THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF APPEAL
BEFORE CHIEF JUSTICE ZAKI AZMI, JUSTICE ROGER GILES AND JUSTICE WAYNE MARTIN

BETWEEN

(1) MELODY
(2) MOLLY

Appellants

and

MELANCE

Respondent

JUDGMENT

Hearing : **18 November 2020**

Counsel : Mr Stephen Brown instructed by KBH Kaanuun on behalf of the Appellants
Mr Jade Laktineh instructed by Laktineh & Co. Ltd on behalf of the Respondent

Judgment : **19 January 2021**

ORDER

UPON reviewing the Defendants' Second Appeal Notice filed on 29 July 2020 (the **"Permission Application"**) seeking permission to appeal against the Order of H.E. Justice Shamlan Al Sawalehi dated 25 March 2020 (the **"Order"**)

AND UPON reviewing the Claimant's submissions in opposition to the Permission Application dated 19 August 2020

AND UPON reading the submissions and evidence recorded in the Court file

AND UPON reviewing Rule 44.19 of the Amended Appeal Rules in the Rules of the DIFC Courts (the **"ARDC"**)

AND UPON hearing Counsel for the Appellant at the appeal hearing on 18 November 2020

AND UPON reading the submissions and evidence filed and recorded in the Court file

IT IS HEREBY ORDERED THAT:

1. The appeal is allowed.

2. The Order of H.E. Justice Shamlan Al Sawalehi dated 25 March 2020 is set aside.

3. The matter is remitted to the, to the Registrar of the Court, for assessment in accordance with these reasons.

4. The Respondent shall pay the Appellants' costs of the appeal within 30 days from the date of this Order, to be assessed by the Registrar on the standard basis if not agreed.

Issued by:
Nour Hineidi
Registrar
Date of issue: 11 February 2021
Time: 2.30pm

SCHEDULE OF REASONS

Summary

1. This is an appeal from an assessment of costs by a Judge in the Court of First Instance. The grant of permission to appeal from such assessments will be exceptional. However, in this case there were departures from due process and errors of principle in the course of the assessment. For the reasons which follow, the appeal will be allowed, the assessment set aside, and the matter remitted to the Registrar of the Court for reassessment.

The substantive dispute

2. The appellants are Melody and Molly (together **"MELODY"**). The respondent is Melance Co W.L.L. (**"Melance"**). All parties to the proceedings are companies engaged in the provision of [redacted] services, including [redacted] services.

3. MELODY and Melance are shareholders in Myra (**"MYRA"**). Prior to April 2019, Melance held 39.5% of the issued shares in MYRA, and MELODY (together) held 60.5%. Pursuant to a Shareholders Agreement dated 23 December 2014, certain decisions of MYRA required the approval of shareholders holding 75% of the issued shares in that company.

4. On 14 April 2019, MYRA issued 75 million new shares. Melance claimed that pursuant to an agreement between the parties dated 27 March 2019, amended by a further agreement dated 23 May 2019, 39.5% of the shares issued on 14 April 2019 were allotted to MELODY to be held as collateral security for a loan made by MELODY to Melance. Melance alleged that upon repayment of that loan it was entitled to the shares - that is, 39.5% of the 75 million shares issued on 14 April 2019 (the **"Disputed Shares"**).

5. MELODY has at all times denied that Melance had any interest in, or entitlement to, those shares. MELODY's position has been that Melance had an option to acquire the Disputed Shares, which lapsed by the effluxion of time before it was exercised.

6. It is common ground that there has at all material times been an arbitration agreement governing the resolution of the substantive dispute between the parties. That agreement required the dispute to be referred to arbitration in the Dubai International Financial Centre in accordance with the Arbitration Rules of the London Court of International Arbitration.

The court proceedings

7. Melance commenced proceedings in the Court of First Instance on 17 June 2019, when it brought an application for an interim injunction without notice to MELODY. Melance sought orders prohibiting MELODY from dealing with or disposing of any of the Disputed Shares in MYRA and from exercising any voting or other rights attached to those shares. The application was said to be urgent because a Board meeting of MYRA was to be held on 19 June 2019, and unless the injunction was granted, MELODY would be able to use the voting rights attached to the Disputed Shares to make changes to the Board, or other significant decisions. The application was said to be justifiably brought without notice to MELODY because of Melance' concern that if given notice, MELODY might take steps to thwart its application by exercising the voting rights attached to the Disputed Shares to alter the corporate structure and governance of MYRA.

8. On 17 June 2019, a Judge of the Court heard the application without notice to MELODY and granted the interim relief sought until the conclusion of a further hearing on notice to MELODY, scheduled to take place seven days later, on 24 June 2019.

9. On 23 June 2019, the Court ordered, by consent of the parties, that the hearing listed for 24 June 2019 would be adjourned to such other date as was agreed between the parties and convenient to the Court, and that the interim injunction would remain in force until the conclusion of that adjourned hearing.

10. On 26 June 2019, MELODY made an application on notice to vary the terms of the interim injunction. That application was heard and dismissed on 27 June 2019, and MELODY was ordered to pay Melance' costs of the application to vary the interim injunction.

11. The issue of the continuation of the interim injunction came on for substantive hearing on 11 July 2019. On 18 July 2019, the Judge who heard that application ordered that the interim injunction should remain in force until further order of the arbitral tribunal appointed to determine the dispute between the parties, and further ordered that MELODY should pay Melance' costs of the application to be assessed by a Registrar if not agreed by the parties within 30 days of the date of the order.

12. No reasons were given for these orders. In the absence of such reasons, it might perhaps be inferred that MELODY was ordered to pay Melance' costs of the application for interim injunction because it had unsuccessfully opposed that application, and by the application of the principle that costs should follow the event. However, at the time those orders were made, no substantive determination had been made with respect to the competing positions of the parties in relation to the Disputed Shares and, as the orders expressly recognized, that determination would, in due course, be made by an arbitral tribunal, not the Court. Accordingly, it remained to be seen whether Melance was justified in seeking the interim relief which it obtained or whether, on the other hand, MELODY was justified in opposing that relief. In those circumstances, in other jurisdictions with which the members of this Court are familiar, the usual practice would have been to either:

1. (a) reserve the costs of the application for interim injunctive relief until the arbitral proceedings had been determined; or

2. (b) make the costs of the application for interim relief costs in the cause of the arbitral proceedings (that is, payable by whichever party failed in those proceedings); or

3. (c) refer the question and quantum of the parties' costs in relation to the application for interim injunctive relief to the arbitral tribunal for determination.

13. None of those steps was taken in this case. As no appeal has been brought from the costs order made on 18 July 2019, it is irrelevant to speculate as to why none of those courses were taken, or whether any of those courses would have been more appropriate.

14. On 11 August 2019, Melance sought to agree payment of its costs for the application for interim injunction, and the unsuccessful application by MELODY to vary the injunctive relief granted, in the amount of USD933,991. Given that the application had been heard on 17 June 2019 without notice to MELODY, and that the hearings on 27 June and 11 July 2019 took no more than half a day and a day respectively, the amount claimed is extraordinary and, on its face, vastly in excess of any amount which one might consider reasonable or appropriate for the costs of an application for interim relief heard over no more than 2.5 days.

15. On 16 August 2019, MELODY advised that it did not agree to pay the costs claimed.

16. On 22 August 2019, Melance wrote to MELODY seeking to engage in discussions in order to agree costs and providing an updated claimed

aggregate of USD919,121. Thereafter the parties corresponded with respect to the quantum of costs claimed, and on 28 August 2019 Melance submitted a formal application to the Court in which it notified the Court of the parties' inability to agree upon costs and set out the basis of its claim for costs.

