[2018] JMCA Civ 21

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 60/2015

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

BETWEEN	**WINSTON FINZI**	**1ST APPELLANT**
AND	**MAHOE BAY COMPANY LIMITED**	**2ND APPELLANT**
AND	**JMMB MERCHANT BANK LIMITED**	**RESPONDENT**

Written submissions filed by Ballantyne, Beswick & Company for the appellants

Written submissions filed by Hylton Powell for the respondent

31 July 2018

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

MCDONALD-BISHOP JA

Background

[1] This is the final aspect of the decision of this court in a procedural appeal brought by Winston Finzi ("Mr Finzi") and Mahoe Bay Company Limited ("Mahoe Bay"), the appellants, from the decision of Sykes J (as he then was), delivered orally on 5 May 2015 in the Commercial Division of the Supreme Court, in favour of the respondent, JMMB Merchant Bank Limited. This judgment treats solely with the question of costs of

the appeal. The issues are (a) whether costs should be awarded in the appeal and (b) if so, to which party they should be awarded.

[2] The judgment on the substantive aspects of the appeal was delivered on 14 June 2016 and is reported as **Winston Finzi and Mahoe Bay Company Limited v JMMB Merchant Bank Limited** [2016] JMCA Civ 34.

[3] By way of providing the context for the court's decision on the issue of costs of the appeal, it would prove helpful to provide a broad outline of the core facts that are immediately relevant to the question of costs. At the heart of the dispute between the parties in the proceedings was an email correspondence of 23 May 2012 between Jamaica Money Market Brokers Limited ("JMMB") and Mr Finzi. On 4 May 2015, the first day fixed for the trial of the claim brought by the respondent against the appellants in the Supreme Court, the respondent made an application before Sykes J that portions of the witness statements of Mr Abraham Dabdoub and Mr Finzi that were filed on behalf of the appellants in the claim be struck out. The basis of the application was that the impugned portions of the witness statements in question referred to "without prejudice" communication contained in the email correspondence of 23 May 2012 that was privileged and the privilege had not been waived. Therefore, the communication, according to the respondent, was not subject to disclosure and use in the trial of the claim.

[4] Sykes J accepted that contention of the respondent and ordered that the challenged portions of the witness statements be struck out and that the respondent

was entitled to one day's costs. The appellants, aggrieved by that decision, applied for leave to appeal, which was granted by the learned judge.

[5] The appellants appealed to this court on these grounds:

> "a. That the Learned Judge erred when he found that the Electronic Mail Communication dated 23rd May, 2012 was a Without Prejudice Communication.
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> b. That the Learned Judge erred when he found that the Electronic Mail Communication dated 23rd May, 2012 and the details of the discussions to which it refers were subject to Legal Professional Privilege.
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> c. That the Learned Judge erred when he found that the Electronic Mail Communication dated 23rd May, 2012 and the details of the discussions to which it refers are not admissible and cannot be relied on in the trial by the Appellants as the other party has not waived privilege.
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> d. That the Learned Judge erred in finding that discussions and related communications between the Appellant and a third party were without prejudice and were subject to Legal Professional Privilege.
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> e. That the Learned Judge erred when he found that any discussions regarding settlement of an issue between parties who subsequently become involved in litigation are subject to Legal Professional Privilege and cannot be referred to in subsequent litigation, even if at the time of the discussions there was no litigation in progress or contemplated between the parties.
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> f. That the Learned Judge erred when he found that discussions between the parties prior to the commencement of litigation was subject to Legal Professional Privilege even though said discussions took place at a time when the parties had no dispute with each other and further had no relationship

capable of giving rise to a cause of action against each other.

g. That the Learned Judge erred in concluding that the discussions and resulting correspondence was subject to Legal Professional Privilege when there was no evidence from any party that such a claim had been made at the relevant time or afterwards, and the Court had no jurisdiction to rule on the application without actual sworn evidence from a party claiming Legal Professional Privilege.

