THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2012-00790

BETWEEN

BRYAN ST. LOUIS
JOSEPH REMY

Claimants

AND

LISA FERREIRA
EDGHILL MESSIAH

On their own behalf and on behalf of all those Managers and Professionals employed by TSTT who were made Members of the TELCO Pension Plan in 2011-2012

Defendants

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. D. Mendes S.C. leading Mr. M. Quamina instructed by Mr. G. Goopeesingh for the Claimants.
Mr. M. Daly S.C. leading Mr. C. Sieuchand for the Defendants

Judgment

Background

1. The present proceedings were commenced on the 27th February 2012 by Claim Form and Statement of Case, whereby the Claimants sought certain declaratory and injunctive relief. On the same date the Claimants filed a Notice of Application seeking an interim injunction, which, the court granted and adjourned its hearing until a later date. The injunction was by consent continued until trial.

2. Though the application was eventually carded to be heard on the 10th April 2013, the parties reached a consensual position and a consent order was entered on the 8th May 2013.

3. The Defendants agree that the Claimants are entitled to costs of the claim and the application, however, the issue of quantum stands to be determined by the court.

Costs on the Claim

4. The Defendants and the Claimants are in agreement that the costs of the claim are to be quantified on the prescribed basis and further that the claim was not a claim for a monetary sum.

5. The Defendants submitted that the claim ought to be assessed as a claim for $50,000.00, pursuant to Rule 67.5(2)(b)(iii). It was contended by the Defendants, that at no time at a case management conference was an application made pursuant to Rule 67.6 to determine the value of the claim for the purpose of prescribed costs, Consequently the Defendants maintained that the claim must be treated as one for $50,000.00.

6. The Claimants on the other hand submitted that Rule 67.6 provides that a party **may** apply to the court at a case management conference for the value to be determined, but it

does not, as is the case with a budgeted costs application, provide, that such an application **must** be made at or before **the first** case management conference. Thus, the Claimants contended that there is no limitation on when the application can be made and submitted that the court ought to allow for an application to be made at this stage to determine the value of the claim for the purposes of prescribed costs. In this regard, the Claimant contended that a value of $750,000.00 be applied.

7. The court will deal first with the Defendants' submission. Rule 67.5(2) provides:

> *In determining such costs the "value" of the claim is to be decided -*
>
> *(a) **in the case of the Claimant**, by the amount agreed or ordered to be paid;*
>
> *(b) in the case of the Defendant –*
>
> *(i) by the amount claimed by the Claimant in his Claim Form or;*
>
> *(ii) if the claim is for damages and the claim form does not specify an amount that is claimed, such sum as agreed between the party entitled to, and the client liable to such costs or if not agreed a sum stipulated by the court as the value of the claim; or*
>
> *(iii) if the claim is not for a monetary sum it is to treated subject to rule 67.6 as a claim for $50,000.00*

8. In the instant case, the Claimants were the successful parties. Thus, the provisions of 67.5(2)(b) are inapplicable to this case, as it provides specifically for when the Defendant is the successful party. A value of $50,000.00 therefore cannot be attributed to this claim as proposed by the Defendants as this is an option available only where the Defendant is the successful party and the claim is not for a monetary sum: see ***Denisha Mayers v Andy Wilson and Colonial Fire and General Insurance Company Limited***. ***BY ANCILLARY***

***CLAIM: Andy Wilson (ancillary claimant) v Farmers Supermarket Limited (first ancillary defendant); Denisha Mayers (claimant/second ancillary defendant); Maritime General Insurance Company Limited (third ancillary defendant)* H.C.3655/2011. CV.2011-03655; *Ed Jacob and Leisl Polar* v *Rajkumar Samlal* H.C.454/2005. H.C.1654/2005**.

9. In accordance with 67.5(2)(a) as no amount was agreed between the parties to be the value of the claim, it is therefore the duty of the court to determine the value of the claim and to so order the Defendant to pay: ***Ed Jacob and Leisl Polar* v *Rajkumar Samlal* (supra)**.

10. Turning to the Claimants' submission, the case of ***Denisha Mayers* v *Andy Wilson and Colonial Fire and General Insurance Company Limited* (supra)** provided assistance. At para 15 of the judgment Kokaram J explained:

> *15. Finally I deal with the Claimant's argument that the Defendants are not entitled to treat the Claim as more than a claim for $50,000.00 if it had not made an application for an assessment of the value of the claim pursuant to rule 67.6. I make the following observations about a rule 67.6 application:*
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> > *(a) A rule 67.6 application is made in two distinct cases. First where the case has no monetary value, which is not the case here. Second where the "likely" value is known and the party wishes to have the prescribed costs calculated at a higher or lower value. This second category captures a claim in damages. Both scenarios do not apply to a claim for a specific or ascertained sum of money. A party in that type of claim may simply have to consider making an application for budgeted costs to avoid the consequences of a strict application of the prescribed costs regime.*
> >
> > *(b) The rule 67.6 application may be made at a CMC.* ***The language of the rule 67.6 (1) as to when the application is made is permissive. It is***

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

(c) Importantly the only basis on which a party will make a rule 67.6 application "where the likely value is known" is if it seeks an order that the prescribed costs should be calculated on the basis of some higher or lower value. The party in that instance has an idea of what the value of the claim is and thinks either that the prescribed costs on that value is too low or too high, taking into account the party's likely expenditure in litigation. In the instant claim for damages both parties had exchanged their respective advice on quantum and it is clear that they both knew the "likely value" of the claim. They were therefore satisfied, in my view, that an approach to the Court before the trial was unnecessary as that likely value in their mind is a satisfactory basis upon which to calculate the prescribed costs.

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

[Emphasis mine]

11. In the court's view, the position in relation to 67.6 thus is that while the section does not mandate that the application be brought at a CMC, surely, it does not allow it to be brought after trial of the issues. In this case, though there has been no trial, in effect, the consent order operates in much the same way; the issues have been determined by consent in practically the same way that a trial determines the issues. The point is that an application ought not to be brought **after** the issues are finally determined. This to the court's mind goes against the grain of the overriding objectives.

12. The court will not therefore entertain an application at this stage to determine the value of the claim.

13. Rule 67.5(2)(a) confers a discretion on the court in making on order of costs. In exercise of this discretion, the court ought to seek to further the overriding objective. Thus as it related to this case the court considers the (i) importance of the case (ii) complexity of the issues. With regards to the importance of the case the court notes that the claim involved a determination of rights that would have affected the entitlement to vote and by extension participate in the process of administering a pension fund encompassing a wide range of persons in the telecommunication sector. The court also considered that the matter involved somewhat complex issues calling for an interpretation of the Rules of the TELCO Pension Plan and the powers thereunder.

14. Thus the court therefore considers that the costs to be ordered be determined on a value of $250,000.00.

15. The prescribed costs on this value is $46,500.00. Taking into consideration Appendix C which prescribes the percentage to be allowed at various stages of a claim, the court will award 75% of the prescribed costs. The court therefore finds that the Defendant is to pay to the Claimant prescribed costs in the sum of **$34,875.00**.

Costs on the application

16. It was submitted on behalf of the Claimants that the costs in relation to the application ought to be in accordance with Rule 67.11. Thus, the Claimants submitted that this was an application which involved Senior Counsel and saw the exchange of affidavits on both sides. Further, that it involved the interpretation of Pension Rules and the application of those rules insofar as the powers of the secretary to the pension plan, membership and management of the plan is concerned. Additionally, it was submitted that the application was an urgent one, and consequently the Claimants suggested assessed costs in the amount of $75,000.00.

17. The Defendants, on the other hand, submitted that Rule 67.11 provides for the assessment of costs in the case of procedural applications. However, it was contended by the Defendants that the application was not procedural in nature as it sought a substantive remedy which said relief was claimed in the Claim. Thus, the Defendants submitted that the costs of the application should be quantified in accordance with the Scale of Prescribed Costs and, that this sum should be quantified in the sum of $10,500.00 subject to a reduction as result in the overlap between the issues in the application and the Claim.

18. The court does not agree with the Defendants that the application was not a procedural application. While the Claimants did claim injunctive relief in the substantive claim, an

interim injunction was the subject of the application. This application was made by way of notice of application filed on the 27th February 2012. The application was not made at a CMC, pre-trial review or at trial. Thus, the costs of the application falls to be determined with reference to Rule 67.11.

19. This was an application which involved Senior Counsel and saw the exchange of affidavits on both sides. It involved the interpretation of Pension Rules and the application of those rules insofar as the powers of the secretary to the pension plan, membership and management of the plan is concerned. The court has also considered that the application was an urgent one.

20. Further, the record shows that the interim injunction was granted on the 27th February 2012 without a hearing. It means that attorneys for the Claimants were not required to appear before the court.

21. The costs on the application are therefore assessed as follows:

Instructing Attorney - $1000.00 / hr	
Preparation - 7 hrs	$7,000.00
Junior Counsel - $1200.00 /hr	
Preparation - 5 hrs	$6,000.00
Senior Counsel - $3500.00 / hr	
Preparation - 5 hrs	$17,500.00
Total costs on application	**$30,500.00**

22. The award of the court is therefore as follows:

i. The Defendants shall pay to the Claimants 75% of the prescribed costs of the Claimants in the sum of $34,875.00;

ii. The Defendants shall pay to the Claimants the costs of the application dated 27th February 2012 assessed in the sum of $30,500.00.

Dated this 15th day of May, 2013

Ricky Rahim

Judge