THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2015-00148

BETWEEN

ROSALIND GABRIEL CARNIVAL PRODUCTIONS LIMITED

1st Claimant

AND

ROSALIND GABRIEL AND VILLAGE PRODUCTIONS

2nd Claimant

AND

NATIONAL CARNIVAL BANDS ASSOCIATION OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Appearances:

Mr Michael Quamina instructed by Ms Gabrielle Gellineau for the Claimant
Mr Colin Kangaloo instructed by Ms Natasha Bisram for the Defendant

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DECISION ON DEFENDANT'S APPLICATION FOR BUDGETED COSTS

I. Background:

[1] The Claimants were both Carnival Mas Bands that participated in the Junior and Senior Parade of the Bands presentations competition facilitated by the Defendant. To be eligible for participation, the Claimants were required to sign the Junior and Senior Parade of Bands Masqueraders' Agreements. The competition was held on the 1st March, 2014 and on the 2nd and 3rd March, 2014 for the junior and senior parade of the bands respectively. The results of the competition, which were published on the Defendant's website, were eventually delivered at the Claimants' attorney's office. It was then revealed that the Claimants had been penalized in accordance with **Rule 10.3 of the Junior and Senior Parade of the Bands Rules** for failing to follow the prescribed parade route. Further, the Senior Parade Band had also been penalised under **Rule 2.1 of the Senior Parade of the Bands Rules**, as some of its members were allegedly under the age of 18. Thus, both Mas Bands had received a **50% deduction** of their score.

[2] The parties engaged in a slew of correspondence over the interpretation of **Rules 2.1 and 10.1 – 10.3 of the Junior and Senior Rules**. Additionally, by their decision to penalize the Claimants, the Claimants pleaded that the Defendant, in breach of **Rules 24.4 and 26.4 of the Junior and Senior Rules,** respectively, failed to act fairly and exercise its decision in a fair and reasonable manner.

[3] Essentially, resulting from the deduction in scores, the 1st and 2nd Claimants claimed that they lost prize money in the sum of $39,000.00 and $79,600.00 respectively. Attendant to this figure, the Claimants sought declaratory reliefs that essentially state that the Defendant was wrong to apply the 50% deduction in their scores in accordance with **Rules 10.3 and 2.1 of both Bands' Rules**.

[4] Based on the Amended Defence filed, it was clear that there were no material issues of fact for determination. For one, the Claimant had admitted that it did not use the official parade route. Secondly, the 2nd Claimant's denial of having members that were underage in its Band amounted to an issue of law centred on the interpretation of the word "member" in **Rule 2.1**. The question being whether an underage person who temporarily enters the band during its parade route could be constituted as a member of the Band.

Thus, the only factual dispute among the parties was whether other bands, who were not penalized, had under-aged members.

[5] On this point, the Defendant pleaded that if, as the Claimant suggested, there was video evidence to support its case on this issue, then the proper procedure would have been to bring such evidence to the attention of the Appeals Review Committee as per **Rule 16 of the Senior Rules** rather than initiate this action. The availability and applicability of the appeal process to determine the issue of underage members was also denied by the Claimants in their Reply. Rather, the Claimant's contended that the appeal process under **Rule 16** related to different complaints of which the presence of under-aged members did not form part. Thus, another issue of law emerged.

[6] After the pleadings had closed, the Defendant put in an application to set a costs budget **(the "Application")** which was higher than the standard basis pursuant to **Part 67.8 (4) of the CPR**. In the attendant statement of costs, attorney for the Defendant sought a costs budget in the sum of **$307,127.50**. This costs budget included fees for both instructing attorney and counsel for work completed as well as to work to be performed along with incurred and future disbursements. The Defendant argued that, in the event that it was successful, an order for prescribed costs under **Part 67.5 of the CPR** would be grossly inadequate and will bear no relation to the value of work having regard to the complexity of the case and the reliefs sought by the Claimants.

[7] The Claimants objected to the Application by affidavit in response filed by Gabrielle Gellineau, instructing attorney for the Claimants. She deposed that budgeted costs should only be granted when it is determined that fixed and prescribed costs would be insufficient to cover the costs of proceedings where the issues of fact and law are exceptionally complex, novel or weighty. Further, it will only be necessary where there is a need for extensive research and legal arguments. In the case at bar, however, it was her opinion that facts are quite simple and further, the issues of law mentioned above needed no extensive research. She deposed that the case at bar required the interpretation of a set of rules and regulations of the following issues:

i. ***The penalty deduction of 50% of the Claimants' scores in accordance with Rule 10.3 of the Junior and Senior Parade Band Rules and 2.1 of the Senior Parade Band Rules.***

ii. ***Whether the Defendant has breached the Junior and Senior Parade Band Rules as a result of the improper imposition of the sanction.***

iii. ***Whether the Claimants breached the Band Rules by failing to use the appeal process and thus are debarred from initiating this action.***

[8] Further, Ms Gellineau deposed that the Application is really an attempt to intimidate and dissuade the Claimants from pursuing their claim considering that the Claimants are small Mas Band owners who are not on a relatively strong financial footing. It was also alleged that the statement of costs attached to the Application was fraught with duplication.

[9] Prior to the filing of submissions, the Defendant's attorneys, Mair & Co., were removed from the Court's record and replaced by Mr Nigel Greaves.

II. Law & Analysis:

[10] The sole issue to be decided is whether the Defendant's Application for Budgeted Costs should be granted**.** The Defendant, in support, relied on several authorities in its submissions. In my review of them, it is clear that there are no set factors which the Court must account for when deciding whether to apply a costs budget to a matter. Rather, there is much discretion in the Court so long as, in accordance with the Overriding Objective, it is of the opinion that prescribed costs will not, due to the size and/or complexity of the matter, properly account for the recoverable costs. Thus, the purpose of budgeted costs is to assist the parties in setting a budget realistic to the nature of the proceedings.

[11] In an earlier decision of this Court[1], I relied on learning from the text **Review of Civil Procedure**[2] and the case of **National Insurance Board v National Insurance Appeals**

[1] **Mukesh Sirju & Anor v the A.G of T & T CV2014-03454**
[2] By Dick Greensdale

Tribunal[3] to discuss the law on budgeted costs. Mr Greenslade, the initial draughtsman of the CPR, stated as follows:

> *"The aim would be that the fixed costs regime, properly constructed, should cover some 85 – 90% of all litigation.* ***However, there will be cases in which the low amount of the claim masks considerable complication 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."*

[12] In my view, as I stated in **Mukesh Sirju** *supra*, what Mr Greenslade envisioned was that Budgeted Costs applications would usually be used for cases where one or both parties wished to increase the sum recoverable in costs due to the novelty and/or complexity of the case. However, the philosophy behind budgeted costs was always, to my mind, to contain costs and thus, arrive at a figure that would not be exceeded by the successful party. In my view therefore, budgeted costs are quite similar to the English equivalent—cost-capping orders, which similarly attempt to allow the parties to set an upper limit of what they believe to be reasonable costs for the nature of the matter. Cost capping orders are provided for in **Part 3.1 (2) (ll) of the UK CPR**[4] under the Court's general powers of management, which allows the Court to *"order any party to file or exchange a costs budget."*

[13] Accordingly, both regimes attempt to achieve the principal aim of effective costs management—to save costs as stated in the **overriding objective**.

Lord Jackson in his report on the **Review of Civil Litigation and Costs in England and Wales**[5] commented on the principle behind effective cost management:

> *"****Effective costs management has the potential to lead to savings of costs and time in litigation****. I recommend that lawyers and judges alike receive*

[3] HCA CV 2005 - 00748
[4] See Part 3.1 (2) (ll) of the UK CPR in the White Book 2014
[5] Final Report, 21st December, 2009

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."

He 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 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****."*

Thus, Lord Jackson, in effect, recommended that the aim of setting costs budgets in England would be to control recoverable costs and encourage access to justice.

[14] With this philosophy in mind, I was and still am of the opinion that applications for budgeted costs should not be filed solely for the basis of achieving increased costs for the successful party. In fact, when one looks at our **Part 67.6 (1) (b) of the CPR**, the parties have available to them an alternative method for seeking higher recoverable costs. It permits a party to apply for a direction that the **prescribed costs be calculated on a higher or lower value**. Such an application is described as an ***"application for costs to be prescribed at a higher level"*** and mandates that Rules **67.8(4) and 67.9** apply.

This provision, i.e. **Part 67.6 (3) of the CPR,** is often misunderstood due to the understandable assumption that an *application for prescribed costs at a higher level* is the same as an *application for budgeted costs*. This is precisely because of the reference to **Part 67.8 (4) (a) and 67.9**. But those referenced provisions clearly deal with acquiring client's consent. Thus, it effectively states that both in *applications for prescribed costs at a higher level* and *budgeted costs*, the client's consent is needed.

Unfortunately, our CPR does not properly differentiate the two applications and as a result, very few, if any, practitioners have made use of the **Part 67.6 application**. In an

attempt to provide some clarity, two notable differences in the wording of the provision in **Rules 67.6** and **67.8** are to be noted and discussed.

The timing at which the application can be made: **Part 67.6** states that an application to set the prescribed costs at a higher level can be made at ***any*** case management conference whereas **Part 67.8** directs that budgeted costs applications be made ***before or at* the *first*** case management conference. This difference is instructive. It means that for budgeted costs, the parties should be able to ascertain from the outset whether the matter has the required novelty or complexity to warrant that a different costs budget be set.

In the **Part 67.6** application, the parties can apply much later in the proceedings. It suggests to me that **Part 67.6** is for matters which, at first blush, may not appear to warrant higher costs, but as the mater progresses, such a realisation becomes apparent.

An example in which this might occur would be in what appears to be a routine action with no novel law or high degree of complexity, but due to changing circumstances or the volume of interlocutory applications filed, the matter becomes drawn out and thus, incurs considerably more costs than a matter with comparable facts/cause of action. Thus, the parties, upon becoming aware of the onerous trend of the proceedings, can make use of the **Part 67.6** application at any of the case management conferences stage to achieve higher costs.

This leads to the second notable and unique feature of the **Part 67.6** application. In particular, at **Part 67.6 (1) (b)** it states:

> *"**Where the likely value is known**, to direct that the prescribed costs be calculated on the basis of some higher or lower value."*

It is not quite clear what circumstances the phrase *"when the likely value is known"* envisions. But, in my interpretation, it suggests a matter where there is a monetary value, yet the claim has not yet stipulated the value to be claimed. Thus, it permits the party to apply to set the value at a higher or lower value than its original estimate.

However, in my experience, when a party knows the likely value of a matter, it is that party's duty to state it in the claim or counterclaim. In such a case, it would be unusual to

expect, for example, a claimant to set a value of say **$50,000.00** in its claim and then be able to later apply to have that value increased because the matter is becoming unexpectedly drawn out etc. Such clarification in the provision is needed to properly guide practitioners. This perhaps, is the primary reason why very little, if any use, has been made of **Part 67.6 (1) (b)** applications.

The other notable difference between the two is that **Part 67.6** applications still come under the rubric of **"prescribed costs"**. Thus, the provisions in **Part 67.5 (4) (a) & (b)** still apply, which allow the Court to have regard to **Part 66.6 (4), (5) & (6)** when applying its discretion as to the amount of recoverable costs to be paid. Thus, the Court must consider (i) the conduct of the parties; (ii) an issue-based approach; (iii) whether it was reasonable for a party to pursue or raise a particular issue; (iv) the manner in which a party has pursued his case, allegation or issue; (v) whether the successful claimant caused the proceedings to be defended by claiming an unreasonable sum; (vi) whether the claimant gave reasonable notice of his intention to initiate the claim, and so on.

Thus, in an application to set prescribed costs at a higher or lower level, the Court has much leeway in determining, after the application is approved, what costs will eventually be awarded to the successful party as the Court retains its discretion under **Part 67.5 (4)**. This, in my view, is not so in a budgeted costs application. Once such an application is made and approved by the Court, there is little to no leeway for the Court to adjust the figure of recoverable costs emanating from that application/Order save for an application made by any of the parties under **Part 67.8 (5)** requesting the Court to vary the terms of a budgeted costs order. This is understandable considering that Budgeted Costs applications require much more proof and detail to be approved. **Part 67.8 (4)** sets out the requirements in the application for a costs budget. By this provision, it is clear that a higher threshold must be met to succeed in a **Part 67.8** application.

Finally, as discussed above, the philosophy of the two applications differ. Although both are underpinned by the overriding objective, the thinking behind budgeted costs is to contain costs and thus, prevent them from soaring too high and out of bounds. Dick Greenslade *ibid* seems to agree. In his report of his investigations into the flaws of our

system under the **Rules of the Supreme Court 1975**[6], he spoke briefly on the objectives for introducing "budgeted costs" in our New Rules as follows:

> *"Each party would have to prepare a budget for the costs of the case. These budgets would have to be presented to the court at the case management conference and a decision would be made there as to the appropriate budget for the case,* ***the successful party would not be able to recover costs in excess of the budget unless he was able to show unforeseen- and unforeseeable- problems****."*

[15] Indeed, such a philosophy is confirmed by English case law. In **Griffiths v Solutia (UK) Ltd**[7], two members of the U.K. Court of Appeal commented upon the power to set costs budgets given to arbitrators by s. 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 wherever appropriate. Section 65 of the U.K. Arbitration Act 1996 permits arbitrators to limit in advance the amount which can be incurred as costs by the parties to an arbitration.

Their Lordships in the panel were of the view that the provision is frequently used and is generally regarded as beneficial in ***creating equality in arms*** because it seeks to prevent a rich party from blackmailing a poorer party by threatening to cause or recover substantial costs. Further, it promotes proportionality by ensuring that costs are proportionate to the amount or value in dispute[8].

Thus, in 2005 the rule contained at **Part 3.1(2) of the UK CPR** was amended to expressly include in the list of powers given to the court, the power to order any party to file and serve an estimate of costs. These "*estimates*" were intended to persuade the judge exercising case management powers to ***set a cap*** on the amount of costs, which one party may recover from its opponents should that party later obtain a costs order in its favour.

[6] Judicial Sector Reform Project: Review of Civil Procedure. 7th May, 1998
[7] 2001 EWCA Civ 736
[8] Para 3.1.8 the White Book 2014 Vol 1.

[16] Given this philosophy and considering the nature and facts of this case, which as analysed below, involve fairly simple facts and issues, I do not think that a **Part 67.8** application for budgeted costs is warranted.

[17] In support, I agree with the Claimant that the material issues in this matter are as follows:

(i) Whether the penalty deduction of 50% of the Claimants' scores in accordance with Rule 10.3 of the Junior and Senior Parade Band Rules and 2.1 of the Senior Parade Band Rules was justified.

(ii) Whether the Defendant has breached the Junior and Senior Parade Band Rules as a result of the improper imposition of the sanction.

(iii) Whether the Claimants breached the Band Rules by failing to use the appeal process and thus are debarred from initiating this action.

[18] None of these issues are issues of fact. For one, the Claimants have agreed that they did not follow the official parade route. Further, the issue of whether the Claimants had underage members in the Bands revolves around an interpretation of the word "*member*" in the respective Band Rules and thus, is an issue of pure law. Lastly, whether or not the Claimants should have used the appeal process is similarly a legal and not a factual issue and concerns an interpretation of the relevant Band Rules. More importantly, each of these issues can be resolved by reference to the Defendant's Band Rules and Regulations along with any relevant case law, which, to my mind, would be limited.

[19] Further, as is seen from the very brief background for this matter, the facts are not at all complex. Additionally, I find that the importance of this litigation is also comparatively low. It is essentially asking whether the Defendant was unfair in its decision to penalise the Claimant. While it may serve to clarify the judging procedure to be used by the Defendant for future events, it is by no means of any significant national or public importance. The parties engage in carnival competitions, which are primarily for entertainment purposes though there are some reward incentives for winning competitions. It affects a very limited section of the population, i.e., members of the bands or those who participate in these competitions. The Claimants claim loss of possible prize money and therefore, even if the Defendant had not penalised them, they inherently admit

that there was no guarantee they would have won the competition. Alternatively, should the Defendant fail, it will not jeopardize its business in any serious way. Rather, a ruling on the substantive matter will only assist it in clarifying its Band Rules.

Thus, I see no basis in the Defendant's submission that the Defendant's reputation is seriously at stake, nor am I at all convinced that any heavy level of preparation will be needed to resolve this matter. In fact, in the entirety of the Defendant's submissions, there is no elaboration on why this matter is as complex and novel as the Defendant contends in its Application.

Thus, even if I were to accept that the proper application in this matter would be for budgeted costs pursuant to **Part 67.8**, I do not find that the Defendant has convinced me that this matter involves the degree of complexity and novelty warranting the Application.

[20] Secondly, there is indeed a monetary value to this claim. However, the amount claimed by the Claimants is not a guarantee of what they would have attained but for the penalization of 50% to their score as explained above. Thus, I think this may be considered a claim in which the Court could, if requested, set a higher value of the claim as stated in **Part 67.6 (1) (b)**, if it is later determined that the matter is incurring more costs than expected.

[21] Thus, even if the Defendant were to be allowed to amend the application and make it pursuant to **Part 67.6 (1) (b) of the CPR**, it would still likely fail because, based on my analysis above, it is premature. For it is only when and if, at a later stage, it becomes clear that the matter has become more complex/weighty than it currently appears, should such an application be made.

[22] Lastly, the Defendant's Application fails for reasons of non-compliance with the relevant Rules. **Part 67.8 (4) (a) of the CPR** requires a **written consent** to filed in accordance with **Part 67.9** with the Application. **Part 67.9 (1) (d)** requires the Defendant to include its client's consent in a separate document and proceeds to list the elements required for this document as follows:

(i) is signed by the lay party;

(ii) deals only with the question of budgeted costs;

(iii) states the attorney's-at-law estimate of what 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;

(v) sets out the basis of that estimate including the amount of any hourly charge.

[23] The written consent filed by David Lopez as Appendix II to the Application fails to meet all these requirements. For one, it does not state what Mr Lopez's attorney's estimate of the prescribed costs appropriate to the proceedings would be in accordance with **Rule 67.9 (1) (d) (iii)**. Secondly, it fails to set out the hourly charge so as to outline the basis of the estimate in accordance with **Rule 67.9 (1) (d) (v)**.

[24] As decided in by this Court in the case of **3G Technologies & ors v Rudranand Maharaj CV2014-02872** delivered on 6th July, 2017, the written consent of the client must comply strictly with the provisions of **Rules 67.8 (4) (a) and 67.9 of the CPR**.

[25] Thus, both procedurally and in substance, I find that the Defendant's Application must fail.

III. Disposition:

[22] Accordingly, in light of the foregoing analyses, the Court orders as follows:

ORDER:

1. **That the Defendant's Amended Notice of Application for budgeted costs filed on the 28th October, 2015 be and is hereby dismissed.**
2. **That the Defendant shall pay the Claimants' 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 Claimants to file and serve a Statement of Costs for assessment on or before the 11th May, 2018.**

4. **The Defendant to file and serve Objections, if any, on or before 1st June, 2018.**

Dated this 22nd day of March, 2018

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Robin N. Mohammed
Judge