[2014] JMCA Civ 32

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 16/2012

BEFORE: **THE HON MRS JUSTICE HARRIS JA**
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**WILLIAM CLARKE**	**APPELLANT**
AND	**THE BANK OF NOVA SCOTIA JAMAICA LIMITED**	**RESPONDENT**

Mrs Georgia Gibson Henlin and Miss Kamau Ruddock instructed by Henlin Gibson Henlin for the appellant

Michael Hylton QC and Sundiata Gibbs instructed by Hylton Powell and Associates for the respondent

30 January, 21 February and 26 September 2014

PHILLIPS JA

[1] On 30 January 2014, we handed down the decision of the court in this matter which read as follows:

> "1. The appeal is allowed as to the striking out of the appellant's claim but dismissed as to the respondent's application for a stay of proceedings.

2. The counter-notice of appeal is dismissed as to the striking out of the appellant's claim but allowed as to the stay of proceedings

3. Half of the costs incurred in the court below and in the Court of Appeal are awarded to the appellant, to be agreed or taxed."

[2] On that same date, the respondent wrote to the registrar of this court requesting an opportunity to be heard on the question of costs awarded to the appellant on the judgment, having had no advance notice of the costs order, and the fact that a panel of the court other than that which heard the appeal, handed down the judgment. The application was grounded on the dictum of Lord Sumption made on behalf of the Board in **Sans Souci Limited v VRL Services Limited** [2012] UKPC 6, in an appeal from this court. In paragraphs 22 and 23, he stated:

> "22. It is the duty of a Court to afford a litigant a reasonable opportunity to be heard on any relevant matter, including costs, on which he wishes to be heard. The Court of Appeal included an order for costs in their Judgment of 12 December 2008 without hearing either party upon it. The Practice Direction in Jamaica assumes that submissions on costs, if any, will be made before the Court rises after giving Judgment, a course which it would have been impossible for the [respondent's] representatives to follow in this case because they had had no advance notice of the contents of the judgment and only one day's notice of the fact that it was to be delivered. This procedure may nevertheless be perfectly acceptable, provided that the order included in the Judgment is provisional, and that parties are given a reasonable opportunity to address the Court on costs later.
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> 23. The importance of finality in litigation has been emphasised by generations of common lawyers. Ultimately there must come an end to the parties' opportunities for reopening matters procedural or substantive which have been judicially decided. This principle is, however founded on an assumption that they

> were decided in accordance with the rules of natural justice. Notwithstanding the importance of finality, the rule of practice is that until either (i) a reasonable time has elapsed or (ii) the order has been perfected, a party who has not been heard on costs or other matters arising out of a judgment, is entitled as of right to be heard…"

[3] As the facts were somewhat similar, on the basis of the above, we accepted the respondent's position and invited the parties to make written submissions in relation to costs on or before 21 February 2014. Both counsel complied. We sincerely apologise for the delay in providing this ruling. This which follows is the decision of the Court.

[4] The contention between the parties has spawned much litigation. The substantive issue in respect of this aspect of their conflict related to whether the appellant, a former president and chief executive officer of the respondent, was entitled to payment by the respondent of the amount of £41,181.06. How did this come about? As stated in the judgment, during his employment with the respondent, the appellant was entitled to a five series BMW motor car. The respondent, however, purchased a seven series BMW for his use. The parties agreed that the appellant would pay the difference in price between the two cars, and if within a period of four years the appellant exercised the option to purchase the car, the sums paid by him would be deducted from the purchase price. An account was opened at one of the respondent's branches and the appellant made payments amounting to £41,181.06 into that account. There was an early determination of the appellant's contract of employment with the respondent in 2007. He had not exercised the option for purchase of the car by then. He stopped making any payments into the account in December 2007. Issues relating

to the appellant's separation from the respondent were submitted to arbitration and out of those proceedings a settlement agreement was arrived at.

[5] On 18 October 2011, the appellant filed a claim for an order for payment of the sum of £41,181.06 plus interest or alternatively damages for breach of contract. The claim was said to be on the basis of the banker-client relationship between the parties. The respondent filed a notice of application for court orders seeking the following: a declaration that the court had no jurisdiction to try the claim; alternatively, a declaration that the court should not exercise its jurisdiction to try the claim; an order that the claim form and particulars of claim be struck out; alternatively, an order that the proceedings be stayed; an order that the costs of the proceedings be awarded to the respondent; and such further or other relief as the court may deem fit. On 27 January 2012, on the said respondent's application, Sinclair-Haynes J struck out the appellant's claim form and particulars of claim with costs to the respondent, and gave permission to appeal.

