

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW AND EQUITY DIVISION**

**2018/CLE/gen/1050**

**IN THE MATTER OF** Section 55(3) of the Arbitration Act, 2009 of the Laws of The Bahamas

**AND IN THE MATTER OF** a Shareholders Agreement dated 29<sup>th</sup> July, 2014

**AND IN THE MATTER OF** Section 21 of the Supreme Court Act Ch. 53 of the Laws of The Bahamas

**AND IN THE MATTER OF** Order 29 rules 1 and 2 of the Rules of the Supreme Court 1978, Ch. 53 of the Laws of The Bahamas

**BETWEEN**

**LYFORD HOLDINGS N.V.**

**Plaintiff**

**AND**

**VERNES HOLDING LTD**

**Defendant**

**Before:** The Honourable Madam Justice Indra H. Charles

**Appearances:** Mr. John Wilson QC with him Ms. Knijah Knowles of McKinney, Bancroft & Hughes for the Plaintiff  
Mrs. Romona Farquharson of R.A. Farquharson & Co. for the Defendant

**Hearing Date:** Heard on written submissions with brief oral submissions on 15 February 2021

**Costs – Mandatory Injunction – Arbitration – Urgent Application – Two Counsel – Reasonableness - Inflation Tables – Bar Council Fees – whether inflation rate ought to be considered when determining reasonable hourly rates for Counsel**

In late 2018, the Plaintiff, Lyford Holdings N.V, brought an urgent application seeking a mandatory injunction compelling the Defendant, Vernes Holding Ltd, to comply with Clause 14 of a Shareholders Agreement entered into between the parties. The Plaintiff's application was successful and by Order dated 11 October 2018, costs were awarded to the Plaintiff to be taxed if not agreed. On 11 January 2019, the Plaintiff filed its Bill of Costs seeking some \$213,000.00 in costs.

The Defendant challenged the costs claimed on two primary grounds (i) that the Order of the Court did not stipulate certification of costs fit for two or more Counsel. Consequently, the Court should only award costs to one Counsel, Mr. John Wilson and (ii) the hourly rate charged by Mr. Wilson as Counsel for Lyford is unreasonably high.

**Held: Costs are certified fit for two Counsel. Costs of \$125,000.00 are awarded to the Plaintiff which are to be paid by the Defendant within 21 days hereof. The Defendant shall pay fixed costs of \$5,000.00 for the hearing of this costs application within 21 days hereof.**

1. The Order of the Court on 11 October 2018 (as well as on 22 October 2018) states as follows; "*I also awarded costs to Lyford to be taxed if not agreed*". It is the kind of order that this Court usually makes in proceedings of this nature. Routinely, this Court does not venture any further into making any other cost order at this stage of the proceedings unless it is raised, in which case, the parties will be given an opportunity to make submissions and/or address the Court.
2. This matter was not the ordinary "run of the mill" matter. Both parties were required to submit comprehensive written submissions (which they complied with) thus reducing the time spent in Court making oral submissions. The parties' skeleton arguments reveal the complexity of the issues involved. The mandatory injunction sought by Lyford was not governed by the usual rules of court. In fact, it was the first such application before this court. Further, as the Ruling reflects, no Bahamian authorities on the grant of such mandatory injunction existed. In order to properly and successfully argue the application, particularly on an urgent basis, required extensive non-routine research and analysis. The Judgment of the Court ran into 30 pages. The Judgment was also appealed to the Court of Appeal. The Judgment of the Court of Appeal consists of 33 pages. In my opinion, it was reasonable and appropriate for lead counsel to have a junior.
3. In civil proceedings, costs are entirely discretionary. Costs must be reasonable. In deciding what would be reasonable the court must take into account all the circumstances of the case, including but not limited to (a) any order that has already been made; (b) the care, speed and economy with which the case was prepared; (c) the conduct of the parties before as well as during the proceedings; (d) the degree of responsibility accepted by the legal practitioner; (e) the importance of the matter to the parties; (f) the novelty and complexity of

the case; and (g) the time reasonably spent on the case: **McPhee (as Administrator of the Estate of Thelma Mackey) v Stuart** [2018] 1 BHS J. No. 18 [unreported] applied.

4. In my judgment, the scale suggested by the Defendant (The Bahamas Bar Association Fee Scale) is outdated and needs to be urgently revised to reflect the realities of the present time.

