[2021] JMCA Civ 22A

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL NO 52/2016

BETWEEN	**WINSTON BROWN**	**1ST APPELLANT**
AND	**ANNETTE MAUD-MARIE BROWN**	**2ND APPELLANT**
AND	**CARLTON DAYE**	**RESPONDENT**

Anwar Wright instructed by Wright Legal for the appellants

Robert Moore for the respondent

23 July 2021

F WILLIAMS JA

[1] I have read, in draft, the ruling on costs of V Harris JA. I agree with her reasoning and conclusion and there is nothing I could usefully add.

STRAW JA

[2] I too have read the draft ruling on costs of V Harris JA. I agree with her reasoning and decision and have nothing useful to add.

V HARRIS JA

[3] The background to this ruling on costs may be briefly outlined. On 21 December 2011, a judge of the Supreme Court ordered that property owned by the appellants be sold to satisfy a debt that was owed to the respondent by the 1st appellant.

[4] The appellants appealed against that decision and, in a judgment given on 22 April 2021[1], this court made the following orders:

> "1. Appeal dismissed.
>
> 2. Costs of the appeal to the respondent to be taxed if not agreed. The order as to costs shall stand unless either party files and serves written submissions proposing a different order within 14 days of the date of this order."

In keeping with the direction of the court, the appellants and the respondent filed their respective submissions on costs on 6 May 2021.

[5] On the peculiar facts of this case, the learned judge in the court below lacked the jurisdiction to order the sale of the property. However, by the time the appellants obtained permission to appeal, the property had already been transferred to new owners and was beyond the reach of this court. The appeal was deemed academic, due to the delay by the appellants in obtaining a stay of execution of the order for sale and pursuing the appeal.

[6] On the issue of costs, the appellants have invoked rules 64.6(3),64.6(4)(a), (d) and (e) of the Civil Procedure Rules ('CPR') and submitted that costs should not follow the event, based on the conduct of the respondent before and during the proceedings in the court below. The appellants' position is that it was as a result of the respondent leading the court below into error, that the order for sale was made. It was further submitted that the respondent's success on the appeal was based solely on a technicality and not on the merits. Therefore, this court should direct that there be no order as to costs. The case of **Jones v Apps (No 2)**[2] was relied on in support of their submissions.

[7] The respondent referred the court to rule 64.6(1) of the CPR and submitted that having succeeded on the appeal, the general rule, that costs follow the event, should

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[2] [2009] VSC 366

apply. Accordingly, the court was correct in its initial costs order that the respondent should have his costs against the appellants. It was asserted by the respondent that the appellants unjustifiably pursued the appeal, knowing that it had no reasonable prospect of succeeding, which caused him to incur costs and expense. It was further submitted that the overall justice of the case, in all the circumstances, requires that the respondent should be awarded the costs of the appeal. The case of **VRL Operations Limited v National Water Commission et al**[3] was cited in support of this submission.

[8] In considering the appropriate order for costs in this matter, this court is guided by 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", but is also mindful of rule 64.6(2) which states, among other things, that the court "…may make no order as to costs". Rules 64.6(3), 64.6(4)(a), (d) and (e), to which we were referred, provide:

> "(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 –
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> (a) the conduct of the parties both before and during the proceedings;
>
> …
>
> (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;

[3] [2014] JMSC Civ 84

(ii) a particular allegation; or

(iii) a particular issue;

…"

[9] The learning enunciated by Phillips JA in **Ivor Walker v Ramsay Hanson**[4] is also instructive:

> "[42] …There is no entitlement to costs. The order for costs always remains within the complete unfettered discretion of the court, although of course the discretion must be exercised judicially. There are so many factors that are open to the consideration of the court when the order of costs is being contemplated. They are set out in detail in parts 64 and 65 of the CPR and they always include a consideration of the conduct of the parties."

[10] Although it is clear that this court is given a wide margin when exercising its discretion concerning costs following an appeal, that discretion is required to be "exercised judicially". Applying the provisions of the relevant rules of the CPR (set out above) and the principles stated in the cited authority, due regard was paid to the following circumstances:

> (i) the learned judge in the court below lacked the jurisdiction to order the sale of the property. On the face of it, therefore, the appellants had an arguable case for the appeal;
>
> (ii) due to the impecuniosity of the appellants, the appeal was not pursued until 30 July 2014, when the appellants filed a notice of application for permission to appeal out of time. By this time the sale of the property was well advanced;

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[4] [2018] JMCA Civ 19

(iii) the property was sold on 8 August 2014, therefore, on 9 May 2016 when this court granted the appellants permission to appeal, the property was beyond the reach of the court, rendering the appeal academic;

(iv) the appellants with the knowledge that the property had been sold, and that they had filed another claim in the court below, seeking to set aside the sale of the property and/or for damages, nonetheless pursued the appeal;

(v) the respondent actively participated in the appeal and applied to adduce fresh evidence. As a result, the respondent was put to costs and expense;

(vi) the respondent was successful, in part, on the application to adduce fresh evidence. It was as a result of the fresh evidence application, that this court became aware of the extant claim in the Supreme Court, in which the appellants are seeking damages for negligence and to set aside the sale on the basis of fraud;

(vii) this court, recognising the difficulty faced by the appellants on the appeal, heard preliminary arguments from the parties concerning whether the appeal should proceed. The appellants persisted with the appeal on the erroneous premise, that if this court did not hear the appeal and they succeeded in the court below, "there was nothing to stop the respondent from selling the property again, since he would have a court order empowering him to do so". This position was incomprehensible and unsustainable for two reasons. Firstly, the respondent had already achieved what he desired

(being repaid in full the money owed to him by the 1st appellant), so that, in my view, there was no reason for him "to sell the property again". Secondly, even if the respondent wanted to do so, the property, under the order which permitted its sale, was identified by specific volume and folio numbers that no longer existed after it was transferred to the current owners. Also, in any event, should the appellants succeed in the court below, it is expected that the current title will be cancelled and new volume and folio numbers assigned to the property, making it nothing short of impossible for its resale under the order; and

(viii) the respondent was the successful party on the appeal.

[11] Taking into account the key factors listed above, I am of the view that it was unreasonable for the appellants to have pursued the appeal, knowing full well that it was doomed to failure, while causing the respondent to incur costs in opposing their case and wasting scarce judicial time and resources. This leads me to the conclusion that the general principle embodied in rule 64.6(1) of the CPR, that costs should ordinarily follow the event, is the applicable rule for the present purposes and that the overall justice of the case requires that the respondent, being the successful party, is entitled to his costs.

[12] For all the reasons I have sought to explain, I would make an order for costs in favour of the respondent against the appellants.

F WILLIAMS JA

ORDER

Costs of the appeal to the respondent to be agreed or taxed.