[2016] JMCC COMM 39

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2016CD00056

(NO 2: COSTS)

BETWEEN	**GORDON STEWART**	**CLAIMANT**
AND	**GOBLIN HILL HOTELS LIMITED**	**FIRST DEFENDANT**
AND	**MIES INVESTMENT LIMITED**	**SECOND DEFENDANT**
AND	**MARVIN GOODMAN**	**THIRD DEFENDANT**
AND	**ROSALEE GOODMAN**	**FOURTH DEFENDANT**

IN CHAMBERS

Emile Leiba and Courtney Bailey instructed by DunnCox for the claimant

Lord Anthony Gifford QC and Emily Shields instructed by Gifford, Thompson & Shields for the defendants

December 19, 2016 and December 30, 2016

COSTS – IDENTIFYING WHICH PARTY WAS SUCCESSFUL – APPORTIONMENT OF COSTS – WHETHER ISSUE BASED OR PERCENTAGE IS MORE APPROPRIATE

SYKES J

[1] The judgment in this matter was delivered on December 19, 2016 (**[2016] JMCC Comm 38]**). Mr Stewart applied to enforce a request for information and for summary judgment. These were made in two separate notice of application for court orders. The defendants, in one notice of application for court orders, applied for the claim to be dismissed for want of prosecution and in the alternative, a summary judgment on a number of the remedies sought by Mr Stewart. Submissions were made on costs. This is the decision on costs and the reasons for the decision.

[2] It would be good to remind ourselves of what costs are and what they are intended to do. In **Harold v Smith** (1860) 5 H & N 381, 385 (Bramwell B):

> *Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the indemnification can be found out, the extent to which costs ought to be allowed is also ascertained.*

[3] Costs are not intended to be a source of profit for either party. It is not payment for the lawyers since legal fees should have been dealt with by the retainer. Costs are those expenses incurred by one litigant which may be recovered from the other litigant.

[4] With this in mind attention is now directed to rule 64.6 (1) of the Civil Procedure Rules ('CPR') which states that if the court decides to make a costs order then the general rule is that it must order that the unsuccessful party is to pay the costs of the successful party. Rule 64.6 (2) allows the court to order the successful party to pay all or part of the unsuccessful party's costs. Rule 64.6 (3) states that in deciding who

should pay costs the court must have regard to all the circumstances. Rule 84.6 (4) lists some of the matters the court must bear in mind.

[5] Rule 64.6 (1) captured the starting point of the common law. This is supported by Morrison JA (now President) in **Capital & Credit Merchant Bank Ltd v Real Estate Board** [2013] JMCA Civ 48 who said at paragraph 10:

> *[10] The question of whether to make any order as to costs - and, if so, what order is therefore a matter entrusted to the discretion of the court. The starting point under the rules, reflecting the longstanding position at common law, is that costs should follow the event. The court may nevertheless make different orders for costs 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.*

[6] What does giving effect to the rule look like in practice? Waller LJ in **Straker v Tudor Rose (a firm)** [2007] EWCA Civ 368 gave good practical advice on this matter. He set out a methodology which should be followed. His Lordship said at paragraphs 11 – 13:

> *…The court must first decide whether it is case where it should make an order as to costs, and have at the forefront of its mind that the general rule is that the unsuccessful party will pay the costs of the successful party. In deciding what order to make it must take into account all the circumstances including (a) the parties' conduct, (b) whether a party has succeeded on part even if not the whole, and (c) any payment into court.*
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> *12. Having regard to the general rule, the first task must be to decide who is the successful party. The court should then apply the general rule unless there are circumstances which lead to a different result. The circumstances which may lead to a different result include (a) a failure to follow a pre-action protocol; (b) whether a party has unreasonably pursued or contested an allegation or an issue; (c) the manner in which someone has*

> *pursued an allegation or an issue; and (d) whether a successful party has exaggerated his claim in whole or in part.*
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> *13. Where, particularly in a commercial context, the claim is for money, in deciding who is the successful party, I agree with Longmore LJ when he said in Barnes v Time Talk (UK) Ltd. [2003] EWCA Civ 402 para 28 that "the most important thing is to identify the party who is to pay money to the other". In considering whether factors militate against the general rule applying, clear findings are necessary of factors which led to a disapplication of the general rule, e.g. if it is to be said that a successful party "unreasonably" pursued an allegation so as to deprive that party of what would normally be his order costs, there must be a clear finding of which allegation was unreasonably pursued.*

[7] **Straker** is helpful when dealing with circumstances where the claim has been disposed of. What about applications made within the case? **VRL Operators Limited v National Water Commission and others** [2015] JMCA Civ 69 provides some assistance in non-money applications. In that case there was an application to disqualify an expert on the ground of impartiality arising from what was said to be improper communication between the expert and one of the attorneys for one of the litigants. The learned judge refused the application and awarded costs to the respondents. Frank Williams JA made the point that adding up orders made for one side or the other is not every edifying. His Lordship said at paragraph 46:

> *Looking at the submissions of both counsel, one is not certain of the benefit to be derived from this sort of numerical approach of considering how many orders were granted and how many refused. On the contrary, it is the substance or main aim or aims of the application which will present us with a clearer picture of which party achieved its objective, against the background of all the circumstances of the case.*

[8] For the learned Justice of Appeal, the person who achieved his objective on the application or the case would be the successful party. Sometimes identifying the successful party may not be as straight forward.

Discussion

i) The application to enforce the request for information and the application to strike out claim

[9] There are two applications – one from Mr Stewart and the other from the defendants – where the applicant failed completely. Mr Stewart failed in his attempt to enforce the request for information and the defendants failed in their striking out application. The respondents to each of these applications are awarded costs.

ii) The applications for summary judgment

[10] The court will adopt the division proposed by Lord Gifford QC. Learned Queen's Counsel proposed that the court should look at Goblin Hill Hotels Limited ('GHHL') differently from Mies Investment Limited ('Mies') and Mr and Mrs Goodman ('the Goodmans'). The idea was that in respect of Mies and the Goodmans, having regard to the decision of the court, the claim against them is now at an end because there are no outstanding issues which require adjudication whereas in the case of GHHL there are still aspect of the claim that have not been disposed of and so may go on to trial. Having said this, the court will not adopt Lord Gifford's further suggestion that the court should not consider costs in respect of GHHL since there are still outstanding issues to be decided.

(a) the claim against Mies and the Goodmans

[11] Paragraphs 42 (1) and (2) of the amended statement of claim (the language used before the CPR), as further 'amended' by what was indicated in Mr Courtney Bailey's affidavit contain the reliefs sought against the defendants. Paragraph 42 (1) sought relief against all four defendants. Paragraph 41 (2) sought relief against GHHL alone.

[12] As it has turned out the claim against Mies and the Goodmans is now at an end. No order was made against the Goodmans in their personal capacity. Three remedies were sought under paragraph 41 (1). The court will refer to remedies sought in their final form as indicated at the hearing. Under paragraph 41 (1) (a), the remedy sought was

that mortgage and debenture granted by GHHL to Mies took effect subject to Mr Stewart's lease. Paragraph 41 (1) (b) sought an injunction against all the defendants barring them from transferring or disposing of the mortgage or debenture to any third party unless the terms of the transfer or disposition preserved the priority of Mr Stewart's lease. The paragraph also sought to restrain the Goodmans from using their voting or management power in Mies to transfer the mortgage or debenture except up on terms which preserved the priority of Mr Stewart's lease. Paragraph 41 (1) (c), which was withdrawn by Mr Stewart, sought damages for conspiracy to injure Mr Stewart in respect of his leas.

