IN THE MATTER OF THE LAND ACQUISITION ACT CAP 233
OF THE LAWS OF ANTIGUA AND BARBUDA

IN THE MATTER OF HMB HOLDINGS LIMITED

IN THE MATTER OF THE BOARD OF ASSESSMENT

BETWEEN:

HMB HOLDINGS LIMITED

Claimant

AND

THE ATTORNEY GENERAL
DAVID MATTHIAS

Defendants

Before:
Master Cheryl Mathurin

Appearances:
Mr. John Carrington and Ms Stacy Richards Anjo for the Claimant
Attorney General Mr. Justin Simon QC for the Defendants

2012: January 20th,
June 1st

ASSESMENT OF COSTS

[1] MATHURIN M; This is an application to assess Counsel's fees and Solicitors professional fees and disbursements following a hearing before the Board of Assessment appointed pursuant to the Land Acquisition Act for that purpose. The Land Acquisition Act doesn't make any provisions for the assessment of such costs but CPR2000 Rule 64.2(2)(c) states that if costs of;

"*proceedings before a tribunal or other statutory body …*

are to be taxed or assessed by the court, they must be assessed in accordance with rule 65.12."

Rule 65.12(4) and (5) states that

"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

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 such assessment to take place."

[2] Directions were given for the assessment and the hearing took place on the 20th January 2012. Counsel for the Claimant Mr. John Carrington made the preliminary submission that the prescribed costs regime applied in this matter and that the correct approach as laid down in the Court of Appeal in Rochamel Construction Limited v National Insurance Corporation Civil Appeal 10 of 2003 wherein he says it was indicated that the court should determine the prescribed costs then consider whether any discretion as to the amount should be exercised. I am not persuaded by Counsel's submission as the wording of Part 64.2(2) is pellucid as to how such an assessment must be done. The proper approach is in accordance with Part 65.12(4) and (5) above.

[3] Counsel for the Claimant Mr. John Carrington filed a schedule of costs on 23rd November 2009. The Learned Attorney General Justin Simon QC responded with his objections by submission on the 19th January 2010 and a reply was filed by Mr. Carrington on the 16th February 2011. I pause at this time to apologize to Counsel and the Parties for the length of time this matter languished in the Court Office without a hearing due until 24th February 2011 when it was brought to my attention. Even after that hearing and despite repeated requests, it appears that the Court Office had difficulty in locating the submissions necessary to the hearing resulting in the hearing taking place on 20th January 2012.

[4] There is no dispute that Interlocutory hearings and directions before the Board took place between May 2008 and July 2009 when it culminated in a hearing which took place then. The hearings were attended by Mr. John Carrington and Ms. Stacy Richards-Anjo as junior counsel. It is appropriate to mention that Mr. Carrington normally practices in the British Virgin Islands and travelled in for the various hearings when necessary. Mrs. Richards-Anjo, who practices in Antigua and Barbuda, necessarily handled all the necessary filings and documentation and took instructions from Mr. Carrington.

Disbursements

[5] Firstly, it is noted that there was no objection to most of the disbursements claimed. Those that were objected to are in reference to Counsel Mr. Carrington's Brief fees in the sum of US$130,00.00 and the disbursements for filing of closing submissions in the sum of US$785.00 for which no bill was provided.

[6] Counsel Mr. Carrington referred to the case of Finecroft Limited v Lamane Trading Corporation BVIHCV2005/0264, and states Hariprashad-Charles J was very clear as to the position of not only that foreign solicitors charges were taxable as disbursements but also that the disbursements were to be calculated at the proper rate of charge in the country concerned. She agreed with Lord Diplock in McCullis v Butler (1961) 2 WLR 1011 when he stated;

> "*I should add that, just as in the case of foreign lawyers, the proper amount to be allowed for disbursements is the proper rate of charge in the country concerned, in this case Scotland, for the necessary services the agent employed."*

Hariprashad-Charles J also added;

> *"It is clear that a foreign solicitor, employed in the circumstances in which Skadden Arps were employed in this case, must be treated, for the purposes of taxation, simply as a foreign agent, and the charges incurred by these solicitors are charges properly taxable as disbursements in the ordinary course. The appropriate head to claim such fees is under disbursements."*

[7] The question of whether Mr. Carrington's fees are properly included in a schedule of costs as a disbursement is necessarily one that I must consider. A reading of the authorities above makes it clear that the inclusion of foreign solicitors' fees as disbursements was contingent on the basis that it was their expertise on matters of foreign law and services provided which were relied on in the determination of the substantive matter. This was indeed the situation in the Finecroft case referred to above where Skadden Apps played a co-coordinating role in a multi jurisdictional matter to avoid duplication of work and resources. In addition in to this, there was clear provision for London Counsel's fees which were clearly not considered as disbursements.

[8] Although Mr. Carrington normally has his practice in Tortola, he is a member of the Bar of Antigua and Barbuda as well as other jurisdictions of the Eastern Caribbean Supreme Court. Mr. Carrington clearly had the conduct of these proceedings and did not act in any other capacity but as solicitor for the Claimant in the arbitration, he was not a foreign solicitor who could claim that his participation in the proceedings was to offer an expertise to allow him to claim his services as a disbursement. In my opinion the appropriate manner to have his costs assessed would be by way of itemized billing.

[9] I am buttressed in my analysis by the words of Hariprashad-Charles J in Michael Wilson & Partners Limited v Temujin International Limited et al BVIHCV2006/0307;

> *"The mere fact that the litigation has an international dimension and the parties instruct lawyers in other jurisdictions does not mean that all the work done by those foreign lawyers are properly disbursements on a solicitor's bill and recoverable as such in the proceedings in England (or the BVI). The English (and the same is true in the BVI) courts are very familiar with commercial proceedings which have an international dimension. The cost of instructing foreign lawyers would not be recoverable as a disbursement item unless the services of the foreign lawyer could genuinely be characterized as of an expert nature. So, if issues of foreign law were involved the costs of instructing a foreign lawyer as an expert would be recoverable"*

In the circumstances, the amount claimed by Mr. Carrington as disbursements, such comprising amounts as Counsel's brief fees and appearing at hearing of the assessment are disallowed as

disbursements and will have to be calculated as professional fees. I have no difficulty in accepting Counsel agreed on the fees and travel expenses of the expert witnesses in the sum of $40,450.00. The Claimant has provided no bill for the sum of US$785.00 claimed for reviewing and filing of written submissions of the Claimant. I would have expected this review to be included in the costs claimed for professional fees as done with all the other filing and reviews submitted in the bill of costs. No reason is offered for why it is to be treated differently and as such that sum is not allowed. All other disbursements are allowed including those without challenge as follows;

(a)	Item No 1	US$	136.60
(b)	Item No 3		331.18
(c)	Item No 4 – travelling expenses		400.00
(d)	Item No 8		450.00
(e)	Item No 18		1593.73
(f)	Item No 20 – travelling expenses		1200.00
(g)	Item No 23 – expert witness's fees		38400.00
(h)	Item No 24 – expert's travelling expenses		2050.00
	TOTAL		US$44,561.51

Professional fees

[10] The professional fees are assessed taking into consideration the bill of costs submitted showing the amount the court is being asked to assess and how the sum was calculated. It would have been a more difficult exercise had Counsel for the Defendant's main objection not been essentially limited to Junior Counsel's hourly rates of US$400.00 an hour. In Antigua and Barbuda, I would have difficulty in assessing that an hourly rate is in excess of EC$1,000.00 per hour. I agree with the Attorney General's submissions that this amount is excessive and although the Learned Attorney General has not provided any comparators, I agree that the fees charged should be at rates reasonable for and appropriate to counsel at the Utter Bar of Antigua and Barbuda. My experience in this jurisdiction makes me comfortable in allowing the sum of EC$550.00 as a more appropriate hourly rate for Counsel of 18 years call. I am also of the opinion that to disallow any

fees for Mr. Carrington on the basis that they were listed as disbursements would be unfair and as such I will place reliance on the hours billed by junior counsel where appropriate with an hourly rate of $750.00.

[11] Generally, I did not find anything inordinate in the hours spent in preparation and conduct of this matter and the Attorney General's concerns were primarily about the rate of the professional fees claimed. I daresay that had it been any more complicated, it would necessarily have to be an exercise carried out by the judicial officer with the conduct of the proceedings. I did however agree with the Attorney General's objections to Item 20 in the sum of $12,000.00 for junior counsel's preparation for and attendance at hearing of the Assessment. Counsel indicates that this figure includes work done during the trial and work outside consisting of reviewing evidence, further cross-examination and re-examination. Inasmuch as I recognize junior counsel's role in assisting counsel with conduct of the matter, especially when counsel is coming from abroad, I cannot but observe that most of this work would be within the province of the counsel with conduct of the matter. I will allow 10 hours at EC$550.00 under this head for junior counsel in the sum of EC$5500.00 and 30 hours for Mr. Carrington at the rate of EC$750.00 per hour in the sum of EC$22,500.00. I also think that 5 hours for preparing bundles for the assessment is a long time and would reduce that time to 3 hours as more acceptable.

[12] Taking into account the changes I have ordered above I calculate junior counsel's fees at 97 hours at EC$550.00 per hour to total EC$53,350.00 and Mr. Carrington's fee at 117 hours at EC$750.00 per hour to total EC$87,750.00. Sales tax on the total professional fees of EC$141,100.00 at 15% as claimed is CE$21,165.00.

[13] In conclusion, it is that officer who would have been privy to the manner and conduct of the proceedings including the time spent on pursuing allegations and the reasonableness of such pursuit, factors which are necessary in determining whether any or all of a party's costs should be allowed.

In Norgulf Holdings Limited v Michael Wilson and Partners Ltd (BVIHCV2006/0307) Hariprashad-Charles J had this to say:

"Since the parties have not agreed on costs, it falls upon the Court to do an assessment. From the outset, I state that this Court is familiar with the matter, having made the ex parte application to appoint receiver on 29 March 2007 and having dealt with all subsequent applications including the application to strike out the action. It follows therefore that CPR 65.12(2) has been complied with since the assessment must be carried out by the judge who heard the proceedings"

Lord Carswell in Blakes Estate Ltd v Government of Montserrat Privy Council 24 of 2009, agreed that the Lands Tribunal practice in relation to costs did not differ from that applied in the courts, stated as follows;

"The Court of Appeal went on to consider the facts of the case and concluded that the claimant had relied on expert evidence which should have been recognized as unreliable, and that the decision to rely on that evidence had led to the waste of substantial time and expense. It accordingly affirmed the decision of the Lands Tribunal allowing the claimant only three quarters of its costs.

…. A claimant should prima facie be entitled to his full costs of preparing and presenting his claim. The Board of Assessment's discretion to reduce the award from the payment of full costs should be exercised judicially. If it holds that the claim was grossly excessive, it is necessary for the Board then to inquire whether the exaggeration gave rise to an obvious and substantial escalation in the costs over and above those which it was reasonable for the claimant to incur. If it is satisfied that this was the case, then it is open to the Board to exercise its discretion to deprive the claimant of part of his costs. The amount of departure from full payment of the claimant's costs should be proportionate, having regard to the amount of waste of time and costs properly attributable to the claimant's acts or omissions".

[14] In summary, the Order of the Court is as follows;

(a) Disbursements are assessed in the sum of US$44,561.51

(b) Professional fees are assessed in the sum of EC$141,100.00 with sales tax of EC$21,165.00.

MASTER CHERYL MATHURIN