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

CLAIM NO. BVIHC(COM) 2014/0105 and 2014/0134

BETWEEN:

[1] HALLIWEL ASSETS INC
[2] PANIKOS SYMEOU
[3] MARIGOLD TRUST COMPANY LIMITED

Applicants/Judgment Creditors

and

HORNBEAM CORPORATION

Respondent/Judgment Debtor

Appearances:

Paul Girolami, Q.C., and Daniel Mitchell of Forbes Hare, for the Applicants/Judgment Creditors (Intended Respondents)

Christopher Parker, Q.C., and Stuart Cullen of Harney Westwood & Riegels, for Bracha Foundation, an Interested Person (Intended Appellant)

Oliver Clifton and Colleen Farrington of Walkers for the Respondent/ Judgment Debtor

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2016: May 9 and 17
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JUDGMENT

Non-party objector, on pending application to make final a provisional charging order on shares to satisfy unsatisfied orders against judgment debtor, applied for permission to appeal from, and a stay (or alternatively an interim stay) of, order that it give security for

judgment creditors' costs of the application – Argued by written submissions – Court held it had jurisdiction to order security for costs by virtue of its case management power to "make any other order for the purposes of managing the case and furthering the overriding objective" and by virtue of its inherent jurisdiction to control its own processes.

HELD that not sufficient merit in any of five grounds for intended appeal to meet test for permission to appeal.

Non-party objector sought to assert on intended appeal that court found jurisdiction on bases not submitted by the parties – Court's jurisdiction not limited by parties' assertions of jurisdiction and parties cannot curtail or constrain court's jurisdiction by relying on other bases for jurisdiction or by agreeing that court does not have jurisdiction on some basis.

Also sought to raise that it did not have opportunity to address whether court had the jurisdiction ultimately relied upon – Issue of court's jurisdiction was "on the table" – In any event, non-party objector had opportunity to air its submissions on this application – Now court has heard what non-party objector had to say about jurisdiction – Not sufficient merit to meet test for permission to appeal.

To extent judgment creditors expanded application for security in written submissions, non-party objector could have sought to make further written submission in response – Instead sat in silence while court made its determination.

Assertion as ground of intended appeal that amount of security for costs ordered included amounts for foreign lawyers that would not be recoverable, or at least that case of "special circumstances" for such fees being recoverable disbursements not made by judgment creditors – Recoverability of work of foreign lawyers (or other third parties who assist on BVI litigation) as a disbursement is context dependent – Need to consider why work of third party generally, or more specifically on various projects or tasks undertaken, in context of particular litigation, should accepted as more than "general conduct of BVI litigation", "work that normally would be done by solicitor instructed to conduct matter" or "general assistance to counsel in conduct of matter".

Prudent, and aids efficiency of costs assessments involving claims for work of foreign lawyers, for BVI legal practitioners working with lawyers outside jurisdiction to consider contemporaneous documentation of reasons for involvement of foreign lawyer on particular roles or tasks – Also, for costs assessments where is claim for work of third parties, particularly foreign lawyers, should consider providing summary of contemporaneous documentation, or if none, non-contemporaneous summary of reason(s) for involvement of foreign lawyer or other third party on particular role(s) or task(s).

Court not satisfied that other compelling reason why appeal should be heard or that law requires clarifying as a matter of general public or commercial importance.

On assessment of costs of security for costs applications, non-party objector submitted that fees of foreign lawyers not recoverable – conduct of litigation covered by order for costs was in hands of a BVI lawyer and work of foreign lawyers apparently done under their general direction – Would have been foolish not to have foreign lawyers bring background and seek to ensure consistency and continuity of positions and submissions, particularly as main litigation taking place elsewhere.

Also objection that judgment creditors' counsel charged more than three times what its counsel charged – Counsel for judgment creditors explained he wrote skeleton while counsel for non-party objector may not have done so, which non-party objector's counsel did not dispute – Two teams structured differently and worked differently, which is perfectly acceptable – Non-party objectors did not provide its total legal costs for applications, which may have been a better comparator.

Objection that hourly fee of supervising partner in judgment creditors legal practitioners was too high – Objection was objectionable and petty, wholly lacking in merit and should not have been made – Non-party objector's legal practitioners' partner with comparable role charged more – While some internal differences among firms in Territory, overall rate structures are reasonably comparable – Not type of objection that should be raised without sound basis – Gratuitous and overly aggressive objections unnecessarily prolong assessments, and do nothing to aid in just determination of what is reasonable for paying party to pay.

Total sum claimed reasonable and fair both to parties. The global approach to proportionality indicated that costs claimed, having particular regard to specified considerations, are proportionate in context of this dispute, each item of costs claimed was reasonably incurred and costs for each item is reasonable.

[1] **LEON J [Ag]** Bracha Foundation ("**Bracha**") applied for permission to appeal to the Court of Appeal ("**Permission to Appeal Application**")[1] from an Order of this

[1] Notice of Application, 26 April 2016.

Court dated 22 April 2016 requiring it to give security for costs ("**Security for Costs Order**").

[2] The Security for Costs Order was made in connection with a pending application ("**Application**") by the Applicants/Judgment Creditors ("**Judgment Creditors**") for the Court to make final a provisional charging order ("**Provisional Charging Order**") on shares in the first Judgment Creditor ("**Shares**") registered in the name of the Judgment Debtor.

[3] The Provisional Charging Order was for amounts owed by the Judgment Debtor to the Judgment Creditors pursuant to two orders of this Court dated 10 December 2014 ("**Orders**").[2] The Orders were in respect of costs of proceedings brought by the Judgment Debtor against the Judgment Creditors. No payment had been made in respect of the amounts payable pursuant to the Orders.

[4] It appeared that the Judgment Debtor held – and now Bracha holds on the same terms – the Shares on trust for the ultimate benefit of Vladimir Shulman ("**Shulman**"), the ultimate beneficial owner of the Shares, although the transfer of the Shares from the Judgment Debtor to Bracha has not been registered by the first Judgment Creditor. Suffice it to say that the evidence and submissions respecting the arrangements and transactions among the Judgment Debtor, Bracha and Shulman had not made clear several matters.[3]

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[2] Orders in the amount of USD 629,250 in 2014/105 and USD 25,000 in 2014/134 plus interest at the rate of 5% per annum from 13 October 2014 pursuant to Section 7 of the Judgments Act (Cap. 35). The Orders are for costs of proceedings awarded to the Judgment Creditors in proceedings brought by the Judgment Debtor.

[3] It was submitted on the Permission to Appeal Application that this Court's inference in the Security for Costs Judgment (as defined below in this Judgment) as to the motivation and timing of the transfer may not have taken appropriate account of all of the evidence and submissions. This Court interred, in paragraph 16 of the Security for Costs Judgment that "[i]t is reasonable to infer that the Orders motivated the transfer, with the objective of those involved in the transfer that execution on the Shares would be more difficult if they were no longer in the name of the Judgment Debtor. If there is some other explanation, the Judgment Debtor, Bracha, Campanile

[5] Bracha also applied to this Court for a stay of the Security for Costs Order pending the determination of the intended appeal ("**Stay Application**"), or alternatively an interim stay until the Court of Appeal can consider an application for permission to appeal, if not granted by this Court, and an application for a stay pending determination of the intended appeal.

[6] On 22 April 2016 this Court handed down a Judgment ("**Security for Costs Judgment**") which provided for the Security for Costs Order. Bracha was ordered to give security for the Judgment Creditors' costs of the Application of $719,234.09 within 21 days (which this Court has since extended by 7 calendar days), and that in the event Bracha does not comply, debarring it from participating in the Application and in any proceedings in relation to the Shares arising in the event the Provisional Charging Order is made final.

[7] While there were cross-applications for security for costs, Bracha's application for the Judgment Creditors to give security for costs was dismissed.[4] No application for permission to appeal from the dismissal has been brought.

[8] Also Bracha was ordered to pay the Judgment Creditors their costs of the security for costs applications ("**Costs of the Security for Costs Applications**"), to be

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[who provided evidence on the security for costs applications] and Shulman failed to provide it." Bracha submitted on the present application that the transfer was "in the works" (this Court's phrase) before the Orders and that the Security for Costs Judgment had not taken appropriate account of that. However whether that was the case or not, and assuming without deciding that it was, the making of the Orders changed the factual matrix, and those involved should have considered the consequence of the transfer for the Judgment Creditors' enforcement of the Orders. In any event, the finding that those involved failed to provide any other explanation for the transfer was not proposed to be challenged on the intended appeal.

[4] The positions of Bracha and the Judgment Creditors, and the Courts reasons for the dismissal of Bracha's application for security for costs, are in the Security for Costs Judgment, paragraphs 60 – 72.

assessed if not agreed, within 10 days. The Judgment Creditors applied to a summary assessment of those costs, which assessment was held at hearing of the Permission to Appeal Application and the Stay Application. This Judgment includes the judgment on the assessment ("**Assessment of Costs of the Security for Costs Applications**").

[9] The Security for Costs Order further provided that in the event Bracha is debarred by its failure to comply with the order for giving security for costs, and if the Judgment Debtor seeks to assume a role as the active objector on the Applications, the Judgment Creditors would have liberty to apply for an order that the Judgment Debtor give security for the Judgment Creditors' costs that are subject to the Security for Costs Order.

Background

[10] The matter of security for costs was raised during the hearing of the Application on 9 October 2015. There was insufficient time to conclude the hearing (which is now listed to resume in November 2016). It was agreed that only written submissions with respect to the security for costs applications would be submitted.

[11] Bracha took the position, and in the Security for Costs Judgment this Court agreed (for the purposes of the security for costs determination only), that Bracha is an

"interested person" within the meaning of the CPR Part 48 "Charging Orders"[5], with a right to file an objection[6].

[12] The result of that determination was that the Security for Costs order could not be under the case management power of the Court in CPR Part 26 to impose a condition (e.g.: "requiring a party to give security"[7]) when a person is added in proceedings by an order under CPR Part 19.

[13] However, this Court held that it had jurisdiction to order security for costs in connection with the Application, in the appropriate circumstances, both by virtue of:

> (a) its case management power in CPR 26.1(2)(w) to "make any other order for the purposes of managing the case and furthering the overriding objective", and
> (b) its inherent jurisdiction to control its own processes.[8]

This Court held that the jurisdiction would enable it, in appropriate circumstances, to order either Bracha or the Judgment Creditors to give security for costs in respect of the Application. As explained below, this holding is sought to be challenged on the intended appeal.

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[5] CPR 48.6(1) and (2): "interested person" includes "(h) any other person who has an interest in the personal property to be charged."

[6] CPR 48.6 and 48.8(2)(a): CPR 48.6 specifies that an "interested person" is, among others, "any other person who has an interest in the personal property to be charged" and CPR 48.8(2)(a) provides that any interested person may file objections to a provisional charging order.

[7] The Court notes that paragraph 28 of the Security for Costs Judgment mistakenly refers to CPR 26.1(4)(a) rather than to CPR 26.1(3) and (4)(b). It appears that parties understood what was intended. Thus, when the Court makes an order it may make it subject to a condition requiring a party to give security, however, as explained in the Security for Costs Judgment, the Court did not need to make an order for Bracha to participate if it was, as found for the purposes of the applications, an interested person.

[8] Security for Costs Judgment, paragraphs 29 – 34.

[14] Regarding the Court's case management powers under CPR Part 26, "Case Management – The Court's Powers", this Court relied in the Security for Costs Judgment upon CPR 26.1(2)(w) which permits the Court to "make any other order for the purposes of managing the case and furthering the overriding objective" (CPR 1.1(1): "The overriding objective is to enable the court to deal with cases justly").

[15] Regarding the Court's inherent jurisdiction to control its own processes, this Court relied in particular on the 2006 judgment of the English High Court (Queens Bench Division) in Days Healthcare UK Ltd v Pihsiang Machinery Manufacturing Co Ltd and Others[9] ("**Days**") in which the court debarred defendants from taking part in a detailed assessment of costs because of their failure to comply with an order against them requiring them to pay interim costs. While the particular circumstances in which the court exercised its jurisdiction in Days was different, the court in Days stated as follows:

> … In my judgment, quite apart from any specific rule, the court has an inherent jurisdiction to control its own processes sufficient to enable it to make an order of the nature sought here.[10]

[16] The court in Days held that it had the power to debar the defendants from participating in the proceeding (an assessment) because they were in breach of the court's order for them to make the interim payment that the court ordered.

[17] As explained further below, Bracha seeks to raise on its intended appeal that the inherent jurisdiction found in Days does not exist in respect of the application made to this Court by the Judgment Creditors to require Bracha to give security in

[9] [2006] 5 Costs LR 788 (QBD per Langley J).
[10] Days, paragraphs 6, 10, 13, 19 and 20. See Security for Costs Judgment, paragraphs 32 – 34.

respect of their costs of the Application; that it exists only where there has been a breach of a court order by the party against whom the order is sought.

[18] Having held that this Court had jurisdiction, it turned to whether security for costs should be ordered.

[19] The Judgment Creditors' position was that whatever the precise arrangements among the Judgment Debtor, Bracha and Shulman, the Judgment Debtor sued the Judgment Creditors in the proceedings in which the Orders were made for the benefit of and at the instigation of Bracha and/or Shulman; the Orders were not appealed and remained unpaid; there was no suggestion that the Judgment Debtor cannot pay; there appears to have been a crude attempt to discourage enforcement of the Orders; and Bracha had not suggested that a security for costs order would prevent it from participating in the Application.[11]

[20] Bracha's position was that no security for costs was necessary from it as the Judgment Creditors, if awarded their costs based on their success on the Application, would be able to obtain a charging order against Bracha in respect of the same Shares.[12]

[21] This Court expressly stated in the Security for Costs Judgment that Bracha was not subject to the Orders and was not in default in honouring them, although it may have participated in making it more difficult for the Judgment Creditors to obtain satisfaction of the Orders by recourse to the Shares, if such recourse is available to the Judgment Creditors at all. This Court confirmed for the purposes of the

[11] Security for Costs Judgment, paragraph 36.
[12] Security for Costs Judgment, paragraphs 37 – 38.

security for costs applications that Bracha had, based on the evidence, a separate legal personality from the Judgment Debtor and from Shulman.[13]

[22] This Court, relying on both its inherent jurisdiction and its case management power, as described above, concluded that Bracha should be ordered to give security for the costs of the Judgment Creditors on the Application.

[23] The Court reasoned that requiring Bracha to give security will further the overriding objective of enabling the Court to deal justly with the Application, including any costs order that may be made in connection with it. It held that it was just that the Judgment Creditors should be able to recover costs from Bracha if such costs are awarded and there is a real risk that they will not be able to do so if security is not given. The Court held that when it looked at what was really going on and what the relationships were among Bracha, the Judgment Debtor and Shulman, debarring Bracha from making its objection on the Application if it fails to give security for the Judgment Creditors' costs of the Application was required in the interests of justice and fairness. Requiring security for costs from Bracha was deemed necessary in the interest of ensuring that there will be compliance with the Court's orders (the Court having an interest in respect of its orders and in the enforcement of them).[14]

[24] The Court concluded that while the Judgment Creditors will have the ability to seek a charging order if they are awarded costs from Bracha in the Application, enforcement of a court order through the charging and subsequent sale of shares is as a practical matter more of a challenge than enforcement against cash or cash-like security.[15]

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[13] Security for Costs Judgment, paragraph 39.
[14] Security for Costs Judgment, paragraphs 40 – 43 and 51 (which explains that the reference to compliance with orders in paragraph 43 is to any future costs order (against Bracha).
[15] Security for Costs Judgment, paragraphs 44 – 45.

