

**COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 95 of 2020
SCCivApp. No. 52 of 2021**

B E T W E E N

**AMBER LOUISE MURPHY
Appellant / Intended Respondent / Respondent**

AND

**HOT PANCAKES LTD.
CS&P SA
Respondents / Intended Appellants / Applicants**

**ANSBACHER (BAHAMAS) LTD.
Respondent**

**BEFORE: The Honourable Sir Michael Barnett, P
The Honourable Madam Justice Crane-Scott, JA
The Honourable Madam Justice Bethell, JA**

**APPEARANCES: Mr. Robert Adams, QC with Mr. Samuel Brown, Counsel for Amber
Louise Murphy**

**Mr. Brian Simms, QC with Mrs. Sophia Rolle-Kapousouzoglou and
Mr. Valdere Murphy, Counsel for Hot Pancakes Ltd. & CS&P SA**

Ms. Keri Sherman, Counsel for Ansbacher (Bahamas) Ltd.

DATES: 5 January 2022

Civil appeal – Costs –Rule 24 of the Court of Appeal Rules

Murphy appealed to this Court from the refusal of the judge below to vary an injunction to allow for the payment of legal fees and reasonable living expenses. On 1 October 2020 the appeal was allowed, and the Court invited the parties to make written submissions as to costs. Hot Pancakes Ltd. and CS&P SA sought leave to appeal the 1 October 2020 decision to the Judicial Committee of the Privy Council. The application for leave was denied on 10 November 2020. The parties were invited to make submissions on costs. Thereafter, Hot Pancakes Ltd. & CS&P SA made an application to anonymize the aforementioned judgments. The application for anonymization was denied on 11 February 2021 and the Court reserved its decision on costs and ordered written submissions to be filed.

Held: Relative to the judgments dated 1 October 2020, 10 November 2020 and 11 February 2021, Murphy is awarded costs to be paid by Hot Pancakes Ltd. and CS&P SA, to be taxed if not agreed. No costs awarded to Ansbacher (Bahamas) Ltd.

Rule 24 of the Court of Appeal Rules empowers the Court with the jurisdiction to make costs awards. In making costs awards the general principle is that costs follow the event. In the present case the Court awards costs to Murphy as she was successful on her appeal, and as Hot Pancakes Ltd. and CS & P SA were unsuccessful on both of their applications.

Kelly v Albury [1998] BHS J No. 85 mentioned

Regina (Viridor Waste Management Ltd and others) v Revenue and Customs Commissioners [2016] 4 WLR 165 applied

Scherer and another v Counting Instruments Ltd and another [1986] 2 All ER 529 applied

DECISION ON COSTS

Delivered by the Honourable Sir Michael Barnett, P:

1. This ruling relates to three outstanding issues as to costs arising out of the following decisions of this Court: firstly, an appeal by Murphy against the decision of Newton, J.; secondly, an application by Hot Pancakes Ltd. and CS&P SA for conditional leave to appeal to the Privy Council and thirdly, an application by Hot Pancakes Ltd. and CS&P SA to anonymize the judgments of the aforementioned appeal and application.
2. On 11 September 2020, Murphy appealed, to this Court, the refusal of Newton, J. to vary an ex parte order in order to permit Hot Pancakes Ltd. and CS&P SA to pay her legal costs and reasonable living expenses out of monies frozen by them in the ex parte order. By judgment dated 1 October 2020 the Court allowed the appeal and varied the ex parte order to permit Murphy access to the sum of \$150,000.00 to pay legal expenses. The Court referred the issue of living expenses back to Newton, J. The parties were invited to make submissions as to the proper order as to costs.
3. Following the Court's decision referred to at paragraph 2 herein, Hot Pancakes Ltd. and CS&P SA applied to this Court for conditional leave to appeal to the Judicial Committee of the Privy Council. By judgment dated 10 November 2020. The application for conditional leave was refused and the parties were, again, invited to make submissions on the issue of costs.
4. Hot Pancakes Ltd. and CS&P SA then applied to this Court to anonymize the 1 October 2020 and 10 November 2020 judgments. The application for anonymization was refused by judgment dated 11 February 2021 and the Court requested that the parties provide submissions on costs.
5. Though not necessary for the purposes of this judgment, for completeness, I mention that subsequent to the aforementioned appeal and applications Murphy requested further funds out

