BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 246 OF 2006

BETWEEN:

PETER MAXYMYCH

Claimant

AND

GLOBAL CONVERTIBLE MEGATREND LTD.
FE GLOBAL UNDERVALUED INVESTMENTS LTD.

Respondents

Appearances:

Mr. Christopher Young of Harney Westwood & Riegels for the Applicants/Respondents
Mr. Stephen Dougherty of Appleby Hunter Bailhache for the Respondent/ Claimant

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2007: April 27th and May 9th

JUDGMENT ON COSTS

(Insolvency Proceedings – Costs – application by Defendant to value non-monetary claim under CPR 65.6 (1) (a) – principles to be considered – whether court should exercise its discretion to value the claim)

[1] Joseph-Olivetti, J.: The issue of costs once again rears its Hydra-like form. This time we are concerned with an application by the Defendants (together, "the Funds") to determine the value of a non-monetary claim for the purpose of ascertaining the amount of the prescribed costs order made in their favour by this court on the 5th December 2006.

[2] In its written decision of 5th December the Court ordered as follows:-

> "For the foregoing reasons I have determined that Mr. Maxymych is not a member of either of the Funds and accordingly that he has no standing to bring the action under section 162(2) of the Insolvency Act and therefore his action is dismissed. This matter, for the purposes of costs is deemed to have been concluded at case management. The Respondents are to have

their prescribed costs. They have made an application for the court to determine the value of the claim and the court will hear counsel on this application at a convenient time to be fixed by the court if agreement cannot be reached."

[3] The decision also sets out what was before the Court in detail and I fail to see how there could be any dispute about that. In summary, Mr. Maxymych issued proceedings as a member for the appointment of a liquidator of both Funds on the just and equitable basis. Whilst that was awaiting a hearing he applied for the appointment of a provisional liquidator ex parte. That was deferred to an inter partes hearing.

[4] At that hearing, the Funds appeared and the court gave directions for the hearing of that interim application. On the date fixed for the hearing the Funds made application to strike out the entire action on the primary basis that Mr. Maxymych had no locus standi as he was not a member of either of the Funds. The Funds succeeded in their primary challenge and the Court dismissed the entire action and made the costs order referred to.

The Funds' Submissions

[5] Mr. Young, learned counsel for the Funds concedes that the default value of the claim is $50,000.00. However, he argues that if that value is employed here the costs recovered are likely to be substantially inadequate as they would amount to $21,000.00. He arrived at that figure by treating the matter as 6 distinct applications, being 3 identical applications in respect of each Fund – (1) Claim for the appointment of a liquidator, (2) Application for the appointment of a provisional liquidator, (3) Application for the claim to be struck out. (Let me say that this interpretation of the court's order is creative. The court certainly did not envisage that Mr. Young would seek to calculate costs on each separate application on the prescribed costs basis. Perhaps it was not abundantly clear and I take the opportunity to clarify. The order was made on the basis that the whole action was dismissed and the costs ordered was for the whole action treating same as having been concluded at case management. It certainly was not intended to be an order for prescribed costs on each application or even assessed costs. If it were intended that each application would attract

separate costs then the order would have been for costs of each application to be assessed separately as this is the appropriate regime for applications which are not made at case management).

[6] Counsel emphasized that his application to value was made pursuant to CPR 2000 65.6(i) (a) and that none of the considerations in sub- rules (2) and (3) apply. He is asking the court to ascribe a value of $90M to the claim on the basis that the proceedings in which he was successful was an application to wind up the Funds and that according to Mr. Maxymych they had assets of that value. This would result in a costs order of $201,575.00. However, Mr. Young most magnanimously indicated that he was prepared to accept not that figure but only the costs actually incurred in the sum of $66,496.98 plus costs of this application. He posited that those were reasonable costs having regard to all the circumstances including the nature and complexity of the matter. However, he adduced no evidence in support of the reasonableness of his fees, not even so much as the hourly rate charged or the time spent or a copy/copies of his firm's invoices.

[7] Alternatively, counsel submitted that the court should adopt the approach embarked on in Asiacorps Development Limited v. Green Salt Group Limited and Firstlink Investments Corporation Limited[1] and ascribe a value to the claim which would result in the Funds receiving full indemnity as the costs they actually incurred were reasonable.

