

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2008/005

BETWEEN:

JOSEPH W. HORSFORD

Appellant

and

LESTER B. BIRD AND OTHERS

Respondents

Before:

The Hon. Mde. Ola Mae Edwards
The Hon. Mr. John Carrington
The Hon. Mr. Michael Gordon, QC

Justice of Appeal [Ag.]
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

The Appellant in person
Ms. Leslie-Ann Brissett for the Respondents

2008: July 8;
September 16.

Costs – Prescribed costs - Assessment of costs – Bases for assessment – Costs of applications – Costs of proceedings – Costs of appeals

The appellant applied for directions as to the costs to be paid by the respondents. The appellant had succeeded on his appeal to the Privy Council respecting a trespass committed by the respondents on his lands. While the Privy Council's Order put an end to the substantive appeal it raised issues on costs. The bill of costs detailed costs associated with the High Court action, costs associated with the appeal to the Court of Appeal and costs incurred in Antigua and Barbuda for the preparation of the appellant's appeal to the Privy Council. Issues of contention were (1) whether the appellant should recover costs associated with his expert and whether a claim can be made for the receiving and perusing of fax pages from the defendant in addition to prescribed costs (2) whether the appellant should recover his costs for an application to examine a witness before the High Court trial (3) whether the appellant as a lay person is entitled to prescribed costs under CPR 65.7 (4) what costs are recoverable in the Court of Appeal (5) what constitute costs of the Privy Council .

Held: partially upholding the court below by awarding certain interlocutory costs and partially allowing the appeal ordering the Chief Registrar of the Eastern Caribbean Supreme Court to tax the appellant's costs of appeal to the Privy Council incurred in Antigua and Barbuda:

1. CPR 32.6 states that a party must first seek the court's permission before calling an expert witness therefore failure to comply with this rule must result in the costs incurred not being recoverable.
2. Prescribed costs include all communication between parties (whether described as unnecessary or not).
3. Whether or not a successful party uses a legal practitioner of reasonable competence such party is entitled costs as if such a practitioner had been used pursuant to CPR 65.2 (1).
4. "Where the Judicial Committee directs a party to bear the costs incurred in a State, such costs shall be taxed by the proper officer of the Court in accordance with the rules for the time being regulating taxation in the Court." It is therefore right to conclude that the Privy Council Order did include the costs associated with the appeal incurred in Antigua as a result this costs should be properly taxed.

Section 20 of The West Indies Associated States (Appeals to the Privy Council) Order 1967

JUDGMENT

- [1] **GORDON, J.A. [AG.]:** By Order dated 14th February 2006 ("the Privy Council Order") the Judicial Committee of the Privy Council advised Her Majesty "that the appeal [of the appellant herein] should be allowed and (1) the appellant awarded damages of a total of EC\$44,192 and (2) the costs in the lower courts will be the appellant's costs at the prescribed rate, and (3) the respondent must pay the costs of this appeal".
- [2] The Privy Council Order brought to a conclusion litigation on the substantive matter between the parties respecting a trespass committed by the respondents on lands of the appellant. The Privy Council Order was, however, the commencement of further litigation between the parties on the ancillary issue of costs.
- [3] Pursuant to rule 75 of **The Judicial Committee (General Appellate Jurisdiction) Rules 1982**, which regulates all matters falling within the appellate jurisdiction of Her Majesty in Council, all bills of costs under orders of the Judicial Committee shall be taxed by the Registrar of the Privy Council or such other person as the Judicial Committee shall

appoint. Rule 76 states that the taxation of costs in England shall be limited to costs incurred in England.

