[2016] JMSC Civ. 71

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014 HCV O4144

BETWEEN	**GORSTEW LIMITED**	**APPLICANT**
AND	**HER HON.LORNA SHELLY-WILLIAMS**	**1ST RESPONDENT**
AND	**PATRICK LYNCH**	**2ND RESPONDENT**
AND	**JEFFREY PYNE**	**3RD RESPONDENT**
AND	**CATHERINE BARBER**	**4TH RESPONDENT**

IN CHAMBERS

D. Leys QC, H. Wildman, B. Hines, K. Tennant instructed by H. Wildman and Co. for the Applicant.

C.Larmond instructed by Director of State Proceedings for 1st Respondent.

K. Knight QC and J. Junor instructed by Knight Junor and Samuels for the 2nd Respondent.

B. Samuels, S. Knight instructed by Knight Junor and Samuels for the 3rd Respondent.

D. Martin, S. Usim instructed by Usim, Williams and Co for the 4th Respondent.

Heard: October 19, 2016

Costs - Leave to apply for judicial review – Indemnity basis – Multiple parties with same interest – Two counsel for one party.

CAROL LAWRENCE BESWICK, J

This concerns the issue of the appropriate order for costs in judicial review proceedings where, on December 10, 2014, the application for leave to apply for judicial review was refused. The parties were invited to file submissions in this regard.

Submissions for the 1st respondent

[1] Counsel, Ms. Larmond, for the 1st respondent. Her Hon. Ms. Shelley Williams relied on **Danville Walker v. Contractor General** [1]in arguing that the rule that generally costs should not be awarded in an application for an administrative order applies only at the final hearing of a judicial review and that where the application is for leave to seek judicial review, general costs principles[2] apply.

[2] Her argument continued that costs should not be awarded against an unsuccessful applicant for leave to apply for judicial review in the absence of exceptional circumstances[3].This case, she submitted, had those exceptional circumstances.

[3] Counsel submitted that it was highly unreasonable for the applicant to pursue an application that had no merit.[4] Further, the applicant was persistent in its pursuit of this unmeritorious point, notwithstanding having been alerted to its futility.

[4] Ms. Larmond acknowledged that the applicant was unaware that the respondents would have been advancing a preliminary point, but she maintained that the applicant was aware of the substance of the preliminary point particularly as it relates to the relevance of the principle of autrefois acquit.[5]

[5] Counsel urged the court to recognise that although there was no notice that the preliminary point would have been taken, counsel for the applicant had produced

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[1] [2013] JMFC Full 1(A)
[2] Part 64 of the CPR
[3] Mount Cook Land Limited v. Westminster City Council [2003]EWCA Civ 1346
[4] Millicent Forbes v. Attorney General(2009) 75 WIR 406
[5] Submissions of 2nd, 3rd, 4th respondents filed Nov. 21, 2014 and of 1st respondents filed Dec. 8, 2014.

a 7 page submission responding to **Millicent Forbes v. R**[6] in detail, a case concerned with similar issues, and had cited authorities to show that its reliance on **Millicent Forbes** would be misplaced.

[6] In arguing further about the exceptional circumstances of the instant case, Ms. Larmond submitted that this court could properly find that the applicant had sought to abuse the process of judicial review for collateral ends. This she said would be based on two facts, firstly, the applicant had participated in the criminal proceedings by way of a fiat from the Director of Public Prosecutions [DPP], yet had embarked on these judicial review proceedings without involving the DPP. Secondly, the applicant had relied on case law from a jurisdiction where appeals by the prosecution are allowed by statute, unlike this jurisdiction.

[7] Ms. Larmond's final submission that this case provided exceptional circumstances which should result in an award for costs to the 1st respondent, against the applicant, was that the applicant had had, in effect, an early hearing of the substantive claim. This, she argued, was because the court had based its decision to refuse leave to seek judicial review, not only on procedural bars, but also on what she described as a carefully considered review of the substantive issue as to the content of the transcript.

[8] Her submission was therefore that there should be an award of costs to the 1st respondent save for the specific costs which had been awarded to the applicant against the 1st respondent on December 9, 2014 that were limited to the costs of counsel reviewing the 1st respondent's submissions filed and served on December 8, 2014.

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[6] (2009) 75WIR 406

Submissions for the 2nd and 3rd respondents

[9] Queen's Counsel Mr. K.D. Knight and Counsel Mr. B. Samuels submitted on behalf of the 2nd and 3rd respondents that although this application concerned an administrative order, costs should nonetheless be awarded to them, the successful parties, because the applicant acted unreasonably in making the application for leave for judicial review.

[10] Further, Counsel relied on the **Danville Walker** case[7] to argue that costs can be properly awarded against an applicant for leave to apply for judicial review if there are exceptional circumstances, and that because of the exceptional circumstances the costs should be on an indemnity basis.

In counsel's submission these exceptional circumstances were three:-

(i) i) abuse of process and futility of review.

[11] The argument for the 2nd and 3rd respondents was that the application was hopeless and futile. Those respondents argued in their filed submissions that there is no authority to remove the decision of the Resident Magistrate by certiorari or mandamus.

[12] Further, the application was frivolous and vexatious as it had as its aim the retrial of the respondents and could not lead to any practical result.

(ii) collateral ends.

[13] Some nineteen days before the hearing, the 2nd and 3rd respondents had served the skeleton submissions on the applicant in which it was made clear that the 2nd and 3rd respondents had been wrongly joined as they had played no role in handing down the decision which the claimant sought to be reviewed.

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[7] supra

[14] The applicant's decision to continue was thus an abuse of process of the court to accomplish a collateral end of having the 2nd and 3rd respondents retried for the same offence.

(iii) retention of counsel

[15] Counsel argued that these respondents were compelled to retain counsel to appear at the hearing of the application because there was the risk that if the applicant succeeded that could have resulted in the respondents being placed before the criminal court again, with a risk to their liberty.

[16] There was no evidence to support this application[8] and any finding adverse to these respondents would have had to be challenged.

[17] Representation at this hearing could therefore prevent the additional expense, stress and inconvenience that could have occurred if the application had proceeded successfully unopposed, and thereafter had been subject to challenge in other proceedings.

[18] As was the argument for the 1st respondent. Counsel here argued that the arguments in this application in effect gave the applicants the benefit of a substantive hearing.

[19] Counsel pointed out that the absence of support of the DPP in this matter should have shown the applicant the futility of the application since the ultimate result sought was the retrial of three respondents, which would have involved the cooperation of the DPP.

[20] In asking for costs to be awarded against the applicant, counsel for the 2nd and 3rd respondents acknowledged that an award for costs in a judicial review matter could have a crippling effect on a litigant seeking to challenge the decision of a

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[8] Par.r 17 and 76 of Judgment of Lawrence-Beswick J

public authority. He submitted that this was not the case here as the applicant Gorstew had not demonstrated that an award of costs would have a crippling effect on it in its application for judicial review.

[21] As it concerns costs for two counsel for the 2nd and 3rd respondents, counsel relied on the Civil Procedure Rules (CPR)[9] to argue that although these 2 respondents had the same interests that did not nullify the work done by their separate attorneys- at- law in preparing for this application. Counsel would have been aware of the risk of costs in deciding to pursue this application which was so obviously futile.

[22] Counsel submitted that in the circumstances of this case, costs should be awarded to each counsel for the 2nd and 3rd respondents on an indemnity basis because of the unreasonable conduct of the applicant to continue this application.

Submissions for the 4th respondent

[23] Counsel, Ms. Usim and Ms. Martin, for the 4th respondent, Ms. Barber also relied on the **Danville Walker** case[10] to state that the general costs principles should apply and that the unsuccessful party should pay costs of the successful party, unless there is a rule or policy that restricts, modifies or excludes its operation.[11]

[24] Counsel's submissions mirrored those of the other respondents. The submission was that Ms. Barber is entitled to an award of costs, because of the following reasons:-

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[9] Rule 64.7
[10] supra
[11] CPR part 64

i) Ms. Barber, ought not to have been joined as a party to the proceedings[12]. There was however the threat of real prejudice to her and she therefore was obliged to retain counsel.

ii) The claim was hopeless and the Court's findings support that view

iii) The applicant was using the process of judicial review for collateral ends, that is, to initiate an appeal against the acquittal of the respondents when that would not be permissible at law, without more.[13]

iv) The applicant had the opportunity to withdraw as the 2nd, 3rd, and 4th respondents had served their submissions on the applicant at least two weeks before the hearing.

[25] Counsel for Ms. Barber acknowledged that at the hearing Mr. K.D. Knight Q.C, made extensive submissions on a preliminary point on behalf of the 2nd and 3rd respondents and that his submissions were adopted by the 4th respondent as were the submissions by the 1st respondent. However, it was because they had done their own extensive preparation and independent research of the relevant law on Ms. Barber's behalf that they were able to recognise that they could properly adopt the arguments .

[26] As it concerns costs for two or more parties having the same interest in a matter, and who are separately represented. Counsel acknowledged that the CPR[14] permits the court to disallow more than one set of such costs .The submission is that the discretion to award costs should however be exercised in favour of the 4th respondent in light of the exceptional circumstances of the case.

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[12] Par. 72 of Judgment of Lawrence-Beswick J delivered April 21, 2015
[13] Par. 65 to 70 of judgment of Lawrence-Beswick J
[14] Part 64.7

[27] Counsel for the 4th respondent concluded that the 4th respondent is entitled to costs on an indemnity basis[15] because there was a tremendous amount of work done by counsel to assist the court in a matter which was hopeless, doomed to failure and which risked bringing the administration of justice into disrepute.

Submissions for the applicant

[28] The argument for the applicant was that the threat of a costs order should not have discouraged it from exercising its right to seek judicial review. Counsel acknowledged that the respondents' submissions had been filed but they had not dealt with the preliminary point. The applicant had therefore not had a real opportunity to know the strength or weakness of its case.

[29] Counsel urged the court to be reminded that there had been no notice of the preliminary point being taken and if there had been, then the applicant could have reflected on these arguments and could have applied mature deliberation and sober consideration.

[30] Further, contended Counsel, unlike the situation in the **Danville Walker**[16] case, this judicial review was the only method available to the applicant to seek to rectify what it had described as the jurisdictional error.

[31] Counsel argued for the applicant that it cannot be held responsible for the fact that the DPP adopted a neutral approach and had not been part of this application.

[32] Then Counsel sought to justify joining the 2nd, 3rd and 4th respondents to the application by stating that the application sought could have affected the liberty of these 3 persons and therefore they had to be joined as respondents in the application.

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[15] Part 64.6(1) CPR
[16] Supra

[33] However, according to Counsel, they could have chosen not to attend in which event no order prejudicial to their interest could have been made. The 2nd 3rd and 4th respondents would be innocent until proven guilty. Further, there could be no order having coercive or financial consequence to the respondents because the application was simply for leave to apply for judicial review. Those respondents chose to come and participate. Part 56 of the CPR should thus apply to the consideration of costs.

[34] Counsel for the applicant submitted that in the circumstances therefore, no costs order should be made against the applicant because it did not act unreasonably in making or conducting the application and indeed it had no other means of obtaining redress.

Discussion

General principles re costs

[35] Rule 56(15) Civil Procedure Rules (CPR) provides that

> *"The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application."*

[36] In my view, this rule concerns the substantive application for an administrative order and not the preliminary application for leave to apply for such an order.[17]

[37] The instant matter is an application for leave and the general principles for awarding of costs as stated in the CPR would therefore apply in the circumstances of this case.

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[17] Danville Walker v Contractor – General (supra)

Rule 64.6 CPR provides:

> *" (1) If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party."*

[38] It follows that here the applicant would, without more, be expected to pay the costs of the respondents. However there are guidelines provided in the CPR which must also be considered in the award of costs.

At Rule 64.6 it is provided that

> *"(3) In deciding who should be liable to pay costs the court must have regard to all the circumstances.*
>
> *(4) In particular it must have regard to -*
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> *(a) the conduct of the parties both before and during the proceedings;*
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> *(b) .....*
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> *(c) .....*
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> *(d) whether it was reasonable for a party -*
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> *(i) .....*
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> *(ii) to raise a particular issue;"*

[39] There is, in my view, nothing to be condemned about the conduct of the parties either before or during the proceedings.

[40] However the reasonableness of the applicant raising the issues involved in this matter escapes my understanding. To me, this application was misconceived .

[41] The Charter of Fundamental Rights and Freedoms provides that once a person has been tried and has been found not guilty, he is not to be tried for that particular charge again.[18] This application for leave for judicial review has as its ultimate aim/result, the retrial of persons who had been already acquitted. This

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[18] Section 16(9)

of course would be contrary to the constitutional provision and would therefore be void of merit.

