THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2018/0001

BETWEEN

PATRICIA ANNE HUGGINS

CLAIMANT

and

LLOYD BROWNE

DEFENDANT

Appearances:

Mr. Richard Williams with him Ms. Danielle France for the claimant/respondent.
Ms. Suenel Fraser of counsel for the applicant/defendant.

2018: May 30
Jul. 30

DECISION

BACKGROUND

[1] **Henry, J.:** Ms. Patricia Anne Huggins and Mr. Lloyd Browne are locked in a dispute over ownership of land situated at Golden Vale. Mr. Browne made an unsuccessful application to strike out Ms. Huggins' claim. The parties were ordered to file skeleton arguments and list of authorities and to transmit electronic copies to the court office on or before 2nd March 2018. Ms. Huggins filed hard copies of the documents but did not transmit electronic copies as ordered. By order dated 21st March 2018, she was ordered to pay wasted costs of $500.00 into the court office by 5th April 2018.

[2] On April 5th 2018, Ms. Huggins applied for stay of execution of that order and for leave to appeal that decision. She filed written submissions. Mr. Browne did not oppose the application and he

made no submissions. Ms. Huggins' application for stay of execution is dismissed. Her application for leave to appeal is granted.

ISSUE

[3] The issues are whether:

1. A stay of execution should be granted of the order for payment of wasted costs? and
2. Patricia Anne Huggins should be granted leave to appeal the decision for payment of wasted costs?

ANALYSIS

Issue 1 – Should stay of execution be granted of the order for payment of wasted costs?

[4] Ms. Huggins intends to appeal against the order outlined in paragraph [52] of the referenced decision. It states:

> 'For her non-compliance with the Court's order to transmit electronic copies of her skeleton arguments and list of authorities to the court office on or before 2nd March 2018, Ms. Huggins shall on or before 5th April 2018 pay into the court office pursuant to CPR 64.9(2) wasted costs of $500.00.'

[5] The court is empowered to grant a stay of execution of a judgment pending the outcome of an appeal[1]. A prospective appellant must seek leave to appeal within 14 days of the date of delivery of the judgment against which she is appealing.[2] April 5th 2018 was the day on which the 14 day period expired. Ms. Huggins filed her application on that day. It was therefore filed within the stipulated timeline. It was in writing as required by the Rules.

[6] When considering an application for a stay of execution the Court applies well established legal principles and considers the prospective appellant's chances of success. Ms. Huggins submitted that the Court of Appeal laid down the applicable test in the case of **Othneil Sylvester and**

[1] Civil Procedure Rules 2000 ('CPR') 26.1(2) (q).

[2] CPR 62.2(1).

Faelleseje, A Danish Foundation[3]. I agree. An order granting a stay of execution is the exception rather than the general rule. If the applicant's prospects of success are realistic and not fanciful the Court will be inclined to grant the stay.

[7] The applicant is required to supply cogent evidence that his appeal will 'be stifled or rendered nugatory' if the stay is refused. The Court will have regard to all the circumstances, apply the balance of harm test and consider the likely prejudice to the successful party. These principles are time honoured and were re-affirmed by Blenman J.A. in **C-Mobile Services Limited v Huawei Technologies Co. Limited**.[4]

Grounds of Appeal – Likelihood of Success

[8] Ms. Huggins submitted that her proposed appeal raises 6 grounds of appeal. I will evaluate them seriatim to gauge their likely chances of success. Ms. Huggins submitted that the learned judge acted ultra vires in making a wasted costs order pursuant to CPR 64.9(2). She contended that wasted costs are compensatory in nature and cannot be made to penalize a party for non-compliance with any rule or order.

[9] Ms. Huggins submitted that wasted costs is defined in the CPR as 'any costs incurred by a party as a result of any improper, unreasonable or negligent act or omission' on the part of any legal practitioner or any employee of the legal practitioner. She argued that the Court may exercise its discretion to impose a wasted costs order in only two circumstances as provided in CPR 6.9(1)(a).

[10] In this regard, she submitted that the Court may only do so where:

1. a party or his legal practitioner fails to comply with a rule, practice direction or court order; or
2. it appears to the Court that a party or his legal practitioner's conduct before or during the proceedings was unreasonable or improper.

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[3] Civil Appeal No. 6 of 2005.

[4] Territory of the British Virgin Islands High Court Commercial Appeal BVIHCMAP2014/0017 (delivered on 2nd October, 2014.

Ms. Huggins argued that in such instances the Court may either disallow all or part of the costs being assessed; or order the defaulting party or his legal practitioner to pay costs to the Court or which he has caused any party to incur, or both. (Underlining added)

[11] Ms. Huggins submitted that the wasted costs order was made against her personally for acts or omissions in relation to the electronic submissions of the order when she was not at fault. This contention seems to ignore the fact that the parties before the Court are the litigants and not the legal practitioners. Suffice it to say that the Court's record will reveal that before the wasted costs order was imposed, the applicant through her legal practitioner was afforded an opportunity to make representations. The record will also reveal that she declined.

[12] Ms. Huggins submitted further that rules 64.8(1), 64.9(1) and (2) must be read together and not in a disjointed manner. She contended that rule 64.8(1) empowers the Court to direct the legal practitioner to pay the whole or part of the wasted costs, which are really costs incurred by a party as a result of improper, unreasonable or negligent act or omission by the legal practitioner or employee. She argued that rule 64.8 is what establishes the wasted costs regime while rule 64.9 ascribes powers to the Court in relation to costs.

[13] CPR 64.8 and 64.9 provide respectively:

'**Wasted costs orders**

64.8 (1) In any proceedings the court may order-

(a) direct the legal practitioner to pay; or

(b) disallow as against the legal practitioner's client;

the whole or part of any wasted costs.

(2) In this rule-

'wasted costs' means any costs incurred by a party-

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal practitioner or any employee of the legal practitioner, or

(b) which, in light of any act or omission occurring after they were incurred; the court considers it unreasonable to expect the party to pay.

Court's power in relation to wasted costs orders

64.9 (1) The court may make an order under this rule where-

(a) a party or his legal representative, fails to comply with a Rule, practice direction or court order; or

it appears that the conduct of a party or his legal representative, before or during the proceedings, was unreasonable or improper.

(2) Where paragraph (1) applies, the court may-

(a) disallow all or part of the costs which are being assessed; or

(b) order the party at fault or his legal representative to pay costs to the court or which he has caused any party to incur; or both.

(3) Where-

(a) the court makes an order under paragraph (2) against a legally represented party; and

(b) the party is not present when the order is made, the party's legal practitioner receives notice of the order.'

[14] Ms. Huggins submitted that rule 64.9(1) and (2) 'add conduct of a party' that can result in wasted costs, in addition to that of his solicitor. She argued that rule 64.9 does not reconcile with the definition or meaning of wasted costs as set out in rule 68.1. She contended that applying the regime in 64.9 would seem however to produce an irregular judgment, if relied on as it was in this case.

[15] Whatever the merits of these contentions, the record will reveal that none of the foregoing arguments were made before the presiding judge. They are completely new arguments. It seems to me that applying the construction suggested by Ms. Huggins would likely lead to an artificial and stilted application of the referenced rules with equally strained results.

[16] Ms. Huggins contended that although the wasted costs order was made against Ms. Huggins, it was in respect of conduct which is attributable to her legal representative. She submitted that there is no authority or case law where wasted costs under this regime have been made against a party as was done in the instant case. This is another argument which was not made before the presiding judge.

[17] A comparison of the English wasted costs regime with that which obtains in this jurisdiction demonstrates that the CPR 64.9(1)(a) in the latter jurisdiction does not appear in the English CPR. This conceivably explains the absence of case law on applicability. However, the objective and rationale behind the provision might possibly be extracted from cases decided in the UK courts based on that jurisdiction's wasted costs regime.

[18] The learned authors of Cook of Costs[5] noted 'Quite simply, a solicitor owes no duty to the opposing party although he does, of course, owe such a duty to the court: *Orchard v South Eastern Electricity Board [1987] QB 565, CA*.' The authors continued: 'In *Persaud v Persaud* (above) the court explained that its jurisdiction to make a wasted costs order against a solicitor is founded on breach of the duty owed by the solicitor to the court to perform his duty as an officer of the court. ... There is no doubt that the jurisdiction under s 51 of the Senior Courts Act 1981 to make a wasted costs order has now been extended to barristers, ...'.

[19] The language of the rule 64.9(1) (a) of the CPR in this State makes it clear that the party and the legal practitioner have an ongoing duty to comply with the Court's orders, non-compliance with which may attract wasted costs sanctions. There being no accompanying notes or relevant Law Commission report explaining the rationale behind the inclusion of this rule on the CPR, it would be perhaps speculative for the Court to attempt to explain the thinking behind it.

[20] It is perhaps reasonable to infer from historical and statistical reporting that this sanction is aimed at curtailing what has been perceived in some quarters as the pervasive failure of litigants to diligently prosecute their claims and comply with court orders with the seriousness and dispatch

[5] Lexis Nexis 2018 Edition.

that the administration of justice system deserves. Ms. Huggins has made some interesting submissions which have not been tested at the appellate level. There might be some merit to them.

[21] Ms. Huggins submitted that Halsbury's Laws of England[6] is authority for the proposition that a wasted costs order may be made against a legal practitioner if 3 circumstances exist:

1. he has acted improperly, unreasonably or negligently;
2. his conduct has caused a party to incur unnecessary costs; and
3. it is just in all the circumstances to order him to compensate that party for the whole or part of those costs.

[22] Ms. Huggins submitted further and correctly that the English Court of Appeal has considered in detail the wasted costs jurisdiction in the conjoined appeals of **Ridelhalgh v Horsefield and Another, Allen v Unigate Airies Ltd, Roberts v Coverite (Asphalters), Philex Plc v Golban (Trading as Capital Estates), Watson v Watson and Antonelli and Others v Wade Gery Farr (A Firm) 1994 3 W.L.R.** Ms. Huggins quite carefully pointed out that the Court of Appeal defined 'improper', 'unreasonable' and 'negligent'.

[23] She concluded that her failure to submit electronic copies to the court office does not amount to improper, unreasonable or negligent conduct and falls below the threshold established by the Court of Appeal. In that case the Court of Appeal was considering section 51(7) of the Courts and Legal Services Act 1990 where the definition for wasted costs is identical to the definition which is set out in CPR 64.9(2) in this jurisdiction. That definition includes reference to 'omission on the part of any legal practitioner or any employee of the legal practitioner' as one of the behaviours which will attract the sanction. Ms. Huggins did not address her mind to that part of the definition or if she did, she omitted all reference to it.

[24] Significantly, while the definition appears to limit the making of a wasted costs order to an order made in favour of a party, the next rule (in this jurisdiction) extends the scope of such an order by making it payable to the opposing party, the court or both. The meaning and scope is unambiguous

[6] 4th Ed. Re-Issue Vol. 10 pg. 92, para. 208.

and unmistakable. The applicable rules of statutory interpretation dictate that they be given their natural and ordinary meaning and that they be construed in such a manner that they can both be applied without contradictory effect. It is worth noting that the manner in which CPR 64.9(1) and (2)(b) are expressed, make it abundantly clear that the measure may be activated even where no costs are being assessed.

[25] In the premises, it seems to me that those provisions afford an opportunity to the Court to impose wasted costs sanctions against a party, her legal practitioner or both, in appropriate circumstances, for their non-compliance with court orders, by directing them to pay such wasted costs to the opposing party, to the court or both. The sole pre-condition to the making of such an order is that the defaulting party be given an opportunity to be heard.

[26] On this point, Ms. Huggins has raised some seemingly novel arguments which may find favour with the appellate court. Although the **Ridelhalgh v Horsefield case** touched on one aspect of the legislative framework, it did not and could not delve into the other aspects because in respect of those, there is no similar provision in England. There is therefore no comparison or benchmark against which to measure the viability of CPR 64.9. It is in my estimation just that Ms. Huggins be given an opportunity to ventilate them at a higher level as they may provide her a reasonable chance of success and remove any lingering doubt as to their efficacy and validity.

[27] In her second proposed ground of appeal, Ms. Huggins contended that the learned judge erred in making the wasted costs order pursuant to CPR 64.9(2) in that her failure to transmit electronic copies of the skeleton arguments to the court office did not incur any additional costs to the defendant. I have already addressed this contention. For the reasons provided before, I do not consider that Ms. Huggins is likely to have any reasonable chance of success with that argument.

[28] In her proposed ground 3, Ms. Huggins stated that the learned judge breached the rules of natural justice by not allowing her a fair and reasonable opportunity to be heard and make proper representations following the wasted costs order. She indicated that her legal representative

replied simply to the Court that it was an oversight. She contended that asking the question without providing a reasonable opportunity to respond falls afoul of the rules of natural justice.

[29] She submitted that simply requiring an explanation from counsel was insufficient to afford her a reasonable opportunity to be heard. She submitted that the case of **Regina v Smith [1974] 2 WLR 495** is applicable. Ms. Huggins also relied on Halsbury's Laws of England[7] which refers to the core rules of natural justice that no man shall be a judge in his own cause (*nemo judex causa sua*) and no man is to be condemned unheard (*audi alteram partem*). Ms. Huggins asserted that she was not given an opportunity to make any representations or a fair opportunity to be heard in relation to the wasted costs order. The record will indicate what transpired.

