IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2022CV00892

BETWEEN	**STEVEN SYKES**	**1ST CLAIMANT**
AND	**LYNDEN NUGENT**	**2ND CLAIMANT**
AND	**KINGSTON AND ST ANDREW MUNICIPAL CORPORATION**	**1ST DEFENDANT**
AND	**NATURAL RESOURCES CONSERVATION AUTHORITY**	**2ND DEFENDANT**
AND	**THE TOWN AND COUNTRY PLANNING AUTHORITY**	**3RD DEFENDANT**

HEARD ON PAPER

Messrs Gavin Goffe & Matthew Royal instructed by Myers, Fletcher & Gordon for the Claimants

Mrs Rose Bennett-Cooper & Ms Sidia Smith instructed by the Bennett-Cooper Smith for the First Defendants

Mr Matthew Ricketts instructed by Morjorn Wollock for the Second and Third Defendants.

Mr Maurice Manning K.C. and Ms Allyandra Thompson instructed by Nunes, Scholefield, DeLeon & Co for the Interested Party.

Heard: July 31 & September 21, 2023

Costs – Whether parties acted unreasonably in their conduct of the claim – Amended fixed date claim filed without permission of court is unreasonable – Breach of duty of candour is unreasonable – Breach of duty not to be selective is unreasonable

Wint-Blair, J

[1] On July 10, 2023, judgment in the case of **Steven Sykes & Lynden Nugent v Kingston & St. Andrew Municipal Corporation, The Natural Resources Conservation Authority and The Town and Country Planning Authority**[1] was handed down. The court invited submissions on the proper order as to costs. The court indicated that it would consider any submissions on paper. Both defendants and Digicel failed to comply with the order of the court as to the time for the filing of submissions on costs. This is the decision of the court having heard from the parties on paper.

[2] The claimant submits that the proper costs order to be made in the claim should be:

1. *Costs to the claimant against the first defendant and Digicel (Jamaica) Limited, to be taxed if not agreed.*

2. *No order as to costs as between the claimants and the second and third defendants.*

[3] The claimants rely on rule 56.15(4) and (5) of the Civil Procedure Rules (CPR) which state:

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[1] [2023] JMSC Civ 122

> *4) The court may, however, make such orders as to costs as appear to the court to be just including a wasted costs order.*
>
> *(5) 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."*

[4] The claimants cited the Privy Council case of **Toussaint v Attorney General of Saint Vincent and the Grenadines**[2] as well as the **University of Technology v IDT & UAWU**[3] in support of their submissions.

[5] In **Toussaint v AG**, the trial judge ordered that the costs of the Attorney General's successful application to strike out should be in the cause. This order was set aside by the Court of Appeal which referred to Rule 56.13 of the East Caribbean Civil Procedure Rules 2000 governing administrative law applications. Paragraphs (4) and (6) of Rule 56.13 provide:

> *"(4) The judge may make such order as to costs as appear to the judge to be just.*
>
> *(6) 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."*

[6] The Court of Appeal directed that there be no order as to costs in the court below or on the appeal. The Board did not agree, and in interpreting Rule 56.13(6) said

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[2] [2007] UKPC 48

[3] Claim No. 2009 HCV 1173

that the rule was a provision intended to facilitate administrative law applications, not to deprive a successful litigant against the State or the ordinary award of costs in his favour. The application to strike out was a discrete application which had failed. The cost orders were set aside, and the order of the Board was that the Attorney General pay the costs of the claimant in the High Court, the Court of Appeal and the Board with the assessment remitted to the Court of Appeal if not agreed.

[7] In the case of the **University of Technology v IDT**, Mangatal, J (as she then was), reviewed rules 56.15(4) and (5) applied the reasoning in the case of **Toussaint** to the interpretation of the above stated rules in awarding costs 75% to the claimant and liability for the payment of those costs should be shared between the defendants 50% to the IDT and 25% to the Union.

[8] As against the KSAMC, the claimants cited the case of **Branch Developments v IDT & UAWU**[4] in which the Court of Appeal considered the appropriate award to be made on appeal and at first instance following a successful appeal in judicial review proceedings. In that case Morrison, P writing for the court said that despite the fact that the proceedings were judicial review proceedings, the manner in which they were conducted was essentially adversarial. The learned President went on to state that the appellant having prevailed, an order for costs in its favour against both respondents was inevitable in both courts.

[9] The court of appeal also favourably considered the case of **R (John Smeaton on behalf of Society of the Protection of Unborn Children v The Secretary of State for Health and Others**[5] where Dyson, J (as he then was) said:

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[4] [2016] JMCA Civ 26

[5] [2002] EWCA 886 (Admin)

> *"The basic rule that costs follow the event ensures that the assets of the successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party. This is as desirable in public law cases as it is in private law cases."*

[10] Further, the court of appeal applied the reasoning of Brooke LJ, in the case of **Regina Davies v Birmingham Deputy Coroner**[6] :

> *"…(1) the established practice of the courts was to make no order for costs against an inferior court or tribunal which did not appear before it except when there was a flagrant instance of improper behaviour or when the inferior court or tribunal unreasonably declined or neglected to sign a consent order disposing of the proceedings; (2) the established practice of the courts was to treat an inferior court or tribunal which resisted an application actively by way of argument in such a way that it made itself an active party to the litigation, as if it was such a party, so that in the normal course of things costs would follow the event;(3) if, however, an inferior court or tribunal appeared in the proceedings in order to assist the court neutrally on questions of jurisdiction, procedure, specialist case law and such like, the established practice of the courts was to treat it as a neutral party, so that it would not make an order for costs in its favour or an order for costs against it whatever the outcome of the application…"*

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[6] [6] [2004] EWCA Civ 207; [2004] 1 WLR 2739

[11] The claimants contend that it was undoubtedly the successful party in the judicial review proceedings as it relates to the KSAMC. The court having ordered that the building permit issued be quashed. This entitles the claimants to an award of costs against the KSAMC. The claimants are members of a community relying on their own resources. The KSAMC is a publicly funded body, and the interested party is a multi-national corporation. Rule 64.6(3) is therefore applicable.

[12] It was further submitted that the claimants attempted to avoid litigation, meetings were scheduled, the first was cancelled by the KSAMC, the second was attended only by counsel for the claimants. The KSAMC maintained its stance throughout. It was submitted that as against the KSAMC, the claim was bound to succeed as there was defence to it on the facts or law.

[13] The claimants argued that as against Digicel, the latter stands liable for the claimants' costs. They rely on the **Utech** case which confirms that costs may be awarded against an interested party who plays a central role in the litigation albeit in support of the decision of another party. Similarly, in **Milex Security Services Ltd v the Industrial Disputes Tribunal and Wesley Gordon**[7] Nembhard, J, decided that a party directly affected was not shielded from an order as to costs. As Digicel joined cause with the KSAMC in defence of the impugned building permit it is now properly exposed to an order that costs follow the event.

[14] As against the second defendant, the claimants argue that the joinder was proper given the findings of the court and the correspondence available at the time the proceedings were commenced. There was material to support the view that the

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[7] [2019] JMSC Civ 102

second defendant had made a decision capable of review. The minutes of the meeting of the NRCA were only made available after an unless order was made by the court some six days prior to the commencement of the trial. The claimants submitted that it was reasonable for them to seek a determination by the court on the distinction between the approval of and the issuance of a permit as there was no reported precedent in Jamaica on the point.

[15] The second defendant also breached its duty of candour to the court despite being a public body. It failed to alert the court or the claimants to the fact that the planning decision was not its decision.

[16] The third defendant was joined as they too acted unreasonably in their response to the claim concerning the planning permit. The second and third defendants are represented by the same counsel. Their interest and position in the suit were aligned at all material times.

[17] The amendment to join the third defendant was in response to the affidavit of the second defendant filed on May 27, 2022, where it was disclosed for the first time that the third defendant considered the planning approval. The third defendant actively participated in the litigation process, reserving its opposition to the amended fixed date claim until the trial of the claim.

The First Defendant (The Kingston and St Andrew Municipal Corporation (KSAMC)

[18] The first defendant submits that cost orders are always discretionary. They rely on section 28E of the Judicature Supreme Court Act and rules 56.15 and 64.6 of the CPR.

[19] The first defendant cites the case of **Bradford City Metropolitan District Council v Eric Wilson Booth** in answer to the claimants' authorities. In that case, Bingham, CJ held that the court should not blindly apply the general rule that costs follow the event in matters involving public bodies. He summarised three propositions for the exercise of such a discretion, the first two are known to

our CPR and case law, the third which is relied upon by the first defendant is reproduced below:

> *"Where a complainant has successfully challenged before justices an administrative decision made by police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appear to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and (ii) the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged."*

[20] In the instant claim, it is submitted that the KSAMC made a decision having regard to the COVID-19 pandemic and that was acknowledged by the court at paragraph [95] of the judgment:

> "*[95] It cannot be in doubt that COVID-19 presented an emergency for the nation. The Disaster Risk Management Act was amended many times as a result of the threat posed by the pandemic. The need for increased telecommunications services then and now similarly cannot be in doubt or dispute."*

[21] The decision taken was in the public interest and the court made no findings as to dishonesty on the part of the entity, therefore no order as to costs should be made against it. A costs order may discourage the first defendant and other local authorities which may need to make and stand by honest, reasonable, and

apparently sound administrative decisions made in the public interest for fear of exposure to undue financial prejudice if the decision is successfully challenged.

[22] The first defendant succeeded against the claimants in its opposition to the amended fixed date claim form which was filed without permission of the court. The issue was determined in favour of the defendants at paragraph 61 of the judgment. The claimants, it was found, had failed to follow the proper procedure in amending the claim. The claimants had also been advised by the first defendant's affidavit of May 17, 2022, that it was not the first defendant who had granted planning permission, should have withdrawn the part of its case against the first defendant. Instead, it filed the amended fixed date claim form in blatant disregard for part 56 of the CPR.

[23] The first defendant attempted to avoid litigation in this matter. The claimants requested a meeting, and one was convened on March 4, 2022, at which Mr Xavier Chevannes, City Engineer was present. The uncontested evidence is that the first claimant and his counsel were also present, counsel was invited to state his objections which was refused, and this claim was instead filed.

[24] Having regard to the claimants' conduct, as indicated, there is a sufficient basis to displace the general rule (see **Branch Developments** supra). It is submitted that no order as to costs should be made against the first defendant.

Digicel Jamaica Limited

[25] The interested party cites rule 64.6 of the CPR and submits that there are many exceptions to the general rule that costs follow the event. The court will generally have regard to the conduct of the parties in the course of the litigation, whether or not (and if so, the extent to which) the need for the proceedings arose out of the default of either party, and whether or not the proceedings have served any substantive purpose.

[26] The court will not generally order an unsuccessful party to pay more than one set of costs. However, orders in relation to more than one set of costs may be made if an interested party (or intervenor) dealt with a separate issue not dealt with by the defendant or where each had distinct interests which justified separate representation.

[27] There was no joint campaign by Digicel and the KSAMC. Digicel exercised no control or authority in this matter and could not have directed the first defendant to concede or admit the claim as the first defendant was concerned with vindicating its process not protecting Digicel or the building permit it issued to Digicel, even if that was a consequence of the position it took.

[28] Digicel was not a party to the proceedings, nor was it ever added as an interested party. Its participation was limited though it had an interest in the outcome. Digicel was treated as having sufficient interest in the matter and given the opportunity to file and serve written submissions on all parties and to make oral arguments. The case of **Milex Security Services Limited** is distinguishable as Digicel filed no affidavits in this claim and its time for submissions was significantly limited in keeping with its role as a party with an interest in the proceedings but not a party to the proceedings. The submissions filed on its behalf raised no new or novel points of law requiring extensive research by the claimants' counsel. Digicel was not a directly affected party.

[29] The without prejudice correspondence of June 10, 2022, was made to all parties in furtherance of the overriding objective and with a view to resolving the issues without the need for protracted litigation. Notwithstanding the findings of the community survey. Digicel opted to engage the parties on whether the process could be re-opened under section 28(1)(b) of the Building Act of 2018 to enable the claimants and other members of the association to be heard. Further, no building works were commenced at 1 Aylsham Heights.

[30] In all the circumstances, Digicel should not be penalized for making a wholly reasonable proposal in circumstances in which it published the noticed on the land as required by the Act. It had no control over the regulators' internal deliberations and could not itself have revoked the building permit. This was acknowledged by the claimant's counsel in his response of June 10, 2022, where he said: "There being no breach by Digicel in that regard, there is nothing Digicel can do to cure it." The correspondence is not a concession on liability on the part of Digicel but was aimed at arriving at an acceptable compromise for all parties.

Discussion

[31] 56.15(4) and (5) of the CPR state:

> "(*4) The court may, however, make such orders as to costs as appear to the court to be just including a wasted costs order.*
>
> *(5) 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."*

[32] Parts 64 and 65 of the CPR apply to the award and quantification of costs. The award of costs may take several forms, and the court shall consider these rules in exercising its discretion.

[33] The general rule is that 'costs follow the event' as is set out in rule 64.6(1) of the CPR. This rule provides that if the court decides to make an order regarding the costs of any proceedings, it must order the unsuccessful party to pay the successful party's costs. The court may in its discretion make no order as to costs per rule 64.6(2). There are exceptions to this rule and its application is subject to the overriding objective of the CPR to deal with the case justly.

i) The first decision is whether or not the general rule should apply, or the order made at trial which was no order as to costs should stand. Pursuant to rule

64.6(3), in deciding whether to grant an order for costs, the court must have regard to all the circumstances in particular rule 64.6(4) which states:

> *(a) the conduct of the parties both before and during the proceedings;*
>
> *(b) whether a party has succeeded on particular issues (even if the party has not been successful in the whole of the proceedings);*
>
> *(c) any payment into court or offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with parts 35 and 36;)*
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> *(d) whether it was reasonable for a party*
>
> > *(i) to pursue a particular allegation and/or*
> >
> > *(ii) to raise a particular issue;*
>
> *(e) the manner in which a party has pursued-*
>
> > *(i) that party's case*
> >
> > *(ii) a particular allegation or issue*
>
> *(f) whether a claimant who has succeeded in his claim, in whole or part, exaggerated his or her claim and*
>
> *(g) whether the claimant gave reasonable notice of intention to issue a claim.*

[34] Rule 64.6(5) of the CPR permits this court to make several orders as to costs. It may order that a party pays, among other things: a proportion of another party's costs; costs relating to particular steps taken in the proceedings; and costs relating to a distinct part of the proceedings (see rules 64.6(5)(a), (e) and (f) of the CPR).

[35] The court must also be mindful of and apply the overriding objective to deal with the case justly in accordance see rules 1.1(1) and 1.2 of the CPR. The threshold test is a high one. It is for the unsuccessful party to show the good reason for the court to depart from the general rule.

The Claimants

[36] At trial, the claimants filed an amended fixed date claim without the permission of the court and did not include the original claim in its trial bundle. It was when the issue was raised by the defendants at trial that the court became aware that the amended fixed date claim was a nullity as the court's trial bundle commenced with the amended fixed date claim without more.

[37] The claimants said nary a word about this until the other side did so. The filing of the amended fixed date claim in this matter resulted in the court's displeasure at the manner of proceeding and resulted in precious judicial time spent on resolving an issue at trial, which should have been dealt with as a pre-trial application. Each defendant spent time defending the application and they were successful on this issue.

[38] Additionally, these were very adversarial proceedings despite being an administrative claim. There was not a complete victory for the claimants as they contend as in the eyes of the court, valuable judicial time was wasted by the manner in which they conducted their claim. The decision of the court pointed to the fact that the claimants' breach of rule 56.14 was not a mere procedural matter as it went to the root of the decision of the court.

[39] The amended Fixed Date Claim sought to join the third defendant to the claim and prayed a grant of certiorari to quash its grant of planning permission to Digicel. This was a substantial and not inconsequential amendment and a matter which falls under Part 56 of the rules. Compliance with rule 56.4(12) is mandatory. Judicial review claims are distinct from ordinary civil claims. Leave is required for an amendment of this nature and there was none. The claimants took a course which was impermissible.

[40] The submission of Mr Goffe that the court granted leave to challenge the planning permit in respect of the first defendant, necessitating the amendment as it was the defendant's evidence that the planning permit was granted by the third

defendant did not preclude the application from being brought before the learned Master who heard the application for specific disclosure and also could not have enjoined the trial court to grant permission for the amendment.

[41] The explanation given that the claimants were unaware that planning permission was granted by the Town and Country Planning Authority did not justify the manner of proceeding in either the pre-trial or trial phase. The permission of the court was required, it was not sought, the Town and Country Planning Authority was served and defended the claim in futility. In addition, the claimants did not advert the attention of the court to the circumstances which led to the amended fixed date claim or the fact of its having been filed at any stage.

[42] In terms of settlement discussions, the claimants requested a meeting, and one was convened on March 4, 2022, at which Mr Xavier Chevannes, City Engineer was present. The uncontested evidence is that the first claimant and his counsel were also present, counsel was invited to state his objections which was refused, and this claim was instead filed.

[43] The claimants' conduct in the pre-trial and trial period is viewed as unreasonable for the foregoing reasons. In the view of the court, the claimants cannot escape an order as to costs against them.

