

SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.15 OF 2005

BETWEEN:

[1] THE ATTORNEY GENERAL OF SAINT CHRISTOPHER AND NEVIS
[2] THE DIRECTOR OF THE FINANCIAL INTELLIGENCE UNIT

Appellants

and

QUEENSWAY TRUSTEES LIMITED

Respondent

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

The Hon Delano Bart with Mrs. C. Hinkson Ohoula for the Appellant
Mr. Nicholas Padfield Q.C. with Ms E. Harper for the Respondent

2007: February 15;
December 3.

Costs – Costs to be assessed – quantum - indemnity costs – jurisdiction of court to order

The Financial Intelligence Unit (FIU) issued a Production Order addressed to Daniel Brantley and Associates requiring the law firm to produce authenticated copies of records relating to The Cardinal Trust and Queensway Trustees Ltd. No explanation was offered as to the basis on which the Order was issued. The Queensway Trustees were granted leave to apply for judicial review of the FIU's decision to issue the Order. The order granting leave stated that costs of the application was to be on an indemnity basis. The matter however came up for hearing on 25th April, 2002 and the trial judge quashed the Order. Costs were awarded on an indemnity basis in favour of the Claimants. The assessment of costs took place in March 2005 and total costs of US\$493,236.42 were awarded against the appellants. The appellants appealed against these orders. In respect of both orders for costs on an indemnity basis the time for appealing had long passed and there was no application for leave to appeal out of time.

Held - The appeal challenging the assessment is allowed and the assessment of costs be remitted to the High Court and awarding the costs of the appeal to the respondent:

- (1) The appellants' contention that as the court had no jurisdiction to award costs on an indemnity basis that the issue remained alive for all time and could be attacked regardless of the passage of time was entirely without merit. Litigation would have no end and litigants no certainty.
- (2) There is no explicit provision in the Civil Procedure Rules 2000 (CPR) for costs to be assessed on an indemnity basis. The CPR contains provisions relating to fixed costs, prescribed costs and assessed costs. One of the reasons for retaining the provisions relating to assessed costs was to preserve the court's inherent jurisdiction to so regulate its own procedure as to protect a litigant from being put upon by an over-bearing or oppressive opponent, or for the court to sanction its finding that the conduct of the litigation was deserving of moral condemnation.
- (3) Where a discretion is to be exercised by the court it must be exercised on the basis of the law. In making an assessment of costs, regard must be had to the overriding objective. The learned trial judge failed to articulate his reasons for awarding indemnity costs so that it is unclear whether the discretion was properly exercised in accordance with law and in keeping with the overriding objective.

Glyne Investments Ltd. v Hill Samuel Life Assurance Ltd. June 17, 1997 (unreported) considered and applied.

JUDGMENT

[1] **GORDON, J.A.:** This is the judgment of the court. A very brief factual background to this appeal is that by letter dated August 4, 2000 the United States Department of Justice sought the assistance of the St. Kitts and Nevis government to provide information relevant to the prosecution of one Michael Brennan. The assistance was sought pursuant to the Treaty between Saint Kitts and Nevis and the United States of America on Mutual Legal Assistance in Criminal Matters entered into in February 2000. A Production Order was issued by the Financial Intelligence Unit (hereafter FIU) addressed to Daniel Brantley and Associates (hereafter the law firm) requiring the law firm to produce authenticated copies of records relating to The Cardinal Trust and Queensway Trustees Limited.

[2] In spite of a number of letters from the law firm to the Director of the FIU, seeking to find out the basis on which the Production Order was issued, no explanation was offered. On January 16, 2002 the trustees were granted leave to apply for

judicial review of the FIU's decision to issue the Production Order. That order stated that "Costs of this application be indemnity costs"

- [3] The Production Order was withdrawn on the 24th April 2002. There is a disagreement of recollection between the parties as to whether the respondents gave an undertaking not to pursue the issue of the judicial review in return for the withdrawal or not. Be that as it may, the issue of the judicial review was heard on 25th April 2002 and the learned trial judge quashed the Production Order. Paragraphs 3 and 4 of the order of the trial judge read as follows:

"3. Costs occasioned by the Production Order, in relation to the filing of the Fixed Date Claim Form herein, of the evidence filed in support thereof and of the application to quash to be the Claimant's cost on an indemnity basis, such costs to be assessed on a date to be fixed in November 2002 if not assessed [sic]

"4. Certificate for two counsel"

- [4] It would appear that the hearing for the assessment of costs took place on March 18, 2005, before the same trial judge who made the order referred to at paragraph 3 above. The trial judge made the following order:

"In the circumstances pursuant to an order dated December 12, 2000, and no challenge having been made, the Applicant [Respondent herein] is granted cost of US\$189,484.20. Pursuant to Order dated April 25, 2002, cost is assessed at US\$303,752.22. This figure represents both Bills of Cost on the indemnity basis. Total cost awarded is US\$493,236.42 or EC\$1,340,074.03. The Government of St. Kitts and Nevis is to pay the said costs to Queensway Trustees Limited. No order as to cost of this application."

- [5] In the Agreed Reasons for Decision as filed by the parties, the learned judge commenced in this way:

"There were two orders for costs made on an indemnity basis. There was no appeal against these orders. On a quantum hearing, the respondent cannot challenge the court's jurisdiction order [sic] costs on an indemnity basis. There is no jurisdiction for the court to set aside its own order for cost on a quantum hearing. The respondents could have appealed the orders and this was not done. In any event, the court has the power to award cost on an indemnity basis."

[6] The appellants, being dissatisfied with the order of the trial judge, sought and obtained leave to appeal and filed its notice of appeal on April 4, 2006. Ground 1 of the grounds of appeal reads as follows: "The learned trial judge misdirected himself that he had jurisdiction to assess indemnity costs when no such authority can be derived from the Civil Procedure Rules 2000..." In respect of both orders for costs on an indemnity basis the time for appealing had long since passed and there was, in any event, no application for leave to appeal out of time.

[7] In oral argument learned counsel for the appellants put forward the somewhat startling submission that as the court had no jurisdiction to award costs on an indemnity basis, notwithstanding the failure of the Attorney General to appeal, the issue remained live for all time and could be attacked regardless of the passage of time. If one takes that argument to its logical conclusion, then at any time that a court gives a decision which is, in the opinion of the losing party, wrong in law, that losing party has no time constraint within which to appeal. He may do so, according to counsel, at any time as the issue remains a live issue. One only has to state the proposition to appreciate its falsity. Litigation would have no end and litigants no certainty. We find this ground of appeal entirely without merit.

[8] Having stated the proposition that the issue of 'indemnity costs' is no longer a live issue, it becomes necessary to determine what meaning must be given to 'indemnity costs' in the context of our Civil Procedure Rules (hereafter 'CPR'). A search of CPR will reveal that the phrase "indemnity costs" or any grammatical variant thereof does not exist. On the other hand, Part 44.4(1) of the Civil Procedure Rules of England reads as follows:

"Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –

- (a) on the standard basis; or
- (b) on the indemnity basis, but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount."

- [9] There are a number of provisions in CPR relating to costs. Those relevant for our purposes are reproduced hereunder for ease of reference:

64.3 Orders about costs

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."

Basis of quantification

65.2 (1) If the court has a discretion as to the amount of costs to be allowed to a party, the sum to be allowed is –

- (a) the amount that the court deems to be reasonable were the work to be carried out by a legal practitioner of reasonable competence; and
- (b) which appears to the court to be fair both to the person paying and the person receiving such costs.

(2) If the court has a discretion as to the amount of costs to be paid to a legal practitioner by his or her client, the sum allowed is –

- (a) the amount that the court deems to be reasonable; and
- (b) which appears to be fair both to the legal practitioner and the client.

(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 legal practitioner;
- (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; and
- (h) in the case of costs charged by a legal practitioner to his or her client –
 - (i) any agreement about what grade of legal practitioner should carry out the work;
 - (ii) any agreement that may have been made as to the basis of charging; and
 - (iii) whether the legal practitioner 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.

Ways in which costs are to be quantified

65.3 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; and
- (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) (if neither prescribed nor budgeted costs are applicable), by assessment in accordance with rules 65.11 and 65.12.

[10] One of the driving philosophies of the framers of CPR, as we discern it, was to simplify and make more predictable the process and cost of litigation. In that context rules 65.4 and 5, “Fixed costs” and “Prescribed costs” might be referred to as the default provisions relating to costs. As rule 65.5(1) puts it: “The general rule is that where rule 65.4 does not apply and a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Appendices B and C to this Part” (scale of prescribed costs). However, CPR also contains provisions relating to Assessed costs. Rule 65.12 reads as follows:

Assessed costs – general

65.12(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) If the assessment relates to part of court proceedings it must be carried out by the judge, master or registrar hearing the proceedings.

(3) If 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 a master or the 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 any such application the master or registrar must either –
(a) assess the costs if there is sufficient material available to do so; or
(b) fix a date, time and place for the assessment to take place.

(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.

[11] In our view, one of the reasons for the retaining of the provisions relating to assessed costs was to preserve the court’s inherent jurisdiction to so regulate its own procedure as to protect a litigant from being put upon by an over-bearing or oppressive opponent or for the court to sanction its finding that the conduct of the

litigation was deserving of moral condemnation – **Glyne Investments Ltd v Hill Samuel Life Assurance Ltd**¹.

[12] Having found (at paragraph 8 above) that indemnity costs or any grammatical derivative of that phrase are not referred to in CPR an ineluctable corollary is that the term cannot be a term of art. Thus, the only interpretation of the term “indemnity” as qualifying “costs” must be its ordinary everyday meaning, but subject to any guidance, constraint or direction contained in the law. Rule 1.1 and 1.2 of CPR are of vital significance in this regard and are reproduced for ease of reference:

The overriding objective

1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly.

(2) Dealing justly with the case includes –

- (a) ensuring, so far as is practicable, that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with cases in ways which are proportionate to the –
 - (i) amount of money involved;
 - (ii) importance of the case;
 - (iii) complexity of the issues; and
 - (iv) financial position of each party;
- (d) ensuring that it is dealt with expeditiously; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Application of overriding objective by the court

1.2 The court must seek to give effect to the overriding objective when it –

- (a) exercises any discretion given to it by the Rules; or
- (b) interprets any rule.

[13] In the Agreed Reasons for Decision², the learned trial judge arrived as to the quantum of costs to be awarded on the basis of the bills of cost submitted and the affidavit in support thereof and most importantly, the lack of challenge by the appellants. Unfortunately, we are of the view that the learned trial judge was required to exercise a judgment (discretion) in keeping with the overriding objective. Whether he did this or not does not appear in the Agreed Reasons for

¹ June 17, 1997 (unrep) Moses J

² Record, Page 104

Decision. In that circumstance an appellate court not having the reasoning of the trial court to determine whether a discretion was exercised judicially, is at liberty to apply its own discretion. The trial judge no doubt felt that the appellant in this case had demonstrated a disregard for the rights of the respondent of such an order as to be deserving of moral (and financial) condemnation. We sympathise with this sentiment, but as has so often been remarked, this is not a court of sympathy or sentiment. It is a court of law and where a discretion is to be exercised it must be so exercised on the basis of the law. This the learned trial judge may have done but he failed to articulate his reasoning.

[14] We would allow this appeal and remit the assessment of costs to the High Court so that there could be an exercise of that court's discretion on the basis of the overriding objective. Unfortunately, based on the contents of the record available to us, we are uncertain that all of the material that should be before a judge or master involved in an assessment is included.

[15] Had the appellants approached this litigation in any other than the cavalier and dismissive way that it has, it is quite likely that this appeal might have been unnecessary. The appellants lost on the principal and fundamental issue, namely, their ability to now challenge indemnity costs for the reasons stated above. Further, had the Government attended the quantification hearing and properly participated, the arguments now being made could have been made then. The judge would have been assisted and an appeal might have been avoided. Costs of the appeal are awarded to the respondent.