EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS

SAINT CHRISTOPHER CIRCUIT

(CIVIL)

A.D 2017

CLAIM NO. SKBHCV1993/0084

BETWEEN:

WYCLIFFE BAIRD

Claimant/Respondent

and

1. **DAVID GOLDGAR** — **1st Defendant**
2. **PAUL B. COBURN** — **2nd Defendant**
3. **CARIBE (REALTIES) CANADA LIMITED/IMMUEBLES CARIBE CANADA LTEE** — **3rd Defendant**
4. **BETTS REALTY LIMITED** — **4th Defendant**
5. **S.P.A.S LIMITED** — **5th Defendant**
6. **FIRST SECURITY BANK OF UTAH** — **6th Defendant**

Appearances:

Mr. Terrance Byron for the claimant

Mr. Sylvester Anthony with Ms. Angelina Gracy Sookoo for the 5th Defendant/Applicant

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2017: December 6
2018: May 15

Discharge of Injunction – Undertaking for damages -Assessment of Damages- Costs

JUDGMENT

[1] **ACTIE M: -** In 1993, the claimant obtained an injunction against **S.P.A.S Limited,** the fifth defendant. The injunction remained in excess of twenty three (23) years

and was discharged at trial on May 5, 2016. The matter now comes on an assessment of legal costs and damages based on the claimant's undertakings when the injunction was granted.

Background

[2] This claim, filed in 1993, prior to the introduction of CPR 2000, has had a checkered history with at least two (2) trial dates and/or trial windows vacated, numerous satellite interlocutory applications and at least six (6) interlocutory appeals from the date of filing till trial in May 2016.

[3] The underlying claim concerned alleged breaches of two (2) option agreements entered into by Mr. Wycliffe Baird (the Claimant), as purchaser and Caribe (Realities) Canada Limited ("Caribe") and Betts Realty Limited ("Betts") as vendors through their agent, David Goldgar (the first defendant), concerning certain lands located at Majors Bay in the South Eastern Peninsula of St. Kitts, including Lot No. 2 (owned by **S.P.A.S Limited**). The claimant obtained an *ex parte* injunction against all the Defendants on the same date of filing the claim.

[4] On March 14, 1994, **S.P.A.S Limited** filed a defence which denied that Lot 2 formed part of the option agreements, an unyielding position it maintained throughout the myriad of interlocutory applications and appeals until trial.

[5] The case against **S.P.A.S Limited** came to an abrupt end at trial on 5th May 2016, when counsel for the claimant admitted that Lot No. 2 did not fall within the lands subject to the option agreements. The dismissal was based on the expert evidence of Mr. Calvin Esdaile, Licensed Land Surveyor, Land Development Consultant and Property Evaluator.

Application for Costs and Damages

[6] **S.P.A.S** filed an application for the assessment of legal costs and damages arising out of the claim and the injunction. The application is supported by the

affidavit evidence of **S.P.A.S's** Managing Director, Mr. Arthur Sharpe and the expert report of Mr. Calvin Esdaile.

LEGAL FEES

[7] **S.P.A.S** claims for legal fees in the sum of USD $156,016.37, comprising of fee notes and invoice for the following:

(i) Kelsick, Wilkin and Ferdinand law firm in the sum of US$22,516.37.

(ii) Ransford Braham QC and George Soutar QC in the sum of US$75,000.00.

(iii) Law Offices of Sylvester Anthony in the sum of US$58,500.00

[8] The claimant did not comply with the three (3) court orders made on March 2, 2017, May 10, 2017 and July 19, 2017 respectively, directing the filing and exchanging of submissions with supporting evidence for the assessment. It was at the hearing of the assessment that counsel for the claimant sought to cross-examine and challenge the affidavit evidence of Mr. Arthur Sharpe.

[9] The respondent's flagrant breach cannot be countenanced in light of the three clear orders made by the court for the conduct of the assessment. Counsel for **S.P.A.S** urges the court to accept the claimant's failure to file submissions in opposition as an indication that the fees claimed are proportionate and reasonable. Counsel, in support, cites the case in **Malitskiy and Filipenkp et al** [1] where Mitchell JA applying the principle of **Lord Chancellor v Rees[2]** states:

> *"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. The Appellants take no issue with the hourly rates charged, which suggests they are not unreasonable[3]"*

[1] BVIHCMAP2016/0006

[22] [2008] EWHC 3168

[3] Paragraph 44 of the judgment in Mark Brantley v Hensley Daniel (NEV2011/0130)

[10] The claimant's failure to file submissions in opposition may ineluctably mean that the amount claimed is satisfactory. However, reasonableness is the key governing factor when assessing costs[4]. In the absence of a consent position on the fees claimed, the court is required to determine whether the costs are fair and reasonable in the circumstances.

[11] Whether costs had been reasonably or necessarily incurred is derived from what is often is referred to as the **Lownds Test** after the case of **Lownds v Home Office** [5] where it states**;**

> "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 Part 44.5(3) (in *pari materia* with P**art 65.3 CPR 2000),** 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 cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable."

[12] The dictum of Mitchell JA in **Malitskiy and Filipenkp** (above) refers to the unchallenged hourly rate for which the respondent had not offered any comparatives. Mitchell JA applied the global approach test propounded in **Lownds** to determine whether the costs claimed were fair and reasonable which I propose to apply in the instant case.

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[4] Paul Webster etal v The AG of Anguilla AXAHCV2008/0015; Mark Brantley v Hensley Daniel etal NEHCV2011/0130

[5] [2002] 4 All ER 775

THE LAW

[13] **CPR 2000 Part 65.2 (3)** provides a list of factors which the court must take into consideration in determining the reasonableness of the costs namely :–

1. any order that has already been made;
2. the care, speed and economy with which the case was prepared;
3. the conduct of the parties before as well as during the proceedings;
4. the degree of responsibility accepted by the legal practitioner;
5. the importance of the matter to the parties;
6. the novelty, weight and complexity of the case;
7. the time reasonably spent on the case;

Any order that has already been made

[14] On 24th November, 2009, Belle J awarded the applicant costs to be assessed, if not agreed. There was never any agreement for costs. In May 2016, Carter J directed that costs be assessed within 6 months of the order.

The care, speed and economy with which the case was prepared

[15] **S.P.A.S** avers that the claim was frivolous and also not pursed by the claimant with the speed, care or economy required by the Rules. **S.P.A.S** chronicled the history of the claim to prove the claimant's phlegmatic attitude since the filing as follows:-

1. On 7th May, 1993, the claimant filed the claim and obtained an *ex parte* injunction against all the Defendants including **S.P.A.S**.
2. On 21st February, 1994, the claim was served on **S.P.A.S** and a defence was filed on 14th March, 1994 denying that Lot 2 formed part of the option agreements.
3. No further action was taken after the defence was filed.
4. On 6th March, 2002, **S.P.A.S** filed an application to have the matter deemed abandoned and struck out.

5. In March 2004, the application to strike out was refused with directions to continue under the new CPR2000.
6. On 4th October, 2004, a number of the defendants filed an application to strike out the Statement of Claim. Master Mathurin, as she then was, gave directions for the reconstruction of the file with further directions for the hearing of the application
7. On 10th December, 2004**, S.P.A.S** filed an amended application to have the injunction dismissed.
8. On 24th January, 2005, the amended application to strike out came up for hearing.
9. On 25th April, 2005, Master Mathurin struck out the claim against all the Defendants except Caribe, Betts and **S.P.A.S.** The application to discharge the injunction against the defendants was also refused. The claimant maintained that he had an equitable right to Lot 2 and therefore this matter could not be resolved at the interlocutory stage.
10. On 20th March, 2005, Rawlins J.A. dismissed the appeal against Master Mathurin's Order and found that there were facts in dispute which ought to be resolved at a trial and directed case management or pretrial review within twenty one (21) days.
11. On 19th March, 2007, Cottle J. set a trial window for June, 2007. The claimant subsequently applied and obtained an order extending time for complying with the Cottle J's Order.
12. **S.P.A.S** and the other defendants appealed Cottle J's order granting the extension of time.
13. In October 2007, the Court of Appeal dismissed the extension Order made by Cottle J..
14. In April 2006, Thomas J refused the claimant's application for relief from sanctions for late filing of witness statements.
15. On appeal, in August 2008, Barrow J.A., allowed the appeal, granting the claimant relief from sanctions for the late filing of witness statements deeming all witness statements properly filed. This decision remains the

locus classicus on the principles to be applied in an application for relief from sanctions for the late filing of witness statements.

