[2019] JMSC Civ 219

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION
CLAIM NO. 2017 HCV 04330

IN THE MATTER of an application by DIANA THORBURN, RACHEL HERNOULD AND BARBARA THORBURN-McINTOSH to exercise jurisdiction over the financial affairs of ERNEST CARROLL THORBURN

AND

IN THE MATTER of Section 29 of the Mental Health Act

IN CHAMBERS

Written submissions received on behalf of the claimants from Mrs. Tana'ania Small Davis, Ms. Sidia Smith and Mr. Mikhail Jackson instructed by Livingston, Alexander & Levy.

Written submissions received on behalf of the Interested Party from Mr. M. Maurice Manning, Ms. Sherry Ann McGregor and Mr. Francois McKnight instructed by Nunes, Scholefield, DeLeon & Co.

November 8, 2019

Costs - Discontinued claim – Discretion of Judge to depart from general rule – Factors to consider in making costs orders in discontinued claims – Recovery of costs by non-party – Civil Procedure Rules part 64 and rule 37.6.

HENRY-MCKENZIE, J (Ag)

BACKGROUND

[1] On December 11 2018, I heard a Notice of Application for Court Orders which was filed on July 4, 2018 by the Claimants. On January 25, 2019, I granted the application for the discharge of the interim injunction and permitted the claimants to discontinue the claim. The issue of costs was then reserved pending the filing and exchange of written submissions, on or before February 8, 2019.

[2] The court notes that the submissions on costs were filed by both sides on February 8, 2019. However, both sides went on to file further submissions and counter submissions on various dates up to March 20, 2019. I have considered all the written submissions made on both sides in arriving at my decision in relation to the award of costs in this matter.

[3] In December 2017, the claimants brought this action asking the court to declare their father Mr. Ernest Thorburn incapable by reason of mental disorder of managing and administering his financial affairs pursuant to section 29 of the Mental Health Act and sought an order that they be appointed to manage his affairs. At the same time, an application was made by them seeking an interim injunction to restrain Mr. Thorburn from encashing Jamaica Money Market Brokers (JMMB) bonds. The order for interim injunctive relief was granted on January 10, 2018 and was subsequently continued by orders of the court made on February 7, March 8, April 25, April 27, July 4, July 31, September 24, October 5, October 19 and December 11, 2018. On January 10, 2018, the court permitted Mrs. Pauline Lindo, Mr. Thorburn's sister, to intervene in the proceedings as an interested party.

[4] Up to July 4, 2018, the injunction was maintained by the claimants and was opposed by the Interested Party. However, after having received a joint medical report of Professor Frederick Hickling and Professor Wendel Abel, the claimants no longer sought the continuation of the injunction and filed a Notice of Application for Court Orders on the said July 4, 2018, seeking the discharge of the injunction and seeking leave to discontinue the claim. The application to

discontinue was scheduled to be heard on September 24, 2018. However, on September 14, 2018, the Interested Party filed a Notice of Application for Court Orders seeking amongst other orders, that the interim injunction granted on January 10, 2018 to restrain Mr. Thorburn from taking steps to encash JMMB bonds be extended and further, an adjournment of the Fixed Date Claim Form and all other applications. The hearing of this application was also scheduled for September 24, 2018. On that date, the matter was adjourned to September 26, 2018. On September 25, 2018, the parties participated in mediation but required more time to discuss the issues. On the next court date, September 26, 2018, the court allowed the parties more time to arrive at settlement arrangements. An extension of the injunction was given on each appearance thereafter until January 25, 2019, when the order was made discharging the interim injunction and granting permission for the claimants to discontinue the claim.

CLAIMANTS'/ APPLICANTS' SUBMISSIONS

[5] Counsel for the claimants, recognized that the general rule in cost proceedings is that costs follow the event, and in particular, that a party discontinuing a claim is liable for the costs incurred by the defendant against whom the claim is discontinued, unless the parties agree or the court orders otherwise. (*See: Civil Procedure Rules (CPR) rule 37.6(1)*.) Counsel argued that the circumstances of this case are exceptional and the parties having not agreed on the appropriate cost to be levied, it requires the Court to exercise its discretion and depart from the general rule and order that the parties should bear their own cost up to July 4, 2018 and thereafter up to the date of discontinuance, the Interested Party should bear the costs.

