[2015] JMCA Civ 34

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 107/2010

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**ROALD NIGEL ADRIAN HENRIQUES**	**APPELLANT**
AND	**HON SHIRLEY TYNDALL, OJ**	**1ST RESPONDENT**
AND	**PATRICK HYLTON**	**2ND RESPONDENT**
AND	**OMAR DAVIES**	**3RD RESPONDENT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION INC**	**4TH RESPONDENT**
AND	**HON JUSTICE BOYD CAREY (Retired)**	**5TH RESPONDENT**
AND	**CHARLES ROSS**	**6TH RESPONDENT**
AND	**WORRICK BOGLE**	**7TH RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**8TH RESPONDENT**

Allan Wood QC, Mrs Daniella Gentles-Silvera and Miguel Williams instructed by Livingston Alexander and Levy for the appellant

Mrs Nicole Foster-Pusey instructed by Michael Hylton and Associates for the 1st respondent

Dave Garcia instructed by Michael Hylton and Associates for the 2nd respondent

Michael Hylton QC and Kevin Powell instructed by Michael Hylton and Associates for the 3rd respondent

Patrick Foster QC and Maurice Manning instructed by Nunes Scholefield Deleon & Co for the 4th respondent

Dr Lloyd Barnett, Mrs Denise Kitson and Miss Sherese Gayle instructed by Grant, Stewart, Phillips & Co for the 5th respondent

Paul Beswick and Miss Lisa White instructed by the Director of State Proceedings for the 6th, 7th and 8th respondents

12 June 2015

(Considered on paper)

HARRIS JA

[1] This is an application on the question of costs.

[2] On 16 February 2010, the 1st to 4th respondents brought a claim for judicial review against the 5th to 8th respondents in which they sought declarations and orders relating to the continuation of a commission of enquiry in respect of the failed financial institutions in the 1990s. The claim was heard by the full court and on 2 September 2010 that court made the following orders and declarations:

"1. An order of Prohibition preventing the continuation of the Commission of Inquiry into the collapse of financial institutions in Jamaica in 1990's [sic] (hereinafter referred to as "the Commission") as currently constituted with the 1st Defendant as member and Chairman;

2. An order of certiorari quashing the decision of the 1st, 2nd and 3rd Defendants to continue with the hearings of the Commission;

3. An order of certiorari quashing the decision of the 1st Defendant whereby he refused to rescue himself from the Commission;

4. A declaration that the 1st Defendant by virtue of his having been a delinquent borrower whose debt was acquired and handled by FINSAC is presumed to be affected by bias and is automatically disqualified from being a member and Chairman of the Commission.

5. A declaration that counsel to the commission by virtue of his, (a) having been a shareholder and a member of the Board of an intervened institution and (b) having been treated by FINSAC as a delinquent debtor is presumed to be affected by bias and is automatically disqualified from acting as counsel to the Commission;

6. The court refuses to declare the proceedings thus far to be null and void.

Costs to the 1st, 2nd, 3rd and 4th Applicants against the 4th Defendant [the 8th Respondent] to be taxed if not agreed."

[3] On 14 September 2010, the 8th respondent filed an appeal against the order for costs which was struck out due to her failure to adhere to the

provisions of section 11(e) of the Judicature (Appellate Jurisdiction) Act, in that, the requisite leave to appeal had not been obtained.

[4] On 20 September 2010, the appellant filed a notice of appeal against the order of the full court against him. The 1st to 4th respondents filed a counter-notice of appeal challenging the full court's refusal to make orders sought by them against the 6th to 8th respondents. The 5th respondent filed a counter-notice of appeal challenging certain findings of the full court against him.

[5] On 29 July 2011, this court made the following decision:

> "The appeal is allowed. The counter appeal of the 5th respondent is dismissed. The counter appeal of the 1st to 4th respondents is dismissed."

[6] A written judgment was delivered on 31 March 2012, at which time, the question of costs was reserved and the parties were requested to make their submissions in writing.

The law

[7] Rule 1.18(1) of the Court of Appeal Rules (CAR) states that:

> "… the provisions of CPR Parts 64 and 65 apply to the award and quantification of costs of an appeal subject to any necessary modifications ..."

[8] Rule 2.15(b) and (f) of the CAR grants the Court of Appeal the authority to made orders for costs both of appeal and in the court below. It reads:

> 2.15 " In relation to a civil appeal, the Court has the power set out in rule 1.7 and in addition-

(a) ….