h. That the application did not consume one day of Court's time since a significant portion of the court's time was consumed with setting up, instructions and submissions in relation to the Digital Recording Pilot Project.

i. That the application did not consume one day of Court's time since the Respondent consumed time explaining and submitting why an adjournment was needed and why trial bundles had not been finalised." (Emphasis as in original)

[6] Four issues were distilled for consideration by this court from the nine grounds of appeal. They were:

i. whether the learned judge erred in ruling that the email communication is inadmissible on the basis that it was a 'without prejudice' communication;

ii. whether the learned judge erred in his ruling that the communication was subject to legal professional privilege and, therefore, inadmissible;

iii. whether the email communication is admissible as giving rise to an estoppel in favour of the appellants in the proceedings against the respondent; and

iv. whether the learned judge erred when he awarded costs for one day in favour of the respondent.

[7] On 14 June 2016, after a consideration of those issues within the framework of the applicable law and the written submissions of counsel, we made these orders:

"1. The appeal against the decision of Sykes J, made on 5 May 2015, is allowed in part, in that:

I. the Electronic Mail Communication dated 23 May 2012 is not a "without prejudice" communication in the proceedings between the appellants and the respondent; and

II. the electronic mail communication dated 23 May 2012 and the details of the discussions to which it refers are not subject to Legal Professional Privilege in the proceedings between the appellants and the respondent.

2. The appeal is otherwise dismissed and the order of Sykes J is affirmed, in the following terms (by reference to the orders sought by the appellants):

I. The electronic mail communication dated 23 May 2012 and the details of the discussions to which it refers are inadmissible and so cannot be entered into evidence and otherwise referred to in the trial of the claim between the appellants and the respondent in the court below.

II. The paragraphs in issue in the witness statements of Messrs Winston Finzi and Abraham Dabdoub filed on 29 April 2015,

subject matter of the appeal, are not permitted to stand and, accordingly, shall be struck out.

III. Order for costs of one day to the respondent in the court below to stand.

3. There shall be no order as to costs of the appeal unless either party files and serves written submissions within 21 days of the date hereof for an award of costs to be made."

[8] It is paragraph (3) of the order, which has given rise to this further judgment in the matter. The respondent was not content with there being no order as to costs and so counsel on its behalf filed their written submissions on 6 July 2016 for an order for costs to be made, in keeping with the directives of the court.

The respondent's submissions

[9] Counsel for the respondent directed the court's attention to the law governing the question of costs on appeal as contained in the Judicature (Appellate Jurisdiction) Act, section 30(3); rule 1.18(1) of the Court of Appeal Rules ("the CAR") and Parts 64 and 65 of the Civil Procedure Rules ("the CPR"). They submitted that the respondent is entitled to be awarded the costs of the appeal. They cited the fact that the respondent succeeded in its application in the court below which resulted in portions of the appellants' evidence being struck out. They also pointed out that the appellants had challenged that decision in this court, seeking an order that they be allowed to adduce and rely on the impugned evidence at the trial, but this court upheld Sykes J's order and ruled that they cannot rely on the evidence. In those circumstances, counsel maintained, the general rule that the unsuccessful party pay the costs of the successful party should apply and the respondent should prima facie be entitled to its costs.

[10] They accepted, however, that the respondent did not succeed on all issues and that it may be appropriate for the court to award it 75% of its costs because it succeeded on the ultimate issue as to whether the email communication should have been admitted into evidence. In advancing this argument, the respondent relied on rule 64.6(5) of the CPR and the dicta of Morrison JA (as he then was) in **Capital & Credit Merchant Bank Limited v Real Estate Board** [Consolidated Appeals] [2013] JMCA Civ 48, at paragraphs [10] and [17].

The appellants' submissions in response

[11] The appellants, having similarly brought the court's attention to the statutory bases for the award of costs noted by the respondent, submitted that they are in agreement with the court's proposal that there should be no order as to costs but that if the court is minded to make an order as to costs, they were partially successfully on the appeal and are, therefore, entitled to 60% of the costs of the appeal. The basis of their contention is that the application before Sykes J, which resulted in the appeal, was brought by the respondent for the striking out of two witness statements on the basis of reference to communication subject to "without prejudice privilege" and "legal professional privilege". Sykes J agreed with those submissions and struck out the application. This was eventually found to be wrong by this court.

