

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM NO: BVIHCV (COM) 2 OF 2014

Between:

**MOSHE SARAGA
PNINA SARAGA
CHINA FURNITURE GROUP LIMITED
EM EXPORT LIMITED**

Claimants

and

REEM MAYER

Defendant

APPEARANCES:

Eleanor Morgan for the claimants

Jeremy Childs for the defendant

2014: April 28;
May 27
Reissued: September 22

REASONS FOR DECISION

Application and arguments

- [1] There are two applications before the court. The first was filed on April 28, 2014 by the defendant for an assessment of costs. The second application was filed by the claimants for a stay of the application for the defendant's assessment of costs. The defendant (hereinafter the respondent) has applied to the court for an assessment of costs awarded by His Lordship Bannister J on April 4, 2014(the order). The order was made following the claimants' (hereinafter the applicants) successful application to set aside the

appointment of Stuart Mackeller and Lauren Lau as receivers of the China Furniture Group Ltd, the third applicant herein. The first and second applicants were ordered to pay the respondent's costs of the application to set aside the receivers' appointment (paragraph 6 of the order). The applicants were dissatisfied with His Lordship's order and appealed it on April 25, 2014 (Civil Appeal No. 16 of 2014). The applicants also applied to Bannister J on April 23, 2014 for an interim order appointing the same receivers pending the appeal. This application was refused. The appeal is also against Bannister J's order to refuse the April 23, 2014 interim application. The application for the assessment of costs was filed on April 28, 2014 (the assessment application) and is scheduled for determination at today's hearing.

[2] The applicants have filed an application yesterday, May 26, 2014 seeking a stay of today's assessment application pending the outcome of the appeal against the order (the stay application).

[3] The assessment application is first in time and as a general rule should be heard first. However, the outcome of the stay application may impact whether the assessment will be heard today. As such the stay application will be considered first. Counsel for the applicants submits that the stay application should be granted on the grounds that –

- (1) The applicants have filed an appeal of the order;
- (2) Within the notice of appeal, the applicants have sought a stay of paragraph 6 of the order. The applicants had applied to the court of appeal for interim relief. A case management hearing was conducted but the court of appeal did not pronounce on the request for a stay set out in the notice of appeal; and
- (3) If the appeal is successful, the costs of the assessment will be wasted.

[4] In response, counsel for the respondent submits that there is no automatic stay of an appeal. The grant of a stay is discretionary and must form the subject of an application in that regard. The grounds for the stay of an award of costs would have to be exceptional since there is nothing extraordinary about assessing the costs of a successful party even though an appeal has been filed. Counsel also submits that the applicants have not made the

stay application in a timely manner. The applicants have had several opportunities from the time of the grant of the order on April 4, 2014 to make the stay application. The applicants have not pursued those opportunities. Even at the time of applying to the court of appeal for interim relief, no application for a stay was made and as such no relief for a stay could be granted or was indeed granted. Finally, counsel for the respondent submits that the respondent is entitled to his costs. He has been without his moneys since the time of the award of costs in his favour and there is no legal basis on which to deny him the fruits of the order. An assessment quantifying and awarding him costs would not be wasted if the applicants are ultimately successful on appeal.

Analysis and conclusion

- [5] The court agrees with Mr. Childs that the grant of stay of an order pending appeal is discretionary. The court also agrees that the applicants would have to demonstrate that there are solid grounds justifying the grant of a stay at this juncture. As Olivetti J.A pointed out in **Courtesy Taxi Co-operative Society Ltd v Lucien Joseph**¹ citing from **Hammond Suddards Solicitors v Agrichem International Holdings Ltd**² *“the essential question is whether there is a risk of injustice to one or other or both parties...”* if the stay is granted or refused. Her Ladyship correctly instructed that the court must look at all the circumstances of a case including whether the appeal has a reasonable prospect of success and the injustice caused to one or both of the parties if the stay is granted or refused. Further, in dealing with matters, the court is always reminded to bear in mind the overriding objective of dealing with cases justly. In this regard much turns on the fact that the respondent has had costs awarded in his favour since April 4, 2014. He is entitled to his costs. The court must however, agree with Mrs. Morgan that the nature of the assessment in this case is not of the run of the mill sort. The bill to be assessed in this case covers about 18 pages and amounts to a total of \$282,648.00. The estimated time to conduct the assessment is (3) to (4) hours. The hourly rate of counsel for the respondent is \$850.00 per hour. Mrs. Morgan hourly rate is not far less.
- [6] Among the other factors to be considered is the fact that the stay application has been brought almost in the dead of night. There was more than ample opportunity to seek a stay of the order. The

¹ Saint Lucia HCVAP 2008/0043 at paragraph 14

² [2001] EWCA Civ. 2065

court does not agree that there was an application for a stay before the court of appeal and as such, this was another squandered opportunity to seek a stay. The respondent is prepared to present his application for an assessment of costs at today's hearing. However, when the court balances the justice of whether the stay should be granted or refused, I agree with Mrs. Morgan that an assessment at this juncture would be time consuming and only add to the costs. The process and costs of assessment would be totally wasted if her client is eventually successful on appeal. Additionally, without forecasting the ultimate outcome of the applicants' appellate motion, it is readily apparent that the applicants' grounds of appeal have more than a fanciful prospect of success. The court is of the view that, in all the circumstances, a stay should be granted pending the outcome of the appeal.

[7] As said above, the court is not unmindful of the position of the respondent. He has an award of costs to be assessed if not agreed. But for the circumstances outlined above in these reasons, he should not be kept out of his money by any delay. Cognizance is taken of the court's power under Part 69B13 of CPR 2000 to make an order for the payment on account of the costs to be paid by a party on assessment. It would seem to me that after taking into consideration all the facts just outlined and after a preliminary assessment of the sums that the respondent is likely to be awarded on an assessment, that he should be awarded a fair percentage of what he may be awarded on a detailed assessment. A payment on account can be made in this case after giving both parties an opportunity to be heard.

[8] The amount of costs sought by the respondent is in the range of \$282, 648.00. Mr. Childs' submits that he continues to object to any stay of the assessment application. Mrs. Morgan suggests payment on account in the sum of \$100,000.00. The respondent, while objecting to the grant of the stay, posits that if the grant of a payment on account is to be made, the court should award no less than \$150,000.00. A preliminary review of the assessment application suggests that the award of a sum of \$150,000.00 seems fair as a payment on account. Mrs. Morgan has urged me to remember that in dealing with an assessment of costs, the court will have to consider issues of proportionality in arriving at a fair award. Counsel submits that the application which led to the order for costs did not last for more than (3) hours. Counsel continues that a claim for costs for an application that did not proceed beyond that length of time should not amount to \$282,684.00. Mrs. Morgan does acknowledge that there are other factors. Accordingly her points of dispute challenge, among other things, the number of hours spent

preparing for the assessment and the claim for the number of counsel assigned to and dealing with the matter.

[9] I agree that while the eventual assessment will consider issues of proportionality, it must focus on a great deal more than the length of time the parties spent arguing the application which led to the order for costs in the respondent's favour. The application to set aside the appointment of the receivers was not a simplistic affair. The stakes are high. The parties are engaged in battle over a substantial amount of money and for control of significant assets of the companies involved. The respondent would have had to spend a great deal of time reviewing the application for appointment of the receivers. A considerable amount of time would also have been spent researching and preparing for the application to set aside the order appointing the receivers. At this juncture the assessment is not a forensic analysis of the costs to be awarded but the court's own preliminary assessment of the possible costs that may be eventually allowed to the respondent. In this regard, on the full assessment, the respondent will have to present stronger justification for the number of counsel assigned and engaged in both reviewing the appointment of the receivers and preparing for the application to set aside the appointment of the receivers since, cursorily, it would not seem to me that an application of this nature would not require the input of more than (2) or at the most extreme (3) attorneys of some seniority for research, review and presentation.

[10] After taking all these matters into consideration, I am satisfied that a payment on account in the sum of \$150,000.00 is a fair award to make to the respondent pending the full assessment of the costs awarded in his favour. It is therefore ordered that –

- (i) The application for a stay of the assessment of costs pending the appeal is granted;
- (ii) The applicants are to pay to the respondent the sum of \$150,000.00 on account of costs to be paid by them on assessment of costs;
- (iii) The payment on account is to be made within 14 days of today's date;
- (iv) The costs of today's proceedings assessed in the sum of \$6,375.00 are to be paid by the applicants to the respondent within 14 days of today's hearing.

Raulston Glasgow
Master (ag.)