

COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 86 of 2022

B E T W E E N

RUBIS BAHAMAS LIMITED

Appellant

AND

LILLIAN ANTOINETTE RUSSELL

Respondent

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

APPEARANCES: **Mr. Audley Hanna Jr. with Mr. Keith Major Jr., Counsel for the**
 Appellant
 Mrs. Krystal Rolle KC, Counsel for the Respondent

DATES: **19 October 2023 & 11 December 2023**

Civil Appeal - Costs - Court of Appeal Rules, 2005, Rule 24 - Supreme Court Act, Section 30 - Supreme Court Civil Procedure Rules, 2022, rules 71.3 and 71.6 - Costs Orders When an Appellant is Largely But Not Wholly Successful on Appeal

On 19 October 2023, the Court issued its judgment on the appeal, allowing it in part by setting aside the award for the 1994 leak and reducing the damages for the 2012/2013 leak to \$159,450.00. The Court upheld the awards of interest, while reserving the issue of costs for further consideration based on the written submissions provided. In the written submissions, the Appellant requested at least 83% of its Supreme Court costs, arguing that the damages payable to the respondent were reduced by 76%, and thus, the Appellant should receive at least 77% of its costs. The Respondent proposed the Court order costs to the Respondent for her 2012/2013 leak claim against the Appellant, certified fit for two counsel after January 31, 2020, and costs to the Appellant for the Respondent's 1994 leak claim, both to be taxed if not agreed, as well as the allocation of costs related to different grounds of appeal. After reviewing the written submissions, the Court reached a decision on the costs of the appeal.

Held: The Respondent is ordered to pay to the Appellant 80% of the costs of the appeal, such costs to be taxed if not agreed.

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 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. The Court must consider the appeal as a whole, as well as the points submitted and decided by the Court, in establishing who is the successful party in this appeal. In this case, the Appellant successfully appealed the finding that part of the claim was statute-barred by limitation laws and also achieved a major reduction of over 77% of the damages awarded at trial through other wins on appeal. While the Respondent still ultimately was entitled to some reduced damages, when looking at the appeal as a whole, the Appellant was largely successful in achieving the overturning or reducing of key findings. Given the circumstances, the Court orders that the Respondent pay the Appellant's appeal costs. However, such expenses will be reduced by 20% to reflect that the Appellant was not wholly successful, notably in connection to the 2012/2013 spill issues. As a result, the Respondent is ordered to pay the Appellant 80% of its appeal expenses, which will be taxed if not agreed upon.

Bastionspark LLP v Revenue and Customs Commissioner [2016] STC 2549

Bernard Schulte Shipmanagement (Cyprus) Ltd. v. Ritchie and another [2015] 3 BHS J. No. 152

Comberg v VivoPower International Services Limited and another company [2020] EWHC 2787 (QB)

Rylands v Fletcher [1868] UKHL 1

Swart et al v Appollon Metaxides, Silver Point Condominium Apt SCCivApp No.78 of 2012 (22 October 2018)

DECISION ON COSTS

Decision delivered by the Honourable Sir Michael Barnett, P:

1. The issue for consideration is what is the proper order regarding costs when the Appellant is largely, but not wholly successful, on the appeal.
2. The issue arose out of a trial before a judge of the Supreme Court. There were two spills from a gas station located at Robinson and Old Trail Road in 1994 and approximately in 2012/2013. The spills migrated on to the property owned by Lillian Russell (“the Respondent”). The Respondent sued Rubis Bahamas Limited (“the Appellant”) in negligence, trespass, nuisance and **Rylands v Fletcher** in relation to both leaks.
3. The judge found that both leaks occurred, they caused damage to the Respondent’s property, the leaks reduced the value of the Respondent’s property, and the Appellant was liable for the

damage caused by both leaks. He then awarded the Respondent \$692,825.14 consisting of \$250,000.00 damages for loss of amenity value, \$3,450.00 for the cost of testing & appraisal and \$439,375.14 for the cost of remedial work. The judge awarded 5% interest on special damages from the date of the incurrance of the expenses to the date of trial and 2% interest on general damages from the date of the Writ of Summons to the date of trial.

4. The Appellant was dissatisfied with the judgment and appealed to this Court. The Appeal consisted of twelve grounds of appeal, and an additional 6 sub-grounds of appeal. We found that notwithstanding the prolixity of the grounds, the issues could readily be dealt with under three headings:
 1. The 1994 leak
 2. The 2012/2013 leak
 3. Amount of damages.
5. The Court allowed the appeal in part; we set aside the judge's award of \$692,825.14. We set aside the amount granted in respect of the 1994 leak and reduced the amount of the damages in respect of the 2012/2013 leak. We awarded \$159,450.00 consisting of \$25,000.00 for loss of amenity value, special damages of \$3,450.00 and \$131,000.00 for loss of value in the property. The awards of interest remained unaffected.
6. However, on the issue of the costs of the appeal, we directed the parties to provide written submissions to this Court on the payment of costs. Pursuant to the directions of the Court, the parties have now provided written submissions for our consideration. The Appellant urged the Court to give it at least 83% of its costs in the Supreme Court action. Further, the Appellant contends that because the damages payable to the Respondent had been lowered by 76% by this Court, then the Appellant should receive at least 77% of its cost.
7. The Respondent invited the Court to make the following costs order in relation to the Supreme Court:
 - Costs to the Respondent of and occasioned by her claim against the Appellant arising out of the 2012/2013 Leak, Certified Fit for Two (2) Counsel after 31st January, 2020, to be taxed if not agreed; AND
 - Costs to the Appellant of and occasioned by the Respondent's claim against the Appellant arising out of the 1994 Leak to be taxed if not agreed.
8. The Respondent further invited the Court to make the following costs order in relation to the Court of Appeal:
 - Costs to the Appellant in relation to Grounds of Appeal Numbers 1.b and 4 to be taxed if not agreed

- Costs to the Respondent in relation to Grounds of Appeal Numbers 1a, 1 c, 1d, 2, 3, 5, 6, 7, 8, 9, 10a, 10b, 10c, 11, 12 a and 12 b to be taxed if not agreed

9. After reviewing the submissions, we now produce this Ruling.

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 powers 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.”

