[2023] UKPC 34
Privy Council Appeal No 0085 of 2021

JUDGMENT

Rollin Clifton Bertrand and others (Respondents) *v* Anthony Elias (Appellant) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Lloyd-Jones
Lord Leggatt
Lord Burrows
Lord Stephens
Lady Rose

JUDGMENT GIVEN ON
26 September 2023

Heard on 18 July 2023

Appellant
Ramesh L Maharaj SC
Robert Strang
Vijaya Maharaj
Michael Rooplal
Isa Dookie
(Instructed by BDB Pitmans LLP (London))

1st Respondent
Ian Benjamin SC
Sadhna Lutchman
(Instructed by Athena Chambers (Port of Spain))

2nd and 3rd Respondents
Jason K Mootoo SC
(Instructed by Gitanjali Gopeesingh (Trinidad))

Respondents

(1) Rollin Clifton Bertrand
(2) Trinidad Cement Ltd
(3) Caribbean Cement Company Ltd

LORD STEPHENS:

1. Introduction

1. This appeal concerns whether costs should be quantified in accordance with the scale of prescribed costs set out in rule 67.5 of the Civil Proceedings Rules 1998 ("the CPR") ("prescribed costs") or assessed in accordance with rules 67.1 and 67.12 of the CPR ("assessed costs"). If costs are quantified as prescribed costs, then it is suggested, see para 31 below, that costs would amount to TT$27,000. In contrast, if costs are assessed, then it is suggested, see para 24 below, that costs would amount to TT$559,695.

2. The appeal arises in the context of proceedings brought by Rollin Clifton Bertrand, Trinidad Cement Ltd ("TCL") and Caribbean Cement Ltd ("CCL") (together "the claimants") for defamation against Dr Anthony Elias ("the defendant"). At an early stage of the proceedings the defendant made clear to the claimants that he would be incurring substantial legal costs by, for instance, instructing senior counsel, to achieve equality of arms with the claimants, who had also, for instance, instructed senior counsel.

3. The proceedings were discontinued by Mr Bertrand on the day before the trial was to commence and by TCL and CCL on the day of trial. Accordingly, the defendant was entitled to an order for costs against the claimants under rule 38.6(1) of the CPR. The general rule is that, where proceedings have been discontinued, the costs shall be quantified in accordance with the prescribed costs regime; see rule 38.7(1) of the CPR. However, quantification of prescribed costs requires a sum either to be agreed between the party entitled to, and the party liable for, such costs or if not agreed stipulated by the court as the value of the claim in circumstances where the claim is for damages, but the claim form does not specify the amount claimed. If no sum is agreed or stipulated, then it is not possible to apply the scales of prescribed costs in Appendices B and C to Part 67 of the CPR. The parties did not agree a sum as the value of the claim and the judge, Charles J, decided that "without having heard the evidence" and "before cross-examination" she could not stipulate a sum so that the prescribed costs regime was not applicable. Accordingly, she made an order that the claimants pay the defendant's costs, to be assessed by the Master in Chambers.

4. The claimants appealed to the Court of Appeal against the judge's order. The Court of Appeal (Yorke-Soo Hon, Rajkumar, and Wilson JJA) allowed the appeal holding that it was possible to stipulate a sum as the value of the claim. The Court of Appeal remitted the matter back to the trial judge "for the stipulation of the value of the claim" so that the defendant's costs would be quantified as prescribed costs.

5. The defendant now appeals to the Board primarily contending that in the exercise of discretion the general rule that costs should be quantified in accordance with the scale of prescribed costs should be displaced in favour of costs being assessed.

6. A further issue in relation to costs, raised on behalf of Mr Bertrand before the judge and the Court of Appeal, was whether all the claimants were jointly liable for the defendant's costs or whether, as submitted on behalf of Mr Bertrand, the only order for costs in favour of the defendant should be against TCL and CCL or alternatively whether the order for costs against Mr Bertrand should be limited to one third of the defendant's costs. The judge rejected these submissions on behalf of Mr Bertrand holding that as this "was a joint claim [brought] by all three claimants … all the claimants are jointly liable to pay the Defendant's [assessed] costs". On appeal the Court of Appeal upheld this part of the judge's order. Mr Bertrand has not pursued this issue before the Board.

2. The factual background

7. The factual background is taken from the allegations contained in the pleadings, the judgments below, and the parties' agreed Statement of Facts and Issues before the Board.

8. Mr Bertrand "is a prominent citizen of Trinidad and Tobago with a distinguished career in business and in commerce" who "has been since 1998 … the Group Chief Executive Officer ('CEO') of [TCL] Group of Companies with responsibility for 12 operational companies of the TCL Group ….''; see para 1 of the Statement of Case. In paras 2-4 of the Statement of Case the various ways in which Mr Bertrand has achieved success in business and his contributions to public life in Trinidad and Tobago are set out. These include, for instance, chairing the Water and Sewerage Authority and having been a director of the Trinidad and Tobago Stock Exchange.

