



[2017] JMSC Civ.40

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010HCV0231

BETWEEN	JEREMY HARDING /2 HARD RECORDING LIMITED	ANCILLARY CLAIMANT
AND	R.S. CONSTRUCTION AND METAL WORKS LIMITED	ANCILLARY DEFENDANT
AND	LEIGHTON HAMILTON AND ASSOCIATES	2ND ANCILLARY DEFENDANT

Mr. Kent Gammon for the Ancillary Claimant

Mr. Carl Dowding for the Ancillary Defendant

Heard: March 3, 2017 and March 13, 2017

WINT-BLAIR, J(AG.)

[1] The general power to award costs in civil proceedings is derived from Judicature Supreme Court Act which sets out in section 28E:

28E.-(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all civil proceedings in the Supreme Court shall be in the discretion of the Court.

Section 28E (2) gives the Rules Committee of the Supreme Court the power to make rules for regulating the costs of civil proceedings in the Supreme Court. The section provides as follows:

2) Without prejudice to any general power to make rules of court, the Rules Committee of the Supreme Court may make provision for regulating matters relating to the costs of civil proceedings including, in particular prescribing-

(a) scales of costs to be paid-

(i) as between party and party;

(ii) the circumstances in which a person may be

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(i) as between party and party;

(ii) the circumstances in which a person may be

ordered to pay the costs of any other person; and the manner in which the amount of any costs payable to the person or to any attorney shall be determined.

(3) Subject to the rules made under subsection (2), the Court may determine by whom and to what extent the costs are to be paid.

[2] The Rules Committee drafted Rules 64 and 65 of the Civil Procedure Rules (“CPR”) pursuant to section 28E(2). These rules govern the instant application for a determination of the award of costs.

[3] The discretion to make the award of costs is one which must be exercised judicially. This discretion is conferred by the Act and the rules aforementioned which are expressly made subject to the Act.

[4] Rule 64.6(1) sets out the general rule when the court is to make an order regarding the award of costs. This rule encapsulates the principle that costs follow the event, it provides:

64.6 (1) "If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.

- [5] In the instant case, the ancillary claimant desired the construction of a house at 39 Dewsbury Avenue, Kingston 6. The ancillary defendant was a construction firm engaged by the ancillary claimant and the second defendant an architectural firm and the project manager of the construction project. The ancillary claimant complained of defective workmanship on the part of the ancillary defendant and negligence in the project management of the contract for the construction of the house.
- [6] Counsel Mr. Gammon has submitted that each party should bear its own costs. He relied on the manner in which the ancillary defendants conducted their professional obligations towards the ancillary claimant. He argued under two heads, that the defective workmanship of the ancillary defendant led the ancillary claimant to incur expense in re-finishing, purchasing additional materials and hiring additional labour to repair and cure the ancillary defendant's shoddy workmanship. The ancillary claimant sought to recover those expenses from the ancillary defendant by way of an adjustment to the latter's bill of quantities. The ancillary defendant denied the existence of any defects and argued that the contract between the parties did not allow for a set off of any sums certified by the second ancillary defendant. Counsel cited. on Halsburys Laws of England 4th edition, volume 27 at paragraphs 713 and 714 and 1192
- [7] Counsel Mr. Dowding has submitted that the ancillary defendant was successful on the counterclaim and should be awarded costs in accordance with the general rule that costs follow the event. It was not reasonable for the ancillary claimant to have pursued a claim against the ancillary defendant in light of clause 30. Further, it was not reasonable for the ancillary claimant to have pursued a claim against the ancillary defendant which arose from responsibilities which fell outside the scope of the ancillary defendant's contractual duties and

responsibilities. The ancillary defendant's claim had a strong likelihood of success yet he has had to incur significant legal costs over the many years of his involvement in this matter which has ultimately been settled. Counsel relied on the cases Desmond Bennett v Jamaica Public Service Company Limited SCCA No. 66/2009 and Arken v Borchard.

Lines Limited and Others [2005] EWCA Civ 655.

- [8]** The substantive claim has been withdrawn against the ancillary claimant. The ancillary claim continued. On March 3, 2017, the court was advised that as between the ancillary claimant and the ancillary defendant the matter had been settled. An order of the court was agreed by both sides to be made on the terms of settlement as agreed between the parties as follows:

The ancillary claimant will pay the amount of the counterclaim with interest on the certificates issued by the Stoppi, Cairney Bloomfield. The sum being \$1,669,301.29.

Interest on the certificates from the date of issue to the date of payment with interest at 6% per annum.

- [9]** The court invited submissions on the issue of costs and the decision below is based on the written submissions filed by counsel for which my gratitude is hereby acknowledged.

- [10]** In the instant case it would appear that the contract in clause 30 did not allow for a set off of sums certified by the second ancillary defendant against sums owed to the ancillary defendant unless three express exceptions had arisen. None of these exceptions could be said to have arisen on the facts. The ancillary claimant alleged defective workmanship on the part of the ancillary defendant, he received no remedy from either defendant so he took matters into his own hands, he caused repairs to be effected which he then set off against the bill of quantities owed to the ancillary defendant. The ancillary defendant did not adjust the bill of

quantities and the ancillary claimant sued the ancillary defendant who counterclaimed. The ancillary claimant has now agreed to settle this counterclaim against the ancillary defendant.

- [11]** The ancillary claimant has clearly breached the terms of clause 30 of the contract. I have given consideration to the behaviour of the ancillary defendant within the terms of clause 32 which provided that work considered defective by the project manager should be removed and re-executed forthwith in an approved manner at the contractor's expense.
- [12]** Neither ancillary defendant complied with the terms of clause 32. The ancillary claimant completed the repairs himself. This was at his election. The repairs complained of were to windows which did not form a complete enclosure against rain. This led to indoor flooding and rotting window jambs. Both ancillary defendants had been informed of the problem by the ancillary claimant however the ancillary defendant did not remedy the situation. This court was not told at what stage of construction these defects complained of occurred.
- [13]** There is no indication whether the second ancillary defendant had considered the work defective even though both ancillary defendants had visited the site. There would not have been an obligation on the ancillary defendant to remedy a defect which was not indicated to him by the second ancillary defendant as this was the agreed term of the contract. The joining of the second ancillary defendant in those circumstances is understandable. The ancillary claimant did not abide by the terms of the contract and instituted proceedings in a matter which could have been handled differently.
- [14]** The costs of the ancillary proceedings are to be considered separately from the original proceedings: *Arken v Borchard Lines Ltd and others* [2005]EWCA Civ 655.
- [15]** The court may exercise its discretion to depart from the general rule set out in Rule 64.6(1) but that discretion must be exercised judicially. The ancillary claim

having now been concluded in respect of the ancillary defendant only, for the foregoing reasons, I see no reason to depart from the general rule that costs follow the event. The ancillary defendant has been successful on the counterclaim.

[16] Order:

Costs awarded to the ancillary defendant against the ancillary claimant to be taxed if not agreed.