

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 83/2015

APPLICATION NO 137/2015

BETWEEN	WINSTON FINZI	1st APPLICANT
AND	MAHOE BAY COMPANY LIMITED	2nd APPLICANT
AND	JMMB MERCHANT BANK LIMITED	RESPONDENT

Written submissions received on behalf of the applicants from Malcolm Gordon, attorneys-at-law

Written submissions received on behalf of the respondent from Hylton Powell, attorneys-at-law

7 October 2015

IN CHAMBERS

MORRISON JA

[1] In this case, the applicants sought an injunction, pending the hearing of an appeal from a judgment of Sykes J given on 14 July 2015, to restrain the respondent (JMMB) from completing the sale of certain properties to Asset Securitisation Trust Limited. By an order made on 5 August 2015, I refused the application. The basis of my decision was that the applicants were not able to show a good arguable ground of appeal against Sykes J's decision to discharge an injunction previously granted by

Stamp J (Ag). At the time of my order, the parties were invited to file written submissions on the question of the costs of the application within 21 days of the date of the judgment and, in due course, submissions were received from the parties' attorneys-at-law as indicated. This is therefore my ruling on the question of costs.

[2] The background to the matter is fully set out in my judgment on the substantive application ([2015] JMCA App 32) and there is no need to rehearse it for present purposes. But it may be helpful to indicate specifically that, during the course of the hearing before me, the applicants invited me to recuse myself from any further consideration of the matter. This application (characterised by JMMB in its submissions as "the recusal application") was opposed by JMMB and ultimately refused by me.

[3] Section 30(3) of the Judicature (Appellate Jurisdiction) Act provides that, subject to, among other things, rules of court, "the costs of and incidental to all civil proceedings...shall be in the discretion of the Court". Rule 1.18 of the Court of Appeal Rules, 2002 makes the provisions of Parts 64 and 65 of the Civil Procedure Rules 2002 (CPR) applicable to the award and quantification of costs on appeals to this court. JMMB therefore refers me to rule 64.6(1) of the CPR, which provides that, "[i]f 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". In addition to rule 64.6(1), there is rule 64.6(2), which provides that the court "may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs". Then rule 64.6(3) provides that, in deciding who should be liable

to pay the costs of any proceedings, “the court must have regard to all the circumstances”; and rule 64.6(4) lists a number of factors to which the court must, in particular, have regard in deciding who should pay the costs. These factors include the conduct of the parties before and during the proceedings (rule 64.6(4)(a)); the reasonableness of a party’s pursuit of a particular allegation or issue (rule 64.6(4)(d)); and the manner in which a party has pursued his or her or its case, or a particular allegation or issue (rule 64.6(4)(e)).

[4] On the strength of these provisions, JMMB contends that, having succeeded on the application for an injunction and on the recusal application, it is, on the face of it, entitled to the costs of both applications in accordance with rule 64.6(1). Further, that none of the circumstances referred to in rule 64.6(4) applies to it.

[5] JMMB also relies on rule 65.11, which provides that costs will not generally be allowed for the attendance of more than one attorney-at-law on the hearing of an application unless the court grants a special costs certificate when making its order for costs or unless the registrar allows it. The grant of a special costs certificate in this case, JMMB submits, is justified under rule 64.12, which provides that, in considering whether to grant such a certificate, the court must take into account (a) whether the application was or was reasonably expected to be contested; (b) the complexity of the legal issues involved in the application; and (c) whether the application reasonably required the citation of authorities and skeleton arguments. While JMMB accepts that “one can question whether the issues were complex”, it nevertheless submits that the

other two criteria in rule 64.12(2) were satisfied and that the court should grant a special costs certificate for two counsel.

[6] Referring me to rule 64.6(5)(h) of the CPR, which allows the court to make an order that a party must pay "interest on costs from or until a certain date, including a date before judgment", JMMB also submits that I should order the payment of interest on the costs at the judgment debt rate of 6% from the date of my decision on the applications. JMMB submits further that, as permitted by rule 65.15, I should order that the costs be taxed immediately, rather than at the end of the appeal. The basis of this last submission is that the properties (the transfer of which the applicants had sought unsuccessfully to restrain) have now been transferred and that "[t]here is now little point in the substantive appeal".

