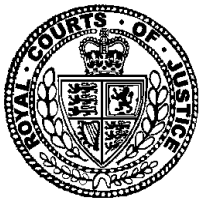

Neutral Citation Number: [2019] EWHC 345 (Comm)

Case Nos: CL-2017-000402 & CL-2018-000025

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 20 February 2019

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

CL-2017-000402 ('the 2017 Claim')

CUNICO RESOURCES NV **CUNICO MARKETING FZE** **FENI INDUSTRIES AD**	**Claimants**
- and -	
KONSTANTINOS DASKALAKIS **ARVIND MUNDHRA**	**Defendants**

CL-2018-000025 ('the 2018 Claim')

CUNICO MARKETING FZE	**Claimant**
- and -	
KONSTANTINOS DASKALAKIS **ARVIND MUNDHRA**	**Defendants**

- -
- -

Thomas Grant QC and Caley Wright (instructed by **Hogan Lovells International LLP**) for **Cunico Resources NV and Cunico Marketing FZE**
Alain Choo Choy QC (instructed by **Wallace LLP**) for the **Defendants**
Edmund King QC (instructed by **Wilmer Cutler Pickering Hale and Dorr LLP**) for **Feni Industries AD**
Hearing date: 18 February 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. This judgment deals with consequential matters in relation to my order dated 7 December 2018 in the 2018 Claim ('the December Order') and my orders, one in the 2017 Claim and one in the 2018 Claim, dated 18 January 2019 ('the January Orders'). The judgments upon the basis of which those orders were made are [2018] EWHC 3382 (Comm) ('the December Judgment') and [2019] EWHC 57 (Comm) ('the January Judgment'). The parties will not need me to reiterate the background or explain the proceedings. If anyone outside the case is interested in this further decision, I refer them to those previous judgments for context.

2. By the December Order, I dismissed an application by Marketing for judgment in default against Mr Daskalakis pursuant to CPR 12.3(1) and an application by Mr Daskalakis for an extension of time for filing acknowledgment of service, and I dismissed (in substance) an application by Mr Daskalakis for relief from sanctions in respect of the late filing of his acknowledgment of service.

3. Mr Daskalakis was granted limited relief from sanctions, waiving timeliness of acknowledgment of service as a requirement under CPR 11(2) of entitlement to challenge jurisdiction under CPR 11(1). However, Marketing volunteered and accepted that Mr Daskalakis' failure to file timely acknowledgment of service should not shut him out from challenging jurisdiction. If he had not sought more wide-ranging relief from sanctions, minimal cost would have been incurred in respect of his application and that cost would have been for his account as the applicant in need of relief from sanctions on what would then have been an application uncontested by Marketing.

4. By each of the January Orders, I declared that the court did not have jurisdiction to try any of the claims pleaded in the respective Claim and set aside the Claim Form and service on each of the defendants.

5. The consequential matters to be addressed now are:

    i) Permission to appeal, and the related question of the time for any appellant's notice. Marketing sought permission to appeal all three Orders. No other party sought permission to appeal.

    ii) Costs. Various applications and cross-applications were made.

Permission to Appeal – December Order

6. There would be two aspects to an appeal by Marketing against the December Order, i.e. an appeal against the dismissal of its application for judgment in default: firstly, the question of importance as to the meaning and effect of CPR 12.3(1), upon which different views have been taken; secondly, the question of jurisdiction. The December Judgment dealt only with the first of those questions, since my answer to it was sufficient to determine the default judgment application against Marketing. As I said at [98], "*Had the application for default judgment not failed for other reasons, … I could not have disposed of it prior to giving judgment on [the] jurisdiction challenge*".

7. Mr Grant QC provided me with draft Grounds of Appeal and a separate Skeleton Argument in support of his application for permission to appeal against the December Order dealing with the first question (the meaning of CPR 12.3(1)). That Skeleton Argument seemed to me apt to stand as Marketing's Skeleton Argument on appeal (with or without permission having been granted by me, as the case may be), perhaps with some minor editing or tidying up, so that in principle Marketing ought to be in a position to file any appellant's notice very promptly now.

8. On the substance of the argument there outlined, as with the argument at the original hearing, it did not seem to me to grapple with the difficulty, standing in the way of the 'third meaning', of the language (and grammatical structure) used in CPR 12.3, or therefore to explain satisfactorily why rejection of the 'second meaning' (one element of Marketing's argument being to endorse my concerns about that meaning) leads to the 'third meaning' rather than to the 'first meaning'. In particular, there was repeated emphasis upon CPR 3.8(1) that I found unpersuasive since it begged the question (i.e. the question of the meaning of CPR 12.3(1)). That said, and in view of my conclusions and observations in the December Judgment at [89]-[92], Mr Grant QC was pushing at an open door in his submission that, all things being equal, the question of the proper meaning of CPR 12.3(1) merited permission to appeal.

