BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NOS.11 AND 17 OF 2004

BETWEEN:

[1] ASTIAN GROUP INC
[2] INDIAN OCEAN PETROLEUM SERVICES LIMITED

Appellants

and

[1] ALFA PETROLEUM HOLDINGS LIMITED
[2] OIL AND GAS INDUSTRIAL HOLDINGS LIMITED

Respondents

Before:

The Hon. Mr. Brian Alleyne, SC — Chief Justice [Ag.]
The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon. Mr. Denys Barrow, SC — Justice of Appeal [Ag.]

On Written Submissions:

Mr. Michael Fay for the Appellants
Mr. James Hilsdon for the Respondents

2005: April 25;
June 27.

JUDGMENT

[1] **BARROW, J.A. [AG.]:** In its judgment[1] dismissing the consolidated appeals with costs to the respondents, the court ordered that the matter of costs would be decided by the court after consideration of written submissions. Comprehensive and very helpful submissions having been delivered by Mr. Phillip Kite, for the Respondents, and Mr. Michael Fay, for the Appellants, the court is now in a position to make its determination.

[1] The judgment was delivered on 25th April 2005.

[2] The respondents seek to recover three sets of costs; these are:

(i) the costs of the first appeal, which was against an order that proceedings be stayed on the basis of *forum non conveniens* (the forum judgment);

(ii) the costs of the second appeal, which was against the refusal of the judge below to lift the stay after a court in the alternative forum had declined jurisdiction (the second judgment); and,

(iii) the costs of the application for leave to appeal and for security for costs, which Gordon JA, sitting as a single judge of this court, had ordered[2] should be costs in the appeal (the security for costs order).

Costs of the appeal against the forum judgment

[3] The respondents argue that costs of the forum judgment should be awarded in the sum of US$ 73,296.26 being 10% of prescribed costs on a claim of a value of US$ 383,173,392.00.[3] Although the appellants' claim in the High Court was for general damages, and no amount was stated in the Statement of Claim, the respondents pointed out that the security for costs order was expressly made on the footing that the value of the claim was US$ 383,173,392.00 and directed that the appellants give security for costs in the sum of US$ 73,296.26. The respondents, therefore, ask simply that the sum paid into court as security for costs be paid out to them.

[4] It was indeed the fact, as the respondents emphasized, that on the security for costs application the appellants in their skeleton argument asserted that the value of their claim was US$ 383,173,392.00. As the respondents also emphasized, the appellants had also asserted that this was the value of their claim on their application for a without notice freezing order that the appellants had obtained against the respondents.[4]

[5] All the synonyms for nimble resonate in wonder at the argument of the appellants that neither Gordon JA nor the trial judge ever heard any application to either stipulate or

[2] This order was delivered on 7th June 2004.
[3] The calculation is shown in paragraph [7] below.
[4] This order is dated 26th May 2003.

determine the value of the appellants' claim and that, therefore, the claim remains, even now, an unvalued claim. Hence, the appellants argued, pursuant to rule 65.5(2)(b)(iii) the court must treat their claim as having a value of EC$50,000.00. On that value the respondents would be limited to costs of 10% of EC$14,000.00 = EC$1,400.00. Remarkably, the appellants simply ignored the fact that they had persuaded both the trial judge and Gordon JA that the minimum value of their claim was US$383,173,392.00. It is a matter of some regret that the short shrift that the appellants' argument deserves does not permit dilation upon the sleight in the appellant's attempt to escape the inescapable.

[6] It is inescapable that the value of the claim was determined by both the High Court judge and by Gordon JA to be the amount stated by the appellants. That was the basis upon which the appellants obtained an order in the High Court freezing that amount and, also, the basis upon which the appellants argued about the amount of security for costs that they should be required to give. There was no need for an application to stipulate or determine a value when the claimants themselves stated to the court what was the value of their claim. It is simply not open to the appellants now to say that the value of their claim was never determined.

[7] It may be useful to recap the basis upon which Gordon JA calculated the amount of costs for which security was to be given in the face of the appellants' contention that the claim had not proceeded beyond the delivery of the Statement of Claim and so full costs were not then in issue. Gordon JA agreed with the submission of counsel for the appellants that prescribed costs, as set forth in Appendix B to Part 65 of the Civil Procedure Rules 2000, would be US$1,099,443.48 if the claim were to go to trial of the substantive issues. The appellants submitted to Gordon JA that costs would only be 45% of that sum ($494,745.07) in that the matter had not progressed beyond the Statement of Claim, as provided by Appendix C. Counsel then argued that the 45% referred to ought to have been further reduced, pursuant to Part 65(11)(7) to 10% of the 45%. Part 65(11) deals with allowable costs on procedural applications and Part 65(11)(7) reads:

> "(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."

Gordon JA did not agree with the submission that he should order security for costs in the amount that the appellants submitted. Instead he ordered security for costs in the amount that would be awarded if the claim went to full trial on the issues. He calculated one tenth of $1,099,443.48 = $109,944.39 and two thirds of that amount (the amount of costs in the Court of Appeal) = $73,296.26. As I understand the decision, the reference in the provision quoted above to "prescribed costs appropriate to the claim" means appropriate to the claim and not appropriate to the claim at the stage it has reached at a particular point in time.

[8] There was no appeal against the decision of Gordon JA as to how costs were to be calculated or any argument on the matter so the decision does not arise for review. Accordingly, I would assess costs to the respondent at US$73,296.26.

[9] Before leaving the award of costs on the appeal against the forum judgment it is important to record that both sides proceeded on the premise that costs were to be quantified by reference to prescribed costs and it is purely because of that common approach that I thought it fit to award costs on that basis. Absent that agreement I would have followed rule 65.3 which states that, apart from instances where the rule pertaining to fixed costs apply, costs are to be quantified either as budgeted costs, prescribed costs or assessed costs. There was no costs budget so the rule relating to budgeted costs could not apply. Prescribed costs are expressly stated to exclude the making or opposing of any application except at a case management conference or pre-trial review, so the rule relating to prescribed costs does not apply. The governing rule, I would have thought, was rule 65.11 which provides that on determining any application except at a case management conference, pre-trial review or the trial, the court must decide which party should pay the costs and assess the amount of such costs.[5]

[5] Rule 65.11(1).

[10] The rule directs the matters that the court must take into account in assessing the amount of costs and the material that a party seeking assessed costs must supply. It then stipulates that the costs allowed under that 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.[6] I do not know if perhaps counsel thought that actual costs would have so far exceeded the maximum of one tenth of prescribed costs that they simply used the one-tenth rate, instead of submitting a statement of costs. I make no finding as to why; I raise that possibility simply to recognize that counsel may have had good reason for proceeding on the premise that they did.

Costs of the appeal against the second judgment

[11] The respondents seek to recover a similar amount as their costs for the appeal against the second judgment. The basis of that claim is that it was a separate appeal to which the respondents had to respond and that this second appeal was against a different judgment concerning different points of law and procedure. Even though the appeals were consolidated and heard consecutively, the issues were different and involved separate preparation, the respondents argued.

[12] In response, the appellants submitted that the court should make one order for costs in respect of the consolidated appeals. They argued that the respondents have been unable to identify a single item of costs that is referable to the second appeal, as opposed to the forum appeal.

[13] It cannot be disputed that the two appeals raised distinct issues and that the one was not subsumed in or incidental to the other. The importance to the appellants of their second application before the High Court and of their appeal against the refusal of the High Court to lift the stay of proceedings must not now be minimized. The two appeals were filed separately and were argued discretely even if consecutively in a consolidated hearing. It is quite clear that there had to be separate preparation and arguments in relation to both.

[6] Rule 65.11(7).

[14] The proper way for the costs of the second appeal to have been assessed was for the respondents to have made representations as to the time that was reasonably spent in opposing the second appeal and preparing for and attending the hearing of the second appeal.[7] The respondent should also have prepared a brief statement showing counsel's fees incurred for the second appeal, how the costs of their legal representatives were calculated and the disbursements incurred.[8] This would have shown whether or not there was duplication in the costs of the two appeals and allowed for any adjustment on that account.

[15] Notwithstanding what I think ought to have been done but was not done, I do not think it would be fair for me to depart, in relation to the second appeal, from the common approach of both sides that one tenth of prescribed costs was the applicable basis upon which to assess costs. It seems to me that the way in which I should proceed is to accept that prima facie the costs of the respondents should be one tenth of the prescribed costs appropriate to the appeal.

[16] I then consider whether I should reduce that amount for duplication or other factors. I find that I have no basis upon which to do so. I consider that there must have been some duplication in the actual costs incurred by the respondents in relation to the two appeals: travel and accommodation costs are obvious examples. However, I do not know that if I were to notionally halve these unknown amounts and ascribe one half to the costs of each appeal that this would take the costs below one tenth of prescribed costs. It seems to me that both sides having premised that the costs of the first appeal should be one tenth of the amount of the prescribed costs appropriate to the claim I have no material that would permit me to depart from that premise in determining the costs of the second appeal. I therefore assess costs of the second appeal in the amount of US$73,296.26.

[7] Rule 65.11(4).
[8] Rule 65.11(5).

Costs of the applications for leave and for security

[17] The respondents sought assessed costs of the appellants' application for leave to appeal and the respondents' application for security for costs that Gordon JA ordered should be costs in the appeal against the forum judgment. The respondents complied with the rules requiring them to make representations as to time spent and to supply a statement of fees and costs. The total shown in the respondents' schedule of costs was US$ 23,263.96.

[18] Apart from criticisms of the respondents' claims for costs in the court below, which I found to be irrelevant to the quantification of the costs of these applications, the appellants limited themselves to objecting that the respondents claimed a brief fee and two daily fees for London Queens Counsel when counsel only attended on two days. I have studied the respondents' schedule of costs and see that the claim is for ½ brief fee for counsel (which the appellants accepted was properly charged) and for 1 daily fee and 1/3 daily fee for counsel. The objection really seems to be that the brief fee should cover the preparation and the first day of hearing. I do not see why this should be so. Counsel's fee note shows that the brief fee was charged some three weeks before the first day of hearing and that three daily fees were charged before the first day of hearing (presumably this included travelling time). The appellants have pointed to nothing to make me say that the sums claimed are not fair and reasonable, which rule 65.11(4) states the court must allow.

[19] Accordingly I allow the assessed costs of these applications in the amount of US$23,263.96.

Denys Barrow, SC
Justice of Appeal [Ag.]

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal