[2015] JMCA Civ 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 90/2014

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (Ag)

BETWEEN	**DIRECTOR OF STATE PROCEEDINGS**	**1ST APPELLANT**
AND	**ATTORNEY GENERAL**	**2ND APPELLANT**
AND	**DETECTIVE CONSTABLE TYRONE FINDLAY**	**3RD APPELLANT**
AND	**CONSTABLE LEONARD LINDSAY**	**4TH APPELLANT**
AND	**ADMINISTRATOR GENERAL OF JAMAICA (Person entitled to a Grant of Administration in the estate of Tony Richie Richards)**	**RESPONDENT**

Written submissions filed by the Director of State Proceedings for the appellants

6 February and 13 March 2015

PROCEDURAL APPEAL

(Considered by the Court on paper pursuant to rule 2.4 of the Court of Appeal Rules 2002)

MORRISON JA

[1] I have had the pleasure of reading in draft the judgment prepared by my sister, McDonald-Bishop JA (Ag), in this matter. I entirely agree with her reasoning and conclusion, and there is nothing that I can possibly add to it.

BROOKS JA

[2] I have read in draft the judgment of my sister, McDonald-Bishop JA (Ag). I agree with her reasoning and conclusion and have nothing further to add.

McDONALD-BISHOP JA (Ag)

[3] This is a procedural appeal that has given rise to a consideration of the rules of court applicable to the award of costs, more particularly, the quantification of costs, in civil proceedings in the Supreme Court. It is an appeal from the order of Morrison J, made on 18 September 2014, by which he awarded costs to the respondent in the sum of $100,000.00 to be paid within 30 days of the date of the order.

[4] The appellants are aggrieved by that order and now seek an order from this court that the award of costs made by Morrison J is set aside and that an order be made in its stead that costs be taxed if not agreed.

[5] Leave to appeal Morrison J's order and a stay of its execution was granted by Pusey J on 10 October 2014.

[6] The grounds of appeal are as follows:

> "1. The learned judge erred by exercising his discretion to award costs without reference to rules of court as required by section 28E of the Judicature (Supreme Court) Act.
>
> 2. The learned judge erred by awarding costs without summarily assessing same in accordance with part 65 of the Civil Procedure Rules.
>
> 3. The learned judge erred by awarding costs in the sum of $100,000.00 in circumstances where the Respondent/ Respondent's attorney-at-law made no representations regarding the time which was reasonably spent in making the application and preparing for the hearing and provided no brief statement of the disbursements incurred and the basis on which the attorney-at-law's costs were calculated as required by rule 65.9(1) and 65.9(2) of the Civil Procedure Rules 2002."

The background

[7] The claim brought by the respondent in this matter arose out of the fatal shooting of Tony Richie Richards by the 3rd and 4th appellants at Alligator Pond in the parish of Manchester on 1 January 2010. On 23 July 2012, the respondent, by way of a further amended claim form, brought a wrongful death claim pursuant to the Fatal Accidents Act against the appellants, for the benefit of the dependants of the deceased and his estate.

[8] The 2nd appellant applied by notice of application for court orders on 20 January 2014 for an extension of time for filing the defence in the matter and for an order

permitting the defence filed on 19 December 2013 and served on 20 December 2013 to stand as having been filed and served.

[9] On 23 January 2014, the respondent applied by way of an amended notice of application for court orders for the defence which was filed out of time to be struck out as an abuse of the process of the court, for judgment in default of defence to be entered and for a direction that there be a trial of the issue of quantum.

[10] Both applications were heard by Morrison J on 18 September 2014 and, following submissions from counsel on both sides, he ordered as follows:

> "i. The Claimant's Notice of Application for Court Orders filed on January 23, 2014 is refused.
>
> ii. The time for filing the Defence herein is extended.
>
> iii. The Defence filed on December 19, 2013 and served on December 20, 2013 is permitted to stand as properly filed and served.
>
> iv. **Costs to the Claimant in the sum of $100,000.00 to be paid within 30 days of this Order.**
>
> v. Claimant's Attorneys-at-Law to prepare, file and serve the Orders." (Emphasis added)

It is the emphasized order at paragraph iv with which this appeal is concerned.

[11] The court has received written submissions from the appellants only. There is, therefore, nothing advanced by the respondent to refute the facts stated in the record

of appeal and to respond to the matters contained in the appellants' written submissions.

The appellants' submissions

[12] The broad contention of the appellants, when the submissions are compressed, may be stated as follows:

(i) While the question of the award of costs was within the learned judge's discretion pursuant to rule 65.8(3)(b) of the Civil Procedure Rules, 2002 ('the CPR'), there was failure on the part of the learned judge to comply with the summary assessment of costs procedure provided in Part 65 of the CPR.

(ii) The learned judge erred by failing to exercise his discretion to award costs to the respondent in accordance with the CPR as required by section 28E(1) of the Judicature (Supreme Court) Act ('the Act').

(iii) The only representation made to the learned judge in purporting to justify the award of $100,000.00 was that the respondent's attorney-at-law had been at the bar for a particular number of years. This was not a proper basis for the assessment of costs in the matter.

(iv) There were no representations from counsel regarding the time spent considering and preparing for the respondent's application or the time spent in attending the hearing.

(v) The respondent's attorney-at-law, having sought the award of costs in a particular sum, was obliged to have supplied to the court and the appellants a statement of disbursements incurred and the basis on which the costs were calculated. This was not done as required by rule 65.9(2) of the CPR.

(vi) As such, the learned judge erred in awarding costs having not been provided with the representations or statement pursuant to rule 65.9(1) and (2) of the CPR.

[13] Based on the appellant's arguments, three specific but interrelated questions have been put before this court for deliberations:

(i) Whether the learned judge erred by exercising his discretion to award costs without reference to the rules of court as required by section 28E of the Act.

(ii) Whether the learned judge erred by awarding costs without summarily assessing them in accordance with part 65 of the CPR.

(iii) Whether the learned judge erred in awarding costs having not been provided with representations or statements from the respondent's attorney-at-law as to time spent on the matter and disbusements incurred as required by rule 69.5 of the CPR.

[14] These questions may all conveniently be considered together because at core they do give rise to the single most important question and that is whether the learned judge was correct in law in awarding costs in the sum of $100,000.00 to the respondent in all the circumstances of the case. The grounds of appeal are, therefore, combined and examined together in treating with the issues raised for consideration.

Grounds 1, 2 and 3

> **The learned judge erred by exercising his discretion to award costs without reference to rules of court as required by section 28E of the Judicature (Supreme Court) Act.**
>
> **The learned judge erred by awarding costs without summarily assessing them in accordance with part 65 of the CPR.**
>
> **The learned judge erred by awarding costs in the sum of $100,000.00 in circumstances where there was no compliance with the requirements of rule 65.9(1) and (2) of the CPR.**

The relevant law

[15] The general power of a judge of the Supreme Court to grant costs in civil proceedings is derived from the Act, section 28E (1) which states:

> "28E. – (1) Subject to the provisions of this or any other enactment and to rules of court, the costs of

and incidental to all civil proceedings in the Supreme Court shall be in the discretion of the Court."

[16] Section 28E (2) empowers the Rules Committee of the Supreme Court to make provisions for regulating matters relating to the costs of civil proceedings. The subsection reads:

> "(2) Without prejudice to any general power to make rules of court, the Rules Committee of the Supreme Court may make provision for regulating matters relating to the costs of civil proceedings including, in particular prescribing -
>
> (a) scales of costs to be paid –
>
> (i) as between party and party;
> (ii) the circumstances in which a person may be ordered to pay the costs of any other person; and
>
> (b) the manner in which the amount of any costs payable to the person or to any attorney shall be determined."

Section 28E (3) continues:

> "(3) Subject to the rules made under subsection (2), the Court may determine by whom and to what extent the costs are to be paid."

[17] Parts 64 and 65 of the CPR thus emanate from section 28E (2) and as such contain the relevant rules of court that have been formulated by the Rules Committee to govern the award of costs in civil proceedings pursuant to section 28E.

[18] A judge of the Supreme Court, therefore, in deciding whether to award or not to

award costs, is to be guided by the Act and the rules of court that have been formulated by the Rules Committee by virtue of that Act, since the discretion conferred by the Act is expressly made subject to the statute itself and the relevant rules of court. Accordingly, the provisions of Parts 64 and 65 should therefore have been of material relevance to the learned judge once he decided to award costs in the proceedings.

[19] Rule 64.6(1) provides the general rule with regards to the award of costs. It states:

> "64.6(1) 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."

This rule embodies the well-known principle that "costs follow the event".

[20] Rule 65.8, however, contains special rules governing the award of costs in some procedural applications. This rule would have been relevant to the application that was before the learned judge as it was one for extension of time within which to file a defence. In this regard, rule 65.8 provides, in so far as is immediately relevant:

> "65.8 (1) On determining any application except at a case management conference, pre-trial review or the trial, the court must decide which party, if any, should pay the costs of that application
>
> (a) summarily assess the amount of such costs in accordance with rule 65.9; and
>
> (b) direct when such costs are to be paid.

