IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 74 OF 2019 (IKJ)

IN THE MATTER OF THE FOREIGN ARBITRAL AWARDS ENFORCEMENT LAW (1997 REVISION)

AND IN THE MATTER OF THE ENFORCEMENT OF THE ARBITRAL AWARD OF THE ICC INTERNATIONAL COURT OF ARBTIRATION CAUSE NO. 22187/RD/MK

BETWEEN

ARCELORMITTAL USA LLC

APPLICANT/JUDGMENT CREDITOR

AND

(1) ESSAR STEEL LIMITED

(a company incorporated under the laws of Mauritius)(in Administration)

FIRST RESPONDENT/JUDGMENT DEBTOR

(2) ESSAR GLOBAL FUND LIMITED

(a company incorporated under the laws of the Cayman Islands)

SECOND RESPONDENT/GARNISHEE

(3)VTB BANK (PJSC)

(a company incorporated under the laws of Russia)

INTERESTED PARTY

IN CHAMBERS

Appearances:	Mr Tom Weisselberg QC instructed by Harneys, on behalf of the Applicant/Judgment Creditor ("AMUSA") Mr Paul Stanley QC instructed by Mr William Jones of Ogier, on behalf of the 2nd Respondent/Garnishee ("EGFL") Mr Adrian Beltrami QC instructed by Mr Brett Basdeo of Walkers, on behalf of VTB Bank (PJSC) ("VTB")
Before:	**The Hon. Justice Kawaley**
Heard:	**On the papers**
Close of submissions:	**27 September 2019**
Draft Ruling Circulated:	**16 March 2020**[1]
Ruling delivered:	**20 March 2020**

HEADNOTE

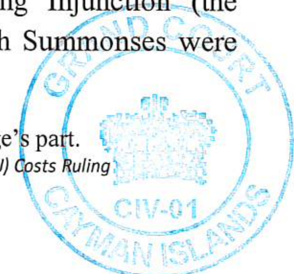
Costs application for garnishee order- application adjourned generally with liberty to restore-costs of abandoned application for a worldwide freezing order and more limited application for a notification order-application adjourned generally with liberty to restore- enforcement of foreign arbitral award

RULING ON THE PAPERS: COSTS OF GARNISHEE AND INJUNCTION SUMMONSES

Background

1. The Applicant (AMUSA) applied by Summonses dated April 26, 2019 for a Garnishee Order (the "Garnishee Summons") and a Worldwide Freezing Injunction (the "Injunction Summons") against EGFL, the 2nd Respondent. Both Summonses were

[1] The regretful delay in completing this Ruling is entirely due to an oversight on the Judge's part.



issued in support of AMUSA's application to enforce an approximately US$1.5 billion foreign arbitration award it obtained against the 1st Respondent ("Essar Steel", a subsidiary of EGFL) in Minnesota on December 19, 2017 (the "Award"). By a third Summons of the same date which was not opposed, AMUSA sought leave to enforce that award in the Cayman Islands pursuant to section 5 of the Foreign Arbitral Award Enforcement Law (1997 Revision) against Essar Steel (the "Enforcement Summons") . By a fourth Summons dated May 24, 2019, VTB applied to be joined as an Interested Party (the "Joinder Summons").

2. All Summonses were listed for hearing on May 29-30, 2019. On May 29, 2019 since Essar Steel did not appear to oppose the Enforcement Summons, I granted leave to enforce the Award against Essar Steel. AMUSA abandoned its application for a Worldwide Freezing Order against EGFL shortly before the hearing and sought instead a narrower 'Notification Order'. I granted VTB's application for joinder summarily at the beginning of the hearing. VTB vigorously opposed the application for a Garnishee Order. In a Judgment delivered on July 2, 2019, I adjourned both contested applications generally with liberty to restore.

3. It was agreed that costs would be dealt with on the papers. The respective positions may be summarised as follows:

   (a) AMUSA, responding to the other two parties' applications for their costs, invited the Court to reserve the costs of all three Summonses;

   (b) EGFL sought its costs of both the Injunction Summons and the Garnishee Summons on the indemnity basis to be taxed and payable forthwith;

   (c) VTB sought its costs of the Joinder Summons and the Garnishee Summons to be taxed and payable forthwith.