16. On 20th April, 2009, by consent, the Court was asked to determine the central issue of whether the claimant was in funds to complete the transaction
17. The matter was heard on 19th February, 1991. Belle J in a Judgment dated 29th November, 2009 held:- (a) the claimant failed to close on the 19th February, 1991 (b) the parties were unable to agree on new terms for the sale of the land and the negotiations broke down and (c) Claimant to pay the costs in accordance with Part 65 of the CPR 200, if not agreed.
18. On 15th December, 2010, **S.P.A.S** etal application for the dismissal was heard. Thomas J in a decision dated 30th September, 2011, dismissed the application.
19. On 25th November, 2015, **S.P.A.S** obtained an Order for any further applications to be filed within 28 days.
20. On the 22nd December, 2015, **S.P.A.S** filed an *omnibus* application seeking leave to file an amended defence, supplemental witness statements, to appoint an expert to provide an expert report.
21. On the 5th February, 2016, Carter J. granted the *omnibus* application
22. On 11th February, 2016, **S.P.A.S** filed an amended defence; an expert report on 26th February, 2016 and witness statements on 30th March, 2016.
23. On 22nd April, 2016, the matter came up for pre-trial review
24. At Trial on 5th May 2016, the claim against **S.P.A.S** was dismissed, injunction discharged with damages and costs to be assessed.
25. On 4th November, 2016, **S.P.A.S** filed an application for damages and costs to be assessed with supporting evidence.
26. On 23rd February, 2017, Master Glasgow, as he then was, gave directions for the assessment.
27. On 10th May, 2017 Master Corbin-Lincoln gave further directions for the assessment.

28. The claimant has to the date of the assessment, failed to comply with any of the orders made for the assessment of damages.

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

[16] **S.P.A.S** tried on two (2) occasions, by way of interlocutory applications, to have the claim dismissed against it. The claimant argued, on each such application, that there was a triable issue which had to be determined at trial and not at an interlocutory stage.

The degree of responsibility accepted by the legal practitioner

[17] **S.P.A.S** contends that there is no evidence before the Court to address the degree of responsibility accepted by the claimant for the manner this matter was prosecuted. Counsel referred to the dictum of Justice Thomas in his judgment dated the 25th September, 2017, where he stated that the application to strike out the claim was akin to an appeal by a concurrent court. **S.P.A.S** also referenced the comments of Barrow J.A., in his decision on appeal, for an extension of time to file late witness statements where he opined:

> "*One of the observations the judge made in the judgment under appeal is that it would have been a simple matter for Mr. Baird's counsel to have sought the agreement of the Defendants' counsel, pursuant to rule 27.8 to a variation of Master Cottle's order and an extension of the time for the filing and serving the witness statements…"*

The importance of the matter to the parties

[18] **S.P.A.S** avers that Lot 2 was an investment property projected to make significant profits had it been developed as intended.

The novelty, weight and complexity of the case

[19] **S.P.A.S** contends that the case was weighty and raised both novel and complex issues. It submits that the appointment of the expert was

necessary to conduct a survey to map out the description of the property which fell under the option agreements.

The time reasonably spent on the case

[20] **S.P.A.S** avers that it was reasonable to retain the two Queens Counsel, Ransford Braham Q.C and George Soutar Q.C having regard to the weightiness of the matter. Counsel indicated the length of time spent reviewing twenty-three (23) years of pleadings, records of the proceedings with six (6) volumes of documents in excess of three thousand and five hundred (3,500) pages. **S.P.A.S** avers that it took approximately seventy-three (73) hours preparations for pre-trial with ten (10) days for the trial.

