[2013] JMCA Civ 48

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 87/2011

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN	**CAPITAL & CREDIT MERCHANT BANK LIMITED**	**APPELLANT**
AND	**REAL ESTATE BOARD**	**RESPONDENT**

CONSOLIDATED WITH

SUPREME COURT CIVIL APPEAL NO 150/2011

BETWEEN	**REAL ESTATE BOARD**	**APPELLANT**
AND	**JENNIFER MESSADO & CO**	**RESPONDENT**

Mrs M Georgia Gibson-Henlin and Miss Keneisha Brown instructed by Henlin Gibson Henlin for Capital and Credit Merchant Bank Ltd

Dr Lloyd Barnett and Miss Gillian Burgess for the Real Estate Board

Miss Carol Davis for Jennifer Messado & Co

6 December 2013

MORRISON JA

Background

[1] This is a consolidated appeal from the judgment of Mangatal J given on 8 June 2011. In SCCA No 87/2011, Capital and Credit Merchant Bank Ltd ('CCMB') is the appellant and the Real Estate Board ('the Board') is the respondent. In that appeal, the Board also filed a counter-notice of appeal, by which it too challenged an aspect of the judgment. In SCCA No 150/2011, the Board is the appellant and the respondent is Jennifer Messado & Co ('JM & Co'). In this appeal, JM & Co also filed a counter-notice of appeal.

[2] In a judgment given on 19 July 2013, this court made the following orders:

> "(a) SCCA No 87/2011
> The appeal and the counter notice of appeal are dismissed.
>
> (b) SCCA No 150/2011
> The appeal is dismissed. The counter notice of appeal is allowed in part. The order for costs in the court below is varied by substituting an order that the respondent should have 50% of its costs, such costs to be paid by KES Development Company Ltd.
>
> (c) The parties are to make written submissions on the costs of the appeal within 21 days of the date of this order."

[3] The result of this judgment was that, in SCCA No 87/2011, both CCMB and the Board had therefore had a measure of success; while, in SCCA No 150/2011, the Board had failed and JM & Co had had a measure of success. In compliance with the court's order, written submissions on costs were received from the Board (on 8 August 2013), CCMB (on 9 August 2013) and JM & Co (on 13 September 2013). This judgment is therefore concerned with the costs of the consolidated appeal.

The submissions

[4] On behalf of CCMB, the unsuccessful appellant in SCCA No 87/2011, it was submitted that this was a public interest matter concerning the interpretation of a novel statute. The question of priority of charges is of interest not only to the general public but to other commercial interests as regards future projects. In these circumstances, it was submitted, in reliance on the recent decision of this court in ***Clarke v Bank of Nova Scotia Jamaica Ltd*** [2013] JMCA App 9, the appropriate order for the costs of this appeal should be that each party bear its own costs. Alternatively, it was submitted, if the court were not minded to deal with costs on this basis, CCMB should be entitled to its costs of the cross-appeal, "which raised entirely different issues from the appeal". For this submission, CCMB relied on the decision of the House of Lords in ***Medway Oil & Storage Co Ltd v Continental Contractors Ltd*** [1929] AC 88, a case concerning the appropriate approach to the taxation of the costs of a trial in which a claim and counterclaim were both dismissed with costs.

[5] On behalf of the Board, it was submitted that there was nothing in the circumstances of this case to displace the general rule that costs follow the event. As regards SCCA No 87/2011, in which both CCMB's appeal and the Board's counter-notice of appeal were dismissed, it was submitted that the great majority of the submissions made on the hearing of the appeal had to do with the issues raised by CCMB's grounds of appeal, and that the Board was therefore entitled to all of its costs of the appeal. In respect of SCCA No 150/2011, in which both the Board's appeal (against the judge's finding that it had not been established that JM & Co was a trustee *de son tort*) and JM & Co's counter-notice of appeal (against the judge's order that it should render an account) were dismissed, save for a variation in the order for costs in JM & Co's favour, the Board submitted that the award for costs should reflect the ultimate result. Therefore, it was submitted, the Board having successfully defended the judge's order against JM & Co, it had enjoyed substantial success in the result of the appeal and should be awarded 75% of its costs.

[6] Finally, JM & Co submitted that, as the successful party in SCCA No 150/2011, its costs of that appeal should be paid by the Board. But JM & Co submitted further that, both appeals having been consolidated, and its counsel having participated fully in both, it was also entitled to its costs in SCCA No 87/2011 and that these costs should be paid by the Board. As regards its counter-notice of appeal, in respect of which it was only partially successful, JM & Co submitted that it should have 50% of its costs. In any event, it was submitted finally, no order for costs should be made against Kes

Development Ltd ('KES'), which was a company in liquidation and not a party to this appeal.

What the rules say

[7] Rule 1.18(1) of the Court of Appeal Rules, 2002 ('the CAR') applies the provisions of Part 64 of the Civil Procedure Rules, 2002 ('the CPR'), which governs the general rules as to costs and the entitlement to costs in the Supreme Court, to the award of costs in this court.

