

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA**

**SUPREME COURT CIVIL APPEAL NOS COA2020CV00038 &
COA2020CV00041**

BETWEEN	STEWART BROWN INVESTMENTS LIMITED	1ST APPELLANT
AND	ALTON WASHINGTON BROWN	2ND APPELLANT
AND	ERMINE STEWART	3RD APPELLANT
AND	NATIONAL EXPORT-IMPORT BANK OF JAMAICA LIMITED (T/A AS EXIM BANK JAMAICA)	RESPONDENT

No written submissions on costs filed on behalf of the appellants

Written submissions on costs filed by Mayhewlaw for the respondent

14 October 2022 and 3 February 2023

F WILLIAMS JA

[1] I have read the costs ruling of my sister Foster-Pusey JA and I agree with her reasoning and conclusion.

STRAW JA

[2] I too have read the costs ruling of my sister Foster-Pusey JA and I agree with her reasoning and conclusion.

FOSTER-PUSEY JA

Background

[3] This costs ruling arises from two appeals and counter appeals brought by the appellants and the respondent, respectively, before this court (see **Stewart Brown Investments Limited and others v National Export-Import Bank of Jamaica Limited (T/A as Exim Bank Jamaica)** [2022] JMCA Civ 32). The first appeal (appeal no COA2020CV00038) challenged the decision of Batts J ('the learned judge') made on 21 May 2020 where he refused the appellants' application to remove or extend time to comply with the Marbella condition. In the second appeal (appeal no COA2020CV00041) the appellants complained about the learned judge's order made on 15 May 2020 refusing to extend an injunction that he had earlier granted.

[4] The counter appeals sought to affirm the learned judge's orders. Counsel for the respondent relied on several grounds in support of their counter appeals. Essentially, they argued that the learned judge had no basis to extend and/or remove the requirement to comply with the Marbella condition.

[5] Having heard the appeals and counter appeals, on 23 September 2022, this court made the following orders:

- "1. The appeals are dismissed.
2. The counter appeals are dismissed.
3. The injunction restraining the respondent from exercising its power of sale as mortgagee in relation to real estate which it holds as security with respect to the loan facility granted to the 1st appellant, is hereby discharged.
4. The application for an interim injunction restraining the respondent from enforcing any security with respect to the loan facility until the determination of the proceedings in the court below is refused.

5. The Registrar of the Supreme Court is directed to schedule the earliest possible trial date for this matter.
6. The appellants and the respondent shall, on or before 14 October 2022 file written submissions on the issue of costs of the appeals and counter appeals, after which the court will issue its ruling.”

[6] As indicated in order no 6 above, the issue in respect of costs was reserved. The parties were ordered to file written submissions on or before 14 October 2022. In compliance with the direction of this court, the respondent filed its written submissions on 14 October 2022.

[7] The attorneys-at-law for the appellant, to date, have not filed any written submissions in respect of costs.

The respondent’s submissions

[8] Counsel for the respondent submitted that since both appeals were heard together, a single costs order is appropriate in the circumstances, as this would obviate the need for separate taxation proceedings and be an efficient use of the court’s time.

[9] Counsel outlined that the court, in exercising its discretion, is guided by the general principle that “costs follow the event” (see rule 64.6(1) of the Civil Procedure Rules (CPR)), and highlighted that rule 64.6 also indicates that the court may order a successful party to pay all or part of the costs of an unsuccessful party or even make no orders as to costs having regard to the circumstances of the case. Therefore, the court in making such a determination will consider for example:

- i. whether a party ought to have pursued certain issues;
and
- ii. whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings.

Counsel also referred to and relied on the cases of **Capital and Credit Merchant Bank Ltd v Real Estate Board** [2013] JMCA Civ 48, **Straker v Tudor Rose (a firm)** [2007] EWCA Civ 368 and **VRL Operators Limited v National Water Commission and others** [2015] JMCA Civ 69 in support of this point.

[10] It was the contention of counsel that neither the appellants nor the respondent succeeded on all the issues that arose for consideration before this court. Counsel noted that the purpose of the appeal was to remove or extend the time for compliance with the Marbella condition. However, this was not achieved and the order of the learned judge was affirmed. Counsel argued that although the respondent was unsuccessful in its counter appeals, the learned judge's order was not disturbed.

[11] Counsel submitted that it was clear that the respondent was the overall successful party. Counsel, however, accepted that since the respondent did not succeed in its counter appeals, a reduction of the costs that is to be awarded may be necessary. Counsel indicated that since the issues in the respondent's counter appeals were really secondary, and did not consume the majority of the preparation time for the hearing, it would be reasonable for the respondent to be awarded 80% of its costs against the appellants in both appeals.

Analysis

[12] In determining the appropriate order for costs, I am guided by settled principles governing the award of costs. The general rule is that where a court decides to order costs, it must order the unsuccessful party to pay the costs of the successful party (see rule 64.6(1)). However, the court may, pursuant to rule 64.6(2), order a successful party to pay all or part of the costs of an unsuccessful party and even make no order as to costs. The award of costs is a discretionary exercise and there is no entitlement to such an award. If the court is so minded to make a costs award, it must have regard to all the circumstances in the case.

[13] Rule 64.6(4) is instructive. It outlines particular factors that the court should consider in exercising its discretion. The court 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 the 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;
- (g) whether the claimant gave reasonable notice of intention to issue a claim.”

[14] In this matter, the issues that arose for the court’s determination were:

1. Whether the 1st appellant established exceptional circumstances which empowered the learned judge to exempt it from complying with the Marbella condition;
2. Whether the learned judge erred in not extending the date for the injunction from 15 May 2020 to 21 May 2020; if so, what was the effect of that error?

3. Whether the learned judge's refusal to so extend the date should be upheld on the basis that the application was *ex parte* and he had the discretion to refuse the application; and
4. Whether the 1st appellant had *locus standi* to apply for an injunction relevant to the mortgaged properties of the guarantor, the 3rd appellant.

[15] The appellants pursued issues 1 and 2, while issues 3 and 4, broadly speaking, reflected the respondent's counter appeals. Insofar as issue 2 was concerned, the court ruled that as the learned judge applied his discretion to order an *inter partes* hearing, he ought to have extended the injunction to the date of that hearing, and the appellants' submissions on the point were correct. The court further held that, contrary to the respondent's submissions, the learned judge's refusal to extend the date for the Marbella condition to be satisfied should not be affirmed on the basis that the injunction had already expired as of 15 May 2020. The court went on to note, however, that there was no evidence that the 1st appellant was prejudiced by the refusal of the learned judge to make the appropriate order on 15 May 2020, and the issues raised by the parties did not assist in the determination of the appeal.

[16] Insofar as issue 4 which was pursued by the respondent was concerned, the court did not find it necessary to consider the issue of *locus standi*, due to the specific circumstances in the appeal before it.

[17] Importantly, issue 1, on which the appellants failed, was the main matter that the court addressed in its extensive judgment.

[18] I agree with the respondent's submissions. The main aim of the appellant's appeal was the setting aside of the learned judge's refusal to remove the Marbella condition or extend the time for compliance. This was not achieved. The respondent was the overall successful party, as the court affirmed the order made by the learned judge. However,

the respondent failed in its counter appeals. As a consequence, it is appropriate to reduce the costs to which the respondent is entitled.

[19] I disagree with the respondent's proposal that it be awarded 80% of the costs in both appeals. The time spent in respect of the counter-notice of appeal, considering the number of grounds relied upon, was more significant than the respondent contends. In light of all the circumstances, I propose that the respondent be awarded 70% of the costs in both appeals.

F WILLIAMS JA

ORDER

70% of the costs of the appeals to the respondent to be agreed or taxed.