally dealt with his BVI solicitors, Walkers, on issues relating to the proceedings in the BVI. The Brothers complained that Ms. Bassett was not Sheikh Abdullah’s legal representative but was a client representative, and as such the firm’s fees for liaising with Walkers should not be allowed, or should be reduced to take account of the amount of the firm’s fees for

acting as a client representative. The suggested reduction is 25% over and above the reductions already made by the trial judge.

[38] Ms. Jones, QC accepted in principle that the fees of Forsters should be reduced and submitted that the reductions already made by the judge were appropriate and no further reduction was necessary or warranted. The judge had reviewed the costs schedules and decided that he could not be sure how much of Forster's fees should be attributed to Ms. Bassett's role as client representative. Applying a broad-brush approach, he reduced the claim of the High Court proceedings from £58,021 to £50,000, a reduction of 13%.¹⁴

[39] Later in the proceedings on day three of the hearing, Forsters' fees in the Court of Appeal and for the applications in that Court for a stay and a freezing injunction came up for consideration under the general heading of communication between counsel (Walkers and Forsters).¹⁵ It appears from the transcript that Mr. Tucker suggested a reduction of 20% for the appeal and the stay application, and a 50% reduction for the injunction application. Mr. Tucker did not suggest to the judge that he was maintaining a different position on any part of Forsters' fees that related to client representative activities. In fact, in dealing with the fees for the injunction Mr. Tucker referred to Mrs. Bassett's role as Sheikh Abdullah's client representative.¹⁶

[40] The judge treated the suggested reductions as applying to the entire claims for counsel liaison fees including any amounts attributable to client representative fees. For example, in dealing with the costs of the stay application the judge accepted Mr. Tucker's offer of a 20% reduction as "20 percent of the overall figure charged, that deals with Points 8 and 9." The suggested 20% and 50% reductions were accepted by the judge and he made the appropriate reductions to the overall claims for counsel liaison fees.

¹⁴ Appeal Bundle 2A/2/46 – 47.

¹⁵ Appeal Bundle 2B/3/101-103 and 2B/3/168 and 2B/4/23-27, respectively.

¹⁶ Appeal Bundle 2B/4/24.

- [41] In the final analysis, the judge reduced the liaison fees of Forsters by 12% of the High Court proceedings, 20% each for the appeal and the application for the stay, and 50% for the injunction. These reductions would have included the element of client representative fees.
- [42] Mr. Tucker complained on appeal that the judge found by implication that Forsters did not act at all as client representative in dealing with Walkers and that no reduction was made for acting as client representative. Therefore, there should be a further reduction of 25% of Forsters' fees for acting as Sheikh Abdullah's client representative. This submission is difficult to understand having regard to what transpired at the hearing. The judge accepted that the client representative principle applied and made reductions of 12%, 20% (twice) and 50% of Forsters' fees for counsel liaison, the two 20% and the 50% reductions based on Mr. Tucker's suggestions. Any reduction on account of Forsters' role as client representative was already taken account of by the judge making these reductions. I would refuse the request for an additional reduction of 25%.
- [43] In any event, the reductions made by the judge were matters entirely within his discretion and based on the general principle set out above regarding how this Court should approach reviewing the exercise of a judge's discretion, there is no basis to interfere with the judge's findings and reductions. It would have been different had the judge not taken account of the client representative principle as such a failure may have given rise to an error of principle.

Grounds 8 to 13 – Costs Associated with the Unfair Prejudice Proceedings

Ground 8 – Costs of the Unfair Prejudice Proceedings

- [44] The background to grounds 8 to 13 of the notice of appeal is that at the case management conference for both claims in November 2011, Bannister J entered the Consent Order which provided, inter alia, that the ownership claim and the unfair prejudice claim "... be tried together and any evidence given in one action shall stand as evidence in other action and any finding of fact in one action shall

be a finding of fact in other action.” During the joint trial of the two claims, Sheikh Abdullah’s legal team attended the entire trial even where the evidence being led or the issues being debated related to the unfair prejudice claim.

[45] The Brothers complain in ground 8 that the judge erred in allowing Sheikh Abdullah’s costs of the unfair prejudice claim. Ms. Jones, QC disputes that any such order was made. It is therefore important to see exactly what order was made in relation to the High Court proceedings.

