COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 134 of 2021

IN THE MATTER OF THE CONSTITUTION OF THE COMMONWEALTH OF THE BAHAMAS AND IN THE MATTER OF THE ACQUISITION OF LAND ACT CHAPTER 252 STATUTE LAWS OF THE BAHAMAS AND IN THE MATTER OF THE COMPULSORY ACQUISITION OF ALL THOSE CERTAIN LOTS PIECES OR PARCELS OR PORTIONS OF LAND BEING PROPOSED TRANSPORTATION CORRIDOR 7 GLADSTONE ROAD A.K.A BAHAMAR BOULEVARD AND SHOWN ON A PLAN BY MOTT MCDONALD DRAWING NO. 51735/HWY/NPI/060101/REV/ PI ON RECORD IN M P FILE 5028 VOL. 1X IN THE DEPARTMENT OF LANDS AND SURVEYS, NEW PROVIDENCE, THE BAHAMAS, SITUATE BETWEEN GLADSTONE ROAD, J. F. KENNEDY DRIVE, AND SKYLINE LAKES SUBDIVISION IN THE WESTERN DISTRICT OF THE ISLAND OF NEW PROVIDENCE IN THE COMMONWEALTH OF THE BAHAMAS

B E T W E E N

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS
THE TREASURER OF THE COMMONWEALTH OF THE BAHAMAS
Appellants

AND

WESTMOR LIMITED
C.A.C. PROPERTIES LIMITED
CHARLES A. CHRISTIE
Respondents

BEFORE: **The Honourable Madam Justice Crane-Scott, JA**
The Honourable Mr. Justice Jones, JA
The Honourable Mr. Justice Evans, JA

APPEARANCES: **Ms. Kenria Smith with Mr. Kirkland Mackey, Counsel for the Appellants**

Mr. Kahlil Parker, KC with Mr. Miles Parker and Ms. Roberta Quant, Counsel for the Respondents

DATES: **23 May 2023**

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Civil Appeal – Costs – Costs follow the event unless there are special circumstances which may militate against the usual order being made – Costs in the discretion of the Court - What is the proper order in the circumstances of this case? - Rule 24(5) of the Court of Appeal Rules

On 30 March 2023 the Court allowed the appeal, quashed the decision of the learned judge below and ordered a retrial of the matter. The issue of costs was reserved, and written submissions were to be provided. By their written submissions the Appellants submit that costs should follow the event. The Respondents submit that, the matter having been remitted, costs ought to follow the event before the court below on the re-hearing, alternatively, that there should be no order as to costs.

The issues for the Court's consideration are: who should bear the costs of the trial in the court below and who should pay the costs of the appeal.

Held: (1) Costs awards relative to the applications made in the court below should remain in place. (2) Costs award relative to the trial in the court below set aside; as the matter has been remitted for retrial, costs of the trial are to be costs in the cause. (3) No order as to costs of the appeal.

As the matter has been remitted for retrial, the costs relative to the trial should be set aside and should be dealt with at the end of the retrial by the court below.

Costs remain within the discretion of the court. That discretion is not to be exercised arbitrarily but in accordance with established principles and in relation to the facts of the case.

With respect to the costs of the appeal, having regard to the facts of this case, the only way to do justice in this matter is to make no order as to costs.

Bernard Schulte Shipmangement (Cyprus) Ltd. v. Ritchie and another [2015] 3 BHS J. No. 152 mentioned
Polymers International Limited v Philip Hepburn SCCivApp. No. 8 of 2021 considered
Swart et al v Appollon Metaxides et al SCCivApp No.78 of 2012 considered

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DECISION ON COSTS

Judgment delivered by the Honourable Mr. Justice Evans, JA:

1. On 30 March 2023 in a written judgment ("the Judgment"), we allowed the Appellant's appeal against a written ruling by Bowe-Darville J. who had found the Appellants liable for trespass and proceeded to make an award for mesne profits and damages for trespass.

2. We made no order in relation to costs, but instead, the issue of costs was reserved and the parties were ordered to file written submissions on costs within 14 days from the date of the Judgment.

3. The deadline fixed for filing written submissions has passed.

4. Mrs. Kenria Smith in her written submissions on behalf of the Appellants contends that costs should follow the event, as this was a case where this Court acceded to the Appellant's appeal.

5. In support of her submission Counsel cited the case of **Polymers International Limited v Philip Hepburn** SCCivApp. No. 8 of 2021 where at paragraph 6 Sir Michael Barnett P. made these observations:

> **"6. In Amber Murphy v Hot Pancakes et al SCCivApp. No. 95 of 2020; SCCivApp. No. 52 of 2021 this court cited with approval the views of Buckley LJ in Scherer and another v Counting Instruments Ltd and another [1986] 2 All ER 529 on the exercise of the discretion of the Court with respect to costs and stated at page 536:**
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> > **'…we derive the following propositions. (1) The normal rule is that costs follow the event. That party who turns out to have unjustifiably either brought another party before the Court or given another party cause to have recourse to the Court to obtain his rights is required to recompense that other party in costs. But, (2) The judge has under s 50 of the 1925 Act an unlimited discretion to make what order as to costs he considers that the justice of the case requires. (3) Consequently, a successful party has a reasonable expectation of obtaining an order for his costs to be paid by the opposing party but has no right to such an order, for it depends on the exercise of the Court's discretion. (4) This discretion is not one to be exercised arbitrarily: it must be exercised judicially, that is to say in accordance with established principles and in relation to the facts of the case. (5) The discretion cannot be well exercised unless there are relevant grounds for its exercise, for its exercise without grounds cannot be a proper exercise of the judge's function. (6) The grounds must be connected with the case. This may extend to any matter relating to the litigation and the parties' conduct in it, and also**

> **to the circumstances leading to the litigation, but no further. (7) If no such ground exists for departing from the normal rule, or if, although such grounds exist, the judge is known to have acted not on any such ground but on some extraneous ground, there has effectively been no exercise of the discretion. (8) If a party invokes the jurisdiction of the Court to grant him some discretionary relief and establishes the basic grounds therefor but the relief sought is denied in the exercise of discretion, as in Dutton v Spink & Beeching (Sales) Ltd and Ottway v Jones, the opposing party may properly be ordered to pay his costs. But where the party who invokes the Court's jurisdiction wholly fails to establish one or more of the ingredients necessary to entitle him to the relief claimed, whether discretionary or not, it is difficult to envisage a ground on which the opposing party could properly be ordered to pay his costs. Indeed, in Ottway v Jones [1955] 2 All ER 585 at 591, [1955] 1 WLR 706 at 715 Parker LJ said that such an order would be judicially impossible, and Evershed MR said that such an order would not be a proper judicial exercise of the discretion, although later he expressed himself in more qualified language (see [1955] 2 All ER 585 at 587, 588-589, [1955] 1 WLR 706 at 708, 711).'"**

6. The Respondents submit that, the matter having been remitted, costs ought to follow the event before the court below on the re-hearing, alternatively, that there should be no order as to costs.

BACKGROUND

7. The full background to this matter may be gleaned from this Court's judgment. However, for the purposes of this Decision on Costs, a summary will suffice:

> **"3. On 4 March 2015, by Originating Summons supported by an Affidavit, the Respondents/Plaintiffs brought an action in the Supreme Court for compensation of land pursuant to the Acquisition of Land Act Chapter 252 of the Statute Laws of The Bahamas…**
>
> **…**

5. The Respondents/Plaintiffs amended their Originating Summons on 30 June 2015 to add Charles A. Christie as an additional plaintiff and the Treasurer of the Commonwealth of The Bahamas as an additional Defendant…

6. The initial response by the Appellants/Defendants in the court below was to make an application by Summons filed on 22 July 2015 for:

> **"(1) An Order pursuant to Order 18, rule 19(1) (b) and or (d) of the Rules of the Supreme Court , Chapter 53, and o/or under the inherent jurisdiction of the Court, that the Plaintiffs Originating Summons be struck out and the action … dismissed on the ground that the causes of action … was statute barred under the provisions of Section 50 of the Acquisition of Land Act, Chapter 252 and/or Section 12 of the Limitation Act, 1995 (Ch.83) and are frivolous and vexatious and/or otherwise an abuse of the process of the Court..."**

7. …This application was not proceeded with, but it is important to note that other than raising the limitation issue there was no substantive opposition to the Respondents'/Plaintiffs' entitlement to compensation.

