[2021] JMCA Civ 25

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

SUPREME COURT CIVIL APPEAL NO 102/2017

BETWEEN	**BARDI LIMITED**	**APPELLANT**
AND	**McDONALD MILLINGEN**	**RESPONDENT**

Written submissions filed by Hylton Powell for the appellant

Written submissions filed by Chen, Green & Company for the respondent

21 May 2021

PHILLIPS JA

[1] On 20 December 2018, we gave judgment in this matter. We made the following orders:

> "1. Appeal allowed.
>
> 2. Order made by Simmons J on 20 October 2017 is set aside.
>
> 3. The applicant can re-list the application to discharge the provisional charging order made by Daye J to be heard by another judge. MG should be served with that application.

4. A case management conference should be scheduled to deal with all the applications relative to the issues in controversy between the parties.

5. **Written submissions to be filed by the parties within 21 days of this order on the question of costs.**" (Emphasis supplied)

[2] Simmons J (as she was then) had refused the application to discharge the *ex parte* provisional charging order and injunction granted on 18 December 2012 by Daye J to the respondent, McDonald Millingen ('MM'). Having made the orders on appeal set out above, this is the costs aspect of the judgment, subsequent to receipt of submissions of counsel, pursuant to order 5.

[3] The background facts to the case are set out in this court's judgment cited at [2018] JMCA Civ 33, and I will not repeat them in any detail here but assume that they are known. Suffice it to say that MM had done professional legal work in their capacity as attorneys-at-law for Mrs Margie Geddes ('MG'). They filed a claim for fees due, then subsequently a bill of costs, and obtained a default costs certificate in the sum of US$1,048,807.19. Based on that certificate, MM obtained, *ex parte*, a provisional charging order against shares held by MG in Bardi Limited ('Bardi') and against shares owned by Bardi in Desnoes and Geddes Limited ('D&G').

[4] Bardi took out an application to set aside the provisional charging order on several bases, one of them being severe prejudice to Bardi, given that its ownership of shares was caught by the provisional charging order, which had been granted based on the default costs certificate relating to fees charged by MM to MG. Bardi was not a part of that contract, and so was unrelated to that debt.

[5] One of the main issues before the court was whether Simmons J was wrong to take the position that she could not set aside/discharge Daye J's order, even though made *ex parte*, as there were no new material circumstances since he had made it, and also

that he had not been misled by the facts placed before him for consideration. It was her opinion that the issues had to be dealt with at the hearing for the final charging order.

[6] The court found, by a majority, that although Part 48 of the Civil Procedure Rules ('CPR') sets out a procedure for making a provisional charging order final, which would be the general course to be followed, nonetheless, an interested party or adversely affected litigant ought not to have to wait for the hearing of the application to make the provisional charging order final, particularly if there is some apparent error leading to the provisional order or some new information has come to light (although that is not necessarily required). The party affected can speedily file an application seeking to have the provisional charging order discharged forthwith. The affected litigant can challenge the provisional order made *ex parte* as it is provisional only, and so subject to review. In this case, that application to set aside the provisional charging order would have been particularly applicable as there had been an offer to purchase the D&G shares held by Bardi at a premium, and that transaction was being prevented by the existence of the provisional charging order.

[7] The result in the appeal (by a majority) was that the application to set aside the provisional charging order ought to have been considered by Simmons J, but that had not been done, and had she done so, the 84,000,000 D&G shares held by Bardi would have been released (as it ultimately was), save the amount of 7,500,000 of the said shares in D&G owned by Bardi, which remained subject to the provisional order, due to the fact that that order had been made in an earlier decision of this court (cited at [2018] JMCA Civ 11).

[8] It is true that certain other matters remain to be considered at the hearing of the final charging order, namely, the true ownership of the assets/shares registered in the name of Bardi; whether MG and Bardi were separate legal entities and whether MG was acting, at all material times, as the alter ego of Bardi; and whether the court ought to have pierced the corporate veil. There was also the significant question of whether the 7,500,000 shares in D&G owned by Bardi, which remained charged, would be reviewed

at the application for the final charging order, as that amount of shares was yet restrained on an *ex parte* order. The court had also not yet determined whether the provisional charging order should be discharged and/or made final.

[9] At the end of the day, the court indicated that it may be prudent for:

1. Bardi to file an application to discharge the provisional charging order so that the restraint on the 7,500,000 shares could be released;
2. MG to file an application to set aside the default costs certificate (pursuant to **Paul Chen-Young and others v Eagle Merchant Bank Jamaica Limited and others** [2018] JMCA App 7 - as the learned judge who heard the application had retired without having delivered the judgment);
3. MM to file an application for the provisional charging order to be made final; and
4. All the applications to be heard together so that the court could dispose of the matters in controversy between the parties.

Submissions

[10] B St Michael Hylton QC for Bardi filed its submissions on costs within the 21 days directed by the court. MM failed to do so, but after a month, filed a notice of application for extension of time to do so with an accompanying affidavit of Makene Brown, sworn to on 30 January 2019. Unfortunately, regrettably, this application though filed in the registry, was only recently brought to the attention of the court. It was subsequently granted and the submissions on behalf of MM were duly filed on 5 May 2021. The court thereafter considered the written submissions filed by counsel on behalf of the parties, pursuant to its earlier order made on 20 December 2018.

