[2025] UKPC 45
Privy Council Appeal No 0045 of 2024

JUDGMENT

Michelle Trotman, The Caura Hospital Director (Respondent) *v* Nailah Ramsaroop (Appellant) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Hodge
Lord Sales
Lord Burrows

JUDGMENT GIVEN ON
25 September 2025

Heard on 2 July 2025

Appellant
Tom Richards KC
Gerald Ramdeen
Drishti Suri
(Instructed by St Michael's Law (Trinidad))

Respondent
Rowan Pennington-Benton
(Instructed by Charles Russell Speechlys LLP (London))

LORD SALES:

1. This is an appeal from the Court of Appeal of Trinidad and Tobago concerning its approach to an issue regarding the implementation of a costs order in relation to an application for habeas corpus. The Court of Appeal allowed an appeal by Ms Michelle Trotman, the Caura Hospital Director (the respondent to the appeal to the Board), from the assessment of costs payable to Ms Nailah Ramsaroop (the appellant in this appeal and the applicant for the writ of habeas corpus) on a party and party basis made by Assistant Registrar Kimberly Prescott.

2. The Court of Appeal assessed the costs payable at an amount much less than the Assistant Registrar. It also gave guidance as to the assessment of costs in relation to an application for habeas corpus. The appellant challenges both the particular decision of the Court of Appeal in allowing the appeal against the decision of the Assistant Registrar and the guidance it gave.

The legal framework for assessment of costs to be paid on a party and party basis

3. Rule 1.1 of the Civil Proceedings Rules 2016 ("the CPR") in Trinidad and Tobago sets out the overriding objective in civil procedure, as follows:

> "1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly.
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> (2) Dealing justly with the case includes—
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> (a) ensuring, so far as is practicable, that the parties are on an equal footing;
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> (b) saving expense;
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> (c) dealing with cases in ways which are proportionate to— (i) the amount of money involved; (ii) the importance of the case; (iii) the complexity of the issues; and (iv) the financial position of each party.
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> (d) ensuring that it is dealt with expeditiously; and

> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

Rule 1.2 states that the court "must seek to give effect to the overriding objective when it … exercises any discretion given to it by the Rules …". Rule 1.3 (headed "Duty of the parties") states that "[t]he parties are required to help the court to further the overriding objective."

4. Rule 67.2(1) of the CPR, headed "Basis of quantification", provides:

> "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 that the court deems to be reasonable were 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 the person receiving such costs."

5. The relevant part of rule 67.2(3) states:

> "In deciding what would be reasonable the court must take into account all the circumstances, including-
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> (a) any orders that have already been made;
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> (b) the conduct of the parties before as well as during the proceedings;
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> (c) the importance of the matter to the parties;
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> (d) the time reasonably spent on the case;
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> (e) the degree of responsibility accepted by the attorney-at-law;
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> (f) the care, speed and economy with which the case was prepared;

(g) the novelty, weight and complexity of the case …"

6. In summary, the combined effect of these rules is that the costs to be assessed for payment on a party and party basis should be proportionate (rule 1.1), reasonable (rule 67.2(1)) and fair as between the paying party and the receiving party (rule 67.2(1)). It is implicit in each of these rules that assessment of the amount to be paid in respect of the legal costs of the receiving party is concerned with the cost of the work actually done for the receiving party in the particular case. Rule 67.2(3) states expressly that in deciding what is reasonable the court must take into account "the time reasonably spent on the case".

7. In December 2007 the then Acting Chief Justice issued guidance entitled "Practice Guide to the Assessment of Costs" ("the Practice Guide"). Paragraphs 2 and 3 stated in relevant part as follows:

> "2. For the assessment to be fair and reasonable the court must be informed about all previous assessments carried out in the case. This is particularly important where the court is assessing costs at the conclusion of a case.
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> 3. The court should not be seen to be endorsing disproportionate and unreasonable costs. Accordingly –
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> …
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> (b) if the court is to make an order which is not by consent, it should, so far as possible, ensure that the final figure is not disproportionate and/or unreasonable having regard to the overriding objective of the CPR. The court should retain this responsibility notwithstanding the absence of challenge to the individual items comprised in the figure sought."

8. Paragraph 6 of the Practice Guide deals with assessment of costs on the standard basis. It states:

> "6. Where the court assesses the amount of costs on the standard basis, for example, on a party and party basis, it will not allow costs which have been unreasonably incurred or are unreasonable in amount and will only allow costs which are proportionate to the matters in issue. The court will resolve in

> favour of the paying party any doubt which it may have as to whether the costs were reasonably incurred or were reasonable and proportionate in amount."

9. In a section headed "Proportionality", the Practice Guide states (para 8) that the concept of proportionality is given paramountcy by the overriding objective in Part 1 of the CPR and refers in particular to rule 1.1(2)(c). Para 9 of the Practice Guide refers to and adopts the guidance given by the Court of Appeal of England and Wales in *Lownds v Home Office (Practice Note)* [2002] EWCA Civ 365; [2002] 1 WLR 2450 ("*Lownds*") set out in para 11 below.

10. Para 19 of the Practice Guide states:

> "The basic guidelines laid down in *Simpsons Motor Sales (London) Ltd v Hendon Borough Council* [1965] 1 WLR 112 per Pennycuick J on the proper assessment of counsel's fee, remain sound law. Thus the proper measure of counsel's fees is to estimate what fee 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, would be content to take on the brief: but there is, in the nature of things, no precise standard of measurement and the costs assessment officer must, employing his knowledge and experience, determine what he considers the proper figure."

