ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2004/013

BETWEEN:

EPICUREAN LIMITED

Appellant/Respondent

and

[1] AMERICAN INTERNATIONAL BANK LIMITED
[2] EDWARD ST. C. SMITH

Respondents/Applicants

Before:
Kimberly Cenac-Phulgence — Chief Registrar

Representation:
Marshall & Co. for the Respondents/Applicants
Hamilton & Associates for the Appellant/Respondent

2008: July 18.

DECISION ON ASSESSMENT OF COSTS

Background

[1] Consequent upon the filing of a Notice of Discontinuance of Appeal by the Appellant on 27th May, 2005, Barrow JA by Order dated 11th July, 2006 dismissed the appeal for want of prosecution and reserved the issue of costs of the appeal.

[2] In dealing with the reserved issue of costs, Barrow JA in a ruling dated 29th August, 2006 ordered that 'the respondents having chosen to claim discretionary and therefore assessed costs must now make a proper application in accordance with rule 65.12.' Pursuant to this ruling the Respondents filed a Notice of Application to the Chief Registrar for directions to be given with respect to how costs are to be assessed in the appeal on 15th February, 2007. Accompanying this application was an Affidavit of Edward Smith and a document entitled 'Working Documents for Preparation of Bill'.

[3] On 30th May, 2007, directions were issued by the Chief Registrar in the following terms:

> "(1) The Appellant/Respondent shall file and serve brief written submissions not exceeding three (3) pages setting out points of dispute (if any) and identifying each item in the bill which disputed stating the nature and grounds of that dispute and where possible, suggesting a figure to be allowed for each item in respect of which a reduction is sought, on or before Friday, June 15th, 2007.
>
> (2) The Respondents/Applicant shall file and serve brief written submissions in reply (if any) not exceeding three (3) pages on or before Friday, June 29th, 2007.
>
> (3) ...."

[3] No submissions were filed by the appellant/respondent by the date in the Directions of the Chief Registrar or at any time subsequent.

[5] The respondents/applicants now represented by Marshall & Co.[1] filed an application for extension of time to comply with the Directions of the Chief Registrar on 7th November, 2007 on the basis that they had recently assumed responsibility for the matter. This application was granted. The respondents/applicants indicated that having realised that the file passed to them did not contain any submissions in relation to the assessment application, they wrote to solicitors for the appellant/respondent requesting a copy of the submissions. To that letter, they have never received a response.

[1] Watt & Associates were the previous attorneys

[6] By letter dated [19th March, 2007][2], solicitors for the respondents/applicants indicated that they had still not been served with the submissions of the appellant/respondent despite repeated requests. It was their contention that the application for assessment of costs filed 15th February, 2007 therefore remains uncontested in the absence of any submissions in opposition.

[7] The fact that the Bill as submitted by the respondents/applicants is unopposed or unchallenged is undisputed. I therefore proceed in the absence of any submissions by the appellant/respondent to assess the bill as presented by the respondents/applicants. Under English Assessment of Costs procedure this is permitted by way of an application for a default costs certificate.

[8] However, the fact that there are no submissions from the appellant/respondent does not mean that whatever costs the respondents/applicants claim should be allowed. "When assessing costs, even costs which are not disputed by the other side, the court retains the right to reduce or disallow costs which it finds are disproportionate."[3] However in arriving at the costs to be awarded in light of this fact, I am guided by Gordon JA (as he then was) in **The Attorney General of Saint Christopher and Nevis et al v Queensway Trustees Limited**[4] when he stated as follows:

> "...the learned trial judge arrived as to the quantum of costs to be awarded on the basis of the bills of costs submitted and the affidavit in support thereof and most importantly, the lack of challenge by the appellants. Unfortunately, we are of the view that the learned trial judge was required to exercise a judgment (discretion) in keeping with the overriding objective. Whether he did this or not does not appear in the Agreed Reasons for Decision...where a discretion is to be exercised it must be so exercised on the basis of the law..."[5]

---

[2] The date of this letter appears to be wrong as it was written after the Order of November 30, 2007.
[3] Blackstone's Civil Practice 2005, Para 68.35
[4] Civil Appeal No. 15 of 2005 (Saint Christopher and Nevis)-delivered 3rd December, 2007
[5] Supra, para [13]

