

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV2015-00720**

BETWEEN

NEELA SAWH

Claimant

AND

AMERICAN LIFE AND GENERAL INSURANCE COMPANY (TRINIDAD & TOBAGO) LIMITED

First Defendant

MARK BARTLET trading as

BARTLET HAULAGE

Second Defendant

MARITIME GENERAL INSURANCE COMPANY LIMITED

Third Defendant

SANJA RAMJATTAN

Fourth Defendant

**SHAWN MC SWEEN trading as
"FULLY LOADED SOUND SYSTEM"**

Fifth Defendant

AND BY ANCILLARY CLAIM

Between

**MARK BARTLET trading as
BARTLET HAULAGE**

Ancillary Claimant

And

**SHAWN MC SWEEN trading as
"FULLY LOADED SOUND SYSTEM"**

Ancillary Defendant

AMERICAN LIFE AND GENERAL INSURANCE COMPANY (TRINIDAD & TOBAGO) LIMITED

Ancillary Co-defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: December 13, 2019

Appearances:

Claimant: Mr. L. Sanguinette instructed by Mr. T. Dassyne

Second Defendant: Mr. A. Hosein instructed by Ms. K. Manohar-Gokool

Third Defendant: Mr. R. Persad instructed by Ms. S. Parsad

Fourth Defendant: Mr. I. Ali instructed by Ms. Nalini Bansee

REASONS FOR DECISION ON COSTS

1. By Claim Form filed on March 6 2016, the claimant claimed damages and consequential loss as a result of negligence of the second, fourth and fifth defendants.

2. On May 6, 2016 the claimant was granted permission to discontinue her claim against the first defendant. On March 11, 2016 judgment in default of defence was entered against the fifth defendant. By Notice of Discontinuance filed on December 17, 2015 the ancillary claimant discontinued his claim against the ancillary co-defendant.

3. On January 17, 2019 the court gave judgment for the claimant against the second and fourth defendants for negligence reduced by a contribution of 70% on the part of the claimant. The court further declared that the third defendant was not liable to indemnify the second and fourth defendants.

4. On February 25, 2019 the court gave the following order for costs;
 - i. The second and fourth defendants shall pay to the claimant the prescribed costs of the claim based on a value of that which they have been ordered to pay namely thirty percent (30%) of the damages agreed by the parties prior to the trial on liability.

 - ii. The second defendant shall pay to the third defendant (by way of Sanderson order) the prescribed costs of the claim as between the claimant and the third defendant based on a value of that which has been ordered to be paid, namely thirty percent (30%) of the damages agreed by the parties prior to the trial on liability.

5. The following are the reasons for the aforementioned order for costs.

6. **Part 66.6 of the CPR** provides as follows;

“66.6 (1) If the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.

...

(4) In deciding who should be liable to pay costs the court must have regard to all the circumstances.

(5) In particular it must have regard to—

(a) the conduct of the parties;

(b) whether a party has succeeded on particular issues, even if he has not been successful in the whole of the proceedings;

(c) whether it was reasonable for a party—

(i) to pursue a particular allegation; and/or

(ii) to raise a particular issue;

(d) the manner in which a party has pursued—

(i) his case;

(ii) a particular allegation; or

(iii) a particular issue;

(e) whether a claimant who has won his claim caused the proceedings to be defended by claiming an unreasonable sum; and

(f) whether the claimant gave reasonable notice of his intention to issue a claim.

(6) The conduct of the parties includes—

(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties complied with any relevant pre-action protocol; and

(b) whether either or both parties refuse unreasonably to try an alternative dispute resolution procedure.”

7. Although she was found to be seventy percent contributorily negligent, the claimant was successful in her claim of negligence against the second and fourth defendants. As the general rule is that the unsuccessful party must pay the costs of the successful party, it was only just for the second and fourth defendants to

pay to the claimant the prescribed costs of the claim based on a value of that which they had been ordered to pay.

8. The third defendant was found to be not liable to indemnify the second and fourth defendants. Consequently, the claimant was not successful in her claim against the third defendant. The court has a discretion to order the unsuccessful defendant to pay the successful defendant's costs. This can be done in one of the two following ways;

- i. An order that the unsuccessful defendant pay directly to the successful defendant the latter's costs (known as a Sanderson order because it was first considered in *Sanderson v Blyth Theatre Co*¹).
- ii. An order that the claimant pay the successful defendant's costs, permitting the claimant to add them to the costs ordered to be paid to him by the unsuccessful defendant (a Bullock order –*Bullock v London General Omnibus Co*²).³

9. In the case of *Irvine v Commissioner of Police for The Metropolis and others*,⁴ Gibson LJ had the following to say at paragraphs 22 & 23;

“[22] There is no doubt that the jurisdiction to make a Bullock or Sanderson order has survived the introduction of the CPR, though the exercise of discretion to make such an order must be guided by the overriding objective and the specific provisions of r 44.3. The jurisdiction is a useful one. It is designed to avoid the injustice that when a Claimant does not know which of two or more Defendants should be sued for a wrong done to the Claimant, he can join those whom it is reasonable to join and avoid having what he recovers in damages from the unsuccessful Defendant eroded or eliminated by the order for costs against the Claimant in respect of his action against the successful Defendant or Defendants.

¹ [1903] 2 KB 533, CA

² [1907] 1 KB 264, CA

³ Butterworths Costs Service, Division A Civil Litigation Costs, paragraph 106

⁴ [2005] EWCA Civ 129, para 22

However, it must also be recognised that it is a strong order, capable of working injustice to the Defendant against whom the claim has succeeded, to be made liable not only for the Claimant's costs of the action against that Defendant, but also the costs of the other Defendants whom the Claimant has chosen to join but against whom the Claimant has failed.

*[23] The court has a wide discretion over costs, and even where a Claimant reasonably brings proceedings against two separate Defendants and succeeds against one and fails against the other, there is no rule of law compelling the court to make a Bullock or Sanderson order (see *Hong v A&R Brown Ltd* [1948] 1 KB 515, [1094] 1 All ER 185). That case demonstrates that the court must also consider whether it would work injustice on an unsuccessful Defendant to make him liable for the costs of another Defendant against whom the Claimant has failed.”*

10. In the case of ***Moon v Garrett and others***,⁵ Lord Justice Waller had the following to say at paragraphs 38 & 39;

“38...there are no hard and fast rules as to when it is appropriate to make a Bullock or Sanderson order. The court takes into account the fact that, if a claimant has behaved reasonably in suing two defendants, it will be harsh if he ends up paying the costs of the defendant against whom he has not succeeded. Equally, if it was not reasonable to join one defendant because the cause of action was practically unsustainable, it would be unjust to make a co-defendant pay those defendant's costs. Those costs should be paid by a claimant. It will always be a factor whether one defendant has sought to blame another.

39. The fact that cases are in the alternative so far as they are made against two defendants will be material, but the fact that claims were not truly alternative does not mean that the court does not have the power to order one defendant to pay the costs of another. The question of who should pay whose costs is peculiarly one for the discretion of the trial judge.”

⁵ [2006] All ER (D) 429 (Jul)

11. The third defendant was the insurer of the truck and trailer owned by the second defendant. As such, the court found that the claimant acted reasonably in joining the third defendant to this action. The court further found that the second defendant's breach of the subject policy of insurance was the main reason for the claimant being unsuccessful in her claim against the third defendant. Moreover, the court found that the second defendant in comparison with the claimant (whose damages has been reduced by seventy percent) has greater resources with which to satisfy the third defendant's costs. Consequently, the court found that the ordering of a Sanderson order was in line with the overriding objective of the CPR and justiciable in the circumstances of this case.

12. In relation to the quantification of the third defendant's costs, this court is of the view that it erred in ordering that the third defendant's costs be calculated on the value of that which had been ordered to be paid, namely thirty percent (30%) of the damages agreed by the parties prior to the trial on liability.

13. **Part 67.5 of the CPR** provides as follows;

"67.5 (1) The general rule is that where rule 67.4 does not apply and a party is entitled to the costs of any proceedings those costs must be determined in accordance with Appendices B and C to this Part and paragraphs (2)–(4) of this rule.

(2) In determining such costs the "value" of the claim shall be decided—

(a) in the case of a claimant, by the amount agreed or ordered to be paid;

(b) in the case of a 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, 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; or

(iii) if the claim is not for a monetary sum, as if it were a claim for \$50,000..."

14. The reduction in the damages ordered to be paid was as a result of the court finding that the claimant had been contributorily negligent. As such, the reduction in the damages ordered to be paid was no fault of the third defendant. As such, the third defendant's costs ought to be calculated based on the value of the claim that is the total sum of damages agreed by the parties and not thirty percent of the damages agreed by the parties.

Ricky Rahim

Judge