8. On 8 July 2019 the Appellants/Defendants filed another Summons making application pursuant to Order 18, Rule 19 (1) (a) (b) and (d) of the Rules of the Supreme Court 1978 and/or the inherent jurisdiction of the Court for an order:

> **'…that the action be dismissed 'on the ground that the Plaintiffs' claim discloses no reasonable cause of action, is scandalous, frivolous or vexatious and/or is otherwise an abuse of the process of the Court'**

…

13. The strike out application was heard by the Learned Judge on 19 August 2019 and dismissed with costs. There was no written Ruling provided.

14. The Originating Summons was Re-amended on the 18 November 2020 to reflect a claim by the first two Respondents/Plaintiffs for compensation for the:

> **'land compulsorily acquired and otherwise affected by the captioned purported compulsory acquisition by the Defendants under the provisions of the Act or damages for the trespass with respect thereto by the said Defendants'.**

…

16. On 26 November 2020 the Appellants/Defendants filed yet another summons which was supported by an affidavit of Kingsley Smith filed on the same date. By this summons the Appellants/Defendants made an application, pursuant to Order 18, Rule 19(1) (a) (b) and (d) of the Rules of the Supreme Court 1978 and/or under the inherent jurisdiction of the Court for an order that the Re-Amended Originating Summons be struck out and dismissed on the ground that the Plaintiffs' claim disclosed no reasonable cause of action, was frivolous, vexatious and an abuse of the process of the Court. The Summons further sought an order that the action was statute barred pursuant to the Limitation Act.

…

19. The Record of appeal does not reflect a decision by the trial Judge relative to this strike out application. However, as the matter proceeded to trial it is safe to say that the application was not successful.

…

27. On 13 October 2022, the learned Judge delivered a full written Decision and after a review of the facts, the law, and submissions by Counsel, she summarized her findings at paragraphs 22 -23 as follows:

> **'22. The Court rejects the Defendants' defence and finds that the Defendants have since on or about 2000 unlawfully entered onto the Plaintiffs' land thereby committing a trespass. However, the Court can only sanction damages from 2009.**

23. In conclusion the Court accepts and sanctions the calculations as presented in the Plaintiffs' submissions namely:

1. Mesne profits

2. Damages in lieu of an injunction

3. Interest at the rate of 7% to run from the date of Judgment until payment;

4. Costs to the Plaintiffs to be taxed if not agreed.'"

8. The appellants appealed the decision of the trial Judge, the matter was heard by us, and a written decision was delivered as indicated above. It is significant however to note that in allowing the appeal our reasons were based on the following findings:

"**31. The Respondents in this appeal did not at any time during the trial below withdraw their claim for compensation under the Acquisition of Land Act. The learned Judge did not make a specific finding that the Respondents/Plaintiffs had not proved their claim for compensation under the Acquisition of Land Act and that claim was not formally dismissed…**

…

33. …It was the Judge's duty to consider that evidence and make a determination as to whether in fact the property was compulsorily acquired. This was important because if the finding was that the property was compulsorily acquired the issue of trespass could not arise. [In these circumstances] it was an error for the trial Judge to move on to consider the alternate claim for trespass without properly determining the main issue.

…

35. …It is clear that the Acquisition Notice was wider than the property under Corridor 7. The result being that the Judgment does not assist with answering the question as to whether and to what extent other properties belonging to the Respondents were taken under the Acquisition.

…

> **39. …The parties provided substantial evidence in support of their opposing positions as to whether permission was given to the Appellants to utilize the subject land. The Learned Judge in her judgment did not treat with that evidence or indeed the relevant submissions on that issue save to say that the Appellants 'could offer no sustainable defence to their actions'.**
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> **…**
>
> **44. In addition to the failure to determine the acquisition claim, the Judge's finding that the Appellants/Defendants have also admitted and accepted the fact of their unlawful and continued trespass upon, and interference with, the Respondents'/Plaintiffs' said land the subject hereof' is not supported by the evidence. The Appellants admitted to being in possession of the land but at no time was there an admission that that possession was unlawful."**

DISCUSSION AND ANALYSIS

9. The two decisions which we must make are (1) who should bear the costs of the trial in the court below and (2) who should pay the costs of the appeal? I will deal first with the costs in the court below. As I have endeavored to show, the Appellants made several unsuccessful applications in the court below. Any costs awarded relative to those applications should remain in place. The costs awarded relative to the trial itself, in my view, must be set aside as the matter has been remitted for retrial. Those costs should be costs in the cause and dealt with at the end of the retrial by the court below.

