

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 100/2016

**BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA**

**BETWEEN DARNEL FRITZ APPELLANT
AND JOHN COLLINS RESPONDENT**

Written submissions by Ballantyne Beswick and Co for the appellant

Written submissions by Hylton Powell for the respondent

19 February 2021

BROOKS JA

[1] On 15 January 2021, this court handed down its decision allowing, in part, an appeal by Ms Darnel Fritz. At that time, the court indicated that it was minded to grant costs of the appeal to the respondent, Mr John Collins, as Ms Fritz’s appeal was largely unsuccessful. It, however, allowed for counsel for the parties to make submissions in writing on the issue of costs.

[2] The issues involved in the case concerned:

- a. the applicability of the limitation period to powers of sale contained in a mortgage; and
- b. Accounting of the amount due in respect of mortgage debts.

[3] As indicated above, this court allowed Ms Fritz's appeal in part. This court found that, whereas the limitation period was applicable to recovery of a mortgage debt, it did not affect the power of sale contained in a mortgage. Accordingly, Mr Collins was permitted to exercise his statutory power of sale to recover the sums owed to him, but was unable to otherwise recover the full debt.

[4] As part of their submissions, filed in respect of this court's order in relation to submissions on costs, learned counsel for Ms Fritz asked the court to award Ms Fritz the costs of the appeal. Learned counsel argued that although Ms Fritz was not entirely successful in her appeal, she did succeed in reducing the amount of the judgment. The issue on which she did not succeed, learned counsel submitted, is an important issue and is of such general importance that Ms Fritz was right to bring the matter to the court's attention. Learned counsel concluded that the results were "evenly balanced" between the parties and therefore the court should either order costs accordingly or make no order as to costs.

[5] In support of their submissions, learned counsel cited the cases of **Bolton Metropolitan District Council v Secretary of State for the Environment (Practice Note)** [1995] 1 WLR 1176, **Crichton Automotive Limited v The Fair Trading Commission** [2017] JMCA Civ 33, **Oshlack v Richmond River Council** [1998] 152 ALR 83 and **Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Another (No 3)** [2010] NSWLEC 59.

[6] Learned counsel for Mr Collins argued that the general rule, which is that costs should be awarded to the successful party, should be applied in this case. Mr Collins, they submitted, successfully resisted Ms Fritz' appeal, in that she was only able to

reduce the amount of the judgment in the court below from US\$159,805.00 to US\$119,805.00. Learned counsel argued that the majority of this court's judgment was engaged in the issues on which Ms Fritz was unsuccessful.

[7] Any interest that the public may have in the result of this case, learned counsel submitted, could not justify a grant of no order as to costs. The case, they submitted, is entirely a commercial dispute. Accordingly, learned counsel submitted, at best for Ms Fritz, the award of costs to Mr Collins, should only be reduced to 90%.

[8] Learned counsel relied, in part, on **Capital and Credit Merchant Bank Limited v Real Estate Board and Real Estate Board v Jennifer Messado & Co** [2013] JMCA Civ 48, as support for their submissions on this issue.

[9] Rule 1.18(1) of the Court of Appeal Rules indicates that Parts 64 and 65 of the Civil Procedure Rules (CPR) apply to the award and quantification of costs of an appeal. Both parties agree that:

- a. the general principle with respect to awarding costs is that the unsuccessful party should pay the costs of the successful party (see rule 64.6(1) of the CPR);
- b. the court may depart from applying the general principle if the circumstances so require (see rule 64.6(3) of the CPR);
and
- c. the award of costs is in the discretion of the court.

[10] The principles that guide the court in deciding whether there should be a departure from the general principle are set out in rule 64.6(4) of the CPR. The rule states:

- “(4) In particular [the court] must have regard to -
- (a) the conduct of the parties both before and during the proceedings;
 - (b) **whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;**
 - (c) any payment into court or offer to settle made by a party which is drawn to the court’s attention (whether or not made in accordance with Parts 35 and 36);
 - (d) **whether it was reasonable for a party -**
 - (i) **to pursue a particular allegation; and/or**
 - (ii) **to raise a particular issue;**
 - (e) the manner in which a party has pursued -
 - (i) that party’s case;
 - (ii) a particular allegation; or
 - (iii) a particular issue;
 - (f) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his or her claim; and
 - (g) whether the claimant gave reasonable notice of intention to issue a claim.

