

SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.10 OF 2003

BETWEEN:

ROCHAMEL CONSTRUCTION LIMITED

Appellant

and

NATIONAL INSURANCE CORPORATION

Respondent

Before:

The Hon. Sir Dennis Byron
The Hon. Mr. Albert Redhead
The Hon. Mr. Brian Alleyne, SC

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Kenneth Monplaisir, QC for the Appellant
Mrs. A. Cadie St. Rose-Bruney for the Respondent

2003: October 21;
November 24.

JUDGMENT

[1] **BYRON, C.J.:** Rochamel Construction Limited [RCL] has appealed against the orders that it will be responsible for the costs of Mr. Lillywhite which the Court fixed at \$75,000.00, and that it will be jointly liable with Mr. French for the costs of National Insurance Corporation [The Corporation] fixed at \$150,000.00. The Corporation cross-appealed for an order to set off any costs awarded against The Corporation by the costs awarded in its favour.

Background

- [2] On 10th July 2001 The Corporation commenced proceedings to recover amounts due by RCL under the National Insurance Act 2000. The claim was made jointly and severally against RCL as the employer and principal debtor and French and Lillywhite as directors of the company. On 30th October 2001 The Corporation entered judgment against all three in default of defence for \$1,520,199.07 and interest and costs which were not quantified

- [3] On 9th November 2001 a document headed “defence” was filed by Monplaisir and Co acting as attorney for the three defendants in which French and Lillywhite denied that were directors at the material times, French alleged that he used due diligence to prevent the non-payment of the social security contributions and RCL admitted liability to the entire claim.

- [4] On 19th December 2001 Monplaisir and Company filed an application to set aside judgment insofar as it related to French and Lillywhite and for ancillary orders including leave to defend. The application was granted.

- [5] At a case management conference held on 18th February 2002, it was ordered that the trial was to proceed only on the defence of due diligence.

- [6] The matter came on for hearing on 13th, 14th February 2003. No evidence was adduced against Lillywhite and accordingly the case against him was dismissed. The learned trial Judge ordered that French was a manager within the meaning of section 80 of the Act, and was jointly liable with The Corporation for the unpaid contributions. He made the extra ordinary costs order without giving any indication of the provisions of the rules which were being applied, or the reasons which informed it. It is necessary therefore to look at the rules of Court relating to costs.

Cost Orders

- [7] There are four types of cost orders that the rules envisage.
- [a] On determining certain types of applications the Court is required to make **Assessed costs** orders as provided by CPR part 65.11 and 12
 - [b] In certain matters concluded before a defence is filed a party is entitled to **Fixed costs** as provided by CPR 65.4
 - [c] Generally in other cases the Court must order **Prescribed costs** as provided by CPR 65.5
 - [d] A party who wishes the costs to be based on a different basis may apply for a **Budgeted costs order** in accordance with CPR part 65.8.

The General Rule and discretion

- [8] CPR part 64.6 prescribes that where the Court decides to make an order about the costs of any proceedings, the general rule is that, it must order the unsuccessful party to pay the costs of the successful party. The Court is, however, given very wide discretionary powers to vary the application of the general rule. These include the power to order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to costs or to pay only certain portions of another person's cost. In exercising these discretions as to costs the Court is required to have regard to all the circumstances. Particular consideration must be given to the conduct of the parties both before and during the proceedings and the manner in which a party has pursued the case in general and particular issues within the case. Thus the order can be affected by whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings. The Court is also required to consider whether it was reasonable for a party to pursue a particular allegation or raise a particular issue and whether the claimant gave reasonable notice of intention to pursue a claim. The Court also has power to order costs against a person who is not a party, but only on giving prior notice and an opportunity to be heard.

The Overriding Objective and Costs

- [9] These discretions are aimed at assisting the Court to further the overriding objective of dealing with cases justly. Dealing justly with cases includes ensuring that the parties are on an equal footing, that expense is saved, that cases are dealt with proportionately to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party, that the matter is dealt with expeditiously and fairly and that an appropriate share of the Court's resources is allotted to it while taking into account the need to allot resources to other cases. The parties are required to assist the Court to further this objective.
- [10] This gives rise to a number of concepts some of which are relevant to the award of costs in this case. Claimants should be discouraged from bringing proceedings or making allegations which are spurious, in the sense that they are unsupported by evidence. A person should not be forced to waste expense to defend a claim that is not being prosecuted. Defendants should be encouraged to admit, at an early stage of the proceedings, allegations or claims which they cannot rebut. The Court should actively manage the case to give effect to the overriding objective. In this case the case management process effectively identified the only justiciable issue and in accordance with CPR 26.1(2)(e) directed a separate trial on that issue. That order gave effect to the objectives of saving expense, speeding up the process and proportionality. RCL was excluded from further participation in the litigation. The other parties did not have to litigate any unnecessary issue. The time was expedited and the cost of the litigation was necessarily reduced. The cost orders ought to further that objective, by proper application of the rules that do exist.

The Lillywhite Costs Order

- [11] Ordering RCL to pay the costs of Lillywhite was not an application of the general rule because RCL was not the unsuccessful party in the trial. In fact it was not even a party to the trial of the issue was litigated. The unsuccessful party was The Corporation. It is therefore necessary to look at the circumstances to determine what factors should influence the exercise of discretion as to costs in this case.

The conduct of the parties before and during the proceedings

- [12] In paragraph 5 of the statement of claim The Corporation alleged that before the action was commenced RCL had entered into a written agreement acknowledging liability for the exact sums for which the claim was made. RCL did not contest any issue during the proceedings. It was significant that the learned trial Judge indicated that The Corporation did not adduce any evidence against Lillywhite, neither did Lillywhite adduce any evidence. In assessing the conduct of the parties before and during the proceedings RCL admitted liability and did not contest any issue. The conduct of The Corporation indicated that they had no basis for their claim against him. Therefore there was nothing in the conduct of the parties that would justify deviation from the general rule. It was clearly unreasonable for The Corporation to pursue the claim against Lillywhite because it had no evidence to support the allegations against him. There was no indication that RCL had anything to do with their decision to claim against Lillywhite.
- [13] The Corporation offended the concept of dealing with cases justly in that Lillywhite was forced to waste expense to defend a claim that was not being prosecuted. The claimant is a substantial and well funded statutory corporation and the defendant is an individual of unequal financial standing. Ordering The Corporation to pay the costs of Lillywhite furthers the overriding objective. On the other hand RCL admitted the entire claim against it and did not dispute any allegation made by The Corporation. Ordering RCL to pay the costs of Lillywhite would not further

the overriding objective. In my view, therefore, the order that RCL must be liable for the costs of Lillywhite must be set aside and The Corporation ordered to pay those costs.

The Costs Order in favour of The Corporation

[14] At the commencement of this appeal we were informed by counsel that French and The Corporation had entered a consent order varying the judgment entered against French to a reduced figure of liability, a timetable for payment and of particular relevance to this appeal agreeing that there was to be no order to costs.

[15] The learned trial Judge specifically commented in his judgment that the default judgment against RCL still stood. That being the case, RCL was not a party to the proceedings to determine whether the directors exercised due diligence as ordered at the case management conference. There was no proceeding under CPR part 64.10. by which RCL was given notice of an intention to make them pay for these proceedings.

[16] The main point, however is that the rules set out that where there is a default judgment the Fixed Costs of CPR 65.4 applies. This prescribes that a party is entitled to the costs set out in column 3 of appendix A. RCL admitted liability before action and allowed judgment to be entered in default and admitted the claim in its entirety. It is completely inconsistent with furthering the overriding objective to order such substantial or punitive costs against a defendant who admitted liability before action and did not defend the claim in any way. This is certainly the effect of CPR 65.4.

The Amount of the Costs Orders

[17] The Overriding objective requires the Court to give effect to the objective of saving expense. The parties did not have to litigate any unnecessary issue, the time was

expedited and the cost of the litigation was necessarily reduced. The cost orders ought to further that objective. In the case of Lillywhite, the absence of evidence against him in the witness statements, made it unnecessary for him to adduce any evidence at all. The cost of his representation ought to have reflected that circumstance. This was not a full trial. It was a hearing on a specific issue ordered at a case management conference as provided by part 26.1(2)(e).

[18] In my view the costs are governed by the prescribed costs rules; it was not an application and a defence had been filed. The first question therefore is what is the value of the separate issue? The rules provide the answer. The issue did not relate to any specified amount of money. Thus the value would be \$50,000.00 and the costs \$14,000.00. The Court should then consider whether any discretion as to the amount should be exercised. This was not a complex issue particularly for Lillywhite. A review of the proceedings and the manner in which Lillywhite conducted himself indicates that he did not adduce any evidence and he was represented by the same legal practitioner that represented French. I would have thought that a Judge who was exercising his discretion in accordance with the rules would not allow him the full costs. I would not think that in these circumstances he would be entitled to no more than 50% of his costs and I would order \$7,000.00.

[19] RCL admitted liability before action and allowed judgment to be entered in default and admitted the claim in its entirety. The rules have clearly provided encouragement for that conduct by making provision for fixed costs in those circumstances. It is completely inconsistent with furthering the overriding objective to order substantial or punitive costs against a defendant who admitted liability before action and did not defend the claim in any way.

[20] In this case Judgment was entered in default. Applying CPR Part 65.4 and appendix A, where judgment is entered in default on a claim exceeding \$500,000.00 the fixed amount is \$2,500.00 in addition to appropriate Court costs

of \$350.00 and service costs of \$100.00 totalling \$2,950.00. No other information was provided in relation to allowable costs.

Guidelines on Costs

[21] It would seem that the practice on costs has been very inconsistent since the introduction of CPR. I would like to use this opportunity to indicate the importance of dealing with costs in accordance with the new culture by making some simple requirements.

[a] Whenever a costs order is being made the learned trial Judge or master should identify the rule that is being applied and if discretion is being exercised give the reason.

[b] Legal practitioners should be encouraged to assist the Court in the making of costs orders by providing information and or submissions as early as possible.

Order

[22] I would set aside the orders for costs made by the learned trial Judge and order that judgment be entered for

[a] Costs to Lillywhite in the sum of \$7,000.00 to be paid by The Corporation and

[b] Costs to The Corporation on the default judgment against RCL Fixed in the sum of \$2,950.00.

Sir Dennis Byron
Chief Justice

I concur.

Albert Redhead
Justice of Appeal

I concur.

Brian Alleyne, SC
Justice of Appeal