

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA NAD BARBUDA**

AD2009

CLAIM NO: ANUHCV2009/0605

BETWEEN:

Public Utilities Authority

Claimant

And

Shoppers Pharmacy

Romaneta Francis

Defendants

Appearances:

Dr. D Dorsett for the Claimant
The Defendant in person

.....
2010: April 23
2010: October 12
.....

DECISION

1. Harris J.: The Applicants/Defendants applied to the Court for an Order to stay proceedings in this Claim, 2009/0605, until their costs have been paid by the Respondent/Claimant in respect of the discontinued Claim No ANUHCV2005/0493, pursuant to Rule 37.8 of The Eastern Caribbean Civil Procedure Rules 2000 (CPR2000). The rule provides as follows:
2. *If the Claimant-*
 - (a) *Discontinues a claim after the defendant against whom the claim is discontinued has filed a defence; and*
 - (b) *Makes a subsequent claim against the same substantially the same as those relating to the discontinued claim; and*
 - (c) *Has not paid the defendant's costs of the discontinued claim; the Court may stay the subsequent claim until the costs of the discontinued claim are paid.*

3. The Applicant contends that the discontinued Claim ANUHCV2005/0493 arose out of the same or substantially the same fact as those relied on or this Claim 2006/0605. The Respondent has not disputed this. The Court in any event accepts this as proved.
4. Further, the second named Applicant in Claim No. 2005/0493, Romaneta Francis, alleged that she had in that discontinued matter, filed her Defence and counterclaim,¹ attended a Chamber hearing² and took several steps in the matter.³ The Respondent has not disputed this fact. Further still, Ms. Romaneta Francis alleges she incurred significant costs in engaging overseas Counsel to represent her for the discontinued Claim⁴.
5. The Respondent submits that with regard to the 2005/0493 matter, it is respectfully submitted that having regard to all the circumstances as prescribed by CPR 2000 Rule 64.6(5) and (6), there should be no order as to costs pursuant to CPR 2000 r. 64.6(2) and accordingly, no stay of the current proceedings.
6. The Respondent accepted that the successful party is generally entitled to costs, but contends that the award is neither automatic nor mandatory. Counsel for the respondent submits that the conduct of the parties in this matter exonerates the correspondent. The conduct relied on is chronicled in the written submissions of the Respondent filed April 21st, 2010. There is however, no Affidavit in support of the facts so chronicled.
7. The Court file and endorsements thereon, speak for themselves with respect to the conduct of the parties.
8. The Respondent in its submissions before this court sets out the relevant Rules in relation to costs upon which it relies. I reproduce it below for convenience.
9. CPR 2000 r. 37.6(1) and 37.7(1) provides as follows:
37.6(1) Unless the-
a. Parties agree; or

¹ See Para 7 of the Applicants Affidavit in support filed on the 23rd January 2010.

² Ibid. para 8.

³ Ibid generally.

⁴ Ibid para 12. Applicant asserts that she was represented by Queen Council, Sir Richard Cheltenham and solicitor, Phillips, Phillips and Archibald. The backing on the documents on the file do not there reflect Sir Richard's involvement.

b. *The Court orders otherwise;*

a claimant who discontinues is liable for the costs incurred by the Defendant against whom the claim is discontinued, on or before the date on which notice of discontinuance was served.

37.7(1) *The general rule is that, unless an order has been made for budgeted under rule 65.8, the costs are to be determined in accordance with the scale of prescribed costs contained in Part 65, Appendices B and C.*

10. The rules on prescribed costs are to be found at CPR 2000 r. 65.5. Particular attention should be given to CPR 2000 r. 65.5(4) (a) which provides as follows.

65.5(4) *The Court may-*

a. *Award a promotion only of such sum having taken into account the matters set out in rule 64.6(4) and (5).*

11. CPR 2000 r. 64.6 is captioned "Successful party generally entitled to costs". So as to put CPR 2000 r. 64.6(4) and (5) in its proper context, the entirety of CPR2000 r. 64.6 is reproduced below:

64.6(1) *Where 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.*

(2) *The Court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.*

(3) *This rule gives the Court power in particular to order a person to pay-*

(a) Costs from or up to a certain date only;

(b) Costs relating only to a certain distinct part of the proceedings; or

(c) Only a specified proportion of another person's costs.

(4) *The Court may not make an order under paragraphs 3(a) or 3(b) unless it is satisfied that an order under paragraph 3(c) would not be more practicable.*

(5) *In deciding who should be liable to pay costs the Court must have regard to all the circumstances.*

(6) *In particular it must have regard to –*

(a) The conduct of the parties both before and during the proceedings;

(b) The manner in which a party has pursued-

- i. A particular allegation
- ii. A particular issue; or
- iii. The case;

FINDINGS/CONCLUSION

12. I accept that the second Claim was probably filed unwittingly. Romaneta Francis all but accepted this in her Affidavit. However, whereas Counsel may have filed the second action unwittingly, it cannot be said that the client Respondent/Claimant did so. Unlike Counsel, they were always party to the matter and knew or ought to have known that they filed and subsequently discontinued a similar matter or in any event, that they had caused to be filed a matter against the same party.
13. Secondly, the Respondent's submission that the Defendants 2006 action was brought solely to frustrate progress of the Respondents 2005 matter is unsupported on the affidavit evidence. I agree however, that the both actions did cover substantially the same substantive factual grounds.
14. The Respondent's additional argument that it was unseemly for the Defendants to use the shield of Judicial Review to escape an award of costs in one action and then "*seeks to use costs as a sword to pierce the Claimant in another when both actions covered the same factual ground*", is unclear to me and perhaps not fully explained. In any event, it does not find favour with this Court as couched by the Respondent.
15. The Respondent's strongest point in resistance to the Application for costs is that no proper evidence of the "Great expense" the Applicant was put through in Defending the now discontinued matter has been put before the Court. Evidence of fees paid, expenses incurred or contingent liabilities have not been put before the Court. The circumstances of this application and the easily quantifiable and provable character of these expenses demand that they be proved in proper form. What has happened is that a dollar figure has not even been set out, far less proved. I do accept that counsel was involved in the matter for the applicant.
16. The Rules provide for the Prescribed Costs scale to be relied upon. In a matter without a dollar value, the sum of \$50,000.00 is provided as the base upon which the costs are

calculated. The discontinued action claimed damages not quantified and declarations. This gives rise to a maximum cost value of EC\$14,000.00. Apply the Appendix "C" of rule 65, stage "1" 45% of the \$14,000.00 is EC\$6,300.00. This figure is the Maximum costs that can be awarded. Costs however are not intended as wind fall, but as a genuine attempt at *restituto in integrum* in relation to the costs.

ORDER

17. Looking through the Prism of the Overriding Objectives of the CPR2000 and having regard to the various considerations provided in the Rules set out above⁵; the Court is of the view that the discounted sum of EC\$5000.00 be awarded the Applicants in Costs for the discontinuation of suit ANUHCV 2005/0493, to be paid forthwith.

18. That, until the payment of the costs ordered above are paid, the action 2009/0605 is stayed.

19. That the Costs of this Application for costs of \$500.00, also be paid forthwith.



JUSTICE DAVID C HARRIS
ANTIGUA AND BARBUDA

⁵ And including the adversaries of failure to prove Counsels expenses where the circumstances dictated that they be proved.