

**EASTERN CARIBBEAN SUPREME COURT
ANTIGUA & BARBUDA**

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

Claim Number: **ANUHCV 2012/0827**
Between

BUILDERS MERCHANT LTD

Claimant

AND

ALEX JOHN

Defendant

APPEARANCES:

Sherfield Bowen of Counsel for the Claimant
Kema Benjamin of Counsel for the Defendant

2014: February 7, 2014
March 7, 2014
March 31

RULING ON COSTS

1. **GLASGOW M (ag):** The contention before the Court centers on the basis on which and the amount of costs to be awarded to the Defendant further to his request for the grant of judgment pursuant to Part 26.5 of CPR 2000 (hereinafter referred to "the Rules"). It was ordered at case management that unless the Claimant amends its claim form and statement of claim within a stipulated time, the claim against the Defendant would be struck out and that judgment would be entered for the Defendant. The Claimant failed to comply with the "unless order". The Defendant requested and received judgment with costs to be assessed. Costs are now to be assessed. The Claimant asserts that the basis of the assessment falls within Part 65.11 of the Rules. The Defendant's view is that he is entitled to have his costs assessed in accordance with the provisions of Part 65.12 of the Rules.

BACKGROUND

2. On December 19, 2012, the Claimant commenced proceedings against the Defendant by filing a Claim form with Statement of Claim in which it alleges that the Defendant was a customer of its building materials and hardware business. The Claimant complained that the Defendant owed the business quite a tidy sum of money for building materials which money was previously demanded but was not paid. Accordingly, the Claimant sought relief, being the balance owed in the sum of \$140,992.84, plus collection fees of \$16,214.17, interest, disbursements and costs all totaling \$159,437.01;
3. The Defence was filed on January 29, 2013 in which the Defendant asserted, among other things, that he ceased being a customer of the Claimant for over (6) years. Thus any claims made for moneys owed were statute barred. Additionally, the Defendant averred that the Claimant's pleadings did not comply with Part 8.7 of the Rules. The claim was therefore fatally flawed and could not succeed. The Claimant did not reply to the Defence.
4. The first Case management conference took place on April 12, 2013. There is no filed Order in respect of those proceedings but the Court's file records a note that Counsel for the parties and the Defendant were present at the case management conference when the Master made the following Orders –
 - (a) Claimant is granted leave to amend the Statement of Claim within (14) days of today's date;
 - (b) Defendant is to reply within 28 days of the receipt of the amended claim.The case management was then adjourned to June 17, 2013.
5. When the matter arose for further case management on June 17, 2013, Counsel for the parties was present along with the Defendant. The Court made the following Orders –
 - (a) Unless the Claimant file and serve its amended Claim form and Statement of Claim by July 15, 2013, the Claim will be struck out and judgment entered for the Defendant;
 - (b) Costs to the Defendant in the sum of \$350.00
6. The Claimant never complied with this case management Order. This prompted the Defendant to file a request for judgment on November 11, 2013. The request sets out the circumstances in which it arose as recited hereinabove at paragraph 5 and asks that judgment be entered for costs to be assessed. It is presumed that the Defendant's request was made pursuant to Part 26.5(7) of the Rules.
7. The request for judgment on the "unless order" came on for hearing on January 21, 2014. It must be stated at this juncture that the parties have disagreed strenuously in their submissions about the nature of the proceedings on that day. I will return to this issue later. It is, however, appropriate to

recite the Learned Master's Order. Again, there is no draft or finalized Order on file but the notes on file state the following –

- (a) The application for judgment pursuant to CPR Part 26.5 is granted;
- (b) The Defendant shall file submissions in relation to costs pursuant to CPR Part 65.11(5);
- (c) The matter is adjourned to 13th February 2014 for the determination of costs

8. The Defendant duly filed submissions on February 7, 2014. Notwithstanding the fact that there was no Order for the Defendant to serve the submissions on the Claimant, the Defendant served the submissions on even date. The case was then listed for hearing on February 13, 2014 where it was ordered that the Court would issue its ruling. In deciding the issue of costs, the Court is constrained to hear from both sides before issuing its ruling. Accordingly, the matter was recalled on March 7, 2014 and the Claimant was given an opportunity to file submissions in response, which it did on March 10, 2014.

