EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
(NEVIS CIRCUIT)

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: NEVHCV2017/0093
SKBHCVAP2017/0010

Between PARADISE BEACH HOLDINGS LIMITED

Applicant

and

NEVIS PARADISE LIMITED
THE NEVIS ISLAND ADMINISTRATION
THE DIRECTOR OF PHYSICAL PLANNING

Respondents

APPEARANCES:

Mr. Brian Barnes for the Applicant
Ms. Liska Hutchinson for the 1st Respondent
Ms.Rhonda Nisbett – Browne for the 2nd, 3rd Respondent

2018: 5th March
2018: 4th June

Judgment

[1] Moise, M.: This is an application for an assessment of costs in high court and court of appeal proceedings. On 15th November, 2017 the applicant filed this application pursuant to the order of the court of appeal dated 31st July, 2017 in which costs was ordered in favour of the applicant, both in the court of appeal and the court below. These costs are to be paid by the 1st respondent and, as a result, the 2nd and 3rd respondents have had no involvement in this particular application. The order directed that costs be assessed by a master of the high court if not agreed by the parties within 21 days. The parties could not agree and, as a result, this application is currently before me. The applicant has filed a bill of costs and affidavits in support of its application. In total the costs

claimed amount to three hundred and twenty thousand, eight hundred and thirty-seven United States Dollars and twenty-four cents ($320,837.24US).

[2] There are two broad areas of contention between the parties as it relates to costs. Firstly, the applicant states that the order of the court of appeal requires costs to be assessed pursuant to rule 65.12 of the CPR. The 1st respondent, on the other hand, argues that the costs are to be assessed in accordance with rule 65.11. I will address each of these broad areas of contention in turn. It is however necessary to establish a brief outline of the procedural history of this case, as it is on that basis the applicant claims the amount of costs outlined in its bill of costs.

Procedural History

[3] On 14th March, 2016 the applicant obtained approval from the Nevis Island Administration for the construction of 5 two bedroom luxury villas referred to as "Pole Houses". On 5th October, 2016 the Director of Physical Planning granted a building permit to the applicant and issued a certificate of planning approval. The applicant commenced construction of the pole houses in December, 2016. However, on 21st June, 2017, the 1st respondent filed an application for leave to apply for judicial review of the decision of the 2nd and 3rd respondents in granting the requisite permission for the applicant to commence this construction. The 1st respondent also sought an interim injunction in order to restrain the implementation of the approval until the determination of the judicial review proceedings. This would have the effect of putting the construction of the project of the applicant on hold until further order of the court. For reasons not now known to me, this application was not served on the applicant and it would be safe to say that the applicant was not initially a party to the action brought by the 1st respondent.

[4] The applicant contends that it knew nothing about this application until 26th June, 2017. The application came up for hearing on 28th June, 2017 and the court granted an interim injunction which effectively placed a hold on construction of the pole houses until further order of the court. Although a legal representative of the applicant was present at that hearing, the company was not yet formally on the record. However, the applicant was granted leave to file an application to intervene in the matter by the end of business hours on the very day of the hearing. The application for leave to file judicial review proceedings was adjourned to 10th July, 2017.

[5] The applicant duly filed its application for leave to intervene in the matter on 28th June, 2017. The following day, that is 29th June, 2017, the applicant filed a separate application for the discharge of the interim injunction. The application to intervene was heard on 30th June, 2017 and leave was granted by the court for the applicant to be added as intervener in the proceedings. It is unclear to me as to whether the judge in the high court awarded costs in that application. However, this order of the judge was not appealed and I am of the view that it was not an issue which arose before the court of appeal for which costs are now to be assessed.

[6] The application dated 29th June, 2017 for the discharge of the interim injunction was heard on 6th and 10th July, 2017. On 11th July, 2017 the court made an order maintaining the interim injunction in relation to 2 of the 5 pole houses and discharging the injunction in relation to 3 of those houses. The applicant was unhappy with this decision and appealed to the court of appeal by way of notice of appeal filed on 17th July, 2017. This appeal was heard on 31st July, 2017 via video conference with the court sitting in Saint Lucia. The appeal was allowed with costs to be paid to the applicant by the 1st respondent, at the level of the court of appeal and in the court below. The costs were to be assessed by a master of the high court if not agreed within 21 days.

[7] As I have stated earlier, there was no appeal of the judge's order on the application dated 28th June, 2017 allowing the applicant to intervene in the matter. This application was heard and determined in favour of the applicant and I am unaware as to whether any order for costs was made by the learned judge. The applicant has, nonetheless, claimed costs for this application as well as its application for the discharge of the interim injunction. However, in my view, when the applicant filed its notice of appeal on 17th July, 2017, this was an interlocutory appeal against the decision of the judge refusing to discharge the interim injunction in relation to the 2 remaining pole houses. This decision arose out of the application filed on 29th June, 2017. It stands to reason therefore, that when the court of appeal allowed the applicant's appeal and discharged the interim injunctions, the award of costs made in favour of the applicant related solely to the application which was the subject of the appeal. The order for costs to be assessed does not give the authority to the master to simply assess costs for applications which were outside of the scope of the appeal. In the circumstances I will disallow any claim for costs as it relates to the application to intervene in the matter, as I do not have an order before me for costs to be assessed on that

application and the substantive issues in this matter are yet to be determined by the high court. This is an assessment of costs on an interlocutory appeal arising out of a specific application.

