EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2010/009

BETWEEN:

C.O. WILLIAMS CONSTRUCTION (ANTIGUA) LTD.

Appellant

and

JENNINGS BUILDING PRODUCTS LTD.

Respondent

Before:
The Hon. Mr. Don Mitchell — Justice of Appeal [Ag.]

Appearances on Paper:
Ms. Gail Christian for the Appellant
Ms. Deniscia Thomas for the Respondent

2012: February 21;
May 22.

Civil Appeal – Interlocutory appeal – Costs

The appellant and the respondent each filed a number of interlocutory applications before the trial of this matter. The applications were heard, disposed of and substantive orders were made, but the orders on each occasion were silent as to who, if anyone, should bear the costs of the applications. The respondent later filed an application for costs to be awarded to them. On 17th December 2009, that application was granted by the trial judge who ordered that costs be awarded to the respondent in the sum of $7,000.00. The appellant appealed.

Held: setting aside the order of 19th February 2010 that awarded costs to the respondent, that:

1. If a party to litigation does not obtain an order for costs at the time of the making of an interlocutory order by the judge, then the party is not entitled to make a later application for costs in relation to the earlier application. The interlocutory orders made by the learned trial judge were already settled; as such the judge was functus officio when the respondent's application came before him.

2. An order which is silent as to costs means that each party must bear its own costs of the proceedings.

JUDGMENT

[1] MITCHELL JA [AG]: This is an appeal against an award of costs which comes up with leave of this court before me for determination as an interlocutory appeal. An appeal against a costs order always requires leave under the provisions of the Eastern Caribbean Supreme Court Act.[1] Interlocutory appeals are generally determined on paper by a single judge of the court pursuant to rule 62.10 of the Civil Procedure Rules 2000 ("CPR").

[2] The simple facts are that during the course of the preparation of this case for trial in the High Court, a number of interlocutory applications came to be made, and they were heard and disposed of. There were two of them in particular. The first was an application by the appellant to amend its claim form. This was disposed of on 16th October 2009 by the judge granting the appellant's application. The second was an application of 16th November 2009 by the appellant to strike out the defendant's amended defence and counterclaim. This was disposed of on 19th January 2010 adverse to the appellant. In both applications, substantive orders were made, but the orders on each occasion were silent as to who if anyone should bear the costs of the applications.

[3] On 17th December 2009, the respondent filed an application in the High Court for costs of $10,500.00 to be awarded to it in respect of the two applications previously referred to. On 19th February 2010, the trial judge heard both counsel and, over the objections of counsel for the appellant, awarded costs to the respondent in the amount of $7,000.00. An appeal followed, the point being a simple one. Is an interlocutory order which contains no mention as to costs capable of being dealt with subsequently on an application for costs? There is a second ground argued, that the award of costs was excessive, but I shall not deal with it.

[1] Cap. 143, Laws of Antigua and Barbuda.

[4] The applicable rules of court are CPR 65.11(1) and (3). They read:

> "Assessed costs – procedural applications
> 65.11 (1) On determining any application except at a case management conference, pre-trial review or the trial, the court must –
> (a) decide which party, if any, should pay the costs of that application;
> (b) assess the amount of such costs; and
> (c) direct when such costs are to be paid.
> …
> (3) The court must take into account all the circumstances including the factors set out in rule 64.6(6) but where the application is –
> (a) an application to amend a statement of case;
> (b) an application to extend the time specified for doing any act under these Rules or an order or direction of the court;
> (c) an application or relief under rule 26.8 (relief from sanctions); or
> (d) one that could reasonably have been made at a case management conference or pre-trial review;
> the court must order the applicant to pay the costs of the respondent unless there are special circumstances."

[5] The respondent submits that CPR 65.11(3) makes it mandatory on an application to amend a statement of case that costs must be awarded in favour of the respondent to the application unless there are special circumstances. The court has no discretion on whether or not to award costs following an application to amend the statement of claim. It is imperative. Costs must be awarded to the respondent. It is only after it is shown that there are special circumstances that the court, after consideration of the issue of costs, can decide to make a nil award. Since no special circumstances were argued on the hearing of the application to amend, the respondent was entitled to costs and this could only have been determined on an application as was done in this case.

[6] Concerning the second application to dismiss the amended defence and counterclaim which went against the appellant, the appellant submits that the judge focused on the merits of the application and the issue of costs was inadvertently overlooked. The application not being dealt with on the occasion of a case management conference, a pre-trial review, or trial, the court had a duty to consider the issue of costs. This was done on 19th February 203 at the hearing of the application in question.

[7] The appellant submits that the learned trial judge was functus in relation to the two Orders in question and had no authority to make an award of costs in relation to them. Counsel for the appellant asks that there be no order as to costs of this appeal.

[8] I am satisfied that the submissions of the appellant in this case are correct. If a party to litigation does not obtain an order for costs at the time of the making of an interlocutory order by the judge, then the party is not entitled to make a later application for costs in relation to the earlier application. Once an order is settled and issued by the court, the judge become functus officio. In the words of Gordon J.A. in the case of Attorney General of Grenada v Peter Charles David et al,[2] any other opinion would result in litigation never being final or certain.

[9] Justice Sandra Mason in the High Court in the case of Stephen Jn. Pierre v Keith Allan Jn. Pierre,[3] was of the same opinion. She was there dealing with an earlier oral judgment of her own in which she made no order as to costs. Some six months later one of the parties applied for damages to be assessed and for an order as to costs in the earlier oral judgment. Her view was that if an order makes no mention of costs, none are payable in respect of the proceedings to which it relates. An order which is silent as to costs can be equated with "no order as to costs" which in turn means that each party must bear its own costs of the proceedings. I entirely agree. Not only is it incumbent on any party who has succeeded on an application, or in whose favour an order for costs would normally be made, to ensure that the applicable costs order is included in the decision that is made, it would be well if on each occasion counsel could assist the court in settling either by agreement or by mathematical calculation the exact amount of assessed or prescribed or other costs that should be included in the decision or order. That is the only way to ensure that costs orders are not required to be the object of further applications and hearings,

[2] (2008) 72 WIR 155.
[3] St. Lucia SLUHCV 2005/0652 (delivered 13th March 2008, unreported).

perhaps even by a judge who was not involved in the particular proceeding and who will not be familiar with what was involved.

[10] For the reasons given above, the order of 19th February 2010 awarding costs to the respondent is set aside.

Don Mitchell
Justice of Appeal [Ag.]