

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: SVGHCV2013/0207

**In the Matter of the transfer of ALENIA ALLEN from the SAINT JOSEPH CONVENT KINGSTOWN to
the EMMANUEL HIGH SCHOOL MESOPOTAMIA without good cause**

**In the Matter of the CIVIL PROCEDURE RULES PART 56 AND THE APPLICATION BY MERLENE
ALLEN (Next Friend of Alenia Allen) for leave to apply for Judicial Review**

BETWEEN:

MERLENE ALLEN (NEXT FRIEND OF ALENIA ALLEN)

Claimant

and

**[1] THE CHIEF EDUCATION OFFICER
[2] SENIOR EDUCATION OFFICER SECONDARY SCHOOLS
[3] PRINCIPAL ST. JOSEPH CONVENT
[4] MINISTRY OF EDUCATION
[5] CLUNY BOARD OF MANAGEMENT**

Defendants

Appearances:

Mr. Jomo Sanga Thomas for the claimant

Mrs. Cerepha Harper-Joseph with her Ms. Gabrielle Myers for the 1st to 4th defendants

Mr. Duane Daniel with him Ms. Jenell Gibson for the 5th defendant

2020: July 2,
July 29.

JUDGMENT ON ASSESSMENT OF COSTS

[1] **GILL, M. (Ag.):** On granting declarations and orders in favour of the claimant in a judgment delivered on July 19, 2016, Lanns J. (Ag.), (as she then was), stipulated, "...if the parties cannot agree on costs, they may make brief submissions within 30 days of the date of receipt of a sealed

copy of this decision". The parties failed to agree on costs and by notice of application for assessment of costs filed on August 18th, 2020, the claimant resorted to the court for a determination.

Background

- [2] The decision concerned the judicial review of the decision to transfer the claimant's daughter Alenia Allen from the St. Joseph Convent, Kingstown (SJCK) to the Emmanuel High School, Mesopotamia (EHS). The essence of the case is captured in Her Ladyship's conclusion at paragraph 49 of the judgment and I reproduce it in full. It reads:

"Given the views expressed above, on the fairness of the decision process, I have come to the conclusion that there was indeed a breach of the principles of natural justice in coming to the decision to transfer and expel the student from the SJCK, and all Convents of the Cluny Board in St. Vincent and the Grenadines. I am satisfied that the Claimant has shown that her right to be heard or to a fair hearing had been infringed. Not only did the Defendants fail to give the Claimant notice of the meeting to transfer/expel the student from the SJCK, so that she could adequately prepare herself, but they failed to give her reasons for the decision to transfer/expel. Even if the Defendants had no duty to give reasons, (as the defendants have submitted) this did not affect their duty to act fairly. In coming to their decision to transfer/expel, the Defendants took irrelevant factors into account, and failed to consider relevant factors. As a consequence of the Defendants' failure to consider relevant factors, the student was met with punishment that was excessive and disproportionate having regard to the purported conduct of the student, and the sanctions for such conduct specified in the Handbook."

- [3] The claimant submitted a bill of costs claiming the sum of \$35,515.43. The defendants contended that this sum is excessive. They countered that a sum of \$10,000.00 is appropriate and reasonable for the entire process of this matter. The claimant and the 1st to 4th defendants filed submissions on the assessment. The 5th defendant did not file submissions but adopted the submissions of the 1st to 4th defendants.

Issue

- [4] The court must determine the quantum of costs to be awarded to the claimant.

The Law

[5] In conducting the assessment, the court is guided by Rule 65.2 of the Civil Procedure Rules (CPR 2000). By virtue of CPR 65.2 (1), 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.

[6] Authorities from the jurisdiction of the Eastern Caribbean Supreme Court give guidance on the principle of reasonableness in the assessment of costs.

[7] In **Michael Wilson & Partners Limited v Temujin International Limited et al**,¹ Hariprashad-Charles J., at paragraph 74 of the judgment, stated:

“...But costs must not be embellished and unreasonable. It is not a punishment. It must be fair and reasonable in all the circumstances of the case.”

[8] Lanns M. (as she then was) in **Paul Webster et al v The Attorney General**,² provided some clarity on the issue when she declared:

“It is clear ...that reasonableness is the key. The Claimants must satisfy the court that their costs are reasonable. To do this, the Claimants must produce evidence that their costs are reasonable as the court, in assessing costs is required to be fair and reasonable. Any doubts must be resolved in favour of the paying party. The Claimants cannot just say that the Defendant has not shown any bases for saying the costs are excessive, or that that (*sic*) the Defendant makes a bald assertion of disagreement. He who asserts must prove. At the same time, it behoves the Defendant to show some basis for concluding that the costs are excessive. The Defendant cannot just limit himself to saying that the costs appear to be excessive for the work performed and that a lower sum has been claimed for similar cases. As noted by Sir Dennis, in his paper “Costs under the CPR” the parties must assist the court.”³

¹ BVIHCV2006/0307

² AXAHCV2008/0015

³ Ibid at paragraph 23 of the judgment

[9] Rule 65.2(3) sets out the factors to be taken into account in determining reasonableness. It states as follows:

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) ...
- (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; and
- (h) ...