[46] As stated above, the Court of Appeal allowed Sheikh Abdullah’s appeal, set aside the order made by Bannister J, including his order for costs, and ordered the Brothers to pay Sheikh Abdullah’s “...costs of the appeal and of the trial in the court below.” Eder J found on this issue that –

“... It seems to me that both as a matter of what was reasonable and what is fair, that the Claimants were perfectly entitled and indeed would be expected to have the entirety of their team present during the entirety of the trial.

As I say, Mr Tucker was unable to identify any particular days or periods when it could seriously be suggested that Sheikh Abdullah’s team might absent themselves in whole or in part and that being the case, it seems to me that the entirety of Sheikh Abdullah’s costs during the trial are in principle recoverable subject, as I keep on saying, to any particular points that may arise.”¹⁷

[47] Mr. Tucker did not appear to press this ground very seriously in his skeleton argument and in oral submissions, with good reason. It is clear from the order of the Court of Appeal and the way that it was interpreted by Eder J that the costs order for the trial was made in the ownership proceedings that was before the Court of Appeal and the judge was correct in allowing Sheikh Abdullah’s costs of attending the entire trial. Eder J’s decision was for Sheikh Abdullah’s costs of the ownership proceedings and not, as suggested in ground 8, an order for the payment of his costs of the unfair prejudice proceedings. This ground of appeal is without merit and I would dismiss it.

¹⁷ Appeal Bundle 2A/1/122-123.

Grounds 9 to 13 – Disclosure of the Fomel Documents

[48] Grounds 9 to 13 concern the learned judge's decision to award Sheikh Abdullah his costs of providing disclosure of the Fomel documents for use in the unfair prejudice proceedings. The resolution of this dispute lies in the interpretation of the Consent Order made at the directions hearing in November 2011, in the context of the provisions of the CPR 2000 relating to disclosure of documents and the background facts. The relevant portion of the Consent Order reads –

“10. Each party to either action shall give standard disclosure by list to all other parties to either action by 4 PM on 24 April 2012, such disclosure in action 158 of 2010 to be as to liability only.”¹⁸

This direction should be read in the context of CPR 28.2 which provides that –

“(1) A party's duty to disclose documents is limited to the documents which are or have been in the control of that party.

(2) For this purpose a party has or has had control of a document if –

(a) it is or was in the physical possession of the party;

(b) the party has or has had a right to inspect or take copies of it;

or

(c) the party has or has had a right to possession of it.”

[49] The undisputed evidence in this case is that as a matter of fact Sheikh Abdullah controlled Fomel's documents that were relevant to the unfair prejudice claim. There is copious correspondence between the legal practitioners in both claims on the issue. The letter that summarises the position of the parties most clearly is Walkers' letter dated 16th March 2012 when they, as Sheikh Abdullah's solicitors, confirmed, *inter alia*, that –

“5. We can therefore confirm and acknowledge that all documents whenever created (whether before or after December 2008) which are or have been in the control of FOMEL since December 2008, including documents at FOMEL's premises in Sharjah and AFPSA's premises in Saudi Arabia, and which are directly relevant to the matters in issue concerning liability in the unfair prejudice proceedings, are also documents which are or have been in the control of Sheikh Abdullah, but not necessarily physically possessed by him. However, we do not consider there is any material difference between physical possession and control and he will give disclosure of such documents.

¹⁸ Appeal Bundle 6/3/12.

6. We can also confirm our understanding (not concession) that our client's disclosure obligation extends to relevant documents in his position or under his control beyond just those under FOMEL's control. To put it a different way, he will give disclosure of the relevant documents in his possession or control whether or not this derives from his de facto (if not also de jure) control of FOMEL. Our client is not giving FOMEL's disclosure, he is giving his own disclosure, which will include all documents that might otherwise have been sought from FOMEL."¹⁹

[50] On 23rd March 2012, Harneys, the BVI solicitors for the Brothers, replied to Walkers' letter acknowledging that the positions taken by Sheikh Abdullah in paragraphs 5 and 6 of the letter are what Harneys had asked for.²⁰ This exchange of letters shows that the parties intended in March 2012 that Sheikh Abdullah would disclose the documents in his control which included the Fomel documents. This is what is contemplated by CPR 28.2.

[51] It is of more than passing interest that Harneys did not pursue the application that they had filed on behalf of the Brothers on 20th February 2012 seeking standard disclosure of documents from Fomel. This suggests, as their letter of 23rd March 2012 confirms, that they were satisfied with the form of disclosure proposed by Sheikh Abdullah's solicitors.

