JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP
THE HON MISS JUSTICE P WILLIAMS JA

SUPREME COURT CIVIL APPEAL NO 77/2015

APPLICATION NO COA2021APP00007

BETWEEN	**CRICHTON AUTOMOTIVE LIMITED**	**APPELLANT**
AND	**THE FAIR TRADING COMMISSION**	**RESPONDENT**

Written submissions filed by Phillipson Partners for the appellant

Written submissions filed by DunnCox for the respondent

21 May 2021

(Further ruling on costs)

PHILLIPS JA

[1] I have read in draft, the judgment of P Williams JA. I agree with her reasoning and conclusion and have nothing useful to add.

McDONALD-BISHOP JA

[2] I, too, have read in draft, the judgment of P. Williams JA and agree with her reasoning and conclusion. There is nothing I could usefully add.

P WILLIAMS JA

[3] By way of this notice of application, the appellant seeks orders for direction that:-

> "1. The appellant is entitled to the costs awarded by the Court of Appeal handed down on February 24, 2017.
>
> 2. As a matter of public law, the scale of cost ought not to be taxed at the quantum of civil/commercial litigation."

Background

[4] The origins of this matter concerned the appellant advertising and selling a motor vehicle as a 2007 Nissan motor car when it was in fact a 2005 model. Within days of receiving the car, the purchaser discovered the error and tried unsuccessfully to reach an amicable resolution of the matter with the appellant. The purchaser turned to the respondent for assistance. The efforts by the respondent to reach a settlement were also unsuccessful. The appellant contended that it had an honest belief that the car was, in fact, a 2007 model based on the documentations it had received from the company in Singapore from which it had purchased the car. It believed that the local authorities had verified the model of the motor vehicle before the documents necessary to complete the importation had been issued.

[5] The respondent eventually turned to the courts. It commenced an action by way of fixed date claim form on 22 August 2013, seeking, *inter alia*: -

> "1. A declaration that the defendant has contravened the obligations and/ or the prohibitions (or any part of the said obligations and or prohibitions) imposed in Part VII of the Fair Competition Act and/or in particular that the Defendant has, in the course of business engaged in the following conduct:
>
> (1) Misleading Advertising in breach of section 37;
>
> 2. An Order pursuant to section 47 of the Act that the Defendant pay the Crown such pecuniary penalty not

> exceeding Five Million Dollar [sic] ($5,000,000.00) for each breach so declared or as this Honourable Court deem fit."

[6] The matter was heard by Sykes J (as he then was) and on 22 May 2015, the following order was made: -

> "The breach of section 37 (1) (a) of the Fair Competition Act has been established. The penalty is $2,000,000.00. Costs to the Fair Trading Commission to be agreed or taxed."

[7] The appellant was aggrieved about this decision and appealed to this court. There were 11 grounds of appeal identified, which were distilled to three questions namely:

> "(1) Does section 37 (1) (a) of the Fair Competition Act impose strict liability on the offender?
>
> (2) On the basis of strict liability was there liability in this case?
>
> (3) Was the penalty imposed excessive in the circumstances?"

[8] On 24 February 2017, this court gave its decision in a judgment cited at [2017] JMCA Civ 6 ('the substantive judgment'). The questions posed were answered in the affirmative resulting in the following orders being made:

> "1. Appeal allowed in part;
>
> 2. The judgment of Sykes J delivered on 22 May 2015 is affirmed on the issue of liability;
>
> 3. The penalty of $2,000,000.00 imposed on the appellant is set aside and substituted in its stead is the sum of $1,200,000.00;
>
> 4. Question of costs reserved. Written submissions to be made by the parties within 21 days."

[9] On 20 October 2017, we gave our ruling on costs in a judgment cited at [2017] JMCA Civ 33 ('the costs judgment') and the following order was made: -

> "75% of the costs in this court to the respondent to be taxed if not agreed."

The application

[10] In its notice of application, the appellant referred to an order, initially given by this court, that the appellant be awarded 50% of the costs of the appeal. It is noted that at the delivery of the judgment in February 2017, the respondent raised an objection to there being no costs awarded in its favour. As a result, the question of costs was reserved. It is also noted that on the final award, the respondent was awarded 75% of its costs, but the revised order was silent as to the appellant's costs. In the appellant's view, its appeal having been allowed in part meant that it remained entitled to its earlier award of 50% of its costs on appeal.

[11] The appellant filed its bill of costs on 11 March 2019, and its notice of taxation on 26 April 2019. The respondent filed its bill of costs on 9 April 2019. It was noted that despite their best efforts, the parties have been unable to agree the question of the appellant's entitlement to costs and hence the court's directions are being sought.

[12] The appellant contends that the court's direction is required to guide the learned Registrar, as it could not be the intention of the court that the further consideration of a costs award in the respondent's favour vacated the appellant's entitlement to its previous, or any costs order, as the appellant contends was the position of the respondent.

[13] The appellant is now seeking the court's direction on the treatment of costs in proceedings, which it says is brought in the "public's name". It contends that if a claim is in the public interest, whether or not the public body is ultimately successful, it ought to be public policy to have public issues decided without cost considerations operating as a fetter on the defence of claims brought by public bodies. It is further contended

that "[i]t must be against public policy that a defendant to a complaint to a public body, unless unequivocally successful, is left worse off than simply resigning itself to the initial complaint or any action brought in the public's name".

[14] In the submissions filed on behalf of the appellant, the contents of the notice of application are largely repeated. It is contended that at the time the substantive judgment was handed down, the appellant did not join in the respondent's oral application for the court's re-consideration of its own entitlement to costs outside of the costs awarded to it. Further, the appellant contends that based on the respondent's application for its own costs, no submissions were advanced by the appellant for the protection of the already awarded costs of 50%.

[15] It was submitted by the appellant, that it is a time-honoured rule that a successful appellant, in whole or part, is entitled to an award of costs on appeal following the reversal or relief from the order of the lower court.

[16] Regarding the second issue, it is submitted that although the general rule that costs follow the event applies equally in public law cases, there are additional considerations where a claim is considered to be in the public interest, irrespective of whether the public body is ultimately, successful. The authority of **Branch Development Limited t/a Iberostar v Industrial Disputes Tribunal and The University and Allied Workers' Union** [2015] JMCA Civ 48, was referred to by the appellant, as providing helpful guidance on the approach to costs in a public law appeal.

[17] It is contended by the appellant that in this notice of application, the court's direction on the treatment of costs proceedings brought in the public's name was being sought and, in particular, the court's consideration of rule 64.6(2) of the Civil Procedure Rules which provides, among other things, that the court "…may make no order as to costs".

[18] It was urged that consideration ought to be given to a complaint brought by a public body, where a defendant, such as the appellant, should be at liberty to defend

the complaint issues without punitive costs considerations operating as a fetter against the defence of claims brought by public bodies.

[19] It is submitted that given the cost/benefit balance, unlike judicial review proceedings, where it is the claimant who takes a decision to challenge the public authority, in the instant appeal, it is the state executive that brought a complaint against the appellant who, on the finding of the lower court, acted on its honest belief throughout. The appellant further submits that it had no other redress than its right to defend, and to appeal, both on the issues of liability and quantum, on which it succeeded on appeal, in part, in relation to quantum.

The response

[20] In the submissions filed on behalf of the respondent, the appellant's application is resisted on the basis that: (a) the court's ruling on 20 October 2017, did not mistakenly omit the appellant's award of 50% of its costs; and (b) the issue of costs has been finally determined by the court and cannot be revisited in the circumstances.

[21] It is not disputed that the court has jurisdiction to amend or modify an order, after it has been perfected, for the purpose of correcting a mistake or error contained therein. It is submitted that there is a test for determining whether the appellant's application was, in fact, seeking to have the court correct an accidental slip or omission, which is starkly different from instances where a litigant seeks to have the court reconsider the merits of a tribunal at the material time. **Dalfel Weir v Beverly Tree** [2016] JMCA App 6 is referred to in support of this submission. The test it is submitted, is the "hypothetical enquiry" referenced by Morrison P at paragraph [62] of that case as follows:

> "[Sankar J] referred to **Hatton v Harris** with particular reference to what he termed the hypothetical enquiry, namely whether if the supposed error had been drawn to the attention of the court or the parties at the relevant time, it would have been corrected as a matter of course."

[22] Counsel for the respondent further submits that the submissions of the parties were recounted and reviewed in the costs judgment and that, thereafter, the court ruled with perfected intent that the respondent should be awarded 75% of the costs. The respondent submits that, in those circumstances, the hypothetical enquiry test would not be met.

[23] The second substantive ground of the application is summarised as being that the court had erred in awarding civil/commercial costs to the respondent, without having regard to the fact that the matter was of public importance and a scale of costs should be determined for the respondent's award. It is submitted by the respondent that in addition to the "accidental slip" rule, there are narrow instances in which the court may disturb costs orders after they have been perfected, to permit the parties to be heard in the interests of natural justice. In support of this submission, the respondent relies on paragraph [2] of **William Clarke v The Bank of Nova Scotia Jamaica Limited** [2014] JMCA Civ 32.

[24] The respondent contends that the parties clearly had an opportunity to be heard on costs and for the issues of public law to be ventilated. It notes that in the costs judgment, the "public importance" ground was covered and decided upon. It was submitted that since the appellant had not raised any fresh evidence, that meets the necessary requirements (as set out in **Rose Hall Development Ltd v Minkah Mudada Hananot** [2010] JMCA App 26 paragraphs [9]-[11]), there was no basis for the court's decision on costs to be disturbed.

[25] Counsel for the respondent submits that, in those circumstances, the award to it of a proportion of its costs was appropriate on the premise that it was successful on the vast majority of the issues on appeal. It is submitted that the practise of awarding a party costs, to account for its success on the majority of the issues as well as the success of the opposing litigant on the minority of the issues, was recognised as correct in **Capital & Credit Merchant Bank Ltd v Real Estate Board** [2013] JMCA Civ 48.

Discussion and disposal

[26] While delivering the substantive judgment on 24 February 2017, the court had, indeed, initially announced that the appellant should get 50% of its costs. The penultimate paragraph of the written judgment states that the court would award half of the costs in this court to the appellant, since it had succeeded in this appeal as to penalty. However, given the immediate request by counsel who then appeared for the respondent for them to be heard on the issue of costs, the orders were adjusted to reflect that the question of costs was reserved and time given for both parties to make written submissions. Therefore, the order in relation to costs was as follows:

> "4. Question of costs reserved. Written submissions to be made by the parties within 21 days."

This order clearly replaced any order originally contemplated which no longer had any effect and this was made even clearer at paragraphs [4] and [30] of the costs judgment.

[27] This court remained guided, in matters such as this, by the observations of the Privy Council in **Sans Souci Limited v VRL Services Limited** [2012] UKPC 6. Lord Sumption, writing on behalf of the Board, had this to say on the issue: -

> "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. Thereafter, the Court still has an inherent jurisdiction to hear him, but the test is more exacting…. This is not the occasion for extended review of the circumstances which will satisfy

> this test, but the Board has no doubt that one of the of the circumstances which will satisfy it is that the party desiring to be heard did not have a reasonable opportunity to be heard at an earlier stage when the test would have been less formidable."

[28] At the time the substantive judgment was being delivered, we had not had the benefit of any submissions from the parties on the costs in this court. The respondent, having not been heard on the issue, was, undoubtedly, entitled to be given that opportunity. Submissions were filed on behalf of both parties and the matter was then considered in keeping with the principles of natural justice.

[29] Ultimately, the appellant submitted that the award of 50% of its costs was appropriate, particularly, given the fact that this court had agreed with it that the penalty awarded by Sykes J was excessive. This, certainly, counters the submissions now made by the appellant that it had advanced no submissions, prior to the costs judgment, for the protection of its already awarded costs of 50%. The respondent submitted that it ought to be awarded 90% of its costs, principally because it had prevailed on all the substantive issues whereas the appellant had succeeded on a non-substantive issue, namely, the variation of the quantum of the penalty awarded.

[30] Having considered those submissions, we were convinced that the respondent could quite properly be viewed as having, in fact, succeeded on the more substantive issues that arose in the appeal and was, therefore, correct that it should be awarded the larger portion of costs (paragraph [30] of the substantive judgment). At paragraph [31], the court concluded as follows: -

> "The appellant successfully argued that the penalty was excessive in the circumstances. The reduction in the penalty to be paid must be of some significance to the appellant and hence its success in having this aspect of its appeal resolved in this manner, should accordingly and appropriately be considered. [We] would therefore award 75% of the costs in this Court to the respondent."

[31] It is unfortunate that it was not pellucid to the appellant that there had, in effect, been no order as to costs made when the substantive judgment was delivered and perfected. It can be assured that if this court had intended for the appellant to get 50% of its costs, it would have so ordered. The appellant is wholly misguided in seeking an order that it is entitled to costs awarded on 24 February 2017, when no such award was made or in existence at that time. The order made by the court that the question of costs was reserved for written submissions to be filed as to costs, which was eventually done, and the subsequent reasoning and conclusion of the court in the costs judgment would have been sufficient to clear up any issue there could have been regarding the initial award of 50% costs to the appellant.

[32] The appellant also invites the court to give directions relative to public law and scales of costs, in terms that lack clarity or substance. I respectfully acknowledge that there was an attempt to explain this issue with reference to the bringing of proceedings in "the public's name". However, I cannot see the basis on which such an assertion can be sustained.

[33] The facts of this case reveal that the appellant, as a private car dealer, had falsely advertised and then sold a vehicle which was not what it purported to be. Even if the appellant did so unknowingly, liability for such an action is strict, and the appellant had clearly breached section 37(1)(a) of the Fair Competition Act. The fact that this section created an offence of absolute liability had been well settled by this court in **Fair Trading Commission v SBH Holdings Ltd and another** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 92/2002, judgment delivered on 30 March 2004, as Sykes J correctly found. The unsuccessful efforts to resolve the issue forced the respondent to seek the court's assistance, given the nature of the breach that had occurred. There is nothing about this scenario that requires the invocation of any rules of public law or public policy.

[34] The respondent is entitled to and must be compensated for the costs incurred in having to pursue this matter in this court, especially given what turned out to be the

spurious basis on which the appellant persistently sought to challenge the complaint and then, later, liability in the appeal. The fact that it had successfully challenged the penalty that was imposed was properly recognised and taken into consideration in the award made to the respondent.

[35] The taxation is to be commenced and completed with the respondent having been awarded 75% of the costs of the appeal in accordance with the clear and unambiguous terms of the costs judgment. There is no need for directions regarding the costs order.

[36] I would order that the application for the court's directions be refused. The respondent, being the successful party on this application, which turns out to be wholly unnecessary, is entitled to costs in keeping with the general rule set out in rules 64.6(1) and 65.8(2) of the CPR. Therefore, I would award costs to the respondent to be agreed or taxed.

PHILLIPS JA

ORDER

1. The application for the court's directions is refused.

2. Costs of the application to the respondent to be agreed or taxed.