

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

Civil Division

SAINT LUCIA

Claim No: SLUHCv2008/0158

BETWEEN:

BARON GABRIEL VAN DER ELST

Claimant

-and-

[1] LPA INTERNATIONAL INC

[2] LANE PETTIGREW ASSOCIATES (ST. LUCIA) LTD

[3] JON LANE PETTIGREW

Defendants

Appearances:

Ms. Diana Thomas for the Claimant; and
Mr. Deale Lee for the Defendants

2021: September 21;
November 26 – via email

DECISION

Claimant's assessment of costs

[1] **PARIAGSINGH, M. (Ag):** - Before the Court is the Claimant's assessment of costs pursuant to the Order of Belle J made on July 26, 2012. The Claimant in this application to assess costs has made reference to a decision of June 26, 2012. I have searched the Court's file and I have found no decision of that day.

[2] The Claimant's application references the decision of Belle J on two applications filed on behalf of the First and Second Defendants on October 20, 2010. I have only been able to find a decision of Belle J on the Second Defendant's application for a stay of proceedings.

[3] On this application Belle J ordered the Second Defendant to pay the Claimant's costs pursuant to Part 65CPR. It is on the basis of this order I now proceed to assess the costs payable on the Second Defendant's application for a stay filed on October 20, 2010.

SUMMARY OF THE PROCEEDINGS:

[4] The application from which the entitlement to costs arose was filed on October 20, 2010 on behalf of the Second Defendant seeking a stay of this claim against pursuant to Section 7 of the Arbitration Act, Chapter 2.06.

[5] The thrust of the application was the interpretation of Clause 8 of a Construction Management Agreement entered into between the parties. The central issue was; whether this clause constituted an arbitration agreement.

[6] The application was supported by the affidavit of Jon Lane Pettigrew. This affidavit comprised of 4 pages and contains 10 paragraphs with 3 exhibits.

[7] On January 18, 2011 the matter came up before Belle J. At that hearing Ms. Leandra Verneuil appeared for the Claimant. Mr. Dexter Theodore and Ms. Patricia Augustin appeared for the Defendants. The matter was adjourned to April 12, 2011.

[8] On April 08, 2011 an affidavit in opposition to the application was filed by the Claimant. This affidavit comprised 4 pages and 17 paragraphs.

[9] The application was heard on April 12 and 13, 2011 by Belle J and decision was reserved. Appearing at the hearing was Mr. Hilford Deterville QC leading Ms. Diana Thomas for the Claimant. Mr. Sydney Bennett QC leading Ms. Patricia Augustin appeared for the Defendants.

[10] In resisting the application, the Claimant filed submissions on April 12, 2011 and supplemental submissions on April 26, 2011.

[11] On July 21, 2011 written submissions were filed by the Defendants. Noteworthy is that these submissions did not only deal with the Second Defendant's application. It also addressed a similar application made on behalf of the First Defendant, also filed on October 20, 2010. These submissions comprised of 68 paragraphs and spanned 10 pages.

[12] On July 26, 2012, Belle J delivered his decision on the Second Defendant's application. In his decision the learned judge held *inter alia* that the Claimant was not able to discharge the burden of proving that having two disputes heard in court while another is heard by an arbitrator would result in conflicting decisions. This was one of the main grounds advanced by the Claimant in opposition to the application.

[13] The learned judge also agreed with the Claimant on its argument regarding when the proceedings were properly instituted, that the delay was not too long and the effect of a stay would be prejudicial.

[14] The Claimant was not successful on all the grounds advanced in opposition to the application but nevertheless was successful in opposing the application.

THE METHOD OF ASSESSMENT:

[15] There are three methods to quantifying costs, budgeted costs, prescribed costs and assessed costs. Rule 65.11 CPR (assessed costs) applies where budgeted costs or prescribed costs do not apply. There has been no application for budgeted costs. Prescribed costs exclude the making or opposing of any application except at a case management conference or pre-trial review (Rule 65.7 (2)(d) CPR). Prescribed costs therefore do not apply to the instant application.

