Hilary Term
[2025] UKPC 10
Privy Council Appeal No 0116 of 2023

JUDGMENT

Bhagwantee Singh-Weekes (as Legal Personal Representative of the Estate of Navin Singh) (Appellant) *v* South-West Regional Health Authority (Respondent) (Trinidad and Tobago)

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

before

Lord Hodge
Lord Briggs
Lord Hamblen
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
20 February 2025

Heard on 12 November 2024

Appellant
Anand Ramlogan SC
Mohammud Jaamae Hafeez-Baig
Aasha Ramlal
(Instructed by Freedom Law Chambers)

Respondent
Katherine Deal KC
Vijai Deonarine
(Instructed by Charles Russell Speechlys LLP (London))

LORD HODGE:

1. This appeal is concerned with the interpretation of rule 67.13 of the Civil Proceedings Rules 1998 of Trinidad and Tobago (as amended) ("CPR") which allows the addition of "the appropriate amount" of value added tax ("VAT") to an award of prescribed, assessed or budgeted costs.

2. Rule 67.13 provides:

> "A party who is not himself registered for value added tax may add the appropriate amount of value added tax to the amount of any prescribed, assessed or budgeted costs awarded to him."

3. The purpose of rule 67.13 is to compensate the recipient of an award of costs for having incurred VAT on his or her attorney's fees when he or she is not VAT-registered and cannot credit the amount of the charge as input tax against a liability to pay output tax. The provision also can reduce the risk of a VAT-registered attorney being disadvantaged in the marketplace for legal services in competition with attorneys who are not VAT-registered. According to the Value Added Tax Act 1989 as amended, VAT is charged at a rate of 12.5% on the supply of goods and services in Trinidad and Tobago.

4. On this appeal the Board is concerned with prescribed costs rather than budgeted or assessed costs. The award of prescribed costs under rules 67.5 and 67.6 and Appendices B and C of Part 67 of the CPR determines the award of costs by reference to the value of the claim. Appendix B prescribes the award of costs as a percentage of the value of the claim, setting out bands of the value of the claim, starting with "not exceeding $30,000" and ending with "exceeding $10,000,000", and applying a declining percentage to each band. The costs attributable to each band of value are then aggregated to determine the cumulative award. This method of calculating the award of costs avoids the expense of a detailed assessment of costs and disputes between the parties in relation to such an assessment. It has the advantage of predictability for both parties to a case and makes the recovery of costs proportionate to the value of the claim: *Bertrand v Elias* [2023] UKPC 34, Lord Stephens at para 63. Prescribed costs reduce the risk of litigants incurring unreasonable and disproportionate costs: *Kumar Mahabir v Sarim Al-Zubaidy* Civ Appeal No P034 of 2021, Mendonça and Kokaram JJA at paras 4 and 26-27. But prescribed costs may in some cases provide an inadequate recovery of costs which is why a party can apply to the court for assessed costs: *Rampersad v Ramlal* [2022] UKPC 50, Lord Kitchin at para 11. On this appeal there is no dispute as to the calculation of the prescribed costs. The sole question is whether the courts were wrong in refusing to allow the appellant to add the appropriate amount of VAT to the prescribed costs so calculated.

1. The legal proceedings

5. The action in which the costs were awarded was a claim for damages which the appellant pursued on behalf of the estate of her son, Navin Singh, who died as a result of medical negligence. The action was, as Mr Anand Ramlogan SC submits, relatively complex as it was concerned with a failure to diagnose necrotising fasciitis and involved the cross-examination of two doctors and two expert witnesses in a three-day trial.

6. Quinlan-Williams J delivered a judgment on liability on 14 February 2020, finding in favour of the appellant. Thereafter, the parties made written submissions on the quantification of damages and on costs. The appellant requested that costs be assessed in the absence of agreement and the case be certified as fit for senior and junior counsel. The respondent argued that the appellant should be awarded prescribed costs, which are the norm for personal injury cases, and that any application for a higher level of costs ought to have been made at a case management conference under CPR r 67.6 and not after the decision on liability had been handed down. On 28 August 2020 Quinlan-Williams J gave an oral summary of the judgment on quantum and costs, which she had written. The damages in aggregate amounted to $1,650,276.97. She then calculated costs on that figure on the prescribed scale as $141,513.85. In response Mr Ramlogan raised a question about the fees of the appellant's expert witness, which is not material to this appeal, but made no submission on the addition of the appropriate amount of VAT to the prescribed costs awarded.