9. All things are not equal, however, because of the second aspect of any appeal, if there is to be one. Marketing cannot ask for the dismissal of its application for default judgment to be reversed unless it can persuade the Court of Appeal that the court has jurisdiction over the 2018 Claim. That stands decided against Marketing by the January Order in the 2018 Claim. Mr Grant QC also provided me with draft Grounds of Appeal, and another separate Skeleton Argument, addressing the question of jurisdiction over Marketing's claims. Those were presented as supporting an application for permission to appeal the January Order in the 2017 Claim only; but Mr Grant QC explained at the hearing – and this echoes the way in which the jurisdiction issue has been dealt with generally – that Marketing would advance the same grounds and argument in support of an appeal against the January Order in the 2018 Claim, and he accepted that only if such an appeal were to succeed could he ultimately ask the Court of Appeal to allow an appeal against the December Order.

10. For the reasons I give below, I was not persuaded to grant permission to appeal against the January Orders. Mr Grant QC and Mr Choo Choy QC agreed that in those circumstances, it would be unhelpful to oblige the parties to incur further costs in respect of an appeal against the December Order at this stage. It will be a matter for Marketing whether it pursues an application to the Court of Appeal for permission to appeal against the January Orders. If it does so successfully, that would be the appropriate time for any appeal against the December Order to be taken further, with case management in the appeals to bring them together for a single hearing (I would imagine, although ultimately that would be a matter for the Court of Appeal).

11. In those circumstances, the order as to permission to appeal against the December Order will be that:

    i) Marketing has permission to appeal conditional upon (a) the Court of Appeal having granted (if it does) permission to appeal against the January Order in the 2018 Claim and (b) Marketing not filing any appellant's notice in respect of the December Order until that condition (a) has been satisfied (if it is).

ii) The period within which Marketing must file any appellant's notice in respect of the December Order shall be a period of 14 days following the grant to it by the Court of Appeal of permission to appeal against the January Order in the 2018 Claim.

12. For completeness, in relation to paragraph 11(ii) above, that order can of course be made in this court, pursuant to CPR 52.12(2)(a), and does not have to be made at the hearing when the order to be appealed against is made. For the avoidance of doubt, however, since both the December Judgment and the January Judgment were handed down, and the December and January Orders were made, without attendance by the parties, I did specify in the December and January Orders that the consequential matters to be dealt with at this further hearing would include setting a time limit for appellant's notices, if any.

Permission to Appeal – January Orders

13. In relation to the January Orders, I start with that same question of time, under CPR 52.12(2)(a). The default rule (if no order is made under CPR 52.12(2)(a)) is that appellant's notices must be filed within 21 days after the decision appealed against (subject then to any application made to the appeal court for an extension of time): CPR 52.12(2)(b).

14. In the present case, I would have been minded to allow more time than that (if sought), under CPR 52.12(2)(a), had the parties been available to attend and deal with consequentials when the January Judgment was handed down. In the event, of course, Marketing has now had the January Judgment for a month and in its draft Grounds of Appeal and separate Skeleton Argument in support of the application for permission to appeal most of the work has been done that is required for it to be in a position to file an appeal (if so advised), including its application for permission to appeal, with the Court of Appeal.

15. In those circumstances, I put to Mr Grant QC that Marketing ought to be able to file within 7 days of the hearing this week, but he sought and I am content to grant 14 days, i.e. until 4 March 2019. The order under CPR 52.12(2)(a) in each Claim will be, therefore, that Marketing must file any appellant's notice in respect of the January Order on or before 4 March 2019.

16. As I have already indicated, I shall not myself grant Marketing permission to appeal against the January Orders (so that any appellant's notice will need to include an application for permission).

17. I considered with care Mr Grant QC's draft Grounds of Appeal and separate Skeleton Argument. There, Marketing accepted my conclusions as to the facts of the case, on the basis of the evidence compiled for the jurisdiction challenge in the 2017 Claim, by reference to which the issues arising under Section 5 of the Lugano Convention fell to be determined. Those conclusions included, centrally, that the so-called 'Advisory Contracts', the English jurisdiction clause in which provided the sole basis for jurisdiction here over Marketing's claims, were nothing of the sort.

18. They were used within the Cunico group with senior employees (by whichever company within the group they were employed), not just with Messrs Daskalakis and

Mundhra. Where used, they "*purported to record an agreement between Marketing and the employee by which Marketing engaged the employee as an 'advisor' to provide 'advisory services' to Marketing and/or other companies within the group. But there was no such agreement. The Advisory Contracts were just a tax-saving device*", and "*they were offered to and accepted by Mr Daskalakis just to provide documentary 'cover' for Marketing to be the payment vehicle within the Cunico group for some or all of the salary and/or bonus payments to which Mr Daskalakis was entitled as employee, i.e. as employee of Cunico group companies not including Marketing itself*" (January Judgment, at [43] and [72], and see at [75] re Mr Mundhra).

19. I agree with Mr Choo Choy QC (in an observation he made in the costs argument – I did not ask him to address this application for permission to appeal) that my conclusion on the evidence, in material substance, was that what Messrs Daskalakis and Mundhra did (or purported to do) on behalf of, or for the benefit of, Marketing was part of their employment by Resources. It seems to me that Mr Grant QC's resumed effort to say that the facts are (materially) those of *Bosworth* rather than those of *Samengo-Turner* and *Petter* just fails on the facts (as I found them to be), and does not disclose any arguable error of law in the January Judgment or other basis upon which there is any real prospect of the Court of Appeal taking a different view.