(Rule 65.8 sets out the way in which the court may deal with the costs of procedural hearings other than a case management conference or pre-trial review.)” (Emphasis supplied)

[11] In examining the learning in respect of this area, significant guidance may be gleaned from the judgment of Morrison JA (as he then was) in **Capital and Credit Merchant Bank Limited v Real Estate Board**. Morrison JA gave that guidance at paragraphs [8] through [10] of that judgment:

“[8] The general rule is that, if the court decides to make an order about the costs of any proceedings, ‘it must order the unsuccessful party to pay the costs of the successful party’ (rule 64.6(1)). The court may however order a successful party to pay all or part of the costs of an unsuccessful party, or make no order as to costs (rule 64.6(2)). **In deciding who should pay costs, the court must have regard to all the circumstances (rule 64.6(3)), including ‘whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings’ (rule 64.6(4)(b)).**

[9] Rule 64.6(5) provides that, among the orders which the court may make, is an order that a party must pay (a) a proportion of another party’s costs; (b) a stated amount in respect of another party’s costs; (c) costs from or until a certain date only; (d) costs incurred before proceedings have begun; (e) costs relating to particular steps taken in the proceedings; (f) costs relating only to a distinct part of the proceedings; (g) costs limited to basic costs in accordance with rule 65.10; and (h) interest on costs from or until a certain date, including a date before judgment. By virtue of rule 64.6(6), where the court would otherwise consider making an order under (c) to (f) above, it must instead, if practicable, make an order under (a) or (b) (that is, for the payment by a party of a proportion of, or a stated amount in respect of, another’s costs).

[10] The question of whether to make any order as to costs - and, if so, what order - is therefore a matter entrusted to the discretion of the court. The starting point under the rules, reflecting the longstanding position at common law, is that costs should follow the event. **The court may nevertheless make different orders for costs in relation to discrete issues. It should in particular consider doing so where a party has been successful on one issue but unsuccessful on another issue. In that event, the court may make an order for costs against a party who has been generally successful in the litigation.**” (Emphasis supplied)

[12] In that case, after considering the degrees of success that each party had had, the court ordered that costs be apportioned proportionately. Morrison JA opined that whatever interest the public may have had in the result of the case, which involved a public entity, it did not justify an order that there should be no order as to costs.

[13] P Williams JA, in **Crichton Automotive**, examined all the other cases, to which learned counsel for Ms Fritz referred. The cases all dealt with the issue of costs where one of the parties was a public entity. Although **Crichton Automotive** also involved a public entity, this court apportioned costs according to the level of success achieved in the appeal.

[14] This case does not involve a public entity; the parties are wholly private individuals involved in a wholly private commercial transaction. The comment made by Morrison JA at paragraph [13] of **Capital and Credit Merchant Bank Limited v Real Estate Board** is applicable to this case. He said:

“...Interested as members of the public at large may be in the outcome, there is nothing in that circumstance, in my view, that necessarily makes an order that each party should bear its own costs the most appropriate order in this matter.”

[15] Having considered the authorities and the submissions, it must be said that learned counsel for Mr Collins are correct in their assertion that Mr Collins has largely succeeded in this appeal. Ms Fritz, however, did succeed in respect of the question of whether Mr Collins could recover, as a debt, the principal sum of a first mortgage that she had granted to him. It was not an insignificant point, but it could not fairly be said that the results were evenly balanced, as learned counsel for Ms Fritz have asserted.

[16] In attempting to balance the weight of those issues and the time spent on them, it is fair to award Mr Collins 75% of his costs of the appeal. The order for costs in the court below should be adjusted to award Mr Collins all his costs in respect of the claim but 75% of his costs on his counter-claim.

MCDONALD-BISHOP JA

[17] I have read the draft judgment of Brooks JA. I agree and have nothing to add.

SINCLAIR-HAYNES JA

[18] I too have read the draft judgment of Brooks JA, and agree.

BROOKS JA

ORDER

- (a) Mr Collins is to have 75% of his costs of the appeal.
- (b) The trial judge's order, in respect of costs, is varied to award all the costs of the claim to Mr Collins but only 75% of his costs of the counter-claim.
- (c) All costs are to be agreed or taxed.