[2014]JMSC Civ. 40

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 00715

BETWEEN **BRANCH DEVELOPMENTS LIMITED T/A IBEROSTAR ROSE HALL BEACH HOTEL** **CLAIMANT**

A N D **THE BANK OF NOVA SCOTIA JAMAICA LIMITED** **DEFENDANT**

INTEREST ON COSTS

IN CHAMBERS

Michael Hylton Q.C., Ms. Shanique Scott and Ms. Melissa McLeod instructed by Michael Hylton & Associates for the defendant (applicant)

Mrs. Pamela Benka-Coker Q.C. and Brian Moodie instructed by Samuda & Johnson for the claimant (respondent)

Heard: 2 April 2014

CIVIL PROCEDURE - APPLICATION TO STRIKE OUT - BREACH OF COURT ORDERS - REFUSAL TO STRIKE OUT - ALTERNATE SANCTION IMPOSED - ORDER FOR PAYMENT OF COSTS - INTEREST AWARDED ON COSTS - WHETHER AWARD OF INTEREST ON COSTS EXCESSIVE OR UNFAIR - APPROPRIATE PERIOD FOR AWARD OF INTEREST - CONSIDERATIONS APPLIED – JUDICATURE (SUPREME COURT) ACT, SS 51 (1) & (2); CPR, RULES 64.6(5) (H); 65.15 & 65.19

McDONALD-BISHOP, J.

[1] This is further consideration of an aspect of the defendant's Notice of Application for Court Orders filed on 17 January 2013 for striking out of the claimant's statement of case pursuant to the Civil Procedure Rules, 2002 (the CPR) rule 26.3 (1) (a). It relates, specifically, to the issue of the court's power to award interest on costs.

[2] On 24 January 2014, I dismissed the application on the ground that striking out was not appropriate in the circumstances albeit that the claimant had breached the orders of the court and had a history of doing so. As an alternative to striking out, I made a costs order against the claimant by way of sanction for the breach.

[3] I indicated, then, that as part of my sanction, I was minded to award interest on the costs payable by the claimant commencing at a date before the application was determined (that is before the date of judgment) until payment. In so far as is relevant, the order reads as follows:

> *2. "By way of sanction*
> *(i) The claimant shall pay the defendant's costs of the application and of the adjournment of the trial, such costs to be agreed or taxed.*
>
> *(ii) The court is minded to award interest on the costs of the application at 6% per annum to be calculated for the period from 17 January 2013 to 25 March 2013 and from 24 January 2014 until payment and the parties are at liberty to prepare and file written submissions on this aspect of the order on or before 21 February 2014."*

[4] On 21 February 2014, written submissions were filed as ordered. I appreciate the parties' input on the subject and I now will proceed to give my reasoning and decision on the matter.

The costs order

[5] The court's power to award costs generally, and more specifically, as sanction in lieu of making a striking out order, is, to my mind, well settled beyond question. Therefore, my decision to award costs will not be made the subject of any further discussion on my part at this point as my reasons for doing so have been detailed in the written judgment delivered on 24 January 2014.

[6] Associated with my order for costs to be paid by the claimant to the defendant was an order that such costs be agreed or taxed. That aspect of my order, it having been perfected, is no longer open for further consideration by me. It follows, therefore,

that the submissions made on behalf of the claimant that I should summarily assess the costs to be paid by the claimant and to determine the specific sum are rejected. I have no legal basis to do so and in any event, I see nothing arising in the circumstances that would necessitate me re-visiting that aspect of my order.

[7] I note too that the claimant's attorneys-at-law have also raised for further consideration the aspect of the order that the costs of the adjournment of the trial are to be paid by the claimant. It seems from those submissions that I am being invited to make further orders in relation to those costs to say that only one day's costs and costs for one attorney should be awarded. It is noted that this issue pertaining to costs of the adjournment was dealt with at length by the defendant in the 'pre-judgment' submissions. The defendant had asked then that even if it did not succeed on the application to strike out, the costs of the application as well as of the trial should be awarded to it for several reasons disclosed. The claimant got its opportunity to respond which it did. I, having considered those submissions along with the circumstances of the case, proceeded to make the order in the terms as stated.

