COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Division

2021/COM/lab/00038

B E T W E E N

ROBERT FORBES

Claimant

AND

MINISTRY OF TOURISM

First Defendant

AND

ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

Second Defendant

Before: The Honourable Chief Justice Sir Ian R. Winder

Appearances: Obie Ferguson KC with Sidney Campbell for the Claimant
Kenria Smith for the Defendants

Hearing date(s): On the papers

DECISION ON COSTS

WINDER, CJ

[1.] This is the summary assessment of the Claimant's costs following a trial which concluded in his favour with a judgment delivered on 5 July 2023. In my subsequent decision on costs dated 7 December 2023, I awarded the Claimant his reasonable and proportionate costs to be paid by the Defendants and gave directions for the summary assessment of the Claimant's costs.

Background

[2.] The directions that I gave as to this summary assessment were set out at paragraph [10] of my decision on costs. I stated:

> The relatively straightforward nature of Forbes' claim makes it apt for summary assessment. However, I do not have the material necessary to carry out a summary assessment of the costs of the claim and the parties have not had the opportunity to address me on the quantum of costs to be paid by the Defendants. I therefore direct that Forbes lodge and serve his bill of costs and representations and additional evidence that he wishes for the Court to consider by 20 December 2023. The Defendants shall lodge and serve any evidence or representations in response they may wish for the Court to consider by 5 January 2024. Forbes shall lodge and serve any response to the Defendants' evidence and representations by 12 January 2024.

[3.] In directing a summary assessment on the papers, I followed a practice that has sometimes been adopted by the English High Court. See **R (on the application of O'Brien) v Independent Police Complaints Commission** [2011] EWHC 3407 (Admin); **Mccready v London Thames Gateway Development Corporation** [2013] EWHC 1059 (Admin); **Blue Manchester Ltd v BUG-Alu Technic GmbH** (2021)199 ConLR 140; and **Otto v Inner Mongolia Happy Lamb Catering Management Company Ltd** [2023] EWHC 3151 (Ch). I did so in the interest of saving expense and with a view to allotting to this matter an appropriate share of court resources.

[4.] On 15 December 2023, the Claimant filed a Statement of Parties, Notice of Taxation and Bill of Costs seeking to recover $39,710 for professional charges and $1,597.20 for disbursements before VAT. While a "Statement of Parties" and "Notice of Taxation" were filed, no order directing a detailed assessment was ever made. No representations were submitted on behalf of the Defendants by 5 January 2024 but representations in the form of objections were submitted on 13 February 2024. No response to those objections was submitted by the Claimant.

[5.] Briefly, the Defendants objected to the costs claimed by the Claimant on the basis that they were unreasonable. The Defendants submitted that, pursuant to **Parts 72.2(3)(f)** and **(g)** of the **Supreme Court Civil Procedure Rules, 2022** (the "**CPR**"), the Court must consider what is reasonable, taking into account whether or not the matter is novel, weighty and complex, and the time spent on the matter. The Defendants submitted, relying on the Bar Scale Fees provided by the Bahamas Bar Association in 1984, which were informally updated on 2 November 2006, that the claimed hourly rates were excessive. The Defendants further submitted that, applying the criterion

of reasonableness, the Claimant should only be entitled to recover $20,724.06 for professional charges and $1,529 for disbursements (including VAT on disbursements at the rate of 10%).

Law

[6.] **CPR 71.2** distinguishes between the detailed assessment of costs and the summary assessment of costs. A "detailed assessment" is defined as "...the procedure by which the amount of costs is decided by the Registrar in accordance with Part 72". By contrast, a "summary assessment" is defined as "the procedure by which the Court, when making an order about costs, orders payment of a sum of money instead of fixed costs".

[7.] While "the Court" is not defined under **Part 2** of the **CPR** in a manner that excludes registrars, summary assessments are intended to be conducted by judges. Summary assessments are, moreover, intended to occur at the end of the hearings to which they relate, or as soon as practicable thereafter. Summary assessments are the default form of assessment under the **CPR**. The general position is that judges will summarily assess costs unless a detailed assessment is warranted by the circumstances.

