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

IN THE MATTER OF OLIVE GROUP CAPITAL LIMITED

AND IN THE MATTER OF THE BVI BUSINESS COMPANIES ACT, 2004

Claim No. BVIHC (Com) 2015/115

BETWEEN:

OLIVE GROUP CAPITAL LIMITED

Claimant

and

GAVIN MARK MAYHEW

Defendant

Appearances on 27 January 2016:
Jeremy Child for Claimant
Mark Forte, Rosalind Nicholson and Tameka Davis for Defendant
Appearances on 2 February 2016:
Jeremy Child (by telephone) for Claimant
Mark Forte, Rosalind Nicholson and Tameka Davis for Defendant
Appearances on 9 February 2016:
Jeremy Child (by telephone) for Claimant
Mark Forte and Tameka Davis for Defendant

2016: January 27
February 2, 9
April 29

JUDGMENT

ASSESSMENTS OF COSTS PURSUANT TO JUDGMENT ON CLAIM DATED 21 JANUARY 2016 AND ON INTERIM STAY APPLICATION DATED 22 JANUARY 2016

Assessments of costs of a claim following an application to determine a preliminary issue, the costs of an interim stay application, and the costs of the assessments of costs.

An order that one party pay another party's costs of a proceeding is a general costs order that includes "pre-litigation costs" (costs incurred before proceedings commence that prove of use and service in the action or the incurring of which was proper for attainment of justice in the case) – Expansive view of pre-litigation costs encourages respondents as well as claimants to investigate, analyze, assess, focus and prepare early, all of which furthers the Overriding Objective.

Costs for appropriate work by foreign lawyers in connection with litigation in the Territory is recoverable as disbursement – In international commercial litigation (which is the vast majority of work of the Commercial Court in the Virgin Islands), the involvement of lawyers from other jurisdictions is common – It is a reality and a practical and reasonable necessity – Costs systems, certainly in relation to international commercial litigation, must recognize realities of today's international commercial litigation – Grand Pacific Holdings Ltd. v Pacific China Holdings Limited, BVIHC 2009/389, 3 December 2010 (Bannister J) followed.

Involvement in commercial and corporate (or other specialized) litigation of an experienced transactional and advisory lawyer (solicitor) can add great value by bringing to litigation team substantive and contextual knowledge; perspectives on legal and sometimes factual issues, on practices 'on the ground', and on the broader context; focused contextual research (hands-on or directed) on difficult corporate law issues; and honed commercial instincts including instincts relevant on overall litigation strategy and tactics – Such corporate legal practitioner involvement on litigation team in these types of cases adds value, increases efficiency and leads to a more effective presentation of party's case.

CPR 69B.11(3) requires that a schedule of costs "particularise the amount of time spent upon the application by the legal practitioner or his partners or employees, specifying in each case – (b) the task or tasks undertaken by the [person], and (c) the precise time spent upon each such task by the relevant [person] – Task may be defined as "a piece of work to be done or undertaken" – Like all CPR provisions, it is to be interpreted in light of overriding objective of dealing with cases justly – "Justly" means here that it must be interpreted in manner that is just for both parties – Time records, particularly in an intensive or expedited proceeding, need not meet standard of perfection – Can and should be read in context by an informed reader, particularly when assessment conducted by Commercial Court Judge who heard proceedings and, to reasonable degree, knows from recollection and evidence in proceedings what was going on at various stages – Time records need to be read with these considerations in mind and in contextual manner – A time record not being perfect or near perfect time need not lead to its disallowance if reasonably clear from context what was done – Burden on party receiving costs to be realistic and have regard for reasons paying party should have information for assessment purposes, to see if costs claimed meet requirements of CPR and case law ("each item should have been reasonably incurred and the costs for each item should be reasonable").

Total sum claimed reasonable and proportionate, having particular regard to requisite considerations, and viewed globally – At Court's request, costs grouped by "activity" in litigation process, a useful additional way to aid in assessment of reasonableness and proportionality – Bore out reasonableness and proportionality – Sum claimed fair to both parties – Global approach indicated that costs claimed, having particular regard to specified considerations, are proportionate, and with limited exception for which disallowances made, each item of costs claimed was reasonably incurred and costs for each item is reasonable – Alternatively, subject to limited exceptions referenced, work in relation to each item necessary and cost of each item reasonable.

Paying party declined receiving party's invitation to disclose in some manner and to some extent its costs as means to assess or confirm reasonableness and proportionality, and Court did not order disclosure – Perhaps should be practice to do so, at least in some cases, as means to add perspective and context as global 'reality check', recognizing that there always will be differences due to wide range of factors – May deter paying parties from taking overly aggressive and arguably unrealistic hindsight positions on assessments

– Would need to be done in cost-effective manner – Detailed costs schedules from paying party would not be helpful – Should show big picture view.

[1] **LEON J [Ag]:** On 21 January 2016 this Court handed down the Judgment ("**Main Judgment**") on an application ("**Application**") to determine a preliminary issue ("**Preliminary Issue**") in this Claim[1] pursuant to this Court's Order dated 16 October 2015[2], and in the result, the Judgment finally determined the Claim.

[2] This Court ordered that the Claimant Olive Group Capital Limited ("**Company**") pay the Defendant Gavin Mark Mayhew ("**Mayhew**") his costs of the Claim (including the injunction proceedings and the hearing on 21 January 2016), to be the subject of a detailed assessment by the Court commencing on 27 January 2016, unless agreed ("**Main Judgment Costs Assessment**")[3].

[3] Immediately following delivery of the Judgment on 21 January 2016, the Company applied orally to this Court for an interim stay of the Main Judgment pending the Company's proposed application to the Court of Appeal for a stay of the Main Judgment pending the determination of the Company's proposed appeal of the Main Judgment to the Court of Appeal ("**Interim Stay Application**").

[4] On 22 January 2016 the Court delivered Judgment on the Interim Stay Application ("**Interim Stay Judgment**"), dismissed the Interim Stay Application, and ordered that the Company pay Mayhew his costs of the Interim Stay Application, to be

[1] Claim Form and Statement of Claim dated 28 September 2015.
[2] Order of the Honourable Justice Barry Leon dated 16 October 2015.
[3] Order of the Honourable Justice Barry Leon dated 21 January 2016, paragraph 4.

assessed (in a detailed assessment) by the Court commencing on 27 January 2016, unless agreed ("**Interim Stay Costs Assessment**")[4].

[5] This Court has conducted the Main Judgment Costs Assessment and the Interim Stay Costs Assessment, and in addition with the concurrence of the parties this Court conducted an assessment (**"Assessment of Costs of Costs Assessments**") of Mayhew's costs of the costs assessments (**"Costs of Costs Assessments**"), subject to the proviso that the Court had yet to receive submissions of the parties and make any decision respecting the award of the costs of the costs assessments. This is the Judgment on those three assessments of costs (collectively, "**Assessments**").

[6] Both parties filed considerable written materials in connection with the Assessments, including the materials described below.

[7] Mayhew filed materials that included, among other materials, the following:

a) Submissions on Costs dated 14 January 2016;
b) Detailed Schedule pursuant to CPR 69B.13(2) and 69B.11(3) dated 14 January 2016, which were updated during the course of the assessments (collectively, "**Statement of Costs – Claim**");
c) Skeleton Argument on Assessment of Costs and Interim Payment [the interim payment application did not proceed in light of the order for an expedited detailed assessment];

[4] Order of the Honourable Justice Barry Leon dated 22 January 2016, paragraph 2.

d) Witness Statement of Timothy N. Ross ("**Mr. Ross**") (filed unsigned at the 21 January 2016 hearing with an undertaking, subsequently fulfilled, to file a signed copy in due course);

e) Further Written Submissions on Assessment of Costs (for hearing on Wednesday 27 January 2016) dated 25 January 2016 with (as requested by the Court) a Schedule of Costs by Activity;

f) Bundle of Authorities [on] Pre-Litigation Costs;

g) Statement of Costs in relation to the Stay Application, which were updated during the course of the Assessments (collectively, "**Statement of Costs – Stay**");

h) Statement of Costs in relation to the Assessments, which were updated during the course of the Assessments (collectively, "**Statement of Costs – Assessments of Costs**"); and

i) Points in Reply.

[8] The Company filed materials that included, among other materials, the following:

a) Written Submissions on Costs and Interim Payment on Account of Costs ("**Company Written Submissions 1**") [as noted above, the interim payment application did not proceed in light of the order for an expedited detailed assessment] for hearing on 21 January 2016, dated 19 January 2016;

b) "Claimant's Points of Dispute on Interim Payment on Account of Costs", which Points of Dispute were updated as "Claimant's Updated Points of Dispute as Directed on 2 February 2016, and supplemented with additional Point of Dispute in relation to Mayhew's "Schedule (Updated)" (collectively, "**Points of Dispute - Claim Costs"**);

c) Written Submissions on Costs for hearing on 27 January 2016 ("**Company Written Submissions 2**");

d) Points of Dispute on Mayhew's Statement of Costs – Stay ("**Points in Dispute - Stay Costs**");

e) Points of Dispute on Mayhew's "Statement of Costs – Assessments of Costs" ("**Points in Dispute – Assessments Costs**"); and

f) two Authorities Bundles.

[9] The Company chose not to file any evidence responding to the Witness Statement of Mr. Ross and chose not to file anything in respect of the Company's own costs (neither a global amount, an activity categorized summary, nor a detailed schedule) despite having been invited to do so by counsel for Mayhew at the 21 January 2016 hearing, and repeatedly thereafter, as a means (it was submitted) of assisting the Court to assess the reasonableness of Mayhew's costs. The Court did not order or even request that the Company do so but indicated that it would entertain submissions on any inferences to be drawn if nothing was filed.

