THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. S-218 OF 2018

CLAIM NO. CV 2017 - 02990

BETWEEN

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

APPELLANT

AND

HALEEMA MOHAMMED

(BY HER NEXT OF KIN AND NEXT FRIEND CRYSTAL CARMEL MOHAMMED)

RESPONDENT

BEFORE:

The Honourable Mr. Justice of Appeal P. Jamadar
The Honourable Madam Justice of Appeal C. Pemberton

APPEARANCES:

Mr. R Grant and Ms. S Ramhit instructed by Ms. R Trotman for the Appellant

Mr. G Ramdeen for the Respondent

DATE OF JUDGMENT: March 11, 2019.

JOINT JUDGMENT

[1] On March 11, 2019 we heard this matter and delivered an oral judgment. We now reduce that joint judgment to writing.

FACTS

[2] This appeal came from judicial review proceedings filed on behalf of Haleema Mohammed by her Kin and Next Friend Kristal Carmel Mohammed.

[3] Haleema was born on August 6, 2012. When she was 18 months old she was diagnosed with a blood disorder, the treatment and cure for which had to be procured elsewhere. In time, it was discovered that a facility in Gurgaon, India was available to treat with her condition, at a cost of approximately TT $400,000.00. Her surgery was carded for on or around the first week in September, 2017.

[4] Faced with that challenge, Haleema sought the assistance of the Children's Life Fund Authority a body corporate established under the **CHILDREN'S LIFE FUND ACT Chap 29:01**. On July 28, 2017, her application to the Authority for relief was made and Haleema's parents were informed that her case would be considered and that the wait period for determination would be approximately 1 - 3 months. Suffice it to say, her parents did not think that Haleema's case received what was considered to be sufficiently urgent attention. They asserted, that other applications for the same aliment were considered and determined by the Authority within one week of receipt. They claimed discrimination.

[5] Kristal Carmel Mohammed, Haleema's Kin and Next Friend sought to move the court with urgency and, on August 15 2017, filed this action, Judicial Review, seeking *inter alia,*

1. Declarations
2. An order of *Certiorari*
3. An order of *Mandamus,*

all with the aim of moving the Authority to consider her application and to act favourably upon it.

[6] On the very day August 15, 2017 - during the Court vacation - the matter came up for hearing. Counsel for the Intended Respondent attended and reported to the Court that by 12 noon the following day, August 16, 2017, a decision from the Authority will be forthcoming. In those circumstances, Haleema was permitted on the day of hearing to withdraw her application for Judicial Review. She received as well, the benefit of an award of costs in her favour which the Judge ordered to be assessed by a Registrar.

STATEMENT OF COSTS

[7] The Statement of Costs was prepared and filed on February 28, 2018. The Assistant Registrar, as per Order of the Court assessed and determined the costs to be received by Haleema in the sum of TT $142,208.00. This figure was not favourably received by the Intended Respondent who appealed on grounds which spoke to the Assistant Registrar erring,

a. in law when she made the award and did not consider or properly consider the mandatory requirements under Rule 67.2(3) of the CPR in particular Rule 67.2(3)(g);
b. in her method in assessing costs, adopting an approach akin to the "Old Rules" of simply taking off a sum of

money from the fee on brief and care and conduct leaving the remainder;

and by failing to,

c. apply the proper mode of assessing costs under the **CPR** and to consider or not properly consider the overriding objective of the **CPR**;

d. to consider the proper breakdown of the fee on brief and care and conduct and thereby consider its component parts;

e. to consider the component parts of the fee on brief and care and conduct, the learned Assistant Registrar awarded the Respondent overly unreasonable sums in fee on brief and care and conduct in the circumstances of this case.

The Orders sought by Haleema were :-

1. allowing this appeal and setting aside and/or quashing the decision of Assistant Registrar Kimitria Gray dated February 28, 2018 or in the alternative an order setting aside the order to award TT $70,000.00 on fee on brief and TT $40,000.00 care and conduct.
2. that this Honourable Court do assess the Respondent's fee on brief and care and conduct.
3. that the Respondent do pay the Appellant's costs of this appeal.
4. Such further order or relief that this Honourable Court deems fit.