[8] No application was made or has been made by the defendant's attorneys-at-law for any special costs certificate and none has been granted (see CPR, rule 64.12). So, I have made no order, as would have been required under rule 65.11, for costs to be allowed for more than one attorney-at-law. Rule 65.11 makes provision for the allowance of costs for the attendance of more than one attorney-at-law at the hearing of the application and/or at trial and it grants power to the Registrar to deal with that issue in accordance with rules 65.17. So, the matters raised on behalf of the claimant as to what costs should be allowed or not can be properly raised and fully ventilated at taxation. There is no need for me to re-open the hearing to deal with such issues. I therefore, refuse to accede to the request to make orders which would relate to matters that would conveniently fall within the purview and competence of the Registrar at taxation.

Interest on costs

[9] My immediate and sole concern is with the outstanding matter that I reserved for final determination which is my stated intention to award interest on the costs awarded to the defendant to commence from a date before the order was made until payment.

[10] Rule 64.6 (5) sets out the orders that the court may make in relation to costs. Those orders include an order that interest be payable on costs from or until a certain date, including a date before judgment. See rule 64.6 (5) (h)

[11] In addition to that power, however, I also take it as being well within the court's power, in determining an appropriate sanction for breach of its orders or the rules of court, to make orders relating to payment of interest (be it on damages or costs), as the court sees just, as a penalty in lieu of the final and draconian sanction of striking out. Striking out must be viewed as a measure of last resort.

[12] The power to do so must be taken as part and parcel of the inherent right of the court to devise its own measures, in so far as the law permits, to ensure that its orders are obeyed and that there is no flouting of its rules with impunity. The power to impose alternate sanctions to striking out must also be viewed as being in keeping with the court's general case management powers and its duty to give effect to the overriding objective. The award of interest on the costs payable to an innocent party by a defaulting party is to me a permissible and potentially effective measure to give effect to the overriding objective while at the same time keeping litigants in check in the interest of the proper administration of the civil justice system.

[13] I must say too that it does appear from the written submissions that counsel on both sides have accepted that I do have the power to award interest on costs as is proposed. From the point of view of the claimant, however, there should be no award of interest on costs. According to the submissions made by counsel on its behalf, "the imposition of costs against the successful party to the application, in and of itself, sends the message which the court wishes to deliver i.e. timelines must be respected and that there are consequences for not observing timelines set by the court". According to

them, the award of interest is "an additional penalty attached to the message which the court has already sent." As such, the award of interest in the circumstances would be "excessive, unjust and unfair, bearing in mind the overriding objective to deal with cases justly." As to how far it can accurately be said that the claimant was the successful party so that a costs with interest order can be viewed as excessive and unfair is, of course, a matter deserving of closer scrutiny.

[14] From the point of view of the defendant, the award of interest on the costs is proper but there should be no allowance made for the period judgment was reserved and the defendant should be awarded interest from the date of the application until payment.

Discussion

[15] I have adopted the convenient approach taken by counsel for the defendant to divide my consideration of the issue under two separate heads in keeping with the proposed periods during which interest should run. Those are (1) 7 January 2013 to 25 March 2013 (from application to hearing) and (2) 24 January 2014 until payment.

Period from filing of application to hearing (17 January to 25 March 2013)

[16] I form the view that the interest should commence from a date before the order was made (the date of judgment). This is based on the conduct of the parties and, in particular, their history of compliance. It is well established on the authorities that the court may order payment of interest on costs from before judgment because of a party's conduct: **Blackstone's Civil Practice** pages 825 – 826.

[17] The records reveal that when the claimant did not comply with the orders made at case management conference, the defendant made an application for striking out which was later not pursued even though there was non - compliance with those orders. The claimant was given time within which to comply and a costs order made against it (by consent). Notwithstanding the extension of time and the earlier costs sanction, the claimant failed to comply with the orders made at pre-trial review. So, for prior non-compliance, a costs order was made but that failed to yield any better results in the

claimant's conduct after relief from sanction and extension of time were granted. This was all within a context of compliance with all the orders of the court by the defendant.

[18] The subsequent breach led to a renewed application to strike out. The defendant, therefore, saw it necessary to make two applications for striking out after failure of the claimant to comply with orders made at case management conference and at pre-trial review. After the second application was made, there was no relief from sanction sought by the claimant even though it knew the deadline for compliance had passed and it had not complied. Such conduct does point to some degree of disregard for or some measure of indifference to the rules, processes and orders of the court.

[19] When all things are considered, including the defendant's consistent compliance with all orders of the court, I believe that a subsequent breach by the claimant, in the light of its prior breach, warrants stronger punitive measures than a mere costs order which had already been applied. Certainly, from the standpoint of the reasonable onlooker it would appear that the claimant did not take the costs sanction seriously. It is my firm belief that a new breach, in the circumstances of this case, demanded firmer action to serve not only as a punishment but as a stronger deterrent. It should be such as to send a clear message to the claimant as well as to other litigants in the civil justice system that disregard for the orders of the court may carry unpleasant or unwanted consequences. It is for all these reasons that I form the view that interest on costs should commence on the date the claimant caused the defendant's application to be filed (being 17 January 2013) due to its failure to comply with the order of the court

[20] The defendant has taken issue with the 'cut-off point' for the award of interest for the 'pre-judgment' period being 25 March 2013 rather than the date of judgment. That date represents the final date of hearing of the application to strike out. It is my view that no award of interest on the costs for the period judgment was reserved should be made. Counsel for the defendant expressed the view that the time within which the judgment was reserved was not unreasonable and that the claimant would not have been prejudiced for that period. According to them, the defendant had already incurred the costs and during the delay, the defendant was out of pocket and the claimant had the

money that could have been earning interest. The proposed order, they contended, would give the "guilty" claimant a windfall and punish the "innocent" defendant. Therefore, interest on costs should be awarded from the date of the application to the date of judgment.

[21] I have found it difficult to accept those submissions. A portion of the period during which judgment was reserved was during my vacation leave. The final date of the hearing was actually at the commencement of the legal vacation for the Hilary term. Due to pressing demands on my time to deal with the preparation of other judgments during the vacation period, a more timely delivery of the judgment in this matter was thwarted.

[22] The delay was also contributed to by the fact that the defendant had raised several grounds on which it was contended that the claim should be struck out which warranted close and thorough investigation. That can be gleaned from the written decision handed down on 24 January, 2014. In the end, the defendant was not successful on all the issues raised.

[23] The CPR stipulate that part of the circumstances to be considered in determining an award of costs is whether the successful party has been successful on all the issues and also whether it was reasonable for a party to raise a particular issue. It is quite arguable whether it was reasonable for the defendant to have raised the issues surrounding the witness summaries and witness statements in light of the applicable law. Costs could have been apportioned according to the success of the parties on the various issues. I did not, however, adopt that approach of apportioning the costs or awarding costs on an issue- by- issue basis since an award of costs was being applied as a sanction for breach of the court's order.

[24] On the other hand, it has been argued on the claimant's behalf that although it was the successful party, it has been ordered to pay costs and in such circumstances the award of interest would be excessive, unjust and unfair. I do not agree that the claimant can be taken as being successful in the full sense and spirit of that word so

that a costs- with- interest order against it could be viewed as unfair. The claimant did not manage to ward off the defendant's core challenge that it be sanctioned for non-compliance with the court's order. It was the non-compliance that formed the basis of the application. Non-compliance was proved. It should be recognized that it is in relation to the form of sanction to be imposed for the non-compliance that I have departed from the defendant's viewpoint and not in relation to the fact that there was non-compliance that warranted punishment.

[25] The claimant, therefore, does not stand in the position of a successful party because it was guilty of a breach which was enough to attract a penalty. It was the defaulting party while the defendant was the innocent party. The release of the claimant from a striking out order should, therefore, be seen as being more in the nature of relief from [the ultimate] sanction rather than as a total 'success' on the application for striking out because in the end, a sanction was imposed. In such a case, it is perfectly in order for the defaulting party to pay the costs of the innocent party and for the court to award interest on those costs.

[26] At best, both parties would have been partially successful on the application, the defendant having failed to secure a striking out order and the claimant having failed to secure a full dismissal of the application without penalty. But, even if the claimant could be taken as being the successful party, the rules do allow the court to order a successful party to pay all or some of the costs of an unsuccessful party. It is, ultimately, a matter as to what the court considers fit and just having regard to all the circumstances and the overriding duty to deal with the case justly.

[27] The true state of affairs that is relevant to my determination of the appropriate period for which to award interest is that although there was non-compliance by the claimant which gave the defendant some success in securing a penalty, the defendant did not win on all fronts and much effort was expended by me considering issues on which it eventually failed. I do not think it is just for the claimant to be visited by way of sanction for the period it took me to consider the matter and to prepare a written judgment in light of the partial success of the defendant. If the court were to ask the

claimant to pay interest for the entire period, that would not make any allowance for the failure of the defendant to prove every aspect of the case it had mounted for striking out. Had the defendant won on all aspects of the application, then a different consideration might have been warranted which could well have included the application of interest for a longer period.

[28] If I were to award to the defendant full interest on the full costs granted, it could well give the defendant an undeserved "windfall" which would be out of proportion to the breach of the claimant when all things are considered. In my view, the defendant, in all the circumstances of the case, is not entitled to interest on costs for the entire period from the filing of the application to judgment. I would, therefore, hold that payment of interest on costs from date of the filing of the application to the date of completion of the hearing (i.e.17 January - 25 March 2013) seems just in all the circumstances.

Period from 24 January 2014 until payment

[29] Part of the contention made on the claimant's behalf is that if the court is minded to grant interest, then it must set specific dates within which interest must be calculated. The defendant's counsel have expressed no difficulty with this aspect of the proposed order and have assisted greatly by directing my attention to several authorities on this point. I will begin with the statutory authority.

[30] The **Judicature (Supreme Court) Act** (the Act) provides in section 51 (1):

> *"Every judgment debt shall in the Supreme Court carry interest at the rate of six per centum per annum or such other rate per annum as the Minister may by order from time to time prescribe in lieu thereof, from the time of entering up the judgment,* ***until the same is satisfied,*** *and such interest may be levied under a writ of execution on judgment." (Emphasis added.)*

Section 51 (2) provides that "the expression "judgment" shall include decree or order."

[31] It is settled on good and accepted authority that an order for payment of costs to be taxed is a judgment debt within the meaning of section 51(1) of the Act. In **Hunt v R.M. Douglas** (**Roofing) Ltd** [1990] 1 AC 398, the House of Lords made it abundantly

clear that a judgment for costs to be agreed or taxed is to be treated in the same way as judgment for damages to be assessed, where the amount ultimately ascertained is treated as if it was mentioned in the judgment, no further order being required. According to their Lordships, a judgment debt can be construed for the purpose of section 17 of the 1838 Judgment Act (UK) [our section 51 (1)] as covering an order for the payment of costs to be taxed. It follows from this line of reasoning, therefore, that interest is payable on costs ultimately ascertained from date of judgment until payment.

[32] It means too that the award of costs to the defendant in this case, even without more, would have stood as a judgment debt to be satisfied by the claimant. As a judgment debt, therefore, it would attract interest by virtue of the operation of section 51 (1) from the time of entering up of the judgment until the judgment is satisfied, even without the court saying so. It means, if one should apply this provision to the case at hand, without further consideration, there could be nothing legally objectionable to an order for payment of interest on the costs (which is the debt) to run from a specified date until the debt is satisfied. It follows then that the fact that a specific date would not be stated in the proposed order as the termination date would, undeniably, be in keeping with section 51 (1) where the operable termination date for the purpose of the Act is the date of payment of the debt. Indicating the date of payment as the date up to which interest should run is, to my mind, specific enough. It stands merely as a restatement of the statutory time limit for the accrual of interest on judgment debt.

[33] It is that fact that had prompted counsel for the defendant to argue that the order for interest to be paid for this period is "unnecessary and superfluous" since the defendant would be entitled to the interest pursuant to the Act and without an order. I quite agree with this submission that by virtue of the subsection, once an order is made for payment of costs, which translates into a judgment debt, then interest would automatically becomes payable thereon from the date of entering up of the judgment until payment. Given all that, it does appear, on the face of it, that it would be unnecessary for me to include the post - judgment application of interest in the order.

[34] It is my view, however, that since this is a case in which it is proposed that interest on costs should be awarded as part of the costs penalty and for a period commencing before judgment, it would be necessary for me to spell out in unambiguous terms the period for which interest should be payable. This would be in keeping with rule 64.6 (5) (h) which, by way of reminder, provides that the court may make an order that a party must pay "interest on costs *from* or *until* a certain date, including a date before judgment." (Emphasis mine) Therefore, in an effort to be clear as to the two separate periods for the accrual of interest, I have considered it prudent to incorporate the period for the statutory interest. This would merely serve to give the complete picture as to the full period for which interest would accrue and to avoid controversy.

[35] What should be evident is that an award of interest starting from a date prior to judgment and ending at the time the judgment is satisfied would not be out of line with the Act or the CPR. In actuality, therefore, the real penalty would be the award of interest for the period before the entering up of the judgment because interest would be payable from the date of the judgment until payment by operation of law, in any event. I find that the complaint made on behalf of the claimant that an order framed in that fashion would be "open ended" and could lead to injustice, with all due respect, seems ill-founded.

[36] In **Hunt v R M Douglas**, the House of Lords, in endorsing the rule that interest to be paid on costs [under section 51(1)] should commence from the date of judgment (incipitur rule) rather than the date of taxation (the allocutur rule), took no issue with the fact that such interest should run until payment. Their Lordships, within that context, noted several reasons the balance of justice favours the incipitur rule. They stated, in part:

> *"Since as the Court of Appeal rightly said in the **Erven Warnick case** [1982] 3 All ER 312, payment of costs today are likely nowadays to be to made to lawyers prior to taxation, then the application of the allocatur rule would generally speaking do greater injustice than the incipitur rule. Moreover the, incipitur rule provides a further necessary stimulus for payments to be made on account of costs and disbursements prior*

> *to taxation, for costs to be more readily agreed and for taxation, when necessary, to be expedited, all of which are desirable developments... If interests are not payable on costs between judgment and completion of taxation, then there is an incentive to delay payment, delaying disbursements and taxation."*

[37] It follows that the fact that the court is empowered to award interest on costs from judgment until payment should be a stimulus to prompt more expeditious settlement of judgment debts including orders for costs. I will say too that I can discern nothing inequitable or unjust in all the circumstances to impose an order for interest on costs for the application in circumstances where the incurrence of costs for a prior infraction failed to evoke a spirit of compliance in the claimant. It would be a mockery of the system of the administration of justice to give back the exact punishment that was given before when it has failed to act as a deterrent for future conduct. A harsher punishment must be warranted and would be justifiable to bring home the point with greater force than before that the court will not condone the flouting of its rules and its authority.

[38] In my view, the payment of costs with interest thereon (for what is in reality, more or less, a three month period) would be a small price to pay for breach of the court's order when one of the grounds provided by the CPR for striking out does exist in the circumstances of this case. However, instead of striking out, I have seen it fit to impose a different sanction. Therefore, what has in effect been granted to the claimant is a relief from the sanction prescribed by the CPR for breaching the rules or order of the court, that being striking out. In the **White Book 2010**, Volume 1, at paragraph 44.3B.2, it is duly noted:

> *"Relief from sanctions should not be granted lightly and any party who fails to comply with the CPR runs a significant risk that he will be refused relief. Thus, if a party does not have good explanation, or the other side is prejudiced by his failure, relief from sanctions will usually be refused. It is vitally important to the administration of justice that the rules of procedure are observed (**Supperstone v Hurst** [2008] EWHC 735 Floyd J.)."*

[39] I will also add that the discontentment with the proposal that interest should run "until the date of payment" is without a reasonable basis. The CPR make provisions in rule 65.19 for a paying party (the claimant) to deal with the failure of a receiving party (the defendant) to commence taxation proceedings within the time specified by the rules. Rule 65.19 (3) (b) also stipulates that the court may disallow all or part of the statutory interest on the costs in respect of any period of delay. These are built-in devices within the provisions of the CPR that can be utilized by the court to safeguard the interest of the paying party in having an expeditious assessment of the costs so that such a party is not unduly prejudiced by delay. So, the claimant would not be without redress or protection if the defendant should fail to proceed in a timely fashion with the taxation of the costs, if they are not agreed.

[40] It is provided too that the court may order the costs to be taxed immediately and not to await the conclusion of the proceedings (rule 65. 15). This power could also be utilized to ensure that the accrual of interest is not extended for a period longer than is reasonably necessary. At this juncture, I would point out that in the event the phrase "until the conclusion of the proceedings" is construed to mean until the end of the trial of the claim, I would, out of an abundance of caution and fairness, make provision that taxation of the costs should not await the outcome of the trial of the claim but should proceed immediately.

Conclusion

[41] Having considered all that has been urged on me by both sides and having borne in mind the concerns raised by them, I see nothing in the circumstances that would lead me to deviate from my stated intention to award interest on costs for the periods indicated. I will now formally make that order to be read in conjunction with the order made on 24 January 2014 for the payment of costs by the claimant to the defendant to be agreed or taxed.

[42] I would also indicate that the costs awarded on this application may be taxed immediately rather than after trial of the claim. It would also be fair that the Registrar on taxation remains at liberty to exercise the power conferred on the court under the CPR

rule 65.19 (3) (b) to disallow a portion of the interest awarded that would fall as part of the statutory interest (that portion from the entering up of judgment until payment) in the event of delay on the part of the defendant.

Claimant's application for permission for video link evidence

[43] I will also take the opportunity to indicate that when the order was made on 24 January for the case to proceed to trial, I, inadvertently, omitted to include in that order that the claimant will no longer be pursuing the application for permission for the evidence of two witnesses to be given by video link. Following on previous communication with the parties, I will now include that as part of the order made herein for completeness of the record.

ORDER

[44] The order of this court shall be as follows:

1. Interest is awarded on the costs of the application at 6% per annum to be calculated for the period from 17 January 2013 to 25 March 2013 and from 24 January 2014 until payment.

2. The costs awarded at the conclusion of the hearing of this application shall be taxed immediately.

3. The Registrar at taxation is at liberty to exercise the power conferred on the court by the CPR rule 65.19 (3) (b) to disallow a portion of the interest awarded that would fall as part of the statutory interest (being that portion from the entering up of the judgment until payment) in the event of delay on the part of the defendant.

4. The claimant's Notice of Application for permission for witnesses to give evidence by video link is withdrawn with no order as to costs.