The Contentions of the parties

9. As stated above, the parties' proffer two differing views on the basis on which costs are to be assessed and awarded in this case. The Defendant, at whose instance the issue of costs arises, submits that the Master was wrong when, on January 21, 2014, she ordered that submissions should be made pursuant to Part 65.11 of the Rules. After reciting most of the history stated hereinabove, Counsel argues that what should be determined at this stage is not cost of a procedural application under Part 65.11 but rather the costs of the entire proceedings thus far including Counsel's fees, disbursements, expenses etc. Counsel submits that the procedure obtaining under Part 65.11 is to be utilized for the determination of any application. In Counsel's estimation, the request for judgment was not an application but rather proceedings at case management. The Order granting judgment was therefore given at a case management conference. In those circumstances, the rules applicable to the determination of costs are found in Part 65.12 whereby costs are assessed "in relation to any matter or proceedings or part of a matter or proceedings, other than a procedural application."¹ The verbatim summation of Counsel's contention is that "the difference of consequence to the Defendant is that whereas costs assessed under Part 65.12 are to be based on the bill submitted by the Defendant and the Court's discretion under Part 65.2 of the CPR, under assessed costs of procedural applications, Part 65.11(7) provides that the costs allowed under this rule may not exceed one tenth of the amount of the prescribed costs appropriate to the claim unless the Court considers that there are special circumstances of the case justifying a higher amount. Although the Court has discretion to allow the costs of a procedural application to exceed 1/10 of the costs appropriate to the Claim, for the reasons hereinbefore stated it is denied that Part 65.11 applies at all to a Case management assessment of the costs of the proceedings." Counsel relies on the guidance given by Barrow J.A in **Norgulf Holdings Ltd and Incomeborts Ltdv Michael Wilson & Partners Ltd**² in which the Court of Appeal elucidated the approach to be taken when assessing costs pursuant to Parts 65.11 and 65.12 of the Rules.

¹ Part 65.12(1) Of CPR 2000

² Civ. App. No. 8 of 2007

10. The Claimant takes a different view and agrees with the Order of the Master made on January 21, 2014 that the costs should be assessed in accordance with Part 65.11. Counsel contends that two case management conferences were held. At the first case management conference held on April 12, 2013, the Court made an order that the Claimant should amend its Claim form and Statement of Claim and adjourned the matter to June 17, 2013. At the second case management held on June 17, 2013, the Claimant had not complied with the Court's Order and as such the Defendant made an oral application for an "unless order" which was granted with costs of \$350. In the Claimant's view, the Defendant's request for judgment filed on November 13, 2014 was an application made for judgment following the Claimant's non-compliance with the Court's order on June 17, 2013. The Master considered this application on January 21, 2014 and it was granted with costs to be assessed. In Counsel's view this was a procedural application to which Part 65.11 applies and not Part 65.12 as argued by the Defendant. Counsel posits that, had the proceedings been concluded on its merits, rather than on a procedural application, Part 65.12 would apply.

Legal Principles applicable

11. Where the Court orders that a party's statement of case be struck out unless it complies with an order, any other party may apply for judgment to be entered if there is non-compliance with that "unless order".³ In the case under discussion, the party who requested judgment on the "unless order" is the Defendant. Part 65.5(7) of the Rules states that, the judgment in these circumstances "must be for assessed costs". Parts 65.11 and 65.12, in turn, give the requisite guidance for the assessment of costs. Both Counsel relied on the elucidation given to these two rules by Barrow J.A in the **Norgulf Holdings**⁴ decision. In that case, his Lordship took time to explain the amplitude of Part 65.11

"Rule 65.11 is often not fully appreciated and so it may be helpful to summarize its broad effects. 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.

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.

12. Barrow J.A observes that a distinguishing feature between Parts 65.11 and 65.12 is that Part 65.12 lays down the procedure for assessing costs whilst Part 65.11 set out guidelines the court must

³ Part 65.5(2) of CPR 2000

⁴ Supra

consider when it is making an assessment on costs to be awarded on an application. His Lordship illuminated the principles underpinning Part 65.12 thusly –

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.

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.

13. The costs were not determined at the hearing of the request for judgment on January 21, 2014. Accordingly, costs now must be determined on the submissions of Counsel. It would seem to me that a useful starting point in that exercise is the determination of what transpired on January 21, 2014. Mr. Bowen for the Claimant has pointed out in his submissions that the Court should be guided by the approach of the Court in the case of **Elfrida Aletha Hughes v Clive Hodge**⁵. In that case, there was an application made by the Defendant to strike out the statement of claim and/or to set aside a default judgment. The learned Master correctly ruled the application in that case was a procedural one to which Part 65.11 applies. Mr. Bowen says that the facts of this case dictate that a similar approach should apply.

⁵ Claim No. AXAHCV 2008/0035

14. Counsel for the Defendant, Ms. Benjamin, on the other hand sought to distinguish the Elfrida Aletha Hughes case from this one. Counsel submitted that the Elfrida Aletha Hughes case was not determined at a case management conference, pre-trial review or trial but rather on an application. It was therefore appropriate to apply Part 65.11 to the assessment of costs. This case, she opines, was determined at a case management conference and as such part 65.11 is inapplicable to the determination of costs.
15. With all due deference to the erudite submissions of Ms. Benjamin, I am disinclined to subscribe to her view. My own assessment comports with that of Mr. Bowen. When this case came up for case management on June 20, 2013, the Court made an “unless order”. The case management conference was not further adjourned. It was open to the Claimant to comply with that “unless order” or face the consequences of having a request for judgment made by the Defendant. The crucial point for me is that proceedings in the litigation were again instituted before the Court at the instance of the Defendant. Put another way, the Court was moved by the Defendant on his request to have judgment entered in his favor. This was a procedural application to the Court on a point of technicality triggered by the Claimant’s recalcitrance. To the extent that the Court is always empowered to manage cases, Counsel may argue that the court was case managing this matter but this was not a case management conference in sensu stricto. It was the hearing of the request for judgment to be entered for the Claimant’s failure to comply with case management directions.
16. Costs on the application should therefore be determined pursuant to Part 65.11 which guides the Court on how it must exercise its discretion to grant costs on applications. As Barrow J.A clarified in Norgulf Holdings, the rule 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.
17. Accordingly, I must take into account the factors set out in Parts 64.6 and (6) and 65.2 of the Rules which provide that in deciding the issue of costs particular regard should be paid to –
- (a) the conduct of the parties both before and during the Proceedings;
 - (b) the manner in which a party has pursued —
 - (i) a particular allegation;
 - (ii) a particular issue; or
 - (iii) the case;
 - (b) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the Proceedings;
 - (d) whether it was reasonable for a party to —
 - (i) pursue a particular allegation; and/or