20. Further, if (which was how Mr Grant QC developed the *Bosworth* argument for a possible appeal) the true characterisation of the facts of Marketing's claims is that they had nothing to do with the employment of Messrs Daskalakis and Mundhra by Feni and/or Resources, the consequence would not be that the jurisdiction challenge should have failed, but that the only basis for English jurisdiction would fall away. The 'Advisory Contracts' were, on my conclusions of fact, mere adjuncts to, and part of, Messrs Daskalakis' and Mundhra's employment relationships within the Cunico group, i.e. (as I found) their relationships with Feni, Ferronikeli and Resources. Claims arising out of or connected to the 'Advisory Contract' relationships with Marketing, so as to be within the scope of the jurisdiction clause in the first place, cannot coherently then be said not to be matters relating to employment (*cf* my comment as to the artificiality of considering one of the alternative arguments: January Judgment at [86(iii)]).

21. For completeness, and contrary to one of Mr Grant QC's submissions, the January Judgment did deal with the question of the nature of the claims (i.e. whether they were of such a nature as would be brought by an employer against an employee – January Judgment, at [33]-[35]). Indeed, at [34] (first sentence), paragraph 20 above was in effect anticipated.

22. For those reasons, I do not think Marketing's proposed appeal against the January Orders has a realistic prospect of success and I do not grant permission to appeal.

Costs – 2018 Claim

23. The 2018 Claim was, and therefore costs issues in that Claim are, between Marketing (only) and the defendants.

24. The challenge to jurisdiction having succeeded and the 2018 Claim having been set aside, plainly any order for the general costs of the 2018 Claim should be for Marketing to bear its own and pay the defendants' costs.

25. The defendants incurred costs in the 2018 Claim of c.£144,000 (leaving aside costs referable to this consequentials hearing), of which:

    i) c.£93,500 were solely Mr Daskalakis' costs, of the applications dealt with by the December Judgment and Order;

    ii) £2,115 were solely Mr Mundhra's costs, relating to Marketing's application for substituted service;

    iii) the balance (i.e. c.£48,500) were other costs in the case, incurred jointly between the defendants.

26. The costs referred to in paragraph 25(ii) above were ordered to be costs in the case when the substituted service application was determined by Jacobs J (his order dated 6 July 2018). Mr Mundhra is now entitled to those costs, therefore.

27. The 'balance' costs were criticised by Mr Grant QC as surprisingly high for a claim in which little had happened (aside from the activities covered by the costs referred to in paragraph 25(i) above) and in which it was agreed that the outcome of the jurisdiction challenge was to follow that of the challenge in the 2017 Claim. I disagree.

28. Requiring a detailed assessment would itself involve disproportionate cost, given the amount involved. I hereby assess the recoverable amount in respect of that balance at £35,000. That, together with Mr Mundhra's £2,115, gives £37,115 to be paid by Marketing in respect of the defendants' costs of the 2018 Claim other than of the applications dealt with by the December Judgment and Order. That £37,115 must be paid within 7 days, i.e. by 27 February 2019. There can be no difficulty about that as Hogan Lovells are holding £45,000 under an undertaking by way of security for the defendants' costs of the 2018 Claim.

29. Turning, then, to the applications dealt with by the December Judgment and Order:-

    i) Marketing's application for judgment in default failed. If it had stood alone, there could be no argument against an order that Marketing bear its own and pay Mr Daskalakis' costs of that application.

    ii) Mr Daskalakis' application for an extension of time and relief from sanctions in substance failed. I do not accept Mr Choo Choy QC's submission that it should be regarded as a successful application because in one, limited (albeit not unimportant) respect, relief was granted. See as to that, paragraph 3 above.

    iii) If it had stood alone, the starting point on costs would have been that Mr Daskalakis could not argue against an order that he bear his own costs of his unsuccessful application. Furthermore, it was an application upon which, even if it had succeeded, Mr Daskalakis should rightly have been required to bear his own costs, at least in general, and also to pay Marketing's costs of the responsive witness statement of Ms Wales of Hogan Lovells. As to the latter, the position in this case is exactly similar to that described by Hamblen J (as he was then) in *Lakatamia Shipping Co Ltd v Nobu Su* [2014] EWHC 796 (Comm) at [4].

iv) I do not, however, regard it as appropriate, in addition, to require Mr Daskalakis to pay Marketing's costs, after Ms Wales' statement had been served, of actively opposing the grant of relief from sanctions through to and at the hearing (which costs will have been substantial, albeit no effort has been made to separate them out), even though the application did in substance fail. Once the factual position had been clarified and corrected via Ms Wales' statement (and the reply evidence from Mr Daskalakis that it provoked), the question of relief from sanctions could and should have been left between Mr Daskalakis and the court. Marketing did not leave the matter with the court because of its active interest in keeping alive the possibility of obtaining judgment in default. Indeed, but for that application, bad in law as I determined it, I judge the probability to be that Marketing *would* have left the issue of extension of time and relief from sanctions to the court.

