

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

CLAIM NO. AXAHCV 2012/0039

BETWEEN:

DION FRIEDLAND

Claimant

and

CHARLES HICKOX

Defendant

Appearances:

Mr. Clyde Williams instructed by Alex Richardson & Associates of Counsel for the Claimant

Mrs. Tana'ania Small-Davis, with Mrs. Laytoya Hobbs Nurse instructed by Iustitia Law Chambers of Counsel for the Defendant

2019: June 19;
: July 25;
2020: February 20.

Trial of preliminary issues – Assessment of costs – CPR 65.11 and 65.12 – Prescribed costs – CPR 65.5 – Appeal – Costs on appeal – CPR 65.13 – Counter notice of appeal – Assessment of costs on counter notice – Whether prescribed costs or assessment pursuant to CPR 65.12 – Bill of costs – Master's decision not stating basis upon which costs to be assessed – Whether costs awarded by the Master in the court below to be assessed on the basis of prescribed costs – Stage of the proceedings to which the applicant is entitled to prescribed costs – Whether trial of preliminary issue falling under case management – Whether prescribed costs to be awarded up to and including Case Management – Court's discretionary powers – Quantification of cost – Whether claimant entitled to apportionment of costs – Whether general rule that costs shall follow the event to be applied or departed from – Basis upon which the court can depart from the general rule – Whether departure from the general rule warranted in the present case

[1] **INNOCENT, J. (Ag.):** By order of Master Ventose (the 'Master') dated 21st February 2017 on the hearing of a trial of preliminary issues, the claimant's case

failed and it was ordered that he pay costs to the defendant to be assessed if not agreed.

[2] The claimant appealed the Master's decision. On 14th June 2018, the appeal was dismissed and the Master's order was affirmed. The Court of Appeal ordered that the claimant pay costs in the sum of two-thirds of the amount awarded in the court below. The Court of Appeal also dismissed the defendant's counter notice and ordered costs to the claimant to be assessed if not agreed within 28 days of the Court of Appeal's order.

[3] The parties have not agreed costs either in the court below or on appeal in respect of the counter notice. The defendant filed a Notice of Application for the assessment of costs on 26th April 2019. The claimant also filed a Notice of Application for the assessment of costs on 6th May 2019. Both applications came on for hearing before Master Actie on 6th May 2019. The defendant was ordered to file points in dispute with respect to the claimant's bill of costs. The parties were both ordered to file written submissions on the assessment of costs in the matter. Master Actie's order has been duly complied with.

[4] The matter now comes before this Court for an assessment of (1) the costs awarded to the defendant by the Master on the trial of the preliminary issues; (2) the costs awarded to the defendant on the claimant's appeal and (3) the costs to be awarded to the claimant consequent on the defendant's counter notice.

Basis of Costs – Trial of Preliminary Issues

[5] Three distinct issues can be distilled from the respective parties' arguments in relation to the assessment of costs on the trial of the preliminary issues. They are as follows: (1) Whether basis for the award of costs ought to be in keeping with the provisions of CPR 65.5 (prescribed costs) or in accordance with CPR 65.11 and 65.12 (assessed costs); (2) Whether costs ought to be assessed up to case management as opposed to up to and including trial; and (3) Whether the Master's

order ought to be interpreted as warranting an apportionment of the costs awarded.

- [6] In relation to the costs to be awarded on the trial of the preliminary issues in the court below, the defendant says that costs ought to be assessed in accordance with CPR 65.5. According to the defendant CPR 65.4 is not applicable and that costs falls to be assessed in accordance with CPR 65.5 (1) and CPR 65.5 (2). Therefore, the defendant seeks to have this costs assessed based on the value of the claim.
- [7] Mrs. Small-Davis appearing for the defendant, argued that costs should be assessed and awarded on the basis of Schedule B of CPR 65.5 and that the provision of CPR 65.4 are not applicable to the present case.
- [8] According to Counsel for the defendant, prescribed costs are applicable to the trial of the preliminary issues before the Master. Mrs. Small-Davis supports this argument in this way. First, the early conclusion of the matter, effectually disposed of the issues in dispute, after the filing of the defence and up to and including case management conference.
- [9] Mrs. Small-Davis contended that it was at the case management conference that the defendant successfully applied for an order for trial of the preliminary issues. In this instance the trial of the preliminary issues brought the matter to a conclusion insofar as it brought the issues in dispute between the parties to the litigation to an end.
- [10] Based on this premise, Mrs. Small-Davis said, that for all intents and purposes the trial of the preliminary issues ought to be treated as a trial which warrants the defendant being awarded the full amount of prescribed costs provided for by Column 1 Stage (3) of Appendix C which is 70% of the value of the claim.

