REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2010-2915

BETWEEN

CHANAN MAHABIR
ANDERSON MAHABIR

Claimants

AND

SANDRA MAHABIR

Defendant

Before The Hon. Madam Justice C. Gobin
Appearances:

Ms. S. Khan instructed by Ms. N. Jagnarine for the claimants
Mr. G. Armorer for the Defendant

REASONS

1. At the trial of this action which was fixed for 1:00pm on the 21st April, 2011, I was greeted with three applications filed by the defendant. One was a striking out hearsay application which I indicated had come too late and which I would not allow to delay or take up trial time. I assured counsel that the court was well aware of the hearsay rules and even without a formal determination, would keep the rule in mind in relation to the witness statements. I was determined to proceed with the trial as scheduled.

2. The other two applications were the ones in respect of which the no costs orders are now appealed. The relevant history of the matter is now set out.

(i) The first application was one to amend an order which was entered ex-parte on the 28th July 2010. The order prepared by the court office did not reflect counsel's undertaking although the draft which had been submitted by the claimants originally did contain one. This was an obvious omission by the court which unfortunately was never brought to my attention until just before the date of the trial. The matter had been called on the 2nd November 2010 and the defendant was represented by other counsel on that occasion. The omission of the undertaking on the office copy was not raised then.

(ii) The ex parte order of 28th July 2010 was overtaken by a consent order entered on the 20th November 2010 which contained voluntary undertaking by the defendant through counsel not to erect any other barrier until the determination of the action. By this time the original barrier had been removed. The parties agreed directions for an urgent hearing of the trial and the matter was adjourned to 25th March 2011 for a pretrial review.

(iii) On the 25th March 2011 Mr. Armorer was granted leave to appear amicus for the defendant. He did not then raise the point of the omission of the undertaking. The matter was adjourned to the 8th April 2011 for the parties to speak to try to resolve it.

(iv) On the 8th April 2011 about two weeks before the date fixed for trial Ms. Mohan held for Mr. Armorer, again amicus. Both counsel for the parties admitted as had been done on the previous occasion, that the removal of the barrier had removed the need for a trial and further costs. Both openly accepted that the outstanding costs order made by consent on the 2nd November 2010 for the aborted exparte trial and the injunction application remained an issue. I indicated to Ms. Mohan that the defendant should not be going into a trial and incurring further costs in the hope that she would be able to cancel the earlier costs order. Again no point was taken on the omission of the undertaking in the original ex parte order.

(v) On the 13th March 2011 a few days before the trial Mr. Armorer finally went on record for the defendant. Sometime shortly thereafter my Judicial Support Officer (JSO) received a letter seeking a rectification of the order. Because the letter came so late in the day I asked my JSO to tell Mr. Armorer he could raise the issue at the trial in the presence of the other side. My JSO was instructed simply to tell him I would deal with the contents of the letter at the trial. He was not told he needed to file a formal application. Further, counsel is wrong when he says in his affidavit that I refused the application. Quite frankly I did not pay much mind to the contents of the letter because I felt that the defendant had been allowed sufficient time to raise all pre-trial matters. Her decision to properly retain counsel only days before the trial could not allow her to impose further on my judicial time. Anything such as a minor omission on the part of the court office could wait.

(vi) On the 21st April 2011 at the trial when it became clear that all that was being sought was the insertion of the undertaking I immediately granted the application. There would have been no need to file a formal application had this matter been brought to the attention of the Court on any of the previous hearings to correct this obvious omission even when Mr. Armorer and Ms. Mohan had appeared amicus. The fact that the defendant waited until mere days before the trial to make proper arrangements for representation and to raise this obvious omission influenced my decision to refuse costs. The claimants were in no way responsible for the error in any case.

(vii) As to the claimant's application of the 8th April 2011 for the stay of the defence and counterclaim until the defendant's payment of the costs, this came to my attention on the 8th April 2011 at the pretrial hearing. At that stage it was clearly indicated that had it not been for the issue of that earlier costs order there would be no need for a trial. I indicated to Counsel as I had before that the cost of the defendant's travel to Trinidad from the USA where she resides, would probably exceed the amount of the order for costs and urged a settlement in this family dispute to avoid further costs. The claimant and the first defendant are a brother and sister. The second claimant is the defendant's nephew.

(viii) I confirmed the trial date for the 21st April 2011, at that time Mr. Armorer had not come on record formally. I indicated to Ms. Mohan I would grant leave to file a response to the application of 8th April 2011 if necessary on or before the 15th April 2011 but that in any case I intended to proceed with the trial. I understood that to be leave to file an affidavit if necessary. I thought it was obvious from this direction that I was not going to seriously consider the application because the matter was proceeding to trial on both claim and counterclaim. After the 15th April, the date fixed for the filing of the reply, Mr. Armorer saw fit not only to respond to the affidavit in support of the application, but to file three days before the trial, outline written submission together with authorities. These had not been ordered by the court and in any case they were out of time. It seemed that counsel chose, out of time, to incur further and unnecessary costs on behalf of his client, while insisting on having the other side pay them.

(ix) When the trial was about to proceed and Mr. Armorer raised the two outstanding applications I immediately corrected the order of 28th July 2010 and I said that as I had clearly indicated I was proceeding with the trial. Insofar as the claimant's application for the stay was concerned, the payment of costs on the 2nd November 2010 had not imposed any term for payment of costs as a condition to the defendant proceeding with her counterclaim. I therefore dismissed it and made no order as to costs.

(x) The claimant had filed an application on the 8th April 2011 that I found to have no merit. The defendant filed two, the hearsay one was too late in the day, although I did not allow it to take up my time, and although the claimant would have had to consider it, I made no order as to costs. On the unnecessary application to amend the order and the one seeking to dismiss the claimants' application I similarly ordered no costs.

3. Having regard to the history of the matter I have come reluctantly to the firm conclusion that the defendant's unnecessary and late applications were filed for the purpose of negotiating

the outstanding costs order. Under Part 1.3 of the CPR, the parties and that includes attorneys are required to help the court to further the overriding objective. In this case it appears that this duty may have been breached in two respects with these particular applications, saving expense and taking more than an appropriate share of the court's resources.

Dated this 17th day of May, 2011

CAROL GOBIN

JUDGE