

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

Claim Numbers: **BVIHCV2016/0015**

Between

BELMONT GROVE VILLAS HOMEOWNERS LIMITED

Claimant/Defendant

and

**(1) JOHN ALBRIGHT
(2) NADIA ALBRIGHT**

Defendants/Counterclaimants

Appearances: Mr. John Carrington Queen's Counsel for the Claimant/Defendant
Defendants/Counter-Claimants were unrepresented

2020: March, 5th

2020: June, 3rd

JUDGMENT ON COSTS

Introduction

- [1] **R. Sandcroft, M. [Ag]:** This is an application by the claimant for costs on the defendants'/counterclaimants' case on the basis that the defendants had made an application for a counterclaim and they were not successful.
- [2] Although this application only relates to a detailed assessment of costs in a relatively modest action, it raises issues of principle which have a direct bearing on the policy on which the effectiveness of the Civil Procedure Rules depends. That policy is that litigation should be conducted in a proportionate manner and, where possible, at a proportionate cost. The policy is reflected in the Overriding Objective set out in **CPR 1.1** which provides:

“(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable-

(c) Dealing with the case in ways which are proportionate

- (i) to the amount of money involved;**
- (ii) to the importance of the case;**
- (iii) to the complexity of the issues; and**
- (iv) to the financial position of each party;"**

- [3] Proportionality played no part in the taxation of costs under the former Rules of the Supreme Court. The only test was that of reasonableness. The problem with that test, standing on its own, was that it institutionalised, as reasonable, the level of costs which were generally charged by the profession at the time when the professional services were rendered. If a rate of charges was commonly adopted it was taken to be reasonable and so was allowed on taxation even though the result was far from reasonable.
- [4] The requirement of proportionality now applies to decisions as to whether an order for costs should be made, and to the assessment of the costs which should be paid when an order has been made. Part 65.2 which deals with the making of an order for costs does not specifically use the word proportionate but the considerations which should be taken into account when making an order for costs are redolent of proportionality.
- [5] Because of the central role that proportionality should have in the resolution of civil litigation, it is essential that courts attach the appropriate significance to the requirement of proportionality when making orders for costs, and when assessing the amount of costs. What has however, caused difficulty for practitioners and members of the judiciary who have to assess costs is how to give effect to the requirement of proportionality. In particular, there is uncertainty as to the relationship between the requirement of reasonableness and the requirement of proportionality. Where there is a conflict between reasonableness and proportionality does one requirement prevail over the other, and, if so, which requirement is it that takes precedence? There is also the question of whether the proportionality test is to be applied globally or on an item by item basis, or both globally and on an item by item basis.

Background/Chronology

- [6] By order of Justice Ellis dated 7th February, 2019 the claimant and the defendants were required to apply for Relief from Sanctions from failure to file their respective witness statements within the time period set out in the order of 3rd October 2016 of Master Fidela Corbin Lincoln as he then was. The claimant complied with the terms of the said Order and the relief was granted.
- [7] It was a term of the said order of Justice Ellis that unless the parties applied for relief from sanctions by 12th March 2019, their pleadings would be struck out and judgment would be entered against the non-compliant party.
- [8] The defendants failed to file their Application for Relief from sanctions within the time stipulated by the aforesaid Order of Justice Ellis and judgment was entered against them on the counterclaim for costs to be assessed under CPR 2000 Part 26.5(7) on 17th December 2019
- [9] Notice of the application for the assessment of costs supported by the affidavit of Reisa Singh was filed on 19th September 2019 and served on the Defendants via email on the 9th day of January 2020. There was no response to this Application by the Defendants.
- [10] The claimant filed an Amended Schedule of Costs on 28th February 2020 in which it sought costs comprising legal practitioner's fees of \$17,970 and disbursements of \$504, inclusive of the costs of attending the assessment.

