IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. 1994/S406

BETWEEN	SIGMA INVESTMENT MANAGEMENT	APPLICANT
A N D	ASSET MANAGEMENT CORPORATION LTD.	FIRST CLAIMANT
A N D	GLOBAL ASSET MANAGEMENT CO. LTD.	SECOND CLAIMANT

Dennis Goffe Q. C. and A. Williams for applicant instructed by Myers, Fletcher and Gordon.

Dr. Manderson-Jones for Claimants.

JUDGMENT

IN CHAMBERS

Heard December 15, 20, 1994 and March 31, 1995.

HARRISON J. Ag.

This judgment concerns the award of costs on an interpleader summons and the bases on which these costs are to be awarded.

In considering the award of costs, it is my view that section 561 of the Judicature (Civil Procedure Code) Law would be a proper starting point. This section states as follows:

> "The court or a judge may, in or for the purposes of any interpleader proceedings, make all such orders as to costs, and all other matters as may be just and reasonable."

It seems to me therefore that section 561 gives the Court or Judge a discretionary power regarding the award of costs on interpleader applications.

It may be useful also to bear in mind the dicta of Mallins V. C in the case of Smith v Buller (1875) L. R 19 for further consideration where costs are concerned. He states as follows:

> "It is of great importance to litigants who are unsuccessful that they should not be oppressed by having to pay an excessive amount of costs. The costs chargeable under a taxation between party and party are all that are necessary to enable the adverse party to conduct litigation and no more."

Now, the background to this contest arose in this way. On the 5th day of December, 1994 the applicant through its Attorneys, Myers, Fletcher and Gordon, issued an Originating Summons seeking an order for interpleader relief against the adverse claims of Asset Management Corporation Ltd. and Global Asset Management Co. Ltd. The issue concerned who was entitled to and who had authority to deal with funds held by and under management of the applicant, Sigma Investment Management Ltd. On the 7th December, 1994 Dr. Manderson-Jones filed appearances on behalf of both claimants.

The records show that an appearance was filed on the 14th December, 1994 by Rattray, Patterson, Rattray on behalf of the second claimant, Global Asset Management Co. Ltd. When the matter came up for hearing on the 15th December, 1994, Mr. Andrew Rattray of the firm Rattray, Patterson, Rattray appeared and informed the Court that his firm had received written instructions from the second claimant hence a Notice of Change of Attorneys was filed on the 15th December on behalf of this claimant. He requested an adjournment and the summons was adjourned to the 20th December, 1994. Costs of the adjournment were awarded to the applicant and first claimant against the second claimant. The basis on which these costs were to be paid was reserved for hearing on December 20th.

On the 20th December, Dr. Manderson-Jones informed the court that he was appearing on behalf of both Claimants and that a Notice of Change of Attorneys was filed by him on the 19th December. This Notice showed that Dr. Manderson-Jones appeared again for the second claimant which formerly appeared by Rattray, Patterson, Rattray. At this stage Mr. Rattray informed the Court that he had filed a Summons on behalf of a Mr. Roy McGrath to intervene in the matter as a claimant and third party and that it was also set for hearing for the 20th December, 1994. This summons was short served and after strong objections were raised by the Attorneys for applicant and claimants, that summons was adjourned sine die. In view of Mr. Rattray having no further locus standi in the present matter, the Court was urged by Dr. Manderson-Jones, to proceed with the interpleader application.

Mr. Goffe found himself in a dilemma and agreed that he was unable to proceed with the summons. He argued that the substratum of the summons had been removed. The conduct of Mr. McGrath and his instructions to Rattray, Patterson, Rattray were given as factors responsible for the present dilemma. Since there were no longer rival claims, the Court was requested to make the following order:

> "Upon it appearing from the records of the court that Asset Management and Global Asset Management are again represented by the same Attorney-at-Law and cannot therefore be rival claimants, summons dismissed."

The question of costs arose at this stage. The thrust of Dr. Manderson-Jones submissions on costs was two-pronged. He argued that the claimants' costs of the 20th December should be bourne by the applicant. He submitted that the Court should follow the rule that costs follow the event and since the summons was dismissed it follows that the applicant had been unsuccessful.

He also argued that the costs awarded to the first claimant and against the second claimant on the 15th December should be paid by Mr. Rattray personally. Having regard to the stand taken by Dr. Manderson-Jones it is important to see why he is making this submission. An affidavit of Atrene Bryan sworn to on the 16th December, 1994, lies on the court's file and is indeed instructive. It has revealed that the deponent is a director of the second claimant. Mr. Bryan had further deposed that the Notice of Change of Attorney filed by Rattray, Patterson, Rattray was not authorised by Global Asset Management Co. Ltd. He has also stated that the Company had never retained the firm of Rattray, Patterson, Rattray and neither does the company recognize them as their Attorneys. On this score, Dr. Manderson-Jones argued that the appearance on behalf of that claimant by Rattray, Patterson, Rattray could have amounted to a want of authority. He referred to and relied on the case of Younger v Toynbee (1910) 1 KB 215. He also referred to the Note at the foot of The Neptune (1918) Probate Div. to support his submission. The note reads as follows:

> "On December 20, 1918 a summons taken out by the plaintiffs came before Hill J. for an order" that the appearance entered in the action by Messrs Stokes & Stokes on behalf of 'the owners of the Neptune,' having been entered by them without such owners' authority, the same and all proceedings thereafter be set aside, and that Messrs Stokes & Stokes may be condemned in an ordered to pay to the plaintiffs their costs incurred in consequence of such appearance."
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> In making the order Hill J. said that he had no doubt that Messrs. Stokes & Stokes believed that they had authority because they had received instructions from the underwriter's representatives, Messrs. W. K. Webster & Co. and he had also no doubt that the latter had authority because they had received instructions from the underwriters. There had realy been a chain of warranties of authority, and the damages which Messrs. Stokes & Stokes would have to pay, namely, the costs incurred by the plaintiffs in consequence of the entering of the appearance, would be passed on to Messrs. W. K. Webster & Co. who possibly would pass them on to the underwriters. The appearnce clearly was entered without authority and would be set aside....."

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Dr. Manderson-Jones also contended that a Certificate for Counsel ought to be allowed in the instant matter.

Mr. Goffe was in agreement with Dr. Manderson-Jones in so far as the costs of the 15th December were concerned but submitted that the applicant ought not to be called upon to pay the claimants' costs of the 20th December. He submitted that the view held by Dr. Manderson-Jones, that is, that the applicant was unsuccessful, was artificial and technical. To him the applicant had succeeded regarding the underlying disputes in getting Mr. McGrath to withdraw his claim to speak for Global Assets. It was that claim he stressed which caused the application for interpleading. Accordingly, there was some measure of success notwithstanding the dismissal of the summons. Furthermore, he argued that the applicant was a mere stakeholder, had always acted bona fides and that it had come on the 20th December, to hear the contest between the claimants.

He therefore submitted that all the costs in respect of both applicant and claimants ought to be bourne by Rattray, Patterson, Rattray since it was Mr. McGrath's conduct which had caused this dilemma. He further submitted that in the alternative a Sanderson Order could be made and for the claimants to have recourse to Rattray, Patterson, Rattray to make good the payment. He supported the submission that a Certificate for Counsel was appropriate in the circumstances but costs should be on a solicitor and client basis. He referred to the case of Barclays Bank v Vermonth 9 JLR 119 for support.

For his part, Mr. Rattray submitted that if Rattray, Patterson, Rattray did not enter an appearance the matter would have had a similar result; the only difference being that it would have ended on the 15th December. He conceded that their presence on the 15th December in light of the instructions they had received caused the matter to be adjourned on the 20th December. He further sumbitted that costs should be allowed on a party and party basis and that Certificate for Counsel ought not to be allowed.

Now, where a person is faced with adverse claims to property or money wherein he claims no interest but of which he is in possession or for which he is liable, he is entitled to invoke the authority of a court to compel the claimants to litigate their differences in place of subjecting him to the uncertainty and expense of separate proceedings. Normally, in these proceedings the court or judge in exercising his discretion over costs is guided by certain principles. As a general rule, the applicant is allowed his costs unless he interpleads needlessly. As far as claimants are concerned, the rule which ordinarily obtains for actions, that the successful party gets his costs is followed - see Re Rogers, Exp. Sheriff of Sussex (191) [illegible] 10/

Having regards to the developments which have taken place one must now be concerned firstly, with the events of the 15th December, 1994. From whom then does the applicant and first claimant look to for their costs? The English position as contained in Order 12 rule 1/7 and followed mutatis mutandis in the Jamaican context, is that a solicitor who enters an appearance for a defendant impliedly warrants or contracts that he has authority to do so. Where it appears that a solicitor appeared for a defendant without his knowledge or authority, the defendant has a clear right to have that appearance vacated. In the instant case a Notice of Change of Attorneys was filed thereby indicating that the second claimant which formerly appeared by Rattray, Patterson, Rattray now appeared by Dr. Manderson-Jones. No steps were taken however to vacate the entry of appearance by Rattray, Patterson, Rattray but when one considers the affidavit evidence of Artene Bryan and Notice of Change it could be implied that there was want of authority on the part of Rattray, Patterson, Rattray. The order of the 15th December as it stands condemns the second claimant in costs. But this order came about because Rattray, Patterson, Rattray had entered an appearance on its behalf and requested an adjournment.

There is authority for saying that the Court or Judge cannot order costs to be paid by a stranger or non-party to the proceedings - see Forbes-Smith v Forbes-Smith and Chadwick (1901) P. 258. Certainly, Roy McGrath the person from whom Rattray, Patterson, Rattray apparently received their instructions is not a party to these proceedings so he cannot be ordered to pay these costs. The fact that Rattray, Patterson, Rattray had written instructions before appearance was entered in the matter shows on the face of it that they had authority for acting on behalf of the second claimant. As it turns out, Rattray, Patterson, Rattray had no authority for doing this. It does seem to me therefore that the costs incurred as a result of Mr. Andrew Rattray requesting an adjournment on the 15th December should be paid by Rattray, Patterson, Rattray personally rather than being paid by the second claimant.

I now move on to the costs of the 20th December. Mr. Rattray has conceded that had it not been for his application to adjourn the matter there would have been a determination on the 15th. It is a fact that it was on his application that the matter was adjourned. I also agree that the matter could have been resolved on the 15th but having urged the court for this adjournment when he clearly had no authority for doing this it is my view and I do hold that so far as the costs of the 20th December 1994 are concerned, Rattray, Patterson, Rattray are also responsible for them.

It is further my view that both set of costs could be passed on to whoever was responsible for Rattray, Patterson, Rattray entering an appearance. I would allow a Certificate for Counsel for the 20th December and order that the costs for both the 15th and 20th should be on a party and party basis.

Finally, it is hereby ordered:

> "Upon it appearing from the records of the Court that Asset Management and Global Asset Management are again represented by the same Attorneys-at-Law and cannot therefore be rival claimants, summons dismissed. Costs of the 15th and 20th December 1994 to the applicant and claimants respectively to be paid on a party and party basis by Rattray, Patterson, Rattray, Attorneys-at-Law. Certificate for Counsel granted in respect of the 20th December.