EASTERN CARIBBEAN SUPREME COURT
GRENADA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: GDAHCV2009/0030

BETWEEN:

[1] DIRK BURKHARDT
[2] VIVIAN BURKHARDT

Claimants

and

[1] DONALD FREDERICK
[2] ANDREW FREDERICK

Defendants

Appearances:
Mrs. Sabrita Khan-Ramdhani for the Claimants
Mr. Dickon MItchell for the Defendant

2013: October 21;
December 16.

DECISION ON ASSESSMENT OF COSTS

[1] CENAC-PHULGENCE M [AG.]: This matter is of some vintage, judgment having been entered in 2011 and the issue of costs being outstanding for some time.

[2] By claim form filed 29th January 2009, the claimant claimed damages for negligence arising as a result of a vehicular accident caused by the second defendant as agent of the first defendant. In paragraph 11 of the Statement of Claim the claimants refer to a letter dated 26th March 2008 written to the Defendants demanding settlement and say that further exchanges of letters and discussions did not result in a settlement. They exhibited the "without prejudice"

letter dated 26th March 2008. In the amended defence filed on 7th September 2009, the defendants at paragraph 10 state that they made offers to settle as early as 20th February 2008 which were unreasonably refused.

[3] On 16th April 2010, when the matter came up for pre-trial review, the parties agreed that the only issue to be decided upon was damages and the matter was referred to the Master for the assessment.

[4] On 25th March 2011, the matter came up for hearing on assessment of damages and the Master made the following order:

> "1. Loss of use is assessed for a period of one (1) month in the sum of $3,400.00 the Court being of the opinion that the first named Claimant did not act reasonably in trying to mitigate his losses.
> 2. Interest on Special Damages from the date of the accident to the date of assessment namely;- the 22nd of March 2011. Statutory interest to apply on total judgment award of $35,270.00 from the 25th March 2011 until satisfaction.
> 3. Parties are to file evidence and brief submissions re; - the issue of costs by the 13th of May 2011.
> 4. The matter is adjourned to the 18th of May 2011 for hearing on the issue of costs."

There was no breakdown of the total judgment sum except that it included $3,400.00 for loss of use.

[5] On 13th May 2011, the first defendant filed an affidavit of Neilgean Mason-Calliste on behalf of the 1st defendant on the issue of costs. The affidavit of Ms. Mason-Calliste in summary spoke to the various correspondence exchanged between the parties during the course of negotiations over the period 12th March 2008 and 17th October 2008. All the correspondence emanating from the first defendant was not expressed to be 'without prejudice' and those emanating from the claimants were all expressed to be 'without prejudice'.

First Defendant's submissions on costs

[6] The first defendant filed submissions on costs on 13th May 2011. Their submissions in the main are that Part 35.15 of the Civil Procedure Rules 2000 ("CPR 2000") is applicable to the issue of costs in this matter.

[7] They submit that the total award was $35,270.00 and from the outset of the negotiations they offered more than the amount awarded by the Court. Three (3) weeks after the accident, the first defendant says they offered $26,000.00 which the claimants rejected and continued to reject right up to the filing of the proceedings. The first defendant says he offered the sum of $10,625.00 for loss of use and that was rejected up until 24th September 2008 when the claimants said they would accept the amount but that acceptance was still subject to the claimants reserving the right to pursue legal action against the first defendant.

[8] The first defendant's position is that before 29th January 2009 when the claimants filed their claim, an offer of $42,995.00 (comprising $26,000.00 for the vehicle, $10,625.00 for loss of use, $5000.00 as general damages, and $1,370.00 as special damages) had been made and this was rejected by the claimants.

[9] The first defendant submits that the claimants should pay the costs of the first defendant for the entire proceedings in keeping with CPR 35.15(1) as they made the offers before any proceedings were commenced by the claimants. The first defendant further submits that the criteria of Rule 35.15(1) (a) is met as the Court awarded less than 85% of the amount of the first defendant's offer. The total offer was $42,995.00 and the Court awarded $35,270.00 (82%).

[10] Further, the first defendant says that the claimants refusal to accept the offer of $26,000.00 made for the vehicle and their insistence on being paid $45,000.00 was unreasonable as that offer was based on the Certificate of Inspection and Report of Robert Miller and was made despite the claimants' own adjuster's pre-accident value of $35,000.00 and a pre-accident value of $8,000.00. The

claimants further insisted on being paid at first US$80.00 per day and then US$50.00 per day and then US$7,500.00 for loss of use.

[11] The first defendant therefore contends that the Court ought to award the first defendant prescribed costs on the amount of $82,920.00 claimed in accordance with CPR 65. Costs should therefore be $20,458.00. They cite the case of D & B Trucking & Hauling Service Limited v Caribbean Insurers Limited[1] although I note that in this case the Court of Appeal stated that CPR 35.15 did not apply to the circumstances of the case.

Claimants' submissions on costs

[12] The claimants filed submissions on 11th October 2013 after having been given a second extension to file submissions. The claimants contend that it is CPR 65 which is applicable to the issue of costs and that the claimants are the ones who are entitled to the award of costs being the successful party. They say that prescribed costs ought to be awarded on the sum of $35,270.00 which was the sum awarded.

[13] They submit that the amount of costs should be 75% of $35,270.00 in accordance with Appendix C of Rule 65 "From Listing Questionnaire up to and including pre-trial review. They say further that Part 35.15 as relied on by the first defendant is wholly inapplicable in the present circumstances as Parts 35.3, 35.5 and 35.6 have not been complied with and that Part 35.15 does not operate in isolation of these Parts.

[14] The claimant submits that the defendants have breached the law relating to privilege granted to "without prejudice" correspondence and refer to the case of Urcil Peters[2] where Olivetti-Joseph J cites Rush & Tompkins v GLC[3]. They say that in this case, Lord Griffiths at page 1299 D stated that the "without prejudice"

[1] BVI Appeal HCVAP2008/025 delivered 8th February 2010.
[2] ANUHCV2002/0318 delivered
[3] [1989] AC 1280.

rule is a policy of encouraging litigants to settle their differences rather than litigate them to the finish. At letter G, it states that

> "The rule applies to exclude all negotiation genuinely aimed at settlement whether oral or in writing from being in evidence. A competent solicitor will always lead any reporting correspondence "without prejudice" to make clear beyond doubt that in the event of the negotiations being successful they are not to be referred to at a subsequent trial. However, the application of the rule is not dependent upon the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of these negotiations will, as a general rule not be admissible at the trial and cannot be used to establish an admission or partial admission."

[15] The claimants submit that without prejudice correspondence has been exhibited to the affidavit of Neilgean Mason Calliste. They say for this correspondence to be admissible, it must have complied with Part 35.3 and must have communicated to the claimants that notwithstanding the "without prejudice" offer that they reserved the right to make the terms of the offer known to the court after judgment is given with regard to the allocation of costs of the proceedings.

[16] The claimants final submission is that the court in embarking on the determination of costs ought not to look at the amount claimed in the claim form but at the amount awarded. Therefore, costs should be $35,270.00 x 75% which they say amounts to $8,566.50.

Issues to be decided

[17] As I see it the following issues are to be decided:

(1) whether Part 35 applies to this case;

(2) whether the correspondence referred to in this case is 'without prejudice correspondence and therefore cannot be referred to;

(3) whether some other party other than the successful party should bear the costs in this case;

(3) whether the costs to be assessed should be prescribed costs on the value of the claim as claimed in the claim form or on the award made by the court on 25th March 2011.

Legal principles

[18] The law is clearly stated in rule 64.6(1) of the Civil Procedure Rules 2000 that the general rule is that the Court must order that the unsuccessful party pay the costs of the successful party. Sub-rule (2) states that the court may however order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to costs.

[19] In deciding who should be liable to pay costs the court must have regard to all the circumstances of a case. 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; (c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings; (d) whether it was reasonable for a party to –(i) pursue a particular allegation; and/or (ii) raise a particular issue; and (e) whether the claimant gave reasonable notice of intention to issue a claim.

[20] In Halsley v Milton Keynes General NHS Trust[4], the Court of Appeal indicated that the burden was on the unsuccessful party to show why there should be a departure from the general rule on costs, in the form of an order to deprive the successful party of some or all of their costs on the grounds that he refused to agree to ADR. Such a departure was not justified unless it had been shown that the successful party acted unreasonably in refusing to agree to ADR. However, it is clear that unreasonable conduct in relation to an offer made would need to be conduct that is unreasonable to a high degree and not merely wrong or misguided.

[4] [2004] EWCA Civ. 576, [2004] 4 All ER 920 CA.

[21] Jackson J in Multiplex Construction (UK) Ltd. v Cleveland Bridge UK Ltd. and Cleveland Bride Dorman Long Engineering Ltd.[5] said after addressing the general rule on award of costs stated that after acknowledging the general rule, the judge must then consider what departures are required from the starting point having regard to all the circumstances of the case. In considering the circumstances of the case the judge will have regard not only to any part 36 (equivalent of part 35 of our rules) offers made but also to each party's approach to negotiations (insofar as admissible) and general conduct of litigation.

Whether Part 35 applies to this case

[22] Part 35 of CPR 2000 deals with offers to settle and is primarily aimed at encouraging parties to make offers to settle. Rule 35.1(2) states that "This Part does not limit a party's right to make an offer to settle otherwise than in accordance with this Part. Rule 35.3 states that

> "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 the costs of the proceedings
> (b) …" (my emphasis)

[23] Rule 35.5(3) states:

> "Neither the fact nor the amount of the offer or any payment into court in support of the offer must be communicated to the court before all questions of liability and the amount of money to be awarded (other than costs and interest) have been decided." (my emphasis)

Rule 35.6(1) states:

> "An offer to settle a claim for damages must state whether or not the amount offered includes interest or costs." (my emphasis)

Rule 35.15 states as follows:

> "35.15 (1) The general rule for defendants' offers is that, if the defendant makes an offer to settle which is not accepted and in –
> (a) the case of an offer to settle a claim for damages – the court awards less than 85% of the amount of the defendant's offer;

[5] [2008] EWHC 2280.

(b) any other case – the court considers that the claimant acted unreasonably in not accepting the defendant's offer;
the claimant must pay any costs incurred by the defendant after the latest date on which the offer could have been accepted without the court's permission."
"(2) …
"(3) The court may decide that the general rule under paragraph (1) is not to apply in a particular case.
"(4) In deciding whether the general rule should not apply and in considering the exercise of its discretion under paragraph (2), the court may take into account the –
(a) conduct of the offeror and the offeree with regard to giving or refusing information for the purposes of enabling the offer to be made or evaluated;
(b) information available to the offeror and the offeree at the time that the offer was made;
(c) stage in the proceedings at which the offer was made; and
(d) terms of any offer.
"(5) This rule applies to offers to settle at any time, including before proceedings were started."

[24] An offer which is not in accordance with the Rule will be afforded such weight in relation to any issue as to costs as the court thinks appropriate. In Amber v Stacey[6], the defendant made a written offer that did not comply with CPR, Part 36, but which was more generous than the award eventually made by the court. It was held to be wrong in principle to treat the offer in the same way as if it had been a Part 36 payment for the purposes of costs. However, it was taken into account when considering costs, the court being influenced by the claimant's intemperate response to the written offer.

[25] It is clear from the correspondence that Part 35 was not at all contemplated as the provisions of the rule have not been complied with. Part 35 relates to a specific method of making offers to settle which then have the consequences as outlined in that Part. There is nothing to suggest that the defendants had Part 35 in their contemplation when they first made the offer to settle. I therefore treat the offers as offers outside of the regime contemplated in Part 35.

[6] [2001] 1 WLR 1225.

[26] Even if I am incorrect in my conclusion that Part 35 does not apply to this case, I still find that the rule 35.15 would not apply. There were several offers put on the table during the course of negotiations, the last being contained in the letter of 23rd September 2008 which was in the amount of $36,625.00. The award finally made, i.e. $35,270.00 represents approximately 95% of the amount of the offer made in the defendants' 23rd September 2008 letter. In addition, the defendants have failed to show that the claimants were unreasonable in not accepting the offers to settle. They have stated this in their submissions but such an allegation must be sustained on the facts. As stated above, unreasonable conduct in relation to an offer made would need to be conduct that is *unreasonable to a high degree* and not merely wrong or misguided.

Whether the correspondence referred to is "without prejudice" and therefore cannot be referred to.

[27] If an item of correspondence is appropriately marked "without prejudice" then, in the absence of any qualifying words in that document, not only the party to whom the letter is addressed but the maker of the offer himself will not generally be entitled to refer to the document even on the question of costs. The maker of an offer may, however, reserve the right to refer (generally on the question of costs) to any offer which he has made[7]. A phrase as simple as 'without prejudice save as to costs' is sufficient for this purpose. Without such words, correspondence written 'without prejudice' may not be used after trial on the issue of costs[8]: Reed Executive plc v Reed Business information Ltd.[9]

[28] It is very clear that the rule is not dependent upon the use of the words 'without prejudice'. If it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at trial and cannot be used to establish an admission or partial admission … the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest

[7] Calderbank v Calderbank [1976] 3 All ER 333.
[8] See Note 225.7 page 322 The Caribbean Civil Court Practice 2011.
[9] [2004] 4 All ER 942.

in promoting settlements and the public interest in full discovery between parties to litigation.

[29] In the instant case, all the defendants' correspondence during the process of negotiation was not stated to be 'without prejudice'. All of the correspondence of the claimants however were always stated to be 'without prejudice'. I have looked at the correspondence and the circumstances of this case and it seems that the intention of the parties was always to try to settle this matter without the need to go to trial and so it could not have been the intention of the parties that what as spoken in the course of negotiation could be divulged to the court. In light of this, it is my opinion that the contents of the letters cannot be taken into account on this assessment. The evidence of the fact that there were offers to settle which were rejected by the claimants is a factor to be taken into account when assessing costs however as this goes to the conduct of the parties before and during the trial.

[30] The letters of offer expressed to be "without prejudice" cannot be used during the course of the trial but is certainly relevant to be considered on the issue of costs. It is the common position that "without prejudice" letters cannot be disclosed except by agreement between the parties before liability and quantum are determined. However, such letters evidencing negotiation are relevant when assessing conduct of the parties before and during the proceedings as contemplated by rule 64.6 CPR 2000. The fact that several letters were sent as offers to settle is a factor to be taken into account when assessing costs but the contents of those offers/letters are privileged and so cannot be disclosed.

Whether some other party other than the successful party should bear the costs in this case

[31] The defendants have not discharged the burden of displacing the general rule that the unsuccessful party should bear the successful party's costs. There is nothing which shows that any other order should be made in this case. The claimants were certainly unreasonable to expect that the defendants would have accepted a position where they would pay monies over to them in settlement of the claim and

then still be subject to legal proceedings. I do not however believe that this conduct amounts to such misconduct which would justify a departure from the general rule that costs are to be paid to the successful party. The conduct can be said to be misguided or wrong at most in terms of how the offer to settle was treated. The defendants have been adequately punished for their unreasonable behaviour by an award which is less than the last offer made to them by the defendants.

Whether the costs to be assessed should be prescribed costs on the value of the claim as claimed in the claim form or on the award made by the court on 25th March 2011.

[31] I find support for the claimants' contention that in the calculation of costs the amount awarded should be looked at and not the amount claimed. This accords with rule 65.5(2). The amount ordered to be paid on 25th March 2011 therefore forms the basis of the calculation of prescribed costs.

Conclusion

[32] In conclusion, I find that the defendants are liable to pay costs to the claimants such costs being prescribed costs on the sum of $35,270.00. Prescribed costs on this amount is $5,290.50. In accordance with Appendix C of Part 65, the claimants are entitled to 75% of this amount since the matter only went up to pre-trial stage. The prescribed costs to be awarded to the claimants is therefore 75% of $5,290.50 which is $3,967.88. I consider it appropriate to award costs of the assessment to the defendants because of the inordinate delay of the claimants in filing submissions in the face of two court orders granting them time so to do. Finally, I wish to thank counsel for their helpful submissions.

Order

[33] The Order is as follows:

(a) The defendants are to pay to the claimants prescribed costs in the sum of $3,967.88.

(b) The claimants shall pay to the defendants' costs on the assessment in the sum of $500.00 bearing in mind that there were no oral arguments in this assessment.

Kimberly Cenac-Phulgence
Master [Ag.]