[13] Mr Stewart failed to secure any of the reliefs sought under paragraph 41 (1). The court decided that Mr Stewart's position that an unregistered lease should receive the protection he sought was not a legal possibility having regard to section 94 of the Registration of Titles Act. Thus no order was made in favour of Mr Stewart giving priority to his lease. The declaration granted in respect of paragraph 41 (1) (a) was that proposed by the defendants. That declaration was that the lease was protected provided that Mr Stewart was in good standing. Therefore, while it might be true to say that Mr Stewart received some measure of protection for his lease the fact is that it was on the terms proposed by the defendants because the mortgage agreement between GHHL and Mies had an express provision for preserving the unregistered leases once the lease holders were in good standing. The court also takes into account that the terms proposed by the defendants was opposed by Mr Stewart and he lost on that.

[14] The defendants received all that they wanted under paragraph 41 (1). Before Mr Stewart withdrew paragraph 41 (1) (c), the defendants had applied for summary judgment on that paragraph. The withdrawal of it does not deprive the defendants of their costs but their costs on that issue would stop at the point of withdrawal and would not properly be part of the costs of the application since no submissions were made on it by either side. From what has been said, the court has decided that it was the defendants who succeeded under paragraphs 41 (1) (a) and (b) because it is clear that Mr Stewart did not receive the level of protection he sought for his lease whereas the defendant secured a declaration that preserved their freedom of action if Mr Stewart

falls out of good standing. Also the injunction sought by Mr Stewart was not granted. Thus despite the fact that Mr Stewart's lease has received some protection it would be a strain of language to describe the outcome of the application as one of success for Mr Stewart and failure for the defendants. Applying the dictum of Frank Williams JA in **VRL**, the main aim of Mr Stewart's application was not met while the defendants met their objectives completely.

[15] Normally, the order would be that costs in the application go to the defendants. However, in this case, the claim against Mies and Goodmans is now at an end. It is this court's view that the correct order is that costs of claim should be awarded to Mies and the Goodmans. This order should ensure that the costs incurred by the Mies and the Goodmans to meet allegations of void mortgage and conspiracy to injure are included.

[16] This approach minimises the risks of over recovery that may arise of the court had ordered costs of the application made by Mr Stewart to the defendants and then also ordering costs on this aspect of the defendants' summary judgment application. The court directs is mind to the applications involving GHHL.

(b) <u>the claim against GHHL</u>

[17] GHHL was required to respond to the summary judgment application by Mr Stewart, at least, while the remedy sought was a declaration that the mortgage granted by GHHL was void. In its final revised version the declaration sought against GHHL under paragraph 41 (1) (a) was not successful. Neither was the application for an injunction under paragraph 41 (1) (b), while paragraph 41 (1) (c) was withdrawn against GHHL as well. GHHL had applied for summary judgment against Mr Stewart on paragraph 41 (1) before the most recent position indicated by Mr Stewart. GHHL should receive its costs either on Mr Stewart's application or on its own summary judgment application in respect of paragraph 41 (1) but not under both applications. As the court understands it, regardless of which summary judgment was first in time, in respect of paragraph 41 (1), the applications were the opposite of each other. That is, rather than simply resist the application of the other side, each wanted an affirmative declaration in

their favour. What this meant was that there was resolution in favour of GHHL under paragraph 41 (1) and that fact should be acknowledged and reflected in the costs order.

[18] GHHL would be entitled to its costs to meet the damages for conspiracy aspect of the claim right up to the point where it was withdrawn. It is entitled to its costs on its application for summary judgment because the court granted the declaration sought by GHHL and the other defendants under paragraph 41 (1) (a). The court will now examine GHHL's position under paragraph 42.

[19] Under paragraphs 42 (2) (d) and (e), the issues raised there were determined in Mr Stewart's favour. Paragraph 42 (2) (d) sought a declaration that the assessments (maintenance was deleted and substituted with assessments) and special assessments exceeded what could be legitimately be charged up on a proper interpretation of the relevant clause in the lease and article in the articles of association. Paragraph 42 (2) (e) sought a declaration that GHHL render a proper assessment based on the correct interpretation of the relevant documents and any excess be repaid with interest at a commercial rate.

[20] GHHL's position was that Mr Stewart was entitled to the declaration at paragraph 42 (2) (e) and not (d). The court had disagreed with this submission having regard to the Privy Council's decision in **Thompson v GHHL** [2011] 1 BCLC 587. The court found that Mr Stewart was entitled to both declarations subject to the wording of the declarations being adjusted to reflect the facts of this particular case and the principle laid down by the Board.

