BARBADOS
[Unreported]

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL

Civil Appeal No. 8 of 2011

BETWEEN:

ELECTRIC SALES AND SERVICES LIMITED	**Appellant**
AND	
KENRICK HOYTE	**Respondent**

BEFORE: The Hon. Peter D.H. Williams, The Hon. Sandra P. Mason and The Hon. Andrew D. Burgess, Justices of Appeal.

2012: March 16 and May 29

Mr. Bryan Weekes of Weekes Kissoon Deane for the Appellant
Mr. Dale Marshall Q.C. and Mrs. Susan Sealy of George Walton Payne & Co. for the Respondent

ADDENDUM JUDGMENT ON COSTS

PETER WILLIAMS JA

I. INTRODUCTION

[1] Costs are the lifeblood of the litigation lawyer. They must be correctly awarded and accurately quantified.

[2] The judgment that we handed down on 31 January 2012 dismissed the appellant's appeal against the judge's order of an interim payment on damages of $20,000.00. The judge ordered the costs to be costs in the cause and we were of the view that the costs of the appeal should also be costs in the cause. However, our order was subject to any written submissions as to costs which the parties wished to make.

[3] Mr. Dale Marshall Q.C., counsel for the respondent, filed written submissions in which he argued that "the appropriate order as to costs should be the respondent to have his costs to be agreed or taxed".

[4] Before proceeding to consider Mr. Marshall's submissions, we should reinforce the importance of courts hearing the parties on costs and arriving at the appropriate order. The importance of adopting this procedure was stressed in a recent Privy Council decision of an appeal from Jamaica, ***Sans Sousi Limited v. VRL Services Limited [2012] UKPC 6 (7 March 2012)***. The Jamaica Court of Appeal ordered half of the appellant's costs to be paid by the respondent "but no argument about costs was either invited or heard". ***Lord Sumption*** in delivering the judgment of the Board stated:

> "22. It is the duty of a Court to afford a litigant a reasonable opportunity to be heard on any relevant matter, including costs, on which he wishes to be heard. The Court of Appeal included an order for costs in their Judgment without hearing either party upon it. The Practice Direction in Jamaica assumes that submissions on costs, if any, will be made before the Court rises after giving Judgment, a course which it would have been impossible for the Manager's representative to follow in this case because they had had no advance notice of the contents of the judgment and only one day's notice of the fact that it was to be delivered. This procedure may nevertheless be perfectly acceptable, provided that the order included in the Judgment is provisional, and that parties are given a reasonable opportunity to address the Court on costs later.

> 23. The importance of finality in litigation has been emphasised by generations of common lawyers. Ultimately there must come an end to the parties' opportunities for reopening matters procedural or substantive which have been judicially decided. This principle is, however, founded on an assumption that they were decided in accordance with the rules of natural justice. Notwithstanding the importance of finality, the rule of practice is that until either (i) a reasonable time has elapsed, or (ii) the order has been perfected, a party who has not been heard on costs or other matters arising out of a judgment, is entitled as of right to be heard. Thereafter, the Court still has an inherent jurisdiction to hear him, but the test is more exacting."

II. AWARD

[5] The order that we made on costs was provisional and we reconsider the order in the light of counsel's submissions. Both counsel are satisfied with the order of the judge that the costs of the High Court application be costs in the cause (the case). The High Court application and the appeal were heard under the ***Rules of the Supreme Court, 1982 ("RSC")*** and those are the ***Rules*** that would apply to the disposal of the appeal. Nevertheless, the parties have invited us to consider the position under the ***Supreme Court (Civil Procedure) Rules, 2008 (CPR)***. Although the ***CPR*** did not apply to the appeal at the date of disposal, the summons for directions was filed and the parties informed us that they had agreed to have the case referred to a case management conference so that the ***CPR*** would thereafter apply.

[6] Mr. Marshall submitted that the respondent as the successful party in the appeal was entitled to his costs unless there was some good reason to deprive him of them. This principle was set out in the ***CPR*** under ***Part 64.6***, which is headed and states as follows:

> **"Successful party generally entitled to costs**
>
> 64.6 (1) In exercising its discretion under section 85 of the [Supreme Court of Judicature] Act, the general rule is that the court will order the unsuccessful party to pay the costs of the successful party.

(2) The court may, however, while acting judicially, make no order as to costs or, in an exceptional case, order a successful party to pay all or part of the costs of an unsuccessful party.

(3) Without limiting the court's discretion or the range of orders open to it, the court may order a person to pay

(a) only a specified proportion of another person's costs;

(b) costs from or up to a certain date only; or

(c) costs relating only to a certain distinct part of proceedings.