[16] Assessed costs applies to procedural applications which are not made at the case management conference or pre-trial review, as the instant application (Rule 65.11 (1) CPR). The Second Defendant in its written submissions contends that the costs payable is prescribed costs based on the value of the claim and invited the Court to consider this, I disagree. Prescribed costs and assessed costs are two entirely different regimes of quantification of costs based on different factors. The applicable method of quantification in the instant application is assessed costs.

[17] Assessed costs can either be on the standard basis (Attorney /Attorney basis) or on the indemnity basis (Attorney /Client basis). The starting point is to determine the basis of the assessed costs to be used. In assessing costs on the standard basis, the Court allows costs which are proportionate to the matters in issue. Any doubt regarding whether an item was reasonably incurred and proportionate under this basis is resolved in favour of the paying party. Conversely, the test of proportionality is not applicable in assessing costs on the indemnity basis. On the indemnity basis (attorney/client basis) any doubt which arises in respect of whether costs were reasonably incurred are resolved in favour of the receiving party.

[18] In the instant application, the order does not provide for costs on the indemnity basis. Further the application does not raise issues as between Attorney/Client. As such, the standard basis is applicable.

[19] One of the pillars of the overruling objective is proportionality. Proportionality is considered with reference to **Part 1 Rule 1.1 (2) (c) of the Civil Proceedings Rules 2000** as amended which states:

- “(c) dealing with the cases in ways which are proportionate to the –
 - (i) the amount of money involved;
 - (ii) the importance of the case;
 - (iii) the complexity of the issues; and
 - (iv) the financial position of each party”

[20] In the case of **Home Office v Lownds [2002] 4 All ER 775 CA** the approach to the proportionality when assessing costs was stated as a two-stage approach. It was stated that:

“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 Part 44.5(3) (Same as Rule 65. 2 (3) of the ECSC CPR) states are relevant. If the costs as a whole are not disproportionate according to the test then all that is normally required is that each item should have been reasonably incurred and the costs 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, the cost of the item was reasonable.”

[21] The sum to be considered in the first stage is the sum claimed before VAT as stated in **Giambrone v JMC Holidays [2003] 2 Costs LR 189**.

[22] Once the Court is of the view that the sum claimed as a whole is not proportionate, then every item then must be considered under the headings of necessity and reasonableness, the item-by-item approach. Even if the Court considers that the sum claimed is proportionate, the Court can still examine items on the basis of necessity and reasonableness. The rationale behind this approach is proportionality being the guiding principle.

[23] The other consideration outside of the necessary and reasonable consideration is whether the Claimant would be entitled to a fee on brief and if so, in what sum.

[24] In **The Attorney General of Trinidad and Tobago v Haleema Mohammed, Civil Appeal No. S-218/2018**, the Court of Appeal of Trinidad and Tobago considered whether Counsel is entitled to a fee on brief if the matter was did not go to trial. In the joint judgment of the Court delivered by Jamadar JA (as he then was) and Pemberton JA the Court held at paragraph 11 that:

“We therefore find that Counsel for Haleema was entitled to claim on brief fee for pre-trial work and for attendance at the inter parties hearing, the application to deem the matter urgent for hearing in the vacation and for the hearing on the representative proceedings. What is necessary is that a proper determination of that fee be employed by the Assistant Registrar using the standard set out by Hobhouse J”

[25] Whilst not binding in this jurisdiction, I agree with the decision and reasoning in **Haleema**. The Claimant is entitled to a fee on brief on the Second Defendant's application.

[26] In **Loveday v Renton [1992] 3 ALL ER 184** at page 191f it is stated :

“... in allowing fees the taxing officer should have regard to the other fees and allowances payable to counsel in respect of other items in the same case when the work done in relation to those items has reduced the work which would have otherwise been necessary in relation to the item in question, I should as a first step identify what items of work are to be treated as covered in by the brief fee and refreshers and to what extent fees already allowed overlap into the brief fee”

[27] In **Simpsons Motor Sales (London) Ltd. v Hendon Borough Council [1965] 1 W.L.R. 112** Pennycuik J stated that:

“the proper measure of counsel's fees is to estimate what fee a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particularly high fee sometimes demanded by counsel of pre-eminent reputation, would be content to take on the brief: but there is, in the nature of things, no precise standard of measurement and the costs assessment officer must, employing his knowledge and experience, determine what he considers the proper figure.”

[28] In **Loveday v Renton and The Wellcome Foundation Ltd (No.2) [1992] 3 All E.R. 184** in determining what items falls under the umbrella of fee on brief, it was stated that preparation by counsel of his examinations in chief, cross-examinations and final submissions are an ordinary part of his conduct of a trial on behalf of a client and fall within the brief fee together with:

1. preparation work before the delivery of the brief on the faith of a solicitor's (instructing attorney's) statement that it will be delivered;
2. preparatory work in counsel satisfying himself that he should accept the brief;
3. evening preparation;
4. any consultations between members of the team of counsel (other than conferences or consultations at the behest of the client or instructing solicitor (attorney));
5. advising experts at weekends;
6. conferring with experts without separate instructions;
7. lost opportunities;
8. chronologies, etc.;
9. skeleton arguments save for the Court of Appeal. See *Hornsby v Clark Kenneth Leventhal (A Firm)* [2000] 4 All E.R. 567;
10. *dramatis personae*;
11. opportunities to prepare further when the court is not sitting;
12. preparation of draft terms of collateral arguments;
13. where a case is sufficiently complex, a separate fee for final written submissions can be claimed, where it has been specifically agreed and not covered by the brief fee. See *Chohan v Times Newspaper* unreported, September 17, 1998 per Nelson J;
14. note of judgment.

ASSESSMENT OF COSTS:

[29] The sum claimed by the Claimant is \$131,095.50. Whilst the statement of costs contains a claim for VAT, the Claimant's Counsel withdraw this claim at the hearing.

[30] Applying the first stage of the two-stage test, I find the sum claim to be disproportionate to the factors stated in Rule 65.2 (3) CPR. In particular, the novelty,

weight and complexity of the application and the time reasonably expected to be spent, in my respectful view does not justify the sum of \$131,095.50.

[31] Although the Claimant relies on a letter dated January 14, 2011 from Caribbean Law Chambers to the Claimant as evidence of an agreement to pay fees at the rates claimed, the same is not proof of fees paid. I nevertheless had regard to the agreement between the Claimant and his lawyers regarding the basis of charging in applying the rates which were agreed as set out below.

[32] I will now proceed to the item-by-item approach:

FEES CLAIMED FOR QC :

Item	Necessary	Reasonable	Allowed (Hrs)
1.	Yes	No	8
2.	Yes	No	0.75
3.	Yes	Yes	1
4.	No	No	0
5.	No.	No.	0
6.	No.	No.	0
7.	Yes	Yes	0.5
8.	Yes	Yes	0.2
9.	No.	No.	0
10.	Yes	N/A	Comprises part of the fee on brief
11.	No	No	0
12.	Yes	Yes	0.4
13.	Yes	Yes	0.4
14.	No	No.	0
15.	Yes	N/A	Comprises part of the fee on brief

16.	Yes	N/A	Comprises part of the fee on brief
17.	Yes	Yes	5.5
18.	Yes	Yes	2.5
19.	Yes	No	Comprises part of the fee on brief
20.	Yes	Yes	1
TOTAL ALLOWED			20.25

In respect of Item 1, the fee on brief for Queen's Counsel the sum of \$10,000.00 was claimed. This is equal to 6 2/3 hours. I have allowed 8 hours for this item as other items claimed on the statement of costs fall under the work which comprises the fee on brief. In particular items, 8, 10, 15, 16 and 19 are all included in the fee on brief. These items are claims for time spent by QC meeting with the other members of the legal team and settling skeletal arguments.

Items 4, 5, 6, 9 which are not allowed are claims for QC drafting letters and case summaries. Those items are not the work of QC they are the function of Junior Counsel and/or Instructing Attorney.

No. 11 is a claim for settling of an opinion prepared by external counsel. This was not necessary. QC's decision to settle a written opinion may be best practice but it was not necessary. Further, no such opinion was produced at the assessment. This item is not allowed.

No. 14 is a claim for time spent on a telephone conversation between QC and the client. The purpose of the conversation is stated as being to advise the client on the progress. It is not necessary for QC to advise the client of the progress of a matter. Any updates to the client would be part of the care and conduct fee and not a separate claim by QC. This item is not allowed.

Items 17, 18 and 20 are actual time spent in Court by QC. These items are allowed.

FEES CLAIMED FOR JUNIOR COUNSEL:

Item	Necessary	Reasonable	Allowed (Hrs)
21.	Yes	No	10
22.	Yes	Yes	3
23.	Yes	N/A	Comprises part of the fee on brief
24.	No	No.	0
25.	Yes	N/A	Comprises part of the fee on brief
26.	No.	No.	0*
27.	Yes	No	1.5
28.	Yes	N/A	Comprises part of the fee on brief
29.	Yes	N/A	Comprises part of the fee on brief
30.	Yes	Yes	5.5
31.	Yes	Yes	2.5
32.	Yes	N/A	Comprises part of the fee on brief
33.	Missing from Bill		
34.	Yes	N/A	Comprises part of the fee on brief
35.	Yes	Yes	1
TOTAL ALLOWED			23.5

*claim made in respect of the First Defendant's application.

The fee on brief claimed is equal to 8.75 hours. I have adjusted this upwards and allowed 10 hours for Junior Counsel's fee on brief. This upward adjustment is to take into account items 23,25, 28, 29, 32 and 34. These items are claims for time spent in meeting with QC, research, preparation of skeletal arguments and considering the other party's submissions. These items are part of the fee on brief.

Item 24 is a claim for preparation of an opinion. This is not a necessary. This item is not allowed.

Item 26 relates to the First Defendant's application. This assessment is of work done on the Second Defendant's application. This sum is therefore not allowed.

Items 30, 31 and 35 are the actual time spent by Junior Counsel in Court.

OTHER ITEMS ON BILL:

[33] Save for item 40, which is not allowed as preparation of an amended statement of claim is not work which falls within the applications, items 36 to 58 are allowed.

[34] The applicable rates are as claimed and agreed between the Claimant and his legal team. In particular; QC at the rate of \$1,500.00 and Junior Counsel at the rate of \$800.00 (Rate allowed for Ms. Diana Thomas.)

SUMMARY OF AWARD:

FEE EARNER	CLAIMED	ALLOWED
QC	\$71,125.00	\$30,375.00
Junior Counsel (Ms. Thomas)	\$57,240.00	\$18,800.00
Junior Counsel (Ms. Deterville)	\$810.00	\$750.00
Legal Clerks	\$950.00	\$950.00
Disbursements	\$970.50	\$970.50
TOTALS	\$131,095.50	\$51,845.50

INTEREST:

[35] The Claimant is entitled to interest on the assessed costs. Interest is however discretionary. The record reflects that the issue the outstanding costs was also part of the mediation order made in this matter. Further, the statement of costs was filed some 3 years after the order of Belle J. Whilst the general position is that interest is

allowed on the assessed sum from the date of the order, in my respectful view the delay of 3 years in presenting the statement of costs for assessment must be taken into account.

[36] Whilst under the Rules of the Supreme Court 1975 there was a limitation period for the institution of taxation proceedings, there is no such provision in the Civil Proceedings Rules. This in my view does not disentitle the Court from considering the delay in commencing taxation proceedings and exercising its discretion in accordance with the overruling objective to deal with cases justly.

[37] In my view, it would be unfair to award interest during the period the claim was stayed pending mediation. Further, there is no explanation as to why there was a delay of 3 years in instituting taxation proceedings. I have also taken this delay into account in exercising my discretion to award interest. In this regard, I award interest at the reduced rate of 2% on the sum assessed from the date of the filing of the statement of costs (December 21, 2015) today's date. Interest shall thereafter accrue at the statutory rate.

COSTS:

[38] The Claimant is entitled to the costs of the assessment having to present a statement of costs for assessment, there being no agreement by the Second Defendant. This sum is summarily assessed in the sum of \$1,500.00.

ORDER:

[39] In the circumstances, it is hereby ordered that:

1. The Claimant's costs of the Second Defendant's application filed on October 20, 2011 are assessed in the sum of \$51,845.50 together with interest thereon at the rate of 2% per annum from December 21, 2015 to today (2,167 days) calculated in the sum of \$6,156.12 ; and
2. The Second Defendant shall pay the Claimant's costs of this assessment in the sum of \$1,500.00.

**Alvin Shiva Pariagsingh
Master (Ag.)**

By the Court,

Registrar