TORTOLA VIRGIN ISLANDS

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

CLAIM NO BVIHCV2011/0038

BETWEEN:

JIPFA INVESTMENTS LIMITED

Respondent

AND

[1] NATALIE BREWLEY

[2] ALFRED FRETT

[3] B & F MEDICAL COMPLEX LIMITED

Applicants

Appearances

Mr Frank Walwyn and Ms Astra Penn of Dancia Penn & Co for the Applicants
Mr Gerard Farara QC, with him Ms Tamara Cameron of Farara Kerins for the Respondent

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2012: May 21; October 31

ASSESSMENT OF COSTS

INTRODUCTION AND BACKGROUND

[1] LANNS, M: The application before the court for assessment of costs, or alternatively for directions on how the assessment is to be carried out, follow upon the order of Mme Justice Indra Hariprashad-Charles contained in the Judgment dated 8th June 2011, discharging an interim injunction which the learned Judge granted on 17th February 2011.

[2] Paragraph [63], subparagraph 4 of the Judgment of Hariprashad-Charles J is in the following terms:

> 4. The applicant will pay the respondents' costs on this application.

[3] The application to which the learned Judge referred was an application by JIPFA Investments to continue an injunction granted on 17th February 2011 against the Respondents, and the cross application by the Applicants to discharge the injunction. The injunction was in the following terms:

1. That the Respondents immediately cease excavation of the area of land on Parcel 21 Block 2938B Road Town Registration Section which comprise a 12 feet Right of Way to JIPFA's property situate at Parcel 22 Block 2938B Road Town Registration Section and the further undermining of the Right of Way by excavation below the Right of Way.

2. That the Respondents immediately cease excavation of the said Right of Way to the extent that it undermines and withdraws lateral support for the western boundary of the Applicant's Parcel 22;

3. That the Respondents immediately cease trespassing on the Applicant's Parcel 22 by removing all trucks and other heavy equipment which the Respondents, whether by themselves or agents placed or caused to be placed on the Applicant's Parcel 22;

4. That the Respondents immediately cease all excavation, construction and other works relating to the proposed development on Parcel 21 until the determination of the Applicant's claim for damages and application for judicial review.

[4] Paragraphs 5 and 6 of the injunction contained timelines for the filing of the Claim and the Application for leave to apply for Judicial Review. The Order also contained the usual stipulations as to the return date hearing, and a stipulation that, should the Respondents wish to discharge or vary the Order before the returnable date, they must give 72 hours notice to the Applicant.

[5] To that injunction order was attached a Penal Notice warning the Respondents that if they fail to comply with the terms of the Order, proceedings may be commenced against them for contempt of court and they may be liable to be imprisoned.

[6] When the inter partes hearing came on, there were two applications pending - one to continue the injunction, and the other to discharge it.

No summary assessment

[7] Having discharged the injunction, and having decided which party should pay costs, the Learned Judge did not go on to assess the amount of such costs and direct when those costs were to be paid. Nor did the Learned Judge identify the rule to be applied to the assessment of those costs.

[8] As no assessment of costs was made at the hearing of the application in which costs were awarded, CPR 65.12 (3) became relevant. CPR 65.12 (3) provides that if the assessment

does not fall to be carried out at the hearing of any proceedings, then the person entitled to the costs must apply to a master or the registrar for directions as to how the assessment is to be carried out.

[9] The Applicants filed their Application for directions in compliance with CPR 65.12 (3); and they filed their Bill of Costs in compliance with CPR 65.12 (4). However, their primary application was for the assessment of costs, and on the date of hearing, the parties were prepared to proceed with the assessment. Upon it appearing to the court that there was sufficient material available to carry out the assessment, the court proceeded with the assessment and declined to give directions as to how the assessment was to be carried out.

[10] Ms Astra Penn swore to and filed an Affidavit in support of the Application for assessment of costs. To this affidavit were exhibited several documents including a Bill of Costs. The Applicants also filed skeletal arguments, and these were augmented by oral arguments. The Applicants also provided authorities.

[11] The Respondent did not file an answering affidavit. Nor did it file a Bill of Costs. However, it filed "Points of Dispute" as well as submissions. These written submissions were also augmented by oral submissions.

THE BILL OF COSTS

[12] The Bill of Costs is dated 17th February 2012. It is unsigned and uncertified. In it the Applicants have claimed $176,102.53 as costs. Of that amount, the Applicants seek $164,445.00 as fees for five fee earners comprising four lawyers and a litigation clerk. Three of the lawyers are foreign lawyers called to the Ontario Bar. Lead counsel Mr Frank Walwyn has been called to the Ontario Bar as well as the BVI Bar.

[13] The sum of $11,657.53 is claimed as disbursements.

[14] Mr Farara QC has vigorously challenged the Bill of Costs. His submissions and specific challenges/points of dispute are set out below.

MR FARARA QC SUBMISSIONS

[15] Mr Farara QC prefaced his written submissions with an explanation of the nature of the application, and a brief background to the events leading up to the application for assessment. I need not regurgitate them.

[16] Learned QC then gave an exposition of the Law on Costs citing the decision in the case of Norgulf Holdings Limited et al v Michael Wilson & Partners[1] wherein Barrow J.A. set out the principles of law to be applied by the Court in determining costs to a party. He quoted Barrow J.A. as saying that rule 65.11

> "makes the amount of costs to be awarded a matter for the discretion of the court. Rule 65.11 states the principles by which the court must guide itself in exercising that discretion and assessing costs. The rule specifies the documentation that the party seeking costs must provide. And finally it caps the amount of costs that normally may be awarded on the determination of that application."

[17] Mr Farara QC next referred to the case of Astian Group Limited et al v TNK Holdings Limited et al[2], in which the court departed from the general rule under 65.11 (7). Mr Farara QC contrasted the instant case with the decision in Astian Group. In doing so, Mr Farara pointed out that in Astian Group, the court justifiably departed from the general rule under Rule 65.11 (7). According to Mr Farara QC, that case concerned a stay of proceedings on the ground of forum non conveniens, which was granted, and a discharge of the freezing injunction, and an application to lift the stay based on developments in proceedings in Russia. Learned QC pointed out that Astian Group involved multi-jurisdictional issues and the minimum value of the claim was $383,173,392. Mr Farara also pointed out that the parties had filed "enormous amount of evidence including comprehensive expert and factual affidavits" and the hearing took place over 4 days. In the end, the court awarded costs of $109,944.39.

[18] By Mr Farara QC submissions, costs in the instant case are to be assessed under CPR 65.11 which limits the costs recoverable to no more than one-tenth of the prescribed costs appropriate to the claim unless the court considers that there are special circumstances of the case justifying a higher amount. So far as Mr Farara QC is concerned there are no special circumstances in the instant case which justifies a departure from CPR 65.11 (7).

[19] Mr Farara QC further submitted that the injunction application was a procedural application which deserves no special treatment when it comes to the issue of costs. The issues of law were not complex or novel. The pleadings were not voluminous and there was no admission of expert evidence, and the learned Judge made no findings of special circumstances which would justify a departure from Rule 65.11 (7) submitted learned QC.

[20] Finally, Mr Farara QC submitted that the default value of $50,000.00 should be attributed to the claim. He urged the court to apply rule 67.11 (7) and award no more than one-tenth of the appropriate prescribed costs which is $14000.00

[21] Learned QC submitted that if the court does not agree with him and finds that there are special circumstances that justify a departure from Rule 65.11(7), then the costs ought to be substantially reduced as the amount claimed by the Applicants is grossly exaggerated and excessive having regard to the nature of the case.

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[1] BVI Civil Appeal No 8 of 2007

[2] Claim No BVIHCV2003/0072, British Virgin Islands, delivered 10th April 2006

MR FARARA's SPECIFIC CHALLENGES TO THE BILL OF COSTS

[22] Mr Farara QC submissions next addressed the Applicants' Bill of Costs under 5 specific heads, 1) Fees claimed by overseas counsel; 2) time spent reviewing and drafting affidavits; 3) Time spent in preparation for and attendance at trial; 4) Time spent by the law clerk; 5) Disbursements

1. Fees claimed by overseas counsel

[23] As previously noted, fees are claimed for three overseas lawyers, namely Frank Walwyn, - the sum of $34,710.00 working for 53.4 hours at $650.00 per hour ; Stephanie Turnham – the sum of $4200.00 working for 14.0 hours at $300.00 per hour; and Faren Bogach. – the sum of $9,275.00 working 37.1 hours at $250 per hour.

[24] Mr Farara QC submitted that these fees are wholly unjustified and should be disallowed as neither Stephanie Turnham nor Faren Bogach has been called to the BVI Bar and ought not to be permitted to recoup legal fees for work allegedly done in the BVI proceedings. It was Mr Farara's further submission that permitting Turnham and Bogach to recoup fees would be inconsistent with the holding in the Astian case where in paragraphs 42 and 46 the court stated that

> "It is trite law that a party to proceeding can only recover legal fees in respect of services provided by persons entitled to practice in this Territory. It therefore follows that legal fees incurred by persons not entitled to practice in this Territory are not recoverable."

[25] In developing that point, Learned QC submitted that the Applicants had lead counsel who travelled from overseas and junior counsel in the BVI. He reasoned that having regard to the nature of the case, it was unreasonable to retain additional overseas counsel.

2. Time spent reviewing and drafting affidavits

[26] A total of 122.65 hours are said to have been spent by Mr Walwyn and Ms Penn in relation to the review of JIPFA's Application and five Affidavits, and drafting two Affidavits. Mr Farara QC disputes the time allegedly spent on these tasks. At one point, Learned QC characterized the time allegedly spent on those tasks as "grossly exaggerated and excessive". At another, "wholly unreasonable"; "grossly inflated" and ought to be undercut given the brevity of some of the affidavits such as the Affidavit of Faye Archibald which was only 5 paragraphs long.

[27] Furthermore, submitted Mr Farara QC, the Bill of Costs indicates a duplication of time spent in relation to the reviewing of an application and affidavits. He was of the view that it was unreasonable for Ms Penn to spend 68.25 hours reviewing and drafting affidavits and even more unreasonable for lead counsel Mr Walwyn to spend another 53.40 hours for the same work.

3. Time spent in preparation for and attendance at trial

[28] The Bill of Costs indicates that Mr Walwyn and Ms Penn spent a total of 129.75 hours to prepare for attendance at trial. The preparation and attendance referred to include Mr Walwyn's travel to the BVI, for attendance at the hearing of the injunction on 31st March 2011, travel to the BVI for preparation for and attendance at the hearing of the Application to strike out the 4th Affidavit of Dr Joseph Archibald, QC, and travel to the BVI for attendance at the hearing of the injunction on 12th May 2011, 17th May 2011, and to take delivery of the judgment on the 8th of June 2011.

[29] Mr Farara QC takes issue with this claim. He submitted that it is grossly exaggerated and should be disallowed in part as the issues were not novel or complex. He stressed that much of the issues on both sides concerned well established principles of law and ought not to have taken counsel 129.75 hours to prepare for and attend at the hearing. As to the adjournments made on 31st March and 14th April 2011, Mr Farara pointed out that those adjournments were made at the instance of the court and the Respondents should not be penalized in costs for them.

[30] As to the fees for time spent on travel to and from the BVI, Mr Farara QC posited that there is no legal justification for recovering fees for time spent on a flight to and from a hearing, In particular, it was not necessary for lead counsel to travel to the BVI for the sole purpose of taking delivery of a judgment in a case where there was competent local counsel to do so.

4. Time spent by the law clerk

[31] The sum of $1,360.00 is claimed for a law clerk for review of accounting records, preparation of breakdown of time, calculation of fees and disbursements and preparation of Costs outline. The time of 6.8 hours were said to be spent on these tasks. Mr Farara QC disputes this claim. He argued that the time allegedly spent is unjustified and excessive and should be wholly disallowed. Further, argued Mr Farara, there is no legal justification for the recovery of the sum of $1360.00 claimed as legal fees where the work was not performed by a solicitor.

