[2012] JMSC Civ. 184

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2011 HCV 08015

BETWEEN	**RAZIEL OFER**	**CLAIMANT**
AND	**GEORGE THOMAS**	**1st DEFENDANT**
AND	**GEORGE THOMAS & CO**	**2nd DEFENDANT**
AND	**CECIL ANTHONY BIRD**	**3rd DEFENDANT**
AND	**RON STANECKEY**	**4th DEFENDANT**
AND	**DAVID LEIBOVITZ**	**5th DEFENDANT**
AND	**JOHN B. CHUCK**	**6th DEFENDANT**
AND	**THE VILLAS-NEGRIL LIMITED**	**7th DEFENDANT**
AND	**FROLIC RESORT LIMITED**	**8th DEFENDANT**

IN CHAMBERS

HEARD: By way of written submissions in August-September 2012 when representation was as follows:

Mr. Maurice Manning and Mr. Weiden Daley instructed by Hart, Muirhead Fatta for the Claimant.

Mrs. Georgia Gibson-Henlin instructed by Jacqueline Samuels-Brown for the 1st and 2nd Defendants.

Mr. Keith Bishop instructed by Mr. Austin Francis of Banjoko, Francis & Co for the 3rd Defendant.

Mrs. Nicole Foster-Pusey for the 6th, 7th and 8th Defendants.

JUDGEMENT DELIVERED: 19th December 2012 by email as follows:

Claimant –raz.ofer@woogo.com; raz@woogo.com

1st and 2nd Defendants- firmlaw@cwjamaica.com; mhenlin@henlin.pro

3rd Defendant –ab@banjokofrancislaw.com

6th,7th,8th Defendants –elizabeth.salmon@rattraypatterson.com

Courtesy copy emailed to: mmanning@nsd.com, wodaley@hmf.com.jm, nfoster-pusey@cwjamaica.com

MANGATAL J:

PRACTICE & PROCEDURE-COSTS-WHETHER TO BE TAXED IMMEDIATELY - WHETHER SPECIAL COSTS CERTIFICATE TO BE GRANTED

[1] By way of a Notice of Application filed April 17th, 2012, the Claimant had sought the further extension of a freezing order. The application was heard *inter-partes* over thirteen (13) days. On the 31st of July 2012, I dismissed the Claimant's Notice of Application with costs to the 1st, 2nd, 3rd and 6th-8th Defendants to be taxed if not agreed. After Judgement was handed down, the Defendants sought the Court's permission to have the costs taxed forthwith. I invited Counsel on both sides to provide written submissions on the issue. Counsel for the Claimant and the Defendants made detailed written submissions on whether the Costs should be taxed immediately which I now address.

[2] Since the submissions were presented, there have been certain changes. Firstly, on the 14th day of November 2012, on the application of the firm of Hart, Muirhead Fatta who had represented Mr. Ofer during the hearing, an order was

made allowing them to remove their names from the record as appearing for the Claimant. Also the firm of Rattray, Patterson, Rattray filed a Notice of Change of Attorneys and now represents the 6th, 7th & 8th Defendants.

FIRST DEFENDANT SUBMISSION

[3] On behalf of the First Defendant, Mrs. Gibson-Henlin submitted that this matter presents special circumstances which would justify the Court ordering that costs be taxed immediately. While accepting that this was not an application for security of costs or for enforcing the undertaking as to damages, the First Defendant urged the Court to consider certain factors peculiar to the Claimant which would support the view that immediate taxation of the costs awarded was necessary. At paragraph 14 of the First Defendant's submission, it was pointed out that the Claimant resides outside the jurisdiction and apart from the disputed property in question; there are no other assets within the jurisdiction to secure costs. There has also not been any order for security for costs. This, the First Defendant submitted can have implications for the payment of the Costs already incurred and impact how costs to be incurred are to be treated. It was also argued that there is evidence that the Claimant cannot be personally reached for enforcement of any costs orders. It was therefore submitted that the true test of this proposition would be in the Defendant's ability to attempt to recover such costs that had already been incurred. Relying on the dicta of Brooks J (as he then was) in the Supreme Court decision of **Michael Distant and Anor. v Nicroja Limited and Anor.**, Claim No. 2010 HCV 1276 delivered 8 March 2011,

the First Defendant argued that these factors discussed above lend a degree of uncertainty to the Defendant's ability to recoup his costs.

