EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2017/0003

BETWEEN:

[1] FRIAR TUCK LTD.
[2] QUIVER INC.

Appellants

and

INTERNATIONAL TAX AUTHORITY

Respondent

Before:

The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mde. Gertel Thom — Justice of Appeal
The Hon. Mr. Rolston Nelson — Justice of Appeal [Ag.]

Appearances:

Mr. Jonathan Addo for the Appellants
Ms. Jo-Ann Williams-Roberts, Solicitor General with her,
Ms. Kaidia Edwards-Allister, Principal Crown Counsel, for the Respondent

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2017: November 20;
2019: March 12.

Civil appeal – Assessment of costs in judicial review proceedings – Basis of assessment – Whether judge erred in assessing costs on a prescribed basis – Rules 56.13, 65.11 and 65.12 of the Civil Procedure Rules 2000

Friar Tuck Ltd. and Quiver Inc. ("the appellants") instituted judicial review proceedings by way of an application for leave, and then a substantive judicial review claim, against the International Tax Authority ("the respondent") for its refusal to provide detailed information on notices served on the appellants, pursuant to the Mutual Legal Assistance (Tax Matters) Act, 2003. Prior to the determination of the judicial review claim, the respondent applied to have the claim struck out. The strike out application was denied by the trial judge and an award of costs was made in favour of the appellants, to be assessed if not agreed. The judicial review claim was finally determined in the appellants' favour and the trial judge awarded costs to the appellants, to be assessed. The assessment of costs was adjourned to 24th April 2017 when the judge heard counsel on the quantum of costs on the strike out application, the

substantive judicial review claim and the preceding application for leave. The judge undertook a detailed assessment of the costs in the strike out application. In respect of the costs on the judicial review claim and application for leave, the trial judge ruled that she was 'satisfied that it ought to be done on a prescribed basis'. There being no value placed on the claims, the trial judge applied rule 65.5(2)(b) of the Civil Procedure Rules 2000 ("the CPR") and awarded costs to the appellants in the amount of $7,500.00 for the substantive claim and $1,500.00 for the leave application.

The appellants, being dissatisfied with the trial judge's award of costs, and having obtained the leave of the trial judge to appeal against her order, appealed the decision of the trial judge to assess the costs payable to them on the judicial review claim and leave application on a prescribed costs basis.

Held: allowing the appeal; remitting the question of costs in the court below to Ellis J for assessments; and making an award of costs on the appeal to the appellants, to be assessed by Ellis J if not agreed within 21 days, that:

1. It is clear that rule 56.13(5) requires a judge who awards costs in judicial review proceedings to assess costs in accordance with the assessed costs regime referred to in rules 65.11 and 65.12. The trial judge was accordingly correct when she assessed the appellants' costs in the proceedings in the court below herself, as she was required to do so by rule 56.13.

   Rules 56.13(5) and 64.2 of the Civil Procedure Rules 2000 considered; Prime Minister and Juno Samuel v Gerald Watt, KCN, QC ANUHCVAP2012/0005 (delivered 27th May 2014, unreported) considered.

2. Whereas there is some overlap between the regimes for the quantification of costs under the CPR, it is not open to a judge to assimilate costs regimes where the CPR expressly requires that a particular regime be utilised. It was therefore not open to the judge to assimilate the prescribed and assessed costs regimes in as much as the CPR mandates that the costs in judicial review proceedings be assessed (and not prescribed). The learned judge therefore erred when she purported to assess costs on a prescribed costs basis, saying that she was "satisfied that it ought to be done on a prescribed basis". Accordingly, the cost award made by the judge must be set aside.

   Rules 65.4(3), 65.5(4)(b)(ii) and 65.11(7) of the Civil Procedure Rules 2000 considered.

