

**COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 54 OF 2023**

B E T W E E N

LITTLE BAY PARTNERS LLC

Appellant

AND

BESING SHORES LTD.

Respondent

BEFORE: **The Honourable Mr. Justice Evans, JA
The Honourable Mr. Justice Smith, JA
The Honourable Mr. Justice Turner, JA**

APPEARANCES: **Mr. Brian Simms, KC with Mr. Valdere Murphy, Counsel for the
Appellant**

**Mrs. Gail Lockhart-Charles, KC with Mrs. Syann Thompson-Wells,
Counsel for the Respondent**

DATES: **7 March 2024**

Civil appeal – Costs – Costs follow the event unless special circumstances warrant a departure from the usual rule – Partial success on appeal - Issue based approach to the award of costs

On 6 February 2024 the Court delivered its substantive judgment, allowing the appeal in part. The issue of costs was reserved. The appeal required the Court to determine three issues and the Respondent was successful on two of the three issues.

Held: Appellant to pay 85% of the Respondent’s costs both here and below, to be taxed if not agreed.

DECISION ON COSTS

Delivered by the Honourable Mr. Justice Smith, JA:

1. This is a reserved ruling on the issue of costs.
2. In the substantive action, the Respondent claimed, inter alia, the return of the deposit of USD \$480,000.00 that it had paid in respect of an agreement for the sale of land in Harbour Island. The Appellant counterclaimed for the forfeiture of the deposit.
3. The Supreme Court judge found for the Respondent and in summary, ordered the return of the deposit plus related expenses and interest. The counterclaim of the Appellant was dismissed. The Appellant was also ordered to pay the costs of Respondent.
4. On appeal, we affirmed the order of the trial judge, save for the payment of the related expenses which were claimed as special damages.
5. The Appellant therefore succeeded in part on its appeal.

Some General Principles

6. The statutory requirement for ordering costs in the Court of Appeal has been set out in the case of **Rubis Bahamas Ltd. v Lillian Antoinette Russell** SCCivApp. No 86 of 2022 (delivered on 11 December 2023) where Sir Michael Barnett, P cited the following:

“10. The statutory regime for ordering costs in this Court is as follows:

Court of Appeal Rules, 2005

24. (1) In relation to an appeal, the court shall have all the powers and duties as to amendment and otherwise of the Supreme Court.

...

(5) The Court may make such order as to the whole or any part of the costs of an appeal as may be just, and may,

in special circumstances, order that such security shall be given for the costs of an appeal as may be just.”

Supreme Court Act

“30. (1) Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.”

7. Further, since this action was commenced before the date of commencement of the Civil Proceedings Rules, the former 1978 Rules of the Supreme Court would apply. (see the Civil Proceedings Rules, section 4 “Savings and transitional.”)
8. In that case, Order 59 of Rules of The Supreme Court (1978) would apply and, as Sir Michael Barnett, P stated at paragraph 11 of the **Rubis Bahamas** case cited above, citing Isaacs, JA in **Swart et al v Appollon Metaxides, Silver Point Condominium Apt** SCCivApp. No. 78 of 2012 (22 October 2018), the Court of Appeal would **“generally have regard to the practice that obtains in the Supreme Court. In my view, this makes estimably good sense.”**
9. Further, in the **Rubis Bahamas** case, the following is stated at paragraph 13:

“13. It is settled law that costs are at the discretion of the court. It is generally accepted and the authorities confirm that this discretion, although wide, is not to be exercised arbitrarily but must be exercised judicially. This requires the Court to act in accordance with established principles applied to the relevant facts of the case. The general rule, as I understand it, is that at the conclusion of a hearing, costs follow the event with the result being that a successful party is awarded his costs of the proceedings unless there are special circumstances which may militate against the usual order being made (Bernard Shipmanagement (Cyprus) Ltd. v Ritchie and another [2015] 3 BHS J. No. 152).

14. It is not always easy to determine who the successful party in an appeal is when an appellant succeeds on some issues raised in an appeal, but is unsuccessful on other issues...

...

16. In short, in determining who the successful party in this appeal was, we must have regard to the appeal as a whole and the issues raised and determined by the Court.”

Analysis

10. In the present matter there is, in my view, little doubt that the Respondent was the successful party in this appeal. I say for the following three (3) reasons.

11. First, there were three (3) issues identified in the decision on the appeal namely:

“(A) Whether the trial judge ought to have rejected the evidence of an expert witness of the Vendor, one Mr. Teofilo Victoria;

(B) Whether the shortfall of 6,359.76 square feet in the description of the property was caught by the words “more or less” in the Agreement for Sale”

(C) Whether the trial judge ought to have dismissed the claim for further ‘special damages’ instead of referring this claim to the Registrar for assessment.”

12. The Respondent was successful on two (2) of these three (3) issues, namely, issues A and B above.

13. Second, although issue C was decided in favour of the appellant, even the appellant at paragraph 9 of its submissions filed on 31 October 2023 recognized that:

“9. ...the gravamen of the Appellant’s case is that the Learned Judge’s findings that the difference between the size of the Property as reflected in the Second Thompson Survey (as well as the First Thompson Survey) and the size of the Property as reflected in the Agreement (and the Chee-A-Tow Surveys) did not fall within the meaning of “more or less” as used in the Agreement cannot be upheld...”

14. Therefore, on the Appellant’s own arguments, the gravamen of its case was contained in issue B above, which we decided in favour of the Respondent.

15. In that case, the Respondent was successful on the gravamen of its case.

16. Third, the Respondent was awarded the sum of USD \$ 480,000 plus interest as his damages. However, the Appellant did succeed in reversing the special damages claimed in the sum of USD \$66,308.55. Therefore, the Respondent recovered much more money as its damages (USD \$ 480,000), while the Appellant only succeeded in diminishing the claim by the much smaller sum of USD \$66, 308.55.
17. Even though the Respondent was, in my view, the successful party in this appeal, I am of the view that this was a case where the Appellant correctly queried the issue of the special damages claim both on appeal and in the Supreme Court. This was, therefore, a proper case to consider an issue- based approach to the award of costs. (see paragraph 20 of the **Rubis Bahamas** decision above.)
18. Bearing in mind the time spent on this issue of special damages and its relatively minor impact on the overall decision, I am of the view that there should be a deduction of 15% from the costs of the Respondent to cater for the partial success of the Appellant on the issue of special damages.
19. I therefore order that the Appellant pays 85% of the costs of the Respondent both on appeal and in the Supreme Court. Such costs are to be taxed by the Registrar in default of agreement.

The Honourable Mr. Justice Smith, JA

20. I agree.

The Honourable Mr. Justice Evans, JA

21. I also agree.

The Honourable Mr. Justice Turner, JA