[2024] JMCA Civ 11A

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CIVIL APPEAL NO COA2022CV00076

BETWEEN	**VINAYAKA MANAGEMENT LIMITED**	**APPELLANT**
AND	**GENESIS DISTRIBUTION NETWORK LIMITED**	**1ST RESPONDENT**
AND	**NOHAUD AZAN**	**2ND RESPONDENT**
AND	**ASHNIK LAND HOLDINGS LIMITED**	**3RD RESPONDENT**

Written submissions filed by Wilkinson Law, attorneys-at-law for the appellant

Written submissions filed by John G Graham and Co, attorneys-at-law for the 1st respondent

Written submissions filed by Hart Muirhead Fatta, attorneys-at-law for the 2nd and 3rd respondents

3 May 2024

(Ruling on costs)

Civil procedure - Costs - Refusal of interlocutory injunction – Dismissal of appeal and counter-notices of appeal - Apportionment of costs - Civil Procedure Rules, Rule 64.6 – Court of Appeal Rules, 1.18(1)

STRAW JA

[1] On 8 December 2023, this court dismissed the appellant's appeal, as well as the counter-notices of appeal filed by the 1st respondent and the 2nd and 3rd respondents. It was also ordered that the parties should file and serve written submissions concerning the costs of the appeal, within 14 days of obtaining the reasons for judgment. The reasons

for judgment were delivered on 8 March 2024 and is cited as **Vinayaka Management Limited v Genesis Distribution Network Limited and others** [2024] JMCA Civ 11. Written submissions on costs were duly filed on behalf of each party. Accordingly, the court now provides its ruling on the issue of costs.

Submissions

[2] Counsel for the appellant, Mr Ian Wilkinson KC, has asked the court to make one of three alternative orders as to costs, in the following sequence:

a) Each party to bear their own costs;

b) The costs of the appeal to be costs in the claim before the Supreme Court;

c) The appellant to pay no more than 50% of the costs awarded to the respondents, with taxation to be deferred until after the conclusion of the trial of the matter, before the Supreme Court.

[3] In contending that each party should bear their own costs, learned King's Counsel asserted that the appeal was justified and not frivolous. By contrast, the conduct of the 1st respondent was inequitable, in that, through its attorney, the 1st respondent simultaneously held the deposit of two different purchasers, for the same property. With respect to the 2nd and 3rd respondents, it was submitted that they could have chosen to watch proceedings, instead of becoming active participants in the claim, resulting in the incurring of additional costs. Further, the 2nd and 3rd respondents also acted unconscionably, in encouraging the 1st respondent to breach the agreement for sale with the appellant.

[4] Learned King's Counsel also advanced that all parties were unsuccessful in the appeal in light of the dismissal of the counter-notices of appeal. In the circumstances, it is also requested that if an order is made for each party to bear their own costs, the sums held in escrow as the appellant's security for costs should be released unconditionally.

[5] As it relates to the alternative order that costs be costs in the claim before the Supreme Court, the appellant relies on the case of **Tara Estates Limited v Milton Arthurs** [2019] JMCA Civ 10 ('**Tara Estates**'), in asserting that this is the usual order made for costs in applications for interim injunctions. Thus, it is the appropriate order in the instant appeal since it is an "interlocutory appeal", seeking the re-imposition of an injunction. Further, that the matter should be given the opportunity for ventilation at trial, as the appellant has a "great chance" for success.

[6] Mr John Graham KC, for the 1st respondent, asks that the court award costs in keeping with the general rule that the unsuccessful party should pay the costs of the successful party. It was submitted that the 1st respondent, as the successful party, and an active participant in the appeal, should be awarded costs and further that the appellant acted unreasonably in pursuing the appeal, after the transfer of title had already been effected. With respect to the counter-notice of appeal, it was submitted that the appellant did not respond to the counter-notice and did not incur any expense in opposing it. However, as an alternative, taking account of the counter-notice of appeal, it was submitted that the 1st respondent should be awarded 95% of its costs. In making these submissions, reliance was placed on the cases of **VRL Operations Limited v National Water Commission and others** [2014] JMSC Civ 84 ('**VRL v NWC**'), and **Stewart Brown Investments Limited and others v National Export-Import Bank of Jamaica Limited (T/A Exim Bank Jamaica)** [2023] JMCA Civ 4 ('**Stewart Brown Investments**').

[7] On behalf of the 2nd and 3rd respondents, it was submitted that they should be awarded their costs on the appeal, inclusive of the costs of their application to adduce fresh evidence. These submissions were made on the basis that the 2nd and 3rd respondents succeeded in having the decision of the learned judge affirmed. They were, therefore, the overall successful parties. Similar to the submission made on behalf of the 1st respondent, it was submitted alternatively, that the 2nd and 3rd respondents should be awarded 95% of their costs of the appeal. The 2nd and 3rd respondents also relied on the

case of **Stewart Brown Investments** as well as the case of **Private Power Operators Ltd v Industrial Disputes Tribunal and others** [2021] JMCA Civ 18A.

Discussion and analysis

[8] Section 30(3) of the Judicature (Appellate Jurisdiction) Act ('JAJA') stipulates that, "… the costs of and incidental to all civil proceedings in the Court shall be in the discretion of the Court", subject to the rules of court, or any other relevant enactment. Further, subsection (5) provides that, subject to the rules of court, the Court may determine by whom and to what extent costs are to be paid.

[9] In the case of **Capital & Credit Merchant Bank Limited v Real Estate Board** [2013] JMCA Civ 48, Morrison JA (as he then was), provided a concise summary of rule 64.6 of the Civil Procedure Rules, 2002 ('the CPR'), relative to the principles for consideration, in determining an appropriate award for costs. Rule 1.18(1) of the Court of Appeal Rules, 2002 ('the CAR'), indicates that parts 64 and 65 of the CPR apply to the award and quantification of the costs of an appeal, subject to any necessary modifications. Morrison JA stated at paras. [8] and [9], as follows:

> "[8] The general rule is that, if the court decides to make an order about the costs of any proceedings, 'it must order the unsuccessful party to pay the costs of the successful party' (rule 64.6(1)). The court may however order a successful party to pay all or part of the costs of an unsuccessful party, or make no order as to costs (rule 64.6(2)). In deciding who should pay costs, the court must have regard to all the circumstances (rule 64.6(3)), including 'whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings' (rule 64.6(4)(b)).
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> [9] Rule 64.6(5) provides that, among the orders which the court may make, is an order that a party must pay (a) a proportion of another party's costs; (b) a stated amount in respect of another party's costs; (c) costs from or until a certain date only; (d) costs incurred before proceedings have begun; (e) costs relating to particular steps taken in the proceedings; (f) costs relating only to a distinct part of the proceedings; (g) costs limited to basic costs in accordance

> with rule 65.10; and (h) interest on costs from or until a certain date, including a date before judgment. By virtue of rule 64.6(6), where the court would otherwise consider making an order under (c) to (f) above, it must instead, if practicable, make an order under (a) or (b) (that is, for the payment by a party of a proportion of, or a stated amount in respect of, another's costs)."

[10] In considering the submissions made by both counsel for the appellant and 1st respondent, it is relevant to note that rules 64.6(4)(a) and (d) of the CPR state that the court should have regard to "the conduct of the parties both before and during the proceedings" and "whether it was reasonable for a party - (i) to pursue a particular allegation; and/or (ii) to raise a particular issue".

[11] In the main, the purpose of an award for costs is to allow a successful party to the litigation, to recover the cost of at least some legal expenses, unless there are valid reasons for the court to exercise its discretion otherwise. Contrary to the submissions made on behalf of the appellant, there is no general rule that the appropriate award in the case at bar should be that costs be costs in the claim. In **Tara Estates**, the substantive claim lay in the tort of nuisance and the interim junction granted by the judge below in relation to specific construction activities was affirmed by this court pending the trial. However, certain supplemental orders of the judge were varied.The order made was that costs be in the claim.

[12] In the instant case, the interim injunction was discharged by the learned judge who also refused the application for an interlocutory injunction. The appellant was unable to establish one or more of the necessary ingredients to entitle it to the relief claimed before this court and so failed in its bid to overturn the learned judge's decision.

[13] I agree, as submitted by Mr Graham KC, in reliance on the case of **VRL v NWC**, that the question of who is the successful party requires the application of commonsense and that the question should be determined by reference to the litigation as a whole.

[14] All the respondents successfully opposed the appeal, although they were unsuccessful on their counter-notices of appeal. The 2nd and 3rd respondents were also successful in their application to adduce fresh evidence.

[15] As it concerns the counter-notices of appeal, the 1st respondent did not pursue the first three grounds. The remaining three grounds were unnecessary as the issues raised had been considered by the learned judge in arriving at his decision (see rule 2.3(3) of the CAR). This was also the case for ground of appeal 5 filed on behalf of the 2nd and 3rd respondents, and to some extent also with respect to grounds 1, 2, 3, 4, 8, 9, 10 and 11 filed on behalf of the 2nd and 3rd respondents. Further, in relation to those latter grounds, this court found that they were based on principles relating to the discharge of an *ex parte* injunction, in circumstances where that issue was overtaken by the consideration of the learned judge at the *inter partes* hearing. Concerning the remaining two grounds of the 2nd and 3rd respondent's counter-notice of appeal, this court found that the learned judge would have been overreaching had he considered section 71 of the Registration of Titles Act ('ROTA'); further that the absence of a caveat at the time that the 2nd and 3rd respondents had entered into an agreement with the 1st respondent would not have been determinative of whether there was a serious issue to be tried.

[16] Ultimately, therefore, the aspects of the counter-notice of appeal that were pursued on behalf of the 1st respondent largely sought to affirm the decision of the learned judge, albeit not on any new grounds. The decision of the learned judge was upheld. It is also true that the appellant did not make submissions in response to the 1st respondent's counter-notice. The issues raised on behalf of the 2nd and 3rd respondents were slightly more substantive but were nonetheless aimed at affirming the decision of the learned judge. The appellant also did not make submissions in response to those grounds.

[17] In light of the above, I am of the view that the respondents are entitled to a substantial portion of their costs.

[18] In the circumstances, a fair award for costs is as follows:

1. The 1st respondent is awarded 95% of its costs of the appeal to be paid by the appellant.

2. The 2nd and 3rd respondents are awarded 95% of their costs of the appeal together with the costs on their application to adduce fresh evidence, to be paid by the appellant.

3. These costs are to be taxed, if not agreed.

4. There shall be no orders as to costs on the counter-notices of appeal.

FOSTER-PUSEY JA

[19] I have read in draft the reasons for the ruling on costs of Straw JA. I agree with them and there is nothing that I could usefully add

SIMMONS JA

[20] I, too, have read, in draft, the ruling on costs of Straw JA and I have nothing else to add.

STRAW JA

ORDER

1. The 1st respondent is awarded 95% of its costs of the appeal to be paid by the appellant.

2. The 2nd and 3rd respondents are awarded 95% of their costs of the appeal together with the costs on their application to adduce fresh evidence, to be paid by the appellant.

3. These costs are to be taxed, if not agreed.

4. There shall be no orders as to costs on the counter-notices of appeal.