

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**CV 814 of 2015**

**BETWEEN**

**KEVIN ROY MAWER,  
TRUSTEE IN BANKRUPTCY  
of the estate of JAMES MOORE**

**INTENDED  
CLAIMANT/APPLICANT**

**AND**

**FIRSTCARIBBEAN INTERNAT-  
IONAL WEALTH MANAGEMENT  
BANK (BARBADOS) LIMITED**

**INTENDED  
DEFENDANT/RESPONDENT**

**Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High  
Court**

**2019: May 03**

**Ms. Faye Finisterre and Ms. Lyanne Lowe, Attorneys-at-Law for the  
Intended Claimant/Applicant.**

**Mrs. Leodean Worrell and Mrs. Laura F. Harvey-Read, Attorneys-at-  
Law for the Intended Defendant/Respondent.**

**DECISION**

**Introduction**

[1] This is an application for costs pursuant to the resolution of an inter-

locutory application.

**Background**

- [2] On 13 March 2012, Kevin Roy Mawer, (“Mr. Mawer”), was appointed the trustee in bankruptcy over the estate of James Moore, by order of a county court in England. Mr. Moore is allegedly the beneficiary of the Delanas trust set up in Liechtenstein; and the trust is purported to be the sole shareholder in Manting Group Inc, a company incorporated under the laws of the British Virgin Islands.
- [3] Manting Group Inc. was re-registered in Barbados as a holding company on 01 June 2007. The company is the owner of the property Windy Ridge, situate at Paynes Bay in the parish of St. James. Mr. Mawer contends that Mr. Moore is the beneficial owner of this property, and that the property forms part of Mr. Moore’s bankrupt estate.
- [4] In November of 2008, Manting Group Inc. mortgaged Windy Ridge to FirstCaribbean International Wealth Management Bank (Barbados) Limited (“FCI”). The mortgage was stamped to secure US\$2,400,000.00. Mr. Moore was a party to the mortgage as a surety. The Manting Group Inc. defaulted on the loan. As at 26 June 2015, the outstanding loan was US\$2,798,937.97, inclusive of principal and interest.
- [5] Mr. Mawer informed FCI of his appointment as the trustee in bankruptcy,

by correspondence to present lead counsel for FCI dated 08 March 2013. He became aware of attempts by Moore and then by FCI to sell Windy Ridge. By correspondence dated 01 June 2015 and directed to FCI's then counsel, he raised concerns about a pending sale of the property at an undervalue. FCI was put on notice that if FCI proceeded with the proposed sale "and it transpires that such a sale is at an undervalue, we will pursue both you and your client for any loss caused to the Bankrupt's estate". The correspondence also requested the disclosure of information pertaining, *inter alia*, to the marketing and valuation of the property and any outstanding debt.

[6] Nine days after writing to FCI's counsel, Mr. Mawer filed an urgent *ex parte* notice of application seeking interim relief. He applied for an injunction to halt a supposedly pending sale of the property, and for the disclosure of certain documents.

[7] The Court granted the interim injunction on 15 June 2015, and adjourned to 29 June 2015 for an *inter partes* hearing. At the *inter partes* hearing a consent order was granted by the Court in these terms:

1. that the injunction granted on 15 June 2015 be discharged;
2. the application for disclosure be dismissed;
3. the parties file and serve written submissions on the issue of

costs; and

4. a cost hearing be convened on 06 October 2015.

**The Determination of Costs**

- [8] Rule 11.1 of the Supreme Court (Civil Procedure) Rules 2008 (“the CPR”), defines an interlocutory application as an application “made before, during or after the course of proceedings”. Mr. Mawer’s application sought interim injunctive relief before the filing of a claim, therefore it was an interlocutory application.
- [9] In **CGI Consumers Guarantee Insurance Co. Ltd. v. Trident Insurance Co. Ltd. (Civ. Ap. No.9 of 2014, CA B’dos, decision dated 16 February 2016)**. Burgess JA referred to an English Court of Appeal case where Cotton LJ offered “A more expansive description of interlocutory injunctions...”. (At para [67] of judgment). The English Lord Justice said that applications are “...considered interlocutory which do not decide the rights of the parties, but are made for the purpose of keeping things in status quo till rights can be decided, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of parties”. (**Gilbert v. Endean (1878) Ch D 259 at 268**).
- [10] As an interlocutory application, the assessment of costs by this Court must

be guided by Rule 65.11 of the CPR. According to Barrow JA:

“The object of rule 65.11 is to establish a norm that the court hearing an application “must” decide the issues of costs, including who is to pay, how much and when. Notably, it makes the amount of costs to be awarded a matter for the discretion of the court. Rule 65.11 states the principles on which the court must guide itself in exercising that discretion and assessing costs. The rule specifies the documentation that the party seeking costs must provide. And, finally, it caps the amount of costs that normally may be awarded on the determination of an application”. (See **Norgulf Holdings Limited & Incomeborts Limited v. Michael Wilson & Partners Limited, BVI Civ.App. No.8 of 2007, decision dated 29 October 2007** at para. [12]).

[11] Our Court of Appeal has noted that although there are differences between Rule 65.11 and a similar rule in the civil procedure rules of the Eastern Caribbean:

“...the application of the **Norgulf** principles would not conflict with the underlying purpose of the provision....**Norgulf** is persuasive authority for the assessment of similar applications under our CPR whether procedural and/or interlocutory”. (See **June Blackman v. Elmira Gittens – Blackman et al, B’dos. Civ. App. No.6 of 2012, decision dated 15 May 2014**, at para. [48]).

### **The Three-Step Process**

[12] Rule 65.11(1) provides that:

“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 the application;
- (b) assess the amount of such costs; and
- (c) direct when such costs are to be paid”.

[13] The Court of Appeal in the **CGI** case was guided by this “three-step” approach in assessing costs. Burgess JA explained that:

“First, the court must decide which party, if any, should pay the costs of this 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”. (Para.[71]).

### **Entitlement to Costs**

[14] In deciding which party is entitled to costs in this matter, the Court is guided by Rules 65.11(2) and (3) of the CPR. These rules provide that:

“(2) In deciding what party, if any, should pay the costs of the application, the general rule is that the unsuccessful party 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 reasonably 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”.

[15] Counsel for Mr. Mawer argued that he was partially successful because the Court initially granted the interim injunction. However, the injunction was short lived. It was granted on 15 June 2015, and discharged by consent fourteen days later on 29 June 2015. Having heard the submissions of counsel for FCI it was obvious that the continuation of the injunction was not sustainable. Counsel for Mr. Mawer not only consented to the discharge of the injunction, but further consented to the dismissal of the disclosure application. Overall FCI was the successful party. In these circumstances, the general rule stipulated in Rule 65.11(2) is applicable to this case.

[16] The Court is mindful of the fact that Rule 65.11(3) directs the Court to consider the factors enunciated in Rule 64.6(5). These factors are:

- “(a) the conduct of the parties both before and during the proceedings;
- (b) whether a party has succeeded on particular issues, even if not ultimately successful in the case, although success on an issue that is not conclusive of the case confers no entitlement to a cost order;
- (c) whether it was reasonable for a party to

- (i) pursue a particular allegation; or
- (ii) raise a particular issue

and whether the successful party increased the costs of the proceedings by the unreasonable pursuit of issues;

- (d) the manner in which a party has pursued

- (i) the case;
- (ii) a particular allegation;
- (iii) a particular issue

and whether that manner increased the cost of the proceedings; and

- (e) whether the claimant gave reasonable notice of an intention to pursue the issue raised by the application”.

[17] As stated previously, the interim injunction was in force for a very brief period, and as the result of an *ex parte* application. Its continuation was untenable. Counsel for FCI carefully presented to the Court the many shortcomings of this application. This left the Court in no doubt that it was fundamentally flawed. These shortcomings included procedural errors; a failure to provide all the relevant facts to the Court; and unsupported allegations of fact. As FCI is a financial institution damages would have been an appropriate remedy if Windy Ridge was sold below its market value without good reason or explanation.

[18] Counsel for FCI also questioned whether Mr. Mawer had the necessary

*locus standi* to file the application. And the consent order effectively put an end to any further proceedings by him. No substantive claim was ever filed. When all these circumstances and the Rule 64.6(5) factors were considered by the Court, they confirmed the Court's view that the general rule in Rule 65.11(2) should obtain. Mr. Mawer is to pay FCI's costs.

### **Assessment of Costs to be Paid**

[19] Again Rule 65.11 gives guidance as to the calculation of the costs to be paid to FCI, by further providing that:

“(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 supply to the court and to all other parties a brief statement showing

(a) the disbursements incurred;

(b) the attorney-at-law fees incurred; and

(c) how the party's attorney-at-law's fees are calculated.

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

(7) The costs allowed under this rule must 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”.

[20] In the **CGI** case, Burgess JA addressed the rationale for these provisions in this way:

“[81] In our judgment, there are three basic requirements to which this Court must have regard in assessing the amount of costs to be paid to any party that are established by these rules. The first is the obligation on this Court to 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 to allow such sum as it considered fair and reasonable. The object of this requirement is to fix a fair and reasonable sum for disbursements incurred and for attorney-at-law’s fees.

[82] The second is that the party seeking assessed costs must supply 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 that party’s attorney-at-law’s costs are calculated. The purpose of this requirement is to facilitate the court’s determination on evidence of whether the sum claimed for disbursements and attorney-at-law’s fees in a given case is fair and reasonable.

[83] The third requirement relates to the quantification of the costs payable. It is that the costs allowed in an interlocutory application “may

not exceed one tenth of the prescribed costs appropriate to the principal application” unless there are special circumstances of the case justifying a higher amount. The purpose of this requirement is to set a cap on the costs that may actually be recovered in respect of a given application. Its effect is that, absent special circumstances, costs recoverable equal the fair and reasonable sum allowed by the court up to “one tenth of the amount of the prescribed costs appropriate to the principal application””.

[21] There is at present no practice direction that impacts on the statement to be provided by FCI. Indeed, their statement was filed on 22 September 2005 as a draft bill of costs setting out the time spent by two counsel, with an urgent rate and a normal time rate. The lead counsel’s time spent on the urgent aspects of the application amounted to 75 hours at a rate of \$800.00 per hour; total urgent fee claimed \$66,500.00. The hours spent by more junior counsel in this area are 52 hours at a rate of \$600.00 per hour; total urgent fee claimed \$31,200.

[22] Lead counsel claimed 10 hours of normal time at a rate of \$650.00 per hour; fee claimed \$6,500.00. The normal time fee for the more junior counsel amounted to \$2,500.00, or 5 hours at \$500.00 per hour. The total number of hours claimed by both counsel was 142 hours at an overall fee of \$117,735.00 inclusive of VAT. The disbursements totaled \$350.

[23] The grand total claimed for costs by FCI’s counsel is \$118,085.00. This

does not include a fee for either the review of Mr. Mawer's written submissions on costs, or attendance at court for the cost hearing. Are these costs fair and reasonable?

[24] In the **CGI** case, counsel spent 66 hours and 5 minutes in preparation for three applications to be heard by the Court of Appeal, and claimed costs of \$44,084.15. The time was disputed by opposing counsel on the basis that the applications were relatively straightforward, and did not necessitate such an allotment of time. The Court of Appeal disagreed, and awarded costs of \$21,799.51, based on prescribed costs of \$217,995.15.

[25] The Court of Appeal reasoned that:

“In our judgment, the representation as to the time spent by counsel for Trident appears to us to be reasonable and the sum claimed to be fair and reasonable. The three applications in this case involved the relatively untrammelled areas of the jurisdiction of a single judge of appeal under Barbados law and; *inter alia*, the novel question of the power of this Court to extend time for filing an application for leave to appeal. The written submissions by counsel on these were very substantial, extremely well researched and supported by all relevant authorities. We are of the view that a significant portion of time must have been reasonably spent in researching, digesting and writing these submissions which were of enormous assistance to this Court”. (Para. [85]).

[26] In **Royal Fidelity Merchant Bank And Trust (Barbados) Limited v.**

**Theresa Harding, No.1751 of 2011, B'dos. High Court, decision dated 29 June 2015**, Alleyne J. assessed costs pursuant to a successful application for interim injunctive relief. The application engaged the attention of three junior associates and one senior partner over a period of 75 hours. The learned Judge opined that:

“[18] Undoubtedly, the claimant committed huge resources to the application. However, despite [counsel’s] best efforts to persuade me otherwise, I do not accept her submission that the claimant should recover the amount set out on the statement of fees and disbursements. The claimant is not entitled to costs on an indemnity basis. The guiding assessment bases are reasonableness, fairness and proportionality.

[19] CPR 65.11(4) and 65.2(1) require me to award an amount I consider to be fair and reasonable. It must be such as I would deem reasonable were the work carried out by an Attorney-at-Law of reasonable competence. To adopt the statement on Pennycuick J in **Simpsons Motors Sales v. Hendon Corp [1965] 1 WLR 112, 118E**, it should be an amount that ‘an hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particularly high fee sometimes demanded by counsel of pre-eminent reputation, would be content to make on the brief, but there ....is no precise standard or measurement’. At the same time, the amount must also appear to me to be fair to both parties.

[20] In construing these fairness requirements, I am mandated by CPR 1.2 to seek to give effect to

the overriding objective expressed in CPR 1.1. This requires that cases must be dealt with justly. According to CPR 1.1(2)(c) dealing with cases justly requires that they be dealt with proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party. Hence, the requirement for proportionality”.

[27] The claimant in **Royal Fidelity** sought to persuade Alleyne J that a cost claim for \$25,501.25 was appropriate. However, Alleyne J did not consider this figure “to satisfy the required standards of fairness, reasonableness and proportionality”. (See para. [22]). In his wisdom he determined that a sum of \$8,580.00, inclusive of disbursements, was both fair and reasonable. (See para. [23]).

[28] In this case, there were no complex issues of fact or law before the Court. However, it was an urgent application that required the immediate application of resources by FCI. The response included an affidavit with numerous exhibits attached, and extensive written and oral submissions. FCI was required to respond to two applications for the interim injunction and disclosure of information. FCI’s response was weighty, not so much because of complexity, but because of the rich vein of missteps and defects exposed by the applications.

[29] The Court does not question the need for both counsel to devote concent-

trated blocks of time to this matter, given the urgency of the applications. But the Court is not persuaded that 142 hours were required. The draft bill of costs indicates similar time frames for two counsel with respect to work done. A reasonable inference is that counsel, for the most part, worked together. But another reasonable inference is that there may well have been some duplication of effort.

[30] Counsel for FCI also sought to convince the Court that Mr. Mawer should pay FCI's costs on an indemnity basis. The Court concurs with the reasoning of Alleyne J. in **Royal Fidelity** that there is no entitlement to costs on an indemnity basis. (See para. [18] of judgment, *supra* at para. [26]). Furthermore the CPR has no provision similar to Rule 44(1) of the English civil procedure rules which states that:

“Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess these costs –

- (a) on the standard basis; or
- (b) on the indemnity basis,

but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount”.

The English authorities cited by FCI's counsel must be understood against the backdrop of Rule 44.1. (See for example **Frances v. Somar Al Assad and Ors** [2007] EWHC 2442 (Ch)).

### **Prescribed Costs**

[31] Rule 65.11(7) caps the amount of costs payable to one tenth of the amount of prescribed costs appropriate to the principal application. The cap may be lifted only if the court considers that there are special circumstances justifying a higher amount.

[32] The prescribed costs are calculated in accordance with Rules 65.5(1) and (2). The Court must first ascertain the value of the claim. In his correspondence of 01 June 2015, Mawer warned about a possible claim for damages. The then counsel for FCI were told by Mawer's counsel that:

“We therefore formally put you on notice that if you and your client proceed with the proposed sale and it transpires that such a sale is at an undervalue, we will pursue both you and your client for any loss caused to the Bankrupt's estate”.

[33] Mawer's affidavit filed on 10 June 2015, threatened that:

“...if the sale proceeds at an undervalue, the Respondent will pursue the Bankrupt and [FCI] for any shortfall it may suffer, including costs and expenses of such pursuit, to the prejudice of creditors of the bankruptcy estate. The less money realised for the Property, the more burdensome the shortfall will be. On an optional sale, there may be an excess due to the bankruptcy estate which can assist satisfaction of the Bankrupt's creditors. The Claimant

would be more disadvantaged if the injunction is not granted preventing this sale". (Para.27).

[34] A draft statement of claim was annexed to the affidavit filed as Exhibit KRM12. It was stated in the affidavit that the proposed statement of claim could not be filed because of urgency and FCI's failure to provide relevant requested information. (Para.32). The draft document requests:

1. an order requiring FCI to advertise the property for sale and to conduct a sale by public auction;
2. an interim injunction restraining FCI from selling the property to the buyer currently under contract as a result of the memorandum process conducted by a realtor;
3. an interim order requiring the FCI to disclose the documents requested;
4. costs; and
5. further or other relief.

[35] The draft statement of claim as it stands does not reveal a claim for any monetary sum. Therefore, the Court will treat the prospective claim as a claim for \$50,000.00 in keeping with Rule 65.5(2)(b)(iii) of the CPR. Using this figure limits the costs recoverable by FCI to \$1,400.00. (See Appendix B to Rule 65.5 (3)).

### **Should the Court Apply the Cap?**

[36] In the very recent case of **Granville Bovell v. Erskine Kellman et al** [2019] CCJ 3 (AJ), the Caribbean Court of Justice sounded a cautionary note on the role of the cap in Rule 65.11(7). The CCJ observed that:

“[12] The cap on costs is a salutary tool; it supports the overriding objective by reinforcing proportionality. The rule gives fair warning that an interlocutory application in a case with a dollar value of BBD\$30,400.00 will generally produce an award of costs limited to \$910.00. That tells the parties and their lawyers what to expect and, therefore, to contain their efforts. It is a limit from which courts should not causally depart. Parties know in advance what to expect, so it is up to them to limit their efforts”.

[37] Counsel for FCI should have been sensitive to the possibility that the time invested in opposing the interim injunction would attract costs of \$1,400.00, unless the Court found special circumstances existed that justified higher costs. The Court has already indicated that FCI will not be awarded either the full costs claimed, or costs on an indemnity basis. (See paras. [29] and [30] *supra*). Counsel for Mr. Mawer considered that fair reasonable costs for FCI should be an amount not exceeding \$5,000.00. (See para.96 of submissions on costs filed on 18 September 2015). Mr. Mawer’s counsel was conceding, in effect, that special circumstances existed, and that the Court could exceed the cap of

\$1,400.00.

[38] Various courts have made pronouncements on the issue of special circumstances, but there are no prescribed rules or guidelines to assist this Court. Each case depends on its own particular facts. The Court considered two cases which involved applications for injunctive relief. The first is **United Company Rusal PLC et al v. Corbiere Holdings Ltd. et al, Claim No.2011 of 0030, ECSC, Hg.Ct. St. K & N, decision dated 08 August 2012**. In that case Wallbank J (Ag.) declined to lift the cap because it was a clear case where the injunction should be set aside. Although both sides committed huge resources to the hearing of the application to set aside the injunction, the matter could have been adequately handled by “any reasonably able senior junior commercial law local Counsel....”. (See para.[51] of judgment).

[39] The second case is **Royal Fidelity** where Alleyne J removed the cap in circumstances where the claimant made a successful application for interim injunctive relief, which was not opposed by the defendant. The learned Judge opined that:

“[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 me 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”.

[40] Alleyne J relied on the wide disparity of the costs claimed, and the amount permitted after the application of the cap, to surmise that the disparity pointed:

“...to the existence of sufficient special circumstances. It indicates that the matter was of sufficient weight and complexity to justify the non-application of the cap”. (Para.[50])

On a cost claim of \$25,501.25, Alleyne J removed the cap, and awarded costs of \$8,580.00.

[41] The Barbados Court of Appeal declined to lift the cap in the **CGI** case, in circumstances where the intended appellant, having been notified that a court order in its favour was made without jurisdiction, relied on that order to obtain a stay of the trial. The Court of Appeal offered very limited insight into what constituted special circumstances. That august body proclaimed that:

“In our view “special circumstances” for 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”. (Para.[96]).

[42] A clearer picture of what constitutes special circumstances emerged in the **Bovell** decision. The CCJ endorsed the removal of the cap by the Barbados Court of Appeal, noting that:

“...in an appropriate case, where there are special circumstances, a court may depart from the general rule. In this case, it is not simply that the [Appellant’s] claim was defective and he refused to acknowledge this, thereby forcing the [Respondents] to make the application to strike out. It is that having lost in the High Court (and being forced to amend, as an alternative to a strike out, is a loss), the proper course he should have taken was to have conceded, by the time the appeal was first called (indeed, well before), that he had used the wrong form. The conduct of the proceedings, following from that intransigence, led to the waste and expense. The Court of Appeal had a proper basis for awarding the costs that they did”. (Para.[13]).

[43] The CCJ identified instances of unreasonable conduct by the Appellant’s counsel that justified the Court of Appeal’s departure from the cap. (Paras.[10] and [17] of judgment). Interestingly, there is no reference in the Court of Appeal decision to either unreasonableness, waste or expense as the reason for removing the cap. The Court of Appeal did not even refer to its earlier decision in **CGI**. (See **Erskine Kellman et al v. Granville Bovell, Civ.Ap.No.13 of 2015, B’dos. CA, decision dated 30 May 2018**).

[44] At the Court of Appeal stage, counsel had argued that the cap of \$912.00 would not be fair or reasonable, given the volume of work done, the time spent to make the application, and the preparation to attend two hearings. The Court of Appeal agreed that the circumstances were such that a higher award was justified for the work done. Costs of \$2,500 were considered to be fair and reasonable. (See paras.[100] and [102] of CA judgment).

### **Disposal**

[45] In this case, neither Mawer nor his counsel engaged in unreasonable conduct during the *inter partes* hearing. In fact, his counsel consented to the order that essentially ended the court proceedings, except for the issue of costs. Indeed, the affidavit of FCI's Senior Manager contained the knockout punch. At paragraph 24 of her affidavit filed on 26 June 2015, she stated categorically that, when Mawer's application was filed, FCI was not under contract with anyone for the sale of Windy Ridge. Mawer's counsel never challenged this assertion, and agreed to end the matter.

[46] The Court considers that granting costs of over \$118,000.00 dollars would be patently unfair and unreasonable, and grossly disproportionate. And the Court does not consider it appropriate to mulct Mr. Mawer in costs because of an ill-advised application. However, the Court will remove

the cap because FCI was responding to an urgent application within a limited time frame. Therefore, it was not unreasonable to engage the services of two counsel. Taking all the circumstances into consideration, the Court considers that costs of \$10,350.00, inclusive of disbursements, are justified in this case.

**Dr. Sonia L. Richards**  
**Judge of the High Court**