[2017] JMCA Civ 33

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 77/2015

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

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

Written Submissions filed by Phillipson Partners for the appellant

Written submissions filed by Dr Delroy Beckford for the respondent

20 October 2017

(Ruling on Costs)

PHILLIPS JA

[1] I have read draft of the judgment of my sister P Williams JA. I agree with her reasoning and conclusion and have nothing further to add.

MCDONALD-BISHOP JA

[2] I too have read the daft judgment of P Williams JA and agree with her reasoning and conclusion. I have nothing useful to add

P WILLIAMS JA

[3] On 24 February 2017, the court gave the following decision in this appeal:

> "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."

[4] In arriving at that decision, I had initially felt that the appellant could be awarded half of its costs in this court, since it had succeeded in this appeal in having the penalty reduced. The parties however indicated a desire to be heard on the issue of costs hence the order made at (4) in paragraph [3] above. Pursuant to this order, the written submissions were received from the appellant on 17 March 2017 and from the respondent on 22 March 2017.

[5] The background to this matter is set out in detail in **Crichton Automotive Limited v The Fair Trading Commission** [2017] JMCA Civ 6 and so only needs now to be briefly stated for this ruling on costs. The appellant sold a motor vehicle to Miss Lisbeth Mills in May 2011. Shortly after taking possession of the vehicle, Miss Mills discovered the Nissan motor car she had purchased was not a 2007 model as the documents and assurances given to her by the appellant had indicated. It was, in fact,

a 2005 model. Her efforts to have the appellant agree to a reasonable resolution of the issue proved unsuccessful and she turned to the respondent for assistance.

[6] Upon the completion of its investigations, the respondent was satisfied that the appellant had committed a breach of the Fair Competition Act ("the Act"). The appellant was so advised and in response indicated that it had relied on documents provided by relevant government bodies upon those bodies verifying information provided for each of the vehicles imported. This vehicle was imported from a Singaporean auto broker. The relevant authority in Singapore had assessed the antecedents of the vehicle and issued a de-registration certificate which had provided the information about the vehicle. It had certified that the vehicle was a 2007 model. The Singaporean auto broker supplied this certificate to the appellant. This information had been submitted to the Commissioner of Customs and Excise here in Jamaica. The appellant contended that it was believed that the authorities here verified the model of the motor vehicle before issuing the documents necessary to complete the importation of the vehicle. The respondent formed the view that there was no basis for the appellant's contention that it had relied on the documents since the representation made to Miss Mills by the appellant had been made prior to the issuance of the documents.

[7] The appellant was thereafter advised by the respondent that it could be liable for a breach of the Act and was offered an opportunity to resolve the matter without recourse to litigation. No resolution was forthcoming and the respondent commenced this action by way of fixed date claim 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 ($5,000,000.00) for each breach so declared or as this Honourable Court deem fit."

[8] In a judgment given by Sykes J 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. Cost to the Fair Trading Commission to be agreed or taxed."

[9] The appellant identified 11 grounds of appeal and the issues raised 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?"

[10] In relation to the first question, this court has previously interpreted section 37(1)(a) of the Act and held that on its proper construction the section creates an offence of absolute liability and does not require the existence of mens rea. In **Fair Trading Commission v SBH Holding Ltd and another** (unreported) Court of Appeal,

Jamaica, Supreme court Civil Appeal No 92/2002, judgment delivered on 30 March 2004, this court came to a unanimous decision that the provision did impose strict liability and that an intention to make a false representation is not required in establishing a breach of the section.

[11] Mr Dunkley, in the appeal, had sought to challenge the finding of Sykes J that the decision in **Fair Trading Commission v SBH Holdings** was unanimous. His arguments and submissions in this regard were found to be without merit. This court was not convinced that its earlier interpretation should be departed from.

In relation to the second question, there was found to be no basis upon which the findings of the learned judge leading to his determination that the appellant was liable could be disturbed. He made the following finding:

> "(1) The appellant did represent that the car was a 2007 car.
>
> (2) At the time the appellant made the representation it honestly believed it to be true but regrettably for the appellant honesty in the belief in the accuracy of the information is irrelevant for liability.
>
> (3) The appellant made the representation to Miss Mills who was clearly a member of the public for purposes of the provision. The representation was made to her for the purpose of getting her to purchase the motor car.
>
> (4) The appellant was in the business of trading in used cars hence the representation was made in pursuance of a trade.
>
> (5) The appellant was promoting the supply of used cars and also advancing its business interest."

[12] In arriving at the decision that the penalty was excessive, the fact that the appellant had honestly believed that the information provided in the de-registration certificate from the Singaporean authorities was of primary significance. The appellant's behaviour following the breach, in refusing to accept liability and to pursue efforts to resolve the matter, ought not to have been the major considerations. The learned trial judge did not make apparent, whether there may have been conduct that was in mitigation of the penalty even though that conduct did not amount to a defence of the liability.