v) Mr Daskalakis incurred costs across both applications of c.£93,500 in aggregate. The entirety (or almost the entirety) of his costs relating to witness evidence in the applications should be regarded as referable to his application. That is so notwithstanding that he served the vast bulk of his factual evidence purportedly as responsive evidence in the default judgment application. The default judgment application itself (leaving aside any application for relief from sanctions) just raised the question of the meaning and effect of CPR 12.3(1) (and the question of jurisdiction which was dealt with separately, as regards any substantial activity generating costs). The evidence served by Mr Daskalakis went, or went almost entirely, to his cross-application for relief from sanctions. It was evidence in the default judgment application only in the sense that if the relief from sanctions Mr Daskalakis sought had been granted, that would have rendered the default judgment application moot.

vi) On Marketing's side, its incurred costs across both applications were c.£86,000. Considering its schedule of costs, c.£21,000 was incurred, in work on the documents, considering and responding through Ms Wales' statement to Mr Daskalakis' application. The preparation of the statement itself cost c.£14,000. Some of the other solicitors' time, in attendances and correspondence, and perhaps some part of counsel's fees in advising, might also be referable to the evidential response to the relief from sanctions application.

vii) Blending those various elements together, it seems to me that, without requiring the parties to engage in a disproportionate exercise of seeking greater precision through a detailed assessment, the extent to which, in principle, Marketing ought to be paying costs to Mr Daskalakis (for its failed application for judgment in default) broadly balances the extent to which, if it had stood alone, I would have required Mr Daskalakis to pay Marketing's costs (rather than merely to bear his own) of his failed application for relief from sanctions. In that regard, in particular, I reject an overarching submission by Mr Choo Choy QC that because Mr Daskalakis would not have sought relief from sanctions if Marketing had not sought judgment in default, Marketing should bear and pay the general costs of both sides across both applications.

viii) The costs order under the December Order, therefore, will be that there is no order as to costs.

30. The order for costs in the 2018 Claim, then, will be: (a) no order as to the costs of and occasioned by Marketing's application for judgment in default and Mr Daskalakis' application for an extension of time and/or relief from sanctions in respect of his failure to file timely acknowledgment of service; (b) otherwise, Marketing shall bear its own and pay the defendants' costs, the latter assessed summarily at £37,115 and to be paid within 7 days. To the extent required, the order should record that Hogan Lovells are permitted to cause that liability to be discharged by releasing funds subject to their undertaking by way of security for costs in the 2017 Claim to Wallace LLP, the defendants' solicitors, and that upon payment of that sum in full (whether by such release of funds or otherwise) Hogan Lovells' undertaking shall stand discharged.

Costs – 2017 Claim

31. The 2017 Claim has failed by reference to my determination of the defendants' challenge to jurisdiction. There can be no doubt that the defendants must have an order entitling them, in general, to costs (to be assessed on the standard basis, if not agreed) of the jurisdiction application and the 2017 Claim as a whole. To go beyond that broad statement, however, is to encounter various disputes I must resolve. Thus:

    i) Mr Grant QC for Resources and Marketing, and Mr King QC for Feni, submitted that the defendants' costs recovery should exclude certain items or be adjusted downwards because of them.

    ii) Mr Choo Choy QC for the defendants submitted that there should be a joint and several liability of all three claimants in respect of the defendants' costs. Mr Grant QC for Resources and Marketing submitted that their costs liability to the defendants should only extend to the claims brought by them and not to the Feni claims. Mr King QC for Feni submitted that the only costs liability to the defendants should be a liability of Resources and Marketing – Feni, he said, should have no liability to anyone for anything.

    iii) As between the claimants in respect of liability for the defendants' costs, Mr Grant QC submitted that Feni should be ordered to indemnify Resources and/or Marketing in respect of any liability ordered against either of them for the defendants' costs so far as they related to the claims pleaded in Feni's name (but which Resources has latterly been claiming to be entitled to pursue as assignee) ('the Feni claims'). Mr King QC submitted that Resources should be ordered to indemnify Feni in respect of any liability for the defendants' costs ordered against Feni.

    iv) As between the claimants in respect of their own respective costs, Mr Grant QC submitted that there should be no order, whereas Mr King QC submitted that Resources should be ordered to pay Feni its costs.

32. The background to the issues on which Resources' and Marketing's interests and submissions diverged from Feni's ((ii) to (iv) above) is that: (a) as Mr Grant QC reminded me, the 2017 Claim comprised a series of separate claims, none of which was said to be a claim jointly of two (let alone all three) of the claimants against either or both of the defendants; (b) as regards the Feni claims, there was an unresolved dispute between Resources/Marketing and Feni, now separately represented although not when the 2017 Claim was commenced, whether they continued to be claims Feni was entitled

