

VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 10 OF 2004

BETWEEN:

CABLE AND WIRELESS (WEST INDIES) LIMITED

Appellant

and

JOANN ROMNEY
JML COMMUNICATIONS LIMITED

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC

Justice of Appeal

Appearances:

2004: July 6

JUDGMENT

[1] **ALLEYNE, J.A.:** This is a procedural appeal against a decision of Hugh Rawlins J. made on 5th May 2004, by which the learned trial judge, upon ordering that an interim injunction granted against the appellant at the instance of the respondents be discharged forthwith, granting the respondents leave to discontinue the claim and to withdraw the application for a permanent injunction against the appellant and making other orders not relevant to the issue, ordered that the appellant bear its own costs occasioned by the discontinued claim and the claimants' withdrawn application. The facts are fully set out in the learned trial judge's oral judgment, the transcript of which I have had the advantage of reading. It is unnecessary to set out the facts for the purposes of this judgment. Suffice it to say that the learned trial judge gave no reasons for his decision to order the appellant to bear

its own costs, nor does the record of proceedings reveal any special circumstances relating to costs. The only issue on costs that arose was in relation to an application by learned counsel for the respondents that the costs, including an indemnity in respect of any costs awarded against the respondents in favour of the appellant, should be borne not by the respondents, but by the second defendant to the claim. That second defendant is not a party to the appeal.

[2] Learned counsel for the respondents had argued at trial that the second defendant caused the respondents to be in the predicament which gave rise to the claim because the second defendant had entered into a contract with the respondents whereby the respondents had undertaken the business which had led to the subject proceedings. The learned trial judge ordered that the second defendant should bear the respondents' costs 'for and incidental to the claim as well as incidental to the claimants' (respondents') application for injunctive relief.' He gave full and comprehensive reasons for this decision, citing Part 64.6 of the **Civil Procedure Rules 2000 (CPR)** and the case of **Rochamel Construction Ltd. V National Insurance Corporation**¹. However, in relation to the costs order in respect of the appellant, the learned trial judge said only "I am also of the view that Cable & Wireless should bear its own costs both in relation to the withdrawn claim and in relation to the applications'.

[3] In his reasons for granting costs to the respondents against the second defendant the learned trial judge relied in part on paragraph 10 of the judgment in **Rochamel supra** which I think is pertinent to the issue before me. In that paragraph Byron C.J. said;

"Claimants should be discouraged from bringing proceedings or making allegations which are spurious, in the sense that they are unsupported by evidence. A person should not be forced to waste expense to defend a claim that is not being prosecuted."

[4] The appellants in their written submissions rely on Part 64.6(1) and 37.6 of **CPR**, and on the case of **Scherer v Counting Instruments Ltd.**² The appellants

¹ Civil Appeal No. 12 of 2003, St. Lucia

² [1986] 2 All ER 529.

concede that there is a discretion in the trial judge to make an order other than in accordance with the general rule that the judge must order the unsuccessful party to pay the costs of the successful party. However, they argue that before the court can depart from this rule and exercise the discretion, there must be grounds upon which to do so. This is trite, and I agree.

- [5] The respondents in their written response to the appeal accept these propositions, but argue that the circumstances of this case were exceptional and the learned trial judge was fully entitled to exercise his discretion to depart from the general rule as he did. The respondents argue that costs are discretionary and no party is entitled to recover costs except under order of the court; Part 64.5. They point to the circumstances which the court should consider; R. 64.6(5) and (6), and cited a number of cases in support of the contention that the learned trial judge had correctly and justifiably exercised his discretion in making the order that he did³. The principles to be applied are not in doubt.
- [6] The respondents' written submissions go in some depth into the facts from their point of view, not fully reflected in the learned trial judge's judgment. Those facts may well have founded an exercise of the learned judge's discretion to award costs in favour of the appellant against the second defendant. I express no view on that. The learned judge did not make such an award and there is no appeal in that regard. The respondents discontinued the litigation and it is not open to them to seek to argue the substantive issues, as they appear to seek to do in their written submissions. In my view the facts as set out by the respondents and the learned trial judge do not provide a basis for the exercise of the discretion to deprive the appellant of its costs on the discontinuance of the claim and the discharge of the injunction.
- [7] I would allow the appeal, order that the respondents pay the costs of the appellants in the court below and the costs of this appeal, and remit the matter to the High Court for determination of the costs due to the appellant by the

³ J.T. Stratford & Sons Ltd. v Lindley & Ors. (No. 2) [1969] 3 All ER 1122; Scherer *supra*; RTZ Pension Property Trust Ltd. v ARC Property Developments Ltd. & Or. [1999] 1 All ER 532; Emcee Ltd. Sunday Pictorial Newspapers (1920) Ltd. [1939] 2 All ER 384; Jones v McKie and Mersey Docks and Harbour Board [1964] 2 All ER 842.

respondent in accordance with the prescribed costs rules, in particular Part 65 Appendix C and bearing in mind that this is a procedural appeal dealt with under Part 62.10 on paper.

Brian Alleyne, SC
Justice of Appeal