[6] They seek to justify the orders sought on the factual basis that after the filing of the application for the discharge of the injunction and the discontinuance of the claim on July 4, 2018, the injunction was being maintained by the Interested Party over the objection of the claimants, despite there being no legal basis for maintaining the action under section 29 of the Mental Health Act. Further, that the merits of discontinuing the claim remained the same between July 4, 2018,

when the application was filed and January 25, 2019, when the application was granted.

[7] Counsel for the claimants further contended, that even after the Interested Party had filed her own claim, there was continued opposition to the discontinuance of the claim on each occasion the matter came before the court and the interim injunction was extended on the application of the Interested Party. This resulted in the claimants being put through undue and unnecessary costs and expenses when the claim could have been discontinued from the latest July 31, 2018, if the Interested Party did not obstruct the claimant's application without just cause.

[8] In determining the appropriate cost order, that is, who should be liable to pay costs, counsel relied on CPR Part 64 which deals with the general rules in relation to costs, and in particular rule 64.6 (4) which outlines the factors the court must have regard to in coming to its decision on costs.

[9] Counsel cited several authorities to ground their submission, to include **J.T. Stratford & Son Ltd v Lindley and Others (No. 2)** [1969] 3 All ER 1122 . In that case, the English Court of Appeal upheld the order granting leave to discontinue with each side bearing its own costs, with reference being made to the court's wide discretion as to costs.

[10] The case **Scherer and another v Counting Instruments Ltd. and another** *[1986] 1 WLR 615,* emphasizes how the court's discretion should be exercised in awarding costs.

[11] Counsel also relied on **RTZ Pension Property Trust Ltd v ARC Property Developments Ltd and another** [1999] 1 All ER 532 where the Court held that in order to justify an order that there be no order as to costs, the test is what is fair and reasonable in the circumstances. The court also found that where the circumstances warrant, the unreasonable or improper conduct of a defendant may give rise to an order that he pay the plaintiff's cost of a discontinued suit.

[12] Counsel also made reference to the cases of **Emcee Ltd v Sunday Pictorial Newspapers (1920) Ltd** [1939] 2 All ER 384; In the matter of **Elgindata Ltd.**

[1992] WL 12678779**;** and **Jones v McKie and Mersey Docks and Harbour Board** [1964] 1 WLR 960 which also exemplify the wide discretion of the court to depart from the general rule.

[13] With that being said, the claimants do not believe they are liable to the Interested Party for any of the costs of the action. They submitted that they made a legitimate, honest and transparent application to the court to protect their father's interest and that even after the Interested Party intervened, the Interested Party's own psychiatrist, Professor Hickling, concluded that Mr. Thorburn had a mental disorder which required medication. Counsel argued further, that the joint medical report does not suggest that the initial opinion which the claimants relied on to bring the action was unfounded. At all times they acted on the advice of professionals as to Mr. Thorburn's mental status.

[14] Counsel for the claimant also contended, that the issue of costs was not contemplated when they filed proceedings. They further argued, that these proceedings were not forced upon the Interested Party, but that she came into the matter on her own volition, hence she is not a defendant and therefore not entitled to costs.

[15] Finally, counsel submitted, that in the present case, prolonging the matter beyond July 4, 2018, is solely attributable to the conduct of the Interested Party. They argued that the Interested Party tied up the proceedings with a misconceived Vulnerable Person Application, rather than a fresh claim and a disingenuous attempt at mediation which served only to block the discontinuance. As such, they asked the court to make cost orders adverse to the Interested Party, from the date on which it became clear that the claim should properly have been allowed to be discontinued.

INTERESTED PARTY'S SUBMISSIONS

[16] Counsel for the Interested Party initially grounded their submissions in CPR rule 37.6 and 64.6. Rule 37.6 is applicable to liability for costs where a claim is discontinued. However, in their rebuttal submissions, they criticized the claimants' reliance on rule 64.6 and indicated that this is misplaced, since CPR part 64 is concerned with situations where costs are at large, which is not the position in this case.

[17] Further, counsel for the Interested Party argued that in this case, it is irrefutable that costs follow the event and that the general rule ought to be applied. They submitted further, that the discontinuance of the claim makes the claimants liable for the costs incurred by the Interested Party, and that while the claimants may argue that the Interested Party was not a defendant in these proceedings, and thus not entitled to costs, she was not a mere volunteer. She had no personal interest to serve and she intervened on the order of the court, so as to protect Mr. Thorburn and safeguard his interests. They argued that the Interested Party has incurred substantial expenses in safeguarding her brother's welfare, and it is only reasonable that she should be reimbursed.