Defendants'/Applicants' Submissions

- [11] Attorney-at-Law for the claimant Mr. John Carrington Q.C. submitted inter alia that in assessing costs the Court must have regard to CPR 65.2 which says:

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;

[12] Counsel for the claimant also submitted the case of Andriy Malitskiy v Oledo Petroleum BVIHMAP2013/0006, where the Court of Appeal enunciated at paragraph 8 a useful guidance on the approach which the Court should take when assessing costs. **“First, I shall assess whether on a global level, the costs claimed are proportionate, having regard to any relevant considerations identified in the Civil Procedure Rules 2000. If I conclude that the costs claimed are not overall disproportionate, I shall satisfy myself that each item was reasonably incurred and that the cost of that item was reasonable. In performing this exercise I must resolve any doubt as to whether any item was reasonably incurred, or was reasonable in amount, in favour of the paying party ...”.**

[13] Counsel posited that in the counterclaim in these proceedings, the defendants had challenged the amendments made to the claimant’s memorandum and articles of association, when the unincorporated homeowners’ association of which the members of the claimant were members, was incorporated through incorporation of the by-laws of the association, into the memorandum and articles of association of the claimant. The defendants sought to have those amendments set aside on the basis that they were oppressive and unfairly prejudicial to them and infringed their property rights. The defendants also sought an accounting from the claimant as to its expenses.

[14] Counsel for the claimant further posited that they filed a Defence to the counterclaim of some 19 paragraphs. The claimant also had to deal with issues arising on the counterclaim at the case management conferences: its witness statements, pre-trial memorandum, and an application for judgment and assessment of costs.

[15] Counsel for the claimant also submitted that in consideration of the line items in the costs schedule that these all alluded to work done in respect of the counterclaim and so were reasonably incurred.

[16] Counsel further posited that the charge out rate applied by them in this matter was low by local standards at \$520 per hour and the defendants were able to benefit from this, notwithstanding that the counterclaim raised issues that were commercial in nature and would usually attract a higher billing rate. Disbursements of \$504 were very reasonable and related only to court related matters.

[17] Therefore, it was the Applicant's submission that on both the global approach and the line by line approach the costs incurred are reasonable, reasonably incurred and proportionate.

[18] Counsel concluded on the basis of the foregoing, that costs be awarded in the terms set out in the Schedule inclusive of the costs claimed with respect to the hearing for assessment of costs.

Issues

[19] (a) Whether this Court should find that the assessed costs are proportional in the circumstances of the case as a whole? and

(b) whether the question for consideration is, (i) what were the respective obligations on the respective parties? And, to what extent, if any, should these obligations also impact on the costs payable?

Court Analysis

[20] The Civil Procedure Rules 2000 rule 64.6 (1) provides:

Rule 64.6(1) provides the general rule with regard to the award of costs. It states:

"64.6(1) If 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."

This rule embodies the well-known principle that "costs follow the event".

[21] The line items that can constitute costs payable to a party are defined in the **Civil Proceedings Rules (CPR)**. These costs "include attorney's charges and disbursements, fixed costs, prescribed costs, budgeted costs or assessed costs"¹. The **CPR, 2000** further defines what are fixed costs,

¹ CPR Rule 64.2 (1)

prescribed costs, budgeted costs and assessed costs². The “attorney’s charges and disbursements” are not defined in the CPR. However **Zuckerman on Civil Procedure: Principles of Practice** has defined the term “costs” and gives the following explanation of what disbursements are:

[it] encompasses both expenses that are incurred by a solicitor in the conduct of litigation on behalf of the client, usually referred to as disbursements³

[22] There was nothing in the circumstances of the claim and the application for Judgment in Default, which persuaded the court to depart from the general rule that the unsuccessful party must pay the costs of the successful party. Therefore the defendants shall pay the claimant’s costs as quantified and assessed.

[23] In assessing the costs for the filing of the defence to the counterclaim and the Application for the judgment in default, the court considered the general basis of quantification as outlined in the CPR Rule 65.2, these are:

(1) Where the court has any discretion as to the amount of costs to be allowed to a party, the sum to be allowed is the amount that the court deems to be reasonable were the work to be carried out by an attorney-at-law of reasonable competence and which appears to the court to be fair both to the person paying and the person receiving such costs.

