In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL LIST)
2009: No. 163

In the Matter of a Compulsory Acquisition Notice under section 103(1) of the Companies Act 1981 dated May 8 2009 relating to shares in BW Gas Limited

In the Matter of an application for appraisal under section 103(2) of the Companies Act 1981

BETWEEN:

GOLAR LNG LIMITED

Applicant

- and -

WORLD NORDIC SE

Respondent

Date of Hearing: 7th December 2011
Date of Judgment: 11th January 2012

Jeremy Garood for the Applicant; and
Christian Luthi for the Respondent.

JUDGMENT
(Taxation Review)

Introduction

1. This judgment is given on the parties' cross-applications under RSC Order 62, r. 35[1] for a review of the Registrar's taxation of the costs of the matter, which were awarded to

[1] Insofar as relevant, the rule provides –

the respondents following my judgment of 18th February 2011. The taxation was hotly contested and extended over several days (11th May, 30th June, 7th July, 25th July and 28th September 2011). The receiving party's bill of costs[2] was in the sum of $739,196.04. The Registrar taxed that down to $516,287.49, a reduction of approximately 30%.

2. The litigation itself concerned an application by Golar LNG Ltd. ('Golar') under section 103 of the Companies Act 1981 ('the Act') for an appraisal of its shares in BW Gas Limited ('the Company'). Both are Bermuda exempted companies. The Company is, via the respondent, a subsidiary of BW Group Limited, which is also the holding company of various other BW denominated shipping and tanker entities. The Company itself is the holding company of the BW Gas group of companies, which is a leading global provider of gas marine transportation services and one of the largest owners and operators of carriers of liquefied petroleum gas ('LPG') and liquefied natural gas ('LNG').

3. The background was that Golar held 234,400 of the common shares in the Company, representing 0.0575% of its issued share capital. On 8 May 2009 the Respondent, World Nordic SE ('World Nordic'), having acquired in excess of 95% of the shares, issued a notice of its intention to acquire the outstanding shares in the company pursuant to section 103 of the Act, ('the 'Notice'). The Notice set an offer price of NOK 21 (about US $3.23) per share. World Nordic was, at the time of the Notice, the owner of 99.37% of the shares in the Company. Under the terms of section 103 (2), minority shareholders had one month to bring an application to appraise the value of the shares to be purchased.

"(1) Any party to any taxation proceedings who is dissatisfied with the allowance or disallowance in whole or in part of any item by the Registrar, or with the amount allowed by him in respect of any item, may apply to the judge for an order to review the taxation as to that item or part of an item.

. . .

(3) An application under this rule shall be made by summons and shall specify the nature and grounds of the objection and the items or parts of items the allowance or disallowance of which or the amount allowed in respect of which is objected to . . . "

[2] The items in the bill were not numbered, which makes reference to them difficult. In England it is now mandatory to number the items in a bill of costs consecutively: see the Costs Practice Direction (CPR PT 43) 43PD.4.9. I think that that practice should be followed here.

Golar exercised its right to do so on 8 June 2009. Golar contended that the Notice significantly undervalued the shares, which it originally said the Court should appraise at a value of NOK 61.5 (or approx. $9.38 per share) that representing its valuer's initial assertion as to the fair value of the shares, although in his evidence his estimate tumbled to a range of NOK 33 - 37.

4. At the end of the hearing I appraised the shares in the Company for the purposes of section 103(2) of the Companies Act 1981 at NOK 21 per share, which is the price offered in the Notice. On that basis I held that the respondent was the clear winner of the litigation, and ordered the applicant to pay the respondent's costs to be taxed if not agreed.

The Paying Party's Points

That the hourly rates allowed were excessive (Ground 1)

5. I was the trial judge, and in my view this was complex, high-value commercial litigation which was important to the respondents. I reject all the arguments to the contrary. On the applicant's contentions, taken at their highest, there was $1,439,216 directly at stake, although that tumbled during trial. However, there was considerably more at stake for the respondents, because if the shares had been revalued they would have had to pay the revalued price to the other shareholders bought out under the statutory mechanism. I also consider that the matter required the resolution of complex issues of both fact and law, most of which were raised by the paying party. The argument that "were it truly complex, the judgment would have been longer" is, I regret to say, mistaken. At the end of the day these were large commercial parties, and a substantial bill of costs was always inevitable.