9. TCL "is the holding company of the TCL Group of Companies operating across the Caribbean". The TCL Group is alleged to be "the leading producer and marketer of cement and ready mixed concrete and aggregate products across the Caribbean region"; see para 5 of the Statement of Case.

10. CCL is a subsidiary of TCL. CCL was incorporated in Jamaica and "[its] primary activity is the manufacture and sale of Ordinary Portland Cement and Portland-Pozzolan Cement"; see para 6 of the Statement of Case.

11. The defendant is a well-known Trinidad and Tobago medical practitioner, who at all material times was a shareholder in TCL; see para 7 of the Statement of Case.

12. On 12 May 2009 at an annual general meeting of the shareholders of TCL, the defendant, attending in his capacity as a shareholder, made statements about Mr Bertrand, voicing his dissatisfaction about the way Mr Bertrand had provided information about TCL to its shareholders, and the accuracy of such information in relation to a cement quality crisis at CCL's cement plant in Jamaica in 2006.

13. On 14 April 2010 the claimants brought these proceedings against the defendant claiming damages and aggravated damages for slander. In para 11 of the Statement of Case it was alleged that the words spoken by the defendant on 12 May 2009 meant:

> "a. That [Mr Bertrand] was dishonest in his conduct of the business of [TCL and CCL], that he was disposed to deceit and to otherwise mislead the legitimate owners, the shareholders of the Company and that [Mr Bertrand] was unfit to hold the position of CEO of [TCL];
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> b. That [Mr Bertrand] was mismanaging the financial affairs of [TCL and CCL];
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> c. That the Claimants were prepared in the person of [Mr Bertrand] to mislead directors, shareholders, employees and members of the public in the conduct of the business of [TCL and CCL];
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> d. That the Claimants were not prepared to provide accurate information directors, shareholders, employees and members of the public with such information [sic];
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> e. That the Claimants were highhanded and unapologetic in the provision of inaccurate information and were not prepared to provide accurate information and were not disposed to provide directors, shareholders, employees and members of the public with such information;
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> f. That [Mr Bertrand] was unfit and/or incompetent to hold the position of CEO of [TCL];
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> g. That [TCL and CCL] were complicit in [Mr Bertrand's] deceit and efforts to mislead the legitimate owners, the shareholders of [TCL];

> h. That [TCL and CCL] were prepared to support and/or retain an incompetent CEO in office and/or affirmed the actions of [Mr Bertrand] by his continued employment as CEO of and his continued appointment as a Director of [TCL and CCL] although he was unfit to be so employed and appointed."

14. In relation to an issue as to equality of arms in respect of costs it is relevant to note that the proceedings were brought against the defendant with the financial backing of TCL and CCL. It is also relevant to note that the claimant's Statement of Case was filed by an attorney, Donna Denbow of the Law Offices of Dr Claude Denbow SC, and settled by senior advocate, Dr Claude Denbow SC, and by a junior advocate with 21 years' experience, Ian L Benjamin.

15. In his defence the defendant admitted that he spoke the words set out in the Statement of Case but denied that the words were capable of being understood to refer to or to bear any defamatory meaning in relation to TCL or CCL. In relation to the claim by Mr Bertrand the defendant asserted that the words he spoke were not actionable without proof of special damages; and the words did not bear the defamatory meanings alleged. Rather, they meant that Mr Bertrand was "careless and/or reckless" in that he "did not give truthful and accurate information to the Annual Meetings of the shareholders". The defendant set out extensive particulars in relation to this allegation. The defendant also pleaded that the words were spoken on an occasion of qualified privilege, namely at the annual meeting of shareholders of TCL or in the alternative that the words were fair comment made in good faith and without malice upon a matter of public interest, namely "the financial soundness of TCL following the loss suffered by its subsidiary, [CCL] in the production of defective cement".

16. In order to meet the claimants' claim the defendant instructed Keisha Patryce Khan as his attorney and his defence was settled by senior counsel Ramesh Lawrence Maharaj SC and junior counsel Dinesh Rambally.

17. The claimants served a 16-page Reply which provided extensive particulars in relation to the cement quality crisis. Furthermore, in response to the defences of qualified privilege and fair comment the Reply alleged that the defendant published the words maliciously. Again, the Reply was filed by Donna Denbow and was settled by Dr Claude Denbow SC and by Ian L Benjamin.

