**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO COA2022CV00030**

**APPLICATION NO COA2022APP00048**

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| **BETWEEN** | **WEST INDIES PETROLEUM LIMITED** | **APPLICANT** |
| **AND** | **SCANBOX LIMITED** | **1ST RESPONDENT** |
| **AND** | **WINSTON HENRY** | **2ND RESPONDENT** |
| **AND** | **COURTNEY WILKINSON** | **3RD RESPONDENT** |
| **AND** | **JOHN LEVY** | **4TH RESPONDENT** |

**Written submissions received on behalf of the applicant from Henlin Gibson Henlin, attorneys-at-law**

**Written submissions received on behalf of the 1st and 2nd respondents from Nea Lex, attorneys-at-law**

**Written submissions received on behalf of the 3rd and 4th respondents from Mayhew Law, attorneys-at-law**

**14 November 2022**

**(Ruling on Costs)**

**IN CHAMBERS**

**F WILLIAMS JA**

**Background**

[1] On 27 July 2022, I made the following orders:

> "1. The orders sought in the applicant's notice of application for preservation orders pending appeal filed 4 March 2022 are refused.
>
> 2. The parties are to file submissions in relation to the costs of the application within seven days of receipt of the written judgment."

[2] The second order was made consequent on the request by counsel for the 1st and 2nd respondents, Mr Neale, that a special costs certificate be issued, allowing the respondents the costs for two counsel and further requesting an order for immediate taxation. Otherwise, it was my intention to simply award costs to the respondents, as the successful parties, to be agreed or taxed. The parties, having complied with order number two regarding the filing of written submissions, I now provide my ruling on costs and my reasons therefor.

[3] As already intimated, this ruling on costs arises from my refusal of an application by West Indies Petroleum Limited, the applicant, for preservation orders pending appeal, against the respondents, in respect of data or information said to be in the possession of the respondents. This data or information was sought to be preserved in order to assist in proving allegations of a data breach by the respondents, on the applicant's servers. Similar orders were sought in the Supreme Court and were refused, thereby giving rise to the applicant's appeal. The full details relating to the application for preservation orders pending appeal and my reasons for refusing the said orders are set out in **West Indies Petroleum Limited v Scanbox and others** [2022] JMCA App 28, and will accordingly not be rehearsed in this ruling.

**Submissions**

[4] On behalf of the applicant, it was urged in the first instance that there should be no order as to costs, given the fact that the application for preservation orders was an application for interim relief and the substantive appeal remains to be determined by the court. It was also argued that, if the court is minded to award costs, it must be considered that the applicant acted reasonably in pursuing the application, in all the circumstances. As such, as an alternative, an appropriate order would be that costs shall be costs in the appeal. The case of **Straker v Tudor Rose (a firm)** [2007] EWCA Civ 368 was cited as offering useful guidance and on the basis of that authority, the applicant's counsel argued that there was a good basis for departure from the general rule that the successful party

should be awarded costs, as the substantive appeal remains before the court and the applicant has a reasonable prospect of success on appeal.

[5] Counsel further stated that, if the court is minded to award costs to the respondents, there should not be immediate taxation but rather, that taxation should await the conclusion of the appeal.

[6] Counsel for the 1st and 2nd respondents, in their written submissions, highlighted the general rule in relation to costs, that is, that the unsuccessful party should pay the costs of the successful party. On the basis of the general rule, the respondents as the successful parties, are entitled to the costs of the application. Counsel went further to assert that, the applicant, having failed to obtain the orders sought in the court below, acted unreasonably in pursuing the application. This unreasonableness was compounded by the fact that the information sought to be preserved was already in its possession and, in any event, the orders sought were wide and disproportionate. This unreasonableness, it was submitted, was contrasted with the conduct of the 1st and 2nd respondents which, counsel maintained, could not be described as unreasonable, given their posture of opposition to the application from the Supreme Court level. Reliance was placed on the case of **Winston Finzi and another v JMMB Merchant Bank Limited** [2015] JMCA App 39.

[7] Regarding the issuance of a special costs certificate, counsel adverted to the relevant rule, (rule 64.12 of the Civil Procedure Rules ('CPR')) and indicated that all the considerations set out in that rule have been satisfied in respect of the 1st and 2nd respondents. Reference was also made to rule 65.17(3), in relation to which it was submitted that most, if not all, the criteria were satisfied. Accordingly, costs should be allowed for two counsel.

