

SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.7 OF 2005

BETWEEN:

THE NEVIS ISLAND ADMINISTRATION

Respondent

and

- [1] LA COPROPRIETE DU NAVIRE J31
- [2] AUXILIARE MARITIME J31 S.A.
- [3] SAINT NICHOLAS DE BARRY 1 S.A.S.
- [4] SAINT NICOLAS DE BARRY 2 S.A.S.
- [5] SAINT NICOLAS DE BARRY 3 S.A.S.
- [6] SELNIC S.A.
- [7] SAINT NICOLAS DE BARRY IV S.A.
formerly known as Quirats + S.A.
- [8] EURIMOB S.A.

Applicants

Before:

Kimberly Cenac-Phulgence

Chief Registrar

On written submissions:

Daniel, Brantley & Associates for the Applicants
Browne & Associates for the Respondent

2007: December 20

DECISION ON ASSESSMENT OF COSTS

- [1] The applicants have filed two separate applications for assessment of costs which fall to be decided by the Chief Registrar.

- [2] On 14th July, 2006, the applicants filed an application for assessment of costs pursuant to an Order dated 29th December, 2005 in which the respondent's Notice of Appeal was struck out as being a nullity. It is to be noted that this application was not accompanied by a Bill of Costs as required by CPR 65.12 (4). (First Assessment)
- [3] On 18th September, 2006, the applicant filed another assessment of costs application, this time in relation to the judgment of Barrow JA refusing the respondent's application for an extension of time to apply for leave to appeal and ordering costs to be assessed if not agreed.¹ (Second Assessment)
- [4] The application of 18th September, 2006 was supported by two affidavits of Elizabeth Harper which consisted of two Bills of Costs in relation to (1) the First Assessment in the sum of US\$23,183.68 and (2) the Second Assessment in the sum of US\$69,912.22. The supplemental affidavit of Elizabeth Harper filed 18th September, 2006 stated at paragraph 5 that:
- “...the omission to include the Bill of Costs in the initial affidavit was an oversight and not meant to be a discourtesy to the Court.”

The Background

- [5] It is necessary to outline some background facts which are important to these assessments.
- a. 25 April, 2005 - respondent filed Notice of Appeal.
 - b. 23 September, 2005 - applicants filed application to strike out Notice of Appeal.
 - c. 24 October, 2005 - respondent filed application for extension of time to apply for leave to appeal.
 - d. 29 December, 2005 - Notice of Appeal struck out and costs awarded to the applicants to be assessed.
 - e. 3 April, 2006 - respondent's application for extension of time refused and costs awarded to the applicants to be assessed if not agreed.

¹ Judgment dated 3rd April, 2006. See also Order dated 3rd March, 2006

- f. 30 June, 2006 - applicants wrote to the respondent "inviting them to agree and pay their costs of defending the proceedings in relation to the application for extension of time in the sum of US\$20,000.00."
- g. 14 July and 18th September, 2006 - applicants filed assessment of costs applications in relation to the First and Second Assessments.
- h. 1 June, 2007 - Directions for filing submissions by the applicants and respondent were given by the Chief Registrar.
- i. 24 July, 2007 - respondent filed submissions a week later than due date.
- j. 8 August, 2007 - applicants filed submissions in response.

Assessed Costs: applicable principles

- [6] CPR 65.2 (1) outlines the basis of quantification of costs. It provides:
- "65.2 (1) If the court has a discretion as to the amount of costs to be allowed to a party, the sum allowed is-
- (a) the amount that the court deems to be reasonable were the work to be carried out by a legal practitioner of reasonable competence;
 - and
 - (b) which appears to the court to be fair both to the person paying and the person receiving such costs."
- [7] CPR 65.2 (3) provides:
- "65.2 (3) In deciding what would be reasonable the court must take into account all the circumstances, including-
- (a) 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
 - (h) in the case of costs charged by a legal practitioner to his or her client-
 - i. any agreement about what grade of legal practitioner should carry out the work;
 - ii. any agreement that may have been made as to the basis of charging; and
 - iii. whether the legal practitioner advised the client and took the client's instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the case."

