THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

BRITISH VIRGIN ISLANDS

CLAIM NO.BVIHCV2003/0140
CIVIL APPEAL No: 20 OF 2003 AND No 1 OF 2004

BETWEEN:

IPOC INTERNATIONAL GROWTH FUND LIMITED

Claimant/Respondent

AND

(1) LV FINANCE GROUP LIMITED
(2) TRANSCONTINENTAL MOBILE INVESTMENT LIMITED
(3) OOO CT-MOBILE
(4) SANTEL LIMITED
(5) AVENUE LIMITED
(6) JANOW PROPERTIES LIMITED
(7) BARROWS ALLIANCE LIMITED
(8) CORMACK SELECT LIMITED
(9) STEGMAN UNIVERSAL LIMITED
(10) SMART FINANCE LIMITED
(11)CARBERT INTERNATIONAL LIMITED
(12)CARBONELL TRADING LIMITED
(13) RAMPTON ENTERPRISES LIMITED
(14)ALAMOSA HOLDINGS LIMITED
(15)NORMANTON LIMITED
(16)OOO ALFA-ECO

Defendants/Applicants

Before:

Master Cheryl Mathurin

Appearances:

Mr Mortimer QC and Mr Colin McKee for the Claimant
Mr Jeffrey Elkinson and Ms Dawn Smith of Conyers Dill & Pearman for the 1st Defendant
Ms Monique Peters and Ms Astra Penn of Dancia Penn & Co for the 2nd Defendant
Mr John Carrington of McW. Todman & Co for the 3rd and 7th to 15th Defendants

Mr Robert Levy QC, Mr Jack Husbands of Walkers for the 4th to 6th and the 16th Defendants

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2006; July 4th, 5th, 21st
December 1st

RULING

[1] MATHURIN, M; On the 18th January 2006, Barrow J.A. made a determination in which he directed that the Claimant (hereafter "IPOC") pay the Defendants' costs of;

a. The proceedings (to include all applications made by the Claimant and the Defendants)
b. The appeals and cross-appeals (to include all applications and case management conferences within the proceedings and the appeals and cross-appeals) together with the hearings before the Court of Appeal on the 19th and 22nd September 2005, 10th October 2005, 18th October 2005 and 18th January 2006.

This determination was reflected in the terms of the Court of Appeal order dated the 24th February 2006.

[2] On the 27th April 2006, all parties appeared before me with applications pursuant to the above mentioned order of Barrow J.A and directions were given designed to assist the court in its determination of the Defendants' costs. Parties were required to prepare and submit a chronology of the proceedings to include all applications in the proceedings as well as in the Court of Appeal. In particular, the parties were asked to file submissions in relation to the questions of

(a) whether there should be assessed costs or prescribed costs;
(b) if assessed costs, whether in accordance with rule 65.11 or 65.12 of the Civil Procedure Rules 2000 (CPR2000)
(c) on what basis should the value of the claim be determined if necessary and
(d) whether or not the appeal was a procedural application attracting quantification under rules 65.11 or 65.12 or if rule 65.13 is the applicable section for the costs applicable to appeals generally

[3] The hearing was set down for the 4th and 5th July 2006 for the purpose of addressing the method of determining the costs, the actual quantum hearing being adjourned pending the determination on the procedure. Mr Robert Levy, Counsel for the 4th to 6th and the 16th Defendants (hereafter "the Alfa Companies") was appointed by Mr Jeffrey Elkinson for the 1st Defendant (hereafter "LVF"), Ms Monique Peters for the 2nd Defendant (hereafter "TMI") and Mr John Carrington for the 3rd and 7th to 15th Defendants (hereafter "the Todman Respondents") to make any oral representations in support of the submissions. Mr

Mortimer made representations on behalf of IPOC. For the most part, Counsel for the Defendants adopted the parts of Mr Levy's arguments that were applicable and supplemented on occasion when necessary. In the circumstances and intending no disrespect to Counsel, arguments on behalf of the Defendants will be referred to generically, save where arguments specific to a particular party are referred to.

[4] A substantial part of the hearing of the 4th and 5th of July 2006 was engaged in representations on the applicability of rules 65.11 and 65.12. The distinguishing factor between the two Parts for the purpose of these proceedings quite frankly being, the ten percent of appropriate prescribed costs cap that procedural applications attract in the absence of special circumstances as opposed to an assessment based upon a bill of costs presented to the court.

[5] The Parties have provided a detailed outline of the proceedings and applications that fall within the order of the 18th January 2006 and below is a brief summary of the applications made to the High Court and which are referred to in paragraph (a) of Justice Barrow's order.

Claimant's applications in the High Court;

(1)	Application and amended application for injunction	2nd September 2003
(2)	Application for service out of the jurisdiction	3rd September 2003
(3)	Application to strike out application of TMI	18th December 2003
(4)	Application for order directing joint receivers	21st October 2003
(5)	Amended application	23rd October 2003
(6)	Application for order for Defendants to file and Serve affidavits and deliver documents	21st October 2003
(7)	Application for leave to appeal parts of order of 4th November 2003	10th November 2003
(8)	Application to re-appoint receivers	19th January 2004
(9)	Application for sequestration order	19th January 2004

Defendants' applications in the High Court

(1)	Todman Respondents' application to discharge or modify order of 4th September 2003 and to provide security for costs for all Defendants	18th September 2003
(2)	LVF application to stay or dismiss proceedings	18th September 2003
(3)	Alfa Companies' application to discharge order of 4th September 2003	19th September 2003
(4)	TMI application to discharge order of 4th September 2003	27th October 2003
(5)	LVF application to stay proceedings	11th December 2003
(6)	TMI application for orders under Part 9(7)	12th December 2003

[6] The following is a list of applications made to the Court of Appeal:

Claimant's applications in the Court of Appeal

(1)	Application for extension of time to apply for leave to appeal	7th October 2003
(2)	Application against decision of 24th October 2003 refusing to hear applications	27th October 2003
(3)	Application for leave to appeal order of 4th November 2003	10th November 2003
(4)	Notice of application for leave to appeal costs order of 20th November 2003	26th November 2003
(5)	Application for stay of judgment of 21st January 2004	21st January 2004
(6)	Notice of Appeal against decision of 1st October 2003	11th October 2003
(7)	Notice of Appeal against Judgment of 21st January 2004	27th January 2004
(8)	Application for consolidation of appeals	31st March 2004
(9)	Application for order to strike out or stay or Summarily dismiss application for security for Costs	29th October 2003
(10)	Amended notice of application	2nd November 2004
(11)	Application for extension of time to file Rebuttal evidence for security for costs Application	15th July 2004
(12)	Notice of withdrawal of application of 15th July 2004	17th August 2004
(13)	Application for extension of time to file Rebuttal evidence for security for costs application	17th August 2004
(14)	Application for order not requiring inspection of documents	20th August 2004
(15)	Amended notice of application	6th September 2004
(16)	Application to stay judgment of 21st January 2004	2nd June 2004
(17)	Oral application for stay and injunction	19th September 2005
(18)	Oral application for stay and injunction pending Application for leave to appeal to the Privy Council	22nd September 2005
(19)	Application for leave to appeal against Court Of Appeal order of 19th September 2005	3rd October 2005

Defendants' applications in the Court of Appeal

(1)	Counter-Notice Application by all Defendants Except TMI to uphold judgment of 21st January 2004 and to cross appeal costs awarded	10th February 2004
(2)	Alfa Companies Application for security For costs	28th April 2004
(3)	Application by Todman Respondents for Security for costs	21st May 2004
(4)	Application by Alfa Companies to Compel attendance of witnesses	28th October 2004
(5)	Application by Alfa Companies for Extension of time to file and serve Evidence in rebuttal	1st November 2004
(6)	TMI application to firewall sum of $50,000.00 as security for costs in Appeal	9th December 2004
(7)	Application of Alfa Companies for inspection Of documents in evidence of claimant	25th August 2004
(8)	Amended application of Alfa Companies	9th September 2004
(9)	Application of Alfa Companies to edit Judgment of 8th June 2004	16th June 2004
(10)	Application of Alfa Companies to adduce Fresh evidence	27th April 2005
(11)	Application of LVF to adduce fresh evidence	9th May 2005
(12)	Oral application by all defendants for costs And an inquiry	22nd September 2005

Part 65.11 – Assessed costs – Procedural applications

[7] The question arising in relation to this rule was what applications were to be considered "procedural" vis a vis "general" as referred to in rule 65.12. It was generally thought that CPR2000 offered little assistance as it did not specifically define procedural applications. The critical sections of rule 65.11 referred to are as follows;

"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….

65.11(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….

65.11(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."

Defendants'/Applicants' submissions

[8] Mr Levy raised the concern that CPR 2000 offers little guidance on what applications are procedural and states in paragraph (3) and (4) of his submissions as follows;

> *"(3) In so far uses of the expression "procedural applications" in other jurisdictions are of assistance in construing CPR 65.11, then the Alfa Parties refer to* ***Re Blue Note Enterprises Ltd*** *(2001) 2 BCLC 427. In that case the judge considered that an application to join a party was a "procedural application" whereas an application to restore a company to the register was a "substantive application";*
>
> *(4) Likewise, the Chancery guide 2005, issued by the Chancellor of the High Court in England, provides, in Para 5.2, "It is most important that applications which need to be heard by a judge (e.g. most applications for an injunction) should be made to a judge. Any procedural application (e.g. for directions) should be made to a Master unless there is some special reason for making it to a judge" So the Guide considers that a "procedural application" is akin to an application for directions (which would include such matters as an extension for time for service of a defence, or evidence, a request for further information etc.);"*

[9] Paragraph 3 of Mr Levy's submissions above, in my mind, does not assist me. The application to join a party will not determine the proceedings and is not a substantive hearing on the merits of the proceedings whereas the application to restore a company to the register is in fact the substantive hearing in accordance with statute.

[10] Similarly, paragraph 4 of Mr Levy's submissions does not facilitate the differences in the CPR 2000 to those of the English Civil Procedure Rules. Firstly, CPR 2000 does not limit the applications to be heard by a judge or a master as applications relating to pending proceedings must, as far as practicable, be listed for hearing at a case management conference or a pre trial review. Secondly, applications for injunctions in England must be heard by a trial judge, while the master has power to grant injunctions only:

(a) by consent;
(b) in connection with charging orders and appointment of receivers; and
(c) in aid of execution of judgments

Under the CPR2000, no such restriction applies and such applications are dealt with by the "court" and not by a "judge", the definition of which excludes a master (See rules 2.4 and 2.5(1)).

[11] Based on his interpretation of what should be determined to be procedural applications, Mr Levy refers me to the applications such as those to inspect documents, for disclosure, to compel the attendance of witnesses, and extension of time to file and serve evidence in

the security for costs applications. He makes reference to rules 56.11 and 56.12 which are relevant to administrative law matters.

[12] Rule 56.11 details the procedure to be followed at the first hearing of the matter detailing directions that would expedite the eventual hearing of the matter. Rule 56.12 states that wherever practicable procedural applications during a claim for an administrative order should be made to the judge who had the conduct of the first hearing unless otherwise ordered by that judge. Mr Levy states that this section supports his arguments that procedural applications are limited to those for directions for the management of the matter because it would be ludicrous to assume that in an administrative action another judge is restricted from hearing, for example, an application for an injunction unless the judge doing the first hearing so orders.

[13] For my part, rule 56.12 does not expressly exclude another judge from hearing any applications in an administrative action, it merely seeks because of the short, fast tracked, concise nature of a fixed date claim, to keep the matter firmly within the control of the court hearing the matter, especially in circumstances where the applications in the matter are so intrinsically part of the determination of the substantive claim.

[14] Mr Levy's arguments are supported by Counsel for LVFG who submits that "*proper distinction between the two varieties of assessed costs should be drawn between "mere" procedural applications on one hand , and substantive applications on the other"* Counsel however offers no assistance as to what constitutes "substantive applications" stating only as follows;

> *"With very few (and specific) exceptions (and still presently excluding Court of Appeal matters), all of the matters were matters of substance. They were matters that sought real substantive relief. They occupied (very) significant resources. In no sense were they merely procedural."*

[15] Counsel for the Todman Respondents adds that;

> *"At the end of the day, however, the Court will be called upon to apply a test based on common sense and common experience to determine what is a procedural application as distinct from a substantive application. On this basis, it is our submission that an application that merely invites the court to regulate the procedure involved in pursuing some substantive relief, whether interim or permanent, in the course of an action should be termed to be a procedural application"*

[16] I have to state that the notion of a "*substantive application*" is in my opinion misconceived as it is clearly not one created by CPR2000. Rule 65.12 certainly does not refer to any such creation, as the application referred to in that rule is an application for directions as to how an assessment pursuant to rule 65.12 should be carried out.

Claimant/Respondent's submissions

[17] Mr Mortimer opposes the distinction between "procedural" and "substantive" applications posited by the Applicants and states that rule 65.11 defines precisely what constitutes a procedural application as any applications other than those made at a case management conference, pre-trial review or the trial, none of which have any relevance to the immediate matter. He states that the distinction that the Applicants seek to raise is a false one as rule 65.11 covers only interlocutory applications whilst rule 65.12 covers other types of hearings. He asserts that the approach of the Applicants was inconsistent with decided Court of Appeal authority.

> *"Thus, in Astian Group Inc and another v Alfa Petroleum Holdings Limited and another (Court of Appeal BVI) Barrow J held that it was rule 65.11 (procedural applications) under which the costs of a forum non conveniens application would fall to be assessed. This approach was followed by Joseph-Olivetti J in Pacific International Sports Clubs Limited v Comerco Commercial Limited (High Court BVI) See at paragraph 26"*

[18] Mr Mortimer's interpretation of Barrow JA in Astian in my opinion is correct, as Barrow J A clarified that

> *"…both sides proceeded on the premise that costs were to be quantified by reference to prescribed costs and it is purely because of that common approach that I thought it fit to award costs on that basis. Absent that agreement I would have followed rule 65.3 which states that, apart from instances where the rule pertaining to fixed costs apply, costs are to be quantified either as budgeted costs, prescribed costs or assessed costs… The governing rule, I would have thought, was rule 65.11…"*

[19] Mr Mortimer draws assistance from the definition of "procedural appeal" in Part 62 as an appeal which does not directly decide the substantive issues in a claim and states that authority shows clearly that it covers all interlocutory decisions made on applications other than those specifically excluded. He quotes Gordon JA in Maria Hughes v AG of Antigua and Barbuda

> "*Although CPR has introduced a different term, to wit "procedural appeal", it is in my view equivalent to an appeal from an interlocutory order… Thus the primary issue … is whether the appeal is a procedural appeal (an appeal from an order which does not directly decide the substantive issues in the claim) or whether an appeal from an order that does so decide the substantive issues."*

[20] Counsel argues that there is no warrant for giving the word "procedural" a completely different meaning in two different sections of CPR unless it is specifically intended. He states that rule 65.12 is intended to cover the action itself, or some discrete part of the action (i.e. the trial of an issue or an assessment of damages) other than an interlocutory application. This he states would mean that all first instance applications dealt with in the proceedings are procedural applications and the costs thereof fall to be assessed under rule 65.11.

The Law

[21] Part 62 deals with appeals to the Court of Appeal and "procedural appeal" means an appeal from a decision of judge, master or registrar which does not directly decide the substantive issues in a claim but specifically excludes some decisions:

(a) any such decision made during the course of the trial or final hearing of the proceedings
(b) an order for committal or sequestration of assets under Part 53
(c) an order granting any relief made on an application for judicial review (including an application for leave to make the application under the relevant Constitution
(d) an order granting or refusing an application for the appointment of a receiver; and
(e) the following orders under Part 17-
a freezing order
an interim declaration or injunction
an order to deliver up goods
any order made before proceedings are commenced or against a non-party
a search order

[22] This provision creates the only exceptions to the hearing of appeals of matters which do not decide the substantive matter and in my opinion lends assistance to what the word "procedural" means within the context of CPR2000.

[23] The normal method of interpreting a word is exhaustively dealt with in any text of the subject of statutory interpretation and additionally it can be summed up in the words of Lord Reid in the following House of Lords matters;

> *"In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase."* (Pinner v Everett (1969) 3 AER 257 at 258-259)
>
> "*It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words of that provision cannot reasonably bear. If they are capable of more than one meaning, then you can choose between those meanings, but beyond that you must not go."* (Jones v Director of Public Prosecutions (1962) AC 635 at 662).

[24] Generally, where a word is defined in an enactment, other parts of speech and grammatical variations and cognate expressions of that word have corresponding meanings in that enactment. Also, definitions contained in an enactment apply to the construction of other provisions of the enactment.

[25] It has been decided by this court in Hughes v AG (#33 of 2003 Antigua) and Sylvester v Singh (#10 of 1992 St Vincent) that in determining whether an appeal is against an interlocutory order, the application test, not the order test, is applied. A reading of the definition of procedural appeal shows that the test to be applied in determining whether the appeal falls within that category is whether or not the decision directly decides the substantive issues. There remain basic similarities however, in the determination. Even if order test applies, the question of whether or not there is a substantive hearing is what defines what is procedural or not, subject obviously to any specific exceptions and it is along these lines that I am guided.

[26] Upon consideration of the submissions and authorities provided by Counsel, it is my finding that all applications in the high court which did not decide the substantive issue and which were not determined at case management, pre-trial review or at trial, are applications in which the costs fall to be decided under rule 65.11. This includes all applications in the proceedings in accordance with the order of the Court of Appeal dated the 24th February 2006 and listed herein in Paragraph 5.

Costs in the Court of Appeal

[27] Submissions by Counsel in this regard suggest that costs in the Court of Appeal in this matter fall into two distinct categories, costs of the applications, procedural or otherwise and costs of the appeals and cross appeals that have not been agreed. This in itself gives rise to questions that Barrow JA summarised in his judgment of 16th January 2006 as follows;

> *"Is it a valid premise that either rule 65.11 or rule 65.12 applies to the quantification of the costs of this appeal? Can an appeal be regarded as or equated to an application, whether procedural or not? Or is it the case that an appeal is an appeal and therefore the rule relating to applications simply does not apply? In this regard it seems that there is one method for the quantification of costs applicable to appeals generally, that is rule 65.13 which states;*
>
> > *"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[all of which relate to prescribed costs] and Appendix B [which contains the scale of prescribed costs] but must be limited to two thirds of the amount that would otherwise be allowed."*

[28] Barrow JA necessarily deferred the matter of determination of costs to the Master or Registrar to allow Counsel the opportunity to present arguments to assist the court in this regard.

[29] The question posed by Barrow JA and which I must address in this matter is whether or not the appeal was a procedural application attracting quantification under rules 65.11 or 65.12 or if Part 65.13 is the applicable section for the costs applicable to appeals generally. Mr Carrington whose position encapsulates the submissions of all parties on this issue submits that;

> *"As regards the appeals against decisions of the High Court, Part 65.13 purports to deal with the costs for such appeals. It is submitted that this is the sole method for determination of costs of an appeal, whether the appeal lies from a procedural application or otherwise."*
>
> *"The Appeals Nos. 20 of 2003 and 1 of 2004 involve appeals from decisions in respect of applications that were not heard at case management conference or pre-trial review and are therefore outside the ambit of the prescribed costs regime. It is submitted that the proper basis for determining the costs on these appeal should be pursuant to an application of Part 65.13"*

[30] Mr Mortimer for the Respondent, states that rule 65.13 is entitled "Costs in the Court of Appeal" and that there is no apparent reason to restrict its ambit only to the costs of the substantive appeal and submits that:

> *"…both the wording of the rule and logic, dictate that all costs to and in the Court of Appeal should be treated on a common and unified basis; under Rule 65.13"*

Out of an apparent abundance of caution however he concedes that;

> *"If IPOC is incorrect in its primary submission, it will contend that the costs of all interlocutory applications to the Court of Appeal fall to be treated as Procedural Applications, the costs of which are to be assessed under rule 65.11…"*

[31] Both Parties by implication or otherwise however concede that irrespective of however the appeal was derived, costs of the substantive hearing, attract the costs referred to under rule 65.13.

[32] The question of whether the appeal is a procedural application or a substantive appeal is not one that has been addressed in CPR2000. Part 62 makes provision for different kinds of appeal i.e. procedural appeals, summary appeals, appeals from the Magistrates Court, appeals from tribunals and the High Court but does not however distinguish between appeals for the purpose of costs which are to be calculated in accordance with rule 65.13. Part 62 also makes provision for various applications i.e. rules 62.15, 62.16 and 62.17, these applications do not affect the substantive hearing of the appeal whether procedural or otherwise. The costs of these applications, as I have indicated earlier will fall to be determined under rule 65.11.

Application for security for costs

[33] The applications for security for costs have been given individual attention by the Applicants who are generally of the mind that the costs of the application should be

determined under rule 65.12. Rule 62.17 provides that if an appeal is dismissed for non compliance with an order for security for costs, the costs to be paid must be assessed in accordance with rule 65.12, it does not however, provide for the assessment of costs of the application for security for costs.

[34] Mr Levy asserts that the application for security for costs in the Court of Appeal should be assessed and should not be lumped together with the costs normally attributed to appeals under rule 65.13. Mr Levy raises the conduct of IPOC in the determination of the application for security for costs, obliging the Applicants to incur costs to ensure that the funds secured were indeed funds that IPOC could deposit legitimately as such as opposed to money that was allegedly proceeds of crime which could be at any time confiscated. Mr Levy mentions the length of time and substantial affidavits filed in the application and quotes Potter J in Piper Double Glazing Ltd v DC Contracts (1992) Ltd (1994) 1 AER 177;

> *"After all, in principle, it's the purpose of a cost order to effect reimbursement to the successful party of all costs properly and reasonably incurred in the proceedings."*

Mr Levy's submission is that the party entitled to costs of a security for costs application, is entitled to the reasonable costs incurred he asserts should be assessed under rule 65.12.

[35] Mr Mortimer argues however that the purpose of a costs award is;

> "*namely, to ensure that a successful party is compensated to the extent permitted under the rules, for its reasonable costs incurred in relation to a particular application or proceeding*"

[36] I note that if the application for security for costs was heard at case management or pre-trial review in accordance with the general rule 24.2, the costs of the application would be included in the prescribed costs as parties are not entitled to assessed costs for case management conferences, pre-trial reviews or trials. In other words, no assessed costs would be attached to the application had it been thus heard.

[37] The security for costs application is not one that affects the merits and should therefore, in my opinion, if not heard at a case management conference or at pre-trial review but rather by way of application before or in the course of the substantive hearing, should be determined in accordance with rule 65.11 relating to procedural applications.

[38] I therefore conclude that the application for security for costs is clearly dealt with by way of rules 62.1(1) (c) (ii) and 65.11. The conduct of the hearing of the application is one therefore that rightfully should be raised under rule 65.11(7) which clearly gives the court the jurisdiction to raise the cap on the costs allocated under this rule if special circumstances justify a higher amount.

[39] I also heed the concerns of Mr. Levy and other Counsel about the procedure requiring procedural applications to be assessed at the hearings. The fact that they are not

determined at that time cannot be an appropriate basis to remove them from the ambit of assessment under this Rule as they remain procedural applications.

[40] Mr. Levy referred me to the obiter dictum of Olivetti J in Pacific International Sports v Comerco Commercial Ltd & Ors;

> "*One would have hoped that the provisions of CPR 2000 on costs are sufficiently unambiguous so as to render any substantial dispute on costs otiose. This case proves otherwise as the issues here concern the basis on which one should quantify costs…"*
>
> *"questions of costs still seem to beset our Court to such an extent that we run the danger of issues of costs using up more resources than the substantive issues – a situation that could eventually erode the credibility of the civil justice system."*

[41] These concerns are noted and I think that situation could be alleviated if the words of Byron CJ in Rachael Construction Limited v National Insurance Corporation (Civil Appeal No 10 of 2003 Saint Lucia) are heeded

> *"It would seem that the practice on costs has been very inconsistent since the introduction of CPR. I would like to use this opportunity to indicate the importance of dealing with costs in accordance with the new culture by making some simple requirements*
> *[a] Whenever a costs order is being made the learned trial judge or master should identify the rule that is being applied and if discretion is being exercised, give the reason*
> *[b] Legal practitioners should be encouraged to assist the Court in the making of costs orders by providing information and submissions as early as possible."*

To this end I would add that the assistance of Counsel in providing the information required in rules 65.11(4) to (7) in the timely manner envisioned should form part of the particular procedural application, the failure of which in the absence of a good explanation, should result in costs being calculated in the discretion of the court.

Valuation of the Claim

[42] Where the prescribed costs of the claim have to be determined, rule 65.5(2) (b) (ii) states that the value of the claim in the case of a defendant where the claim is for damages and the claim form does not specify an amount that is claimed and if the parties do not agree, an amount stipulated by the court as the value of the claim. This was an issue which Barrow JA contemplated would have to be determined and of which I required parties to file evidence in support of this valuation.

[43] Mr. Levy submits that when stipulating the value of the claim, the Court could use the benefit of actual knowledge of the value of the claim. He further submits that the Court should not allow a party who at all material times has agreed the value of the claim, subsequently to assert that the claim has not been valued and should not be valued. Mr.

Levy refers me to the dicta of Barrow JA in the case of Astian Group Inc v Alfa Petroleum Holdings Limited Civil Appeals Nos 11 and 17 of 2004 British Virgin Islands

> *"Remarkably, the appellants simply ignored the fact that they had persuaded both the trial judge and Gordon JA that the minimum value of their claim was US$383,173,392.00. It is a matter of some regret that the short shrift that the appellants' argument deserves does not permit dilation upon the sleight in the appellant's attempt to escape the inescapable.*
>
> *It is inescapable that the value of the claim was determined by both the High Court judge and by Gordon JA to be the amount stated by the appellants. … It is simply not open to the appellants now to say that the value of their claim was never determined."*

[44] Mr. Levy traces the value of the MegaFon stake, which is the subject matter of this claim, by reference to the third Affidavit of Mr. Christopher George Hardman filed on the 15th June 2006 which traces the apparent growth in value of the stake from the filing of the initial proceedings in 2003 as follows;

(a) Skeleton Arguments of IPOC dated 29th September 2003 at Para 23 page 7

> *"On the evidence before the court, the personal claim is worth not less than US$295m which is the figure the Alfa purchasers were apparently prepared to commit to as their combined consideration for the CTM's shares… This is US$295m which IPOC can expect to lose should the Order not be continued."*

(b) Affidavit of Nicholas C. Ulmer filed on the 2nd September 2003 at Para 20 page 7

> *"MegaFon's shares have become increasingly desirable and valuable in light of MegaFon's proposal that it undertake an initial public offering during when the estimated value of a 25.1% stake in the company was expected to be significantly greater than the price paid by IPOC by a considerable multiple."*

(c) Reply to Skeleton Arguments by IPOC on the 5th December 2003 at Para 26 page 7

> *"In considering the overriding objective to this case, the Court should be aware of the amount of money involved. IPOC's claim is to the ownership rights over shares worth at least US$295m …"*

(d) Judgment of Mitchell JA(Ag) dated the 8th June 2004 at Para 28

> "*A sixth objection is that the US$30 million security for damages is now inadequate due to the passage of time. If it was based on a 10% value of the option rights assessed at the time as worth US$300 million, then the appellant has suggested that the rights are now probably worth more like US$500 million."*

(e) Affidavit of IPOC in support of petition for interlocutory injunction in the Privy Council undated but sworn on the 21st October 2005

"The petition for the injunction discloses the importance to the competing claimants – IPOC and the Alfa Parties – of the CT-Mobile and its blocking minority stake in MegaFon. It shows these are unique assets of strategic importance in the Russian telecoms market and are of very considerable value, being worth hundreds of millions of dollars. I am informed that the Alfa Parties most recent estimate is that they exceed US$1 billion in value."

[45] Mr Mortimer states that the "proper value to attribute to the claim is US$295 million. Further, he concedes in his skeleton arguments at paragraph 33 that "the MegaFon stake is an asset which undoubtedly appreciated in value over the course of litigation." Mr Mortimer does, however state that the Applicants wrongly attribute to IPOC an acceptance of figures put forward in other proceedings, in which the value of the stake still remains in issue. It is regrettable that Mr. Mortimer did not expand on this, more so, as the references above are all in relation to the current proceedings.

[46] Mr. Mortimer submits that the commencement of the proceedings is not only logical but consistent with the CPR'S own approach and refers to rule 65.5 (2) which he says takes as a starting point, where costs are claimed by a defendant, the amount claimed in the claim form. He continues that there are several competing dates in the proceedings and no logic to choosing the value of the claim on one date as opposed to the other.

[47] I am not satisfied that Mr Mortimer in his submissions, has overcome the hurdle presented by the evidence of not only complicity but actual agreement as to the value of the claim in light of the guidance clearly established by the Court of Appeal in the Astian case. It is noteworthy that the indications in the increase of value of the MegaFon stake were all derived from IPOC. I do not however agree that the words "*I am informed that the Alfa Parties most recent estimate is that they* (the MegaFon shares) *exceed US$1 billion in value"* are necessarily indicative of IPOC's acceptance of that value but it is evident and accepted that the shares have increased over the duration of the proceedings. In the circumstances, I order that the value of the claim herein be stipulated at US$650 million.

Summary of order

[48] It is hereby ordered as follows

(1) That the costs of all applications listed in Paragraph 5 by the Claimant and the Defendants in the High Court be assessed in accordance with Rule 65.11
(2) That the costs of all applications listed in Paragraph 6 by the Claimant and the Defendants in the Court of Appeal be assessed in accordance with Rule 65.11
(3) That the costs for the security for costs applications be assessed in accordance with Rule 65.11
(4) That the stipulated value of the claim in accordance with Rule 65.5 (2) (b) (ii) be US$650 million.

(5) That the determination of the quantum of costs in relation to the Order of the 24th February 2006 be adjourned pending application by the Defendants.

CHERYL MATHURIN
MASTER