Para 25 states:

> "In assessing counsel's brief fee it is always relevant to take into account what work that fee, together with any refreshers, is intended to cover. The brief fee should cover all work done by way of preparation for representation at the trial and attendance at the first day of the trial. *Loveday v Renton and The Wellcome Foundation Ltd (No 2)* [1992] 3 All ER 184 ["*Loveday"*] held that the preparation by counsel of his examinations in chief, cross-examinations and final submissions are an ordinary part of his conduct of a trial on behalf of a client and fall within the brief fee together with:
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> - preparation work before the delivery of the brief on the faith of a solicitor's (instructing attorney's) statement that it will be delivered;

- preparatory work in counsel satisfying himself that he should accept the brief;

- evening preparation;

- any consultations between members of the team of counsel (other than conferences or consultations at the behest of the client or instructing solicitor (attorney));

- advising experts at weekends;

- conferring with experts without separate instructions;

- lost opportunities;

- chronologies, etc.;

- skeleton arguments save for the Court of Appeal. See *Hornsby v Clark Kenneth Leventhal (A Firm)* [2000] 4 All ER 567;

- *dramatis personae*;

- opportunities to prepare further when the court is not sitting;

- preparation of draft terms of collateral arguments;

- where a case is sufficiently complex, a separate fee for final written submissions can be claimed, where it has been specifically agreed and not covered by the brief fee. See *Chohan v Times Newspaper* unreported, September 17, 1998 *per* Nelson J;

- note of judgment."

11. In *Lownds*, the Court of Appeal of England and Wales, applying the equivalent procedure rules in that jurisdiction which required that the costs incurred should be both reasonable and proportionate, explained (para 31):

> "… what is required is a two-stage approach. There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which [the relevant English procedural rule corresponding to rule 1.1 and rule 67.2(3) of the CPR] states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable. If, because of lack of planning or due to other causes, the global costs are disproportionately high, then the requirement that the costs should be proportionate means that no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner. This is turn means that reasonable costs will only be recovered for the items which were necessary if the litigation had been conducted in a proportionate manner."

Factual background

12. On 28 March 2020 the appellant and her mother, Ms Karen Ramsaroop ("Karen"), were tested for the Novel Coronavirus (COVID-19) at the Eric Williams Hospital and were sent home. The test results revealed they had contracted the virus.

13. Late on 1 April 2020 the appellant and Karen, with other relatives, were admitted to the Caura Hospital. They were presented with "Quarantine Directions" which informed them that they were being quarantined at a designated facility for observation and treatment pursuant to regulation 38(1)(b) of the Quarantine (Maritime) Regulations and section 15 of the Quarantine (Air) Regulations. They objected to this.

14. On 10 April 2020 the appellant and Karen each instructed Mr Gerald Ramdeen, as Advocate Attorney, and Ms Dayadai Harripaul, as Instructing Attorney, to represent them. On 14 April 2020 Ms Harripaul sent a pre-action protocol letter on behalf of the appellant to the respondent stating that the appellant's quarantine constituted detention,

maintaining that the legislation referred to did not authorise that detention and stating that if she were not released the next day she would issue habeas corpus proceedings to secure her release. A similar letter was sent on behalf of Karen.

15. The respondent did not respond to the pre-action protocol letters. The appellant and Karen were not released from quarantine. Therefore, on 15 April 2020 they each commenced proceedings seeking permission to issue a writ of habeas corpus and an order that the application be deemed urgent and fit for vacation business.

16. Later on 15 April 2020 Rahim J certified that the applications were urgent and fit for vacation business. He directed the respondent to file her affidavit evidence by 17 April 2020 and ordered an online hearing for 2pm that day on a "rolled-up" basis to consider the application for permission and the substantive merits at the same time.

17. On 16 April 2020 the Public Health [2019 Novel Coronavirus (2019-nCoV)] (No 10) Regulations 2020 ("the No 10 Regulations") were published, to come into force on 17 April 2020. Regulation 8 empowered the Chief Medical Officer to order "the restraint, segregation and isolation" of an individual where a test showed that he or she was suffering from Covid-19. On 17 April the Chief Medical Officer made such orders in respect of the appellant and Karen, requiring them to isolate themselves at the Caura Hospital, and the respondent gave them notice of these orders. This was explained in evidence filed by the respondent on 17 and 20 April 2020.

18. It is accepted that the No 10 Regulations and the orders of the Chief Medical Officer provided an express lawful basis for the mandatory isolation of the appellant and Karen at the Caura Hospital, under the direction of the respondent. Therefore, at a hearing before Rahim J on the afternoon of 17 April 2020, which lasted only a few minutes, the appellant and Karen applied for and were granted permission to withdraw their applications for habeas corpus. Rahim J reserved the issue of costs and ordered the parties to file written submissions.

19. On 4 May 2020 the appellant gave notice that she would rely on the costs submissions made on behalf of Karen in the separate application.

20. By a judgment dated 22 May 2020, Rahim J ordered the respondent to pay the costs of both the appellant's and Karen's applications for habeas corpus, to be assessed if not agreed. The judge considered that by their pre-action protocol letters the appellant and Karen had caused the respondent to react by seeking to rely on a new basis for their detention and that the respondent was at fault for failing to reply promptly to inform them that their concerns were being addressed. This deprived the appellant and Karen of an opportunity to discontinue their applications at an earlier stage, avoiding the incurring of

costs. The judge ordered that the respondent should pay their costs on the standard basis, rejecting an application for indemnity costs.

21. The appellant filed a statement of costs in the sum of $346,495 and the respondent filed a statement of her objections. The appellant amended her statement of costs to give an explanation of the claim to recover the costs of a brief fee of $34,500 (representing 5 hours with an uplift of 10 hours) for the Advocate Attorney in respect of the application to have the habeas corpus application certified as fit for vacation business and a brief fee of $138,000 (representing 40 hours with an uplift of 20 hours) for the Advocate Attorney on the substantive application for habeas corpus, which had been included as items in the original statement of costs. Karen filed a statement of costs (and an amendment) in identical terms claiming the same total amount.

22. The items in the appellant's statement of costs included particular sums (reflecting the relevant hourly rate) for every step required to be taken to advise on and present an application for habeas corpus. These included items for the Instructing Advocate taking instructions, for the Advocate Attorney taking instructions, for conducting legal research and advising in conference on a number of occasions, including on the merits of the claim, for the drafting of the pre-action protocol letter, for drafting the applications for habeas corpus and the applications for certification of the matter as fit for vacation business, for the Advocate Attorney perusing and advising on the evidence and for his attendance at court on 17 April, for Instructing Solicitor's general care and conduct of the matter (40 hours, in addition to other items reflecting time spent on obtaining and receiving instructions and conducting legal research) and $16,400 for preparation and submission of written submissions on costs. The total sum for these items was $173,995.

23. In addition, the appellant's statement of costs included item 13, a claim for $34,500 as a brief fee for the Advocate Attorney on the application for certification of the matter as fit for vacation business, and item 14, a brief fee of $138,000 for the Advocate Attorney on the application for habeas corpus. The explanation given for item 14 in the amendments to the statement of costs referred to the account of what is included in a brief fee for counsel set out in para 25 of the Practice Guide and the *Loveday* case (para 10 above). The particulars of work done in respect of the brief fee in item 14 referred to legal research involving reading the relevant legislation and relevant authorities, consideration of the evidence and preparation of the arguments in the application and advising in conference.

24. The respondent filed objections in which she contended that the amount claimed in the appellant's statement of costs was clearly excessive, particularly since it quickly became clear that the appellant's application for habeas corpus was a nonstarter which was discontinued at the first hearing which lasted only a few minutes; it essentially repeated ("piggybacked" on) the same habeas corpus application made by Karen and the

work referred to in the appellant's statement of costs was unnecessarily duplicative; and the proceedings took up very little time (only two days, from filing to withdrawal).

25. After the appellant's statement of costs and the respondent's objections were filed, the costs payable to Karen were assessed by a different assistant registrar on 27 October 2020 in the total sum of $149,194.50.

26. The costs assessment hearing in relation to the appellant took place on 15 September 2021. Neither party drew the attention of the Assistant Registrar to Karen's identical statement of costs. Neither party informed the Assistant Registrar about the amount of the costs which the respondent had been ordered to pay in Karen's case.

The judgment of the Assistant Registrar

27. The Assistant Registrar handed down her written judgment on 17 February 2023. She directed herself by reference to rule 67.2 of the CPR, the Practice Guide and the Court of Appeal decision in *Attorney General of Trinidad and Tobago v Haleema Mohammed (by her next of kin and friend Crystal Carmel Mohammed)* Civil Appeal No S-218 of 2018 ("*Mohammed*") which, at paras 23-24, affirmed the applicability in Trinidad and Tobago of the approach to assessment of costs set out in *Lownds*.

28. Applying the first, global stage of the approach in *Lownds*, the Assistant Registrar found that the total sum claimed ($346,495) was "unreasonable, unfair and highly disproportionate", having regard to the duration of the matter, the reasonable amount of time which ought to have been spent on a matter of this nature and the quantity of work done: para 17. She agreed with the principal points made in the respondent's statement of objections (para 24 above).

29. Therefore, the Assistant Registrar proceeded to the second stage of the approach in *Lownds*, to conduct an item by item examination of the appellant's statement of costs. She took into account the importance of the matter to the parties, the length of time taken and the degree of responsibility taken on by the attorneys for the appellant and the novel context for the claim for habeas corpus. She reduced certain items where the time claimed was excessive or was not what she considered a reasonably competent attorney would have required to complete the relevant task. She deleted certain items which she considered were duplicated.

30. As regards the brief fee in item 13, the Assistant Registrar considered that the application for certification of the matter as fit for vacation business was not separate from the application for habeas corpus itself. In relation to item 14, having regard to the *Loveday* case, the Assistant Registrar concluded that the appellant's Advocate Attorney

was entitled to a brief fee for the habeas corpus application, but that the amount claimed was excessive and exorbitant. However, maintaining the separation of these elements of a brief fee, she reduced item 13 to $17,250 and item 14 to $23,000: para 23(ii).

31. The net effect of the reductions to the statement of costs was that the overall sum due was found to be $125,770, a reduction of 64%. The Assistant Registrar assessed that this sum was "reasonable, fair and proportionate to the work done": para 24. The award included the sum of $16,400 claimed for preparation of written submissions on costs.

32. The respondent appealed to the Court of Appeal. The Court of Appeal considered her appeal on a "rolled up" basis in order to decide in one hearing whether to grant permission to appeal and, if permission were granted, the substantive outcome of the appeal.

33. The grounds of appeal were that (i) there had been double counting of two particular items; (ii) the award by the Assistant Registrar included $16,400 for preparation and submission of written submissions on costs, whereas this work had not been done, since the appellant relied on the costs submissions presented in Karen's case; (iii) no sum should have been allowed in respect of a brief fee, since the other itemised claims covered the work which such a fee would have covered; and (iv) the overall sum of $125,770 was excessive and, after conducting the item by item assessment, the Assistant Registrar ought to have reduced the final global award since it was disproportionate and inconsistent with other costs awards in habeas corpus cases.

34. It is an odd feature of this case that ground (iii) was directed only to a challenge to the brief fee of $23,000 allowed by the Assistant Registrar in relation to item 14, and did not refer to the brief fee of $17,250 allowed in relation to item 13, although the logic of the respondent's argument extended to that item as well. For the purposes of the appeal to the Court of Appeal and of the appeal to the Board the brief fee element in relation to item 13 has dropped out of the picture and does not require further consideration.

The judgment of the Court of Appeal

35. By its judgment dated 24 November 2023 the Court of Appeal granted permission to appeal and allowed the appeal. Boodoosingh JA gave the substantive judgment, with which Bereaux JA and Wilson JA agreed.

36. The court stated that the appeal raised important issues relating to the assessment of costs in habeas corpus claims: para 1. It took the opportunity to give general guidance regarding the assessment of costs in such claims.

37. The court dismissed the respondent's first ground of appeal. It is not necessary to say anything more about this.

38. The court allowed the appeal on ground (ii) (costs submissions). It found that the Assistant Registrar had not been made aware that the appellant had relied on the written submissions on costs filed by Karen. The sum of $16,400 claimed by the appellant for the preparation of written submissions on costs should therefore have been disallowed.

39. The court allowed the appeal on ground (iii) (brief fee). Boodoosingh JA analysed the itemised elements in the statement of costs and compared this work with what would in other cases be expected to be covered by a brief fee, as explained in *Loveday*. He observed (para 20):

> "In this case the nature of the case being a habeas corpus application was relevant. The context of how such an application ordinarily proceeds in this jurisdiction is important. An attorney is approached, usually by a family member, that a relative is being detained. Instructions are taken from the client or the client's representative. A pre-action letter is ordinarily issued. If there is no satisfactory response, an application for the issuance of a writ of habeas corpus is made supported by evidence. The judge may issue the writ immediately ordering that the detained person be produced to the court at a particular time and date and for the State to justify the detention. An alternative approach is to set a time for hearing the application and ask the applicant to give notice to the person or persons from the State detaining the person. The judge may also in doing so order an affidavit be filed to justify the detention. At the hearing, the judge considers the evidence filed on behalf of the applicant and the State or may enquire from the State the reason for the detention with a possible undertaking that what is represented would later be sworn on affidavit. The judge, after hearing the parties, may make an order then and there dismissing the application or granting an order for release or may order evidence be filed or written submissions, if this is needed. An order to file submissions tends to be an exceptional course."

40. Boodoosingh JA found (para 21) that the appellant's case had followed this same basic pattern, with certain variations ("nuances") in that it was conducted in the vacation and concerned detention under new and novel regulations concerning the health of the public, a matter which the State considered to be particularly important and such as to justify engaging external Senior Counsel. He continued (para 22):

> "The nature of this habeas corpus application, as for most of such applications, however, did not require a trial in the normal way that a trial is contemplated. In this case, the application was withdrawn, the hearing lasted approximately 15 minutes and the issues were almost identical, as submitted by Mr Ramdeen, to the Karen Ramsaroop v Michelle Trotman matter. In principle, therefore, the incidence of a brief fee ought not to have arisen in this case, as it would also not ordinarily arise in a habeas corpus matter."

41. The issue the Assistant Registrar had to consider was whether it was fair and reasonable for the respondent to have to pay the brief fee where there was no trial, in the usual sense of the word as contemplated in *Loveday*; this was particularly the case "where an itemized approach was taken in the assessment where fees were being claimed for taking instructions, conferences, research, drafting the applications and attending at the hearing"; the Assistant Registrar had erred in determining that it was appropriate to make an award of $23,000 for a brief fee in these circumstances: para 23.

42. The court also allowed the appeal on ground (iv) (disproportionality of the overall sum awarded). The approach set out in *Mohammed*, reflecting the guidance in *Lownds* and in the Practice Guide, required the costs assessor who has conducted an item by item assessment to step back at the end of that process to consider whether the overall sum is fair, reasonable and proportionate in all the circumstances. The Assistant Registrar's judgment indicated that she had not done this properly. It therefore fell to the Court of Appeal to undertake that assessment for itself, taking account of the fact that the item of $16,400 for costs submissions and the item of $23,000 for brief fee should have been disallowed, so that even on the Assistant Registrar's assessment (allowing for deletion of those items) the overall award should have been $86,370: para 28.

43. Before the Court of Appeal Mr Gerald Ramdeen, for the appellant, submitted that the respondent should not be allowed to appeal on this ground because in Karen's identical related case a different assistant registrar had ordered payment of a higher sum ($149,194.50) and the respondent had not appealed against that. Boodoosingh JA rejected this contention, observing that "it is precisely because an award was made before in the related matter [ie in Karen's case] that the assistant registrar ought to have considered whether it was disproportionate to make the full award here that she made" since she was aware of Karen's claim for costs, even though she did not know an assessment had already been made: paras 29-30. The Assistant Registrar should have considered that the attorneys for the appellant and Karen were the same, the parties and the claims were the same, "much of the work, including research, would have applied in both cases", submissions filed in Karen's case were relied on, and "there would have been duplication of the work for both": para 31.

44. At para 32, Boodoosingh JA said that when cases are related it makes sense for there to be one assessor of costs so as to ensure that a fair, reasonable and proportionate result is achieved overall. In any event, where assessments were proceeding in related cases, "Attorneys ought to bring the related case to the attention of the relevant costs assessor at the material time": ibid. Generally, in habeas corpus cases it would make sense for the judge who is seized of the matter to make a summary assessment of costs at the hearing, since he or she would have a good understanding of the case and would be well-placed to do so: para 33.

45. In the present case, the Assistant Registrar knew that Karen's related case was the lead case and should have appreciated that the sums claimed by the appellant would have involved duplication in several respects. There would have been overlap in the hours spent in dealing with both cases: para 34.

46. In these circumstances, the Assistant Registrar was wrong in principle not to have reduced the award of costs further after conducting the item by item assessment, in order to ensure that the global sum awarded was fair, reasonable and proportionate. Balancing the different factors (in particular, the overlap between the two cases, weighed against the important issues which they raised), a fair reduction of the global sum should have been 50%. Applying that to the global sum arrived at by the Court of Appeal after consideration on an item by item basis ($86,370), the final figure to be awarded was $43,185: para 35. As a sense-check, Boodoosingh JA considered how that sum would be justified by taking an approach of charging for the attorneys' time by the hour: 8 hours work for the Advocate Attorney (at $2300 per hour, totalling $18,400); 12 hours work for the Instructing Attorney (at $1200 per hour, totalling $14,400); and an increase of about 30%-32% (totalling $10,385) to reflect the importance of the case "and other factors" (presumably the urgency involved and the need to have it dealt with as vacation business).

47. At para 36 Boodoosingh JA pointed out that the figure awarded was not a matter of mathematical exactitude, but a fair, reasonable and proportionate estimate of the kind which a judicial officer "either seized of the case from first-hand knowledge [ie if conducting a summary assessment or a combined assessment] or made aware of the case by having access to the file and information from attorneys" would be in a good position to undertake. He continued, "Given the nature of habeas corpus applications as described above, in most cases, an assessment based on an estimate of the hours reasonably spent with an increase or reduction after considering the CPR Part 67.2(3) factors ought to result in a fair, reasonable and proportionate costs award".

The appeal to the Board

48. The appellant appeals to the Board. Mr Tom Richards KC, for the appellant, submits that the Court of Appeal committed two errors. First, the court's approach

involved what Mr Richards called "appellate overreach", in that it did not accord proper respect to the assessment of the Assistant Registrar, having regard to the fact that she had given herself a proper self-direction on the law. Secondly, the Court of Appeal erred in principle in ruling that there should be no costs awarded for the brief fee for the Advocate Attorney. The Court of Appeal was wrong to give the general guidance in relation to habeas corpus applications set out at para 22 of the judgment (para 40 above). A brief fee should be regarded as an acceptable way for counsel to be recompensed for their work in such cases and it was important for constitutional reasons regarding the importance of the remedy of habeas corpus and the right of access to a court that this should be affirmed by the Board. The award of costs by the Assistant Registrar should be restored.

49. In the course of Mr Richards' opening submissions the Board expressed some scepticism about them. At the close of his submissions the Board rose to consider whether it required to hear from counsel for the respondent. When the hearing recommenced, Mr Richards made an application for permission to withdraw the appeal. The Board refused that application. The Board has the benefit of full written submissions by both parties. In view of the importance of the principles governing the assessment of costs in habeas corpus proceedings, to which the Court of Appeal referred and which the appellant had herself emphasised in the written and oral submissions made on her behalf, the Board considered that it was not appropriate, and would be contrary to the orderly development of the law through guidance provided by the Board, to allow the appeal to be terminated at the election of the appellant in this way. The Board therefore proceeds to give judgment in this matter. It did not find it necessary to call on counsel for the respondent at the hearing.

50. The Board dismisses the appeal for the reasons set out below.

The role of the appellate court

51. The test for an appellate court to intervene in relation to the exercise of discretion by a lower court is well understood. An appellate court will intervene if the lower court has misdirected itself in law, has taken into account irrelevant considerations or has failed to take into account relevant considerations, has gone wrong in principle or has reached a conclusion which is clearly wrong. The decision to make a costs order in the first place is discretionary, albeit the discretion is structured and constrained according to certain principles.

52. In the present case, however, the Board is concerned with the implementation of the costs order made by Rahim J. The tests to be applied by the Assistant Registrar were whether the overall sum to be awarded was proportionate and whether the individual items in the statement of costs were fair and reasonable. The application of these tests is not, strictly speaking, a matter of discretion, but rather involves the working through of

tests or standards laid down by law which are open-textured and which depend on a variety of factors. As Hoffmann LJ observed in *In re Grayan Building Services Ltd* [1995] Ch 241, 254: "generally speaking, the vaguer the standard and the greater the number of factors which the court has to weigh up in deciding whether or not the standards have been met, the more reluctant an appellate court will be to interfere with the trial judge's decision". Therefore the approach to review of the Assistant Registrar's decision on appeal is analogous to that applicable in relation to an appeal in relation to the exercise of a discretion. So, for example, in relation to the application of the proportionality standard, an appellate court will only intervene if the lower court has made a significant error of principle or there is "an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of [a] material factor, which undermines the cogency of [the judge's] conclusion": see *R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47; [2018] 1 WLR 4079, para 64. In this context, the same approach is applicable in relation to determining what is fair and reasonable in terms of incurring costs. Due adjustment of the approach on review of exercise of a discretion has to be made for the fact that the concepts of proportionality, fairness and reasonableness are legal standards which are well understood which constrained what the Assistant Registrar was lawfully authorised to do to a somewhat greater extent than would be the case in relation to the exercise of an ordinary discretion regarding what costs order should be imposed in the first place.

53. In the Board's view, there is no indication that the Court of Appeal misunderstood or misdirected itself as to its role on the appeal. On the contrary, it clearly directed its examination of the Assistant Registrar's decision to identifying whether there were any clear errors which affected the Assistant Registrar's order and also examined whether she had committed an error of principle (see paras 22 and 35).

The errors identified by the Court of Appeal

54. The Court of Appeal identified four errors underlying the Assistant Registrar's order, each of which, in the Court of Appeal's view, entitled it to reopen the Assistant Registrar's assessment of costs and to substitute its own assessment. The four errors were: (i) the Assistant Registrar included in her order a sum of $16,400 for submissions on costs which did not in fact reflect work done in the appellant's case; (ii) the Assistant Registrar failed to take properly into account a relevant consideration, namely the overlap between the work covered by specific items in the costs statement and what should be covered by a brief fee, and had erred in principle by including the sum of $23,000 for a brief fee; (iii) the Assistant Registrar had failed to take properly into account the duplication involved in the "piggybacking" of the appellant's claim on Karen's claim; and (iv) the Assistant Registrar had erred in principle by failing to stand back adequately after examining the statement of costs item by item to assess whether the global sum she proposed to award was fair, reasonable and proportionate, and the amount that she awarded was clearly too high.

55. The Board will examine each of these in turn.

(i) Inclusion of $16,400 for submissions on costs

56. It is clear from the facts, and is common ground on this appeal, that the inclusion of this sum in the award of costs was wrong, because it did not reflect work done in the appellant's case. Nonetheless, Mr Richards submits that this was not due to an error by the Assistant Registrar, since she was not informed by either counsel for the appellant or counsel for the respondent about the true position. Therefore, he said, the Court of Appeal was wrong to allow the appeal in respect of this ground of complaint by the respondent. The respondent, by her counsel, could have referred to the true facts and could have asked the Assistant Registrar to exclude this amount, but failed to do so. The respondent could not now complain about the inclusion of this amount. There had been no error by the Assistant Registrar on the basis of the facts as understood by her.

57. The Board does not agree. The Court of Appeal was right to allow the appeal on this ground.

58. As noted, it is common ground that the inclusion of this item in the award was a clear mistake of fact. The Assistant Registrar did not have the error drawn to her attention, but once it was identified her award could not stand. Even though it was through inadvertence on her part, she has taken into account an irrelevant consideration (ie that work was done for the appellant to draw up costs submissions, when in fact it was not) and/or has failed to take into account a relevant consideration (ie that no such work was done for the appellant). Moreover, the sum involved is a material amount in the context of the overall award of costs, so its inclusion must inevitably undermine her assessment of the overall fairness, reasonableness and proportionality of the global sum awarded.

59. It is not in every case that an error of fact will be sufficient to allow an exercise of discretion to be set aside on appeal. But in the present case the object of the exercise conducted by the Assistant Registrar was to check the validity of the amount claimed in a statement of costs, involving consideration of and adding up a series of items. The conclusion she came to and the order she made to give effect to her conclusion had no good claim to be respected and accepted by the Court of Appeal where it was known to be affected by the mistaken inclusion of an item which is material in amount.

60. This reasoning is sufficient to determine this aspect of complaint in relation to the Court of Appeal's decision. However, the Board also observes that the appellant's contention that the responsibility for drawing the error to the attention of the Assistant Registrar rested with the respondent is unsustainable. The appellant had placed an untrue statement of costs before the court in support of her request for a payment to include this amount. The primary onus was on her and her counsel to correct the inaccuracy.

61. Furthermore, both the appellant's advocates, as officers of the court, had a professional duty not to mislead the court. As soon as they became aware of the error, they should have informed the court and corrected it, so as to enable the court to avoid making the mistake in the first place or to correct its own order before it was drawn up or under the slip rule. Failing that, their duty was to inform the court and the respondent, so that if necessary an appeal could be brought to correct the error.

62. Yet further, rule 1.3 of the CPR (para 3 above) states that it is the duty of all parties to help the court to further the overriding objective. Therefore, for this reason also, there was a clear responsibility on the appellant and her representatives to ensure that the Assistant Registrar was informed about the true facts which were relevant to her assessment of the costs payable. It is not correct to ascribe relevant responsibility for this aspect of the Assistant Registrar's erroneous costs award to the respondent.

(ii) Allowance of $23,000 for a brief fee

63. Mr Richards submits that the Court of Appeal erred in its determination that this amount should not have been included in the sum awarded. He also submits that the Court of Appeal itself erred in principle by stating at para 22 of its judgment that ordinarily a brief fee ought not be included in a statement of costs for an application for habeas corpus.

64. The Board does not accept either of these submissions.

65. As to the first, Boodoosingh JA explained clearly that the itemised charges (apart from the brief fee element at items 13 and 14) fully covered all the work in fact carried out by the attorneys: see paras 39-40 above. There was nothing which had not been covered by those charges which could properly have been left over to be covered by a separate brief fee element. The Assistant Registrar did not identify anything which had not been covered by the itemised charges. It was therefore clearly wrong in principle to include a charge for a brief fee.

66. The Board does not agree with Mr Richards' criticism of the Court of Appeal's statement of general principle in para 22 of its judgment (see para 40 above). The Court of Appeal is the senior local court in Trinidad and Tobago. It has detailed knowledge about, extensive practical experience of, and expertise in, the court procedures in that jurisdiction. It is in a good position to determine how parties may reasonably be expected to behave in the conduct of litigation in a proportionate manner in accordance with the CPR.

67. The Court of Appeal is well placed to give general guidance of this kind and was entitled to do so. On a matter of procedure affecting the recovery of costs, including in a

case such as this, "it is appropriate for an appellate court to lay down guidance or even rules which should apply in the absence of special circumstances": *Competition and Markets Authority v Flynn Pharma Ltd* [2022] UKSC 14; [2022] 1 WLR 2972, para 94 (Lady Rose). By doing so it reduces the scope for arbitrary differences of result as between similar cases and assists parties to know where they stand and hence facilitates them in seeking to agree matters without the need to go to court.

68. In the present case the Court of Appeal was careful to explain the usual course of a habeas corpus application (at para 20), so that lower courts could understand the circumstances in which its guidance would be applicable. It was also careful not to remove all discretion and power of evaluation from the court making the assessment of costs, since it gave guidance only as to what should ordinarily happen.

69. In relation to the approach to be adopted in respect of recovery of costs, an apex court generally accepts that this is usually a matter for the Court of Appeal in the relevant jurisdiction to determine. In the United Kingdom this was the position adopted by the House of Lords and now by the Supreme Court. In *Fourie v Le Roux* [2007] 1 WLR 320, Lord Carswell said (p 338) in relation to appeals about costs that:

> "this is peculiarly an area in which the principles should be developed and applied by the judges at first instance, with the oversight of the Court of Appeal, and that the House should not reverse a costs order without a strong reason in principle."

In *R (Gourlay) v Parole Board* [2020] UKSC 50; [2020] 1 WLR 5344, in the Supreme Court, Lord Reed explained (para 36):

> "… this court will ordinarily be slow to intervene in matters of practice, including guidance given by the Court of Appeal as to the practice to be followed by lower courts in relation to the award of costs. The court recognises that responsibility for monitoring and controlling developments in practice generally lies with the Court of Appeal, which hears a far larger number of cases. This court is generally less well placed to assess what changes in practice can appropriately be made. It cannot respond to developments with the speed, sensitivity and flexibility of the Court of Appeal … ."

70. The Board follows this approach, including in respect of Trinidad and Tobago: see, eg, *Singh v Public Service Commission* [2019] UKPC 18, para 2; *Ngumi v Attorney General of the Bahamas* [2023] UKPC 12, para 94; and *Chhina v Ismail* [2024] UKPC 10; [2024] 1 WLR 2459, paras 42-44. In addition to the general reason for adoption of a

restrained approach given in *Fourie v Le Roux*, the Board acknowledges that in issues about civil procedure which are brought before it on appeal "the courts below … are generally better informed than the Board about the particular conditions and norms of civil litigation in which the rules of procedure … have effect": *Bergan v Evans* [2019] UKPC 33, para 2; cited in *Chhina v Ismail* at para 43.

71. The Court of Appeal is more familiar than the Board with local practices in Trinidad and Tobago regarding the way in which fees are charged for counsel's work. It seems that in relation to habeas corpus applications charges are made for specific items of work done on an hourly basis, as the appellant's statement of costs and that presented by Karen indicate happens. On the basis that the charging structure for work done for an application for habeas corpus typically has this character, so that statements of costs are typically presented in a format like those of the appellant and Karen, the guidance given by the Court of Appeal is clearly justified. Costs claimed should reflect the work actually done. The main point made by the Court of Appeal was that an application for habeas corpus does not require a trial in the usual full sense of that word and does not involve all the additional preparation which is associated with a trial, as described in *Loveday*.

72. It remains open to a party to agree to engage counsel on the basis that he or she will be remunerated for all the work done by way of a brief fee arrangement, rather than by a series of charges on an hourly basis for the work done. But if so, on an assessment of costs (on a party and party basis) the party claiming reimbursement of the costs will need to be able to explain clearly what work was involved in preparing for and presenting the habeas corpus application. Where a brief fee is charged, the general position is that a statement of costs "should, as far as possible … itemize the time and charges fixed accordingly": *Mohammed*, para 12. Having regard to the typical course of an application for habeas corpus as explained by the Court of Appeal, it is likely that a court assessing costs payable in respect of such an application will find an itemised list of work done at an hourly rate more reliable as a true reflection of the work actually done than a general and unspecific brief fee, and may therefore be more readily disposed to find the work so specified and the charges made for it to be fair, reasonable and proportionate, as required by rule 1.1 and rule 67 of the CPR.

