

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

(CIVIL)

CLAIM NO: ANUHCV 2000/0400

BETWEEN:

JOSEPH W. HORSFORD

Claimant

And

**LESTER BIRD
B.T.LEWIS DIRECTOR OF PUBLIC WORKS
SAMS ENGINEERING CONSTRUCTION CO LTD
MAULVIN EDWARDS OPERATING AS MAULVIN'S TRUCKING
ELMEAD BROOKS
AUBREY LAKE**

Defendants

Appearances:

Ms. Leslie-Ann Brissett of Rika Bird & Associates for the Defendants
Mr. Joseph W. Horsford, Claimant, in person

.....
2007: November 08
2008: March 07
.....

JUDGMENT

[1] **Harris J:** On the 14th February, 2006 the Judicial Committee of the Privy Council allowed an appeal of Mr. Horsford the Claimant/Appellant, on the substantive matter¹ and made the following order:

- (i) The appellant awarded damages of a total of EC\$44,192.00.
- (ii) The Costs in the lower courts will be appellants cost at the prescribed rate.
- (iii) The Respondent must pay the Costs of this appeal.

¹ Commenced as Suit #400 of 2000 before Olivetti J.

[2] With respect to “iii” above, the Appellant taxed his cost under rule 75 of the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 (S.I. 1982/1676). In accordance with the Board’s Order was to be taxed on the standard basis¹. The total amount of costs allowed, as taxed, was £7,768.07. Pursuant to Rule 79 of the said 1982 order the Appellant being dissatisfied with the decision of the Costs Judge, appealed against it under this rule². The appeal was heard before the Privy Council³.

[3] On this appeal on costs at the Privy Council, the Board concludes:

“Their Lordships are not persuaded that the costs judge erred in respect of the sum which he allowed for hotel accommodation and incidentals and for the preparation of the bill of costs by the appellant’s solicitors. But they are of the opinion that the appellant ought to have been accorded the costs of the taxation. They will humbly advise her Majesty that the petition should be allowed, but only to the effect that these should be added to the bill of costs as taxed a reasonable sum for the time spent by the appellant’s solicitor in preparing for and attending the taxation. As success has been divided, no order will be made in favour of either party as to the costs occasioned by this appeal.”

[4] The appellant/Claimant, and now, applicant, Mr. Joseph W. Horsford, applies to a Judge in Chambers pursuant to CPR 2000 Part 65.12 “as to the assessment of the costs” in accordance with the “*ORDER of the Queen’s Most Excellent Majesty in Council given at the Court at Buckingham Palace on the 14th day of February, 2006*”⁴.

[5] The said application was heard on the 8th day of November, 2007, both parties having filed written submissions with the Court⁵. The Claimant is claiming his costs at the High Court and at the Court of Appeal. Further, Mr. Horsford is claiming costs incurred in the appeal to the Privy Council which were incurred in Antigua as opposed to those incurred in England.

¹ See Privy Council Appeal No. 43 of 2004, Joseph W. Horsford v Lester Bird & Others paras. (1) and (2) per Lord Hope of Craighead

² Judicial Committee (General Appellate Jurisdiction) Rules order 1982 (S.I. 1982/1676)

³ Privy Council Appeal No. 43 of 2004, delivered 28th November 2006

⁴ See “Notice of Assessment of Costs”, ANUHCv 2000/0400, filed in the High Court of Justice, Antigua and Barbuda on the 6th January 2007

⁵ Claimant/Appellant/applicant Mr. J.W. Horsford filed on March 12, 2007 and the Respondent/Defendant, Lester Bird & Others, filed on the January 20, 2007 and an amended ‘Bill of Costs’ filed on March 12, 2007

[6] The Claimant's submissions are set out below:

"The High Court Costs"

Costs are to be assessed at the **Prescribed rate**. In accordance with CPR 2000, PART 65 (5) (111) and APPENDIX B, the amount here is \$14,000.00.

Rule 65.7 sets out what is included in the calculated figure of APPENDIX B (\$14,000.00).

It also lists items that are not included in those calculations. These are:

- (a) Expert's fees for preparing a report and attending any conference, hearing or trial;
- (b) Costs incurred in enforcing any order (which are generally fixed in accordance with rule 65.4 but may, in certain cases, be assessed in accordance with rule 65.12);
- (c) The costs of obtaining a daily transcript of the evidence if the trial judge certifies this as reasonable disbursement in all the circumstances of the case;
- (d) The making or opposing of any application except at a case management conference or pre-trial review.

The Claimant in his Bill of Costs has claimed for:

i	Item 2 – Expert's fees	\$6,800.00
ii	Item 3 - Expert's attendance at conference	\$ 900.00
iii	Item 4 - Expert's attendance at trial (2 ½ hours)	\$ 750.00
iv	Items 6 to 9 – Application to examine witness before trial	\$1,297.50
v	Item 10 to 12 – Costs ordered by the trial Judge at the hearing of an application brought by the defendant out of case management or Pre-Trial Review	\$ 750.00
vi	Items 13 and 14 are costs in the Court of Appeal	\$1,201.81
vii	All the other items on the Bill of Costs, except item 42, are costs incurred in Antigua with allusion to the appeal to the Privy Council.	

In the Court of Appeal

When the Court of Appeal scheduled the time and place where the Judgment of the Court in this matter were to be delivered, the Claimant was duly informed by the Registrar that the Court of Appeal will deliver its judgment in the territory of Saint Christopher and Nevis on Monday, January 26, 2004 at 9:00 AM on the Thursday prior to that date. This necessitated the Claimant traveling to St. Kitts on the Sunday and arriving back in Antigua late evening the following Monday.

Item 14 on the Bill of Costs sets out the details of the disbursements associated with the travelling to St. Kitts to receive the Judgment of the Court of Appeal.

Costs in the Privy Council

The rules of the Privy Council provide that taxation of costs in England is limited to the costs incurred in England. In practice those costs that are incurred in Antigua are taxed in Antigua¹.

The Orders for costs by the Privy Council are: “... (2) the costs in the lower courts will be the appellant’s costs at the prescribed rate, and (3) the respondent must pay the costs of this appeal”.

The items of costs in the appeal to the Privy Council, which were incurred in Antigua, are listed in the Amended bill of Cost and numbered 15 to 43, excluding item 42. Item 42 represents the taxed costs of those costs, which were incurred in England.

The schedule of supporting documents attached to the Bill gives details of the items of costs.

¹ The Judicial Committee (General Appellate Jurisdiction) Rules Order 1982, rule 76, in conjunction with SI 1967 No. 224, Order 20. For the reasons given in this Judgment in relation to the costs in the “lower courts”, this court is unable to assess these costs.

Claimant's entitlement to costs

[7] The Order in Council the 14th day of February, 2006 sets out the costs Order:
“The costs in the lower courts will be the appellant’s costs at the prescribed rate, and also the costs of the appeal to the Privy Council.”

[8] The Defendant/Respondent’s submissions in ‘conclusion’ encapsulate its contention with Mr. Horsford claim. I set it out below for convenience.

“It is submitted that all the following matters ought to be considered by the Court:

- 1. The Order of the Privy Council was for costs at the prescribed rate. Therefore, the costs are not subject to assessment (my emphasis).*
- 2. Part 65 of CPR clearly defines what is included and what is excluded in prescribed costs. There is no rule directing that the Claimant/Appellant is entitled to recover on the items he has listed on his Bill of Costs and further, such an application for assessment is misconceived.*
- 3. The Claimant/Appellant’s costs relative to the Privy Council have already been taxed by the Taxing Master and the Claimant/Appellant ought not to be permitted to now include matters that he did not include and/or recover on at the Privy Council level.”*

[9] With respect to the costs in relation to the Privy Council Appeal the Defendant/Respondent further submits¹ that:

“Rule 79 of the 1982 Order provides that any party aggrieved by taxation may appeal to the Judicial Committee. The appellant was dissatisfied with the decision of the Costs Judge, and he appealed against it under this rule. The appellant explained in his petition that he is dissatisfied with the taxation in the following respects:

- (a) as to the amount allowed for hotel accommodation and incidentals; and**
- (b) as to the amount allowed for the preparation of the bill of costs by his solicitor.**

He also appealed against the decision of the Costs Judge to make no order as to the costs of the taxation.”

¹ See the footnote (*) at bottom of page 6 of the Defendant/Respondents submissions filed February 20, 2007.

HISTORY

- [10] The substantive issue before the 1st instance Court in 2003, concerned the claim against the First Defendant and others, for an Order that the 1st Defendant do forthwith pull down and remove the masonry wall with wire fence around it which the Claimant alleges was built on his land. The wall in question enclosed part of the official residence of the Prime Minister (as he then was) of Antigua and Barbuda.
- [11] The Action was commenced by Writ of Summons filed on the 28th November, 2000 where the Claimant alleged in para. 2 and 3 thereof, that in the period January 2000 to June 2000 the 1st named Defendant together with others and with the aid of moving equipment unlawfully removed trees and shrubs, boulders, top soil, other things and carried out 'works' including building a masonry wall on the plaintiffs land about "two feet from the boundary with the Defendant's land and erected a wire fence thereon". At the close of the trial the Defendant submitted that the Claimants right to bring an action was statute barred and that, in the alternative, the court should not grant injunctive relief but award damages instead. Ultimately, Judgment was entered for the "Claimant for damages in the sum of \$75,000.00 and prescribed costs in accordance with the CPR 2000"¹.
- [12] In March of 2003 the Claimant/applicant filed a Notice of Assessment of Costs for directions pursuant to CPR 65.12 (3) on the Judgment Order of the High Court dated the 21st February, 2003. He attached his Bill of Costs².
- [13] The Defendant appealed the decision of the High Court. The Claimant appealed from the Eastern Caribbean Court of Appeal to the Privy Council.
- [14] Now, the Defendant/Respondent in the instant matter has defined the issues in this application as:
- “(1) Whether the Claimant/Appellant is legally entitled to move the court for this specific remedy to wit an assessment of costs hearing pursuant to Part 65.12 of the Civil Procedure Rules 2000.

¹ Joseph- Olivetti J. p. 17 of the Judgment in Suit No. 400 of 2000 delivered February 21st, 2003

² No evidence whether it was served or heard

- (2) If the Claimant/Appellant is so entitled in Law, whether he is in fact entitled to claim all the costs as particularized in his Bill of Costs, which is attached to his Application for Assessment of Costs¹”.

[15] The Privy Council Order of the 14th February 2006 provides for the applicants costs to be paid at the ‘*prescribed rate*’. The first order of business, as it were, is to determine what is meant by the words “*prescribed rate*”.

[16] Does it refer to the rates prescribed for the Privy Council Appeals in the UK? Does it for instance refer to the “prescribed cost” regime and related ‘scale’ in the CPR 2000 or is it a general reference to whatever applicable costs regime prescribed by Law in Antigua and Barbuda such as the said CPR 2000 generally.

[17] I am satisfied that the Board would not attempt to impose the UK and/or Privy Council Appeals cost regime on the independent State of Antigua and Barbuda.

[18] I am also satisfied that the words “prescribed rate” are not a reference to any costs regime in general prescribed by any law in Antigua and Barbuda. The Board surely would have referred to the “prescribed law” or the *CPR 2000* some other reference that would import that general cost regime.

[19] Considering these possible interpretations of the Board’s order and more specifically the words “**prescribed rate**” in the context of all the circumstances of this case, I am inclined to the view that the said Order was referring to the C.P.R 2000 cost regime ,but in particular, to the “Prescribed Costs” regime therein. In my view, the use of the words “prescribed” and “rate” impart a notion of a standard, a schedule or a scale. It suggests a precalculated sum or a standard formula for achieving same.

[20] In order to convey what it intended-if it intended something other than ‘prescribed costs’- the Board could have(but did not) use the words “Budgeted Costs”, Assessed Costs” or

¹ See page 1 of the Defendant/Respondent’s Submissions filed February 20, 2007

even referred to the old process of “taxed costs” a concept somewhat akin to ‘assessed costs’ under our CPR 2000.

[21] Certainly, in the context of the overriding objectives, Part 1 of the CPR 2000¹ in particular, Part 1.2(b) and (c) (i),(ii),(iii), (d) and (e), the *prescribed* costs regime under and including Part 65(5) 65(6), 65(7) and the appendix thereto would more likely commend itself to the Board in this matter than the *assessed* cost regime.

[22] The Appellate/Claimant Mr. Joseph W. Horsford has now applied to the court by way of “Notice of Assessment of Costs” filed on the 8th January 2007 and heard on the 8th day of November, 2007 for directions pursuant to CPR 65 (12) as to the assessment of the costs herein in accordance with the said Privy Council Order of the 14th day of February, 2006.

[23] The Judgment sum awarded Mr. Horsford at the Privy Council is EC\$44,192.00².

[24] Applying the Prescribed cost scale under the CPR 2000 at Appendix B the cumulative costs applicable on the judgment ordered is EC\$14,000.00³. This is the costs applicable to the **High Court**.

[25] Under Part 65 (13) and in the absence of an order for budgeted costs⁴ or an agreement between the parties, costs in the **Court of Appeal** may be determined in accordance with the prescribed cost regime but “...*must be limited to two thirds of the amount that would otherwise be allowed*⁵.” This provision has been applied in the jurisdiction routinely as two thirds of the sum calculated on the scale of Prescribed Costs in Appendix B. This cumulative calculation is Two thirds of the sum of EC\$14,000.00 amounting to

¹ The overriding objectives are not however, intended to deprive a party of his just entitlements.

² The Judgment sum awarded at the High Court for damages was \$75,000.00

³ High Court Costs on the prescribed cost scale. Arguably the costs should be calculated based on the Privy Council Judgment sum (“...amount...ordered to be paid”) of \$44,192.00 and only if there is no monetary sum claimed **or ordered**, is the sum of \$50,000.00 under 65.5(2)(iii) to be used. The Defendant however, has also submitted (and in effect agreed to) that the sum of \$50,000.00 be used in the calculation.

⁴ See Part 65 (8) and 65 (9) of the CPR 2000

⁵ See Part 65.13 (b)

EC\$9,333.33. The costs in the court of appeal do not include costs incurred in the preparation of the appeal to the Privy Council. These latter costs are, it appears to me, either sunken costs or costs recovered at the taxation in the U.K. The Board's order, that "*costs in the lower courts will be the appellant's....*", in my view leaves no room for the interpretation that it includes Privy Council costs "*...which were incurred in Antigua,...*"¹. Costs in the Court of Appeal are those costs properly incurred in pursuing the appeal before that court and costs in the High Court are those costs properly incurred in pursuing the action at the High Court.

[26] The prescribed costs for both the High Court and Court of Appeal are, in this case based on the value of the claim deemed as EC\$50,000.00 pursuant to Part 65.5 (2) (iii)².

[27] I note that Part 65.6 of the CPR 2000 makes provision for a party at a Case Management Conference to apply to the court for a variety of orders to facilitate the award of higher costs. The said Part is set out below:

"(1) A party may apply to the court at a Case Management conference –

- (a) to determine the value to be placed on a case which has no monetary value; or**
- (b) if the likely value is known, to direct that the prescribed costs be calculated on the basis of some higher or lower value;**

(2) The court may make an Order under paragraph (1) (b) only if it is satisfied that the costs as calculated in accordance with rule 65.5 are likely to be either –

- (a) excessive; or**
- (b) substantially inadequate, taking into account the nature and circumstances of the particular case.**

(3) If an application is made for costs to be prescribed at a higher level, rules 65.8(4) and 65.9 apply".

[28] Neither party in this matter availed themselves of the facility under Part 65.6 to protect themselves in the event actual costs were to become excessive or the prescribed costs scale was likely to generate costs that were substantially inadequate.

¹ See Claimant's submissions filed March 12th 2007, at page 3 of 7.

² But see footnote 2 to para. 23 above.

Claimants/Appellants Contention

- [29] The Claimant/Appellant submits, pursuant to Part 65.7 (2) that certain legitimate costs were incurred in this matter pertaining to the High Court and Court of Appeal proceedings which are not included (and/or recoverable) under the umbrella of prescribed costs.
- [30] The Claimant/Appellant contends that these costs which are not included under prescribed costs fall to be assessed under Part 65 (11) and 65 (12) as “Assessed Cost”. These items of cost are set out in the amended Bill of Costs filed in this matter on March 12, 2007 and include items such as “expert fees of D. Matthew, land survey and preparation of Report”¹, “Experts attendance at conference”, “... receiving 78 pages of unnecessary faxed pages from defendant”, “... Application to examine witness before trial”.
- [31] Prescribed Costs under Part 65 of the CPR 2000 are limited to the amount calculated from the “scale of Prescribed Costs” in appendix B of the CPR 2000 and **includes** items of costs set out in Part 65.7 (1).
- [32] Part 65.7 (2) on the other hand, provides for costs **excluded** from being covered by the prescribed cost regime. These, however, are not costs excluded from being recovered at all. They can be recoverable. Their legitimacy and quantification is established by assessing them under the “assessed costs” regime² in Part 65 (11) and/or Part 65 (12) of the CPR 2000.
- [33] The Claimant/Appellant, Mr. Horsford, is asking that these ‘*excluded*’ costs be assessed. Presumably the Claimant is saying, among other things, that an order for prescribed costs of necessity and/or impliedly requires assessment under Part 67.7(2) of those classes of cost items set out in the said part. If the Court does not accept the Claimant’s position³ on

¹ This was an application by the Claimant/Appellant pursuant to Part 33 of the CPR 2000 to obtain evidence before trial by way of deposition.

² The Court notes that the Claimant/Appellant had filed an application before the High Court Master in 2003 to assess his costs. There is no evidence before this Court or on file to indicate that the application was served and/or heard. A Budgeted costs order could also take these costs into consideration.

³ The court does not accept the Claimant’s position. See para. 18 above.

this point, then on what authority does this Court embark on this *assessment* when the Board has specified that costs in the *lower courts* be determined as prescribed costs¹.

[34] This is very late in the day to apply for and to pursue this final application for assessed costs, but in any event the question still stands, on what authority do I Assess costs in this matter and do so contrary to the Order of the Judicial Board of the Privy Council?

[35] The High Court Judgment in the substantive matter herein – Suit 400 of 2000 – delivered on February 21, 2003, provides for “*Prescribed Costs in accordance with CPR 2000.*” The Board can alter the cost order of the High Court but I hold that the Board has not done so and by its order in effect, confirmed the said high court cost order².

[36] I accept the interpretation placed on Part 65.7 of the CPR 2000 by the Claimant/Appellant, as a general proposition; that it does permit a party to recover the costs referred to as being excluded in Part 65.7 (2). The cost items set out in Part 65.7 (2) and referred to as being excluded as prescribed costs items, are recoverable under another head, such as “*Assessed Costs* ³” for instance. I do not accept that this part provides for an assessment of those items of costs as a necessary and/or implied part of the prescribed cost order⁴. An application by the party and/or a specific order for assessment, by the court, would have been necessary at the time, to have invoked that assessment.

The Claimant/Appellants Costs entitlement

[37] Mr. Horsford is entitled to his costs at the Privy Council, already taxed and fixed at £7,768.07. His costs at the Court of Appeal calculated on the Prescribed Cost Scale is EC\$9,333.33 and his costs at the High Court calculated in accordance with the prescribed cost scale is EC\$14,000.00⁵. Further, added to these costs to the Claimant/Appellant are

¹ Upon proper construction of the Board’s Order, the Court holds that the Prescribed Costs regime applies. See also para. 18 above.

² The judgment of the Court of Appeal has not been provided by either party

³ See Part 65 (11) and 65 (12) of the CPR 2000

⁴ Part 65.5(4) (b) does not help clarify the ambit of the rule 65.5 generally.

⁵ Pursuant to Part 65.5(4) I see no basis for awarding only a proportion of these prescribed costs amounts.

the costs of, \$750.00 in any event, pursuant to an Interlocutory High Court Order dated 28th January, 2003¹.

[38] I need to make the point here that the Claimant was free to make the application at the Privy Council Appeal hearing that; Costs in the lower court be, *assessed costs* or some other formula provided for by the CPR 2000 that would have ensured his costs would have been adequately satisfied. He either failed to do so or the Board was not inclined to make a more advantageous cost order. Either way, I am bound by the Board's Order of 14th February, 2006. Further, the claimant could have but did not apply to the *lower courts* at the time he was before them, respectively, for an order for assessed or combination of prescribed and assessed costs orders. Court costs, is an area of specialization in many jurisdictions and is *serious business* in all jurisdictions and certainly not a matter for an afterthought. I do acknowledge the claimants application for an assessment of his costs after the first trial. But thereafter nothing more has been said of it until this application.

[39] It is not expected (perhaps not intended either) by any court costs regime that a litigant recover all of his expenses in pursuing a matter. In pursuing a matter a litigant must be at least in part, motivated by a higher principle that would make the pursuit of justice a worthwhile one even in the event of being out-of-pocket. In the circumstances:

[40] **IT IS HEREBY ORDERED AND DECLARED:**

- (i) That the application to assess costs in the *courts below* be dismissed on the grounds that the order of the Judicial Board of the Privy Council provided for costs in the Courts below on a Prescribed Cost basis only.
- (ii) That the Claimant's Costs in the High Court proceedings is the sum of (a) calculated in accordance with the prescribed cost scale is \$14,000.00 together with; (b) pursuant to Order of the High Court dated 28th January, 2003 the sum of \$750.00².
- (iii) That the Claimant's Costs in the Court of Appeal calculated in accordance with CPR Part 65 and the Prescribed Costs Scale is \$9,333.33.

¹ "IT IS ORDERED that the Application stands dismissed with Costs in the sum of \$750.00 to be paid to the Claimant by the Defendant"

² See para. 36 above. The High Court Costs are the sum of "(a)" and "(b)" in para. 39 (ii) herein

- (iv) That costs of this application¹ be that of the Defendant/Respondent in the sum of EC\$750.00.

DAVID C. HARRIS
Judge
The High
Court of Justice
Antigua and Barbuda

¹ This application is also subject to the Overriding Objectives of the CPR 2000. See the Defendants written submissions on this assessment of *costs* application.