IN THE EASTEN CARIBBEAN SUPREME COURT

HIGH COURT OF JUSTICE

BRITISH VIRGIN ISLANDS

COMMERCIAL DIVISION

BVIHC (COM) 2012/130

BETWEEN:

MARUTI HOLDINGS PTE LIMITED

Claimant/Respondent

and

1. SINCLAIR STRATEGIES LIMITED
2. MICK CAHILL
3. PETER MOULTON

Defendant/ Applicant

Appearances :

Mr. Richard Brown together with Keisha Frett of Counsel for the Second Defendant
Ms. Oliver Clifton of Counsel for the First and Third Named Defendants
Mr. Brian Lacy of Counsel for the Claimant/Respondent

2013: September 26; October 15th
and 17th and November 21st

DECISION ON ASSESSMENT OF COSTS

Introduction

[1] The applicants succeeded on an application for striking out and summary judgment following which the court ordered, that the first defendant's costs of the proceedings and its application of the 16th April 2013; the second defendant's costs of the proceedings and its application by notice dated the 15th April 2013; and the third defendant's costs of the proceedings and its application by notice

dated the 15th April 2013 all consequent on their success to be assessed if not agreed. It was further ordered that the claimant do make interim payments on account of costs due to the first defendant in the sum of US$40,000.00 and on account of costs due to the second defendant in the sum of US$40,000.00 and on account of costs due to the third defendant in the sum of US$40,000.00. These sums remain unpaid. The applicants attempts to have costs agreed was unsuccessful. The second defendant/applicant has applied by application dated the 27th August 2013 to have their costs assessed and the first and third named defendants have applied by application dated the 4th September 2013.

[2] The respondent Maruti Holdings PTE Limited has since appealed the decision of the commercial court. Its application for the stay of the proceedings pending appeal was unsuccessful.

[3] The defendants filed a consolidated bundle for the hearing of the application containing schedules of costs detailing the professional fees and disbursements incurred for the second named defendant in the total sum of US$241,879.52 and the first and third defendants have applied for combined costs of US$247,760.60. These costs now stand to be assessed.

Assessed costs – CPR 2000

[4] The claim filed, although it allegs various causes of action was based primarily in intimidation alleging that the defendants had in effect bribed the claimant to secure their unjust enrichment, and had exercised intimidation in order to achieve their objective. The claim sought the return of US$21,000,000.00 which it alleged the defendants fraudulently forced the claimant to pay to them. The proceedings were summarily determined before case management conference. Had costs been determined on the basis of prescribed costs the sum payable on dismissal of the action would have been at US$21,000,000.00 x 0.5% x 55% =US$57,750.00, per defendant.

[5] Order 65.12 directs the court on an application for assessment of costs and the basis of quantification is contained in Part 65.2(1) which requires that I consider all relevant circumstances and the amount deemed reasonable were the work to be carried out by reasonably competent counsel and having regard to what is fair as between the paying and receiving party. In particular I am to consider:—

(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.

Consideration of Submissions

[6] I have considered the submissions generally and under the following heads which include the grounds advanced by the defendants :—

The care speed and economy with which the case was prepared

[7] The second defendants in their submissions suggested that it was with tremendous efficiency that counsel applied themselves to the proceedings. The claimant however challenges the defendants economic management of the proceedings advancing three overarching complaints that of (1) the number of Grade A fee earners who were attendant on the proceedings. In the case of the bill of costs for the second defendant there were two from the commencement of the proceedings to the 20th March 2013, and in relation to the first and third defendants there were three whose costs were in fact duplicated for the two defendants. Counsel submits that this is unjustified and unnecessary and it significantly increased the cost of the proceedings. No reasonable justification

has been advanced for overuse of Grade A fee earners. (2) The hourly rates used by the second defendant is excessive and although such rate is not fixed, there must be consideration dependent on the nature of the proceedings of the level at which fee earners should be applied. The claimant urges the court to discount any overuse and where there has been excessive fire power thrown after this case. The claimant submits that it has resulted in a significant and unnecessary increase in the costs.

[8] The early action of the defendants brought to swift conclusion proceedings which the trial judge referred to at paragraph [57] as being hopeless. The application challenging the jurisdiction of the proceedings was advanced in a two month period following service of the claim. It was the first and third defendant's application to strike that brought the proceedings to conclusion in the early stages if only because that application was heard first and thereafter it dispensed with the need for any further application.

The conduct of the parties before as well as during the proceedings.

[9] The second defendant urges the court to consider as the starkest example of the claimant's conduct the fact that it is already in breach of the order of Justice Bannister ordering an interim costs payment to each defendant in the sum of $40,000.00, which it was required to pay on or before the 1st of August 2013. He also asks the court to consider as relevant to the issue of conduct that the claimant has issued parallel proceedings in Australia and Singapore, against the second and third defendants. This, the second defendant argues is vexatious and oppressive as these proceedings were filed only to gain leverage in the BVI proceedings. Leave was granted by the Australia court to serve out on the second defendant Mick Cahill but such application has yet to be made in Singapore. The second defendant relies on Australian Commercial Research and Development Limited v ANZ Mc Craughan Merchant Bank Limited (1989) 3 All ER and the dicta of Browne Wilkinson to support his contention. Justice Browne Wilkinson said this:—

> *" In my judgment where a plaintiff seeks to pursue the same defendants in two jurisdictions in the same subject matter , the proceedings verge on vexatious."*

" In those circumstances it seems right that the defendant should recover fully the costs thrown away since they need never have been incurred at all but for the plaintiff's act."

The claimant's action the defendants' submit is deserving of reprimand to be reflected in the favourable consideration of the application and bill of costs of the defendants.

[10] The claimant opposes these submissions clarifying that the proceedings brought in Singapore were strategically commenced to avoid the statutory limitation. In any event costs in relation to the Singapore proceedings are to be recovered under these proceedings and ought not to impact these instant proceedings. As to the submission that it continues in violation of an order of Justice Bannister to pay interim costs, the claimant states that the second defendant is being less than truthful in the submissions levied. The claimant has notified the defendants that it has placed the interim costs award in escrow pending the appeal. Although the claimant's recently filed application for a stay of proceedings was denied by the Court of Appeal, Maruti unapologetically remains in contempt, opting of its own accord to avoid the difficulties of having to recover these costs if it is ultimately successful on appeal. The claimant submits that its conduct with regard to the interim payment is neither relevant conduct nor has it resulted in an increase of the costs of the defendants.

[11] Part 65.2(3) of CPR 2000 requires the court to consider the conduct of the parties before as well as during the proceedings. The Order of Justice Bannister of the 1st of August 2013, allowed the defendants' costs of the application as well as their costs of the entire proceedings. Consequently the claimant's conduct throughout the run of the proceedings, including its contemptuous conduct in relation to the interim award is relevant, which can be accounted for by an appreciation of the necessity for the energy thrown behind this case.

[12] I do not find the case of Australian Commercial Research and Development Limited v ANZ Mc Craughan Merchant Bank Limited (1989) 3 All ER to be at all relevant to the issues before me and it is a case distinguishable on its facts. I do consider the institution of parallel proceedings to be relevant to the assessment of costs in so far as it resulted in the increase of costs incurred in this jurisdiction, by perhaps reference to dialogue on strategy between counsels of the various

jurisdictions. In so far as the bill of costs reflects increases in the costs in that regard, these will be principally allowed.

Novelty weight and complexity of the case

[13] The facts as I appreciate them are not entirely simple, and are founded on a claim for blackmail which it is alleged was made by the second and third defendant to Pankaj Oswal to pay to them US$50 million which Oswal requested that Maruti pay on his behalf. The causes of action alleged are for duress exercised upon Maruti; intimidation of Oswal and/or Maruti through Oswal by threatening to commit unlawful interference with Oswal's economic interests; unjust enrichment at Maruti's expense and by reasons of threats; conspiracy to injure by unlawful means. The relief sought was for; rescission of compliance with the terms of the blackmail; a declaration that the payments received are held on trusts for Maruti; an account; restitution of the 21 million dollars paid over and equitable compensation. The second defendant submits that the claim raised several economic torts at least one of which was intimidation rarely argued before the commercial court and in that regard was of some novelty. The concept of unjust enrichment and piercing the corporate veil were the subject of two recent major English Supreme Court decisions where the issue of abuse of corporate liability warranting the lifting of a corporate veil was canvassed. Further counsel states that one of the grounds on which jurisdiction was challenged was that there was no good cause of action against the second named defendant. Each of these issues and generally principles of forum non conveniens had to be fully ventilated. The hearing of the application required a full day of argument which ultimately was of tremendous assistance to the court resulting in the conclusion that the causes of action were without merit. According to the defendants the legal submissions were complex and the factual background cumbrous. Counsel for the first and third defendants submit that the amount claimed of US$21 million is a considerable sum of money and the allegations levied serious enough to warrant the amount of costs incurred in defence of the action.

