

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 03459 – 2014

Between

PARVATEE ANMOLSINGH MAHABIR

Claimant

And

THE PRESBYTERIAN CHURCH OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Llewelyn Thompson for the Claimant

Mr Ken Sagar and Mr Yaseen Ahmed for the Defendant

Date: 6 February 2019

RULING ON COSTS

1. This claim was for adverse possession of a parcel of land. The claim was dismissed. Subsequently the matter was appealed by the claimant. That appeal has been struck out. The court had previously decided, in accordance with authorities submitted, that the issue of costs would be dealt with after the appeal was determined. The defendant has accordingly applied for a decision to be made on costs. Both parties had filed submissions on costs in July and November 2016. It has not been asserted by the claimant that the defendant should not be entitled to some costs. Nothing has been advanced to show why costs should not follow the event. The issue is how much.

2. A costs budget was set. This budget was applied for by the claimant. The defendant did not oppose the application. After due consideration it was set at the sum of \$200,000.00.

3. Part 67.8 of the **Civil Proceedings Rules, 1998** requires certain requirements to be met before a costs budget can be set. It is one of the means by which costs may be worked out. The establishment of a costs budget is one of the mechanisms for the parties to determine this issue of costs. It is consistent with the overriding objective to deal with cases justly.

4. Rules 67.8 and 68.9 of the CPR states as follows:

67.8 (1) A party may, however, apply to the court to set a costs budget for the proceedings.

(2) An application for such a costs budget must be made at or before the first case management conference.

(3) The application may be made by either or both parties but an order setting a costs budget may not be made by consent.

(4) An application for a costs budget must be accompanied by—

- (a) a written consent from the client in accordance with rule 67.9;
- (b) a statement of the amount that the party seeking the order wishes to be set as the costs budget; and
- (c) a statement showing how such budget has been calculated and setting out in particular—
 - (i) the hourly rate charged by the attorney-at-law (or other basis of charging);
 - (ii) a breakdown of the costs incurred to date;
 - (iii) the fees for advocacy, advising or settling any document that are anticipated to be paid to any attorney-at-law other than the attorney-at-law on record;
 - (iv) the disbursements other than expert witness fees that are included in the budget;
 - (v) the anticipated amount of any expert fees and whether or not such fees are included in the budget;
 - (vi) a statement of the number of hours of preparation time (including attendances upon the party, any witnesses and on any other parties to the proceedings) that the attorney-at-law for the party making the application has already spent and

anticipates will be required to bring the proceedings to trial;
and

- (vii) what procedural steps or applications are or are not included in the budget.

(5) A party may apply to vary the terms of an order made under this rule at any time prior to the commencement of the trial but no order may be made increasing the amount of the budgeted costs unless the court is satisfied that there has been a change of circumstances which became known after the order was made.

67.9 (1) The court may not make an order for budgeted costs unless—

- (d) the lay party seeking the order is present, unless for some exceptional reasons this is impracticable, when the application is made;
- (e) the court satisfies itself that each party fully understands the consequences of the order that is being sought as to—
 - (i) the lay party's liability for costs to his own attorney-at-law whether he obtains an order for costs against any other party or not;
 - (ii) his liability to pay costs in the budgeted sum to the other party if that party obtains an order for costs against him; and
 - (iii) what his liability might be under paragraphs (i) and (ii) if rule 67.5 applied;
- (f) there has been filed a document recording the express consent of the lay party to the application and to any order made as a consequence of the application; and
- (g) (D) such consent is in a separate document which—
 - (i) is signed by the lay party;

- (ii) deals only with the question of budgeted costs;
- (iii) states the attorney's-at-law estimate of what the prescribed costs appropriate to the proceedings would be;
- (iv) gives an estimate of the total costs of the proceedings as between attorney-at-law and client; and
- (v) sets out the basis of that estimate including the amount of any hourly charge.

(2) The written consent of the client must not be disclosed to the other party.

(3) This rule also applies to any other lay party who consents to or does not oppose an order for a costs budget.

5. These rules provide for several things. The client's consent must be obtained to file a budgeted costs application. The client should be present in court when the order is to be made unless it is impracticable. The client must file a separate document agreeing to it. The court must ensure **each party** understands the consequences of the order in different respects. These are in relation to the lay party's liability for costs to his attorney, and very importantly for present purposes, each party's liability to pay the costs of the other party if required to pay costs.

6. From an early stage the parties are made to know what would be the maximum sum they may recover if they are successful. Given that the parties must be treated equally, it also tells the parties the maximum exposure they will have if they are unsuccessful.

7. A costs budget is for the case, not for one side. The court engages in a process before the budget is set. An order setting a costs budget may not be made by consent. Either or both parties may apply.

8. The costs budget cannot be only for the party who applies in the event he or she is successful in the claim. It exposes that party to pay costs if he or she is unsuccessful. There would no need for such stringency in the requirements if it was not intended that the client would be liable for the other party's costs if the client lost.

9. In the 1995 Report prepared by Mr Dick Greenslade before the CPR came into operation, where he examined the system under the Rules of the Supreme Court, he noted:

“Each party would have to prepare a budget for the costs of the case. These budgets would have to be presented to the court at the case management conference and a decision would be made there as to the appropriate budget for the case, the successful party would not be able to recover costs in excess of the budget unless he was able to show unforeseen- and unforeseeable- problems.”

10. That having been said, the court can order that a lesser sum be paid in costs if there is a sufficiently good reason to do so. The court's discretion to order a lesser amount cannot be fettered completely by the order for the costs budget. At the end of the day costs must be fair and reasonable. There are all kinds of variables that could apply. The costs budget is set at the first case

management conference which is early on in the trial process. The case could be resolved earlier than expected. Witnesses previously thought necessary may not be called. Issues may be narrowed by the time the trial comes around. The case could be shown to be less complex than previously thought after disclosure and the evidence is filed. The court may have considered that an expert would be required and it turns out such a witness was not.

11. However, the costs budget having been set, if a party is seeking to have a lesser sum being paid, that party must justify it. The court in exercising its judgment on costs must consider if there are true circumstances justifying a lower amount. The purpose of setting a costs budget is to provide for circumstances where prescribed costs may be inadequate having regard to the nature of the case. It also is there to provide some certainty about the maximum exposure each party may have if they have to pay costs. Having engaged the specific process for setting a costs budget and the careful consideration required to set the budget, it would not be appropriate to simply discard the budget. Litigation always carries some risk and one of the risks of asking and obtaining an order for a budget is that you may be held to it. It goes both ways. If a party runs a case and there is no budget set or no value stipulated and it is not for a prescribed sum, the general rule is that the claim is deemed to be a claim for \$50,000.00 for which \$14,000.00 in prescribed costs is payable. That in itself does not mean that this rule cannot be departed from where the circumstances are justified. Public law litigation often attracts an order for costs to be assessed. None of this takes away from the fact of the setting a costs budget, which it is within the power of the court to refuse to set.

12. In this claim I considered that the evidence lasted in all two full court days; written submissions were filed; there were no oral submissions; the legal issues were not particularly complex. This was a fact driven case. However, the court and the attorneys did have to cross-examine several witnesses. I have also considered that both sides were represented by very senior lawyers at the Bar although not Senior Counsel. The respective cases were robustly advanced. There were injunction proceedings but undertakings dealt with the issues raised there. In some respects the claim was not as involved as may have been anticipated at the time the costs budget was established. It was a fairly standard adverse possession cases with 8 witnesses called and a moderate number of documents to consider. The land in question was considered valuable to both sides. Some additional legal issues were raised by the claimant which merited submissions being made by the defendant and consideration in the court's judgment. With the benefit of hindsight it is apparent that certain items in the costs budget were overestimated and the budget was set at a higher sum when the actual proceedings as they unfolded are considered.

13. Costs must also be proportionate to the claim. Under the overriding objective the court must consider several factors to enable the court to deal with the case justly.

14. Having considered all of the factors set out above, and undertaking a balancing exercise between the right of the defendant to its costs and the right of the claimant to pay costs which overall are fair and reasonable and having at the forefront how the case ran, I am of the view that 75 % of the budgeted costs should be paid and that this sum adequately covers the costs payable by the

losing party. The order therefore is that the claimant must pay to the defendant the sum of \$150,000.00 in costs.

Ronnie Boodoosingh

Judge