BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV 70 OF 2005

PACIFIC INTERNATIONAL SPORT CLUBS LTD.

and

1. COMERCO COMMERCIAL LIMITED
2. COGNIMAX VENTURES LIMITED
3. CASTORIAN COMMERCIAL LIMITED
4. JESTLIC VENTURES LIMITED
5. HAMBAY TRADING CORPORATION
6. LAOMAX HOLDINGS LIMITED
7. HWR SERVICES LIMITED

Appearances:

Mr. John Carrington and Miss Thalicia Blair for the Claimants
Mr. Michael Fay for the 1st – 6th Defendants

2005: December 7th and 20th

JUDGMENT IN CHAMBERS

(Costs on discontinuance - claim for unspecified damages - only interim applications dealt with prior to discontinuance - what costs are successful parties entitled to - what value should court attribute to the claim - CPR Part 65.5(2) (b) and Part 37.)

[1] Joseph–Olivetti, J: One would have hoped that the provisions of CPR 2000 on costs are sufficiently unambiguous so as to render any substantial dispute on costs otiose. This case

proves otherwise as the issues here concern the basis on which one should quantify costs on discontinuance where the claim is for a non-monetary claim and or includes a claim for damages which are not specified. The application is that of the 1st – 6th Defendants ("the Principal Defendants").

Procedural History of Case

[2] The procedural history before the Court is relevant. Pacific International Sports Clubs Limited ("Pacific") is a company incorporated in Mauritius with beneficial owner in the Ukraine. The Principal Defendants are all international business companies incorporated here with beneficial owners in the Ukraine and the seventh Defendant is a company incorporated here which is their registered agent. The Claim was for certain declarations that the Principal Defendants sold their shares in the CJSC Football Club Dynamo Kiev, a prestigious soccer club in the Ukraine, in breach of Pacific's rights of pre-emption under the by-laws of that club and Ukranian law, to persons unknown; that the transfer was in breach of Pacific's rights and for damages for such breach. Pacific also sought Norwich Pharmacal type relief and a freezing order. The Claim made it abundantly clear that this action was ancillary to an action brought by Pacific against the Principal Defendants and others in the Ukraine for substantially the same relief.

[3] Pacific, on the same day it filed the Claim, also filed an ex parte application for disclosure and a freezing order against assets of the Principal Defendants not exceeding U.S. $22,390,688.00. The order was granted on the 12th April. On the 27th April, the Principal Defendants applied to discharge the order. In a hearing before Rawlins, J. (as he then was) on 5th May, which both counsel agreed did not exceed one hour, the learned judge discharged the order. However, he gave directions to facilitate an inter parties hearing and to preserve the information which was being sought. Costs were reserved pending the determination of the inter partes hearing. Pursuant to the directions the Principal Defendants filed, inter alia, an expert report on Ukrainian law by Mr. Petrovych. Pacific also filed an expert report on Ukranian law.

[4] The Principal Defendants, also made, one day after they filed their report (17thth June) an application for (1) the Court to determine the value of the claim as being U.S. $22,390,688.00 and (2) an application for security for costs. However, the court did not hear either of these applications as it gave leave to Pacific to discontinue the action on the 12th July (Hariprashad-Charles, J. – the application was filed on the 11th July) and Pacific filed its notice of discontinuance on 15th August. At the time of granting such leave, the Court granted an unopposed oral application by the Principal Defendants restraining Pacific from using any information disclosed in this suit until the 25th July which was the date fixed for the inter partes hearing. To my mind it was clear that no inter partes hearing would occur in light of Pacific's obtaining leave to discontinue so the necessity for the Principal Defendants seeking and obtaining this relief with that cut off date escapes me. It is worthy of note that at the date leave to discontinue was given the substantive claim had not progressed beyond the filing of the bare claim form as the parties were engaged on the various interim applications.

[5] Quite properly, Pacific, on the hearing of the application for leave to discontinue recognized that it would have to bear the usual consequences if the order were granted. This was in accordance with CPR Rule 37.6 which provides that the party seeking discontinuance must bear the costs. Pacific abides by that position.

[6] The Principal Defendants are seeking, in addition to their costs to the date of discontinuance, the costs attendant on each application they filed, whether it was heard or not, including the costs of appearing on Pacific's application to discontinue which it concedes should not exceed $1,000.00 to $1,500.00. That the Principal Defendants are entitled to costs on discontinuance and on the application to set aside the ex parte order is not disputed; what is disputed is the basis of the quantification of those costs.

