JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 137/2009

APPLICATION NO 126/2016

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

BETWEEN	**PATRICK WOOLCOCK**	**1ST APPLICANT**
AND	**THE BUNGALOO HOTEL**	**2ND APPLICANT**
AND	**DAVID GEOFFREY SYKES**	**1ST RESPONDENT**
AND	**AUDREY LOUISE SYKES**	**2ND RESPONDENT**

Raphael Codlin and Miss Annishka Biggs instructed by Raphael Codlin & Co for the applicants

David Geoffrey Sykes and Mrs Audrey Louise Sykes in person

23, 24 March and 7 April 2017

ORAL JUDGMENT

PHILLIPS JA

[1] On 13 September 2016, the applicants in this matter filed an amended application for court orders seeking the following relief:

> "1. Variation of the Costs Order made herein on the 19th of December 2014 so as to read: Half Costs to the [applicant] here and Half Costs to the Respondent in the court below, to be agreed or taxed.
>
> **OR ALTERNATIVELY**

2. Variation of the Costs Order made herein on the 19th of December 2014 so as to read: Half Costs to the [applicant] to be agreed or taxed.

OR ALTERNATIVELY

3. Variation of the Costs Order made herein on the 19th of December 2014 so as to read[:] Half Costs to the Respondent here and below, to be agreed or taxed.

OR ALTERNATIVELY

4. Variation of its Costs Order made herein on the 19th of December 2014 to read [:] each party bear its own costs of Appeal.

OR ALTERNATIVELY

5. Variation of its order made herein on the 19th of December 2014 in such manner as this Honourable Court sees fit.

AND

6. Such further or other order and/or relief as this Honourable Court sees fit."

[2] The applicant relied on the following grounds:

"1. Pursuant to Rule 1.7(7) of the Court of Appeal Rules.

2. Pursuant to Part 64.6 of the Civil procedure rules which applies to this [matter] by virtue of Part 1.18 of the Court of Appeal Rules which speaks to the general principle that the successful party should recover his cost.

3. Pursuant to the court's established practice of awarding Costs to the successful party in keeping with the general principle.

4. In 2009, judgment was handed down in this matter in the Supreme Court wherein the order was made that the Applicant pay the Respondents herein, the sum of Ten Million dollars ($10,000,000.00) for trespass and Three Million Five Hundred Thousand Dollars

($3,500,000.00) in respect of public nuisance with costs to the Respondent herein.

5. The matter was appealed and this Honourable Court, in its judgment on the 19th of December 2014, cut the overall awards down from Thirteen Million Five Hundred Thousand to One million dollars for trespass only.

6. The [applicant] was therefore successful in getting the award for trespass reduced by over 90% and in having the award for public nuisance completely set aside. However the said judgment went on to order that half costs of the appeal should go to the Respondents to be taxed if not agreed.

7. The taxation hearings in the Court of Appeal have not yet started but the Respondents are seeking to claim the sum of $2,305,073.61 as the Court of Appeal costs based on their filed Bill of Cost[s] and by virtue of the Order of this Honourable Court, the [applicant] would be liable to pay half of whatever costs is taxed.

8. The costs ordered against the [applicant] in the Supreme Court have been taxed at Four Million Six Hundred and Ninety Six Thousand Nine Hundred and Eighty Three Dollars and Twenty Two cents ($4,696,983.22).

9. The judgment debt based on the judgment of this Honourable Court is $1 million dollars but in view of the costs taxed in the Supreme Court and the costs that are likely to be taxed in this Honourable Court, the [applicant] is at jeopardy of paying more than five times the judgment debt.

10. The costs are therefore significantly disproportionate to the judgment debt.

11. The [applicant] has had to pay his own legal fees in getting the judgment debt reduced from $13.5 million dollars to $1 million dollars and it is unconscionable for him to have to pay the full legal fees of the Respondent in the Supreme Court and half the legal fees taxed in the Court of Appeal.

12. To award the Respondent the full costs in the Court below would be to award him costs for all his causes of action, despite the fact that they were not all successful.

