IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Division

Claim No. 2023/COM/adm/00063

IN THE MATTER of Section 281 of the Merchant Shipping Act, Chapter 268

IN THE MATTER OF an Admiralty Action *in Rem* against the Proceeds of Sale of the M/V Crystal Serenity and the Proceeds of Sale of the M/V Crystal Symphony

AND IN THE MATTER of Section 8(1)(c) of the Supreme Court Act, Chapter 53

AND IN THE MATTER of Sections 13, 60 and 61 of the Value Added Tax Act, 2014

AND IN THE MATTER of Section 4(1) of the Value Added Tax Regulations, 2014

BETWEEN

THE COMPTROLLER OF VALUE ADDED TAX

First Claimant

and

THE ATTORNEY GENERAL

Second Claimant

AND

ADMIRALTY MARSHAL

First Defendant

and

ALEXIOU, KNOWLES & CO

Second Defendant

Before: The Hon. Madam Justice Simone Fitzcharles

Appearances: Ms Kenria Smith for the First and Second Claimant

No Appearance for the First Defendant

Mr Richard Horton with Ms Winsome Carey and Mr Darzhon Rolle for the Second Defendant

Hearing: On the papers

DECISION ON COSTS

FITZCHARLES, J.

1. This is an application by the Second Defendant, the law firm of Alexiou, Knowles & Co ("the Firm") to have its costs assessed and for an Order that such costs be permitted on an indemnity basis. It is made pursuant to the Order of this Court on 9th September 2024 whereby the First Claimant ("**the Comptroller of VAT**") and Second Claimant ("**the Attorney-General**") (collectively "**the Claimants**") were granted leave to discontinue this action as against the First Defendant ("**the Admiralty Marshal**") and the Firm (collectively "**the Defendants**"), with costs to the Firm to be assessed.

2. In awarding the Firm the costs it incurred in and ancillary to these proceedings, the Court has determined that adherence to the general principle that costs follow the event is appropriate in this case.

3. To deal with this application, the Court has received and reviewed, in addition to the various pleadings filed in the matter now discontinued, the following:

   (1) Submissions on Costs on Behalf of the Firm dated 30 September 2024,

   (2) the Bill of Costs filed by the Firm on 1 October 2024,

   (3) the First Affidavit of Mandy McKenzie filed on 21 May 2024 on behalf of the Firm,

   (4) the Claimants' Submissions on Costs dated 6 October 2024, and

   (5) the Claimants' Objections to Bill of Costs dated 7 October 2024.

4. The Court also considered the Affidavit of Patricia Jackson filed on 21 November 2023 on behalf of the Claimants.

Issues

5. The issues to be determined are relatively simple. Succinctly stated, they are:

   (1) whether costs should be awarded on an indemnity basis; and

   (2) if not, whether, taxed on a standard 'party and party' basis, the Firm is entitled to the amount of costs it seeks in its submitted Bill of Costs.

Relevant Events

6. There is no dispute as to the general background of this case. A summary of the facts suffices, which is primarily based upon the affidavit evidence put forward by the parties.

7. In the actions, ***DNB Bank ASA v The Owners and Parties Interested in the Motor Vessel "Crystal Symphony" et al*** 2022/COM/adm/00012 and ***DNB Bank ASA v The Owners and Parties Interested in the Motor Vessel "Crystal Serenity" et al*** 2022/COM/adm/00013 (collectively "**the DNB Action**"), the Firm was the legal representative of DNB Bank ASA ("**DNB Bank**"). DNB Bank is mortgagee of First Priority Registered Mortgages over two Motor vessels known as the "*Crystal Symphony*" and "*Crystal Serenity*" ("**the Ships**").

8. The Ships were arrested in The Bahamas and sold for the sums of $25,000,000.00 (for the M/V *Crystal Symphony*) and $103,000,000.00 (for the M/V *Crystal Serenity*), pursuant to Supreme Court Orders for Appraisement and Sale of the Ships *pendente lite* dated 24 March 2022. By a condition of the Orders for Appraisement and Sale, all sale proceeds were to be placed into interest-bearing joint accounts held jointly by the Admiralty Marshal and the Firm as officers of the Court. Further, the Orders stipulated that no payments shall be made out of the joint account except pursuant to an order of the Court under **Order 67 Rule 24** of the **Rules of the Supreme Court**. Creditors were notified by an advertisement of the Admiralty Marshal that "***any person with a claim against the Vessel or the proceeds of sale thereof, upon which he intends to proceed to judgment, should do so before the expiry of the period of 30 days***...".

9. On 20 October 2022, the Attorney General served the Admiralty Marshal with a Notice of Assessment for Value Added Tax in the sum of $11,636,364.00. DNB Bank along with other lenders and the purchasers of the Ships, on 15 November 2022, filed an Objection to the Notice of Assessment for Value Added Tax.

10. On 17 January 2023, pursuant to the 19 December 2022 decision of Tynes J (Actg), an Order for the determination of priority of payments against the proceeds of sale of the Ships and for retention of sums for eventual payment to agreed creditors or judgment creditors, was filed. By this Order, in part, the sum of US$2,272,727.27 was earmarked (in the joint account which held proceeds of sale of the Ships) for the payment of the amount assessed by the Department of Inland Revenue against the Admiralty Marshal in relation to value added tax subject to: (i) the Court's determination as to whether the sum assessed is properly to be included in the Marshal's expenses of the sale of the Ships, (ii) to directions of the Court and (iii) to any aggrieved party's right to object to the assessment and appeal any decision by the Comptroller of VAT.