Size of billable time units (Ground 2)

6. The respondent's attorneys bill in 15 minute increments. Complaint is made that that is too large. I agree. The English practice is to bill routine work in six minute units (i.e. one tenth of an hour): see UK CPR PD 43, para. 4.16. I think that that is the appropriate

means of doing so, especially where the hourly rate is high. Billing in quarter hour increments is simply too insensitive when a minute is worth upwards of $11 (Counsel with conduct of the matter, Mr. Luthi, billed at $710 per hour for much of the relevant period). It is hard to assess what impact this would have on the taxation of these bills. There are something in the region of 330 items in the bill ranging from 0.25 to 12 hours. There are differing rates, depending upon the fee earner. If one assumed that the last unit of each item was overbilled by 0.15 hour at Mr. Luthi's rate, that would give something like $34,000. On the other hand the Registrar in her written ruling seems to say that she has taken this into account in the general taxation exercise:

> "The balancing act will come in the amount of time charged for discussions/meetings, research, preparation of bundles, preparation for trial and attendance at Court."

At the end of the day, I have accepted that, although not without considerable reservation. In practice, I would expect the Registrar to tax down each item to the nearest 6 minute unit automatically, unless the receiving party could demonstrate that they in fact used the full 15 minutes.

Multiple lawyers (Grounds 3 & 6).

7. The paying party relies upon the Schedule to Ord. 62, Part II, division I, paragraph 2(2):

> (2) Except in taxations under rule 14, no costs shall be allowed in respect of more than one counsel appearing before the court unless the Judge or Registrar hearing the matter has certified the attendance as being proper in the circumstances of the case.

I do not think that applies to pre-trial work, and I do not think that it operates to debar a team approach to the preparatory work. As for the hearing itself, Mr. Luthi appeared alone, while I note that the paying party saw fit to employ two counsel, so it does not really lie in their mouth to complain. The Registrar was alive to this point, and declared "I will only allow time where it is deemed necessary in the circumstances and no

duplication of charging." At the end of the day she robustly taxed down some of the other counsel. I see no reason to interfere with the way that she handled this.

The burden of proof (Ground 4) and the Respondent's failure meet it (Ground 5)

8. The paying party relies upon the reference to "all necessary papers and vouchers" in Ord. 62, r. 29(8), but that rule is speaking of what other parties whose costs are also to be taxed in the proceedings must do. It is said that the receiving party did not produce all the necessary documents to substantiate the work done, in particular letters and emails. The Respondent contends that they did, albeit after various production requests. It seems that there was an issue over privilege for much of this material. The Registrar was alive to this issue, and indeed dealt with it in her ruling. At the end of the day, I consider that the question how much of this sort of material she needed to see was a matter for the Registrar, and I am not persuaded that she went wrong.

Expert's fees (Ground 7)

9. Each side called an expert. The applicant used an in-house person. The respondent hired a forensic valuer. I think that they were perfectly entitled to do that. The valuer led a team of accountants who appear to have done most of the leg-work for the report. It was a major task, producing a NAV for a substantial shipping concern with a large and specialised fleet, whose assets were in the region of $3.7 Bn. On the other hand the work was essentially the collation and adjustment of information from the company's financial statements and from other valuers. The fee was $345,460, of which the registrar disallowed $120,227.30 [these are conversions from GBP, in which the work was originally invoiced]. I think that the expert's fee was too large. I do not entirely accept the learned Registrar's explanation for her reduction (she disallowed early work) but I think that the amount of the reduction itself, which was slightly more than one third, was in the ball-park of what was fair and reasonable.

Trial preparation and the affidavit of Mr. Sohnem-Pao (Grounds 8 & 9).

10. I have considered these together because Mr. Sohnem-Pao's affidavit dealt with all the background to the acquisition and the dispute. Whoever prepared that affidavit would

have, of necessity, gained a detailed understanding of much of the respondent's case. In fact it was largely prepared by trial counsel, Mr. Luthi. It was prepared in two tranches, an initial draft having been done before the receipt of the applicant's evidence. Thus, 21 hours were spent in July and August 2009 (19 by Mr. Luthi) and a further 28.5 hours in April, May and early June 2010 (25.75 by Mr. Luthi). The affidavit itself was filed on 3rd June, and consisted of 81 paragraph spread over 23 pages. The exhibits were substantial, but a lot of that was made up of the unselective copying of large documents (the bye-laws; the prospectus for the 2009 offering; company reports etc.). It may be that the affidavit itself was a masterpiece of compression, but I have no doubt (having heard him give evidence) that Mr. Sohnem-Pao was well capable on his own of a lucid and laconic account.