Analysis

[21] The issue for determination is whether the global costs claimed are reasonable and proportionate in the circumstances. **S.P.A.S** presented fee notes for (i) Kelsick, Wilkin and Ferdinand law firm in the sum of US$22,516.37, (ii) Ransford Braham Q.C and George Soutar Q.C in the sum of US$75,000.00 and (iii) Law Offices of Sylvester Anthony as Junior Counsel in the sum of US$58,500.00.

Fee Note of Kelsick Wilkin and Ferdinand

[22] I will first deal with the fee note of Kelsick, Wilkin and Ferdinand. The fee note represents professional services rendered by the law firm from 1994 to September 2013. During the retainer, the firm provided legal services which included drafting and filing a defence, witness statements and other court documents for the numerous interlocutory applications and appeals.

[23] I have considered all the relevant factors in CPR 65.2 and especially the numerous satellite interlocutory applications and appeals during the currency of their retainer. I am of the view that the sum of USD $22,516.37 claimed for the legal services provided by Kelsick, Wilkin and Ferdinand during the twenty years is reasonable and fair in the circumstances and is accordingly allowed.

The Fee Notes for Ransford Braham QC and George Soutar QC with Junior Counsel

[24] In 2014, the original legal team of Kelsick, Wilkin and Ferdinand was replaced by the Law Offices of Sylvester Anthony with Lead Counsel, Mr. Ransford Braham Q.C. and Mr. George Soutar Q.C, of Jamaica.

[25] **S.P.A.S** presented a schedule of costs and disbursements in the sum of USD$133,500.00, being (USD $75,000.00) for the two Queen's Counsel and (USD$58,500.00) for Junior Counsel, for professional services provided in connection with the litigation.

[26] My first observation is that the global sum of USD$133,500.00 claimed for the period from 2014 to 2016 far exceeds the costs of US$22,516.37 claimed and approved for the professional services provided by Kelsick, Wilkins and Ferdinand between 1993 to 2013. Counsel did not lead evidence of a Queen's Counsel forming part of the Kelsick, Wilkins and Ferdinand legal team.

[27] **S.P.A.S** contends that each party to the claim engaged the services of reputable Queen's Counsel from overseas together with Junior Counsel to help advance their case**.** In his witness statement, Mr. Sharpe states that the two Queen's Counsel together with Junior Counsel had to collate all the filed documents to reconstitute the file which had been misplaced. The new legal team had to review approximately two (2) banker's box of court documents filed over the twenty-one (21) years.

[28] **S.P.A.S** avers that the nature and complexity of the case had several direct consequences on the issue of costs. **S.P.A.S** further submits that the complexity of the extant case was parallel to the case in **Mark Brantley v Hensley Daniel[6].** The trial in **Mark Brantley** took place over two (2) weeks and the appeal was heard over two (2) days. **S.P.A.S** avers that the number of days for the hearing of

[6] NEVHCV2011/0130 delivered March 9,2015

interlocutory applications, case management conferences and interlocutory appeals as well as the trial of this matter would have exceeded two (2) weeks and two (2) days.

[29] I accept the evidence that the newly retained legal team had to review the voluminous bundles of document taking into consideration the myriad of legal proceedings since the filing of the claim. The new legal team had to determine a strategy to win their client's case. However, I am of the view that the comparison to the **Mark Brantley v Hensley Daniel's** case is exaggerated. The **Brantley's** claim raised multifaceted constitutional and elections issues, with several scheduled hearings at the High Court Level with an appeal at the Court of Appeal. The matter against **S.P.A.S** was not as complicated as counsel seems to suggest. The simple nature of the claim against **S.P.A.S** turned on facts rather than law. The issue did not require an extensive examination of legal principles.

[30] On 22nd December, 2015, **S.P.A.S** filed an omnibus application for leave to amend its Defence, to call Calvin Esdaille as an expert witness and to prepare and file an expert report. The application was presented by Junior Counsel. Carter J granted the application enabling **S.P.A.S** to file an amended defence, witness statements and the expert report.