[8.] A judge's jurisdiction to summarily assess costs is found in **CPR 71.12**. **CPR 71.12** states:

> (1) As a general rule, a judge hearing an application will summarily assess the costs of that application immediately or as soon as practicable after the same is disposed of.
>
> (2) As a general rule, a judge conducting the trial will summarily assess the costs of the entire claim immediately after he has delivered judgment in respect of the same or as soon as practicable thereafter.
>
> (3) A judge may, instead of summarily assessing the costs under paragraphs (1) or (2), direct that the whole or any part of the costs payable shall be subject to a detailed assessment and he may, when making such direction, indicate which particular matters the Registrar may or shall take into account or exclude in relation to such detailed assessment.

[9.] The purpose of a summary assessment of costs is to avoid the time and expense of a detailed assessment. In **Leslie Stuart Naylor v David Monahan** [2011] EWHC 1412 (QB), *Coulson J* (as he then was) observed that the procedure is:

> ...designed to ensure that a successful party does not have to wait months for a further hearing at which the costs of mounting his successful claim are picked over in detail, causing him more expense and more inconvenience. The summary assessment of costs is intended to produce a more robust and cost-effective method of resolving disputes about costs, allowing the court to exercise a broad discretion as to the assessment of those costs. ...

[10.] The **CPR** appears to be silent on the details of the summary assessment procedure. It is uncertain to what extent, if at all, the details of **Part 72** of the **CPR** apply to a summary assessment given that (i) (despite the generality of some of its language) **Part 72** is described as establishing the procedure for the detailed assessment of costs and (ii) **Part 72** contains a plethora of references to "the Registrar", which, contextually, may be read as excluding judges. The **CPR** does not contain prescriptive provisions analogous to **JAM CPR 65.9** (in Jamaica) **Practice Direction 44 para [9]** (in England and Wales).

[11.] While the **CPR** is silent on the details of the summary assessment procedure, and this is not an appropriate occasion on which to attempt to elaborate such details, there must be at least two minimum requirements:

(i) firstly, the Court ought to obtain a bill or statement of costs from the receiving party before it can proceed to summarily assess costs. The detailed provisions of the **CPR** on costs indicate that the Rules Committee did not intend for the summary assessment of costs to be done on an arbitrary or random basis. The procedure is not intended to be a vehicle for judges to pluck costs awards "out of thin air".

(ii) secondly, the Court must permit the parties a reasonable opportunity to be heard on the assessment. In the absence of any clear words in the **CPR** compelling a different conclusion, the Rules Committee, must be presumed to have intended a fair procedure in providing for the summary assessment of costs. That opportunity to be heard may, in appropriate cases, take the form of a paper hearing.

[12.] By virtue of **section 30** of the **Supreme Court Act** and **CPR 71.9**, the Court enjoys an undoubted discretion as to the quantum of costs. That discretion, like any other discretion vested in the Court, is to be exercised judicially and not arbitrarily or capriciously. Accordingly, the Court must have regard to the provisions of the **CPR** which deal with the quantification of costs. The discretion of the Court must be exercised consistently with the overriding objective of the **CPR**, set out in **CPR 1.1**, which is to "deal with cases justly and at proportionate cost".

[13.] **Part 71** of the **CPR** contains "general rules about costs and the entitlement to costs". **CPR 71.11** enumerates factors that the Court is to take into account in deciding the amount of costs. **CPR 71.11** provides:

> (1) The Court is to have regard to all the circumstances in deciding whether costs were —
> (a) proportionately and reasonably incurred; or
> (b) were proportionate and reasonable in amount.
> (2) In particular, the Court must give effect to any orders which have already been made.
> (3) The Court must also have regard to —
> (a) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
> (b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;
(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
(e) the skill, effort, specialised knowledge and responsibility involved;
(f) the time spent on the case;
(g) the place where and the circumstances in which work or any part of it was done;
(h) the care, speed and economy with which the case was prepared; and
(i) in the case of costs charged by an attorney to his or her client —
(i) any agreement about what grade of attorney should carry out the work;
(ii) any agreement that may have been made as to the basis of charging; and
(iii) whether the attorney advised the client and took the client's instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the case.