[21] Mr Stewart sought summary judgment on paragraph 42 (2) (f) (ii) as part of package deal, meaning that if he were successful in getting summary judgments on paragraphs 42 (2) (d), (e) and (f) (ii) then he would not be seeking summary judgment on paragraphs 42 (2) (f) (i) and (g).

[22] Only part of paragraph 42 (2) (f) (i) was granted. That was the legality of the occupancy charges. In the **John Thompson** CL T005/2002 (unreported) delivered November 6, 2006), the Supreme Court had decided that as a matter of law occupancy

charges could lawfully levied on the leaseholder. The other part of what was sought under paragraph 42 (2) (f) (i), that is, that booking charges and commissions were wrongfully charged to Mr Stewart was not granted because that would require a trial to determine both legality and amount.

[23] The court declined to grant summary judgment on paragraph 42 (f) (ii) because it dealt with quantification of occupancy charges. The pleadings did not contain any information that would enable any quantification of occupancy charges to be done. Quantification of occupancy charges would require evidence and the affidavits in support did not have any evidence on this issue.

[24] Mr Stewart withdrew paragraphs 42 (2) (h) and 42 (2) (i). The former was a claim for damages for breach of duty and the latte was for the appointment of a receiver. This means that GHHL would be entitle to costs to meet these remedies up to the date they were withdrawn. GHHL had applied for summary judgment on these paragraphs. Mr Stewart's most recent position meant that the court did not have to adjudicate on the paragraphs but that does not mean that GHHL did not incur any costs in preparing to meet those reliefs as well as the paragraphs on which they were based.

[25] Overall Mr Stewart succeeded in respect of the assessments and special assessments but failed on the legality of the occupancy charges and the injunction. He also failed on the booking charges and commissions. The defendants failed to secure summary judgment in their favour on all of paragraph 42 (2) (f) (i). Thus both sides failed to secure summary judgment in their favour on the booking charges and commissions. In addition the defendants no longer had to face paragraphs 43 (2) (h) and (i).

[26] It was noted earlier that Lord Gifford had submitted that it would be premature to address the question of costs in relation to GHHL because other issues were still outstanding. This position of counsel is not accepted because the applications were heard. The matters outstanding simply could not be addressed on the summary judgment application because there was no enough evidence to make any

determination in law or on fact. There is no need to await the trial, settlement or abandonment of the outstanding matters.

[27] Mr Leiba submitted that on the summary judgment applications GHHL was largely unsuccessful, meaning that Mr Stewart was largely successful. This was to say that GHHL should receive no more than 20% of costs of application. The court does not agree. The court is looking at GHHL's position on the summary judgment applications in the round, that is, the applications involving paragraphs 42 (1) and (2). GHHL was successful on those parts of the application involving paragraph 42 (1). The orders made there were not those sought by Mr Stewart but those sought by the defendants including GHHL. One aspect of the claim was withdrawn (paragraph 42 (1) (c)).

[28] Under paragraph 42 (2) Mr Stewart was successful only in respect of that part which, by law, the court and the parties were bound by the Privy Council decision in **John Thompson**. The other parts of the claim under that paragraph were either withdrawn or not decided in favour of Mr Stewart. The defendant too failed in in parts too under paragraph 42 (2).

[29] Overall, the court would say that the success of Mr Stewart and GHHL were equal. In coming to this conclusion that court does not tot up the number of orders made for each party but looks at the essence or substance of the applications and determines whether the party has achieved its objective.

Orders

a) Costs of enforcement of request for information to the respondent(s) to that application.

b) Costs of striking out application to respondent to that application;

Taking summary judgment applications together

c) Costs to the defendant(s) on those parts of the claim that were withdrawn against them/it up to the date they were withdrawn;

d) **Costs in the claim** to the second, third and fourth defendants;

e) The claimant and the fourth are entitled to 50% of costs of the application in respect of those contested parts of the summary judgment application.