[8] The general rule is that, if the court decides to make an order about the costs of any proceedings, "it must order the unsuccessful party to pay the costs of the successful party" (rule 64.6(1)). The court may however order a successful party to pay all or part of the costs of an unsuccessful party, or make no order as to costs (rule 64.6(2)). In deciding who should pay costs, the court must have regard to all the circumstances (rule 64.6(3)), including "whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings" (rule 64.6(4)(b)).

[9] Rule 64.6(5) provides that, among the orders which the court may make, is an order that a party must pay (a) a proportion of another party's costs; (b) a stated amount in respect of another party's costs; (c) costs from or until a certain date only; (d) costs incurred before proceedings have begun; (e) costs relating to particular steps taken in the proceedings; (f) costs relating only to a distinct part of the proceedings; (g) costs limited to basic costs in accordance with rule 65.10; and (h) interest on costs

from or until a certain date, including a date before judgment. By virtue of rule 64.6(6), where the court would otherwise consider making an order under (c) to (f) above, it must instead, if practicable, make an order under (a) or (b) (that is, for the payment by a party of a proportion of, or a stated amount in respect of, another's costs).

[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.

SCCA No 87/2011

[11] CCMB relies on ***Clarke v Bank of Nova Scotia Jamaica Ltd*** in support of its contention that each party to that appeal should bear its own costs. That case was concerned with the constitutionality of rule 2.4(3) of the CAR, which provides for the determination of procedural appeals on paper by a single judge of this court. In a unanimous ruling, a five member panel of the court decided that rule 2.4(3) is irreconcilable with sections 109 and 110 of the Constitution and must therefore be treated as void. On the question of costs, Harris JA, with whom all the other members of the court agreed, said this (at para. [70]):

> "The questions as to the constitutionality and validity of the rules permitting a single judge to hear and dispose of an appeal have been a concern for the court and in its opinion, the issue, being a matter of law and of great public importance ought to have been resolved. The resolution of the matter is not merely one which inures for the benefit of the applicant but for all litigants. In the circumstances, it would be just that each party bears his own costs. Consequently, there shall be no order as to costs."

[12] As CCMB acknowledges, ***Clarke v Bank of Nova Scotia Jamaica Ltd*** was a matter concerned entirely with a question of public law. Once the constitutionality of rule 2.4(3) of the CAR, a question going to the jurisdiction of a single judge of this court to hear and determine an appeal, was put in issue, the appeal could not proceed, and the dispute between the parties could not be resolved, without it being settled. The resolution of the question by this court did not itself resolve the underlying dispute between the parties. The jurisdiction of the single judge having been clarified, that dispute still remained to be addressed and ultimately determined in the manner sanctioned by the court's decision. Given not only the interests of the parties, but the manifest public interest in knowing the appropriate procedure to adopt in pursuance of a right of appeal, it seems to me to be hardly surprising that the court should have decided that each party should bear its own costs in that case.

[13] In my view, this case is in an entirely different category. I expect that it may well be true that sections - perhaps significant sections - of the public may have an interest in the court's interpretation of the Real Estate Dealers and Developers Act ("a novel statute", as CCMB described it). But I would also expect this to be equally true of many

of the various types of matters which come before the court from time to time. This appeal was essentially a contest between CCMB's commercial interests and the Board's regulatory powers. Interested as members of the public at large may be in the outcome, there is nothing in that circumstance, in my view, that necessarily makes an order that each party should bear its own costs the most appropriate order in this matter.

[14] In support of its alternative submission that it should be awarded its costs of the cross-appeal, on which it succeeded, as a separate matter from the costs of the appeal, CCMB relies on ***Medway Oil & Storage Co Ltd v Continental Contractors Ltd***. In that case, the House of Lords held that, where a claim and counterclaim are both dismissed with costs, upon the taxation of the costs, the claim should be treated as if it stood alone and the counterclaim should bear only the amount by which it increased the costs of the proceedings. Costs not incurred by reason of the counterclaim cannot be costs of the counterclaim. In the absence of special directions by the court, there should be no apportionment.

[15] In ***Burchell v Bullard & Others*** [2005] EWCA Civ 358, a case to which CCMB also referred us, Ward LJ considered (at para. 26) that ***Medway Oil & Storage Co Ltd v Continental Contractors Ltd*** remained good law, despite the passage of time since it was decided and the substantially reformed rules of civil procedure. But the case is, in my view, clearly distinguishable from this case. In that case, the trial judge had dismissed the claim and counterclaim with costs. By the time the matter reached the House of Lords, the only issue which remained was how to assess the additional or

incremental costs occasioned by the counterclaim for the purposes of taxation. As Viscount Haldane (who delivered the principal judgment) observed (at page 91), "…the real question in this case…relates to the principle which ought to prevail in the taxation of costs when the successful defendants to an action have put in a counterclaim and have been defeated on it with costs". So the decision is ultimately unhelpful as regards the factors that should inform the proper exercise of the court's discretion as to costs in this case.