17. In the meantime, arbitral proceedings relating to the substantive dispute had been commenced. On 1 October 2019, the arbitral tribunal discharged the injunction granted by the Court so as to allow MELODY to exercise voting rights in respect of the Disputed Shares after MELODY had agreed to give certain undertakings in favour of Melance.

18. On 17 October 2019, MELODY filed an application to strike out the detailed assessment proceedings brought by Melance on the basis that they were said to have been commenced after the deadline imposed by RDC 40.10.

19. On 20 October 2019, Melance wrote to MELODY requesting that the strike out application be withdrawn in exchange for a commitment that Melance would prepare and serve a further detailed bill of costs within 14 days, that is by 3 November 2019. MELODY did not respond to that request, with the result that Melance prepared and served a responsive submission to MELODY's strike out application on 21 October 2019.

20. On 3 November 2019, Melance served a Detailed Bill of Costs claiming an aggregate amount of USD942,546.46. The increase in the aggregate costs claimed of USD23,425.46 was said to be attributable to the cost of preparing the Detailed Bill of Costs.

21. On 24 November 2019, MELODY submitted its Points of Dispute in response to the Detailed Bill of Costs served by Melance. In that response, MELODY conceded USD258,992.85 of the amount claimed by Melance.

22. During December 2019, Melance submitted its Points of Reply to MELODY's Points of Dispute and submitted costs notes prepared by Counsel in support of the costs claimed.

23. The substantive hearing of the arbitration took place on 6 and 7 January 2020.

24. On 12 January 2020, Melance wrote to the Court requesting an interim order that MELODY be required to pay 50% of its claimed aggregate costs pursuant to paragraph 5 of Practice Direction No. 5 of 2014. MELODY opposed the order sought, and during January 2020, the parties exchanged correspondence and submissions in relation to the application for an interim payment.

25. On 12 February 2020, the Court granted the application for interim payment of 50% of the total amount claimed and directed MELODY to pay USD471,273. That sum was paid into the Court by MELODY on 20 February 2020 and on 27 February 2020, Melance applied to the Court for an order that the amount paid be released to Melance. The Court acceded to that application.

26. On 6 March 2020, the arbitral tribunal issued its "partial Final Award on Liability Issues" in which it dismissed Melance' claim to the Disputed Shares and declared that Melance had no right, title or interest of any nature whatsoever in the Disputed Shares. The Tribunal upheld the position which had been advocated by MELODY, to the effect that Melance had been given an option to acquire the Disputed Shares which it had failed to exercise in time and which had therefore lapsed. Based on the Tribunal's determination, it follows that Melance did not have the rights which it asserted at the time it moved the Court to grant interim injunctive relief in its favour, and the effect of the injunction granted was to restrict MELODY in the lawful exercise of its rights relating to the Disputed Shares without lawful justification.

27. The hearing of Melance' claim for costs was listed for 19 March 2020. However, Counsel for MELODY developed symptoms consistent with the COVID-19 virus and appropriately went into isolation, with the result that the hearing was adjourned. The parties subsequently agreed that the costs proceedings should be determined on the papers, and each submitted a "speaking note" to the Court. It appears that these were the notes that had been prepared by Counsel for their use when addressing the Court orally.

28. On 25 March 2020, a Judge of the Court ordered that MELODY pay Melance 80% of the total costs which it had claimed, and the costs of its application for costs, the latter to be assessed by a Registrar if not agreed. No reasons were provided for the order at the time it was made. Upon a request for reasons by Counsel for MELODY, the parties were informed that reasons for the order would follow in due course.

29. On 29 March 2020, MELODY issued an application requesting a direction that the period within which it could commence proceedings to challenge the costs order would not commence until delivery of the reasons for that order, and certain other relief.

30. On 2 April 2020, the Court ordered that the time for commencement of proceedings challenging the costs order would not run until reasons for that order had been provided, and dismissed the other relief sought by MELODY.

31. On 9 April 2020, MELODY issued a notice seeking permission to appeal the costs order.

32. On 23 April 2020, the Judge provided reasons for the costs order which he made on 25 March 2020. It will be necessary to refer to those reasons in some detail shortly.

33. The arbitral tribunal ordered that Melance pay MELODY's costs of the arbitration which it fixed in the following amounts:

USD7,521.00

GBP983,059.23

AED1,424,000.92

KWD26,122.50

At least at the time of the hearing of this appeal, Melance had not paid any of the amounts it was ordered to pay by the arbitral tribunal.

34. We digress to observe that the net result of this litany of events appears to us to be the antithesis of justice. The arbitral tribunal has authoritatively determined that Melance had no right to the Disputed Shares. It follows that Melance had no entitlement to the interim injunctive relief it sought and obtained, and that MELODY was entirely justified in opposing the grant of that relief. As we have noted, the course taken by Melance resulted in an unjustified interference with MELODY's rights to the Disputed Shares. Melance has failed to pay MELODY's costs of the arbitral proceedings but has received and retains more than USD400,000 in respect of its costs in relation to what we now know to be an unjustified claim for interim relief, and seeks to enforce an order for the payment of a further amount of similar magnitude pursuant to the order under appeal, while at the same time failing to pay MELODY's costs of the arbitral proceedings.

35. In these circumstances it is difficult to resist the notion that something has gone wrong in respect of the costs of these proceedings. It seems very likely that this state of affairs has come about because of the differing jurisdictions exercised by the Court on the one hand, and the arbitral tribunal on the other, and in particular, the fact that the Court has exercised its discretion with respect to costs on the basis of the outcome of the application for interim relief, whereas the arbitral tribunal has exercised its discretion on the basis of its determination with respect to the substantive rights of the parties.

36. Be that as it may, as we have already observed, no appeal was brought from the order that MELODY pay Melance' costs of the application for interim injunction, and the only matter with which this appeal is concerned is the assessment of those costs. Nevertheless, we would respectfully suggest to Judges at first instance that whenever applications are made for interim injunctive relief, it will often be appropriate to either reserve the costs of such applications until such time as the substantive rights and obligations of the parties have been determined, or alternatively utilise a form of order which will allocate those costs to the party ultimately found to be successful.

The reasons for the costs assessment

37. In his reasons for the assessment of costs, after setting out the chronological sequence of the proceedings[1] the Judge provided an overview of the respective positions of the parties. He cited with approval the observation that while *"litigants are free to pay for a Rolls Royce service [they are not free] to charge it to the other side"*[2]. He noted that Melance submitted that its costs of preparing and filing the request for arbitration should be included within its costs of obtaining the injunction because of its assertion that the arbitration was commenced pursuant to the terms of the injunction[3]. He noted that Melance' aggregate claim for costs was USD993,991.

38. The Judge also noted MELODY's submission to the effect that the amount claimed by Melance was *"egregious and unjustifiable"*[4] and noted MELODY's submission that Melance could recover no more than *"the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances"*[5].

39. The Judge noted that MELODY's principal objection was to the amount of time that Melance' legal representatives had spent on the proceedings and that time spent on the underlying arbitration has been claimed in the costs sought. He also noted Melance' submission that when assessing costs, the Court should take into account the conduct of MELODY, which was described as "intransigent".

40. The Judge then set the context for a more detailed consideration of the respective positions of the parties by setting out the applicable rules of Court, and in particular RDCs 38.21 to 38.24. The Judge also described the passage in Kazakhstan Kagazy to which MELODY had referred as providing "important guidance"[6]. That passage includes the following:

> "What is reasonable and proportionate . must be judged objectively. The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party. This approach is first of all fair. It is fair to distinguish between, on the one hand, costs which are reasonably attributable to the other party's conduct in bringing or contesting the proceeding or otherwise causing costs to be incurred and, on the other hand, costs which are attributable to a party's own choice about how best to advance its interests."[7]

The costs of commencing the arbitration

41. The first substantive issue addressed by the Judge was the question of whether, as Melance contended, its costs of commencing the arbitration proceedings (the **Arbitration Costs**) were recoverable as part of the costs of the application for interim injunctive relief. The Judge concluded that they were not. As that conclusion is not challenged in this appeal, and was in our view clearly correct, it is unnecessary to refer to the reasons for it.

