BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 8 OF 2007

BETWEEN:

NORGULF HOLDINGS LIMITED
INCOMEBORTS LIMITED

Appellants

and

MICHAEL WILSON & PARTNERS LIMITED

Respondent

Before:

The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh Rawlins	Justice of Appeal
The Hon. Ms. Ola Mae Edwards	Justice of Appeal [Ag.]

Appearances :

Mr. John Jarvis QC and Mr. Paul Dennis for the Appellants
Mr. James Drake for the Respondents

2005: September 24;
October 29.

-Costs – Costs to be assessed – Bases for assessment – Costs of applications – Costs of proceedings – Costs of appeals

Interim payment of costs – jurisdiction of court to order

The appellants having succeeded on their appeal, the Court of Appeal ordered that the respondent "shall pay to the appellants the costs on this appeal and in the High Court proceedings, to be assessed if not agreed". Costs were not agreed. The appellants made no application for the assessment of costs. The appellants applied to the Court of Appeal for an order that the respondent should pay one half of the sum of US$1, 322,564.85 that the appellants claimed they

should be awarded as costs. The respondent resisted the application on the ground that the court had no jurisdiction to order interim payment of costs and, while agreeing that the costs that the appellants should be awarded were to be assessed pursuant to rule 65.11 of the Civil Procedure rules 2000, the respondent also argued that the amount that the court could award as costs was capped by rule 65.11(7) at ten percent of the sum that could be awarded as prescribed costs. The appellants pointed to the provision in the last mentioned rule that permits the court to exceed that cap when the court considers that there are special circumstances of the case justifying a higher amount and argued that the fact that this was a commercial case placed this case within that class of cases.

Held, refusing the application: (1) The court had both an inherent jurisdiction to order interim payment of costs and jurisdiction conferred by rule 17.1(1)(g) to grant interim remedies including "an order for interim costs".

(2) An award of costs to be assessed did not necessarily mean that costs were to be assessed pursuant to rule 65.11, which provided for an award of discretionary costs on the hearing of applications, whether procedural or other than procedural. In conducting an assessment of costs the court or judicial officer carrying out the assessment is to be guided by rule 65.3, which identifies the bases for assessment and how to determine which basis to apply.

(3) Rule 65.12 established the procedure for carrying out an assessment of costs when the assessment was not made at the hearing of the application or other proceedings in which costs were awarded.

(4) The costs of an appeal, as distinct from the costs of an application, were specifically provided for by rule 65.13. The costs of an appeal will generally be prescribed costs.

(5) A necessary step before making an order for interim costs is for the court or judicial officer to determine the value of the claim, regardless of which basis for quantification would ultimately be used. The value of the claim had not been determined in this case and it remains for the appellants to apply for this to be done. It would be as simple or perhaps simpler for the appellants to procure the assessment of the prescribed costs of the appeal as to apply for interim costs.

(6) The application is dismissed with costs of the application to the respondent to be assessed, pursuant to rules 65.11 and 65.12, if not agreed within 21 days of this decision.

DECISION

[1] BARROW, J.A.: This is an application by the appellants for an order for an interim payment to account of costs, to be assessed, that this court awarded to the successful appellants. Among the issues to decide are whether the Civil Procedure Rules 2000 (CPR 2000) confer jurisdiction on the court to make an order for interim payment of costs and, if they do not, does the court have an inherent jurisdiction to do so. If the court can do so, should it order interim payment in this case, and, if the court decides to make an order, what sum should it order to be paid? But before this court decides any of those issues it is necessary to clarify the basis upon which costs are to be quantified on the appeal.

The costs order

[2] The appeal was against the order of Hariprashad-Charles J, in proceedings that were brought against seven defendants in all, appointing a receiver over the entire assets, undertakings and shareholdings of the two appellants. At the stage when the application for interim costs was made this court had issued an order, dated 22nd August 2007, allowing the appeal, which stated that the order would be followed by a written judgment, but no written judgment had been issued at that point. After allowing the appeal and consequentially setting aside the order appointing the receiver, the order stated:

> "(4) The Respondent shall pay to the Appellants the costs on this Appeal and in the High Court proceedings, to be assessed if not agreed, in accordance with rule 64.7 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000."[1]

[3] No distinction was drawn on this application between costs in the court below and costs in this court. Counsel for the applicant seemed to proceed on the basis that as both sets of costs were to be assessed this court should simply consider the appellants' draft schedule of costs covering proceedings in both courts, amounting to US$ 1,322,564.85, and order an interim payment of one half that amount. No reason was suggested to us as to why this court should assume the outcome of the assessment of costs in the court below and make

[1] Nothing turns on the rule that was referred to, which deals with the court disallowing more than one set of costs when two or more parties having the same interest in relation to the proceedings are separately represented. In this appeal the two appellants were not separately represented.

an order based on that assumption. As will be discussed below, a court assessing costs is required to consider a number of factors that may significantly reduce the quantum of its award, even though it makes a net award to a successful party. In my view it would be quite wrong for this court to proceed on any assumption as to the assessment of costs in the court below and, accordingly, I consider the application only in relation to costs in this court.

Quantification of costs

[4] Counsel on both sides thought that the proper basis for quantifying costs was rule 65.11 of the CPR 2000. It appears that the word "assessed" in the court's order led counsel to think that costs in both the High Court and this court were to be assessed in accordance with that rule. Perhaps it would have been better to use the neutral word "quantified". Whatever impression may have been conveyed, the question is, what rule applies to the assessment or quantification of costs of the appeal? It is a question that is appropriately answered on this application, which directly raises that question, especially given that the court heard no argument and received no submissions on the quantification of costs when it heard the appeal.

Assessment pursuant to rule 65.11

[5] It is fitting to begin with an examination of rule 65.11, because that is the rule both counsel thought applied. That rule provides:

Assessed costs – procedural applications

65.11(1) On determining any application except at a case management conference, pre-trial review or the trial, the court must –
(a) decide which party, if any, should pay the costs of that application;
(b) assess the amount of such costs; and
(c) direct when such costs are to be paid.

(2) In deciding which party, if any, should pay the costs of the application the general rule is that the unsuccessful party must pay the costs of the successful party.

(3) The court must take into account all the circumstances including the factors set out in rule 64.6(6) but where the application is –
(a) an application to amend a statement of case;
(b) an application to extend the time specified for doing any act under these Rules or an order or

direction of the court;

(c) an application for relief under rule 26.8 (relief from sanctions); or

(d) one that could reasonably have been made at a case management conference or pre-trial review;

the court must order the applicant to pay the costs of the respondent unless there are special circumstances.

(4) In assessing the amount of costs to be paid by any party the court must take into account any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing and must allow such sum as it considers fair and reasonable.

(5) A party seeking assessed costs must supply to the court and to all other parties a brief statement showing –

(a) any counsel's fees incurred;

(b) how that party's legal representative's costs are calculated; and

(c) the disbursements incurred.

(6) The statement under paragraph (5) must comply with any relevant practice direction.

(7) The costs allowed under this rule may not exceed one tenth of the amount of the prescribed costs appropriate to the claim unless the court considers that there are special circumstances of the case justifying a higher amount.

[6] A good starting point for appreciating this rule is not to be misled by its heading. The rule clearly applies to more than just procedural applications because paragraph (1) of the rule says that "on determining any application" other than at a case management conference, pre-trial review or at the trial, the court must: decide whether to award costs of that application and which party should pay them; assess the amount of such costs; and direct when they are to be paid. These are decisions the court must make for applications generally, and not just for procedural applications. Paragraph (2), similarly, is of general application in providing that the general rule is that the unsuccessful party must pay the costs of the successful party.

[7] Even paragraph (3), which mentions certain specific types of procedural applications – to amend a statement of case, to extend time, to be relieved from sanctions, or an application that could reasonably have been made at a case management conference or pre-trial review – has as its major premise the operation of a well-known requirement that is applicable to applications generally. That requirement is that the court, in deciding which party, if any, should pay costs, must take into account all the circumstances of the case. The circumstances to be so taken into account include the factors set out in rule 64.6(6),

such as the conduct of the parties both before and during the proceedings and the manner in which a party has pursued allegations or issues or the case, among others.

[8] The object of mentioning the specific procedural applications in paragraph (3) is to create an exception in favour of those specific procedural applications. It is worth emphasising that the paragraph does not refer to procedural applications generally; it identifies specific procedural applications or types of applications. The exception that paragraph (3) creates is to the general rule that the successful party should be awarded costs, by providing that an applicant who makes one of the specified applications or types of applications must pay the costs of the respondent. This is to avoid the anomaly of awarding costs to an applicant whose own conduct has caused the need to apply to amend his statement of case, or to extend time, or to be relieved from sanction, or to make an application that he could reasonably have made at a scheduled hearing. The success of such an applicant on his application, which, by its very nature, will normally have been avoidable, should not be rewarded by the benefit of the general rule that costs follow success. It is, therefore, to create a different general rule in respect of such applications -- a rule that the applicant should pay costs -- that the specific procedural applications are mentioned. That, it appears, is the sole object of referring to those specific procedural applications.

[9] Paragraph (4) of rule 65.11 again applies to applications generally and not only to procedural applications in stating that when the court assesses the amount of costs the court must consider time reasonably spent in making the application and preparing for and attending the hearing. The second part of this paragraph is of even more general application, in stating that the court must allow such sum as it considers fair and reasonable.

[10] Paragraphs (5) and (6) direct parties seeking assessed costs that they must supply a statement of costs to the court and to all other parties, showing counsel's fees, legal representatives' costs and disbursements. Paragraph (7) places a cap on the costs allowed under this rule of one tenth of the amount of the prescribed costs appropriate to

the claim, unless the court considers that there are special circumstances justifying a higher amount. Those are the provisions of rule 65.11.

[11] Rule 65.11 is often not fully appreciated and so it may be helpful to summarize its broad effects. The rule applies to all applications except for two categories of applications. One category consists of those applications that are made at a case management conference, pre-trial review and trial. There are specific rules that apply to such applications[2] and hence they are excluded. The other category of applications to which rule 65.11 does not apply consists of the specific applications listed – to amend, to extend time and to obtain relief from sanctions – and applications that could have been made at case management or pre-trial review (and which would therefore have fallen into the first category). Rule 65.11 does not apply to the second category of applications because of the need to exclude such applications from the general rule that costs are awarded to the party who succeeds on his application.

[12] The object of rule 65.11 is to establish a norm that the court hearing an application "must" decide the issues of costs, including who is to pay, how much and when. Notably, it makes the amount of costs to be awarded a matter for the discretion of the court. Rule 65.11 states the principles by which the court must guide itself in exercising that discretion and assessing costs. The rule specifies the documentation that the party seeking costs must provide. And, finally, it caps the amount of costs that normally may be awarded on the determination of an application.

Assessment of costs pursuant to rule 65.12

[13] The other rule that deals with the assessment of costs is rule 65.12, which reads:

> **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.

[2] CPR, rules 25, 26, 27, 38 and 39

(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.

[14] Rule 65.12 complements and overlaps rule 65.11 but it is much broader in scope. Rule 65.12 applies to all assessments of costs, not just costs of an application. The rule opens by stating in paragraph (1) that this rule applies where costs fall to be assessed in relation to any matter or proceedings, or part thereof, other than a procedural application. These two words, "matter" and "proceedings", both terms of art, together extend the rule to virtually every proceeding that could come before the court. In the Eastern Caribbean Supreme Court (British Virgin Islands) Act[3], in the interpretation section, section 2, "'matter' includes every proceeding in court not in a cause"; "'proceeding' includes action, cause or matter"; and "'cause' includes any action, suit or other original proceeding between a plaintiff and defendant, and any criminal proceeding by the Crown". The effect of paragraph (1), in stating that this rule applies to any matter or proceedings or part thereof, is to apply this rule to proceedings generally, not just applications. But the rule does cover applications generally, which are necessarily parts of proceedings, save for procedural applications, which are specifically excepted. Put another way, by excluding only procedural applications this rule includes all other applications.

[15] The amplitude of its operation having been established in paragraph (1), the rule proceeds in its other paragraphs to set out the procedure to be followed for an assessment to be carried out. That is what rule 65.12 does – it lays down the procedure for assessment. This is in contrast with the provisions of rule 65.11, which lay down the principles to guide the court in making an assessment of costs on determining applications.

[3] Chapter 80

[16] Thus, paragraph (2) of rule 65.12 extends to proceedings generally the proposition relating to applications that appears in rule 65.11(1)(b), which was that on determining an application the court must assess the amount of costs. Paragraph (2) of rule 65.12 states that if the assessment relates to part of court proceedings it must be carried out by the judge, master or registrar hearing the proceedings. In other words, if the assessment relates to part of court proceedings it must be carried out "at the hearing" (see rule 65.12(3)). By identifying the range of judicial officers who would be 'hearing the proceedings' paragraph (2) also confirms that this rule applies to the whole range of proceedings that can come before a court. The rule applies to proceedings that are heard by the registrar, which are minor applications; to proceedings that are heard by the master, which are almost all applications that a judge could hear in chambers; and to proceedings that are heard by judges, which are "any" proceedings, whether in chambers or open court, including trials.

[17] Paragraphs (3), (4) and (5) of rule 65.12 provide the procedure for obtaining an assessment of costs when the assessment does not fall to be carried out at the hearing of proceedings. These paragraphs provide that an application must be made for an assessment to be done, to whom the application must be made, the documentation to be filed and the way in which the master or registrar must proceed. It is only when the assessment is not carried out "at the hearing of any proceedings" (r. 65.12 (3)) that the procedure contained in these paragraphs becomes applicable. If the assessment of costs is carried out at the hearing of an application then, as seen earlier, the procedure contained in rule 65.11(5) and (6) applies. If the assessment of costs is carried out at the hearing of the claim, that is, at the trial, then the assessment the court must make is of the costs of the claim. Pursuant to rule 65.3 the costs of proceedings will be fixed costs or prescribed costs or budgeted costs or, if none of the foregoing is applicable, costs assessed in accordance with rules 65.11 and 65.12.

Assessment

[18] As used in the rules the words "assessed costs" and "assessment" have the meanings given them by rules 65.11 and 65.12[4] but even in those rules there are variations in meanings. It will have emerged from considering rule 65.11 that this rule confers a discretion on the court to determine the amount of costs[5] to award on hearing an application.[6] Therefore, as used in rule 65.11, "assessed costs" means discretionary costs and the "assessment" that the court conducts pursuant to that rule is to quantify such costs. On the other hand, rule 65.12 neither confers nor takes away discretion as to amount but is almost purely procedural, as has been seen, and the procedure applies to proceedings generally, including trials. That rule, therefore, speaks to how an assessment may be procured regardless of the basis upon which costs are to be quantified. All too often trials will conclude and prescribed costs will be awarded but will not be quantified. In such instances the procedure by which a successful litigant must procure the quantification of the award of prescribed costs in his favour is that provided by rule 65.12. Thus, notwithstanding that a distinction is drawn between fixed costs, budgeted costs, prescribed costs and assessed costs[7] it is no solecism to refer to the assessment of prescribed costs.

[19] A clear instance of the awarding of prescribed costs to be assessed is the case of Grenada Electricity Services Ltd. v Isaac Peters[8] in which this court upheld an award of damages to be assessed and awarded prescribed costs, also to be assessed.[9] As that example shows, because prescribed costs are calculated, in the case of a claimant, based on the amount ordered to be paid[10], it will not be possible for the court to quantify the

[4] Rule 64.2(1)
[5] Rules 65.11(1)(b) and 65.11(4). In paragraph (4) it is provided that the court "must allow such sum as it considers fair and reasonable".
[6] This is subject to a normal cap of one tenth of the amount of the prescribed costs appropriate to the claim but the court may award a higher amount if there are special circumstances justifying exceeding the cap; rule 65.11(7).
[7] See the definition of "costs" in rule 64.2(1)
[8] Grenada Civil appeal No. 10 of 2002 (judgment delivered 28th January 2003)
[9] See paragraph [31] below for the express references in that judgment to the assessment of prescribed costs.
[10] Rule 65.5(2)(a)

amount of prescribed costs when the amount ordered to be paid remains to be assessed, and in that situation it will be the norm for the court to award prescribed costs, to be assessed. Similarly, in the case of a successful defendant, the court at the conclusion of the proceedings will sometimes not have stipulated the value of a claim[11], and the court will then be forced to award prescribed costs to be assessed. Accordingly, when in this case this court awarded costs to be assessed, the use of the word "assessed" encompassed more than an assessment of discretionary costs.[12]

Costs of an appeal

[20] The examination of rules 65.11 and 65.12 reveals nothing that makes rule 65.11 applicable to the costs of the appeal. As the analysis of paragraph (1) of rule 65.11 revealed, that paragraph requires the court to assess costs on determining applications and the rest of rule 65.11 provides the guidelines and principles by which the court must make its assessment of costs. Rule 65.12 lays down the procedure to be followed for obtaining an assessment when the assessment is not carried out at the hearing – regardless of whether it was the hearing of an application or the substantive proceedings.

[21] It follows that it is only if the appeal that this court decided is treated as an application that rule 65.11 could apply, because that rule applies only where the court determines an application. It is quite clear that the appeal that this court determined was an appeal and not an application, so rule 65.11 cannot apply. The appeal was a complete appeal in itself; it was not an application made in the course of proceedings that were pending before the Court of Appeal.

[22] It would have been otherwise if, before this court determined the appeal, either party had made an application to this court for some interim order, for example, for security for costs or the lodging of share certificates in court or for the receiver to give security or to

[11] For instance, when the claim concludes before there is a trial.
[12] In this context it is useful to bear in mind that rule 65.7, in specifying what is included in and what is excluded from prescribed costs, must not be treated as disabling the court from specifically awarding the costs of the items that are not included in prescribed costs. It will be the duty of counsel to ask for the costs of the items that are not awarded as part of prescribed costs so as to enable the court to decide, in each case, whether or not to award those costs. If awarded, those costs will be assessed, either at the hearing or subsequently.

introduce fresh evidence. On making its hypothetical determination of any of those applications this court would have been required to assess costs in accordance with rule 65.11 and, if it did not do so at the hearing, in accordance with the procedure established by rule 65.12. It would have been in such circumstances that rule 65.11 would have applied. The discretionary costs of such an application would have been required to be assessed. But that is not what happened. There was no application. There was an appeal and the appeal was determined. A particular rule applies to appeals. That rule is rule 65.13, which reads:

> Costs in Court of Appeal
>
> 65.13 Unless the –
> (a) Court of Appeal on an application made in accordance with rules 65.8 and 65.9 makes an order for budgeted costs; or
> (b) parties to the appeal agree otherwise;
> the costs of any appeal must be determined in accordance with rules 65.5, 65.6 and 65.7 and Appendix B but must be limited to two thirds of the amount that would otherwise be allowed.

[23] In the appeal there was no order for budgeted costs and the parties had no agreement as to costs. Therefore, pursuant to rule 65.13, the costs of the appeal must be determined in accordance with the specified rules, which are the rules that provide for prescribed costs, how those costs are quantified and what they include. In short, the appellants are entitled to prescribed costs in the court of appeal. Therefore, it is by reference to prescribed costs that the application for an interim payment of costs must be considered.

Jurisdiction to order interim payment of costs

[24] A close reading of the applicants' submissions reveals that the applicant can point to no specific provision in CPR 2000 for making an order for an interim payment of costs to a successful defendant. The closest counsel came to finding a rule was rule 17.6(1)(c) which provides:

> "Interim payments – conditions to be satisfied and matters to be taken into account
>
> "17.6(1) The court may make an order for an interim payment only if –

(a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;
(b) the claimant has obtained an order for an account to be taken as between the claimant and the defendant and for judgment for any amount certified due on taking the account;
(c) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (including costs) to be assessed;
(d) (except where paragraph (3) applies), it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs; or
(e) the following conditions are satisfied –
(i) the claimant is seeking an order for possession of land (whether or not any other order is also being sought); and
(ii) the court is satisfied that, if the case went to trial, the defendant would be held liable (even if the claim for possession fails) to pay the claimant a sum of money for rent or for the defendant's use and occupation of the land while the claim for possession was pending."

[25] Counsel acknowledged the absence of any provision similar to the English rule 44.3(8), which states:

> "(8) Where the Court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed."

[26] Although counsel tried to argue for a construction that could extend the benefit of rule 17.6(1)(c) to the applicants it proved an impossible task, because the definition of an "order for interim payment" given in rule 17.1(1)(m) makes it clear that the power to order interim payment is intended to provide for payment by a defendant on account of any sum which the court may find the defendant liable to pay. In this case, the applicants are the defendants and they seek an order against the claimant, for which the rule does not provide. In the end, counsel fell back on the inherent jurisdiction of the court. Counsel found assistance in an extract from the English White Book[13] that reads:

> "Quite apart from the specific rule, the Court has an inherent jurisdiction to control its own processes."

Counsel buttressed this statement by reference to the court's case management power, expressed in rule 26.1(2)(w) as including the power:

[13] 2007 ed. at 44.3.15 (p. 1161)

"to take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective."

[27] Counsel for the respondent rested his argument against the existence of the jurisdiction to order an interim payment of costs on the uncertainty I had expressed in IPOC International Growth Fund Limited v LV Finance Group Limited.[14] With the benefit of more assistance than the circumstances of that case permitted counsel to provide, and guided by the previous decision of this court in Grenada Electricity Services Ltd. v Isaac Peters[15] and an express provision in CPR 2000[16], both of which escaped the attention of counsel in this case, I am satisfied that the Supreme Court has both a statutory and an inherent jurisdiction to make an order for interim costs.

[28] The two sources of jurisdiction are not mutually exclusive and there will be instances when the conditions for the exercise of the jurisdiction stated in the rules will not be satisfied and resort will have to be made to the inherent jurisdiction, so it is helpful to consider both sources. In Halsbury's Laws of England[17] appears the following treatment on the inherent jurisdiction of a court:

> "Unlike all other branches of law, except perhaps criminal procedure, there is a source of law which is peculiar and special to civil procedural law and is commonly called "the inherent jurisdiction of the court". In the ordinary way the Supreme Court, as a superior court of record, exercises the full plenitude of judicial power in all matters concerning the general administration of justice within its territorial limits, and enjoys unrestricted and unlimited powers in all matters of substantive law, both civil and criminal, except insofar as that has been taken away in unequivocal terms by statutory enactment. The term "inherent jurisdiction" is not used in contradistinction to the jurisdiction of the court exercisable at common law or conferred on it by statute or rules of court, for the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or

[14] British Virgin Islands Civil Appeal Nos. 20 of 2003 and 1 of 2004 (judgment delivered 16th January 2006), at [10] and [11].
[15] Grenada Civil Appeal No. 10 of 2002 (judgment delivered 28th January 2003)
[16] Rule 17.1(1)(g)
[17] Volume 37, 4th edition (1982) at paragraph 14

rule of court. The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is a part of procedural law, both civil and criminal, and not a part of substantive law; it is exercisable by summary process, without a plenary trial; it may be invoked not only in relation to parties …; it must be distinguished from the exercise of judicial discretion; and it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise (1) control over process by regulating its proceedings, by preventing the abuse of process and by compelling the observance of process, (2) control over persons, as for example over minors and mental patients, and officers of the court, and (3) control over the powers of inferior courts and tribunals.

In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

[29] That jurisdiction is supplemented by the provision of rule 26.1(2)(w), quoted above, which says the court may make any order for furthering the overriding objective which, as rule 1 states, requires the court to deal with cases justly. Confirmation of the court's jurisdiction in relation to costs is also gathered from the previously considered rule 65.11(1) which requires, when the court assesses the costs of an application, that it should direct when such costs are to be paid. Further confirmation of the jurisdiction comes from the decision of this court delivered by Chief Justice Byron in Grenada Electricity Services Ltd. v Isaac Peters[18] in which, in ordering the interim payment of costs, he stated[19] that the concept of interim or provisional orders is not addressed in the rules of court but it was not novel and referred to the decision in the case of Mars UK Ltd v Teknowledge Ltd[20] as an

[18] Grenada Civil Appeal No. 10 of 2002 (judgment delivered 28th January 2003)
[19] at [37]
[20] [2000] F.S.R 138, 8th The Times July 1999

example of an order for the interim payment of costs. In addition, counsel for the applicant pointed to an order that the judge in the High Court proceedings made for the interim payment of costs in the sum of US$ 250,000.00 to show that the jurisdiction to make such an order seems an accepted fact.

[30] In fact rule 17.1(1)(g) confers express jurisdiction by providing:

> "17.1 (1) The court may grant interim remedies including –
>
> …
>
> (g) an order for interim costs; "

Interim payment to account of prescribed costs

[31] Satisfied that the jurisdiction exists, the question that I must next consider is whether this court should make an order. In the Grenada Electricity Services Ltd. Case, Byron CJ made the order on the following basis:

> "[36] It is open to us to mirror the order of the learned trial Judge and order that the costs be assessed when the damages are assessed. The concern I have is that the process of assessment may take a long time and the respondent could be forced into a situation where, although he had the benefit of a judgment in his favour, he has to fund several further stages of litigation before a stage is reached where he can be put in costs. This could create a difficulty as he is an individual litigant opposed to a statutory corporation whose means are substantially greater than his, and there is the obvious risk of his inability to continue funding litigation indefinitely, as opposed to the appellant whose financial position is much better. It seems to me that in the interests of justice, and in pursuance of the overriding objective, even if the court is unable at this time to finally assess the costs that will become due an order ought to be made."

[32] That order was made, it is seen, in a case where costs could not be assessed[21] until damages had been assessed since prescribed costs, in the case of a claimant, as the respondent had been in the lower court proceedings, are calculated based on the amount of damages awarded. That is the fundamental difference with this appeal. The quantification of costs in this appeal does not need to await any assessment of damages because costs on the appeal were awarded to the defendants, who claimed no damages. Prescribed costs in favour of a defendant are determined based on the value of the claim; see rule 65.5(2)(b). In the case of a defendant, that value is the amount claimed in the claim form; or, if the claim is for unquantified damages, the value of the claim is such sum as the parties agree or if they do not agree, a sum stipulated by the court as the value of the claim; or, if the claim is not for a monetary sum – the amount of EC$50,000.00 unless the court places a different value; rule 65.5(2)(b)(i), (ii) and (iii). The amount of prescribed costs will reflect the stage the proceedings have reached.

[33] It seems to me that it would have been easier and more dispositive for the appellants to apply to assess their costs rather than apply for an interim payment of costs. The application for interim payment was unnecessary. Counsel responded to the court's inquiry by indicating that the appellants had made no application to assess or quantify costs. I think it would be a salutary thing if the appellants were to proceed in the normal way to have their costs quantified, both in the court below and in this court, rather than to skip stages and, unwittingly no doubt, overreach the court's consideration of a number of factors that may be relevant and, if they are, may impact the quantum of costs awarded.

[34] A prime relevant factor is the value of the claim, and in that regard I observe that on the material that comprised the record of appeal, I am not aware of what was the value of the claim, in the court below, against these two appellants as distinct from the value of the claim against the other five defendants. As regards the value of the appeal, because the appeal was confined to the limited aspect of whether or not the judge should have continued the receivership, it seems highly arguable that the value of the appeal should be

[21] It will be observed that the Chief Justice repeatedly referred to the "assessment" of costs when clearly dealing with prescribed costs.

significantly different from the value of the claim. It seems to me that until the values of both the claim against these two appellants and the appeal that they brought are agreed or stipulated there can be no assessment of either discretionary or prescribed costs. Neither could there have been any reliable estimation of the minimum amount of costs likely to be awarded so as to have determined a safe amount to order as interim costs. It will therefore be appreciated that the ascertainment of values (of the claim and the appeal, respectively) that would have established the bases for interim costs would have equally established the basis for the assessment of costs, both discretionary and prescribed. With those values established it would have been a straightforward matter to assess both discretionary and prescribed costs. It is for this reason that I take the view that the appellants should have proceeded with the assessments of costs rather than apply for interim costs.

[35] I would dismiss the application for an order for an interim payment of costs with costs of the application to the respondents, to be assessed pursuant to rules 65.11 and 65.12, unless agreed within 21 days of the date of this decision. If these costs need to be assessed perhaps they may be assessed at the same time as the costs of the appeal.