

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.19 OF 2005

BETWEEN:

ERNESTO SORRENTINO

Appellant

and

[1] **PETER CLARKE**
[2] **THERESA CLARKE**

Respondents

Before:

The Hon. Mr. Brian Alleyne, SC
The Hon. Mr. Michael Gordon, QC
The Hon. Mr. Hugh A. Rawlins

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal

Appearances:

Mrs. Tana'ania Small-Davis for Appellant
Mr. John Carrington for the Respondents

2006: May 9;
July 3.

JUDGMENT

[1] **ALLEYNE, C.J. [AG.]:** This is an appeal, and a counter notice of appeal, on a costs order made by Master Cheryl Mathurin upon making an order for summary judgment in favour of the defendants in the action, the respondents on the appeal. The application for summary judgment was not contested save on the issue of costs.

[2] In the action both the appellants and the respondent were claiming ownership and title to a disputed portion of land lying along their common boundary, by way of claim and counterclaim. This dispute was resolved by due process under the relevant legislation, in favour of the respondents. The only matter which remained

for the court to resolve was the matter of costs in the proceedings before the court. Efforts by the parties to negotiate a settlement of that issue had been unsuccessful.

[3] Specifically, the appellant had sought in the claim an injunction, damages for trespass, special damages for destruction of property, further and other relief, and costs.

[4] It would be helpful in understanding the matter before us to quote from the learned master's written judgment on the proceedings before the court. She said at paragraph [6] of her judgment:

“On June 16th 2000, Benjamin J. prohibited both parties from entering the dispute (sic) property and stayed the proceedings pending the determination of the Registrar of Lands of the disputed boundaries. The Registrar determines the position of uncertain and disputed boundaries pursuant to the Registered Land Act Cap 229. The decision of the Registrar essentially concluded that the disputed land belonged to the defendants. On the June 10th 2002, the claimant filed a Notice of Appeal against the decision of the Registrar. Suffice it to say that Shanks J dismissed the appeal on the 21st July 2004 with costs to the defendants. The effect of this dismissal therefore was to reaffirm the decision of the Registrar that the disputed land belonged to the defendants and as a result it is clear that the claimant has no real prospect of succeeding on the claim herein and I accordingly rule that summary judgment be entered for the defendants.”

[5] The appellant argued before the learned master that he ought not to be ordered to pay costs, but that each party should bear their own costs. Neither the appeal nor the counter notice of appeal challenges the order in terms of liability for costs. Both appeal and counter notice relate to the quantum of costs, and the principles applied by the learned master in arriving at the sum awarded.

[6] The learned master held that, for the purposes of costs, the value of the claim should be the value of the property encroached upon, and that costs should be awarded to the respondents separately on both the claim and the counterclaim, in equal amounts of \$9,460.00, yielding a total sum of \$18,920.00.

- [7] The appellant appeals on three grounds, which I will seek to summarise.
- (1) the master erred in determining the value of the claim under rule 65.6 at a time when the case management conference had already been held.
 - (2) the master erred in failing to apply a value of \$50,000.00 to the claim in keeping with rule 65.5.
 - (3) the master erred in awarding costs separately for the claim and the counter claim.
- [8] The sole ground of the respondent's counter notice is that the master in the exercise of her discretion failed to consider or give appropriate weight to the fact that the proceedings before the High Court had reached the stage of trial and thereby erred in making the award that she did.
- [9] Rules 65.5 and 65.6 are in the following terms:

Prescribed costs

65.5 (1) The general rule is that where rule 65.4 does not apply and a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Appendices B and C to this Part and paragraphs (2) to (4) of this rule.

- (2) In determining such costs the value of the claim is –
- (a) in the case of a claimant – the amount agreed or ordered to be paid;
 - (b) in the case of a defendant –
 - (i) the amount claimed by the claimant in the claim form; or
 - (ii) if the claim is for damages and the claim form does not specify an amount that is claimed – such sum as is agreed between the party entitled to, and the party liable for, the costs or, if not agreed, a sum stipulated by the court as the value of the claim; or
 - (iii) if the claim is not for a monetary sum – the amount of EC\$50,000 unless the court makes an order under rule 65.6(1) (a).

(3) The general rule is that the amount of costs to be paid is to be calculated in accordance with the percentages specified in column 3 of Appendix B against the appropriate value.

- (4) The court may –
 - (a) award a proportion only of such sum having taken into account the matters set out in rule 64.6(4) and (5); and
 - (b) order a party to pay costs –
 - (i) from or to a certain date; or
 - (ii) relating only to a certain distinct part of the proceedings, in which case it must specify the proportion of the fixed costs which is to be paid by the party liable to pay such costs and in so doing may take into account the table set out in Appendix C.

