

**EASTERN CARIBBEAN SUPREME COURT  
ANGUILLA**

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

**CLAIM NO: AXAHCV 2016/0032**

**BETWEEN:**

**[1] National Bank of Anguilla (Private Banking and Trust) Limited  
(In Administration)**

**[2] Caribbean Commercial Investment Bank Limited  
(In Administration)**

**Claimants**

**-and-**

**[1] National Bank of Anguilla Limited (In Receivership)**

**[2] Caribbean Commercial Bank of Anguilla Limited  
(In Receivership)**

**[3] National Commercial Bank of Anguilla Limited**

**[4] Eastern Caribbean Central Bank**

**[5] Martin Dinning**

**[6] Hudson Carr**

**[7] Shawn Williams**

**[8] Robert Miller**

**Defendants**

**Before: His Lordship The Honourable Justice Ermin Moise**

**Appearances:**

Mr. Ronald Scipio, KC with him Ms. Eustella Fontaine and Ms. Yanique Stewart of counsel for the Claimants

Mr. James Christopher Willan, KC with him Mr. J. Alex Richardson and Mr. William Hare of counsel for 3<sup>rd</sup> Defendant

Mr. Paul Dennis, KC with him Ms. Navine Fleming and Ms. Nadine Whyte of counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> to 7<sup>th</sup> Defendants

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2024: February 9.

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## Decision on Costs

- [1] **Moise, J.:** On 12<sup>th</sup> October, 2023, the court delivered its judgment on the substantive claim in this matter. In essence, the court dismissed the claim and awarded costs to the defendants. On the date of the delivery of the judgment, the court invited submissions on the appropriate regime of costs to be used for the determination of costs. The parties have duly filed submissions and the issue for consideration is whether there are special circumstances which warrant a departure from the usual award of prescribed costs in the matter. I have decided that such circumstances do exist and awarded costs to the defendants to be assessed in accordance with the provisions of CPR 65.12. The reasons for my decision are as follows.
- [2] According to rule 64.6 (1) of the CPR, “[w]here the court ... decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.” There is therefore no dispute that the claimants have been unsuccessful in this litigation and are liable to pay costs to the defendant. However, as contained in rule 65.5 of the CPR, “[t]he 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.” In essence there is no dispute here that the general rule for the quantification of costs at the end of this trial is that the costs should be prescribed costs in accordance with Appendix B based on the appropriate value of the claim. It is also worth noting that in accordance with rule 65.5(2)(b) if the claim does not have a monetary value the default value of EC\$50,000.00 would apply, therefore potentially subjecting the defendants to an award of costs in the sum of EC\$7,500.00.
- [3] The rationale for reliance on prescribed costs as a general rule is now fully understood. As was noted by Lord Kitchin in the Privy Council decision in the case of *Rampersad et al v. Ramlal et al*<sup>1</sup> “the advantage of the regime of prescribed costs is plain. Where it is applicable, the parties know where they are in terms of the opportunity to recover costs if they are successful, and their potential liability if they fail. They also know that

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<sup>1</sup> [2022] UKPC 50

***they will not become embroiled in what may prove to be lengthy and expensive assessment proceedings.”***

- [4] To put it differently, the value in a regime of prescribed costs is that it allows litigants to count the cost of litigation. Litigants should give consideration to the issues of proportionality prior to and during the course of litigation. The proportionate use of the resources of the parties as well as the court should be considered. In determining the amount of costs which is likely to be recoverable at the end of litigation, a party, as well as the court itself, is better guided as to the time and resources which ought to be placed on the litigation and the manner in which the litigation takes place. This furthers the overriding objective of the CPR.
- [5] However, it has also been determined that the general rule is not written on tablets of stone. Whilst it is not one which ought to be so easily departed from, the court has a discretion to further the overriding objective in dealing with cases justly. As Sir Dennis Byron noted in the case of ***Rochamel Construction Limited v. National Insurance Corporation***<sup>2</sup> ***“the court is, however, given very wide discretionary powers to vary the application of the general rule.”*** Although Sir Dennis spoke here within the context of CPR Rule 64.6, which to my mind may very well bring different considerations to the fore than what is under consideration before me, I am of the view that the broad discretion allows the court to employ a different regime of costs if to do so would further the overriding objective of dealing with cases justly. This is in line with the decision of Lord Kitchin in ***Rampersad et al v. Ramlal et al*** where he goes on to say that ***“...depending on the circumstances, such a regime may provide an inadequate recovery of costs, and for this reason, it may be just and appropriate in some circumstances to apply a different and more generous regime.”*** Lord Kitchin went on to state the following:

***“... in cases which are not subject to a fixed costs regime, where no application has been made for the approval of a budget, and where the regime for prescribed costs would normally be applicable, the court may nevertheless award a party costs to be assessed.”***

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<sup>2</sup> SLUHCAP2003/0010

- [6] This was further highlighted in the more recent decision of the Privy Council in the case of ***Bertrand et al v. Elias***<sup>3</sup> where Lord Stephens noted that ***“even if no application or order is made in advance of trial under rules 67.6 or 67.8 the court has a discretion to award a party its costs to be assessed.”*** The question for consideration is what are the principles which ought to guide the court in making a determination as to whether the general rule ought to be departed from? For that Lord Stephens notes as follows:

***“The starting point in relation to discretion to order costs to be assessed is that it should not be exercised to undermine the purposes of prescribed costs which includes providing a measure of certainty to the public through having a costs regime where the amount of prescribed costs directly correlates with, and is proportionate to, the value of the claim. Accordingly, the discretion will only be exercised for good reasons and in exceptional cases.”***

- [7] The starting point is therefore to appreciate that a decision to depart from the general rule should not be taken lightly. The court should not be seen as undermining the general purpose of the prescribed costs regime. That regime should only be departed from for good reason and in exceptional circumstances. The Privy Council was of the view that ***“where the reasonable estimate of the actual costs is hugely disproportionate to the likely amount of prescribed costs”*** that would amount to an exceptional circumstance.
- [8] Lord Stephens went on to highlight (7) seven factors for consideration based on the peculiar facts of the case before the Privy Council. I agree with counsel for the 3<sup>rd</sup> defendant where it is submitted that these can be encapsulated in (5) five broad principles as follows:

- (a) Where the proceedings are ill-founded;
- (b) Where the claimants were on notice of the detailed estimate of the actual costs to be incurred by the defendant up to trial;
- (c) Where the importance of the claim to the parties or to the wider public is wholly disproportionate to the monetary value of the claim; and

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<sup>3</sup> [2023] UKPC 34

(d) Where the issues are relatively complex.

- [9] Having assessed the decision of the Privy Council, I do not take these 5 factors to be conjunctive; neither are they designed to place a limit of the various factors which a court may rely on to determine whether the circumstances warrant a departure from the general rule. It would all depend on the circumstances of the case. I will nonetheless address each factor in turn as they are applicable to the issues before me.

### **Was the Claim “ill-founded”?**

- [10] In the **Bertand Case**, Lord Stephens noted that ***“the prescribed costs regime is for genuine claims, and, although it generally applies in cases of discontinuance, it should not be used to protect TCL and CCL from the consequence of reimbursing the defendant in relation to the reasonable costs he actually incurred in defending ill-founded proceedings that should never have been brought by TCL and CCL.”*** In the circumstances of that case, it was found that the claim was one which ought not to have been brought in the first place. Even the actions of the claimant could have been relied on in order to make that determination.

- [11] In light of this specific factor, counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> to 7<sup>th</sup> defendants argue as follows:

*“... the claimants’ main witness, being its administrator, having made certain admissions in the witness box, accepted inter alia that the pleadings were based on views and that he had no expert evidence or otherwise to corroborate his claims. However, what is clear is that the claimants pursued a matter that was spurious, in the sense that it was unsupported by evidence, and the defendants were forced to defend an unmeritorious claim.”*

- [12] Counsel for the 3<sup>rd</sup> defendant also submitted that the claimants lost comprehensively on every single issue pleaded in the amended statement of claim. It was further submitted that the claimants made extremely serious allegations against the conservators, in particular. They were accused of acting in ways which no honest and intelligent person would have

done. It was submitted that those allegations were without merit. Further to that, it was submitted, as the court found in its own judgment, that the claimants' own main witness laid bare in his oral testimony that none of the actions put forward by the claimants were practical or would have improved the position of the Offshore Banks or their customers. It was submitted that *"the case was not a 'near miss'. It was fundamentally flawed from the onset."* Insofar as it relates to the claim specifically against NCBA, it was submitted that the claimants adduced no evidence that NCBA had received traceable property.

[13] I accept that the decision of the court was such that none of the allegations levelled against the defendants were substantiated at trial. In a review of the judgment of the court handed down on 12<sup>th</sup> October, 2023, it was also clear that Mr. Tacon had made a number of concessions in the witness box which were contrary to the substance of what had been pleaded. He accepted that a ring-fencing of the funds of the offshore banks would have been catastrophic and made other concessions which the court determined had undermined the case. It is therefore true to say that in general the evidence did not substantiate the substance of what had been pleaded; or at least that was what the court had found.

[14] However, in considering whether to depart from the general rule, the court must bear in mind the need for balance. There is a distinction to be drawn here between a case which is weak and/or not proven and trial and one which is ill-founded. In as much as the court should discourage persons from bringing spurious claims, the manner in which such issues are dealt with by the court may also serve the purpose of discouraging persons from accessing the courts in fear of significant cost awards being made against them merely because there may be certain weaknesses in the case. In the circumstances of this case, the Offshore Banks sought an account of net new monies which had been deposited into the Domestic Banks. Whilst I appreciate that the court's judgment indicates that there were inherent weaknesses in the case, that was a conclusion drawn after hearing all of the evidence. I would not go so far as to say that the claim was ill-founded to begin with.

**Were the claimants put on notice of the detailed estimate of the actual costs to be incurred by the defendants up to trial?**

- [15] In the **Bertand** case Lord Stephens noted that “*as from 3 November 2010 by virtue of the defendant’s application in relation to costs ... the claimants were on notice of the detailed estimate of the actual costs to be incurred by the defendant up to trial. There was no suggestion before the judge or before the Board that the estimate was unreasonable. Despite knowing the amount of costs which were estimated to be incurred by the defendant, and where they knew or ought to have known that these would be wholly disproportionate to the likely amount of prescribed costs, the claimants persisted right up to the door of the court in pursuing an ill-founded claim against the defendant.*”
- [16] In submissions presented by counsel for the claimants as well as the 3<sup>rd</sup> defendant, it is noted that NCBA had in fact made an application for security for costs. The affidavits in support of that application detailed a significant amount of costs which had allegedly been or were likely to be incurred in the litigation. It is my understanding that the claimants had disputed this, and an agreement was arrived at. It can therefore be argued that the notice referred to by Lord Stephens in the **Bertrand** case was distinguishable as there had been a dispute in the present case and a consent arrived at on that application. There is not an indication here that the other defendants had given any earlier indication of the costs they were incurring.
- [17] However, I make the point here that Lord Stephens was careful to point out that not only did the claimant know but that he ought to have known that the costs of the claim would be disproportionate to the likely amount of prescribed costs. In the submissions filed by counsel for the claimants in the case before me it is argued that there was no value placed on the claim and that in accordance with the CPR a default value of EC\$50,000.00 ought to apply. If that submission is to be upheld, then this would limit the costs recoverable to each defendant to EC\$7,500.00 or approximately US\$2,768.00. It is difficult to see the circumstances under which the court can conclude that the claimants would not have been aware or ought not to have been aware that the very nature of this claim was such that the costs to the litigation would have been significant and perhaps disproportionate to prescribed costs. I accept the submissions of counsel for the defendants on this point.

**Was the importance of the claim to the parties or to the wider public wholly disproportionate to the monetary value of the claim?**

[18] In Lord Stephens' decision in **Bertrand** he stated as follows:

*“... a factor which may be considered in the exercise of discretion in relation to quantification of costs is whether the importance of the claim to the parties or to the wider public is wholly disproportionate to the monetary value of the claim. In this case, if, as submitted on behalf of Mr. Bertrand, the estimated value of the claim is TT\$120,000 then there is a glaring disparity between the value of the claim and its importance. The claim involved an allegation that the defendant had maliciously asserted that Mr. Bertrand, a prominent businessman “was dishonest in his conduct of the business of [TCL and CCL], that he was disposed to deceit and to otherwise mislead ... the shareholders of the Company”. The claim also involved allegations the defendant had defamed Mr. Bertrand by asserting that he had mismanaged the financial affairs of TCL and CCL and was unfit and incompetent to hold the position of CEO of TCL; see para 13 above. The claim was obviously of considerable importance not only to the parties but also to the wider public in the Caribbean given Mr. Bertrand's involvement in important commercial and public positions; see para 8 above. The Board considers in the circumstances of this case the importance of the claim to the parties and to the wider public is a factor to be taken into account in the exercise of discretion.”*

