In The Supreme Court of Bermuda

COMMERCIAL COURT

CIVIL JURISDICTION

2018: No. 359

B E T W E E N:

(1) ANNUITY & LIFE RE LTD

(2) POPE ASSET MANAGEMENT LLC

Plaintiffs

-and-

(1) KINGBOARD COPPER FOIL HOLDINGS LIMITED

(2) JAMPLAN (BVI) LIMITED

(3) KINGBOARD LAMINATES HOLDING LIMITED

(4) EXCEL FIRST INVESTMENT LIMITED

(5) KINGBOARD CHEMICAL HOLDINGS LIMITED

Defendants

RULING

(In Chambers)

Date of Hearing: **24 February 2025**
Date of Ruling: **4 March 2025**

Appearances: *Sam Stevens* of Carey Olsen Limited for the Plaintiff

Britt Smith of Conyers Dill & Pearman Limited for the Defendant

Ruling of Martin J

Introduction

1. This matter came before the Court by way of a review of the Registrar's taxation of the costs thrown away as a result of the adjournment of the trial of this matter on 14 December 2022 on the application of the Plaintiff. There is only one item in dispute between the parties, namely the liability of the Plaintiff to indemnify the Defendant in respect of the costs incurred for Leading Counsel's brief fee.

Disposition

2. For the reasons explained below the Court has decided that it is appropriate to exercise its powers on a review of the Registrar's Taxation Order and to allow the sum of USD178,240.01 in respect of the brief fee claimed. The Registrar's Taxation Order shall be amended accordingly.

Background

3. The trial of this action was due to take place on 16 January 2023 and was listed for five days in the commercial court. A month before the trial the Plaintiff applied to adjourn the trial on the basis that the Plaintiff wished to pursue disclosure of evidence from third parties to the litigation by way of Letter of Request under the Evidence Act 1905. Applying the conventional principles concerning the balance of prejudice to the Defendant by a delay against the need to afford the Plaintiff the opportunity to adduce the evidence necessary to present its case fully, Mussenden J (as he then was) acceded to the Plaintiff's application on terms as to costs.

4. The learned judge awarded the costs of the application to adjourn the trial to the Defendant on the indemnity scale to be paid forthwith and further ordered that the Defendant's costs of the thrown away by the adjournment of the trial were to be paid by the Plaintiff forthwith on the indemnity scale, such costs to be taxed if not agreed[1].

[1] Paragraphs 5 and 6 of Mussenden J's Order dated 14 December 2022.

5. The Registrar duly taxed the bill of costs that was presented by the Defendant in a taxation ruling dated 29 November 2024, the details of which it is not necessary to record. The only item that comes before the Court on the Defendant's application for review is the disallowance of the overwhelming majority of Leading Counsel's brief fee.

6. The brief fee was divided into three tranches: (i) a payment of £73, 383.33 due on 29 November 2022 (ii) a payment of £73,383.33 due on 20 December 2022 and (iii) a third payment due at a later date (presumably before the trial) which was later waived by Leading Counsel. The brief fee was to cover the trial preparation as well as the 5-day trial itself[2]. The Defendant paid the first two tranches of the brief fee on the basis that the fee was payable on delivery of the brief in accordance with the usual convention when instructing counsel on the basis of a brief fee.

7. The Defendant claimed that the payment of the brief fee was a cost necessarily thrown away by the adjournment, not least because the work done by Leading Counsel will have to be repeated and, when the trial comes back on for hearing, the cost will have to be incurred a second time. The Defendant referred to the fact that a brief fee becomes due when the brief is delivered, so that the Defendant was bound to pay the fee no matter what happened. The existence of this liability was not disputed by the Plaintiff.

8. The Plaintiff objected to allowance of the of the brief fee on the basis that the term "*costs thrown away*"[3] does not mean all costs incurred in the case to that date, only the costs of work that will necessarily have to be repeated or re-done[4]. The Plaintiff contended that the timeline between the instruction of counsel (in about mid-November 2022) and the date of the adjournment (about 4 weeks) meant that it was highly unlikely that Leading Counsel had done much work on the preparation for the trial. Therefore, it was said, not much work would have to be re-done.

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[2] This differs slightly from the conventional brief fee which is often based on a fee for trial preparation and the first day of the trial followed by daily refreshers. There is nothing wrong in making this arrangement, which may have been structured this way because the 5-day trial would have required Leading Counsel to be in Bermuda for the whole period in any event.

[3] RSC Order 62 rule 3 defines this as meaning *"Where proceedings or any part of them have been ineffective…the party in whose favour this order is made shall be entitled to his costs of those proceedings.."*

[4] **Fern Trading Ltd v Greater Lane Ltd** [2021] EWHC 1939 (Comm) at paragraph 28 per Hon Judge Pelling QC.

9. The absence of any clear evidence on this led the learned Registrar to assess an amount of USD20,000 as being the appropriate amount to allow for this item[5].

10. It is against the disallowance of about 90% of the claim for Leading Counsel's brief fee that the Defendant has sought a review of the Registrar's decision by the Court.

11. The Costs Order provided that the Plaintiff was to pay the costs thrown away on an indemnity basis, which means that the Plaintiff has the burden of showing that the costs claimed are either unreasonable or disproportionate in nature (i.e. they were unnecessarily or unreasonably incurred) and/or that the costs were unreasonable[6] in amount. Any doubt as to the reasonableness of the costs incurred is to be resolved in the receiving party's favour[7].

12. Mr Stevens contended that the Leading Counsel's brief fee was both unreasonably incurred and unreasonable in amount. The Court has examined these arguments separately.

Was it reasonable for the Defendant to instruct Leading Counsel?

13. Mr. Stevens sought to persuade the Court that it was not reasonable for the Defendant to instruct Leading Counsel in the circumstances because the case is not sufficiently complex to justify the engagement of Leading Counsel.

14. Ms Smith invited the Court to reject that submission entirely given that the Plaintiff had previously asserted that the case involved complex matters of commercial law justifying the engagement of Leading Counsel[8]. Nor had the Plaintiff informed the Defendant that a decision had been taken not to instruct Leading Counsel for the trial after all before the Defendant had instructed its own Leading Counsel.

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[5] Registrar's Taxation Ruling at paragraph 35.
[6] On the indemnity scale the costs only reasonable costs are allowable: see notes to 1999 Supreme Court Practice at page 1148.
[7] RSC Order 62 rule 12 (2).
[8] See ruling of Mussenden J regarding admission of Leading Counsel dated 26 April 2021at paragraph 5 *"Mr Stevens' evidence is that ...the substantive claim...[concerns] complex matters of law and contractual interpretation..."*

15. Ms Smith submitted that the Defendant's legal team had reasonably believed that the Plaintiff had already instructed an eminent Leading Counsel to appear at the trial and had agreed dates to accommodate Leading Counsel's availability[9]. She said that the Defendant decided in good faith that it was appropriate to instruct Leading Counsel as well. This was to ensure "equality of arms" at the trial[10]. This principle is one well recognised in this jurisdiction. It is a general rule of practice that the Bermuda Bar Council will (invariably) support applications for the admission of foreign counsel where the other side has already done so.

16. The Court agrees with Ms. Smith and holds that it was entirely reasonable for the Defendant to instruct Leading Counsel for the trial. To use a colloquial expression, it is a bit rich for Mr. Stevens to argue that Leading Counsel was not appropriate in light of the evidence that he had himself given on behalf of the Plaintiff to justify the admission of Leading Counsel for the Plaintiff at an earlier stage of the proceedings. Whether or not the Defendant could have relied upon local counsel, who are indeed highly experienced practitioners in international commercial litigation, is not relevant to the determination of the right of recovery of the costs associated with a client's natural wish to ensure that it had an equality of representation. In this respect, to borrow a phrase from another area of law, the Plaintiff must take its victim as it finds them.

17. It was also suggested by Mr. Stevens that the decision to instruct Leading Counsel is a matter for the client and should not weigh against the Plaintiff in assessing whether the costs of instructing Leading Counsel were *"thrown away"* because they were an expense that was significantly greater than the Defendant might have otherwise incurred, whilst still having its case presented proficiently[11]. Once it is accepted that it was not unreasonable for the Defendant to instruct its own Leading Counsel, much of the force of this submission is reduced, and falls to be evaluated under the second limb of the Plaintiff's argument that the amount of the brief fee was unreasonable in amount.