11. Of the 49.5 hours spent on this exercise, the Registrar disallowed 11.25 hours. I think that the cost of this exercise should have been more rigorously discounted, and 25 only should have been allowed (i.e. approximately one half, with 24.5 being disallowed). For ease of calculation I would have attributed all the time allowed to Mr. Luthi.

12. I turn then to trial preparation. Mr. Luthi himself spent something like 160 hours on that. By the time that begins he had already spent something approaching 12 hours reviewing the expert's report. That, of course, was the crux of the case, and Mr. Bezant made it very clear that he understood his duties as an independent expert, and plainly had considerable experience. He could therefore, as a witness, handle himself. What was left for counsel to do was prepare his cross-examination of the applicant's witnesses and the arguments on the law. In the event there was only one live witness, the applicant's expert, although it would appear that one of the deponents was anticipated to give evidence, and the fact that they would not was only apparent at a late stage.

13. As to the law, it is not usual to allow legal research, at least on routine issues:

> "Time spent considering the law and procedure is usually non-chargeable – and the higher the expense rate, the more law and procedure the fee earner is expected to know. In a review of criminal costs it was held that leading and junior counsel

> can be assumed to be fully up-to-date with the law in the field in which they hold themselves out as practising in and they will not be paid for researching the law unless the case is unusual or infrequent (*Perry v Lord Chancellor* (1994) Times, 26 May, QBD). The same principle of course applies to civil work and to solicitors." ['Cook on Costs', Butterworths 2004, p. 230]

14. I do accept that this case had some novel elements – the statutory provisions seem to be unique to Bermuda, and the Applicant raised a series of potentially difficult issues which had to be dealt with. Nonetheless, legal research as an element of charge should be constrained, particularly for high fee earners who are entitled to charge a high fee precisely because they are experienced and presumed to know the law.

15. The trial itself only lasted 3½ days, and during that time Mr. Luthi continued with out-of-court work: for the first three days he billed 12 hours a day for preparation and attendance, as against an actual court day of about 5 hours. The Registrar allowed all of that.

16. In all of this the function of the Court has to be born in mind. It was succinctly explained by Floyd J in Research in Motion UK Limited v Visto Corporation [2008] EWHC 819 (Pat):

> "[17] The Court's function at this stage is not to stop the parties spending money on litigation: it has no power to prevent expenditure, although it will use its powers to ensure that the litigation is run in a way that does not cause the parties to expend unnecessary sums . . . The Court does however have a function in preventing unnecessary and unreasonable costs being recovered by a party from its opponent. . . . parties can be discouraged from enforcing or defending their rights if they face claims for unreasonable and unnecessary costs being allowed against them."

I take that as a statement of general principle, which stands apart from the facts of that particular case. I would make one alteration, which would be to substitute 'or' in the phrase "unreasonable and unnecessary". In order to be allowed, costs have to be reasonable *and* necessary, or rather, in the words of Ord. 62, r. 12(1), what should be allowed is "a reasonable amount in respect of all costs reasonably incurred". Necessary

costs incurrent in an unreasonable amount should be disallowed to the extent that the amount is unreasonable.

17. The same point was made by Lord Woolf in Lownds v Home Office [2002] EWCA Civ. 365 (cited in the Research in Motion case at paragraph [31]). I recognize that both these cases were decided in the context of the English CPR, but it seems to me that the principles are of fundamental and universal application. Lord Woolf said at [31], referring to the assessment of costs:

> "In other words what is required is a two-stage approach. There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having regard to the particular considerations which CPR r. 44.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable."

18. Against that background I consider that the 160 hours of pre-trial preparation at a rate of $710 per hour was disproportionate and excessive. The Registrar disallowed 40 hours from the pre-trial preparation. I do not think that that was sufficient. I consider that 60 hours was the maximum recoverable time for a lawyer of that caliber and experience, and therefore disallow 100 hours. I should be clear that I am not saying that Mr. Luthi did not do this work. I have no doubt that he did. What I am saying is that it is unreasonable to expect the paying party to pay for such an elevated degree of diligence and care.

19. For the avoidance of doubt, the preparatory work to which I am referring is that itemized on the loose sheet handed in at the hearing, and concludes with the 10.5 hours on 7th January. I do not intend to interfere with the two items for Mr. Astwood on 9th and 10th January, which the Registrar disallowed.