[4] At Paragraph 19 of the First Defendant's submission, it was argued that misconduct is a factor that the Court takes into account in determining whether to grant cost orders as also the manner in which the Claimant or a party conducts the litigation. It was the First Defendant's submission that the Claimant had misconducted himself not only in the averments on the *ex parte* application, but also in the oppressive manner in which it policed the orders being granted. These circumstances the First Defendant submitted justifies that the order for Costs be taxed immediately.

6th-8th DEFENDANTS SUBMISSION

[5] Mrs. Foster-Pusey, then Counsel for the 6th-8th Defendants, noted that pursuant to Rule 65.15 of the Civil Procedure Rules ("CPR') the Court has a discretion as to whether to order that costs be taxed immediately. It was also observed that there were no specific considerations outlined for the court to take into account in determining the manner in which this discretion should be exercised. However, it was their submission that the case at bar presents special circumstances which would persuade the Court to exercise its discretion favourably.

[6] Counsel for these Defendants looked at the length of time over which the hearing of the application was conducted and the extensive preparation and time involved. The Defendants argued that extensive costs would have been incurred in responding to the application. Reliance was also placed on the decision of

Brooks J in the case of **Michael Distant and Anor. v Nicroja Limited and Anor.** in urging this Court to take into account the costs that were incurred in the application as a basis on which to order the immediate taxation of costs. It was also submitted that in light of the complexity of the claim, economic practicalities demand that the 6th-8th Defendants be compensated now for the costs of the freezing application, as against awaiting the determination of the claim which may well take years to be concluded with the incurring of further legal costs.

[7] It was argued by Counsel that since the Court found that there was no good arguable case against the 6th-8th Defendants, the Application by the Claimant was therefore inappropriate and unwarranted and caused the Defendants in question to endure great pressure mentally and financially in responding to the Application.

[8] The 6th-8th Defendants also relied on the fact that the Claimant resided overseas and his inability to come to Jamaica because of his immigration status as a basis on which the Court should grant the order being sought. The Defendants argued that the Claimant gave an undertaking to the Court in applying for the freezing order and like the First Defendant, felt that it was appropriate to test the Claimant's will to indemnify the 6th-8th Defendants for the expenses incurred in the course of this unwarranted application as against requiring them to await the determination of the claim.

CLAIMANT'S SUBMISSION

[9] After looking at the rationale for Rule 65.15, Mr. Manning and Mr. Daley, then appearing for the Claimant, submitted that the Defendants had not presented any special circumstances for the Court to depart from the general rule of having costs taxed at the conclusion of proceedings. The Claimant attacked the Defendant's argument that the length of time of the hearing of the application justifies the Court's departure. In response, the Claimant submitted that immediacy of taxation does not arise from a long hearing *per se* and the Defendants have not cited any authority to the contrary. Further the Claimant pointed out several reasons which accounted for the protracted period of the application. These include, the number of parties involved in the application, the differences in the schedules of counsel and the Court as well as the fact that certain preliminary applications and issues had to be addressed.

[10] The Claimant also sought to discredit the Defendants' argument that the Court ought to consider the amount of costs incurred when exercising its discretion. The Claimant commented on the reliance of the Defendants on the Judgement of Brooks J which alluded to this particular issue and submitted that the Defendants were ignoring the fact that Brooks J mentioned the significant costs there only in making the point that the receiving party should not be out of pocket for the significant costs incurred during the stay of proceedings which was unlikely to be lifted. It was posited that no such consideration applies here as there is no stay or appeal. Further the Claimants argued that the relevant costs are grossly exaggerated by the Defendants, since it was their inadvertence in several

regards which led to them having to file additional affidavits. Additionally, the Claimants argued that the relevant costs are restricted to the application and do not relate to the entire proceedings. Therefore, the 6th-8th Defendants submission upon the number of pleadings read, prepared and responded to are grossly exaggerated since much of the costs incurred in these proceedings are not covered by the costs order made on July 31st, 2012.

[11] The Claimant also challenged the 1st Defendant's allegation of oppression as a basis for the Court ordering the immediate taxation of costs. At paragraph 16 of his written submission, the Claimant argued that this allegation is without substance. The Claimant made reference to the fact that the 1st Defendant had for several weeks failed to disclose his assets at all to the Court or the Claimant and thus neither the Court nor the Claimant were in a position to assess which of the 1st Defendant's assets would be required to meet the limit of the freezing order. It was argued that it was the Claimant, having made certain investigations that brought the requisite information by way of affidavit to the attention of the court. The Claimant further argued that the fact that the injunction was discharged is irrelevant to the merit of this submission, since the conduct and or actions of the Defendants must be considered not only at taxation but also on an application for immediate taxation.

[12] At Paragraph 16, the Claimant also made reference to examples of misconduct of the Defendants in the proceedings. Reliance was placed on paragraph 7 of the 1st Defendant's submission where it was stated there that the 1st Defendant was not seeking to deny "error" on his part. The Claimant referred to the 3rd

Defendant's failure to comply with disclosure orders and the 6th Defendants filing several incomplete affidavits of assets as examples of the misconduct on the part of the Defendants.

[13] As it relates to the issue of the Claimant residing overseas and the need for immediate taxation, the Claimant submitted that this argument was *non sequitur* as immediate taxation cannot test recoverability any better than delayed taxation. The Claimants argue that what the 1st Defendant is seeking is security for costs before his application for security for costs is even heard.

[14] In rounding out its submission on this issue of immediate taxation, the Claimant pointed out that the parties are scheduled to proceed to automatic mediation and contention on taxation would not further that process and is likely to be an obstacle.

RESOLUTION OF THE ISSUES

[15] Rule 65.15 of the Civil Procedure Rules ("CPR") states:-

"The General Rule is that the Costs of any proceedings or any part of the proceedings are not to be taxed until the conclusion of the proceedings, but the Court may order them to be taxed immediately."

The Claimants in their submission opined on the rationale for the principle that costs should not be taxed until proceedings have been concluded. They reasoned that this principle serves to prevent the Taxing Master from becoming too overwhelmed with taxation hearings, which would result in the system becoming further backlogged. The First Defendant and the 6th-8th Defendants urged the Court to allow the immediate taxation of cost as a test to assess the

Claimant's will to indemnify the Defendants for the expenses incurred. It is my view that rule 65.15 was not formulated with that intention in mind. Whilst I appreciate that the practical effect of costs not being taxed immediately in the general run of cases, may have the desirable effect of not adding to the burdens of the taxing master, I do not think that is a direct objective of the Rule. The real rationale behind the rule must have been to assist litigants in recouping expenses in circumstances where it would have been difficult or inconvenient for such litigants to wait until proceedings have culminated. An example of such a situation would be where the financial outlook of a party becomes uncertain while proceedings are underway (such as where one of the parties to the suit is a company that has suddenly gone into liquidation). Another example would be where a Defendant succeeds in an application to have a claim struck out against him, leaving other Defendants in the matter. In such situations, it may be appropriate for an order for immediate taxation of costs to be made.

[16] Counsel for the 6th-8th Defendants rightly submitted that Rule 65.15 gives the Court a discretion in determining the cases in which the court will order that costs be taxed immediately. Rule 65.15 provides no guidance on how the Court ought to exercise its discretion in this regard. I will therefore have to look to case law to see how this particular matter has been resolved judicially.

The Need for Special Circumstances

[17] In the Court of Appeal decision of ***Pan Caribbean Financial Services Ltd v Robert Cartade and other [2011] JMCA Civ 2 (28th January 2011),*** which was cited by Counsel for the 6th-8th Defendants, it was stated there that when the

Court is faced with the issue of deciding whether to order that costs be taxed immediately, it ought to consider whether there are any **special circumstances.** The Court is therefore required to look at the particular facts of each case to determine if there are exceptional features of the case which would warrant the Court ordering that Costs be taxed forthwith.

Misconduct

[18] In the instant case, the Defendants have argued several bases on which the Court can find that special circumstances exist; misconduct being one of them. The First Defendant in its submission argued that the Claimant had misconducted himself not only in the averments on the ex parte application but also in the oppressive manner in which it policed the orders granted. In the Supreme Court decision of ***Michael Distant and Anor. v Nicroja Limited and Anor.*** Brooks J held that while misconduct may be a factor to be considered when determining whether there should be an order for immediate taxation, it is not an essential element for such an order to be made. Similarly, in the Court of Appeal decision of Pan ***Caribbean Financial Services Ltd*** Harrison JA also agreed that 'misconduct" is not a *sine qua non* for an order for immediate taxation to be made.

