

ST CHRISTOPHER AND NEVIS
ST CHRISTOPHER CIRCUIT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2021/0086

BETWEEN:

[1] CHANGSHA METRO GROUP CO. LTD

Claimant

and

[1] PENG XUFENG

[2] JIA SIYU

Defendants

Appearances:

Ms. Jean M Dyer for the Claimant

Ms. Natasha Brooks for the Defendants

2024: June 6
July 17

JUDGMENT

[1] **SAUNDERS, M:** The Claimant's ("*Changsha's*") claim is, among other things, for the return of alleged bribes paid by contractors to the 1st Defendant ("*Mr. Xufeng*") in breach of his fiduciary duties¹ to it and against the 2nd Defendant, his wife, by way of accessory liability. By an application issued 13 February 2023 the Defendants applied for orders that the Claim be struck out or stayed pending the provision of security for costs ("*the Application*"). On 10 October 2023 Master Pariagsingh (as he then was) made an order, following the withdrawal of the Application, that the Defendants pay Changsha's costs which were to be summarily assessed if not agreed. By the time the Defendants withdrew the

¹ Presumably, relying on such authority as **FHR European Ventures LLP v Cedar Capital Partners LLC** [2015] AC 250 in which it was decided that all bribes and secret commissions paid to a fiduciary are impressed with a constructive trust for the principal's benefit.

Application, written submissions had been filed by both parties and an affidavit in opposition had been filed by Changsha.

- [2] Changsha filed a Bill of Costs on 8 February 2024 totaling USD\$15,983.29 and I ordered that the parties exchange written submissions on 8 May 2024. On 6 June 2024 I heard the parties' oral submissions, and my order is that the Defendants pay Changsha's costs assessed in the amount of EC\$21,434.88 for the reasons set out below.

ASSESSED COSTS

- [3] The principles underpinning the Court's assessment of costs are relatively well known. The introduction of the Eastern Caribbean Supreme Court Civil Procedure Rules (revised edition) 2023 (*"the CPR"*), however, brought with it the significant change that there is no longer a Part 65.11(7) (*"the Costs Cap"*) which provided that, the assessed costs of a procedural application should not exceed 10% of the prescribed costs, unless special circumstances applied. Counsel for Changsha contended that the value of the claim was now not a factor to be considered when the Court assessed costs. She further submitted that the period within which Changsha could apply to set the value of the claim had not passed and it would therefore not be fair to ascribe a nominal value under Part 65.5(2)(c) to the claim. Counsel for the Defendants made the opposite submission. She contended that even if the Costs Cap was repealed, the value of the claim was a factor that the Court should consider in making its assessment and that value was the nominal sum of EC\$50,000.
- [4] There was also some disagreement between the parties concerning whether the assessment was to be conducted pursuant to Part 65.11 or 65.12 although it was accepted that the difference was not very material in light of the removal of the Costs Cap. Before I discuss the effect of the removal of the Costs Cap, I will very briefly summarise the assessed costs regime as it now stands under the CPR:
- a. Part 65.11 provides for the assessment of costs on the determination of all applications, procedural or not, and sets out the principles to be applied

unless the application takes place at a Case Management Conference, Pre-Trial Review or Trial².

- b. Specific rules concerning costs apply to applications which take place at a case management conference³, pre-trial review and a trial⁴. There are also cost consequences for a successful application which ought to have been, but was not, brought at a Case Management Conference or a Pre-Trial Review⁵.
- c. In quantifying the costs payable under Part 65.11, the court must consider any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing and must allow such sum as it considers fair and reasonable⁶.
- d. In making a determination concerning what is fair and reasonable the Court must be guided by the factors set out at Part 65.2(3) of the CPR. The wholesale adoption of the approach to costs in the English cases is inappropriate as Parts 44-48 of the England and Wales CPR setup a distinct regime from that in the CPR. See the decision of Michel JA in **Dawn Emberson Bain v Tortola Investment Trust Limited** BVIHCVAP2014/0001 and Note 29.1 of The Caribbean Civil Court Practice, 3rd Edn⁷.
- e. Part 65.12 does not describe a separate discretion to assess costs and applies to any matter, proceedings or part thereof, including applications, but not procedural applications, as they are specifically exempt by virtue of 65.12(1).

² **Norgulf Holdings Limited v Michael Wilson & Partners Ltd** (British Virgin Islands) Civil Appeal No. 8 of 2007 at [6], [18]

³ **Bertrand Burke v Mildred Kirwan** MNIHCVAP2015/0001

⁴ **Norgulf Holdings Limited v Michael Wilson & Partners Ltd** (British Virgin Islands) Civil Appeal No. 8 of 2007 at [11]

⁵ Eastern Caribbean Supreme Court Civil Procedure Rules (revised edition) 2023; Part 11.3(2)

⁶ Ibid; Part 65.11(1)(4)

⁷ Pg. 430

- f. Procedural Applications are those which do not decide the substantive issues in dispute on the claim⁸. By their very nature, procedural applications cannot be governed by Part 65.12 because, upon their determination, the Court is in a position to assess costs pursuant to the principles in CPR 65.11. No separate procedure is necessary to move the Court to make an assessment as is provided by Part 65.12.
- g. Part 65.12 is entirely procedural and delineates a process for commencing an assessment where one could not take place at the hearing of the application or other proceedings in which costs were awarded⁹.
- h. Parts 65.13-65.17 of the new CPR further particularise how an assessment pursuant to Part 65.12 is to be conducted, including by reference to the filing of points of dispute¹⁰ and the making of a provisional order on the written material by the Court¹¹.

[5] Changsha's costs consequent on the withdrawal of the Application are the costs of an application not made at a Case Management Conference. They are also costs of a procedural application as the substantive dispute was not the subject of the Application. In light of the principles set out at [4](a)-(d) above, Part 65.11 governs the costs of the Application.

THE EFFECT OF THE REMOVAL OF THE COSTS CAP

[6] Although the Costs Cap has been repealed, the proportion of the assessed costs to the value of the claim is a consideration for the Court in assessing costs. See, for example, the decision of Barrow JA (as he then was) in **Norgulf Holdings Limited v Michael Wilson & Partners Ltd** (British Virgin Islands) Civil Appeal No. 8 of 2007 in which the Court of Appeal had to consider whether to order an interim payment of costs following the appellants having been

⁸ **IPOC International Growth Fund Limited v LV Finance Group Limited & Ors** (British Virgin Islands) BVIHCV2003/0140 at [26], **United Company Rusal PLC et al v Corbiere Holdings Ltd et al** (St. Christopher & Nevis) NEVHCV2011/0030 at [47.ii].

⁹ **Norgulf Holdings Limited v Michael Wilson & Partners Ltd** (British Virgin Islands) Civil Appeal No. 8 of 2007 at [17]

¹⁰ Eastern Caribbean Supreme Court Civil Procedure Rules (revised edition) 2023; Part 65.14

¹¹ *Ibid*; Part 65.15(3)

successful on their appeal. The appellants contended in **Norgulf Holdings Limited** that the costs were to be assessed pursuant to Part 65.11 of the then CPR. Barrow JA decided, among other things, regardless whether the costs of the appeal were prescribed costs, or, were assessed on a discretionary basis (such as pursuant to Part 65.11), that the value of the claim had to be considered. He stated as follows:

“A prime relevant factor is the value of the claim, and in that regard I observe that on the material that comprised the record of appeal, I am not aware of what was the value of the claim, in the court below, against these two appellants as distinct from the value of the claim against the other five defendants. As regards the value of the appeal, because the appeal was confined to the limited aspect of whether or not the judge should have continued the receivership, it seems highly arguable that the value of the appeal should be significantly different from the value of the claim. It seems to me that until the values of both the claim against these two appellants and the appeal that they brought are agreed or stipulated there can be no assessment of either discretionary or prescribed costs. Neither could there have been any reliable estimation of the minimum amount of costs likely to be awarded so as to have determined a safe amount to order as interim costs. It will therefore be appreciated that the ascertainment of values (of the claim and the appeal, respectively) that would have established the bases for interim costs would have equally established the basis for the assessment of costs, both discretionary and prescribed. With those values established it would have been a straightforward matter to assess both discretionary and prescribed costs. It is for this reason that I take the view that the appellants should have proceeded with the assessments of costs rather than apply for interim costs.” [emphasis added]

- [7] One may be tempted to suggest that the Court of Appeal in **Norgulf Holdings Limited v Michael Wilson & Partners Ltd** was influenced in its decision by the now repealed Costs Cap. The Overriding Objective, however, which the CPR

says the Court is to seek to give effect when it exercises any discretion or construes any rule¹², provides that:

“The Overriding Objective

1.1 (1) The overriding objective of these rules is to enable the court to deal with cases justly.

(2) Dealing justly with the case includes –

(a) ensuring, so far as is practicable, that the parties are on an equal footing;

(b) saving expense;

(c) dealing with cases in ways which are proportionate to the –

(i) amount of money involved;

(ii) importance of the case;

(iii) complexity of the issues; and

(iv) financial position of each party;

(d) ensuring that it is dealt with expeditiously; and

(e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases”¹³

[emphasis added]

[8] Considering how the overriding objective says the Court ought to exercise its jurisdiction, the conclusion that, in assessing costs a very relevant factor is the value of the Claim, is inescapable¹⁴. The repeal of the Costs Cap has only removed the rigid ceiling on assessed costs relative to the value of the claim.

THE VALUE OF THE CLAIM

[9] Having satisfied myself that a consideration of the value of the claim is necessary, I must give the claim a value. Part 65.5, which governs how claims are to be valued, provides that:

¹² Eastern Caribbean Supreme Court Civil Procedure Rules (revised edition) 2023; Part 1.2

¹³ Eastern Caribbean Supreme Court Civil Procedure Rules (revised edition) 2023; Part 1.1

¹⁴ If there is any doubt that the overriding objective applies to an assessment of costs, the decision of Gordan JA in **The Attorney General of St Kitts and Nevis et al v Queensway Trustees Limited** Civil Appeal No.15 of 2005, is apposite.

“Prescribed costs

65.5 (1) The general rule is that where rule 65.4 does not apply and a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Appendices B and C to this Part and paragraphs (2) to (4) of this rule.

(2) In determining such costs, the value of the claim is –

(a) in the case of the claimant –

(i) the amount agreed or ordered to be paid; or

(ii) the amount determined in accordance with sub-paragraph (d);

(b) in the case of the defendant - (i) the amount claimed by the claimant in the claim form; (ii) the amount determined in accordance with sub-paragraph (c); or 387 386 (iii) the amount determined in accordance with subparagraph (d);

(c) if the claim is for damages and the claim form does not specify an amount that is claimed, such sum as may be agreed between the party entitled to and the party liable to such costs or, if not agreed, a sum stipulated by the court as the value of the claim; or

(d) if the claim is not for a monetary sum, it is to be treated as a claim for \$50,000 unless the court makes an order under rule 65.6(1)(a).” [emphasis added]

- [10] No evidence or submissions were filed concerning the value of the claim. Notwithstanding that and although Changsha has not sought a specific sum as part of its relief, the claim is not necessarily to be valued for the nominal sum of \$50,000 pursuant to Part 65.5(2)(d). The approved approach is that Changsha’s claim, which seeks the recovery of an unspecified sum, is to be treated as a monetary sum which has yet to be ascertained. See, for example, the decision **Bradford Noel v First Caribbean International Bank (Barbados) Limited** Civil Appeal No. 29 of 2006 (Grenada) in which Barrow JA decided that a claim for general damages is a claim for a monetary sum that has not yet been quantified. As was decided in **Bradford Noel**, the Court may stipulate a value of the claimant’s claim by reference to Part 65.5(2)(c) from the material

available. Much the same was done by Master Fidela Corbin Lincoln (Ag.) (as she then was) in the decision **Island IFS S.A v Hamilton Trust Co. Limited** NEVHCV2013/0018 (St Christopher & Nevis). In that case, during an assessment pursuant to Part 65.11, EC\$540,000.00 was stipulated as the value of the claim following a review of the claimant's Statement of Claim.

[11] It is not difficult following a review of Changsha's claim to form an impression of the amount of money in contest. See the following paragraphs of the amended Statement of Claim which allege specific bribes paid to Mr. Xufeng and others in consideration for their manipulation of Changsha's construction contract bidding process: 12(1),(2),(5),(10)-(16) and (20). At paragraph 13 of the Statement of Claim Changsha sums up the bribes allegedly paid to Mr. Xufeng and the others and states that as much as US\$18,987,025.00 in total was "*pocketed in return for plum construction contracts from Changsha*".

[12] Although the allegations in the Statement of Claim are often that bribes were split between Mr. Xufeng and another individual, who is not joined to these proceedings, it does not seem unfair to stipulate a value of about US\$9M, considering that the allegations which do specify how the bribes were split, usually indicate that they were split equally. I am not overly troubled by the fact that a more precise figure cannot be established as the Court, unlike where prescribed costs are being calculated, is here only trying to weigh whether the costs claimed bear a reasonable relationship to the value and importance of the subject matter in issue. Whether the sum ultimately proved against the Defendants is US\$1M, US\$18M, or, 0, the Statement of Claim discloses that Changsha's counsel is charged with recovering the equivalent of several million USD.