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[9] Email correspondence from the Plaintiff's attorneys dated 17 March 2022 *"I can confirm that [Leading Counsel] is available between 9 January and 24 March 2023…"*

[10] RSC Order 1A (2) (a) provides that the Court is to ensure that the parties (so far as possible) are on an equal footing.

[11] **Re Louis Dreyfus Co Suisse SA v St Petersburg Co** [2021] EWHC 1039 at paragraph 48 per Calver J.

18. Before turning to that question, it is necessary to give consideration as to how to approach the question of unreasonableness in this context.

The legal principles to be applied: old school or new?

19. Ms Smith submitted that the relevant test for the Court to apply is the test under the equivalent of the English Rules of Supreme Court Practice which were in force in 1999 (i.e. the model for the updated Costs regime under the Rules of the Supreme Court of Bermuda 1985 ("RSC")).

20. She submitted that these rules were less onerous than the later costs rules that were amended in the revision to the English Costs regime under the Civil Procedure Rules ("CPR") following the report by Jackson LJ in 2009 (the "Jackson Reforms"). It was submitted that it was not appropriate to interpret and apply the Bermuda Rules as if they included the English Practice Direction and the case law decided under the CPR which have no equivalent under the Bermuda RSC.

21. Ms. Smith placed reliance on the *dictum* of Kawaley CJ in ***Lightbourne v Thomas***[12] in which he accepted the submission of counsel that *"...English CPR authority was not directly relevant to Bermuda and our own pre-CPR Rules."*

22. However, it is right to note that Kawaley CJ also went on to say that RSC Order 1A imported the concepts of reasonableness and proportionality in the taxation of allowable costs and adopted the *dictum* of Woolf LJ (as he then was) in ***Home Office v Lownds***[13]in which he held that "*the requirement of proportionality now applies to decisions as to whether an order for costs should be made and to the assessment of the costs which should be paid when an order has been made."*[14]

23. It should also be noted that ***Home Office v Lownds*** was decided before the Jackson Reforms were introduced in 2009. Part of those reforms included a change to the test

[12] [2016] SC (Bda) 80 App (23 August 2016) at paragraph 9.
[13] [2002] EWCA Civ 365
[14] See also a statement to similar effect by Ground CJ in **Golar LNG v World Nordic SE** [2012] Bda LR 2 at paragraph 17 *"...but it seems to me that the principles are of fundamental and universal application."*

proposed by Woolf LJ in **Lownds** that the Court must first look at proportionality and then look at a line-item review of reasonableness. The reformed rules that were introduced in 2009 now direct the Court to look at the reasonableness of the line-item amounts first and then look at the proportionality of the totality of the costs in the round to avoid costs being allowed as reasonable in terms of amount, but which are not, in the wider context of the case, proportionate overall[15].

24. Strictly it can reasonably be said (as it was by Ms. Smith) that these principles do not apply here because Bermuda has not adopted the Jackson Reforms as to costs procedure and has not adopted a Practice Direction to require breakdowns of cost estimates and summaries of costs incurred[16]. But, on the same principles referred to by Kawaley CJ and Ground CJ before him[17], it would be unjust to apply an approach that would undermine the objectives of reasonableness and proportionality required by the Overriding Objective, and accordingly in my view the updated post-Jackson Reform approach is to be preferred[18].

25. This is consistent with the approach taken by the learned Registrar in ***St Johns Trust Company (Pvt) Ltd v Watlington and Others***[19]which the Court respectfully adopts and endorses in this case.

26. Therefore, the Court has decided to adopt the 'new school' approach to the assessment of costs, namely not to assume that because the brief fee was reasonably incurred that it must follow that it is a cost which can be recovered in full as a cost thrown away by the adjournment of the trial. It requires a more nuanced analysis.

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[15]**East Sussex Fire & Rescue v Austin** [2019] EWHC 1455 (QB) at paragraph 27 *"Under the current rules, necessity and reasonableness do not trump proportionality*" per Lambert J. See also *Friston on Costs* (3rd Ed 2018) paragraphs 25.47 to 90.

[16] This may be for future consideration by the Chief Justice.

[17] Namely that these principles are of '*fundamental and universal application'*.

[18] It appears that before the present costs rules were adopted, historically the Court of Appeal in Bermuda took the view that before allowing a Leading Counsel's brief fee to be taxed it was necessary to assess what work Leading Counsel had actually done: see **Royal Gazette Ltd v AG (No 2)** BM 1984 CA 20 and BM 1984 CA 15 per Sir Alastair Blair-Kerr P and Sir James Smith JA respectively. The relevance of this is not the old procedure itself, which required taxation against a scale, but the practice of the Court under the old rules, i.e. to review the actual work done by Leading Counsel and not just to rely upon the broad statement of work summarized in the brief fee Fee Note. The old taxation rules were replaced in 2005.

[19] [2023] SC (Bda) 62 Civ (2 August 2023) at paragraph 49 per Registrar Wheatley.

The Costs Order

27. The purpose of making an order for the costs thrown away is to compensate the other party for the costs that have been wasted as a result of a step taken or a change in position which has rendered the steps taken to date "ineffective". The costs order for costs thrown away can be made on a standard basis or on an indemnity basis. Although a costs order is compensatory and not punitive, the making of an order on an indemnity basis usually connotes a degree of disapproval by the court, often in relation to the manner in which a party has conducted the litigation[20].

28. In this case, the trial was a month away (and in reality much less, if the intervening holidays are taken into account) and the Plaintiff sought an adjournment of the trial in order to seek evidence from a third party said to be relevant to the determination of the issues in the case. The application was not as a result of a late disclosure of information from the Defendant.

29. The learned judge granted the application for the adjournment to reflect need to do justice, but it is very likely that he had in mind that it was an application that was made almost on the eve of the trial, and that applications to adjourn a trial fixture at the last minute are to be discouraged because of the disruption to the court process and the inconvenience to the other party and their witnesses and counsel, all of whom have been preparing for a trial since the directions for trial were given. The proceedings had by then been on foot for four years.

30. Therefore, the award of indemnity costs in this case is not surprising, and the intention behind the Order is to put the burden on the paying party to show that the expense claimed by the receiving party is unreasonable. This is a point to which the Court will return.

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[20] See Lord Woolf CJ **in Excelsior Commercial and Industrial Holdings Ltd v. Salisbury Hammer Aspden and Johnson (A Firm)** [2002] EWCA Civ 879 at paragraphs 19 and 30 approving a *dictum* of Simon Brown LJ in **Kiam v MGN Ltd No 2** [2002] 2 All ER 242: *"To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An indemnity costs order made under part 44 (unlike one made under part 36) does I think carry at least some stigma. It is of its nature penal rather than exhortatory…"* . See also *Friston on Costs* (3rd Ed 2018) paragraph 16.27.

31. In addition, the learned judge ordered that the costs were to be paid "*forthwith*". This means that the costs are to be paid immediately[21], without waiting for the usual point in the proceedings when costs are awarded and assessed—i.e. at the end of the trial. The making of an order for the payment of the costs forthwith usually also connotes a degree of disapproval by the court, such that the court considers at the very least that it would be unjust for the receiving party to have to wait until the end of the case to receive the costs thrown away.

32. Taken together, these terms point to the learned judge's dissatisfaction with the course the Plaintiff has taken in disrupting the trial schedule and the need for a prompt and proper payment of the costs of the Defendant. In my view it is right to see this as an indication that the learned judge considered that it would be unjust for the Plaintiff to deprive the Defendant of the costs associated with the adjournment of the trial any longer than absolutely necessary.

The modern approach to leading counsel's brief fees for taxation purposes

33. The starting point for the modern approach to the assessment of a brief fee is the 'hypothetical counsel' test[22]. This is a hypothetical counsel who is capable of conducting the case effectively but unable or unwilling to insist on the particularly high fee sometimes commanded by counsel of pre-eminent reputation. Then the court is to imagine what fee this hypothetical character would be content to take on the brief as objectively as possible. There is no precise standard or measurement. It depends on the experience and judgment of the person assessing the bill of costs.

34. In the assessment of the choice of leading counsel, the appropriate approach is to determine whether the party who is claiming the costs acted reasonably in instructing the particular counsel[23]. Whether the other side has instructed Leading Counsel is said to be a relevant but not determinative factor[24].

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[21] RSC Order 62 rule 8.
[22] **Simpsons Motor Sales (London) v Hendon Borough Council** [1965] 1 WLR 112,117 per Pennycuick J.
[23] **R v Dudley Magistrates Court, ex p Power City Stores Ltd** (1990) 154 JP 654 per Woolf LJ.
[24] **British Metal Corp Ltd v Ludlow Bros** [1938] Ch 987. The Court notes that some care may be needed with a case of this vintage. This is especially so in the context of applications to admit overseas counsel to appear in Bermuda for the reasons explained in paragraph 15 above.

35. In more recent cases, the courts have reduced the allowance of the brief fee on taxation when a case has settled shortly before trial, or where the trial has been adjourned. In ***Hankin v Barrington and Others***[25] a number of recent examples cited by the court provide some useful illustrations for the application of these principles. In ***Miller v Hales***[26] Jack J said there are two elements to consider: the work that will be done by counsel as the trial approaches (the main element) and the loss of other work by making the commitment to do the trial. In ***Bowcott v Wilding***[27] the case settled on day 3 of the trial and Hallet J allowed half the full brief fee, being the commitment element. In ***Lewis v Royal Shrewsbury Hospital***[28] Miting J awarded half the full fee when the case settled three weeks before the trial.

36. In **Hankin** itself the case settled about three weeks before trial. The learned costs judge took into account that the counsel instructed had not come into the case late and therefore did not need to work up the case from a standing start[29]. He reduced the brief fee by 50%[30].

37. In the **East Sussex Fire** case[31] the court upheld the master's reduction of the brief fee by 10% in a case which ran short by 7 court days.

38. In ***Various SAM Borrowers v BOS (Shared Appreciation Mortgages) No 1 PLC and Others***[32], Smith J reduced the costs budget estimate for the leading counsel's fees by 50%, regarding the time for preparation to have been inflated and the fees generated as being 'aspirational'[33].

[25] Unreported. 5 January 2022 Deputy Master Campbell sitting as a Costs Judge: Case No. SC-2021-BTP-001095.
[26] [2007] EWHC 1717 (QB) at paragraph 7.
[27] [2003] EWHC 9042 (Costs).
[28] Unreported 20 May 2005.
[29] At paragraph 28.
[30] At paragraph 34.
[31] Cited above at footnote 15.
[32] [2022] EWHC 2594 (Ch)
[33] At paragraph 67.

Applying the principles to the present case

39. As described above, the Court must start with an assessment of the line-item in dispute, namely the brief fee itself and consider whether that item was unreasonable or disproportionate.

40. The first point to note is that apart from criticising the Defendant for not explaining the work undertaken by Leading Counsel in more detail, Mr. Stevens says that it is unrealistic to think that the Leading Counsel had done much work in the four weeks or so after delivery of the brief and the adjournment, and asks the Court to infer that only a small amount of work was likely to have been done. This is unsatisfactory in terms of discharging the burden on him to show either (i) that the amount of the brief fee was unreasonable in amount, and (ii) that only a small proportion of the work had been undertaken by counsel representing USD 20,000 in value.

41. Leading Counsel was instructed at a late stage, only some 8 weeks before the trial. It may well be that the Defendant's legal team considered it prudent to defer the commitment to instructing Leading Counsel until it was absolutely necessary to do so.

42. Whatever the reason, it is in my judgment more likely than not that in the four weeks after being instructed, Leading Counsel will have had to do quite a lot of work to get the case up from a standing start (to use the expression in the **Hankin** case). It is not a case in which he had been involved from the beginning and was fully familiar with all the issues and evidential materials. It is not appropriate in my judgment (in the absence of anything more than supposition) to ask the Court to infer that only a small amount of work had been done by him in preparing the case: if anything, it is very likely to have been quite to the contrary.

43. It is important to recognise that in the cases cited involving the taxation of brief fees, the English courts did not try to make an assessment of the time spent by the respective barristers to justify the discount of the brief fee[34]. This may be because (as recognised

[34] See **East Sussex Fire** at paragraph 42: *"The Master acknowledged that brief fees are not calculated by reference to hourly rates..."*; **SAM Borrowers** at paragraphs 65-7; **Hankin** at paragraphs 30-33; **Miller v Hales**

in the commentary in *Friston on Costs*[35]) there is no precise standard of measurement, and that while time may be a relevant factor, it is not appropriate to determine a brief fee having regard solely to an hourly rate[36]. The Court agrees with that approach.

44. It is pertinent to note in this connection that RSC Order 62 Part II (Costs) Division I "Fees to counsel"[37] does not require a detailed breakdown of hourly costs to support the taxation of a brief fee, just a certified copy of the fee note[38]. This suggests that the Rules recognise the different basis on which counsel's brief fees are to be assessed, i.e. other than by reference to a time only basis. Whatever the historic practice in Bermuda may have been under the pre-2005 Costs regime, the Court is satisfied that it is no longer applicable, and that it is more appropriate to apply the case law derived from the current formulation of the revised rules. In particular, applying the principles in the cases noted (and until such time as a Practice Direction is issued stating otherwise), the Court does not require a full breakdown of the hours spent by Leading Counsel when the engagement is undertaken under a brief fee.

45. The second point of relevance is that whatever the Plaintiff now says, the Plaintiff's Bermuda legal team had taken the position that these proceedings involve complex commercial issues and had signalled the intention to instruct eminent Leading Counsel. For the reasons given already, this means that it was not unreasonable for the Defendant to do likewise.

46. In the context of a five-day trial, the Court's experience is that securing a commitment to take on a case in Bermuda at relatively short notice is likely to be reflected in the brief fee of even the imaginary hypothetical silk conjured by Pennycuick J.

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cited in **Hankin** at paragraphs 19 and 25; **Lewis v Royal Shrewsbury Hospital** cited in **Hankin** at paragraph 21; **Loveday v Renton** cited in **Hankin** at paragraph 22.

[35] 3rd Ed (2018) paragraphs 53.87 to 90.

[36] Citing **XYZ v Schering Health Care: Oral Contraceptive Litigation** [2004] EWHC 90026 (Costs) 31 March 2004 at paragraph 4 per Cooke J.

[37] RSC 1985 at page 220.

[38] Compare the old historic practice referred to above at footnote 18: this change in the rules appears to reflect an express departure from the old practice.

47. It therefore comes down to a practical assessment of whether the amount of the brief fee was excessive and disproportionate (i.e. unreasonable) in the circumstances of this particular case.

48. The Court takes into account that there is no obligation on the part of a party to engage counsel on a staged payment basis where there is no commitment beyond each stage. This was recognised in **Hankin**.[39] As noted earlier the Plaintiff must accept the situation as it is, not as it might have been in more ideal circumstances (from the Plaintiff's point of view). The Court also takes into account that counsel's clerk may have been unwilling to commit a leader on any other terms than a full brief fee when the engagement was accepted just over 8 weeks before the trial date.

49. In the Court's view, these are all risks that a party takes when deciding the strategic value of applying for an adjournment so close to the trial date. The burden is on the Plaintiff to show positively that the brief fee was unreasonable and disproportionate in amount when facing the sharp end of an indemnity costs award. In my view Mr. Stevens has failed to do so. It is not enough to suppose what work may or may not have been done. In the context of an indemnity costs award, the burden is reversed, and any doubts *must* be resolved in the receiving party's favour.

50. Although the full brief fee was for three payments, in the light of the adjournment, Leading Counsel has waived the third payment, on which he might have insisted as a matter of professional obligation. The Plaintiff was therefore relieved of that potential liability.

51. Some of the brief fee may represent the commitment aspect of the fee that is recognised as being a relevant 'background fact'[40]. In the Bermuda context, this aspect of the fee may take on greater prominence than in London where there are a much greater number of commercial silks potentially available at short notice. In Bermuda, it takes some time to get Leading Counsel admitted and it is not easy to make last minute changes.

[39] At paragraph 39.
[40] Per Hobhouse J in **Loveday v Renton:** for the reasons mentioned above, this may have more weight than a 'background fact' in the context of engaging overseas counsel in Bermuda.

52. Therefore, taking all these factors into account and the issues that have been described as complex commercial issues of contractual interpretation, on the face of it, the brief fee is within the range of what the Court might expect in a case of this kind, if a little on the high side for a five-day trial.

Proportionality

53. In an ordinary case applying the standard scale, having assessed the reasonableness of the claim for costs, the Court must take a step back and look at the proportionality of the fee in the context of the case as a whole. The sum in issue is potentially about UDS5 million[41].

54. It is not appropriate for the Court to assess the brief fee purely as a proportion of the overall (potential) value of the case, although it is a relevant metric to take into account. The Court must also take into account the importance of the case to the client, the complexity of the issues and the other surrounding factors, including public importance[42]. This case has been hard fought to date.

55. The Court's experience is that there is an irreducible base cost to instructing Leading Counsel for a case in Bermuda, partly due to the complexity of the issues in the case that are required to justify the admission of overseas counsel, as well as the time spent on travel and general disruption to Leading Counsel's diary.

56. As earlier noted, the brief fee overall is somewhat higher than the Court might expect a hypothetical silk to be prepared to take the case on for, but it is not out of the range of what experience in practice might suggest. In saying this the Court is not expressing any value judgment on the fee. In the round, the amount of the brief fee is not in my view so disproportionate as to justify its wholesale rejection.

[41] This was the figure put to Mussenden J by the Plaintiff's counsel (reflected in paragraph 21 of his ruling) in the application referred to in footnote 8 above.
[42] RSC Order 1A 1 (2) sets out the matters that go into the assessment of 'proportionality'.

Is proportionality to be disregarded when indemnity costs are awarded?

57. The standard texts and commentaries on costs indicate that where indemnity costs are awarded, overall proportionality is left out of account[43]. The source of this statement of general principle is to be found in the judgment of Lord Woolf MR *in* ***Petrotrade Inc v Texaco Ltd***[44] and the judgment of Simon Brown LJ in ***Victor Kermit Kiam II v MGN Ltd***[45]**.**

58. The principle was explained by Tomlinson J in the well-known case of **Three Rivers *District Council and Others v Bank of England***[46]. The relevant passage is worth setting out in full[47].

> *"The significance of costs being ordered to be paid on an indemnity as opposed to the standard basis is that, although the beneficiary of such an order will still only be paid costs which have been reasonably incurred,* ***there is no requirement of proportionality*** *and in cases of doubt on assessment it is for the payer to show that the costs were not reasonably incurred. Whilst an indemnity costs order does carry at least some stigma the purpose of such an order is not to punish the paying party but to give a more fair result for the party in whose favour a costs order is made."* (My emphasis added).

59. This weighty judicial statement of principle was made after the introduction of the Overriding Objective in England and is therefore consistent with the present position under the Bermuda RSC and the *dictum* of Kawaley CJ in ***Lightbourne v Thomas*** referred to above. The Jackson Reforms do not appear to have affected the position in England[48], and so it seems to me that, in principle, proportionality is not to be taken into account when assessing a costs award made on the indemnity scale in Bermuda.

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[43] See *Cook on Costs* (2019) at paragraph 24.25 and *Friston on Costs* (3rd Ed 2018) at paragraph 16.10.
[44] (Note) [2002] 1 WLR 947, 949.
[45] [2002] EWCA Civ 66 at paragraph 12 per Simon Brown LJ.
[46] [2006] All ER (D) 175
[47] At paragraph 14 of the judgment.
[48] i.e. as reflected in *Cook on Costs* and *Friston on Costs* in the extracts referred to above.

Conclusions

60. For the reasons explained above, the Court has found that it was entirely reasonable for the Defendant to have instructed Leading Counsel for the trial. The only question is how to approach the assessment of the award of costs thrown away on the indemnity scale.

61. The Court is satisfied that there is an important element of indemnity involved in compensating the receiving party for the costs that have been incurred, and which will either have to be incurred again or which have rendered moot or pointless. Although the reference to work that will have to be repeated is made in **Fern Trading**, in my view, this expression should not be taken too literally or out of its context.

62. It is a one-line reference which does not explain what work in that case would fall on either side of the line and did not refer to the liability to pay a brief fee. In the summary assessment of costs for the *adjournment application* (not the brief fee for the trial) the Court discounted counsel's fees by 33% (i.e. reduced it from £6000 to £4000). No guidance can be drawn from this decision for the approach to be taken in relation to the allowance of a brief fee generally.

63. In preparing for an adjourned trial, many aspects of the case will have to be refreshed and reviewed even if they have been covered in earlier work. Interviewing witnesses, reviewing documents, preparing cross-examination are all matters which require counsel to be immersed in the material and to have it at the top of his or her mind as the trial approaches. Obviously, some aspects of trial preparation may not need to be repeated, and these costs cannot be recovered twice. Duplicated costs might be the subject of a claim for a deduction on a later assessment of costs if the Defendant is successful at the trial. But it is not appropriate for the Court to prejudge that issue on this Review.

64. The Court has therefore approached the assessment of the brief fee in the light of those considerations.

First instalment

65. It seems to the Court that the fee was likely broken down into three segments to reflect the proportions of costs attributable to each stage of the work in the two months prior to the trial from a 'standing start'. In my view it seems highly probable that Leading Counsel will have undertaken a large amount of preparation in the month after receiving the brief and before the application for an adjournment of the trial was granted. Thus, I am satisfied that the first instalment of the brief fee is reasonable and proportionate. Therefore, in my judgment, this aspect of the brief fee is properly recoverable in full.

Second instalment

66. While Leading Counsel may not have spent any more time on the case after the order granting the adjournment was made, I consider that the commitment element of the brief fee should be recognised (as it is in the cases referred to above) by an allowance of a proportion of the second instalment.

67. Were it not for the statement of principle set out in **Three Rivers**, I would have decided that an allowance of the second instalment of approximately 50% would not have been unreasonable or disproportionate to recognise the commitment element, which follows the approach that was taken in several of the cases referred to in **Hankin**.

68. However, given the clear indication by distinguished members of the higher English judiciary that the Court is **not** required to apply a principle of proportionality in cases where indemnity costs are awarded, the Court feels obliged to allow the whole of the second instalment of the brief fee.

69. The Court has taken into account three elements in making this decision:

(i) this result is consistent with the principle of indemnity, namely that the actual expenses paid out by the receiving party should be reimbursed where an indemnity award is made (unless they have been unreasonably incurred);

(ii) the paying party ought to take the receiving party's situation as they find it: i.e. irrespective of whether a different arrangement as to fee structure could have been made; and

(iii) the removal of the requirement for proportionality reflects the element of judicial disapproval that underpinned the making of the indemnity award (or more neutrally, the unusual feature that justified it).

Third Instalment

70. The third instalment of the brief fee has been waived, and recovery has (obviously) not been claimed. Leading Counsel's reasonable approach in waiving this part of the brief fee is duly recognised by the Court. The Court expresses no view as to what conclusion the Court might have reached on this aspect of the brief fee had it not been waived, but it is worth noting that the benefit of the waiver inured to the Plaintiff, even if it was only the removal of the risk that the Court might have awarded more.

Departure from the Registrar's ruling

71. The Court acknowledges that this decision represents a rare departure from the approach taken by the learned Registrar, whose wide experience and practical knowledge of taxation of costs is highly respected.

Award and Order on Review

72. The Court therefore has decided to allow the sum of USD178,240.01 for the converted value of the first and second instalments of the brief fee claimed and directs that the Defendant's Revised Bill of Costs be amended to reflect this adjustment and to be allowed accordingly.

73. The Court has made a summary assessment of the costs allowable for the Review in favour of the Defendant in the amount of BD$2,825.00 representing 3 hours of preparation and 2 hours of hearing time at Ms Smith's hourly rate (on the indemnity basis).

74. Counsel is directed to prepare an Order in an agreed form reflecting this decision for entry on the Court Record and to file an amended Revised Bill of Costs with the amended allowance.

Dated this 4th day of March 2025

THE HON. JUSTICE MR. ANDREW MARTIN

PUISNE JUDGE