

BRITISH VIRGIN ISLANDS

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO BVIHCV2009/0451

BETWEEN:

OBM LIMITED

Respondent/Claimant

AND

LSJ LLC

Applicant/Defendant

Appearances:

Mrs Tana'ania Small-Davis for Applicant/Defendant
Ms Nadine Whyte for the Respondent/Claimant

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2011: November 14;
2012: January 20; July 20
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ASSESSMENT OF COSTS

Introduction

[1] **LANNS, M:** On 3rd June 2011, the Honourable Mde Justice Indra Hariprashad-Charles handed down a written judgment in respect of an Application by the Defendant for an Order setting aside the permission granted to the Claimant to serve the Claim Form out of the jurisdiction. In her conclusion, the learned Judge ordered and declared as follows:

- [1] The permission granted to the Claimant to serve the Claim Form out of the jurisdiction on LSJ is set aside;
- [2] The court has no jurisdiction over the defendant;
- [3] The court declines to exercise its jurisdiction to try this claim;
- [4] The claimant shall pay the defendant's costs to be assessed if not agreed.

- [2] By letter dated 2nd September 2011, the Defendant wrote to the Claimant inviting it to agree costs, but the Claimant did not respond. In the circumstances, the Defendant has applied to the court for the assessment of costs. This is the assessment.
- [3] Before proceeding to the assessment, it should be noted that the learned Judge did not identify the rule that is to be applied to the assessment. When the application came up for hearing on 14th November 2011, Mrs Small-Davis made a case that costs are to be allowed on the prescribed scale. Ms White did not agree. She was of the view that costs are to be assessed in accordance with rule 65.11. In the end, I took the view that costs were to be assessed in accordance with 65.11 and 65.12 and I gave directions on the assessment.
- [4] Those directions were finally complied with on 5th January 2012, when the Defendant filed its Points of Reply to the Claimant's Points of Dispute to the Defendant's Schedule of Costs.
- [5] The submissions were delivered to me in Nevis by the Nevis Court Office on 20th January 2012.

Principles of Assessment

- [6] The principle upon which costs are awarded is laid down in CPR, 65.2(1) and 65.11 (4) which rules are to the effect that a party can only be allowed costs which the court deems fair and reasonable.
- [7] The principle of reasonableness has been expounded on, and applied in several cases and in several Papers on costs.
- [8] For example, in a Paper entitled "**Costs under the CPR**", dated 24th February 2003, Sir Dennis Byron, Chief Justice (as he then was) outlined the principles of reasonableness by stating among other things that
- "The Court must consider the time spent in making, preparing for and attendance at hearing and allow a reasonable and fair sum...."
- [9] **In Michael Wilson & Partners Ltd v Temujin International Limited et al** – Claim No. BVIHCV2006/0307 – British Virgin Islands, Her Ladyship Indra Hariprashad-Charles stated at paragraph 39
- a) "Ultimately, the court must allow such sum that is reasonable taking into consideration the matters set out in CPR 64.6 (6) and CPR 65.2(3).

- [10] And in **Peter Maxymych v Global Convertible Megatren Ltd and Anor** Claim No 246 of 2006, Olivetti J found it necessary to refer to the Privy Counsel decision in **Horsford v Bird** 43/2004 (28th November 2006), for the principle that no party can be expected to be fully indemnified for his costs; he is only entitled to reasonable costs.

In **Horsford v Bird** supra, Lord Hope of Craighead stated:

"It has to be borne in mind in judging what was reasonable and proportionate in this case, that the basis of the award was not that the appellant was to be indemnified for all his costs. The respondent was to be required to pay only such costs as were reasonably incurred for the conduct of the hearing before the judge and were proportionate."

- [11] It is clear from the above paragraphs [6] to [10] that reasonableness is the most important factor in the assessment of costs. The Defendant must satisfy the court that its costs are reasonable. To do this, the Defendant must produce evidence that its costs are reasonable as the court, in assessing costs is required to be fair and reasonable. Any doubts must be resolved in favour of the paying party.