10. Unfortunately, the position relative to costs of the appeal are not so clear. Rule 24(5) of the Court of Appeal Rules provides that:

> **"24. (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."**

11. 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 follows 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 Schulte Shipmangement (Cyprus) Ltd. v. Ritchie and another** [2015] 3 BHS J. No. 152.

12. In considering the established principles it is noted that in the case of **Swart et al v Appollon Metaxides et al** SCCivApp. No.78 of 2012 (delivered on 22 October 2018), Isaacs JA said as follows:

> **"7. In the Supreme Court the issue of who should bear the costs of an action and/or application falls to be considered in light of Order 59 of the Rules of the Supreme Court. Moreover, section 30(1) of the Supreme Court Act provides:**
>
> > **'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.'**
>
> **8. We generally have regard to the practice that obtains in the Supreme Court. In my view this makes estimably good sense".**

13. Prior to the introduction of the Civil Procedure Rules (CPR), Order 59 rule 2 of the Rules of the Supreme Court (RSC) provided that:

> **"2. (2) The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order."**

14. Notwithstanding the introduction of the CPR, as outlined below, the principle remains the same:

> **"71.6 Successful party generally entitled to costs.**
>
> **(1) 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.**

(2) The court may, however, make no order as to costs or, in an exceptional case, order a successful party to pay all or part of the costs of an unsuccessful party."

15. It is clear then that whereas a successful party has a reasonable expectation of obtaining an order for his costs to be paid by the opposing party he has no right to such an order, for it depends on the exercise of the court's discretion. That discretion is an unlimited discretion to make what order as to costs the court considers that the justice of the case requires. It is well accepted that this means that this discretion is not one to be exercised arbitrarily: it must be exercised judicially, that is to say in accordance with established principles and in relation to the facts of the case.

16. The facts of the case as are disclosed in our written Judgment were placed before the trial Judge for her determination. Unfortunately, as we found, the learned judge did not utilize those facts to reach her determination. Instead, she failed to make a determination on the central issue as to whether the property in issue was compulsorily acquired. This error was compounded by arriving at a finding of trespass that was based on a misunderstanding of the Respondents' position which led her to find that they admitted to that trespass.

17. The Appellants claim for costs is based on their view that they were the successful party in the appeal. In these circumstances it is not unreasonable for them to have an expectation that they are entitled to their costs as the successful party. The question to be answered, however, is whether to order the Respondents to pay the costs of the action would be just, having regard to the facts before us.

18. The Respondents' claim was for compensation for the compulsory acquisition of their property. As noted above, the Respondents in this appeal at no time during the trial below withdrew their claim for compensation under the Acquisition of Land Act. The learned Judge did not make a specific finding that the Respondents/Plaintiffs had not proved their claim for compensation under the Acquisition of Land Act and that claim was not formally dismissed.

19. Additionally, it is clear that it was the Judge's duty to consider the evidence and make a determination as to whether in fact the property was compulsorily acquired. If the finding was that the property was compulsorily acquired, the issue of trespass could not arise. In these circumstances it was an error for the trial judge to proceed to consider the alternate claim for trespass without properly determining the main issue.

20. In my view, in the circumstances of this case it would not be just to require the Respondents to pay the costs of the appeal. It is significant that the trial Judge noted in her judgment at paragraph 11 that she had **"no doubt that the subject land was compulsorily acquired by the Government under the Acquisition of Land Act."** However, rather than deciding the case on that basis she opted to determine the action based on her finding that the Appellants **"admitted and accepted the fact of their unlawful entry and continued trespass upon, and**

interference with, the [respondents'] said land the subject hereof." This finding was unfortunate as although the Appellants admitted being present on the land, they did not accept that their entry or presence there was unlawful.

21. I am satisfied that the only way to do justice in this matter is to make no order as to costs of the appeal. It follows that both parties will unfortunately have to bear their own costs relative to the appeal.

The Honourable Mr. Justice Evans, JA

22. I agree.

The Honourable Madam Justice Crane-Scott, JA

23. I also agree.

The Honourable Mr. Justice Jones, JA