

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2020**

CLAIM NO. AXAHCV 2019/0004

BETWEEN:

SOF 82 ANGUILLA HOLDINGS LLC

Claimant

and

EXECUTIVE COUNCIL (GOVERNMENT OF ANGUILLA)

Defendant

Appearances:

Ms. Tara Carter, Carter & Associates of counsel for the claimant

Mr. Thomas W.R. Astaphan, QC instructed by the Attorney General's Chambers of counsel for the defendant

2020: June 16, 19;
July 6.

Judicial review – Assessment of costs in judicial review proceedings – CPR 56.13(4) and 56.13(5) – Basis of Assessment – Quantification of costs – Whether costs to be assessed on an indemnity basis or on a standard basis – CPR 65.11 and 65.12 – Whether prescribed costs regime applicable to quantification of costs – CPR 65.11 (7) – Court's discretionary powers when awarding costs – Fairness reasonableness and proportionality – Matters which the court should take into account in exercising its discretion – CPR 65.2 – Global approach or itemized approach – Conduct of the parties in the proceedings – Whether claimant entitled to the entirety of its costs

DECISION

- [1] **INNOCENT, J:** The Claimant, SOF 82 Anguilla Holdings LLC ('SOF') had been granted leave by this Court to file a claim against the Executive Council ('EXCO') on the narrow and distinct ground that EXCO had failed to provide adequate reasons for its decision (the 'Leave Application').

- [2] The court also ordered that the costs of and occasioned by the Leave Application be agreed or otherwise assessed by the court.
- [3] On the substantive claim for judicial review, the court quashed the decision of EXCO refusing SOF's appeal against the decision of the LDCC refusing SOF's application for planning approval as contained in EXCO Minute dated 24th October 2018. The matter was remitted to EXCO for reconsideration in accordance with the court's judgment as it related to giving adequate reasons for EXCO's decision.
- [4] The court also ordered costs to be assessed in accordance with CPR Part 65.11 and 65.12 within 14 days of the court's order unless otherwise agreed between the parties.
- [5] The parties failed to arrive at an agreement with respect to costs either on the Leave Application or on the substantive claim.
- [6] On 22nd April 2020 SOF filed an application for the assessment of costs in respect of both the Leave Application and the substantive claim for judicial review. In respect of the Leave Application, SOF by its notice of application sought costs in the sum of US\$7,836.40; and, with respect to the substantive claim in the sum of US\$6,655.10 assessed in accordance with CPR 65.11 and CPR 65.12.
- [7] It appears from SOF's notice of application, that it is seeking costs on a full indemnity basis on the grounds that EXCO acted capriciously in relation to the matters upon which SOF sought to obtain judicial review.
- [8] The notice of application was accompanied by the affidavit of Mr. Roy Shanholtz ('Mr. Shanholtz') which had exhibited thereto a detailed bill of costs in respect of both the Leave Application and the substantive claim for judicial review. Mr. Shanholtz's

affidavit sets out the basis upon which SOF contends that it is entitled to costs on a full indemnity basis.¹

Basis of Assessment

- [9] EXCO dismisses SOF's claim to be entitled to an award of costs on an indemnity basis as being without merit. Instead of filing points in dispute to the various items claimed by SOF on its bill of costs, EXCO has instead opposed the entire basis upon which SOF seeks to be awarded costs and the global amount claimed as costs at both stages of the proceedings. Mr. Thomas Astaphan QC, Counsel appearing for EXCO, filed written submissions in opposition to SOF's costs application.
- [10] EXCO submitted that the bill of costs submitted by SOF is unreasonable, disproportionate and unsustainable. SOF's claim to be entitled to costs on an indemnity basis was strongly opposed by EXCO. Mr. Astaphan QC, submitted that, SOF's assertion that it is entitled to have its costs assessed on an indemnity basis is entirely misconceived; and, that the quantum of costs to be awarded in the present case ought to be assessed on a standard basis. According to Mr. Astaphan QC, costs ought only to be awarded on an indemnity basis "where the court so orders for specific or categorical reasons" of which there are none in the present case.
- [11] Mr. Astaphan QC contended, that costs occasioned by the Leave Application ought to be assessed in accordance with CPR 65.11 which by no stretch of imagination could conceivably amount to US\$7,836.40.
- [12] Mr. Astaphan QC further contended, that there was no finding by the court in either the decision on the Leave Application or on the judgment in the substantive claim that suggested or in any way confirmed capricious or arbitrary conduct on the part of EXCO that would warrant a departure from the general rule laid down by CPR

