GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.29 OF 2006

BETWEEN:

BRADFORD NOEL

Appellant

and

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED

Respondent

On written submissions:
The Hon. Mr. Denys Barrow, SC — Justice of Appeal

Representation:
Amicus Attorneys for the Appellant
Lewis & Renwick for the Respondent

2007: March 19.

JUDGMENT

[1] BARROW, J.A.: At quite an advanced stage in the life of the claim which gave rise to this appeal, after a trial date had been set and then vacated, Baptiste J granted an application by the respondent and ordered that U.S.$680,000.00 be stipulated as the value of the claim brought by the appellant against the respondent. This order was made for the purpose of later quantifying prescribed costs. The appellant contended that the judge had no jurisdiction to make the order at that late stage. The appellant held that the claim was valued by the Civil Procedure Rules 2000 (CPR 2000) at EC$50,000.00.

[2] Nothing turns on the facts of the substantive case (which has not yet been tried, so far as this court is informed) in which the appellant claimed specific performance of an alleged contract by the respondent to sell him the freehold of a property that

the appellant alleged the respondent subsequently offered for sale by auction. The appellant claimed, further or in the alternative, damages for breach of contract as well as special damages in the amount of US$30,000.00. The appellant obtained an injunction restraining the respondent from disposing of the property. There was much forensic activity along the way, including but distinctly not limited to a case management conference, referral to mediation, application for security for costs, pre-trial review, the fixing and vacation of trial dates in December 2005 and an appeal to this court.

[3] On 2nd May 2006 the respondent filed a notice of application asking for orders fixing new trial dates and directing compliance with earlier orders. The application stated that those orders were sought by consent. The respondent additionally asked, pursuant to the court's general powers of case management or alternatively pursuant to rule 65.6(1), for a direction that "the value to be placed on the case for the purposes of CPR 65.5 be determined to be (a) US$680,000.00 being the total of (i) the monetary value of the contract of which the [appellant] seeks specific performance being the sum of US$650,000.00 and (ii) the special damages of US$30,000.00 claimed by the [appellant], or (b) such other value as shall seem appropriate to the Court …" As indicated, the judge acceded to the application.

[4] The provisions in CPR 2000 that the judge was required to examine were rules 65.5 and 65.6. The relevant parts of the first rule read 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) of this rule.
>
> (2) In determining such costs the value of the claim is –
>
> (a) in the case of a claimant – the amount agreed or ordered to be paid;
>
> (b) in the case of a defendant –
>
> (i) the amount claimed by the claimant in the claim form;

(ii) if the claim is for damages and the claim form does not specify an amount that is claimed – such sum as is agreed between the party entitled to, and the party liable for, the costs or, if not agreed, a sum stipulated by the court as the value of the claim; or

(iii) if the claim is not for a monetary sum – the amount of EC$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) …"

[5] Rule 65.6 is in the following terms:

> Application to determine value of claim for purpose of prescribed costs
>
> 65.6 (1) A party may apply to the court at a case management conference
>
> (a) to determine the value to be placed on a case which has no monetary value; or
>
> (b) if the likely value is known, to direct that the prescribed costs be calculated on the basis of some higher or lower value.
>
> (2) The court may make an order under paragraph (1) (b) only if it is satisfied that the costs as calculated in accordance with rule 65.5 are likely to be either –
>
> (a) excessive; or
>
> (b) substantially inadequate;
>
> taking into account the nature and the circumstances of the particular case.
>
> (3) If an application is made for costs to be prescribed at a higher level, rules 65.8 (4) (c) and 65.9 apply.