Disbursements (Ground 10)

20. I accept Mr. Garood's submission that photocopying is not an allowable cost, being already included in the overhead element embodied in the hourly rate: see Supreme Court Practice 1999 ed., note 62/A2/35A and the Practice Direction at 62/C/4, para. (1.15). I do not think that there was anything in the case to justify a departure from the normal rule, and bear in mind that the Court of Appeal have in several recent cases criticized the amount unselective copying in commercial cases. I therefore disallow all photocopying and 'printing' charges (I was told that the latter is essentially the same as photocopying). The disbursements are not sufficiently particularized in the final bill for me to quantify the amount of the reduction, and I leave that to counsel to agree, or remit it to the Registrar in default of agreement.

Costs of the Taxation (Grounds 11 & 12)

21. The paying party argues that it should have been awarded the costs of the taxation as it achieved a 30.06% reduction in the receiving party's costs. I don't accept that. The normal rule is that the taxing party gets its costs: see RSC Ord. 62, r. 27(1). That rule might be displaced if there had been a Calderbank offer as to costs, and the taxing party failed to beat the sum offered, and that is now given recognition by RSC Ord. 62, r. 27(3) and (4). However, no such offer appears to have been made in this case. Otherwise, the receiving party has to come to taxation to get its costs, and in order to displace the ordinary rule, there has to be something in the circumstances of the case to justify some other order: see RSC Ord. 62, r. 27(2). I do not see that there is anything of that nature here.

The Receiving Party's Application

22. The Registrar excluded and disallowed costs between 8th June 2009, when the proceedings were filed, and 24th June. The summons for review asserts that she disallowed costs before 13th August 2009, which was the date when formal service was finally effected: the application had to be served out of the jurisdiction, as the respondent's local attorneys refused to accept service. An appearance was then entered on 1st September 2009. However, it seems that an information copy of the proceedings had

been provided on 25th June, and the registrar then allowed "limited credit for reasonable work done from 25th June 2009 and 13th August 2009". However, it is in fact difficult to discern any difference in her approach before and after 13th August, and the parties' submissions really focused on the disallowance of costs prior to 24th June.

23. The receiving party argues that they knew the nature of the application once it had been filed and issued, which was on 9th June 2009, and were entitled to start preparatory work from that time. Mr. Luthi relies upon In re Gibson's Settlement Trusts [1981] 1 Ch. 179, and the following passage from the headnote:

> " Held, (2) That on a taxation on a common fund basis the provision in RSC ord. 62, r. 28(4) for allowing a "reasonable amount in respect of all costs reasonably incurred" referred to "the costs of and incidental to" the particular proceedings in question; and that whether costs for work done before any proceedings were commenced fell within those provisions depended on whether in the event those proceedings were wide enough to include that work."

24. The old 'common fund' basis has now gone, but the wording used in the old order is the same as that now used in the definition of the 'standard basis', so I think that that principle applies. It is, therefore, a question of fact whether the work done related to and was within the ambit of the proceedings once commenced. I do not think, therefore, that the Registrar was right automatically to exclude this work, and I consider that it requires a detailed assessment. Some of the work may well fall outside the test. For instance, the 4.25 hours on 4th June, the explanation for which reads "discuss share transfer mechanisms with S. Reedy; research; consider points re transfer by operation of law; review cases." On the face of it, that appears to be counsel getting up to speed on the acquisition mechanism, and not to be referable to the valuation exercise. However, that is a question for the taxing officer and I do not think that I should attempt a detailed taxation at this point. I therefore remit the 43.5 hours prior to 25th June to the Registrar for a detailed assessment (unless the parties can agree or wish me to conduct a summary assessment).

25. The receiving party also complained about the reduction in their expert's fees. I have dealt with that above under the paying party's objections on this issue.

Summary

26. In summary –

(i) I remit the 43.5 hours prior to 25th June to the Registrar for a detailed assessment, unless otherwise agreed.

(ii) I set aside the Registrar's assessment in respect of the work done for the preparation of Mr. Sohnem-Pao's affidavit, and allow 25 hours only at Mr. Luthi's rate. I disallow the remainder, being 24.5 hours.

(iii) I set aside the Registrar's assessment in respect of the work done by Mr. Luthi for trial preparation up to and including 7th January, and substitute an allowance of 60 hours. I disallow the remainder, being 100 hours.

(iv) I disallow all photocopying and printing charges.

I uphold the remainder of the learned Registrar's conclusions and to that extent dismiss both parties' complaints about them.

27. I will hear the parties as to costs, and give a liberty to apply in respect of the detailed application of my rulings.

Dated the 11th day of January 2012

Richard Ground
Chief Justice