REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2015-01192

BETWEEN

LUTCHMEESINGH'S TRANSPORT CONTRACTORS LIMITED

Claimant

AND

NATIONAL INFRASTRUCTURE DEVELOPMENT COMPANY LIMITED

Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: 13th July 2017

Appearances:
Mr. Simon Hughes Q.C. leads Ms. Jessica Harragin instructed by Mr. Derek Balliram for the Claimant
Dr. Claude Denbow S.C. leads Mr. Kelvin Ramkissoon instructed by Mr. Nizam Saladeen for the Defendant

JUDGMENT ON COSTS

1. This judgment deals with the quantification and assessment of the Defendant's costs. The Court had dismissed the Claimant's claim on the determination of a preliminary issue and made the following costs order: "The Claimant do pay to the Defendant 50% of the assessed costs on its application to determine a preliminary point and the prescribed costs of the claim to be quantified by the Court in default of agreement".

2. The Defendant submitted its statement of costs and the Claimant filed its points of objection. Both parties filed their respective written submissions on the question of prescribed costs. I deal firstly with the quantification of the prescribed costs of the claim and second with the assessment of the Defendant's costs on the hearing of the preliminary issue.

Prescribed Costs

3. The applicable "costs regime" in determining the Defendant's prescribed costs on the claim is prescribed costs pursuant to rules 67.5 (1) and (2) of the Civil Proceeding Rules 1998 as amended (CPR). The Defendant's costs are to be determined pursuant to Appendix B and C of Part 67 based upon the "value of the claim". That is not in contest. Where the parties differ is in the manner in which that value is to be determined. Of course the process by which the Court **quantifies** prescribed costs pursuant to Part 67.5, 67.6 and 67.7 CPR is not to be confused with **an assessment** of costs which is conducted pursuant to rules 67.11 and 67.12 CPR.

4. On this issue of determining the "value of the claim" the Claimant contends that this claim is for a non-monetary sum and therefore Rule 67.5 (2) (c) is applicable where the value of the claim will be treated as $50,000.00. The Defendant contends that this claim is a claim for damages and therefore Rule 67.5 (2) (b) (ii) applies where the Court is entitled at this stage post judgment to "stipulate" a value of the claim.

Determining the value of the claim

5. Where a Defendant is entitled to prescribed costs[1], the value of the claim can be determined by any of the following three means where applicable: (a) by the amount claimed by the Claimant in his claim form (b) if the claim is for damages and the claim form does not specify an amount that is claimed, then the value is determined by a sum agreed by the parties or a sum stipulated by the court or (c) if the claim is not for a monetary sum it is to be treated as a claim for $50,000.00.[2]

6. Rule 67.5 (2) (b) and (c) CPR provides:

> "(2) In determining such costs, the "value" of the claim shall be decided–
>
> .....
>
> (b) in the case of a defendant–
>
> i) by the amount claimed by the claimant in his claim form; or
>
> ii) if the claim is for damages and the claim form does not specify an amount that is claimed, be such sum as may be agreed between the party entitled to, and the party liable for, such costs or if not agreed, a sum stipulated by the court as the value of the claim; or

[1] Different considerations arise to quantify costs where a Claimant is entitled to prescribed costs.
[2] 67.5 (2) (i) (ii) (c).

(c) if the claim is not for a monetary sum, as if it were a claim for $50,000."

7. It must be remembered that the new regime of prescribed costs was introduced to make the system of determining costs less cumbersome, more predictable and efficient. See Note 29.6 Caribbean Civil Court Practice 2011. It also strived to fix the recoverable legal costs as a sum which is proportionate to the value of the claim. This was part of the revolution in the allocation of costs discussed by Dick Greenslade in his review of the Rules of Supreme Court. He recognized that the taxation of costs was a "somewhat arcane and incomprehensible art" and in recommending the system of quantification of costs he identified five useful aims which bear repeating[3]:

    - That the litigant, winner or loser, should not be expected to pay more than the reasonable cost of the litigation.
    - That the attorney should be adequately remunerated- by adequate I mean sufficiently to enable an attorney of a little over average competence to conduct the litigation efficiently and speedily.
    - That the system of quantification contained positive incentives to efficiency not perverse incentives whereby the inefficient attorney may be paid more than his efficient counterpart.
    - It should be transparent, i.e., the litigant should be able to understand how costs are calculated.
    - It should be relatively certain, i.e., the litigant should know reasonably accurately what his potential liability for costs, whether he win or lose, may be.

8. It is to be noted that this new regime of prescribed costs should focus both parties' attention on the management of the risks of litigation. It creates a fairly predictable environment for parties to be aware of the exposure to legal costs or the recovery of legal costs in the event of either failure or victory in litigation, where the claim specifies the sums being claimed. Such a regime encourages claimants to be realistic with their claims and discourages attempts to unfairly exaggerate their claim, as they will do so at the risk of being liable to a higher cost award based upon Appendix B. Where the value of the claim is not immediately apparent on the pleadings, parties have available to them the option of either setting a cost budget or fixing a value of the claim pursuant to Rule 67.6 CPR. See **Donald**

[3] Judicial Sector Reform Project, Review of Civil Procedure by Dick Greenslade, page 156-157.

v AG Grenada Civil Appeal No. 32 of 2013.[4] By these methods parties make it very clear to each other their relative liabilities in an award of costs at the end of the trial.

9. The Claimant submitted that it was open for the Defendant to place a monetary value of the claim pursuant to Rule 67.6 at a case management conference and not post-trial. The Claimant relied on **Bryan St. Louis and Joseph Remy v Lisa Ferreira and Edghill Messiah** CV2012-00790 to contend that the Defendant's submission in favour of an ex post facto determination of value goes against the "spirit and intent of the CPR" and can lead to an "unsatisfactory situation" which may have adverse consequences to the other party after costs have been incurred. The Claimant therefore submitted that the claim should be assessed for $50,000.00 pursuant to Rule 67.5 (2) (b) (iii).

10. For the reasons set out below, both parties are right. The value of this claim is to be determined pursuant to both rules 67.5(2) (b) (ii) and (iii).

11. There is no sum claimed by the Claimant on the claim form. To determine the "value of the claim" the Court must first examine the reliefs claimed. The Claimant, Lutchmeesingh's Transport Contractors Limited, was one of five tenderers who responded to an Invitation to Tender (ITT)[5] issued by the Defendant NIDCO for the construction of a flyover at the intersection of Churchill Roosevelt Highway and the Southern Main Road. The Claimant was invited to negotiations with the Defendant when its negotiations with the first ranked tender was not successful. The ITT allowed for the Defendant to reject the tender if it is unable to agree on detailed costs or compensation for the tenderer's services. The negotiations took place over a four month period when by letter dated 6th February 2015 the Defendant advised that it did not anticipate arriving at an agreement as to scope and provide for the execution of the contract and withdrew from the negotiations. The Claimant's claim for breach of contract was formulated on the basis that the Defendant failed to provide "detailed alternatively sufficient" reasons for its purported decision to

[4] It was pointed out in **Donald v AG** that:

> "The Rules do not intend that once a claim is to be concluded after trial the prescribed costs regime should inflexibly be applied in order to determine the costs payable. A perusal of the Rules will indicate that opportunities are afforded parties to vary the consequences of a mechanical application of the prescribed costs. For example, CPR 65.5(4) and CPR 64.6(3) entitles the court to award a proportion only of the costs detailed in the Scale of Prescribed Costs. Further, CPR 65.6 provides for a party at a case management conference to apply to the court for an order that prescribed costs should be calculated on a higher or lower figure than the likely value of the claim. And of course it is always open for a party to apply to the court to set a costs budget."

[5] The ITT is known as #1307/03 Design Build Contract for package D- Churchill Roosevelt Highway/Southern Main Road Flyover and Ancillary Works.

reject or not proceed with the Tender. The Claimant contended that such an obligation was express or implicit within the ITT.

12. The claim was for the following relief:

    a) A declaration that the ITT (Invitation to Tender), including the instructions, constitute a binding contractual document between the Claimant and the Defendant.

    b) Damages for breach of contract.

    c) Interest pursuant to the Supreme Court of Judicature Act on all damages recovered at such rate and for such period as this Honourable Court shall think fit.

    d) Costs.

    e) Such further and/or other reliefs this Honourable Court deems fit.

13. In short the claim was for both declaratory relief and for damages (where the amount was not specified in the claim form). The claim can be regarded therefore as a "mixed claim" for both a claim for damages and for a relief which has no monetary value, that is, a claim for declaratory relief. The applicable Rules are therefore both Rules 67.5 (2) (b) (ii) and 67.5 (2) (c) CPR. Previously under the Rules of Supreme Court 1975 a distinction was made between liquidated and unliquidated claims. No such terminology is used in the CPR and the distinction drawn between Rules 67.5(2) (b) (ii) and (iii) is simply between claims for damages and claims for which there is no monetary value. The latter category refers for instance to such claims for declaratory or injunctive relief.

14. It therefore means that the value of this claim which includes a claim for a declaration carries a minimum of $50,000.00 pursuant to rule 67.5 (2) (c).

15. It is quite right in some cases for the purposes of determining the "value" of the claim to examine the claim and make a determination as to what in substance was the claim before the Court. In such a case a Court is entitled to say that whereas the claim presents itself as a mixed claim it is for practical purposes a claim for damages or for declaratory relief whichever is in substance the main relief sought. In doing so the Court exercises its discretion to answer the question what was the main question before the Court to be resolved in this claim and from that juxtapose the appropriate value.

16. For instance in a mixed claim for declaratory relief and for damages, where the Claimant is successful and damages are awarded in most cases the Court will ascribe a value of the

claim solely based upon the sum of money ordered to be paid. In such a case the Court presumes that there is greater significance and value in such a claim for damages and it may be unnecessary to also add to it the value of $50,000.00 (representing the value of the non-monetary claim for a declaration). In other cases where claims for damages and non-monetary claims are sought with equal vigor it should require separate consideration. In such cases the question of determining values for more than one "claim" may be appropriate. The question of determining the value of the claim in the mixed claims is to be resolved in each case by the exercise of the Court's discretion considering all the circumstances and giving effect to the overriding objective having regard to the considerations in Rule 66.6 CPR where the Court determines what is proportional, fair and just. See **Denisha Mayers v Andy Wilson and Colonial Fire and General Insurance Company Limited** H.C.3655/2011, CV.2011-03655.

