[2023 Gib LR 628]

TOLKYNNEFTEGAZ LLP (in bankruptcy) and KUBYGUL (as bankruptcy manager of TOLKYNNEFTEGAZ LLP) v. TERRA RAF TRANS TRAIDING LIMITED, A. STATI, G. STATI and TRISTAN OIL LIMITED

SUPREME COURT (Yeats, J.): September 20th, 2023

2023/GSC/034

Civil Procedure—costs—apportionment—general rule that costs follow event—defendant who succeeded in challenge to court's jurisdiction on one ground but unsuccessfully pursued many other grounds awarded 40% of costs

The claimants brought claims for damages.

Following the handing down of the judgment reported at 2023 Gib LR 71, the court made a declaration declining to hear the claims against the first defendant ("Terra Raf") on the basis of the rule that the court had no jurisdiction to entertain an action for the enforcement of a foreign revenue law. The court also made a declaration that it did not have jurisdiction to hear the claims against the second to fourth defendants ("the Statis" and "Tristan") because Gibraltar was not the more appropriate forum for the trial.

Decisions on costs had to be made in respect of (i) the defendants' principal applications challenging jurisdiction; (ii) applications for extensions of time to file the challenges to the court's jurisdiction made by Terra Raf and by the Statis and Tristan, which had been granted by consent; and (iii) an application for an adjournment of the hearing of the principal applications which was made by Terra Raf but supported by the Statis and Tristan to enable them to consider evidence filed by the claimants late and without permission.

Terra Raf sought its costs in all three applications but conceded that the court might consider a proportionate or percentage costs order to be appropriate. The Statis and Tristan submitted that the claimants should pay all of their costs without deduction. The claimants submitted that the defendants should pay 70% of their costs because, although the defendants had succeeded in challenging the court's jurisdiction, they had raised a number of other issues on which they had not succeeded.

Held, ruling as follows:

(1) The starting point was that a successful party should have its costs. The issues on which Terra Raf was not successful would not have been litigated if the claimants had conceded that the revenue rule barred them from bringing their claims. Terra Raf's overall success had to be balanced against the fact that it pursued many other issues on which it did not succeed. Extensive evidence was filed in support of the unsuccessful issues. It had plainly been reasonable for the claimants to have addressed and defended all of them. The circumstances warranted a significant reduction in the costs that Terra Raf should be allowed. A just and fair order was that Terra Raf should have 40% of its costs of the principal applications (paras. 32–34).

(2) The Statis and Tristan succeeded in the main focus of their applications challenging jurisdiction. Although they adopted Terra Raf's submissions (because if the claimants did not succeed in establishing jurisdiction against Terra Raf as the anchor defendant, the court would not have jurisdiction to try the other defendants) they did not make any of those arguments themselves. The Statis and Tristan should have all of their costs of the principal application (para. 35).

(3) The orders extending time for the defendants to make their applications challenging jurisdiction had been made by consent. This was complex, high value litigation and it was reasonable to allow the defendants sufficient time to bring their challenges. The proper orders as to costs should have been costs in the applications and the court would treat them as such (para. 39).

(4) The defendants had been justified in making the adjournment application because the claimants filed evidence late and without permission. The defendants were entitled to seek to have it excluded or to ask for an adjournment so that they could properly review and respond to the evidence. The claimants would be ordered to pay the defendants' costs of that application (para. 43).

Cases cited:

(1) *A.E.I. Rediffusion Music Ltd.* v. *Phonographic Performance Ltd.*, [1999] 1 W.L.R. 1507; [1999] 2 All E.R. 299; [1999] C.P.L.R. 551; [1999] E.M.L.R. 335, considered.

(2) *Budgen* v. *Andrew Gardner Partnership*, [2002] EWCA Civ 1125, considered.

(3) *Deutsche Bank AG London* v. *Comune di Busto Arsizi*o, [2022] EWHC 219 (Comm); [2022] Costs L.R. 257, considered.

(4) *Kastor Navigation Co. Ltd.* v. *AXA Global Risks (UK) Ltd.*, [2004] EWCA Civ 277; [2004] 2 CLC 68; [2004] 2 Lloyd's Rep. 119; [2004] Costs L.R. 569, considered.

(5) *Multiplex Constr. (UK) Ltd.* v. *Cleveland Bridge UK Ltd.*, [2008] EWHC 2280 (TCC); 122 Con LR 88; [2009] 1 Costs L.R. 55, considered.

