[2001–02 Gib LR 386]

DEVELOPMENT AND PLANNING COMMISSION v. STIPENDIARY MAGISTRATE, ex parte A. HADWEN and J. HADWEN

SUPREME COURT (Pizzarello, A.J.): December 13th, 2002

Criminal Procedure—judgment—finality—judge not functus officio after delivering judgment and awarding costs if no formal order perfected—may still reconsider costs if appropriate

Criminal Procedure—appeals—parties—parties in original prosecution remain parties to appeal—Stipendiary Magistrate not respondent to appeal by case stated against his decision

Criminal Procedure—appeals—witnesses on appeal—on appeal by case stated against decision of Stipendiary Magistrate, Stipendiary not required to be witness and respondent has no right to cross-examine him as to basis of his decision

Criminal Procedure—costs—costs against non-party—costs for or against non-party only in exceptional circumstances—if party mistakenly not described as such in court record but treated as party throughout, not non-party and costs may be awarded against him

The parties applied for costs following a decision in favour of the appellant on an appeal by way of case stated from the magistrates' court.

Criminal proceedings in the magistrates' court against the individual respondents ("the Hadwens") in respect of the unauthorized erection of a partition adjacent to their property were dismissed on a technicality. The appellant Commission maintained that the Stipendiary Magistrate erred in doing so and appealed against the acquittal by way of case stated. The appeal record wrongly named the Stipendiary Magistrate as the respondent, the Hadwens were merely described as applicants and appeared only as "persons interested" and the appeal was listed as a civil matter. After answering the case stated, the Supreme Court gave judgment for the appellant and, in the absence of the Hadwens' counsel, who had been misinformed as to the date on which judgment would be given, made an order for costs in favour of the appellant and against the Hadwens.

Before the judge had left the court and before the judgment had been perfected by a formal order, the Hadwens' counsel appeared and asked to

address the court on costs. Over the objection of the appellant's counsel, who submitted that the judge was at that stage of the proceedings *functus officio*, the matter was adjourned and argument as to costs was heard at a later date.

The Hadwens submitted *inter alia* that, although orders for costs normally followed the event, they should not do so here because (a) the Hadwens were not parties to the appeal since only the Stipendiary Magistrate had been named in the appeal record as "the respondent"; (b) there were no exceptional circumstances to justify the award of costs against a non-party, especially as there was a possibility that the appellant was only seeking costs against them because it could not obtain them from the Stipendiary Magistrate; (c) they had been disadvantaged by the appeal being conducted as a civil appeal, especially as they had been unable to cross-examine the Stipendiary Magistrate; and (d) the court should always be circumspect in awarding costs in a criminal matter.

The appellant Commission submitted in reply that an order for costs could and should be made against the Hadwens since (a) they were in reality parties (the respondents) to the appeal and had been treated as such even though they had not been so described in the record; (b) whether the appeal was treated as civil or criminal did not effectively prejudice the Hadwens as in neither case need the Stipendiary Magistrate be present and he would therefore not have been available for cross-examination had the appeal been listed properly; and (c) the Hadwens had had ample opportunity to correct the errors of which they now complained and had failed to take it.

Held, upholding the award of costs to the appellant:

(1) The judge was entitled to reconsider his order for costs in the circumstances of this case, since he remained *functus officio* in the matter, even though he had already delivered judgment and awarded costs, since the judgment had not been perfected by a formal order (para. 3).

(2) Although the court would only make an order for costs against a non-party with considerable caution and in exceptional circumstances, it would not be so constrained in the present case. The Stipendiary Magistrate had wrongly been described in the appeal record as "the respondent" but the reality was that the Hadwens were the respondents and had throughout the appeal procedure been treated as such. As the appellant had succeeded on appeal, it was proper to apply the usual rule (as expressed in the Civil Procedure Rules, r.44.3(2)) and order the unsuccessful parties to pay the costs of the successful party (para. 8; para. 12).

(3) This was especially so as the Hadwens had not been prejudiced by either of the procedural mistakes made, *i.e.* the failure to name them as respondents and the treatment of the case as a civil appeal. They had been treated as respondents throughout; even if the appeal had properly been treated as a criminal matter, they would still have had no opportunity to

cross-examine the Stipendiary Magistrate—and in any case they had failed to take the steps necessary to correct these formal errors. The order for costs against them would therefore stand (para. 9; paras. 11–12).

Case cited:
(1) *Symphony Group plc.* v. *Hodgson*, [1994] Q.B. 179; [1993] 4 All E.R. 143, *dicta* of Balcombe, L.J. applied.

Legislation construed:
Criminal Appeal Rules 1977 (L.N. 1977/162), r.12(3): The relevant terms of this sub-rule are set out at para. 9.

Civil Procedure Rules 1998 (S.I. 1998/3132), r.44.3: The relevant terms of this sub-rule are set out at para. 4.

r.48.2(1): "Where the court is considering whether to exercise its power under section 51 of the Supreme Court Act 1981 (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings—

(a) that person must be added as a party to the proceedings for the purposes of costs only; and

(b) he must be given a reasonable opportunity to attend a hearing at which the court will consider the matter further."

J. Restano for the appellant;
A.A. Vasquez, Q.C. for the respondents.

1 **PIZZARELLO, A.J.:** I will set out my understanding of how an order for costs made in open court has come to be reviewed. The costs order followed the delivery of a judgment which had previously been handed down to the parties' legal advisers. The judgment was delivered on December 6th, 2002. The judgment has not been perfected by a formal order.

2 Due to an administrative error in the offices of the respondents' legal adviser, Mr. Vasquez, Q.C. did not attend for the delivery of the judgment herein. On the application of the appellant's counsel, I awarded costs to the appellant, while refusing his application for costs on an indemnity basis and a wasted costs order.

3 Minutes after the court recessed, Mr. Vasquez, on being informed of the delivery of the judgment, attended at the Registry asked to see me and sought to address me on costs. I saw him informally and Mr. Restano, who had not yet left the precincts of the court, was present. Mr. Restano pointed out that (subject to clarification) he believed I was *functus officio* and could not review my decision—that would be the province of the Court of Appeal. I therefore adjourned to later that day to hear counsel and on a formal resumption in my offices, after hearing both counsel and

specifically on hearing the explanation of Mr. Vasquez for his non-attendance, I ruled that I was not *functus* in the circumstances of the present case. It is not necessary for the purpose of this ruling to revisit the arguments raised. I then adjourned to December 9th, 2002 to hear Mr. Vasquez on the question of costs.

4 At that hearing, Mr. Vasquez conceded that the general rule was that the successful party is entitled to costs. However, the present matter was an exceptional case and the court ought not to make an order for costs against the Hadwens. He referred to Fordham, *Judicial Review Handbook*, 2nd ed., para 20.1.1, at 227 (1997) and Part 44 of the Civil Procedure Rules, where it is plainly stated that costs are always in the discretion of the court. Rule 44.3 reads:

> "(1) The court has discretion as to—
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> (a) whether costs are payable by one party to another;
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> (b) the amount of those costs; and
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> (c) when they are to be paid.
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> (2) If the court decides to make an order about costs—
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> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
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> (b) the court may make a different order . . .
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> . . .
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> (4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including—
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> (a) the conduct of all the parties;
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> (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
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> (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).
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> (Part 36 contains further provisions about how the court's discretion is to be exercised where a payment into court or an offer to settle is made under that Part)."

5 He referred to the following matters as matters which make this an exceptional case:

(a) In the appeal record, the Stipendiary Magistrate is the respondent and the Hadwens appear in a secondary capacity described as "*ex parte*." They are not described as respondents and have appeared as interested

parties. For the purpose of costs, there was never any joinder of the Hadwens as parties in the proceedings, which is a requirement of r.48.2 of the Civil Procedure Rules. Mr. Vasquez referred to *Symphony Group plc.* v. *Hodgson* (1), where the material considerations are set out and the important ones in the present appeal are ([1993] 4 All E.R. at 152–154):

> "(1) An order for the payment of costs by a non-party will always be exceptional . . . The judge should treat any application for such an order with considerable caution.
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> . . .
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> (9) The judge should be alert to the possibility that an application [for costs] against a non-party is motivated by resentment of an inability to obtain an effective order for costs against a legally aided litigant."

Mr. Vasquez submits that (9) is in point because the appellant cannot obtain costs from the Stipendiary Magistrate and so falls back on the party interested (the Hadwens).

(b) The appeal was pursued as a civil appeal and the Hadwens were not given the opportunity to identify the grounds on which the Stipendiary Magistrate could say he was not cognizant of his discretion. They had only one opportunity, one bite at the cherry, to look at the draft case stated and were surprised to see the contents of the case as finally stated by the Stipendiary Magistrate. The Hadwens expected the Stipendiary Magistrate to be present at the appeal to explain his findings. That was important because, as I understood Mr. Vasquez, the Hadwens were always of the view (or had been so advised) that on that finding there was no question but that the appeal would be allowed and they could not resist that. That would have been the Hadwens' sole intervention in the appeal and in his submission that they were unable to do so was because of the wrong procedure. The fundamental mistake was that of the Stipendiary Magistrate and he was the one cited as the respondent.

(c) These are criminal proceedings, as was recognized in the judgment. Mr. Vasquez submitted that courts are more circumspect in granting costs in criminal matters. It is significant, he said, that in the second summons issued by the Development and Planning Commission against the Hadwens in respect of the same partition, the Stipendiary found for the Hadwens, dismissed the summons but did not award costs to the successful party.

(d) The final point is that of proportionality. The matter at issue is a partition which was put up, not fancifully, by law-abiding citizens who wished to protect their security from passers-by and also to blank out noise emanating from the ground floor below their flat. In addition, the Stipendiary Magistrate had had his attention drawn to the fact that he had

a discretion and, if he chose to use it in the manner he did, it is no fault of the Hadwens, who ought not to bear the costs of his mistake.

6 In reply, Mr. Restano disputed that the Hadwens were not parties. They were the defendants in the court below and they were the respondents in the appeal. The actual respondents are the parties affected and not the Stipendiary Magistrate. If they were not respondents, what *locus* did they have to defend the appeal other than that? There is no validity in Mr. Vasquez's submission.

7 As to the second point, criminal and civil procedure in case stated from the magistrates' court are the same. The only difference in the present case is one of form which is unimportant and in respect of which the Hadwens are not prejudiced. The respondents' submissions are based on a wrong premise. That the Stipendiary Magistrate was expected to be present at the appeal by way of case stated is a fundamental misconception, as a magistrate never appears except in certain circumstances—of which the present case is not one. As to one bite at the cherry, there is no evidence about that. And anyway the submission rings hollow because the Hadwens did not make any application to put this right nor did they write to the clerk to identify their problem.

8 As to this court's discretion, that is exercised differently in the magistrates' court. In the Supreme Court, costs should follow the event and it does not make any difference whether it is criminal or not. He argued that their counsel had not been able to produce any authorities as the basis for his submission. In the present case, the Hadwens chose to take the opportunity which presented itself on the non-appearance of the prosecutor, to have determined in their favour on a technicality the whole proceedings taken against them by the Development and Planning Commission, and that in his submission militates against not giving costs. In his submission, the Hadwens are the architects of their own misfortune. The Stipendiary gave them a way out: go back to the magistrates' court within 28 days and have the matter reviewed, but the reply was not only "No" but a vigorously contested defence and those factors provide material for the court to exercise its discretion to give the successful appellant its costs.

9 On the first point, that the Hadwens were not respondents, I am of the view that Mr. Vasquez's submission cannot be right. The parties in the magistrates' court were the Development and Planning Commission and the Hadwens. An appeal by way of case stated concerns both those parties and this is reflected in the Criminal Appeal Rules 1977, r.12(3), which provides for a copy of the case stated to be sent to "the respondent." There is no word about "parties interested." The case stated in this matter was sent to Mr. Vasquez for the Hadwens and he made representations. Clearly, the Hadwens were treated as respondents and

equally Mr. Vasquez accepted this. The mistake in the heading of the appeal and that it was marked as a civil appeal does not affect the substance. It follows that I do not accept the point Mr. Vasquez makes about the need to join the Hadwens as parties. I reiterate that in my opinion they were parties and as such respondents.

10 On the second point: A magistrate is rarely involved in the hearing of an appeal. Despite the error in the heading of the appeal (there were in fact two errors, the naming of the Stipendiary as respondent being the first, and the allocation to the civil appellate jurisdiction being the other), I fail to understand why the Hadwens expected to be able to examine the Stipendiary Magistrate. Had the form of appeal been correct, it would have been clear that the Stipendiary would not have been so subject. Does that fact of error make any difference in regard to costs in a matter which is lost? In my judgment of December 6th, 2002, I stated the Hadwens had been disadvantaged by the departure from the recommended procedure and this aspect is one such disadvantage. If one stops there, there would appear to be a fairly solid reason to support Mr. Vasquez's submission. But the question of the consideration of costs does not stop there, because the matter could have been put right by a timely application and the fault that the Hadwens failed to make such an application lies with themselves. So I conclude that this point does not amount to a circumstance which is exceptional.

11 As to the third point, that in criminal matters the court is more reticent to grant costs than it is in civil matters, I think this is true but this approach assumes that costs may be granted, as indeed is the case, and with this in mind I turn to the fourth point.

12 The fourth point is proportionality. It is true that in relative terms the offence is a minor offence and that said, it also deals with a trifling matter. Not for that reason, I hasten to say, does it lose importance to the Development and Planning Commission, but I am looking now at costs. The point that it is the Magistrate's fault is well taken but in the accusatorial system where generally one wins or loses with costs following the event, that circumstance seems to me to lose its force. As for Mr. Restano's point that it was the conduct of the respondents that made the appeal necessary, I do not see why the respondents' actions should be held against them.

13 Recalling that costs are always in my discretion and, having regard to the arguments and considerations above related, however, I am of the opinion that the order made on December 6th as to costs should stand.

Ruling accordingly.