[2015] JMCA Civ 5

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 127/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**RECREATIONAL HOLDINGS (JAMAICA) LIMITED**	**APPELLANT**
AND	**CARL LAZARUS**	**1ST RESPONDENT**
AND	**THE REGISTRAR OF TITLES**	**2ND RESPONDENT**

Written submissions received from:

Michael Hylton QC and Miss Shanique Scott instructed by Hylton Powell for the appellant

Allan Wood QC and Miguel Williams instructed by Livingston, Alexander & Levy for the 1st respondent

Miss Alicia McIntosh instructed by the Director of State Proceedings for the 2nd respondent

27 January 2015

PANTON P

[1] I have read the draft judgment of Morrison JA and agree with his reasoning and conclusion. I have nothing to add.

MORRISON JA

[2] On 31 July 2014, the court gave the following decision in this appeal:

> "1. The appeal is allowed in part. The declaration granted by the learned trial judge that the respondent has been in open and undisturbed possession of the lands registered at Volume 1204 Folio 806 of the Register Book of Titles in excess of 12 years and that the appellant's title to such lands has been extinguished pursuant to section 30 of the Limitation of Actions Act (see para. 1(ii) of the Formal Order filed on 20 September 2012) is set aside.
>
> 2. Save as above, the appeal is dismissed and the judgment of Anderson J and the orders made by him on 19 September 2012 are affirmed."

[3] At the conclusion of the reasons for judgment delivered on 30 September 2014, the court invited written submissions from the parties on the question of costs. In response to this invitation, written submissions were received from the appellant (on 15 October 2014), the 1st respondent (on 6 October 2014) and the 2nd respondent (on 24 October 2014).

[4] The appellant referred the court to rules 1.18(1) of the Court of Appeal Rules 2002 ('the CAR') and 64.6(1) and (3) of the Civil Procedure Rules 2002 ('the CPR'). Rule 1.18(1) of the CAR provides that "[t]he provisions of CPR Parts 64 and 65 apply to the award and quantification of costs of an appeal…"; rule 64.6(1) of the CPR provides that, if the court decides to make an order for costs

in any proceedings, "the general rule is that it must order the unsuccessful party to pay the costs of the successful party"; and rule 64.6(3) provides that, in deciding who should pay the costs of any proceedings, "the court must have regard to all the circumstances". Rule 64.6(4)(b) identifies one such circumstance as being "whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings".

[5] In this case, the appellant accepts that, although the appeal was allowed in part and one of the declarations granted by the trial judge was set aside, the 1st respondent in fact succeeded on "the more substantial issues and that costs should be awarded in his favour". However, the appellant contends, having regard to all the circumstances, including the fact that an appeal was necessary to correct the judge's error in one respect, the appropriate order for costs in this matter would be to award the 1st respondent 75% of his costs only. In this regard, the appellant prays in aid the decision of this court in **Capital & Credit Merchant Bank Ltd v Real Estate Board** [2013] JMCA Civ 48, in which, in a case of partial success on appeal, costs were awarded on a proportionate basis. As regards the 2nd respondent, who took no active part in the appeal, the appellant submits that there should be no order as to costs.

[6] The 1st respondent points out that the majority of the grounds of appeal were in fact dismissed by the court and that the only ground upon which the appellant succeeded, which was in respect of an order amounting to a "slip" by the judge, was not contested. In these circumstances, the 1st respondent

submits, given that he was successful on the two substantial issues which occupied most of the court's time in hearing the appeal, the general rule that costs follow the event should apply.

[7] The 2nd respondent is content to submit that, given that (i) there were no issues joined on appeal between the Registrar of Titles and the other parties to the appeal; and (ii) she took no part in the appeal, no order as to costs should be made either for or against her.

[8] The "slip" to which the appellant refers in it submissions relates to an order made by the learned judge in respect of a parcel of land registered at Volume 1204 Folio 806 of the Register Book of Titles (and described in the appeal as "the second Lazarus property"). In my judgment in the substantive appeal, with which the learned President and Phillips JA agreed, the circumstances were described in this way (at para [5]):

> "[5] The second Lazarus property is registered at Volume 1204 Folio 806 of the Register Book of Titles. While orders were originally sought from the court in the proceedings below in relation to this property, its status was resolved by the parties by agreement after the commencement of the litigation. So nothing turned on it at the end of the day. The parties are therefore agreed that the learned trial judge's order in respect of this property was erroneously made and must be set aside, whatever the outcome of the appeal. Save at the end of this judgment, therefore, nothing further needs be said about the second Lazarus property."

[9] Against this background, the 1st respondent is therefore obviously correct in saying that the issue of the second Lazarus property was not in contest between the parties and played no part in the hearing of the appeal. It is therefore also true to say that the 1st respondent was, in essence, the successful party on appeal. So the only question is whether there is anything in the circumstances of the case, in particular the fact that, as the appellant contends, an appeal was necessary to cure the judge's error in making an order relating to the second Lazarus property, to disentitle the 1st respondent to any part of his costs of the appeal.

[10] I accept that, as the appellant submits, the judge's error necessitated the inclusion in its grounds of appeal of a ground seeking to correct it. I also accept that, as CPR rule 64.6(4)(b) provides, the court is required to have regard to the appellant's success on the issue of the second Lazarus property, even though it did not prevail on the other issues in the appeal. But, given that the true position in respect of the second Lazarus property was well known to the parties from the outset, I tend to doubt that this issue can have consumed too much of the appellant's legal advisers' time in the preparation of the appeal. I accordingly consider that the appellant's proposal of a 25% reduction in the costs payable to the 1st respondent reflects too severe a discount on the facts of this case. In all the circumstances, it therefore seems to me that a reduction of 10% in the costs payable to the 1st respondent by the appellant will suffice to do justice to both parties in this case.

[11] I would therefore order that the appellant should pay 90% of the 1st respondent's costs of the appeal, such costs to be taxed if not sooner agreed. In the light of the outcome of the appeal, the judge's order for costs of the trial in the 1st respondent's favour remains undisturbed. No order for costs, either for or against, should be made in relation to the 2nd respondent.

PHILLIPS JA

[12] I agree.

PANTON P

ORDER

1. The appellant is to pay 90% of the 1st respondent's costs of the appeal, to be taxed if not agreed.

2. There will be no order as to costs in relation to the 2nd respondent.