BARBADOS

IN THE SUPREME COURT OF BARBADOS

COURT OF APPEAL

Civil Appeal No. 10 of 2015

Between

AARON TRUSS **INTENDED APPELLANT**

AND

WINDSOR PLAZA LIMITED **INTENDED RESPONDENT**

Before the Hon. Sir Marston C.D. Gibson K.A., Chief Justice; and the Hon. Sandra Mason; and the Hon. Andrew Burgess, Justices of Appeal.

Mr. Bryan L. Weekes of Messrs Bryan Weekes & Associates for the intended Appellant
Mr. Garth Patterson Q.C., and Mr. Bartlett D. Morgan of Lex Caribbean for the intended Respondent

2020: 9 October

DECISION

GIBSON CJ:

[1] On 10th December 2015, this court denied an application made by the intended appellant ("Mr. Truss") for leave to appeal against a decision of a trial judge

who had refused his application for summary judgment. This Court's decision was affirmed by the Caribbean Court of Justice ("CCJ") on other grounds. The application before this Court is one for costs filed by the successful intended respondent Windsor Plaza Limited ("Windsor") arising out of this court's denial of the application for leave.

[2] The facts are largely undisputed. On 21st July 2008, Windsor filed a claim against Mr. Truss on the basis that he trespassed on its property located at Hastings Plaza in the parish of Christ Church. They sought, *inter alia,* an injunction restricting Mr. Truss from entering into their property in addition to damages. The injunction was granted but no damages were assessed. Mr. Truss filed a defence and counterclaimed that an easement existed between his property and that of Windsor, and that his was the dominant tenement permitting him ingress and egress over a portion of Windsor's property.

[3] On 21st August 2014, Mr. Truss filed an application for Summary Judgment against Windsor. This application was heard on 23rd September and 9th December 2014. On 18th September 2015, the learned trial judge dismissed the application citing "significant and complex disputes of facts and law to be determined". On 8th October 2015, Mr. Truss applied to this Court for leave to appeal against the decision of the trial judge.

[4] On 10th December 2015, this Court, agreeing with the analysis and conclusion of the learned trial judge, denied Mr. Truss' application. Windsor seeks its costs consequent upon the denial of the leave application.

SUBMISSIONS

[5] Windsor made three submissions in support of its application. First, it contends that costs followed the event and, since it was successful, it ought to be granted costs (see, ***section 85 (1) Supreme Court of Judicature Act Cap 117A***). The costs of and incidental to all proceedings were discretionary and the court had to determine to whom and to what extent the costs were to be paid. The general rule was that the court would order an unsuccessful party to pay costs to a successful party (see, ***Rule 64.6(1) Supreme Court (Civil Procedure) Rules*** **2008** **(**the **"CPR")**). Where the court had a discretion, Windsor argued, the amount allowed was an amount (a) which the court deemed to be reasonable were the work to be carried out by an attorney-at-law of reasonable competence; and (b) which appeared to the court to be fair both to the person paying and the person receiving such costs (see, **CPR Rule 65.2(1)**).

[6] Windsor's second submission was that costs should be quantified under **CPR Rule 65.12** since **Rule 65.13** is inapplicable. The crux of this submission was that **CPR 65.12** is the rough equivalent of 'taxation' under Order 62 Rule 7

of the RSC. It did not limit the amount of costs that were awardable and merely indicated that the party seeking costs had to provide a "bill or other document showing the sum in which the court was being asked to assess costs" and how such sum was calculated. In the instant matter, their Bill of Costs, reasonably incurred was $11, 642.50 and it ought to be recoverable.

[7] Their third submission, as they put it, provided an alternative basis for quantification based on **CPR 65.11(7)** which provides that:

> "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."

[8] Mr. Truss responded that in a claim for an unspecified sum, the prescribed costs were determined on the sum of $50,000.00. This translated to a maximum costs award of $14,000.00. The substantive case in this matter was before the High Court at the pre-trial stage and accordingly was adjusted down to 75% of the raw figure which translated to $10,500.00. However, Windsor submitted that this was merely a baseline figure and where special circumstances existed, there could be an uplift to the sum (see, ***CPR 65.11(7)***). In their view, the disparity between the costs reasonably incurred and the baseline amount was significant enough to constitute a special factor upon which the Court of Appeal could act to uplift the sums awarded as costs. (see,

Builders Merchant v Alex John Claim# ANUHCV 2012/0827 decided 31st March 2014).

[9] Mr. Truss further submitted that Windsor had no right of audience on the application before the court and accordingly had no right to a costs order because of **CPR Rule 62.2**. (see, *Cage St. Lucia Limited v Treasure Bay (St. Lucia) Limited et al* decided 23rd January 2012; Eastern Caribbean Court of Appeal). He maintained that the court should not award any sums by way of costs on this application. The matter which engaged the court was an appeal from an interlocutory application in which the intended defendant claimed an unspecified amount of damages. Citing **CPR Rule 65.11(7)**, he contended that this matter was valued at $50,000.00 as damages had yet to be decided and the application was made at pre-trial review which would mean at most 10% of 75% of the prescribed costs would be the maximum amount that could be awarded unless the court was of the view that the application was meritorious of a large quantum based on special circumstances. The figure, he submitted, was $1,050.00 plus VAT.

LAW AND ANALYSIS

[10] Our analysis of this issue begins at first principles. ***Section 85(1)*** of the ***Supreme Court of Judicature Act*** ("***SCJA***" or "***Cap 117A***") provides:

> "Subject to rules of Court, the costs of and incidental to all proceedings in the High Court and the Court of Appeal, including the administration of estates and trusts,

> are in the discretion of the Court and each court has power to determine by whom and to what extent the costs are to be paid.