[13] The appellant commenced the submissions relative to this issue of costs with a reminder of these words of Lord Lloyd in **Bolton Metropolitan District Council v Secretary of State for the Environment** (Practice Note) [1995] 1 WLR 1176:

> "In all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the Court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule."

[14] It was submitted that the time-honoured rule recognises that the successful appellant can be awarded the whole or part of costs of the appeal and can benefit from the overturning, reversal or relief otherwise from the costs order of the lower court. It was further noted that the appellant had successfully argued before Sykes J that the penalty that was being sought was excessive and this court had set aside the penalty

awarded by Sykes J and imposed a lower one. Thus, the appellant submitted that the award of 50% of its costs was appropriate.

[15] The appellant further submitted that "having regard to the outcome of the appeal and in review of its own order", it should have the benefit of an adjustment to the full costs award below. It submitted that a reasonable adjustment to reflect the result of the appeal could see the costs below adjusted to 50% of the taxed (or agreed) costs.

[16] The appellant went on to invite this court to consider the issue of the treatment of costs in proceedings brought for the benefit of the public. It was submitted that if the court is satisfied that a claim is of public importance and that it is in the public's interest to have the issues decided, then an award of costs in whole or in part, might be inappropriate. It was further submitted that although there is no general 'public interest' exception to the ordinary rule that costs follow the event, a court may depart from the ordinary rule and not award costs against an unsuccessful litigant, having regard to all the circumstances of the cases. Reference was made to the cases of **Oshlack v Richmond River Council** [1998] 152 ALR 83 and **Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister of Mineral Resources (No 3)** [2010] NSWLEC 59.

[17] The appellant referred to the Motor Vehicle Import Policy Paper of 3 April 2014 ("the Ministry Paper") which had been issued to address the problem that had emerged in the used car industry, with cars being imported from Singapore, which had incorrect years of manufacture. It was submitted that the Ministry Paper had settled that the

model year of all imported vehicles must be accepted unless otherwise indicated by the Island Traffic Authority and the Trade Board Limited. It was submitted that there was a public interest to be served in bringing certainty to the offences for which the used car dealers were being held accountable, more so, given the stance of the competent authority. It was contended that the appellant, and by extension all members of its industry and the public at large, needed to know whether the Ministry Paper mitigated the possible breach of the provisions of the Act.

[18] It was submitted also that the complaint, which formed the basis of the respondent's claim that the appellant breached section 37 of the Act, was one of many before the courts for issues similar to the instant claim. Thus, the appellant submitted, "the very nature of this claim and the effect it will have on the public who have purchased vehicles bearing a year which may be the subject of dispute makes it public interest litigation". Consequently, it was submitted, this case could be viewed differently and if the court agreed that there is a public interest element involved, a more equitable adjudication, in the interests of justice could be a "no order" or that each party bear its own costs.

[19] The respondent referred the court to rule 1.18(1) of the Court of Appeal Rules 2002 ("the CAR") which provides that the provisions of Parts 64 and 65 of the Civil Procedure Rules ("the CPR") apply to the award and quantification of costs on an appeal. It was submitted that costs should follow the event in the instant case and reliance was placed on the approach of this court to the issue in **Recreational Holdings (Jamaica)**

Limited v Carl Lazarus et al [2015] JMCA Civ 5 and **VRL Operators Limited v National Water Commission and others** [2015] JMCA Civ 69 and in the Supreme Court decision of **David Wong Ken et al v National Investment Bank of Jamaica et al** [2012] JMSC Civ 79.

[20] The respondent usefully summarized its submissions as follows:

> "(i) The principle that 'costs follow the event' ought to be applied to recognize that the respondent succeeded on all of the substantial issues and therefore should be awarded the larger proportion of costs.
>
> (ii) As the respondent prevailed on all the substantial issues, albeit the appellant has succeeded on a non-substantial issue - namely variation of the quantum of the penalty awarded - the respondent ought to be awarded 90% of its costs in the Court of Appeal.
>
> (iii) The issue of costs not having been raised in the Court below, nor having been raised as a ground of appeal, the rule that costs follow the event should be applied wherein the Court below was correct in its order of costs; which should therefore remain undisturbed."

[21] In expanding its submissions, it was noted, that the quantum of the penalty imposed is a peripheral issue given the legislative scheme of the Act in the context of a breach of section 37. There were two main issues to be determined namely that of liability and that of the imposition of a penalty with the quantum of the penalty being discretionary. It was therefore submitted that, in essence, this court has upheld the substantive issues regarding a finding of liability and the grant of a penalty while varying

the judgment of the court below in respect of a peripheral or non-substantive issue only - that is, the amount of the penalty to be awarded.

[22] It was further submitted that there was no suggestion being made "that the resolution of a minor issue, or one issue among many, in an applicant's favour may not result in the apportionment of costs that does not reflect the fact that only one issue was addressed in the applicant's favour or, alternatively, may seem disproportionate to the issue resolved in the applicant's favour". The decision of this court in **Capital and Credit Merchant Bank Limited v Real Estate Board and Real Estate Board v Jennifer Messado and Co** [2013] JMCA Civ 48 was referred to as being instructive in relation to this point.

[23] It was noted that of the 11 grounds of appeal filed by the appellant, only one ground was devoted to the issues of the quantum of the penalty. Further, it was observed that of the two hours allotted to the appellant to make its submissions, more than an hour and a half was "consumed" with the issues of liability and the concomitant penalty that follows with barely more than 15 or 20 minutes devoted to the quantum of the penalty. The respondent also observed that of the 40 paragraphs contained in the appellant's speaking notes, only one was devoted exclusively to the issue.

[24] Rule 1.18(1) of the CAR provides that the provisions of part 64 and 65 of the CPR shall apply to the award and quantification of costs in this court. It was well settled that rule 64.6 of the CPR enshrines the principle that costs follow the events and it provides inter alia:

> "(1) If 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.
>
> (2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.
>
> (3) In deciding who should be liable to pay the costs the court must have regard to all the circumstances."

[25] Rule 64.6(4) then provides a list of a number of factors which may be taken into account in deciding who should be liable to pay the costs including the conduct of the parties, the success of a party on particular issues and whether it was reasonable for a party to have raised a particular issue.

[26] In the instant case, it seems to me that the place to start must be for a determination of whether it is appropriate to make any order at all for the costs of these proceedings. This is so in light of the appellant's submission that this matter is to be regarded as one of public interest litigation and no costs should be awarded.

[27] The appellant's contention was that it could not be at fault in advertising that the car was a 2007 model since that was the year of manufacture with which the company from which it had been imported had supplied it. Significantly, however, there was a disclaimer from the Singaporean Authority wherein it expressly did not warrant the accuracy, adequacy or completeness of the information contained in the relevant documentation. The appellant did not seek to verify that information. It assumed the

risk of being in breach of the Act when it advertised the vehicle with the incorrect year of manufacture without any similar disclaimer.

[28] The fact that section 37(1)(a) of the Act did impose strict liability on the offender was the clear and unanimous decision of this court from 2004 in **Fair Trading Commission v SBH Holdings Ltd and another**. Any person who, in the course of business, advertises information to the public which is found to be misleading contravenes the provisions of the Act. The Ministry Paper in the instant case did not in any way affect the issue of liability or impact the general formulation of the law as it has existed since 2004. This matter did not, as has been urged, have any issues to be decided which were of public interest or importance. There seems to me to be no special circumstances which would make it inappropriate to make an order as to costs or which justify a departure from the long established principle that costs should follow the event.

[29] There can be no real dispute that the main thrust of the appellant's challenge to the decision of Sykes J was on the issue of liability. The submissions valiantly advanced by the appellant, was that in **Fair Trading Commission v SBH Holding Ltd and another**, where two members expressly stated that they agreed with the main decision of the other member, the decision was not unanimous. This submission was hopelessly misconceived and had no possible chance of succeeding. The appellant failed to provide any basis for departing from the principle clearly established in that decision and it is noted that there was no real issue taken or arguments advanced to challenge the basis of the learned judge's finding that the appellant was in fact liable. Finally, it is to be borne in mind that the imposition of a penalty in these circumstances was dependent on

a successful application to the learned judge to exercise his discretion to do so. There was no basis on which it could be said that the exercise of the discretion in ordering that a pecuniary penalty be paid was wrong.

[30] Ultimately, the respondent can quite properly be viewed as having, in fact, succeeded on the more substantial issues that arose in the appeal. The respondent is therefore obviously correct that it should be awarded the larger proportion of costs.

[31] 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. I would therefore award 75% of the costs in this Court to the respondent.

[32] The respondent in its submission noted that the award of costs by the court below was not a ground of appeal, nor was the issue raised and/or argued there and further was not a ground in any cross-appeal. However, the order of Sykes J being appealed includes the award of costs to the respondent and hence the appeal can be viewed as encompassing that aspect of the order. The appellant has not however advanced any real arguments as to why the costs awarded in the court below should be disturbed. I would therefore affirm the order as to costs that was made by Sykes J.

PHILLIPS JA

ORDER

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