IN THE EASTEN CARIBBEAN SUPREME COURT

HIGH COURT OF JUSTICE

BRITISH VIRGIN ISLANDS

COMMERCIAL DIVISION: BVICOM2012/0137

BETWEEN:

1. **ARTEMIS TRUSTEES LIMITED AS TRUSTEES OF NEW HORIZON TRUST**
2. **VLADIMIR ASHUROV**
3. **ARTEMIS TRUSTEES LIMITED AS TRUSTEES OF THE GATITO VENTURES TRUST**
4. **ARTEMIS TRUSTEES LIMITED AS TRUSTEES OF THE BAILEY TREE TRUST**
5. **ARTEMIS TRUSTEES LIMITED AS TRUSTEES OF THE ARCTURUS TRUST**
6. **MILICA RAKOVIC**

Claimants/Applicants

and

1. **KBC PARTNERS L.P**
2. **SCI PARTNERS L.P**
3. **SALFORD CAPITAL PARTNERS INC.**
4. **EUGENE JAFFE**
5. **GIORGI BEDINEISHVILI**

Defendants/Respondents

Appearances :

R. Nadertogether with **D Mitchell**of Forbes Hare Counsel for the Applicants
J Ward of Counsel for the Respondent

2013: September 26;
November 21st

Introduction

[1] The applicants who are the defendants have succeed on an application for a stay of proceedings dated the 5th April 2013 whereon the court ordered the claimants to pay the first to third defendant's costs on the application to be assessed if not agreed. The court also directed an interim payment within 14 days in the sum of $15,000 plus £25,000.00 (a combined total of US$52,362.50) to the first and third defendant on account of the liability to pay costs.

[2] In an unsworn statement of Daniel Mitchell of the defendants counsel, Mr. Mitchell acknowledges receiving the sum of US$52,352.50 from the claimants in discharge of the order ofthe court.

[3] The defendants/applicants submitted a bill of costs to the respondents and the costs were not agreed by the claimants who have raised points in dispute. As a consequencethe costs of the defendants one to three are required to be assessed.

Assessed costs

[4] Order 65.11 and 65.12 of CPR 2000 directs the court generally on an assessment of costs, and rule 65.2 provides the basis for quantification. The conjoint effect of those three rulesis that on an application there is a discretion reserved to the court to determine the amount of costs to award. This discretion is to be exercised by the court having regard to the following factors namely:—

(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) in the case of costs charged by a legal practitioner to his or her client —

(i) any agreement about what grade of legal practitioner should carry out the work;

(ii) any agreement that may have been made as to the basis of charging; and

(iii) whether the legal practitioner advised the client and took the client's instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the case.

[5] When the parties came before me for the assessment I was not satisfied that the defendants had addressed their mind to the basis of quantification and the factors to which the court must have regard. Additionally I was of the view that the parties were under an obligation to manage their costs by indicating those areas of the bill of costs included with the application where there was agreement or otherwise dispute. In fact Justice Bannister had directed the parties at page 39 of the transcript to do precisely that. It was not done and that forced an adjournment of the hearing on assessment. For that reason I do not intend to allow either party their costs for the hearing of that date. The application came back on the 17th October 2013 at which time I continued with the assessment.

[6] I have considered the bill and documents provided in the proceedings. I also had the benefit of the transcript of the hearing before Mr. Justice Bannister and his reasoning (obiter) on the bill of costs, I have also reviewed the points in dispute of the claimants. I make specific reference to the following:—

Orders already made

[7] As previously indicated Mr. Justice Edward Bannister had directed an interim payment of costs to the first to third defendants in the amount of US$52,362.50. Additionallythe hearing of the assessment of costs initially began before Justice Bannister on the 15th May 2013 where the following costs charged were discounted and allowed as follows:—

Charged

Professional Fees and disbursements of Brown Rudnick in the sum of $138,012.77

Queen Counsel's brief fee in the sum of £50,000.00

Forbes Hare's professional fees in the sum of $46,878.30 and disbursement s in the sum of $2300.63

Allowed

Professional Fees of £5000/$7655 and disbursements of £6048.01/$9259.50 and $510.10 for Brown Rudnick.

Queen Counsel's brief fee in the sum of £52,200.00.

The court further directed Forbes Hare's fees and disbursements to the master for detailed assessment.

The novelty, weight and complexity of the case and the time reasonably spent on the case;

[8] Ultimately the application brought was for a stay of the proceedings in favour of arbitration. The court acknowledged that the application raised aspects that were novel and with some complexityon the issue of arbitration and limited partnerships. In any event while I agree that the case raised issues of some complexity, I am mindful that the case was dismissed on ona preliminary application which was argued for a total of only three hours.

Submissions of the Claimants

[9] Both before Mr. Justice Bannister and before me, the claimants flagged a number of issues relevant to the consideration of the application. In particular:—

(a) The significant fees charged for research work and internal discussions . The claimants submit that fees claimed for these charges are to be disallowed on the basisthat knowledge of the law is a solicitor's stock in tradeand where the solicitor's knowledge needs to be replenished or supplemented the time and costs of that exercise is to be regarded as an overhead, the same applies to supervision of junior employees of the firm and on both these issues costs out not to be allowed.