[52] Considering that we are dealing with a Consent Order that is consistent with the position that the parties had taken in correspondence in March 2012, and that the Order requires each party to give standard disclosure to all other parties, and that disclosure means all documents in the possession or control of a party, I agree with the finding by the judge that Sheikh Abdullah was directed and required by the Consent Order to disclose all documents in either proceedings over which he had control. These documents included the Fomel documents which were undisputedly under Sheikh Abdullah's control.

¹⁹ Appeal Bundle 8/23/184.

²⁰ Appeal Bundle 8/25/188.

- [53] The judge then went on, as he was required to do, to find that it was entirely fair and reasonable for the Brothers to pay such costs without reduction.
- [54] Before leaving the issue of disclosure there are two matters that I need to deal with. Firstly, I do not think that this was a case where Sheikh Abdullah needed to make an application for a costs order against a third party. Sheikh Abdullah was acting in accordance with the terms of the Consent Order and no further application or order was necessary for him to recover his disclosure costs from the Brothers.
- [55] Secondly, the issue of the Brothers' conduct. The judge's treatment of the Brothers' conduct is not listed as a separate ground of appeal in the notice of appeal, but both parties addressed this Court on the issue and I will therefore deal with it.
- [56] The main issue regarding the Brothers' conduct is the findings by the High Court, Court of Appeal and the Privy Council that they presented a false case that the shares in Fomel were not included in the sale to Sheikh Abdullah, and that they knew that this was a false case. This was the central issue in the trial and it took up a substantial amount of the court's time. The other conduct issue was the allegation by Sheikh Abdullah that the conduct of the Brothers in the assessment proceedings had the effect of lengthening the time and increasing the costs of the assessment.
- [57] Ms. Jones, QC submitted that conduct is one of the factors listed in CPR 65.2²¹ that the court can and should consider in assessing costs.
- [58] Mr. Tucker did not dispute that the conduct of the Brothers was relevant and that the judge was entitled to consider it in assessing the costs. However, the judge erred in his treatment of the issue. As an example, Mr. Tucker referred to the

²¹ CPR 65.2 is set out in paragraph 22 above.

judge's treatment of the Brothers' conduct in relation to the issue of disclosure in the unfair prejudice proceedings. Having found that the Brothers should pay Sheikh Abdullah's costs of the disclosure in the unfair prejudice proceedings, the judge concluded –

“One has to bear in mind, as Ms Jones submitted, that if the Brothers had not advanced the case that they did which, as I have said, was a case which was not only false but false in the sense that they knew it was false, then none of this would have happened. For those reasons, it is my conclusion that so far as disclosure is concerned, that Sheikh Abdullah is entitled those costs without reduction.”²²

[59] It is the last two words of the judge's finding, “without reduction”, that give me some concern. Mr. Tucker submitted, and I agree, that the effect of the judge's finding was that if the Brothers had not advanced a false case Sheikh Abdullah would not have had to defend that case and Sheikh Abdullah is therefore entitled to his full costs of defending any issue that arises from the conduct. I think that this is taking the issue of conduct one step too far. The court is entitled to take into account any conduct that has the effect of unnecessarily increasing the time and costs of the proceedings and can order the party responsible for the conduct to pay the increased costs. What the court should not do is to conclude, without more, that as a result of the conduct of the paying party the receiving party should receive the full amount of dealing with the issues affected by the conduct. The court must still carry out the additional exercise of deciding what amount of the increased costs is reasonable and fair for the paying party to pay. This type of conduct by the paying party does not obviate the need for the court to investigate the amount of the claim and order him or her to pay only the reasonable and fair amount of the additional costs incurred by the receiving party.

[60] The learned judge having failed to carry out a proper assessment of the costs of the Fomel disclosure, it falls to this Court to do the assessment. The easiest way of doing this would be to remit this part of the claim to the Commercial Court to do the assessment, but this is the only issue that needs to be re-assessed and the

²² Appeal Bundle 2A/1/119.

litigation between these parties has gone on for far too long. It is time for it to end. I will assess the claim using a broad-brush approach by reducing the claim for these costs of approximately £600,000, which the judge allowed without reduction, by 20% to £480,000.

[61] I would allow this ground of appeal and reduce the amount awarded to £480,000.

