

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV2016-00775**

BETWEEN

KEN MAHADEO

Claimant

AND

GARVIN GILBERT

Defendant

Before Assistant Registrar Kimberly Prescott

Appearances:

Mr. Pariagsingh for the Applicant/Former Attorney-at-Law for the Claimant

Mr. Scoon for the Claimant/Respondent

Date of Delivery: 24th February, 2021

DECISION ON ASSESSMENT OF COSTS

1. This decision relates to the assessment of costs on an attorney/client basis as ordered by the Honourable Mr. Justice Aboud on 15th October, 2018. The said order was corrected on 10th October, 2019 to refer the matter to the Registrar's Court for assessment.

BACKGROUND

2. The matter commenced on 16th March, 2016 with the filing of a Claim Form and Statement of Case by the Applicant in her capacity as the attorney-at-law for the Claimant. The reliefs sought in this matter were:
 - (i) A declaration that the Defendant holds the beneficial interest in trust for the Claimant of All and Singular that certain piece or parcel of land measuring 50 feet in width by 200 feet in depth situate at Carapichaima in the Ward of Chaguanas, in the island of Trinidad and bounded on the North by lands of William Lynch on the South by Carapichaima Road on the East by lands of Charles Stewart and on the West by lands of William Lynch together with buildings thereon and the appurtenances thereto belonging as registered by Deed No. DE200600560019D001.

- (ii) An Order that that Defendant do transfer the subject property to the Claimant within 30 days of the said order, in default that the Registrar of the Supreme Court of Trinidad and Tobago to execute the Deed of Conveyance on behalf of the Defendant;
- (iii) An injunction restraining the Defendant from transferring, mortgaging and/or in any other way dealing with the title to the subject property;
- (iv) An injunction restraining the Defendant whether by himself his servants and/or agents or howsoever otherwise from entering and/or remaining on the subject property;
- (v) Costs;
- (vi) Such further and/or other relief as the Court may deem fit in the circumstances.

3. The Applicant continued to act for the Claimant as the matter proceeded up to the final Case Management Conference which was held on 26th February, 2018. At this stage, the Applicant would have filed the Claim Form, Statement of Case, Reply to Defence, List of Documents, Bundle of Documents, Statement of Agreed Facts and Issues and the Claimant's Witness Statement.
4. By Notice of Application filed on 9th October, 2018, the applicant sought the Court's leave to cease to act for the Claimant, stating in support of her application that the Attorney-Client relationship between the Applicant and the Claimant had broken down. By order dated 15th October 2018, the Court granted the application and ordered that costs be taxed on an attorney/client basis.
5. The Applicant filed the Statement of Costs for assessment before the Registrar on 28th March, 2019 setting out particulars of fees owed for the period the Applicant had done work for the Claimant from 31st October, 2014 to 20th November, 2017. The Claimant filed his Objections to the said Statement on 21st December, 2020.

LEGAL FRAMEWORK FOR THE ASSESSMENT OF COSTS ON AN ATTORNEY/CLIENT BASIS

6. The framework for an assessment of costs on an Attorney/Client basis is concisely dealt with in the **Civil Proceedings Rules, 1998 (“CPR”)** and the **Practice Guide to the Assessment of Costs issued by the Chief Justice (Ag.) on 20th December, 2007 (“2007 Practice Guide”)**.
7. **Rule 67.2(2) of the CPR** states:

(2) Where the court has any discretion as to the amount of costs to be paid to an attorney-at-law by his client, the sum allowed is the amount that the court deems to be reasonable and which appears to be fair both to the attorney-at-law and the client concerned.
8. **The 2007 Practice Guide** sets out aptly:

*7. Where the court assesses the amount of costs on the indemnity basis, for example, on an attorney-at-law and client basis, it will not allow costs which have been unreasonably incurred or are unreasonable in amount. The court will resolve **in favour of the receiving party** any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount. The test of proportionality is not applicable to the indemnity basis.*

[Emphasis mine]
9. Sir Robert Megarry VC in *EMI Records Ltd v Ian Cameron Wallace Ltd* **[1983] Ch 59 at 64E-G, [1982] 2 All ER 980, [1982] 3 WLR 245** states it succinctly at paragraph 74G that, *“In brief, the result is that all the costs incurred will be allowed except any which have been unreasonably incurred or are of an unreasonable amount; and in applying these exceptions the receiving party will be given the benefit of any doubt.”*
10. In light of the provisions set out above, it is clear that reasonableness is the main consideration in the assessment of attorney/client costs. This Court is also guided therefore by **Rule 67.2(3) of the CPR** which specifically addresses the factors to be taken

into account in making a determination as to the reasonableness of the sums claimed with respect to costs.

