BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV 1200 of 2011 (No.2)

BETWEEN

MICHAEL STALLARD **CLAIMANT**

AND

MARK BISHOP **FIRST DEFENDANT**
GILLIAN BISHOP **SECOND DEFENDANT**
MB & GB HOLDINGS LTD **THIRD DEFENDANT**

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court

2019: March 27
May 31

Mr. Alvin D. Bryan, Attorney-at-Law, appearing on his own behalf on the question of wasted costs.

DECISION

Introduction

[1] The Court has for its consideration whether counsel for the Defendants should be called upon to pay as wasted costs, part or all of the costs awarded to the Claimant pursuant to an interlocutory application by the Defendants

during the course of the trial.

Background

[2] On 13 February 2019, this Court delivered its judgment in an application filed by the Defendants seeking permission to recall the Claimant for further cross-examination. When the application was filed, the First Defendant was giving oral evidence. His counsel, Mr. Bryan, tried unsuccessfully to have the First Defendant's two witness statements admitted into evidence. The challenge for the Defendants was that the witness statements raised issues that were never put to the Claimant when he was cross-examined by previous counsel for the Defendants.

[3] The Court granted the order for further cross-examination of the Claimant on certain conditions. One of the four conditions was that:

> "4. The Defendants will bear the Claimant's costs for this application. The Court will also consider whether the cost order should be made against counsel for the Defendants".

[4] After the delivery of the judgment, counsel for the Claimant submitted a statement of costs in the sum of $12,700.00. After hearing both counsel, the Court made a further order for the Claimant to be paid costs in the sum of $7,000.00. This order was not appealed. The Court reserved the decision as to whether an order would be made against counsel for the Defendants to

pay all or part of the costs awarded to the Claimant, as wasted costs.

[5] On 18 February 2019, Mr. Bryan was given formal notice that the Court was considering whether the cost order of 13 February 2019 should be made against him in full or in part. A date of hearing was set for 27 March 2019, and Mr. Bryan directed to file his written submissions on or before 08 March 2019, showing cause why a wasted costs order should not be made against him.

[6] The Court explained to Mr. Bryan the reasons why the wasted costs order was being considered. Those reasons are referred to in the judgment delivered on 13 January as follows:

> "[17] If current counsel for the Defendants rejected the strategy of previous counsel, it was incumbent upon him to make the application to recall the Claimant at the earliest possible opportunity. The transcripts of the proceedings were available to new counsel. He had time to evaluate the Defendant's case and to determine whether further cross-examination of the Claimant was crucial. Having conceded the several objections to the First Defendant's witness statements, counsel was also conceding that there was a lack vigilance in the representation of the Defendants. It is for this reason that the Defence is now in jeopardy".

[7] The Court also noted that this was not the first time, since the close of the

Claimant's case, that the Defendants were ordered to pay costs pursuant to a series of unsuccessful applications. These prior applications, filed at a time when Mr. Bryan had assumed representation of the Defendants, also delayed the progress of the case.

The Submissions

[8] Mr. Bryan filed his submissions on 08 March 2019. He contended that as the First Defendant was successful in his application, no costs order should be made against him. Rather, as the successful party, the First Defendant was entitled to costs. Secondly, Mr. Bryan submitted that there was no improper, unreasonable or negligent act or omission on his part that warranted his payment of the whole or part of any wasted costs. Thirdly, Mr. Bryan was of the view that the Court should consider the overriding objective. In this case the Court was obliged to deal with the matter justly by considering the amount of money involved, and the financial position of each party.

[9] At the hearing Mr. Bryan argued that a cost order against the Defendants would be onerous. He also disavowed any action on his part to delay the trial, and insisted that he had done nothing to merit a wasted costs order.

Discussion

[10] Rule 64.6 of the Supreme Court (Civil Procedure) Rules, 2008, ("the CPR")

provides that:

> "(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".

[11] The First Defendant was the successful party, however, the Court awarded costs to the Claimant. The CPR does not define what is an "exceptional case", but Rule 64.6 offers guidance regarding what the Court should take into consideration. Sub-rules (4) and (5) provide that:

> "(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 must be considered, the court must have regard to
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> (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 manner 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".

[12] In **The Attorney-General et al v. Anton Tonge, Ant. & Barb. Civ. Ap. No. ANUHCVAP 2013/0005, decision dated 03 October 2013,** Dame Janice Pereira CJ observed that:

> "[6] Whilst it is recognised that the court has a general discretion with regard to costs, and may order a successful party to pay all or part of the costs of an unsuccessful party, the circumstances for departing from the general rule, must either be obvious from all the circumstances such as not to require a stated reason, or otherwise it is expected that a reason or reasons would be expressed for the departure from the general rule. Further (the CPR) states in effect that in deciding who should be liable to pay costs, the court must have regard to all the circumstances….

> [7] From the factors to be considered, it becomes clear that the court would look to see whether party "A" may have behaved unreasonably in the context of the proceedings and is such that notwithstanding being successful, "A" should nevertheless either be deprived of his costs or be ordered to pay "B's" costs although "B" was unsuccessful".

[13] This Court was at pains to point out to Mr. Bryan that he was in possession of the transcripts of the proceedings prior to the First Defendant's oral evidence. He had more than sufficient time to evaluate the First Defendant's witness statements against the Claimant's cross-examination, and to determine that essential aspects of the defence were not put to the Claimant. This was the very basis on which counsel for the Claimant objected to the admission of the First Defendant's witness statements into evidence.

[14] Mr. Bryan conceded that he lacked the proper foundation on which to seek the admission of the witness statements. Given the lengthy hiatus between the close of the Claimant's case and the start of the oral evidence of the First Defendant (almost four years), Mr. Bryan should have filed the application to cross-examine the Claimant much earlier. The failure to do so further delayed the trial and prejudiced the Claimant. It was for these reasons that the First Defendant was ordered to pay costs to the Claimant, despite his successful application. (See paras. [2], [3] and [17] of judgment delivered

on 13 February 2019). The Court considers that these circumstances were also exceptional.

[15] The CPR's of other Caribbean countries do not require exceptional circumstances to exist before a court exercises its discretion to award damages against a successful party. (See for example Rule 64.6 (2) of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000). In Queensland the courts have held that there is a judicial discretion to make another order in the interests of justice, where for example:

> "….the successful party by its lax conduct effectively invites the litigation; unnecessarily protracts the proceedings; succeeds on a point not argued before a lower court; or obtains relief which the unsuccessful party had already offered in settlement of the dispute". (See **West v. Blackgrove [2012] QCA 321** at para. [49], and **Oshlack v. Richmond River Council (1998) 193 CLR 72** at para. [69]).

[16] The Queensland courts have also noted that there are limited exceptions to the usual order as to costs which focus "on conduct of the successful party which disentitles it to the beneficial exercise of the discretion", or to the existence of "special" or "exceptional" circumstances. (See **Bucknell v. Robins [2004] QCA 474** at para. [17]; and **Oldfield v. Gold Coast City Council [2009] QCA 124** at para. [71]).

Wasted Costs

[17] Rule 64.8 of the CPR provides that:

> "(1) In any proceedings, the court may by order
>
> (a) disallow as against an attorney-at-law's client; or
> (b) direct the attorney-at-law to pay the whole or part of any wasted costs.
>
> (2) "Wasted costs" means any costs incurred by a party
>
> (a) as a result of an improper, unreasonable or negligent act or omission on the part of the attorney-at-law or any employee of an attorney-at-law; or
>
> (b) which, in light of any act or omission occurring before or after they were incurred, the court considers it unreasonable to expect that party to pay".

[18] There is a marked paucity of regional decisions either dealing with wasted costs or interpreting the wasted costs provisions of the CPR. Ventose J made a similar observation in **Murtland Watterton v. Nigel Smith et al, Fed. Of St. C. & N., St. C. circuit, Claim No. SKBHCV 2012/0181, decision dated 15 November 2018.** He noted that:

> "[52] There has been no reported or unreported decision of the Eastern Caribbean Supreme Court dealing extensively with wasted costs orders. The leading authority in England and Wales is the decision of the Court of

> Appeal in **Ridehalgh v. Horsefield [1994] Ch 205…** It has been applied in many subsequent decisions of the Court of Appeal including: **Re P (a Barrister), (Wasted Costs Order) [2001] EWCA Crim. 1728… Re Wiseman Lee (Solicitors) (Wasted Costs Order) (No.5 of 2000) [2001] EWCA Crim.707; Dempsey v. Johnstone [2003] EWCA Civ 1134; Persaud v. Persaud [2003] EWCA Civ 394;** and **Hallam-Peel & Co. v. Southwark London Borough Council [2008] EWCA Civ 1120;** and **Gill v. Humanware Europe plc [2010] EWCA Civ 799….**
>
> [53] It was also approved by the House of Lords in **Medcalf v. Mardell….[2003] 1 AC 120….".**

[19] In the **Watterton** case, Ventose J ordered counsel for the claimant to file an affidavit providing reasons or showing cause why a wasted costs order should not be made against them (para.[55] (5)). The background to this order is encapsulated in the insightful comment by the learned Judge that:

> "There is very little that cannot be accommodated if there is compliance with the CPR. The culture of non-compliance with orders of the court and with the CPR as happened here must not be allowed to take root and develop into a culture of habitual non-compliance…. Legal practitioners who subscribe to this habitual non-compliance are put on notice that the court will enforce the rules within the spirit of the overriding objective of the

> CPR in order to stamp out the residual culture of habitual non-compliance". (Para. [50]).

[20] The United Kingdom has witnessed a veritable explosion of wasted costs applications. This prompted Sir Thomas Bingham MR to comment at the Court of Appeal level, that:

> "Both before and after introduction of the new rule, contested applications for wasted cost orders against solicitors did come before the courts…. But we believe such applications to have been infrequent. In the course of their practices the three members of this court were personally involved in only one such application.
>
> During the 1980s the tempo quickened". (See **Ridehalgh** supra para.[18] at p.228C).

[21] The learned Master of the Rolls also proffered the rationale underpinning wasted costs legislation:

> "There can in our view be no room for doubt about the mischief against which these new provisions were aimed: this was the causing of loss and expense to litigants by the unjustifiable conduct of litigation by their or the other side's lawyers. Where such conduct is shown, Parliament clearly intended to arm the courts with an effective remedy for the protection of those injured". (At p.231E).

[22] Sir Thomas warned that:

> "Judges must not reject a weapon which Parliament has intended to be used for the protection of those injured by the unjustifiable

> conduct of the other side's lawyers, but they must be astute to control what threatens to become a new and costly form of satellite litigation". (At p. 238H-239A).

[23] The **Ridehalgh** court endorsed the views expressed in an earlier case that:

> "….arose out of an unhappy difference between counsel and a judge sitting in the Crown Court in a criminal case. It was held on appeal, in our view quite rightly, that courts should apply a three-stage test when a wasted costs order is contemplated. (1) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently? (2) if so, did such conduct cause the applicant to incur unnecessary costs? (3) if so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole of any part of the relevant costs? (If so, the costs to be met must be specified and, in a criminal case, the amount of the costs). We have somewhat altered the wording of the court's ruling but not, we think, its effect". (At p. 231E-G; referring to **In re A Barrister (Wasted Costs Order) (No.1 of 1991) [1993] QB 293)**.

[24] The Master of the Rolls also expounded on the meaning of the terms "improper, unreasonable or negligent". Referring to similarly worded English legislation he opined expansively that:

> "Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is

not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatized as such whether or not it violates the letter of a professional code.

"Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.

…..we are clear that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

In adopting an untechnical approach to the meaning of negligence in this context, we would however wish firmly to discountenance any suggestion that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence: "advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do; " an error "such as no

> reasonable well-informed and competent would have given or done or omitted to do;" an error "such as no reasonable well-informed and competent member of that profession could have made:" See **Saif Ali v. Sydney Mitchell & Co. [1980] AC 198,** 218, 220, per Lord Diplock.
>
> We were invited to give the three adjectives (improper, unreasonable and negligent) specific, self-contained meanings, so as to avoid overlap between the three. We do not read these very familiar expressions in that way. Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by definition) unreasonable. We do not think any sharp differentiation between these expressions is useful or necessary or intended". (P.232C-F and 233 B-E).

[25] In this case the impugned conduct of Mr. Bryan is his contribution to the continuing delays associated with this case. He was not responsible for the state of the defence at the close of the Claimant's case. But, having assumed responsibility for the representation of the Defendants, he was able to obtain documents critical to the defence, including the transcripts. He had ample time to assess the shortcomings in the Claimant's cross-examination, in so far as those shortcomings impacted on the presentation of the defence.

[26] Mr. Bryan would not have been responsible for wasted costs had he brought the application to recall the Claimant for further cross-examination, before the First Defendant began his oral evidence. He has not explained this strategy of allowing the First Defendant to commence his oral evidence, and

then conceding that he could proceed no further unless the Claimant was further cross-examined. Mr. Bryan accepted that it was impossible for the Court to admit critical aspects of the two witness statements, unless he was permitted to recall the Claimant. Therefore, it was critical for him to request the further cross-examination of the Claimant at the earliest possible opportunity. It is obvious that counsel had not properly assessed his clients' case before the First Defendant began his oral testimony. This was an error that no reasonable well-informed and competent advocate should have made. Mr. Bryan's conduct of the case was both negligent and unreasonable.

[27] The hearing of the application at this stage further prolonged the trial, and undermined the overriding objective that requires cases to be dealt with proportionately and expeditiously. (CPR Rule.1.1(2) (c) and (d)). It was Mr. Bryan's duty to ensure that the proceedings were conducted efficiently and expeditiously. (see **Baulderstone Hornibrook Engineering Pty Ltd v. Gordian Runoff Ltd [2008] NSWCA 243** at [8]**; Araf Capital Funding Pty Ltd v. Megaloudis [2006] NSWCA 1255** at [10]; **Ashmore v. Corporation of Lloyds [1992] 2 All ER 486;** and **Whyte v. Brosch (1998) 45 NSWLR 354.**

[28] As counsel appearing before the court, Ms. Bryan is expected to assist the court in achieving the overriding objective. A breach of this duty may be met with a wasted costs order against him. (See **Albon v. Naza Motor Trading [2007] EWHC 2613 (Ch); Kendirjian v. Ayoub [2008] NSWCA 194; Denton v. White Ltd [2015] 1 All ER 880 Civ 906; Davies v. Southern Rock Insurance Co Ltd [2015] EWHC 1761 (QB); and Whitfield v. Revenue Customs Commrs. [2016] UKFTT 65 (TC).**

[29] Mr. Bryan has not prayed in aid any legal professional privilege. He did not argue that the reasons for his unfortunate strategy could not be revealed because of this privilege. The Court is satisfied that there is nothing that he could say, if unconstrained, to resist the wasted costs order. (Per. Lord Hobhouse of Woodborough in **Medcalf v. Mardell [2003] 1 AC 120** at para. [63]).

[30] The actions of counsel not only contributed to further delaying the proceedings, but occasioned additional costs and prejudice to the Claimant. The Court is persuaded that in these circumstances it is fair to make the order for him to pay wasted costs to the Claimant.

Disposal

[31] Mr. Bryan is to pay wasted costs to the Claimant in the sum of $7,000.00. He is to pay the Claim

ant $1,000.00 per month with effect from 15 June 2019, and thereafter on the 15th day of each successive month until the costs are paid in full.

[32] The Defendants are not liable to pay the $7,000.00 costs ordered on 13 February 2019.

Dr. Sonia L. Richards
Judge of the High Court