[2023] JMCA Civ 34A

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

SUPREME COURT CIVIL APPEAL NO COA2023CV00009

IN THE MATTER OF THE CONSTITUTION OF JAMAICA

AND

IN THE MATTER OF SPECIAL MINING LEASES PERMITTING BAUXITE MINING IN AREAS WHERE THE CLAIMANTS LIVE AND FARM

AND

IN THE MATTER OF AN APPLICATION FOR CONSTITUTIONAL REDRESS PURSUANT TO SECTION 19 OF THE CONSTITUTION

BETWEEN	**NORANDA JAMAICA BAUXITE PARTNERS**	**1ST APPELLANT**
AND	**NORANDA JAMAICA BAUXITE PARTNERS II**	**2ND APPELLANT**
AND	**NEW DAY ALUMINIUM (JAMAICA) LIMITED**	**3RD APPELLANT**
AND	**VICTORIA GRANT**	**1ST RESPONDENT**
AND	**LINSFORD HAMILTON**	**2ND RESPONDENT**
AND	**CYRIL ANDERSON**	**3RD RESPONDENT**
AND	**MERLINA ROWE**	**4TH RESPONDENT**

AND	**BEVERLY LEVERMORE**	**5TH RESPONDENT**
AND	**ALTY CURRIE**	**6TH RESPONDENT**
AND	**BOBLET CAMPBELL**	**7TH RESPONDENT**
AND	**LAWFORD FLETCHER**	**8TH RESPONDENT**
AND	**EDLIN WALTON**	**9TH RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**10TH RESPONDENT**

Ransford Braham KC, Glenford Watson and Ms Christina Thompson instructed by Glenford Watson for the 1st and 2nd appellants

Miss Carlene Larmond KC and Ms Giselle Campbell instructed by Patterson Mair Hamilton for the 3rd appellant

B St Michael Hylton KC, Ms Malene Alleyne, Ms Melissa McLeod and Ms Daynia Allen instructed by Hylton Powell for the 1st to 9th respondents

Miss Lisa White instructed by the Director of State Proceedings for the 10th respondent

29 September 2023

Civil Procedure – Costs – Appeal from injunction proceedings in an environmental claim – Whether there should be any departure from the usual principle that costs should follow the event – Civil Procedure Rules, rules 64.6(1) and 64.6(4)

BROOKS P

[1] On 9 June 2023, this court granted, in part, an appeal by Noranda Jamaica Bauxite Partners ('Noranda I'), Noranda Jamaica Bauxite Partners II ('Noranda II') and New Day Aluminium (Jamaica) Limited ('New Day') (together, 'the appellants') and dismissed a counter-notice of appeal by Mrs Victoria Grant, Mr Linsford Hamilton, Mr Cyril Anderson, Ms Merlina Rowe, Ms Beverly Levermore, Mr Alty Currie, Ms Boblet Campbell, Mr Lawford Fletcher, and Mr Edlin Walton ('the 1st to 9th respondents'). The Attorney General of Jamaica was the 10th respondent, but he supported the appeal.

[2] The court was inclined at that time to order that costs of the appeal and the counter-notice of appeal be granted to the appellants to be agreed or taxed. However, it allowed the 1st to 9th respondents, if they were so minded, to file and serve submissions in writing proposing a different order as to costs.

[3] The 1st to 9th respondents have done so, submitting that the appropriate order in the circumstances would be "no order as to costs" for both the appeal and the counter-notice of appeal. They contend that the unique nature of the case, being a claim in support of their constitutional rights in matters to do with the environment, justifies a departure from the usual order that costs should go to the victorious party.

[4] Learned counsel for the 1st to 9th respondents relied on the following cases, which they contended supported the stance of those respondents:

a. **Oshlack v Richmond River Council** [1998] HCA 11;

b. **Sierra Club of Western Canada and Western Canada Wilderness Committee v The Attorney General for British Columbia, John Cuthbert Chief Forester, Tom A. Walker, District Manager of Forests, and Fletcher Challenge Canada Limited** (1991), 83 DLR (4th) 708; 28 ACWS (3d) 845 (B.C.S.C.); [1991] CanLII 233 (BC SC); [1991] BCTC Uned. B11 (SC) ('**Sierra Club**'); and

c. **The Valhalla Wilderness Society v Her Majesty the Queen in Right of the Province of British Columbia as Represented by the Ministry of the Forests, the Ministry of the Environment, Lands and Parks, the Attorney General of British Columbia and Slocan Forest Products Ltd** 4 Admin LR (3d) 120 — 26 CELR (NS) (2d) 147; 1997 CanLII 2099 (BC SC) ('**Valhalla**').

[5] The appellants have resisted the stance of the 1st to 9th respondents. They argue that there should be no departure from the usual order that should be made at the

completion of any contested appeal. They contend that they were obliged to appeal the decision of the judge in the court below and incurred costs to do so. Learned counsel representing them sought to distinguish the cases that the 1st to 9th respondents cited.

Analysis

[6] Rule 1.18(1) of the Court of Appeal Rules ('CAR') incorporates the provisions of Parts 64 and 65 of the Civil Procedure Rules ('CPR') into the CAR. Both the appellants and the respondents accept the existence of the general principles governing costs, which is that the court "must order the unsuccessful party to pay the costs of the successful party" (rule 64.6(1) of the CPR). Rule 64.6(4) of the CPR gives guidance as to the elements that the court should take into account in considering all the circumstances of the case, in order to decide the issue of costs. Rule 64.6(4) states:

> "(4) In particular [the court] must have regard to -
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> (a) the conduct of the parties both before and during the proceedings;
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> (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.)"

[7] It is accepted that that guide does not preclude the court from considering other factors, such as whether any of the parties were acting on purely altruistic motives.

[8] In **Oshlack v Richmond River Council**, the High Court of Australia, by a majority, upheld the first instance judge's decision to make no order for the costs of the litigation. The judge at first instance (a judge of the Environment Court of New South Wales) did so because, in his view, the proceedings were motivated by a desire to preserve the habitat of certain endangered fauna, particularly koalas, rather than by personal motive and that the case raised significant issues as to the interpretation of the relevant statute. The New South Wales Court of Appeal disagreed with the judge at first instance, and there was an appeal to the High Court of Australia. Gaudron and Gummow JJ, two of the judges of the High Court of Australia, who formed part of the majority (and wrote a joint judgment), made that fact clear at para. 13 of their judgment:

> "The difference of opinion, as to the carriage of costs, between the primary judge and the Court of Appeal turned to a significant degree upon the construction placed upon and significance attached to certain provisions of the EPA Act [Environmental Planning and Assessment Act 1979 (NSW)] and the Court Act [Land and Environment Court Act 1979 (NSW)]. To these we now turn. We have indicated that the appellant founded his application to the Court upon s 123 of the EPA Act. Sub-sections (1), (2) and (3) thereof state:
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> '(1) Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or

may be infringed by or as a consequence of that breach.

(2) Proceedings under this section may be brought by a person on his own behalf or on behalf of himself and on behalf of other persons (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.

(3) Any person on whose behalf proceedings are brought is entitled to contribute to or provide for the payment of the legal costs and expenses incurred by the person bringing the proceedings.'"

[9] Gaudron and Gummow JJ followed up on that concept in para. 31 of their judgment by identifying that the issue before them turned on the scope and purpose of section 69 of the Land and Environment Court Act 1979 of New South Wales ('the Court Act').

[10] In addition, their Honours said, in para. 18, that the first instance judge, with whom they agreed, in determining that there should be no order as to costs, was "exercising the powers conferred on the Court by paras. (a) and (b) of s 69(2) of the Court Act". Their Honours, in para. 19, identified the relevant provision, as it then stood:

> "19. Section 69(2) of the Court Act stated:
>
> 'Subject to the rules and subject to any other Act:
>
> (a) costs are in the discretion of the Court;
>
> (b) the Court may determine by whom and to what extent costs are to be paid; and
>
> (c) the Court may order costs to be taxed or otherwise ascertained on a party and party basis or on any other basis.'"

Although the import of those provisions is recognisable as being within the normal culture of this jurisdiction, with regard to costs, it is noteworthy that the principle that costs should normally go to the victor, or, "follow the event", is absent from the Court Act.

Gaudron and Gummow JJ were alert to the latter principle as it was set out in **Milne v Attorney-General for the State of Tasmania** (1956) 95 CLR 460 at 477 but made it plain that the judge at first instance was exercising the discretion conferred by section 69(2) of the Court Act, which conferred a jurisdiction of a "specialised nature" (para. 32).

[11] Kirby J was the other judge forming the majority for the decision in **Oshlack v Richmond River Council**. The learned judge also stressed the importance of the legislation in arriving at his decision. He said, in part, in para. 117:

> "When this background of special, and in some ways peculiar, legislation is recognised, it will be appreciated that the provision in the *Land and Environment Court Act* as to costs appears in a statutory context **which alters, to some extent, the assumptions upon which civil litigation in this country has hitherto, ordinarily, taken place**. Instead of a purely adversarial contest between two parties having individual, and typically financial, interests to advance, Parliament has envisaged that, in some cases at least, the contestants will be ranged as they were in these proceedings…" (Italics as in original, emphasis supplied)

[12] His Honour, in explaining the statutory context in which costs should be considered in the Court Act, pointed out that the Parliament of that country encouraged public interest litigation and that a rigid application of a "costs to follow the event" principle would be inconsistent with that approach. He said, in part, at para. 134:

> "6. Given that statutory context and the clear purpose of Parliament to permit, and even encourage, individuals and groups to exercise functions in the enforcement of environmental law before the Land and Environment Court, a rigid application of the compensatory principle in costs orders would be completely impermissible…."

[13] Apart from the difference in the legislation, Gaudron and Gummow JJ ruled in favour of re-instating the first instance judge's costs order on the bases that:

a. the successful party was a government entity, which in the circumstances should not "assume the position of a protagonist" (para. 46);

b. the relevant provisions of the EPA did not vary the ordinary costs rule;

c. where the litigation is not for the benefit of particular individuals, but for the benefit of the public, or a section of the public, the court has a discretion to leave the costs to lie where they fall; and

d. the first instance judge was of the view that that litigation was for the benefit of the public or at least a section of the public living in a particular area.

[14] Based on the heavy reliance on the statutory framework of New South Wales in arriving at that decision, it may be said that **Oshlack v Richmond River Council** does not assist the 1st to 9th respondents' submissions.

[15] In **Sierra Club**, cited above, two organisations sued the Attorney General for British Columbia and the Chief Forester and others seeking to prevent the extension of a logging permit. The judge who heard the matter in chambers refused the petition but ordered that each party should bear its own costs.

[16] The learned judge's reasoning was that despite the fact that there was established case law that rendered untenable, the major point advanced by the petitioners:

a. there were other issues which had to be considered; and

b. there was significant public interest involved.

These factors, he stated, made it inappropriate to penalise the petitioners in costs. He said, in concluding his judgment:

> "Disputes involving environmental issues, such as this one, are all too liable to provoke confrontations outside of the law. In my opinion it would not be conducive to the proper and legal

> resolution of this case which is one of significant public interest, to penalize the Petitioners who have acted responsibly by attempting to resolve the issues according to law, through awarding costs against them."

[17] Paris J in **Valhalla,** at para. [11], stated that the decision to use the processes of the court is a "legitimate consideration, although it would not, of course, be sufficient by itself to grant the petitioner the relief asked". The ruling that a party should not be condemned in costs because it chose to use the processes of the court is, of course, not generally applicable, but was made in the context of the litigation being "public interest litigation".

[18] The difference between **Sierra Club** and this case is that, in this case, the 1st to 9th respondents were not conducting public interest litigation but claiming in their private capacities, including therein a claim for their personal financial gain.

[19] Finally, the 1st to 9th respondents relied on **Valhalla**, which also involved a challenge to the grant of a forest licence, cutting permit and road permit, issued to a private entity. The learned judge, who heard the case at first instance, ruled that each party should bear its own costs. His decision turned on:

a. the fact that the argument concerning the watershed reserves raised serious legal issues and issues of "unquestionable public interest" and those issues affected the water supply of two communities (para. 8);
b. the petitioners were a public advocacy group;
c. the proceedings were by way of petition and arguments on affidavits and did not require extensive pre-hearing proceedings or oral evidence; and
d. the petitioners acted responsibly in utilising the court's processes.

[20] Again, the distinction may be drawn that in the present case, the 1st to 9th respondents are not a public advocacy group, although they did assert that their claim would benefit their community.

[21] There is another Canadian case that is helpful. In **Sierra Club of Western Canada v Chief Forester, Appeal Board and others** (1994) 117 DLR (4th) 395; 94 BCLR (2d) 331; 1994 CanLII 6510(BC SC) ('**Sierra Club v Chief Forester**'), Smith J traversed a number of cases in his consideration of the appropriate order for costs. In that case, a non-profit society failed in its petition to secure judicial review of a decision of the chief forester concerning the harvesting of timber. The private entity that was affected by the litigation claimed costs against the society. Counsel for the society, in submitting that each party should bear its own costs, stressed the novelty of the issues in the case.

[22] After considering the previously decided public interest cases, Smith J could find no consistent principle and opined that the cases seemed to each turn on their respective facts. He did opine, however, at page 8 of his judgment, that the novelty of a case and its public benefit were not, even together, conclusive:

> "Accordingly, I accept that the novelty of the issue raised and the public benefit accruing from the decision are relevant factors to be considered in exercising my discretion, but not to the exclusion of other relevant factors. I do not accept that there is any rule that no costs should be awarded when the issue raised is novel and there is a public benefit from a decision on the point."

[23] In concluding his review of a wider range of cases, Smith J stated on pages 16 - 17 that there was no principle allowing for people who institute public interest litigation to be insulated from costs. He said:

> "I do not think it would be wise to establish a principle that any person bringing a proceeding out of a bona fide concern to vindicate his or her perception of the public interest should be insulated from an award of costs in all cases. Such a motive will always be a relevant and important factor, but it should

not be considered to the exclusion of all other relevant and important factors. The court must retain the flexibility to do justice in each case.

In my view, the authorities cited do not set out any rule which must guide the exercise of my discretion. Rather, they set out examples of relevant factors to be taken into account and illustrate that the factors emphasized by [counsel for the society] will be given more or less weight depending on their relationship to other pertinent considerations. In the result, whether to depart from the ordinary rule that costs follow the event is a matter within my discretion. The exercise of that discretion must be informed by proper principles, but it is none the less a decision to be made with regard to the particular facts before me."

[24] Smith J accepted that the society was "a responsible public interest organization" that brought the application in good faith in what it thought to be in the public interest. He balanced against that consideration the fact that the private entity affected by the litigation:

a. was entitled to go about its business within the law;

b. had based its plans on the interpretation of the legislation accepted and applied for many years by the relevant government ministry;

c. was obliged to defend the claim;

d. would have been dramatically financially affected by a decision in favour of the society;

e. was not in and default; and

f. did not seek to act in the public interest or to have clarification of the law.

[25] His final paragraphs are helpful in resolving the issue in this case:

"So far as other potential public interest litigators are concerned, this decision establishes no rule of general application. It is not every public interest lawsuit which will engage and threaten private interests, and in those which do

> the court has a broad and unfettered discretion to make an award of costs which will achieve a just result in the particular circumstances presented.
>
> Costs are intended to be a partial indemnity to a successful litigant for the actual legal expenses incurred. They cannot confer a profit or windfall and they do not provide a full indemnity. It has long been a policy of our law that a successful litigant should be partially compensated for the expense to which it has been put by the unsuccessful litigant.
>
> I am not persuaded that in the circumstances of this case I should depart from the ordinary rule that costs follow the event. Accordingly, [the private entity] will have its costs of the proceeding against the petitioner. Application granted."

Conclusion

[26] Based on the reasoning of Smith J, in **Sierra Club v Chief Forester**, set out above, and the distinction between this case and the cases cited by learned counsel for the 1st to 9th respondents, it must be said that there is no basis for departing from the general rule that the court "must order the unsuccessful party to pay the costs of the successful party" (rule 64.6(1) of the CPR), and the court should so order.

V HARRIS JA

[27] I have read the judgment, in draft, of my learned brother Brooks P. I agree with his reasoning and conclusion and have nothing to add.

DUNBAR-GREEN JA

[28] I, too, have read the draft judgment of my learned brother Brooks P and agree with his reasoning and conclusion.

BROOKS P

ORDER

Costs of the appeal and the counter-notice of appeal to the appellants to be agreed or taxed.