(6) *Summit Property Ltd.* v. *Pitmans*, [2001] EWCA Civ 2020; [2002] CPLR 97, referred to.

Legislation construed:
Civil Procedure Rules (S.I. 1998/3132), r.44.2(1)–(2): The relevant terms of this provision are set out at para. 5.
r.44.2(4): The relevant terms of this provision are set out at para. 6.
r.44.2(5): The relevant terms of this provision are set out at para. 7.
r.44.2(8): The relevant terms of this provision are set out at para. 44.

J. Ramsden, *K.C.* with *P. Kuhn* and *D. Nagrani* (instructed by Triay Lawyers) for the first defendant/applicant;
K. Power with *S. Danino* (instructed by TSN) for the second, third and fourth defendants/applicants;
R. Morgan, *K.C.* with *M. Levy* (instructed by Hassans) for the claimants/respondents.

1 **YEATS, J.:** On January 31st, 2023, following the handing down of a reserved judgment (reported at 2023 Gib LR 71), I made the following principal orders: A declaration declining jurisdiction to hear the claims against the first defendant ("Terra Raf") and a declaration that the court does not have jurisdiction to hear the claims against the second to fourth defendants (together referred to as "the Statis and Tristan"). On July 11th, 2023, I granted the claimants permission to appeal and heard the parties on costs.

2 I shall refer to my judgment of January 31st, 2023 as "the principal judgment" and shall use the same definitions and abbreviations in this judgment.

3 Decisions on costs have to be made in respect of three distinct matters/applications as follows:

(i) *The principal applications*. The costs of the defendants' principal applications challenging jurisdiction—which were heard from May 23rd–31st, 2022.

(ii) *The extension of time applications*. Terra Raf applied for extensions of time to file its challenge to the court's jurisdiction. The extensions were granted by a consent order of November 30th, 2020 with costs being reserved. Similarly, the Statis and Tristan also applied to extend time. Their extension of time was granted by a consent order of March 5th, 2021. Costs were also reserved.

(iii) *The adjournment application*. On December 22nd, 2021, I granted an adjournment of the hearing of the principal applications which were then set to commence on January 17th, 2022. (The decision was reflected in an order for directions made on January 20th, 2022.) I reserved the question

of costs of that application. It had been made by Terra Raf but was supported by the Statis and Tristan.

4 The parties' respective positions on costs is the following. Terra Raf seeks its costs in all three applications. It however concedes that the court may consider a proportionate or percentage costs order in its favour to be more appropriate. Terra Raf's costs amount to £1,664,083. For their part, the Statis and Tristan say that the claimants should pay all of their costs without deduction. Their costs amount to £1,007,426. Despite being unsuccessful in the principal applications, the claimants seek an order for a proportion of their costs. They say that the defendants should pay 70% of their costs. The claimants' costs are £2,876,221.

CPR 44.2 and the applicable principles

5 CPR 44.2 is the rule governing the court's discretion on costs. CPR 44.2(1) and (2) provide as follows:

> "(1) The court has discretion as to—
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> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs—
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order."

6 CPR 44.2(4) then sets out what the court must have regard to when deciding what order to make:

> "(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including—
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply."

7 CPR 44.2(5) defines the term "conduct" in CPR 44.2(4)(a):

> "(5) The conduct of the parties includes—
>
> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice

> Direction—Pre-Action Conduct or any relevant pre-action protocol;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
>
> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."

8 CPR 44.2(6) sets out the types of orders that the court can make. These include at subpara. (a) a proportionate costs order and at subpara. (f) an issue based costs order. CPR 44.2(7) then provides that before the court considers making an issue based order it must consider whether it is practicable to make a proportionate costs order instead.

9 In *Multiplex Constr. (UK) Ltd.* v. *Cleveland Bridge UK Ltd.* (5), Jackson, J. set out a summary of how CPR 44.2 should be applied. The learned judge said ([2008] EWHC 2280 (TCC), at para. 72):

> "72. From this review of authority I derive the following eight principles.
>
> (i) In commercial litigation where each party has claims and asserts that a balance is owing in its own favour, the party which ends up receiving payment should generally be characterised as the overall winner of the entire action.
>
> (ii) In considering how to exercise its discretion the court should take as its starting point the general rule that the successful party is entitled to an order for costs.
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> (iii) The judge must then consider what departures are required from that starting point, having regard to all the circumstances of the case.
>
> (iv) Where the circumstances of the case require an issue-based costs order, that is what the judge should make. However, the judge should hesitate before doing so, because of the practical difficulties which this causes and because of the steer given by rule 44.3(7).
>
> (v) In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order.
>
> (vi) In considering the circumstances of the case the judge will have regard not only to any part 36 offers made but also to each

> party's approach to negotiations (insofar as admissible) and general conduct of the litigation.
>
> (vii) . . .
>
> (viii) In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won but also the common costs."

