**EASTERN CARIBBEAN SUPREME COURT**
**IN THE COURT OF APPEAL**

**SAINT LUCIA**

**SLUHCVAP2016/0007**

**BETWEEN:**

**UNICOMER (SAINTLUCIA) LIMITED**

Appellant

**and**

**COMPTROLLER OF INLAND REVENUE**

Respondent

**Before**:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mr. Godfrey Smith, SC — Justice of Appeal [Ag.]

**Appearances:**

Mr. Garth Patterson, QC with him, Mr. Anthony Bristol for the Appellant
Mr. Seryozha Cenac with him, Mr. Renee Williams and Mr. Kurt Thomas for the Respondent

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2017: June 26
2018: April 18.

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*Civil appeal – Administrative law – Judicial review – Availability of remedy – Certiorari – Natural Justice – Abuse of power – Costs – Prescribed Costs – Powers of Comptroller of Inland Revenue – Whether learned judge erred in failing to grant leave to review the Comptroller of Inland Revenue decision – Income Tax Act Cap. 15.02, Revised Laws of Saint Lucia 2013*

The appellant, Unicomer (Saint Lucia) Limited is part of a group of companies formerly owned by Courts Plc and now owned by Cobalt Holding Company Limited ("Cobalt"). Caribbean Financial Services Limited ("CFSL") was incorporated as a subsidiary of Cobalt for the purpose of acquiring and operating the hire purchase portfolio from Courts St. Lucia

Limited. CFSL borrowed money to secure the hire purchase portfolio and proceeded to file income tax returns claiming interest expense as an allowable deduction under the Income Tax Act (the "Act").

The Comptroller of Inland Revenue (the "Comptroller") denied the claim and concluded that the proceeds of the loan borrowed by CFSL were not used to generate assessable income. The appellant objected and maintained that the funds were used to purchase the assets of the hire purchase portfolio and that meant it was used to produce assessable income within the meaning of the Act.

By letter dated 27th August 2017, the Comptroller gave reasons for disallowing the objection raised by the appellant to his decision. In so doing, he relied on sections 43 and 99 of the Act. The appellant applied for judicial review, claiming the Comptroller failed to follow the proper statutory procedures for determining the objection to the assessment. The claim was dismissed by the learned judge. The learned judge held that the Comptroller did not breach any of the appellant's rights, nor the statutory duties required of him. It was held that there was no infraction of the principles of natural justice and that all relevant issues could be heard before the Appeal Commissioners as provided by the Act.

The appellant, being dissatisfied with the learned judge's decision, appealed. The issues for this Court's determination were whether the statutory right of appeal to the Appeal Commissioners is an efficient remedy and whether the Comptroller breached the principles of natural justice by not treating the appellant fairly in making a determination of the objection and finally the assessment of costs.

The appellant, argued that the Comptroller changed the entire reason for the assessment and that constituted a new assessment against CFSL. Furthermore, no notice was given nor an opportunity afforded to be heard and thus the Comptroller acted unfairly and breached the process regulated by the Act. The Comptroller argued that the appellant's allegations are without merit in that he was only seeking to provide clarity on the position as to why the deduction sought was being disallowed. The Comptroller submitted that changing the reason does not amount to a breach of natural justice.

On the issue of costs, the appellant argued that, the case was one of an administrative nature and that rules 56.13(4), (5) and (6) of the Civil Procedure Rules 2000 ("CPR") were applicable. The appellant submitted that the normal basis of appeal costs, if computed on the basis of prescribed costs under CPR 65:5, would not lead to a level of costs commensurate with the complexity of the appeal and the time and effort counsel spent preparing and arguing the matter. The Comptroller argued that as the claim was not a monetary claim but rather public law proceedings, CPR 65.5 should apply and that the assessment of costs is limited to what CPR 65.5 stipulates.

**Held:** allowing the appeal and making the orders set out in paragraph 34 of the judgment with prescribed costs to the appellant of $9333.33 in the court below and two thirds of that amount on appeal, that:

1. The Comptroller owes a duty of fairness to taxpayers in the exercise of his statutory powers and duties. This duty of fairness is susceptible to judicial review if breached. The Comptroller's powers are not immune from judicial review and provided those seeking redress by judicial review can show the Comptroller failed to discharge his duty or abused his power the Court can afford judicial review.