[12] Counsel maintained that despite the fact that this court ultimately ruled that the documents in question were inadmissible, the underlying basis for the decision of Sykes J was successfully appealed by them and the resulting judgment of the court has provided much clarity to the law on the point.

Discussion and findings

[13] The Judicature (Appellate Jurisdiction) Act, section 30(3) provides:

> "Subject to subsections (1) and (2), the provisions of any other enactment and to rules of court, the costs of and incidental to all civil proceedings in the Court shall be in the discretion of the Court."

[14] The discretion, albeit wide, however, must be exercised subject to any relevant enactment or rules of court as well as the general duty of the court to act judicially. There is, therefore, no room for capriciousness in the award of costs.

[15] In so far as the applicable rules of court are concerned, rule 1.18(1) of the CAR provides that Parts 64 and 65 of the CPR are applicable to proceedings in this court. Rules 64.6(1) and 65.8(2) of the CPR embody the general rule that if the court decides to make an order about costs that "costs follow the event", that is to say, that the unsuccessful party must be ordered by the court to pay the costs of the successful party. The court may, however, order the successful party to pay all or part of the costs of an unsuccessful party (rules 64.6(2) and 65.8(3)) or may make no order as to costs (rule 64.6(2)). Rules 64.6(3) and 65.8(3) provide that in deciding who should be liable to pay costs, the court must have regard to all the circumstances, including those matters set out in rule 64.6(4).

[16] Some of the matters to which the court may have regard under the CPR, rule 64.6(4) include: (a) the conduct of the parties both before and during the proceedings; (b) whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings; (c) whether it was reasonable for a party to

pursue a particular allegation and/or to raise a particular issue; and (d) the manner in which a party has pursued his case, a particular allegation or a particular issue.

[17] The orders that the court may make are set out in the CPR, rule 64.6(5). According to this rule, and in so far as is immediately relevant, the court may order, among other things, that a party must pay a proportion of another party's costs. This is the contention of the parties in the instant case. The appellant say they are entitled to 60% of the costs, if the court is minded to make an order; while the respondent is saying that the court should make an order and it should be awarded 75% of the costs. Each party, therefore, makes its claim for costs on the basis of partial success in the appeal.

[18] Morrison JA in **Capital & Credit Merchant Bank Limited v Real Estate Board** at paragraphs [10] and [17] (relied on by the respondent), succinctly stated some of the applicable principles in this way:

> "[10] The question of whether to make any order as to costs - and, if so, what order- is therefore a matter entrusted to the discretion of the court. The starting point under the rules, reflecting the longstanding position at common law, is that costs should follow the event. The court may nevertheless make different orders for costs in relation to discrete issues. It should in particular consider doing so where a party has been successful on one issue but unsuccessful on another issue. In that event, the court may make an order for costs against a party who has been generally successful in the litigation.
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> [17] To similar effect, the learned editors of Blackstone's Civil Practice (2012, para. 66.13) make the point, in

> reference to the English equivalent of rule 64.6(6), that '[t]he usual approach in the event of partial success is to award the successful party a proportion of its costs rather than an 'issues-based' order. (See also ***English v Emery Reimbold and Strick Ltd*** [2002] EWCA Civ 605, para. 115, in which Lord Phillips MR observed that 'a 'percentage' order...will often produce a fairer result than an 'issues based' order'.)"

[19] Having considered the circumstances of the instant case against the background of the applicable law, and having taken into account the submissions of counsel on both sides, I am persuaded to the view that making no order as to the costs of the appeal may not produce a just outcome in all the circumstances of the case. I am moved to accept the respondent's position that an award of costs should be made and that there is no good and sufficient reason to depart from the general rule that costs should follow the event. The crucial question now, is to whom these costs should be awarded.

