[2015] JMCA App 39A

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 83/2015

APPLICATION NO 137/2015

BETWEEN	**WINSTON FINZI**	**1st APPLICANT**
AND	**MAHOE BAY COMPANY LIMITED**	**2nd APPLICANT**
AND	**JMMB MERCHANT BANK LIMITED**	**RESPONDENT**

Written submissions received on behalf of the applicants from Malcolm Gordon, attorneys-at-law

Written submissions received on behalf of the respondent from Hylton Powell, attorneys-at-law

Written submissions received on behalf of the interested party Assets Securitisation Limited from Patterson Mair Hamilton, attorneys-at-law

29 October 2015

IN CHAMBERS

MORRISON JA

[1] This is an addendum to my ruling on costs dated 8 October 2015 ('the first ruling'), in which I ordered that the applicants should pay JMMB's costs of the application for an injunction pending appeal, certified fit for two counsel, such costs to be agreed or taxed. The first ruling was made by me after consideration of written submissions delivered to me by the registrar as having been received from Malcolm

Gordon, attorneys-at-law for the applicants and Hylton Powell, attorneys-at-law for JMMB.

[2] At the time of preparation and dispatch of the first ruling, I proceeded on the basis that no submissions on costs had been made on behalf of Assets Securitisation Ltd (ASL), which had also participated in the hearing of the substantive application before me as an interested party. The first ruling accordingly made no reference to any issue of costs as between ASL and the applicants. However, shortly after the first ruling was dispatched by electronic mail (e-mail) to all attorneys-at-law involved in the matter (including ASL's attorneys), the Registrar brought to my attention an e-mail message from Patterson Mair Hamilton, attorneys-at-law for ASL. In that message, it was indicated that submissions on costs had also been filed by that firm on behalf of ASL on 2 September 2015. Further, that on 14 September 2014, the applicants had responded to those submissions. When the matter was investigated by the Registrar, it emerged that although both these submissions were in fact sitting on the court file, they had not been brought to my attention before. I believe that the Registrar has already made a suitable apology to all concerned for what was plainly an inexcusable lapse.

[3] In the submissions filed on its behalf, ASL seeks an order for costs in relation to the substantive application. The applicants for their part maintain that ASL is not entitled to such an order. So, given that in the first ruling I did not address that issue at all, I considered (and all concerned were so advised) that the omission to do so might best be dealt with by way of an addendum to that ruling. However, Malcolm Gordon for the applicants have taken an objection to my proceeding in this way, submitting that,

by virtue of the first ruling, I am *functus officio* and therefore lacking in jurisdiction to make any further order in the matter. On the other hand, neither ASL nor JMMB, as I understand it, has any objection to my proceeding in the manner proposed. ASL in particular makes the point that, not having previously addressed the issue of costs as between ASL and the applicants, it is now open to me to do so. I must therefore consider this issue at the outset.

[4] In Jowitt's Dictionary of English Law[1], the phrase *functus officio*[2] is defined as "[a]n expression applied to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted". The principle itself is uncontroversial. As the learned author of the text Modern Legal Usage[3] puts it —

> "… the phrase denotes the idea that the specific duties and functions that an officer was legally empowered and charged to perform have now been wholly accomplished, and thus the officer has no further authority or legal competence based on the original commission."

[5] So it is important, firstly, to determine the scope of my authority with regard to the costs of the application for an injunction pending appeal. That authority stems from section 30 of the Judicature (Appellate Jurisdiction) Act (the Act), the relevant subsections of which[4] it may be helpful to set out in full:

> "(3) Subject to subsections (1) and (2), the provisions of any other enactment and to rules of court, the costs of and incidental to all civil proceedings in the Court shall be in the discretion of the Court.

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[1] 2nd edn, by John Burke, Volume 1, page 840
[2] Literally meaning having performed or discharged his or her function or duty
[3] 2nd edn, by Bryan Garner, page 377
[4] Sections (3)-(5)

> (4) Without prejudice to any general power to make rules of court, the Rules Committee of the Supreme Court may make provision for regulating matters relating to the costs of civil proceedings including, in particular prescribing –
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> (a) scales of costs to be paid as between party and party;
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> (b) the circumstances in which a person may be ordered to pay the costs of any other person; and
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> (c) the manner in which the amount of any costs payable to the person or to any attorney shall be determined.
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> (5) Subject to the rules made under subsection (4), the Court may determine by whom and to what extent the costs are to be paid."