The Applicable Regime of Costs

[8] The 1st respondent argues that the applicable rule for the assessment of costs in this matter is CPR 65.11. The rule states as follows:

> *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.*
>
> *(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.*

[9] Insofar as rule 65.11 is concerned, sub rule (7) is perhaps more relevant to the issues currently under consideration. It states that ***"[t]he 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.".* If the 1st respondent is correct in its argument that rule 65.11 is the applicable rule, then the costs allowed in this application must not exceed 10% of the prescribed costs in the claim. This would require the court to assess the actual value of the claim and then determine whether the assessed costs exceed 10% of what would be prescribed, based on that value. However, the rule retains a discretion for the court to award a sum higher than this 10% cap if it is of the opinion that the circumstances require a higher award. Rule 65.12, on the other hand, does not contain such a limitation. That rule, however, does not apply to procedural applications.

[10] The 1st respondent's argument is simply that the applications made by the applicant in the high court matters were procedural and in that regard rule 65.12 does not apply to them. (As I have stated earlier the only application for consideration is the application dated 29th June, 2017 for the discharge of the interim injunction). In support of this argument the 1st respondent relies on the case of *Island IFS S.A v. Hamilton Trust Co. Limited*[1] where Master Corbin-Lincoln stated the following at paragraph 30 of her judgment:

> *"CPR 65.12 states that it does not apply to procedural applications. Being guided by the decisions in IPOC International Growth Fund Limited v LV Finance Group Limited & Ors and United Company Rusal Plc and another v Corbiere Holdings Ltd. and another I find* ***that the claimant's application for an interim injunction and the application to discharge*** *same were procedural applications and consequently the costs for same cannot be determined under CPR 65.12 but must be determined under CPR 65.11."*

[11] Reliance is also placed on the case of *United Company Rusal PLC et al v. Corbiere Holdings Limited et al*[2] where Wallbank J stated the following at paragraph 47 of his judgment:

> *The injunction was an interim remedy within the meaning of CPR 17.1(1)(****b) "interim injunction", and possibly CPR 17.1(1)(j)(i) "an order restraining a party from dealing with any asset whether located within the jurisdiction or not". The injunction was*** *interim pending determination of a claim, as then pleaded. Discharge of the injunction* ***did not decide the substantive issue in the claim. It was therefore "procedural" for the purposes of CPR 65.11 and 65.12. I am not taken with the Defendants' clever*** *submission that discharge of the injunction determined the injunction proceedings, and* ***should therefore be treated as not procedural. The "injunction proceedings" were*** *ancillary to a substantive claim, and not proceedings in their own right, which continued notwithstanding discharge of the injunction. Furthermore, I do not consider that the fact that interim injunctions are treated like final relief for the purposes of not requiring leave to appeal assists the Defendants here. The common denominator in*

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[1] NEVHCV2013/0018
[2] NEVHCV2011/0030

that situation is that interim injunctions affect a party's substantive rig*hts in the same manner as final relief, and therefore it is right and just to allow immediate access to review by the Court of Appeal. The test, for the purposes of assessment of costs, is not whether the interim relief affected substantive rights, but whether the application decided the substantive issue in the claim. It would appear to be clear in the present* ***case that it did not. Equally, the Defendants' submission that costs assessments in*** *respect of interim applications have in practice been dealt with under CPR 65.12 rather than CPR 65.11, their citing Michael Wilson as an example, does not withstand close scrutiny, as set out above. There is nothing about interim applications that necessarily direct them to be dealt with under CPR 65.12.*

[12] On the authorities sited above, the 1st respondent argues that matters relating to the application for and discharge of an interim injunction are procedural applications and therefore costs cannot be determined under rule 65.12. The 1st respondent also draws the court's attention to the decision of Master Cheryl Mathurin (as she was at the time) in the case of *IPOC International Growth Fund Limited v. LV Finance Group Limited*[3] where she states at paragraph 26 that "*all applications in the high court which did not decide the substantive issue and which were not determined at case management, pre-trial review or at trial, are applications in which the costs fall to be decided under rule 65.11.*"

[13] The 1st respondent also makes reference to the decision of Barrow JA in the case of *Norgulf Holdings Limited et al v. Michael Wilson & Partners Limited*[4] where he assessed this issue and states that rule 65.12 ***"does cover applications generally, which are necessarily parts of*** *proceedings, save for procedural applications, which are specifically excepted. Put another* ***way, by excluding only procedural applications this rule includes all other applications."*** This decision has often been cited as an important authority on the issue of the assessment of costs and I too find it particularly helpful.

[14] Notwithstanding the decision in *Norgulf*, it may very well be that the overlap between 65.11 and 65.12 is not as simple to define and I do not make an attempt at doing so now. It suffices to say

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[3] BVIHCV2003/0140
[4] CIVIL APPEAL NO. 8 OF 2007

that the 1st respondent, in relying on these authorities, argues that ***"****the discharge application* ***was merely to discharge the interim injunction that was granted in relation to NPL's leave*** *application. The leave application has still not been heard by the Court and the discharge* ***application did not determine any substantive matter… leave to apply for judicial review is still a live issue before the Court."***

[15] The applicant on the other hand argues that ***"there is no order asking t****he master to make a determination about the basis for the assessment. The master was directed to assess* ***costs."*** The applicant goes further in its submissions and states, at paragraph 27, that ***"there*** *ought to be no doubt that when the Court of Appeal orders that costs be assessed this assessment is carried out under the general assessment provisions under Rule 65.12. As* ***aforesaid if the Court of Appeal intended for any other basis it would have done so."*** In support of this proposition, the applicant relies on the case of *Joseph W. Horsford v. Lester Bird et al*[5] where Harris J stated the following at paragraph 19 as it related to the Privy Council's express order that costs should be awarded at the prescribed rate:

> ***"****In order to convey what it intended-****if it intended something other than 'prescribed co****sts'- the Board could have(but did not) use the words "Budgeted Costs", Assessed Costs" or even referred to the old process of "taxed costs" a concept somewhat akin to 'assessed costs' under our CPR 2000."***

