IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS

CLAIM NO:BVIHCV 2008/403

BETWEEN:

ELENA RYBOLOVLEVA

Claimant

And

(1) DMITRI RYBOLOVLEVA

(2) XITRANS FINANCE LTD

(3) RINGHAM INVESTMENT FINANCE SA

(4) TREEHOUSE CAPITAL INC

Defendants

Appearances: Mr Michael Fay of Ogier for the first and third Defendants
Mr Philip Kite of Harney Wetwood & Riegels for the second and fourth Defendants
Mr Jack Husbands of Walkers for the Claimant

JUDGMENT IN CHAMBERS

[2009: 14 July, 20 July]

[Costs – successful applications to strike out or stay proceedings – whether costs to be assessed under CPR 65.5 or 65.11 – method of quantification to be applied]

[1] On 9 June 2009 I handed down judgment on three applications made in these proceedings. The first two applications by time were applications by the second and fourth Defendants on the one hand and the third Defendant on the other for the claims against them to be struck out under CPR 26(3) as disclosing no reasonable ground for bringing the claim; or else dismissed under CPR 15 on the grounds that the claimant had no reasonable prospect of succeeding on the claim. The third application was an application by the first Defendant in similar terms to the applications made by the first to third Defendants with the addition that the grant of permission to serve out be set aside against him.

[2] By my order I set aside the order of Madam Justice Olivetti granting permission to the wife to serve the proceedings on the husband out of the jurisdiction and stayed the wife's claims against the first Defendant. I struck out the claims against the second to fourth Defendants on the grounds that the wife's pleadings as they stood when the applications were heard disclosed no reasonable ground for bringing a claim against any of those entities. In consequence of these orders I set aside the freezing order granted by Madam Justice Olivetti on 30 December 2008 (as subsequently varied). Finally, I directed a hearing to decide the incidence of costs and the proper costs regime to be applied as a result of the orders I had made.

[3] That hearing took place on 14 July 2009. I received careful written submissions and heard excellent oral argument in the course of which I was taken on a tour of CPR Part 65 and referred to the decisions of the Court of Appeal in *Astian Group and another v Alfa Petroleum Holdings Limited and another*[1] and *Norgulf Holdings Limited and another v Michael Wilson & Partners Limited*[2].

[4] From an examination of the Rules and the two cases to which I have been referred, I derive, with some considerable hesitation, the following propositions:

[1] Civil Appeals Nos 11 and 17 of 2004
[2] Civil Appeal No 8 of 2007

(1) the hearing before me was a hearing of three 'applications', within the meaning of CPR 65.11 (1): *Norgulf* at [6]

(2) at the hearing of such an application the court must decide the issue of costs: CPR 65.11(1) and *Norgulf* at [12]

(3) the principles governing assessment of such costs are those set out in the body of Rule 65(11) itself: *Astian* at [9] and *Norgulf* at [15]

(4) the basis for the assessment of such costs is discretionary and the prescribed costs rules have no application (except, perhaps, by agreement): *Norgulf* at [12] and *Astian* at [9]

(5) the assessment of costs where they are costs of part only of proceedings must be carried out (in the case of an application heard by a judge) by the judge hearing the application: CPR 65.12(2) and *Norgulf* at [16].

[5] These propositions must guide me in determining the costs outcome in the three applications. On the other hand, it is clear and I hold that given the nature of the three applications and the grounds upon which I decided them that the applicants are entitled not only to the costs of the applications (as to which, apart from questions of quantum, there is no real issue between the wife and the applicants) but also to the costs of the proceedings, to the extent that those costs exceed their costs of the respective applications.

[6] I was much pressed by the successful defendants with the argument that in awarding them the costs of the proceedings (which I accept they should have) I should apply the prescribed costs rules set out in CPR 65.5. I was pressed with the terms of Rule 65.5(1):

> *'The general rule is that where . . . a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Appendices B and C to this Part and paragraphs (2) to (4) of this rule.'*

[7] The defendants argued that I should simply apply the formulae contained in the appendices referred to in CPR 65.5(1) to the figure of US$325 million which was the stated value of the wife's claim for the purposes of her freezing injunction and award them the resulting figure of US$429,300. While I agree that if the prescribed costs rules were applicable to this case, then US$325 million would be the correct starting figure (see *Astian* at [3] to [5]), I am bound by authority, as I have explained above, to exercise my own discretion and not to apply the prescribed costs rules to at any rate a substantial part of the costs of these proceedings, that is to say, the costs of the three applications which I determined on June 9 2009. It seems to me impossible to combine those mandatory rules and binding principles with any rational application of the prescribed costs rules to cover the remainder of the proceedings. In my judgment, therefore, this case is one where the 'general rule' contained in CPR 65.5(1) does not apply. Instead, the residual costs of the proceeding should be assessed using the same principles as I am required to apply in determining the incidence of the costs of the three applications.

[8] I start, therefore, by ordering that the wife pay to the first to fourth Defendants their costs of these proceedings (a) so far as incurred in and about the injunction granted by Olivetti on 30 December 2009 and in the applications to vary the injunction, to include the applications ending in the decision of Foster J handed down on 18 February 2009 ('the injunction proceedings' and 'the injunction costs')) and (b) in and about the three applications determined by me on 9 June 2009 ('the applications' and 'the application costs').