[25] The Court went on to note that there had been and continued to be an unexplained breach of this Court's Orders by the Judgment Debtor with the apparent support, in part, of Bracha, and that the evidence of Bracha made clear that the positions being taken by Bracha and the Judgment Debtor on the Application are for the interests of Shulman. This Court considered that it should at least ensure that the situation of non-compliance by the Judgment Debtor with its Orders will not be compounded by the possibility that a further costs order it may make on the Application against Bracha, as the entity representing Shulman's interests, will go unsatisfied.[16]

[26] The Court again stated that presumptively the Judgment Debtor, Bracha and Shulman are three separate legal persons and that nothing in the Security for Costs Judgment was about lifting the corporate veil. Rather, it was about drawing character and anticipated behaviour inferences about presumptively (unless and until shown otherwise) separate legal persons. Bracha, the Judgment Debtor and Shulman had been and were acting in a coordinated and consistent manner, in the interests of Shulman as the ultimate beneficial owner of the Shares.[17]

[27] With respect to the quantum of the security to be given, the Judgment Creditors submitted two Schedules of Cost, one showing costs (fees and disbursements) from early February 2015 through the 9 October 2015 hearing, and one showing estimated future costs, being a total of $719,234.09. The total included the costs (fees and disbursements) of the legal practitioners for the Judgment Creditors and (as disbursements) the fees of the English solicitors for the Judgment Creditors, and the fees of their Counsel. The costs for the first period included work done in

[16] Security for Costs Judgment, paragraphs 46 – 51.
[17] Security for Costs Judgment, paragraphs 52 – 58.

relation to the Provisional Charging Order and other related work beyond responding to Bracha's Notice of Objection.[18]

[28] Bracha, with its submissions on the security for costs applications, also submitted a schedule of costs (fees and disbursements) "for the 9 October 2015 hearing" and estimated future costs.[19]

[29] Bracha submitted that "a party to British Virgin Islands proceedings can only recover legal fees in respect of services provided by persons entitled to practise in this Territory." The Security for Costs Judgment held that while that is true, the fees of foreign lawyers can be recovered as a disbursement.[20] Bracha also challenged other items on the schedule including "research" which this Court held should be allowed if it is on a complex or novel issue or otherwise justifiable and reasonable.[21]

[30] While Bracha submitted that "one would expect a figure based on no more than two-thirds of the costs of the highest possible claimable figure to be used", this Court held that even if ordinarily this type of balancing is appropriate, in the circumstances that led this Court to require Bracha to give security for the full charging order proceeding, it was appropriate that the Judgment Creditors should have adequate protection for their costs and that two-thirds of the amount of the Judgment Creditors' cost schedule amounts would be inadequate. There was no

[18] Security for Costs Judgment, paragraphs 78 – 80.
[19] Security for Costs Judgment, paragraph 81.
[20] Security for Costs Judgment, paragraph 84. BVIHC 2009/389 Grand Pacific Holdings Ltd. v Pacific China Holdings Limited, 3 December 2010, Bannister, J., paragraph 22: "The fees of instructed foreign lawyers are themselves treated as a disbursement in an BVI assessment. In other words, they have to be justified as a reasonable expense incurred by the BVI lawyers."
[21] Security for Costs Judgment, paragraph 85.

suggestion or evidence that an order for Bracha to give security would impede it from participating in the application to make final the Provisional Charging Order.[22]

[31] The Court rejected Bracha's position that security should only be for the costs that had been and will be incurred in responding to Bracha's opposition to the making final the Provisional Charging Order. The Court acknowledged that there was a superficial appeal to Bracha's position and that without considering carefully the real context, and Bracha's role and participation, one might say that it would be difficult to justify Bracha having to give security for costs incurred for the period prior to Bracha becoming involved in the Application or for costs incurred that do not relate to Bracha's Notice of Objection. However, this Court held that Bracha's involvement arose because it accepted a transfer of the Shares, for nominal consideration, and cooperated and coordinated with the Judgment Debtor and Shulman. While the proceedings to obtain the Provisional Charging Order were directed to executing on the Shares, they were understandably directed to the Judgment Debtor. Bracha stepped into the role of owning legal title to the Shares. It was held to be fair and reasonable that Bracha should give security to cover the entire charging order proceedings. Otherwise, the Judgment Creditors, if awarded costs, would be left to look to the Judgment Debtor only for their costs until the time of Bracha's involvement. This would be so because Bracha accepted the Shares which may have been available to satisfy those costs.[23]

[32] This Court ordered Bracha to give security for costs in the sum of $719,234.09 and that if Bracha does not comply it shall be debarred from participating in the Application and in any proceedings in relation to the Shares arising in the event the Provisional Charging Order is made final, subject to any relief from sanctions

[22] Security for Costs Judgment, paragraph 86.
[23] Security for Costs Judgment, paragraphs 87 – 91.

that may be ordered. The Court ordered that Bracha to pay the Judgment Creditors their Costs of the Security for Costs Applications, to be assessed if not agreed, within 10 days.

Principles Governing Permission to Appeal

[33] Permission to appeal should be given only where (a) the appeal appears to have a realistic (as opposed to a fanciful) prospect of success or (b) there is some other compelling reason why the appeal should be heard (e.g.: in the public interest, the issue (such as a point of law or practice) should be examined by the appellate court because the law requires clarifying as a matter of general public or commercial importance).[24]

[34] With respect to a discretionary decision, such as an order requiring security for costs and the determination of the amount of such security, an appellate court should only interfere when it considers that the judge "has not merely preferred an imperfect solution which is different from an alternative imperfect solution" which the appellate court might or would have adopted, "but has exceeded the generous ambit within which a reasonable disagreement is possible."[25] Put another way, the judge "erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations, and the result of the error or the degree of the error in principle is that the decision exceeded the

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

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

generous ambit within which reasonable disagreement is possibly and therefore may be said to be clearly or blatantly wrong."[26]

[35] The English Court of Appeal held as follows in relation to an order for costs but which appears applicable to an order for security for costs:

> In deciding whether an appeal against an order for costs has any reasonable prospects of success, the standard practice in this court, established over many years, is that it will only interfere with a discretion that a judge of first instance has on costs if it can be shown that his decision was plainly wrong. That means he has misunderstood the law, or has made a mistake of legal principle, or has misunderstood the facts by taking into account things that are not relevant or forgetting to take into account things that are relevant.[27]

[36] Those are the principles governing this application for permission to appeal.

Grounds for Intended Appeal

[37] Bracha's five grounds for the intended appeal are set out in its Permission to Appeal Application.[28]

[38] **First Ground: Jurisdiction.** The first ground for the intended appeal by Bracha is that this Court did not have jurisdiction to make the Security for Costs Order –

[26] Employers, paragraph 24, citing Michel Dufour and Others v Helenair Corporation Ltd. Civil Appeal No. 4 or 1995 (12th February 1996), at pages 3 – 4.
[27] The Queen on the Application of Eyers v Uttlesford District Council [2010] EWCA Civ 48 at paragraph 3.
[28] Permission to Appeal Application, "Grounds of Application, A. Grounds of Appeal".

neither under CPR 26.1(2)(w) nor inherently – and Bracha therefore asserted that the intended appeal has a realistic prospect of success.[29]

[39] While Bracha seeks to assert on the intended appeal that this Court found jurisdiction on two bases that were not submitted by the parties as giving rise to jurisdiction for their respective security of costs application, counsel for Bracha accepted in oral submissions that the Court's jurisdiction is not limited by the parties' assertions of jurisdiction for their respective applications or their agreement (if indeed there was one) that jurisdiction could not be founded on a particular basis.

[40] Even if he had not accepted the proposition, it must be correct that parties cannot curtail or constrain the Court's jurisdiction by relying on some other alleged bases for jurisdiction that the Court found inapplicable or by agreeing that the Court does not have jurisdiction on some basis when in law it does.

[41] Counsel for Bracha put it that the Court should be readier to give leave to appeal because it went beyond the parties' submissions. While that is not a recognized consideration in the principles for leave to appeal, perhaps in a very close call, it may mean an intended appellant should be given a bit more 'benefit of the doubt'. However this Court does not consider that concept is applicable to this intended appeal, as this is not a situation in which the Court considers there is a 'close call'. This opinion is explained in the review and discussion of the intended grounds of appeal.

[29] Permission to Appeal Application, "Grounds of Application, A. Grounds of Appeal, Ground of Appeal (1)", paragraphs 1 – 12.

[42] Bracha also seeks to raise on the intended appeal that "Bracha did not have the opportunity to address the Court as to whether the Court had the jurisdiction it ultimately relied upon."[30]

[43] This Court does not consider there is merit in that aspect of this ground. The issue of the Court's jurisdiction was "on the table", there were references to certain possible bases of jurisdiction, there was a reference to inherent jurisdiction and a judgment (Days) cited in support, and there was a reference to the overriding objective, albeit in a somewhat different way.

[44] This was not a case of the Court finding a new issue that was not "on the table". The parties agreed to the determinations of the security for costs applications in writing. The contention of Bracha that it did not have an opportunity to address the specific bases of jurisdiction relied upon by the Court, if accepted, would mean (in the context of the type of situation described above), that a court needs to seek further written submissions or reconvene a hearing whenever its consideration of the written submissions made, the CPR and the authorities submitted leads it to a somewhat different take on an issue that was "on the table".

[45] While of course there are circumstances when a court on its own motion considers that there is a new legal or factual issue not raised by the parties that should be addressed. Then, it may be appropriate to seek submissions on the new issues. But that was not the case before this Court on the Security for Costs Application.