[6] On one hand the appellant contended that the monies were due as being in his account, and the respondent was obliged to pay the sums due to him pursuant to the banker customer relationship. The respondent, on the other hand, said that all issues between the parties had been settled and were reflected in the settlement agreement executed by them, and that included the car and all funds associated therewith; but in any event, the settlement agreement stated that any issues arising out of that agreement should be submitted to Mr Graeme Hew for determination. The settlement agreement, however, had not been disclosed to Sinclair-Haynes J the basis being, inter

alia, and which was submitted by both parties, the confidentiality clause in the settlement agreement.

[7] As Harris JA said on behalf of the court, in paragraph [26] of the judgment,

> "Two broad issues arise in this case. The first is whether the court has effective jurisdiction to try and determine the appellant's claim. The second is, if the court is seized of jurisdiction, whether it is obliged to exercise it."

We found in respect of the first issue, that the court was endowed with jurisdiction, as the claim was founded on a banker and customer relationship, and the banker, the debtor, was resident in the jurisdiction; and that the claim was not an abuse of process and the learned judge was wrong to strike out the claim for want of jurisdiction.

[8] With regard to the second issue, we found that the claim falling as it did within the purview of matters directly or indirectly relating to the settlement agreement, and the appellant having signed the same, he had thereby consented to Mr Hew adjudicating on the disputes arising out of that agreement in accordance with clause 11. Mr Hew was best suited to determine the dispute which had arisen, being fully seized of all the circumstances surrounding the settlement agreement. The appellant was bound by the settlement agreement and ought to honour it, and abide by its terms. We found that arbitration proceedings by Mr Hew was the proper forum in which the case could be suitably dealt with in the interests of the parties and the interests of justice. We made orders as stated in paragraph [1] above, among which, is an order for the stay of the proceedings in the court below and an award of one-half of the costs of the Court of Appeal and the court below to the appellant.

[9] The issue now arising relates to the award of costs to the appellant.

Submissions

[10] Counsel for the appellant contended that the primary relief sought by the respondent in the court below was for a declaration that the court had no jurisdiction to try the claim, which was granted with costs. The appellant therefore had no option but to appeal as his claim had been struck out. The respondent, counsel submitted, could have recognised the jurisdiction of the court and asked for the matter to be stayed pursuant to section 5 of the Arbitration Act, but it did not pursue that course. So, the respondent succeeded in obtaining its primary relief in relation to the only claim brought by the appellant. The appellant, counsel stated, had first made a demand for the sum and having received no response within a week, thereafter filed his claim. The Court of Appeal found that the court had jurisdiction and restored the claim, which dealt with the only order made by the learned judge which was to strike out the claim. The issue of a stay of the proceedings was merely obiter in her judgment, and not really a consideration, as once the claim had been struck out, there was nothing to stay. In fact, the restoration of the claim was a condition precedent to the stay being granted. Based on the above arguments counsel asked that the order made by this court in relation to costs be varied to permit that:

1. The appellant be awarded all the costs in the Supreme Court and in the Court of Appeal.

2. In the alternative, the appellant be awarded all the costs in the Supreme Court and 75% of his costs in the Court of Appeal.

[11] Counsel referred to and relied on part 64 of the Civil Procedure Rules (CPR) dealing with the award of costs generally, the definition and application, and submitted that part 64 is applicable to the Court of Appeal by virtue of rule 1.18(1) of the Court of Appeal Rules (CAR). Counsel accepted that the award of costs is in the discretion of the court, but the general rule is that the successful party is entitled to the costs. However, counsel submitted that the court should, in the exercise of its discretion. examine the conduct of the parties, in particular whether the stance adopted by a party was reasonable in all the circumstances.