[42] I therefore decide that, based on the general principle as to the awarding of costs, including the unreasonableness of this application, the costs should be paid by the losing party, that is, the applicant.

[43] If I am wrong in my view[19] of the meaning of Rule 56(15) CPR and the Rule does in fact apply not only to the substantive applications for an administrative order but also applications for leave to apply for such an order, I would similarly award costs against the losing party.

[44] This would be because Rule 56 makes an exception that there would be no order for costs unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.

[45] For the reasons outlined above, the applicant has acted unreasonably in making this application. In my judgment therefore, on any interpretation of Rule 56 , my order would be for the applicant to pay costs.

Multiple parties with the same interest

[46] Another issue to be determined is whether the award should be for costs for the individual respondents in this situation moreso where the 4th respondent adopted the arguments of the 1st, 2nd and 3rd respondents and indeed they all relied on the 2 sets of submissions made.

[47] The CPR addresses the award of costs where two or more parties have the same interest.

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[19] See par.36 above

[48] Rule 64.7 provides that where two or more parties having the same interest in relation to proceedings are separately represented the court may disallow more than one set of costs.

[49] I accept the arguments of counsel for the 4th respondent that they had to be prepared fully to meet any arguments of the claimant and that they ought therefore to be awarded costs themselves.

[50] In an unusual application such as this was, and one which sought the ultimate result of three of the respondents facing a new trial, with the real possibility of incarceration before and during such a trial, responsible Counsel appearing for any of the litigants would be expected to be properly prepared to respond to the applicant's submissions.

[51] Mr. Knight Q.C's arguments were comprehensive. There would be no necessity for each respondent to repeat them, as the arguments were applicable to all respondents. That of course does not detract from the reasonable expectation that each Counsel for the respondents had done sufficient work to have independently made successful submissions. The substance of the submissions that were necessary was clear and applicable to all respondents. Each respondent therefore would be entitled to be awarded costs in the circumstances.

Two counsel for any litigant

[52] Yet another question is whether costs should be awarded for two counsel for any litigant.

Rule 64 CPR provides

> *"12(3) The court, having regard to the matters set out in rule 65.17(3), may direct that the costs of the attendance of more than -*
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> *(a) one attorney-at-law on the hearing of an application;*
>
> *(b) .....*
>
> *be allowed."*

[53] Rule 65.17(3) CPR states that in awarding the specific amount for costs, the court (which includes the Registrar) must consider all the circumstances and it lists certain factors which must be taken into account in deciding what would be a reasonable award where costs are awarded. This includes whether the cause or matter or the particular item is appropriate for a senior attorney-at-law or an attorney-at-law of specialised knowledge and the novelty, weight and complexity of the matter.

[54] It may well have been appropriate for a senior attorney-at-law to have conduct of the application because the matter was relatively novel. However the novelty was perhaps due to the fact that the issues involved have been so long established and accepted in this jurisdiction that it would be in rare circumstances that they would be challenged.

[55] The arguments therefore that were presented in making the in limine point were straightforward and did not require the research or presentation of two Counsel. There would be no necessity for the skills of 2 Counsel to represent each litigant.

[56] I therefore would refuse the application for costs for 2 counsel for any respondent.

Costs on an indemnity basis

[57] The 2nd, 3rd and 4th respondents seek costs on an indemnity basis based on the assertion that the circumstances of the case are exceptional. With that submission I agree.

[58] The 1st Respondent had been the Resident Magistrate before whom they appeared at the Resident Magistrate's Court. It was her decision that was being challenged.

[59] However, respondents 2, 3 and 4 were the accused persons in the Resident Magistrates Court. They made no decision which could have been the subject of

a judicial review. It ought to have been clear that they should not be made party to this application.

[60] They have become participants in an application which, even if successful, could not have required any action by any of them. In those circumstances in my view indemnity costs become appropriate.

Disposition

[61] In these circumstances therefore I award costs to each respondent for one counsel each to be agreed or taxed save for the specific costs which had been awarded to the applicant against the 1st respondent on December 9, 2014 those costs having been limited to the costs of counsel reviewing the 1st respondent's submissions filed and served on December 8, 2014.The costs are on an indemnity basis as it concerns the 2nd, 3rd and 4th respondents.