IN THE COURT OF APPEAL OF BELIZE, A.D. 2009

CIVIL APPEAL NO. 29 OF 2008

BETWEEN:

RBTT TRUST LIMITED	**Appellant**
AND	
CEDRIC FLOWERS	**Respondent**

—

BEFORE:

The Hon. Mr. Justice Sosa	-	Justice of Appeal
The Hon. Mr. Justice Carey	-	Justice of Appeal
The Hon. Mr. Justice Morrison	-	Justice of Appeal

Mr. Christopher Hamel-Smith SC and Mr. Philip Zuniga SC for the appellant.
Mr. Eamon Courtenay SC and Mrs. Robertha Magnus-Usher for the respondent.

—

25, 26 & 27 March, 10 June & 30 October 2009.

SOSA JA

[1] For the reasons given by Morrison JA in his judgment, which I have read in draft, I would allow the appeal and concur in the orders proposed by him.

_____
SOSA JA

CAREY JA

[2] I entirely agree, and have nothing useful to add.

_____
CAREY JA

MORRISON JA

Introduction

[3] This is an appeal from a judgment of Awich J given on 10 October 2008 in favour of the respondent in the amount of US$787,981.48 and BZ$1,950.00, with interest at 3% per annum from 3 February 2005 to the date of judgment.

[4] The appellant is a company incorporated under the Laws of Trinidad and Tobago. The respondent is a Certified Public Accountant practising in Belize City. In 2004, he had, as the judge found, several years of practice as an accountant and had acted as a company receiver on at least three previous occasions.

[5] In early 2003, the board of directors of International Telecommunications Limited ("Intelco") determined to raise the sum of US$25,000,000.00 by the issue and sale of fixed rate bonds. The bonds were constituted and secured upon the terms and conditions contained in a Trust Deed dated 24 March 2003 between

Intelco and the appellant, which acted at all material times in the capacity of trustee for and on behalf of the registered holders of the bonds for the time being.

[6] The original bondholder was RBTT Merchant Bank Limited ("RBTTMB"), a company described by the judge as "a sister company to" the appellant.

[7] By a Debenture made collateral to the Trust Deed between Intelco and the appellant, also dated 24 March 2003, Intelco charged its fixed assets (including all real property) and its floating assets ("the charged assets") to the appellant as trustee, by way of security for the repayment of the bonds.

[8] Pursuant to powers contained in the Debenture, the appellant by instrument dated 1 November 2004 appointed the respondent to be Receiver of all the charged assets of Intelco. The appellant was empowered by clause 7.01 of the Debenture to fix the remuneration of the Receiver and to remove any such receiver.

[9] Clause 7.04 of the Debenture provided as follows:

> "7.04 The Company hereby covenants with the Trustee on demand to pay all costs charges and expenses incurred by the Trustee or by any such receiver or which it or he shall properly incur in or about the enforcement preservation or attempted preservation of this security or of the Charged Assets or any of them on a full indemnity basis with interest at the Default Rate from the date of payment by the Trustee or such receiver. Any such receiver shall be entitled to remuneration appropriate to the work and responsibilities involved upon the basis of charging from time to time adopted by such receiver in accordance with the current practice of his firm." (Emphasis supplied).

The progress of the receivership

[10] By letter dated 1 November 2004, the appellant notified Intelco of the respondent's appointment and, by letter of the same date, wrote to the respondent as follows:

> "Dear Mr. Flowers:
>
> In consideration of your agreement to act as Receiver of the Charged Assets of the above-mentioned company, pursuant to an appointment to be made by us as Debenture Holder and Trustee, we hereby undertake to pay or reimburse you (as the case may require) so much of the expenses properly incurred by you in the performance of your duties as Receiver and so much of your remuneration for so acting as you are unable to recover from the monies coming into your hands as Receiver."

[11] Thereafter, despite the fact that there had been no discussion or agreement between the parties as to fees at that point, the respondent took immediate steps to identify, assess and secure the charged assets of Intelco. He reviewed numerous invoices, letters and other documents and, additionally, communications from parties expressing an interest in the Intelco assets. He also held meetings with representatives of the Government of Belize, the Public Utilities Commission, Intelco's auditors and bankers and with various other parties either interested in the Intelco assets or having some connection with the company. In particular, having discovered that there was an existing maintenance agreement between Intelco and Belize Telecommunication Ltd. ("BTL"), which gave BTL temporary control of the assets of Intelco, he made arrangements with BTL for the preparation of a listing and compilation of those assets, which were due to revert to Intelco upon the expiration of the agreement on 31 December 2004.

[12] The respondent was also in contact with representatives of the appellant by telephone and electronic mail and on 25 November 2004, at the appellant's

request, he remitted by facsimile a five page letter reporting in detail on the progress thus far made by him as Receiver. The letter described as a "current issue" the difficulties which the respondent was encountering in obtaining information from BTL with respect to the assets under its control under the temporary management agreement and ended with a list of matters described by the respondent as "Issues of concern as the receiver moves forward", giving the assurance that "The Receiver continues to work on these issues and will keep you informed." The letter was silent on the question of fees.

[13] On the following day (26 November 2004) the respondent participated in what he described as "an extended conference call" with three executives of the appellant (who were speaking to him from Port-of-Spain). During this conference call, the respondent was asked, among other things, about fees and legislation in Belize governing the appointment of receivers and the call was followed by a letter dated 8 December 2004 from the appellant to the respondent seeking his advice on nine specific matters, the second of which again raised the question of fees as follows:

> "Kindly advise us as to your fees in the matter in order that we may be able to plan properly."

[14] After taking advice from an attorney-at-law in Belize, the respondent responded by letter (again sent by facsimile) dated 16 December 2004, in which he provided extracts from the relevant legislation (Registered Land Act, section 76(6)) referring to receivers' compensation. He then specifically addressed the question of fees as follows:

> "Fees
>
> Receivers are generally paid as provided for in the law (see enclosed section on Receiver's Remuneration), unless prior arrangements have been made. The law sets the limit for the

> receiver at 5% of the receipts. We are open and flexible on this issue and I wish to be very clear on that.
>
> You will note from the debenture document that the receiver's costs and fees are to be paid by the Company (INTELCO). We would be amenable to a compensation arrangement that would be based on RBTT's rate of recovery. For example, if RBTT recovers a 100%, the receiver might bill a maximum ___ percent of the limit provided for in the law. Once again, we are flexible on this arrangement.
>
> The matter of costs is another issue. When the current BTL/INTELCO arrangement is discontinued, we will need to take possession and secure all the assets. This will involve insurance, electricity, transportation, security, and such other costs necessary to protect the assets. Until we have a listing of the assets (including location) it may be difficult to estimate some of these costs. In any event, we will need to come under an arrangement to deal with such costs, as I fully expect to take possession as soon as practicable."

[15] It is clear from this letter that the parties had not yet reached agreement on fees and there was no further discussion on the subject for the remainder of December 2004. The respondent's evidence was that he nevertheless continued to carry out his duties as receiver, including taking steps "to secure the assets, to address issues of concerns with various other creditors of INTELCO and to meet with potential purchasers". He also made several requests from the appellant for, as he put it, "information to assist with my duties", but complained in his evidence at the trial that the appellant's approach was "less-than-cooperative".

[16] On 5 January 2005, in a telephone conversation with the respondent, the representative of the appellant with whom he had primarily been dealing requested that he forward his bill. The respondent responded by letter dated 5 January 2005, in which he outlined his fee structure and also submitted his fee invoice for the months of November and December 2004 and the period 1 – 5 January 2005. The letter stated that the invoices were based on the respondent's "customary fee structure and terms for an assignment of this nature" and these were set out as follows:

1. A retainer fee of $50,000;

2. An hourly fee of $400;

3. Telephone, postage, mileage and other costs;

4. Disbursements for hire of professional legal and technical services;

5. Direct costs of securing and selling the assets (insurance, security, rent, electricity, etc.); and

6. A commission of 3½ % of the receipts or the sale or disposal price of the charged assets or fees derived from the use of the charged assets or from the value of an assigned debt, along with all associated fees. All fees are quoted in United States dollars. Upon completion of the sale of the charged assets or an assignment of the debt and upon final settlement of accounts, 80% of the retainer fee shall be deducted from the receiver's commission, along with all hourly fees previously billed and collected by the receiver.

In the event RBTT Trust Limited elects to terminate the receiver's appointment prior to a sale of the charged assets or an assignment of the debt, a termination fee of $50,000 would become due and payable, in addition to any other fees.

Should a sale of the charged assets or an assignment of the debt be completed within 60 days of such termination, the commission stated above (3½ %) shall become due and payable to the receiver, less the termination fee and previously paid fees (hourly fees, 80% of retainer), even though the receiver's appointment was terminated.

All fees are due and payable upon presentation of invoices. Interest at the United States prime rate will accrue on outstanding amounts after 30 days.

[17] The total of the three invoices enclosed in this letter was US$71,450.00, made up as follows:

November 2004		
Retainer fee	-	$50,000.00
28.5 hours at $400.00 per hour	-	$11,400.00
December 2004		
13 hours at $400.00 per hour	-	$5,200.00
1–5 January 2005		
3.5 hours at $400.00 per hour	-	$3,125.00
Out of pocket expenses	-	$1,725.00
Total		US$71,450.00

[18] On 12 January 2005 the respondent received information from the appellant by telephone that the Intelco bonds had been sold and that the receivership was to be terminated. This was confirmed by a letter dated 14 January 2005, as follows:

> "Dear Mr. Flowers:
>
> We thank you for your letter dated January 13, 2005 and wish to inform you that the Intelco Bond issued under Trust Deed dated March 23, 2003 has been sold.
>
> In that regard, as Trustee, we have been asked by the Bondholder to terminate the Receivership and you are therefore instructed to cease all action with regard to your current functions as Receiver. We shall contact you as soon as we have more information to communicate.
>
> Yours truly,
>
> S..A.C. Bayne
> Managing Director"

[19] On 18 January 2005, the respondent wrote to the appellant enclosing his final invoice in the total amount of US$887,000.00, made up as follows:

	Professional Services Rendered	
1.	Commission due @ 3 ½ % of sale/transfer/assignment value of December 31, 2004 transaction, $27,000,000	$945,000
2.	Retainer fee (20% of $50,000)	10,000
3.	Costs (see January 1 – 5, 2005 invoice)	1,725
	Total due	956,725
4.	Less: Amounts already billed	
	November, 2004 invoice	(61,400)
	December, 2004 invoice	(5,200)
	January, 2005 invoice	(3,125
	Net amount of this invoice	$887,000

Note: All amounts in United States dollars. Interest at the United States prime rate will accrue on all outstanding amounts after 30 days.

Invoice sent without prejudice to any other claims.

[20] The respondent's evidence was that this invoice was based on the amount of the Intelco debt and the terms outlined in his 5 January 2005 letter. It did not however find favour with the appellant and, after several enquiries by the respondent as to when he might expect payment, the appellant replied by letter dated 21 February 2005 as follows:

> "Dear Mr. Flowers:
>
> Intelco Receivership – Outstanding Invoices
>
> We acknowledge receipt of your Invoices and correspondence culminating with your most recent of February 17, 2005.
>
> We recognize that acting in your capacity as Receiver you would have devoted time and incurred expenses in pursuit of your functions. We confirm that we are of course willing to pay your reasonable charges in connection with these functions.

> As you know, we appointed you as Receiver without a specific agreed fee structure, but on terms of reasonableness. Having received your invoices, we noted that your proposed fee structure is not in line with what obtains in our local environment. Since we are not domiciled in Belize and have no knowledge of the normal fee scale applicable in your jurisdiction, we sought the advice of Attorneys in Belize, who confirmed that the normal approach to this issue in Belize is quite similar to what pertains in Trinidad. Based on this advice from our Attorneys in Belize, we consider that the fairest and most reasonable approach would be for your charges to be based on an hourly rate for the time spent in pursuit of your functions as Receiver. We do not agree with a retainer fee or a commission on the sale of the assets of the company. Accordingly, we confirm our willingness to pay your charges on the basis of an hourly rate of up to US$150 per hour.
>
> We wish to convey our appreciation for your services and look forward to a mutually agreed resolution of this matter."

[21] As it turned out, the bonds had in fact been sold and transferred by RBTTMB to BTL, which was one of the entities that had early in the receivership expressed an interest in purchasing the charged assets, on 31 December 2004. The consideration for the sale of the bonds was US$26,266,049.38 and the purchase by BTL was fully financed by funds borrowed by BTL from RBTTMB (attracting a 2% commitment fee of US$525,320.99).

[22] After an exchange of correspondence between attorneys-at-law representing the respondent and the appellant, in which both parties maintained the positions already foreshadowed, the stage was thus set for litigation, which commenced when the respondent filed action on 2 February 2006.

The pleadings

[23] By his amended statement of claim, the respondent claimed to recover US$931,036.25, being the total of his interim and final invoices, with interest. The respondent specifically pleaded clause 7.04 of the Debenture and averred that

the appellant had "accepted and agreed to pay" his remuneration on the basis set out in his letter of 5 January 2005 (see para. [16] above). The respondent further averred that in or about December 2004 he had identified four prospective purchasers of the charged assets and that he "was in negotiations with the said prospective purchasers for the sale of the said assets to one of the said interested purchasers", when the appellant, "contrary to the [respondent's] instrument of appointment, sold the charged assets of Intelco which were in the receivership to [BTL]", one of the four prospective purchasers previously mentioned.

[24] The appellant by its amended defence denied that there was an agreement to pay fees in the terms alleged by the respondent, and asserted that no assets had been realised or recovered in the course of the receivership, neither had there been any receipts. Further, the respondent had played no role in the sale and transfer of the bonds to BTL and the Intelco debt in fact remained unsatisfied. The appellant repeated its willingness to pay reasonable charges at a reasonable hourly rate for the work done by the respondent during the receivership, on the basis of the time actually spent by the respondent.

The trial

[25] Awich J heard evidence from the respondent, a single witness called on his behalf (Mr. Kimano Barrow) and Mr. Stephen Bayne, the Managing Director of the appellant. Both the respondent and Mr. Bayne were subjected to searching cross examination, by Mr. Hamel-Smith SC for the appellant and Mr. Courtenay SC for the respondent. Both parties referred to and relied on clause 7.04 of the Debenture (see para. [9] above) and the judge also had the benefit of the copious documentation put before him, by agreement, by the parties.

