REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV 2016-2020**

IN THE MATTER OF THE TRUSTS OF THE PENSION FUND PLAN OF TRINIDAD AND TOBAGO METHANOL COMPANY LIMITED ESTABLISHED BY THE TRUST DEED AND PENSION RULES DATED 3RD OCTOBER, 1998

BETWEEN

CHRISTOPHER FELIX

Claimant

AND

REPUBLIC BANK LIMITED

First Defendant

AND

METHANOL HOLDINGS (TRINIDAD) LIMITED

Second Defendant

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Before the Hon. Madam Justice C. Gobin

Appearances:
Dr. Claude Denbow S.C., Mr. Jerome Rajkumar
instructed by Mrs. Donna Denbow for the Claimant
Mrs. D. Peake S.C., Mr. Ravi Heffes Doon
instructed by Alana Bissessar for the First Defendant
Mr. Christopher Hamel-Smith S.C., Mr. J. Walker
instructed by Ms. D. Thompson for the Second Defendant

REASONS

Background

1. The Claimant, a retired janitor filed these proceedings on 13th June 2016 for the determination of several questions relating to the administration of the trusts of a pension plan under which he is a beneficiary by virtue of his former employment with Methanol Holdings Trinidad Ltd. Republic Bank Limited are the trustees of the Plan.

2. The Claimant simultaneously filed two further applications. He sought an order that he be appointed the representative of the members of the plan and he sought a pre-emptive or prospective costs order (PCO). At the first hearing of these applications on 9th November 2016 the representative order was entered by consent.

3. The PCO was eventually heard on 27th June 2018, on which date I had before me the original application for the PCO and the claimant's affidavit as well as his written submission in support. These had been filed on 22nd July 2016. I heard oral submissions from all parties and Mrs. Peake provided a speaking note. At the close of the hearing I granted leave to the claimant to file written submissions in reply and these were filed on 30th July 2018. The claimant took the liberty of filing a further affidavit to respond to certain statements which had been made by Mrs. Peake in her address.

4. For the purposes of this ruling I have not considered the contents of that affidavit. It was filed late in the day, without leave, and it attempted to detail information relevant to prelitigation exchanges and conduct to support its claim for pre-action costs. Such evidence was available since before the filing of the claim and the PCO and if the Claimant intended to rely on it, those matters ought to have been deposed to at a much earlier stage.

Jurisdiction to make PCO

5. The jurisdiction to make a PCO is not in dispute. It has been applied for and granted in several cases including in pension fund cases in this jurisdiction. The power to make the order is to be found in S. 9 (1) of the Supreme Court of Judicature Act Ch. 4:01 by which our High Court

was vested with the jurisdiction to makes costs as provided for by S. 50 (1) of the UK Supreme Court of Judicature (Consolidation) Act, 1925.

6. **S 50 (1) provides: -**

> **(1) Subject to the provisions of this Act and to rules of court and to the express provisions of any other Act, the costs of and incidental to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent the costs are to be paid.**

Pre-action costs recoverable?

7. It has been argued that "the costs incidental to all proceedings" allows for the recovery of pre-action costs in appropriate circumstances. I have noted that the jurisdiction is "subject to the rules of court." The relevant rule is to be found in CPR Part 66 (3) which provides: -

> **66.(3) – The Court's powers to make orders about costs include power to make orders requiring a person to pay the costs of another person arising out of or related to all or any part of any proceedings.**

8. While this hints at a power to make an order for pre-action costs, I do not believe it is one which courts should exercise, save in exceptional circumstances which justify the grant of an order. It would be inconsistent with the philosophy of the CPR if claims for pre-action costs were to be encouraged and lightly entertained since this could well undermine the overriding objectives of the CPR of saving expense, dealing with cases in ways which are proportionate to the amount of money involved etc. Indeed if these were to be lightly allowed the prescribed costs regime for example would be weakened. Such an approach could well result in pre-action costs exceeding the prescribed costs recoverable under the rules.

9. I think it is important to remind ourselves of the objectives of the changes regarding costs under the CPR. In the preface to the Rules, **Sharma CJ,** as he then was, said: -

> **The introduction of a new costs regime has been necessary to address the underlying problem of high litigation costs encountered under the old system. A key component of the overriding philosophy upon which the new rules were established demands that there be a set of clear formulae for the allocation and quantification of costs so that the outcome of costs orders could be predicted with greater confidence and precision than before. The rules governing costs are to be found in CPR Parts 66 and 67. A Costs Practice Direction and a Costs Practice Guide would be issued to guide Attorneys and litigants in the application of the new costs rules.**
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> **On the question of the allocation of costs, the primacy of the "costs follow the event" principle has been considerably eroded and is now considered to be a mere starting point from which the court may depart for justifiable reasons. It is no longer the case that "the winner" or "the successful party" on the case as a whole would be entitled to recover all his litigation costs from "the loser" or "the unsuccessful party". The court must now have regards to, among other things, the conduct of the parties and the extent to which each party has succeeded in his claim or defence – the issue-based approach. The court may, in the exercise of its discretion, order a successful party to pay all or part of the costs of an unsuccessful party; [CPR Part 66.6].**
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> **Quantification of costs has also undergone considerable transformation in the attempt to make costs more certain. The arcane and incomprehensible art of taxation of costs has been abolished and costs are now determined in one (or more) of four bases: fixed costs, prescribed costs; budgeted costs or assessed costs. Under the old system costs were invariably calculated at the end of the matter by the process of taxation before the Registrar. Under the CPR costs considerations are inextricably linked to case management and therefore inform the progress of the case.**

10. More specifically CPR 1.2 mandates that the Court in interpreting any rule, must seek to give effect to the overriding objective. In the light of the foregoing, I would think CPR 66.3 (above), which may arguably support a claim for the recovery of pre-action costs, should be applied stringently and only when there is sufficient evidence to support a claim for necessary pre-action costs. In this case, Mr. Felix's affidavit in support contained a bare statement at paragraph 7 that "in or around March 2014, he approached his attorneys with a view to securing representation for the purpose of pursuing an action with respect to the surplus which had accumulated in respect of the pension plan." This, in my view, falls short of the evidence that would invoke the court's jurisdiction. Clearly, compliance with pre-action protocols which is required by the rules, cannot be enough.

Should the PCO be granted?

11. On the issue of whether I should grant the PCO in this case at all, I have heard the arguments of the Claimant and the Trustee as to the applicability of the principles laid out in **McDonald v. Horn** *[1995] 1 All ER 961;* **R (on the Application of Corner House Research) v. S.o.S. for Trade & Industry** *[2005] 4 All ER 1* **("Corner House"); R. v. Lord Chancellor ex p Child Poverty Action Group,** *[1998] 2 All ER 755***,** There is one feature of these proceeding which distinguishes this case from all of the authorities cited by the parties and it is this.

12. This matter was first listed for hearing on 9th November 2016. Dr. Denbow pressed to have his PCO determined. Mrs. Peake for the Trustee indicated without that there was a common intention to settle, that the formula that the parties had in mind was one which involved the costs of all parties being paid out of the fund and that it was unnecessary to embark upon an

application for a PCO. Counsel indicated that it did not appear to be significant difference between the company and the members of the plan.

13. While it has to be said there was no express undertaking by the Trustee that there would be a consent in the particular terms of the draft order which had been attached to the application, I understood that I could rely on Counsel's representation that the issue of who would pay the claimant's costs was not going to be contentious. I understood they were going to be paid along with the other parties' costs out of the fund but that because the settlement was going to be worked out and entered into by consent it was not anticipated that there would be further or significant steps in pursuance of the litigation. In these circumstances, there could be no justification for a PCO which necessarily contemplated a series of further directions and procedural steps or full blown litigation. The matter was adjourned to a date in January 2017. I indicated if there was no resolution by that date we would have dealt with the Claimant's application for the PCO then.

14. As it turned out the matter was further adjourned to allow for settlement discussions and then from time to time for hearing on particular issues as they arose. It is fair to say that throughout the course of it Dr. Denbow continued to ask for his application to be dealt with. My understanding was that so long as settlement was on the cards, the formula for the payment of costs signalled by Mrs. Peake on the first day was not in contention. Attempts to arrive at a settlement have continued until as recently as May 2018 and even now I maintain my optimism and that of Senior Counsel, Mr. Hamel Smith's that this matter may yet be resolved. At no time over an almost two year period whether at a hearing or in email correspondence to the court did I have any indication of a change in position of the Trustee on the issue of costs.

15. Two years have now elapsed since the first hearing. Over that time there has been a major shift in course of the Claimant's case, as well as a notice of termination of the Trust by the Trustees. As recently as in February 2018, the parties agreed to attempt to settle the costs issue. More recently in May 2018 and significantly, the parties asked for time to finalize the terms of a consent order. Minor skirmishes in the litigation notwithstanding, this matter proceeded until very recently on the basis that it would be settled. I do believe that there have been genuine efforts on the parts of all concerned to achieve consensus. In those circumstances, while the Claimant consistently pressed for his PCO to be determined, I preferred in managing the case, to aim for a settlement which would include the agreement on costs which had been indicated.

16. The representation that the claimant's costs would be paid out of the fund was not conditional upon or limited by settlement within any identifiable time frame. In the course of the proceedings and well into the course of the management of the case, the Trustee sought to introduce the requirement for approvals of other regulatory institutions as a condition to the conclusion of settlement discussion. I accept that the Central Bank and the Board of Inland Revenue have a role to play and that regard may have to be had to their view on any settlement order agreed by the parties. Indeed in an effort to obtain the preliminary views of these institutions I invited submissions from them and both very generously provided Counsel's opinion and assisted by having Counsel appear before me. Directions for this course were made with the consent of the parties, all in an effort to aid the settlement process. The mere fact that approvals or input may be required from CBTT and BIR cannot in the historical context of these proceedings, justify retrospective withdrawal of the position on costs.

17. For the Trustee it was also argued that the fact that almost two years have elapsed since we were first here and that the Claimant has managed to retain his representation with no PCO in place. I have accepted the responsibility for the deferral of the hearing of the PCO application. I encouraged the continued participation of the parties in the several further discussions and procedural steps to achieve the settlement. It is only fair and consistent with the overriding objective that the Trustee must be held to the representation that the Claimants' costs would be paid out of the fund.

Form of PCO

18. I am not however prepared to grant an order in the terms which have been sought by the Claimant. The form of Prospective Costs Order which was attached by the Claimant was adopted from a UK practice Note [2001] 3 ALL ER is not applicable in this jurisdiction. A more conservative and cautious approach of our local courts is to be discerned from the judgment of **Hamel Smith JA in CA 166/00 – Eugene Lopez v. TSTT; Royal Bank Trust Company.** The judge of appeal sitting in chambers, was concerned to retain a measure of control over the expenditure in circumstances even where he was persuaded that a PCO was justifiable. He expressed reluctance in making the type of order sought in circumstances where the Court was effectively deprived of some measure of control over the quantum and nature of the expenditure incurred by the applicant. The learned judge went on to refuse to make an indemnity order in the event the appellant did not succeed on the appeal, noting that pre-emptive costs applications are novel in this jurisdiction.

19. In my view they remain fairly novel and I agree that we should proceed with caution as we create precedent. Trust fund litigation may be regarded as specialized and complex in many instances. In some they may not be so. The court's responsibility to control legal costs is

increased in these circumstances. The form of order submitted by the claimant does not allow for the degree of control which I believe is necessary for the proper discharge of my responsibility. A drain on trust funds for legal costs by parties ultimately impacts negatively on the beneficiaries.

20. I appreciate the time and effort that all parties have applied in assisting, in not just settlement discussions but on other legal issues which have arisen in the course of the matter. So long as it is not disproportionate and bearing in mind the conciliatory approach to the matter to date, fair and reasonable compensation is due.

Order

21. I consider the following order appropriate : -

(1) The Trustee is to pay the Claimant's reasonable costs of these proceedings to date to be agreed within 7 days of the date hereof, out of the Trust fund.

(2) If there is no agreement on quantum, the Claimant is to submit a statement of costs to this Court within 14 days.

(3) The Court will assess the costs in Chambers without a hearing.

(4) The Court will direct the payment of the costs allowed within 7 days of the assessment, out of the Trust Fund.

(5) There shall be liberty to apply;

(6) The Trustee is to pay 50% of the costs of this application to be assessed in default of agreement.

Dated this 19th day of September 2018

CAROL GOBIN
Judge