

**EASTERN CARIBBEAN SUPREME COURT
ANGUILLA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO: AXAHCV2022/0008

BETWEEN:

DELTA PETROLEUM (ANGUILLA) LTD.

Claimant

-and-

ANGUILLA ELECTRICITY COMPANY LIMITED

Defendant

Before: His Lordship, The Honourable Justice Ermin Moise

Appearances:

Ms. Rayana Dowden for the Claimant

Mrs. Tana'ania Small-Davis KC and with her Mrs. Jacinth Jeffers of counsel for the Respondent

2023: May 31
2025: May 14

JUDGMENT

[1] **MOISE, J.:** This is an application to determine the value of a claim which was discontinued prior to the deadline for filing a defence. The applicant also seeks an assessment of costs. In essence, the outstanding issue in this matter is that of the appropriate costs order to be made in the claim as well as an interim injunction which had been dismissed by the court. In order to determine these issues, it is important to briefly outline the procedural history of this litigation.

[2] This matter initially commenced by way of claim form and statement of claim filed on 16th March, 2022. In addition to the claim, an application for an interim injunction was also filed on the same date. The issue between the parties centered around an alleged breach of a consent order which settled previous litigation between them. In essence, Delta Petroleum (DELTA) and the Anguilla Electricity Company Limited (ANGLEC) were previously parties to an agreement for the supply of fuel. DELTA

complained that ANGLEC had breached the contract and commenced litigation in case number AXAHCV2020/0030. In settlement of that claim, the parties agreed that any *tender process for the new fuel supply undertaken by ANGLEC would be conducted in a “fair, open and transparent manner.”* On that basis, DELTA discontinued its previous claim in accordance with the consent order.

- [3] In the current proceedings, DELTA complained that a new tender for the supply of fuel was issued by ANGLEC and subsequently withdrawn and replaced twice. It was contended that ANGLEC was in breach of the consent order in that the tender process was not fair, open and transparent. The court denied an application for an interim injunction on 29th July, 2022 and ordered that DELTA pay costs to ANGLEC. The court also ordered that the costs were to be assessed if the parties could not agree on reasonable costs within a period of 21 days. The parties could not agree on the costs to be paid on the injunction. However, on 12th August, 2022, DELTA discontinued the claim altogether. At that point the time for filing a defence had not expired and ANGLEC had not done so. The parties are now at variance as to how the issue of costs ought to be determined.
- [4] ANGLEC has filed an application and submits that costs should be determined pursuant to Rule 65.5 (2)(a) of the CPR. It is contended that the claim should be valued at US\$1,000,000.00 as the tender documents for the fuel supply indicate that the contract is valued in the region of US\$1,000,000.00. ANGLEC also argued that the Court, in dismissing DELTA's application for an interim injunction, determined that, among other things, damages was an adequate remedy against the alleged breach. If the sum of US\$1,000,000.00 is determined to be the value of the claim, then prescribed costs under the CPR would amount to \$US42,187.50, given that the claim was discontinued prior to the filing of the defence.
- [5] In addition to that, ANGLEC also presented a bill of costs on the injunction application which totaled the sum of US\$20,640.00. However, it is noted by counsel for ANGLEC that the appropriate rule to be applied for costs in an interim injunction is 65.11. If this is the case, then this rule would cap the costs of the injunction at no more than 10% of the full prescribed costs which would be awarded in the claim. If ANGLEC is successful in its submission that the claim should be valued at US\$1,000,000.00, then even after assessing the bill of costs, it is submitted, that costs on the interim injunction would be no more than US\$9,350.00

- [6] DELTA, on the other hand, argues that the applicable rule is 65.5(2)(b) and that the claim should be valued at \$50,000.00EC as it was not a claim for damages. What DELTA was in fact seeking was an injunction, although damages had been claimed as an alternative remedy. In the alternative, DELTA argues that although the fuel supply contract which was put to tender was valued at US\$1,000,000.00, that would not have been the profits made if DELTA had been successful in a bid. In fact, it was argued that the profit was more likely to be US\$100,000.00 per annum for a contract period of 3 years. Therefore, if the court were to reject the applicability of rule 65.5(2)(b) the proper value to be placed on the claim was US\$300,000.00. If that value is to be placed, then the prescribed costs on the claim would be US\$17,435.00 (considering that the claim was discontinued prior to the filing of a defence) and with the cap on the costs of the injunction, the maximum award would be \$3,875.00US. I note that counsel for ANGLEC, in their submissions, was prepared to accept an award in keeping with a value of US\$300,000.00 if the court rejects their initial submissions.

