THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2015

Claim No. NEVHCV2013/0018

Between:

ISLAND IFS S.A

Claimant

and

HAMILTON TRUST CO. LIMITED

Defendant

Before:
Master Fidela Corbin Lincoln

On Written Submissions:
Midge Morton of Counsel for the claimant
Arudranauth Gossai of Counsel for the defendant

2015: March 4th

Background

[1] On 20th February 2013, the claimant filed a Without Notice Application seeking an injunction against the defendant. The parties were at this stage 'intended parties' as the claimant had not yet filed a claim form.

[2] On 22nd February 2013 the Honourable Justice Benjamin Q.C. granted the injunction until the return date of 8th March 2013.

[3] The intended defendant filed an application to discharge the injunction on 4th March 2013. The application was fixed for hearing on 8th March 2013.

[4] On 7th March 2013, the intended claimant filed an application for the injunction granted on 22nd February 2013, to be extended from 8th March 2013 to 22nd March 2013. There is no date fixed for the hearing of this application on the copy of the application on the court's file.

[5] The hearing scheduled for 8th March 2013 was rescheduled by the court to 11th March 2013.

[6] On 11th March 2013, Justice Benjamin Q.C. ordered ("**the Benjamin J order**") as follows:

> *"The court acknowledging that the injunction which was granted on 22nd February 2013 expired on 8th March 2013, the Intended Defendant is at liberty to make an application for its costs"*

[7] The claimant subsequently filed its claim and statement of claim. The defendant filed an application to strike out the claim on the grounds of it being an abuse of the process of the court. On 10th June 2013, Guilford J struck out the claim and awarded costs against the claimant to be assessed if not agreed ("**the Guilford J order**").

[8] The parties exchanged correspondence with a view to agreeing on costs but were unable to agree on costs.

[9] On 1st October 2014 the defendants filed an application for the court to determine the value of the claim. The parties were given leave by Williams J to file submissions.

[10] The application was thereafter fixed for hearing before the Master. At the first hearing before the Master, the court noted that the parties appeared to be proceeding on the premise that costs awarded by both Benjamin J and Guilford J were prescribed costs.

However, the court noted that the order of Benjamin J did not state the basis upon which costs should be quantified and the order of Guilford J was that costs should be assessed if not agreed, but the order did not state under which Rule costs should be assessed. The parties were therefore directed to file further submissions.

The Benjamin J Order

[11] While Benjamin J appears to have awarded costs against the intended claimant, he did not state the basis on which costs were to be quantified.

[12] Byron CJ in **Rochamel Construction Limited v National Insurance Corporation** Civil Appeal No.10 of 2003 noted:

> *"Guidelines on Costs*
>
> *It would seem that the practice on costs has been very inconsistent since the introduction of CPR. I would like to use this opportunity to indicate the importance of dealing with costs in accordance with the new culture by making some simple requirements.*
>
> *[a] Whenever a costs order is being made the learned trial Judge or master should identify the rule that is being applied and if discretion is being exercised give the reason.*
>
> *[b] Legal practitioners should be encouraged to assist the Court in the making of costs orders by providing information and or submissions as early as possible. "*

[13] In the absence of the learned trial judge identifying the basis upon which costs should be quantified, this Court must determine the basis of quantification of the costs.

[14] **CPR** 65.3 states that **"costs of proceedings under these Rules"** where the fixed costs regime does not apply should be quantified as follows, having regard to **CPR** 64.6:

(1) costs determined in accordance with rule 65.5 ("prescribed costs");

(2) costs in accordance with a budget approved by the court under rule 65.8 ('budgeted costs"); or

(3) (if neither prescribed not budgeted costs are applicable), by assessment in accordance with rules 65.11 and 65.12."

[15] **CPR**8.1 (1) states:

> *"A claimant starts proceedings by filing in the court office the original and one copy (for sealing) of –*
>
> *(a) the claim form; and (subject to rule 8.2)*
>
> *(b) the statement of claim; or*
>
> *(c) if any rule or practice direction so requires – an affidavit or other document."*

[16] The claimant made an ex-parte application for an injunction and therefore did not '*start proceedings'* by way of filing a claim form or statement of claim. **CPR** 8.1 states however that proceedings may also be commenced by filing *"an affidavit or other document if a rule or practice direction so requires."*

[17] **CPR** 8.1 (6) states:

> "A person who seeks a remedy –
>
> (a) before proceedings have been started; or
>
> (b) in relation to proceedings which are taking place, or will take place, in another jurisdiction;
>
> must seek that remedy by an application under Part 11."

[18] **CPR**11.1 deals with applications for court orders made before, during or after the course of proceedings.

[19] The Rules therefore contemplate and make provision for *"proceedings under the Rules"* being initiated by filing an application under **CPR** 11 even prior to proceedings being commenced by a claim or statement of claim.

[20] Thus, while the claimant initiated action for interim relief by filing an ex-parte application, this in my view still amounts to '*proceedings under these rules*" to which **CPR** 65.3 applies.

[21] Costs must therefore be either prescribed, budgeted or assessed since the fixed cost regime would not apply. There was no application for budgeted costs and therefore this cost regime would also not apply.

[22] **CPR** 65.5 states that the general rule is that where fixed costs do not apply, costs should be determined under the rules for prescribed costs.

[23] In my view, the prescribed costs regime is not the most suitable basis for quantifying costs for an application for an interim injunction made prior to the filing of a claim since there is a risk of costs being disproportionate, unreasonable and not in furtherance of the overriding objective.

[24] In my view, the more appropriate basis for quantifying costs on an application for an interim injunction made prior to the filing of a claim is assessed costs.

Assessing Costs – CPR 65.11 or 65.12?

[25] Both **CPR** 65.11 and **CPR** 65.12 deal with assessment of costs.

[26] Barrow JA in **Norgulf Holdings Limited et al v Michael Wilson & Partners Limited**[1] found that **CPR** 65.11 of the Civil Procedure Rules 2000 ("CPR") applies to more than just procedural applications. He said:

[1]Civil Appeal No. 8 of 2007

"A good starting point for appreciating this rule is not to be misled by its heading. The rule clearly applies to more than just procedural applications because paragraph (1) of the rule says that ***"on determining any application" other than at a case management conference, pre-trial review or at the trial****, the court must: decide whether to award costs of that application and which party should pay them; assess the amount of such costs; and direct when they are to be paid. These are decisions the court must make for applications generally, and not just for procedural applications. Paragraph (2), similarly, is of general application in providing that the general rule is that the unsuccessful party must pay the costs of the successful party."*[2] (My emphasis).

[27] Barrow JA also found that :

(1) CPR 65.11 applies to all applications except those made at a case management conference, a pre-trial review, trial, to amend, extend time, for relief from sanctions and applications that could be made at case management conference or pre-trial.

(2) CPR 65.12 contemplates and overlaps 65.11 but is broader in scope.

(3) CPR 65.12 applies to all assessments of costs not just costs on an application but excludes procedural applications.

(4) If the assessment of costs is carried out at the hearing of an application then the procedure contained in 65.11 (5) and (6) applies.

(5) 65.12 is the established procedure for carrying out an assessment of costs when the assessment was ***not*** *made at the hearing of the application or other proceedings in which cost were awarded.*

[28] The process of determining which of the two Rules applies continues to present challenges

has led to numerous judicial pronouncements and comments. Lanns M[2] noted that notwithstanding the decision of **Norgulf,** the issue of the correct Rule for assessment of costs still besets the court. Joseph-Olivetti J noted that *"we run the real danger of issues of costs using up more resources than substantive issues."*[3] Wallbank J[4] noted that the issue continues to vex the court and he therefore sought not to add any further complexity while Glasgow M commented that the tasks of assessing costs under these two rules *"should be infinitely more straightforward."*[5] I concur with the view of the learned trial judges and masters, but I too must attempt to ascertain which of the two rules applies.