18. The issues in relation to the claimants' claim necessarily require: an understanding of the cement quality crisis at CCL's cement plant in Jamaica and the various statements made by Mr Bertrand at several annual meetings of shareholders of TCL about that crisis; and an examination of the minutes of those meetings and whether those minutes accurately reflected what Mr Bertrand had said. Furthermore, the issues

in relation to the claimants' claim require an understanding of the accounts of TCL and CCL together with an understanding of CCL's product liability insurance policy and of communications with its insurers. The minutes of TCL's annual meetings of 17 June 2008 and 12 May 2009 were annexed to the claimants' Statement of Case. The claimants' Reply relied on what was said to have occurred at several meetings of TCL and CCL and on numerous documents. For instance, the claimants relied on (a) a presentation made by Mr Bertrand on 9 May 2007; (b) the interim financial reports for CCL for the first, second and third quarters of 2006; (c) a June 2006 report of the Jamaican authorities in relation to cement quality control; (d) a presentation at TCL's annual meeting of 4 July 2006; and (e) a presentation at CCL's annual meeting of 29 August 2006. The documents also included correspondence with the insurer's loss adjusters.

19. In essence the cement crisis involved defective cement supplied by CCL. In February 2006 claims were made that the cement supplied by CCL exhibited premature hardening. On 2 March 2006 CCL issued a recall of 500 tonnes of cement. This was widely reported in the Jamaican and Trinidad and Tobago press.

20. The defendant was concerned the shareholders in TCL might be liable in respect of any loss suffered from the defective cement produced by CCL. Accordingly, the defendant alleges that he raised the issue as to whether there was any potential loss to the shareholders of TCL at the Annual Meeting of the Shareholders on 4 July 2006. The defendant asserts that Mr Bertrand denied that defective cement had been produced for months, rather he limited the potential liability to an approximate four-hour production run or to 400-450 tonnes of defective cement. The defendant also asserts that at this meeting Mr Bertrand stated that there would be no liability of the shareholders and that in any event there was product liability insurance to cover any loss.

21. At TCL's Annual Meeting of Shareholders on 9 May 2007 Mr Bertrand in his report to the meeting stated that the direct loss which TCL suffered from the cement recall was TT$30m and that there was also an indirect loss of TT$32m. The defendant alleges that he expressed his anger in that Mr Bertrand had assured shareholders at the last Annual Meeting of Shareholders that the shareholders would suffer no loss on their shares and that based on what Mr Bertrand was now saying the shareholders would suffer a loss of more than TT$60m. The defendant then alleges that he asked Mr Bertrand as to the amount collected from the insurers in respect of this loss and that Mr Bertrand replied that US$1m had been collected.

22. At TCL's Annual Meeting of Shareholders held on 17 June 2008 the defendant alleges that he informed the meeting that he had ascertained from officials of CCL that no insurance monies had been collected in respect of the loss arising from the provision of defective cement. He further alleges that he informed the meeting that he had checked the relevant accounts of TCL and found that there was no evidence of any

insurance monies having been collected. The defendant alleges that he asked the Chairman of TCL to provide proof in respect of the payment of US$1m which Mr Bertrand said had been collected from the insurers and that the Chairman informed the defendant that he would provide that proof to the defendant.

23. The defendant alleges that at the next TCL Annual Meeting of Shareholders held on 12 May 2009 further information was provided by Mr Bertrand which conflicted with what he had said at the earlier meetings. The defendant alleges that Mr Bertrand said that the product liability insurance coverage which was held had a limit of cover of US$150,000 and that the insurers refused to pay for any loss because CCL was negligent in the production of the defective cement. The defendant also alleges that Mr Bertrand said that he never knew that insurance monies had not been collected in respect of the losses. After Mr Bertrand presented his report to the meeting, the defendant spoke the words which are alleged to have been defamatory of the claimants. Mr Bertrand is alleged then to have told the meeting that he at no time said that he collected US$1m from the insurers.

24. After the proceedings had been commenced the defendant was concerned that prescribed costs would be wholly insufficient having regard to the complex issues of fact and law involved. Furthermore, both sides had instructed senior and junior counsel. Neither prior to nor during the first case management conference, which took place on 2 November 2010, did the defendant make an application for the court to set a costs budget. On the basis that it was no longer possible to make an application to set a costs budget after the first case management conference, the defendant applied on 3 November 2010 for an order that the costs of the proceedings be quantified as assessed costs in accordance with rule 67.12 of the CPR rather than prescribed costs under rule 67.5. In the alternative the defendant applied for an order that the court stipulate the value of the claim pursuant to rule 67.5(2)(b)(ii). The application was accompanied by a detailed breakdown of the defendant's estimate of the costs of defending the proceedings. The estimated total amounted to TT$559,695. This application was opposed by the claimants on the basis that it was premature. The hearing of the application came on before Charles J on 9 October 2012 who on 17 October 2012 dismissed the application. The judge ordered the defendant to pay the claimants' costs of opposing the application, to be assessed in default of agreement. The parties subsequently agreed costs in the sum of TT$15,100 which the defendant paid.

