

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2017-01446

ASHTON BALGOBIN

Claimant

AND

COMMISSIONER OF POLICE

Defendant

Before Assistant Registrar Mr. Raymond A. Roberts

Appearances:

Mr. Larry Boyer Attorney-at-law for the Claimant

Ms. Svetlana Dass, Attorney-at-law for the Respondent.

Dated of Delivery: 29th day of April, 2019

JUDGMENT ON COSTS

Chronology of facts

1. The Claimant filed a Statement of Costs on the 6th February, 2018 pursuant to the order of the Honourable Mr. Justice Frank Seepersad dated 16th day of October, 2017 wherein it was ordered by consent that the Defendant do pay the Claimant's costs to be assessed by the Registrar in default of Agreement.
2. The order for costs arose following the Claimant's application for judicial review into the status of his application for the issuance of a firearm user's licence to him. The Claimant between 16th October 2013 and 6th April 2017 wrote letters through his attorney making enquiries into the status of the application. The letters were ignored in their entirety and/or extensions to

respond were requested by the Defendant, yet no substantial response was forthcoming to address the concerns of the Claimant.

3. On 27th April, 2017 the Claimant filed for leave for judicial review which was granted on the condition that the Claimant file the fixed date claim form. The first case management conference was scheduled for 23rd May, 2017. On the 8th May 2017, the Claimant filed and served the fixed date claim form.
4. On 23rd May, 2017, the Claimant attended the first case management conference, however the Defendant was not present. The Court gave directions to file affidavit of service and notice of adjourned date to the Defendant. The matter was adjourned to 20th June, 2017. On June 8th 2017, the Claimant filed the affidavit of service as directed.
5. On 20th June, 2017 the Claimant and Defendant appeared. On this occasion, the Defendant requested time to file and serve an affidavit in response and was directed by the Court to so file on or before 4th August, 2017. The Court also ordered the Claimant to file an affidavit in reply on to before 8th September, 2017 and the matter was adjourned to 2nd October, 2017.
6. On the 3rd August 2017, the Defendant wrote to the Claimant indicating that a provisional licence was issued to the Claimant and that the Defendant would not be filing an affidavit. On 7th September the Claimant informed the Defendant that he had received the provisional permit on 22nd August 2017 which allowed him to obtain and submit a Certificate of Competence on 28th August 2017. This was one of the pre-conditions that the Claimant had to satisfy, yet there was still no decision made by the Defendant in relation to the Claimant's application for a firearm user's licence, which formed the basis of the Claimant's claim before the Court.
7. On 2nd October, 2017 the remedy of the Claimant's claim was dealt with and the matter was adjourned to 16th October, 2017 to deal with costs. On 16th October, 2017 the Claimant withdrew his application and the Court ordered that the Claimant's costs be assessed by the Registrar in default of agreement. The statement of costs was filed on the 6th February, 2018.

8. Following various hearing before the Registrar where the parties indicated that discussions were ongoing, the Registrar on 5th November, 2018, ordered the Defendant to file submissions on the statement of costs on or before the 20th November, 2018 and the Claimant to file submissions in reply on or before 4th December, 2018. The submissions were so filed and were considered by this court in determining the appropriate award of costs.

Law and Analysis

9. The decision in *Nizam Mohammed v Attorney General of Trinidad and Tobago Civ App 75* of 2013 makes it clear that in applications for administrative orders, the successful applicant is entitled to have his costs assessed under Rule 67.12.

10. Rule 67.2 (1) treats with the basis of the quantification and states that, where the court has any discretion as to the amount of costs to be allowed to a party, the sum to be allowed is the amount that the court deems to be reasonable were the work to be carried out by an Attorney-at-law of reasonable competence and which appears to the court to be fair both to the person paying and the person receiving the costs.

11. In the matter of **Attorney General of Trinidad and Tobago v Haleema Mohammed CA s-218/2018 delivered on 11th March, 2019** the court outlines the proper approach to an assessment of costs. The Practice Guide on the Assessment of Costs that refers to the test as set out in *Lownds v Home Office [2002] EWCA Civ 365* was identified as the starting point of the considerations.

12. Following the *Lownds* test, I have applied a two-pronged test by first assessing whether on a global approach, the costs claimed are proportionate having regard to the relevant provisions of the Rule 67.2(3). If the costs as a whole are not disproportionate according to that test, then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. I must therefore satisfy myself that each item was reasonably incurred and the cost of that item was reasonable.

13. The comments of the Honourable Jamadar JA in **Haleema Mohammed** are instructive. The learned Appellate Judge indicated that “the hourly rates are guideline figures and are intended as a starting point to assist Judges, and in this case, Registrars who are faced with the task of assessing costs. They are not however intended to replace the Court’s discretion to allow appropriate fees to attorneys in particular cases. The Court may therefore allow a higher or lower fee, where appropriate, having regard to all the relevant circumstances.
14. The Court of Appeal discussed the difficulty of adhering strictly to hourly rates “so as not to reward the indolent and less efficient lawyer and penalise the diligent and more efficient counterpart.” In terms of the standard of the attorney-at-law of reasonable competence as expressed in Rule 67.2, the court indicated that a benchmark must be chosen, not the most junior attorney, not the most senior attorney, but an attorney of reasonable experience (the equivalent of the person whether you call it the reasonable man on the priority bus route), an attorney of reasonable competence.
15. The Court of Appeal highlighted further that “in looking at the Practice Guide the system is such that if you are senior you are entitled to a value, a different value for your time. So that for instance where junior attorney claims 4 hours and senior 4 hours, the junior gets at the lower rate and the senior at the higher rate for the same 4 hours. But the four hours is determined objectively, by asking and answering the questions- **how much time would an attorney of reasonable competence have spent on this?** This is the starting point.”
16. From there I turn to the part 67.2 factors. That is to say, in deciding what is reasonable, the court must take into account all the circumstances, including-
- (a) any orders that have already been made;
 - (b) the conduct of the parties before as well as during the proceedings
 - (c) the importance of the matter to the parties
 - (d) the time reasonably spent on the case;
 - (e) the degree of responsibility accepted by the attorney-at-law
 - (f) the care, speed and economy with which the case was prepared;
 - (g) the novelty, weight and complexity of the case;

- (h) in the case of costs charged by an attorney-at-law to his client—
 - (i) any agreement that may have been made as to the basis of charging;
 - (ii) any agreement about what grade of attorney-at-law should carry out the work; and
 - (iii) whether the attorney-at-law 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.

17. Jamadar JA went on to add that in looking at the factors, one would determine whether an uplift is necessary because the matter may have been urgent, complex, whether application brought during the vacation etc. or whether in the given case a downgrade may be warranted.

18. The Court went on to emphasize that there is a third layer- where the assessor goes back to the overriding objective as that is where the proportionality comes in.

19. I am of the view that the costs claimed as a whole are not disproportionate. This is a matter where the Claimant challenged the failure of the Defendant to render a decision on his application for a firearm user's licence. While the Court acknowledges that this application can be considered routine, the pre-trial conduct of the parties cannot be ignored. The application was made in 2010, there were correspondence between the parties through different attorneys on behalf of the Claimant up to the filing of this action in 2017. From a perusal of the pre-action correspondences, it appears that very little was done to bring closure to this matter and obviate the need for the instituting of proceedings. Moreover, the course of conduct subsequent to the commencement of proceedings, it appears that the legal proceedings were the impetus to cause the Defendant to treat with the issue.

20. It should be noted at this juncture that the fact that, at this first stage, even where the costs as a whole appear to be proportionate does not prevent this court from finding that individual items are disproportionate and applying the test of necessity to them alone- *Giambrone v JMC Holidays* [2002] EWHC 2932 (QB). I have reviewed the detailed objections of the Defendant's and find merit in some of them.

21. I turn now to each item of the bill.

Submissions and rulings

22. **Item 1**

(a) **Taking instructions on Applicants' application, preparing brief for counsel for opinion and conference**

Instructing Attorney 5hrs @ \$1,200.00 = \$6,000.00

Counsel for the Claimant has argued that the attorney had to record instructions which stemmed over a period of 8 years including the perusal of correspondence between the parties during that period. However, the correspondences do not appear to be incredibly detailed, in particular those of the Defendant are characterised by brevity. It is agreed as argued by Counsel for the Defendant, that this matter is not a complex one. In the circumstances I am of the view that 2.5 hours would be reasonable in the circumstances.

(2.5 @\$1,200.00= \$3000.00)

(b) **Counsel's fee for Opinion including teleconferences, perusing documents, researching the law and advising-** Senior Advocate Counsel 4 hrs@ \$2,300.00= \$9,200.00

It must be acknowledged that in these types of matters, in order to succeed on an application for leave, the preparation for doing so is at the front. Having regard here to the fact that the matter is neither novel nor complex; not requiring any research of any ground-breaking area of the law, the time spent reasonably for research and the preparation of an opinion would be **3 hours@ 2,300.00= \$6,900.00**

(c) **Drafting of pre-action letter and follow up- correspondence, compiling of exhibits and service of documents 3 hours @ \$1,200.00= \$3,600.00 Instructing attorney**

Counsel for the Defendant submitted that compliance with pre-action protocol is a consideration to be taken into account in whether costs should be awarded and that these costs should not be included in the costs for the claim. I find it difficult to follow the logic of counsel's argument. While it is certainly agreed that the compliance with the pre-action protocol is a relevant factor in assessing costs, and in so complying, work would be done

by the instructing attorney and at times by Senior advocate in settling the pre-action letter. However I am of the view that under this item, **1.5 hours** is reasonable as it is not limited to the initial correspondence but the management of the process until filing of the application for leave.= **\$1,800.00 for instructing attorney.**

(d) **Review of pre-action correspondence by Senior Counsel- 1 hour = \$2,300.00.** For reasons given above in (c), one hour is deemed reasonable.

