EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2011/0015

IN THE MATTER of a Declaration dated 18th January 2007 for the compulsory vesting in the Government of St. Christopher and Nevis of lands comprising the Angelus project

and

IN THE MATTER of the Land Acquisition Act Cap 10.08 Revised Statutes of the Laws of St. Christopher and Nevis, Sections 3, 7, 8, 9, 11, 12, 13, 14, 15, 17, 19, 21, 22, 26, 28, and 29

and

IN THE MATTER of the Board of Assessment of Lands commonly referred to as **"The** Angelus**"**

and

IN THE MATTER of the Crown Proceedings Act

and

IN THE MATTER of the Constitution of St. Christopher and Nevis, Sections 2, 3 and 8

BETWEEN:

[1] ROSALIND NICHOLLS
[2] CONSTANCE V. MITCHAM
[3] PEARLINE O. SYLVESTER

Appellants

and

[1] RICHARD ROWE AND MARK SECRIST (and those whom they represent)
[2] ROY AND GEN BENTON
[3] PAUL AND CHAE DUNN

1st., 2nd and 3rd Respondents

and

[1] THE ATTORNEY GENERAL OF ST. CHRISTOPHER AND NEVIS
[2] THE AUTHORISED OFFICER FOR THE ANGELUS RESORT

4th and 5th Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mde. Gertel Thom — Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC — Justice of Appeal [Ag.]

On Written Submissions:

Mr. Patrick Patterson for the Appellants
Ms. Elizabeth Harper for the 1st, 2nd, and 3rd Respondents

2018: September 21.

Civil appeal — Costs — Which party was successful in the appeal — Percentage costs order — Whether prescribed costs or assessed costs should be awarded

On 18th January 2007, the Government of the Federation of Saint Christopher and Nevis (the **"Government") compulsor**ily acquired three parcels of land (the **"Angelus Lands")**. The appellants, respondents and the authorised officer commenced negotiations in relation to issues of entitlement to and quantum of compensation, but there was no productive outcome. As a result, **a Board of Assessment ("the Board")** was established to hear their claims for compensation. Th**e Board rejected the appellants' claim to compensation,** finding that they had no interest in land that required payment of compensation under the Land Acquisition Act **(the "LAA")**. The appellants appealed the decision of the Board to the High Court. The learned judge dismissed **the appellants' appeal on the basis that** section 17 of the LAA only permits appeals against an award of compensation, and as the appellants were not the recipients of an award of compensation, they had no right of appeal against the award of the Board.

The appellants appealed to this Court on the basis that the learned judge erred in finding that the appellants had no right of appeal against the decision of the Board, and that the learned judge erred in finding that the appellants had no interest in the acquired lands entitling them to an award of compensation. This Court on 11th January 2016 allowed the appeal in part and held that the appellants had a right of appeal against the decision of the Board under section 17 of the LAA. However, the Court upheld the finding of the Board that the appellants had no interest in the acquired lands entitling them to an award of

compensation. The Court reserved its decision on the issue of costs and now has to determine: (1) which party was successful in the appeal and should therefore be awarded costs? and (2) whether the successful party should be awarded prescribed costs or assessed costs.

Held: awarding 90 percent of the prescribed costs in the court below in the amount of US$75,038.99 and two-thirds of that sum on appeal in the amount of US$45,023.39 to the respondents, that:

1. Where the court decides to make a costs order, the general rule is that it must order the unsuccessful party to pay the costs of the successful party. The court is, however, given very wide discretionary powers to vary the application of the general rule. These include the power to order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to costs or to pay only certain portions of another person's cost. The court may depart from the general rule but it remains appropriate to give 'real weight' to the overall success of the wining party. In exercising its discretions as to costs, the court is required to have regard to all the circumstances. Particular consideration must be given to the conduct of the parties both before and during the proceedings, the manner in which a party has pursued the case in general and the particular issues within the case. Thus, the costs order can be affected by whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings.

   Rule 64.6 of the Civil Procedure Rules 2000 applied; Rochamel Construction Limited v National Insurance Corporation SLUHCVAP2003/0010 (delivered 24th November 2003, unreported) followed; Straker v Tudor Rose (a firm) [2007] EWCA Civ 368 applied.