The Claimant/Respondents' Submissions

[8] Learned Counsel for the Respondent, Mr. Dougherty, submitted that in determining whether the court should fix a value to the claim which is greater than the $50,000 ordinarily ascribed to such a claim by CPR 65.5 (2) (b) (iii), it must take into consideration that (1) the value that the court fixes will determine the amount of costs that Mr. Maxymych will have to pay to the Funds, (2) the principal objective of Mr. Maxymych's application was to appoint a provisional liquidator for the purpose of reviewing the books and records of the Funds, (3) there was no claim to recover any sum of money, the intent was to ascertain if a fraud had occurred, (4) the court did not consider the substantive arguments of Mr. Maxymych as the court decided that he did not have the necessary locus standi to bring the action and his application was dismissed, (5) the course of the

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proceedings and the nature of the evidence filed by both sides, and (6) that the matter itself was relatively straightforward and was determined with dispatch.

[9] Mr. Dougherty urged that Asiacorps should not be followed as the case was distinguishable from the case at bar. In Asiacorps there were a number of hearings over a protracted period of time, additional parties were added to the proceedings, other pertinent evidence came to light which resulted in further hearings and the applicant conducted itself in such a way as to cause undue delays and repeated hearings.

[10] Counsel in conclusion submitted that the court should not exercise its discretion to value the claim but should retain the value fixed by CPR for non-monetary claims. He relied on Rochamel Construction Ltd v. National Insurance Corporation Ltd.[2] and RBG Resources PLC (In Liquidation) v. RBG Global S.A.[3]

Analysis

[11] This application to value the claim is made pursuant to CPR Part 65.6 (1) (a). Now CPR 65.5 (2) (b) (iii) provides that for the purposes of prescribed costs in the case of a defendant in whose favour costs have been awarded the value of a claim which is not a claim for a monetary sum is EC $50,000 unless the court makes an order under rule 65 6(1) (a). (I note en passant that under 65.5 (2) (a) in the case of a successful claimant in a non-monetary claim the value of the claim is, "the amount agreed or ordered to be paid" and that there is no provision for the value to be fixed at $50,000.00 or for the court to value the claim under r. 65.6 (1) (a). However, to cure this seeming omission the practice seems to have arisen of applying the same rules as governs a defendant under 65.5(2) (b) (iii) as this seems to be what was contemplated by CPR when one reads 65.5 and 65.6 together as 65.6 (1) (a) allows either party to make an application to determine the value of a claim.)

[12] CPR 65.6 provides:-

> "(1) A party may apply to the court at a case management conference –

[2] Civil Appeal No. 10 of 2003
[3] BVI Civil Appeal No.6 of 2003

(a) to determine the value to be placed on a case which has no monetary value; or

(b) if the likely value is known, to direct that the prescribed costs be calculated on the basis of some higher or lower value.

(2) The court may make an order under paragraph (1) (b) only if it satisfied that the costs as calculated in accordance with rule 65.5 are likely to be either –

(a) excessive; or

(b) substantially inadequate;

taking into account the nature and circumstances of the particular case.

(3) If an application is made for costs to be prescribed at a higher level, rules 65.8(4) (c) and 65.9 apply."

[13] Unfortunately, the rule itself gives no guidance as to the circumstances in which a defendant may apply to have the value of a claim determined under para. (1) (a) or the matters which the court should take into account in determining the value, as clearly the considerations adverted to in paragraph (2) only apply to an application under para. (1)(b). However, both parties referred to several authorities and I will examine them to determine what if any assistance can be derived from them.

[14] In Rochamel the Court of Appeal were concerned with two costs orders made in a case in which the claimant corporation commenced proceedings to recover monies due by Rochamel under the National Insurance Act. The claim was made jointly and severally against Rochamel as the employer and principal debtor and against two of its directors. The corporation entered judgment in default of defence against all three. Subsequently, the directors obtained leave to defend and at the case management conference it was ordered that the trial proceed only on the defence of due diligence as raised by the directors. At the hearing the corporation adduced no evidence against one director and the

case against him was dismissed. The court ordered that Rochamel pay his costs of $75,000.00 even though Rochamel had not participated in the trial and had no notice that a costs order was being sought against it. The learned trial judge found that the other director was liable jointly with Rochamel and ordered that he and Rochamel together pay the corporation's costs fixed at $150,000.00. Rochamel l appealed against both costs orders.

