

**EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL**

**MONTSERRAT**

**MNIHCVAP2015/0001**

**BETWEEN:**

**BERTRAND BURKE**

Appellant

and

**[1] MILDRED KIRWAN**

**[2] HIGHLANDER PROPERTIES LTD.**

Respondents

**Before:**

The Hon. Dame Janice M. Pereira, DBE

Chief Justice

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

The Hon. Mr. Paul Webster, QC

Justice of Appeal [Ag.]

**On written submissions:**

Ms. Chivone Gerald of Allen Markham & Associates for the Appellant

Mr. Sylvester Carrott for the Respondents

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2015: November 24.

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*Interlocutory appeal – Costs award – Proceedings at case management conference – Whether master exercised her discretion to award costs incorrectly or on wrong principles – Whether costs ought to have been awarded under the prescribed costs regime – Rule 65.7 of the Civil Procedure Rules 2000*

The appellant, a land surveyor, filed a claim against the respondents for \$15,900.00, being the balance due on fees for surveying the 2<sup>nd</sup> respondent's property. The 2<sup>nd</sup> respondent is a company incorporated in Montserrat ("the Company"). The 1<sup>st</sup> respondent, a director of the Company, denies that he is personally responsible for the Company's debts and the respondents plead that at all material times the Company was struck off the Register of Companies.

At the start of the case management conference in the proceedings, the learned master, of her own volition, directed the parties to file evidence on affidavit and written submissions on whether the appellant's statement of case disclosed a reasonable ground for bringing a case against the 1<sup>st</sup> respondent and whether the Company, which at all material times was struck off Register of Companies, was capable of being sued. The parties complied with

the master's direction and in a judgment dated 11<sup>th</sup> December 2014, the master found that the statement of claim does not disclose any facts to support a claim for making the 1<sup>st</sup> respondent personally liable for the appellant's unpaid fees, and the Company, having been struck off the Register of Companies, is not a legal entity capable of being sued. The learned master proceeded to grant leave to the appellant to amend the statement of claim, stayed the claim against the Company pending its restoration to the Register of Companies and ordered the appellant to pay costs in the sum of \$1,000.00 to the respondents within 21 days.

The appellant, being dissatisfied with the master's costs order, appeals against the judge's decision in respect of costs. The appellant has not appealed against the other findings of the master.

**Held:** allowing the appeal; setting aside the order of the master awarding \$1,000.00 costs to the respondents; ordering that costs of the proceedings before the master be reserved to the trial; and ordering that each party bear their own costs of the appeal, that:

The costs of a case management conference fall under the prescribed costs regime. Accordingly, an application or other proceeding that is dealt with at a case management conference falls under CPR 65.7. In such circumstances, costs are to be paid in the trial. Applications at the case management conference, as well as pre-trial review or trial do not fall under CPR 65.11 or 65.12, which deal with assessed costs. In the present case, the master did not have regard to CPR 65.7 in awarding costs of a decision made at case management and awarded assessed costs to the respondents as if the matter that was before her fell under the assessed costs regime in CPR 65.11 and 65.12. Therefore, the master exercised her discretion on the wrong principles.

Rule 65.7 of the **Civil Procedure Rules 2000** applied; **United Company Rusal plc et al v Corbiere Holdings Ltd et al** NEVHCV2011/0030 (delivered 8<sup>th</sup> August 2012, unreported) referred.

## **JUDGMENT**

- [1] **WEBSTER JA [AG.]:** The appellant is a land surveyor. On 3<sup>rd</sup> July 2014 he filed a claim against the respondents for \$15,900.00 as the balance due on fees for surveying the 2<sup>nd</sup> respondent's property at Brades, Montserrat.
- [2] The 2<sup>nd</sup> respondent is a company incorporated in Montserrat ("the Company") and the 1<sup>st</sup> respondent was at all material times a director of the Company.

[3] The pleadings are not in the record of appeal but the parties' respective cases are adequately set out in the judgment of the learned master delivered in December 2014. The appellant's case is that he was hired by the 1<sup>st</sup> respondent to survey the property at Brades. The appellant carried out the survey and presented his invoice to the 1<sup>st</sup> respondent who acknowledged the amount due and promised to pay the same by the end of March 2009. The 1<sup>st</sup> respondent confirms that he is a director of the Company but denies that he is personally responsible for the Company's debts and denies acknowledging the invoice. The respondents also plead that the Company was struck off the Register of Companies at all material times.

[4] The learned master was obviously dissatisfied with the state of the appellant's statement of case. At the commencement of the case management conference she directed the parties to file evidence on affidavit and written submissions on the following issues:

- (i) whether the appellant's statement of case discloses a reasonable ground for bringing the claim against the 1<sup>st</sup> respondent; and
- (ii) whether the Company, which was at all material times struck off the Register, is capable of being sued.

The direction was made by the master of her own initiative and there was no application by either party.

[5] The parties complied with the master's directions and on 11<sup>th</sup> December 2014 she delivered a full written judgment in which she made the following findings on the two critical issues in the case:

- (i) the statement of claim does not disclose any facts to support a claim for making the 1<sup>st</sup> respondent personally liable for the appellant's unpaid fees; and

- (ii) the Company having been struck off the Register when the claim was filed, is not an existing legal entity capable of being sued.