to pursue or were now claims Resources was entitled to pursue in its own name and in any event for its own benefit as assignee. As Mr King QC showed me, if Resources was right in that unresolved dispute, then not only was it entitled to pursue the Feni claims for its own (Resources' own) benefit, but it was obliged to indemnify Feni in respect of any costs incurred by Feni in the pursuit or enforcement of those claims or liability in costs to the defendants. But of course (this being the content of the unresolved dispute) Feni's position remained that Resources had no such entitlement. Whilst it laudably minimised its participation in the jurisdiction challenge, in the interests of keeping costs down overall, it was a keenly interested observer, hoping to benefit from Resources' success, had it seen off that challenge in respect of the Feni claims, so as then to pursue them for itself by showing that the purported assignment to Resources was null and void by operation of Macedonian bankruptcy law. Feni's case as to that was that the purported assignment was concluded at a time when by virtue of Macedonian bankruptcy law an assignment to which Feni's trustee in bankruptcy had not consented was of no effect and he had not consented (indeed, Feni said, he had expressly refused consent twice, when asked, Resources taking the purported assignment only thereafter and despite those refusals).

(i) Defendants' Entitlement

33. I take the first issue first (paragraph 31(i) above). Leaving aside upon whom or in what shares the liability is imposed and/or questions of indemnification between claimants, how full a costs recovery should the defendants be awarded (subject always to assessment of *quantum*, if not agreed)? Given the premise, I shall treat the claimants as a single litigation 'camp' for this purpose.

34. Firstly, it was said, the defendants did not succeed on every point taken in the jurisdiction challenge. That is correct. For example: the defendants succeeded on the Marketing claims by an application of *Samengo-Turner* and *Petter* and not on their primary analysis that they were employees (in the ordinary sense) of Marketing (and indeed there is some force in Mr Grant QC's submission that the alternative case, directly applying *Samengo-Turner* and *Petter*, gained more traction during oral argument than it had been given prominence in writing); not every detailed submission on the facts found favour with the court; Resources and Feni would have had the better of the alternative arguments on the Contracts (Rights of Third Parties) Act 1999 and the scope of the jurisdiction provision in the 'Advisory Contracts', if those points had arisen (albeit some care must be taken over that, because that is a very narrow and to some extent artificial premise). However, in my judgment none of those 'victories' for the claimants involved issues that will have made any material difference to the nature, scope, volume or cost of the evidence, or the burden and cost of the hearing. I cannot say they will not have generated some aggravation of the costs overall, but any such aggravation is not such that justice requires a downward adjustment to the defendants' costs recovery.

35. Secondly, it was said that the defendants' approach to evidence was flawed generally, namely to "*file as much evidence as was conceivable regardless of need, including inadmissible expert evidence, filed and served without permission*".

36. Taking the particular point first, the defendants indeed obtained and served without permission some expert evidence as to UAE and Macedonian employment law. But they did so under protest as to relevance because the claimants had first obtained and

served without permission expert evidence as to Dutch employment law. I can see no basis in fairness upon which the Dutch law evidence could ever have been admitted without also admitting the UAE and Macedonian law. In the event, *the claimants* did not seek the permission they would have needed to rely on the Dutch law evidence and so, consistently with their primary position that none of it was relevant anyway, the defendants did not press for admission of the UAE law or Macedonian law evidence. In those circumstances, there may have been a powerful argument for disallowing the claimants the costs of and associated with the Dutch law evidence, and for requiring them to pay in any event the defendants' (as it happens rather modest) costs of and associated with the UAE and Macedonian law evidence. There is no force in the argument that, the defendants being entitled to the general costs order, they should be deprived of their foreign law costs.

37. Moving then to the general point, I disagree entirely. The volume, detail and nature of the evidence obtained and served by the defendants was in proportion to the scale of the litigation as a whole and the nature and importance of the issues being addressed. As Mr Choo Choy QC rightly observed, it was largely necessary for the defendants to prepare and present a thorough case on the facts, documented as best they could document it, because the claimants had essentially chosen not to do so, but to take a stand instead on the so-called 'Advisory Contracts' and to treat anything else as irrelevant or secondary. If the defendants spent more money than reasonably they should have putting that evidence together, that will come out on assessment, although I shall bear in mind the contention that they did so when it comes to fixing an amount to be ordered by way of interim payment.

38. Separate to the general point about the evidence, but this time a point on which I agree with the claimants, is that the defendants made a failed application for permission to adduce late, additional evidence. Had that application been brought on, as in truth it should have been, at least a little ahead of the main hearing, the defendants would rightly have been required to pay the costs (their own and the claimants'). The justice of that result is not altered by the fact that the defendants (without good reason, in my judgment) left their additional evidence application until so late that it could not be dealt with separately in advance of the main hearing. I would have preferred to assess the costs involved summarily, so as to give effect to that result by just specifying an amount for deduction in an assessment of the defendants' costs equal to the sum of the defendants' incurred costs and the claimants' assessed costs of that application. However, I am not comfortable that I have been given sufficiently reliable statements of the incurred costs on each side to allow me to do that.

39. There will therefore be an order that the defendants must bear their own and pay the claimants' costs (subject to detailed assessment on the standard basis, if not agreed) of the defendants' application to adduce late, additional evidence.