The First Defendant

[44] This entity while successful in having the amended fixed date claim ordered a nullity, breached its duty of candour to the court. The affidavit of Mr Xavier Chevannes filed on its behalf sets out facts which were false. The minutes of the meeting of the second and third defendant filed in this court did not contain the words COVID-19. Or emergency approval. Therefore, the submission still being made on behalf of the first defendant even now remains false and without merit. This court frowns on such conduct on the part of a public body and would hope that there is no repeat performance. The fact that the first defendant as a public body did not come to the court with clean hands is viewed as egregious.

[45] The first defendant relies on the judgment of the court which states that COVID-19 was an emergency, yet failed to refer to the next paragraph which clearly stated that the actions of the KSAMC in granting the building permit were outside of its governing statute. There was no emergency approval of Digicel's application noted in the minutes of the meeting of the second defendant. The court found that the decision to issue the building permit was invalid on the ground of procedural ultra vires.

[46] In this regard, the decision in **Bradford City Metropolitan District Council** does not avail the first defendant as it is not for a public body to put the court in the position to have to make a finding of dishonesty. Disclosure is not typically ordered in cases of judicial review, because the courts trust that public authorities will discharge their duty to the court. This duty is very high one and the first defendant by relying on affidavit evidence and making submissions which were false, fell short of the high standards of candour which are routinely adhered to by government departments faced with proceedings for judicial review.[8] The public authorities who make decisions in the public interest should have no fear of making them honestly and reasonably. The prospect of review by a court is always live.

[47] In that regard, the court having considered that the claimants are ordinary citizens who live in a community were reliant on their own resources for the prosecution of this claim. They tried to approach the KSAMC to settle the matter but were unsuccessful, the claim was filed and was both prosecuted and defended in an adversarial manner. The claimants ultimately prevailed. In all these circumstances it is open on the facts to find that there will be financial

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[8] R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1409 at [55]

prejudice on the part of the claimants in these circumstances. However, that is a burden they will have to bear given how the trial was conducted.

The Second Defendant (The Natural Resources Conservation Authority)

[48] The claimants were compelled to file an application seeking an unless order for compliance with the orders of the learned Master for the full minutes of the meeting of the second and third defendants. The full minutes had not been inspected as ordered. The second defendant's explanation did not go so far as to state why the issues raised on the application filed by the claimants and heard by this court as currently constituted on December 13, 2022, were not raised before the learned Master when she heard the application for specific disclosure.

[49] The pre-trial actions of the second defendant were found to have increased the litigation proceedings in this claim and reduced the available time of the court. The second defendant gave no thought to its position until after the orders of August 12, 2022, had been made. This was not the fault of the claimants nor of Digicel. On December 13, 2022, this court ordered that second defendant's statement of case stands struck out unless it complies with the orders of this court made on August 12, 2022, within one day of the orders made herein. The second defendant in its attempt to withhold the minutes, breached its duty not to be selective.

[50] At trial, the actions of the second defendant were not found to be invalid in all the circumstances. The court refused to grant the orders sought against the second defendant as the environmental permit had not been issued and was incapable of judicial review.

The Third Defendant (The Town and Country Planning Authority)

[51] At trial the claim was dismissed against the third defendant. Based on the judgment of the court, which sets out the conduct of the claimant with respect to

the third defendant, the claimants cannot successfully contest an award of costs to the third defendant.

Digicel Jamaica Limited

[52] I have erroneously referred to this entity in the judgment as the interested party and I am grateful for the submissions of Kings Counsel for the correction. I find that Digicel did not join with the defendants in this matter. The submissions made were on its own behalf as a body with sufficient interest in the proceedings.

[53] The record reflects attempts to meet and to engage in without prejudice discussions on the part of all the parties. Each maintained their stance; litigation was the inevitable outcome.

[54] The application of the overriding objective to the totality of the circumstances in this claim requires that the parties take the rules of court seriously and that those found to have acted unreasonably not derive a reward for increasing litigation and having taken intractable or unreasonable positions which ultimately led to a failure to do their duty to assist the court to further the overriding objective. As a result of the foregoing, the court makes the following orders.

[55] **Orders**:

1. Costs to the first, second and third defendants against the claimants to be taxed if not agreed.
2. Costs to the claimants against the first defendant to be taxed if not agreed.
3. No order as to costs against the second defendant.
4. No order as to costs against Digicel.

Wint-Blair, J