[20] Having evaluated the grounds of appeal and the broad issues considered by the court to which they have given rise, it is clear that both sides have attained partial success on certain issues. I find, however, looking at the result of the appeal, and the effect of that result in real terms, that the respondent has retained success on the critical issue, which is the admissibility of the witness statements, which the appellants were seeking to rely on, and which they continued to insist on the appeal were admissible at trial. Even though this court held that the trial judge was wrong to strike out the portions of the witness statements on the basis he did, he was, nevertheless, justified in doing so because, in the end, the impugned witness statements were inadmissible as they stood before him. So, the appellants were wrong in insisting on

appeal that the witness statements were admissible on another basis, which, in the end, was not accepted by this court.

[21] Furthermore, had the appellants not sought to adduce inadmissible evidence from the very outset in the court below, the objection would not have been taken by the respondent (even on a wrong basis), leading to the erroneous finding of Sykes J.

[22] Therefore, the critical result, which the respondent desired in taking the objection in the court below, was retained on appeal, in that Sykes J's decision, striking out the impugned portions of the witness statements, was ultimately affirmed by this court and still stands. The respondent was, therefore, successful in its contention that the impugned witness statements ought not to have been admitted as they stood. Thus, the outcome of the appeal favoured the respondent's position far more than it did the appellants'. For these reasons, I am of the view that the respondent is entitled to be regarded as the successful party on the appeal and should be awarded the costs of the appeal.

[23] Of course, there is no basis in law to ignore the fact that the appellants have had some measure of success in relation to the error of the learned judge in treating with the question of privilege. The respondent was also wrong to base its objection on privilege, which contributed to the error of the learned judge. This error led to a substantial part of the submissions of counsel on appeal as well as the reasoning of the court being devoted to the issue of privilege. Counsel for the appellants contend that the case has served to bring greater clarity to the law relating to privileged

communication and so that should be taken into consideration in determining on whom and how the costs burden should fall.

[24] I accept that had the respondent not erroneously raised this objection in law based on privilege, much of the court's time down below and in this court would not have been taken up with treating with that area of the law. Therefore, although it enjoys greater success in the appeal than the appellants, it is not entitled to all the costs because the appellants cannot be said to be totally wrong in bringing the appeal. The error in the law had to be corrected. The appeal was not frivolous. The appellants deserve to have their partial success reflected in the award of costs.

[25] It is observed, however, that the appellants' success on the appeal is more of academic value to the jurisprudence than of real worth to them in terms of the case they were seeking to present at the trial. They have failed to preserve the integrity of their witness statements on which they were heavily relying to prove their case. The respondent has therefore secured a more tangible and valuable victory than the appellants on appeal in relation to the question of the admissibility of the challenged correspondence.

[26] The appellants had also challenged in the appeal the costs order made by Sykes J in the proceedings below. They complained that he ought not to have made the order that they should pay one day's costs. This was also the subject matter of full arguments by both sides to which this court also devoted reasonably detailed attention.

The appellants were also unsuccessful on that ground and the learned judge's award of costs was affirmed.

[27] It is quite clear then that in general terms, the respondent is the successful party, for all intents and purposes, on the appeal. There is no basis in law for this court to deviate from the general rule and award the costs of the appeal to the appellants.

[28] Upon a consideration of the case in the light of the submissions made by both sides and the applicable principles of law, it is my view that the only order which would be consonant with the interests of justice and do justice between the parties, in keeping with the overriding objective, is to order that the appellants pay a proportion of the respondent's costs, which would make allowance for the appellants' partial success in the appeal.

[29] I would propose that 65% of the costs of the appeal be paid by the appellants to the respondent to be agreed or taxed.

F WILLIAMS JA

[30] I have read in draft the judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion and have nothing to add.

P WILLIAMS JA (AG)

[31] I too have read in draft the reasons for judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion and I have nothing further to add.

MCDONALD-BISHOP JA

ORDER

(1) 65% of the costs of the appeal to the respondent to be agreed or taxed.