EASTERN CARIBBEAN SUPREME COURT
IN THE FEDERATION OF SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE
ST. CHRISTOPHER CIRCUIT

SBKHCV2011/0024

BETWEEN:

[1] WILLIAM TYSON
[2] CLOESTA TYSON

Applicants/Claimants

And

NAGICO INSURANCE COMPANY LIMITED

Respondent/Defendant

Appearances:

Mr. Garth Wilkin for the Applicants/Claimants
Mr. Sylvester Anthony and Ms. Angela Gracie Sookoo for the Respondent /Defendant

---

2013: May 10;
November 27;

DECISION

[1] THOMAS, J [A.G]: The matter before the court is an Application filed by the 1st and 2nd claimants/ applicants on 2nd August 2012. The following orders are sought:

(1) The defendant pay damages to the claimant in the sum of $EC 138,792.15

(2) The defendant pay interest to the claimant from 28th April 201 to 26th July 2012 in the sum of EC$24,501.51

(3) The defendant pay costs to the claimant in the sum of EC$19,849.02

(4) No order as to the costs of this application.

[2] Grounds 1 to 5 on which the applicants/claimants are seeking these orders are as follows:

(1) Judgment was granted in the subject claim by this court on 26th July 2012; it was ordered therein that damages payable to the claimants shall be $138,792.15, if the claimants are in possession of the salvage

(2) The claimants have been and continue to be in possession of the said salvage since the loss occurred on 13th August 2010

(3) It was further ordered in the said judgment that prescribed costs are payable pursuant to Part 65 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000; the said costs being quantifiable in the sum of EC$19,849.02

(4) Pursuant to Part 33 of the CPR 2000, by letter dated 28th April 2011, the claimants made an offer to the defendant to settle the captioned claim (such letter being without prejudice save as to interest on damages).

(5) The said offer contained the provision that the claimants reserved the right to make the terms of the offer known to this honourable court after judgment was given with regard to the question of interest on damages.

Affidavit in Support

[3] In her affidavit Cloesta Tyson, the 2nd claimant/applicant, outlined the circumstances giving rise to the offer made to the defendant to settle the matter on or about 28th April 2011.

[4] The affiant deposes that the precursor to the offer to settle was a request to the defendant for a copy of the proposal letter which was referred to in the defendants filed defence; in relation Bus GT17. This request, according to the deponents was

made on or about 29th March 2011; and not having received a reply on about 28th April 2011 she gave instructions to her attorney to make an offer to the defendant to settle the matter "as the cost of time a litigation put and would further put" strain on our business."

[5] Finally, the deponent says that the 1st claimant and herself "wish to be awarded interest in accordance with the Laws of St. Kitts and Nevis from the period between the offer to settle the captioned claim and the date of the judgment.

[6] On 26th September 2012, the defendant, NAGICO Insurance Company Limited filed a notice of objection to the applicants/claimants application from the pre-judgment interest from 28th April 2011 to 26th July 2012.

[7] The grounds for the objection are these:

(1) That this honourable court is functus officio and or res judicata in that

I The claim for pre-judgment interest which was properly before the court by virtue of the amended claim form filed herein on February 28th, 2011 was refused by virtue of the decision …contained in the written judgment delivered on July 26th, 2012.

II The whole of the decision…contained in the judgment delivered on the 26th July 2012 has been appealed by the respondent in the High Court. Civil Notice of Appeal No.20 of 2012 filed September 7th, 2012 including the quantum of damages awarded by the court which forms the basis of the application for pre-judgment interest.

(2) That the application for pre-judgment interest is properly an application to vary the decision…contained in the judgment delivered on July 26th, 2012 and amounts to an abuse of process in that

I That the appropriate time for bringing the offer to settle to the courts' attention would have been after the oral decision delivered in open court on July 26th, 2012 and before the said decision was issued in the form of the written judgment.

II The court having refused the applicants' claim from pre-judgment interest and the applicants' failure to bring the offer, to settle to the court's attention prior to the delivery of the written judgment, the appropriate course of action for the appellants is to appeal the decision of the court.

(3) The application for pre-judgment interest from April 28th, 2011 to July 26th, 2012 in the sum of EC$24,501.51 is excessive in that

I The applicants have failed to properly account for and or consider the twenty one (21) days from April 28th, 2011 to May 20th, 2011 during which the offer to settle was open for acceptance by the respondent.

II That the respondent cited reasonably in refusing the applicants offer to settle, having regard to all the circumstances of the case including the factual and legal issues that were still in dispute between the parties.

(4) This is not an appropriate case for the exercise of the courts' jurisdiction to vary the judgment delivered on July 26th, 2012, having regard to all the circumstances of this case in that:

I That there is no evidence of error on the part of the court in relation to the misapprehension of some fact or law in relation to its refusal to grant pre-judgment interest.

II The judgment has already been appealed to the Court of Appeal by virtue of the High Court Civil Notice of Appeal No. 20 of 2012 on September 7th, 2012

[8] The issue for determination are:

(1) Whether the court is functus officio in the matter

(2) Whether the application under part 35 of CPR 2000 or an appeal filed by the respondent operate as a stay

(3) Whether the applicants/claimants are entitled to the order sought

ISSUE NO. 1

Whether the court is functus officio in the matter and or *res judicata*

[9] On behalf of the claimants/applicants it is submitted that this court is not functus on 2nd August 2012 when the Part 35 application was made, nor is it functus to date

[10] In furtherance of this contention reliance is placed on the cases of Re Harrison Settlements [1]and Richard Rowe et al v Attorney General et al [2] and the submission goes on to say that the orders made in the judgment were never perfected or entered and that is by virtue of the Part 35 application that such perfection was sought: a further contention is that the defendant is seeking to move the court disregard the Part 35 application on the authority of Saint Christopher Club Ltd v Saint Christopher Club Condominions et al [3].

[11] Learned counsel for the claimants/applicants then goes on to distinguish the above mentioned cases with the following line of reasoning:

(12) "Firstly, the St. Christopher Club was concerned with variation of orders based on the slip rule under Rule 42.10 of CPR 2000. The Part 35 application does not concern the slip rule in any manner.

(13) The head note of the Saint Christopher Club case sums up the *stare decisis* therein

> "After an order is perfected on an appeal against that order is filed, the slip rule may only be used to correct genuine clerical errors on omission in the order."

(15) It is submitted that the core of the Part 35 application is mutually exclusive to the core of the St. Christopher Club case"

[12] Learned counsel for the defendant does not address the doctrine of functus officio directly, but he advances submissions on the kindred doctrine of *res judicata.* The submissions run thus:

> "The doctrine *res judicata* we submit at this stage is trite law. A plea of *res judicata* must show that the same point has actually been decided

[1] [1955] 1 ALL ER 185
[2] SKBHCV 2010/00845 dd 18th May 2012 (unreported)
[3] Civil Appeal No. 4/2007

> between the same parties. The doctrine and application of the principle of *res judicata* was addressed by the Court of Appeal in the local decision of Analdo Bailey v St. Kitts-Nevis Cable Communications Limited. Applying the essentials of the doctrine of *res judicata* it is clear that the issue of quantum of damages and costs were already decided by this honourable court in its decision of July 26th, 2012. The court in its judgment dated July 26th, 2012 ordered that the defendant pay to the claimants damages in the sum of $138,792.15 if they were in possession of the salvage and prescribed costs on the damages which would of course depend on which sum the claimants were entitled to. There is therefore absolutely no need for the claimants to come by way of application for orders from the court to determine the issue of quantum or costs. Such issues were already determined by the court between the parties."

[13] The court considers it expedient to address the submissions on the doctrine of *res justicata* forthwith. The import of this doctrine was explained succinctly by Rawlins JA, as he then was, in this way. "… [R*] es judicata pro veritate acciptua*. A literal translation is that a thing adjudicated is accepted as the truth[4]. This indeed the essence of what was held in Henderson v Henderson[5]

[14] On the respondents' our submission it is said that a plea of *res judicata* must show that the same point has already been decided. But while it can be said that the issue of the quantum of damages has been decided, this is not the case as far as the interest coupled with an application under Part 35 of CPR 2000 based on an offer to settle which by the said rules must come after judgment is given.

[15] Accordingly it is the determination of the court that *res judicata* does not apply in this context.

[16] In terms of the applicability of the functus officio doctrine, the court agrees entirely with the submissions on behalf of the applicants in this regard in saying that the application is not concerned with the slip rule embodied in Rule 42.10 of CPR 2000 and non applicability of the cases cite by learned council for the respondent. Indeed, the very tenor of Rule 35.3 (i) gives the court jurisdiction to hear the

[4] Macrina Blaize v Dr. Christina Nathaniel et al Civil appeal No. 12/2004 at para 5
[5] [1843-60] ALL ER 378. See alson: Etoile Commerciale SA v Owens Bank [1952] 43 WLR 128

application as it speaks to "…Making the terms of offer known to the court after judgment is given." In other words, so long as an application is filed under Rule 35.3 it cannot be that a new judge must hear the application.

ISSUE NO. 2

Whether application under Part 35 of CPR 2000 or an appeal filed by the respondent operate as a stay

[17] This issue become academic having regard to the determination above that the court has jurisdiction to hear an application under Part 35 of CPR 2000. Therefore, such an application or an appeal does not operate as a stay.

[18] Indeed, while the jurisdiction of the court in sub paragraphs (a) and (b) of Rule 35.3 (1) is limited to the allocation of costs in the proceedings and the interest on damages with respect to an offer by the claimant, Rule 35.3 (2) states that: "the offer may relate to the whole of the proceedings or to part of them or to any issues that arises in them." This cannot be a limitation on the court's jurisdiction.

ISSUE NO. 3

Whether the applicants/claimants arte entitled to the order sought with respect to

[19] It will be recalled that in their application the grounds in summary are that: judgment was granted in the matter on 26th July 2012 with an award of damages, prescribed costs were ordered in the said judgment; pursuant to Part 35 of CPR 2000 by letter dated 28th April 2011 the claimants made an offer to the defendant to settle the claim, the offer was made without prejudice; the said order contained a provision that the [applicants]/claimants reserved the right to make the terms of the offer known to the court after judgment; the court has a discretion under Rule 35.15 (2), order interest which was triggered by the award of damages in the judgment in the amount of EC $138,792.15 which exceeds the offer of $130,000.00 made by the defendant.

Rule 35.3 (1)

[20] Rule 35.3 (1) states as follows:

(1) A party may make an offer to another party which is expressed to be "without prejudice" and in which the offeror reserves the right to make the terms of the offer known to the court after judgment is given with regard to

a. the allocation of costs of the proceedings; and

b. (in the case of an offer by the claimant) the question of interest on damages.

Do the applicants/claimants satisfy the Law

[21] Cloesta Tyson in her affidavit in support exhibits a copy of a letter written by her attorneys-at-law to the defendant. And for the purpose of Rule 35.3 (1) the following portions thereof are considered relevant:-

> "Our clients are prepared to pursue the captioned claim as they consider they have a good case. However, our clients recognize that it will be costly and lengthy to pursue the claim. Solely for these pragmatic economical reasons, we are instructed to propose that your client settle the captioned claim[6] in full by a compromise payment of EC$130,000.00. This offer relates to the whole of the proceedings and is not inclusive of interest and costs….
>
> Our client reserves the right to make the terms of this offer known to the court after judgment is given with regard to the allocation of costs of the proceedings and the question of interest on damages.
>
> This offer is open for acceptance until 4:30 pm on Friday 20th May 2011"

[22] There can be no doubt that the actions on behalf of the applicants/claimants on 28th April 2011, in terms of the subject letter satisfies the requirements of Rule 35.3 (1) of CPR 2000 in terms of the offer and in terms of the reservation of making the offer known to the court.

[6] The caption in the said letter reads: William Tyson and Cloesta Tyson v Nagico Insurance Company Limited (SKSHCV 2011/0024)

The matter of interest

[23] Rule 35.15 (2), (4) and (5) are in these terms:

"(2) If a claimant makes an offer to settle and in

a) the case of an offer to settle a claim for damages- the court awards an amount which is equal to or more than the amount of the offer;

b) any other case the court considers that the defendant acted unreasonable in accepting the claimant offer;

The court may, in exercising its discretion as to interest take into account the rates set out."

[24] In this connection grounds 6 and 7 as contained in the application speaks to the following:

"6 The discretion of this honourable Court to order interest at rates set out in Rule 35.15 (2) of CPR 2000 was triggered by the award of damages in the judgment [being EC$ 138,792.00 which exceeds the amount of the offer made to the defendant, being EC $130,000.00]

7 The factors which the claimant rely on in support of their prayer for the exercise of this honourable Court's discretion to order interest on damages as set out in Rule 35.15 (2) of CPR 2000 are:

a. The claimant's prayer in the relief in the claim for interest pursuant to section 29 of the Eastern Caribbean Supreme Court Saint Christopher and Nevis Act, Cap. 3.11;

b. Prior to the making the Part 35 offer pursuant to Part 34 of CPR 2000, the claimants, by letter dated 29th March 2011, requested a true copy of the proposal letter applicable to the insurance contract between the claimants and defendant, which was the subject of captioned claim; the defendant did not provide the said proposal letter until 43 days had elapsed, which affected the claimant's ability to evaluate the offer being made to settle the captioned claim

c. The Part 35 offer to settle was made at an early stage in the proceedings (28th April 2011), the claim being originally filed on 4th February 2011 and Case Management Conference being held on 27th June 2011; and

d. The defendant was provided with the details of the claim in August 2010 and was seized with all the relevant documents tendered as evidence by the claimant before the Part 35 offer was made.

8 The claimants humbly request that interest be awarded from the date of the said offer to the date of the judgment with the rates of interest set out in Rule 35.15 (2) of CPR 2000."

Conclusion

[25] The power of the court to award pre-judgment interest is not in doubt. Parliament has so ordered in section 29 of the Eastern Caribbean (Saint Christopher and Nevis) Act [7] and in this context of an offer to settle Rule 35.15 (2) also prevails.

[26] The overriding consideration from the court is whether the defendant acted unreasonably in the circumstances and, therefore, the issue which the court must consider are:

(1) The letter from the applicants attorney-at-law, dated 29th March 2011, requesting proposal letter dated 18th July 2006 "referred to in paragraphs 4 and 5 of the defendant's defence"; coupled with a request for a reply before Tuesday 12th April, 2011

(2) The response from the defendant's attorney-at-law is dated May 10th, 2011.

(3) The "Without Prejudice" letter making the offer to settle dated 28th April 2011 from the applicants/claimant's attorney-at-law with a reservation to make the terms of the offer known to the court after judgment.

(4) It was not denied by the defendant that the insured vehicle was destroyed by fire on 13th August 2010

[27] The purpose of insurance is to provide a methodology whereby a person pays a premium against a certain risk so as to indemnify the policy holder or for the payment of the insured value of the subject of the policy in event that the risk materialize, in accordance with the terms of the policy of insurance[8]. In all of this,

[7] Cap. 3.11 (Revised Laws of Saint Christopher and Nevis, 2002)
[8] See: Global Process Systems Inc and another v Syarikal Takaful Malaysia Bha [2011] 1 ALL UK SL 5, Patterson v Harris [1861] 1 BLS 336 353

reasonable action is required by all and the reasonableness is accentuated where a business, on the one hand, or serious illness is involved.

[28] Based on the matters considered above, it cannot be said that the defendant acted reasonably. As learned counsel has pointed out the defendant's attorney-at-law took some 43 to elapse before there was a response to the request for a copy of the Proposal Letter. Further, in making the offer to settle the letter from the applicants' attorneys-at-law reflected a tone of reasonableness and economic pragmatism. This is what the letter said in part:

> "This offer relates to the whole of the proceedings and is not inclusive of interest and costs. If accepted, this proposal will result in your client paying significantly less than the insured value of the vehicle involved in the accident. A settlement will also result in an early resolution of this matter, and would save the further expenditure of time, energy and resources by each of the parties

[29] The point is that the foregoing can be novel or even strange to an insurer. They were simply not moved and as it turned out; the offer of $130,000.00 was, in all the circumstances a reasonable one.

[30] The applicants/claimants seek pre-judgment from the date of the offer to settle, being 28th April 2011 to the 26th July 2012, the date of judgment.

[31] The rates set out in Rule 35.15. The applicable rates set out in Rule 35.15 (2) in relation to the net damages of $138,792.15 not exceeding EC $100,000.00- 15% per annum and for the next $150,000.00-12%.

[32] The period involved here is rounded off as 15 months[9] and the court has not been shown any reason why the suggested rates should not be applied. Accordingly, 15% on the $138,792.15 the first $100,000.00 over 15 months at 15% yields $8,750.00 while the residue of $38,972.15 at 12% over the same period yields $5,818.00. This gives a total of $24,568.00.

[9] In actual fact the period of 15 months is 2 days short of that figure

[32] There is no order as to costs.

ORDER

IT IS HEREBY ORDERED AND DECLARED as follows:

1. The doctrine of *res judicata* has no application in the context of the hearing of an application under Part 35.3 of CPR 2000.

2. The court is not functus officio in relation to this application as the very tenor of Rule 53.3 of CPR 2000 gives the court jurisdiction as the rule speaks to making the terms of this offer known to the court after judgment and as long there is an application filed it cannot be heard by a new court in the normal course of civil litigation.

3. Given the court's jurisdiction to hear the application under Part 35.3 of CPR 2000, such an application or an appeal does not operate as a stay.

4. The applicants/claimants have satisfied the requirements of Rule 35.3 of CPR 2000 and are entitled to pre-judgment interest on the total award of damage of $138,792.00 at the rate of 15% on the first $100,000.00 and 12% on the remaining $38,792.00 yielding $18,750.00 and $5,818.00, respectively and a total of $24,568.00.

5. There is no order as to costs

Errol L. Thomas
High Court Judge [Ag]