of the monies held by Ansbacher. That application was refused by Bowe-Darville, J. and Murphy sought leave to appeal that decision to this Court. The application for leave to appeal was refused and the Court ordered that costs should follow the event.

6. Having regard to the aforementioned, this judgment relates to the Court's 1 October 2020, 10 November 2020 and 11 February 2021 judgments only.
7. The general principle is that costs follow the event.
8. As stated in rule 24 of the Court of Appeal Rules 2005 Ch. 52, the Court of Appeal, having the same powers as the Supreme Court, has the jurisdiction to order the award of costs. Subsection 5 provides:

“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.”

9. In *Scherer and another v Counting Instruments Ltd and another* [1986] 2 All ER 529 Buckley, LJ in considering the discretion of the Court with respect to costs stated at page 536:

“...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). (9) If a judge, having relevant grounds on which to do so, has on those grounds, or some of them, made an order as to costs in the exercise of his discretion, his decision is final unless he gives leave to a dissatisfied party to appeal. (10) If, however, he has made his order having no relevant grounds available or having in fact acted on extraneous grounds, this Court can entertain an appeal without leave and can make what order it thinks fit." [Emphasis added]

10. The exposition by Buckley, LJ was applied in *The Bahamas in Kelly v Albury* [1998] BHS J No. 85. In that case Strachan, J. accepted the exposition of Buckley, LJ and stated that it was wholly applicable.
11. In *Regina (Viridor Waste Management Ltd and others) v Revenue and Customs Commissioners* [2016] 4 WLR 165, Nugee, J. succinctly stated the rationale for the "costs follow the event" rule, to wit:

"21. ...The general rule that costs follow the event is I think based on causation principles: a claimant who has a good claim which the defendant denies is obliged to sue, and hence incur costs, in order to make good his claim and the defendant therefore ought to pay for the costs which he has caused the claimant to incur; similarly a defendant who is sued by a claimant who in fact has no claim is obliged to defend himself, and hence incur costs,

in order to see off the invalid claim, and the claimant therefore ought to pay for the costs which he has caused the defendant to incur...”

12. Having regard to the aforementioned principles, I make the following orders.

Judgment dated 1 October 2020 – Appeal against the refusal to modify the ex parte order

13. Murphy, being the successful party, in the appeal against the refusal to vary the ex parte order to permit the payment of legal costs is entitled to costs to be paid by Hot Pancakes Ltd. and CS&P SA. Therefore, Hot Pancakes Ltd. and CS&P SA shall pay Murphy’s costs of the appeal.

Judgment dated 10 November 2020 - Application for conditional leave to appeal to the JCPC

14. As the application for conditional leave to appeal to the JCPC was refused, Hot Pancakes Ltd. and CS&P SA must pay Murphy’s costs of that application before this Court.

Judgment dated 11 February 2021 - Application for anonymization

15. The same principle applies to the application to anonymize the 1 October 2020 and 10 November 2020 judgments. Hot Pancakes Ltd. and CS&P SA lost that application and must pay the costs of that application to Murphy.

Ansbacher (Bahamas) Ltd.

16. We do not award any costs to Ansbacher (Bahamas) Ltd. in the matters before this Court as Ansbacher had no interest whatsoever in the appeal or applications and their attendance by counsel was unnecessary.

17. All costs are to be taxed if not agreed.

The Honourable Sir Michael Barnett, P

18. I agree.

The Honourable Madam Justice Crane-Scott, JA

19. I also agree.

The Honourable Madam Justice Bethell, JA