11. Both in the decision of Tynes J (Actg) and a subsequent decision of Forbes J made on 31 March 2023 the Court confirmed that, primarily, there could be no payment out of the proceeds of sale of the Ships unless the receiving party had been adjudged a creditor. Both judges confirmed that DNB Bank, as at the time they issued their decisions, was the only party with such judgment in its favour.

12. On 8 March 2023, DNB Bank sought an order and declaration from the Supreme Court in the DNB Action that the expenses of the Admiralty Marshal related to the

Court-ordered sale of the Ships, and did not include value added tax. The Comptroller of VAT then applied to intervene in the DNB Action.

13. Further, having received no response to their 15 November 2022 Objection to the Assessment of value added tax on the sale of the Ships, DNB Bank and its fellow objectors filed a Notice of Appeal to the Tax Appeal Commission on 16 March 2023. The Comptroller of VAT filed an application in the Tax Appeal Commission on 30 June 2023 supported by Affidavit filed 19 July 2023 to strike-out DNB Bank's Notice of Appeal on the basis that only the Admiralty Marshal had *locus standi* to object. That application was not heard up to the time of the filing of the papers in this application. A disgruntled DNB Bank described its tax appeal as sitting "in limbo".

14. The application to intervene brought by the Comptroller of VAT in the DNB Action was on 25 September 2023 dismissed by Hanna-Adderley J and the Court urged the Attorney General to take out separate actions on behalf of the Comptroller of VAT to prosecute the Department of Inland Revenue's claims against the Owners of the Ships. The Court stated:

"***16. Obviously, the OAG's application to intervene is to ensure that the VAT Department receives the totality of sums on what they assert is the VAT applied on the sale of the vessels and prevent the payout by the Admiralty Marshal to the Claimant Bank as such a payout can only be made to a Judgment holder or by consent. By then Justice Tynes' Orders provisions have been made for the setting aside of the sums the OAG asserts are owed to the DIR as the VAT levied on the sales of the Vessels. It is for this reason that I am of the view that at this juncture in this action it would not be necessary for the intervention of the Comptroller of VAT. <u>There is of course no bar to the Comptroller of VAT commencing an action against the Owners of the vessels as I fully expect other Creditors to do</u>***." [Emphasis added].

15. By an Admiralty Claim *in Rem* Form the Claimants commenced this action on 6th November 2023 against the Defendants. By Notice of Application filed on 21st November 2023 the Claimants sought the Court's permission (after the fact) to extend the period of 90 days to file the Claimants' Admiralty *in Rem* Claim.

16. Subsequently, in a 9 February 2024 ruling, Hanna-Adderley J. ordered that the funds previously reserved for the Comptroller of VAT's value added tax claim be released from the joint account held in the names of the Admiralty Marshal and the Firm, and paid to DNB Bank. Hanna-Adderley J confirmed in her ruling, having considered the evidence and the law, that she was persuaded by "***the overwhelming arguments and authorities that VAT is not a Marshal's expense nor is it chargeable on Judicial Sales***."

17. The Firm was of the view that the Claimants' Admiralty Claim *in Rem* does not disclose any reasonable ground for bringing a claim and/or that it is frivolous, vexatious, scandalous and/or an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings. As such, the Firm sought to strike-out the

claim of the Claimants, and brought that application by way of Notice of Application filed on 17 May 2024. In brief, the Firm's grounds were –

(1) that neither the Admiralty Marshal nor the Firm is, or ever has been, the owner of the M/V *Crystal Symphony* or the M/V *Crystal Serenity*; rather, they are acting in their capacity, pursuant to Orders of the Court, as officers of the Court in respect of the proceeds of judicial sales and are subject to the Court's direction;

(2) the Comptroller of VAT and the Attorney General have used one *in Rem* Claim Form in respect of two different vessels (or the proceeds of sale of two different vessels); and

(3) if it be said that this action is a claim *in Rem* against the owners of the Ships, the Claim Form discloses no cause of action *in Rem* against the previous owners of the Ships since the Comptroller's claim is made *in Personam* against the Admiralty Marshal (and by extension, the Marshal's principal, the Supreme Court) in relation to the sale of the Ships.

18. The Firm submitted also that the Claimants had shown no reason to explain why they should have an extension of time to bring a claim against the owners of the Ships. The Firm stated, amongst other things, that any other claim against the proceeds (which represents the *res*) would involve invoking a claim *in rem* against the Ships and their previous owners. Moreover, the Firm argued that the Comptroller of VAT did not explain why this action was brought before leave was sought to do so out of time.

19. On 29 July 2024, the Comptroller of VAT and the Attorney General applied by way of Notice of Application to withdraw the action in its entirety, following which the Court granted permission to the Claimants to discontinue their action with costs, as applied for, to the Firm.

Arguments of the Firm

20. The Firm opens its argument with general principles on assessment of costs and focuses on Rule 71.9 of the Supreme Court Civil Procedure Rules 2022 (the "CPR"), which speaks to the Court's discretion to order costs. The Firm explores principles in Rule 71.12 of the CPR which sets out general rules on a Court's summary assessment of costs. This may be contrasted with the detailed assessment of costs which is conducted by the Registrar pursuant to Part 72 of the CPR.