[16] In placing reliance on this authority, the applicant argues that one must have regard to the express wording of the order of the court of appeal and that when the court of appeal states that costs are to be assessed, it simply means that the assessment should take place in accordance with rule 65.12 of the CPR. However, I do not accept this submission, as to my mind, the applicant has not considered a number of important issues. Firstly, it is to be observed that both rule 65.11 and 65.12 of the CPR address the issue of assessed costs. What rule 65.11 does is to simply cap assessed costs to an amount which does not exceed 10% of what prescribed costs would have been based on the value of the claim. This is perhaps because the rule recognizes that costs on applications which are merely procedural should not generally exceed 10% of costs in the claim itself. By

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[5] ANUHCV2000/0400

applying rule 65.11, the court is in no way disregarding the order of the court of appeal that costs be assessed. Secondly, the court must consider the express words by Barrow JA in *NorgulF* where he states the following at paragraph 18:

> ***"As used in the rules the words "assessed costs" and "assessment" have the*** *meanings given them by rules 65.11 and 65.12 but even in those rules there are variations in meanings. It will have emerged from considering rule 65.11 that this rule confers a discretion on the court to determine the amount of costs to award on hearing an application.* ***Therefore, as used in rule 65.11, "assessed costs" means discretionary costs and the "assessment" that the court conducts pur****suant to that rule is to quantify such costs. On the other hand, rule 65.12 neither confers nor takes away discretion as to amount but is almost purely procedural, as has been seen, and the procedure applies to proceedings generally, including trials. That rule, therefore, speaks to how an assessment may be procured regardless of the basis upon which costs are to be quantified."***

[17] It stands to reason therefore, that an order from the court of appeal requiring that costs be assessed does not oblige the master to assess costs pursuant to rule 65.12. Unlike rule 65.11, that rule excludes the assessment of costs for procedural applications. It is for the master to decide the appropriate regime of costs to apply by considering the provisions of both 65.11 and 65.12 and whether they relate to the particular circumstances of the case. The question for determination at this stage therefore, is whether the application in the high court to which the order for assessment of costs relate, is procedural. If it is, then rule 65.12 does not apply and the court is to assess costs in accordance with the provisions of rule 65.11.

[18] In any event, the applicant also argues that the application in question is not procedural and can therefore be assessed in accordance with rule 65.12. At paragraph 31 of its written submissions the applicant states that ***"the intervener application and the discharge application in this case*** *are substantive applications in their own right, the determination of which are final determinations****."*** I have already determined that there is no order for me to assess costs in relation to the intervener application. As it relates to the application for the discharge of the interim

injunction, the applicant has attempted to distinguish the application made in this case with that made in the case of *United Company Rusal.* The argument is that the application in *United Company Rusal* was ancillary to existing proceedings. It is argued that there are no existing proceedings to which the application in the current matter is ancillary. Insofar as the case of *IFS SA Hamilton Trust* is concerned, the applicant states that the application to discharge the injunction in that case was filed within an existing claim and was therefore ancillary to a substantive matter. It was as a result of this distinction that costs in that case fell to be determined on the basis of CPR 65.11 and not CPR 65.12.

[19] From the onset I wish to state that I do not agree with the distinction drawn by the applicant. Whilst I do have my doubts as to whether an application for an interim injunction is procedural, there is, for now, a clear line of authority which establishes that it is. As Wallbank J stated in *United Company Rusal PLC* "*The test, for the purposes of assessment of costs, is **...** whether the application decided the substantive issue in the claim.**"*** It would seem to me that the application before the high court did not decide the substantive issues in the claim. In the *Island IFS* case Master Corbin-Lincoln stated that ***"the claimant's application for an interim injunction** and the application to discharge same were procedural applications and consequently the costs for same cannot be determined under CPR 65.12 but must be determined under CPR **65.11".*** Under rule 17 of the CPR, an injunction is not granted as a substantive issue. Whether the application for an interim injunction is made prior to, or during the course of, a substantive claim does not change the fact that it is not designed to address the substantive issues, but is merely interim. If an interim injunction is granted prior to the filing of a claim, the successful applicant would be obligated to ground this injunction with a claim or risk the injunction being discharged.

[20] In this particular case, the substantive issue was the judicial review of the decision of the 2nd and 3rd respondents to grant planning permission to the applicant to construct the pole houses. In light of this, it was essential that the 1st respondent first obtain leave before filing a claim. At that stage in the proceedings what was before the court was an application for leave to file a claim for judicial review. The grant of the injunction and the application to discharge it were ancillary to the hearing of the substantive matter, which had been scheduled for a later date. In fact, pursuant to the application filed by the applicant on 28th June, 2017, the applicant was granted leave to file affidavit

evidence in the application for leave to file for judicial review. This matter was further adjourned and, to my knowledge, is still a live issue before the court. If the authorities are to be followed therefore, the application for the discharge of the interim injunction was procedural in the same vein as described in the authorities sited by the 1st respondent. Although I have expressed my doubts as to the correctness of these decisions, for reasons which will be apparent later, I will adopt the line of authorities as the proper course of action to pursue. In the circumstances I am in agreement with the submissions of the 1st respondent that the applicable rule in the present case is rule 65.11 and not 65.12.

[21] Having determined that the assessment of costs is to be made in accordance with rule 65.11, the court is firstly to determine the value of the claim. The 1st respondent argues that the court is to apply the default value of *fifty thousand dollars ($50,000.00EC)* in accordance with rule 65.5(2)(b), which states that ***"if the claim is not for a monetary sum it is to be treated as a claim for $50,000 unless the court makes an order under Rule 65.6(1)(a)."*** Under rule 65.6(1)(a) a party may apply to the court for a value to be placed on a claim which, on the face of it, has no monetary value.

[22] At paragraph 57 of its submissions, the applicant argues that there has been no trial in this matter ***"so the applicant is well within its rights to apply to the Court for a determination of the value should the Court find the evidence put before it insufficient."*** The applicant goes on to argue that, based on the evidence filed in the application for leave to apply for judicial review, the court is in a position to assess the value of the claim. It is argued that in the affidavit of Mr. Oral Martin, a full agreement of the hotel deal entered into by the 1st respondent was exhibited. The affidavit also indicates that the hotel project envisaged by the 1st respondent was valued at *seventy-five million United States dollars ($75,000,000.00US)* and that *four million ($4,000,000.00US)* of that had already been spent in furtherance of the project. In that regard, the applicant argues that the hotel development cost of *seventy-five million United States dollars ($75,000,000.00US)* is to be treated as the estimated value of the claim.

[23] I am not of the view that the estimated cost of the hotel development should be used as the value of the claim. This is not a claim for a monetary sum, but rather a claim for judicial review seeking certain declarations. There is nothing before me which draws me to the conclusion submitted by

the applicant. In the case of *Oliver Macdonna v. Benjamin Wilson Richardson*[6], Gordon JA, after assessing this issue, went on to conclude that ***"since the claim was not a spurious one and an application to value the claim was never made, similar to the Ernesto Sorrentino case, the value for this case would be $50,000.00."*** His Lordship was following the reasoning of Alleyne C.J. in the case of *Ernesto Sorrentino v. Peter Clarke et al*[7] where the master applied the value of the land, which was the subject matter of the claim, as the value of the claim in determining costs. Alleyne C.J. states at paragraph 19 that ***"the proper basis for determining the value of the claim in the circumstances of this case is the application of rule 65.5(2) (b)(iii), whereby a value of $50,000.00 is derived."*** Earlier in his judgment, at paragraph 15, his Lordship states that ***"The claim and counterclaim also potentially fall under Part 65.5(2)(b)(iii), insofar as they are substantially claims for injunctive and declaratory relief."*** Also, in the case of *Unicomber (St. Lucia) Limited v. Comptroller of Inland Revenue*[8] Baptise JA expressed a similar sentiment when he states the following at paragraph 32:

> *CPR 65.6(1)(a) affords a party the opportunity of applying to the court to determine the value of a claim for the purpose of prescribed costs. The rule provides that a party may apply to the court at any time before trial to determine the value to be placed on a case which has no monetary value. I note that the claim here was not for a monetary sum. The appellant did not avail itself of that rule. CPR 65.5(2)(b) provides that if the claim is not for a monetary sum, it is to be treated as a claim for $50,000.00 unless the court makes an order under rule 65.6(1)(a). There being no application pursuant to rule 65.6(1)(a) to determine the value to be placed on the claim, the value of the claim is to be treated as $50,000.0 by virtue of rule 65.5(2)(b).*

[24] A similar situation arises in the present case. I am satisfied that the 1st respondent is correct in stating that the court is to apply the default value of *fifty thousand dollars ($50,000.00EC)* in determining this application. This is not a claim for a monetary sum but rather for declarations. The court has also not made any order in accordance with Rule 65.6(1)(a).

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[6] AXAHCVAP2005/0003
[7] CIVIL APPEAL NO. 19 OF 2005
[8] SLUHCVAP2016/0007

[25] However, I am also mindful of the fact that rule 65.11 grants a discretion to the court to award costs at a sum which exceeds the 10% cap if the circumstances requires a higher amount. I am satisfied that in this particular case the circumstances so require that the court awards a sum which is higher than 10% of the prescribed costs. At the default value of *fifty thousand dollars ($50,000.00EC)*, costs at the prescribed rate would amount to *seven thousand, five hundred dollars ($7,500.00EC)*. 10% of this amounts to *seven hundred and fifty dollars ($750.00EC).* Given the nature of the application, the urgency with which it was filed and prosecuted and the evidence presented by the applicant regarding the number of documents filed and court appearances made in this matter, I am satisfied that the circumstances warrant an award beyond 10% of the prescribed costs in this claim. *Seven hundred and fifty dollars ($750.00EC)* in costs would simply not be reasonable in these circumstances. I will therefore proceed to assess the costs without the limitations placed in rule 65.11 of the CPR.

The Assessment

[26] In accordance with Rule 65.2(1), where the court has a discretion in the amount to be awarded in costs, the award must be "*the amount that the court deems to be reasonable were the work to be carried out by a legal practitioner of reasonable competence; and which appears to the court to be fair both to the person paying and the person receiving such costs.*" I observe that the award of costs is to be reasonable and it is worth repeating the words of Lord Hope in the case of *Horsford v. Bird*[9] where he states as follows:

> ***"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."***

[27] The bill of costs supplied by the applicant can only be a guide in assisting the court in the exercise of its discretion in awarding costs. The applicant can have no expectation as of right to be

[9] Privy Council Appeal No.43 of 2004

indemnified of all his costs. I also consider the approach encouraged by Lord Wolf in the case of *Lownds v Home Office*[10] where he states as follows:

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

[28] I am in agreement with the 1st respondent that the costs claimed by the applicant appear to be disproportionate to what may be reasonable in the circumstances. This was an application for the discharge of an interim injunction. An award of in excess of *three hundred thousand United States dollars ($300,000.00US)* (which also covers costs in the court of appeal) is, in my view, not warranted in the circumstances of this case; bearing in mind that I am not considering costs on the application dated 28th June, 2017. It is important, therefore, to give more consideration to the items claimed by the applicant. Insofar as that is the case, rule 65.2(3) sets out the factors which the court must consider in arriving at this conclusion. These are as follows:

> *(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) …;*
> *(e) the importance of the matter to the parties;*
> *(f) the novelty, weight and complexity of the case;*
> *(g) the time reasonably spent on the case; and*
> *(h) …*

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[10] [2002)4 All ER 775

[29] The only order already made in this matter is the order of the court of appeal in directing that costs are to be assessed by the master. As such, there is nothing more to be said about the first factor for consideration.