Ground 14 – Sharjah Business Licence

[62] The dispute regarding the Sharjah business licence involves the recovery of sums of money spent by Sheikh Abdullah's representatives in dealing with Fomel's business licence to operate in Sharjah and the expenses for the operation of its website. Mr. Tucker submitted that these expenses were not incurred in relation to the court proceedings and would have been incurred in any event as a part of Fomel's normal business operations. The judge did not accept this submission and found that the expenses were incurred to protect the underlying assets in dispute (Fomel) because of the position taken by the Brothers in the litigation. He therefore concluded that the costs were a part of the ownership proceedings to preserve the underlying assets and were recoverable. For myself I think that this was a very generous interpretation of the entitlement to costs on the facts but it was a finding of fact by the judge that the costs were part of the ownership proceedings and an exercise of his discretion in allowing recovery. There is no basis for interfering with his decision.

Ground 15 - Costs of Indemnity Agreements and Liaising with Fuchs and Fuchs' Lawyers

[63] In ground 15 the Brothers complain that the judge erred in allowing recovery of sums incurred in relation to the entry into two indemnity agreements between Fuchs and Sheikh Abdullah and in Sheikh Abdullah and his lawyers liaising with Fuchs and Fuchs' lawyers.

- [64] Ms. Jones, QC submitted that the indemnity agreements came about because Sheikh Abdullah was concerned about the underlying assets as a result of the Brothers' conduct and their attempts to take control of Fomel and its substantial cash reserves. Therefore, he liaised with Fuchs and entered into the indemnity agreements in order to keep Fuchs on his side and by doing so to protect the underlying assets. Ms. Jones, QC submitted that insofar as the costs were incurred in protecting the assets they were costs incurred in the ownership proceedings and are therefore recoverable.
- [65] Ms Jones, QC submitted further that the liaison fees were incurred in gathering evidence to meet allegations by the Brothers and generally because Sheikh Abdullah and Fuchs had a common interest in defeating the ownership claim. She informed the court that appropriate deductions had been made for any costs that were associated with the actual conduct of the unfair prejudice proceedings
- [66] Mr. Tucker submitted that the amounts claimed were for costs incurred by Sheikh Abdullah in connection with the unfair prejudice claim and the entire claim (£136,416 for liaison and £23,626 for the agreements) should be refused.
- [67] The judge heard arguments on these points on the second day of the hearing. He rejected Mr. Tucker's submission that the claims for the indemnity agreements and the costs for liaison with Fuchs related to the unfair prejudice claim and found that both claims related, at least in part, to the ownership claim. He acknowledged Ms. Jones' concession that the claim for liaison fees had been reduced and allowed fees for the reduced amount claimed. He allowed the full amount of the claim for the indemnity agreements.
- [68] This is another example of the learned judge making findings on the evidence and exercising his discretion as to the amounts of costs to be awarded. There is no basis for me to interfere with the exercise of his discretion and I would dismiss this ground of appeal.

Grounds 16 and 17 - Pre-action Costs

- [69] As stated above, the disputes between the parties in the two sets of proceedings before the Commercial Court have a long pre-trial history which included litigation in Saudi Arabia and the Channel Islands. The Saudi claim was filed by Sheikh Abdullah on 13th January 2010 for a declaration that he owned the shares in Chemtrade which he claimed to have acquired from the Brothers. The BVI ownership claim seeking similar relief was filed by Sheikh Abdullah on 11th July 2011.
- [70] The claim for pre-action costs of \$1,454,565.75 covered a period of approximately 1½ years from December 2009 (one month before the filing of the Saudi ownership claim) to June 2011 (one month before the filing of the BVI ownership claim). Sheikh Abdullah claimed that all of the costs for this period should be allowed as costs in the ownership proceedings because the work involved various aspects of collecting and analysing huge volumes of material, considering and analysing options for proceeding with the claim and taking steps in the BVI to restrain the unfair prejudice proceedings. Ms. Jones, QC was careful to point out that the claim did not include the costs of any applications that were contemplated but not issued and any costs associated with the Saudi proceedings other than the costs of English lawyers monitoring those proceedings.
- [71] Mr. Tucker submitted that the vast majority of this claim should be disallowed because the amounts claimed related to either the Saudi ownership claim or the BVI unfair prejudice claim. Further, the Brothers could not determine if any of the items claimed related to the ownership proceedings because of the paucity of information in the schedules showing how these vast sums were incurred. As a result, it was not possible to say how much of the claim truly related to the BVI ownership claim. Further, that the long period of up to 1½ years covered by the claim of itself shows that the claim must be grossly excessive. He suggested that there should be a cut-off date of 1st June 2011 because it appeared from the

schedules that it was on this date that preparation began for the anti-suit injunction (which became the ownership claim) issued by Sheikh Abdullah on 11th July 2011. This would result in a recovery period of just over one month. Alternatively, the cut-off date should be January 2011 which would result in an award of approximately \$390,000.00.

