EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: **BVIHC(Com)2011/089**

Between **Sheik Abdullah Ali M Alhamrani**

Claimant

and

SHEIKH MOHAMED ALI M ALHAMRANI
SHEIKH SIRAJ ALI M ALHAMRANI
SHEIKH KALID ALI M ALHAMRANI
SHEIKH MOHAMED ALI M ALHAMRANI
as legal representative of the late SHEIKH ABDULAZIZ ALI M ALHAMRANI
SHEIKH AHMED ALI M ALHAMRANI
SHEIKH FAHAD ALI M ALHAMRANI

Defendants

Before: **MASTER Ermin Moise**

Appearances:

The Chambers of Walkers & Associates of Counsel for the Claimant/Applicant
The Chambers of Harney, Westood & Reigels of Counsel for the Defendants/Respondents

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2019: July 26th

JUDGMENT

[1] **MOISE, M.:** This litigation has had a very long and rather complex history before the courts in the British Virgin Islands. With the substantive matters now closed, one would have thought that finality would have been achieved and that considerable resources would no longer be spent by the parties. However, the issue of costs appears to have been just as vexing as the substance of this case. On 15th March, 2018, Justice Leon rendered a judgment on an assessment of costs on two applications which were determined by Carrington J (Ag) on 8th March, 2017. In handing down his judgment on the assessment of costs, his Lordship then made an order regarding the assessment of the costs assessment. The order of Justice Leon, which is relevant to this assessment, is as follows:

4. The question of the costs of the assessment of the claimant's costs of the applications shall be determined on paper in accordance with the following:

...

(c) The incidence and quantum of the costs of the assessment of the claimant's costs of the application shall be determined on paper thereafter by a master.

[2] The parties have both filed submissions and presented bills of costs to this court. From the onset I wish to state that I was unclear as to the precise interpretation to place on this order. Despite the fact that a very clear and concise judgment was handed down by Leon J, it would seem that the order has referred to the master the task of determining who is entitled to costs and at what amount. This is a difficult task as the parties have presented submissions which include a number of issues which transpired before the judge leading up to the assessment and during the delivery of the judge's decision. I will proceed to address the submissions as best as I can in the circumstances.

The Order for Costs

[3] It is perhaps important to first address a submission made by the defendants where they argue that an assessment of Leon J's decision would reveal that both parties enjoyed partial success. In light of that it is submitted that the court should award each party the costs commensurate with their success and offset this against the other's costs. Counsel for the defendant argues that "it is plain that the order for costs should reflect the fact that there was partial success on both sides. The claimant should have the costs of the points on which he won and the defendants should have the costs of the points on which they won." It is submitted that the apportionment should be 70% of the claimant's costs and 30% of the defendants' costs offset against each other.

[4] The defendants claim to find support for this approach in the decision of Webster JA when this very matter went to the court of appeal on the assessment of the costs in the substantive claim. In particular counsel refers the court to paragraphs 55 to 61 of his Lordship's judgment. I would however reference paragraph 59 where he stated as follows:

"Mr. Tucker submitted, and I agree, that the effect of the judge's finding was that if the Brothers had not advanced a false case Sheikh Abdullah would not have had to defend that case and Sheikh Abdullah is therefore entitled to his full costs of defending any issue that arises from the conduct. I think that this is taking the issue of conduct one step too far. The court is entitled to take into account any conduct that has the effect of unnecessarily increasing the time and costs of the proceedings and can order the party responsible for the conduct to pay the increased costs. What the court should not do is to conclude, without more, that as a result of the conduct of the paying party the receiving party should receive the full amount of dealing with the issues affected by the conduct. The court must still carry out the additional exercise of deciding what amount of the increased costs is reasonable and fair for the paying party to pay. This type of conduct by the paying party does not obviate the need for the court to investigate the amount of the claim and order him or her to pay only the reasonable and fair amount of the additional costs incurred by the receiving party."