Early warning about costs

[6] Long before the making of the application to stipulate a value of the claim the attorneys-at-law for the respondent had written the attorneys-at-law for the appellant, on 29th July 2004, pointing out the loss that was being caused to the

respondent by an undertaking it had given in place of the injunction and stating the respondent's view as to costs. That letter included this statement:

> "In addition, we consider that our client will be entitled to Prescribed Fees based on the value of the agreement for which Dr. Noel contends, i.e. some US$650,000.00 producing recoverable costs of $119,479.55. We have no doubt you and Dr. Noel are fully aware of this exposure on his part.
> "If you have any queries on these matters, please let us know …"

[7] Shortly before making the relevant application the attorneys-at-law for the respondent again wrote on the matter of the value of the claim to the attorneys-at-law for the appellant, on 26th April 2006, as follows:

> "We have from an early stage in this matter notified you as to our view of the value to be placed on the case for the purposes of CPR 65 and in particular Prescribed costs.
>
> Our letter of 29th July, 2004, stated that we considered the value should be US$650,000.00 (being the value of the contract alleged by your client). We note you did not respond to our request to let us know if you had any queries on the matter. We assume from this, and the fact that no response was given to the same point made in affidavit evidence on behalf of our client, that there is no disagreement between the parties.
>
> Please therefore confirm our understanding that the value is agreed. If for some reason you wish to contend for a different value then, without prejudice to the aforementioned correspondence and evidence and our understanding derived therefrom, please let us know the basis of the disagreement and what value you consider should be placed on the case."

[8] Both parties placed written submissions before the judge and the substance of these were repeated, expanded upon and added to on this appeal. The judge delivered a written ruling on 10th August 2006 in which he summarised the principal arguments against and in favour of making the order and of placing the value on the claim that the respondent sought. The essence of the judge's decision was that he considered the claim for general damages was really for the value of the alleged contract that the appellant was seeking to enforce, being US$650,000.00. There was no argument that the claim for special damages in the sum of US$30,000.00 was to be reckoned in valuing the claim. The judge

accordingly stipulated the total of those sums as the value of the claim for the purpose of rule 65.5 (2) (b) (ii). The judge also noted there was nothing in *that* rule that prescribed a time limit for the court to stipulate the value of a claim.

[9] The appellant filed three grounds of appeal. In his first ground the appellant complained that the judge had no jurisdiction to value the claim after case management had already taken place. In the second ground the appellant contended that the rule pursuant to which the judge acted enabled him to fix a value of the claim only after the trial and not before. The final ground of appeal complained that the judge failed to properly consider the appellant's submissions and to follow the guidance in a previous decision of this court.

No jurisdiction after case management conference?

[10] The attorneys for the appellant argued this issue under both the first and last grounds of appeal. The appellant submitted that the court had no jurisdiction for holding a hearing to stipulate the value of the claim after the case management process had been completed and a date had been set for trial, and reliance on rule 65.5 (2) (b) (ii) of CPR 2000 was erroneous as this rule deals with costs after judgment. The appellant argued this is seen in the reference in that provision to "the party entitled to" costs, which could only be to a post judgment stage because it was only after judgment that any party became entitled to costs. This argument was developed under the second ground and will be dealt with under the next heading.

[11] The appellant's attorneys contended that only rule 65.5 (2) (b) (iii) of CPR 2000 enabled the court to fix the value of a claim before its conclusion as this provision alone makes an exception to the general rule set out in 65.5 (1), which implies that the value of a claim is to be set at the conclusion of a matter. Rule 65.5 (2) (b) (iii) creates the exception by providing "… unless the court makes an order under rule 65.6 (1) (a)."

[12] The attorneys further contended that there is a limit in this last mentioned rule in that this rule allows a party to apply to the court "at a case management conference" to determine the value of a claim which has no monetary value. It is only this rule which allows a judge to fix the value of a claim for the purpose of calculating prescribed costs before the conclusion of a trial, the attorneys for the appellant submitted, and they emphasized that it must be done at the case management conference. The attorneys further emphasized that this claim had passed the case management stage and passed the pre – trial review stage so the judge had no jurisdiction to determine the value of the claim at the stage that he did. The appellant relied on this argument to show the judge was wrong when he stated there was nothing in rule 65.5 (2) (b) (ii) prescribing a time limit for the court to stipulate the value of a claim.

Can the court stipulate a value only after judgment?

[13] This was really the primary argument of the appellant. Save for the exception created by rule 65.5 (2) (b) (iii), mentioned above, the whole scheme of rule 65 was that the value of a claim is to be determined post judgment, the attorneys for the appellant submitted. Rule 65.5 (1) speaks to determining the costs of a party who "is entitled to the costs of any proceedings" and these words could only refer to a situation post judgment, the appellant submitted. So also, the appellant submitted, must be understood the reference in rule 65.5 (2) (a) to the amount "ordered to be paid". Likewise the reference in rule 65.5 (2) (b) (ii) to "such sum as is agreed between the party entitled to, and the party liable, for costs". A court may choose to make no order as to costs and this again supported the contention that rule 65.5, with the one exception mentioned, "can only be invoked at the conclusion of a case", the attorneys for the appellant submitted.

[14] It was the appellant's third ground but it is appropriate to consider at this juncture the appellant's argument that the decision of this court in Cleveland Donald v AG

of Grenada[1] supported his contention that rule 65.5 (2) can only be invoked after the trial. That case decided that the award of pre-trial interest was to be regarded as forming part of the value of the claim. The appellant thought paragraph [3] of the judgment was helpful to him but I am unable to see how it assists. In that paragraph Saunders J.A. referred to rule 65.5 (2) for its statement that, in the case of a claimant, the value of the claim is the amount agreed or ordered to be paid and expressed surprise that there could be doubt that that expression comprehended interest. There is nothing in that paragraph that says rule 65.5 (2) can only be invoked after trial.

[15] I also do not see what assistance the appellant's case gets from paragraph [5] of the judgment, to which the appellant also referred, which highlighted the scope given by the rules for avoiding a mechanical application after trial of the prescribed costs regime. Among the provisions to which Saunders J.A. referred was rule 65.6, which provides for a party at a case management conference to apply to the court for an order that prescribed costs should be calculated on a different figure than the likely value of the claim. I do not see any advertence, even by faint implication, to the question whether an application for an order such as was made in this case can be made other than at a case management conference. It is clear that such an application should be made at a case management conference: that is not in issue. The issue is whether it may be made otherwise. The string of cases that the appellant listed, in all of which the provisions in rule 65.5 (2) were invoked after judgment, simply shows what occurred in those cases and takes the issue no further.

Not a claim for a monetary sum

[16] A second part of the appellant's third ground of appeal was that his claim was essentially for specific performance, with a lesser claim for special damages, so the respondent's costs could only be calculated in accordance with rule 65.5 (2)

[1] Grenada Civil Appeal No. 32 of 2003, judgment delivered 26 July 2004

(b) (i) and (iii). The attorneys for the appellant submitted that sub-rule (2) (b) (i), which applies when an amount is claimed in the claim form, applies to the claim for special damages, and that left sub-rule (2) (b) (iii) to apply to the claim for specific performance. That sub-rule, it will be recalled, states that the value of the claim in the case of a defendant is,

> "if the claim is not for a monetary sum – the amount of EC$50,000.00 unless the court makes an order under rule 65.6 (1) (a)."

The appellant reasoned that there not having been an application under rule 65.6 (1) (a) (at a case management conference) that left the claim with a value of EC$50,000.00.

[17] This argument ignores the obvious truth that a claim for general damages is a claim for a monetary sum that is as yet unascertained. The reference to a claim for a monetary "sum" is really a reference to a claim for a monetary "award"; they mean the same thing in this context. Therefore sub-rule (2) (b) (iii) which deals with a claim that is not for a monetary sum could not be applicable; this was a claim for a monetary sum. It was, therefore, perfectly open to the judge to determine the value of the claim and, as he noted, the material for doing so was right in the appellant's own statement of claim. Therefore, I have no hesitation in dismissing this aspect of this ground of appeal.

Stipulating a value before judgment

[18] Having decided that sub-rule 2 (b) (iii) does not apply to this claim for general damages it follows that rule 65.6 (1), which allows a party to apply to the court at a case management conference to determine the value to be placed on a case which has no monetary value, also does not apply. This is merely confirmatory of the position taken by the judge in his specific statements that he was making his determination pursuant to rule 65.5 (2) (b) (ii). It is therefore not necessary for my decision to consider whether an application under rule 65.6 can be made other

than at a case management conference and the precedent question, what is a case management conference?

[19] I am left to decide whether, for the purpose of a future determination of prescribed costs, the court can pursuant to rule 65.5 (2) (b) (ii) stipulate a sum as the value of the claim before judgment. The judge was quite right in observing that there is nothing in that rule that limits the time when the court may make that stipulation. The argument for the appellant that the language of the sub-rule, in referring to the party entitled to costs, speaks to a post judgment stage is undoubtedly sound, but should that be determinative of when the court may stipulate a sum as the value of the claim?

[20] The reference to "the party entitled" on which the appellant relied is the provision that permits the party entitled to, and the party liable for, the costs to agree a sum as the value of the claim. If upheld, the appellant's argument would mean that the parties may not agree a sum before judgment. This would inevitably follow because the party entitled to and the party liable for costs can only be determined by the judgment of the court. That would be an absurd situation. It seems to me that the sensible way of regarding the rule is to recognize that while it is only after judgment that it will be known whether costs are awarded and who must pay and who must receive costs there is no reason why the value of the claim should not be determined at an earlier stage, whether by agreement between the parties or by stipulation of the court.

[21] In considering the appellant's objection to the judge determining the value of the claim at the stage that he did I looked to see if the objection was supported by reasons apart from what the appellant thought the rules said and it was not. The appellant stated "… the time for fixing a value on the claim having gone, it was inequitable, manifestly unjust and contrary to the overriding objective of CPR 2000 to fix a value of the Claim in the amount of US$680,000.00 at that late stage of the

proceedings …" That is pure opinion and rhetoric. It is a conclusion for which no reason is given.

[22] The reasoning that occurs to me is that if a judge must conduct the very same exercise after the trial, that is, to determine the value of the claim, it can make no difference if the judge determines the value at this stage. In fact I can think of a very salutary reason why it is better done at this stage: such a determination focuses the minds of the litigants on the costs consequences of continuing to prosecute or defend the claim.

[23] It is common judicial experience that there is nothing so wonderfully effective in bringing good sense to bear on whether to continue to prosecute or defend a claim as the certainty of the cost consequence for whoever will turn out the loser. A turning point is reached when a party sees it is ineluctable that if he loses he will likely have to pay a definite sum as costs. The risk of losing that is inherent in litigation then looms larger and appropriate decisions – settle; discontinue; admit - are then more likely to be made. This can only benefit the litigants themselves, the court and the society by saving expense and precious judicial time that other litigants are waiting to utilise.

[24] There is good reason why there is nothing in sub-rule (2) (b) (ii) that compares with rule 65.8 (2) which states,

> "An application for a costs budget *must* be made at or before the first case management conference." (Emphasis added)

The costs budget rule is intended to prevent the abuse of a party waiting to see which way the wind is blowing, following disclosure and witness statements, and then applying for budgeted costs because it suits him then to keep costs within a budget.

[25] In contrast, when the court is asked to stipulate a sum as the value of the claim the court is not called upon to increase or reduce the value of the claim. As Baptiste J

did, the court sets out to arrive at the real, not adjusted, value of the claim. That should be the same value at which the court arrives whenever it conducts the exercise of determining value, whether immediately after the statements of case are filed or after judgment is given. Therefore a defendant gains no advantage if he applies for value to be determined at a later rather than at an earlier stage. So long as there is no abuse of process I see no reason why a late application to determine costs should not be granted. Given the early indication that the respondent made to the appellant as to the value of the claim I consider the judge was a perfectly entitled to exercise his discretion in favour of granting the application.

[26] For the reasons I have given I dismiss the appeal with costs to the respondent in the sum of $1,000.00.

Denys Barrow, SC
Justice of Appeal