[2020] JMCA Civ 29A

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 7/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD BISHOP JA

BETWEEN	**UNITED GENERAL INSURANCE COMPANY LIMITED**	**APPELLANT**
AND	**MARILYN HAMILTON**	**RESPONDENT**

Written submissions filed by Hart Muirhead Fatta for the appellant

Written submissions filed by Ballantyne Beswick and Co for the respondent

1 October 2020

PHILLIPS JA

[1] I have read, in draft, the judgment written by my brother Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

[2] On 3 July 2020, this court handed down its decision allowing, in part, an appeal by United General Insurance Company Limited, now named Advantage General Insurance Company Limited (UGI). At that time, the court made orders in respect of the costs in the court below and invited counsel for the parties to make submissions in writing on the issue of the appropriate order in respect of the costs of the appeal. There were three

aspects to the orders that were made on the appeal. The order made in respect of the trial costs states:

> "5. Order 5 [of the trial judge's orders] is set aside and in its place it is ordered that UGI shall pay Mrs Hamilton one half of her costs."

The order made in respect of the costs of the assessment of damages in the Supreme Court states:

> "4. Order 7 [of the orders on assessment of damages] is modified to award Mrs Hamilton one-half of the costs of the assessment of damages."

Finally, the order made in respect of the costs of the appeal states:

> "(g) Counsel for the parties shall, within 14 days of the date hereof, file and serve written submissions as to the costs of the appeal."

[3] As part of their submissions, filed in obedience to that order, learned counsel for the respondent, Mrs Marilyn Hamilton, asked the court to reconsider its orders in respect of costs in the court below. Learned counsel submitted that a request for submissions concerning those costs would be consistent with the principle laid down by their Lordships in **Sans Souci Limited v VRL Services Limited** [2012] UKPC 6.

[4] The matter of the order in respect of those costs will be addressed before the issue of costs of the appeal.

The orders for costs in the court below

Submissions

[5] Learned counsel for Mrs Hamilton argued that counsel for the parties should have been allowed the privilege of submitting on the award of costs in the court below. They argued that the variation by the court, without the benefit of submissions from counsel

worked to Mrs Hamilton's disadvantage. Learned counsel argued that the time spent during the trial arguing UGI's issue of justification for dismissing Mrs Hamilton from its employment unnecessarily lengthened the trial. Accordingly, learned counsel argued, Mrs Hamilton's costs should not have been reduced by one-half. Indeed, learned counsel submitted, there ought not to be any reduction of Mrs Hamilton's costs of trial. The issue of the pension claim, on which Mrs Hamilton lost, learned counsel submitted, was not so significant as to warrant any discounting of the costs.

[6] Learned counsel also submitted that there ought not to have been any adjustment of Mrs Hamilton's costs in respect of the assessment of damages, which followed the trial, as the assessment of damages would have inevitably occurred. They accepted that the adjustment of the orders on the trial would necessarily require an adjustment of the quantum of the damages assessed. They, however, argued that there ought not to have been any adjustment in the costs of the assessment of damages as there had been no appeal from the result of the assessment. Learned counsel further argued that UGI's conduct in respect of the assessment exercise was obstructionist and uncooperative and rendered, as unwarranted, a reduction of the costs.

[7] Learned counsel on behalf of UGI, initially, made no submissions on these points. Their original submissions were filed on the same day as those for Mrs Hamilton. They were, however, alerted, at the time of the delivery of the judgment on the appeal, of the stance of learned counsel for Mrs Hamilton, concerning the request for an opportunity to make submissions in respect of costs in the court below.

[8] Unfortunately, the panel that handed down the judgment was not the panel that heard the appeal and therefore it could make no orders in respect of the matter. It is also

to be noted that no formal application for reconsideration of the costs awarded by this court in relation to costs in the court below was filed, before the Registrar of this court issued the certificate of the result of the appeal.

[9] The court, in considering Mrs Hamilton's application for reconsideration, requested counsel for UGI to make submissions on the matter of the costs in the court below.

[10] Learned counsel argued that Mrs Hamilton was unsuccessful, based on the ruling of this court, in the majority of the issues that she placed before the court below for its adjudication. Even where Mrs Hamilton was successful, learned counsel for UGI assert, she was only partially so. Learned counsel argued that a significant portion of the trial was spent on evidence dealing with the unsuccessful areas of Mrs Hamilton's case. The way in which Mrs Hamilton's case was pleaded, learned counsel submitted, largely caused unnecessary evidence to be led and an unduly long trial. This court should take into account these issues, learned counsel submitted, in considering the provisions of rule 64.6(3) and (4) of the Civil Procedure Rules (the CPR). Learned counsel relied, in part, on **Peerless Limited v Gambling Regulatory Authority and others** [2015] UKPC 29, for support for their submissions on this point.

