

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

**SAINT CHRISTOPHER AND NEVIS
SKBHCVAP2011/0025**

BETWEEN:

Eugene Hamilton

Appellant

and

[1] Cedric Liburd

[2] Leroy Benjamin

[3] Wayland Vaughn

Respondents

Before:

The Hon. Dame Janice M. Pereira DBE

Chief Justice

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mr. Michael J. Fay

Justice of Appeal [Ag.]

Appearances:

Mr. Terence Byron for the Appellant

Mr. Delano Bart QC with Ms. Vadeesha John for the 1st Respondent

Ms. Nisharma Rattan-Mack for the 2nd and 3rd Respondents

2017: December 4;
2021: November 10.

Civil Appeal- Costs- Whether order for costs to be taxed unenforceable due to repeal of the Rules of Supreme Court (1970)- Determination of quantum of costs- Whether learned judge erred in his approach to quantifying costs by determining what costs were reasonable

JUDGMENT

[1] FAY JA [AG.]: In this matter, Mr. Hamilton appeals the decision made by Thomas J dated 2nd December 2011 in which he determined the quantum of costs that should be paid by Mr. Hamilton to:

- (a) Mr. Liburd pursuant to an Order made by Belle J on 26th July 2006 which provided that Mr. Hamilton should pay Mr. Liburd's costs of the election petition to be taxed if not agreed.
- (b) Mr. Benjamin and Mr. Vaughn pursuant to an Order made by the Court of Appeal on 2nd December 2011 which provided that Mr. Hamilton should pay Mr. Benjamin's and Mr. Vaughn's quantified costs.

[2] Thomas J determined on 2nd December 2011 that Mr. Hamilton should pay the following costs:

- (a) \$225,000.00 to Mr. Liburd.
- (b) \$545,368.41 to Mr. Benjamin and Mr. Vaughn.

In order to determine those sums, Thomas J adopted an approach whereby he essentially allowed such costs as he considered reasonable. It is important to note that he did not, and did not purport to, determine the costs by reference to either the taxation of costs regime that existed pursuant to Order 62 of the old Rules of the Supreme Court ('the RSC') or by reference to Parts 64 and 65 of the **Civil Procedure Rules 2000** ('the CPR 2000').

[3] In essence, Mr. Hamilton's case on the appeal was that:

- (a) the order of Belle J that the costs be taxed was valid but unenforceable;
- (b) the order of the Court of Appeal that the costs be quantified required that the costs be determined in accordance with the provisions of Parts 64 and 65 of the CPR 2000.

The Order of Belle J dated 26th July 2006

[4] Mr. Terence Byron, who appeared for Mr. Hamilton, submitted that the order dated 26th July 2006 was valid but was, in his words, 'unenforceable'.

[5] In my view, the determination of the quantum of costs pursuant to an order for costs is not an 'enforcement' of that costs order but is merely the determination of the quantum of costs that should be paid pursuant to that order. Enforcement, as I

understand that word, would and could only arise once the quantum had been determined and the person ordered to pay had not made payment of the determined costs by the date upon which they were due. In those circumstances, I understand Mr. Byron's use of the word 'unenforceable' to mean that it was not possible for Mr. Liburd to take any steps to have the quantum of his costs determined pursuant to the order that they be taxed.

- [6] Counsel reminded the Court that taxation was a process for the determination of costs that was found in Order 62 of the RSC. The RSC were repealed on 3rd May 2001 and were replaced by the CPR 2000. I note that the RSC, and the taxation process provided in Order 62, had been repealed prior to Belle J making the 26th July 2006 order.
- [7] Mr. Byron's conclusion was that there was nothing that Mr. Liburd could do to have the High Court determine the quantum of costs that Mr. Hamilton should pay pursuant to the order in his favour. In particular, Mr. Byron submitted that the Court had no jurisdiction to determine the quantum of the costs that should be paid pursuant to the order dated 26th July 2006 because the order required that the costs be determined by taxation, and that there was no longer any process of taxation.
- [8] It was a necessary part of Mr. Byron's submissions to contend that the word 'taxed' as it appeared in the order dated 26th July 2006 was a reference to the process under the now repealed RSC Order 62 procedure of taxation of costs. Indeed, when asked what taxed meant, Mr. Byron referred us to the definition of 'taxed costs' as meaning 'costs taxed in accordance with this Order' in RSC Order 62 **Rule 1(1)**.
- [9] Mr. Delano Bart QC, who appeared for Mr. Liburd, drew our attention to the inconsistency in Mr. Byron contending that:
- (a) this Court, and the High Court, should interpret the word 'taxed' (b) by reference to the repealed RSC Order 62;

(b) the High Court could not carry out any taxation of the costs pursuant to RSC Order 62 because it has been repealed.

In my view this inconsistency completely undermines the submission made by Mr. Byron. His client cannot both allege that RSC Order 62 is relevant to the construction and interpretation of the order dated 26th July 2006 and yet is unavailable as a method of determining the quantum of costs that should be paid pursuant to that order.

[10] In my opinion, the proper interpretation of the order dated 26th July 2006 is not that the costs should be determined by taxation under RSC Order 62, but merely an order that the Court should determine what the quantum of such costs should be in the event that the parties were not able to agree on the quantum. The learned first instance judge did not intend, by the use of the word 'taxed', that the costs should be taxed pursuant to RSC Order 62 but merely meant by way of shorthand that they should be determined by the Court if the parties were not able to agree the quantum. In short, quantified in the absence of agreement. Belle J would have been well aware of the fact that RSC Order 62 had been repealed and in my opinion he did not, and did not intend to, require that the determination of the costs be undertaken by a taxation under RSC Order 62. Indeed, the learned first instance judge did not prescribe any methodology by which the costs should be determined. His use of the word 'taxed' was merely intended to provide in the order dated 26th July 2006, that the Court would determine the costs if the parties were unable to agree them.

[11] This Court will, in line with well-established principles, only interfere in the decision of a first instance judge if it is satisfied that he had approached the determination of costs on an incorrect basis, that he had taken into account irrelevant factors, that he had not taken into account relevant factors, and/or if he had reached a decision that was clearly and obviously wrong. The fact that this Court might have reached a different decision is not in itself the test.

[12] As I indicated above, the approach taken by Thomas J on the determination of the costs was to consider whether they were reasonable in the circumstances of the case. In doing so, the learned judge had a broad discretion to decide whether any element of the costs was reasonable. He found that the costs of leading counsel were reasonable but reduced the claim for costs for junior counsel to a sum that he considered reasonable. Mr. Hamilton did not dispute any specific items but complained that:

- (i) the costs claimed were exorbitant and intimidatory; and
- (ii) that the learned judge ought not to have accepted fees notes from leading and junior counsel without receipts/bills.

[13] I cannot fault the approach adopted by the learned first instance judge with respect to Mr. Liburd's costs, and I note that his approach is similar to the approach that was approved by this Court in its decision dated 14th July 2017 in **Lindsay Grant v Rupert Herbert**¹. In my view, whether the exercise was undertaken under Parts 64 and 65 of the CPR 2000 or by the utilization of a different approach for quantification would not in substance yield a different result. The touchstone by whichever method is adopted, is what is a fair and reasonable sum with regard to the underlying proceedings and the factors to which the court would have regard for such assessment in arriving at a determination as to quantum. It is to be borne in mind that the underlying proceedings concerned challenges to an election and was not a monetary claim.

The Order of the Court of Appeal dated 2nd December 2011

[14] As I mentioned above, Mr. Hamilton's case on this appeal was that the order of the Court of Appeal dated 2nd December 2011 that the costs be quantified, required that the costs be determined in accordance with the provisions of Parts 64 and 65 of the CPR 2000.

¹ SKBHCVAP20012/0001 (delivered 21 December 2017, unreported)

[15] Unfortunately for Mr. Hamilton, the decision of this Court on 14th July 2017 in **Grant v Herbert**² mentioned above, effectively deprived Mr. Hamilton of the opportunity to proceed with that ground of appeal. Mr. Byron sensibly did not press that argument before us.

[16] As in the case of Mr. Liburd's costs, the approach taken by Thomas J on the determination of the costs was to consider whether they were reasonable in the circumstances of the case. In doing so, the learned judge had a broad discretion to decide whether any element of the costs was reasonable.

- (a) He found that the costs of leading and junior counsel were reasonable.
- (b) Mr. Hamilton again did not dispute any specific items but complained that:
 - (iii) the costs claimed were exorbitant and intimidatory;
 - (iv) that the learned judge ought not to have accepted fees notes from leading and junior counsel without receipt/bills.

[17] I cannot fault the approach adopted by the learned first instance judge with respect to Mr. Hamilton's costs, and I note that his approach is similar to the approach that was approved by this Court in **Grant v Herbert**.

[18] The Court was told that settlement negotiations have been ongoing between Mr. Hamilton on the one part and Messrs. Benjamin and Vaughn on the other part. Ms. Rattan-Mack who appeared for Messrs. Benjamin and Vaughn told this Court that she had not prepared written submissions because she thought that the matter would settle and that the submissions would therefore not be necessary. Counsel ought to know that ongoing settlement negotiations are no excuse for not complying with rules and directions, and Ms. Rattan-Mack should have filed written submissions notwithstanding the on-going settlement negotiations. However, and whilst no substitute for written submissions, Ms. Rattan-Mack did make short oral submissions that were clear and concise. She told the Court that her clients have

² supra n.1

agreed with Mr. Hamilton that they will not seek costs from him even if they are successful on the appeal.

Order

[19] It follows that I would make the following orders:

- (a) the appeal be dismissed;
- (b) the appellant pay the costs of the first respondent in the sum of two thirds of the costs in the High Court;
- (c) there be no order for costs as between the appellant and the second and third respondents.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar

POSTSCRIPT

We apologise for the delay in delivery of this judgment. Unfortunately, the court had been advised that the entire matter had been settled out of court and thus not requiring any further action on the Court's part. It was learnt quite belatedly that the information so communicated was erroneous and that the true state of events was that settlement was only as between the appellant and the second and third respondents thereby leaving the matter outstanding in respect of the first respondent. This error which caused this delay is regrettable.