IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION

CLAIM NO. 2009/HCV 03398

BETWEEN	**VRL OPERATIONS LIMITED**	**1ST CLAIMANT**
AND	**NATIONAL WATER COMMISSION**	**1ST DEFENDANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**
AND	**NATIONAL WORKS AGENCY**	**3RD DEFENDANT**
AND	**JOSE CARTELLONE CONSTRUCCIONES**	
	CIVILES, S.A.	**4TH DEFENDANT**
AND	**STANLEY CONSULTANTS INC.**	**5TH DEFENDANT**
AND	**FREDEREICK RODRIQUES &**	
	ASSOCIATES LIMITED	**6TH DEFENDANT**

Dr. L. Barnett Q.C. and Mr. Weiden Daley instructed by Hart, Muirhead, Fatta for the Claimant/Respondent

Mr. Kevin Williams and Mr. Colin Alcott for Applicant/1st Defendant.

Ms. Carlene Larmond and Mr. Basil Williams instructed by the Director of State Proceedings for the 2nd and 3rd Applicants/Defendants.

Mrs. Denise Kitson, Q.C., Mrs. S. Risden-Foster and Mrs. Trudy-Ann Dixon-Frith instructed by Grant, Stewart, Phillips & Co., for the 5th Applicant/Defendant.

Mr. Charles Piper and Mr. Wayne Piper instructed by Charles instructed by Charles E. Piper & Associates for 6th Applicant/Defendant

Heard : 21st November 2013 and 19th May 2014

Notice Application for Court Orders - Costs – Who is successful party in prior Notice of Application for Court Orders – Judicature (Supreme Court) Act – Rule 64 of Civil Procedure Rules (Amended) 2006

CORAM: MORRISON, J

[1] Following on the outcome of a Notice of Application for Court Orders filed by the first defendant and adopted by the second and third defendants and the fifth and sixth defendants I invited the parties to make written submissions on the vexed question of costs.

[2] However, before I engage the written submissions it is apposite that I set out the terms of the Notice of Application for Court Orders itself.

The Notice of Application for Court Orders filed by the 1st Defendant on November 7, 2013 sought orders that:

a. The Court provide such directions as are necessary relative to the Claimant's communications with the Expert Witness, Mr. Barry Walton particularly since October 16, 2013;
b. Mr. Barry Walton be disqualified as an Expert Witness in this matter;
c. The trial dates of November 11-23, 2013, be vacated and a new and further case management directions be given for the proper conduct of this matter;
d. The costs of this Application and hearin be determined;
e. Such further and other relief and orders as this Honorable Court deems fit in the circumstances of this case.

[3] After hearing submissions relative to the above application I ruled that "The trial dates of November 11-23, 2013 be vacated and new and further case management

directions be given for the proper conduct of this matter". Indeed it was immediately upon my delivery of the decision on the application that the parties began to make oral submissions as to costs which I now address.

[4] It may be useful to note that this Court made case management orders as are consistent with the orders sought by order #3 of the Notice of application for Court Orders, already adverted to.

[5] The first, second and third, fifth and sixth defendants have all asked that they be awarded costs in view of the success of the Notice of Application for Court Orders dated November 7, 2013. While each application for costs stands on its own particular merit, I propose to deal with all applications collectively as the arguments advanced by each counsel are the same: that is, that costs of and incidental to the making of the application and costs thrown away are to be agreed or taxed and are to be paid by the Claimant in any event.

All applicants reposed on Part 64 of the Civil Procedure Rules with the first defendant also relying on the following cases:

a. **HLB Kidsons (A Firm) v Lloyds Underwriters Subscribing To Lloyds Policy No. 621/PKlDOO101 & Others** [2007] EWHC 2699.
b. **Phonographic Performance Limited v ACE Rediffusion Music Ltd** [1999] EWCA Cn. 834.
c. **Re Elgindata Ltd (No. 2)** [1982] lWLR1207
d. **Summit Property Ltd v Pitmans (A Firm)** [2001] EWCA Civ. 2020
e. **Aspin v Metric Group Ltd** (2007)EWCA Civ. 922.

As to the second and third defendants they also relied on the Privy Council decision in **Seepersad v Persad And Another** [2004] UKPC 19.

[6] The fifth defendant attached reliance on **Re Elgindata** supra, Section 47 of the Judicature (Supreme Court) Act the case law authority of **English v Emery Reinmbold And Strick Ltd**. [2002] EWCA, Civ. 605 and on Stuart Simes's, "A Practical Approach to Civil Procedure", 12th Edition, page 569.

[7] On the other hand, the Claimant submits that, "The correct Order to make is costs to the Claimant, the successful party" as the Defendant failed in their real and substantive application to disqualify the expert witness. That being so, urged the Claimant/Respondent, the inevitable consequence of the trial dates having to be vacated, the blameless Claimant is prima facie entitled to the costs of the failed application there being no exceptional circumstances to take the case outside the general rule in Part 64 of the Civil Procedure Rules.

THE ISSUES

[8] First, the real issue is to ask and answer who is to be regarded as the successful party. Second, should the general rule abide, should cost follow the event. Third, are there any exceptional or extenuating and unusual circumstances that would warrant a departure from the normal rule.

THE LAW

[9] According to Section 47 of the Judicature (Supreme Court) Act, "In the absence of express provisions to the contrary, the costs of and incident to every proceeding in the Supreme Court shall be in the discretion of the Court". However, it is well recognized that the exercise of this discretion should be pursued in a judicial manner.

The relevant rule as regards costs in contained at Part 64 of the Civil Procedure Rules. Rule 64.1 states, “This Part contains general rules about costs and the entitlement of costs”. Rule 64.6(1) speaks in the following terms: “If the Court decides to make an order about the cost of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party”. However, according to Rule 64.6(2) onwards, “The Court may order a successful party to pay all or part of the costs of an unsuccessful party or make no order to costs. In deciding who should pay costs the Court must have regard to all the circumstances”. In particular, says rule 64.6(4), I must have regard to:-

a. The conduct of the parties both before and during the proceedings.
b. Whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings.
c. …
d. Whether it was reasonable for a party:-
    i) to pursue a particular allegation; and/ or
    ii) to raise a particular issue
e. The manner in which a party has pursued:-
    i) that party’s case
    ii) a particular allegation; or
    iii) a particular issue”
f. …
g. …”

WHO IS THE SUCCESSFUL PARTY?

[10] To answer this question it is to the decided cases that I now turn for guidance in interpreting Rule 64.6. To that extent I note that the equivalent English provision is similarly worded. In the English case of **HLB Kidsons (A Firm) v Lloyds Policy No. 621/PKID00101 And Others** supra, Mrs. Justice Gloster on the matter of costs spoke in the following terms:

> "The principles applicable as to costs were not in contention. The Court's discretion as to costs is a wide one. The aim always is to 'make an order that reflects on the overall justice of the case (**Travellers' Casualty v Sun Life** [2006]. EWHC 2885 (Comm) at paragraph 11 Per Clarke J. As Mr. Kealey submitted, the general rule remains that cost should follow the event, i.e. that 'the unsuccessful party' will be ordered to pay the costs of the successful party": CPR 44.3(2).

In **Kastor Navigation v AXA Global Risks** [2004] 2 Lloyd's Rep. 119, the Court of Appeal affirmed the general rule and noted that the question of who is the 'successful party' for the purposes of the general rule must be determined by reference to the litigation as a whole: see paragraph 143, per Rix LJ. The Court may of course, depart from the general rule, but it remains appropriate to give 'real weight' to the overall success of the wining party: **Scholes Windows v Magnet** (No.2) [2000] ECDR 266 at 268. As Longmore LJ said in **Barnes v Timetalk** [2003] BLR 331 at paragraph 28, it is important to identify at the outset who is the 'successful party'. Only then is the Court likely to approach costs from the right perspective. The question of who is the successful party "is a matter for the exercise of common sense": **BCCI v Ali** (No. 4) 149 NLJ 1222 per Lightman,J success for the purposes of the CPR is "not a technical term but a result in real life" (**BCCI (No. 4**) (supra)). The matter must be looked at in a realistic … and … commercially sensible way: **Fulman Leisure Holdings v Nicholson Graham And Jones** [2006] EWHC 2428 (CL) at paragraph 3, per Mann J.

There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. In any litigation, especially any winning party is likely to fail on one or more issues in the case. As Simon Brown LJ said in **Budgen v Andrew**

Gardner Partnership [2002] EWCA CIV. 1125 at paragraph 35: “the court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues”. Likewise in **Travellers’ Casuality** (supra) Clarke J said at paragraph 12: ‘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. It is a fortunate litigant who wins on every point’.”

[11] In light of the above observations made by Mrs. Justice Gloster, I am at once to say that any omission on my part to treat singly with each cited case is no tot be viewed as a diminution of their respective value, rather, that the distillation of the principles germane to costs generally are sufficiently captured in the **HLB** K**idson’s** case so as to render their repetition unnecessary.

[12] Having determined which party has won the starting point is that the winner should recover his/her costs as against the unsuccessful party although there are factors which may lead to a different order.

[13] In **Scherer v Counting Instruments Ltd** [1986] IWLR 615 the English Court of Appeal set out the principles for the award of costs. They are:

a) The normal rule is that cost follows the event. 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 compensate that other party in costs; but

b) The Judge has an unlimited discretion to make what orders as to costs he considers that the justice of the case requires.
c) Consequently, a successful party has a reasonable expectation of obtaining an order for his costs to be paid by the opposing party, but has no right to such an order, for it depends upon the exercise of the Court’s discretion.

d) This discretion is not one to be exercised arbitrarily, it must be exercised judicially, that is to say, in accordance with established principles and in relation to the facts of the case.

e) The discretion cannot be well exercised unless there are relevant grounds for its exercise, for its exercise without grounds cannot be a proper exercise of the Judges' function.

f) The grounds must be connected with the case. This may extend to any matter relating to litigation, but no further. In relation to interim application, 'the case' is restricted to the application, and does not extend to the whole of the proceedings.

g) If a party invokes the jurisdiction of the Court to grant him some discretionary relief and establish the basic ground therefor, but the relief sought is denied in the exercise of discretion the opposing party may properly be ordered to pay his costs. But where the party who invokes the Court's jurisdiction wholly fails to establish one or more of the ingredients necessary to entitle him to the relief claimed, whether discretionary or not, it is difficult to envisage a ground on which the opposing party could properly be ordered to pay his costs." It is to be noted, however, that thought the above principles as mined reflect the pre CPR position yet these principles are as apposite today as they were then having been cited with approval in subsequent post CPR judgments.

[14] I wish to lay emphatic stress that in **Re Elgindata Ltd. (No. 2)** IWLR 1207 is authority for the proportion that a successful party is in normal circumstances entitled to have an order for costs against the loser. However, this is subject to limited exceptions, for example, where a successful party recovers no more than nominal damages or where the successful party has acted improperly or unreasonably.

[15] In **Winter v Winter** [2000] LTL 10/11/2000 is authority for the proposition that the CPR has not changed the position regarding awarding the whole costs to a party meeting with 'substantial success'.

[16] In **Phonographic Performance Limited v AIE Rediffusion Music Ltd** [1999]. W.L.R. 1507, Lord Woolf M.R. expressed himself thus: "I draw attention to the new rules because, while they make clear that the general rule remains that the successful party will normally he entitled to costs, they at the same time indicate the wide range of considerations which will result in the Court making different orders as to costs…[T]he 'follow the event principle' will still play a significant role, but it will be a starting point from which a court can readily depart. This is also the position prior to the new rules coming into force. The most significant change of emphasis of the new rules is to require Courts to be more ready to make separate orders which reflect the outcome of different issues."

[17] After this poignant observation Lord Woolf then referred to the four principles enshrined in **Re Elgindata Ltd (No. 2)** [1982] lWLR 1207, that is; costs are in the discretion of the Court; they should follow the event where it appears to the Court that in the circumstances of the case some other order should be made the general rule does not cease to apply simply because the successful party raises issues or makes allegation on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs; and , where the successful party raises issues and make allegations improperly or unreasonably, the Court may not only deprive him of his costs but may order him to pay the whole or in part of the unsuccessful party's costs.

In answering the question, 'who was the successful party?', in the matter at bar, I need only revert to my finding that there was misconduct on the part of the Claimant's counsel though such misconduct did not degenerate to the nadir of being designated moral turpitude. Even so, such misconduct cannot escape being labeled an irregularity. Against that finding the Application for Costs are well grounded and must go to the successful litigants, this is the Applicant/1st Defendant, the 2nd and 3rd

Applicants/Defendants, the 5th Applicant/Defendant and the 6th Applicant/Defendant. Such costs are to be agreed if not agreed, then such costs are to be taxed.