[8] In the case of **Lownds v Home Office**², Lord Woolf CJ in discussing the approach to be adopted in assessing costs stated:

“In other words what is required is a two-stage approach. There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which CPR r. 44.5 (3) (which is similar to our CPR 65.2 (3))³ states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work done in relation to each item was necessary and, if necessary, that the cost of the item is reasonable.”⁴

Costs on an indemnity basis

[9] The respondent in its submissions stated that the costs claimed by the applicants appeared to be based on an indemnity basis and that under CPR 2000 costs are to be reasonable. The applicants for their part dispelled this but went into a long discourse to show that costs can be awarded on an indemnity basis and provided cases in support. As the Court of Appeal observed in **The Attorney General of Saint Christopher and Nevis et al v Queensway Trustees Limited**⁵, indemnity costs is a basis for assessment that is specifically provided for in the English Civil Procedure Rules but “a search of our CPR will reveal **that the phrase “indemnity costs” or any grammatical variant thereof does not exist**”.⁶

[10] There is therefore no need to expound on this issue as it is accepted that what CPR 2000 requires is that costs be reasonable and fair to the legal practitioner and the client and there is no issue of costs having been ordered to be assessed on the indemnity basis.

² [2002] 4 All E R 775

³ My insertion

⁴ [2002] 4 All E R 775 at 782

⁵ Saint Christopher and Nevis Civil Appeal No. 15 of 2005

⁶ Supra at paragraph 8

First Assessment

- [11] The applicants' Bill of Costs claimed the sum of US\$23,183.68 in relation to the application to strike out the Notice of Appeal which was dismissed with costs awarded to the applicants to be assessed.
- [12] Counsel for the respondent in his submissions argued that the costs claimed were outrageous and extravagant. He further submitted that the case was not a complex one, it was straightforward and therefore the costs should reflect this. It was his submission that the time spent by a reasonably competent legal practitioner in the case could not have exceeded ten (10) hours. Learned Counsel went on to indicate that counsel who conducted the case for the applicants was not a Queens Counsel although an experienced practitioner.
- [13] The respondent's final submission was that CPR Part 65.12 strictures are mandatory and therefore the assessment application of 14th July, 2006 must fail because no Bill of Costs was attached. The application must be a nullity as it was not accompanied by a Bill of Costs until two months after the application was filed, that is, 18th September, 2006.
- [14] It is to be noted that the respondent did not consider providing the Court with a reduced figure for its consideration for the award as it totally rejected the Bill of Costs. Obviously, the respondent cannot be suggesting that no costs should be awarded to the applicants as this would be to totally ignore the Order of the Court dated 29th December, 2005.
- [15] The applicants submitted that the contention of the respondent as regards the failure to provide the Bill of Costs along with the assessment application is fatal and renders the application a nullity is unwarranted. The applicants argue that this is so because the omission was remedied in September, 2006 and caused no prejudice to the respondent since the application was not considered or decided prior to the filing of the relevant Bill of Costs. Further, argued the applicants, the respondent did not raise any objection/opposition on this matter prior to September, 2006 and have only sought to do so after a whole year.

[16] In relation to this issue, it is clear from the White Book that the failure to file and serve a statement of costs in compliance with section 13 of the Costs Practice Direction did not warrant the wholesale disallowance of costs. The court would take the matter into account but its reaction should be proportionate.⁷ The question should be whether there has been any prejudice to the paying party and how that prejudice should be dealt with.⁸

[17] I therefore agree with the applicants' submissions that the failure having been remedied well before consideration of the application and there having been no objection by the respondents before now, no prejudice has been suffered by the respondent.

Conduct of the parties

[18] The conduct of the parties is a factor which should be considered when assessing costs. The applicants in their submissions stated that steps were taken to agree costs with the respondent by way of letter and the respondent did not respond.

[19] The applicants further contend that the respondent's conduct is also relevant in light of the fact that they only filed an application for extension of time to apply for leave to appeal after the applicants had filed their application to strike out. They contend that they would not have had to file their application to strike out had the respondent taken effective steps to prosecute the appeal. Had the respondent acted prudently the nullity point would have been raised as a preliminary issue on the hearing of the appeal and there would have been no need for the application to strike out.

[20] From the judgment of Barrow JA delivered April 3rd, 2006, it is clear that the respondent had an inkling that they needed leave to appeal and that they could have taken steps to remedy this failure much earlier than they did. Therefore, the respondent by their inaction caused the expense now associated with the strike out assessment.

