Michaelmas Term
[2022] UKPC 50
Privy Council Appeal No 0090 of 2021

JUDGMENT

Phyllis Rampersad and another (Appellants) *v* Deo Ramlal and 3 others (Respondents) (Trinidad and Tobago)

From the Court of Appeal of Trinidad and Tobago

before

Lord Briggs
Lord Kitchin
Lord Hamblen
Lord Leggatt
Lord Burrows

JUDGMENT GIVEN ON
8 December 2022

Heard on 10 October 2022

Appellants
Anand Ramlogan SC
Ben Jones
(Instructed by Ganesh Saroop (Trinidad))

Respondents
Zelica Haynes-Soo Hon
Kerri-Ann Oliverie
(Instructed by Al-Rawi, Haynes-Soo Hon & Co (Trinidad))

Appellants:

(1) Phyllis Rampersad
(2) Bhim Rampersad

Respondents:

(1) Deo Ramlal
(2) Rosina Ramlal
(3) Lochan Dipsingh
(4) Kumar Birbal

LORD KITCHIN (with whom Lord Briggs, Lord Hamblen, Lord Leggatt, and Lord Burrows agree):

1. This appeal concerns the general rules governing the award of costs after a trial in the Republic of Trinidad and Tobago; the rules which apply to any party seeking to appeal against any costs order with which it does not agree; and the jurisdiction of an appeal court to allow an appeal against a final costs order which the trial judge has made.

2. The appeal arises in the context of a dispute in which allegations of the most serious kind were made by the appellants, Phyllis Rampersad and her husband, Bhim Rampersad, against the respondents. These allegations, including allegations of fraudulent misrepresentation and forgery, were all rejected by the judge, Dean-Armorer J, after a full trial. The judge then made an order that the claim be dismissed and the appellants should pay the respondents their costs of the action, such costs to be assessed by the Registrar of the Supreme Court of Trinidad and Tobago.

3. The appellants appealed to the Court of Appeal against the judge's order. Ultimately, they did not pursue their appeal against that part of the order which dismissed their claim but they did pursue their appeal against the judge's order for costs. The Court of Appeal dismissed that appeal, holding it to be an abuse of process, and they did so for reasons the Board will explain.

4. This further appeal, pursued with the permission of the Court of Appeal, gives rise to issues concerning the power of the court to award costs to be assessed and the approach to be adopted by the court if it is considering making such an order; and the jurisdiction of an appeal court, in this case the Court of Appeal, to entertain an appeal against a costs order for which no ground of appeal had been spelled out and for which no express permission had been given.

5. The Board will elaborate the background to this appeal and the grounds upon which it is now pursued in a moment. First, however, the Board must outline the legal framework in which orders for costs of civil proceedings are made and the basis upon which an appeal against a costs order may be pursued.

Orders for costs

6. There is now in Trinidad and Tobago what has been described as a suite of costs regimes which are embodied in the Civil Proceedings Rules 1998 ("the CPR") and which

are designed to make costs in civil litigation more predictable and reduce the risk of litigants incurring costs which are unreasonable and disproportionate.

7. The starting point is entirely conventional. Rule 66.6 provides that if the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party. But the court may make a different order and, as rule 66.6(2) makes clear, may even, in an appropriate case, order a successful party to pay all or part of the costs of the unsuccessful party. In deciding who should be liable to pay costs, the court must have regard to all the circumstances and in particular must have regard to the matters set out in rule 66.6(5) which include the conduct of the parties, whether a party has succeeded on particular issues even if he has not been successful overall, whether it was reasonable for a party to raise or pursue a particular issue and the manner in which the party has pursued the whole or any aspect of his case.

8. As will be seen, the appellants make no complaint now about the judge's decision to make a costs order against them. Their complaint concerns the form of that order and, in particular, the order that they should pay the respondents' assessed costs. They contend that such an order is unusual and that they should have been given an opportunity to address the judge about whether it was fair or appropriate. They also contend that they should have been given an opportunity to make their submissions before she made her order. Consideration of these arguments requires an understanding of the provisions of Part 67 of the CPR and the ways in which any costs awarded by the court are to be quantified under the various costs regimes which may now be applied.

9. Rule 67.3 provides that costs of proceedings under the CPR are to be quantified in one of the following ways. First, where rule 67.4 applies, that is to say in proceedings subject to a fixed costs regime, costs are to be quantified in accordance with the provisions of that rule ("fixed costs"). In all other cases, where the court orders a party to pay the costs of another party, the costs are to be quantified in accordance with the prescribed costs regime set out in rule 67.5 ("prescribed costs"); or in accordance with a budget approved by the court ("budgeted costs"); or, where neither prescribed nor budgeted costs are applicable, by assessment in accordance with rules 67.1 and 67.12 ("assessed costs").

10. Rule 67.5 provides that if, as here, a party is entitled to the costs of proceedings and rule 67.4 (which is concerned with fixed costs) does not apply, the general rule is that the receiving party is entitled to prescribed costs determined in accordance with rule 67.5 and Appendix B. Under rule 67.5, it is also the general rule that the amount of

costs to be paid is to be calculated by applying the percentages specified in Appendix B to the value of the claim. Further, in determining the value of a claim such as this, which is not for a monetary sum and for which no value has been agreed or stipulated by the court, it is to be treated, subject to rule 67.6 (which permits an application to be made to the court), as a claim for $50,000. It is the appellants' case that the application of the specified percentages in this case would have resulted in a costs liability of $14,000, comprising 30% of $30,000 and 25% of the balance of $20,000.

11. The advantage of a regime for prescribed costs is plain. Where it is applicable, the parties know where they are in terms of the opportunity to recover costs if they are successful, and their potential liability if they fail. They also know that they will not become embroiled in what may prove to be lengthy and expensive assessment proceedings. But, depending on the circumstances, such a regime may provide an inadequate recovery of costs, and for this reason it may be just and appropriate in some circumstances to apply a different and more generous regime.

12. Accordingly, the next way in which costs may be quantified is in accordance with a budget approved by the court under rule 67.8. If any party seeks to invoke this jurisdiction, it should make an application to the court for that purpose and should do so at the first (or at least at an early) case management conference. No such application was made in this case, however.

13. Further, in cases which are not subject to a fixed costs regime, where no application has been made for the approval of a budget, and where the regime for prescribed costs would normally be applicable, the court may nevertheless award a party its costs to be assessed. Rules 67.11 and 67.12 provide a regime for the assessment of costs incurred in connection with applications and for the assessment of costs generally. It is not necessary at this stage to expand on the principles to be applied in carrying out an assessment save to say that where, as here, no order has been made for the assessment of costs on an indemnity basis, costs will be assessed on the standard basis. Further, where the court assesses costs on the standard basis, it will not allow costs which have been unreasonably incurred or are unreasonable in amount, and it will only allow costs which are proportionate to the matters in issue. The court will resolve in favour of the paying party any doubt which it may have as to whether the costs were reasonably incurred or were reasonable and proportionate in amount.

An appeal against an order for costs

14. The Supreme Court of Judicature Act of Trinidad and Tobago provides, in section 38(1), that subject as provided in the Act or other written law, the Court of Appeal has jurisdiction to hear and determine appeals from any judgment or order of the High Court in all civil proceedings. Section 38(2) provides that no appeal shall lie except by leave of the judge making the order or of the Court of Appeal from an order as to costs.

15. The general procedure to be followed when a party requires leave to appeal is set out in rule 64.2. It provides, so far as relevant:

> "64.2 (1) Where an appeal may be made only with the leave of the judge making the order or the court a party wishing to appeal must apply for leave within 14 days of the order against which leave to appeal is sought.
>
> (2) The application for leave to appeal must set out concisely the grounds of the appeal."

16. These are important provisions and two general points may be made about them. First, so far as an application for permission to appeal is required, the application ought in the first instance to be made to the judge who made the order. That will give the judge an opportunity to decide whether to grant or refuse permission to appeal and to give reasons for that decision. It is in general not appropriate for a party to try to bypass an application to the judge by applying directly to the Court of Appeal. The Board agrees with the observation to this effect made by the Court of Appeal of Trinidad and Tobago in Civil Appeal Application No S 008 of 2015, *Attorney General of Trinidad and Tobago v Mohammed* in its judgment given on 15 February 2017 at para 26. Indeed rule 64.14 makes clear that, were an application for permission to appeal to the Court of Appeal to be made to that court in a case such as this, it ought to be made in accordance with Part 11 of the CPR in writing, and it will then be considered in the first instance by a single judge who may adjourn the application to be heard by the court. As will be seen, no such application was made in this case.

17. Secondly, in a limited number of cases the Court of Appeal may entertain an appeal against an order for costs without the prior grant of express permission to appeal. One such case is where there is a genuine appeal on the merits, even if it

ultimately fails. The appellants contend and, for the purposes of this appeal, the Board is content to proceed on the basis that another is where the judge has fallen into error on a point of law which governs or affects costs, or where the discretion to award costs has not been judicially exercised because, for example, the judge has taken into account matters which are wholly unconnected with the claim or cause of action.

18. In this connection the appellants referred the Board to the decision of the Court of Appeal of Trinidad and Tobago in Civil Appeal No 158 of 2003, *Motor and General Insurance Co Ltd v Sanguinette* (10 July 2006) where the approach for which they contend was summarised by Mendonca JA at para 21, in terms with which Hamel-Smith and Kangaloo JJA agreed:

> "It has been held that this section [section 38(2)] does not apply in every case where an order as to costs has been appealed from. In *Bholai –v- St. Louis* (1963) 6 WIR 453, 457 it was recognized that there is an established rule of practice that where there is a bona fide appeal on the merits, or where the judge has fallen into an error on a point of law which governs or affects costs, an appeal will be heard without leave. It has also been held that where it has been shown that the discretion to award costs has not been judicially exercised, in that the judge considered grounds wholly unconnected with the cause of action or had no relevant grounds, leave was not necessary (see *Lush –v- Duprey* (1966) 10 WIR 388 and *Scherer v. Counting Instruments Ltd* [1986] 2 All ER 530). …"

19. There is one other rule relating to costs which it is appropriate to mention at this stage. Part 67 of the CPR deals with the quantification of costs of an appeal to the Court of Appeal. Rule 67.14 provides that unless the Court of Appeal upon an appropriate application makes an order for budgeted costs, the costs of any appeal must be determined in accordance with rules 67.5, 67.6 and 67.7 and Appendix B, but the costs must be determined at two thirds of the amount that would otherwise be allowed under Appendix B. This is another rule upon which the appellants rely and which they say the Court of Appeal failed to apply properly.

The background

20. The Board can now turn to the dispute which has given rise to this appeal. It concerns a parcel of land in what is known as the Sou-Sou Land Project, Las Lomas No

3, in the Ward of San Rafael on the island of Trinidad. The Board will refer to this land as "the disputed land".

21. On 20 February 2005, the appellants made an agreement in writing with the first respondent, Mr Deo Ramlal, for the sale of the disputed land to Mr Ramlal. There was also before the court what purported to be a deed of conveyance of the land, executed on 24 March 2005, and by which the land was conveyed by the appellants to the first respondent and the second and third respondents, Rosina Ramlal and Lochan Dipsingh.

22. It was the appellants' case that they were induced to enter into the agreement to sell and dispose of the disputed land by a fraudulent misrepresentation made to them by the first respondent, and that their signatures on the deed of conveyance relied on by the respondents were forgeries. The appellants accordingly sought declarations to that effect, to have the agreement rescinded and to have the deed of conveyance set aside.

The trial

23. The action came on for trial before Dean-Armorer J in March 2015 and it took four days. A number of witnesses gave evidence and there was extensive cross-examination.

24. Both elements of the appellants' case were rejected by Dean-Armorer J in her judgment which she gave orally and in summary form on 31 May 2016. She also found that the first, second and third respondents had later sold and conveyed the disputed land to the fourth respondent, Kumar Birbal, as they were entitled to do. The whole claim therefore failed. Having delivered her oral judgment, the judge said that she had found the appellants to be "shamelessly lying on oath" and observed in relation to the appellants' claims that "the distortion of the truth was shameless". In summary, the appellants' case was that the respondents had behaved fraudulently, but that case collapsed as they themselves were found to have lied on oath on the crucial factual issues on which their claim depended.

25. The final order of Dean-Armorer J, dated 31 May 2016, recorded that the claim had come on for decision and that she had heard submissions from legal representatives for all the parties. It continued:

> "1. The Claimants' Claim is dismissed.

2. The Claimants do pay the Defendants' costs to be quantified by the Registrar of the Supreme Court."

26. There is no dispute that in making the order for the costs to be quantified, Dean-Armorer J intended to award the respondents their costs to be assessed by the Registrar. The appellants did not then or at any later time seek permission from the judge to appeal against the whole or any part of her order.

The appeal to the Court of Appeal

27. Nevertheless, on 7 July 2016, the appellants filed a notice of appeal to the Court of Appeal. This notice was in relatively bare terms and recorded that the appellants did not at that stage have the benefit of the judge's reasons in writing. It contained one ground of appeal, namely that the decision was "against the weight of the evidence". It continued: "Further grounds would be added upon receipt of the learned judge's reasons".

28. Some ten months later, on 25 May 2017, the judge issued a judgment in writing giving her reasons for dismissing the claim. This judgment contained no specific reason for making the order that the respondents should have their costs to be assessed. Nor, so far as the Board is aware, was the judge requested at that or any other time to provide any reason for making the costs order in the form that she did.

29. There matters rested until, on 13 October 2020, the appellants received a transcript of the proceedings before the judge, and on the same day they filed a copy of that transcript as a supplemental record of appeal.

30. On 9 November 2020 the appellants filed written submissions in which they explained that, their counsel having had an opportunity to study the transcript of the evidence given at the trial, they would not be pursuing their appeal against the judge's order dismissing their claim and that they would "confine their appeal" to the judge's order in relation to costs. In particular, they continued, in ordering that the respondents should have their costs of the appeal, such costs to be assessed, the judge had fallen into error and:

(i) had departed from the general rule in CPR r 67.5 that a claim not for a monetary sum should be treated as a claim for $50,000;

(ii) in the absence of a costs budget or an application to determine the value of the claim, ought to have followed the general rule stipulated in CPR r 67.5 and ordered the appellants to pay the respondents their costs on the prescribed basis and that such costs should have been quantified in the sum of $14,000; and

(iii) if and in so far as the judge intended to depart from the general rule, she ought to have given the parties, and in particular the appellants, an opportunity to be heard, and that she had not done.

31. The appellants also indicated they would be inviting the Court of Appeal to set aside the judge's order for costs; to make the order for costs that in their submission the judge ought to have made, that is to say for prescribed costs in the sum of $14,000; and to direct that the appellants should have their costs of the appeal, such costs to be assessed in the sum of two thirds of the costs to which the respondents were properly entitled in respect of the trial itself, that is to say $9,333.34.

32. On 18 December 2020 the respondents filed written submissions in reply. They resisted every element of the appellants' case as it had developed and contended, in summary:

(i) that the appellants had neither sought nor been granted permission to appeal against the judge's order in relation to costs;

(ii) that the grounds of appeal contained no ground relating specifically to the judge's costs order; and the appellants had never sought permission to amend their grounds of appeal to introduce such a ground;

(iii) that these deficiencies could not be addressed by filing and pursuing a substantive appeal which was always doomed to fail and which the appellants could never in good faith have believed had any merit or real prospect of success; and

(iv) that in these circumstances the pursuit of the appeal amounted to an abuse of process.

33. The appeal came on for hearing before the Court of Appeal on 3 February 2021 and it was dismissed for reasons given in a relatively short oral judgment of the court

delivered by Bereaux JA on that same day. The Court of Appeal held, in summary, that any challenge to the substantive decision of the judge was hopeless in the light of the judge's findings that the appellants were not truthful witnesses, and that the appeal's lack of merit must have been apparent to the appellants at the latest from 25 May 2017 when the judge's reasons were made available in writing. The appellants' decision not to pursue the appeal was therefore unsurprising, and the circumstances also revealed that the appeal was not genuine. The appeal against the costs award did not and could not stand alone and should not have been pursued. Moreover, Bereaux JA continued, it must have been obvious that the judge had made an unusual costs order, and the appellants had ample time to apply to amend their notice of appeal and to identify any specific grounds of challenge to the order which they may have wished to advance, and to draw these to the attention of the judge and the respondents. Had they done so, the judge would have been alerted and no doubt would have given her reasons for making the order. As it was, the Court of Appeal had been deprived of that benefit. In all these circumstances, the challenge to the costs order was itself an abuse of process and would be dismissed with costs.

The further appeal to the Board

34. The appellants now appeal to the Board on multiple grounds, and they do so pursuant to the leave given by the Court of Appeal. In broad summary the appellants contend:

(i) that the judge was wrong to award costs on an assessed as opposed to the prescribed basis;

(ii) that the Court of Appeal was wrong to refuse to hear the appellants' appeal against the judge's order and had no proper basis for dismissing it as an abuse of process;

(iii) that the Court of Appeal, had it heard the appeal, ought to have replaced the judge's order with an order that the appellants must pay costs on the prescribed basis in the sum of $14,000;

(iv) that any award of costs in respect of the appeal to the Court of Appeal ought to have reflected the limited scope of that appeal, and ought to have been for payment of no more than two thirds of the costs awardable on the prescribed basis, that is to say, $9,333.34.

35. It is convenient to deal with these various arguments (and the grounds of appeal that relate to them) in turn and by reference to the underlying events taken in largely chronological order.

The order made by the judge

36. The Board therefore turns to consider first the appellants' contention that in this case the fixed costs regime did not apply and there were no costs budgets and so the prescribed costs regime necessarily applied, as set out in CPR r 67.5. The appellants also contend that the judge erred in awarding costs to be assessed rather than prescribed costs (ground 6); that in so far as the judge was minded to order that the appellants should pay assessed costs, she ought first to have given the parties, and in particular the appellants, an opportunity to make submissions (ground 7); and that she also erred in that she failed to give any reasons for making the order in the terms that she did (ground 8).

37. In the Board's view, these grounds of appeal have no merit, for they have no or no sufficient regard to the nature of the allegations made in the proceedings or the findings made by the judge as to the lack of honesty and integrity of the appellants themselves. As the Board has foreshadowed, this was a claim which was based upon allegations of fraud and it failed. Still worse, the appellants were found to have engaged in a shameless distortion of the truth. The respondents had no choice but to come to court and defend themselves, and they did so in proceedings involving extensive cross examination which took place over several days. Circumstances such as these would normally justify an order that the appellants should pay the respondents' costs to be assessed on an indemnity basis. The Board does not accept that the judge intended by her order to require the appellants to pay the respondents' costs to be assessed on an indemnity basis in this case because there is no mention of that in her order, but the Board has no doubt that she did intend to order the appellants to pay to the respondents their costs to be assessed on the standard basis, and that this order was entirely justified in the exercise of the court's discretion.

38. The Board recognises that this order may have been considered out of the norm for proceedings of this kind, subject to the allegations and findings of fraud and dishonesty to which the Board has referred. The Board also accepts that parties should generally be given an opportunity to be heard or make representations before the court makes an order for costs, for fairness and justice demand no less, as the Court of Appeal of Trinidad and Tobago explained in *Pan Trinbago Inc v Simpson* CA Civ App No S-027 of 2013 (23 February 2015) at para 74. The Court of Appeal also explained in *Pan Trinbago*, at para 75, that the court has a discretion to vary costs orders prescribed by

the CPR, but where the court intends to move away from the CPR guidelines, it is generally appropriate and indeed necessary to give a reason for doing so.

39. The Board has no hesitation in approving these principles. Indeed, they are entirely in accordance with those explained and applied by the Court of Appeal of England and Wales in *English v Emery Reimbold & Strick Ltd*, [2002] EWCA Civ 605; [2022] 1 WLR 2409. There, Lord Phillips of Worth Matravers MR, giving the judgment of the court, explained, at para 16, that the need for reasons is, at its simplest, that justice will not be done if it is not apparent to the parties why one has lost and the other has won.

40. There is a further point of some importance in the context of this appeal, namely that if the appellate process is to work satisfactorily, the judgment, in context, must enable the appeal court to understand why the judge made the order the subject of the appeal. But of course, the adequacy of the judge's reasons will depend on the nature of the case.

41. These points also have a bearing on the approach to be adopted where a party is considering making an application for permission to appeal on the ground of lack of reasons. In this connection the Court of Appeal of England and Wales provided helpful guidance in *English v Emery Reimbold & Strick* at para 25:

> "If an application for permission to appeal on the ground of lack of reasons is made to the trial judge, the judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal."

42. If no express explanation is available for a costs order, however, the appellate court will approach the material facts on the assumption that the judge will have had a good reason for making the order she did. Indeed, as the Court of Appeal went on to explain in *English v Emery Reimbold & Strick*, at para 30, where there is a perfectly rational explanation for the order made, the court is likely to draw the inference that this is what motivated the judge in making it. Further, in practice, it is only in those cases where a costs order is made with neither reasons nor any obvious explanation

for the order that it is likely to be appropriate to give permission to appeal on the ground of lack of reasons.

43. In this case the judge had ample justification for making her order for costs in light of her dismissal of the appellants' allegations and her findings concerning the appellants' lack of integrity. But more than that, these were matters of which the appellants were or ought to have been well aware at the latest from the moment the judge gave her judgment orally and in summary form on 31 May 2016. Further, any doubt the appellants may have harboured as to the justification for the order must surely have been dispelled when, on 25 May 2017, the judge gave her reasons for dismissing the claim in writing.

44. It is true that the judge gave no specific reason for making her costs order in the form that she did. It must also be borne in mind, however, that the appellants never asked the judge to explain why she had made her costs order; nor did they ask the judge for permission to appeal against that order. If the appellants had adopted either course, the judge would have been alerted to the issue and would have had an opportunity to give her reasons expressly, and it is deeply unattractive for the appellants to complain now that she did not.

45. As it is, however, the Board has no difficulty inferring that the judge's reason for making her order, following her dismissal of the claim, was soundly based upon the nature of the allegations made and the lack of probity with which they were pursued. The Board is also satisfied that the order was justified, and further, that this justification was or ought to have been apparent to the appellants at the latest by 25 May 2017, if not a good deal earlier. What is more, although the judge failed to give the appellants any opportunity to make submissions as to the appropriate costs order, the Board has no doubt that they have suffered no prejudice. Indeed, had the appellants made submissions, the Board considers it is highly likely the judge would have ordered them to pay costs to be assessed on the indemnity as opposed to the standard basis for this would have given an opportunity for the respondents and the judge to focus on the misconceived allegations of fraudulent misrepresentation on which the claim depended.

The decision and order of the Court of Appeal

46. The Board turns next to the grounds of appeal concerning the appeal to the Court of Appeal. Here the appellants contend that the Court of Appeal fell into error in finding that the appellants needed permission to pursue the costs appeal, and that is

so because it formed part of a substantive appeal (ground 1), and the judge erred in law in making the order for costs to be assessed (ground 2).

47. The appellants also contend that the Court of Appeal erred in not granting leave to appeal in circumstances where the ground of appeal relating to the judge's costs order clearly had a realistic prospect of success and the respondents had ample time to deal with it (grounds 3 and 4). They continue that the Court of Appeal also fell into error in finding that there had been an abuse of process (ground 5).

48. The Board does not find any of these grounds of appeal persuasive for once again they ignore the lack of merit of the appellants' underlying claims, the procedural deficiencies in the way the appellants sought to appeal against the judge's order and the inability of the appellants to explain any proper basis for their substantive appeal.

49. It is true that, on 7 July 2016, the appellants filed a notice of appeal against the judge's order dismissing their claim. But it contained only one ground of appeal and it was cast in the most general terms, namely that the judge's decision was against the weight of the evidence. The notice of appeal continued that further grounds would be provided on receipt of the judge's reasons. As the Board has explained, however, the judge did give reasons in summary form on 31 May 2016 and more detailed reasons in writing on 25 May 2017. But no application was at that time made to amend or supplement the grounds of appeal. In these circumstances, the Board has no hesitation in concluding that the notice of appeal was hopelessly deficient from June 2017, at the latest.

50. In the event, it was not until November 2020, over three years later, and after the appellants (or those advising them) had reviewed the transcripts of the evidence given at trial, that the appellants notified the respondents that they would not be pursuing the substantive appeal but would be pursuing an appeal against the judge's order for costs. In these circumstances, the Court of Appeal was fully justified in questioning whether the substantive challenge was ever genuine. The Court of Appeal accordingly proceeded to consider the judgment, aspects of the evidence given by important witnesses and some of the documentary disclosure and concluded that it must or ought to have been apparent from 2017 that any appeal on the merits was hopeless. The Court of Appeal continued that the decision not to pursue the substantive appeal was unsurprising, but it also showed that the appeal was not a genuine appeal. The Board is satisfied that this was a conclusion which was properly open to the Court of Appeal.

51. In all these circumstances, leave to appeal against the judge's order for costs was required. Nevertheless, the appellants did not at any time seek the permission of the judge to appeal against her order. The appellants could have sought that permission when she made her order or at a later time, for example after she had given her reasons in writing in 2017, but they did not do so. Nor did they at any time spell out their grounds of appeal against the order for costs in a properly formulated notice of appeal as they were required to do under Part 64 or in a properly formulated application for permission to appeal.

52. The Court of Appeal was therefore justified in refusing to consider the application for permission to appeal against the costs order at the substantive hearing of the appeal. At that point, any suggestion that the appeal against the judge's order for costs was being pursued as part and parcel of a bona fide appeal on the merits had fallen away. The appellants had failed to formulate a self-standing ground of appeal relating to the order for costs; and they had failed to make an application to the judge or to the Court of Appeal for permission to appeal in advance of the appeal hearing. Further and in any event, an appeal would have had no merit because the order made by the judge that the appellants should pay the respondents' costs to be assessed constituted an unimpeachable exercise of her discretion.

The costs of the appeal to the Court of Appeal

53. Finally, the appellants contend that the Court of Appeal erred in ordering the appellants to pay the costs of the appeal in the sum of two thirds of the costs below and in not apportioning or discounting that figure. They argue that the Court of Appeal failed to recognise that there was no appeal against the judge's order so far as it related to the substantive hearing, and that the appeal was limited to the issue of costs (grounds 9 and 10). They continue that the Court of Appeal ought, at most, to have ordered that the appellants should pay two thirds of the prescribed costs, that is to say, two thirds of $14,000 (ground 11).

54. The Board is unable to accept these submissions (in so far as they are maintained despite the other conclusions the Board has reached). The appellants had made a decision to abandon their appeal on the merits at the last moment and their application to the Court of Appeal for permission to appeal against the order for costs had failed. In these circumstances, the order made by the Court of Appeal fell well within the scope of a reasonable exercise of its discretion and there is no basis upon which it would be proper or appropriate for the Board to interfere with it.

Overall conclusion

55. It follows that this appeal must be dismissed.