25. In preparation for trial the claimants filed a Statement of Facts on 18 March 2011, and the defendant filed both a Statement of Facts and a Statement of Issues on 7 April 2011. Furthermore, a total of six witness statements were filed including an 18-page statement from Mr Bertrand. In his statement Mr Bertrand described, amongst other matters, the impact on him of the words spoken by the defendant. He asserted that for the defendant to say that he was dishonest was a source of grave embarrassment to him and that comments about him being a liar caused employees to have less respect for him. He also said that the defendant's words had spread. His fellow directors of the

Board of the Trinidad and Tobago Stock Exchange referred to the pressure he was under given the words spoken by the defendant. He also asserted that this pattern of the defendant's words spreading was a continuing pattern.

26. The trial of the action was due to commence on 20 January 2015.

27. By Notice of Change dated 8 January 2015, TCL and CCL changed attorneys from the Law Offices of Dr Denbow SC to Gitanjali Gopeesingh solicitor and attorney-at-law.

28. By letter dated 15 January 2015 Gitanjali Gopeesingh, the new attorney for TCL and CCL, informed the defendant and Mr Bertrand that:

> "… the Companies no longer wish to pursue this matter against the Defendant. Accordingly, the Companies will not be pursuing the prosecution of this claim against [the defendant]. Please be advised that the Companies will on the next occasion, be seeking the Court's permission to discontinue the claim mentioned herein."

29. On 19 January 2015, Mr Bertrand filed a Notice of Discontinuance to discontinue the whole of his claim against the defendant pursuant to CPR Part 38.

30. On 20 January 2015, the opening day of the trial, the attorneys for TCL and CCL sought leave to discontinue the proceedings. The judge, Charles J, gave them leave to discontinue and ordered the parties to file and exchange submissions on the issue of costs.

31. The submissions on costs filed on behalf of Mr Bertrand on 26 February 2015 asserted that costs were "to be determined on the prescribed scale". It was submitted that it was for the court to stipulate a value of the claim and that the damages likely to have been awarded would have been low so that the value of the claim to be stipulated by the court should be TT$120,000. The prescribed costs applying Appendices B and C to Part 67 in relation to a value of TT$120,000 would be TT$27,000.

32. The submissions on costs filed on behalf of the TCL and CCL on 27 February 2015 disclosed further information as to why those claimants had discontinued the proceedings. In para 13 of the submissions, it was stated that by the time that the action was scheduled to begin on 20 January 2015 Mr Bertrand "no longer had a role to play" in TCL or CCL. Furthermore, that Mr Bertrand "along with the rest of the Board

members of [TCL] were a few months prior to the trial date, removed as Directors" and that Mr Bertrand had been "terminated as the Group Chief Executive Officer." In para 14 of the submissions, it was stated that:

> "The pursuit of these proceedings were abandoned by [TCL and CCL] as the new Board members were of the opinion that the proceedings were ***ill founded*** and personal to [Mr Bertrand]. [Mr Bertrand] embarked upon these proceedings without having regard to the financial implication for either of these companies as Claimants. This matter was driven at all material times by [Mr Bertrand]." (Emphasis added).

33. By her judgment dated 25 April 2016 the judge ordered costs to be assessed.

3. Legal framework

34. The liability for costs following discontinuance of a claim is governed by rule 38.6(1) of the CPR which stipulates:

> "Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom he discontinues incurred on or before the date on which notice of discontinuance was served on him."

It was not suggested that the court should order otherwise. Accordingly, the defendant is entitled to an order for costs against the claimants. This appeal concerns the quantification of the defendant's costs.

35. The quantification of costs is governed by rules in Parts 67 and 68 of the CPR which were introduced in 1998 implementing many of the recommendations in the report entitled "Judicial Sector Reform Project: Review of Civil Procedure" by Mr Dick Greenslade. The purpose of Parts 67 and 68, which can be discerned from the Rules and from the report, is to make costs in civil litigation more predictable and reduce the risk of litigants incurring costs which are unreasonable and disproportionate.

36. As explained in *Rampersad v Ramlal* [2022] UKPC 50 at para 9, rule 67.3 provides that costs of proceedings under the CPR are to be quantified in one of the following ways. First, where rule 67.4 applies, that is to say in proceedings subject to a fixed costs regime, costs are to be quantified in accordance with the provisions of that rule ("fixed costs"). In all other cases, where the court orders a party to pay the costs of

another party, costs are to be quantified in accordance with the prescribed costs regime set out in rule 67.5 ("prescribed costs"); or in accordance with a budget approved by the court under rule 67.8 ("budgeted costs"); or, where neither prescribed nor budgeted costs are applicable, by assessment in accordance with rules 67.1 and 67.12 ("assessed costs").

37. Rule 67.4 headed "Fixed Costs" read with Part 1 of Appendix A applies to a claim for a specified sum of money and, read with Part 2 of Appendix A, applies to miscellaneous enforcement proceedings, such as filing a request for the issue of a writ of execution. As these proceedings do not fall within these provisions, the general rule is that the receiving party is entitled to prescribed costs determined in accordance with Appendices B and C to Part 67 and rule 67.5(2)-(4).

38. As rule 67.5 is central to the issues on this appeal it is appropriate to set it out in full. It provides:

> "(1) The general rule is that where rule 67.4 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)–(4) of this rule.
>
> (2) In determining such costs the 'value' of the claim shall be decided—
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> > (a) in the case of a claimant, by the amount agreed or ordered to be paid;
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> > (b) in the case of a defendant—
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> > > (i) by the amount claimed by the claimant in his claim form; or
> > >
> > > (ii) *if the claim is for damages and the claim form does not specify an amount that is claimed, by such sum as may be agreed between the party entitled to, and the party liable for, such 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, as if it were a claim for $50,000.

(3) The general rule is that the amount of costs to be paid is to be calculated in accordance with the percentage specified in column 2 of Appendix B against the appropriate value.

(4) The court may, however—

(a) award a percentage only of such sum having taken into account the matters set out in rule 66.6(4),(5) and (6); or

(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 percentage 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." (Emphasis added).

39. It can be seen that in accordance with rule 67.5(3) the general rule (where, as mentioned above, fixed costs do not apply) is that the amount of costs to be paid is to be calculated in accordance with the percentage specified in column 2 of Appendix B against the appropriate value and that the value of the claim is to be decided in accordance with rule 67.5(2). The claim in these proceedings is for damages so, in a case concerning the defendant's recoverable costs, the value of the claim is to be decided in accordance with rule 67.5(2)(b)(ii) as emphasised above. As the claim form did not specify an amount that was claimed and no sum as the value of the claim was agreed between the parties, it fell to the court to stipulate a sum as the value of the claim so that the scale of prescribed costs could be applied to that value.

40. The general rule that the amount of costs to be paid is prescribed costs is also found in Part 38 of the CPR headed "Discontinuance". Rule 38.7(1) provides:

> "The general rule is that, unless an order has been made for budgeted costs under rule 67.8 the costs shall be determined in accordance with the scale of prescribed costs contained in Appendix B and Appendix C to Part 67."

41. Rule 67.7 headed "What is included in prescribed costs" provides:

> "Prescribed costs include all work that is required to prepare the proceedings for trial including, in particular, the costs involved in instructing any expert, in considering and disclosing any report made by him or arranging his attendance at trial and for attendance and advocacy at the trial including attendance at any case management conference or pre-trial review but exclude—
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> (a) the making or opposing of any application except at a case management conference or pre-trial review;
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> (b) expert's fees for preparing a report and attending any conference, hearing or trial; and
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> (c) costs incurred in enforcing any order (which are generally fixed in accordance with rule 67.4 but may, in certain cases, be assessed in accordance with rule 67.12)."

Accordingly, the prescribed costs calculated in accordance with the scale comprehensively covers virtually all the costs of the proceedings.

42. A prescribed costs regime is not unknown in the UK. For example, it is the costs regime which is applied to civil proceedings in the County Court in Northern Ireland; for an analysis of fixed costs in Northern Ireland see "Review of Civil and Family Justice in Northern Ireland, Review Group's Report on Civil Justice, September 2017" at para 6.24–6.39. As stated in *Rampersad v Ramlal* [2022] UKPC 50 at para 11:

> "The advantage of a regime for prescribed costs is plain. Where it is applicable, the parties know where they are in terms of the opportunity to recover costs if they are successful, and their potential liability if they fail. They also

> know that they will not become embroiled in what may prove to be lengthy and expensive assessment proceedings."

However, the general rule that costs awarded are prescribed costs may not be appropriate in all cases. Accordingly, the CPR make provision for discretion to be exercised in advance of trial to either adjust the value of the claim under rule 67.6(1)(b) so that prescribed costs can be calculated on the basis of some higher or lower value than the known value or for the court to set a costs budget for the proceedings under rule 67.8. Furthermore, even if no application or order is made in advance of trial under rules 67.6 or 67.8 the court has a discretion to award a party its costs to be assessed; see *Rampersad v Ramlal* at paras 13, 37 and 52.

43. As an application was made by the defendant in advance of trial in relation to costs in this case, it is appropriate to set out in some further detail the provisions of rules 67.6 and 67.8.

44. Rule 67.6 is headed "Applications to determine [the] value of a claim for the purpose of prescribed costs". Rule 67.6(1)(b) enables a party to apply at a case management conference where the likely value of a claim is known for a direction that the prescribed costs be calculated based on some higher or lower value. The exercise of the court's discretion is subject to rule 67.6(2), which provides that the court "may make an order under paragraph (1)(b) if it is satisfied that the costs as calculated in accordance with rule 67.5 are likely to be excessive or substantially inadequate taking into account the nature and circumstances of the particular case".

45. Rule 67.8 is headed "Budgeted Costs". Rule 67.8(1) permits a party to apply to the court to set a costs budget for the proceedings. However, rule 67.8(2) provides that an application for such a costs budget must be made at or before the first case management conference. Rule 67.8(4) provides that an application for a costs budget must be accompanied by: (a) a written consent from the client in accordance with rule 67.9; (b) a statement of the amount that the party seeking the order wishes to be set as the costs budget; and (c) a statement showing how such budget has been calculated. The statement showing how the budget has been calculated must set out several matters including the hourly rate charged by the attorney-at-law (or other basis of charging) and a statement of the number of hours of preparation time (including attendances upon the party, any witnesses and on any other parties to the proceedings) that the attorney-at-law for the party making the application has already spent and anticipates will be required to bring the proceedings to trial.

46. If discretion is exercised for costs to be assessed rather than quantified as prescribed costs, then rule 67.12 makes provision as to how assessed costs are to be quantified either by the judge or the master.

47. A further rule relevant to these proceedings is rule 67.14 headed "Costs of proceedings in the Court of Appeal". In so far as relevant rule 67.14 provides that "the costs of any appeal must be determined in accordance with [prescribed costs] but the costs must be determined at two thirds of the amount that would otherwise be allowed under Appendix B".

4. The judgments of the High Court and the Court of Appeal

(a) The judgment of Charles J

48. Before the judge it was submitted on behalf of Mr Bertrand that the defendant's costs should be quantified as prescribed costs and that pursuant to rule 67.5(2)(b)(ii) the court was required to stipulate a sum as the value of the claim to determine the amount of prescribed costs applying Appendices B and C to Part 67. It was submitted that the value of the claim was TT$120,000 with the consequence that prescribed costs would be TT$27,000.

49. On behalf of the defendant, it was submitted that, where no sum is claimed and unless parties agree the sum to be paid in costs, there was nothing before the court on which it could decide the value of the claim. Therefore, the only reasonable course to be taken was to give directions for the assessment of costs.

50. The judge, at para 31, referred to rule 38.6 which provides that a claimant who discontinues proceedings is liable for the costs which a defendant against whom he discontinues incurred on or before the date on which notice of discontinuance was served on him. She held that the object of rule 38.6 is fairness. Then at para 32 the judge stated:

> "I also considered [rule] 67.5(2)(b)(ii) which requires the Court to stipulate a value. I took into account the fact that assessing a value in this case without having heard the evidence may not result in fairness to the parties. The First Claimant submitted that the Court should stipulate a value based on the damages likely to be awarded in the case; however, this method of assessment is speculative since I cannot anticipate the extent of damage *proved* before cross-examination". (Emphasis added).

Accordingly, as the judge considered that she was unable in fairness to the parties to stipulate a sum as the "*proved*" value of the claim "without having heard the evidence"

and "before cross-examination", she ordered that costs be assessed by the Master in Chambers.

(b) The judgment of the Court of Appeal

51. The focus of the appeal before the Court of Appeal was whether the judge was unable to stipulate a sum as the value of the claim "without having heard the evidence" and "before cross-examination". On behalf of the claimants, it was submitted that the judge had more than sufficient information to do so. The pleadings set out the words spoken and the alleged defamatory meanings. Statements of Facts and Issues had been filed. There were several witness statements including Mr Bertrand's witness statement which contained his evidence as to the impact of those words on him. The judge could stipulate a sum by reference to that material read in the context of awards of damages for defamation which had been made in other cases.

52. At the conclusion of the parties' submissions Rajkumar JA delivered an ex tempore judgment with which the other members of the court agreed. For several reasons the Court of Appeal held that the judge had erred in failing to stipulate a sum as the value of the claim. First, there was sufficient material available to the judge upon which she could stipulate a sum as the value of the claim. Second, discontinuance ordinarily occurs before an action goes to trial and therefore before the evidence is heard and before cross-examination. Accordingly, a principle that it was not possible to stipulate a sum as the value of a claim before the evidence is heard or before cross-examination would entirely undermine the general rule set out in rule 38.7(1) that on discontinuance costs should be prescribed costs. Third, the purpose of cross-examination would have been to try to reduce the level of damages. Cross-examination therefore could only have disadvantaged the defendant since, for this exercise, it is in the defendant's interest for the value of the claim to be as high as possible so as to increase the amount of prescribed costs. Accordingly, the judge ought to have rejected the reason that there had been no cross-examination where this reason was being advanced by the defendant, who for the purposes of prescribed costs did not seek to diminish the value of the claim.

53. In view of these errors the Court of Appeal held "that the appeal would *necessarily* [need to] be allowed" (emphasis added) and "the matter be remitted [to] the Trial Judge for the assessment of costs and for the stipulation of the value of the claim … based upon the material that was before her with such assistance from Counsel, as the Trial Judge may require". The order of the Court of Appeal provided that the matter is remitted to the trial judge "for the stipulation of the value of the claim". In making that order it was clear that once the sum was stipulated the defendant's costs would be quantified as prescribed costs.

