IN THE EASTERN CARIBBEAN SUPREME COURT
HIGH COURT OF JUSTICE
ST. CHRISTOPHER & NEVIS
NEVIS CIRCUIT
(CIVIL)
A.D. 2012

CLAIM NO. NEVHCV2011/0030

BETWEEN:

1.UNITED COMPANY RUSAL PLC
2.UNITED COMPANY RUSAL INVESTMENT MANAGEMENT LLC

Claimants

-and-

1.CORBIERE HOLDINGS LTD.
2.RALEIGH INVESTMENTS INC.

Defendants

Appearances: Mr Jonathan Crow QC, Mr Mark Brantley, Ms Elizabeth Harper and Ms Midge Morton for the Claimants;
Lord Goldsmith QC, Mr Anthony E. Gonsalves and Ms Sonya Parry for the Defendants

JUDGMENT

[2012: 20, 21, June; 26 July]

(Assessment of costs upon discharge of interim injunction – whether CPR Part 65.11 or 65.12 applies – whether cap in Part 65.11 should be disapplied – value of claim)

INTRODUCTION

[1] Wallbank J [Ag]: On 18 November 2011, the Defendants filed and served a Notice of Application pursuant to an Order of Mr. Justice Bannister of 27 February 2011 for costs to be assessed if not agreed in relation to an application to discharge

an interim injunction granted by Mr Justice Redhead on 3 February 2011.

[2] During the hearing of the Costs Application on 21 June 2012, I invited the parties to make written submissions in relation the following:

i. whether the assessment fell to be conducted pursuant to CPR 65.11 or 65.12; and

ii. if the former, whether special circumstances apply to this case such that the rule in CPR 65.11(7) that limits the award of costs to one tenth of the prescribed costs appropriate to the claim should not apply; and

iii. in the event that there are no such special circumstances, what the value of the Claimants' claim is for the purposes of calculating the cap under EC CPR 65.11(7).

[3] This aspect of the matter fell to be determined along with a number of other applications in this cause, which were heard together. The context of this invitation was that the Defendants are seeking a sum in excess of US$1.3million as their costs of successfully having an interim injunction set aside, at a hearing which took place over parts of three days. I had strongly encouraged the parties' legal teams, which, ranged before the Bench, comprised in total some nine lawyers, including two highly distinguished and accomplished Queen's Counsel, together with a number of lawyers from highly respected overseas law firms, to agree costs between themselves. The parties' Learned Queen's Counsel then reported that the parties had agreed directions for assessment, but not on a figure. The parties' respective Learned Counsel have presented the Court with written submissions.

[4] Both sides have taken diametrically opposite positions on the issue of what basis of assessment should apply. The Defendants submit that CPR 65.12 applies. The Claimants submit that CPR 65.11 applies. The point, obviously, is that the Defendants do not want the cap on costs contained in CPR 65.11 to apply, whereas the Claimants do.

[5] Both sides' submissions, so far as they went, were highly persuasive and exceptionally well argued. However in order to sift their respective positions it is regrettably necessary for this Court once more to tax its scarce judicial resources by reviewing the primary authorities on the distinctions between and application of CPRs 65.11 and 65.12. In doing so, it appears to me that the legal position is now clear, at least where costs of an interim application such as discharge of an interim injunction are concerned and all I therefore need do is apply the law to the facts of this case.

[6] For present purposes I do not consider it necessary to set out the background to the underlying dispute in great detail, other than to state the following.

[7] On 3 February 2011 Redhead J. had granted the Claimants an *ex parte* injunction. This was interim and ancillary to a claim filed on 1 February 2011 wherein the Claimants sought various declarations and then orders seeking

> (i) a permanent injunction against the Defendants from voting their shares in a company called Norilsk Nickel in contravention of section 70(3) of the Nevis Business Corporation Ordinance, 1984 as amended; and

(ii) a permanent injunction against the Defendants from, rather vaguely and generally, unlawfully interfering with the Claimants' rights and interests and their contractual and business relations regarding Norilsk Nickel as they relate to a certain buy-back and public tender offer.

