EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANGUILLA

AXAHCVAP2005/0003

BETWEEN:

OLIVER MACDONNA
(Personal Representative of Margaret Richardson, (Widowed) deceased)

Appellant

and

BENJAMIN WILSON RICHARDSON
(Personal Representative for John Richards Richardson, deceased)

Respondent

Before:

The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mr. Davidson K. Baptiste	Justice of Appeal [Ag.]
The Hon. Mr. Michael Gordon, QC	Justice of Appeal [Ag.]

Appearances:

Ms. Dahlia Joseph for the Appellant
Mrs. Joyce Kentish-Egan for the Respondent

2009: November 17;
2013: November 25.

Civil appeal – Application to strike – Costs – Costs to be assessed – Special circumstances – Whether Court should award costs outside of the one-tenth prescribed limit per CPR 65.11

In 2003, the appellant filed a claim opposing the respondent's ownership of a parcel of land. The claim was a non-monetary claim and no application was made to value the claim. The respondent filed a notice to strike out the claim. The claim was struck out and, without filing leave to appeal, the appellant filed a notice of appeal. The respondent was again successful on an application to strike out the appeal. Afterwards, there were a number of applications filed by the appellant and the respondent with the result that an application to strike came on for hearing before the Full Court. This application was conceded by the appellant on the morning of the hearing. At the sitting, the Court ordered

that costs in the Court of Appeal be assessed and that submissions be filed in relation thereto.

On that basis, the respondent submitted that costs should exceed the one-tenth limit prescribed by rule 65.11(7) of the Civil Procedure Rules 2000 ("CPR") as the special circumstances in the case would justify this. The special circumstances include the appellant's vigorous litigation in the matter, the respondent's hiring of senior counsel, the preparation for the hearing of an appeal and the appellant's failure to file leave to appeal.

The appellant argued that no special circumstances exist; as such the one-tenth prescribed limit would be applicable.

Held: awarding costs in the sum of $1,400.00, that:

1. The appellant's vigorous litigation of the matter along with (1) the respondent's hiring of senior counsel; (2) the preparation of the hearing of an appeal; and (3) the appellant's failure to file leave to appeal cannot be considered as special circumstances within the context of the CPR.

2. The Court should actively manage a case to give effect to the overriding objective of the CPR. In that regard, the cost orders ought to further that objective. The Court must keep in mind what was reasonable and proportionate. In light of this, a costs order in the sum claimed by the respondent, for a striking out application, can neither be fair nor reasonable.

   Rochamel Construction Limited v National Insurance Corporation Saint Lucia, High Court Civil Appeal SLUHCVAP2003/0010 (delivered 24th November 2003, unreported) followed.

JUDGMENT

[1] GORDON JA [AG.]: This is an assessment of costs pursuant to an order of the Court dated 13th October 2008.

[2] A short background to this assessment is as follows:

(i) Sometime in 2003, legal proceedings were instituted by the appellant concerning the ownership of a parcel of land registered as West End Block 180 IIB Parcels 181, 182, 199, 200 and Block 181 11B Parcel 28, 29, 30, 31, 32, 33 and 34 ("the land").

(ii) In 2004, Edwards J in the High Court acceded to an application by the respondent to strike out the claim as an abuse of process,

indicating that the issue of the ownership of the land had been conclusively determined in earlier proceedings. She held that the latest attempt before her, by another member of the same family that had previously claimed ownership of the land as against the registered owner, a member of a different branch of the family, was an abuse of process. She therefore struck out the claim on the respondent's application at an interlocutory stage.

(iii) In 2005, the appellant filed a notice of appeal of the judgment of Edwards J.

(iv) In 2006, an amended notice of appeal was filed by the appellant.

(v) In 2006, there was an application to strike out the notice of appeal by the respondent.

(vi) In that same year the appellant filed an affidavit opposing the striking out of the appeal.

(vii) In early 2007, Justice of Appeal Barrow struck out the notice of appeal and made an award of costs in favour of the respondent in the sum of $1,000.00.

(viii) In the same year the appellant applied to set aside the order of Barrow JA.

(viiii) On that application, Barrow JA set aside his previous order on the grounds that he had not seen the appellant's latest submissions when he had made it and directed that the application to strike out be considered afresh by a single judge of the Court of Appeal to be assigned by the Chief Justice.

(x) Later in 2007, the single judge assigned by the Chief Justice requested written submissions on the issue of whether leave to appeal from the order of Edwards J was required.

(xi) After written submissions were made, Barrow JA, the single judge of the Court of Appeal, again struck out the notice of appeal on 13th June 2007.

(xii) The appellant then filed an application to set aside that order of Barrow JA.

(xiii) On 29th June 2007, there was a written judgment of the Court in support of the order of 13th June 2007.

(xiv) In that same year, the appellant once again applied to set aside Barrow JA's order by way of an amendment of the notice of application. In this amended version, the appellant applied for permission to appeal.

(xv) On 10th October 2008, communication was sent by counsel for the appellant to counsel for the respondent stating that the appellant wished to discontinue the application for permission to appeal.

(xvi) On 13th October 2008, a notice of discontinuance was filed by the appellant. On that same day the Full Court ordered that costs in the Court of Appeal be assessed and that submissions be filed pertaining to such costs.

[3] All those matters have brought us to this point. As one can appreciate, the matter was quite a protracted one. It is noteworthy that Barrow JA stated in his judgment that the appeal before him was the seventh litigation event regarding ownership of the land.

The Assessment

[4] Barrow JA in Norgulf Holdings Limited et al v Michael Wilson & Partners Limited[1] confirmed that rule 65.11 of the Civil Procedure Rules 2000 ("CPR") applies to more than just procedural applications. He said:

> "A good starting point for appreciating this rule is not to be misled by its heading. The rule clearly applies to more than just procedural applications because paragraph (1) of the rule says that "on determining any application" other than at a case management conference, pre-trial review or at the trial, the court must: decide whether to award costs of that application and which party should pay them; assess the amount of such costs; and direct when they are to be paid. These are decisions the court must make for applications generally, and not just for procedural applications. Paragraph (2), similarly, is of general application in providing that the general rule is that the unsuccessful party must pay the costs of the successful party."[2] (My emphasis).

He summed it up by saying, "… rule [65.11] applies only where the court determines an application". As it was on the application to strike out that was being determined, it follows that rule 65.11 would apply.

[5] Rule 65.11 reads as follows:

> "Assessed costs – procedural applications
>
> 65.11(1) On determining any application except at a case management conference, pre-trial review or the trial, the court must –
> (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.

[1] Territory of the British Virgin Islands High Court Civil Appeal BVIHCVAP2007/0008 (delivered 29th October 2007, unreported).
[2] At para. 6.

(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.

(3) The court must take into account all the circumstances including the factors set out in rule 64.6(6) but where the application is –

(a) an application to amend a statement of case;

(b) an application to extend the time specified for doing any act under these Rules or an order or 5 direction of the court;

(c) an application for relief under rule 26.8 (relief from sanctions); or

(d) one that could reasonably have been made at a case management conference or pretrial review;

the court must order the applicant to pay the costs of the respondent unless there are special circumstances.

(4) In assessing the amount of costs to be paid by any party the court must take into account any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing and must allow such sum as it considers fair and reasonable.

(5) A party seeking assessed costs must supply to the court and to all other parties a brief statement showing –

(a) any counsel's fees incurred;

(b) how that party's legal representative's costs are calculated; and

(c) the disbursements incurred.

(6) The statement under paragraph (5) must comply with any relevant practice direction.

(7) The costs allowed under this rule may not exceed one tenth of the amount of the prescribed costs appropriate to the claim unless the court considers that there are special circumstances of the case justifying a higher amount."

[6] This rule notably states the principles by which the Court must guide itself in exercising its discretion in assessing and awarding costs. The discretion is especially conferred by rule 65.11(7). The rule also states that the Court, in deciding which party, if any, should pay costs, must take into account all the

circumstances of the case. Those circumstances include the factors set out in rule 64.6(6) which reads:

> "64.6 (6) In particular it [the court] must have regard to –
> (a) the conduct of the parties both before and during the proceedings;
> (b) the manner in which a party has pursued –
> (ii) a particular allegation;
> (ii) a particular issue; or
> (iii) the case;
> …
> (d) whether it was reasonable for a party to –
> (i) pursue a particular allegation; and/or
> (ii) raise a particular issue; and
> (e) whether the claimant gave reasonable notice of intention to issue a claim."

