TERRITORY OF ANGUILLA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO AXAHCV2008/0035

BETWEEN:

ELFRIDA ALETHEA HUGHES

Claimant

AND

CLIVE HODGE
As ADMINISTRATOR OF THE ESTATE OF RUPERT HODGE, deceased

Defendant

Appearances

Ms Kristy Richardson holding for Mrs Tara Ruan of Caribbean Juris Chambers for the Claimant
Ms Jenny Lindsay of Jenny Lindsay and Associates for the Defendant

……
2011: September 27
2012: June 11
……

ASSESSMENT OF COSTS

## Introductory and background

[1] LANNS, M: Despite their efforts to negotiate a settlement of costs, the parties failed to settle, and thus, the assessment of costs falls to be considered by me on the written and oral submissions of the parties.

[2] A short background to the assessment of costs as gleaned from the filings is as follows: The Claimant is the paternal Aunt of the Defendant. The Defendant is the Administrator of the Estate of his father Rupert Leopold Hodge, deceased.

[3] On the 5th June 2008, the Claimant issued a Claim Form and Statement of Claim seeking a Declaration that certain property at West End belongs to her. The property is identified as Parcel 196, Registration Section West End, Block 17709B. The Claimant also claimed

mesne profits of US48,000.00 and interest pursuant to section 35A of the Supreme Court Act 1981, costs and further or other relief.

[4] On even date, the Claimant also filed an application for substituted service and for leave to serve the Claim Form and Statement of Claim out of jurisdiction in the United Kingdom. Leave was granted for service out of the jurisdiction by electronic mail.

[5] An Affidavit of Service of the Claim sworn by Patricia Hodge was filed on 27th March 2009. It revealed that Mr Hodge had acknowledged service (via email), of the Claim Form and Statement of Claim and attachments on 4th July 2008. However, no Acknowledgement of Service or Defence having been filed, the Claimant applied for and obtained Judgment in Default for failure to file an Acknowledgement of Service or Defence on 27th March 2009. According to the Defendant, he received the judgment "on or about 21st September 2009".

[6] It turned out that the order granting leave to serve the Claim and Statement of Claim outside the jurisdiction was defective. Such order and subsequent service ran afoul of CPR 7.3 (2) (a) and CPR 7.5 of the Civil Procedure Rules 2000.

[7] On 11th November 2009, the Defendant through his newly retained counsel, Jenny Lindsay & Associates, filed an application asking for the following reliefs:

1. That the Claim Form and Statement of Claim be struck out for want of service;

2. In the alternative, that the Court exercises its inherent jurisdiction to set aside the Judgment in default on the basis that Judgment in Default was erroneously entered.

3. In the alternative to relief in [1] above, that the Defendant be given leave to defend the Claim with following directions;

    (a) The Claimant do serve the Claim Form…;
    (b) The Defendant do file and serve the Acknowledgement of Service, and thereafter the Defence;
    (c ) The Claimant do file and serve a Reply

4. The monthly rents and / or profits paid into the escrow account be made subject to a preservation order;

5. The Claimant and/or agents and /or servants do provide full details of the bank account and sort code where monthly rents were paid into escrow;

6. The Claimant and /or agents and /or servants do provide a full accounting of the monthly rents and /or profits paid into escrow together with interest accruing on the total monthly rents and /or profits paid;

7. The Respondent/Claimant shall pay the Applicant/Defendant's costs of and incidental to the Application.

[8] The application came on for hearing on 8th February 2010 before another Master. Mrs Tara Ruan and Mr Jonel Powell appeared for the Claimant, and Mr Mark Brantley of Counsel appeared for the Defendant. The result of the application was a consent Judgment in the following terms:

> "UPON hearing Counsel for the Claimant and Counsel for the Defendant
>
> IT IS ORDERED BY CONSENT as follows:
>
> 1. The Default Judgment entered herein on the 27th March 2009 is set aside;
>
> 2. The Claim Form and Statement of Claim filed on the 5th day of June 2008 are struck out for want of Service.
>
> 3. Costs to the Defendant to be assessed if not agreed.

