

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 88/2015

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA**

BETWEEN	ASPINAL WAYNE NUNES	APPELLANT
AND	JAMAICA REDEVELOPMENT FOUNDATION, INC.	RESPONDENT

Written submissions dated 8 July 2019 filed by Seyon T Hanson & Co for the appellant

Written submissions dated 10 July 2019 filed by Myers, Fletcher & Gordon for the respondent

29 November 2019

MORRISON P

[1] In the court below, the appellant applied for an interim injunction to restrain the respondent, as mortgagee, from exercising its power of sale over his residential property situated in Beverley Hills, in the parish of Saint Andrew. By his order made on 31 July 2015, Laing J refused the application, with costs to the respondent to be agreed or taxed.

[2] The appellant appealed against this decision. He contended for an unconditional interim injunction restraining the respondent from (i) taking any steps whatsoever to sell the property; and (ii) entering upon the property, pending the determination of the action in this matter. The respondent also filed a counter-notice of appeal, by which it sought to support Laing J's decision on grounds other than those relied on by him. These were that (i) there were no serious issues to be tried; and (ii) the refusal of the injunction was in any event the course likely to cause the least irremediable prejudice to one party or the other.

[3] This court delivered judgment on 21 June 2019¹. The order of the court was as follows:

1. Appeal allowed and the order made by Laing J on 31 July is set aside.
2. Counter-notice of appeal dismissed.
3. Upon condition that the appellant pay US\$100,000.00 into court within 60 days of the date of this judgment, interim injunction granted to restrain the respondent, by itself or its servants, employees, agents, or otherwise howsoever from - (i) taking any steps whatsoever to sell all those parcels of land registered at Volume 1482 Folio 188 and Volume 1480 Folio 858 of the Register Book of Titles ('the relevant parcels of land') pending the determination of Claim No 2015 CD 00059; and (ii) entering upon the relevant parcels of land or taking any steps to dispossess the appellant of the relevant parcels of land pending the determination of Claim No 2015 CD 00059.

¹ [2019] JMCA Civ 20

4. Costs in the court below to be costs in the claim.
5. The parties are to file written submissions on the costs of the appeal within 21 days of the date of this order, whereupon the court will give its decision on the costs of the appeal within a further 21 days of the date of filing of the last of the parties' submissions."

[4] The appeal was therefore largely successful, in that the appeal was allowed, the cross-appeal was dismissed and the appellant was granted the injunctive relief which he sought. However, at variance with the actual terms of his application for an interim injunction, the court made the order conditional on the appellant paying the sum of US\$100,000.00 into court within 60 days of the date of the judgment.

[5] Pursuant to the court's order as to the determination of the costs of the appeal, written submissions were received from the appellant's attorneys-at-law on 5 July 2019, and from the respondent's attorneys-at-law on 10 July 2019.

[6] The appellant submits that "[t]here is no doubt that the appeal was a very real victory for the appellant". In these circumstances, the general rule in civil proceedings, which is that costs should ordinarily follow the event², should apply and the appellant should therefore have his costs of the appeal. The court should only depart from the usual rule if there was some evidence, of which there is none in this case, that the

² Civil Procedure Rules, 2002, rule 64.6(1)

appellant had acted unreasonably or inappropriately in conducting the appeal³. In this case, there are no good reasons or exceptional circumstances to displace the general rule and the fact that the appellant may have failed on any particular issue argued in the appeal should not automatically lead to a reduction in the costs to which he is entitled⁴.

[7] The respondent submits that this is a case in which the general rule that costs should go to the successful party should give way to the other general rule applicable to the award of costs following the grant of an interlocutory injunction. In such cases, the usual order is that costs should be costs in the claim and this is the order which the court should make in this case. The basis for this submission is that, should it ultimately turn out that the conditional interlocutory injunction which this court granted to the appellant was wrongly granted, it would be unfair to saddle the respondent, as the party restrained, with the costs of having that restraint imposed on it.

[8] The respondent obviously makes a fair point. And the approach for which it contends is in conformance with the usual practice of the court on the grant of an interim injunction. But, on the other hand, the need for an appeal would not have arisen at all had the judge granted the injunction in the court below. From this point of

³ **Branch Developments Ltd t/a Iberostar v Industrial Disputes Tribunal et al** [2016] JMCA Civ 26, paras [11]-[14]; **Roald Nigel Henriques v Hon Shirley Tyndall, OJ et al** [2015] JMCA Civ 34, paras [24]-[25] and [31] –[32]

⁴ **HLB Kidsons (a firm) v Lloyds Underwriters et al** [2007] EWHC 2699 (Comm), per Gloster J DBE paras [10]-[11]

view, an order that the respondent should pay the appellant's costs of the appeal might well seem to be a fair result.

[9] These considerations are, in my view, finely balanced. However, it is relevant to bear in mind that an appeal, although obviously connected, is a separate proceeding from the action in the court below. By its order made in the substantive appeal, this court has already set aside the judge's order for costs in favour of the respondent in the court below and substituted an order that those costs should be costs in the claim. But the respondent vigorously resisted the appellant's contention for an interim injunction in this court, both by way of its opposition to the appeal and its own unsuccessful cross-appeal. In these circumstances, I think that it is right that the appellant as the substantially successful party overall should have at least a measure of his costs.

[10] However, it is also relevant to recall that what the appellant sought from this court was an unconditional restraint against the respondent exercising its power of sale pending the trial of the action in this matter. So, to the extent that in the result this court granted the injunction on condition that the appellant pay into court the sum of US\$100,000.00, the appellant's success on the appeal was only partial.

[11] Rule 64.6(3) of the CPR provides that, "[i]n deciding who should be liable to pay costs the court must have regard to all the circumstances". Accordingly, pursuant to rule 64.6(4)(b), which provides that, among other things, the court must have regard to "whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings"; and rule.64.(5)(a), which empowers the

court to make an order that one party must pay a proportion of another party's costs, I would order that the respondent should pay (i) 75% of the appellant's costs of the appeal; and (ii) 100% of the appellant's costs of the cross-appeal. These costs are to be taxed if not sooner agreed between the parties.

F WILLIAMS JA

[12] I have read in draft the judgment on costs of the learned President. I agree with his reasoning and conclusion. There is nothing I wish to add.

P WILLIAMS JA

[13] I too have read in draft the learned President's judgment on costs. I agree with his reasoning and conclusion and have nothing to add.

MORRISON P

ORDER

75% costs of the appeal and 100% costs of the cross-appeal to the appellant, to be taxed if not sooner agreed between the parties.