[18] Counsel for the Interested Party further stated that the Interested Party did not oppose the application to discontinue the claim and argued that the claim had no prospect of success and that the issues concerning the vulnerability claim are the subject of fresh proceedings. They went on to say that the Interested Party requested that appropriate orders be agreed for the proper arrangements of Mr. Thorburn's care, but the claimants' sole objective was to discontinue the claim, without more.

[19] Counsel relied on sections 28E (1) and 28E (2) of the **Judicature (Supreme Court) Act** as authority for the Court to award costs to the Interested Party.

[20] Counsel also cited **Winston Finzi and Mahoe Bay Company Limited v JMMB Merchant Bank** *[2015] JMCA App 39A.* In that case, Morrison JA (as he then was) looked at sections 30 (3) and (5) of the **Judicature (Appellate Jurisdiction) Act**, the provisions of which are virtually identical to section 28E

(1) and (3) of the **Judicature (Supreme Court) Act** in considering the application by Assets Securitisation Ltd (ASL), an Interested Party, to recover costs against Winston Finzi and Mahoe Bay Limited. In paragraph 17 he stated thus:

> *"… the effect of section 30(3) and (5) of the Act is therefore that, subject to rules of court, the costs of and incidental to all civil proceedings are in the discretion of the court and it is for the court to determine by whom and to what extent the costs are to be paid."*

Morrison J.A. also sought to determine the effect of CPR Part 64.3 on the exercise of the Court's discretion as to costs under section 30 (3) and (5) of the Judicature (Appellate Jurisdiction) Act and posited in paragraph 19 that:

> *"Taken together, these provisions lead me to think that the court does have the power to order the payment of costs by a party or parties (such as the applicants) to a non-party (such as ASL)".*

[21] Counsel impressed upon the court that though an award of costs in favour of non-parties is only done in exceptional cases, in keeping with the ruling of Morrison JA, and having regard to the circumstances of the Interested Party's intervention, the court ought to allow costs to be paid to the Interested Party as this is an exceptional case. Counsel emphasized the Interested Party's integral role in the matter and was of the view that if it had not been for her intervention, the Court would have been misled.

[22] Counsel also mentioned as a guide and commended to the court, the cost provisions in the United Kingdom (UK), in particular the **Court of Protection Rules 2017,** in relation to the considerations a Court should take into account in the exercise of its discretion.

[23] The court notes however, that the United Kingdom (UK) Court of Protection Rules 2017 differ from our CPR and therefore do not offer any assistance in determining the matter.

LAW AND ANALYSIS

[24] The main issues to be decided in this matter are:

i. Whether it is open to the court to make an order for costs in favour of a non-party to the proceedings.

ii. Whether part 64 is applicable to costs in discontinued claims.

iii. Whether the circumstances of this case justify a departure from the general rule on costs.

iv. What orders as to cost should be made taking into account the circumstances of the case.

Whether it is open to the Court to make an Order for Costs in favour of a non-party to proceedings.

[25] CPR Part 64 provides general rules on costs and one's entitlement to costs in civil proceedings. Rule 64.3 highlights the power of the court to make orders about costs. It states:

> *"The court's powers to make orders about costs include power to make orders requiring any person to pay the costs of another person arising out of or related to all or any part of any proceedings".*

Rule 64.5 which is also important in determining this issue states:

> *"(1) A person may not recover the costs of proceedings from any other party or person except by virtue of –*
>
> *(a) an order of the court;*
>
> *(b) a provision of these Rules; or*
>
> *(c) an agreement between the parties."*

[26] In addition, section 28E of the Judicature (Supreme Court) Act gives the court a wide discretion in deciding matters of costs in civil proceedings. Section 28E states:

(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.

(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 ordered to pay the costs of any other person; and

***(b)** 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.*

[27] Reference is made as well to the case of ***Finzi*** *(supra)* in which the Court of Appeal examined, section 30 (3) and (5) of the Judicature (Appellate Jurisdiction) Act which has identical provisions to section 28E of the Judicature (Supreme Court) Act to determine if there is an implied limitation on the category of persons entitled to costs. After examining section 30 (3) and (5) as well as the CPR in relation to costs, Morrison JA came to the conclusion that the court has a wide discretion in determining by whom and to what extent costs are to be paid. He was also of the opinion that rule 64.5 appears to contemplate that a party may in fact be ordered to pay costs to a person other than a party and ruled at paragraph 19, *"…that the court does have the power to order the payment of costs by a party or parties (such as the applicants) to a non-party…"*

[28] Given that the provisions of both section 28E of the Judicature (Supreme Court) Act and section 30 (3) and (5) of the Judicature (Appellate Jurisdiction) Act are identical, a similar approach can be taken by this court to the interpretation of section 28E and the application of the CPR. This court therefore concludes that the award of costs can be made in favour of a non-party to proceedings. As such,

the Interested Party may recover costs if the court so orders in its discretion and if the circumstances of the case permit.

The applicability of the general costs provisions at Part 64 to discontinued claims

[29] Both parties have relied on rules 37.6 and 64.6 in their individual quest to sway the court to make what they each consider the appropriate cost order. However, as earlier intimated, the Interested Party in her rebuttal submissions seemed to have abandoned her reliance on rule 64.6 and criticized the claimants' reliance on the rule. I find the Interested Party's criticism to be unsustainable. While it can be acknowledged that rule 37.6 deals specifically with costs in discontinued claims, it is no way exhaustive of the rules governing costs as it relates to discontinued claims. Rule 37.6 only makes provision for the general rule on costs in discontinued claims, but makes no provision for the factors a court must take into account if it considers to depart from the general rule. In order to determine if this court can depart from the general rule, there must be resort to rule 64.6(4) factors.

[30] Therefore, both part 64 and rule 37.6 are applicable in the circumstances of this case. The court can rely on the general rules on costs at part 64 in its determination of the issue of costs in discontinued claims under rule 37.6.

Whether there should be a departure from the general rules on costs.

[31] The claimants have asked for the court to make orders that the parties bear their own costs up to July 4, 2018 and for the Interested Party to bear the costs beyond that to the date of discontinuance. On the other hand, the Interested Party has asked that liability for costs be placed on the claimants up to discontinuance.

[32] Under rule 37.6, the general rule where a claim has been discontinued is that the claimant who discontinues is liable for the costs of the defendant incurred on or before the date on which the Notice of Discontinuance was served. There is no defendant in this case, but only an Interested Party. Given that the claimants have abandoned their claim, the presumption is that they are liable for the costs. It is now for the claimants to satisfy the court with good reason, that this case requires a departure from the general principles on costs and for the court to make orders as they seek.

[33] In **Teasdale v. HSBC Bank Ltd and others** *[2010] EWHC612*, Waksman J. had to determine the issue of costs following a discontinuance of claims against the defendant banks by the claimants, who argued that costs should be awarded in their favour against the defendants. Waksman J., enunciated several principles which should guide a court in its determination as to who is liable for costs in those circumstances. He considered UK CPR rule 38.6 (1) which is similar to our CPR rule 37.6(1) and UK CPR rule 44.3(4) which is similar to our CPR rule 64.6 (3) and 64.6(4), in deciding the issue. According to Waksman J at paragraph 7 (1)**.**

> *"When a party discontinues, there is a presumption by reason of (CPR38.6) that the defendant will get his costs. The burden is firmly upon the claimant to show that there is good reason to disapply it"*

He continued at paragraph 7 (5):

> *"In most cases, in order to show good reasons, the claimant will need first to show a change of circumstances since the claim was made. This will demonstrate at least that there is something more than a simple re-evaluation"*

Wakesman J. further commented at paragraph 7 (6) that:

> *"In truth it is difficult to see how any change in circumstance could amount to good reason unless it is connected with some conduct on the part of the defendant which deserves to sound in costs against him"*

Lastly, at paragraph 7 (7) he indicated:

> *"And even if there has been some conduct by defendant which has caused a change of circumstances this should not have an adverse impact against him if, having regard to all the circumstances, it does not amount to good reason to disapply the presumption..."*

I find these guidelines to be helpful and applicable to the circumstances of this case.

[34] The Claimants, in this case, have argued that they have advanced good reason for a departure from the general rule. They maintain that their claim was well founded to commence with. They made reference to what they say is a change in the circumstances since the filing of the claim. They contend that Mr. Thorburn's rehabilitation through change in medication and the change in diagnosis by Professor Hickling and the subsequent joint report from Professors Abel and Hickling, amount to a change in the circumstances.

[35] The claimants also pointed to the conduct of the Interested Party as a reason for the departure from the general rule on costs.