[10] The court has to consider whether the sum claimed by the claimant is reasonable in the circumstances of this case. The approach to be adopted was set out in **Lownds v Home Office**.⁴ Referring to a provision similar to CPR 65.2(3), Lord Woolf CJ pronounced:

“...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 CPR 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 costs of 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.”⁵

[11] I will proceed to consider the factors set out in CPR 65.2(3). The parties have addressed the relevant factors in their submissions.

⁴ [2004] 4 All ER 775

⁵ Ibid at 782, paragraph 31

Any order that has already been made

- [12] No order influencing the outcome of the assessment has been made. Lanns J. (Ag.) simply ordered that if the parties could not agree on costs, they were allowed to make submissions on same.

The care, speed and economy with which the case was prepared

- [13] The claimant submitted that the case was prepared with relatively good care and skill, although admitting a delay in filing the fixed date claim as ordered by the court. The claim was filed out of time and, with the leave of the court, was deemed properly filed. The claimant complied with all other court directions. Whilst stating that the case was generally conducted expeditiously, the defendants submitted that the late filing of the fixed date claim should negatively impact the claimant's award of costs. The parties have not cited any order in relation to the application for, and the granting of, leave for the late filing of the fixed date claim and I see no reason to find that this should influence the assessment to the disadvantage of the claimant. I am of the view that the case was prepared with good care, speed and economy.

The conduct of the parties before as well as during the proceedings

- [14] I glean from the submissions that the case was vigorously contested and emotions ran high during the proceedings. The defendants made three applications to strike and were successful on the third. There is nothing before this court in relation to costs associated with those applications or whether the unsuccessful applications were found to be frivolous or vexatious or an abuse of the process of the court. The defendants argued that had the claimant availed herself of mediation the trial may not have been necessary. Perhaps mediation may have been an option but in the context of this case, the claimant cannot be blamed for wanting to have the matter fully ventilated. The defendants further pointed out that the claimants abandoned two of the reliefs sought when the defendants had already spent time addressing their minds to those issues. To my mind, the abandoning of the two reliefs was quite in order as they were "**no longer** in the interest of either party". (emphasis added)

The importance of the matter to the parties

- [15] The matter was of great importance to both sides. It attracted both national and regional attention. The court's decision highlighted the rights of claimant against the school authorities and it directed the defendants as to how to treat, or more importantly, how not to treat with students in matters of a disciplinary nature. The conclusion of the trial judge (reproduced earlier at paragraph 2) in no uncertain terms vindicated the claimant in her dealings with the defendants.

The novelty, weight and complexity of the case

- [16] On its facts, this is a novel case. It involved a single mother coming up against the church and State to assert the rights of her child to be treated fairly and to have access to a quality education. However, I am not of the view that the issues were particularly weighty or complex. The law in relation to judicial review regarding principles of natural justice is well beaten and trodden in our courts.

The time reasonably spent on the case

- [17] After consultation with the claimant, the application for leave for judicial review was filed in September 2013. The trial ended in July 2015. The claimant stated that it involved about twelve court appearances. Judgment was delivered in July 2016. Whereas learned counsel for the claimant submitted that the matter required thorough research and in-depth analysis, and that a substantial amount of time was necessary to protect the claimant's cause, and that there were several case management hearings, there is no indication as to the time spent on the case in terms of preparation. The court has to decide what is reasonable in the circumstances of this case in relation the items in the bill of costs.

The bill of costs

- [18] I will spell out each item in the bill of costs and assess whether the items were reasonably incurred.

Item 1

- [19] Late August 2013 - Initial appointment fee & conference with claimant - \$60.00 and \$250.00.

Item 2

- [20] 02/09/13 – Follow-up appointment fee, conference with claimant & consultation - \$60.00 and \$250.00.

- [21] The defendants submitted that the costs in Item 1 and Item 2 are excessive and there is no indication as to how long these consultations and conferences lasted and what hourly rate counsel used to determine these figures. In particular, they considered that a cost of \$250.00 per day for two days of consultation to be exorbitant, especially when the court is unassisted as to how counsel arrived at these figures.

Item 3

- [22] 10/9/2013 – Application for leave for judicial review – research, drafting pleading, affidavit, draft order, printing, client consultation, clerk labour - \$5000.00.

- [23] The defendants contended that this cost is also excessive. They posited that the law on judicial review is quite settled and no great deal of research would have had to be conducted. The court is not assisted by a statement of how much time counsel utilised to prepare the leave application and there is no mention of an hourly rate. Learned counsel for the claimant submitted as it was close to the re-opening of the new school year 2013-2014, it was critical that they acted urgently to institute proceedings against the defendants. The application was met with intense opposition by the defendants. Further, counsel stated that it is not common practice to charge clients by the hour.

Item 4

- [24] 13/9/2013 – Hearing of application for judicial review – matter decided on paper by Justice Bruce-Lyle – no amount claimed.

Item 5

- [25] 18/9/2013 – Service of documents on the defendants – application for leave; affidavit; order of court - \$60.00 (\$20.00 on each defendant AG, principal SJCK, Ministry of Education (x2)).
The defendants did not challenge this item.

Item 6

- [26] 20/9/2013 – Chamber hearing before Justice Bruce-Lyle to determine whether the applicant remained at the St. Joseph Convent Kingstown or to lift mandatory order to remain - \$1500.00.

[30] The defendants argued that this cost is embellished. They pointed out that the hearing did not last more than two hours and the sum of \$1500.00 for attendance at a chamber hearing is incredibly inflated. They submitted that senior counsel of over ten years standing may command a rate of \$350.00 per hour. Queen's Counsel would be entitled to \$750.00 per hour.

[31] The claimant used a combination of recommended fee schedules to determine legal fees. Counsel submitted that the unlisted minimum legal fee for a notice of application at the High Court is \$1500.00.

Item 7

[32] 4/10/2013 – Hearing of defendants' application before Justice James to set aside *ex parte* orders; leave for judicial review; and order for claimant to remain at St. Joseph Convent Kingstown - \$3500.00.

[33] The defendants reiterated their submissions on Item 6 and insisted that it was one application before the court concerning one hearing.

[34] The claimant contended that the base fee of \$1500.00 would have increased because of the work effort required and the level of contention involved. Counsel advanced that fees for research, drafting and administrative costs vary according to the effort and time required and, therefore, there is no set cost.

Item 8

[35] 4/10/2013 – Applicant/claimant filed notice of opposition to defendants' application to set aside orders: case preparation (research, drafting – affidavit and administrative costs, print and labour) - \$2000.00.

[36] Again, the defendants asserted that this cost is embellished as the law on setting aside orders is quite settled and does not require extensive research.

Item 9

- [37] 7/10/2013 - Hearing before Justice Gertel Thom – defendants’ application to set aside orders of the court - \$3000.00. The parties’ submissions in relation to Items 6 and 7 are applicable here.

Item 10

- [38] 14/10/2013 – Fixed date claim: research, drafting of pleadings & affidavit, printing paper, clerk labour, client consultation, filing costs - \$3000.00.
- [39] Learned counsel for the defendants drew the court’s attention to the fact that the fixed date claim form and affidavit in support mirror almost verbatim the application for leave and it is therefore perplexing that the preparation of these documents amounts to \$3000.00. The defendants maintained that these costs are embellished.

Item 11

- [40] 15/10/2013 – Letter preparation and service to the chief education officer regarding the education of the claimant: to resolve transferring the claimant to the Emmanuel High School Mesopotamia, a school which did not cater to the claimant’s academic needs - \$220.00. The defendants did not challenge this item.

Item 12

- [41] 26/3/2014 – Case management before Justice Combie Martyr – directions for trial - \$500.00.
- The defendants reiterated their submissions that for a chamber hearing, counsel for the claimant is not entitled to more than \$350.00 per hour. The claimant stated that they applied the State’s case management/basic hearing fee for legal aid (criminal matters), which is capped at \$500.00 per hearing for Items 12, 13 and 14.

Item 13

- [42] 9/10/2014 – Case management hearing – Justice Combie Martyr - \$500.00.
- The defendants submitted the same as for Item 12.

Item 14

- [43] 13/11/2014 – Preparation and filing of skeleton arguments in response to 5th defendant's application to strike out application: research, drafting – response; affidavit, administrative costs – printing, paper, clerk labour - \$2500.00.
- [44] Counsel for the 1st to 4th defendants submitted that the amounts claimed in Items 14, 15 and 16 should not be recovered from the 1st to 4th defendants as the 5th defendant was separately represented.

Item 15

- [45] 29/11/2014 – Courier service via Federal Express on 5th defendant - \$115.43.00.
The 5th defendant did not challenge this item.

Item 16

- [46] 11/12/2014 – Case management hearing: hearing on 5th defendant's application to strike out fixed date claim - \$1500.00.
In oral submissions to the court, learned counsel for the 5th defendant argued the same point as did counsel for the 1st to 4th defendants on chamber hearings.

Item 17

- [47] 13/05/2015, 2/06/2015, 8/7/2015 – Trial dates - \$5000.00.
The defendants did not challenge the amount claimed under this item.

Item 18

- [48] 8/7/2015 – Submissions on behalf of claimant filed – research, drafting, printing, paper, clerk labour: list of authorities and exhibits - \$2000.00.
- [49] The defendants argued that this amount is unreasonable since these were post trial submissions, requiring no great deal of research. Further, they submitted that the printing and cost of paper would not come close to the amount claimed. The defendants urged the court to award a complete figure for disbursements.

Item 19

- [50] 19/7/2016 – Judgment delivered in court - \$500.00.
The defendants challenge this amount as embellished.

Item 20

- [51] 26/7/2016 – Sealed copy of judgment received by the claimant – no amount claimed.

Item 21

- [52] Preparation of submissions for costs research, drafting (application, affidavit, submissions, bill of costs), printing, paper, clerk labour, filing - \$2500.00.
- [53] The defendants contended that, on the bill of costs, the award sought is embellished, as the claimant did not specify how many pages were printed or how counsel arrived at that figure. Moreover, they averred that they are uncertain as to what the term 'clerk labour' means, and asked the court to award a reasonable figure in all the circumstances.

Item 22

- [54] Hearing of assessment of costs - \$1500.00.

General submissions on the bill of costs

- [55] The claimant put forward that counsel made every effort to discuss a reasonable settlement with counsel for the defendants who could not see costs beyond 2% of the amount claimed. As a result of counsel's failed attempts, the claimant relies on the court for assessment. The claimant cited the case of **Otto Sam v The Public Service Board of Appeal**⁶ in which Moise M. (as he then was) awarded the claimant costs in the sum of \$33,480.00 as costs in the cause. The claimant succeeded in a claim for judicial review of the defendant's decision to dismiss him from the office of head teacher in the Ministry of Education, St. Vincent and the Grenadines. Being satisfied that each item in the bill of costs was reasonably incurred, the learned master did not find it necessary to address each item in turn.

⁶ SVGHVC2014/0247

- [56] Learned counsel for the claimant made an impassioned plea for the court to determine that the bill of costs is fair and reasonable in light of the fact that the claimant had to battle 5 defendants including the all-powerful State machinery and the Catholic Church.
- [57] Learned counsel for the defendants asserted that this case is distinguishable from the **Otto Sam** case, which involved far greater complexity.
- [58] The defendants were adamant that the claimant did not specify how the final quantum for each item was arrived at as required by CPR 65.12(4). The Rule mandates that an application for assessment of costs “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”. On May 26, 2020 the court ordered the claimant to file supplemental submissions which was done on May 29, 2020. However, the defendants pointed out that the claimant failed to amend the bill of costs to reflect the requirements of CPR 65.12(4). They referred to the case of **Dawn Emberson Bain v Tortola Investment Trust Limited**.⁷ In that case, the Court of Appeal set aside the order of the learned master who proceeded to assess costs without ‘sufficient material available to do so’.
- [59] The defendants also brought the court’s attention to the case of **Bally and Bally Investment Ltd v Comptroller of Customs and Excise and The Attorney General**⁸ in which the court awarded the claimant costs in the sum of \$15,700.00 on an item by item approach in a claim for judicial review.

The award

- [60] In coming to a determination as to what is a reasonable amount to award as costs in this matter, I have decided that, in the circumstances of this case, it is prudent to order an overall sum as costs in the cause. For the most part, the claimant has given no proper account of the costs claimed. This makes it difficult for the court to come to a conclusion on the reasonableness of most of the amounts claimed. It is evident that over the course of the proceedings a great deal of preparation and several court hearings were necessary. I am of the view, however, that some of the amounts claimed, particularly for chamber hearings, are excessive. Whereas the bill of costs and

⁷ BVIHCVAP2014/0001

⁸ SVGHCV2018/0101

submissions spell out the work done, there is no method of calculation to explain how the claimant arrived at the amount claimed for most items. Further, in several instances, disbursements were lumped together with legal fees. In the premises, I cannot conclude that most of the amounts claimed in the bill of costs were reasonable.

[61] The claimant was ordered to file supplemental submissions on the assessment but the additional submissions filed did not assist the court any further in determining the quantification mechanism adopted by the claimant. In the face of the lack of methodology, the defendants still urged the court to award a reasonable amount.

[62] Having considered the factors in CPR 65.2(3) and scrutinised the bill of costs, and having digested the written and oral submissions of the parties, I conclude that a reasonable amount to award the claimant in this matter is \$18,500.00.

Order

[63] It is hereby ordered as follows:

- (i) The defendants shall pay the claimant costs assessed in the sum of \$18,500 within 60 days of today's date.
- (ii) The defendants shall pay the claimant costs of the application for assessment of costs in the sum of \$1500.00 within 60 days of today's date.

Tamara Gill

Master (Ag.)

By the Court

Registrar