[11] Mr. Williams, Counsel for the claimant adopted the position that costs awarded to the defendant should be assessed pursuant to CPR 65.11 and 65.12. This, Mr. Williams said, is based on the strict interpretation of the Master's costs order which holds no ambiguity. Therefore, according to Mr. Williams, the proper basis for the quantification of costs is assessed costs. Accordingly, the claimant has filed a bill of costs with respect to the trial of the preliminary issues.

[12] However, Mr. Williams also proffered an alternative position, depending on the view that the court took of the applications before it. Mr. Williams argued that contrary to the defendant's argument that the proper basis for the quantification of costs in these proceedings is prescribed costs, the prescribed costs regime is not applicable since it is "incapable of being assessed". In this regard the claimant relies on the decision of Barrow JA in **Norgulf Holdings Limited and Another v Michael Wilson Partners Limited**¹, where he said:

"...an award of costs to be assessed did not necessarily mean that costs were to be assessed pursuant to rule 65.11, which provided for an award of discretionary costs on the hearing of applications, whether than procedural or other than procedural. In conducting an assessment of costs the court or judicial officer carrying out the assessment is to be guided by rule 65.3 which identifies the bases for assessment and how to determine which bases apply."

[13] In order to resolve the issue of the proper basis upon which costs ought to be assessed the proper starting point would be the Master's cost order. The Master ordered that: "Costs to be assessed if not agreed." The Master's costs order did not state upon what basis costs were to be assessed. The Court is now placed in the unenviable position of having to determine or ascribe a meaning or interpretation to the Master's costs order. Certainly the Court is incapable of performing this task with precision. Therefore, it is now left up to the Court to determine and apply the appropriate basis upon which costs are to be assessed based on the principles and procedure set out in the CPR.²

¹ BVIHCAP2007/0008 (29th October, 2009)

² David Sims and others v Audubon Holdings Ltd et al Civil Appeal Nos. 14 and 15 of 2006 per Barrow JA

[14] The mere fact that the Master's costs order stated "costs to be assessed" did not necessarily imply that costs were to be assessed in accordance with CPR 65.12.

Barrow JA in **Norgulf** held:

"As used in the rules the words "assessed costs" and "assessment" have the meanings given them by rules 65.11 and 65.12 but even in those rules there are variations in meanings. It will have emerged from considering rule 65.11 that this rule confers a discretion on the court to determine the amount of costs to award on hearing an application. Therefore, as used in rule 65.11, "assessed costs" means discretionary costs and the "assessment" that the court conducts pursuant to that rule is to quantify such costs. On the other hand, rule 65.12 neither confers nor takes away discretion as to amount but is almost purely procedural, as has been seen, and the procedure applies to proceedings generally, including trials. That rule, therefore, speaks to how an assessment may be procured regardless of the basis upon which costs are to be quantified. All too often trials will conclude and prescribed costs will be awarded but will not be quantified. In such instances the procedure by which a successful litigant must procure the quantification of the award of prescribed costs in his favour is that provided by rule 65.12. Thus, notwithstanding that a distinction is drawn between fixed costs, budgeted costs, prescribed costs and assessed costs it is no solecism to refer to the assessment of prescribed costs.

A clear instance of the awarding of prescribed costs to be assessed is the case of *Grenada Electricity Services Ltd. v Isaac Peters* in which this court upheld an award of damages to be assessed and awarded prescribed costs, also to be assessed. As that example shows, because prescribed costs are calculated, in the case of a claimant, based on the amount ordered to be paid, it will not be possible for the court to quantify the amount of prescribed costs when the amount ordered to be paid remains to be assessed, and in that situation it will be the norm for the court to award prescribed costs, to be assessed. Similarly, in the case of a successful defendant, the court at the conclusion of the proceedings will sometimes not have stipulated the value of a claim, and the court will then be forced to award prescribed costs to be assessed. Accordingly, when in this case this court awarded costs to be assessed, the use of the word "assessed" encompassed more than an assessment of discretionary costs.³

[15] CPR 65.3 provides:

³ At paras. 18-19

“65.3 Costs of proceedings under these Rules are to be quantified as follows –

(a) where rule 65.4 applies – in accordance with the provisions of that rule; and

(b) in all other cases if, having regard to rule 64.6, the court orders a party to pay all or any part of the costs of another party – in one of the following ways –

(i) costs determined in accordance with rule 65.5 (“prescribed costs”);

(ii) costs in accordance with a budget approved by the court under rule 65.8 (“budgeted costs”); or

(iii) (if neither prescribed nor budgeted costs are applicable), by assessment in accordance with rules 65.11 and 65.12.”

[16] On the question of whether costs should be assessed on the basis of prescribed costs pursuant to CPR 65.5 or assessed costs pursuant to CPR 65.11 and 65.12 the court had regard to the interpretation of both rules. CPR 65.5 provides:

“(1) The general rule is that where rule 65.4 does not apply and 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 paragraphs (2) to (4) of this rule.