40. Thirdly, and finally, the defendants were criticised for incurring costs in relation to the issue of the validity of the purported assignment of the Feni claims to Resources. To the extent that was advanced as a general criticism, I reject it. The issue had a particular prominence when it arose because it was contentious between Resources and Feni, not just between Resources, claiming entitlement to pursue the Feni claims, and the defendants, against whom it did so. To suggest that it did not deserve close and careful attention on the defendants' behalf by those advising them is to my mind quite unreal. That would have been so even if the claimants presented a united front, and retained

common representation. All the more so when they did not, where that dispute between them was set to cause the procedural complication and added costs of separate representation as between co-claimants, and the now separately represented claimant, Feni, was bankrupt.

41. The criticism of the defendants for incurring cost in relation to issues arising from the purported assignment of the Feni claims also involved two particular points, however. One of those, that the costs incurred were unreasonable in amount, is a matter for assessment (although again, I shall bear it in mind as a contention when considering how much to order on account). The other particular point is well founded. In September 2018, Feni succeeded before Cockerill J on an application to adjourn Resources' amendment application (arising out of its claim to be Feni's assignee) so it would come on for hearing only after the jurisdiction challenge had been determined. Cockerill J dealt with the costs of that application, ordering Resources to pay Feni's costs but also deciding that there should be no order as to the defendants' costs. The latter decision is clear in the transcript of the hearing although it was not included in the written order drawn up afterwards. In my judgment, it would be wrong not to give effect to that decision (even assuming I would have jurisdiction to depart from it).

42. The result on a consideration of this first topic, then, is that there must be an order the effect of which is to entitle the defendants to their costs of the 2017 Claim generally (including of course the jurisdiction application), to be assessed on the standard basis if not agreed, save that the defendants must bear their own and pay the claimants' costs of the defendants' application to admit late, additional evidence in the jurisdiction application (Application Notice dated 25 October 2018) and that the defendants are not entitled to their costs of Feni's application to adjourn the hearing of the amendment application (Application Notice dated 20 August 2018).

(ii) Who Must Pay the Defendants?

43. I have no doubt at all that Resources and Marketing should be liable between them for the full amount of the defendants' proper entitlement, i.e. should be liable for costs referable to all of the claims brought without excluding the Feni claims as suggested by Mr Grant QC. On the evidence put before the court for this hearing by Feni, which Resources and Marketing chose not to answer, it seems to me probable that the proceedings were instituted, pursued and funded by Resources and Marketing, for their benefit, including the claims brought in Feni's name. Further, when Feni's bankruptcy intervened, Resources and Marketing continued to pursue all claims, including those brought originally in Feni's name, and plainly had every intention of continuing to do so unless and until the court made a decision (if it did prior to trial) that the purported assignment to Resources was null and void.

44. In my judgment, it is fair, just and appropriate to treat Resources and Marketing as real and effective claimants against the defendants for all claims throughout. They should be liable, jointly and severally, in full.

45. That does not mean that Feni should have no liability to the defendants. Mr King QC says with a certain degree of force that Feni's trustee in bankruptcy was in an invidious position. Proceedings had been commenced in Feni's name without, so far as he could ascertain, the knowledge or authority of anyone with power to authorise such proceedings. At the same time, and although he took the view that the purported

assignment to Resources had no effect, he would need to be careful not to do anything to prejudice Resources' rights if, contrary to that view and as Resources was insisting, the purported assignment was valid.

46. However, none of that required Feni, once separately represented, to adopt the proceedings. It would not prejudice Resources' rights for Feni to consent to the claims hitherto pleaded in its name being pursued by Resources and by Resources only, in which Resources would have to prove against the defendants that it had title to sue (as to which Feni could have agreed to be bound by the result, if it needed to be retained as a party at all). Instead, Feni contested Resources' amendment application, not to try to avoid the defendants being troubled further here by the Feni claims, but so as to keep the benefit of those claims to itself and continue the pursuit of them here for itself.

47. I have already said it is laudable that Feni, separately represented, sought to minimise its need to be separately involved while jurisdiction was still under challenge, so as to keep its costs down and so as to limit the aggravation of the other parties' costs caused by its separate involvement, and so it is. But I do not think that changes the justice of requiring that the defendants' costs of the Feni claims be payable, in principle, by Feni, as a joint and several liability with Resources and Marketing. (Given my conclusions on the evidence available – paragraph 43 above – I do not agree with the submission of Mr Choo Choy QC that Feni should be liable for *all* of the defendant's recoverable costs, whether or not referable to the Feni claims.)

48. Therefore, the order as to the defendants' entitlement (see paragraph 42 above) shall be in terms rendering Resources and Marketing jointly and severally liable in full and rendering Feni liable, jointly and severally with Resources and Marketing, to the extent only that the defendants' recoverable costs (as assessed or agreed) related to the Feni claims.

(iii)/(iv) Intra-Claimant Liabilities (Resources/Marketing vs. Feni)

49. Mr King QC advanced two submissions, neither of which I can accept.

50. First, he argued that since the issue over the validity of the purported assignment had been rendered moot by the success of the jurisdiction challenge, as between Resources and Feni the litigation (or at any rate the amendment application, which Mr King QC said accounted for the vast majority of Feni's separately incurred costs) should be treated like a discontinued claim, Resources being the discontinuing claimant. But there is no such analogy. There is no sense in which Resources has withdrawn, discontinued or backed away at all from its claim that Feni validly assigned the relevant causes of action. It is just that Resources' claimed entitlement in that regard will now never fall to be determined in this court.

51. Second, Mr King QC advanced the proposition that it was difficult to conceive of circumstances in which Resources would not pick up Feni's costs (including liability for the defendants' costs). This was on the logic that Resources asserted an entitlement (via the purported assignment) that, if it existed, carried with it an obligation to indemnify Feni in respect of costs (including costs liability to the defendants). However:

i) If Feni had lost the issue of the validity of the purported assignment, true it is that in consequence it would have an indemnity for its own costs and its liability to the defendants generally, but that would not have applied to the costs of the issue it had lost and as things now stand those, as I have already noted, are said to be the vast majority of Feni's separately incurred costs.

ii) If Feni had won that issue, it could expect to recover from Resources its costs of that issue, but not its costs of the proceedings more generally or any costs liability to the defendants. Moreover, there would then have been a substantial case for Resources and Marketing to recover from Feni costs incurred and funded by them pursuing the Feni claims prior to Feni, once separately represented, adopting the proceedings as it did. I repeat (from part (ii) above) that, once separately represented, Feni contested the validity of the purported assignment in this court not to try to avoid the defendants being troubled by the Feni claims, but so as to pursue them for itself, whether or not they had originally been brought with its due authority.

52. The court is thus faced with the position that: on Feni's case concerning the purported assignment, as still maintained, it could not seek to recover from Resources in respect of any costs liability to the defendants, it could expect to make a costs recovery from Resources on the assignment issue, but it might well face a costs liability to Resources/Marketing for past costs incurred in its name and for its benefit; on Resources' case as to the assignment, as still maintained, it would be obliged to indemnify Feni for costs liability to the defendants but would expect to recover from Feni the costs of establishing its case on the assignment; in the event, neither is it feasible to determine the rights and wrongs of the assignment issue, nor is the court asked by either side to do so, possibly because of the decision to postpone a decision on the amendment application. As it happens, that decision to adjourn the amendment application was made at Feni's instance, although the good case management sense of it will have seemed clear enough at the time. I say that only 'possibly' causes the difficulty now because it is not clear to me that determination of the amendment application would have required, or in fact included, any final decision on the validity of the assignment.

53. In the circumstances, I agree with Mr Grant QC that the just order as between Resources/Marketing and Feni, in respect of their own costs, is that they must lie where they have fallen and there will be no order as to costs. As regards liability for the defendants' costs of the Feni claims, however, the same circumstances render it just, in my view, for that burden to be shared, in principle, 50:50 as between Resources/Marketing and Feni. That decision in principle may or may not be of value to Resources/Marketing in practice, since Feni is bankrupt, but that should not affect the principle (and in any event I do not have information from which to begin to gauge whether there will be some material recovery for unsecured creditors in Feni's bankruptcy), just as Feni's bankruptcy was not relevant to my consideration at stage (ii) of the claimants' respective proper liabilities to the defendants.

Conclusion

54. In conclusion, then, as to liability for costs in the 2017 Claim, there will be orders that:

i) Resources and Marketing shall have joint and several liability for the defendants' costs of the 2017 Claim, subject to detailed assessment if not agreed, save as specified in paragraph 42 above ('the defendants' recoverable costs').

ii) Feni shall have liability, jointly and severally with Resources and Marketing and each of them, for the defendants' recoverable costs to the extent they related to the Feni claims.

iii) There shall be no order as to costs as between Resources and Marketing, on the one hand, and Feni, on the other hand, in respect of their own respective costs.

iv) To the extent that Feni discharges its liability under (ii) above, Resources and Marketing shall have joint and several liability to pay Feni 50% of any and all sums paid by Feni to the defendants or either of them.

v) To the extent that either Resources or Marketing discharges its liability under (i) above as regards costs related to the Feni claims, Feni shall have joint and several liability to pay it 50% of any and all sums paid by it to the defendants or either of them.

Costs – 2017 Claim, Interim Payment

55. It was not disputed that there should be an order, in the usual way, for an interim payment on account of the defendants' entitlement as to costs in the 2017 Claim.

56. The defendants say their total incurred costs in the 2017 Claim (apart from costs incurred for this consequentials hearing) are a little over £540,000. Mr Grant QC said this was an 'eye-watering' amount, by which I took him to mean unreasonable and disproportionate. It does seem rather large, at first blush, and some of the high level points Mr Grant QC made may have force (e.g. as to the concentration of time spent at senior level, some rather large amounts being incurred for relatively minor tasks or stages in the proceedings, and the very high level of counsel's fees), although such points may perhaps be answered, or their impact reduced, by other factors (e.g. the relatively lower hourly rates charged and number of fee earners used by Wallace LLP than this court often sees, including for example in the case of Hogan Lovells on the other side in these proceedings, and the life-changing importance and magnitude of the liabilities being asserted against the defendants).

57. On the other hand, I do not agree with Mr King QC in his submission, adopted by Mr Grant QC, that the £205,000 presently held by Hogan Lovells under an undertaking by way of security for the defendants' costs of the 2017 Claim should operate as a ceiling upon any interim payment amount ordered now.

58. For the purposes of the current question – the reasonable amount to order by way of a payment on account – my arithmetic is as follows:

i) I start with the costs said to have been incurred, c.£540,000.

ii) I deduct £39,875 (but for current purposes, call that £40,000) previously paid to the defendants pursuant to an order of Bryan J dated 9 November 2017 as to security for costs.

iii) I deduct further, erring on the side of generosity to the paying parties at this stage, (a) £40,000 to cover the costs for the defendants' account of the late evidence application and (b) £10,000 to cover the defendants' costs of the amendment application adjournment application.

iv) That gives me a reduced starting point (at 100% costs recovery) of £450,000.

v) I judge a reasonable payment on account to be 60% of that total, i.e. £270,000. I also think (although this is not ultimately the test) that even bearing fully in mind the criticisms of the defendants' costs raised by Mr Grant QC and Mr King QC, it would be surprising if the defendants' final recovery on a detailed assessment were not at least that amount.

59. At this stage, I have no basis for judging with any pretence of science the proportion of the defendants' recoverable costs that will be found on assessment to have related to the Feni claims. I would be surprised if such costs would prove to be less than £90,000, which is also one third of what I have decided is the proper overall payment on account.

60. The order for a payment on account in the 2017 Claim, therefore, will be that the defendants are to be entitled to £270,000, as to £180,000 as a joint and several liability of Resources and Marketing only and as to £90,000 as a joint and several liability of all three claimants. As with the assessed costs entitlement in the 2018 Claim, £205,000 of that entitlement must be paid within 7 days, i.e. by 27 February 2019, with Hogan Lovells to be entitled to cause that amount to be paid from the funds they hold under their undertaking by way of security for costs and that undertaking to stand discharged upon payment in full of that amount to the defendants. The balance of £65,000, however and by whomever it is paid, must be paid within the normal time allowed of 14 days, i.e. by 6 March 2019.

Costs – Interest

61. I decline in my discretion to order any interest on the defendants' costs entitlement in the 2018 Claim. The costs recovery there is relatively modest, in the general scale of this litigation, the costs have been summarily assessed, and they will be paid in full very promptly, less than 2 months after the dispositive order in the proceedings.

62. As regards the defendants' final costs entitlement in the 2017 Claim, as may be agreed or assessed, that will be much more substantial, and it may well be some considerable time before it is discharged. I think it just and appropriate to order that interest is to run on the amount to which the defendants are entitled by way of costs in the 2017 Claim at 8% per annum and from 18 January 2019, the date of the dispositive order in the proceedings that has generated the costs entitlement albeit that costs entitlement has only been settled a month later because of counsel's availability to deal with consequentials.

Costs – The Consequentials Hearing Itself

63. Finally, whilst I have not ordered as large a payment on account as Mr Choo Choy QC sought (he proposed £377,500) and his arguments in the 2018 Claim were relatively unsuccessful, on the other hand so too Mr Grant QC's arguments in the 2018 Claim (he proposed that Marketing should be a net costs payee), and more generally I regard the

defendants as the successful party overall on the consequential matters that were argued. But even if they had not been, I am not persuaded that would have had any real impact on the costs of the consequentials hearing.

64. The evidence provided for it (witness statements from Mr Weinberg for the defendants and Mr Speller for Feni) were relevant and helpful. The argument was valuable but no doubt (as ever) not inexpensive. The defendants are the clear victors in the litigation overall, having had both Claims set aside for want of jurisdiction. There is no basis for saying that the extent to which the defendants did not get all they sought on costs (or the fact that I granted conditional permission to appeal against the December Order, not resisted by Mr Choo Choy QC), or the individual points on which I may have sided with Resources/Marketing or Feni, will have increased materially the costs of this hearing. Those costs should be regarded as costs in the case, which means that they should be the defendants', with no order for costs as between Resources and Marketing, on the one hand, and Feni, on the other hand. I see no reason at all for distinguishing between the claimants as regards responsibility to the defendants for these costs.

65. The defendants provided a schedule of costs for summary assessment, totalling £29,340.37, an amount that brought more tears to Mr Grant QC's eye. I regard the solicitors' work on documents (£11,692) as high and likely to be difficult to justify on a detailed assessment; but otherwise there is to my mind nothing obviously excessive or disproportionate in that schedule, although in the usual way there would likely be room for greater argument if a detailed assessment were ordered. The order will be that the claimants must pay, as a joint and several liability, the defendants' costs of this hearing, summarily assessed at £20,000 (being 80% of £25,000, a starting point reduced from the claimed total because of my concern about the work on documents figure), payment within 14 days.

Draft Orders

66. I am handing down this judgment without requiring the parties to attend. Counsel must please seek to agree and submit as soon as possible for my approval draft Orders, one in each Claim, reflecting and giving effect to the decisions identified above. I thank them in advance for that further assistance, and generally for their considerable assistance throughout.