[46] In any event, Bracha has had an opportunity to air its submissions on the jurisdiction issue on this Permission to Appeal Application. Whether it had a full opportunity to make submissions before or not, this Court now has heard what it

[30] Permission to Appeal Application, "Grounds of Application, A. Grounds of Appeal, Ground of Appeal (1)", paragraph 3.

has to say about jurisdiction. If sufficiently compelling, it should be given permission to appeal under the applicable principles.

[47] **CPR 26.1(2)(w) and Overriding Objective.** Bracha asserted that "[i[t did not, contrary to what paragraph 30 of the [Security for Costs] Judgment states, ever claim jurisdiction could be found in CPR 26.1(2)(w)."[31] That is not quite what paragraph 30 states. Paragraph 30 states that "Bracha, in effect, pointed to the Court's case management powers" and that it appeared to rely on that subsection by its reference to the overriding objection. However, whether the Court's characterization was the best characterization or not appears to be beside the point.

[48] The first question relevant to the prospects of success of the intended appeal on the jurisdictional ground is whether CPR 26.1(2)(w) provides the Court with jurisdiction to make an order for security for costs to further the overriding objective. The contrary view would be that the provisions in the CPR dealing with security for costs (Part 24 in the case of this Court) "occupy the field" so that there is no jurisdictional room in the CPR for this Court to make a security for costs order in any other circumstance even if the Court is of the view in the particular circumstances before it that ordering security for costs will further the overriding objective.

[49] It is this Court's opinion, having considered Bracha's submissions, that Part 24 has not occupied the field with respect to the ordering of security for costs.

[50] CPR 24.1 simply describes that "[t]his Part deals with the power of the court to require a claimant to give security for the costs of the defendant." It does not say

[31] Permission to Appeal Application, "Grounds of Application, A. Grounds of Appeal, Ground of Appeal (1)", paragraph 2.

that the court has no other power to order security to be given or that the court may require security to be given only in the circumstances set out in this rule.

[51] If there is a more general power in the CPR to require security does not mean CPR 24 is "entirely redundant" or that "the rules cease to serve a purpose" as Bracha submitted.[32] It simply means that CPR Rule 24 describes the more common instances where security from a claimant may be ordered.

[52] In interpreting this rule, the Court is required by CPR 1.2(b) to have regard to the overriding objective ("enable the court to deal with cases justly").

[53] CPR 26.1 lists the powers "in additional to any powers given to the court by any rule, practice directions or enactment" and says in CPR 26.1(2) that "[e]xcept where these rules provide otherwise, the court may – (w) … make any other order for the purpose of managing the case and furthering the overriding objective." If read the way Bracha contends, the court would only be able to make a security for costs order against a claimant (or counterclaimant), and only in the circumstances of (a) – (g) of CPR 24.3. This is an unnecessary narrowing of the case management power in light of the interpretive direction given in CPR 1.2(b). Other rules show how the draftspersons could restrict the Court so specific circumstances or criteria – in this case they did not do so.

[54] Bracha also seeks to argue on the intended appeal that CPR 26.1(2)(w) "is not a blanket authority to make any order it likes simply on the basis that the purpose of the order is to manage the case or further the overriding objective."[33]

[32] Permission to Appeal Application, "Grounds of Application, A. Grounds of Appeal, Ground of Appeal (1)", paragraph 5.

[33] Permission to Appeal Application, "Grounds of Application, A. Grounds of Appeal, Ground of Appeal (1)", paragraph 4.

[55] Put in terms of "any order it likes" makes it sound as though this Court's decision was or could be that the power can be exercised capriciously. Of course it cannot.

[56] The principle set out clearly in the rule is that the court must exercise its discretion on the basis that making the order is desirable either for the management of the case or to further the overriding objective of dealing with cases justly. In other words, a principled exercise of the discretion is required.

[57] This Court does not consider that the intended appeal has a realistic prospect of success on this first part of the first intended ground of appeal.

[58] **Inherent Jurisdiction.** The second part of the first ground for the intended appeal is that this Court also does not have inherent jurisdiction to order security for costs. To some degree the argument overlaps with the argument concerning CPR 26.1(2)(w).

[59] Bracha seeks to argue that there cannot be inherent jurisdiction where its exercise would be inconsistent with a statutory provision or a provision of the CPR, relying on the principle articulated in this Court's judgments in Olive Group Capital Limited v Gavin Mark Mayhew.[34] However, inconsistency exists where the statute or rule has occupied the field, saying for example that something must be done in a certain way and it is argued that inherent jurisdiction enables the court to order it to

[34] BVIHC (COM) 2015/115, Judgment, 21 January 2016 ("**Olive Group Main Judgment**"), paragraphs 50 – 51; and BVIHC(COM) 2015/0115, Judgment on Claimant's Application for Interim Stay of Judgment dated 21 January 2016 Pending Proposed Application to Court of Appeal for Stay of Judgment Pending Determination of Proposed Appeal of the Judgement, dated 22 January 2016 ("**Olive Group Interim Stay Judgment**"), paragraph 32, relying on Texan Management Limited et al v Pacific Electric Wire & Cable Company Limited [2009] UKPC 46, paragraph 57 which was applied by the Court of Appeal in Fairfield Sentry Limited (In Liquidation) v. Alfredo Migani and others HCVAP 2011/041 - 052; 054 - 056; 058 – 062, October 4, 2012, page 7. An appeal of the Olive Group Main Judgment is under reserve by the Court of Appeal.

be done in a different way. The situation in the Olive Group Main Judgment is an example.

[60] On the security for costs applications this Court had before it Days, as well as Olatawura v Abiloye, a judgment of the English Court of Appeal[35].

[61] As noted above, Days held that "quite apart from any specific rule, the court has an inherent jurisdiction to control its own processes sufficient to enable it to make an order of the nature sought here."[36]

[62] As Bracha correctly pointed out on this Application for Permission to Appeal, the Court in Days was dealing with a party that had ignored an order for payment of costs made against it. Of course that is not the case here in respect of Bracha – as its counsel reminded the Court, Bracha is not in default of the Orders or any orders. There is no question about that and this Court did not proceed on the security for costs application that Bracha was in breach of the Orders.

[63] This Court held in the Security for Costs Judgment that there is inherent jurisdiction and it exists even though the CPR contains specific provisions dealing with security for costs.

[64] For the purposes of the second part of the first ground, the question is whether Days is confined to its facts such that inherent jurisdiction exists only to sanction a party that has ignored an order for payment of costs made against it.

[65] This Court does not consider that is so, or that there is sufficient merit in such a proposition to meet the test for permission to appeal. In this Court's opinion, the

[35] [2003] 1 WLR 275; [2002] EWCA Civ 998 (Court of Appeal).
[36] Days, paragraphs 6, 10, 13, 19 and 20. See Security for Costs Judgment, paragraphs 32 – 34.

intended appeal on the second part of the first ground does not have a realistic prospect of success.

[66] It appears that some of the points sought to be raised by Bracha under the first ground in its Notice of Application dated 26 April 2016 really focus on the exercise of the jurisdiction, which is the second ground. Those points are discussed in the consideration of the second ground.

[67] **Second and Third Grounds: Exercise of Jurisdiction.** The second ground for the intended appeal is that this Court did not exercise its jurisdiction properly, if it had jurisdiction at all.[37] In part it is founded on the third ground for the intended appeal, being that the Security for Costs Judgment was premised on the erroneous assumption that the transfer of the legal title to the Shares from the Judgment Debtor to Bracha was because of the Orders.[38]

[68] The essence of the second ground is that this Court considered what amounts to "nothing more than that the Orders have not been paid by the Judgment Debtor" and this would mean that "virtually every judgment debtor (and any party wishing to oppose who the Court views as connected thereto) has to put up security)."

[69] This Court considers that its reasoning in paragraphs 40 – 59 is not appropriately characterized in that manner. The Security for Costs Order was not simply based on the Judgment Debtor not having paid the money due under the Orders.