[7] In this case, it is the appellant to pay the respondent's costs. In accordance with rule 65.11(5), the respondent filed an application on 12th November 2008 for the assessment of costs.

[8] The claim was not a monetary claim, was never valued and there never was an application for the claim to be valued. The claim was struck out immediately after it was filed and I can accept that that was the reason for the lack of an application for the claim to be valued. This was further confirmed at the hearing for the assessment of costs when counsel for the respondent, responding to a question posed about the failure to file an application for budgeted costs, replied that the claim was filed and was immediately struck out on an application by the respondent, so that an opportunity did not exist to apply for budgeted costs.

[9] The value of the claim is relevant in the context of CPR 65. Counsel for the respondent is asking this Court to award a costs order against the appellant in the sum of EC$121,873.00.[3] This is of course not in keeping with the limit prescribed by the CPR 65.11(7).[4] At the risk of being redundant, CPR 65.11(7) states that, "The costs allowed under this rule may not exceed one tenth of the amount of the

[3] As can be gleaned from the bill of costs that was filed on 12th November 2008.
[4] I am not unmindful that the Court has a discretion to award costs outside of the prescribed limit.

prescribed costs appropriate to the claim unless the court considers that there are special circumstances of the case justifying a higher amount."

[10] Ordinarily a claim which is not a monetary claim would be deemed to have a value of EC$50,000.00 unless the court makes an order under CPR 65.6(1)(a). Rule 65.5 states that:

> "65.5 (1) The general rule is that where rule 65.4 [fixed costs] does not apply and 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.
>
> (2) In determining such costs the value of the claim is –
>
> …
>
> (iii) if the claim is not for a monetary sum – the amount of EC$50,000 unless the court makes an order under rule 65.6(1)(a)."

For completeness, rule 65.6(1)(a) states that a party may apply to the court at a case management conference to determine the value to be placed on a case which has no monetary value. Earlier, it was revealed why this was never done.

[11] Counsel for the respondent argued that there are special circumstances existing in this case, as such the Court should not fetter its discretion to award a costs order outside of the default value of the claim at $50,000.00. Counsel acknowledged that there have not been many instances where the Court went outside of the prescribed costs regime. Counsel submitted that in the absence of a tabulated list of what special circumstances are, each case must be judged on the circumstances attending that particular case.

[12] Counsel highlighted three (3) such circumstances that can be constituted as "special circumstances". Counsel advanced that firstly, the appellant had launched an onslaught on the respondent in several proceedings prior to the fixed date claim[5] in relation to the land even though there was a final determination given with respect to same. Counsel stated that contention surrounded the land

[5] Which was the claim that was struck out by Edwards J as an abuse of process.

from as far back as 1977. Counsel argued that the appellant cannot be separated from the parties in the previous proceedings as they stood in a privity relationship to the other. Counsel urged that the repetitive abuse of the court's process would constitute blameworthy behaviour of a type which the Court could consider as a special circumstance under rule 65.11(7).

[13] Counsel for the respondent further argued that the second illustration of a special circumstance was the preparation put into the case by counsel. Counsel submitted that the respondent's counsel had an obligation to prepare himself to argue the appeal as the appellant had requested that if they (the appellant) were successful on the application to strike, the Court should deal with the appeal on the same day. In essence, full preparations were made by counsel for the respondent to argue the appeal before the Full Court.

[14] The third illustration was the failure of the appellant to apply for leave to appeal notwithstanding Barrow JA's request that submissions be made on the issue as to whether the appellant required leave to appeal the judgment of Edwards J, with the effect being that if the appellant required leave, the appeal would be a nullity. Counsel proffered that this, coupled with the previous illustrations, created the special circumstances for the Court to award costs of a higher value than what would have normally been awarded. Counsel justified their bill of costs by stating that, in response to the appellant's senior counsel, Mr. Victor Joffe, QC, the respondent had to provide opposition of equal strength. Finally, counsel posited that a sufficient costs order would deter further applications and proceedings to challenge the respondent's ownership in the land.[6] Counsel did not provide the Court with any authority which would give that submission some force.