[29] Applying the principles of **Norgulf**, at first blush the assessment of costs in relation to the application for the injunction should be determined under **CPR** 65.12 since the assessment of costs was **not** made by Benjamin J at the hearing of the application.

[30] However, **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.

[31] **CPR** 65.11 (7) states that *"the 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."*

[32] I therefore agree with Counsel for the defendant, that in assessing costs under **CPR** 65.11 the value of the claim must be determined as the rule caps the costs that can be recovered at 1/10 of prescribed costs unless special circumstances exist.

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[2]Elfrida Hughes v Clive Hodge As Administrator of the Estate of Rupert Hodge, deceased Claim No AXAHCV2008/0035 page 6, para 24

[3] Pacific International Sports Club Ltd. V Comerco Commercial Limited et al Claim No. BVIHCV2005/070

[4]United Company Rusal Plc and another v Corbiere Holdings Ltd. and another NEVHCV2011/0030

[5] Ginelle Jerome v Errol Felix et al

[33] Since prescribed costs appropriate to the claim is calculated based upon the value of the claim, the court must determine the value of the claim.

Value of Claim

[34] **CPR** 65.5 (2) states:

> *"The "value" of the claim, whether or not the claim is one for a specified or unspecified or unspecified sum, coupled with a claim for other remedies is to be decided in the case of the claimant or defendant –*
>
> *(a) by the amount agreed or ordered to be paid; or if the claim is for damages and the claim form does not specify an amount that is claimed, such sum as may be agreed between the party entitled to, and the party liable to, such costs* ***or, if not agreed, a sum stipulated by the court as the value of the claim****; or*
>
> *(b) 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).*

[35] The claimant's claim, filed on 19th March 2013 sought the following relief:

(1) Damages for breach of contract ;

(2) A declaration that the defendant breached its fiduciary duties to the claimant ;

(3) An injunction to restrain the defendant, whether by itself or by its servants or agents or howsoever, from taking any action for the recovery of any fee alleged to be owed to the defendant by the applicant, in relation to business allegedly conducted as registered agent of the applicant or for any work allegedly done pursuant to an agreement dated 16th January 2008 until final determination of these proceedings;

(4) An order that the defendant produce an accounting of all business conducted during its tenure as registered agent of the Claimant;

(5) An order that the defendant be removed as registered agent of the Claimant

(6) Interest and costs

[36] The substantive relief sought by the claimant was for **damages for breach of contact** but the claim form did not specify the amount of damages being sought. The value of the claim is therefore to be ***"such sum as may be agreed between the party entitled to, and the party liable to, such costs or, if not agreed, a sum stipulated by the court as the value of the claim"***

[37] The parties have been unable to agree on the value of the claim. The court must therefore stipulate a value pursuant to 65.5 (2) (a).

Stipulating the value of the claim

[38] Counsel for the defendant submits that the claim should be valued at US$208,885.25 (EC$563,990.18). Counsel submits that the claim was *"a claim for, inter alia, a monetary sum albeit unascertained. Further, it was in essence a claim to challenge Hamilton's entitlement and payment of its fees of US$208,885.18.*

[39] Counsel for the claimant submits that the claim should be valued at $50,000.00 being the default value provided by the Rules. Counsel submits that the claim was for an unspecified sum which *"would be based on the extent of the breach of these fiduciary duties – which respectfully could not have been determined without the matter having gone further. At no time did the defendant seek to make a counterclaim for recovery of any sums it claimed was owed to it notwithstanding the fact that it had ample opportunity to make such a claim."*

[40] I am unable to agree with Counsel for the claimant that the 'default value' provided in **CPR** 65.5 (2) (b) for a claim for a *non-monetary* sum applies since the claimant's claim is for a monetary sum. The substantive relief sought was damages for breach of contract. Barrow

J.A in **Bradford Noel v First Caribbean International Bank (Barbados) Limited**[6] found that a claim for general damages is a claim for a monetary sum that has not yet been ascertained.

