

GRENADA

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. GDAHCV2011/0488

BETWEEN:

SUSAN PATRICE

Claimant

and

JANIN CARIBBEAN CONTRACTORS LTD.

Defendant

Appearances:

Mr. Ruggles Ferguson for Claimant
Mr. Ian Sandy for Defendant

2012: May 31
July 20

JUDGMENT

[1] **ELLIS, J.:** By Claim Form and Statement of Claim filed on 2nd November 2011 and served on the named Defendant, **Janin Caribbean Contractors Ltd.** on 3rd November 2011, the Claimant (*qua executrix for Edward Coleridge Griffith*) sought as against the Defendant, **Janin Constructions Company Limited** (so stated in the Claim Form) the following relief:

- i. A declaration that the Defendant is indebted to the Claimant in excess of \$1 million arising out of a guarantee by Edward Coleridge ("the Coleridge Guarantee"). In October 1995, of Scotiabank credit facilities to the Defendant to facilitate road works for which Caribbean Consolidated Company Ltd. (CCC) had contracted with the Government of Grenada.

- ii. An order directing CCC, its servants and/or agents howsoever named to withhold payment of the sum of \$1 million owing to the Defendant arising out of a High Court judgement against CCC until further order by the Court.
- iii. In the alternative an order directing CCC and its servants and or agents to pay into Court any sums owing to Janin amounting to the sum of \$1 million, or any part thereof.
- iv. An injunction restraining the Defendant, its servant and or agents howsoever from removing from the jurisdiction transferring, disposing of or otherwise dealing or attempting to deal with howsoever any monies held in bank accounts or elsewhere of any assets amounting to the value of \$1 million or any part thereof until settlement of or final determination of the Claim or until further order.
- v. An order directing the Defendant its servants or agents to pay the sums owing to the Claimant inclusive or interest as a consequence of the Coleridge Guarantee.
- vi. Such further or other relief.
- vii. Costs.

[2] The Claim is founded on a debt which is alleged to have been incurred by **Janin Caribbean Construction Ltd.** to Edward Coleridge Griffith (deceased). It appears that prior to his death Edward Coleridge Griffith executed a Guarantee with Scotiabank guaranteeing repayment to the bank of the loan raised by **Janin Caribbean Construction Ltd.** in the amount of \$450,000.00 together with interest. The security used for the loan was 4 acres of land owned by the said Edward Coleridge Griffith.

[3] In August 2001 Edward Coleridge Griffith sold 2 acres of property at a purchase price of \$1,437,480.00. The Company defaulted on its loan payments which caused Scotiabank to debit the account of Edward Coleridge Griffith for sums in

excess of \$900,000.00 to satisfy in full the debt owed by the Company in addition to another loan taken by Edward Coleridge Griffith.

[4] The Claimant claims that the Janin has not repaid Edward Coleridge Griffith or his estate either in whole or in part any of the substantial money used to satisfy the guarantee.

[5] On the 2nd November 2011 the Claimant also filed an *ex parte* Notice of Application in which she sought the following relief:

1. An injunction restraining the Defendant, its servant and or agents howsoever from removing from the jurisdiction transferring, disposing of or otherwise dealing or attempting to deal with howsoever any monies held in bank accounts or elsewhere of any assets amount to the value of \$1 million or any part thereof until settlement of or final determination of the Claim or until further order.
2. An order directing CCC, its servants and/or agents howsoever named
 - i. to withhold payment of the sum of \$1 million owing to the Defendant arising out of a High Court judgement against CCC until further order by the Court, or in the alternative
 - ii. to pay into Court any sums owing to Janin amounting to the sum of \$1 million, or any part thereof.
3. Costs.

[6] The grounds of the Application were that the Claimant had learned that CCC had paid to the Defendant, **Janin Caribbean Contractors Ltd.** the sum of \$3 million in part satisfaction of the High Court judgement. The Claimant states that prior to this payment, the Defendant had no assets or other means against which the Claimant could have recovered the so called "Janin debt". The Claimant further learned that the CCC was scheduled to pay the balance of the judgement debt owing to the Defendant in the sum of \$1 million by 1:00 p.m. on 2nd November 2011. Once that payment was received, the Claimant was concerned that the Defendant would

have no other assets against which the Claimant could recover the so called "Janin debt".

- [7] Following an *ex parte* hearing on 4th November 2011 the Court granted an interim injunction restraining the Defendant from removing from the jurisdiction, transferring, disposing of or otherwise dealing or attempting to deal with howsoever any monies held in bank accounts or elsewhere of any assets amount to the value of \$1 million or any part thereof until settlement of or final determination of the Claim or until further order. The Court also made an order directing CCC, its servants and/or agents howsoever named to withhold payment of the sum of \$1 million owing to the Defendant arising out of a high court judgement against CCC until further order by the Court, or in the alternative to pay into Court any sums owing to Janin amounting to the sum of \$1 million, or any part thereof.
- [8] The Court also awarded the Claimant its costs.
- [9] On 9th November 2011, the Claimant filed a Notice of Application for continuance of the restraining order and following an *ex parte* hearing on 10th November 2011, the Court ordered the continuation of the interim restraining order until the hearing and determination of the substantive claim or further order.
- [10] On **15th December 2011**, the Defendant filed and served a statement of Defence on the Claimant. The Defence pleaded *inter alia* that the Claim does not demonstrate or show any cause of action against the Defendant, **Janin Caribbean Contractors Ltd.** In the alternative (assuming that there is a cause of action against the Defendant) the Defendant pleaded section 40 (1) of the Limitation of Actions Act and the equitable defence of laches.
- [11] In addition, the Claimant filed the following Applications which were served on the Defendant on 10th January 2012:
- i. To set aside the Interim Restraining Order. This application was also supported by an affidavit of Geoffrey Croome.

ii. For Summary Judgment. This Application was supported by the affidavit of Geoffrey Croome in which he averred that:

- [12] It is not surprising that following an *inter partes* hearing on 25th January 2012, the Court discharged the interim restraining order which had been granted and extended in November of 2011. The Claimant's own evidence having demonstrated that the Guarantee was made in connection with a bank loan made to **Janin Caribbean Construction Ltd.** and not **Janin Caribbean Contractors Ltd.**, the named Defendant in this action.
- [13] The Defendant Company made it clear in its Defence that **Janin Caribbean Construction Ltd.** is a separate legal entity from the Defendant herein. **Janin Caribbean Contractors Ltd.** is an international business company incorporated in the British Virgin Islands and registered as an external company under the Companies Act in Grenada in 1996 while **Janin Caribbean Construction Ltd.** is incorporated under the Companies Act in Grenada in 1989. Any legal obligation or liability which **Janin Caribbean Construction Ltd** would have incurred could not *without more* be ascribed to **Janin Caribbean Contractors Ltd.** It followed that any moneys owed to **Janin Caribbean Contractors Ltd** could not be properly be applied to satisfy a debt owed by **Janin Caribbean Construction Ltd.**
- [14] On 19th April 2012 at the hearing of the Application for Summary Judgment, the Claimant sought an adjournment. That application was opposed by the Defendant. The Court granted the Claimant's application for adjournment with costs to the Defendant. The Court also gave leave to the Claimant to file an affidavit in response to the Defendant's application and ordered the parties to file and exchange skeleton arguments by 21st May 2012.
- [15] On the 31st May 2012, when the application for summary judgment came up for hearing, the Claimant's attorney indicated to the Court that he had filed a Notice of Discontinuance in the action. He indicated that that Notice had been filed the previous day although a sealed copy of the Notice had not made its way to the

Court's file neither had it been served on the Defendant. The Claimant undertook to ensure that a sealed copy was forthwith served on the Defendant.

[16] The Defendant's attorney indicated that while there was no objection to the Claimant seeking to discontinue the action, the Defendant would seek an award of prescribed costs based on the value of the Claim (\$1,000,000.00) in the amount of \$51,562.00, in accordance with CPR Part 65 - Appendix "B".

[17] The Defendant submitted that no application for budgeted costs having been made, the proper basis upon which costs should be awarded in this matter is in accordance to the **Part 65.5 – Prescribed costs**. The Defendant seeks costs at the discounted rate of 55%.

[18] The Claimant opposes that application and submitted that this is a perfect case for the Court to exercise its discretion in awarding costs outside the prescribed costs regime. The Claimant's attorney set out the circumstances which he asks the Court to consider in the exercise of this discretion. He indicated:

1. That before bringing this matter to Court, the Claimant made every effort to have the matter resolved by the parties amicably. These efforts were all rejected by the Defendant.
2. The application for the injunction was made out of sheer necessity because moneys were being paid over and this meant that the Claimant would have had to move at some heightened speed to ensure that some repayment would have been made.
3. Following the discharge of the interim injunction, the Claimant again pleaded with the Defendant to mediate the dispute, having recognised that the parties needed to talk to arrive at a common understanding. Although the Claimant recognised that there were certain challenges, in the interest of closure, she thought that it was best that the parties talk and attempt to resolve the matter. These attempts were all rebuffed by the Defendant.
4. That the principal behind both companies **Janin Caribbean Contractors Ltd** and **Janin Caribbean Construction Ltd**. is the same person, Mr. Croome.

5. Based on the stage of the proceedings and the nature of the matters and the fact that it was determined on the basis of a technicality and attempts by the Claimant to resolve the matter amicably, prescribed costs should not be ordered.

Costs on Discontinuance

[19] CPR Part 37.3 generally sets out the procedure for discontinuing an action.

[20] Part 37.5 provides that:

- (1) "Discontinuance against any defendant takes effect on the date when the notice of discontinuance is served on that defendant under rule 37.3(1)
 - (a).
- (2) A claim or the relevant part of a claim is brought to an end as against that defendant on that date.
- (3) However, this does not affect –
 - (a) any proceedings relating to costs; or
 - (b) the right of the defendant under rule 37.4 to apply to have the notice of discontinuance set aside."

[21] As regards the question of costs following a discontinuance of an action Part 37.6(1) provides:

"Unless

- (a) the parties agree; or
- (b) 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."

[22] As regards the quantification of costs on discontinuance, Part 37.7(1) provides:

"The general rule is that, unless an order has been made for budgeted costs 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."

Prescribed Costs

[23] CPR Part 65.5 states:

- (1) The general rule is that where Rule 65.4 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) to (4) of this rule.
- (2) The "value" of the claim, whether or not the claim is one for a specified or unspecified sum, coupled with a claim for other remedies is to be decided in the case of the claimant or defendant -
 - (a) by the amount agreed or ordered to be paid; or if the claim is for damages and the claim form does not specify an amount that is claimed, such sum as may be agreed between the party entitled to, and the party liable to, such costs or, if not agreed, a sum stipulated by the court as the value of the claim; or
 - (b) if the claim is not for a monetary sum it is to be treated as a claim for \$50,000 unless the court makes an order under Rule 65.6(1)(a).
- (3) The general rule is that the amount of costs to be paid is to be calculated in accordance with the percentages specified in Column 3 of Appendix B against the appropriate value.

[24] In the Court's view the costs on discontinuance are governed by the prescribed costs rules.

[25] The first question therefore is what is the value of the Claim? The Claimant's Statement of Claim sought a declaration that the Defendant is indebted to the Claimant in excess of \$1 million, inclusive of interest arising out of a guarantee and

sought an order directing the Defendant to pay the sums owing to the Claimant inclusive of interest as a consequence of the Guarantee.

[26] The Claimant's claim falls under Part 65.5 (2) (a) of the CPR as amended. The Costs are to be calculated in accordance with Appendix "B" applying Appendix "C" (45% - up to the filing and service of Defence). The Claimant's costs are therefore calculated at \$42,187.50.

[27] The Court should then consider whether any discretion as to the amount should be exercised. After approving the judgement of Byron CJ in **Rochamel Construction Ltd. v National Insurance Corporation**, the Court of Appeal in **Cleveland Donald v Attorney General of Grenada** wisely counselled:

"The Rules do not intend that once a claim is to be concluded after trial the prescribed costs regime should inflexibly be applied in order to determine the costs payable. A perusal of the Rules will indicate that opportunities are afforded parties to vary the consequences of a mechanical application of the prescribed costs. For example, CPR 65.5(4) and CPR 64.6(3) entitle the court to award a proportion only of the costs detailed in the Scale of Prescribed Costs.

[28] CPR Part 65.5(4) provides:

The Court may -

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

[29] CPR Part 64.6 prescribes that where the Court 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. The Court is, however, given very wide discretionary powers to vary the application of the general rule. In exercising these discretions as to costs the Court is required to have regard to all the circumstances. Particular consideration must be given to the conduct of the parties both before and during the proceedings and the manner in which a party has pursued the case in general and particular issues within the case. Thus the order can be affected by whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings. The Court is also required to consider whether it was reasonable for a party to pursue a particular allegation or raise a particular issue and whether the Claimant gave reasonable notice of intention to pursue a claim.

Conduct of the Parties before and during the Proceedings

[30] The Claimant asks that the Court exercise its discretion under Part 64.6 to order that only a portion of those prescribed costs be paid having regard to the conduct of the Defendant (who rebuffed all efforts to engage in discussions regarding the claim with a view to reaching an amicable settlement) and having regard to the fact that the Claimant's pure motives in seeking closure.

[31] The Court is of the view that Part 64.6 does not avail the Claimant. There is no question that the Claimant brought this action against the Defendant Company which on the face of it had no direct liability. It is also clear that this did not occur through inadvertence or mistake. Rather, as Counsel for the Claimant indicated, the Defendant was joined because the company which should properly have been sued, **Janin Caribbean Construction Ltd.**, had for some time ceased to operate and had no assets against which the Claimant could hope to recover.

[32] The Claimant chose to ignore the fact that the companies were two separate legal entities whose liabilities were not *without more* transposable. The fact that the Claimant urged the Defendant through pre-action exhortations to settle this claim

amicably and out of court does not assist because she would have engaged the wrong entity. The fact that both companies had a principal officer in common also does not assist the Claimant.

[33] The Claimant must have and it turns out did in fact know that it had the wrong Defendant before the Court. That the Claimant sought to pursue the Defendant in the circumstances is not, in the Court's view, reasonable. That the Claimant persisted in this pursuit for the length of time which it did despite the early indication of the Defendant's position further compounds the problem. The Notice of Discontinuance was filed some considerable time after the Claim was filed. It is clear that the Defendant has been inconvenienced (injunctive relief was granted though later discharged) and drawn into a dispute in which it played no part and put into a position where it was forced to incur legal costs in defence of a claim which should not have been brought against it and which was clearly not maintainable.

[34] The Court is therefore not persuaded that there is any basis upon which a discretion could be exercised under Part 64.6 in the Claimant's favour. The Claimant should accordingly be ordered to pay the Respondent's prescribed costs in the sum of \$42,187.50.

[35] The Court Orders as follows:-

Notice of Discontinuance having been entered by the Claimant, the Claimant is ordered to pay the Defendant's prescribed costs in the sum of \$42,187.50.


Vicki Ann Ellis
High Court Judge