(Emphasis added)

Supreme Court Civil Procedure Rules, 2022

“71.3 The court’s powers to make orders about costs include power to make orders requiring a party to pay the costs of another person arising out of or related to all or any part of any proceedings.

71.6 (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.

...

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(3) Without limiting the court’s discretion or the range of orders open to it, the court may order a person to pay —

(a) costs from or up to a certain date only;

(b) costs relating only to a certain distinct part of the proceedings; or

(c) only a specified proportion of another person’s costs.”

(Emphasis added)

11. As is evident from the wording of the above provision, costs are left to the discretion of the Court to make a decision which meets the justice of the case. In the case of **Swart et al v Appollon Metaxides, Silver Point Condominium Apt** SCCivApp No.78 of 2012 (22 October 2018), Issacs 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.”

12. In delivering the Judgment in this appeal, this Court (at paragraph 74) stated:

“74. ...the appeal is allowed in part. The judgment in the sum of \$692,825.14 is set aside. I substitute an award of \$159,450.00, consisting of \$25,000.00 for loss of amenity value, special damages of \$3,450.00 and \$131,000.00 for loss of value in the property. The awards of interest remain unaffected.” (Emphasis added)

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 Schulte 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. This issue was canvassed by Nugee J in **Bastionspark LLP v Revenue and Customs Commissioner** [2016] STC 2549. That case involved an award of costs in an appeal by a taxpayer against decisions

of the Revenue Authority. The appeal raised many issues and the appeal was favourable to the taxpayers on some issues but not on others.

15. Nugee J made some observations which appear to me to be relevant in determining how to exercise our discretion in this case. At paragraph 23 he said:

“In these circumstances it seems to me an inadequate account of what happened to say that one or other party was *the* successful party. The reality is that both parties were in part successful, and in part unsuccessful. In seeking to apply the overriding objective of being fair and just, I do not myself see why the FTT needs to identify one overall winner; what one would expect it to do is fashion a costs order that reflected the fact that each side won in some respects but lost in others. Since costs are ultimately a matter of discretion which has to be exercised on the facts of the individual case, and since cases vary infinitely in their facts, I think one should be wary of seeking to be too prescriptive in how the discretion should be exercised or trying to lay down general principles. But what I think can be said is that there would not at first sight appear to be anything wrong in a case like the present in the FTT making a costs order which seeks to reflect the relative success of the parties.” (Emphasis added)

And later at paragraph 43:

“There are two points which are I think of some interest: first, Judge Berner regarded HMRC as the successful party overall “in real life, having regard to the litigation as a whole, and looking at the position in a realistic and commercially sensible way” (at [14]), on the basis that the scheme failed and the taxpayers did not succeed in their objective. This was so notwithstanding that the appellants overall had succeeded in achieving a better outcome by appealing than if they had not done so. If anything therefore it suggests that one cannot simply identify the overall successful party by asking if the appeal to the FTT has achieved anything of value for the appellants.” (Emphasis added)

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.
17. The Respondent, in paragraph 14 of its submissions, relied on the authority of **Comberg v VivoPower International Services Limited and another company** [2020] EWHC 2787 (QB) for the proposition that the question of who is the unsuccessful party is generally determined

by deciding “*who has to write the check at the end of the case.*” If this view were adopted by this Court, this would then mean that the Respondent is the successful party, notwithstanding that the check it receives from the Appellant is substantially less than what it would have received had the Supreme Court judgment been upheld.

18. However, I find that notwithstanding that the Appellant is still ultimately going to write a check to the Respondent, the Appellant has nonetheless been the overall victor of this appeal.
19. In this case, although it did not succeed on every issue raised in the appeal, taking a holistic view, the Appellant was overall the more successful party in this appeal. First, it successfully appealed the issues regarding the fact that any claim with respect to the 1994 leak was statute-barred. Given that there were two leaks, for which the claim was made, by virtue of eliminating any liability for the 1994 leak, the Appellant should receive at least 50% of its costs. Additionally, the Appellant also scored significantly with the reduction of the loss of amenity from \$125,000 to \$25,000, on the basis that the judge had not taken a number of factors into account including that the Respondent's loss of amenity was mitigated by the fact that she was able to rent the Property to tenants. Finally, the \$439,375.14 award for the cost of remediation was vacated. In the end, this meant that the damages were reduced by 77% as a result of the appeal.
20. In the circumstances, given that the Appellant was largely successful on this appeal, I would order that the Respondent pay to the Appellant the costs of the appeal. However, such costs are to be reduced by 20% to reflect that the Appellant was not entirely successful, particularly in relation to the issues surrounding the 2012/2013 spill. Accordingly, the Respondent is ordered to pay to the Appellant 80% of its costs of the appeal, such costs to be taxed if not agreed.
21. I see no reason to interfere with the order of the trial judge on the costs of the Supreme Court action. The Respondent was required to bring the action to recover damages suffered. There is no evidence that the Appellant paid into court an amount to satisfy the claim or damages which exceeded the amount of the award on this appeal. The Respondent is entitled to her costs in the court below as ordered by the trial judge.

The Honourable Sir Michael Barnett, P

22. I agree.

The Honourable Madam Justice Crane-Scott, JA

23. I also agree.

The Honourable Mr. Justice Evans, JA