(b) Insufficient particularity of the line items which operate to prejudice and embarrass the claimants' in its obligation to critique the bill of costs.

(c) The costs claimed were not reasonable and were disproportionate to the time spent on the application which involved a short legal point.

I find reason in the submissions of the claimants.

[10] As regards research and internal discussions I do not propose any further commentary on the issue beyond what has been stated by Justice Bannister with whose reasoning I am in accord. His view is that internal correspondence and legal research in principal are not allowed. In this case Queen's Counsel was retained at significant fees which severely curtailed the attendant obligations of Forbes Hare. It is unreasonable that the bill of costs should contain charges for research outside the fees already agreed for Queen's Counsel. I have listened to the submissions of the defendants with regard to the manner in which and the function of the internal discussions and the preliminary research required to be done and I remain unconvinced.

Costs allowed

[11] I painstakingly went through a line by line assessment with the parties and the allowable costs were arrived at after giving each party an opportunity to be heard on each line item. The figures finally allowed weredone in the presence of the parties cognizant of the relevant considerations and were allowed in the sum of $22,330.00 of the sum of 46,878.30 originally claimed. I further allow in full the disbursements of Forbes Hare in the sum of $2838.00.[1]

Liability for the costs of the assessment:

[11] I am required to determine who is to bear the costs on the application for the assessment and in what amounts.CPR 65.11(1)and (2) offers some direction on the issue, it states:—

(1) On determining any application except at a case management conference, pre-trial review or the trial, the court must –

[1] The parties had pointed out some discrepancies with the bill resulting in the slight difference in the figures allowed and with the parties record of what was allowed which I ultimately resolved in the defendant/applicants favour.

(a) decide which party, if any, should pay the costs of that application;

(b) assess the amount of such costs; and

(c) direct when such costs are to be paid.

(2) In deciding which party, if any, should pay the costs of the application the general rule is that the unsuccessful party must pay the costs of the successful party.

[12] Success of an application for assessment of costs is difficult to define. The claimant submits that it is the "accepted practice" that where the paying party is successful in reducing the bill significantly that party is usually considered as successful. Counsel for the claimants found support for his submission from the defendants themselves who agreed with his submission. In the present case the bill of costs was reduced by almost 50%.

[13] Fortunately the CPR offers me some reprieve from the "accepted practice" at 65.12 (6) to which I had directed the parties at the hearing. It states:—

"*The master or registrar may direct that the party against whom the bill isassessed pay the costs of the party whose bill is being assessed and, if so, must assess such costs and add them to the costs ordered to be paid."*

This provision to my mind speaks to a general rule that ought to be applied and I favour the flexibility of that principle over the "accepted practice".

[14] The general rule may be discounted in favour of another order usually in the court's discretion. Where the court exercises its discretion it must take into account all the circumstances including the factors set out in rule 64.6(6)

[15] In the latter stages of the assessment, in fact, it was after the court had assessed down the costs of the defendant,the claimant produced correspondence unfiled in the proceedingswhich showed that an offer in agreement of costs slightly in excess of the allowed figure, less disbursements and Queen's Counsel's fees had been earlier made to the defendants who unfortunately had not accepted it. The correspondence being "without prejudice" was unknown to the court until it was

produced by the claimants to support of their submission that they were to be treated as the successful party to the assessment and ought to be awarded their costs. The claimants relied on the correspondence to show the offer that they had made and to confirm that it was higher than the figure allowed on assessment and to also submit that it was expected that they would be allowed their costs.

[16] I have considered the submissions of the parties in relation to the costs of the assessment and have considered the bill of costs both unfilled by the parties. While I am under no obligation to accept documentation not filed in the proceedings and the parties are directed to rule 65.12 generally, in the interest of bringing finality to these proceedings and to stop the costs hemorrhaging I have opted to assess the costs of the hearings on assessment allowing a total sum of $5000.00 of which the defendant is awarded 50% of the costs allowed on assessment and the claimant is awarded 50% of the costs allowed on assessment,In effect setting off the costs of each party against the other.

Summary of overall award including the award of Mr. Justice Bannister.

1. The first to third defendants costs pursuant to their bill of costs is allowed in the following sums as follows:—
    (a) Fees of £5000/$7655 and disbursements of £6048.01/9259.50 and $510.10 for Brown Rudnick.
    (b) Queen Counsel's brief fee in the sum of £52,200.00.
    (c) Professional fees of Forbes Hare in the sum of $22,330.00 and disbursements in the sum of $2838.00.
    (d) Costs of the hearings on assessment are allowed at the rate of 50% and 50% to the first to third defendants and claimants respectively on the allowed sum of $5000.00.
2. Less sums already paid which I am advised is the sum of $52,352.50.
3. Interest on the total award is to run from the date of the hearing of the application for the stay being the 5th April 2013 to date of payment in full at the rate of 6% per annum.

V. GEORGIS TAYLOR-ALEXANDER

HIGH COURT MASTER