   **Ex p Preston** [1985] AC 835 applied; **R v IRC ex p National Federation of Self-Employed and Small Businesses Ltd** [1982] AC 617 applied.

2. The learned judge failed to have regard to the principles of fairness in deciding to dismiss the appellant's claim for judicial review. In holding that judicial review was unnecessary, the learned judge failed to recognise that, unfairness in the purported exercise of a power can be such that it is an abuse of power. The learned judge thus erred in not paying proper regard to the principles of fairness.

   **Ex p Preston** [1985] AC 835 applied.

3. In failing to notify the appellant of his intention to change the reasoning and rely on a completely new section of the Act, the Comptroller failed in the exercise of his statutory function and power. The actions of the Comptroller amounted to an abuse of power. It was unfair and a breach of natural justice to deny the appellant an opportunity to object on the new grounds.

4. In assessing costs, the key is reasonableness; a party is entitled to reasonable costs. In deciding what is reasonable, the court must take into account all the circumstances including the care, speed and economy with which the case was prepared, the conduct of the parties before as well as during the proceedings, the importance of the matter to the parties, the novelty, weight and complexity of the case and the time reasonably spent on the case.

5. The prescribed costs regime in CPR 65.5(1) applies as the claim is not a monetary claim. CPR 65.5(1) affords a party the opportunity of applying to the court to determine the value of a claim for the purpose of prescribed costs. There being no application pursuant to rule 65.6(1)(a) to determine the value to be placed on the claim, the value of the claim is to be treated as $50,000.0 by virtue of rule 65.5(2).

With respect to costs on appeal the general rule is that costs of any appeal must be determined in accordance with rules 65.5, 65.6 and 65.7 and Appendix B with costs limited to two thirds of the amount that should otherwise be allowed.

Rules 65.5(2)(b) and 65.13(1) **Civil Procedure Rules** applied; **Westerhall Point Residents Association Ltd v Anthony Batihk** GDAMCVAP2015/0004 (delivered 3rd May 2016, unreported) distinguished.

## JUDGMENT

[1] **BAPTISTE JA**: This appeal stems from the dismissal of the appellant's claim for judicial review in respect of the Comptroller of Inland Revenue's (the "Comptroller") disallowance of interest expense claimed under section 43 (1)(a) of the **Income Tax Act** [1] (the "Act"). The appellant had initially invoked the statutory appeal procedure of appealing the Comptroller's decision to the Appeal Commissioners. That appeal was stayed by the High Court pending the determination of the judicial review claim.

### Short background

[2] The appellant is part of a group of companies formerly owned by Courts Plc. About December 2006 Cobalt Holding Co. Ltd acquired Courts St Lucia Ltd as part of the acquisition of the regional operation of Courts Plc. Caribbean Financial Services Ltd. ("CFSL"), a wholly owned subsidiary of Cobalt was incorporated as a finance company for the purpose of acquiring and operating the hire purchase contracts comprising the hire purchase portfolio of Courts St. Lucia Limited. CFSL obtained a loan of EC$62.1 million to finance the acquisition of the hire purchase portfolio of Courts St. Lucia Limited. On the basis that the loan was used to acquire the hire purchase portfolio and thus produce assessable income of CFSL, CFSL filed income tax returns for the years 2007 to 2010 claiming interest expense as an allowable deduction under section 38(1)(i) of the Act.

[1] Cap. 15.02, Revised Laws of Saint Lucia 2013.

[2] Section 38 (1)(i) provides that the deductions allowable in ascertaining the assessable income of any person for any year of income shall include:

> **"**any expenditure incurred during the year of income by way of interest on any loan made to that person, including interest payable on debentures, to the extent that the Comptroller is satisfied that the amount of such loan was used by that person for the purpose of producing assessable income".

[3] The Comptroller raised an assessment and disallowed the claim for the deduction of interest in accordance with section 43(1)(a) of the Act. The reason advanced for the disallowance as contained in a letter of 2nd November 2011, was that the purpose of the loan was for Cobalt and its related companies to finance the purchase of the Caribbean operations of Courts Plc and to refinance the existing debts of Courts Plc. In the circumstances, the Comptroller concluded that the proceeds of the loan were not used to generate assessable income in accordance with section 38(1)(i) with the result that the annual interest expense was not allowable under section 43(1)(a) of the **Income Tax Act**.

[4] Section 43 (1)(a) states:

> "Subject to any express provision in this Act authorizing a specified deduction, in ascertaining the assessable income of any person for any year of income no deduction is allowed in respect of – any expenditure to the extent to which it is not incurred for the purpose of producing assessable income".

[5] By letter dated 30th January 2012, the Comptroller reiterated its position that the basis of the assessment was that the loan was used to facilitate the transfer of ownership of the Caribbean operations of Courts PLC to Cobalt and specifically for Cobalt to acquire the shares in Courts (St. Lucia) Limited. The Comptroller maintained his position that the proceeds of the loan were not used in the business to produce assessable income. The annual interest on the loan was disallowed.

[6] The appellant objected to the assessment by letter of 6th April 2012, reiterating that the proceeds of the loan were used to purchase the assets comprising the hire

purchase portfolio and were therefore used to produce assessable income within the meaning of the Act as shown in the audited financial statements of CFSL. By letter of August 27 2012, the Comptroller disallowed the objection and confirmed the assessment in accordance with sections 43(1)(a) and 99 of the Act.

[7] Section 99(1) states:

> "Where the Comptroller has reasonable grounds to believe that the main purpose or one of the main purposes for which any transaction was or transactions were effected (whether before or after the commencement of this Act) was the avoidance or reduction of liability to tax for any year, he or she may, if he or she determines it to be just and reasonable, direct that such adjustments shall be made as respect liability to tax as he or she may deem appropriate so as to counteract the avoidance or reduction of liability to tax which would otherwise be effected by the transaction or transactions."

[8] The Comptroller proffered the following reasons for the disallowance:

(a) upon further analysis of the financial statements (of Courts St Lucia Ltd and CFSL) the proceeds of the loan were utilised (by CFSL) to fund a dividend payout by Courts St Lucia Ltd (to Cobalt), thus interest payed was not incurred in the production of assessable income;

(b) he was concerned by the argument advanced by the auditors - KPMG – in its letter of 6th April 2012 that the proceeds of the loan were used to acquire assets of Courts Plc when that was not the case;

(c) there was no business reason for the incorporation of CFSL - a conclusion he supported by the fact that Courts St Lucia Ltd and CFSL were amalgamated on 5th March 2010;

(d) the actions of CFSL and Courts St Lucia Ltd were indicative of transactions designed to avoid tax liability and thus the disallowance of the interest expense was further supported by section 99 of the Act.

[9] The Comptroller also stated that the deduction of interest expense on the loan resulted in CFSL's failure to file a correct return under section 133(1)(b) of the Act and due to the "egregious nature of tax avoidance" he had increased the penalty from 30% to 50% under section 133(2)(a) of the Act for "neglect or carelessness".

**The position of the parties**

[10] The appellant complained, among other things, that the Comptroller changed the core reason or basis for the assessment so fundamentally that it effectively constituted a new assessment against CFSL; the Comptroller did so without giving it notice of intention to do so, (it was first informed of the change upon receipt of the Comptroller's letter of 27th August 2012 informing of the decision on the objection) and/or an opportunity to make further representations or submissions by way of amended objection to the new basis of assessment before making a determination of the objection. In the circumstances, the appellant submitted that the Comptroller's conduct was unfair, in breach of the statutory objection and appeals process contemplated by the Act, violated the principles of natural justice and amounted to an abuse of process.

[11] The Comptroller denied changing the basis of the assessment, asserting that he simply provided further clarity and explanation as to why the deduction sought was being disallowed. To the extent that there was a change of the contentions underlying the reason for the disallowance, this amounted to a permissible amplification or extension of the existing contentions. The appellant remained aware that the basis of the assessment was the fact that they have not satisfied him that the proceeds of the loan were utilised to generate assessable income.

[12] The Comptroller also argued that if there were a change in reasons, this does not amount to a breach of natural justice and fairness as the entire objection and appeal process ensures natural justice and fairness. An appeal was pending before the Appeal Commissioners under section 109 of the Act and that judicial review is inappropriate since the Act gives the appellant an opportunity for the

rehearing of all the facts and law before the Appeal Commissioners, including the question whether the statutorily prescribed procedures were adhered to.

**Judge's reasoning**

[13] In dismissing the claim for judicial review, the learned judge ruled that the Comptroller gave notice of a new basis for disallowance of a deduction but did not change the assessment decision which is the basis of the grievance and objection. The assessment remained the "disallowance of an amount as a deduction." The judge stated that even if the Comptroller gave a new reason for disallowing a deduction, in disallowing the objection, the objection for the purposes of this case, still went only to the disallowance of an amount claimed as a deduction in ascertaining the chargeable income.

[14] The learned judge found that the lawful ground of appeal laid against the disallowance of the deduction and nothing else. Any reasons given for refusal of the objection would be relevant on appeal as long as they addressed the disallowance of a deduction on the assessment. It was therefore quite open for the appellant to address the respondent's new reasons given for the disallowance on the appeal, since they could only be relevant if they addressed the disallowance of the deduction and nothing else. The judge opined that the new grounds did not escape the appellate process because they were articulated after the decision to appeal. The new grounds need not be the basis of a new objection since the facts and legal consequences of the disallowance of the deduction did not change. The change related to arguments about the facts.

[15] The learned judge agreed that the issue of natural justice was a matter for the High Court only. The judge however stated that the substantive grounds of appeal are for the Commissioners to consider and they need not be based on the argument put to the Comptroller on the objection if the Comptroller himself changed the reasons for his decision. He stated, "[i]t is therefore evident that the claim for judicial review is unnecessary."

[16] The learned judge opined that the appellant's interpretation of the provisions of sections 106 to 109 of the Act dealing with objections and appeal was erroneous, since the Act did not prevent the Comptroller from changing the reasons for his assessment or indeed his assessment within a certain time. The learned judge stated that: "[w]hat is necessary thereafter is the ability to object to the statutory reason for the assessment and later to appeal against the Comptroller's disallowance of an objection to the assessment".

[17] The learned judge held that there was no breach of any of the appellant's rights, no breach of the legislative scheme and no breach of natural justice. Any contention freshly raised can be addressed on appeal where a fair hearing can be expected on all of the relevant issues before the Appeal Commissioners.

**Grounds of appeal and principal issues**

[15] Eleven grounds of appeal were filed including that: (i) the learned judge erred in law and misdirected himself in ruling that the provisions of the Act permitted the Comptroller to change the reasons for the assessment after the objection had been filed and without giving the appellant an opportunity to be heard in respect of the new reasons; (ii) the learned judge erred in law in ruling that the judicial review claim was unnecessary; (iii) the learned judge erred in law in ruling that there was no breach of the appellant's rights under sections 106 to 109 of the Act and no breach of natural justice.

[16] Despite the numerous grounds filed and the various arguments ventilated, the appeal really boils down to two principal issues. The first issue is the efficacy of the statutory right of appeal to the Appeal Commissioners. The second issue relates to whether the Comptroller breached the principles of natural justice by not treating the appellant fairly in making a determination of the objection. The first issue can be considered as the alternative remedy point and will be dealt with first. The second issue will be considered as the natural justice point.

**Alternative remedy**

[17] Several authorities support the principle that the existence of an alternative remedy, particularly in a case where parliament has provided a statutory appeal procedure, makes it exceptional for judicial review to be granted. This principle is fact and contextually sensitive in its application. The court may, in exercising its discretion, decline to grant judicial review notwithstanding the existence of an alternative remedy if it is satisfied that the alternative remedy is for some reason clearly unsatisfactory, inappropriate or ineffective or fails to provide "fair, adequate or proportionate protection". The test of "exceptionality" went only to whether or not the alternative remedy provided "fair adequate or proportionate protection."

[18] In **Ex p Preston**,[2] Lord Scarman stated that:

> "… a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision".

In **Sivasubramaniam v Wandsworth County Court**,[3] Lord Phillips MR stated at paragraph 47:

> "Judicial review is customarily refused as an exercise of judicial discretion where an alternative remedy is available. Where parliament has provided a statutory appeal procedure it will rarely be appropriate to grant permission for judicial review. The exceptional case may arise because the statutory procedure is less satisfactory than the procedure of judicial review. Usually, however, the alternative procedure is more convenient and judicial review is refused".