Applications to determine value of claim for purpose of prescribed costs

65.6 (1) A party may apply to the court at a case management conference
(a) to determine the value to be placed on a case which has no monetary value; or

(b) if the likely value is known, to direct that the prescribed costs be calculated on the basis of some higher or lower value.

(2) The court may make an order under paragraph (1) (b) only if it is satisfied that the costs as calculated in accordance with rule 65.5 are likely to be either –

- (a) excessive; or
- (b) substantially inadequate;

taking into account the nature and circumstances of the particular case.

(3) If an application is made for costs to be prescribed at a higher level, rules 65.8(4)(c) and 65.9 apply.”

[10] Although the claim included a claim for an unspecified sum for damages, and the learned master made an order for directions for the assessment of damages, we were informed that no steps have been taken in that regard and counsel for the respondent indicated that he had no instructions to pursue that aspect of the claim. Rule 65.5(2)(b)(ii) appears to authorise the court to stipulate a value for the purposes of determining the costs. That particular rule does not specify when such stipulation may be made by the court, nor does it explicitly prohibit the making of such stipulation on any particular occasion. However, the learned master did not apply that rule, but determined the value of the claim pursuant to rule 65.6(1)(a).

- [11] I think there are two questions to be determined; first, whether the learned master was wrong in the exercise of her discretion regarding costs at the stage at which she did so, in that she failed to give appropriate weight to the fact that the proceedings had reached the stage of trial (the counter-notice of appeal); and second, whether the learned master was wrong in fixing the value of the claim on the basis of the value of the disputed portion of land (the notice of appeal).

At what stage may the value of the claim be determined?

- [12] Part 65.6 is the rule which provides for the determination of the value of the claim. The rule provides that a party may apply at a case management conference for such a determination. In this case the determination of the costs was made upon an application for summary judgment, which did not, on the face of the order made, bring the proceedings to an end. The learned Master ordered that the matter be fixed for directions for the hearing of an assessment of damages.
- [13] Learned counsel for the respondent cited Part 15.6 of CPR 2000, relating to the powers of the court on an application for summary judgment. The rule makes clear, in sub-rule (b), that “if the proceedings are not brought to an end the court must also treat the hearing as a case management conference”. This rule fortifies the submission by learned counsel for the respondent that a case management conference is not a single event in the course of the processing of a claim, but is a tool which enables the court to actively manage the trial at all stages, as necessary, pursuant to its duty to further the overriding objective, as stated in rule 25.1.
- [14] I have no difficulty in holding that the learned master acted entirely properly and within her powers under the Rules in determining the value of the claim for the purposes of prescribed costs at the stage of the proceedings she did. She, however, awarded costs ‘after defence and up to and including the case management conference’ under the prescribed costs rule, Appendix C (2) on a

value determined by her. The learned master failed to take account of the fact that the application for summary judgment was made when the matter came on for trial, and was not opposed. There was no proper basis, in my view, on which the learned master could have awarded costs otherwise than under Appendix C (5), that is to say costs to trial. The learned master could, of course, have exercised a discretion under rule 65.5(4), but did not purport to do so. In the circumstances I would allow the cross appeal, and order that the respondents are entitled to full costs in the court below.

Was the learned master wrong in determining the value of the claim on the basis of the value of the land?

- [15] The claim in this case was for special and general damages and for injunctive relief. The counterclaim was also for damages, a declaration of title and injunctive relief. In some respects at least, therefore, both claim and counterclaim fall within the provisions of Part 65.5(2)(b)(ii). Part 65.5(2)(a) has been pre-empted by the decision of the respondents not to pursue the learned master's order for an assessment of damages. The claim and counterclaim also potentially fall under Part 65.5(2)(b)(iii), insofar as they are substantially claims for injunctive and declaratory relief.
- [16] The question for determination on the notice of appeal is whether the learned master should have applied a value of the claim at \$50,000.00, or properly exercised a discretion to determine the value by reference to the value of the land on which the trespass occurred.
- [17] Included in the counterclaim was a claim for a declaration of title. However, this aspect of the claim was, properly, diverted to another forum which determined that title to the disputed land resides in the respondents to the appeal, the defendants in the action, in whose favour the costs award was made. The issue of title, at an early stage of the proceedings, ceased to be an issue for determination by the court. The remaining issues before the court were the factual question of

trespass, which ceased to be a serious contention once the issue of title had been resolved, injunctive relief, which naturally followed the title resolution, and quantum of damages. The value of the land, which, if it ever was an issue, ceased to be so on the resolution of the issue of title by an alternative appropriate forum, could in no way have been the value of the claim at the stage of the proceedings when the learned master made her order. It seems to me clear that the master was wrong in determining the value of the claim on that basis.

- [18] Learned counsel for the respondent submitted, on the authority of **Quillen v Harney Westwood and Reigels**¹ that in order to succeed on an appeal against the master's exercise of discretion, the appellant must show that the master was clearly wrong, and that she exercised her discretion under a mistake of law, in disregard of principle, or under a misapprehension as to facts, or that she took into account irrelevant matters. It seems to me that in this case, the issue of the title to the land having been long and separately disposed of by another competent tribunal and being no longer in issue in the litigation, the learned master was operating under a mistake in law in taking the irrelevant issue of the value of the land as the basis for determining the value of the case. The proper basis for determining the value of the claim in the circumstances of this case is the application of rule 65.5(2)(b)(iii), whereby a value of \$50,000.00 is derived. I would allow the appellant's appeal on this ground.

Costs of claim and counterclaim

- [19] The appellant appealed further against the decision of the learned master to order costs separately in respect of the claim and the counterclaim. Counsel submitted that the claim and the counterclaim were based on the same cause of action, and turned on the same issues of fact and law. Indeed, according to learned counsel, in their counter notice of appeal, the respondents seek an order that the order of the master be varied so as to award the respondents 'costs of the claim in the sum

¹ 58 WIR 147.

of \$17,200.00', which the appellant contends 'is properly calculated as the costs up to trial based on a value of \$66,000.00'.

- [20] Part 42.11 makes provision for costs of a claim and counterclaim in specific circumstances:

Cases where court gives judgment both on claim and counterclaim

42.11 (1) This rule applies where the court gives judgment for specified amounts both for the claimant on the claim and the defendant on the counterclaim.

(2) If there is a balance in favour of one of the parties, the court may order the party whose judgment is for the lesser amount to pay the balance.

(3) In a case to which this rule applies, the court may make against the claimant and the defendant (whether or not it makes an order under paragraph (2)) a separate order as to –
(a) costs; or
(b) damages.”

- [21] This case does not fall within the categories contemplated by that rule, nor have the parties argued for the application of any other special rule. This case involved a claim and a counterclaim, in each case for an injunction in respect of a portion of land claimed by each party, and for related other relief. The respondents succeeded on both the claim and the counterclaim, and were awarded prescribed costs separately in respect of both the claim and the counterclaim, under rule 65.5, except that the learned master was persuaded not to apply the general rule as stated in rule 65.5(2)(iii) in respect of the value of the claim, but proceeded instead to determine the value of the claim pursuant to rule 65.6 as the value of the disputed land, and awarded costs to the respondents based on that value, separately, in respect of both the claim and the counterclaim. The appellants challenge both the application of rule 65.6 to the valuation of the claim, a matter which I have already addressed in paragraphs 15 to 18 of this judgment, and the duplication of the costs award, in respect of both the claim and the counterclaim.

[22] Part 64.6 (1) states the general rule that where the court decides to make an order for costs, it must order the unsuccessful party to pay the costs of the successful party. Rule 64 does not specifically address the issue which arises in this case, but requires the court to have regard to all the circumstances. Part 64.6 sets out a number of matters to which the court must have regard in deciding who should be liable to pay costs. There is no issue raised in this case on liability to pay costs, only on the basis of quantification of those costs, in terms of value of the claim and counterclaim, and the issue of duplication.

[23] In my view, in the absence of any special rule applicable to the circumstances of the case the matter is governed by the general rule set out in part 65.5, which entitles the successful party to the costs of the proceedings, calculated in accordance with that rule. The rule does not contemplate duplicating costs in favour of a party who has been successful on both a claim and a counterclaim, save in so far as rule 65.8 has been applied and a budgeted costs order has been made. No such order was applied for or made in this case. The order for separate costs of the claim and counterclaim was in my view wrong and I would allow the appeal on this ground.

The counter-notice

[24] The respondent's counter-notice complains that the learned master in the exercise of her discretion failed to consider or to give appropriate weight to the fact that the proceedings before the High Court had reached the stage of trial in February 2004, well before the learned master's order. Learned counsel proceeded on the basis that the learned master awarded costs on the claim and counterclaim to the stage of summary judgment only.

[25] The learned master, in paragraph 11 of her judgment, indicated that she was calculating prescribed costs up to case management on the claim, and an equal amount on the counterclaim, based on a value of \$66,000.00 on each, yielding a

total of \$18,920.00, i.e. 55% of full prescribed costs on that value (Appendix C to part 65). As determined earlier, the learned master was clearly wrong in limiting costs to the stage of case management. The case had in fact gone well beyond that point and was ready for trial, when an application was made for summary judgment by the defendants/respondents, which was not opposed by the claimant/appellant. In my view the cross-appeal must be allowed.

[26] In the result, I would allow both the appeal and the cross appeal, order that the respondents be paid their costs of trial in the sum of \$14,000.00, and that each party bear their respective costs of the appeal and the cross-appeal.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal