



[2024] JMCC Comm 28

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
COMMERCIAL DIVISION
CLAIM NO. 2018CD00003**

BETWEEN	SUSAN WILLIAMS T/A SUSAN WILLIAMS INTERIOR DESIGN	1st CLAIMANT
AND	SAMANTHA WATES T/A SUSAN WILLIAMS INTERIOR DESIGN	2nd CLAIMANT
AND	KURT CHIN T/A CHIN'S HARDWARE	3rd CLAIMANT
AND	PRINCE PALMER T/A PALMER'S UNIQUE FURNITURE MANUFACTURING	4th CLAIMANT
AND	TRISHANUNI PALMER T/A PALMER'S UNIQUE FURNITURE MANUFACTURING	5th CLAIMANT
AND	CARMEN BLAIR-PALMER T/A PALMER'S UNIQUE FURNITURE MANUFACTURING	6th CLAIMANT
AND	MOPEA LIMITED	7th CLAIMANT
AND	DALEY'S CONSTRUCTION AND HARDWARE LIMITED	8th CLAIMANT
AND	JTC-32 LLC	1st DEFENDANT
AND	MR. GUO ZHONG	2nd DEFENDANT
AND	MRS. DAZHUN ZHANG	3rd DEFENDANT

IN CHAMBERS

**Written submissions received on behalf of the claimants from Nigel Jones & Co.,
attorneys-at-law**

**Written submissions received on behalf of the defendants from Hart Muirhead
Fatta, attorneys-at-law**

**Heard: April 17, 18, 19, 20, 26, May 1, 2, 3, 4, 8, 9, 10, 16, 2023, April 19 & June 24,
2024**

Commercial Law - Building Contract for luxury villa– Breach of Contract – Whether Unjust Enrichment - Quantum Meruit – Whether Collateral Contract – Defective work – Cost

WINT-BLAIR, J

Background

[1] On the 19th of April 2024, after a trial of the claim, the court made the following orders:

“The First Defendant

The claim against the first defendant is dismissed with costs awarded to the first defendant to be agreed or taxed.

The First and Second Claimants are awarded judgment on the claim and damages for breach of contract in the sums below:

- a. The sum of US\$176,877.61.
- b. Balance outstanding US\$159,338.42.¹
- c. Costs to be agreed or taxed.
- d. Interest on outstanding invoices totalling US\$4,434.20 at the rate of 3% per annum and continuing at the said rate until payment is made.
- e. The sum of US\$59,885.06 has been paid.

The Third Claimant is awarded judgment on the claim and compensation in the sums below:

- a. The sum of J\$493,000.00.

¹ Further amended particulars of claim

- b. Interest on outstanding invoices totalling J\$26,175.92 at the rate of 3% per annum and continuing at the said rate until payment is made.
- c. Costs to be agreed or taxed.
- d. The sum of J\$176,347.00 has been paid.

The Fourth, Fifth and Sixth Claimants are awarded judgment on the claim and compensation in the sums below:

- a. The sum of US\$31,837.85.
- b. Interest on outstanding invoices totalling US\$1,199.70 at the rate of 3% per annum and continuing at the said rate until payment is made.
- c. Costs to be agreed or taxed.

The Seventh Claimant is awarded judgment on the claim and compensation in the sums below:

- a. The sum of US\$31,078.71.
- b. Interest on outstanding invoices totalling US\$872.41 at the rate of 3% per annum and continuing at the said rate until payment is made.
- c. Costs to be agreed or taxed.
- d. The sum of US\$26,363.90 has been paid.

The Eighth Claimant is awarded judgment on the claim and damages for breach of contract in the sums below:

- a. The sum of US\$172,416.90.
- b. Interest on all outstanding invoices totalling US\$4,406.87 at the rate of 3% per annum and continuing at the said rate until payment is made.
- c. Costs to be agreed or taxed.

The Second and Third Defendants:

- a. The second and third defendants are awarded judgment on the counter-claim against the first and eighth claimants.
- b. The second and third defendants are awarded damages in the sums of:
 - i. J\$19,259,094.28 for remediation work with interest at the rate of 6% per annum and continuing until payment is made.
 - ii. US\$98,000.00 for potential lost profits due to expected remediation work calculated at the rate of J\$127.00: US\$1.00.
- c. The second and third defendants are entitled to set-off the awards made by the court against the sums awarded to the first and second claimants.
- d. Costs to be agreed or taxed.”

[2] This decision relates to costs. The orders made above as to costs have now been varied by this judgment after hearing submissions on this issue upon the application of the parties.

Submissions

The Claimants

[3] Counsel submitted that it is trite law that the court has discretion in relation to the cost orders that can be made. However, as it relates to the 1st defendant, there are several relevant considerations arising in this matter which would make the general rule relating to costs in rule 64.6 (1) of the Civil Procedure Rules² inapplicable.

[4] This court found that the 1st defendant was not a party to a contract with any of the claimants and dismissed the claim against it. The defendants counterclaimed

² "...the general rule is that it must order the unsuccessful party to pay the costs of the successful party"

against the claimants and were successful in establishing a breach of contract but failed to adduce sufficient evidence of negligence and deceit. Counsel also relied on the case of **Capital & Credit Merchant Bank Limited v Real Estate Board and Others**³ to submit that it is open to the court to award only a percentage of the costs a party is entitled to. The 1st defendant was unsuccessful in relation to not only its counterclaim but several issues joined between the parties. By virtue of rule 64.6 (3) and (4) of the Civil Procedure Rules this court, in determining who should be liable to pay costs, must have regard to all the circumstances. In relying on this, counsel submitted that if this court however, determines that some costs should be paid to the 1st defendant, the 1st defendant should be entitled to no more than 25% of its costs.

[5] The defendants' case is that the 2nd and 3rd defendants signed the contract with the 1st and 2nd claimants as agents of the 1st defendant. Therefore, contending that the 2nd and 3rd defendants were not personally liable and that the contract was with the 1st defendant. The position of the defendants in this regard is set out at paragraphs 64 -65 of this court's judgment.

[6] Indeed, as this court also recognized the case for the defendants as presented was such that the "owners" of the villa was a term used loosely. Based on the way the defendants presented their defence to the claim, keeping the 1st defendant as a party was a reasonable step by the claimants.

[7] Counsel submitted that this court should adopt the approach of the court in the well-known case of **Sanderson v Blyth Theatre Company**⁴ which illustrates that the court has the discretion to depart from the general rule and order the unsuccessful defendants to pay the successful defendant's costs.

[8] In the alternative, this court could make a "Bullock Order" in keeping with the decision of **Bullock v London General Omnibus Co.**⁵ Counsel cited the House

³ [2013] JMCA Civ 48

⁴ [1903] 2 KB 533

⁵ [1907] 1KB 246

of Lords decision of **Bankamerica Finance Ltd v Nock and another**⁶, **Irvine v Commissioner of the Police for the Metropolis and Others**⁷ and **Desmond Clarence Bennett v Jamaica Public Service Co. Ltd and Others**⁸ to highlight the jurisdiction of the court to make a Sanderson or Bullock cost order as well as the case of **National Contracts Commission v Cenitech Engineering Solutions Limited, The Integrity Commission and The Attorney-General of Jamaica**⁹.

[9] Counsel submitted that in the face of the evidence, the following were all circumstances which this Court ought to consider and find that having the 1st Defendant as a party to the claim was necessary:

- (i) how the transactions/ services were rendered;
- (ii) the loose use of the designation of Owner;
- (iii) the defence advanced by the defendants in relation to the proper party to the contract with the 1st and 2nd claimants;
- (iv) the conduct of the 2nd and 3rd defendants in not meeting with the claimants;
- (v) the 2nd and 3rd defendants shutting the claimants out of the premises and preventing them from fulfilling their obligation;
- (vi) the fact that the 1st defendant is the registered proprietor of the property;

[10] Additionally, the claimants submitted that it would be an injustice that having brought the claim in the alternative and succeeded against the 2nd and 3rd defendants, they might find themselves in a position where they are unable to recover any compensation as the damages recoverable from the 2nd and 3rd defendants would be eroded or eliminated by the order for costs in respect of their action against the 1st defendant. The claimants maintained that one of the purposes of the "Bullock" order as established in **Irvine v Commissioner of Police**, is to protect a claimant from losing the benefit of their success, where the

⁶ [1988] 1 All ER 81

⁷ [2005] EWCA Civ 129

⁸ delivered on May 1, 2009

⁹ [2023] JMCA Civ 52

joinder of multiple defendants was reasonable.

- [11] Insofar as it did not establish its counterclaim this would be an appropriate matter for the 1st defendant to not recover its costs from the claimant. Accordingly, counsel sought that the court order that the 1st defendant's costs be paid by the 2nd and 3rd defendants. In the further alternative, it was submitted that the court makes an order that the 1st defendant should bear its own costs in light of the evidence.
- [12] The claimants submit that they should be entitled to recover their costs against the 2nd and 3rd defendants in full as they enjoyed success on their claim against them. Furthermore, much of the contention and evidence led was in relation to establishing the nature of the relationship between the claimants and the 2nd and 3rd defendants. The claimants sought to amicably resolve the matter prior to commencing litigation. In fact, the evidence of the claimants was that they sought to meet with the 2nd and 3rd defendants on May 9, 2017 but were unsuccessful. They had an attorney, Mr. Wayne Silvera issue a demand letter; however, the evidence is that even after the demand letter was issued the 1st claimant was still seeking to make contact with Ms. Doria Pan to have the dispute resolved.
- [13] Given the nature, complexity and volume of documentation involved in the matter, counsel submitted that a special costs certificate be issued pursuant to rule 64.12 of the Civil Procedure Rules. The court can be guided by the approach taken by the Honourable F. Williams JA in the Court of Appeal decision of **West Indies Petroleum Limited v Scanbox Limited and Others**¹⁰ at paragraphs 16-17 of the judgment. The Honourable Justice of Appeal was considering whether a special cost certificate was appropriate in relation to a chamber application but that consideration remain useful here. Counsel sought a special cost certificate on behalf of the claimants for three attorneys.

The Defendants

¹⁰ [2022] JMCA App 28A

- [14] Counsel for the defendants relied on CPR 64.6(1),(2),(3) and (4) and the case of **Gordon Stewart v. Goblin Hill Hotels Limited & Ors**¹¹ to argue the approach the courts ought to take in determining the successful party.
- [15] In **Travelers' Casualty v. Sun Life**,¹² it was held that if the successful claimant has lost out on a number of issues, it may be inappropriate to make separate orders for costs in respect of issues upon which he has failed, unless the points were unreasonably taken. (See **A L Barnes Ltd v. Time Talk (UK) Ltd.**)¹³
- [16] In relying on **Day v Day**¹⁴ counsel argued that in assessing the amount which should reasonably be awarded, special attention has to be paid to the amount of time spent in the preparation for and the trial of the major issues and the findings in relation to those issues. The issues related to defective work, the substitution of different wood for mahogany, the identification and assessment of the defects and the quantities for remedial works occupied a very high percentage of the trial time. Since the 2nd and 3rd defendants were successful on these issues, this should result in a high percentage of the costs being awarded to them. The 1st and 8th claimants ought therefore to pay the costs on the counterclaim; and 2nd and 3rd defendants ought to pay the costs on the claim.
- [17] In the case of the 3rd and 7th claimants, their claims are subject to the provisions of section 71 of the Judicature (Parish Court) Act which provides that the Parish Court shall have jurisdiction. Additionally, section 130(1) of the Judicature (Parish Court) Act provides that actions founded on contract or for any cause for which a plaintiff might have been entered in the Parish Court under its equitable jurisdiction, if the plaintiff recovers a sum of less than J\$850,000, the plaintiff "shall recover no more costs than he would have been entitled had he brought the action or suit in a [Parish Court]". In view of the specific and discrete nature of the claims brought

¹¹ [2016] JMCC COMM 39

¹² [2006] EWHC 2885 (Comm)

¹³ [2003] EWCA Civ 402

¹⁴ [2006] EWCA Civ 415

by the 3rd and 7th claimants for goods supplied and work done, there was no justification for bringing the claim in the Supreme Court.

[18] In the case of the 3rd claimant where the claim was for J\$493,000.00 and the sum of J\$176,347 had already been paid as the court has found, the next amount recoverable on the judgment is only J\$316,653.00 plus interest of J\$26,175.92 making a total of J\$342,828.92. This claim should clearly have been brought in the Parish Court where the jurisdiction far exceeds even the sum claimed. This claim was specifically for mirrors supplied and installed by the 3rd claimant and had nothing to do with the other issues in the case.

[19] Similarly, in the case of the 7th claimant where the claim was for US\$31,078.71 for interior design and decoration, of which US\$26,363.90 had already been paid, and interest of US\$872.41 was awarded. The total net amount adjudged due is US\$5,587.22 which is also clearly within the jurisdiction of the Parish Court and so there was clearly no justification for this claim to be brought in the Supreme Court as part of a long and involved trial.

[20] As a result, the amount of costs that ought to be awarded to the 3rd and 7th claimants is limited by the Judicature (Resident Magistrates) (Tariff of Fees) (Amendment) Rules, 2013, which states in the amended Schedule at item 50 "*Contested Cases*" that in cases within the common law jurisdiction if the amount of the claim recovered does not exceed J\$100,000 plus J\$10,000 for each additional J\$100,000 or part thereof.

[21] Rule 64.6(1) is wholly inapplicable in respect of the claimants as there is every reason to depart from the general principle that in litigation the "unsuccessful party" is to pay the costs of the "successful party".

[22] It was submitted that the provisional order of 100% costs in favour of the claimants against the 2nd and 3rd defendants would not be appropriate, because:

(a) it would effectively result in the 2nd and 3rd defendants not having any order for costs at all against the 2nd claimant who is a partner with the 1st claimant Susan Williams,

(b) the 2nd and 3rd defendants would in effect be required to pay the costs of the joint representation of not only the 1st and 8th claimants but also the 2nd, 3rd, 4th, 5th, 6th, and 7th claimants in the context where the 1st, 2nd and 8th claimants made it necessary for these proceedings to be brought (that is, both the claim and counterclaim) since the court has found that their breaches have caused the 2nd and 3rd defendants substantial loss and damage, and

(c) although the court has rejected the evidence of the expert witnesses called by the claimants, it would mean the 2nd and 3rd defendants would be required to pay the costs associated with those expert witnesses before and at trial. This would be an extraordinary result where to establish their counterclaim in the claimants' claim the 2nd and 3rd defendants and the claimants were forced by the claimants to litigate together, in the interest of the overriding objective, substantially all the issues on the claimants' claim and the 2nd and 3rd defendants' counterclaim.

[23] Our courts including the Court of Appeal, have made Sanderson Orders in several cases. In **Desmond Clarence Bennett v. Jamaica Public Service Co. Ltd and Others**¹⁵, on the question of costs, Roy Anderson J held that the unsuccessful claimant (the equivalent of 1st and 8th claimants in the instant case) should ultimately pay the costs of both successful parties (the 3rd to 7th claimants in the instant case).

[24] In the present case, the 1st and 8th claimants failed on the major issues which occupied a very high percentage of the trial spent in the preparation for and the trial of those issues and therefore should take responsibility for the costs which were incurred by the 2nd to 7th claimants in being present and participating in the trial of those issues.

[25] Therefore, the proposed alternative orders in respect of the claimants' respective claims should be:

¹⁵ (unreported, delivered 1st May 2009)

(1) Any costs to the 3rd and 7th claimants in respect of their claims be limited in each case to the maximum which could have been awarded in the Parish Court if those claims had been brought, as they ought to have been, in the Parish Court.

(2) Any costs to the 4th, 5th and 6th claimants be either:

- a. limited to 20% to 25% as against the 2nd and 3rd defendants, to be taxed if not agreed; or
- b. a Sanderson Order that: The 1st and 8th claimants shall pay to the 3rd to 7th claimants their costs, to be taxed if not agreed.

[26] Counsel submitted that there is nothing in this case to permit consideration of a departure from the general rule that in respect of the 1st defendant against which all claims have been dismissed, and so costs follow the event and therefore the 1st to 8th claimants must be liable for the 1st defendants' costs as the court has proposed.

[27] Counsel further submitted that there is nothing in this case to permit consideration of a departure from the general rule in respect of the 2nd and 3rd defendants' counterclaim, and so costs follow the event and therefore the 1st and 8th claimants must be liable for the 2nd and 3rd defendants' costs as the court has proposed. Counsel relied on **Nemeth v. Prynew; Piling v. Prynew**¹⁶ to conclude that joint and several liability for costs by defendants was well-recognised.

Discussion

[28] Who has to write the cheques? In my view, it is the 1st and 8th claimants on the counterclaim and the 2nd and 3rd defendants on the claim.

[29] It was not readily apparent to the court why the 3rd to 7th claimants claimed against any of the defendants as there was no contract between them and any of the defendants. The 3rd, 4th, 5th 6th and 7th claimants succeeded on their claim to be paid by way of quantum meruit.

¹⁶ [2009] NSWSC 511

- [30]** I agree with the submissions of the defendants in that the joint representation of the claimants made it necessary for the defendants to defend a much larger claim involving some issues which were not joined on the evidence. The effect of this was that the 2nd and 3rd defendants would be required to pay the costs of the joint representation of all the claimants.
- [31]** The claimants filed a joint claim, meanwhile, the 1st claimant sought to distance herself during the trial by raising an exclusion clause in the contract with the 2nd and 3rd defendants. Given that stance, the trial was significantly lengthened as she tendered mountains of emails showing how she performed the contract.
- [32]** Having considered how the court should exercise its discretion, giving due regard to the overriding objective, the 1st and 8th claimants are the successful parties on the claim. However, they failed on the issues with occupied significant trial time. Especially problematic was the interference with court-appointed experts. This meant that volumes of evidence were rendered valueless at the stage of the weighing up despite the experts having given days of oral evidence. These first claimant is also responsible in my view for the costs incurred by the other claimants in having to participate in the trial.
- [33]** I find that the way the defendants pitched their case in defending the claim, made it reasonable for the claimants to proceed against the 1st defendant as it was unclear which defendant should have been sued. The court having regard to all the circumstances is of the view that the claim against the defendants was sufficiently connected such that a determination had to be made by the court. The claimants failed to establish their claim against the first defendant and costs will follow the event.
- [34]** The defendants submit, and I agree, that they were compelled by the claimants' method of proceeding to defend all of the claimants' claims and to litigate the counterclaim against all the claimants jointly.
- [35]** The 1st defendant was successful in having the claim dismissed against it and did not succeed against the claimants on the counterclaim. The court was not primarily

concerned with whether the 1st defendant was a proper party as has been submitted by the claimant as this issue did not occupy any significant time during the trial, however, this issue had to be resolved as a matter of law before the court could determine the issues raised by the evidence.

[36] In the case of **Desmond Clarence Bennett v Jamaica Public Service Co. Ltd and Others** cited by both sides, the 1st defendant brought an ancillary claim against the defendant for an indemnity. The court granted judgment for the 1st defendant on the claim and for the ancillary defendant on the ancillary claim. Roy Anderson, J held that the unsuccessful claimant should pay the costs of both successful parties.

“The threshold test that a claimant must meet for the issuance of a Bullock or a Sanderson Costs Order is one of reasonableness: whether it was reasonable to join the defendant and to keep him in the action until judgment. If the action was properly brought, and the plaintiff had legitimate doubt as to which of two or more persons was responsible for the act that caused the injury, then the plaintiff may escape paying the successful defendant’s costs.”

