REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2010-01518

BETWEEN

SHAMIE BUDHU

PRAKASH HARRILAL

PREM SINGH

NALEFA RAMJIT

Claimants

AND

NATIONAL AGRICULTURAL MARKETING

AND DEVELOPMENT CORPORATION

Defendant

<u>Before the Honorable Mr. Justice V. Kokaram</u>

Appearances:

Mr. R.L. Maharaj S.C. and Mr. P. Persad Maharaj for the Claimants
Ms. Peake S.C. instructed by Mr. R. Thomas for the Defendant

JUDGMENT

Introduction

1. The parties in this case settled their dispute as a consequence of which the Claimants sought and obtained the Court's permission to withdraw their claim. However the parties were not in agreement on the issue of costs and left this issue to be determined by the Court. After hearing arguments on the question of costs, even though the Court was not privy to the terms of the settlement, I delivered an oral judgment awarding costs in favour of the Defendant and proceeded to quantify those costs in the sum of $2, 000.00 on the prescribed scale. My reasons for doing so are set out hereunder.

2. I must comment at the outset that a settlement of legal disputes of parties without resort to a trial is encouraged by the Court. Alternative Dispute Resolution (ADR) is a manifestation of the overriding objective of the CPR. It is the centre piece of the CPR in articulating the promise of an expedited and just resolution of a legal dispute in the new civil litigation landscape. Dealing with a case justly will as far as possible ensure parties are on an equal footing and that matters are dealt with proportionately, expeditiously and allocated an appropriate share of the Court's resources. The use of ADR effectively achieves these objectives. Lord Wolf observed in his "Access to Justice" report:

> "It is a characteristic of our civil justice system that the vast majority of cases are settled without trial, by negotiation between the parties or their legal advisers. There are many more potential claimants who settle their disputes without starting legal proceedings at all. It is my intention to build on this. My approach to civil justice is that disputes should, wherever possible, be resolved without litigation. Where litigation is unavoidable, it should be conducted with a view to encouraging settlement at the earliest appropriate stage."

3. The Civil Proceedings Rules (CPR) was introduced to deal with the twin evils of delay and the high costs of civil litigation that prevailed under the former Rules of the Supreme Court. Settlements achieved through alternative dispute mechanisms such as party to party negotiations or mediation ultimately achieves a just resolution of a legal dispute which incurs less cost and time than a trial.

4. A quick survey of the rules demonstrates the importance of using ADR mechanisms to effect a just resolution of disputes. In Rule 1.3 CPR, parties are "required to help the Court to further the overriding objective". Rule 25.1 CPR provides that the Court must further the overriding objective "by actively managing cases which may include encouraging the parties to use the most appropriate form of dispute resolution including in particular mediation if the court considers that appropriate and facilitating their use of such procedures." In Rule 25.1 (e) CPR the Court's management of a case may also include "actively encouraging and assisting parties to settle the whole or part of their case on terms that are fair to each party." Even before commencing litigation, parties are required to comply with pre action protocols to "enable the parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings."

The proceedings:

5. The Claimant's claim was a simple dispute. They are large wholesalers in the NAMDEVCO Farm Market at Macoya, off the Churchill Roosevelt Highway operated by the Defendant under the purview of the National Agricultural Marketing and Development Corporation Act ("the Act"). They have operated their business by selling wholesale market items from certain designated areas in the market bay area since 2000. The appropriate fees and rentals payable for the occupation of the areas of the stall were fully paid up by the Claimants to the Defendant. They alleged in their claim that they were given short notice to relocation from the bay areas which they have been occupying continuously over the years to another area so as to accommodate renovation works in the market

being conducted by the Defendant. They alleged that the alternative spaces were inadequate and negatively impacted on their ability to trade and earn a livelihood. As a consequence they filed their claim seeking damages for trespass and breach of contract, several declarations as to their rights under the Act and an injunction restraining the Defendant from inter alia removing or altering the Claimants' designed bay areas.

6. On 23rd April, 2010 this Court granted an ex parte injunction, restraining the Defendant from continuing the said works. Recognizing that the order was made ex parte and that the Defendant may have a reasonable explanation for their action, a very short time frame was scheduled for the return date of the hearing for the injunction. The return date was scheduled for 29th April, 2010 to ensure that the Defendant would be properly served and a representative fully seized of the facts could attend the next hearing. The Court expressed its view to the Claimants' attorney at law, that having examined the contents of the Claimants' affidavits that this was a matter that could be easily resolved by the parties rather than having recourse to protracted litigation.

7. On the next day of hearing not only was a representative of the Defendant in attendance but it had retained Senior Counsel and filed affidavits in opposition to the Claimant's application for an injunction. Such level of preparedness and efficiency is certainly commended and is evidence of the new culture in the conduct of civil litigation. However, at the Court's initiative it was suggested to both parties rather than embark upon a hearing of the Claimant's application to continue the injunction and the Defendant's application to discharge same, that this matter can be resolved be convening a short meeting between the parties. The Court expressed the view that having seen the affidavits there must have been a miscommunication of the intention to commence construction on the Claimants which lay at the heart of the dispute between the parties. After a meeting of the parties and Senior Counsel, it was agreed that the injunction would be discharged by consent. This paved the way for further discussion between the parties in a short time frame. The parties agreed to return to the court to announce a

settlement, but if a settlement could not be achieved they would then proceed with the Claimants' application as an inter partes application for an injunction. Not only was this a fair and just result but it re-invested control in the hands of the parties to firmly take a grip over their dispute. Certainly there existed between the respective Claimants and the Defendant a continuing business relationship of trader and manager which made settlement talks a viable option.

8. On 7th May, 2010, not to the Court' surprise, it was announced that the matter was settled and that the Claimant sought and obtained the permission of the Court to withdraw its claim and its application for an injunction. The parties however were not in agreement on costs and asked the Court to determine that issue. The Defendant insisted on its costs. The Claimants submitted that having regard to the manner in which the matter proceeded that there should be no order as to costs. Having regard to my opening remarks on the Court's view of party to party settlement and the coincidence of objectives with the overriding objective, I confess I do not approach the issue of costs with any great degree of enthusiasm. Senior Counsel for the Defendant however submitted that a signal should be sent to parties who unreasonably use or abuse the Court's process. Equally in my view a signal should not be sent that discourages party to party resolution of disputes. Ultimately however the fundamental guide in resolving this issue must be to arrive at a result on the issue of costs that gives effect to the overriding objective.

The incidence of Costs

9. Normally when parties present the issue of costs to be determined by the Court after the parties have entered a consent order it is a relatively simple affair. The Court will examine the terms of the settlement and make a determination as to the incidence of costs based upon the issues that arise for determination applying the general principles set out in Part 66 CPR. However in cases where the terms of settlement are unknown, as it is in this one, the task is more difficult.

10. On the issue of the incidence of costs where parties have arrived at a settlement of a claim, Lord Justice Mummery in ***BCT Software Limited v C Brewer and Sons Limited [2003] EWCA Civ*** 939 observed:

> "There are however more complex cases (and this is such a case) in which it will be difficult for the judge to decide who is the winner and who is the loser without embarking on a course which comes close to conducting a trial of the action that the parties intend to avoid by their compromise. The truth often is that neither side has won or lost. It is also true that a considerable number of cases are settled by the parties in the belief that the terms of settlement represent a victory or a least a vindication of their position in the litigation or in the belief that they have not lost or at the very least in the belief that the other side has not won. In my judgment in all but straightforward compromises which as in general unlikely to involve him, a judge is entitled to say to the parties "If you have not reached an agreement on costs, you have not settled your dispute. The action must go on unless your compromise covers costs as well …"
>
> "The disposition of a judge to help parties in negotiations for a settlement is understood and applauded. Good intentions are not however risk fee. If acted upon too readily judicial intervention can make things far worse than they would have been if the judge had taken the unpopular stance of requiring the parties to confront the realities of the litigation situation. The judge has a discretion to decline to do what the parties ask him to do …"

11. Having already exercised my discretion to give the Claimants permission to withdraw this claim and their application for an injunction in circumstances where the full terms of an agreement, if any, arrived at by the parties are not before the court, this Court is thrown in the difficult position which Lord Mummery warned against. Ultimately what transpired before this court on the argument of costs was a mini trial and, a "de facto" hearing of the inter partes application for an injunction. I must however at the end of the day strive to do justice between the

parties who have found a way to settle their difference without further investment of time and money in the court's process.

12. The starting point in arriving at a just outcome on costs is a recognition that the overriding objective and the Court's initiative to have the parties arrive at a settlement forms the backcloth to the exercise of this discretion.

Part 66.6 (4) and 66.6 (5) CPR is in my view inapplicable as there is no loser or winner in this action although I strongly suspect that the parties themselves each view the result that they brokered as indicative of their respective victories. There are other rules which provide a useful guide for the exercise of the Court's discretion.

Withdrawal of claims

13. Part 66.6 (4) and 66.6 (5) CPR would be the applicable rules to govern the exercise of my discretion on the incidence of costs. I must however bear in mind the general rule of rule 38.6 CPR which states that:

> "Unless the Court orders otherwise a claimant who discontinues is liable for the costs which a defendant against whom he discontinues incurred on or before the day the notice of discountenance was serve don him."[1]

14. With regard to the quantification of costs under rule 38.7 CPR, where a Claimant withdraws a claim, it is quantified on the prescribed scale, unless an order is made for budgeted costs.

15. In a case where rules 38.6 CPR applies the onus is on the party discontinuing the action to demonstrate that this general rule would not apply. See ***Re Walker***[2]. The Court of appeal in that case had found that there was no change in circumstances since the filing of the claim and therefore there was noting to show that it was fair

[1] In this case the dicnsontinuance is not as a result of a notice being served but as a result of an order being made by the court with the consent of the parties

[2] [2005] EWCA 247

to depart form the general rule. In this present case however there is a change in circumstances since the issue of the claim. The parties held a meeting and had discussions, promises may have been made, but whatever the subject of these discussions, the result was that the parties were content to let the litigation die.

16. In ***Re Estate of Hean Wlyne***[3] the court made no order as to costs where there was no evidence to show that the Claimant had acted unreasonably or in bad faith in challenging a will. There was no order as to costs in ***R v Bassettlaw***[4] when a good claim was withdrawn after it became academic based on a concession made by a party. In ***Aegis Group v Inland Revenue***[5] the costs were reduced to reflect a defendant's failure to comply with pre action protocols. In ***Reid v The Capital Group***[6] the claimant was ordered to pay the defendant's costs as the action was premature and insufficient notice issued by the claimant. See generally ***para 38.61 Civil Procedure Vol. 1 2009***.

17. These cases are working examples of the Court awarding costs, on the withdrawal of the claim, based upon its assessment of all the circumstances that gave rise to the withdrawal and giving particular consideration to reasonableness of the conduct of parties, bad faith, compliance with pre action protocols and changed circumstances. These are the type of considerations set out in Part 66.6 (4) and (5) CPR.

<u>The party's submissions:</u>

18. The Defendant's submissions can be summarized briefly. The Defendant submitted that there was no serious issue to be tried. It argued that there simply is no entitlement to a bay area. There was no notice of this action or no real notice. They had succeeded on the all issues. One Claimant at least should not have been

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[3] April 12 2006 UK unreported
[4] April 2000
[5] [2005] EWHC 1468
[6] October 2005

here as his stall was not affected. There was no real compliance with pre action protocols.

19. The Claimant submitted that there was no "caving in" by the Claimants by withdrawing the claim. The position with regard to discharging the injunction was made "without prejudice." There are serious issues to be tried in particular the right to be consulted properly before adverse decision was made. It was a genuine ex parte application because of the dire consequences of the Defendant's action. The notification of the construction by the Defendant was a sham. The Claimants contended that I am also entitled to take into account this circumstance, which in my view is significant, that a settlement would not have been arrived at this stage had this Court not intervened.

Exercising the discretion on costs

20. I have taken into account following factors in the exercise of my discretion on the issue of costs:

(a) The settlement was arrived at through this Court's intervention. Had this court sat silently there may have been a full blown hearing to discharge the injunction and trial.

(b) The parties themselves co-operated with the Court in furthering the overriding objective and acceded to this Court's invitation to settle this matter.

(c) I am advised that the upshot of the settlement, without getting into details, was that the parties have been relocated. I act cautiously in placing any great weight on this resolution as it was unclear as to exactly what was agreed or promised. It is only relevant in so far as one of the claims sought was a declaration to the entitlement to the use of the specific stalls and therefore a right not to be relocated. The Claimant therefore conceded one of their claims.

(d) The issues raised on the application were not frivolous but arguable. The declaratory relief in paragraphs 2, 3 and 4, and the claim for relief seeks damage for breach of contract would be resolved by a construction of the powers of the Defendant in the management of the market and the nature of notice that is required to be given to the Claimants to carry out the work of the market. This is an arguable case and deserves investigation. I can say no more at this stage. However, I agree with the Defendant that the claim as of right to a specific stall and damages for trespass is weak and unarguable.

(e) A pre-action notice was issued but the time given was too short for there to have been any meaningful notice and discussion before commencing litigation.

(f) One of the claimants ought not to have brought this action at all and his joinder in this action was unnecessary.

21. I am however also entitled to take the view that had the Claimant not hastily approached the Court the matter could have been resolved in meetings with the Defendant. I take this approach because of the facts alleged by the Claimants that this made this matter urgent. The Claimants stated that there was a fear of confusion in the market when other vendors appeared on the scene. I do not regard that as a sufficient reason not to give proper notice to the Defendant of the application. The Claimants are businessmen who would have incurred a temporary inconvenience and dislocation as a result of the Defendant's works, such is the nature of construction works. There was nothing in the nature of the works that prevented the Claimants from holding meaningful discussions. The Claimants should have observed the ethos of the new culture in trying to work this out before coming to this Court.

22. In his foreword the final version of the "Pre Action Protocol for the Resolution Clinical Disputes" Lord Chancellor Lord Irvine of Laing stated:

> "The protocol aims to improve the pre-action communication between the parties by establishing a timetable for the exchange of information relevant to the dispute and by setting standards for the content of correspondence. Compliance with the protocol will enable parties to make an informed judgment of the merits of their case earlier than tends to happen today, because they will have earlier access to the information they need. This will provide every opportunity for improved communication between the parties, designed to lead to an increase in the number of pre-action settlements."

The pre-action protocols set out in our Practice Direction are not window dressing for the CPR but were devised to meaningfully contribute to the resolution of disputes. The effective and proper exchange of information and views are in the majority of cases a useful tool in resolving disputes before incurring the expense of litigation. The pre-action protocols are designed to achieve this. Compliance with these protocols must therefore be ingrained in the culture of civil litigation.

23. The practice direction on protocols provides:

> "1.4 The objectives of pre-action protocols are:
>
> (1) to encourage the exchange of early and full information about the prospective legal claim,
>
> (2) to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings,
>
> (3) to support the efficient management of proceedings under the CPR where litigation cannot be avoided.

6.1 Parties and their legal representatives are encouraged to enter into appropriate negotiations with a view to settling their dispute and avoiding litigation. The protocol does not specify when or how this might be done but parties should bear in mind that the courts increasingly take the view that litigation should be a last resort, and that parties should take all reasonable steps to resolve their dispute amicably before a claim is issued."

These protocols create a structure which will promote the early settlement of disputes. That structure, in my view, must be supported by effective judicial sanctions in the event of noncompliance. ***See P.D. 2.3, 2.4 and CPR r 66.6 (6)***.

24. Rule 66.5 (6) and the pre-action protocols gives the Court the power to award costs where insufficient steps were taken by parties comply with the protocols and arrive at early resolution of their deputes.

Conclusion:

25. I would therefore award costs for the defendant. However that is not the end of the matter. I take into account as well the consideration of part 67 CPR and as well the stage at which the matter was settled and the fact that costs are on a prescribed scale. I am entitled to award a percentage of the Defendant's costs as it too could have pre-empted this by seeking to negotiate without filing any further affidavits.

26. I award costs for the Defendant in the sum of $2, 000.00 which is roughly one third of the costs to which the Defendant would be entitled as prescribed costs at this stage before the first CMC. This includes the cost of the application, as the claim itself did not advance beyond the application and I would prefer to avoid any double recovery in costs.

27. The Claimants are therefore ordered to pay to the Defendant costs in the sum of $2, 000.00.

Dated this 14th day of May 2010.

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Vasheist Kokaram

Judge