

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE D FRASER JA**

MISCELLANEOUS APPEAL NO 1/2017

APPLICATION NOS 27/2018 & COA2019APP00063

BETWEEN	HAROLD BRADY	APPLICANT
AND	GENERAL LEGAL COUNCIL	RESPONDENT
AND	FACTORIES CORPORATION OF JAMAICA LIMITED	INTERESTED PARTY

Written submissions filed by Grant, Stewart, Phillips & Co for the respondent

Written submissions filed by Myers, Fletcher & Gordon for the interested party

29 July 2022

(Ruling on Costs)

(Considered on paper pursuant to rule 1.7(2)(i) and (j) of the Court of Appeal Rules, 2002)

MCDONALD-BISHOP JA

[1] This judgment is the court's ruling on costs concerning three distinct applications brought before this court by Mr Harold Brady ('Mr Brady') in connection to an appeal he filed in this court, from decisions of a panel of the Disciplinary Committee of the General Legal Council ('the Committee') made on 25 February 2017 and 4 March 2017. The three applications were: (i) an application to adduce fresh evidence; (ii) an application to add

a ground of appeal; and (iii) a renewed application for stay of execution of the decisions of the Committee.

[2] The background to this matter is fully set out in the judgment on the substantive applications cited as **Harold Brady v General Legal Council** [2021] JMCA App 27. There is no need to rehearse the factual background to these proceedings, for present purposes, except to state that during the hearing of the applications, the Factories Corporation of Jamaica Limited ('FCJ') was added by this court as an interested party to Mr Brady's application to adduce fresh evidence (application no 27/2018). Inadvertently, the name of the FCJ was omitted from the heading of the previous judgment as the interested party.

[3] On 5 November 2021, we made the following orders disposing of the three applications brought by Mr Brady:

- "(1) The application to adduce fresh evidence on appeal (Application No 27/2018) is refused.
- (2) The application to amend notice and grounds of appeal to add a new ground of appeal (Application No 27/2018) is refused.
- (3) The renewed application for stay of execution of the order of the Committee (Application No COA2019APP00063) is refused.
- (4) The question of the costs of the above applications is reserved for consideration following the determination of the appeal unless the parties (or any of them) are of a different view. In such circumstances, written submissions on costs are to be filed within 14 days of the date hereof for the court's consideration on paper.
- (5) The Registrar, after consultation with the parties, is to fix a date for the hearing of the appeal by this bench of judges as soon as is reasonably practicable."

[4] In keeping with order (4) above, the FCJ and the GLC filed their submissions on costs on 19 and 22 November 2021, respectively. On 26 November 2021, the court

subsequently directed that “[a]ll submissions filed, to date, pursuant to the order of the Court made on 5 November 2021, are permitted to stand in good stead”. Mr Brady filed no submissions on costs.

[5] Counsel for the GLC submitted that the matter falls squarely within the usual rule that “costs should follow the event” and be awarded to the GLC because the GLC successfully resisted the orders sought by Mr Brady. They further submitted that there are no extenuating and unusual circumstances that would warrant a departure from the general rule. In support of these submissions, counsel placed reliance on section 30 of the Judicature (Appellate Jurisdiction) Act (‘JAJA’), Parts 64 and 65 of the Civil Procedure Rules (‘CPR’) and the authorities of **In re Elgindata Ltd (No 2)** [1992] 1 WLR 1207 and **Seepersad v Persad and anor (Trinidad and Tobago)** [2004] UKPC 19.

[6] Concerning whether this court should make an order for immediate taxation, counsel for the GLC relied on paras. [52] – [55] of the case of **VRL Operators Limited v National Water Commission and others** [2015] JMCA Civ 69, and contended that:

“[H]aving regard to this Court’s findings as to the abject lack of credibility in the assertions which underpinned the allegations as to bias and the debts allegedly owed to [Mr Brady]...; the resultant lack of any bases whatsoever for permitting an amendment to the Grounds of Appeal or a renewed application for a stay, or any basis in law to strike out paragraphs of Mrs. Gentles-Silvera’s affidavit, it is open to this Court to depart from the general rule that taxation of costs should abide the conclusion of the proceedings and instead find that [Mr Brady] pursued wholly unmeritorious applications which entitle the [GLC] to recover costs to be taxed and paid immediately.”

[7] Counsel, on behalf of the FCJ, relied on **Winston Finzi v Mahoe Bay Company Limited and JMMB Merchant Bank Limited** [2015] JMCA App 39A in submitting that an order for costs may be made in favour of an interested party and that, in this case, costs should follow the event and be awarded to the FCJ. Counsel contended that though an award of costs in favour of non-parties is only done in exceptional cases, having regard

to the circumstances of the FCJ's intervention, the court ought to allow costs to be paid to the FCJ as this is an exceptional case. In support of this contention, counsel outlined for the court the reasons and circumstances as to why it would be fair, just and reasonable that the FCJ's costs in the application are immediately taxed and not await the outcome of the appeal and why the matter was of sufficient weight, and complexity to be handled by two counsel. In summary, counsel outlined that:

- (a) The FCJ was added by the court as an interested party to application no 27/2018 because it was necessary to do so as the application could not have been properly considered without the FCJ's evidence.
- (b) The FCJ was the complainant against Mr Brady to the GLC and had commenced proceedings in the Supreme Court against Mr Brady to recover the debt owed to it as ordered by the GLC. Mr Brady filed an application in the Supreme Court to stay those proceedings in or around the same time he renewed his application for stay in this court. The FCJ had given an undertaking to this court not to pursue its enforcement actions until the determination of the application.
- (c) The FCJ's entitlement to costs is separate from the GLC's entitlement as different interests were being protected. The GLC was concerned with protecting the integrity of its processes in light of the allegation of bias of its panel member. The FCJ, on the other hand, was concerned with protecting the judgment in which Mr Brady was ordered to pay restitution for the benefit of the FCJ. The FCJ was also concerned with defending the allegation that the FCJ was indebted to Mr Brady. The FCJ, as a government agency, was

mandated to respond to the allegations in the application to protect its integrity.

- (d) The FCJ engaged counsel to respond to the application, called a witness to refute Mr Brady's case and cross-examined witnesses. The FCJ was also ordered to file submissions by the court and had complied with that order. The participation of the FCJ in these respects played a critical role in the court's determination of the application.
- (e) All of Mr Brady's claims that he was entitled to compensation from the FCJ failed and were deemed to be "incapable of belief".
- (f) Mr Brady's conduct in pursuing the application caused considerable expense to the FCJ. The FCJ would not have had to bear expenses but for the application for fresh evidence, which was refused.
- (g) In light of the court's refusal of the application, the FCJ's involvement in the appeal going forward will be limited, and it is unlikely to incur any further costs for which Mr Brady would be liable unless he seeks to raise new issues which touch and concern the FCJ's interests.

[8] Sections 30(3) and (5) of the JAJA provide that:

"30. – ...

(3) 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.**

...

(5) Subject to the rules made under subsection (4), **the Court may determine by whom and to what extent the costs are to be paid.**" (Emphasis added)

[9] Pursuant to rule 1.18 of the Court of Appeal Rules, 2002 ('CAR'), "[t]he provisions of CPR Parts 64 and 65 apply to the award and quantification of costs of an appeal...". Of direct relevance to this matter are rules 64.3, 64.5(1) and 64.6 of the CPR. Rule 64.3 of the CPR provides that:

"The court's powers to make orders about costs include [the] power to make orders requiring any person to pay the costs of another person arising out of or related to all or any part of the proceedings."

[10] Concerning a party's entitlement to costs, rule 64.5(1) provides that "[a] person may not recover the costs of proceedings from any other party or person except by virtue of (a) an order of the court; (b) a provision of [the CPR]; or (c) an agreement between the parties".

[11] Rule 64.6 of the CPR expresses the well-settled principle that costs follow the event. Under the heading "**Successful party generally entitled to costs**", rule 64.6 provides that:

- "64.6 (1) If 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.
- (2) 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.
 - (3) In deciding who should be liable to pay costs the court must have regard to all the circumstances.
 - (4) In particular it must have regard to -
 - (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) any payment into court or offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Parts 35 and 36);
- (d) whether it was reasonable for a party –
 - (i) to pursue a particular allegation; and/or
 - (ii) to raise a particular issue;
- (e) the manner in which a party has pursued –
 - (i) that party's case;
 - (ii) a particular allegation; or
 - (iii) a particular issue;
- (f) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his or her claim; and
- (g) whether the claimant gave reasonable notice of intention to issue a claim."