Summary of findings on merits of the respective Summonses

<u>The Joinder Summons</u>

4. The Joinder Summons was not seriously opposed, although AMUSA sought to make joinder conditional upon discovery being given. I granted the application unconditionally at the beginning of the hearing. The July 2, 2019 Judgment provided as follows:

> *"8. VTB applied to be joined as an Interested Party to the present proceedings by Summons dated May 24, 2019. AMUSA did not object, subject to discovery.*

Mr Beltrami QC complained that it was unsatisfactory for his client's position to be left unresolved, and I signified that for the purposes of the present hearing VTB was joined. Its commercial interests lay in ensuring that AMUSA did not take steps by way of execution which it contended were debarred by a Subordination Deed entered into on October 21, 2016 between, inter alia, EGFL and VTB (the 'Subordination Deed')."

The Garnishee Summons

5. The key findings in relation to the Garnishee Summons in the Judgment were as follows:

> "*63. I accordingly find that, assuming for present purposes the Subordination Deed to be valid, its legal effect is that (1) ESL cannot sue to recover any inter-company debt owed to it by EGFL, (2) AMUSA cannot stand in a better position than ESL, and (3) as a result a Garnishee Order is not legally available...*
>
> *70. I decline to summarily conclude at this stage that it is so clear that the issue of the existence of the debt should be determined in Mauritius that the Garnishee Summons should be dismissed without affording AMUSA an opportunity to fully address the issue, should the need arise.*"

The Injunction Summons

6. Injunction Summons pursued as an application for a Notification Order was disposed of, as summarised in the Judgment, as follows:

> "*74...In my judgment VTB's attack on the Garnishee Summons, as reflected in my findings on the effect of the Subordination Deed on AMUSA's right to collect any debt payable to ESL, has effectively left the Garnishee Summons on life support. I am bound to accept the submissions of Mr Stanley QC on behalf of EGFL that the application for the 'Notification Order' in support of the Garnishee Summons should be refused at this stage because:*
>
> > *(a) there is presently no serious question to be tried on the merits of the application for a Garnishee Order; and*
> >
> > *(b) it is not just and convenient to grant the injunctive relief sought.*
>
> *75. These findings... are, of course, subject to being revisited in the event that AMUSA is able to demonstrate an arguable case for impugning the validity of ESL's agreement to be bound by the Subordination Deed through an*

application made in this Court, whether made under the Garnishee Summons or otherwise."

The respective submissions

AMUSA's submissions

7. It was submitted that the general rule was that costs should follow the event and that this rule should only be departed from applying the principles in *Re Elgindata Ltd. (No.2)* [1992] 1 WLR 1214, applied in *Sagicor General Insurance (Cayman) Limited* [2011(2) CILR 471] at [13]. The general rule also was that costs should be taxed at the end of the proceedings: GCR Order 62 rule 9(1). The failure to satisfy a judgment may be relevant as to whether or not to depart from the rule that costs should follow the event: *Masri-v-Consolidated Contractors* [2010 (1) CILR 265] at [44].

8. As regards the present case, it was submitted that costs should be reserved until the conclusion of the proceedings having regard to all the circumstances:

   (a) there was no successful party, in "real life" terms applying a "common sense" approach. No party obtained all the relief they sought;

   (b) the outcome of proceedings in Mauritius in particular, as well as in England, was likely to impact upon the appropriate costs order in respect of the applications before this Court;

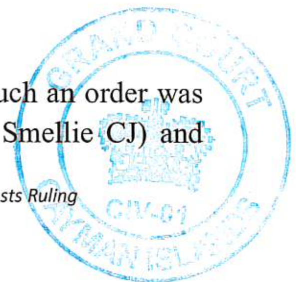
   (c) as regards EGFL, it would be inconsistent with a pro-enforcement approach to punish AMUSA in costs while it was still seeking to recover a "huge unpaid debt";

   (d) VTB's costs of the Joinder Summons should be reserved because if it is found that the Subordination Deed is not valid, VTB would have had no standing to intervene. Alternatively, any costs should be awarded from May 24, 2019 when the Joinder Summons was filed;

   (e) AMUSA should not in any event have to pay two sets of costs;

   (f) there was no basis for indemnity costs as AMUSA's conduct "*has not come anywhere close to being improper, negligent or unreasonable in any sense*";

   (g) any costs awarded should not be taxable forthwith. Such an order was "exceptional" (*Re Sphinx Group* [2009 CILR 278], Smellie CJ) and



would not in this case "*reflect the reality that the issues between the parties have been decided*" (*Jones-v-Gwent County Council* [1992] IRLR 521, Chadwick J (as he then was));

(h) the costs of the Enforcement Summons should also be reserved as such costs might be sought against parties other than ESL.

EGFL's submissions

9. EGFL summarised its view of the application, the result and the appropriate costs Order as follows in the 'Second Respondent's Costs Submissions':

"*1. By two Summonses, both dated 26 April 2019 ("the Summonses"), the Applicant ('AMUSA') applied for the following relief against the Second Respondent ('EGFL'):*

1.1. A garnishee order requiring EGFL to pay AMUSA a sum equal to the value of a supposed "debt" of $1.5bn allegedly owed by EGFL to its Mauritian subsidiary, Essar Steel Limited ("ESL"); and

1.2. A worldwide freezing order against EGFL.

2. The Summonses were listed to be dealt with at a two-day hearing on 29 and 30 May 2019. Very shortly before that hearing (after EGFL had gone to the trouble of producing substantial responsive evidence), and in what amounted to a substantial climb-down, AMUSA indicated that:

2.1. It would not be seeking a garnishee order, and would instead be seeking directions for an exchange of evidence (and a further hearing in due course) in relation to the question of whether there was any garnishable debt owed by EGFL to ESL; and

2.2 It would not be seeking a worldwide freezing order, and would instead be seeking a much more limited injunction requiring EGFL to notify it of certain proposed transactions.

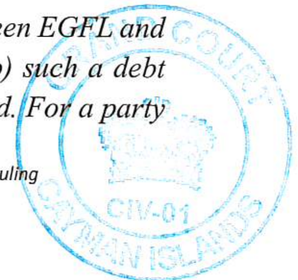
*3. On 2 July 2019, the Judge delivered his Ruling on the Summonses. By this Ruling (**'the Ruling'**), this Court:*

3.1. concluded that, on the assumption that a subordination deed between EGFL, its subsidiaries, and their principle lender (VTB) was valid, there was no garnishable debt due to ESL from EGFL;

> *3.2. therefore neither granted any garnishee order (even an order nisi) nor gave the directions for which AMUSA was asking. Instead, this Court adjourned the application for a garnishee order generally with liberty to restore. The Judge's refusal to give directions demonstrates that he did not consider that AMUSA had even made out a sufficiently cogent case to justify a further exchange of evidence – indeed, the Judge himself described AMUSA's application as being 'on life support'; and*
>
> *3.3. refused to grant AMUSA any form of interim injunctive relief at all, principally on the basis that 'there is presently no serious question to be tried on the merits of the application for a Garnishee Order'. Again, this Court adjourned the application for injunctive relief generally.*
>
> *4. In those circumstances, and for reasons more fully explained below, the Court ought to order that:*
>
> *4.1. AMUSA shall pay EGFL's costs of and occasioned by its two Summonses; and*
>
> *4.2. Those costs are to be subject to immediate taxation.*"

10. The Court was invited to exercise its discretion to direct that costs should be taxed forthwith. It was further submitted that taxation should be on the indemnity basis because:

> "*(1) [AMUSA] issued its application for a Garnishee Order (which was not an urgent ex parte application) without sending any pre-action letter (and despite the fact that Ogier wrote to Harneys on 12 April 2019 to demand that proper notice was given in respect of any proceedings that AMUSA may bring against EGFL). Proper pre-action correspondence (with EGFL and VTB) could have flushed out the existence of the issues which resulted in the indefinite adjournment of AMUSA' applications.*
>
> *(2) On any sensible view (and indeed, on AMUSA's own view) applying for both a garnishee order absolute and a worldwide freezing order represented a gross overreach. Having vastly curtailed the relief which it chose to seek at the hearing on 29 and 30 May 2019, AMUSA failed to obtain even that more limited relief.*
>
> *(3)On its merits, the application failed, not because AMUSA happened to lose on some issue of fact or law, but because it had failed to undertake even the most rudimentary analysis of how: (a) the relevant dealings between EGFL and ESL could be said to give rise to a garnishable debt; and/or, (b) such a debt could possibly be garnished in the face of the Subordination Deed. For a party*



to bring what was, in effect, a US$1.5bn claim without properly analyzing the legal or factual basis for that claim is plainly unreasonable to a high degree. It is the type of conduct which this Court ought strongly to discourage. An order for indemnity costs ought to provide the requisite discouragement."

11. In its Reply Submissions, these points were reiterated. In addition, it was argued:

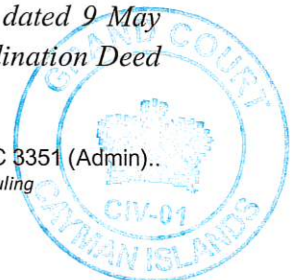
> "*7. There is nothing in AMUSA's complaint that it ought not to be liable for the costs of both EGFL and VTB. It made an application which, if successful, would have had a substantial impact on the commercial positions of both EGFL and VTB. However, the particular impact on those entities would be legally and factually different. They therefore had different interests which required defending (and which were successfully defended). The only authority which AMUSA cites on this point (i.e. Hussain)*[2] *was a judicial review case concerning whether the successful applicant ought to be liable for the costs of both the Defendant and an interested party. It is not at all analogous to an application which has potentially different impacts on the rights and obligations of two different commercial parties, who appear to defend their different interests.*
>
> *8. The court should also not lose sight of the scale of what was originally being sought by AMUSA. Its application was, in substance, a $1.5bn claim against EGFL, to be supported by a freezing order which was intended to substantially to restrict the freedom to act of the entire Essar Group. It was therefore both understandable and proportionate for EGFL and VTB to be separately represented at the hearing.*"

VTB's submissions

12. In the Interested Party's Submissions on Costs, the following principal positions were advanced:

> "*15. The Applicant was aware of the Subordination Deed before it issued the Applications and subsequently, on receipt of the Walkers letter dated 9 May 2019 should have been in no doubt as to the effect of the Subordination Deed*

[2] *R (on the application of Hussain & Ors)-v-Secretary of State for Health Department* [2010] EWHC 3351 (Admin)..



and the Interested Party's position on the Applications. Ultimately, the Interested Party's submissions as to the same were wholly accepted by this Honourable Court.

16. In substance, the orders made on 26 July 2019 are no different in effect than if the Applications been dismissed. In any event, on any analysis it is plain that the Interested Party was successful both in applying to be joined as a party to the Applications and thereafter in opposing the relief sought in the Applications. Accordingly, as a consequence of the Applicant's pursuit of the Applications, it is entirely appropriate that the Interested Party's costs in seeking leave to be joined to these proceedings for the purpose of responding to the Applications should be met by the Applicant.

17. Furthermore, notwithstanding the liberty to apply in the orders, it is unclear whether these proceedings will continue in any meaningful sense. No timetable for further steps has been set and, absent some material change of facts, there is no reason to suppose it ever will. Accordingly an order for payment of the Interested Party's costs should be made forthwith, as is within the Court's jurisdiction pursuant to Order 62, rule 9(2), which provides:

> *'(2) If it appears to the Court when making an order for costs that all or any part of the costs ought to be taxed at an earlier stage it may order accordingly.'*

18. In exercising its discretion, pursuant to Order 62, rule 4(7) of the GCR, the Court may make orders that a party must pay, inter alia:

> *'(c) costs from or until a certain date only; ...*
>
> *(e) costs relating to particular steps in the proceedings;*
>
> *(f) costs relating only to a distinct part of the proceedings;'*

19. Should this Honourable Court see fit to make such orders, the Interested Party respectfully submits that this discretion should be exercised such that the Applicant be ordered to pay the Interested Party's costs of and occasioned by the Applications or, in the alternative, from 9 May 2019, being the date on which the executed copy of the Subordination Deed was provided to the Applicant. In either case, there are sufficient grounds for such orders to be made forthwith."