[12] Counsel submitted that the appellant should be entitled to all his costs in the Supreme Court and in the Court of Appeal as he had first made a demand for the funds in the account prior to commencing proceedings, and filed a claim as he had received no response to his letter. The respondent took a position of striking out the claim from the beginning and never pursued the approach accepted in these courts for the matter to be stayed and for the parties to proceed to arbitration. The respondent only considered arbitration and a stay in the Court of Appeal by way of concession and variation of the learned judge's decision. This, counsel said, was by way of a counter notice and so the respondent should not be rewarded with costs.

[13] Counsel maintained that had the respondent had a bona fide interest in invoking the arbitration clause in the settlement agreement from the outset, it would have done

so, but instead it has pursued a course to strike out the appellant's claim which was not in keeping with the overriding objective, that is to save expenses, inter alia. The Court of Appeal, having found that the local court has jurisdiction, has restored the appellant's claim and has also found that the claim was not an abuse of process. So, the argument continues, the appellant has been successful in setting aside the learned judge's order and has also been successful on the counter notice and should therefore be awarded costs in both courts.

[14] With regard to the counter-notice of appeal, counsel submitted that the respondent has been largely unsuccessful. It had certainly failed, where it sought to affirm the decision of the learned judge. Counsel submitted further that the respondent sought variation of the judge's order which was that a stay be granted in the alternative; but for a stay to be granted, it assumed that the claim subsisted, which, counsel said, supported her contention that the respondent had been unreasonable in challenging the court's jurisdiction to try the claim. The position taken by the respondent on the counter-notice was done by way of a concession and in doing so, the respondent did not challenge any ground on which it had succeeded which could have resulted in an increase of costs, in order to warrant any costs on the counter-notice.

[15] Counsel therefore submitted that on the authority of **Burchell v Bullard and Ors** [2005] 3 Costs LR 507, the court having looked at the matter in the round, and having balanced all the facts, should award the greater share of the costs to the party who has had the greater share of success. Counsel stated that the appellant had been forced to appeal because of the stance adopted by the respondent throughout, that is

to strike out the appellant's valid claim. The greater part of the appeal and the counter notice of appeal, counsel submitted, was having the claim restored. Counsel therefore asked for the costs to be awarded as suggested in paragraph [10] herein, or in the alternative, that the order for costs remain as stated in the judgment.

[16] Counsel for the respondent agreed with the general principle that costs are awarded to the successful party and stated that in the instant case, prima facie, it could appear that both parties had been successful on appeal. But, counsel submitted, in fact that was not the case when one considers the entire circumstances, as, indeed the respondent has been the successful party and is entitled to its costs.

[17] Counsel submitted that, both in this court and in the court below, the respondent had sought alternative orders. In both courts, the appellant had opposed both reliefs. In the court below the learned judge had decided to strike out the claim, but, submitted counsel, both courts had agreed that the respondent should succeed; they just had not agreed on the appropriate relief which ought to have been granted. The Court of Appeal found that the learned judge was wrong to have struck out the claim, but also found that the application by the respondent had merit, and the respondent was therefore correct in bringing the application. The appellant's position, counsel noted, had been persistent that the matter should be tried in the court, but the courts had been equally consistent in rejecting that position. Counsel referred to the ruling made by Brooks JA in chambers when considering the procedural appeal in this matter (which was later set aside by the full court as the judge in chambers lacked jurisdiction to hear an appeal), where having stated that the decision of the learned judge to strike out the

claim was wrong and that the appropriate order was to stay the proceedings, Brooks JA stated at paragraph [35]:

> "Despite this finding, it is Mr Clarke who should bear the costs of the appeal and the application below. I find that he ought to have either proceeded to arbitration before filing the claim or, having filed the claim agreed to its stay pending the arbitration."

[18] So, counsel submitted, the appellant had argued three times that the matter should not be stayed but should proceed through the courts and had been unsuccessful all three times. It is on that basis that counsel submitted that the respondent had been successful and should be awarded its costs both in the Court of Appeal and in the court below.

[19] Counsel argued alternatively that if the court is of the view that both parties had been somewhat successful then each party should bear its own costs. But an order requiring the respondent to pay any part of the appellant's costs would mean that the respondent ought not to have brought the application, which would be inconsistent with the ruling of the court. Counsel therefore concluded that the costs should be awarded in the respondent's favour or each party should bear its own costs.

