[2022 Gib LR 111]

LEMBERGA v. SERILLO (PTC) LIMITED, FIDUX TRUST COMPANY LIMITED, CANRIF LIMITED and FIMAN LIMITED

COURT OF APPEAL (Kay, P., Elias and Rimer, JJ.A.): May 6th, 2022

2022/GCA/06

Civil Procedure—withdrawal and discontinuance of action—costs—appellant who brings and then discontinues appeal to pay respondent's costs, absent very good reason

The appellant brought a claim seeking the termination of a trust and the distribution to her of the assets.

The appellant was the sole beneficiary of a trust. The second respondent ("Fidux") and the fourth respondent ("Fiman") were Gibraltar companies which were part of the Fidux group of companies which provided trust and corporate services. The first respondent ("Serillo") and the third respondent ("Canrif") were BVI companies. Serillo was the trustee of the trust. Finom, which was part of the Fidux group but not a party to the proceedings, was the sole shareholder of Canrif, and Canrif was the sole director of Serillo. Fiman and the appellant were the directors of Canrif.

The appellant had asked Fidux, which was said to be a *de facto* trustee, to consider distributing the trust assets to her and terminating the trust. She claimed that Fidux refused to take any steps until she provided certain indemnities, which she refused to do. The appellant brought proceedings in the Supreme Court seeking *inter alia* the termination of the trust and the distribution to her or as she might direct of the trust assets.

Fidux and Fiman applied to strike out the claims against them under CPR r.3.4(2)(a) as they disclosed no reasonable grounds for being brought against them. Fidux asserted that the appellant was able to assume full control of the trust and that if she took the necessary steps, the court's assistance was not required. Dudley, C.J. gave judgment in the respondents' favour and the claims were struck out (that judgment is reported at 2020 Gib LR 22).

By notice of appeal dated February 5th, 2020, the appellant appealed against that judgment. The respondents filed a notice of cross-appeal. The appellant discontinued the appeal by a notice of withdrawal dated March 17th, 2021. She contended that although the appeal had merit, it had become academic and therefore continuing it would serve no useful purpose. The respondents were content for the appeal to be withdrawn provided their

costs were paid. The appellant argued that while that might be the default position, there were features of the case which warranted a different order, namely that (a) the respondents had withdrawn or accrued for deduction moneys from the Fidux client account funds on account of their legal expenses in these proceedings and to award costs would lead to a windfall or amount to double recovery and unfairly penalize her; and (b) it was only three days before the Supreme Court hearing that the respondents had indicated that she could herself take control of the trust, which was a change of circumstance to which she had not contributed. She did in fact do so and thereafter there was no purpose in continuing the appeal because she had achieved her objective. The appellant submitted that the respondents should bear the costs incurred after the notice of discontinuance because they had unreasonably refused to accept her offer to discontinue without any order for costs.

Held, ruling as follows:

(1) Rule 68 of the Court of Appeal Rules 2004 provided that an order for costs must be "just." There was no specific rule in Gibraltar relating to the principles for awarding costs on discontinuance but in the UK the general rule was provided by CPR r.38.6(1): "Unless the court orders otherwise, a claimant who discontinues is liable for the costs which the defendant against whom [the claimant] discontinues incurred on or before the date on which notice of discontinuance was served on [the defendant]." The following principles could appropriately be applied in this case: (i) when a claimant discontinued proceedings, there was a presumption that the defendant should recover his costs; the burden was on the claimant to show a good reason for departing from that position; (ii) the fact that the claimant would or might well have succeeded at trial was not itself a sufficient reason for doing so; (iii) however, if it was plain that the claim would have failed, that was an additional factor in favour of applying the presumption; (iv) the mere fact that the claimant's decision to discontinue might have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case would not suffice to displace the presumption; (v) if the claimant was to succeed in displacing the presumption, he or she would usually need to show a change of circumstances to which he or she had not contributed; however (vi) no change in circumstances was likely to suffice unless it had been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provided a good reason for departing from the rule. The ultimate question was what costs order would be just. If an appellant chose to appeal and later chose to withdraw that appeal, then absent very good reason, justice demanded that the appellant should pay the costs incurred by the respondent (paras. 15–17).