21. The Firm also references, as both parties do, the decision of Winder CJ in **Robert Forbes** v **Ministry of Tourism and Attorney General of the Commonwealth of The Bahamas** 2021/COM/lab/00038, in which the Court comprehensively traversed the law in relation to a summary assessment of costs. In doing so, the Firm highlights that the Court should have a bill of costs before it so as to avoid assessment being done on an arbitrary basis. It is also stated that the Court must permit the parties to be

heard and such opportunity may be a hearing on the papers. Lastly, the Firm states that a court should exercise its discretion in this exercise judicially.

22. On the issue of seeking costs on an indemnity basis, the Firm delves into the applicable principles as it cites the Jamaican High Court decision of **Knightsman Limited v Western Regional Health Authority and the Attorney General** [2020] JMSC Civ 229. In that case, Brown Beckford J referred to the UK High Court decision of Coulson J in **Fitzpatrick Contractors Limited v Tyco Fire and Integrated Solutions (UK) Limited** where the court set out the principles for indemnity costs. In summary, those principles are:

    (1) indemnity costs may be ordered outside of situations where moral condemnation is appropriate;

    (2) unreasonable conduct is required, not merely misguided (in hindsight) or wrong conduct;

    (3) matters should be considered on a case by case basis to see whether there are circumstances which are outside of the normal run of litigation, such that an indemnity costs order is justified;

    (4) examples of conduct which warrants an indemnity costs order include use of litigation for an ulterior motive and making an unjustified personal attack on one party by another; and

    (5) pursuit of a hopeless claim, and not merely a weak one, could attract an indemnity costs order.

23. The Firm also relies upon that portion of the decision of Brown Beckford J which sets out the factors that should be evaluated to justify an award of indemnity costs as stated by Tomlinson J in **Three Rivers District Council v The Governor and Company of the Bank of England (No. 6)**. Amongst those factors the Court evaluates whether the party against whom indemnity costs are sought acted unreasonably (with culpability). The court reviews the conduct of that party before and during the trial. The court looks at whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which it did so. According to Tomlinson J, the claimant runs a high risk of having to pay indemnity costs if he pursues a claim that is "speculative, weak, opportunistic or thin."

24. On the Firm's analysis, it submits that this action by the Claimants "***was woefully misguided and an utter waste of judicial resources***". The Firm contends that "***the entire premise of the Claimants' action was based on the notion that the judicial sale of the [Ships] constituted a taxable supply of goods by a taxable person and was subject to value added tax at the standard rate of 10%. This premise was refuted in the recent decision***" of Hanna-Adderley J in the DNB Action.

25. It is further contended for the Firm that the actions of the Claimants were done in furtherance of an ulterior commercial purpose and those actions warrant costs on an indemnity basis. Reliance is placed on **Amoco (UK) Exploration Co v British American Offshore Ltd (No 2)** [2001] All ER (D) 327 (Nov). The Firm also relies upon the averments set out immediately below.

    (1) At no point after the Ships were sold did the Comptroller of VAT or the Attorney General seek to prosecute their claims against the Ships or their owners despite being urged by the Court to do so.

    (2) The Claimants sought to intervene in the actions commenced by DNB Bank (unsuccessfully so), and tried to stifle DNB Bank's bid to object to and appeal the assessment of value added tax through proper channels.

    (3) The Claimants required CIBC Bank (where the proceeds of the sale of the Ships were held in a joint account by the Defendants pursuant to Court Orders) to pay the claimed money over to them with threats of penalties. Then, they instituted proceedings against the Admiralty Marshal and the Firm who have no legal interest whatsoever in the proceeds of sale, being merely officers of the Court, before abandoning those proceedings after substantial costs had already been incurred.

    (4) As a result of the Claimants' actions, on or around 3 October 2023, the Admiralty Marshal and Mr E Terry North (a partner of the Firm acting as a signatory on the Joint Accounts) could not make personal banking transactions at CIBC due to the bank being served with a Notice from the Comptroller of VAT. The Firm wrote to Ms Luana Ingraham at the Attorney General's Office in this regard on 3 October 2023, but received no response. This was an attempt by the Comptroller of VAT to exert pressure on the parties to release the funds to the Claimants on the alleged basis they are entitled to the same under the VAT legislation.

26. The Firm asks the Court to consider also that the applications before it for an extension of time by the Claimants and for a strike out of the claim by the Defendants were slated to be heard on 9 September 2024, with directions that written submissions were to be filed and served by all parties on or before 26 July 2024. On 26 July 2024, after Counsel for the Firm had already prepared the required written submissions, Counsel for the Claimants informed the Defendants of the Claimants' intention to withdraw the action. The Firm contends this position could have been communicated before the Firm had incurred further costs to defend the action.

27. Finally, the Firm relies upon the decision of Lord Woolf in **Petrotrade Inc v Texaco Ltd** [2002] 1 WLR 947 in which the court discussed the practical effect of an order for indemnity costs. Reliance was placed on this decision as the Firm wishes to ensure costs are not awarded at the lesser standard basis, which is based on the concept of proportionality. However, the reasonableness of costs is relevant regardless of whether standard or indemnity costs are awarded.

28. The Firm rounds off its arguments by stating that indemnity costs against the Claimants would be appropriate because they forced the Firm to incur costs which were unwarranted and could have been easily avoided had the Claimants fully assessed the circumstances initially. This is supported, according to the Second Defendant, by the First and Second Claimants' 'last minute withdrawal' of the action. The Second Defendant seeks approval of its costs of $61,341.50 and disbursements of $990.00.

Arguments of the Claimants

29. The Claimants state that in accordance with CPR Part 72.21, the Court shall not allow the recovery of costs which are unreasonable. Further, when deciding what is reasonable the Court must consider whether the novelty, weight and complexity of the matter in respect of which costs are sought. It is submitted by the Claimants that this matter is not a novel one and it has little complexity or weight. They explain that there were two "*trite*" applications before the Court – one for an extension of time and the other, a strike-out application. The Claimants say that such applications "have been argued many times by Counsel."

30. The Claimants further contend that costs must be proportionate as this is required by the Overriding Objective.

31. Claimants point out that pursuant to CPR Part 72.21(3) when deciding what is reasonable the Court ought to consider the novelty, weight and complexity of the case. It is stated that there are only two applications before the Court. The application of the Claimants is for an extension of time in which to bring the claim. The Firm's application is to strike out the claim. The Claimants assert that there is nothing novel, weighty or complex about these applications.

32. On the issue of payment of indemnity costs, the Claimants assert that "*if any of the parties acted egregiously in this matter, it was the Second Defendant who knew that there was an application by the Comptroller of VAT, yet allowed a hearing on 9 February 2024 which depleted the proceeds of the sale.*" The Claimants therefore state that the Second Defendant acted "*in furtherance of an ulterior commercial purpose, which was not frank and without full disclosure.*"

33. On the other hand, it is submitted for the Claimants that the Comptroller of VAT acted in her function "*to recoup VAT monies for the People of this great Commonwealth... to be held in trust for the Government.*" It is contended that there are no exceptional circumstances (i.e. those which may take the case outside of normal litigation) to warrant the award of indemnity costs. In fact, the Claimants state that "*even where the litigation is bitter and unreasonable, indemnity costs do not flow.*" Reliance is place upon ***Levine v Callenders & Co et al*** [1998] BHS J No 75 (as referred to in ***Douglas Ngumi v The Hon Carl Bethel et al*** 2017/CLE/gen/01167). The Claimants extensively quote passages from the ***Ngumi*** case where Charles J (as she then was) set

out the law relevant to the consideration whether a judicial discretion to award indemnity costs ought to be exercised.

34. Rehearsing those principles, it is argued for the Claimants that the conduct of the Comptroller of VAT in filing a claim to receive VAT out of proceeds of sale of the Ships pursuant to the VAT Act is in no way egregious, contumacious or unreasonable.

35. Reference is made to the decision of Fraser Snr J in ***The Committee to Restore Nymox Shareholder Value Inc et al v Paul Averback et al***, 2023/COM/com/00057 in which the Court applied guidance provided by Moree CJ in ***Taihu International Cruise Co Limited v Diamond Cruise International C. Limited*** [2020] 1 BHS J No 45. In those cases the Court examined relevant facts pertaining to the manner in which the parties conducted the litigation and came to the conclusion, respectively, that the paying parties' conduct did not rise to the level of moral condemnation or egregious behavior. The Claimants, resultantly, assert that the Court ought not to punish them by ordering indemnity costs and invite the Court to make a similar finding in relation to their conduct as was made in ***Nymox*** and ***Taihu***, respectively.

36. The Claimants argue that it is reasonable for the paying party to pay per the 1984 Bar Scale Fees and the 2006 Inflation Update. They say that the Bar Council for The Bahamas has set the Bar fees pursuant to the date of call of Counsel at The Bahamas Bar. Fees are paid on that basis. As such, it is contended that:

    (1) Richard J W Horton whose call date is 9 June 2023 is entitled to bill at the rate of $141.70 for his work as he has been called to The Bahamas Bar for 1 year;

    (2) Wynsome D Carey whose call date was 26 September 2008 is entitled to bill at the rate of $404.90 per hour for her work as she has been called since 16 years ago; and

    (3) Darzhon J R Rolle was called on 25 October 2019, so for 5 years' call his hourly rate for work should be $182.20.

37. It is further argued that in reviewing the Bill of Costs it is noted that there are many chain emails for which Counsel wants to be paid. The usual practice of the Court is to pay $75 for chain emails, and $50 for single emails. Further, the First and Second Claimants point out that there are many internal emails (internal to the Firm in which Counsel works). These emails, it is contended, should be disallowed as not reasonable. Reference is made to **Robert Forbes v Ministry of Tourism et al** 2021/COM/lab/00038. The bundle also helpfully includes the actual bill of costs in that case along with the schedule of challenges to the bill of costs and the ultimate decision on each item by Winder CJ.