17. In this case the preliminary issue dealt with the limited contractual obligations that may arise between the Claimant as a tenderer and the Defendant as an inviter of tenders before a contract accepting the tender has been made. The Defendant had declined to continue negotiations with the Claimant on its tender and the very narrow issue for determination was whether a duty to provide detailed or sufficient reasons to reject or not proceed with a tender can be implied in such a contract.

18. Therefore a fundamental question to be answered was the question of a declaration that a right existed in contract for the Defendant to provide reasons in rejecting or not proceeding with the tender. Equally however, there was no injunction to force the hand of the Defendant to treat with the Claimant if such a right existed. At best then the practical result for the Claimant was its claim for damages for breach of contract predicated on the declaration of that right. The claim for damages is therefore also significant for the Claimant but hinged upon the declaration.

19. However, the Court had significant difficulty during the management of this case in obtaining from the Claimant a clear picture of what was the extent of those damages even after disclosure was ordered. The question of the extent or nature of damages sought was important so that the Court could ascertain the value of this claim in determining the amount of resources and strategies to be employed in bring a timely resolution to the claim. It is also important for the parties to understand their respective liabilities and exposure.

20. The value of the claim is therefore a matter which litigants must constantly bear in mind to engage in their respective risk management and to determine what appropriate steps are to be taken to preserve their recovery of costs. In the absence of a budgeted costs application the parties must be aware of their recourse to an application to determine a value for the claim pursuant to rule 67.6 CPR. However applications pursuant to Rule 67.6 CPR cannot be made post judgment. See **Denisha Mayers** (supra) and **Bryan St. Louis and Joseph Remy v Lisa Ferreira and Edghill Messiah** CV2012-00790.

21. The Defendant in its application referred to three rules in making its application to determine a value of this claim Rule 67.5 (2) Rule 67.6 and Rule 67.11. Clearly Rule 67.11 which operated in cases where costs are being assessed is inapplicable. Rule 67.6 provides as follows:

> "**67.6** (1) A party may apply to the court at a case management conference—
>
> (a) to determine the value to be placed on a case which has no monetary value; or
>
> (b) where the likely value is known, to direct that the prescribed costs be calculated on the basis of some higher or lower value.
>
> (2) The court may make an order under paragraph (1)(b) if it is satisfied that the costs as calculated in accordance with rule 67.5 are likely to be excessive or substantially inadequate taking into account the nature and circumstances of the particular case.
>
> (3) Where an application is made for costs to be prescribed at a higher level rules 67.8(4)(a) and 67.9 apply."

22. However Rule 67.6 is also irrelevant for three reasons. First such applications should be made in the first instance at the case management conference. See rule 67.6(1). Second, although there is no prohibition to make such an application at a later stage such as at a pre-trial review there is no warrant or rationale for such an exercise to be conducted at or post-trial. It is clear from the considerations set out in Rule 67.6(1) (b)[6] and 67.6 (2)[7] the Rule

[6] Rule 67.6(1)(b) provides:

> **67.6** (1) A party may apply to the court at a case management conference—
>
> …….
>
> ***(b)*** **where the likely value is known, to direct that the prescribed costs b calculated on the basis of some higher or lower value.**

[7] Rule 67.6(2) provides:

seeks to predict the future costs to be incurred during the proceedings to determine whether the general rule set out in Rule 67.5 are likely to be excessive or substantially inadequate. It is a forecast of future costs and would be inappropriate at or after the trial to do such an exercise when the costs would have already have been expended. Third, I agree with the analysis in **Bryan St. Louis**. In that case the defendants agreed that the claimants were entitled to costs and that the claim was not for a monetary sum. As the Claimant was entitled to costs Rule 67.5(2)(b) was therefore inapplicable because that Rule provides for determining the value of the Claim when the Defendant and not the Claimant is a successful party. Justice Rahim also noted that "while the section does not mandate that the application be brought at a CMC, surely, it does not allow it to be brought after trial of the issues."[8]

23. In determining the value of the claim for damages for the successful Defendant for the purposes of Rule 67.5(2) (b) it is the task of the Court to stipulate a sum pursuant to Rule 67.2(b) (ii).

Ascertaining the stipulated sum

24. In stipulating a value of the claim for damages, the Court is not engaged in a de facto assessment of damages. I had set out the factors to be considered and again it is an exercise of a discretion to give effect to the overriding objective. In **Denisha Meyers** the Court sets out what may be taken into account :

> "(a) The sum is an assessment by the Court of the value of the claim.
>
> (b) The Court should identify the real dispute between the parties and stipulate a sum that is the value of that claim.
>
> (c) That assessment is made on the evidence before the Court. The Court is also entitled to examine the pleadings, examine correspondence passing between attorneys, examine opinions on quantum filed or exchanged between the parties any material which in the Court's view would have informed the parties as to the value of the claim that the Defendant had to defend.

(2) The court may make an order under paragraph (1)*(b)* if it is satisfied that the costs as calculated in accordance with rule 67.5 are likely to be excessive or substantially inadequate taking into account the nature and circumstances of the particular case.

[8] **Bryan St. Louis and Joseph Remy v Lisa Ferreira and Edghill Messiah** CV2012-00790, paragraph 11.

(d) The Court should not conduct a trial or an assessment of damages to determine this sum. To do so would unnecessarily increase the expense of the proceedings and cause further delay.

(e) If the Court stipulates a sum as the value, the Court should proceed to exercise its discretion in the quantification of the prescribed costs to ensure that the costs awarded is fair and reasonable. The Court is therefore entitled to award a percentage of the costs calculated in accordance with the percentages in Appendix B against the appropriate value or some lower percentage. In doing so the Court will take into account the factors set out in rule 66.6 (4), (5) and (6)."[9]

25. In this way Courts have been stipulating sums striving as best as it can, to make a determination of the value of what eventually was at stake in the litigation. Where parties exchanged advice on damages for instance, the likely value of the claim becomes known. In the absence of such an exercise and where the claim, as in this case, ends pre-maturely, the Court is in a substantial difficulty to make such an assessment even on a superficial level.

26. The Defendant submitted that the Court is to be guided by the learning in **Denisha Meyers** wherein in determining the value of the claim which the Defendant had to defend, it is open to the Court to consider the pleadings, the correspondence between the parties, the opinions on quantum filed and exchanged, the documents in the disclosure bundles by the parties. The Defendant submitted that the following documents can assist the Court in determining the value of the claim:

(i) Statement of Case filed on 15th April 2015 which made reference to the tender security of $4million, the loss and damage the Claimant suffered in that it was deprived the opportunity to protest and change the outcome of the tender and damages for loss of opportunity in being successful in its tender and wasted expenditure in a tender evaluation process.

[9] **Denisha Mayers v Andy Wilson and Colonial Fire and General Insurance Company Limited. BY ANCILLARY CLAIM: Andy Wilson (ancillary claimant) v Farmers Supermarket Limited (first ancillary defendant); Denisha Mayers (claimant/second ancillary defendant); Maritime General Insurance Company Limited (third ancillary defendant)** H.C.3655/2011. CV.2011-03655, paragraph 16. See also **Maxymych v Global Convertible Megatrend Ltd** Note 29.6 Caribbean Civil Court Practice.

(ii) Reply filed on 4th December 2015 which indicated that the Claimant has a justifiable claim for breach of contract arising out of the ITT.

(iii) The Internal Document 1, ITT 1307/03 dated July 2013, the Internal Document dated 31st October 2014 and the Internal Document 12 dated 17th November 2014.

(iv) The Claimant's Skeleton argument in reply filed on 12th May 2016.

(v) The Report on Negotiations with LTC and NIDCO (document No. 21 on the Defendant's bundle) filed 12th February 2016 which indicated that the cost of works tendered by LTC was $331,219,175.10 VAT Inclusive, PAL's estimates cost of the works inclusive of provisional sum and VAT is $391,364,457.13, Engineers estimates is $391,364,457.13 and the total of estimate in AECOM Design Estimate Grand Summary is $391,354,457.13.

(vi) Letter from K.R. Lalla and Company to the Instructing Attorney for the Defendant entitled: "Offer made without prejudice except as to costs within the meaning of the CPR Part 63.3(1).

27. The Defendant further submitted on the preliminary point the Court should take into account the following:

(i) The filing of submissions on both sides and replies.

(ii) The filing of bundles of documents, disclosure lists, statement of facts and responding to several letters.

(iii) Senior Counsel was retained.

(iv) Instructing Attorney (5 years call)

(v) Junior Counsel (26 years call)

28. The Defendant contended that the value of the claim should be determined on the costs associated with the bid preparation, attendance of meetings, conduct of negotiations, the cost for providing the tender security of $4million, the quantum of damages the Claimant would have obtained for the loss of opportunity to obtain a profit on the project and the estimated profit the Claimant would have turned over determined from the Engineer's Estimate of $391,364.457.13 and using the rate of return of 15%-20% may amount to $58,650,000.00 to $78,200,000.00.

29. In my view the entire exercise of determining a value of the claim linked to the likely award of damages for the Claimant in this claim is speculative. At best the damages for the Claimant would be an assessment of the lost chance of obtaining the contract. There was no guarantee that had the parties continued negotiations that a final contract would have been entered into for the work on the flyover. It is extremely difficult for the Court at this stage to determine what the loss of chance was to the Claimant from a failure to continue negotiations. The estimated loss of profits set out in the bundle of documents are of no assistance either as there was no guarantee that had the parties continued negotiations there would have been a successful conclusion of an agreement to provide services and the final shape and form of the terms and conditions of the services to be provided, the costs and profits. Further it was not clear from the Claimant's documents of the quantification of that "lost chance". The Court would have had to do the best it could have based on the chance of a profit, or the costs thrown away but neither of this is certain. Doing the best it can the Court can only stipulate a nominal value of $50,000.00 to the claim for damages.

30. Recognizing that this is a mixed claim seeking a declaration (which carries a value of $50,000.00) and damages (which I stipulate a nominal value of $50,000.00) both of which were important to the Claimant, I have pursuant to Rule 67.5(2)(b)(ii) and 67.5(2)(c) (c) CPR valued these claims in the sum of $100,000.00 for the purposes of determining the prescribed costs. The prescribed costs will therefore be $24,000.00 pursuant to Appendix B of Part 67. This matter was determined at the CMC stage and therefore 55% would be applied to $24,000.00 leaving the sum of $13,200.00 as the Defendant's prescribed costs of the claim.

Assessed costs

31. The sum to be allowed on this assessment is the amount the Court deems to be reasonable where the work to be carried out by an Attorney at Law of reasonable competence and which appears to the Court to be fair both to the person paying and receiving such costs. In deciding what is reasonable the Court is guided by the Practice Direction and the factors set out in Rule 67.2(3) and in particular (c) (d) (e) (f) and (g) CPR.

32. In determining a "reasonable fee" the guidance of **Simpson Motors Sales (London) Limited v Hendon Borough Council** [1965] 1 WLR 112 is still relevant where "One must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particularly high fee sometimes demanded by counsel

of pre-eminent reputation. Then one must estimate what fee this hypothetical character would be content to take on the brief". Arriving at the "right figure" is an exercise of the Court's discretion guided by experience and the applicable principles of costs assessment. The traditional factors to determine what is a reasonable fee and which to a large extent set out the considerations in Rule 10 Part B of the Code of Ethics was previously set out in Part X of Order 62 in the RSC. Under the CPR however, rule 67.2(3) provides the considerations to be considered and there is now a new ethos in the assessment of costs which takes into account more fluid notions of fairness, proportionality and the overriding objective.

33. As a general principle, the Court's discretion as to the amount of costs allowed must be exercised consistently with the overriding objective, Rule 1.2. In so doing the Court engages in an exercise to ascribe an appropriate fee which is proportionate to the amount of work involved, the importance of the case, the complexity of the issues and the financial position of each party. An important aspect of the exercise in the principles of proportionality.

34. In **Scotiabank Trinidad and Tobago Limited v Bank Employees Union** Civil Appeal No. 187 of 2010, on the issue of proportionality, Mendonca JA at paragraph 49:

> "49. However, costs must not only be reasonably incurred and reasonable in amount but should also be proportionate. What proportionality seeks to do is to impose a sensible correlation between the costs a party may recover and the claim. It acts as a counter-weight to disproportionately high costs...."

35. Following **Lownds v Home Office Practice** Note [2002] EWCA Civ. 365 Mendonca JA recommended a two stage approach in the assessment of costs. In paragraph 53 he noted:

> "The first stage is the global approach and the second an item by item approach. In the first stage the Court is required to form a preliminary opinion whether the total costs claimed were proportionate having regard to the considerations referred to earlier. The next stage is an item by item approach. If the Court is of the opinion that the costs are not disproportionate, all that is required is for the Court to determine whether each item claimed was reasonably incurred and whether the amount claimed for it is reasonable. If however the Court at the global stage were to find the costs disproportional the manner of assessment is more rigorous. Then the receiving party will be required at the

item by item stage to satisfy the Court that each item of costs was necessarily incurred and, if so, the amount charged therefore is reasonable."

36. The Defendant submitted its statement of costs and the Claimant submitted its points in reply. The costs order for the assessments was in relation to the application to determine a preliminary issue. That application[10] was filed by the Defendant and was supported by a brief affidavit of Dinanath Ramkissoon filed on 22nd January 2016. The Court upon perusing the application at the CMC and after hearing submissions from the parties worked with the parties in formulating the following preliminary issues for determination:

    a) Whether the Invitation to Tender ITT #1307/03 issued by the Defendant in July 2013 gives rise to any contractual rights and obligations to found a justifiable case for breach of contract as pleaded in the Statement of Case.
    b) If it does whether the matters pleaded in paragraphs 8 (1) – (4) in the Statement of Case gives rise to express or implied terms in the ITT.

37. The Court also gave further directions for the hearing of that issue which included the filing of agreed documents, statement of facts and written submissions. There was a very brief oral hearing. Both sides were represented by Senior Counsel. Whereas the matter was very important for both parties and included the consideration of voluminous documentation the issue was a simple one in contract.

38. The Claimant's statement of costs had set out the fee earners of an Instructing Attorney at law of five (5) years call, a Junior Counsel and Senior Counsel. It sets out the work done and the number of hours claimed by each fee earner on the specific item of work and disbursements. The hourly rates are based upon the Practice Guide of 2015. The total sum claimed by the Defendants on its statement of costs is in the sum of $1,393,937.81. This is wholly disproportionate to the nature of the application, the very narrow issues to be resolved, the fact that there was no cross examination of witnesses and the submissions were on matters of basic contract law. There were no complex issues of law nor serious factual dispute, the parties were prepared to rest on their written submission but for the Court's invitation to make brief oral submissions. In those circumstances, globally the sum is disproportionate to the nature of the application. Adopting the two stage approach the Court must therefore rigorously examine this statement of costs and determine if the items were necessarily incurred and if so whether the costs charged are reasonable.