[14] Not surprisingly these submissions are challenged by the claimant who state that these matters were not unduly complex and certainly did not warrant three supervising Grade A fee earners, in the case of the second defendant. The affidavits of Thomas Carlil and Peter Moltoni by their lack

of length and content bear out the submission that the applications were not complex. I was also directed to the submissions filed in support of the application which the claimant submits was modest. The claimant submits that it is irrelevant to these proceedings that concurrent proceedings had been brought in Singapore, as the award of costs relate only to the BVI, and in so far as the proceedings were identical it would only result in the duplication of effort for which no additional charges ought to be incurred. That the first and third defendant spent 40 hours on legal research and the second defendant 18 hours the claimant submits is excessive. The claimant challenges research undertaken by Grade A fee earners as unnecessary and not the most efficient use of time. A Grade A fee earner's function is ordinarily to provide a supervisory role. The second defendant is incapable of satisfactorily justifying the use of two Grade A fee earners in the initial stages when one assumed the role of a Grade B fee earner resulting in an unnecessary increase in costs which the claimant ought not to bear.

[15] There is some merit to the claimant's submission. Ultimately the action was dismissed preliminarily and the costs incurred should reflect that this is not a matter that was prosecuted to trial. While I agree that the case raised issues of some complexity, I am mindful that the case was dismissed on issues raised on interim preliminary applications. I am not convinced that these preliminary issues raised any issues of particular novelty. The decision in VTB plc v Nutritek International Corpn [2013] 2 WLR 398 and Prest v Petrodel Resources Limited [2013] UKSC 34 too which the second defendant referred seemed to me to clarify and confirm the common law on circumstances of abuse warranting the lifting of the corporate veil, without expanding the principles on which it was founded. The fact that these issues may have been first time argued in this jurisdiction is of no moment to my consideration of novelty unless it alters the manner in which the law relevant to the BVI has since been operating. I am unconvinced. What resonates with me is the decision of Justice Bannister at paragraph [57] of his decision that the claim advanced on the pleadings might have assumed some relevance had the pleadings established the obligation by Maruti to pay because of its concerns that a disclosure to ANZ would have affected its economic interests. There being no such pleading and no proceedings having been brought by Oswal the conclusion was that the case was hopeless and had no prospect of success and disclosed no cause of action, and at paragraph [50] where he said that it was *'plain'* and '*obvious'* that Maruti had no case. In my view this was the principal reason why the proceedings were dismissed.

[16] In the circumstances I am prepared to concede that the causes of action raised were of some legal weight, with a heavy factual background, and there was diligence in the manner in which the claim was challenged. I do not consider this matter to be one to be distinguished on grounds of complexity.

The Importance of the Matters to the Parties.

[17] The action assumed importance to all parties involved. The second defendant submits that he is a professional corporate service provider of some repute who was accused of conspiracy to extort a client. The third defendant also seems to be a person of some reputation in his field. The allegations I agree were grave enough to require a frontal attack and robust response.

The Time Reasonably Spent on the Case

[18] The second defendant claims to have spent 240 hours on the proceedings up to and including the preliminary application. The first defendant submits a total time of 145 hours while the third defendant submits time of 119.45. This time does not include the time of Queen's Counsel who was retained to argue the application before the court. Most of the time and argument was spent in the critique of evidence on this ground. As earlier stated the claimant challenged the bills of costs submitted on essentially four grounds which I will use as the basis to determine the reasonableness of the costs claimed. Additionally I had informed counsel for the defendants of what I had noticed to be were duplication of costs particularly in the bills of costs of the first and third defendants bills and in so far as these were not addressed by the critical eye of the claimant's counsel would be discounted hereunder.

(a) Hourly rate for fee earners:—

The claimant submits that a rate of $850.00 for a Grade A fee earner is unusual and it is $75.00 higher than the Grade A fee earner of the first and third named defendant. The claimant states that it is not justified in the circumstances of this case. In response to questions from

the court, the second defendant clarified that the rate of its fee earner is not fixed but is assigned based on the circumstances of each case.

I had earlier concluded that the applications resulting in the striking out were not of particular complexity although they were factually heavy. I am cognizant that this is an application on which overseas Queens Counsel had been retained at a significant brief, and as such on shore Counsel had a limited function. I find no basis for the application of the fee earners at different rates for the defendants. I accept the claimant's proposed rate of $650.00 for a Grade A fee earner, where such fee earner was acting in a supervisory capacity. $625.00, where they were not, the sum of $600.00 for a Grade B fee earner and $475 for a Grade C fee earner.