(2) In deciding what party, if any, should pay the costs of the application the general rule is that the unsuccessful party must pay the costs of the successful party.

(3) The court must however take account of all the circumstances including the factors set out in rule 64.6(4) but where the application is-

(a) …

(b) to extend the time specified for doing any act under these Rules or an order or direction of the court;

(c) …

(d) …

the court must order the applicant to pay the costs of the respondent unless there are special circumstances."

[21] There is no issue taken by the appellants with the order that they should pay the costs of the application to the respondent. This position is understandable in the light of rule 65.8(3)(b), which clearly states that where the application is to extend the time specified for doing an act under the rules the court must order the applicant to pay the costs of the respondent. So, in this case, the order that the appellants should pay the costs of the applications to the respondent was in accordance with the rules of court.

[22] However, the issue taken by the appellants with the learned judge's order is with the quantification of the costs. In so far as the quantification of costs goes, rule 65.2 becomes relevant and it provides:

"65.2 Costs of proceedings under these Rules are to be quantified as follows-

(a) where rules 65.4, 65.5 and 65.6 (fixed costs) apply, in accordance with the provisions of those rules.

(b) **in all other cases if, having regard to rule 64.6, the court orders a party to pay all or any part of the costs of another party, the costs are to be taxed in accordance with rule 65.13 unless-**

(i) those costs have been summarily assessed under rule 65.8 or 65.9; or

(ii) the receiving party has elected to receive basic costs under rule 65.10." (Emphasis mine)

[23] Similarly, rule 65.7(1) provides:

"65.7 (1) Where the court orders a party to pay costs (other than fixed costs) to another party, it may either -

(a) make a summary assessment of the costs under rule 65.9; or

(b) order that costs be taxed by the registrar,

unless any rule, practice direction or enactment provides otherwise."

[24] Rule 65.9, to which rules 65.7(1) and 65.8(1)(a) refer, provides:

"65.9(1) In summarily assessing the amount of costs to be paid by any party the court must take into account any representations as to the time that

was reasonably spent in making the application and preparing for and attending the hearing or otherwise dealing with the matter in respect of which costs are to be assessed and must allow such sums as is considered fair and reasonable.

(2) A party seeking assessed costs must supply to the court and to all other parties a brief statement showing -

(a) the disbursements incurred; and
(b) the basis on which that party's attorney-at-law's costs are calculated.

(3) In summarily assessing the costs the court may take into account the basic costs set out in Appendix B to this Part."

[25] Rule 65.17(1), in so far as is relevant, states:

"65.17(1) Where the court has a discretion as to the amount of costs to be allowed to a party, the sum to be allowed is the amount-

(a) that the court deems to be reasonable; and
(b) which appears to the court to be fair both to the person paying and to the person receiving such costs."

Rule 65.17(3) provides, in part:

"(3) In deciding what would be reasonable the court must take into account all the circumstances, including –

(a) any orders that have already been made;

(b) the conduct of the parties before as well as during the proceedings;

(c) the importance of the matter to the parties;

(d) the time reasonably spent on the matter;

(e) whether the cause or matter or the particular item is appropriate for a senior attorney-at-law or an attorney-at-law of specialised knowledge;

(f) the degree of responsibility accepted by the attorney-at-law;

(g) the care, speed and economy with which the matter was prepared;

(h) the novelty, weight and complexity of the matter…"

Analysis - application of the relevant law to the facts

[26] The learned judge had seen it fit, and properly so, to award costs against the appellants. In making the order, he simply stipulated that the sum of $100,000.00 should be paid by the appellants to the respondent within 30 days of the order. He did, in fact, quantify the costs and directed when such costs should be paid. The question that arises, therefore, is whether in doing so he acted in accordance with rule 65.2, which makes general provisions for the quantification of costs (see paragraph [22] above).

[27] When rule 65.2 is closely examined, it does show that in cases in which fixed costs are not being awarded or where the receiving party has not elected to receive basic costs, then the costs to be paid will have to be be taxed by the registrar or be summarily assessed by the court. In this case, neither fixed costs nor basic costs were awarded. It follows, therefore, pursuant to rule 65.2(b), that the costs to be paid by the

appellants ought to have been taxed in accordance with rule 65.13 unless the learned judge had summarily assessed them under rules 65.8 or 65.9.

[28] Rule 65.8(1), to which rule 65.2 refers, in like manner, also stipulates that in deciding which party should pay the costs of the application, the court may summarily assess the amount of such costs in accordance with rule 65.9 and direct when such costs are to be paid.

[29] It becomes evident that the summary assessment of costs was not intended by the statute or the rules of court to be done arbitrarily or on any random basis. The relevant rules cited above both stipulate that summary assessment of costs must be done in accordance with rule 65.9. (See also rule 65.7 at paragraph [23].)

[30] Rule 65.9 sets out the relevant considerations for the court in determining the quantum of costs that should be paid as well as the duty of the receiving party in the assessment process. The rule specifically states, as an evidently mandatory requirement, that in summarily assessing the amount of costs to be paid, the court must take into account any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing or otherwise dealing with the matter. Also, the court must, according to the rule, allow such sum as is fair and reasonable.

[31] Furthermore, any receiving party who wishes for costs to be summarily assessed is obliged to put before the court a brief statement showing the disbursements incurred

and the basis on which that party's attorney-at law's costs are calculated in fulfillment of the requirements of rule 65.9 (2).

[32] In the instant case, the unchallenged evidence of the appellants is that the only basis put forward for the quantification of costs in the sum of $100,000.00 was counsel's seniority at the bar. The respondent had, therefore, furnished no statement to the learned judge showing disbursements incurred or the basis on which counsel's costs were calculated. There was thus no representation before the learned judge as to time spent in dealing with the application and preparing for and attending the hearing or with respect to any other pertinent matter in dealing with the application or connected to the case. In sum, there was nothing done by the respondent in fulfillment of the requirements of the relevant rules for costs to be summarily assessed.

[33] Furthermore, section 65.9 (1) provides that the learned judge must allow such sum as is fair and reasonable, after taking into account the matters placed before him. Again, what is fair and reasonable requires an objective assessment of the circumstances of the case. The CPR, by providing for the "basis of quantification" in part 65, have laid down certain criteria by which this objective standard as to what is fair and reasonable may be arrived at.

[34] The learned judge would have been duty bound not only to summarily assess costs but also to take into account the matters enumerated in rule 65.17(3). It was incumbent on the learned judge to have had regards to all these matters and anything else that might have arisen from the circumstances of the case that could have assisted

in determining what would have been a fair and reasonable award in the circumstances. The quantification of costs was, therefore, not simply a matter for the subjective evaluation of the learned judge based on arbitrary considerations. The exercise of his discretion was subject to established rules of procedure.

[35] The learned authors of Blackstone's Civil Practice 2004 at paragraph 66.5, in speaking of the equivalent English statute, the Supreme Court Act 1981, section 51(1), noted that while the statute has granted to the court a wide discretion in awarding costs and that the court has the full power to determine by whom and to what extent costs should be paid (***Singh v Observer Ltd*** [1989] 2 All ER 751), **"like any discretion, it must be exercised judicially and on reasons connected with the case** *(see* ***Donald Campbell and Co. Ltd v Pollack*** [1927] AC 732 and the speech of Viscount Cave LC, which continues to represent the law after the introduction of the CPR…)" (Emphasis mine).

[36] In may be said then, in consideration of the instant case, that although it was within the absolute discretion of the learned judge to award costs in the proceedings before him, he was, nevertheless, required to exercise his discretion judicially and not arbitrarily or capriciously. In order to act judicially, he was duty bound to have regard to the provisions of the CPR, which prescribe the basis and procedure for the quantification of costs. Therefore, in assessing those costs he should have awarded a sum that was fair and reasonable. This, he would only have been able to do by having regard to rules 65.9 and 65.17(3) (a-h).

[37] When the circumstances in which the learned judge had granted costs in the sum of $100,000.00 are considered within the framework of the applicable rules, it is palpably clear that he did not summarily assess the costs as he was required to do by the rules of court, and by extension, section 28E(1) of the Act which expressly make the exercise of his discretion subject to the rules.

Conclusion

[38] The learned judge, by awarding the sum of $100,000.00 on the mere basis of the respondent's attorney's-at-law standing at the bar, failed to adhere to the dictates of the rules of court and in so doing failed to exercise his discretion judicially in keeping with the provisions of section 28E of the Judicature (Supreme Court) Act. In these circumstances, it is clear that the learned judge was, regrettably, plainly wrong in making the order for the payment of costs in the sum he did. It follows from this conclusion that there is therefore a proper basis for this court to interfere with the exercise of his discretion.

[39] Accordingly, I am of the view that the appeal should be allowed, the order of the learned judge set aside and an order made, in its stead, for the costs of the application in the court below to be taxed if not agreed. The appellants should also have the costs of the appeal, such costs to be agreed or taxed.

MORRISON JA

ORDER

1. The appeal is allowed.

2. The order of Morrison J as to costs made on 18 September 2014 is set aside and an order that costs to be taxed if not agreed is hereby substituted.

3. Costs of the appeal to the appellants to be agreed or taxed.