[2015] JMCA App 35

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 47/2015

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

BETWEEN	**DUKE ST JOHN-PAUL FOOTE**	**APPLICANT**
AND	**UNIVERSITY OF TECHNOLOGY JAMAICA (UTECH)**	**1ST RESPONDENT**
AND	**ELAINE WALLACE**	**2ND RESPONDENT**

Written submissions received on behalf of the applicant from John Thompson, attorney-at-law

Written submissions received on behalf of the respondents from Myers Fletcher & Gordon, attorneys-at-law

28 September 2015

MORRISON JA

[1] In a decision given in the court below on 3 March 2015, Lindo J (Ag), as she then was, determined that the applicant's complaint against the respondents was not cognisable by the court. The basis of this decision was that the visitor of the 1st respondent (the university) had exclusive jurisdiction in respect of disputes between students and the university as to the proper interpretation and application of its internal

regulations. By its order dated 31 July 2015, this court refused the applicant's application for leave to appeal against Lindo J (Ag)'s decision. The history of the matter is fully set out in my judgment, with which my learned sisters agreed, on the substantive application ([2015] JMCA App 27). There is accordingly no need to rehearse it for present purposes.

[2] At paragraph [59] of the judgment, I indicated that, "[i]n the light of the unusual circumstances of this matter", my inclination was to make no order as to costs. However, in the event that either side wished to contend for a different order, the parties were invited to file written submissions on costs within 21 days of the date of the judgment, failing which there would be no order as to costs. Written submissions on costs were in due course filed on the respondents' behalf on 17 August 2015 and on the applicant's behalf on 31 August 2015. This is therefore my contribution on the question of costs.

[3] The respondents contend that, as the successful parties in the matter, they are entitled to an order for costs in their favour on the strength of rule 64.6(1) of the Civil Procedure Rules, 2002 (the CPR). That rule provides 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". The respondents also submit that there are no special circumstances in this case to warrant a deviation from the general rule.

[4] The general rule notwithstanding, rule 64.6(2) of the CPR expressly reserves a discretion to the court to make "no order as to costs". Rule 64.6(3) provides that, in deciding who should be liable to pay the costs of any proceedings, "the court must have regard to all the circumstances"; while rule 64.6(4) lists a number of factors to which the court must, in particular, have regard in deciding who should pay the costs. Among other things, these factors include the conduct of the parties before and during the proceedings (rule 64.6(4)(a)); the reasonableness of a party's pursuit of a particular allegation or issue (rule 64.6(4)(d)); and the manner in which a party has pursued his or her case, or a particular allegation or issue (rule 64.6(4)(e)).

[5] The respondents draw attention to a number of aspects of the case in which, it is said, the applicant's conduct of the litigation fell on the wrong side of these considerations. These include having sought and obtained two *ex parte* interim injunctions without justification; and the fact that the applicant sought, as a matter of principle, to pursue an appeal which, in the circumstances, could have had no practical impact on his academic status for the year 2014-2015.

[6] The applicant contends, on the other hand, that the circumstances of the case were in fact unusual and that for this reason there should be no order as to costs. Among other things, the applicant relies on the inequality of bargaining power between the parties; the fact that he was prevented from sitting his examinations, although the respondents were "in possession of his fees so to do"; the fact that he did nothing illegal in bringing the action in the first place; and the fact that, there not having been any trial on the merits of his complaint, "the justice of the matter is yet to be

determined which [sic] the Respondent [sic] assert that is a matter for the Visitor to decide".

[7] As has been seen, my initial disinclination to make any order for costs in the matter was based on what I described expressly as "unusual circumstances". In saying this, what I had in mind was that the applicant, still a fledgling law student, had lost an entire year of study which, irrespective of how he might ultimately fare before the visitor, he was now obliged to repeat. In these circumstances, it seemed to me, given the inequality of bargaining power between the parties of which the applicant complained, the fairest outcome would be to decline to make an order for costs against him.

[8] However, having considered the submissions of the parties, I am now satisfied that it is impossible to justify such an order in principle. I accept that the applicant might be able to rely on the fact that he was self-represented as a mitigating factor in relation to the costs of the proceedings in the court below. But, in my view, that argument cannot possibly avail him in this court, where he was represented by three counsel, all of whom played an active role in deploying his case. The application was dismissed on the ground that the applicant had failed to show that he had an appeal with a realistic chance of success. This result was, in my judgment, inevitable, given that, as she was indeed bound by authority to do, Lindo J (Ag) had applied the well established principle of the exclusivity of the visitor's jurisdiction in relation to the matters of which the applicant complained. The learned judge having, it seems to me quite correctly, refused leave to appeal, the applicant opted to renew his application

before this court, despite the fact that there was also authority binding on this court directly against him. In these circumstances, I find myself unable to avoid the conclusion that the applicant acted unreasonably in pursuing the application for leave to appeal.

[9] I accordingly consider that no reason has been shown in this case not to apply the general rule that costs should follow the event. In my judgment, therefore, the appropriate order for costs is that the respondents must have their costs of the application for leave to appeal, such costs to be taxed if not sooner agreed.

PHILLIPS JA

[10] I have read in draft the judgment of my brother Morrison JA and agree with his reasoning and conclusion and have nothing to add.

SINCLAIR-HAYNES JA (AG)

[11] I too have read the draft judgment of Morrison JA and agree with his reasoning and conclusion.

MORRISON JA

ORDER

Costs to the respondents to be taxed if not sooner agreed.