IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
IN THE HIGH COURT OF JUSTICE
(CIVIL)

GRENADA

Claim Number: GDAHCV2008/0478

Between :

GINELLE JEROME

Claimant

AND

ERROL FELIX
ORAL NARINE
ALEX BAIN
(By his guardian ad litem, GRACE BAIN)

Defendants

Before:
Raulston Glasgow — Master

Appearances:
Celia Edwards Q.C along with Deloni Edwards for the Claimant/Respondent
Skeeta Chitan for the 1st Defendant
Alban John along with Thandiwye Lyle for the 2nd Defendant/Applicant
Cathisha Williams for the 3rd Defendant

2014: October 31;
December 15;
2015: January 29

ASSESSMENT OF COSTS

APPLICATION

[1] **GLASGOW, M [AG.]:** On June 20, 2014, his Lordship Cumberbatch J ruled that the action against the second defendant (hereinafter the applicant) should be struck out for failing to disclose a reasonable ground for bringing the action and that the continuation of the claim against the applicant is likely to obstruct the just disposal of the proceedings. In terms of costs, his Lordship ruled that the costs are to be determined by the master if not agreed by the parties. The parties have not arrived at any consensus on costs and as such the application has been made for me to assess the costs to be awarded.

RELEVANT FACTS

[2] On February 23, 2008, the applicant sold his car to the third named defendant. Two days later, he attended the Inland Revenue Department, Licensing Division to execute a transfer of the registration of the vehicle from his name to that of the third named defendant. The applicant requested that the third defendant attend the licensing department at the same time to effect the transfer but he did not appear. On February 26, 2008, the applicant surrendered his policy of insurance to the insurers of the vehicle. The policy of insurance was cancelled with effect from that date.

[3] On the very day when the applicant surrendered the insurance policy (February 26, 2008) and after he had signed a transfer of registration at the licensing division of the Inland Revenue, the claimant (hereinafter the respondent) was injured in an accident involving the said vehicle. A claim was filed against the applicant and the third defendant for the injuries and losses suffered by the respondent. On November 6, 2008 the applicant applied to strike out the claim as aforesaid. His Lordship Cumberbatch J found that the prima facie evidence of ownership by reason of registration was refuted by the evidence of the third defendant whereby he admitted in his defence that he had in fact purchased the vehicle from the applicant and had taken ownership of the same on February 23, 2008, (3) days before the accident. His Lordship found that on the day of the accident the third

defendant held the vehicle as owner. Accordingly, since the applicant had been divested of ownership of the vehicle, there was no basis for joining him as a defendant on the claim. The claim against him was struck out. He wishes the court to assess the costs as ordered by the judge. Curiously, the claimant disagrees that the applicant should be allowed his costs for the reasons set out herein below.

ARGUMENTS ON COSTS

[4] The applicant's position is that he is entitled to costs either granted in accordance with CPR 65.5 (prescribed costs) or costs as assessed in accordance with CPR 65.12. The respondent takes the opposite view. The respondent submits that this is not a proper case for the award of any costs to the applicant. Counsel for the respondent argues that if the court looks at the respondent's conduct throughout these proceedings it would be apparent that the respondent acted appropriately by bringing and maintaining the claim. In particular counsel observes that before filing the claim, the respondent *"did all in her power to ascertain ownership of the vehicles involved in the accident..."* The information received from the Inland Revenue Department advised that the applicant was the owner of the vehicle. The information showing transfer of the vehicle is dated after the accident. When the respondent received the applicant's defence, it averred a denial of ownership of the vehicle and exhibited a hand – written note signed by the third defendant and the applicant's son stating that the vehicle was sold to the third defendant. There was no evidence that the applicant's son was acting in a representative capacity. Additionally, the applicant exhibited to his defence the instruction to his insurance company dated February 26, 2008 advising them to cancel the policy of insurance.