[70] The above referenced paragraphs of the Security for Costs Judgment refer, among other things, to the Court having look at what is really going on and what

[37] Permission to Appeal Application, "Grounds of Application, A. Grounds of Appeal, Ground of Appeal (2)", paragraphs 13 – 16 and effectively paragraphs 9 – 11.
[38] Permission to Appeal Application, "Grounds of Application, A. Grounds of Appeal, Ground of Appeal (2) and Ground of Appeal (3)", paragraphs 13 – 16 and 17 – 19.

the relationships are among Bracha, the Judgment Debtor and Shulman (paragraph 42), that there was a "real risk" that the Judgment Creditors will not be able to recover costs from Bracha if costs are awarded, that the Court has an interest in respect for its orders and the enforcement of them (referring to any future order against Bracha) (paragraph 43), that the charging order remedy may be inadequate (paragraphs 44 and 45) (and in oral submissions on the Application for Permission to Appeal counsel for the Judgment Creditors added that there is no evidence as to the market value of the Shares, which of course would be on a forced sale if sold under the charging order and they already would have the Orders that would need to be satisfied from the net proceeds of sale), and that an inference can be drawn about Bracha and its character and anticipated behaviour (paragraphs 54 and 55). Regard also should be had to paragraphs 73 – 77 about the lack of proportionality and to paragraph 76, about the BVI proceedings being "a battle in a larger war" (about which more is said later in this Permission to Appeal Judgment).

[71] Finally, in paragraph 42 of the Security for Costs Judgment this Court noted that there has been no evidence or submission that Bracha cannot afford to give security for costs, and thus no basis to conclude that an order for security for costs would preclude Bracha from pursuing its objections to the Charging Order being made final.

[72] In the earlier part of the Permission to Appeal Application, dealing with the inherent jurisdiction ground, it is said that Bracha seeks to submit on its intended appeal that the "Court treated Bracha as if it were also in breach of the orders of the Court", referring to paragraphs 34 and 40 and the Security for Costs Judgment and dismissing what this Court said in paragraphs 39 and 52 as "giving lip service

to the fact that Bracha had not ignored any order of the Court".[39] Having re-read those paragraphs and considering them in the context of the part of the Security for Costs Judgment discussed above in relation to the Second Ground, this Court does not consider that is what was done or that to have been any part of the Court's reasoning in the exercise of its discretion.

[73] With respect to the third ground of the intended appeal, it was submitted on the Permission to Appeal Application that this Court's inference in the Security for Costs Judgment as to the motivation and timing of the transfer may not have taken account of all of the evidence and submissions. The Court inferred, in paragraph 16 of the Security for Costs Judgment that "[i]t is reasonable to infer that the Orders motivated the transfer, with the objective of those involved in the transfer that execution on the Shares would be more difficult if they were no longer in the name of the Judgment Debtor. If there is some other explanation, the Judgment Debtor, Bracha, Campanile [who provided evidence on the security for costs applications] and Shulman failed to provide it." Bracha submits that the transfer was "in the works" (this Court's phrase) before the Orders.

[74] First, the Court notes that the finding that those involved failed to provide any other explanation is not proposed to be challenged on appeal.

[75] Second, irrespective of the above point, and whether it was the case that the transfer was "in the works" at the time the Orders were made, but assuming without deciding that such was the case, the making of the Orders changed the factual matrix, the dynamic and the consequences of making the transfer such that

[39] Permission to Appeal Application, "Grounds of Application, A. Grounds of Appeal, Ground of Appeal (1)", paragraph 9.

those involved should have considered the consequence of the transfer for the enforcement of the Orders.

[76] The status of the transfer of the Shares at the time of the Orders is just one part of what led this Court to characterize Bracha as it did. The same characterization would have resulted if that factor were to be taken out of the equation.

[77] Further, even if there was the above asserted erroneous factual conclusion or impermissible interference it would not in this Court's view mean that Bracha meets the test for permission to appeal a discretionary decision.

[78] This Court does not consider there is sufficient merit in the second and third grounds to meet the test for permission in relation to a discretionary decision or at all. In this Court's opinion, the intended appeal on these grounds does not have a realistic prospect of success.

[79] The Court is of the opinion that it did not err in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or, as asserted by Bracha, by taking into account or being influenced by irrelevant factors and considerations.

[80] Even assuming that Bracha was correct that the transfer was in the works at the time the Orders were made, the decision to order Bracha to give security was not the result of an error or the degree of an error in principle, and the decision did not exceed the generous ambit within which reasonable disagreement is possibly such that it may be said to be clearly or blatantly wrong.

[81] In this Court's opinion, there is not a reasonable prospect that the Court of Appeal will interfere with the discretion exercised by finding it was plainly wrong – that this

Court misunderstood the law, made a mistake of legal principle, or misunderstood the facts by taking into account things that were not relevant or forgetting to take into account things that were relevant. The Court's analysis here, assuming the fact for the purposes of this discussion is that the transfer was in the works when the Orders were made but not stopped after the Orders were made, would not make the ordering of security clearly or blatantly wrong.

[82] **Fourth Ground: Quantum of Security for Costs.** The fourth ground for the intended appeal is that ordering the full amount of the Judgment Creditors' anticipated costs was an error that meets the test for permission to appeal because the only costs for which security could be ordered were those incurred or to be incurred because of the involvement of Bracha.[40]

[83] Bracha stated that it contention at the hearing on 9 October 2015, which was the contention in respect of which the parties agreed there should be written submission, was that Bracha should be required to give security for the increased costs because of Bracha's involvement.

[84] Accepting that to be correct, Bracha is incorrect to say in paragraph 21 the Grounds in its Notice of Notice of Application dated 26 April 2016 that the Security for Costs Order did not respect the different legal personalities. The reasoning with respect to quantum, in paragraphs 78 – 91, and especially paragraphs 88 – 91, of the Security for Costs Judgment, is based on a careful consideration of the real context, and Bracha's role and participation in actions that may make it more it more difficult for the Judgment Creditors to execute on the Shares. Whether the transfer was in the works or not, Bracha accepted a transfer of the Shares, for

[40] Permission to Appeal Application, "Grounds of Application, A. Grounds of Appeal, Ground of Appeal (4)", paragraphs 20 – 21.

nominal consideration, after the Orders, and cooperated and coordinated with the Judgment Debtor and Shulman. Bracha provided no explanation for the transfer.

[85] Further the reasoning with respect to quantum had regard to the fact that the proceedings to obtain the Provisional Charging Order were directed to executing on the Shares and as such were understandably directed to the Judgment Debtor. However, Bracha stepped into the role of owning legal title to the Shares – at least according to Bracha, the Judgment Debtor and Shulman. It was considered by this Court to be fair and reasonable that Bracha should give security to cover the entire charging order proceedings. Otherwise, the Judgment Creditors, if awarded costs, would be left to look to the Judgment Debtor only for their costs until the time of Bracha's involvement. This would be so because Bracha accepted the Shares which may have been available to satisfy those costs (albeit with the difficulty of selling them).

[86] To the extent the Judgment Creditors expanded their application for security in their written submissions, after the hearing on 9 October 2015, and/or came to appreciate that Bracha was taking over the substance of the opposition to making the charging orders final so that the increase in costs because of Bracha's involvement was greater than originally thought, Bracha could have written to the Court to object, or to seek to make further written submission in response. Bracha has not shown itself to be shy. Counsel not infrequently (perhaps too frequently, however) write to the Court after a hearing or after written submissions. If Bracha felt the Judgment Creditors had done something inappropriate or unfair to Bracha, Bracha could have spoken up. Instead Bracha sat in silence while the Court made its determination.

[87] As noted in the Security for Costs Judgment, paragraphs 96 – 108, when Bracha received a draft of the Security for Costs Judgment, it sought to use that process, (inappropriately in this Court's view) to raise the matter. The Court expressly stated that the appropriate manner to raise the points would be by application following the handing down of the Security for Costs Judgment in accordance with the applicable tests for doing so (see paragraph 106 – 108). Bracha did not follow that course, whether because it felt it would not have sufficient merit to meet the applicable test or for some other reason. It matters not. It does not lie in Bracha's mouth at this stage to complain that the Judgment Creditors in their written application for security went beyond what was initially anticipated at the first part of the hearing of the Application on 9 October 2015.

[88] With respect to the amount of the security, counsel for the Judgment Creditors made two further points on the hearing of the Permission to Appeal hearing – first, that the quantum ordered in the result reflects that it would be difficult to disentangle the cost from which Bracha will benefit from the overall costs, and second, that given the way matters are proceedings, the security ordered to be given will be light in any event. The Court agrees that there is merit in both points.

[89] This Court does not consider there is sufficient merit in the fourth ground of the intended appeal to meet the test for permission in relation to a discretionary decision or at all. In this Court's opinion, the intended appeal on these grounds does not have a realistic prospect of success.

[90] **Fifth Ground: Security for Costs Covering Foreign Lawyers.** The fifth ground for the intended appeal is that the amount of security for costs ordered included amounts for foreign lawyers that would not be recoverable, or at least that the case had not been made by the Judgement Creditors that there are "special

circumstances" that would make the incurring of such fees as disbursements recoverable.[41]

[91] This, they submit, was an error that meets the test for permission to appeal.