[6] Accordingly, the entire matter of the costs of and incidental to the application was before me. This necessarily involves, in my view, making a ruling on any question of costs arising out of that application. So it is next necessary to consider whether my authority to do this was exhausted by my having made the first ruling. As has been seen, due to the entirely regrettable circumstance of my not having been made aware of ASL's submission that it too should be awarded its costs of the application, that ruling dealt exclusively with the question of costs as between the applicants and JMMB. The first ruling was therefore completely silent on any question of costs as between the applicants and ASL. In these circumstances, it appears to me that my authority to determine all issues as to costs arising out of the application for an injunction pending appeal was plainly not exhausted by the first ruling. It accordingly seems to me that, on the face of it, the matter of costs as between the applicants and ASL remains open for my consideration.

[7] But the applicants contend that I am constrained by authority from arriving at this conclusion. To make this point, I was referred by Malcolm Gordon to the decisions of the Privy Council in **Isaacs v Robertson**[5] and Rawlins JA (as he then was) in **Saint Christopher Club Ltd v Saint Christopher Club Condominiums and others**[6].

[8] In **Isaacs v Robertson**, a judge of the High Court of Saint Vincent and The Grenadines made an order granting an interlocutory injunction. No application was made by the defendant to set this order aside and the plaintiff subsequently sought the committal of the defendant to prison for his disobedience of it. However, the judge dismissed the motion for committal, holding that the earlier order for an interlocutory injunction was a nullity and that disobedience of it could not therefore constitute contempt of court. The Court of Appeal and the Privy Council disagreed with the judge, on the basis of what Lord Diplock for the Board described[7] as, "the short and well-established ground that an order made by a court of unlimited jurisdiction, such as the High Court of St Vincent, must be obeyed unless and until it has been set aside by the court". However, as well established as this principle obviously is, I regret that I am completely unable to discern its relevance to the issue of whether, having made the first ruling, I am *functus officio* on the question of costs. In the instant case, no question of disobedience to the first ruling arises.

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[5] (1984) 43 WIR 126
[6] Saint Christopher and Nevis Civil Appeal No 4/2007, judgment delivered 15 January 2008
[7] At pages 128-129

[9] **Saint Christopher Club Ltd v Saint Christopher Club Condominiums and others** is, I fear, of no greater assistance. In that case an application was made to the court to vary its previous order under the equivalent of rule 42.10 of the CPR (the slip rule). In considering the powers of the court under that rule, Rawlins JA held that, after an order is perfected or an appeal against that order is filed, the slip rule may only be used to correct genuine clerical errors, rather than errors of substance. However, no question of the correction of an order previously made arises in the instant case. What I am proposing to do by this addendum is to supplement, rather than to correct, my previous order as to costs.

[10] I have therefore come to the clear conclusion that it is now open to me to consider the issue of costs as between the applicants and ASL.

[11] ASL submits that the court should order the applicants to pay its costs, it having successfully resisted both the applications that I should recuse myself from hearing the matter and for an injunction pending appeal. In this regard, ASL relies on the general rule set out in rule 64.6(1) of the CPR, which is that, if the court decides to make an order as to costs, it should order the unsuccessful party to pay the costs of the successful party. Further that, in deciding who should be liable to pay costs, the court should have regard to all the circumstances, including the conduct of the parties before and during the proceedings (rule 64.6(3) and (4)). In particular, ASL lists a number of matters by reason of which, it submits, the applicants are, by their conduct, not entitled to an order for costs in their favour. ASL also asks for a special costs certificate to

enable it to recover a higher level of costs than basic costs (rule 64.6(12)(3)) and for an order for the costs of two attorneys-at-law (rule 64.6(12)(3)).

[12] The applicants resist ASL's entitlement to costs on two primary bases. Firstly, that the general principle is that the court will not award costs to two or more parties having the same interest (rule 64.7). And secondly, that ASL, not being a party to the proceedings, cannot rely on the general rule as to the payment of costs in rule 64.6 of the CPR, as this rule applies only to parties to the proceedings.

[13] It seems to me that this latter point, which begs the wider question whether it is open to the court to make an order for costs in favour of a non-party to the proceedings, is potentially determinative of the question of costs as between ASL and the applicants. It may therefore be convenient to deal with it first. But in order to provide some context, it may be helpful to recall the circumstances in which it arises. ASL was not an original party to the proceedings in the Supreme Court. Nor, as far as I am aware, has it been added as a party to those proceedings pursuant to the relevant provisions of the CPR[8]. The applicants filed their notice of appeal on 22 July 2015. According to Mr Trevor Patterson, in his affidavit filed on behalf of ASL in this court on 27 July 2015, ASL only became aware of the proceedings on 23 July 2015, which was the day on which McDonald-Bishop JA (Ag) (as she then was) granted a without notice interim injunction for five days, pending the hearing of the *inter partes* application for an injunction pending appeal. That was the application which in due course commenced before me on 28 July 2015.

[8] Part 19

[14] Despite the fact that ASL appeared by counsel and made submissions, without objection, at that hearing, no formal step was taken by it to intervene in the proceedings as a party. (It may in any event be arguable whether there is in fact any procedural route under the rules of this court as they now stand by which this could be achieved, since rule 19.3 of the CPR, which provides that "[t]he court may add, substitute or remove a party on or without an application", is not one of those rules made applicable to this court by virtue of rule 1.1(10) of the Court of Appeal Rules, 2002.)

[15] As has been seen, section 30(3) of the Act provides that, subject to rules of court, "… the costs of and incidental to all civil proceedings in the Court shall be in the discretion of the Court". This provision is supplemented by section 30(5), which provides, again subject to rules of court, that "… the Court may determine by whom and to what extent the costs are to be paid".

[16] In **Aiden Shipping Co Ltd v Interbulk Ltd The Vimeira**[9], the House of Lords had to determine the effect of the virtually identical provisions of section 51 of the Supreme Court Act 1981. The question was whether, despite the broad words of the section, there fell to be implied a limitation on the category of persons by whom costs might be ordered to be paid; that is, whether costs could only be ordered to be paid by persons who were parties to the relevant proceedings. It was held that, on its true construction, the section conferred a very wide discretionary jurisdiction on the court,

[9] [1986] 2 All ER 409

subject to rules of court, to determine by whom and to what extent the costs of proceedings were to be paid and there was no implied limitation restricting costs orders to orders made against the parties to the proceedings. Delivering the leading judgment for unanimous House of Lords, Lord Goff observed[10] that —

> "Such a provision is consistent with a policy under which jurisdiction to exercise the relevant discretionary power is expressed in wide terms, thus ensuring that the court has, so far as possible, freedom of action, leaving it to the rule-making authority to control the exercise of discretion (if it thinks it right to do so) by the making of rules of court, and to the appellate courts to establish principles on which the discretionary power may, within the framework of the statute and the applicable rules of court, be exercised."

[17] In similar vein, it seems to me that the effect of section 30(3) and (5) of the Act is therefore that, subject to rules of court, the costs of and incidental to all civil proceedings are in the discretion of the court and it is for the court to determine by whom and to what extent the costs are to be paid. Following on from these provisions, rule 64.3 of the CPR provides that "[t]he court's powers to make orders about costs include [the] power to make orders requiring any **person** to pay the costs of another **person** arising out of or related to all or any part of the proceedings" (my emphasis). Then, under the rubric, "Entitlement to recover costs", rule 64.5(1) provides that "[a] **person** may not recover the costs of proceedings from any other **party** or **person** except by virtue of (a) an order of the court; (b) a provision of these Rules; or (c) an agreement between the parties" (my emphasis).

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[10] At page 413

[18] Rule 64.3 therefore distinguishes between a 'party' and a 'person' and rule 64.5(1) appears clearly to contemplate that a party may in fact be ordered to pay costs to a person other than a party. However, unlike rule 48.2 of the English CPR, which, against a similar statutory backdrop, expressly provides for "Costs Orders in favour of or against Non-parties", rule 64.9 of the CPR makes provision only for "Costs against person who is not a party". Given that, as is well known, the provisions of the CPR were substantially influenced, both conceptually and in detail, by the English CPR, the omission from the former of a specific provision for costs orders in favour of non-parties could, looked at one way, be some indication that the framers of the CPR specifically intended to exclude any power in the court to make such orders.

[19] But that view is, I think, difficult to reconcile with the breadth of the discretion as to costs given by (i) section 30(3) and (5) of the Act and (ii) rule 64.3 of the CPR itself. Taken together, these provisions lead me to think that the court does have the power to order the payment of costs by a party or parties (such as the applicants) to a non-party (such as ASL). Looked at in this light, it seems to me that all that the specific provision in rule 64.9 relating to the ordering of costs against a non-party was intended to achieve was to ensure that appropriate notice is given to that person of the fact that an application for such an order is being made against them.

[20] It appears to be generally accepted that costs orders against non-parties are to be regarded as exceptional, though, as Lord Brown explained in **Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others**[11] —

> "… exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such 'exceptional' case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against."

[21] On the other hand, perhaps reflecting the relative infrequency of the cases in which the jurisdiction is invoked, there is very little discussion in the civil procedure texts which I have been able to consult on the question of costs orders in favour of non-parties. Both Commonwealth Caribbean Civil Procedure[12] and A Practical Approach to Civil Procedure[13] are completely silent on the point; while the authors of Civil Litigation[14] merely note the existence of the power to make such orders, but give no guidance at all on the circumstances in which it will ordinarily be exercised. However, in Zuckerman on Civil Procedure, Principles of Practice[15], the following appears (under the rubric "Costs orders in favour of non-parties"):

> "27.267 There are a number of situations in which a party may be ordered to pay the costs of a non-party. A party will normally be ordered to pay the costs of a

[11] [2005] 4 All ER 195, at para. [25]
[12] 3rd edn, by Gilbert and Vanessa Kodilinye
[13] 10th edn, by Stuart Sime
[14] John O'Hare and Kevin Browne, Civil Litigation, 16th edn, para. 39-010
[15] 3rd edn, by Adrian Zuckerman, para. 27.267

> non-party where the party has obtained an order against a non-party requiring the non-party to perform some act. For example, where a party to a dispute applies for a disclosure order against a non-party, the party will normally be ordered to pay the non-party's costs of the application and of complying with any disclosure order made (CPR 46.1(2)). Similarly, where a claimant requires a bank to comply with a freezing order and provide information concerning the defendant's accounts with the bank or to freeze the account, the bank will normally be entitled to look at the claimant for its costs."

[22] Similarly, in **J v Oyston**[16], a decision of McKinnon J at first instance, the court made an order that the unsuccessful defendant should pay the costs of the Solicitor's Indemnity Fund (SIF), which had taken over conduct of the proceedings on behalf of the claimant. Although accepting that such an order should only be made in exceptional circumstances, the court held that, as a matter of reasonableness and justice, the order was justified in this case by, among other things, the fact that, if the defendant had won, he would have had his costs paid in full by the SIF: it therefore followed naturally that he should pay SIF's costs now that he had lost.

[23] These examples suggest that costs orders in favour of non-parties are also to be regarded as exceptional. As Professor Zuckerman indicates, such an order will be particularly apt in a case in which, pursuant to an order of the court, the non-party has been obliged to perform some act. In such a case, one can readily see why, I think, the court might consider it just to make an order that the party at whose instance the non-party has been required to do something should pay the costs incurred by the non-

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[16] [2002] EWHC 819 (QB)

party as a result. But, as with orders for the payment of costs by non-parties, it seems to me that the consideration of whether to order the payment of costs to a non-party must necessarily also be a fact-specific exercise, taking into account all the circumstances of the particular case.

[24] So the question is whether in the circumstances of this case it is just to make an order that the applicants should pay ASL's costs of the application for an injunction pending appeal. In my view, they do not. It is clear that ASL's participation in the application for an injunction pending appeal was for the single purpose of protecting its own interest in the property being sold under powers of sale by JMMB. In this regard, there was no material difference between ASL's position and that which would inevitably have been (and was in fact) advanced by JMMB: that is, that the applicants were not entitled to and ought not to be granted an injunction to prevent completion of the sale. So from a practical point of view, it seems to me that ASL's position was fully protected by the stance which had already been successfully maintained by JMMB in the court below. The evidence which was provided to the court by Mr Patterson, in his capacity as one of ASL's legal advisors, could as easily have been made available to JMMB for filing as part of its objection to the grant of the injunction. Looked at this way, ASL's participation in the proceedings, rather than being directly necessitated by an action taken by the applicants, was purely voluntary.

[25] In saying this, I hasten to add that I do not wish to be taken as making any comment on whether it was necessary or prudent for ASL to be represented on the hearing of the application before me. That was entirely a matter for ASL to determine,

on the basis of its own assessment of what the full protection of its best interests might require and on the advice of its lawyers. And, at the hearing itself, it was, as always, a pleasure to listen to Mr Small QC's ever thoughtful submissions on ASL's behalf. But this, in my respectful view, has no bearing on the question of whether it would be a just exercise of my discretion to order that the applicants should pay ASL's costs of that representation.

[26] My conclusion on this point makes it unnecessary to consider the applicants' first point, based on rule 64.7 of the CPR, which provides that "[w]here two or more parties having the same interest in relation to proceedings are separately represented the court may disallow more than one set of costs". In any event, it seems to me that since, as I have already suggested to be the case, ASL is not a party to the proceedings, the essential precondition to rule 64.7, which is that there should be two or more parties having the same interest, has not been triggered in this case. So, on the view I take of the case, the question simply does not arise.

[27] I would accordingly conclude that, in all the circumstances of this case, ASL has not made good its contention that the applicants should pay its costs.