5. Disbursements

[32] The sum of $11,657.53 is claimed as disbursements in respect of the following:

1. Photocopying charges including,
    a. Affidavit of Alfred Frett sworn on 3rd March 2011;
    b. Affidavit of Alfred Frett sworn 16th March 2011;
    c. Affidavit of James O Frett sworn on 16th March 2011;
    d. Certificate of Exhibits to Affidavit of James G Frett;
    e. Application to strike out 4th Affidavit of Dr Joseph Archibald;

f. Skeleton and Book of Authorities of the Respondents/Defendants on Application;

2. Binding fees;
3. Filing fees;
4. Telephone charges;
5. Travel expenses incurred by Franck Walwyn to travel to and from British Virgin islands between March 2011 and June 2011; including meals, transportation an accommodation;
6. Legal research;
7. Deliveries/Service of Documents/Postage

[33] Mr Farara QC submitted that the disbursements claimed are excessive and ought to be substantially reduced. He pointed out that there was no Affidavit of Alfred Frett sworn on 3rd March 2011 in relation to the application heard, and no written skeleton arguments for the application to strike out the 4th Affidavit of Dr Joseph Archibald QC. Therefore, submitted Mr Farara QC, items 1 and 6 under 'Photocopying Charges' of the Bill of Costs must be wholly disallowed.

[34] Mr Farara's further submission was that the Applicants have not specified the rate of charge for the photocopying, and having regard to the documents listed, the total figure claimed is excessive. All other items claimed under disbursements were disputed by Mr Farara QC as being unreasonable, grossly exaggerated, and lack explanation.

[35] As to the amount of $9, 812.72 claimed as disbursements for travel and accommodation for Mr Walwyn, Mr Farara QC submitted that this sum should be wholly disallowed as it was unreasonable, having regard to the nature of the case, to have retained overseas counsel. He was adamant that where the applicants elected to do so, they should do so at their own expense.

[36] Mr Farara QC concluded his submissions by reminding the court that costs in this jurisdiction is not awarded on a full indemnity basis, but is a matter of discretion of the court, having regard to the principles set out in the Rules. Finally, Mr Farara reemphasized that the Applicants are entitled to no more than one-tenth of the prescribed costs.

MR WALWYN'S SUBMISSIONS

[37] Mr Walwyn prefaced his submissions with a chronology of the events leading up to the application for the assessment of costs. I need not repeat them. Learned Counsel then went on to make his submissions under the following heads:

(1) Complexity

[38] In resisting the submissions of Mr Farara QC, Mr Walwyn submitted that the injunction was very complex, involving eight affidavits from four deponents. He stressed that the parties filed extensive skeletons and briefs of authorities of their positions. He pointed out that

there were four appearances with respect to the injunction and the matter was adjourned at the last minute on two separate appearances.

[39] Mr Walwyn was also careful to point out that the hearing of the Application to continue the injunction was argued over one and a half days, and it resulted in a decision consisting of 24 pages. So far as Mr Walwyn was concerned, the complexity of the injunction warrants an amount of costs beyond the amounts provided for under CPR 65.11 (7).

(2) Importance of the matter to the Defendants

[40] As to the importance of the matter to the Defendants, Mr Walwyn submitted that the issues raised in the injunction were of utmost importance to the Defendants. He further submitted that the injunction halted the Defendants' development of a medical complex which was being built to provide additional medical services to residents of the Territory, and it left the Defendants' property partially excavated and exposed for months. The risks and costs to the Defendants were very serious and resulted in an urgent and fulsome response to the Claimant's injunction, submitted Mr Walwyn.

(3) Time spent on the case

[41] In his written submissions, Mr Walwyn asserted that the time spent on the file was reasonable considering the complexity and urgency of the matter and the importance of the matters to the Defendants.

[42] Before the court, counsel conceded that the costs and disbursements incurred by the Defendants for foreign lawyers who are not called to the BVI Bar are not recoverable.

Other submissions

[43] Mr Walwyn, in his written submissions, submitted that, given the importance and complexity of the case, the Defendants should be allowed costs of the injunction in the amount of $176,102.3 as requested. It is of interest to note, however, that very early during the course of his oral submissions, Mr Walwyn indicated that the Defendants are no longer asking for $176,103.52. Counsel informed the court that the Defendants were now asking for $140, 098.00, and that Mr Farara QC has been notified of this change. The reason for the reduction was not explained to the court; No amended Bill of Costs has been filed; so it is not clear which aspect of the Bill has purportedly been revised or reduced.