23. Item 2. Application for leave for Judicial Review

(a) **Instructing fee for preparing, filing and serving- 4 hours @ \$1,200.00= \$4,800.00**

The submissions by the Claimant are persuasive as it details that the preparation of the application with 9 exhibits would have involved the taking of instructions, interviewing and the recording of an affidavit, attending the court office to file and service. Therefore, it is agreed that **4 hours** for instructing attorney is reasonable. **\$4,800.00**

(b) **Senior Advocate Counsel fee for settling application for leave- 3 hours @ \$2,300.00=\$6900.00**

The reasonable time spent by Senior Counsel for the settling of the application for leave should be 2.5 hours. **\$5,750.00**

(c) **Copies for service- \$138.00 allowed**

(d) **Filing Fee- no sum claimed**

(e) **Copy for Counsel's brief- \$54.00 Allowed**

24. Item 3. Substantive Application for Judicial Review

(a) **Instructing fee for preparing, filing and serving substantive application- 4 hours @ \$1,200.00= \$4,800.00**

By order of the Honourable Justice Frank Seepersad dated 27th April, 2017 on review of the Notice of application, Affidavit of Ashton Balgobin filed on even date with exhibits thereto attached at the draft order filed, the Court ordered that leave be granted to the Applicant to

apply for judicial review. The Court further ordered at “*The Applicant/ Intended Claimant be permitted to use the affidavit in support of leave for Judicial review as the affidavit in support of the substantive application for judicial review.*” The affidavit which was filed in the substantive application was the said affidavit filed at the leave stage.

It is also important to mention here that on a proper review of the file, it is clear that the grounds detailed in the Notice of Application at the leave stage were transposed into the grounds stated in the Fixed date Claim form filed in the substantive application with the exception of an additional paragraph which indicated that the Claimant was adversely affected by the failure of the Defendant to make a decision and that there has been unreasonable delay.

This is typical of these types of applications and as such claiming fees anew is not reasonable.

In respect of this item, the time spent by instructing counsel would be reduced from 4 hours to **1 hour -\$1,200.00**

(b) Senior Counsel fee for settling 3 hours @ \$2,300.00=\$6900.00

The fact that there may have been some high level of duplication here may have been betrayed by Counsel’s argument that “it was necessary for Senior Advocate to settle the application for leave and ensure that it is consistent with its opinion and instructions.” Perhaps Counsel meant to state settle the substantive application, which in essence was mirror of the application for leave. The reasonable time in light of the foregoing is 1 hour- **\$2,300.00.**

(c) Three copies \$162.00 allowed

(d) Filing fee- no sum claimed

(e) Copy for Counsel’s brief- \$54.00 Allowed

25. Item 4. Court Preparation and Attendance on 23rd May, 2017- 2 hours @ 2,300.00 = \$4,600.00

(a) Review of file by Senior Advocate Counsel for Court room preparation and attendance

The Court is surprised that Counsel for the Defendant has challenged this item in its entirety. The First Case management conference is a significant event. As part of the role of judge and the duty of counsel to the Court under the CPR, there must be active case management. Parties must be prepared to identify and articulate the issues and assist the court in fixing a timetable for the matter. The conclusion of the first CMC results in significant consequences. For instance, permission of the court is required in order to make changes to a statement of case after the first case management conference ends and certain criteria have to be satisfied to do so. So that counsel must be prepared to assist the court in actively managing the case, which requires a high degree of preparation and foresight.

The record reflects that the leave application was heard on the 27th April, 2017 and adjourned for CMC on the 23rd May, 2017. On the 23rd May, 2017 the matter lasted for a total of 5 minutes where both instructing and Senior Advocate counsel appeared. While counsel would have had been familiar with the nature of the matter and documents filed, preparation for the first CMC goes beyond that.

I am therefore in agreement that **2 hours** is reasonable. **\$4,600.00 for preparation and attendance by Senior Advocate.**

(b) Attendance by instructing counsel on the 23rd March, 2017- I am of the view that the time claimed is reasonable, that is to say **30minutes - \$600.00** in light of the foregoing discussion.