(ii) *raise a particular issue; and*

(d) *whether the Claimant gave reasonable notice of intention to issue a claim*
Part 65.2 states –

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.*

(2) *If the court has a discretion as to the amount of costs to be paid to a legal practitioner by his or her client, the sum allowed is –*

- (a) *the amount that the court deems to be reasonable; and*
- (b) *which appears to be fair both to the legal practitioner and the client.*

(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.*

18. I must also pay regard to “any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing and ... allow such sum ...” considered to be “fair and reasonable.” I pause here to point out that Ms. Benjamin has filed a bill of costs along with her submissions. But, as Mr. Bowen has rejoined, this statement relates to the course of preparing for and attending of the whole of the proceedings to date, rather than the costs of the application for the grant of judgment. As I have previously ruled, the costs to be allowed are the costs of the application for the entry of judgment which are specifically itemized at paragraphs 6 to 12 of Counsel’s bill of costs. These total the sum of \$4541.25. I must then compare the prescribed cost appropriate to this claim since I am constrained to award no more than one tenth of those prescribed costs. I may award more than the one tenth if I find special circumstances justifying the same. The value of the claim is \$159,437.01 as set out in the claim form, being a claim for a specified sum. ⁶ Applying Appendices B and C of Part 65 and Part 65.11(7) of the Rules, the total prescribed costs would be \$2243.00

⁶ Part 65.5 (2) (a)

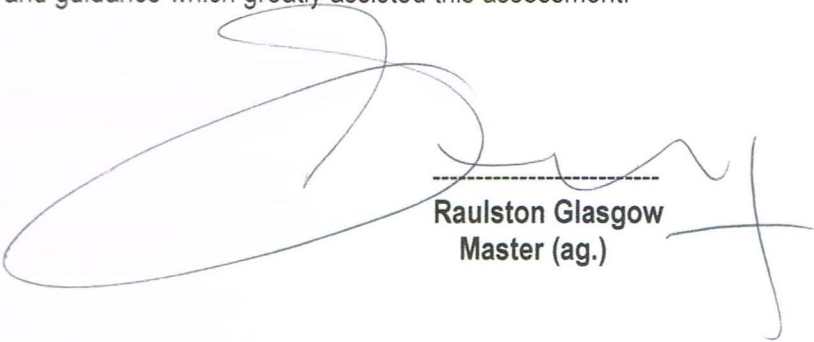
19. I have perused the submissions of Ms. Benjamin to assist me with determining whether there are special circumstances in this case that dictate that a higher award should be made. At paragraph 20 of her submissions, Counsel suggests that "given the unlikelihood of success for the Claimant in the case at bar and the efficient manner in which Counsel for the Defendant has pursued a resolution of this case, as well as the conduct of the Claimant in not vigilantly pursuing its claim, that in the event that the assessment of costs in this matter is found by the Court to comprise a procedural application from which costs are to be assessed, that the Court be minded to exercise its discretion not to impose a cap of the prescribed costs appropriate to the claim." The manner in which either or both of the parties conducted the litigation or a party's success or chances of success on the claim or on issues in the claim are factors that must be reviewed before arriving at the award and are not, in my opinion, special circumstances as contemplated by the Rules. I would find, though, that I accept Counsel's bill of costs for the work done in preparation for and litigation of this application as being reasonable and fair. In my opinion, then, a special feature of this case would be the substantial disparity between what I have accepted as reasonable costs incurred by Counsel on this application per her bill of costs, that is, the sum of \$4541.25 and the amount allowable pursuant to Part 65.11(7), that is, the sum of \$2243.00. I would therefore adjust the figure allowable under Part 65.11(7) to \$4541.25.

Conclusion

20. The Defendant is awarded costs assessed at \$4541.25 made up as follows –

a. Drafting request for Judgment plus taxes	- \$537.50
b. Drafting Unless Order & Amendment to Request for Judgment plus filing fees and taxes	- \$1176.25
c. Drafting affidavit of service plus filing fees and taxes	- \$182.50
d. Attendance at case management	- \$600.00
e. Legal research and drafting submissions	- \$2045.00
f. Total costs	- \$4541.25

21. I thank Counsel for their thorough research and guidance which greatly assisted this assessment.



Raulston Glasgow
Master (ag.)