

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 17/2018

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE FOSTER-PUSEY JA**

BETWEEN	HAROLD MORRISON and ROBERT WOODSTOCK ASSOCIATES LIMITED	APPELLANT
AND	MARJORIE MORRISON (Legal Guardian of JAMES MORRISON)	1st RESPONDENT
AND	SJUAN MORRISON (Mother and Next Friend of ZOE MORRISON)	2nd RESPONDENT
AND	SJUAN MORRISON (Mother and Next Friend of ZARA MORRISON)	3rd RESPONDENT
AND	LOURICE MORRISON (Administrator Ad Litem of the Estate of HAROLD EUSTACE MELVILLE MORRISON, deceased)	4th RESPONDENT

**Written submissions filed by Ransford Braham QC instructed by Brahamlegal
for the appellant**

**Written submissions filed by Ms Sherry Ann McGregor instructed by Nunes,
Scholefield, DeLeon & Co for the 1st, 2nd, and 3rd respondents**

16 April 2021

MCDONALD-BISHOP JA

[1] I have read in draft the judgment of my sister Foster-Pusey JA. I agree with her reasoning and conclusion with nothing to add.

SINCLAIR-HAYNES JA

[2] I too have read the draft judgment of my sister Foster-Pusey JA and agree with her reasoning and conclusion.

FOSTER-PUSEY JA

[3] This is the court's decision in respect of costs arising out of a procedural appeal brought by the appellant, Harold Morrison and Robert Woodstock Associates Limited, challenging the orders of Palmer Hamilton J (Ag) (as she was then), ("the judge"), made in the Supreme Court on 2 February 2018. On that date, in exercise of the jurisdiction of the court established in **Norwich Pharmacal Co & others v Customs & Excise Commissioners** [1973] 2 WLR 164, which empowers the court to make orders for disclosure against a person who is not a party to the proceeding, "**Norwich Pharmacal orders**", the judge ruled in favour of the first, second and third respondents ("the respondents") and made orders requiring the appellant to disclose certain information to them.

[4] In order to put this ruling in context, it is necessary that I provide a short rehearsal of the background to the application and the substantive claim below.

[5] The appellant is an architectural firm. Harold Morrison, now deceased ("HM"), was a renowned architect who owned 51% of the shares in the firm. He died on 4 March 2016, leaving his entire estate to Lourice Morrison his then wife.

[6] On 17 June 2016, Marjorie Morrison ("Marjorie"), the first respondent and ex-wife of HM, along with Sjaun Morrison ("Sjuan"), on behalf of two of HM's grandchildren, filed a fixed date claim form ("the claim"), pursuant to the Inheritance (Provision for Family and Dependents) Act ("the Act"), seeking declarations that Marjorie and the grandchildren were entitled to receive financial provision from HM's estate.

[7] The court, in determining such a claim, must, among other things, have regard to the size and nature of the net estate of the deceased. Although a letter from the appellant's independent auditor was available to the court, and indicated a value for the 51% shareholding, the respondents, on account of information to which they referred, believed that the valuation was not accurate. Lourice Morrison stated that she was not able to provide any additional information. This led to the respondents applying to the court for a **Norwich Pharmacal** order directed to the appellant.

[8] The judge having granted the order, the appellant challenged the decision. The appellant had withdrawn the appeal as against the fourth respondent who, therefore, did not participate in the appeal.

[9] Arising out of the grounds of appeal and in resolving the appeal, this court had to consider and determine whether the judge took into account and correctly addressed the following issues:

- i. whether the appellant had to be a party to the proceedings for the **Norwich Pharmacal** order to be directed to it;
- ii. whether a wrong was arguably committed by HM in failing to make reasonable financial provision in his last will and testament for the respondents, or whether the alleged undervaluing of HM's shareholding constituted wrongdoing in the circumstances;
- iii. whether there was a need for a **Norwich Pharmacal** order to be made to enable action to be brought against HM's estate;
- iv. whether the appellant was mixed up in or facilitated the alleged wrongdoing of HM;
- v. whether the appellant was able or likely to be able to provide the information necessary to enable HM to be sued; and

vi. whether in the interests of justice, it was an appropriate case in which to apply the **Norwich Pharmacal** principles and grant the order sought by the respondents.

[10] On 19 November 2020, this court, in the substantive appeal, **Harold Morrison and Robert Woodstock Associates Limited v Marjorie Morrison and Others** [2020] JMCA Civ 55, made orders as follows:

- “1. The appeal is dismissed.
2. The order made by Palmer Hamilton J (Ag) on 2 February 2018 is affirmed.
3. The appellant shall, on or before 24 November 2020, disclose the following:
 - a. Copies of its audited or draft financial statements for the years 2015 and 2016;
 - b. All documents pertaining to the income generated or derived by the firm as at 2015 and 2016; and
 - c. All documents pertaining to the debts owed to the firm as at 2015 and 2016.
4. **The appellant and respondents shall, on or before 4 December 2020, file written submissions on the issue of costs of this appeal.**” (Emphasis added)

In compliance with order 4, the parties to the appeal filed their written submissions on 3 and 4 December 2020, respectively.

