EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: BVIHCV2015/0141

Between Nevile Pole trading as PL Consultancy
Alfred Christopher trading as Castle Maria Hotel

Claimants

and

The Licensing Magistrate

Defendant

Before: MASTER Ermin Moise

Appearances:

Mr. Jamal Smith of Counsel for the Claimant
Mrs. Jo-Ann Williams-Roberts Solicitor General of the BVI of Counsel for the Defendant

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**2018: June, 25th**
**October, 3rd**

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# JUDGMENT

[1] **MOISE, M.:** This is an application for an assessment of costs in judicial review proceedings. On 27th March, 2018 the trial judge awarded ***"costs** to the Claimant to be assessed in accordance with Part 65.12 and Part 64.6".* On 9th April, 2018 the claimant filed his application for costs to be assessed to which a bill of costs was exhibited.

[2] I wish firstly to address a submission made by the defendant regarding the regime of costs to be applied in the present case. It was argued that "*the prescribed costs regime in CPR 65.5 ought to apply."* On that premise, it is further argued by the defendant that, given this is not a claim for a specified sum of money, the court is to value the claim at $50,000.00 and award prescribed costs on that value. The defendant has relied on the cases of *Unicomber Saint Lucia Limited v. Comptroller of the Inland Revenue*[1], *Norgulf Holding Limited v. Michael Wilson and Partners*

[1] SLUHCVAP2016/0007

*Limited*[2] and *Elfrida Alethea Hughes v. Clive Hodge*[3], in support of this submission. After reviewing these authorities I find myself unable to accept the submissions of the defendant. To my mind, the order of the trial judge could not be clearer as to the manner in which costs are to be assessed in this case. She was specific as to the provisions of the rules under which her order was made. I am ordered to assess costs in accordance with the provisions of Rule 65.12 and 64.6 and I can find no basis in law to disregard this express order of the trial judge. Rule 64.6 addresses the issue of whether a costs order should be made in general and in whose favour it is to be made. It would seem to me that the trial judge has already determined that costs are to be paid in favor of the claimant but requests that due regard is given the fact that some measure of success was attributed to the defendant.

[3] Rule 65.12 of the CPR ***"****applies where costs fall to be assessed in relation to any matter or proceedings,* ***or part of a matter or proceedings, other than a procedural application."*** The rule goes on to state that where the assessment ***"****does not fall to be carried out at the hearing of any proceedings then the person entitled to the costs must apply to a master or the* ***registrar for directions as to how the assessment is to be carried out."*** The applicant, in that instance, must attach a bill of costs to his application for consideration by the court.

[4] Perhaps the starting point in assessing costs is found in Rule 65.2(1). This rule provides that where the court has a discretion as to the amount to be awarded to the applicant, the award must be an amount which ***"****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."*** In making that determination I consider the case of *Horsford v. Bird*[4] where Lord Hope 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."***

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[2] CIVIL APPEAL NO. 8 OF 2007 (BVI)
[3] AXAHCV2008/0035
[4] Privy Council Appeal No.43 of 2004

[5] Taking this into consideration, I observe that the claimant is not entitled as of right to be indemnified of all the expenses claimed in the bill of costs. Rather, he is entitled to an award of costs which is reasonable. Further guidance on the manner in which the court is to proceed can be found in the case of *Lownds v Home Office*[5] where Lord Wolf 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."*

[6] In applying this two-stage approach encouraged by Lord Wolf, I am tasked, firstly, to take a global approach regarding the sum actually claimed by the claimant in his bill of costs and to determine whether it is disproportionate, having regard to the provisions of CPR 65.2. If I find that the costs claimed are not disproportionate, I must then satisfy myself that each item has been reasonably incurred. The relevant provisions of this rule are highlighted below:

*Rule 65.2(3)*

> *In deciding what would be reasonable the court must take into account all the circumstances, including* **–**
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> *(a) any order that has already been made;*
>
> *(b) the care, speed and economy with which the case was prepared;*
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> *(c) the conduct of the parties before as well as during the proceedings;*
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> ***...***
>
> *(e) the importance of the matter to the parties;*

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[5] [2002)4 All ER 775

*(f) the novelty, weight and complexity of the case;*

*(g) the time reasonably spent on the case;*

***...***

[7] The total costs outlined in the bill of costs filed by the claimant amounts to $57,690.00 in fee hours. He claims a further $579.80 in disbursements. This totals $58,269.80. The defendant has argued that this is entirely disproportionate. However, prior to making such a determination I will consider the factors outlined in Rule 65.2(3) of the CPR.