[11] Mr Hylton submitted that as Bardi had been successful, it should be accorded its costs pursuant to rule 64.6(1) of the CPR. He indicated that rule 64.6(1) states that the general rule was that the court should order the unsuccessful party to pay the costs of the successful party. He reminded the court that rule 1.18(i) of the Court of Appeal Rules (CAR) provides that Parts 64 and 65 of the CPR apply to the award and quantification of costs of an appeal.

[12] Mr Hylton submitted further that there were no circumstances which would take this matter out of the general rule, no conduct of either party and certainly, no conduct by Bardi, to warrant it not being awarded its costs. Counsel submitted further that there had been no issue on which MM had been successful. The court had ruled that the learned judge of the Supreme Court ought to have considered the issues before her. It was not necessary for there to have been any material non-disclosure or change in circumstances before she could do that. Bardi had therefore acted reasonably, counsel argued, to have pursued the appeal, and should obtain its full costs in the appeal.

[13] MM saw things differently. While Mr Makene Brown, counsel for MM, accepted that there is a wide discretion afforded to the court in Parts 64 and 65 of the CPR and agreed with the general rule stated by counsel for Bardi that the unsuccessful party should pay the costs of the successful party, he submitted that before applying that general rule, the court should consider whether it should make an order for costs at all, or perhaps an order not following the general rule. Counsel submitted that in doing so, the court must therefore consider all the circumstances of the case, including the conduct of the parties, the success of all or some of the issues before the court, and in some cases, the payments of sums into court and any admissible offers. Counsel relied on the following cases for support of his arguments: **Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd and another** [2008] EWHC 2280 (TCC) and **Johnsey Estates (1990) Ltd v Secretary of State for the Environment** [2001] EWCA Civ 535, but specifically for the distillation of the general principles applicable to the determination of costs.

[14] Counsel for MM also submitted that Bardi had not been successful in any of the orders that it sought on appeal. He stated that it had failed to convince the court "to set aside the [*ex parte*] Charging Order and Charging Order or the Injunction". In fact, he stated that Bardi was "only able to have this Court direct that [Bardi] must reissue the application, and that the matter be remitted to the Supreme Court". Counsel maintained that Bardi had failed to move the court "in its analysis of the issues before it". Indeed, counsel posited, that the resulting order of the court places the parties in the same position as if all matters were to be heard at the hearing of the final charging order, that is, where all persons with an interest in the charged property could make their submissions. In all those circumstances, counsel urged this court to award costs to MM.

Law

[15] The jurisdiction to award costs in this court is found in section 30(3) of the Judicature (Appellate Jurisdiction) Act. This should be exercised in accordance with the rules of court for the time being. Mr Hylton pointed out that rule 1.18(1) of CAR embraced Parts 64 and 65 of the CPR which detail the award and quantification of costs and which, by now, are all well known.

[16] In **Johnny Estates v Secretary of State for the Environment**, Chadwick LJ set out, at paragraph 21, a clear summary of the principles which the court should apply in relation to costs. He first referred to the statement of Lord Woolf MR in **Phonographic Performance Ltd v AE1 Rediffusion Music Ltd** [1999] 2 All ER 299, where he indicated that although the general rule of "follow the event" would still play a pivotal role in the award of costs, with the advent of the Civil Procedure Rules, that principle would now be utilised as a "starting point from which the court can readily depart". The court, Lord Woolf MR said, could now be more ready to make separate orders which would reflect the outcome of different issues.

[17] Chadwick LJ then stated the applicable principles in relation to the determination of costs in this way at paragraph 21 (although formatted differently):

"(i) costs cannot be recovered except under an order of the court;

(ii) the question whether to make any order as to costs – and, if so, what order – is a matter entrusted to the discretion of the trial judge;

(iii) the starting point for the exercise of discretion is that costs should follow the event; nevertheless,

(iv) the judge may make different orders for costs in relation to discrete issues – and, in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another issue and, in that event, may make an order for costs against the party who has been generally successful in the litigation;

(v) the judge may deprive a party of costs on an issue on which he has been successful if satisfied that the party has acted unreasonably in relation to that issue; [and]

(vi) an appellate court should not interfere with the judge's exercise of discretion merely because it takes the view that it would have exercised that discretion differently."

[18] In extrapolating those principles and relating them to the submissions in the matter on appeal, the first question then is to decide which party has won the appeal. The order made was that the appeal was allowed, and the decision of Simmons J was set aside. There can be no doubt who was the successful party. The successful party was Bardi. So, although much has been said in the cases with regard to the development of issue-based cost orders and proportionate cost orders, which, when applicable, can do justice between the parties, that is not the situation here in the instant case.

[19] I do not accept, at all, the submissions of MM that Bardi was not successful. The ruling was that the *ex parte* provisional charging order could be set aside prior to the hearing of the final charging order and that the shares of Bardi were released save and except the amount of 7,500,000 shares which had been restrained by a prior order of

this court. The injunction restraining those assets was released as the default costs certificate did not relate to Bardi at all.

[20] There is no doubt that certain matters remain to be decided as set out earlier herein. But there is also no doubt that Bardi succeeded on the issues before the court relevant to it. I agree with counsel for Bardi that there is no basis for not enforcing the general rule that costs should follow the event.

[21] The order of this court should therefore be that costs of the appeal are awarded to Bardi, to be taxed if not agreed.

F WILLIAMS JA

[22] I have read in draft the judgment of Phillips JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

P WILLIAMS JA

[23] I too have read the draft judgment of Phillips JA. I agree and have nothing further to add.

PHILLIPS JA

ORDER

Costs of the appeal are awarded to Bardi Limited to be taxed if not agreed.