

IN THE SUPREME COURT OF BELIZE A.D. 2002

CLAIM NO. 81 OF 2002

BETWEEN: SAMUEL FLORES	APPLICANT AND SECOND DEFENDANT
AND	
1. BELIZE ELECTRICITY LIMITED	FIRST DEFENDANT
2. ALFRED CARD	RESPONDENT AND CLAIMANT

Mr. Michael Chebat for the applicant-second defendant.

Linbert Willis for the respondent-plaintiff.

Mr. Darrell Bradley for the first defendant.

AWICH J.

6.11.2008.

DECISION

*Ex tempore.*

1. *Notes: Costs; liability of a claimant discontinuing claim to pay costs, R 37.6; general discretion of court to award or decline costs; costs to be fair and reasonable; R 63.3, 63.5, 63.6 and 64.2; costs arising from joinder of a defendant by court.*
2. The application dated 17.7.2008, by Samuel Flores, who was the second defendant in the claim to which this application relates, is

directed only against Alfred Card who was the claimant, and who filed a notice of discontinuance of his claim on 17.6.2008, following a settlement between him and the first defendant, Belize Electricity Limited.

3. The claim was for damages for alleged negligence on the part of Belize Electricity Limited. Mr. Card averred that Belize Electricity Limited through its supervisor employee, Mr. Samuel Flores, engaged him as a daily casual worker, to work on electricity lines, and that while he was up on an electricity pole, it broke and fell down with him. He sustained grave injuries. He alleged that he fell as the result of negligence on the part of Belize Electricity Limited, in that it did not maintain and ensure that the pole was safe. Originally Mr. Card brought his claim against Belize electricity Limited only. Mr. Flores was joined later as the second defendant at case management conference.
  
4. Learned counsel Mr. Michel Chebat for Mr. Flores, relied for his application on R 37.6 of the Supreme Court (Civil Procedure) Rules, 2005, which directs that: *“unless-(a) the parties agree; or (b) the*

*court orders otherwise, a claimant, who discontinues a claim is liable for costs incurred by the defendant against whom the claim is discontinued, incurred on or before the date on which notice of discontinuance was served*". However, there are three other points which are relevant to this application, and which must be borne in mind when the court considers the application.

5. The first point is the common law rule that where statute does not provide otherwise, and there has been no agreement by parties, costs are always matters for the discretion of the Court – see ***Donald Campbell & Co. v Pollack [1927] A.C. 732 HL; Jones v McKenzie and Mersey Docks and Harbour Board [1964] 2 All ER 842 CA***, and also ***Alltrans Express Limited v G. V. A. Holdings Ltd. [1984] 1 All ER 685***. Rule 63.5 of the Supreme Court (Civil Procedures) Rules 2005, affirms that common law rule. With due respect, to Mr. Chebat, I do not accept his submission that R 37.6 takes away that fundamental discretion. The rule itself directs at (b), that the court may order otherwise. That is the meaning I attach to the clause, *“unless the court orders otherwise”*. Should costs not be a matter for the decision of court if parties agree and settle the claim, but are

unable to agree on who is to pay the costs, or on whether the costs, be shared?

6. The second point is that originally the claimant cited only Belize Electricity Limited as the sole defendant. This court was informed that the order for joinder was made, without an application by the claimant, by the learned judge, Denys Barrow, or at his prompting, and that the claimant accordingly amended his statement of claim to include Samuel Flores as the second defendant. There is nothing wrong in the court initiating joinder or even making the order *meru motu*, if it will help to have all the questions in the claim resolved. I accept the learned submission by Mr. Chebat that parties must accept the risk of costs arising in litigation, even if the costs arise as the consequence of an order made by court, without an application by a party. However, in my view, the initial reluctance of the claimant to join the additional defendant is a relevant consideration to some extent in the decision as to the incidence of costs or at least as to the *quantum*. It has always been a difficult question for me, as to whether I should order, without an application by the claimant, joinder of an additional defendant when the claimant has chosen not to claim

against him. I have always considered that such a claimant might have excluded the additional defendant because the claimant wished to minimise costs.

7. The third point is that on 5.5.2008, the day appointed for trial, Mr. Flores did not attend court. The trial could have proceeded without him defending the claim against him in court, had the claimant and Belize Electricity Limited not agreed to discuss settlement. It was on the following occasion when the proposal for settlement was to be presented to court that Mr. Flores appeared to ask for costs because he was not included in the settlement. I did not decide the question of costs then. I directed that the settlement between Card and Belize Electricity Limited may proceed, and that an application for costs may be made if it would be necessary.
  
8. It is my view that Mr. Flores is entitled to insist on his costs under R 37.6, but his non attendance must be taken into consideration, even if only to the extent that it may affect the *quantum* only. The rule is that Court may take into account conduct previous to and affecting the claim; and the mode adopted in conducting the litigation – see

*Harnett v Vise* 91980) Ex. D. 307, CA, and also *Metropolitan Asylum District v Hill* (1880), 5 App. Cas. 582. HL. Most of the factors to be taken into consideration are set out in **R. 64.2 (3) of the Rules.**

9. For the reasons I have given, I allow the application by Mr. Flores for costs against the claimant Mr. Card, under **R 37.6**; but I go beyond the application and exercise the fundamental discretion of the court as to whether or not to order costs and against which party. In my view, it is fair and reasonable that where the claimant and the defendant cited by the claimant have agreed to a settlement and discontinuance of the claim, and have not agreed on costs, the costs of a defendant joined without an application by the claimant, should be shared between the claimant and the original defendant cited by the claimant, if the facts of the claim justify. The facts of this claim justify an order to that effect. Accordingly I order that Belize Electricity Limited will also pay the costs of Mr. Flores.
  
10. The costs asked for in the application, totalling \$7,563.00 are fair and reasonable – see *Property and Reversionary Investment Corporation*

*Ltd. v Secretary of State for the Environment [1975] 2 All ER 436.*

and also, *R 64.2(1) of the Rules*. In the bill of costs attached, the costs in fact totalled to less than would be, had the bill been drawn according to appendix B of the schedule to R. 64. I do however, reduce the bill by \$700.00 to \$6,863.00, to take into account the fact that the applicant-defendant did not appear on the date appointed for trial. In his bill of costs Mr. Chebat charged \$700.00 for one attendance at court. Mr. Alfred Card will pay one-half of the costs, that is, \$3,431.50; and Belize Electricity Limited will pay the other one-half, \$3,431.50. Parties will bear own costs of this application.

11. Dated this Thursday the 6<sup>th</sup> day of November 2008  
At the Supreme Court  
Belize City.

Sam Lungole-Awich  
Judge