[26] Among the items of evidence before the judge was material produced by the respondent to establish the standard or usual practice of his firm with regard

to remuneration in previous receiverships in which he had acted as receiver. In the matter of Bellitur Limited (claim no. 160 of 2003), the order of the court (dated 25 October 2005) appointing the respondent as Receiver/Manager provided as follows:

> "The costs of the Receiver/Manager, including his remuneration, the costs of obtaining his appointment, of completing his security, of passing his accounts and of obtaining his discharge shall not exceed ten per cent of the amount due under the said Judgment or the amount recovered by the Receiver/Manager, whichever is the less, provided the Court shall otherwise order. Such costs shall be taxed unless assessed by the Court and shall be primarily payable out of the sums received by the Receiver/Manager, but if there shall be no sums received or the amount shall be insufficient, then upon the certificate of the Court being given stating the amount of the deficiency, such certificate to be given after passing the final account, the amount of the deficiency so certified shall be paid by the respondent to the Applicant."

[27] In the matter of Cuello Distillery Limited (action no.66 of 1994), the order of the court (dated 26 July 2001) appointing the respondent (and another) as Joint Receivers and Managers provided as follows:

> "AND that the costs of the Joint Receivers and Managers including their remuneration, the costs of obtaining their appointment, of completing their securities, of passing their accounts and of obtaining their discharge shall not exceed ten per cent of the amount due under the judgment or the amount received by the Joint Receivers and Manager [sic] which ever may be lesser sum. The costs allowed including the costs of this order and of carrying the same into effect and of obtaining the discharge of the Joint

> Receivers and Managers shall be ascertained by the Registrar, if not agreed, shall be primarily payable out of the sums received by the Joint Receivers and Managers, but if there shall be no sums received or the amount shall be insufficient, then upon the certificate of the Registrar being given stating the amount of the deficiency, such certificate to be given after the passing of the final accounts, the amount of the deficiency so certified shall be paid by the Respondents to the Applicant."

[28] Further documentation produced by the respondent on the Cuello receivership suggested, on the basis of a Remuneration Statement prepared by him, that for the period 1 May 2002 to 31 August 2004 he had billed for a total of 1730.3 hours at an hourly rate of $350.00 per hour (the respondent also billed an additional $35.00 per hour for his staff members involved in the receivership). In that receivership, the respondent had been responsible for all aspects of the company's operations and his total fee was $632,605.00.

[29] The respondent also produced a copy of a letter written by him, from as early as 24 November 1998, in connection with another receivership in which he had indicated that his fees would be based on a billing rate of US$100.00 per hour for the receiver and US$50.00 per hour for staff members, in addition to which he would expect to be paid "a commission of 10.5% on the value of any sale, disposal, settlement, or action that effectively concludes the receivership". However, it was not clear whether the proposed fee basis was accepted or in fact implemented.

Awich J's judgment

[30] The judge did not form a good impression of the appellant's case, observing that "Right at the commencement of the trial, during cross-examination of Mr. Flowers, it became apparent that most of the contentions of the defendant were

inconsistent with one another." He was also clearly of the view that, while the respondent had fared well in the witness box, notwithstanding "detailed and long cross-examination…for 3 days", the appellant's single witness, Mr. Stephen Bayne, had not and had ended up "eventually admitting most of the facts put to him" in cross examination. The judge's comment on this was that "It was apparent that Mr. Flowers gave much more detailed instructions to his attorneys, than RBTT Trust Limited gave to its attorneys."

[31] After a careful and accurate discussion of the duties and responsibilities of receivers, Awich J concluded that the respondent had established "that he carried out his duties diligently and with due professional skill, as far as was possible, given that the [appellant] was either uncooperative, unwilling or negligent in responding to requests for information, title documents, instructions and money for costs incidental."

[32] The judge noted that the respondent had not been involved by the appellant in the sale of the bonds, "although he was the one who informed [the appellant] about the interest of [BTL] to buy the assets of Intelco". The judge also noted that the appellant had not discussed the intended termination of his appointment as Receiver with the respondent, and stated that he had "no hesitation in concluding that the [appellant] either deliberately participated in, or aided the sale of the bonds without the knowledge of [the respondent] so as to deny him his remuneration. After all, [the appellant] was the holder of the legal title to the bonds." This behaviour, he observed, "would be an embarrassing dishonesty for an ordinary person".

[33] The judge concluded that the appellant had breached the agreement by which the respondent was appointed receiver, thereby entitling the respondent to damages. The measure of damages was the appropriate remuneration in the circumstances of the case and costs properly incurred in the receivership and the basis of arriving at such remuneration was to found in clause 7.04 of the

Debenture. The judge accepted the respondent's evidence of his charges in previous receiverships as establishing that it was the practice of his firm to charge on a percentage basis and considered that the respondent "was entitled, according to paragraph 7.04 of the deed of debenture, to charge by percentage of receipt of income whether by sale, assignment or howsoever obtained in this receivership". This was subject, however, to the requirement in clause 7.04 that the receiver's remuneration be "appropriate to the work and responsibilities involved". In arriving at this figure, Awich J considered the quantum meruit approach urged by the appellant to be "totally inappropriate" and concluded that a rate of charge of 3% (rather than the 3.5% claimed) of US $26,266.049.38 (the sale price of the bonds to BTL) was fair and reasonable in the circumstances, yielding a total of US$787,981.48.

[34] The judge accordingly entered judgment for the respondent in the terms set out at para. [3] above, but not without a parting comment:

> "Much was said about the fact that sale of the bonds was not sale of the assets, so there were no proceeds of sale on which to charge a percentage as remuneration. I do not see the merit in that argument. The bonds were sold so that the secured debt about which a receiver was appointed could be paid to the secured creditor, the beneficiary of the bonds. As the result of the sale, the debt owed to the beneficiary of the bonds was fully paid and the beneficiary ceased to have a charge on the assets of Intelco; and the receivership ended. Intelco was relieved of its debt. The sale of the bonds was a stratagem aimed at denying remuneration to Mr. Flowers".

The appeal

[35] The appellant filed 12 grounds of appeal, the effect of which I am happily able to state by adopting the summary very helpfully provided by Mr. Hamel-Smith SC and Mr. Zuniga SC in their skeleton arguments:

> "(i) The Respondent's entitlement to remuneration is governed by the terms of clause 7.04 of the deed of Debenture which specifies that the Appellant's remuneration must be appropriate to the work and responsibilities involved and upon the basis of charges from time to time adopted by the Respondent in accordance with the current practice of his Firm. However, the learned Judge erred in concluding that the basis of charging from time to time adopted by the Respondent in accordance with the current practice of his Firm was to charge by percentage of receipt of income. More specifically, the undisputed evidence before the learned Judge (including the contemporaneous documentary evidence produced by the Respondent himself) demonstrated that there was no consistent practice of charging on the basis of a percentage of receipt of income, but that if there was any practice it was that the Respondent's fees were such as may be determined, in one way or the other, on the basis of reasonableness. Further, and in any event, the evidence shows no consistent practice as to the level of the percentage which would be charged by the Respondent's firm for receiverships. Accordingly, in the absence of any consistent practice being proved by the Respondent, there is every reason for the Court to determine the Respondent's fees on a quantum meruit basis as contended for by the Appellant.
>
> (ii) Alternatively, even if (contrary to the above submission) the learned Judge was correct to conclude that the basis of charging

from time to time adopted by the Respondent in accordance with the current practice of his Firm was to charge by percentage of receipt of income, the learned Judge's decision to calculate the Respondent's remuneration as a percentage of the price at which the bonds (which were not any part of the Charged Assets of Intelco over which he was appointed Receiver) were sold by the Merchant Bank to BTL was wholly misconceived and inappropriate;

(iii) In the further alternative, even if the learned Judge were right to approach the determination of the Respondent's remuneration on the basis of calculating it as a percentage of the price at which the Bonds were sold by the merchant Bank to BTL, the determination of the level of remuneration still required it to be appropriate to the work and responsibilities involved. However, the sum of US$787,981.48 awarded by the learned Judge to the Respondent for the services he provided as Receiver during the relevant period of 2.5 months was wholly disproportionate to the work and responsibilities involved."

[36] The submissions of both Mr. Hamel-Smith SC and Mr. Courtenay SC ranged, as had the cross-examination of both the appellant's witness and the respondent at the trial, far and wide. I intend absolutely no disrespect to the high quality forensic and persuasive skills deployed by both counsel at the trial and again in this court by not rehearsing their submissions in full detail in this judgment.

[37] Mr. Hamel-Smith told the court without equivocation that it was not his client's position that the respondent was not entitled to any remuneration and, when quite properly pressed on the point by Mr. Courtenay, he equally properly withdrew any suggestion to the contrary in the notice of appeal. However, Mr. Hamel-Smith contended that the respondent's entitlement to remuneration was

governed by clause 7.04 of the Debenture, on the basis of which that remuneration should be (i) arrived at upon the basis of charging from time to time adopted by his firm in accordance with the current practice of his firm, and (ii) appropriate to the work and responsibilities involved.

[38] Mr. Hamel-Smith was also concerned to demonstrate that Awich J had misunderstood the true import of the evidence before him, as a result of which he had come to the wrong conclusion about the "current practice" of the respondent's firm and the impact of the sale of the bonds on the receivership and Intelco's indebtedness. In the result, he submitted, the judge had arrived at a figure so wholly disproportionate to the work done and responsibilities undertaken by the respondent as to make his judgment perverse and, in effect, an error or law.

[39] Mr. Courtenay emphasised that the respondent's entitlement was a matter of contract, also drawing attention to clause 7.04 and, in particular, the respondent's letter to the appellant of 5 January 2005, to which the appellant had not responded. There was certainly no evidence of any agreement that the respondent should be remunerated at an hourly rate, a suggestion which was first made by the appellant after his appointment had been terminated; neither was it possible to imply a term to this effect.

[40] Mr. Courtenay invited the Court to uphold the judge's finding that the entire bonds sale transaction was "a stratagem devised to get access to the very assets which the Receiver had been engaged to sell." Although it was conceded that the judge may have misunderstood the "technical details" of the transaction, he had certainly understood what the case was about in substance and his finding that the appellant was in breach of contract should be upheld.

[41] At the end of the day, Mr. Courtenay accepted that clause 7.04 of the Debenture did admit of some notion of reasonableness, but submitted that the

judge had considered this and his use of 3% of the sale price of the bonds had not produced an outrageous or excessive result, as the appellant contended. He urged the Court in the final analysis not to go below 2%, which was the fee charged by RBTTMB to BTL for arranging the financing for the purchase of the bonds from the appellant, which Mr. Courtenay described as 10 days work.

[42] Finally, both counsel urged the court to award the respondent fair and reasonable compensation, taking into account the work actually done by him in the receivership, the magnitude of the assignment and the level of responsibility undertaken by him.

The nature of the bond transactions

[43] At the end of the hearing of the appeal, it was no longer in controversy that the judge had in important respects misunderstood the nature of the bond transactions and the evidence of the sale to BTL. The bonds were issued by Intelco in an effort to raise US$25,000,000.00 and they were secured on the terms and conditions contained in (among other security documents) the Trust Deed and the Debenture. The respondent himself confirmed in his evidence that they were therefore plainly liabilities, and not assets, of Intelco. The parties to the bonds were Intelco and the appellant as trustee for the bondholders and the bonds were freely transferable by instrument in writing signed by the transferor (Trust Deed, clauses 32.03 and 32.04). The appellant as trustee was entitled to receive all payments due to the bondholders from Intelco on the bonds (clause 2.01). The sale and assignment of the bonds to BTL by RBTTMB did not affect the responsibilities of the appellant as trustee, save that the identity of the bondholder had changed. The liability of Intelco under the Trust Deed was not affected by the sale of the bonds. The payment received by RBTTMB from BTL (the price for which the bonds were sold), had no effect on the secured debt of Intelco to the appellant; the company was not relieved of its debt, but remained liable to the appellant, which continued as trustee, save that the beneficiary was

now BTL and not RBTTMB. There was no sale of the charged assets of Intelco, neither were there any receipts on account of the company's debt during the period when the respondent acted as receiver.

[44] It follows from this very general outline of the nature and structure of the bonds that Awich J was clearly wrong in at least three of his conclusions. The first is that the sale price of the bonds provided the appropriate basis upon which the respondent's percentage fee, even assuming that that was the appropriate formula, could be calculated: the sale of the bonds did not amount to a realisation of any of the charged assets of Intelco, whether by way of sale, assignment or otherwise. The second is that the receivership ended upon the sale of the bonds to BTL and the third, related, point is that Intelco was fact relieved of its debts upon the sale of the bonds to BTL. In fact, there was no evidence that the receivership ended and it is clear that Intelco was not relieved of its debt, for the reason that all that had happened was that BTL had stepped into the appellant's shoes as bondholder.

What did the parties agree?

[45] Both parties are agreed that the respondent is entitled to fair and reasonable compensation for his work during the period 1 November 2004 to 14 January 2005. Stripped of unpleaded and unproved accretions, (most notably, that there was "a stratagem"), the only issues therefore remaining in the appeal are (i) whether Awich J's judgment achieves this desideratum, and (ii) if it does not, what should this court determine to be appropriate in the circumstances. But because, as Mr. Courtenay submitted, this is primarily a question of contract, it is important to ascertain whether there was an agreed basis between the parties upon which the respondent would be remunerated.

[46] In its letter confirming the respondent's appointment as receiver (1 November 2004), the appellant undertook to pay or reimburse "so much of the expenses properly incurred by you…and so much of your remuneration for so acting as you are unable to recover from the monies coming into your hands as Receiver." It is common ground that no monies came into the respondent's hands as receiver, with the result that the letter was, in effect, as the judge found, "an unconditional promise by the [appellant] to pay the remuneration of the receiver and costs properly incurred."

[47] However, it is equally clear that there was, as the appellant pointed out in its 21 February 2005 letter, no agreement as to either fees or fee structure at the time of the appointment. This is confirmed by the appellant's letter to the respondent dated 8 December 2004 asking the respondent to "advise as to your fees in the matter in order that we may be able to plan properly" and the respondent's reply on 16 December 2004 indicating that he would be amenable to a compensation arrangement that would be based on a percentage of receipts. Save to say that there was a 5% limit set by law, there was no percentage specified or proposed by the respondent, who emphasised that he wished to make it "very clear" that he was "open and flexible on this issue."

[48] The respondent's "customary fee structure" was therefore first unveiled in detail in his letter to the appellant dated 5 January 2005, indicating a "retainer fee" of US $50,000.00, an hourly rate of charge of US$400.00 and a commission of 3.5% of "receipts or the sale or disposal price of the charged assets or from the value of an assigned debt." The letter also indicated a "termination fee" of US $50,000.00 in the event of the respondent's appointment being terminated prior to a sale of the charged assets or assignment of the debt.

[49] I cannot accept Mr. Courtenay's submission that this letter, together with the previous correspondence, the respondent's subsequent letter of 17 January 2005 indicating that he would be sending his final invoice on the basis of his

earlier letter, or the appellant's conduct, establishes that there was an agreement between the parties entitling the respondent to be paid the amount awarded him by Awich J. Given the correspondence between the parties before the 5 January 2005 letter, I cannot regard it as anything more than a proposal from the respondent and there is absolutely nothing in the evidence to suggest that it was ever accepted or agreed to by the appellant. While it is a fact that the appellant did not respond in writing to this letter, despite reminders from the respondent, I do not regard that as especially significant, particularly in the light of the fact that by this time there was a new bondholder, with whom the appellant as trustee was now obliged to consult, and that the appellant was obliged to seek legal advice in Belize with regard to the respondent's bills, before responding to the 5 January 2005 letter.

[50] I would therefore conclude that there was no agreement between the parties that the respondent's remuneration would be based on the terms of his 5 January 2005 letter. However, in its 1 November 2004 letter to the respondent, the appellant had undertaken to pay or reimburse the respondent his expenses and so much of his remuneration as he was unable to recover from moneys coming into his hands as Receiver. The respondent having commenced and continued to work on this basis (and no moneys having come into his hands as Receiver), it is clear that there was an agreement between the parties that the respondent would be reimbursed his expenses and remunerated by the appellant. The appellant, as its 21 February 2005 letter to the respondent indicated, accepts this and, in the absence of an agreed fee basis, the only remaining question is upon what basis is the respondent's remuneration to be calculated and paid.

Clause 7.04 of the Debenture

[51] The learned editors of Chitty on Contracts (30th edn, volume 1, at para. 29-071) state that "in a contract for work to be done, if no scale of remuneration is fixed, the law imposes an obligation to pay a reasonable sum (quantum meruit)". Both sides accepted that clause 7.04 provided a guide to arriving at reasonable compensation for the respondent (indeed, Mr. Bayne agreed with a suggestion put to him in cross-examination by Mr. Courtenay that "every term in the debenture was incorporated in the [respondent's] instrument of appointment"). Clause 7.04 identified two relevant considerations, being (i) the respondent's customary basis of charging and (ii) that the fee arrived at should be appropriate to the work and responsibilities involved.

[52] The respondent maintained throughout that the customary practice of his firm was to charge fees on a percentage of receipts from the sale or disposal price of charged assets. However, it appears to me that this contention was not made good on the evidence in any meaningful sense. In the first place, while the evidence of both the Bellitur and the Cuello receiverships does reveal that a percentage basis was mentioned in the court orders appointing the receiver, that was not the sole determining factor of the receiver's remuneration. In both cases the stated percentage established the upper limit (a "cap", as Mr. Hamel-Smith submitted) for the receiver's fees, which included both his expenses and compensation for professional services. Secondly, in both cases the receiver's actual compensation fell to be determined at the end of the day by the court or the Registrar, presumably on the basis of reasonableness. Further, the respondent himself confirmed in his evidence that the actual percentage figure used might vary from case to case, depending on the client. In other words, it was negotiable.

[53] But in any event, it seems to me, the entire percentage basis discussion becomes quite pointless once it is accepted, as I think it must be, that there was in fact no sale or assignment of the charged assets, with the result that there is no base figure to which to apply whichever percentage thought to be appropriate. There was indeed some confirmation from the respondent himself that his customary fee structure might also provide for cases in which there was no realistic prospect of a sale of the assets, when, in cross-examination, he allowed that the possibility that a commission might not be achieved was "a possible reason" for also making provision for an hourly charge in the fee structure. He was to make the same point even more explicitly in re-examination:

> "We very rarely charge on an hourly basis in our firm, it is when we have an assignment such as the Cuellos assignment where it's ongoing where it is not anticipated that the assets will be realize [sic] in a sale we are forced to charge on an hourly basis …"

[54] Which brings me to the second consideration in clause 7.04, that is, a fee appropriate to the work and responsibilities involved in the assignment. In other words, what is a fair and reasonable fee in all the circumstances?

[55] In its letter to the respondent dated 21 February 2005, the appellant had suggested that "the fairest and most reasonable approach would be for your charges to be based on an hourly rate for the time spent in pursuit of your functions as Receiver." The appellant then proposed an hourly rate of US$150.00 for this purpose and at the conclusion of the hearing of the appeal Mr. Hamel-Smith reiterated this position. Mr. Courtenay on the other hand, while maintaining his position that the figure arrived at by the judge did achieve fair and reasonable compensation (pointing out that the judge had himself reduced the 3.5% which the respondent had claimed to 3% in seeking that objective), nevertheless indicated that the "absolute minimum would be the 2% earned by the Merchant Bank for less than 10 days work." It was certainly not

open to the court, Mr. Courtenay submitted, to imply a term to the effect that remuneration is to be on an hourly basis.

[56] However, I do not think that either approach is entirely realistic or fair to the other side. To take the respondent's suggested approach first, the continued adherence to a formula which seeks to apply a percentage to the price at which RBTTMB sold the bonds to BTL is completely artificial in its continued assumption that that sale represents or equates to a sale of the charged assets of Intelco. It follows from this, in my view, that the conclusion of the trial judge, based as it is on the same demonstrably false hypothesis, is quite unsustainable.

[57] On the other hand, the appellant's approach may not be fair to the respondent in that, in the first place, the hourly rate proposed seems arbitrary and secondly, an exclusively time based approach fails to take into account factors such as the lost opportunity cost which the respondent would undoubtedly have sustained by committing himself (at, it appears, relatively short notice) to the Intelco receivership. The respondent's unchallenged evidence on this point was that, upon taking up the appointment as Receiver, he had cleared his desk and gotten rid of all pending matters, so that he could be in a position to devote his time, effort and attention "to the receivership matter at hand". This is hardly surprising, given the fact that on the evidence before the judge, the applicant was the sole owner of and only certified public accountant in his firm.

[58] Mr. Hamel-Smith submitted, and I agree, that some assistance might be derived from a comparison of the respondent's charges in the other receiverships which he brought to the court's attention. In the Cuello receivership, for instance, where the respondent as receiver/manager was responsible for all the operations of the company for a little over three years, he charged $27,000.00 for the period 26 July 2001 to 30 April 2002 and thereafter billed for 1730.3 hours, at $350.00 per hour, for a total of $632,605.00. He also billed an additional $35.00 per hour for staff members' time.

[59] In the instant case, I consider that the actual time spent on the assignment by the respondent is an appropriate starting point. In fixing the appropriate hourly rate, regard must also be had to the following further inputs (all of which were accepted by counsel on both sides as relevant factors in this exercise):

(a) The magnitude and complexity of the assignment.

(b) The responsibility associated with the assignment, together with any possible additional professional and reputational risk.

(c) The Receiver's experience and expertise.

[60] As to the actual rate itself, I am acutely conscious that this is where a level of arbitrariness may enter the equation. However, I do not see any basis in the evidence for accepting either the US$400.00 per hour put forward by the respondent in his final invoice, or the US$150.00 per hour proposed by the appellant, the one appearing to me to be on the high side, the other, conversely, to be on the low side. Taking as a base the Cuello receivership (in which the respondent's own statement of fees applied a rate of charge of $350.00 (or US$175.00) per hour covering the period 2002 – 2004, I propose a rate of US$250.00 per hour, to take into account the respondent's staff costs (which were separately billed for in the Cuello receivership), as well as such contingencies as might have arisen, given the probability that, had his appointment not been terminated, his involvement in the receivership may well have extended for some time into the future.

[61] The bills rendered by the respondent for November and December 2004 and 1 – 5 January 2005 showed a total of 45 hours. I would add to this an additional five hours to cover the period 5 to 14 January 2005, when the

respondent's appointment was formally terminated. The time based component of the respondent's fee would therefore be US$12,500.00 (US$250.00 x 50).

[62] The respondent's proposed fee structure set out in his 5 January 2005 letter also indicated a retainer fee of US$50,000.00 and a "termination fee" of the like amount. While I do not in principle regard it as inappropriate that the respondent should have sought to charge both categories of fee (primarily to compensate for the lost opportunity cost factor), I do not regard the quantum proposed by the respondent as reasonable in circumstances in which, as it turned out, the total duration of his appointment as Receiver was a mere two and a half months. I would in those circumstances suggest that it would be appropriate for the respondent to be paid 20% of his total proposed retainer and termination fees, that is, US $20,000.00.

[63] Taking all things together, therefore, a fair and reasonable fee to the respondent to cover his professional work during the period November 2004 to 14 January 2005 would in my view be US$32,500.00.

Conclusion

[64] It is obvious that Awich J's sense of the case was that the appellant had behaved badly. Indeed, the appellant's Managing Director, Mr. Bayne, accepted that the appellant had failed to keep the respondent fully apprised of all the events as they unfolded, particularly in the final stages of his receivership. However, as Mr Courtenay submitted, the case was really about what the parties the parties had agreed. In these circumstances, it seems to me that very little, if anything at all, turned on whether the appellant had treated the respondent with perfect courtesy, or on the credibility of the witnesses on either side, and it may well be that the learned trial judge allowed himself to be unduly influenced in his conclusions by these matters.

[65] In the result, I would allow the appeal and vary Awich J's judgment to the extent that, in place of the sum of US$787,981.48, there should be judgment for the respondent in the sum of US$32,500.00, with interest at the rate of 3% per annum from 3 February 2005 to 10 October 2008. The respondent is also to be paid the amount of $1,950.00, being costs incurred in the receivership. At the request of counsel, the question of costs is reserved pending further submissions from the parties, if necessary, to be submitted to the Registrar in writing within 10 days of the date of this judgment.

MORRISON JA