Discussion and Analysis

[20] There is no doubt that in considering whether to make an award of costs, the court has a wide discretion, which in the exercise thereof, it must ensure that each case is dealt with justly. Part 64.6 of the CPR, deals with the question of costs generally

and by virtue of rule 1.18(1) of the CAR the provisions of part 64 apply to the award of costs of an appeal subject to any necessary modifications and amendments set out in that rule. Part 64.6 makes it clear that if the court decides to make an order in respect of the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party. However, that order can be adjusted and the court may order that a successful party pay all or a part of the costs of an unsuccessful party or may make no order on costs at all (rule 64.6(2)).

[21] The rule sets out certain factors that the court can take into consideration when exercising its discretion to make an award of costs, which include but are not limited to the conduct of the parties both before and during the proceedings; whether a party has succeeded on a particular issue although not successful on the whole of the proceedings; whether it was reasonable for the party to have pursued a particular issue and the manner in which the party has pursued the particular issue; whether the claim was exaggerated; and whether the claimant gave reasonable notice of his intention to issue the claim (rule 64.6(4)). The rule also permits the court to order a party to pay a proportion of another party's costs (rule 64.6(5)).

[22] In the instant case, as can be seen from the judgment, the appellant pursued a claim which was founded on a banker and customer relationship. We found that the court had jurisdiction to try the claim and that it was not an abuse of the court's process. The entire settlement agreement between the parties was not before the court and so there was not sufficient information for a ruling by the court as to whether the appellant's claim to an entitlement to the money in the account had been settled. What

was clear though was that the claim was governed by the settlement agreement and there was no doubt that the parties had agreed that any further dispute between them arising out of the settlement agreement should proceed to arbitration before Mr Hew.

[23] It is not true to say that the primary relief claimed by the respondent was to strike out the claim and that the respondent only considered arbitration and stay on appeal by way of concession and in the counter-notice. We have examined the submissions of the respondent made before Sinclair-Haynes J and it was clear that although the application and the submissions did request the court to strike out the claim, it was on the basis that the court had no jurisdiction (rule 9.6(6)) as the matter having been settled, and the appellant having signed a release and indemnity agreement, the appellant was estopped from pursuing any further litigation on the matters in conflict between the parties, and therefore there was no reason for bringing the claim (rule 26.3(1)(c)). The alternate relief claimed in the application, namely to stay the proceeding was based, as set out in the submissions, on section 5 of the Arbitration Act on the dictum of Orr J, in **Douglas Wright Associates v The Bank of Nova Scotia Jamaica Limited** (1994) 31 JLR 351, and particularly at 358 where he stated that:

> "The authorities reveal that the basic stance of the Courts has been that parties who have agreed to arbitrate should be held to their agreement."

And at 359 B he observed:

> "In more recent times there has been a shift in the position of courts of high authority, and there is now a very strong

> bias in favour of enforcing arbitration agreements. A strong cause for refusing a stay must be shown."

[24] Although the court below wrongly held that the court had no jurisdiction to hear the claim, Sinclair-Haynes J did so on the basis of concluding that the submission of counsel for the appellant, that the issue which grounded the claim was an independent one of banker and customer contract, which was unconnected to the matter resolved by the arbitration, was unsustainable. This court has found that the appellant must abide by the agreement that he signed which stated that any disputes arising out of the settlement agreement must be referred to the forum of Mr Graeme Hew.

[25] We agree with the appellant that the claim having been struck out the appeal had to be pursued in order to have it restored. But that would not have been necessary if the correct approach had been taken in the first place which was to access the forum that the parties had chosen.

[26] Suffice it to say, having read the submissions and the material put before us, we do not believe that in the circumstances of this case, that either party should obtain all of its costs in this court, and in the court below. The appellant has succeeded in part, as the claim has been restored, but the dispute has been referred for a hearing before the arbitral tribunal. The respondent has succeeded in part, as the claim has been placed in the forum of the parties' choice, but as indicated, the court has jurisdiction in respect of such a claim, and as a consequence, the claim was restored.

[27] It seems therefore, that in the interests of the parties and in the interests of justice and in all the circumstances, that each party should bear its own costs both in this court and in the court below.

[28] Paragraph [3] of the judgment will therefore be amended to read as follows:

> "3. Each party is to bear its own costs incurred both in this court and in the court below."