BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2006/0307

BETWEEN:

MICHAEL WILSON & PARTNERS, LIMITED

Claimant/Respondent

-and-

TEMUJIN INTERNATIONAL LIMITED
TEMUJIN SERVICES LIMITED
HAKKISAN FINANCE CORPORATION LIMITED
MYRZALY LIMITED
(5) NORGULF HOLDINGS LIMITED
(6) INCOMEBORTS LIMITED
(7) TIGERKHAN LIMITED

Defendants/Applicants

Appearances:

Mr Richard Evans and Mr Mark Forté of Conyers Dill & Pearman for the Seventh Defendant

Mr Christopher Young and Mr Andrew Thorp of Harney Westwood and Riegels for the Claimant

---

2007: September 14, 17, November 07
2008: June 20

CATCHWORDS

Costs – Costs to be assessed if not agreed – Basis of assessment – Costs on striking out – Relationship between CPR 65.11 and CPR 65.12 –Categorisation of procedural applications- Disapplication of cap under CPR 65.11(7) – Quantification of assessed costs – Form of bill required under CPR 65.12(4) – Treatment of fees incurred by foreign lawyers)

HEADNOTE:

On 29 March 2007, the Respondent obtained an ex parte receivership order against the Applicant. The Applicant engaged a firm of solicitors in London, who in turn briefed local BVI counsel. The Applicant subsequently applied to discharge the receivership order, and on 3 May 2007, an agreed order was made which relevantly provided in paragraphs 1 and 10:

1. The Receivership Order be set aside and the Receiver discharged with immediate effect.

10. The Claimant (Respondent) pay the 7th Defendant's (Applicant's) costs of the action, to be assessed if not agreed.

The parties were unable to agree the Applicant's costs. The Applicant therefore applied for its costs of $917,832.69 or such other sum that the Court shall determine. The claim for costs included the fees incurred by the London solicitors.

HELD:

(1) In determining the basis for assessment of costs, the Court must look at what was intended by the particular order. In the present case, paragraph 10 was intended to refer to assessed costs.

Norgulf Holdings Limited et al v Michael Wilson & Partners Limited [Civil Appeal No. 8 of 2007 (British Virgin Islands)] applied

(2) The general rule is that judgment without trial after striking out attracts assessed costs. CPR 26.5 (7) reads: "if the party wishing to obtain judgment is a defendant, judgment must be for assessed costs." In the present case, the action was struck out without a hearing.

(3) The applications were to strike out the claim or alternatively, reverse summary judgment against MWP and to set aside the receivership order. Pursuant to the agreed order, the action was brought to an end and the receiver discharged forthwith. The present application was not procedural and costs falls to be determined under CPR 65.12.

(4) Special circumstances exist to disapply the cap on allowable costs under CPR 65.11(7). It was not an ordinary run-of-the-mill case but a large, complex multi-jurisdictional commercial matter.

(5) Once the cap under CPR 65.11(7) is disapplied, the court has a discretion to determine the amount of costs to award. Such amount is not limited to the level of prescribed costs appropriate to the claim.

(6) A bill of costs submitted for assessment under CPR 65.12 (4) should have sufficient detail, and contain fee notes, such that the court is not required to speculate.

(7) The London solicitors, employed in the circumstances in they were employed in this case, must be treated, for the purposes of taxation, simply as foreign agent, and the charges incurred by these solicitors are charges properly taxable as disbursements in the ordinary course. However, the mere fact that the litigation has an international dimension and the parties instruct lawyers in other jurisdictions does not mean that all the work done by those foreign lawyers are properly disbursements on a solicitor's bill and recoverable as such in the proceedings in the BVI.

Finecroft Limited v Lamane Trading Corporation [BVIHCV2003/0072] and *McCullis v Butler* [1961] 2 W.L.R. 1011 considered

Agassi v Robinson [2006] 1 All ER 900 applied

(8) Following consideration of CPR 64.6(6) and CPR 65.2 (3), the Applicant's costs are assessed at $395,085.84.

JUDGMENT

[1] HARIPRASHAD-CHARLES J: Before the Court on 3 May 2007 were two applications by the Seventh Defendant ("Tigerkhan") namely (i) to discharge or set aside the Receivership Order made on 29 March 2007 and (ii) to strike out the Amended Claim Form and Re-Amended Statement of Claim in so far as it relates to Tigerkhan or alternatively, for summary judgment to be entered against the Claimant ("MWP").

[2] Both applications were disposed of on that day without a hearing as sound and matured judgment by two distinguished Queens' Counsel prevailed. After approximately 5 hours of dialogue, they were able to reach an agreed albeit not a consent order on all issues except that of costs ("the Order"). Basically, the Order brought to an end the action. It also set aside the receivership order and discharged the receiver with immediate effect. One would have assumed that the same judiciousness would have persisted in the application for costs. But, that was not the case as the parties discordantly fought for three days over the vexed issue of costs.

The procedural history

[3] The procedural history of this action needs narration. On 29 March 2007, MWP obtained an ex parte receivership order against Tigerkhan. In summary, MWP's claim is that Tigerkhan has:

i. dishonestly assisted Emmott in his breach of fiduciary and other duties, and/or in receiving and attempting to retain the proceeds of his breaches and is, therefore, liable as an accessory in equity (or knowing assistance);

ii. Further or alternatively, Tigerkhan has conspired with Emmott, Nicholls and Slater, Hakkisan, Myrzaly, Norgulf, Incomeborts and/or the Temujin Companies to injure MWP by unlawful means, by fabricating evidence with the object of concealing and attempting to render judgment proof assets of Emmott, Nicholls, Slater, Hakkisan,

Myrzaly, and/or the Temujin Companies or assets to which MWP might lay claim in equity.[1]

[4] MWP alleged that Tigerkhan received 6 million shares in Max on 5 August 2005, amounting to approximately 3.23% of Max's then issued share capital for a non-cash consideration. At paragraph 32 of the Re-amended Statement of Claim, MWP alleged that Tigerkhan has participated in the dishonest actions of its director, Mr Risbey, Myrzaly and Hakissan by allowing its name to have been entered on the forged records pleaded and purportedly entering into an agreement for the sale of the shares of Myrzaly (which Mr Risbey) has declined to produce to the Receiver) to a Mr Juric in Croatia who is an associate of Mr Risbey and is provided with e-mail facilities by him and has participated in giving the appearance of a director in Northern Cyprus having been appointed. Its actions are dishonest assistance in covering up and trying to render judgment proof the proceeds of breaches of fiduciary duty of Emmott, Nicholls and Slater and amount to entering into the conspiracy pleaded above.

[5] The gist of Tigerkhan's case is that the matters pleaded by MWP do not disclose any cause of action against it and therefore the whole claim should be struck out. As a consequence, Tigerkhan aggressively began to defend the claim brought against it. Between 11 April and 16 April 2007, it filed three applications. Stripped to their bare essentials, these applications sought a discharge of the receivership order and more significantly, to strike out the Amended Claim Form and the Re-Amended Statement of Claim.

[6] Between 13 April and 3 May 2007, the Court convened on no less than three occasions to hear the parties on varied matters. A plethora of correspondence passed between the lawyers during that period, foremost amongst them being a letter from Tigerkhan's lawyers dated 18 April 2007 to MWP's lawyers pointing out the deficiencies in MWP's pleaded case and inviting them to discontinue forthwith the claim. This did not come to pass until 3

[1] See paragraph 18(h) of Amended Statement of Claim., Tab 16 of Volume 1(Application Bundle) Hearing 3 May 2007.

AND UPON THE APPLICATION of the 7th Defendant by Notice of Application dated 16th April to strike out alternatively for summary judgment in respect of the Claimant's claims against the 7th Defendant

AND UPON HEARING Mr. Lawrence Cohen QC, together with Mr James Drake, Mr Phillip Kite and Mr Andrew Thorp on behalf of the Claimant and Mr Joe Smouha QC, together with Mr David Lord, Mr Mark Forté and Mr Richard Evans on behalf of the Seventh Defendant

IT IS HEREBY ORDERED THAT:

1. The Receivership Order be set aside and the Receiver discharged with immediate effect.

2. The Claimant to pay the remuneration and expenses of the Receiver to be paid within 30 days of rendering of his bill of costs, or within such other period of time as subsequently agreed between the Receiver and the Claimant. Liberty to apply.

3. The Receiver to deliver up to the 7th Defendant all his files relating to the Receivership including without prejudice to the generality of this order all documents generated in the Receivership and all communications to and from the Receiver save that:

    a. The Receiver is at liberty to retain copies of such records if and insofar as he is obliged to do so by law or regulation or internal policy;

    b. The Receiver is not obliged to deliver up his notes, calculations and working papers prepared by him not pursuant to any duty to prepare them but better to enable him throughout to discharge his professional duties.

4. The three Reports of the Receiver dated 12th April, 19th April and 2nd May 2007 and any related documentation submitted to the Court shall be sealed in the Court record.

5. Subject to paragraphs 7 and 8, the Claimant's claims against the 7th Defendant shall be struck out in their entirety.

6. The Claimant shall serve on all remaining defendants a Re-Re-Amended Statement of Claim.

7. The striking out of the claim against the 7th Defendant is without prejudice to the 7th Defendant's entitlement to costs as set out in this order, the further enforcement of the provisions of this order and any claim that the Seventh Defendant may make pursuant to the cross-undertaking included in the Receivership Order by para. 1 of the Order of the Court made on 13th April 2007.

8. The Claimant has liberty to join afresh the 7th Defendant to the action on condition that:

   a. A Re-Amended Claim Form filed and an information copy provided to Conyers Dill & Pearman together with the proposed draft Re-Re-Re Amended Statement of Claim by 31st May 2007;

   b. If the Claimant fails to comply with the order made in paragraph 11 below, the proceedings shall be stayed without the need for further order.

9. In the event that the Claimant files and serves a Re-Amended Claim form, it shall not affect the liability of the Claimant to pay the costs of the action against the 7th Defendant to date as provided for in paragraph 10 below.

10. The Claimant to pay the 7th Defendant's costs of the action, to be assessed if not agreed.

11. The Claimant to make an interim payment to the 7th Defendant on account of its costs of the action in the amount of $250,000 by 30 May 2007.

12. For the avoidance of doubt the Claimant is prohibited from using documents or information obtained by it from the Receiver in these proceedings, in any other proceedings or otherwise.

[7] The action was short-lived. However, during its brief existence of 35 days, it moved at a rate of knots.

The application for costs

[8] The present application for assessment of costs has its genesis in the above Order. Paragraph 10 of the Order states *"the Claimant to pay the 7th Defendant's costs of the action, to be assessed if not agreed."*

[9] As a result of this Order, Tigerkhan approached the Court seeking an order that the costs liability be assessed in the sum of $917,832.69 or such other sum that the Court shall

[2]. In passing, it is to be observed that Tigerkhan had made an open offer to accept 75% of the sum claimed. In effect, it was prepared to accept $688,374.[3] MWP did not accept the open offer. It says that the sum claimed is staggering and does not represent reasonable and fair costs. In short, MWP challenged the amount as well as the method by which such costs are to be quantified.

"Prescribed costs" or "assessed costs"

[10] A generous amount of time was engaged in representations on the meaning of paragraph 10 of the Order and more specifically, the words "costs of the action to be assessed." Learned Counsel for MWP, Mr Young submitted that the Order provides for "*the Claimant to pay Tigerkhan's costs of the action to be assessed if not agreed*" and therefore, costs should be "prescribed costs to be assessed" and not "assessed costs." He referred to CPR 65.5 (1) which provides that:

> "The general rule is that where rule 65.4 does not apply and a party is entitled to the costs of any proceedings, these costs must be determined in accordance with Appendices B and C to this Part and paragraphs (2) to (4) of this rule."

[11] Mr Young submitted that CPR 65.4 (fixed costs) does not apply to this case. Therefore, the general rule is that the costs of the action are to be assessed by reference to the prescribed costs provisions. He cited the Court of Appeal decision in Sims v Audubon Holdings Limited and another [4] and noted that no reasons were advanced at the hearing on 3 May 2007 and none had been advanced subsequently as to why the assessment should not be by reference to prescribed costs in the light of CPR 65.5(1) and the decision in Audubon. He submitted that there is no material distinction between this case and Audubon. Counsel attractively argued that there is no reason why the successful claimants in Audubon should have their costs of the action determined by reference to

[2] See 5/105-112.
[3] An interim payment of $250,000 was already received thus leaving a net balance due of $438,374.
[4] (Civil Appeal Nos. 14 and 15 of 2006).

prescribed costs but Tigerkhan should have its costs of the action assessed on a different basis.

[12] Mr Young argued that the amount to be paid by MWP to Tigerkhan falls to be assessed by reference to CPR 65.5(2)(b) which when calculated amounts to $216,500. The proceedings have not yet reached the stage of a defence and therefore 45% is to be allowed pursuant to Appendix B to CPR 65. Learned Counsel relied heavily on a recent judgment of the Court of Appeal in Norgulf Holdings Limited et al v Michael Wilson & Partners Limited[5]. In that case, Barrow JA (delivering the judgment of the Court) held that "*an award of costs to be assessed did not necessarily mean that costs were to be assessed pursuant to CPR 65.11, which provided for an award of discretionary costs on the hearing of applications, whether procedural or other than procedural. In conducting an assessment of costs the court or judicial officer carrying out the assessment is to be guided by rule 65.3 which identifies the bases for assessment and how to determine which basis to apply."* Barrow JA intimated that perhaps, it would have been better to use the neutral word "quantified" rather than "assessed."

[13] Mr Evans who appeared as Counsel for Tigerkhan submitted that the Order was carefully drafted by experienced lawyers and it was more or less a consent order. He argued that at no time during submissions on costs was it stated that the words "assessed costs" were intended to mean "prescribed costs to be assessed." He added that it is disingenuous for MWP to carry out a *volte-face* when they themselves have agreed to the Order. Furthermore, on 16 July 2007, MWP filed submissions in four costs applications against the First, Second, Third and Fourth Defendants seeking an order that its costs be assessed if not agreed. In those applications, MWP's lawyers submitted that the starting point for assessment of costs is CPR 65.11 (1). They also argued that there are a number of special circumstances which justify a lifting of the cap.

[5] Civil Appeal No. 8 of 2007 (British Virgin Islands) –Judgment delivered on 20 October 2007. [unreported].

[14] Mr Evans submitted that, on that basis alone, MWP should not have challenged the Order. He submitted that paragraph 10 is plain and it means exactly what it says. Therefore, the Court should proceed to assess costs of the action under CPR 65.12 in that they are assessed costs not referable to "procedural" applications.

[15] Learned Counsel submitted that the case of Norgulf sheds little light on the present application for costs. He agreed that the word "assessed" does not necessarily means that assessed costs under CPR 65.11 and 65.12 apply. He submitted that it is important to bear in mind that the Order in this case was a consent order unlike the Order in Norgulf. In any event, he argued that this Court had already determined on 14 September 2007 that "assessed costs" in the Order meant "costs to be assessed". This is correct. [6]

[16] The general rule is that judgment without trial after striking out attracts assessed costs. CPR 26.5 (7) reads: "if the party wishing to obtain judgment is a defendant, judgment must be for assessed costs." On 3 May 2007, the main application before the Court was to strike out. The action was struck out without a hearing. So, we are therefore concerned with the costs incurred by Tigerkhan from 29 March 2007 to 3 May 2007 when the action was struck out.

[17] Tigerkhan claimed an amount of $917,832.69 which is indeed staggering. So also, are the submissions of Mr Young that "assessed costs" in the Order meant "prescribed costs to be assessed." I appreciate that lawyers as well as judges sometimes use the term "assessed costs" loosely but I do not think that this was the case here. The Order of 3 May 2007 was meticulously crafted by two illustrious Queens' Counsel and a barrage of senior as well as junior lawyers. I do believe that they meant everything that was put in the Order. I am fortified in my judgment that "assessed costs" must mean costs to be assessed or quantified in accordance with the assessed costs rules by virtue of CPR 26.5(7). I therefore find that the submission advanced by Mr Young, though appealing, lacked merit and must fail.

[6] See page 60 of the draft partial transcript of proceedings on 14 September 2007.

Assessed Costs - Aftermath of Norgulf

[18] On 14 September 2007, the Court determined that "assessed costs" in the Order meant "costs to be assessed." At that time, the Court did not decide the issue of whether costs fell to be assessed under CPR 65.11 or 65.12. Against that background, the Court proceeded to examine the Schedule of Costs which was presented. At the end of the hearing, judgment was reserved. On 31 October 2007 and whilst the judgment was still pending, MWP's lawyers wrote to the Registrar seeking to adduce fresh evidence by bringing to the attention of the Court the judgment in Norgulf. As a result, the parties re-appeared before me on 7 November 2007 and made submissions on that judgment. Once again, judgment was reserved. The Court regrets the inordinate delay in the delivery of the judgment but had hoped that the parties might have reached a settlement during all those months.

[19] The Court of Appeal judgment in Norgulf needs to be examined meticulously because it bears some similarity with the present application. The judgment is however distinguishable from the present application in two material respects namely (i) it concerns costs in the Court of Appeal and (ii) there was no formal application for the assessment of costs. Despite that, judgments of the Court of Appeal on costs in commercial matters are always enlightening to lawyers as well as judges as we continue to grapple with the applicable costs regime to be applied in large, complex, multi-jurisdictional commercial matters. Some critics feel that the present costs rules are grossly inadequate for the British Virgin Islands and that large, complex commercial matters were not sufficiently considered when the Rules were drafted. Others consider the costs regime particularly prescribed costs, a windfall. For my part, there appears to be one or two difficulties with the Rules, for example, when is an application considered "procedural" to fall under CPR 65.11 vis-à-vis general applications under CPR 65.12?[7] This is so because CPR 2000 did not specifically define "procedural" applications. In fact, the present application accentuates the conundrum. Mr Evans is of the view that CPR 65.12 applies. Mr Young opines that CPR 65.11 is applicable. In IPOC International Growth Fund Limited v LV Finance Group

[7] See Master Mathurin in Claim No. BVIHCV2003/0140 and Civil Appeal No. 20 of 2003 and No. 1 of 2004- IPOC International Growth Fund Limited v LV Finance Group Limited et al- Judgment delivered on 1 December 2006[unreported]

Limited [supra], Master Mathurin, faced with similar challenges, helpfully outlined a distinguishing feature between these two rules when she stated that:

> "The distinguishing factor between the two Parts for the purpose of these proceedings quite frankly being, the ten percent of appropriate prescribed costs cap that procedural applications attract in the absence of special circumstances as opposed to an assessment based upon a bill of costs presented to the Court."

[20] Back to Norgulf. Not only is the judgment incisive; it is also opportune as it addresses some of the very challenges which this Court faces with the present application. Barrow JA comprehensively analysed assessment of costs pursuant to CPR 65.11 and CPR 65.12.[8] He explained the difference between "procedural" applications in CPR 65.11 and "general" applications in CPR 65.12. In short, the concerns raised in the past about some of the shortcomings of the Rules ought now to be dispelled.

[21] On the authority of Norgulf, the Court must determine, when looking at the particular order, what was intended. This issue was argued at length before me and I had ruled that "assessed costs" in paragraph 10 was intended to refer to assessed costs (as a term of art) and not prescribed costs. It is therefore proper that I examine both CPR 65.11 and 65.12 because these rules lie at the heart of this dispute.

CPR 65.11 –procedural applications

[22] CPR 65.11 deals with assessment of costs on procedural applications. A good starting point is to set out the section in full.

> "65.11 (1) On determining <u>any application</u> except at a case management conference, pre-trial review or the trial, the court must-
>
> (a) decide which party, if any, should pay the costs of that application;
>
> (b) assess the amount of such costs; and
>
> (c) direct when such costs are to be paid.

[8] See paragraphs 5 -18 of the Judgment.

(2) In deciding which party, if any, should pay the costs of the application the general rule is that the unsuccessful party must pay the costs of the successful party.

(3) The court must take into account all the circumstances including the factors set out in rule 64.6(6) but where the application is –

(a) an application to amend a statement of case;

(b) an application to extend the time specified for doing an act under these Rules or an order or direction of the court;

(c) an application for relief under rule 26.8 (relief from sanctions); or

(d) one that could reasonably have been made at a case management conference or pre-trial review;

The court must order the applicant to pay the costs of the respondent unless there are special circumstances;

(4) In assessing the amount of costs to be paid by any party the court must take into account any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing and must allow such sum as it considers fair and reasonable.

(5) A party seeking assessed costs must supply to the court and to all other parties a brief statement showing –

(a) any counsel's fees incurred;

(b) how that party's legal representative's costs are calculated; and

(c) the disbursements incurred.