[92] Bracha raised essentially the same issue on the Assessment of Costs of the Security for Costs Applications.

[93] Recently this Court considered the issue of foreign lawyers in the assessment of costs judgment in Olive Group Capital Limited v Gavin Mark Mayhew ("**Olive Group Assessment of Costs Judgment**")[42] stating as follows:

> [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.

[41] Permission to Appeal Application, "Grounds of Application, A. Grounds of Appeal, Ground of Appeal (4)", paragraphs 20 – 21.
[42] BVIHC(COM) 2015/0115 - Judgment on Assessments of Costs, 29 April 2016, paragraphs 88 – 95.

[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 [BVIHC 2009/389, 3 December 2010]:

> 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 …

[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.

[94] Bracha relied on earlier authority, namely Michael Wilson & Partners Limited v Temujin International Limited ("**Wilson**")[43], a Judgment of Justice Hariprashad-Charles of this Court, which quoted Agassi v Robinson ("**Agassi**")[44], a judgment of the English Court of Appeal, that was referred to by counsel before Justice Hariprashad-Charles. Counsel's submissions on this issue to Justice Hariprashad-Charles are then summarized in a long paragraph in Wilson. Counsel submitted to Justice Hariprashad-Charles as follows:

- to be recoverable as a disbursement, work of a foreign lawyer should be "assistance in a specialist esoteric area" (words used in Agassi, along with "may be possible to characterise these specialist services as those of an expert", and distinguished from "work that would normally be done by the solicitor instructed in the appeals" and "general assistance to counsel in the conduct or the appeals").
- the mere fact that the litigation has an international dimension and the parties instruct lawyers in other jurisdictions does not mean that all the work done by those foreign lawyers are properly recoverable as such in England (or the BVI);
- English (and the same is true in the BVI) courts are very familiar with commercial proceedings which have an international dimension;
- the services of the foreign lawyer [need] "genuinely [to be] characterised as of an expert nature"; and
- "assistance of a general nature in English or BVI commercial litigation cannot property be characterized as assistance in a specialist esoteric area or as an expert".[45]

[43] BVIHC 2006/0307, 20 June 2008.
[44] [2006] 1 All ER 900.
[45] Wilson, paragraphs 69 and 70.

[95] It is important to note that those were submissions of counsel, not the Court's holding.

[96] The Court simply and clearly held as follows:

> Mr. Young [counsel for the paying party] correctly submitted that insofar as sums have been paid … to foreign lawyers for work amounting to the general conduct of BVI litigation … those sums are not as a matter of law recoverable as legal costs in the BVI proceedings.[46]

[97] The preclusion is for "work amounting to the general conduct of BVI litigation", a proposition with counsel for the Judgment Creditors did not dispute. This Court does not consider that it differs with the essence of what was held in the Olive Group Assessment of Costs Judgment.

[98] Agassi, which was referred to in Wilson only with reference to counsel's submissions, appears to have taken the same approach. Reading the relevant passage a whole, and not just the way counsel apparently summarized Agassi to Justice Hariprashad-Charles, is instructive – and important. Dyson LJ stated in Agassi as follows:

> [75] … the appellant is not entitled to recover costs as a disbursement in respect of work done by Tenon [who appears not be have been a foreign lawyer but it does not appear to matter in relation to the court's holding] which would normally have been done by a solicitor who has been instructed to conduct the appeal. This means that the appellant is not entitled to recover for the costs of Tenon providing general assistance to counsel in the conduct of the appeals.

[46] Wilson, paragraph 71.

> [76] But it seems to us that it does not necessarily follow that the appellant is not entitled to recover costs in respect of the ancillary services provided by Tenon on these appeals. … It may be appropriate to allow the appellant at least part of Tenon's fees as a disbursement. It may be possible to argue that the cost of discussing the issues with counsel, assisting with the preparation of the skeleton argument etc. is allowable as a disbursement because the provision of this kind of assistance in a specialist esoteric area is not the kind of work that would normally be done by the solicitor instructed to conduct the appeals. Another way of making the same point is that it may be possible to characterise these specialist services as those of an expert, and to say for that reason that the fees for those services are in principle recoverable as disbursement.

[99] The Court was discussing the particular third parties whose services were in question and the particular context of tax appeals. Some of what is said above was directed to which fees for services may be recoverable in that context, not to saying that to be recoverable the services must be "in a specialist esoteric area" or must be characterized as "specialist services … of an expert". It is one way in which third party, or in our case, foreign lawyers' services may be recoverable.

[100] What Agassi says may be recoverable as a disbursement in that case would be "the cost of discussing the issues with counsel, assisting with the preparation of the skeleton argument etc." The reason given for possible recoverability was because "the provision of this kind of assistance in a specialist area is not the kind of work that would normally be done by the solicitor instructed to conduct the appeals" or because it may be possible to characterise the specialist services provided as those of an expert (on the footing that expert fees are in principle recoverable as a disbursement).

[101] The key general holding of Agassi is the type of foreign lawyer or other third party work that cannot be recovered as a disbursement.

[102] What is precluded by Agassi is work done by a third party that normally would be done by a solicitor instructed to conduct the matter and general assistance to counsel in the conduct of the matter.

[103] Agassi, Wilson, Grand Pacific Holdings Ltd. v Pacific China Holdings Limited, and the Olive Group Assessment of Costs Judgment, read together, make the point that to a material degree the assessment of recoverability of the work of foreign lawyers (or other third parties who assist on a matter) as a disbursement is context dependent. The assessing process needs to consider why the work of the third party generally, or more specifically on the various projects or tasks he or she undertook, in the context of the particular litigation, should be accepted as something other than the "general conduct of BVI litigation", "work that normally would be done by a solicitor instructed to conduct the matter" or "general assistance to counsel in the conduct of the matter".

[104] Of course the work must be "within the bounds of what is legally permissible under the laws of the relevant jurisdiction" – the person involved cannot be practising local law in doing the work. In line with what counsel for the Judgment Creditors submitted, the conduct of the matter must be in the hands of a BVI lawyer and the work done under his or her general direction, and of course at the end of the day he or she is responsible to the Court, and the client, for that work.

[105] Also as submitted by Bracha and as held by this Court in the Olive Group Assessment of Costs Judgment, work by the foreign lawyer "effectively as the clients of the BVI lawyers" ("receiving and interpreting BVI legal, strategic and

tactical advice" in the Olive Group Assessment of Costs Judgment) is not recoverable.[47]

[106] Accordingly, this Court rejects in principle the fifth ground of the intended appeal as having sufficient merit to meet the test for permission. The fifth ground does not have a realistic prospect of success.

[107] **Contemporaneous Documentation and Activity Summaries for the Work of Foreign Lawyers and Other Third Parties.** In light of the foregoing regarding the work of third parties, and particularly foreign lawyers, it may be prudent, and aid in the efficiency of costs assessments involving claims for cost of the work of foreign lawyers, for for BVI legal practitioners who are working with lawyers outside the jurisdiction on litigious matters to consider some form of standardized contemporaneous documentation of the reasons for the involvement of the foreign lawyer on the particular roles or tasks. While not a precondition to recovery, it would be helpful to the assessment process, and in the interests of the paying party, the receiving party and the court.

[108] As well, for costs assessments where there is a claim for the cost of the work of third parties, and particularly foreign lawyers, in addition to providing the paying party and the Court with, first, the usual detailed records of their work, time and the cost of same, and second, the type of summaries by activities that the Court has requested in respect of the work, time and cost of same for BVI legal practitioners, the receiving party should consider providing (third) a summary of the contemporaneous documentation of the reasons for the involvement of the foreign lawyer or other third party on the particular roles or tasks on which he or she was involved, or if such contemporaneous documentation was not prepared, a

[47] Paragraphs 96 – 97.

non-contemporaneous summary of the reason(s) for the involvement of the foreign lawyer or other third party on the particular role(s) or task(s).

No Other Compelling Reason Why Appeal Should Be Heard

[109] Turning to the second branch of the test for permission to appeal, this Court is not satisfied that there is some other compelling reason why the appeal should be heard or that the law requires clarifying as a matter of general public or commercial importance.

Interim Stay Application

[110] In light of this Court's Judgment on the Permission to Appeal Application, there is no need to determine the Stay Application. For good order, it should be dismissed.