11. The recent Court of Appeal decision in **Civil Appeal No. S-218 of 2018 *The Attorney General of Trinidad and Tobago v Haleema Mohammed (by her next of kin and friend Crystal Carmel Mohammed)*** (hereinafter referred to as *The AG v Haleema Mohammed*) in its outline of the proper approach to an assessment of costs refers to the test as set out in ***Lownds v Home Office* [2002] EWCA Civ 365** as the starting point in conducting an assessment of costs. Jamadar JA (as he then was) explained at paragraph 23-24, “*our Practice Guide has provided an objective standard with regard to remuneration of fee earners... This forms the basis and starting point for the exercise on conducting assessments. The Assessment Officer is advised that the next steps to follow are:*
- (i) Keeping in mind the band width, that is, value of work done at an hourly rate as per number of years call for each branch of the profession, look at the work done. Assessing whether the work was reasonable and/or proportionate and properly undertaken given the Part 1.1(2)(c) factors.*
 - (ii) Next, consider the particular circumstances of the case using a global approach by examining the factors in the round, to assess reasonableness and proportionality.*
 - (iii) If a reasonable or proportional result is not achieved, then an itemised assessment may be done taking into account the fee earner and the time spent to do the reasonable and proportionate tasks.*
 - (iv) Take into account the Part 67.2(3) factors.*
 - (v) Determine whether the figure, given all of the above, is: (i) reasonable and proportionate; or (ii) whether an uplift (for instance the use of the 67.2(3) factors, skill and competence in a novel area of law), or a discount, should be applied; and (iii) the measure of such determination and the reasons for so doing. These are suggested guidelines and are not intended to replace a court’s discretion to allow appropriate fees to Attorneys in any case.*

12. I will therefore apply this approach in conducting this assessment. My particular task in assessing this Statement of Costs is to focus on the heads of costs and to form my best judgment of the proportion that is reasonable to require the paying party to pay: ***Bryen & Langley Ltd v Martin Boston [2005] EWCA Civ 973, [2005] All ER (D) 507 (Jul)***.

ANALYSIS

13. The total of the Statement of Costs filed is \$106,273.00. Based on the **Second Practice Guide to the Assessment of Costs issued by the Chief Justice on 20th October, 2015 (“2015 Practice Guide”)**, the filing attorney would have fallen in Band A (\$750.00 per hour) and advocate in Band C (\$2,300.00 per hour). This \$106,273.00 reflects an accumulation of 29 hours for the Instructing Attorney, 22½ hours for the Advocate Attorney, a separate and undetailed claim for \$30,000.00 as fee on brief and \$198.00 in disbursements.

14. I have determined this sum to be unreasonable in the circumstances, in light of the reasonable amount of time which ought to have been spent on a matter of this nature, the quantity of work done and the point at which this attorney came off record in this matter and therefore, unfair to the paying party.

15. As a result of this conclusion, I will now proceed to the item by item analysis. In this regard, there were a number of items, to which the Claimant had no objections. Notwithstanding no objections being taken for these items, I took into account the preceding learning in evaluating the items and determined that they are fair and reasonable. As such, items 2-5, 8, 9 and 14 are allowed.

16. . My analysis on the other items which are in contention is set out below under broad categories of the objections stated:

Fee on brief

17. The Applicant has taken a unique approach to the Statement of Costs and has placed as her first item the claim for Fee on Brief. The sum claimed is \$30,000.00, which can be roughly estimated at about 13 hours at Advocate's rate. There is no further information set out under this item and no detail as to what this sum entails.

18. The Claimant objected to this item on 3 grounds:

- (i) The Applicant came off record before the matter proceed to trial and therefore is not entitled to the fee on brief;
- (ii) Alternatively, the Applicant has not provided details to account for the sum claimed as has been expressed as a requirement by the Court of Appeal in ***The AG v Haleema Mohammed***;
- (iii) Possibility of duplication of compensation as the work done may overlap into other items claimed.

19. In his objection, the Claimant quotes paragraph 12 of ***The AG v Haleema Mohammed*** which instructs that the preparer of the Statement of Costs "*should, as far as possible, when presenting a figure for the fee on brief or brief fee... itemize the time and charges fixed accordingly.*" While it is understood that the purpose and intent of this direction is to make clear what the sum claimed represents, this Court is of the view that the Applicant's non-compliance with this particular instruction does not disentitle him from making a claim for fee on brief. To my mind, neither does the fact that a matter had not proceeded to trial (an issue which was also ventilated in the ***Haleema Mohammed*** decision).

20. In considering this item, I was guided by ***Loveday v Renton and the Wellcome Foundation Ltd (No.2) [1992] 3 All E.R. 184*** which details the particulars of the fee on brief:

"The brief fee covers all the work done by way of preparation for representation at the trial and attendance on the first day of the trial... Counsel is not normally entitled to be

remunerated separately for necessary work which is an incident of the proper representation of the client; rather... a barrister must negotiate a brief fee sufficient to cover such work... Although it should take into account any need for counsel to have meetings with each other and with experts out of court hours and to prepare final submissions, it should also take account of the fact that all heavy trials include such a need to a greater or lesser extent; preparation by counsel of his examinations-in-chief and cross-examinations and of his final submissions is an ordinary part of his conduct of a trial on behalf of his client, being all part of the work which counsel accepts an obligation to perform by accepting the brief and for which he is remunerated by the brief fee and the agreed refreshers."

21. In determining this claim therefore, I have taken into account this definition of the fee on brief as well as the relevant factors of Rule 67.2 (3) CPR as follows:

- i. the importance of the matter to the parties having regard to the type of application made and reliefs sought;
- ii. the length of time that the attorney was on record for the Claimant;
- iii. the time reasonably spent on the case;
- iv. the degree of responsibility accepted by the attorney-at-law;
- v. the common nature of this case.

22. I accept that this matter, as many matters concerning an interest in land, would have been of significance to the Claimant, and required extensive pre-action work. I accept also that sorting through the facts and gathering information for a matter of this nature, taking instructions and drafting, finalising and filing the required documents, would have been a somewhat time-consuming and arduous exercise for an attorney-at-law. I note generally that the Applicant accepted a reasonable degree of responsibility to have this matter filed and pursued in an efficient and effective manner. I considered also that the law on cases of this nature is well settled and there was no novel point of law which required additional work or preparation on the part of the Advocate.

23. With these considerations in mind, and having regard to other claims made in this statement of costs (the reason I believe fee on brief is usually dealt with later on in a statement of costs); I find the fee on brief sum of \$10,000.00 being just over four (4) hours at Advocate's band to be reasonable and fair to both the attorney-at-law and the client.

Items requiring disclosure

24. Counsel for the Claimant objects to certain items on the bill on the basis that disclosure had not occurred with respect to these items. For reference, I have summarized the items below:

- (i) Item 7 – 1 hour for Instructing for preparation of pre-action protocol letter; ½ hour for Advocate for review/approval of the pre-action letter
- (ii) Items 15-18 – 1 hour claimed for instructing attorney at each item for the preparation of letters to Antonio Emmanuel (Defendant's Attorney)
- (iii) Item 19 – 1 hour for Instructing Attorney for the Preparation of the Notice to Prove which was filed on 11th January, 2017.
- (iv) Item 20 – 2 hours for Instructing Attorney for the preparation of Joint Statement of Agreed facts; 1 hour for Advocate for settling same
- (v) Item 27 – 3 hours for Instructing Attorney for the procurement of foreign handwriting analyst with fee negotiation and written agreements
- (vi) Item 31 – 1 hour claimed for Instructing Attorney for the preparation of a letter to the Claimant
- (vii) Item 33 – ½ hour for instructing attorney for perusing the written instructions from the Claimant re proceeding to trial
- (viii) Item 34 – 3 hours for instructing attorney for settling the transcriptions of court proceedings

25. Bearing in mind the guidance provided at **paragraph 7 of the 2007 Practice Guide** as well as in the *EMI Records case supra*, I have evaluated the reasonableness of these items

both as it relates to the work done and the time spent on same and corresponding sums claimed.

26. I am satisfied that items 7, 15-19, 31 and 33, which, being necessary work involved in the usual course of good representation, I do not find to be unreasonably incurred or of an unreasonable amount are to be decided in the favour of the receiving party and are therefore allowed.

27. As it relates to item 20, having reviewed the Joint Statement which is 6 pages long, the amounts claimed are somewhat inflated. The nature of this Statement For this item, I would allow \$650.00 for the Instructing Attorney and \$1,150.00 for the Advocate Attorney.

28. With respect to item 27, the Claimant in his objection stated that the Applicant is required to provide copies of all correspondence and agreements. In the absence of these copies, I am prepared to exercise my discretion as to whether this item ought to be allowed. A review of this matter revealed that the authenticity of documents was a live issue as early as the case management stage of this matter It is therefore not unreasonable that the Applicant when acting for the Claimant would have taken the appropriate steps in preparation for having to address this issue. Consequently, in assessing whether the costs were reasonably incurred, I considered that the incursion of the expenses and time spent on engaging the analyst, was necessary for proper representation. It was therefore reasonably incurred. In determining whether it was reasonable in amount, having regard to the work required, I am satisfied that the hours claimed are reasonable for the task which was before the Instructing Attorney and thus allow the item.

29. The claim at item 34 is a peculiar one. With nothing further from the Applicant with respect to the circumstances under which a review of the transcript was required, I am unable to conclude that this fee was reasonably incurred. As such, this item is disallowed.

Items not adequately detailed

30. The Claimant objected to certain items on the basis that the Applicant has not provided sufficient details to substantiate the claims made. I have discussed each item below:

(i) Item 6 – 1 hour claimed for Advocate for taking of further instructions and update done on 20th February, 2016: This meeting was the second meeting with the client and it was held some 16 months after the first meeting. I therefore find it reasonable that the Advocate attorney would meet with the client to provide an update and seek further instructions based on the research done. This sum claimed at this item is therefore allowed as fair and reasonable to both the attorney-at-law and the client.

(ii) Items 10, 13, 25 and 35 – 1 hour claimed at each item for Attendance in Court by Advocate Attorney on 4th June 2016, 24th October 2016, 5th June, 2017, 20th November, 2017: The Court's records show that this matter came up for hearing on five (5) occasions prior to the Applicant ceasing to act for the Claimant. These 5 hearings totaled on average 2 ½ hours. Of these 5 hearings held, the Advocate Attorney retained by the Claimant was present on one occasion on 5th June, 2017 which lasted 66 minutes. At all other hearings, another attorney (a junior attorney on all occasions) held on behalf of the advocate.

In these circumstances, it appears to this Court that the claims made at items 10, 13 and 35 are unfair to the Claimant as the Applicant is requesting compensation for attendances at which she had not personally appeared. The Claimant was not given at these hearing the benefit of the years of experience and expertise of the retained Advocate Attorney. Therefore, to have the Advocate paid as if the Claimant had this benefit is nether reasonable nor fair. These items are therefore disallowed.

Item 25, being the occasion on which the Advocate Attorney appeared, is allowed.

(iii) Items 21, 23, 24, 26, 28, 29, 30, 32 – 1 hour for Advocate claimed at each item for conferences with client on 21st February, 2017, 22nd April, 2017, 3rd May, 2017, 8th June 2017, 11th August 2017, 5th September 2017, 18th September 2017, 28th October, 2017: The Claimant has made no allegation that these meetings had not in fact occurred. As such, in keeping with **paragraph 7 of the 2007 Practice Guide** as well as in the *EMI Records case supra*, I am prepared to allow these items.

Items claimed to be unreasonable

31. The Claimant objected to the following items on the basis that they were not reasonable sums claimed by the Applicant. A discussion on these items is set out below:

- (i) Item 11- 2 hours claimed for Advocate for giving instructions for reply to defence with advocate attorney: The Claimant in his objections states that the 2 hour period is unreasonable bearing in mind that the reply merely incorporates the statement of case and defence. Having reviewed the contents of the Reply and Defence to Counterclaim, I agree with the Claimant's contention that 2 hours claimed is not reasonable in the circumstances. As such, 1 hour will be allowed for this item.
- (ii) Item 12 – 3 hours claimed for Instructing for the preparation of the Reply to Defence; 1 hour claimed for Advocate for settling the Reply to Defence: I have reviewed the Reply to Defence and Defence to Counterclaim which is a 2-page document consisting of 9 paragraphs for the reply to the defence and 5 paragraphs for the Defence to the Counterclaim. This court is of the view that, given that a reply to defence requires a review of the Claim Form and Statement of Case, drafting the reply and defence to Counterclaim and then a review to ensure that all allegations were dealt with appropriately, a reasonable amount of time to be spent on the preparation and settling of this document is 1 ½ hour for Instructing and 45 minutes for Advocate. As such, an award which is fair to both the attorney-at-law and the client is \$975.00 for the Instructing Attorney and \$1,725.00 for the Advocate Attorney.

(iii) Item 22 - 3 hours for Instructing Attorney for the preparation of Claimant's Witness Statement of Agreed facts; 2 hours for Advocate for settling same: The Claimant's Witness Statement contained 35 paragraphs and 18 exhibits including deeds, a court order, an agreement for sale and other documents which would have required thorough review and legal analysis to ensure that the witness statement was both accurate and sufficiently detailed. I also bear in mind the importance of this document and the timely filing of same as the Court had directed that the failure to file same would attract the sanction set out in **CPR Rule 29.13**.

In these circumstances, and bearing in mind that the preparation of a witness statement requires an attorney-at-law to have a full and proper understanding of the client's case and reduce that understanding to writing with reference to all pertinent documents, I am prepared to allow the sums claimed as fair and reasonable.

CONCLUSION

32. The attorney/client statement of costs filed in this matter on 28th March, 2019, pursuant to the order of the Honourable Mr. Justice Aboud dated 15th October 2018 is assessed in the sum of **seventy-three thousand six hundred and eleven dollars (\$73,611.00)**. No indication of a request for VAT was included in the Statement of Costs. I am however prepared to hear both sides with respect to the Applicant's entitlement thereto.

**Kimberly Prescott
Assistant Registrar**