[2024] JMCA Civ 20A

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL NO COA2023CV00034

BETWEEN	**EVON REID (Executor of the Estate of Easton Douglas)**	**APPELLANT**
AND	**JACQUELINE DOUGLAS BROWN**	**RESPONDENT**

Written submissions filed by Ms Carol Davis instructed by Carol Davis & Co for the appellant

Written submissions filed by Miss Stephanie A Williams instructed by Henlin Gibson Henlin for the respondent

25 October 2024

(Ruling on Costs)

Civil Procedure – Costs – Whether there should be a departure from the general rule that costs follow the event – Whether there should be no order as to costs in a successful appeal from the decision of the registrar of the Supreme Court – Rule 64.6 of the Civil Procedure Rules

FOSTER-PUSEY JA

[1] I have read the draft judgment on costs by my learned sister V Harris JA. I agree with her reasoning and conclusion and have nothing to add.

D FRASER JA

[2] I, too, have read the draft judgment of my learned sister V Harris JA. I agree with her reasoning and conclusion and have nothing useful to add.

V HARRIS JA

[3] This matter concerned the sale of property located at 14A Carvalho Drive, Kingston 10, in the parish of Saint Andrew, registered at Volume 1303 Folio 984 of the Register Book of Titles ('the property'). Prior to its sale, the property was jointly owned by Mr Easton Douglas, now deceased (whose estate is represented by his executor, the appellant, Mr Evon Reid) and his daughter, Mrs Jacqueline Douglas Brown, the respondent. Further to an order by Campbell J in the Supreme Court, Mr Douglas sought to purchase Mrs Douglas Brown's interest in the property.

[4] Mr Douglas' attorney-at-law, Ms Carol Davis, had carriage of sale. She drafted the agreement for sale, which named both Mr Douglas and Mrs Douglas Brown as the vendors and Mr Douglas as the sole purchaser. The agreement for sale stipulated that one-half share of the interest in the property was to be conveyed to Mr Douglas for $10,500,000.00.

[5] Upon completion of the sale in March 2016, the allocation of the costs related to the sale became a contentious issue. Mrs Douglas Brown's attorneys-at-law, Henlin Gibson Henlin, disputed several of the deductions from the sale price. Unable to arrive at an agreement as to the appropriate deductions, on 13 May 2016, Mrs Douglas Brown filed an application for an account to be taken by the registrar of the Supreme Court (in accordance with Campbell J's order and pursuant to rule 41.2(2) of the Civil Procedure Rules ('CPR')). That application inquired about the monies deducted from the sale price for transfer tax, property tax, and attorney's fees for the transfer.

[6] The registrar of the Supreme Court heard the application on 6 December 2016 and 25 January 2017, and on 27 September 2019, she gave her decision for, among other things, the transfer tax, property tax (for the period 2014-2015), and the attorney's fees for the transfer to be borne equally between the co-owners. The learned registrar had

also ruled that Ms Davis was the accounting party, so she was to pay $283,675.00 to Mrs Douglas Brown.

[7] On 14 October 2019, Ms Davis filed a notice of appeal in the Supreme Court on behalf of Mr Douglas (for which an extension of time to file was granted pursuant to an application on 23 September 2022). That appeal went before a judge of the Supreme Court ('the learned judge'), who dismissed the appeal on 15 May 2023 and awarded costs to the respondent. Subsequently, Ms Davis filed an appeal on behalf of the estate with this court, challenging the learned judge's decision.

