The Court of Appeal for Bermuda

CIVIL APPEAL No. 4 of 2017

B E T W E E N:

KEVIN WAKEFIELD SAMPSON, JR
Plaintiff/Appellant

-v-

LIONEL EARLE JAMES ANDERSON
First Defendant/First Respondent

-and-

THE ESTATE OF NINA MAE JOELL
(ALBERT JOELL, JR as Estate Representative)
Second Defendant/Second Respondent

-and-

THE ESTATE OF CLIFFORD WAKEFIELD SAMPSON
(TYRONE LLEWLLYN SAMPSON SR as Estate Representative)
Third Defendant/Third Respondent

Before: **Baker, President**
Kay, JA
Bernard, JA

Appearances: Sonia Grant, Grant & Associates, for the Appellant
Paul Harshaw, Canterbury Law Ltd., for the Respondents

Date of Hearing: **31 October 2017**

Date of Judgment: **22 June 2018**

JUDGMENT

Costs of Appeal – relevance of parties' conduct

KAY, JA

1. On 17 November 2017, we allowed the Appellant's appeal. We proceeded to invite written submissions on costs. We have read the submissions filed by respective counsel. As with everything else in this unusual case, they are polarized – the Appellant seeking his costs of the appeal and of the previous hearing in the Supreme Court (where costs were awarded to the Respondents) and the Respondents seeking to retain the costs order in their favour in the Supreme Court and now to add to it a costs order in their favour in respect of the costs of the appeal. It is suggested that the latter is appropriate by reference to the without prejudice correspondence which passed shortly before the hearing of the appeal.

2. Dealing first with the costs order made in the Supreme Court, we do not consider that it would be right for us to interfere with that order. It is not suggested that the substantive judgment of the Chief Justice was erroneous in its treatment of the submissions which were advanced before him. The Appellant's success before us was on a basis not pursued in the Supreme Court. Ms Grant submits that it had been referred to in the Amended Statement of Claim but it is plain that it was not relied upon by counsel who represented the Appellant at the hearing before the Chief Justice. His submissions were correctly rejected and have not been repeated before us.

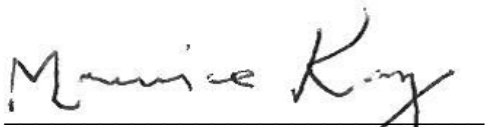
3. Turning to the costs of the appeal, it is axiomatic that, in the absence of countervailing factors, a successful appellant will normally obtain an order for the costs of the appeal. In the present case, it is submitted on behalf of the Respondents that there are such countervailing factors and that they are of such strength that they call not just for the denial of an order in favour of the Appellant but for an order awarding the unsuccessful Respondents their costs of the appeal. This submission seeks to rely on the wayward pleading

history of the Appellant's case and on the without prejudice correspondence.

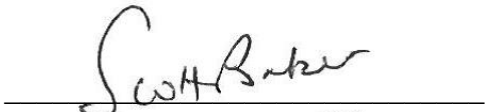
4. It is true that the pleading history has been lamentable. However, it seems to us that a realistic overview of this appeal is that, from the day when this Court granted leave to appeal, and expressed itself as it did through the judgment of Clarke JA, the Appellant's new case had begun to be strong, if not irresistible. We infer that this was appreciated by the Respondents because their position in the without prejudice correspondence was based on a proposed consent order whereby the appeal would be allowed. The negotiations did not ripen into a compromise because the Appellant dug in his heels in relation to the Supreme Court costs and the Respondents insisted on recovering their costs of the appeal. Moreover, and importantly, the parties remained miles apart on other issues including the extent to which a final settlement should deal with the benefits and burdens of the property during the long period when the Appellant's interest was unknown to him and/or ignored.

5. Essentially, the Respondents' case on the costs of the appeal is that they made reasonable offers that were unreasonably rejected. We do not accept that. It seems to us that if the Respondents wished to safeguard themselves in relation to the costs of the appeal which they now appreciated was going to succeed, they could only do so by ceasing to oppose the appeal. They could have said – openly and not just in without prejudice correspondence – that they were no longer going to resist the substantive appeal but simply wanted to be heard on costs and consequential matters. Instead, their open position remained one of total opposition to the substantive appeal which they sought to resist at the hearing by the deployment of every conceivable argument.

6. In these circumstances, we have come to the conclusion that the Appellant should be awarded his costs of the appeal from the date of the grant of leave to appeal. It was not unreasonable of him to reject the Respondents' offers. In addition, it seems to us that it was unreasonable for the Second Respondent in particular, as estate representative, to continue to contest an appeal which he had come to realize was meritorious. It may be that difficulties arose from the fact that the First Respondent (a beneficiary) and the Second Respondent (an estate representative) were not separately represented. We say no more about that.



Kay JA



Baker P

Bernard JA