(6) The statement under paragraph (5) must comply with any relevant practice direction.

(7) The costs allowed under this rule may not exceed one tenth of the amount of the prescribed costs appropriate to the claim unless the court considers that there are special circumstances of the case justifying a higher amount."

[23] The critical sections of CPR 65.11 are those highlighted. Barrow JA in Norgulf admonished us that we must not be misled by its heading in that the rule plainly applies to

more than just procedural applications. At paragraph 11 of the judgment, his Lordship explicated:

> "The rule applies to all applications except for two categories of applications. One category consists of those applications that are made at a case management conference, pre-trial review and trial. There are specific rules that apply to such applications[9] and hence they are excluded. The other category of applications to which rule 65.11 does not apply consists of the specific applications listed – to amend, to extend time and to obtain relief from sanctions – and applications that could have been made at case management or pre-trial review (and which would therefore have fallen into the first category). Rule 65.11 does not apply to the second category of applications because of the need to exclude such applications from the general rule that costs are awarded to the party who succeeds on his application."

[24] His Lordship continued (at para 12):

> "The object of rule 65.11 is to establish a norm that the court hearing an application "must" decide the issues of costs, including who is to pay, how much and when. Notably, it makes the amount of costs to be awarded a matter for the discretion of the court. Rule 65.11 states the principles by which the court must guide itself in exercising that discretion and assessing costs. The rule specifies the documentation that the party seeking costs must provide. And, finally, it caps the amount of costs that normally may be awarded on the determination of an application."

[25] Paragraph 7 places a cap on the costs allowed under this rule of one tenth of the amount of the prescribed costs appropriate to the claim unless the court considers that there are special circumstances of the case justifying a higher amount.

CPR 65.12 – general

[26] CPR 65.12 provides:

> "(1) This rule applies where costs fall to be assessed in relation to any matter or proceedings, or part of a matter or proceedings, other than a procedural application.
>
> (2) If the assessment relates to part of court proceedings it must be carried out by the judge, master or registrar hearing the proceedings [emphasis added].

[9] CPR 25, 26, 27, 38 and 39.

(3) If the assessment does not fall to be carried out at the hearing of any proceedings then the person entitled to the costs must apply to a master or the registrar for directions as to how the assessment is to be carried out.

(4) The application must be accompanied by a bill or other document showing the sum in which the court is being asked to assess the costs and how such sum was calculated [emphasis added].

(5) On hearing any such application the master or registrar must either –

(a) assess the costs if there is sufficient material available for him to do so; or

(b) fix a date time and place for the assessment to take place.

(6) The master or registrar may direct that the party against whom the bill is assessed pay the costs of the party whose bill is being assessed and, if so, must assess such costs and add them to the costs ordered to be paid."

[27] In Norgulf, Barrow JA expounded (at para 14):

> "Rule 65.12 complements and overlaps rule 65.11 but it is much broader in scope. Rule 65.12 applies to all assessments of costs, not just costs of an application. The rule opens by stating in paragraph (1) that this rule applies where costs fall to be assessed in relation to any matter or proceedings, or part thereof, other than a procedural application. These two words "matter" and "proceedings," both terms of art, together extend the rule to virtually every proceeding that could come before the court….The effect of paragraph (1) in stating that this rule applies to any matter or proceedings or part thereof, is to apply this rule to proceedings generally, not just applications. But the rule does cover applications generally, which are necessarily parts of proceedings, save for procedural applications, which are specifically excepted. Put another way, by excluding only procedural applications this rule includes all other applications."

The applicable rule: CPR 65.11 or CPR 65.12

[28] The main application before me on 3 May 2007 was to strike out the Amended Claim Form and Re-Amended Statement of Claim or alternatively, for summary judgment to be entered against MWP. The application to set aside or discharge the receivership was an ancillary application. If the Court struck out the main application, the receivership order would consequentially be discharged as there would be no claim. The receivership could not

[10]. On 3 May, 2007, there was an agreed Order which set aside the receivership order, discharged the Receiver with immediate effect and struck out the claim against Tigerkhan in its entirety.

[29] Mr Young submitted that if costs were to be assessed, the applicable rule would be CPR 65.11 and not CPR 65.12. He next submitted that in assessing costs under this rule, the amount that the Court could award as costs was capped by CPR 65.11(7) at ten percent of the sum that could be awarded as prescribed costs unless special circumstances are shown. He argued that even if special circumstances are shown, the court cannot exceed 100 per cent. In other words, prescribed costs of the action based on a value of $30 million, in accordance with Appendix B to CPR 65 is $216,500. One tenth of that amount is $21,650 and 100% (if the Court allows the maximum) is $216,500 which is the maximum allowable costs.

.

[30] Mr Evans argued that the contention by MWP that if special circumstances are held to apply, the costs awarded would be between 10% and 100% of the prescribed costs appropriate to the claim is wrong. He says that that contention finds no support in CPR 65.11 or in Norgulf. I do agree with Mr Evans. CPR 65.11 (7) empowers the Court to award a higher amount than the normal cap of one tenth of the amount of the prescribed costs appropriate to the claim if there are special circumstances justifying exceeding the cap. CPR 65.11 confers a discretion on the court to determine the amount of costs to award on hearing an application so I see no reason why a successful party cannot be awarded costs of 200% of the prescribed costs appropriate to the claim if the Court determines that that is fair and reasonable in the circumstances.

[31] Be that as it may, Mr Evans insisted that in the present application, costs fall to be assessed under CPR 65.12 - general, in that they are assessed costs not referable to "procedural" applications.

---

[10] Lord Diplock in **Siskina (Cargo Owners) v Distos Compania Naviera S.A. ("the Siskina")**[10] stated: "It is a well-established principle that the right to obtain interlocutory relief is merely ancillary and incidental to a pre-existing cause of action."

[32] Mr Evans next submitted that the use of the term "purely procedural" is an invention on the part of MWP and it finds no support in the judgment in **Norgulf**. He argued that Barrow JA in fact stated that CPR 65.12 is "almost purely procedural. He submitted, with respect, that what the learned Justice of Appeal did not consider in **Norgulf**, is the precise relationship between CPR 65.12 (1) and CPR 65.11 and in particular the words: "*This rule applies where costs fall to be assessed in relation to any matter or proceedings, or part of a matter or proceedings, other than a procedural application."* What is intended by the words "other than a procedural application?", he quizzically inquired: are they intended to stand in contradistinction to the procedural costs regime? If, as MWP suggested, that the provision is purely procedural, what is the relationship to the procedural parts of CPR 65.11(5) which mandates the requirement to provide a schedule? He submitted that arguably, this is what led Barrow JA to rule expressly that CPR 65.12 is almost purely procedural in that it has some form of substantive content.

[33] Learned Counsel argued that even if MWP is correct that CPR 65.12 has no substantive application to this case, then the application of CPR 65.11 does not prevent, in any way, the result contended for by Tigerkhan. He submitted that, in any event, the Court has the power to disapply the cap under CPR 65.11 (7) and this is an overwhelmingly clear case for such a disapplication.

[34] In my view, there is a very fine distinction between CPR 65.11 and CPR 65.12. While they overlap and complement each other, it is still difficult to determine the precise relationship between the two because of CPR 65.12 (1) which provides that "*This rule applies where costs fall to be assessed in relation to any matter or proceedings, or part of a matter or proceedings, other than a procedural application."*

[35] It is difficult to consider the two applications before me on 3 May 2007 as "procedural" despite the fact that CPR 65.11 applies to all applications except for two categories of application namely (i) those applications that are made at case management conference, pre-trial review and trial and (ii) specific applications listed – to amend, to extend time and to obtain relief from sanctions. The applications were to strike out the claim or alternatively,

reversed summary judgment against MWP and to set aside the receivership order. Pursuant to the Agreed Order, the action was brought to an end and the Receiver discharged forthwith. Applying the principles enunciated in Norgulf, I am of the considered opinion that the present application to assess costs falls to be determined under CPR 65.12 and I so find.

[36] If I am wrong to come to this finding that CPR 65.12 applies, then the alternative position is to assess costs under CPR 65.11. Pursuant to CPR 65.11 (7), costs allowed under this rule will be limited to one tenth of the amount of prescribed costs unless the Court considers that there are special circumstances to the case justifying a higher amount. In the case of Michael Wilson & Partners Limited v (1) Temujin International Limited et al[11], this Court has to consider a similar application by MWP for costs to be assessed against four Defendants namely Temujin International Limited, Temujin Services Limited, Hakkisan Finance Corporation Limited and Myrzaly Limited. MWP contended that *"there are a number of special circumstances in this case, which, even on their own can justify special circumstances."* [12]

[37] In my opinion, this is an appropriate case to disapply the cap under CPR 65.11 (7). It is not an ordinary run-of-the-mill case but a large, complex multi-jurisdictional commercial matter. The conduct of MWP must also be considered as MWP itself listed "*conduct of the defendants"* as one of the factors to be taken into account. In its supplemental submission listed for limited hearing on 7 November 2007, Tigerkhan alleged that the court should approach matters, including issues as to costs consistently. Mr Evans submitted that when MWP sought, and obtained, an order for costs against Hakkisan on 26 October 2007, the Court expressly remarked that what applied in connection with MWP's application for costs, must be applied against it in respect of the present application. He submitted that whilst MWP has no compunction about acting inconsistently (it invited the Court on 26 October 2007 to order an interim payment on account of costs, whilst, we see from Norgulf having vigorously argued that there is no jurisdiction to make such an order), the

[11] BVIHCV2006/0307 –High Court of Justice, British Virgin Islands.
[12] See paragraph 9 et seq of written submissions filed on 16 July 2007 at 3.05 p.m.

Court ought to lend no support whatsoever to such an approach. I totally agree with this submission and I am impelled to say that at the hearings in September 2007, MWP should have properly conceded that the term "assessed costs" in the Order meant exactly what it said.

[38] Having said that, the end result is that the Court has the power to disapply the cap in cases where special circumstances exist and will do so in this case. As I opined in paragraph 30 [supra], I see no reason why a successful party cannot be awarded costs of 50%, 75%, 200% or 300% of the prescribed costs appropriate to the claim. I do not think that the cap limits the costs award to a sum between 10% and 100% of the prescribed costs. After all, costs are discretionary and have to be fair and reasonable in all the circumstances of the case.

Matters to be considered

[39] Ultimately, the Court must allow such sum that is reasonable taking into consideration the matters set out in CPR 64.6(6) and CPR 65.2 (3). The latter sets out the non-exclusive list of factors that the court is required to take into account in assessing costs namely:

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; and

h) …."

[40] In this regard, Tigerkhan relied upon the First and Second Affidavits of Mr Jayson Wood dated 1 May and 1 June 2007 respectively. MWP has not served any evidence in

opposition to Tigerkhan's evidence so the evidence in relation to the conduct of MWP and its effect on the costs of the litigation is not disputed. However, MWP made submissions on what it considers to be unreasonable costs.

Application of CPR 65.2 (3) to the present case

(i) Care, speed and economy with which the case was prepared

[41] It is true to say that the legal team representing Tigerkhan set to work from the moment they were retained. This can be gleaned from the torrent of correspondence sent to MWP's legal practitioners.[13] It appears that the bulk of these letters concerned the issue of the availability of the transcript of the ex parte hearing[14] and an invitation to discontinue the claims against Tigerkhan[15]. There was also email correspondence between the parties dealing with a convenient date for the hearing of the two applications which were before me on 3 May 2008. In the correspondence, Tigerkhan alleged non-cooperation by MWP but the only issue which appeared to have taken a long time to resolve was the transcript of the ex parte hearing (to which MWP had little control as it is prepared by the Court Reporting Department). But, I must confess that the success of Tigerkhan's preparation and manner of conducting the litigation was exemplary – MWP gave in on the date of the hearing. Perhaps, it should have done so earlier to save costs particularly when it was confronted with hard facts that the claim against Tigerkhan was so fatally flawed and tenuous that it ought to be disposed of as soon as possible[16]. MWP resisted this course of action.

(ii) Conduct of the parties

[42] Mr Evans submitted that the affidavits of Mr Wood speak volumes as to the manner in which MWP conducted this litigation and that the Court should not countenance such attitude given the overriding objective of CPR 2000. Having said that, he submitted that he is not relying upon the conduct of MWP by way of an invitation to make a punitive award but that the conduct complained of led directly to an increase in the costs that Tigerkhan

[13] See Exhibit "JNW1" referred to in the affidavit of Jayson Nathan Wood filed on 1 May 2007.
[14] See letters from Conyers Dill & Pearman dated 11 April 2007, 13 April 2007, 20 April 2007, 25 April 2007, 26 April 2007 and 27 April 2007.
[15] See letter from Conyers Dill & Pearman dated 18 April 2007.
[16] See letter at footnote 15.

was forced to incur in order to protect its interest and to rid itself of a draconian order which was wrongly obtained as well as a wholly unmeritorious claim.

[43] It is perfectly permissible to require a party to compensate an opposing party to the extent that its conduct has increased costs but the Court must be guarded in doing so. I believe that when Conyers Dill & Pearman ("CDP") wrote the copious letter on 18 April 2007, MWP should have become aware of the fragile nature of the claim against Tigerkhan and apply to discontinue it. Having prolonged litigation until 3 May 2007 when it acknowledged at the door of the Court that its claim was fatally misconceived, no doubt, exacerbated costs.

[44] Tigerkhan complained of a plethora of other circumstances which they say amount to unreasonable conduct on the part of MWP namely:

1. The failure of MWP to provide the transcript of the ex parte hearing.

2. Very serious material non-disclosures at the ex parte hearing. [17]

3. Failure to reply to the letter of 18 April 2007 in a timely fashion, or at all and it was only at the door of the court that MWP acknowledged that the claim was fatally flawed. Undoubtedly, this has resulted in costs consequences.

4. A marked failure to reply to reasonable requests and queries raised in correspondence.

5. Failure ever properly to engage with the issues between the parties, including full and frank disclosure and the weaknesses of the claim against Tigerkhan, contrary to the requirements to CPR 1.3 – the duty to assist the court in furthering its overriding objective.

[17] See paragraphs 34 – 46 of skeleton argument on behalf of Tigerkhan Limited.

6. The catalogue of failures that were summarised in CDP's letter to Harneys of 27 April 2007.

7. Extremely late service of evidence in reply by MWP which led to costs being wasted (e.g. the preparation of a further skeleton argument).

(iii) The importance of the matter to the parties

[45] Mr Evans contended that MWP obtained, ex parte, against Tigerkhan, a receivership order. He submitted that it cannot be denied that such an order is the most draconian order that a court can make particularly when a receiver is appointed ex parte, denying the other party the right to put its case before the Court.

[46] Learned Counsel further submitted that the effect of the receivership order was to remove Mr David Rigoll, control of the company which he owned and it directly affected his ability to trade in the Max shares held by Tigerkhan. Such was the importance of the matter that Mr Rigoll flew in to attend the hearing on 3 May 2007.

[47] Unquestionably, the appointment of a receiver is still often regarded as a remedy of last resort, in particular where a ***trading company*** (emphasis added) is involved and where the capacity to damage is great.[18] Such a company that is subject to such a "nuclear-attack", as Mr Evans puts it, is entitled and expected to marshal significant resources in order to restore its control. According to him, Tigerkhan did just that.

(iv) Complexity of the matter

[48] The applications that were before the Court on 3 May 2007 were not ordinary run-of-the-mill applications. In short, they were complex applications. MWP conceded that a "silk" was necessary for these applications. In fact, both sides flew in leading London-based Queens' Counsel from reputable commercial chambers in London for the hearing of this application which was scheduled to last for at least 8 hours. Comprehensive written submissions were prepared in advance of the hearing together with 2 arch-level bundles of

[18] NAB v Bond Brewing Holdings [1991] 1 VB 836 at 840.

documents and exhibits. It came as no surprise that the parties took 5 hours to draw up the final agreed order. In addition, arguments on interim costs took nearly one hour.

(v) Time reasonably spent on the case

[49] This is reflected in the Schedule of Costs which appears below.

The Schedule of Costs claimed by Tigerkhan

[50] Tigerkhan provided a Schedule of Costs. It comprises of two main categories namely (i) costs incurred by its legal practitioner, CDP, in an amount of $122,295 and disbursements and other related charges totaling $13,712.57 and (ii) costs of English solicitors and Counsel, Blake Lapthorn Tarlo Lyons ("BLTL") claimed as disbursements, in a total amount of $781,825.12 making a global amount of $917,832.69. MWP vehemently challenged this amount. MWP is not even prepared to pay ¾ of this amount. Since the parties have not agreed on costs, it falls upon the Court to do an assessment. From the outset, I state that this Court is familiar with the matter, having made the ex parte application to appoint receiver on 29 March 2007 and having dealt with all subsequent applications including the application to strike out the action. It follows therefore that CPR 65.12(2) has been complied with since the assessment must be carried out by the judge who heard the proceedings.

[51] MWP has filed comprehensive Points of Reply to Tigerkhan's costs. Mr Young submitted that the format of the Schedule of Costs which was submitted by Tigerkhan does not provide a proper breakdown with respect to how much time was spent by whom and what tasks. It is regrettable that MWP did not raise this concern before because under cover of a letter dated 18 May 2007, CDP served on Harneys the Schedule of Costs. No reply was received to that letter. The letter invited agreement to the contents of the Schedule and Proposals for payment. On 31 May 2007, CDP wrote again. No reply was received.

[52] Learned Counsel submitted further, that the Schedule of Costs seems to include work carried out in the Hakkisan and Myrzaly matters which are not recoverable in these proceedings. In addition, no fee notes have been produced showing what was incurred in

relation to the other matters and specifically, to Tigerkhan. Mr Evans is of the opinion that CPR 65.12 does not mandate the production of fee notes or to give other forms of disclosure.

[53] CPR 65.12 (4) states that "the application must be accompanied by a bill or other document showing the sum in which the court is being asked to assess the costs and how such sum was calculated." The section does not expressly state that fee notes are required but they are essential to vouch a claim. The production of fee notes does not take away from the process of assessment or make it inefficient. In reality, it assists the Court. I have to confess that Tigerkhan's Schedule of Costs is wanting and as Mr Young correctly submitted, it should have been more detailed and included fee notes. It does allow for speculation, which a court ought not to do. Fortunately, having conduct of this matter, I am of the view that I am still ably placed to assess costs despite the deficiencies of the Schedule of Costs.

[54] Mr Young next submitted that Tigerkhan's Schedule of Costs relates to a period commencing (at the earliest) 4 April 2007 to 3 May 2007. This is a period of 30 days in which time they have produced a Schedule of Costs in the sum of over $30,000 per day, including week-ends. Learned Counsel reminded that the Court must start from a position of what should have been reasonably incurred in meeting the claim. Indeed, this is the correct approach.

Fees of Conyers Dill & Pearman

[55] Firstly, Mr Young submitted that the hourly rates of CDP are charged at those comparative to a partner in this jurisdiction. An appropriate charge out rate for the work carried out would be $550 per hour. Secondly, the time incurred by CDP Counsel is in excess of over 200 hours. Learned Counsel argued that Harneys did not receive any correspondence from CDP until 10 April 2007. The scope of the Schedule of Costs therefore covers a period of 4 weeks and it suggests that two senior lawyers worked full time on the case every single day. Mr Young contended that this is an unlikely proposition. He argued that there would have been duplication of work by the use of two Counsel of almost exactly the

same experience and while he does not dispute that a level of experience was required to deal with the matter, he disputed that it required two senior counsel full time of same ilk, particularly, given London support.

[56] Mr Young clinically analysed every aspect of the work allegedly carried out by CDP in his Points of Reply.[19] He suggested an estimate of time that the work should have taken given the tremendous London support and their expertise. He identified some apparent areas of duplication with BLTL, for example, the work on draft order,[20] dealing with Receiver's requests and providing further information for the Receiver, including detailed generic description,[21]considering affidavit of Emma Sparshott of Harneys served in response to Tigerkhan's Receivership with supporting affidavit of Philip Kite of Harneys[22] and considering the Eleventh Affidavit of Michael Wilson.[23] Mr Young submitted that a proper estimation of work undertaken by CDP during their four weeks of instruction would be 65.5 hours at $550 per hour is two full weeks of full time work which adds up to $36,025.

[57] Learned Counsel alluded to the fact that there is no breakdown for the disbursements of $5,682.85. He insisted that Ms Sarah Rees, London solicitor and/or Mr Rigoll and/or Mr Barbey were not necessary for the hearing and consequently, the cost of their flights from Antigua should be disallowed. Altogether, Counsel was extremely economical and suggested a total figure of $40,000 to cover fees and disbursements under this head.

