[2012] JMSC Civ 79

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2006 HCV 1847

No. 2 (COSTS)

BETWEEN	**DAVID WONG KEN**	**FIRST CLAIMANT**
AND	**JACK KOONCE**	**SECOND CLAIMANT**
AND	**DAVID WONG KEN (Representative of the Estate of Shirley Shakespeare)**	**THIRD CLAIMANT**
AND	**WESTERN CEMENT COMPANY LIMITED**	**FOURTH CLAIMANT**
AND	**NATIONAL INVESTMENT BANK OF JAMAICA**	**FIRST DEFENDANT**
AND	**CLARENDON LIME COMPANY LIMITED**	**SECOND DEFENDANT**
AND	**LIMESTONE CORPORATION OF JAMAICA LIMITED**	**THIRD DEFENDANT**
AND	**DR. VINCENT LAWRENCE**	**FOURTH DEFENDANT**
AND	**KIRBY CLARKE (Representative of the Estate of Horace Clarke)**	**FIFTH DEFENDANT**
AND	**CEZLEY SAMPSON**	**SIXTH DEFENDANT**
AND	**VINROY GORDON**	**SEVENTH DEFENDANT**

IN OPEN COURT

Lord Gifford QC, David Batts and Miguel Williams instructed by Livingston Alexander and Levy for the claimants

Charles Piper and Marsha Locke instructed by Charles Piper & Associates for the first defendant

Garth McBean and Teri-Ann Lawson instructed by DunnCox for the second, third and fifth defendants

May 9 and June 29, 2012

COSTS – RULE 64.6 OF THE CIVIL PROCEDURE RULES – WHETHER COSTS SHOULD BE REDUCED – WHETHER COURT SHOULD REDUCE COSTS ON ISSUE-BASED METHOD

SYKES J

[1] The main judgment was delivered in this matter on March 16, 2012 ([2012] JMSC 32). The question of costs was reserved until further order. This judgment deals with costs. The claimants now apply for the costs of the trial to be apportioned between the claimants and the defendants in proportion to the time spent on the respective issues and in particular on the issues on which the claimants succeeded and the defendants or any of them failed. The grounds on which this application is based are as follows:

a. the claimants partially succeeded on the issues that were before the court;

b. in such circumstances it would be just to apportion the costs based on the time spent on the respective issues.

[2] The claimants' basic proposition is that they succeeded on one aspect of the tort of misfeasance in public office against Mr Horace Clarke and also succeeded in establishing that National Investment Bank of Jamaica (NIBJ) owed a fiduciary duty to Western Cement Company (WCC) and breached that duty. This success, it is said, entitles them to have seventy five (75%) percent of their costs paid by the NIBJ, Clarendon Lime Company Limited (CLCL), Limestone Corporation of Jamaica (Licojam) and Miss Kirby Clarke who represents the estate of Mr Clarke who has died since the claim began.

[3] WCC's bold submission on the costs issue rests on the assertion that the misfeasance in public office and breach of fiduciary duty issues consumed most of the trial time. In addition, it was submitted that the lack of proper disclosure by CLCL prevented WCC from closing its case on March 4, 2011. This lack of proper disclosure, it was said, led WCC to apply, during the trial, for an order of specific disclosure of CLCL's minutes of board meetings. This prolonged the trial unnecessarily and should be taken into account when determining the costs payable.

[4] The claimants rely on paragraphs 209 – 211 of the decision of Munby J in **R (ota Watts) v Bedford Primary Care Trust, Secretary of State of Health** [2003] EWHC 2401 (Admin) (21st October 2003). This case produced two judgments: one on the substantive issues raised in a judicial review and the other on costs. To place his Lordship's costs judgment in perspective it is necessary to have regard to the facts and issues of the substantive case which is **R (ota Watts) v Bedford Primary Care Trust and anor** [2003] EWHC 2229 (Admin) (1st October 2003); [2003] All ER (D) 20 (Oct).

[5] The facts of the main judgment were that the claimant required a medical procedure but because of the long waiting lists of the National Health Service decided to seek treatment outside of the United Kingdom. She received the treatment. She then sought to recover the full costs of her treatment. Munby J concluded that under domestic law the claimant did not have a remedy (paragraph 43). The judge then considered her claim under human rights law and concluded that she had no remedy

there either (paragraph 55). Munby J then examined her claim under European Community Law and concluded that her basic contention that EU law applied to her case was correct but she failed on the facts.

[6] In the costs judgment Munby J ordered the Secretary of State to pay 35% of the claimant's cost. The reasoning was that the claimant has succeeded in establishing an important legal principle which would benefit future litigants albeit that the claimant failed on the facts. However, his Lordship did say that since the claimant lost overall she was not entitled to recover her full costs but the costs orders should reflect the success on the various issues in the case. Reasoning by analogy, the claimants in the case before this court submit that a similar principle ought to be applied to them.

The controlling rule of the Civil Procedure Rules

[7] The relevant rule of the Civil Procedure Rules (CPR) is rule 64.6 which reads as follows:

> *(1) If the court decides to make an order about the costs of the proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.*
>
> *(2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.*
>
> *(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 –*
>
> > *(a) the conduct of the parties both before and during the proceedings;*
> >
> > *(b) whether a party has succeeded on particular issues, even if that 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);

(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

(iii) a particular issue

(f) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his or her claim; and

(g) whether the claimant gave reasonable notice of intention to issue a claim

(5) The orders which the court may make under this rule include orders that a party must pay –

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings;

(g) costs limited to basic costs in accordance with rule 65.10; and

(h) interest on costs from or until a certain date, including a date before judgment.

(6) Where the court would otherwise consider making an order under paragraphs (5) (c) to (f), it must instead, if practicable, make an order under paragraphs 5 (a) or (b).

[8] This rule makes it clear that the usual rule is that the unsuccessful party pays the costs of the winning party. However, that general rule may be departed from in an appropriate case. In determining whether to depart from the usual rule the court must have regard to the matters set out in the rule and in particular rule 64.6 (3) and (4). The issue, then, is whether the normal rule stated in rule 64.6 (1) should apply in this case.

Analysis of the evidence and submissions

Costs in favour of the first three claimants

[9] The court must say that in respect of the first three claimants, it is difficult to avoid the application of the normal rule for a number of reasons. First, the case of the first three claimants never alleged, against any of the defendants, with any degree of particularity any injury done to them which would be actionable. This was not surprising given the way in which the case was eventually projected. The first three claimants were shareholders in WCC. In the normal course of things, shareholders do not have the locus standi to bring an action against persons who are alleged to have injured the company.

[10] It was submitted on behalf of the first three claimants that the omission to specify with any particularity the specific conduct engaged in by the defendants which may have caused injury to the first three claimants did not prejudice the defendants in any significant way since the core of the case was always and remained the injury allegedly suffered by WCC. This court takes the view that this is not the appropriate way to examine the matter. The fact of the matter is that the defendants had to retain counsel thereby incurring significant costs. Counsel for the defendants would have had to have done legal research and combed the pleadings carefully to make sure that the allegations did not reveal any valid claim against the defendants. Also, there was nothing to prevent the claimants from seeking to amend their claim at any time before trial to make specific allegations against the defendants. The defendants were forced to maintain, as it has turned out, unnecessary vigilance lest the first three claimants changed tack and amended the pleadings in order to allege, with appropriate specificity, the acts or omissions of the defendants that amounted to the pleaded causes of actions or some other allegation. The defendants could not rest unless and until, they either obtained judgment in their favour against the first three claimants or the claimants formally discontinued proceedings against them.

[11] The claimants dropped the claim at the end of the evidence. It is not clear why the first three claimants pursued the defendants right to the end but it might have been a deliberate strategy by which they were hoping for a serendipitous moment that sometimes occurs during litigation, that is to say, a party may have a weak case but decides to press on in the hope that during trial something arises on which to rest the claim. If that happens then there may well be an application to amend the pleadings to accord with the evidence. This court must observe, however, that what has just been stated ought not to happen under the new regime of case management. As it has turned out the first three claimants had no case to begin with and ended with none.

[12] Second, this case went through the case management system. One of the goals of this system is that as more information is disclosed through the process of pleading, the filing of witness statements, disclosure and examination of documents as well as

preparing a statement of facts and issues, the parties will have their case under constant review so that they will know whether an issue is worth pursuing. They should be assessing the likelihood of success on the issue and how the success or lack of it will affect the ultimate outcome of the case. Had the first three claimants done this they would have discontinued proceedings against the defendants before the end of the trial. Their claim should have been struck out early in the day or at the very latest, at the pre-trial review when the case of both claimants and defendants should be well documented by way of pleadings, documents and witness statements. Alternatively, the first three claimants should have discontinued the claim. They ought to have abandoned the claim certainly by the pre-trial review, if not before. Unfortunately, this did not happen.

[13] Third, having re-read the opening speech of Lord Gifford QC, it will be seen that the court raised the query of whether what he had said in his opening applied to the first three claimants. The query was made because the opening gave the distinct impression that the case was really being pursued by WCC. Learned Queen's Counsel responded by indicating that he thought that it was arguable that if they suffered damage as a result of the conspiracy then they may have a claim. He also did take the point that normally the claim is made by the company. His final position was that he wished to leave it open 'as to whether we can maintain the claim for the individual.' Leaving it open has consequences such as costs.

[14] In all the circumstances of this case, this court cannot accede to the submissions of the first three claimants and therefore costs are awarded against them in favour of the first three defendants. In respect of the fourth defendant, the claimants have conceded that he is entitled to his costs. The sixth and seventh were not served and therefore not parties to the action.

WCC's costs claim against CLCL, Licojam and Mr Clarke

[15] The court now deals with the fourth claimant, WCC. The court will examine the case against Mr Clarke and his companies separately from the case against NIBJ. In light of what has been said so far, WCC was the only real claimant in the case. It did succeed in establishing, subject to appeals, that the conduct engaged in by Mr Clarke

while a member of the Cabinet can provide the factual foundation for the tort of misfeasance in public office. WCC also succeeded in establishing that Mr Clarke knew that he did not have the power to use public funds for private gain. To this extent, it may be said that an important legal principle has been established in Jamaica. The failure occurred at the second part of the mental element of the tort which is the intent to harm WCC or being reckless as to whether WCC was injured. The claim also failed on the causation issue. Lord Gifford also submitted that the approach in this case should be on an issue basis and the court should have regard to the significance of the issue and the time taken to establish it.

[16] The nature of the case against CLCL, Licojam and Mr Clarke was circumstantial. It relied on the interpretation of documents viewed in the context of a chain of events. There was no 'insider' who testified for the claimants. This approach meant that proof of the tort was not going to be easy.

[17] In the absence of evidence from someone within NIBJ supporting WCC's allegations, the circumstantial evidence would need to be compelling before the court would find the tort proved. The reason is that the tort of misfeasance in public office is a very serious allegation to make against a public official.

[18] At the best of times, the tort of misfeasance in public office is difficult to establish. A deliberate misuse of power is insufficient to establish the tort (paragraph 29 of earlier reasons for judgment). The double intent required, in the second form of the tort, will always be difficult to prove (paragraphs 28 and 73 of earlier reasons for judgment). It is also the case, that this tort has a very close affinity to dishonesty and fraud. It is as close to calling a public official dishonest as one could get without actually using the word. This is why the evidence to ground the tort needs to be strong (paragraph 29 of earlier reasons for judgment). While there is one standard of proof in civil cases it has been recognized that the more serious the allegations are the stronger the proof needs to be.

[19] It is the view of this court that WCC succeeded on that ingredient of the tort which would be relatively easy to prove (in comparison to the second part of the double intent). WCC proved the absence of lawful authority and knowledge that there was an absence of lawful authority. Having said this it must not be thought that what the claimant proved in this case was not without some degree of difficulty. There were no cases identified where a similar situation had arisen. In most cases there was usually a statute or regulation which clearly sets out what the public official is permitted to do. This case involved an extension of the law based on the underlying philosophy of the tort. Assuming the decision survives possible appeals an important point would have been made, namely, that even in the absence of a specific statute or rule, a public servant who uses public funds for private gain, without permission from the appropriate person, has done an act sufficient to ground the tort of misfeasance in public office since such conduct was found to be antithetical to the idea that a public servant has power to be used solely for the public good. It is in this regard that the judgment of Munby J on the issue of costs becomes important and is persuasive. This court is of the view that the costs order should reflect the success of WCC on this issue. The question is how is that to be reflected? The decision on this point will await further analysis of the law on the appropriate method of dealing with costs orders of the kind asked for by WCC.

[20] The other point raised by Lord Gifford concerning the late disclosure of minutes of CLCL's board meetings will be addressed at final disposition of the case.

WCC's costs claim against NIBJ

[21] The claim against NIBJ was that it had the intent to harm WCC and was part of a conspiracy to delay funding so that WCC would flounder and then go under. Since the allegations were being made against a company WCC should have appreciated that it would have to address its mind to the appropriate rules of attribution. That is WCC should have had asked itself whose conduct was to be attributed to the company to ground the conclusion that that person's conduct (act and intention) would be that of the company? Also in the context of this case where WCC projected its case on the

premise of collective action of NIBJ's board then consideration should have been given to whether it could actually be proven that a majority of the board shared the intention required by the tort of misfeasance in public office and made decisions based on the intention required by the tort.

[22] WCC sought to say that the act and intention of one director, namely, Dr Vincent Lawrence would be the person whose conduct would be attributed to the board. The difficulty with this proposition is that even if Dr Lawrence had the intention required by law, his action alone could not make the company liable because the board was made up of other individuals of whom there was no evidence that they acted in an improper manner. The earlier reasons for judgment identified objective reasons which would have caused any reasonable board of a financial institution to have reservations about extending further loans to a struggling borrower. There was no legal obligation on NIBJ to lend to WCC. Dr Lawrence's personal views, even if they were as WCC alleged, could not possibly be advanced as the position of the board in the absence of proof that the board adopted his views as their own and consequently those views became that of the institution. The reason for insisting on this is that WCC projected its case on the premise that the board declined to make the second loan to WCC because the board was part of a conspiracy to injure WCC. This would mean that the majority of the board (and therefore NIBJ) decided to withhold the loan from WCC on the basis alleged by WCC. The evidence of this was wholly lacking. If I may be permitted to refer to Lord Millett's observation in ***Three Rivers v Bank of England*** [2003] 2 AC 1. In that case, the claimants alleged that the Bank of England committed the tort of misfeasance in public office. Lord Millett stated that to accuse an institution like the Bank of England of committing the tort of misfeasance in public office requires wrong doing on a massive scale on the part of officers of the institution. These comments apply with equal force to NIBJ. This was a development bank tasked with the responsibility of lending to and supporting projects that met the Government of Jamaica's developmental goals. To make such an accusation of this nature with this kind of conduct means alleging wholesale corruption of the board of directors. Stating the matter in this way shows that success against the bank was going to require strong evidence. The case management

process is designed to force litigants to consider not just allegations which are easily made but address their minds to the practical matter of proof. As the old saying goes, in launching a claim it is not what you can allege but what you can prove.

[23] Regarding the breach of fiduciary duty, the problem was establishing that there was such a duty, that it was breached and there was damage caused by the breach. In this court's view, establishing the causal connection between breach of duty and damage was always going to be an uphill struggle for WCC. The reason for this is quite simply that the duty of loyalty owed by a fiduciary is not usually or easily found in borrower/lender relationships because the lender, by definition has an interest that is 'antagonistic' to that of the borrower. The lender is pursuing his interest and not that of the borrower. This is why the courts look for evidence that the lender has indicated that he has undertaken to act in the interest of the borrower. In the trial, WCC sought to establish that NIBJ was not only in a fiduciary relationship with WCC but breached that duty. WCC succeeded in establishing that NIBJ was in a fiduciary relationship with WCC only at the point that NIBJ appointed a director to the board of WCC. A director falls within the category of relationships from which the law readily infers a fiduciary relationship. WCC also proved that NIBJ after it became a director of WCC failed to make important disclosures. This was the only issue on which WCC succeeded against NIBJ. WCC failed to prove that this breach caused loss to WCC.

[24] The fact that NIBJ was in a fiduciary relationship with WCC at some point would still necessitate a close examination of the alleged duty owed and the specific duty said to have been breached. This flows from the very fact that not all breaches by a fiduciary amount to a breach of fiduciary duty. Thus from an evidentiary point of view it was relatively easy to place NIBJ within the presumptive fiduciary relationships once NIBJ appointed a director to WCC's board but time would still have to be spent scrutinizing the evidence to see if the other criteria for liability were met.

[25] WCC sought to have NIBJ declared a fiduciary from the time NIBJ began to process WCC's first loan application right up to the time the company collapsed. In the earlier judgment of this court, it was pointed out that the clear law was that ordinarily a

banker does not have a fiduciary relationship with his client unless he crosses the line from lender to something in the nature of confidante and close adviser or took a position that placed him within the category of presumptive fiduciary relationships.

[26] WCC was swimming against the tide when it pitched its case on the footing that the fiduciary duty existed from the moment NIBJ began examining the very first loan application. The claimants were relying on dicta from cases in which it was held that the categories of persons or instances which can give rise to fiduciary duty were not closed and that the circumstances of their case gave rise to a fiduciary relationship. This was the claimants' position even in the face of strong authority from Jamaica which indicated a very strong line against turning a lender into a fiduciary in the absence of special factors which would compel such a conclusion.

[27] When looked at in the round, to say that the claimants succeeded in the fiduciary issue while not wrong is a clear overstatement without knowledge of the full circumstances of this case and how it was presented. The claimants succeeded only at the point when NIBJ exercised the option of appointing a director to WCC's board. Evidentially, this did not require much since the documents spoke for themselves on this issue. The fact that NIBJ resisted this conclusion has to be looked at against the background that NIBJ was also resisting the conclusion that the breach, if any, caused damage. NIBJ was also resisting the over-broad approach advanced by the claimants.

[28] It could be said that NIBJ should have admitted that it was fiduciary from the time it became a director of WCC but this resistance by NIBJ was a minor 'sin' in comparison to the claimants' attempt to cast a wide fiduciary net and fix NIBJ with liability. In other words, the approach to the fiduciary issue by the claimants would necessarily have included relying on the appointment of a director and even if there were no such appointment, the claimants' case would still have been the same. This court is unable to discern any significant reduction of time or effort that would have followed if NIBJ accepted that it was fiduciary from the time of being appointed to WCC's board of directors. The causation issue would still have to be dealt with.

[29] Mr Piper makes the quite practical point that as it presently stands, WCC is actually in receivership. An order in the terms proposed by the claimant would be an order that NIBJ stand its own costs because NIBJ is actually standing the cost of the receivership.

[30] There is therefore no basis for me to reduce NIBJ's costs on the fiduciary issue.

Resolution

[31] In deciding the appropriate order this court will not use the issue-based method because that involves a methodology which makes the assessment more difficult. The taxing officer would have to appreciate the nature and importance of the issue in the case. This would undoubtedly consume more time and costs. An issue-based costs order would create undue problems for the taxing officer who would necessarily have to be read the pleadings, possibly the evidence as well as the reasons for judgment in the substantive matter, and then hear lengthy submissions on the importance of this or that issue. The taxing officer, in all probability, would need to reserve decision while a review of the material in light of the submissions is undertaken. This should be avoided where possible.

