

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.13 OF 2004

BETWEEN:

EPICUREAN LIMITED

Appellant

and

[1] AMERICAN INTERNATIONAL BANK LIMITED

[2] EDWARD ST. C. SMITH

Respondents

Before:

The Hon. Denys Barrow, SC

Justice of Appeal

Representation:

Mr. Dane Hamilton for the Appellant

Mr. Jerry Watt, QC and Dr. David Dorsett for the Respondents

2006: August 29.

RULING

[1] **BARROW, J.A.:** Consequent upon the filing of a notice of discontinuance of the appeal the respondents applied for costs. The discontinued appeal had been against a judgment that awarded damages of US\$200,000.00 to the appellant. The appeal had been listed for hearing in Antigua on 30th May 2005 but on 27th May 2005 the appellant filed and served a notice of discontinuance.

[2] Counsel for the respondents say they would have fully prepared themselves for the upcoming appeal. Counsel for the appellant says it was on 30th May 2005, after the appeal had been called in court and formally withdrawn, that counsel for the respondents served their skeleton argument on him. There is a dispute as to whether the appeal was formally withdrawn in court on 30th May 2005 but in view

of the undisputed filing of the notice of discontinuance on 27th May 2005 I do not see that it matters.

- [3] Costs were awarded in the court below to the appellant. There was no appeal by the respondent against that award. No costs were awarded to the respondents in the court below. There was no appeal by the respondents against that non-award. Nonetheless counsel for the respondents now ask this court to make an award of costs *in the High Court* in their favour. This, after this court has entered a formal order to give effect to the notice of discontinuance by dismissing the appeal for want of prosecution. This court reserved only the matter of costs, so there is no longer an extant appeal. That being the case I reject the attempt by counsel for the respondents to now appeal, or to obtain a decision in relation to, the award of costs in the court below, because this court now has jurisdiction to deal only with the costs of the discontinued appeal.
- [4] In relation to the discontinued appeal, there is no dispute that the respondents are entitled to its costs. I regard the respondents as the successful parties in relation to the appeal and it does not matter, for the purpose of deciding entitlement to costs, the manner in which they obtained that success. Counsel for the appellant has suggested a figure. That figure is not acceptable to the respondents. It is therefore purely a matter of quantification.
- [5] CPR 2000 provides, in rule 65.13, that the costs of any appeal must be determined in accordance with rules 65.5, 65.6 and 65.7, the rules relating to prescribed costs, but must be limited to two thirds of the amount that would otherwise be allowed.
- [6] However, dispositively in my view, both sides argued on the premise that prescribed costs were *not* to be awarded. The respondents expressed the view that costs should be quantified on the discretionary basis stated in rule 65.2. The appellant did not identify the rule upon which it relied but submitted that

reasonable costs should be awarded and I take this as amounting to the same thing.

- [7] Rule 65.2 (1) states, so far as relevant, that the court must allow as costs a sum that the court deems to be reasonable had the work been done by a reasonably competent practitioner and that the court considers fair to both the paying and the receiving party. In deciding what would be reasonable the court must take into account all the circumstances, including any order that has already been made; the care, speed and economy with which the case was prepared; the conduct of the parties before as well as during the proceedings; the degree of responsibility accepted by the legal practitioner; the importance of the matter; its novelty and complexity; and the time reasonably spent on the case.
- [8] The ways in which costs are to be quantified are stated in rule 65.3. In this case, where the respondent does not claim prescribed costs or budgeted costs, and it is not a procedural application, the method of quantification has to be by assessment in accordance with rule 65.12.
- [9] The starting point for such an assessment is for the party entitled to the costs, in this case the respondents, to apply to the Chief Registrar for directions as to how the assessment is to be carried out; (rule 65.12 (4)). The application must be accompanied by a bill or other document showing the sum which the court is being asked to assess as costs and how such sum was calculated; (rule 65.12 (5)).
- [10] If I may presume to comment, the object of the rule is to avoid parties simply throwing figures at each other or at the court. Or worse, simply saying to the court, please give me costs. Instead, the rule requires the party entitled to costs to adopt a rational approach by asking for an amount that the party knows that he must justify. This serves the valuable purpose of screening out un- or ill-considered claims. It serves the equally valuable purpose of enabling the paying party to properly consider a rationally presented claim. Agreement on costs, with the

consequent saving of court time, which is now being recognized as one of the court's most valuable resources, is far more likely when a well considered and justified claim is presented than when arbitrary figures are bandied about. If costs are not agreed, as is usually the case, the court has a clear basis and a transparent departure point for assessing costs. And the parties know the extent of their dispute.

[11] In this case the respondents have not even suggested a figure; far less have they offered any basis for calculation. The present consideration of costs begins with a letter dated 10th July 2006 from the respondents claiming, pursuant to rule 65.13 (b), prescribed costs of two thirds of the costs awarded below to the appellant. In view of those submissions the court issued directions for the respondent to make full submissions in writing, if desired, and for the appellant to respond. When the respondents filed their submissions they claimed, apart from costs in the court below which I have rejected, costs "based on rule 65.2". This was not the claim for costs that led to the giving of directions for "full submissions" to be made. That claim was for prescribed costs. The respondents, having chosen to claim discretionary and therefore assessed costs, must now make a proper application in accordance with rule 65.12.

[12] I would award the costs of the present application, in the sum of \$1,000.00, to the appellant.

Denys Barrow, SC
Justice of Appeal