

IN THE EASTERN CARIBBEAN SUPREME COURT
HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)

CLAIM NO. SKBHCV2011/0144

In the Matter of St. Kitts Scenic Railway Limited
In the Matter of the Companies Act, Cap. 21.03

BETWEEN:

AGUILLA BUSINESS SERVICES LTD
(on its own behalf as creditor and member
of the First Defendant and on behalf of the
First Defendant and its derivate capacity
against the Second and Third Defendants)

Claimant/Respondent

And

ST. KITTS SCENIC RAILWAY LIMITED

First Defendant

And

STEVEN G. HITES

Second-named Defendant/Applicant

And

JEFFERY D. HAMILTON

Third-named Defendant/Applicant

Appearances:

Mr Damien Kelsick and Garth Wilkin of Kelsick Wilkin and Ferdinand for Claimant/Applicant
Mr Terrence Byron of Byron & Byron for the First-named Defendant/Respondent

2012: February 13
2012: April 23

DECISION

- [1] THOMAS J: It is common ground that the Claimant's application sought an Order that Mr Thomas Williams, General Manager of the First Defendant, be punished by way of

imprisonment or in such other manner as the Court deems just for contempt of the Court's Order dated 6th June 2011. It is also common ground that the application was not granted. This gave rise to the issue of costs and the Court ordered that submissions be filed.

[2] Costs in this context is governed by Part 65.11 which is in these terms:

- "1) On determining any application except at a case management conference, pre-trial review of the trial, the court must –
 - a) decide which party, if any, should pay the costs of that application;
 - b) assess the amount of such costs; and
 - c) direct when such costs are to be paid.
- 2) In deciding which party, if any, should pay the costs of the application the general rule is that the unsuccessful party must pay the costs of the successful party.
- 3) The court must take into account all the circumstances including the factors set out in rule 64.6(6) but where the application is –
 - a) an application to amend a statement of case;
 - b) an application to extend the time specified for doing any act under these Rules or an order or direction of the court;
 - c) an application for relief under rule 26.8 (relief from sanctions); or
 - d) one that could reasonably have been made at a case management conference or pre-trial review;the court must order the applicant to pay the costs of the respondent unless there are special circumstances.
- 4) In assessing the amount of costs to be paid the costs to be paid by any party the court must take into account any representations as to the time that was reasonably spent in making the application and preparing for an attending the hearing and must allow such sum as it considers fair and reasonable.
- 5) A party seeking assessed costs must supply to the court and to all other parties a brief statement showing
 - a) any counsel's fees incurred;
 - b) how that party's legal representative's costs are calculated; and
 - c) the disbursements incurred.
- 6) The statement under paragraph (5) must comply with any relevant practice direction.
- 7) 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".

[3] Mr Vincent Byron for the Defendant/Respondent in his submissions contends in part that:

"[S]ince the amendment to the scale of prescribed costs in force from 1st October 2011, and having regard to Rule 65.5(2)(b) as amended, and Rule 65.11(7), the Court cannot ordinarily award more than 15% of \$50,000.00 = \$7,500.00 ÷ 10 = \$750.00. However, it is submitted that the Court ought to consider that there are special circumstances in this matter justifying a higher amount, and that, accordingly, the Court can award a higher award of costs than \$750.00"