Basis of quantification of Costs

[9] CPR 65.2 (1) of the **Civil Procedure Rules 2000** (**CPR 2000**) states that in exercising the discretion as to the amount of costs to be allowed, the court must allow as costs a sum that (1) it deems reasonable were the work to be carried out by a legal practitioner of reasonable competence and (2) which appears to it to be fair both to the paying and receiving party. In deciding what is 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 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; and (g) the time reasonably spent on the case.[6]

[10] Costs must be proportionate as well as reasonable. In the case of **Lownds v Home Office**[7], Lord Woolf CJ in discussing the approach to be adopted in assessing costs stated:

> "In other words what is required is a two-stage approach. There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which CPR 44.5 (3) [which is similar to our CPR 65.2 (3)][8] states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the costs of that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable."[9]

---

[6] **CRP 2000,** Rule 65.2 (3)
[7] [2002] 4 All ER 775
[8] My insertion
[9] [2002]4 All ER 775 at 782 para [31]

[11] The Court of Appeal went further:

> "...the costs judge will have regard to whether the appropriate level of fee earner or counsel has been deployed, whether offers to settle have been made, whether unnecessary experts had been instructed..."[10]

Conduct of the parties

[12] In the case of **Craig v Railtrack plc**[11], the defendant conceded liability six days before trial. The claimant was awarded costs on the indemnity basis because among other things, the defendant had taken an unreasonably long time (five years) to admit liability.

[13] The conduct of the appellant/respondent is a factor to be taken into account in assessing the reasonableness of the costs to be awarded. It appears that the appellant/respondent only filed a Notice of Discontinuance three days prior to the scheduled hearing of the appeal. The discontinuance was filed with no prior warning or indication that this course of action would have been pursued, say the respondents/applicants[12].

[14] The respondents/applicants by all accounts were well on their way to preparing for the appeal hearing and this is seen from the fact that their skeleton arguments in relation to the appeal were filed the same day the Notice of Discontinuance was filed by the appellant/respondent.

[15] Had the appellant/respondent communicated his intention to the respondents/applicants earlier, it is quite possible that the respondents/applicants would not have had to expend time and energy in preparing skeleton arguments for an appeal which was not going to take place and this definitely will be taken into account in looking at the Bill as presented in the application for assessment of costs.

---

[10] Supra at page 783 para [36]
[11] (2002) L.T.L. February 18 Q.B.D.
[12] See Written Submissions filed 28th July, 2006-page 2 under the heading 'The Appeal'

[16] The appellant/respondent on the issue of reserved costs in the appeal suggested that they offered the respondents/applicants costs in the sum of $10,000.00 which was refused.[13] This was denied by the respondents/applicants and there is nothing to suggest that this is the case. In the absence of any evidence of such a refusal, I do not consider that this is a matter which will impact this assessment.

The level of fee earner/Counsel's fees

[17] "Counsel's fees are based on a judgment taking into account all the relevant circumstances, including:

(a) the seniority of counsel;

(b) the amount of time reasonably spent on the work;

(c) the number of documents perused and their importance and technicality (even if brief);

(d) the specialist knowledge and skill of counsel;

(e) the complexity of the work undertaken;

(f) the difficulty or novelty of the questions involved;

(g) the value of the claim and its importance;

(h) the responsibility involved;

(i) the place and circumstances where the work is performed; and

(j) whether there is any overlap with other work performed by counsel which reduces the work that would otherwise have been necessary."[14]

(See **Loveday v Fenton (No. 2)** [1992] 3 All E.R. 184)

[18] In assessing the hourly rate claimed in the Bill of Costs, I will have regard, as a guide to the minimum fees of the Bar Association of Antigua and Barbuda. Based on the tariff which I was able to obtain, it would appear that the rates of $500.00 per hour for Senior Counsel and $300.00 per hour for Junior Counsel are in keeping with the latest tariff of fees.[15] In fact they are slightly lower than that stated in the tariff. The general

---

[13] Written Submissions filed 4th August, 206-page 5 under the heading 'Costs in the appeal'

[14] Blackstone's Civil Practice 2005, para 68.44

[15] Legal Practitioners' Minimum Fees (Rev. 8/10/04)

approach is that junior counsel are allowed between 50% and 67% of the leaders' brief fees.[16] Taking this into account, the fees claimed for senior and junior counsel are reasonable.