(2) Where the court has any discretion as to the amount of costs to be paid to an attorney-at-law by his client, the sum allowed is the amount that the court deems to be reasonable and which appears to be fair both to the attorney-at-law and the client concerned.

(3) In deciding what would be reasonable the court must take into account all the circumstances, including—

(a) any orders that have already been made;

(b) the conduct of the parties before as well as during the proceedings;

² CPR Rule 64.2 (1)

³ Zuckerman on Civil Procedure Principles of Practice. Third edition. Para 27.17.

- (c) the importance of the matter to the parties;
- (d) the time reasonably spent on the case;
- (e) the degree of responsibility accepted by the attorney-at-law;
- (f) the care, speed and economy with which the case was prepared;
- (g) the novelty, weight and complexity of the case; and
- (h) in the case of costs charged by an attorney-at-law to his client—
 - (i) any agreement that may have been made as to the basis of charging;
 - (ii) any agreement about what grade of attorney-at-law should carry out the work; and
 - (iii) whether the attorney-at-law advised the client and took the client's instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the case.

[24] The court also considered CPR Rule 65.12 which states:

- (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) Where the assessment relates to part of court proceedings it may be carried out by the judge or master hearing the proceedings, or the judge or master may give directions as to how the assessment is to be carried out.

[25] The sum assessed as costs, must be such sum that the Court deems to be reasonable considering the work to be carried out by an attorney-at-law of reasonable competence and which appears to the Court to be fair both to the person paying and the person receiving such costs. On that exercise of determining a reasonable sum, Kokaram J said in **Lutchmeesingh's Transport Contractors Limited and National Infrastructure Development Company Limited**⁴

As a general principle, the Court's discretion as to the amount of costs allowed must be exercised consistently with the overriding objective, Rule

⁴ Claim No: CV2015-01192. Date of Delivery: 13th July 2017.

1.2. In so doing the Court engages in an exercise to ascribe an appropriate fee which is proportionate to the amount of work involved, the importance of the case, the complexity of the issues and the financial position of each party. An important aspect of the exercise is the principles of proportionality. (Paragraph 13)

[26] On the issue of proportionality, Mendonca JA said in **Scotiabank Trinidad and Tobago Limited v Bank Employees Union**

However, costs must not only be reasonably incurred and reasonable in amount but should also be proportionate. What proportionality seeks to do is to impose a sensible correlation between the costs a party may recover and the claim. It acts as a counter-weight to disproportionately high costs.... (Paragraph 49)

[27] With respect to the approach that the court should take, Mendonca JA, in **Scotiabank Trinidad and Tobago Limited v Bank Employees Union** (supra), advocated and applied the two stage approach used in **Lownds v Home Office Practice Note**:

The first stage is the global approach and the second an item by item approach. In the first stage the Court is required to form a preliminary opinion whether the total costs claimed were proportionate having regard to the considerations referred to earlier. The next stage is an item by item approach. If the Court is of the opinion that the costs are not disproportionate, all that is required is for the Court to determine whether each item claimed was reasonably incurred and whether the amount claimed for it is reasonable. If however the Court at the global stage were to find the costs disproportional the manner of assessment is more rigorous. Then the receiving party will be required at the item by item stage to satisfy the Court that each item of costs was necessarily incurred and, if so, the amount charged therefore is reasonable. (Paragraph 53)

[28] The court has determined that the defendants are to pay to the claimant the assessed costs of the defence to the counterclaim and the Application for the judgment in default. Where this court has a discretion in determining the sum of the award, as with assessed costs and pretrial costs, the court has considered the basis of quantification of such costs as outlined in the CPR Rule 65.2 (supra).

[29] The issues raised in the claim and counter claim and the application for judgment in default were obviously important for both the claimant and the defendants. For one there was the important issue of the right to possession of premises while for the other there were the important issues of exercising what was felt to be a right to purchase, and the impact such a right would have on her life and livelihood. In terms of novelty and complexity, it was not one of the highest novelty and complexity but it also was not the simplest of cases. On the scale of novelty and complexity it would be somewhere just approaching the middle, from least to most.