What is the effect of the Consent Order

[9] The practical effect of the striking out of the Order is that there could be no basis for the entry of default judgment. The default judgment was first set aside and service of the claim was not validated. At the date of the Order, the Claim Form had expired. To extend the validity of the Claim Form required the filing of an application before the expiration of the validity of the Claim Form. The validity of the Claim Form expired on or about 5th June 2009 - about five months before the application to strike was filed.

[10] The consent order did not determine the substantive matter. The claim was not struck out as disclosing no reasonable ground for bringing the claim. It was not determined on its merits. It means that once the limitation period has not yet passed, the Claimant can put in the claim again. But so far as the Claim Form and Statement in this matter are concerned, they have been struck out. If a similar claim is commenced, the court office will be obliged to assign a new number and create a new file. However, rule 26.3 (2) will kick in. It states that if the court has struck out a claimant's statement of case; the claimant is ordered to pay costs to the defendant; and before those costs are paid, the claimant starts a similar claim against the same defendant based on substantially the same facts; the court may on the application of the defendant stay the subsequent claim until the costs of the first claim has been paid.

[11] It is arguable then that this particular claim has been effectively discontinued or concluded with the consent of the parties. The parties agreed that costs were to be assessed if not agreed. The order does not reflect that the parties agreed, or that the court identified the

rule that is to be applied to the assessment. There is now a dispute as to whether costs should be assessed under CPR 65.11 or 65.12.

[12] The parties filed submissions pursuant to the order of the Master, and both parties addressed the court briefly. Both parties examined and discussed the provisions of Part 65 of the CPR 2000, and cited cases which examine and interpret those provisions.

## The submissions

[13] The parties are not in accord as to which is the applicable rule. The thrust of the Defendant's submissions advanced by Ms Lindsay was that costs should be prescribed costs to be assessed pursuant under rule 65.12. She insists that the application before the Master was not a procedural application. The costs to be quantified are not costs of the application to strike out the Claim alone; they are the costs of the entire action, because the action was brought firmly to an end by the application to strike, counsel submitted. Counsel was adamant that the value of the claim should be set at EC$4,168,050.00, - the value of the subject land, adding that based on the formula set out in CPR 65.5 Appendices B and C, the costs to the Defendant amount to EC144,114.15.

[14] Ms Lindsay placed heavy reliance on the following cases

1) Norgulf Holdings Limited Incomeborts Limited v Michael Wilson & Partners Limited, British Virgin Islands Civil Appeal No 8 of 2007;

2) Michael Wilson and Partners Limited v Temujin International Limited et al, Claim No BVIHCV2007/307; and

3) Extracts from Cook on Costs

[15] Mrs Ruan, on the other hand takes the position that the costs should not be prescribed costs to be assessed. Rather, costs should be assessed under CPR 65.11. She submitted that the Defendant is entitled to costs on the application only. She urged that the court should allow "a modest amount of costs". It was counsel's further submission that the court should consider that it was the court that formed the view that the requirements for service had been satisfied, and granted the order which was obeyed by the Claimant.
Mrs Ruan pressed the court to look at the involvement of the Defendants in the proceedings. This involvement she stated to be:

(a) Filed Affidavit and Application on November 11, 2008
(b) Instructed his solicitor to appear before Master Lanns on 14th December 2009;
(c) Instructed solicitor to file submissions on 5th February 2010;
(d) Instructed his solicitor to attend court on 8th February 2010

[16] Counsel placed reliance on the case of Pacific International Sport Clubs Ltd v Commercial Limited Claim No BVIHCV2005/070. She submitted that the consent to strike out was similar to the Claimant discontinuing the claim in the Pacific case wherein the court was unable to value a claim and ordered $1000.00 on the application to discontinue. Counsel also relied on certain passages in the judgment in Michael Wilson and Partners Limited, v Temujin International Limited et al, supra. As to the value of the claim, counsel was of the view that the value attributed to the claim is unsubstantiated and excessive given the circumstances of the case. I think it is fitting to look at the discourse as presented by Barrow JA on the assessment provisions of the CPR 2000.

Assessment under the provisions of the CPR 2000

CPR 65.11

[17] In Nugolph Holdings Limited and Michael Wilson and Partners Limited British Virgin Islands Civil Appeal No 8 of 2007, Barrow, J.A. made a close examination of the cost provisions under CPR. In relation to rule 65.11 he stated at page 5:

> " a good starting point for appreciation of 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 a case management conference, pre-trial review or at the trial the court must decide which party should pay them, assess the amount of such costs; and direct when they are to be paid.

[18] His Lordship continued:

> "…Paragraph (4) of rule 65.11 again applies to applications generally … in stating that when the court assesses the amount of costs the court must consider time reasonably spent in making the applications and preparing for and attending the hearing. The second part of this paragraph is even of more general application, in stating that the court must allow such sum as it considered fair and reasonable.
> 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".

[19] In summarizing the broad objective of the rule, His Lordship stressed that the rule applies to applications generally except for two categories - those applications that are made at a case management conference, pre-trial review and trial. The other category of applications being applications to amend, to extend time and applications for relief from sanctions and applications that could be made at case management conference or pre-trial.

[20] His Lordship went on to emphasize that "…the object of the rule is to establish a norm that the court hearing an application "must" decide the issue of costs, including who is to pay,

how much, and when. Notably, the rule 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 the application.

CPR 65.12

[21] Having examined rule 65.11, Justice of Appeal Barrow then went on to examine the other rule that deals with assessment of costs that is, rule 65.12.

[22] After setting out the provisions of rule 65.12, His Lordship sets out the amplitude of its operation by stating at page 6, paragraph 14:

"… Rule 65.12 complements and overlaps rule 65.11 but it is much broader in scope. Rule 65 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 "proceeding", both terms of art together extend the rule to virtually every proceedings that could come before the court….the rule covers applications generally which are necessarily part of proceedings, save for procedural applications which are specifically excepted. Put another way, by excluding procedural applications, the rule applies to all other applications".

[23] In Norgulf Holdings, the purpose of rule 65.12 was said to be "the established 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: At page 9, His Lordship noted that

> '… 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 the proceedings….It is only when the assessment is not carried out "at the hearing of any proceeding" (r 65.2 (2) and (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 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 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.

Which is the applicable rule?

[24] Notwithstanding the guidance provided in the above mentioned cases, this question has beset out courts to the extent that we have been very inconsistent in the practice and application of costs under the CPR, and as Joseph-Olivetti J puts it in Pacific

International Sports Club Ltd v Comerco Commercial Limited et al, BVIHCV2005/070 "we run the real danger of issues of costs using up more resources than substantive issues."

[25] In Michael Wilson & Partners ltd v Temujin International Limited et al – Claim No BVIHCV2006/0307 – British Virgin Islands, Her Ladyship, Madame Justice Indra Hariprashad-Charles, faced with challenges similar to those with which I am now faced, and after examining rules 65.11 and 65.12 took the view that "there is a very thin line between CPR 65.11 and CPR 65.12. While they overlap and complement each other, it is still very difficult to determine the precise relationship between the two because of CPR 65.12 (1) which provides that "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."

[26] And in IPOC International Growth Fund Limited v LV Finance Group – Claim No BVI HCV2003/0140 Master Mathurin, faced also with similar challenges, concluded that "The distinguishing feature between the two Parts for the purposes 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". In the end, the Master found that

> "All applications in the high court which did not decide the substantive issue and which were not determined at case management conference or pre-trial review or trial, are applications in which the costs fall to be decided under 65.11…"

[27] Challenges were also faced by Her Ladyship, Madame Justice Rita Joseph-Olivetti, in Pacific International Sports Club Ltd v Comerco Commercial Limited et al, supra. There, the learned Judge found it necessary to say "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 upon which one should quantify costs on discontinuance where the claim is for a non monetary claim and or includes a claim for damages which are not specified."

[28] In the instant case, it is clear from a review of the filings that Ms Lindsay herself was faced with challenges as to what is the proper method of quantification to apply. This can be inferred from the number and variation of costs schedules filed on behalf of the Claimant. There were three of them. I address them below.

[29] I am not persuaded that the prescribed costs regime suggested by Ms Lindsay is applicable. Even if I thought it were applicable, I would be minded to set the value of the claim at $50,000.00 in accordance with CPR 65.5 (2) (b) (iii) since the main relief sought was a Declaration of ownership of disputed land. This view appears to be consistent with the approach taken by His Lordship Alleyne, JA [AG] in the case of Ernesto Sorrento v Peter Clarke and Teresa Clarke Civil Appeal No 19 of 2005. One of the questions the

court had to decide in that case was whether the learned Master was wrong in determining the value of the claim on the basis of the value of the land.

[30] The claim in that case was for special and general damages and for injunctive relief. The counter claim was also for damages, a declaration of title and injunctive relief. The court held that the claim and counterclaim potentially fell under Part 65.5 (2) (b) (iii) in so far as they were claims for injunctive and declaratory relief. Alleyne CJ [AG] opined at paragraph [18] that

> "The proper basis for determining the value of the claim in the circumstances of this case is rule 65. 5 (2) (b) (iii) whereby a value of $50,000.00 is derived. I would allow the appellants appeal on this ground."

[31] It is my view that to proceed in accordance with the submission of the Defendant's counsel to set the value of the claim at EC$4,168,050.00, - the value of the subject land, would give rise to a most disproportionate and unreasonable sum contrary to the overriding objective of the rules. In the words of Sir Dennis Byron, Chief Justice as he then was, "the overriding objective requires the court to deal with cases in ways which save expense and which are proportionate to the nature of the case." (See Costs under CPR 2000, 24th February 2002).

[32] I am of the view that given the nature of the application that was before Master Mathurin, and the grounds upon which it was decided, the costs suggested by Claimant's counsel do not further the objective of proportionality.

[33] In Peter Maxymych v Global Convertible Megatren Ltd and Anor Claim No 246 of 2006, Olivetti J referred to the Privy Counsel decision in Horsford v Bird 43/2004 (28the November 2006), for the principle that no party can be expected to be fully indemnified for his costs; he is only entitled to reasonable costs.

[34] In Horsford v Bird supra, Lord Hope of Craigshead stated:

> "It has to be borne in mind in judging what was reasonable and proportionate in this case, that the basis of the award was not that the appellant was to be indemnified for all his costs. The respondent was to be required to pay only such costs as were reasonably incurred for the conduct of the hearing before the judge and were proportionate."

[35] The hearing before the Master was an application for an order striking out the claim for want of service, or in default, an application for an order setting aside the default judgment and for an extension of time to file a defence.

The Defendant's Schedules of Costs

[36] As stated before, the Defendant filed three schedules of costs. Mrs Ruan examined each of them but her objections seem to have been focused primarily on the third schedule.

She says that overall the Bill of costs is inflated and embellished. So far as Ms Ruan is concerned it is wholly unreasonable for that level of costs to be incurred on an application to strike out, or to set aside a default judgment on a point of law that service was defective, and in circumstances where the court formed the view that the requirements for service had been satisfied, and had granted the order which was obeyed by the Claimant. In counsel's view it was unnecessary to retain overseas counsel.

[37] Ms Lindsay's defence of schedule 3 span 36 pages plus exhibits. It is impracticable to reproduce them here. They can be summarized thus:

a) Counsel Mr Mark Brantley had been fully briefed prior to travelling to Anguilla on 7th February 2010 for the hearing of the application

b) The assistance of junior counsel, Ms Dahlia Joseph of Daniel Brantley & Associates was necessary, and was properly billed for.

c) Claimant's Counsel agreed to the assessment of costs

d) The claimant had every opportunity to settle the matter;

e) The application was formulated speedily and an urgent hearing was sought;

f) Judgment was obtained by the Claimant in questionable circumstances without personally serving the pleadings or orders on the Defendant overseas.

g) By December 14, 2009, the Claimant should have been seriously considering her position in an effort to settle the matter to prevent further costs;

h) The Claimant refused to give the Defendant a copy of the land appraisals, although she was obliged to disclose it;

i) To date, the claimant's legal practitioner has refused to accept responsibility for failing to settle the matter. She made no proposal to keep the costs to a minimal;

j) Claimant failed to present the value of the property in her claim although rule 8.7 requires it;

k) The matter is important to the Defendant. He is being sued by his aunt and father's sister in a family estate matter. If the judgment was not set aside, this would have caused irreparable irremediable and significant damage to the Estate of the Defendant's father, and the beneficiaries of the estate;

l) The case is novel and complex on account of the factual matrix; the peculiar pleadings which fail to disclose material facts and by their nature strived to make a case which would result in alleged theft and fraud on the estate of Rupert Leopold Hodge, deceased;

m) The case is about a sophisticated attempt by the administrator of an estate to commit fraud on the estate of one of the lawful beneficiaries after his death;

n) The general approach had the rule the one tenth rule attached to this assessment the prescribed costs value of EC$4,168,049.67 would entitle the Defendant to up to EC$416,805.00 or UD$150,000.00. A full scheduling outlining how the amount has been arrived at has been provided.

o) The assessed prescribed costs is EC$143,488.00, or UD$52,945.00, an is entirely reasonable given the unique circumstances of the case;

p) The Norgulf case is applicable here. That action was brought to an end by an application. Costs were assessed at US917,883.69 or EC$2,467,317.80. The claim for costs included fees incurred by London solicitors;

q) The Pacific case is distinguishable on its facts. The costs order was made on the discontinuance order only. There was no costs schedule before the Learned Judge;

r) The letters and briefs to counsel were valid costs; travelling and waiting fees are recoverable;

s) The application brought the matter to an end. Schedule 3 deals with the actual costs to the Defendant. The schedule is reasonable. It is not embellished.

[38] The court is in agreement with Ms Ruan that the application before the Master on 8th February 2010 was a procedural application, the assessment of which is governed by CPR 65.11. Accordingly, I am unable to agree with Ms Lindsay that the assessment should proceed under CPR 65.12. In the circumstances, I am content to determine the costs of the application under CPR 65.11 on the basis that the application before the court did not decide the substantive issue. Nor was it determined at a Case Management Conference, pre-trial review or trial.

[39] I find support for my decision in CPR 65.11 which reads:

> "65.11 (1) On determining any application except at a case management conference, pre-trial review or 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 consideration 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 an act under these Rules or an order or a 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 the 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 the court and 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 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."

[40] As can be seen, the rule sets out two categories of applications that are excluded from 65.1, and as His Lordship Barrow J.A. noted in Nugolf, it makes the amount of costs 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.

[41] I turn now to look at each schedule or statement of costs.

First Schedule/Statement of Costs

[42] On 5th February 2010, the Defendant filed a document headed "Defendant's Skeleton Submissions in support of the Defendant's Notice of Application dated 11th November 2009 to strike out Claim Form and, in the alternative to set aside Default Judgment".

[43] At paragraph 12 of those submissions the Defendant stated that the entire cause has been struck out and thus the Defendant is entitled to 70 per cent Prescribed Costs of the value of the claim pursuant to Part 64.6, 65.11 and 12 (1). She further stated that Appendix C is applicable as the matter proceeded to Case Management Conference. It was counsel's further submission that under Appendix C, the sum of EC$20,553.72 is payable as costs to the Defendant, otherwise 60 per cent Prescribed Costs up to Default Judgment in the sum of EC$17,614.47. Counsel was of the view that failing those two submissions, costs should be assessed as fit for two counsel, given the complexities of the facts of the case and the investigations that had to be undertaken.

Schedule 2

[44] On 28th April 2011, the Defendant filed a document headed "Schedule for Assessment of Costs in support of Notice of Application dated 11th November 2009". There was a note indicating that that Schedule was filed in compliance with Master's order dated 8th February 2010. The Claimant preceded the Schedule of Costs with a brief background and chronology up to the entry of Default Judgment and a letter from the Registrar of Lands to Defendant's counsel informing of the default judgment, among other things, and suggesting that the Claimant is the rightful owner of the disputed land.

[45] Having set out the background and chronology, Defendant's counsel then stated as follows: "Value of the Claim must include the value of the property for which the declaration was sought together with the other relief as set out in the Claim Form is EC$4,168,049.67,

having applied a very modest estimate value of US$1,500,000.00 for the property situated in West End."

[46] The Defendant's counsel then proceeded to set out the formulae as set out in Appendix B – Scale of Prescribed Costs, and computing 60 per cent of the figure said to be the value of the subject property to arrive at a cost of $144,114, 14 purportedly due to the Defendant.

Schedule 3

[47] On June 1, 2011, Claimant's counsel filed another document headed "Schedule of Costs in Support of Notice of Application dated 11th November 2009". There is also under this heading a note similar to the one in Schedule 2, to the effect that that Schedule was in compliance with "Master's Order dated 8th February 2010".

[48] The background and chronology which precedes Schedule 3 are identical to that in Schedule 2 – but not the Schedule itself. Schedule 3 is different. Of interest, is that Schedule 3 does not include or repeat anything that had been stated in Schedules 1 and 2. Of interest too, is the fact that Schedule 3 comprises an itemized list of costs and disbursements for three fee earners, namely, Jenny Lindsay, Mark Brantley and Dahlia Joseph. In Schedule 3 the Defendant claims EC$ 143,488.00 - the same region of costs as in Schedule 2 ($144,114.14). Schedule 3 covers the period 14th September 2009 to 31st May 2011.

[49] It was during the course of her oral arguments and submissions that Ms Lindsay informed the court that she was relying on Schedule 3; so the court disregards Schedules 1 and 2. Mrs Ruan, while disputing that prescribed costs apply, made certain submissions on the Schedule of Costs produced by Ms Lindsay.

Fees to Mr Mark Brantley

[50] The total sum of $5,236.40 is claimed for Mr Mark Brantley for the following: $1000.00 for travelling to Anguilla; $1200.00 for travelling, waiting, and pre and post discussions with Claimant; $80.00 for prepping file; $25.00 for telephone and email; $1500.00 for airfare $686 for hotel; $45.00 for car rental.

[51] Mrs Ruan is of the view that it was unnecessary to retain overseas counsel for the hearing of the application, as there was no technical issue of foreign law involved as would be required in commercial cases. The matter was simply a matter of determining whether service of a claim form and statement of claim had been properly effected under the laws of the jurisdiction in which the claimant sought to serve the claim. She does not agree that the matter was complex and that there was any basis for instructing overseas counsel and soliciting their time in the matter.

[52] Ms Ruan submitted that the costs are unjustified and unreasonable and the disbursements are not supported by any evidence. I agree.

[53] In my judgment, this application could have been done by Ms Lindsay. I do not think it necessitated bringing in a lawyer from overseas. However, in deference to Mr Brantley, I think he was instrumental in curtailing the time that may otherwise have been spent at the hearing of the application, had he not attended to present the application.