13. The Applicant herein is asking this Honourable Court to do justice by revisiting the issue as to Costs as ordered by the Court of Appeal in view of the circumstances and to vary the order in a manner that deals with the case justly."

[3] In the court below Cole-Smith J made the following orders at page 20 of her written judgment:

> "Having found that there was Trespass on the [respondents] land by the construction of the bar and public nuisance I give judgment for the [respondents] on the [applicants'] Ancillary claim. I find on a balance of probabilities that the [respondents] have established their right to:
>
> (1) Damages for Trespass and Public Nuisance.
>
> (2) An Order that the [applicants] remove the open air bathrooms and any other structure constructed by the [applicants] which currently encroaches on the [respondents'] land.
>
> I therefore award damages to the [respondents] as follows:
>
> | | |
> |---|---|
> | Trespass | $10,000000 |
> | Public Nuisance | 3,500000 |
> | | $13.5M |
>
> Ordered that the [applicants] remove the open air bathrooms and any other structure constructed by the [applicants] which currently encroaches on the [respondents'] land within ninety (90) days from the date hereof.
>
> Costs to the [respondents'] on the claim and on the [applicants'] Ancillary claim if not agreed to be taxed."

[4] On 19 December 2014, this court made the orders set out below:

> "a. The appeal is allowed in part. The order for damages for trespass and public nuisance is set aside and the following order is substituted:
>
> > The [respondents] are awarded general damages for trespass in the sum of $1,000,000.00.
>
> b. Save as above, the appeal is dismissed and the judgement of Cole-Smith J and the orders made by her on 23 September 2009 are affirmed
>
> c. Half costs of the appeal to the respondents to be agreed or taxed."

[5] In support of the instant application, the applicants filed an affidavit on 7 July 2017, sworn to by Mr Patrick Woolcock, to vary this court's order, which essentially deposed to the grounds set out in the application. His complaint was that the applicants had been successful in having the judgment of the said trial judge set aside in relation to the amount that he had been found to pay and with regard to the sum payable for damages in respect of trespass, that had been reduced from $10,000,000.00 to $1,000,000.00. Additionally the court had found that there was no public nuisance and had set aside the order for the applicants to pay $3,500,000.00. However, he complained that the order for costs in the court below had not been disturbed and had recently been taxed in the amount of $4,696,983.22. The taxation process was about to commence in the Court of Appeal and the respondents were claiming $2,305,073.61. Once those costs were taxed the order of this court would require that the applicants pay one-half of those costs. He was concerned with this result as he considered that he had been successful in the Court of Appeal having reduced the damages payable by the applicants substantially, indeed by $12,500,000.00.

[6] The 1st applicant further deponed that the respondents would suffer no prejudice if the application was granted as the order for taxation had only been finalized by the registrar on 14 June 2016, and so they would only have become entitled to that amount since then. Further, and in any event, the prejudice that would be suffered by the applicants would far outweigh any prejudice to the respondents as the amount payable for costs is in excess of the judgment debt. The applicant confirmed that the judgment debt had been paid. He also indicated that the decision to pursue the appeal was a justifiable one, as the applicants had been successful in reducing the overall amount payable by them.

[7] He had also, he indicated, successfully challenged in the court below the imposition of permanent mandatory injunctions and only one prohibitory injunction which had been granted by the learned trial judge remained.

[8] He therefore pleaded the he was "appealing to this Honourable Court to do justice in this case in view of all the circumstances".