3. The appellants having prevailed in their contested judicial review applications, ought to be awarded costs on their applications against the respondent which unsuccessfully contested the claims for judicial review. It does not follow, however, that the appellants are entitled to have the entirety of their costs paid by the respondent. In light of the fact that the respondent was carrying out its statutorily mandated function and that its operations could be crippled by large costs awards made against it; and, having regard to the manner in which the court is required to

exercise its discretion by rule 65.2(1)(b), the quantum of costs to be awarded in cases like this should more closely resemble prescribed costs awards than costs assessed on an indemnity basis. It may be different if it is found that the International Tax Authority had acted capriciously or maliciously in the purported discharge of its functions, in which case it may be visited by large costs awards, but not so if it is simply doing what it is statutorily mandated to do, which appears to be the situation in the present case. This Court, being unapprised of any material which could assist its assessment and quantification of the costs to be paid to the respondent by the appellants in the proceedings below, is constrained to remit the assessment of the costs in those proceedings to Ellis J.

Rules 56.13, 65.2(1)(b) and 65.12 of the Civil Procedure Rules 2000 considered; M v Croydon Borough of London [2012] EWCA Civ 595 and R (on the application of Bahta) v Secretary of State for the Home Department [2011] EWCA Civ 895 distinguished.

JUDGMENT

[1] MICHEL JA: This appeal revolves around a single issue, which can be framed in the form of a simple question, that is, is it open to a judge assessing costs in judicial review proceedings to apply the prescribed costs regime to the assessment of the costs in those proceedings.

Background

[2] The International Tax Authority **("the Authority")** is a BVI statutory functionary empowered to conduct its activities under the Mutual Legal Assistance (Tax Matters) Act, 2003[1] ("the MLA"), which includes requiring individuals or companies to provide to the Authority such information and documentation as is necessary to comply with requests from foreign governments. In 2015, the Authority received a request from a Swedish tax authority for the provision of certain documents and information from two BVI registered companies. Pursuant to this request and to its powers under the MLA, the Authority served notices on the companies requiring them to provide specific information and documentation itemised in the notices. The companies asserted that the notices did not provide sufficient information to them on

[1] Act No. 18 of 2003.

the basis of which they could make any determinations about the validity or justification of the notices. The companies accordingly challenged the notices, arguing that they did not identify the relevant taxpayers who were the subjects of the enquiry, the relevant tax years under investigation, the periods of interest, or the tax purposes for which the information was sought. The companies' lawyers informed the Authority of the concerns which they had with the notices, highlighting the inability of their clients to assess the validity of the notices given the lack of information or the absence of the factual basis underlying the requests. The Authority responded by informing the companies' lawyers that, under the MLA, the Authority had no obligation to provide any such information to the companies and was in fact prohibited from so doing by the relevant Tax Information Exchange Agreement. The companies accordingly sought the leave of the High Court to bring judicial review proceedings against the Authority on the basis that the Authority was acting unlawfully and in breach of the fundamental duty of fairness by failing to disclose any material information concerning the factual basis for the issuing of the notices so as to enable the companies to assess the validity of the notices. The applications for leave were resisted by the Authority, but were granted by the High Court. The companies then filed the judicial review claims which were also resisted by the Authority, but the High Court proceeded to review the decision of the Authority challenged by the companies, and on 31st March 2017 made an order of mandamus requiring the Authority to provide certain information to the companies in accordance with the duty of procedural fairness. The issue of costs was adjourned to 24th April 2017.

[3] It should be noted that, prior to the determination of the judicial review claim, the Authority had sought to strike out the claim, but the strike out application was denied by the court, with costs to the companies to be assessed if not agreed.

[4] On 24th April 2017, the learned trial judge heard counsel on the quantum of costs on the strike out application and on the incidence and quantum of costs on the substantive claim and the preceding application for leave. The trial judge's award on

costs on the strike out application has not been challenged and is not therefore relevant in this appeal.