[6] Instead of striking out the claim against both defendants, which she had the power to do at that stage, the master gave the appellant leave to amend his statement of claim, stayed the claim against the Company pending its restoration to the Register of Companies and ordered the appellant to pay \$1,000.00 costs to the respondents within 21 days.

[7] The appellant appealed against the costs order. He did not appeal against the findings by the master that the statement of claim does not disclose a claim against the 1<sup>st</sup> respondent and that the Company is not an existing legal entity capable of being sued.

[8] The notice of appeal sets out six grounds of appeal. The appellant abandoned two of the grounds in his written submissions and the remaining four grounds overlap and can be condensed into the following two issues:

- (a) whether the master exercised her discretion incorrectly or on wrong principles;
- (b) whether the award of costs was unreasonable, unjust and unfair.

### **Wrong Principles**

[9] The appellant contends that the master followed the wrong principles in awarding costs of a decision made at case management and further awarding such costs to the respondents as if they were successful parties (within the meaning of rule 65.11 of the **Civil Procedure Rules 2000** ("CPR 2000")).

[10] The situation that faced the master at the start of the case management conference was that the appellant's statement of case was hopelessly defective. This would normally have attracted applications by one or both sides to the claim.

The respondents could have applied under CPR 26.3(1)(b) to strike out the claim as not disclosing a reasonable ground for bringing the claim, or under Part 15 of CPR 2000 for summary judgment on the ground that the claim has no reasonable prospects of success. On the other hand, the case management conference having started, the appellant could have applied under Part 20 of CPR 2000 to amend his statement of case. Based on the master's findings, if the strike out or summary judgment application had been made, it would have been successful and the claim would have been struck out, and the appellant would have been ordered to pay the costs of the claim. Alternatively, if the appellant had applied to amend his statement of case, the costs of that application would have been awarded to the respondents regardless of the outcome of the application.<sup>1</sup> In other words, the respondents would have been awarded the costs of any of the three applications that could have been made in respect of the defective statement of case. But this is all speculative because the respondents did not make any of the applications that were available to them, choosing instead to proceed to case management. The matter that was before the master was not an application and it started and ended during the case management conference. It is a matter that was determined in the case management conference. In the circumstances, the respondents must abide by the rules relating to costs in the case management conference.

[11] The costs of a case management conference fall under the prescribed costs regime and the specific rule is set out in CPR 65.7 which provides that:

- “(1) Prescribed costs include all the work that is required to prepare the proceedings for trial including, in particular, the costs involved in –
  - (a) ...
  - (b) ...
  - (c) ...
  - (d) attendance and advocacy at the trial including attendance at any case management conference or pre-trial review.”

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<sup>1</sup> See CPR 65.11(3).

A simple reading of this rule leads inevitably to the conclusion that an application or other proceeding that is dealt with at the case management conference falls under CPR 65.7 and should be dealt with under the prescribed costs regime which means that they are to be paid in the trial. This is consistent with paragraph 46(iii) of the judgment of Wallbank J [Ag.] in **United Company Rusal plc et al v Corbiere Holdings Ltd et al**<sup>2</sup> when he said that an application that is determined at the case management conference, pre-trial review or trial does not fall under CPR 65.11 or 65.12 (which deal with assessed costs). By extension of the learned judge's reasoning, those costs fall under CPR 65.7.

[12] It is apparent that the master did not have regard to CPR 65.7 and awarded assessed costs to the respondents as if the matter that was before her fell under CPR 65.11 or 65.12. But the assessed costs regime under these rules state that they do not apply to applications determined at the case management conference. Therefore, the master exercised her discretion on the wrong principles in that she treated the matter that was before her as falling under the assessed costs regime in CPR 65.11 and 65.12. The learned master having exercised her discretion on the wrong principles, this court will set aside the costs order that was made and order that the costs of the proceedings before the master be reserved to the trial. This finding obviates the need to deal with the other grounds of appeal.

[13] It is with some regret that I come to this conclusion because the appellant filed a defective statement of case and now has the benefit of an order allowing him to amend it with no adverse costs consequences. This will be reflected in the costs order below.

[14] As an aside, if, as I have found, the master awarded the \$1,000.00 as assessed costs, the maximum amount that she awarded should not have exceeded one-tenth of the amount of prescribed costs appropriate to the claim.<sup>3</sup> The prescribed

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<sup>2</sup> NEVHCV2011/0030 (delivered 8<sup>th</sup> August 2012, unreported).

<sup>3</sup> See CPR 65.11(7).

costs appropriate to this claim is 15% of \$15,900.00, or \$2,385.00, and one-tenth of this amount is \$238.50. Assessed costs on this matter could not have exceeded this amount unless the court considered that there were special circumstances and the master did not allude to any special circumstances.

**Order**

[15] It is hereby declared and ordered as follows:

- (1) The appeal is allowed.
- (2) The order of the master awarding \$1,000.00 costs to the respondents is set aside.
- (3) The costs of the proceedings before the master are reserved to the trial.
- (4) Each party will bear their own costs of the appeal.

**Paul Webster, QC**  
Justice of Appeal [Ag.]

I concur.

**Dame Janice M. Pereira, DBE**  
Chief Justice

I concur.

**Louise Esther Blenman**  
Justice of Appeal