(4) In deciding who, or if any person should be liable to pay costs, the court must have regard to all the circumstances.

(5) Without limiting the factors which may be considered, the court 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 not ultimately successful in the case, although success on an issue that is not conclusive of the case confers no entitlement to a costs order;

(c) whether it was reasonable for a party to

(i) pursue a particular allegation; or

(ii) raise a particular issue

and whether the successful party increased the costs of the proceedings by the unreasonable pursuit of issues;

(d) the manner in which a party has pursued

(i) the case;

(ii) a particular allegation;

(iii) a particular issue

and whether that matter increased the costs of the proceedings; and

(e) whether the claimant gave reasonable notice of an intention to pursue the issue raised by the application."

We should point out that the Court can take into account in exercising its discretion under the ***RSC*** the principles set out in the ***CPR*** as provided for in ***Part 73.4*** of the ***CPR***.

[7] Mr. Marshall referred to the old case of ***Kierson v Joseph L. Thompson & Sons, Limited [1913] 1 K.B. 587***, in which the English Court of Appeal held that if "the judge had a discretion as to costs, it was not a judicial exercise of that discretion to order a party who had been completely successful and against whom no misconduct was alleged to pay the costs of the proceedings". He also referred to the House of Lords case of ***Donald Campbell and Company, Limited v. Pollak [1927] A.C. 732,*** in which it was held that:

> "Although a successful defendant has, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs, the Court has an absolute and unfettered discretion to award or not to award them to him. This discretion must be exercised judicially, and the judge ought not to exercise his discretion against a successful party on grounds wholly unconnected with the cause of action."

[8] Mr. Marshall concluded by submitting that no misconduct was alleged against the respondent and that the respondent should be awarded the costs of the Court of Appeal hearing in any event. He stated that the respondent had incurred additional expense in resisting the appeal. The order should therefore follow the general rule and be the respondent's costs in any event.

[9] Mr. Weekes conceded that the respondent should not have to pay the appellant's Court of Appeal costs if the respondent lost the substantive action. He therefore proposed that the appropriate order was, "the respondent's costs in the case" i.e. if the respondent is awarded costs at the end of the proceedings, he would be entitled to his costs of the appeal but if the appellant is awarded costs at the end of the proceedings, the respondent would not be liable to pay the appellant's costs of the appeal. However, this form of order would still be contingent on the result of the proceedings and would preclude the respondent from recovering his costs of the appeal in the event that he was unsuccessful in the substantive action.

[10] The ***CPR*** provide no practice direction on costs. We have therefore referred to the English ***CPR, Costs Practice Direction***, where terms of costs orders which the court will commonly make in proceedings before trial are defined in PD 44, para. 8.5. We are of the view that the appropriate costs order for an appellate court to make following an appeal from an interim order will depend on the subject matter of the order and the circumstances of the proceedings. In the instant case, on further consideration, the appeal costs should not be dependent on the end result of the case. We agree with Mr. Marshall that the proper order that this Court should make is that the respondent have his costs in any event i.e. he is entitled to the costs of the appeal whatever other costs orders are made in the proceedings. We would add that this is the proper costs order under both the ***CPR***

and the ***RSC.*** It may be noted that even where proceedings were commenced before the commencement date of the ***CPR*** the Court may as stipulated in ***Part 73.4*** take into account in exercising its discretion the principles of the ***CPR***.

[11] The matter is an appeal from an interim payment order and should not be dependent on the final outcome of the proceedings. We are also of the view that appeals from orders granting interim remedies are for the most part to be discouraged. They often do not affect the final determination of the action and generally substantially delay the trial of the action, as happened in this case. We therefore substitute our provisional order with an order that the appellant pay the respondent the costs of the appeal in any event.

III. QUANTIFICATION

[12] As stated in paragraph [5] above the ***RSC*** would apply to the disposal of the appeal. It follows that under the ***RSC*** the usual costs order on quantification would be that the costs be agreed or taxed and in this case certified fit for two attorneys-at-law.

[13] Nevertheless, the parties have invited us to quantify the costs under the ***CPR***. The ***CPR*** require the Court of Appeal and judges to generally assess costs summarily at the end of every procedural application. The ***CPR*** provide for quantification of the award of costs in ***Part 65*** in relation to appeals as follows:

> **"Costs of proceedings in Court of Appeal**
>
> **65.13** Unless
>
> *(a)* the Court of Appeal on an application made in accordance with rules 65.8 and 65.9 makes an order for budgeted costs; or
>
> *(b)* the parties to the appeal agree otherwise,
>
> the costs of any appeal must be determined in accordance with rules 65.5, 65.6 and 65.7 and Appendix B, but the costs must be limited to two thirds of the amount that would otherwise be allowed."

[14] ***Rules 65.5, 65.6*** and ***65.7*** deal with prescribed costs as follows:

> **"Prescribed Costs**

65.5 (1) The general rule is that where rule 65.4 [Fixed Costs] does not apply and a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Appendices B [Scale of prescribed costs] and C [Percentage to be allowed at various stages of claim] to this Part and sub-rules (2) to (4) of this rule.

(2) In determining prescribed costs, the value of the claim is to be decided

(a) in the case of a claimant, by the amount agreed or ordered to be paid; or

(b) in the case of a defendant,

(i) by the amount claimed by the claimant in his claim form;

(ii) where the claim is for damages and the claim form does not specify an amount that is claimed, such sum as may be agreed between the party entitled to, and the party liable to such costs or if not agreed, a sum stipulated by the court as the value of the claim; or

(iii) where the claim is not for a monetary sum it is to be treated as a claim for $50,000 unless the court makes an order under rule 65.6(1)*(a)* [for a case management conference].

(3) The general rule is that the amount of costs to be paid is to be calculated in accordance with the percentages specified in column 3 of Appendix B against the appropriate value.

(4) The court may however

(a) award a proportion only of the sum referred to in sub-rule (3) having taken into account the matters set out in rule 64.6(4) and (5) [the circumstances and factors to be considered];

(b) order a party to pay costs

(i) from or to a certain date; or

(ii) relating only to a certain distinct part of the proceedings

in either of which cases it must specify the proportion of the fixed costs which is to be paid by the party liable to pay such costs, and in so doing may take into account the table set out in Appendix C.

Rule 65.6 provides for applications to determine the value of the claim for the purpose of prescribed costs and ***Rule 65.7*** specifies what is included in prescribed costs.

[15] In the Court of Appeal the prescribed costs regime applies unless the Court on an application makes an order for budgeted costs or the parties to the appeal agree otherwise. However, the process for obtaining a budgeted costs order is "strictly regulated" as explained at ***page 357*** in ***The Caribbean Civil Court Practice 2011***, Edited by ***David DI Mambro***. Moreover, parties may not be willing to agree costs otherwise than prescribed. Mr. Marshall expressed some concerns about the costs provisions in the ***CPR***. There is a view that prescribed costs do not adequately reflect the real costs of

litigation with the result that there is too great a disparity between actual costs and recovered costs. Prescribed costs do not specifically provide for matters which require Queen's Counsel, Junior Counsel and instructing attorneys-at-law as was provided for in ***Order 62 rule 7(3)*** of the ***RSC***. Only in relation to budgeted costs is there a provision that an application under ***Part 65.8(4)(c)(iii)*** must be accompanied by "the fees for advocacy, including advocacy by a Queen's Counsel or more than one counsel". We would add that no provision is made for disbursements to be segregated from legal fees and for Value Added Tax on the legal fees. There are many concerns in relation to the costs provisions in the ***CPR*** which require attention.

[16] The Rules Committee of the Supreme Court in the exercise of the powers conferred on it by ***section 82*** of the ***Supreme Court of Judicature Act, Cap. 117A*** made the ***CPR***. It is necessary for the ***CPR*** to be under constant review; in some jurisdictions there is a Monitoring Committee of the ***CPR***. ***Section 81*** of the said ***Act*** empowers the Rules Committee as an important statutory committee to meet regularly and keep the Rules under review.

IV. DISPOSAL

[17] The amount ordered to be paid was $20,000.00. The parties agreed to adopt this figure as the value of the claim for the purpose of quantifying the costs. The amount of costs to be paid is calculated under the ***CPR*** in accordance with the scale of prescribed costs specified in Appendix B which is a percentage of the value of the claim. In this case it is 30% of $20,000.00 i.e. $6,000.00. The costs must be limited to two thirds of $6,000.00 i.e. $4,000.00. The respondent would therefore be entitled to costs of $4,000.00. The usual order would be that the costs are to be paid within 28 days of the date of this decision and if not paid thereafter bear interest at the rate of 6% per annum until paid.

[18] In summary, therefore, our order is that the respondent is entitled to an award of costs against the appellant for the appeal hearing in any event. The quantification of those costs is to be under the ***RSC*** and taxed or agreed. However, the parties are at liberty to agree the costs quantified under the ***CPR*** or as they see fit.

Justice of Appeal

Justice of Appeal

Justice of Appeal