(2) The “value” of the claim, whether or not the claim is one for a specified or unspecified or unspecified sum, coupled with a claim for other remedies is to be decided in the case of the claimant or defendant –

(a) by the amount agreed or ordered to be paid; or if the claim is for damages and the claim form does not specify an amount that is claimed, such sum as may be agreed between the party entitled to, and the party liable to, such costs or, if not agreed, a sum stipulated by the court as the value of the claim; or

(b) if the claim is not for a monetary sum it is to be treated as a claim for \$50,000 unless the court makes an order under Rule 65.6(1)(a).

(3) 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.

(4) The court may –

(a) award a proportion only of such sum having taken into account the matters set out in rule 64.6(4) and (5); and

(b) order a party to pay costs –

(i) from or to a certain date; or

(ii) relating only to a certain distinct part of the proceedings, in which case it must specify the proportion of the fixed costs which is to be paid by the party liable to pay such costs and in so doing may take into account the table set out in Appendix C.”

CPR 65.11 deals with assessed cost on procedural applications, whereas CPR 65.12 deals with assessed costs generally in any matter or proceedings or part of any matter or proceedings, other than procedural applications where costs fall to be assessed. CPR 65.12 provides:

- “(1) This rule applies where costs fall to be assessed in relation to any matter or proceedings, or part of a matter or proceedings, other than a procedural application.
- (2) If the assessment relates to part of court proceedings it must be carried out by the judge, master or registrar hearing the proceedings.
- (3) If the assessment does not fall to be carried out at the hearing of any proceedings then the person entitled to the costs must apply to a master or the registrar for directions as to how the assessment is to be carried out.
- (4) The application must be accompanied by a bill or other document showing the sum in which the court is being asked to assess the costs and how such sum was calculated.
- (5) On hearing any such application the master or registrar must either –
 - (a) assess the costs if there is sufficient material available to do so; or
 - (b) fix a date, time and place for the assessment to take place.
- (6) The master or registrar may direct that the party against whom the bill is assessed pay the costs of the party whose bill is being assessed and, if so, must assess such costs and add them to the costs ordered to be paid.

[17] The purport and effect of the two rules were discussed in the judgment of Barrow JA in **Norgulf**⁴, where His Lordship said:

“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. In the Eastern Caribbean Supreme Court (British Virgin Islands) Act, in the interpretation section, section 2, "'matter' includes every proceeding in court not in a cause"; "'proceeding' includes action, cause or matter"; and "'cause' includes any action, suit or other original proceeding between a plaintiff and defendant, and any criminal proceeding by the Crown". 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

⁴ At paras. 14-17

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.

The amplitude of its operation having been established in paragraph (1), the rule proceeds in its other paragraphs to set out the procedure to be followed for an assessment to be carried out. That is what rule 65.12 does - it lays down the procedure for assessment. This is in contrast with the provisions of rule 65.11, which lay down the principles to guide the court in making an assessment of costs on determining applications.

Thus, paragraph (2) of rule 65.12 extends to proceedings generally the proposition relating to applications that appears in rule 65.11(1) (b), which was that on determining an application the court must assess the amount of costs. Paragraph (2) of rule 65.12 states that if the assessment relates to part of court proceedings it must be carried out by the judge, master or registrar hearing the proceedings. In other words, if the assessment relates to part of court proceedings it must be carried out "at the hearing" (see rule 65.12(3)). By identifying the range of judicial officers who would be 'hearing the proceedings' paragraph (2) also confirms that this rule applies to the whole range of proceedings that can come before a court. The rule applies to proceedings that are heard by the registrar, which are minor applications; to proceedings that are heard by the master, which are almost all applications that a judge could hear in chambers; and to proceedings that are heard by judges, which are "any" proceedings, whether in chambers or open court, including trials.

Paragraphs (3), (4) and (5) of rule 65.12 provide the procedure for obtaining an assessment of costs when the assessment does not fall to be carried out at the hearing of proceedings. These paragraphs provide that an application must be made for an assessment to be done, to whom the application must be made, the documentation to be filed and the way in which the master or registrar must proceed. It is only when the assessment is not carried out "at the hearing of any proceedings" (r. 65.12 (3)) that the procedure contained in these paragraphs becomes applicable. If the assessment of costs is carried out at the hearing of an application then, as seen earlier, the procedure contained in rule 65.11(5) and (6) applies. If the assessment of costs is carried out at the hearing of the claim, that is, at the trial, then the assessment the court must make is of the costs of the claim. Pursuant to rule 65.3 the costs of proceedings will be fixed costs or prescribed costs or budgeted costs or, if none of the foregoing is applicable, costs assessed in accordance with rules 65.11 and 65.12.

- [18] Therefore, notwithstanding that the parties have agreed that the basis of the costs to be assessed is prescribed costs pursuant to CPR 65.5, the court has also

determined that costs ought to be assessed in accordance with CPR 65.3 (b) (i) and CPR 65.5.