[10] Filed on 22nd January 2016.

39. In doing so the Court's approach to the assessment is threefold which are to:

    a) determine the appropriate fee earners;

    b) determine the appropriate work required and

    c) the reasonable number of hours required by each attorney for the items of work. In adopting this approach the Court is mindful of the guidelines in Rule 66.6 and the Practice Guide 2007.

The fee earners

40. In my view it was fair and reasonable to retain both Senior and Junior Counsel in a matter which would have had huge significance for the Defendant in a very important building contract. The fact that the Claimant also retained Senior Counsel is of particular relevance but not determinative of the question of what is appropriate for the Defendant. Although the "two counsel rule" is no longer appropriate I have allowed two counsels in this matter having regard to the importance of the matter, the exposure of damages had the matter progressed and the general importance to other tenderers. I however will take into account the reasonable hours required to conduct the work required and not apply the traditional 2/3 Rule. In fact in some instances Junior Counsel may work longer hours than an Instructing Attorney and Senior Counsel.

41. The level of instructing work required could have been assigned to a Band A practitioner having regard to the experience and guidance of the other fee earners involved. A band A instructing attorney would have been the hypothetical Instructing Attorney required in this instance. See **Simpsons Motor Sales (London) Ltd V Hendon Corporation** [1965] 1 WLR 112. I would therefore apply the following rates for the following fee earners, Instructing Attorney Band A $750.00 per hour, Junior Counsel $2,850.00 per hour and Senior Counsel $4,000.00 per hour.

Appropriate work and reasonable hours

42. In determining the appropriate work required and number of hours I have taken into account the principle of proportionality discussed in the guidelines and in **Scotiabank Trinidad and Tobago Limited v Bank Employees Union** Civil Appeal No. 187 of 2010. I set out below my assessment of the Defendant's costs on an item by item basis to determine if the costs charged are reasonable.

    i. **Items 1 to 5**:

Item 1- Claimant's statement of case and claim form filed on 15/04/2015- Junior Counsel's fee for receiving and perusing Statement of case and claim form.

Item 2- Claimant's Affidavit of Service filed on 17/04/2015- Junior Counsel fee for receiving and perusing Affidavit.

Item 3- Appearance filed by the Defendant on 20/04/2015- Instructing Attorney's fee for taking instructions, completing and filing appearance.

Item 4- Defendant's Defence filed on 27/08/2015-

(i) Instructing Attorney's fee for taking instructions and preparation of Defence.

(ii) Junior Counsel's fee for drafting and settling Defence.

(iii) Photocopies of Defence ((632 pages) 5 copies at $1.00 per page)

Item 5- Claimant's reply to Defence filed on 04/12/2015- Instructing Attorney's fee receiving and perusing Claimant's reply to Defence. Junior Counsel's fee for reviewing and considering Claimant's reply.

These are disallowed as these are fees that are not associated with or reasonably incurred in relation to the application to deal with a preliminary issue but rather with the fees for the claim which were already recovered as prescribed costs for the claim.

ii. **Item 6**- Defendant's Notice of Application on Preliminary point filed on 22/01/2016.

(i) Instructing attorney's fee for taking instructions and preparation of notice of application on preliminary point.

(ii) Junior Counsel's Fee for drafting and settling notice of application on preliminary point.

(iii) Photocopies of notice of application on preliminary point ((3 pages) 5 copies @ $1.00 per page).

It would not be proportionate to allow both an Instructing and Junior Counsel fee. This work I would attribute to Junior Counsel but I am of the view that only two (2) hours would be reasonable in the circumstances.

iii. **Item 7**– Defendant's Affidavit in Support of Notice of Application on Preliminary Point filed on 22/01/2016.

(i) Instructing Attorney's fee for taking instructions and preparation of affidavit in support.

(ii) Junior Counsel fee for settling affidavit.

(iii) Photocopies of affidavit in support ((5 pages) 5 copies @ $1.00 per page).

The affidavit in support was brief and required in my view one (1) hour of Instructing Attorney work and one (1) hour of Junior Counsel to vet same before it was filed.

iv. **Item 8**- Defendant's List of Documents filed on 12/02/2016.

(i) Instructing Attorney's fee for taking instructions and preparing list of documents.

(ii) Junior Counsel's fee for reviewing List of Documents.

(iii) Photocopies of List of Documents ((1253 pages) 5 copies @ $1.00 per page).

(iv) Copies of CD's, 5 copies @ $10.00.