[15] The main thrust of the appellant's response is that a litigant's vigorous efforts to establish what he is convinced is his legal right should not be penalized with an

[6] In their written submissions, the respondent averred that the respondent's ownership to the land was established in legal proceedings in the High Court launched in 1977. On appeal, the respondent was successful. Then in 1990, proceedings were again brought against the respondent challenging his ownership. And again he was successful. In 2003, the appellant brought a claim yet again challenging the ownership of the land.

exceptionally high costs award. Further, that the respondent has not shown anything to suggest that the appellant pursued his case in any improper manner. Counsel made the point that the issues raised by the appellant were reasonable and ought not to negatively impact any costs order made by the Court.

[16] Counsel asserted that the three day notice given to the respondent, albeit short, was sufficient so that the respondent need not have incurred the costs associated with having Queen Counsel fly to Anguilla from England and appear at the hearing before the Court of Appeal on 13th October 2008. Counsel took the point that Barrow JA had awarded costs on the respondent's application to strike out the appellant's notice of appeal. This is indicative of the absence of special circumstances in the case; with that in mind, the sum claimed by the respondent can be neither reasonable nor fair in the circumstances.

[17] Counsel concluded that since no application was made to value the claim, in accordance with rule 65.2(b)(iii) the claim is valued at EC$50,000.00. Moreover, the respondent has failed to establish any special circumstances to justify a costs award in excess of the general rule laid down at rule 65.11(7). The respondent's bill of costs is inflated and an award of costs in the sum claimed by the respondent would be unreasonable and unfair in all the circumstances of the case.

Analysis

[18] It is of interest to note Byron CJ's comments at paragraph 10 of Rochamel Construction Limited v National Insurance Corporation:[7]

> "Claimants should be discouraged from bringing proceedings or making allegations which are spurious, in the sense that they are unsupported by evidence. A person should not be forced to waste expense to defend a claim that is not being prosecuted. Defendant should be encouraged to admit, at an early stage of the proceedings, allegations or claims which they cannot rebut. The Court should actively manage the case to give effect to the overriding objective… The cost orders ought to further that objective, by proper application of the rules that do exist."

[7] Saint Lucia, High Court Civil Appeal SLUHCVAP2003/0010 (delivered 24th November 2003, unreported).

[19] In that case, the National Insurance Corporation ("NIC") commenced proceedings to recover monies due by Rochamel under the National Insurance Act 2000. The claim was made jointly and severally against Rochamel as the employer and principal debtor and Mr. French and Mr. Lillywhite as directors of the company. A judgment in default was entered by the NIC against all three parties for failure to file a defence. Eventually, Rochamel admitted liability to the entire claim. On an application by counsel for the defence, the default judgment was set aside and French and Lillywhite were given leave to defend the claim. After a hearing of the matter to which Rochamel was not a party, the court ordered that Rochamel pay the costs of Lillywhite (alleged director of Rochamel) which the court fixed at $75,000.00 and that it would be jointly liable with French (whom the court found to be the manager of Rochamel) for the costs of NIC fixed at $150,000.00.

[20] On appeal, the Court examined the conduct of the parties before and during the proceedings. The Court found that it was unreasonable for the NIC to pursue the claim against Lillywhite because it had no evidence to support the allegations against him; as a result of this the NIC offended the concept of dealing with cases justly in that "Lillywhite was forced to waste expense to defend a claim that was not being prosecuted".[8] The Court set aside the costs order against Rochamel and held that, "It is completely inconsistent with furthering the overriding objective to order such substantial or punitive costs against a defendant who admitted liability before action and did not defend the claim in any way".[9] The Court ultimately found that the issue in the case was not a complex one; it did not relate to any specified amount of money, thus the value would be $50,000.000 and the costs $14,000.00. On that basis, the Court awarded Lillywhite $7,000.00 costs to be paid by NIC and costs in the sum of $2,950.00 on the previously obtained default judgment to NIC, to be paid by Rochamel.

[21] In the case of In the Matter of the Companies Act Cap 285 and In the Matter of the International Business Companies Act Cap 291 and In the Matter of a

[8] At para. 13.
[9] At para. 19.

Petition by RBG Resources PLC [In Liquidation] v In the Matter of RBG Global S.A,[10] on the question of costs, appellant counsel submitted that the director of the respondent failed to undertake any real investigation, and caused the litigation to be unnecessarily prolonged and the costs to be substantially increased. The appellant applied for costs in the sum of $270,000.00. Alleyne JA delivering the judgment of the Court pointed out that no application was made pursuant to rule 65.6(1) to determine the value to be placed on the case for the purposes of costs under the prescribed costs regime. Consequently the value of the claim would be $50,000.00 in accordance with CPR 65.5(2)(iii). The Court awarded costs in the sum of $14,000.00 in the court below and $9,333.33 in the appeal court.

[22] In Ernesto Sorrentino v Peter Clarke et al,[11] Alleyne CJ [Ag.] held that the proper basis for determining the value of the claim in the circumstances of that case was the application of rule 65.5(2)(b)(iii), whereby a value of $50,000.00 was derived.[12] That case featured a claim for ownership and title to land. One of the questions the Court had to decide was whether the learned master was wrong in determining the value of the claim on the basis of the value of the land.

[23] In my opinion, what counsel for the respondent has to convince this Court of is that the framers of the CPR contemplated that vigorous litigation, along with hiring of senior counsel, the preparation for the hearing of an appeal and the appellant's failure to file leave to appeal can be considered as special circumstances justifying a higher amount in costs. It must be remembered that CPR 65.2(3) makes specific provision for, inter alia, the conduct of the parties before as well as during the proceedings, the complexity of the case and the costs charged by a legal practitioner to his or her client. CPR 65.2(3), however, cannot be read in isolation from CPR 65.12 by which I am guided in this case.

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[10] Territory of the British Virgin Islands High Court Civil Appeal BVIHCVAP2003/0006 (delivered 12th January 2004, unreported).
[11] Territory of the British Virgin Islands BVIHCVAP2005/0019, (delivered 3rd July 2006, unreported).
[12] At para. 18.

[24] The Court is cognizant of the fact that an usually high costs order may dissuade potential claimants from advancing a claim that they firmly believe in. At the same time the Court cannot be too lenient and allow a continual abuse of the court's process by litigants who are unwilling to accept their fate, so to speak. With these factors in mind, and further, bearing in mind the criteria set forth in CPR 64.6(6) I have not been persuaded that this case warrants a costs order outside of the prescribed limit as the cumulative effect of the illustrations highlighted by counsel for the respondent, does not lend themselves to be "special circumstances". It is true that the appellant pursued this case with some vigour; at the same time it is also true, by respondent counsel's very own admission, that the case raised arguments of formidable complexity and legal technicality, which would prove that it was not a spurious case. The question posed by the Court regarding whether leave to appeal from Edwards J order[13] was required has troubled many practitioners over the years; some practitioners out of an abundance of caution choose to file an application for leave to appeal along with the notice of appeal. Counsel for the appellant's failure to file an application for leave to appeal is not egregious behaviour to my mind. Even coupled with respondent counsel's is other illustrations, this Court cannot sanction the appellant in costs outside of the one-tenth prescribed limit as imposed by CPR 65.11(7).

[25] An application to discontinue was filed in this case and it must be remembered it is on the application to strike that costs need to be determined for. The overriding objective of the CPR requires the court to deal with cases justly and fairly and award a costs order that is proportionate to the case.

[26] In Joseph W. Horsford v Lester B Bird and others,[14] 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 of the appellant's costs as were reasonably

[13] Under the amended CPR 2000, there now only exists the regime of interlocutory appeals so hopefully that has erased or at the very least diminished the confusion between interlocutory and procedural appeals.
[14] [2006] UKPC 55 at para. 7.

> incurred for the conduct of the hearing before the Board and were proportionate."

Barrow JA in this case, on a previous application to strike out the claim, awarded costs in the sum of $1,000.00.

[27] In conclusion, since the claim was not a spurious one and an application to value the claim was never made,[15] similar to the Ernesto Sorrentino case, the value for this case would be $50,000.00. Paying due regard to CPR 65.11(7) the costs allowed may not exceed one tenth of the amount of the prescribed costs appropriate to the claim; the prescribed costs being $14,000. In the circumstances, costs are assessed in the sum of $1,400.00.

[28] As a final comment, I should like to apologise to the parties and their counsel for the inordinate delay in rendering this decision. The blame rests entirely with the writer of the judgment.

Michael Gordon, QC
Justice of Appeal [Ag.]

Ola Mae Edwards
Justice of Appeal

Davidson K. Baptiste
Justice of Appeal

[15] Applying RBG case.