[8] The terms of the *ex parte* injunction enjoined the Defendants from doing the things for which permanent relief was sought in the claim, but on an interim basis.

[9] Bannister QC, J. heard an application for discharge or variation of the *ex parte* injunction over 25th, 26th and 27th February 2011 and rendered a written decision on 4 March 2011. He discharged the injunction and made an order for an inquiry as to damages (which is the subject of further applications which will be addressed separately).

[10] Bannister QC, J. discharged the injunction on a number of grounds:

i. Non-disclosure of the material fact that an Arbitration Tribunal elsewhere had already rejected the Claimants' application for similar relief as in this case;

ii. Non-disclosure that on 10 September 2010 the Russian General Prosecutor's Office had rejected a complaint by the Claimant that certain Russian laws had been violated, and that the Claimants had admitted this is an open letter to the Russian National Council on Corporate Governance in December 2010;

iii. Non-disclosure, or failure to draw attention to an obvious defence under Nevis law arising out of section 2 of the Nevis Business Corporation Ordinance, 1984 as amended, as a result of which the Court had been fundamentally misled;

iv. More controversially – although Bannister QC J.'s decision was not appealed – the underlying statements of case as presented to the Court at that time did not disclose a cause of action, let alone a good arguable case.

[11] Bannister QC J. ordered that the Defendants are "to have their costs to be assessed if not agreed, such assessment to be carried out by the Master."

[12] It is instructive to set out the parties' respective submissions on the issue of the basis for the assessment.

DEFENDANTS' SUBMISSIONS

[13] The Defendants submitted as follows:

Assessment under EC CPR 65.11 or 65.12

[14] The Defendants' primary case is that the costs should be assessed under CPR 65.12 on the grounds that the application to discharge the injunction was

not a "procedural application".

[15] In support of the foregoing, the Defendants submit as follows:

[16] The Defendants' application to discharge the injunction substantively and finally resolved the injunctive proceedings. As such it was a "general application" and cannot properly be characterised as a "procedural application". In ***Norgulf Holdings Limited and Incomeborts Limted v Michael Wilson & Partners Limited BVICA No.8 of 2007***, Barrow JA stated in paragraph 14 of the judgment that non-procedural applications fall under EC CPR 65.12:

> *"The effect of paragraph [65.12] (1), in stating that this rule applies to any matter or proceedings or part thereof, is to apply this rule to proceedings generally, not just applications. But the rule does cover applications generally, which are necessarily parts of proceedings, save for procedural applications, which are specifically excepted. Put another way, by excluding procedural applications this rule includes all other applications."*

[17] In the case of ***IPOC International Growth Fund Limited v LV Finance Group Limited & Ors British Virgin Islands High Court BVIHCV2003/0140/Civil Appeal Nos 20 of 2003 and 1 of 2004*** Master Cheryl Mathurin took guidance from CPR Part 62 (which deals with appeals to the Court of Appeal) as to the meaning of "procedural" in the context of CPR2000. She noted that, in that context of Part 62, a "procedural appeal" specifically excludes an application for an interim declaration or injunction.

[18] In practice, interim applications have been dealt with under CPR 65.12 rather than 65.11, including, for example, ***Michael Wilson & Partners Ltd v Temujin Intl Ltd & ors, BVI Court, BVIHCV 2006/0307*** at paragraph [35].

[19] Assuming that the assessment is to be conducted under EC CPR 65.12, the question of whether a cap applies and, if so, whether the cap should be disapplied on the grounds of special circumstances does not arise.

Special Circumstances

[20] If, contrary to the Defendants' primary position, this Court finds that CPR 65.11 is the applicable rule, the Defendants submit that there can be no doubt that this is a case in which special circumstances apply, such that the claim for costs should not limited to one tenth of the prescribed costs appropriate to the claim. This was not a run-of-the-mill case but a large, complex, high value, multi-jurisdictional matter requiring the involvement of many lawyers with varying degrees of skill and expertise. These are the very same grounds in which special circumstances were held to apply in ***Michael Wilson*** (see paragraph 37 of the judgment).

Value of the Claim

[21] The issue of the value of the claim arises only if this Court finds that (a) the assessment is to be conducted under EC CPR 65.11 and (b) there are no special circumstances justifying the cap being disapplied.

[22] In February 2011, the Claimants valued the claim at US$227 million. On 16 March 2012, the First Claimant filed an Annual Results Announcement for the year ended 31 December 2011 at the Hong Kong Stock Exchange, which recorded a loss in profit for the First Claimant of US$1.4 billion attributable to the diminution of its interests in a company called Norilsk, as a result, the Claimants would say, of the events in issue in the underlying claim.

[23] Accordingly, the Defendants submit that the Court should take the figure of US$1.4 billion as the value of the claim for the purposes of CPR 65.11(7), should it be necessary to ascertain the value.

CLAIMANTS' SUBMISSIONS

[24] The Claimants submit as follows, by way of summary:

(1) DOES r. 65.12 APPLY?

CPR r. 65.12 is inapplicable. Because:

1.1. Rule r. 65.12(1) applies only "where costs fall to be assessed in relation to any matter or proceedings, or part of a matter or proceedings, other than a procedural application" (emphasis added). The question is therefore whether the Defendants' application to discharge the injunction in February 2011 was a "procedural application" for these purposes.

1.2. Within the taxonomy of CPR Part 65, a "procedural application" means any application to which r. 65.11 applies. That much is clear from the heading to r. 65.11: "Assessed costs – procedural applications".

1.3. CPR r. 65.11 applies to the assessment of the costs of any application other than (i) the costs of an application at a case management conference ("CMC") and (ii) the costs of an application at a pre-trial review ("PTR"). The reason for this is that the costs of a CMC and of a PTR are "prescribed costs" under r. 65.5 – see in particular r. 65.7(1)(d) and r. 65.7(2)(d). There are separate regimes for "assessed costs" (under r. 65.11) and "prescribed costs" (under rr. 65.5 – 65.7): the two do not overlap. Accordingly, a "procedural application" is any application the costs of which are not part of "prescribed costs". The Claimants submit that the logic of this division between "prescribed costs" and "assessed costs" appears to be that "prescribed costs" are designed to capture only those costs which are inevitably and necessarily incurred in relation to the preparation and conduct of any trial – which is why the costs of the CMC and of the PTR

are included, together with the costs of the actual trial itself. By contrast, "assessed costs" are intended to capture the costs of any additional procedural applications which may be made in any given case (*e.g.* (the Claimants suggest) applications for injunctions, disclosure, further information *etc.*).

1.4. The application to discharge the injunction in February 2011 was plainly not an application at either a CMC or a PTR. As such, it was a "procedural application". As a result, it is not covered by r. 65.12.

2. **Relevance**: CPR r. 65.12 is in any event irrelevant to the underlying basis for the quantification of the Defendants' costs of the discharge application. Rule 65.12 is not an enabling provision, in the sense that it does not confer any substantive power on the court to award costs (other than in relation to the assessment process itself – see r. 65.12(6)). Nor does it define the scope of the court's power to assess costs. Nor does it prescribe the criteria for assessing costs. Rather, it is a purely procedural provision, defining (i) the steps that need to be taken by an applicant, (ii) the office holders who may exercise the court's powers in relation to costs, and (iii) the time when such applications should be heard. As such, the debate about the application of r. 65.12 (which the Defendants raised) is entirely sterile.

(2) Do "Special Circumstances" Apply?

3. **Summary:** The Claimants have two separate submissions in relation to the question whether "special circumstances" (within the meaning of r. 65.11(7)) apply:

3.1. It is inappropriate for the court to try answering the question at this stage.

3.2. Alternatively, if the point is to be decided now, the court should conclude that "special circumstances" do not apply.

4. Both submissions are informed by some general considerations with regard to the rules under the CPR in relation to costs:

4.1. First, those rules impose certain caps and controls which have, no doubt, been imposed for good, public policy reasons. Parties should not be encouraged to incur extravagant costs by being readily allowed to avoid the effect of those caps.

4.2. Secondly, the cap in relation to procedural applications operates by reference to a principle of proportionality between the overall allowable costs of the action as a whole, and the costs of any individual, procedural

application. That element of proportionality should not be readily jettisoned in any particular case.

4.3. Thirdly, the cap can be adjusted downwards: r. 65.5(4). Alternatively, it can be adjusted upwards where "the likely value [of the claim] is known": see r. 65.6(1)(b). In other words, there is no express provision for the cap to be adjusted upwards by reference to a valuation placed on the claim by the court in circumstances where its likely value is not known (as here).

5. **Timing:** The question whether "special circumstances" apply forms part of the substantive assessment process, and it should not be carved off and decided separately. The full question for the court under r. 65.11(7) is not whether "special circumstances" apply (*i.e.* it is not an abstract question). Rather, the question is a comparative one – namely, whether "there are special circumstances of the case justifying a higher amount" than would generally be awarded in respect of a single procedural application (*i.e.* up to one-tenth of the "prescribed costs" of the whole trial process). In order to determine whether special circumstances "justify the award of a higher amount", the court needs first to ascertain what the alternative costs outcome would be if special circumstances did not apply: in other words, the full analysis requires the court to ascertain (i) what the prescribed costs of a trial would be (and hence what would be awarded in respect of the application under the standard one-tenth rule), and (ii) whether there are special circumstances justifying a higher amount than that. The need for that analysis can be illustrated by the facts of this case. Here, the Defendants are seeking costs of over US$1.3 million in relation to the discharge application. They suggest that the claim may be valued at about US$227 million. Assuming for the sake of argument that that were the correct value of the claim, if the case proceeded to a contested trial and the Defendants won, then they would be entitled to "prescribed costs" under r. 65.5. Such costs would be assessed by reference to Appendix B. Applying the scale of costs set out in that Appendix to a claim of US$227 million would give the Defendants an entitlement after trial to US$709,500 in costs. And yet they are currently claiming nearly twice that amount for a short interlocutory hearing alone. By contrast, if it were accepted by the Defendants that the claim is worth more than a billion US Dollars (as the Claimants contend in other proceedings) then the discrepancy between the "prescribed costs" of the trial and the costs claimed in relation to the discharge application might be much smaller. That kind of consideration would be highly material for the court in determining whether there are "special circumstances" justifying a higher amount for the discharge application than one-tenth of "prescribed costs" of the whole action. It is for this reason that the Claimants submit that the question whether such circumstances exist should not be decided summarily now: rather, it should be deferred until the "value of the claim" is assessed.

6. **No special circumstances**: Alternatively, if the court is minded to rule now on whether special circumstances justify awarding a higher amount than one-tenth of

the prescribed costs, then the conclusion should be that they do not, for the following reasons:

6.1. The value of the claim is not currently known. As such, no uplift in the cap is possible as contemplated by r. 65.6(1)(b). The inference is that the kind of "special circumstances" which r. 65.11(7) is looking for are not present in this case.

6.2. In any event –

6.2.1. the discharge application involved no new law. The court simply applied well known authorities on material non-disclosure and on conspiracy.

6.2.2. There was a single hearing bundle at the discharge application.

6.2.3. The hearing lasted only slightly more than 2 days.

6.2.4. From beginning to end, the discharge application was prepared by the Defendants and disposed of in three weeks, between the grant of the injunction (on the 3rd February) and its discharge (on the 27th February). It was not an exceptionally heavy case.

6.2.5. The parties are not numerous, and there is a single set of legal representation on both sides. There are only two Defendants, both being Nevis companies.

6.2.6. The judgment is just over 25 pages long.

6.3. It is apparent from the Defendants' schedule of costs that their lawyers spent an extravagant amount of time preparing for the hearing – a total of well over 1,384 man hours,[1] which equates to roughly ten people working 10 hours a day for three weeks solidly in preparation for a hearing of less than three days. However, the fact that the Defendants are apparently prepared to deploy these kinds of resources on such a short hearing does not mean that "special circumstances" apply. The question is one for the court, not for either litigant.

(3) WHAT IS THE VALUE OF THE CLAIM?