[9] In response to this application the respondents fired their own salvo. They filed an application for court orders on 27 February 2017, wherein they sought a myriad of reliefs. In the main they complained that the applicants had failed to comply with the orders of the court below, which had been confirmed by this court, specifically with regard to removing the encroachment on their property which grounded the claim for, and the order made in respect of damages for trespass. There were other acts of trespass that the respondents claimed the applicants were still engaged in, and they

were therefore asking the court to order the removal of the offending open-air shower cubicles and other debris placed on their property, and in the event of the continued failure to comply with the earlier orders of the courts, and any orders that this court should make, that the applicants be committed to prison for a specified period. The respondents relied on the following grounds in support of their application:

> "1. To enable the Respondents to get their land back and then retain it.
>
> 2. To enable the Respondents to get the compensation that the Courts have ordered.
>
> 3. To protect the Respondents from [the] continuing and future failure of the [applicants] to follow Court Orders.
>
> 4. To go some way towards providing justice to the Respondents.
>
> 5. To deter the [applicants] from wilfully ignoring Court Orders.
>
> 6. We think that the [applicants] will not comply with court Orders unless failure to do so will without question result in imprisonment.
>
> 7. We think that the [applicants] will continue to show that he is above the law unless failure to comply with Court Orders can lead to lengthy spells in prison.
>
> 8. We believe that the law in general, and in particular, is brought into disrespect when there has been a refusal to comply with Orders."

[10] This application was supported by a very comprehensive affidavit sworn to by the 1st respondent, setting out an unfortunate set of circumstances which the respondents claimed had unfolded over the years with regard to the behaviour of the 1st applicant to the respondents by virtue of their occupation of an adjoining property.

The incidents deposed to were, if accepted, distressing to the point where the 1st respondent claimed that the 2nd respondent had been assaulted by the 1st applicant such that she had to be hospitalised; also the 1st respondent was detained in the police lock up in the parish of Westmoreland on the basis of false claims of theft of blocks allegedly owned by the 1st applicant which had been deliberately left on the respondents' property by the applicants who had claimed that the respondents had stolen the said blocks. The relationship between these neighbours had obviously deteriorated to the point where the respondents claim that they are unable to utilize their property at all and have not resided there in years. I will make no comment on these allegations, bearing in mind how this matter will have to be resolved by this court, save to say that it is very disappointing that having gone through the courts for so many years, the parties have still been unable to resolve their outstanding differences.

The submissions

[11] Mr Codlin submitted, on behalf of the applicants that the court ought to vary the order that it made on 19 December 2014, and address the order of costs made by the learned judge in the court below. The court, he stated, had the authority to vary an order made in the court below, and he referred to rule 1.7(7) of CAR, for this proposition. He was therefore, he said, asking this court to address what the court ought to have addressed at the time of delivery of its judgment. He was asking the court to say that at the time of making its judgment it would have thought it most unlikely that costs on a judgment debt of $1,000,000.00 would result in a taxed costs

order of four times that amount. As a consequence, he asked the court to consider the application before it in the exercise of its inherent jurisdiction. In exercising that jurisdiction, the court was not restricted to any particular factor, and certainly not any specific time frame, as would be applicable to the applicants if they were to have pursued an appeal to Her Majesty in Council.

[12] Counsel therefore posited that the applicants were merely asking the court to amend its order in respect of the costs order in the court below, so as to be in keeping with the old adage that "costs follow the event". Counsel queried whether it was unreasonable in all the circumstances of this case to award half costs to the respondents in the Court of Appeal, yet maintaining the order of all the costs to the respondents in the court below. Counsel recognized that it was within the court's discretion to order costs as it thinks fit, but relied on the judgment of this court in **Digiorder Jamaica Limited v Dennis Atkinson** [2015] JMCA Civ 40 for clarification of the order, as the facts in that case, counsel argued, were identical to those in the case at bar.

[13] Counsel made it clear that he was "not saying that the court had made an error" nor was he "judging the court's error as he had no authority to do that". He was merely asking the court to substitute its order for one that was "fair and reasonable". He argued further that, "when the court gives a judgment, it will reconsider its judgment if in all the circumstances it considers that it is a proper case for the exercise of its inherent jurisdiction". Counsel submitted that the court will do so if it considers that there is a basis on which to do so as it did in **Digiorder Jamaica Limited v Dennis**

Atkinson. Counsel referred to and relied on paragraphs [15] and [16] of the judgment of the court in that case.

[14] Miss Biggs submitted that although the applicants were not saying that the court had erred, they were also not saying, she stated, that the court had not erred. She attempted to and did take issue with the fact that Mangatal JA (Ag), on behalf of this court, had referred to permanent injunction**s** being granted in the court below when only one injunction had been granted by Cole-Smith J, to support an argument that this was an error which perhaps could explain why this court had made no mention of, or interfered with the costs order in the court below. Counsel referred to three cases in which this court had ordered, as in the instant case, that the appeal should be allowed in part. However, counsel submitted that on each occasion, the court had either ordered that (1) the appellant should have one-quarter of his costs; (2) one-half of the costs of the appeal was to the appellants, and (3) half costs of the appeal and in the court below to the appellants, all to be taxed if not agreed (see **The Attorney-General of Jamaica v Devon Bryan (Administrator of Estate of Ian Bryan)** [2013] JMCA Civ 3; **The Chairman, Penwood High School's Board of Management v The Attorney General of Jamaica and Another** [2013] JMCA Civ 30; and **Theophilus McLeod v Joseph Richards** [2015] JMCA Civ 44). These orders, counsel submitted, suggested that it was not reasonable for this court to have ordered, as was effectively done in the instant case, half of the costs of the appeal, and all of the costs on the claim and on the ancillary claim in the court below, to the respondents.

[15] The 1st respondent, to his credit, having had the opportunity to read the relevant authorities provided by the court, acknowledged and accepted that he would not be able to obtain the various remedies that he had sought in his application. He argued that based on the reasoning in **Digiorder Jamaica Limited v Dennis Atkinson**, there were really only two relevant points, namely costs and the grant of the injunction. He also relied on paragraph [15] of **Digiorder Jamaica Limited v Dennis Atkinson** to submit that the court had made its order, and that since there was no error, it could not be changed. He therefore asked the court to affirm the judgment, enforce compliance therewith and failing that, to imprison the applicants for contempt of court.

Analysis

[16] The applicants are asking this court to vary the order for costs that it had made in its judgment delivered 19 December 2014, over two years ago and which has been perfected. Counsel for the applicants, Mr Codlin, has indicated that he was not submitting that any error had been made in the judgment pertaining to the award of costs. He was simply asking the court to "do Justice" to ensure that "costs follow the event" and to "exercise the inherent jurisdiction of the court". In our opinion, this application is fraught with many difficulties. There must be finality in litigation. It cannot be in the mouth of the litigant to come to this court after two years and say, that at the time of receipt of the judgment of the Court of Appeal, I did not think that the costs of the court below could be so substantial that they would be four times the reduced damages that the Court of Appeal had ordered, and so I would like this court, though the judgment has been delivered, perfected and acted upon, to review the same, so

that the costs order can be made more to my liking. That would be an unacceptable approach to litigation entirely.

[17] We accept that this court has, by virtue of its inherent jurisdiction, the power to control its process, which permits it to correct a clerical error, or an error arising from an accidental slip or omission in its judgment or order (see **Brown v Chambers** [2011] JMCA App 16). The court is therefore always willing to clarify or correct its own previous order. But that is within the context of ensuring that the order of the court reflects the true and clear intention of the court. Thus, as Morrison JA (as he then was) said in **Dalfel Weir v Beverly Tree** [2015] JMCA App 6, while quoting from the House of Lord's decision in **Hatton v Harris** [1892] AC 547, where the court corrected a decree entered by the Lord Chancellor on the grounds that it contained an accidental slip or omission, that he could see no basis upon which such an order could have been made, and therefore, once the error had been brought to the attention of the court, the correction was effected. It was always, the court opined, within the competency of the court to correct an error that has been made. The court can make a mistake, but if it is one that it was impossible to conceive that the court would have made with its eyes wide open, then it was one that the court ought to correct.

[18] So, it is clear that the court has the power to and ought to correct accidental errors, slips or omissions, and the principle was re-stated in **Preston Banking Company v William Allsup & Sons** [1895] 1 Ch 141 by Lord Halsbury that if by mistake the order of the court had been drawn up, but did not express the intention of the court, then the court must always have the jurisdiction to correct it. However, that

position must be distinguished from the ratio decidendi in **Preston Banking Company**, as it was held on the facts of that case, that the court had no jurisdiction to rehear or alter an order after it had been passed and entered, provided that it accurately expressed the intention of the court. Indeed, Lord Halsbury articulated the principle further in this way:

> "But this is an application to the Vice Chancellor in effect to rehear an order which he intended to make, but which it is said, he ought not to have made.... he has no jurisdiction to rehear or alter this order."

Lord Lindley confirmed the same thus:

> "This is not an application to alter an order on the ground of some slip or oversight. Nor is it a case in which the order has not been drawn up. Here the order has been drawn up, and it expresses the real decision of the Court; and that being so, the Court has no jurisdiction to alter it..."

And added that:

> "...it is of the utmost importance, in order that there may be some finality in litigation, that when once the order has been completed it should not be liable to review by the Judge who made it..."

[19] In reliance on the authorities set out above, one cannot merely ask the court to review an order that the court has made and intended to make, on the basis that it ought not to have been made. We have no jurisdiction to do that. That would have to be the subject of an appeal. One cannot open up and review a judgment just because one party would wish the court to make an alternate order to the one that had been made previously. This was not a case of an accidental slip error or omission. It was also not a case of an inconsistency within a judgment as occurred in **American Jewellery**

Company Limited and Others v Commercial Corporation Jamaica Limited and Others [2014] JMCA App 16. We recognize that the applicants herein are endeavouring to state that the facts of the instant case are the same as those in **Digiorder Jamaica Limited v Dennis Atkinson**. In that case there was a similar issue relating to the order of the Court of Appeal making no reference to the order of costs in the court below. However, this court found that the order made in the court below was wrong as the learned judge refused to remove Digiorder as not being a necessary party to the claim. Digiorder therefore was entirely successful both here and in the court below. This court therefore found that as there was no basis for Digiorder to remain in the claim since they had no legal or equitable interest therein, the costs of the claim and of the appeal ought to be theirs. As this court stated "that properly reflected the intention and reasoning of the order of the court". It was therefore a correction of an omission by the court, one which all the authorities say, the court ought to make. As an aside it may be prudent to note also that this decision was made on paper in the absence of the parties, and not after full submissions by counsel before the court, as in the instant case.

[20] It is true that the applicants have had some success on appeal. Firstly, in reducing the damages significantly, with regard to the order for trespass, and also in removing altogether the order and damages in relation to the claim in respect of public nuisance. However, the respondents are still holding a judgment on liability and for damages and an injunction in the court below, which was upheld on appeal. They also have a judgment on the ancillary claim in the court below. This is therefore unlike

Digiorder Jamaica Limited v Dennis Atkinson, where the order made on the claim below had been completely overturned. So, in that case, the court was unlikely, with its eyes wide open, to have permitted the respondents to have received an order in respect of costs in its favour in circumstances where the order was found to have been palpably wrong. Consequently, the appeal was not allowed in part but was allowed, simpliciter.

[21] It can be discerned from both written judgments in the instant case that there was evidence of an encroachment on the respondents' property and yet the 1st applicant had conducted himself in a very unacceptable manner towards the respondents over the years. The trespass is one that has been continuing for years and as the applicants have stated, costs are in the discretion of the court. There are many factors that the court can take into consideration when making a costs order and as the respondents have also argued, costs follow the event. So, the order for costs to the respondents in the court below would not seem unreasonable in the circumstances, and certainly is not an error or omission in the judgment requiring clarity, or interpretation or adjustment because of a mistake. That order would therefore have to remain.

[22] Additionally, the order made in this court reflects that the respondent has only partly succeeded in the appeal. But judgment nonetheless remains with the respondents. The applicants have succeeded to the extent that they do not have to pay all of the respondents' costs, only one-half of the same. There is still judgment on the claim and the ancillary claim to the respondents at the end of the appeal. There is no indication that the intention of this court has not been reflected in the order of the

court. The court therefore has no jurisdiction to interfere with its order made years ago. The applicants' application and that of the respondents are refused. There shall be no order as to costs.