

EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

In the Matter of an Assessment of
Costs on an Interlocutory Appeal
from the Commercial Division.

BVIHCMAP2013/0006

BETWEEN:

[1] ANDRIY MALITSKIY
[2] IGOR FILIPENKO

Appellants

and

OLEDO PETROLEUM LTD

Respondent

and

BETWEEN:

OLEDO PETROLEUM LTD

Appellant

and

[1] ANDREY GRIGORYEVYCH ADAMOVSKY
[2] STOCKMAN INTERHOLD S.A.

Respondents

Before:

The Hon. Mr. Don Mitchell

Justice of Appeal [Ag.]

On written submissions:

Martin Kenney & Co. for the Appellants

Mr. Andrew Willins of Appleby for the Respondents

2014: March 6.

Civil appeal – Interlocutory appeal – Assessment of costs – Whether costs claimed are proportionate having regard to relevant considerations identified in the Civil Procedure Rules 2000 – Whether cost of each item was reasonable and reasonably incurred

Held: ordering assessed costs to the respondents in the sum of \$107,000.00, that:

1. The overall amount of costs charged by the respondents is proportionate and entirely reasonable and properly incurred. All of the items claimed, save those conceded by the respondents, appear both necessary and reasonable in such a complex interlocutory appeal. As such, the respondents are entitled by the order for costs that was made to be compensated for their costs expended in putting the applications before the Court.

ASSESSMENT OF COSTS

- [1] **MITCHELL JA [AG.]:** This is an assessment of costs on an interlocutory appeal made pursuant to an order of this Court of 16th August 2013.
- [2] The history is that the appellants filed their notice of application for leave to appeal on 4th February 2013. The respondents filed a notice of intention to oppose the application for leave, and filed an application for security for costs of the appeal and for leave to adduce additional evidence on 5th March 2013. These applications came on before the Court of Appeal at an oral hearing on 6th May 2013. The Court granted the appellants leave to appeal, and ruled that the applications for security for costs and for leave to adduce additional evidence should be restored after the notice of appeal had been filed. The Court ordered that the costs of the application for leave to appeal should be treated as costs in the matter.
- [3] The notice of appeal was filed on 30th May 2013 together with skeleton arguments and authorities. The respondents filed their cross appeal/counter notice and their skeleton arguments in support of each.

[4] On 16th August 2013 I dismissed the appeal and the cross appeal, and ordered the appellants to pay the respondents' costs of the appeal in the following words:

"[5] The appellants will pay the costs of this appeal to be assessed by me if not agreed within 30 days of the date of this order. If there is no agreement, the respondents are to file and serve submissions on costs within 30 days thereafter. Any submissions from the appellants are to be filed and served within 30 days of service upon them of the respondents' submissions. Any response by the respondents to be filed and served within 14 days thereafter."

[5] I now have before me a costs bundle containing a schedule of the respondents' costs of the appeal; Points of Dispute served by the appellants; the respondents' Consolidated Points of Reply; and reply submissions of the respondents on the issue of costs. There are various legal authorities in the bundle which I have considered.

[6] The respondents seek a total of \$101,622.50 to cover the fees of four attorneys, and disbursements of \$6,270.72. The four attorneys are Peter McMaster, QC who billed 76.5 hours at \$800.00 to a total of \$61,200.00; Andrew Willins who billed 23.5 hours at \$650.00 to a total of \$15,275.00 and 24.1 hours at \$675.00 to a total of \$16,267.50; Sarah Masson who billed 9.8 hours at \$450.00 to a total of \$4,410.00 and 3.1 hours at \$500.00 to a total of \$1,550.00; and Jonathan Ward who billed 7.3 hours at \$400.00 to a total of \$2,920.00. In addition there is a claim for disbursements of \$6,270.70. This is made up of stamps of \$3.93; administrative fees (Immigration) of \$1,252.50; travel, accommodation and meals of \$3,052.97; and printing costs of \$1,961.30.

[7] The appellants dispute the amounts claimed as being unreasonable and/or excessive. The two general points of objection are:

(1) an application for leave to appeal is essentially a without notice procedure and the respondents were not entitled to file an objection or to otherwise oppose the appellants' application for

leave to appeal, and the respondents are not entitled to recover costs incurred as a result of their decision to do so;

- (2) no order for costs was made in relation to the respondents' applications for (a) security for costs; and (b) leave to adduce further evidence. No determination was made by the Court in relation to either of these applications. The former application was referred to the court below. The respondents are therefore not entitled to recover costs associated with either of these applications from the appellants in the same way that the appellants are not entitled to recover their costs of the unsuccessful cross-appeal from the respondents.

The appellants have further detailed objections to each of the items claimed both as fees and as disbursements. The respondents concede a number of the minor objections but reject the majority.

- [8] Following the guidelines in **Lownds v Home Office Practice Note**,¹ I apply a two-stage approach in assessing these costs. First I shall assess whether, on a global approach, the costs claimed are proportionate, having regard to any relevant considerations identified in the **Civil Procedure Rules 2000**. If I conclude that the costs claimed are not, overall, disproportionate, I shall satisfy myself that each item was reasonably incurred and the cost of that item was reasonable. In performing this exercise I must resolve any doubt as to whether any item was reasonably incurred, or was reasonable in amount, in favour of the paying party, the appellants.

- [9] First, on the objection that the respondents should not have their costs of appearing at the application for leave to appeal, I accept the submissions of the

¹ [2002] EWCA Civ 365; [2002] 1 WLR 2450.

respondents that it was open to the appellants at the oral hearing of the application for leave to contend that there should be no order for costs or that the respondents' costs should be in the appeal. They did not do so and they cannot re-argue the position now. The Court has already by its order of 9th May 2013 ordered that the costs of the leave application were to be costs in the appeal. The Court by its order of 16th August 2013 has ordered the respondents to have the costs of the appeal. The result is that the appellants have been ordered to pay the costs of the application for leave.

[10] I do not accept the appellants' second general objection that no order for costs was made on the respondents' application for security for costs of the appeal. The application constituted an integral part of the appeal and was fully argued by both parties, and was considered by the Court. The appeal having failed, there was no point in the Court considering the application further. The application was not dismissed as lacking merit or for any other reason. The respondents are entitled by the order for costs that was made to be compensated for their costs expended in putting this application before the Court.

[11] The application by the respondents for leave to adduce further evidence fell by the way when the appeal was dismissed without requiring recourse to the additional evidence. That does not in any way invalidate the respondents' application which was placed before the Court and argued. The respondents are entitled by the order for costs to be compensated for their costs expended in putting this application before the Court.

[12] I see no merit in the submission of the appellants opposing the retaining by the respondents of senior counsel from the Cayman Islands. The appellants themselves retained leading counsel from London. Additionally, in a complex and document-heavy case such as this was, an amount of duplicative reading of

skeleton arguments was inevitable, and the objection on this basis is not maintainable.

[13] This is an interlocutory appeal in a US\$71.6m claim in which both parties instructed leading counsel. The total costs incurred by the respondents are \$107,893.20. If the appellants' contentions are accepted, the sum they contend that the respondents should recover amounts to some \$11,625.00, if the respondents' mathematics is correct. I note that the appellants have not offered to provide details of their own costs so that the Court may perform a comparison to see whether the overall costs claimed are disproportionate.² The appellants take no issue with the hourly rates charged, which suggests they are not unreasonable. So far as the first stage, explained in **Lownds v Home Office** (at paragraph 8 above) is concerned, I am satisfied that the overall amount of costs charged by the respondents is proportionate and entirely reasonable and properly incurred.

[14] So far as the second stage is concerned, I see no merit in the various detailed objections made by the appellants to the items claimed for time spent by the various attorneys on this appeal, including those objections on the basis of duplicative effort, unnecessary work, and excessive charges, etc. All of the items claimed, save those conceded by the respondents, appear both necessary and reasonable in a complex interlocutory appeal such as this was. The small amounts conceded by the respondents are not quantified. I would account for them by rounding off the amount claimed for costs downwards, and I would order that the respondents have their costs on the appeal assessed at \$107,000.00.

² As recommended in *Lord Chancellor v Rees* [2008] EWHC 3168 (QB), admittedly in a criminal legal aid case.

[15] The order is that the respondents' costs on the appeal are assessed at \$107,000.00.

Don Mitchell
Justice of Appeal [Ag.]