THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2014-03454

BETWEEN

MUKESH SIRJU

VIDESH SAMUEL

Claimants

AND

THE ATTORNEY GENERAL OF TRINDIAD AND TOBAGO

Defendant

BEFORE THE HONOURABLE MR. JUSTICE ROBIN MOHAMMED

Appearances:

Mr. Sunil Gopaul-Gosine for the Claimants

Ms. Tamara Maharajh instructed by Ms. Nisa Simmons for the Defendant

DECISION

INTRODUCTION, APPLICATION AND PROCEDURAL HISTORY

1. Before this Court is the Claimants' Notice of Application ("the Application") filed on the 18th March, 2015 for an Order that a costs budget be set for these proceedings. On the 22nd September, 2014 the Claimants filed their Claim Form and Statement of Case seeking damages for wrongful arrest and/or false imprisonment and/or assault and battery, aggravated and/or exemplary damages, costs, interest and such further or other relief as the nature of the case may require. An Appearance was entered on behalf of the Defendant on the 22nd October, 2014. The Claimants consented to extending the time for filing of the Defence to on or before the 22nd December, 2014. The Defence was then filed on the 22nd December, 2014.

2. As was indicated earlier, the Claimants then filed their Application for budgeted costs on the 18th March, 2015. On that date, the Court gave directions for the Defendant to respond to the Application on or before the 18th May, 2015. The Defendant accordingly filed its submissions in opposition to the Claimant's Application for budgeted costs on the 8th May, 2015.

THE APPLICATION FOR BUDGETED COSTS

3. The Application for budgeted costs sets out the grounds of the Application. It is stated that it is fair and reasonable to set a costs budget herein higher than the prescribed cost as calculated in accordance with **Part 67.5( )(iii)**[1] **(*sic*)** as the prescribed costs are grossly inadequate having regard to the nature and circumstance of this case and the factors set out in paragraph 10, Part B of the Third Schedule of the **Legal Profession Act No 21 of 2006**[2] **(*sic*)**. The Application also stated that the **written consent** of the Claimants is attached and marked **"B".**

4. It is further stated in the said Application that "the Claimants Attorney-at-Law has been in practice for 25 years and the structure of fees has been assessed at **$2,500.00** per hour. The costs budget applied for is **$62,500.00**. The costs budget has been calculated as set out below:

A. Breakdown of costs incurred to date and proposed -

i. Counsel's fee for advising on Opinion for instituting proceedings by way of Claim Form. Settling Proceedings, fee on brief for proceedings, fee for conferences with client; advising on service Claim; perusing and advising and researching on law and facts; attendance at case management conferences, pre-trial review and trial- **15 hours-$37,500.00.**

ii. Instructing Attorney-at-Law's fees for and including all work required to bring proceedings to hearing, including preliminary advice relating to defence, drawing brief to Counsel, attendance on witnesses, attendance on witness recording statements and taking proof of their evidence; preparation of affidavits, attendance at Registry to file Claim; conferences with client; receiving and perusing Claim; settling notices; attendance to service copies of application, attendance for application for costs budget, draft Order and consent of client; attendance on client to sign consent as settled by Counsel,

[1] This is exactly how this rule was stated by the Claimant's attorney in the Application. It seems, however, that attorney wanted to refer to **Part 67.5(2)(b)(iii) of the CPR 1998** as amended.

[2] There is no **"2006"** Legal Profession Act as referred to in the said Application. It is therefore presumed that attorney was referring to **Legal Profession Act No. 21 of 1996** Chapter 90:01.

conference and advice, appearance at case management hearings for High Court, receiving And perusing documents; Telephone calls, faxes, photocopies, correspondence with the Defendant's Attorney-at-law; Drawing Briefs for Counsel, Receiving And perusing Court Notices for hearing; Considering the facts and law and general care and conduct of the matter - **10 hours-$25,000.00.**

B. Number of hours of preparation time (including attendances upon the Claimants, any witnesses and on any other parties to the proceedings) that the Attorney for the Claimants has already spent and anticipates will be required to bring the proceedings to trial - **10 hours.**

C. Procedural steps or applications included in the budget are case management conferences, pre-trial review, applications for costs budget."

THE DEFENDANT'S SUBMISSIONS IN OPPOSITION TO THE APPLICATION FOR BUDGETED COSTS

5. According to the Defendant, budgeted costs are not appropriate to these proceedings. The Defendant submits that it has been the practice that in civil proceedings relating to trespass to the person (as is the case here), costs are determined on a prescribed scale in accordance with **Rule 67.5** of the **CPR**. The Defendant further submits that the work described in the breakdown of costs at paragraphs (A), (B) and (C) of the Claimants' Application falls within the description of work attracting prescribed costs pursuant to **Part 67.7** of the **CPR**.

6. The Defendant submits that having regard to the nature of this case (proceedings grounded in the tort of trespass to the person where the Court is being asked to adjudicate mainly on matters of fact and to determine whether the elements of these established causes of action have been satisfied) costs on the prescribed scale are not grossly inadequate, taking into account the simple nature and circumstances of the case. Moreover, the Defendant submits that the Claimants have not shown good reason for departure from the general rule of prescribed costs.

7. It is the Defendant's contention that budgeted costs are usually utilized in proceedings where parties are engaged in examining novel or complex points of law. In such cases, parties may be involved in extensive research and arguments, numerous applications and expert testimony. This is not the case here and the nature and circumstances of this matter do not warrant the application of budgeted costs.

8. Accordingly, the Defendant submits that the general rule of prescribed costs is applicable to these proceedings as is the practice in Trinidad and Tobago, and the Claimants have not shown any good reason for departure from the general rule.

9. The Defendant further contends that in any event, the Claimants' Application for budgeted costs has not satisfied the requirements of **Rules 67.8(4)** and **67.9** of the **CPR** as it lacks certain prerequisites required by **Rule 67.8(4)(c)** of the **CPR** and is silent on the requisites contained in **Rule 67.9(d)(iii),(iv) and (v).** In the circumstances, the Defendant submits that should the Court hold that budgeted costs are appropriate to these proceedings, which Counsel for the Defendant does not concede, the Claimants' Application does not comply with **Rules 67.8** and **67.9** of the **CPR** and they have not provided sufficient information to satisfy the Court that they understand the consequences of the Order being sought.

ISSUES

10. From the Application, the main issues which fall to be determined are as follows:

    a. **Whether budgeted costs are appropriate to these proceedings; and**
    b. **Whether the Claimants' Notice of Application for budgeted costs meets the requirements of Rules 67.8(4) and 67.9 of the CPR.**

a. Whether budgeted costs are appropriate to these proceedings?

11. In the Claimants' Application for budgeted costs, it is stated that the grounds of the application are that it is fair and reasonable to set a costs budget herein higher than the prescribed costs as calculated in accordance with **Part 67.5( )(iii)**[3] ***(sic)*** as the prescribed costs are grossly inadequate having regard to the nature and circumstance of this case and the factors set out in **paragraph 10, Part B of the Third Schedule of the Legal Profession Act No. 21 of 2006**[4] **(*sic*)**. Thus, the Claimants are essentially submitting that the prescribed costs so calculated are highly insufficient in that they are too low and thus are attempting to secure higher costs via the mechanism of budgeted costs.

12. It must thus be resolved, whether, on a true reading/correct interpretation of the **CPR**, this ought to be the purpose for which the vehicle of budgeted costs provided for by the **CPR** is to be utilized.