[12] With respect to whether costs may be awarded to the FCJ, an interested party, guidance is derived from the dicta of Morrison JA (as he then was) in **Winston Finzi and anor v JMMB Merchant Bank Limited** [2015] JMCA App 39A, where he stated that:

"[20] It appears to be generally accepted that costs orders against non-parties are to be regarded as exceptional, though, as Lord Brown explained in **Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others** [2005] 4 All ER 195, at para. [25] —

'... exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own

benefit and at their own expense. The ultimate question in any such 'exceptional' case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.'

...

[23] These examples suggest that costs orders in favour of non-parties are also to be regarded as exceptional. As Professor Zuckerman indicates, **such an order will be particularly apt in a case in which, pursuant to an order of the court, the non-party has been obliged to perform some act. In such a case, one can readily see why, I think, the court might consider it just to make an order that the party at whose instance the non-party has been required to do something should pay the costs incurred by the non-party as a result.** But, as with orders for the payment of costs by non-parties, it seems to me that the consideration of whether to order the payment of costs to a non-party must necessarily also be a fact-specific exercise, taking into account all the circumstances of the particular case." (Emphasis added)

[13] Having considered the provisions of the JAJA and the CPR, case law and the written submissions of the GLC and the FCJ, I see no reason why the court should not make an order for costs in this matter, and the general rule that "costs follow the event" ought not to apply. I also accept that, though costs orders in favour of non-parties are to be regarded as exceptional, the circumstances of this matter justify the award of costs in favour of the FCJ against Mr Brady for all the reasons aptly summarized in para. [7] of this judgment. I find the circumstances surrounding the FCJ's involvement and participation in these proceedings to be wholly exceptional. Indeed, no submissions were filed on behalf of Mr Brady seeking to sway the court from this conclusion.

[14] As regards the request of both the GLC and the FCJ, for immediate taxation, this court has examined the provisions of rule 65.15 of the CPR, which state:

“65.15 The general rule is that the costs of any proceedings or any part of the proceedings are not to be taxed until the conclusion of the proceedings but the court may order them to be taxed immediately.”

[15] Accordingly, the general rule is that taxation is to be carried out at the conclusion of the proceedings, which, in this case, would be at the end of the appeal. However, this rule is not inflexible, and the court has the discretion to order costs to be taxed immediately. However, as is well known in principle, the general rule is not to be departed from without good reason. I bear in mind that though there is still a pending appeal before this court, counsel for the FCJ has correctly highlighted that the FCJ’s involvement in the appeal going forward will be limited, and it is unlikely to incur any further costs for which Mr Brady would be liable. With this in mind, it would not be fair or reasonable for the FCJ to await the determination of the appeal before recovering its costs. It would also be most practical, reasonable and just, given all the circumstances, that costs in favour of the GLC are also assessed with the same expedition as that of the FCJ. In considering this point in favour of the GLC, its submissions at para. [6] above are accepted as a proper basis to order the immediate taxation of costs. In short, Mr Brady’s applications in respect of which costs orders are now being considered lacked a credible and reasonable ground for bringing them. Therefore, the defending parties should not be deprived, for too long, of the fruits of their success in these proceedings.

[16] In the light of the foregoing, I would propose that these orders be made in favour of the GLC and the FCJ against Mr Brady:

- (i) costs of application no 27/2018 to the GLC and the FCJ to be immediately taxed, if not agreed; and
- (ii) costs of application no COA2019APP00063 to the GLC to be immediately taxed, if not agreed.

P WILLIAMS JA

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

D FRASER JA

[18] I, too, have read, in draft, the judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion, and there is nothing I could usefully add.

MCDONALD-BISHOP JA

ORDER

1. The applicant, Mr Harold Brady, shall pay costs of application no 27/2018 (application to adduce fresh evidence on appeal and to amend notice and grounds of appeal to add a new ground of appeal) to the respondent, the General Legal Council, and the interested third party, the Factories Corporation of Jamaica, to be immediately taxed, if not agreed.
2. The applicant, Mr Brady shall pay costs of application no COA2019APP00063 (renewed application for stay of execution) to the General Legal Council to be immediately taxed, if not agreed.