[19] Counsel for NCBA submits that if a comparison is made between the circumstances of the **Bertrand** case, this would pale in comparison to one in which what was under consideration was judicial scrutiny of a regulatory intervention in a national bank which could have potentially caused a collapse of an entire local and sub-regional economy. No doubt the case was of significant importance to the claimants who sought accounts of funds deposited into the Domestic Banks on behalf of their clients. On the other hand, the reputation of the conservators as professionals of many years' experience was also at stake. A judgment against the NCBA, which is the leading banking institution in Anguilla, and which was set up

as a bridge bank as a general part of a plan to save the banking sector from collapse, raises the level of importance in this case. So too would be a judgment against the ECCB as regulators in the circumstances of this case. One cannot doubt the importance of this case to the parties and the wider public. It cannot be said that an award of prescribed costs on the value as outlined by the claimants in their submissions would be proportionate to the importance of this case and the inherent costs associated with prosecuting and defending it.

### **Were the issues relatively complex?**

[20] Lord Stephens noted that ***“where the issues are relatively complex and the estimate of the actual costs is hugely disproportionate to the likely amount of prescribed costs, then there is a risk that the prescribed costs regime could be used to adversely affect the defendant’s access to justice. ... However, inherent in any system of prescribed costs is the principle that there will be “swings and roundabouts” so that legal representatives may receive less generous remuneration in a complex case, but this will be made up by more generous remuneration in a simple case. Accordingly, for complexity to be a relevant factor the degree of complexity must be significant and contribute substantially to the disproportion between the actual costs and prescribed costs. The Board considers in the circumstances of this case that complexity is a factor to be taken into account in the exercise of discretion.”***

[21] Counsel for NCBA submits that there is no dispute that the matters in this case were highly complex. There were approximately 20 trial bundles and a significant amount of pre-trial disclosure. There were a series of interlocutory applications which engaged the high court as well as the court of appeal. Counsel also submits that the prescribed costs regime may not be suitable for commercial or other complex forms of litigation.

[22] Counsel for the claimants however argue that whilst the context of the claim is somewhat atypical in that such claims are rather rare in our region, the case itself does not raise any novel points of law or matters of particular legal or factual complexity.

- [23] In my view however, a matter need not be novel for it to be complex. One cannot doubt that this was a case of some measure of complexity. This involved the actions of the conservators who were alleged to be trustees of subsidiaries of two domestic banks which were subject to regulatory intervention. The overlap between the role of the conservators as it relates to the management of the Offshore Banks and the myriad of issues raised were in fact rather complex. I would find that counsel for the defendants are correct in their submissions that given the complexity of the matter, the costs on a prescribed costs basis would be disproportionate and unfair.

### The Costs

- [24] I make just one final observation here. The factors outlined in the authorities appear to call upon the court to consider, at least on the face of it, what the prescribed costs are likely to be and then to balance the issue against what the actual costs incurred in the litigation was also likely to have been. This does not necessarily call upon the court to conduct an actual assessment at this stage. The reasonableness of the costs claimed by the defendants will be subject to scrutiny in the assessment and the court is clothed with a duty in the CPR to ensure that these costs are not unreasonable.
- [25] There is however a shifting scope in the pleadings as to the value of this claim. There is no doubt that what was being pursued here ultimately is money. However, it was not clear exactly how much money was being pursued. At one point in the pleadings, it appears that PBT was claiming approximately US\$9,100,000.00 in net new monies. CCIB appeared to have been claiming in excess of US\$900,000.00. On the other hand, there was a representation to the effect that monies in excess of US\$200,000,000.00 were unaccounted for. The claimants however have made a submission here that the appropriate value to be placed on this claim is EC\$50,000.00.
- [26] As I have stated before, it cannot be reasonable to argue that EC\$7,500.00 would be even remotely proportionate and fair as an award of costs when taking the factors in the **Bertrand** case into account. In my view, taking all of the evidence and the principles in the round, I am

satisfied that this is a case in which the circumstances dictate that the court departs from the general rule and order that costs not only be awarded to the defendants but that the costs should be assessed.

[27] In the circumstances it is ordered that:

- (a) The costs of the proceedings are to be paid by the claimants to the defendants;
- (b) The costs are to be assessed costs;
- (c) The parties are to engage in discussions with a view to arriving at a consent position on the reasonable costs to be paid to the defendants;
- (d) In the event that the parties are unable to arrive at a consensus the defendants are at liberty to apply to the court for the assessment of their costs in keeping with the provisions of Rule 65.12 of the CPR after the expiration of 28 days from the date of this order.

**Ermin Moise**  
High Court Judge

**By the Court**

**Registrar**