(c) Attendance on 23rd March, 2017 by Senior Counsel- item (a) indicated preparation and attendance and as such both were considered under that head. The sum of **\$1,150.00 claimed is not allowed.**

26. Item 5. Affidavit of Service per Court direction

(a) Instructing fee for preparation and serving of two affidavits 1 hour claimed for instructing attorney- 1 hour @ \$1,200.00 claimed. Two affidavits not much longer than a page each filed were filed and as such, **30 minutes** for preparation and filing of same is deemed reasonable **\$600.00.**

- (b) Six copies for service \$18.00 allowed**
- (c) Filing fee -\$20.00 allowed**
- (d) Copy for Counsel Brief- 1.00 allowed**

27. Item 6. Court preparation and Attendance on 20th June, 2017

- (a) Review by Junior Advocate counsel for court preparation and attendance- 2 hours @ \$900.00 claimed.** It should be noted that the court's record reflects that there was no hearing on the 20th of June, 2017 instead the matter was rescheduled to the 23rd June 2017. The Court would permit amendment of bill to reflect same. It should also be noted here that the court's record also reflects that the hearing on the 23rd June, 2017 lasted for 2 minutes where directions were given for filing of affidavits in response by Defendant and affidavits in reply by the Claimant. As junior advocate had not appeared in this matter previously, it would be reasonable that Junior Advocate would need to get himself up to speed. In those circumstances 1 hour would be reasonable for preparation and attendance **\$900.00.**
- (b) Attendance by Instructing attorney-** 30 minutes claimed \$600.00 and is reduced to 10 minutes **\$200.00.** Instructing Attorney would have appeared in this matter previously and should have been seized of the facts and issues of law that may have arisen at the hearing.
- (c) Attendance on 23rd* June 2017 by Junior advocate counsel- not allowed duplicated item already covered under (a).**

28. Item 7. Correspondence between the Defendant and Claimant

- (a) Perusing correspondence, taking client's instructions drafting replies to correspondence- 2 hours claimed @\$1,200.00-** The Claimant submitted under this item 'the review and response to two letters and taking client instructions and instructions from Advocate Counsel'. I am of the view that 1.5 hours is reasonable. = **\$1800.00.**
- (b) Senior Counsel Fee for Settling responses-** One hour claimed discounted to 30 minutes= **\$1,150.00.**

29. Item 8. Court preparation and attendance 2nd October 2017

(a) Review of file by Senior Advocate for court preparation and attendance-

The Court finds favour with the submissions of the Defendant in relation to this item. The submission indicated that the Claimant had already been informed that the Defendant would not be filing affidavit in opposition and steps were being taken to resolve the matter. No additional preparation for court. That is was more appropriate for Junior Advocate to attend to indicate to the court that the matter was close to resolution. Further, the court record reveals that the hearing on that date lasted for 2 minutes, where it was adjourned for consent order. In the circumstances 10 minutes would be allowed= **\$383.00**

(b) Attendance by Senior Advocate- not allowed included in (a) above.

30. Item 9 Settlement of Costs

(a) Preparation of Statement of Costs to settle costs Instructing Attorney claimed 3 hours @ \$1,200.00= \$3,600.00. In light of the length of the bill it is estimated that counsel of reasonable experience and competence would take no more than 1.5 hours in preparation= **\$1,800.00.**

(b) Senior Advocate fee on settling Statement of Costs, 1 hour @ \$2,300.00 claimed. While the work of preparation of the bill of costs is primarily that of the instructing attorney, as the bill also related to fees for Senior Advocate it is not unfathomable that Senior Advocate would have some input regarding those items and in those circumstances I find that 30 minutes is reasonable= **\$1,150.00.**

31. Item 10. Court preparation and attendance.

(a) Review of file by Senior Advocate Counsel for court preparation and attendance- 1 hour claimed at \$2,300.00. It should be noted that the hearing on 16 October lasted for 2 minutes according to the court's record. At the hearing, the matter was withdrawn and the parties agreed by consent that costs would be assessed by the Registrar in default of agreement. In the circumstances, 10 minutes would be allowed as reasonable time for counsel to prepare and attend said hearing= **\$383.00.**

(b) Attendance on 16th October 2017 -item not allowed subsumed in (a) above.

32. The Claimant has also claimed a premium of \$3,000.00 for the time limitation imposed by the client or the circumstances section 10 Part B Code of Ethics, Third Schedule of the Legal Profession Act. The Claimant did not provide the court with submissions to buttress this claim. In any event, section 10 as I understand it relates to the relationship between the attorney/client and provides that an attorney shall not charge fees that are unfair or unreasonable and goes on to set what factors an attorney must consider in charging fees. Perhaps such section may be of assistance where the bill was on an attorney/client basis. In the circumstances, no premium allowed. Moreover, the factors that this court is entitled to and has borne in mind in assessing costs in this matter have been ventilated above and where necessary the appropriate adjustments were made.

Order

33. The Statement of Costs filed on 6th February 2018 stands assessed on the 29th April, 2019. The Defendant shall pay the Claimant's costs assessed in the sum of \$42,063.00.

**Raymond A. Roberts
Assistant Registrar**