7. **Summary:** Assuming that "special circumstances" under r. 65.11(7) do not apply, the Defendants will be entitled to no more than one-tenth of the "prescribed costs" of the entire trial process: see r. 65.11(7). In order to assess the "prescribed costs" of the whole trial, the court must assess "the value of the claim" under r.

[1] This does not include the time spent by junior Counsel, whose fee of US$193,792 is not broken down by reference to time spent.

65.5(2)(b)(ii), and then apply the table of costs in Schedule B to that figure. So far as that is concerned, the Claimants have two submissions:

7.1. The valuation of the claim is too complex to be assessed summarily on paper at this stage. Either (i) it should be deferred until after any appeal against Redhead J.'s judgment in the (separate) strike-out / summary judgment application; or (ii) it should be deferred until after the LCIA Arbitration Tribunal has ruled on the subject; or (iii) it should be determined at the full hearing for the assessment of the Defendants' costs, which the court has already ordered.

7.2. Alternatively, if the claim is to be valued now, it should be so valued on a comparable basis to that in the LCIA arbitration.

8. **Complexity:**

8.1. The problem in assessing the "value of the claim" at this stage is that the claim has been struck out. As such, any valuation now is entirely hypothetical, because the court has held that there is no sustainable cause of action. However, if permission to appeal is granted and if the appeal succeeds, then the case will proceed to trial, and (if successful) damages will be assessed in due course. Accordingly, one option is for the court to defer any attempt to value the claim until after a ruling has been given on the application for permission to appeal and (if permission is granted) until after the substantive appeal.

8.2. The alternative is to attempt a valuation now. The complexity of that undertaking is illustrated by the current proceedings in the LCIA arbitration. As things stand, Rusal estimates that its loss is likely to be in excess of US$1billion, but the process of valuation is far from complete. That being the position in the arbitration, the Claimants submit that it would be unrealistic for this court to attempt any summary valuation of the claim at this stage of the action. Instead, the valuation process should be deferred until after the LCIA has ruled on the subject.

8.3. The final alternative is that any valuation should be determined at the full hearing for the assessment of the Defendants' costs (in relation to which the court gave directions on 21 June).

9. **Summary valuation:** Alternatively, if the court is now minded to attribute a value to the claim in this action for the purpose of assessing costs, then the Claimants would submit that it should be not less than US$1 billion.

REVIEW OF AUTHORITIES

[25] The question whether CPR 65.11 or 65.12 is the operative rule for assessment

of costs in a particular case continues to vex the Court from time to time. Three primary authorities from this jurisdiction give guidance and set out principles of general application. In order not to add a further layer of complexity by a detailed review I will only highlight certain points here, perhaps too starkly, to demarcate the navigation channel that I consider to be the appropriate one towards the answer in this case.

[26] In ***Norgulf,*** at paragraph [6], Barrow J.A. stated as follows with regard to CPR 65.11:

> *A good starting point for appreciating this rule is not to be misled by its heading. The rule clearly applies to more than just procedural applications because paragraph (1) of the rule says that "on determining any application" other than at a case management conference, pre-trial review or at the trial, the court must: decide whether to award costs of that application and which party should pay them; assess the amount of such costs; and direct when they are to be paid. These are decisions the court must make for applications generally, and not just for procedural applications. Paragraph (2), similarly, is of general application in providing that the general rule is that the unsuccessful party must pay the costs of the successful party.*

[27] In sum, CPR 65.11 applies to any applications, except those made at a CMC, a PTR or at trial, whether they are procedural, substantive or both.

[28] This is in contrast to CPR 65.12, which is stated to apply to "*any matter or proceedings, or part of a matter or proceedings, other than a procedural application*".

[29] Clearly CPR 65.12 encompasses more than applications, whereas CPR 65.11 is dedicated to assessment of costs on "applications".

[30] If an application is a "procedural application", it is excluded from CPR65.12 and the costs thereof fall to be assessed under CPR 65.11, except the instances specially excluded in that Rule.

[31] This is not an arbitrary distinction. Regard must be had to the respective functions of CPR 65.11 and 65.12.

[32] In Norgulf, at paragraph 15, Barrow J.A. contrasts CPR 65.11 and 65.12 as follows:

> *That is what rule 65.12 does – it lays down the procedure for assessment. This is in contrast with the provisions of rule 65.11, which lay down the principles to guide the court in making an assessment of costs on determining applications.*

[33] In short, CPR 65.11 sets out how the Court's discretion on assessment of costs of an application is to be exercised, together with what information the parties must supply to the Court to assist it in exercising its discretion.

[34] CPR 65.12 on the other hand does not. It lays down

i. how to move the court to undertake an assessment;
ii. what the application for assessment must include by way of material to assist the court; and
iii. which judicial officer should perform the assessment; and
iv. what the judicial officer must do procedurally; and
v. what is the Court's discretion to determine and award the costs of the assessment.

[35] The reason for the distinction between CPR 65.11 and 65.12 is inherent in the nature of the types of proceedings each looks towards. Part 65.11 concerns assessment of costs of "applications". These applications, by their nature, are at least normally ancillary to existing proceedings that are governed by the Civil Procedure Rules and to which prescribed costs apply. Prescribed costs must, except in special circumstances, apply to the claim, otherwise the cap in CPR 65.11(7) of one tenth of the amount of the prescribed costs appropriate to the claim cannot operate.

[36] Upon the application being determined by the Court, the Court need then only go on to make an assessment applying the principles set out in CPR 65.11 and with the parties' assistance as therein prescribed. No further, or separate, procedure is necessary to move the Court to make an assessment.

[37] CPR 65.12 however is addressed to proceedings other than procedural applications. It encompasses substantive applications outside the prescribed costs regime, and situations where the court has not already been moved to make an assessment.

[38] The Defendants urge that in practice, interim applications have been dealt with under EC CPR 65.12 rather than 65.11, including, for example, ***Michael Wilson & Partners Ltd v Temujin Intl Ltd & ors, BVI Court, BVIHCV 2006/0307*** at paragraph [35].

[39] That paragraph stated as follows:

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

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

[40] The principles in ***Norgulf*** alluded to were quoted in this way:

> *[23] The critical sections of CPR 65.11 are those highlighted. Barrow JA in* ***Norgulf*** *admonished us that we must not be misled by its heading in that the rule plainly applies to more than just procedural applications. At paragraph 11 of the judgment, his Lordship explicated:*
> *"The rule applies to all applications except for two categories of applications. One category consists of those applications that are made at a case management conference, pre-trial review and trial. There are specific rules that apply to such applications and hence they are excluded. The other category of applications to which rule 65.11 does not apply consists of the specific applications listed – to amend, to extend time and to obtain relief from sanctions – and applications that could have been made at case management or pre-trial review (and which would therefore have fallen into the first category). Rule 65.11 does not apply to the second category of applications because of the need to exclude such applications from the general rule that costs are awarded to the party who succeeds on his application."*
>
> *[24] His Lordship continued (at para 12):*
> *"The object of rule 65.11 is to establish a norm that the court hearing an application "must" decide the issues of costs, including who is to pay, how much and when. Notably, it makes the amount of costs to be awarded a matter for the discretion of the court. Rule 65.11 states the principles by which the court must guide itself in exercising that discretion and assessing costs. The rule specifies the documentation that the party seeking costs must provide. And, finally, it caps the amount of costs that normally may be awarded on the determination of an application."*
>
> *[27] In* ***Norgulf****, Barrow JA expounded (at para 14):*
> *"Rule 65.12 complements and overlaps rule 65.11 but it is much broader in scope. Rule 65.12 applies to all assessments of costs, not just costs of an application. The rule opens by stating in paragraph (1) that this rule applies where costs fall to be assessed in relation to <u>any</u> matter or proceedings, or part thereof, other than a procedural application. These two words "matter" and "proceedings," both terms of art, together extend the rule to virtually every proceeding that could come before the court....The effect of paragraph (1) in stating that this rule applies to any matter or proceedings or part thereof, is to apply this*

rule to proceedings generally, not just applications. But the rule does cover applications generally, which are necessarily parts of proceedings, save for procedural applications, which are specifically excepted. Put another way, by excluding only procedural applications this rule includes all other applications."

[41] In ***Norgulf*** at paragraph [6], Barrow J.A. stated that CPR 65.11 applied to assessment of costs of applications generally, except those expressly excluded. At paragraph [27], he stated that CPR 65.12 applies to all applications except procedural applications. This is only duplicative if it is assumed that both CPR 65.11 and 65.12 lay down how the court is to exercise its discretion on assessment, but, as Barrow J.A. explained at paragraph [15], only CPR 65.11 does this, whilst CPR 65.12 addresses procedure (for cases, typically, where an application for assessment is not already before the court).

[42] In ***Michael Wilson & Partners Ltd v Temujin Intl Ltd & ors, BVI Court, BVIHCV 2006/0307*** at paragraph [35] the Learned Judge appears to have proceeded on the basis that the purview of CPR 65.11 is for assessment of "procedural" applications and CPR 65.12 is for other types of applications. That distinction does not appear to follow from the principles enunciated by Barrow J.A. in ***Norgulf***. Nor did the Learned Judge consider how procedural applications are to be distinguished from other applications.

[43] Indeed the Learned Judge appears not to have been convinced that CPR 65.12 should apply in ***Michael Wilson***, because she then went on to consider how CPR 65.11 should be applied, if it were to be applicable.

[44] Clearly, however, when an application is procedural CPR 65.12 cannot apply.

[45] In ***Michael Wilson***, the Learned Judge did not consider closely what makes an application "procedural" for the purposes of CPR 65.11 and 65.12. In ***IPOC International Growth Fund Limited v LV Finance Group Limited & Ors***, at paragraph [26], Master Mathurin, guided herself with the following criterion in deciding whether an application was procedural:

[26] Upon consideration of the submissions and authorities provided by Counsel, it is my finding that all applications in the high court which did not decide the substantive issue and which were not determined at case management, pre-trial review or at trial, are applications in which the costs fall to be decided under rule 65.11.

[46] When considering whether CPR 65.11 or 65.12 should apply in the case of assessment of costs of an application to discharge an interim injunction, it appears to me that the questions the Court must ask itself which derive from the above therefore appear to be the following:

i. Is the matter or proceeding for which costs are to be assessed an "application"? If not, CPR 65.12 may apply, but CPR 65.11 does not apply.

ii. If it is an application, is it "procedural", in the sense that it did not decide the substantive issue in the claim? If it is "procedural" in this sense, CPR 65.12 does not apply.

iii. Was the "procedural" application determined at case management, pre-trial review or at trial? If so, neither CPR 65.11 nor 65.12 apply. If the "procedural" application was not determined at case management, pre-trial review or at trial, CPR 65.11 applies.

iv. If the application was not procedural, in the sense that it did decide the substantive issue, was the claim one to which prescribed costs applied and further, has the court already been moved to make an assessment? If so, CPR 65.11 lays down the manner in which the Court should exercise its discretion in assessing costs and the assistance the parties must provide the court in order to do so. If the Court has not already been moved, or moved itself, to assess costs as part of dealing with a non-procedural application, CPR 65.12 lays down the procedure to be followed by the applicant and by the Court, but CPR 65.12 does not lay down the manner in which the Court should exercise its discretion. For completeness, but not essential for this case, that manner of exercising its discretion can be summarized as a determination of what costs are reasonable to be awarded in all the circumstances. All the circumstances include whether prescribed costs apply to the claim and whether the costs of the application are proportionate to the costs that would be awarded for the claim as a whole, but no prescribed cap applies. As the cap can be disapplied in special circumstances under CPR65.11, the assessment result should be the same. The reason is that the thread which runs through assessment under both rules is that the court is not being required to suspend right-thinking common sense.

Applying these to the present case:

i. Clearly the application to discharge the interim injunction was an "application".

ii. The injunction was an interim remedy within the meaning of CPR 17.1(1)(b) "interim injunction", and possibly CPR 17.1(1)(j)(i) "an order restraining a party from dealing with any asset whether located within the jurisdiction or not". The injunction was interim pending determination of a claim, as then pleaded. Discharge of the injunction did not decide the substantive issue in the claim. It was therefore "procedural" for the purposes of CPR 65.11 and 65.12. I am not taken with the Defendants' clever submission that discharge of the injunction determined the injunction proceedings, and should therefore be treated

as not procedural. The "injunction proceedings" were ancillary to a substantive claim, and not proceedings in their own right, which continued notwithstanding discharge of the injunction. Furthermore, I do not consider that the fact that interim injunctions are treated like final relief for the purposes of not requiring leave to appeal assists the Defendants here. The common denominator in that situation is that interim injunctions affect a party's substantive rights in the same manner as final relief, and therefore it is right and just to allow immediate access to review by the Court of Appeal. The test, for the purposes of assessment of costs, is not whether the interim relief affected substantive rights, but whether the application decided the substantive issue in the claim. It would appear to be clear in the present case that it did not. Equally, the Defendants' submission that costs assessments in respect of interim applications have in practice been dealt with under CPR 65.12 rather than CPR 65.11, their citing ***Michael Wilson*** as an example, does not withstand close scrutiny, as set out above. There is nothing about interim applications that necessarily direct them to be dealt with under CPR 65.12.

iii. The application was not determined at a CMC, PTR or a trial.

[48] For the reasons stated, I agree with the Claimants' submission that the application in issue here was a "procedural" application to which CPR 65.11 applies.

Whether special circumstances apply

[49] On the question whether special circumstances apply to displace any cap, I agree with the Claimants' submissions that no special circumstances apply in this case.

[50] The considerations whether a matter is high value, multi-jurisdictional, treated by overseas Counsel and is complex, and other factors, are not to be treated as "boxes to be checked" which compel a conclusion that special circumstances do or do not apply. Each case must be considered in the context of its own circumstances. It may be, for example, that a matter of relatively low, or no ascertainable monetary value, local to a state or territory of this jurisdiction, has an exceptionally high profile or publicly emotive interest that it warrants being treated by specialist Counsel from overseas. Conversely, an application which is made in the context of high value, complex multi-jurisdiction may of itself be relatively simple and straight-forward.

[51] In the present case, although both sides committed huge resources to disputing the application to set aside the injunction, regarded objectively, this was a clear case where the injunction should be set aside and any reasonably able senior junior commercial law local Counsel (of which there are a goodly number), armed with a synopsis of proceedings elsewhere and facts provided by overseas solicitors, could, in my view, have achieved the same result for a low five figure costs sum.

The cap and value of the claim

[52] It would be unsatisfactory for the judicial officer assessing the claim not to know what the value of the claim should be treated as for prescribed costs purposes, in case the cap of one tenth of the prescribed costs should be exceeded.

[53] It would also be unsatisfactory for that valuation process to be put off to a later date after other proceedings have matured. Such an approach would run contrary to the concept that costs should, in general, be assessed at the hearing of the application in question.

[54] Both parties, through their submissions, seem content to treat the value of the underlying claim as at least US$1 billion.

[55] For present purposes this Court will therefore treat the value of the claim as US$1billion.

[56] This may well be academic in the present case, as a sum for costs below the cap may be assessed. Without in any way trespassing upon the judicial officer's assessment remit, it is abundantly clear to this court that, certain possibly fatal deficiencies in the presentation of the request for costs aside, it is an understatement to say that the costs claimed are stratospherically luxurious and indeed other, less delicate, epithets come to mind.

[57] I therefore direct that the assessment shall take place pursuant to CPR 65.11 and that the value for the claim for the purposes of the cap of one tenth of the prescribed costs of claim shall be US$1 billion.

Costs of this application

[58] I make no order as to the costs of this application.

[59] It is difficult to see at this point which party is "successful" on this application.

[60] Furthermore, any costs order I would make upon this application would be picayune in relation to the resources the parties appear ready to expend upon this matter so that a costs order would serve no useful purpose.

Gerhard Wallbank
Acting High Court Judge