[8] In addition, counsel submitted that this is a case warranting an order for immediate taxation of costs, as provided for in rule 65.15 of the CPR. In seeking to justify the position that costs should not await the completion of the appeal, counsel set out the factors

which are said to satisfy the criterion that "special circumstances" exist. It was argued in particular, that the costs to date in the matter are not insignificant, given the comprehensive preparation that was required for the hearings. Additionally, there is the fact that the applicant is a company with means and the fact that the parties are embroiled in litigation both in this court and the Supreme Court. As such, it is unreasonable that the respondents should await the determination of the appeal to be able to recoup costs. Also in supporting their contention for immediate taxation of costs, counsel repeated that the applicant was unreasonable in pursuing the application and added that this was especially so in light of the fact that it was officers of the applicant that caused the police to seize the respondents' devices and further in light of the fact that they sought, by this application, to have the substantive issue on appeal determined by a sidewind. Reliance was placed on the cases of **Pan Caribbean Financial Services Limited v Robert Cartade and others** [2011] JMCA Civ 2 and **Raziel Ofer v George Thomas and others** [2012] JMSC Civ 184.

[9] On behalf of the 3rd and 4th respondents, Courtney Wilkinson and John Levy, similar requests were also made for immediate taxation of costs and for a special costs certificate allowing for two counsel. The bases for these requests were also similar, with counsel highlighting the contention that the requirements for the grant of a special costs certificate were satisfied and further that special circumstances exist that justify immediate taxation. However, the 3rd and 4th respondents went further to also request that an order be made for costs to be payable by the applicant on an indemnity basis. In this regard, counsel referenced the requirements of rules 65.17(1) and (3) of the CPR as a basis for contending that the amount of costs to be allowed must be what the court deems reasonable. As such, in determining what constitutes reasonableness, the court has a discretion to award costs on an indemnity basis. The cases of **RBTT Bank Limited v YP Seaton** [2014] JMSC Civ 139 and **Port Kaiser Oil Terminal SA v Rusal Alpart Jamaica (A partnership)** [2016] JMCC Comm 10, were commended as being instructive. Counsel pointed to what they essentially characterized as unreasonable conduct by the applicant that merited an award of costs on a full indemnity basis. In

summary, counsel asserted that costs should be awarded on an indemnity basis as the applicant sought to have an issue, that is to be determined on the substantive appeal, determined by way of sidewind, and in circumstances where it was aware that the devices of the 1st to 3rd respondents had been seized by the police. Of greater relevance, counsel submitted that the applicant, in pursuing its application, put the respondents to great expense to oppose the application, in what has already been expensive and continuous litigation between the parties. Counsel characterized the application as being "unnecessary" and stated that it was intended to bring commercial pressure upon the 3rd and 4th respondents in order to "bring them to their knees in the underlying contentious disputes". Essentially it was submitted that the applicant acted in a highly unreasonable manner and as such costs on an indemnity would properly compensate the respondents. Such an order would also serve to discourage highly unreasonable behaviour.

**Discussion and analysis**

[10] The overarching principle in relation to an award of costs in civil proceedings, in this court, as adumbrated in section 30(3) of the Judicature (Appellate Jurisdiction) Act, is that an award of costs lies within the discretion of the court. The more specific principles that guide this court are captured by rule 1.18(1) of the Court of Appeal Rules ('CAR') which provides expressly that, "CPR Parts 64 and 65 apply to the award and quantification of costs of an appeal subject to any necessary modifications …". Rule 1.18(4) identifies specific rules within part 65 as well as appendices A and B, as being inapplicable to the Court of Appeal. However, those latter rules are not relevant for the determination of the issue of the award of costs in this matter.

[11] Part 64.3 of the CPR provides:

> "The court's power to make orders about costs include power to make orders requiring any person to pay the costs of another person **arising out of or related to all or any part of any proceedings**." (Emphasis added)

This rule demonstrates patently that this court is empowered to determine the issue of costs arising from the application that was heard, being an application arising out of and related to the substantive appeal.

[12] As all the parties have acknowledged, rule 64.6(1) sets out the general rule that:

> "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."

[13] Rules 64.6(3) and (4) further indicate that a court, in deciding which party should be liable to pay costs, "must have regard to all the circumstances" including factors such as:

> "64.6(4) (a) the conduct of the parties both before and during 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) the manner in which a party has pursued –
>
> (i) that party's case;
>
> (ii) a particular allegation; or
>
> (iii) a particular issue; …"

[14] With particular reference to procedural applications, rules 65.8(1) and (2) require the court to, "decide which party, if any, should pay the costs of that application", where the application is not made at a case management conference, pre-trial review, or trial. In so doing, the court is empowered to summarily assess costs or "direct when such costs

are to be paid". In respect of procedural applications, the general rule still takes precedence, along with the abovementioned factors set out in rule 64.6(4).

[15] In my view, the applicant has not advanced any compelling submission to militate against an award of costs. Neither has any submission been made that would cause me to make an award that departs from the general rule. This is because, notwithstanding the fact that the application was interim in nature and the substantive appeal remains to be decided, there is some merit in the submission that the applicant acted unreasonably in making this application, having acted with full knowledge that the 1st to 3rd respondents' devices had been seized by the police and also having regard to the information already contained in the reports of Mr Shawn Wenzel. I am also fortified in this view, by my conclusion that the appeal does not have a real chance of success.

[16] On the question of whether a special costs certificate should be issued to both sets of respondents, I am guided by rule 64.12 which provides as follows:

> "64.12 (1) When making an order as to the costs of an application in chambers the court may grant a 'special costs certificate'.
>
> (2) In considering whether to grant a special costs certificate the court must take into account -
>
> (a) whether the application was or was reasonably expected to be contested;
>
> (b) the complexity of the legal issues involved in the application; and
>
> (c) whether the application reasonably required the citation of authorities and skeleton arguments.
>
> (3) The court, having regard to the matters set out in rule 65.17(3), may direct that the costs of the attendance of more than -
>
> (a) one attorney-at-law on the hearing of an application; or

(b) two attorneys-at-law at the trial,

be allowed."

[17] With respect to this application, it cannot be disputed that the application was both reasonably expected to have been and was in fact contested, given the position that had been taken by the respondents on the similar application in the court below. The legal issues involved in the application were, in my view, considerably complex as it chiefly concerned the grant or refusal of preservation orders, which are not commonplace. This warranted the citation of authorities, from which the court benefitted, and the provision of submissions that were more than just skeletal and simple. As it relates to rule 65.17(3), the factors which bear on this case are: (1) the time reasonably spent on the matter; (2) whether the matter is appropriate for a senior attorney-at-law; and (3) the novelty, weight and complexity of the matter. When all these things are considered, it is fair to conclude that this is a matter which merits the grant of a special costs certificate, allowing the costs of two attorneys for both sets of respondents. Notably, two attorneys also appeared on behalf of the applicant.

[18] As it relates to the time that taxation is to be carried out, rule 65.15 stipulates:

> "The general rule is that the costs of any proceedings or any part of the proceedings are not to be taxed until the conclusion of the proceedings **but the court may order them to be taxed immediately**." (Emphasis added)

[19] Notably, the rule does not provide any guidance as to the circumstances that may give rise to an order for immediate taxation, with the result that the court's obligation to apply the overriding objective, to deal with cases justly, would be paramount, in any case in which immediate taxation is sought. In the case of **Pan Caribbean Financial Services Limited v Robert Cartade and others**, Harrison JA stated that, "a court faced with this situation [a request for immediate taxation] ought to consider if special circumstances had existed".

[20] Having considered the circumstances highlighted by counsel for the respondents, it seems to me that an order for immediate taxation is warranted in this case, given the fact that three of the respondents are individuals, whereas the applicant is a company, which, it is reasonable to conclude, has greater financial means. Further, having regard to the fact that the appeal and application have arisen before the trial of the matter in the Supreme Court has even commenced. Therefore, in order to give effect to rule 1.1(2)(a) of the CPR of "ensuring, so far as practicable, that the parties are on an equal footing **and are not prejudiced by their financial position**" (emphasis added), in what is likely expensive litigation, it is my considered view that the respondents should be able to recover the costs of this application, immediately.

[21] On the other hand, I am not satisfied that there has been any action or course of conduct on the part of the applicant that would merit an order that costs should be assessed on an indemnity basis. Accordingly, the following are the orders of the court relating to costs:

1. Costs of the application are awarded to the respondents, to be taxed immediately, if not agreed.

2. The 1st and 2nd respondents and 3rd and 4th respondents, respectively, are granted a special costs certificate allowing for the costs of two counsel, in respect of the application.