[30] The court considered the statement of costs submitted by the claimant and the submissions and representations made by both the claimant and the defendants on previous occasions. The court also considered those matters under the **CPR, 2000 Rule 65.11** including the representations as to the time that was reasonably spent in making the application, and preparing for and attending the hearing. The court is also mindful that it must allow such sum as it considers fair and reasonable.

[31] The court closely examined the statement of costs submitted by the claimant and applied the first stage of the test, to the statement of costs, the global approach outlined by Mendonca JA in *Scotiabank Trinidad and Tobago Limited v Bank Employees Union* (supra). Also considering the nature of the claim and the damages awarded to the claimant, the court has concluded that the statement of costs submitted by the claimant for the application for summary judgment is disproportionate. Applying the second stage of the test outlined by Mendonca JA in **Scotiabank Trinidad and Tobago Limited v Bank Employees Union** (supra) the court next looked at items line by line and considered the costs submitted.

[32] Also, this court, in **Roberts v Financial and Regulatory Commission** (Claim No. SKBHCV2016/0019 dated 14 October 2019) had the opportunity to examine the provisions of CPR 65.5 in some detail. The court stated as follows:

[12] The starting point is to consider the words of CPR 65.5 to determine whether they expressly cover the situation with which we are here presented, and, if they do not, whether there is any implication that can properly be made or even necessary. CPR 65.5(1) states expressly that the general rule is that where a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Appendices B and C to this Part and CPR 65.5(2) to (4). It seems to me that this must be the starting point to any determination of prescribed costs in accordance with CPR 65.5. CPR 65.5(2) provides for the situations in which it is necessary to determine the value of a claim. CPR 65.5(3) states that the general rule is that the amount of costs to be paid is to be calculated in accordance with the percentages specified in column 3 of Appendix B against the appropriate value. Appendix B, entitled “Scale of prescribed costs” provides for the percentages of costs (Column 3) based on the “Value of the Claim” (Column 2). Appendix C states that it is a table “showing the percentage of the prescribed costs to be allowed under Appendix B where a claim concludes prior to trial”. Therefore, the percentage of prescribed costs is calculated based on the value of the claim in accordance with Appendix B and the amount payable to a party is further calculated in accordance with Appendix C based on the stage of the claim.

[15] ... it is necessary to focus on the chapeau of CPR 65.5(2) which states that “[t]he “value” of the claim, whether or not the claim is one for a specified or unspecified sum, coupled with a claim for other remedies is to

be decided in the case of the claimant or defendant – ”. The important point is that CPR 65.5(2) does not apply in all cases where the value of the claim is to be determined but applies only where the claim is: (1) for a specified sum; or (2) for an unspecified sum; and in both cases where it is (3) coupled with a claim for other remedies. The words “coupled with a claim for other remedies” is the deciding limitation on the scope of CPR 65.5(2). If the claim, whether for a specified or unspecified sum, is not coupled with a claim for other remedies, CPR 65.5(2) does not apply.

[18] It is important not to forget that CPR 65.5(1) states that the general rule is that where a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Appendices B and C to this Part and CPR 65.5(2) to (4). As stated above, Appendix B provides the scale of prescribed costs based on a percentage of the “Value of the Claim”. CPR 65.5(2) provides for the determination of the value of the claim in the circumstances outlined therein.

[19] It seems to me to be obvious that the first place to look to determine the value of the claim is the claim form. Where the claim is for a specified amount that amount is the value of the claim. Prescribed costs are to be determined in accordance with CPR 65.5(1). Where claim, whether for a specified or unspecified sum, is coupled with other remedies, CPR 65.5(2)(a) applies.

