

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE HARRIS JA**

SUPREME COURT CIVIL APPEAL NO 36/2018

BETWEEN	NATIONAL COMMERCIAL BANK OF JAMAICA LIMITED	APPELLANT
AND	LAMECH M E GOODEN	RESPONDENT

Litrow Hickson instructed by Myers, Fletcher & Gordon for the appellant

Mrs Martina Shelton and Ms Christina Thompson instructed by Shelards for the respondent

25 March and 21 May 2021

SINCLAIR-HAYNES JA

[1] I have read in draft the judgment of my sister Straw JA and agree.

STRAW JA

[2] On 25 March 2021, we commenced the hearing in relation to the wasted costs order (as indicated at paragraph 4 of the order made in the substantive judgment [2021] JMCA Civ 11). At that time, counsel for Shelards, Mrs Shelton, made an application to adduce further evidence concerning the information contained in two letters, dated 29 October 2005 and 3 November 2006 from National Commercial Bank Jamaica Ltd ('NCB') to its client, Lamech Gooden ('Mr Gooden').

[3] We allowed the application for the limited purpose of our consideration of the wasted costs order and commenced the hearing of submissions on behalf of Shelards.

[4] Having considered the submissions, as well as the fresh evidence, we remained firmly of the view that Shelards ought to have provided the relevant documentation and additional information to NCB, before joining it as a party to the proceedings (as detailed at paragraphs [36] to [40] and [43] of the substantive judgment). It was the above considerations that triggered the court's decision to conduct a wasted costs hearing. The court's discretionary power to make orders for wasted costs is engaged, where costs are incurred as a result of any improper, unreasonable or negligent act or omission on the part of any attorney-at-law or where the court considers it unreasonable to expect a party to pay costs in light of any act or omission (see rule 64.13 of the Civil Procedure Rules).

[5] Mrs Shelton, however, submitted that Mr Gooden, had given Shelards firm instructions to file the application to join NCB to the proceedings, for the purpose of facilitating an order by the court that the title should be released to him. She asked if she could be allowed to file an affidavit from Mr Gooden for this court's consideration.

[6] We granted this request. On 14 April 2021, the affidavit of Mr Gooden was filed. Mrs Shelton indicated that she had no further submissions to make and requested that the court complete its consideration of this matter without any further appearance by counsel.

[7] A perusal of the affidavit of Mr Gooden reveals that he was adamant that he had given specific instructions to Shelards to join NCB as a party at the time it was done, based on his unsatisfactory experience with NCB over the years regarding the recovery of his title.

[8] In spite of the statements made by Mr Gooden, it is difficult to conclude that Shelards acted reasonably in the circumstances, insofar that it failed as attorneys-at-law, to place NCB in the position of having all the relevant information (which it had in its possession) in this matter before acceding to its client's request to seek the court's intervention. The issue is not whether the learned judge gave directions to NCB to satisfy itself that it could safely release the title, as NCB had not refused to do so before being

joined as a party. If NCB had refused to release the title, after all the relevant documentation had been given to it, then there may have been no complaint about the costs order of the learned judge. This was not done, so it is doubtful as to how NCB would have dealt with the matter. However, what is clear is that a financial institution cannot be faulted for ensuring that it is seised with the requisite information, before releasing a duplicate certificate of title to one proprietor, where more than one interest is noted on the said title.

[9] However, having perused the affidavit of Mr Gooden, he has signalled that his attorneys-at-law cannot be blamed for their actions, and appears to be ready to bear the consequences relative to the order for costs. In the circumstances, where an explanation has been provided to the effect that a client does not wish to be protected from the expense of what could be described as “unjustifiable conduct of litigation” (per Sir Thomas Bingham MR, in **Ridehalgh v Horsefield and another** [1994] Ch 205, 231), the consideration of wasted costs will be forgone.

[10] Accordingly, the general rule relating to costs will be followed and I would make an order for costs in favour of NCB against Mr Gooden, both here and in the court below (see rule 64.6(1) of the Civil Procedure Rules).

HARRIS JA

[11] I agree.

SINCLAIR-HAYNES JA

ORDER

Costs of the appeal and of the respondent’s application in the court below to the appellant to be agreed or taxed.