[30] These submissions were not made at the hearing. Attempting to respond to them would place the Court in the invidious position of giving evidence from the bench. I refrain from doing so. The record will attest to what transpired. In all of the circumstances, this ground screams for a review by the appellate Court. Ms. Huggins' chances of success will depend on the view the Court takes of what transpired, her and her legal practitioner's stance and the Court's posture. It strikes me that this is a matter which requires independent scrutiny.

[31] Ms. Huggins advanced as her 4th ground of appeal that the learned judge acted in breach of the principles of fairness by issuing a wasted costs order against her for non-compliance, but none against Mr. Browne for his failure to serve copies of his skeleton argument and the order of 21st February 2018 on her. She submitted that principles of fairness would dictate that where a judge makes an order which would result in sanctions if parties fail to comply, then the judge should penalize both parties for non-compliance or none at all, if both parties failed to comply with all or part of the order.

[32] Ms. Huggins relied on affidavit testimony filed in support of her leave to appeal. In it, she averred that Mr. Browne did not serve his skeleton arguments on her on the stipulated day or at all. She indicated therein that no enquiry was made by the Court as to whether the parties were in

[7] 4th Ed. Re-issue Vol. 1(1) pg. 95, para. 95.

compliance with the said order. I do not recall if I made any such enquiries or if the information was volunteered by either party. The record will reflect what transpired.

[33] As I understand it, the Court exercises an independent discretion when determining whether to apply sanctions for non-compliance with orders. It is usual to be balanced, even-handed and always fair. I refrain from giving evidence from the bench regarding whether I was aware of Mr. Browne's failure in serving his skeleton argument on Ms. Huggins. It is possible that I did not ask. I am of the considered opinion that Ms. Huggins is not likely to succeed on this ground of appeal.

[34] In her proposed ground 5 of appeal, Ms. Huggins stated that the learned judge was unreasonable and excessive in making the order considering that arguments were filed in the manner set out in CPR 3.7. She submitted that although the learned judge did not define the act of transmitting electronic copies as electronic filing, it amounts to the same. Ms. Huggins contended that the practice direction issued by the Hon. Chief Justice makes provision for filing of electronic documents at the central registry of the Court of Appeal in Saint Lucia.

[35] She contended that although the learned judge has wide case management powers she is not permitted to ask a party to essentially file electronic submissions of documents where it is not authorized by the Hon. Chief Justice. She reasoned that she had filed her submissions on time in compliance with the rule governing the filing of documents. She argued that the judge's order of wasted costs is unreasonable and excessive in the circumstances. Ms. Huggins cited no case law or legal commentary in support of these submissions.

[36] CPR 25.1(k) and (m) empowers the court to actively manage cases by among other things, giving directions to ensure that the trial of the case proceeds quickly and efficiently; and making appropriate use of technology. The Court is also authorized to take any step, give any direction or make any other order for the purpose of managing the case and furthering the overriding objective[8]. This aims to ensure that each case is dealt with expeditiously.

[8] CPR 26.1(2)(w).

[37] It is common knowledge that the judge has not been assigned a dedicated typist to type and format judgments and decisions. It seems to me that if the judge is required to personally transcribe every pleading, affidavit, witness statement, skeleton argument and written submission in every application, motion, claim and petition which is assigned to that judge, litigants would be waiting for unacceptable periods to obtain their decisions.

[38] At the same, submission of electronic versions of filings can be accomplished in less than a minute, by a clerk and even an office attendant, makes appropriate use of technology and significantly oils the wheels of justice. There appears to be little merit in Ms. Huggins' arguments related to this ground of appeal.

[39] Ms. Huggins indicated in her 6th proposed ground of appeal she considers the wasted costs order to be a fine which is penal in nature and unlawful. She argued that the powers granted to the Hon. Chief Justice and two judges to make rules do not empower them to make laws or rules that are penal in nature. She argued that the sections referring to paying money into court falls outside of the Honourable Chief Justice's authority and are reserved for Parliament. She reasoned that it is not Parliament's intention to confer such powers on the Chief Justice.