[31] What is clear is that the interlocutory applications and trial were not attended by both Queen's Counsel. It was Lead Counsel, Ranford Braham Q.C, at the trial in May 2016 who made a request for dismissal of the claim. The factual issue was determined by the expert evidence of Mr. Calvin Esdaile, Licensed Land Surveyor. Mr. James Gutherie Q.C, lead counsel for the claimant, conceded **S.P.A.S**'s entitlement to the lot 2 could not be contradicted. Carter J dismissed the claim against **S.P.A.S** and discharged the injunction as a preliminary point which did not engage the ten (10) days trial period claimed in the fee note.

[32] The court when determining an appropriate quantum of costs, must consider the reasonableness of the rates, hours of work and particularly the usefulness of such

hours and whether there was value or purpose associated with those hours. The court must also consider the complexity of the action, the importance of the issues, the stage of the action, and other case-specific factors.

[33] It was always **S.P.A.S c**ontention that Lot 2 did not form part of the agreement in dispute. The claimant frustrated **S.P.A.S'**s several attempts to discontinue the claim and the injunction at the early stages of the proceedings. I am of the view that the claimant's conduct in this case caused **S.P.A.S** to incur unnecessary costs. The claimant did not pursue the claim with the alacrity mandated by CPR 2000. **S.P.A.S** was forced to adopt new strategies by engaging a new legal team together with an expert in an attempt to succeed at trial. The claimant has also flagrantly breached the three (3) court's orders directing the filing of submissions to determine a comparative award on costs.

[34] The Privy Council in **Horsford v. Bird**,[7] Lord Hope of Craigshead states:

> "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'.

[35] The claim was longwinded and raised a number of factual issues, nevertheless, I am of the view that global sum claimed for the two Queen's Counsel together with Junior Counsel seem to be disproportionate for the period claimed. In reaching that conclusion, regard was had to the fact that the myriad of interlocutory applications and appeals were conducted during the retainer of Kelsick, Wilkin and Ferdinand.

[36] The hourly rate claimed for Queen's Counsel is in keeping with the rates allowed in this jurisdiction. As indicated earlier, the matter against **S.P.A.S** was dismissed solely on the expert evidence without ventilation of any legal arguments or a full

[7] Privy Council Appeal No. 43 of 2004, 28th November, 2006

trial as anticipated. Having adopted the two stage process, I am of the opinion that 70% of the amount claimed would be a reasonable and fair compensation for the two Queen's Counsel. Accordingly, an award is made in the sum of USD $52,500.00 for the two Queen's Counsel with 17% Value Added Tax.

JUNIOR COUNSEL

[37] The Law Offices of Sylvester Anthony provided legal services as Junior Counsel to the two Queen's Counsel. It is standard practice and keeping with the authority of **Lindsay Fitzpatrick Grant and Cedric Liburd et al**[8] that Junior Counsel is allowed two-thirds (2/3) of the rate of Senior Counsel. I accept that the professional services provided by Junior Counsel were of necessity to assist Queen's Counsel from outside the jurisdiction. In keeping with the standard acceptable principle, I award the Law Offices of Sylvester Anthony, two-thirds (2/3) of the award made to the two Queens s Counsel, in the sum of USD $35,000.00, with 17% Value Added Tax.

Damages consequent upon the granting of the injunction

[38] On the grant of the injunction in 1993, the claimant gave the usual undertaking to pay damages. **S.P.A.S** seeks damages consequent upon the granting and discharge of the injunction which deprived it of the use of its property for Twenty-Three (23) years.

[39] Counsel cites the learned authors of **Bean on Injunctions** at paragraph 6-05 which reads:-

> *"Where an interim injunction is granted, but subsequently discharged the defendant may well have suffered damage by reason of having had to comply with the injunction in the meantime. He may then seek to enforce the undertaking as to damages which the claimant will have been required to give at the earlier hearing… In order to enforce the undertaking, the damage*

[8] SKBHCV2004/0182 delivered on December 21,2011

sustained must generally be assessed by means of an inquiry as to the damages, generally before a master or district judge:

"Two questions arise whenever there is an application by a defendant to enforce cross undertaking in damages. The first question is whether the undertaking ought to be enforced at all…If the first question is answered in favour of the defendant, the second question is whether the defendant suffered any damage by reason of the granting of the injunction."

