IN THE COURT OF APPEAL OF BELIZE, A.D. 2010

CIVIL APPEAL NO. 29 OF 2008

BETWEEN:

RBTT TRUST LIMITED **Appellant**

AND

CEDRIC FLOWERS **Respondent**

BEFORE:

The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

P Zuniga SC for the appellant.
E Courtenay SC for the respondent.

9 and 19 March 2010.

SOSA JA

[1] On 9 March 2010 I agreed with the other members of this Court (i) that the appellant should have its costs of the appeal and (as from the end of the acceptance period provided for in the letter of offer dated 8 February 2007 from the attorney for the appellant to the then attorney for the respondent) its costs in the court below; (ii) that the respondent should have his costs below up to the end of that period and (iii) that all costs be taxed in view of the past failure of the parties to reach agreement as to costs. I have since read, in draft, the reasons for order set out by Morrison JA in his judgment on costs and I concur in those reasons.

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SOSA JA

CAREY JA

[2] I too have read the judgment prepared by Morrison JA in draft. I entirely agree with it and accordingly have nothing to add.

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CAREY JA

MORRISON JA

[3] By its judgment given on 30 October 2009, the appeal in this matter was allowed and the judgment of Awich J varied to the extent that, in place of the sum of US$787,981.48, there should be judgment for the respondent in the sum of US$32,500.00, with interest at the rate of 3% per annum from 3 February 2005 to 10 October 2008. It was also ordered that the appellant pay to the respondent the amount of $1,950.00, by way of reimbursement of costs incurred in the receivership. At the request of counsel, the question of costs was reserved pending further submissions from the parties, if necessary. The court understood this request to have been for the purpose of permitting discussions between the parties and, if possible, agreement, with regard to costs.

[4] In the event, it appears that the discussions were not fruitful and, on 20 November and 23 November 2009 written submissions were filed on behalf of the respondent and the appellant respectively. On 9 March 2010, the parties having confirmed that they would stand by their written submissions, the court made an order for costs in the following terms:

(i) The appellant is to have the costs of the appeal, as well as costs in the court below as from the end of the acceptance

period stated in the appellant's letter to the respondent dated 8 February 2007.

(ii) The respondent is to have all of its costs in the court below up to the end of the acceptance period aforesaid.

(iii) In the light of the failure of the parties to reach agreement on costs, all costs are to be taxed.

[5] These are the reasons for making that order. In this matter the respondent commenced action against the appellant in the Supreme Court to recover US$931,036.25, with interest. This claim related to professional fees said by the respondent to be due to him from the appellant as a result of his having been appointed by the appellant to be the Receiver of the charged assets of International Telecommunications Limited. The receivership, which commenced on 1 November 2004, was terminated by the appellant by letter dated 14 January 2005. When the question of his fees then arose, the respondent asserted his entitlement to be paid on a commission basis, while the appellant indicated its willingness to compensate on a time basis, plus reimbursement of his expenses. The suit was in due course filed because of the parties' inability to locate any common ground on this issue. In the result, as already indicated, Awich J gave judgment for the respondent in the sum of US$787,981.48, for fees which the appellant succeeded on appeal in reducing to US$32,500.00.

[6] As it now turns out, the appellant's attorney-at-law had by letter dated 8 February 2007, before commencement of the trial (but after all the pleadings were in) made an offer to the respondent to settle his claim for damages, interest and costs in the total sum of US$90,000.00. This offer, which was expressly stated to have been made pursuant to Part 35 of the Supreme Court (Civil Procedure) Rules 2005 ("the CPR"), was in the following terms:

"8th February, 2007.

Our Ref: 1100/487 (1) **WITHOUT PREJUDICE**

Ms. Velda Flowers
Velda M. Flowers & Associates,
Attorneys-at-Law,
54 King Street,
Belize City, Belize.

Dear Ms. Flowers,

Re: Supreme Court Claim No. 471 of 2005
Cedric Flowers v RBTT Trust Limited – Offer to Settle

I am instructed to make an offer pursuant to Part 35 of the Civil Procedure Rules to settle the whole of the Claimant's claim for damages inclusive of interest and costs in the sum of US$90,000.00. This offer remains available for acceptance for twenty-eight (28) days from the date hereof.

This offer is 'without prejudice' but my client reserves the right to make the terms of this offer known to the Court after judgment is given with regard to the allocation of the costs of the proceedings.

Although my client disputes the reasonableness of your client's hourly rate claimed as well as your Client's entitlement to a retainer on top of his hourly charges, and will contest these matters vigorously at trial if necessary, this offer is made on the basis of allowing your client:

(1) To be fully remunerated for 45 hours of his time at his claimed rate of US$400.00 per hour, i.e. US$18,000.00;

(2) To receive a further US$40,000.00 on top of his hourly based charges; and

(3) To recover the total of costs/disbursements as claimed by your client in the sum of US$1,725.00.00

Interest is included on the total sum in the amount of US$9,556.00.

Legal costs are included in the sum of US$14,250.00.

Finally a further uplift has been applied to make sure that your client is more than fairly treated in this matter and this rounds the offer upwards to US$90,000.00.

I look forward to hearing from you as to your client's position on this offer.

Yours faithfully,

Original signed by
PHILIP ZUNIGA, S.C."

[7] Rule 35.3 of the CPR provides as follows:

> "35.3 (1) A party may make an offer to another party which is expressed to be 'without prejudice' but in which the offeror reserves the right to make the terms of the offer known to the court after judgment is given with regard to -
>
> (a) the allocation of the costs of the proceedings; and
>
> (b) (in the case of an offer by the claimant) the question of interest on damages.
>
> (2) the offer may relate to the whole of the proceedings or to part of them or to any issue that arises in them."

[8] Rule 35.4 provides that the offer to settle may be made at any time before the beginning of the trial and rule 35.5(1) provides that it must be in writing. Rule 35.5(3) provides that neither the fact nor the amount of the offer must be communicated to the court before all questions of liability and the amount of

money to be awarded (save for costs and interest) have been decided. Where the offer is not accepted, the consequence is stated in rule 35.15(1) as follows:

> "35.15 (1) The general rule for defendant's offers is that, where the defendant makes an offer to settle which is not accepted and –
>
> (a) in the case of an offer to settle a claim for damages, the court awards less than 85% of the amount of the defendant's offer, or
>
> (b) in any other case, the court considers that the claimant acted unreasonably in not accepting the defendant's offer,
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> The claimant must pay any costs incurred by the defendant after the latest date on which the offer could have been accepted without the court's permission."

[9] There is no question that the appellant's letter of offer conformed fully with the requirements of Part 35. The offer was not accepted and the matter proceeded in due course to trial before Awich J.

[10] The appellant accordingly submitted that, having made a Part 35 offer well in excess of the sums ultimately awarded to the respondent by the judgment of this court, the respondent ought to be required to pay (a) the costs in the court below at least from the date to which the offer remained open for acceptance and (b) the costs of the appeal.

[11] With respect to the costs in the court below, the appellant referred us to Part 63 of the Civil Procedure Rules, in particular, rule 63.6 which states the general rule (that costs should ordinarily follow the event - rule 63.6(10) - but also makes provision for the court to make such order as it thinks fit having regard to all the circumstances of a particular case (rule 63.6(2) to (6)). We were also referred by the appellant to two English cases on the subject of costs, that is, **Islam v Ali [2003] All ER D 384** and **Painting v University of Oxford [2005] EWCA Civ. Div. 161**.

[12] The respondent pointed out that section 18 of the Court of Appeal Act provides, in part, that "The Court may make any order as to the whole or any part of the costs of an appeal as may be just …" (emphasis supplied by the respondent). It was also pointed out that the CPR have no application to the Court of Appeal. This court therefore has, it was submitted, "a wide discretion to do what is just as between the parties to the appeal when making a decision as to costs". The respondent submitted that what had happened in this case was that both sides had in fact lost, the appellant having failed in its bid to set aside Awich J's judgment in its entirety, and the respondent having had the damages awarded to him by the judge substantially reduced. In these circumstances, the respondent submitted that it would be unjust for him to have to bear the costs of an appellant who had not succeeded completely on the appeal, particularly as this could have the effect of "completely wiping away the award of damages, by way of compensation for work done, made in [his] favour…". The respondent also submitted that the court could take into account the conduct of the appellant in its dealings with the respondent during the receivership, as well as the "relative standing" of the parties in this case, the appellant being a major financial institution as against the respondent's position as a single practitioner.

[13] Finally the respondent referred the court to the cases of **Allan Soh v The Owners of the vessel "Columbus Caravelle" [2003] HKCF1 769** and **Excelsior Commercial & Industrial Holdings Ltd. v Salisbury Hammer**

Aspden & Johnson (a firm), et al [2002] EWCA Civ. 879, to demonstrate the wide discretion enjoyed by the Court of Appeal on the question of costs. The "Columbus Caravelle" was a case in which the Court of First Instance of Hong Kong had to consider the appropriate order as to costs upon the discontinuance of an action by the plaintiff. Waung J referred to Order 21, rule 3(1) of the Rules of the High Court, which provided that, upon the hearing of an application for leave to discontinue an action, the court had a discretion to make an order "on such terms as to costs … or otherwise as it thinks just". The learned judge considered that "a statutory discretion given to the court must not be too fettered by rules", subject of course to any guidance as may have previously been given by a higher court to lower courts in this regard. Accordingly, in Waung J's view, "Order 21, rule 3(1) gives the court the widest possible discretion with regard to costs, which enabled him to award costs in that case to the discontinuing plaintiff, talking into account all the circumstances, notwithstanding a vigorous submission by the defendant that the plaintiff should be ordered to pay its costs, having in effect conceded defeat in the action.

[14] In the **Excelsior Commercial & Industrial Holdings Ltd.** case, Waller LJ referred with approval to the judgment of Simon Brown LJ (as he then was) in **Kiam v MGN Ltd (No. 2) [2002] 2 All ER 242**, in which that learned judge was concerned to stress (in relation to a Part 36 offer, which is equivalent to our Part 35), that "where all that was relied upon is the failure to accept a reasonable offer, it will be to a high degree of unreasonableness before an award of indemnity costs should be made."

[15] The cases referred to by the appellant were both cases in which it was held on appeal that, although in point of fact the claimant had succeeded in the litigation, it was the defendant who was the effective overall winner and that in those circumstances the general rule that costs should follow the event had been displaced. In **Islam v Ali**, the claimant ran the accountancy practice of the defendant's late husband fro some time. He issued proceedings for

remuneration for the services he had provided during that period, maintaining that he was entitled to a total payment of some £156,000, of which £72,000 had been paid, based on an hourly rate. The defendant contended that he was entitled only to reasonable remuneration for his services and, though a number of offers and counter-offers were made by both parties, they remained far apart (separated by about £60,000) by the time the matter came on for trial. The judge found that the claimant was entitled only to reasonable remuneration and, taking into account the £72,000 already paid, gave judgment in the sum of £12,746.41. However, the judge nonetheless concluded that as the claimant had succeeded on his claim, the ordinary rule should apply and the defendant should pay the claimant's costs.

[16] The defendant appealed on the grounds that she had won on the initial issue that the claimant was entitled to reasonable remuneration only, and that justice required that no order as to costs be made. The Court of Appeal, while restating the general rule that the unsuccessful party should pay the successful party's costs, agreed with the defendant that the trial judge has a wide discretion in furtherance of the overriding objective of justice and fairness to make a different order. In the exercise of that discretion, the judge should have regard to all the circumstances, including the conduct of the parties, for example, how they have respectively pitched and pursued their cases and whether a party has succeeded on part, if not all of his case and to any payment in or offer made.

[17] This is how Arnold LJ put the position in that case (at paras. 23 – 24):

> "23. In my view, the reality of this case is that Mrs. Ali was the winner. She was facing a claim substantially greater than the amount finally awarded. There were, as I have said, competing claims and offers, not only as to the manner of calculation of the amount due but as to the amount, an issue as to the latter ranging from nil to a balance of £80,000 after

giving credit for the monies received. The sum of £12,746.41 ordered was arguably as limited a loss as it was a gain. And it emerged as a result, not only of Mr. Islam losing the case on principle on the main issues in the case, but also as to the true amount due out of a very much large claim. The disparity between what Mr. Islam sought, including what he put Mrs. Ali through to get it, and what he received was so large as to put the relatively small amount finally awarded in the balance between the two rival contentions into relative insignificance.

24. In my view, the judge erred in principle in failing to have due regard in the exercise of his discretion to that fact that Mrs. Ali had won the case in principle, or as near as could be, given the large competing sums being canvassed between the parties and the wide issue between them as to the proper basis of the claim. I would therefore allow the appeal."

[18] In the result, the court held that the appropriate order was that there should be no order as to costs. **Islam v Ali** was applied by the Court of Appeal in **Painting v University of Oxford**, in which the court also held that the trial judge, by applying the general rule that costs should follow the vent, had failed to give appropriate weight to the fact that the defendant, though the loser in fact, was "the effective overall winner" in the litigation (see per Longmore LJ, at para. [24]).

[19] In the instant case, the substantial difference between the appellant and the respondent from the outset of the litigation had to do with whether the remuneration due to the respondent should be calculated on the basis of a commission based on the amount recovered by the appellant or whether the

respondent was entitled to reasonable remuneration calculated primarily on a time basis. Awich J found for the respondent, but this court allowed the appeal and substantially reduced the amount due to the respondent (to a figure well below the appellant's Part 35 offer).

[20] I naturally accept, as the respondent submitted, that this court has a wide discretion as to costs. At the end of the day, however, despite the fact that it is the respondent who has come away from the litigation with a judgment in his favour, there can be no doubt, in my view, that it is the respondent who has won on the substantial issue in the case, that is, whether the appropriate principle of calculation was the respondent's commission basis or the appellant's reasonable remuneration basis. In these circumstances, taking all factors into consideration, it therefore appears to me that, as the amount finally recovered by the respondent is considerably less than 85% of the appellant's Part 35 offer, the general rule in rule 35.13(1)(a) should apply, with the result that the respondent should be ordered to pay the appellant's costs incurred in the court below after the latest date on which the appellant's offer could have been accepted, that is, 28 days after 7 February 2008.

[21] Finally, as regards the costs of the appeal, no good reason has in my view been shown by the respondent why the general rule that costs follow the event should not be applied, hence the order that the appellant must have the costs of the appeal, to be taxed in the light of the parties' failure to reach agreement on the issue.

[22] These are my reasons for concurring in the order for costs made in this matter, and set out at para. 1 above.

MORRISON JA