BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No. CV1136 of 2014

BETWEEN:

REPUBLIC BANK (BARBADOS) LTD. **CLAIMANT**

AND

M. D. HOLDINGS INC. **DEFENDANT**

Before Master Deborah Holder, BSS, Master of the High Court

2017: March 1
2018: June 21

Appearances:
Mr. Bartlett Morgan of Lex Caribbean, attorneys-at-law for the Claimant

Ms. Alicia Archer, attorney-at-law for the Defendant

DECISION

Introduction

[1] On 14th October, 2016 the Claimant applied for costs to be assessed in the amount of $130,262.95 pursuant to **Rule 65.12 (3)** of the **Supreme Court (Civil Procedure) Rules, 2008**.

[2] This application was made as a result of an order which was made on 8th June, 2016 by Beckles, J.

[3] The order is a follows:

"It is ordered that:

(1) vacant possession of the mortgaged property described in the Schedule hereto be granted on or before the 8th June,

2016 such order to be stayed for the period of three (3) months from the date of the order; and

(2) the Defendant pays the Claimant's prescribed costs plus VAT (VAT Registration No. 7000724) to be agreed or assessed by the Registrar of the Supreme Court."

[4] In the application of 14th October, 2016, under the heading "Basis for Calculation of Sum", it was stated at paragraphs (2), (3) and (4) as follows:

> "2. On the face of the fixed date claim, the underlying monetary value of the claim was $2,250,803.71.
>
> 3. Rule 65.5.(3) of the Supreme Court (Civil Procedure) Rules, 2008 (the "CPR") indicates that *"The general rule is that the amount of costs to be paid is to be calculated in accordance with the percentages specified in column 3 of Appendix B against the appropriate value."*
>
> 4. When Appendices B & C to Part 65 of the C.P.R. are applied to the underlying monetary value, this results in prescribed costs of $130,262.96."

Background

[5] The matter commenced by fixed date claim filed on 18th July, 2014.

[6] The Claimant sought:

> "1. Payment of $2,250,863.71 being principal, interest and fees outstanding as at the 10th day of July, 2014 and further interest at the daily rate of $388.01 until payment, owed by the Claimant under a Debenture/Mortgage dated 19th day of February, 2004 made between the Defendant and Claimant and recorded in the Land Registry….
>
> 2. Possession of the Property; and
>
> 3. Costs."

[7] The following facts were put forward by counsel for the Defendant and were not disputed by counsel for the Claimant.

> "2. The matter came on for hearing on 2nd April, 2015 and further appearances were made on the 23rd July, 2015, 26th November, 2015 and 8th June, 2016. The adjournments were by consent as a result of negotiations between the parties for the redemption of the mortgage or other accommodation by the Defendant.
>
> 3. At no time has the Defendant contested liability in this matter and in fact no defence was filed herein on behalf of the Defendant.
>
> 4. On the 8th June 2016, an order was made by Madam Justice Pamela Beckles, Judge of the High Court in terms of a draft order perused and approved by counsel for the Defendant as amended. The said draft was initialled by the judge and returned to counsel for the Claimant in order to be perfected.
>
> 5. Subsequent to the making of the order the parties failed to agree the quantum of costs to be awarded and the parties discussed the obtaining of a date before the judge to get instructions in respect thereof.
>
> 6. Instead of obtaining a date of hearing as indicated, counsel for the Claimant informed the Defendant's counsel that he had sought audience with the judge in the absence of counsel for the Defendant and that the judge had initialled a further change. The order was subsequently perfected and served on counsel for the Defendant under cover of letter dated 8th September, 2016.
>
> 7. An application for assessment of costs pursuant to C.P.R. Rule 65.12(3) was filed herein on the 14th October, 2016 by the Claimant….
>
> 8. The Claimant proposes to sell the property which is the subject matter of the substantive suit to an

> unknown third party at an undervalue and without having factored in the costs of the suit."

Claimant's Submissions:

[8] Mr. Morgan argued that since prescribed costs were awarded, the appropriate amount was $130,263.96. This was justified because it was the full amount awardable to the successful party where the matter had gone to trial.

[9] He also submitted that the matter did go to trial within the meaning contemplated by the **Supreme Court (Civil Procedure) Rules, 2008** and that "the Claimant's handling of the claim would not induce any court, acting judicially, to reduce the amount awardable."

[10] Having stated that the basis of an award of prescribed costs could be found at Rule 65.5. of the C.P.R., and that Rule 65.5.(1) provided the general formulation for calculating prescribed costs, he referred the court to the decision of the CCJ in ***Knox v Deane 80(WIR) 71*** where he said that the rationale for prescribed costs was explained by **Mr. Justice Saunders** as follows:

> "[61] A change in culture is particularly required for the effective administration of the costs regime embodied in the new Rules. The general approach to costs outlined by the new Rules is characterized by flexibility, intolerance of abuse and waste, economy, fairness and pro-active role of the judge. The new rules have largely dispensed with the byzantine approach to determining costs; what Judge Greenslade, the chief consultant in the drafting of the blue print, described as "the arcane and incomprehensible art" of taxation of costs. The Rules stipulate that the costs awarded for any claim or proceeding must fall under one of four different heads, namely, (a) Fixed Costs; (b) Prescribed Costs; (c) Assessed Costs; and (d) Budgeted Costs. In the case of prescribed and fixed costs one can determine with mathematical precision, well in advance of a hearing, the extent of a litigant's liability for costs."

[11] He stated that Rule 65.5.(2) outlined the steps towards the "mathematical precision" which were referred to in ***Knox v Deane (supra)***.

[12] He argued that a literal reading of Rule 65.5.(2) lead to absurdity in that in the case of the Claimant, if no amount was ordered or agreed to be paid then there was no basis upon which a court could proceed to calculate the costs of a successful Claimant.

[13] He said that the cases ***Royal Fidelity Merchant Bank v Harding CV1751 of 2011*** and ***King and Smith v Clarke CV427 of 2012*** from the High Court of Barbados addressed this. It was held in both cases "that the same methods outlined under 65.5.(2) (b) for determining the prescribed costs of a Defendant should apply with equal measure to the determination of the prescribed costs of a Claimant."

[14] He noted that Rule 65.3 required that the calculation be based on the percentage specified in Column 3 of Appendix B against the appropriate value.

[15] Mr. Morgan submitted that Rule 65.5.(4) and Rule 64.6.(4) when read together required that as long as the value of the claim was ascertainable on the face of the claim, the value ought to be used to determine the prescribed costs which were payable. He acknowledged the court's discretion to limit costs awarded pursuant to Rule 65.5.(4) but added that that rule outlined a series of criteria which ultimately turned on Part 65 Appendix C table.

[16] He posed two questions for the court to determine:

> "1. At what stage was the matter when it came to an end and, by extension, what percentage of costs pursuant to Appendix C are payable on that basis?
>
> 2. Are there any matters in accordance with the criteria listed at Rule 64.6.(4) and (5) which could limit the amount of costs payable."

[17] He submitted that the face of the pleadings was the natural place to start. The Claimant sought payment of $2,250,863.71. He said that because the matter was commenced by a fixed date claim it could be dealt with summarily and a final decision made.

[18] He referred to Rules 27.2 (1) – (3) which provided:

> **27.** **2** (1) When a fixed date claim is issued the court must fix a date for the first hearing of the claim.
>
> (2) On the first hearing, in addition to any other powers that the court may have, the court shall have all the powers of a case management conference.
>
> (3) The court may, however treat the first hearing as the trial for the claim if
>
> (a) it is not defended; or
>
> (b) it considers that the claim can be dealt with summarily.

[19] He stated that the Defendant could argue that the final order was not given on the first day of the hearing per se but contended that an adjournment did not result in a new hearing but rather the subsequent hearing was deemed a continuation of the initial hearing. He cited **Lush J** in ***Fitzgerald's case (1869) Le 5QB1 at 12***.

[20] He contended that it was "self-evident" that the matter was dealt with as a trial. One of the final remedies sought by the Claimant was granted by the court, the matter was not defended, it could be dealt with summarily being a mortgaged action for possession and the court could only have had jurisdiction to award prescribed costs where the matter came to an end.

[21] Mr. Morgan subsequently drew the court's attention to the decision by the Court of Appeal of Barbados in ***Robinson v First Citizens Bank (Civil Appeal No. 15 of 2016)***, which he said had clarified "at paragraphs 24 – 25 that where a claim is properly originated by fixed date claim and the judge grants the remedies sought, the hearing constitutes a trial within the meaning of the C.P.R."

[22] **Goodridge JA** said:

> "[24] Generally, in claims for possession of land, a fixed date claim form is required: See Rule 8.1.5(a). Under Rule 66, mortgage claims are also brought by way of a fixed date claim form. Rules 27.2(3) provided that on the first hearing of a fixed date claim, the court may treat the first hearing as the trial of the action where it is not defended; or it considered that the claim can be dealt with summarily.

> [25] The use of the fixed date claim form is a summary means of proceeding in the High Court when the matter is summary. Where the matter is not defended, the summary proceeding would have come to an end when the judge made the order for possession. In our view, when the court made the order for possession, this amounted to a final order in a summary proceeding…."

[23] He submitted that since the matter was concluded at a trial within the meaning of Rule 27 2.(3) the appropriate costs would be 100% of the allowable prescribed costs pursuant to Part 65. Schedule B.

[24] Further, there was no evidence which could impeach the impeccable conduct of the Claimant in the proceedings. In the circumstances therefore he concluded that 100% of prescribed costs was due to the Claimant.

The Defendant's Submissions:

[25] Ms. Archer objected to the Claimant's application for costs in the sum of $130,262.96. She said that it was not in keeping with costs claimed or awarded in matters of this kind in this jurisdiction.

[26] She submitted that costs should be assessed on the basis of the work done taking into account the factors outlined in Rule 65.2(3) as well as principles outlined in ***Royal Fidelity Merchant Bank v Harding (supra)*** and ***Rochamel Construction Ltd. v National Insurance Corporation LC 2003 CA7***. In the alternative she said that prescribed costs may be awarded calculated as a percentage of the default sum, the court having the discretion to reduce the costs awarded if the court considered them excessive in light of overriding objective in the C.P.R. and the principles in the two mentioned cases.

[27] Referring to **Part 66** which outlined the procedure for mortgage claims, she indicated that once the relevant documentation was filed by the Claimant Rule 66.3 contemplated that judgment might be entered at the first hearing.

[28] She saw this as analogous to a default judgment where no defence to the claim was filed. She did not believe that Rule 66.3, which spoke of final judgment at first hearing contemplated a trial "within the ordinary sense provided for in Appendix C of Rule 65."

[29] She argued that this was separate and distinct from the treatment of the first hearing of a fixed date claim as a case management conference. She added that no orders for case management were ever made.

[30] Ms. Archer said that a date of hearing was automatically assigned upon filing a fixed date claim and the entry of judgment did not equate to the conduct of a trial.

[31] Relying on the definition of the word "trial", which was found in *Black's Law Dictionary*, 7th edition as "a formal judicial examination of evidence and determination of legal claims in an adversary proceeding," she argued that the proceedings in this matter did not meet the standard of "trial".

[32] She also pointed out that the Affidavit which was filed by the Claimant was never referred to before the court, no witnesses were called, no representative of the Claimant ever appeared and the matter was disposed of by consent of the parties. She also added that there were no issues raised which had to be determined by the court.

[33] Counsel also considered Fixed Costs. She pointed out that where judgment was entered in default, Appendix A indicated that costs for a claim exceeding $500,000.00 was $5,000.00. In addition Column 2 also allowed an additional $500.00, the total fixed costs being $5,500.00 plus $75.00 for service of the claim documents on the Defendant.

[34] Ms. Archer submitted that prescribed costs were inappropriate in this case. She said that prescribed costs were calculated based on a monetary value. In support she relied on Rule 65.5.(2) which provided that "in determining prescribed costs, the value of the claim is to be decided (a) in the case of a Claimant, by the amount agreed or ordered to be paid;"

[35] She pointed out that the order of 8th June, 2016 provided for vacant possession. Neither did the court order nor the parties agree that the Defendant should pay to the Claimant any amount of money.

[36] She said that in ***Royal Fidelity Merchant Bank v Harding (supra)*** the court stated that "an ascertained value is central to the operation of a regime of prescribed costs." The court also indicated that the "default value of $50,000.00" could be applied where there was no monetary value.

[37] In the circumstances the full prescribed costs would be $14,000.00 in accordance with Appendix B of Rule 65. Since the Defendant did not file

a defence, the Claimant would be entitled to forty-five percent (45%) of the prescribed costs in accordance with Appendix C, that is $6,300.00.

[38] She also did not believe that the rate of sixty percent (60%) of prescribed costs provided for default judgment in Appendix C was appropriate since that contemplated a trial on the assessment of damages.

[39] She said that under Rule 65.6 the court had the discretion to apply a lesser value where the prescribed costs as calculated would likely to be excessive "taking into account the nature and circumstances of the particular case."

[40] In addition, under Rule 65.5 (4) the court still retained the discretion to award a proportion only of the sum referred to, taking into account the matters set out in Rule 64.6(4) and (5).

[41] In this regard she reiterated that her client never denied liability, adjournments resulted from negotiations between the parties and that the Defendant never took any action which would have increased costs in this matter.

[42] In her opinion the Claimant's application was for assessment of costs awarded under Rule 65.3 (b) (iii) where neither prescribed nor budgeted costs applied. Consequently the court had discretion as to the sum to be awarded.

[43] She referred to Rule 65.2 which provided that "the sum to be allowed is the amount (a) that the court deems would be reasonable were the work to be carried out by an attorney-at-law of reasonable competence; and (b) which appears to the court to be fair both to the person paying and the person receiving such costs."

[44] She also outlined the factors to be considered by the court under Rule 65.2.(3).

[45] Ms. Archer argued that the substantive matter was not complex nor novel. She described it as "a run of the mill application for a debt or possession of a mortgaged property." Also, that no legal ingenuity was required since Rule 66 specifically outlined what had to be put into the affidavit in support of the fixed date claim. She also submitted that under the said Rule 66 the

work required was the same regardless of the dollar value of the mortgage or the amount outstanding on the mortgage.

[46] She characterized the work involved as "the mere formulaic recitation of dates and the exhibiting of documents." She said that the Claim Form consisted of two paragraphs and could not have entailed significant time spent drafting it or the affidavit in support.

[47] Counsel stressed that her client never denied liability and referring to ***Royal Fidelity Merchant Bank v Harding (supra)*** where the court assessed costs at less than one third of the costs which the Claimant sought, the fees having been considered unfair, unreasonable and disproportionate, she said that the court stated that "the Defendant's non-combative approach expedited the inter parties hearing…and must result in a lower assessment than might otherwise have been the case."

[48] In the said case it was pointed out that the Claimant was not entitled to costs on an indemnity basis and that the guiding assessment bases are reasonableness and proportionality. She was clear that the Claimant's attorney was not entitled to a windfall.

[49] Ms. Archer said that the Defendant was unable to satisfy the initial debt and since the Claimant foreclosed on its sole asset and means of income, the Defendant, like the Defendant in ***Royal Fidelity*** could be described as having "no means", essentially a bankrupt company.

[50] On the other hand she described the Claimant as a private sector entity who in 2017 boasted "in the media of having exceeded its targets for the last financial year."

[51] The Defendants financial standing therefore was, in her opinion, an important factor. In this regard she referred to ***Rochamel Construction Ltd. v National Insurance Corporation (supra)*** where **Byron CJ** in the Court of Appeal of St. Lucia considered that it was an important factor that "the claimant [was] a substantial and well-funded statutory corporation and the defendant [was] an individual of unequal financial standing."

[52] She concluded that the sum was excessive in light of the work done and in circumstances where the matter was not defended it would be punitive and counter to the overriding objective.

[53] She suggested that $5,250.00 should be awarded on the basis of the work which was done. This included $3,000.00 for preparation of Fixed Date Claim and affidavit in support and $2,250.00 for three appearances by junior counsel.

[54] She added that given the disparity in means between the parties, the Defendant's admission of liability and the reference of this matter back to the judge in absence of counsel for the Defendant, no further costs on assessment should be allowed.

Law

[55] ***The Supreme Court (Civil Procedure) Rules 2008***

Assessment of Costs – general

> **65.12** (1) This rule applies where costs fall to be assessed in relation to any matter or proceedings, or part of a matter or proceedings other than a procedural application.
>
> (2) Where the assessment relates to a part of court proceedings, it must be carried out by the judge, Master or Registrar hearing the proceedings.
>
> (3) Where the assessment does not fall to be carried out at the hearing of any proceedings, then the person entitled to the costs must apply to the Master or Registrar for directions as to how the assessment is to be carried out.
>
> (4) The application must be accompanied by a bill or other document showing the sum in which the court is being asked to assess the costs and how such sum was calculated.

[56] **Prescribed Costs**

> **65.5** (1) The general rule is that where rule 65.4 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 to this Part and sub-rules (2) to (4) of this rule.

(2) In determining prescribed costs, the value of the claim is to be decided

(a) in the case of a claimant, by the amount agreed or ordered to be paid; or

(b) in the case of a defendant,

(i) by the amount claimed by the claimant in his claim form;

(ii) where the claim is for damages and the claim form does not specify an amount that is claimed, such sum as may be agreed between the party entitled to, and the party liable to such costs or if not agreed, a sum stipulated by the court as the value of the claim; or

(iii) where 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).

(3) The general rule is that the amount of costs to be paid is to be calculated in accordance with the percentages specified in Column 3 of Appendix B against the appropriate value.

(4) The court may however

(a) award a proportion only of the sum referred to in sub-rule (3) having taken into account the matters set out in rule 64.6 (4) and (5);

(b) order a party to pay costs

(i) from or to a certain date; or

(ii) relating only to a certain distinct part of the proceedings

in either of which cases it must specify the portion of the fixed costs which is to be paid to the party liable to pay such costs, and in so doing may take into account the table set out in Appendix C.

[57] **Basis of quantification**

65.2 (1) Where the court has any discretion as to the amount of costs to be allowed to a party, the sum to be allowed is the amount

(a) that the court deems would be reasonable were the work to be carried out by an attorney-at-law of reasonable competence; and

(b) which appears to the court to be fair both to the person paying and the person receiving such costs.

(2) Where the court has any discretion as to the amount of costs to be paid to an attorney-at-law by his client, the sum allowed is the amount

(a) that the court deems to be reasonable; and

(b) which appears to be fair both to the attorney-at-law and the client concerned.

(3) In deciding what would be reasonable, the court must take into account all the circumstances including

(a) any orders that have already been made;

(b) the conduct of parties before as well as during the proceedings;

(c) the importance of the matter to the parties;

(d) the time reasonably spent on the case;

(e) the degree of responsibility accepted by the attorney-at-law;

(f) the care, speed and economy with which the case was prepared;

(g) the novelty, weight and complexity of the case; and

(h) in the case of costs charged by an attorney-at-law to his client,

(i) any agreement that may have been made as to the basis of charging;

(ii) any agreement about what grade of attorney-at-law should carry out the work; and

(iii) whether the attorney-at-law advised the client and took the client's instructions before taking any unusual step or one which was usually expensive having regard to the nature of the case.

[58] **Ways in which costs are to be quantified**

65.3. Costs of proceedings under these Rules are to be quantified as follows:

(a) where rule 65.4 applies, in accordance with the provisions of that rule;

(b) in all cases if, having regard to rule 64.6, the court orders a party to pay all or any part of the costs of another party, in one of the following ways:

(i) costs determined in accordance with rule 65.5 (prescribed costs);

(ii) costs in accordance with a budget approved by the court under rule 65.8 (budgeted costs); or

(iii) where neither prescribed costs nor budgeted costs are applicable, by assessment in accordance with rules 65.11 and 65.12.

Discussion

[59] The parties in this matter are miles apart in their figures. Mr. Morgan submits that $130,262.96 is appropriate because it is the full amount awardable to the successful party where a matter has gone to trial and this matter did go to trial within the meaning of C.P.R. Ms. Archer disputes this and suggests that $5,250.50 is fair and reasonable both for the party paying and the party receiving and also based on the work which was actually done.

[60] Mr. Morgan has applied for assessment pursuant to **Part 65.12.(3)** and puts forward **65.5(1)** as the basis for calculation. Ms. Archer, on the other hand, believes that costs in this matter are to be assessed in accordance with **65.2(3)** and **65.3(b) iii**.

[61] The dispute therefore is between prescribed costs and assessed costs.

[62] Counsel for the Defendant has asked the court to give effect to the overriding objective of dealing with this matter justly.

[63] At the outset I must say that I find the order under which the Claimant purports to act, that is, "prescribed costs plus vat to be agreed or assessed", to be confusing. Given Ms. Archer's complaint that she was not present when there was a change to the consent order, which was subsequently served on her, this may have been the genesis of this confusion.

[64] As Mr. Morgan has argued, quoting **Saunders J** in ***Knox v Deane (supra)***,prescribed costs can be determined with "mathematical precision." I agree with this. Although the court has some discretion under 65.5(4) in awarding prescribed costs, generally speaking, there is no real need for assessment.

[65] **Saunders J** in the said case also commented on assessed costs. He said:

> "[62] Assessed costs are applicable in the case of those interlocutory or procedural applications that could not reasonably have been made at a case management conference…. Costs may also fall to be assessed in relation to matters other than procedural applications and, where they relate to part of court proceedings, the assessment is carried out by the Judge, Master or Registrar.
>
> [63] The new Rules specify that where costs are to be assessed in relation to a procedural application…. In the case of any other matter or proceeding and where the assessment does not fall to be carried out at the hearing, the application for costs must be accompanied by a bill or other document showing the sum which the court is being asked to assess costs and how such sum was calculated."

[66] I will now consider whether the matter did go to trial. As stated previously **Part 27.2.(3)** provides that the court may treat the first hearing as the trial of the claim if (a) it is not defended, or (b) it is considered that the case can be dealt with summarily.

[67] The following commentary which is written under the heading **"Plain meaning of the rules"** is instructive.

> "The C.P.R. has been deliberately drafted in a plain English style in order to make them intelligible to lay people using the courts. When construing the rules the court must primarily seek to find the natural meaning of the words used. Although the court must seek to give effect to the overriding objective when interpreting any rule (C.P.R., r.1.2(b)), this should not enable the court to hold that provisions of the C.P.R. which have a plain meaning should be construed contrary to that

> meaning, nor that plain meaning should be ignored ***(Vinos v Marks and Spencer plc [2001] 3 All ER 784 at [20])***. The court cannot, therefore, assume a discretion in order to assist a deserving case where there is no jurisdiction to make an order, even by resorting to the overriding objective. ***(Goodwin v Swindon Borough Council [2001] EWCA Civ 1478 [2002] 1 WLR 997 at [45])***. Blackstone's Civil Practice 2011. Chapter 1-15.

[68] It is also noteworthy that in **27.2(3)** the word "may" is used. Once again I will quote the learned authors of Blackstone.

> "There is a clear distinction between a rule that says that a court 'may' do something, thereby giving the court a discretion (which ought to be exercised in accordance with the overriding objective), and a rule which says something 'must' be done (which is obligatory)."
> Blackstone's Civil Practice 2011. Chapter 1.16.

[69] The words used in **27.2.(3)** are clear and unambiguous. I expect that lawyers and some lay persons are familiar with what constitutes a trial. The Claimant has based its entitlement to 100% prescribed costs on this, therefore it must be carefully considered.

What is the definition of "trial"?

In ***Selby v Mapp CV14/2010*** **Mason JA** in the Court of Appeal of Barbados made a helpful comment.

> "32. While dependence on the dictionary for the authoritative proponent of the meaning of words is not to be encouraged and while we do not intend "to make a fortress out of the dictionary", we are of the view that in the absence of any judicial guidance or authority, the dictionary may still be consulted and especially where the word to be construed has no hidden meaning."

[70] In its ordinary meaning the word "trial" is defined as "a formal examination of evidence in a court of law by a judge and often a jury…." (Oxford Advanced Learner's Dictionary. 6th edition page 1387).

[71] The word is also defined as: "The hearing of a civil or criminal case before a court of competent jurisdiction…. At the trial all issues of law and fact arising in the case will be determined." (A Dictionary of Law. 5th edition. pages 508 – 9).

[72] Ms. Archer at paragraph 31 above also provides a useful definition. She argues that "judgment at first hearing" does not contemplate a trial within the ordinary sense provided for in **Appendix C** to rule 65.

[73] **Appendix C** sets out the percentages of prescribed costs to be allowed at various stages of the claim. These stages are: (a) Up to and including service of defence. 45% (b) After defence and up to and including the case management conference. 55% (c) From case management conference and up to and including listing questionnaire. 70% (d) From listing questionnaire and up to and including pre-trial review (if any). 75% (e) To trial. 100%. (f) Up to default judgment and including assessment of damages. 60%.

[74] **Part 27** of the C.P.R. deals with the procedure by which the court manages cases. There is no stated link between treatment of the first hearing as a trial and costs.

[75] The claim was not defended and it was disposed of summarily. Assuming that the matter was treated as a trial, the question which naturally follows is whether in those circumstances the Claimant is automatically entitled to 100% of prescribed costs.

[76] If the matter is analysed based on the work actually done there is a clear distinction between an uncontested case which is disposed of summarily and a case which progresses from case management conference, to pre-trial review and at trial is vigorously defended, witnesses cross-examined, arguments heard and the issues determined by the court.

[77] In passing, I will say that the case of ***Robinson v First Citizens Bank (Barbados) Ltd (supra)*** offers the Claimant no help whatsoever with its arguments. The case restates the law as it is. It also points out that the use of the fixed date claim is a summary procedure. It certainly does not say that "where the judge grants the remedies sought, the hearing constitutes a trial within the meaning of the C.P.R."

[78] Since the decision was not actually made on the first date of hearing counsel for the Claimant seeks to address a potential argument in relation to this. He submits that an adjournment does not result in a new hearing. (Counsel for the Defendant has not dealt with this.)

[79] The following definition of "an adjournment" "in court procedure" offers assistance.

> "The postponement or suspension of the hearing of a case until a future date." (A Dictionary of Law. 5th edition. page 11.)

[80] In principle there is no difficulty with the notion that where a hearing is adjourned, a subsequent hearing can be regarded as a continuation of that hearing rather than a new hearing. This in itself does not address "first hearing".

[81] Under the heading **"Evidence at first hearing", Rule 66.3** sets out the documents to be filed and served by a Claimant "who seeks final judgment at the first hearing." The notion of "first hearing" implies that there may also be a "second hearing". The words are of obvious significance, thus their inclusion in the rules.

[82] The rules have been drafted in "a plain English style", as stated previously. While a hearing can be adjourned on several occasions, it is my opinion that "first hearing" means "first hearing". I take issue with the idea that,

after a number of appearances before the judge, an adjourned hearing is still a "first hearing".

[84] This matter was first heard in April 2015 and the final order was made more than a year later.

[85] The statement of **Lush J** is not critical to the advancement of this matter. In any event, the quotation has been taken out of context. He merely compares the "technical" use of the word "adjourn" with the use of the word in the Act.

[86] In ***Fitzgerald's case*** (supra) the issue to be determined was whether two out of three Commissioners, who were appointed under an Act to enquire into corrupt practices at parliamentary elections, (and who were given authority to hold meetings from time to time and adjourn) could validly adjourn a meeting in the absence of the third Commissioner. It was argued that an adjournment was a judicial act and could only be valid if done by all three Commissioners.

[87] I will now consider the Defendant submissions.

Where judgment is entered in default fixed costs are applicable. Ms. Archer's reference to the fixed costs awarded for a claim in excess of $500,000.00 is useful in that it allows one to make a comparison with an award for prescribed costs. However, I do not see the analogy between judgment at first hearing and default judgment. Default judgment is defined as judgment without trial when the Defendant has failed to file an acknowledgment of service or a Defence. (**Rule 12.1(a)**). This process is facilitated administratively without the need to appear in court.

[88] Moreover, a Claimant may not obtain default judgment where the claim is a fixed date claim (**Rule 12.2 (b)**). It follows therefore that for a fixed date

claim there must be a court appearance for judgment to be entered. The first hearing becomes relevant at that stage.

[89] It is true that in this matter the Defendant has neither filed a Defence nor disputed liability, but the circumstances are different.

[90] I acknowledge that this is not the thrust of Ms. Archer's submissions and will not discuss it any further because it offers no assistance in the resolution of this matter.

(1) *Prescribed Costs*

[91] Ms. Archer argues that prescribed costs are inappropriate because the calculation is based on a monetary value and this is determined in the Claimant's case by the amount agreed or ordered to be paid and no amount has been agreed or ordered to be paid as required by **Rule 65.5(2) (a)**.

[92] Mr. Morgan counters by pointing out that the value of the claim is stated in the fixed date claim. He finds support in ***Royal Fidelity Merchant Bank and Trust (B'dos) Ltd. v Harding (supra)*** where the court held that the Claimant and Defendant should be treated equally.

[93] In this case **Alleyne J** said:

> "43. I am satisfied, therefore, that C.P.R. 65.5. (2) ought to be read as if the provisions of C.P.R. 65.5. (2) (b) iii apply both in the case of a claimant and a defendant and I so hold."

[94] Ms. Archer also finds support in the said case in that the default figure of $50,000.00 is used for assessment of costs.

[95] In ***King and Smith v Clarke CV427/2012*** **Goodridge J** said:

> "[21] The claimants/applicants were successful in the action and it has been determined that they are entitled to costs. According to rule 65.5.(2) (a), the value of the claim is to be decided "by the amount agreed or ordered to be paid." No amount was agreed or ordered to be paid. This matter involved a non-monetary claim. However no provision has been made in this rule for the fixing of a value where the

> claim is not a monetary claim and it is the claimant who is successful. This to my mind is an omission.
>
> [22] Rule 65.6 allows either party to make an application to the court at a case management conference to determine the value of a claim. When one considers that rule 65.5.(2) (b) (iii) allows a claim which is not for a monetary sum to be treated as a claim for $50,000.00 in the case of a successful defendant; it seems reasonable to conclude that a similar rule ought to apply in the case of a successful claimant in the interest of justice. I am of the opinion that the claim should be treated as a claim for $50,000.00."

[96] In the said case the Claimants were entitled to 100% of costs because the matter was concluded after trial. The sum was however reduced by the court in the exercise of its discretion.

[97] The Claimant sought both monetary and non-monetary relief, that is payment of $2,250,863.71 being principal, interest and fees and possession of the mortgaged property. These two aspects of the claim were clearly in the alternative. The Claimant could not have expected to be successful in both aspects of the claim because once payment was made there could be no possession and vice versa.

[98] Apparently there was an acceptance that the Defendant could not pay and as a result the parties consented to and the court made an order for vacant possession of the property. Therefore the Claimant was successful with respect to the non-monetary aspect of the claim. Consequently Ms. Archer is correct when she makes the point that no amount was agreed by the parties nor ordered by the court to be paid.

[99] In keeping with the decisions in the two cases from the High Court of Barbados which are cited above, Mr. Morgan has argued that the Claimant and the Defendant must be treated equally. In this context the figure of $50,000.00 can be applied.

(2) *Assessed Costs*

[100] The Defendant has asked that costs be assessed based on the work which was done. The Claimant, however has not submitted "a bill of costs" or "other document" detailing the hours of work involved, the rate and how a specific sum has been calculated. Having indicated that a calculation of the prescribed costs payable, pursuant to Schedule B results in prescribed costs of $130,262.96, the Claimant has included a table which illustrates how that figure was arrived at. In other words, the Claimant's calculation is based on the scale of prescribed costs under **Appendix B** ("(h) exceeding $2 million but not exceeding $5 million. 1.5%) and percentages stipulated under **Appendix C**.

[101] A summary of Ms. Archer's description of this matter is as follows: (1) Not complex nor novel. (2) A run-of-the mill application for debt or possession of mortgage property. (3) No legal ingenuity required. (4) The contents of the affidavit in support are specifically outlined in the Rules. (5) The work required is the same regardless of dollar value of mortgage or the amount outstanding. (6) A mere formulaic recitation of dates and exhibiting of documents. (7) A claim form which consists of two paragraphs. (8) No significant time required to prepare claim form and affidavit.

[102] For the most part this summary is a particularly apt description of what is involved in this kind of claim. Inspite of this comment I do not accept any suggestion that time and effort are not required in the preparation of the claim. On the contrary the work still has to be carefully and accurately done. Therefore a reasonable and proportionate costs award is warranted.

[103] Given the nature of this matter, I believe that there is "sufficient material" to properly assess costs.

(a) ***Conduct during proceedings***

[104] The Claimant has been portrayed as a company which has exhibited impeccable conduct during the proceedings and the Defendant as essentially a co-operative company which has neither denied liability nor has taken any action to increase costs in the matter.

[105] Ms. Archer suggests that a factor against the Claimant is that its counsel sought audience with the judge on the consent order in her absence.

[106] Misconduct by the successful party may result in the court exercising its discretion to deprive the party of some or even all of its costs but this must relate to conduct before and during proceedings. (See Blackstone. Chapter 66:16 for discussion of principles).

[107] Quite apart from the fact that the Claimant's attorney was facilitated by the judge, this after proceedings act is not in itself misconduct.

(b) ***Financial Standing***

[108] In assessing costs Ms. Archer has asked the court to consider "the unequal financial standing" of the Defendant vis à vis the Claimant as was done in ***Rochamel Construction Ltd. v National Insurance Corporation (supra)***.

[109] In that case **Byron CJ** found that the Corporation had offended the concept of dealing with cases justly and he felt that by "ordering the Corporation to pay the costs of Lillywhite further[ed] the overriding objective." He considered the conduct of the parties before and during the proceedings and found that the "substantial and well-funded statutory corporation" had no basis for the claim and had forced the Defendant, "an individual of unequal financial standing" to waste expense to defend a claim that was not being prosecuted.

[110] In the present case, the financially successful Claimant has not committed any breaches for which sanction is warranted. However, in the exercise of its discretion the Defendant's lack of means must be considered. (See **Rule 1.1 (2) (c) (iv)**.)

(c) *Reasonableness and Proportionality*

[111] The power of a costs judge to reduce items to reasonable amounts has been described as "a sufficient safeguard against excess in most circumstances."

[112] The court has to consider all circumstances in determining whether costs are reasonable and proportionate with the assistance of the criteria stipulated in the Rules.

[113] The following statement encapsulates what is required.

> "One of the main aims of the C.P.R. is to provide a system of civil justice which is affordable and proportionate to the importance of the claim. The overriding objective requires the court to deal with claims in ways that will save expense and which are proportionate to the nature of the case (C.P.R., r.1.1 (2)). The parties are required to cooperate in achieving this aim, which means they must conduct themselves in ways that do not involve unnecessary costs, or costs which are not really justified by the nature or importance of the claim." (Blackstone. Chapter 68.36).

Conclusion

[114] Generally speaking, summary proceedings are distinguished by the following: They are short, not complex, can be disposed of quickly and they are not subjected to the normal delays of a full trial.

[115] The use of the fixed date claim is a summary means of proceeding in the High Court. In this matter a final order was made in a summary proceeding.

[116] This matter was disposed of summarily but not after trial. In other words none of the accepted components or constituents of a trial existed. I

therefore accept the argument that the circumstances under which the matter was concluded did not equate to trial.

[117] This matter was disposed of summarily but not at "first hearing". However even if the disposal of the matter on 8th June 2016 can be considered "first hearing" and the court's discretion pursuant to **Part 27.1.(3)** to treat it as a trial had been exercised, this is of no significance.

[118] The Claimant has not demonstrated that there is a link between treating the first hearing as a trial and an entitlement to 100% prescribed costs awarded in **Appendix C**. Consequently, I agree with counsel for the Defendant that the first hearing did not contemplate trial within the ordinary sense provided for in **Appendix C** of **Rule 65**.

[119] **Appendix C** sets out the costs to be awarded at various stages of the case, for work done. It is not there to award costs for work that was not done. It is also not there to penalize a co-operative party for saving judicial time while unjustly rewarding another.

[120] I therefore support the statement of **Byron CJ** in ***Rochamel Construction Ltd. v National Insurance Corporation (supra)***, which was cited by Ms. Archer. He said:

> "[16….RCL admitted liability before action and allowed judgment to be entered in default and admitted the claim in its entirety. It is completely inconsistent with furthering the overriding objective to order such substantial or punitive costs against a defendant who admitted liability before action and did not defend the claim in anyway."

[121] This thinking must also be applicable to the Defendant who never filed a Defence and admitted liability.

[122] Having regard to the circumstances of this matter the sum of $130,262.95 is neither reasonable nor proportionate.

[123] The value of the claim is known from the fixed date claim form but on a clear and unambiguous reading of the rules, prescribed costs are not applicable. The court's order was for vacant possession. In keeping with previously mentioned cases from the High Court of Barbados where the parties are treated equally, the use of the default figure of $50,000.00 could result in a reasonable and proportionate award.

[124] Nevertheless, I agree that costs should be assessed pursuant to **Rule 65.3.(b) iii** with due consideration being paid to the factors set out in **Rule 65.2.(3)**.

[125] It has been suggested that $3,000.00 be awarded for the preparation of the fixed date claim and affidavit and $2,500.00 for three court appearances. To my mind the former sum represents six hours of work at the rate of $500.00 per hour and the latter $750.00 per court appearance.

This suggestion is not necessarily unreasonable. The Claimant must also be credited with Claimant/Counsel consultation time.

[126] I believe that a slightly higher sum is appropriate. The Claimant is also entitled to filing fees of $150.00 and payment of $75.00 for service of documents.

[127] After having considered all arguments and relevant rules, I assess costs in the sum of $7,000.00. I believe that this sum is reasonable and proportionate.

Disposal

[128] The Defendant is ordered to pay the Claimant costs in the sum of **$7,000.00 plus VAT** and fees of **$225.00**.

DEBORAH HOLDER, BSS
Master of the High Court