Costs of the appeal

[11] While the parties take no issue with the order for costs made at first instance, they disagree as to the treatment of costs on appeal.

[12] The appellant submits that the costs of the appeal should be awarded to it or there should be no order as to costs.

[13] It argues that it is an innocent party and the legal points raised on appeal required clarification of issues relating to a **Norwich Pharmacal** application, for example, the meaning and application of the principle that the party requested to provide the information must be mixed up in or must have facilitated the wrongdoing of the party to be sued. Thus, the appeal raised substantial and important points of law which have been clarified by the court's judgment. The appellant relied on rule 64.6(4)(d) of the Civil Procedure Rules (CPR).

[14] On the other hand, the respondents argue that this court ought to, in the exercise of its discretion, award them the costs of the appeal. They submit that the general rule, that the unsuccessful party should pay the costs of the successful party, should apply.

[15] They urge that, while at first instance in the court below, the appellant was an innocent respondent entitled to be awarded costs, on launching its appeal against the order, it became an adversary and should be treated as any other party who then loses an appeal.

[16] The respondents submit that, ultimately, every issue on the appeal was determined in their favour and the judgment of this court does not vary much from the first instance judgment of Palmer Hamilton J (Ag).

[17] As a consequence, they ask that costs be awarded to them and that such costs be set off against the costs awarded to the appellant at first instance.

[18] They have relied on **Cartier International AG and Ors v British Telecom** [2018] UKSC 28, **Jofa Limited v Benherst Finance Limited** [2019] EWCA Civ 899, **Ashworth Hospital Authority v MGN Ltd** [2002] 1 WLR 2033, **Winston Finzi and Mahoe Bay Company Limited v JMMB Merchant Bank Limited** [2015] JMCA App 39A and rule 64.6(3) and (4) of the CPR.

Discussion

[19] It is noteworthy that, while the appellant's submissions in the substantive appeal were skeletal to an extreme degree, the respondents provided very full and helpful submissions with a wide range of cases.

[20] Rule 1.18 of the Court of Appeal Rules states that the provisions of Parts 64 and 65 of the CPR apply to the award and quantification of costs of an appeal, subject to any necessary modifications.

[21] Costs are indeed in the discretion of this court, and I have taken into account rule 64.6 of the CPR, in particular, which provides:

- (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 costs the court must have regard to all the circumstances.**
- (4) **In particular it 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)
 - (d) **whether it was reasonable for a party-**
 - (i) **to pursue a particular allegation; and/or**
 - (ii) **to raise a particular issue**
 - (e) ...
 - (f) ...
 - (g) ...
- (5) The orders which the court may make under this rule include orders 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)-(h)..." (Emphasis supplied).

[22] I have also taken into account the principles outlined in respect of costs in **Capital and Credit Merchant Bank Limited v Real Estate Board and Real Estate Board v Jennifer Messado & Co** [2013] JMCA Civ 48 and **Darnel Fritz v John Collins** [2021] JMCA Civ 8.

[23] In my view, this is not a case in which it would be appropriate for this court to decide that there should be no order as to costs as contended by the appellant. The respondents, being the party successful in the appeal, should be awarded costs, although the appeal has emanated from a **Norwich Pharmacal** order. The position of the appellant, as a non-party to the proceedings in the Supreme Court, is not the same on appeal. It has seen it fit to challenge the decision of the judge on appeal and the respondents have successfully defended the appeal.

[24] I have, nevertheless, taken into account the fact that, as is the course in **Norwich Pharmacal** matters, the order has been made against the appellant, although it is not a party to the substantive proceedings. In addition, the question as to whether the appellant could properly be regarded as having been mixed up in or to have facilitated wrongdoing by the deceased HM, was a point which gave the court a significant measure of anxiety in the context of this particular case. It appears to me that it was reasonable for the appellant to have raised that issue on appeal.

[25] Furthermore, while it is correct that by appealing, the appellant could have been seen as becoming an 'adversary', I do not believe that, in these particular circumstances, it would be correct to describe the appellant in such a manner.

[26] On the other hand, there were also issues which were unnecessarily raised and pursued by the appellant.

[27] Looking at the matter in the round, having considered the material provided by both parties, as well as the helpful submissions of counsel, it seems to me that in the interests of justice, the respondents should not be deprived of all the costs of the appeal, simply because the appeal involves a **Norwich Pharmacal** order that was made against the appellant as a stranger to the proceedings below.

[28] I would order that the appellant pay the respondents 75% of their costs of the appeal, to be taxed or agreed.

[29] The issue as to whether a set-off of costs may be appropriate in the circumstances, if the parties are unable to agree on such a course, may be pursued before the Registrar in the event that costs will be taxed.

MCDONALD-BISHOP JA

ORDER

75% of the costs of the appeal to the first, second and third respondents
against the appellant to be agreed or taxed.