[36] In order for the court to determine whether good reason has been shown for the court to depart from the established rule, the history of the matter leading to the grant of the application for discontinuance of the claim and discharge of the injunction is apposite.

[37] The claimants brought this action after they say they witnessed unusual changes in their father's behaviour. They applied to the court to grant them authority to manage his affairs pursuant to the Mental Health Act and for an injunction to restrain him encashing bonds. In simple terms, they sought to manage his affairs on the ground that he was mentally incompetent. They sought this, as his behaviour coincided with two former periods of depression which affected his spending habits. The claimants proceeded in their claim and did not seek to abandon it until the court ordered a joint medical report from Professor Hickling and Professor Abel which showed that Mr. Thorburn had full mental capacity and was capable of making his own decisions, in spite of his underlying mental issues.

[38] Whilst the claimants' claim may not have been unfounded, the claimants in my view, would have benefited from a further evaluation of Mr. Thorburn before they pursued their claim, since the last evaluation was in 2009. By saying this however, the court is not making any pronouncement as to whether the claim was likely to have succeeded, as this is irrelevant to my determination of this matter.

[39] The claimants filed their application for discontinuance on July 4, 2018 and it was served on that same date. This indicated that they no longer sought the continuation of the proceedings and the interim injunction. The matter continued thereafter at the insistence of the Interested Party. The Court has taken note of the fact that the Interested Party filed on September 14, 2018, a Notice of Application for Court Orders seeking amongst other orders, an extension of the interim injunction granted on January 10, 2018, which the claimants were seeking to have discharged. The Interested Party also expressed her opposition to the matter discontinuing on the basis that she wanted to ensure that proper arrangements were in place for the care of Mr. Thorburn, although he was already rendered mentally competent to make his own decisions and manage his own affairs by both Professors Abel and Hickling.

[40] Given the history outlined, it is my considered view that the circumstances of this case are indeed exceptional and warrant a departure from the general rule. I accept that the conduct of the Interested Party played a major role in delaying the claimants' application to discontinue the claim and to have the interim injunction discharged which ultimately led to the protraction of the claimant's case. This no doubt, adversely affects the award of costs in her favour.

Appropriate Cost Order

[41] By the simple fact that the claimants had discontinued their claim, they acknowledged that their claim was not sustainable. From this very fact, an order for costs should be made against them. They brought this matter before the court and its pre-mature end was due to insufficient grounds for its continuance.

[42] The Interested Party had intervened in the proceedings with the permission of the court to protect Mr. Thorburn's interest. Although she is not a defendant in the matter, she would have incurred legal expenses as well as expenses associated with the medical examination and care of Mr Thorburn and the medical reports which were subsequently generated and which the claimants themselves utilized in discontinuing their claim. The Interested Party would not have had to bear these expenses, but for the claim brought by the claimants, only later to be discontinued. In all the circumstances, she is entitled to recover costs from the claimants. Although costs orders in favour of non-parties are exceptional, in this case, such an order is warranted. The claimants are therefore liable to pay costs in favour of the Interested Party.

[43] In ***Finzi*** *(supra)* Morrison JA referred to **Civil Procedure, Principles of Practise,** 3rd edition by Adrian Zuckerman, paragraph 27.267, where Professor Zuckerman indicates the circumstances in which such an order will be suitable. He pointed out that such an order is particularly apt in a case in which, pursuant to an order of the court, the non-party has been obliged to perform some act. Morrison JA was also of the opinion that it is just to make an order that the party at whose instance the non-party has been required to do something should pay the costs incurred by the non-party as a result.

[44] Having established that the claimants are liable to pay the costs incurred by the Interested Party, it must now be decided up to what date they should be liable to pay costs, given the history of the matter.

[45] In the circumstances of this case, it is fair and just that costs be awarded against the claimants in favour of the Interested Party from January 10, 2018, the date the Interested Party was permitted by the court to intervene, to July 4, 2018, the date on which the claimants filed and served the Application for Leave to Discontinue and for the discharge of the injunction. Thereafter and up to January 25, 2019, the date the court granted the application for discontinuance and discharge of the injunction, the parties should bear their own costs. I therefore make the following orders:

ORDERS

1. The claimants are liable to pay the costs incurred by the Interested Party from January 10, 2018 to July 4, 2018.

2. From July 4, 2018 to January 25, 2019, the claimants and the Interested Party should bear their own costs.

3. Costs to be agreed or taxed.

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Hon. G. Henry McKenzie, J