[16] Closer to the point, it seems to me, is ***Burchell v Bullard***. In that case, the claimant succeeded at trial on his claim and the defendants succeeded in part on their counterclaim. The trial judge awarded costs on the basis that "the only possible order that will do justice is an order that the defendants pay the costs of the claimant of the claim and the claimant pays the defendants' costs of the counterclaim". In his judgment on appeal from the judge's award of costs, Ward LJ (with whom Rix LJ concurred), after setting out in full the provisions of rule 44.3 of the English CPR (which are in terms very similar to rule 64.6), said this (at paras 29-30):

> "29. The modern tendency is at least to consider the award of costs on an issue by issue basis. The recorder addressed that but dismissed it because of the difficulty in the preparation of a bill of costs and the enormous complication of the process of detailed assessment. I agree with that. I also agree with him that it is better if possible to deal with the matter another way. His judgment shows, however, that he did not find another way: he resorted to costs following the event. In doing so I fear he fell into error.

> 30. His error in my judgment was to fetter his discretion and not to go on to consider, as he should have considered, what alternatives were available to him. The most obvious and frequently most desirable option is that signposted in CPR 44.3 paragraph (6)(a), namely to order a proportion of the party's costs to be paid. The recorder had directed his mind to paragraph 6(f), namely ordering costs relating only to a distinct part of the proceedings but he seems to have overlooked paragraph (7) which required him, where he would otherwise have considered confining costs to part of the proceedings only, to make instead, where practicable, an order under (6)(a) for a proportion of the costs. Ordering a proportion of costs obviates all the difficulties he acknowledged in an assessment of how much is properly to be allocated to each and every issue considered in isolation. Better by far to decide, despite the difficulty and imprecision of the calculation, that the relevant issue or issues should bear a percentage of the costs taken overall. As the recorder erred in principle, the appeal on this aspect must be allowed."

[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".)

[18] CCMB did not succeed on the appeal. On the face of it, costs should therefore follow the event and CCMB should be ordered to pay the Board's costs, as the Board

submits. However, some allowance must be made for the fact that CCMB successfully resisted the Board's cross-appeal. One approach sanctioned by the rules would be an order that the Board and CCMB should have their costs on the appeal and the cross-appeal respectively. But such an order could, it seems to me, present problems of assessment similar to those with which the court was faced in ***Burchell v Bullard*** and may therefore not be practicable.

[19] I accordingly consider that the appropriate approach in this case is to order that the Board should have a proportion of its costs, reduced to take into account CCMB's success on the cross-appeal. In arriving at an appropriate percentage reduction, I take into account the fact that the larger part of the proceedings before this court was consumed by the issues canvassed on appeal from Mangatal J's judgment by CCMB (whether (i) it was proper for an order for an account to have been made against CCMB; (ii) the Board's charge lacked efficacy; and (iii) the Board's charge ranked in priority to CCMB's registered mortgage). The Board's cross-appeal, on the other hand, was primarily concerned with whether the judge was correct in holding that a finding of trustee *de son tort* could not be made against CCMB. Taking all factors into account, therefore, I would order that the Board should have 75% of its costs of this appeal.

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[20] In this appeal, both the Board and JM & Co were unsuccessful in their principal contentions (the Board in its challenge to the judge's ruling on the trustee *de son tort* issue and JM & Co in its challenge to the judge's order for an account). But, as already

noted, JM & Co did achieve a variation in the order for costs in its favour against KES (from the 20% ordered by the judge to 50%), although it is true, as the Board submitted, that this aspect of the matter did not occupy any significant part of the court's time during the hearing of the appeal. The overall balance of success on this appeal was therefore marginally in JM & Co's favour.

[21] In these circumstances, I would again consider that the appropriate approach is to award JM & Co, as the successful respondent, its costs of the appeal, reduced to reflect the fact that, in the cross-appeal, it failed in part. On this basis, I would accordingly order that JM & Co should have 65% of its costs of this appeal.

[22] I have not lost sight of JM & Co's further submission that, both appeals having been consolidated, and its counsel having participated fully in both, it is also entitled to its costs against the Board in SCCA No 87/2011. However, JM & Co not having been a party to that appeal, I can see no basis for such an order and I would therefore decline to make it.

[23] And finally, JM & Co renews its contention that no order for payment of costs should be made against KES. On this point, I would adhere to the view already expressed in my judgment in the substantive appeal (at para. [169]) that no basis has been shown to disturb Mangatal J's exercise of her discretion in this regard.

Conclusion

[24] I would therefore propose that (i) in SCCA No 87/2011, the Board is to have 75% of its costs, to be paid by CCMB; and (ii) in SCCA No 150/2011, JM & Co is to have 65% of its costs, to be paid by KES. In both cases, the costs are to be taxed, if not sooner agreed.

PHILLIPS JA

[25] I have read in draft the judgment of Morrison JA. I agree with his reasoning and conclusion and have nothing to add.

MCINTOSH JA

[26] I too have read the judgment of Morrison JA and agree with his reasoning and conclusion.

MORRISON JA

ORDER

(1) In SCCA No 87/2011, it is ordered that the Board is to have 75% of its costs, to be paid by CCMB.

(2) In SCCA No 150/2011, it is ordered that JM & Co is to have 65% of its costs, to be paid by KES.

(3) The costs of both appeals are to be agreed or taxed.