- [4] Learned counsel went on to detail, at paragraph 18(a) to (d) special circumstances for the purposes of Rule 65.11(7). These in basic outline are: the gravity of the order sought touching and concerning the liberty of the subject; the burden of proof and standard of proof, the hearing of the matter in open Court “with all the attendant pressure, potential embarrassment and obloquy of exposure to and scrutiny by the public at large”, and the contention that the application was by definition an unreasonable application.
- [5] In the circumstances learned counsel contends that in all the circumstances a reasonable award of costs in EC\$7,500.00 having regard to counsel's fees at the rate of EC\$600.00 per hour involving 10 hours of preparation and related matters plus 2 ½ hours spent in Court.
- [6] Mr Damian E.S. Kelsick for the Claimant in his submissions “vehemently opposes” the other sides contention that special circumstances exist to justify a higher award of costs. The submissions continue thus:
- “(a) The submissions in paras. 18(a) – (c) of Mr Byron's submissions amount to an argument that the rules as to assessment of costs are never applicable to applications for committal. There is no support in the rules for such a submission.
 - (b) The reasons given in support of the argument that the Claimant's Application was unreasonable and unsustainable:-
 - I. The primary purpose of this Honourable Court's jurisdiction in contempt proceedings is to ensure compliance with Court orders. The injunction was obtained by the Claimant to stop the payment of funds by the 1st Defendant to the 2nd Defendants, and the Claimant is entitled to seek compliance by the 1st Defendant with that Order,
 - II. The Claimant's Application clearly stated that it sought imprisonment of Mr Williams on such other penalty as the Court deems just,
 - III. The allegation in paragraph 18(d)(iii) is inflammatory and wholly unwarranted-;
 - IV. The rest of the paragraphs in support are no more than an attempt by the Respondent to cast aspersions on the underlying merits of the Claimant's case.
 - 16. The Claimant vehemently denied Mr Byron's submissions that the Claimant's application was unreasonable”.
- [7] Finally, learned counsel submits that maximum costs of \$750.00 should be awarded which would be a fair and reasonable in the circumstances.

Analysis and Conclusion

[8] Central to the award of costs generally is Rule 64.6 (5) and (6) of CPR 2000 provide as follows:

“(5) In deciding who should be liable to pay costs the Court must have regard to all the circumstances.

(6) In particular it must have regard 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;
- c) whether a party has succeeded on particular issues even if the party has not been successful in the whole proceedings;
- d) whether it was reasonable for a party to
 - i. Persuade a particular allegation; and/or
 - ii. Raise a particular issue; and
- e) whether the Claimant gave reasonable notice of intention to issue a claim”.

[9] The Court agrees with Mr Kelsick’s submission to the extent that no special circumstances exist to justify a higher award of costs as contemplated by Rule 65.11(7). The underlying reasons being that the application relates to contempt of Court and imprisonment is one of the sanctions that may be imposed regardless. In the like manner, it is the criminal standard that is involved which brings it the criminal standard of proof.

[10] But the application does bear a degree of seriousness in that the principal deponent in support of the application to commit Mr Thomas Williams did admit in cross-examination that he had adduced no material evidence against, Mr Williams, the subject of the contempt proceedings. This is cited by Mr Byron as part of the special circumstances. This alone cannot suffice. And the Court does not accept that the submissions advanced by Mr Byron meet the threshold set by Rule 65.11(7).

[11] Given the foregoing, the matter comes down to a simple case of assessment. In this regard Rule 65.11(4) states that:

“(4) In assessing the amount of costs to be paid by any party the Court must take into

account any, representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing and must allow such sum as it considers fair and reasonable”.

[12] Although the award of assessed costs is in the discretion of the Court the above rules prescribes the matters to be considered in such assessment. In this regard and in accordance with Rule 65.11(b) learned counsel for the Claimant submits the following:

“19. It is contended that a reasonable award of costs on this application is EC \$7,500.00 in all the circumstances, and based in particular on the following statement required by Rule 65.11(5)

- a. Counsel’s fees were incurred at the rate of EC \$7,500.00.
- b. The said fees are calculated at EC \$600.00 per hour, comprising 10 hours of preparation and research, taking instructions, including reviewing all of the previous affidavits on which the Applicant relied, plus 2 ½ hours of time spent in Court.
- c. No disbursements are claimed”.

[13] While the Court can accept that the time stated was spent Court, it cannot accept that 10 hours of preparation was reasonably spent in the preparation of the case, at the same time the Court cannot accept that costs of \$750.00 are reasonable for a matter in open Court.

[14] In all the circumstances the award of costs is \$3,500.00 to the Respondent.

ORDER

[15] IT IS HEREBY ORDERED as follows:-

1. No special circumstances in relation to this application were identified to the Court to warrant the award of costs exceeding 10% of the prescribed costs appropriate to the application as stipulated in Rule 65.11(7) of CPR 2000.
2. In all the circumstances the award of costs to the Respondent is \$3,500.00.

Errol L Thomas
High Court Judge (Ag)