10 None of the parties advocated for an issue based costs order. In the circumstances, it is unnecessary to review the English authorities cited by the parties in which the use of these types of costs orders is discouraged.

11 Mr. Ramsden went further and submitted that even proportionate costs orders should be sparingly used. He referred to *Deutsche Bank AG London* v. *Comune di Busto Arsizio* (3), where Cockerill, J. said ([2022] EWHC 219 (Comm), at para. 65):

> "There is a danger, noted in some of the authorities, that proportionate orders end up undermining the general rule that costs follow the event. As noted in many of the authorities, in any litigation—especially complex commercial litigation such as the present case—any winning party is likely to fail on some issues . . ."

12 Mr. Morgan on the other hand referred to two earlier decisions of the English Court of Appeal in support of the proposition that the courts should not hesitate in departing from the general rule where appropriate, and should make orders that reflect levels of success. In *A.E.I. Rediffusion Music Ltd.* v. *Phonographic Performance Ltd.* (1), Lord Woolf, M.R., the architect of the 1999 reforms, said the following ([1999] 1 W.L.R. at 1522):

> "I draw attention to the new Rules because, while they make clear that the general rule remains, that the successful party will normally be entitled to costs, they at the same time indicate the wide range of considerations which will result in the court making different orders as to costs. From April 26th, 1999 the 'follow the event principle' will still play a significant role, but it will be a starting point from which a court can readily depart. This is also the position prior to the new Rules coming into force. The most significant change of emphasis of the new Rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new Rules are reflecting a change of practice which has already started. It is now clear that too robust an application of the 'follow the event principle' encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they

take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your efforts to do so."

13 In *Budgen* v. *Andrew Gardner Partnership* (2), Simon Brown, L.J. said the following ([2002] EWCA Civ 1125, at paras. 26–27):

"26. For my part I have no doubt whatever that judges nowadays should be altogether readier than in times past to make costs orders which reflect not merely the overall outcome of proceedings but also the loss of particular issues. If, moreover, the 'winning' party has not merely lost on an issue but has pursued an issue when clearly he should not have done, then there are two good reasons why that should be reflected in the costs order: first, as a sanction to deter such conduct in future; secondly, to relieve the 'losing' party of at least part of his costs liability. It is one thing for the losing party to have to pay the costs of issues properly before the court, another that he should have to pay also for fighting issues which were hopeless and ought never to have been pursued.

27. By no means does it follow, however, that the judge should give effect to these considerations by making an issue based costs order rather than a percentage costs order. Indeed, quite the contrary, as rule 44.3(7) makes plain."

14 The parties also referred to a number of other authorities. To the general summary set out in *Multiplex Constructions* (5) I would add the following statement of principle which is reflected in many of the authorities: the order that is made must reflect the overall justice of the case.

Costs of the principal applications

15 As a starting point, the claimants sensibly accept that the defendants were the successful parties. Ultimately, the defendants succeeded in challenging the court's jurisdiction. However, that is not the complete picture.

16 I granted the declaration declining jurisdiction to hear the claims against Terra Raf because I considered that the claims breached the common law revenue rule. In my judgment of January 31st, 2023, I said (2023 Gib LR 71, at para. 353):

"The claimants' claims were brought with the principal aim of obtaining damages and applying these to the satisfaction of tax debts due by TNG in the Republic of Kazakhstan. This is a breach of the common law revenue rule which provides that the Gibraltar courts do not have jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a revenue law of a foreign state. As such, the court should decline jurisdiction to hear the claims against Terra Raf."

17 However, Terra Raf raised a number of other issues on which it did not succeed. In relation to its challenge to jurisdiction under CPR 11, it also said that the claims were an abuse of European Union law. In relation to its application that the claims be struck out pursuant to CPR 3.4(2), Terra Raf raised the following: that the proceedings amounted to a collateral attack on the ECT award; champerty/champertous maintenance; that TNG's bankruptcy proceedings in the ROK are a sham; that TNG's bankruptcy proceedings in the ROK are time barred under Kazakh law; that the fraud allegations in two of the claims were barred by issue estoppel and *res judicata*; limitation; the double actionability rule; and that there were no reasonable grounds for bringing the claims on the merits.

18 In so far as the Statis and Tristan are concerned, I declared that the court did not have jurisdiction to try the claims because I considered that Gibraltar was not the more appropriate forum for the trial. However, as I recorded in the principal judgment (*ibid.*, at para. 283), the submissions made by the Statis and Tristan were the following:

> "That there is no real prospect of success against GS; that the Statis and Tristan are not necessary or proper parties to the claims against Terra Raf; that Gibraltar is not the most appropriate forum for the trial of these claims; and that the orders I made on service on the November 27th, 2020 should be set aside because there was material non-disclosure by the claimants at the *without notice* hearing." [Emphasis in original.]

19 The upshot is that although the defendants achieved their overall desired result, they only succeeded on two out of the fourteen issues that they put before the court. The question that I therefore have to decide is whether I should follow the general rule that costs should be awarded to the party that achieved overall success or whether I should depart from the starting point to reflect the fact that the defendants did not succeed on most of the issues they raised.

20 Terra Raf's position is that it achieved the declaration it sought. That it is therefore appropriate to apply the general rule that costs follow the event. In this regard, Mr. Ramsden referred to *Kastor Navigation Co. Ltd.* v. *AXA Global Risks (UK) Ltd.* (4), where the English Court of Appeal said ([2004] EWCA Civ 277, at para. 151):

> "This is not a case where the issue on which the successful party lost was a separate head of claim: it was a separate basis for putting the successful party's only claim. Accordingly, unlike in many cases involving issue based orders for costs, this was a case where the issue on which the successful party lost would not have been litigated if the unsuccessful party had conceded the issue on which the successful party won."

It was submitted that this was true of Terra Raf's application.

21 It was also said that it would be wrong to describe the result of the other issues dealt with in the judgment as being decided in the claimants' favour. For example, it is said that matters such as limitation, double actionability and the sufficiency of the pleadings were determined to be matters for trial. (It does not seem to me that this submission would be correct. At the hearing, the claimants only had to answer the jurisdiction challenge and the strike out application. If issues were determined to be matters for trial then it follows that the defendants should not have raised them at this interlocutory stage.)

22 The following submissions were also made: that the court criticized the Republic of Kazakhstan in the "abuse of process by collateral attack" issue; that some issues were simply dealt with in writing and no meaningful time was taken at the hearing; that the common costs of the different issues are very substantial; and that in high value commercial litigation of this type it is common for a defendant to pursue all possible grounds and challenges. Terra Raf says its conduct was beyond reproach.

23 In relation to the Statis and Tristan, Ms. Power reminded the court that at para. 297 of the principal judgment, I had observed that these defendants had concentrated on the appropriate forum issue at the hearing. The court could therefore disregard the fact that the Statis and Tristan did not succeed on the other issues they raised. It was submitted that there is no good reason to depart from the general rule that the Statis and Tristan should have their costs. They succeeded in the main focus of their application.

24 The claimants' position is that the court should have regard to the defendants' conduct in relation to the allegations and issues they advanced, and to the fact that the claimants were successful on all issues save for the revenue rule (as concerned Terra Raf) and appropriate forum (as concerned the Statis and Tristan). The majority of the claimants' costs were incurred in defending what Mr. Morgan described as the defendants' "scattergun approach" to the applications. Mr. Morgan submitted that it was unreasonable for the defendants to have attempted to run points such as that the claim was an abuse of EU law, that it amounted to a collateral attack on the ECT award, that TNG's bankruptcy was a sham or that there had been an absence of full and frank disclosure. In any event, it is not necessary for a court to find that a party has acted unreasonably or improperly before he can be ordered to pay the costs of an issue on which he has failed—see *Summit Property Ltd.* v. *Pitmans* (6) ([2001] EWCA Civ 2020, at para. 16). The claimants had to show arguability and they plainly did on all issues save for the revenue rule. The revenue rule was a "tiny and discrete issue" according to Mr. Morgan, with little overlap with the other issues taken by Terra Raf. In fact, the claimants' focus on this issue at the

hearing had been very limited. In the circumstances, it was submitted that the case merits a departure from the general rule and a swing in their favour.

25 In relation to the Statis and Tristan, Mr. Morgan criticized the fact that they had argued that there had been a breach of full and frank disclosure at the without notice hearing. He described it as unfortunate and unreasonable. More generally, Mr. Morgan submitted that all four defendants should be treated as one and should all be liable to pay a proportion of the claimants' costs. The Statis and Tristan had adopted Terra Raf's submissions. There was, it was said, a single approach to the applications. Mr. Morgan pointed to how the defendants all have a single controlling legal advisor with a common team. (In the defendants' bills of costs, they refer to the work done by their instructing solicitors, King & Spalding, on the case generally. That firm's costs are then attributed on a 60:40 split as between Terra Raf on the one hand and the Statis and Tristan on the other.)

26 As I have already stated, the claimants seek an order for costs in their favour. They say that the defendants should pay 70% of their costs. Their simple proposition is that although they were unsuccessful, they succeeded in all but two of the issues raised by the defendants. Working out what exact time was spent on particular issues is of course impossible. However, the claimants put forward two bases for calculating costs. The first is a simple percentage drawn by dividing the number of issues equally. They say that there were in effect thirteen issues dealt with by the court (I consider there were fourteen) and this means that the defendants succeeded on 15.38% of the issues in dispute. The second is a percentage said to be derived by analysing the work done by their legal team. The methodology is described in Part B of Annex 1 to the claimants' bill of costs as follows:

> "2. The review undertaken has included identifying time entries, which specifically relate to forum and the revenue rule. Where such a time entry has been identified, it has been allocated in full to the claimants' estimation of how much time has been spent on forum or the revenue rule (as appropriate). Where time entries related to a number of issues, it has been necessary to approximate the amount of time spent on (as the case may be) forum and the revenue rule. This has necessarily involved a degree of subjectivity."

This is then developed further. Witness statements which deal with more than one issue, and skeleton arguments, have been divided by number of paragraphs and an analysis undertaken of how many paragraphs deal with the revenue rule or appropriate forum. For example at para. 5, the claimants say the following:

> "5. In relation to Mr. Anatolie Stati's first witness statement, only a small part of this related to forum. Mr. Anatolie Stati's first witness statement consisted of 105 paragraphs and addressed forum at paragraphs 43 to 48. On this basis, 6 out of 105 paragraphs of Mr.

> Anatolie Stati's first witness statement concerned forum which would amount to approximately 5.7% of the statement. Accordingly, 5.7% of all time spent considering or attributed to considering Mr. Anatolie Stati's first witness statement has been allocated as time spent on forum."

27 Using this methodology, the claimants say that only 10.3% of their costs relate to the revenue rule and appropriate forum. They suggest that similar proportions would apply to the defendants.

28 Mr. Ramsden's response was to say that it is artificial to simply divide by the number of issues in order to arrive at a percentage figure for costs incurred on a particular issue. Some grounds featured more prominently than others (in the evidence, written submissions and at the hearing) and some were closely intertwined. For example, it was said that the evidence relating to TNG's bankruptcy proceedings and Mr. Kubygul's appointment went to both the revenue rule and the arguments on sham bankruptcy. As to the methodology used by the claimants in Part B of Annex 1 to their bill of costs, Mr. Ramsden submitted that this too was an incorrect analysis. A single paragraph in a witness statement, for example, could take hours to prepare whereas other paragraphs can be drafted relatively quickly or can be taken from material which already exists. I agree that this must be so.

29 Mr. Ramsden also submitted that the court did not say that the issues on which Terra Raf lost had been unreasonably taken or that its approach was overzealous. In fact, Mr. Ramsden pointed to how the only entity that was expressly criticized in the judgment was the Republic of Kazakhstan who are funding and providing practical assistance to the claimants.

30 As to whether all defendants should be treated as one for the purposes of costs, Mr. Ramsden and Ms. Power both submitted that the defendants made separate and distinct challenges and it was therefore necessary for them to be separately represented. That it does not follow that if Terra Raf do not get all their costs that the position should be the same with the Statis and Tristan.

31 It seems to me that, contrary to the submissions advanced on behalf of the claimants, I should deal with the defendants separately. Although they clearly have a common aim and they have a common legal team in the background, it was reasonable to have separate representation for the hearing of the applications. Terra Raf, as a Gibraltar registered company, was being sued as the anchor defendant. The Statis and Tristan were foreign defendants. They were entitled to present their positions differently.

32 So what orders should I make? As has been conceded, the defendants were the successful parties. The starting point is that a successful party should have its costs. In Terra Raf's case, should I depart from this starting point?

33 As the English Court of Appeal observed in *Kastor Navigation* v. *AXA Global Risks* (4), this is a case where the issues on which Terra Raf lost would not have been litigated if the claimants had conceded that the revenue rule barred them from bringing their claims. This is a strong point in Terra Raf's favour, although it does not follow (as it did not in *Kastor Navigation* where the Court of Appeal ordered that each side pay their own costs) that it should thereby have all of its costs. Terra Raf's overall success has to be balanced against the fact that it pursued no less than nine other issues on which it did not succeed. It is fair to say that not all issues were pursued with vigour or took up significant court time, but some certainly did—for example the double actionability rule submissions. There was extensive evidence filed in support of the issues that failed. I agree with Mr. Morgan that it was plainly reasonable for the claimants to have to address and defend all of these.

34 Whilst I do not consider that the circumstances warrant the making of a net order in the claimants' favour, they do warrant a significant reduction in the costs that Terra Raf should be allowed. I will not however adopt a rigid mechanical and mathematical approach. That would not achieve the right result. I have to take a step back and take a broad view. I consider that the just and fair order to make is that Terra Raf should have 40% of its costs of the principal applications.

35 As to the Statis and Tristan, I agree with Ms. Power that they succeeded in the main focus of their application. The fact that they were unsuccessful in their full and frank disclosure submissions or the arguments on the prospects of success against Gabriel Stati does not warrant any reduction of their costs. Even though the Statis and Tristan adopted Terra Raf's submissions (because if the claimants did not succeed in establishing jurisdiction against Terra Raf then it followed that the court did not have jurisdiction to try the other defendants) they did not field any of those arguments themselves. The Statis and Tristan should have all of their costs of the principal application.

36 In my judgment, the orders that I am making reflect the overall justice of the case.

Extension of time applications

37 By application notices dated September 29th, 2020 and November 20th, 2020, Terra Raf applied to extend time for the filing of an application challenging the court's jurisdiction. By a consent order made on November 30th, 2020, the court extended time and costs were reserved. Similarly, by application notice dated February 8th, 2021, the Statis and Tristan also applied to extend time to make their application under CPR 11.1. By a consent order of March 5th, 2021 the extension was granted and costs were reserved.

38 The defendants say that as they were successful in their challenges to the court's jurisdiction, it follows that they should have their costs of the applications to extend time to mount those challenges.

39 The orders were made by consent. Clearly, this was complex, high value litigation and it was reasonable to allow the defendants sufficient time to mount their challenges. It seems to me that the proper orders on costs should well have been costs in the applications, and I shall treat them as such.

Application to adjourn the hearing of January 17th, 2022

40 The adjournment of January 17th, 2022 hearing came about in the following way. On December 14th, 2021, the claimants filed further evidence for the hearing without permission. The latest date by which the claimants were to file evidence was July 30th, 2021 and it was therefore well out of time. On December 20th, 2021, Terra Raf filed an application seeking an order that the claimant not be allowed to rely on the late evidence or, in the alternative, that the hearing of January 17th, 2022 be adjourned. The Statis and Tristan supported the application. At a hearing on December 22nd, 2021, I determined that the court would benefit from the admission of the late evidence but that the hearing would have to be adjourned in order to give the defendants an opportunity to properly consider the evidence and reply if necessary. I reserved my decision on costs.

41 Terra Raf says that the evidence was filed and served late and without permission—approximately one month before the hearing. Although in an email from Messrs. Hassans of November 17th, 2021, the claimants had reserved the right to file "brief reply evidence," they did not have the court's permission to do so and in any event, the evidence could not properly be described as brief. Due to a combination of factors, including the Christmas holidays, the defendants could not address and reply to the evidence in time for the hearing. It is also said that dealing with the reply evidence in the available time would have had an impact on the defendants' ability to prepare for the hearing.

42 The claimants' position is that they successfully defended Terra Raf's primary application that the late evidence not be admitted and they should therefore be entitled to their costs.