42. As a consequence of that conclusion, the Judge observed:

> "Using MELODY's speaking notes for the hearing listed for 19 March 2020, I have calculated that the Arbitration Costs amount to USD28,407.40 i.e. 3.1% of Melance' Bill of Costs. This amount will accordingly be deducted from Melance recoverable costs."[8]

43. It will be necessary to return to this assessment in the context of the grounds of appeal.

Other costs not directly related to the interim injunction

44. The Judge then addressed MELODY'S submission to the effect that costs were being claimed for matters other than matters directly related to the interim injunction application, including costs related to settlement submissions, costs for reviewing correspondence by email and associated with considering the next steps to be taken. The Judge accepted that:

> "To the extent that these costs were incurred in relation to the underlying dispute and not to the injunction . they should not be recoverable in these court proceedings. However, I do not think that it is clear from the submissions made by MELODY in this regard which category these steps should fall into. As such, I will not make any adjustments to the amount claimed .".[9]

Proportionality

45. The Judge next addressed the question of proportionality, having earlier observed that RDC 38.21 requires the Court to assess costs which were:

> "(a) proportionately and reasonably incurred; and
>
> (b) were proportionate and reasonable in amount."

46. The Judge noted in his reasons that each party had made submissions in relation to proportionality which engaged the considerations specified in RDC 1.6(3)(a)-(c), so that the costs should be proportionate to:

> (a) the amount of money involved;
>
> (b) the importance of the case;
>
> (c) the complexity of the issues.

47. Dealing firstly with the amount of money involved, the Judge rejected Melance' submission that the commercial value of the Disputed Shares (USD170-180 million) reflected the amount of money involved in the Court proceedings. In his view the value of the Disputed Shares was the amount of money involved in the arbitration, and the Court proceedings were not commenced in order to establish ownership over the Disputed Shares, but rather to preserve the rights which Melance claimed in respect of the Disputed Shares until the dispute had been finally determined in the arbitration.[10]

48. The Judge drew an inference from Melance' submissions to the effect that the costs which it claimed were proportionate to a much larger amount of money involved than the amount which he considered to be involved, and used that inference to sustain his conclusion that the costs incurred by Melance were disproportionate to the amount of money involved in the case.[11]

49. In relation to the importance of the case, the Judge noted Melance' submission that the injunction application was "existentially important" to Melance' continued participation in the joint venture and to the preservation of its investment. The Judge considered that submission to overstate the importance of the case, and to again confuse the issues in the arbitration with the issues involved in the Court proceedings. In that context the Judge noted that Melance' submissions emphasized considerations of permanence and finality which could only be effected by the outcome of the arbitral proceedings, not the Court proceedings. In his view the importance of the case was to be assessed by reference to the period of time which it would take to resolve the arbitral proceedings. The Court proceedings served only to maintain the status quo for that period.

50. Once again the Judge drew an inference from the terms of Melance' submissions to the effect that it had overstated the importance of the Court proceedings, and used that inference to conclude that the costs incurred by Melance were disproportionate insofar as the importance of the case was concerned.[12]

51. Turning then to the subject of complexity, the Judge set out the respective positions of the parties on that topic, before concluding that the costs incurred by Melance were proportionate insofar as the complexity of the case was concerned.

52. However, the Judge concluded that the total costs claimed by Melance were disproportionate, and that it cannot be said that its costs had been reasonably incurred.[13] It followed that, in his view, a reduction had to be made to those costs in order to reflect "the correct scope of recoverable costs". He did not consider that the Court had been given the information that it would need to conduct a precise assessment of that amount, with the result that he would use a "ballpark" figure. He then observed:

> "Aggregated with the Arbitration Costs, in my judgment the fair estimation of the RDC 1.6(3)(a) Disproportionate Costs and the RDC 1.6(3)(b) disproportionate costs is 30% of the total costs that Melance claims in its Bill of Costs and it follows that the same is deducted."

Hourly rates

53. The Judge next considered MELODY's attack upon the hourly rates claimed for both solicitors and Counsel, and concluded that, having regard to the complexity of the issues, those rates were justified.

Duplication

54. The Judge then addressed MELODY's submission that costs claimed by Melance duplicated work because they were first represented by one law firm and Senior Counsel, and then changed representation without explanation, engaging another law firm and another Senior Counsel. The Judge did not consider that sufficient evidence had been adduced to show that there was duplication of work by fee earners. He therefore rejected the submission based on duplication.

MELODY's conduct

55. The Judge noted that pursuant to RDC 38.8(1) and 38.9(1), the conduct of the parties, both before and during the proceedings, was relevant to the Court's determination of costs.[14]

56. The Judge noted that Melance' contentions with respect to MELODY's conduct focused upon what was said to be:

> (a) MELODY's persistent refusal to accept, offer counter-proposals or otherwise engage properly with Melance' good faith attempts to reach a negotiated settlement;

(b) The meritless variation application; and

(c) The vexatious application to strike out the detailed assessment proceedings.

57. The Judge rejected the submission based upon the second and third of these propositions. He noted that Melance was awarded the costs of the variation application and has therefore been compensated in that respect, and did not consider MELODY's application to strike out the assessment proceedings as vexatious but rather considered it arguable.

58. In relation to MELODY's alleged refusal to negotiate, the Judge referred to a letter sent to MELODY dated 31 May 2019 requesting an undertaking that MELODY would not exercise any voting rights in respect of the Disputed Shares, and noted that MELODY refused that request.

59. In this context, the Judge noted that it would be artificial to assess MELODY's conduct without taking into the account the fact that the arbitral tribunal has found that MELODY was correct in its refusal to acknowledge that Melance had any interest in the Disputed Shares.

60. However, the Judge went on to observe:

"With that said there is another yardstick which, in my judgment, should be employed to determine whether MELODY's conduct fell below that required from it, namely the standard of proof relevant to the remedy sought against it.

> The standard of proof required for the grant of an interim injunction is of course lower than that required to obtain a final remedy, and which is lower, in turn, than the standard corresponding to certainty. Though the Court was not taken to this authority, per Lord Diplock in *American Cyanamid v Ethicon* [1975] AC 396 on page 408, in proceedings for an injunction `the plaintiff [must at least disclose a] real prospect of succeeding in its claim for a permanent injunction at the trial.' As such, in my view, MELODY's conduct in these proceedings should have been informed and determined by whether Melance could demonstrate any real prospect of success and not by any certainty it may have had with respect to the ownership of the Disputed Shares. However, it is evident on MELODY's own case that its case was informed by its certainty as to its ownership of the Disputed Shares. In separate written submissions MELODY have stated:
>
> [MELODY] were not being uncooperative and adversarial, they were defending their right to their own property .
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> .
>
> As events have borne out, [MELODY] were entirely justified in asserting that the Disputed Shares were their unencumbered property, in respect of which they could vote as they chose. The Claimant had no sustainable basis for asserting otherwise.
>
> In my judgment, to the extent that Melance could demonstrate that it had at least any real prospect of succeeding in its claim, MELODY was vulnerable to the imposition of an injunction against it; and to the extent that MELODY was so vulnerable, its resistance to the proceedings would in all likelihood only create an increase of costs. And as it happened, Melance was successful in its application for an interim injunction, and so it did have at least any real prospect of succeeding in its claim. As such, MELODY could have given appropriate undertakings to avoid those Court proceedings until the dispute was finally determined in the arbitration -proceedings it should be emphasized it had consented to and took part in - but it did not. .
>
> In my view, MELODY could have adopted a more cooperative stance in these proceedings for an interim injunction. The standard of proof required for the grant of injunction meant that MELODY should have been less adversarial, however certain it was of the correctness of its position, until that position was properly vindicated, or else costs would be incurred unnecessarily. .
>
> As with the . Disproportionate Costs ., there is no precise way for the Court to determine the appropriate extent of a sanction with respect to MELODY's Conduct. Again I have no option but to aim at what appears to be a fair figure, this time increasing the recoverable costs with the relevant considerations in mind. This fair figure, in my judgment, requires reducing the 30% reduction to Melance costs on account of the Arbitration Costs and its disproportionality by 10%, rendering the final reduction 20% of Melance' Bill of Costs." [15]

The Judge's conclusion

61. For these reasons the Judge concluded that MELODY should be ordered to pay 80% of the amount claimed by Melance in its Detailed Bill of Costs.