Analysis and Disposition

38. The issue of indemnity costs first arises. Paragraph 3 of the decision of Coulson J in **Fitzpatrick Contractors Limited v Tyco Fire Integrated Solutions (UK) Limited** [2009] BLR 144 as to the principles for indemnity costs bears repetition here:

"Principles Relating to Indemnity costs

i. Indemnity costs are no longer limited to cases where the court wishes to express disapproval of the way in which the litigation has been conducted. An order for indemnity costs can be made even where the conduct could not properly be regarded lacking in moral probity or deserving of moral condemnation in **Reid Minty v Taylor** [2002] 1 WLR 2800.

ii. However, such conduct would need to be unreasonable 'to a high degree. Unreasonable in this context certainly does not mean merely wrong or misguided in hindsight.' (Simon Brown LJ (as he then was) in **Kiam v MGN Limited No. 2** [2002] 1 WLR 2810).

iii. It is always important for the court to consider each case on its facts and to decide whether there is something in the conduct of the action or the circumstances of the case in question which takes it out of the norm in a way which justifies an order for indemnity costs (see Waller LJ in **Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson** [2002] EWCA (Civ) 879).

iv. Examples of conduct that has led to such an order for indemnity costs include the use of litigation for ulterior commercial purposes (see **Amoco (UK) Exploration v British American Offshore Ltd** [2002] BLR 135) and the making of an unjustified and personal attack on one party by the other (see **Clark v Associated Newspapers** (unreported) 21st September 1989).

v. There are a number of decisions, both of the TCC, and of other courts, which make plain that the pursuit of a weak claim will not usually, on its own justify an order for indemnity costs, whereas the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) will lead to such an order. In both **Wates Construction Ltd v HGP Greentree Allchurch Evans Ltd** [2006] BLR 45 and **EQ Projects Ltd v Javid Alavi** [2006] BLR 130 this court was persuaded that, in the circumstances of those cases, an order for indemnity costs was appropriate because the claimants should have realized that their claim was hopeless and should not have taken the matter on to trial. However, in **Healy-Upright v Bradley & Another** [2007] EWHC 3161 (Ch), the court reiterated that an order for indemnity costs was not justified by the mere fact that the paying party had been found to be wrong, either in fact or in law or both, or by the

fact that in hindsight, the result for the case now being known, the position adopted by that party may be thought to have been unreasonable."

39. These principles ought to be considered along with further the authority cited by the Second Defendant of **Three Rivers District Council v The Governor and Company of the Bank of England (No. 6)**. At paragraph 25, Tomlinson J set out guidelines for the court to consider as it decides whether to award indemnity costs as follows:

"1) The Court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide;

"2) The critical requirement before an indemnity order can be made in the successful defendant's favour is that there must be some conduct or some circumstances which takes the case out of the norm;

"3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an *a fortiori* ground, but rather unreasonableness;

"4) The court can and should have regard to the conduct of an unsuccessful Claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the Claimant to raise and pursue particular allegations and the manner in which the Claimant pursued its case and its allegations;

"5) Where a claim is speculative, weak, opportunistic or thin, a Claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails…".

40. In looking at the application brought by the Claimants, described as "woefully misguided and an utter waste of judicial time" by the Firm, I take note the Court's pronouncement in the DNB Action. The main question was whether the judicial sale of the Ships constituted a taxable supply of goods by a taxable person and was subject to VAT at the standard rate of 10%.

41. In the DNB Action, Hanna-Adderley J pronounced at pages 15 and 22:

"16.

…

"The Court accepts and approves of Counsel's analysis of Admiralty law and practice with respect to recoverable Marshal's expenses from the sale proceeds of a judicial sale. The authorities cited support the analysis and I have found no instances or case authority under Bahamian law or International practice, which

> The Bahamas follows in maritime law, which establishes that VAT is a Marshal's expense and that Judicial sales are or have been the subject of VAT…
> …
> "17. With respect to the release from the Joint Account of the sum of US$2,272,727.27 and US$9,363,636.36 to the Claimant, I have determined that the sums assessed are not Marshal's expenses and ought not to be included in the Marshal's expenses of sale. Having made that determination, I can see no justification for withholding those sums from the only Judgment holder in this action, the Claimant. The DIR has dragged its feet before the Tax Appeal Tribunal to answer the Objection by the Claimant and the other Lenders. The DIR has again dragged its feet in filing its claim in the Supreme Court for the VAT. I would not be acting in the interest of justice to withhold these sums from the Judgment Holder until the appeal is heard by the Tribunal or the new action is determined by the Supreme Court, and in the fact of the overwhelming arguments and authorities that VAT is not a Marshal's expense nor is it chargeable on Judicial Sales."

42. Turning to look at the factors in this case, the Court considers the matters set out below.

The Freeport Judgment and Objection to VAT

(1) The Claimants argue that the Firm acted in "*furtherance of an ulterior commercial purpose*" as they knew the Comptroller of VAT had an application before this Court for VAT, yet "*allowed a hearing on 9 February 2024 which depleted the proceeds of sale.*" I do not agree with this characterization of the Firm's actions. The Claimants should not have been surprised by the 9 February 2024 ruling, since the Department of Inland Revenue knew that DNS Bank had objected to the payment of value added tax on the sale of the Ships since 28 July 2022. (See Letter dated 28 July 2022 from Mr Richard Horton of the Firm to Ms Shunda Missick-Strachan at page 49, Exhibit MM.1, Affidavit of Mandy I. McKenzie).

