

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2014/0001

BETWEEN:

DAWN EMBERSON BAIN

Appellant

and

TORTOLA INVESTMENT TRUST LIMITED

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE

Chief Justice

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mr. Mario Michel

Justice of Appeal

On written submissions:

Mr. Terrance B. Neale of McW Todman & Co for the Appellant

No submissions filed by the Respondent

2015: May 29.

Interlocutory appeal – Assessment of costs – Bill of costs – Rule 65.12 of the Civil Procedure Rules 2000 – Whether master erred in assessing costs where there was no adequate material or itemised bill of costs – Whether master erred in applying English High Court case to assessment of costs under CPR 65.12 – Whether master erred in awarding refresher fees to counsel

Held: allowing the appeal; setting aside the learned master's order; ordering that the assessment of the respondent's costs in the trial be undertaken by a different master upon the filing of a proper itemised bill of costs by the respondent; and awarding costs on the appeal to the appellant in the sum of US\$1,000.00, that:

1. Rule 65.12 of the **Civil Procedure Rules 2000** ("CPR 2000") requires that an application for assessment of costs be accompanied by a bill or other document showing the sum in which the court is being asked to assess the costs and how such sum was calculated. In this appeal, the learned master, having found that

the bill of costs appended to the respondent's application for assessment of costs was deficient, ought to have complied with CPR 65.12(5) and not assessed the costs, but fixed a date, time and place for the assessment to have taken place. Accordingly, the learned master erred in not doing so.

Rule 65.12 of the **Civil Procedure Rules 2000** applied.

2. The test formulated in the English High Court case of **Simpsons Motor Sales (London) Ltd v Hendon Corporation (No. 2)**¹ on the assessment of costs was based on the application of rule 28(2) of the English Supreme Court Costs Rules, 1959, whereas the applicable rules in the present case were CPR 65.12 and 65.2, which are dissimilar to the English rule. Accordingly, the learned master erred in assessing the costs in this case using the test laid down by the English High Court.

Simpsons Motor Sales (London) Ltd v Hendon Corporation (No. 2) [1965] 1 WLR 112 distinguished.

3. The learned master found that counsel's brief covered all work undertaken to prepare the case for trial, including the attendance on the first day of the trial. In the circumstances, in the absence of any indication that the trial proceeded beyond the first day and in the absence even of a claim for refresher fees in the respondent's bill of costs, it is apparent that the learned master's award of refresher fees was based on his following the method of assessment of costs in **Simpsons Motor Sales (London) Ltd. v Hendon Corporation (No. 2)**, even to the extent of awarding refresher fees in this case when there was evidently no proceedings in the High Court beyond the first day. Consequently, the learned master erred in awarding the refresher fees.

Simpsons Motor Sales (London) Ltd v Hendon Corporation (No. 2) [1965] 1 WLR 112 distinguished.

JUDGMENT

- [1] **MICHEL JA:** This is an appeal against a ruling on assessment of costs made by Tabor M [Ag.] on 8th January 2014 wherein the learned master ordered that:

(1) The legal costs awarded to the leading counsel in the proceedings shall be \$15,000.00.

¹ [1965] 1 WLR 112.

- (2) The legal costs awarded to junior counsel in the proceedings shall be \$10,000.00.
- (3) Refresher of \$1,800.00 shall be paid to leading counsel in the proceedings.
- (4) Refresher of \$1,200.00 shall be paid to junior counsel in the proceedings.
- (5) Taking the costs of items 1 to 4 above together, the total sum to be paid to the claimant for legal costs shall be \$28,000.00.

[2] The grounds of appeal are as follows:²

- “a. The learned [master] was wrong in law to exercise his discretion under CPR 2000 Rule 65.12 to assess costs in circumstances where there was not any adequate material or proper itemised bill of costs required under CPR [2000] Rule 65.12 (4) before the court to enable it to do so ...
- “b. The learned [master] was wrong in law to hold that the case of **Simpson Motor Sales (London) Ltd v Hendon Borough Council [1965] 1 W.L.R. 112** was relevant to an assessment of costs under CPR 2000 Rule 65.12 in circumstances where there was not any adequate material or properly itemised bill of costs before the Court in keeping with the requirements of CPR 2000 Rule 65.12 (4) upon which it was able to make an assessment of costs or determination in the matter ...
- “c. The learned [master] erred in law having held that a fee on brief covers all work undertaken to prepare the case for trial, including the attendance on the first day of trial and having accepted the submissions of Counsel for the Appellant that the trial did not last more than 3 hours which was in fact a matter of record and which was not disputed by the Respondent then erroneously proceeded to award refresher fees of \$1,800 and \$1,200 to leading and junior Counsel ...”