[15] The Court of Appeal set aside the order obliging Rochamel to pay the director's costs and instead ordered that the corporation do so. With respect to the corporation's costs, the Court the court held that the applicable costs regime was that of fixed costs under CPR 65.4 and set aside that order as it was based on prescribed costs. The court then had to determine the costs of the trial on the separate issue. It held that the issue did not relate to any specified amount of money and that accordingly the value was $50,000 and prescribed costs was therefore $14,000. However, the Court determined that it had a discretion as to the amount of prescribed costs to be awarded and it exercised its discretion having regard to CPR 64.6 and to the overriding objective and reduced the costs by 50 per cent. However it must be noted that there was no application to value the claim which is what we are concerned with.

[16] Byron CJ painstakingly explained the guiding principles behind the four types of costs orders envisaged by CPR and explained how the "wide discretionary powers" given by rule 65.4 to vary the general rule of awarding costs to the successful party must be exercised to further the overriding objective of dealing with cases justly. See paras. 8 – 10.

[17] This case therefore establishes that the formula for calculating prescribed costs gives one a maximum sum that can be awarded but that the court has a discretion in all cases to decide whether or not to award the maximum and that the value of a non-monetary claim in the absence of an application to value it is $50,000.00.

[18] In RBG Resources PLC, the Court of Appeal (Alleyne, J.A.) considered the question of costs in paras.26 - 33 of his judgment in a case which was similar in some respects to the case before us. In that case an order appointing provisional liquidators was made without notice and subsequently it was set aside on an inter partes hearing. The court of the appeal restored the order. The main action was for the appointment of a liquidator on the grounds (1) that the company was indebted to the applicant and (2) that the company was

part of a major international fraud being perpetrated against the applicant and third-party financial institutions throughout the world. The hearing before the Court of Appeal took place on two days and it is noted that two Queen's Counsel appeared on behalf of the applicant. The applicants being successful applied for costs in the sum of $270,000.00. However, Alleyne JA noted that no application to value the claim had been made under CPR 65.6 (1) and awarded costs in keeping with 65.2 (iii). Thus a value of $50,000 was attributed to the claim which resulted in a cost order of $14,000.00 in the High Court and $9,333.33 in the Court of Appeal.

[19] In Asiacorp the court was concerned with an application to assess costs or, alternatively, if costs fell to be determined on the prescribed basis, to fix the value of the claim. This application stemmed from a successful application to dismiss an origination application for the appointment of joint liquidators. The application was deemed to have been dismissed pursuant to section 168 (3) of the Insolvency Act 2003.

[20] In Asiacorps the Court had before it two applications for costs; namely one for costs on the application to appoint liquidators and another for costs of the application to dismiss the application to appoint liquidators. (See para. 1)

[21] Firstlink, the successful party applied for costs to be assessed or alternatively if costs were to be determined on the prescribed costs basis, the value of the claim to be fixed in the sum of $435,000.00, (being the value of the claim required to provide an award of $65,000.00 the sum sought by Firstlink as its actual costs) or such other sum greater than $50,000.00 as shall seem just pursuant to CPR 65.6. This was made on the basis that if the value ascribed to a non-monetary claim by CPR is used the value of the costs award was likely to be considerably inadequate. The Court held that the action was not a straightforward one, that in all the circumstances, the level of costs that would be recoverable if prescribed costs were awarded would not be reasonable and that a reasonable sum was the amount claimed by Firstlink.

[22] The Court in determining the value of the claim had regard to R 64.6 and all the circumstances of the case and concluded that Asiacorp's conduct was blameworthy and that the costs claimed were fair and reasonable. See para 23.The Court also held that Asiacorp had not shown that the costs claimed were unreasonable, thus casting the onus on Asiacorp to establish the unreasonableness of Firstlink's costs.

[23] The assistance to be gleaned from Rocahmel and Asiacorps on the valuation of a non-monetary claim or on an application to assess costs is that the court in deciding whether or not it should exercise its discretion to value a claim should consider all the circumstances and seek to further the overriding objective.

[24] It cannot be argued that the court always has a discretion both as to who it makes an order of costs in favour of and as to the amount to be awarded .And, having regard to the whole of rules 64 and 65 it is implicit that it has the same discretion on being called upon to value a non-monetary claim for the purposes of costs. How then is that discretion to be exercised?

[25] R. 65.2(1) provides:-

> "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."

[26] And, 65.2(3) directs that in deciding what would be reasonable the court must take into account all the circumstances including –

> "(a) any order that has already been made;
>
> (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 or 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 …"(this is not applicable)

[27] In determining whether I should value this claim or not I must first be satisfied that the costs on the default value basis would be inadequate. I do not think, as argued by Mr. Young that one can just ask the court to value a non-monetary claim simply because one wants to – the court must do so on the basis that the costs resulting would either be excessive or inadequate otherwise what would be the point of the exercise? In this case Mr. Young submits that the costs recovered would be inadequate having regard to the circumstances and what his actual fees are.

[28] Even if I were to find that costs awarded on the default value would be inadequate, Mr. Young still has to produce evidence that his fees are reasonable as the Court in awarding costs must arrive at a sum which is not only reasonable but which appears to the Court to be fair to both Mr. Maxymych, the person paying it, and to the Funds, the persons receiving it. Therefore, it is imperative that Mr. Young satisfy the Court that his costs are reasonable. With all due respect to what was decided in Asiacorps on this point, he cannot cast the burden of doing so on his opponent by simply saying that his opponent has failed to show that his costs are unreasonable. He who asserts must prove.

[29] Having considered all the circumstances and the matters specified in 65.2 (3), I find that Mr. Dougherty's assessment of the complexities involved are correct. The case was a straightforward one and fell, to use a cricketing analogy, at the first ball delivered by Mr. Young. It was prepared with care and economy and dealt with dispatch. The costs surely must reflect this. There were no complex issues as the primary challenge was to Mr. Maxymych's standing which issue is governed by the Insolvency Act. No party conducted itself or its case in an untoward manner. The Court does not accept that Mr. Maxymych should be penalized for bringing the action because he thought that he had standing to do so as a beneficial owner of shares in the Funds which in all probability he was. And having regard to the issues, the time that would have been spent by a reasonably competent legal practitioner on the case would not in my estimation have exceeded 20 hours. I understand that in this jurisdiction Queen's Counsel fees average about $550.00 per hour and that counsel here are not Queen's Counsel although experienced practitioners. Therefore, an

award based on the default value would be reasonable and fair and accordingly I will decline to exercise my discretion to value the claim.

[30] I must also remark that under CPR 2000 there is no concept of costs on an indemnity basis which was available under the old rules but only in certain circumstances. This is pellucid from r. 65.2(1). In other words no party can expect to be fully indemnified for his costs; he is only entitled to reasonable costs. The decision of the Privy Council in Horsford v. Bird 43/2004 (28 November 2006) on costs is instructive generally on this point. See para. 7 Lord Hope of Craigshead[4].

[31] In conclusion the application to value the claim is refused. The default value applies resulting in the sum of $7,700.00 to each of the Funds. Mr. Maxymych is to have his costs of this application which I fix at $700.00 having regard to the time spent in argument and what I deem to have been reasonable for the preparation of the written submissions. This equates to approximately 2 hours at $350.00 per hour.

Rita Joseph-Olivetti
High Court Judge

[4] Where the courts of England and Wales are asked to assess the amount of costs they will not allow costs which have been unreasonably incurred or are unreasonable in amount: Civil Procedure Rules 1998, Rule 44.4(1). Where costs are to be assessed **on the standard basis** they will only allow costs which are proportionate to the matters in issue, and they will resolve any doubt which they may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party: CPR, r 44.4(2). The concept of proportionality which the CPR has adopted is new. But otherwise the principles which they set out have been established for a very long time: see the former Rules of the Supreme Court, Ord 62, r 12(1); L v L (Legal Aid Taxation) [1996] 1 FLR 873, 884, per Aldous LJ; Wraith v Sheffield Forgemasters Ltd [1998] 1 WLR 132, 140, per Kennedy LJ. A costs judge is expected to apply the same principles when taxing an award of costs on the standard basis in proceedings before the Board. **It has to be borne in mind, in judging what was reasonable and proportionate in this case, that the basis of the award was not that the appellant was to be indemnified for all his costs**. The respondent was to be required to pay only such of the appellant's costs as were reasonably incurred for the conduct of the hearing before the Board and were proportionate.