[58] Mr Evans counteracted the submissions advanced by Mr Young. In a nutshell, he submitted that there were four substantive applications before the Court and that this litigation was intensive and was moving at a very rapid pace. He is of the opinion that the criticisms leveled at CDP are unfair and disingenuous particularly coming from a claimant who was responsible for the increased costs of this litigation.

[19] Filed on 16 July 2007.
[20] Point 22 on the Schedule of Costs.
[21] Point 17. MWP says it is the exact duplication of Point 19 in BLTL's schedule.
[22] Point 7. MWP says it is the exact duplication of BLTL's point but relates to inter partes correspondence involving non-compliance.
[23] Point 8 – MWP says it is exact duplication of BLTL's point 7.

[59] For my part, I do not think that the hourly rates charged by two senior lawyers (one of whom is now a partner) are unreasonable. However, I myself am startled at the number of hours spent on this case and some of the work carried out by CDP's legal team. Certain aspects of the work undertaken by CDP appear to be duplicative between Counsel in London and within CDP itself. Because of the powerful London support in this litigation, one would not have expected CDP to spend so many hours on this matter. Having said that, I am of the firm view that the total amount of $40,000 for fees and disbursements seems unreasonable.

[60] In my judgment, the number of hours reasonably spent on this matter would be 121.75 hours – 50 hours for Mr Forte, 70 hours for Mr Evans and 1.75 hours for Mr Wood making an aggregate of $67,027.75.

[61] In terms of office disbursements and other related expenses, there should have been a proper breakdown. The amount of $5,682.85 appears high for telephone, copying and courier charges. With no documentation to support how the figure was arrived at, it becomes a very difficult task of the Court. In the circumstances, I would discount $1,000 leaving a remainder of $4,682.85 as office disbursements.

[62] MWP submitted that Ms Rees and/or Mr Rigoll and/or Mr Barbey did not need to attend the hearing. This argument is untenable since Ms Rees played a very significant role in these proceedings and Mr Rigoll's company was subject to a receivership order. In fact, he was in the process of purchasing property and the outcome of this case was of vital importance to him both personally and professionally. As a consequence, I will allow the amount of $3,245 for air charter transfers from Antigua. The other expenses stand unchallenged and will be allowed. For office disbursements and other related expenses, the amount allowable is $12,712.57.

[63] The total sum allowable under this head is as follows:

Fees to CDP	$67,027.75
Disbursements	$12,712.57

TOTAL	$79,740.32

Fees of BLTL

[64] Tigerkhan seeks to recover as legal costs not only the sums which it had paid to legal practitioners (i.e. CDP, Joe Smouha QC and David Lord) who are authorized to practise in the BVI but also sums which it had paid to solicitors at the London firm of BLTL who are not admitted or authorized to practise in this jurisdiction. This matter raises a legal issue as to whether fees paid to foreign lawyers are recoverable at all.

[65] CPR 65.2(1) makes it clear that costs are allowed in respect of work carried out by legal practitioners. CPR 2.4 defines a legal practitioner as *"a Queen's or Senior Counsel, a barrister at law, a solicitor, an attorney at law and a notary royal."* A "barrister" or a "solicitor" means someone admitted to practise as such pursuant to the West Indies Associated States Supreme Court (Virgin Islands) Ordinance, Cap. 80.[24]

[66] The issue of whether legal fees incurred by persons not entitled to practise in this Territory had been argued on at least two occasions before this Court.[25] It is well-established that a party to BVI proceedings can only recover legal fees in respect of services rendered by legal practitioners entitled to practise in this Territory. It rationally follows that legal fees incurred by foreign lawyers are not recoverable. However, there are circumstances whereby fees incurred by foreign lawyers are recoverable as disbursements. In Finecroft Limited v Lamane Trading Corporation[26], this very issue came before the Court for its determination. The English case of McCullis v Butler [27] was cited to demonstrate that charges incurred by and paid to foreign solicitors were properly taxable as disbursements. Diplock J. (as he then was) stated at page 1014:

[24] See the Interpretation Act, section 45(2).
[25] See BVIHCV2003/0072 –Astian Group Limited & Or v TNK Industrial Holdings Limited & Or.- Judgment delivered on 24 March and 10 April 2006 respectively and BVIHCV2005/0264 – Finecroft Limited v Lamane Trading Corporation –Judgment delivered on 31 August 2006 [unreported].
[26] ibid
[27] [1961] 2 W.L.R. 1011.

> "I should add that, just as in the case of other foreign lawyers, the proper amount to be allowed for disbursements is the proper rate of charge in the country concerned, in this case Scotland, for the necessary services the agent employed."

[67] I think Mr Young fully appreciates this point. However, he is concerned that the Schedule of Costs does not reflect "BLTL Fees and Disbursements" as a disbursement of CDP. Rather, they are represented as legal costs in their own right and the cost of instructing counsel is shown as a disbursement of BLTL rather than of CDP.[28]

[68] Mr Young next submitted that based on the description of the work which it is said was carried out by BLTL and the number of hours worked (456 hours for BLTL and 221.5 hours for CDP), it would appear that in fact BLTL had general conduct of the litigation on behalf of Tigerkhan to a greater extent than CDP. I agree entirely with Mr Young. His further submission that even if the Schedule of Costs could otherwise be formally recast so as to represent the BLTL items as disbursements, it would be proper to do so if the sum paid to BLTL could as a matter of law properly be characterised as a disbursement item.

[69] Learned Counsel referred to the case of Agassi v Robinson[29]. In that case, the Court of Appeal considered the costs treatment of fees paid to persons who did not have the right to conduct litigation. The question of the recoverability of sums as disbursements was considered at paras 65ff. At paras 74 – 76 (920f -921d Dyson LJ stated:

> "74. A clear distinction has always been recognised between disbursements made and work done by a legal representative. The fact that an element of the legal representative's work is delegated to a third party does not mean that it may be regarded as a disbursement …
>
> 75. It follows in our view that the appellant is not entitled to recover costs as a disbursement in respect of work done by Tenon which would normally have been done by a solicitor who has been instructed to conduct the appeal. This means that the appellant is not entitled to recover for the cost of Tenon providing general assistance to counsel in the conduct of the appeals.
>
> 76. But it seems to us that it does not necessarily follow that the appellant is not entitled to recover costs in respect of the ancillary assistance provided by Tenon

[28] See pages 109 -111 of the Bundle.
[29] [2006] 1 All ER 900.

> on these appeals. Mr Mill is an accountant who has expertise in tax matters, especially in the kind of issues that arose in the present case. It may be appropriate to allow the appellant at least part of Tenon's fees as a disbursement. It may be possible to argue that the cost of discussing the issues with counsel, assisting with the preparation of the skeleton argument etc is allowable as a disbursement, because the provision of this kind of assistance in a specialist esoteric area is not the kind of work that would normally be done by the solicitor instructed to conduct the appeals. Another way of making the same point is that it may be possible to characterise these specialist services as those of an expert, and to say for that reason that the fees for these services are in principle recoverable as disbursement."

