BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

No. 1196 of 2008

BETWEEN:

WINDSOR PLAZA LTD.	**CLAIMANT**
AND	
AARON TRUSS	**DEFENDANT**

Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court

Dates of Hearing: 2017 March 15th,
July 4th
November 23rd

Appearances:

Lex Caribbean Attorneys-at-Law for the Plaintiff represented by Mr. Bartlett Morgan
Mr. Bryan Weekes of Bryan L. Weekes & Associates Attorneys-at-Law for the Defendant

DECISION

Introduction

[1] This is a continuation of a longstanding (possibly epic) action, commenced by the Plaintiff, who sought a permanent injunction to restrain the Defendant

from trespassing on its land. The Defendant has defended the action, alleging the entitlement to a right of way reserved by an early Deed of Conveyance to previous owners; and has filed a Counter-Claim.

[2] The present application, filed March 1st 2017 (and supported by the affidavit of Anice Granville, attorney-at-law of Lex Caribbean), raises two issues: firstly, costs; and secondly, a stay of the Defendant's Counter-claim until all the Plaintiff's costs have been paid.

The Background to this Application

[3] This claim was filed by the Plaintiff (hereinafter referred to as the Claimant in accordance with CPR 2008) in July of 2008 under the 'old' **RSC 1982**, but later transitioned to **CPR**. A substantial volume of pleadings were generated by this matter. The most significant for these purposes was the re-re-amended Defence and Counterclaim filed by the Defendant in October 2012.

[4] In August 2014 the Defendant filed an application for summary judgment on the above-mentioned Counterclaim. The application was heard in September and December 2014, and a decision handed down on September 18th 2015. The Defendant's application was denied and costs were awarded to the Claimant, to be agreed or assessed.

[5] Leave was sought to appeal this decision in October 2015, and on December 10th 2015 the Court of Appeal refused leave, handing down a written decision

on the same on April 18th 2016. The Court of Appeal awarded costs to the Claimant, such costs to be agreed, if not, assessed.

[6] This decision was also appealed by the Defendant to the Caribbean Court of Justice (CCJ), when on January 19th 2016 the Defendant applied for special leave to appeal the decision of the Court of Appeal. On April 27th 2016, the CCJ denied the appeal, giving Reasons therefor on May 27th 2016. It awarded costs to the Claimant, also to be agreed or assessed.

[7] I propose to deal firstly with the issue of the Stay.

Should the Proceedings be stayed?

[8] The affidavit of Anice Granville filed March 1st 2017 reveals that requests for the payment of costs of the High Court proceeding, the Court of Appeal proceeding and the CCJ hearing have been unfruitful.

[9] The Claimant therefore argues/submits that to allow the Defendant "to proceed to trial in circumstances where significant fees were expended in meeting the Defendant's counterclaim and the summary judgment application arising from it, would be inequitable unless the Defendant is required to meet his outstanding costs obligations". And that "allowing the Defendant to proceed to trial in circumstances where significant costs are outstanding in this Court, the Court of Appeal and the Caribbean Court of Justice would be inequitable in all the circumstances of the matter." (See paragraphs (m) and

(n) of The Grounds of the Application of March 1st 2017 and paragraphs (12) and (13) of the Affidavit in Support of even date).

The Claimant's Argument in favour of the Stay

[10] Counsel for the Claimant argued that the Court has express and unfettered powers to stay proceedings. (This runs counter to counsel's vigorously argued position in **RBTT Bank Barbados Ltd. v Olympiad Inc. & Jeffrey Chandler CV 817 of 2008 [Unreported]**, that the Court's jurisdiction to stay (execution) can only be exercised in limited circumstances). He referred the Court to **Section 38(2) of the Supreme Court of Judicature Act** which provides as follows:

> "The High Court and the Court of Appeal respectively, may, acting on equitable grounds, and without limiting any other powers exercisable by either Court, stay any proceedings or the execution of any process in any cause or matter before the Court, subject to such conditions as that Court thinks fit."

[11] And to **CPR Rule 26.1(2)(d)**, which in his submission replicates the Court's general power under **section 38(2)** when it provides:

> "Except where these Rules provide otherwise, the Court may
>
> d) stay the whole or part of any proceedings generally or until a specified date or event."

[12] The **Whitebook Service 2011** at **para 3.1.7** also states:

> "The court has an inherent jurisdiction to stay the whole or any part of the proceedings and this is recited in r.3.1(2)(f). The circumstances in which a stay may be appropriate are many and various and need not be explained here."

[13] Counsel submitted, in effect, that the actions of the Defendant amounted to an abuse of process that allows him to ventilate this matter "without being saddled with the burden of paying the significant costs which are due to Windsor Plaza", forcing Windsor Plaza to incur even greater legal fees and disbursements to pursue payment of its costs, not to mention the costs that will continue to accrue in the conduct of this matter. Counsel submits that there would be no prejudice to the Defendant in staying these proceedings, but provided no explanation as to why he thought there would be no prejudice.

The Defendant's Arguments against a stay

[14] While conceding the Court's jurisdiction to grant a stay of proceedings where a party is in breach of a court order, counsel argued that in this case there is no assessed costs order that the Defendant has failed to pay; and this is a significant fact. Counsel submitted that the Court should not be minded to grant any form of "unless order" at this stage, as to do so would be manifestly unjust to the Defendant, who was brought before the Court by the Claimant. He urged the Court to consider that it is significant that the Claimant sued the Defendant, and still has in place an injunction restraining the Claimant from entering onto its property; it is therefore incumbent upon the Claimant to prosecute its claim to trial.

Discussion

[15] Counsel in conceding this Court's unfettered jurisdiction to grant a stay, referenced **section 38(2)** of the **Supreme Court of Judicature Act** and **CPR Rule 26(1)(2)(d)**, but **section 40** of the **Supreme Court of Judicature on Act Cap. 117A** is of equal importance. It provides as follows:

> "40. Subject to the express provisions of any other enactment, the rules of equity shall prevail…
>
> > (b) generally, in all matters not particularly mentioned in this Act, in which there was …. any conflict or variance between the rules of equity and the rules of common law with reference to the same matter."

[16] This provision was relevant to the position taken by this Court in **RBTT Bank Barbados Ltd. v Olympiad Inc. and Jeffrey Chandler (supra)**, that this Court has an unfettered discretion in determining whether to grant or refuse a stay; and that in making such a determination the Court is essentially conducting a balancing exercise, and must address its mind to the interest of justice; in other words, will there be a risk of injustice in these circumstances, if a stay is not granted.

[17] In looking at the circumstances of this matter this Court took into account the following, inter alia: that there are at present no Assessed Costs Orders in the High Court, the Court of Appeal or the CCJ; there is no evidence that an application for assessment of costs has been filed, (other than this one) heard and Costs Orders made; the evidence of the Claimant's delay, namely its

failure to file its witness statements, and adjournments applied for and granted to them to facilitate such filing (mentioned below).

The Assessment of Costs occasioned by the Application for Summary Judgment

[18] The Court is required on the second limb of this application to assess the Claimant's costs related to the application for summary judgment, as well as the costs of the instant application for assessment and stay.

[19] The Claimant claims the sum of $92,993.93, as costs, V.A.T. and disbursements in relation to the application for summary judgment. That request was made in April 2016.

[20] With respect to the costs related to the application for summary judgment, the Defendant has offered costs in the sum of $1,050.00, under cover of letter dated May 2016. There are no further exhibited exchanges between the parties before the filing of March 2017.

The Claimant's Submissions on Costs

[21] The Claimant's application is made under **Rule 65.11** of the **Supreme Court (Civil Procedure) Rules 2008 (the CPR)** which, in directing the Court on a roadmap to assessment, provides as follows:

> (1) On determining any interlocutory 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 must pay the costs of the successful party.

(3) The court must however take account of all the circumstances including the factors set out in **Rule 64.6(5)** but where the application is one that could easily have been made at a case management conference or pre-trial review, the court will order the applicant to pay the costs of the respondent unless there are special circumstances.

(4) In assessing the amount of costs to be paid by any party, the court must take into account any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing and must allow such sum as it considers fair and reasonable.

(5) A party seeking assessed costs must apply to the court and to all other parties a brief statement showing:

(a) the disbursements incurred;
(b) the attorney-at-law's fees incurred; and
(c) how the parties attorney-at-law costs are calculated.

(6) The statement under sub-rule (5) must comply with any relevant practice direction.

(7) **The costs allowed under this rule may not exceed one tenth of the amount of the prescribed costs appropriate to the principle application unless the court considers that there are special circumstances of the case justifying a higher amount**." (my emphasis)

[22] In **CGI Consumers Guarantee Insurance Co. Ltd. v Trident Insurance Co. Ltd.**, **Civil Application No. 9 of 2014** our Court of Appeal broke this down to a tripartite or three-step approach, when it states at paragraph [71] as follows:

"It is clear from this provision that the court must take a three-step approach in assessing costs. First, the court must decide which party, if any, should pay the costs of that application. This may be conveniently labelled the entitlement to costs determination. Second, the court must assess the amount of such costs. This may be referred to as the assessment of costs determination. Third the court must direct when such costs are to be paid."

[23] Step 1 having already been determined, the Claimant submits, that what is left is a determination of the quantum, and a payment date for the costs awarded.

[24] The Claimant followed this path in making its submission, culminating in a claim for substantial costs. **CPR 65.11** limits costs in an interlocutory application to no more than one-tenth of the value of the substantive application unless there are "special circumstances". This provision provides as follows:

> "(7) The costs allowed under this rule may not exceed one tenth of the amount of the prescribed costs appropriate to the principal application unless the court considers that there are special circumstances of the case justifying a higher amount."

[25] The Claimant's claim being for a permanent injunction (no monetary value), the Defendant's Counterclaim was used for the purposes of determining the value of the claim, in accordance with **CPR 65.5(2)(b)** which provides as follows:

> "In determining prescribed costs, the value of the claim is to be decided…in the case of the defendant,
>
> (i) by the amount claimed by the claimant in his claim form;
> (ii) where 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;
> (iii) where 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)."

[26] This provision obviously does not contemplate a situation such as this, where the claim has no monetary value, but the Defendant's Counterclaim is capable of being valued.

[27] It is against this background that counsel for the Claimant is submitting that this Court uses the value of the Counterclaim in the place of the claim as being the "principal application". Counsel placed a value on the Defendant's claim of not less than $1,080,000.00 should the Counterclaim be determined in his favour (see paragraph 16 of the Claimant's Submission on Costs). There has been no challenge of this assessment by the Defendant.

[28] Applying **Rule 65.11(7)** to the above, counsel estimated prescribed costs of $98,980.00, which would attract costs on his interlocutory application of $9,890.00, unless special circumstances justifying a higher amount are established by Windsor Plaza.

[29] Reference was made to the following cases where the Court (domestic and regional) found that there were special circumstances: **Royal Fidelity Bank v Harding BB2015 HC 24; Builders Merchant v John, Eastern Caribbean High Court CV ANUHCV 201210827;** and **Elfida Hughes v Hodge AXAAH CV 2008/0035**.

[30] It was counsel's submission, that these were special circumstances allowing an uplift of the costs awardable to Windsor Plaza for the following reasons:

the complexity of the underlying case and by implication the summary judgment application; the conduct of the Defendant in making a late application for summary judgment; the unsustainability of the appeal of the decision denying summary judgment, the effect of which was to delay the matter's advance to trial and cause Windsor Plaza to incur significant expenses in defending the appeal; that the Defendant has taken no voluntary steps to comply with three outstanding orders for costs made at three different levels of the Court system (no good faith attempt has been made by the Defendant to effect settlement of the question of costs); penal costs for unnecessarily engaging judicial time and resources.

[31] Counsel submits at paragraph 23 as follows:

> "Windsor Plaza further submits that given the foregoing special circumstances of this matter, Mr. Truss should be deemed liable for a significant portion of the costs and fees incurred by Windsor Plaza, so long as Windsor Plaza can prove that those costs have been genuinely incurred. The Statement of Fees and Disbursements attached to Windsor Plaza's application confirms this sum amounts to $90,857.12, inclusive of disbursements and V.A.T. was genuinely expended and so a significant portion of this figure should be made payable to Windsor Plaza."

The Defendant's Submission on Costs

[32] The Defendant's submission on costs is made against the context of a chronology of events culminating in the submission that the Claimant has caused delays in the progress of this action by its tardiness in the filing of its evidence. It raises the issue of whether the Claimant is entitled to costs.

Paragraphs 1 to 6 of the Defendant's Submissions filed April 12th 2017 are set out seriatim:

> "1. On the Pre-trial Review (PTR) of this matter on the 16th day of June, 2014 the Claimant, Windsor Plaza Limited, requested an adjournment of the PTR to allow it to file evidence by way of witness statement on the issue of the abandonment of the right of way which is the subject matter of this litigation. The Court ordered that the Claimant had permission to file 3 additional witness statements on or before the 25th of July, 2014. The matter was adjourned until the 9th day of September, 2014 for further PTR.
>
> 2. The Claimant failed to file the witness statements by the 25th of July, 2014 and the Defendant on the 21st day of August, 2014 filed an application for summary judgment in this matter.
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> 3. On the 9th day of September, 2014 the Claimant made an application for a further extension of time to file its witness statements which was dismissed by the Court but the Court granted an adjournment of 7 days for the Claimant to file affidavits in response to the Defendant's application for summary judgment and set the matter down for hearing on the 23rd day of September, 2014.
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> 4. On the 23rd day of September 2014 the Claimant applied to the Court for an amendment to its pleadings which was not opposed and the matter was further adjourned until the 14th day of October, 2014. The Court did not hear the matter on the 14th day of October, 2014.
>
> 5. The Defendant's application for summary judgment was heard by the Court on the 10th day of December, 2014.
>
> 6. The Court rendered its decision on the 18th day of September, 2015 dismissing the application for summary judgment and made an order for costs, without hearing the parties on this issue."

[33] Counsel submitted that the matter of assessment is governed by **Rule 65.11**, but opined that the Court should have heard the parties on costs before making its costs order on September 18th 2015.

[34] Counsel further submitted that there are no "special circumstances" justifying an uplift of costs. In support, he cited the Anguillan case of **MacDonna v Richardson AL 2013 CA1**, where the Court of Appeal expressed the view that vigorous litigation, hiring of senior counsel inter alia could not be considered special circumstances worthy of an uplift. He distinguished this case from **Royal Fidelity** (above) cited by the Claimant where **Alleyne J.** found that "special circumstances" existed.

[35] In counsel's submission, the work undertaken by the Claimant was no more than was necessary or incidental to proving its claim; the work having not been valued should be limited to a value of $14,000.00. No evidence has been put forward to prove that the damage suffered in this action reaches the $50,000.00 mark in accordance with the provisions of **Part 65.2(2)(b)(iii)**. Further, there is nothing complex or novel about this matter; it is a standard summary judgment application and costs should be confined to $1,400.00 There is nothing before the Court which should cause the Court to place on it a value in excess of $50,000.00.

Discussion

[36] **Parts 64** and **65** of the **CPR** deal with costs, generally and specifically. (**Part 64** dealing with the general rules about costs and entitlement to costs while **Part 65** deals with the quantification of such costs). We know that the general

rule is that costs follow the unsuccessful party **(64.6(1)**), but this general rule is subject to exceptions and the exercise of a (wide) discretion by the Court. We know also that there are four (4) types of costs orders (**65.3**), Assessed Costs (**65.11 & 65.12**), Fixed Costs (**65.4**) Prescribed Costs (**65.5**) and Budgeted Costs (**65.8**), but that in these circumstances we are dealing with Prescribed Costs.

How are these Costs to be assessed?

[37] It is not in dispute that **Part 65.11** is applicable in carrying out an assessment in these circumstances, namely costs arising on an interlocutory application such as this one for summary judgment. **Part 65.11(7)** limits (prescribes) the amount of costs to a maximum of one tenth of the applicable prescribed costs, unless there are special circumstances.

What is the value of the Claim (or principal application)?

[38] It is a fact that no application was made at any time under **Part 65.6(1)(a)** to value the claim in the principal application, which is one for a permanent injunction.

[39] It is left for this Court to determine what value to attribute to this Claim whether $50,000.00 (in accordance with **65.5(2)(b)(iii)**) or the $1,080,000.00 claimed by the Claimant as the value of the Defendant's Counterclaim.

[40] In so doing, this Court must conduct the balancing exercise referred to by **Gordon JA** below.

[41] Our Court of Appeal in **June Blackman v Elma Gittens-Blackman et al Civil Application No. 6 of 2012**, provided another option for this Court in dealing with assessments of costs generally. In this case (as with the matter before me), the application for costs did not fall within the scope of **Part 65.11**. Like this matter, the parties' submission was that the correct method of calculation was under prescribed costs. Counsel for the Respondent proposed that the value of the claim should be the value of the property which was the subject matter of the claim which was one for possession. The Court of Appeal rejected this submission in favour of doing what is "fair".

[42] In considering the issue, our Court was persuasively influenced by the principles discussed and applied by **Barrow JA** in the case **Norgulf Holdings Ltd & Incomeborts Ltd v Michael Wilson Partners Ltd, Civil Appeal No. 8 of 2007** in relation to **Rule 65.11** of the **EC CPR**; similar but not *'in pari materia'* with the Barbados **CPR**.

[43] Our Court of Appeal opined that the underlying purpose of the provision is to provide a mechanism for valuing a claim for the purpose of assessment of the costs of applications under **CPR**, whether procedural and/or interlocutory. After reviewing the material submitted by counsel for the Intended Appellant,

the Court used "fairness" and "reasonableness" as its test [paragraph 52] stating at paragraph [53]:

> "In our opinion an award of costs in the amount of $4,000.00 would be "fair and reasonable."

The Test of Fairness, Reasonableness and Proportionality

[44] Courts (in the United Kingdom and in the region) continue to grapple with the appropriate (or best) test to be applied in assessing costs, particularly in circumstances where the Court has a discretion as to the amount of costs to be awarded. These three words, Fairness, Reasonableness and Proportionality are most often used and there appears to be an as yet unresolved debate as to which concept/test should take pre-eminence. (See the Jackson Report [2009] on aspects of Civil Litigation costs).

[45] In **Lownds v Home Office [2002] EWCA Civ 365**, **Lord Woolf CJ** clearly weighs in heavily on the side of Proportionality. In this case, **Lord Woolf CJ** provides valuable insight into the areas of principle influencing the policy on which the effectiveness of the Civil Procedure Rules as they relate to costs, depends, as is reflected in the Overriding Objective set out in **CPR 1.1**. He states that the requirement of Proportionality "is important in itself, since it should discourage parties from incurring disproportionate costs as these costs will not be recoverable unless an indemnity order is made." (**Lord Woolf CJ**

Lownds v Home Office at para 8). The test of "proportionality is necessity".

At **para 29** he states:

> "[29] In assessing costs judges should have no difficulty in deciding whether, in order to conduct the litigation successfully, it was necessary to incur each item of costs. When an item of costs is necessarily incurred then a reasonable amount for the item should normally be allowed. Any item that was not necessary should be disallowed."

See also Willis v Nicolson [2007] EWCA Civ 199: Jefferson v National Freight Carriers [2001] EWCA Civ 2082.

Are these "Special Circumstances"?
What constitutes "Special Circumstances"?

