THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

CLAIM NO. SKBHCV2016/0019

BETWEEN:

ORIN ROBERTS

Claimant/Judgement Debtor

and

FINANCIAL AND REGULATORY COMMISSION

Defendant/Judgment Creditor

Appearances:

Mr. Emile Ferdinand Q.C., with him, Mr. Garth Wilkin for the Claimant
Mr. Anthony Gonsalves Q.C., with him, Mrs. Tashna Powell Williams for the Defendant

---

2019: July 31
October 14

JUDGMENT

[1] VENTOSE, J.: The Claimant brought a claim against the Defendant for wrongful dismissal and for breach of statutory duty under the Holidays with Pay Act CAP 18:15 of the Revised Laws of Saint Christopher and Nevis. Lanns J. (Ag.) held that the Claimant had not established that the Defendant wrongfully dismissed him or was in breach of contract when it terminated his services, nor had he proven a contravention of the Holidays with Pay Act. Lanns J. (Ag), however, determined that the calculation of the payment in lieu of notice to which the Claimant was

entitled upon his termination was made incorrectly. Lanns J. (Ag.) ordered that "[c]osts [be] awarded to the [Defendant] in accordance with part 65.5". However, Lanns J. (Ag) did say that in light of the incorrect calculation of the amount paid by the Defendant to the Claimant she would "order payment for that sum". The essential question that arises in this case is how costs are to be calculated in accordance with CPR 65.5

Prescribed Costs

[2] CPR 65.5 governs the prescribed costs regime, providing as follows:

> ### Prescribed costs
>
> 65.5 (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 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.
>
> (4) 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.

[3] The Claimant submits that the prescribed costs awarded in the Defendant's favour are to be calculated on the amount ordered to be paid, namely, the underpayment by the Defendant to the Claimant based on the incorrect calculation of the notice period amounting to EC$1,616.66. The prescribed costs on that sum would be EC$242.50. The Defendant, however, submits that the prescribed costs awarded to the Defendant are to be calculated based on the sum set out in the Claimant's claim form as the value of the claim.

The Claimant's Submissions

[4] The Claimant submits in summary that there is no current CPR Rule, Overriding Objective CPR principle or other common law principle of interpretation which provides the Defendant a path to its goal: prescribed costs calculated based on the amount claimed by the Claimant in the claim form. The Claimant further submits that the pre-2011 position that prescribed costs were awarded to a defendant based on "the amount claimed by the claimant in the claim form" has been abolished. The Claimant contends that, first, CPR 65.5 is crystal clear and its natural and ordinary meaning must be applied; and, second, the Defendant is entitled to mathematically determinable prescribed costs based on the "amount ordered to be paid", that is, $1,616.66. The calculation of such costs is therefore 15% of $1,616.66 which equals the sum of $242.50.

[5] The Claimant submits that there is nothing inherently absurd in the language of the amendment or contextually absurd within the costs regime of the CPR as a whole; and that it would be improper and impermissible for the court to interpret CPR 65.5 as if the amendment had not been made. In the Claimant's view, first, the value of the claim is the sum adjudged by the court or agreed by both parties to be used solely for calculating prescribed costs. Just because a claim form contains a unilateral "specified sum" does not automatically mean the value of the claim is that specified sum; second, in the pre-2011 CPR, with respect to defendants who were facing a claim for a specified sum, the "value of the claim" was that "specified

sum" but that regime has ended; third, in the post-2011 CPR the "likely value" of a claim is usually known when there is a "specified sum" unilaterally contained therein. Just because a claimant believes he is owed a specific sum of money, does not mean that the value of the claim (for the purposes of determining prescribed costs) is that specific sum; fourth, in the post-2011 claim - one seeking quantifiable damages for breach of contract and breach of statutory duty in relation to employment - the likely value of the claim was known and, therefore, a CPR 65.6(1)(b) application was an option for the Defendant; and, fifth, a pre-2011 defendant could sit back and defend a specified sum claim without worrying about costs, because it was merely a matter of arithmetic. A post-2011 defendant must be proactive and use the options provided within the CPR to get his costs or negotiate a pre-trial mutually agreed sum.

[6] The Claimant concludes by submitting that: (1) the existence of alternative cost determination options within the CPR support the Claimant's - and the natural and ordinary language - interpretation of CPR 65.5 within the context of the CPR as a whole and eliminates any suggestions that CPR 65.5 is absurd or the current prescribed costs regime causes injustice to defendants; (2) the true and proper interpretation of CPR 65.5 is contained in its pellucidly clear language: the value of the claim, in the case of the claimant or defendant, is the amount agreed or ordered to be paid. The Chief Justice has acknowledged and applied the current regime in Delta Petroleum (Nevis) Limited v OOJJ'S Ltd (Doing business as OOJJ's Service Station) (SKBHCVAP 2013/0016 dated 10 October 2016); (3) there is simply no current CPR Rule, overriding objective, CPR principle or other principle of interpretation which provides the Defendant a path to its goal: prescribed costs calculated based on the amount claimed by the Claimant in the claim form; (4) the Defendant is stuck in a pre-2011 time warp just because it is convenient for its purposes and wishes the court to take a quantum leap thereto by ignoring the clear and unambiguous wording of the amended rule; and (5) the Judgment Summons should be amended to reflect the true costs payable to the Defendant based on the trial judge's order, i.e. EC$242.50.

The Defendant's Submissions

[7] The Defendant argues that the Civil Procedure Rules must be interpreted in accordance with the overriding objective of dealing with cases justly, taking into account the non-exhaustive considerations in CPR 1.2; and that the dictates of fairness, common sense and justice militate strongly in against the Claimant's interpretation. The Defendant argues further that the calculation of costs on the basis suggested by the Claimant results in costs being awarded to the Defendant in the sum of $242.50 on a claim made by the Claimant for approximately $99,000.00 in a trial that lasted three days and in circumstances where the court resolved all of the issues in the case in favour of the Defendant . In the Defendant's view, the award of $242.50 costs to the Defendant would be manifestly unreasonable, unfair and absurd and would result in a total injustice if the Claimant's interpretation was allowed to succeed. The Defendant contends that this result simply could not have been the intention of the Rules Committee.

[8] In addition, the Defendant submits that the payment to the Claimant of the amount to make up his notice pay was not an issue for determination at trial. The trial judge agreed with the Defendant that one month's holiday pay was appropriate and payable, but that the sum had been calculated erroneously by the Defendant. The Defendant contends that there was never a claim by the Claimant that he had received an incorrect amount based on a wrong calculation of his one month's notice pay and the court only ordered the correct calculation of what was already accepted as an erroneous calculation by the Defendant in its defence.

[9] The Defendant submits that the way in which this matter can be resolved is the implication that necessarily arises by looking at the latter part of CPR 65.5(2)(a) that reads, "…or if the claim is for damages and the claim form does not specify the 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 courts as the value of the claim". The Defendant further submits that CPR 65.5(2)(a) provides an express mechanism to arrive at a valuation in a claim for damages where the claim form does not specify the amount that is claimed. In

the Defendant's view, this means that this mechanism for fixing a value does not apply where the claim form does in fact specify an amount claimed. There is no valuation exercise required where the claim form does in fact specify such an amount. This means that where the claim form does specify an amount claimed (a) no valuation exercise is necessary and (b) that is the value to be used. The Defendant contends that this interpretation is reasonable, sensible, in keeping with the overriding objective of treating parties fairly and requires no real violence to be done to CPR 65.5.

[10] The Defendant submits that CPR 65.5 expressly contemplates covering costs payable to a winning defendant but contains an internal problem in the way it has expressed the method of calculation of those costs; and that the problem must be solved by considering the proper interpretation internally of that very rule. The Defendant also submits that the proper reading of the rule is that the calculation of the value based on the sum agreed or ordered to be paid can apply only to costs awarded to a successful claimant, the second part where the claim is for an unspecified sum of damages can apply to both a claimant and a defendant. The Defendant further submits that there is no express provision in CPR 65.5(2)(a) that covers the case where the claim form in fact specifies an amount that is claimed.

[11] The Defendant submits that the logical inference of the wording "or if the claim form is for damages and the claimed form does not specify an amount that is claimed" is not to exclude such specified sum claims, but that simply it was so patent that these would be governed by the sum specified in the claim that there was no need to mention them – it is implied. The Defendant questions why the drafters sought to limit the second part of CPR 65.5(2)(a) to only cases where a damages claim did not specify a sum, answering that the logical and inescapable conclusion is that a valuation exercise was seen as simply unnecessary where the claim specifies the sum claimed. The Defendant contends that it was already there, and where there is a specified sum claimed, there is no need to apply for a valuation.

The Court's Considerations

[12] The starting point is to consider the words of CPR 65.5 to determine whether they expressly cover the situation with which we are here presented, and, if they do not, whether there is any implication that can properly be made or even necessary. CPR 65.5(1) states expressly that the general rule is that where 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 CPR 65.5(2) to (4). It seems to me that this must be the starting point to any determination of prescribed costs in accordance with CPR 65.5. CPR 65.5(2) provides for the situations in which it is necessary to determine the value of a claim. CPR 65.5(3) states that 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. Appendix B, entitled "Scale of prescribed costs" provides for the percentages of costs (Column 3) based on the "Value of the Claim" (Column 2). Appendix C states that it is a table "showing the percentage of the prescribed costs to be allowed under Appendix B where a claim concludes prior to trial". Therefore, the percentage of prescribed costs is calculated based on the value of the claim in accordance with Appendix B and the amount payable to a party is further calculated in accordance with Appendix C based on the stage of the claim.

[13] It is necessary to consider CPR 65.5(2) because the submissions of the parties focus almost exclusively on it. CPR 65.5(2) provides that:

> (2) The "value" of the claim, whether or not the claim is one for a specified or unspecified 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.

[14] The first point to note in CPR 65.5(2) is that "or specified" appears twice. This is clearly an error in the online version of the CPR. It is not contained in section 40 of the Eastern Caribbean Supreme Court Civil Procedure Anguilla (Amendment) Rules, 2011 (L.S.I. 1/2011) which amended CPR 65.5(2) by repealing paragraph (2) and substituting the following paragraph—

> "(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)."

[15] This typographical error having been addressed, it is necessary to focus on the chapeau of CPR 65.5(2) which states that "[t]he "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 – ". The important point is that CPR 65.5(2) does not apply in all cases where the value of the claim is to be determined but applies only where the claim is: (1) for a specified sum; or (2) for an unspecified sum; and in both cases where it is (3) coupled with a claim for other remedies. The words "coupled with a claim for other remedies" is the deciding limitation on the scope of CPR 65.5(2). If the claim, whether for a specified or unspecified sum, is not coupled with a claim for other remedies, CPR 65.5(2) does not apply.

[16] I agree with the Claimant that CPR 65.5 is crystal clear and its natural and ordinary meaning must be applied. However, that ordinary and natural meaning leads to the clear conclusion that CPR 65.5(2) does not apply to the case where the claim, whether for a specified or unspecified sum, is not coupled with a claim

for other remedies. Since CPR 65.5(2) is inapplicable, it is not necessary to address the comprehensive submissions made by the Defendant as to why its application to the facts of this case would lead to an absurdity, an unjust result or disproportionate result and would drive a coach and horses through the overall concept of prescribed costs that it could not have been the intention of the framers of the CPR. The simple answer is that the framers of the 2011 amendment of the CPR never contemplated that a claim which is not "coupled with a claim for other remedies" could ever be covered by CPR 65.5(2). The express words of CPR 65.5(2) forbid any such interpretation. I, therefore, do not agree with the Claimant that the language of CPR 65.5(2) is clear and unambiguous: the value of the claim, in the case of the claimant or defendant, is the amount agreed or ordered to be paid. This interpretation fails to have regard to **all** the clear words of CPR 65.5(2).

[17] What CPR rule governs a situation where a claimant makes a claim for a specified sum but does not have a claim for other remedies – the typical case? The Claimant submits that the pre-2011 position that prescribed costs were awarded to a defendant based on "the amount claimed by the claimant in the claim form" has been abolished as those words have been excised by the 2011 amendment. The Defendant submits that the removal of what was 65.5(2)(b)(i), that is, "the amount claimed by the claimant in the claim form" was neither intended to remove the ability of the court to award prescribed costs to a winning defendant based on the amount claimed in the claim form, nor does it have that necessary effect. The Defendant is plainly correct that CPR 65.5(2)(a) (second part) expressly provides a method to determine the value of a claim for damages where the claim form does not specify the amount that is claimed. Consequently, the Defendant submits, firstly, that it easily implies that this mechanism for fixing a value does not apply where the claim form does in fact specify an amount claimed; and, secondly, no valuation exercise is required where the claim form does in fact specify such an amount. I completely agree.

[18] It is important not to forget that CPR 65.5(1) states that the general rule is that where 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 CPR 65.5(2) to (4). As stated above, Appendix B provides the scale of prescribed costs based on a percentage of the "Value of the Claim". CPR 65.5(2) provides for the determination of the value of the claim in the circumstances outlined therein. However, CPR 65.5 does not state what the value of the claim should be where the claim form specifies an amount claimed. CPR 65.5(2), as the Defendant correctly notes, does provide a mechanism for determining the value of the claim where the claim form does not specify an amount in the claim. It is no stretch of the words used in CPR 65.5 to state simply that the drafters of the 2011 amendment thought it unnecessary to provide a mechanism to determine the value of the claim where the claim form specifies the amount claimed. It may be that the pre 2011 CPR 65.5(2)(b)(i) providing as it did that the value of the claim in the case of the defendant is "the amount claimed by the claimant in the claim form" was included out of an abundance of caution. It is arguable that the drafters of the 2011 amendment felt that in a case where the claimant succeeds, prescribed costs will be based on the amount that the defendant is ordered to pay. Likewise, where the defendant succeeds, prescribed costs will be based on the value of the claim based on the amount claimed by the claimant in the claim form. None of these situations are expressly provided for in CPR 65.5. CPR 65.5(2) is not applicable where the claims are not "coupled with a claim for other remedies".

[19] It seems to me to be obvious that the first place to look to determine the value of the claim is the claim form. Where the claim is for a specified amount that amount is the value of the claim. Prescribed costs are to be determined in accordance with CPR 65.5(1). Where claim, whether for a specified or unspecified sum, is coupled with other remedies, CPR 65.5(2)(a) applies. It is not unusual for the CPR to determine a method of valuing claims when that is not easily ascertainable as in the case where the claim form is only for a specified sum. It provides that mechanism in CPR 65.5(2). I agree with the Defendant that where the claim form does specify an amount claimed: (a) no valuation exercise is necessary and (b)

that amount claimed is the value to be used for the purpose of prescribed costs. I also agree with the Defendant that this interpretation is reasonable, sensible, in keeping with the overriding objective of the CPR 2000 of treating parties fairly and requires no real violence to be done to the wording of CPR 65.5. It could not have been the intention of the drafters of the post 2011 amendment to leave unaddressed two of the most common situations where costs are to be awarded, namely, firstly, where the claimant succeeds, and the court orders an amount to be paid by the defendant to the claimant; and, secondly, where the defendant succeeds and in both cases the claims are not coupled with other remedies. Since I disagree with the Claimant that CPR 65.5(2) is applicable, it is not necessary for me to address the Claimant's submission that there are other avenues within CPR (i.e. outside of 65.5) available to a defendant.

[20] There is no internal dilemma in CPR 65.5 as contended by the Defendant because CPR 65.5(2) is not applicable to the situation where the defendant succeeds, and the claim form specifies an amount claimed and is not coupled with a claim for other remedies. The answer is to look to CPR 65.5(1) which contains the general rule and Appendices B and C. It seems unnecessary to state what the value of the claim is, or provide a mechanism for its determination, where it is patently clear what it is when the claim form specifies the amount claimed. The court in such a case does not need to determine the value of the claim because it already exists.

[21] The Court of Appeal in Ultramarine (Antigua) Ltd. v Sunsail (Antigua) Limited (ANUHCVAP2016/0004 dated 17 April 2017) observed (at [41]) that "CPR 65.5(2)(b) applies to a non-monetary claim, not to an unquantified monetary claim". This statement is *obiter*. It is clear however that CPR 65.5(2)(b) applies to a monetary claim, whether quantified or not, that is coupled with a claim for other remedies, and it also applies to an unquantified monetary claim. This decision does not assist the Claimant's case. First principles do.

[22] At the hearing on 30 July 2019, the parties agreed that the sum due to the Claimant by the Defendant pursuant to the judgment of the court is $1,616.66. Based on the court's reasoning above, prescribed costs are to be calculated on

the value of the claim as determined by the amount specified in the claim form. The Claimant's amended statement of claim filed on 29 April 2016 claimed damages in the sum of $92,836.34 for wrongful dismissal and damages in the sum of $6,714.09 for breach of statutory duty. This amounts to a total of $99,550.43 and it is this figure that is to be used as the value of the claim for the purposes of prescribed costs in accordance with CPR 65.5(1). Appendix B mandates that where the value of the claim does not exceed $100,000.00, the scale of prescribed costs is 15%. 15% of $99,550.43 gives the sum of $14,932.56. The table in Appendix C, showing the percentage of the prescribed costs to be allowed under Appendix B where a claim concludes prior to trial, informs that if the claim proceeds to trial the party is entitled to 100% of the costs allowed under Appendix B. The Defendant is, therefore, entitled to prescribed costs in the sum of $14,932.56. As mentioned above, the parties agreed that the sum of $1,616.66 is payable to the Claimant by the Defendant pursuant to the judgment of the court. Subtracting this amount from the total amount awarded for prescribed costs gives a total amount of prescribed costs in the sum of $13,315.90.

Disposition

[23] For the reasons explained above, I make the following orders:

(1) The Claimant shall pay the Defendant the sum of $13,315.90 representing prescribed costs pursuant to CPR 65.5(1) within 14 days of today's date.
(2) The Judgment Summons is adjourned to 30 October 2019.
(3) Each party to bear their own costs in this matter.

Eddy D. Ventose
High Court Judge

By the Court

Registrar