

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

**FEDERATION OF ST. CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**A.D. 2020
(CIVIL)**

CLAIM NO: NEVHCV2020/0027

BETWEEN

VITALY GOGOKHIA

Respondent/Applicant

and

[1] SAVANNAH ADVISORS INC.
[2] THOMAS WILHELM
[3] NIKOLAUS T. WILHELM
[4] CTX TREUHAND AKTIENGESELLSCHAFT [ALSO
KNOWN AS CTX TREUHAND AG] AS TRUSTEE OF THE
ALPHA TRUST
[5] ALPENROSE WEALTH MANAGEMENT AG

Respondents

ASHOT EGIAZARIAN

Applicant/6th Respondent

Before:

Mrs. Michelle John-Theobalds

Master [Ag.]

Appearances (via Zoom):

Ms. Kurlyn Merchant for the Applicant/6th Respondent.

Ms. Derriann Charles for the Respondent/Applicant.

2021: March 15;
2022: August 15

JUDGMENT

- [1] **JOHN-THEOBALDS M [AG.]:** On 30th April 2020, Moise J heard the following applications:
- (a) The application of the applicant/6th respondent (“Ashot”) seeking an order setting aside the worldwide freezing order granted on 18th March 2020;
 - (b) The application of the 1st respondent seeking a variation of the terms of the worldwide freezing order; and
 - (c) The application of the respondent/applicant (“Vitaly”) for a continuation of the worldwide freezing order filed on 15th April 2020.
- [2] The court being of the view that the injunction ought to be discharged made such an order and inter alia awarded as follows:
- “The respondents are awarded costs to be assessed within the provisions of 65.12 of the CPR. The respondents are at liberty to file an application for an assessment of these costs within 21 days from the date of this order.”
- [3] On 22nd May 2020, Ashot made an application for the assessment of costs. The application was supported by an affidavit of Ashot, to which the order of Moise J and the Bill of Costs in the sum of US \$10,340.65 were attached. It is this application with which the court is now concerned.
- [4] On 8th June 2020, Vitaly filed an affidavit in reply to the application for assessment of costs. This was followed by written submissions in response on 1st December 2020. These submissions however primarily focused on the question of whether costs should be paid to Ashot in this instance. Vitaly submitted that costs should not be payable to Ashot and hastened to add that if the court did not agree with this submission and was minded to make an award for costs, then such award should be nominal.
- [5] In my view, Moise J’s order is pellucid. His Lordship made a costs award in favor of Ashot. This brought an end to that phase of the proceedings. The time for the consideration of factors as to whether or not Ashot was entitled to costs has passed.

If Vitaly had any objections to costs being awarded to Ashot, this should have been raised before Moise J when the application was heard. Additionally, the order granting costs to Ashot was not appealed by Vitaly. Consequently, as the matter of costs having been considered and determined by the judge, I am not in a position to go behind that order and consider the factors which Vitaly has now raised under rule 64.6(2) of the **Civil Procedure Rules 2000** (the “CPR”). This would essentially amount to a review or appeal of Moise J’s order which is improper. The matter before me must therefore be restricted to the assessment of the costs which should be paid to Ashot.

- [6] It must be stated that in their written submissions, Vitaly did not address the quantification of the costs. There was no mention made of the detailed particulars of the bill of costs submitted by Ashot. Vitaly has therefore opted not to weigh in on the assessment of the costs via written submissions.

The applicable law

- [7] Rule 65.12 of the CPR which deals with the assessment of costs regime provides as follows:

“Assessed costs –general

- 65.12 (1) 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.
- (2) If the assessment relates to part of court proceedings it must be carried out by the judge, master or registrar hearing the proceedings.
- (3) If the assessment does not fall to be carried out at the hearing of any proceedings then the person entitled to the costs must apply to a master or the registrar for directions as to how the assessment is to be carried out.
- (4) The application must be accompanied by a bill or other document showing the sum in which the court is being asked to assess the costs and how such sum was calculated.
- (5) On hearing any such application the master or registrar must either –
- (a) assess the costs if there is sufficient material available to do so; or
 - (b) fix a date, time and place for the assessment to take place.

