[2019] CCJ 3 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction
ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No. BBCV2018/004
BB Civil Appeal No. 13 of 2015

BETWEEN

GRANVILLE BOVELL **APPELLANT**

AND

ERSKINE KELLMAN **FIRST RESPONDENT**
IRVIN KELLMAN **SECOND RESPONDENT**

Before the Honourables: **Mr Justice Wit**
Mr Justice Anderson
Mr Justice Barrow

On Written Submissions

Ms. Faye Finisterre for the Appellant
Mrs. Kristin Turton for the Respondent

JUDGMENT
of
The Honourable Justices Wit, Anderson and Barrow
Delivered by The Honourable Mr Justice Barrow

and

CONCURRING JUDGMENT
of the Honourable Mr Justice Wit

Delivered on the 14th day of February 2019

JUDGMENT OF THE HONOURABLE JUSTICE BARROW

[1] This application by Mr. Bovell for special leave to appeal to this Court concerns three costs order made in the courts below. It is about trifling sums of money, unrelieved by any issue of a higher nature, such as vindicating a principle or protecting a right.

[2] The intended appeal is against an order for costs of BBD$1200.00, another for costs of BBD$2,500.00 and another which ordered the parties to bear their own costs. These have generated a judgment in the Court of Appeal of 103 paragraphs, preceded by a reserved judgment in the High Court, and all the standard efforts of counsel on both sides in preparing for a hotly contested procedural application and the appeal, including at least four attendances before these courts. The preparation by counsel for the present application to this Court has been substantial, as has been the preparation by the Court.

Grossly disproportionate

[3] Quite simply, the litigation events and efforts have been grossly disproportionate. The costs orders followed an application by the Kellmans to strike out a claim for damages for having been brought wrongly by Fixed Date Claim Form and for wrongly claiming for conversion of a concrete pig pen attached to land belonging to the Kellman family, that had been built with the permission of their deceased mother. On their mother's death the Kellmans excluded Mr. Bovell, her now-86 year old former companion and sold the pigs. Mr. Bovell, who claimed ownership of the pigs and half of the value of the pig pens with the deceased, brought his claim. There is no appeal of the decision of the Court of Appeal that has now settled that Mr. Bovell's claim was defective both in respect of form and cause of action.

[4] The considered view that the litigation efforts have been disproportionate coupled with the finding that no issue of principle or rights is involved in this dispute purely as to costs, would normally lead to a dismissal of the application for special leave to appeal, made under section 8 of the Caribbean Court of Justice Act[1]. The application for special leave has been made because Mr. Bovell has no right to appeal; he can only appeal against the interlocutory orders if this Court, as a matter of discretion, decides that the interests of justice require that he should be permitted to appeal. To his benefit, this Court has

[1] Cap. 117.

repeatedly stated it will give special leave to appeal when it appears, on a preliminary view, that a miscarriage of justice may need to be corrected by this Court[2].

Special leave

[5] In this case, the miscarriage of justice is confirmed in the commendable acceptance by counsel for the Kellmans that Mr. Bovell's appeal, as regards the quantum of costs awarded for the application in the High Court, should succeed. Therefore, it would be a miscarriage of justice to leave standing that costs award and this, in itself, justifies the grant of special leave to appeal, which we now formally give. By granting special leave permitting Mr. Bovell to appeal, the Court brings this matter into the Court's jurisdiction and it is thus able, at once, to correct the miscarriage of justice -- the Court having ordered that if leave is granted it would treat the hearing of the application for leave as the hearing of the substantive appeal.

A**greed reduction of costs**

[6] The miscarriage of justice is easily corrected: counsel for the Kellmans accepted that instead of the sum of BBD$1,200.00, awarded as costs of the application in the High Court, the proper sum, as provided by the Civil Procedure Rules 2008 ('the Rules'), in rule 65.11(7), was BBD$910.00. That rule limits the costs of a procedural application to one tenth of the prescribed costs "appropriate to the principal application", which the parties treated as referring to the substantive claim. The sum of BBD$910.00 is calculated as one tenth of the prescribed costs of the value of the claim of BBD$30,400.00.

Costs of the application for leave to appeal

[7] As regards the second costs order, the Kellmans resisted Mr. Bovell's contention that the Court of Appeal erred in awarding costs of the application for leave to appeal to the Court of Appeal, in the amount of BBD$2,500.00. The contention of Mr. Bovell on this ground of the appeal was that, on a proper application of the Rules, the amount was capped by reference to the same rule 65.11 (7), so as to limit the award to BBD$910.00 for the leave application to the Court of Appeal. The Court of Appeal specifically addressed that rule and decided to depart from the cap, on the basis that the rule permitted such departure for "special circumstances of the case justifying a higher amount." In opposition to Mr.

[2] See: The Attorney General of Guyana v Dipcon Engineering [2017] CCJ 17 (AJ) at [6].

Bovell's contention that the cap should have applied, the Kellmans contended there were, indeed, special circumstances.

[8] It is noted that both counsel and the Court of Appeal proceeded on the footing that rule 65.11(7), which applies to procedural applications in the High Court, applied to the application to the Court of Appeal for leave to appeal. The question arises as to which parts of the rules that apply to costs of litigation in the High Court apply to costs in the Court of Appeal. Rule 65.13 makes the prescribed costs regime in the High Court applicable to appeals and limits costs in the Court of Appeal to two thirds of the amount that would be allowed in the High Court. However, nothing in Part 65 makes rule 65.11 (7), which imposes the cap on costs of procedural applications in the High Court, applicable to an application to the Court of Appeal for leave to appeal. The point was not addressed. In the absence of any submissions from the parties, we will proceed as if the cap applies in the Court of Appeal, but we make clear that we leave the question open.

Special circumstances

[9] The special circumstances that the Kellmans claimed existed, were stated in an affidavit by their attorney at law in the following terms:

> "i. A second date of hearing of the Application for Leave to Appeal was necessitated because the Attorney-at-Law for the Intended Appellant/Applicant was requested to produce authority to support his oral submission that the Intended Appellant/Applicant was entitled to commence the proceedings by way of a Fixed Date Claim Form. No such authority was produced at the second date of hearing.
>
> ii. One of the grounds of the Application was that there was no Court of Appeal decision to guide the Judges of the High Court in relation to the proper approach to be taken to striking out Applications based on commencement of proceedings by way of the wrong Form.
>
> iii. The preparation of Written Submissions on Costs was only necessitated because the Intended Appellant/Applicant refused to engage in a meaningful negotiation on the issue of Costs. I prepared and submitted a Bill of Costs to the Attorneys-at-Law for the Intended Appellant/Applicant on 31st March 2016. On Wednesday 6th April 2016 I discussed the Bill of Costs with Ms. Faye Finisterre, one of the Attorneys-at-Law representing the Intended Appellant/Applicant, during which no official counter-offer or agreement was made. On Tuesday 12th April, 2016 Counsel for the Intended Respondents received an email from Ms. Finisterre stating that Mr. Rawlins had instructed that "the court should decide the issue of costs." …"

iv. Ultimately, the disposal of the Application for Leave to Appeal required not only the preparation of a Notice of Application and two (2) Affidavits, but also:

(a) substantial oral arguments over two dates of hearing,
(b) extensive research on an issue which had not yet been addressed by the Court of Appeal of Barbados,
(c) preparation of Skeleton Arguments in Support of the Application,
(d) the review of the Skeleton Arguments of the Intended Appellant/Applicant,
(e) the preparation of Skeleton Arguments in Response thereto on issues of law,
(f) the preparation of a Bill of Costs, and
(g) the preparation of a Written Submissions on the issue of Costs."

Unreasonableness

[10] The factors claimed to amount to special circumstances can be dealt with globally, because the alleged unreasonableness on Mr. Bovell's side unifies them. When the objection was first taken, orally at the first hearing of the Fixed Date claim, that the wrong claim form had been used and the hearing was adjourned, this gave Mr. Bovell's lawyer ample opportunity to consider and correct his mistake. It should have been obvious that it was the wrong form. The persistence in this error, after the High Court had pronounced on it, by insisting before the Court of Appeal that it was the proper way to proceed and causing that court to adjourn so that counsel could produce the alleged authority that validated the use of that claim form, was egregious. By that stage, at the latest, Mr. Bovell's lawyer should have better advised himself: it was pure bluff to insist there was authority to support what was clearly unsupportable and bereft of authority. It was neophyte knowledge that the Fixed Date Claim Form was the wrong process. It was utterly wrong for counsel to have caused this matter to drag on needlessly, and this conduct justified the Court of Appeal's departure from the cap on costs.

[11] Reinforcing the appropriateness of that departure was the failure of Mr. Bovell or his legal advisers to agree on costs and their deciding, instead, in response to the invitation to agree, to leave it to the court to decide. The approach of counsel for the Kellmans of trying to save effort and costs was sensible. This was what the overriding objective, stated in rule 1.1 of the Rules, demands: litigation must be conducted so as to save expense, proportionately to the amount of money involved, expeditiously and with a view to saving court time. The attempt on the Kellmans' side to save costs required Mr. Bovell to requite that effort. So much of what followed – the oral argument on two days of hearing, the

time and effort expended in research and preparation – was avoidable. That it was not avoided was squarely due to Mr. Bovell's side acting unreasonably in the conduct of this matter.

The role of the cap

[12] The cap on costs is a salutary tool; it supports the overriding objective by reinforcing proportionality. The rule gives fair warning that an interlocutory application in a case with a dollar value of BBD$30,400.00 will generally produce an award of costs limited to $910.00. That tells the parties and their lawyers what to expect and, therefore, to contain their efforts. It is a limit from which courts should not casually depart. Parties know in advance what to expect, so it is up to them to limit their efforts.

Departure

[13] However, in an appropriate case, where there are special circumstances, a court may depart from the general rule. In this case, it is not simply that Mr. Bovell's claim was defective and he refused to acknowledge this, thereby forcing the Kellmans to make the application to strike out. It is that, having lost in the High Court (and being forced to amend, as an alternative to a strike out, is a loss), the proper course he should have taken was to have conceded, by the time the appeal was first called (indeed, well before), that he had used the wrong form. The conduct of the proceedings, following from that intransigence, led to the waste and expense. The Court of Appeal had a proper basis for awarding the costs that they did.

Costs of the appeal

[14] The remaining costs issue is the decision of the Court of Appeal to order that each party bears its own costs of the appeal. While the court was not expansive, it indicated its reason for this order in the language of its disposition at [103] that "… the appeal is allowed in part." It is bold of Mr. Bovell to appeal against this order because, on one view, the Kellmans were the successful party on the appeal. They were vindicated in their contentions that the wrong form was used to commence the claim; that there could be no conversion of a structure that had become attached to the land, contrary to the view of the High Court judge; and that costs should be awarded to them and not against them. It is difficult to see how Mr. Bovell's counsel could think he won and is entitled to costs of the appeal in the Court of Appeal. We dismiss that ground of appeal.

Conclusion

[15] In summary, we grant special leave to appeal and allow the appeal against the quantum of costs in the High Court. In place of the order for costs of BBD$1,200.00, we order costs of BBD$910.00 in that court, to be paid to the Kellmans. We dismiss Mr. Bovell's appeals against the order of the Court of Appeal for costs of BBD$2,500.00 for the application for leave to appeal and against the order that the parties shall bear their own costs of the appeal in the Court of Appeal. In this Court, in view of the mixed result, we order that the parties bear their own costs.

[16] It is dearly to be hoped that the lawyers will now make a determined effort to prevail on their clients to compromise the substantive claim, which remains to be tried, more than five years after it was filed.

JUDGMENT OF THE HONOURABLE JUSTICE WIT

[17] Going through the file of this case, the reader enters a surreal and mindboggling world. Although the underlying story seems to reveal a personal drama of some complexity, in terms of law the case is one of breath-taking simplicity.

[18] Mr. Bovell is suing the Kellmans for BBD$30,400 based on the tort of conversion of his pigs (BBD$13,000) and pigpens allegedly built by him (BBD$17,400). He used the wrong claim form. The Kellmans filed an application to strike out the claim in its entirety because (a) the wrong claim form was used and (b) there cannot be conversion of pigs and pigpens. The trial judge correctly decided that the wrong form was used but that this was not fatal. Thus, the case could proceed as if it was in the right form. She also decided, again correctly, that conversion of pigs is a possibility. The trial judge, however, incorrectly decided that conversion of the pigpens was also possible. With hindsight, the Kellmans were correct in most of their criticism of the trial judge's decision. Practically, this should have resulted in cutting down Mr. Bovell's claim to the amount of BBD$13,000. Again, with hindsight, they should have been the victors in those proceedings and that should have resulted in a costs order of BBD$910.00 in their favour.

[19] The strike out application is meant to streamline litigation, make it less time-consuming, less costly and more efficient. It is basically an instrument of case management. In this

case, however, it turned out to be an absolute nightmare. The start was promising. On 23 May 2013, the statement of claim was filed, and three months later, the first hearing was held. It was there and then that counsel for the Kellmans orally took the point that the claim was in the wrong form and she announced that she would file an application to strike out the claim. It took seven months for her to do that. A month later the trial judge heard the application. Instead of orally deciding this simple matter then and there, the decision was reserved, and delivery was listed for 4 April 2014, ten days after the date of the hearing. However, the judgment was not delivered on that date and the matter was further adjourned for one year and six months! This resulted in an incorrect decision, prompting the Kellmans to go to the Court of Appeal with an application for leave.

[20] On 17 November 2015, the notice of application for leave to appeal was filed. Counsel for the Kellmans was not only arguing that there cannot be conversion of the pigpens but appeared to be getting completely carried away in arguing that the use of the wrong claim form must lead to striking out the case. Making a mountain out of a molehill, she dedicated hours of study and preparation, going through a sea of authorities, to make that point. Mr. Bovell's lawyer also made things more complicated than necessary. Before giving leave, the Court of Appeal thought it necessary to allow two oral hearings of two hours each on the subject. The Court finally heard the appeal on 8 December 2016 and took almost 18 months to deliver a judgment of 103 paragraphs, not only dealing with the relevant issue but also with costs of the proceedings which by now had reached disproportionate proportions. The Court of Appeal, in the end, ordered costs in the amount of BBD$2,500 in favour of the Kellmans with respect to the leave application. For the reasons set out by Barrow JCCJ, that decision was within that court's discretion, even though another court could easily have come to another amount. The same is true for its decision in the appeal that each party should bear their own costs.

[21] The absurdity of this matter has nothing to do with these decisions on costs. It lies in the fact that a simple case management decision that could easily have been taken at the very first hearing (and within 15 minutes) now took more than five years to emerge, at the expense of the parties. That is not the way to organise litigation. The absurdity also lies in the fact that Mr. Bovell, now 86 years old, will have to pay in costs a multiple of the amount he gained by this Court's decision (BBD$290). Still, almost 6 years after he took the Kellmans to court, his case has not even started!

[22] There is a famous ancient Dutch tile tableau picturing a cow with on each side of the cow (front and tail) a man pulling the cow in his direction, while a robed man is milking the cow. The tableau is accompanied by an old saying: "If you litigate for a cow, you will end up paying the price of two". I suppose this is equally true in the case of pigs. Very sad, indeed.

Disposition

[23] Having regard to our reasoning above, we make the following orders:

(a) The application for special leave to appeal is granted;

(b) The appeal is allowed against the quantum of costs in the High Court. In place of the order for costs of BBD$1,200.00, we order costs of BBD$910.00 in that court, to be paid to the Kellmans.

(c) The appeals against the order of the Court of Appeal for costs of BBD$2,500.00 for the application for leave to appeal and against the order that the parties shall bear their own costs of the appeal in the Court of Appeal are dismissed

(d) The parties bear their own costs in this Court.

/s/ J Wit

The Hon Mr Justice J. Wit

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/ D Barrow

The Hon Mr Justice D Barrow