[2016] JMCA Civ 26

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 14/2013

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (AG)

BETWEEN	**BRANCH DEVELOPMENTS LIMITED t/a IBEROSTAR**	**APPELLANT**
AND	**INDUSTRIAL DISPUTES TRIBUNAL**	**1ST RESPONDENT**
AND	**THE UNIVERSITY AND ALLIED WORKERS' UNION**	**2ND RESPONDENT**

Dr Lloyd Barnett and Kwame Gordon instructed by Samuda & Johnson for the appellant

Miss Lisa White and Miss Monique Harrison instructed by the Director of State Proceedings for the 1st respondent

Wendell Wilkins instructed by Robertson Smith Ledgister & Co for the 2nd respondent

13 May 2016

MORRISON P

[1] The background to this ruling on costs may be briefly stated. In proceedings before the Supreme Court for judicial review, the appellant applied for, among other things, an order of certiorari to quash in its entirety an award given by the first

respondent in favour of certain workers represented by the second respondent. In a judgment given on 18 January 2013[1], Batts J dismissed the application, with costs to the respondents.

[2] The appellant appealed against this decision and, in a judgment given on 21 September 2015[2], this court made the following orders:

> "1) The appeal is allowed and the judgment of Batts J given on 18 January 2013 is set aside.
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> 2) An order of certiorari is granted to quash the award of the Industrial Disputes Tribunal dated 30 August 2011.
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> 3) The parties are to make written submissions on costs within 21 days of the date of this order and the court will rule on the matter within a further 21 days of receipt of the last such submission."

[3] In keeping with the direction of the court, the appellant and the first respondent filed their submissions on costs on 9 and 13 October 2015, respectively. However, the second respondent's submissions were not filed until 20 January 2016. And now, regrettably, due to an oversight, the promised ruling on costs is only now being given, with profuse apologies from the court for its own contribution to the delay in settling this aspect of the matter.

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[1] [2013] JMSC CIVIL 4

[2] [2015] JMCA Civ 48

[4] The appellant referred the court to rule 64.6(1) of the Civil Procedure Rules 2002 (the CPR), which states that, "[i]f 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". However, rule 64.6(2) provides, among other things, that the court "...may make no order as to costs". We were also referred to rule 64.6(3)-(4), which provides as follows:

> "(3) In deciding who should be liable to pay costs the court must have regard to all the circumstances.
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> (4) In particular it 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;
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> (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);
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> (d) whether it was reasonable for a party –
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> (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."

[5] The appellant submitted that, it having succeeded, against opposition, on every ground argued before the court in the substantive appeal, the general rule should apply and that accordingly, as the successful party, it should have its costs against the respondents, the unsuccessful parties, in this court and in the court below below. In this regard, the appellant referred us to **R (John Smeaton on behalf of Society for the Protection of Unborn Children) v The Secretary of State for Health and others**[3], in which Dyson J (as he then was) is reported as having said the following[4]:

> "The basic rule that costs follow the event ensures that the assets of the successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party. This is as desirable in public law cases as it is in private law cases."

[6] Specifically as regards the position of the first respondent, the appellant submitted that an order for costs against it was appropriate, it having actively participated in the proceedings and opposed the appellant's case on appeal. The appellant supported this submission by reference to **Regina (Davies) v Birmingham Deputy Coroner**[5], in which Brooke LJ summarised the practice of the High Court in

[3] [2002] EWHC 886 (Admin)
[4] In **R v Lord Chancellor exp Child Poverty Action Group** [1999] 1 WLR 347, 355
[5] [2004] EWCA Civ 207; [2004] 1 WLR 2739

relation to orders for costs against inferior courts or tribunals in judicial review proceedings in this way[6]:

> "… (1) the established practice of the courts was to make no order for costs against an inferior court or tribunal which did not appear before it except when there was a flagrant instance of improper behavior or when the inferior court or tribunal unreasonably declined or neglected to sign a consent order disposing of the proceedings; (2) the established practice of the courts was to treat an inferior court or tribunal which resisted an application actively by way of argument in such a way that it made itself an active party to the litigation, as if it was such a party, so that in the normal course of things costs would follow the event; (3) if, however, an inferior court or tribunal appeared in the proceedings in order to assist the court neutrally on questions of jurisdiction, procedure, specialist case law and such like, the established practice of the courts was to treat it as a neutral party, so that it would not make an order for costs in its favour or an order for costs against it whatever the outcome of the application ..."

[7] Finally, the appellant pointed out that, save with regard to an applicant for judicial review, against whom no order for costs will generally be made, "unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application"[7], the court in judicial review proceedings is free "to make such orders as to costs as appear to the court to be just …"[8]

[8] The first respondent directed us to rule 64.6(5)(a), by virtue of which the court may make an order that a party must pay "a proportion of of another party's costs". On this basis, the first respondent submitted that, while there should be no order as to

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[6] At para. 47
[7] Rule 56.15(5)
[8] Rule 56.15(4)

costs in the court below, the appellant's costs of the appeal should be shared equally between the respondents, such costs to be agreed or taxed. Alternatively, the first respondent submitted, the appellant's costs in the court below and in this court should be shared equally between the respondents.

[9] For its part, the second respondent invited the court to consider a number of factors in its approach to the issue of costs, including the fact that:

> "The legitimacy and the manner of the termination of the workers became a matter of public importance especially for the important tourism sector of the Jamaican economy in light of the finding of [the first respondent] that there was no genuine redundancy situation prevailing at the material time. In a matter of this importance and the impact the decision of [the first respondent] and the court could have on the tourism sector, foreign investment in that sector, industrial relations and labour law regarding the termination of the employment of workers, it was desirable that the workers represented by the Second Respondent should be heard in the court below as well as in this Court. The Second Respondent in putting forward its response to the grounds and points argued by the Appellant assisted the Court in the consideration and proper determination of the appeal."

[10] The second respondent submitted further that, in a matter of such public importance, the court should be wary of making an order for costs that would have the effect of discouraging public participation in judicial review proceedings. Further still, it was submitted, the court should have regard to the overriding objective and the financial inequality as between the appellant and the workers represented by the second respondent. In all the circumstances, the second respondent submitted, the only "fair and just approach" is for the court to make no order as to costs, with the result that each party would bear its own costs.

[11] In considering the appropriate order for costs in this matter, the starting point must be for the court to determine whether it is appropriate to make any order at all for the costs of these proceedings. For, if the answer to this question is no, then rule 64.6(1), by its very terms, will have no application. The second respondent is the only one of the three parties to contend for this result. But it appears from the order for costs made in the second respondent's favour in the court below that the second respondent may not then have been of the view that, given the general public importance of the matter, the court should make no order as to costs. And I can fully understand that, since, despite the fact that these were judicial review proceedings, the manner in which they were conducted was essentially adversarial. In these circumstances, I think that it is sufficient to say that, nothing having been urged on appeal to suggest that the learned judge below erred in principle in making an order for costs, it is right that this court should also approach the matter on the basis that an order for costs of some kind is appropriate in this matter.

[12] In my view, rule 64.6(1), which enshrines the long-established principle that costs should ordinarily follow the event, is the applicable rule for present purposes. It accordingly seems to me that, as the undoubted winner in the contest, the appellant is on the face of it plainly entitled to its costs, both here and in the court below. I will therefore approach the matter on this basis, nothing having been shown, along the lines indicated in rule 64.6(4), to displace the general rule.

[13] The first respondent appears to concede that an order for costs of some kind against it is appropriate in this case: as has been seen, the first respondent's

submission is that any order for costs against it should be on the basis of an equal sharing with the second respondent. As regards its susceptibility to an order for costs, it appears to me that the first respondent's position on costs is an entirely realistic one in all the circumstances. For a reading of my judgment in the substantive matter makes it clear, I think, that the first respondent's participation in the appeal was not limited to matters such as jurisdiction and the like. Rather, the first respondent played an active part, in tandem with the second respondent, in the effort to resist the appellant's appeal. In my judgment, therefore, the appellant having prevailed, an order for costs in its favour against the first respondent is plainly inevitable. And, in respect of the second respondent itself, which was the appellant's principal adversary in the litigation, I think that the position is even clearer.

[14] Accordingly, I would make an order for costs in favour of the appellant against both respondents, both here and in the court below. The only remaining question is therefore whether, as the first respondent submitted, it would be appropriate to order that the respondents should pay the appellant's costs, as determined by either agreement or taxation, in equal moieties, given the court's power under rule 64.6(5)(a) to order that a party should pay "a proportion of another party's costs". In my view, this would be an appropriate solution in all the circumstances, reflecting the fact that, in essence, this litigation was fought on the basis that it was the appellant on one side and the respondents on the other. I would therefore make an order in these terms.

PHILLIPS JA

[15] I have read, in draft, the ruling on costs of the learned President and agree with his reasoning and conclusion. There is nothing that I can usefully add.

LAWRENCE-BESWICK JA (AG)

[16] I too have read the draft ruling on costs of the learned President. I agree with his reasoning and conclusion and have nothing to add.

MORRISON P

ORDER

The appellant's costs of the appeal, as agreed or taxed, shall be paid by the respondents in equal shares.