Findings: application for VTB's costs of the Joinder Summons

13. VTB on any view in common sense and 'real life' terms achieved success on its Joinder Summons which AMUSA initially opposed. *Prima facie*, it should be awarded its costs. The main argument advanced in favour of reserving costs is that it may, based on evidence not presently available, at some future uncertain date be demonstrated that the Subordination Deed is invalid. In my judgment, when a question of the entitlement to costs of a third party to litigation are in issue, the matter should ordinarily be determined based on information available when the costs were incurred. The position might be otherwise if the Court was able to properly conclude that a purported third party was not intervening in the main litigation to vindicate its own commercial interests, but instead was really a surrogate for another party. There is no basis for such a finding in the present case.

14. I find that VTB should be awarded its costs of filing and preparing for and attending the hearing of the Joinder Summons to be taxed if not agreed on the standard basis and payable forthwith.

Findings: costs of the Garnishee Summons

VTB's costs

15. VTB succeeded in persuading the Court that the relief sought on the Garnishee Summons should not be granted because the effect of the Subordination Deed VTB had entered into was a legal impediment to the granting of the Garnishee Order that AMUSA sought. The Garnishee Summons was not dismissed outright because I wished to preserve the ability of AMUSA, in substance in proceedings against the 1st Respondent and/or EGFL, to investigate the viability of renewing the application on the grounds that evidence not presently available to the Judgment Creditor disclosed that the Subordination Deed was liable to be set aside.

16. The Garnishee Summons was adjourned on July 2, 2019 and so far as I am aware, more than eight months later, no application to restore the Summons has yet been made. I infer from this that AMUSA has found no obvious and straightforward basis for impugning the validity of the Subordination Deed. There is no present justification for assuming that AMUSA may be able to establish that VTB, apparently a *bona fide* unaffiliated third party lender, was in some way implicated in a scheme to defeat the Judgment that AMUSA now seeks to enforce.

17. In these circumstances, it is impossible to identify any sufficient justification for denying VTB its costs of its successful opposition to the Garnishee Summons.

Moreover, the best available evidence presently suggests that VTB's involvement with this litigation is at an end.

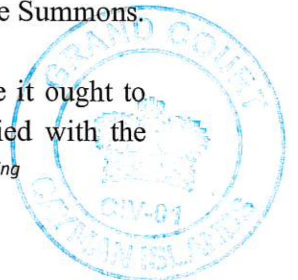
18. I find that VTB should be granted its costs from May 9, 2019 when it supplied the Subordination Deed to AMUSA, to be taxed if not agreed on the standard basis and payable forthwith.

EGFL's costs

19. In my judgment it is equally clear that EGFL should in principle have its costs of the Garnishee Summons because it achieved substantial success in common sense and 'real world' terms. It is unfortunate that AMUSA as an unsatisfied and extremely frustrated Judgment Creditor should have to pay two sets of costs. But that is a different thing entirely to finding grounds for concluding that EGFL should be deprived of its costs because it acted unreasonably in opposing the Garnishee Summons alongside VTB. The Summons, I find, sufficiently engaged the respective commercial interests of both EGFL and VTB that its pursuit necessarily exposed AMUSA to the risk of paying two sets of costs, subject to a need for EGFL to be proportionate and avoid a duplication of effort.

20. However, the only significant freestanding point that EGFL advanced was the interesting legal point that the "debt" no longer existed which I declined to summarily decide. In the course of the hearing I also indicated that I saw nothing in the suggestion that no Order should be made because it would constitute a preference and might not be recognised by the Mauritian Court. EGFL's Skeleton ran to 80 paragraphs. Paragraphs 1-26 were introductory and substantively argued that this Court could not determine summarily whether the Essar Steel had a valid Mauritian law claim against EGFL. This point was in substance vindicated by AMUSA's retreat to seeking directions only rather an Order Absolute. Paragraphs 35-46 and 52-56 advanced various arguments (that any claim did not sound in debt, that a garnishee order could not be granted to confer a preference and that a garnishee order would not be recognised by the Mauritian Court) which were either not considered or rejected by me in the course of the hearing. These points consumed roughly 20 % of its Skeleton Argument and I find that they added a significant amount to EGFL's costs and warrant a proportionate deduction from any costs it recovers. In this regard, I apply the principles commended to the Court by AMUSA's counsel as to the circumstances in which a successful party may be deprived of a proportion of their costs: *Re Elgindata Ltd. (No.2)* [1992] 1 WLR 1214, applied in *Sagicor General Insurance (Cayman) Limited* [2011(2) CILR 471] at [13]. I find that EGFL should be awarded 80% of its costs of the Garnishee Summons.

