[2015] JMCA App 25

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 152/2010

APPLICATION NO 90/2015

BEFORE: THE HON MR JUSTICE DUKHARAN, JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (AG)

BETWEEN	**DAVID PREBLE (T/a Xtabi Resort Club and Cottages)**	**1ST APPLICANT**
AND	**XTABI RESORT LIMITED**	**2ND APPLICANT**
AND	**ELITA FLICKINGER (Widow of the deceased Robert Flickinger)**	**RESPONDENT**

Miss Danielle Chai instructed by Samuda & Johnson for the applicants

Ainsworth Campbell for the respondent

6 and 9 July 2015

DUKHARAN JA

[1] I have read, in draft, the judgment of my brother, Brooks JA. I agree with his reasoning and conclusion that the applicants should have their bills of costs taxed.

BROOKS JA

[2] This is an application by Mr David Preble and Xtabi Resort Limited ("Xtabi") for an order for the payment out to them of monies paid in, by Mrs Elita Flickinger, as security for costs. They also seek the interest that has accrued on those monies. They assert that the sums are now due to them since Mrs Flickinger has failed in her claim against them, as well as in her appeal from the judgment in that claim, that went against her.

[3] Mrs Flickinger had made a claim against Mr Preble and Xtabi as a result of the tragic death, by drowning, of her husband, on 9 February 1995. Mr Flickinger died at a resort property owned by Xtabi and operated by Mr Preble. On 27 March 2015, this court dismissed Mrs Flickinger's appeal from the judgment of the Supreme Court in which judgment was given in favour of Mr Preble and Xtabi. Costs of the appeal and in the court below were ordered in favour of Mr Preble and Xtabi.

[4] Mrs Flickinger resides outside of the jurisdiction and, as a result, there were, previous to each of the hearings in the Supreme Court and this court, two successful applications made by Mr Preble and Xtabi for her to pay in monies for security for costs. The first order, made on 23 December 2002, resulted in her paying in the sum of $350,000.00 in respect of the costs of the claim in the Supreme Court. The second order was made in this court on 29 August 2011 and, pursuant to that order, Mrs Flickinger paid in the sum of $600,000.00 in respect of the costs of the appeal.

[5] Mrs Flickinger seeks to further appeal to Her Majesty in Council. She has been granted conditional leave to do so. Mr Preble and Xtabi assert that they are now entitled to the sums paid as security for costs. Mr Campbell, on behalf of Mrs Flickinger, submitted, firstly, that the sums could not be paid out until the costs in each court have been taxed. Learned counsel also submitted that, as there is a continuation of the matter to Her Majesty in Council, the claim has not yet been brought to its final conclusion and the present application is, therefore, premature.

[6] Miss Chai, on behalf of Mr Preble and Xtabi, submitted that there is no stay of execution in place in respect of the order for costs. Learned counsel further submitted that in making the respective orders for security for costs the judge considering the application would have summarily assessed the likely costs to be incurred. There was, therefore, she submitted, no need for a taxation of costs before the sums were paid out.

[7] Mr Campbell sought to make an application for stay of execution on his feet but there was no affidavit in place to support such an application. It could, therefore, not be entertained.

[8] Miss Chai is, however, not on good ground in respect of the issue of taxation. It is settled law that costs are paid as compensation for expenses actually incurred in litigation. The receiving party, to use the nomenclature of the Civil Procedure Rules (the CPR), cannot make a profit out of the costs recovered from the paying party. In **Garbutt and another v Edwards and another** [2006] 1 All ER 553, Arden LJ

explained that costs between party and party have their foundation in the indemnity principle set out in the common law. He said at pages 555-556:

> "[2] The two fundamental principles [in the field of costs] to which I refer are: (1) the indemnity principle, and (2) the special status of the solicitors' certificate of accuracy attached to a bill of costs.
>
> THE INDEMNITY PRINCIPLE
>
> [3] This principle is well known to solicitors and others who are concerned in this field, but it bears repeating. It is in origin a common law principle. The principle was described by Bramwell B thus when giving the judgment of the court in *Harold v Smith* (1860) 5 H & N 381 at 384-385, 157 ER 1229 at 1231:
>
> > 'Before stating the principle on which the Master acted on this taxation, it may be as well that I should state what we consider the principle upon which he ought to have acted. I think the question is one of considerable importance, and therefore, although it is only a question of reviewing taxation of costs, I go into it at some length.
> >
> > Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained. Of course, I do not say there are not exceptional cases, in which certain arbitrary rules of taxation have been laid down; but, as a general rule, costs are an indemnity, and the principle is this, - find out the damnification, and then you find out the costs which should be allowed.'"

[9] The receiving party is therefore required to put some evidence before the court that the expenditure has been incurred. That evidence is the bill of costs.

[10] It is to be noted that this common law indemnity principle is not to be confused with the separate issue of what costs are fair and reasonable and where the burden of proof lies in respect of that separate issue. The common law indemnity principle is, therefore, also separate from the issue of the two bases for taxation (standard and indemnity) established in the early days of the English Civil Procedure Rules. The issues of what is fair and reasonable and the bases for taxation more closely involve the mechanics of the exercise of taxation or, put another way, the quantification of the costs.

[11] The exercise of taxation is to determine what is fair and reasonable in respect of expenses actually incurred. It is not, as in the case of an application for security for costs, an exercise in determining a reasonable estimate of costs. An application for security for costs (the subject of part 24 of the CPR) is not a summary assessment of costs as contemplated by rule 65.9 of the CPR. The processes are separate and distinct. An application for security for costs is made before the hearing of the claim or the appeal. It requires the court to consider the quantum of costs that the applicant is likely to incur by the time the litigation is concluded. It does not necessarily require the court to examine what has been actually expended. The taxation exercise is at the end of the litigation process. It requires an assessment of what has been actually expended and determines the extent the paying party should be required to compensate the receiving party.

[12] In order to secure the payment out of the sums paid in as security for costs, Mr Preble and Xtabi have to have their bills of costs prepared and presented to show that

they have actually incurred the costs. Thereafter, the procedure set out in part 65 of the CPR will take its course. It is at the end of that procedure that they will be entitled to a payment out of such of the sums, held as security, to compensate them for their expenses, or, to go toward compensating them for their expenses.

[13] Their present application for payment out should therefore be refused. There should be no order as to costs as the application was heard at the same sitting as the motion for leave to appeal to Her Majesty in Council, no additional documents were filed on behalf of Mrs Flickinger in respect of the application and the submissions in respect of the point were terse and without any cases being cited.

MCDONALD-BISHOP JA (AG)

[14] I too have read in draft the judgment of Brooks JA and agree with his reasoning and conclusion.

DUKHARAN JA

ORDER

1. The application for payment out of the monies paid as security for costs is refused.

2. No order as to costs.