[11] The Rules of Court then referred to in Cap 117A were the Rules of the Supreme Court 1982 ("RSC"), particularly Rule 62 which dealt with costs. However, the current rules are the CPR promulgated in 2008, as amended in 2009. "Costs" including an attorney-at-law's charges and disbursements, fixed costs, prescribed costs, budgeted costs and assessed costs" are dealt with in Parts 64 and 65 of the CPR. (see, ***CPR 64.2(1)***). A court can order costs at any part of a proceeding:

> "The court's powers to make orders about costs include power to make orders requiring a party to pay the costs of another person arising out of or related to all or any part of any proceedings". (CPR 64.3)

This court is also empowered to order costs leading up to and including the appeal.

> "The court hearing an appeal may make orders about the costs of the proceedings giving rise to the appeal as well as the costs of the appeal."

[12] What must be determined is the correct approach to quantifying costs in this particular matter which concerned an application for leave to appeal against a decision of the High Court issued at the case management stage.

[13] I think it convenient to note at this stage that ***CPR 65.3*** provides that costs are either to be fixed costs, prescribed costs, budgeted costs or assessed costs (see,

per **Saunders JCCJ**, as he then was, in ***Knox v Deane et al***, [2012] CCJ 4 (AJ), para 61).

[14] ***CPR 65.3*** provides as follows:

> "Costs of proceedings under these Rules are to be quantified as follows:
> (a) where rule 65.4 applies, in accordance with the provisions of that rule;
> (b) in all other cases if, having regard to rule 64.6, the court orders a party to pay all or any part of the costs of another party, in one of the following ways:
> (i) costs determined in accordance with rule 65.5 (prescribed costs);
> (ii) costs in accordance with a budget approved by the court under rule 65.8 (budgeted costs); or
> (iii) where neither prescribed nor budgeted costs are applicable, by assessment in accordance with rules 65.11 and 65.12"

[15] This is not a matter in which there has been prescribed costs or indeed budgeted costs, so we turn to the assessment of costs. The assessment of costs in general is provided for under **Rule 65.12** and provides as follows:

> "(1) This rule applies where costs fall to be assessed in relation to any matter or proceedings, or part of a matter or proceedings other than a procedural application.
> (2) Where the assessment relates to part of court proceedings, it must be carried out by the judge, Master or Registrar hearing the proceedings.
> (3) Where the assessment does not fall to be carried out at the hearing of any proceedings, then the person entitled to the costs must apply to the Master or Registrar for directions as to how the assessment is to be carried out.
> (4) The application must be accompanied by a bill or other document showing the sum in which the court is being asked to assess the costs and how such sum was calculated
> (5) On hearing an application under sub-rule (4) the Master or Registrar must either
> (a) assess the costs if there is sufficient material available for the Master or Registrar to do so; or
> (b) fix a date time and place for the assessment to be carried out.

(6) The Master or Registrar may direct that the party against whom the bill is assessed pay the costs of the party whose bill is being assessed and, if so, must assess such costs and add them to the costs ordered to be paid.
(7) The Master or Registrar may direct either party to pay the costs of the other on the ground of unreasonable conduct in respect of the bill or otherwise in respect of the assessment and, if so, must assess such costs and make an appropriate adjustment to the costs ordered to be paid."

[16] ***CPR 65.12(1)*** and ***(2)*** are applicable to the extent that, in this matter, the question of costs arose during the course of a case-management hearing before a Judge. CPR 65.12 (4) provides the methodology that should be adopted in the circumstances of this matter and it provides that "[t]he application must be accompanied by a bill or other document showing the sum in which the court is being asked to assess the costs and how such sum was calculated."

[17] Before looking at this section, it is necessary to examine whether **CPR 65.11** could also be applicable since it was referred to by Mr. Truss. **CPR 65.11** is in the following terms:

> "(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."
> [Emphasis added]

[18] **CPR 65.11** refers to the costs of procedural applications but **sub-para (1)** clearly, in terms, carves out of that rule costs arising out of a case management conference, pre-trial review or trial. Since this matter arose out of an

interlocutory application in the high court at the case management stage, ***CPR 65.11*** is inapplicable in the circumstances.

[19] I must thus return to **CPR 65.12** for a determination of this matter. As provided for under **CPR 65.12 (4)**, the applications for costs should be submitted with a Bill of Costs showing the sums which the court is being asked to assess. Windsor has submitted a detailed Bill of Costs totalling $11, 642.50.

[20] Mr. Truss argues that, in any event, costs should not be awarded because Windsor had no right of audience before the court in this application. In support of this argument, he cites ***CPR 62.2(4)*** and ***(5)*** which provide that an application seeking leave to appeal may be granted "without hearing the applicant."

[21] I find it difficult to agree with the intended appellant that ***CPR 62.2*** provides authority for a denial of audience to a respondent to an application for leave to appeal. Far from it, ***CPR 62.2(5)*** provides that the matter be fixed and heard in court where refusal is likely. This does not suggest that any party should of necessity be excluded.

DISPOSAL

(i) For the reasons therein, the Court determines that CPR 65.12 is applicable in the circumstances of this matter. The intended appellant

shall have its assessed costs totaling $11, 642.50 as set out in the Bill of Costs submitted to this court.

(ii) For the purposes of the proceedings in this Court, each party shall bear his or its own costs.

(iii) I tender my sincere apologies for the length of time that it has taken to deliver this judgment, for which I take entire responsibility.

Chief Justice

I concur

Justice of Appeal

I concur

Justice of Appeal