43 It seems to me that the defendants were plainly justified in making the adjournment application. The claimants filed evidence late and without permission. The defendants were entitled to seek to have it excluded or to ask for an adjournment so that they could properly review and respond to the evidence. I determined that the best course was to admit the evidence and adjourn the hearing. I have little hesitation in ordering that the claimants pay the defendants' costs of that application.

Payment on account

44 CPR 44.2(8) provides:

> "(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

45 The parties are agreed that a payment of 50% of a receiving party's costs is a commonly used benchmark in England and would be an appropriate percentage in this case. None say that there is any good reason as to why a payment on account should not be made.

46 It was also accepted by all sides that any payment on account should be paid into court, and that 28 days should be allowed for that to happen—subject to a "liberty to apply" provision relating to the timeframe.

47 I have concluded that Terra Raf should have 40% of its costs in the principal applications and the extension of time applications. It will also have all of its costs in the adjournment application. Terra Raf's bill of costs does not however reflect what costs are attributable to each of these different applications. (The claimants do say that their costs of the adjournment application amount to £65,071. In the context of a total bill of £2,876,221 they can be characterized as relatively minor.) For the purposes of a payment on account, I will therefore simply proceed as if Terra Raf were receiving 40% of all of its costs. 40% of the sum of £1,664,083 is £665,633. Applying the 50% benchmark and making a slight adjustment to round off, I shall order that the claimants pay the sum of £330,000 on account.

48 The Statis' and Tristan's bill of costs amounts to £1,007,426. I shall order that the claimants pay the sum of £500,000 on account—again applying the 50% benchmark and making a slight adjustment to arrive at a rounded-off figure.

Permission to appeal

49 At the hearing on July 11th, 2023, I granted the claimants permission to appeal. Permission was required because the orders made on January 31st, 2023 were interlocutory decisions. Permission may be given where the court considers that the appeal would have a real prospect of success or if there is some other compelling reason for the appeal to be heard. The claimants say that there is both a real prospect of success and a compelling reason for the appeal to be heard. (The defendants simply recorded that they do not consider that an appeal has a real prospect of success, but they left the matter to the court.)

50 As has already been observed, Terra Raf was successful in its assertion that the claims were brought in breach of the common law

revenue rule. Mr. Morgan submitted that the application of the revenue rule raises a number of complex issues of law (both in this case and generally) which need to go before the higher courts. He grouped his proposed grounds of appeal into four.

51 *First*, that the nature and scope of the revenue rule raises complex issues of law. The claimants say that it is wrong in principle to prevent a claimant from pursuing a good arguable case simply because damages would be applied to the satisfaction of foreign tax claims. They also say that the rule is in any event in conflict with the scheme established by the Brussels Recast Regulation.

52 *Second*, whether by their nature the claimants' claims were capable in principle of falling within the scope of the revenue rule. This relates to whether the revenue rule just applies to claims where the *only* creditor is the foreign tax authority. Here, there were other minor creditors and significant potential creditors.

53 *Third*, if the claimants' claims could in principle fall within the scope of the revenue rule, whether they actually do so in the circumstances of this case. It is submitted that the claimants' claims are ordinary claims by a corporate claimant to recover substantial sums that have been allegedly misappropriated from it. The revenue rule should not therefore apply.

54 *Fourth*, if the claimants' claims do fall within the scope of the revenue rule, whether the public policy exception to that rule would nevertheless prevent it from applying in this case.

55 In my judgment, an appeal on these grounds would not be fanciful and the claimants should therefore be able to proceed with their proposed appeal.

56 In so far as an appeal against my conclusions on appropriate forum is concerned, the claimants say that my decision was perverse and outside the scope of my discretion on the issue. That there was an incorrect analysis of the connecting factors between the different forums. Whilst I disagree with the claimants' contention regarding the exercise of my discretion, I granted them permission to appeal. It did not seem to me that an appeal would be fanciful notwithstanding the limitations on an appellate court to interfere with a discretionary decision of a lower court.

Conclusion

57 The claimants shall pay 40% of Terra Raf's costs of the principal application and the extension of time applications. Terra Raf shall have all of its costs of the adjournment application.

58 The claimants shall pay all of the Statis' and Tristan's costs.

59 The claimants shall pay the sum of £330,000 on account of Terra Raf's costs and the sum of £500,000 on account of the Statis' and Tristan's costs. The payments shall be made into court within 28 days. (There shall be liberty to apply in relation to the timeframe for the payments.)

Judgment accordingly.