## **RULING**

**CHARLES J:**

### **Introduction**

- [1] The issue of costs is always a vexing one as the unsuccessful party invariably attempts to scale down the successful party's costs. The present case is no exception. At the end of the day, the Court must award to the successful party such costs that are reasonable.
- [2] This matter came before me on an urgent basis. I had to interpose to hear it in conjunction with my normal assignment. Consequently, it was heard intermittently over a three-day period. Because of the urgency, on the last day of the hearing on 11 October 2018, I rendered an oral ruling in favour of the Plaintiff, Lyford Holdings N.V. ("Lyford") compelling the Defendant, Vernes Holding Ltd ("Vernes") to comply with Clause 14 of a Shareholders Agreement ("SA") entered into, between the parties, on 29 July 2014, in relation to the exercise by Lyford of its drag along option right under that Agreement. I also awarded costs to Lyford to be taxed if not agreed.
- [3] On 22 October 2018, I rendered a written ruling which was appealed unsuccessfully to the Court of Appeal.
- [4] Being the successful party in these proceedings, Lyford filed its Bill of Costs on 11 January 2019 seeking costs of \$213,052.00 certified fit for three counsel.

### **Preliminary objections**

- [5] Learned Counsel, Mrs. Farquharson who appeared for Vernes, raised two main challenges at the outset namely:

1. That the Order of the Court did not stipulate certification of costs fit for two or more Counsel. Consequently, the Court should only award costs to one Counsel, Mr. John Wilson (who was elevated to Queen's Counsel in or about 2020; that is after these proceedings) and;
2. The hourly rate charged by Mr. Wilson as Counsel for Lyford is unreasonably high. Mrs. Farquharson submits that the industry rate provided by the Bahamas Bar Association in 1984 and amended on 2 November 2006 (as well as their recent taxation before the Deputy Registrar of the Court of Appeal) suggests that Mr. Wilson's hourly rate should be \$600.00.

**Order of the Court with respect to costs**

[6] The Order of the Court on 11 October 2018 (as well as on 22 October 2018) states as follows; *"I also awarded costs to Lyford to be taxed if not agreed"*.

[7] It is the kind of order that this Court usually makes in proceedings of this nature. Routinely, this Court does not venture any further into making any other cost order at this stage of the proceedings unless it is raised, in which case, the parties will be given an opportunity to make submissions and/or address the Court.

[8] Therefore, it was somewhat perplexing that Vernes will mount such a challenge that Lyford is entitled to costs fit for one Counsel, namely Mr. Wilson, when Vernes was represented by two able counsel in these proceedings. This matter was not the ordinary "run of the mill" matter. It occupied the Court's calendar for at least four to five hours. Notwithstanding, both parties were required to submit comprehensive written submissions (which they complied with) thus reducing the time spent in Court making oral submissions. The parties' skeleton arguments reveal the complexity of the issues involved. The Judgment of the Court ran into 30 pages. The Judgment was also appealed to the Court of Appeal. The Judgment of the Court of Appeal consists of 33 pages. The Court of Appeal also made an

order similar to the Order I made that the award for costs is to be taxed if not agreed.

[9] In his comprehensive submissions dated 12 February 2021, Mr. Wilson QC deals with this issue at paragraphs 12 to 14.

[10] That said, I agree with Mrs. Farquharson that this was not a matter where three counsel were necessary. However, in my opinion, it was reasonable and appropriate for lead counsel to have a junior: see Moore J in **Nassau Cruises Ltd v Bahamas Hotel Catering and Allied Workers Union** [2000] BHS J. No. 248 at paragraphs 83 to 91.

[11] In the circumstances, I will order costs certified fit for two Counsel namely Mr. Wilson and Ms. Knijah Knowles or Mr. Campbell (but not both).

#### **Rate**

[12] As already stated, Mrs. Farquharson contends that the hourly rate charged by Mr. Wilson is unreasonably exorbitant. She suggests an hourly rate of \$600.00 (as per the Bahamas Bar Association scale in 2006). That scale was last revised almost 15 years ago. Cost of living has soared immensely with a 12% value added tax (“VAT”).