In **Khan v Secretary of State for the Home Department**,[4] at paragraph 9, Underhill LJ stated the well-established principle that where there is a statutory right of appeal against a decision it is only where "special or exceptional factors"

[2][1985] AC 835 at p.852.
[3][2002] EWCA Civ 1738 at para. 47.
[4][2017] EWCA Civ 424.

are in play that the court will allow a challenge to that decision to proceed by way of judicial review rather than by the route provided by statute.

**Statutory appeal**

[19] With these guiding principles, it is necessary to examine the relevant statutory regime pertaining to appeals and the suitability of the statutory appeal in the context of this case. Section 108(1) of the Act establishes a tribunal of Appeal Commissioners. Any person aggrieved by the decision of the Comptroller may, by notice of appeal, appeal to the Appeal Commissioners.[5] "Aggrieved by a decision of the Comptroller" means aggrieved by a decision of the Comptroller upon an objection against the disallowance in an assessment of an amount claimed as a deduction in ascertaining the chargeable income.[6] The notice of appeal shall be in writing and shall be lodged with the secretary to the Appeal Commissioners within 30 days of the date of service of the Comptroller's decision on the objection.[7] Upon hearing of an appeal, the Appeal Commissioners may confirm, increase or order the reduction of any assessment or make such other order as they deem fit.[8]

[20] Section 111(1) provides the Comptroller or taxpayer with a right of appeal to the High Court from any decision of the Appeal Commissioners which involves a question of law, including a question of mixed fact and law. A further appeal lies to the Court of Appeal from any decision of the High Court (being a decision of the High Court on an appeal from the Appeal Commissioners) which involves a question of law, including a question of mixed fact and law.[9] On an appeal, the High Court or the Court of Appeal may confirm, increase or order the reduction of any assessment or make such order as it deems fit.[10]

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[5] Section 109(1) of the Act.
[6] Section 109(3)(b) of the Act.
[7] Section 109(2)(a) of the Act.
[8] Section 110 of the Act.
[9] Section 111(2) of the Act.
[10] Section 111(3) of the Act.

**Discussion**

[21] An alternative statutory remedy is provided by section 109 of the Act. As indicated, the existence of an alternative remedy does not necessarily preclude the grant of judicial review. Where the alternative remedy is inappropriate, unsatisfactory or ineffective to address the complaints, judicial review can lie. I am of the view that some of the issues raised by the appellant can be properly ventilated and accommodated within the statutory appeal process; included therein would be whether the Comptroller's decision amounted to a new assessment, or alternatively, altered the basis of the assessment and whether the Comptroller wrongfully infringed the appellant's statutory right to object and appeal. There are, however, fundamental issues relied on by the appellant relating to the Comptroller's failure to deal with it in a fair manner, natural justice and abuse of power.

**Fairness**

[22] It has long been recognised that fairness has an important place in the law of judicial review. In an appropriate case, fairness is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law. The Comptroller undoubtedly owed a duty of fairness to the appellant. The modern case law recognises such a duty. In **R v IRC ex parte National Federation of Self-Employed and Small Businesses Ltd**,[11] Lord Scarman stated:

> "I am persuaded that the modern case law recognises a legal duty owed by the revenue to the general body of taxpayers to treat taxpayers fairly … I am, therefore, of the opinion that a legal duty of fairness is owed by the revenue to the general body of taxpayers".[12]

[23] The exercise of the Comptroller's statutory powers and duties can be challenged by judicial review if the appellant shows either the Comptroller failed to discharge his statutory duty to him or abused his power or acted outside them. This is captured in the second proposition of Lord Scarman in **Ex p Preston** which dealt

[11] [1982] AC 617.
[12] At pp. 651 and 652.

with the grounds on which the taxpayer may seek judicial review of a decision taken by the Commissioners of Inland Revenue. Lord Scarman stated:

> "The commissioners have their statutory powers and duties, the exercise of which can be challenged by the process of judicial review only if certain principles of general application are met. The taxpayer must show either a failure to discharge their statutory duty to him or that they have abused their powers or acted outside them: *Reg. v. IRC, Ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982 AC 617] per Lord Wilberforce, p. 362, and per Lord Roskill, p. 660."

[24] In my judgment, the appellant's complaints with respect to the natural justice point are unassailable. The exercise of the Comptroller's statutory function or power does not render his decision immune from judicial review; for as Lord Scarman reminds us in his third proposition in **Ex p Preston**, unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In dismissing the judicial review claim and holding that judicial review was unnecessary, the learned judge erred in not paying proper regard to the principle of fairness.

[25] The Comptroller's letter of 2nd November 2011 provided reasons for the assessment and outlined the facts on which his decision to raise the assessment were based. Based on these facts, the Comptroller concluded that the loan proceeds were not used to produce assessable income and therefore the annual interest expense associated with the loans were not allowable under section 43(1)(a) of the Act. In preparing its objection, the appellant quite naturally stated that it would have been guided by the reasons or bases articulated by the Comptroller and the grounds of the objection were crafted in response to the factual matrix and legal propositions contained in the letter. In setting out the reasons for the decision, the Comptroller abandoned the position articulated in its letter of 2nd November and introduced and relied on new factual allegations as well as a new provision of the Act, section 99. The new reasons or bases included that: the proceeds of the loan were utilised by CFSL to fund a dividend payout by Courts St Lucia Ltd to Cobalt; the incorporation of CFSL was a sham; the actions of CFSL and Courts St Lucia Ltd were part of a tax avoidance scheme and the

disallowance was based on section 99 of the Act. The Comptroller sought to support the assessment under section 38 by relying on the provisions of section 99 of the Act.

[26] I am of the view that there was undoubted unfairness by the Comptroller in the exercise of his statutory function and power which amounted to an abuse of power. I agree with the appellant's contention that even if the learned judge was correct in holding that the Comptroller did not change the basis of the assessment, he should have concluded that the Comptroller did not take the precautions aimed at achieving a fair trial of the issues, such as notifying the appellant in advance that he intended to change his reasons and rely on a different section, and giving the appellant an opportunity to advance new grounds of objection. For the reasons given, the Comptroller's conduct was unfair, violated the principles of natural justice, and amounted to an abuse of process. The appeal is accordingly allowed.

**Parties' submissions on costs**

[27] In the court below, the learned judge made no order as to costs on the basis that the claim was not unreasonably brought. The appellant has prevailed on the appeal and would, in my view, be entitled to costs both in the court below and on appeal. In this Court, the parties filed written submissions on costs. The appellant filed a draft bill of costs on 27th July 2017 claiming costs of $295,962.00 in the court below and $99,157.50 on appeal. The parties are not in sync as to how costs should be quantified.

[28] The appellant's case is that these are administrative proceedings and the court's power with respect to costs is defined by rules 56.13(4), 56.13(5) and 56.13(6) of the **Civil Procedure Rules 2000** ("CPR"). Regarding the quantification of costs in the court below, CPR 56.13(5) requires that such costs should be assessed by the judge making the order. CPR 65.11 and 65.12 govern the assessment of costs. The pertinent rule would be CPR 65.12 which applies to assessments of costs for

proceedings other than procedural applications and directs the general circumstances in which an assessment of costs may take place. In assessing costs, the key is reasonableness; a party is entitled to reasonable costs. CPR 65.2(3) provides that in deciding what is reasonable, the court must take into account all the circumstances including the care, speed and economy with which the case was prepared, the conduct of the parties before as well as during the proceedings, the importance of the matter to the parties, the novelty, weight and complexity of the case and the time reasonably spent on the case.

[29] Mr. Patterson, QC contended that the appellant has approached the case with care, speed and economy. The issues in the appeal and in the substantive proceedings in the court below are complex. The appellant invested a proportionate amount of time and resources in bringing the relevant facts and authorities before the Court. The matter is of great significance to the appellant and it would have sufferer undue hardship if the decision were allowed to stand. The matter is also important to the Comptroller since it will clarify in the future how it should handle procedural aspects of assessments.

[30] Mr. Patterson, QC submitted that the normal basis of appeal costs, if computed on the basis of prescribed costs under CPR 65.5 would not lead to a level of costs commensurate with the complexity of the appeal and the time and effort counsel spent preparing and arguing it. Mr. Patterson, QC posited that having regard to the reasonable costs actually incurred, the normal basis would not provide a fair and just recovery for the appellant.

**Discussion**

[31] The Comptroller's position is that the general rule of prescribed costs regime in CPR 65.5(1) applies and that the assessment of costs is limited to what is prescribed in CPR 65.5(2)(b), for the reason that the claim is not a monetary claim but proceedings in public law against the decision of the Comptroller. I agree. Mr. Patterson, QC referred to the novelty, complexity and the importance of the

issues argued on appeal, and he submitted that costs should be quantified based on the amount of work reasonably required to further these proceedings. I do not share Mr. Patterson QC's view as to the novelty and complexity of the matter. As the Comptroller correctly pointed out, this appeal presented two main issues: whether the Comptroller acted in breach of natural justice in disallowing the claim for interest and whether the appellant was required to exhaust the statutory appeal remedy instead of resorting to judicial review. Mr. Patterson, QC himself, in the written submissions on costs, stated that 'the underlying claim concerned what is accepted as a substantial breach of natural justice principles, in that the Respondent failed to give the Appellant an opportunity to be heard in respect of the new basis of Assessments.' In my judgment, the issues involved are not novel or complex and have been addressed by the courts on several occasions. The judicial review proceedings in the court below and on appeal were not concerned with a determination of the underlying merits of the matter as to whether or not the loan interest was an allowable deduction.

[32] CPR 65.6(1)(a) affords a party the opportunity of applying to the court to determine the value of a claim for the purpose of prescribed costs. The rule provides that a party may apply to the court at any time before trial to determine the value to be placed on a case which has no monetary value. I note that the claim here was not for a monetary sum. The appellant did not avail itself of that rule. CPR 65.5(2)(b) provides that if the claim is not for a monetary sum, it is to be treated as a claim for $50,000.00 unless the court makes an order under rule 65.6(1)(a). There being no application pursuant to rule 65.6(1)(a) to determine the value to be placed on the claim, the value of the claim is to be treated as $50,000.0 by virtue of rule 65.5(2)(b).

[33] With respect to costs on appeal, CPR 65.13(1) provides that the general rule is that costs of any appeal must be determined in accordance with CPR 65.5, 65.6 and 65.7 and Appendix B with costs limited to two thirds of the amount that should otherwise be allowed**.** Pursuant to CPR 65:13(2), the court has discretion to depart from the general rule if the circumstances of the appeal or the justice of the case requires, and may make an order for budgeted costs or such other order as it sees fit. Mr. Patterson, QC relied on **Westerhall Point Residents Association Ltd v Anthony Batihk**[13] in which the Court of Appeal applied CPR 65.13(2). The Comptroller urged the court to distinguish the **Westerhall Point** case on the basis that the appellant has provided no proper basis upon which the court could exercise its discretion and apply rule 65.13(2). I agree. In the **Westerhall Point** case, the magistrate had awarded costs of $500.00 which would have led to two thirds of that sum being awarded on appeal. Webster JA was of the view that preparation of the appeal would have cost much more than that sum; therefore in the exercise of discretion, departed from the two thirds rule and awarded costs of $1000.00 on the appeal. In the circumstances, I would award prescribed costs to the appellant on the sum of $50,000.00 in the court below and two thirds of prescribed costs on appeal.

**Disposition**

[34] I would allow the appeal. I would grant a declaration that the Comptroller's decision on the assessment, contained in the letter dated 27th August 2012 in so far as it related to CFSL's claim for a deduction for annual interest expense under section 38 of the Act was made in breach of the rules of natural justice and accordingly invalid, null and void. I would grant an order of certiorari quashing the decision of the Comptroller and remitting the matter to the Comptroller for a proper determination. I would also grant an order of certiorari quashing the respondent's

[13]GDAMCVAP2015/0004 (delivered 3rd May 2016, unreported).

decision to impose a 50 percent penalty on CFLS under section 133 (2) of the **Income Tax Act**. I would award costs to the appellant of $9333.33 in the court below and two thirds of that amount on appeal.

I concur.
**Louise Esther Blenman**
Justice of Appeal

I concur.
**Godfrey Smith**
Justice of Appeal [Ag.]

**By the Court**

**Chief Registrar**