Main Issue Arising

[7] What is the appropriate basis to award costs in the circumstances of this claim and in particular are the Principal Defendants entitled to costs on discontinuance and in addition to costs on each application it filed or on which it was successful prior to discontinuance?

Principal Defendants' Submissions

[7] The gravamen of their submission is that they are entitled on discontinuance to prescribed costs under CPR 65.5. As part of the Claim was for unspecified damages and the parties had not agreed a value they submit that the Court should value the claim for this purpose as mandated by 65.5(2)(b)(ii). They say that the value should be set at US $22,390,688.00 and thus, that in accordance with Part 65.6 Appendix B, the prescribed costs on discontinuance is $88,864.72 which is 45% of $197,476.72 (prescribed costs on completion of trial). They base their submissions on value having regard to the amount for which the freezing order was obtained and on the decision of Barrow, J.A. in Astian Group Inc & Another v. Alfa Petroleum Holdings Limited and another[1].They contend that Pacific is bound by the amount for which it obtained the freezing order. They resist Pacific's contention that this value was not applicable as it did not reflect Pacific's alleged losses and that the claim was in reality one to obtain information in support of the proceedings in Ukraine and relied on the fact that Pacific commenced action by way of claim form rather than by way of an application as showing that it was seeking substantive relief.

[8] They also submit that in addition they are entitled to the assessed costs of their applications for security for costs and for the valuation of the claim despite the fact that they were not heard as a result of Pacific obtaining leave to discontinue. They oppose Pacific's assertion that those applications were premature contending that having regard to the nature of the case, it being front loaded, so to speak, they were entitled to approach the court prior to a case management conference. They also ask for the costs of attending on the hearing of Pacific's application to discontinue which is not disputed.

Pacific's Submissions

[9] Counsel for Pacific vigorously contends that the Principal Defendants are not entitled to prescribed costs on discontinuance based on a claim valued at $22,390.688.00. Counsel takes a different approach and submits that the real issue is whether prescribed costs

[1] BVIHCA 11 and 17 of 2004

should be awarded or whether costs should be assessed as in reality all the costs incurred related to the four interim applications filed. Counsel submits that the prescribed costs rules are not relevant and submits, relying on Barrow J.A.'s explanation at page 4 of Astian that where costs are considered in relation to applications other than those made at case management or pre-trial review, the correct approach is to assess costs under CPR Part 65.11.

[10] Counsel says that the dicta of Barrow, J. in Astian relied on by the Principal Defendants is not applicable, as, unlike the present case, Astian had put a value on its claim which value was reflected in the freezing order and the security for costs and that the parties had proceeded on that basis. Further, Counsel contends that the true nature of the case must be viewed as ancillary to the Ukraine proceedings as the action was really to obtain information for use in the Ukranian court. This court had no jurisdiction to make free standing injunctions and therefore a claim for damages was included. Counsel says that this is borne out by the amended claim form and the fact that the matter was subsequently discontinued without even a statement of case having been filed. Further, counsel says that the amount for which the freezing order was obtained was simply a convenient figure pending full disclosure as it was the price at which the shares had first been offered to Pacific and does not reflect the damages suffered as a result of the Principal Defendants' alleged breaches. Pacific would have had to pay that price for the shares and so this cannot be treated as its loss.

[11] Counsel submits that the Principal Defendants are only entitled to the costs of the application to discharge the ex parte order and to the costs of attending at the hearing of its application to discontinue. Pacific also argues that the application for security for costs cannot be recovered as it was premature having regard to CPR 24.2(2) which envisages such an application being made at a case management conference or at pre-trial review and that the Principal Defendants refused to negotiate – vide the correspondence exchanged between Pacific's lawyers and the Principal Defendants[2] – and says the same of the application to value the claim. In any event he contests the value claimed as stated above.

[2] The third affidavit of Ms. Whiley filed 17th June at paragraph 7 and 8 and Exhibit CLW 2 pages 1 and 2

[12] Pacific makes the further point that the assessment of costs of the relevant applications cannot proceed as the Principal Defendants have not supplied a brief statement of fees and disbursements as is required by Part 65.11(5) and that therefore, the Court should adjourn the hearing to allow this to be done. Counsel also points out that he had offered to agree costs but that the Principal Defendants had not to date provided any evidence of costs to allow a meaningful dialogue to take place.

Court's Analysis

A. The Law Governing Costs on Discontinuance

[13] CPR 37(6) provides that unless the parties agree or the Court makes a different order, that a claimant who discontinues is liable for the costs incurred by the defendant on or before the date on which notice of discontinuance was served.

[14] Pacific obtained leave to discontinue on the 12th July. Leave was necessary in view of the undertakings given to the Court by the Principal Defendants – CPR Part 37(2)(2). The Principal Defendants are entitled to their costs reasonably incurred prior to and on the date of service of the discontinuance. As their counsel properly conceded, no costs to speak of were incurred from the date notice of the application was served save the actual costs of appearing at the hearing of the application which he conceded should be no more than $1000.00 to $1500.00. Of course there is also the costs of this application to consider as well. We are therefore primarily concerned with the costs incurred by the Principal Defendants from the date they were served with the ex parte order to 1st August when notice of discontinuance was filed.

[15] The general rule is that on discontinuance costs are to be determined in accordance with the scale of prescribed costs in CPR Part 65 Appendices B and C - CPR 37.7(1). As this is not a claim for a specific sum which would invoke the fixed costs regime under CPR 65.4 costs fall to be determined in accordance with Part 65 Appendices B and C and paragraphs (2) to (4) of Rule 65.5. We must therefore determine the value of the claim.

[16] As I see it there are two possible approaches I can take as this is strictly speaking a claim with no monetary value and also one which so to speak is a claim which includes a prayer for unspecified damages. If I adopt the first method then this is the easier route and the value is US $50,000.00 under CPR 65.5 (2)(b)(iii) as the Court has not valued the claim under 65.6(1)(a). I pause to say that this rule refers to E.C. dollars but that the practice in this jurisdiction is to use the official currency which is U.S. dollars, which was clearly an oversight by the framers of the rules as it would be manifestly unjust to apply an E.C. value in this jurisdiction.

[17] This approach however does not strike me as the correct one as one of the claims here is for unspecified damages. Rule 65.5(2)(b)(ii) deals specifically with a claim for unspecified damages and the court is mandated to fix a value. On its face the rule implies such a claim as being the only claim; whereas here we have other claims as well. Despite this, I am of the view that this is the relevant rule having regard to the claim for unspecified damages and in construing legislation, the specific provision prevails over the general.

[18] The Principal Defendants did not press the court to hear their application to determine the value of the claim prior to discontinuance. In the face of this, can I now, in effect hear the application? I think that in the interests of justice I should do so as the application was clearly overtaken by Pacific's application to discontinue and in any event both parties essentially argued the application at this hearing so no one is prejudiced. Furthermore, and most importantly, the Court is mandated to value the claim in order to quantify costs under this rule.

[19] Rule 65.6(1)(a) allows a party to apply to value a claim at a case management conference. The rule is permissive in its language and I interpret it as allowing an application to be made prior to case management where the circumstances warrant it. Undoubtedly, requiring the application to be made at case management stage is logical as the Court is usually in a far better position to determine the value of a claim after issue is joined than at an earlier stage. However, in the circumstances, I do not regard it as premature as the court would have had sufficient material to determine the value of the

claim after the inter partes hearing; therefore the Principal Defendants were no doubt anticipating this.

[20] However, the Principal Defendants' substantial ground to support the value claimed rests on the amount of the freezing order and Astian. To my mind I can only have regard to the amount for which the freezing order was obtained if this case can be brought within the factual circumstances of Astian. First of all, Astian does not deal with the costs on discontinuance although it does concern the valuation of a claim in which a freezing order was obtained. The Court held that the value of the claim was the amount for which the freezing order was obtained as the Claimant had attributed that value to the claim, had given security for costs on that value and the parties had conducted themselves on that basis. Can the same be said of the instant case?

[21] Both the Claim Form and the amended Claim Form state unambiguously – "The Claimant has filed proceedings in Ukraine against the 1st – 6th Defendants ... The proceedings herein are ancillary to such proceedings and invoke the personal jurisdiction of the Court over the Defendants". This is reiterated in the grounds of the ex parte application of 8th April (Ground IV). And, in the affidavit in support (Ms. Khomyak -paragraph 39-40) she explains what assistance is sought from this court, which is essentially disclosure about the alleged transfer of the shares by the Principal Defendants. In paragraph 42 she states that upon obtaining the further information Pacific intends to attach a monetary value to its claim and see also the attachment.[3]

[22] In paragraph 10, Ms. Khomyak explains that the figure of US$22,390,688.00 was the price at which the Principal Defendants first offered to sell their shares to Pacific; it is clearly not the value of the damages Pacific is claiming.

[23] On the argument on the form in which the action was initiated being decisive, as to whether this claim was ancillary to the Ukranian proceedings or not, I thinks that the Court can look beyond the form to determine the real purpose of any proceedings and is not bound by the form in which a claim was commenced. See for example Part 26.9(2) CPR

[3] Exhibit VB1 paragraph 43

which provides, inter alia, that an error of procedure does not invalidate the proceedings unless the Court otherwise orders. Therefore, the process by which the claim was commenced is of no moment on this issue.

[24] On review of the case history as reflected on the court's file and in particular having regard to the fact that the action was discontinued even before a statement of case was filed, it appears that this matter was really ancillary to the Ukrainian proceedings as contended for by Pacific and that its true and only purpose was to obtain the disclosure and freezing orders in aid of those proceedings. These forms of relief are standard weapons in the arsenal of any commercial lawyer and the principles are well established. The claim for damages was merely a hook on which to hang these proceedings to obtain the ex parte disclosure and freezing orders as it is well known that the Court does not grant free-standing injunctions – See the Siskina.[4] Without deciding the point, as it does not fall for determination, I also understand that the law governing Norwich Pharmacal orders is such that it does not permit an order to be made requiring anyone to disclose information for use in foreign proceedings (a different regime covers this) but in aid of suit in this jurisdiction[5], and in any event the remedy is directed at an innocent person who unwittingly or unknowingly becomes involved in another's wrongdoing[6]. I understand that this was in part the nature of the submissions which founded the discharge of the ex parte order. Therefore, the likelihood of this action going any further after the Court discharged the ex parte order was slim and to my mind this is borne out by the subsequent discontinuance even before the inter partes hearing.

[25] The Court therefore agrees with the submissions of Pacific on the issue of the value of the claim. Clearly, the value of the claim cannot be the price of the shares which Pacific has lost the opportunity to purchase. What is alleged to have been breached is Pacific's rights of pre-emption to those shares and therefore the value of Pacific's claim must be related to the value of these pre-emptive rights or the loss which Pacific suffered as a result of the alleged breach of those rights. It may be the difference between the price it could have obtained the shares for on the exercise of its pre-emptive rights and the market value of

[4] [1979] A.C. 210
[5] Disclosure – Paul Matthews 2nd Edn. para. 2:13
[6] Norwich Pharmacol Company v. Customs and Excise Commissioner [1974] A.C. 133 Lord Reid at page 175.

those shares or the dividends or other benefits it lost the chance of acquiring and or the monies it expended to make arrangements to purchase the shares when they were first offered. There is no evidence of that. Ironically, the Principal Defendants are the best persons to tell the Court whether they sold those shares and for how much. They have succeeded in setting aside the disclosure order which might have aided this exercise and so in a manner of speaking they are hoisted with their own petard. The Court cannot set an artificial or arbitrary and unjust value on the claim or be asked to speculate as to these matters and it is obviously wrong to use the price at which the shares were offered to Pacific as the value of Pacific's claim. I may add having regard to an argument advanced by the Principal Defendants that if the Principal Defendants have suffered as a result of their assets being improperly frozen then another remedy is available to them and one cannot seek to compensate them by setting an illogical value on the claim.

[26] However, to leave the matter like this would likewise be unjust as it would deprive the Principal Defendants of the costs to which they are entitled. Happily, another solution presents itself, that is, to assess the costs of each application on which the Principal Defendants are entitled to costs, under CPR 65.11 which I find is the relevant rule in dealing with the costs of applications other than those made at case management or pre-trial review or trial as confirmed by Barrow, J. in Astian. This rule essentially provides for the Court to assess the costs. I am fortified in this approach as the provisions on costs are not to be mechanically applied and that the Court always has a discretion on awarding costs. See Part 64 and Cleveland Donald v. The Attorney General 321/2003 Civil Appeal – Grenada. Saunders, J.A.: "A perusal of the Rules would indicate that opportunities are afforded parties to vary the consequences of a mechanical application of the prescribed costs."

[27] I see this alternative approach as a fair and just solution. As has already been noted, no steps were taken in the substantive action after the filing of the claim form; the time being devoted to the several interim applications. And, Counsel for the Principal Defendants conceded, albeit somewhat reluctantly, that in seeking to recover both prescribed costs on discontinuance and assessed costs on each application that there is an element of double recovery. Furthermore, when given the opportunity by the Court, Counsel could not say

what costs were incurred in the proceedings which were separate from those incurred in the applications and could only say that the costs were so intermingled that it was impossible to say.

[28] Accordingly, to my mind, in the circumstances of the case, to give the Principal Defendants both their costs on discontinuance and the costs of the various applications to which they are entitled would be to grant them a windfall by way of double recovery. It is one or the other. As I am unable to proceed on the basis of prescribed costs for the reasons adverted to, the Court will proceed on the alternative view and assess the Principal Defendants' costs on each application on which they are entitled to costs.

[29] I find that they are entitled to costs of the application to discharge the ex parte order, such costs to be assessed as provided for by CPR 65.11(1)(b). In addition they are to have the costs of the affidavits including the ex parte affidavit they filed in preparation for the inter partes hearing which never came off and the costs incidental on the preparation of those affidavits. They are also entitled to costs of appearing on the hearing of the application for leave to discontinue which I will fix at $1,000.00 having regard to Counsel's concession. I also find that they are not entitled to the costs of the application for the value of the claim, arguments on which were presented at this hearing, as they failed on their main point.

[30] Now to consider whether the Principal Defendants are entitled to the costs of the application for Security for Costs which was never heard as Pacific obtained leave to discontinue because it cannot be gainsaid that costs were incurred in the preparation of the application. Can the Principal Defendant recover those costs from Pacific?

[31] True, CPR 24.2(2) stipulates that "where practicable" the application for security for costs must be made at the case management conference or pre-trial review. In my view, the use of the words "where practicable" indicates that the court retains a discretion to entertain an application at any other time. I therefore agree with the Principal Defendants' submission that in this case an earlier application could and was properly made. However, it is usual for this matter to be agreed and I note that despite Pacific's stated willingness to provide security in a sum to be negotiated that no attempt was made by the Principal

Defendants to even begin negotiations. It seemed that they stuck to their guns that security should be given on the value they had attributed to the claim, an approach which was clearly misguided and unreasonable. It is for these reasons that I will not allow them the costs of preparing and filing the application for security for costs – See Part 64.6(d).

[32] Regretfully, the court cannot proceed to assess the costs of the application to set aside the ex parte order and the costs of and attendant on the provisions of the affidavits for use at the inter partes hearing as the Principal Defendants have not filed the required information. Perforce, this assessment must be adjourned to enable this to be done if the costs are not agreed in the interim, an opportunity which I trust the parties would take full advantage of.

[33] In conclusion, this court therefore orders as follows:-

1. The Principal Defendants are entitled to the costs of their application to discharge the ex parte order together with the costs of and attendant on the preparation of the affidavits for use at the inter partes hearing. Such costs to be assessed if not agreed.

2. If costs are not agreed then the Principal Defendants must file and serve their information on costs pursuant to CPR Part 65.11 on or before January 10, 2006 and their written submissions.

3. Pacific must file any affidavit in answer and their written submission on or before January 23, 2006.

4. The Principal Defendants shall file a written reply, if necessary on or before January 30, 2006.

5. The Court directs that the assessment proceed on the written submissions without further oral arguments in accordance with CPR 26.1(2)(n).

6. Pacific is to pay to the Principal Defendants the sum of $1,000.00 which represents their costs on appearing on the application to discontinue.

7. The Principal Defendants' application for costs of the applications for security for costs and for valuation of the claim are dismissed.

8. The Principal Defendants are to have the costs of this application fixed at $2,500.00.

Postscript

[34] I am afraid that despite the very positive sentiments expressed by the court on the provisions on costs in CPR 2000[7] and although those provisions are a substantial improvement on the old rules that the question of costs still seem to beset our Courts to such an extent that we run the real danger of issues of costs using up more resources than the substantive issues – a situation that could eventually erode the credibility of the civil justice system.

Rita Joseph- Olivetti
High Court Judge

[7] Byron, C.J. - Rochamel Construction Ltd. v. National Insurance Corp. - Civil Appeal No. 10 of 2003 – St. Lucia