- [4] The appellant received from the Registrar of the Privy Council a certificate of taxation in the sum of Nine Thousand Two Hundred and Six Pounds Forty-Seven Pence (£9,206.47) representing his costs in England for pursuing his appeal.
- [5] The appellant filed an application for directions dated 8th February 2007 which, according to its tenor, was pursuant to **Civil Procedure Rules** (CPR) Part 65.12. Accompanying the application for directions was a bill of costs fulfilling the requirement of Part 65.12 (4). The application was heard in November 2007 in the High Court before a judge of that court and a written judgment was rendered in March 2008.
- [6] The appellant's bill of costs was broken down into three parts: costs associated with the High Court action; costs associated with the appeal to the Court of Appeal; and, finally, costs incurred in Antigua and Barbuda for the preparation of the appellant's appeal to the Privy Council. It would be logical to follow that separation in this judgment.

The High Court Action

- [7] The appellant claimed and the learned trial judge allowed the sum of \$14,000.00 as prescribed costs pursuant to CPR Part 65.5. There is no challenge by either side to this finding by the learned trial judge. In addition to the sum of \$14,000.00, the appellant claimed \$9,467.50 as costs associated with his expert. Part CPR 65.7 specifically excludes from the ambit of prescribed costs expert's fees for preparing a report and attending any conference hearing or trial. When asked by this court whether he had sought and obtained permission from the high court for the use of an expert, the appellant conceded that he had not. CPR Part 32.6 is quite clear that a party must first seek the court's permission before calling an expert witness. In my view, notwithstanding that the court may have received the evidence of the appellant's expert at the trial of the matter, and I cannot decide this from the record before me, failure to conform with Part 32.6 must result in the costs thus incurred not being recoverable. That is the sanction for failure to comply with the rules. In

respect, therefore, of costs relating the expert I confirm the finding of the learned trial judge.

- [8] The appellant claimed the further sum of \$940.88 for receiving and perusing “78 pages of unnecessary faxed pages from defendant”. This sum too was disallowed by the learned trial judge. There is no category of work excluded by prescribed costs that would cover such an item. Thus it must be taken that prescribed costs include all communication between the parties (whether described as unnecessary or not). I agree with the learned trial judge that the costs claimed under this head are not recoverable.
- [9] A further claim by the appellant in respect of the High Court action was for an application to examine a witness before trial. According to the information on the appellant’s bill of costs the preparation of the application took him 12 hours, the preparation of the draft order took him 6 hours and the preparation of the final order took him a further 4 hours. The appellant claims \$1,017.50 for this exercise.
- [10] Part 65.7 (2) of CPR states that prescribed costs exclude “the making or opposing of any application except at a case management conference or pre-trial review”. The appellant’s claim for costs for this latter application is an allowable claim. The only issue that remains, therefore, is quantum.
- [11] The appellant is a lay person. That is to say, he is a person who does not possess a practicing certificate as an attorney at law. Implicit in the Privy Council Order is an acknowledgment that notwithstanding the status of the appellant as a lay person he is entitled to prescribed costs. I have no doubt that their Lordships considered the language of Part 65.5 of CPR which speaks to “a party” being entitled to the costs of any proceedings and the language of Part 65.7 which states that prescribed costs include “attendance and advocacy at the trial...” However, where a matter, such as the instant application being dealt with, is excluded from prescribed costs, then I am of the view that the applicable law in respect of costs is the pre-CPR law.

[12] The law in England regarding costs for litigants in person prior to 1975 is expressed thus in **Cook on Costs 2007** at page 510:

“Prior to the coming into force of the Act¹ in April 1976, LIPs² (other than those who were practicing solicitors) whose costs were ordered to be paid were entitled to recover from the paying party no more than such out of pocket expenses as had been properly incurred.”

The Act established a regime in England whereby litigants were allowed to recover the same category of costs as would have been allowed if the work had been done by a solicitor on the litigant’s behalf, limited in amount to such sum as was required to compensate the litigant for the time he had reasonably spent on preparing and conducting his case. I am unaware of any legislative provision which imports the Act¹ into the law of Antigua and Barbuda.