54. The Court of Appeal also ordered the defendant to pay the claimants' costs of the appeal quantified pursuant to rule 67.14 (see para 47 above) "in the amount of two-thirds (2/3) of such costs as the trial court eventually determines based upon the stipulated value and the application of the prescribed costs regime to that stipulated value". The effect of this order was that the costs of a hearing in the Court of Appeal relating to the manner of quantification of costs, lasting approximately one and a half hours, would leave the defendant with, in effect, a costs order of only one third of the prescribed costs for defending the entire proceedings.

5. The defendant's grounds of appeal and the Board's conclusions

55. Mr Maharaj SC on behalf of the defendant advanced two grounds of appeal as to why the judge was right to order that the defendant's costs be assessed rather than awarded on the prescribed costs scale. The Board will deal with each in turn.

56. First, Mr Maharaj submitted that the judge did not express as her sole reason for displacing the general rule as to prescribed costs that she was unable to stipulate a sum as the value of the claim "without having heard the evidence" and "before cross-examination". Rather, Mr Maharaj submitted that the judge also expressed an overall view that it was unfair to the defendant to award him costs quantified as prescribed costs as opposed to an assessment of the costs actually incurred. He submitted that the Court of Appeal erred in failing to recognise that the judge expressed an overall view as to the unfairness of prescribed costs.

57. In support of the submission that the judge also based her decision on overall fairness Mr Maharaj relied on the judge's view, expressed at para 31 of her judgment, that the object of rule 38.6 was fairness.

58. In advancing this ground of appeal Mr Maharaj accepted that, if the judge's sole reason had been that she was unable to stipulate a sum as the value of the claim "without having heard the evidence" and "before cross-examination", then for the reasons given by the Court of Appeal the judge had erred. It is appropriate at this stage to state that the Board considers that the judge would also have been in error in seeking to establish, in a case concerning the defendant's recoverable costs, the amount of the claim by reference to a sum which is the "proved" value of the claim. The value of the claim for the purpose of quantifying the costs payable to a successful defendant under rule 67.5(2)(b) is the fullest value alleged by the claimant rather than the "proved" value. In this way claimants are at risk of an increased prescribed costs order against them if their claim is dismissed in circumstances where their claim is exaggerated. Furthermore, evidence called on behalf of a defendant or effective cross-examination of a claimant which reduces the value of a claim should not benefit the unsuccessful

claimant by reducing the prescribed costs payable by the claimant if the claim is dismissed.

59. In relation to the first ground of appeal, the Board considers that the judge's reference to fairness in paras 31 and 32 of her judgment is to be construed as a lack of fairness in stipulating a sum as the value of the claim "without having heard the evidence" and "before cross-examination". This was the sole reason why the judge considered that costs should be assessed and, as now accepted by the defendant, she erred in relying on that reason.

60. The Board therefore rejects the defendant's first ground of appeal.

61. Second, Mr Maharaj submitted that the Court of Appeal erred in holding that because of the judge's errors the appeal was "necessarily" allowed. Rather, the Court of Appeal ought to have considered exercising its discretion whether to apply the general rule of prescribed costs or whether to order costs to be assessed. The Board notes that during submissions in the Court of Appeal Rajkumar JA appeared to recognise the relevance of discretion in this context by stating during an intervention that "departure from the prescribed costs basis must take place for good reason". The Board also notes that the focus of the defendant's submissions in the Court of Appeal was on whether it was possible to stipulate a sum as the value of the claim. However, the process of quantifying costs necessarily involves the exercise of discretion as the Court of Appeal recognised during submissions. After concluding that the judge's decision must be set aside, the Court of Appeal ought to have, but failed to, exercise that discretion. The Board considers that in failing to do so the Court of Appeal fell into error.

62. It therefore is necessary for either the Court of Appeal or the Board to consider in the exercise of discretion whether to apply the general rule of prescribed costs or whether to order costs to be assessed. All the material in relation to the exercise of discretion is available to the Board and the Board has received full submissions from the parties. Accordingly, in the interests of expedition and to save the costs of a further hearing before the Court of Appeal, the Board will exercise the discretion.

6. The Board's exercise of discretion

63. The starting point in relation to discretion to order costs to be assessed is that it should not be exercised to undermine the purposes of prescribed costs which includes providing a measure of certainty to the public through having a costs regime where the amount of prescribed costs directly correlates with, and is proportionate to, the value of the claim. Accordingly, the discretion will only be exercised for good reasons and in exceptional cases.

64. The Board considers for several cumulative reasons, in the circumstances of this case where the reasonable estimate of the actual costs is hugely disproportionate to the likely amount of prescribed costs, that this is an exceptional case.

65. First, a powerful reason for departing from the general rule in relation to TCL and CCL is that in addition to discontinuing the proceedings they expressly acknowledge that the proceedings which they brought against the defendant were "ill founded" and accordingly that the proceedings should never have been brought; see para 32 above. The Board considers that the prescribed costs regime is for genuine claims, and, although it generally applies in cases of discontinuance, it should not be used to protect TCL and CCL from the consequence of reimbursing the defendant in relation to the reasonable costs he actually incurred in defending ill-founded proceedings that should never have been brought by TCL and CCL.

66. Second, Mr Bertrand could have continued with his action against the defendant even though TCL and CCL had informed him that they were to discontinue their proceedings. However, Mr Bertrand abandoned his claim by serving his own notice of discontinuance a day before the trial began. In the circumstances of this case, particularly where TCL and CCL acknowledged the proceedings were "ill founded", the Board infers that by doing so Mr Bertrand effectively also acknowledged that his claim was ill founded and should not have been brought. Again, the Board considers that the prescribed costs regime is for genuine claims, and it should not be used to protect Mr Bertrand from the consequence of reimbursing the defendant in relation to the reasonable costs he actually incurred in defending ill-founded proceedings that should never have been brought by Mr Bertrand.

67. Third, as from 3 November 2010 by virtue of the defendant's application in relation to costs (see para 24 above) the claimants were on notice of the detailed estimate of the actual costs to be incurred by the defendant up to trial. There was no suggestion before the judge or before the Board that the estimate was unreasonable. Despite knowing the amount of costs which were estimated to be incurred by the defendant, and where they knew or ought to have known that these would be wholly disproportionate to the likely amount of prescribed costs, the claimants persisted right up to the door of the court in pursuing an ill-founded claim against the defendant.

68. Fourth, prescribed costs for a defendant are quantified as a proportion of the monetary value of the claim determined in accordance with rule 67.5(2)(b). However, a factor which may be considered in the exercise of discretion in relation to quantification of costs is whether the importance of the claim to the parties or to the wider public is wholly disproportionate to the monetary value of the claim. In this case, if, as submitted on behalf of Mr Bertrand, the estimated value of the claim is TT$120,000 then there is a glaring disparity between the value of the claim and its importance. The claim involved an allegation that the defendant had maliciously asserted that Mr Bertrand, a prominent

businessman "was dishonest in his conduct of the business of [TCL and CCL], that he was disposed to deceit and to otherwise mislead … the shareholders of the Company". The claim also involved allegations the defendant had defamed Mr Bertrand by asserting that he had mismanaged the financial affairs of TCL and CCL and was unfit and incompetent to hold the position of CEO of TCL; see para 13 above. The claim was obviously of considerable importance not only to the parties but also to the wider public in the Caribbean given Mr Bertrand's involvement in important commercial and public positions; see para 8 above. The Board considers in the circumstances of this case the importance of the claim to the parties and to the wider public is a factor to be taken into account in the exercise of discretion.

69. Fifth, in the circumstances of this case, where the issues are relatively complex and the estimate of the actual costs is hugely disproportionate to the likely amount of prescribed costs, then there is a risk that the prescribed costs regime could be used to adversely affect the defendant's access to justice. As the Board has set out above, the issues in these defamation proceedings are relatively complex requiring, for instance, an analysis of events which occurred at a series of TCL's Annual Meetings of Shareholders and an examination of the fairly extensive documentation referred to in the pleadings. However, inherent in any system of prescribed costs is the principle that there will be "swings and roundabouts" so that legal representatives may receive less generous remuneration in a complex case, but this will be made up by more generous remuneration in a simple case. Accordingly, for complexity to be a relevant factor the degree of complexity must be significant and contribute substantially to the disproportion between the actual costs and prescribed costs. The Board considers in the circumstances of this case that complexity is a factor to be taken into account in the exercise of discretion.

70. Sixth, again in the circumstances of this case where the reasonable estimate of the actual costs is hugely disproportionate to the likely amount of prescribed costs then the prescribed costs regime should not be used to adversely affect the defendant's freedom of speech at meetings of shareholders. The defendant's freedom of speech could be adversely affected by the claimants bringing ill-founded and groundless claims alleging defamation and then restricting the defendant to recovering prescribed costs. Many litigants would be intimidated and silenced if they knew that they had to incur substantial costs but could only recover an extremely modest fraction of those costs as prescribed costs even if they were successful in defending the proceedings. Indeed, at an anterior stage, many shareholders wishing to raise a legitimate issue of concern with the management at a general meeting, would also be intimidated and silenced.

71. Seventh, given the disparity with actual costs, the quantification of costs as prescribed costs could also have resulted in an inequality of arms as between the well-resourced claimants and the defendant. In the event the defendant through his own personal outlay did achieve equality of arms with the claimants. However, a factor in relation to the exercise of discretion in the circumstances of this case, where there is a

huge disparity between actual costs and prescribed costs, is to vindicate the defendant's decision to achieve that equality.

72. For these cumulative reasons the Board exercises its discretion to depart from the general rule and to order costs to be assessed by a Master in Chambers.

7. Overall conclusion

73. The Board allows the defendant's appeal.

74. For different reasons from those expressed by the judge, the Board reinstates her order that the claimants pay the defendant's costs to be assessed by the Master in Chambers.