Factors to be taken into account in assessing costs

- [12] CPR 65.2(3) sets out a list of factors that the court is required to take into account in assessing costs, namely:

- i) any order that has already been made;
 - b) the care, speed and economy with which the case was prepared;
 - c) the conduct of the parties before, as well as during the proceedings;
 - d) the degree of responsibility accepted by the legal practitioner;
 - e) the importance of the matter to the parties;
 - f) the novelty, weight and complexity of the case;
 - g) the time reasonably spent on the case; and
-"

- [13] I turn now to look at the schedule of costs

The Schedule of Costs

- [14] The Schedule lists the costs of the Defendant in relation to the Application made by the Defendant to set aside service of the Claim out of jurisdiction and for an order declining

jurisdiction to hear the claim. It gives a description of fee earners and their hourly billing rates. It narrates the nature of the work performed and it gives the fees incurred.

The Defendant has claimed a total of **\$17,980.00**. Of that sum, \$17,805 is claimed as professional fees and \$175.00 as disbursements incurred by the Defendant in relation to the application it made to set aside service of the Claim Form. Professional fees are claimed for three fee earners, namely, Tana'ania Small, Grade [A] working at \$600.00 per hour; Akilah Anderson, Grade [B] working at \$350.00 per hour; and Natalee Laylor, Grade [C] working at \$150.00 per hour.

- [15] The fees claimed are for the period 1st September 2010 to 4th June 2011.

Fees to Tana'ania Small-Davis

- [16] The total sum of \$12,930.00 is claimed for Mrs Small –Davis as follows:
- (i) The sum of \$1,020.00 for receiving instructions, receiving and perusing Claim Form, Statement of Claim, Notice of Application, Affidavit of Willa Tavernier and exhibits; Order granting service out of jurisdiction, Notice of application for variation of order; Affidavit of Glenis Potts and Exhibits; Order varying service address. Mrs Small claims that she spent 1.70 hrs performing these tasks on the 1st of September 2010.
 - (ii) The sum of \$1,680.00 has been claimed for perusing contracts for Architectural services; researching the law; written advice to client on progress of claims. The work was performed on 2nd September 2010 for 2.80 hours.
 - (iii) The sum of \$2,460.00 is claimed for preparation of Notice of Application to set aside permission to serve Claim Form outside the jurisdiction, and to dispute jurisdiction; Affidavit of Akilah Anderson and Exhibits; reviewing further documents provided by client; email to client setting out legal principles to be met as regards conclusion of contract as it relates to jurisdiction. These tasks were performed on 14th September 2010 and 19th September 2010 for a total of 4.10 hours.
 - (iv) For receiving and perusing a Notice of Status hearing for 0.10 hours, the sum of \$60.00 has been claimed.
 - (v) For receiving further instructions from client on 15th May 2010, the sum of \$480.00 has been claimed for 0.80 hours.
 - (vi) The sum of \$360.00 is claimed for finalizing the Notice of Application commenced on 14th September 2010. (See entry at (iii) above).

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- (vii) For reviewing and considering Affidavit of Steve Fox on 10th November 2011, (should be 10th November 2010) the sum of \$300.00 is claimed for 0.60 hours.
- (viii) \$720.00 is claimed for receiving further instructions and discussing the contents of Mr Fox's affidavit; reviewing and perusing file of correspondence between the parties including notes of site visits, review of plans etc on 11th November 2010.
- (ix) For preparing Affidavit of Darren Indyke on 11th November 2011, (should be 11th November 2010) the sum of \$750.00 is claimed for a total of 1.25 hours.
- (x) For reviewing and finalizing of skeleton argument on 12th November 2011, (should be 12th November 2010) the sum of \$900.00 is claimed.
- (xi) The sum of \$1,200.00 is claimed for reviewing Claimant's skeleton arguments and Authorities on 12th November 2011, (should be 2010) working for 2.00 hours
- (xii) For attendance at adjourned hearing of application on 15th November 2011, (should be 15th November 2010) the sum of \$600.00 has been claimed, waiting for 1.00 hour.
- (xiii) The sum of \$2,400.00 is claimed for attendance at hearing on 29th November 2011, devoting 4.00 hours at the hearing.

Fees to Ms Akilah Anderson

[17] A total of \$4,200.00 has been claimed for Ms Anderson:

- (i) \$2,100.00 for research and preparation of skeleton argument on 11th November 2011 (should be 11th November 2010). This work took 6.00 hours.
- (ii) For attendance at hearing on 29th November 2011, the sum of \$1,400.00 is claimed; (Date should be 29th November 2010) devoting 4.00 hours.
- (iii) The sum of \$350.00 is claimed for attendance on 3rd June 2011 for 1.00 hour to take delivery of judgment; and
- (iv) For extracting, filing and serving sealed Order, the sum of \$350.00 has been claimed for 1.00 hour work on 4th June 2011

Fees to Ms Natalee Laylor

- [18] For Ms Laylor, a total of \$675.00 has been claimed:
- (i) For preparing, filing and delivery of Acknowledgment of Service, on 6th September 2010, the sum of \$75.00 has been claimed for 0.50 hour.
 - (ii) The sum of \$600.00 is claimed for the preparation of the hearing bundle and Skeleton Argument and Authorities Bundle on 12th November 2011 (should be 12th November 2010).

Disbursements

- [19] The Disbursements section of the Schedule of Costs contains two entries only - \$155.00 for photocopies and \$20.00 for stamp duty for filing of documents on 12th November 2011. There is no challenge to this claim.

Claimant's Points of Disputes/Submissions

(i) Costs of the Application

- [20] Learned counsel Ms Whyte has taken issue with the Defendant's Schedule of Costs. Counsel submitted that costs of the Application should be restricted to 10 per cent of the amount of the prescribed costs appropriate to the claim as there are no circumstances of this case justifying a higher amount.
- [21] Counsel further submitted that there was nothing in the Claimant's conduct to justify a departure from the rules. Furthermore, the issues of fact and law were not complex, novel or extensive, and the Claimant did not waste the court's time in the manner in which it conducted the case. Counsel was of the view that in relation to the costs of the Application, the Defendant is only entitled to costs of \$3,064.00, being one tenth of \$30,634.91.

(ii) Costs of the Proceeding

- [22] The Claimant agrees that the Defendant is entitled to costs of the proceeding. This cost, counsel submitted, is to be assessed under CPR 65.12. Counsel dissected the Schedule, submitting that items one, two, three and five relate to the proceedings. These items counsel computed to the sum of \$2,836.00, and that is the sum that the Claimant is willing to pay for the proceedings.

(iii) Claimant's Alternative Position

- [23] The Claimant's alternative position is that since it succeeded on particular issues, the Claimant should be only liable to pay \$7,485.00 which is one half of the costs of the

application. Counsel then went on to analyze aspects of the Judgment of Hariprashad Charles J. outlining the issues on which the Claimant claims to have succeeded.

(iv) The Authorities/Conclusion

[24] Apart from CPR 65. 11 (7) and 65.12, Counsel placed reliance on the following cases, copies of which she presented to the court:-

(1) **Asian Group INC and Another v Alpha Petroleum Holdings Ltd**, BVI Civil Appeal Nos. 11 and 17 of 2004; Judgment delivered 27th June 2005.

(2) **Rochamel Construction Limited v National Insurance Corporation**, St Lucia Civil appeal No 10 of 2003; Judgment delivered on 27th June 2005;

[25] Counsel concluded her submissions by submitting that the Defendant is entitled to a total of \$5,899.00 being \$3,064.00 plus \$2,835.00) or alternatively the total sum of \$10,320 being (\$7,485.00 plus \$2,835.00).