(b) Necessity of and Duplication of Grade A Fee Earner.

I accept the submission of the second defendant that a client is free to choose whom he wishes to have represent him in any proceedings, and the fact that the proceedings of the second defendant is reflected to have two Grade A fee earners and then subsequently a Grade B fee earner, reflects the wishes of the client. No justification was advanced for the first and third defendants use of three grade A fee earners. In the Privy Council decision No. 43 of 2004 of Horsford v Bird Lord Hope of Craighead reasons the principle that no party can be expected to be fully indemnified for his costs. He said thus:

> *"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."*

The claimant submits that the costs properly recoverable for the second defendant from the 17th January 2013 until the 19th March 2013 should in so far as they are justified reflect one Grade A fee earner and a Grade B fee earner from the 20th of March 2013 only one Grade A fee earner is to be allowed in a supervisory capacity. And any duplication of fee earners are to to be discounted. I accept these submissions which to my mind are well reasoned.

(c) Duplication of Costs.

The first and third defendants whose interest in the proceedings were not dissimilar have filed separate bills of costs. I am guided by Part 64.7 of the CPR 2000 which provides that where two or more parties having the same interest in relation to proceedings are separately represented the court may disallow more than one set of costs. The implication being a consideration of whether there was a necessity to incur the additional costs of separate representation. A natural extension of this reasoning is in this case whether two defendants who have the same interest and are represented by the same legal practitioners ought to have their costs separately assessed and awarded. I agree with the claimant that wherever the bills of costs reflect a duplication both in respect of legal practitioner fees and disbursements that the costs claimed are to be discounted to the extent of the duplication.

(d) Legal Research

Having ruled that the matter raised no issue of novelty I find excessive the number of hours spent on researchI had earlier noted that overseas counsel had been retained for the purposes of the strike out applications at significant costs. There is no reasonable justification for such significant costs for legal research in view of the brief to Queen's Counsel. In this case I am prepared to allow fees for research in the initial stages at which time the defendants would have been engaged in advising themselves on the strength of a course or application they wished to pursue.

Award

[20] Having considered all of the relevant factors and made the discounts in consideration of the matters to which I referred, I have assessed the Bill of Costs for the second defendant in the sum of $131,831.50, for the first defendant and third defendants in the sum of $145,000.00.

Disbursements

[21] The disbursements claimed by the defendants can be broken down into two categories: (a) professional disbursements and b) other disbursements. No evidence was provided in support of

the disbursements. Mindful of all I said before and cognizant of the application being a preliminary application argued over one day. I award the professional fees of the first and third defendant jointly in the sum of £51,000.00/ together with the other disbursements allowed at $1050.00 and of the second defendant in the sum of £30,000.00 together with other disbursements allowed at $8,000.00.

The Defendants Costs on the Assessment of Damages

[22] I have assessed the costs of first and third defendants in relation to their application for assessment in the total sum of $4150.00. I have discounted the time of the Grade A fee earner to a total of one hour questioning the necessity for his level of overview and to discount what I agree is a duplication of charges in relation to the reviewing of submissions. Those hours are allowed at a fee of $615.00 resulting 615.00 x 1 = $615.00. Fees to the Grade B fee earner are allowed in the sum of $600 and for a total of 5 hours resulting 600.00 x 5 = $3000.00. The fees of the Grade C fee earner are allowed in the hourly rate of $500.00 for a total of 1 hour.

[23] I award the second defendants its costs on the assessment in the sum of $600.00 per hour for a total of three hours for Richard Brown and $500.00 for MM for a total of one hour and thirty minutes. For a total award of $2250.00

[24] Summary of Award

(a) I quantify the second named defendant's professional charges in the sum of $131,831.50; Queen's Counsel's brief fee in the sum of £30,000.00/$48,388.50; Costs on the application for assessment in the sum of $2300.00; and disbursements in the sum of $8000.00 for a total sum of $190,520.50

(b) I quantify the first and third defendant's costs in the sum of $145,000.00 for professional charges; Queen's Counsel's brief fee in the sum of £51,000.00/$82,260.45; costs on the application for assessment in the sum of $4150.00 and disbursements in the sum of $1015.00 for a total sum of $ 232,425.45 .

(c) The Court having issued an interim award each of $40,000.00 the amounts awarded are to be discounted by the sum of the interim award in so far as it has been paid.

(d) I further award interest on the amounts remaining outstanding at the judicial rate of 6% per annum from the date of judgment to payment in full.

V. GEORGIS TAYLOR-ALEXANDER

HIGH COURT MASTER