[46] **Burgess JA** in **CGI Consumers Guarantee Insurance Co. Ltd v Trident Insurance Co. Ltd (supra)** has this to say at paragraph [96] about the meaning of special circumstances:

> "[96] Counsel for Trident argue that the continued actions of CGI in this matter, including using the order of Sir Marston Gibson CJ of 18th June 2014 to apply for and obtain a stay of the trial despite having notice that the order was made without jurisdiction constitutes circumstances justifying a higher amount. We do not agree with counsel. In our view, "special circumstances" for the purposes of rule 65.11(7) are "circumstances" which would immediately strike a reasonable Bajan as "special. The circumstances identified by Trident do not bear this badge."

[47] My brother **Alleyne J.** spoke to it thus in **Royal Fidelity Merchant Bank and Trust (Barbados) Limited v Harding (supra)**:

> "[47] The phrase "special circumstances" as used in CPR 65.11(7) seems to require the existence of circumstances of an exceptional nature that impact the matter of costs. The test appears to be an elastic one. The court is required to exercise a broad discretion in the interest of justice by taking account of any particular circumstance of the case."

[48] **Gordon JA** in **MacDonna v Richardson AI 2013 CA1** spoke to the balancing act that judicial officers must perfect in making this determination:

> "[24] The court is cognizant of the fact that an unusually high costs order may dissuade potential claimants from advancing a claim that they firmly believe in. At the same time the Court cannot be too lenient and allow a continual abuse of the Court's process by litigants who are unwilling to accept their fate, so to speak. With these factors in mind, and further, bearing in mind the criteria set forth in CPR 64.6(6) I have not been persuaded that this case warrants a costs order outside of the prescribed limit as the cumulative effect of the illustrations highlighted by counsel for the respondent, does not lend themselves to be "special circumstances."

[49] At paragraph [26] **Gordon JA** emphasises the role of reasonableness and proportionality in the conduct of this exercise in pursuance of the Overriding Objective of the CPR:

> "[26] In Joseph W. Horsford v Lester B. Bird and others [2006] UKPC 55 at para 7, Lord Hope of Craighead stated:
>
> > "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 of the appellant's costs as were reasonably incurred for the conduct of the hearing before the Board and were proportionate."

[50] In this case, the Court of Appeal after observing that the claim was not a spurious one, and that an application to value the claim had never been made, valued the claim at $50,000.00 prescribed costs being $14,000.00 and assessed costs in the sum of $1,400.00.

[51] The determination of what constitutes 'special circumstances' must in this Court's view be made against the backdrop of the Overriding Objective. One

of the objectives of the new **CPR** regime is to put a "downward pressure on process costs". (Zuckerman on Civil Procedure 1.99).

Disposal

[52] It is the finding of this Court that there are no "special circumstances" justifying the uplift of the one-tenth value of the claim.

[53] In an application of the Overriding Objective of saving expense and pursuant to the understanding that costs orders ought to further that objective, a costs order in the amount claimed by the Claimant would neither be fair or reasonable; it would be punitive and disproportionate, with the possible (perhaps intended) effect of causing the Defendant to abandon a claim that he firmly believes in. **CPR** was meant to avoid this; it was meant to bring litigation costs under control by introducing, inter alia, the concept of proportionality.

[54] In an application of the concepts of fairness, reasonableness and proportionality, costs in this matter are assessed in the sum of $7,500.00.

[55] In the final exercise of the three-step process adverted to by **Burgess JA** in **CGI**, it is merely left for this Court to determine when such costs should be paid. This court orders that the assessed costs shall be paid within one month of today's date, namely on or by December 21st, 2017.

[56] It is my view, that in the interest of controlling costs in this action, the application for a stay should be adjourned (rather than dismissed at this time). It should not be set down for hearing before the time fixed for the payment of costs in this application, and when heard, any further affidavit[s] in support should also speak to the status of the costs assessments in the Court of Appeal and by the CCJ.

[57] Assessment of the costs of the Application for assessment and stay is accordingly adjourned for a date to be fixed.

MARGARET A. REIFER
Judge of the High Court