[44] Curiously, in response to a question from the court, Mr Walwyn explained that his concession that fees to foreign counsel should be disallowed means that those fees are to be deducted from the $176,102.53 claimed in the Bill of Costs and not from the $140,098.00 which counsel say the Defendants were now claiming. The court is still struggling to understand this submission and explanation.

[45] Mr Walwyn also submitted that an injunction is not a run-of- the-mill procedural application and he failed to see how it could be characterized as such.

[46] As to travel fees for foreign counsel, Mr Walwyn relied on Astian Group [3] and Michael Wilson v Michael Wilson & Partners, Limited v Temujin International Limited et al[4] to say that fees incurred by him are recoverable and that it is not fair for Mr Farara QC to submit that the Respondents should have retained counsel in the jurisdiction to do the matter. If the shoe was on the other foot, the Respondents would have been making the same charges, Mr Walwyn countered.

[47] In relation to the number of hours spent on the case, Mr Walwyn submitted that this was a true reflection of the time keepers. As far as Mr Walwyn was concerned, the time reflected is a decision that counsel made on the actual time and resources spent, and Mr Farara should not take it lightly by disparaging the claim with expressions like "grossly exaggerated" etc.

[48] In respect of the filing fees of $30.00, Mr Walwyn was content to have that figure reduced to $5.00.

[49] In regard to photocopying, Mr Walwyn submitted that that was a true disbursement to the client.

[50] Mr Walwyn submitted that Mr Farara was not correct when he said that there was no affidavit by Mr Frett. However, he accepts that there were no skeleton arguments filed by Mr Archibald.

[51] In reply to Mr Farara QC's submission that it was unnecessary for Mr Walwyn to have flown down from Canada to the BVI for the release of reasons, Mr Walwyn posited that the release of reasons are important and the court should not countenance Mr Farara QC's attempt to choose when counsel should appear. Mr Farara replied.

MR FARARA QC REPLY

[52] In reply, Mr Farara QC examined Rule 65.12 on which Mr Walwyn relied for the assessment. In particular, Learned QC pointed to Rule 65.12 (4) which stipulates that the application must be accompanied by a bill or other document showing the sum in which the court is being asked to assess the costs and how such sum was calculated. In summary, Learned QC went on to submit that

(i) The Bill of costs is unsigned and uncertified and does not inform the court or the respondents as to the particulars in relation to each item claimed, particularly those claimed as professional fees;

(ii) The document which is unsigned and uncertified is one which gives in some format a summary of the various items of work said to have been

[3] Ibid, paragraphs 43 and 50

[4] Claim No BVIHCV2006/0307, paragraph 82

carried out at different stages of the proceedings but attributes no specific time frame of any of the work or items;

(iii) In relation to the first item 'reviewing of ex parte injunction order' that is a one page document. No time is attributed to neither Mr Walwyn nor Ms Penn showing what time they spent in reviewing that ex parte injunction order; No particularization in the item whatsoever; this is a matter that has been frowned upon by judges in this jurisdiction and does not satisfy the requirement of Rule 65.12 (4)

(iv) The court is called upon to assess the reasonableness and fairness of each and every one of these charges. How is the court to do that without any form of particularization in time spent in relation to the work done?

(v) What is provided is just a total number of hours multiplied by a rate attributable to each professional resulting in a sub total line item; this is of critical importance because these are major items being claimed - $34710.00 for Mr Walwyn and $34,125.00 for Ms Penn;

(vi) These claims lack the required particularity under the rules;

(vii) The sums claimed are grossly excessive. Counsel has taken objection to that characterization, but our courts have said that certain costs claimed by certain counsel are 'grossly excessive'

(viii) Telephone charges, travel expenses, hotel expenses, transportation and accommodation expenses are in no way shape or form particularized;

(ix) .None of the sums claimed is supported by receipts or document. There is no evidence that the clients have been billed for any of these charges; there are no fee notes addressed to the clients.

(x) When counsel states that he is now claiming $140,000.00 but says that the fees claimed for foreign counsel is to be deducted from the $176,102.58, one is completely at a loss as to what is being claimed.

CONDITIONAL DISCHARGE

[53] At one point, Mr Farara QC alluded to the climate in which the court is being asked to assess costs. In so doing, Mr Farara QC noted that the injunction was discharged on the condition that the Respondents give an undertaking to refrain from engaging in any further

construction and excavation activities save and except for the works necessary for carrying out of the erection of retaining walls. What this means, explained Mr Farara QC, is that even after the order is given, the injunction remains in place, and the only thing that can proceed is the construction of retaining walls. The injunction remained in place, and the undertaking was given six months later.

VALUE OF THE CLAIM

[54] Mr Farara QC made much of the fact that there has been no determination of the value of the claim. He submitted that it was for the Applicants to have raised it with the judge if they wished. Where there is a default position, the Court of Appeal has repeatedly said that the default value of $50,000.00 applies, submitted Mr Farara QC. He urged upon me that even in a best case scenario, the court cannot go more than the Fifty Thousand Dollars which is the default value. On that value, the Applicants would be limited to costs of 10% of US$14,000.00 = $1400.00, submitted Mr Farara QC.

[55] Mr Walwyn does not agree that the $50,000.00 default value is applicable where, as in the instant case damages are sought. My short comment on this submission comes by reference to paragraph 32 of the judgment of Hariprashad-Charles J to which both counsel referred. That paragraph speaks to nominal damages in the following terms"

> '[32] the applicants say that the applicant's amended claim seeks only damage and does not even pray for an injunction. They say that the applicant has not made a claim for continuing trespass. And rightly so, because the evidence shows one isolated instance of trespass which ended immediately upon request, for which damages would be nominal at best. To the extent that any alleged diminution in value of the applicant's property occurs, it can be quantified. Therefore, damages are an adequate remedy."

[56] Mr Farara emphasized that there is no evidence pointing to diminution in value. Then he posed the question "How is the court to quantify nominal damages?" The answer, to my mind must be by assigning an amount of costs that I consider not out of scale - an amount which I consider to be proportionate, fair and reasonable.

DISPOSITION

[57] A sensible starting point in this assessment must be a consideration of CPR 65.2 which provides in part:

> "65.2 (1) 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.

(3) 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 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) … "

[58] Also of relevance is the principle enunciated in Horsford v Bird[5] in which Lord Hope of Craighead stated:

> "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 costs as were reasonably incurred for the conduct of the hearing before the judge and were proportionate."

[59] Clearly, reasonableness is the main ingredient in the assessment of costs. The court in assessing costs is required to be fair and reasonable. The Applicants must satisfy the court that their costs are reasonable. To do this, they must produce evidence that their costs are reasonable. Any doubts must be resolved in favour of the paying party. The applicants cannot just submit an unsigned and uncertified Bill of Costs and say these are the costs that we have incurred, we ask you to give them to me. They have to explain them, particularize them and provide sufficient evidence that will assist me to come to a determination of their reasonableness or otherwise. Counsel for the parties must know this.

[60] At the same time, it behoves the Respondent to show some basis for concluding that the costs are unfair, unreasonable, excessive or grossly exaggerated.

[61] The Applicant relies on the supporting affidavit of Astra Penn. That affidavit spoke briefly to the events that have taken place in the matter and it enumerated the documents filed in relation to the injunction. It also indicated that attempts to agree the costs had not been successful. At paragraph 4 of her Affidavit, Ms Penn deposed:

[5] Privy Council 43/2004 (28th November 2006)

> "We have, on behalf of the Defendants, prepared a detailed and itemized account of the costs (Bill of Costs"). The counsel fees referred to in the Bill of Costs have been incurred relative to the provision of legal services to the Claimants and the disbursements referred to in the Bill of costs have been paid. A copy of the Bill of Costs is now produced shown to me and marked "ADP"

[62] The court is unable to agree with Ms Penn that the Bill of Costs is "detailed". I will revert to this issue later.

[63] As previously stated, the Respondent has not filed or served any evidence in opposition to Ms Penn's affidavit evidence. So her evidence remains unchallenged. However, the Respondent made written and oral submissions on what it considers to be unfair, unreasonable and excessive costs.

[64] The court agrees with Mr Farara's submission that the Bill of Costs is unparticularised, and that the costs claimed are unreasonable and or excessive.

[65] In my judgment, Mr Walwyn has impliedly accepted the unreasonableness or excessiveness of the costs when at the hearing, he informed the court that the Applicants were now asking for $140,000.00 instead of the $176,102.58. He impliedly accepted the unreasonableness or excessiveness of the costs when he conceded that the fees claimed for foreign counsel who are not called to the BVI Bar are irrecoverable. And he impliedly accepted that the costs were unreasonable and or excessive when he agreed that the costs for filing fees should be reduced from $30.00 to $5.00.

[66] I have considered the factors as stated in 65.2 (3). I have also considered the written and oral submissions of both parties. I have given careful scrutiny to the items on the Bill to see whether or not costs were reasonably or unnecessarily incurred.

[67] I am in no doubt that the breakdown is inadequate to allow me to properly make such assessment. Nevertheless, I consider that the most fair and reasonable disposition of the assessment of costs is to order that the Respondent pay half of the $140,000.00 which Mr Walwyn has claimed before the court. Accordingly, costs are assessed in the sum of $70,000.00. That figure is not to be taken to include the sum of $13,475.00 which has been claimed in favour of Stephanie Turnham and Faren Bogach; nor is it to be taken to include the sum of $25.00 which Mr Walwyn agrees should be deducted from filing fees. In all honesty, the court is uncertain as to how to deal with these claims. Mr Walwyn has complicated matters by his indication that the amount is to be deducted from the $176.102.58 contended for. I think they ought to have been deducted from the revised amount of $140,000.00. Nevertheless, as I have already discounted the Bill, I do not think I ought to reduce it any further as the Applicant would be doubly penalized.

[68] In assessing the costs claimed, I found that

(1) The submission by Mr Farara QC that the Bill of Costs lacks signature, certification, specificity, particularity and proper explanation, and is excessive in relation to the time and costs claimed is well founded.

(2) The number of hours devoted to the work appears to be excessive and include work which appears to be duplicative or repetitious, e.g. the work said to be performed by both Mr Walwyn and Ms Penn occupying 53.40 hours in the case of Mr Walwyn and 68.25 hours for the same work in the case of Ms Penn with fees averaging slightly less that the other.

[3] The disbursements include amounts for travel expenses, meals, transportation and accommodation, deliveries service and postage, of documents. No documentary proof is shown as to how these costs were broken down or calculated. As to accommodation, no information is given as to where Mr Walwyn was accommodated. If in a hotel, how long was the stay in the hotel? Were the hotel costs reasonably incurred? There is a cost for meals. To my mind no allowance should be made for meals. Normally, counsel would be responsible for his own meals.

With no documents or information showing how the figures for disbursements were arrived at, it becomes difficult for me to determine the reasonableness of the costs claimed.

[4] The Applicants were not wholly successful on their application to discharge the injunction as the discharge was a conditional discharge.

[5] The issue of the applicable costs regime was the subject of detailed submissions by both parties. Also, there was much discussion as to the value to be ascribed to a non-monetary claim, and the complexity of the matter. The parties are not in accord as to the complexity of the matter, but they agree that there were lots of arguments and the application was hard fought.

I am the view that the applicable rule is CPR 65.12 (5) (a) which provides that "on hearing any such application, the master or registrar must either (a) assess the costs if there is sufficient material available to do so, or (b) …"
While I agree that the costs are excessive and unreasonable, and that the proceedings were not document heavy, I am clearly not of the view that the costs of the application before the learned judge, should be whittled down to $1400.00.

CONCLUSION

[69] Costs of the application before Justice Hariprashad-Charles are assessed in the sum of $70,000.00, to be paid within one month of the date of the delivery of this decision or at some later date as agreed by the parties.

[70] The Applicants are entitled to the costs of the assessment proceedings which I fix at $2,000.00.

[71] Counsel presented very helpful submissions and authorities. I am grateful for their immeasurable assistance.

Pearletta E Lanns
Master