[111] Had permission to appeal been granted, having regard to the principles for a stay set out by the Court of Appeal in C-Mobile Services Limited v Huawei Technologies Co. Limited and summarized by this Court in a Judgment of this Court in the Olive Interim Stay Judgment[48] below (from the headnote summary of the Court of Appeal), a stay would not have been granted.

[112] The principles for a stay are as follows:

> There is no automatic right to a stay of proceedings pending appeal and a successful litigant should not normally be denied the fruits of its success pending appeal except for in exceptional circumstances. There are five relevant principles a court should apply when deciding whether to exercise it discretion to stay proceedings pending appeal. The first is that the court should take into account all of the circumstances of the case. Second, a stay is the exception rather than the general rule. Third, the party seeking stay must provide cogent

[48] Paragraph 56.

> evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. Fourth, in exercising its discretion, the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered. The fifth is that the court should also take into account the prospect of the appeal succeeding, but only where there are strong grounds of appeal or a strong likelihood the appeal will succeed is shown (which would usually enable a stay to be granted.

[113] In the Olive Group Interim Stay Judgment it was noted that at least for an interim stay application made orally following the handing down of judgment, the "evidence' is not limited to fact or expert evidence but may be inferential and judicially noticed 'evidence'.[49]

[114] Bracha filed no evidence of the effect of not having a stay but submitted that it will lose the "right to walk away" (afforded, it submitted, by Part 24); that without a stay it would have "to decide whether or not to put up such a large amount of money".

[115] It was concerned that if the money were moved into this jurisdiction as security, even if successful on the appeal, the money may not be released to Bracha but used to satisfy the Orders (which are against the Judgment Debtor, not Bracha).

[116] It also raised that if it does walk away now, there will be additional expense in dealing with whether the Judgment Debtor needs to give security, as the Security for Costs Judgment contemplates that it would be possible for the Judgment Creditors to seek security from the Judgment Debtor if Bracha walks away. The third point raised by Bracha related to payment of a costs order against it which may be subsequently overturned.

[49] Paragraph 57.

[117] On the other hand, having raised the spectre that it may not give the security and walk away, there is a strong interest in having Bracha "fish or cut bait" at this point, so that the Judgment Creditors, the Judgment Debtor, and if it remains, Bracha, can move forward towards the November 2016 hearing knowing whether Bracha is in or out, and an application for security can be brought against the Judgment Debtor if the Judgment Creditors are so advised.

[118] This Court would not have granted an interim stay as in its opinion those arguments do not meet the tests for a stay. In particular, the balance of harm test favours not granting a stay.

[119] **Interim, Interim Stay.** However, this Court considered that it should grant, and did grant, what it will call an interim, interim stay so that the deadline for giving security is extended by 7 calendar days, to 20 May 2016 at 2 pm. That seems to be fair to Bracha and not unfair to the Judgment Creditors.

[120] Further, the Court will grant a short interim, interim stay to enable Bracha to apply to the Court of Appeal for an interim stay. As suggested by counsel for the Judgment Creditors, while it will be a short stay, the Court will consider a request for one or more short extensions to enable any stay application to be considered by the Court of Appeal without excessive pressure. In other words, Bracha will be kept under the eye of the Court to ensure it prosecutes any such application expeditiously.

A Footnote on the 'Larger War' Between the Parties

[121] At the outset of his submissions, counsel for Bracha said that he was asked by his client to say, in relation to paragraph 76 of the Security for Costs Judgment

(where the Court stated "… clearly the Application, and the Judgment Creditors' efforts to enforce the Orders, is a battle in a larger war, and to the parties more is at stake in one way or another than the amount of the Orders"), that "this is indeed part of a larger tapestry and that in terms of, if there was such a thing as relative morality, my client asserts that at the end of the day it will be quite clear who the bad guys are as it is a battle of this larger war …".

[122] This court appreciates the general point (without comment on who may or may not be the good or the bad guys, and particularly because 'the larger war' is not before this Court). The general point is something the Court tries to keep in mind in all multijurisdictional litigation – and wishes to address briefly, speaking to the parties.

[123] This Court, like most courts, can only assess cases as they come before them. In this case, the case comes before this Court as described in the Security for Costs Judgment. That is the background relevant to what this Court needs to decide. The Court can and must decide the legal and factual issues that come before it, often knowing that in the background there is a lot more going on about which it is not aware, and which usually is not legally relevant. Of course to the parties the big picture is very relevant.

[124] If Shulman, Bracha and the Judgment Debtor have adopted as a litigation strategy or tactic in relation to the broader picture that is based on resistance to payment of the Orders that are sought to be enforced by the Judgment Creditors, it is for them to assess the overall benefits and detriments of doing so. This Court is not in a position to assess, nor is it this Court's role, to assess litigation strategies and tactics of either side. This Court, like most if not all courts, is charged with assessing and deciding cases as they come before it.

[125] It is for the parties to determine the wisdom of their approaches both in respect of the litigation in this jurisdiction and in the bigger litigation, and perhaps commercial picture. This Court cannot assess, nor is it its role to assess, how its decisions made based on those approaches will impact, if at all, whether in legal terms (for example, res judicata and issue estoppel) or (as this Court's judgments are largely public and available for such use in proceedings in other jurisdictions as those jurisdictions considered appropriate and relevant) practically on the overall litigation – the 'larger war' – that is not in this jurisdiction.

[126] The other point that the parties may wish to keep in mind, which is not a comment on the larger dispute among these parties but a general comment, that often when there is a breakdown in a business relationship, there is 'shared responsibility', not necessarily equally. Courts continue to struggle with the kinds of situations that real life more often presents of shared (not necessarily equally shared) responsibility (to abandon the less helpful word "blame") for the breakdown.[50] In some cases, even where there are good guys and bad guys, the interests of all concerned – yes, even the good guys – would be best severed by a relatively expeditious consensual parting of the ways – a commercial divorce – on terms upon which they can agree as business people, putting aside as much of the emotion (anger, hurt, disappointment, frustration or otherwise) and by avoiding the painful and expensive process of attempting to have a court or arbitral tribunal ascertain fault.[51]

[127] The disproportionate resources being applied to this litigation in this jurisdiction could be rationale only because of how these proceedings may relate to litigation

[50] Fortune Bright Global Limited v Central Shipping Co Limited, BVIHC (COM) 2015/0038, Judgment, 29 April 2016, paragraph 35;
[51] Kandy & Kandy Limited and Others v Harjeev Singh Kandhari BVIHC (COM) 2014/0127, 2014/0128 and 2014/0129, Judgment, 13 May 2016, paragraphs 86 – 87.

elsewhere, to the 'larger war'. Even so, it is to be hoped that in their common self-interests the parties are taking maximum advantage of means of achieving a consensual resolution, whether through mediation or otherwise.

Assessment of Costs of the Security for Costs Applications

[128] The provisions on costs in the Security for Costs Judgment provided[52], to be incorporated in the Security for Costs Order, were as follows:

> 6. Bracha shall pay the Judgment Creditors their costs of these security for costs applications ("Costs of the Security for Costs Applications"), to be assessed if not agreed, within 10 days.
>
> 7. The Costs of the Security for Costs Applications shall include costs associated with preparing and reviewing written submissions on security for costs, including any work that can be identified as having been done before 9 October 2015 on the question of security for costs, and the work done leading up to and attending upon the handing down of this Judgment.
>
> 8. The Costs of the Security for Costs Applications shall not include any time or disbursements in connection with dealing with security for costs at the 9 October 2015 hearing. The short time spent during the 9 October 2015 hearing developing a process to deal with these applications for security for costs is not sufficiently material to segregate cost-effectively.

[129] As noted at the outset of this judgment, the Judgment Creditors applied to a summary assessment of those costs, which was held at hearing of the Permission to Appeal Application and the Stay Application.

[52] Paragraph 109.

[130] 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), are as follows:

> (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.

[131] 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.

[132] The Judgment Creditors' submitted an Amended Schedule of Costs dated 22 April 2016 claiming costs that included $14,334.50 of legal fees and GBP 10,671.20 of disbursements, comprising counsel's fee of GBP 5,000 and the fees of Fieldfisher LLP of London, which are not BVI legal practitioners, of GBP 5,671.20. While not converted to US currency by the Judgment Creditors, Bracha submitted that the amount in US currency totals $29,776.50. The Court will use that figure.

[133] Bracha took four objections to the costs claimed by the Judgment Creditors and submitted in conclusion that the Judgment Creditors' costs should be assessed at no more than $16,000.00.