[72] During the hearing the judge pressed Mr. Tucker as to what test should be applied in determining the amount to be allowed for pre-action costs. Mr. Tucker did not resile from his primary position that there should be a cut-off date but agreed that the test is that the costs must reasonably relate to the action that is subsequently commenced.²³

[73] The judge, correctly in my opinion, declined to test the matter by reference to a so-called “cut-off date”. He applied the test used by Leon J in **Olive Group Capital Limited v Mayhew**²⁴ who in turn had applied the test used by Briggs J (as he then was) in **National Westminster Bank v Kotonou**.²⁵ Eder J set out the test as follows:

“In broad summary, the relevant test approved by Justice Leon, which I accept, is that with respect to the scope of pre-litigation costs, they include costs related to the creation of materials ultimately proving of use and service in the action or as being costs, the incurring of which was proper for the attainment of justice in the case.”²⁶

[74] I note that the test is disjunctive and the costs can be recovered either because they relate to the creation of materials ultimately proving of use and service in the case or because they were properly incurred for the attainment of justice in the case. I completely agree with the first limb of the test as it provides a simple and objective measure by which a court can decide whether pre-action costs relate to the current proceedings and are therefore recoverable. I am less satisfied with the second limb of the test because it introduces a very elastic concept of the

²³ Appeal Bundle 2A/1/148.

²⁴ *op. cit.*

²⁵ [2009] EWHC 3309.

²⁶ Appeal Bundle 2A/1/171 (line 22) -172 (lines 1-3).

attainment of justice in the case which may be difficult to pinpoint from case to case, especially if the first limb of the test had not been met. It may be significant that when Davis J (sitting with assessors) in **Roach and another v Home Office**²⁷ cited the test with approval he did not include the second limb. He said at paragraph 23 of his judgment –

“There is no doubt at all that costs incurred prior to proceedings are capable in principle of being recoverable as costs in the proceedings. That has long been established. The principle has been widely stated to this effect:

‘there is power in the Master to allow costs incurred before action brought and if the costs are in respect of materials ultimately proving of use and service in the action, the Master has discretion to allow these costs’.”

[75] I am satisfied that this is a more precise test and the one that should be applied in future for deciding whether pre-action costs can be recovered. The costs must be relevant in the sense that they were incurred to produce material that ultimately proves to be of use and service in the subsequent action. This is not to say that either Leon J or Eder J erred in applying the test that has been established and accepted in cases such as **National Westminster Bank v Kotonou**.²⁸

[76] Once the claimed costs meet the test of recoverability, the amount of costs incurred must also be reasonable, a point that was not lost on Eder J. On the first day of the hearing he said that satisfying ‘the Justice Leon test’ gives only a prima facie right to recovery and the final recovery will depend on “... further points that may be argued in due course”.²⁹ I take this to be a reference to his mantra throughout his judgment that the recovery of costs depends on reasonableness, fairness and proportionality.

[77] Having settled on the test to be applied for pre-action costs the judge then proceeded to deal with the individual claims in the schedules, and, where they included pre-action costs took account of those costs when assessing the claims. For example, one of the objections to the claim for £153,000.00 for “counsel

²⁷ [2009] EWHC 312 (QB).

²⁸ *supra*, note 25.

²⁹ Appeal Bundle 2A/1/173-174.

communications and related matters” was that some of the fees were incurred before the ownership claim was filed and there was insufficient detail of how these fees related to the ownership claim. The judge took this objection into consideration³⁰ in making his decision to reduce the claim to £110,000.³¹ The issue of pre-action costs also came up in the claim for communications with Sheikh Abdullah but the judge found that these charges were entirely reasonable and allowed them in full.³²

[78] Mr. Tucker referred to the claim for inter fee earner liaison of £217,766.00. He submitted that the claim included £57,712.00 of fees incurred before July 2011 for which the judge did not make a deduction and did not even consider applying the test that he had adopted earlier. I have reviewed the relevant portion of the transcript and it appears to me that the judge considered the time period covered by the claim noting that it was 3½ years but decided that the amount of the claim was “... not surprising at all given the nature of the case and its complexity”.³³ He went on to find that the claim was not unreasonable and allowed it in full. The fact that he did not refer to the test for pre-action costs which he had earlier approved in coming to his decision on this particular item is of no moment. It was not necessary for him to repeat the test every time that he made a finding that involved the issue of fees incurred prior to the filing of the ownership claim.