7. Mr Ramlogan's office received the judgment of Quinlan-Williams J on 3 September 2020. On the same day, his colleague, Mr Jared Jagroo, emailed the court to request an order under rule 67.13 for VAT to be added to the appellant's prescribed costs and enclosed the VAT certificate of the appellant's attorneys which was in the name of Mr Ramlogan trading as Freedom Law Chambers. The respondent's attorneys responded by email on the same afternoon arguing that the court was functus officio as Quinlan-Williams J had issued her judgment in relation to the matters which the appellant's attorneys had raised. Mr Jagroo responded promptly on the same afternoon by email, in which he argued that the court was not functus officio as the court had not yet issued a perfected order and referred the court to the decision of Rampersad J in *Daisley v Yara Trinidad Ltd* (Claim No CV 2012-1440) in which the court considered the addition of VAT and expert fees after making an award on liability and quantum. Thereafter, the respondent's attorneys reiterated their opposition to the appellant's request.

8. Quinlan-Williams J did not accede to the appellant's request for the addition of the appropriate amount of VAT but gave no reasons for her decision. A sealed order was subsequently issued on 15 December 2020.

9. The appellant appealed to the Court of Appeal against the refusal to allow the recovery of fees for her medical expert and to add the appropriate amount of VAT on the prescribed costs of the award of damages. The respondent cross-appealed on the calculation of damages compensating Navin Singh's estate for the earnings he would have

made but for his untimely death. The issue raised in the cross-appeal was the main issue before the Court of Appeal; its resolution took up the large majority of the Court of Appeal's judgment and is a matter which does not arise on this appeal. The appellant succeeded in obtaining relatively minor increases in the award of damages and reimbursement of the costs of her expert witness. The total award in relation to the appellant's claim was increased to $1,762,215.87. The Court of Appeal awarded costs on that sum on the prescribed basis but refused to add the appropriate amount of VAT thereon.

10. The Court of Appeal's reason for refusing to add "the appropriate amount of VAT" involved a very literal interpretation of the words "any prescribed … costs awarded to him" in rule 67.13. Noting the past tense of the verb "awarded", it stated that rule 67.13 refers to costs which have already been awarded and not to costs which the court may award. Therefore, it reasoned, the rule did not give the court authority to add VAT to the costs which it had already awarded. The court referred to paragraphs 9 and 10 of the Practice Guide to the Assessment of Costs which Hamel-Smith ACJ promulgated in 2007 and said that they did not support the addition of a further sum to the prescribed costs. It stated that it appeared to be unprincipled to expose an unsuccessful party to costs with VAT in addition when the successful party's attorney was VAT-registered, but, when the successful party's attorney was not VAT-registered, to impose on the unsuccessful party the prescribed costs without the addition of VAT.

11. The Court of Appeal's decision in this case has since been applied in several cases by first instance judges to refuse applications to add VAT to the costs awarded to a successful party who has been represented by a VAT-registered attorney. The decision raises a question of law which is important to legal practice in Trinidad and Tobago. The appellant appeals to the Board with the leave of the Court of Appeal.

2. The interpretation of rule 67.13

12. The appellant challenges the reasoning of the Court of Appeal and Katherine Deal KC, for the respondent, does not seek to support that reasoning or the argument that the first instance judge was functus when Mr Ramlogan belatedly applied for the addition of VAT to the prescribed costs. In the Board's view, she is correct so to concede.

13. The first instance judge was not functus before she issued her order on 15 December 2020. See *Liberty Development Co Ltd v Official Receiver* Civ App No 91 of 2015 (Claim No. CV 2009-4515), in which at para 17 J Jones JA, delivering the judgment of the Court of Appeal, stated:

> "It is settled law that, under the inherent jurisdiction of the court, a judge can, on his own motion, recall and change an order made by him or her before it is perfected."

14. For the equivalent rule in English law see *In re L and B (Children)* [2013] UKSC 8, Lady Hale at paras 16-19.

15. Further, the Court of Appeal was incorrect in its interpretation of rule 67.13. In the Board's view the word "awarded" in context means "awarded or to be awarded". Rule 67.13 in terms applies to the award of costs to a party against another party as it speaks of the costs "awarded to him". There is nothing unprincipled about the addition of the appropriate amount of VAT to the prescribed or other costs awarded or to be awarded when the recipient party's attorney is VAT-registered and the recipient party has paid or is liable to pay that sum as VAT.

16. Counsel agreed, in the Board's view correctly, that there is an indemnity principle which caps what a recipient of an award of costs can recover by the addition of a sum under rule 67.13. The recipient cannot recover VAT on the award of costs in a sum greater than the liability to VAT which he or she has incurred on the fees charged by his or her attorneys. In other words, the appellant's entitlement under rule 67.13, if established, is the lesser of (i) VAT at 12.5% on the prescribed costs and (ii) the VAT actually paid or payable by her on her attorney's fees. The words of the rule, "the appropriate amount of value added tax" direct the court to apply the indemnity principle and thereby make sure that the recipient party is not over-compensated for the VAT charge which he or she has incurred.

3. The remaining issue in dispute

17. The only matter which remains in dispute on this appeal is the means by which the recipient party should make an application for and establish an entitlement to the addition of the appropriate amount of VAT under rule 67.13.

18. Mr Ramlogan explains that while the action had been commenced by another firm of attorneys, his chambers had been involved since 2018 and several lawyers from his chambers had been involved in the preparation for and conduct of the trial. He accepts that he could have applied for the addition of the appropriate amount of VAT under rule 67.13 when Quinlan-Williams J gave a summary of her judgment on 28 August 2020. He states that his chambers applied within three hours of receiving the judgment on 3 September 2020 and sent the court his chambers' VAT registration certificate. He represents to the Board that his chambers' fees charged to the appellant greatly exceeded the prescribed costs and that, as a result, the VAT due on those fees greatly exceeded the 12.5% of the prescribed costs which could be recovered under rule 67.13. His claim for

the additional sum is therefore "the appropriate amount of VAT" in accordance with the indemnity principle. He points out that the respondent's argument that there needs to be an investigation into his chambers' fees, which the Board summarises below, has "an air of unreality" as the respondent's disclosure under a freedom of information request revealed that the legal fees for the case which the respondent incurred were six times larger than the prescribed costs awarded to the appellant.

19. Ms Deal for the respondent argues that it is premature to add any amount of VAT under rule 67.13 until the appellant has satisfied the court that the VAT, which she has paid or for which she is liable, is equal to or exceeds the sum representing VAT which would be added by the application of rule 67.13. The respondent is a public body and must use public funds responsibly. The burden is on the recipient of an award of costs to satisfy the court that the addition of an amount of VAT under rule 67.13 complies with the indemnity principle. In this case, the attorneys acting for the appellant until 2018 were not VAT-registered, but she accepts that Mr Ramlogan's chambers were so registered. She submits that the appellant has not yet established her entitlement to the addition of a specific sum under rule 67.13. A more detailed examination is required.

20. The Board is not persuaded by the respondent's argument in the circumstances of this case. It is nonetheless necessary to discuss what may be a practicable procedure in cases where there may be uncertainty as to whether an addition of an amount representing VAT under rule 67.13 might breach the indemnity principle because there may be cases which are conducted for the bulk of the time by an attorney who is not VAT-registered, but a VAT-registered attorney is instructed to play a role in the trial. In such a case the question whether an additional amount claimed under rule 67.13 meets the indemnity principle could be a live question.

21. In this case, Mr Ramlogan's delay in applying for an additional amount under rule 67.13 would have involved the first instance judge in duplicated work if she had acceded to his request as she had completed her formal judgment on quantum and costs before the application was made. That is not desirable. It would have been better if the application had been made as part of the written submissions on quantum and costs on behalf of the appellant and in any event before or when Quinlan-Williams J gave the summary of her judgment on 28 August 2020. This would have allowed her to prepare or amend her draft judgment before issuing it if she had acceded to the application.