(b) power to…

(c) … (e)…

(f) make an order for the costs of the appeal and the proceedings in the court below…"

[9] Rule 64 of the Civil Procedure Rules (CPR) governs the principles by which the court should be guided in relation to the award of costs. Rule 64.6 is of manifest significance in this application. The rule outlines the relevant factors in respect of a party's liability for the payment of costs. Rules 64.6(1) and (2) state:

> "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.
>
> (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."

[10] In awarding costs rule 64.6(4) lists certain factors to which the court must pay due regard. These include:

> "(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) ... ;
>
> (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) … (g)."

[11] The appeal arose out of judicial review proceedings. Part 56 of the CPR makes provision for, among other things, the matter of costs in judicial review proceedings. Rule 56.15(5) reads:

> "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 acted unreasonably in making the application or in the conduct of the application."

[12] The CAR do not incorporate part 56 of the CPR. This case being one born out of judicial review proceedings, no violence would be done if rule 56.15(5) is looked at in deciding whether it can be of any assistance in the determination of the question of liability for costs.

[13] As can be observed, the rule stipulates that ordinarily no order as to costs should be made against an applicant for an administrative order, unless the applicant was unreasonable in making the application or in the conduct of such application. Although the suit related to a claim for judicial review, the applicants in this particular case would have to show that there are special or exceptional circumstances demanding a departure from the general rule that costs follows the event.

The appellant's costs

[14] The hearing of the appeal was fixed to commence on 5 April 2011.

On that date, an application was made by the 1st to 4th respondents for permission to adduce fresh evidence in relation to the delivery of a paper, at a conference in March 2010, by the appellant, entitled "**Jamaica Mid 1990's Financial Sector Crisis Reflection on Crisis Resolution Strategies**". The application was dismissed and the 1st to 4th respondents were ordered to pay the costs of that application.

[15] Arguments on the appeal commenced on 5 April 2011. The appellant made submissions. Certain submissions, in response, were made on behalf of the 1st to 4th respondents. However, on the morning of 7 April 2011, counsel for these respondents announced that they would not proceed further in contesting the appeal. Following this, counsel for the appellant was released pending recall, if the circumstances so warranted. He was not recalled.

[16] It was the appellant's contention that costs follow the event and as a consequence, he is entitled to four days costs. Mr Wood submitted that notwithstanding that the appellant was not a party to the claim, the 1st to 4th respondents contested the appeal from 5 to 8 April 2011 in an endeavour to have the order which was made against the appellant in the court below upheld.

[17] Counsel for the 1st to 4th respondents urged that in the circumstances of this case and in keeping with the rules there ought to be no order as to costs or alternatively, that the appellant's costs be paid by the 8th

respondent, in that, the Commission of Enquiry, which was the subject of the judicial review claim, the defence of the claim and the appeal, had been funded by the government. The submissions were premised on the following bases, namely that: the order forming the subject matter of the appeal was not sought by the 1st to 4th respondents in their fixed date claim form as clearly the appellant was not named a party to the suit, nor did they seek to obtain the order in their submissions in the court below. Therefore, it would not have been contemplated that such an order would have been made; upon the concession by counsel for the 1st to 4th respondents, the appellant's counsel did not attend court for the arguments on the hearing of the cross-appeals which concluded on 12 April 2011; an order for costs against the 1st to 4th respondents is in place in respect of the application for the order sought by them against the appellant to adduce fresh evidence; the 1st to 4th respondents sought administrative orders of great public interest and importance and having met with success on the most important issue and there being nothing to show that they acted unreasonably in the conduct of the proceedings, there ought to be no order as to costs in accordance with rule 56.15(5) of the CPR.

[18] The critical issue in the claim surrounded allegations of apparent bias on the part of the 5th, 6th and 7th respondents. No claim was made against the appellant but curiously, paragraph (iv) of the 1st to 4th respondents' grounds upon which they sought relief in their claim

included allegations of facts which ostensibly placed the appellant within the landscape of the claim. The paragraph reads:

> "Counsel to the Commission falls within the class of persons in relation to whom the Commission is to determine how they were treated and whether they were treated fairly, in that he was a director and a shareholder of a company which was indebted to an intervened institution, and he was allegedly a guarantor of its indebtedness."