[13] The issue of revision of the scale and inflation came before me not so long ago. In **OPAC (Bahamas) Ltd v (1) Duane Bennett Parnham and (2) Leigh Magdalene Parnham** [2019/CLE/gen/00127] – Ruling delivered on 5 February 2021, this Court was faced with a similar issue. At paragraphs 71 to 75 of that Ruling, this Court stated:

**“[71] The Defendants contend that the hourly rate charged by Counsel for the Plaintiff, Mr. Moree, is unreasonably high. He suggests that an appropriate rate for Counsel of just over 8 years standing at the Bar is \$350.00 per hour.**

**[72] According to Mr. Moree, using the method relied upon by the Defendants, Mr. Hanna’s reasonable rate would be \$425.00 per hour.**

1. Mr. Hanna was called to the Bar of the Commonwealth of The Bahamas on 11 June 2010, making him an attorney of 10.5 years standing.
2. According to the scale rates provided by the Bahamas Bar Association in 1984, Mr. Hanna's suggested hourly rate would have been \$150.00 at that time.
3. Adjusting that rate using i) the US Department of Labour CPI Inflation Calculator, Mr. Hanna's suggested 1984 hourly rate would be \$383.43 as at December 2020 and ii) the Bank of England Inflation Calculator, Mr. Hanna's suggested 1984 hourly rate would be £493.06 as at December 2020.

[73] Nevertheless, Mr. Hanna's rate in the Defendants' Bill of Costs is \$500.00/hour which, presumably, the Defendants would suggest is reasonable.

**[74] Mr. Moree submits that this illustrates that the suggested scale is outdated and does not reflect the realities of the present rates charged by attorneys in The Bahamas. I agree. [Emphasis added]**

**[75] Further, says Mr. Moree, Mr. Hanna worked on this matter with another partner at his firm, Mrs. Tara Archer-Glasgow, while he (Mr. Moree) was the sole partner who had carriage of this matter in his firm. The fact that he (Mr. Moree) was capable of handling this matter without the assistance of any other partners must entitle him to a rate which is at least commensurate with Mr. Hanna's. I also agree".**

[14] Mr. Wilson was elevated to Queen's Counsel in 2020. It is obvious that, in 2018, he was a very senior attorney. He was called to the English Bar in July 1994 and the Bahamas Bar in September of that same year. In 2018, he would have been an attorney at law for a little under one quarter of a century.

[15] In my judgment, the scale suggested by Mrs. Farquharson is outdated and needs to be urgently revised to reflect the realities of the present time. In 2006, Mr. Wilson's hourly rate would have been \$506.10 and in 2018 was approximately \$624.32. Given his 23 plus years at the Bahamian Bar, I opined that an hourly rate of \$700.00 is commensurate with his qualifications and experience.

[16] No challenge was mounted with respect to the hourly rate of Mr. Campbell or Ms. Knowles. As I stated, I will allow fees for one junior counsel.

## The law on costs

[17] In civil proceedings, costs are entirely discretionary. Section 30(1) of the Supreme Court Act provides:

**“Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.”**[Emphasis added]

[18] The principle that costs are discretionary is further fortified in Order 59, rule 2(2) of the Rules of the Supreme Court (“RSC”) which reads:

**“The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order.”**[Emphasis added]

[19] Order 59, rule 3(2) of the RSC is helpful. It provides:

**“If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.”**

[20] Costs must be reasonable. There are certain factors that the Court must consider in determining what are reasonable costs. In **McPhee (as Administrator of the Estate of Thelma Mackey) v Stuart** [2018] 1 BHS J. No. 18 [unreported] at [8], this Court enumerated the factors as:

**“In deciding what would be reasonable the Court must take into account all the circumstances, including but not limited to:**

- a) any order that has already been made;
- b) the care, speed and economy with which the case was prepared;
- c) the conduct of the parties before as well as during the proceedings;

- d) the degree of responsibility accepted by the legal practitioner;
- e) the importance of the matter to the parties;
- f) the novelty, weight and complexity of the case; and
- g) the time reasonably spent on the case.”

[21] See also: **Rahming v Bahamas Ferries Limited** [2018] 1 BHS J. No. 55, a case referred to by Mr. Wilson QC where the same factors were considered.

[22] I now turn to the Bill of Costs bearing in mind that Mrs. Farquharson has offered a little over \$58,000. There were also some concessions made by Mr. Wilson QC.

#### **Application of the principles to the present case**

[23] If my mathematical calculations are correct, Mr. Wilson spent 128 hours in preparation for the case excluding one full day and two half days in Court. For a junior whether it be Mr. Campbell or Ms. Knowles (allowing for one only), the aggregate time spent by both juniors was 136 hours aside from their appearances with Mr. Wilson in Court on one full day and two half days.

[24] Mr. Wilson and Ms. Knowles also claimed \$6,000 for attending before the Registrar of the Supreme Court on the taxation of Lyford’s Bill of Costs.

[25] On the other hand, Mrs. Farquharson submits that some of the items claimed are duplicates, the claims should only be for three bundles, and overall, costs to Mr. Wilson should be for approximately 30 hours.

[26] Undoubtedly, the judge who hears the case has a better appreciation of the case in considering the factors which are enumerated in **McPhee** [supra].