[14.] Reference to **CPR 72.13(2)** and **CPR 72.21** also seems appropriate, as it would be strange if significantly different considerations were relevant on a summary assessment versus on a detailed assessment.

[15.] **CPR 72.13(2)** provides:

> Subject paragraph (3) [sic], costs to which this rule applies shall be assessed on a standard basis, and on an assessment on that basis there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed.

[16.] **CPR 72.21** provides (so far as is relevant):

> (1) Where the Court has a discretion as to the amount of costs allowed to a party, the sum to be allowed –
> (a) is the amount that the Court deems to be reasonable were the work to be carried out by an attorney of reasonable competence; and
> (b) which appears to the Court to be fair both to the person paying and the person receiving such costs.
> ...
> (3) In deciding what would be reasonable the Court must take into account all the circumstances, including –
> (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 attorney;
> (e) the importance of the matter to the parties;
> (f) the novelty, weight and complexity of the case;
> (g) the time reasonably spent on the case ...

[17.] In **Leslie Stuart Naylor** (supra), *Coulson J* helpfully reviewed some of the leading English Court of Appeal authorities on summary assessments, from which guidance may be taken. He said at paras [10] to [12]:

10. The principal authorities relating to the summary assessment of costs can, I think, be summarised as follows:

(a) The court should focus on the detailed breakdown of costs actually incurred and should carry out an assessment by reference to the items in the draft bill. Having done that, the court should also look at the total sum at which it has arrived to see whether that sum is reasonable and proportionate: see ***1-800 Flowers Inc v Phonenames Limited*** [2001] EWCA Civ 721.

(b) The two-stage approach (albeit in a different order) was also identified in ***Lownds v Home Office; Practice Note*** [2002] EWCA Civ 365. Lord Woolf MR said that it was necessary for the court to consider whether the global sum claimed was disproportionate, by reference to CPR r. 44.5(3). If the costs were disproportionate, then the court will want to be satisfied that the work in relation to each item was necessary and, if so, reasonable. If the global costs were disproportionately high, no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner.

(c) In the most recent case on this topic, ***Katherine Morgan v The Spirit Group Limited*** [2011] EWCA Civ 88, Black LJ said at paragraph 27:

"As ***Lownds*** shows, it is very important for the judge to take a global view of the proportionality of the costs incurred but, before he fixes a figure for costs, he must advance from that to an item by item consideration of the individual elements of the bill, by way of a summary assessment or alternatively, he must direct a detailed assessment which will fulfil that task. Naturally, any judge carrying out a summary assessment, appropriately focused on the detailed breakdown of costs, will have firmly in mind that the court's discretion when carrying out such an assessment is very wide and that a minute examination of detail is not always required and a broad-brush approach can, where appropriate, be used. It would be a great pity if the summary assessment procedure were to become bedevilled by formulaic and time consuming intricacy, which would often be wholly disproportionate to the exercise being carried out and the nature of the litigation in hand."

11. In both ***Flowers*** and ***Morgan***, the Court of Appeal allowed the appeal against the original summary assessment because the judge who had undertaken it had not looked at the individual items at all, but had instead identified a round figure which he considered - without further ado - to be the appropriate amount of proportionate and recoverable costs. He had not looked at the components of the bill at all. In addition, in both cases, the judge had adopted this erroneous approach because he had concluded that the claimed costs were wholly disproportionate to the sums at stake in the litigation.

12. … as Black LJ stressed in ***Morgan***, a judge carrying out a summary assessment of costs:

(a) should consider the component parts of the bill, and not simply start and finish at the round figure that he or she may consider to be reasonable and proportionate; **but**

(b) should not be obliged to go through a box-ticking exercise, in which he or she is forced to comment in detail upon each item of the draft bill.