*Any order that has already been made*

[8] Although, strictly speaking, it is not an order, I am of the view that the statement made by the trial judge in the final paragraph of her judgment is important and relates in some way to the actual order made for costs to be assessed. Her Ladyship stated that ***"it** is clear that both sides have achieved some success in this Claim. For that reason the Court is satisfied that the Claimants' costs will have to be assessed in accordance with the principles set out in Part **64. 6."*** In approaching the final figure to be paid in costs, I must bear this issue in mind.

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

[9] This claim was filed in February, 2015 and concluded in April, 2018. In perusing the file, I note that both parties, at various intervals, made applications for extensions of time within which to comply with case management orders of the court. Other than that, I can find no other issue to be raised generally regarding the speed and economy with which the case was prepared. The claimant appeared to be to have taken great care in the preparation of his case. The same can be said of the defendant.

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

[10] The claimant has requested that the court consider two issues which emerged from the judgment of the trial judge. Her Ladyship commented on the fact that the 1st claimant received no response to a number of letters written to the defendant and other government officials prior to the filing of

the claim. Secondly, it was observed that pre-existing guidance notes were only brought to the attention of the claimants during the proceedings. This was not in keeping with the requirements of full and frank disclosure.

[11] The defendant, on the other hand, argues that the issues referred to by the claimant were discussed in relation to determining the issues of breach of natural rights and want of procedural fairness. Indeed, in paragraph 19 of her judgment the trial judge stated that ***"[t]****he evidence before the Court also reveals that between October 2014 and April 2015, the First Claimant acting on behalf of his clients wrote several letters to the Licensing Magistrate, the* ***Governor, the Premier, the Attorney General seeking redress."*** Regarding the issue of the lack of full and frank disclosure, the trial judge stated the following at paragraph 139 of her judgment:

> ***"...*** *towards the close of the trial, it was revealed that Guidance Notes had been issued by the Respondent which had hitherto never been disclosed to the Claimants and which had never been placed before the Court. This development was of course not well received as it was a clear breach of the duty of candour. Moreover, it demonstrated a failure to appreciate the legal obligation to inform and apprise applicants so that they know what to expect. Licensing power has been described as a drastic power greatly affecting the rights and liberties of citizens and in particular their livelihoods and this fact alone demand a fair administrative procedure*."

[12] It may be the case, in some circumstances, that the failure of a party to properly respond to correspondence by another party may be a factor to take into consideration in an assessment of costs. This failure may very well have led to unnecessary litigation which could have been averted had serious consideration been given to the representations of the claimant in his letters. However I do agree with the defendant that the trial judge was not particularly critical of the manner in which the 1st claimant's letters were dealt with. This issue arose on the question of whether the 1st claimant had any standing to commence these proceedings. I am not inclined to consider this is a factor which should negatively impact the defendants in the costs which they are liable to pay.

[13] However on the issue of disclosure, I accept the submissions of the claimant. The trial judge was particularly critical of the defendant's failure to disclose these documents prior to the

commencement of the trial and referred to this as a failure on the part of the defendant to appreciate the legal obligation of disclosure. I agree that this is a factor to be taken into consideration in assessing costs.

*The importance of the matter to the parties*

[14] Both parties have accepted that this was a case of public importance. Given the express content of the judgment itself, I am of the view that there is not much more which needs to be said on this issue other than to endorse that sentiment.

*The novelty, weight and complexity of the case*

[15] I note that the judgment in this case covered 42 pages and 158 paragraphs. Upon perusal it appears to me that the issues were not only of general public importance, but were of some measure of complexity. I would not venture to say that the issue was particularly novel, but it was certainly an issue being raised for the 1st time in the territory and needed careful consideration by the judge.

*The time reasonably spent on the case*

[16] In the bill of costs presented by the claimant a total of 96.1 hours is claimed as time spent on this case. Given the nature of the case and considering the factors which I have already outlined above, I do not find the time spent, as represented by the claimant, to be unreasonable.

The Global Approach

[17] Having addressed these factors I must now determine whether the costs claimed as a whole are disproportionate. As Mitchell JA notes in the case of *ANDRIY MALITSKIY ET AL v. OLEDO PETROLEUM LTD*[6], ***"In performing this exercise I must resolve any doubt as to whether any item was reasonably incurred, or was reasonable in amount, in favour of the paying party [respondents]".***

[6] BVIHCMAP2013/0006

[18] The first issue I will consider is that of the hourly rates claimed in the bill of costs. The claimant noted in his submissions that a fee structure of $600.00 is charged per hour for normal working hours and $750.00 for every hour outside of the normal working hours. From my examination of the bill of costs, it appears that the sum of $600.00 was maintained as the hourly rate. The defendants argue that this is excessive. I refer to the case of *Maruti Holdings PTE Ltd v Sinclair Strategies Ltd et al*[7], where Master Alexander (as she then was) made the following determination on an assessment for costs in this territory:

> ***"I accept the claimant's proposed rat****e of $650.00 for a Grade A fee earner, where such fee earner was acting in a supervisory capacity, $625.00, where they were not, the sum of $600.00 for a Grade B fee earner and $475 for a Grade C fee earner*."

[19] In the present case there was only one attorney, who was therefore not acting in the capacity of a supervisor. In the circumstances, and considering the findings of Master Alexander, I do not find the sum of $600.00 per hour to be unreasonable and I would award costs at this hourly rate. Having considered this I would conclude that the costs claimed by the claimant are not unreasonable.

Has each item been reasonably incurred?

[20] I turn now to consider the items on the bill of costs. In general, I do find that the expenses claimed were reasonably incurred. However I make the following observations:

(a) The claimant claims a total of 2 hours for the review of a request for extension. I assume this refers to an extension of time requested by the defendant;

(b) The claimant also claims 2 hours for time spent in preparing an application for an extension of time on his own behalf.

[21] I am not inclined to allow costs for these requests. I noted earlier in this decision that the fact that both parties had requested extensions of time is a factor which I would consider. I am of the view

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[7] BVIHC (COM) 2012/130

that where there is no order for costs on interim applications such as these, then such claims should be disallowed at this stage. Further to this, it would not be reasonable to demand that the defendant pays the costs of an application filed by the claimant which seeks to extend the time in which he is to comply with a court order. I have also considered that some of the other items in the bill of costs may relate directly to these applications. I will therefore reduce the total number of hours claimed to 90 as I am of the view that this is reasonable in the circumstances.

[22] In light of this, I would assess costs at an hourly rate of $600 for 90 hours, making a total sum of $54,000.00. I would add to that the sum of $570 as disbursements which were reasonably incurred. I would therefore assess costs to be the sum of $54,570.00US.

[23] As indicated earlier, the trial judge did note that there was some measure of success enjoyed by both parties. The defendant submits that the costs assessed should be reduced to 50% as a reasonable apportionment for the measure of success enjoyed. However, after reading the judgment in full, I am satisfied that the claimant was more successful in his claim and is entitled to a higher percentage of the costs. I would reduce the costs awarded by 30% in consideration of the measure of success enjoyed by the defendant.

[24] In the circumstances I make the following orders:

(a) The defendant is to pay the sum of $38,199.00US in costs to the claimants;
(b) Costs in the sum of $1000.00US is awarded to the claimants on his application for assessment;
(c) The costs are to be paid within 45 days from the date of delivery of this judgment unless the parties mutually agree to an alternative time table.

**Ermin Moise**
**Master**

**By the Court**

**Registrar**