[27] As I reiterated earlier, a vexing issue arises as the unsuccessful party tries to reduce the successful party’s costs which that party feels is unreasonably high. In this case, for Lyford’s attorneys to spend 128 hours in preparation for the case and another one full day and two half days in Court and for his junior counsel to rack



up 136 hours aside from their appearances with Mr. Wilson in Court on one full day and two half day is, in my opinion, unreasonably high. On the other hand, for Mrs. Farquharson to urge this court to allow costs for approximately 30 hours of work is unreasonable.

[28] Mr. Wilson QC submits that from the guidelines and principles set out in the authorities, it appears that the taxing master should have regard, amongst other things, to fee scales advised by the Bar Association, the urgency, the novelty, complexity and importance of the matter and the possible loss of other employment.

[29] As already alluded to, this was not an ordinary “run of the mill” matter. The matter involved the sale of Lyford International Bank (“LIB”) to Ansbacher (Bahamas) Limited (“Ansbacher”). The transaction was valued at approximately 15 million dollars and was scheduled to complete in July of 2018. Vernes, the minority shareholder for LIB, refused to transfer its shares to Ansbacher when called to do so by LIB. Vernes sought to stall the sale by commencing arbitration proceedings; which conduct necessitated LIB to apply for an urgent mandatory injunction in aid of arbitration proceedings to protect, amongst other things, its contractual right to sell its shares.

[30] Mrs. Farquharson (who was not Counsel before me at those hearings) surmised that it was not a complex matter.

[31] The mandatory injunction sought by Lyford was not governed by the usual rules of court. In fact, it was the first such application before this court. Further, as the Ruling reflects, no Bahamian authorities on the grant of such mandatory injunction existed. I agree with Mr. Wilson QC that to properly and successfully argue the application, particularly on an urgent basis, required extensive non-routine research and analysis.

[32] In the exercise of my discretion and taking into account all relevant factors including the manner of opposition to the relief sought by Lyford, which was

vehemently fought by Vernes at every conceivable stage and on every possible point, which no doubt, is its rights, the upshot was, of necessity, to intensify the work required of Lyford's legal team.

- [33] Some additional guiding principles that arose in this litigation was (1) the care, speed and economy with which the case was prepared (Mrs. Farquharson argues that Lyford should have only produced not more than three copies of some affidavits, for example, the Affidavit of Frederic Hottinger comprising 236 pages as well as submitting 5 hard copies of submissions and authorities). I do not agree with Mrs. Farquharson. Invariably, Counsel has to produce a copy of these documents for the Court's stenographer and as many good lawyers do, they prepare an additional copy in the event that the copies do not reach the judge's chambers. In fact, only recently, I requested that Lyford submits another copy of Mr. Hottinger's affidavit to the Court since the original file cannot be located at the present time.
- [34] Taking all matters into consideration and having scrutinized in great detail the objections made by Mrs. Farquharson, the Court considers that an overall sum of \$125, 000.00 is reasonable and meets the justice of this case.
- [35] Before I close, the Court also relies on its own Judgment in the BVI case of **Finecroft Limited v Lamane Trading Corporation Claim** No. BVIHC2005/0264. In that case, Finecroft Limited and Winfair Limited ("the Applicants") sought an "anti-suit injunction" against Lamane Trading Corporation ("Lamane") to restrain Lamane from taking any steps to prosecute or continue the proceedings it commenced against both Applicants in New York, Russia and Cyprus. Lamane has initiated these proceedings in these jurisdictions in what was alleged to be a flagrant breach of an agreement to arbitrate in London. Lamane had also commenced arbitration proceedings in the London Court of International Arbitration (the "LCIA"). The hearing of the application for the anti-suit injunction took one day. Finecroft was the successful party in the proceedings. It claimed costs in the amount of \$816,848.27. The hearing of the application for costs took

two days. The Court awarded costs to Finecroft in the amount of \$448,208.50 less the credit of \$125,000.00 which it had previously received from Lamane. This case exemplifies the amount of costs sought and granted in matters which are not “run of the mill” matters.

**Conclusion**

[36] I will therefore disallow or tax off \$88,052.00 and make an award of \$125,000.00 which represents, in my judgment, reasonable costs to Lyford Holdings N.V. Such costs are to be paid by Vernes Holding Ltd within 21 days hereof.

[37] The costs of this hearing was fixed at \$5,000.00 which are to be paid to Lyford Holdings N.V. within 21 days hereof.

**Dated this 23<sup>rd</sup> day of February, A.D., 2021**

**Indra H. Charles  
Justice**