The Care, Speed and Economy with which the case was prepared

[30] The applicant became aware of the ongoing proceedings on 26th June, 2017. The matter was scheduled for an application for leave to apply for judicial review, as well as an application for an interim injunction on 28th June, 2017. The applicant would have therefore needed to move with some expedition in order to protect its interest in these proceedings. At the hearing on 28th June, 2017 the judge of the high court granted leave to the applicant to file an application by the end of business hours on that very day. The application to discharge the interim injunction and the subsequent appeal was filed, heard and determined between 29th June, 2017 and 31st July, 2017. There was certainly a need for care and speed in dealing with this application.

[31] The applicant contends that the care and speed, with which this matter had to be dealt with, necessitated the use of a number of senior and junior counsels to assist in preparation for the matters before the court. In the item highlighted as "fee item" in the bill of costs, the applicant claims fees for 7 attorneys ranging from 2 to 22 years call. The 1st respondent contends that the number of counsel for whom fees are claimed is excessive. In the case of *Fincroft Limited v. Lamane Trading Corporation*[11] Hariprashad J expressed some concern about the number of fee earners claimed in what was an application for an interim injunction, despite the fact that it was perhaps more complex than the circumstances of the present case. She confessed to having ***"some difficulty i****n comprehending the need for so many solicitors, their rates and the number of hours spent on the case despite its complexity. After all, it was an application for an interim injunction and it would be out of proportion for this court to allow Finecroft to* ***recover costs which appear inflated and unjustifiable."*** I share a similar sentiment in the present case, as I do agree that an award of fees for 7 attorneys would not be reasonable in the circumstances. I would reduce the number of fee earners in this instance to 4. This would include

[11] BVIHCV2005/0264

reasonable fees for 2 senior and 2 junior counsels to assist in the preparation and presentation of the application before the court, which needed to be done with some measure of urgency.

[32] Insofar as the hourly rate is concerned, the applicant claims a rate of *seven hundred and fifty United States dollars ($750.00US)* for the services of Mr. Frank Walwyn as the most senior attorney in this matter. A sum of *four hundred and ninety United States dollars ($490.00US)* is also claimed as an hourly rate for the services of Mr. Brian Barnes of Daniel Brantley's chambers. I agree with the 1st respondent where it is argued that these rates ought to be reduced. In the case of Epicurean Limited v. American International Bank Limited[12], then Chief Registrar Mrs. Kimberly Cenac-Phulgence applied a tariff set in Antigua and Barbuda which fixed the fees for senior counsel at *five hundred Eastern Caribbean dollars ($500.00EC)* an hour and *three hundred Eastern Caribbean dollars ($300.00EC)* an hour for junior counsel. Although there is no similar tariff set for Nevis, Williams J in the Nevis case of *Mark Brantley v Hensley Daniel et al*[13] adopted a figure of five hundred and fifty Eastern Caribbean dollars ($550.00EC) as a reasonable hourly rate for counsel above 18 years call. In the circumstances I would adopt a similar approach. An hourly rate of *seven hundred and fifty United States dollars ($750.00US)* would amount to approximately *two thousand and two Eastern Caribbean dollars ($2002.00EC)* and is, in my view, disproportionate to any reasonable sum which should be considered. I would reduce the hourly rate for senior counsel to *six hundred Eastern Caribbean dollars ($600.00EC)*. Williams J then went on to allow reasonable fees for two junior counsels at an hourly rate of two-thirds of that allowed for senior counsel. I would therefore reduce the rate for junior counsel to *four hundred Eastern Caribbean dollars ($400.00EC)*. As stated above, I would award costs for time reasonably spent on this matter for 2 senior and 2 junior counsels at these rates.

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

[33] The applicant has contended that the conduct of the 1st respondent prior to the proceedings is a factor to be taken into consideration. It is argued that the failure to serve the applications for leave to apply for judicial review and the application for an interim injunction on the applicant is indicative

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[12] HCVAP 2004/013
[13] NEVHCV2013/0118

of the manner in which the applicant has been treated by the 1st respondent. I agree with that submission. Given what would have been a significant financial impact the applicant would have suffered as a result of the injunction and the judicial review proceedings in general, it is difficult to appreciate why the applicant was not added as a party to the proceedings in the first place. This failure on the part of the 1st respondent would have been directly responsible for the urgent application of the applicant to be added as a party to the matter as intervener. Further, had the applicant been included in the matter form the onset, it would have obviated the need to file a separate application to discharge the injunction, as the applicant would have already been a party to the claim, with a right to respond to the application prior to the granting of the injunction by the judge of the high court on 28th June, 2017. I am of the view that the applicant is correct where it states that the 1st respondent's conduct is a factor which I should take into consideration.

The importance of the matter to the parties

[34] No doubt this matter was of significance to the parties. Insofar as the applicant is concerned, the evidence suggests that by the time it became aware of the proceedings, 3 of the 5 pole houses under construction were already completed. The estimated opening date was less than 6 months away and the grant of the injunction would have certainly had a negative impact on this investment. The 1st respondent was also heavily invested in its own project and the court is well aware of the impact the outcome would have had on either party. This would have necessitated a mobilization of resources to protect these interests. As long as the expenses are reasonable, the court should give consideration to these issues in an award of costs.