[8] We considered the appeal on paper (pursuant to rule 2.4(3) of the Court of Appeal Rules, 2002 ('CAR')), and on 3 May 2024, we made the following orders:

> "1. The appeal is allowed.
>
> 2. The decision of the learned judge affirming the order of the registrar of the Supreme Court given on 25 January 2017 is set aside.
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> 3. The order of the registrar that attorney's cost on transfer to remain is affirmed.
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> 4. The order of the registrar that Ms Carol Davis is ruled to be the accounting party is set aside.
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> 5. The order of the registrar that 'property tax amended to refer to the year **2014-2015**. Each party is liable to pay one-half (½) property taxes for that period' is set aside. Substituted therefor is an order that each party is liable to pay one-half of the outstanding property tax for the period 2015 to 2016.
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> 6. The order of the registrar that transfer tax is to be equally borne by the parties is set aside. Substituted therefor is an order that Mrs Jacqueline Douglas Brown, as the sole transferor, is liable to pay the total amount assessed for transfer tax.
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> 7. Mr Evon Reid, as the executor of the estate of Easton Douglas, is to pay the sum of $21,175.00, being one-half of the property tax for 2015 to 2016, to Mrs Jacqueline Douglas Brown.
>
> 8. No order as to costs both here and in the court below.

> 9. The order as to costs shall stand unless either party files and serves written submissions proposing a different order within 14 days of the date of this order. The other party shall file and serve its response within 14 days of being served. The court shall consider any submissions on costs on paper and deliver its decision thereafter." (Emphasis as in the original)

Submissions

[9] In accordance with para. 9 of the order, submissions on costs were filed on behalf of the appellant and the respondent on 9 May 2024 and 3 June 2024, respectively.

[10] Counsel for the appellant, Ms Davis, has advanced that the general rule that the successful party is entitled to its costs should prevail. She argued that the appellant, having won on two of the three court-identified issues, should be considered the successful party, especially since those two issues carried greater weight and were the main issues on appeal. Ms Davis also argued that the registrar's decision was produced in excess of one year after the hearing, and this caused the appellant to seek an extension of time to file the appeal, an application for which the appellant has to pay the costs. She submitted that the respondent should not be rewarded for her poor conduct. Reference was made to the respondent's efforts to repudiate the prior agreement between the parties and their respective attorneys at law that the respondent would pay the transfer tax. In such circumstances, Ms Davis contended that it is unfair for the appellant to be deprived of his costs. Alternatively, she proposed that a fairer cost order would be to award the appellant 75% of his costs, both here and in the court below.

[11] On the respondent's behalf, Ms Williams emphasised that the application was not of her own volition but rather was made in accordance with the order of Campbell J. In any event, she submitted, the taking of account is customary in matters relating to the division of matrimonial property. Additionally, Ms Williams contended that whereas the appellant succeeded on the transfer tax issue, the respondent succeeded on the property tax issue. She also argued that the appellant did not technically succeed on the issue relating to Ms Davis being appointed as the accounting party since the court did not find it necessary to make conclusive findings in that regard. Therefore, asserting that the

appellant succeeded on the majority of the appeal is incorrect. It was further submitted that the appellant had not suffered any detriment or loss, having already benefitted from the payment of the transfer tax. Conversely, the respondent has been prejudiced as she has not yet been reimbursed for the excessive deduction for the payment of the outstanding property tax. Counsel also referred to the dictum of the court regarding the deduction of Ms Davis' fees from the proceeds of the sale and submitted that it is a factor to be considered in determining the appropriate cost order. For those reasons, she contended that the costs order is just.

Discussion

[12] It is well known that the successful party is generally entitled to costs (rule 64.6(1) of the CPR, which has been incorporated into the CAR by virtue of rule 1.18). In **R (John Smeaton on behalf of the Society for the Protection of Unborn Children) v The Secretary of State for Health and others** [2002] EWHC 886, Dyson J (as he then was) elucidated this principle as such:

> "The basic rule that costs follow the event ensures that the assets of the successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party. This is as desirable in public law cases as it is in private law cases."

[13] Notwithstanding, the court retains the absolute and unfettered discretion, which must be exercised judicially, to depart from that general rule if it deems it appropriate (**Ivor Walker v Ramsay Hanson** [2018] JMCA Civ 19, **Crichton Automotive Limited v The Fair Trading Commission** [2017] JMCA Civ 33 and section 30(3) of the Judicature (Appellate Jurisdiction) Act). In so doing, all the circumstances of the case must be considered, in particular, the factors listed in rule 64.6(4) of the CPR, such as the conduct of the parties both before and during the proceedings and whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings.

Reasonableness of the appeal

[14] In light of Campbell J's orders, it cannot be said that the respondent acted unreasonably in pursuing her application for the taking of accounts. This is especially so since the parties were at odds concerning the statement of accounts prepared by Ms Davis and the consequent net proceeds of the sale. In like manner, the appellant's appeal to the learned judge and subsequently to this court cannot be faulted. As determined in the substantive appeal, the learned judge's decision to dismiss the appeal against the registrar's order was demonstrably wrong since the order ascribed liability for certain costs in a manner that was improper and adverse to both parties.

[15] Since the ensuing appeal against the registrar's orders and further appeal to this court against the learned judge's dismissal are consequent on the registrar's erroneous decision in an application that was ordered by the court, it cannot be said that either party unreasonably pursued their case.

Success on the issues

[16] At first glance, it could appropriately be said that the appellant was the successful party in the appeal. However, mindful of the history of the proceedings and apprised of the issues raised before this court, a view could be taken that in the determination of their dispute, the parties were equally successful on the appeal. Ms Davis, having improperly allocated certain costs on the completion of the sale, paved the way for both parties to embark on an exercise to resolve the errors in the statement of account that was to be agreed between the parties.

[17] On appeal, both parties succeeded on an issue, and on account of how they were resolved, the third and final issue did not significantly detain the court. Irrespective of the fact that the appellant's appeal was successful, I do not think that, in these circumstances, success would merit an award of costs.

Conduct of the parties

[18] While we identified three issues that were argued on the appeal, there was a fourth question that did not emerge from a specific ground of appeal, nor was it featured in the written submissions for the parties. That issue was who was liable to pay the attorney's fee to Ms Davis for the transfer of one-half of the interest in the property.

[19] In the "Further Amended VENDOR'S STATEMENT OF ACCOUNT" prepared by Ms Davis, the amount of $236,250.00 plus general consumption tax ('GCT') of $38,981.00 was deducted from the proceeds of the sale for one-half of her "Attorney's Cost on Transfer". This was done on the basis that Ms Davis had carriage of sale, and so she sought to recover her fees from "both vendors". Naturally, this became a point of contention between the parties since Ms Davis did not represent the respondent. Upon reviewing the various payments under the agreement for sale, the registrar directed "Attorneys cost on transfer to remain". This effectively allowed Ms Davis to retain the sum of $236,250.00 (plus $39,981.00 for GCT) that was deducted from the proceeds of the sale that was to be paid over to the respondent.

[20] As indicated in the judgment on the substantive appeal ([2024] JMCA Civ 20), given the reason or purpose for the agreement of sale, it was incorrect to have referred to Mr Douglas as a vendor, and we were concerned about the registrar's order in the light of the terms of that agreement (see paras. [32] and [55]). It would be fair and reasonable to observe that since the respondent was not Ms Davis' client, there being no retainer or any agreement between them, the payment of Ms Davis' fees by anyone other than the appellant was inappropriate. Moreover, their respective costs in relation to the sale/purchase of the property were particularised in the agreement for sale, which stated that "[e]ach party shall bear their respective legal fees". Accordingly, Mr Douglas' estate has benefitted from the improper deduction of the one-half of the attorney's costs on transfer.

[21] I am also cognizant of the respondent's conduct, especially her attempt to renege on their agreement to pay the transfer tax. Suffice it to say that this has no bearing on

the determination of the costs order since the transfer tax was paid solely by her (the total sum for the transfer tax was deducted from the proceeds of the sale), albeit unwillingly.

Conclusion

[22] In my view, both parties have equally succeeded on the appeal and given the parties' conduct, as outlined above, the appellant has not advanced any compelling reasons to counter our decision to depart from the general rule. For all of the preceding reasons, I recommend that the costs order imposed on 3 May 2024 should stand, and as such, there should be no order as to costs both here and in the court below.

FOSTER-PUSEY JA

ORDER

> Order number 8, made on 3 May 2024, that there should be "[n]o order as to costs both here and in the court below," is affirmed.