[7] The applicants for their part observe that no application for recusal was made by them (by which I understand them to mean that there was no separate application for recusal, but that the issue of recusal only arose because of a disclosure made to the parties by me during the hearing). They submit that, in order for JMMB's requests for special costs orders to be granted, the case must "distinguish itself". Accordingly, the applicants submit, the applications for (a) a special costs certificate for two counsel; (b) interest on costs; and (c) costs to be taxed immediately, ought to be refused. Pointing out that "[i]t is not absolute law that a Court will not grant an injunction to prevent a transfer of a property where a mortgagee has entered into an agreement for sale of the mortgage [sic] property with a bona fide purchaser", the applicants further submit that

it was reasonable for them to have pursued their application for an injunction pending appeal. Accordingly, the applicants submit that, as the matter is still ongoing, the appropriate order in these circumstances “must be costs in the Claim”.

[8] I should say at the outset that, in my view, there was only one application before me: that is, the applicants’ application for an injunction pending appeal. It is true that, in the circumstances which I described in detail in my judgment in the substantive matter, the issue of recusal did arise. But I think that the applicants are obviously correct in submitting that, given that there was no separate application before me, that matter falls to be treated as an aspect of the substantive application.

[9] However, that having been said, I can discern no reason why (i) an order for costs should not be made in this matter; and (ii) the general rule that costs should follow the event ought not to apply. While I might be prepared to accept that the applicants cannot be said to have acted unreasonably in pursuing their application for injunctive relief pending appeal, there can be no doubt that, in doing so, they were in fact inviting me to go against the tide of authority. But, neither can it be said that JMMB acted unreasonably in opposing the application: indeed, its stance in the court below, where it succeeded, made it plain that it would do so. In these circumstances, I think that JMMB, having prevailed, must have its costs in the usual way.

[10] This then leaves JMMB’s contention that I should also make some special costs orders in the particular circumstances of this matter. Firstly, as regards the number of counsel for whom costs should be allowed, I note — and agree with — JMMB’s

concession that the issues involved in this application were not of the most complex variety. But this still leaves the other two factors which rule 64.12(2) requires me to take into account, *viz*, whether the application was or was reasonably expected to be contested and whether the application reasonably required the citation of authorities and skeleton arguments. With respect to the former, I consider it to be clear that, given its history, the matter must have been expected to be hotly contested on both sides. And, with respect to the latter, particularly given the fact that JMMB's opposition was primarily based on a question of law arising out of the provisions of section 106 of the Registration of Titles Act, it seems to me that skeleton arguments and the citation of authorities were not only desirable, but plainly necessary. So on balance, therefore, I consider that JMMB has made good its application for a special costs certificate for two counsel in respect of the application for an injunction pending appeal. In coming to this conclusion, I have borne in mind that, although this is obviously not decisive, the applicants themselves also saw it fit to instruct two counsel to represent them on the application for an injunction pending appeal.

[11] Secondly, as regards the payment of interest on costs, I note that rule 64.6(5)(h), which empowers the court to make an order that a party must pay interest on costs from or until a special date, states no special criterion or factor which might ordinarily justify such an order. Nor does JMMB, in submitting that I should make such an order, advance any reason why I should do so. In the absence of any stated or discernible basis for making such an order in this case, therefore, I decline to do so.

[12] And finally, as regards the request for immediate taxation, the fact is that there is still a pending appeal before this court. Irrespective of my view as to the prospects of success of that appeal, the question whether it ultimately succeeds or not will be a matter for the court after hearing the appeal. Accordingly, I do not see any basis for making an order for immediate taxation of the costs of the application.

[13] In summary, my order for costs is that the applicants are to pay JMMB's costs of the application for an injunction pending appeal, certified fit for two counsel. If they cannot be agreed, these costs are to be taxed.