

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

CLAIM NO. SVGHCV2009/0124

BETWEEN:

DANIEL CUMMINGS

Claimant

AND

THE CENTRAL WATER AND SEWERAGE AUTHORITY

Defendant

Before:

Master Cheryl Mathurin

Appearances:

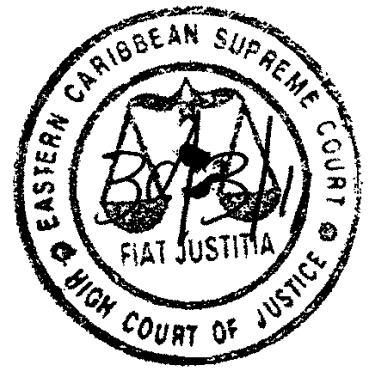
Mr. Emory Robertson for the Claimant

Mr. G Grahame Bollers for the Defendant

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2011: March 30<sup>th</sup>; 31<sup>st</sup>  
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### RULING

- [1] **MATHURIN, M:** This is a procedural application filed by the Claimant for an order setting aside an order dismissing an application for costs and also to proceed to assess the costs as originally applied for. The application is made pursuant to Rule 11.18(1) and Rule 65.
- [2] A brief chronology of proceedings will assist in the determination in this matter which has been approached with such vigor by the Parties.



- (a) Claim form and Statement of Case were filed on the 24<sup>th</sup> April 2009. The claim was for a declaration that the Claimant was entitled to \$64,700.00 monies due and owing, \$3000.00 consequential loss, Interest, General damages and costs.
- (b) Acknowledgement of Service filed on the 18<sup>th</sup> May 2009
- (c) Application by the Defendant for relief from sanctions and extension of time filed on the 18<sup>th</sup> May 2009
- (d) Order granting relief and an extension of time for filing the Defence on the 24<sup>th</sup> July 2009. The extension was granted to the 16<sup>th</sup> September 2009 and costs were assessed in the sum of \$750.00.
- (e) Request for judgment in default was filed by the Claimant on the 4<sup>th</sup> November 2009;
- (f) Judgment entered for the Claimant in the sum of \$87,732.50 inclusive of interest and fixed costs on issue.
- (g) Application by the Defendant for a further extension of time and relief from sanctions was filed on the 16<sup>th</sup> November 2011.
- (h) Default Judgment served on Defendant on 28<sup>th</sup> December 2009
- (i) Application by the Defendant to set aside Default judgment filed on the 4<sup>th</sup> January 2010
- (j) Order giving directions for hearing the application and adjourning it to 5<sup>th</sup> February 2010 made by the Court.
- (k) Application to set aside default judgment dismissed with costs to the Claimant in the sum of \$1000.00 ordered on the 19<sup>th</sup> April 2010.
- (l) Application for the determination of costs by the Claimant filed on the 13<sup>th</sup> October 2010
- (m) Order of the court dated the 9<sup>th</sup> November 2010 directing Defendant to respond to the application by 19<sup>th</sup> November 2010 and for Claimant to reply by the 30<sup>th</sup> November 2010 for a hearing on the 14<sup>th</sup> December 2010.
- (n) Submissions and authorities filed by the Defendant on the 19<sup>th</sup> November 2010.
- (o) Order of the Court by acting Master dated the 17<sup>th</sup> December 2010 directing Claimant to file and serve submissions with authorities on the issue of costs by the 5<sup>th</sup> January 2011. Defendant to respond within 7 days of service. Matter adjourned to the 17<sup>th</sup> January 2011

- (p) No appearance of the Claimant on the 17<sup>th</sup> January 2011. Non compliance with the directions of the 17<sup>th</sup> December 2010. No submissions filed. Application dismissed.

### **APPLICATION FOR PRESCRIBED COSTS**

- [3] On the 17<sup>th</sup> January 2011, the Court considered the application and dismissed it. The application was for an assessment of costs on a prescribed basis or alternatively in pursuance of Part 65.11. The Defendant opposed the application for costs on the prescribed basis submitting that the fixed costs regime applied as the claim was for a specified sum of money. Judgment pursuant to the Claimant's request was for a specified sum of money. The Defendant submitted for the Court's perusal the cases of Rochamel Construction Limited v National Insurance Corporation Civil Appeal No 10 of 2003 Saint Lucia and The Attorney General of Dominica v Stewco Construction Company Ltd Civil Appeal No 7 of 2008 Dominica.

In both of these cases the issue of costs pursuant to default judgment was considered.

- [4] In Rochamel, where the defendant admitted liability before action and allowed judgment in default to be entered on a claim exceeding \$500,000.00, the fixed costs were assessed at \$2,500.00 and Chief Justice Sir Dennis Byron stated as follows;

*"The rules have clearly provided encouragement for that conduct by making provision for fixed costs in those circumstances. It is completely inconsistent with furthering the overriding objective to order substantial or punitive costs against a defendant who admitted liability before action and did not defend the claim in any way.*

*In this case judgment was entered in default. Applying CPR Part 65.4 and Appendix A where judgment is entered in default on a claim exceeding \$500,000.00 the fixed amount is \$2500.00 in addition to appropriate Court costs..."*

- [5] In AG v Stewco, the judge made and award for prescribed costs in the sum of \$24,525.00 in a situation where default judgment pursuant to Part 12 was entered. Gordon JA in overturning that decision stated as follows;

*"As a general rule, a party is entitled to prescribed costs only if the fixed costs regime does not apply. Fixed costs are applicable to a claim for a specified sum of money as provided*

*in Appendix A of Part 65. Notably, Appendix A, Part 1 contemplates the application of fixed costs on a claim for a specified sum of money where default judgment under Part 12 is entered.*

*The issue as to whether a prescribed costs award was correct in the circumstances turns on whether the claim was for payment of a specified sum of money.*

*It is clear that the claim as originally entered was for both a specified sum of money and for an unspecified amount being a claim for damages, which would have been subject to assessment. However, upon application for default judgment, the claim for general damages was abandoned so that that which was claimed was the balance due on the specified amount claimed... In the circumstances, the fixed costs regime is applicable. The learned judge accordingly erred in awarding prescribed costs."*

- [6] In consideration of the non compliance and non attendance of the Claimant as well as the above authorities, I was of the opinion that the application for prescribed costs should be dismissed. Additionally, the Claimant, although applying for a costs assessment under rule 65.11, filed no evidence in support of such an assessment. The rule is clear as to what the court must take into account in 65.11(4) and (5) but yet no indications were made for the assistance of the Court. Accordingly the entire application was dismissed and I so ordered on the 17<sup>th</sup> January 2011.

#### **APPLICATION TO SET ASIDE ORDER OF 17<sup>TH</sup> JANUARY 2011**

- [7] This application was made pursuant to Part 11.18(1) which states as follows;

*"(1) A party who was not present when an order was made may apply to set aside or vary the order.*

*(2) The application must be made not more than 14 days after the date on which the order was served on the applicant*

*(3) The application to set aside the order must be supported by evidence on affidavit showing –*

*(a) a good reason for failing to attend the hearing; and*

*(b) that it is likely that had the applicant attended some other order might have been made.”*

- [8] The application is supported by Ms Andrea Roberts, Solicitors clerk in the office of Mr. Emory Robertson, Counsel for the Claimant. Ms Roberts states that Mr. Robertson attended late as he had an urgent matter to attend to and thought he could make the chamber hearing because of the position his matter was listed in. Mr. Robertson did not advise as to what time he did appear nor did he give any cognizance to the fact that as a senior practitioner his matters are normally amongst those that are prioritized, a tradition which is zealously protected in the jurisdiction. Mr. Robertson also did not give any particulars as to what the urgent matter was that took him away from the hearing that was set down for 9:15am. In any event the matter was disposed of before he arrived. I do not find that the explanation provides any cogent reason for not attending the hearing.
- [9] This finding should render the rest of the application otiose but in the event that I am wrong I will address the second limb of Part 11.18(3) (b). Is it likely that had the applicant attended I might have made another order? The order as discussed above was based on the application and the submissions of the Defendant. The Claimant had not filed any submissions to assist the court despite the order so directing him to do. He had not complied with the order of the Court giving the directions and he had not applied to the court for an extension of time within which to do so.
- [10] In support of this application, Mr. Robertson has on the 30<sup>th</sup> March 2011 filed submissions in support of the application for prescribed costs which should have been filed before the hearing on the 17<sup>th</sup> January 2011. These submissions, he asserts show authority which would cause me to revisit my decision to dismiss the application and award the prescribed costs he seeks.
- [11] The Claimant firstly relies on the case of **Saint Lucia Furnishings Limited v Saint Lucia Co-operative Bank Limited and Frank Myers of KPMG** Civil Appeal No 15 of 2003. He refers to paragraphs 16 to 20 of the judgment. I failed to appreciate how this would assist, paragraph 18 refers to where a claim was dismissed after the defence was filed and costs were awarded on the prescribed basis. Sir Dennis rationalized a lesser amount being awarded by the Master on the basis that absolutely no steps were taken after defence... but the award was prescribed costs on

the basis that the defence was filed. In Para 19 wherein the issue of costs was decided on a judgment in default on the counterclaim, it was clear that the fixed costs regime was applied in the absence of an assessment. Paragraph 20 refers to the fact of the default judgment being entered by the court at the case management conference may have led some to believe that prescribed costs should apply... he further rationalized this by stating that the costs should not be allowed to be aggravated by the Claimants failure in that case not to apply for a default judgment up to six months later as opposed to after 28 days had elapsed.

[12] I did not consider the authority of Singh v Observer Ltd helpful as it was a 1989 matter which was referencing a judgment that had been entered by the court for non compliance by the Plaintiff and not a default judgment and in any event the prescribed and fixed costs regimes were not established at that time. Toussaint v AG of St Vincent (2007) UKPC 48 determined the issue as to whether on the construction of CPR2000 Part 56.13 precluded the awarding of costs to a successful applicant in administrative law proceedings and Perez v Banner (2009) 73 WIR 74 referred to the setting aside of a default judgment under Part 13. The authorities did little to cause me to reflect on my previous determination.

[13] In the circumstances, the application to set aside the order of the 17<sup>th</sup> January 2010 is dismissed with costs assessed at \$500.00.

  
CHERYL MATHURIN  
Master