21. Should AMUSA be ordered to pay costs on the indemnity basis because it ought to have realised its application was bound to fail, once it had been supplied with the



Subordination Deed, and failed analyse the legal position adequately? EGFL submitted that AMUSA pursued the Garnishee Summons in a way which was "*plainly unreasonable to a high degree*". What is unreasonable in the requisite indemnity costs sense calls for a context-laden assessment of a litigant's conduct, with the Court drawing heavily on its somewhat intuitive sense, in light of the merits of the application and against the background of the litigation as a whole, of whether a punitive costs penalty is required.

22. In my judgment the conduct of AMUSA, against the background of its enforcement efforts as a whole, which EGFL appears determined to legally obstruct, falls well short of misconduct which justifies an indemnity costs award in favour of EGFL. This wider litigation conduct cannot be ignored when considering the question as to whether:

    (a) these costs should be reserved; and/or

    (b) EGFL's costs should be taxable and payable forthwith.

23. On balance I find that EGFL should be awarded 80% of its costs to be taxed if not agreed on the standard basis in any event. AMUSA essentially elected to pursue the Garnishee Summons on the basis that it could prevail without impugning the validity of the Subordination Deed. The Garnishee Summons sought an Order Absolute, even though AMUSA was already on notice of the existence of the Subordination Deed . It is true that shortly before the hearing it changed tack to seek directions only, but it did not express a willingness to withdraw the Summons or adjourn it *sine die*. However, as EGFL is a party to the present action (unlike VTB), I see no justification for taking the exceptional course of ordering that those costs should be payable forthwith[3].

The Injunction Summons

24. For the same broad reasons as are set out above in relation to the Garnishee Summons, I find that EGFL should be awarded its costs of dealing with the Injunction Summons to be taxed if not agreed on the standard basis, but not payable forthwith.

25. AMUSA should be commended, not condemned, for abandoning the 'full-blown' version of injunction it initially sought, and seeking a more limited Notification Order.

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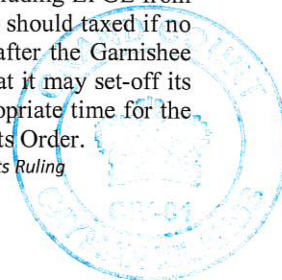
[3] When commenting on a draft of the present Ruling, EFGL invited the Court to impose a long-stop date for AMUSA to renew its Garnishee Summons to avoid the right to taxation being indefinitely delayed. This invitation is declined. For the avoidance of doubt nothing in the present Ruling should be read as precluding EFGL from applying to dismiss the Garnishee Summons with a view to obtaining an Order that its costs should taxed if no steps are taken to renew the application within what EFGL contends is a reasonable time after the Garnishee Summons was adjourned on July 2, 2019. AMUSA invited the Court to rule at this stage that it may set-off its costs obligations to EFGL against the Judgment Debt. This invitation is declined. The appropriate time for the set-off issue to be addressed is when EFGL is (or will soon be) in a position to enforce its costs Order.



In the event the case for even that fell away with the refusal of a Garnishee Order, but there was no unreasonable conduct warranting indemnity costs.

Provisional findings: costs of the costs application

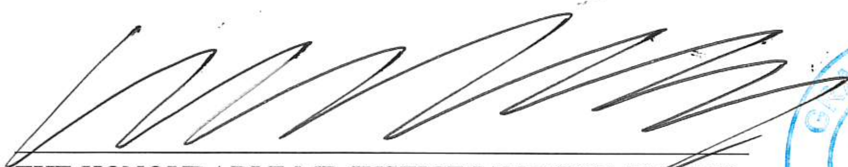
26. Unless any party applies within 21 days by letter to the Court to be heard as to costs, the following Order is made in relation to the costs of the present costs application:

(a) VTB shall be awarded its costs of to be taxed if not agreed and payable forthwith; and

(b) EGFL shall be awarded its costs to be taxed if not agreed.

Summary

27. VTB shall be awarded its costs of the Garnishee Summons from after May 9, 2019 to be taxed if not agreed and payable forthwith. EGFL is awarded 80% of its costs in relation to the Garnishee Summons and its costs of the Injunction Summons, to be taxed if not agreed on the standard basis.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT