THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CA No. S 153 of 2015

Between

MARY GOMEZ
SHAIRA MOHAMMED
DAVID SAMMY

Appellants

And

ASHMEED MOHAMMED

Respondent

PANEL: PETER JAMADAR J.A.
GREGORY SMITH J.A.
PETER A. RAJKUMAR J.A.

APPEARANCES:
Mr. R. L Maharaj SC, Ms. V. Maharaj, Mr. A.D. Ramroop appeared on behalf of the Appellants.
Mrs. D. Peake SC, Mr. R. Heffes-Doon appeared on behalf of the Respondent

Date Delivered: October 2nd 2017

I have read the judgment of Rajkumar J.A. and I agree with it.

Peter Jamadar
Justice of Appeal

I also agree.

Gregory Smith
Justice of Appeal

Delivered by P. Rajkumar J.A.

Ruling on costs

Background

1. In the court below the claimants/appellants sought a declaration as to their entitlements as equitable owners of 3 parcels of land. Although in the alternative they did claim compensation in lieu of equitable relief their claim was not one for a quantified monetary sum.

2. The trial judge dismissed their claims, **stipulated** a value of those claims **based on valuations of their houses**, and ordered that costs be paid by them on the basis of those values. On appeal the appellants succeeded in their claims, although the third named appellant was unsuccessful on a further claim based on adverse possession to an additional parcel of land.

Issues

3. i. Whether the trial judge's order on costs was made on the correct **basis**.

ii. If not, the appellants having been largely successful on appeal, what was the correct basis on which to make the order for costs, both in the High Court and on appeal.

Conclusion

4. The appellants having been successful on appeal, the order of the trial court will be reversed in any event. However the order of the court below on costs was not made on the correct basis. In

determining the proper basis for an award of costs, both on appeal and in the court below, we are of the view that:-

a. Stipulation of the value of the claim should not have occurred at the conclusion of the trial, and in any event should not have been based on the value of the claimants' houses.

b. Costs in this matter should have been based upon the reliefs that the claimants actually sought.

c. We are of the view that it would be an appropriate exercise of our discretion to take into account that the claim is of indeterminate value, which could be considered a claim "*not for a monetary sum"*, and which can be treated pursuant to CPR 67.5(2)(c) as if it were a claim for fifty thousand dollars. The costs calculated on such a claim would be $14,000.00 (fourteen thousand dollars). That would be the starting point for an award of costs, subject to such adjustments as may be appropriate in this case, and considered in detail hereunder.

Order

5. In those circumstances it is ordered that:-

i. the orders of the trial judge with respect to costs are overturned;

ii. the respondent is to pay the costs of the first and second named appellants before the trial court in the sum of fourteen thousand dollars **($14,000.00) each**;

iii. the respondent is to pay the costs of the third named appellant before the trial court in the sum of two thirds of the sum of fourteen thousand dollars – that is **$9,333.33;**

iv. the costs of the appeal are to be paid by the respondent to the first and second named appellants in the sum of two thirds of fourteen thousand dollars, (that is nine thousand three hundred and thirty three dollars and thirty three cents) **$9,333.33 each;**

v. the costs of the appeal are to be paid by the respondent to the third named appellant in the sum of two thirds of $9,333.33- that is **$6,222.22**;

vi. there will be no order as to costs on the counterclaim.

Analysis

6. Rule 67.5 of the Civil Proceeding Rules (CPR) is relevant and is set out as follows (all emphasis added):

> ***Prescribed costs***
> ***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, be 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*
> ***(c) if the claim is <u>not for a monetary sum</u> as if it were a claim for $50,000.***

Costs – order of the High Court

7. The trial Judge at the conclusion of trial assigned a value to the claim based upon the value of the claimant's **houses**. We are of the view that this was erroneous for the following reasons:

a. Erroneous value assigned to the claim

The claimants' claims were never for the value of their houses. Their claims were for the determination of their equitable interests, if any, in the land upon which those houses stood. We have now determined those interests as each comprising a fifteen year lease commencing May 31st 2011 with an option to purchase within that fifteen year period at half of the market value of the land as at May 31st 2011. Although it has been contended that it was open to the Judge on a reading of Rule (67 (5) (2) (b) (ii)) of the CPR, to stipulate the value of the claim, the value actually stipulated by the trial judge based on the valuations of their houses[1], was **not justified on the evidence**. That was because the value of the appellants' claims for **equitable interests** in the land on which their houses stood was **not the same as the value of their own houses.**

b. No evidence of actual value of the claim

There was no evidence of even the value in May 2011 of the land on which those houses stood, far less the value of the appellants' interests in those parcels of land. Even though the interests of the claimants have now been determined, to date **the values of those interests remain devoid of evidence.**

c. Stipulating the value of the claim

Rule 67.5 (2) b (ii) of the Civil Proceeding Rules (CPR) does permit a court to stipulate a value to a claim in the case of (i) a **defendant**, (ii) **if the claim is for damages and the claim form does not specify an amount that is claimed, and (iii) if not agreed**. However, this must be exercised in accordance with a judicial discretion. To assign a value to the appellants' claim at the end of

[1] *apart from being based on valuations that had been excluded as evidence at trial*

trial, rather than at a case management conference, is not in this case consistent with the language of CPR 67(5) (2) (b) (ii), when read together with CPR 67.6 (1).

CPR Part 67 provides for exceptions to prescribed costs and the circumstances in which these exceptions can occur, (for example, on an application for budgeted costs). CPR Part 67(6)(1) provides generally that issues of cost exposure in relation to costs of proceedings, (though not costs of applications within proceedings), are to be determined by **application** at a **case management conference**. In fact in relation to applications for budgeted costs, for example, the application is to be made at or before the **first** case management conference. (See for example CPR Part 67 (8).

The unpleasant surprise of extraordinary, unexpected, and excessive cost exposure based upon a value of a claim stipulated by a trial Judge under Part 67.5 (2)(b) (ii) at the conclusion of trial often may not be consistent with the overriding objective to deal with cases justly, or consistent with the structure of CPR Part 67 itself.

d. Inconsistencies in the appellants' position on costs

The appellants' position on costs in written submissions filed on May 31st 2016 was markedly different from and inconsistent with that in their submissions filed on May 12th 2017- after the determination of the appeal.

In the former (at paragraph 57 page 75) they contended that the trial Judge erred in not treating the claim as one for $50,000.00, which should only have led to a cost exposure of $14,000.00 (fourteen thousand dollars). In the latter, (at paragraph 12) they now contend that Rule 67. 5 (2) (b) (iii)

(**sic**) would ***only apply in the case of a defendant***, which they are not, and that they are entitled to their costs on the basis of the **value of their houses**. However, Part 67. 5 (2) (b) (iii) was repealed and replaced on June 29th 2011 by the Civil Proceedings (Amendment) Rules- Legal Notice 126 of 2011, and Part 67. 5 (2) (b) (iii) has now been replaced by Part 67. 5 (2) (c). The rule is therefore now as set out above.

Since June 29th 2011 therefore, in relation to a claim **not for a monetary sum**, the position with respect to the costs to which both a successful claimant and a successful defendant may be entitled, is equated. In either case such a claim **not for a monetary sum** can now be treated as if it were a claim for $50,000.

The appellants' post appeal submission is in direct contradiction to their position (in the written submissions filed on their behalf on May 31st 2016). In the latter they recognized that the claimed value of their houses was for the purpose of corroborating their claim to have invested in the construction and renovation of those houses. This went toward the existence of the **equitable interests** that they claimed in the **land** on which the houses stood. They were not claiming those alleged values, or any values, of their **houses**.

The reasoning of this court in allowing their appeal was consistent with, and paralleled the position advanced by the appellants' in their written submissions filed on May 31st 2016. We are of the view that the appellants were justified in their original view.

Further there is, to date, no basis on the evidence to place a value upon those equitable interests as now declared and defined by this court.

8. **(a) Award re costs in the High Court - first and second named appellants**

Accordingly, with respect to the first and second named appellants the costs payable to them by the respondent will be based on a claim for $50,000.00. Costs payable to them re the High Court would therefore be $14,000.00 each.

(b) Award re costs in the Court of Appeal – first and second named appellants

Pursuant to CPR 67.14 costs payable to the first and second named appellants by the respondent re the Court of Appeal would be two thirds of that sum, that is $9,333.33 **each**.

(c) Award re third named appellant

The third named appellant also sought the additional relief of a claim to title by adverse possession of 2500 square feet of land. He was not successful here or below. We are of the view that pursuant to CPR 67.5 (4) (a) and 66.6 (5) this would justify a reduction of costs in relation to him. We propose to reduce the award of costs to him by one third here and in the court below.

(d) Counterclaim

With respect to the counterclaim it was the mirror image of the claim. The research, preparation, drafting, and argument involved in presenting the claim, and in defending the counterclaim were identical, and therefore would not justify an additional award of costs.

Order

9. In those circumstances it is ordered that:-

i. the orders of the trial judge with respect to costs are overturned;

ii. the respondent is to pay the costs of the first and second named appellants before the trial court in the sum of fourteen thousand dollars **($14,000.00) each**;

iii. the respondent is to pay the costs of the third named appellant before the trial court in the sum of two thirds of the sum of fourteen thousand dollars – that is **$9,333.33**

iv. the costs of the appeal are to be paid by the respondent to the first and second named appellants in the sum of two thirds of fourteen thousand dollars, (that is nine thousand three hundred and thirty three dollars and thirty three cents) **$9,333.33 each**.

v. the costs of the appeal are to be paid by the respondent to the third named appellant in the sum of two thirds of $9,333.33- that is **$6,222.22**.

vi. there will be no order as to costs on the counterclaim.

Peter A. Rajkumar

Justice of Appeal