(2) In the present case, there was no reason to depart from the default position with respect to the costs of the discontinued appeal (this included costs incurred in relation to the cross-appeal). First, there was no merit in the appellant's submission that no costs order should be made because the

respondents had already indemnified themselves with respect to their costs out of the trust fund. Even if they had been so reimbursed, they would be entitled to a costs order in their favour. Costs were recoverable by a party who was liable to his solicitors to pay them, regardless of who actually paid them. That did not mean that any costs the appellant was required to pay would result in a windfall to the respondents, or in double recovery by them and an unfair penalty on her. If the respondents had already indemnified themselves out of the trust funds, they would have to reimburse such funds to the extent of their recovery from the appellant. Secondly, as to the change of position or circumstance, the court could not see how it could be said that the respondents were under an obligation to advise the appellant about how she could obtain control of the trust. She had her own legal advice. However, even if such an obligation existed, the position had been disclosed to her before the strike out application was heard by the Supreme Court. By the time her appeal was lodged, it had become readily apparent how she could take control of the trust funds. There was no need to pursue the appeal. The appellant would be ordered to pay the respondents' costs incurred with respect to the appeal up to the notice of withdrawal and the additional costs incurred in resolving the costs dispute (paras. 21–26).

Cases cited:

(1) *Bath* v. *Standard Land Co.*, [1911] 1 Ch. 618, referred to.

(2) *Brookes* v. *HSBC Bank plc*, [2011] EWCA Civ 354, followed.

(3) *Thornley* v. *Lang*, [2003] EWCA Civ 1484; [2004] 1 W.L.R. 378; [2004] 1 All E.R. 886; [2004] 1 Costs L.R. 91, referred to.

Legislation construed:

Civil Procedure Rules (S.I. 1998/3132), r.38.6(1): The relevant terms of this provision are set out at para. 14.

Court of Appeal Rules 2004, r.60:

> "(3) If all parties to the appeal consent to the withdrawal of the appeal without order of the court, the appellant may file in the Registry the document or documents signifying such consent and signed by the parties or by their solicitor, and the appeal shall thereupon be deemed to have been withdrawn and shall be struck out of the list of appeals by the Registrar. In such event any sum lodged in court as security for the costs of the appeal shall be paid out to the appellant.
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> (4) If all the parties do not consent to the withdrawal of the appeal, the appeal shall remain on the list, and shall come on for the hearing of any issue as to costs or otherwise remaining outstanding between the parties, and for the making of an order as to the disposal of any sum lodged in court as security for the costs of the appeal."

r.68: "The court may make such order as to the whole or any part of the costs of appeal or in the court below as may be just, and may assess the same or direct taxation thereof."

L. Baglietto, *Q.C.* (instructed by Hassans) for the appellant;
E. Phillips and *P. Grant* (instructed by Signature Litigation) for the second and fourth respondents.

The parties' submissions were in writing

1 **ELIAS, J.A.:**

Introduction

The issue in this case is who should bear the costs following a notice of discontinuance of an appeal.

2 The position under r.60 of the Gibraltar Court of Appeal Rules 2004 is that if the parties consent, the appeal may be withdrawn without order of the court. If they do not consent—and typically this will be because of a dispute over costs—the appeal remains on the list until any outstanding issues have been resolved.

3 In this case the court directed that it would determine the costs dispute on the basis of the parties' written submissions.

The background

4 The background, in summary form, is as follows. The appellant is the sole beneficiary of the Cerise Trust and sought to have the trust funds released to her. She initiated proceedings against a number of defendants, including the two respondent companies to this appeal, namely Fidux Trust Co. Ltd. ("Fidux") and Fiman Ltd. ("Fiman"). The appellant alleged that Fidux was in effective control of the trust and was making unreasonable demands for an indemnity from her before agreeing to release the trust funds to her.

5 Fidux and Fiman sought to strike out the claims against them on the basis that they disclosed no reasonable grounds for bringing the claims. A judgment in their favour was given by the Chief Justice on January 23rd, 2020 (reported at 2020 Gib LR 22) and all the claims were struck out.

6 By a notice of appeal dated February 5th, 2020, the appellant appealed against that judgment. The respondents filed a notice of cross-appeal on March 4th which sought to uphold the judgment on slightly different grounds.

7 The appellant discontinued the appeal by a notice of withdrawal dated March 17th, 2021. She contends that although her appeal had merit, it had become academic and therefore continuing with it would serve no useful purpose. The respondents were content for the appeal to be withdrawn provided their costs were paid. The appellant disputed this and argued that whilst this might be the default position when an appeal is withdrawn, there were features of this case that warranted a different order. She contends

that there should be no order as to costs up to the date when the notice to discontinue was lodged, and that thereafter the additional costs she has incurred in seeking to resolve the costs issue should be borne by the respondents. She says that these costs should be paid by the respondents because they had unreasonably refused to accept her offer that there should be no order as to costs on discontinuance. The respondents are seeking their costs at all stages.