[37] I am of the view that a Sanderson order¹⁷ as submitted by both parties is the appropriate order to be made given the evidence and the pleadings, but only against the claimants. The jurisdiction to make such an order is derived from section 47(1) of the Judicature Supreme Court Act and rule 64.6 of the Civil Procedure Rules. This order is being made having given consideration to rule 64.6(1) and the meritorious submissions of both sides.

[38] Parts 64 and 65 of the CPR apply to the award and quantification of costs. The award of costs may take several forms, and the court shall consider these rules in exercising its discretion. The general rule is that 'costs follow the event' as is set out in rule 64.6(1) of the CPR. This rule provides that if the court decides to make

¹⁷ Sanderson v Blyth Theatre Company [1903] 2 KB 533

an order regarding the costs of any proceedings, it must order the unsuccessful party to pay the successful party's costs. There are exceptions to this rule and its application is subject to the overriding objective of the CPR to deal with the case justly.

- [39]** In deciding whether to grant an order for costs, the court must have regard to all the circumstances. This includes, in so far as is pertinent for present purposes, such matters as the conduct of the parties both before and during the proceedings; whether a party has succeeded on particular issues (even if the party has not been successful in the whole of the proceedings); whether it was reasonable for a party to pursue a particular allegation or raise a particular issue, be it in proceedings below or on appeal; and the manner in which a party has pursued a particular allegation or issue (see rules 64.6(3) and 64.6(4)(a), (b), (d) and (e) (ii) and (iii) of the CPR).
- [40]** Rule 64.6(5) of the CPR permits this court to make several orders as to costs. It may order that a party pays, among other things, a proportion of another party's costs; costs relating to particular steps taken in the proceedings; and costs relating to a distinct part of the proceedings (see rules 64.6(5)(a), (e) and (f) of the CPR).
- [41]** The exercise of the discretion to make a Sanderson order must be guided by the overriding objective. The claimants seek an order in which the 2nd and 3rd defendants being the unsuccessful parties should pay the costs of the successful 1st defendant directly to it. I disagree. While the 2nd and 3rd defendants succeeded only in breach of contract having failed to establish their claims in tort, the trial time of the court was largely engaged with the issues of defective work and how this was brought about.
- [42]** Given the enlarged claim with the joinder of all the claimants; the decision at trial to fragment the actions of the first claimant from the other claimants; the failure of the first claimant to observe the rules regarding the experts appointed by the court, the findings made by the court in the area of the written and oral contract, these factors had to be taken into account.

[43] The claimants have also not addressed the fact that the third to seventh claimants are in a distinct position from the 1st and 8th claimants and have made submissions which even at this stage, seemingly maintain a joint position. For the foregoing reasons, I will decline their request for a special cost certificate.

[44] I accede to the submissions of counsel for the defendants as the orders sought are in line with my view that the claims brought by the 3rd to 7th claimants are within the monetary limits of the jurisdiction of the Parish Court. Their costs are limited to the maximum award which could be awarded by the Parish Court under section 130 of the Judicature Parish Court Act and pursuant to the Judicature (Resident Magistrates) (Tariff of Fees) Amendment Rules, 2013, schedule as amended at paragraph 50.

[45] In light of the foregoing the following orders are made by the Court:

[46] Orders:

1. The claim against the first defendant is dismissed with costs to the first defendant against the first, second, third, fourth, fifth, sixth, seventh and eighth claimants to be taxed if not agreed.
2. Costs of the claim awarded to the first and eighth claimants against the second and third defendants to be taxed if not agreed.
3. Costs of the claim awarded to the third and seventh claimants are limited in each case to the maximum award which can be made by the Parish Court.
4. The first claimant shall pay the costs of the third to seventh claimants to be taxed if not agreed.
5. Thirty-three and one-third percent (33.3%) of the costs of the counterclaim awarded to the second and third defendants against the first and eighth claimants to be taxed if not agreed.