



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018 No 359

BETWEEN

(1) ANNUITY & LIFE RE LTD

(2) POPE ASSET MANAGEMENT LLC APPLICANTS

AND

(1) KINGBOARD COPPER FOIL HOLDINGS LIMITED

(2) JAMPLAN (BVI) LIMITED

(3) KINGBOARD LAMINATES HOLDING LIMITED

(4) EXCEL FIRST INVESTMENT LIMITED

(5) KINGBOARD CHEMICAL HOLDINGS LIMITED

RESPONDENTS

Reasons for ex tempore ruling on leave to appeal application on grounds that it would be for the public advantage for leave to appeal to be granted

In Chambers

Date of hearing: 12 January 2026

Date of reasons for Ruling: 19 January 2026

Appearances

Keith Robinson and Jonathan Marion of Carey Olsen Bermuda Limited for the Applicants

Ben Adamson and Sam Hudson of Conyers Dill & Pearman Limited for the Respondents

MARTIN J

REASONS FOR GRANT OF LEAVE TO APPEAL AND REFUSAL OF A STAY PENDING APPEAL

1. On 12 January 2026 I gave an *ex tempore* decision granting leave to appeal in relation to my Ruling dated 4 March 2025 in relation to the taxation of leading counsel's brief fee as costs

thrown away by the adjournment of the trial of this action in November 2024 and I refused to grant a stay of the costs Ruling pending appeal. These are the court's reasons for those decisions.

2. The present matter relates to the costs thrown away by a last-minute adjournment of the trial of the action. In November 2024 Mussenden J (as he was then) granted the plaintiffs' application for an adjournment of the trial six weeks before the trial date and awarded the costs thrown away to the defendants in any event on an indemnity basis and ordered that the costs be paid forthwith.
3. The Registrar taxed down leading counsel's fee note from USD178,240.01 to USD20,000.00. On a Review of the Registrar's decision, I disagreed with the approach that the Registrar had taken and allowed the brief fee which had been paid (i.e the first two tranches which had been paid). The reasons for the decision do not need to be repeated here but are fully set out in the Ruling¹.
4. The issues in this appeal relate to how the court is to approach the taxation of leading counsel's fee note in those circumstances.

The grounds of appeal

5. In this case there is only one item that was the subject of dispute, namely the allowance of the fee note of leading counsel on taxation, and it does not involve a line-by-line review of each item of the costs allowed or refused or the exercise of judgment in relation to allowing or refusing numerous individual amounts claimed.
6. The draft Notice of Appeal raises a number of grounds in relation to which it is said that this court erred on the Review of the Registrar's taxation award in its application of the principles of taxation and (in relation to one aspect of the appeal) it is said that the court proceeded on a misunderstanding of the facts.

The test for leave to appeal against a discretionary decision

7. Normally the court will only grant leave to appeal in relation to discretionary matters when it is satisfied that there is an arguable ground of appeal that the judge has misunderstood or misapplied the law, proceeded on a misunderstanding of the facts, or has reached a decision which is plainly wrong. The draft grounds of appeal must raise issues that show that one of these elements is engaged and that the grounds have a realistic prospect of success. The court may also grant leave to appeal in cases in which the court considers that it would be to the public advantage for the Court of Appeal to consider the issues raised in the appeal².
8. The allowance of the recovery of costs requires an exercise of judgment on the part of the Registrar or judge and necessarily involves a discretion. It is for this reason that the courts have repeatedly held that the grant of leave to appeal in costs cases is only rarely to be granted. It is not appropriate for the Court of Appeal to undertake a detailed assessment of the items allowed or refused on a detailed bill of costs. It is only in cases where a point of law or principle is involved that it is appropriate to grant permission to appeal on a costs ruling.

¹ [2025] SC (Bda) 24 civ (4 March 2025)

² *Bubkle v Holmes* [1926] 2 KB 125, 127 cited in *Apex Fund Services Ltd v Clingerman* [2020] SC Bda 12 Com.

9. The grounds set out in the draft notice of appeal address five areas where the court is said to have gone astray as a matter of fact or principle. The intending appellant accepts that the general principles of taxation have been correctly stated in the Ruling but says that I misapplied the principles in the context of this case and submitted that the grounds of appeal have more than a fanciful prospect of success.
10. I have refrained from expressing any view as to the arguability of any of the individual grounds of appeal because there are two independent reasons why I consider that the grant of leave to appeal is appropriate in this case.

Correct approach to taxation of leading counsel's brief fees

11. The question of how the court should approach the taxation of leading counsel's brief fees has not been considered by the Court of Appeal in over 30 years, and that consideration was based on the predecessor to the current rules. A lot has changed in the intervening period. The framework of the local costs rules has changed twice in the meantime and the English rules on which the court relies for guidance have changed even beyond the changes to the local rules.
12. The present rules do not address how counsel's brief fees are to be taxed in detail but simply require the receiving party to present a fee note duly authenticated by counsel's clerk. It is unclear whether this means that the receiving party must show what work was done which was thrown away by the adjournment or whether the fact that the liability was incurred by the receiving party is sufficient.
13. With the volume of high value commercial litigation coming before the courts involving overseas counsel, I consider that it would be to the public advantage for the Court of Appeal to express its view on the meaning and application of the relevant taxation principles in the modern context.

Proportionality

14. The principle of proportionality that has been imported by the overriding objective applies in relation to the taxation of costs, but the English case law suggests that on a taxation on the indemnity scale, a taxing officer is not required to apply the proportionality principle. This is the approach I adopted in the Review.
15. The appellant seeks to argue that the court should apply a discount before applying the principle of proportionality. This is potentially an important issue of principle which also has wide application. It seems to me that it would also be to the public advantage to have the Court of Appeal consider and express its views on the appropriate approach to be taken to proportionality when taxing counsel's brief fees on an indemnity basis.
16. Therefore, it seems to me that it is appropriate for leave to appeal to be granted in this case.

Refusal of the stay of enforcement of the costs award pending appeal

17. In principle, a money monetary award should be met and satisfied after the grant of judgement, or in this case the issue of a costs award, without the ground of a stay pending appeal, unless there is solid evidence that shows that the appellant will suffer irremediable harm if the cost

award is paid. A mere suspicion or fear of a risk of difficulty in recovering the money if the appellant is successful is not sufficient to engage the courts powers to order a stay of payment over money monetary award pending the appeal.

18. Mr McCandless says that there is a justifiable fear that the respondents to the appeal will not repay any amount that is awarded in the appellant's favour as a result of the long standing ill will that has existed between the parties over a long period of hostile litigation.
19. Against this, Mr Lam has indicated that the respondents are highly capitalised and have never failed to meet a court order in the past. Mr Lam also says that the respondents will honour any judgment of the Court of Appeal and will repay any amount that the Court of Appeal awards in their favour.
20. On the evidence, I am satisfied that there is no reason to grant a stay of the obligation to meet the costs award pending appeal. In my view, there is no evidence on which the court would be justified in making that order. Mr Lam has confirmed that the company can pay back any amount that has been awarded by the Court of Appeal and has indicated that the respondents will do so. In addition, one of the respondents is a Bermuda company and is amenable to the court's jurisdiction in relation to enforcement of any award made by the Court of Appeal.
21. Therefore, I refused the application for a stay of the Ruling pending appeal.
22. The costs of the application were ordered to be the costs in the appeal.

Dated this 19th day of January 2026



THE HON. JUSTICE MR. ANDREW MARTIN
PUISNE JUDGE