

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

Claim Numbers: **BVIHCV2016/0308**

Between

Virgin Islands Broadcasting Limited

Claimant

and

(1) Sydney Kazembe

(2) Medical Air Services Association of the (BVI) Limited

Defendants

Before: MASTER Ricardo Sandcroft [Ag]

Appearances: Ms. Nellien P. Bute of Counsel for the Claimant
Mr. John McCarroll S.C. appearing with Ms. Sarah Bolt of Counsel for the 2nd Defendant

2020: January, 29th
2020: March, 4 & 6

JUDGMENT

Introduction

- [1] **R. SANDCROFT, M. [Ag.]:** This is an application by the Defendants for costs on the Claimant's case on the basis that the 2nd Defendant had made an application for strike out and Summary judgment and was successful on the latter. The application is strenuously resisted by the Claimant on the basis that the Defendants should be entitled to costs on the application and not the claim.

Background/Chronology

- [2] The Claimant brought this action against the defendants claiming damages arising out of a motor vehicular accident which occurred at 4:00 am. On 9th March 2013. It is not disputed that the motor vehicle was driven by the 1st defendant. He has not filed a defence in this matter, nor has he participated in the proceedings in any way. However, the claimant claims that the 2nd defendant

was the 1st defendant's employer and/or the owner of the motor vehicle in question. On that basis, it was argued that the 2nd defendant would be vicariously liable for the actions of the 1st defendant.

[3] The 2nd defendant filed a defence in which it was denied that the 1st defendant was ever an employee within its operations. In fact, the 2nd defendant presented evidence to suggest that the 1st defendant was employed with an external company named Medical Air Services Association International Inc. (International). This was an external company registered in the BVI on 23rd day of February, 2009 and which ceased operations on the 16th day of February, 2017. The 2nd defendant, on the other hand, was registered in the BVI as a limited liability company on the 21st day of September, 2012 but did not commence operations until it had obtained the required licenses on the 1st of November, 2016 and 16th of February, 2017 respectively.

[4] On the 24th of June, 2019, the 2nd defendant made a strident application for the striking out of the claimant's statement of case which the claimant staunchly and vigorously opposed.

Defendant's/Applicants' Submissions

[5] Attorney-at-Law for the 2nd Defendant, Mr. John McCarroll S.C. argued that the claim should be struck out against it. The argument was that it was plain that the 2nd defendant was never the 1st defendant's employer, neither was it the owner of the vehicle which the 1st defendant was driving at the material time. In those circumstances, there was no claim against the 2nd defendant. It was argued that there was no prospect of success there and that it was an abuse of process to continue the claim.

[6] My brother Master Moise, as he then was at the time, denied the application to strike out the statement of claim but instead entered Summary Judgment in favour of the 2nd defendant and also ordered the claimant to pay prescribed costs to the 2nd defendant pursuant to the provisions of the CPR (as amended 2000).

[7] The 2nd defendant now pursues prescribed costs in accordance with the provisions of the CPR (as amended 2000). They contend that the prescribed costs should be on the value of the entire claim

because of the aforementioned Summary Judgment made in their favour; and they rest their submissions on the prescribed costs regime as stated in the CPR (as amended 2000):

Prescribed Costs

The prescribed costs regime in CPR 2000 is found in CPR 65.5 which provides as follows:

Prescribed costs

65.5 (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

Claimant's/Respondent's Submissions

[8] Ms. N. Bute for the claimant, submitted that the defendant was awarded Summary Judgment by the Court and not a strike out of the claimant's statement of claim; therefore, they would not be entitled to prescribed costs on the value of the entire claim.

[9] Ms. Bute further submits that the overriding objective of the rules of the CPR (as amended 2000) is to ensure that cases are dealt with justly, ensuring that justice is done by all the parties involved, Ms. Bute stated that since the Claim was not struck out, the 2nd defendant should be given prescribed costs in relation to the application to have the matter struck out/Summary Judgment and not the value of the entire claim.

Issue

[10] (a) Whether this Court should order costs on the striking out and Summary judgment applications or costs on the claim itself, 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 impact on the costs payable.

Court Analysis

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

Rule 64.6(1) provides the general rule with regards 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”.

[12] The provisions in CPR 2000 that the judge is required to examine are rules 65.5 and 65.6. The relevant parts of the first rule read as follows:

Prescribed costs

“65.5 (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) of this rule.

(2) In determining such costs the value of the claim is –

(a) in the case of a claimant – the amount agreed or ordered to be paid;

(b) in the case of a defendant –

(i) the amount claimed by the claimant in the claim form;

(ii) if the claim is for damages and the claim form does not specify an amount that is claimed – such sum as is agreed between the party entitled to, and the party liable

for, the costs or, if not agreed, a sum stipulated by the court as the value of the claim; or

(iii) if the claim is not for a monetary sum – the amount of EC\$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) ...”

[13] Rule 65.6 is in the following terms:

Application to determine value of claim for purpose of prescribed costs

65.6 (1) A party may apply to the court at a case management conference

(a) to determine the value to be placed on a case which has no monetary value; or

(b) if the likely value is known, to direct that the prescribed costs be calculated on the basis of some higher or lower value.

(2) The court may make an order under paragraph (1) (b) only if it is satisfied that the costs as calculated in accordance with rule 65.5 are likely to be either –

(a) excessive; or

(b) substantially inadequate; taking into account the nature and the circumstances of the particular case.

(3) If an application is made for costs to be prescribed at a higher level, rules 65.8 (4)

(c) and 65.9 apply.

[14] 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.

[15] 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.

[16] 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 –

(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

- [17] 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 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.
- [18] The 2nd Defendant contended that the present claim is an abuse of the process of the court and that there were no reasonable grounds for bringing the claim against them. The court is therefore being asked to examine the conduct of the Claimant in filing the instant claim in assessing and awarding prescribed costs on the value of the claim itself. The Claimant on the other hand is asking the court to consider that the issues raised in the claim have not been litigated and therefore prescribed costs should be awarded on the application and not the value of the claim itself.
- [19] 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 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.

[20] The starting point, which is the overriding objective of 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.”

[21] 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 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 claims are dealt with, with the overriding objectives in mind.

- [22] 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, complexity of the matter, 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.**¹ then Barrow JA of the Eastern 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).

- [23] 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

¹ OECS Civil Appeal No. 8 of 2007 paras 13 et seq.

excepted. Put another way, by excluding only procedural applications this rule includes all other applications.”

[24] 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.”

[25] Barrow JA 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.”

[26] Additionally, I have considered, as Barrow JA did in **Bradford Noel v First Caribbean International Bank (Barbados Ltd.)** (Civil Appeal No. 29 of 2006 dated 19 March 2007), where he stated that in interpreting CPR 65.5 one must avoid a result that may amount to an absurdity (at [20]). To make sense of CPR 65.5(2)(b), it must be read so that the words “whether or not the claim is one for a specified or unspecified sum, coupled with a claim for other remedies”, found in the chapeau of CPR 65.5(2), and do not apply.

[27] 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.

[28] Finally, I wish to thank learned Counsel for their written submissions in this matter.

[29] The 2nd defendant's application to prescribed costs on the claim is granted and these are the orders that follow:

[30] **Orders**

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

- (1) Prescribed costs of 55% on the claim are awarded pursuant to CPR 65.5(2) (b) to the Defendant on the claim to be paid by the Claimant within 21 days of today's date.
- (2) The value of the claim pursuant to Part 65, Appendix B Column 2(3).
- (3) The Claimant is also liable for any costs that have been incurred by the Defendant and not included in prescribed 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