(2) The Comptroller of VAT was aware of the grounds of such objection and that it was the intention of DNS Bank, represented by the Firm, to contest, on those grounds, the payment of value added tax as claimed. (See pages 1 through 71 of Exhibit MM.1, Affidavit of Mandy I. McKenzie). The Claimants' awareness that Hanna-Adderley J. was slated to hear the application concerning the payment of value added tax is demonstrated by the clear bid of the Claimants, unsuccessfully as it turned out, to intervene in that action prior to the 9 February 2024 judgment in which DNB Bank prevailed in their arguments before Hanna-Adderley J. Additionally, I do not find that the Claimants' objection to the Firm's stance on the payment of VAT and the application to strike out the objection of DNS Bank to be remarkable or unreasonable to a high degree.

An Ostensibly Weak Case

(3) The Claimants eventually appeared to accept that their claim before this Court against the Defendants, who merely held the proceeds of sale as officers of the court pursuant to Court Orders, was too speculative or thin, as against the Defendants, to succeed. Hanna-Adderley J was of the view that there was no applicable authority to support the claim for value added tax in the circumstances of the case. The Court notes that the Claimants withdrew their case before this Court months after the judgment of Hanna-Adderley J. was delivered. It is noted that in the argument on costs they say nothing in defence of the strength of their now withdrawn claim against the Admiralty Marshal and the Firm.

Timing of Filing and Withdrawal

(4) Adding to the challenges of the Claimants is the fact that their claim was brought, without leave of the Court, outside of the 90 day deadline permitted by Court Order of Hanna-Adderley J dated 24 March 2022 for the pursuit of claims to the proceeds of the sale of the Ships. Further, the timing of the Claimants' withdrawal of the case (inclusive of the main claim for value added tax and the application for an extension of time to bring the claim) is a point of criticism raised by the Firm. The Claimants waited for nearly 6 months after the delivery of the decision of Hanna-Adderley J and did not file their Notice of Discontinuance until the day on which they were to exchange the first round of submissions with the Firm – i.e. on 26 July 2024. By that time, the Firm states that it had incurred costs in preparing to strike out the claim and defend against the Claimants' case. The Claimants in submissions say that on 26 June 2024 they communicated with the Defendants verbally and apprised them of the intention to withdraw the case.

The Wrong Defendants

(5) The Claimants brought proceedings against the Defendants who, as previously stated, have no legal interest in the proceeds of sale. The Firm argues that they were merely officers of the Court, yet they were dragged into litigation and the Firm had to personally incur costs to defend itself. In paragraph 15 of the Affidavit of Patricia Jackson, the justification for bringing the action against the Defendants, (that is, that Justice Hanna-Adderley stated that "*the appropriate action would be for a separate claim to be prosecuted to recover the amounts levied*"). It is noted that Forbes J in his ruling on 31 March 2023 also stated that "*the real dispute between the Plaintiff and the DIR should be properly adjudicated by way of the DIR bringing its own claim to recover the sum representing VAT attached to the judicial sales of the said vessels they allege is now due and owing.*" Hanna-Adderley J. indicated in her ruling of 25 September 2023, that the Comptroller of VAT was free to bring a claim against "the Owners" of the Ships. Such claim would not have been in the nature of the claims brought by the Claimants against the Admiralty Marshal or the Firm *in personam* before this Court.

Commercial Pressure

(6) The Firm also asserts that as a result of a notice served by the Comptroller of VAT on FirstCaribbean International Bank (Bahamas) Limited ("**FCIB**"), on or around 3 October 2023, the Admiralty Marshal (Mr Berne Wright) and Mr Terry North, were prevented from making personal banking transactions at FCIB. The Firm complained that when Attorney General's Office was apprised of this situation, there was no response by Counsel. Then on 23 October 2023, the Firm received for the first time a copy of the Comptroller's Notice To Deemed Agent To Pay Money ("**the Notice**"). It was perceived by the Firm to be a tactic employed by the Defendants for exerting pressure to coerce the Defendants to release the funds claimed by the Claimants for alleged VAT due.

43. The Notice, in standard language of such notices, furnishes the penalties for non-compliance with the demand to pay, which included conviction by fine of up to $10,000.00 and/or imprisonment for a term of 6 months, and/or a fine of up to $100,000.00 or personal liability for failure to pay or for a misapplication of funds contrary to the Notice.

44. The Claimants obviously tendered the Notice in order to attempt to protect their position after their bid to intervene in the DNB Action was rejected in Freeport, Grand Bahama by the Court on 25 September 2023. Any deliberate approach to encumber the accounts personally of Mr North and Mr Wright would have been heavy-handed and unjustifiable, especially in light of the fact they had no personal interest in the proceeds of sale of the Ships. However, the question that remains unanswered was whether the freezing by FCIB of the personal transactions of the Defendants deliberately engineered by the Claimants to force capitulation by the Defendants in this action.

45. I examined the Notice from the Comptroller of VAT dated 28 September 2023 and addressed to FCIB for the attention of the Account Manager. In my view the effect of this was, in part, to make the persons who acted as signatories on the joint account which held the proceeds of sale of the Ships responsible to pay the VAT levied by the Comptroller of VAT, as persons who had control over the movement of the funds in the joint account. In the circumstances of this case, there was no justification for freezing the signatories' personal transactions. However, that action appears to have been taken by FCIB based upon its interpretation of the Notice. Further, there was no Court Order freezing a personal account of either of the Defendants or prohibiting their conduct of personal transactions. The Department of Inland Revenue directed a Notice to FCIB, the bank which held the court-ordered joint account in which proceeds of sale, inclusive of funds which had been earmarked by the Court for the payment of value added tax, were held and over which the Defendants were signatories. Standard penalties were outlined in the Notice for failure to pay value added tax.

46. We are told Mr North could not make transactions on 03 October 2023 at FCIB. How long did this situation last? Was it a mistake which was, at some point corrected, and if so, what were the circumstances of the correction? The Court is simply told that the Attorney General's office did not answer a query. The Court does not have complete evidence on this point. The action before this Court did not commence until 6 November 2023, after the issue with the Defendants' personal transactions at FCIB. The Court has not been told whether after 6 November 2023 Mr North and Mr Wright were still unable to perform their personal transactions. If that were the case, any deliberate curtailment of the Defendants' personal transactions in order to force them to pay contested sums in this action would have been egregious, and the very type of manoeuvre which would tip the scales in favour of the award of indemnity costs. Could the Court safely find that undue commercial pressure was applied in such a way by the Claimants against the Defendants in the conduct or circumstances of this action? The evidence falls short of fully supporting such a conclusion.

47. All in all, I am not of the view that the circumstances considered collectively propel the case into the territory of granting costs on an indemnity basis. While the case for VAT is apparently weak and perhaps misguidedly brought against the wrong defendants, I balance it against the fact that in the application in which the question whether VAT was properly to be included in the Admiralty Marshal's expenses, there was no opportunity for the Claimants to advance counter argument on that key issue (ironically, because the Firm successfully argued that the Claimants be debarred from participating). I consider, additionally, that while the Claimants may have earlier been aware of the Firm's position on VAT, the Claimants did not have the judicial guidance of the Court (ruling of Hanna-Adderley J dated 9 February 2024) on the non-viability of their VAT claim until some months after this claim was brought.

48. I also consider that the Claimants tarried in their withdrawal of this claim (which may be indicative of a tardy assessment of the merits of their case). But the timing of the discontinuance of this case is somewhat mitigated by the Claimants' earlier verbal communication with the Defendants to the effect that they intended to withdraw the claim. I am satisfied that any expense incurred by the Firm in preparing arguments for 26 July 2024 can adequately be compensated in costs on the standard basis. I am mindful that the Court is armed with an extremely wide discretion to grant costs on an indemnity basis. I decline to do so in the circumstances put before the Court.

49. Based upon the Court's consideration of the foregoing, I order that the costs in favour of the Firm shall be taxed on the standard party and party basis.

50. The Court now embarks upon the summary assessment of costs in this case. As stated before, it is appropriate and saving of time and expense. The Court in such exercise must bear in mind **Rule 71.12** of the **CPR** which provides:

> "(1) As a general rule, a judge hearing an application will summarily assess the costs of that application immediately or as soon as practicable after the same is disposed of.

"(2) As a general rule, a judge conducting the trial will summarily assess the costs of the entire claim immediately after he has delivered judgment in respect of the same or as soon as practicable thereafter.

"(3) A judge may, instead of summarily assessing the costs under paragraphs (1) or (2), direct that the whole or any part of the costs payable shall be subject to a detailed assessment and he may, when making such direction, indicate which particular matters the Registrar may or shall take into account or exclude in relation to such detailed assessment."

51. In relation to the procedure to be adopted, the Court refers (as both parties have done) to the words of Winder CJ in ***Robert Forbes*** as follows:

"[11] While the CPR is silent on the details of the summary assessment procedure, and this is not an appropriate occasion on which to attempt to elaborate such details, there must be at least two minimum requirements:

i. firstly, the Court ought to obtain a bill or statement of costs from the receiving party before it can proceed to summarily assess costs. The detailed provisions of the CPR on costs indicate that the Rules Committee did not intend for the summary assessment of costs to be done on an arbitrary or random basis. The procedure is not intended to be a vehicle for judge to pluck costs awards 'out of thin air'.

ii. secondly, the Court must permit the parties a reasonable opportunity to be heard on the assessment. In the absence of any clear words in the CPR compelling a different conclusion, the Rules Committee, must be presumed to have intended a fair procedure in providing for the summary assessment of costs. That opportunity to be heard may, in appropriate cases, take the form of a paper hearing.

"[12] By virtue of Section 30 of the Supreme Court Act and CPR 71.9, the Court enjoys an undoubted discretion as to the quantum of costs. That discretion, like any other discretion vested in the Court, is to be exercised judicially and not arbitrarily or capriciously. Accordingly, the Court must have regard to the provisions of the CPR which deal with the quantification of costs. The discretion of the Court must be exercised consistently with the overriding objective of the CPR, set out in CPR 1.1, which is to 'deal with cases justly and at proportionate cost.'"

52. In considering whether the costs applied for are proportionate and reasonable in having been incurred, and in the amounts claimed, pursuant to CPR 71.11, the Court will consider all factors set out in CPR 71.11(3) as follows:

"(3)...

(a) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
(b) the amount or value of any money or property involved;
(c) the importance of the matter to all the parties;
(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
(e) the skill, effort, specialized knowledge and responsibility involved;
(f) the time spent on the case;
(g) the place where and the circumstances in which work or any part of it was done;
(h) the care, speed and economy with which the case was prepared…".

53. Guided by these principles the Court has chosen to carry out a summary assessment of the costs in this case and is appropriately armed with a Bill of Costs and the Submissions by the parties.

