

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

CV 1015 of 2015

BETWEEN

IAN NILES

CLAIMANT

AND

**EXCLUSIVE COTTONS OF
THE CARIBBEAN INC.**

DEFENDANT

**Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High
Court**

2019: May 23

Ms. Jaydene O. Thomas, Attorney-at-Law for the Claimant.

Mr. John F.A. Forde, Attorney-at-Law for the Defendant.

DECISION

Introduction

- [1] The issue to be resolved is whether a cost assessment, made pursuant to an award of damages for personal injuries, should be calculated on the agreed damages inclusive of sickness benefits.

Background

- [2] The Claimant filed an action on 16 July 2015, in which he sought:
1. damages for personal injuries, loss and damages arising out of an accident which occurred at the Defendant's workplace situated at Groves, St. George on 01 April 2014 whilst the Claimant was acting within the scope of his employment; carrying out the duties stipulated by the Defendant as his employer; and caused by the Defendant's negligence and/or breach of statutory duty and/or breach of contract of employment with the Claimant;
 2. interest pursuant to section 35 of the Supreme Court of Judicature Act, Cap.117A;
 3. costs; and
 4. further or other relief
- [3] The Claimant obtained a default judgment on 21 March 2016. The Defendant was ordered to pay the Claimant an amount to be determined by the Court.
- [4] On 27 September 2016, the parties agreed by consent that:
1. a settlement in the sum of \$29,819.50 as damages be approved;
 2. the Defendant deduct from the settlement the sum of \$7,079.50 paid by the National Insurance Department ("the NIS") to the Claimant as sickness benefit;

3. the disbursements as agreed in the sum of \$400;
4. the Defendant is to pay the remaining balance to the Claimant within fourteen (14) days;
5. the Defendant is to pay the Claimant's costs to be agreed or determined by the Court; and
6. upon payment of the said sums and costs, the Defendant will be fully discharged from any further liability in respect of the claim.

[5] On 12 January 2017, counsel for the Claimant applied to the Court for a determination of the costs payable to the Claimant. The impasse between the parties arose when counsel for the Defendant asserted that the Claimant's costs should be calculated on the net amount awarded to the Claimant. Counsel was of the view that the sickness benefit deducted from the award should not be included in the overall figure for damages, prior to the calculation of the costs.

Discussion

- [6] The consent order of 27 September 2016 awarded damages of \$29,819.50. The sickness benefit of \$7,079.50, paid to the Claimant by the NIS was deducted from the agreed damages. Thus the Claimant actually received \$22,740.00 as damages.
- [7] Section 52 of the National Insurance and Social Security Act, Cap.47 pro-

vides that:

“Where personal injury is caused to an insured person in such circumstances as to entitle him or his dependants to an action against his employer, in assessing damages there shall be taken into account against any loss of earnings or profit which has accrued or probably will accrue to the insured person from the injury

(a) the value of any rights which have accrued or probably will accrue to him therefrom in respect of employment injury benefit; and

(b) one-half the value of any rights which have accrued or probably will accrue to him therefrom in respect of any other benefit,

for the period of 5 years beginning with the time when the cause of action arose”.

[8] Counsel for the Defendant cited **Vernon Marshall v. Abacus Builders Inc., Civ. Suit No. 1020 of 2011, Hgh. Ct. B’dos, decision dated 05 February 2015**, as authority for deducting the NIS sickness benefit from the overall damages. In the **Marshall** case, the NIS benefit was deducted from the special damages assessed for past loss of earnings. However, Cornelius J offered no comment in the judgment as to the possible impact of the deduction on the costs calculation. And interestingly, unlike the present case there was no overall figure stated in the **Marshall** judgment for the entirety of the past loss of earnings, prior to the deduction of the NIS benefit.

[9] It appears to this Court that the rationale for deducting NIS or similar benefits

from damages, is to preclude a claimant from receiving double compensation for his injuries. However, the Defendant remains liable for the total agreed damages. In this case the Defendant was fully responsible for the entirety of the agreed damages of \$29,819.50. \$22, 740.00 of that amount was paid to the Claimant, and the sum of \$7,079.50 refunded to the NIS by the Defendant. The refund is confirmed by Exhibit 2 to Ms. Thomas' affidavit filed on 12 January 2017. It follows that costs are to be calculated on the entirety of the damages, that is, \$29,819.50.

Calculation of Costs

[10] Rule 65.5 of the Supreme Court (Civil Procedure) Rules, 2008 ("the CPR") provides that:

“(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 sub-rules (2) to (4) of this rule.

(2) In determining prescribed costs, the value of the claim is to be decided

(a) in the case of a claimant, by the amount agreed or ordered to be paid;

.....

(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”.

[11] Rule 65.4 contains the fixed costs regime which does not apply to this case. Therefore, the costs are to be calculated in accordance with Appendices B and C. The value of the claim is \$29,819.50, the sum agreed to be paid by the Defendant. This confirms the Court's view that the costs are to be calculated on the entirety of the damages. (See para.9 supra). Burgess JA, as he then was, observed that:

“...the key to the operation of the prescribed costs regime is the determination of “the value of the claim”...it is only after “the value of the claim” is determined that the scale stipulate in Appendix B can be applied to “the value of the claim” to arrive at the appropriate prescribed costs”. (See **CGI Consumers Guarantee Insurance Co. Ltd. v. Trident Insurance Co. Ltd, Civ. Ap. No.9 of 2014, decision dated 16 February 2016**, at para. [87]).

[12] Neither party made an application for the prescribed costs to be calculated on either a higher or a lower value. (See Rule 65.6(1) CPR). Counsel for the Claimant attached a draft bill of costs to her affidavit filed on 12 January 2017, in which she claimed \$16,200.00 as her fees, together with \$39.75 for photocopying and stamps. The Court observes that the draft bill is out of proportion to the damages awarded to the Claimant; and the affidavit itself does not indicate why prescribed costs would be substantially inadequate or unreasonable in this matter.

[13] The Court agrees with counsel for the Defendant that item (a) Appendix B, and item (f) of Appendix C are the appropriate categories for this case. The Claimant's costs should be 60% of 30% of \$29,819.50, that is \$5, 370.00.

Disposal

[14] Costs are awarded to the Claimant in the sum of \$5,370.00 to be paid by the Defendant on or before 07 June 2019.

Dr. Sonia L. Richards
Judge of the High Court