



[2016] JMSC Civ. 191

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013 HCV 00294

IN THE MATTER of **ALL THAT** parcel of land part of **MONA AND PAPINE ESTATES** part of **BAMBOO PEN** containing by survey Sixty - One Thousand Nine Hundred and Thirty - Nine square feet of Fifty Seven Hundredths of a square foot, of the shape and dimensions and butting as appears on the plan annexed and being as to part thereof of the land comprised in Certificate of Title registered at Volume 675 Folio 14 also known as 1 Bamboo Avenue, Kingston 6.

AND

IN THE MATTER of **ALL THAT** parcel of land part of **MONA AND PAPINE ESTATES** part of **BAMBOO PEN** containing by survey Forty-Three Thousand Five Hundred and Twenty square feet and Seventy- Five Hundredths of a square foot, of the shape and dimensions and butting as appears by the plan annexed and being the land comprised in Certificate of Title registered at Volume 983 Folio 219 formerly comprised in Certificate of Title registered at Volume 675 Folio 13 also known as 1B Bamboo Avenue, Kingston6.

AND

IN THE MATTER of **ALL THAT** parcel of land of **BAMBOO PEN** in the parish of Saint Andrew being the Lot numbered Three on the plan of Pen deposited in the Office of Titles on the 25th of June 1934 of the shape and dimensions and butting as appears by the plan annexed unto and being part of the land comprised in Certificate of Title registered at Volume 294 Folio 82 and being all the land comprised in Certificate of Title registered at Volume 345 Folio 69 also known as 3 Bamboo Avenue, Kingston 6.

AND

IN THE MATTER of the Restrictive Covenant (Discharge and Modifications) Act

IN OPEN COURT

Gordon Robinson and Jerome Spencer Instructed by Patterson Mair Hamilton for the Applicant.

Symone Mayhew and Kimberley Morris for the Objectors.

Cost – Order for cost - Restrictive Covenants

Heard: 11th, 12th May 2015 & 3rd June, 2016

CRESENCIA BROWN BECKFORD J.

ORDER AS TO COSTS

- [1]** At the time of delivering the Reasons for Judgment, the court invited submissions on the issue of costs, the parties being unable to agree to same. Written submissions were in due course received from the parties.
- [2]** The applicant has submitted that as the successful party in (a) having the relevant restrictive covenants modified and discharged and (b) successfully

resisting the claim for compensation, it ought to be awarded its costs in keeping with Rule 64.6(1) of the Civil Procedure Rules 2002 (as amended) (CPR.)

[3] CPR Rule 64.6(1) states:

“If the court decided 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.”

[4] It was submitted on behalf of the Objectors that they successfully maintained their objection to the modification of the covenants for the construction of townhouses. On this basis the court should have regard to CPR Rule 64.6(4)(b) which provides that in deciding who should pay costs the court should have regard to:

“(b) whether a party has succeeded on particular issues even if that party has not been successful in the whole of the proceedings.”

[5] It has been the common law now enshrined in CPR Rule 64.6(1) that costs follow the event. The starting point therefore as was enunciated by Morrison P (AG) as he then was, in **VRL Operators Limited v National Water Commission and Others** 2015 JMCA Civ. 69 is:

“...to assess whether the general principles of awarding costs should [be] departed from.”

[6] In making the assessment the court must first determine the successful party. In the VRL case Morrison P. (Ag) said:

“... it is the substance or main aim or aims of the application that will present us with a clearer picture of which party achieved its objective, against the background of all the circumstances of the case.”

[7] The application was for the modification of the restrictive covenants to allow the construction of townhouses and apartments. From the outset, it was the applicant’s contention that the Objectors had conceded to a modification to allow for townhouses only. The application was vigorously pursued for the modification to include the construction of apartments.

[8] On the other hand, though the court found that the Objectors had impliedly consented to the modification to allow for the construction of townhouses, the Objectors maintained their objection to any modification or discharge though more strenuously to the construction of townhouses. Though claimed, the claim for compensation was not argued.

[9] What is pellucid is that the main issue joined was around the construction of apartments. On this issue, the objectors were successful.

[10] In *Capital & Credit Merchant Bank Limited v Real Estate Board*, [2013] JMCA Civ. 48 Morrison JA (as he then was said:

“The court may nevertheless make different orders for cost in relation to discrete issues. It should in particular consider doing so where a party has been successful on one issue but unsuccessful on another issue. In that event, the court may make an order for costs against a party who has been generally successful in the litigation.”

[11] After discussing the problems an assessment of costs using the issues based approach would presage, Morrison JA in *Capital and Credit*, agreed with the learned editors of *Blackstone’s Civil Practice*, that “the usual approach in the event of partial success is to award the successful party a proportion of its costs rather than an ‘issues based’ order”

[12] I will adopt that approach in this case. The applicant is to have a portion of its costs reduced to take into account the Objectors success on the issue of the construction of townhouses. In determining the appropriate reduction, I take into account that this issue loomed largest in the proceedings.

[13] I find in all the circumstances that the Applicant should have 25% of its costs of this application.