

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2011/0581

BETWEEN:

TRISHEL WETHERILL

Claimant

AND

JOSEPH PINDER

Defendant

Before:

Master Charlesworth Tabor (Ag.)

Appearances:

Ms. C. Debra Burnette for the Claimant

Dr. David Dorsette for the Defendant

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2012: November 23

2013: February 25
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RULING

[1] TABOR, M (Ag.): This is an application by the claimant filed on 15 December, 2011 for an order that the Court in the exercise of its Case Management powers given under rule 65.8 of the Civil Procedure Rules (CPR) 2000 set a costs budget for the matter.

[2] The grounds for the application are as follows:

- (1) The claimant does not wish to rely on prescribed costs in these proceedings as she is concerned that the same will be disproportionate to actual costs incurred and to be incurred.
- (2) A cost budget will ensure that the claimant recovers all costs incurred in these proceedings.

- [3] As required by rule 65.8(4) of the CPR, the application is accompanied by (a) a statement of the amount the claimant wishes to be set as the costs budget, (b) a statement showing how the budget has been calculated and (c) the written consent of the claimant in accordance with rule 65.9.
- [4] The claimant filed submissions on 21 June, 2012 in support of the application for budgeted costs, while the defendant filed submissions on 11 July, 2012 in opposition to the budgeted costs application. The claimant's submissions in reply were filed on 16 July, 2012.

Claimant Counsel's Submissions

- [5] Counsel for the claimant contends that in making provision for a party to obtain a costs budget under the Rules, it was the intention of the rule makers to promote the overriding objective of the Rules by an "equality of arms" as well as to provide that party for adequate costs in the proceedings.
- [6] Counsel further contends that in the Practitioners' text *Cook on Costs* 2007, which is based on the English Civil Procedure Rules, a Judge or Master at Case Management is required to direct the parties to file an estimate of the costs of the proceedings, which is a precursor to the Court setting a Costs Budget.
- [7] The calculation of the budgeted costs for disbursements and fees amounted to \$96,434.05. With respect to the quantum, counsel contends that in examining the costs budget, none of the itemized costs incurred can be considered unreasonable in any instance for the estimate of time and money involved in the preparation of the matter for trial.

Defendant Counsel's Submissions

- [8] Counsel for the defendant opposes the application for budgeted costs on grounds that the claimant is seeking to recover all her costs incurred or to be incurred in these proceedings, and as such appears to be seeking a recovery of costs on an indemnity basis. In that regard, counsel has submitted that the CPR 2000 makes no provision for the recovery of costs on an indemnity basis and cites as authority the case of *The Attorney General of St. Christopher and Nevis v Queensway Trustees Limited* (SKNHCVAP 2005/0005).
- [9] Counsel noted that the principles of proportionality and reasonableness underlie the modern CPR regime, and that under this regime costs are not awarded on the basis of indemnifying a party for all his costs. In support of this contention, counsel referred to the Privy Council case of *Joseph W. Horsford v Lester Bird and others* [2006] UKPC 55, where Lord Hope of Craighead stated that:

"Where the courts of England and Wales are asked to assess the amount of costs they will not allow costs which have been unreasonably incurred or are unreasonable in amount. Civil Procedure Rules 1998, rule 44.4(1). Where costs are to be assessed on the standard basis they will only allow costs which are proportionate to the matters in issue, and they will resolve any doubt which they

may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party: CPR, r 44.4(2). The concept of proportionality which the CPR has adopted is new. But otherwise the principles which they set out have been established for a very long time: see the former Rules of the Supreme Court, Ord 62, r 12(1); *L v L (Legal Aid Taxation)* [1996] 1 FLR 873, 884, per Aldous LJ; *Wraith v Sheffield Forgemasters Ltd* [1998] 1 WLR 132, 140, per Kennedy LJ. A costs judge is expected to apply the same principles when taxing an award of costs on the standard basis in proceedings before the Board. It has to be borne in mind, in judging what was reasonable and proportionate in this case, that the basis of the award was not that the appellant was to be indemnified for all his costs. The respondent was to be required to pay only such of the appellant's costs as were reasonably incurred for the conduct of the hearing before the Board and were proportionate".

- [10] With respect to budgeted costs, counsel submitted that this is an exercise in the assessment of costs prior to the costs being incurred, while with a regular assessment of costs the court looks at costs after they have been incurred. While the latter is true, the former is not entirely the case since with budgeted costs many cost items and disbursements are incurred in advance of any assessment. In fact in an application for budgeted costs, the party requesting the application must indicate in the statement showing how the budget was calculated a breakdown of the costs that have been incurred to date as well as anticipated future costs and the manner of calculation.

- [11] Counsel further submitted that a number of items in the budgeted costs relating to an application for interim payment should be disallowed. This position is buttressed by the fact that the Court of Appeal had set aside the order for an interim payment. Counsel also cited the English Court of Appeal case of *Lahey v Pirelli Tires Ltd* [2007] EWCA Civ 91 where Dyson LJ stated that where a court "decides that a party was unreasonable to raise and pursue an issue, the costs judge is entitled to disallow the costs relating to that issue on the grounds that they were unreasonably incurred".

- [12] Counsel also identified a number of items included in the costs budget that he considered to be unreasonable. Some of these items are nine (9) hours for the preparation of the budgeted costs application, three (3) hours for the preparation of an application for an expert witness, ninety-six (96) hours for the purposes of complying with the case management order and six (6) hours for the preparation of the trial bundle. The calling of eight (8) witnesses is also perceived by Counsel to be disproportionate to the needs of the case.

- [13] On the question of proportionality of costs, counsel cited *Lownds v Home Office* [2000] EWCA Civ 365, [2000] 1 WLR 2450 as the locus classicus where Lord Woolf stated:

"In assessing costs judges should have no difficulty in deciding whether, in order to conduct the litigation successfully, it was necessary to incur each item of costs. When an item of costs is necessarily incurred then a reasonable amount for the item should normally be allowed. Any item that was not necessary should be disallowed. In other words what is required is a two-stage approach. There

has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular considerations which CPR r 44.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable”.

It should be noted that the English CPR 44.5(3) corresponds to our CPR 2000 r 65.2(3). Counsel has submitted that the budgeted sum of \$96,434.05 is disproportionate to the claim and in accordance with *Lownds* the court is required to examine each item claimed with regard to its necessity and its reasonableness.

- [14] On the issue of contributory negligence, counsel contends that this has been pleaded by the defendant and no provision is made for this in the budgeted costs. At trial the issue of contributory negligence would have to be determined, and in the event that contributory negligence is awarded against the claimant then the costs would be adjusted to take this into account.
- [15] Counsel submits that in all the circumstances the application for budgeted costs should be dismissed.

Counsel Reply to Defendant Counsel's Submissions

- [16] In reply to the defendant counsel's submissions, claimant counsel noted that the basis of the his objection to the application for a costs budget was rooted in the perception that the claimant was seeking recovery of costs on an indemnity basis and that the costs budget is not reasonable and proportionate. With respect to the indemnity issue, counsel submitted that this is a misconception since the claimant had not indicated in her application or submissions that she was seeking to be indemnified for her costs.
- [17] Counsel further submitted that reasonableness and proportionality are not the only factors to be taken into account in reviewing a costs budget, but that they must be taken together with the overriding objective with a view to furthering the same. She cited the case of *Rochamel Construction Ltd. V National Insurance Corporation*, Civil Appeal No. 10 of 2003 (St. Lucia), in which Sir Dennis Byron CJ observed that the costs regime outlined in the CPR 2000 has been used by the courts and legal practitioners in a very inconsistent manner. It was noted that there are four (4) types of costs orders, namely, fixed costs under r 65.4; assessed costs under r 65.11; prescribed costs under r 65.5 and budgeted costs under r 65.8.
- [18] Counsel pointed out that all the cases cited by the defendant's counsel were cases where the court was being called upon to assess costs and not a situation of budgeted costs as in the instant case. It is further noted that in the instant application for budgeted costs, the court is required pursuant to the CPR 2000 to “exercise its independent discretion in all

cases except where parties are bodies corporate". Citing the *Rochamel Construction Limited* case again, Counsel highlighted the costs guidelines outlined by Sir Dennis Byron when he stated that:

"It would seem that the practice on costs have been very inconsistent since the introduction of the CPR. I would like to use this opportunity to indicate the importance of dealing with costs in accordance with the new culture by making some simple requirement:

- (a) Whenever a costs order is being made the learned trial Judge or Master should identify the rule that is being applied and if discretion is being exercised give reason.
- (b) Legal practitioners should be encouraged to assist the Court in the making of costs orders by providing information and/or submissions as early as possible".

- [19] With respect to counsel for the defendant's objection to the inclusion of the application for an interim payment in the costs budget, counsel submits that Part 65.8(5) makes provision for varying an order made for budgeted costs once it can be shown that the circumstances have changed. In fact Part 65.8(5) states:

"A party may apply to vary the terms of an order made under this rule at any time prior to the commencement of the trial but no order may be made increasing the amount of the budgeted costs unless the court is satisfied that there has been a change of circumstances which became known after the order was made".

