[2017] JMCA App 34

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 204/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN	**GORSTEW LIMITED**	**APPLICANT**
AND	**HER HON MRS LORNA SHELLY-WILLIAMS (Sitting in the Corporate Area Resident Magistrate's Court (Criminal) Holden at Half-Way-Tree)**	**1ST RESPONDENT**
AND	**PATRICK LYNCH**	**2ND RESPONDENT**
AND	**JEFFREY PYNE**	**3RD RESPONDENT**
AND	**CATHERINE BARBER**	**4TH RESPONDENT**

Written submissions filed by Hugh Wildman & Company for the applicant

Written submissions filed by the Director of State Proceedings for the 1st respondent

Written submissions filed by Usim, Williams & Co for the 4th respondent

6 November 2017

(Considered on paper pursuant to rule 1.7(2)(j) of the Court of Appeal Rules 2002)

MORRISON P

[1] I have read in draft the judgment of my sister Straw JA (Ag). I agree with her reasoning and conclusion and I have nothing further to add.

F WILLIAMS JA

[2] I too have read the judgment of Straw JA (Ag) and agree with her reasoning and conclusion.

STRAW JA (AG)

[3] At the hearing of the application for leave to appeal against the decision of the Full Court in this matter, this court refused Gorstew Limited's (the applicant's) application for leave to apply for judicial review. The applicant was however granted leave to appeal against the Full Court's decision that it should bear the respondents' costs of the renewed application for leave to apply for judicial review. The ground of appeal as argued by Mr Douglas Leys QC was simply that the applicant was not granted any opportunity to be heard before the Full Court made the order for costs. Such an opportunity ought to have been given in light of the decision of the Privy Council in **Sans Souci Ltd v VRL Services Ltd** [2012] UKPC 6 (an appeal from this court) and so this court made the following consequential orders at paragraph [51] of its reasons for judgment (cited at [2017] JMCA App 9):

> "In order that the appeal on costs can be dealt with as efficiently and cost effectively as possible, I would order that: (i) the applicant is to file and serve its grounds of appeal against the Full Court's award of costs, together with skeleton arguments in support of the grounds of appeal, within 21 days of the date of this order; (ii) within a further 21 days of the service on them of the applicant's grounds of appeal and skeleton arguments, the respondents are to file and serve skeleton arguments in response to the appeal; and (iii) within 28 days of the filing of the last of the respondents' skeleton arguments, the court will issue its decision on the appeal in writing."

[4] The applicant, the 1st and 4th respondents have filed relevant submissions, however to date, no submissions have been received on behalf of the 2nd and 3rd respondents.

Applicant's submissions

[5] In the written submissions filed on the applicant's behalf, it was argued that the Full Court erred by making an award for costs to the respondents without affording a prior hearing to the applicant to be heard on the matter. It was also submitted that the applicant was unable to make submissions as it would not have been aware, before the judgment was handed down, that its application would have been dismissed. The applicant also contended that the order of the Full Court in relation to costs was final, and it had no opportunity to convene the Full Court to reverse its order as to costs between delivery of judgment and the perfection of the order. In support of this submission, the applicant placed reliance on **Sans Souci**, where Lord Sumption at paragraph [22] said:

> "It is the duty of a court to afford a litigant a reasonable opportunity to be heard on any relevant matter, including costs, on which he wishes to be heard. The Court of Appeal included an order for costs in their Judgment of 12 December 2008 without hearing either party upon it. The Practice Direction in Jamaica assumes that submissions on costs, if any, will be made before the court rises after giving Judgment, a course which it would have been impossible for the Manager's representatives to follow in this case because they had had no advance notice of the contents of the judgment and only one day's notice of the fact that it was to be delivered. This procedure may nevertheless be perfectly acceptable, provided that the order included in the Judgment is provisional, and that parties are given a reasonable opportunity to address the court on costs later."

The applicant therefore urged this court to ought to set aside the award of costs to the respondents made by the Full Court.

