

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. S-301 of 2017

Claim No. CV2016-03177

FIRST CITIZENS BANK LIMITED

APPELLANT

AND

BIG Q CONSULTING SERVICES LIMITED

FIRST RESPONDENT

FRANCIS BERTRAND

SECOND RESPONDENT

JOANN BERTRAND

THIRD RESPONDENT

**PANEL: Breaux JA
Moosai JA
Jones, J.A.**

**APPEARANCES: Ms. S. Moolchan and L. Rajkumar for the Appellants
No appearance for the Respondents**

DATE OF DELIVERY: Wednesday 31st October, 2018

I have read the Judgement of Jones J.A. and I agree with it.

**Bereaux JA
Justice of Appeal**

I too agree

**Moosai JA
Justice of Appeal**

JUDGEMENT

Delivered by J. Jones, JA.

1. This is an appeal from the determination of costs in an undefended mortgage action. This appeal arises from a claim brought by the Appellant, First Citizens Bank Ltd, against the Respondents, Big Q Constructions Services Ltd, as the borrower and Francis and Joann Bernard as the owners in possession of the mortgaged property and guarantors of the loan.
2. By the claim the Appellant sought the payment of the sum of \$297, 875.40 due under the mortgage and vacant possession of the mortgaged property. Neither Respondent defended the action nor have they appeared on the appeal. The Judge awarded the Appellant their fixed costs of the claim in the sum of \$1,400.00 based on the scale contained in Table I of Part 1 of Appendix A of Part 67 of the Civil Proceedings Rules 1998 as amended (the CPR).

The relevant rules

3. Before examining the Judge’s reasoning it is necessary to set out the relevant rules. **Part 67** deals with the quantification of costs. Part **67.3** provides for the costs of proceedings under the Rules to be quantified as follows:

“(a) where rule 67.4 applies, in accordance with the provisions of that rule; and

(b) in all other cases if, having regard to rule 66.6, the court orders a party to pay all or any part of the costs of another party, in one of the following ways:

(i) costs determined in accordance with rule 67.5 (“prescribed costs”);

(ii) costs in accordance with a budget approved by the court under rule 67.8 (“budgeted costs”); or

(iii) where neither prescribed nor budgeted costs are applicable, by assessment in accordance with rules 67.1 and 67.12.”

Budgeted and assessed costs, that is costs in accordance with part 67.3(b)(iii), do not apply to this appeal. The relevant costs are prescribed and fixed costs.

4. **Part 67.5** treats with prescribed costs and identifies the general rule to be 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.”

In order to determine whether fixed costs or prescribed costs apply it is therefore necessary first to ascertain whether rule 67.4 which treats with fixed costs applies.

5. **Part 67.4** states:

- “(1) A party is entitled to the costs set out in Part I of Appendix A.
- (2) The court may, however, direct that some other amount of costs be allowed for the work covered by any item in Part 2 of Appendix A.
- (3) If so, the court must assess such costs.”

6. **Appendix A** to the rule states:

“PART 1

This part of the appendix sets out the fixed costs applicable to a claim for a specified sum of money:

- a. Table 1 – which a defendant who does not defend must pay to the claimant, in addition to the amount claimed and interest and the court fees paid by the claimant, in order to avoid judgment being entered against him under Part 12. These sums are to be entered on the claim form. The table also deals with claims for possession of land or delivery of goods and an application for an attachment of debts order.
- b. Table 2 – which a claimant is entitled to include as costs in any default judgment under Part 12 in addition to the costs set out in Table 1.

SCALE OF FIXED COSTS

TABLE 1

1. This Table shows the fixed costs to be entered on a claim form or provisional attachment of debts order in respect of attorney’s-at-law charges

—

- a. in an action for payment of a specified sum of money;
- b. in attachment of debt proceedings; or
- c. in an action for the recovery of land.

2. In addition to the fixed costs hereunder the appropriate court fee is to be allowed.

	Claim	Fixed Cost
(1)	Claim not exceeding \$15,000	\$ 750.00
(2)	Claim exceeding \$ 15,000 but not exceeding \$25,000 or a claim for recovery of land or goods	\$1,000.00
(3)	Claim exceeding \$25,000 but not exceeding \$ 100,000	\$1,200.00
(4)	Claim exceeding \$100,000 but not exceeding \$500,000	\$1,400.00
(5)	Claim exceeding \$500,000 but not exceeding \$1m	\$1,600.00
(6)	Claim exceeding \$1m but not exceeding \$5m	\$2,000.00
(7)	Claim exceeding \$5m	\$2,500.00

TABLE 2

This Table shows additional costs which may be added to the entry of a default judgment under Part 12 or a judgment on admissions under Part 14 for a specified sum of money.

(1)	Basic costs	.....	\$650.00
(2)	Where there is more than one defendant, in respect of each additional defendant served against whom judgement is entered	.....	\$100.00
(3)	Where an order is made under rule 5.12 (specified method of service), for each defendant served	.....	\$800.00
(4)	When an order is made under Part 7, for service out of the jurisdiction (to cover the obtaining of an order under Part 7 and service)	.....	\$800.00
(5)	Where judgment is entered on an admission and the claimant accepts the defendant's proposal as to method of payment under rule 14.9	.....	\$650.00
(6)	Where judgment is entered on admission and the time and rate of payment are not agreed under rule 14.10	...	\$800.00"

Part 2 of Appendix A deals with enforcement and is not relevant to this appeal.

The Judge's reasoning

- 7. In arriving at his conclusion that fixed costs applied the Judge adopted the reasoning applied by him in an earlier case of **Scotiabank Trinidad and**

Tobago Ltd. v Law¹. This was a decision on exactly the same facts. The claim there was a mortgage action; the relief sought the payment of a sum of money and possession of the mortgaged property and the defendant advanced no defence. There was no appeal from the Judge's determination on costs in the Scotiabank case.

8. In that case in considering Appendix A the Judge concluded that fixed costs were not limited to claims for which default judgment could be obtained under part 12. He concluded that the two principle reliefs sought by the claimant, a claim for a specified sum of money and interest and possession of the land secured by the mortgage, also fell within the fixed costs regime established by part 67.4. He was of the view that in mortgage claims where a stipulated sum is claimed and /or possession of land fixed costs applied unless the claim is challenged by the defendant. He seemed to equate the position on an undefended mortgage with a default judgment.

9. In instant case the Judge specifically rejected the Appellant's submission that the application of Table 1 to claims for possession of land should relate only to those matters in which it was possible for a default judgment to be obtained. According to the Judge since the paragraph stated that the Table also deals with claims for possession of land or delivery of goods and an application for an attachment of debts order the word "also" led him "to conclude that although these matters may be in relation to claims for a specified sum it is not necessary that they relate only to matters for which default judgment can be obtained."

¹ CV. 2016 -00027

He therefore determined that since the claim before him was one for a specified sum of money in the sense that a definite sum has been claimed and for possession of land in the circumstances fixed costs applied.

10. According to the Judge the position taken by him was consistent with the approach taken in England and Wales as reflected in a note contained in the Atkins Court Forms on Costs referred to in the Scotiabank case. The reference in the Scotiabank case was to a passage in the **Atkin's Court Forms/Costs Vol 13/ Practice/G** as follows:

“Possession claims are commenced in accordance with CPR Part 55 and CPR pre-action Protocol for possession claims (by social landlords) based on rent arrears or the CPR Pre-action Protocol for possession claims based on mortgage or home purchase plan arrears in respect of residential property. Claims may be allocated to one of the three tracks with appropriate cost consequences but only to the small claims track if the parties agree. If a possession order is made and the defendant takes no part in the proceedings, the claimant will only be granted an order for fixed costs. If the defendant (in a possession claim other than a possession claim against trespassers) does not file a defence within the time limits he may take part in any hearing but the court may take his failure to do so into account in relation to costs.

Where permission is given to enforce a judgment or order for the recovery of possession of land by writ of possession, if costs are allowed

on the judgment or order, the costs allowed are fixed and are added to the judgment or order.

‘Possession claim’ in England and Wales means a claim for the recovery of possession of land including buildings and parts of buildings: CPR 55.1(a).”

11. The Appellant submits that the Judge was wrong in that:
 - i. he failed to consider the procedural and substantive differences between the UK rules and our CPR;
 - ii. he erred in law (a) in finding that the fixed costs regime is applicable to undefended mortgage claims; and (b) by concluding that a mortgage action initiated pursuant to part 69 is a claim for the payment of a specified sum and for possession of land as set out in Appendix A.

Is the Judge’s comparison between the rules applicable in England and Wales and our CPR valid?

12. Insofar as the Judge sought to rely on the Atkins Court Forms in support of his conclusion he was wrong to do so in the face of a lack of similarity between the UK rules and the CPR in this area. The Appellants are correct when they submit that the Judge failed to consider the procedural and substantial differences between Part 45 of the UK rules, which deals with fixed costs, and

Part 55 of the UK rules, which deals with possession of land, and CPR parts 67 and 69.

13. The passage of the Atkins relied on by the Judge deals with the procedure applicable for the recovery of land. The passage references Part 55 of the UK Rules. This rule, introduced in 2001, has no equivalent in the CPR. It specifically treats with all claims for the recovery of possession of land including summary claims for possession against trespassers (part 68 of the CPR) and possession claims relating to mortgaged residential property.

14. Similarly, while it may assist in understanding the concept of fixed costs, part 45 of the UK rules is not on all fours with CPR 67.4 and Appendix A. In particular part 45 of the UK rules makes specific reference to those parts of part 55 to which fixed costs are applicable. The CPR does not contain similar specific statements. In those circumstances the Judge was wrong to take comfort from the passage in Atkins. The conclusion in the Atkins that if a possession order is made and the defendant takes no part in the proceedings, the claimant will only be granted an order for fixed costs is in fact based on part 45.1(2)(d) and (e) of the UK rules which specifically state that fixed costs will apply in these circumstances. Our rules do not contain similar specific statements.

Is fixed costs the appropriate cost regime in mortgage actions where no defence is presented.

15. This is the essential question to be determined in this appeal. It requires an examination of the Appendix A to Part 67 (“Appendix A”). In particular it requires an examination of Part 1 of Appendix A.

16. Insofar as a claim for a specific sum of money is concerned the rule is clear. In such a claim the fixed costs as set out in Table 1 will apply to avoid judgment being obtained against the defendant. This is consistent with the requirement in Form 1 of the Prescribed Forms, where the claim is for a specified sum of money, that the Attorney’s fixed costs be included on the claim form. In such a claim it is Table 2 that will apply if a default judgment or judgment on admissions is obtained against the defendant.

17. The problem in this case arises from the introduction of the words “The table also deals with claims for possession of land or delivery of goods and an application of debts order” in Appendix A Part 1. By these words the Judge determined that the table, that is Table 1, applied to undefended mortgage actions.

18. The inclusion of claims for the payment of a specified sum of money and attachment of debt proceedings under the words:

“SCALE OF FIXED COSTS

TABLE 1”

makes clear that the intention is for Table 1 to apply to these types of claims. In the context used it is reasonable to assume that that the words “claims for

possession of land” and “actions for the recovery of land” refer to the same type of action.

19. By Appendix A Part 1 therefore fixed costs, as identified in Table 1, will apply to claims for a specific sum of money to avoid a judgment being obtained against the defendant and fixed costs, as identified in Table 2, will apply to default judgments and judgments on admissions. Fixed costs, as identified in Table 1, will also apply to claims for possession of land/recovery of land and attachment of debt proceedings in one of two ways either to avoid a judgment being entered against the defendant or in every action for an attachment of debt or possession of land.
20. For the purposes of this appeal it is not necessary to determine whether the table applies to those claims only so as to avoid a judgment being obtained against the defendant or across the board. Neither is it necessary to determine whether the table is to apply to claims for delivery of goods. It may be however be appropriate for the Rules Committee to consider an amendment to the appendix to make the application of the rule clear.
21. Of relevance to this appeal is simply whether, because a mortgage claim is a claim for both a specific sum of money and the possession of land, Appendix A Table 1 applies to an undefended mortgage claim. The Judge determined that it did. In this regard the Judge was wrong. Insofar as the Judge seemed to equate the position on an undefended mortgage with a default judgment and

therefore applied Table 1 he failed to appreciate that Table 1 does not apply to a default judgment but such a payment avoids a default judgment.

22. Further to arrive at the conclusion that fixed costs applied to undefended mortgages the Judge seems to have put a very strained interpretation on Appendix A Part 1. The flaw in the Judge's interpretation is that he treats with the relief sought rather than the nature of the claim. A mortgage claim is not a claim for a specific sum of money or possession of land but rather a claim for the enforcement of a security, a mortgage, in which these two reliefs, among others, are sought. In a mortgage claim it is possible, indeed it is usual, to obtain both of these reliefs at the same time. In those circumstances taking the Judge's interpretation to its logical conclusion it would mean that the Appellant ought to be entitled to the fixed costs on each of the reliefs obtained, that is, possession of the mortgage property and the repayment of the outstanding debt. To do so would fly in the face of common sense and attach costs, not to the case presented, but to the number of reliefs granted by the court.

23. While the award of costs is dependent on obtaining some or all of the relief sought what is rewarded or penalized by the award of costs is success or failure in the claim itself. Indeed a careful examination of the rule shows that the rule attaches to the nature of the claim and not the relief sought. This is evident by the use of the word "claim" rather than "relief" in the appendix. Looking at the rule in this manner it is clear that, while it applies to claims for specific sums of money and claims for possession/ recovery of land, Appendix A does

not purport to apply to claims for the enforcement of a mortgage despite the fact that the relief claimed may include an order for the possession of land and payment of a specified sum of money.

24. Once it is determined that Appendix A does not apply then, in accordance with part 67.5, the appropriate cost regime for mortgage actions is prescribed costs. Insofar as the Judge concluded that the appropriate cost regime for a mortgage claim that was undefended was fixed costs and that the quantum was as identified by Table 1 of Appendix A the Judge therefore was wrong.
25. The dilemma presented to a Judge however is that in the majority of mortgage actions, particularly those which are undefended, prescribed costs based on the value of the claim, even where discounted by 45% as provided for at Appendix C of part 67, does not reflect a reasonable sum for the work carried out by the attorney and is in the majority of cases exorbitant and unfair to the defendant.
26. In dealing with prescribed costs **Part 67.5 (3) and (4)** provides:
 - (3) The general rule is that the amount of costs to be paid is to be calculated in accordance with the percentage specified in column 2 of Appendix B against the appropriate value.
 - (4) The court may, however –
 - a. award a percentage only of such sum having taken into account the matters set out in rule 66.6(4),(5) and (6); or
 - b. order a party to pay costs-
 - (i) from or to a certain date; or

(ii) relating only to a certain distinct part of the proceedings,

in which case it must specify the percentage of the fixed costs which is to be paid by the party liable to pay such costs and in so doing may take into account the table set out in Appendix C.

27. This does not seem to be a situation to which part 67.5(4)(b) applies. Part 67.5(4)(a) however gives a judge a discretion to award a percentage of the applicable prescribed costs after taking into account the matters set out in rule 66.6(4), (5) and (6).

28. **Parts 66.6(4), (5) and (6)** state:

(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.

29. In awarding prescribed costs therefore a judge has the discretion to award a percentage of those costs in accordance with part 67.5 (4). In doing so the judge is required to take into consideration all the circumstances including the matters identified at 67.5(5) and (6) where relevant.

30. Further **Part 67.2(1)** of the CPR provides that:

“Where the court has any discretion as to the amount of costs to be allowed to a party the sum to be allowed is the amount that the court deems to be reasonable were the work to be carried out by an attorney at law of reasonable competence and which appears to the court to be fair to both the person paying and the person receiving such costs.”

31. In deciding to depart from the general rule and award the claimant only a percentage of the prescribed costs a judge is now required to exercise a discretion as to the amount of costs to be allowed. In these circumstances part 67.2 also becomes relevant. A judge who wishes to apply part 67.5 (4) and order that only a percentage of the applicable prescribed costs be awarded therefore also has to factor in what would be a reasonable amount to be allowed were the work to be carried out by an Attorney-at-law of reasonable competence and which is fair to both to the person paying and the person receiving such costs.
32. In the instant case the Judge was wrong to order the Respondents to pay the fixed costs of the Appellant in accordance with Table 1. The Judge ought to have awarded prescribed costs. Since the award of prescribed costs, and in particular a determination of whether there should be awarded a percentage of the full costs, involves an exercise of a discretion by the trial judge, a discretion that we are unable to exercise given the paucity of the facts available to us, this action ought to be referred back to the Judge for him to determine whether in the circumstances the general rule as to quantum of prescribed costs ought to apply and, if not, what percentage of that sum is appropriate having regard to the circumstances including the matters identified in part 66.6(5) and (6) and for a determination in accordance with part 67.2 of the CPR.

33. Accordingly the appeal is allowed the order of the Judge set aside and the matter referred back to the Judge for a determination on the applicable costs on the basis of prescribed costs.

Judith Jones
Justice of Appeal