(6) The master or registrar may direct that the party against whom the bill is assessed pay the costs of the party whose bill is being assessed and, if so, must assess such costs and add them to the costs ordered to be paid.”

[8] Rule 65.2(1) of the CPR is clear that what is essential is that the court, in the exercise of its discretion, makes an award that (i) it finds reasonable were the work to be carried out by a legal practitioner of reasonable competence; and (ii) which appears to the court to be fair both to the person paying and the person receiving such costs. This position is buttressed by several authorities.

[9] I am guided by Lord Hope of Craighead in **Horsford v Bird and others**¹ where he states as follows:

“It has to be borne in mind, in judging what was reasonable and proportionate in this case, that the basis of the award was not that the appellant was to be indemnified for all his costs. The respondent was to be required to pay only such of the appellant’s costs as were reasonably incurred for the conduct of the hearing before the Board and were proportionate.”

[10] In **Lownds v Home Office**² the court outlined the approach to be taken when assessing costs. Here the court held:

“... 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 Pt 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 cost for 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] Following the two-stage approach outlined in **Lownds**, the bill of costs submitted by Ashot will accordingly be used to identify which costs should be awarded.

¹ [2006] UKPC 55.

² [2002] EWCA Civ 365.

[12] Rule 65.2(3) CPR provides guidance as to what factors the court must take into account in assessing the costs. It states:

“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;”

Ashot's application

[13] In support of the application, Ashot has urged the following on the court:

- (i) The matter involved a substantial amount of money and a complexed area of law i.e. a worldwide freezing order. The matter also required urgency and great care and attention as well as it touched and concerned orders from other jurisdictions.
- (ii) It is submitted that having regard to the time reasonably spent on the case, the novelty, weight and complexity of the case as well as the importance of the matter, the total costs as a whole are not disproportionate.
- (iii) The bill of costs satisfies the requirements of CPR 65.11(5) in that it: -
 - (a) Particularizes counsel's fees incurred which range from taking instructions, drafting documents, reviewing documents, research and preparation of skeleton arguments preparation for trial and court appearances.
 - (b) Shows how the costs are calculated by specifying the time and rate of billing.
 - (c) Particularizes disbursements incurred which include stamps/filing fees, service of documents, printing and copying.

[14] The bill of costs submitted by Ashot sets out the time spent on the various aspects in relation to the matter and translates these into costs based on an hourly rate.

[15] Ashot is not automatically entitled to costs as outlined in its bill of costs. As the authorities instruct, if the global sum submitted by a party is disproportionately high

then the court is obligated to conduct a thorough and detailed review of the bill of costs to ascertain which items are reasonable or determine what a reasonable figure would be for items which appear to be unreasonable.

- [16] In reviewing the bill of costs submitted by Ashot, I find that the sum of US\$10,340.65 which is sought by Ashot on applications dealing with a worldwide freezing order and a stay to be not only excessive but also unreasonable and disproportionate and my reasoning for so finding will become apparent shortly. Having determined that the global sum claimed appears to be disproportionate, I will therefore review each item in turn.

Disbursements

- [17] Ashot has submitted a cost for disbursements for the filing fees in the sum of EC\$163.00. Having reviewed the individual fees submitted and the filings required to be made in this matter, I find this to be reasonable and would allow this item.

Letters

- [18] Ms. Merchant, counsel on record for Ashot, has submitted that she prepared and dispatched 4 letters in relation to this matter.³ The rate submitted for each letter was US\$100.00 (or EC\$271.69). I am satisfied that this is an acceptable rate and would allow the award of EC\$1086.76 in total for the letters to opposing counsel.

Service of documents

Ms. Merchant has also submitted a cost of US\$100.00 for service of documents on opposing counsel via email. I do not accept that this is an amount which should be claimed separately from the cost of the preparation of these very documents, particularly since there was no process server involved and the service was done via email. I therefore disallow the costs for this item.

³ The dates of these letters were 1st, 2nd (when two letters were sent) and 7th April 2020.

Hourly Rate for Counsel

[19] Ms. Merchant has submitted that the rate of US\$300.00 per hour for counsel is reasonable, is not excessive and is well within the standard practice. It must be stated that while the bill of costs states that this rate was the agreed retainer for counsel, although this court can take it into account it is not bound by this figure and is obligated to conduct a proper assessment to determine a reasonable and proportionate rate considering all the circumstances.

[20] On the above proposition, I am guided by the Board in **Horsford** where Lord Hope of Craighead opined:

“Where the courts of England and Wales are asked to assess the amount of costs they will not allow costs which have been unreasonably incurred or are unreasonable in amount. Civil Procedure Rules 1998, r 44.4(1). Where costs are to be assessed on the standard basis they will only allow costs which are proportionate to the matters in issue, and they will resolve any doubt which they may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party: CPR, r 44.4(2). The concept of proportionality which the CPR has adopted is new. But otherwise the principles which they set out have been established for a very long time: see the former Rules of the Supreme Court, Ord 62, r 12(1); **L v L (Legal Aid Taxation)**...[1996] 1 FLR 873...per Aldous LJ; **Wraith v Sheffield Forgemasters Ltd**...[1998] 1 WLR 132...per Kennedy LJ. A costs judge is expected to apply the same principles when taxing an award of costs on the standard basis in proceedings before the Board. It has to be borne in mind, in judging what was reasonable and proportionate in this case, that the basis of the award was not that the appellant was to be indemnified for all his costs. The respondent was to be required to pay only such of the appellant’s costs as were reasonably incurred for the conduct of the hearing before the Board and were proportionate.”

[21] For the purposes of this assessment, counsel Ms. Merchant has not submitted any documentation to show what the standard practice is in the jurisdiction. There is also the fact that the fees are in United States dollars when the predominant currency on island is Eastern Caribbean dollars. For this purpose, I will assess the costs using Eastern Caribbean dollars. This would make the rate of US\$300.00 per hour submitted by Ashot equivalent to EC\$815.00 per hour.

- [22] Counsel Ms. Merchant was called to the Bar of St. Kitts and Nevis in 2010. This would put her in the range of a little over 10 years call at the Bar. In assessing whether the rate submitted by counsel is proportionate, particularly in the absence of any confirmation from counsel as to what the standard practice is in St. Kitts and Nevis, it is necessary to examine some of the awards that have been made in the jurisdiction.
- [23] The case of **HMB Holdings v The Attorney General et al**⁴ is instructive in this regard. In that case, the Master was tasked with making a determination as to whether counsel's fees and solicitor's professional fees and disbursements were reasonable. In making this determination the Master considered the hourly rate submitted by senior counsel in that matter. The Master, using her experience in the jurisdiction, found that she was comfortable in allowing the sum of EC\$550.00 as a more appropriate hourly rate for counsel of 18 years call.
- [24] In **Paradise Beach Holdings Limited v Nevis Paradise Limited et al**,⁵ in offering some guidance, Moise M (as he then was) observed that in relation to the hourly rate for counsel, "[t]he range has been within five hundred dollars (\$500.00EC) to seven hundred and fifty dollars (\$750.00EC) an hour with perhaps a two-thirds reduction for junior counsel." In that case he awarded the hourly rate of EC\$600.00 for senior counsel.
- [25] Williams J in the Nevis case of **Mark Brantley v Hensley Daniel et al**⁶ was of the view that a figure of five hundred and fifty Eastern Caribbean dollars (\$550.00EC) was suitable for counsel in that matter.
- [26] I am guided by the awards made in the above stated decisions and, taking these into consideration I find that the hourly rate of US\$300.00 proposed is

⁴ ANUHCv2010/0406 (delivered 1st June 2012, unreported).

⁵ NEVHCv2017/0093 (delivered 4th June 2018, unreported).

⁶ NEVHCv2011/0130 (delivered 9th March 2015, unreported).

disproportionate and is not a reasonable sum to be considered. In particular, I find it to be excessive, for counsel who may not be considered as senior counsel given her years of call and experience at the Bar. The authorities suggest that EC\$550.00 would be a reasonable award for counsel in this matter. I do however take into consideration the fact that counsel is the head of her Chambers and appears to have been the only counsel who worked on this matter. For this reason, I deviate slightly from the awards made in the matters previously highlighted and I am of the view that a rate of EC\$600.00 per hours a reasonable award for counsel's professional fees. Consequently I so order.