The nature of the claims

8 Ms. Lemberga was the beneficiary of the Cerise Trust. She brought proceedings against four defendants. The first defendant, Serillo (PTC) Ltd. ("Serillo") was the trustee of the Cerise Trust. The sole shareholder of Serillo was Finom Ltd. ("Finom"), not a party in the action. Finom held the shares on a bare trust for Ms. Lemberga. Serillo is the sole shareholder of Canrif Ltd. ("Canrif"), the third defendant, and Canrif is in turn the sole director of Serillo. Fiman, the fourth defendant, and Ms. Lemberga were Canrif's directors. Fidux, the second defendant, was the holding company of Finom and Fiman.

9 Ms. Lemberga alleged that Fidux had in practice administered the Cerise Trust structure from its inception in 2009. In effect, it was said to be a *de facto* trustee of the trust. Differences arose between Ms. Lemberga and Fidux and she asked for the trust to be terminated and its assets transferred to her. Fidux was not willing to do this unless Ms. Lemberga provided certain indemnities to it and its personnel. She considered that the indemnities sought were onerous and unjustified. She took legal proceedings under CPR r.64 which enables the court to determine any question which arises in relation to the execution of a trust. In essence the proceedings were designed to enable her to obtain a transfer of the trust assets without having to give the indemnities sought. To that end, she sought a number of directions and orders from the court including ordering the resignation of Fiman as director of Canrif.

10 Fidux and Fiman (respondents to the appeal) successfully sought to have these proceedings struck out on the grounds that there were no reasonable grounds for bringing the claims.

11 The detailed nature of the arguments advanced by Fidux and Fiman are not material to this appeal. Suffice it to say that, so far as Fiman is concerned, it argued that Canrif, as director of Serillo, the corporate trustee, owed fiduciary duties to the trustee alone and no duty of any kind to the beneficiary, Ms. Lemberga: see *Bath* v. *Standard Land Co.* (1). As director of the corporate director, Fiman was even further removed and it was plain that Ms. Lemberga could not obtain any relief against it. The Chief Justice agreed and held that there were no reasonable grounds for bringing the claim against Fiman.

12 The principal claim was against Fidux, which was said to be in *de facto* control, and a *de facto* trustee, of the Cerise Trust. The judge held that the evidence relied upon to support that allegation did not sustain, and was not capable of sustaining, it. The judge found that Fidux's administration of the trust was clearly referable to a client service agreement.

13 In relation to both these claims, counsel on behalf of Fidux asserted that far from Fidux having *de facto* control of the Cerise Trust as alleged, Ms. Lemberga herself was able to take ultimate control of it. She was in a position to secure the removal of Fiman as a director of Canrif, thereby leaving her as the sole director of that company; and she could have Canrif removed as sole director of Serillo. It was asserted that if these steps were taken, the assistance of the court was not required for her to achieve her object. She would be in a position to take ultimate control of the trust structure and would need to give no indemnities to anyone. The judge accepted this analysis and, as Ms. Lemberga correctly asserts, was influenced by it in his ruling.

The grounds of appeal

14 Essentially, the appeal alleges that the judge was not entitled to reach the conclusions he did. The appeal included a submission that the judge was wrong to say that "the Appellant was and had always been in a position to 'assume full control' over the Trust."

Arguments on costs

15 Rule 68 of the Gibraltar Court of Appeal Rules provides that an order for costs must be "just." There is no specific rule in Gibraltar relating to the principles for awarding costs on discontinuance, but in the UK the general rule is provided by CPR r.38.6(1):

> "Unless the court orders otherwise, a claimant who discontinues is liable for the costs which the defendant against whom [the claimant] discontinues incurred on or before the date on which notice of discontinuance was served on [the defendant]."

16 This provides a default rule; it was considered by Moore-Bick, L.J. in *Brookes* v. *HSBC Bank PLC* (2) with respect to the discontinuance of claims. He summarized the following principles ([2011] EWCA Civ 354, at para. 6):

> "(1) when a claimant discontinues the proceedings, there is a presumption by reason of CPR 38.6 that the defendant should recover his costs; the burden is on the claimant to show a good reason for departing from that position;
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> (2) the fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so;

(3) however, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption;

(4) the mere fact that the claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption;

(5) if the claimant is to succeed in displacing the presumption he will usually need to show a change of circumstances to which he has not himself contributed;

(6) however, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule."

17 The respondents contend that these principles can appropriately be applied to costs on discontinuance in this case. I agree with that submission, provided that the court recognizes that the ultimate question is what costs order would be just. If a party chooses to appeal and later chooses to withdraw that appeal, then absent very good reason, justice demands that the appellant should pay the costs which have been incurred by the respondent.

The submissions

18 The appellant submits that there are three reasons why it would not be just to award costs to the respondents. The first two can be considered together. Ms. Lemberga alleges that the respondents have either withdrawn or accrued for deduction moneys from the Fidux client account funds on account of their legal expenses in these proceedings. To award costs would either lead to a windfall payment over and above the costs actually incurred, or it would amount to double recovery and would unfairly penalize Ms. Lemberga.

19 The third ground is an alleged change of position. The appellant complains that it was only three days before the hearing before the Chief Justice that the respondents indicated, in their skeleton argument, that she could herself take control of the trust with the consequence that she would not have to provide the indemnities to which she objected. This was a change of circumstance to which she had not contributed. She did in fact take control in the manner suggested and was able to obtain the assets of the trust without any indemnities being given. Thereafter, there was no purpose in continuing the appeal because she had achieved her objective. As a matter of substance and reality, it could be said that she had "won" the strike out application in the sense that by taking the legal proceedings,

she had indirectly achieved her aim. This provided an obvious justification for departing from the default position.

20 The respondents submit that, applying the guidelines in *Brookes* (2), the only proper order is to award them their costs. The change of circumstances was that she had achieved her objective, but that was always within her control. The respondents had not acted unreasonably in simply pointing out to her that her remedy lay in her own hands.

Discussion

21 I do not consider there is any merit in the appellant's points that no costs order should be made because the respondents have already indemnified themselves with respect to their costs out of the trust fund. Even if they have been so reimbursed, they would still be entitled to a costs order in their favour. Costs are recoverable by a party who is liable to his solicitors to pay them, regardless of who actually pays them: see, for example, *Thornley* v. *Lang* (3) ([2003] EWCA Civ 1484, at paras. 5–8), the judgment of the Court of Appeal delivered by Lord Phillips of Worth Matravers, M.R. It has not been suggested that Fidux and Fiman were not so liable. This does not mean, however, as the appellant alleges, that any costs she is required to pay will result in a windfall to the respondents or amount to double recovery by them and an unfair penalty on her. If the respondents have already indemnified themselves out of the trust funds against their costs liability, they will have to reimburse such funds to the extent of their recovery from the appellant. There can be no question of their enjoying any double recovery and nor, therefore, does the making of the costs order constitute a windfall or impose an unfair penalty on the appellant.

22 As to the change of position or circumstance, I do not see on what basis it could possibly be said that the respondents were under an obligation to advise Ms. Lemberga about how she could obtain control of the trust. She had her own legal advice. But even assuming that some such obligation existed, the position had been disclosed to her even before the strike out application had been heard by the Chief Justice. In particular, by the time the appeal was lodged, it had become readily apparent how Ms. Lemberga could take control of the trust funds. Indeed, she adopted the mechanism suggested by the respondents (but which in her notice of appeal she had claimed demonstrated an error of law by the judge). There was no need to pursue the appeal at all.

23 The appellant suggests in her skeleton argument that given the earlier position adopted by the respondents, when they had demanded the indemnities before releasing funds, it was reasonable for her to pursue the appeal until the transfer of the Serillo shares had been completed. That is not in my view a justified reason. Since the matter was in her own hands, the respondents could not ultimately prevent her from gaining access to the

funds. But in any event, if that was her chosen strategy, she had to be prepared to pay the costs if the appeal proved to be unnecessary, as it did.

24 For these reasons, I see no justification at all for departing from the default position with respect of the costs of the appeal. This includes the costs incurred in relation to the cross-appeal.

25 As to the costs incurred after the notice of discontinuance had been lodged, Ms. Lemberga says that the respondents should bear the costs because they had unreasonably refused to accept her offer that the appeal should be discontinued without any order for costs. Since I have found that the stance of the respondents was far from unreasonable, it follows that they are entitled to the costs unnecessarily incurred by the refusal of Ms. Lemberga to pay their costs as a condition of discontinuing the appeal.

26 Accordingly, I would order Ms. Lemberga to pay to the respondents both the costs incurred with respect to the appeal up to the notice of withdrawal and for the additional costs incurred in resolving the costs dispute.

27 We were asked to make a summary assessment of the respondents' costs. However, the appellant has objected to this, and it is not a case where a summary assessment would typically be made. In the circumstances, we think we ought not to make the assessment. The costs will have to be assessed if not agreed.

28 **RIMER, J.A.:** I agree.

29 **KAY, P.:** I also agree.

Ruling accordingly.