2. The question of who is the successful party for the purposes of the general rule must be determined by reference to the litigation as a whole. The aim always is to make an order that reflects the overall justice of the case. In the case at bar, both the appellants and the respondents have had some measure of success. However, the respondents, having succeeded on the major issue in the appeal, had overall success in defending the appeal. Accordingly, the respondents are awarded 90% of its costs, applying a ten percent reduction in the amount to account for the minor success of the appellants.

   A L Barnes v Time Talk (UK) Ltd [2003] EWCA Civ 402 applied; Kastor Navigation v AXA Global Risks [2004] 2 Lloyd's Rep.119 applied; Scholes Windows v Magnet (No.2) [2000] ECDR 266 applied; Travellers' Casualty v Sun Life [2006] EWHC 2885 (Comm) applied.

3. In this case, an award of prescribed costs would reflect the overall justice of the case. There is no basis for this Court to exercise its discretion under rule 65.13(2)(b) of the Civil Procedure Rules 2000 to award assessed costs.

Rules 65.5, 65.6, 65.7 of the Civil Procedure Rules 2000 applied.

JUDGMENT ON COSTS

[1] BAPTISTE JA: This is the Court's decision on the issue of costs. The contextual background is set out below.

Background

[2] On 28th December 2006, the Government of the Federation of Saint Christopher and Nevis (the "Government") acting pursuant to section 3 of the Land Acquisition Act[1] (the "LAA") published two declarations in the official Gazette for the compulsory acquisition of three parcels of land (the "Angelus Lands"). In 2004, a condominium resort development (the "Angelus") was constructed on one of the parcels of which B.M.T. Limited was the registered proprietor.

[3] On 18th January 2007, the Government became vested with ownership of the Angelus under section 3(3) of the LAA, and on that date appointed an authorised officer. In compliance with section 13 of the LAA, the authorised officer prepared a report in which she recognised the appellants as persons possessing an interest in the Angelus Lands entitling them to compensation. She accepted the appellants' claim for compensation on the production of duly executed but unregistered memoranda of transfer evidencing purchase. She also accepted the claims of the first, second and third respondents (the "respondents") that they too were entitled to compensation payable by the Government to the owners of the Angelus.

[4] Having accepted the claims of the appellants and the respondents, the authorised officer commenced negotiations with them in relation to issues of entitlement to compensation and the amounts of compensation, but there was no productive outcome. As a result, the Governor General established a Board of Assessment (the "Board") which proceeded to hear their claims for compensation. The Board

[1] Cap 10.08, Revised Laws of Saint Christopher and Nevis 2009.

rejected the appellants' claim to compensation, finding that they had no interest in the lands that required payment of compensation under the LAA. The Board also found that the effect of section 5(3) of the Title By Registration Act[2] (the "TRA") is that the appellants' unregistered memoranda of transfer is an unregistered dealing in land, which is incapable of conferring any right or interest in respect of land.

[5] The appellants appealed the decision of the Board to the High Court. The learned judge refused to entertain the appellants' appeal on the basis that section 17 of the LAA permits appeals only against an award of compensation, and as the appellants were not the recipients of an award of compensation, they had no right of appeal against the award of the Board.

[6] The appellants appealed to this Court on the following two limbs. Firstly, that the learned judge erred in finding that the appellants had no right of appeal against the decision of the Board under section 17 of the LAA. Secondly, that the learned judge erred in finding that the appellants had no interest in the acquired lands entitling them to an award of compensation.

[7] The Court of Appeal, its judgment dated 11th January 2016,[3] allowed the appeal in part and held that the appellants had a right of appeal against the decision of the Board under section 17 of the LAA. However, the Court held that the appellants, who each hold a fully executed but unregistered memorandum of transfer evidencing their purchase of the condominium units in the Angelus, are not persons holding an interest in land for which they should be compensated by the Government on its compulsory acquisition of the Angelus pursuant to the provisions of the LAA. The Court upheld the decision of the Board on the latter issue and reserved its decision on the issue of costs which I address below.

[2]Cap.10.19, Revised Laws of Saint Christopher and Nevis 2009.

[3] SKBHCVAP2011/0015 (delivered 11th January 2016, unreported).

The Issues

[8] There are two central issues surrounding the issue of costs at hand, namely:

(1) Which party was successful in the appeal and should therefore be awarded costs?

(2) Whether the successful party should be awarded prescribed costs or assessed costs.

Appellants' Submissions

[9] The main thrust of the appellants' **submissions is that,** having been successful in their appeal against the learned **judge's** decision that there was no right of appeal available to them under the section 17 of the LAA, an award of costs in their favour would be the correct award in the circumstances.

[10] The appellants argue that the learned judge**'s finding** that there was no right of appeal available to them had the effect of shutting them out of their first instance appeal and as such, that was the primary matter of appeal. They contend that the only issue which remains is whether there should be any percentage reduction in those costs on the basis that the appellants were unsuccessful in relation to the question of their right to compensation.

[11] The appellants further submit that nothing in the manner of their conduct during the proceedings provides a basis on which they should be penalised in costs, save for the obvious possibility that the overall award could be reduced by a percentage, having not succeeded on the second limb.

[12] Alternatively, the appellants contend that no award of costs should be made against them. They submit that the Board**'s determination of claims for** compensation fell within the compass of constitutional protection given in respect of the compulsory acquisition of property. Additionally, that with respect to matters which have constitutional and public law underpinnings such as this case, as a matter of practice, no award of costs should be made against the unsuccessful

party. This is because an unsuccessful party should not be condemned in costs where the claim is brought in good faith and involves issues of public interest.

[13] In expounding on the constitutional implications point, the appellants contend that the provisions of the LAA provide constitutionality to the act of compulsory acquisition of lands by the Government. Further, it was submitted that even though the respondents are not within the description of a "public body", the issues in this appeal were between the Government and the appellants as to whether any award should be made to the appellants.

[14] Finally, the appellants invited the Court to consider that the Board's decision was made even though the authorised officer had found that the appellants were entitled to compensation. They contend that it was wholly appropriate in the circumstances to seek to have the matter reviewed by this Court and their position vindicated.

First, Second and Third Respondents' Submissions

[15] The respondents[4] submit that having succeeded in the appeal before this Court, they are entitled to their costs on the standard assessment of reasonable costs plus disbursements. The respondents acknowledge that the general rule is that the successful party on appeal should be awarded prescribed costs. However, they contend that the Court of Appeal should exercise its discretion under rule 65.13(2)(b) of the Civil Procedure Rules 2000 ("CPR") to depart from the general rule and grant them costs on the standard assessment of reasonable costs.

[16] In support of their position, the respondents aver that the Court should consider the overall costs that the respondents were forced to incur because of the appellants' behaviour in pursuing their appeal. They contend that a few of their legal representatives were compelled to incur the costs of travelling to Saint Christopher and Nevis and instructing lead counsel, Mr. John Carrington, QC to

[4] The 1st, 2nd and 3rd respondents will be referred to as "the respondents".

deal with the matter. Further, all costs which the respondents incurred in appearing before the Court of Appeal along with the significant and necessary preparation related solely to the appellants' appeal, which was completely unsupported in law.

[17] Having regard to the total sum of US$732,699.88 claimed by the appellants, the complexity of the issues at bar and the appellants' seemingly unreasonable pursuit of a groundless appeal, the respondents submit that an award of prescribed costs in this instance would result in significant unfairness to them. They submit that an award of prescribed costs would merely cover the fees and expenses of their lead counsel.

[18] The respondents submit, referring to their schedule of costs, that a substantial amount of work was undertaken by their legal representatives in revisiting the legal research done in relation to the proceedings before the Board in order to advise the respondents on whether to defend the appeal. The respondents further submit that the documentation in the matter was voluminous and the respondents' legal representatives were required to meet with lead counsel, Mr. John Carrington, QC, who has expertise in land acquisition matters, in order to discuss the detailed legal issues canvassed before the Court of Appeal.

[19] The respondents argue that in light of the value of the claim (a sum of US$732,699.88), the fees incurred of US$100,056.50 plus disbursements of US$38,186.84, a total of US$138,243.34 is entirely reasonable and well below what could be considered disproportionate in the circumstances.

Discussion

General Principles

[20] In Rochamel Construction Limited v National Insurance Corporation[5] Byron CJ elucidated the general principles governing the award of costs as follows:

[5] SLUHCVAP2003/0010 (delivered 24th November 2003, unreported).

> "CPR part 64.6 prescribes that where the Court decides to make an order about the costs of any proceedings, the general rule is that, it must order the unsuccessful party to pay the costs of the successful party. The Court is, however, given very wide discretionary powers to vary the application of the general rule. These include the power to order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to costs or to pay only certain portions of another person's cost. In exercising these discretions as to costs the Court is required to have regard to all the circumstances. Particular consideration must be given to the conduct of the parties both before and during the proceedings and the manner in which a party has pursued the case in general and particular issues within the case. Thus the order can be affected by whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings. The Court is also required to consider whether it was reasonable for a party to pursue a particular allegation or raise a particular issue and whether the claimant gave reasonable notice of intention to pursue a claim."

[21] Further guidance on the appropriate methodology to be adopted in deciding the issue of costs was stated by Waller LJ in Straker v Tudor Rose (a firm).[6] His Lordship stated at paragraphs 11-12 that:

> "...The court must first decide whether it is case where it should make an order as to costs and have at the forefront of its mind that the general rule is that the unsuccessful party will pay the costs of the successful party. In deciding what order to make it must take into account all the circumstances including (a) the parties' conduct, (b) whether a party has succeeded on part even if not the whole, and (c) any payment into court.
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> 12. Having regard to the general rule, the first task must be to decide who is the successful party. The court should then apply the general rule unless there are circumstances which lead to a different result. The circumstances which may lead to a different result include (a) a failure to follow a pre-action protocol; (b) whether a party has unreasonably pursued or contested an allegation or an issue; (c) the manner in which someone has pursued an allegation or an issue; and (d) whether a successful party has exaggerated his claim in whole or in part."

Whether the Court Should Make an Order as to Costs

[22] A useful starting point is to determine whether the Court should make a costs order. The appellants submit that, if the Court is not inclined to award costs in their favour, no order as to costs should be made as the claim before the Board

[6] [2007] EWCA Civ 368.

was one which had constitutional or public law implications. The appellants relied on the provisions of CPR 56.13(6) which provides that:

> "The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application"

[23] The right to compensation on a compulsory acquisition of property is protected by section 8 of the Saint Christopher and Nevis Constitution Order[7] (the **"Constitution").** By section 8(1) of the Constitution, property acquired by the State must be for a public purpose and compensation must be paid to persons having an interest in the acquired property.

[24] The Court of Appeal in the substantive judgment of this matter held that on a compulsory acquisition of lands brought under the operation of the TRA, one must look to the scheme of TRA in order to determine what constitutes interests in land. It is only interests in land as so ascertained, which are protected on a compulsory acquisition by the right to compensation under section 8(1) of the Constitution and pursuant to the provisions of the LAA. The Court further held that to find that an unregistered dealing constitutes an interest in land which is protected by the right to compensation under section 8(1) of the Constitution, would undermine the indefeasible nature of registered interests and throw into a state of flux if not chaos, the scheme and principles of the TRA.

[25] In my view, **the appellants' contention that the claim before the Board had** constitutional implications is without merit for the following reasons. Firstly, the Court of Appeal found that the appellants had no interest in the Angelus Lands which entitled them to compensation as their claim was based on unregistered memoranda of transfer, which are not protected by the right to compensation under the Constitution. The memoranda of transfer were required to be registered in order to have legal effect as a completed sale to the appellants. Unless

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[7] The Saint Christopher and Nevis Constitution Order 1983, SI 1983 No. 881.

registered, the sale of the units remained incomplete with the consequence that the proprietorship of the land was never affected by the alleged beneficial interest.

[26] Secondly, this matter did not arise in the context of a claim for constitutional relief, but has its origin in a claim for compensation before the Board. The claim was not brought by way of judicial review and did not challenge the manner by which the compulsory acquisition of the Angelus was undertaken. Further, the appellants have not sought relief in the form of administrative orders.

[27] I find that this case cannot be regarded as one in which the appellants sought to enforce their constitutional rights or alleged that any of their fundamental rights were infringed. Therefore, this is a case in which the court should make an award of costs.

Which Party Was Successful in the Appeal?

[28] Having found that a costs order should be made, the question arises: which party was successful in the appeal? The general rule is that the court must order the unsuccessful party to pay the costs of the successful party.[8] However, the court may order a successful party to pay all or part of the costs of an unsuccessful party.[9]

[29] Longmore LJ in A L Barnes v Time Talk (UK) Ltd[10] noted that it is important to identify at the outset who is the successful party, as only then is the court likely to approach costs from the right perspective. His Lordship stated that in deciding who the successful party is, the most important thing is to identify the party who is to pay money to the other as that is the truest indication of success and failure. Further, in Kastor Navigation v AXA Global Risks,[11] Rix LJ noted that the question of who is the successful party for the purposes of the general rule must

[8] Rule 64.6(1) of the Civil Procedure Rules 2000.
[9] Rule 64.6(2) of the Civil Procedure Rules 2000.
[10] [2003] EWCA Civ 402 at para. 28.
[11] **[2004] 2 Lloyd's Rep.119 at para. 143.**

be determined by reference to the litigation as a whole. The court may depart from the general rule but it remains appropriate to give 'real weight' to the overall success of the wining party.[12] However, the aim always is to make an order that reflects the overall justice of the case.[13]

[30] Additionally, Lightman J in BCCI v Ali (No.4)[14] stated that the question of who is the successful party is a matter for the exercise of common sense. Success for the purposes of the CPR is "not a technical term but a result in real life".[15]

[31] In determining which party should pay costs, the court must have regard to all the circumstances of the case.[16] In particular, the court must have regard to:[17]

> (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.

Conduct of the Parties Before and During the Proceedings

[32] Under CPR 64.6(6), the Court may consider the conduct of the parties both before and during the proceedings, in determining which party should be ordered to pay costs. The appellants contend that the respondents prevented them from registering their memoranda of transfer by lodging caveats.

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[12] Scholes Windows v Magnet (No.2) [2000] ECDR 266 at p. 268.
[13] Travellers' Casualty v Sun Life [2006] EWHC 2885 (Comm) at para. 11 per Clarke J.
[14] BCCI v Ali (No. 4) 149 NLJ 1222.
[15] ibid.
[16] Rule 64.6(5) of the Civil Procedure Rules 2000.
[17] Rule 64.6(6) of the Civil Procedure Rules 2000.

[33] On the other hand, the respondents argue that the conduct of the appellants in pursuing their appeal should be taken into consideration. The respondents argue that the appellants having accepted, in the proceedings before the Board and before the learned judge, that they had no registered interest in the relevant land, decided nevertheless to pursue this appeal. Further, they argue that such conduct by the appellants delayed the release of the respondents' compensation and amounted to forcing settlement negotiations through vexatious and unmeritorious litigation. The respondents contend that they were deprived of their compensation in full for a significant period and this has resulted in continued hardship.

[34] In the substantive judgment, the Court of Appeal noted that there were steps available to the appellants to have the caveats removed and their memoranda registered. The Court of Appeal at paragraph 71 of its judgment stated the following in relation to the failure of the appellants to take steps to register their memoranda of transfer:

> "[I]t was foolhardy for the appellants to take an armchair approach to their rights. They must bear the consequences of their inertia without intervention by the court of equity to grant the relief they seek…and to deem as done what ought to be done to complete the Memorandum of Transfer."

In light of this, the appellant's argument that the respondents prevented them from registering their memoranda is without merit.

[35] I find merit in the respondents' argument that the appellants having accepted that they had no registered interest in the relevant land pursued an unmeritorious appeal. The Court of Appeal held that section 5(3) of the TRA clearly and unequivocally provides that an unregistered memorandum of transfer cannot create a right or interest in land. It is observed that this point was raised by the learned judge in the High Court. Nevertheless, the appellants appealed the decision of the learned judge to this Court, and as a consequence the respondents have incurred costs in defending the appeal. In my view, this aspect of the

appellants' appeal was unreasonably pursued and shall be taken into consideration in arriving at the appropriate costs order.

Appellants' Partial Success

[36] Under CPR 64.6(6)(c) the court may consider whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings. On this point, the respondents contend that they were successful in defending the appeal.

[37] It is noteworthy that the appellants only succeeded on the first of the two limbs of their appeal. That is, they successfully argued that there is a right of appeal available to them under section 17 of the LAA. However, they failed to establish that they have a right to compensation. It is common ground that, at the hearing of this appeal, the respondents conceded the point that the appellants did have a right of appeal against the decision of the Board under section 17 of the LAA. Therefore, the vexed issue in this appeal is the issue on which the respondents have succeeded.

[38] In my view, establishing a right to appeal without more cannot be regarded as any major success on the part of the appellants. The success of the appellants in this appeal can be aptly described as pyrrhic as having a right of appeal is of no practical consequence in the absence of a right to compensation, which is the gravamen of the appellants' claim pursued before the Board, the learned judge and the Court of Appeal. As such, I find that the issue which the appellants succeeded on was a minor issue in the appeal. Therefore, the significance of the issue should be reflected in any award of costs made.

[39] The learned editors of **Blackstone's Civil Practice**[18] noted that "[t]he usual approach in the event of partial success is to award the successful party a proportion of its costs rather than an 'issues-based' order". I find that the case at

[18] Blackstone's Civil Practice 2012, para. 66.13.

bar is one where both the appellants and the respondents have had some measure of success. However, the respondents, having succeeded on the major issue in the appeal, had overall success in defending the appeal. I adopt the approach stated by the learned editors of **Blackstone's** Civil Practice and award the respondents 90% of its costs, applying a ten percent reduction in the amount to account for the minor success of the appellants. In my view, such a proportion reflects the justice of the case.

Whether Prescribed Costs or Assessed Costs Should Be Awarded

[40] The respondents submit that an award of prescribed costs would be insufficient in the circumstances and requested an award of reasonable costs representing the fees incurred in the amount of US$100,056.50 plus disbursements of US$38,186.84, a total of US$138,243.34.

[41] Rules 65.5, 65.6 and 65.7 of the CPR specifically address prescribed costs. The general rule is that where CPR 65.4 (the fixed costs rule) does not apply and a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Appendices B and C of Part 65 of the CPR. In this case, CPR rule 65.4 relating to fixed costs is not applicable to the circumstances of this case. The issue of costs therefore falls to be determined in accordance with Appendices B and C relating to prescribed costs.

[42] Under CPR 65.7, prescribed costs include all work that is required to prepare the proceedings for trial including, in particular, the costs involved in:

(a) instructing any expert;

(b) considering and disclosing any report made by the expert;

(c) arranging the expert witness' attendance at trial; and

(d) attendance and advocacy at the trial including attendance at any case management conference or pre-trial review.

[43] The respondents submit that the matter was complex and required substantial legal research and consultation with lead counsel, Mr. John Carrington, QC. However, the respondents in their submissions claim quite contrastingly that the appellants' appeal lacked merit and that their claim before the Board and the learned judge was "doomed to fail". At paragraph 28 of the respondents' submissions, it is stated that: "[t]he Respondents were forced to incur significant legal fees in response to an appeal which, given the unambiguous language of the relevant legislation, was always bound to fail".

[44] At paragraph 29 of their submissions, the respondents posit that: "[l]itigants in the jurisdiction should be careful not to pursue appeals unreasonably which obviously lack merit". Further, at paragraph 35 of the respondents' submissions, it is stated that:

> "To persuade the Court of Appeal that both the Board and Thomas J were wrong, the Appellants had to satisfy the Court that the decisions were 'clearly or blatantly wrong, or as it sometimes elegantly stated, exceeded the generous ambit within which reasonable agreement is possible'. To try and challenge such a finding was clearly ambitious, to be generous"

[45] In my view, the respondents correctly acknowledged that the appellants' case pursued before the Board, the learned judge and the Court of Appeal concerned one major issue, that is, whether the appellants had a right to compensation for the Government's acquisition of the Angelus Lands. Further, they recognised that based on the provisions of the TRA, the appellants could not succeed on the major issue as they only held unregistered memoranda of transfer. The respondents seem to be contending on one hand that the complexity of the issues in the appeal justifies the costs incurred, and on the other that the appeal obviously lacked merit and "was always bound to fail". As the crux of the appeal is the single major issue, the respondents' claim that the issues were so complex to warrant an award of assessed costs is rejected.

[46] Additionally, the preparatory work undertaken by the respondents, which include settlement negotiations, instructing lead counsel, and preparing written

submissions, are features which ordinarily arise in the preparation of an appeal and appropriately reflect the notion of prescribed costs, which account for the costs for all the work that is required to prepare the proceedings for trial. Therefore, there is nothing in the respondents' submissions which justify an exercise of this Court's discretion under 65.13(2)(b) to award them assessed costs.

[47] I find that an award of prescribed costs would reflect the overall justice of the case. Having regard to Part 65, Appendix B of the CPR, and the value of the appellants' claim of US$732,699.88, prescribed costs of the appeal amount to US$75,038.99.

Conclusion

[48] For the reasons given, I would make the following orders:

(1) The appellants shall pay ninety percent of the respondents' costs on the prescribed basis in the court below in the amount of US$67,535.09.

(2) On this appeal, the appellants shall pay two-thirds of that amount to the respondents in the amount of US$45,023.39.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Joyce Kentish Egan, QC
Justice of Appeal [Ag.]

By the Court

Chief Registrar