[41] The reliefs sought by the claimant also included an application for an interim injunction and an order for an accounting. The key facts relied upon by the claimant to prove its entitlement to an injunction and an accounting were that; (a) invoices amounting to US$$208,885.18 submitted by the defendant to the claimant were exorbitant; (b) the defendant failed to provide itemised invoices even though requested to do so; and (c) Mr. Morton, who had control of the claimant's bank account, had stated that *"he, on behalf of the defendant, Hamilton, would order the transfer of funds from the account to cover the defendant's invoices"* notwithstanding the failure by the defendant to provide an itemized invoice as requested.

[42] The claimant's statement of case does not assert that *nothing is due and owing* but rather that the sum invoiced was *exorbitant* having regard to all the circumstances set out in the claim and the defendant should be made to account for the work done so that, presumably, it can be ascertained what is legitimately owed.

[43] While the claim does not expressly seek relief in the form of a declaration or order that the defendant is only entitled to be paid the sum found to be owing following the accounting requested, the claim is in substance disputing the defendant's entitlement to the entire sum of US$208,885.18. I therefore find that the defendant was disputing *a portion* of the invoiced sum but it is unclear from the claimant's pleadings what portion of the invoiced sum was being disputed.

[44] In summary, the claimant was disputing a portion of the invoiced sum and seeking damages for breach of contract. The damages were however, for an unascertained sum and there are no averments in the pleadings regarding the measure or quantum of general damages being sought. There is also no averment with respect to how much of the

[6]Civil Appeal No. 29 of 2006

invoiced sum of US$208,885.18 was disputed.

[45] In the absence of any averments in the claim which could guide the court with respect to the measure and quantum of damages being sought and the quantum of the invoiced sum being disputed, it is not possible to arrive at a precise value. The best the court can do is approximate the value based on the information currently before the court. In the circumstance I will stipulate the value at the rounded figure of EC$540,000.00 (US$200,000.00) based on the fact that part of the invoiced sum of US$208,885.18 was being disputed and the claimant was also seeking damages.

[46] Costs are therefore capped at 1/10 of $540,000.00 as there is no evidence of special circumstances.

[47] The cap is the *maximum* that can be allowed under **CPR** 65.11. It does not follow that costs will be allowed at the maximum figure. In assessing costs, the court will only allow fees which are proportionate and reasonable.

The Guilford J Order

[48] The order of Guilford J following the striking out of the claim was that costs should be assessed if not agreed. The parties have not agreed on costs. The application before Guilford J was an application to strike out the claim, is in my view a procedural application. I therefore find that the costs of this application, like the costs ordered by Benjamin J, should be assessed under **CPR** 65.11.

Procedure for Assessment under CPR 65.11

[49] **CPR** 65.11 requires an applicant seeking cost to be assessed to supply to the court and all other parties a statement showing;

(a) any counsel's fees incurred;

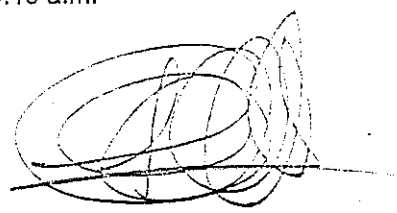
(b) how that party's legal representative's costs are calculated; and

(c) the disbursements incurred.

[50] The defendant/applicant has not complied with this aspect of the Rule.

IT IS THEERFORE ORDERED THAT:

1. The value of the claim is stipulated as EC$540,000.00.
2. The defendant/ applicant shall file a cost schedule and any supporting documents (if any) within 21 days.
3. The claimant/respondent is at liberty to file Points of Dispute within 14 days of service of the defendant's cost schedule.
4. The assessment of costs is fixed for 27th April 2015 at 10:15 a.m.



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Fidela Corbin Lincoln
Master (Ag.)