[3] Written submissions were filed by the appellant on 14th March 2014 in support of the three grounds of appeal. The submissions were served on the legal

² Notice of appeal (filed 12th March 2014).

practitioner for the respondent, but no submissions were filed on behalf of the respondent.

- [4] Assessments of costs are undertaken by the court in accordance with rule 65.12 of the **Civil Procedure Rules 2000** ("CPR 2000"), which provides as follows:

"Assessed costs – general

- 65.12(1) This rule applies where costs fall to be assessed in relation to any matter or proceedings, or part of a matter or proceedings, other than a procedural application.
- (2) If the assessment relates to part of court proceedings it must be carried out by the judge, master or registrar hearing the proceedings.
 - (3) If the assessment does not fall to be carried out at the hearing of any proceedings then the person entitled to the costs must apply to a master or the registrar for directions as to how the assessment is to be carried out.
 - (4) The application must be accompanied by a bill or other document showing the sum in which the court is being asked to assess the costs and how such sum was calculated.
 - (5) On hearing any such application the master or registrar must either –
 - (a) assess the costs if there is sufficient material available to do so; or
 - (b) fix a date, time and place for the assessment to take place.
 - (6) The master or registrar may direct that the party against whom the bill is assessed pay the costs of the party whose bill is being assessed and, if so, must assess such costs and add them to the costs ordered to be paid."

- [5] The respondent (as the claimant in the court below) had filed an application for the assessment of costs under CPR 65.12, with the bill of costs appended to the application. But this is what the learned master had to say about the respondent's bill of costs:³

"As required by Rule 65.12 (4) of the CPR, the bill of costs should not just provide the sum to be assessed but should also give an indication as to how such sum was calculated for each item of work. In the bill of costs submitted in the present case, only global figures are presented without any information whatsoever showing how the quantum was determined.

³ At para. 40 of judgment.

This deficiency in the formulation of the bill of costs makes it difficult, if not impossible, to determine the reasonableness of the costs claimed.”

- [6] On the basis of this finding by the master, which is entirely borne out by the bill of costs appended to the application for the assessment of costs filed by the respondent, the master ought to have complied with CPR 65.12(5) and not assess the costs, but fix a date, time and place for the assessment to take place. The learned master erred in not doing so but instead proceeding to assess costs without ‘sufficient material available to do so’.⁴
- [7] The appellant’s first ground of appeal is accordingly allowed.
- [8] In the appellant’s second ground of appeal, it is contended in effect that the learned master erred in assessing the costs in this case using a test laid down by the English High Court in the case of **Simpsons Motor Sales (London) Ltd. v Hendon Corporation (No. 2)**.⁵
- [9] I agree with this submission of the appellant because Pennycuik J, who presided in the **Simpsons** case in the English High Court, formulated his test based on the application of rule 28(2) of the English Supreme Court Costs Rules, 1959, whereas the applicable rules in the present case are rules 65.12 and 65.2 of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000**, which are dissimilar to the English rule.
- [10] The appellant’s second ground of appeal is, therefore, also allowed.
- [11] The appellant’s third ground of appeal criticises the learned master’s award of refresher fees to counsel in the face of findings by him that the trial lasted approximately two (2) hours and that counsel’s brief covers all work undertaken to prepare the case for trial, including the attendance on the first day of the trial.

⁴ See CPR 65.12(5)(a).

⁵ [1965] 1 WLR 112.

[12] In the absence of any indication that the trial proceeded beyond the first day, and in the absence even of a claim for refresher fees in the respondent's bill of costs, it is apparent that the learned master's award of refresher fees was based on his blindly following the taxing master's method of assessment of costs in the **Simpsons** case, even to the extent of awarding refresher fees in this case when there was evidently no proceedings in the High Court beyond the first day.

[13] The appellant's third ground of appeal is also allowed therefore.

[14] All three grounds of appeal having been allowed, the master's order is accordingly set aside and it is ordered that the assessment of the respondent's costs in the trial be undertaken by a different master upon the filing of a proper itemised bill of costs by the respondent.

[15] The appellant, having prevailed in the appeal, is entitled to her costs on the appeal, which are awarded in the amount of US\$1,000.00.

Mario Michel
Justice of Appeal

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal