[2014] JMCA Civ 18A

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 73/2008

BEFORE: **THE HON MR JUSTICE MORRISON JA**
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**JAMAICA OBSERVER LIMITED**	**1ST APPELLANT**
AND	**PAGET deFREITAS**	**2nd APPELLANT**
AND	**GLADSTONE WRIGHT**	**RESPONDENT**

Written submissions filed by Charles E. Piper & Associates for the appellants

Written submissions filed by Gaynair & Fraser for the respondent

31 July 2014

(Considered on paper)

MORRISON JA

[1] In this appeal, the appellants challenged the finding of a jury in the court below that they had libelled the respondent and that they should pay him damages of $30,000,000.00 for the libel. In its judgment given on 31 May 2014, this court dismissed the appeal on liability but allowed the appeal on damages. The award of $30,000,000.00 was set aside and an award of $6,500,000.00, with interest thereon at 3% per annum from 27 March 1998 to 22 May 2008, was substituted in its place. It was

also ordered that the respondent should have its costs of the trial to be agreed or taxed.

[2] As regards the costs of the appeal, the parties were invited to make written submissions within 28 days and the court promised a determination on the matter within a further period of 28 days. Written submissions having been filed on behalf of the respondent and the appellants on 23 June and 30 June 2014 respectively, this is the court's ruling on costs in fulfilment of its promise.

[3] The appellants referred us to rule 64.6(1) of the Civil Procedure Rules 2002 ('the CPR'), which states the general rule as to costs:

> "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."

[4] Reference was also made to rule 64.6(3), which provides that, in deciding who should be liable to pay costs, "the court must have regard to all the circumstances"; and to rule 64.6(4)(b), which invites the court to have regard to "whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings". By virtue of rule 1.18(1) of the Court of Appeal Rules, Part 64 of the CPR applies to this court and in **Marilyn Hamilton v United General Insurance Company Ltd** [2010] JMCA App 32, to which the appellants also referred us, Harrison JA observed (at para. [18]), that, "[f]ollowing the usual rules, a successful party on appeal is normally awarded the costs of the appeal". The learned judge also explained the rationale for the general rule (at para. [17]), that the party "who turns out to have

unjustifiably either brought another party before the court, or given another party cause to have recourse to the court to obtain his rights, is required to recompense that other party in costs". However, the court has an unlimited discretion to make whatever order for costs it considers to be required by the justice of the case.

[5] In the light of the result of the appeal, in which, even if they did not prevail on liability, they succeeded in substantially reducing the damages awarded in the court below, the appellants submitted that they were clearly justified in having pursued an appeal and ought therefore to be awarded their full costs of the appeal.

[6] For his part, the respondent, who also referred to the general rule and to the fact that an award of costs was within the discretion of the court, pointed out the various other options available to the court under rule 64.6. These include the making of an order for payment by one party of a proportion of another party's costs (rule 64.6(5)(a)), or a stated amount in respect of that other party's costs (rule 64.6(5)(b)). Further, the respondent relied on Blackstone's Civil Practice, 2012, para. 66.13, in which the learned editors observe that "[t]he usual approach in the event of partial success is to award the successful party a proportion of its costs".

[7] Given the fact that the appellants have enjoyed partial success only, the respondent submitted that they should have a proportion of their costs only, to take account of the respondent's success on the issue of liability. In support of this submission, the respondent reminded us that this was the approach which had commended itself to this court in **CVM Television v Fabian Tewarie** (SCCA No

46/2003, judgment delivered 8 November 2006). In that case, the court having set aside the jury's award of $20,000,000.00 for general damages and substituted an award of $3,500,000.00 in its place, it was ordered that the appellant should have one third of its costs on appeal.

[8] On this basis, the respondent submitted that the appropriate order for costs in this case would be to award the appellants their costs of the appeal, reduced by two-thirds to reflect their failure on the issue of liability.

[9] I should say at once that, in my view, the appellants' contention that they should have the costs of the appeal is wholly unrealistic, bearing in mind that the issue on which they failed, *viz*, the question of liability, was on any view of the matter the most substantial issue in the appeal and the one which occupied the far larger part of counsel's energies and the court's time. I am more attracted to the respondent's nuanced approach to the award of costs, reflecting as it does the fact that the appellant has only had partial – albeit not insignificant - success on appeal.

[10] I accordingly consider that the appellants should have a proportion of their costs only. In this case, as in **CVM v Fabian Tewarie**, the appeal on liability failed but the appeal on quantum achieved a substantial reduction in the damages awarded by the jury. In these circumstances, I would propose that the appellants should also have one third of the costs of the appeal, such costs to be taxed if not sooner agreed.

MCINTOSH JA

[11] I agree with the reasoning and conclusion of Morrison JA and have nothing to add.

BROOKS JA

[12] I also agree.

MORRISON JA

ORDER

The appellants are to have one third of the costs of the appeal, such costs to be agreed or taxed.