[5] In relation to the claims for costs on the applications for leave to bring the judicial review proceedings and on the actual judicial review proceedings, counsel acting on behalf of the companies, Mr. Jonathan Addo, submitted that, having succeeded in their claims, his clients were entitled to their costs on both the claims and the leave applications and that the costs should be assessed. The Solicitor General, Ms. Joanne Williams-Roberts, acting on behalf of the Authority, submitted that in issuing the notices that it did, requesting information and documentation from the companies, the Authority was merely performing its statutory functions. She submitted that the Authority would be crippled in its operations if it had to face the risk of having to pay large costs awards once it was determined by a court that it ought not to have issued several of the numerous notices which it is required to issue in the performance of its statutory obligations. Ms. Williams-Roberts accordingly asked the court to make no order as to costs or to order that the parties each bear their own costs.

[6] In her ruling on costs, the trial judge rejected the Solicitor General's submission that no order should be made as to costs or that each party should bear its own costs and, instead, accepted Mr. Addo's submission that the companies, having been completely successful in their claims and the applications for leave to bring them, should get their costs and that the costs should be assessed. The judge decided to assess the costs herself and ruled that, in carrying out the assessment, she was 'satisfied that it ought to be done on a prescribed basis'. There being no value placed on the claims, the judge applied rule 65.5(2)(b) of the Civil Procedure Rules 2000 ("the CPR") and awarded costs to the appellants in the amount of $7,500.00 for the substantive claims, and also made an award of $1,500.00 for the leave applications.

[7] The companies, having obtained the leave of the trial judge to appeal against her order, filed an appeal on 16th May 2017 (amended the following day) challenging the decision of the judge to assess the costs payable to the companies on the judicial

review claim subject to the prescribed costs regime, rather than subject to a discretionary detailed assessment.

The appeal

[8] The companies (now "the appellants"), in their amended notice of appeal, take issue with the costs awarded by the trial judge on the basis of the prescribed costs regime. The appellants state in their amended notice, under the heading 'details of the order appealed', that:

> "This is an appeal against the decision of Ellis J…. erroneously assessing costs of the Joint Claims subject to the prescribed costs regime (pursuant to ECSC CPR 65.5), rather than subject to discretionary detailed assessment (pursuant to ECSC CPR 65.12)."

[9] Among the several matters listed in the amended notice of appeal, the main grounds of appeal are found at sub-paragraphs (1), (2) and (11) of paragraph 6 in the amended notice of appeal, and are as follows:

> "(1) The Learned Judge erred in law by failing to apply the correct standard of assessment required by ECSC CPR 56.13(5), namely a discretionary detailed assessment pursuant to the principles under ECSC CPR 65.12.
>
> (2) The Learned Judge erred in law by failing to apply and/or dis-applying without good reason the costs regime applicable to Judicial Review claims under ECSC CPR 56.13(5), and/or by applying the prescribed costs regime when there was no good reason to do so.
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> ….
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> (11) Alternatively, if contrary to the above, the Learned Judge was right to apply the prescribed costs regime, she was wrong as to the amount awarded, because the claim should have as a matter of substantive fairness been treated as having a higher value. The sums awarded were inadequate with regards to the circumstances of the Joint Claims."

[10] The appellants in their written submissions advance two main arguments. First, the appellants argue that a discrete costs regime exists for judicial review proceedings by virtue of rule 56.13 of the CPR. They contend that this regime empowered the court below to make an award of costs in their favour and, citing M v Croydon Borough of

London[2] and R (on the application of Bahta) v Secretary of State for the Home Department[3] as authority, say that the regime entitles them to have the entirety of their costs paid by the Authority (now the respondent). Second, the appellants argue that the trial judge was incorrect in applying the prescribed cost regime under rule 65.5 of the CPR. They contend that rule 56.13 mandates a judge to assess costs in accordance with rule 65.12. They further contend that the regime of assessment provided for under rule 65.12 is qualitatively different than that of rule 65.5, that the trial judge erroneously misapplied the latter in quantifying costs in the proceedings, and that a more detailed discretionary assessment of the costs was required.

