

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0017

BETWEEN:

SUN VESSEL GLOBAL LIMITED

Appellant

and

[1] **HQ AVIATION LIMITED**

[2] **GREAT LAKES INSURANCE (UK) SE**

Respondents

Before:

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mr. Anthony Gonsalves KC

Justice of Appeal [Ag.]

The Hon. Mr. Godfrey Smith SC

Justice of Appeal [Ag.]

On written Submissions

Appearances on Paper:

Mr. John Russell QC for the Appellant

Mr. Matthew Reeve, Mr. Joseph England and Ms. Olga Osadchaya for the
Respondents

2023: January 9.

*Commercial Appeal – Costs – Assessment of Costs – Exercise of Discretion on
Costs – Jurisdiction to reconsider matters prior to the perfection of its judgments/
orders*

JUDGMENT

[1] **GONSALVES JA [AG.]:** On Thursday 24th November 2022 at the hand-down hearing for the delivery of the judgment of the substantive appeal, His Lordship, the Hon. Mr. Mario Michel, JA announced the result by reading the headnote of the Court's decision. The headnote indicated that the respondent had succeeded in resisting grounds 1 and 2 of the appeal, (the interest issue) and the appellant was

successful in relation to ground 3 of the appeal (the costs of the foreign lawyer issue). In the course of that reading, the Court's decision on the consequential order for costs was communicated, i.e., no order as to costs. At that point, the parties had not been provided with the full judgment. Counsel for the respondents sought an opportunity, before any consequential order was perfected, to make submissions on the appropriate order for the costs of the appeal and to make the submission that the respondents are the winners of the appeal for costs purposes and that the parties had not had an opportunity to make submissions on consequential orders such as costs. Counsel appearing for the appellant indicated that he did not object to the "no order as to costs". Michel JA ordered that the certificate of result of appeal be deferred until 1st December 2022 and indicated that it was up to the parties to decide what steps, if any, they wished to take.

[2] On Friday, 29th November 2022 the Court Registry circulated a copy of the judgment marked "draft". On 29th November 2022, the respondents filed a notice of application¹ pursuant to rule 65.12 of the **Civil Procedure Rules 2000** ("CPR") and/or CPR 65.20 (read with the powers in CPR 26) and /or CPR 64.4 and /or CPR 64.6 and the Court's jurisdiction to reconsider its judgments or orders before sealing or certifying the result of the appeal, seeking the following relief:

- (a) The Court permit the respondents to make submissions on costs and the Court exercise its jurisdiction to reconsider its order as to costs in light of the respondents' filed submissions;
- (b) That the appellant pay the costs of the appeal to be assessed; and
- (c) The certification of the judgment and of the result of the appeal shall not include the last sentence of paragraph [51] of the draft judgment relating to costs.

¹ Together with a certificate of urgency and written submissions.

[3] By subsequent order made by Michel JA, the sealing of the judgment was deferred to a date to be fixed and the appellant was directed to file a reply to the respondents' application with which direction the appellant complied.

[4] This application engages the Court's jurisdiction to reconsider matters prior to the perfection of its judgments/ orders. Both parties agree that the Court has jurisdiction to revise its decision on costs prior to the perfection of its final order. In **Sky Stream Corporation et al v Alexander Plekashov**² this Court stated:

"It has long been settled law that a judge is entitled to reverse his decision and has undoubted jurisdiction to change his mind and revisit his own decision at any time before his order is drawn up and perfected. His overriding objective must be to deal with the case justly."

In **Re L and B (Children)**³, which affirmed **Re Barrell Enterprises**⁴, the Supreme Court made clear that, although the jurisdiction should not be exercised lightly, it was not confined to exceptional circumstances. It was emphasized that the overriding objective was the key consideration.

[5] In support of their application the respondents submitted, (a) that pursuant to CPR Part 64.6⁵ the Court must order that the unsuccessful party is to pay the costs of the successful party, and (b) an issues-based approach to costs is discouraged and losing on subsidiary issues on appeal should not detract from a party being the successful party.⁶ The respondents submit that they are the successful party. They argue that this is an appeal in a commercial case where the only relief sought is financial. On the main part of the appeal (interest), in which they have prevailed⁷, the respondents have secured the sum of at least US\$564,183.71. On the ground on which the appellant has been successful (the disallowance of Dr. Trevor Fox's

² BVIHCMAP2014/0027 (delivered 1st November 2018, unreported) at para 65 per Baptiste JA, relying on **Re L and B (Children)** 2013 UKSC 8, which affirmed **Re Barrell Enterprises** [1973] 1 WLR 19 (CA).

³ *Ibid.*

⁴ *Supra* note 2.

⁵ Successful party generally entitled to costs.

⁶ Relying on **Travellers' Casualty and Surety Company of Canada and ors v Sun Life Assurance Company of Canada (UK) Limited** [2006] EWHC 2885 (Comm) per Clarke J (as he then was).

⁷ Grounds 1 and 2 of the notice of appeal.

pre-action costs) the amount in question is no more than \$34,000.00 or about six per-cent of the sum secured on the main part of the appeal. They suggest that there are very few circumstances in which a commercial litigant recovering ninety-four per-cent of its claim could be classified as anything other than the clear and outright winner. Consequently, the result cannot be said to be a “draw”.

[6] As a complementary argument the respondents argue that from a costs’ footprint perspective, the appeal on the issue in relation to Dr. Fox’s pre-action fees was a very small part of the forensic effort generated by the respondents’ overall appeal. The meat of the appeal was the statutory interpretation of the **(BVI) Merchant Shipping Act 2001**⁸ and the rate of interest and related issues and the crux of this matter was always centered on the issue of interest, on which they prevailed. The appeal in respect of Dr. Fox’s costs only occupied 3 of 17 paragraphs of the notice of appeal, one line in the respondents’ notice, 1.5 pages in the appellant’s skeleton, 1 of 10 pages in the respondents’ skeleton and 7 of the 30 authorities cited in this case. Consequently, the vast majority of the costs on the appeal related to the main issues in respect of interest, on which they succeeded.

[7] The respondents also argued that the conduct of the appellant and the manner in which it conducted the appeal are matters which can be considered under CPR 64.6(6) (b). The respondents suggest that this was an appeal (on the interest issue) which should never have been launched in light of the information available at this time and this constituted an independent reason why the appellant should be ordered to pay the costs of the appeal. Further, if the appellant caused all of the costs of the appeal merely for the sake of recovery of \$34,000.00 that would be unreasonable and disproportionate conduct by a litigant as well.

[8] On the other hand, argued the respondents, it cannot be said that it was unreasonable for the respondents to contest the subsidiary small issue of Dr. Fox’s

⁸ Act No. 13 of 2021, Laws of the Virgin Islands.

costs of \$34,000.00 as it had the support of the trial judge who decisively ruled in favour of the respondents on that aspect.

[9] The respondents conclude, in essence, that the appellant should be ordered to pay the respondents' costs of the appeal as the successful party and on grounds of the appellant's conduct. Further, there should be no reduction in the respondents' costs award because of the loss on the issue of Dr. Fox's pre-action costs which reduces the respondent's recovery by about six per cent. And even if there were grounds for a reduction it should be very small in light of the costs profile on the point.

[10] While accepting that the Court has a jurisdiction to revisit its decisions prior to the perfection of its final order, the appellant submits that this jurisdiction is not to be exercised lightly and such applications ought to be rare. Relying on **Heron Bros Ltd v Central Bedfordshire Council (No. 2)**⁹ where the judge discussed the examples of where the jurisdiction might be exercised and said at [17] to [18]:

“17. Whilst I accept that this is not to be treated as a closed list of categories, I consider that they are all examples of situations where either something has obviously gone wrong or relevant material was overlooked through no fault of the parties...

18. It therefore seems to me that in principle there has to be something more than a post-judgment second thought based on material that was already in play. If it were otherwise, any fresh point that occurred to a party following the handing down of a judgment would entitle the party to require the court to hear further submissions with a view to revisiting the judgment. That would then become the rule rather than the exception. It seems to me that this would accord neither with the interests of finality of judgments nor with the overriding objective to deal with cases justly and at proportionate cost, particularly in the sense of ensuring that parties are on an equal footing, avoiding unnecessary expense and dealing with cases expeditiously.”

[11] The appellant further submitted that if the Court was minded to revisit the exercise of its discretion on costs, that it rejected the respondents' assertion that they were the successful party on the appeal. The appellant contended that by virtue of its success on the appeal, (and therefore despite losing on grounds 1 and 2) its total

⁹ [2015] EWHC 1009 (TCC).

liability was reduced by about US\$34,000.00 and that the respondents cannot claim to be the winner if they are worse off than before and where an appellant wins on some point and loses on others, but overall improves its position as a result of the appeal, the appellant is the successful party. If the Court were to hold that either party was successful, it should be the appellant. Alternatively, the appellant argued that the Court's view that there was a score draw with no overall winner should be maintained.

- [12] The appellant also argued that the Court's decision here on costs is not an issues-based order as the court did not order the appellant to pay the costs of grounds 1 and 2 and the respondents to pay the costs of ground 3. In answer to the respondents' costs footprint argument, the appellant acknowledged that by the time of the skeleton and oral submissions the argument on ground 3 was more streamlined than in respect of grounds 1 and 2. But that does not mean that the overall costs in the appeal on that ground will have been less, or significantly so. The ground required a careful analysis of the interplay between the CPR and the **Legal Profession Act 2015**¹⁰ and as the respondents note required the citation of 7 authorities. The judgment on ground 3 covers some 8 pages. If one does not count the introductory sections, this is approaching half the judgment. Moreover, while it may have been worth less in terms of money, it is likely that ground 3 will be of greater importance in the long run as the recoverability (irrecoverability) of non BVI qualified lawyers' costs is a matter of considerable general importance, given the BVI's status as an important forum for the resolution of international disputes. The importance of the issue is a matter to which the Court is entitled to have regard when exercising its discretion in relation to costs. Further, given the general importance of the ground 3 issue, it is illegitimate for the respondents to simply assert that the "real reason" for the appeal was the interest point. As far as conduct is concerned, the appellant rejected the respondents' criticism of the way it argued the interest point and the suggestion that the appellant had no real basis for seeking

¹⁰ Act No. 13 of 2015, Laws of the Virgin Islands applied.

to argue the interest point by pointing out that the judgment stated that the principle of construction relied upon by the appellant was that a purposive approach should be adopted. Given the Court's view that each party had a measure of success, there is nothing in the appellant's conduct that could justify a departure from the proposed "no order as to costs" order. The appellant submitted that, in the final analysis, this is not an appropriate case for the Court to revisit the exercise of its discretion in relation to costs and the application should be dismissed on that basis. However, if the Court were to revisit its decision, the appropriate order would in fact be that the respondents should pay the appellant's costs. Alternatively, the current "no order as to costs" order should be maintained, on any re-exercise of discretion.

Analysis

- [13] The parties agree on the issue of the Court's jurisdiction to alter an unperfected judgment, but disagree as to whether this is an appropriate case for the Court to exercise that discretion. In **Re L and B (Children)**, the Supreme Court explained that the jurisdiction was not confined to exceptional circumstances and that the overriding objective was the key consideration. Inherent in the determination of whether the jurisdiction ought to be exercised would be a preliminary finding that a revision of a prior decision is necessary in order to do proper justice between the parties. In this case, the fundamental argument of the respondents is that, notwithstanding that the respondents succeeded on grounds 1 and 2 and the appellant succeeded on ground 3, this is not a score draw and does not therefore justify the order of no order as to costs. When looked at as a whole this being an appeal relating to the quantum of monies to be paid, the total sum in issue on the appeal is in the region of US\$ 598,183.37¹¹ and it has prevailed in retaining at least US\$546,183.71 and therefore it is the overall successful party. The appellant's opposing argument is that as a result of its success on ground 3 of the appeal it has reduced its liability to the respondents and therefore it must be considered to be the successful party on appeal. This reasoning does not appear to be correct. In a case like this where the only relief sought is financial, one is forced to the conclusion that

¹¹ US\$564,183.71 on the interest issue and US\$34,000.00 on the costs issue.

a determination of the successful party on appeal must depend on the financial outcome consequent upon the appeal itself. That would point to the respondents.

[14] The appellant's alternative argument that while ground 3 may have been worth less in monetary terms, it is of greater importance in the long run, may have some factual merit. However, assuming that to be the case, the issue is whether "greater importance in the long run" is a material consideration in ascribing "value" on the specific issue of determining who is the successful party for the purposes of costs, in an appeal that was entirely about the quantum to be paid. The appellant in its submissions stated 'The importance of the issue is a matter to which the Court is entitled to have regard when exercising its discretion in relation to costs'. However, the appellant did not submit any authority to support the applicability of that proposition in what is essentially a non-public interest case. It would appear to this Court that, as between the appellant and the respondents, in a case exclusively seeking financial relief, it would be improper to utilize the public interest argument of the importance of the matter for others in the future, as a basis for increasing its value for the purpose of ascribing an additional value to it in determining the successful party¹².

[15] This, however, does not mean that the Court is to entirely disregard the fact that the appellant has been successful on ground 3. This Court has interpreted CPR 65.6 (6) as empowering the Court to take account of the fact that a successful party may not have succeeded on all grounds in determining the appropriate costs order to make. In **Rosalind Nicholls et al and Richard Rowe and Mark Secrist et al**¹³ reference was also made to Blackstone's Civil Practice where it was noted that '[t]he usual approach in the event of partial success is to award the successful party a proportion of its costs rather than an 'issues-based' order'. In **Rosalind Nicholls**,¹⁴ this Court found that the appellants and respondents had some measure of success

¹² See *Al Oshlack v Richmond River Council* (1999) 193 CLR 72, *Rinehart v Welker* (No.3) [2012] NSWCA 228 at para 15, *Friends of Hinchinbrook Society Inc v Minister for Environment & Ors* [1998] FCA 432.

¹³ SKBHCVP2011/0015 per Baptiste JA at para 39.

¹⁴ *Ibid*.

but that the respondents had succeeded on the major issues in the appeal and had overall success in defending the appeal. It therefore adopted the approach set out in Blackstone's Civil Practice and awarded the respondent ninety per cent of its costs, applying a ten per cent reduction in the amount to account for what it described as the minor success of the appellants. I consider that a similar approach is applicable here. However, I would not consider ground 3, despite representing only six per cent of the amounts at issue under grounds 1 and 2, to be a minor issue, considering that ground 3 occupied a not insubstantial part of the argument before this Court as reflected in the submissions, authorities, and the judgment. I consider a twenty per cent reduction would be appropriate.

Order

[16] In the circumstances the Court makes the following orders:

- (a) The appellant shall pay the respondents eighty per cent of the respondents' costs on the appeal, to be assessed if not agreed within 30 days.
- (c) The appellant shall also pay the respondents the costs of this application to be assessed if not agreed within 30 days.

I concur
Mario Michel
Justice of Appeal

I concur
Godfrey Smith SC
Justice of Appeal [Ag.]

By the Court

Chief Registrar