[79] In the circumstances, I find that the judge considered the evidence and submissions of counsel, applied the proper test, considered the issue of pre-action costs wherever it was part of a claim and did not err in his treatment of the assessment of these costs. Therefore, there is no basis for interfering with his decision and I would dismiss this ground of appeal.

Ground 18 – Travelling Time

³⁰ Appeal Bundle 2A/2/33-35.

³¹ Appeal Bundle 2A/2/35.

³² Appeal Bundle 2A/2/136-137.

³³ Appeal Bundle 2A/1/235.

[80] The issue in ground 18 is the level of fees that overseas-based lawyers in the proceedings should have charged for their travel time when not working on the case. It was not disputed that the overseas lawyers in these proceedings were entitled to and did charge the full hourly rates for work done while travelling. The issue is the amount that should be allowed for what I would describe as “down time” while travelling, that is, sleeping and other not working activities associated with overseas travel. This is an important issue in the context of the Commercial Court in the BVI as the lawyers appearing in the court quite often have to travel across the Atlantic and even from as far as Asia. As such there is potential for significant amounts of down time on each trip. The judge’s decision on this issue is at pages 73 to 76 of Appeal Bundle 2B tab 3. He referred to the practice in England and the BVI (including his own experience) and found that down time is chargeable at either the full rate or two thirds of the full rate. He allowed the full amount claimed finding that it was entirely reasonable.

[81] I have reviewed how the judge came to his decision on this issue and I think that he should have had more regard to the differences between attending court in England and travelling overseas to attend the Commercial Court in the BVI. The latter journeys can take up to two working days each way resulting in very long periods of down time. I think a more reasonable rate for down time for the Commercial Court is one half of the lawyer’s regular hourly rate. This is a matter of principle and I have no difficulty varying the judge’s decision to reflect this change.

[82] This ground of appeal is allowed and the amount allowed should be calculated at one-half of the respective fee earners’ hourly rates. I invite counsel to make the necessary adjustment

Grounds 19 and 20

[83] Ground 19 concerns the judge’s reliance on the judgment of Leon J in **Olive Group Capital Limited v Mayhew**.³⁴ The judge was entitled to rely on this

³⁴ Op cit.

decision as he saw fit. The concern when the skeleton arguments were drafted may have been that the decision was on appeal to this Court. The appeal has since been settled and withdrawn and this concern therefore falls away.

[84] Ground 20 is in substance the same as ground 5 which I dealt with above.

Conclusion

[85] In conclusion, I would allow the appeal on grounds 9 to 13 to the extent of reducing the amount awarded from £600,000 to £480,000, and on ground 18 by ordering that the amount awarded for travel time be recalculated at the rate of one-half of each fee earner's normal hourly rate. I would dismiss the appeal on all other grounds.

Orders

[86] I would make the following orders:

- (1) The appeal on grounds 9 to 13 is allowed to the extent of reducing the amount awarded from £600,000 to £480,000.00.
- (2) The appeal on ground 18 is allowed and it is ordered that the amount awarded for travel time be recalculated at the rate of one-half of each fee earner's normal hourly rate. If the parties cannot agree the recalculated amount within 21 days, the amount shall be assessed by a judge of the Commercial Court.
- (3) The appeal on grounds 1 to 8, 14 to 17 and 19 and 20 is dismissed.
- (4) The appellants will have one-quarter of their costs of the appeal to be assessed if not agreed within 21 days.
- (5) The respondent will have three-quarters of his costs of the appeal to be assessed if not agreed within 21 days.
- (6) All costs to be paid within 14 days of being assessed or agreed.

Postscript

[87] I commented early in this judgment on the scale of the proceedings that was before the learned judge and outlined the procedure that he adopted for dealing with the multiplicity of issues that he had to resolve. The judge is to be commended for his efficiency in dealing with all the issues and giving his decision on each one in his ex tempore judgment, thereby completing the hearing within the allocated time of four days. The Court also expresses its gratitude to counsel on both sides and those assisting them for their careful and detailed presentation of the issues.

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Mario F. Michel
Justice of Appeal

By the Court

Chief Registrar