[54] As to the travel/airfare costs, there seems to have been a duplication here, and while there is an explanation in respect of the $1000.00, for travelling to Anguilla, there is no explanation in the narrative in respect of the $1500.00 claimed for airfare. I disallow the $1500.00 claimed for airfare. This reduces the amount claimed for Mr Brantley to $3736.00.

Dahlia Joseph

[55] The sum of $3,492.00 is claimed for Dahlia Joseph as follows: US$$27.50 for letter from Daniel Brantley & Associates; US$687.50 to peruse file; US$137.50 for email to Jenny Lindsay; US$137.50 for speaking to Jenny Lindsay and responding to email; US$55.00 for speaking with and emailing Jenny Lindsay; US$1925.00 for preparation of submissions; US$165.00 for liaising with Jenny Lindsay; US$357.00 for perusing draft affidavit and forwarding comments via email.

[56] Ms Ruan complains that the costs claimed for Ms Joseph are duplicative. She complains that Ms Joseph has never appeared, yet there is time billed for her. In my judgment it was unreasonable to incur that amount of costs in relation to the application that was before the court. I find that these costs are duplicative and excessive. I reduce them to US$1500.00.

Jenny Lindsay

A. Letters/ written correspondence

[57] Ms Lindsay has claimed for herself the following: The sum of US$6993.00 for a plethora of correspondence, being eighty two (82) letters to various persons including, the Registrar of Lands; the Registrar of the High Court; Daniel Brantley & Associates; the Defendant; Surveyors; Claimant's counsel;

[58] Mrs Ruan is of the view that this sum is unreasonable for an application to strike. She pointed to entry No 21 which is a claim for US$2800.00 for instructions to Daniel Brantley & Associates, submitting that it is duplicative and excessive. She also pointed to entry No 65 which is a claim for US$2100.00 for Brief to Daniel Brantley Brief, submitting that this is also excessive and duplicative. She also submitted that it is apparent that some of these letters have nothing to do with the application to strike. I entirely agree. I allow US$2000.00 only.

B. Telephone calls

[59] There are thirty eight entries for telephone calls. Ms Lindsay has claimed for herself the sum of US$5460.00 for these telephone calls. These calls were apparently made to the same persons to whom Ms Lindsay had written letters. Curiously enough, there are entries for calls to witnesses, and to the ECSC Headquarters in St Lucia; to surveyor.

There are no particulars as to what these calls were about; or how long each call took. It is not clear why there must be a call to witnesses in relation to an application to strike out a claim, or to set aside a default judgment. I find that it was not necessary for Ms Lindsay to incur these costs on an application to strike. I am satisfied that they are excessive, unreasonable, and inadequately explained. I reduce them to US$1500.00.

C. Preparation

[60] Ms Lindsay has claimed the sum of US$30,000.00 for preparation. There are forty entries under this item. Mrs Ruan complains that this sum is grossly excessive and should be reduced, because many of these entries had nothing to do with the application before the court. I totally agree. Mrs Ruan specifically pointed to the claim for US$7200.00 for working instructions to counsel. She says this sum is duplicative and excessive. It is apparent that many of the entries concern attendance at the Land Registry to conduct searches, etc. Notably, there are entries for seeing, speaking and taking statements from witness; preparing care taker/witness statement; perusing documents from surveyor. I find these costs to be excessive and unreasonable. I reduce them to US$10,000.00.

D. Court attendance

[61] Ms Lindsay has claimed for herself the sum of US$1390 for court attendance made up as follows: US$ 280.00 for preparation; US$200.00 for travelling; US$630.00 for waiting; US$200.00 for appearing in court for hearing on 14th December 2009; pre and post discussion with the other side.

[62] Ms Ruan complains that these costs are unreasonable and excessive and duplicative. She takes objection to the amount claimed for waiting. She is of the view that this claim should be disallowed. I find these costs to be excessive and lack particularity. I reduce them to $500.00

E. Disbursements

[63] The sum of US$1073.00 is claimed for disbursements for filing fees, Fed-Ex, Quik Pak, photocopies, travel trips to Registry, folders, dividers, stamps, bailiff; grant of probate, land certificates. Of the sum of US1073.00 claimed for disbursements, US$666.00 is claimed for photocopying.

[64] Ms Ruan complains that these costs are unreasonable and excessive, as the application before the court did not justify making so many photocopies. She also complains that the breakdown is inadequate. I am in no doubt that this submission is correct. I will allow US$500.00.00. I think this is reasonable.

Costs allegedly incurred on the Application for Assessment of Costs

[65] On 9th August 2011, the Defendant filed a document headed "Schedule of the Costs of the Application for Assessment of Costs" claiming a total of EC$9, 409.00 for attorney's fees

(charges for preparation and attendance) and disbursements of EC$242.00 (charges for photocopying, filing, local travel.

[66] Then on 9th September 2011, the Defendant filed a document headed "Amended Schedule of Costs" of the Application for assessment of costs" claiming a total of EC$12,232.00 as attorney's fees for preparation of submissions and court attendance, travelling and waiting and disbursements of EC$272.00 for photocopying, filings and local travel. There is no documentary support for these costs. There is a lack of particularity especially in relation to the attorney's fees. There are no fee notes or invoice. In order to determine if these fees are reasonable, a breakdown is required.

[67] I am satisfied that the Claimant is entitled to costs of the application for assessment. I assess those costs at US$1500.00.

[68] As I am determining the costs under CPR 65.11, I have to decide whether there are any special circumstances justifying the disapplication of the ten per cent cap imposed by rule 65.11 (7).

[69] The Defendant has been successful on his application to strike. He has also been successful on his application to set aside the default judgment. Although I am of the view that the Defendant added to the costs by the number of repetitious and unnecessary work billed for the specific hearing before the court, I am willing to accept that some preparation would have been required for the possible filing of a Defence in case he did not succeed on his application to strike out the Claim for want of service. On the other hand, I consider that the method of service used by the Claimant, served to bring the claim to the attention of the Defendant very quickly. He acknowledged receiving the email, but did not file an Acknowledgement of service; hence, the default judgment.

[70] I consider the fact that the Defendant took appropriate steps to secure a court order permitting her to serve the claim out of jurisdiction, albeit the order was defective. The Claimant complied with the court order specifying the method of service, and once the application came on for hearing, she conceded that the claim ought to be struck out for want of service, and that the judgment should be set aside, with costs to be assessed if not agreed. Perhaps she placed herself in a corner by not asking the Master to exercise her discretion under CPR 26.9 (2) and validate service as was done by Barrow J [Ag] in Transworld Metals S SA (Bahamas) et al v Bluzwed Metals Limited (BVI), Claim No BVIHCV2003,0179.

[71] Notwithstanding all these facts, I am content to refrain from imposing the cap.

## Conclusion

[72] In all the circumstances, I allow costs to the Defendant assessed in the amount of US$ 21,236.00 made up as follows:

| | | |
|---|---|---|
| i) | Fees to Mark Brantley | US$ 3,736.00 |
| ii) | Fees to Dahlia Joseph | US$ 1,500.00 |

| | | |
|---|---|---|
| iii) | Fees to Jenny Lindsay | |
| | (a) Correspondence | US$ 2,000.00 |
| | (b) Telephone | US$ 1,500.00 |
| | (c) Preparation | US$10,000.00 |
| | (d) Court Attendance | US$ 500.00 |
| | (3) Disbursements | US$ 500.00 |
| | Sub Total | US$19,736.00 |
| iv) | Costs of the Application for assessment of costs | US$ 1,500.00 |
| | Total | US$21,236.00 |

[72] The costs awarded are to be paid within one month of the date of delivery of this decision, or on a subsequent date as agreed by the parties.

[73] I would like to thank counsel for the parties for their assistance in this assessment.

Pearletta E Lanns
Master