22. The burden is on the party who is or is to be the recipient of an award of costs to establish his or her entitlement to the addition of the appropriate amount of VAT under rule 67.13. What is needed in terms of representation or evidence may vary from case to case but it is important to bear in mind that any procedure adopted for the operation of rule 67.13 should be consistent with the overriding objective of CPR r 1.1 of dealing justly with the case, and in particular the elements of that objective such as saving expense, dealing with the matter proportionately, and the appropriate use of the court's resources.

In many cases in which the recipient party has been represented by a VAT-registered attorney throughout the litigation it should be straightforward for the attorney to establish that entitlement by providing the relevant VAT registration certificate and by making a representation that the VAT which has been charged on the fees submitted to the client is not less that the appropriate amount of VAT claimed under rule 67.13. In such circumstances, it would be for the paying party to object to the straightforward application of rule 67.13. The paying party would have to persuade the court that there was a real possibility that the 12.5% uplift on the prescribed costs would contravene the indemnity principle and that it was proportionate for the court to require more information from the attorney of the recipient party.

23. In what is likely to be a less usual circumstance of a litigation conducted in part by an attorney who is not registered for VAT and in part by one who is so registered, a genuine question may arise as to whether the amount of VAT which the recipient party claims under rule 67.13 is consistent with the indemnity principle. If the recipient party is the claimant, his or her attorney may not be able to determine whether the rule 67.13 claim is consistent with the indemnity principle until he or she knows the amount of damages or other sum awarded by reference to which prescribed costs are calculated. In such circumstances the attorney of the recipient party will not be able to represent to the court that the rule 67.13 claim complies with the indemnity principle until after the court has informed the parties of the sum to be awarded in the action so that the prescribed costs can then be calculated using the scale in Appendix B. In this case the first opportunity for the appellant's attorney to make a representation to the court that a claim under rule 67.13 complied with the indemnity principle was on 28 August 2020 when Quinlan-Williams J summarised her judgment. It would nonetheless have been good practice for the appellant's attorneys to have flagged up an intention to make a claim under rule 67.13 in their written submissions on quantum and costs and then to have addressed the question on 28 August 2020.

24. On the facts of this appeal, in which Mr Ramlogan's chambers have been acting for the appellant since 2018 and have prepared for and conducted a three-day medical negligence trial, it is objectively highly unlikely that the addition of a 12.5% uplift on the prescribed fees would breach the indemnity principle. The Board notes that the respondent did not suggest to Quinlan-Williams J or the Court of Appeal that such an uplift might overcompensate the appellant. The Board is content to accept the representation by Mr Ramlogan that the VAT paid or due on his chambers' fees in this case greatly exceeds a 12.5% uplift on the prescribed costs under rule 67.13. There is therefore no need to require the production of his chambers' fee notes or to remit the case for further investigations. Such further proceedings would not be consistent with the overriding objective.

25. The Board observes that where a litigant is represented in part of the proceedings by an attorney who is not registered for VAT and in part of those proceedings by a VAT-registered attorney, the "appropriate amount" will be 12.5% of the prescribed costs so

long as the VAT paid or due to the VAT-registered attorney amounts to or exceeds that sum. VAT is added under rule 67.13 by reference to the prescribed costs and not the costs actually incurred in the proceedings, but the indemnity principle requires that the recipient of the award of costs must have incurred a liability to VAT of at least the sum added as "the appropriate amount". See para 15 above.

26. The Board therefore concludes that the appellant is entitled to receive an uplift of 12.5% on the prescribed costs awarded to her as the appropriate amount under rule 67.13. It understands that the sum in question is $18,388.85 but invites the parties to make submissions if that sum is not correct.

4. Conclusion

27. For the reasons set out above, the Board allows the appeal and invites the parties to make written submissions on the amount of the uplift and the costs to be awarded at first instance, in the Court of Appeal, and in the Board within 21 days of the promulgation of this judgment.