

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
2 **FINANCIAL SERVICES DIVISION**

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4 **FSD Nos. 240 & 242 OF 2010 (AJJ)**  
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7 **In the Matter of the Bankruptcy Law (Cap 7) (1997 Revision)**  
8

9 **AND In the Matter of Josephine Otu, a bankrupt**

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11 **AND In the Matter of Joseph Otu, a bankrupt**  
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14 **Applicants:** Bodden & Bodden, Attorneys-at-Law  
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19 **RULING ON REVIEW OF THE TAXATION DATED 15<sup>TH</sup> APRIL 2013**  
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23 1. GCR O.62, r.30 provides inter alia:  
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25 *(1) Any party who is dissatisfied with the amount of any costs certificate may apply to a*  
26 *Judge to review the taxing officer's decision.*

27 *(2) In the event that the taxation was conducted by a Judge in his capacity as an ex*  
28 *officio taxing officer, the review shall be conducted by a different Judge.*

29 .....  
30 *(6) A review under this rule shall be inquisitional in nature and the Judge may receive*  
31 *further evidence and may exercise all the powers which he might have exercised on*  
32 *an original taxation, including the power to award costs of the proceedings before*  
33 *him.*  
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35 2. This application relates to 2 bankruptcy matters in respect a husband and wife, Mr and Mrs  
36 Otu, which for practical purposes were treated as one matter and their estates as one  
37 bankruptcy estate. The Judge assigned to these matters, the Hon. Mr. Justice Jones, made an

1 order on 8<sup>th</sup> October 2012 directing that the costs of the Applicants, Bodden & Bodden,  
2 attorneys-at-law, in their capacity as attorneys for the Trustee in Bankruptcy (who pursuant  
3 to the relevant legislation is the Clerk of Court) should be taxed on the indemnity basis. The  
4 Applicants acted in relation to the sale of a residential property (“the Property”), which was a  
5 major asset of the bankruptcy estate, The Applicants’ costs in this context means their fees,  
6 charges, disbursements, expenses and remuneration in relation to the proceedings (see GCR  
7 O.62, r.3 (3)). The Applicants’ costs, having been incurred in acting as attorneys for the  
8 Trustee in Bankruptcy, were accordingly to be paid out of the bankruptcy estate.

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10 3. The taxation was conducted by the Hon Judge himself. No party other than the Applicants  
11 took part or was involved. The Hon. Judge’s Note Relating to the Taxation dated 15<sup>th</sup> April  
12 2013, which is on the court file and a copy of which is attached as a Schedule to this Ruling,  
13 indicates that he ordered the taxation of the Applicants’ costs because he considered the  
14 amount of the costs which they proposed to charge was excessive having regard to the nature  
15 of the work involved and the period over which it was carried out. He also considered the  
16 amount of costs to be charged to be out of proportion to the value of the Property.

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18 4. The Property was sold for CI\$201,155.00 net of real estate agents’ fees. The Applicants’  
19 total costs claimed amounted to CI\$98,297.90, almost half of the value of the Property. That  
20 sum included the Applicants’ fees relating to the actual conveyancing, which amounted to  
21 CI\$8,100.00 and which were specifically allowed by the Hon Judge in any event.  
22 Accordingly it was the balance of the Applicants’ costs of CI\$90,197.79 which was the  
23 subject of the taxation.

24  
25 5. By his taxation the Hon. Judge reduced the hourly rates claimed by the Applicants’ and also  
26 reduced the number of hours of time claimed by the Applicants to have been spent by them  
27 on the matter. The consequence of this was to allow the Applicants’ costs of US\$38,375.50  
28 out of the total of US\$90,197.79 claimed. Accordingly the balance of their costs taxed off,  
29 which the Applicants claim in their application for Review should have been allowed, is  
30 US\$70,280.34. That sum has been paid into court by the Applicants pending the outcome of  
31 this Review.





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2 6. GCR O.62, r.30 (7) provides:

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4 *In the event that the Judge considers that he cannot properly review the taxing officer's*  
5 *decision without hearing oral submissions, he shall fix a hearing date and any party to whom*  
6 *a copy of the objections [of the Applicants] delivered under paragraph (4) shall be entitled*  
7 *to be heard .....*

8  
9 As I have already said, no other party participated in the application for Review of the Hon  
10 Judge's taxation or applied to do so. However, I should mention that my secretary received  
11 an email letter dated 3<sup>rd</sup> June 2013 from, Mr Jorg Geissler of Toronto, Canada, one of the 2  
12 creditors who petitioned for the bankrupts' bankruptcy (the other being Mr Paul Geissler also  
13 of Toronto), stating that they had received from the Applicants copies of the Applicants'  
14 Application for Review of the taxation and of their Objections and Grounds in support of the  
15 application. Mr Geissler wrote that he wished "*to confirm our objection and opposition to*  
16 *any further funds being awarded to them [the Applicants]*" but no written answers to the  
17 Applicants' Objections and Grounds have been received. In the circumstances, while I have  
18 obviously taken note of the creditors' objection and opposition to the Applicants being  
19 awarded any further costs, having considered all the comprehensive written material before  
20 me relating to the application for review of the taxation I did not consider it necessary to  
21 have a hearing.

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23 7. The Hon. Judge's Note explains clearly the work which he undertook in carrying out the  
24 taxation and it is not necessary for me to repeat that. He was the judge assigned to the cases  
25 from the start and was involved throughout. He also reviewed the correspondence files. He  
26 accordingly had complete understanding of the matters and a detailed knowledge of the work  
27 necessary and of the work carried out by the Applicants. He considered that the reality of the  
28 proceedings was that they related to a small domestic bankruptcy, which to all intents and  
29 purposes involved nothing more than the sale of a modest residential property in West Bay  
30 for the very moderate price of slightly over CI\$200,000.00 after deduction of real estate  
31 agents' fees. In effect therefore the total costs which the Applicants claimed, including the  
32 approved conveyancing fees of CI\$8,100.00, amounted to almost half of the value of the

1 Property. In my opinion the Hon Judge's view that this was excessive in the circumstances  
2 was entirely justified.

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4 8. The Hon Judge did not state why he ordered that the Applicants' costs should be taxed on the  
5 indemnity basis but it was probably because the Applicants were acting as attorneys for the  
6 Trustee in Bankruptcy and a trustee would normally be entitled to an indemnity for his  
7 reasonable costs and expenses, including legal costs, out of the relevant trust estate. In any  
8 event, the Hon Judge in fact clearly took into account in his reasons for his taxation the fact  
9 that the Applicants' costs would indeed be paid out of the bankruptcy estate, which was  
10 obviously a small one and he specifically stated that he considered that the costs claimed by  
11 the Applicants were out of proportion to the value of the Property.

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13 9. In their Grounds for Objection to the Hon Judge's taxation the Applicants contend that in a  
14 taxation on the indemnity basis proportionality is not relevant and they make reference to the  
15 comments in *Petrotrade Inc v Texaco Ltd* [2001] 4 All ER 853. The taxation having been  
16 inquisitorial in nature (see GCR O.62, r. 29 (1)) this submission was not made to the Hon.  
17 Judge nor was that case brought to his attention and it is unfortunate that he therefore did  
18 have the opportunity to consider it when the Applicants seek to rely on this now in  
19 challenging the taxation.

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21 10. However, that case related a party and party taxation and was not concerned with and did not  
22 consider the situation where the costs concerned are payable out of a fund. It is trite law that  
23 a trustee in bankruptcy, like any other trustee, and by extension the trustee's agents, owes  
24 duties to the trust estate and its beneficiaries. In my opinion one of those duties must be to  
25 incur only reasonable expenses and not to charge unreasonable or excessive fees to the trust  
26 estate. It seems to me that the proportionality of the fees to the size and value of the estate  
27 could well be a factor in appropriate circumstances in determining the reasonableness of the  
28 fees concerned. In the present case the view of the Hon. Judge that the Applicants' costs were  
29 excessive and unreasonable apparently based in part on his view that they were  
30 disproportionate to the value of the Property does not seem to me unjustified or  
31 inappropriate. It is a view which I consider he was entitled to take into account in the  
32 exercise of his discretion in taxing those costs.



1 11. The Applicants also complain about the Hon Judge's reduction of their claimed hourly rates.  
2 They submit that bankruptcy proceedings are Financial Services Division ("FSD") matters  
3 and that the prescribed FSD hourly rates should accordingly apply. They claimed US\$625  
4 per hour for each of their two qualified lawyers who worked on the matter and US\$320 for  
5 each of their two paralegals who also worked on the matter. However, Practice Direction  
6 No. 1/2012, which is the relevant regulation, expressly states that in each case the rates  
7 provided are maximum rates. It also provides that "*the taxing officer may, in the exercise of*  
8 *his discretion, determine that rates lower than the maximum rates are appropriate in any*  
9 *particular case*". In the present case the Hon Judge clearly did consider that in the  
10 circumstances the hourly rates charged were indeed unreasonable and excessive and in the  
11 exercise of his discretion determined that in this particular case rates lower than the  
12 maximum were appropriate. He allowed the senior of the two lawyers concerned an hourly  
13 rate of US\$365 and the more junior lawyer a rate of US\$335. According to the Hon Judge's  
14 Note, there was no evidence before him of the qualification and experience of the two  
15 paralegals involved which, in my view, meant that strictly speaking he would have been  
16 entitled to ignore them entirely. In fact he allowed an hourly rate of US\$175 for each of  
17 them.

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19 12. The Hon Judge's Note also makes it clear that he considered, in light of his detailed  
20 knowledge and experience of the matter and of what legal work was involved, that there was  
21 no need for two lawyers and two paralegals to be engaged in working on it. As he pointed  
22 out, and as I have already mentioned, the matter was very simple and straightforward. One  
23 junior lawyer and one paralegal should have been well able to deal with it. There was a Court  
24 application for possession of the Property but that was not a difficult or complicated  
25 application and it required no great experience or expertise. It could easily have been dealt  
26 with by the more junior lawyer by himself, perhaps with the assistance of one paralegal. The  
27 Hon Judge was clearly of the view that the number of hours claimed to have been spent by  
28 the two lawyers and the two paralegals was unjustified and thus unreasonable in the  
29 particular circumstances. He was well placed to assess that and in his discretion he  
30 accordingly reduced the time claimed. In my opinion there is no basis for criticizing, still  
31 less setting aside, the Hon Judge's exercise of his discretion in these respects.



1 13. The Applicants' referred in their Objections and Grounds for Review to the report of an  
2 application to a single Judge of the Hong Kong Court of Final Appeal for leave to appeal  
3 against a taxation: *David John Kennedy v Kelly Cheng* [2012] HKCFA 64. That case  
4 concerned a liquidator's costs. Although it is a decision of a single Judge and is obviously  
5 not binding on this Court, in fact it nonetheless makes it clear that taxation of costs on an  
6 indemnity basis does not amount to "*giving a blank cheque to the receiving party to recover*  
7 *all his costs without proper scrutiny by the Court. This would defeat the very object of*  
8 *having a taxation*" (see paragraph 21). The Applicants referred in particular to paragraph 34  
9 of the Decision but even that makes it clear that in a taxation on the indemnity basis hourly  
10 rates charged may be considered unreasonable (and so reduced) if they are clearly excessive.  
11 In the present case, as I have already explained, the Hon Judge obviously did consider, in  
12 light of his familiarity with the case and the work necessary, that the hourly rates claimed and  
13 the time spent were indeed excessive and thus unreasonable. There is nothing in acting on  
14 that view which is incompatible with taxation on the indemnity basis.

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16 14. I should also mention the Applicants' argument based on an engagement letter between the  
17 Trustee in Bankruptcy and the Applicants dated 12 December 2011, which provided for  
18 hourly rates in the range of those claimed by the Applicants which, they contend, was  
19 contractually binding and which the Hon Judge was not entitled to disregard. Of course the  
20 engagement letter related to hourly rates and did not relate to time to be spent or to the  
21 number of the Applicants' employees to be involved in the work on the matter. In his Note  
22 the Hon. Judge states: "*I reviewed Bodden & Bodden's engagement letter dated 12*  
23 *December 2011. Notwithstanding that it was agreed by the Trustee, I considered that the*  
24 *hourly rates specified in paragraph 5.3 to be (sic) grossly excessive having regard to the*  
25 *nature of the work*". He then goes on to describe the nature of the work, which I have already  
26 summarized above, and sets out his conclusions on the appropriate rates to be charged for the  
27 matter.

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29 15. I am not aware, and have not sought to ascertain, why the Clerk of Court as Trustee in  
30 Bankruptcy purported to agree hourly rates with the Applicants, which the Hon. Judge  
31 considered to be clearly excessive and unreasonable, without apparently having any regard to



1 the nature of the work to be involved. As I have already pointed out, as the Trustee in  
2 Bankruptcy she owed a duty to ensure that costs charged to the bankruptcy estate were  
3 reasonable and not excessive. It does not seem to me appropriate that the Applicants, as  
4 attorneys to the Trustee in Bankruptcy should be entitled to take personal advantage of that  
5 apparent breach of duty. I am of the view that in the circumstances here the Hon. Judge was  
6 entitled, indeed bound, to consider the reasonableness of the hourly rates which Applicants'  
7 claimed in taxing their costs as he did.

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9 16. In the circumstances of this matter I can see no good reason to interfere with the Hon Judge's  
10 exercise of his discretion in his taxation of the Applicants' costs and I decline to do so. I  
11 therefore refuse the application for review of the taxation dated 15<sup>th</sup> April 2013. I direct that  
12 the sum of US\$70,280.34 paid into Court on 3<sup>rd</sup> May 2013 should now be paid into the  
13 bankruptcy estate for the benefit thereof and not for the benefit of the Applicants. I make no  
14 order in relation to the Applicants' costs of and incidental to their application for review of  
15 the taxation.

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17 **Dated 7<sup>th</sup> June 2013**

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**The Hon. Mr. Justice Angus Foster**  
**JUDGE OF THE GRAND COURT**



## Schedule to Ruling on Review of the Taxation dated 15 April 2013

**In the Matter of the Bankruptcy Law (Cap 7) (1997 Revision)**

**AND In the Matter of Joseph Otu, a bankrupt**  
**AND In the Matter of Josephine Otu, a bankrupt**

**FSD #240/2010**  
**FSD #242/2010**



### Judge's Note Relating to Taxation

By an Order made on 8<sup>th</sup> October 2012, I directed that the costs of Bodden & Bodden in their capacity as the attorneys for the Trustee in Bankruptcy relating to the sale of the Alhambra Apartment (as defined) be taxed on the indemnity basis. Bodden & Bodden claimed CI\$90,197.79, excluding their fees relating to the actual conveyancing which I allowed in the sum of CI\$8,100.00. I order taxation because I considered that the amount charged to be (a) excessive having regard to the nature of the work involved and the period over which it was done and (b) out of proportion to the value of the property, which was sold for CI\$201,155 net of the real estate agent's fees.

For the purposes of this taxation, I undertook the following work:

1. I reviewed Bodden & Bodden's engagement letter dated 12 December 2011. Notwithstanding that it was agreed by the Trustee, I considered that the hourly rates specified in paragraph 5.3 to be grossly excessive having regard to the nature of the work. This was a simple domestic matter involving nothing more than the sale of a residential property pursuant to the terms of a court order. Although this matter is technically a financial services proceeding, in reality it is a small domestic bankruptcy matter involving husband who is a self employed "jobbing builder" and his wife who earns \$200 per week doing domestic work for her sister. I considered that the rates charged should be commensurate with the scale of prescribed for work done after 1<sup>st</sup> June 2011 in the Civil Division (Practice Direction #1/2011)
2. Having confirmed the post-qualification experience of all those engaged, I concluded that the following rates would be appropriate for this matter :-

David Dinner (DRD) – 8-9yrs PQE (max rate US\$375) - allow \$365 (CI\$300)  
Stephen Symons (SS) - 5+ yrs PQE (max rate US\$375) – allow \$335 (CI\$275)  
Rebecca Stoner (RS) - paralegal, no qualifications (max US\$190) – allow \$175 (CI\$143)  
Ryan Charles (RC) - ditto allow \$175 (CI\$143)

Whatever academic or other qualifications or experience is possessed by the paralegals has not been disclosed in response to my enquiry. My review of their work suggests that they must have some relevant practical experience.



## Schedule to Ruling on Review of the Taxation dated 15 April 2013

- I then reviewed the correspondence files and did various exercises to compare the hours worked with the work product. I also considered the nature of the work relative to the qualifications/experience of the person doing it. Four individuals were engaged on the matter. It would have been more efficient to have engaged one lawyer and one paralegal.
- I concluded that the hourly rates claimed, namely DRD US\$695, SS \$595 and RS/RC \$395 were unreasonable in amount and should be reduced to a level within the scale of rates reflected in Practice Direction #1/2011. I also concluded that the number of hours worked by SS and DRD in May, June and July (Inv #103177 and #103279) was unreasonable. The amounts allowed are calculated as follows :-

Partner (DRD) -	19.4 hrs @ US\$365 (CI\$300) =	US\$ 7,081.00 (CI\$ 5,806)
Associate (SS) -	80.2 hrs @ US\$335 (CI\$275) =	US\$26,867.00 (CI\$21,097)
Paralegal (RC & RS) -	25.3 hrs @ US\$175 (CI\$143) =	US\$ 4,427.50 (CI\$ 3,630)
<u>Total</u>		<u>US\$38,375.50 (CI\$31,467.91)</u>

- The following disbursements are allowed:-
  - Process servers - US\$304.88 (CI\$250) x 4 = US\$1220 (CI\$1,000)
  - Court fees US\$24.39 (CI\$20)
  - Notorisation US\$97.56 (CI\$80)      Total - US\$1342 (CI\$1,100)
- The invoices also reflect what appears to be a 3% uplift in respect "Copying/binder and telephone fax charges". In my view this charge is unreasonable because there is no provision for such charges in the Practice Direction; it cannot be said to be a genuine disbursement because it does not relate to actual expenditure; and the amount claimed of approximately \$3,000 is unreasonable and unrealistic in the circumstances of this case.
- In conclusion, I allow the sum of CI\$31,467.91 in respect of legal fees plus disbursements of CI\$1,100. Total CI\$32,567.91.

15<sup>th</sup> April 2013

AJJ

