COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.10 OF 2004

BETWEEN:

JOSEPHINE GABRIEL AND COMPANY LIMITED

Appellant

and

DOMINICA BREWERY AND BEVERAGES LIMITED

Respondent

Before:

The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal
The Hon. Ms. Dancia Penn-Sallah, QC	Justice of Appeal [Ag.]

Appearances:

Ms. Francine Baron Royer for the Appellant
Ms. Singoalla Blomqvist Williams for the Respondent

2007: April 16;
July 2.

JUDGMENT

[1] BARROW, J.A.: There was no appeal against the decision of Thomas J that the respondent was liable to pay damages to the appellant for wrongfully terminating a distributorship agreement between the parties by giving one month's instead of twelve months' notice. The appeal was by the successful party against the award of $30,673.00 damages, seeking the sum of $834,000.00 that the appellant thought it should be awarded.

Termination of the distributorship agreements

[2] In October 1995 the parties entered into a distributorship agreement for the appellant to distribute the products of the respondent. That agreement ran for its scheduled duration of three years at the end of which the respondent gave notice of termination to take effect in October 1999. The parties thereafter entered into a new agreement to continue "for the next six or twelve months under the general terms and conditions" of the expired first agreement. In a departure from the provision of the first agreement, the respondent reserved the right to sell its products directly to traders.

[3] By letter dated 28th December 2001 the respondent terminated the new agreement by giving a month's notice. In the High Court proceedings it was a major issue between the parties whether the period of notice given satisfied the contractual requirement. The trial judge determined that the notice period given by the respondent did not accord with what was required by the provisions of the new agreement and, therefore, that the respondent had terminated in breach of contract. On this aspect there has not been any appeal and no more need be said about it.

[4] This appeal is solely concerned with the quantum of damages. In its statement of claim the appellant claimed damages as follows:

> Loss of profit for 12 months $839.300.00,
>
> Loss of goodwill $156,672.00
>
> Loss from discarding stationery advertising the respondent's product, $32,1000.00.

The judge awarded damages for breach of the notice requirement of $30,673.00 and for the loss of the discarded stationery of $5,000.00. The judge also awarded interest at the rate of 5% on the above sums from the date of the claim until payment.

Duty of expert witnesses

[5] Both in the court below and before this court, the principal issue relating to the award of damages was which of two experts to rely upon in determining what was the loss sustained by the Appellant. The expert evidence that was given failed in a major way to comply with the provisions in the Civil Procedure Rules 2000 governing expert witness evidence and this made the evidence most unsatisfactory. The partisanship of the experts was the primary factor in the violation of the rules. Rule 32.3 states that the expert's overriding duty is to the court:

> "32.3 (1) It is the duty of an expert witness to help the court impartially on the matters relevant to his or her expertise.
> (2) This duty overrides any obligation to the person by whom he or she is instructed or paid."

[6] Rule 32.4 sets out in detail the way in which the expert's duty to the court is to be carried out. The rule leaves no doubt about the importance attached to the impartiality of the expert and the need for that impartiality manifestly to be seen:

> "32.4 (1) Expert evidence presented to the court must be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the demands of the litigation.
> (2) An expert witness must provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within the witness' expertise.
> (3) An expert witness must state the facts or assumptions upon which his or her opinion is based, and must consider and include any material fact which could detract from his or her conclusion.
> (4) An expert witness must state if a particular matter or issue falls outside his or her expertise.
> (5) If the opinion of an expert witness is not properly researched then this must be stated with an indication that the opinion is no more than a provisional one.
> (6) If an expert witness cannot assert that his or her report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification must be stated in the report.
> (7) If after service of a report, an expert witness changes his or her opinion on a material matter, that change of opinion must be communicated to all parties.

[7] The over-arching importance that the rules place on the duty of the expert to assist the court and not to seek to procure a favourable outcome for the party who instructed him appears in rule 32.14, which specifies certain things that must be contained in an expert witness' report. The relevant portions are rules 32.14 (2) and (3) which state:

> "(2) At the end of an expert witness' report there must be a statement that the expert witness –
>
> (a) understands his or her duty to the court as set out in rules 32.3 and 32.4;
>
> (b) has complied with that duty;
>
> (c) has included in the report all matters within the expert witness' knowledge and area of expertise relevant to the issue on which the expert evidence is given; and
>
> (d) has given details in the report of any matter which to his or her knowledge might affect the validity of the report.
>
> (3) There must also be attached to an expert witness' report copies of –
>
> (a) all written instructions given to the expert witness;
>
> (b) any supplemental instructions given to the expert witness since the original instructions were given; and
>
> (c) a note of any oral instruction given to the expert witness;
>
> and the expert must certify that no other instruction than those disclosed have been received by him or her from the party instructing the expert, the party's legal practitioner or any other person acting on behalf of the party.

[8] The reports for both experts did not contain a statement that the expert understood her or his duty to the court or that she or he had complied with that duty. There was no indication that either expert had included in her or his report all matters within her or his knowledge and area of expertise relevant to the issue. The instructions given to the experts were not disclosed.

[9] The breaches of the rules that were committed in the presentation of the expert evidence were egregious. The parties were lucky to escape the consequences of such breaches. It would have been entirely appropriate, because it would have been proportionate to the scale of the violations, for the judge to refuse to receive

the evidence of both expert witnesses.[1] The administration of justice cannot countenance the conduct of litigation in such flagrant violation of rules specifically designed to protect the courts against the danger of deception by apparently credible expertise that conceals its true intent of promoting the interests of its purchaser. Expert evidence of that character will often be of limited, if any true, value. In this case it remains to be seen whether, and to what extent, the evidence of the experts really assisted the judge in arriving at his decision.

Evidence of the experts

[10] Mrs. Roseanne Pringle-Pierre was the expert upon whom the appellant relied. She prepared a document headed "Report on Estimated Loss of Earnings and Damages …" which served as her examination in chief. Mrs Pringle-Pierre began her report by stating "I have been engaged to determine the effects on the overall operations and cash flow position of " the appellant company for the year following the sudden termination of the distribution contract with the respondent. She continued, "I have conducted my evaluation by reviewing the gross margin contribution of [the respondent's] product to the company's fixed operating costs over the last 6 years, based on financial statements audited by KPB chartered accountants". She detailed the gross margin contribution of the respondent's product over the years 1996-2001 in a schedule and stated that it was expected that the gross margin contribution made from the sale of the respondent's products of approximately $834,300.00 in the year 2001 would in all probability have been maintained for the year 2002, the year over which the notice that should have been given would have run ('the notice year'). She therefore concluded that as a result of the termination the cash flows of the appellant decreased in the notice year by a similar amount of $834,000, based on the assumption that the accounts receivable and accounts payable remained relatively constant over the period.

[1] In Stevens v Gullis [2000] 1 All ER 527 Lord Woolf MR upheld the decision of a judge to exclude expert evidence for the failure of the expert to comply with the duty to act impartially and to disclose the instructions that he had been given.

[11] In answers to written questions put to Mrs. Pringle-Pierre she stated that net earnings of the Appellant company for the past 5 years were as follows:

1997	$270,681.00
1998	$305,039.00
1999	$695,775.00
2000	$482,123.00
2001	$30, 673.00.

[12] Mr Floyd Patterson, a practising public accountant based in St. Vincent and the Grenadines, gave expert evidence on behalf of the respondent. His evidence was essentially an assessment of the claim of losses made on behalf of the appellant and, in particular, the analysis done by Mrs. Pringle-Pierre. In Mr. Patterson's first report he stated that he was unable, given the absence from the claim of certain pertinent information, to reasonably determine the losses, if any, incurred by the appellant company as a result of the termination of the distributorship. Mr. Patterson stated that based on the information then available to him (that is, at the time of his preparing his first report) he concluded that the claim on behalf of the appellant was "baseless and not supported conceptually or by verifiable evidence provided by Ms. Rosanne Pringle-Pierre."

[13] Mr. Patterson gave a second report that concentrated on dealing with the claim that Mrs Pringle-Pierre had put forward in her report stating that the appellant had suffered a loss in the value of the goodwill of the company of $153,672.00. Mr. Patterson stated that the method employed by Mrs. Pringle-Pierre in assessing goodwill failed to take account of a number of factors that he identified. Further, he observed that businesses might in fact have negative goodwill. He added to this statement in his oral testimony by pointing out that the rate of return that the appellant company was making was in fact less than the rate of return that was being paid at the time on government securities. He stated that if a potential purchaser of this company were to make an analysis of where to invest his money, the investor would see that it would be more profitable to invest in government

securities rather than buying a company that produced the rate of return that the appellant company did. Mr. Patterson stated that on the basis that goodwill represented the price above the value of an asset that an investor was prepared to pay, this company would in fact have negative good will.

