THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

CIVIL APPEAL NO. ANUHCVAP 2013/0005

[1] THE ATTORNEY GENERAL
[2] NORMAN PARILLON GEORGE

Appellants

and

ANTON TONGE

Respondent

Before:
Hon. Dame Janice M. Pereira Chief Justice

APPEARANCES:
On written submissions:
Ms Carla Brookes-Harris for the Appellants.

2013: October 3.

Civil Appeal – Interlocutory Appeal- Award of costs to the unsuccessful party on the setting aside of a judgment- Civil Procedure Rules 64.6.

The appellants made an application to set aside a judgment given in their absence on the basis that they were not informed by the court office of the date of the trial and were therefore unaware that it was taking place. The learned trial judge ordered that the judgment be set aside and also ordered that the successful appellants pay the costs of the unsuccessful respondent in the sum of $1,100.00. The appellants appealed the costs order.

Held: allowing the appeal setting aside the order for costs made by the trial judge on 8th March, 2013 and making no order as to costs, that:

1. 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 reasons 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. In this case a departure from the general rule is not obvious so in the absence of any reasons stated by the trial judge for making such a costs order it can only be inferred that the learned trial judge did not properly address her mind to the applicable principles or a consideration of the factors as set out in CPR 64.6. Had the learned trial judge done so she would have concluded in the circumstances that blame for the non-attendance could not be attributed to the appellants, but rather to the court office and would have therefore made the appropriate order of "no order as to costs" which would properly reflect the omission of the court office in giving notice.

JUDGMENT

[1] PEREIRA, CJ: This appeal, though not so stated on the Notice of Appeal as stipulated by CPR 62.10(2), is an interlocutory appeal. It arises from an order made on application pursuant to CPR 39.5, to set aside a judgment given in a party's absence. The appellants were successful as the learned trial judge (Henry J), by order made on 8th March 2013, set aside the judgment of Lanns J (Ag.) made on 11th December 2012, which followed upon a trial and a judgment being given where neither the appellants (the Defendants to the claim below) nor their counsel were in attendance at the trial. The order setting aside the judgment of Lanns J (Ag.) however, also ordered that the appellants (the successful applicants) pay the costs of the respondent (the claimant below) in the sum of $1,100.00. It is this costs order which the appellants have appealed having sought and obtained leave to do so.

[2] The appellants contend that:

(a) The circumstances of the appellants' absence do not justify an award of costs on the setting aside of the judgment; and

(b) The learned judge in awarding costs to the respondent erred in the proper exercise of her discretion having regard to CPR 64.6(1) and 65.11(2) and (3).

[3] In respect of the appellants' first contention, it appears to be common ground that Henry J set aside the judgment of Lanns J (Ag.) after having been satisfied that it was given in the absence of the respondent. The explanation given for the absence of the appellants appears also to have been accepted by the learned judge. This explanation was to the effect that the court office had failed to inform counsel and the appellants of the date fixed for trial. Accordingly, they were unaware of the trial being proceeded with on 11th December 2012.

[4] I accept the position as stated above to be correct in the absence of any demur by the respondent. Further, notwithstanding that the respondent's solicitors were served with the notice of appeal and the appellants' written submissions on 10th and 14th May 2013, respectively, and the respondent personally served on 5th September 2013, there has been no response by the respondent or his solicitors. The time allowed for a response by the respondent pursuant to CPR 62.10(3) and (4) has expired, and the appeal now falls to be considered pursuant to CPR 62.10(5) and (6).

[5] The singular issue raised on this appeal is whether the appellants ought to have been visited with an award of costs against them, where they were the successful parties on the application or, put another way, whether the general rule which provides that the unsuccessful party must pay the costs of the successful party ought to have been deviated from in the circumstances.

The Principles

[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[1], 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 CPR 64.6(5) states in effect that in

[1] See CPR 64.6(2).

deciding who should be liable to pay costs, the court must have regard to all the circumstances. In particular it must have regard to:

> "(a) the conduct of the parties both before and during the proceedings;
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> (b) the manner in which a party has pursued -
>
> (i) a particular allegation;
>
> (ii) a particular issue; or
>
> (iii) the case;
>
> (c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings;
>
> (d) whether it was reasonable for a party to -
>
> (i) pursue a particular allegation; and/or
>
> (ii) raise a particular issue; and
>
> (e) whether the claimant gave reasonable notice of intention to issue a claim."[2]

[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.

The circumstances

[8] There is no reasoned judgment by the trial judge on this issue. The order of the court merely states as follows:

> "1. The Application to set aside the judgment of Lann's J dated 11th December 2012 is granted. The matter is restored to the trial list and shall be set down for trial on a date to be fixed by the Court Office.
>
> 2. Costs to the Claimant in the sum of EC$1100.00."

[9] It stands to reason, that Henry J could only have been acting pursuant to CPR 39.5 in setting aside the judgment of Lanns J, a judge exercising coordinate

[2] CPR 64.6(6).

jurisdiction. Further the fact that the judgment was set aside with directions for fixing a new trial date, must mean that Henry J was satisfied as to the reason given for failure to attend, and also satisfied that had the appellants attended some other judgment or order may have been given or made. No reason has been given by the trial judge for deviating from the general rule of ordering the unsuccessful party to pay the costs of the successful party, and indeed in the circumstances of this case, for ordering the successful party to pay the costs of the unsuccessful party.

[10] The only failing identified in the affidavit evidence and which was not controverted is the failing of the court office in giving notice to the appellants, as ought to have been done, of the dates fixed for trial. Accordingly due to no fault of the parties, the appellants were totally unaware of the hearing taking place. In having regard to CPR 64.6, no doubt, had the learned trial judge addressed her mind to them, she would have concluded in the circumstances that blame for the non-attendance could not be attributed to the appellants, but rather to the court office. Accordingly, the appellants having succeeded in setting aside the judgment pursuant to CPR 39.5 the appropriate order in the exercise of her discretion ought to have been "no order as to costs" which would properly reflect the omission of the court office in giving notice.

Conclusion

[11] In the absence of any reasons given by the trial judge for ordering costs to be paid by the successful applicants to the respondent and thereby deviating from the general rule regarding entitlement to costs, it can only be inferred that the learned trial judge did not properly address her mind to the applicable principles or a consideration of the factors as set out in CPR 64.6. Consequently, she erred in principle in the exercise of her discretion in the costs order made. Accordingly, in exercising the discretion afresh, and having regard to the circumstances of the matter as set out above, the appropriate order as to costs would be 'no order as to costs' and I so order.

[12] The order then is as follows:

(1) The appeal is allowed and the order for costs made by the trial judge on 8th March 2013 is hereby set aside.

(2) There shall be no order as to costs on the setting aside of the judgment below, and no order as to costs on this appeal.

Dame Janice M. Pereira
Chief Justice