[11] The respondent concedes that the appellants were entitled to a cost order in their favour. They however argue that to have made an award on an assessed costs basis would render the costs disproportionate and unreasonable. The respondent contends that its ability to continue with its important international obligations is such that it outweighs the private interest of the appellants in seeking to recover all their costs in the proceedings. As such, the respondent contends that the prescribed costs regime is a more sensible approach for the assessment of costs in judicial review proceedings as it enables a balance to be struck so that agencies, such as the respondent, can continue to perform their functions.

[12] In light of the foregoing, the issue to be determined by this appeal is whether the trial judge properly exercised her jurisdiction to award costs on a prescribed basis in light of the requirements of rule 56.13 of the CPR. If the trial judge is found by this Court to have properly exercised her discretion to award costs on a prescribed costs basis, it further falls to be considered whether the sum awarded in the exercise of her discretion was unreasonable or unjustified in the circumstances. The starting point of the analysis in this appeal, therefore, is an examination of the court's discretion to award costs pursuant to rule 53.13 and the corollary of rules that circumscribe the exercise of that discretion.

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[2] [2012] EWCA Civ 595.
[3] [2011] EWCA Civ 895.

The **court's costs jurisdiction in judicial review p**roceedings

[13] It is long-established that the court enjoys a wide discretion in the award and quantification of costs. The court**'s** discretion is in many regards circumscribed by the provisions of the CPR which set out the considerations to be borne in mind, and procedure to be followed, in exercising the discretion to make an award for and in the quantification of costs.

[14] The costs jurisdiction of the court with respect to judicial review proceedings is governed by paragraphs (4) to (6) of rule 56.13, which provide as follows:

> "(4) The judge may, however, make such orders as to costs as appear to the judge to be just including a wasted costs order.
>
> (5) If the judge makes any order as to costs the judge must assess them.
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> - Rules 65.11 and 65.12 deal with the assessment of costs
>
> (6) The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application
>
> - Part 64 deals with the court's general discretion as to the award of costs."

[15] The plain words of rule 56.13(4) indicate that a judge has a discretion to make (or refuse to make) an order for costs in light of the particular facts of each case, and in light of what appears to the judge to be just in the circumstances. Rule 56.13(5) goes on to make it clear that if a judge in judicial review proceedings is minded to make an order for costs, the judge must assess the costs.

[16] In light of the subsidiary note following the text of rule 56.13(5), which states: 'Rules 65.11 and 65.12 deal with the assessment of costs', and in light of the interpretation previously given to rule 56.13(5) by this Court in cases like Prime Minister and Juno Samuel v Gerald Watt, KCN, QC[4], and the definition of 'assessed costs' and 'assessment' in rule 64.2, it is clear that rule 56.13(5) requires a judge who awards costs in judicial review proceedings to assess the costs in accordance with the

[4] ANUHCVAP2012/0005 (delivered 27th May 2014, unreported).

assessed costs regime referred to in rules 65.11 and 65.12, which rules are respectively entitled 'Assessed costs – procedural applications' and 'Assessed costs – general'. A trial judge therefore, having exercised the discretion to make an award for costs pursuant to rule 56.13(4) would, at the outset, have no discretion to determine the particular regime by which costs should be quantified, insofar as rule 56.13(5) requires the costs ordered to be quantified in accordance with the assessed costs regime.

Rules 65.11 and 65.12

[17] The scope and purpose of rules 65.11 and 65.12 were discussed extensively in Norgulf Holdings Limited and Incomeborts Limited v Michael Wilson & Partners Limited.[5] There, Barrow JA said:

> "The amplitude of its operation having been established in paragraph (1), [rule 65.12] proceeds in its other paragraphs to set out the procedure to be followed for an assessment to be carried out. That is what rule 65.12 does – it lays down the procedure for assessment. This is in contrast with the provisions of rule 65.11, which lays down the principles to guide the court in making an assessment of costs on determining applications."

[18] Accepting Barrow JA's basic characterisation of rule 65.11, it appears that the rule is limited in application to the assessment of costs in procedural applications and possibly non-procedural interim applications. Rule 65.11 as a result is not applicable and will not form part of the disposition of this appeal, as the appeal here does not concern the assessment of costs in a procedural application. Rule 65.12, however, is of general application and only excludes from its scope, procedural applications which are expressly covered by rule 65.11. According to rule 65.12(1), rule 65.12 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'. Accordingly, rule 65.12 is the rule applicable to the assessment of costs in this case.

[19] Rule 65.12 makes a distinction between the assessment of costs for a part of proceedings and the assessment of costs for entire proceedings, with rule 65.12(2)

[5] BVIHCVAP2007/0008 (delivered 29th October 2005, unreported).

stating that: 'If the assessment relates to part of court proceedings it must be carried out by the judge, master or registrar hearing the proceedings' and rule 65.12(3), (4) and (5) seeming to deal with the assessment of costs for entire (as opposed to part of) proceedings, which assessment must be done by a master or the registrar upon application by the person entitled to the costs. But this distinction cannot apply to the assessment of costs in judicial review proceedings which, by virtue of rule 56.13, must be assessed by the judge who makes the order as to costs. It would therefore appear that the procedure laid down in paragraphs (3), (4) and (5) of rule 65.12 for the assessment of costs cannot be applied to the assessment of costs in judicial review proceedings, because these paragraphs deal exclusively with assessments of costs undertaken by a master or the registrar.

[20] As previously indicated though, courts enjoy a wide discretion in the award and quantification of costs, which is expressly provided for in judicial review proceedings by **rule 56.11(4), as follows: "The judge may … make such orders as to costs as appear to the judge to be just"**. There is nothing to prevent a judge therefore, in assessing costs on a judicial review claim, from summarily deciding the quantum of costs at the conclusion of the trial or claim, or from conducting a detailed assessment of the costs, insofar as any award made is reasonable and proportionate in accordance with rule 65.2 of the CPR. There is also nothing to prevent the judge from directing the parties to make submissions (orally or in writing) on the quantum of costs. These directions may include the filing of a bill or other document showing the sum in which the court is being asked to assess the costs and how such sum was calculated, to be followed by an assessment of the costs using this material, or by the fixing of a date, time and place for the assessment to take place.

Analysis

[21] Against the background set out above, the trial judge was accordingly correct when she assessed **the appellants' costs in the proceedings in the court below** herself, as she was required so to do by rule 56.13. She however erred when she purported to

do so on a prescribed costs basis, saying that she was 'satisfied that it ought to be done on a prescribed basis'.

[22] The CPR sets out four regimes for the quantification of costs in civil proceedings. The first is the fixed costs regime provided for in rule 65.4; the second is the prescribed costs regime provided for in rule 65.5; the third is the budgeted costs regime provided for in rule 65.8; and the fourth is the assessed costs regime provided for in rules 65.11 and 65.12. Whereas there is some overlap between the regimes for the quantification of costs under the CPR,[6] it is not open to a judge to assimilate costs regimes where the CPR expressly requires that a particular regime be utilised. It was not therefore open to the judge to assimilate the prescribed and assessed costs regimes in as much as the CPR mandates that the costs in judicial review proceedings be assessed (and not prescribed). On that basis, the costs award made by the judge must be set aside.

[23] Having determined that the learned judge had erred in her assessment of the costs to which the appellants were entitled on their applications for judicial review and that her costs order should be set aside, it would be in order to conclude the judgment with an assessment of the costs or an order for it to be remitted to the judge for her assessment. The parties however have not provided this Court or the court below with any detailed information on the quantum of costs which they claim to have incurred in the court below. This information would be necessary for the Court to properly evaluate the reasonableness and proportionality of the sum claimed or to evaluate the appropriateness of the sum which was awarded by the court below (albeit on an improper basis). As a result, and in the absence of this information, it would be inappropriate for this Court to attempt to assess and make an order as to the quantum of costs to be paid by the respondent to the appellants. The parties did however make fairly substantial submissions in the court below on whether costs should have been awarded to the appellants and, both here and in the court below, on what the level of these costs ought to be, thus meriting some consideration of these issues.

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[6] See for example rules 65.4(3), 65.5(4)(b)(ii) and 65.11(7).

[24] I agree with the appellants that, having prevailed in their contested judicial review applications, they ought to be granted costs on their applications against the respondent which unsuccessfully contested the claims for judicial review. I do not agree with the appellants, however, when they contend that they are entitled to have the entirety of their costs paid by the respondent, meaning the full costs incurred by them in the prosecution of their judicial review claim. This contention is not supported by rules 56.13 and 65.12 referred to by the appellants or by the cases of M v Croydon Borough of London and R (on the application of Bahta) v Secretary of State for the Home Department also referred to by them.

[25] I do not agree with the respondent that the judge was correct in awarding costs to the appellants using the prescribed costs regime because to have made an award on the assessed costs regime would render the costs disproportionate and unreasonable. I agree with the respondent, however, that if it had to pay large costs awards anytime a court determines that it should not have issued notices in the discharge of its statutory obligations, then it would be crippled in its operations.

[26] As previously stated, a judge hearing an application for judicial review who makes an order as to costs is required by rule 56.13 to assess the costs in accordance with the assessed costs regime referred to in rules 65.11 and 65.12. Very importantly too is rule 65.2(1) which states:

> "If the court has a discretion as to the amount of costs to be allowed to a party, the sum to be allowed is –
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> (a) the amount that the court deems to be reasonable were the work to be carried out by a legal practitioner of reasonable competence; and
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> (b) which appears to the court to be fair both to the person paying and the person receiving such costs."

[27] Having expressed my agreement with the respondent's position that it would be crippled in its operations if it had to pay large costs awards anytime a court determined that it should not have issued notices in the discharge of its statutory obligations, and having regard to the manner in which the court is required to exercise its discretion by rule 65.2(1)(b) as to the amount of costs to be allowed to a party, I take the view that

the quantum of costs to be awarded in cases like the present one should more closely resemble prescribed costs awards than costs assessed on an indemnity basis. It may well be that companies, like the appellants in this case, may spare no expense in resisting requests for information made by entities like the respondent, but such entities may be hard-pressed to carry out their functions if they are to face the prospect of massive costs awards because a court finds that they ought not to have made the requests for information which they did or should not have made them at the time or in the manner they made them. It may be different if it is found that the Authority had acted capriciously or maliciously in the purported discharge of its functions, in which case it may be visited with large costs awards, but not so if it is simply doing what it is statutorily mandated to do, which appears to be the situation in the present case.

Conclusion

[28] The judge having failed to assess the costs as she was required to do by rule 56.13, and having instead made a prescribed costs award, the costs award made by her is set aside. This Court being unapprised of any material which could assist its assessment and quantification of the costs to be paid to the respondent by the appellants in the proceedings below, is constrained to remit the assessment of the costs in those proceedings to Ellis J. The appellants being successful on their appeal are entitled to their costs, which costs should be assessed by Ellis J, if not agreed.

[29] I accordingly make the following orders:

(1) The appeal against the order of the trial judge made on 24th April 2017 assessing the appel**lant's costs on the judicial review claim**s on a prescribed costs basis in the amount of $7,500.00 and $1,500.00 for the applications for leave to bring judicial review proceedings is allowed.

(2) The determination of the quantum of costs in the proceedings below is remitted to Ellis J for an assessment to be conducted in accordance with the assessed costs regime.

(3) Costs to the appellants on the appeal to be assessed by Ellis J, if not agreed within 21 days.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Rolston Nelson
Justice of Appeal [Ag.]

By the Court

Chief Registrar