[40] Ms. Huggins cited no legal authority for that proposition. The judgment of the Court of Appeal in **Astaphan v Comptroller of Customs** is apt. There the Eastern Caribbean Court of Appeal reasoned that:

> '... if the Legislature delegates or transfers its legislative power to the Executive and does so without circumscribing the power or without prescribing guidelines or a policy for its exercise, the Legislature should be deemed to have surrendered or abdicated the power. In that event, the delegation or transfer of legislative power is inconsistent with basic principle of separation of powers.'[9]

[41] The Court of Appeal opined that if the Executive is empowered by the Legislature to make laws which have the effect of creating penalties without effective control by the Legislature, then such

[9] J. Astaphan & Co. (1970) Ltd., Civil Appeal No. 8 of 1994, (Commonwealth of Dominica).

exercise would run afoul of the constitutional concept of separation of powers. It appears that Ms. Huggins is proposing to make a similar argument in respect of the judiciary. She stopped short of stating why and how the wasted costs sanctions amounts to a penalty, in the absence of an offending provision and without reference to the delegating legislation. I was unable to evaluate the merits of this submission in the face of those omissions and Ms. Huggins' failure to fully develop that line of reasoning.

[42] Ms. Huggins contended that the learned trial judge did not have the discretion to make a wasted costs order where the 'trigger conduct of cost being incurred did not take place'. She argued that the learned trial judge appeared to have relied solely on Rule 64.9(2) without reading it in conjunction with rule 64.8. She submitted that the learned trial judge erred in principle by failing to take into account or give any weight at all to rule 64.8 when making the wasted costs order and as a result 'exceeded the generous ambit within which reasonable disagreement is possible and is therefore clearly and blatantly wrong.'[10]

[43] Ms. Huggins submitted that no reasonable disagreement is possible as the wasted costs regime was designed to compensate a party for culpable conduct of another. Ms. Huggins did not indicate how she arrived at this conclusion regarding the objective behind the provisions contained in CPR 64.9, especially since there is no accompanying note or memorandum to explain the rationale. It seems that she has fully accepted the English authorities as being dispositive of that question. I hold a different viewpoint.

[44] I am much more confident that the departure from the English position on this rule was deliberate and was motivated by a more laudable pursuit, within the administrative of justice system. I am of the view that the architects of that provision were driven by the higher ideals of access to justice for all, with all of the underlying and illustrious hopes of clearing the stifling backlogs and delivering to court users a more appealing, expeditious, well-deserved, legitimately expected and desired efficiency in dispensation of justice. Perhaps in this regard, the rule making and implementing

[10] Per Floissac CJ in Dufour v Helenair Corporation et al, Civil Appeal No. 4 of 1995.

authority on the one hand and the prospective appellant on the other, were working at cross purposes.

[45] Ms. Huggins' passionate submissions are just as deserving of ventilation before a more qualified panel. She could meet some measure of success on this point and is entitled to explore these contentions at a higher level.

[46] Ms. Huggins submitted that her appeal would be rendered nugatory unless a stay is granted. She contended that her wasted costs would be lost to her if they are paid. I do not understand why this would be so. Although it might take some time for her to recover the wasted costs, I harbor no doubt that the relevant government officers will comply with any order made for reimbursement if she succeeds on appeal. I therefore make no order for stay of execution. In any event the time for payment of the wasted costs has long passed.

Issue 2 - Should Patricia Anne Huggins be granted leave to appeal the decision for payment of wasted costs?

[47] A determination of whether to grant leave to appeal requires consideration of the proposed appellant's chances of success. Such an appellant must demonstrate that she has a realistic prospect of succeeding[11]. I have already considered those matters. Ms. Huggins appears to have a reasonable chance of succeeding on aspects of her proposed appeal. She should therefore be granted leave to do so. It is ordered that she be granted leave to appeal.

Costs

[48] The general rule is that the successful party is entitled to his costs. The Court has discretion to make no order for payment of costs, in appropriate cases. In making a determination, the Court must have regard to all the circumstances including the parties' conduct before and during the proceedings; the manner in which a party pursued a particular issue, allegation or the case; and

[11] Swain v Hillman [2001] 1 All E. R. 91 per Lord Woolf; Attorney General of Grenada et al v. Andy Redhead GDAHCVAP 2007/0010.

whether it was reasonable for a party to do so.[12] Mr. Browne did not oppose the application and he made no submissions on the matter at hand. In the premises, I make no order for payment of costs.

ORDER

[49] It is ordered:

1. Patricia Anne Huggins' application for a stay of execution is dismissed
2. Patricia Anne Huggins' application for leave to appeal the decision to pay wasted costs is granted.
3. Patricia Anne Huggins shall bear her own costs.

Postscript

[50] The submissions filed by learned counsel are well-researched. I am grateful for the assistance. The delay in finalizing this judgment is regretted. Due to competing priorities, it was unavoidable.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar

[12] In accordance with CPR 64.6 and 65.11.