

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MISS JUSTICE SIMMONS JA**

SUPREME COURT CIVIL APPEAL NO 82/2017

BETWEEN	CAPITAL SOLUTIONS LIMITED	APPELLANT
AND	MARIETTA RIZZA (who claims by her attorney Roberto Rizza)	1st RESPONDENT
AND	ROBERTO RIZZA	2nd RESPONDENT
AND	WILLIAM MASSIAS	3rd RESPONDENT

Written submissions by Phillipson Partners for the appellant

Written submissions by Byfield, Mellish & Rushton for the 1st and 2nd respondents

14 January 2022

BROOKS P

[1] On 25 September 2020, this court (a panel comprised of Morrison P, Brooks JA (as he then was) and P Williams JA) allowed, in part, an appeal by Capital Solutions Limited ('the appellant'), but also allowed a counter-notice of appeal by the 1st and 2nd respondents, Mrs Marietta Rizza and her son Roberto Rizza ('the Rizzas'). The third respondent, Mr William Massias, did not take part in the appeal. He had previously been

the appellant's president and chief executive officer. The Rizzas had sued him, along with the appellant, but their claim against him was dismissed.

[2] The result of the appeal was that the appellant was ordered to pay the Rizzas the sum of US\$647,053.25 (being the difference between the amount of US\$869,956.79 which this court found, on appeal, was due to the Rizzas, and the credit of US\$222,903.54, to which, the court found, Cap Sol is entitled). The basis for this court's decision was that the trial judge, Sykes J (as he then was) ('the learned judge'), had erred in respect of some of his findings of fact, including his finding that the Rizzas had not made a claim for a balance that, they asserted, the appellant held for them. The court, however, upheld the learned judge's decision on the largest aspects of the Rizzas' claim against the appellant.

[3] At the time of delivering its judgment, the court requested counsel in the matter to make submissions in writing in respect of the appropriate order as to costs.

[4] Learned counsel did file their respective submissions within the time stipulated by the court. Those filings were, regrettably, not brought to the panel's attention, and the submissions have had to be considered by a different panel. It is noted that the appellant has since obtained leave to appeal, from this court's decision, to Her Majesty in Council.

The submissions

[5] In their submissions in respect of costs, learned counsel for the appellant contended that the costs should be apportioned according to the benefit obtained, on appeal, by each side. Learned counsel argued that the appellant received a benefit of US\$222,903.54 from its successes on appeal, while the Rizzas received a benefit of US\$647,053.16 (the figure used in the final order by the court). Accordingly, learned counsel argued, "the [costs] award should therefore reflect the ratios of 25% to the Appellant and 75% to the [Rizzas] in this Court as well as in the Court below".

[6] Learned counsel for the Rizzas submitted that the Rizzas were the overwhelmingly successful parties and therefore should be awarded all the costs, both in this court and in the court below. They argued that this would be consistent with the general rule on costs. They submitted that the issues on which the appellant succeeded occupied very little time, at both the trial and the appellate stages. In fact, learned counsel argued, the amounts involved in the issues on which the appellant succeeded, “were not disputed and were already part of the [Rizzas’] computation which the court was urged to accept”. The Rizzas succeeded, learned counsel submitted, on the critical issue of Mr Massias having been the appellant’s agent. In fact, learned counsel submitted, the Rizzas obtained a higher award on appeal than they had received at first instance.

The analysis

[7] The determination of awards of costs is largely guided by the provisions of rule 64.6 of the Civil Procedure Rules (2002) as amended. Rule 64.6(1) stipulates that the general rule is that the unsuccessful party should pay the costs of the successful party. The court is allowed, however, to depart from the general rule, in certain circumstances. Departure lies in the discretion of the court, but rule 64.6 does give some assistance. In giving guidance to the court in deciding on the party that should be liable to pay the costs, rule 64.6(4) states:

- “In particular [the court] 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.

(Rule 65.8 sets out the way in which the court may deal with the costs of procedural hearings other than a case management conference or pre-trial review.)” (Emphasis supplied)

[8] In this case, rule 64.6(4)(b) is the most helpful in deciding the issue of costs. In order to apply its terms, it is necessary to set out the elements of the issues in the case.

[9] The Rizzas claimed against the appellant the sum of US\$931,845.15. That sum comprised the sums of US\$360,882.63 and US\$570,962.52. The appellant defended the claim on the basis that those transactions were private and exclusive arrangements between Mr Massias and the Rizzas, and that the appellant had no responsibility to the Rizzas for any of that money.

[10] The learned judge rejected the appellant’s defence. In granting judgment, the learned judge awarded the Rizzas US\$205,998.11, in respect of the claim for US\$360,882.63, and US\$404,100.41 in respect of the claim for US\$570,962.52. The reduction in respect of the latter claim arose from an indication (during the presentation of the Rizzas’ case) by counsel for the Rizzas, that there has been a double-counting in the calculation of the two aspects of the claim.

[11] The appeal contested the learned judge’s finding that:

- a. the appellant was liable for Mr Massias’ actions; and
- b. the appellant had failed to account to the Rizzas for the two amounts (each sum being treated as concerning a separate issue).

[12] The Rizzas, in their counter-notice of appeal, complained that the learned judge had improperly denied them an award of US\$259,858.27. His reason for doing so, was that they had not claimed it.

[13] On appeal, this court:

- a. affirmed the award of US\$404,100.41;
- b. dismissed the appeal in respect of the award of US\$205,998.11;
- c. ruled that the appellant was entitled to credit totalling US\$222,903.54; and
- d. awarded the Rizzas the sum of US\$259,858.27, as a result of their successful counter-notice of appeal.

[14] The result of those rulings is that the appellant was ordered to pay to the Rizzas, the total sum of US\$647,053.16, together with interest thereon.

[15] In applying rule 64.6(4)(b), it must be held that the costs in the court below should be awarded to the Rizzas. The fact that they did not succeed on their entire claim cannot detract from the fact that they were entitled to bring the claim, especially given the defence, which the appellant sought to advance.

[16] Similarly, the fact that the appellant succeeded on an aspect of its appeal, demonstrates that it properly challenged the learned judge's award. It, however, only succeeded on one of the four issues, which were contested before this court (the three issues it raised and the one the Rizzas raised). The appellant, therefore, could not be awarded its costs of the appeal. It was, largely, the unsuccessful party. It would, however, be entitled to have the Rizzas' costs reduced.

[17] Contrary to the submissions on behalf of the Rizzas, the issue on which the appellant succeeded was not a minor one. It occupied a significant portion of the court's judgment.

[18] A fair award of costs, in the circumstances, therefore, is that:

1. the Rizzas should have:
 - a. costs in the court below; and
 - b. 75% of their costs in this court.
2. The costs are to be agreed or taxed.

FOSTER-PUSEY JA

[19] I have read the draft judgment of Brooks P and I agree with his reasoning and conclusion.

SIMMONS JA

[20] I too have read, in draft, the judgment of Brooks P. I agree with his reasoning and conclusion.

BROOKS P

ORDER

1. The Rizzas should have:
 - a. costs in the court below; and
 - b. 75% of their costs in this court.
2. The costs are to be agreed or taxed.