[10] The Company's points of dispute submissions in relation to the Assessments contained line by line comments, and as well the Company raised in both of its written submissions and in its oral submissions general objections to certain categories of costs claimed, which are described and discussed below.

Background to Main Judgment Relevant to Assessments

[11] The Preliminary Issue in the Claim was whether this Court had jurisdiction to grant the relief sought by the Company, being a series of declarations respecting the

fixing of the "fair value" of the shares of the Mayhew, by appraisers ("**Appraisers**") pursuant to section 179(9)(c) of the BVI Business Companies Act, 2004 ("**Act**").

[12] The declarations claimed, in summary, included the following[5]:

a. the meaning of "fair value",

b. the parameters for the fixing of the fair value (including facts to be taken into account by the appraisers who have been designated to fix fair value),

c. the maximum amount the appraisers may fix as fair value or alternatively that the appraisers are under a duty to give reasons for exceeding that maximum amount;

d. that the appraisers must apply "a discount for [the shares'] minority and illiquid status", and

e. the process that must be adopted by each of the appraisers (which essentially would be a full adjudicative process).

[13] The Main Judgment determined the following matters:

- first, questions respecting the purpose and scope of Section 246 of the Act (which was submitted as one of the bases for this Court's jurisdiction to make the declarations sought, the other being this Court's inherent jurisdiction); and
- second, whether in light of the scheme and provisions of section 179 of the Act, this Court had jurisdiction – under Section 246 of the Act or inherent – to make any of the declarations claimed in the Claim and Statement of Claim respecting, and during the course of, the fixing of the "fair value" of the shares by appraisers pursuant to section 179(9)(c) of the Act, at a time when the appraisers were not impeded (completely or at all) from proceeding with their

[5] Statement of Claim dated 28 September 2015, prayer for relief, pages 17 – 21, paras. 1(1) – (6).

ongoing statutory share valuation work (fixing the fair value of shares) and had not sought the assistance of this Court, directly or indirectly ("**Current Circumstances**").

[14] Mayhew owns 8.29% of the issued share capital (6,522,437 ordinary shares) of the Company ("**Mayhew Shares**"). The Company's majority shareholder is Strategic and General Holdings Ltd. ("**Strategic**") which held 90.11% of the issued share capital of the Company. Strategic directed the Company to redeem the Mayhew Shares pursuant to Section 176 of the Act which permits "members of the company holding ninety percent" of the outstanding shares (as specified in the subsection) to instruct "the company to redeem the shares held by the remaining members", and requires that the "company shall redeem the shares".[6]

[15] Section 176(3) required the Company to give written notice to Mayhew "stating the redemption price". The Company gave notice to Mayhew pursuant to section 176(3) on 9 January 2014.

[16] Section 179(1) provides that a member of a company is entitled to payment of the "fair value of his shares upon dissenting from" any of five types of transactions.[7]

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[6] Provisions of the nature exist in many modern company statutes. They reflect a policy decision to give companies, and in particular their shareholders with a specified high (here 90%) majority, flexibility to do things which they would not be able to do with small minority shareholders as members of the company. It has been described as an 'expropriation' right whereby the interests of a small minority are required, as a matter of public policy, to give way to the large majority. The offsetting policy decision is to treat the expropriated shareholder(s) "fairly".

[7] 179(1) A member of a company is entitled to payment of the fair value of his shares upon dissenting from

(a) a merger, if the company is a constituent company, unless the company is the surviving company and the member continues to hold the same or similar shares;

(b) a consolidation, if the company is a constituent company;

One of those is "(d) a redemption of his shares by the company pursuant to section 176".[8] On 16 January 2014, Mayhew gave written notice to the Company of his election to dissent.[9]

[17] Where a member dissents, Section 179(8) of the Act provides a period of thirty days for the company and the dissenting member to attempt to agree the price to be paid for the member's shares. If they fail to agree, the process set out in Section 179(9) shall be followed to determine the amount to be paid to the dissenting member by the company for the dissenting member's shares. No agreement was reached between the Company and Mayhew within the thirty-day period and, accordingly, the provisions of section 179(9) were engaged.

[18] Sections 179(9)(a) and (b) of the Act required that the Company and Mayhew each designate an appraiser within twenty days and then that the two designated appraisers together designate a third appraiser. The Company designated PricewaterhouseCoopers Limited ("**PwC**") and Mayhew designated Deloitte

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(c) any sale, transfer, lease, exchange or other disposition of more than 50 per cent in value of the assets or business of the company, if not made in the usual or regular course of the business carried on by the company, but not including

(i) a disposition pursuant to an order of the Court having jurisdiction in the matter,

(ii) a disposition for money on terms requiring all or substantially all net proceeds to be distributed to the members in accordance with their respective interest within one year after the date of disposition, or

(iii) a transfer pursuant to the power described in section 28(2);

(d) a redemption of his shares by the company pursuant to section 176; and

(e) an arrangement, if permitted by the Court.

[8] The other four types of transactions that give rise to dissent rights are different in that they are transactions being entered into by the company (merger; consolidation; disposition of more than fifty per cent in value of the assets or business of the company out of the usual or regular course of the business; and arrangement permitted by the Court) that may change the company in a way that the dissenting minority member(s), as a matter of public policy, should not be required to be part of. They have the option of staying in and going along for the ride, or exiting and being paid "the fair value of the share" which they own.

[9] Act, Section 179&) and (12).

Corporate Finance Limited ("**Deloitte**") as appraisers. Together PwC and Deloitte designated BDO LLP ("**BDO**") as the third appraiser. BDO, PwC and Deloitte together are referred to in this Judgment as the Appraisers.

[19] Section 179(9)(c) of the Act provides as follows – and only as follows – with respect to the mandate, mission, parameters, processes of and limitation on appraisers under the section:

> (c) the three appraisers shall fix the fair value of the shares owed by the dissenting member as of the close of business on the day prior to the date on which the vote of members authorizing the action was taken or the date on which written consent of members without a meeting was obtained, excluding any appreciation or depreciation directly or indirectly induced by the action or its proposal, and that value is binding on the company and the dissenting member for all purposes;

[20] The terms on which BDO took up its appointment are set out in a letter of engagement dated 9 March 2015 ("**Engagement Letter**"), including a majority decision-making provision in accordance with an Order of the Honourable Justice Bannister of this Court. The Engagement Letter was agreed between the Company and Mayhew and included provisions respecting the appraisal process and other matters that fleshed out the statutory appraisal process for this appraisal to some degree, and as a consequence, to some degree limited the wide scope that Section 179(9) provides to the Appraisers.

[21] Following the execution of the Engagement Letter, in March 2015 the Appraisers undertook their work, including meeting with the Company's senior management

and with Mayhew to gather information.[10] Early in the course of their work, starting at least before mid-April 2015[11], they communicated with the Company and Mayhew, through their respective legal practitioners, regarding the legal practitioners' respective views on the applicability, or not, of a 'minority discount' in the fixing of the fair value of the Mayhew Shares, and in light of the differences of views, engaged their own legal practitioners on the question.

[22] The Appraisers communicated among themselves including respecting the fair value of the shares. In a letter dated 15 June 2015, BDO communicated to the other two Appraisers, PwC and Deloitte, "preliminary views on the question whether a minority discount should be applied in fixing the "fair value" of the Mayhew Shares".[12]

[23] The Company took issue with BDO's preliminary views when it learned of them, and after back and forth between legal practitioners, the Company asked the Appraisers to suspend their work, which Mayhew opposed, pending the Company bringing proceedings in this Court. When the Claim was commenced on 28 September 2015, the Appraisers declined to suspend their work. They scheduled meetings of the Appraisers for 12 and 13 October 2015 in Dubai.[13]

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[10] Affidavit of David St. George sworn 6 October 2015 ("**St. George Affidavit 1**"), paragraph 22.
[11] St. George Affidavit 1, paragraph 22 (which inadvertently incorrectly stated the year as 2014 rather than 2015) and Affidavit of David St. George sworn 8 October 2015 ("**St. George Affidavit 2**"), paragraph 4(e) and Exhibit DSG-2, pages 974 - 977 (letter from Maples (on behalf of the Company) to the Appraisers dated 13 April 2015 and letter from Conyers (on behalf of Mayhew) to Appraisers dated 21 April 2015.
[12] Statement of Claim, paragraph 51(i), and Statement of Defence, paragraph 62.
[13] St. George Affidavit 1, paragraphs 22, 26, 30 and 31.

[24] The Company chose not to accept that the Appraisers could continue their work in the face of the Company's proceedings and brought an urgent injunction application to this Court to prevent the Appraisers from proceeding with the scheduled meetings on the ground that they should be restrained from deciding matters, or forming views on matters, before the Claim was determined that could preclude them from later proceeding and making decisions in accordance with the declarations sought in the Claim, if granted by this Court.

[25] The submissions supporting this view included both the contractual provision in the Engagement Letter that the Appraisers' determination shall be "final and binding for all purposes" so that it may be "very difficult for this to be subsequently challenged"[14], and a practical concern that once people discuss and form preliminary views on a matter, it may be more difficult to move them from those views.

