

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANGUILLA

AXAHCVAP2013/0005

BETWEEN:

CLIVE HODGE
(as Administrator of the estate of the late Rupert Hodge, deceased)

Appellant/Applicant

and

ELFRIDA ALETHEA HUGHES
(in a personal capacity and as Administratrix of the estate of the late Leopold
Bomont Hodge, deceased)

Respondent

Before:

Kimberly Cenac-Phulgence

Chief Registrar

Representation:

Ms. Jenny Lindsay of Jenny Lindsay & Associates for the Appellant/Applicant

Ms. Tara Carter of Caribbean Juris Chambers for the Respondent

2016: November 10.

DECISION ON ASSESSMENT OF COSTS

Background

- [1] This decision concerns an assessment of costs on an application for injunctive relief. It is helpful to provide a background to this appeal so that the circumstances giving rise to this assessment are clear. The appellant/applicant, Mr. Clive Hodge (“Mr. Hodge”) obtained leave to appeal from the High Court on 11th July 2013 and appealed against the decision of Mathurin J dated 9th July 2013 in which she struck out his claim which he had brought. Mr. Hodge also applied to the High Court for an injunction to preserve the property which was the subject of

the proceedings (**"the Property"**) by application dated 19th July 2013 and by order dated 17th October 2013, the learned judge dismissed this application. It is apparent from the record that Mr. Hodge had also applied for a stay of execution on that occasion which was granted.

- [2] On 28th October 2013, Mr. Hodge applied to the Court of Appeal for injunctive relief requesting an order that the respondent, Ms. Elfrida Hughes (Ms. Hughes) be restrained, until after the hearing of the appeal, from selling, renting, mortgaging or otherwise disposing of the Property, or any interest therein.
- [3] The appeal was heard on 23rd and 24th June 2014 and the Court allowed the appeal and ordered that the matter proceed to trial before a different judge. Mr. Hodge was awarded two-thirds of the costs awarded in the court below and the costs below. It was also ordered by consent, that "the stay of execution granted in the order dated 17th October 2013 is extended until final determination of the matter". The respondent, Ms. Hughes whether acting by herself or her husband, their servants or agents agreed not to enter or deal with the Property until final determination of the matter. The court also ordered that costs were to be assessed failing agreement within 14 days which appears to be referring to costs on the application for the injunction.
- [4] Mr. Hodge filed an application for assessment of costs of the injunctive relief application on 25th September 2015 with an attached costs schedule in the sum of US\$10,281.00 on the injunction application and US\$1,993.24 on the application for assessment of costs. The respondent, Ms. Hughes filed an affidavit in response and submissions.
- [5] This application came up for hearing before a single judge of the Court of Appeal on 20th October 2015 and the order of even date was discharged and set aside by the Full Court on 8th December 2015. The court held that the costs awarded by the single judge related to the hearing of the appeal which had already been the

subject of an order and not to the application for injunction which remained outstanding. The court therefore directed that the application for assessment of costs in relation to the injunctive relief application be referred to the Chief Registrar.

- [6] For the purposes of this assessment, counsel for Mr. Hodge relies on the application for assessment of costs and costs schedule filed on 25th September 2015 and skeleton arguments filed on 8th February 2016. The respondent relies on the affidavit in reply of Mr. Albert Hughes and submissions filed on 8th October and 13th October 2015 respectively.

Submissions

Conduct of the parties and complexity of the matter

- [7] The conduct of the parties is a factor to be taken into account in assessing the reasonableness of the costs to be awarded. Counsel for Mr. Hodge has very forcefully submitted that it is the conduct of the respondent that has led to the application for the injunction being necessary and that in much the same way that there was an agreed position for the entry of an injunction on the day when the matter came up before the Full Court, this could have been done way before obviating the need for the injunction application in the first place. There would have been no need for the matter to have been set for hearing by the Full Court.
- [8] Counsel, Ms. Lindsay also submits that she wrote to counsel for the respondent attaching the schedule of costs and that no response was forthcoming. They could have objected to the costs at the point. Due to the fact that there was no agreement, Mr. Hodge was forced to make the application for assessment. That there have been discussions on the matter of costs is supported in the affidavit of Mr. Albert Hughes in opposition to the application for assessment. However, the respondent avers that since the making of the application they have tried to negotiate and agree a reasonable amount but **Mr. Hodge's counsel** did not agree

to any of the offers made. Attached to the affidavit is an email dated 22nd May 2015 in which counsel for the appellant/applicant, Ms. Lindsay states as follows:

“...We informed you that US\$3000.00 is the sum our client is looking for. To prevent the costs of an assessment of [costs] in the court of appeal we would have expected your client to be reasonable. The matter concerned the injunction at court of appeal level. Therefore this amount is entirely reasonable. The sum of US\$500.00 [c]an be set off against it and your client would pay ou[r] client US\$2,500.00 in settlement of the appeal costs on the injunction.”