Costs and the CPR

- [7] Whilst counsel for the parties have centered their arguments on the applicability of rule 65.5(2) (a) or (b), the starting point in determining the issue of costs, especially on the interim injunction, is in fact rule 65.2 which states that ***[i]f the court has a discretion as to the amount of costs to be allowed to a party, the sum to be 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.*** In light of this, it is always worth reminding ourselves that the applicant is not entitled to an indemnity of all costs. The respondent should only be expected to pay costs which were reasonably incurred and were proportionate to the issues before the court
- [8] Insofar as the interim injunction is concerned, the court has already awarded costs to be assessed. As I have already noted, counsel for ANGLEC filed an itemized bill along with the current application. Both parties have submitted that the assessment of the costs should be done in accordance with CPR 65.11. Counsel for ANGLEC, at paragraph 18 of their submission notes that it has been consistently held that interim injunctions are procedural applications and therefore should be assessed under CPR 65.11. The rule states that:

65.11(1) On determining any application except at a case management conference, pre-trial review or the trial, the court must –
(a) decide which party, if any, should pay the costs of that application;
(b) assess the amount of such costs; and
(c) direct when such costs are to be paid.

In the CPR 2000, rule **65.11(7)** goes on to state that “[t]he costs allowed under this rule may not exceed one tenth of the amount of the prescribed costs appropriate to the claim unless the court considers that there are special circumstances of the case justifying a higher amount.”.

It is for this reason the value of the claim becomes important if this rule is to be applicable. If 65.12 is the appropriate rule, then there is no such cap on the assessment of costs.

[9] However, in the case of *Paradise Beach Holdings Ltd. v. Nevis Paradise Ltd. et al*¹, I expressed some doubt as to whether CPR 65.11 was the appropriate rule to apply in assessing costs for interim injunctions in general. This was the case as, to my mind, there is nothing inherently procedural about an interim injunction. Although there was a line of authority applying CPR 65.11 to injunctions, these judgments had never been subject to appellate review. However, I am now more fortified in my mind that this is wrong and that interim injunctions should be assessed in accordance with CPR 65.12. In addition to that, the new CPR promulgated in 2023 has now removed the equivalent of 65.11(7) and no longer carries a 10% cap on the costs as was previously the case. However, given that this application was filed prior to the promulgation of the new rules, the old principles will therefore apply. I am prepared, none-the-less, to find that the appropriate rule to apply in the assessment of costs for interim injunctions is that of CPR 65.12 as this rule applies where costs fall to be assessed in relation to any matter or proceedings, or part of a matter or proceedings, other than a procedural application. An interim injunction is not inherently procedural and therefore does not automatically fall within the ambit of rule 65.11.

[10] In determining the reasonableness of the costs claimed by ANGLEC it is important to adopt the approach of Lord Woolf in the case of *Home Office v Lownds*² where he states that:

¹ NEVHCV2017/0093

² [2002]4 All ER 775

"... 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 44.5 (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 reasonably incurred and the costs of that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable."

[11] The first question is whether or not the amount claimed on the interim injunction is proportionate, having regard to the relevant provisions of the CPR. In light of this rule 65.2(3) sets out the factors which the court must consider as follows:

- (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) ...;***
- (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) ...***

[12] The amount claimed by ANGLEC in its itemized bill amounts to US\$20,640.00. The first task of the court is to initially assess whether, in general, the costs appear to be proportionate and fair. Having assessed the bill, I am not of that view. The amount claimed as costs incurred in this bill is not proportionate to the issues addressed in the interim injunction. The application was considered with an appropriate measure of expedition and counsel on both sides addressed the issues with the care and speed as was required. There can be nothing peculiar said about the conduct of the parties, save

that the application for the interim injunction had been amended at some point. The matter was of no doubt important to both sides.