COUNSEL'S RATE

[13] Finally, issue has been taken with the hourly rate of US\$400 (the equivalent of EC\$1,080) adopted by Changsha's counsel in relation to the items in the Bill of Costs. By common law, an attorney's rate is informed by the reasonable objective costs of conducting the work in question¹⁵. Because Master

¹⁵ **Finley v Glaxo Laboratories Ltd** [1997] Costs Law Rep 106

Pariagsingh ordered a summary assessment, it was not possible for evidence to be adduced concerning the actual costs to Changsha's counsel of conducting the work¹⁶ and, in any event, such evidence is rare in an assessment of costs in St. Christopher and Nevis in recent history. In such circumstances, the first recourse in my view, is the guideline rates within the jurisdiction which it may be presumed have taken account of an attorney's reasonable objective costs.

[14] The St. Kitts and Nevis Bar Council Scale of Fees published July 2019 does not prescribe an approved rate in respect of counsel's fee, however, it does note that applications in the civil court carry a fixed fee of EC\$1,500. That relatively modest sum for an entire application does suggest that the hourly rate employed by Changsha's counsel is high. In **Paradise Beach Holdings Limited v Nevis Paradise Limited** NEVHCV2017/0093 (St. Christopher and Nevis) Moise J, on considering the same issue, approved a rate of EC\$550 per hour as a reasonable rate for counsel above 18 years call, as Changsha's counsel is. In **Vitaly Gogokhia v Savannah Advisors Inc** NEVHCV2020/0027 (St. Christopher and Nevis) Master John-Theobalds (Ag.) applied the same rate of EC\$550.00 in respect of junior counsel. In **Carmel Bernadette Agnes Mc Gill v the Attorney General of St. Christopher and Nevis** SKBHCV2022/0043 (St. Christopher and Nevis) Master Gill (as she then was) applied a rate of EC\$1,000, in distinction to such cases as those above, because counsel was a member of the Inner Bar. Considering the authorities, my view is that the rate of US\$400 is unreasonable and that a more appropriate basic rate is that of EC\$550 per hour.

[15] It seems to me sensible, however, to presume that where the value of the litigation is such as it is in this matter, that is, quite high, counsel has an even greater responsibility in performing the work as missteps, were they to occur, could be quite costly from a professional indemnity perspective. Furthermore, I am cognisant of the fact that the litigation is taking place across two jurisdictions

¹⁶ See **Lazarus (Leopold) Ltd v Secretary of State for Trade and Industry** [1976] Costs Law Rep 62 in which the calculus is explained as the grade of person that it was reasonable to employ at each stage, an approximation of their cost of employment and assessing a rate per hour sufficient to cover the salary and the appropriate share of the general overheads of each such person.

and concerns an area of law and legal issues which are not typical of the civil litigation practice in St. Christopher and Nevis. In light of the foregoing, I consider it reasonable that an uplift of EC\$100 should be applied to Changsha's counsel's rate where the work being performed is more complex.

MY ASSESSMENT

[16] With those preliminary matters out of the way, I have set out below my assessment in relation to the Bill of Costs:

Item	Time	My comments	Time allowed
1	2.5hrs	I find the time allotted in respect of the review of the application reasonable.	2.5hrs at EC\$650 per hour
2-4	10.5hrs	While I am mindful of the fact that the application was particularly important and the affidavit in response lengthy, even Changsha's submissions conceded that the main issue was really a forum challenge. I have also considered that the affidavit in opposition had to be translated overseas. Notwithstanding, I find 10.5hrs to be somewhat unreasonable for the taking of instructions and drafting the affidavit in response.	8hrs at EC\$650 per hour
5-6	11.5hrs	Given the nature of the application, the value of the claim and that the Application was in effect an existential threat to the claim, I accept that the written submissions would have reasonably taken this amount of time.	11.5hrs at EC\$650 per hour
7-8	10.5hrs	I am only prepared to allow 6hrs for written submissions in Reply. I believe that is the outer limit of the time it should	6hrs at EC\$650 per hour

		have reasonably taken Changsha's counsel to review and reply to the 11-page written submissions of the applicant.	
9	2hrs	I find the time spent preparing for the hearing reasonable, however, I have assessed it at the normal rate considering the heavy lifting, so to speak, would have been done in the written submissions.	2hrs at EC\$550 per hour
10-11	2hrs	I find the time allotted in respect of this work reasonable, however, the hearings can be assessed at the basic rate considering what they entailed as the Application was withdrawn.	2hrs at EC\$550 per hour
		Total	EC\$20,400
12-19		I do not find the sum of EC\$1,034.88 unreasonable in respect of the disbursements considering the volume of the bundles prepared and the logistics challenges encountered in preparing the affidavits.	EC\$1,034.88

Yuri Saunders

Master

Registrar