[9] Ms. Lindsay contends that the application for the injunctive relief was necessary because of the behaviour of Ms. Hughes in relation to property which she accepts belongs to Mr. Rupert Hodge and her refusal despite being invited to do so, to enter into an agreed position.

[10] Counsel for Ms. Hughes, Ms. Tara Carter argues that there was no need for the injunction application as a stay of execution had been granted and that this prevented the respondent from dealing with the Property. With all due respect to counsel, this seems not be **supported by the Court’s order which extended the** stay of execution that had been granted previously and also entered the terms of the injunction which had been agreed by consent. If there was no need for the injunction, the Court would not have encouraged discussions to take place between the parties on the day the matter came up for hearing. The stay of execution was clearly in relation to the order striking out the claim. Counsel for Ms. Hughes also argues that there was no urgency in obtaining the injunction since although the matter was filed in October 2013, when it came up for hearing in December 2013, counsel for the appellant/applicant was not available to deal with the matter and it was adjourned to June 2014. Counsel submits that if it was so urgent, counsel for Mr. Hodge would have made arrangements to have the matter dealt with more expeditiously.

[11] Learned counsel Ms. Lindsay further contends that the matter before the court was not a run of the mill case; that it was a large, complex, high value matter involving estate property and family relations and it has special circumstances given the

factual matrix. Therefore, she submits that the costs claimed are reasonable and justified. Ms. Lindsay further submits that the costs are a fraction of the value of the land and property that the respondent has attempted to appropriate. The value of the land I dare say has nothing to do with the costs to be paid on the injunction application.

[12] In response, learned counsel, Ms. Carter submits that the amount claimed by the appellant/applicant is excessive and embellished and ought to be significantly reduced. Ms. Carter says that costs should be reasonable and just given the circumstances of the case. Counsel contends that it is wholly unreasonable that that level of costs would be incurred on an application for an injunction. This is so given among other things, the fact that no arguments were advanced in support of or against the application for the injunction at the hearing in June 2015; and that since the hearing Ms. Lindsay had offered to accept US\$3000.00 as reasonable costs on the injunction application¹ and then submitted a bill for costs in excess of US\$10,000.00. Ms. Carter further contends that this was not a large, complex and high value matter. It did not touch and concern the substantive issues in the case. Rather, the application was a straightforward one to decide whether Ms. Hughes should be prevented from accessing the Property during the time that the matter was being decided.

[13] Ms. Carter referred to the case of Elfrida Hughes v Clive Hodge² where the Court of Appeal on an appeal against an award on assessment of an application to strike out reduced the sum awarded to US\$1,500.00 to support her contention that the sum claimed is unreasonable in this case.

Disbursements

[14] It is to be noted that cost of postage, couriers, outgoing telephone calls, fax and telex messages will in general not be allowed unless unusually heavy. Nor will the

¹ Email dated 22nd May 2015.

² AXAHCVAP2012/0004, delivered 27th November 2012, unreported.

cost of making copies be allowed unless they are unusually numerous.³ In this regard, I note that the appellant/applicant has provided no supporting documentation for amounts claimed in relation to the disbursements most of which relate to copies of documents made.

Basis of quantification of Costs

[15] Rule 65.2(1) of the Civil Procedure Rules 2000 (CPR 2000) provides the basis for quantification of costs and states that in exercising the discretion as to the amount of costs to be allowed, the court must allow as costs a sum that (1) it deems reasonable were the work to be carried out by a legal practitioner of reasonable competence and (2) which appears to it to be fair both to the paying and receiving party. In deciding what is reasonable, the court must take into account all the circumstances including (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; and (g) the time reasonably spent on the case.⁴

[16] It is well established that costs must be proportionate as well as reasonable. In the case of *Lownds v Home Office*⁵, Lord Woolf CJ in discussing the approach to be adopted in assessing costs stated:

“In other words what is required is a two-stage approach. There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which CPR 44.5 (3) [which is similar to our CPR 65.2 (3)]⁶ states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the costs of that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want

³ *Blackstone's Civil Practice 2016*, para 71.51.

⁴ CRP 2000, Rule 65.2 (3).

⁵ [2002] 4 All ER 775.

⁶ My insertion.

to be satisfied that the work in relation to each item was necessary and, if **necessary, that the cost of the item is reasonable.**⁷

- [17] A party is not entitled to be fully indemnified for his costs. Rather he is entitled to reasonable costs. In the Privy Council decision of *Horsford v Bird and others*,⁸ 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 costs as were reasonably incurred for the conduct of the hearing before the judge and were proportionate.”

And in *Michael Wilson & Partners Limited v Temujin International Limited et al*,⁹ Hariprashad-Charles J said this which I agree with:

“...But, costs must not be embellished and unreasonable. It is not a punishment. It must be fair and reasonable in all the circumstances of the case.”