Appeals from assessment of costs

62. There is a distinct trend in many jurisdictions in which it is customary to make orders with respect to the costs of parties for disputes with respect to those orders, and for the assessment of costs pursuant to their terms to become a form of satellite litigation - constantly orbiting around the core business of the courts, which is the resolution of substantive disputes, consuming entirely disproportionate amounts of time, money and the limited resources of the court which are funded by the State. The policy of discouraging satellite litigation of that kind is clearly evident in the various provisions of Part 38 of the Rules of the DIFC Courts.

63. It is consistent with that policy, and with the policies adopted by the Courts of Appeal in other comparable jurisdictions, for this Court to state, clearly and emphatically, that permission to appeal from an exercise of the discretion to make an order with respect to costs, or from an assessment of costs pursuant to such an order will only be granted in exceptional circumstances. Generally speaking, permission to appeal from an order for costs, or from an assessment of costs, will only be granted if there is an arguable case that there has been:

(a) A substantial departure from due and proper process; and/or

(b) An error in principle,

which is likely to have caused significant prejudice to the party seeking permission to appeal.

64. For reasons which will appear, in this case there have been both substantial departures from due and proper process and errors in principle.

The assessment of the amount of costs

65. The factors to be taken into account in assessing the amount of costs to be paid pursuant to an order are specified in RDC 38.21 - 38.26.

66. It is apparent from RDC38.21 that there are two bases upon which costs may be assessed - that is, on the standard basis or on an indemnity basis. When costs are assessed on the standard basis, the beneficiary of the order (the **"receiving party"**) is entitled to an award in respect of all costs proportionately and reasonably incurred and which were proportionate and reasonable in amount in conducting the litigation, or the particular procedure within the litigation in respect of which costs were awarded in the receiving party's favour. If costs are to be assessed on an indemnity basis, the receiving party is entitled to an award reflecting all costs incurred in the conduct of the litigation or the particular procedure in respect of which costs were awarded in its favour, except for costs which were unreasonably incurred or which are unreasonable in amount. Significantly, proportionality plays no part in the assessment of indemnity costs.

67. It is implicit in the structure of RDC 38.21 that in cases in which costs are assessed on the standard basis, the receiving party carries the burden of proving the amount of the costs which were proportionately and reasonably incurred and which were proportionate and reasonable in amount in conducting either the litigation generally, or the particular procedure within the litigation in respect of which costs were awarded in its favour. On the other hand, in cases in which costs are to be assessed on an indemnity basis, the receiving party will carry the burden of proving the costs which were actually incurred in the conduct of the litigation generally or the particular procedure in respect of which costs were awarded in its favour, after which the paying party will carry the burden of establishing that portion of the costs claimed which were unreasonably incurred or unreasonable in amount.

68. Applying these general principles to this case, Melance was the beneficiary of an order for costs to be assessed on the standard basis in respect of two procedures within the litigation - namely, the application for an interim injunction and MELODY's application to vary the interim injunction granted. It follows that Melance carried the burden of establishing the costs which were proportionately and reasonably incurred, and which were proportionate and reasonable in amount in bringing its application for an interim injunction or resisting MELODY's application to vary the interim injunction.

69. RDC 38.23 sets out various matters which the Court must take into account in assessing the amount of costs to be awarded. The matters which the Court must take into account are:

> "(1) The conduct of all the parties, including in particular:
>
> (a) conduct before, as well as during the proceedings; and
>
> (b) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
>
> (2) The amount or value of any money or property involved;
>
> (3) The importance of the matter to all the parties;
>
> (4) The particular complexity of the matter or the difficulty or novelty of the questions raised;
>
> (5) The skill, effort, specialised knowledge and responsibility involved;
>
> (6) The time spent on the case; and
>
> (7) The place where and the circumstances in which work or any part of it was done." [16]

70. RDC 38.24 requires the Court to have regard to RDC 1.6(3) when applying the test of proportionality. As we have noted, the Judge satisfied that obligation in this case. RDC 38.24 also embodies the principle that the relationship between the total of the costs incurred and the financial value of the claim may not be a reliable guide to proportionality, and the further principle that a fixed percentage cannot be applied in all cases to the value of the claim in order to ascertain whether or not the costs are proportionate.

71. RDC 38.25 includes an observation to the effect that legal representatives are not required to conduct litigation at rates which are uneconomic, with the consequence that in a modest claim the proportionate costs are likely to be higher than in a large claim, and may even equal or possibly exceed the amount in dispute.

72. RDC 38.26 contains the observation that when a trial takes place, the time taken by the Court in dealing with a particular issue may not be an accurate guide to the time properly spent by either the legal or other representatives in preparation for the trial of that issue.

73. The principles established by the Rules to which we have referred are appropriately augmented by principles established in cases decided in comparable jurisdictions. In this case, at both first instance, and on appeal, both parties relied upon principles established in cases decided in the High Court of England and Wales, which is a comparable jurisdiction, and it is clear that many of the provisions of Part 38 to which we have referred, have been derived from the Rules of that Court.

74. *Lownds v Home Office*[17] was a significant decision in the development of the jurisprudence of that Court with respect to costs. An aspect of that decision has, in effect, been reversed by changes made to the Rules of that Court as part of the Jackson reforms in relation to costs, but other aspects of the decision continue to provide appropriate guidance. Those aspects include the principle that assessment of costs requires both a global approach and an item by item approach. The global approach will provide guidance as to whether the total sum claimed is or appears to be disproportionate having regard to the matters which the Court is required to take into account pursuant to the Rules. The item by item approach will be required to assess whether each item claimed satisfies the requirements specified in the Rules with respect to proportionality and

reasonableness.

75. The Court also emphasized the need to determine what work was necessary when costs were disproportionate. In that context, in a passage cited by the Judge in this case, the Court observed:

> "In deciding what is necessary the conduct of the other party is highly relevant. The other party by cooperation can reduce costs, by being uncooperative he can increase costs. If he is uncooperative that may render necessary costs which would otherwise be unnecessary and that he should pay the costs for the expense which he has made necessary is perfectly acceptable."[18]

76. It is important to understand what is being conveyed by this passage. It does not convey any suggestion that the Court could, or should, impose a sanction or penalty upon the paying party because of that party's lack of cooperation. The starting point for the assessment will always be the costs incurred by the receiving party. The Court in Lownds was not suggesting that those costs should be inflated or increased because of lack of cooperation by the paying party. Rather, what the Court was saying was that costs which would not normally be incurred, and therefore irrecoverable on an assessment, but which were incurred only as a consequence of the conduct of the paying party can, in those circumstances, be recovered by the receiving party.