[40] In **Hoffmann-La Roche & Co AG v Secretary of State**[9], Lord Diplock states the assessment of compensation consequent upon a discharge of an injunction is determined:-

> "upon the same basis as that upon which damages for breach of contract would be assessed, if the undertaking had been a contract between the [claimant] and the defendant that the [claimant] would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction".

[41] The primary aim for awarding damages consequent on a discharge of an injunction is to put the injured party in the same position in which it would have been had there not been an infringement of its rights. The damages awarded must be confined to loss which is the natural consequence of the injunction taking all relevant matters into consideration.

[42] **S.P.A.S** through the witness statement of Mr. Arthur Sharpe, states that it intended to construct and operate an upscale family beach facility called "The Majors Bay Villa Complex" consisting of four (4) three (3) bedroom and three (3) bathroom villas. Construction was scheduled to have commenced in 1993 and conclude in

[9] [1975] AC 295

1995. The injunction which remained in force until the 5th May, 2016 prevented **S.P.A.S** from realizing its intended use of the lot.

[43] **S.P.A.S** presented the expert report of Mr. Calvin R. Esdaile, Licensed Land Surveyor, Land Development Consultant and Property Evaluator to assist the court in arriving at a fair compensation. The report describes the lot's location on "one of best beaches in St Kitts and a prime location for, very high end beach villa, or restaurant or combination". The report appraised Lot 2 with an open market value of USD$1,112,000.00 with an annual projected rental income in the sum of ECD$1,192,090 inclusive of Land Taxes of $18,400 and interest of $55,890.00.

[44] At a case management conference held on the 19th July, 2017, counsel for the claimant conceded the expert fees for Calvin Esdaille in sum of USD $22,500.00. The claimant has not provided any evidence to dispute the contents of the experts' report.

[45] I am content to accept the expert evidence of Mr. Esdaile who is well placed to make an objective assessment of the Lot. It is the evidence that the intended use of the Lot was for an upscale development with no stated intention to sell. The court is under an obligation as far as monetary compensation allows to make good the harm which the grant of the injunction caused. I have considered the projected rental income as the basis for the assessment, taking into account the intended use of the lot.

[46] The court must always make allowance for imponderables, keeping mind that the injured party is being awarded a lump sum of an artificial projected sum instead of several smaller sums spread over the years. With this in mind, I take into consideration that unpredictable environmental changes such as hurricanes/storms, fair wear and tear and other events which could have impacted the projected income during the past twenty three (23) years. I will discount the projected rental revenue of EC$1,192,090 by 25% ($298,022.50) to cover such imponderables, making an award of damages consequent upon the discharge of the injunction in the sum of EC$894,067.50.

EXPERT FEES FOR CALVIN ESDAILE

[47] The expert fees for Calvin Esdaile in the sum of USD $22,500.00 was approved by the claimant and is awarded as claimed.

ORDER

[48] In summary, It is ordered that the claimant, Wycliffe Baird shall pay S.P.A.S. Limited**,** the 5th Defendant, the following awards:-

1. Legal Costs for the firm of Kelsick, Wilkin and Ferdinand in the sum of USD $22,516.37.

2. Legal Costs to Queens Counsel, George G. Soutar Q.C and Ransford Braham Q.C in the sum of USD $52,500.00 with Value Added Tax at the rate of 17%.

3. Legal Costs to The Law Offices of Sylvester Anthony, Junior Counsel, in the sum of USD $35,000.00 with Value Added Tax at the rate of 17%.

4. Agreed Expert Fees in the sum of USD $22,500.00 for Calvin Esdaile.

5. Damages consequent upon the discharge of the injunction in the sum ECD$894,067.50.

6. The claimant shall pay the Legal Costs at Paragraphs (1) (2) (3) above together with the Expert Fees for Calvin Esdaile at paragraph (4) within sixty (60) days of today's date, or at a subsequent date as agreed by **S.P.A.S** Limited and the Claimant.

AGNES ACTIE

MASTER

BY THE COURT

REGISTRAR