IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2011-03223

BETWEEN

CELEST CHAITRAM

Claimant

AND

ANDREW SAHATOO

First defendant

MOTOR ONE INSURANCE COMPANY LIMITED

Second defendant

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Before: Master Alexander

Appearances:
For the claimant: Mr Ted Roopnarine
For the defendants: Mr Imran Khan instructed by Mrs Wendy Ramnath-Panday

DECISION

1. It is a very simple issue that engages this court's attention but one that raises an important point for which judicial guidance is sought. It is the issue of the costs to be paid to a claimant whose matter ended by consent at the assessment stage. Some contextual framework must be set out before looking at the Civil Proceedings Rules, 1998 (CPR) on costs.

2. The substantive matter involved a claim for damages for personal injuries and consequential losses. A defence on quantum was filed by the 2nd defendant only and a request was made on 8th March, 2012 by the claimant for an over the counter judgment against the 1st defendant in default of defence. Before that judgment was entered against the 1st defendant, the first case

management conference was convened on 15th March, 2012 where judgment was entered on liability against both defendants and the assessment was referred to a master. The matter came up on at least 4 occasions in the master's court over the period of 18th May, 2012 and 17th January, 2013 and the date set for trial, before a consent order was entered as follows:

a. *The defendants shall pay to the claimant damages inclusive of interest in the sum of $283,000.00 which sum shall be payable by monthly installments of thirty thousand dollars ($30,000.00) to commence on 24th April, 2013 and to continue on the 24th day of each successive month.*
b. *In default of any installment, the entire outstanding balance shall become due and payable.*

3. By the said order, the issue of costs was deferred and directions were given for the filing of submissions. The sole issue for determination by this court, therefore, is what percentage of costs is payable to the claimant under the CPR as amended.

Costs

4. Under the present costs regime of the CPR, the costs of the claim, such as at bar, are to be quantified on the prescribed basis[1]. In issue is the application of Appendix C of Part 37 which prescribes the percentage to be allowed at various stages of the claim.

5. The claimant seeks 100% of her costs on the basis of the unnecessary expenses and delays she was put to by the defendants' failure and/or neglect in complying with the provisions of the rules[2] in admitting liability upfront and settling this matter expeditiously. Mr Ted Roopnarine, counsel for the claimant, argued that the entire hearing before Gobin J was an unnecessary expense and delay; wasted judicial and legal time; and needlessly increased the claimant's costs of this action. He pointed to the defendants' course of behaviour in breaching the pre-action protocol as being unreasonable and wasteful of the court's resources and to be discouraged. Mr Roopnarine submitted that such behaviour is punishable by the court, in exercising its discretion with respect to the award of costs against a party who abuses the legal system for the purpose of delay or sheer negligence. Before settlement, the

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1 Part 67.5(1) provides inter alia that costs "must be determined in accordance with Appendices B and C …" which deal respectively with the "Scale of Prescribed Costs" and the "Percentage to be allowed at various stages of claim."

2 Civil Proceedings (Amendment) Rules, 2011

claimant was made to comply with all the directions of the assessing court in preparation for the assessment[3] and so is entitled to 100% costs in this matter.

6. Mr Roopnarine relied on several cases in support of his position:

- ***Taylor* v *KD Coach Hire Ltd***[4] involving a minor road accident, where the court determined that the claimant was entitled to assessed costs rather than fixed costs since the defendant had acted unreasonably in waiting until after the issue of proceedings before negotiating, especially as it had been in possession of the witness statements.

  Taylor can be distinguished from the case at hand in terms of the types of costs treated with. Further, and more particularly, the defendants in the case at bar were not in possession of witness statements prior to the issue of proceedings. The present matter was a running down action but one that involved some serious injuries and claims for continuing medical treatment and loss of earnings as well as future corrective surgery. By its defence, the 2nd defendant was seeking proof of the nature and effects of the injuries, loss and expenses (past and future) to put itself in a more considered position for settlement. It was clear that it was not contesting liability. In the circumstances of this case, it would have required more than merely a pre action protocol letter to facilitate settlement of this claim.

- ***Northfield* v *DSM (Southern) Ltd***[5] where an award was made for the full costs as the defendant had failed to state its case on liability prior to filing a defence. This was held to amount to unreasonable conduct for the purposes of the rules on the part of the defendant who had waited until proceedings commenced before making an offer on liability and clarifying its case.

  Again, this case is distinguishable as the present defendants never contested liability. Whilst the 2nd defendant had waited until proceedings commenced, liability determined

3 For filing of bundles of agreed and un-agreed documents, list of documents and witness statements
4 *Taylor* v *KD Coach Hire Ltd* (2000) CLY 447
5 *Northfield* v *DSM (Southern) Ltd* (2000) CLY 461

and the matter sent to assessment, I do not see it as unreasonable (given the nature and severity of the injuries) for the 2nd defendant to try to secure full instructions and obtain all necessary documents in support of the claimant's case before reaching settlement.

- ***Linton* v *RD Williams Haulage Ltd***[6] which held that the defendant, who had made an offer to settle one week before trial, had behaved unreasonably in leaving it so late to settle. "*A reasonable defendant, if looking at the economies of the case as a reason for settling, should do so as soon as possible. This was especially true in road traffic accident cases, where insurers and solicitors would be familiar with the likely cost of proceeding to trial."* The defendant was ordered to pay the claimant's costs assessed for the issue of proceedings. Whilst the principle laid down in ***Linton*** is accepted, I concluded that it must be applied within the context of each individual case.

Analysis

7. There is a case to be made out for an award of the full costs, in this changed litigation climate, where attorneys and litigants behave unreasonably in delaying the settlement process and/or in waiting until they reach the doors of the court to settle. It is not every case of delayed settlement, however, that would attract such a punitive measure in costs. I will now look at the rules on this issue.

8. The costs regime is clear and provides under Appendix C that 60% costs ought to be awarded where an action concludes "up to default judgment and including assessment of damages." For the guidance of practitioners, this 60% also takes into account if the assessment of damages is proceeded with and fully ventilated and there was no trial on liability. Various other percentages are also ascribed to matters at different stages of the proceedings including where there are full trials on liability.

9. In my view, there will be cases outside of the strictures of these rules prescribing the costs award, where a court may award 100% of costs as a punitive measure, where the factual context show unreasonable and unjustifiable delay leading to a waste of judicial time and

6 *Linton* v *RD Williams Haulage Ltd* (2001) CLY 516

resources and is an affront to the administration of justice. The intent and main thrust of the rules, under which wide case management powers are given, are to ensure that justice is done and to create a climate where settlement is encouraged from early on so as to save judicial time and expense and avoid protracted litigation. It is in such a context that the pre-action protocol assumes prominence and attorneys are to engage this process before proceeding to litigation.

The pre-action personal injury protocol

10. This protocol[7] was set up to provide litigants and their attorneys the opportunity to focus on resolving the issues early through the obtaining and exchanging of information to facilitate offers of settlement and/or to lay the groundwork for the expeditious and economical conduct of proceedings. It was meant to encourage settlement at the earliest appropriate stage and so avoid wasteful litigation, with its attendant costs. Where one party has refused unreasonably to engage in this pre-litigation process, the court can take account of this, which may be reflected in costs consequences. Non-compliance on the part of one party in engaging in this pre-litigation activity, which can help clarify or resolve issues upfront, would be of serious concern to a court having the further conduct of the proceedings.

11. Mr Roopnarine has, therefore, made heavy weather of the defendants' failure to provide a written response to his pre-action protocol letter, either by admitting or denying liability or by asking for more time or further information or clarification of documents provided or for the claimant to be medically examined. He pointed to the 2nd defendant filing instead an unnecessary defence where for the first time liability was shown as not being contested for its insured's negligence and of the uncalled for expense and delay of having a hearing before the trial judge where liability was judicially determined. This defence, he submitted, was not a true defence on liability but was used to minimize the quantum of damages. The defendants in ignoring the pre-action protocol letter and filing a defence on quantum caused the

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7 The aims of the personal injury pre-action protocol are:
(a) to foster more pre-action contact between the parties, better and earlier exchange of information and better pre-action investigation by both sides;
(b) to put the parties in a position where they may be able to settle cases fairly and early without litigation;
(c) to enable proceedings to run to the court's timetable and efficiently, if litigation does become necessary.
See Practice Direction on Pre-Action Protocol for Road Accidents and Personal Injury Claims Appendix B.

pointless and additional step that led to a waste of court resources and time. He asked this court to strongly discourage such an approach to litigation by allowing the claimant the full costs of this action.

12. Of note is that the claimant at bar had sustained severe personal injuries and her damages and losses were continuing up to and after the filing of the claim , with further medicals to be sent and future corrective surgeries to be undertaken. The pre-action protocol process provided a platform for settlement discussions and rightly both parties should have engaged in it but settlement is not an end in itself but must be appropriate to the needs of both sides. Given the factual matrix of this case, I was not prepared, without more, to make the costs order sought on the basis solely of the non-response in writing to the pre-action letter. I bear in mind that liability was not contested and the 2nd defendant may have wanted to be apprised of the evidence on quantum and to safeguard its rights to be heard so filed its defence.

13. To my mind, attorneys involved in litigating **all** matters, and particularly simple, straightforward, minor running down actions, should engage in the settlement process early on and so seek from upfront to dispose of them. ***Linton*** was a straightforward case for damages for cost of repairs and minor whiplash injury where the defendant filed a defence denying liability so I agree that in such circumstances, it was unreasonable for the defendant to avoid engaging in the settlement process at an earlier stage. It is accepted, however, that it is not all running down actions that are without complications or straightforward. In such cases, attorneys and parties can and should engage the settlement process but may also require directions for filing documents to afford the defendant an opportunity to know the full case it has to meet so it can aid with the settlement process.

14. Bearing in mind that in the present case, the damages claimed were not for minor injuries and were clearly substantial; there were several medical reports involved and some still pending; there was a huge loss of earnings claim and corrective surgeries in the pipeline; liability was determined at the 1st case management conference, without any directions being given and without a full ventilation of the issues at trial, I was not satisfied that this was a case that should attract a full costs order. Further, the rules provide for a defendant who

wants to be heard on the issue of quantum to file a defence, which was done in this case. The fact that the 2nd defendant may want to minimize the quantum it has to pay is part of the litigation process and nothing for which it is to be penalized. It is accepted that the 2nd defendant's main purpose as insurer is to indemnify the 1st defendant, as its insured, from any judgment against him. When the matter came up for assessment, full directions were issued and complied with by the claimant, as part of the preparation of her case to determine quantum. The actual assessment hearing was not ventilated but ended with a consent order being entered at the doors of the court.

15. Whilst practitioners and litigants are encouraged to move with economy and due dispatch in settling matters that can be settled rather than indulging in protracted litigation, this court bears in mind that in the instant matter, liability was not denied or contested at the first case management conference, so the matter proceeded swiftly to the assessment of damages. Thus, the expense of a full trial was avoided, as well as judicial time, resources and unnecessary costs would have been saved. On this basis only, I am of the view that the claimant cannot be entitled to 100% costs. Based on Appendix C, a 100% costs award is reserved for instances where the parties have participated in all stages of the trial: service of defence, case management conference, listing questionnaire, pre-trial review and trial.

16. The arguments advanced by Mr Roopnarine as to the unnecessary expense and delay to which his client was put were indeed persuasive but I could not accede to same and award her 100% of her costs as a punitive measure against the defendants. It is my view that, in the absence of a trial and where a matter is sent to be assessed, the 100% costs is not applicable. A 100% costs award is reserved for a full hearing of the trial of the issues on liability. The present matter was settled at the CMC stage with respect to liability; it was not concluded at that stage. The issue of quantum was still left to be determined. The conclusion of the matter occurred at the assessment stage, without a trial on liability or quantum having taken place. The claimant would have been saved some of the expense, time and costs of a trial and is entitled to a pro-rated percentage of her costs as a consequence and as provided by the rules. The fact that the assessment was prepared (including the expense incurred for preparing and settling documents, prepping witnesses for the assessment and that the

witnesses and counsel were ready to proceed before it was compromised) does not automatically entitle the claimant to 100% costs.

17. Under the new costs regime, costs ought to be fair, proportionate and reasonable. To award 100% costs in this matter is against the thrust of the overriding objective of the CPR to deal with cases justly. How such an award of 100% costs is made is clearly prescribed by the rules and the present matter, in my view, does not satisfy the criteria for a full costs award. I was also unwilling to apply the ***Linton*** principle to the current fact scenario and award full costs as that case too can be distinguished from the present one. In the context of this particular claim involving multiple injuries, future surgery and loss of earnings, I was satisfied that it was reasonable that the defendants did not rush to settlement before having a full and complete picture of the case it had to meet. To my mind, waiting to have clarification of these issues, may have delayed the settlement process, but cannot be deemed as unreasonable in the circumstances of this case. The claimant is entitled, therefore, to 60% of her costs as the stage reached is "up to default judgment and including assessment of damages."

Order

18. The claimant is entitled to 60% costs, which she is hereby awarded in the sum of **$29,880.00**.

Dated 6th June, 2014

Martha Alexander
Master