77. Other helpful guidance is contained in the passage from the decision of the Court in *Kazakhstan Kagazy* which was cited by the Judge in this case and which we have set out above, to the effect that the touchstone is "the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently."

78. Helpful guidance is also provided by the recent decision of the Court of Appeal in *West v Stockport NHS Foundation Trust*[19]. In that case, the Court observed:

> **"The right approach to costs assessment**
>
> We are anxious not to restrict judges or force them, when assessing a bill of costs, to follow inflexible or overly complex rules. One of the matters, however, which is apparent from the many cases cited to us, and from the submissions of counsel on the hearing of these appeals, is that there is an absence of consistency in the way in which costs bills are assessed. Taking the various points made above and drawing them together, we give the following guidance on an appropriate approach.
>
> First, the judge should go through the bill line by line, assessing the reasonableness of each item of cost. If the judge considers it possible, appropriate and convenient when undertaking that exercise, he or she may also address the proportionality of any particular item at the same time. That is because, although reasonableness and proportionality are conceptually distinct, there can be an overlap between them, not least because reasonableness may be a necessary condition of proportionality . This will be a matter for the judge. It will apply, for example, when the judge considers an item to be clearly disproportionate, irrespective of the final figures.
>
> At the conclusion of the line by line exercise, there will be a total figure which the judge considers to be reasonable (and which may, as indicated, also take into account at least some aspects of proportionality). That total figure will have involved an assessment of every item of costs, including court fees .
>
> The proportionality of that total figure must be assessed by reference to . [the Rules]. If that total figure is found to be proportionate, then no further assessment is required. If the judge regards the overall figure as disproportionate, then a further assessment is required. That should not be line by line, but should instead consider various categories of costs, such as disclosure or experts reports, or specific periods where particular costs were incurred, or particular parts of the profit costs.
>
> At that stage, however, any reductions for proportionality should exclude those elements of costs which are properly regarded as unavoidable, such as court fees . and the like.
>
> The judge will undertake the proportionality assessment by looking at the different categories of costs (excluding the unavoidable items noted above) and considering, in respect of each such category, whether the costs incurred were disproportionate. If yes, then the judge will make such reduction as is appropriate. In that way, reductions for proportionality will be clear and transparent for both sides.
>
> Once any further reductions have been made, the resulting figure will be the final amount of the costs assessment. There would be no further stage of standing back and, if necessary, undertaking a yet further review by reference to proportionality. That would introduce the risk of double counting."[20]

79. That approach appears to us to be consistent with Part 38 of the RDC, and it is an approach which should be followed by the Judges and Registrars of this Court.

80. With these general principles in mind, we turn to the grounds of appeal.

The grounds of appeal

Ground 1

81. The first ground of appeal asserts that having correctly held that Melance should not be able to recover costs related to the arbitration as part and parcel of the costs awarded in its favour in the court proceedings, the Judge erred in finding that only USD28,407.40 of the costs claimed by Melance related to the arbitration.

82. Melance does not contest the Judge's finding that costs related to the arbitration should not be recovered out of the costs of the court proceedings. However, it asserts that there are no grounds for interfering with the Judge's determination of the component of the costs claimed which should be disallowed on that basis.

83. It follows that the question raised by this ground of appeal is whether the Judge correctly differentiated between the costs incurred by Melance which are properly characterized as related to the arbitration proceedings, and the costs properly characterized as relating to the claim for interim injunctive relief. In order to address that issue, it is necessary to provide more detail with respect to the process of cost assessment.

The detailed bill of costs

84. Melance filed a Detailed Bill of Costs to be assessed on the standard basis on 3 November 2019. The Bill commences with a general description of the substantive dispute, the application for interim injunctive relief and assertions with respect to the amount or value of any money or property involved, the importance of the matter to the parties, the complexity of the matter, the skill effort and responsibility involved, the time spent on the case, and the place where and the circumstances in which the work or any part of it was done.[21] After referring to the financial position of the parties, the Bill identifies the legal practitioners and a paralegal involved in the provision of legal services, and their hourly rates.

85. Then follows a list, in chronological order (generally) identifying and describing some 70 items of work undertaken between 30 May and 14 July 2019. Columns applicable to each item differentiate between a claim made for a disbursement, and a claim made for "Profit Costs".

86. It is clear from the description of the items claimed that during the period covered by the Bill, legal services were being provided in respect of both the preparation of Melance' claim in the arbitration proceedings, and its claim for interim injunctive relief. However, no attempt is made in the Bill to differentiate between the costs applicable to each of those two matters. This approach appears to have been taken on the advice of Mr QC, who advised, in a note dated 17 December 2019, filed with the Court, that "costs for the preparation of the Request for Arbitration are . properly recoverable under the terms of the costs awards." As we have noted, the Judge rejected that contention, which is no longer advanced by Melance. However, the adoption of that erroneous contention in the preparation of the Bill of Costs created a real difficulty for the process of assessment.

87. For example, the first six items described in the Bill are expressed in the following terms:

> **"Thursday, May 30 2019**
>
> Counsel Mr Benjamin Strong QC fee for discussions with N Johnson; reading papers; advising by telephone and email
>
> **Friday, May 31 2019**
>
> Counsel Mr Benjamin Strong QC fee for finalizing letter, advising by telephone
>
> **Friday, June 17 2019**
>
> Attending upon consultation with client and counsel to consider next steps/strategy
>
> Counsel Mr Benjamin Strong QC fee for preparation for consultation over telephone and consultation over telephone
>
> **Saturday, June 8 2019**
>
> Counsel Mr Benjamin Strong QC fee for preparation for request for arbitration
>
> Counsel Mr Benjamin Strong QC fee for advising by telephone with N Johnson"

88. It is obviously impossible to tell from these descriptions of the work claimed whether services provided related to general advice with respect to the substantive dispute or specific advice related to the claim for interim injunctive relief.

89. The descriptions of later items in the Bill more clearly identify work relating to the application for injunctive relief. However, those items are intermixed with other items which are clearly not related to the injunction application. For example, in relation to a claim for Mr QC for advice given between 19 June and 5 July 2019, the services provided include "reading previous award; considering damages claims; choice to (sic of) arbitrator; correspondence".

90. Further, a very significant component of the Bill is the claim made in respect of "work carried out on documents and preparation", which is essentially a claim for time spent by each of the identified fee earners, at their respective rates. That time is itemized in a portion of the Bill entitled "Document Schedule 1". However, the itemized description of work done also fails to differentiate between work done in relation to the substantive dispute generally, and work done in relation to the application for interim relief. So, by way of example, the first items in the Schedule are expressed in the following terms:

> "Review and analysis of background documentation received. Investigating position re Bank holidays.
>
> Numerous internal exchanges re background, assemble team, review extensive preliminary documents received, begin strategy outline, numerous emails re foregoing.
>
> Multiple emails with team, review of documentation provided and consideration of legal theories.
>
> Conference call with PC and NE re case strategy prior to attending upon client to discuss; further review and analysis of key documents and potential claims; drawing and circulating note of conference call with client.
>
> Continued review of documents and exchanges thereon; considering next steps prior to attending upon NLJ and client, work on strategy and legal issues and emails re same, retention of local counsel and team.
>
> Emails with AZ and PC re materials and legal theories, considering company shareholders agreement and articles of association, noting amendments; collating six number batches of information, to include documents in support of lengthy chronology of events and emails to team

thereon, preparation of memorandum for legal team and the client.

Initial review of documents shared by ET and drafting note on thoughts of possible defences.

Attention to overall strategy and possible arguments, considering executed documents relating the transaction; email exchanges re same, drawing and circulating note of conference call with client, retention of Dubai counsel.

Review of materials, legal sources and feedback from HZ; compilation of memorandum for the client; exchanges with counsels in Dubai to set up conference call/provide information.

Detailed review of documents from ET, and consideration of possible defences, call with ET re same; drawing note of defences to ET; exchanges with JL to provide information; update chronology.

Numerous emails and telephone calls with client and team re strategy; retention of counsel, possible arguments."

91. These descriptions of services provided appear to relate to the provision of advice with respect to the substantive dispute generally, rather than specific advice relating to the application for interim injunctive relief.

92. Later items in the schedule include references to the injunction application, but sometimes in a single item in which other items are included within a single time claimed, such as the following item claimed on 10 June 2019:

"Preparing to attending upon conference call (Judge, Mr QC, Mr QC); attention to legal issues, review memos re same, review notice of arbitration, considering advice from counsel; outline SOC and related documents, attention to strategy."

While it is possible that some of that work may have related to the injunction application, clearly much of it did not.

93. There are however a number of items in the Schedule which clearly and unequivocally relate exclusively to the injunction application.

94. Further, item 56 of the Bill of Costs states:

"Mown LLP served as counsel to the Claimant during the preliminary stages of the dispute provided high level guidance, research, analysis, advisory services and preparatory work, including written communications with the defendants - see breakdown attached."

The amount of USD137,369.63 is claimed as a disbursement in respect of that item.

95. The "breakdown attached" appears to be a reference to a fee note from Mown dated 19 August 2019 covering services rendered between 22 May and 10 June 2019. That fee note commences with a general description of professional services rendered in the following terms:

"Advice regarding availability of preliminary injunctive relief;

Review of and preparation of a response to the first Greenberg Traurig letter;

Review of the provisions of the Shareholders Agreement, MYRA articles of association, MYRA board and shareholder resolutions and DIFC law relevant to the funding dispute and purported change in shareholding;

Litigation/arbitration analysis of the funding dispute, including detailed review of the batches of relevant documentation and correspondence provided by Melance as well as applicable case law;

Preparatory steps in relation to the potential DIFC arbitration process including preparation of a request for arbitration;

Preparation of various memoranda for the purposes of briefing other Melance stakeholders;

Review of and preparation of a response to the second Greenberg Traurig letter;

Preparation of a letter to be sent to MYRA in relation to the funding dispute and purported change in shareholding;

Liaising with One Essex Court in relation to the funding disputes;

Attendance on various conference calls to discuss the funding dispute with representatives of One Essex Court."

96. It is significant that of the ten items of professional services described, only the first clearly relates to the injunction application, and the other nine appear to relate to the substantive dispute which was to become the subject of the arbitral proceedings.

97. The fee note contains a detailed description of work done by reference to fee earner, the office in which the work was done, the hours spent, the charge rate and a narrative description of the work. There are approximately 50 items of specific work contained within that list. There is no obvious reference to the claim for interim injunction in the narrative description of any of those items.

98. It is clear from the Mown fee note that only a very small proportion of the work performed by that firm, if any, is referable to the injunction proceedings. Nevertheless, the total amount of that firm's fees were claimed and, subject to the general reduction for disproportionality made by the Judge, allowed.

99. We have already referred to the claim made in respect of the fees of Mr QC, which clearly includes advice with respect to the arbitration. Also in evidence before the Judge was the fee note of Mr QC, which describes the services he provided in the following terms:

"30 May 2019 - discussions with N Johnson; reading papers; advising by telephone and item

31 May 2019 - finalizing letter; advising by telephone

7 June 2019 - preparation for consultation over telephone and consultation over telephone

8 June 2019 - preparation for request for arbitration

10 June 2019 - advising by telephone with N Johnson."

100. It is not apparent from the description of those services that any of them relate to the injunction, and at least one item specifically related to the arbitration proceedings.

101. MELODY filed Points of Dispute in response to the Bill of Costs on 24 November 2019. The response commenced with a number of general points, including, under the heading "Proportionality" an assertion that the costs claimed are "exorbitant relative to the matters in issue and the short period of time in which they were incurred". Other general points made relate to the hourly rates claimed, which were asserted to be excessive, the duplication of work following the instruction of another firm of lawyers to replace Mown, and the duplication of work between fee earners.

102. Relevantly to this ground of appeal, general point 8 in MELODY's Response is headed "work relating to the underlying arbitration proceedings". Under that heading MELODY asserted:

"This Bill of Costs should be limited to work carried out in conjunction with the Injunction Application and the Defendant's variation application. The underlying Arbitration Proceedings remain live and liability for costs therein is yet to be determined.

It is apparent from the Bill of Costs that the Claimant erroneously seeks to recover costs associated with the Arbitration Proceedings, any such items should be removed."

103. Following the general points made at the commencement of the Response there follows a detailed response to each item in the Bill. The response to many of those items reiterates General Point 8 and asserts that the item of work relates only to the arbitration proceedings, and not the injunction application.[23]

104. On 15 December 2019, Melance filed a Reply to MELODY's Points of Dispute. In response to MELODY's General Point 8 relating to the non-recoverability of costs relating to the arbitration proceedings, Melance asserted that it was entitled to "all aspects of the injunction application" including the costs of preparing and filing the Request for Arbitration, which formed an integral part of the injunction application. That assertion was repeated in a general response to the specific complaints made by MELODY with respect to specific items of work.

105. In relation to the complaint with respect to the claim for the fees of Mown LLP, Melance replied in these terms:

"The fee note provided by Mown LLP expressly lists a number of items linked directly to the injunction proceedings. These include:

(i) `advice regarding the availability of preliminary injunctive relief',

(ii) a review of the provisions of underlying contractual documents for the purposes of advising on the dispute,

(iii) `litigation analysis' of the dispute,

(iv) the preparation of memoranda to advise the Claimant,

(v) liaising with One Essex Court for the purposes of the dispute, and

(vi) attending various conference calls to discuss the dispute with the Claimant and One Essex Court.

All of the costs claimed were incurred from 22 May to 10 June 2019, ie. the period from the negotiation of the 23 May letter agreement to just 3 days before the injunction proceedings were initiated. Given the time frame in which the costs were incurred, the defendants have no basis for suggesting that the costs are not connected to the injunction proceedings.

Accordingly, the costs are maintained and recoverable in full."

106. We digress to observe that, contrary to these assertions, the only item in the Mown fee note which is directly linked to the injunction proceedings is the item referring to "advice regarding the availability of preliminary injunctive relief", and none of the narratives in the fee note relating to any of the various specific items of work claimed appear to be directly related to the injunction proceedings.

The decision of the Judge on this issue

107. We have recounted above the general approach taken by the Judge in relation to this issue. To recap, he correctly concluded that the injunctive proceedings were ancillary to the proceedings relating to the substantive determination of the dispute between the parties, which were the arbitration proceedings. On that basis he correctly concluded:

"It follows that Melance should not be able to recover from MELODY any costs whatsoever related to the arbitration as part and parcel of the costs awarded in its favour in these DIFC Court proceedings (the Arbitration Costs).

Using MELODY's speaking notes for the hearing listed for 19 March 2020, I have calculated that the Arbitration Costs amount to

USD28,407.40, ie. 3.1% of Melance' Bill of Costs. This amount will accordingly be deducted from Melance' recoverable costs."[23]

108. The reasons provide no particulars as to the manner in which the Judge arrived at that calculation. Having observed that the proceedings were ancillary to the dominant proceedings, being the arbitration proceedings, and having regard to the manner in which Melance had presented its Bill of Costs, in which no attempt was made to differentiate between costs incurred in relation to the injunctive proceedings and costs incurred in relation to the arbitration proceedings, with the result that all costs incurred prior to the completion of the injunction proceedings were claimed, the conclusion that only 3% of the total costs claimed by Melance related to the arbitration proceedings is, on its face, surprising to say the least.

109. It seems from the brief reasons given that the Judge only referred to the speaking notes for the purpose of identifying what he described as the "Arbitration Costs". That inference is supported by the reasons given by the Judge when dismissing MELODY's first application for permission to appeal. In the course of the reasons given for that dismissal, the Judge was critical of MELODY for relying on a spreadsheet which set out the items which it asserted included "Arbitration Costs" when the spreadsheet had not been provided to him before he made his decision. In fact the spreadsheet only provides, in another format, MELODY's objections to specific items which were already before the Judge in MELODY's Response to the Detailed Bill of Costs. It is a fair inference that the Judge relied exclusively on the speaking notes and did not go through MELODY's Response to the Detailed Bill when ascertaining what he described as the Arbitration Costs.

110. Further, given that the Judge found, based on the speaking notes, that only 3% of the costs claimed were "Arbitration Costs" whereas, for example, the Mown fees alone were almost 15% of the total amount claimed, it seems clear it he has only excluded from the claim those items which clearly and unequivocally specifically related only to the arbitration proceedings. There is a clear inference that in respect of the many items in which the services rendered were not clearly identified as relating to either the injunction proceedings or the arbitration proceedings, or apparently included both, he has allowed the claim in full.

111. In our view, and with respect, in taking this approach the Judge departed from due and proper process and erred in principle.

112. The Judge had been presented with a Detailed Bill of Costs, MELODY's detailed Response to that Bill and Melance' Reply to that Response. It was incumbent upon the Judge to undertake the assessment of each item of cost claimed by reference to these documents, in accordance with the authorities to which we have referred and Part 38 of the RDC. It was necessary for him to determine, item by item, whether Melance had established that the cost claimed was a cost incurred in relation to the injunction application which was proportionately and reasonably incurred and which was proportionate and reasonable in amount. The respective positions of the parties on that topic were set out in detail in the exchange of documents to which we have referred.

113. It seems clear that the Judge did not refer to the detailed arguments set out in those documents in respect of each item, but referred only to the speaking notes. Understandably, the speaking notes were intended to inform an oral address which would have referred only to particular items by way of example, relying upon the underlying documents for the exhaustive detail. In this context, the Judge's criticism of MELODY for not providing him with the spreadsheet which it filed in support of its application for permission to appeal before his decision was made was misplaced, as all the detail within that spreadsheet was, in effect, contained within the documents which had been exchanged by the parties in relation to the costs assessment.

114. Further, as we have observed, Melance carried the onus of proving that the costs which it claimed were incurred in relation to the injunction application. The form in which it served its Bill of Costs was not calculated to discharge that burden. However, the Judge seems to have taken the view that it was incumbent upon MELODY to establish that particular costs claimed related only to the arbitration proceedings. That approach can be inferred from the fact that he only excluded a very small amount of the costs claimed, being some of the costs which were referred to in the speaking notes provided by MELODY and which he considered were clearly and only attributable to the arbitration proceedings, when as we have observed, the detailed Bill of Costs provided by Melance contained many items which were not clearly referable to the interim injunction.

115. In these circumstances the Judge departed from due and proper process by:

(a) Not undertaking an item by item assessment of the Bill of Costs, by reference to the Bill, the Response and the Reply to the Response;

(b) Referring only to the speaking notes provided by MELODY when assessing the extent to which the costs claimed included costs relating to the arbitration proceedings.

Further, the Judge erred in principle by, in effect, reversing the onus of proof and requiring MELODY to establish that the costs claimed related to the arbitration proceedings, rather than requiring Melance to establish that the costs claimed related to the injunction proceedings.

116. It is clear that the potential consequences of this erroneous approach are significant in relation to the amounts claimed. As we have indicated, the single item relating to Mown fees concerns USD137,000 and no attempt was made by the Judge to apportion those costs as between the injunction proceedings and the arbitration proceedings, even though, on the face of the fee note, the vast majority of the work done by that firm does not relate the interim injunction. It follows that the assessment process has miscarried in a material way, and must be undertaken afresh, most appropriately by a Registrar of the Court.

117. During the hearing of the appeal, each of the parties encouraged this Court to give guidance in relation to the manner in which any apportionment of costs as between the injunction proceedings and the arbitration proceedings should be undertaken if reassessment became necessary. Although there is no escape from an item by item assessment of each amount claimed for the purposes of undertaking such an apportionment, we hope the following general principles might provide guidance to the parties and the assessing officer of the Court.

118. First, as we have noted several times, Melance carries the burden of proving that each item of cost claimed was incurred in relation to the injunction proceedings. In a context in which there were clearly two streams of work being undertaken simultaneously - one stream relating to the arbitration proceedings and the other relating to the claim for interim injunctive relief, that burden will not be discharged merely by saying that the work was done at or around the time the injunction proceedings were in contemplation.

119. Second, as the Judge correctly found, it is appropriate to undertake the assessment and any apportionment on the basis that the injunction proceedings were ancillary to the dominant proceedings, which the arbitration proceedings. It should be steadfastly borne in mind that the costs which were awarded to Melance were its costs of the injunction proceedings, and only those costs. It follows that the mere fact that work done may have had some relevance to, or may have been of assistance in relation to the injunction proceedings does not lead to the conclusion that those costs were incurred for the purpose of the injunction proceedings.

120. So, work done by lawyers taking initial instructions, assembling relevant documents, assessing legal issues, identifying causes of action and possible defences, taking statements from witnesses etc is all work properly characterized as referable to the substantive dispute between the parties or, in this case, the arbitration proceedings. On the other hand, services specifically relating to the injunction proceedings - such as advice given with respect to the availability of those proceedings, the preparation and presentation of documentation pertaining to those proceedings, and work related to the hearing of those proceedings is clearly work related to the injunction proceedings, and therefore recoverable pursuant to the order, provided the requirements of Part 38 with respect to proportionality and reasonableness are made out.

121. On the topic of characterization of the work done, each of the parties adopted extreme positions, neither of which are, in our view, correct. Melance adopted the position that if work done had any potential relevance to, or could be of assistance in connection with the injunction proceedings, the cost of that work was recoverable as work related to the injunction proceedings. On the other hand, MELODY adopted the position that if the work done had any potential benefit to the arbitration proceedings, the cost of that work should be attributed to the arbitration proceedings, and not the injunction proceedings.

122. Neither of these extreme positions is correct. As we have already indicated, contrary to Melance' position, work done which bears primarily upon the underlying substantive dispute between the parties will not properly be characterized as work undertaken in relation to the injunction proceedings, notwithstanding that the work was of benefit to the preparation and presentation of the claim for an injunction. Contrary to MELODY's position, the fact that a witness statement prepared for use in the injunction proceedings might also be of assistance or use in the arbitration proceedings, does not deprive the work done in preparing that statement of the character of work undertaken for the purposes of the injunction claim.

123. In relation to any item in respect of which this issue is raised, it will be necessary for the assessing officer to determine what work was done and whether that work was undertaken for the purposes of the injunction application. If the work done is predominantly referable to the underlying substantive dispute between the parties, it is not work that was done in relation to the injunction proceedings and will not be recoverable under the terms of the costs order. On the other hand, if the work was undertaken for the purposes of the injunction proceedings, the fact that the work done might be of utility in the arbitration proceedings does not deprive it of the character of work undertaken for the purpose of the injunction proceedings, and therefore work covered by the costs order.

Ground 1 - conclusion

124. For these reasons the first ground of appeal must be allowed, the Judge's assessment set aside and the matter remitted to a Registrar of the Court for fresh assessment.

