IN THE COURT OF APPEAL OF BELIZE AD 2019

CIVIL APPEAL NO 1 OF 2017

JULIUS ESPAT Applicant/Appellant
Member of the House of Representatives

v

(1) **MICHAEL PEYREFITTE**
Speaker of the House of Representatives

(2) **EDDIE WEBSTER**
Clerk of the National Assembly

(3) **THE ATTORNEY GENERAL** Respondents

_____

BEFORE
The Hon Mr Justice Sir Manuel Sosa President
The Hon Madam Justice Minnet Hafiz Bertram Justice of Appeal

E A Marshalleck SC for the appellant.
A Finnegan, Crown Counsel, for the respondents.
By written submissions.

_____

21 June 2019

RULING ON COSTS APPLICATION

SIR MANUEL SOSA P

Introduction

[1] For some years now, following the guidance given in the judgment of their Lordships' Board in *Sans Souci Limited v VRL Services Limited* [2012] UKPC 6 (judgment delivered on 7 March 2012), this Court has been making costs orders designed to be

provisional in the first instance but to become final unless there shall follow within a given period an application for a contrary or different order. In accordance with this practice, the costs order made by the majority (me and Hafiz Bertram JA) in this appeal on 16 May 2019 was in the terms following:

> "Each party to bear its own costs of the appeal. This costs order is provisional to be made final after seven days. In the event either party should apply for a contrary order within the period of seven days from the delivery of this judgment the matter of costs shall be determined on written submissions to be filed by the parties in ten days from the date of the application."

Somewhat unusually, but as he was fully entitled to do by letter to the Registrar, the appellant applied for a contrary order on 20 May 2019.

The terms of the application

[2] The application asks (a) that costs of the appeal, to be agreed or taxed, be paid by the respondents to the appellant and (b) that the costs thereof, ie of the application, be costs in the appeal.

The rival contentions

[3] The submissions of Mr Marshalleck SC, for the applicant, may be grouped, not without some overlapping, under two grounds.

[4] The first ground is that, in accordance with the general rule that costs shall follow the event, the appellant, as the successful party in the appeal, ought to be awarded his costs therein. Mr Marshalleck argues that there is ample authority for the making of such an award in the broad provisions of section 18 of the Court of Appeal Act, which, as material for present purposes, are as follows:

> "The Court may make any order as to the whole or any part of costs of an appeal as may be just …"

Citing the decision of the Court of Appeal of England and Wales in *Straker v Tudor Rose (a firm)* [2007] EWCA Civ 368, counsel urges the majority to adopt the approach to the

making of a costs order taken in that jurisdiction under the new dispensation. Under that approach, he submits, the court must start by asking itself whether a costs order would be appropriate. If that question admits of an answer in the affirmative, the court must then remind itself of the general rule already stated in the opening sentence of this paragraph. Next, the court must identify the successful party in the appeal. Then the court should consider whether are any reasons why it should depart, whether wholly or in part, from the general rule. If it decides that there are such reasons, the court should clearly set out the factors which justify such a departure.

[5] Counsel contends, first, that, in the particular circumstances of the present case, an order for costs would be appropriate because the claim of the appellant was struck out below without trial and at the request of the respondents when there was a clear and obvious need for trial. Trial was required, he says, in order for the relevant standing orders to be interpreted. He points to the decision of the majority in the appeal, which leaves it in no doubt that, in its opinion, such request, and the acceding of the court below thereto, were both wrong. Then he submits that "there exists no circumstance that would justify withholding costs in such a case and none have been suggested or identified by the Court in the proceedings". In that situation, he adds, the applicant should not have to bear the costs of putting matters right.

[6] Secondly, in keeping with the approach in *Straker* which he commends to the majority, Mr Marshalleck, refers back to the general rule, under which, of course, the unsuccessful party should be ordered to pay the costs of the successful party.

[7] That done, he proceeds, thirdly, to underline the undeniable, viz that the appellant is the successful party in the appeal. He directs attention in this regard to the fact that the judgment of the majority has restored the appellant's claim and remitted it to the court below for rehearing. He further emphasises that the Court has identified the triable issue for the court below and found that consideration of any alternative remedy would be premature having regard to the need first to determine whether or not there was indeed any suspension from the House.

[8] Fourthly, counsel for the applicant argues that the general rule must apply in the absence of anything in the appellant's conduct to justify a departure therefrom.

[9] The second ground needs only to be mentioned. It is that there is, in the circumstances of the appeal, nothing that would warrant non-application of the general rule. Given the overlapping already alluded to above, the contention just noted in the paragraph immediately preceding this one is the one made in support of this second ground and need not be repeated here.

[10] The appellant advances further submissions which, for reasons to be given below, it is not necessary to refer to here.

[11] Ms Finnegan, for the respondents, vigorously opposes the making of a contrary order, marshalling her submissions around the core proposition that the parties ought to be guided by the discretion of the Court, which has already been exercised. Like Mr Marshalleck, she acknowledges the primacy of section 18 of the Act, with its broadly-worded provisions, and, having done so, stresses that when the majority order for costs was made on 16 May 2019 there was no violation of the terms of that section. There ought, on her contention, to be no "deviation" from the majority's proper exercise of its wide discretion under section 18. The approach taken in *Straker*, should not be followed by this Court primarily because the circumstances of that case differ, and are distinguishable, from those in the present appeal. Counsel lists those suggested differences, among which is the existence in England and Wales, and non-existence in Belize, of pertinent rules of court.

[12] At the same time, Miss Finnegan helpfully draws attention to para 10 of the judgment in *Straker*, at which it is observed that, when it comes to costs, decided cases are of relatively limited assistance, the important consideration being that "it is to the rules that one should go, and it is by reference to the rules that one should test whether the judge has gone wrong in any particular case". Counsel further asks the majority to bear in mind that it is at an early stage in the proceedings that the matter came to this Court and, in addition, that this is not a case where the appellant can complain that the judge below ordered him to pay costs on striking out his claim. Moreover, says, Miss Finnegan, there is a possibility that the appellant will be awarded costs when the claim comes on for hearing again below, which possibility should be a factor when considering whether to award him costs in this Court and at this stage.

[13] Counsel for the respondent will have no part of Mr Marshalleck's contention that this Court found that "it was wrong to urge the application on the basis argued by the Respondents", her riposte being that the Court made no such observation or ruling. That contention, being thus unsupported, lends no weight, she submits, to the case for a contrary costs order.

[14] There was a further submission made by Miss Finnegan to which there is no need to refer in this summary but to which I shall briefly advert later.

Discussion

[15] I must state from the very outset that I find utterly irresistible the approach commended by Mr Marshalleck to the court seeking to decide whether to make a costs order. I so find it not because I consider the *Straker* decision to be of binding or persuasive authority in this Court, given the rules by which this Court is now governed, but because it is an approach which is shaped and dictated by good sense. Therefore without committing the indiscretion of following and applying *Straker*, I would adopt the approach in question for the simple reason that, in my view, it is a sound and practical approach which can safely be adopted within the capacious framework of section 18 of the Act.

[16] That decision having been made, I turn first to the question whether a costs order is appropriate in the present case. Here again, I cannot but agree with counsel for the appellant that the question must be answered in the affirmative. Without the benefit of argument through submissions in writing, I was obviously not of the view that there ought to be an award. But it is in proper recognition of the fact that one may be persuaded to change one's stance on costs that orders of the kind made in this case on 16 May 2019 started to be made. Appellant's counsel has persuaded me that it will be fair to make a contrary order, chiefly because, otherwise, the appellant will not be enabled to recover the costs incurred by him to put things right.

[17] He has succeeded in this connection by placing under appropriately sharp focus the fact that, in moving for a striking out of the claim without a hearing on the merits, the respondents urged upon the court below a supposed basis for that drastic remedy which has proved quite wrong on appeal. Miss Finnegan, as already noted, takes exception to Mr Marshalleck's choice of words. But, in my view, it is impossible to escape from the

clear implications of the majority judgment allowing the appeal; and those implications have not been misstated by Mr Marshalleck. I hasten, nevertheless, to point out here that care needs to be taken in reading the relevant contention of Mr Marshalleck. I do not consider that he is for a moment suggesting that anything other than the law relied upon by the respondents was "wrong". As I read him, his point is that the wrong in question was a legal one, not a moral one. The argument of Miss Finnegan referred to at para **[13]**, above, does not seem fully to appreciate that distinction. I refer here to her comment that-

> "As such there was no imputation as to any wrongs being occasioned by the Respondents when it (*sic*) filed and argued its (*sic*) strike out in the court below."

[18] Which takes me to the earlier point made by Miss Finnegan, at para 3 of her written submissions, concerning what she perceives to be a need for the parties to be guided by the majority's exercise of its discretion in making the costs order of 16 May. Here again counsel is betraying a failure to appreciate something vital, viz the provisional nature of the order in question during the specified period of seven days. There can be no need, as such, to be guided by a provisional order which effectively invites an application for a contrary order, which application is then made.

[19] Secondly, as required under the chosen approach, I pause to remind myself of the general rule – that costs follow the event.

[20] Thirdly, I find, without the slightest difficulty, that the appellant is the successful party to the appeal. That is not, in fact, disputed by the respondents.

[21] Fourthly, I ask myself whether there are any reasons why in the present case costs should not be paid by the respondents to the appellant. I consider for this purpose the conduct of the appellant and can find no such reasons. In this part of the exercise I make sure not to lose sight of the fact that the governing provisions are to be found in section 18 and not in the rules of the court below.

[22] At both paras **[10]** and **[14**], above, I have referred to, without specifying, other submissions of Mr Marshalleck and Miss Finnegan, respectively. These were submissions having to do with principles and/or rules relating to the award of costs in constitutional claims. While I can appreciate the relevance of those matters to a

discussion of costs in a court, eg the court below, to which the new dispensation is a reality, I readily confess to being unable to grasp why they should figure in the present debate, given the undisputed primacy of section 18 of the Act. It is for this reason that I choose not to burden this ruling with consideration of the argument focussing on rule 56.13(4) to (6) of the Supreme Court (Civil Procedure) Rules 2005 and *Dominic Dunne v The Minister of the Environment*, *Heritage and Local Government*, Ireland, *The Attorney General and Dun Laoghaire-Rathdown County Council* [2008] 2 IR 775.

Disposition

[23] It follows from the preceding discussion that I would grant the application of the applicant for his costs of the appeal, including the costs of such application, to be taxed if not agreed.

_____

SIR MANUEL SOSA P

HAFIZ-BERTRAM JA

[24] I have read the draft judgment of the learned President, and I concur in the reasons for granting costs to the appellant and the costs order proposed in the judgment.

_____

HAFIZ-BERTRAM JA