¹ At paras. 5-6 of Shanholtz affidavit

56.13(5) that costs awarded by the court on a claim for judicial review must be assessed in accordance with CPR 65.11 and 65.12.

[13] Notwithstanding SOF's argument that it is entitled to have costs assessed on an indemnity basis, SOF has adopted the rather curious position that costs on the substantive claim for judicial review ought to be assessed in accordance with CPR 65.11 and CPR 65.12 and has relied on the decision of the Court of Appeal of the Eastern Caribbean Supreme Court's (the 'Court of Appeal') decision in the case of **Friar Tuck Ltd. and another v International Tax Authority**² as authority for that position. This obviously runs contrary to SOF's contention that they are entitled to an award of costs on a full indemnity basis.

[14] The court is persuaded by Mr. Astaphan QC's arguments with respect to the approach that the court should adopt in the assessment and quantification of costs. The court is guided by the provisions of CPR 65.2 which provides:

"65.2 (1) If 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.

(3) 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; ..."

² [2019] ECSCJ No. 77

[15] Therefore, it appears from the provisions of CPR 65.2 that the court, when exercising its discretion in awarding costs, ought to be guided by the principle that an award of costs must be fair, reasonable and proportionate.

[16] This approach to the award of costs is evident in the case of **Lownds v Home Office**³. The case of **Lownds v Home Office** sets out a two stage approach to the assessment of costs. The headnote in **Lownds v Home Office** reads:

“When assessing costs on the standard basis, judges should give effect to the requirement of proportionality in CPR 44.4^a by adopting a two-stage approach: 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 set out in CPR 44.5(3)^b. If the costs as a whole are not disproportionate according to that test, 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, 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. If the global costs are disproportionately high, reasonable costs will only be recovered for the items which were necessary if the litigation had been conducted in a proportionate manner. Any item that was not necessary should be disallowed. A sensible standard of necessity has to be adopted, taking fully into account the need to make allowances for the different judgments which those responsible for litigation can sensibly come to as to what is required. In deciding what is necessary, the conduct of the other party is highly relevant. In a case where the claimant recovers considerably less than he has claimed, the question whether the costs incurred were proportionate should be decided having regard to what it was reasonable for the party in question to believe might be recovered...”

[17] SOF also applied for costs to be awarded on the Leave Application on an indemnity basis. On the contrary, learned Queens’ Counsel Mr. Astaphan countered that the costs occasioned on the Leave Application fall to be assessed pursuant to CPR 65.11.

³ [2002] 4 All ER 775

- [18] The court adopts the view that costs on the Leave Application ought not to be assessed in accordance with CPR 65.11. In awarding costs both on the Leave Application and the substantive claim for judicial review, the court is minded to adopt the approach already set out in **Lownds v Home Office**. It is now clear how costs in judicial review proceedings are to be assessed.
- [19] CPR 56.13(4) provides that the judge may, make such orders as to costs as appear to the judge to be just including a wasted costs order. CPR 56.13(5) mandates that if the judge makes any order as to costs the judge must assess them and it references CPR 65.11 and 65.12 which deal with the assessment of costs.
- [20] CPR 56.13(6) provides that the general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application. CPR 56.13(6) references CPR 64⁴ deals with the court's general discretion as to the award of costs. CPR 64.6(3) empowers the court to order a party to pay only a specified portion of another party's costs.
- [21] CPR 64.6(6) ⁵is also instructive with respect to the matters which the court ought to have regard. Therefore, it appears that CPR 64.6 places the court's observations regarding SOF's conduct of the proceedings at the leave stage and on the substantive claim into proper context.