Assessment

- [18] Applying the principles as outlined in *Lownds v Home Office*¹⁰, I find the sum of \$10,281.00 which includes disbursements to be unreasonable and excessive in light of (1) the nature of the matter being dealt with; (2) the fact that the application was never argued before the Court and appearance in Court for this matter was **not for any lengthy period based on counsel's account and (3) the fact that** counsel for the appellant accepted and put forward that US\$3000.00 was a reasonable sum as costs in relation to the injunction application. I am not persuaded by counsel for Mr. Hodge that this application was of a complex nature. This was an application for an injunction which does not appear to have been very complicated at all.
- [19] The schedule of costs as presented by counsel for Mr. Hodge is woefully inadequate and in some aspects confusing as it is not properly itemized, there is no evidence to support some of the amounts claimed. A bill when presented on

⁷ [2002] 4 All ER 775 at 782 para [31].

⁸ [2006] UKPC 55 at para. 7 (delivered 28th November 2006).

⁹ BVIHCV2006/0307 at para 74 (delivered 20th June 2008).

¹⁰ See fn 5 above.

an assessment should be sufficiently detailed so as not to leave the court to speculate in relation to amounts claimed.

[20] Having determined that the overall figure is not reasonable, I will now proceed to look at each item of the Bill of Costs individually with a view to assessing reasonableness and necessity. I **accept counsel's hourly** rate of US\$400.00 in the absence of any contrary rate or objection by the respondent.

- Item No. 1 - 25/10/2013 - Amount reduced from \$400.00 to \$200.00. The writing and sending of an email and letter for signature to the other side could not reasonably have taken 1 hour.

Amount of \$400.00 for preparing and reviewing affidavit and sorting out the application for injunction allowed.

- Item No. 2 - 27/10/13 - Amount of \$800.00 allowed for continuation of preparation of injunction application.
- Item No. 3 – 28/10/13 - Amount claimed reduced from \$824.35 to \$220.35. Based on the learning in **Blackstone's**, disbursements are not normally allowed except where they are numerous. The letter to the Court of Appeal was a routine cover letter which required no effort. Charges for the letterhead and large envelope disallowed. No evidence to support the printing costs of \$240.00 provided and this is therefore disallowed. The cost of copies is allowed although no evidence to support the cost was provided. The cost of \$280.00 for travelling to the High Court Registry and filing documents is disallowed. As the respondent noted, 42 minutes to travel to the Registry and file documents in Anguilla seems a bit unreasonable.
- Item No. 4 – 31/10/13 - Amount allowed at \$600.00 for commencement of preparation of written submission on the injunction application.
- Item No. 5 – 01/11/13 - Amount reduced from \$1,419.00 to \$607.00. The amount of \$400.00 for drafting and reviewing submissions is considered

reasonable and is allowed. Here again there is a figure of \$520.00 with respect to printing but no evidence in support thereof and this is disallowed. Costs relating to dividers and travelling costs to the Registry are not allowed. Costs in relation to copies and court fees are allowed.

- Item No. 6 – 03/11/13 - Amount of \$28.60 disallowed. Based on the learning in **Blackstone's** earlier cited, the amount for courier fees disallowed.
- Item No. 7 – 07/11/13 - Amount of \$80.00 disallowed. The amount is disallowed as it is an unreasonable amount for simply re-sending correspondence sent previously.
- Item No. 8 – 17/06/14 - Amount of \$84.50 disallowed. There is no particularity to the amount claimed. It is stated to be in relation to overseas calls to the Court of Appeal but no specifics as to the number of such calls made is stated.
- Item No. 9, 10 and 11 – 18/06/14-22/06/14 - Amount of \$2080.00 claimed in relation to appeal preparations-injunctions vague as it does not indicate what time relates to the injunction application to which this assessment relates. The amount claimed seems to be in relation to preparation for the substantive appeal hearing as well as the injunction hearing. It is reasonable given that this relates to an injunction application that 1 hour preparation would suffice. Amount of \$2,080.00 reduced and allowed at \$400.00.
- Item No. 12 – 23/06/14 – Amount of \$1215.00 claimed for this date relate to the appeal hearing and not to the injunction application which is the subject of this assessment. Amount therefore disallowed.
- Item No. 13 – 24/06/14 – Amount of \$535.00 disallowed. I accept the evidence of the respondent that there was no hearing or arguments in relation to the injunction application. The parties were asked by the court to enter into discussions so that the time spent in court was minimal.

- Item Nos. 14 and 15 – 18/06/15 and 21/0615 - Amount of \$1,814.50 disallowed as these costs relate to preparation for the assessment of costs rather than the injunction application.
- The costs listed for 22/06/14 to 25/09/15 and which total \$1,993.24 relate to preparation for the assessment of costs application. I will deal with the costs in relation to the assessment shortly.

Award

[21] I therefore award costs in the sum of US\$3,227.35 to the appellant/applicant, Mr. Clive Hodge. In relation to the assessment of costs, the sum of US\$500.00 is awarded to the appellant/applicant as there was no oral hearing and the matter was dealt with on written submissions.

Kimberly Cenac-Phulgence
Chief Registrar