[2016] JMCA Civ 24A

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 70/2015

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**APPELLANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**1ST RESPONDENT**
	PETER JENNINGS	**2ND RESPONDENT**

Written submissions filed by Myers Fletcher and Gordon for the appellant

Written submissions filed by Douglas A Thompson for the 2nd respondent

14 July 2016

BROOKS JA

[1] On 6 May 2016 this court handed down a decision in this matter dismissing National Commercial Bank Jamaica Limited's (NCB) appeal against a refusal by Sykes J to grant it permission to apply for judicial review of a decision of the Industrial Disputes Tribunal (IDT). At the time of finalising the written judgment the court stipulated that

there would be no order as to costs. It was, however, a different panel that actually handed down the written judgment.

[2] At the time the judgment was handed down, learned counsel for the 2nd respondent, Mr Jennings, asked for the order for costs to be revisited. Based on the decision in **Sans Souci Limited v VRL Services Limited** [2012] UKPC 6, counsel on both sides were asked to file written submissions in respect of costs, for the consideration of the court. Learned counsel filed very helpful submissions on the point, for which the court is grateful.

[3] The essence of the issue is whether the principle set out at rule 56.15(5) of the Civil Procedure Rules 2002 (CPR), that generally speaking there should be no order as to costs in matters of judicial review, unless the applicant acted unreasonably, should apply to this appeal.

[4] Learned counsel for Mr Jennings submitted that the general rule in section 56.15 of the CPR is not directly applicable to an application for costs in this court. This was especially in a situation concerning an appeal from the refusal of the grant of leave in the Supreme Court. Learned counsel submitted that this was an ordinary civil appeal and therefore the general rule in respect of costs, that the unsuccessful party should pay the costs of the successful party, should prevail. Learned counsel relied, in support of those submissions, on rules 1.18(1) and 2.15 of the Court of Appeal Rules 2002 (CAR) and on decisions of this court including **Roald Nigel Adrian Henriques v Hon Shirley Tyndall OJ and Others** [2015] JMCA Civ 34.

[5] Learned counsel for Mr Jennings argued that NCB had acted unreasonably in pursuing the appeal particularly in light of the reasons given by Sykes J for refusing the application for leave to apply for judicial review. In the circumstances, it was submitted, the normal provisions that costs should follow the event, should apply. Learned counsel pointed, in addition, to the financial circumstances of NCB as against that of Mr Jennings, that it would be unreasonable to make no order as to costs.

[6] Not surprisingly, learned counsel for NCB submitted that the court's order contained in the judgment handed down on 6 May 2016, that there be no order as to costs, "is the most appropriate order to make with respect to [the] appeal, which is in the nature of an application for judicial review" and accordingly should not be disturbed. In their written submissions, learned counsel argued that NCB had not acted unreasonably in its appeal from the decision of Sykes J. It was noted in those submissions that Sykes J did not make an award of costs in the matter. It was also noted by NCB's counsel that:

a. the court had granted leave to appeal;
b. the court found that Sykes had fallen into error in certain respects;
c. Brooks JA had opined that it was "tempting...to say that the...issues...suggests that they ought to be the subject of judicial review"; and
d. costs would have been less if the Mr Jennings had agreed for hearing of the application for leave to appeal be treated as the hearing of the appeal.

Learned counsel urged the court not to place any reliance on the provision in rule 1.2(2) of the CPR concerning the financial position of each party.

[7] Learned counsel placed reliance on rule 56.15(5) of the CPR and on the reasoning in **Danville Walker v The Contractor-General** [2013] JMFC FULL 1(A) and **Branch Developments Limited t/a Iberostar v Industrial Disputes Tribunal and The University and Allied Workers' Union** [2016] JMCA Civ 26.

[8] In considering the matter it is noted that rule 56.15(5) of the CPR provides that in matters of administrative law, the general rule is that there should be no order as to costs. It states:

> "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."

That rule refers to matters in the Supreme Court and it is to be noted that the provisions of part 56 are not incorporated into the rules of this court.

[9] In contrast to that rule, is the general rule regarding costs, which is set out at rule 64.6 of the CPR. Rule 64.6, paragraphs (1)-(4), state as follows:

> "(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**.
>
> (2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.

(3) In deciding who should be liable to pay costs the court must have regard to all the circumstances.

(4) In particular it must have regard to –

(a) the conduct of the parties both before and during the proceedings;

(b) whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;

(c) any payment into court or offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Parts 35 and 36);

(d) whether it was reasonable for a party –

(i) to pursue a particular allegation; and/or

(ii) to raise a particular issue;

(e) the manner in which a party has pursued –

(i) that party's case;

(ii) a particular allegation; or

(iii) a particular issue;

(f) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his or her claim; and

(g) whether the claimant gave reasonable notice of intention to issue a claim." (Emphasis supplied)

The provisions of part 64 of the CPR do apply in this court (see rule 1.18 of the CAR).

[10] The submissions of learned counsel for Mr Jennings are convincing. It must be accepted in light of the decision in the court below, the relative financial circumstances of the parties and the reasons given for the dismissal of the appeal, that, on a

reconsideration of the matter, the appropriate order is that costs should be awarded to Mr Jennings to be taxed if not agreed. The fact that the granting of leave to appeal was an indication that the appeal was not unreasonable was taken into account. That consideration, however, would not trump the general rule that costs should be awarded to the successful party.

[11] It is to be noted that the IDT, although represented in this court by counsel, as it was in the court below, took a neutral stance. It did not oppose the application for leave to apply for judicial review and it did not oppose NCB's appeal. In the circumstances it would be more appropriate that no order be made as to costs in respect of the IDT's participation in these proceedings.

SINCLAIR-HAYNES JA

[1] I have read the draft judgment of Brooks JA. I agree that costs should be awarded to the 2nd respondent.

P WILLIAMS JA (AG)

[2] I too have read the draft judgment of Brooks JA and agree that the appellant should pay the costs of the 2nd respondent.

BROOKS JA

ORDER

1. The order in respect of costs as set out in the written judgment handed down on 6 May 2016 is set aside.
2. The following order is to be substituted as the order for costs in this appeal:
    a. No order as to costs in respect of the 1st respondent;
    b. The appellant shall pay the costs of the 2nd respondent as are taxed if not agreed.