Submissions of the 1st respondent

[6] In brief written submissions on behalf of Her Honour Mrs Lorna Shelly Williams, (the 1st respondent), it was argued that the applicant would have been alerted to the difficulties inherent in the application when the application for leave to apply for judicial review, which was heard by Lawrence-Beswick J, first arose. Counsel referred to paragraphs [69] and [70] of that judgment (cited at [2015] JMSC Civ 71) where Lawrence-Beswick J rehearsed several questions related to these difficulties:

> "[69] ...If the verdict of Not Guilty is quashed, does the prosecution start afresh? Who would initiate such a fresh start? The DPP is not a party to these proceedings. There has been no complaint filed in these proceedings by the DPP. Is the DPP to be directed to prosecute afresh? No one is empowered to direct the DPP to prosecute, without more. If the DPP does prosecute afresh, does the idea of *autrefois* acquit avail the 2nd, 3rd and 4th Respondents?
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> [70] These concerns exemplify the futility of judicially reviewing the decision. The 2nd, 3rd and 4th respondents could not be tried again at the instance of the complainant. A complainant is not at liberty to seek to cause the prosecution of a person twice for the same offence. A judicial review would be a waste of time."

[7] It was further contended that the applicant had taken the matter to the Full Court which thereby forced the respondents to incur costs in a matter that has been described as 'hopeless'. Counsel for the 1st respondent also adopted and relied on the skeleton arguments filed by of counsel on behalf of the 4th respondent in relation to this

issue, and urged this court to enforce the order for costs made below pursuant to rule 2.15(b)(f) of the Court of Appeal Rules 2002 (CAR).

Submissions of the 4th respondent

[8] In skeleton arguments filed on behalf of Catherine Barber (the 4th respondent), counsel submitted that this court should either affirm the order for costs made by the court below (rule 2.15(b)(a) of CAR), or make such an order for costs in the proceedings in the court below pursuant to rule 2.15(f) of CAR. While counsel admitted that the Full Court did not hear the parties on the question of costs, they noted Sykes J's decision in **Danville Walker v The Contractor General** [2013] JMFC Full 1(A) where he stated that there are unique characteristics of judicial review proceedings that can limit the award of costs (at paragraph [14]). Nonetheless, it was submitted that there are exceptional circumstances which would persuade this court to grant costs at the leave stage of judicial review hearings and that these circumstances, which are set out in the case of **Mount Cook Land Ltd and Another (R) v Westminister City Council** [2003] EWCA Civ 1346 (and adopted by the Full Court in **Danville Walker** at paragraph [18]) as follows:

> "5) Exceptional circumstances may consist in the presence of one or more of the features in the following non-exhaustive list:
>
> a) the hopelessness of the claim;
>
> b) the persistence in it by the claimant after having been alerted to facts and/or of the law demonstrating its hopelessness;
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> c) the extent to which the court considers that the claimant, in the pursuit of his application,

has sought to abuse the process of judicial review for collateral ends - a relevant consideration as to costs at the permission stage, as well as when considering discretionary refusal of relief at the stage of substantive hearing, if there is one; and

d) whether, as a result of the deployment of full argument and documentary evidence by both sides at the hearing of a contested application, the unsuccessful claimant has had, in effect, the advantage of an early substantive hearing of the claim." (Item 5, paragraph 76)

[9] It was further submitted that the order for costs made below should be affirmed for the following reasons:

1. Under Part 64 of the Civil Procedure Rules 2002 (CPR), the general rule is that the court has the power to order the unsuccessful party to pay the costs of the successful party unless there is some rule or policy that restricts, modifies or excludes its operation.
2. The instant case falls squarely within the ambit of exceptional circumstances as described in **Mount Cooke**.
3. The Full Court found that the applicant's renewed application for leave, after having been refused by Lawrence-Beswick J following a full ventilation of the issues, was highly unreasonable, frivolous and vexatious, and against the weight of authority, was

bound to fail; that the legal hurdles facing the applicant, particularly on the issue of *autrefois* were insurmountable. (See paragraphs [44]-[46] and [117] of the Full Court's judgment).

4. The applicant has failed to make any submissions whatsoever in relation to the question of costs before this court.

5. The 4th respondent was subjected to expense when she was forced to retain counsel to respond to the application, file written submissions, and attend the hearing before the Full Court over two days.

Analysis

[10] In the written submissions, the applicant had only sought to challenge the Full Court's decision to award costs because they were not allowed an opportunity to be heard. Both the 1st and 4th respondents have asked that this court enforce the cost order made below.

[11] It is clear that the Full Court had the discretion to award costs against the applicant, whether by virtue of part 64 of the CPR, as relied on by counsel for the respondents, or by virtue of part 56 of the CPR which was relied on by the Full Court. The emphasis in both is different. Part 56 of the CPR deals with an application for administrative orders. Rules 56.15(4) and (5) of the CPR reads as follows:

> "(4) The court may, however, make such orders as to costs as appear to the court to be just including a wasted costs order.
> (5) The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.
> (Part 64 deals with the court's general discretion as to the award of costs, rules 64.13 and 64.14 deal with wasted costs orders.)"

Under part 64 of the CPR, the general rule is that the unsuccessful party pays the costs of the successful party. This general rule is also subject to the court's discretion to order otherwise. In particular, rule 64.6(3) of the CPR directs the court to have regard to all the circumstances in deciding who should be liable to pay costs. Rule 64.6(4) of the CPR sets out particular factors to be considered under the gambit of rule 64(3).

[12] The Full Court followed the decision of the majority in **Danville Walker** in granting costs against the applicant at a renewed application for leave to proceed to judicial review. In dissenting, Sykes J stated that part 64 of the CPR would be the proper section under which to award costs since part 56 of the CPR only spoke specifically to costs in the context of a full hearing after leave for judicial review had been granted and the claim had been heard. However, both the majority and dissenting judgment relied on exceptional circumstances identified by Auld LJ in **Mount Cook**.

[13] **Mount Cook** and **Danville Walker** were also considered and relied on by the Full Court in this matter in the hearing below (cited at [2016] JMSC Full 8, paragraphs [36]- [42]). At paragraphs [40]-[42], Thompson-James J stated that:

> "[40] All judges however unanimously agreed that the formulation by Auld J in ***Mount Cook*** [2014] 2 Costs LR 211 as to what would amount to exceptional circumstances could be considered as helpful in determining what may be unreasonable conduct of an applicant [para. 33]…
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> [41] In ***Danville Walker***, the court consequently decided that costs were to be granted to the respondent on a limited basis, owing to the unreasonable conduct of the applicant, in seeking to renew its application for leave, since the application was hopeless and bound to fail, and that the applicant persisted with the renewal in spite of this [para. 29].
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> [42] Based on the foregoing, and the reasoning set out in ***Danville Walker***, I see no reason to depart from the finding of the majority of the court, and therefore find that the rules in part 56.15(4)(5) are applicable to the case at bar. I also bear in mind that though the circumstances set out by Auld J in ***Mount Cook*** are indeed useful, they are not exhaustive, and what amounts to 'unreasonable conduct' still ultimately rests in the courts discretion, once exercised judicially."

[14] In relation to the reasons for ordering costs, Thompson-James J stated at paragraphs [43]-[46] that:

> "[43] The Applicant renewed its application after having been refused leave by Beswick J on December 10, 2014, following a full ventilation of issues in its initial application.
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> [44] I agree with Brown Beckford J that the application is vexatious and the applicant's conduct in renewing the application was highly unreasonable, being so against the weight of authority that it was hopeless and bound to fail. The legal hurdles facing the applicant, particularly in respect of the issue of *autre fois* [sic] were insurmountable based on the law in our jurisdiction which is well settled.

> [45] Further, there was absolutely no credible evidence before the court of the allegations levied against the Resident Magistrate. Not only was the applicant alerted to this in its initial application by the submissions of the respondents, but Beswick J, in her written decision of April 2015, gave a lengthy detailed discourse on the law surrounding the issues and the reasons for which the application was bound to fail, reasons with which this court agrees.
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> [46] Despite this the Applicant persisted in renewing the application, bringing the four respondents back before the court to expend time, effort and expense to defend the application for a second time.
>
> In the premises, it is only fair that the applicant pays costs."

[15] Brown Beckford J in her reasons for granting the cost order stated at paragraph [119] that:

> "I find that the application is vexatious for being so against the weight of authority that there could have been no reasonable expectation that it would have succeeded. Pursuant to CPR Rules 56.15 (4) and (5), cost of this application is to the Respondents."

[16] The court notes also that this was a renewed application for leave as the initial application had been heard and refused by Lawrence-Beswick J and as submitted by counsel for the 4th respondent, this was after a full ventilation of the issues. The applicant would have been alerted, when the judgment of Lawrence-Beswick J was handed down, of the extreme difficulties inherent in the application as stated in paragraphs [69]-[70] of her judgment (see paragraph [6] herein).

Conclusion

[17] In light the reasons given by the Full Court, and in light of the fact that the applicant has advanced no reasons before this court as to why costs should not have been awarded to the respondents. This court will affirm the order as to costs made by the Full Court.

MORRISON P

ORDER

1) Appeal against the order for costs made by the Full Court dismissed.

2) No order as to the costs of the appeal.