[33] In summary, the decision in **Roberts** made it pellucid that: (A) an important and first consideration is that CPR 65.5(1) states that the general rule is that where a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Appendices B and C to this Part and CPR 65.5(2) to (4); (B) CPR 65.5(2) does not apply in all cases where the value of the claim is to be determined but applies only where the claim is: (1) for a specified sum; or (2) for an unspecified sum; and in both cases where it is (3) coupled with a claim for other remedies; and (C) the words “coupled with a claim for other remedies” is the deciding limitation on the scope of CPR 65.5(2). If the claim, whether for a specified or unspecified sum, is not coupled with a claim for other remedies, CPR 65.5(2) does not apply.

[34] In particular, in respect of all deliberations on costs in which the court has a discretion, the court must take into account all the circumstances pursuant to Part 65.2 (3) of the CPR 2000 which provides that:

(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; and

(h) in the case of costs charged by a legal practitioner to his or her client –

(i) any agreement about what grade of legal practitioner should carry out the work;

(ii) any agreement that may have been made as to the basis of charging; and

(iii) whether the legal practitioner advised the client and took the client/s instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the case.

Discussion & Conclusion

- [35] It is common judicial experience that there is nothing so wonderfully effective in bringing good sense to bear on whether to continue to prosecute or defend a claim (or in this case a counter-claim) as the certainty of the cost consequence for whoever will turn out the loser. A turning point is reached when a party sees it is ineluctable that if he loses he will likely have to pay a definite sum as costs. The risk of losing that is inherent in litigation then looms larger and appropriate decisions – settle; discontinue; admit - are then more likely to be made. This can only benefit the litigants themselves, the court and the society by saving expense and precious judicial time that other litigants are waiting to utilise.
- [36] Starting with first principles, part of a claimant's obligation is to ensure that a bona fide claim is brought and that it is brought against the correct party. Where a corporate entity is concerned, care has to be taken to do such relevant searches as are necessary to ensure that the correct party is identified. In this case, the wrong party was sued and the primary obligation must rest with the claimant for the failure to sue the correct party.
- [37] The starting point, which is the overriding objective of the CPR, found at part 1, provides:
- “1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly.**
- (2) Dealing justly with the case includes—**
- (a) ensuring, so far as is practicable, that the parties are on an equal footing;**
- (b) saving expense;**
- (c) dealing with cases in ways which are proportionate to—**
- (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;**
- (d) ensuring that it is dealt with expeditiously; and**

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Application by the court of the overriding objective

1.2 The court must seek to give effect to the overriding objective when it —

(1) exercises any discretion given to it by the Rules; or

(2) interprets the meaning of any rule.

Duty of the parties

1.3 The parties are required to help the court to further the overriding objective.”

[38] The encouragement of settlement of disputes, preferably without the need to commence proceedings, is an important objective of the CPR. The contribution which the new requirement of proportionality in the case of standard orders for costs makes to the early resolution of disputes is an added reason why the role of proportionality is so fundamental to the proper functioning of the CPR.

[39] Under the CPR, both or all parties are under an obligation to do what they can to assist in the just disposition of a claim. Such obligations must extend to the efficient disposition of a claim. A claim should not go on for longer than is necessary. There are many rules which underscore this obligation. The court has the power to dispose of a claim at the case management stage; default judgment can be granted; summary judgment can be granted; a claim can be dismissed for various breaches of the CPR and the court can impose the sanctions set out in the CPR for these breaches. All of these options available to the court underscore the court's management powers to ensure that claims are dealt with, with the overriding objectives in mind.

[40] With respect to the determination of what is reasonable in terms of such costs, there are then the factors enumerated in Rule 64.3 which include time reasonably spent, the complexity of the matter, the importance of the matter to the parties and several other factors. In this regard, in **Norgulf Holdings Ltd et Anor v Michael Wilson and Partners Ltd.**⁵ then Barrow JA of the Eastern

⁵ OECS Civil Appeal No. 8 of 2007 paras 13 et seq.

