[2016] JMCA App 14A

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 128/2015

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**CONSTRUCTION DEVELOPERS ASSOCIATES LIMITED**	**APPLICANT**
AND	**URBAN DEVELOPMENT CORPORATION**	**RESPONDENT**

Written submissions filed by DunnCox for the respondent

23 September 2016

BROOKS JA

[1] On 3 June 2016 this court handed down a decision in this matter in which it granted Construction Developers Associates Limited (CDA) an extension of time within which to file a notice and grounds of appeal. Certain conditions attended the grant. The application for the extension of time had been opposed, in part, by Urban Development Corporation (UDC). The UDC's opposition was successful. Based on its success CDA's grounds of appeal were restricted.

[2] At the time the judgment was handed down, the court ordered that one half of the costs of the application should be costs in the appeal. No order was made in respect of the other half. Learned counsel for the UDC, who attended at the delivery of the judgment, asked for the order for costs to be revisited. The panel that actually handed down the written judgment was, however, not the panel that heard the appeal and formulated the decision and the reasons therefor. The panel handing down the decision could not, therefore, have addressed the point raised by learned counsel. Based on the decision in **Sans Souci Limited v VRL Services Limited** [2012] UKPC 6, counsel on both sides were asked to file written submissions in respect of costs, for the consideration of the court. Learned counsel for the UDC filed very helpful submissions on the point, for which the court is grateful. CDA did not file any submissions in respect of the matter.

[3] The essence of the issue is whether CDA, having failed to file its notice and grounds of appeal within the time stipulated by rule 1.11 of the Court of Appeal Rules (CAR), was entitled to the costs of the application. The submissions filed by Mr Vassell QC, on behalf of UDC, contended that CDA, having been in default, could not properly benefit from any order as to costs. Learned Queen's Counsel submitted that UDC incurred costs as a result of CDA's default and that the costs order should have been in favour of UDC. In his written submissions, Mr Vassell relied on an extract from the 14th edition of A Practical Approach to Civil Procedure by Professor Sime. In paragraph 43.51 of that work, the learned author set out certain situations in which costs do not follow

the event. At subparagraph (a), the learned author stipulates applications for extension of time as one of those situations. He states there:

> "The costs of any application to extend time are borne by the party making the application."

Mr Vassell also cited a number of cases in which this court had utilised the approach for which the learned author had contended.

[4] Having considered the submissions, it must be held that learned Queen's Counsel is correct. CDA, having been in default, and having applied for an order to correct the default, should not be placed in a position whereby it could benefit from that default. The order which was made initially allowed it to do so in two ways. Firstly, because no order was made as to one half of the costs, CDA benefitted in that it was not required to pay such costs, which it would normally have had to pay. Secondly, in having the other half of the costs being made dependent on the result of the appeal, meant that CDA, if it were successful on appeal would benefit by having UDC pay the costs of the application although it was not the party in default. Neither situation would be fair.

[5] In exercising its discretion in the award of costs, a court may take into account the conduct of the parties to the litigation (rule 64.6(4)(a) of the Civil Procedure Rules (CPR)). A party, who has behaved unreasonably, even if that party is successful, may be deprived of its costs. It must be said that UDC's conduct in respect of the application was not such that it should be deprived of the normal order of costs being awarded to the party who has been put to expense as a result of the default of another party.

[6] The relevant rules of the CAR and the CPR do not specifically address the issue of costs in circumstances such as these. Learned Queen's Counsel is however correct that this court has generally applied the principle, for which he contends, in previous cases. Examples of these cases are **Sylvester Dennis v Lana Dennis** [2014] JMCA App 11, **Carlton Williams v Veda Miller** [2012] JMCA App 39 and **George Ranglin and Others v Fitzroy Henry** [2014] JMCA App 34. In each of those cases, there was a contested application for extension of time within which to comply with time limits imposed by the CAR. Costs were awarded to the respondent in each one, despite the fact that the application was granted.

[7] In the circumstances, the award of costs originally made in this case should be set aside and costs of the application should be awarded to UDC.

F WILLIAMS JA

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

EDWARDS JA (AG)

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

BROOKS JA

ORDER

1. The order in respect of costs as stated in the written judgment handed down on 3 June 2016 is set aside.
2. The following order is to be substituted as the order for costs in this application:

   The applicant shall pay the costs of the respondent as are taxed if not agreed.