[70] Mr Young submitted that Tigerkhan appears to have instructed BLTL to have general conduct of the litigation to a greater extent than CDP as legal practitioners. It is submitted that whilst Tigerkhan may have considered that it had good reason to make extensive use of BLTL's services, the work done by BLTL (or at least a very large proportion of it) simply cannot properly be characterized as *"assistance in a specialist esoteric area"* or as the specialist services of an expert such that it would be proper as a matter of law to include these items as disbursements. The mere fact that the litigation has an international dimension and the parties instruct lawyers in other jurisdictions does not mean that all the work done by those foreign lawyers are properly disbursements on a solicitor's bill and recoverable as such in the proceedings in England (or the BVI). The English (and the same is true in the BVI) courts are very familiar with commercial proceedings which have an international dimension. The cost of instructing foreign lawyers would not be recoverable as a disbursement item unless the services of the foreign lawyer could genuinely be characterized as of an expert nature. So, if issues of foreign law were involved the costs of instructing a foreign lawyer as an expert would be recoverable. However, assistance of a general nature in English or BVI commercial litigation cannot properly be characterized as assistance in a specialist esoteric area or as an expert.

[71] Mr Young correctly submitted that insofar as sums have been paid by Tigerkhan to foreign lawyers for work amounting to the general conduct of the BVI litigation, which from the Schedule of Costs appears to be the case, these sums are not as a matter of law recoverable as legal costs in the BVI proceedings.

[72] It is clear that a foreign solicitor, employed in the circumstances in which BLTL were employed in this case, must be treated, for the purposes of taxation, simply as foreign agent, and the charges incurred by these solicitors are charges properly taxable as disbursements in the ordinary course. The appropriate head to claim such fees is under disbursements. Here again, the Schedule of Costs provided by CDP is inadequate to enable this Court to carry out this assessment.

[73] However, given my familiarity with this matter, I shall attempt as best as possible to resolve this issue. In future, lawyers have to be more precise when seeking to recover as disbursements the legal charges incurred by foreign agents.

[74] Like Mr Young, I have great difficulty in understanding why there was the necessity for so many solicitors. A client who is sued has all the rights to properly defend his case and to pay the best legal team to defend him. But, costs must not be embellished and unreasonable. It is not a punishment. It must be fair and reasonable in all the circumstances of the case. Despite the complexity and multi-jurisdictional nature of the dispute, the hourly rates and the number of hours spent on the case are truly amazing. After all, it was an application seeking to discharge an ex parte receivership order and to strike out the action. Fundamentally, if the action is struck out, then the receivership order automatically would be discharged so in a sense, Tigerkhan was arguing one substantive application. I must express that within recent times, such applications have become common in the BVI Courts. So, also must it be for a specialist law firm of solicitors, for example, BLTL, who boasts that their clients benefit from being advised by leading experts in commercial law who have the resources of the largest law firm in the south east. They also enjoy on their webpage of getting results for clients in the most effective way at very competitive rates [emphasis added].

[75] MWP submitted that a total time reasonably spent during the period of instruction is 62.5 hours and on the basis of a BVI partner charge out rate of $575 per hour, it amounts to $35,937.50.

[76] Having looked at the Schedule of Costs and with the great assistance of both Counsel, I have come to the conclusion that there was no need for the consultant, Mr Goldsmith. I am yet to fully comprehend his role in these proceedings. In addition, there is no breakdown as to how many hours were spent by Ms Rees or Mr Singleton. In the circumstances, I think that the proper figure to be recoverable under BLTL fees would be: Sarah Rees – 100 hours at $575 per hour aggregating $57,500 and Mr Singleton: 70 hours at $450 per hour making a total of $31,500. The overall fees recoverable under this head are $89,000.

Counsels Fees

[77] It was conceded that this is a matter that required the attention of a silk. Mr Young submitted that no fee notes were exhibited which in any way justify the number of hours that Learned Queen's Counsel applied to this matter and as such, it is difficult to ascertain whether the work carried out by Counsel is justified. Mr Young also submitted that the commercial rate for a Queen's Counsel of Mr Smouha's call should be no more that $1,100 per hour (this figure is slightly less than the hourly rate charged by Mr Cohen QC who was called to the bar before Mr Smouha QC.

[78] Learned Counsel raised concerns that Learned Queen's Counsel's fee included time expended on the Hakkisan and Myrzaly matters. He also questioned the high fees of Mr Smouha on the two occasions to the BVI totaling just under $196,828. He submitted that overall, Mr Smouha was assisted by a very senior junior counsel who would presumably be responsible for drafts. He intimated that a reasonable figure would be in the region of $80,000.

[79] Mr Young submitted that the same arguments apply to Mr Lord, although his rates are somewhat below that of a Queen's Counsel. Mr Young suggested a figure of $50,000.

[80] Mr Evans submitted that the concession by MWP that the services of Leading and Junior Counsel were required, is a factor which takes this case out of the ordinary. He said that the fees charged are commensurate with the level of counsel used and the intensity of the

activity that they were required to carry out. Mr Evans emphasised the complexity of the case.

[81] In Finecroft v Lamane [supra], the fees of Mr Mark Howard QC was $51,450 for a case which is not dissimilar to the present one. Both Mr Howard and Mr Smouha were admitted to the Inner Bar in 2003. In my opinion, a reasonable figure is (i) brief fee for hearing on 13 April 2007 - $50,000; perusing and advising -$10,000; brief fee for hearing on 3 May 2007 - $40,000 and perusing and advising - $5,000 making totaling $105,000. For Mr Lord, brief fees for hearing on 3 May 2007 - $35,000, perusing and advising, drafting skeleton arguments - $25,000 making a global sum of $60,000. In total, under the head of Counsel fees, I will allow a figure of $180,000 to include everything claimed under that head.

Other disbursements

[82] Mr Young submitted that it was not necessary for English solicitors and/or the clients to attend and therefore, the costs in doing so, is irrecoverable. This is a bold statement coming from Learned Counsel who, if he was in the position of Tigerkhan, would be saying the converse. There is no basis for saying so. Ms Rees was necessary. So also, was Mr Rigoll. With respect to Mr Barbey, his presence was not essential. Therefore, I will make no allowance for him. The allowable disbursements are as follows:

(1)	Flight and travel costs for hearing in BVI on 13 April 2007	£10,284.00
(2)	Flight and travel costs for hearing in BVI on 3 May 2007	£12,664.00
(3)	Other travel costs	£ 464.28
(4)	Copying	£ 613.98
(5)	Translation services	£ 300.82
	TOTAL	£24,327.08

Other expenses and disbursements

[83] These have all been considered in the general assessment of costs which was reasonably incurred.

Conclusion

[84] In the circumstances, Tigerkhan is entitled to costs which were assessed in the amount of $348,740.32 + £24,327.08 [US equivalent of $46,345.52] making a global figure of $395,085.84. An interim payment of $250,000 was paid and accordingly, it should be discounted. The remaining balance of $145,085.84 is to be paid by 18 July 2008.

[85] For the avoidance of any doubt, time to appeal will begin to run from 3 July 2008.

Indra Hariprashad-Charles

High Court Judge