REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2011-03655

BETWEEN

DENISHA MAYERS

Claimant

AND

ANDY DERRICK WILSON

First Defendant

AND

COLONIAL FIRE AND GENERAL INSURANCE COMPANY LIMITED

Second Defendant

BY ANCILLARY CLAIM

BETWEEN

ANDY DERRICK WILSON

Ancillary Claimant

AND

FARMERS SUPERMARKET LIMITED

First Ancillary Defendant

AND

DANEISHA MAYERS

Claimant/Second Ancillary Defendant

MARITIME GENERAL INSURANCE COMPANY LIMITED

Third Ancillary Defendant

Before the Honourable Mr. Justice V. Kokaram

Appearances:
Mr. Rennie K. Gosine for the Claimant
Mr. Darin Bissoondatt for the First Defendant/Ancillary Claimant and Second Defendant
Mr. Roger Kawalsingh for the first and third Ancillary Defendants

JUDGMENT

1. Before this Court is the question of costs arising from the Claimant's withdrawal of her claim for damages against the Defendants for personal injuries and loss arising from a motor vehicle collision. Case management directions were given by this Court with a view to determining the issue of liability at a trial scheduled for 25th July 2012. At the Pre Trial Review, Counsel for the Claimant indicated that the Claimant "lost her taste" for the litigation and, without making admission of any fault on her part, did not wish to pursue the claim. The Court in those circumstances granted the Claimant permission to withdraw her claim.

2. Both parties agree that the Defendants are entitled to their prescribed costs of the claim. See rule 38.7 (1) CPR. The Defendants submitted however that the Court is entitled at this stage to value the claim to determine the Defendants' prescribed costs pursuant to rule 67.5 (2)(b)(ii) CPR. To that extent it was submitted that the Court must examine the claim for special damages specifically pleaded in the Statement of Case and make an assessment as best as it can of the claim for general damages from the pleadings and relevant documentary evidence. The Claimant adopted a position that has been a regular practice before the Courts, which is to conveniently treat the claim as valued at $50,000.00 pursuant to rule 67.5 (2)(b)(iii) for the reason that the claim was not for a specific sum and no previous application was made at a CMC to value the claim pursuant to rule 67.6 CPR.

3. The Defendant also submitted that Maritime General Insurance Company Limited ("Maritime"), the insurer of the motor vehicle driven by the Claimant, should bear the costs of the claim. Maritime is not a party to the claim but is the ancillary Defendant in an ancillary claim brought by the Defendants for, damages sustained by the first Defendant as a result of the negligent driving by the Claimant of the motor vehicle

owned by the first Ancillary Defendant and insured by Maritime. The ancillary claim was compromised with Maritime paying an agreed sum for damages and costs to the Defendant/Ancillary Claimant. The Defendants' proposition that Maritime should also bear the costs of the claim is rejected and I do not propose to deal extensively with that issue. Maritime is not a party to the claim. No award of costs will be made against it when it had no entitlement to participate in those proceedings and where its insured (the Ancillary Defendant) was not a defendant in the claim. See also Rule 66.6(1) CPR.

4. I turn to the main question of prescribed costs. I acknowledge that in determining a party's prescribed costs there has been a practice, though not generally observed, where claims for damages are treated as a claim for a value of $50,000.00 if no assessment of the value of the claim was made pursuant to rule 67.7 CPR. In my view such a practice is wrong and is a misapplication of rule 67.6 (2) (b) (iii) CPR. In my view where a Defendant is entitled to its costs in a claim for damages, in the absence of an agreement by the parties or an order made by the Court pursuant to 67.6 as to the value of the claim, the value of that claim is a sum as stipulated by the Court. The Court cannot however stipulate such a sum arbitrarily. It must act reasonably and give effect to the overriding objective. The Court must in my opinion, in the absence of practice directions or rules, do the best it can in determining that value from the available evidence or material before it.

5. The prescribed cost regime as provided for in rule 67.5 is as follows:

"67.5 (1) The general rule is that where rule 67.4 does not apply and a party is entitled to the costs of any proceedings those costs must be determined in accordance with Appendices B and C to this Part and paragraphs (2)-(4) of this rule.

(2) In determining such costs the "value" of the claim shall-

(a) In the case of a claimant, be the amount agreed or ordered to be paid;

(b) In the case of a ***defendant****-*

i. Be the amount claimed by the claimant in his claim form; or

ii. ***If the claim is for damages*** *and the claim form does not specify an amount that is claimed, be such sum as may be agreed between the party entitled to, and the client liable to, such costs or if not agreed****, a sum stipulated by the court as the value of the claim****; or*

iii. ***If the claim is not for a monetary sum****, be treated as a claim for $50,000. (emphasis mine)*

(3) The general rule is that the amount of costs to be paid is to be calculated in accordance with the percentage specified in column 2 of Appendix B against the appropriate value.

(4) The court may, however-

(a) Award a percentage only of such sum having taken into account the matters set out in rule 66.6(4), (5) and (6); or

(b) Order a party to pay costs-

i. *From or to a certain date; or*

ii. *Relating only to a certain distinct part of the proceedings, in which case it must specify the percentage of the fixed costs which is to be paid by the party liable to pay such cost and in so doing may take into account the table set out in Appendix C.*

Rule 67.6 provides:

(1) A party may apply to the court at a case management conference-

(a) To determine the value to be placed on a case which has no monetary value; or

(b) Where the likely value is known, to direct that the prescribed costs be calculated on the basis of some higher or lower value.

(2) The court may make an order under paragraph (1)(b) if it is satisfied that the costs as calculated in accordance with rule 67.5 are likely to be excessive or substantially inadequate taking into account the nature and circumstances of the particular case.

(3) Where an application is made for costs to be prescribed at a higher level rules 67.8(4)(a) and 67.9 apply."

6. From a reading of Rules 67.5 and 67.6 the narrow issues that arise to determine these Defendants' costs on the prescribed scale are as follows:
   (a) Whether the words "a sum stipulated by the Court as the value of the claim" in rule 67.5 (2) (b) (ii) refers to the value as determined on an application made pursuant to 67.6 CPR or a sum that is to be assessed by the Court on its own motion.
   (b) What principles should guide a Court in "stipulating" a value for a claim?

7. As a preliminary matter I wish to make the following observations about costs and the prescribed costs regime:

   - The costs regime of Part 66 and 67 CPR was designed to bring a measure of certainty and efficiency in determining a party's costs. Prescribed costs are determined as a percentage of the value of the claim and it has promoted a degree of predictability and expedition in the determination of a party's costs. The editors of the Caribbean Civil Court Practice 2011 observed:

     "The notion of prescribing by a pre determined formula the quantum of costs to be recovered by a litigant is a novel feature of the CPR in those jurisdictions that provide for the same. This approach to costs has the advantage of being transparent, certain and fair to all parties. The costs are easy to calculate and the litigant knows well beforehand what his costs liability is likely to be."

   - The concept of prescribed costs promotes certainty in that parties have a fair idea of what their respective liabilities on costs will be at the end of a trial. Parties may therefore make risk assessments about the future of the litigation as opposed to an earlier settlement of the claim;
   - Costs are value based. The costs are a portion of the value of the claim. The (increasing) scale of percentages in Appendix B is designed to be

proportionate to the costs incurred as the litigation advances in discrete stages from before a defence is filed to the conclusion of a trial or assessment of damages. The scale also promotes early settlement as the paying party reaps the rewards of a lower costs order where the claim is settled at earlier stages in the litigation.

- If the costs are not proportionate to the complexity of the matter or of the work that would be involved, the party has the choice of determining the value of the claim by an application at a CMC pursuant to rule 67.6 or make an application for budgeted costs. In **Donald v AG Grenada** Civil Appeal No 32 of 2003 it was pointed out that:

  'The Rules do not intend that once a claim is to be concluded after trial the prescribed costs regime should inflexibly be applied in order to determine the costs payable. A perusal of the Rules will indicate that opportunities are afforded parties to vary the consequences of a mechanical application of the prescribed costs. For example, CPR 65.5(4) and CPR 64.6(3) entitle the court to award a proportion only of the costs detailed in the Scale of Prescribed Costs. Further, CPR 65.6 provides for a party at a case management conference to apply to the court for an order that prescribed costs should be calculated on a higher or lower figure than the likely value of the claim. And of course it is always open for a party to apply to the court to set a costs budget.'

- Attorneys can better advise their clients on the proper allocation of resources to defending or prosecuting the claim with advanced knowledge of the recoverability of those costs.
- After the determination of the claim or assessment of damages the costs are awarded as a matter of course and there is no delay in the quantification of those costs. In complex value claims there may be a short delay for parties to agree amongst themselves the respective value and applicable percentages.
- The rules reserve unto the Court the discretion to award a proportion of those costs guided by the matters set out in rule 66.6. The award of prescribed

costs must further the overriding objective of dealing with cases justly ensuring that cases are dealt with economically. Byron CJ observed the relevance of the overriding objective in the award of prescribed costs in **Rochamel** LC2003 CA 7:

"The Overriding Objective and Costs

[9] These discretions are aimed at assisting the Court to further the overriding objective of dealing with cases justly. Dealing justly with cases includes ensuring that the parties are on an equal footing, that expense is saved, that cases are dealt with proportionately to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party, that the matter is dealt with expeditiously and fairly and that an appropriate share of the Court's resources is allotted to it while taking into account the need to allot resources to other cases. The parties are required to assist the Court to further this objective.

[10] This gives rise to a number of concepts some of which are relevant to the award of costs in this case. Claimants should be discouraged from bringing proceedings or making allegations which are spurious, in the sense that they are unsupported by evidence. A person should not be forced to waste expense to defend a claim that is not being prosecuted. Defendants should be encouraged to admit, at an early stage of the proceedings, allegations or claims which they cannot rebut. The Court should actively manage the case to give effect to the overriding objective. In this case the case management process effectively identified the only justiciable issue and in accordance with CPR 26.1(2)(e) directed a separate trial on that issue. That order gave effect to the objectives of saving expense, speeding up the process and proportionality. RCL was excluded from further participation in the litigation. The other parties did not have to litigate any unnecessary issue. The time was expedited and the cost of the litigation was necessarily reduced. The cost orders ought to

further that objective, by proper application of the rules that do exist. (end of pg 4)"

8. As the determination of the quantum of prescribed costs is value based; in the case of a Claimant the value of the claim is the amount agreed or ordered to be paid. For this reason, when a Claimant is successful in a claim for damages unless those damages are agreed between the parties, those damages must be assessed to determine the value of the claim and by extension the measure of prescribed costs payable.

9. In determining the Defendants' prescribed costs, the value of a claim for damages is either a sum agreed by the parties or a sum stipulated by the court. The applicable rule to determine the value of the claim is rule 66.6 (2) (b) (ii):

> "**if the claim is for damages and the claim form does not specify an amount (that is) claimed**, such sum as may be agreed between the party(parties) entitled to, and the client liable to, such costs (or) **if not agreed, a sum stipulated by the court as the value of the claim**;"

10. It is clear in this case that the Claimant's claim is a claim for damages and the claim form does not specify an amount claimed. The claim form simply states "damages for personal injuries and loss…" The claim therefore falls squarely within the literal meaning of sub rule (ii):

> "if the claim is for damages and the claim form does not specify an amount that is claimed…"

11. A literal construction of sub rule (iii) would mean that this claim cannot be treated as a $50,000.00 claim. Sub rule (iii) is restricted to claims where "no monetary sum" is claimed. In my view, under no circumstances can a claim for damages be characterized as anything but a claim for a monetary sum. Under the "old rules", RSC 1975, such a claim for damages was described as un-liquidated damages, that is an unascertained sum of money. It is straining the language of Sub rule (iii) to treat a claim for damages as a claim that is "not for a monetary sum".

12. It is true that the Court is obliged to give effect to the overriding objective in interpreting a rule, however, if the language of the rules admits of only one interpretation, it must be given that effect. See the judgment of Sir John Dyson in ***AG v Keiron Matthews*** at paragraphs 19 and 20, where he rationalised that the implied sanction regime was not prescribed by the rules by examining and giving effect to the clear meaning of the rules.

13. Therefore, in a claim such as this one, for unspecified damages, the clear meaning of the rules is to be given its full effect. The Defendants' costs, in the absence of an agreement between the parties on the value of the claim, is a sum to be stipulated by the Court. Logically, if the Claimant is entitled to costs, it means that he has proven his case on liability and damages. In the absence of an agreement on damages, where the Claimant is victorious on the claim for damages, the Court would have assessed or made an order quantifying the award of damages. There is therefore inevitably an order as to the value of the claim on which the prescribed costs can be calculated.

14. However, in this case of the victorious Defendant who is entitled to his prescribed costs when a claim for damages has failed there would have been no assessment of damages conducted by the Court. Unless the parties announced to the Court at an early stage in the proceedings that they have arrived at an agreement on damages without admission of liability, the Claimant's claim is simply dismissed and no order for damages can be made. The clear intention of the draftsman of this rule is therefore in those cases that the Court must stipulate a sum that is to be the value of the claim. In my view, rationalized in this way, the Court must for the purposes of stipulating that sum carry out a "de facto" assessment of damages.

15. Finally I deal with the Claimant's argument that the Defendants are not entitled to treat the Claim as more than a claim for $50,000.00 if it had not made an application for an assessment of the value of the claim pursuant to rule 67.6. I make the following observations about a rule 67.6 application:

(a) A rule 67.6 application is made in two distinct cases. First where the case has no monetary value, which is not the case here. Second where the "likely" value is known and the party wishes to have the prescribed costs calculated at a higher or lower value. This second category captures a claim in damages. Both scenarios do not apply to a claim for a specific or ascertained sum of money. A party in that type of claim may simply have to consider making an application for budgeted costs to avoid the consequences of a strict application of the prescribed costs regime.

(b) The rule 67.6 application may be made at a CMC. The language of the rule 67.6 (1) as to when the application is made is permissive. It is not mandatory and does not restrict the making of such an application after a CMC. Barrow JA made that observation in **Noel v First Caribbean International Bank (Barbados) Ltd**, Grenada Civil Appeal No. 29 of 2006. *'The sensible way of regarding the rule is to recognize that while it is only after judgment that it will be known whether costs are awarded and who must pay and who must receive costs there is no reason why the value of the claim should not be determined at an earlier stage, whether by agreement between the parties or by stipulation of the court'. Barrow, JA contrasted that situation with an application for a costs budget which CPR 65.8(2) stipulates must be made at or after the first case management conference. The judge rationalized the difference of approach thus: 'The costs budget rule is intended to prevent the abuse of a party waiting to see which way the wind is blowing, following disclosure and witness statements, and then applying for budgeted costs because it suits him then to keep costs within a budget'.* It presumes however that this determination of the value will take place before a trial. Arguably either party in this case could have made a rule 67.6 application before the trial.

(c) Importantly the only basis on which a party will make a rule 67.6 application "where the likely value is known" is if it seeks an order that the prescribed costs should be calculated on the basis of some higher or lower value. The party in that instance has an idea of what the value of the claim is and thinks

either that the prescribed costs on that value is too low or too high, taking into account the party's likely expenditure in litigation. In the instant claim for damages both parties had exchanged their respective advice on quantum and it is clear that they both knew the "likely value" of the claim. They were therefore satisfied, in my view, that an approach to the Court before the trial was unnecessary as that likely value in their mind is a satisfactory basis upon which to calculate the prescribed costs.

(d) Finally rule 67.5(2) (b) (ii), the applicable rule in this case, makes no reference to rule 67.6 to determine the value of the claim. In fact, the language of both rules is different with respect to determining the value. Sub rule (ii) refers to "a sum stipulated by the Court as the value of the claim" whereas rule 67.6 CPR refers to applications made to the Court to determine the value. Sub rule (ii) therefore contemplates the Court acting on its own motion even in the absence of an application. The Court must stipulate a sum which in its view represents the value of the claim.

Stipulating a value of the claim.

16. I begin with the observation that in stipulating a sum as the value of the claim there is no express rule that guides the Court in making this stipulation. The following guides comport in my view with the overriding objective:

    (a) The sum is an assessment by the Court of the value of the claim.

    (b) The Court should identify the real dispute between the parties and stipulate a sum that is the value of that claim.

    (c) That assessment is made on the evidence before the Court. The Court is also entitled to examine the pleadings, examine correspondence passing between attorneys, examine opinions on quantum filed or exchanged between the parties any material which in the Court's view would have informed the parties as to the value of the claim that the Defendant had to defend.

(d) The Court should not conduct a trial or an assessment of damages to determine this sum. To do so would unnecessarily increase the expense of the proceedings and cause further delay.

(e) If the Court stipulates a sum as the value, the Court should proceed to exercise its discretion in the quantification of the prescribed costs to ensure that the costs awarded is fair and reasonable. The Court is therefore entitled to award a percentage of the costs calculated in accordance with the percentages in Appendix B against the appropriate value or some lower percentage. In doing so the Court will take into account the factors set out in rule 66.6 (4), (5) and (6).

17. In this case the amount claimed as special damages on the statement of case is approximately $320,000.00. There is no pleading as to a range of awards in general damages applicable for the type of injuries allegedly sustained by the Claimant. The pre action protocol letter which is annexed to the statement of case makes no forecast to the Defendant as to the likely value of the general damages claimed. As the trial was limited to the issue of liability there are no witness statements which deal with the issue of damages on which I could have made an assessment of the likely value of the claim for deferred damages. I was told by counsel for the Defendant however that opinions on quantum were exchanged by both parties and the range of general damages between both parties was in the sum of $110,000.00 to $120,000.00. The parties would therefore have had an idea of the likely value of this claim from the amount claimed as special damages and the range of awards that may have been awarded in general damages. I have outlined above the principle behind the award of prescribed costs on the value of the claim. I am satisfied that I can in those circumstances stipulate the sum of $430,000.00 on the value of the claim. Both parties would have had that value in mind as the likely liability for the Defendant before the trial commenced. Both parties could have made the choice of applying for a cost budget to keep the costs within manageable limits or to ask for the court to ascribe a smaller value under a rule 66.7 application. They

did not. I will make my quantification of prescribed costs based on the value of the claim as the sum stipulated as $430,000.00.

18. I however take into account as well the discretionary factors of rule 66.6 to take into account all the circumstances in making the value for costs in giving effect to the overriding objective in the final award of costs. The claim was withdrawn at the Pre Trial stage. The Defendant is therefore entitled to 75% of the value of $430,000.00. However I would award half of those costs for the following reasons:
    (a) The parties had not incurred the expense of an assessment of damages. The trial was limited to liability only.
    (b) There were several documents disclosed but the witness statements were not complex.

Conclusion

21. The Claimant shall pay to the Defendants prescribed costs quantified in the sum of $29,025.00[1]. There shall be a Stay of Execution of twenty-eight (28) days from the date hereof.

Dated 27th July 2012

Vasheist Kokaram
Judge

[1] Costs: Value of the claim- $430,000.00

$30,000.00 x 30%	$9,000.00
$20,000.00 x 25%	$5,000.00
$50,000.00 x 20%	$10,000.00
$150,000.00 x 15%	$22,500.00
$180,000.00 x 10%	$18,000.00
	$64,500.00
$64,500.00 x 75%	$48,375.00 – Entitlement under Appendix B
$48,375.00 x 60%	$29,025.00 – Award in exercise of Court's discretion 67.5 (4) (a) CPR