- [19] In terms of the manner in which the prescribed costs falls to be assessed in the present case, the court sought guidance from the case of **Rochamel Construction Limited v National Insurance Corporation**⁵ where the Court of Appeal had to review the exercise of the discretion of the court below in awarding costs on the trial of a preliminary issue. In **Rochamel** Byron CJ expressed the view that “the costs are governed by the prescribed costs rules; it was not an application and a defence had been filed”⁶. Likewise in the present case.

Quantification of Costs

- [20] The parties appear to have divergent views on the question of the stage of the proceedings at which prescribed costs ought to be determined. This is so notwithstanding, that the parties have to some extent agreed that the proper basis for the assessment of costs awarded by the Master ought to be prescribed costs in accordance with CPR 65.5.
- [21] Mr. Williams contended that the appropriate stage of Appendix B should be applied in determining the amount of prescribed costs to be awarded to the defendant is at Column 2 Stage (3) of Appendix C. On the contrary, the defendant contended that in fact, the case management had been held and that it was at the case management stage that the trial of the preliminary issues was heard and determined. Counsel for the claimant argued that the amount of prescribed costs to be awarded was in accordance with Appendix B Column 2 Stage (2) which equates to 55% of the value of the claim. On the contrary, Counsel for the defendant submitted that he is entitled to costs at the third stage of Appendix B which equates to 70% of the costs to be awarded based on the value of the claim.

⁵ [2003] ECSCJ No. 83

⁶ At para. 18

- [22] In any event, the defendant took its point a step further and argued that the matter had progressed beyond case management and was tantamount to an actual trial which effectually determined the issue of liability between the parties. The court disagrees entirely with this view.

Stage at which costs to be awarded

- [23] It appears that the extent of the parties' disagreement is with respect to the precise stage of the proceedings in the court below that prescribed costs ought to be quantified. Initially, the parties were divided on the issue of whether based on the terms of the Master's order, costs were to be assessed in accordance with CPR 65.12 as opposed to prescribed costs under CPR 65.5. It appears that the parties have resolved this impasse. In the circumstances the bone of contention between the parties appears to be now limited to issues (2) and (3) set out above.
- [24] Counsel for the defendant argued that the matter had progressed beyond case management when the trial of a preliminary issue had been held. Therefore, for all intents and purposes the court should treat the trial of the preliminary issues as a trial when considering the question of costs. The defendant says, that on this basis he is entitled to costs in the amount of 70% of the costs to be awarded from listing questionnaire up to and including listing questionnaire. Mrs. Small-Davis appearing for the defendant coined the phrase that "case management was in the rear view mirror" as the proceedings had gone beyond case management.
- [25] The court disagrees entirely with Mrs. Small-Davis' submission on this point. The application for the trial of preliminary issues was made by the defendant at case management. In directing the trial of the preliminary issues, the Master was exercising his case management powers pursuant to CPR 26.1 (2) (e). The point raised by Mrs. Small-Davis is answered by Byron CJ in **Rochamel**; where His Lordship said: "This was not a full trial. It was a hearing on a specific issue ordered

at a case management conference as provided by part 26.1(2) (e).⁷ Therefore, adopting the reasoning of Byron CJ, the court is minded to award prescribed costs in accordance with Appendix B Column 2 Stage (2) which equates to 55% of the value of the claim.

Apportionment

- [26] Counsel for the claimant contended that on the trial of the preliminary issues, the Master found in favour of the claimant on one issue and found for the defendant on another issue. Therefore, Counsel for the claimant argued that it behooves the court to construe the Master's order in light of the judgment and the relevant provisions of the CPR. In this regard, Counsel for the claimant contended that, given the result of the trial of the preliminary issues before the Master, the strict application of the general rule contemplated by CPR 64.6 (1) that provides that costs shall follow the event would not achieve a fair and just result in the present case.
- [27] According to Counsel for the claimant, the applicable prescribed costs to be paid on an early conclusion of the matter should be apportioned between the parties. The claimant said that the amount awarded as prescribed costs should be apportioned equally between the parties in light of how the two preliminary issues were decided by the Master.
- [28] Counsel for the claimant seeks support for this contention in the provisions of CPR 64.6 (2) to the extent that he is seeking the Court to depart from the general rule prescribed by CPR 64.6 (1) that the unsuccessful party shall pay the costs of the successful party.
- [29] It was further argued on the claimant's behalf that the Master did not award costs specifically to the defendant. The court was referred to paragraph [40] of the Master's judgment where he said:

⁷ At para. 17

- “(1) The answer to the first preliminary question is that the Defendant did not breach the Settlement Agreement by exercising his power of sale by holding a public auction on 2 May 2012 pursuant to the Hickox charges.
- (2) Since the Defendant did not breach the Settlement Agreement, the second preliminary question does not arise.
- (3) If however, I am wrong, the answer to the second preliminary question is that the Claimant has locus standi and is not estopped from bringing this action or claiming damages against the Defendant for loss as a result of the auction of the property.
- (4) The Claimant’s statement of claim is dismissed.”

[30] Counsel for the claimant interpreted the Master’s Order to mean that both parties should benefit from the Master’s costs order. The claimant sought to buttress this argument by placing reliance on CPR 64.6 (2) and (3) and paragraphs [8] and [9] of the decision in **Rochamel** where 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.”

[31] On these bases Counsel for the claimant submitted that, notwithstanding the general principle, which remains, that is, that costs follows the event, the court making a costs order must still be guided by other considerations including, the overriding objective of the CPR which gives the court a discretion in awarding costs. In this regard, the claimant relied on the decision of Lord Wolf MR in **Rediffusion Music Ltd v Phonographic Performance Ltd**⁸, cited at paragraph [24] in the case of **Aspin v Metric Group Limited**⁹ to the effect that:

“In a case of this nature where there were distinct and discreet issues, it was important for the judge to keep in mind the observations of Lord Woolf MR in *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 2 All ER 299, [1999] 1 WLR 1507 at 1522H to 1523B, [1999] RPC 599. Lord Woolf said this:

“I draw attention to the new Rules because, while they make clear that the general rule remains, that the successful party will normally be entitled to costs, they at the same time indicate the wide range of considerations which will result in the court making different orders as to costs. From 26 April 1999 the, 'follow the event principle' will still play a significant role, but it will be a starting point from which a court can readily depart. This is also the position prior to the new Rules coming into force. The most significant change of emphasis of the new Rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new Rules are reflecting a change of practice which has already started. It is now clear that too robust an application of the 'follow the event principle' encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so.”

⁸ [1999] 1 WLR 1507, 1522H – 1523B

⁹ [2007] EWCA Civ. 922

- [32] Therefore, Counsel for the claimant argued that the Master's costs order favoured both parties to the extent the outcome of the two preliminary issues was split between the two parties. This the claimant says gives the court the discretion when awarding costs to have regard to all the circumstances, including whether a party has succeeded on a particular issue, even if the party had not been successful in the entire proceedings.
- [33] Counsel for the defendant countered this argument in this way. According to Mrs. Small-Davis, the learned Master failed to observe one of the guidelines set out in the case of **Rochamel**, which involved identifying the rule that is being applied, and if discretion is being exercised, give the reasons. In the premises, Mrs. Small-Davis said essentially, that in making the costs order, the Master was not purporting to depart from the general rule. In other words, had the Master intended to exercise any discretion in the manner contemplated by the claimant he would have said so with specificity. However, according to Counsel for the defendant, the Master's costs order was not in any way ambiguous and ought therefore to be interpreted strictly. That costs awarded were to be assessed in favour of the defendant; the defendant being the successful party in the proceedings.
- [34] Therefore, contrary to the claimant's assertions on this point, the defendant argued that the Master's costs order ought not to be interpreted in a manner requiring that the parties be treated equally.
- [35] Mr. Williams dismissed the defendant's argument that costs should be awarded exclusively to the defendant as the successful party. He argued that the Master found in favour of the claimant on one issue and for the defendant on the other issue. Therefore, the costs awarded in the court below ought to be equally apportioned.

- [36] It is the court's view that this argument cannot pass muster in view of the fact that the outcome of the trial of the first preliminary issues determined the claim in the court below. Therefore, the court is of the considered view that a departure from the general rule is not warranted in the present case. In arriving at this conclusion the court has adopted the approach advocated by Byron CJ in **Rochamel**.
- [37] Given the tenor of the Master's order that "since the defendant did not breach the Settlement Agreement, the second preliminary question did not arise". Therefore, the Master's decision on the first preliminary issue ultimately determined the entire claim. The claimant's statement of claim was dismissed. The Master's decision on the first preliminary issue was the ultimate decision that ultimately decided the claim. In the court's view, the Master made no determination in relation to the second preliminary issue that decided the claim. The Master's statement regarding the second preliminary issue may properly and conveniently be taken as merely orbiter. Essentially, the Master was alluding to the fact that had he decided the first preliminary issue in the defendant's favour, then the outcome would have been decided on the second preliminary issue. The court fails to see any ambiguity or a decision that favoured the claimant in terms of the outcome of the proceedings.
- [38] Mrs. Small-Davis cited the case of **VRL Operations Limited v National Water Commission and others**¹⁰ cited in **Delta Petroleum (Nevis) Limited v OOJJ's Ltd**¹¹ where at para [38] Pereira CJ said:
- "At the outset, I wish to make it clear that I am in agreement with the appellant that, as a general rule flowing from CPR 64.6(1), if a court decides to award costs, it must order the "unsuccessful party to pay the costs of the successful party." Notwithstanding this, however, as recently opined in the Jamaican case of *VRL Operations Limited v National Water Commission and others* ¹⁶ "the Court may, of course, depart from the general rule, but it remains appropriate to give 'real weight' to the overall success of the winning party: *Scholes Windows v Magnet* (No.2) [2000] ECDR 266 at paragraph 268." The question to be determined, then, is who is the successful or winning party, as only then is the Court likely to

