

THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2023/0005

BETWEEN:

COLUMBUS COMMUNICATIONS (ST. LUCIA) LIMITED DBA FLOW

Appellant

and

MARK D. MARAGH

Respondent

Heard together with:

SLUHCVAP2023/0006

BETWEEN:

RICHARD FREDERICK

Appellant

and

MARK D. MARAGH

Respondent

Heard together with:

SLUHCVAP2023/0007

BETWEEN:

MARK D. MARAGH

Appellant

and

[1] MCDOWALL BROADCASTING CORPORATION (MBC) LIMITED  
[2] COLUMBUS COMMUNICATIONS (ST. LUCIA) LTD. TRADING AS FLOW

Respondents

**Before:**

The Hon. Mr. Mario Michel  
The Hon. Mr. Gerard St. C Farara  
The Hon. Mde V. Georgis Taylor-Alexander

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

**Appearances:****On Written Submissions:**

Mr. Deale Lee for Columbus Communications (St. Lucia) Ltd. dba FLOW  
Mr. Horace Fraser for Mr. Richard Frederick  
Ms. Vanessa S. Pinnock for Mr. Mark D. Maragh

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2024: May 22.

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*Costs - Entitlement to Costs – Successful party generally entitled to costs – Rule 64.6(1) of the Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023 - The discretion of the Court to award costs – Costs in instances of mixed success*

**JUDGMENT**

- [1] **TAYLOR-ALEXANDER JA [AG.]:** On 9<sup>th</sup> November 2023, the Court heard the consolidated appeals against the judgment of the learned master dated 20<sup>th</sup> February 2023 (“the judgment”). The Court gave its decision allowing the appeals against the unless order made at paragraph 60(4) of the judgment. All three appellants, Columbus Communications (St. Lucia) Limited dba Flow (“Columbus”), Mark D. Maragh (“Mr. Maragh”) and Richard Frederick (“Mr. Frederick”) appealed against the unless order and therefore all three were successful in that regard. However, whereas Mr. Maragh appealed only against the unless order, Mr. Frederick and Columbus canvassed challenges to the unless order in addition to other orders made in the learned master’s judgment. On the issue of costs, the Court decided to invite the parties to make written submissions. The Court promised to provide, at a later date, a determination on the incidence of costs. We now do so.

**Background**

- [2] Mr. Maragh commenced proceedings against Mr. Frederick, Columbus and McDowall Broadcasting Corporation (“McDowall”) for defamation and a perpetual

injunction in two separate claims in the court below, as follows: **Mark D. Maragh v Richard Frederick, McDowall Broadcasting Corporation (MBC) Limited and Columbus Communications (St. Lucia) Limited dba as Flow**, Claim No. SLUHCV2021/0130 (“the first claim”); and **Mark D. Maragh v Richard Frederick, McDowall Broadcasting Corporation (MBC) Limited and Columbus Communications (St. Lucia) Limited dba as Flow**, Claim No. SLUHCV2021/0281 (“the second claim”).

- [3] Preliminary applications were filed by all the parties. Mr. Maragh applied for default judgment in the first claim contending that no acknowledgement of service was filed. Mr. Frederick, Columbus and McDowall made three separate applications disputing the court’s jurisdiction in respect of the first claim. Mr. Frederick disputed the method of service and further contended that he was served on a public holiday. In his view, considering the deemed date of service, there was no judicial demand on him before the action became prescribed. Columbus and McDowall contended in their applications that by the time they were served with the claim, the cause of action had become prescribed. Columbus and McDowall’s applications invited for the learned master’s consideration, the issue of whether Mr. Maragh ought to have pleaded the date on which he had knowledge of the alleged defamatory statements. McDowall also filed an application in the second claim disputing the court’s jurisdiction. The crux of this application concerned the validity of service of the second claim.
- [4] All the applications were heard together before the master who gave a decision on 20<sup>th</sup> February 2023. The master made a number of orders. He found that Mr. Maragh’s claim was for damages for defamation and a perpetual injunction, which was not susceptible to judgment in default of acknowledgement of service, consequently he rejected Mr. Maragh’s application for judgment in default with no order as to costs. He found that Mr. Frederick had been properly served on 2<sup>nd</sup> April 2021 with the originating process in the first claim and there was proper judicial demand, and that Mr. Frederick should pay Mr. Maragh’s costs of the application to be assessed in default of agreement. Regarding the applications of Columbus and

McDowall to strike out the claim form and statement of claim, he ordered at paragraph 60(4) of the judgment that unless Mr. Maragh filed and served an amended statement of claim within seven days specifically pleading when the alleged defamatory statements came to his knowledge, his claim against McDowall and Columbus would be struck out with costs ("the unless order"). He further ordered that Columbus and McDowall's costs of their applications be their costs in the cause. McDowall's application to strike out the claim form and statement of claim in the second claim was dismissed and McDowall was ordered to pay Mr. Maragh's costs of the application to be assessed in default of agreement.

- [5] The parties, with the exception of McDowall, sought to appeal the order of the master. A common ground of appeal was that the master erred in law when he made the unless order without there being an application before him or without hearing the parties. On the common ground of appeal, the parties requested that the master's order be set aside. The Court decided to consolidate the three appeals.

#### **The decision of the Court of Appeal**

- [6] The consolidated appeals were heard and determined on 9<sup>th</sup> November 2023. The appeal against the unless order was allowed. The decision of this Court is summarized as follows:
- (i) The appeals against the unless order in SLUHCVAP2023/0007, SLUHCVAP2023/0005 and SLUHCVAP2023/0006 are allowed and paragraph 60(4) of the said order is set aside.
  - (ii) The master's findings on service of the claim form, statement of claim and authorization code are upheld. The appeal by Columbus Communications (St. Lucia) Limited dba Flow in SLUHCVAP2023/0005 to set aside the claim form and statement of claim stands dismissed.
  - (iii) The appeal by Richard Frederick in civil appeal SLUHCVAP2023/0006 against the dismissal of his application to strike out the claim form and statement of claim stands dismissed.
  - (iv) The parties are to file submissions on the issue of costs which will be decided by the Court on paper.

### **Summary of the parties' position on costs**

- [7] The parties have filed submissions on the issue of costs and have each postulated their success on the appeal. Mr. Maragh submits that he is entitled to all his costs on appeal, as he was completely successful on his single ground of appeal, while Mr. Frederick and Columbus submit that they should have part of their costs as they were both successful on one of their grounds of appeal. Otherwise, both Mr. Frederick and Columbus submit that the only other appropriate order, as each party enjoyed some measure of success, is that each party bears their own costs.

### **Mr. Maragh's submissions**

- [8] Mr. Maragh trenchantly submits that any decision the Court may make regarding costs should turn on how the court defines 'success' in the context of the appeals. He states that the fact that the unless order was set aside is not, of itself, decisive and it is critical to examine success by reference to the Court's decision on the grounds and issues raised and argued on the appeals. He submits that when this is done, the conclusion must be that he was completely successful in the appeal, as not only was the unless order set aside, but the Court ordered or confirmed that the applications filed by Mr. Frederick and Columbus respectively were to stand dismissed.

### **Columbus' submissions**

- [9] Columbus submits that the appeals present an unusual situation as all the parties successfully appealed against the unless order. On a strict application of rule 64.6(1) of the **Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023** ("CPR"), all of the parties would be entitled to have their costs having succeeded at least partially on their appeals. Columbus acknowledges that such an award would be impractical as it would mean each party paying the other's costs.
- [10] Columbus submits that as it was successful on half of its appeal at the very least it is entitled to a proportionate order. It acknowledges however that it remains open to the court to make no order in costs and allow each party to bear its own costs, where

the conduct of the parties and the outcome of the applications make it difficult to determine that one party has lost to the extent that they ought to pay the other party's cost.

#### **Mr. Frederick's submissions**

- [11] Mr. Frederick submits that as he was successful on one ground albeit unsuccessful on his first ground, the court in its usual disposition would give him the benefit of a reduced cost order. He states that given Mr. Maragh's success as well on his appeal of the unless order, it would not be just for the court to order him to pay costs to Mr. Frederick on his partial success. He submits that the fairest apportionment of cost is to order that each party bear their own costs.

#### **Issue**

- [12] The issue for the Court's determination is having regard to the circumstances in this appeal, where all parties have experienced success, albeit at varying degrees, whether the Court ought to exercise its discretion to make a costs order, and if so, which party is entitled to those costs.

#### **The circumstances**

- [13] A close scrutiny of the decisions of the master, and of this Court in the appeals reveal the following:
- (i) Five applications were before the master for determination. Mr. Maragh applied for judgment in default of an acknowledgement of service against Mr. Frederick. Mr. Frederick applied to dispute the jurisdiction of the court. Columbus applied to dispute the jurisdiction of the court and to strike out the statement of claim. McDowall applied to dispute the court's jurisdiction in both the first and second claims.
  - (ii) The issue of whether Mr. Maragh was required to plead the date the alleged defamatory statements came to his knowledge arose primarily in the applications of Columbus and McDowall.