[14] In relation to the overall valuation of the loss sustained by the company, in his second report Mr. Patterson made the conclusionary statement that he found the claims presented to be "baseless, unfounded, unsupportable and seeks (sic) to unjustly enrich" the appellant at the expense of the respondent.

The judge's decision

[15] The decision made by the trial judge in relation to the claim for damages is contained in the following five paragraphs:

> "[27] The defendant's expert witness, Mr. Patterson challenged the figure of $834,300 claimed by the Claimant on a number of grounds: The figure did not take into account the costs ordinarily incurred in distribution, sales and marketing of products but which would not be incurred if the products are no longer being sold; profits are calculated on a number of accounting rules and include a number of accounting rules and include a number of non-cash charges such as deprecation (sic) charges and others; after termination there are a number of expenses which are normally incurred, such as vehicle running costs, salesmen costs and advertising, but which could be terminated at the discretion of management.
>
> "[28] The evidence of Mr. Patterson therefore fortifies the Defendant's contention that the Claimant's witness did not calculate net margin and as such could establish the extent of its loss. That notwithstanding Mrs. Pringle said that the gross margin is what the company lost up front.
>
> "[29] There is merit also in the Defendants contention that the Claimant was unable to explain its loss. In this regard Mrs. Pringle explained in cross examination that the figure of $834,300 is based on an estimate. It is made on the assumption that the level of sales would be sustained in the following year.
>
> "[30] There is also merit in the contention of the Defendant that loss cannot be equivalent of gross profit or (sic) can it be based on the total cash flow for any particular year. In this regard it is to be noted that the evidence reveals that for the year 2001 the gross margin was $834,312

while the net warnings (sic) was a mere $30,673 which is far below that for the year 2000 being $482 123.

"[31] Having regard to the evidence of the two experts and this admission by Mrs. Pringle-Pierre that the loss claimed is an estimate, the net profit for the year 2001, being $ 30,673.00 is awarded as the loss for the year 2002 since there is no basis established for awarding any other amount."

[16] As regards the matter of goodwill, the trial judge summarised the evidence given by both expert witnesses and concluded as follows:

"[38] On the whole having regard to all the evidence relating to this issue, it cannot be said that it has been established that the loss of goodwill is applicable in these circumstances and the method of calculation if it does. Accordingly, no award is made with respect to the loss claimed."

Grounds of appeal

[17] The appellant filed three grounds of appeal. The first two grounds of appeal are the principal grounds and they challenge findings of fact made by the trial judge. Ground one complains that the judge erred in law and or misdirected himself when he rejected the claimant's claim for damages in the amount of $834,000.00 in that the judge failed to have due regard to the fact that "the majority of the claimant's expenses, including the running and maintenance of its trucks, payment of employees, loan payments and insurance costs continued to be incurred and therefore could not be deducted in a computation of loss." This ground also contends that the judge wrongly disregarded the calculation of loss put forward by the claimant's expert because it was based on an estimate.

[18] To take the latter aspect first, if one reads in isolation the last of the five paragraphs quoted above, it is easy to see how the argument is advanced that the claim made on behalf of the appellant was dismissed because it represented an estimate. However, if one reads the entirety of the extract quoted above, it appears very clearly that there is a more fundamental basis upon which the judge rejected the contention put forward by Mrs. Pringle-Pierre. The main reason for

rejecting the claim was the manifest truth that what was being claimed under the head of "loss of Profit' was clearly not loss of net profit but rather the loss of the cash flow to the business from selling the respondent's product. As the judge stated in paragraph [28] of his judgment, the appellant's witness "did not calculate net margin and as such could [not] establish the extent of its loss."

[19] In the course of argument it appeared that counsel for the appellant was unaware of the proposition that a claimant can recover no damages for a defendant's breach of a contract that, if it had been performed, would have resulted in a net loss to the claimant. A helpful discussion of this proposition is contained in C.C.C. Films (London) Ltd. V Impact Quadrant Films Ltd[2] in which the principle is stated to be based on the following reasoning:

> "The law of contract compensates a plaintiff for damages resulting from the defendant's breach; it does not compensate a plaintiff for damages resulting from his making a bad bargain. Where it can be seen that the plaintiff would have incurred a loss on the contract as a whole, the expenses he has incurred are losses flowing from entering into the contract, not losses flowing from the defendant's breach. In these circumstances, the true consequence of the defendant's breach is that the plaintiff is released from his obligation to complete the contract – or in other words, he is saved from incurring further losses." [3]

[20] That is the reasoning underlying the proposition that a claimant is allowed to recover loss of net profit not loss of gross profit.[4] It is the duty of the claimant to prove his loss of profit. It was on the expressed basis that the appellant did not prove its loss of net profit that the judge disallowed the appellant's claim. I therefore find no merit in the complaint that the judge disregarded the calculation of loss put forward by the appellant because it was based on an estimate. To repeat, the judge rejected it because it was claim for gross margin or gross profit.[5]

---

[2] [1985] 1 QB 16
[3] At 34 E, quoting from Bowlay Logging Ltd. V Domtar Ltd. [1978] 4 W.W.R. 105
[4] At 32 E
[5] See also paragraph [30] of the judgment

[21] The other limb of this ground of appeal, that the judge failed to have regard to the fact that the appellant continued to incur the cost of operating its distributorship, implies that there is an entitlement to reimbursement of future operating costs as compensation for a foreseeable loss occasioned by the breach of contract. The legal question whether such a loss is recoverable raises at the outset the factual questions whether there has been such a loss and whether that loss was unavoidable. The opinion of Mrs. Pringle Pierre was that there was such a loss and it was unavoidable. The judge concluded otherwise, relying on the evidence of Mr. Patterson that the judge summarised as being to the effect that "after termination there are a number of expenses which are normally incurred, such as vehicle running costs, salesmen costs and advertising, but which could be terminated at the discretion of management". Counsel for the appellant has not shown that the judge was wrong in accepting this opinion. Based on that opinion the judge was entitled to reject the claim for the continuing operating costs. I would dismiss this ground of appeal.

[22] The second ground of appeal is in the alternative to the first ground: it contends that the judge should have awarded damages on the basis of an average of net profits over the five year period preceding termination, calculated at $351,448.20.The difficulty with this contention is that the claim the appellant put forward, based on Mrs. Pringle-Pierre's report, was not for loss of average net profit but was a claim for one year's decreased cash flow, which wrongly purported to be, as I have found, a claim for loss of profit. Therefore no justification was provided to the judge, and consequently there is none before this court, for making an award of average net profit over the five-year period that is now being contended for on appeal. The issues that would call for consideration on such a claim were never canvassed. Thus, counsel for the respondent quite rightly asked, why a five-year period when the distributorship ran for six years? Why not a six year period? And as counsel also asked, why go back as far as five or six years? Why not the last year before termination? Further to that last question, what occurred in that last year which explained why net profit was as low as

$30,673.00? That explanation was not provided to the court below. No evidence was given to enable the court to conclude that net profit would not be similarly low in the 'notice year'.

[23] In contrast to the appellant's failure to explain away the low net profit, Mr. Patterson explained why it was so low, stating that the "economic landscape in Dominica" changed significantly over the period 1997 through 2001 because of the decline in the local and regional banana industry. Mr. Patterson stated: "In light of the new economic realities confronting Dominica, the most recent financial performance of any company would and should form the basis of any loss of earnings assessment." The explanation and the approach offered by Mr. Patterson both seem sensible. It was the obligation of the appellant, as the claimant, to establish on a balance of probabilities that the five-year average net profit was the appropriate basis on which to measure the loss the appellant sustained. The appellant having failed to do so, I would dismiss this ground of appeal.

[24] The remaining ground of appeal was that the judge erred in law when he refused to allow the claimant's witness, Christina Lewis, the appellant's accountant and director, to give additional evidence to that contained in her witness statement, as to the effect of the termination of the distributorship agreement on the appellant's business. According to the appellant's written submissions the objective was to have the witness give evidence of the performance between January and December 2002. In addition counsel for the appellant wanted to have Ms. Lewis comment on the written opinion Mr. Patterson had given relating to the discretionary nature of selling, distribution and administration costs. The judge refused to allow her to do so on the basis that it was not shown to be within her competence and that other witnesses could deal with this aspect. Counsel for the appellant asserted in her submissions that it was not being proposed to have Ms. Lewis offer opinion evidence but it is difficult to see that it could have been otherwise. Mr. Patterson expressed his expert opinion on the discretionary nature of these costs. He was challenging a claim made by Ms. Pringle-Pierre. It seems

to me that the judge was justified in confining the offerings of opinions to the experts and to limit participation in the dispute on the issue to them. I see no basis for interfering with the judge's exercise of discretion and control of the evidence.

[25] As to the proposed new evidence, this court enquired of counsel for the appellant whether it would have been fair for the judge to have allowed Ms. Lewis to give new evidence at trial without counsel, at least, having prepared in advance a supplementary witness statement and serving it on the respondent to give it notice of the additional evidence which the appellant would be seeking to adduce and the opportunity to prepare rebutting evidence, if necessary. That not having been done, substantially new evidence would have been given in the course of the oral hearing causing, as counsel for the respondent submitted, forensic prejudice to the respondent. I can see no basis for thinking the judge erred in the exercise of his discretion and accordingly I would dismiss this remaining ground of appeal, as well.

The cross-appeal

[26] The respondent cross-appealed seeking to reduce the award of damages to take account of the fact that the appellant had obtained an injunction pursuant to which the appellant continued distributing the products of the respondent for almost two months after the date of the notice of termination. The respondent claims that the damages should therefore be reduced to reflect that the appellant lost 10 months and 5 days' profits and not 12 months' profits from the termination of the distributorship. In resisting this contention counsel for the appellant argued that during this period the respondent started selling its products directly to the public and this reduced the sales and hence the profit the appellant made during this period. However, counsel for the appellant was forced to concede that the respondent had expressly reserved the right to sell to traders in the new agreement (which is what the respondent did during the two months). For that reason there is to be no compensating the appellant for the lesser sales it thereby

suffered by this court refusing to reduce the period of the loss of the distributorship. Accordingly I would allow the reduction. The respondent's calculation of the damages due to the appellant was $26,017.24. That figure was not challenged and it seems correct by my calculations.

[27] The respondent also contended the judge erred in awarding a nominal sum of $5,000.00 to the appellant for the loss it suffered by having to discard stationery that bore advertisements of the respondent's products. This contention of the respondent was based on the fact that the appellant was unable to give specific evidence to enable the court to mathematically calculate the loss the appellant suffered. It was settled by the Privy Council in Greer v Alston's Engineering[6] that in such a situation the court can make an award of nominal damages, in a substantial rather than minimal or derisory amount, to compensate for an unquantifiable loss that has undoubtedly been suffered. The duty of the court in such a situation is to make an award that is not out of scale. The evidence before the court established that the appellant had spent some $30,000.00 on stationery in the seven months or so before the termination. Failure by the appellant to prove how much of the stationery it had left and was forced to discard at the date of termination did not prevent the judge from deciding, as he must have done, that the appellant was forced to discard an amount of stationery that, in the scale of the situation, would have been valued in excess of the sum of $5,000.00 he awarded. I see no reason for interfering with the judge's decision on the basis which the respondent relied and I would dismiss this ground of the cross-appeal.

The result

[28] The overall result, in my view, would be that the entire appeal stands dismissed. I would allow the cross-appeal by reducing the award of damages for breach of the distributorship agreement by failing to give proper notice from $30,673.00 to $26,017.24. I would uphold the award of $5,000.00 for wasted expenditure on

[6] 2003 UKPC 46

stationery. There was no appeal as to the basis on which costs in the High Court were calculated. Therefore I would simply adjust the award of prescribed costs in the court below, quantified using the damages awarded to the successful claimant as the value of the claim, and award $7,805.17.

[29] The respondent is entitled to the costs of the appeal. Rule 65.13 states that 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. Rule 65.5 tells how to value a claim or, by virtue of rule 65.13, how to value an appeal. The starting point, in the case of a defendant or, again by virtue of the last mentioned rule, in the case of a respondent, is the amount claimed in the claim form or, again by virtue of rule 65.13, the amount claimed in the notice of appeal. It seems to me, in accordance with those rules, that costs to the respondent must be determined on the basis that the respondent successfully resisted a claim of a value of $834,000.00. "The general rule is that the amount of costs to be paid is to be calculated in accordance with the percentages specified in column 3 of Appendix B against the appropriate value"; see rule 65.5 (3). So calculated the appellant must pay costs to the respondent of two thirds of $88,200 or $58,800.

[30] It is hoped that the appellant was fully seised of the costs implications of bringing this appeal. The result brings to mind the following words of Lord Donaldson of Lymington MR in considering appeals to the Court of Appeal[7]:

> "The question which the adviser may ask himself is whether, looking at the matter objectively, there are sufficient grounds for believing not only that the case should have been decided differently, but that in all the circumstances it can be demonstrated to the satisfaction of the Court of Appeal that there are grounds for reversing the judge's findings. In considering this question the adviser must never forget the financial risk which an appellant undertakes of having not only to pay his own costs of the appeal, but those of his opponent … Nor must he underrate the effect upon his client of the emotional and other consequences of a continued state of uncertainty pending an appeal. In a word, one of the most important duties of a professional legal adviser is to save his clients from

[7] Quoted in Blackstone's Civil Practice 2006 at 71.1

themselves and always to remember that, whilst it may well be reasonable to institute or to defend particular proceedings at first instance, a wholly new and different situation arises once the claim has been fully investigated by the court and a decision given.

Denys Barrow, SC
Justice of Appeal

[31] RAWLINS, JA: I concur with the decision of Barrow JA on the quantum of damages to be awarded on this appeal. I am concerned with the costs order, although it appears that a strict interpretation of rules 65.5(2)(b)(i) and 65.13(b) of CPR 2000 yields that result. It is noteworthy, however, that sub-rules 65.1(2)(a) and 65.13(b) limit the prescribed costs that could be awarded against an unsuccessful defendant, or respondent, to the specified proportions of the quantum of damages agreed or ordered to be paid. The rules which govern the costs that an unsuccessful claimant, or, as in the present case, an unsuccessful appellant, is required to pay are no doubt intended to deter the pursuit of claims or appeals for exorbitant sums. Legal practitioners should always be conscious that this is a possible result when they contemplate advising clients whether to pursue appeals for greater quantum of damages.

[32] However, I doubt that these rules permit proportionality. I have agonized over whether this is the type of situation which Part 1 of CPR 2000 is intended to address. This Part enjoins the court to deal with cases justly and rule 1.2 requires the court to give effect to this overriding objective when the court exercises any discretion under the rules. Part 1.1(2)(c) states that dealing justly with a case includes dealing with a case in ways which are proportionate, inter alia, to the amount of money involved; the importance of the case; the complexity of the issues and the financial position of each party. Neither the trial nor these appeal proceedings involved any complex issues or procedures. In the light of this, I have searched to find whether this court could make a costs order that would mitigate the disproportionate costs award in these appeal proceedings. Rule 64.6(3)(c) of CPR 2000 confers discretion on this court to order a party to pay only a specified

portion of another party's costs. I think, however, that the bases upon which this discretion is to be exercised are provided in rule 64.6(6) of CPR 2000 and none of these bases is present in this case.

[33] Generally, rule 65.5 of CPR 2000 provides for the calculation of prescribed costs. Rule 65.13 provides that prescribed costs on appeal are limited to two-thirds of the amount calculated on rule 65.5 unless the court made a budgeted costs order or the parties agree otherwise. Rule 65.6(2) of CPR 2000 confers discretion on the court to direct that prescribed costs should be calculated on the basis of a higher or lower value, if the court is satisfied that costs calculated in accordance with rule 65.5 are excessive or substantially inadequate. I would have wished to make an award reducing the costs because costs calculated in accordance with sub-rules 65.5(2)(b)(i) and 65.13(b) of CPR 2000 are quite excessive, in my view. The difficulty, however, is that rule 65.6(1)(b) appears to base the exercise of the discretion to reduce the costs on an application for such an order, which is to be considered at a case management conference. Since no application was made in this case, very unhappily, I find no basis on which to depart from the costs order that Barrow JA proposes.

Hugh A. Rawlins
Justice of Appeal

I concur.

Dancia Penn-Sallah, QC
Justice of Appeal [Ag.]