125. In these circumstances, it is appropriate to deal with the remaining grounds of appeal rather more briefly than would otherwise be the case.

Ground 3

126. As ground 3 is related to ground 1, it is convenient to deal with it next.

127. Ground 3 asserts that the Judge erred by rejecting the contention that he should have found that there was duplication of work by the law firms engaged sequentially (Mown and Mad) and by the Counsel engaged sequentially (Mr QC 1and Mr QC 2).

128. The Judge rejected that contention on the basis that he was not satisfied that the evidence established duplication of the work. However, there are, with respect, a number of errors evident in this approach.

129. First, as with ground 1, the Judge appears to have misplaced the burden of proof. Melance carried the burden of proving that the work done was work done in relation to the injunction application, that the work was proportionate and reasonable, and that the amount claimed was reasonable and proportionate. Those requirements would not ordinarily be met if items of work had been duplicated because of a decision made by Melance to change legal representatives. To the extent that such a decision had the consequence of increasing the costs payable by Melance, those costs were to its account, and not to MELODY's account. Accordingly, it was for Melance to establish that the work the subject of its claim was not duplicated, rather than for MELODY to establish that it was. However, the judge appears to have approached the matter on the basis that MELODY carried the burden of adducing evidence establishing duplication.

130. The second problem with the approach taken by the Judge is that his failure to undertake an item by item assessment of the Bill of Costs necessarily had the consequence that he was unable to assess whether or not there was any evidence of duplication of work. So, if he had, for example, assessed in detail the work undertaken by Mown and Mr QC, he would then have been in a position to assess whether the work undertaken by Mad and Mr QC 2 involved duplication of that work.

131. It follows that in our view this ground should also be allowed. In practical terms however, as Counsel for MELODY observed during the course of the hearing, it is likely that the consequence of the success of this ground will be overtaken by the success of ground 1. If, for example, as we expect, item by item analysis of the work undertaken by MownMown and Mr QC shows that very little, if any of that work, related to the injunction application, the cost of that work will be disallowed for that reason and no question of duplication will arise.

Ground 2A

132. On the hearing of the appeal, MELODY moved to amend its grounds of appeal to introduce, as ground 2A, the following ground:

"The Judge erred as a matter of law when he applied an uplift on assessment of the Claimant's costs in order to sanction the Defendants' conduct."

133. Notice of the proposed amendment was given only a few days before the hearing, and clearly late amendments of this kind should be discouraged. However, it is the Court's obligation to do justice as between the parties and in this case, as the issue raised by the ground is purely one of law and a short point at that, we concluded that there was no prejudice to Melance if the amendment was allowed subject to the provision of an opportunity to Melance to present written submissions in opposition to the ground in due course. Melance took up that opportunity.

134. In our view the approach taken by the Judge reveals an error of principle of the kind identified in this ground of appeal. Although the Rules specifically required the Judge to take MELODY's conduct into account when assessing the costs which should be paid, it was in the sense described by the Court of Appeal in Lownds, and which we have explained above.

135. In that sense, the conduct of the paying party will be relevant if it has caused the receiving party to incur costs that would not normally be incurred and which would not therefore normally be recoverable. In such a circumstance, the additional costs may be recovered. However, the requirement to take the paying party's conduct into account does not authorize the Court to impose a penalty or sanction upon that party, or to increase the costs payable to the receiving party over and above the costs incurred doing work which was reasonable and proportionate, and in an amount which is reasonable and proportionate.

136. In this case the Judge reasoned that if MELODY had properly appreciated that its prospects of defending the application for interim injunction were not strong, because of what he considered to be the low standard of proof of an arguable case in order to support the injunction claimed, the costs incurred by Melance would have been reduced. That process of reasoning cannot be denied. Obviously, if MELODY had not applied to vary the interim injunction or had not opposed its continuation, Melance costs would have been less.

137. However, with respect, that proposition misses the point. The point is that before addressing this issue, the Judge had made a determination of the amount of the costs which he considered were reasonably and proportionately incurred by Melance in relation to the injunction proceedings, including the application to vary the injunction. Put another way, he had determined the amount required to compensate Melance for all work properly, reasonably and proportionately undertaken in relation to the injunction proceedings. Obviously that amount would have been less if MELODY had not applied to vary the injunction, or had not opposed its continuation. But the point is that Melance had, by the Judge's determination, been fully compensated, by the Judge's determination for all costs reasonably and proportionately incurred in relation to the work actually done. It follows that any increase in the amount of that compensation would be both a penalty and a sanction imposed upon MELODY and a windfall gain to Melance by enabling it to recover an amount greater than the costs properly and reasonably and proportionately incurred in undertaking all work related to the injunction proceedings.

138. Accordingly, this ground should also be upheld.

Ground 2

139. Ground 2 asserts that the Judge erred in concluding that the defendants' response to the claim for injunctive relief was conduct of a kind which justified increasing the costs payable to Melance. As our allowance of ground 2A has the consequence of setting aside any increase in the costs payable by MELODY as a result of its conduct in any event, this ground can be dealt with very briefly.

140. As we have noted the Judge took the view that MELODY's conduct had to be assessed in light of the fact that it was ultimately held to be entitled to resist the claim by Melance and was therefore perfectly entitled to refuse to restrict its exercise of its rights in relation to the shares registered in its name. In our view that was a very important consideration, and it is difficult to see how a party can be retrospectively criticized, or in fact penalised and sanctioned for insisting upon its legal rights.

141. But in any event we consider, with respect, that the Judge erred in concluding that MELODY had not behaved appropriately in its response to the claim for injunctive relief. At the time that claim was foreshadowed by Melance, it is clear from the evidence that the MYRA was in urgent need of additional funding. The shareholders in MYRA[24], were in detailed negotiations with respect to the provision of that additional funding. If MELODY was unable to exercise its right to vote in respect of the Disputed Shares, and thereby lacked the 75% of the votes required to authorize additional loan funding, Melance could, in effect, hold the majority shareholder (MELODY) to ransom with respect to the terms of the additional funding, given the urgent need for that funding. MELODY therefore had every commercial reason to resist the attempt by Melance to prevent it from exercising the voting rights attached to the shares which were found by the arbitral tribunal to be its property. Further, after Melance obtained the interim injunction without notice to MELODY, MELODY volunteered a number of different forms of undertaking to Melance, including undertakings with respect to its transfer or disposition of the shares. Melance refused to entertain those undertakings unless and until MELODY had agreed to transfer the Disputed Shares back to Melance. So, if there was any intransigence in the positions adopted by the parties, it was the position adopted by Melance which more aptly bore that description.

142. In the result, after the arbitral tribunal had been created and Melance had failed to bring the question of the interim injunction before that Tribunal (as it had previously indicated to the Court it would), MELODY brought the matter before the arbitral tribunal, which discharged the interim injunction in return for the provision of an undertaking not dissimilar to the various undertakings which MELODY had proffered during the course of the proceedings before the Court.

143. For these reasons we would also allow this ground of appeal, which provides an additional reason for setting aside the Judge's conclusion that the costs payable by MELODY should be increased.

Disposition of the appeal

144. For these reasons, all grounds of appeal should be allowed. The assessment of the Judge should be set aside and the matter of the assessment of costs remitted to the Registrar of the Court for assessment in accordance with these reasons. As MELODY has been entirely successful in its appeal, Melance should be ordered to pay MELODY's costs of the appeal. Unless those costs are agreed within 30 days of

publication of these reasons, they should also be assessed by the Registrar making the assessment of the costs awarded in favour of Melance.

Issued by:
Nour Hineidi
Registrar
Date of issue: 11 February 2021
Time: 2.30pm