73. Mr Richards submitted that the guidance given by the Court of Appeal regarding recoverability of a brief fee, and its decision in the present case applying the approach it set out, represented an unjustified interference with the constitutional and common law right of access to a court to vindicate the fundamental right of security of the person and protection against unlawful detention. The Board does not agree. Where an applicant for habeas corpus obtains an order for payment of his or her costs, the applicant will recover pursuant to that award a fair, reasonable and proportionate amount in respect of what the applicant has paid his or her attorneys. That does not constitute any impediment at all to the applicant being able to obtain representation and in being able to secure access to the courts to vindicate his or her rights

(iii) Duplication from the appellant's claim "piggybacking" on Karen's claim

74. The Assistant Registrar accepted that there was likely to be some element of duplication between the appellant's application for habeas corpus and that made by Karen and on that basis reduced or removed some of the items claimed in the appellant's statement of costs. Mr Richards submits that this shows that the Assistant Registrar responded appropriately to this aspect of the case and that the limited reductions she made to account for it fell within the scope of her legitimate power of evaluation, so that the Court of Appeal should not have allowed the respondent's appeal on this basis.

75. In the Board's view, however, the Court of Appeal was right in its assessment that the Assistant Registrar had an imperfect appreciation of the full extent of the "piggybacking" and of the duplicative effect of the two claims being run alongside each other and that she erred by failing to give that factor much greater weight than she did. It was common ground that Karen's case was the lead case.

76. The Assistant Registrar did not have before her Karen's statement of costs, which would have enabled her to see that it was identical to that presented by the appellant. Also, the Assistant Registrar was not informed about the amount of costs which the respondent had been ordered to pay in Karen's case, ie $149,194.50. This was on any view a substantial sum for the work done by two attorneys over a very short period in relation to a relatively straightforward legal claim which simply turned on the existence or otherwise of legal authority to detain, albeit this involved a novel situation and a modest degree of complexity as a result. The sum claimed as costs in Karen's case and the sum awarded for costs in that case both indicated that most of the work must have been referable to and done in Karen's case, over the short period in issue. Yet the appellant was claiming a similarly substantial amount.

77. The respondent had raised the "piggyback" effect in her objections to the appellant's statement of costs, so everyone appreciated it was a potentially significant matter. It was clearly desirable that in these circumstances the Assistant Registrar should have had full information about the two parallel claims for costs, precisely to avoid the risk of unfair and disproportionate duplication between the claims.

78. The Board refers to para 2 of the Practice Guide, set out at para 7 above. The statement in that paragraph is not directly in point in the present case, since it refers to costs assessments in the same case rather than in parallel cases. However, the principle and rationale which underlie it are equally applicable in the present case, in view of the close correspondence between the appellant's application for habeas corpus and claim for costs and Karen's equivalent application and claim.

79. Both the appellant and the respondent had a responsibility to inform the Assistant Registrar about Karen's statement of costs and the award of costs in Karen's favour. It can be said that it was remiss and imprudent for the respondent not to do so, but that is not a basis for disallowing her appeal on this ground when the basic fact of the substantial award in Karen's favour for the same work was identified by the Court of Appeal. The appellant and her representatives also had a responsibility to inform the Assistant Registrar about these matters and to explain the relationship between the costs claimed in Karen's case and those claimed by the appellant (see paras 60-62 above) and they cannot be allowed to take advantage of the fact that they failed to do so. The Court of Appeal rightly observed (para 32) that the attorneys should have brought the related case to the attention of the costs assessor at the material time; see also para 36 of the judgment (paras 44 and 47 above).

80. The Court of Appeal considered that the Assistant Registrar failed to give proper weight to the existence of the parallel proceedings brought by Karen, both by reason of the fact that those proceedings constituted the lead case (as the Assistant Registrar was aware) and by reason of the information regarding the award in Karen's favour about which the Assistant Registrar should have been informed. In the Board's view, the Court of Appeal was correct on both points and was right to allow the respondent's appeal on this ground as well. Even on the information which the Assistant Registrar did have, she had clearly underestimated the impact of the "piggyback" effect.

(iv) Error in overall assessment

81. The fourth ground on which the Court of Appeal upheld the respondent's appeal is closely linked to ground (iii). In the Board's view, for the same reasons, the Court of Appeal was entitled to find that the overall award made by the Assistant Registrar was clearly excessive in the circumstances and was for that reason wrong in principle: para 35. This did not involve the Court of Appeal in overstepping its appellate role: see paras 51-53 above.

The Court of Appeal's assessment of costs

82. Any one of the errors in the assessment made by the Assistant Registrar identified by the Court of Appeal was sufficient to justify it in setting aside her assessment of the payment to be made in respect of costs. In fact, the Board upholds the Court of Appeal's judgment on all these points. The Court of Appeal was therefore entitled to make its own assessment of the costs payable, as it proceeded to do. The appellant does not contend that the Court of Appeal exceeded its lawful power of evaluation in making that assessment.

Conclusion

83. For the reasons given above, the Board dismisses the appeal. The Board also affirms that the Court of Appeal was entitled to give the guidance it did at para 22 of its judgment (para 40 above) regarding the assessment of costs in applications for habeas corpus.