[2015] JMCA Civ 67

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 156/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE BROOKS JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (AG)

BETWEEN	**JUNIOR MILLS** **NORVAL THOMPSON** **(As representative Claimants)**	**APPELLANTS**
AND	**STAINTON KNOTT**	**1ST RESPONDENT**
AND	**BENJAMIN O BEALE JNR**	**2ND RESPONDENT**
AND	**LLEWELLYN CHRISTIAN**	**3RD RESPONDENT**
AND	**LASCELLES A WISDOM**	**4TH RESPONDENT**
AND	**DERRICK A SPENCE**	**5TH RESPONDENT**
AND	**CLIFTON GRANT**	**6TH RESPONDENT**
AND	**ALCOA MINERALS OF JAMAICA LLC**	**7TH RESPONDENT**

Written submissions filed by Brian J Barnes & Associates for the appellants

Written submissions filed by Garth McBean & Co for the 1st - 6th respondents

Written submissions filed by DunnCox for the 7th respondent

18 December 2015

PANTON P

[1] I have read the reasons for the order for costs that have been written by my learned brother Brooks JA. I have also taken note of the views expressed by my sister Lawrence-Beswick JA (Ag). I agree with Brooks JA that there should be no stay of execution of the judgment. I am also of the view that the unsuccessful appellants should pay the costs of the appeal. It seems to me that the respondents' integrity was under attack in the proceedings and it was not simply a matter of construing the documents.

BROOKS JA

[2] On 16 October 2015, after a long delay, this court ordered, by a majority decision, that an appeal by Junior Mills and Norval Thompson, from a decision of the Supreme Court, should be dismissed. Messrs Mills and Thompson, who are two former employees of Alcoa Minerals of Jamaica LLC (Alcoa) and members of Alcoa's pension scheme, had filed a claim against Alcoa and the trustees of the pension fund. The claim was filed by Messrs Mills and Thompson as representatives of other members of the pension scheme. Hibbert J, in the Supreme Court, heard and dismissed their claim. It was an appeal from that ruling that we ruled on, as mentioned above.

[3] The claim concerned certain amendments to the rules of the pension scheme. Messrs Mills and Thompson accused Alcoa and the trustees of having improperly effected those amendments and the trustees of having acted improperly in their distribution of the surplus in the fund when the scheme was wound up in 2003.

[4] At the time of handing down its judgment, this court reserved its decision in respect of costs and ordered that counsel for the parties should, within 14 days, make submissions on paper in respect of the appropriate order to be made. Although we have received submissions from counsel for all the parties, Messrs Mills and Thompson have also applied for a stay of the order for costs, pending the outcome of an intended appeal to Her Majesty in Council.

Application for stay

[5] Whereas a case may be properly advanced for a stay of execution of a costs order, there is no justification for halting the process of deciding who should bear the costs of the appeal so as to bring the appeal to an end. The present application for a stay should be refused. The following, therefore, is an analysis of the appropriate order to be made in respect of costs.

Analysis

[6] The appropriate approach in respect of orders for costs is set out in rule 64.6 of the Civil Procedure Rules (the CPR). It reiterates the previously existing position that costs follow the event, that is, the unsuccessful party is usually ordered to pay the costs of the successful party. The relevant portion of the rule 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.
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> (Rule 65.8(3)(a) contains special rules where a separate application is made which could have been made at a case management conference or pre-trial review.)

[7] It is customary to depart from that rule when the litigation involves the construction of trust documents and the administration of trusts such as pension funds. The bases on which there will be a departure, are, however, well set out in the judgment of Kekewich J in **In Re Buckton; Buckton v Buckton** [1907] 2 Ch 406. His Lordship explained that if the litigation is aimed at obtaining an interpretation of the instrument at the heart of the dispute, the costs will normally be borne by the trust fund. If however, the litigation is wholly adversarial, the normal principle of costs following the event, would apply. He said, in part, at pages 414-415:

> "In a large proportion of the summonses adjourned into Court for argument the applicants are trustees of a will or settlement who ask the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of the beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts. In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of the estate, and direct them to be taxed as between solicitor and client and paid out of the estate....
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> There is a second class of cases differing in form, but not in substance, from the first. In these cases it is admitted on all hands, or it is apparent from the proceedings, that although the application is made, not by trustees (who are respondents), but by some of the beneficiaries, yet it is made by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, and it is not made by them only because, for some reason or other, a different course has been deemed more convenient. To cases of this class I extend the operation of the same rule as is observed in cases of the first class. The application is necessary for the administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole.
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> There is yet a third class of cases differing in form and substance from the first, and in substance, though not in

> form, from the second. In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the description of litigation. It is often difficult to discriminate between cases of the second and third classes, but when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs. Whether he ought to be ordered to pay the costs of the trustees, who are, of course, respondents, or not, is sometimes open to question, but with this possible exception the unsuccessful party bears the costs of all whom he has brought before the Court."

[8] Those principles were accepted by Hoffmann LJ (as he then was), in **McDonald and Others v Horn and Others** [1995] 1 All ER 961, to be applicable to pension scheme cases. Hoffmann LJ also went on to state that where a beneficiary acts on behalf of several other beneficiaries, that would be an additional reason to exercise the court's discretion to order that the costs of all the parties should all be paid from the trust fund.

[9] This court has also accepted the principles laid down in **Buckton**. In **UC Rusal Alumina Jamaica Limited and Others v Wynette Miller and Others** [2013] JMCA Civ 14, Morrison JA (as he then was) referred to the relevant portion of the judgment of Kekewich J as "the classic statement" in relation to the approach to costs in cases concerning the construction of trust deeds and the administration of trusts. He was careful to point out, however, that an order for costs was a matter for the discretion of the court.

[10] The litigation in this case was distinctly adversarial. Messrs Mills and Thompson made a number of derogatory accusations against Alcoa and the trustees. It is true, however, that the analysis of the case did require the construction of certain rules governing the pension fund. That factor should be taken into account in exercising the discretion given to the court. An overall view of the issues and the conduct of the claim would reveal that the interpretation was not the dominant issue to be resolved. Perhaps the critical factor, however, is that the trust fund has already been wound up and the monies therein paid out. This was not entirely clear on the material available at the time of the appeal. Counsel for the trustees has, however, confirmed that the monies were all paid out in 2003. The result would be that the orders usually made for the first category of cases mentioned by Kekewich J, are not available to this court.

[11] Based on all those factors, it seems that the appropriate order to be made is that the appellants, being the unsuccessful party in the appeal, should pay the costs of the successful respondents. Such costs should be taxed if not agreed.

LAWRENCE-BESWICK JA (DISSENTING)

[12] The appellants, acting in a representative capacity for the beneficiaries of a pension scheme operated at Alcoa Minerals of Jamaica LLC (Alcoa), filed a fixed date claim form in the Supreme Court. The respondents were the trustees of the scheme as well as Alcoa. In the claim they sought a number of declarations, the effect of which would have been to set aside an amendment which had been made to the pension scheme rules and to have monies which had been paid out, refunded to the pension

fund. Their claim was dismissed and this court, by majority, dismissed their appeal of that judgment. This matter now concerns the remaining issue as to the order which should be made with respect to the costs of the appeal.

Stay of execution

[13] I have had the privilege of reading the draft judgment of my learned brother, Brooks JA. I agree that the process of deciding who should bear the costs of the appeal should not be halted. The appeal must come to an end.

Dominant issues

[14] As it concerns the matter of the costs, I also agree with the learned judge of appeal's analysis of the law but regrettably differ insofar as his application of that law to this appeal is concerned. I agree that the litigation in the case was adversarial and that the analysis of the case required the construction of certain rules governing the pension scheme, a factor which should be taken into account in exercising the discretion given to the court.

[15] However, I do not agree with my learned brother's opinion that an overall view of the issues and the conduct of the claim would reveal that the interpretation was not the dominant issue to be resolved.

[16] To my mind, at the foundation of the claim and of the appeal is the issue of interpretation. In my view, the primary and fundamental question was the interpretation of the pension scheme rules and the deed creating them. The question was whether an amendment to the rules was permissible, and, if so, the correct method

of its execution allowed by the rules. It is only after an acceptance that the amendment was permissible and that it had been properly executed according to the rules, that other factors could be considered.

[17] Because of the adversarial nature of the litigation, there were other important factors which were resolved, as, for example, whether the trustees acted fairly, whether a signature was genuine and also the effect of Alcoa breaching the pension fund rules by unilaterally stopping the payment of its monthly contributions.

[18] However, none of these important factors could have been properly considered without resolution of the primary and fundamental question of the interpretation of the rules and deed. In my view therefore, interpretation was a dominant issue to be resolved, and in accordance with the authorities, as comprehensively reviewed by my learned brother, the costs should normally be paid out of the fund[1]. The interpretation was necessary for the proper administration of the pension scheme.

Active trustees

[19] The trustees of the fund have actively defended this claim, even after the pension fund monies have been paid out. After the appeal had been dismissed, counsel for the trustees filed submissions concerning costs to be awarded by this court, arguing that the costs should follow the event. The appeal having been dismissed, this would

[1] **In Re Buckton; Buckton v Buckton** [1907] 2 Ch 406. **McDonald and others v Horn and others** [1995] 1 All ER 961, **UC Rusal Alumina Jamaica Limited and Others v Miller and Others** [2013] JMCA Civ 14.

mean that costs would be to the respondents, that is, the trustees of the fund and also to Alcoa.

[20] To my mind, if the trustees of the fund are capable of applying for and receiving costs, though the fund has already been wound up, by the same token they must be capable of paying out of the fund the costs incurred in litigation which they actively defended.

Fund liable for costs

[21] It is my opinion that the fact that the fund has been wound up should not change the general principle that the costs should be paid by the fund in a case such as this where the interpretation of the rules and deed of the pension fund scheme is a dominant issue.

[22] To my mind, the winding up of the Fund and payment out of its monies should not shift the liability for costs to the losing party in circumstances such as these. The trustees would be aware of where the monies were placed when the fund was wound up, a portion being paid to Alcoa and a portion to the beneficiaries and a portion for winding up expenses.

[23] The claim was, in the main, seeking an interpretation of the proper construction to be given to the rules and deed of the pension fund scheme. This interpretation would enure to the benefit of the administration of the scheme, in that it was necessary in order to determine the proper distribution of the funds managed by the scheme. In

those circumstances the costs of the litigation would come from the fund.

[24] However in this matter, there were arguments which were concerned with issues not directly associated with interpretation. It is in those associated issues that the appellants were unsuccessful, as for example, the authenticity of a signature and the fairness of the trustees' decision.

[25] The dominant and associated issues are intricately intertwined and in my view costs should normally be paid out of the fund in keeping with the general principles concerning costs in pension scheme matters.

Monies already paid out

[26] However, it is accepted that the monies have been paid out of the fund to the beneficiaries and to Alcoa and for expenses. Because of the extreme, if not insurmountable, difficulty which would arise in determining the precise portions of the costs which Alcoa and the individual beneficiaries of the fund would have to pay, I would exercise the discretion to which orders for costs are subject, and order each party to bear its own costs.

PANTON P

ORDER

By a majority (Lawrence-Beswick JA (Ag) dissenting)

Costs of the appeal to the respondents to be taxed if not agreed.