[8] Counsel will forgive us for not rehearsing their arguments in a fulsome manner but the Court must express that it is deeply grateful for their

thought provoking submissions. As stated above, at the hearing we delivered an oral decision but under took to reduce our thoughts to writing in the hope that it will assist all those concerned with assessing costs.

[9] Mr. Grant put forward two arguments:-

1. Counsel was not entitled to a fee on brief since the matter did not go to trial, a point which was not argued before the Registrar; and
2. In the alternative he argued that even if a brief fee was to be allowed the Assistant Registrar did not take into account the Part 67.2(3) factors of the **CPR**, particularly Part 67.2(3)(g), and that the methodology used in the assessment was faulty and did not accord with the overriding objective.

[10] Mr. Grant sought to make some traction by distinguishing a "fee on brief" by Counsel chargeable when a matter goes to a trial, (that is a fee inclusive of pre-trial work and refreshers), from fees paid for work done on the brief delivered to Counsel in a matter that did not go to trial. In this case, since the matter did not go to trial, Counsel for the Respondent ought not to receive sums claimed under any item styled "*fee in brief*". His concern largely rested on the possibility of overlap or double counting as expressed in Hobhouse J's dicta in **LOVEDAY V RENTON**[1]**.**

[1] **LOVEDAY v RENTON AND ANOTHER (No 2) [1992] 3 ALL ER 184** at p 191 f *"… in allowing fees the taxing officer should have regard to other fees and allowances payable to counsel in respect of other items in the same case when the work done in relation to those items has reduced the work which would have otherwise been necessary in relation to the item in question, I should* as a *first step identify what items of work are to be treated as covered by the brief fee and refreshers and to what extent fees already allowed overlap into the brief fee*".

[11] We found that the distinction drawn between "*brief fee*" and "*fee on brief*" in this case was artificial. Mr. Grant eventually conceded that Counsel was entitled to remuneration for pre-trial work and appearing at the hearing. We think that the issue of refreshers did not apply here and so that part of the fee on brief representing refreshers must be considered. We therefore find that Counsel for Haleema was entitled to claim on brief fee for pre-trial work and for attendance at the *inter parties* hearing, the application to deem the matter urgent for hearing in the vacation and for the hearing on the representative proceedings. What is necessary is that a proper determination of that fee be employed by the Assistant Registrar using the standard set out by Hobhouse J.

[12] Justice Hobhouse's approach in **LOVEDAY** when considering items for brief fee can be adopted when considering the item care and conduct. In that event, the Assistant Registrar ought to conduct a rigorous interrogation of the items as claimed. This is so, especially in this case since other sums were claimed for pre-trial work. This should be done to avoid double counting for the same task or overlap[2]. We suggest that in preparing the Statement of Costs the preparer should, as far as possible, when presenting a figure for the *fee on brief* or *brief fee*, or *care and conduct* aspects of the work done by Counsel and Instructing Attorney-at- Law, itemize the time and charges fixed accordingly. Once these are set out in detail and specificity, there will be no doubt as to what the figures claimed represent.

QUANTUM – PROCESS TO BE USED TO ARRIVE AT QUANTUM

[13] How then is the quantum to be calculated? Part 1.1 of the **CPR** outlines the overriding objective which is the backdrop against which the Rules are to

[2] See Items 2,3,5,6,7,9,13 and 14.

be interpreted and applied to litigation. Parts 66-67 of the **CPR** detail the Costs regime. It further gives expression to the rule that costs follow the event, and allows successful parties to obtain costs which may be quantified on either of 3 bases:-

1) Fixed;
2) Prescribed; and
3) Assessed.

We are here concerned with assessed costs since this is the costs regime prescribed by Part 56 of the **CPR**[3].

[14] We note that Part 56.14(4) states that, "*the judge may, however make such order as to costs as appear to him to be just ……*" and (5) where a judge makes <u>any</u> order as to costs he <u>must</u> assess them. It is the duty of the judge to do the assessment for matters captured by Part 56. Even in this case, where permission was given to the Applicant, Haleema, to withdraw the action, we remind judges that the judge awarding the costs ought to do the assessment exercise. Having said that, this does not impugn the process of the Assistant Registrar assessing the Statement of Costs.

[15] The meat of this Appeal therefore concerns whether the Assistant Registrar was plainly wrong in her assessment of quantum to be awarded to Haleema resulting in "unreasonable" sums as awards to Counsel as a fee on brief[4] and to Instructing Attorney-at-Law, care and conduct[5]. In other words, process is an issue in this case.

[16] We shall deal with the second ground of appeal first. Mr. Grant took issue with what he styled the Assistant Registrar's use of "Old Rules"

[3] See Part 56.14(5).
[4] Item 13
[5] Item 14

methodology. Mr. Grant argued that it is not evident whether the Assistant Registrar took into account the "*Practice Guide and the Assessment of Costs"*, which forms part of the **CPR**. In Counsel's view, the provisions of the Guide form a "*starting point"* for an assessment exercise. Not having done this, the Assistant Registrar did not attend to the concepts of reasonableness or proportionality and no consideration was given to the time element.

[17] After examining the Reasons proffered by the Assistant Registrar, we find that they did not reveal that the "*Practice Guide and the Assessment of Costs",* especially at Paragraph 16 which sets out the methodology to be used in this exercise was considered. The Practice Guide seeks to compensate Counsel using objective criteria of value of work per hour for any work done. The Assistant Registrar is tasked with assessing the work done, as per the Statement of Costs and filings to assess costs on a time and value basis. Junior Attorneys-at-Law are to be compensated at the lower end of the spectrum and more Senior Attorneys at the upper end of the spectrum. We therefore agree with Mr. Grant's submission that, by not starting at a very good place to start; the beginning - the Practice Guide, the Assistant Registrar erred in not applying current methodology in assessing costs in this matter. Consequently, any other deliberations would not be favourably coloured by this deviation.

[18] After that exercise, if the Assistant Registrar considered that the figure was not reflective of a reasonable or proportionate sum, she could then consider whether the figure arrived at on a value for time basis may be adjusted. Part 67.2(3) of the **CPR** lists factors which may be considered in this exercise. The Assistant Registrar listed the factors, but the written Reasons revealed that she considered the following factors important,

a) Conduct of the parties before as well as during proceedings;
b) Importance of the matter to the parties and general importance of the case; and
c) Care, speed and economy used in the preparation,

which she then assessed against the requirement of reasonableness. The Part 1.1 requirement of proportionality was not featured in the deliberations.

[19] Mr. Grant argued that some of the other factors identified at Part 67.2 (3) were not considered, and that goes against the provisions of the **CPR**, which admonishes that "*all of the circumstances"* of a case must be taken into account. Mr. Grant complained that the Assistant Registrar's Reasons did not reveal that **novelty, weight and complexity** of the matter, for instance, were considered. We appreciate this argument and though we can find no fault in choosing these criteria, we do find that there is a lacunae in the Reasoning advanced by the Assistant Registrar in not considering the novelty, weight and complexity criteria. Having said that, we do not think that the Assistant Registrar is slavishly bound to consider all of the Part 67.2 (3) criteria. A useful practice is to state which of them may be irrelevant and why this is so.

SUGGESTED APPROACH TO QUANTIFYING COSTS

[20] In Trinidad and Tobago, we are fortunate to have as an appendix to our **CPR**, the ***Practice Guide to the Assessment of Costs***, which can be described at the very least as comprehensive. The general approach to assessing costs has been stated thus:-

> The judge should as far as practicable assess such cost in keeping with the overriding philosophy of the **CPR** and should not lightly refer such costs to be assessed before another costs assessment officer not withstanding his discretion to do so.

[21] At paragraph 3b the Court is further admonished to ensure as far as possible, that the final figure is not disproportionate and/or unreasonable having regard to the overriding objective expressed in Part 1.1 **CPR**. Further, the Court should "*retain this responsibility not withstanding*". There may be no challenge to particular items comprised – the figures sought. The Guide further empowers the Court to intervene, but only if satisfied that the costs are so disproportionate and unreasonable.

[22] There are two (2) bases for assessment. In this case, we are concerned with the standard basis, when the Court will only allow costs reasonably incurred and proportionate to the case under consideration. In terms of proportionality, this is explained by reference to the overriding objective set out at Part 1.1(2)(c), which lists the factors to be considered as (i) amount of money involved; (ii) the importance of the case; (iii) the complexity of the issues; and (iv) the financial position of the parties.

[23] The Practice Guide adopted the learning in **HOME OFFICE v LOWNDS**[6], which advocates a two-step approach: (i) the global approach; and (ii) the item by item approach. Utilizing this formula, regard must be had to Part 67.2(3) factors. In addition, our Practice Guide has provided an objective standard with regard to remuneration of fee earners. This has been revised in 2015 in consultation with the Law Association of Trinidad and

[6] See **[2002] EWCA Civ. 365 Court of Appeal per Lord Woolf CJ.**

Tobago. That is the starting point[7]. Paragraph 16 explicitly provides that the hourly rates "*are intended as a starting point"* and are *"not intended to replace the Court's discretion to allow appropriated fees to attorneys in particular cases*". An Assessment officer may therefore allow a higher or lower fee when all of the circumstances of the case are considered. Paragraph 17 gives further guidance for the time spent. The caveat expressed is that the Assessment Officer must "*consider the work properly undertaken*" by both Advocate and Instructing Attorney to arrive at a figure that is reasonable and I might add proportionate.

[24] This forms the basis and starting point for the exercise on conducting assessments. The Assessment Officer is advised that the next steps to follow are:

1. Keeping in mind the band width, that is, value of work done at an hourly rate as per number of years call for each branch of the profession, look at the work done. Assessing whether the work was reasonable and/or proportionate and properly undertaken given the Part 1.1(2)(c) factors.
2. Next, consider the particular circumstances of the case using a global approach by examining the factors in the round, to assess reasonableness and proportionality.
3. If a reasonable or proportional result is not achieved, then an itemised assessment may be done taking into account the fee earner and the time spent to do the reasonable and proportionate tasks.
4. Take into account the Part 67.2(3) factors.
5. Determine whether the figure, given all of the above, is:

[7] See paragraph 16.

(i) reasonable and proportionate; or

(ii) whether an uplift (for instance the use of the 67.2(3) factors, skill and competence in a novel area of law), or a discount, should be applied; and

(iii) the measure of such determination and the reasons for so doing.

These are suggested guidelines and are not intended to replace a court's discretion to allow appropriate fees to Attorneys in any case.

FINDING AND CONCLUSION

[25] In the premises, we find that the approach used by the Assistant Registrar in assessing costs was fundamentally flawed in terms of its process in not:

(i) using the Practice Guide to look at the time spent on tasks, together with the commensurate remuneration according to number of years in practise;

(ii) applying that part of the overriding objective mandating proportionality; and

(ii) applying all of the relevant factors stated in Part 67.2(3) of the **CPR** in assessing reasonableness of the sums claimed.

The assessment therefore lacked transparency and accountability and should be set aside. We note that the Assistant Registrar should be given the opportunity to apply these rules and criteria and therefore remit the matter for rehearing.

COSTS

[26] Costs are a very important part of the litigation regime and is a real factor in bringing about resolution. Attorneys-at-Law are reminded that it is necessary for them to conduct cost/benefit analyses with their clients. It

may be useful as well, if more use is made of the Budgeted Costs provisions in the **CPR** so that litigants, Attorneys-at-Law and the court have a fair contemplation of the likely exposure in costs to the unsuccessful party. Part 67.8 details what must be considered in such an application and the guidance is well worth a study.

[27] In this case, since Mr. Grant was successful in part of his appeal, we think it fair that Haleema should pay only a portion of the costs, which we determine to be fifty percent (50%).

ORDER

1. **The Appeal is allowed in part.**
2. **The Assessment dated February 28, 2018 is remitted to Assistant Registrar Grey for rehearing.**
3. **The costs of this Appeal to be paid by the Respondent to the Appellant.**
4. **The Appellant is entitled to the sum of $5,200.00 being the sum assessed discounted by fifty percent (50%).**

/s/ PETER JAMADAR
JUSTICE OF APPEAL

/s/ CHARMAINE PEMBERTON
JUSTICE OF APPEAL