Caribbean Supreme Court observed that the provisions of Rule 65.12 were merely procedural so that in any event, the actual quantification of costs was nonetheless to be determined according to the principles otherwise provided in the Rules. It is clear, that these principles are those provided in Rule 64.2. The Court's review of the assessment is therefore to be conducted with reference to the overall principles stated in Rule 64.2(1), within the context of the relevant factors enumerated in Rule 64.2(3).

[41] 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.

[42] I would repeat the approach of Judge Alton, which was approved in **Jefferson v National Freight Carriers Ltd** [2001] 2 Costs L.R. 313. The judge said, in particular:

“In modern litigation, with the emphasis on proportionality, there is a requirement for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity, and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which would be necessary and appropriate spend on the various stages in bringing the action to trial and the likely overall cost. While it was not unusual for costs to exceed the amount in issue, it was, in the context of modest litigation such as the present case, one reason for seeking to curb the amount of work done, and the cost by reference to the need for proportionality.”

[43] In **Norgulf**, Barrow JA expounded (at para 14):

“Rule 65.12 complements and overlaps rule 65.11 but it is much broader in scope. Rule 65.12 applies to all assessments of costs, not just costs of an application. The rule opens by stating in paragraph (1) that this rule applies where costs fall to be assessed in relation to any matter or proceedings, or part thereof, other than a procedural application. These two words “matter” and “proceedings,” both terms of art, together extend the rule to virtually every proceeding that could come before the court....The effect of paragraph (1) in stating that this rule applies to any matter or proceedings or part thereof, is to apply this rule to proceedings generally, not just applications. But the rule does cover applications generally, which are necessarily parts of proceedings, save for procedural applications, which are specifically excepted. Put another way, by excluding only procedural applications this rule includes all other applications.”

[44] His Lordship continued (at para 12):

“The object of rule 65.11 is to establish a norm that the court hearing an application “must” decide the issues of costs, including who is to pay, how much and when. Notably, it makes the amount of costs to be awarded a matter for the discretion of the court. Rule 65.11 states the principles by which the court must guide itself in exercising that discretion and assessing costs. The rule specifies the documentation that the party seeking costs must provide. And, finally, it caps the amount of costs that normally may be awarded on the determination of an application.”

[45] Barrow JA, as he then was, in **Norgulf**... admonished us that we must not be misled by its heading in that the rule plainly applies to more than just procedural applications. At paragraph 11 of the judgment, his Lordship explicated:

“The rule applies to all applications except for two categories of applications. One category consists of those applications that are made at a case management conference, pre-trial review and trial. There are specific rules that apply to such applications and hence they are excluded. The other

category of applications to which rule 65.11 does not apply consists of the specific applications listed – to amend, to extend time and to obtain relief from sanctions – and applications that could have been made at case management or pre-trial review (and which would therefore have fallen into the first category). Rule 65.11 does not apply to the second category of applications because of the need to exclude such applications from the general rule that costs are awarded to the party who succeeds on his application.”

- [46] Additionally, the fact that the litigation has been conducted in an insufficiently rigorous manner to meet the requirement of proportionality does not mean that no costs are recoverable. It means that only those costs which would have been recoverable if the litigation had been appropriately conducted will be recovered. No greater sum can be recovered than that which would have been recoverable item by item if the litigation had been conducted proportionately.
- [47] This approach does not conflict with that expositied in **Flowers Inc v Phonenames Ltd** [2001] EWCA Civ 721 2 Costs L.R. 286. There a summary assessment had been conducted by the Registrar of Trade Marks in relation to an application for £38,842.46, costs for a one-day hearing in the High Court. (The other side put their costs at £65,009.51) The Registrar considered such a claim simply out of order and awarded £10,000 which he considered to be the proper sum for a case which was admittedly of great importance to the parties.
- [48] Jonathan Parker LJ giving the first judgment stated:

“114. In my judgment, it is of the essence of a summary assessment of costs that the court should focus on the detailed breakdown of costs actually incurred by the party in question, as shown in its statement of costs; and that it should carry out the assessment by reference to the items appearing in that statement. In so doing, the court may find it helpful to draw to a greater or lesser extent on its own experience of summary assessments of costs in what it considers to be comparable cases. Equally, having dealt with

the costs by reference to the detailed items in the statement of costs which is before it, the court may find it helpful to look at the total sum at which it has arrived in order to see whether that sum falls within the bounds of what it considers reasonable and proportionate. If the court considers the total sum to be unreasonable or disproportionate, it may wish to look again at the various detailed items in order to see what further reductions should be made. Such an approach is wholly unobjectionable. It is, however, to be contrasted with the approach adopted by the judge in the instant case.