⁷ White Book 2002 Vol. 1 Para 44.5.2, Page 952

⁸ MacDonald v Taree Holdings Ltd, The Times, December 28, 2000

The novelty, weight and complexity of the application and the time

- [21] The respondent submitted that the case was not a complex one and that the time spent by a reasonably competent legal practitioner in the case could not have been more than 10 hours. The applicants did not specifically address this point as relates to the strike out application. It is clear from the facts that the strike out application was dealt with by Barrow JA on written submissions and that there was no actual hearing of the parties.
- [22] The nature of the application which was before the Court was one for which there is ample case law and precedent on how the Court treats a Notice of Appeal filed without leave being obtained where leave is required. In fact, the respondent in their submissions cited several such cases.
- [23] It is therefore reasonable to state that a competent junior attorney having done research of not more than 2 hours on the Court's website would have landed himself with a plethora of authority thus obviating the need for extensive argument to convince the Court on an issue on which it had ruled on several occasions.
- [24] I therefore agree with the respondent that the case was not complex and would not have required an attorney as experienced as Mr. Michael Fay to argue it. I also accept the respondent's submissions that ten (10) hours is a reasonable time to have spent in preparation for this application.
- [25] The respondent in its submissions cited cases which dealt with applications to strike out Notice(s) of Appeal and made reference to the amount of costs awarded by the Court in these cases⁹ and submitted that the Court is bound by these authorities.
- [26] The applicants submitted that the cases cited refer to actual costs awards on the face of the applications and should be distinguished. They claim that had the Court been minded

⁹ Antigua Civil Appeal No. 33 of 2003-Maria Hughes v The AG of Antigua -\$1000.00
Anguilla Civil Appeal No. 6 of 2004-John Paul De Joria et al v Gigi Osco Bingemann et al - \$1000.00
BVI Civil Appeal No. 27 of 2006-Lyra Farrington v The Estate of Alec Mathavious et al -\$1500.00

to be guided by these principles it would have done so at the time the applications were heard.

- [27] Whichever argument one uses, the fact remains that the awards made by the Court on similar applications as the current one certainly serve as a guide as to what the Court considers reasonable in all the circumstances of the case. One thing is certain, the Court did not consider an application to strike out a Notice of Appeal as an extraordinary application requiring special skill to handle and argue.

Assessment

- [28] Applying the principles as set out in **Lownds v Home Office**¹⁰, when one applies the global approach and takes into account the factors set down in CPR 65.2 (3) and all the circumstances of the instant appeal, there can be no doubt that a claim for costs in the sum of US\$23,183.68 is unreasonable.

- [29] The applicants submit that they spent 27.25 hours in preparation for the application. I have already indicated that I find that 10 hours is a reasonable time to have spent on a matter such as this and that such a matter could have been ably argued by the counsel at Daniel, Brantley & Associates without the need for outside counsel.

Award

- [30] Taking all the factors into account, I award the hourly rate of US\$240.00 being a reasonable rate for junior counsel and multiplying this by 10 hours, award the sum of US\$2400.00 as costs to the applicants on this assessment. The departure from the awards made by the Court on similar applications takes into account the conduct of the respondent which I think was very relevant and significant in this case. No additional costs are awarded as costs of the assessment pursuant to CPR Part 65.12 (6) as this award, as I have already stated, is well over the costs awards made by the Court in similar cases.

¹⁰ See paragraph [8] supra

Second Assessment

- [31] The applicants submitted a Bill of Costs in the sum of US\$69,912.22 in relation to the application for an extension of time to apply for leave to appeal.

Applicable Principles

- [32] The bases of quantification are as outlined in paragraphs 6 and 7 (*supra*) and the approach to be adopted in assessing costs as stated by Lord Woolf in **Lownds v Home Office**¹¹.

Submissions

- [33] The respondent disputed each and every item of the applicants' Bill of Costs. They submitted that the application was done by way of teleconference and was not complex and involved a straightforward opposition by the applicants to the application. It therefore did not require more than one Counsel of moderate skill and, further argued the respondent, the application for extension of time was dealt with on written submissions.
- [34] The respondent pointed to claims for costs under items 2 and 3 for the week of October 23, 2005, item 2 for the week of November 20, 2005, item 3 for the week of December 11, 2005 and item 4 for the week of 15 January, 2006 and pointed out from these items that it would appear that the applicants employed 5 lawyers. The respondent indicated that the solicitors on record are Daniel, Brantley & Associates and that there was no justification for the array of lawyers to deal with three simple matters. The respondent also submitted that the Bill of Costs was replete with e-mail advice of 5 lawyers which expenditure it considered quite extravagant and should be rejected. There was no supporting evidence to support these costs. There was nothing before the Court to assist it for the purposes of assessing whether the tasks were performed, whether on an hourly basis, the number of hours calculated, or the personnel involved, submitted the respondent. However, the respondent did not provide any alternative costs figures for consideration.

