THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2019-01972

BETWEEN

SARIM AL-ZUBAIDY

Claimant

AND

KUMAR MAHABIR

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: Friday 19 February 2021

Appearances:

Reah Sookhai instructed by Skeeta John for the Claimant

Anand Ramlogan SC, Douglas C. Bailey, Ganesh Saroop instructed by Ché Dindial

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DECISION ON THE DEFENDANT'S NOTICE OF APLICATION FOR BUDGETED COSTS FILED ON 27 NOVEMBER 2019

I. Introduction and Procedural History

[1] Before the Court is the Defendant's Notice of Application filed on 27 November 2019 for an Order that a costs budget be set for these proceedings.

[2] The Claimant filed a Claim Form and Statement of Case on 9 May 2019. The Defendant filed his Defence on 1 July 2019. The Claimant then filed an Amended

Claim Form and Statement of Case on 30 September 2019. The Defendant was granted permission at the first Case Management Conference ("CMC") on 1 October 2019 to file an Amended Defence. The Amended Defence was filed on 31 October 2019. The first CMC was preserved on the basis that pleadings were not closed, and adjourned.

[3] The Claimant claimed the following reliefs against the Defendant:

a. Damages including aggravated and exemplary damages for defamation;

b. An injunction restraining the Defendant whether by itself and/or its servants and/or agents from further speaking, writing, emailing, broadcasting or circulating or causing to be written, printed or circulated or otherwise publishing of the Claimant the said defamatory words or any similar words;

c. Interest;

d. Costs;

e. Such further and/or other relief as the Honourable Court may deem just.

The Application for budgeted costs

[4] The grounds are set out in the Application as follows:

i. In the event that the Defendant is successful, an order for prescribed costs under **Part 67.5 Civil Proceedings Rules 1998 (as amended)** ("**CPR**") would be grossly inadequate and will bear no relation to the value of the work done, having regard to the complexity of the case and the relief sought by the Claimant since:

(a) The Claim concerns persons who are well-known and conduct work which is inherently public in nature- the Claimant is the President of the University of Trinidad and Tobago (UTT) and the Defendant is a former lecturer at the UTT and is a well-known writer, journalist, and social and cultural activist;

(b) The alleged defamatory publication concerns matters of public importance and interest;

(c) The Claim involves complex legal issues;

(d) If the Claimant is successful, he may obtain a substantial sum in damages, upon which costs will be calculated on the prescribed scale. Conversely, if the Defendant is successful, there will be no value of the claim and costs would be awarded on the nominal value of $50,000.00.

ii. The Defendant is seeking to have costs determined based on the value of the legal work to be conducted rather than the value of the claim under the prescribed costs regime;

iii. The sums in the costs budget application are reasonable and fair having regard to the issues raised in the case, the pre-trial work to be done, and the likely duration of the trial;

iv. In the absence of the costs budget, the Defendant stands to be severely prejudiced if he is successful as costs will be capped at $14,000.00. This would be highly unfair, unreasonable and disproportionate having regard to the complexity of the matter, and the expense of the Defendant to retain Senior Counsel;

v. The Defendant has consented to the costs budget being capped at **$301,950.00 plus VAT**. The Defendant's consent attached as "**A**."

[5] It is also stated in the Application the hourly rates of the Defendant's attorneys-at-law as recommended by the Practice Guide to the Assessment of Costs as amended by the Second Practice Guide to the Assessment of Costs dated 20 October 2015:

vi. Senior Counsel- $4000.00 per hour plus VAT;

vii. Junior Counsel over 5 years but less than 10 years- $1400.00 per hour plus VAT;

viii. Instructing Attorney under 5 years call- $750.00 plus VAT.

A. Breakdown of costs incurred to date:

Attorney fees- $32,050.00

Disbursements- $325.00

B. Breakdown of costs to be incurred:
Attorney fees- $93,100.00
Disbursements- $4,000.00

C. Fees for advocacy, advising or settling any document that are anticipated to be paid to any attorney other than the attorney on record:
Senior Counsel Fee on brief- $100,000.00
Counsel's fee on brief- $75,000.00

[6] These fees include the costs of preparation for and attendance at case management conferences, preparation for examination in chief and cross examination, legal research, preparation of written submissions and submissions in reply, consideration of Claimant's submissions, authorities, and statement of issues, attendance, and representation at the trial and delivery of judgment; a statement of the number of hours of preparation time; and all procedural steps and applications save enforcement proceedings arising out of any Order made by the Court. All disbursements including filing fees, photocopying, tabbing and binding expenses, correspondence, facsimiles etc. are included.

[7] No expert fees will be incurred.