115. In the instant case, the judge does not appear to have focused at all on the detailed items in the opponent's statement of costs. Rather, having concluded that the total of the detailed items was unreasonably high he then proceeded to apply his own tariff – a tariff, moreover, which appears to have been derived primarily from a case in which the opponent had not been involved and about which it and its advisers knew nothing. In my judgment the jurisdiction to assess costs summarily is not to be used as a vehicle for the introduction of a scale of judicial tariffs for different categories of case.”

[49] Although Jonathan Parker LJ did not refer specifically to the need for the costs to be necessarily incurred if they would be otherwise disproportionate, his approach of looking again at each item “if the court considered the total sum to be unreasonable or disproportionate”, is very much in accord with the two-stage approach we commend. We agree that the judge was wrong to base his decision on his experience of a single case, but this does not mean he was not entitled to have regard to his general experience.

[50] Although I underscore the need, when costs are disproportionate, to determine what was necessary, I also underscore 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.

[51] 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. Thus

- (i) The proportionality of the costs incurred by the claimant should be determined having regard to the sum that it was reasonable for him to believe that he might recover at the time he made his claim.**
- (ii) The proportionality of the costs incurred by the defendant should be determined having regard to the sum that it was reasonable for him to believe that the claimant might recover, should his claim succeed. This is likely to be the amount that the claimant has claimed, for a defendant will normally be entitled to take a claim at its face value.**

- [52] The rationale for this approach is that a claimant should be allowed to incur the cost necessary to pursue a reasonable claim but is not allowed to recover costs increased or incurred by putting forward an exaggerated claim, and a defendant should not be prejudiced if he assumes that the claim which was made was one which was reasonable and incurs costs in contesting the claim on this assumption.
- [53] In considering the question of costs the 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 **Part 64.2(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.
- [54] The approach which I have sought to explain and which is required by the CPR will not make litigation inexpensive but should help to ensure that costs are kept within proper bounds. Costs assessed in the way I have indicated will also underline the advantages to a claimant, before embarking on litigation, of making a formal offer to settle which will avoid the risks of litigation if the offer is accepted or provide a real prospect of obtaining an order for costs if the offer is rejected.
- [55] Parties should be vigilant in ensuring that issues of costs are dealt with early. Both parties may make an application: (a) at case management for budgeted costs pursuant to **CPR 65.8**; or (b) at any time prior to trial to determine the value of the claim for purpose of prescribed costs pursuant to **CPR 65.6**.
- [56] The court has awarded the claimant the costs of \$USD504. 80 for disbursements. There was no getting around this expenditure and the figures submitted were determined to be reasonable.
- [57] Finally, I wish to thank learned Queen's Counsel for his written submissions in this matter.
- [58] The claimant's application to costs on the claim is granted and these are the orders that follow:

[59] **Orders**

For the reasons explained above, I make the following orders:

- (1) It is hereby ordered that the defendant is to pay the claimant's costs in the sum of Seventeen Thousand, Nine Hundred and Seventy Dollars and Eighty Cents (\$USD17, 970. 80) on the claim to be paid by the defendants within 21 days of today's date.

- (2) The value of the claim pursuant to Part 65, Appendix B Column 2(3).
- (3) The defendants are also liable for any costs that have been reasonably incurred by the claimant and not included in the budgeted costs as outlined in CPR 65.7(2).
- (4) Liberty to apply in respect of matters covered in Paragraphs (2) & (3).

**Ricardo Sandcroft
Master [Ag]**

By the Court

Registrar