[2022] JMCA Civ 10

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

SUPREME COURT CIVIL APPEAL NO 89/2015

BETWEEN	**STEADLY MOULTON**	**1ST APPELLANT**
AND	**DOREEN HARRISON**	**2ND APPELLANT**
AND	**WADMAR CONSTRUCTION LIMITED**	**1ST RESPONDENT**
AND	**RAJIV KNIGHT**	**2ND RESPONDENT**
AND	**THE ADMINISTRATOR GENERAL FOR JAMAICA (Representative of the Estate of Ainsworth Boreland, Deceased, Intestate)**	**3RD RESPONDENT**

Written submissions filed by Elizabeth L Salmon for 1st and 2nd respondents

Written submission filed by Geraldine R Bradford for the 3rd respondent

18 March 2022

Ruling on costs

F WILLIAMS JA

[1] I have read the draft judgment of P Williams JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

P WILLIAMS JA

[2] The background to this ruling on costs is set out in the decision of this court handed on 5 July 2021 with neutral citation [2021] JMCA Civ 33.

[3] In summary, a tragic motor vehicle accident, occurred in the early morning of 1 May 2010, along the White River main road in the parish of Saint James. Mr Steadly Moulton ('the 1st appellant') and Miss Doreen Harrison ('the 2nd appellant') were passengers in one of the motor vehicles, a Toyota Corolla motor vehicle that was driven by Mr Ainsworth Boreland. Both appellants and Mr Boreland were injured and Mr Boreland succumbed to his injuries. The second vehicle involved in the accident was driven by Mr Rajiv Knight ('the 2nd respondent') and was owned by Wadmar Construction Limited ('the 1st respondent'). The Administrator General of Jamaica ('the 3rd respondent') was appointed administrator ad litem for Mr Boreland's estate, he having died intestate, for the purposes of the claim.

[4] In their claim, the appellants had alleged that the accident had been caused by the negligence of the 2nd respondent and/or Mr Boreland. The 3rd respondent in its defence and ancillary claim asserted that the accident was caused by the negligence of the 2nd respondent. The 1st and 2nd respondents countered that the collision was caused solely or materially contributed to by the negligence of Mr Boreland.

[5] On 5 July 2015, E Brown J ('the learned trial judge') gave judgment in favour of the appellants against the 3rd respondent. He, in effect, agreed with one of their assertions that the accident was caused by the negligence of Mr Boreland. It was noted from the transcript of the trial that the 3rd respondent did not participate in it.

[6] On appeal to this court, we concluded that there was no basis upon which to interfere with any of the learned trial judge's findings of fact and it had not been demonstrated that the learned trial judge misunderstood or misapplied the law relevant to his determination of liability. However, recognising that we had not heard from the

parties on the issue of costs, an order was made affording the parties an opportunity to make written submissions on the issue.

[7] On 5 July 2021, we, therefore, made the following orders:

> "1. The appeal and counter-notice of appeal against the decision of E Brown J delivered on 2 July 2015 are dismissed.
>
> 2. The parties are to make submissions on the costs of the appeal and the counter-notice of the appeal within 21 days of the date of this order."

[8] In keeping with the directions on order no 2, submissions were filed by the respondents on 26 July 2021. To date, we have received none on behalf of the appellants.

Submissions on behalf of the 1st and 2nd respondents

[9] The 1st and 2nd respondents commenced their submissions relative to the award of costs, by referring to the provisions of rule 1.18(1) of the Court of Appeal which state that the provisions of Parts 64 and 65 of the Civil Procedure Rules (CPR) apply to the award and quantification of costs of an appeal subject to any necessary modifications. Counsel noted rule 64.6(1) of the CPR, which provides that if the court decides to make an order about costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party. Nevertheless, she contended that, having regard to the nature and the outcome of this matter, there was no dispute as to who is the successful party, and there was no behaviour that would lead the court to vary from the general rule. Reference was made to **Bardi Limited v McDonald Millingen** [2021] JMCA Civ 25 and **VRL Operations Limited v National Water Commission and Others** [2014] JMSC Civ 84.

[10] We were invited to consider Part 64.6(3) of the CPR, which provides that, in arriving at its decision as to who pay costs, this court must have regard to all the circumstances. It was noted that rule 64.6(4) provides guidance as to the relevant circumstances, which could be considered, and it was contended that rules 64.6(b), (d)

and (e) were of particular significance. It was urged that no aspect of the appeal or the counter-notice of appeal was upheld by this court, and, further, the reasonableness of the appellants and the 3rd respondent appealing findings of fact, given the position of appellate courts, should be considered.

[11] It was further pointed out that rule 64.6(5)(b) of the CPR empowers the court to make a summary assessment of what is fair and reasonable, although it was recognised that the court, generally, preferred for the quantification of costs to be treated with at taxation before the Registrar (pursuant to rule 65.7(1)(b) of the CPR).

[12] It was ultimately submitted that the court ought to:

> "a) exercise its discretion and order a special [costs] certificate for three counsel for the hearing of the Appeal to the 1st and 2nd Respondents;
>
> b) exercise its discretion and summarily award costs; and
>
> c) award costs to the 1st and 2nd Respondents in the sum of $3,500,000.00 to be paid by the 1st and 2nd Appellant and the 3rd Respondent."

Submissions on behalf of the 3rd respondent

[13] The 3rd respondent commenced the submissions by identifying, as an issue for the court, whether the interests of justice would be served by an award of costs against them. The relevant provisions of the CPR, as well as section 28E (1) of the Judicature (Supreme Court) Act, were referred to, and the observations of Morrison P in **Branch Developments Limited t/a Iberostar v Industrial Disputes Tribunal and the University and Allied Workers' Union** [2016] JMCA Civ26, at para. [5], was also relied on.

[14] It was submitted that the pertinent issue to be determined was what special circumstances or otherwise exist to allow a deviation from the general rule. The court was asked to consider rule 64.6(4)(d) of the CPR, namely, whether it was reasonable for a party to pursue a particular allegation and/or raise a particular issue.

[15] It was the contention of the 3rd respondent that the administrator ad litem had an obligation, by virtue of the appointment, to represent the estate, and it was recognised that it was reasonable that the deceased be added as a defendant since he was involved in the collision, which, unfortunately, took his life. However, it was submitted that the court still had to consider the injustice to the 3rd respondent should it be made liable for costs. The case of **Michael Irvine v Commissioner of Police for the Metropolis and Others** [2005] EWCA Civ 129 was referred to as being demonstrative of this principle.

[16] It was indicated that the 3rd respondent had not identified and did not hold any estate or property on behalf of the deceased and had no knowledge or information in this regard.

[17] Further, it was submitted that this court must have regard to the fact that the 3rd respondent did not initiate proceedings on behalf of the estate but had been appointed to facilitate the continuation of the hearing. The 3rd respondent was joined as a party as it was the appellants' belief, which had been accepted, that the 3rd respondent was the most suitable party to represent Mr Boreland as she had no interest adverse to that of his estate.

[18] It was submitted that although there had initially been affidavit evidence that the 3rd respondent would not incur any personal liability in respect of any potential liability entered against them due to the fact that the vehicle was insured, this position was never guaranteed. However, it was explained that the insurers had subsequently advised that the deceased was an unauthorised driver and the policy did not cover passengers. As such, neither the passengers nor the driver would be afforded indemnity and there are no funds to be obtained from the insurance coverage of the vehicle the deceased was driving. It was opined that the appellants, having been seized with this information, could have discontinued their claim against the estate of the deceased but never did.

[19] It was posited that since the 3rd respondent was not administering the estate of the deceased, was not in possession of any assets, and there had been no reports

concerning their existence, any order of costs made against the 3rd respondent cannot be satisfied. It was ultimately submitted that this matter is one that requires the exercise of the court's discretion, and, in furtherance of the overriding objective, this court was urged to make no order as to costs against the estate, here and in the courts below.

Discussion and analysis

[20] It is well settled that rule 64.6 of the CPR embodies the principle that costs follow the event. It states, in part, that:

> "(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.
>
> …"

[21] Rule 64.6(4) of the CPR then outlines a number of factors that may be taken into account in deciding who should be liable to pay the costs. This includes the conduct of the parties, both before and during the proceedings, the success of a party on particular issues, whether it was reasonable for a party to have pursued a particular allegation or raised a particular issue and the manner in which it did.

[22] This is clearly a matter where the successful party is entitled to have their costs in the appeal paid by the unsuccessful parties. The appellants, in their claim, alleged that either the driver of the motor vehicle in which they were travelling, the deceased, or the driver of the other motor vehicle (the 2nd respondent) or both of them should be found responsible for their injuries. However, the learned trial judge, in giving judgment in the appellants' favour, found that only the deceased was responsible. The appellants sought to challenge that decision and their appeal to this court was dismissed. Therefore, the

appellants (the unsuccessful party), ought to pay the costs, to be agreed or taxed, by the 1st and 2nd respondents (the successful party).

[23] It is true that the Administrator General was in a unique position who, having been named as administrator ad litem for the deceased's estate, had no direct knowledge of the circumstances of the accident. This may well have guided their decision not to participate in the trial. However, the fact that they mounted not only a defence to the appellants' challenge to the decision but mounted its own counter-notice of appeal, meant that the 1st and 2nd respondents were now tasked with responding to two appeals. Having done so successfully, they are clearly entitled to the entire costs for so doing.

[24] The contention of the 3rd respondent that they were unaware of any funds in the estate of the deceased, is not sufficient basis to deviate from the general rule that the 1st and 2nd respondents are entitled to be awarded costs.

[25] In the circumstances, the only matter that detained me was a question of the apportionment of the costs. However, in recognition of the fact that the appellants and the 3rd respondent launched separate challenges to the learned judge's findings of fact, it seems to me that they must all, accordingly, pay the costs arising in equal portions.

[26] Although the 1st and 2nd respondents requested that this court summarily assess the costs to be awarded, if costs cannot be agreed between the parties, the taxation process seems to be more appropriate. I also do not think that the nature of the appeal was such that the request for special costs certificate for three counsel should be granted.

Conclusion

[27] In all the circumstances, I would order that costs, as agreed or taxed, be awarded to the 1st and 2nd respondent to be paid by the 1st and 2nd appellants and the 3rd respondent in equal shares.

FOSTER-PUSEY JA

[28] I too have read the draft judgment of P Williams JA. I agree with her reasoning and conclusion.

F WILLIAMS JA

ORDER

Costs, as agreed or taxed, are awarded to the Wadmar Construction Limited (the 1st respondent) and Rajiv Knight (the 2nd respondent) to be paid in equal shares by Steadly Moulton (the 1st appellant) and Doreen Harrison (the 2nd appellant) and the Administrator General for Jamaica (Representative of the Estate of Ainsworth Boreland, Deceased, Intestate) (the 3rd respondent).