[8] The Claimant's attorney at law filed an Affidavit in response to the Application on 22 January 2020. He stated therein that the law with respect to budgeted costs dictates that such orders ought only to be granted where fixed or prescribed costs would not represent a reasonable amount to be paid for costs of the proceedings because the facts are exceptionally complex, novel and/or weighty. Furthermore, budgeted costs would only be appropriate where there is need for extensive research and legal arguments, numerous interim applications are required to be made and costly testimony is called upon. He stated that as a consequence, the Court reserves budgeted costs for rare complicated matters because to do otherwise would run counter to the philosophy of the costs regime set out in the **CPR**, which is to reduce

costs and ensure that parties are not disadvantaged by their financial position. He also stated that the matters are not at all complex and is one purely of defamation.

II. Submissions

Defendant's submissions filed on 27 February 2020

[9] The Defendant submitted that the Court must have regard to the following possible scenarios, based on the pleaded case of the parties and the likely issues that would flow from it:

(a) Whether the words are in fact defamatory or not;

(b) The seriousness of the allegations complained of i.e. there is a possibility that the credentials of the Claimant may be false, or at the very least, that his qualifications were being questioned and/or investigated;

(c) Whether or not a mere inquiry regarding the veracity of a person's credentials, to his former employees, constitute a maintainable claim for defamation in light of the defence of qualified privilege;

(d) Whether a public official, in this case the head of the country's university, which is funded by taxpayers, is beyond scrutiny and accountability; and

(e) The constitutional and democratic considerations, which flow from the questioning and/or enquiry regarding a public official.

[10] In the Defendant's opinion, the above considerations removes the claim from the realm of a simple, routine defamation claim, and demonstrates aptly its complex nature.

[11] The Defendant went on to submit that the complexity of the case is not the only consideration.

[12] The Court was referred to the case of **Gemma Attale v Michelle Russell Lwiseh**[1], a decision of Mohammed (M) J. In **Attale**, the issues were with respect to lack of testamentary capacity, whether the Will was executed in accordance with the law

[1] CV2016-03339

and undue influence and fraud, which were questions of fact. Mohammed J considered that the issues were not novel and the law was settled but that the claim would have required dedicated preparation by the attorneys at law.

[13] The Defendant submitted that the Defendant relied on the defences of justification, qualified privilege and fair comment, and disputed whether the meanings of the words ascribed to by the Claimant are defamatory at all. According to the Defendant, this would require the Court not only to determine issues of fact in light of the defence of justification, but also, to determine the meanings of the words, whether they are defamatory, and if they are, whether the Defendant has proven them to be substantially true.

[14] The Defendant submits that this would require a considerable amount of work, which will require a high level of skill and competence, since the defence has sought to put the facts into issue, which has to be fleshed out in the witness statements.

[15] The Defendant submits that should the Defendant be successful in this matter, costs in the sum of $14,000.00 would be disproportionately low as this figure does not take into account Senior and Junior Counsel Fee on brief and is merely enough to cover an Instructing attorney's costs for maintaining conduct of the matter.

[16] The Defendant submits that this is a case which ought to be certified fit for Senior Counsel[2] having regard to the nature of the allegations made; the analysis of the law as it relates to publication and re-publication; defences raised; the balancing exercise to be conducted to determine whether the comments made were in line with the Defendant's constitutional right to freedom of speech and expression or if it crosses the threshold to be defamatory; the position held by the Claimant at the material time; the position of the Defendant at the time; the exorbitant amount of public funds required to maintain the Claimant's employment per month; the

[2] The Court was referred to **CV2013-01962 George Nicholas III V Maxie Cuffie & Ors.**

political atmosphere at the time with respect to the Claimant's employment; and the impact of any findings on the Claimant and/or the public interest.

[17] As it relates to the parties being on equal footing, the Defendant submits that he is a former lecturer with no steady form of income commensurate to that of the Claimant, and therefore the parties cannot be said to be on equal footing.

[18] The Court was also referred to a decision of this Court in **Mukesh Sirju & Anor v The Attorney General of Trinidad and Tobago**[3] where the Court dealt with the English equivalent of cost capping orders and the learning of Dick Greenslade in his "Review of Civil Procedure".

[19] The Defendant submitted that there is nothing wrong with costs budgets being used to increase the costs to be traditionally awarded through the prescribed costs regime. In this regard, the Court was referred to the decision of Boodoosingh J (as he then was) in **Parvatee Anmolsingh Mahabir v The Presbyterian Church of Trinidad and Tobago**[4], where he stated that "*The establishment of a costs budget is one of the mechanisms for the parties to determine this issue of costs. It is consistent with the overriding objective to deal with cases justly*." The Defendant concluded on this point that this is so even if the budget seeks to increase the costs to be awarded through the conventional prescribed regime.

[20] The Defendant raised what he deemed to be a further relevant consideration on the issue of costs saving which is that Claimants can institute claims without fear of any significant costs consequence. This may lead to decisions to institute significantly weak cases to stifle voices of critics with no or little prospect of success.

[3] CV2014-03454
[4] CV2014-03459

[21] The Defendant submits that the learning in **Leigh v Michelin Tyre Plc**[5] applies to our jurisdiction. That is, 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 it has become inappropriate due to circumstances that could not reasonably have been foreseen at the time the order was made. In this regard, the Defendant submitted that the Court retains the inherent jurisdiction to vary the sum to be awarded to ensure fairness and proportionality at all times, see **Mahabir** (supra) per Boodoosingh J (as he then was).

[22] In support of the Defendant's position that budgeted costs can be used in matters of significant public interest, the Court was referred to the decision of **The Sports Company of Trinidad and Tobago v Sabastian Paddington & Ors**[6]. In that case, the claim contained a wide public interest component as the issues touched and concerned the fiduciary duties of board members of state enterprises and by extension the expenditure of state funds. Rahim J found it fair and reasonable to set a costs budget.

[23] The Defendant also sought to provide learning of the English jurisdiction on the issue of budgeted costs in defamation proceedings.

[24] The Court was referred to the **Final Report of the Civil Justice Council's Working Group on Defamation Costs**; **Stocker v Stocker**[7]; and **Henry v News Group Newspapers Ltd**[8].

[5] [2004] 1 WLR 846
[6] CV2016-04365
[7] [2015] EWHC 1634 (QB)
[8] [2013] 2 All ER 840

[25] The Defendant referred the Court to the above to show that in England, especially following the **Defamation Proceedings Costs Management Scheme**[9], costs budgets are now highly recommended in defamation proceedings.

[26] In conclusion, the Defendant referred the Court to the decision of **The Attorney General of Trinidad and Tobago v Haleema Mohammed (by her next of kin Crystal Mohammed)**[10] on the utility of budgeted costs. Jamadar and Pemberton JJA speaking strictly obiter, stated therein that "*not enough use is being made of budgeted costs*."

Claimant's submissions in response filed on 29 June 2020

[27] The Claimant submitted that this matter being one for defamation is an area of law, which has been very well explored, despite the Defendant's attempt to paint the illusion that the facts of the matter are complex, weighty and novel.

[28] The issues between the parties have been engaging the attention for some time, and were extensively ventilated by pre-action letter dated 18 February 2019, which the Defendant responded to by letter dated 28 March 2019. These letters assisted the parties in verifying the facts and narrowing the issues. Unfortunately no resolution was arrived at, hence the filing of the instant claim.

[29] The Court was referred to its decisions in **3G Technology Ltd & Ors v Rudranand Maharaj**,[11] and **Razia Lutchmin Elahie v Samaroo Boodoo & Ors**,[12] which dealt with applications for budgeted costs.

[30] The Claimant submitted that the law with respect to budgeted costs dictates that such orders only be granted where fixed or prescribed costs would not represent a reasonable amount to be paid for costs of the proceedings because the facts and

[9] Practice Direction 51D (English CPR)
[10] Civ App S218 of 2018
[11] CV2014-02872
[12] CV2013-01903

issues of law are exceptionally complex, novel and/or weighty. Furthermore, budgeted costs will only be appropriate where there is need for extensive research and legal arguments, numerous interim applications are required and costly expert testimony is called upon. As a result, the Court reserves orders for budgeted costs for rare complicated mattes because to do otherwise would run counter to the philosophy of the costs regime set out in the CPR, which is to reduce costs and ensure that parties are not disadvantaged by their financial positions.

[31] The Claimant submitted that the areas of complexity and weightiness set out in the Defendant's submissions at paragraph 5 does not require extensive research as they have been explored in and out of the jurisdiction.

[32] Throughout the Defendant's submissions, he has made it clear that if he is successful, prescribed costs would be grossly inadequate. His application therefore seems to be on the sole purpose of securing higher costs via budgeted costs.

[33] The Claimant submits that it is public knowledge that he has resigned his position and is unemployed. However, whilst the Defendant seeks to claim that he is unemployed, he is an active journalist constantly writing articles for Indo-Caribbean Publications and the Sunday Today Newspaper. It is therefore unfitting for the Defendant to use the overriding objective of the CPR as a shield, to protest that parties are on unequal footing, when he is gainfully employed.

[34] While it is the Defendant's right to retain Counsel of his choosing, it is questionable why he requires a team of four attorneys to defend him, if he knows that his financial position does not afford him a retainer of four attorneys, inclusive of Senior Counsel.

[35] The Claimant submits that a review of the Defendant's figures in his Application are highly unreasonable and grossly overstated. He therefore, opposes the

Application as the fees are not only unreasonable but also inflated and disproportionate having regard to the circumstances of the case.

[36] The Defendant filed submissions in reply on 3 August 2020, stating that the Claimant filed no legal basis for the assertion that the estimated costs were highly unreasonable and grossly overstated; and that if the Court approves the costs budget, the issue of proportionality and reasonableness will be determined by an item-to-item assessment.

III. Issues

[37] The following are the main issues with regard to the application for a costs budget:

(a) Are budgeted costs appropriate for these proceedings? and

(b) Does the Defendant's Notice of Application for budgeted costs meet the requirements of Rules 67.8(4)(a) and 67.9 of the CPR?

IV. Law and Analysis

(a) Are budgeted costs appropriate for these proceedings?

[38] **Part 67.8 of the CPR** states as follows:

> *"(1) A party may, however, apply to the court to set a costs budget for the proceedings.*
>
> *(2) An application for such a costs budget must be made at or before the first case management conference.*
>
> *(3) The application may be made by either or both parties but an order setting a costs budget may not be made by consent.*
>
> *(4) ……..*
>
> *(5)……."*

[39] This Court has dealt with the issue of budgeted costs in numerous matters.

[40] In **Mukesh Sirju & Anor v The Attorney General of Trinidad and Tobago**[13], the Claimant brought an Application for budgeted costs. The ground of the Application was that prescribed costs were highly insufficient in that they were too low. The Claimant was thus attempting to secure higher costs via the mechanism of budgeted costs.

[41] This Court dealt with the issue of whether on a true reading/correct interpretation of the **CPR,** this ought to be the purpose for which the vehicle of budgeted costs is to be utilised.

[42] This Court quoted Greenslade, the initial draftsman of the **CPR**, in his report "**Review of Civil Procedure**:"

> *"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]

[43] The Court considered the English approach under the English **Civil Procedure Rules**, where there was, at that time, no equivalent to budgeted costs[14] but provided for the concept of "prospective cost cap orders."

[44] I concluded 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, and 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

[13] CV2014-03454 delivered on 3 November 2015
[14] Budgeted costs have now been introduced as part of the costs regime in the English CPR

purpose to prospective costs cap orders in England- their purpose being to set parameters for costs and prevent them from soaring disproportionately.

[45] This Court differed with Greenslade as to the purpose of a budgeted costs application in so far as he suggests that the underlying purpose is to recover greater costs. However, on the application before the Court, I found that even if one adopts Greenslade's view of the rationale behind budgeted costs, the Claimant's application would still be unsuccessful. This was because Greenslade suggests that such orders would be available in matters where recoverable costs would be disproportionately low in light of the complexity of the matter. The Claimant would have been 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].

[46] **3G Technology Ltd & Ors v Rudranand Maharaj**[15] was another matter considered by this Court for a budgeted costs order. The Defendant had made his application on the ground that it is fair and reasonable to set a Costs Budget and not to calculate costs in accordance with the prescribed costs regime since the latter would not have adequately provided for the costs of the claim. He based this on the importance of the matter to the Defendant, the complexity of the case and the number of hours spent on preparation thus far. It follows that the instant claim was vastly different from **Mukesh Sirju** since the purpose of the application was not made merely on the ground that prescribed costs are grossly insufficient.

[47] In finding that budgeted costs would be appropriate, I stated:

> *"**14. In my view, the present application made by the defendant outlines the accurate reasoning in line with the purpose of budgeted costs. I do not think that the defendant has made the application simply to claim higher costs but to control and contain costs, but more particularly, to be reasonably***

[15] CV2014-02872 delivered on 6 July 2017

compensated for costs duly incurred in this matter. *Budgeted costs are often used in proceedings involving* ***novel or complex points of law as well as lengthy and cumbersome procedures****. In these types of case,* ***parties are often engaged in lengthy arguments, several applications and extensive research****.* ***In my opinion, this claim could be considered complex since it will involve the examination of many different statutes and laws to determine the validity of the receiver's appointment, especially in light of the relatively new BIA and the question as to whether its provisions are applicable at all to these proceedings****. This claim was initiated on the 7th August, 2014 and to date five interim applications have already been made by various parties. I am of the firm view that this claim is complex and will inevitably be lengthy in procedures. Accordingly, budgeted costs would be an appropriate basis to set parameters for costs and prevent them from soaring disproportionately."*

[48] In **Rosalind Gabriel Carnival Productions Limited & Anor v National Carnival Bands Association of Trinidad and Tobago**[16], after reviewing authorities submitted by the Defendant in support of its application for budgeted costs, I stated, *"…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."*

[49] I stated at paragraph 14 that, *"…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."*

[16] CV2015-00148 delivered on 22 March 2018

[50] In **Razia Lutchmin Elahie v Samaroo Boodoo & Ors**[17] the Defendant was granted leave to file an application for budgeted costs. The budgeted costs order was dismissed on the basis that it was made retrospectively, but even if it was made in the appropriate time, it would have failed as it was premised on the basis that prescribed costs would be "grossly inadequate."

[51] The Court quoted Lord Jackson in his report **Review of Civil Litigation and Costs in England and Wales**[18] where he 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 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.**"*

[52] 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. This strengthens my opinion that applications for budgeted costs should not be filed solely for the basis of achieving increased costs for the successful party.

[17] CV2013-01903 delivered on 16 January 2019
[18] Final Report, 21 December 2009

[53] On the point of cost cap orders in England, where the parties are required to file costs estimates in much the same way as the statement of costs in budgeted costs application in this jurisdiction, I noted the principle may best be explained by reference to the case of **Griffiths v Solutia (UK) Ltd**.[19] 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).

[54] In **Leigh v Michelin Tyre Plc**[20] 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 it has become inappropriate due to circumstances that could not reasonably have been foreseen at the time the order was made.

[55] I again concluded that 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.

[56] At paragraph 33, I stated:

[19] (2001) 1 Costs L.R
[20] [2004] 1 WLR 846

"The paramount objective of budgeted costs (as rationalised in paragraphs 21 - 28 above) is to properly account for the recoverable costs of a party by projecting what those costs are likely to be and thereafter setting a budget realistic to the nature of the proceedings, ensuring always that parameters are set in order to prevent costs from soaring disproportionately. Budgeted costs are often used in proceedings involving novel or complex points of law as well as lengthy and cumbersome procedures. In these types of case, parties are often engaged in lengthy arguments, several applications and extensive research."

[57] I continued at paragraph 37:

"Budgeted costs are often used in proceedings involving novel or complex points of law as well as lengthy and cumbersome procedures. In these types of cases, parties are often engaged in lengthy arguments, several applications and extensive research. In my opinion, the instant claim is not considered to be complex since it is a routine action in possession and ownership of a right of way/road reserved. There is nothing on the facts as alleged which suggests, by any stretch of interpretation, that the case ought to be placed in the category of a complex, novel or complicated matter. Accordingly, I am of the view that a Part 67.8 application for budgeted costs is not warranted and is not appropriate to these proceedings."

[58] I have reiterated the decisions of this Court ranging from the year 2015 to 2019 to show what the Court's view of budgeted costs has been, and continues to be. Since delivery of the judgments noted above, there has been no amendments to the particular Parts of the **CPR** dealing with budgeted costs. I say that unless and until there are amendments, which deal directly, or indirectly with budgeted costs, or which explicitly state the conditions under which the Court is to grant a budgeted costs order, the view of this Court remains the same. Since delivery of the above judgments, there have also not been any decisions of the higher Courts, which have set out any contrary opinion, or conditions for the lower Court's discretion in granting budgeted costs order. Defence counsel's reference to the obiter dicta of

Jamadar and Pemberton JJA in **The Attorney General of Trinidad and Tobago v Haleema Mohammed (by her next of kin Crystal Mohammed)**[21] where it was stated that "*not enough use is being made of budgeted costs*" can only be construed as meaning that more use should be made of the utility of budgeted costs ***in appropriate cases.***

[59] Accordingly, the Defendant's application for budgeted costs will be considered in light of the decisions above.

[60] The application of the Defendant states that the Defendant is seeking to have costs determined based on the grossly inadequate sum in prescribed costs if he is successful, as well as the value of the legal work to be conducted rather than the value of the claim under the prescribed costs regime.[22] The application went on to state that in the absence of a budgeted costs order, the Defendant stands to be "severely prejudiced" if he is successful as his award of costs will be capped at $14,000.00.[23]

[61] The Defendant is his application stated that the matter was inherently public in nature as the UTT is funded by taxpayers, and so the Claimant's office is accountable to the citizens. He also stated that the defamatory publication touches and concerns matters of public importance and interest. He further stated that the matter gives rise to a number of complex legal issues, including the right of freedom of expression and the issues of online publication in defamation matters, and that of information being privately communicated to specific persons for the limited and legitimate aim of investigation and/or to ascertain information, which the Claimant is seeking to establish as publication in defamation. He went further to state that it is quite a novel case in this jurisdiction as issues of fair comment on

[21] Civ App S218 of 2018
[22] Paragraph 2
[23] Paragraph 4

a matter of public interest and qualified/Reynold's privilege would be fully explored.

[62] To determine whether I am to grant the Defendant's application, I must consider the pleadings before me.

[63] The Claimant's Amended Claim Form states that he seeks damages and an injunction against the Defendant from publishing defamatory words against him. His Amended Statement of Case provides that the Defendant wrote by way of email dated 17 February 2019, to the Dean of the School of Engineering Nazarbayev University in the Republic of Kazakhstan, his former place of employment, and forwarded to the Faculty of Engineering, requesting information on him and stating that he was under investigation for apparently having false credentials and administrative misconduct. The Defendant included in the said email an article published online at http;//indocaribbeanpublications.com.

[64] Past colleagues and friends from the Faculty of Engineering immediately reached out to him by virtue of email to inform him that members of staff and/or the entire Faculty had received the email and its contents.

[65] The contents of the email was also forwarded to the Deputy Chairman of the Board of Governors of UTT by certain members of staff, explaining that the Defendant had approached almost all members of staff with regards to its contents.

[66] In his Amended Defence, the Defendant admitted to sending the email dated 17 February 2019, to the Dean and Faculty members, and to the contents of said email. The Defendant raised the defence of justification, and Reynold's privilege, as well as provided particulars of public interest and fair comment.

[67] The law of defamation is well settled in this jurisdiction and has been traversed repeatedly by the Courts. The Defendant's application states that the instant case

raises a number of complex legal issues. I have great difficulty in agreeing with him. The Claim as pleaded and the Defence, do not in my opinion give rise to any issues which are worthy of being labelled complex. The case also does not raise any novel points of law. The defences of the Defendant are also not new to this jurisdiction and have been dealt with by all levels of the judiciary in this jurisdiction, and other persuasive Commonwealth jurisdictions, from which our Courts have always sought guidance.

[68] The case at bar is a straightforward case which requires a determination on whether the law of defamation has been satisfied. Nothing more, nothing less. I therefore do not find myself in agreement with the Defendant that the instant case is one of a complex and novel nature.

[69] The Defendant referred the Court to the case of **Attale** (supra) where Mohammed (M) J found that although the issues were not novel and the law was well settled, the claim would have required dedicated preparation by the attorneys at law. It is noteworthy that this case involved issues of lack of testamentary capacity, whether the Will was executed in accordance with the law and undue influence and fraud.

[70] **Attale** is to be considered on its own facts, which I find are not comparable to those at bar. Matters contesting a Will on the grounds of testamentary capacity and fraud almost always require a degree of dedicated preparation by attorneys at law, as the maker of the Will is not present. In the case at bar, both parties are present and available, and there is no issue of intention and fraud to be proven. The evidence required to prove fraud in a probate matter is considerably different and more intricate than is required in a matter for defamation.

[71] The Court also does not agree that the case of **Sebastian Paddington** (supra) is applicable. As stated by the Defendant, that case involved a case by a state enterprise against its entire Board of which the Defendants were members. The claim was brought against 14 individuals and concerned their capabilities,

responsibilities and duties as former directors. The Court found that the case raised important public issues of accountability of state boards. Rahim J held that there were very serious allegations, which required full scrutiny and determination.

[72] The instant case does not concern the duties and accountability of the Claimant to anyone. The Claim was brought by the Claimant against the Defendant for defamation, and that is the only matter which this Court is tasked with addressing.

[73] There is no evidence before me to conclude that the Claimant is directly accountable to citizens or to show a direct link between his office and any responsibility to the citizenry. As far as his employment is concerned, he is accountable to the UTT as his employer. Even if the issues touch and concern public importance and interest, the matter at bar is not concerned with what accountability if any, he has to the citizenry. The Claim before me is one of defamation, and so I am tasked with determining whether on the facts and evidence to be presented, the Defendant defamed the Claimant. Deciding that the Claimant is accountable to the citizens, would mean stepping into the political and organisational structure of the UTT. In doing so, I would be overstepping my limits.

[74] The Defendant also submitted that he is not on equal footing with the Claimant since he has no steady form of income. However, at paragraph 1(a) of his application, he stated that he is a well-known writer, journalist, and social and cultural activist. At paragraph 3 of his Defence, he further averred that he is a newspaper and magazine journalist, the author of a dozen books, and researcher and presenter at local, regional, and international conferences.

[75] To my mind, when the Court considers whether parties are on equal footing, the Court is not looking at an exact quantification of each party's financial well-being. Instead, the Court is concerned with whether the parties have the resources to bring or defend their case as is applicable, so as not to be disadvantaged. While some

degree of comparison between the party's resources is inevitable, bearing in mind the numerous titles the Defendant has labelled himself with, including author of a dozen books, I have difficulty in agreeing with this submission. While I form no conclusion on whether he has a steady income commensurate with that of the Claimant, it would appear that he is certainly not penurious.

[76] On the Defendant's ground of the value of the legal work to be conducted, I see no basis for ruling that this is indeed a case where the preparation and skill required to defend, is over and above that required in other defamation cases, particularly where Senior Counsel is involved with Junior and Instructing Attorneys. What may be required is research relevant to the facts of the instant case. However, that is applicable to all types of legal matters and is not some new phenomenon.

[77] Despite the Defendant including in his application grounds of complexity and public importance, and that the application is based on the value of the legal work to be conducted, he stated numerous times in his application and written submissions, that should he be successful, prescribed costs will be *severely prejudicial, grossly inadequate, unjust, unfair, unreasonable and disproportionate or disproportionately low.*

[78] This Court is of the opinion that the Defendant's application and written submissions were carefully drafted following thorough research on the circumstances in which the Court is likely to grant an application for budgeted costs. The aim of this was to construct an application encompassing a multi-faceted approach, which incorporated multiple possible situations for which such an order would be made. It was clear that this was an attempt to seek to convince the Court that this was a ripe case for a budgeted costs order to be granted, as the application was one not drafted solely on the insufficiency of prescribed costs.

[79] However, a reading of the pleadings and submissions does not convince this Court that this was indeed a complex or novel case. The Claim revolves around the issue

of defamatory comments/writings made by the Defendant against the Claimant. The law on defamation proceedings are well traversed and settled in this jurisdiction, and this case does not include any issues which are to be regarded as novel.

[80] While the Claimant at the material time was attached to a public university, this Court is not convinced that this case is truly one containing a public interest element. The surrounding issues which the Defendant sought to convince this Court, as being of public importance, particularly the politics at the UTT at the time does not have an immediate bearing on the Claim against the Defendant. The issue for determination is whether the Defendant defamed the Claimant. This Court, based on the pleadings, will not be tasked with assessing whether the Claimant has breached any duties aligned to his office. Any issue of public accountability is not before this Court.

[81] In conclusion, I am of the opinion that on a true interpretation and construction, the application by the Defendant, was one which was based solely on the insufficiency of prescribed costs, but was disguised under an all-encompassing application.

[82] I reiterate what my view of budgeted costs has always been, that is, 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. I am not convinced that the aim of the Defendant's application was to control or contain costs. I am also not convinced this case is one, which requires any lengthy arguments, numerous applications and extensive research.

[83] In the circumstances, I rule that the instant matter is not one for which a budgeted costs order ought to be granted.

[84] In the Defendant's written submissions, he submitted that there is nothing wrong with costs budgets being used to increase the costs to be traditionally awarded through the prescribed costs regime. Perhaps, the Defendant was not made aware of any alternatives available to him or was under a misunderstanding of the **CPR**.

[85] As I stated in the cases above, in which this Court has dealt with applications for budgeted costs, the Defendant had available to him an alternative method for seeking higher recoverable costs pursuant to **Part 67.6 CPR**, that is, to seek an order for costs to be **prescribed at a higher level**.

[86] **Rule 67.6** of the **CPR** concerns applications to determine the 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. 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.

[87] This avenue could have been explored by the Defendant, and even included in his application as an alternative.

[88] On a final point raised by the Defendant, which is the approach of the English Courts to budgeted costs in defamation proceedings, I say very briefly that I see no

deterrent to budgeted costs being applicable to defamation proceedings in this jurisdiction. However, as noted above, this is not a suitable case for such an order.

(b) Does the Defendant's Notice of Application for budgeted costs meet the requirements of Rules 67.8(4) and 67.9 of the CPR?

[89] Having concluded that this is not a suitable case for a budgeted costs order, there is no need for me to consider this issue in any detail. However, for the sake of completeness, I will consider whether the application met the requirements of the **CPR**.

[90] **Part 67.8(4) CPR** states:

*(4) An application for a costs budget **must** be accompanied by—*

*(a) **a written consent from the client in accordance with rule 67.9**;*

(b) a statement of the amount that the party seeking the order wishes to be set as the costs budget; and

(c) a statement showing how such budget has been calculated and setting out in particular—

(i) the hourly rate charged by the attorney-at-law (or other basis of charging);

(ii) a breakdown of the costs incurred to date;

(iii) the fees for advocacy, advising or settling any document that are anticipated to be paid to any attorney-at-law other than the attorney-at-law on record;

(iv) the disbursements other than expert witness fees that are included in the budget;

(v) the anticipated amount of any expert fees and whether or not such fees are included in the budget;

(vi) a statement of the number of hours of preparation time (including attendances upon the party, any witnesses and on any other parties to the proceedings) that the attorney-at-law for the party making the application has already spent and anticipates will be required to bring the proceedings to trial; and

(vii) what procedural steps or applications are or are not included in the budget.

[91] **Part 67.9(1) CPR** provides that the Court **may not make an order for budgeted costs unless** there has been filed a document recording the express consent of the lay party[24]…and that consent should be in a **separate document** which:

(i) is signed by the lay party;

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

(iii) states the attorney-at-law's 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.[25]

[92] The **written consent of the Defendant, Kumar Mahabir was annexed as "A"** to the Notice of Application. The consent was signed by the Defendant. However, as stated in **Sirju** (supra):

"The written consent of the Defendant, Samaroo Boodoo annexed and marked "B" to the Amended Application, while it contains his signature, the requirements under ***Part 67.9(1)(d) of the CPR*** *were not fully complied with.* ***The written consent was not a separate document filed into Court; it was annexed to the Amended Application."***

[93] The written consent as stated above was annexed to the Notice of Application. Rule **Part 67.9(1)(d) CPR** requires that consent should be in a **separate document. Rule 67.9(2) CPR** provides that the written consent of the client must not be disclosed to the other party.

[24] Rule 67.9(1)(c) CPR
[25] Rule 67.9(1)(d) CPR

[94] This Court is therefore bound to rule that there was not adherence to **Rule 67.9(1)(d) CPR**, and accordingly the requirement to file the written consent in a separate document was not adhered to.

[95] As decided in **3G Technologies** (supra), the written consent of the client must comply strictly with the provisions of **Rules 67.8(4)(a)** and **67.9** of the **CPR** before the Court can consider making any order for budgeted costs: [see **Rule 67.9(1)**]. Accordingly, the written consent of the Defendant in the instant application is deficient and if budgeted costs were appropriate to these proceedings, the application would have been dismissed for failing to comply with the requirements of the specified Rules.

[96] Therefore, even if the Defendant's application succeeds in substance, it must fail procedurally.

V. Prescribed costs pursuant to Rule 67.5(2)(b) CPR

[97] While I have ruled that this is not a case appropriate for budgeted costs, the Court remains mindful that should the Defendant be successful, the award of costs would not be commensurate with defending the amount the Claimant would be entitled to recover in the event that the Claimant is successful.

[98] In this regard, the Court is prepared to provide a fair balance between the parties as it relates to costs.

[99] Since there is no monetary value calculable on the face of the Claim, **Rule 67.5(2)(b)(ii) CPR** is relevant. This Rule provides:

> "*67.5 (2) In determining such costs the "value" of the claim shall be decided—*
>
> *(b) in the case of a defendant—*
>
> *(ii) if the claim is for damages and the claim form does not specify an amount that is claimed, by such sum as may be agreed*

between the party entitled to, and the party liable for, such costs or if not agreed, a sum stipulated by the court as the value of the claim;"

[100] It is clear that the Claimant's case is one for damages for which the Claim Form does not specify an amount claimed. In this regard, this Rule gives the parties the opportunity to agree on the sum failing which the court can stipulate a sum as the value of the Claim

[101] Kokaram J (as he then was) made the following observations about costs and the prescribed costs regime in **Denisha Mayers v Andy Wilson and Colonial Fire and General Insurance Company Limited**[26] at paragraph 7:

- *"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.*

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- *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.""*

[102] Unlike **Rule 67.6**, no application is necessary under **Rule 67.5(2)(b)(ii)**.

[103] Therefore, I am satisfied that it would be a proper use of the Court's discretion as it relates to costs, to have the parties in this matter seek to agree on the value to be attached to the claim pursuant to **Rule 67.5(2)(b)(ii)**.

[104] By so doing, the parties would know the claim they are to meet as *"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."* This approach would also ensure the Overriding Objective of the CPR is adhered to.

[105] In the event the parties are unable to agree on a value, the Court has the power under **sub-rule (2)(b)(ii)** to stipulate a sum to be attached as the value of the claim. Put another way, the Court has the power to conduct a *de facto* assessment of damages to determine the likely award in the event the Claimant is successful. This would be the amount the Defendant would be defending and so his costs could be calculated on that amount in the event he succeeds.

[106] This decision ought not to prejudice either of the parties, as the Court still retains the discretion pursuant to **Part 66.6(4)-(6)** as well as **Part 67.5(4) CPR**, to make adjustments to entitlement as well as quantification of recoverable costs.

VI. Costs

[107] Having decided against the Defendant on the Notice of Application for Budgeted Costs, the logical order on the entitlement of costs of such applications would be that the Defendant pay the Claimant's costs thereof, **Rule 66.6(1) CPR**. There are no special circumstances, which justify the Court not making such an order. In any event the other options available to the Defendant, as highlighted in this judgment, should have been explored instead of applying for budgeted costs, in the face of clear authority.

VII. Disposition

[108] Accordingly, in light of the foregoing analyses and findings, the Court orders as follows:

ORDER

1. **The Defendant's Notice of Application for Budgeted Costs filed on 27 November 2019 be and is hereby dismissed.**

2. **The Defendant shall pay to the Defendant costs of this Application to be assessed in accordance with CPR Part 67.11, in default of agreement.**

3. **In the event that there is no agreement, the Claimant to file and serve a Statement of Costs for assessment on or before 16 April 2021.**

4. **The Defendant to file and serve Objections, if any, on or before 7 May 2021.**

5. **The parties to file an agreed statement of the value to be attached to the Claim pursuant to CPR Part 67.5(2)(b)(ii) on or before 19 March 2021.**

6. **Should the parties not agree on the value to be attached to the Claim, both parties to file and serve written submissions with authorities as to an appropriate sum to be stipulated by the Court as the value of the Claim, on or before 16 April 2021.**

7. **The matter is adjourned to the 7 May 2021 at 11:00am in courtroom SF09 for a case management conference.**

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Robin N. Mohammed
Judge