- [20] Counsel for the claimant also takes issue with the objections of counsel for the defendant on the time spent in consultations with her client and also the time taken to prepare the statement of costs budget. Counsel further noted that it is the manner in which the claim is being defended that has created the need to be in constant and consistent consultation with the claimant. It is submitted by counsel that litigation is a process requiring management of a case, not only by the court but by the parties and their legal practitioners as well and in complying with Case Management orders, parties are required to do the following:

- (1) produce the documents on which they are relying taking care to ensure that they comply with the CPR 2000 and the Rules of Evidence and discuss their relevance with the client;
- (2) do the same exercise with the documents of the adverse party;
- (3) take instructions on the documents obtained from the adverse party;
- (4) meet with the adverse party and agree on documents;
- (5) if there is no agreement or partial agreement, take some step regarding those not agreed;
- (6) meet with witnesses, take statements, prepare statements and discuss with client;
- (7) take instructions on witness statements received from the adverse party and discuss with client;

- (8) conducting further research on any point arising from documents or witness statements and consulting further with client in preparation for the Pre-trial memorandum and reviewing the Pre-trial memorandum filed by adverse party which necessitate further research; and
- (9) Continuous management of the case in preparation for the Listing Questionnaire.

Analysis

- [21] Part 65 of the CPR deals with the way in which any costs awarded by the court are quantified. Rule 65.2(1) states:

“If the court has 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”.

Rule 65.2(2) states:

“If the court has 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”.

Rule 65.2(3) states:

“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”.

- [22] In the awarding of costs by the court, four approaches are utilized in the determination of the quantum. These are fixed costs under rule 65.4, assessed costs under rule 65.11, prescribed costs under rule 65.5 and budgeted costs under rule 65.8. With respect to the latter of these, this approach of costs determination is the most rarely used and the one which appears to be open to the most controversy. This development is rather unfortunate since the whole underpinning of costs budgets is to facilitate the control of costs and preventing the costs of litigation from becoming unreasonable and disproportionate. Developing a costs budget is a useful undertaking and can provide some benefits. As the learned author Michael Cook noted in his text *Cook on Costs* 2012:

“Budgeting will benefit the solicitor by enabling him to produce a realistic forecast of his costs for the purposes of estimates between the parties and to his client as required by Solicitors’ Practice Rule 15. It will better enable him to resist attacks on his figures from either source at any stage and enable him to make an informed proposal in any application for a costs-capping order. The client will not only appreciate a solicitor who provides a budget at the outset; clients will increasingly expect a solicitor to conduct his business with the same discipline with which they conduct their own”.

- [23] The point is worth noting that the court has a discretion in determining the reasonableness of costs included in a budget. As counsel for the defendant rightly noted “It is not a situation where a budget is presented and the court or the other party is obliged to accept it hook, line and sinker. When a budget is proposed that budget must only be for costs that are reasonable and proportionate”. In *Leigh v Michelin Tyre plc* [2003] EWCA Civ 1766, [2004] 2 All ER 175, the English Court of Appeal provided the following guidance regarding costs estimates:

“First, the estimates made by solicitors of the overall likely costs of the litigation should usually provide a useful yard-stick by which the reasonableness of the costs finally claimed may be measured. If there is a substantial difference between the estimated costs and the costs claimed, that difference calls for an explanation. In the absence of a satisfactory explanation, the court may conclude that the difference itself is evidence from which it can conclude that the costs claimed are unreasonable.

Second, the court may take the estimated costs into account if the other party shows that it relied on the estimate in a certain way. An obvious example would be where A shows that he relied on the relatively low estimate given by B not to make an offer of settlement, but carried on with the litigation on the basis that his potential liability for costs was likely to be of the order indicated in B’s estimate.

Third, the court may take the estimate into account in cases where it decides that it would probably have given different case management directions if a realistic estimate had been given. It might, for example, have trimmed the number of experts who could be called, and taken other steps to slim down the complexity of the litigation in the interests of controlling costs in a reasonable and proportionate manner”.

[24] The regime of budgeted costs as I have mentioned earlier is an approach to costs determination that is rarely utilized in our jurisdiction. Rule 65.8 of the CPR 2000 outlines the requirements that must be satisfied when a party wishes to adopt this approach. In the instant case the said requirements have been satisfied and what is left for the court to decide, in applying its discretion, is whether the quantum sought is reasonable and proportionate in all the circumstances of the case.

[25] Employing the two-stage approach enunciated by Lord Woolf in *Lownds*, I have looked at the claim and all the consequent work undertaken to prepare the case for trial, in particular, I have scrutinized the costs budget and the items included therein and I am of the view that the costs are all reasonable.

Conclusion

[26] In the premises, having examined all the documentation supplied in this case as well as reviewing the submissions of learned counsel on both sides, I am satisfied that the application for budgeted costs is fully justified and I accordingly order that:

(1) The costs budget set for the proceedings in the sum of \$96,434.05 is granted.

Charlesworth Tabor
Master (Ag.)