[134] **First, Objection to Disbursement for Foreign Lawyers.** Bracha submitted that the fees of Fieldfisher LLP as foreign lawyers were not recoverable because (a) it was not self-evident that they provided services that could be characterised as of an expert nature, or in a specialist esoteric area as an expert, but rather they appeared to provide assistance of a general nature; and (b) in part they were effectively the clients of Forbes Hare (the BVI legal practitioners handling this entire litigation in this jurisdiction), that is, the Judgment Creditors.

[135] The Judgment Creditors relied on the Olive Group Assessment of Costs Judgment, paragraphs 91 – 92, which was quoted above under "Fifth Ground: Security for Costs Covering Foreign Lawyers".

[136] Also they pointed out that Justice Bannister, in relation to the Orders, had allowed the work of Fieldfisher. Whether it was objected to in principle by the Judgment Debtor at the time or whether it was accepted, the Court did not disallow it in principle. While not determinative of this objection, it is an interesting observation given the position of Bracha.

[137] Based on the holding of this Court under "Fifth Ground: Security for Costs Covering Foreign Lawyers", the general objection is rejected.

[138] Having reviewed each of the work and time records of Fieldfisher, the Court accepts that the work of Fieldfisher, in the context of this case which is part of what was described as 'a larger war' that is not been litigated in this jurisdiction, meets the test of being more than the "general conduct of BVI litigation", "work that normally would be done by a solicitor instructed to conduct the matter" or "general assistance to counsel in the conduct of the matter".

[139] The conduct of the litigation covered by the order for costs was in the hands of a BVI lawyer and Fieldfisher's work appears to have been done under their general direction. For example, it made perfect sense for Fieldfisher to do work on the Security for Costs Application, in relation to the costs schedule relating to their future work (which was submitted to be the "overwhelming majority" of their work), and to bring their background to bear on the Security for Costs Application. Indeed in the context of a larger war, it would be foolish not to have the Judgment Creditors' English solicitors bringing background and seeking to ensure consistency and continuity of positions and submissions.

[140] At the hearing, counsel for the Judgment Creditors submitted that one small reference to "provisional research" would not have been research on BVI law. This Court accepts that submission.

[141] While the "client relationship" was managed by Fieldfisher, according to the submissions made, it does not appear it is sought to recover from Bracha the costs of reporting to and taking instructions from the clients, which would have been reasonable to seek to recover if it was done during the relevant period in relation to the Security for Costs Application.

[142] As noted above, the Court has reviewed all of the work and time entries of Fieldfisher in the Amended Schedule of Costs and finds that none appear to be as the clients of Forbes Hare.

[143] This objection is rejected.

[144] **Second, Costs Incurred at 9 October 2015 Hearing.** Bracha focused on the wording of a work and time entry by Fieldfisher suggested that it related to the costs incurred at the 9 October 2015 hearing, which by the order quoted above

were not to be included, and Forbes Hare "may well have done the same based on a work entry on 12 October 2015."

[145] The Judgment Creditors accepted that meaning of Security for Costs Judgment in this regard but informed the Court, as officers of the Court, that such was not the case despite any possible lack of clarity in the wording of the work and time entries, and indeed the first entry for which work was claimed was 12 October 2016.

[146] While it may have been reasonable for Bracha to raise the question in relation to Fieldfisher given the wording of the first work and time entry of Fieldfisher, counsel for the Judgment Creditors has satisfied this Court that work and time on 9 October 2015 was not included. However, it was not reasonable to raise the question in relation to the work and time of Forbes Hare as there is nothing that suggests that firm may have included work and time on 9 October 2015. The objection is rejected.

[147] **Third, Fee of Judgment Creditors' Counsel.** The Judgment Creditors' counsel, Paul Girolami, Q.C., charged GBP 5000, whereas Bracha's counsel, Christopher Parker, Q.C., charged GBP 1500. Bracha submitted that allowing GBP 3,000 would be more than reasonable.

[148] Mr. Girolami explained to the Court that he had written the Judgment Creditors' skeleton for the Security for Costs Application while Mr. Parker may not have drafted Bracha's skeleton. Mr. Parker did not challenge that submission. Indeed the two teams may been, and likely were structured differently and worked differently, which is perfectly acceptable.

[149] Counsel for the Judgment Creditors also pointed out that Bracha did not provide on the assessment its total legal costs for the security for costs applications, which this Court considers may have been a better comparator.

[150] In the Olive Group Assessment of Costs Judgment, this Court stated as follows:

> [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.

[151] In the Olive Group Assessment of Costs Judgment[53], this Court noted that that the two sides 'staffed up' for the litigation in different ways (the Company engaged a leading English silk as counsel while Mr. Mayhew chose a senior BVI litigation counsel resident in the Territory as his lead counsel, with no involvement of an English barrister). Both made permissible choices in that case, as did Bracha and the Judgment Creditors in this case.

[53] Paragraph 103 and 145, for example.

[152] The Court was fortunate that both lead counsel handled the Assessment of Costs of the Security for Costs Applications and could directly enlighten to Court on the facts that appear to put this objection to bed. This objection is rejected.

[153] **Fourth, Hourly Rate Charged by Supervising Partner in Judgment Creditors' BVI Legal Practitioners.** Bracha objected that the hourly fee of Robert Nader, a Forbes Hare Partner and the supervising partner on this matter, was "too high and is worryingly flexible ($725 here but $750 in the security for costs schedule): using a rate of $600 would have been generous."

[154] This Court finds this objection to be quite objectionable and petty, and wholly lacking in merit.

[155] This Court has seen enough assessments to have a sense of the hourly rates charged by law firms in the BVI, including Bracha's BVI legal practitioners, Harneys. The Judgment Creditors pointed out the Partner at Harneys who had a comparable role charged his time at $795 per hour (his ordinary rate being $895 it was submitted) and that $600 per hours is less than the rate charged for two Harneys' associates ($625). While there may be some internal differences among firms, the overall rate structures are reasonably comparable. Mr. Nader's rate at $725, or if it had been at $750 (which was explained as being his 2016 rate), was well within the bounds of reasonableness and well within the range of hourly rates for legal practitioners at his experience and seniority level doing litigation work. Also it was pointed out that Justice Bannister, in relation to the Orders, had allowed Mr. Nader's work and time at $725 per hour. Whether it was objected to by the Judgment Debtor at the time or whether it accepted the rate as reasonable, Justice Bannister did not reduce it.

[156] The fourth objection should not have been made and is rejected. This is not the type of objection that should be raised without a sound basis. Gratuitous and overly aggressive objections of this kind unnecessarily prolong assessments of costs, and does nothing to aid in a just determination of what is reasonable for a paying party to pay.

[157] **Consideration of General Principles for Assessment of Costs.** The Court has considered the general principles for the assessment of costs discussed above and has had regard to all of the circumstance, and the seven particular factors listed in CPR 65.2(3) as applicable. Two factors should be specifically mentioned.

[158] With respect to factor (e), the importance of the matter to the parties, it is clear from what this Court said in the Security for Costs Judgment and in this judgment that the proceedings were important to Bracha, and to its ultimate beneficial owner, Shulman, in the 'larger war', and likewise to the Judgment Creditors. Both sides have pursued this litigation with vigour, expending disproportionate sums. Clearly they considered the matter important. Objectively, the Court considers that the matter was important to the parties.

[159] With respect to factor (f), the novelty, weight and complexity of the case, and the legal issues raised, as discussed with respect to the Permission to Appeal Application, the issues were ones on which there is limited jurisprudence and as they deal with this Court's jurisdiction, have some importance. Without detracting from the reasons this Court has given in denying permission to appeal, this factor supports the costs claimed being recoverable.

[160] The total sum claimed is reasonable and fair both to Bracha and the Judgment Creditors. The global approach to proportionality indicated to this Court that the costs claimed, having particular regard to specified considerations, are

proportionate in the context of this dispute, 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 that the work in relation to each item of costs claimed was necessary and the cost of each item is reasonable.

[161] The Costs of the Security for Costs Applications are assessed at $29,776.50.

Orders

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

1. Bracha's Application for Permission to Appeal Application and Stay Application shall be dismissed.

2. An interim, interim stay of the Security for Costs Order is granted for 7 calendar days, to 20 May 2016 at 2 pm.

3. The Costs of the Security for Costs Applications are assessed at $29,776.50.

4. The costs of the Permission to Appeal Application and the Stay Application shall be reserved to be determined following the parties' submissions on costs.

Justice Barry Leon
Commercial Court Judge
17 May 2016