[5] To my mind, what Webster JA concluded was that a party, whether he is successful in his application or not, may be called upon to pay any increase in the costs which may have been unnecessarily incurred as a result of his conduct. It was found that "the Fomel disclosure" fell into that category and as a result the defendants were liable to meet these costs as it had the effect of increasing the cost of the litigation.

[6] In order to place this submission into context it is important to assess the decision of Leon J to determine whether there was any conduct on the part of the claimant which warrants that such an assessment be made. As he pointed out at paragraph 11 of his judgment, his task was to assess the costs in light of the provisions of rule 65.2(3) of the CPR. Having given due consideration to the bill of costs presented by the defendants as a comparison to that of the claimants Leon J went on to conclude at paragraph 26 of his judgment that **"the costs claimed by the claimant, subject to the adjustments and determinations set out below in relation to the remaining 10 points, are proportionate, reasonable and fair both the defendants and the claimants."** No doubt, the exercise upon which his Lordship was to embark mandates that he gives consideration to the line items outlined in the bill of costs. Insofar as that is the case, he went on to consider the submissions made by the defendants and reduced some of what was claimed by the claimant.

[7] The defendants argue that they were successful in reducing the costs claimed by the claimant in numbers 8 to 10 of the points canvassed before Leon J. The first of these issues was that the fees and some of the disbursements of the claimant's counsel were charged and incurred in British Pounds and then converted into US Dollars. It is apparent that there was a dispute as to the exchange rate which was applicable. The amount claimed therefore fell to be reduced when this observation was brought the judge's attention. However, I observe that the defendants accepted that the exchange rate used was what was in effect when the costs were actually incurred in 2016. What transpired was that the fees were actually paid to counsel in October of 2016, at which point the exchange rate had changed. The judge was at pains to note that neither party presented any authority on the point but he determined that the indemnity principle should govern and that the fees ought to have been recovered at the applicable exchange rate in effect when they were actually paid. The parties also addressed similar issues regarding the fees paid in 2017 and the travel expenses of counsel from abroad, on which Leon J took a similar approach.

[8] Whilst I accept the defendants were successful in pointing this issue out to the judge, I do not agree that this is such conduct on the part of the claimant so as to entitle the defendants to an award of costs. There is nothing to suggest that this was conduct on the part of the claimant which resulted in an increase in the costs of litigating this particular application so as to fall within the principles expressed by Webster JA as I have outlined them above.

[9] The other issue taken by the defendants was the claimant's claim for costs regarding the travel time of his attorneys for arguments in the applications which were before Carrington J. Justice Leon determined that this claim was to be split in half, given that counsel was also travelling to the BVI for the hearing of the applications as well as the costs appeal.

[10] This is the basis upon which the defendants argue that they were partially successful and entitled to some measure of costs, which ought to be offset against the claimant's costs. It was submitted that Webster JA took a similar approach when this matter was on appeal in that he awarded 75% of the appellant's costs on the points in which he was successful and 25% of the respondents' costs on the point in which they were successful. However, I am not at all sure that Webster JA's apportionment of the award of costs on appeal was linked in any way to his comments at paragraphs 55 to 61 of his judgment. In these paragraphs what he sought to establish was that

where a party's conduct has resulted in increased costs he may be called upon to bear these costs and pay them to the other side. I am not satisfied that such conduct arises in the circumstances of the present case. On the appeal however, Webster JA found that there was success on some of the grounds of appeal to which the appellant was entitled to costs and the respondents were entitled to costs on the grounds on which they were successful. I am not of the view that he was establishing a universal approach to all applications. In any event I do not agree that a similar approach ought to be taken in the circumstances of the present application.

[11] I wish to refer to the closing paragraphs of Leon J's decision. At paragraph 86, which he headed as his overall conclusion on the assessment, he states that ***"the costs claimed by the claimant, subject to the specific adjustments and determinations above, are proportionate, reasonable and fair to both the defendants and the claimant."*** Counsel for the claimant notes that the claimant received 87.775% of the fees which it claimed, despite the fact that there was an offer to settle at 75% of those costs which were rejected. Whilst it is disputed that this offer was ever made, it is also important to consider Leon J's treatment of a submission made by the claimant at the assessment of costs. The claimant submitted that there was unwillingness on the part of the defendants to negotiate certain aspects of the costs claimed. His Lordship concluded that ***"the claimant's submission evidences the potential value of negotiations, even where a disparity is considered great, to narrow issues and shorten assessments."*** Regarding the points on which the defendants claim to have won in particular, I fail to see any reason that such matters ought to have been left for determination by a judge, rather than meaningful negotiations between the parties. In any event it seems to me that the fact the claimants were successful in receiving a judgment of close to 88% of what they had initially claimed, undermines the defendant's arguments that they are entitled to as much as 30% of their costs.

[12] I find that in general the claimant was successful in securing an order for costs before Carrington J. These costs came to be assessed by Leon J and he found what was claimed to be generally reasonable and fair. He made the necessary adjustments which he was empowered to make under rule 65.12 of the CPR, after considering submissions from both sides. This hardly seems to me to be the circumstances under which the defendants can legitimately claim partial success sufficient to entitle them to an award of costs.

[13] I would proceed to assess the bill of costs presented by the claimant. Insofar as the defendant's bill of costs is concerned I would adopt a similar approach to Leon J in that this bill will be used in order to compare the claimant's bill and determine whether it presents a claim for costs which is reasonable to both sides.

The assessment

[14] Rule 65.2(1) of the CPR states that an award of costs 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.***" It is now well established that what the claimant is entitled to is not an indemnification of all his costs, but rather an award which is reasonable to both sides. In that regard the manner in which the court is to proceed is as outlined in the case of ***Lownds v Home Office***[1] where Lord Wolf states that:

> ***"... 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."***

[15] In this two-stage approach I must first determine whether the costs claimed appear to be disproportionate. In doing so I must consider the provisions of rule 65.2(3) of the CPR. The claimant claims a total of $39,845.87 in costs on the costs assessment. These refer primarily to legal fees earned for 5 legal practitioners at a range of $900 per hour for the most senior to $425 an hour for the most junior of counsel acting for the claimant. I note that the defendants in their submissions have indicated that the main objection raised regarding the claimant's bill of costs

[1] [2002)4 All ER 775

relates to the question of costs incurred at the hearing of 15th March, 2018. The defendant raised a number of issues regarding what transpired at that hearing. I will address these issues later. What is apparent is that the defendants do not argue that the costs claimed by the claimant are generally disproportionate but rather take issue with some of the line items claimed. In that regard, the only issue arising from the factors outlined in rule 65.2(3) relates to the conduct of the parties. This is an issue I will address later but it would suffice to say, in taking a broad approach, that I do not find the amounts claimed in costs to be disproportionate. In light of that it will be necessary to address the specific items claimed by the claimant to determine whether they are reasonable. I will do so by giving due regard to the objections raised by the defendants. It is also important to consider the events of 15th March, 2018 as the defendants take grave issue with a number of issues arising from that hearing before the judge.

The events of 15th March, 2018

[16] It would seem that by email dated 13th March, 2018 the parties were informed that Leon J intended on delivering his decision on assessment the following day; that is 14th March, 2018. The parties were provided a copy of the draft of the judgment for corrections to be made. There was some correspondence regarding the issue of whether this was sufficient time within which to make the necessary corrections. The delivery of the decision was deferred to 15th March, 2018. Further to this, there was some communication of the judge's intention to also hear submissions on the costs to be paid on the costs assessment. There was an initial objection to this from counsel for the defendants that there would not be sufficient time within which to prepare to make such submissions. It is also apparent that at some point during the communications the claimant's counsel agreed that these costs should be assessed on paper. What transpired however was that the judge heard submissions on the costs of the assessment and made an award of costs in favour of the claimant in the sum of $121,287.00.

[17] Subsequent to that, the defendants observed that the claimant's counsel had made an error in the bill presented to the judge. This was relevant as the costs on the bill, which is now presented to me, is in fact $39,845.00. This is significantly less than what was ordered by the judge. Counsel on both sides therefore agreed that the award should be set aside and the costs assessed on paper.

This is the application which is currently before me. The defendants are justifiably concerned with this. To my mind the current assessment on paper would not have been necessary had the correct bill been presented to the court in the first place. Whilst I do not agree that this ought to disentitle the claimant to his costs on the assessment, I am satisfied that I ought to take this in mind when determining my final order in this matter. The parties would have already had an obligation to be before Leon J on that day. What is important is that that hearing was prolonged so as to address the judge on the issue of the assessment of the costs assessment. This was made obsolete due to the claimant's error and the appropriate discount must be made in consideration of that fact. I would therefore discount the claimant's counsels' fee hours which relate to 15th March, 2018 by 25% to cater for this error.

Professional Fees of Jack Husbands

[18] No claim was made in relation to the events of 15th March, 2018 for Mr. Jack Husbands. A total of $13,500.00 is claimed in what is a total of 15.8 fee hours. The defendants argue that the fees should be calculated at $650 per hour, given that this was the sum claimed in a previous application. The claimant, on the other hand, argues that the sum of $900 is appropriate given the supervisory role which Mr. Husbands undertook during the assessment proceedings. I accept the claimant's submissions as the bill of costs and the information presented does indicate that Mr. Husbands was then the senior attorney acting during the course of this assessment. I would allow his fees and $900 an hour.

[19] The defendant next takes objection to the fact that work claimed for Mr. Husbands was in fact done by the claimant's English solicitors. However, I do not agree that this is established. Having examined the fees and hours spent by Mr. Husbands and the role played in these proceedings I would allow these fees as being reasonable. The parties have agreed that the calculation presented is incorrect and that the actual costs of Mr. Husband's fee hours should be $13,140.00.

Professional Fees for Lucy Hannett

[20] Ms. Hannett also did not claim fees for the hearing of 15th March, 2018 and therefore her fees will not be reduced in that regard. They total $3,120.00 for 4.8 hours of work. I do not find any of the items claimed to be unreasonable and would award that amount.

Professional Fees for Mr. Renell Benjamin

[21] As I indicated earlier, I am of the view that the claimant ought to bear some responsibility for the events of 15th March, 2018. Mr. Benjamin's fee hours include time spent on amending and finalizing the costs schedule. I take this to mean the very schedule which was the cause of the error in the judge's award for the costs on assessment. I would reduce the fees which relate specifically to that hearing by 25% to address this issue. The parties have also agreed that the sum of $1,190.00 claimed for work done on 8th December, 2017 should be reduced. The claimant has conceded that a 50% reduction is reasonable and I would make this adjustment.

Other Objections Raised by the Defendants

[22] The only other item to which there was an objection was a fee of $612.00 claimed for Mr. Clifton on 16th February, 2017. The parties both agree that this should be disallowed.

[23] In the circumstances the fees awarded by the court will be as follows:

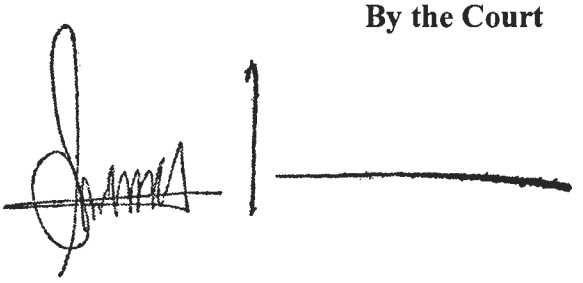
(a) Professional Fees for Mr. Jack Husbands - $13,140.00US;
(b) Professional Fees for Ms. Lucy Hannet - $3,120.00USS
(c) Professional Fees for Renell Benjamin - $13,233.35US
(d) Professional Fees for Rosalind Nicholson - $6,007.50.00US

[24] The defendants will therefore pay costs to the claimant in the sum of $35,500.85US. Given the events of 15th March, 2018 and the length and extent of the litigation which has already transpired in this matter I would also order that each party bear their own costs in relation to this assessment and hope that this would bring some finality to this litigation.

Ermin Moise

Master

By the Court



Registrar