¹¹ See paragraph [8] *supra*

- [35] The applicants for their part submitted that the respondent's conduct was relevant in that the time for filing an application for leave to appeal expired on 26th April, 2005 but the respondent only made an application for extension of time to apply for leave to appeal on 24th October, 2005 despite the fact that the need to apply for leave to appeal was specifically brought to the attention of the respondent by the applicants' solicitors on 23rd May, 2005.
- [36] In response to the respondent's submissions regarding the use of 5 lawyers, the applicants contended that all the applicants are based in France and are defending related proceedings in France as well as in Nevis. Consequently, they had no choice but to retain both usual French counsel and counsel in Nevis to conduct the proceedings and to liaise with each other on a regular basis to maintain a coordinated approach to litigation. Therefore, the applicants submitted that the disbursements are justified and reasonable in amount. The applicants further submitted that at all times the respondent had more than one solicitor, they say at least 3 lawyers. This the applicants use to justify their retaining 5 lawyers.
- [37] However, 'the fact that the other party has instructed leading counsel or intends to do so cannot and should not be disregarded as a factor to be taken into account when deciding the question whether or not it is reasonable to have instructed leading counsel'.¹² The fact that the respondent had 3 lawyers does not in and of itself justify the applicants retaining 5 especially in light of the nature of the application although it may be taken into account in assessing costs.
- [38] In relation to the non-Nevis lawyers submission, I quote Hariprashad-Charles J in the case of **Fincroft Limited v Lamane Trading Corporation**¹³:
- "It is clear that a foreign solicitor,...must be treated for the purposes of taxation , simply as foreign agents, and the charges incurred by these solicitors are charges properly taxable as disbursements in the ordinary course. The appropriate head to claim such fees is under disbursements."

¹² White Book 2002 Vol. 1 para 47.14.7 Page 1016

¹³ Claim No. BVIHCV2005/0264 at paragraph 30

Assessment

[39] Applying the principles outlined in **Lownds v Home Office**¹⁴ (the global approach), I find the sum of US\$69,912.22 claimed by the Applicants in relation to the second assessment to be disproportionate and unreasonable in light of the complexity of the case, the fact that the Applicants role was to oppose the application, the application was dealt with by way of teleconference and determined on the written submissions of the parties.

[40] Having determined that the overall figure is not reasonable, I will now look at the individual items of the Bill of Costs.

-Week of 23 October, 2005 - Item 2 not allowed - very vague.

-Week of 13 November, 2005 - Item 2 not allowed as costs relate merely to perusal of the skeleton argument and more particularly to searches at the Registry as to the new claim which does not relate to the application for which costs were awarded; Item 3 not allowed - not necessary expense as skeleton argument was already prepared; Item 4 not allowed as it relates to the new claim and not the application for extension of time.

-Week of 20 November, 2005 - Items 1, 2 and 3 not allowed - these activities not related to the application for extension of time.

-Week of 28 November, 2005 - Item 1 not allowed - review of exchanges between ZM and MB last week. This does not indicate what these exchanges were in relation to.

-Week of 4 December, 2005 - Item 3 not allowed - too vague as it does not indicate to what this relates.

-Week of 18 December, 2005 - Item 1 allowed only as regards 10 hours to reflect work done on finalising skeleton submissions in relation to the respondent's extension of time application and filing of bundles and sending of scanned copies of them. Drafting of Acknowledgments of Service and research on matter of fiat have nothing to do with the extension of time application; Item 2 and 3 not allowed as these relate to the new High Court claim which was filed by the respondent and not to the extension of time application.

¹⁴ [2002] 4 All E R 775 at 782

-Week of 25 December, 2005 - Items 1 and 2 not allowed as they are unrelated to application for extension of time.

-Week of 1 January, 2006 - Item 1 not allowed as it is unrelated to application for extension of time; Item 3 not allowed as it is very general.

-Week of 8 January, 2006 - Item 1 not allowed.

-Week of 15 January, 2006 - Item 1 not allowed as it is unrelated to application for extension of time.

-Week of 22 January, 2006 - Items 1 and 2 not allowed as they relate to the new High Court claim and not the application to which assessment relates.

-Week of 29 January, 2006 - Items 1, 2 and 3 not allowed as they relate to the new High Court claim and the application to which assessment relates.

-Week of 5 February, 2006 – Items 1, 2 and 3 not allowed as these costs appear to relate to the new High Court claim and not the application to which assessment relates.

-Week of 26 February, 2006 - Item 2 not allowed as it is unrelated to the application for extension of time to which this assessment relates.

Award

[41] I therefore award costs in the sum of US\$29,811.31 in relation to the application for extension of time to apply for leave to appeal (the second assessment) and application for assessment of costs in relation thereto.

Kimberly Cenac-Phulgence
Chief Registrar