[19] It is not surprising that an affidavit responding to the allegations was filed by the appellant in the suit. He did not seek to make submissions in the claim and rightly so, as obviously, he was not a named defendant in the suit. It is clear that the full court had not only taken into account the contents of the foregoing ground but also the affidavit when it had no good reason for so doing. The full court, in making a declaration of the apparent bias of the appellant acted wrongly. That court failed to appreciate the fact that a claim had not been made against the appellant. They clearly overlooked an important consideration, namely, that although ground (iv) in support of the fixed date claim form made specific allegations against the appellant, this would not have been material upon which a ruling could have been made against him.

[20] Even if, as contended for by the 1st to 4th respondents, the decision to make the order against the appellant was taken by the full court without being urged by them to do so, their allegations of appellant's connection with the 5th respondent, undoubtedly misled the full court. Remarkably, they did not only attempt to draw the appellant within the

scope of the claim by way of ground (iv) but also went further to seek to obtain information by way of their unsuccessful application to adduce evidence to support the ground. It would not be unreasonable to find that, in all the circumstances, these respondents may have considered the possibility of the court below making an order against the appellant.

[21] The fact that the 1st to 4th respondents conceded the appeal, rendering it unnecessary for this court to have fully heard the substantive issues which would have been raised on the appeal, this does not necessarily absolve them from liability in costs. Their attempt to have the appellant implicitly drawn into the array, by not only placing him within the ambit of the terms of reference but also by seeking, in their failed application, to adduce irrelevant evidence against him, cannot be ignored.

[22] It is perfectly true that, in the proceedings brought by the 1st to 4th respondents, administrative orders were sought. Although the subject matter of the claim concerns the issue of apparent bias which falls within the purview of public law and could attract some degree of public interest, despite this, the claim is not of sufficient public interest and of such great importance to induce this court to import rule 56.15(5) and favourably embrace the provisions laid down therein on liability for costs.

[23] The attorneys-at-law for the 1st to 4th respondents were present in the court below when the declaration was made against the appellant and in the interests of justice, at the time of the delivery of the judgment, they

ought to have brought to the court's attention that a claim had not been made by the 1st to 4th respondent against the appellant. They clearly had a duty so to do, in view of the fact that he was not a named defendant. As rightly indicated by Mr Wood, no attempt was made to assist the full court by advising that a declaration should not be made against the appellant as he was not a named party.

[24] The appellant succeeded in his appeal against the 1st to 4th respondents. There is nothing to show that this court should depart from the provisions of rule 64.6(1) of the CPR. No circumstances within the constraints of rule 64.6(4) or otherwise, have been advanced by the 1st to 4th respondents to show that the appellant should be deprived of his costs or that his costs should be paid by the 8th respondent. The costs order against the 8th respondent was wrongly made. More will be said about this later.

[25] The appellant, having been successful in his appeal, should be awarded costs. Although he is entitled to costs, the further question is how many days' costs should he be allowed? The hearing of the appeal began on 5 April 2011 and on that day the appellant was awarded costs by reason of the 1st to 4th respondents' failed application. No additional costs will be awarded for that day. Significantly, the 1st to 4th respondents' concession was made after the appellant's counsel had argued his grounds of appeal and after arguments were made on their

behalf contesting the appeal up to 7 April 2011. In our view, the appellant should be allowed costs for two days, 6 and 7 April 2011.

Costs on the cross-appeal

[26] The 1st to 4th respondents contended that they were successful on the 5th respondent's cross appeal and that save and except the setting aside of the order made against the appellant, the orders made by the full court were not disturbed by this court, therefore, the costs order against the 8th respondent ought to stand. It was also submitted by them that an appellate court is slow to impose its own discretion in place of that of the court which hears the matter.

[27] It is true that this court is guided by the well known principle that an appellate court is reluctant to intervene in the exercise of the discretion of the court below. However, even if, as contended for by the 1st to 4th respondents, the parties were invited to make submissions to the full court on the question of costs, following which the court made the order they deemed apposite, this court will intervene if it is shown that the full court was plainly wrong in the exercise of its discretion– see **Hadmor Production Ltd v Hamilton** [1983] 1 AC 191 at 196. This case falls within that class of cases which impels the court's intervention.

[28] There are no allegations or averments of bias, which formed the foundation of the claim, pointing to any misdeed or misconduct on the 8th

respondent's part. Notably, there were no findings by the full court against her. Nor could there have been any proper finding against her. Clearly, she was unnecessarily drawn into the claim. She was undoubtedly a successful party in the claim. The full court was clearly wrong in ordering costs against her. There are no exceptional or compelling circumstances which could have justified the full court taking the course of condemning her in costs. The issue as to whether, she is entitled to an order for costs will be dealt with late in this judgment.

[29] The 6th to 8th respondents submitted that, no order having been made against them, they had succeeded on the claim and are entitled to receive costs against the 1st to the 4th respondents who were unsuccessful in their cross appeal. It was also their contention that the costs order had been wrongly made, and is, on the face of it, unreasonable and disproportionate.

[30] It was the 1st to 4th respondents' submission that the appeal substantially concerned the alleged bias in relation to the 5th respondent, and was an issue raised in respect of the 6th respondent and the only issue for the 7th respondent and that the issue in respect of the 5th respondent was by far the most substantive issue on which significantly more time was dedicated in presenting arguments. This is true. However, it cannot be overlooked that in light of the allegations of bias directed against the 6th and 7th respondents they were placed under an obligation

to defend themselves and this they did. They participated fully in responding to the claim brought against them. No finding of wrongdoing was made against them. Clearly, they successfully defended the claim.

[31] There is no room for accommodating rule 15.15(5) of the CPR in relation to the question of costs in this matter. Nothing put forward by the 1st to 4th respondents would persuade this court to depart from the basic rule that costs should follow the event. No good reason or exceptional circumstances have been advanced by the 1st to 4th respondents to warrant such departure in respect of the 6th and 7th respondents, who have succeeded in their cross appeal against them. Clearly, the 6th and 7th respondents are entitled to costs against the 1st to 4th respondents**.**

[32] The 1st to 4th respondents, having succeeded on their claim and the cross-appeal brought by the 5th respondent, would be entitled to their costs against him.

[33] It was submitted by the 1st to 4th respondents that the 8th respondent's separate appeal against the costs awarded against her was determined by the order of this court striking it out and therefore the order made by the full court was not before this court in this appeal. Therefore, it was submitted, in view of issue estoppels, the 8th respondent cannot now rightly ask this court to disturb the costs orders made in the court below when this court has not interfered with the orders made in

the court below that led to the relevant order for costs.

[34] It is our view that although this court has not disturbed the orders in the court below, except that in relation to the appellant, this does not mean that this court cannot interfere with the costs order made by it. As earlier indicated, the full court was palpably wrong in making the order for the payment of the costs by the 8th respondent and therefore this court is compelled to intervene.

[35] The 8th respondent's earlier appeal was struck out for want of compliance with section 11(e) of the Judicature (Appellate Jurisdiction) Act. The 1st to 4th respondents' complaint that the 8th respondent would be barred from obtaining costs by reason of issue estoppels is without merit. Issue estoppel does not arise.

[36] The appeal filed by the 8th respondent on 2 March 2011 was invalid. The issue of costs, although raised in that appeal had not been specifically determined. Therefore, it cannot be said that in this appeal, the 8th respondent now seeks to re-open the issue in which a decision had already been made. As a consequence, the doctrine of issue estoppels would not become operative. Having succeeded against the 1st to 4th respondents, the 8th respondent can rightly pursue her request for costs, and is not precluded from obtaining an order against them.

[37] We would set aside the order for costs against the 8th respondent

made by the full court. Two days' costs of the appeal are awarded to the appellant against the 1st to 4th respondents. The 5th respondent shall pay the costs of the 1st to 4th respondents in the court below and in the court of appeal, while the 1st to 4th respondents shall pay the costs of the 6th and 7th respondents in the court below and in the court of appeal. The 1st to 4th respondents shall pay the costs of the 8th respondent in the court below and in the court of appeal. All costs are to be agreed or taxed.

ORDER

1. The order for costs made by the full court against the 8th respondent is set aside.
2. The appellant is awarded costs in the appeal against the 1st to 4th respondents, to be agreed or taxed.
3. The 5th respondent shall pay the costs of the 1st to 4th respondents in the court of appeal and in the court below, to be agreed or taxed.
4. The 1st to 4th respondents shall pay the costs of the 6th and 7th respondents in the appeal and in the court below, to be agreed or taxed.
5. The 1st to 4th respondent shall pay the costs of the 8th respondent in the court of appeal and in the court below to be taxed or agreed.

We wish to offer our sincere apology for the late delivery of this judgment.