Defendant's Points of Reply to the Claimant's Point of Dispute/Submissions

[26] The Defendant takes issue with the points of dispute made by the Claimant. The Defendant submitted that as a consequence of the Order of Hariprashad – Charles J, the claim has been brought to an end and thus, the Defendant is entitled to its costs on the whole of the proceedings.

(i) Costs on the Application

[27] Learned counsel Mrs Small-Davis submitted that the Claimant's submission that the Defendant is only entitled to \$3,064.00 as costs on the application is misconceived. To develop that point, Counsel referred to the statement of Barrow J.A made in **Nugolph Holdings v Michael Wilson & Partners Limited** to the effect that CPR 65.12 is a rule that lays down the procedure for assessment of costs in all cases. Assessment is to be construed as encompassing more than an assessment of discretionary costs. Therefore, in assessing reasonable costs to be awarded to a successful party, the court may still have regard to the level of prescribed costs applicable to the claim. The court is to use all the resources available in order to properly quantify the costs award.

(ii) Success on particular issues

[28] Mrs Small-Davis refuted the Claimant's assertion that the Claimant was successful on particular issues. In the view of Counsel, this was a misrepresentation of the facts and of the outcome of the Application. Counsel went on to explain the nature of the Application that was before the Court. Then she put forward her own analysis of the Judgment of the Court submitting that the Defendant was wholly successful on its Application. Counsel pointed out that the entire order that the Claimant sought in the draft order lodged with the Application was made by the Judge. In these circumstances, submitted counsel, there is

no merit in the alternative proposition of the Claimant that costs should be apportioned 50:50.

No challenge to factors listed under 65.2 (3)

- [29] It was Mrs Small-Davis further submission that the Claimant was unable to mount any challenge to any of the factors as listed under rule 65.2 (3), in particular the time spent by the legal practitioners. In light of the absence of dispute with time spent, conduct of the case or of the rate of fees charged, the Claimant has no proper complaint against the level of costs sought, Mrs Small-Davis submitted.

The Assessment

- [30] Taking into account the matters set out in CPR 64.6(6) and CPR 65.2 (3), AND having considered the submissions of counsel for the parties, and the authorities cited by them; AND having studied and scrutinized the Claimant's Schedule of Costs, I consider that the most fair and reasonable disposition of the assessment of costs is to order that the Claimant pay three quarters of the costs claimed by the Defendant. In coming to this determination, I consider that:
- a) The Claimant complied with a court order permitting it to serve the claim form out of jurisdiction and specifying the method of service.
 - b) The Defendant has been wholly successful on its Application to set aside the order and the court awarded costs to be assessed if not agreed.
 - c) The Defendant's conduct in refusing to respond to the invitation to agree costs, and its failure to make any attempt to agree costs was unreasonable. The overriding objective of the rules contemplates that parties make an effort to agree costs before they resort to assessment.
 - d) The Claimant has not seriously challenged the Defendant's Schedule of Costs. In particular, it has not challenged the time allegedly spent on the tasks performed, or the fees charged.
 - e) Over thirty-nine hours were said to have been devoted to the Application before the learned Judge. However, in some cases, there appear to have been a duplication of work for example, items (iii), (vi), (x), (xi) in paragraph 16 of this judgment, item (1) in paragraph 17 herein, and item (ii) in paragraph 18. These entries relate to the preparation and review of Notice of Application and the preparation and review of skeletal arguments.
 - f) In relation to the sum of \$600.00 claimed for attendance at an adjourned hearing on 5th November 2011, I can find no merit in this claim. There is no evidence that the hearing was adjourned at the instance of the

Claimant. I do not think that the Claimant should be punished for an adjournment which it apparently did not request.

Conclusion

- [31] In all the circumstances, I give judgment for the Defendant in the sum of \$13,485.00, to be paid within one month, or at some subsequent date as agreed by the Defendant.
- [32] I am grateful to counsel for their assistance.


Pearletta E. Lanns
Master