The novelty, weight and complexity of the case

[35] I do not find that there is anything novel or particularly complex about the matters which were before the court; at least not on the basis of any evidence presented to me. This was an application for the discharge on an interim injunction. The applicant draws the court's attention to the number of documents filed and hours spent preparing for the case. That is, however, not synonymous with the case being one of a complex nature. I also observe that these documents include the application to intervene as well as documents filed in the substantive matter which are not up for

consideration in this assessment of costs. The legal issues before the court are all too familiar and I do not find that the facts render them novel, weighty or complex in any way. Whilst I accept that there are circumstances which warrant an award of costs beyond the 10% cap outlined in rule 65.11, I am not of the view that these circumstances are such as to render the issues, novel, weighty, or complex to any significant extent.

The time reasonably spent on the case

[36] In the "fee item" of the bill of costs, the total number of hours claimed by the applicant for the applications before the high court amount to 435.43 hours; by my estimate. This would amount to an equivalent of approximately18 days spent accumulatively by all of the attorneys included in this item of the bill of costs. In a more detailed breakdown of these costs filed by the applicant, I note that the total time spent in preparation by individual attorneys at Daniel Brantley's amounts to 274.43 hours. The applicant has presented this breakdown of work done per day and the hours spent on each item. Given that these relate to more than the application for the discharge I do not propose to address them in specific detail. I would deal with this generally as one item.

[37] In a second document filed in relation to the fee hours of Mr. Frank Walwyn and Ms. Nadia Chiesa, a total of 241 hours is claimed by Mr. Walwyn and 27.1 hours by Ms. Chiesa. I note that this is inclusive of time spent on the appeal. The documents also claim for time spent travelling from Canada for appearances before the court in Nevis. These include hours occasioned by flight delays. No doubt Mr. Walwyn may have profited from this time to assist in his preparation for the matters before the court. However, the travels on the 28th and 29th June, 2017 relate primarily to the appearance in the intervener application. I am also not inclined to penalize the 1st respondent for time lost occasioned by flight delays. I have disallowed costs which relate to the application to intervene and would therefore disallow any hours of work which relate to that application, including the hours of travel. I note also, that perhaps in the future, where the court is inclined to award costs for time spent travelling for matters, a per diem rate is more reasonable as opposed to an award at an hourly rate for time. This would allow for the award of costs to be reasonable and not inflated in any way.

[38] In *JlPFA Investments Ltd v Natalie Brewley et al*[14] Master Pearlette Lanns (as she then was) concluded that ***"t****he number of hours devoted to the work appears to be excessive and* ***include work which appears to be duplicative or repetitious."*** I express a similar sentiment in the circumstances of the present case. These hours relate to the preparation, and presentation of the application to discharge the injunction. It is also inclusive of consultations and meetings with the client as well as the time spent travelling and attending court, responding to emails and telephone calls. When examining this item in the bill of costs it appears that many of these are duplicative, repetitious and in general excessive.

[39] I make the following observations regarding the breakdown of fee hours presented by Daniel Brantley's:

(a) A total of 17 hours is claimed by Mr. Brian Barnes regarding work done on 29th June, 2017 for the filing of the application to set aside the interim injunction. I agree with the 1st respondent that this is excessive and I would find that no more than 10 hours is reasonable time spent for that purpose. 13 hours is also claimed for that same day for work done by Mr. Adrian Daniel and Ms. Dia Forester collectively. Whilst I understand that there was some urgency, I am of the view that an additional 5 hours for assistance from junior counsel is sufficient and reasonable in the circumstances;

(b) A total of 16 hours is claimed by Mr. Adrian Daniel for preparation of affidavits, communication with legal team, assisting with preparation of bundles and other work on 5th July, 2017. I again am of the view that his is excessive notwithstanding the sense of urgency needed with this matter. I would allow no more than 8 hours for this;

(c) 11 hours is claimed by both Ms. Dia Forrester and Mr. Brian Barnes for court attendance and preparation for the application. I would allow no more than 7 hours for this claim;

(d) A claim of fees for 8 hours is made by Mr. Brian Barnes for pre-hearing conference and court attendance on 10th July, 2017. I would award no more than 5 hours;

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[14] BVIHCV2011/0038

[40] I make the following observations in relation to the breakdown of fee hours claimed by Weirfold's LLP:

(a) Mr. Walwyn claims a total of 19 hours on 4th July, 2017 in court preparation and travelling to Nevis. It is worth noting with the sum of $750.00US claimed for his hourly rate, Mr. Walwyn is requesting that the 1st respondent pay in the region of $40,000.00EC for his time spent travelling to Nevis and performing other tasks during this one day. This is not reasonable. I have already stated that I would reduce the hourly rate to $600.00EC. I would also disallow time spent travelling and would award no more than 3 hours for work done during this time and a further 4 hours for work done on arrival in Nevis;

(b) For work done on 5th July, 2017 in preparation for the hearing, Mr. Walwyn claims a further 19 fee hours. I would again reduce this to the more reasonable figure of no more than 8 hours;

(c) Although the first hearing took place on 6th July, 2017 a total of 17 hours is claimed for time spent in relation to this matter on that day. I would have awarded no more than 6 hours;

(d) The judge of the high court delivered her decision on 11th July, 2018. A total of 3.5 hours is claimed for this day. I would award no more than 1 hour.

[41] I make these specific observations as these are the claims which stand out to me as being particularly excessive. As it relates to the other claims made in relation to fee hours, whilst I do not find them generally excessive, I will award a general number of hours which I believe are reasonable in the circumstances. I am of the view that a total of 50 hours per senior counsel and 30 hours per junior counsel would be reasonable hours spent in preparation and presentation of this application before the court. This would amount to a total of 160 hours which, in my view, is reasonable given the nature of the application which was before the court. On that premise the total amount of fees awarded for the application before the high court would amount to *eighty-four thousand Eastern Caribbean dollars ($84,000.00EC)*.

[42] Schedules A and B of the bill of costs addresses the issue of disbursements on the application. Chambers of Daniel Brantley's disbursements amount to a total of *five thousand, nine hundred*

and seventy-six United States dollars and ninety-eight cents ($5,976.98US). This includes costs of telephone calls amounting to *one hundred United States dollars ($100.00US),* binding, copies and other incidentals at *two thousand, nine hundred and seventy-four United States dollars and ninety-eight cents ($2,974.98US)* and finally legal assistance at *two thousand, nine hundred and two United States dollars ($2,902.00US)*. These amount in total to approximately *fifteen thousand, nine hundred and fifty-eight Eastern Caribbean dollars and fifty-four cents ($15,958.54EC).* Given the limitations in relation to the evidence to substantiate these disbursements I will reduce the expense of telephone calls to *two hundred Eastern Caribbean dollars ($200.00EC).* The amount claimed for binding and copies appear to me to be excessive; especially given the fact that further claims are made for similar expenses. I will reduce this amount to *three thousand, five hundred dollars ($3,500.00EC)*. With regard to the claim for legal assistance I am not at all sure what this entails. Given that I have already awarded costs for legal fees I would disallow this item. I make these adjustments bearing in mind that I have also disallowed expenses which relate to the application dated 28th June, 2017.

[43] Schedule B claims disbursements from Weirfold's LLP. This in total amounts to *six thousand, five hundred and seventy-nine United States dollars and thirty-six cents ($6,579.36US).* The claim includes air transportation at a cost of *four thousand, four hundred and two United States dollars and forty-three cents ($4,402.43US)*. As I have stated earlier, the applicant can have no expectation as of right for the reimbursement of all of its expenses. Some of these travel expenses relate to the appearance of Mr. Walwyn at the hearing on 30th June, 2018 which dealt primarily with the application to intervene. These costs are not before me for assessment and I would disallow these as they are expenses incurred in the intervener application.

[44] Regarding the costs of travels for the discharge application, the issue is whether it would be reasonable to allow these expenses. Whilst it is entirely within the applicant's right to select an attorney of its choice, it must do so with the knowledge that there is no specific right to be reimbursed for the travel expenses of counsel residing abroad. The applicant in its written submissions argues that Mr. Walwyn is called to the bar in Nevis and can be considered a local attorney with a practice within the jurisdiction. I agree with that submission. However, in those circumstances, I do not think it is reasonable to pass on the expense of travel to the 1st respondent as costs in these proceedings. What is required is the reasonable costs had the work been done by

a reasonably competent attorney. I would disallow the travel expenses. I also disallow the costs claimed for ground transportation and hotel accommodation for the same reasons.

[45] There is a claim for a further *seven hundred and eighty-four United States dollars and sixty-three cents ($784.63US)* for costs of photocopies, binding and telephone. Given the fact that these claims also relate to the application dated 28th June, 2017, I would reduce this cost to *one thousand, five hundred Eastern Caribbean dollars ($1,500.00EC).* I am of the view that this is a reasonable sum in photocopying, binding and telephone costs, considering the fact that this was also claimed by Daniel Brantley's chambers and is, to some extent, a duplication of items already claimed for.

[46] In total I would award disbursements for the application to discharge the injunction in the sum of *five thousand, two hundred Eastern Caribbean dollars ($5,200.00).* In the circumstances I have assessed the costs to which the applicant is entitled in the application before the high court and would award the sum of *eighty-nine thousand, two hundred Eastern Caribbean dollars ($89,200.00EC)* inclusive of legal fees and disbursements.

[47] As it relates to costs in the court of appeal, the 1st respondent asserts that rule 65.13 is the applicable rule for consideration. It states as follows:

> *65.13 (1) The general rule is that the costs of any appeal must be determined in accordance with rules 65.5, 65.6 and 65.7 and Appendix B but the costs must be limited to two thirds of the amount that would otherwise be allowed.*
>
> *(2) The Court of Appeal may, if the circumstances of the appeal or the justice of the case require, depart from the general rule and, in such a case, it may -*
>
> *(a) make an order for budgeted costs whether on an application made in accordance with rules 65.8 and 65.9 or otherwise; or*
>
> *(b) make such other order as it sees fit.*

[48] Rule 65.5 speaks to the issue of prescribed costs. However, I agree with the applicant's argument that based on the order of the court of appeal, the costs are to be assessed. Before examining the bill of costs in further detail regarding costs on the appeal, I will address the issue of travel expenses and time spent during travelling. It would appear that the court of appeal made

arrangements for the appeal to be heard via video conference out of Saint Lucia. The 1st respondent argues that there was no need for overseas counsel, or any counsel for that matter, to travel to Saint Lucia for the hearing. I have already stated that I do not consider Mr. Walwyn to be overseas counsel, given that he is called to practice in the jurisdiction. It would suffice to say that he resides abroad. It would be for the applicant to satisfy the court that the costs incurred in Mr. Walwyn travelling from Toronto to Saint Lucia for the hearing of the appeal were reasonable. I am not so satisfied. I agree with the 1st respondent where it is argued that the fact that counsel in Nevis was able to participate in the hearing via video conference meant that the applicant needed to explain precisely why this cost was incurred. I am not satisfied that a reasonable explanation was given. I would disallow the travel expenses, including hotel and transportation fees associated with it.

[49] Regarding the breakdown of Daniel Bartley's hours of work on appeal, I make the following observations:

(a) A total of 23.8 hours is claimed for the preparation of the appeal and other incidentals between 15th and 16th July, 2017. This appears to me to be excessive and is to be reduced to no more than 10 hours;

(b) A meeting with the court administrator on 25th July, 2017 to discuss matters relating to the appeal was claimed at a total of 2.5 hours. I find that this meeting should be no more than 1 hour. I express a similar sentiment for the time claimed for 30th July, 2017;

(c) A total of 11.83 hours is claimed by attorney Mr. Brian Barnes for time spent on 1st August, 2017. I observe that this appeal was heard on 31st July, 2017 and was allowed. It is difficult to see any justification of this amount of hours claimed after the appeal had already been granted. I note also, that with the sum of *four hundred and ninety united stated dollars ($490.00US)* claimed by Mr. Barnes for his hourly rate, the fees for post appeal hours claimed would amount to in excess of *fifteen thousand Eastern Caribbean dollars ($15,000.00EC)*. With utmost respect to counsel and due regard to the apprehension the applicant must have experienced with this injunction being in place, I am unable to

appreciate how this claim can be reasonable in the circumstances. I would disallow this item in the bill of costs.

(d) I would award a total of 50 hours for fees in relation to the claims made by Daniel Brantley's chambers on appeal.

[50] I make the following observations regarding the fees claimed by Weirfold's LLP in relation to the appeal:

(a) There is an overlap in relation to the hours claimed on 11th July, 2017. This was the date in which the judge's decision in the high court was delivered and Mr. Walwyn travelled back to Canada. I have disallowed travel expenses. Insofar as he was engaged on matters relating to the appeal on that day I would find that 2 hours is sufficient for this assessment;

(b) A total of 8 hours is claimed in relation to preparation of appeal material. Given that counsel was also on record in Nevis and performing the same function, there is an overlap and I would reduce this to no more than 3 hours;

(c) The claim for travelling on 29th July 2017 is disallowed for reasons which I have already explained. I would award no more than 3 hours during these travels for time spent working on the appeal;

(d) A total of 18 hours is claimed for preparation on 30th July, 2017. This is excessive and I would reduce it to no more than 5 hours;

(e) A total of 12 hours is claimed for preparation and attending of the appeal on 31st July, 2017. I am of the view that no more than 5 hours should be considered for this claim.

(f) Insofar as the other items claimed are duplicative of items already claimed by Daniel Brantley's, I would make a further reduction to arrive at fee hours which are reasonable in the circumstances. I would award total hours for Weirfold's LLP in the amount of 40 hours.

[51] Earlier in this decision I certified this claim for reasonable fees for 2 senior and 2 junior counsels and a rate of six hundred dollars ($600.00EC) and four hundred dollars ($400.00EC) respectively. In the high court costs I apportioned these at a 60% to 40% ratio. The total hours on appeal stands at 90. I therefore award the sum of *forty-six thousand, eight hundred Eastern Caribbean dollars ($46,800.00EC)* as reasonable costs on appeal.

[52] In relation to disbursements on the appeal I have already disallowed travel and other incidental expenses. There is a claim for *seven hundred and seven United States Dollars ($717.00US)* for photocopying and other related expenses as well as telephone calls. I do find this to be reasonable and I would grant this claim. In total therefore disbursements on appeal is awarded at a sum of *one thousand, nine hundred and fourteen dollars and thirty-nine cents $1,914.39EC.*

[53] I wish, in closing, to make some general observations as it relates to the assessment of costs. In my assessment of the cases referred to by counsel in this matter, as well as cases assessed from my own research, it seems to me that there has been some consistency in the decisions of the court regarding certain aspects of the award of costs. Firstly, the court has been consistent in the range of hourly rates it is prepared to give as reasonable costs for attorney's fees. In fact, the court has specifically discouraged claims made for attorney's fees in excess of one thousand dollars ($1,000.00EC) per hour[15]. The range has been within five hundred dollars ($500.00EC) to seven hundred and fifty dollars ($750.00EC) an hour with perhaps a two-thirds reduction for junior counsel. Despite this, in cases such as the present, an hourly rate of in excess of two thousand dollars ($2000.00EC) is claimed. Secondly, the court has attempted in many cases to address what it perceives to be the excessive number of hours claimed as time spent by counsel on matters, as well as the number of attorneys for which these hours are claimed. While each case must be taken on its own merits, the cases do assist in determining what may be reasonable for interlocutory applications which are not particularly complex or multi-jurisdictional.

[54] In my view, therefore, counsel should be encouraged to have due regard to the decisions of the court regarding the issues of costs. When the court of appeal awards costs and encourages the parties to agree on the sum to be awarded, a serious attempt must be made to comply with this

[15] Except, of course, the British Virgin Islands where the official currency is the US dollar.

order. By claiming costs which are so far outside the range of what has been awarded by the court in previous decisions, the applicant would not be assisting with this process. This results in further and unnecessary litigation, as well as increased costs to the parties. The issue of costs ought not to become far more complicated than the issues of liability and damages in substantive matters. This may very well discourage litigants from pursuing genuine claims before the court in the future and is to be discouraged. Costs must at all times be reasonable in the circumstances and counsel should be in a good position to agree on reasonable costs when so ordered by the court, if properly guided by precedent.

[55] The 1st respondent is therefore ordered to pay costs in the sum of *one hundred and thirty-seven thousand, nine hundred and fourteen Eastern Caribbean dollars and thirty nine cents ($137,914.39EC)* representing costs in the court of appeal and the court below. This is to be paid within 30 days from the date of this judgment. I would also award costs in the sum of *five thousand Eastern Caribbean dollars ($5,000.00EC)* in favour of the applicant in this application for the assessment of costs.

[56] Finally, I thank counsel for their assistance in this matter. Especially counsel for the applicant, who readily agreed to compile an electronic bundle and forward to the registry in order to assist with the preparation and delivery of this decision.

Ermin Moise
Master

By the Court

Registrar