BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2005/0264

BETWEEN

FINECROFT LIMITED

Applicant

And

LAMANE TRADING CORPRATION

Respondent

Appearances:
Mr. Richard G. Evans of Conyers Dill & Pearman for the Applicant
Mr. Samuel Jackson Husbands of Walkers for the Respondent

2006: April 26, 28
2006: August 31

JUDGMENT

[1] HARIPRASHAD-CHARLES J: The question of costs in big commercial cases in this Territory is sometimes more protracted and litigious as the cases themselves. The present application to assess costs is one such example. It took two days to be argued whereas the application for the anti-suit injunction took one day. However, the submissions were stimulating.

[2] On 6 January 2006, after a successful application for an anti-suit injunction by Finecroft Limited ("Finecroft"), this Court ordered Lamane Trading Corporation ("Lamane") to pay to Finecroft the sum of $125,000 representing an interim payment until the issue of costs is fully litigated. [1] On 20 April 2006 Walkers handed over to Conyers Dill & Pearman ("Conyers") a cheque of $125,000. Consequently, it is not disputed that Finecroft is entitled

[1] See paragraph 61 of the Judgment of the Court delivered on 6 January 2006.

to costs. The dispute however focuses on the quantum of costs to be paid to Finecroft. The costs entitlement of Winfair Limited, the other successful applicant has already been determined.

[3] Finecroft is claiming an amount of $816,848.27. Lamane vociferously challenged that amount and served at the last-minute, preliminary points of dispute in relation to Finecroft's Schedule of Costs. This hearing will therefore determine the amount of costs to be paid to Finecroft. But before I venture to do so, it is necessary by way of introduction to say something about the background to the application for the injunction as it is fundamental for an appreciation of the complexity of that application.

The background

[4] On 4 March 2004, Finecroft, Winfair (collectively "the Applicants"), Lamane and Chrysses Demetriades & Co. Law Office entered into a Trust Deed to regulate their conduct in respect of shares relating to an ultimate investment in two Russian companies involved in the titanium industry, OAO VSMPO ("VSMPO") and OAO Avisma ("Avisma") and to establish a trust in respect of the same. Chrysses Demetriades & Co. was made trustee of the Trust.

[5] Clause 35.2 of the Trust Deed provides for 'any disputes or differences in connection with the Trust Deed or touching upon any breach of the provisions thereof to be referred to the London Court of International Arbitration ("LCIA").'

[6] Clause 15 contains a mutual buyout clause which empowers a beneficiary under the Trust to make to the other beneficiaries an irrevocable offer to sell its interest in the Trust at a certain price per share. The effect of this irrevocable offer is that the beneficiary making the offer is entitled to purchase the other beneficiaries' interest in the Trust at the same price per share unless the offerees are able to accept the irrevocable offer within a time frame provided for in the Trust Deed.

[7] On 25 April 2005, Lamane made an irrevocable buyout offer to sell all of its shares for an aggregate of US$148.6 million. On 25 July 2005, the Applicants accepted Lamane's offer to sell. On 26 July 2005, the Trustee confirmed that US$148.6 million has been credited to the Trust account representing payment in full of Lamane's Respective Interest under the Trust.

[8] During the Mutual Buyout Option process and after the Applicants accepted Lamane's irrevocable offer to sell, Lamane made a number of different allegations in an attempt to influence the Trustee to suspend or stop the Mutual Buyout Option from proceeding. These included an allegation that the Applicants had created an Encumbrance within the meaning of the Trust Deed and that they have violated the Trust Deed by doing so. The Trustee rejected these allegations. The Trustee sought and obtained independent advice which confirmed its own view. On 2 August 2005, the Trustee issued the Re-Designation Certificate confirming the Transfer of Lamane's Respective Interest to the Applicants.

[9] By letter dated 17 October 2005, Lamane issued a request for arbitration against the Applicants in accordance with the terms of the Trust Deed. Both Applicants have served their Response in the LCIA pursuant to Article 2.1 of the LCIA Rules.

[10] In addition to the London arbitration, Lamane has issued three different sets of legal proceedings in three different jurisdictions. These proceedings concern the same facts and make the same or substantially the same claims and seek the same or substantially the same remedies. In particular, Lamane has initiated legal proceedings in New York, Cyprus and Russia. At the heart of all of these proceedings and of the London arbitration are allegations of breach of the Trust Deed. The Applicants contend that Lamane has flagrantly breached the agreement to arbitrate in London.

[11] This Court found in favour of the Applicants. It held among other things that the arbitration agreement in the Trust Deed is valid and that the dispute between the parties fell within the scope and ambit of the arbitration agreement. As a consequence, the Applicants have a legal right not to be sued in respect of any disputes or differences in connection with or

touching upon breach of the Trust Deed in any jurisdiction other than in the London Court of International Arbitration. It also held that the bringing of the same or substantially the same claims simultaneously in multiple jurisdictions is oppressive and vexatious and as such, Lamane should be restrained on this further, discrete point.

General principles – CPR 64.6

[12] As the general rule, the unsuccessful party should pay the costs of the successful party. Costs are in the discretion of the Court. The Judge is required to exercise his discretion judicially i.e. in accordance with established principles and in relation to the facts of the case and on relevant grounds connected with the case, which included any matter relating to the litigation; the parties' conduct in it and the circumstances leading to the litigation, but nothing else: see Buckley L.J. in Scherer v Counting Instruments Ltd.[2]

Assessed costs: applicable principles

[13] Under the CPR, the costs of the injunction application fall to be determined as assessed costs: CPR 65.11 (1). In determining assessed costs, "the court must take into account all the circumstances including the factors set out in rule 64.6 (6)": CPR 65.11 (3). In addition, CPR 65.2 prescribes the basis for quantification. CPR 65.2 (1) provides as follows:

> "If the court has a discretion as to the amount of costs to be allowed to a party, the sum to be allowed is-
>
> a) the amount that the court deems to be reasonable were the work to be carried out by a legal practitioner of reasonable competence; and
>
> b) which appears to the court to be fair both to the person paying and the person receiving such costs."

[14] CPR 65.2 (3) states:

> "In deciding what would be reasonable the court must take into account all the circumstances, including –
>
> a) any order that has already been made;

[2] [1986] 2 All ER 529 at pages 536-537.

b) the care, speed and economy with which the case was prepared;

c) the conduct of the parties before as well as during the proceedings;

d) the degree of responsibility accepted by the legal practitioner;

e) the importance of the matter to the parties;

f) the novelty, weight and complexity of the case;

g) the time reasonably spent on the case; and

h) in the case of costs charged by a legal practitioner to his or her client –

i. any agreement about what grade of legal practitioner should carry out the work;
ii. any agreement that may have been made as to the basis of charging; and
iii. whether the legal practitioner advised the client and took the client's instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the case."

Application of the principles to the present case

(i) Complexity of the application

[15] The application for the anti-suit injunction was not an ordinary run-of-the-mill application. Succinctly put, it was complex. It occupied the Court for one day. The parties' skeleton arguments reveal the complexity of the issues involved. The judgment of the Court ran into 21 pages. The judgment has been appealed. The Court of Appeal has reserved judgment. Presumably, if it were not complex, the Court of Appeal might have delivered an extempore judgment as it frequently does.

[16] As Mr. Richard Evans, Learned Counsel for Finecroft rightly alluded to in his comprehensive written submissions, "the complexity has several consequences of direct relevance to the quantification of costs". First, the level of fee earner engaged must properly reflect the complexity and difficulty of the subject matter. A litigant can properly be expected to engage senior lawyers in such a matter: the Court also, can reasonably expect that those who prepare and present complex matters before it are of sufficient experience and expertise to do so.

[17] Mr. Evans next submitted that in respect of such a complex matter, the selection of Leading Counsel from commercial chambers in London is not only entirely appropriate but positively necessary. I do not think that Mr. Jack Husbands, Learned Counsel for Lamane had a contrary view. In his oral submissions, he did not object to the fact that Mr. Mark Howard, London-based Queen's Counsel argued the case. However, he was concerned with Mr. John Maclean's presence and his fees. He also questioned the presence of Mr. Paul Mitchard, solicitor and partner at the law firm of Skadden, Arps, Slate, Meagher & Flom (UK) ("Skadden Arps") who was not a solicitor admitted to the BVI Bar at the time of the hearing of the injunction. I will come to that later.

[18] Mr. Evans further submitted that the more complex a matter, the more fee earners are required to carry out the work and therefore, it was apposite that the number of different lawyers who advised and acted were retained. Mr. Husbands argued that the corollary to this is that the more experienced the lawyer, the less time and assistance he is likely to require given his expertise in the particular field. Both arguments are sound.

(ii) Multi-jurisdictional nature of the litigation

[19] It is a fact that in addition to this jurisdiction, the application was also concerned with proceedings in New York, Cyprus and Russia. Mr. Evans argued that two over-arching observations may be drawn.

[20] Firstly, the inter-connection with each of these jurisdictions was not merely insignificant, or by way of related background. Rather, it was fundamental to the relief that Finecroft obtained. The proceedings in each of these jurisdictions were the very actions that Finecroft sought to restrain (and succeeded in restraining). Mr. Evans contended that it follows that the close involvement of foreign lawyers was essential in order to fully and efficiently deal with the application. Cooperation with each of those teams of lawyers, and equally important, the effective coordination of what is in the very real sense, global litigation was indispensable. A failure to coordinate in such global litigation could lead to disastrous consequences. Wherever possible, it is preferable for one firm with a global capacity, and preferably its own offices and personnel in each jurisdiction, to take the lead

and act as coordinator. Skadden Arps has such global presence and capacity. Mr. Evans persuasively argued that often, there is a cost-saving to be enjoyed by the use of such a firm: the alternative of instructing local solicitors as agents very often give rise to considerable duplication of work and resources, as well as the risk of error, and lack of consistency.

[21] Secondly, the fact that the dispute was multi-jurisdictional was not the fault of Finecroft. Nor indeed was the multi-jurisdictional nature of the litigation merely necessary incidence of the residence/domicile of the contracting or interested parties. Rather, this consequence was wholly attributable to Lamane's own actions in commencing its claims in each of the divergent jurisdictions in flagrant breach of the agreement to arbitrate. Mr. Evans pointed out that Lamane is the author of its own misfortune and must bear the eventual consequences. In short, a litigant who chooses to fight litigation on a global scale must be made to pay the costs of doing so, if unsuccessful. I agree with Mr. Evans' submissions but a court, in the exercise of its discretion, cannot act arbitrarily but judicially. The court must award costs that is 'reasonable' in the circumstances taken all matters into consideration.

(iii) <u>The manner of opposition to the relief sought by Finecroft</u>

[22] I agree with Mr. Evans that Finecroft's application for an anti-suit injunction, and its efforts to enforce its contractual right, was vehemently fought by Lamane at every conceivable stage and on every possible point. Such is its right. The upshot was, of necessity, to intensify the work required of Finecroft's lawyers.

(iv) <u>The conduct of the parties during the litigation</u>

[23] Mr. Evans argued that although the court should be cautious in penalizing party through costs, it is perfectly permissible to require a party to compensate an opposing party to the extent that its conduct has increased costs.

[24] It was plain that Lamane made an unsuccessful attempt to have the *inter partes* hearing in November 2005 adjourned. Besides that, there was a flurry of affidavits coming from

Lamane at the eleventh hour for no apparent and good reason.[3] Strictly speaking, this matter should never have reached the courts much less four diverse courts.

(v) Time reasonably spent

[25] Mr. Husbands submitted that the *inter partes* hearing took one day and therefore, the costs claimed are disproportionate. Mr. Evans contended that this is a fallacious argument for the following reasons:

a) The simple fact of the duration of the hearing cannot be determinative of the level of costs properly incurred in its preparation and conduct. It is gross generalization to suggest that shorter hearings are cheap and protracted hearings are costly. Mr. Evans surmised that the fact that a complex matter can be disposed of effectively within one day is evidence of the quality of preparation conducted in advance.

b) Preparation began in October which culminated in the *exparte* hearing some weeks before the *inter partes* hearing.

(vi) Costs to Winfair

[26] Winfair's claim for costs was significantly less than Finecroft's and has not been the subject of challenge. In fact, on the said day of the delivery of judgment; Winfair was awarded the sum of $95,337.07. In his oral submissions, Mr. Husbands guardedly suggested that an amount of $200,000.00 is more than sufficient for an application of this nature.

[27] Mr. Evans submitted that the disparity in Winfair's costs and Finecroft's costs is explained by the fact that Winfair assumed a subsidiary role throughout these proceedings. It has been comfortable to follow Finecroft's lead; consequently, the costs incurred by Finecroft have far exceeded those of Winfair.

[3] See paragraph 8 of judgment of the court delivered on 6 January 2006.

[28] In fact, Winfair played a very minimal role throughout these proceedings while Finecroft fought hard to victory. When one examines the amount paid to Winfair without challenge, and the amount that is reticently being offered to Finecroft, it is effortless to notice the disparity.

Points of objections

Skadden Arps

[29] The first matter which raises a question of principle, relates to the services performed by the firm of solicitors in London, Skadden Arps. Mr. Husbands submitted that these fees are not recoverable as a matter of principle, given that Conyers are the lawyers on record in this jurisdiction. He next submitted that if they are allowable as disbursements, then the number of fee earners and their hourly rates are grossly overstated. Mr. Evans suggested that the argument that fees payable to foreign lawyers are not recoverable is devoid of merit. He argued that by reason of the complexity and multi-jurisdictional nature of the dispute, it was fundamental to have a law firm like Skadden Arps involved and to assume a coordinating role. The case of McCullis v Butler [4] was cited to demonstrate that charges incurred by and paid to foreign solicitors were properly taxable as disbursements. Diplock J. (as he then was) stated at page 1014:

> "I should add that, just as in the case of other foreign lawyers, the proper amount to be allowed for disbursements is the proper rate of charge in the country concerned, in this case Scotland, for the necessary services the agent employed."

[30] It is clear that a foreign solicitor, employed in the circumstances in which Skadden Arps were employed in this case, must be treated, for the purposes of taxation, simply as foreign agent, and the charges incurred by these solicitors are charges properly taxable as disbursements in the ordinary course. The appropriate head to claim such fees is under disbursements.

[31] However, like Mr. Husbands, I have some difficulty in comprehending the need for so many solicitors, their rates and the number of hours spent on the case despite its

[4] [1961] 2 W.L.R. 1011.

complexity. After all, it was an application for an interim injunction and it would be out of proportion for this court to allow Finecroft to recover costs which appear inflated and unjustifiable. Having looked at the detailed schedule of costs and with the great assistance of both Counsel, I have come to the conclusion that the proper figure to be recoverable under item 2.a to 2.c. are as follows: a partner –UK qualified at $600.00 per hour; an associate –NY-qualified at $450.00 per hour; a trainee UK at $250.00 per hour and a paralegal/legal assistant at $150.00 per hour. Having dealt with the application and having appreciated the complexity involved, I do not quite agree to the proposed reduction of hours as calculated by Mr. Husbands. My estimation would be: Partner –UK qualified - 150 hours at $600.00 per hour; an associate –NY qualified – 100 hours at $450.00 per hour; a trainee UK - 50 hours at $250.00 per hour and 100 hours for the paralegal/legal assistant at $150.00 per hour. If my computation is correct, the total figure allowed would be $162,500.00. The correct way of dealing with an item of this kind, that it should be dealt with as disbursements.

Attendance on overseas counsel and other parties

[32] Under this head, Mr. Husbands proclaimed that it is not clear whether this time includes attendances with Professor William Butler, Mr. Polyvios Polyviou and Conyers. Mr. Evans ably clarified any ambiguity which may have arisen and submitted that it is plain from the detailed schedule, this covers attendances on BVI Counsel Conyers, with Winfair's Counsel, Mr. Michael Fay and SASMF UK's Russian Counsel Monastyrsky, Zyuba, Stepanov & Partners. I agree with Mr. Evans that the assertion that the costs associated with liaising with Conyers is irrecoverable is bald and unparticularised. This section excluded attendance on with Professor William Butler, Skadden Arps, Moscow and Mr. Polyvios Polyviou. I would allow a figure of $10,000 for attendance on overseas counsel and $15,000 for attendance on other parties. Mr. Evans explained that the parties with whom communications were held are readily discernible from a reading of the detailed breakdown and include communications relating to the preparation of various affidavits (affidavits of Mr. Bresht, Mr. Glekel and Mr. Polyviou) and the collection of other evidence.

Work done on documents, affidavits, research, internal discussions and general case management

[33] Mr. Husbands vociferously challenged the work done on documents, affidavits, research, internal discussions and general case management. This totaled $520, 820.79. Mr. Husbands itemized the documents that were produced by Finecroft: see 2 g of preliminary points of objection by Lamane. Learned Counsel also challenged the overall time of 1,397 hours which he said represented more than a year's work. Fourteen fee earners were employed.

[34] At first blush, this appears unreasonable and overstated but Mr. Evans explained that the complexity and multi-jurisdictional nature of the application were the primary factors which attracted such large costs. For reasons already stated, an application of this nature, however complex did not warrant the need for 14 fee earners and more than a year's work. In the exercise of my discretionary powers, the following global figure is used: Partner –UK qualified - 75 hours at $600.00 per hour; an associate –NY qualified – 100 hours at $450.00 per hour; a trainee UK - 25 hours at $250.00 per hour and 50 hours for the paralegal/legal assistant at $150.00 per hour making an aggregate of $ 103,750.

Attendance at hearings/ Travelling

[35] The attendance of Counsel at hearings had been an issue for Lamane. Mr. Husbands submitted that the attendance of a senior fee earner and two counsel and a lawyer from Conyers is not justified for a one day interlocutory hearing. Mr. Husbands suggested that these items should be disallowed.

[36] Mr. Evans argued that the argument advanced by Lamane again displayed an unduly critical and unrealistic approach to the case which it initiated despite an arbitration agreement.

[37] As I have already indicated, there is nothing unreasonable for a hearing of such complexity to be attended to by Leading Counsel, one representative from Conyers and Skadden Arps. In this regard, I will allow a figure of $8,400.00 making a grand total of $299,650.

Counsel Fees

[38] The fees of $48,461 to Conyers and $51,450 to Mr. Mark Howard QC are not in dispute and are therefore recoverable. Mr. Husbands took issue with the attendance of junior counsel: Mr. John Alan Maclean. He ably argued that it was not necessary to employ two UK barristers when the matter could have been handed at a local level. I think it was unnecessary to have Mr. Maclean and I will disallow any fees payable to him.

Other expenses and disbursements

[39] Finecroft claimed $40,500 for translation costs, a total of $14,647.50 for experts' fees, travel and accommodation expenses of $15,694.06 and other miscellaneous expenses of $5,750. At the hearing, I allowed the following: translation costs of $20,000; travel and accommodation expenses of $10,000; expert fees of $14,647.50; photocopying of $2,000 and fax and telephone charges of $2,000 making an aggregate of $48,647.50.

Conclusion

[40] Finecroft is therefore entitled to global costs of $448,208.50 less the credit of $125,000 which it received from Lamane on 20 April 2006.

Indra Hariprashad-Charles
High Court Judge