[5] The respondent argues that none of the exhibits explained matters and were all in fact self serving. The respondent's position is that the Motor Vehicle Insurance (Third Party) Act sets out the definition of owner of a vehicle. The Act goes on to prescribe the manner in which the registration of such ownership was to be transferred to a purchaser of a vehicle. The statutory steps were not adhered to by the applicant and the third defendant. As such there was nothing that the respondent could have done to satisfy herself that anyone else but the applicant was the owner of the said

vehicle. Had the applicant done all the law required of him to do, the action would not have been brought against him. It would, therefore, be improper to order costs to be paid by her to the applicant. This reasoning was evidently scotched by the learned judge on the application to dismiss the claim against the applicant. Nonetheless, the respondent repeats these arguments on the application for costs to demonstrate that she acted reasonably in all the circumstances and that no one could fault her for bringing this action. In her view she utilised the correct approach in bringing this action and as such she should not be faced with a costs order if it turns that she was wrong. The court has a discretion not to award costs even where a party is successful and as such no costs should be awarded to the applicant even though he was successful on his application to be removed from the claim.

[6] I disagree with the respondent. The judge before whom the application to strike out was heard dealt with the issue of costs and made a specific ruling in respect thereof. He specifically ordered that costs were to be assessed by the master if not agreed by the parties. This, in my view, is a clear award of costs. The only matter remaining would be its quantification. If the sum is not agreed by the parties then I am to assess the same. Mitchell J.A in **Andriy Malitskiy and Igor Filipenko v Oledo Petroleum Ltd**[1] was confronted with the same arguments by the respondents on an assessment of costs following the dismissal of an appeal. On dismissal, his Lordship ordered costs to be assessed by himself if not agreed by the parties. There was no agreement on costs. At the hearing of the assessment, the respondents argued that the applicants should not be awarded costs for a number of reasons. The learned justice of appeal ruled that it was open to the respondents to argue before the court hearing the appeal that there should be no order as to costs. They did not do so and they could not re-argue the issue on the assessment hearing. It seems to me that the same reasoning applies here and even more forcefully. A judge of the high court has ruled on the issue of costs whereby he has ordered the master to make an assessment of the sum to be paid if not agreed. There is no authority in this court to order that costs should not be awarded.

[7] If I am wrong and the authority does exist for me to do what the respondent requests, I would still find that based on the facts of this case, costs should be awarded to the applicant. In that regard

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[1] 2013/0006 at paragraph 9

the applicant responds to the respondent's charge recited above and submits that the respondent did not act properly in this claim. Rather, the respondent forfeited a number of opportunities to either refrain from filing proceedings against the applicant or to withdraw the proceedings once they had been thus filed. In this context the applicant counters that in a pre-action letter he disclosed to the respondent that the vehicle had been sold by the time of the accident and that the insurance policy was cancelled concomitantly. Further, the applicant submits that the respondent was met with the pleadings of the third defendant who specifically stated that he had purchased the vehicle from the applicant before the date of the accident. A further opportunity to withdraw the claim against the applicant was again ignored by the respondent when she was confronted with the applicant's application to strike out the claim. Faced with all these facts, the respondent clearly did not act with reasonableness in persisting in her action. She has therefore failed to demonstrate that these are circumstances in which the court should not award costs to the applicant who is the successful party on his application.

[8] The general rule is that the successful party is entitled to his or her costs (CPR 64.6(2). In deciding who is liable to pay costs the court will consider all the circumstances of the case and will have regard, in particular, to the matters set out in CPR 64.6 (5) which states the following –

> *In particular it must have regard to –*
>
> *(a) the conduct of the parties both before and during the proceedings;*
> *(b) the manner in which a party has pursued –*
>
> *(i) a particular allegation;*
> *(ii) a particular issue; or*
> *(iii) the case;*
>
> *(c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings;*
> *(d) whether it was reasonable for a party to –*
>
> *(i) pursue a particular allegation; and/or*
> *(ii) raise a particular issue; and*
>
> *(e) whether the claimant gave reasonable notice of intention to issue a claim*

[9] CPR 64.6(5) therefore dictates that whether it was reasonable for a party to pursue a particular allegation or issue is only one of the matters that the court is enjoined to consider when determining which party is liable to pay costs. But even if this issue was the sole consideration in this case, I would be inclined to find against the respondent. As Cumberbatch J correctly pointed out, the registration of the applicant with the Inland Revenue Department as owner of the vehicle was *"only prima facie proof of ownership"*. This certification was stoutly refuted by the evidence that the vehicle was sold by the time of the accident, that the applicant had signed a transfer with the Inland Revenue Department and that he had applied for the cancellation of the insurance policy. I cannot agree with the respondent that she acted reasonably in the face of all this evidence which became available to her when the defence was filed. She took the view that the evidence exhibited to the defence was self serving and should be tested at trial. Even if it was felt that the applicant had fabricated a receipt and signed a transfer form after the accident, I cannot see how the respondent could have persisted in this disposition in the face of the evidence that the insurance policy was cancelled by the time of the accident. That the respondent may have taken the posture that something was awry with the applicant's evidence should not redound to her benefit if it turns out that she was wrong.

[10] I am confirmed in my opinion that the respondent is incorrect to assert that she acted reasonably in these proceedings when one considers the defence of the third defendant. His unequivocal defence that he purchased the vehicle on February 23, 2008 (3) days prior to the accident should have put to rest the debate raised by the respondent about the veracity of the sale transaction asserted by the applicant in his defence and exposed on the receipt attached to his defence. I cannot see how much clearer matters needed to be once the third defendant accepted that he had indeed purchased the vehicle prior to the accident. The respondent states in her submissions that she was cognisant of the terms of the third defendant's assertion of ownership very late in the day; her reply to the applicant's defence was filed before the third defendant filed his defence stating that he had purchased the vehicle and was in fact its rightful owner at the date of the accident. But what was done after receipt of the third defendant's defence? The respondent did not withdraw the action against the applicant in the face of an explicit assertion of ownership by the third defendant. Instead she persisted and vigorously defended the application to strike out the claim against the applicant. I find therefore that the basis on which the respondent has asked the court not to

exercise the discretion to award costs to a successful party has not been made out. The applicant is entitled to his costs which are to be quantified in the manner set out in CPR 65[2].

ASSESSMENT OF COSTS TO THE APPLICANT

[11] The respondent has not said much regarding the basis on which the court may quantify costs to be awarded to the applicant. As stated above, the respondent's position is that the applicant should not be awarded any costs. For the reasons stated above, I disagree with the respondent.

[12] In regards to the assessment of costs, the applicant argues that costs should be assessed as prescribed costs where the value of the claim is assessed and an award made based on the stage of the proceedings. I would assume that counsel refers to CPR 65.5. The applicant proposes alternatively that the court proceeds pursuant to CPR 65.12(4) to assess costs based on the bill set out in the application. I do not find the submissions made by the applicant particularly helpful. For one thing, CPR 65.7 (2) (d) expressly excludes an award for prescribed costs in respect of the *"the making or opposing of any application except at a case management conference or pre-trial review."* It is evident that the application to strike out was not made at a case management conference or pre-trial. CPR 65.7(2)(d) suggests that the court making the award would have to look at the other provisions on costs to determine the costs to be awarded in those circumstances.

[13] It seems to me that the assessment must proceed pursuant to CPR 65.11 or 65.12 which carry the appellation *"assessed costs"*. The process of deciding which one of those rules applies has been elsewhere described as, among other things, vexing[3] or besetting[4]. The task of assessing costs under these two rules should be infinitely more straightforward. The objects of the provisions are readily apparent. Where costs do not fall to be awarded as fixed or prescribed costs or where there is no costs budget, CPR 65.11 and 65.12 are enacted to offer guidance on how costs are to be

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[2] See Byron CJ (as he then was) in Rochamel Construction Limited v National Insurance Corporation Civ. App. 2003/0010 (Saint Lucia) for a useful discourse in the exercise of the discretion to award costs and an examination of the factors for the court's consideration

[3] Wallbank J in United Company Rusal Plc, Uninted Company Rusal Investment Management LLC v Corbierre Holdings Ltd and Raleigh Investments Inc Claim No. NEHCV 2011/0030

[4] Lanns M. (as she then was) in Elfrida Hughes v Clive Hodge Claim No. AXAHCV 2008/0035

assessed and awarded. For my part, I would think that the process may prove less arduous and time consuming if the assessment of costs was guided by one rule. A lot of time and expense is consumed in arguing about which rule applies even before getting to how much should be awarded as costs. I accept that it may pose immense difficulty to delineate all the circumstances to which an assessment of costs should apply under a single rule but the guiding principles and the procedure can be enacted.

[14] As matters stand, assessments of costs are not that straightforward. A plethora of cases have provided guidelines on how the court ought to assess costs pursuant to CPR 65.11 and 65.12[5]. I find the principles enunciated by Barrow J.A in the case of **Norgulf Holdings Ltd and Incomeborts Ltd v Michael Wilson & Partners Ltd**[6] to be particularly helpful to this process. His Lordship explained CPR 65.11 in this manner –

> *"A good starting point for appreciating this rule is not to be misled by its heading. The rule clearly applies to more than just procedural applications because paragraph (1) of the rule says that "on determining any application" other than at a case management conference, pre-trial review or at the trial, the court must: decide whether to award costs of that application and which party should pay them; assess the amount of such costs; and direct when they are to be paid. These are decisions the court must make for applications generally, and not just for procedural applications..."*
>
> *"The rule applies to all applications except for two categories of applications. One category consists of those applications that are made at a case management conference, pre-trial review and trial. There are specific rules that apply to such applications and hence they are excluded. The other category of applications to which rule 65.11 does not apply consists of the specific applications listed – to amend, to extend time and to obtain relief from sanctions – and applications that could have been made at case management or pre-trial*

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[5] See for instance Norgulf Holdings Ltd and Incomeborts Ltd v Michael Wilson & Partners Ltd BVICVAPP 2007/0008; United Company Rusal Plc, United Company Rusal Investment Management LLC v Corbierre Holdings Ltd and Raleigh Investments Inc. Claim No. NEHCV 2011/0030, IPOC International Growth Fund Limited v LV Finance Group Limited & Ors High Court BVIHCV2003/0140/Civil Appeal Nos. 20 of 2003 and 1 of 2004; Elfrida Aletha Hughes v Clive Hodge Claim No. AXAHCV 2008/0035

[6] Ibid

review (and which would therefore have fallen into the first category). Rule 65.11 does not apply to the second category of applications because of the need to exclude such applications from the general rule that costs are awarded to the party who succeeds on his application."

[15] The object of CPR65.11, his Lordship opined –

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

[16] In respect of CPR 65.12, Barrow J.A offered this elucidation –

> *Rule 65.12 complements and overlaps rule 65.11 but it is much broader in scope. Rule 65.12 applies to all assessments of costs, not just costs of an application. The rule opens by stating in paragraph (1) that this rule applies where costs fall to be assessed in relation to any matter or proceedings, or part thereof, other than a procedural application. These two words, "matter" and "proceedings", both terms of art, together extend the rule to virtually every proceeding that could come before the court…The effect of paragraph (1), in stating that this rule applies to any matter or proceedings or part thereof, is to apply this rule to proceedings generally, not just applications. But the rule does cover applications generally, which are necessarily parts of proceedings, save for procedural applications, which are specifically excepted. Put another way, by excluding only procedural applications this rule includes all other applications. The amplitude of its operation having been established in paragraph (1), the rule proceeds in its other paragraphs to set out the procedure to be followed for an assessment to be carried out. That is what rule 65.12 does – it lays down the procedure for assessment. This is in contrast with the provisions of rule 65.11, which lay down the principles to guide the court in making an assessment of costs on determining applications.*
>
> *Thus, paragraph (2) of rule 65.12 extends to proceedings generally the proposition relating to applications that appears in rule 65.11(1)(b), which was that on determining an application the court must assess the amount of costs. Paragraph (2) of rule 65.12 states that if the assessment relates to part of court proceedings it must be carried out by the judge, master or registrar hearing the proceedings. In other words, if the assessment relates to part of court proceedings it must be carried out "at the hearing" (see rule 65.12(3)). By identifying the range of judicial officers who would be 'hearing the proceedings' paragraph (2) also confirms that this rule applies to the whole range of proceedings that can come before a court. The rule applies to proceedings that are heard*

by the registrar, which are minor applications; to proceedings that are heard by the master, which are almost all applications that a judge could hear in chambers; and to proceedings that are heard by judges, which are "any" proceedings, whether in chambers or open court, including trials.

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

[17] Wallbank J in **United Company Rusal Plc, United Company Rusal Investment Management LLC v Corbierre Holdings Ltd and Raleigh Investments Inc**[7], after reciting most of the principal authorities on assessment of costs pursuant to CPR 65.11 and 65.12, offered the insight that whether a matter is procedural for the purposes of the 65.12(1) may be gleaned from its results, that is to say, the application is procedural if it did not decide the substantive issue in the claim. Applying that reasoning to this assessment, it is evident that the application in this case was not procedural since the substantive claim between the applicant and the respondent was disposed upon the hearing of the application. In that sense, CPR 65.12 may apply to this instance. CPR 65.11 may also apply since that rule covers all application except those heard at case management, pre-trial or trial. This application was not heard at any of those types of proceedings. There is a further distinction that would narrow the rule under which this assessment would ensue. CPR 65.12 also operates where, as Barrow J.A correctly pointed out[8], the assessment does not fall to be carried out at the hearing of the proceedings[9]. Cumberbatch J heard the application but did not assess costs. An order for costs was made with the assessment thereof to be carried out by the master. CPR 65.12 (3) to (6) therefore springs into operation. The application for assessment

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[7] Supra, note 5. See also Mathurin M (as she then was) in IPOC International Growth Fund Limited v LV Finance Group Limited & Ors.

[8] Supra, note 5

[9] CPR 65.12(3)

was properly made pursuant to CPR 65.12(3) and it must be heard in keeping with that rule. CPR 65.12 (3) to (6) state –

> *(3) If the assessment does not fall to be carried out at the hearing of any proceedings then the person entitled to the costs must apply to a master or the registrar for directions as to how the assessment is to be carried out.*
>
> *(4) The application must be accompanied by a bill or other document showing the sum in which the court is being asked to assess the costs and how such sum was calculated.*
>
> *(5) On hearing any such application the master or registrar must either –*
>
> *(a) assess the costs if there is sufficient material available to do so; or*
>
> *(b) fix a date, time and place for the assessment to take place.*
>
> *(6) The master or registrar may direct that the party against whom the bill is assessed pay the costs of the party whose bill is being assessed and, if so, must assess such costs and add them to the costs ordered to be paid.*

[18] The applicant has supplied a bill setting out his costs to date in accordance with CPR 65.12(4). The bill enumerates the following –

1.	Letter before action to counsel for the claimant – 10/6/08	$350.00
2.	Letter to Licensing Officer, Inland Revenue - 13/10/08	$100.00
3.	Solicitor's/Attorney's fees for defending claim	$3150.00
4.	Filing acknowledgment of service	$5.00
5.	Filing defence	$5.00
6.	Filing application to strike out with affidavit	$6.00
7.	Photocopies	$18.00
8.	Solicitor's/Attorney fee for filing & arguing application to strike out with submissions	$ 2500.00
	Total	$6134.00

[19] In assessing the costs to be allowed, much assistance is garnered from the words of Mitchell J.A in **Andriy Malitskiy and Igor Filipenko v Oledo Petroleum Ltd** quoting from the English authority of **Lownds v Home Office**[10] , his Lordship stated the following –

> *Following the guidelines in **Lownds v Home Office**, I apply a two stage approach in assessing these costs. First I shall assess whether, on a global approach, the costs claimed are proportionate, having regard to any relevant considerations identified in the **Civil Procedure Rules 2000**. If I conclude that the costs claimed are not, overall, disproportionate, I shall satisfy myself that each item was reasonably incurred and the cost of that item was reasonable. In performing this exercise I must resolve any doubt as to whether any item was reasonably incurred, or was reasonable in amount, in favour of the paying party, the appellants.*

[20] The applicant would have offered greater assistance to this exercise if the hourly rate of counsel was stated in the bill supplied. That omission notwithstanding, my evaluation of the bill provided by the applicant is that it is disproportionate in light of what transpired in this case. The applicant was removed as a defendant even before the first case management conference. The greatest burden came for preparing and prosecuting his application to be removed from the proceedings. The applicant's estimate puts the claim to be in the range of $83,000.00. While the costs in a claim of small value may be substantial, the issues for the defendant were not convoluted or complex. This was a simple case of whether he was the owner of a vehicle that caused the respondent to suffer losses for which she claims damages.

[21] His Lordship Mitchell J.A did not say what approach should be adopted if I find the bill disproportionate. Lord Woolf had this to say on the matter[11] -

> *"If ... the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable. If, because of lack of planning or due to other causes, the global costs are disproportionately high, then the requirement that the costs should be proportionate means that no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner. This is turn means that reasonable costs will*

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[10] [2002] EWCA Civ 365
[11] Ibid

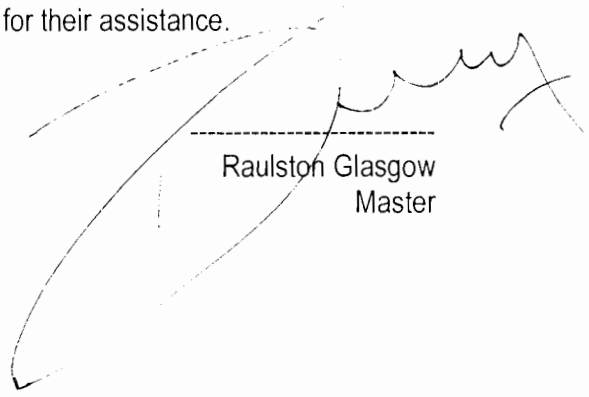
only be recovered for the items which were necessary if the litigation had been conducted in a proportionate manner."

[22] Lord Woolf cautioned that a "*sensible standard of necessity has to be adopted*". The standard of necessity is one

> *"Which takes fully into account the need to make allowances for the different judgments which those responsible for litigation can sensibly come to as to what is required. The danger of setting too high a standard with the benefit of hindsight has to be avoided. While the threshold required to meet necessity is higher than that of reasonableness, it is still a standard that a competent practitioner should be able to achieve without undue difficulty"*[12]

[23] I must assess each item to ascertain whether they were necessary and if each item in turn is necessary, then the sum claimed for the item must be reasonable in all the circumstances. The bill provided for assessment itemises costs which I find were all necessary. However, the sum claimed for solicitor's fees for defending the claim and the fee for preparing and arguing the application to strike out the claim seem unreasonable in light of what transpired in this case. A fair and reasonable assessment, in my view, would award the sum of $2000.00 for solicitor's fees for defending the claim and the sum of $1500.00 as cost for preparing for and prosecuting the application to strike out the claim. This would amount to assessment of costs in the sum of $3984.00.

[24] The sum assessed on the bill of costs is $3984.00. To achieve a fair and reasonable award to the applicant, I will adjust this sum to $4000.00. This was a fairly uncomplicated assessment. Applying the discretion granted to me by CPR 65.12(6), I award the applicant the costs of this exercise assessed in the sum of $500.00. The applicant is therefore awarded assessed costs of $4500.00 which includes the costs of this assessment. I thank counsel for their assistance.



Raulston Glasgow
Master

[12] Supra, note 10 at paragraph 37