Hours Claimed

[27] Ms. Merchant, in her bill of costs has outlined the time spent on the matter, translated to hours, which includes, taking instructions, sending correspondence, review and preparation of pleadings and written submissions as well as time spent in court. Counsel urges this court to accept the following as time spent on the matter:

- | | | | |
|-------|---|---|----------|
| (i) | Communication via email and telephone | - | 4 hours |
| (ii) | Time spent on foreign proceedings | - | 5 hours |
| (iii) | Time spent on preparation of this claim | - | 23 hours |

When tallied, the hours submitted amount to approximately 32 hours. In determining whether this time is reasonable, I will review the items separately.

[28] Ms. Merchant has quantified the total amount of time spent on communication via email and telephone as 4 hours. I note that, based on the bill of costs, this matter appears to have engaged Ms. Merchant for a span of about 8 weeks. I also note that for some of the communication costs billed, the exact nature and purpose of the communication was not elucidated, and others are nebulous. I am therefore not satisfied that a total of 4 hours was spent taking instructions and sending emails. This is outside of the hours billed for preparation of the matter. In my view this is not proportionate to the nature of the matter. Instead, I would award costs for time reasonably spent on communication via email and telephone as 2 hours.

- [29] Ms. Merchant is seeking to be indemnified for work done in relation to contempt of court proceedings in the United States of America. To this end, Ms. Merchant has submitted a claim for an additional 5 hours. It must be stated that for the purpose of the assessment of costs, this court can only be concerned with the proceedings in the Eastern Caribbean Supreme Court. Consequently, in assessing the costs in this matter, the court will not take into account any time spent on these proceedings. I therefore disallow the costs for the time spent on this item.
- [30] In relation to the preparation of the matter in this court, including the application to vary the freezing order, the application for the stay and the assessment of costs, counsel has submitted in the bill of costs that some 23 hours were spent on the same.
- [31] Ms. Merchant has submitted that the hours claimed are not excessive or unreasonable considering the work required, degree of preparation and attention required to provide representation in the matter. Counsel also urges this court to find that the matter was weighty and involved complex multi-jurisdictional claims. The matter at hand is that of the discharge of a worldwide freezing order and a stay of proceedings. Although counsel submits that a significant number of hours were spent in preparation for this matter, by no means is this representative of the complexity of the matter. Such applications are not novel to the court and the mere fact that the matter was disposed of at a hearing which lasted a little over an hour is indicative of the finding that the matter is not weighty or complex in any way.
- [32] Having reviewed the documents filed and having given consideration to the nature of the matter, I am of the view that 14 hours is a reasonable amount of time to expend on the preparation for this matter. To this I would add the 1 hour for the assessment of costs hearing, allowing a total of 15 hours for the preparation and execution of this matter. I am satisfied that for a matter of this nature this amount of time is reasonable.

[33] Taking into consideration the rate which I found to be reasonable for Counsel Ms. Merchant being EC\$600.00 per hour, I therefore award the sum of EC\$9,000.00 as reasonable costs for professional fees for preparation and court attendance in this matter.

Order

[34] Based on the above, I order as follows:

1. Costs are assessed in the sum of EC\$11,449.76 as follows:
 - (i) EC\$9,000.00 for 15 hours spent on this matter, including research, drafting, preparation and court attendance, at the rate of EC\$600.00 per hour;
 - (ii) EC\$1200.00 for 2 hours spent taking instructions, telephone and email communication at the rate of EC\$600.00 per hour;
 - (iii) EC\$1086.76 in total for the preparation of 4 letters; and
 - (iv) EC\$163.00 for disbursements for the filing fees.
2. On the application for assessment of costs, I award the sum of EC\$1000.00 to be paid by Vitaly to Ashot.

**Michelle John-Theobalds
Master [Ag.]**

By the Court

Registrar