

**Joseph W Horsford**

*Appellant*

v.

**Lester B Bird and others**

*Respondent*

FROM

**THE COURT OF APPEAL OF  
ANTIGUA AND BARBUDA**

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REASONS FOR DECISION OF THE LORDS OF THE  
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON COSTS

Delivered the 28th November 2006

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*Present at the hearing:-*

Lord Hope of Craighead  
Lord Scott of Foscote  
Lord Walker of Gestingthorpe  
Baroness Hale of Richmond  
Lord Mance

*[Delivered by Lord Hope of Craighead]*

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1. When the Board delivered judgment in this case on 17 January 2006 their Lordships advised Her Majesty that the respondent must pay the costs of the appeal, to be certified and taxed if not agreed. The parties were unable to agree the amount claimed by the appellant in his bill of costs, so it had to be taxed under rule 75 of the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 (SI 1982/1676). On 16 June 2006 Master Wright sitting as the costs judge (“the costs judge”) taxed the bill of costs, which in accordance with the Board’s order was to be taxed on the standard basis. As taxed by him, the total amount of the costs to which the appellant was entitled was £7,768.07.

2. Rule 79 of the 1982 Order provides that any party aggrieved by a taxation may appeal to the Judicial Committee. The appellant is

dissatisfied with the decision of the costs judge, and he has appealed against it under this Rule. Board has received and considered submissions in writing from both parties, including the appellant's reply to the respondent's response to his petition.

3. The appellant has explained in his petition that he is dissatisfied with the taxation in the following respects:

(a) as to the amount allowed for hotel accommodation and incidentals;  
and

(b) as to the amount allowed for the preparation of the bill of costs by his solicitor.

He has also appealed against the decision of the costs judge to make no order as to the costs of the taxation.

#### Hotel accommodation and incidentals

4. The hearing of the appellant's appeal took place on 1 November 2005. He appeared in person at the hearing before the Board. His bill of costs included £2,200.46 for the cost of his hotel accommodation while in London from 21 October to 5 November 2005 – a period of 16 days; £530 for a sum paid to his London booking agent by credit card, as the booking was done on line; and £998.09 for incidentals. The respondent submitted that expenses of only £700 could be justified. This was on the basis of hotel accommodation at the rate of £129 per day for three days, plus subsistence of £100 per day for the same period. The costs judge allowed the sum of £750 for this item. The appellant submits that the amount allowed by the costs judge should be varied from £750 to £2,730.46.

5. The appellant submits that the amount of £750 which the costs judge allowed for this item is unreasonably low. His argument is that he had to be in London for the hearing on 1 November 2005 so that he could appear in person at the hearing before the Board. He claims that the latest date before the hearing that it was possible for him to obtain a seat on a flight from Antigua to London was 19 October 2005, and that no seat was available on a flight back from London to Antigua until 5 November 2005. He says that this was the advice he received from his travel agent, who arranged flights for him on Virgin Atlantic and advised him on his itinerary. He maintains that he could not have achieved these journeys within the period that would have been needed if his accommodation in London was to be limited to a period of three days.

6. Their Lordships accept the appellant's assurance that he was told by his travel agent that the flights which were obtained for him were the only ones that were available at the time when the booking was made. On the other hand the respondent has produced a letter from his travel consultant which shows that both British Airways and Virgin Atlantic currently operate three scheduled flights per week between Antigua and London Gatwick and that BWIA operates a scheduled flight twice a week between Antigua and London Heathrow. This information shows that a flight between Antigua and London is available every day of the week except Monday and Thursday. Their Lordships are also aware that British Airways published a Worldwide Timetable for the period from 30 October 2005 to 25 March 2006 which shows that during that period this airline operated flights between London Gatwick and Antigua seven days a week in each direction. There is, of course, a difference between the flights that were being operated during the relevant period and the flights that had seats that were available, as the appellant points out. But the availability of seats on flights depends on how early bookings are made, and the appellant had ample notice of the date when the hearing before the Board was to take place.

7. Where the courts of England and Wales are asked to assess the amount of costs they will not allow costs which have been unreasonably incurred or are unreasonable in amount: Civil Procedure Rules 1998, Rule 44.4(1). Where costs are to be assessed on the standard basis they will only allow costs which are proportionate to the matters in issue, and they will resolve any doubt which they may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party: CPR, r 44.4(2). The concept of proportionality which the CPR has adopted is new. But otherwise the principles which they set out have been established for a very long time: see the former Rules of the Supreme Court, Ord 62, r 12(1); *L v L (Legal Aid Taxation)* [1996] 1 FLR 873, 884, per Aldous LJ; *Wraith v Sheffield Forgemasters Ltd* [1998] 1 WLR 132, 140, per Kennedy LJ. A costs judge is expected to apply the same principles when taxing an award of costs on the standard basis in proceedings before the Board. It has to be borne in mind, in judging what was reasonable and proportionate in this case, that the basis of the award was not that the appellant was to be indemnified for all his costs. The respondent was to be required to pay only such of the appellant's costs as were reasonably incurred for the conduct of the hearing before the Board and were proportionate.

8. There is no dispute that it was reasonable for the appellant to travel to London to appear in person before the Board and to incur the cost of hotel accommodation while he was here. The question for the costs judge was whether it was reasonable and proportionate for the respondent to

bear the cost of a stay in London extending to 16 days for an appearance that was expected to, and did, take one day only. Any doubts that he may have had on this issue were to be resolved in favour of the respondent. In their Lordships' opinion he was entitled to regard a claim for 16 days' accommodation to enable the appellant to attend in person for a single day before the Board as excessive unless there was a sufficient explanation to the contrary. He was also entitled to regard the explanation that was offered for the lack of available seats as unsatisfactory in view of the number of other scheduled flights that were being operated during the relevant period. The critical question was whether it would have been possible for the appellant, by issuing instructions earlier, to obtain seats on flights that would have enabled him to restrict his stay in London to three days. The costs judge was entitled to resolve this issue in the respondent's favour and to hold that the sum claimed by the appellant must be disallowed. Their Lordships are of the opinion his decision to allow three days' hotel accommodation and incidentals cannot be said to be unreasonable or disproportionate.

#### Preparation of Bill of Costs

9. The appellant claimed £720 for the preparation of his bill of costs by his solicitor. This was based on an hourly rate of £170, a preparation time of three hours and an addition of 40% for care and attention. The respondent objected to this figure, and the amount claimed was reduced by the costs judge to £390. The calculations which led him to this figure are not shown on the amended bill of costs. But other entries on the amended bill show that he reduced the solicitors' hourly rate from £170 to £160 per hour, and it can be inferred that he considered the time charged for as excessive in the circumstances. The appellant submits that the amount of £390 for this item should be varied to £720.

10. The amount to be allowed for the preparation of the bill of costs was a matter that lay peculiarly within the expertise of the costs judge. His examination of the bill had shown that there were several deficiencies in it. The significance of those deficiencies in regard to the solicitor's remuneration for the work done is a matter that he was best placed to determine. Their Lordships can find no basis for disagreeing with his assessment.

#### Costs of the taxation

11. The appellant asked the costs judge to award him the costs of preparing for and attending the taxation by his solicitor. That submission was made in the light of the following facts. On 3 May 2006 the respondent's solicitor wrote to the appellant's solicitor offering to pay the

appellant £6,250 in settlement of his costs. On 26 May 2006 and again on 12 June 2006 the respondent's solicitor telephoned the appellant's solicitor to enquire whether that offer was acceptable. On the second occasion he said that he had been instructed to increase the offer to £8,000. But this offer was not made in writing, and it was subject to the condition that it was accepted the following morning. On the occasion of each telephone call the respondent's solicitor was told by the appellant's solicitor that he was awaiting instructions. At no point prior to the taxation on 16 June 2006 were these offers either accepted or rejected. The costs judge decided to make no order in respect of the costs of the taxation.

12. The appellant points out that the offer of £6,250 made on 3 May 2006 was below the amount allowed by the costs judge. He maintains that it was not practicable for his solicitor to obtain instructions as to whether the offer of £8,000 was acceptable by the following morning. He also states that his solicitor, who attended the taxation, advised him that the costs judge decided to make no order for costs because there had been no counter offer from the appellant. He submits that he should be awarded the costs of the taxation. The respondent, on the other hand, states that the costs judge made no order because the amount which he allowed was substantially less than the amount claimed. He submits that the decision by the costs judge was fair and reasonable.

13. As Waller J observed in *Chrulew v Borm-Reid & Co* [1992] 1 WLR 176, 185E–F, the expectation at the conclusion of a taxation is that normally the party whose bill is being taxed will be entitled to his costs, and there is no expectation that someone who succeeds in taxing the bill down will necessarily be entitled to his costs of attending the taxation. That case was decided under RSC, Ord 62, r 27. The general rule, which was set out in paragraph (1) of that rule, was qualified by Ord 62, r 27(2) which provided that, where it appeared to the taxing officer that in the circumstances of the case some other order should be made as to the whole or any part of the costs, he was to have the same powers as the court had in relation to the costs of proceedings. Ord 62, r 27(3) enabled either party to seek to protect his position by making use of the *Calderbank* procedure: see *Calderbank v Calderbank* [1976] Fam 93. Ord 62, r 27(4) provided that the taxing officer might take into account any offer that had been made under that paragraph. In *Chrulew v Borm-Reid & Co* [1992] 1 WLR 176 there was a *Calderbank* offer which the paying party was able to beat, although not by much.

Waller J held, at p 185, that an appropriate exercise of the discretion in regard to the costs in that case would be to disentitle the plaintiffs from the costs of the taxation proceedings as from the date when they should

reasonably have accepted the *Calderbank* offer, but to make no order that the plaintiff should pay the defendants' costs of the taxation.

14. The same approach as to the costs of a taxation has been preserved under the Civil Procedure Rules. CPR, r 47.18(1) provides that the receiving party is entitled to his costs of the detailed assessment proceedings, except where the provisions of an Act, any of those Rules or any relevant practice direction provide otherwise or the court makes some other order in relation to all or part of those costs. There is, in other words, a presumption that the receiving party will be entitled to his costs. CPR, r 47.18(2) provides that the conduct of the proceedings and the amount, if any, by which the sum claimed has been reduced may be taken into account in deciding whether some other order should be made having regard to all the circumstances. CPR, r 47.19 provides that, where a party (whether the paying party or the receiving party) makes a written offer to settle the costs of the proceedings which gave rise to the assessment proceedings and this offer is expressed to be without prejudice save as to the costs of the detailed assessment proceedings, the court will take the offer into account in deciding who should pay the costs of those proceedings.

15. In this case the respondent made an offer in writing which amounted to a *Calderbank* offer. But the sum that was offered, which was £6,250, was substantially below the total amount that the costs judge allowed after taxation, which was £7,768.07. The respondent then made another offer in the sum of £8,000 which was slightly above the total amount that was allowed by the costs judge. But it did not meet the requirements of CPR, r 47.19(1) as it was not made in writing, and it was not renewed after the expiry of time limit to which it was made subject. It is true, as the respondent points out, that the total amount which the costs judge allowed after taxation was substantially less than that claimed in the bill of costs. But that result was due as much to the disallowance of several large amounts as a whole because they could not be claimed by a litigant who was representing himself as it was to the product of a detailed assessment. Their Lordships consider that, in the circumstances, this was not in itself a sufficient reason for holding that the appellant was not entitled to the costs of the taxation. Nor would it have been a good reason for the costs judge to decline to make such an order that there was no counter offer by the appellant, as the appellant suggests he did.

16. Their Lordships have concluded that there are no factors in this case which justified a departure from the normal expectation to which Waller J referred in *Chrulew v Borm-Reid & Co* and which has been preserved by CPR, r 47.18(1), that the party whose bill is being taxed will be entitled to his costs of that taxation.

## Conclusion

17. Their Lordships are not persuaded that the costs judge erred in respect of the sums which he allowed for hotel accommodation and incidentals and for the preparation of the bill of costs by the appellant's solicitors. But they are of the opinion that the appellant ought to have been awarded the costs of the taxation. They will humbly advise Her Majesty that the petition should be allowed, but only to the effect that there should be added to the bill of costs as taxed a reasonable sum for the time spent by the appellant's solicitor in preparing for and attending the taxation. As success has been divided, no order will be made in favour of either party as to the costs occasioned by this appeal.