[9] I accept the submission made to me that the assessment of costs otherwise than under the prescribed costs regime does not involve a line by line 'taxation'. It can, in other words, operate on the basis of broad brush principles. The parties invited me, if I came to the conclusion that these costs must be assessed, to lay down some guidelines as to the manner in which the amounts be quantified and I now proceed to do that.

[10] Starting with the injunction costs, and in the light of the claimant's acceptance that separate representation in this matter was justified, I order the claimant pay one set of costs to the first and third Defendants and one set to the second and fourth Defendants.

[11] In light of the terms of paragraph [37] of my judgment of 9 June 2009, together with the criticisms of the claimant's conduct made in paragraph [35] of the judgment of Foster J handed down on 18 February 2009, the amount of each set of injunction costs shall be determined as follows. In the case of the first and third Defendants, the Claimant shall, subject to assessment by the court of the items in such certificate, pay to the first and third Defendants the amount of a certificate to be produced to Walkers by Ogier certifying (1) the total counsel's fees incurred in and about the injunction proceedings by the first and third Defendants (2) the amount of lawyer's time spent by Ogier in and about the injunction proceedings on behalf of the first and third Defendants, together with a breakdown by broad categories of the nature of the work and the number of hours spent by each grade of lawyer at Ogier on that category of work and (3) the amount and nature of each disbursement incurred by Ogier in and about the injunction proceedings. Exactly similar principles shall apply, *mutatis mutandis*, to the injunction costs incurred by Harney Westwood & Riegels in acting for the second and fourth Defendants.

[12] Dealing now with the application costs, in terms of result the applications were successful. The case against the third Defendant had already been abandoned, without a notice of discontinuance having been served, by the amendments to the statement of claim. The case against the second and fourth Defendants was also effectively abandoned when the pleading was amended, because the amendments meant that no viable cause of action was disclosed against either of them. The evaporation of any cause of action against any of the other three Defendants meant that there could be no basis for serving the first Defendant with these

proceedings, so that the practical effect of the amendments was the abandonment of any ability to maintain any proceedings within this jurisdiction against him also.

[13] In these circumstances, it seems to me that in principle the Claimant should pay the Defendants their application costs. I have considered whether the fact that I refused to strike out the constructive trust claim should make any difference and have come to the conclusion that it should. The first Defendant had perfectly good *forum conveniens* grounds for objecting to having the constructive trust claim stayed in this jurisdiction but instead made a deliberate decision to attempt stifle it for good by attempting to have it struck out as disclosing no cause of action. The second and fourth Defendants argued the constructive trust point despite the fact that the amendments meant that there was no longer any viable constructive trust claim against either of them.

[14] I do not think that it is feasible to split up the costs of the hearing or of counsel's preparation to reflect the failure of the strike out. In my judgment, the right order is that the Claimant should not have to pay to any of the Defendants any costs incurred or disbursements paid or payable in respect of the obtaining of expert evidence of Swiss law. Those disbursements will include not only disbursements directly incurred to the Defendants' expert, but also attendances on and correspondence with foreign lawyers by English or other lawyers.

[15] Subject to that, I will order, subject to assessment by the court of the certified items, that the Clamant will pay one set of application costs, certified in accordance with the principles set out in paragraph [11] above, to the first and third Defendants, and a second set, certified on the same basis, to the second and fourth Defendants. I wish to make it absolutely clear that the costs and disbursements so made payable do not include any costs and disbursements not strictly referable to the subject matter of the applications which were before me. The Claimant is not obliged to pay for general or specific matrimonial advice,

wherever sought or given and irrespective of whether that advice may have been sought or given in part with a view to determining the approach of any of the Defendants to these proceedings. The Claimant in other words will not be obliged to pay any costs or disbursements of any of the Defendants other than costs or disbursements incurred strictly in and about the applications which I determined on 9 June 2009.

[16] Finally, since I am proceedings to determine the costs of the applications under CPR 65.11, I have to decide whether there are any special circumstances justifying the disapplication of the 10% cap imposed by Rule 65.11(7). It see ms to me that in the absence of some extraordinary circumstance, where the effect of a successful application is to bring proceedings against the applicant to an end, there is no room for the cap imposed by Rule 65.11(7). If that is wrong as an expression of general principle, I am nevertheless satisfied that there are ample special circumstances specific to the present case. I have set them out in paragraph [1] above. By her (inevitable) change of position, the Claimant had painted herself into a corner where her claims had either been abandoned, or abandoned bar the shouting or (so far as the first Defendant was concerned) could no longer be maintained within the jurisdiction. The effect differed from discontinuance only in the form taken by the process. Had the Claimant discontinued in terms, she would have been liable to pay prescribed costs of the whole case.

[17] I will therefore adjourn this hearing to a date to be fixed when I can review the certificates to be produced in support of the Defendants' costs applications and quantify the sums payable by the Claimant. That said, I hope that the general principles set out above will encourage the parties to agree the costs payable by the Claimant without the need to return to court. I would be grateful if counsel could draw up an order giving effect to the terms of this judgment. The Claimant will pay three quarters of the costs of this hearing, to be assessed if not agreed.

Edward Bannister

Commercial Court Judge

20 July 2009