¹⁰ [2014] JMSC Civ 84

¹¹ [2016] ECSCJ No. 154

approach costs from the right perspective.¹⁷ The question of who is the successful party 'is a matter for the exercise of common sense', given that 'success', for the purposes of the CPR, is 'not a technical term but a result in real life'.¹⁸ On the basis of the foregoing, I accept that the issue of whether the appellant in the case at bar, Delta Petroleum (Nevis) Limited, was the successful party is a matter that must be looked at in a realistic and commercially sensible way.

[39] Ultimately, the real question that the court should consider is who was the successful party to the claim? The court is of the considered view that notwithstanding a party's failure on a particular issue, it does not follow as a matter of course that his costs should be apportioned or discounted merely because he was partially successful on the preliminary issues tried in the proceedings.

[40] Mr. Williams alluded to the discretion which the court must exercise when departing from the general rule that costs is awarded to the successful party. However, when exercising this discretion in a situation where each party is regarded as having had some success, a court may make an award of only a proportion of the costs to the party who is overall the successful party in accordance with CPR 65.5 (4) (a).

[41] However, in the present case the Master's decision gives no indication that he intended to depart from the general rule or that he had intended to apply his discretion in a particular way. Mrs. Small-Davis, argued, correctly in the court's view, that:

“...the learned Master did not express himself in an ambiguous way. In construing the costs order, the court should note that it was made following the order dismissing the claim... It would be inconsistent for the Master to have noted the irrelevance of the second preliminary issue in light of his main findings and yet intended for the claimant to be awarded costs.”

[42] In short, Mrs. Small-Davis argued that the Master's order must be interpreted in accordance with its plain and ordinary meaning and in light of the outcome of the trial of the preliminary issues. The court finds favour with this approach. Notwithstanding, that the Master had decided the second preliminary issue in the

claimant's favour as the Court of Appeal found, the outcome of the proceedings would have been the same. In other words, if it were that the Master had found in favour of the claimant on the second preliminary issue, the Master's decision that the defendant did not breach the Settlement Agreement would have determined the claim in favour of the defendant in any event. Therefore, for all intents and purposes the defendant may properly be regarded as the successful party in the proceedings.

- [43] It would appear that the application for the trial of the preliminary issue was made at the behest of the defendant. This application clearly saved a considerable amount of the court's time and resources by the early identification of the real dispute between the parties and the resolution of these issues at an early stage of the proceedings. The defendant's conduct was clearly in furtherance of the overriding objectives of the rules. Therefore, applying the principles involving the exercise of the court's discretion in assessing the amount of prescribed costs to be awarded in the circumstances such as present themselves in the present case the court finds no basis for departing from the general rule. Therefore, the defendant is entitled to the full amount of the prescribed costs as set out above.

Costs – Court of Appeal

- [44] The costs awarded to the defendant in the Court Appeal was stipulated to be two-thirds of the costs awarded in the court below. Therefore, the quantification of this costs will be determined by the amount awarded as costs pursuant to the Master's costs order. This is capable of precise calculation.
- [45] Therefore, the costs awarded to the defendant on the appeal will be two-thirds of that awarded in the court below. This equates to the sum of US\$63,050.24.

Costs on the Counter Notice

- [46] The costs order made by the Court of Appeal on the defendant's counter notice is not capable of precise calculation. The claimant has submitted a bill of costs in

respect of challenging the counter notice. The defendant has filed points in dispute. Fortunately, the parties have agreed on the amounts that ought to be allowed on the claimant's bill of costs.

[47] In relation to the defendant's counter notice concerning the Master's findings on the second preliminary issue, the Court of Appeal held that "there is no evidence of reliance on any representation by the appellant or detriment suffered by the respondent, which are essential elements of estoppel. Accordingly, the appellant was not estopped from bringing the claim against the respondent". In the circumstances, the second preliminary question was answered in the claimant's favour.

[48] The Court of Appeal dismissed the counter-appeal with costs to the appellant (the claimant in the present case) to be assessed if not agreed within 28 days of the date of the Court of Appeal's order. In the circumstances, it can be said that both parties were partially successful on the appeal. The question that immediately arises is how costs ought to be assessed in the present circumstances.

[49] In the circumstances, the court holds that the costs awarded on the dismissal of the counter notice to the claimant ought to be assessed in accordance with CPR 65.11 and CPR 65.12. This is the case because the Court of Appeal did not apply the general rule that costs is to be awarded at two-thirds of the costs awarded in the court below¹². The Court of Appeal was clearly departing from the general rule when it ordered costs on the counter notice to be assessed. CPR 65.13 (2)¹³ sets

¹² 65.13(1) The general rule is that the costs of any appeal must be determined in accordance with rules 65.5, 65.6 and 65.7 and Appendix B but the costs must be limited to two thirds of the amount that would otherwise be allowed.

¹³ (2) The Court of Appeal may, if the circumstances of the appeal or the justice of the case require, depart from the general rule and, in such a case, it may -

(a) make an order for budgeted costs whether on an application made in accordance with rules 65.8 and 65.9 or otherwise; or

(b) make such other order as it sees fit.

out the circumstances under which the Court of Appeal may depart from the general rule.

[50] Nevertheless the Court of Appeal did not state the basis upon which such costs were to be assessed. However, it can be readily inferred from the fact that the Court of Appeal did not specifically order costs to be determined in accordance with the general rule that it intended to depart from that rule. Therefore, costs in relation to the counter notice falls to be assessed in accordance with CPR 65.12 having regard also to the provisions of CPR 65.2 (1) (a) and CPR 65.2. (3).

[51] Therefore, the court agrees with Mr. William's argument in relation to CPR 65.13 that if the court is departing from the general rule, it must do so on the basis of what is just in all the circumstances of the case; and where the court specifically states that it is departing from the general rule it must also state the basis for this departure. Mr. Williams contended that these matters were not referred to in the Court of Appeal's costs order. Therefore, Mr. Williams argued that on a strict interpretation of the costs order made by the Court of Appeal, the Court of Appeal did not intend to depart from the general rule. Therefore, Mr. Williams submitted that costs on the counter notice of appeal ought to be assessed at two-thirds of the costs awarded in the court below. Mr. Williams argued trenchantly that because the Court of Appeal did not specify the basis of or in accordance with what rule costs on the counter notice of appeal was to be assessed then, in keeping with the decision in **Norgulf**, it would automatically be prescribed costs. The court does not agree with this submission. However, the court has no quarrel with the approach encapsulated by the statement of principle recited by Mr. Williams in his submissions. This was the approach taken in the case of **Telecommunications Regulatory Commission v Cable & Wireless (BVI) Limited**¹⁴. What is important is whether this statement of principle can be applied to the present case.

¹⁴ [2018] ECSCJ No. 148, per Carrington JA (Ag) at para 74

- [52] The general rule is that costs of any appeal must be determined by the prescribed costs regime and the related Appendix to the rules¹⁵; but the costs of the appeal must be limited to two thirds of the amount that would otherwise be ordered. Assuming that the correct method of assessment was on a prescribed costs basis, the difficulty that arises is the manner in which such prescribed costs are to be quantified. The claimant having succeeded on the counter notice is entitled to recover costs against the defendant. However, whereas the costs recoverable by the defendant can be determined by simple mathematical calculation based on the value of the claim, there is no ease in determining the quantum of costs to be awarded to the claimant in resisting the counter notice.
- [53] Therefore, in assessing the costs recoverable by the claimant on the counter notice the court is forced to apply the provisions of CPR 65.5 (2) (b). Therefore, under this regime the amount of costs recoverable by the claimant would be US\$5,000.00. The court is of the view that a departure from the general rule is warranted to meet the requirements of the circumstances of the appeal and the justice of the case¹⁶. Therefore, the court can only assume that the Court of Appeal had intended to depart from the general rule and make some other order, in this case being “costs to be assessed”.
- [54] The court has formed the view that the second preliminary issue raised by the defendant in the court below was unnecessary and did not eventually determine the outcome of the proceedings. That being the case, the defendant nevertheless filed the counter notice upon which it was unsuccessful. The result of the counter notice was that the claimant now had to defend a counter notice that was of no moment in determining the outcome of the claim in the court below. Therefore, the court would depart from the general rule.

¹⁵ 65.13(1) The general rule is that the costs of any appeal must be determined in accordance with rules 65.5, 65.6 and 65.7 and Appendix B but the costs must be limited to two thirds of the amount that would otherwise be allowed.

¹⁶ CPR 65.13 (2) (b)

[55] In any event, it appears that the claimant has conceded that the proper basis upon which costs should be assessed on the counter notice of appeal is assessed costs in accordance with CPR 65.11 and 65.12. It appears that throughout these proceedings the claimant has adopted a two pronged approach. This is evident from the claimant having filed both a Bill of Costs and an Amended Bill of Costs notwithstanding Mr. Williams' argument that the costs ought to be assessed as prescribed costs in accordance with CPR 65.13 (1).

Assessment based on Claimant's Bill of Costs

[56] The claimant claimed Queen's Counsel's fees in respect of Mr. David Phillips QC on the appeal and the counter notice of appeal apportioned at two-thirds and one-third respectively. This figure amounted to US\$12,413.00 in respect of the counter notice.

[57] Mrs. Small-Davis disputes this sum on the grounds that this amounted to an unreasonable apportionment. Mrs. Small-Davis submitted that the work done by Queen's Counsel on the counter notice was reflected in three pages of submissions. Therefore, according to Mrs. Small-Davis one-third of the time was certainly not spent on the counter notice. Mrs. Small-Davis also argued that a fair estimate of the time allocated and reasonably spent on the counter notice would be more in the order of one-tenth of the costs awarded on the notice of appeal. Given the points in dispute advanced by Mrs. Small-Davis and having heard the parties' arguments in relation to this item of costs I would award costs in the sum of one third of the sum claimed which equates to US\$4,137.67.

[58] In response to Mrs. Small-Davis, Mr. Williams submitted that Queen's Counsel would have spent time perusing the judgment in the court below and the other papers filed in the appeal. Therefore, Mr. Williams contended that one-tenth was a wholly inadequate sum and that one-third was adequate in the circumstances.

- [59] The amount claimed as Junior Counsel's fees in the claimant's Bill of Costs was also challenged by the defendant. This item of costs related to costs incurred in respect of Mr. David Fisher ('Mr. Fisher') who was Junior Counsel. It appears that the claimant takes issue with this item of costs on the basis that Mr. Fisher did not attend at the hearing of the appeal. In fact it was Mr. Alex Richardson ('Mr. Richardson') who acted as Junior Counsel in the Court of Appeal. This item of costs was conceded by Mrs. Small-Davis on the assumption that although Mr. Richardson was present at the hearing of appeal, he did not present any work related thereto. Therefore, the sum of US\$3,114.30 claimed in respect of Mr. Fisher was accepted.
- [60] In respect of the costs related to Ms. Smikle set out in the claimant's Bill of Costs, Mrs. Small-Davis argued that Ms. Smikle's costs were generally related to the leave stage of the proceedings in the Court of Appeal which were unconnected to the counter notice. Therefore, Mrs. Small-Davis submitted that none of those costs ought to be allowed.
- [61] The court understands Mrs. Small-Davis' argument in this way; that this item of costs was not incurred in relation to the counter notice and therefore should not be included in the claimant's Bill of Costs as being incidental or contingent on the counter notice which was nonexistent at the time of the leave application.
- [62] It appears that Mr. Williams took no objection to Mrs. Small-Davis' line of reasoning and is taken to have conceded this point of objection. In the circumstances, this item will be discounted from the claimant's Bill of Costs in its entirety.
- [63] The claimants also claim Solicitor's costs in relation to the provision of services by Mr. Richardson in relation to the counter notice. The sum claimed under this head is US\$1,876.18. The court finds this sum reasonable and therefore this sum is allowed in its entirety.

Costs on the Assessment Application

[64] Mr. Williams suggested either party bears their own costs. Mrs. Small-Davis took no position on the point and opted to leave it entirely in the court's discretion, although somewhat reluctantly acceding to Mr. Williams' request. Notwithstanding the position adopted by the parties the court will assess the costs to be awarded on the costs application in accordance with CPR 65.12. This rule permits the court to direct that the party whose bill is being assessed pay the costs of the party whose bill is being assessed and, if so, must assess such costs and add them to the costs ordered to be paid¹⁷. In the circumstances, the court approves the claimant's bill of costs on the counter notice in the sum of US\$9,128.15.

Summary

[65] In the circumstances, the Court orders that the costs recoverable by the defendant on the trial of the preliminary issues before the Master shall be on the basis of prescribed costs calculated in accordance with Appendix B, which equates to US\$171,955.21. Applying the provisions of Appendix C Column 2 Stage (2) the defendant shall be allowed 55% of the prescribed costs of US\$171,955.21, that is after defence and up to and including case management, which equates to US\$94,575.37.

[66] The defendant is also entitled to costs on the appeal at the rate of two-thirds of the costs awarded on the trial of the preliminary issues in the court below which equates to US\$63,050.24.

[67] The claimant's costs on the counter notice is assessed at US\$9,128.15.

[68] The defendant shall pay the claimant's costs on the assessment of the claimant's bill of costs in the sum of US\$1,000.00.

¹⁷ CPR 65.12 (6)

Order

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

1. Costs is awarded to the defendant in the sum of US\$94,575.37 being prescribed costs on the value of the claim assessed in accordance with CPR65.5 and Appendix B and Appendix C on the trial of the preliminary issues before the Master.
2. Costs is awarded to the defendant on the appeal at two-thirds of the costs awarded in the court below in the sum of US\$63,050.24.
3. The claimant's bill of costs in respect of the counter notice is assessed at and allowed in the sum of US\$9,128.15.
4. Costs is awarded to the claimant on the assessment of the claimant's bill of costs in the sum US\$1,000.00.

Shawn Innocent
High Court Judge

By the Court

Registrar