[13] Under the heading of application to examine witness, therefore, I would allow the sums of \$20.00 and \$75.00 which I take to be filing fees for the application and the order permitting the examination of the witness. A further \$75.00 is allowed for filing an order pursuant to an application by the respondent that was refused. I would allow a further sum of \$500.00 for the preparation and presentation of the application. Part 65.2 (1) reads:

“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.”

It would seem to me that Part 65.2 (1) sets a standard to be used in determining such costs, whether a legal practitioner of reasonable competence is used or not.

[14] In addition, the learned trial judge included as being due to the appellant, as he was bound to, the sum of \$750.00 as ordered by the High Court by order dated 28th January 2003. This sum is properly payable to the appellant.

¹ The Litigants in Person Costs and Expenses Act 1975

² Litigants in person

In the Court of Appeal

[15] The learned trial judge allowed the sum of \$9,333.33 as being two-thirds of \$14,000.00 as prescribed costs for the appeal of the appellant. There is no dispute as to this sum.

[16] In addition to the prescribed costs, the appellant claimed the sum of \$1,201.81 being costs associated with himself and his wife travelling to St Kits to receive the judgment of the Court of appeal. This sum was disallowed by the trial judge. Apart from the unreasonableness of charging to travel to receive a judgment in this day and age of instantaneous electronic communication, CPR makes no provision for such charges. I too would disallow this sum.

The Privy Council Appeal

[17] All other charges in the Bill of Costs as filed by the appellant related to the appeal to the Privy Council and were disallowed by the learned trial judge. I too would disallow them as claimed, but for entirely different reasons and, I dare say, with different consequences.

[18] Pursuant to **The Judicial Committee (General Appellate Jurisdiction) Rules Order 1982**, rule 76 the taxation of costs in England shall be limited to costs incurred in England. Thus, although the appellant secured a certificate of taxation from the Registrar of the Privy Council in the sum stated in paragraph 4 above, it is quite clear that this sum could have represented only costs to which the appellant was entitled which were incurred in England. There is still the issue of costs incurred in Antigua relating to the appeal to the Privy Council.

[19] Section 20 of **The West Indies Associated States (Appeals to the Privy Council) Order 1967** (the 1967 Order) reads as follows:

“Where the Judicial Committee directs a party to bear the costs incurred in a State, such costs shall be taxed by the proper officer of the Court in accordance with the rules for the time being regulating taxation in the Court.”

I am in no doubt that when the Privy Council ordered that the respondent must pay the costs of the appeal (that is to the Privy Council) they must have meant not only the costs incurred in England but also the costs associated with the appeal incurred in Antigua.

[20] "Court", in the 1967 Order is defined as the Court of Appeal and the proper officer of that court is the Registrar of that court. Thus, costs incurred by the appellant for the appeal to the Privy Council in Antigua should properly be taxed by the Chief Registrar of the East Caribbean Supreme Court and I so order.

[21] As both parties have been to an extent successful, I would order each party to bear its own costs of this appeal.

[21] Thus the order of this court is:

- (i) The respondent shall pay to the appellant the appellant's costs in the High Court in accordance with the prescribed costs scale in the sum of \$14,000.00.
- (ii) The respondent shall pay the appellant's costs in the Court of Appeal in the sum of \$9,333.33.
- (iii) The Chief Registrar of the East Caribbean Supreme Court shall tax the appellant's costs of the appeal to the Privy Council incurred in Antigua and Barbuda.
- (iv) The taxing by the Chief Registrar shall be on paper submissions. The appellant shall file and serve on the respondent the appellant's bill of costs together with any submissions in support thereof and the respondent shall file and serve on the appellant any submissions in response/opposition thereto within 14 days of the serving of the appellant's submissions on the respondent. Submissions in reply by the Appellant, if any, should be filed within 7 days of the receipt of the Respondent's submissions.

(v) Each party will bear its own costs of this appeal.

Michael Gordon, QC
Justice of Appeal [Ag]

I concur.

Ola Mae Edwards
Justice of Appeal [Ag]

I concur.

John Carrington
Justice of Appeal [Ag]