Analysis and disposition

[18.] I have reviewed the detailed items in the Claimant's 97-item Bill of Costs and the Defendants' objections to those detailed items. At the outset, it is worthy of remark that the Claimant seeks to recover professional fees for approximately 42 hours of work done by attorneys with stated hourly rates of $650 initially (later $950), $750 and $550, respectively, plus disbursements. In my view, the total costs claimed by the Claimant are disproportionate when the particulars of this action are considered.

[19.] Although the majority of the work that was done in this case was undertaken under the **Rules of the Supreme Court**, under which reasonableness was the exclusive governing criterion in the field of costs, I take this opportunity to highlight that proportionality is of heightened significance under the **CPR**. That this is so may be deduced from **CPR 1.1** (which refers to dealing with cases "at proportionate cost") and **CPR 71.11** (which refers to the Court deciding whether costs were "proportionately and reasonably incurred" or "proportionate and reasonable in amount").

[20.] In **Jefferson v National Freight Carriers Ltd** [2001] 2 Costs LR 313, the English Court of Appeal approved the following observation at para [40] which I would respectfully endorse:

> In modern litigation, with the emphasis on proportionality, it is necessary for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity, and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which would be necessary and appropriate to spend on the various stages in bringing the action to trial, and the likely overall cost. While it was not unusual for costs to exceed the amount in issue, it was, in the context of modest litigation such as the present case, one reason for seeking to curb the amount of work done, and the cost by reference to the need for proportionality.

[21.] This was a wrongful dismissal and breach of contract claim for $58,381.66 before interest and costs. The Claimant succeeded in obtaining only $8,630.69 before accounting for the sum of $6,667.50 paid to him during the proceedings. The issues raised in the action were simple, except for the issue of whether the Claimant was to be regarded as having been employed under one continuous contract of employment. But that itself was a narrow issue. The facts were also largely not in dispute. To the extent that facts were in dispute, there were only two witnesses and very limited documentary evidence. The trial of the action occupied less than two hours of court time.

[22.] While I have made allowance for the fact that work was largely done under the **Rules of the Supreme Court**, in my view, it would be neither reasonable nor fair for the Defendants to be ordered to pay the entirety of the costs claimed by the Claimant. This was not a matter that required senior counsel. Taking into account the relevant considerations set forth in **CPR 71.11, CPR 72.13(2)** and **CPR 72.21**, the Defendants' item-by-item objections, and what I consider would be reasonable and fair to allow for the work done on behalf of the Claimant, I summarily assess the Claimant's costs of the action in the sum of $22,758.68 and order that that sum be paid by the

Defendants to the Claimant. The sum ordered is composed of the allowed sums listed in the attached schedule and VAT at 10%.

Dated the 11th day of March 2024

Sir Ian R. Winder
Chief Justice

SCHEDULE

Item number on Claimant's Bill of Costs	Amount allowed ($)
Commencement until costs proceedings	
1	1012.20
2	126.53
3	63.25
4	126.53
5	50
6	506.10
7	1012.20
8	506.10
9	24
10	50
11	50
12	63.26
13	253.06
14	126.53
15	126.53
16	126.53
17	126.53
18	50
19	506.10
20	50
21	50
22	126.53
23	50
24	126.53
25	126.53
26	253.06
27	253.06
28	126.53
29	50
30	50
31	50
32	759.15
33	16
34	50
35	126.53
36	506.10
37	759.15
38	160
39	50
40	506.10
41	506.10

42	15
43	50
44	379.58
45	16
46	253.06
47	506.10
48	12
49	100
50	759.15
51	1012.20
52	60
53	506.10
54	506.25
55	50
56	1012.20
57	126.53
58	50
59	759.15
60	1012.20
61	99
62	50.61
63	50
64	50
65	506.10
66	126.53
67	50
68	253.05
69	50
70	253.05
71	75
72	50
73	50
74	50
75	75
76	75
77	50
78	50
79	50
80	50
81	75
82	75
83	50
84	50

Costs proceedings	
1	1012.50
2	39
3	0
4	6
5	0
6	50
7	0
8	0
9	0
10	0
11	0
12	126.53
13	0
Drafting costs order and attending to service of order	300