With regard to the Defendant's list of documents although the documents themselves were voluminous and would have taken up a considerable time to organize, it is the work of the Instructing Attorney rather than Junior Counsel. I would assess this work at six (6) hours for the Instructing Attorney and one (1) hour for the Junior Counsel for spending time in a supervisory capacity.

v. **Item 9**- Claimant's List of Documents filed on 15/02/2016 Junior Counsel's fee for reviewing and perusing the Claimant's list of documents.

Junior Counsel would not have required three (3) hours to review the Claimant's list as these documents would have already been included in the Statement of Case. I would allow one (1) hour as a reasonable amount of time required.

vi. **Item 10-** Claimant's Unagreed Statement of facts filed on 11/03/2016. Junior Counsel's fee for reviewing and perusing the Claimant's Unagreed facts.

Similarly in Item 10 one (1) hour is reasonable for the Junior Counsel to peruse the Claimant's brief statement of facts.

vii. **Item 11**- Defendant's List of Documents Unagreed filed on 11/03/2016.

(i) Instructing Attorney's fee for taking instructions and preparing list of documents.

(ii) Junior Counsel's fee for reviewing List of Documents.

(iii) Photocopies of List of Documents ((6 pages) 5 copies @ $1.00 per page).

I am of the view that three (3) hours was sufficient for the Instructing Attorney but one (1) hour only for Junior Counsel.

viii. **Item 12**- Defendant's Statement of Facts filed on 11/03/2016.

(i) Instructing Attorney's fee for taking instructions and preparing Defendant's Unagreed facts.

(ii) Junior Counsel's fee for settling Defendant's Unagreed facts.

(iii) Photocopies of Statement of Facts ((7 pages) 5 copies @ $1.00 per page).

The unagreed statement of facts were relatively straightforward and not complex. I would allow two (2) hours for Instructing Attorney and one (1) hour for Junior Counsel.

ix. **Item 13**- Claimant's skeleton argument and authorities filed on 18/04/2016 Junior Counsel's fee for reviewing and perusing the Claimant's skeleton arguments

Perusing the skeleton argument of the Claimants would have required in my view reasonably approximately three (3) hours and not five (5) hours as claimed for Junior Counsel.

x. **Item 14**- Defendant's Submissions filed on 18/04/2016.

(i) Instructing Attorney's fee for taking instructions, preparation and Legal Research.

(ii) Junior Counsel's fee for drafting, researching and preparation of draft for forwarding to Senior Counsel for vetting.

(iii) Senior Counsel's fees for settling of submissions.

(iv) Photocopies of Submissions ((23 pages) 5 copies @ $1.00 per page).

I would allow a total of eighteen (18) hours to prepare the Defendant's skeleton submissions made up of three (3) hours for Instructing Attorney, eight (8) hours of Junior Counsel and seven (7) hours of Senior Counsel.

xi. **Item 15**- Defendant's Bundle of Authorities filed on 18/04/2016.

(i) Instructing Attorney's fees for preparation of Bundle of Authorities.

(ii) Junior Counsel's fee for reviewing Bundle of Authorities.

(iii) Photocopying, Indexing, Paginating and binding of bundles of authorities (4(12 pages) 5 copies @ $1.00 per page).

The bundle of authorities were not voluminous but some time had to be spent to prepare them. It is typically the work of Instructing Attorney to do this and I would allow two (2) hours for Instructing Attorney and one (1) hour of Junior Counsel to supervise and ensure that the correct authorities have been appended.

xii. **Item 16**- Claimant's Supplemental List of Documents filed on 22/04/2016.

(i) Junior Counsel's fee for reviewing Supplemental List of Documents.

(ii) Senior Counsel's review of Supplemental List of Documents.

The Claimant's supplemental list was not significant and I would allow one (1) hour for Junior Counsel and one (1) hour for Senior Counsel.

xiii. **Item 17** – Claimant's Submissions in Reply filed on 12/05/2016.

(i) Junior Counsel's fee for review of the Claimant's Submissions.

(ii) Senior Counsel's fee for review of the Claimant's Submissions.

In perusing the submissions in reply which was not lengthy I would allow three (3) hours in total comprising two (2) hours for Junior Counsel and one (1) hour for Senior Counsel.

xiv. **Item 18** – Defendant's Reply to Claimant's submissions filed on 11/05/2016.

(i) Instructing Attorney's fee for taking instructions.

(ii) Junior Counsel's fee for preparation of speaking note.

(iii) Senior Counsel's fees for settling of submissions in reply.

(iv) Photocopies of submissions ((12 pages) 5 copies @ $1.00 per page).

The Defendant's reply to the Claimant's submission was not lengthy and I would allow a total of seven (7) hours comprising five (5) hours Junior Counsel and two (2) hours Senior Counsel.

xv. **Item 19** – Defendant's speaking note filed on 03/06/2016.

(i) Instructing Attorney's fee for taking instructions.

(ii) Junior Counsel's fee for preparation of speaking note.

(iii) Senior Counsel's fee for settling speaking note.

(iv) Photocopies of speaking note ((5 pages) 5 copies @ $1.00 per page).

The Defendant's speaking note was also not long but brief. I would allow two (2) hours, one (1) hour for Junior Counsel and one (1) hour for Senior Counsel.

xvi. **Item 20** – Claimant's speaking note filed on 03/06/2016.

(i) Junior Counsel fee for reviewing Claimant's speaking note.

(ii) Senior Counsel's fee for reviewing Claimant's speaking note.

The speaking note for the Claimant was delivered in Court during the oral hearing but I would allow a half (½) hour for Senior Counsel in considering it in developing his arguments in reply.

xvii. **Items 21 to 25**

Item 21- Defendant's notice of application for value of the claim to be determined filed on 21/02/2017.

(i) Instructing Attorney's fee for taking instructions, preparation and legal research.

(ii) Junior Counsel fee for settling Notice of Application.

(iii) Photocopies of Notice of Application and draft order ((5 pages) 5 copes @ $1.00 per page).

Item 22- Defendant's affidavit in support of Notice of Application for Value of Claim to be determined filed on 21/02/2017.

(i) Instructing Attorney's fee for taking instructions and preparation of affidavit in support.

(ii) Junior Counsel fee for settling affidavit.

(iii) Photocopies of affidavit in support ((14 pages) 5 copies @ $1.00 per page).

Item 23- Claimant's submissions on Notice of Application on assessment of value of claim filed on 24/04/2017.

(i) Instructing Attorney's fee for receiving and perusing.
(ii) Junior Counsel's fee for review of the Claimant's submissions.

Item 24- Defendant's Submissions on Notice of Application on assessment of value of claim filed on 24/04/2017.

(i) Instructing Attorney's fee for taking instructions, preparation and Legal research.
(ii) Junior Counsel fee for settling submissions.
(iii) Photocopies of submissions ((11 pages) 5 copies @ $1.00 per page).

Item 25- Defendant's bundle of authorities filed on 24/04/2017.

(i) Instructing Attorney's fees for preparation of Bundle of authorities.
(ii) Junior Counsel's fee for reviewing Bundle of Authorities.
(iii) Photocopying, indexing, paginating and binding of bundles of authorities ((58 pages) 5 copies @ $1.00 per page).

Items 21-25 are not relevant as they do not fall within the scope of the order for costs on the preliminary issue.

xviii. **Items 26 to 27**

Item 26 – Instructing Attorney's fee on brief.
Junior Counsel's fee on brief.
Senior Counsel's fee on brief.

Item 27 – Court appearances.

(i) 15/10/2014
Instructing Attorney's fees
Junior Counsel's fees

(ii) 26/01/2015

Instructing Attorney's fees

Junior Counsel's fees

(iii) 24/02/2016

Instructing Attorney's fees

Junior Counsel's fees

(iv) 07/07/2016

Instructing Attorney's fees

Junior Counsel's fees

The fees on brief should take into account other matters such as the time spent in preparation for the application and attendance at the first day of the application.[11] Fees on brief were usually received for the hearing of contested applications and trials. In Butterworths Costs Service[12] it is stated that:

> "The **brief fee** covers all work done by way of preparation for representation at the trial and attendance on the first day of trial, but in heavy litigation particularly where there is a team of barristers and experts additional work is involved in ensuring that the client is properly represented and his case fully developed, beyond simply appearing in court, such as meeting to consider strategy and tactics and preparing material and where necessary meeting experts prior to their giving evidence."

I would take into account that there was no trial in this matter and that the application before the Court was not intended to consume advocate attorneys time making submissions before the Court. I would also take into account the sums that have already been claimed and recovered for every item of work that would have been reasonably required in the preparation for the application which assisted the Court in arriving at a judgment. Any extra sum to be recovered would be strictly for preparation for the very brief hearing. There will therefore be no fee on brief for Instructing Attorney. The fees on brief for the application will be in the sum of $10,000.00, Junior Counsel and Senior Counsel $10,000.00.

[11] Practice Guide 2007.
[12] Butterworths Cost Service paragraph 190.

Item 28 – Receiving and perusing judgment of the High Court (20 pages) dated 7th July 2016.

(i) Junior Counsel's fee for reviewing Claimant's speaking note.

(ii) Senior Counsel's fee for reviewing Claimant's speaking note.

I will allow two (2) hours for Junior Counsel and two (2) hours for Senior Counsel.

43. I would allow all the disbursements and court appearances[13] for the items claimed with the items allowed as reasonable and fair.

44. The assessed costs for the hearing of the application is therefore $208,680.00. My costs order for the reasons I gave reduced them by 50% which equates to $104,340.00.

Costs quantification and assessment

45. The Claimant therefore shall pay to the Defendant prescribed costs quantified in the sum of $13,200.00 and assessed costs quantified in the sum of $104,340.00.

Vasheist Kokaram

Judge

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Item	**Amount**
Item 6-	$15.00
Item 7-	$25.00
Item 8-	$6,265.00
	$50.00
Item 11-	$30.00
Item 12-	$35.00
Item 14-	$115.00
Item 15-	$4,560.00
Item 18-	$60.00
Item 19-	$25.00
Item 27-	$750.00
	$2,850.00
	$750.00
	$2,850.00
	$750.00
	$2,850.00
	$750.00
	$2,850.00
	$4,000.00