Disbursements

[19] It is to be noted that the cost of making copies will not normally be allowed unless they are unusually numerous.[17] In this regard, I note that the respondents/applicants provided no supporting documentation for their claims in relation to the disbursements most of which relate to copies of documents made.

Assessment

[20] Applying the principles as outlined in **Lownds v Home Office[18],** I find the sum of $88,750.00 plus disbursements of $515.00 to be unreasonable in light of the fact that the matter was never argued before the Court and appearance in Court for this matter could not have been for more than 10 minutes. The respondents/applicants already knew by May 30th, 2005, i.e. the hearing date, that the matter would have been withdrawn/discontinued and therefore would have known that there would have been no significant Court time required.

[21] Having determined that the overall figure is not reasonable, I will now proceed to look at each item of the Bill of Costs individually with a view to assessing reasonableness and necessity.

-**Item No. 1**- Allowed at **$1500.00.**

-**Item No. 2**- Allowed at **$500.00.**

-**Item No. 3** – Amount reduced from $8400.00 to **$8000.00**. It is noted that this item only addresses perusal of the record and not a detailed analysis.

---

[16] Blackstone's Civil Practice 2005, para 68.44
[17] Supra, para 68.43
[18] See fn 6 above

Based on the number of pages in the record, I am of opinion that 10 hours would be a reasonable timeframe for perusal of the record.

-Item No. 4 – Amount reduced from $28, 800.00 to **$24,000.00.** Taking into account the size of the record, I consider 30 hours to be more than reasonable in terms of time spent by counsel on the analysis and study of the record.

-Item No. 5 – Amount reduced from $17,850.00 to **$13,600.00.** In light of the length of the skeleton arguments, it is considered that 20 hours for Senior Counsel and 12 hours for Junior Counsel would be more than reasonable.

-Item No. 6 – Allowed at **$20,800.00.**

Amount of $180.00 disbursements not allowed. See paragraph [19] above. Eight copies of a document is not unusually numerous.

-Item No. 7 – Amount reduced from $2000.00 to **$1000.00.** This reduction is made in light of the fact that this appeal required no oral argument. Counsel would have attended simply for the appellant/respondent to indicate that a Notice of Discontinuance had been filed and for the court to formally discontinue the matter.

-Item No. 8 – No amount claimed-Allowed.

-Item No. 9 – Amount reduced from $4000.00 to **$2500.00.** I am of opinion having regard to their length, the submissions filed 1st August, 2006 to which reference is made could have been prepared in 5 hours. The submissions are not extensive at all and do not appear to have involved any substantial amount of research.

Amount of $10.00 disbursements not allowed. There is no indication as to what it is for, neither is it supported by any documentation.

-Item No. 10 – Allowed at **$800.00.**

-Item No. 11 – Allowed at **$2400.00.** These submissions filed 9th August, 2006 appear to have involved a greater amount of research than the submissions filed 1st August, 2006 and merit the 8 hours.

Amount of $76.00 disbursements not allowed. No supporting documentation or indication of purpose provided. Also see paragraph [19] above.

-Item No. 12 – Amount reduced from $800.00 to **$400.00.** The decision/ruling of Barrow JA, was four pages long and could not have needed more than ½ hour to review. The decision was very clear and did not involve any technical issues.

-Item No. 13 – Amount reduced from $900.00 to **$600.00.** I consider that 2 hours is a reasonable time within which to prepare an application for assessment of costs. The application and affidavit in support are usually standard documents. The only document requiring more thought would be the Bill of Costs itself.

Disbursements in the sum of $243.00 not allowed. See paragraph [19] above.

Award

[22] I therefore award costs in the sum of **$76,100.00** to the respondents/applicants. The sum of $515.00 claimed as disbursements is not allowed.

Kimberly Cenac-Phulgence
Chief Registrar