54. Having taken the foregoing principles into consideration, I have reviewed the Bill of Costs with a view to disallow costs which are unreasonably or disproportionately incurred or for an unreasonable or disproportionate amount.

55. Firstly, as to the rates to be attributed to the attorneys who performed work on the file, I take note of the great disparity between what is claimed and what is argued by the Claimants to be actually appropriate. Taking the hourly rate of Mr Horton first, he claims $550 per hour while the Claimants insist that his rate should be $141.70 as Mr Horton has been called to The Bahamas Bar for 1 year.

56. The Claimants fail to take into consideration that Mr Horton had, for some 17 years prior to his call to The Bahamas Bar, been a Registered Associate under the Legal Profession Act. His standing is therefore more substantial than a person with merely 1 year's standing at the Bar. Further, in his former designation, he would have been able to bill in a taxation of costs and recover costs for his work as seen of a registered associate in the case of **Johann D Swart and another v Apollon Metaxides and another** [2022] 2 BHS J No 210. Moreover, his current rate would exceed that which is being proposed by the Claimants. In **Patrick Tarh v Hon. Elsworth Johnson** [2023] 1 BHS J No 63, a decision by Deputy Registrar Toote (as he then was), the Court rated the work of a registered associate at $350 per hour. I take judicial notice of the fact that Counsel in that case had been a registered associate for some 7 years before she was called to The Bahamas Bar.

57. In 2006, Mr Brian C. Simms (now Brian Simms KC), in service to the legal profession, provided his memorandum on Counsel and Attorneys' Remuneration to The Bahamas Bar Association with inflation uplifts from 1984, for the year 2006 ("the **Simms guideline**"). It has proved to be a useful tool in many taxation matters in this jurisdiction; in fact, the Claimants say that we ought, in relation to the costs order of 2024, to adhere strictly to the 2006 guidelines. Back in 2006, according to the Simms

guideline, Counsel practicing for 20 years or more could recover $506.10 per hour. Nearly 20 years have gone by.

58. Given Mr Horton's standing and 17 years as a registered associate and practicing lawyer (albeit in 2023 he became Counsel with a right of audience), I am of the view that the appropriate rate for him ought to be $550 per hour. As for Ms Winsome Carey who has been called to The Bahamas Bar and practicing for some 16 years, the rate of $550 also seems appropriate. Lastly, for Mr Darzhon Rolle, called to the Bahamas Bar for 5 years as at the date of the costs order in this matter, the rate of $225 is more appropriate than $182.20 suggested by the Claimants.

59. Applying these rates to the Bill of Costs, and the principles rehearsed above as to reasonableness and proportionality. I have also carefully considered the objections of the Claimants. It must be borne in mind that the claim against the Defendants was a relatively large one – that is, for value added tax in the amount of $13,950,189.07, according to the Claimants' Admiralty Claim in Rem Form. The importance of the claim to the parties would therefore be obvious. Further, the issues surrounding the claim were somewhat novel for, as the Firm pointed out, Admiralty court ship sales in The Bahamas have never been the subject of value added tax. It was thought that The Bahamas follows international practice where value added tax is not charged on the Admiralty court sale of vessels. The claim for value added tax in these circumstances was therefore unique.

60. As the Court perused the Bill of Costs, note was taken of the objection to "internal" emails. However, the Firm was sued and had to defend itself. I do not consider that the usual objection can apply in relation to emails in which Mr Horton or Ms Carey or Mr Rolle reasonably had to take instructions from their seniors – the partners at the Firm – or provide updates to them in relation to the pursuit of the defence of the Firm.

61. I summarily assess costs of this action at $37,298.25 and order that this sum be paid by the Claimants to the Firm. The sum ordered to be paid by way of costs is comprised of allowed sums listed in the attached Schedule, which also include value added tax at 10%.

Dated 06 May 2025

Simone I. Fitzcharles

Justice

SCHEDULE OF ALLOWED COSTS

Item Number (as shown of Bill of Costs)	**Sum Allowed ($)**
From commencement of action	
1	330.00
2	550.00
3	0
4	165.00
5	0
6	165.00
7	275.00
8	165.00
9	550.00
10	550.00
11	220.00
12	220.00
13	90.00
14	562.50
15	550.00
16	330.00
17	0
18	275.00
19	0
20	0
21	0
22	1012.50
23	275.00
24	1650.00
25	412.50
26	0
27	0
28	330.00
29	220.00
30	550.00
31	165.00

32	165.00
33	165.00
34	1100
35	562.50
36	2200.00
37	0
38	1925.00
39	1925.00
40	1375.00
41	825.00
42	360.00
43	165.00
44	110.00
45	165.00
46	0
47	165.00
48	0
49	50
50	165.00
51	0
52	1100.00
53	50
54	50
55	450.00
56	385.00
57	112.50
58	165.00
59	165.00
60	0
61	550.00
62	550.00
63	0
64	472.50
65	550.00

66	330.00
67	440.00
68 Sub-Total: 26,405.00	
69 Value Added Tax 10%:	2,640.00
Bill of Costs attendances	
70	1,925.00 2,250.00
71	0
72	825.00 337.50
73	1100.00 675.00
74 Disbursements:	390.00
75 Plus VAT 10% on Disbursements:	39.00