[19] While misconduct is not a crucial element for the Court to consider when deciding on the question of whether to allow costs to be taxed immediately, it does seem that it forms part of the overall context which the Court has to assess. To my mind, for misconduct to have any significant weight in the exercise of my

discretion, the conduct complained of must have been a flagrant abuse of the Court process having regard to the circumstances surrounding the application. At paragraph 24 of my judgement that was delivered on July 31st, 2012, I had commented on the Claimant's failure to disclose relevant matters both at *the ex parte* hearing and overall throughout the said Notice of Application. I had also indicated that neither the Defendants nor the Claimants emerged from the various transactions, "smelling of roses" or with any halos intact. However, on balance, I think that the Claimant's manner of involvement in the proceedings to date, and it being him who instigated this application, are matters to be taken into account in this case.

Cost Incurred

[20] Both the First Defendant and the 6th-8th Defendants urged the Court to consider the significant cost incurred in this application as a basis to make an award for immediate taxation of costs. In support of this, reliance was placed on the dictum of Brooks J in **Michael Distant and Anor. v Nicroja Limited and Anor.** In that case, Brooks J took into consideration the significant costs incurred, in light of a stay pending the adjudication of proceedings in a foreign court. The Learned Judge felt that having regard to the extensive research and submissions that were made, economic practicalities that the issue of costs be dealt with forthwith rather than await a resolution in a foreign court. The uncertainty of the situation caused Brooks, J. to consider the significant costs that had been incurred. The

significant costs was not of itself individually considered, but was paired with other issues.

[21] As previously stated, on the 14th of November 2012, an order was made that the firm of Hart, Muirhead Fatta be removed from the record of proceedings as acting for the Claimant. There has been no indication on the file of any new legal representation on behalf of Mr. Ofer, the Claimant. Further, the Claimant did not attend the hearing of the application to remove name. Indeed I bear in mind his immigration status which was at different stages of the matter relied upon as a basis for the Claimant's inability to attend court in Jamaica. The Claimant now being unrepresented creates a situation of uncertainty in this case. The Defendants are potentially left in limbo as to the direction in which the case will now proceed and the time it will now take to resolve the issues in dispute. Harrison JA in ***Pan Caribbean Financial Services Limited*** suggested that the Court has to consider whether it is fair and just in all the circumstances to make an order for the immediate taxation of costs. The Application for which the costs order were made was heard over several days and involved a substantial amount of industry on the part of both counsel for the Defendants and the Claimants. The Claimant did not come to this court, and has not made this application for a freezing order with clean hands. By seeking a freezing order the Claimant was attempting to have the court impose what is by its nature an extraordinary restriction on the Defendants. Given the turn of events and in all circumstances, including the uncertainty surrounding the Claimants own representation, in my judgment fairness would require that the Defendants be allowed to tax the costs

immediately, rather than having to do so at a later date when the matter might be resolved.

Special Costs Certificate

[22] The First Defendants as well as the 6th-8th Defendants have made applications in their submissions for the Court to grant special costs certificates. I will look at this issue raised by the Defendants briefly. Rule 64.12 of the CPR sets out the criteria for granting special costs certificates. These being: (a) whether the application was or was reasonably expected to be contested; (b) the complexity of the legal issues involved in the application and (c) whether the application reasonably required the citation of authorities and skeleton arguments. The Claimant is indeed correct in asserting that these criteria are cumulative in effect and must all be satisfied.

[23] Any application involving a freezing order is likely to be a contested one and in this case it was one that was vigorously opposed and defended by both sides. The issues arising from this application were sufficiently complex and this is manifested in the varied and detailed submissions by counsel on all sides. The Notice of Application in question certainly required the filing of legal authorities and arguments to properly assist the Court. I therefore have no difficulty in granting the Defendants an order for special costs certificates.

[24] I therefore make the following orders:

(1) Costs ordered on the 31st Day of July 2012 are to be taxed immediately.

(2) Special Costs Certificates are granted to the 1st, 2nd, 3rd and 6th-8th Defendants.