⁴ See: CPR 64.6(3); 64.6(4); 64.6(5) and 64.6(6)

⁵ (6) In particular it must have regard to –

(a) the conduct of the parties both before and during the proceedings;

(b) the manner in which a party has pursued –

(i) a particular allegation;

(ii) a particular issue; or

(iii) the case;

(c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings;

(d) whether it was reasonable for a party to –

(i) pursue a particular allegation; and/or

(ii) raise a particular issue; and

(e) whether the claimant gave reasonable notice of intention to issue a claim.

- [22] Contrary to Mr. Astaphan QC's assertions in relation to the provisions of CPR 65.11(7), the court is of the view that it ought not to be applied in these proceedings. The court is fortified in its view by the decisions in **Norgulf Holdings Limited and Incomeborts Limited v Michael Wilson & Partners Limited**.⁶ This position is supported by the decision in **Friar Tuck Ltd**. The prescribed costs regime has no applicability to the assessment of costs on judicial review proceedings.
- [23] It appears that the provisions of CPR 65.11(7) relates to a situation where there is a procedural application before the court which requires the master or the registrar to assess costs at an amount that does not exceed one-tenth of the prescribed costs likely to be awarded in the substantive claim. This provision in no way relates to the assessment of costs on a claim for judicial review. Therefore, the court declines to accept Mr. Astaphan QC's submissions on this point.
- [24] With respect to the basis for the assessment of costs on the substantive claim, Mr. Astaphan QC submitted that costs on the substantive claim ought to be assessed in accordance with CPR 56.13, CPR 65.2 and CPR 65.11 and CPR 65.12.
- [25] Mr. Astaphan QC also submitted that CPR 65.12 governs the general rules which form the basis for the assessment of costs and the exercise of the court's discretion in awarding costs to a party.
- [26] The court does not find favour with Mr. Astaphan QC's submissions on this point in light of the decision of the Court of Appeal in **Friar Tuck Ltd. v International Tax Authority**. The court has already discussed the provisions of CPR 56.13 that are relevant to applications for administrative orders.
- [27] In **Friar Tuck Ltd. v International Tax Authority**, the Court of Appeal Court of Appeal tackled the question of whether it was open to the judge assessing costs in judicial review proceedings to apply the prescribed costs regime to the assessment

⁶ [2005] ECSCJ No. 68 per Barrow JA at paras. 5-18

of the costs in these proceedings. The learned judge in the court below in assessing the costs on the leave application and the substantive claim for judicial review ruled that in carrying out the assessment, she was satisfied that it ought to be done on a prescribed basis. The learned trial judge applied the provisions of CPR 65.5(2)(b) in awarding costs.

- [28] The appellants appealed on the grounds that the learned trial judge erred in law by failing to apply the correct standard of assessment required by CPR 56.13(5), namely a discretionary detailed assessment pursuant to the principles under CPR 65.12 and that the learned judge erred in law by failing to apply the costs regime applicable to judicial review proceedings under CPR 56.13(5) by applying the prescribed costs regime when there was no good reason to do so.
- [29] The Court of Appeal held that the judge in the court below erred when she determined that the proper basis for the assessment of costs was prescribed costs pursuant to CPR 65.5(2)(b).
- [30] Michel JA, in delivering the judgment of the Court of Appeal, set out what may be aptly described as a blueprint for the assessment of costs in judicial review proceedings. The following principles can be distilled from the case of **Friar Tuck Ltd**. CPR 65.11 lays down the principles to guide the court in making an assessment of costs on determining applications.
- [31] Therefore, CPR 65.11 has no applicability in the assessment of costs on claims for judicial review or administrative remedies. The procedure laid down in paragraphs (3), (4) and (5) of CPR 65.12 for the assessment of costs cannot be applied to the assessment of costs in judicial review proceedings because they deal exclusively with assessment of costs undertaken by a master or registrar.⁷