[13] However, it is my view that the application did not address any issue which was novel or complex in any way. Injunction applications relating to procurement and tenders are by no means a novel occurrence in the ECSC jurisdictions. In addition to this, it is my view that the hourly rate claimed for the services of two attorneys, one a King's Counsel, is not proportionate, neither is it within the parameters of what has been previously sanctioned by this court in other cases. I am not of the view that the nature of the application and the case in general is one which warrants the approval of King's Counsel fees. I therefore accept the submission of counsel for DELTA in her reliance on the case of ***Oliver Macdonna v Benjamin Richardson***. King's Counsel fees are not warranted in this case. The court is prepared to consider fees which are in keeping with its usual awards of junior and senior counsel.

[14] It must also be observed that the hourly rates claimed by junior counsel amount to approximately EC\$810.00. Anguilla is an EC jurisdiction, and that amount is beyond what the court has consistently sanctioned as appropriate fees for junior counsel. It must also not be taken for granted that it is reasonable to incur legal fees for both junior and senior counsel in any case. An attempt must always be made to ensure that costs remain proportionate to the issues raised in the case. In any event, as has been awarded by the court in previous cases, the sum of EC\$600.00 per hour is a reasonable rate for junior counsel and EC\$750.00 for senior counsel³. Again, it must be observed that this is not an award on an indemnity basis but an award which is reasonable had the work been done by a reasonably competent attorney. This is in no way designed to diminish the goodwill and experience acquired by counsel in this case, but rather to assess the substance and nature of the case itself and determine what a reasonable hourly rate should be.

[15] It is important, therefore, to give consideration to the line items on the itemized bill in order to determine whether a reasonable amount of time was spent in preparation for this application. In doing so, I see no offence in items 1, 2, 4, and 7-11 on the bill. The number of hours applied to these items appear to me to be reasonable. Insofar as it relates to item 3, I am of the view that the hours claimed

³ See ***Paradise Beach Holdings Ltd. v. Nevis Paradise Ltd. et al***

are excessive and would reduce the number of hours to 3. I share a similar view as it relates to items 5 and 6. I do not see the need for that many hours in preparation for the hearing. I would reduce item 5 to 5 hours and item 6 to 3 hours. As it relates to item 12, it is my view that this is a separate issue altogether and the court will award reasonable costs on the application for assessment and valuation of the claim separately.

[16] In taking these factors into consideration I would award a total number of hours for junior counsel as 9 hours. At a rate of EC\$600.00 per hour, the court would award the sum of EC\$5,400.00 in costs. As it relates to the hours for senior counsel, I have determined that the total number of hours awarded amounts to 22.25 hours at a rate of EC\$750.00 per hour. This amounts to a total of EC\$16,687.50. In total therefore I have determined that the costs of the interim injunction amounts to EC\$ 22,087.50.

[17] It is now left for the court to determine the appropriate award for the claim. I do not wish to repeat in detail the number of authorities cited by counsel for each party. However, it would suffice to say that after considering the authorities I am of the view that the appropriate rule to apply in determining the value of the claim is in fact 65.5(2)(b). The claim was not one for specified or unspecified damages. I agree with the submissions of counsel for DELTA where it is argued that the matter is substantively one claiming injunctive relief. The fact that damages was pleaded as an alternative remedy not does alter that position. Despite the court's finding on the injunction application that damages was an adequate remedy, this also does not alter what was specifically claimed in the pleadings. In the circumstances, I am of the view that the value to be placed on this case is that of EC\$50,000.00 and the prescribed costs ought to be 45% of EC\$7,500.00 given that the claim was discontinued prior to the filing of the defence. That amounts to EC\$3,375.00.

[18] It is therefore ordered that DELTA is to pay the sum of EC\$25,462.50 in costs to ANGLEC as follows:

- (a) EC\$22,087.50 on the costs of the interim injunction; and
- (b) EC\$3,375.00 as costs for the claim upon its discontinuance.

[19] The court also awards costs in the sum of EC\$1,500.00 for the application for the assessment and valuation of the claim.

[20] In closing, I do wish to apologize to the parties and counsel for the delay in delivering this decision. The assessment was heard in May, 2023 and unfortunately dropped off the list of outstanding decisions. I do hope that this has not caused too much of an inconvenience to the parties.

Ermin Moise
High Court Judge



BY THE COURT

REGISTRAR