[3] This is the way this rule is stated in the Application.
[4] There is no Legal Profession Act No. 21 of **2006**. It is presumed that Attorney is referring to **Act 21 of 1996**

13. The rationale for budgeted costs, as conceptualized by Mr. Dick Greenslade, the initial draughtsman of the CPR, is documented in his report **"Review of Civil Procedure"** thus:

"The aim would be that the fixed costs regime, properly constructed, should cover some 85-90 percent of all litigation. However, there will be cases in which the ***low amount of the claim masks considerable complications of law and/or facts****. These are mainly those types of cases which I describe as* ***complex cases****...In such cases the fixed costs might well not be appropriate. Hence my suggestion that the parties could agree, or one party could apply at the case management conference, for a budget to be fixed for the case."* [Emphasis mine]

14. Therefore, according to Greenslade, parties may agree or one party may apply for a costs budget to be fixed once it is perceived that the recoverable costs would be disproportionately low *vis-à-vis* the complexity of the matter. It follows that Greenslade's view is that budgeted costs may be applied for whenever a party holds the view that prescribed costs will not adequately represent recoverable costs of proceedings. Indeed, that appears to be the view adopted in **National Insurance Board v. National Insurance Appeals Tribunal H.C.A. CV 2005-00748** by Stollmeyer J[5]. To me, it appears that the logical conclusion of Greenslade's view would be that in practically every instance, the purpose of an application for a costs budget would be to ***increase*** the sum of recoverable costs.

15. It is worth noting that **Rule 67.6(3)** of the **CPR** stipulates that whenever an application is made for budgeted costs to be prescribed at a higher level the applicant must file documents in accordance with certain requirements for a costs budget. Interestingly, there is no requirement to file documents in accordance with a costs budget when seeking to set prescribed costs at a lower value.

16. This therefore goes counter to the overriding objective of the **CPR** which mandates the court to deal with cases in ways which will enable parties to be on equal footing, save expense and in ways which are proportionate to their financial position. The underlying philosophy of the principles surrounding the new costs regime is to reduce costs in litigation and not allow parties to be prejudiced by their financial position. Accordingly, it is helpful to consider the English approach to this issue. It is worth noting, however, that there is no equivalent position in the English **Civil Procedure Rules** to budgeted costs, though proposals for reform relevant to such have been put forth, which I shall examine later on in this decision. Of similar purport to the concept of budgeted costs is that of "prospective cost cap orders" which in effect fixes a costs budget for the

[5] See page 2 of the judgment.

proceedings. Lord Justice Jackson's Report[6] highlights that these are distinct concepts the purpose of which is similar in terms of ensuring proportionality and controlling costs. The provision for costs cap orders is not contained in the English **CPR** but in a **Costs Practice Direction**[7].

17. In order to set cost cap orders, parties are required by the court to file costs estimates in much the same way as the statement of costs in budgeted costs applications in the Trinidad and Tobago CPR. The principle may best be explained by reference to the case of **Griffiths v. Solutia (UK) Ltd. (2001) 1 Costs L.R.** where two members of the Court of Appeal commented upon the power to set costs budgets given to arbitrators by **section 65** of the **Arbitration Act 1996** and expressed the view that the general case management powers set out in **CPR Part 3** should be employed in future to set costs budgets whenever appropriate. **Section 65** of the **Arbitration Act 1996** permits arbitrators to *limit in advance* the amount which can be incurred as costs by the parties to arbitration. This provision is frequently used and is generally regarded as beneficial in creating **"equality of arms"** (a rich party cannot take advantage of a poorer party by threatening to cause or recover substantial costs) and in promoting proportionality (making sure that costs are in proportion to the amount in dispute).

18. In **Leigh v. Michelin Tyre Plc [2004] 1 WLR 846** it was stated that such orders (now called "prospective costs cap orders") can have a significantly beneficial effect *in keeping costs within the bounds* and concentrating minds on keeping costs proportionate throughout the litigation. Each order should contain provision for the court to review the cap where it is shown that is has become inappropriate due to circumstances that could not reasonably have been foreseen at the time the order was made.

19. It appears, therefore, that under the English **CPR**, costs budgets in the form of cost cap orders are made in order to limit in advance the amount of costs to be incurred in a matter. In Lord Jackson's Report the Law Society stressed that cost capping is not the same as budgeted costs though the terms have been used interchangeably for years. It is my view that, in light of the underlying philosophy of the Trinidad and Tobago **CPR** which is to reduce the costs of litigation and not allow parties to be prejudiced by their financial situation, budgeted costs under the TT **CPR** are somewhat akin in purpose to prospective costs cap orders in England- their purpose being to set parameters for costs and prevent them from soaring disproportionately.

[6] Referred to further in paragraph 20 of this judgment

[7] See Practice Direction 3F on costs capping. This Practice Direction supplements Section III of the English CPR, Part 3.

20. Of interest are the views and recommendations expressed by Lord Justice Jackson in his Report on the review of civil litigation and costs in England and Wales.[8] Lord Justice (Sir Rupert) Jackson was commissioned in late 2008 by the then Master of the Rolls to conduct a review of the rules and principles governing the costs of civil litigation in England and Wales and to make recommendations to promote access to justice at proportionate costs.[9] In the foreword of the Report, Jackson L.J. states as follows:

"In some areas of civil litigation, costs are disproportionate and impede access to justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to justice".

In the executive summary of his Report, Lord Jackson goes on to state as follows:

"Effective costs management has the potential to lead to savings of costs (and time) in litigation. I recommend that lawyer and judges alike receive training in ***costs budgeting and costs management****. I also recommend that rules be drawn up which set out standard costs management procedure, which judges would have a discretion to adopt if the use of costs management would appear beneficial in any particular case.[10]"* [Emphasis mine]

The Report went on to refer to the Law Society's definition of cost budgeting. It provides as follows:

"This is a term which describes the association of a budget with specific steps in the course of civil litigation and has been extensively used by some firms of solicitors as part of the management of their retainer with their client. Some firms use computer programs which they have developed in house but others use an Excel spreadsheet which works effectively. The crucial characteristic is that budgeting takes place prospectively whereas other forms of costs management are reactive. Budgeting is not costs capping although the terms have been used interchangeably by the profession and the judiciary for some years as this section of the Report makes clear.[11]"

21. Jackson L.J. concluded that:

"On the basis of all that I have learnt during the Costs Review I conclude that effective ***costs budgeting*** *is a skill which all lawyers can acquire, if they are prepared to give up the time to be trained; effective costs management is well within the abilities of all civil*

[8] "Review of Civil Litigation: Final Report", 21st December, 2009.
[9] See 1.1(1) of the Executive Summary of the UK Ministry of Justice's "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales: Implementation of Lord Justice Jackson's Recommendations" Consultation Paper CP 13/10 November 2010.
[10] Page xxiv, executive summary of "Review of Civil Litigation: Final Report".
[11] Page 413 of "Review of Civil Litigation: Final Report".

judges if properly trained; effective costs management has the potential to control recoverable costs, and sometimes the actual cost of litigation to more acceptable levels[12]*."*

22. In terms of the way forward, Jackson L.J. suggests that Rules for costs management be drafted. He opined that when the rules for costs management are being drafted, it will also be necessary to amend the rules in respect of cost capping. He stated that:

    "there must be harmony between both sets of rules, even though costs capping and costs management are separate concepts.[13]*"*

23. Thus it would seem that should Jackson L.J's recommendations as they relate to budgeted costs be implemented in England and Wales, the basis for same would be to control recoverable costs and encourage access to justice.
    .
24. Insofar as the Claimants' Notice of Application for budgeted costs appears to be premised on the basis that prescribed costs would be "grossly inadequate" and accordingly appears to be seeking to recover higher costs, in my view, such is not the purpose of an application for budgeted costs and so, at the outset, the application is inappropriate as its purpose has been misconceived.

25. What the Claimants really ought to be seeking is perhaps **prescribed costs on a higher level.** To be clear, I am of the view that an application seeking prescribed costs on a higher level is not one and the same with one for budgeted costs, though, admittedly, a cursory reading of the provisions of **Rule 67.6(3)** of the **CPR** may lead to the misguided view that there is some integration between the two. In that regard, I am of the view that perhaps a second look ought to be taken at that Rule so as to ensure how best clarity could be achieved, particularly in light of the fact that the new civil proceedings rules were intended to be more "user friendly".

26. **Rule 67.6** of the **CPR** concerns applications to determine value of a claim for the purpose of prescribed costs. **Rule 67.6(3)** provides that where an application is made for costs to be prescribed at a higher level **Rules 67.8(4)(a)** and **67.9** apply. **Rule 67.8** concerns budgeted costs and **sub-rules 67.8(1) - 67.8(5)** concern the requirements relevant to making an application for a costs budget. **Rule 67.9** deals with the **client's consent** to an application for a costs budget. It is to be noted that **Rule 67.6(3)** which concerns making an application for prescribed costs at a higher level states only that **Rules 67.8(4)(a)** and **67.9** apply. **Rule 67.8(4)(a)** and **Rule 67.9** only address the issue of consent.

[12] Page 417 of "Review of Civil Litigation: Final Report".
[13] *Ibid*.

Accordingly, it is my view that **Rule 67.6(3)** intended to refer to **Rules 67.8(4)(a)** and **67.9** merely for the issue of consent of the client, that is, to require that where an application for prescribed costs on a higher level is made, the proper consent of the client must be obtained. I draw this conclusion from the fact that specific reference was made in **Rule 67.6(3)** to **Rule 67.8(4)(a)** to the exclusion of the rest of **Rule 67.8**, with **67.8(4)(a)** and **67.9** both addressing the issue of consent. If the intention was for prescribed costs at a higher level to be one and the same with budgeted costs, then it begs the question why not simply deem the whole of **Rule 67.8** applicable as the whole part is said to relate to budgeted costs or simply say that the Applicant must apply for a costs budget?

27. Assuming that I am correct in my interpretation of the provisions of **Rule 67.6(3)**, clarifying same by setting out the consent requirements thereunder without any reference to budgeted costs would go a long way in preventing any misunderstanding of the law as it relates to seeking prescribed costs on a higher scale ***vis-a-vis*** budgeted costs.

28. As is clear from my interpretation of the law outlined above, I respectfully beg to differ from Greenslade as to the purpose of a budgeted costs application insofar as he suggests the underlying purpose is to recover greater costs.

29. In any event, should one adopt Greenslade's view of the rationale behind budgeted costs and apply same to the Application before this Court, the Claimant would still be unsuccessful on his Application. Greenslade's view of budgeted costs, discussed above, suggests that such would be available in matters where recoverable costs would be disproportionately low in light of the complexity of the matter. He views budgeted costs (which essentially would allow, in his view, for the recovery of greater sums than would be recovered under the fixed costs regime) as being the rare exception- the fifteen to ten percent of litigated cases- since as he put it ***"the fixed costs regime, properly constructed should cover 85-90% of all litigation".*** The exceptional cases, to which budgeted costs would apply, would be **"complex cases".**

30. It is my view that even if Greenslade's view on budgeted costs was to be applied, the Claimants would fail on their Application as they would be unable to surmount the hurdle of establishing that this case falls to be considered as **"a complex case"** such a case being a case where **"the low amount of the claim masks *the considerable complications of law and or/fact"***, to quote Greenslade [Emphasis mine]. From the alleged facts as set out, while of course each matter turns on its own facts and circumstances, this case appears to be a routine action in tort for false imprisonment, wrongful arrest and assault and battery. There is nothing on the facts as alleged which suggests by any stretch that the case ought to be placed in the category of a complex or complicated matter. In fact, Attorney-at-law for the Claimants has clearly submitted that ***"The Claimants' Attorney at Law on record***

will perform the duties of both Instructing and Advocate". Accordingly, I am of the view that budgeted costs would not be appropriate on an application of either Greenslade's rationale for budgeted costs or mine set out prior.

b. <u>Whether the Claimants' Notice of Application for budgeted costs meets the requirements of Rules 67.8 and 67.9 of the CPR?</u>

31. Having concluded that budgeted costs would not be appropriate in these proceedings, there is thus no need to proceed to consider this issue. However, I wish to say that even if it had been concluded that the Claimants matter was (bearing in mind my rationale for budgeted costs) made for the purpose of setting or controlling the recoverable costs or (bearing in mind Greenslade's rationale for budgeted costs) "complex" enough to warrant a budgeted costs application being made, the said Notice of Application would not succeed for failure to meet the stipulated requirements of **<u>Rule 67.8</u>** <u>and</u> **<u>Rule 67.9</u>** of the **CPR**.

32. **<u>Rule 67.8(4)</u>** sets out the information which must accompany an application for a costs budget. More particularly, **<u>Rule 67.8(4)(a)</u>** requires the written consent from the client in accordance with **<u>Rule 67.9</u>**. **<u>Rule 67.9(1)(b)</u>** provides that the court may not make an order for budgeted costs unless the court satisfies itself that each party fully understands the consequences of the order that is being sought as to (i) the lay party's liability for costs to his own attorney-at-law whether he obtains an order for costs against any other party or not, (ii) his ability to pay costs in the budgeted sum to the other party if that party obtains an order for costs against him and (iii) what his liability might be under paragraph (i) and (ii) if rule 67.5 applied.[14]

33. **<u>Rule 67.9(d)</u>** requires, inter alia, the consent of the lay party to the application to be in a separate document which (iii) states the attorney's-at-law estimate of what the prescribed costs appropriate to the proceedings would be, (iv) gives an estimate of the total costs of the proceedings as between attorney-at-law and client; and (v) sets out the basis of the estimate including the amount of the hourly charge. It is important to note that what is required by **<u>Rule 67.9(1)(d)</u>** is that the consent itself, signed by the lay party, must be a *separate* document from the Application and such consent must, in addition to the lay party's signature, contain the rest of the information set out at **<u>Rule 67.9(1)(d)</u>** since in the absence of evidence to the contrary, this goes towards satisfying the Court that the lay party understood the nature of the Application being sought and his obligations thereunder. It is not enough for that information to simply be contained in the Notice of Application.

[14] Rule 67.5 deals with prescribed costs.

34. The ***written consent*** ***of the Claimants, annexed and marked "B"*** while it contains the Claimants' signatures, has none of the information required by **Rule 67.9(1)(d)(iii),(iv) and (v)**. There is nothing on the Claim Form, Statement of Case or the Application pointing to what the prescribed costs would likely be if the matter is determined by a trial. In the event that the Claimants succeed in their claim the value of the claim can only be determined when the Court awards an amount representing damages or an amount agreed between the parties **(Rule 67.5(2)(a))**. However, in the event that the Court decides in favour of the Defendant by dismissing the Claim, then the value of the Claim will be considered to be one for **$50,000.00 (Rule 67.5(2)(c)) as amended**, the prescribed costs of which is **$14,000.00**. This will be the Claimants' liability for costs to the Defendant. However, if a costs budget is fixed or the costs are prescribed at a higher level, then the liability of the Claimants' will consequentially be higher in accordance with the fixed budget or the higher level of prescribed costs. The Court is not satisfied that the Claimants are aware of these intricacies. Accordingly, the written consent is deficient and the Court cannot, on the existing Application, be satisfied that the Claimants truly appreciate the nature of the order which they seek. In the circumstances, I am of the view that the Application for budgeted costs cannot succeed.

35. Accordingly, the **ORDER** of the Court is as follows:

1) **The Claimants' Notice of Application for budgeted costs filed on the 18th March, 2015 be and is hereby dismissed.**

2) **The Claimants shall pay the Defendant's costs of this Application to be assessed in accordance with CPR 1998 Part 67.11 in default of agreement.**

3) **In the event that there is no agreement, the Defendant to file and serve a Statement of Costs for assessment on or before 18th December, 2015.**

4) **The Claimants to file and serve objections, if any, on or before 15th January, 2016.**

Dated this 3rd day of November, 2015

Robin N. Mohammed
Judge