[26] The extent and manner in which the Company and Mayhew may challenge the Appraisers' determination once made was considered at length in the Main Judgment. As set out below, and in greater detail in the Main Judgment, this Court concluded in the Main Judgment that there are established but limited grounds on which an interested party may challenge a determination by experts, such as the determination of fair value by the Appraisers pursuant to the Act, that such limited bases of challenge is what the House of Assembly intended in the Act, and that essentially the time for such challenge would be subsequent to the Appraisers' determination.

[14] St George Affidavit 2, paragraph 4 (g).

[27] This Court granted the interim relief by Order made on 8 October 2015. In fact what the Court did was order the Company and Mayhew to jointly instruct the Appraisers that they shall not fix the fair value of the Mayhew Shares or finally determine any issues in respect of which the Company was seeking declarations in this Claim, or meet without leave of the Court except for their meeting scheduled for 12 and 13 October 2015. It was accepted that an Order directed to the parties would be the practical way to 'enjoin' the Appraisers.

[28] Following the handing down of the Main Judgment and the Interim Stay Judgment, this same method was to be used to instruct the Appraisers to resume their work.

[29] On 16 October 2015, as set out above, the Court granted a modified order that precluded the Appraisers, pending determination of the Claim, from fixing the fair value of the Mayhew Shares or "finally, formally or informally, [determining] any issue" on which the Company was asking the Court to make declarations, and directed the determination (trial) of the Preliminary Issue.

[30] Specifically, the Order of 16 October 2015 set out the Preliminary Issue as follows:

> [W]hether the court has jurisdiction to grant the relief prayed by the Claimant in its Claim Form and Statement of Claim.

Summary of Main Judgment

[31] This Court concluded in the Main Judgment that Section 246 could be used by the Company, on notice to Mayhew, to seek an interpretation of a provision of the Act which the Court otherwise has jurisdiction to interpret at the time and in the circumstances that exist. Likewise, the Court determined that it has inherent

jurisdiction to interpret the Act at a time and in circumstances when a question of interpretation is properly before it.

[32] However, this Court held that that did not mean that this Court had jurisdiction on either basis at the time and in the Current Circumstances to intervene to interpret a provision of the Act – in this case Section 179(9)(c) – because effectively the House of Assembly had mandated a process that limits the motivation for, and extent, manner and timing of any Court intervention.

[33] Further, the Court held that its inherent jurisdiction is not applicable where its exercise would be inconsistent with a statutory provision or a provision of the CPR.

[34] This Court held, to like effect, this Court's Section 246 jurisdiction is not applicable where its exercise would be inconsistent with an operative provision of the Act; that is, where making a declaration under Section 246 about the operation of a provision of the Act is precluded directly or indirectly by that very provision.

[35] The question for determination on the Preliminary Issue was whether this Court had jurisdiction in the Current Circumstances to grant any of the declaratory orders sought by the Company in its Claim. The Main Judgment held that The Preliminary Issue was designed by this Court to have this Court determine, at the outset of the Claim, in the interests of efficiency and in line with the Overriding Objective and this Court's case management authority, whether it could make at that stage and in the circumstances as they stood, any of the declarations sought in the Claim.

[36] The Court accepted the Claimant's submission that the question on the application in relation to the Preliminary Issue was whether the Court *could* make any of the

declarations, not whether it *should* make any particular declaration or declarations. The Court held, however, that the Preliminary Issue still must be context specific – the context being the Current Circumstances with the statutory appraisal process ongoing – that process was not being completely impeded, or impeded at all; the Appraisers had not asked for any assistance or guidance from the Court nor given any indication that they needed or desired it; and so forth.

[37] The Court held that there is no jurisdiction for the Court to intervene in the statutory process under Section 179(9) when there is no issue and no problem. The House of Assembly chose a process known as Expert Determination. It is neither court adjudication nor arbitration, both of which involve various processes that the declarations seek to impose upon the Section 179(9) process. By reason of the scheme and provisions of section 179(9) of the Act, this Court held that it did not have jurisdiction in the Current Circumstances to grant the relief sought by the Company in its Claim Form and Statement of Claim, being the series of declarations.

Summary of Interim Stay Judgment

[38] In the Interim Stay Judgment, the Court set out, discussed and applied the five principles that a court should apply in deciding whether to exercise its discretion to stay proceedings pending an appeal, as articulated by the Court of Appeal.

[39] Having considered the five principles, the Court concluded that the test for an interim stay of proceedings had not been met and accordingly dismissed the application for an interim stay.

General Principles for Assessment of Costs

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

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

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

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

[42] When assessing costs, effect should be given to the requirement of proportionality by adopting a two-stage approach: a global approach and an item-by-item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate, having particular regard to the considerations set out above. If the costs as a whole are not disproportionate according to that test, all that is normally required is that each item should have been reasonably

incurred and the costs for each item should be reasonable. It is only if the costs as a whole appear to be disproportionate that the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable. If the global costs are disproportionately high, reasonable costs will only be recovered for the items which were necessary if the litigation had been conducted in a proportionate manner.[15]

Categories of General Objections Raised by Company

[43] The Company raised and pursued six categories of general objections to the costs claimed by Mayhew (some of which apply only to the costs of the Claim, not the costs of the Interim Stay Application)[16]. In summary, they are as follows:

1. "**Pre-Litigation Costs Issue**": the recoverability of so-called "pre-litigation costs" was challenged with the Company taking the position in principle that based on the wording of the costs order made by this Court and the provisions of CPR 63.3, pre-litigation costs incurred by Mayhew are not recoverable, and alternatively, that if in principle they are recoverable, only the most minimal if any such costs are recoverable;
2. "**Foreign Lawyer Issue**": the recoverability of costs in relation to the work done by a foreign lawyer, claimed as a disbursement, in respect of work of Mr. Ross, a partner with the Bennett Jones LLP law firm was challenged;

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

[16] Some of the categories of objective affected a considerable number of time entry records, although others were of lesser significance yet still general points.

3. "**Corporate Legal Practitioner Issue**": the recoverability of the costs of work done by Mr. Robert Briant, a senior corporate partner in the BVI office of Conyers Dill & Pearman ("**Conyers**"), Mayhew's BVI firm of legal practitioners was challenged;
4. "**Detail/Particularity Issue**": the recoverability of costs in respect of work for which the time records submitted allegedly lack detail and particularity in the narrative was challenged in respect of a considerable number of items in the schedules/statements of costs;
5. "**Time Unit Issue**": the recoverability of costs was challenged in relation to the recording of work by Mayhew's legal practitioners in 15-minute units of time; and
6. "**Senior Legal Practitioner Issue**": the recoverability of costs for a senior legal practitioner doing a small amount of work on bundles was challenged.

[44] Each of these categories of objections are discussed in turn, with the overall reasonableness, proportionality and fairness – to both parties – being discussed thereafter.

Issue 1: Pre-Litigation Costs Issue

[45] The Company challenged the recoverability of all of Mayhew's so-called "pre-litigation costs", taking the position in principle that based on the wording of the costs order made by this Court in respect of the Claim and the provisions of CPR 63.3, pre-litigation costs incurred by Mayhew are not recoverable, and alternatively, that if in principle they are recoverable, only the most minimal of any

such costs can be said to relate to the litigation that ensued and hence be recoverable.[17]

[46] As set out near the beginning of this Judgment, the costs order in the Main Judgment is that the Company pay Mayhew's costs of the Claim (including the injunction proceedings and the hearing on 21 January 2016).

[47] The Company submitted that CPR 64.3 therefore limited the recoverable costs to the costs of the Claim itself, and does not include pre-litigation costs.

[48] CPR 64.3 is headed "Orders about costs" and reads as follows:

> The court's powers to make orders about costs include power to make orders requiring a party to pay the costs of another person arising out of or related to all or any part of any proceeding. [emphasis added]

[49] The focus of the objection, admitted by counsel for the Company to be novel, was on the words that say the court has the power to make orders "arising out of or related to all or any part of any proceeding". It was submitted that those words permit the making of a costs order that goes beyond the costs from the commencement of a claim. It was submitted, however, that absent the costs order including pre-litigation costs specifically, pre-litigation costs were not ordered to be paid to Mayhew by the Company. To recover pre-litigation costs, submitted counsel for the Company, the Court's costs order in respect of the Claim would have had to so specify, and it did not.

[17] As a practical matter, this objection is not applicable to the costs of the Interim Stay Application or the Costs of the Assessments of Costs as there were no 'pre-litigation' phases to them.

[50] This Court does not accept this objection.

[51] By way of background, the power to make orders respecting costs does not arise from the CPR. It is an inherent power of the Court, carried forward into the Territory of the Virgin Islands by section 7 of the Eastern Caribbean Supreme Court (Territory of the Virgin Islands) Act (formerly the West Indies Associated States Supreme Court (Virgin Islands) Ordinance), Cap 80, which imported the previous English law on costs.[18]

[52] There were no submissions made to the Court when the costs order was made that drew the distinction now sought to be made. It was not submitted by the Company that Mayhew should not recover his pre-litigation costs. It was not raised with the Court by either party that the costs order would have to include costs "arising out of or related to all or any part of any proceeding" to cover "pre-litigation costs". The Court suspects that it was not a point in the mind of the Company's counsel at the time and certainly it was not a point in the mind of Mayhew's counsel at the time.

[53] Indeed, this Court cannot recall any costs submission in any matter making such a request.

[54] Had it been in the mind of the Company's counsel that pre-litigation costs should be excluded, it would have been easy for the point to be raised with Mayhew's

[18] BVIHCMAP2015/0001 Halliwel Assets Inc, Panikos Symeou and Marigold Trust Company Limited (Appellants/Defendants) v Hornbeam Corporation (Claimant) and Vadim Shulman (Respondent), 12 October 2015, paragraphs 10 – 12.

counsel and the Court at the time. Certainly when the costs order was being made, it was not in this Court's mind that it might be suggested later that it was excluding pre-litigation costs.

[55] Counsel for the Company could not direct the Court to any authority or precedent for the position he took, or that so interpreted CPR 64.3.

[56] The wording of the costs order in respect of the Claim made by this Court appears to be standard wording used in the courts of the Territory for what might be termed a general order as to costs. A general order as to costs is not limited to costs from the commencement of the proceedings and is subject only to the scheme for assessing the quantum of costs ordered, as set out in the CPR and clarified in case law.

[57] The words "costs of the proceeding" have become, it appears, a short-hand way of referring to a general order as to costs; that is, all costs that are assessable without any specific order, which include appropriate pre-litigation costs, whether payable to a claimant/applicant or respondent.

[58] Of course courts sometimes make costs orders denying the party to which costs are awarded a part of the costs that a general order would include, such as where the party prevails overall but is unsuccessful on one of a number of issues. But that is a different situation.

[59] Where a rule has been applied in a certain manner by the Bar and the Court, even if the words may be capable of a different meaning, even a more natural meaning

(which is not to say these words are), the Court should be hesitant to 'upset the apple cart' by pronouncing a different interpretation. Parties are entitled to reasonable certainty and conduct their proceedings accordingly.

[60] This hesitancy to change established practice should be even more the case where the policy objectives favour the existing interpretation, as they do here. This is discussed below.

[61] Consistency, predictability and certainty are part of dealing with cases justly, which the Court must do pursuant to the Overriding Objective, and the Court must seek to give effect to the Overriding Objective when it interprets any rule.[19]

[62] If the Company's submission were correct, a court awarding costs at the end of a proceeding would need to specify with particularity which types or categories of pre-litigation steps, activities or actions were to be additional inclusions in the costs to be paid, and thus may involve the court in details going beyond what occurred before that court in the matter, and even into some details that one might expect to see in an assessment, not in an award of costs.

[63] The words in CPR 64.3 "include power to make orders requiring a party to pay the costs of another person arising out of or related to all or any part of any proceeding" simply make clear that such power to make such costs orders are included in the general "powers to make orders about costs". They are words that in effect say "for greater certainty" or viewed a somewhat different way, they are expansive words.

[19] CPR 1.1(1) and 1.2.

[64] It is not necessary to determine in this Judgment the situations in which a court may wish to exercise its expanded discretion to make an order "requiring a party to pay the costs of another person arising out of or related to all or any part of any proceeding". It may be used, where appropriate, in an array of situations.

[65] Suffice it to say that the discretion is available to a court when it wishes to order costs that are not included in an award of costs that uses the standard wording used in the courts of the Territory for a general order as to costs which often are "X do pay Y his/her/its costs. of the Claim …" or a variation of such words. This Court holds that pre-litigation costs are included in such a general order as to costs.

[66] There are (at least) three categories of costs that courts have power to award:

- first, costs from the formal commencement of the proceeding (e.g.: claim), which ordinarily would be the filing of the initiating document(s) with the court until its formal end, which ordinarily would be the sealing of the final order;
- second, costs incurred before the filing of the initiating document(s) (so-called "pre-litigation costs") which relate in some manner to the issues later raised in the proceeding, or that might have been raised later but for some reason it was decided that it was not necessary or advisable to do so (in other words, the pre-litigation work led to a more informed and sensible basis for the structure and assertion of the claim); and
- third, "costs of another person arising out of or related to all or any part of any proceeding".

[67] Counsel for both parties referred to English case law respecting pre-litigation costs which undisputedly were under different wording in the applicable rules than exists in the CPR.

[68] However, what comes through from those judgments is that the English courts, for principled policy reasons, are taking an increasingly expansive view of pre-litigation costs, and of what may or should be included in pre-litigation costs.

[69] Counsel for the Company relied on In re Gibson Settlement Trust[20] ("**Gibson's Settlement**") for the proposition that "the question of costs incurred before proceedings were commenced do not arise in an order for costs *simpliciter*, which is what we have in this case" and submitted that means pre-litigation costs are not part of cost *simpliciter.* By costs *simpliciter*, the Company's counsel was referring to an order for costs without so-called words of extension.

[70] In Gibson's Settlement the order provided for costs "of and incidental to" the proceeding and the issue was whether the words "incidental to" reduced or extended the ambit of the costs order. Sir Robert Megarry V.C. started by confirming that "costs that otherwise would be recoverable are not to be disallowed by reason only that they were incurred before action brought."[21] In other words, an order for costs *simpliciter* includes pre-litigation costs. He then held that the words "of and incidental to" extend rather than reduce the ambit of

[20] [1981] Ch 179 at 184 (Sir Robert Megarry VC). Company Written Submissions 2, in footnote 1, states "The principles in this case were approved by the Court of Appeal in England and Wales in Goldstein v Conley [2001] EWCA Civ 637, [2002] 1 WLR 281 (CA) at 300, [75] (Clarke LJ), and were accepted by the Appellate Committee of the House of Lords in Aden Shipping Co Ltd v Interbulk Ltd (the Vimeria) (No 2) [1986] AC 965."

[21] Gibson's Settlement, page 184, lines E-F.

the order". He went on to say "I find great difficulty in seeing on what basis it can be said that the addition of these words drives out the right to antecedent costs" established in prior judgments.[22] The judgment then considers the scope of pre-litigation costs.

[71] Even if that were not the case, this Court holds that the prevailing meaning given to the word of a general costs order in this jurisdiction prevails.

[72] With respect to the scope of pre-litigation costs, they have been held to be costs "related to the creation of materials 'ultimately proving of use and service in the action' or as being costs the incurring of which was 'proper for the attainment of justice' in the case." It has been held that, for example, "[i]n the context of the litigation environment created and encouraged by the CPR and the Woolf Reforms … negotiations as to the resolution of interim issues should be encouraged and that, therefore, the costs regime should accommodate the costs of such negotiation as part of the costs of the litigation …."[23]

[73] This Court considers the spirit of that holding is applicable in the Territory, and is even more compelling in the evolving litigation environment where 'early case assessment' is encouraged so that the parties can understand and focus their cases early on, and either resolve them or litigate them in a more focused and efficient manner. The costs regime, in awarding pre-litigation costs as part of costs of a claim, should encourage respondents as well as claimants to investigate, analyze, assess, focus and prepare early. In the case of a respondent, particularly

[22] Gibson's Settlement, page 184, line F – page 185, line A.

[23] National Westminster Bank v Kotonou ("**National Westminster**") [2009] EWHC (CH) at paragraphs 38 and 37.

in commercial litigation arising from an ongoing relationship and/or a commercial event, often it can be expected that a claim is going to be brought.

[74] This Court prefers to view the costs incurred to focus and narrow issues in relation to a claim that is looming as properly coverable as pre-litigation costs. The Company cited English authority for the proposition that a claimant ought not to be "penalised" for not pursuing claims originally included in a pre-action protocol letter, as the purpose of the procedure is to narrow issues.[24] However, a preferred way to view it is that the claimant is not being penalised but in fact is being saved from later having to pay a much larger sum in costs for pursuing a weak claim that fails. It is a modest 'price to pay' to the respondent for doing the work early on to demonstrate to the claimant the 'error of his (or her or its) ways'.

[75] This view seems fully in line with the view that costs incurred in the reasonable negotiation of interim solutions to problems arising between the parties in connection with issues to be decided in contemplated or pending litigation meet the tests of "ultimately proving of use and service' and being costs incurred that were "proper for the attainment of justice".[25]

[76] In this case, it was abundantly clear a considerable time before the commencement of the Claim that the issues raised in the Claim were in dispute between the Company and Mayhew. As outlined above, the Claim arose from an ongoing dispute regarding the manner in which the Appraisers should do their work, and the involvement or non-involvement of the parties, and the Court.

[24] McGlinn v Waltham Contractors Ltd and others [2005] EWHC 1429 (TCC) at paragraph 14.
[25] National Westminster, paragraphs 35 – 37.

[77] From early days in the valuation process, at least by mid-April 2015, it was evident that the key dispute between the Company and Mayhew included both whether there should be a minority discount and the role of the Appraisers in determining that question. The dispute over a minority discount began with exchanges between the parties' legal practitioners, and by them with the Appraisers. Gradually the scope of the dispute expanded to include the other aspects of the work on the Appraisers on which the Company eventually sought to have this Court direct the Appraisers. The efforts to deal with the dispute, including to resolve it and to get in position for litigation over it, was ongoing. It seems clear that the work done to prepare for the litigation that was reasonably anticipated and the work done to try to avoid the dispute and resolve matters consensually, should be recoverable as pre-litigation costs within the ambit of this Court's costs order. It was work "ultimately proving of use and service in the action" and the costs incurred in performing that work were "proper for the attainment of justice' in the case."[26]

[78] The Company's position on the pre-litigation work was that almost all of it was work to deal with the determination of the compensation to Mayhew for his Shares and would have been needed in any event. It would not have been but for the disputes that led to the Claim.

[79] The Company submitted that whether the pre-litigation work was work to deal with the determination of the compensation to Mayhew for his Shares should be determined without the benefit of hindsight; that is, without regard to this Court's finding that it lacked jurisdiction and without regard to the dismissal of the Claim

[26] In the words used in National Westminster, supra.

which sought a wide range of declaratory relief in relation to the process that this Court held it lacked the jurisdiction to grant. The Court has taken that approach and determined the issue pre-litigation work without regard to the result of this litigation. However, it remains the case, and would be the case even if the Court had found that it had jurisdiction and then gone on to make the declarations sought, that the work related to the evolving dispute, irrespective of which party was successful in the litigation.

[80] Different types of disputes will have different types of legal work that result or do not result in costs that are appropriately pre-litigation costs.

[81] When the party awarded costs is a respondent (defendant), in some cases the party may find that service of the claim is the first suggestion of a dispute or of litigation. However, in other cases (such as this one) there will be an ongoing and escalating series of events, and conduct by the party that ultimately commences the claim, that are fundamentally a run up to and part of the dispute that gets litigated.

Issue 2: Foreign Lawyer Issue

[82] Mayhew claimed, as a disbursement, work of Mr. Ross, a partner with the Bennett Jones LLP law firm. He is not a BVI legal practitioner. When the expropriation of the Shares began and for part of it prior to the Claim (see below), both Mayhew and Mr. Ross were located in Dubai. Mayhew continued to be based in Dubai.

[83] Mr. Ross' Witness Statement for the Assessments and the submissions of Mayhew's counsel show that he was Mayhew's principle advisor, as a non-BVI

lawyer, in relation to the expropriation and fair value claim, had the direct non-BVI lawyer-client relationship (from a legal and business perspective) and to some degree served as Mayhew's representative in dealing with Mayhew's BVI legal practitioners.

[84] Mr. Ross stated in his Witness Statement that his involvement started and carried on for eight months when he was in Dubai (where Mayhew is located) and continued when Mr. Ross re-located to Toronto, Canada in September 2014. He spent (for example) "two weeks in March 2015 working with Mr. Mayhew in person in Dubai on this matter." He states that he has "been embedded in and involved in this matter form the outset" and that "the continuity of my involvement was therefore important and saved costs."[27]

[85] He went on to say:

> 11. The substance of [Mayhew's] Claims in this matter (and the litigation threats that precede the filing of the claim) benefitted in my view from my experience in the matter and familiarity with the client and the issues raised by the Company, and also my familiarity with principles of English law, in which I am also qualified.
>
> ….
>
> 14. I have had a longstanding relationship with Mr. Mayhew and was able to provide services including client liaison support as a foreign agent: this support was in my view crucial to the success of Mr. Mayhew's application and indeed to the expedition with which it was conducted. The cost incurred by my involvement were plainly reasonable because they further the litigation but also because they would have been costs incurred by the BVI lawyers themselves had I not adopted this role. Indeed, it is likely to

[27] Witness Statement of Mr. Ross, paragraphs 7 -9.

have been at much greater cost since the time spent in reading into the matter and understanding the context would have been far more substantial.

[86] Mr. Ross' detailed time records were included in the costs materials submitted by Mayhew for these Assessments. They were reviewed by the Court on these Assessments, along with the submissions on them for the parties, with the same attention as were the time records of Mayhew's BVI legal practitioners.

[87] Mayhew submitted that Mr. Ross provided, among other things, continuity which was relevant and cost efficient overall; a knowledge of the history of the dispute; international case analysis on common law authorities (which otherwise would have had to have been done by someone else, presumably at Conyers); a sense of the strategy; a pre-existing relationship of trust with Mayhew; contact with the Appraisers; corporate analysis; and active case management.

[88] In international commercial litigation, which is the vast majority of the work of the Commercial Court in the Virgin Islands, the involvement of lawyers who are not practitioners of the jurisdiction's law (in whatever way the particular jurisdiction regulates that) and who are located outside the jurisdiction of the litigation, is common. This is only natural given the international nature of the commercial activities involved and that the individuals involved with the parties often are located elsewhere in the world.

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

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

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

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

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

[94] In the words of Justice Bannister in Grand Pacific Holdings Ltd. v Pacific China Holdings Limited:[28]

> The fees of instructed foreign lawyers are themselves treated as a disbursement in a BVI assessment. In other words, they have to be justified as a reasonable expense incurred by the BVI lawyers …

[28] BVIHC 2009/389, 3 December 2010, paragraph 22. Also see: BVIHCV2003/0072 Astian Group Limited et al v TNK Industrial Holdings Limited et al, March 24 and April 10, 2006 per Hariprashad-Charles, J, at paragraphs 42 and 46.

[95] Justice Bannister went on to refer to the roles of the foreign lawyer in that case and why they were a reasonable expense. This Court reads those roles and why they were reasonable as examples, not any limitation on the broad general principle. The circumstances of each case, of each client and client representative (location; language facility; sophistication; background; etc.), of each BVI legal team, of each foreign lawyer (expertise; background with the client; background with the events or matters leading to the BVI litigation; language facilities; location), and so on, will be different.

[96] This Court concludes that in principle Mr. Ross' involvement in the work covered by the costs statements was appropriate and should be part of the costs (as disbursements) to be recovered by Mayhew, with one exception. To the extent Mr. Ross served as Mayhew's representative in receiving and interpreting BVI legal, strategic and tactical advice, his work in doing so effectively was time as 'the client' and should not be included in what the Company should pay as costs to Mayhew.

[97] This Court has considered the submissions in that regard in the detailed review of time records and considers that an appropriate deduction would be 25% to reflect Mr. Ross' work in that role as "part of the client" as opposed to part of the legal team and any duplication as a member of the legal team.

[98] This approach is reasonable and fair to both parties.

Issue 3: Corporate Legal Practitioner Issue

[99] The Company objected to the recoverability of almost all the costs of the work of Mr. Robert Briant, a senior corporate partner in the BVI office of Conyers, Mayhew's BVI firm of legal practitioners.

[100] The detailed time records show Mr. Briant's involvement in various ways throughout. He appears to have had carriage of the matter for Mayhew in this jurisdiction from the outset (and hence a knowledge of the facts and corporate law issues), in the lead up to the specific issues leading to the Claim being disputed actively between the Company and Mayhew. He was involved as the dispute moved closer to the litigation that the Company commenced, and he maintained a specialized involvement during the course of the litigation.

[101] The Company's position in essence was that if pre-litigation costs are recoverable under this Court's costs order, which this Court has found to be the case, some of Mr. Briant's work before the litigation commenced may be recoverable. However, once the litigation was commenced, it is submitted that he should have (in the Court's words) "passed the baton" to Conyers' litigation lawyers and withdrawn.

[102] Mr. Forte, senior counsel in the litigation for Mayhew, stated (as an officer of the Court) that having the involvement of an experienced senior corporate lawyer in this litigation that dealt with significant and difficult, and in several respects novel, issues of corporate law under the Act was not only beneficial but almost essential.

[103] It should be noted here that Mayhew and the Company 'staffed up' for the litigation in a different way. The Company engaged a leading English silk, Vernon Flynn

Q.C., as counsel for the Company while Mayhew chose Mr. Forte as his lead counsel, with no involvement of an English barrister.

[104] The model advocated by the Company of the corporate legal practitioner "passing the baton" when the court proceeding is commenced is not the way in which corporate litigation is or should conducted in this day and age, if it ever was the way.

[105] In this judge's experience as a corporate commercial litigation counsel for over 30 years, the best arrangements for corporate commercial litigation (and indeed other types of business and other specialized litigation) are to have an experienced transactional and advisory lawyer (solicitor) involved throughout. He or she can add great value by bringing to the litigation team substantive and contextual knowledge (particularly if having had direct involvement in the matters leading to the dispute); perspectives on the legal and sometimes factual issue at hand, on practices 'on the ground' and on the broader context; focused contextual research (hands-on or directed) on difficult corporate law issues; and honed commercial instincts including instincts relevant on the overall strategy and tactics. Those non-litigators with experience in such roles and reasonable knowledge of litigation processes and tactics are even more valuable.

[106] This Court has no doubt that such corporate legal practitioner involvement on the litigation team in these types of cases adds value, increases efficiency and leads to a more effective presentation of the party's case.

[107] From a Court's perspective, having the benefit of such a contextual presentation in such cases not only makes the Court's work easier and more efficient, but reduces

the risk of a Court getting it wrong or in certain instances "messing up" an established and sensible way of doing things or of applying a law or regulation. It is of considerable assistance.

[108] Accordingly, this Court rejects the premise of the Company's general submission respecting Mr. Briant. Of course, his detailed time records remained subject to the same level of scrutiny on an assessment as all others who worked on the matter.

Issue 4: Detail/Particularity Issue

[109] No detailed assessment of costs would be complete without the party that is to pay the assessed costs raising in its points of dispute that detailed record of tasks submitted by the party that is to recover costs were lacking in detail or particularity.

[110] Both parties appeared to accept that the requirement that must be met is the requirement in CPR 69B.11(3) that the schedule of costs "particularise the amount of time spent upon the application by the legal practitioner or his partners or employees, specifying in each case – (b) the task or tasks undertaken by the [person], and (c) the precise time spent upon each such task by the relevant [person].

[111] This requirement, like all provisions in the CPR, is subject to being interpreted in light of the Overriding Objective of dealing with cases justly.[29] "Justly" means here that the requirement must be interpreted in a manner that is just for both parties.

[29] CPR 1.1(1) and 1.2.

This is reinforced by CPR 65.2(1)(b) which requires that the amount of costs to be allowed "be fair both to the person paying and the person receiving such costs."

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

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

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

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

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

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

[118] On the other hand, as counsel for the Company reminded the Court, justice to the party paying the costs requires that the paying party and the paying party's counsel have sufficient contextual detail of the task to be able to submit, among other things, that the particular work was not necessary or the particular time was not "reasonably spent"[30].

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

Issue 5: Time Unit Issue

[30] CPR 65.2(3)(g).

[120] The Company questioned in its objections the use by Conyers of 15-minute time units for the recording of time ("it is not understood why units are being claimed in quarter hours (15 minutes)").

[121] Mr. Forte explained to the Court the use of that unit of time by Conyers. The Court appreciates that the use of any unit of time, whether a 6-minute unit (0.1 hour) (which seems to be the smallest unit used generally) or a larger unit, requires timekeepers to record time honestly, accurately and fairly, and the presumption should be that they do so, unless and until shown otherwise. Arguably almost any activity takes more than six minutes (0.1 hour) , if one considers the various steps involved in getting ready for it, doing it, and then doing whatever follow up activity is needed (such as a file note). Because of that, a 12-minute (0.2 hour) unit may be a more realistic minimum unit. It may be anticipated that many timekeepers will record a 12 minutes (0.2 hour) entry even if a 6-minute (0.1 hour) unit is available in the system simply because 0.2 hour is more realistic and accurate. As well, it may be assumed that a larger unit means that truly minor tasks that take only a small portion of a unit will not be recorded, or they will be pooled (two, three or more minor activities recorded in a combined way using the smallest available unit).

[122] The point is that the time has been recorded in a manner that is presumed to be honest, accurate and fair unless and until shown otherwise.

[123] Quite property, there was nothing even suggested by the Company that this was not the case. The Company simply questioned the use of that unit, and Mr. Forte responded satisfactorily.

Issue 6: Senior Legal Practitioner Issue

[124] The Company objected to at least one entry in which the senior counsel for Mayhew recorded that, among other things, he had been "working with bundles", submitting that such work is an administrative task that should be disallowed.

[125] While of course if a senior legal practitioner, probably any legal practitioner, were to be doing the administrative work to a significant degree – such as the photocopying and assembly of bundles – the costs of that work should be disallowed.

[126] However, the Court has found that one of the problems with bundles and even skeletons is that too often no legal practitioner does any random or other quality control check to ensure globally that the materials are as they should be. The result can be a waste of time for everyone in the courtroom during the hearing.

[127] While it is not known what specifically was being done on this occasion, it is fair to say that it is incumbent on legal practitioners to invest a little time, efficiently and effectively, in the quality control of bundles and skeletons.

[128] While without question this objection is not a material aspect of the Assessments, for the reasons above, it is a general point on which a few words seem desirable.

Overall Reasonableness, Proportionality and Fairness

[129] The Court has considered the General Principles for Assessment of Costs and has had regard to all of the circumstance, and the seven particular factors listed in CPR 65.2(3) as applicable.

[130] With respect to factor (b), the care, speed and economy with which the case was prepared, the Court considers that Mayhew prepared his case carefully, expeditiously and cost-effectively, responding to the Company in a manner designed to achieve, and that resulted in, an expeditious and focused determination of the Preliminary Issue.

[131] With respect to factor (c), there is nothing in the conduct of Mayhew before or during the proceedings that affects the assessments of his costs in any negative manner.

[132] With respect to factor (d), the degree of responsibility accepted by the legal practitioners, Mayhew's legal team was appropriate in its composition having regard to considerations of the nature (complex and novel) and importance of the issues, and the timing (including Long Vacation, the speed of the proceedings, and that timing was driven at the outset by the Company's actions in bringing its application and taking subsequent steps). In assessing the composition and responsibility assumed by members of Mayhew's team of legal practitioners, the Court notes that the Company's team, while different overall, included senior members of the firm of legal practitioners as well as a leading Queen's Counsel from London.

[133] With respect to factor (e), the importance of the matter to the parties, it is clear from the Main Judgment that the proceedings were important to Mayhew given that they related materially to the manner and timing of his entitlement to a determination of the value of his expropriated Mayhew Shares. Likewise, the manner in which the Company pursued the proceedings with urgency and vigour demonstrated clearly to the Court that it considered the matter important. Objectively, the Court considers that the matter was important to the parties.

[134] With respect to factor (f), the novelty, weight and complexity of the case, and the legal issues raised, as shown in the Main Judgment, were indeed novel, weighty and complex. The issues were ones on which there was a lack of jurisprudence. It is evident from the materially divergent position of the parties, both represented by leading company law practitioners, that the issues were novel weighty and complex.

[135] With respect to factor (g), the time reasonably spent on the case, the Court considers that the time spent on the case by Mayhew's legal practitioners was reasonable and proportionate, as explained in this Judgment.

[136] The legal practitioners for Mayhew provided to Mayhew a 10% discount on hourly rates, which of course is reflected in the costs claimed by him from the Company. While no submissions were made about the hourly rates charge by Mayhew's legal practitioners, or anyone else, on the assumption that competition has legal practitioners in comparable practices charging reasonably competitive hourly rates, the discount is a factor than may be considered as support for the reasonableness of the total sum claimed.

[137] The total sum claimed is or appears to the Court to be reasonable and proportionate, having particular regard to the considerations set out and discussed above, and also viewed globally.

[138] At the request of the Court, Mayhew's costs were grouped by "activity" in the litigation process, which the Court finds a useful additional way to aid in the assessment of reasonableness and proportionality. The activity grouping bore out the Courts conclusion of reasonableness and proportionality.

[139] The total sum claimed is fair both to Mayhew and the Company. The global approach to proportionality indicated to this Court that the costs claimed, having particular regard to specified considerations, are proportionate, and that with certain limited exception for which disallowances are made below, each item of costs claimed was reasonably incurred and the costs for each item is reasonable. Alternatively, if the Court is wrong in its conclusion that the costs claimed are proportionate, the Court is satisfied, subject to the limited exceptions just referenced, that the work in relation to each item of costs claimed was necessary and the cost of each item is reasonable.

[140] **The Company's Costs.** The Court arrived at those conclusions without regard to any inference it may draw about the costs incurred by the Company. As previously noted, the Company declined Mayhew's invitation to disclose in some manner and to some extent its costs as a means to assess or confirm reasonableness and proportionality.

[141] The Company chose not to file anything in respect of the Company's costs (neither a global amount, an activity categorized summary, nor a detailed schedule)

despite having been invited by counsel for Mayhew at the 21 January 2016 hearing, and repeatedly thereafter, as a means (it was submitted) of assisting the Court to assess the reasonableness of Mayhew's costs.

[142] The Court did not order or even request that the Company do so but indicated that it would entertain submissions on any inferences to be drawn if nothing was filed.

[143] Counsel for the Company pointed out that it has not been the practice to provide paying party information in this jurisdiction, even if it is the practice elsewhere. Perhaps it should be the practice in this jurisdiction, at least in some cases, as it is a means to add perspective and context if it is used as a global 'reality check' recognizing that there always will be differences due to a wide range of factors.

[144] Tabling the paying party's basis costs information, as described below, may deter paying parties from taking overly aggressive and arguably unrealistic hindsight positions on assessments. Having said that, it would need to be done in a cost-effective manner. In this case the Company's counsel said that preparing a costs schedule for the Company would take a disproportionate amount of time ("at least 10 hours"). However, a detailed costs schedule would not be helpful nor is that what the exercise should be about. It should be a big picture (as the expression goes, "30,000 foot") view – total hours, or time aggregated by category of activity, and basic details about the paying party's staffing model and differences in what it had to deal with as compared to what the receiving party had to deal with. In addition, there could be any other big picture out-of-the-ordinarily-course information that resulted in the paying party's costs

being materially greater or lower than the receiving party's costs for reasons that would be inapplicable to the receiving party.

[145] Also as noted above, in this case the 'staffing model' of the Company in its legal representation was different than the 'staffing model' of Mayhew in his legal representation. Both made permissible choices and there was nothing in the Company's staffing model to suggest its costs were lower – indeed, the staffing model would tend to indicate the opposite.

[146] If the Court looks at the extent of work done by, and the composition of, the Company's legal team, including its reliance on a leading Queen's Counsel, it is very difficult to conclude that the Company's costs would have been lower than Mayhew's costs presented on the Assessments.

[147] However, in this alternative consideration, the fact the Company did not indicate in any way that its costs were less (or otherwise) than Mayhew's costs can and does lead this Court to the inference that they were not less. The inference is merely confirmatory of what the Court has concluded independently.

[148] While the Court must still be satisfied that the costs of the receiving party are reasonable, where the paying party's costs are not lower, and there are no 'big picture' indications that either party did not devote appropriate time, care and attention to the case (that is, neither too much nor too little), ordinarily it may indicate generally to a court that the overall costs claimed are reasonable and that it is not unfair to the paying party to compensate the receiving party below or to a level commensurate with what the paying party spent, and the time, care and attention that its legal team gave to the case.

[149] A recent report on costs awards in the context of international arbitration by the Commission on Arbitration and ADR of the International Chamber of Commerce ("**ICC**")[31] reviews the ways in which costs are assessed in different jurisdictions. In paragraph 65(iv), the ICC Costs Report states that a consideration in determining whether the costs sought are reasonable is "any disparity between the costs incurred by the parties as a general indicator of reasonableness as opposed to a separate factor in itself." This seems logically sound, for the reasons noted above.

[150] **A Further Aspect of Fairness to Mayhew as the Person Receiving Costs.** In assessing fairness to the person receiving costs in the context of a proceeding brought by a company against or in relation to the interests of a dissenting member arising from an expropriation under section 176 of the Act and an appraisal under section 179 of the Act (and perhaps in relation to any appraisal under that section regardless of the triggering event), it seems it would be appropriate to consider that the member has been expropriated (or put in the situation of having to accept a major change in relation to his investment or leave as a member).

[151] While the Court has come to its conclusion on fairness to the parties without regard to this consideration, it seems appropriate to consider it on an alternative basis.

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

[152] Those statutory provisions reflect a policy decision to give companies, and in particular their members with a specified high (here 90%) majority, flexibility to do things which they would not be able to do with small minority members in the company. The interests of a small minority are required, as a matter of public policy, to give way to the large majority. The offsetting policy decision is to treat the expropriated member(s) "fairly".[32]

[153] If litigation ensues, and the dissenting expropriated member incurs costs and is awarded costs payable by the company, reasonableness and fairness may be viewed through a contextual prism. It should lie less in the company's mouth to alleged unfairness. The dissenting expropriated member is entitled to a reasonable benefit of the doubt that costs incurred in prosecuting or defending the litigation – fully and vigourously if necessary – were reasonable, and compensating the member for such costs is fair to both parties.

[154] As stated above with respect to the consideration of the Company's costs as a factor, and as applicable to the expropriation factor immediately above, while those factors confirm this Court's conclusion on these Assessments, the Court did and would have come to the same conclusions whether or not these matters were considered.

DETAILED ASSESSMENTS

[155] **Conduct of the Assessments.** At the hearing of the Assessments and after, the Court reviewed in detail, item by item and line by line, the schedule of costs of Mayhew (with the details work description headed "CDP Description"), the

[32] Main Judgment, paragraph 9, footnote 5.

Company's specific objections (headed "Comments on Recoverability"), and Mayhew's Responses (headed "Conyers' Response").[33] As well Mayhew filed a schedule with updated information for the Main Judgment Costs Assessment and the Company provided comments thereon.

[156] Mayhew also filed a "Statement of Costs (Stay) (updated)" and a "Statement of Costs (Costs of Assessment of Costs) (updated)" and the Company provided detailed submissions with respect to those statements as well, which the Court has reviewed in detail, item by item and line by line, in conducting the Costs Assessments.

[157] At the hearing at which review was conducted for part of the time entries in connection with the Main Judgment Costs Assessment, the Court also had the benefit of explanations from counsel for Mayhew, Mark Forte, who had responsibility for the matter and was familiar with it. For the review of entries starting with 10 October 2015, the Court had the Conyers' Response, referenced above.

[158] Having considered the category or categories of objections that related to each item in the CDP Description, the Court also considered each item in the context of other entries on the schedule of costs, each of the Company's specific objection and each of Mayhew's specific responses. Likewise, for the Interim Stay Costs Assessment and the Assessment of the Costs of the Assessments, the court considered the specific objection to specific items and also each of those items in the context of the other entries on the respective statements of costs.

[33] Claimant's Updated Points of Dispute as Directed 2 February 2016".

[159] **Assessments by Judge Who Heard the Matters.** In a detailed review, a judge familiar with the case from having dealt with it, and familiar with the way in which litigation work is done in law firms generally and the way in which time records are generated generally, may be able to read individual items in their context and the context of what was going to in the case around that point in time. As noted above, it is not necessary that each time entry be perfect in order for an informed reader, whether the judge who heard the matter or counsel for the paying party, to be able to do that. With respect to the judge, this benefit is part of the value of having the judge who heard the matter deal with the assessment.

[160] **Nature of Objections by Company.** Objections throughout the individual entries included such complaints as "insufficient detail", "insufficient particulars", "duplicative", "unclear breakdown", occasionally "too long", "supervision", "unnecessary involvement [of certain people at certain points in time]", and too much time on skeleton, as well as "administrative task".

[161] In respect of a couple of entries on one of the Assessments, it was said that the item actually related to the other Assessment (however, given the overlap of timing and work, and the fact that "it all comes out in the wash" given that the paying and receiving parties are the same, and the amounts relatively small, there seems no basis to disallow any item grounded in that objection).

[162] **General Observations and Conclusions.** Viewed in the context of the chronology and context of this litigation, and the Court's general appreciation, referred to above, for the way in which teams in law firms can work efficiently on litigation matters, and the way in which work and time records are created during

intensive (particularly 'real time') litigation and the way in which they can be read in the context of surrounding entries, short form words and what was going on at the time, the Court finds that almost all work and time entries are satisfactory with the explanations provided in writing and orally by counsel who was personally involved.

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

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

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

Different parties have different challenges in their cases, adopt different written advocacy and overall strategies, and so on.

[166] One complaint, by way of example of the point the Court is seeking to make, was that six hours of work by Mr. Mark Forte revising a skeleton at a certain (late) stage of the proceedings suggested that a "decision was made at this stage to alter the skeleton fundamentally" and the time should not be recoverable.[34] The response was that "Lead counsel will always have input on shape of skeleton after it has been initially drafted in a cost efficient manner by someone at a lesser rate."

[167] That response is a realistic reflection and explanation of how teams work on litigation in many law firms. Further, sometimes a decision will be made upon further reflection late in the day to make a fundamental change (which is not what Mr. Forte said occurred here). The best counsel continue thinking and re-thinking their cases and how they will present them most effectively. While a fundamental change late in the day may not happen in the majority of cases, it does not mean that earlier work was not of value. While in some cases poor quality work by a junior person, for example, will mean a re-write, and should mean a disallowance, an explanation that rethinking led to a desire to improve the substance of the submissions or their presentation should not lead to an inference that the earlier work was unnecessary or without value. It would have been part of the process leading to the improved and more effective final product.

[168] With respect to descriptions in the records of work and time, CPR 69B.11(3)(c) states that "the precise time sent upon each such task ["such" being a reference

[34] 25/11/2015 MJF [Mark Forte].

back to CPR 69B.11(3)(b) which requires the task or tasks undertaken by the person to be specified] undertaken by the relevant practitioner, partner or employee" to be specified.

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

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

[171] In most cases, page upon page of "engaged in file" would not suffice. Indeed, unless the context made it clear, "engaged in file" might never suffice. But would it not be sufficient to record "preparing skeleton" as the description of the task? This Court considers that at least in some – perhaps many – contexts, that would be sufficient.

[172] If a person is preparing for a telephone call, does need he or she have three entries, such as "prepared for telephone call", engaged in telephone call", and "prepared note of telephone call", with a time entry for each. But what if the call was less than three minimum units of time that the law firm uses, even if a 6 minute (0.1 hour) unit? Would it be disallowed because three activities were described together as say a 12 minutes (0.2 hour) entry? Or perhaps some

timekeepers would simply put "engaged in telephone call" as covering preparation for it and a follow up file note. This Court considers that either approach at least in some – perhaps many – contexts, that would be sufficient.

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

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

[175] **Judgment on Main Judgment Costs Assessment.** The amount claimed by Mayhew for costs pursuant to the Main Judgment totaled $377,692.00.

[176] Through the course of the oral hearing, $1,642.50 was disallowed in the Main Judgment Costs Assessment. Having reviewed carefully the balance of the time records and the submissions thereon, a further $2,119.25 should be disallowed, for individual time entries that either are administrative work or whether there is insufficient detail, namely being items for preparing a letter or email or having a telephone conversation where there is no further detail and it is not evident from the context. The entry should have specified at least the recipient (person or entity) of the written communication or the other participant or participants in the telephone conversation (by name or perhaps by entity), or possibly noting the subject matter would have been sufficient to make the entry somewhat less opaque. But absent anything else, including sufficient context, those items fall on the 'disallow' side of the line. The result is a total disallowance of $4,491.75. In addition, $730.00 is disallowed from the updated schedule.

[177] In the Main Judgment Costs Assessment, the total costs claimed for fees of legal practitioners (including the updated information) of $238,574.75 ($230,657.00 + $7,917.75) shall be reduced by $4,491.75 ($3,761.75 + $730.00) to **$243,066.50**.

[178] 'Disbursements by way of foreign legal practitioner costs', which were claimed at $115,560.00, shall be reduced by 25%, to reflect Mr. Ross' role and work as "part of the client" as opposed to part of the legal team and any duplication as a member of the legal team. The disbursement allowed is **$86,670.00**.

[179] General disbursements claimed, to which there were no objections, were **$5,692.75** ($5,237.20 + $455.55) and shall be allowed in full.

[180] Accordingly, in connection with the Assessment of Costs of the Main Judgement, the costs payable by the Company to Mayhew shall be the sum of **$335,429.25**.

[181] **Judgment on Interim Stay Costs Assessment.** In the Interim Stay Costs Assessment, the total costs claimed by Mayhew for fees was $16,860.46 plus disbursements by way of foreign legal practitioner costs of $4,860.00.

[182] The main objection of the Company was that the amount claimed was "wholly disproportionate to the relief claimed, i.e. an interim stay pending determination by the [Court of Appeal] whether to grant a stay pending appeal." The Company also had similar objections as in the Main Judgment Costs Assessment about individual time and work record entries on the statement, including objections such as (remarkably) that no preparation was required for the stay application and that too many legal practitioners were involved. With respect to the foreign legal practitioner, the main objection was similar to the objection discussed and rejected earlier in this Judgment to the effect that there was no need for his involvement on an application involving BVI law and procedure.

[183] With respect to the main objection above, whether the appraisal work would continue was a matter of considerable importance to both parties, as it has been throughout starting with the Company's urgent application to stop the Appraisers from meeting. From Mayhew's perspective, his position has been that delay is keeping him out of payment for his Shares, and as discussed in the Main Judgment, delay is prejudicial to him.

[184] In the context of this case, the disputes between the parties about the ongoing Appraisal and its timing, and the issues on and the importance of the Interim Stay

Application, this Court does not consider as disproportionate the work done by Mayhew's legal team (including Mr. Ross, the foreign legal practitioner, acting as part of the legal team, although (as above) there will be a 25% reduction to reflect Mr. Ross' role and work as "part of the client" as opposed to part of the legal team and any duplication as a member of the legal team).

[185] The response of Mayhew pointed out, correctly, that Mayhew's submissions and materials were effective and helpful to the Court. The Court cannot conclude that the objections are meritorious. Likewise, the involvement of two counsel for Mayhew was not disproportionate or unnecessary in the context. Nor does the Court consider that any of the specific objections should result in any items of work being disallowed or the time therefore reduced, save for one hour (taken at $860.00) conceded by Mayhew's counsel in reply.

[186] The Court agrees with Mayhew's reply submission that the interim payment application was not "unsuccessful". The Court considered that it could assess costs expeditiously and it did so, making the alternative interim payment application unnecessary. Mayhew achieved his objective of arriving at a position reasonably expeditiously of being able to obtain payment in respect of his costs.

[187] Accordingly, in connection with the Interim Stay Costs Assessment, the costs payable by the Company to Mayhew shall be the sum of **$19,645.46** ($16,860.46 - $860.00 + ($4,860.00 X 0.75 =) 3,645.00).

[188] **Judgment on Assessment of Costs of Costs Assessments.** The Company's first position was that it desires the opportunity to make submissions on the award of costs of the Costs Assessments once the Court has completed the Main

Judgment Costs Assessment and the Interim Stay Costs Assessment. However, the Company was content to proceed, and did proceed, with the Assessment of the Costs of the Costs Assessments, subject to that fundamental reservation.

[189] In the Assessment of Costs of the Costs Assessments, the total costs claimed by Mayhew for fees was $50,091.66 plus disbursements by way of foreign legal practitioner costs of $5,580.00 and general disbursements of $19.25 (to which there was no objection).

[190] The main objection of the Company was similar to the main objection on the Interim Stay Costs Assessment, namely that the amount claimed was disproportionate ("outrageously high"; "clearly disproportionate to a costs assessment exercise") and that the costs should be about one-tenth of the amount claimed as fees. The

Company also had similar objections as in the Main Judgment Costs Assessment and the Interim Stay Costs Assessment about individual time record entries on the statement, including that too many legal practitioners were involved and that far too much time was spent. In addition, the Company pointed to a few entries that were administrative tasks and a few that appeared to included work respecting the appeal from the Main Judgment to the Court of Appeal. With respect to the foreign legal practitioner, the main objection was similar to the objection discussed and rejected earlier in this Judgment to the effect that there was no need for his involvement on an application involving BVI law and procedure. As well there were objections to specific entries on his schedule of work.

[191] With respect to the main objection above, the Court observed that the Costs Assessments were vigourously contested by the Company. There were extensive objections on a line by line basis, as well as the six general objections, which understandably required work to consider and respond. As set out above in this Judgment, the Company raised six general objections, overall proportionality objections, and specific objections to a vast number of individual entries. As it was entitled to do, it exercised fully the ability of a paying party to object to the costs claimed by a receiving party. The result, however, was extensive written submissions, detailed objections, and lengthy oral hearings.

[192] The Company asserted that the speed with which the Assessments ensued may have resulted in the number of schedules and updated schedules, including schedules with objections and reply comments, which were submitted. On the other hand, the expedited process meant that the proceedings that gave rise to the Assessments were still reasonably fresh in the minds of all concerned, both the legal practitioners and the Court. The result seems to have been the achievement of

[193] efficiencies in the assessment processes that would not have been achievable months and months later.

[194] The Company insisted upon the assessment process it got, and there is no reason in principle that it should not pay Mayhew's costs of going through it, subject to certain disallowances, if Mayhew is awarded his Costs of the Assessments of Costs.

[195] There should be disallowances for two items of work that appear to be administrative in nature ($506.25 disallowance), one that is too vaguely described ($337.50 disallowance) and for an items of work that appear to relate in part to Court of Appeal proceedings ($300.00 disallowance). Accordingly, the sum of $1,143.75 is disallowed, resulting in fees of **$48,947.91** ($50,091.66 - $1,143.75).

[196] The disbursement claimed for Mr. Ross' work of $5,580.00 shall be reduced, first by one item that appear to relate in part to Court of Appeal proceedings ($200.00), and then by 25% to reflect Mr. Ross' role to reflect Mr. Ross' work as "part of the client" as opposed to part of the legal team and any duplication as part of the legal team, to **$4,035.00**.

[197] Accordingly, subject to receiving submissions in connection with the award of Costs of the Costs Assessments and determining same, the Court assesses the costs that will be payable by the Company to Mayhew if the Company is ordered to pay Mayhew's Costs of the Assessments of Costs. In such event, the Costs of the Assessments of Costs that will be payable by the Company to Mayhew shall be the sum of **$53,002.16** ($48,947.91 + $4,035.00 + $19.25).

Footnote on Section 176 and 179 of the Act:
Delay in Payment; Expenses Incurred by Member

[198] At paragraph 63 of the Interim Stay Judgment, this Court commented as follows:

> Mayhew still owns the shares but is being deprived of any upside and is not being compensated for the delay (if there is an ability to obtain such

compensation for the 'time value of money', neither side has identified it – and perhaps that is a serious gap in the legislative scheme).

[199] The Assessments have raised in the mind of the Court whether consideration should be given to a statutory provision for the compensation of dissenting members, or at least the compensation of expropriated members, not just for the 'time value of money' but for the legal and other incidental costs incurred by the member consequent upon the exercise of the right to dissent. The way those matters are handled are policy matters for the House of Assembly, absent any provision in the Act that enables the Court to consider them, or either of them.

[200] As noted in the prior judgments in this matter, in this Court's view the appraisal remedy in the Act is intended to provide an expeditious and cost-effective process. Whatever the outcome of the legal issues in the Main Judgment upon further consideration at the appellate level, it seems clear that there will be situations in which delay occurs in the determination of fair value and as a result, in payment to the member for the member's shares, and in which the dissenting member incurs more than nominal legal and other costs.

Footnote on Costs Assessments in the Commercial Court

[201] There are various methods for the determination of costs in a 'loser pay' system. Each has its advantages and disadvantages. They range from summary processes to the detailed assessment conducted in this jurisdiction, and for these Assessments.

[202] Costs can be significant in absolute terms, and relative to what was in dispute, and their assessment needs a certain level of care and attention.

[203] The "basis of quantification" in CPR 65.2 is generally in line with the prevailing criteria for the assessment of costs elsewhere. Recent evidence of this can be seen from a review of the ways in which costs are assessed in different jurisdictions, as reported in the context of international arbitration in the ICC Costs Report.[35]

[204] In the Commercial Court, costs often are assessed by the Judge, and by definition usually that is the Judge who lived with the proceeding throughout, saw how the proceedings were conducted, understands the issues that were raised, and has a context that anyone not involved would not have.

[205] Commonly counsel on assessments refer to the extensive work done to compile the time records and for the paying party to review them and provide points of dispute. It can be a disproportionately expensive exercise. As noted above, in this case the Assessments required disproportionate time.

[206] A detailed assessment can be, for all concerned a painful and in some ways disproportionate means of assessing costs.

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

[207] How much is gained by the line-by-line review of time records? On a cost-benefit basis, is the time and effort worth the gain to either the paying or the receiving party?

[208] As noted above, the Court asked in this case, as it has in others, for breakdown of time which are proportionately more useful tools.

[209] First, there is value to having a summary chart (schedule) showing the name of each legal practitioner and other person who did billable work on the matter, with that person's position and seniority (in all relevant jurisdictions), the person's applicable hourly rate(s), the hours worked on the matter by the person, and total fees charged for the person (that is, hours multiplied by the hourly rate(s)), and then a grand total.

[210] Liquidators routinely provide such information when they apply for the Court to review their remuneration claims.

[211] Second, there is even greater value to having a breakdown chart (schedule) showing the following type of information:

a. A breakdown of all time covered by costs schedule by 'meaningful activity' ("**Activity**") [e.g.: in a typical proceeding, a 'meaningful activity' might be 'preparing claim [or application]', 'preparing defence', 'document disclosure', etc. but in any particular case the 'meaningful activities' will depend on the nature of the matter, what work was done, etc.], with a section for each meaningful activity beginning with

the name of the activity, and with the column being headed "Name of Activity"';

b. a brief description of the work done on each Activity by each person;

c. the time worked on that Activity by each person;

d. the total amount claimed for that person in relation to that Activity; and

e. the total amount claimed for that Activity (e.g.: total amount for each person added up).

[212] Seeing the cost of each Activity and how much time was worked by each person on each activity tends to be a more meaningful way to appreciate what was done, and the reasonableness and proportionality of the handling of that Activity.

Orders

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

1. Mayhew's costs of the Claim, including the injunction proceedings and the Application, are assessed and fixed in the amount of **$335,429.25**.

2. Mayhew's costs of the Interim Stay Application are assessed and fixed in the amount of **$19,645.46**.

3. Mayhew's costs of the Assessments are assessed and fixed in the amount of **$53,002.16**.

4. The Company shall pay to Mayhew his Costs of the Costs Assessments.

Justice Barry Leon
Commercial Court Judge
29 April 2016