[11] Learned counsel also made extensive submissions concerning the conduct of Mrs Hamilton's attorneys-at-law in relation to the preparation, taxing and enforcement of bills of costs relating to this case. That conduct, learned counsel submitted, should also be taken into account by this court, in UGI's favour, in assessing the order for costs.

[12] Mrs Hamilton's counsel responded vehemently to the latter submissions on behalf of UGI. They completely rejected the denigration of the conduct of Mrs Hamilton's

attorneys-at-law, asserting that the assertions were either false or made on a twisting of the facts. Learned counsel also submitted that UGI's complaints in this regard were irrelevant to the issue on which this court sought assistance.

Analysis

[13] The request by learned counsel for Mrs Hamilton must be considered against the background that the Registrar of this court had previously issued the certificate of the result of the appeal in accordance with rule 2.18 of the Court of Appeal Rules (CAR). The existence of the certificate raises the issue as whether it prevents the court from entertaining learned counsel's request.

[14] The principles preventing this court from adjusting its orders, once the certificate of the result of the appeal has been issued, were comprehensively set out in **Sarah Brown v Alfred Chambers** [2011] JMCA App 16. In that case the applicant asked this court to extend the time that the court had stipulated for the applicant to vacate land. The court ruled that it had no authority to do so once the certificate of the result of the appeal had been issued. It said at paragraphs [5] and [6]:

> "[5] The fundamental issue in this application is whether the court is empowered to extend time after a final judgment or order has been made. It is common ground that the pronouncement of the court on 20 December is a final order. As a general rule, once a judgment or order is perfected it brings litigation to an end. It follows therefore that a court cannot revisit an order which it has previously made. The extent of the court's jurisdiction does not go beyond that which is pronounced in its final order. Despite this, certain exceptional circumstances may arise which may cause the court to revisit a prior order. In the Australian case of **Bailey v Marinoff** [(1971)125 CLR 529], Barwick CJ, speaking to the foregoing principles, at page 530 said:
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> > 'Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court,

that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its substance, in my opinion, beyond recall by that court. It would, in my opinion not promote the due administration of the law or the promotion of justice for a court to have a power to reinstate a proceeding of which it has finally disposed. In my opinion, none of the decided cases lend support to the view that the Supreme Court in this case had any inherent power or jurisdiction to make the order it did make, its earlier order dismissing the appeal having been perfected by the processes of the Court.'

[6] At page 539 Gibbs J said:

'It is a well-settled rule that once an order of a court has been passed and entered or otherwise perfected in a form which correctly expresses the intention with which it was made the court has no jurisdiction to alter it … The rule rests on the obvious principle that it is desirable that there be an end to litigation and on the view that it would be mischievous if there were jurisdiction to rehear a matter decided after a full hearing. However, the rule is not inflexible and there are a number of exceptions to it in addition to those that depend on statutory provisions such as the slip rule found in most rules of court.'

In **Gamser v The Nominal Defendant** [(1977) 136 CLR 145], in addressing the principle, Barwick [CJ] said [at paragraph 2]:

'I regard it as unfortunate that the inherent power of an appellate court does not extend to varying its own orders when the interests of justice require it. It is of course a most important principle, based on sound grounds of policy, that there should be finality in litigation. However, exceptional cases may arise in which it clearly appears from further evidence that has become available that a judgment which has been given rested on assumptions that were false and that it would be manifestly unjust if the judgment were allowed to stand. In my opinion it is desirable that the Court of Appeal should have a discretion – however guardedly it might have to be exercised – to reopen its judgments in cases such as that in which the needs of justice require it. I agree, however, that the decision in

> **Bailey v Marinoff** shows that the Court of Appeal lacks that inherent power.'"

[15] The court also said, definitively, at paragraph [11] of its judgment:

> "Neither the COAR [Court of Appeal Rules] nor the Civil Procedure Rules (so far as is applicable to the powers of the Court of Appeal), authorizes this court to enforce or put into execution its final judgment or order. Under rule 1.12 of the COAR, this court is empowered to alter or modify a notice of appeal by way of an amendment. This is clearly a process which would be done before judgment. Although the Civil Procedure Rules do not give this court the power to correct judgments or orders, the court, by virtue of its inherent jurisdiction may, correct a clerical error, or an error arising from an accidental slip or an omission arising in its judgment or order. Generally, that is the extent of the court's authority to amend after judgment. In construing section 10 [of the Judicature (Appellate Jurisdiction) Act], **we are of the view that it could not have been the legislative intent to have permitted this court to interfere with its judgment once it has been delivered. It is plain that no other meaning could reasonably be attributed to it. To construe the section otherwise would undoubtedly run contrary to that which was contemplated by the legislature. On a true construction of section 10, this court is empowered to deal only with judgments or orders of the Supreme Court which are pending before it**." (Emphasis supplied)

[16] The reasoning in **Brown v Chambers** is complementary to the general guidance in **Taylor and another v Lawrence and another** [2002] EWCA Civ 90; [2003] QB 528, where it was held that the re-opening of an appeal, by an intermediate appellate court, is unlikely to be granted if a further appeal to a higher court is available. The first finding, as set out in the headnote of the report of the case, is reflective of the findings of the Court of Appeal of England and Wales, and is instructive:

> "*Held*, (1) that the Court of Appeal had an implicit jurisdiction to do what was necessary to achieve its two principal objectives of correcting wrong decisions and ensuring public confidence in the administration of justice; that, therefore, it

> could take the exceptional course of reopening proceedings which it had already heard and determined if it was clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy; that, before exercising such a power, the court would consider the effect of reopening the appeal on others and the extent to which the complaining party was the author of his own misfortune; and that where the alternative remedy would be an appeal to the House of Lords the Court of Appeal would only give permission to reopen an appeal if it was satisfied that leave to appeal to the House of Lords would not be given…"

[17] The Court of Appeal of England and Wales, in **In re Uddin (A Child)** [2005] 1 WLR 2398 explained the position that it had taken in **Taylor v Lawrence**. The court stated that appeals would only be re-opened in the most exceptional cases. It said, in part, at paragraph 5:

> "…There is a pressing public interest, which has to be understood, in confining the circumstances in which the court will reopen an appeal that has already been finally determined to cases of the most exceptional kind; and this is so across all areas of the law, including family law…."

[18] Nonetheless, the Privy Council in **Sans Souci Limited v VRL Services Limited** suggests that, in circumstances such as the instant case, the court may allow the parties the opportunity to address it on the issue of costs, or, indeed, on any issue on which the parties had not been previously been given an opportunity to make submissions. Their Lordships said at paragraph 23 of their judgment:

> "The importance of finality in litigation has been emphasised by generations of common lawyers. Ultimately there must come an end to the parties' opportunities for reopening matters procedural or substantive which have been judicially decided. This principle is, however, founded on an assumption that they were decided in accordance with the rules of natural justice. Notwithstanding the importance of finality, the rule of practice is that until either (i) a reasonable time has elapsed, or (ii) the order has been perfected, a party

> who has not been heard on costs or other matters arising out of a judgment, is entitled as of right to be heard. Thereafter, the Court still has an inherent jurisdiction to hear him, but the test is more exacting. The order will be varied only in exceptional circumstances, when the party can demonstrate that the form of the order can be attributed to a miscarriage of justice: *Taylor v. Lawrence* [2002] EWCA Civ 10, [2003] QB 528 at [55]. **The Board would endorse the test which was formulated in *Re Uddin* [2005] I WLR 2398, at [4], and applied by the Court of Appeal in this case, that there must be 'special circumstances where the process itself has been corrupted.' This is not the occasion for extended review of the circumstances which will satisfy this test, but the Board has no doubt that one of the circumstances which will satisfy it is that the party desiring to be heard did not have a reasonable opportunity to be heard at an earlier stage when the test would have been less formidable**." (Emphasis supplied)

[19] Based on the reasoning of their Lordships, and the circumstances of this case wherein the parties were not able to address the court on the issue of costs in the court below, this court is permitted to consider submissions from counsel in respect of an application to review the orders that it has made in respect of the costs in the court below. It was on that basis that counsel for UGI were requested to make submissions on costs in respect of the proceedings in the court below. Having considered the competing submissions, the issue of the costs in the court below, will be considered below.

[20] In **William Clarke v The Bank of Nova Scotia Ja Ltd (Ruling on Costs)** [2014] JMCA Civ 32, this court reconsidered an order that it had made in respect of costs. The circumstances of that case were slightly different in that a written request for reconsideration was made on the same day of the original order, and before the issue of the Registrar's certificate. Nonetheless, the reconsideration was based on the guidance

in **Sans Souci Limited v VRL Services Limited**, which has informed the present approach.

[21] In its judgment in the substantive matter, the court noted that the general principle with respect to awarding costs is that the unsuccessful party should pay the costs of the successful party (see rule 64.6(1) of the CPR). The court may, however, depart from applying the general principle if the circumstances so require (see rule 64.6(3) of the CPR). The principles that guide the court in deciding whether there should be a departure from the general principle are set out in Rule 64.6(4) of the CPR. The rule states:

> "(4) In particular [the court] must have regard to -
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> (a) the conduct of the parties both before and during the proceedings;
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> (b) **whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings**;
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> (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);
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> (d) **whether it was reasonable for a party** -
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> (i) **to pursue a particular allegation; and/or**
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> (ii) **to raise a particular issue**;
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> (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.

(Rule 65.8 sets out the way in which the court may deal with the costs of procedural hearings other than a case management conference or pre- trial review.)" (Emphasis supplied)

[22] Although learned counsel for Mrs Hamilton argued that, as the successful party, she should have all the costs of both the trial and the assessment of damages, it cannot be ignored that, at the trial and as a result of the appeal, UGI has succeeded on a number of the areas in contention at the trial. Mrs Hamilton only succeeded on the issues of:

a. the unlawful dismissal, insofar as UGI had failed to justify dismissing her, and, based on the judgment on the appeal, had failed to give the appropriate period of notice; and

b. her motor vehicle allowance entitlement.

UGI succeeded at the trial on the defamation claim, and on appeal, on the issues of:

a. the additional award based on the manner of dismissal; and

b. the pension claim.

[23] It is true, however, that some of the trial time was unnecessarily spent on the justification issue, which UGI ought not to have raised. That issue caused Mrs Hamilton to have to adduce evidence from persons in the information technology industry, who, had UGI's stance been otherwise, would not have been needed to testify.

[24] In attempting to balance the weight of those issues and the time spent on them, it is fair to award Mrs Hamilton, as the victor, two-thirds of her costs of the trial. She lost on more issues than she succeeded, but she was obliged to initiate the claim and the issue that she succeeded on took a disproportionate amount of the trial time, due to UGI's unreasonable stance.

[25] A similar conclusion may be applied to the assessment of damages. Despite the fact that there has been no appeal from the assessment, the orders on the assessment could not stand as they were inconsistent with the findings on the appeal from the learned trial judge's decision. There is no basis to treat with the award of costs on the assessment differently from the substantive orders that resulted from the exercise.

[26] The learned trial judge's order of a separate assessment of damages was only necessary because of the erroneous orders that she made concerning the length of time for which Mrs Hamilton should have been compensated. Nonetheless an assessment was conducted and Mrs Hamilton is entitled to some costs for the exercise. There are two factors, one on either side of the equation that must be considered. Firstly, there must be condemnation of UGI's failure to co-operate in having the assessment of damages conducted. The assertions that several orders had to be made concerning disclosure are uncontested. Secondly, there must be an adjustment of the costs due to the time spent on matters for which Mrs Hamilton was not entitled to an award. Those matters were in the majority. As a result, the appropriate adjustment for the costs is to also award Mrs Hamilton two-thirds of the costs of the assessment of damages.

[27] The complaints about the conduct of Mrs Hamilton's attorneys-at-law in respect of various costs exercises in the court below need not be considered at this stage. No doubt the taxation exercise will determine whether or not the allegations are meritorious.

Costs of the appeal

[28] Before setting out the respective submissions of counsel for the parties, it is necessary to outline the context in which the submissions were invited. During the course of the proceedings in this court, the parties arrived at a consent order, filed on 22 March 2018, which includes the following as order 6:

> "[UGI] undertakes in the event of the appeal being allowed whether completely or in part (a) to pay the costs of [Mrs Hamilton] to the appeal, to be agreed or taxed, limited to the appearance of two counsel and an instructing attorney at the first five days of the Appeal (b) not to seek or enforce any order for costs against [Mrs Hamilton] to the appeal. In the event of the appeal being dismissed wholly or in part [Mrs Hamilton] will be entitled to seek orders for costs of the appeal. The costs of the action in the court below shall be determined by the Court of Appeal after hearing the appeal."

Submissions

[29] Learned counsel for UGI submitted, that despite the fact that UGI entered into that consent order, it should nonetheless be awarded the costs of the appeal. The basis of that argument is that UGI agreed to the order based on an error of law regarding the court's stance on applications to strike out claims and appeals. As a result, learned counsel submitted, not only should UGI not be bound by the order but that the order ought to be set aside.

[30] The error of law, learned counsel submitted, is that UGI's legal representatives were not aware of a case that modified the harshness of the decision in **Mitchell v News**

Group Papers Limited [2013] EWCA Civ 1537. It was **Mitchell v News Group Papers**, learned counsel submitted, that influenced UGI's legal representatives to agree the terms of the consent order. According to learned counsel, if the legal representatives were aware of the later case of **Denton and Others v TH White Limited and Another** [2015] 1 All ER 880, they would not have agreed on those terms. **Denton and Others v TH White**, learned counsel submitted, supported the stance that the alternatives to striking out are the preferable steps to take to ensure justice and to minimise "satellite litigation" and non-cooperation.

[31] Learned counsel also submitted that even if the consent order was not disturbed, UGI is nonetheless entitled to the costs of the counter-notice of appeal, which, they argued, the consent order did not address.

[32] Learned counsel for Mrs Hamilton argued for the full application of the consent order. They submitted, that despite the fact that UGI was partially successful in its appeal, the court should nonetheless award Mrs Hamilton the costs of the appeal because the conduct of UGI and its approach to the appeal was so abysmal, that apart from the consent order, UGI deserved to be deprived of the benefit of the general principle that costs should be awarded to the successful party.

Analysis

[33] Despite the arguments set out by learned counsel for UGI, there is no basis for setting aside the consent order. UGI was represented by an able legal team, which was led by very senior and experienced Queen's Counsel. There is nothing that has been raised to show that they misunderstood the law regarding applications for striking out. Indeed, the failure of UGI's instructing attorneys-at-law to consistently obey the rules and

orders of the court in this appeal, caused them to contest at least three applications to strike out the appeal. They were well versed on the law in this area. UGI must be bound by the consent order.

[34] The application of the consent order means that there is no need to discuss the aspect of costs of the appearances for hearing of the counter-notice of appeal. The arguments in respect of both the appeal and the counter-notice of appeal were completed within the five-day limit set out in the consent order. UGI has agreed to pay the costs of those appearances as detailed in the order.

[35] The costs relating to the preparation of documents and the interlocutory appearances were also addressed by the consent order, where it states that UGI undertakes "not to seek or enforce any order for costs against [Mrs Hamilton] to the appeal". That restriction prevents UGI from securing any costs, not only in respect of the appeal, but also, from the tenor of the order, the counter-notice of appeal. It is true that the order does not mention the counter-notice of appeal, but the tenor of the order is such that UGI must be read to be agreeing to hold Mrs Hamilton harmless in respect of costs of the proceedings in this court. Its restraint was consideration, in the contractual sense, for Mrs Hamilton's restraint in one of her several applications to strike out UGI's appeal.

[36] Even if that assessment of the order is incorrect, learned counsel for Mrs Hamilton are correct in their assertion that UGI's conduct of the litigation in this court is such that it ought not to be granted any of the costs of the counter-notice of appeal.

Conclusion

[37] The court has applied the principle in **Sans Souci v VRL Services Limited** and, based on the fact that it did not previously invite or receive, from counsel, submissions on costs in the court below, has re-opened the matter of those costs.

[38] Based on an assessment of the time spent at the trial on the relevant issues on which UGI succeeded, it would be fair to award Mrs Hamilton two-thirds of the costs of the trial. The assessment of damages, which flowed from the trial, was, largely, an unnecessary exercise, since it mostly dealt with matters which flowed from the erroneous findings of the learned trial judge. However, UGI's approach to the exercise was not consistent with the spirit of the overriding objective. Accordingly, Mrs Hamilton should be awarded two-thirds of the costs of the assessment of damages.

[39] The consent order adequately addresses the issue of the costs of the appeal. The parties are to abide by it. The consent order is, however, silent on the issue of the costs of the counter-notice of appeal, and therefore it is for this court to make an order as to costs in that regard. It is determined that UGI's conduct in the appeal does not merit it being awarded any costs associated with the counter-notice of appeal.

MCDONALD-BISHOP JA

[40] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing to add.

PHILLIPS JA

ORDER

(a) This court's order, made herein on 3 July 2020, in respect of the costs of the trial in the court below, is set aside.

(b) The trial judge's order, in respect of costs, is set aside and in its place UGI is hereby ordered to pay Mrs Hamilton two-thirds of her costs.

(c) This court's order, made herein on 3 July 2020, in respect of the costs of the assessment of damages, is set aside.

(d) The assessment judge's order, in respect of the costs of the assessment of damages herein, is set aside and in its place UGI is hereby ordered to pay Mrs Hamilton two-thirds of her costs of the assessment of damages.

(e) Costs of the appeal shall be in accordance with the consent order filed herein on 22 March 2018.

(f) Each party shall bear its own costs in respect of the counter-notice of appeal.

(g) All costs are to be agreed or taxed.