

EASTERN CARIBBEAN SUPREME COURT
ANTIGUA & BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: ANUHCV 2012/0805
Between

YVONNE MARTIN

Claimant/applicant

AND

CARBBEAN DISTRIBUTORS LTD trading as
CHRISTO'S SUPERMARKET

Defendant/respondent

IN MASTERS COURT

BEFORE: RAULSTON GLASGOW [AG.]

APPEARANCES: Stacey – Ann Saunders Osbourne of Counsel for the Claimant/Applicant
Jarid Hewlett of Counsel for the Defendant/Respondent

2014: May 22;
2014: June 27.

DECISION ON COSTS BUDGET

GLASGOW M (ag): The present ruling follows an application made by the Claimant (hereinafter the applicant) for the court to set a costs budget for the trial of the claim herein

BACKGROUND

1. The applicant was a customer at the defendant's (hereinafter the respondent's) supermarket on March 4, 2011 when it is alleged that she fell after stepping on an onion lying in the aisle of the supermarket. The applicant complains that her fall and injuries, for which she has claimed damages, were caused by the respondent's negligence.
2. The respondent has vigorously disputed the claim that it was negligent. The respondent specifically denies that there were any onions lying on the floor in the supermarket aisle in which the applicant was injured.
3. The applicant has filed a reply in which she reasserted her claim for damages on the grounds that it was indeed the respondent's negligence which led to her injuries.
4. The first case management of this matter took place on June 21, 2014 at which hearing the matter was assigned to a mediation session for the parties to discuss the possible settlement of the case. Settlement was not achieved at mediation and the proceedings were returned for further case management. Further case management took place on January 15, 2014 at which time trial directions were set. A pre-trial review is to be conducted on July 3, 2014.

Applicant's contentions

5. The present application was filed on January 31, 2014 pursuant to Part 65.8 of the Civil Procedure Rules 2000 (hereinafter the CPR 2000) wherein the applicant asks the court to set a costs budget on the grounds that –

- a) The applicant does not wish to rely on prescribed costs since she is concerned that an order for prescribed costs will be disproportionate to the actual costs incurred and to be incurred;
 - b) A costs budget will ensure that the applicant recovers all the costs she incurred in these proceedings.
6. The application is supported by an affidavit setting out both the proposed costs budget and the manner in which the proposed costs budget is calculated. The applicant's written consent has been filed as well. Written submissions have been filed in support of the application. The written submissions recite the court's discretion to set a cost budget. The applicant's view is that the discretion can be exercised in favour of the grant of the proposed costs budget.

Respondent's opposition

7. The respondent has filed an affidavit and written submissions in which it opposes the proposed costs budget. The respondent's contention is that the proposal is disproportionate and excessive. Several reasons are given for this posture –
- a) The applicant has indicated that it would take (20) hours to comply with the case management directions. The respondent's view is that the issues in the case relate to a fall at a supermarket. Accordingly, the respondent disputes the claim that it should take (20) hours to comply with the directions for trial. Instructively, by the time of filing of the submissions on this application, the parties have already filed and exchanged witness statements, lists of documents, one expert report by the applicant and pre-trial memoranda. The respondent points out that (2) witness statements have been filed by the applicant; one witness statement consists of (2) pages and the second consists of (7) pages. Additionally, the respondent submits that both parties have agreed to a list of documents which comprises solely of the applicant's documents;
 - b) The case revolves around (2) issues – (1) whether the applicant's fall was as a result of the respondent's negligence; and (2) if the respondent is so liable, the quantum of damages to be paid. There is

no complexity demanding that (2) lawyers attend the trial of these proceedings as claimed by the applicant;

- c) The proposed costs are wholly disproportionate when one looks at the range of possible awards for injuries of the nature suffered by the applicant.

Applicant's response to Respondent's opposition

8. In response to the respondent's specific objection on the claim for costs for compliance with the case management orders, the applicant's answer as set out in her affidavit in response to the respondent's affidavit is that the time allotted to compliance with the case management directions does not merely consist of filing witness statements and perusing the respondent's documents. The applicant will be required to do several other things which include liaising with the expert witness, reviewing the respondent's witness statements and taking instructions in respect of the same, preparing and filing lists of documents, liaising with the respondent's attorney on the agreed list of documents, preparing and filing the applicant's pre-trial memorandum, reviewing the respondent's pre-trial memorandum and preparing and filing the listing questionnaire. The applicant reiterates that the proposed budget is reasonable;
9. In respect of the disbursements for filing of the trial bundle which reveals a mathematical oversight, the applicant agrees with the respondent that the sum should be \$200.00 instead of \$2000.00. The applicant submits that she has made a further concession on her request; the sum claimed for (2) medical experts can now be reduced from \$2000.00 to \$1500.00. The applicant will now call (1) medical expert instead of (2) and hence the reduced sum.

Analysis and conclusion

10. The guidelines for and the procedure by which the court arrives at an award for costs are enacted extensively in Part 65 of the CPR 2000¹. One of the basis on which costs are determined is the setting of a costs budget. The court's ability to set a costs budget is dealt with in Parts 65.8 to 65.10 of the CPR 2000 where it is provided that –

¹ See Master Taylor – Alexander in Milhawke Holdings (Bequia) Ltd et al v Dornieden Claim No. SVGHCV 2010/0301 at paragraphs 44 to 47 and Master Tabor in Trishel Wetherhill v Joseph Pinder Claim No. ANUHCV 20111/0581 at paragraph 22

Budgeted costs

65.8 (1) A party may apply to the court to set a costs budget for the proceedings.

(2) An application for a costs budget must be made at or before the first case management conference.

(3) *The application may be made by either or both parties but an order setting a costs budget may not be made by consent unless all relevant parties are bodies corporate.*

(4) *An application for a costs budget must be accompanied by –*

(a) *a statement of the amount that the party seeking the order wishes to be set as the costs budget;*

(b) *a statement showing how the budget has been calculated and setting out in particular –*

(i) *a breakdown of the costs incurred to date;*

(ii) *the anticipated amount of any expert witness fees and whether or not such fees are included in the budget;*

(ii) *the disbursements other than expert fees that are included in the budget;*

(iv) *the fees that are anticipated to be paid to any legal practitioner other than the legal practitioner on record for advocacy (including advocacy by a Queen's Counsel, a State Counsel or more than one counsel), advising or settling any document;*

(v) *the hourly rate charged by the legal practitioner (or other basis of charging);*

(vi) *a statement of the number of hours of preparation time (including attendances upon the party, any witness and any other party to the proceedings) that the legal practitioner for the party making the application has already spent and anticipates will be required to bring the proceedings to trial; and*

(vii) *what procedural steps or applications are or are not included in the budget; and*

(c) *the written consent from the client in accordance with rule 65.9.*

(5) *A party may apply to vary the terms of an order made under this rule at any time prior to the commencement of the trial but no order may be made increasing the amount of the budgeted costs unless the court is satisfied that there has been a change of circumstances which became known after the order was made.*

Client's consent to application for budgeted costs

65.9 (1) *The court may not make an order for budgeted costs unless –*

(a) *the court satisfies itself that each party fully understands the consequences of the order that is being sought as to –*

(i) *the party's liability for costs to the party's own legal practitioner, whether the party obtains an order for costs against any other party or not;*

(ii) *the party's liability to pay costs in the budgeted sum to the other party if that other party obtains an order for costs against the party; and*

(ii) *what the party's liability might be under paragraphs (i) and (ii) if rule 65.5 applied;*

(b) *the consent under sub-paragraph (c) is in a separate document which –*

(i) *deals only with the question of budgeted costs;*

(ii) *gives an estimate of the total costs of the proceedings as between the legal practitioner and the client;*

(ii) *is signed by the party in person;*

(iv) *states the legal practitioner's estimate of what the prescribed costs appropriate to the proceedings would be; and*

(v) *sets out the basis of that estimate including the amount of any hourly charge;*

(c) *there has been filed a document recording the express consent of the party in person to the application and to any order made as a consequence of the application; and*

(c) *the party seeking the order is present in person when the application is made except where–*

(i) *that party is a body corporate; or*

(ii) *for some exceptional reason this is impracticable.*

(2) *The written consent of the client must not be disclosed to the other party.*

(3) *This rule also applies to any other party personally who consents to or does not oppose an order for a costs budget.*

What is included in costs budget

65.10 Unless the costs budget approved by the court specifies otherwise, rule 65.7 applies to budgeted costs as it does to prescribed costs.

11. Costs budgets have not become a common practice in the Eastern Caribbean Supreme Court jurisdiction. However, the utility of setting a costs budget has been emphasized. In Milhawke Holdings (Bequia) Ltd et al v Dornieden, learned Master Taylor – Alexander had this to say on cost budgets –

Although the rules do not dictate the circumstances when such an application should be made, nor does it limit such an application to circumstances of unusual expenditure, the learned authors of The Caribbean Civil Law Practice at note 29.6 surmise that the provision is one to be applied where the costs assessed or fixed by reference to the low amount of the value of the claim do not justly reflect the considerable complications of law or fact. It may well be the authors suggest that the converse situation arises with a claim the value of which is very high but the work involved in its conduct is not appreciable and the value of the costs payable by reference to the value of the claim is disproportionate to the reality of the expense involved, in which case prescribed costs may not be appropriate.

12. The learned Master does go on to point out that the two instances referenced in the above discourse are not the exclusive circumstances in which costs budgets are to be set. Rather, the considerations are “at large”² and would, in my opinion, be circumscribed by the guidance given by the rules on assessing costs. In particular, in respect of all deliberations on costs in which the court has a discretion, the court must take into account all the circumstances pursuant to Part 65.2 (3) of the CPR 2000³ which provides –

(3) In deciding what would be reasonable the court must take into account all the circumstances, including –

(a) any order that has already been made;

(b) the care, speed and economy with which the case was prepared;

(c) the conduct of the parties before as well as during the proceedings;

(d) the degree of responsibility accepted by the legal practitioner;

(e) the importance of the matter to the parties;

(f) the novelty, weight and complexity of the case;

(g) the time reasonably spent on the case; and

² See paragraph 50 of In Milhawke Holdings (Bequia) Ltd et al v Dornieden

³ See also Part 65.10.

(h) in the case of costs charged by a legal practitioner to his or her client –

(i) any agreement about what grade of legal practitioner should carry out the work;

(iii) any agreement that may have been made as to the basis of charging; and

(iii) whether the legal practitioner advised the client and took the client's instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the case.

13. It would seem to me therefore that in setting a costs budget, reasonableness is at the core of the assessment exercise. As counsel for the respondent puts it, the court must decide whether the sum proposed is reasonable and proportionate. Cook on Costs⁴ speaks of a “realistic forecast” of the likely costs of the proceedings.
14. The issues in this case are rather simple. The applicant fell in the respondent's supermarket and suffered injuries to her ankle and her back. She claims that her fall and injuries were caused by the respondent's negligence. The respondent's answer is that the applicant's fall was not caused by any negligence on its part. Notwithstanding the apparent non-complex nature of those issues, the applicant contends that the costs she has incurred and is likely to incur will be wholly disproportionate to the prescribed costs to be awarded if the claim is successful. The applicant has provided the court with her projected costs as required by Part 65.9 of the CPR 2000.
15. Before I determine whether the costs budget will be accepted I must assess whether the projected costs are reasonable in light of the matters prescribed at Part 65.2 (3) of the CPR 2000. This assessment is necessary since it cannot be the case that the court must accept whatever is offered by the applicant as her projected costs. The applicant is not entitled to costs on an indemnity basis but she may only recover what is reasonable and proportionate⁵.
16. One of the guiding factors I have considered in arriving at whether the proposed budget is reasonable or proportionate is the novelty, weight and complexity of this

⁴ Cook on Costs 2013 at page 137 paragraph 10.20

⁵ The Nevis Island Administration v La Copropriete du Navire J31, Civil Appeal No. 7 of 2005 (St. Kitts and Nevis)

case⁶. The issues involved in this case are not complex and have been recited above. Additionally, if the claimant is ultimately successful, her claim for special damages is no more than \$1,908.00. Her claim for general damages will have to be assessed but Counsel for the respondent asserts that the range of general damages would be relatively low. In this regard, Counsel submits that the range of general damages for the type of injuries suffered by the applicant stands in the region of \$24,958.03 to \$39,330.06 (E.C)⁷.

17. Counsel for the respondent further submits that the costs budget of \$24,241.37 should be disallowed because it is disproportionate to the sum the applicant may be awarded on assessment of damages. But this seems a very narrow way of looking at things. In determining the costs budget, the court is not asked to balance what the applicant is to receive as damages against the costs she claims she has or may incur. Indeed, the applicant's position is that notwithstanding the nature of the claim and the issues involved, the costs of preparing for and prosecuting these proceedings will be exorbitant. As such the court is being asked to approve a budget of the costs she may incur.
18. But the nature, complexity and novelty of a case are not matters that can be wholly discounted in setting a costs budget since the budget has to be a realistic one. The exercise includes all the factors underlying reasonableness including the novelty, weight and complexity of the case. In this regard, it would be appropriate to look at the novelty, weight and complexity of the case to form some view as to whether, for instance, the costs claimed for the time spent or to be spent on some aspect of the case seems outlandish or is practical.
19. I have been somewhat assisted in arriving at my conclusions by the fact that trial directions have been set and mainly complied with by both sides. The application to set the costs budget should have been made before or at case management⁸. However, there is no sanction against proceeding at this time and as such I would surmise that it would be entirely in the court's case management discretion to entertain the application at this late hour. Taking all the factors stated above and as set out in Part 65.2(3) of CPR 2000 into account, I find that the costs budget is not a reasonable one for the following reasons –

⁶ Part 65.2(3)(f) of the CPR

⁷ Counsel references the Guidelines for the Assessment of General damages in Personal Injuries, 11th Edition at pages 34 to 35

⁸ Part 65.8(2) of CPR 2000

- a) Costs should be significantly discounted in respect of the application filed by the applicant on February 10, 2014 requesting the court's permission to call an expert. There were no arguments before the court on this application since the parties achieved consensus which was reduced to a consent order filed in the court office on March 31, 2014. Costs under this head should be discounted by \$350.00 for the hearing of the application;
- b) The costs for complying with the case management directions in this case seem overly excessive. The applicant has filed (2) witness statements; one witness statement from the applicant totaling (7) pages and another filed by Eustace Gordon totaling (2) pages. The respondent has filed one witness statement from one Violet Southwell totaling (2) pages. The parties have filed separate pretrial memorandum which total (7) pages. The applicant has filed an agreed list of documents made up of entirely of the documents recited in her standard disclosure form. Counsel would not have to review any disclosure from the respondent.
- c) It seems to me that the totality of the costs attendant on preparing, filing and reviewing the documents just mentioned combined with the process of interviewing the witnesses, reviewing the short witness statement of the respondent, calling counsel to agree on the list of documents to be used at trial, filing the pre-trial memorandum, reviewing the respondent's pre-trial memorandum and filing the listing questionnaire would not take (1200) minutes or (20) hours in a matter of this nature. A more realistic time estimate would be (10) hours. I have not addressed the disbursements claimed in the sum of \$500.00 but this seems excessive as projected costs for the filing of (2) witness statements, lists of documents, pre-trial memorandum, listing questionnaire and an agreed list of documents. The costs under this head would be projected as \$3500.00. This award does not include the sums for disbursements;
- d) I am also concerned that the (4) hours allocated for the preparation for trial is unrealistic. There are (3) witness whose evidence in toto amounts to (11) pages. The documents to be used at trial are all documents produced by the applicant. The issues for trial are simple and well trammled areas of law. The factual disputations are similarly

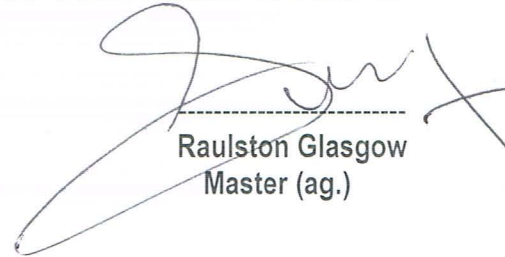
narrow. I cannot see how it would take the applicant (4) hours to prepare for this relatively simple case. I would project preparation time of (3) hours. Costs under this head would total \$1050.00;

- e) I do not believe the trial bundles will be as large as 100 pages as asserted by the applicant. Witness statements alone are merely (11) pages for all the witnesses to be called. The applicant's list of documents indicates no more than (7) items including a bundle of receipts and ABIB cheques. The basic pleadings do not exceed (20) pages. Preparing and filing the trial bundles should take no more than (2) hours. I would also suggest that a copy of each trial bundle may consist of no more than (50) pages each. Costs for preparation and filing of the trial bundles would be discounted by \$700.00. Disbursements under this head would also amount to \$100.00 for filing (4) trial bundles;
- f) It is also my view that the complexity of this case does not dictate the attendance of (2) counsel at trial. No more than one practitioner of reasonable competence is required. I would allow costs of \$1000.00 under this head.

20. The applicant has asked the court to set a costs budget of 24,241.37. This proposed figure is discounted by the sum of \$6000.00 being –

- a) Discount on the application to call expert witness - \$350.00;
- b) Discount on the costs for compliance with case management orders - \$3500.00;
- c) Discount on the costs for preparation for trial - \$350.00;
- d) Discount on the cost for preparing and filing trial bundles - \$700.00;
- e) Discount on the disbursements for filing (4) copies of the trial bundles - \$100.00;
- f) Discount on the costs for attendance of counsel at trial - \$1000.00

21. I therefore find that the sum of \$18, 241.37 is a reasonable sum to set as a costs budget for the conduct of these proceedings and I so order. I thank counsel for their research and assistance.



Raulston Glasgow
Master (ag.)