⁷ Per Michel JA at para. 19

Conclusion

- [32] After considering the arguments advanced by the parties and the case law referred to in this judgment, the court is of the considered view, that costs on the Leave Application ought to be assessed in accordance with CPR 56.13 and CPR 65.12(1), CPR 65.12(2), CPR 65.2 and CPR 64.6.
- [33] The leave stage of the proceedings can appropriately be described as part of the substantive claim for judicial review. CPR 65.11 deals with the assessment of costs on procedural applications. Indeed, one may wish to argue that an application for leave to bring a claim for judicial review is a procedural step in the proceedings and therefore, costs at the leave stage ought to be assessed in accordance with CPR 65.11. However, the provisions of CPR 56.13 are specific whereas CPR 65.11 is general to the extent that it relates to all procedural applications.
- [34] In the circumstances, the court is minded to apply the same approach to the assessment of costs in both at the leave stage and the substantive claim for judicial review.

Assessment of Costs

- [35] In assessing costs on the present application, the court has looked at the global sum which SOF seeks as opposed to dissecting the Leave Application from the substantive claim. Clearly, the court is entitled to treat the Leave Application as part of the substantive proceedings. The CPR entitles the court to assess the costs of part of any proceedings.
- [36] In looking at the global sum claimed by SOF, the court has asked itself the pertinent question, whether the global sum is fair, reasonable and proportionate in light of the provisions of CPR 64.4(6) and 65.2.

- [37] In the circumstances, the court finds the sum of US\$7,836.40 and US\$6,655.10 which SOF seeks as costs on the leave application and the substantive claim for judicial review respectively, to not only be excessive, but also unreasonable and disproportionate. In addition, based on the principles set out in the relevant parts of the CPR as they relate to the assessment of costs, SOF is wrong to assume that they are automatically entitled to the entirety of their costs.
- [38] The court having arrived at the conclusion that the global costs are disproportionately high, holds that SOF is only entitled to recover reasonable costs for the items which were necessary if the litigation had been conducted in a proportionate manner.
- [39] The bill of costs is structured in a time and billing format and sets an hourly rate of US\$300.00 per hour. Based on the court's review of the bill of costs it appears that all the items contained therein were reasonably incurred. However, when calculated, each item listed in the bill of costs appears to be inflated considering the fact that the matter was not of an extremely complex nature, did not involve any novel area of the law, and clearly did not require such prolonged periods for preparation. In particular, the court notes also that the sums claimed for attendance at both the hearing of the Leave Application and the substantive claim appear to be somewhat inflated.
- [40] The court makes these observations in light of its own experience and taking into consideration the experience and ability of counsel appearing in the matter. The court is also well placed having had the opportunity to hear and determine both the Leave Application and the substantive claim to make a fair assessment of what the quantum of costs incurred in the preparation and trial of the proceedings ought to entail.

- [41] In the circumstances, the court will allow the sum of EC\$2500.00 including disbursements of EC\$500.00 on the Leave Application which the court finds reasonable in the circumstances.
- [42] The court makes the same observations in respect of the bill of costs submitted with respect to the substantive claim for judicial review as in the case of the Leave Application. Therefore, the court will award the sum of EC\$5,000.00 plus disbursements of EC\$230.00.
- [43] In conducting the assessment of costs in the present proceedings, the court took into account the conduct of the parties in the litigation.
- [44] Leave was granted to SOF to bring the claim for judicial review on only one of the grounds which they advanced, that is, the failure of EXCO to give reasons and the adequacy of the reasons given by EXCO for not allowing the appeal from the LDCC.
- [45] Also, SOF had sought leave on the basis that EXCO had acted irrationally, unfairly and in bad faith. In addition, the Leave Application was premised on the principle of legitimate expectation. None of the other grounds advanced by SOF for leave to bring a claim for judicial review were allowed by the court.
- [46] The court also makes the following observations concerning SOF's Leave Application and on the hearing of the substantive claim. The court has also taken into account the conduct of the other party in the litigation both at the leave stage and the substantive claim for judicial review.
- [47] The court recalls that SOF had mistakenly joined the Attorney General as a party to the Leave Application; and this resulted in the striking out of the Attorney General as a party to the proceedings and the substitution of the EXCO.⁸

⁸ Decision in AXAHCV 2019/0004 delivered 25th March 2019 at para. [33]

- [48] In the Leave Application, the court also disallowed the grant of leave in relation to what was termed the implied decision of the LDCC on the grounds that there was an alternative remedy to the relief sought in relation to the implied decision of the LDCC. The court had reasoned that SOF ought to have appealed to the EXCO with respect to the so called implied decision of the LDCC.⁹
- [49] In the circumstances, the respondent in the Leave Application was forced to expend time and costs in having to defend grounds for judicial review which were unfounded and unnecessary. Notwithstanding that the court had only granted leave on the single ground of the inadequacy of reasons, SOF included in its Fixed Date Claim Form grounds upon which leave was not granted by the court and sought to advance the claim for judicial review on the same disallowed grounds.
- [50] Subsequent to the grant of leave to SOF, and prior to the hearing of the substantive claim, SOF had filed an application seeking specific disclosure of the documentation that EXCO relied on in its deliberations and amounted to the “paper” that EXCO had considered. This application was contested and subsequently dismissed by the court.
- [51] Surprisingly, in the course of the hearing of the substantive claim, SOF challenged and sought to have struck out, the affidavit of the Honourable Deputy Governor, Mr. Perin Bradley which had exhibited thereto an EXCO memorandum setting out the matters that EXCO had before it when it considered the appeal.¹⁰
- [52] This memorandum was what the respondent in the substantive claim described as the basis for which EXCO derived its reasons. In giving its judgment the court had considered this to be the giving of late reasons. Therefore, the court will take this aspect of the case into account when considering the conduct of the respondent in the litigation which would make it liable to pay more of the other party’s costs.

⁹ *Infra* at paras. [34] – [43]

¹⁰ Judgment in AXAHCV 2019/0004 delivered 28th June 2019 at paras. [29] – [39]

However, the court recognizes the privileged nature of the EXCO memorandum; and, for this reason does not believe that the respondent ought to be penalized in costs.

[53] In **Rochamel Construction Limited v National Insurance Corporation**¹¹, the Court of Appeal placed the provisions of CPR 64.6 (2) and (3) under the microscope. In delivering the decision of the Court of Appeal in **Rochamel**, Byron CJ said:

“CPR part 64.6 prescribes that where 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. The Court is, however, given very wide discretionary powers to vary the application of the general rule. These include the power to order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to costs or to pay only certain portions of another person's cost. In exercising these discretions as to costs the Court is required to have regard to all the circumstances. Particular consideration must be given to the conduct of the parties both before and during the proceedings and the manner in which a party has pursued the case in general and particular issues within the case. Thus the order can be affected by whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings. The Court is also required to consider whether it was reasonable for a party to pursue a particular allegation or raise a particular issue and whether the claimant gave reasonable notice of intention to pursue a claim. The Court also has power to order costs against a person who is not a party, but only on giving prior notice and an opportunity to be heard.

These discretions are aimed at assisting the Court to further the overriding objective of dealing with cases justly. Dealing justly with cases includes ensuring that the parties are on an equal footing, that expense is saved, that cases are dealt with proportionately to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party, that the matter is dealt with expeditiously and fairly and that an appropriate share of the Court's resources is allotted to it while taking into account the need to allot resources to other cases. The parties are required to assist the Court to further this objective.”

¹¹ [2003] ECSCJ No. 83

- [54] The court has arrived at the conclusion that SOF is not entitled to the entirety of its costs. The court echoes the sentiments expressed by Michel JA in **Friar Tuck Ltd.**¹² In the present case EXCO was performing an appellate function conferred by statute. That is, to hear appeals from those aggrieved by decisions of the LDCC. EXCO made no decisions concerning the approval or disapproval of planning permissions. There was no act or decision made by EXCO which directly involved the grant or refusal of planning permission to SOF. EXCO could simply confirm or reject the decision of the LDCC. The court does not accept that the failure to give adequate reasons could be ascribed the status of a capricious or deliberate act on the part of EXCO.
- [55] The court does not find merit with SOF's complaint that it wrote copious letters to various ministerial departments and the Attorney General requesting reasons for EXCO's decision and that no reply to their request was forthcoming. In the present application SOF relied on these asserted facts in support of their argument that the EXCO's conduct was capricious and deliberate. In the claim for judicial review, the court found that EXCO's explanation for the failure to communicate its reasons to SOF was a viable one, and held that the failure to communicate the reasons for EXCO's decision was clearly a ministerial shortcoming and not that of EXCO.¹³
- [56] The court reiterates, that SOF is only entitled to recover those costs which would have been recoverable if the litigation had been appropriately conducted. No greater sum can be recovered than that which would have been recoverable item by item if the litigation had been conducted proportionately.
- [57] The court has adopted the reasoning of the court in **Lownds v Home Office** where Lord Woolf CJ said:

“Based on their experience, costs judges will be well equipped to assess which approach a particular case requires. In a case where proportionality is likely to be an issue, a preliminary judgment as to the proportionality of

¹² At para. 24

¹³ At paras. [21] – [22]

the costs as a whole must be made at the outset. This will ensure that the costs judge applies the correct approach to the detailed assessment. In considering that question, the costs judge will have regard to whether the appropriate level of fee earner or counsel has been deployed, whether offers to settle have been made, whether unnecessary experts had been instructed and the other matters set out in CPR 44.5(3). Once a decision is reached as to proportionality of costs as a whole, the judge will be able to proceed to consider the costs, item by item, applying the appropriate test to each item.

Although we emphasise the need, when costs are disproportionate, to determine what was necessary, we also emphasise that a sensible standard of necessity has to be adopted. This is a standard which takes fully into account the need to make allowances for the different judgments which those responsible for litigation can sensibly come to as to what is required. The danger of setting too high a standard with the benefit of hindsight has to be avoided. While the threshold required to meet necessity is higher than that of reasonableness, it is still a standard that a competent practitioner should be able to achieve without undue difficulty. When a practitioner incurs expenses which are reasonable but not necessary, he may be able to recover his fees and disbursements from his client, but extra expense which results from conducting litigation in a disproportionate manner cannot be recovered from the other party.

In deciding what is necessary, the conduct of the other party is highly relevant. The other party by co-operation can reduce costs, by being uncooperative he can increase costs. If he is uncooperative, that may render necessary costs which would otherwise be unnecessary, and that he should pay the costs for the expense which he has made necessary is perfectly acceptable. Access to justice would be impeded if lawyers felt they could not afford to do what is necessary to conduct the litigation. Giving appropriate weight to the requirements of proportionality and reasonableness will not make the conduct of litigation uneconomic if on the assessment there is allowed a reasonable sum for the work carried out which was necessary."¹⁴

Order

[58] In the circumstances, the court's order is as follows:

1. Costs is awarded to the claimant in the sum of EC\$8,230.00.

¹⁴ At paras. 36 – 37

2. The claimant is awarded costs on the present application in the sum of EC\$1,000.00.

Shawn Innocent
High Court Judge

By the Court

A handwritten signature in black ink, appearing to read 'J. S. / R. S. O.', enclosed within a horizontal oval.

Registrar