[32] This court respectfully adopts the following passage from **English v Emery Reimbold & Strick Ltd; DJ & C Withers (Farms) Ltd v Ambic Equipment Ltd; Verrechia (trading as Freightmaster Commercials) v Commissioner of Police of the Metropolis** [2002] 3 All ER 385. Lord Phillips MR said at [115]:

> *However, we would emphasise that the CPR requires that an order which allows or disallows costs by reference to certain issues should be made only if other forms of order cannot be made which sufficiently reflect the justice of the case (see CPR 44.3(7), above). In our view there are good reasons for this rule. An order which allows or disallows costs of certain issues creates difficulties at the stage of the assessment of costs because the costs judge will have to master the issue in detail to understand what costs were properly incurred in dealing with it and then analyse the work done by the receiving party's legal advisors to determine whether or not it was*

> *attributable to the issue the costs of which had been disallowed. All this adds to the costs of assessment and to the amount of time absorbed in dealing with costs on this basis. The costs incurred on assessment may thus be disproportionate to the benefit gained. In all the circumstances, contrary to what might be thought to be the case, a 'percentage' order (under CPR 44.3(6)(a)) made by the judge who heard the application will often produce a fairer result than an 'issues based' order under CPR 44.3(6)(f). Moreover such an order is consistent with the overriding objective of the CPR.*

[33] It was also emphasised by Simon Brown LJ in **Budgen v Andrew Gardner Partnership** [2002] EWCA Civ 1125 (31st July 2002) at [26] – [27]:

> ***[26]*** *For my part I have no doubt whatever that judges nowadays should be altogether readier than in times past to make costs orders which reflect not merely the overall outcome of proceedings but also the loss of particular issues. If, moreover, the "winning" party has not merely lost on an issue but has pursued an issue when clearly he should not have done, then there are two good reasons why that should be reflected in the costs order: first, as a sanction to deter such conduct in future; secondly, to relieve the "losing" party of at least part of his costs liability. It is one thing for the losing party to have to pay the costs of issues properly before the court, another that he should have to pay also for fighting issues which were hopeless and ought never to have been pursued.*
>
> ***[27]*** *By no means does it follow, however, that the judge should give effect to these considerations by making an issue based costs order rather than a percentage costs order. Indeed, quite the contrary, as r 44.3(7) makes plain.*

[34] These two passages emphasise, in the view of this court, that issue-based costs orders should not be the norm for the reasons stated by Lord Phillips. These reasons are very good ones. The order made should not, where possible, impose unnecessary costs on resolving the costs question. The two cases just cited do not compel an order based on percentage but show that that should be the preferred option. Rule 64.6 (5) indicates some of the orders that the court may make. It should be observed that the rules says that the orders 'the court may make **include'** (emphasis added) and not 'the court may make only one or more of the following orders.' This means that if the court

considers it appropriate the court may make an order in terms of costs for a specified number of days.

Conclusion

[35] The court concludes that there should be some reduction of costs that CLCL, Licojam and the estate of Mr Clarke would receive. As stated earlier, subject to appeals, CLCL and Licojam were the corporate vehicles by which Mr Clarke put in motion his plan to benefit himself. There was also the delay by CLCL in producing the additional board minutes. This delayed the completion of the claimants' case. The court will use a percentage basis instead of the issue-based method because it will reduce the time and costs of the taxing of costs if they are not agreed.

[36] The court is of the view that there should be a ten percent reduction in costs payable to CLCL, Licojam and the estate of Mr Clarke. WCC did establish an important legal principle. CLCL and Licojam were necessary parties in order to show how the plan was created and implemented. Joining these two entities were also necessary to get over any issue of admissibility of evidence that may have arisen if only Mr Clarke and not the companies was one of the defendants. There was also the delay in CLCL producing the board minutes, albeit that the application for specific disclosure was made during the trial.

Disposition

[37]

a. The first three claimants are to pay the full costs of the first, second, third and fifth defendants;

b. WCC is to pay the full costs of NIBJ;

c. WCC is to pay ninety percent of the costs of CLCL, Licojam and the estate of Mr Clarke;

d. Claimants to pay full costs of fourth defendant.