

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Civil Application No. 5 of 2015**

**BETWEEN:**

**MICHELLE DOTTIN**

**Applicant**

**AND**

**ANGELA DEBORAH HALL**

**Respondent**

**(Administratrix and Personal Representative of the  
Estate of Beryl Eileen Dottin also known as Beryl  
Dottin also known as Eileen Dottin, (deceased))**

**Before: The Hon. Sir Marston C.D. Gibson, KA, Chief Justice, The Hon. Andrew D. Burgess and The Hon. Kaye. C. Goodridge, Justices of Appeal.**

**2015: February 19**

**March 25**

**November 4**

**Mr. Stewart Mottley of Elliott D. Mottley & Co for the Applicant.**

**Ms. Keren D. Prescott and Ms. Paulette E. Sealy for the Respondent.**

**DECISION**

**GOODRIDGE JA**

**Introduction**

[1] The applicant filed an urgent application seeking leave to appeal an order made on 26 January 2015 by **Richards J** for the applicant to deliver up possession of a property situated at 218 Jasper Road, Kingsland Terrace in the parish of Christ Church on or before 31 March 2015. The basis of the application for leave was that the judge

erred in entering judgment for the respondent without affording the applicant an opportunity to enter a defence.

[2] When the matter came on for hearing before this Court on 16 February 2015, Mr. Mottley, counsel for the applicant, sought an adjournment which was granted. The applicant was directed to file written submissions by 6 March 2015 and the respondent by 20 March 2015. The matter was adjourned to 25 March 2015.

[3] On 19 March 2015 the applicant filed a notice of discontinuance. At the resumption of the hearing on 25 March 2015, Mr. Mottley formally sought leave to withdraw the application. He informed the Court that the notice of discontinuance had been filed after he discovered that the order was a consent order. Leave was granted.

Ms. Prescott, counsel for the respondent, then sought an order for costs. That application was resisted by Mr. Mottley and it was agreed that both parties would file written submissions on the issue of costs for the Court's consideration. The applicant and the respondent filed those submissions on 5 May 2015 and 19 May 2015, respectively.

### **Discontinuance and Liability for Costs.**

#### **Discontinuance**

[4] **Part 37** of the **Supreme Court (Civil Procedure) Rules, 2008**, (the **CPR**) sets out the procedure by which a claimant may discontinue all or part of a claim. **Rule 37.5** provides that proceedings are brought to an end against a defendant on the date of service of a notice of discontinuance.

#### **Liability for Costs**

[5] Discontinuance of a claim does not affect any proceeding relating to costs. In this regard **rule 37.6(1)** provides:

"37.6 Liability for costs

(1) Unless

(a) the parties agree otherwise; or

(b) the court orders otherwise;

a claimant who discontinues is liable for the costs incurred by the defendant against whom the proceeding is discontinued before the service of the notice of discontinuance."

[6] There is no specific provision dealing with discontinuance of applications or appeals in the **CPR**. However, we are of the view that there is no good reason why the above principles should not apply in relation to discontinuance of matters in the Court of Appeal.

[7] In any event, **section 85(1)** of the **Supreme Court of Judicature Act, Cap. 117A (Cap. 117A)** provides that the costs of and incidental to all proceedings, whether in the High Court or this Court, are in the discretion of the Court and each court has the power to determine by whom and to what extent the costs are to be paid.

#### **Submissions of Counsel**

[8] Mr. Mottley submitted that the matter was commenced by way of an urgent application; the documents were served on the applicant on 24 January 2015 and the matter was heard on 26 January 2015. While he accepted that the applicant was represented by counsel at the hearing, he submitted that she did not truly understand what had transpired with the result that new counsel was instructed.

[9] Counsel also submitted that, having been instructed just prior to the expiration of time for appeal, he had no opportunity to contact counsel for the respondent nor the applicant's former counsel to investigate what had in fact transpired.

[10] Mr. Mottley stated further that on a review of the file prior to the filing of the application for leave, there was no order on file indicating the circumstances in which the order had been entered against the applicant. It was only at the initial hearing that it was disclosed that the order had been entered by consent. Consequently, the applicant had no alternative but to abandon the application.

[11] Counsel's final submission was that in all the circumstances the applicant had acted reasonably and he urged the Court not to award costs to the respondent. He relied on the following authorities: **Barrow v Caribbean Publishing Co. (No 1)(1967) 11 WIR 171** and **Re Wylde (deceased); Wylde v Culver [2006] 4 All ER 345**.

[12] In response, Ms. Prescott referred to the principles on which the Court exercises its discretion in relation to costs. She submitted that the application should not have been filed, especially when the applicant had been represented by counsel at the hearing and the order was made by consent of the parties. She stated that a notation of the order made was recorded on the inside of the jacket of the High Court file.

[13] Ms. Prescott submitted that the applicant had not advanced any valid reason why this Court should depart from the ordinary principle of awarding costs against a discontinuing party. She concluded her submissions by stating that, when this Court considered all the facts, it would be appropriate to award the respondent costs in the amount as set out in the draft bill of costs.

### Discussion

[14] It is undisputed that the award of costs lies within the discretion of the Court and that there are certain principles which must be applied in determining whether that discretion ought to be exercised.

[15] **Rule 64.6** of the **CPR** provides that in exercising its discretion under **s.85** of **Cap. 117A**, the general rule is that the court will order the unsuccessful party to pay the costs of the successful party. The court is obliged to have regard to all the circumstances and must consider the factors set out in **rule 64.6(5)** when deciding who should be liable to pay costs, or whether there should be any order for costs at all.

[16] In **Blackman v Gittens-Blackman and Gittens, Civil Application No. 6 of 2012**, this Court discussed the issue of assessing costs of applications to the Court and determined that such assessment should be done in accordance with **rule 65.11**.

[17] In the instant case, the applicant was seeking leave to appeal an order which had been made by consent at a time when she was duly represented by counsel. That attempt was aborted after the applicant had obtained an adjournment of the application.

[18] In our opinion, the course which the applicant embarked upon was not reasonable in the circumstances. The respondent, having reaped success in the court below, then found herself in a position where she had to be prepared to deal with this application. We have not been furnished with any reasons which would persuade us that the Court should depart from the general rule that the unsuccessful party

should pay the costs of the successful party. We have therefore determined that the applicant should be ordered to pay costs to the respondent.

[19] Counsel for the respondent has supplied the Court with a draft bill of costs which complies with **rule 65.11(5)**. According to **rule 65.11(7)**, the costs allowed may not exceed one-tenth of the amount of the prescribed costs appropriate to the principal application unless special circumstances exist to justify a higher amount. Two things must be noted: one, that no costs were awarded in the High Court and two, the matter was not for a prescribed sum.

[20] Counsel for the respondent appeared at court on two occasions. Applying the formula set out in the **CPR**, and taking all relevant factors into consideration, we have assessed the costs at \$2,500.

### **Disposal**

[21] The applicant is ordered to pay the costs of the respondent which have been assessed at \$2,500 to be paid on or before 15 December, 2015.

Chief Justice

Justice of Appeal

Justice of Appeal