- (iii) The master decided among others to make an unless order when none of the parties had applied for such an order. The unless order was made by the master on the basis that Mr. Maragh was required to plead when the alleged defamatory statements came to his knowledge and to establish that his claim was filed within the relevant period to exclude extinctive prescription.
- (iv) All parties were entitled to appeal to the Court against the unless order. Mr. Maragh's claim was to stand dismissed if he did not make the amendment in the time frame stipulated by the unless order. Columbus and McDowall asserted extinctive prescription as a means of extinguishing any right to a cause of action asserted by Mr. Maragh, however the master determined that before those issues could be determined the claim had to be amended. Mr. Frederick put before the Court that no application was before the court for an unless order and the master thus erred in law in making such an order.
- (v) Mr. Maragh appealed against the unless order. He was totally successful on appeal.
- (vi) Columbus appealed against the unless order. Columbus challenged whether the authorization code was served with the claim form and whether there was otherwise proper service. Columbus was successful in part.
- (vii) Mr. Frederick appealed against the unless order, the dismissal of his application and the costs order. Mr. Frederick was successful in part.

### **Discussion**

[14] CPR 64.6(1), states the general rule on costs entitlement as follows:

"Where the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party."

- [15] The language of CPR64.6(1), particularly, ‘**where the court... decides** to make an order about the costs’ (emphasis added), is the primary indication that the Court’s power to award costs is a discretionary one. The rule does not say that the court must award costs, nor does it otherwise use language to indicate that awarding costs to a successful party is mandatory. Sir Dennis Byron in **Rochamel Construction Limited v National Insurance Corporation**<sup>1</sup> puts this discretionary power of the Court into context:

“...where the Court decides to make an order about the costs of any proceedings, the general rule is that, it must order the unsuccessful party to pay the costs of the successful party. The Court is, however, **given very wide discretionary powers to vary the application of the general rule**. These include the power to order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to costs or to pay only certain portions of another person’s cost. In exercising these discretions as to costs the Court is required to have regard to all the circumstances. Particular consideration must be given to the conduct of the parties both before and during the proceedings and the manner in which a party has pursued the case in general and particular issues within the case. **Thus the order can be affected by whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings.**” (Emphasis added)

- [16] Where the Court decides to depart from the general rule, the Court must state the reasons for its decision as is set out in CPR 64.6(2):

“(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 but the court must state the reasons for its decision.”

- [17] Any departure from the general rule must be exercised on a principled and judicial basis. The Court must state the reasons for so doing, and the reasons must be connected to the case. The Chief Justice, Dame Janice Pereira in **Attorney General et al v Anton Tonge**<sup>2</sup> explained as follows:

“Whilst it is recognized that the court has a general discretion with regard to costs, and may order a successful party to pay all or part of the costs of an unsuccessful party, the circumstances for departing from the general rule, must either be obvious from all the circumstances such as not

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<sup>1</sup> Civil appeal No. 10 of 2003 (delivered 24<sup>th</sup> November 2003, unreported) at paragraph 8.

<sup>2</sup> ANUHCVP2013/0005 (delivered 3<sup>rd</sup> October 2013, unreported) at paragraph 6.

to require a stated reason, or otherwise it is expected that a reason or reasons would be expressed for the departure from the general rule.”

[18] In cases where the Court finds that both or all parties have enjoyed some success on appeal, the Court may order that each party bear their own costs. This has been shown to be a reason for the Court to decide that the parties bear their own costs on the appeal. Recently in the 2023 decision of **Oris Sullivan v Dagrie Wilson**,<sup>3</sup> the Court made such a decision.

[19] This Court, having regard to the totality of the circumstances, is of the view that a similar costs decision to that in **Sullivan** should be rendered. The relevant consideration that gives rise to this decision is that all parties have challenged the unless order and have been successful on the appeal, even though Columbus and Mr. Frederick experienced mixed success. The Court finds that this is a case where the justice of the matter requires that each party ought to bear their own costs.

### **Disposal**

[20] It is ordered that each party bear their own costs on the appeals.

I concur.  
**Mario Michel**  
Justice of Appeal

I concur.  
**Gerard St.C Farara**  
Justice of Appeal [Ag.]

**By the Court**

**Chief Registrar**

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<sup>3</sup> MNIHCVAP2021/0009 (delivered 28<sup>th</sup> July 2023, unreported).