

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCMAP2023/0002

BETWEEN

[1] OUTDOOR LIVING, INC.
[2] COSMO IMPORT & EXPORT, LLC

Appellants

and

RELIANT GROUP & CASUALTY INSURANCE ICC LTD.

Respondent

Before:

The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Trevor M. Ward
The Hon. Mr. Eddy D. Ventose

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Sahleem Charles with Mrs. Esther Greene-Ernest for the appellant
Ms. Eugenia Dickson with Ms. Kayla Theeuwen for the respondent

2025: January 14;
March 12.

Commercial appeal – Assessment of costs in a commercial claim – Rule 71.13 Civil Procedure Rules (Revised Edition) 2023 – Assessment of costs on discontinuance – Part 37 Civil Procedure Rules (Revised Edition) 2023 – Whether the prescribed costs regime applicable to a discontinuance under CPR 37.7(1) applies to a claim in the commercial division in light of CPR 71.13(1) – Whether the learned trial judge was correct in quantifying costs on the discontinuance using the prescribed costs regime rather than assessing costs – Whether the learned trial judge was correct in stating that there was no discretion to award assessed costs under CPR 37.7(1) – Whether the learned trial judge was correct in summarily assessing costs of the consolidation application

On 8th September 2022, the appellants filed a claim against the respondent (the “Second Claim”). On 7th December 2022, the appellants applied to consolidate the Second Claim with a related claim in which the appellants are defendants in the main claim and ancillary defendants in the ancillary claim brought by the respondent (the “First Claim”) (the “Consolidation Application”) as it was common ground and not in dispute between the parties that the First Claim and the Second Claim concern the same subject matter.

On 26th January 2023, the respondent filed an application to strike out the Second Claim as an abuse of process (the “Strike Out Application”). Both the Consolidation Application and the Strike Out Application came on for hearing before the learned trial judge on 20th April 2023. At that hearing, counsel for the appellants informed the learned trial judge that the appellants wished to file a notice of discontinuance of the Second Claim on the basis that the Second Claim had been rendered nugatory, because of new developments in the First Claim. The learned trial judge therefore ordered as follows: (1) the appellants will file a notice of discontinuance of the Second Claim within 7 days of the date of this order; (2) costs on discontinuance is awarded to the respondent to be assessed, if not agreed within 21 days of the date of this order; (3) the Consolidation Application is struck out and cost is awarded to the respondent to be assessed if not agreed within 21 days of the date of this order; and (4) the Strike Out Application is struck out, with no order for costs.

The parties did not agree on costs. Instead, on 27th June 2023, the respondent filed its application, with submissions, for costs to be assessed on both the discontinuance and the Consolidation Application (the “Cost Assessment Application”). The respondent sought the following orders: (1) an order that the appellants pay the respondent its costs occasioned by the discontinuance of the Second Claim on a prescribed basis in the amount of US\$121,109.00; (2) in the alternative to paragraph 1 above, an order that the appellants pay the respondent its assessed costs occasioned by the discontinuance of the Second Claim in the amount of US\$13,223.87; (3) an order that the appellants pay the respondent its full costs in relation to the Consolidation Application in the amount of US\$17,328.40; (4) costs of the Costs Assessment Application; and (5) such further and other relief as counsel may advise and the court may permit. On 27th June 2023, the appellants filed a Notice of Objection to the quantum of costs and filed its submissions in opposition to the Cost Assessment Application on 10th July 2023.

The Cost Assessment Application came on for hearing on 12th July 2023 and the parties were ordered to file further written submissions. In determining the costs of the discontinuance, the learned trial judge explained that she was of the opinion that Part 37 and more specifically Civil Procedure Rules (“CPR”) 37.7 are the applicable rules for determining the quantification of costs for discontinuing the claim and not CPR 71.13. The learned trial judge therefore ordered, in keeping with Appendix C of Part 65 of the CPR, as the Second Claim was discontinued after the first case management conference, the respondent is entitled to 55% of the total costs, which amounts to US\$122,485.00. With respect to costs on the Consolidation Application, the learned judge explained that since the Consolidation Application was struck out, the applicable rule is CPR 71.13(4) which states that if the hearing of an application has occupied the time of the court for one hearing day or less, the court shall immediately summarily assess the quantum. The summary assessment was the sum of US\$5,000.00.

On 12th September 2023, the appellant filed their notice of appeal with no less than 21 grounds of appeal, however, on 12th February 2024, the appellants consolidated their grounds, which they accepted encompassed four main issues on appeal.

Held: allowing the appeal in part and ordering that the award of prescribed costs made by the learned judge to the respondent in the sum of US\$122,485.00 for the discontinuance of the Second Claim is set aside; the appellants shall pay the sum of US\$13,223.87 to the respondent for the discontinuance of the Second Claim; the award of costs made by the learned judge in the sum of US\$5,000.00 on the Consolidation Application is affirmed; the appellants shall have two thirds of their costs in the appeal, to be assessed by the judge of the Commercial Division if not agreed within 21 days of the date of this order that:

1. CPR 71.2(3) applies to a claim in the Commercial Division, but it applies “unless this Part or a practice direction provides otherwise”. CPR 71.13(1) states, “Rules 65.3 to 65.10, 65.11(1) and 65.12 do not apply in a commercial claim under this Part”. The prescribed costs regime is found in CPR 65.5 to 65.7. The plain meaning of CPR 71.13(1) is that the prescribed costs regime does not apply to a claim in the Commercial Division. Furthermore, CPR 71.2(3) makes clear that CPR 2023 and the practice direction relating to any rule apply to a claim on the commercial list unless Part 71 or a practice direction provides otherwise. By virtue of CPR 71.13(1), the prescribed costs regime found in CPR 37.7(1) relating to discontinuance of claims does not apply to a discontinuance of a claim in the Commercial Division. Such costs are to be assessed. The general words of CPR 71.13(1) would disapply the prescribed costs regime in respect of a claim in the Commercial Division. Therefore, there is no need to qualify CPR 37.7 because the inapplicability of the prescribed costs regime is achieved in CPR 71.13(1).

Part 71 Civil Procedures Rules (Revised Edition) 2023 applied; **Part 37 Civil Procedure Rules (Revised Edition) 2023** applied.

2. There is no doubt that since the decision of the Privy Council in **Rollin Clifton Bertrand and others v Anthony Elias** following its decision in **Phyliss Rampersad and another v Deo Ramlal and 3 others**, that where the prescribed costs regime applies in respect of a discontinuance of a claim, the court retains a power to order that costs be assessed for good reason and in exceptional cases. Consequently, even if CPR 37.7(1) was applicable, in this case (which it is not), it is wrong to conclude that CPR 37.7(1) “leaves no room for discretion” to order costs to be assessed.

Rollin Clifton Bertrand and others v Anthony Elias [2023] UKPC 34 applied; **Phyliss Rampersad and another v Deo Ramlal and 3 others** [2022] UKPC 50 applied.

3. If a party to litigation does not obtain an order for costs at the time of the making of an interlocutory order by the judge, then the party is not entitled to make a later application for costs in relation to the earlier application. Once an order is settled, perfected and issued by the court, the judge becomes *functus officio*. Having made

the order on 20th April 2023, and that order having been perfected, that became the order of the court. Therefore, the learned trial judge was *functus officio*. The assessment of costs fell squarely within the ambit of CPR 71.13(1), which expressly excludes the application of prescribed costs for claims in the Commercial Division.

C.O Williams Construction (Antigua) Ltd v Jennings Building Products Ltd ANUHCVP2010/0009 (delivered 22nd May 2022, unreported) applied; **The Attorney General of Grenada v Peter Charles David et al** GDAHCVP2006/0034 (delivered 2nd June 2008, unreported) applied.

4. An appellate court should be reluctant to interfere with the exercise of discretion by first instance judges on costs matters and should only interfere if the conclusion of the costs judge was not open to him. With respect to the costs on the Consolidation Application, the appellants have not shown that: (1) the award was not open to the trial judge; (2) or that the award is unreasonable or disproportionate; or (3) that the learned trial judge did not adopt the proper approach in arriving at her decision, to justify appellate interference. Therefore, the costs awarded in the Consolidation Application does not warrant interference by this Court.

Dion Weekes v Providence Estate Limited MNIHCVP2023/0007 (delivered 20th June 2024, unreported) applied.

JUDGMENT

- [1] **VENTOSE JA:** This is an appeal against the decision of the learned trial judge dated 3rd August 2023 in which she made the following orders: (1) the appellants will pay the respondent costs in the sum of US\$122,485.00 for discontinuance of the claim; (2) the appellants will pay the respondent costs in the sum of US\$5,000.00 in relation to the consolidation application; and (3) there is no order for costs on the application for the assessment of costs.

The Factual Background

- [2] The appellants filed a claim on 8th September 2022 against the respondent (the “Second Claim”). The appellants also applied on 7th December 2022 to consolidate the Second Claim with a related claim in which the appellants are defendants in the main claim and ancillary defendants to an ancillary claim brought by the respondent (the “First Claim”) (the “Consolidation Application”). It was common ground before the learned trial judge, and it is not in dispute between the parties that the First Claim

and the Second Claim concern the same subject matter. In respect of its defence in the First Claim and in respect of its claim in the Second Claim, the appellants advanced distinct causes of action against the respondent for breach of trust, fraud and negligent misrepresentation in the sum of US\$18,789,803.00.

[3] At a case management hearing held on 15th December 2022, the learned trial judge gave directions and adjourned the Consolidation Application. The respondent on 26th January 2023 filed an application to strike out the Second Claim as an abuse of process (the “Strike Out Application”). Both the Consolidation Application and the Strike Out Application came on for hearing before the learned trial judge on 20th April 2023. At that hearing, counsel for the appellants informed the learned trial judge that the appellants wished to file a notice of discontinuance of the Second Claim on the basis that the Second Claim had been rendered nugatory, because of new developments in the First Claim. The learned trial judge therefore ordered as follows: (1) the appellants will file a notice of discontinuance of the Second Claim within 7 days of the date of this order; (2) costs on discontinuance is awarded to the respondent to be assessed, if not agreed within 21 days of the date of this order; (3) the Consolidation Application is struck out and costs is awarded to the respondent to be assessed if not agreed within 21 days of the date of this order; and (4) the Strike Out Application is struck out, with no order for costs.

[4] As indicated, at the hearing on 20th April 2023, the learned trial judge, among other things, ordered that “costs on discontinuance is awarded to the [respondent] **to be assessed**, if not agreed within 21 days of the date of this order” (emphasis added). After making the orders above, the following exchanges took place between the learned trial judge and counsel for the parties:

“MR. WALWYN: My lady, ... the only question I have is, cost of the discontinuance govern (sic) by the Rules, when you say they are to be assessed...

THE COURT: Right. So, in the Commercial Division we do not follow the prescribed costs regime. There is provision under Parts 69(c) and the Practice Direction for the Court to assess cost.

MR. WALWYN: Understood and I was aware of that. The, the quirk in the Rules is with respect to discontinuance, I don't think the Commercial Court Rules really deal with it ..."

- [5] After some further exchanges with Mr. Walwyn, the learned trial judge stated that:

"THE COURT: That's right, I was about to say that all of this can be address (sic) on the assessment if you think that there is a regime for prescribed cost on a discontinuance which is separate and outside the Commercial Division cost regime or not included in the Commercial Division cost regime, then the Court will hear you on this. ..."

- [6] The learned trial judge then restated her final order after which Mr. Walwyn explained to her that there was no specific reference to the costs of the discontinuance. The learned trial judge replied as follows:

"THE COURT: The discontinuance, very well. So, I will break it up and say that the [appellants] will file a Notice of Discontinuance within seven days of the date of this Order and the cost is – on the discontinuance is awarded to the [respondent] to be assessed, if not agreed, within 21 days and if it comes to an Application at that stage, the Court will look at the Rules and which rule is applicable ..."

- [7] The parties did not agree on costs. Instead, on 27th June 2023 the respondent filed its application, with submissions, for costs to be assessed on both the discontinuance and the Consolidation Application (the **"Costs Assessment Application"**). The respondent sought the following orders: (1) an order that the appellants pay the respondent its costs occasioned by the discontinuance of the Second Claim on a prescribed basis in the amount of US\$121,109.00; (2) in the alternative to paragraph 1 above, an order that the appellants pay the respondent its assessed costs occasioned by the discontinuance of the Second Claim in the amount of US\$13,223.87; (3) an order that the appellants pay the respondent its full costs in relation to the Consolidation Application in the amount of US\$17,328.40; (4) costs of the Costs Assessment Application; and (5) such further and other relief as counsel may advise and the court may permit. On 27th June 2023, the appellants filed a Notice of Objection to the quantum of costs and filed its submissions in opposition to the Costs Assessment Application on 10th July 2023.

The decision in the court below

[8] The Cost Assessment Application came on for hearing before the learned trial judge on 12th July 2023 and after hearing counsel for the parties, the learned trial judge ordered that the parties may file further submissions and authorities on or before 21st July 2023 and indicated that the decision on the Cost Assessment Application would be delivered on 27th July 2023. The learned trial judge did not deliver a written judgment on the Cost Assessment Application. Instead, she made a detailed order dated 3rd August 2023 which included some recitals followed by numbered paragraphs in which the learned trial judge outlined her reasoning which were then followed by the actual orders. The entire document is referred to in this judgment as the “Order”.

[9] In respect of whether the earlier order made by the learned trial judge to the effect that costs on the discontinuance are to be assessed should stand, the learned trial judge stated that:

“10. Counsel for the claimants say the Court has made an order that costs is to be assessed, which has not been appealed, and rightly or wrongly it stands as the order to be followed. Counsel for the defendant submitted that the determination of quantum of costs is still a live issue, and the Court is empowered to apply the appropriate cost regime for discontinuance, as the issue was raised when the order was made.

11. It is trite that it is an order of this Court, and when it was made the Court remained open to hearing submissions on any applicable rule, to determine whether assessed costs was appropriate for the present circumstance. There is nothing to preclude the Court from applying the correct rule, if found to be otherwise, albeit that the order stated that costs was to be assessed, if not agreed.”

[10] In relation to the question of whether the prescribed costs regime applies to claims in the Commercial Division, the reasoning of the learned trial judge is found in the following paragraphs of the Order:

“15. It is not the case that the Court heard and disposed of an application (oral or written) for permission to file a notice of discontinuance. Neither has the Court finally disposed of the claim by way of trial. These are the circumstances which invoke rule 71.13. Here the Court is dealing with a notice of discontinuance filed at the claimant’s choosing, within a timeframe

fixed by the Court to do so. Such circumstances are not addressed under rule 71.13, which deals with costs generally on disposal of an application or a claim after trial. There is nothing in Part 71 or the Practice Direction which governs commercial claims, or any other Practice Direction that excludes Part 37 or any portion of it from commercial claims.

16. It means therefore, that on a strict interpretation and application of the rules, Part 37 is applicable to a commercial claim, albeit that the end result is an award of prescribed costs, unlike what usually upholds after trial or disposal of an application. There is nothing unusual or injurious about this.

17. Counsel for the claimants relied on the Privy Council decision in the Trinidadian case of *Phyllis Rampersad and Another v Deo Ramlal and 3 others* - [2022] UKPC 50, to make the point that even where cost is on a prescribed basis, the court always has a discretion to order that it be assessed. The factual matrix of that case is distinguishable from the present case. There the court was dealing purely with the general rules governing an award of costs after a 4-day trial, and made the point that 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. In the present case the Court is dealing with a discontinuance to which Part 37 is entirely devoted. It says how costs should be quantified, in mandatory language, and leaves no room for discretion. Furthermore, Part 37 is not excluded from commercial claims, hence there is no uncertainty regarding the cost position on discontinuance of a commercial claim. In short the pronouncement in the *Phyllis Rampersad* case does not displace the effect of rule 37.7.

18. The Court also notes the statement made obiter by Bannister J in *Elena Rybolovleva v Dmitri Rybolovleva and others* – [2009] ECSC J0720-1 cited by Counsel for the defendant, which seem more fitting for the present case. There the court was considering the method of cost quantification to be applied in circumstances where the defendants had succeeded on applications to strike out or stay the proceeds and the claim was deemed abandoned. Bannister J appeared to recognize the effect of rule 37.7 in a BVI commercial claim when he said: “The effect differed from discontinuance only in the form taken by the process. Had the Claimant discontinued in terms, she would have been liable to pay prescribed costs of the whole case.”

19. Having given due consideration to the contending written and oral submissions on whether costs should be assessed or prescribed, the Court is of the opinion that Part 37 and more specifically rule 37.7 are the applicable rules for determining the quantification of costs for discontinuing the claim and not rule 71.13. Costs will therefore be calculated in accordance with Appendix B and C of Part 65.”

[11] In determining the costs of the discontinuance, the learned trial judge stated at paragraph [20] of the Order that since the value of the claim was US\$18,789,803.00, the mathematical calculation required in Appendix B of Part 65 of the Civil Procedure Rules Revised Edition 2023 ("CPR") derives total costs of US\$222,700.00. She continued that, in keeping with Appendix C of Part 65 of the CPR, as the Second Claim was discontinued after the first case management conference, the respondent is entitled to 55% of the total costs, which amounts to US\$122,485.00.

[12] In respect of the costs on the Consolidation Application, the learned trial judge explained at para [21] that since the Consolidation Application was struck out, the applicable rule is CPR 71.13(4) which states that if the hearing of an application has occupied the time of the court for one hearing day or less, the court shall immediately summarily assess the quantum. The learned trial judge continued at para [22] that since there was no ventilation of this application, and any time spent discussing ancillary matters and appropriate orders occupied significantly less than one hearing day, she would summarily assess the quantum of cost in that regard. The learned trial judge observed that CPR 71.13(4) clearly precludes a full assessment, as contemplated in CPR 71.13(2). The summary assessment was the sum of US\$5,000.00.

The appeal

[13] The appellants filed their notice of appeal on 12th September 2023 with no less than 21 grounds of appeal. However, in submissions filed on 12th February 2024, the appellants consolidated their grounds which they accepted encompassed the following issues: (1) whether the learned trial judge erred in law and or misdirected herself when she found that Part 37 of the CPR (Revised Edition) 2023 which deals with costs on a discontinuance is in mandatory language and leaves no room for discretion; (2) whether the learned judge erred in law and or misdirected herself when she failed to follow her order which is governed by rules 69C.13 and 69C.14 Civil Procedure Rules 2000 ("CPR 2000") (now rules 71.13 and 71.14 CPR (Revised

Edition) 2023 which expressly precludes prescribed costs and cannot in giving her decision on assessment renege on that order to adopt a rule that is not only at variance with said order but also not applicable on an assessment of costs in the Commercial Court; (3) whether the learned trial judge erred in law and or misdirected herself when she summarily assessed costs on the Consolidation Application, in circumstances where the respondent did not file any documents in response to the appellants' Consolidation Application.

- [14] For ease of reference, I will use the numbering from the CPR 2023 (Revised Edition) since the relevant provisions are identical to those in CPR 2000. In my view, the issues that properly arise in this appeal are as follows: (1) whether the prescribed costs regime applicable to a discontinuance under CPR 37.7(1) applies to a claim in the Commercial Division in light of CPR 71.13(1); (2) whether the learned trial judge was correct in quantifying costs on the discontinuance using the prescribed costs regime rather than assessing the costs as she had ordered on 20th April 2023; (3) whether the learned judge was correct in stating that there was no discretion to award assessed costs under CPR 37.7(1); and (4) whether the learned trial judge was correct in summarily assessing costs of the Consolidation Application.

Analysis and Conclusions

- [15] The central question in this appeal is whether the prescribed costs regime applicable to a discontinuance under CPR 37.7(1) applies to claims in the Commercial Division. CPR 71.13(1) states that "Rules 65.3 to 65.10, 65.11(1) and 65.12 do not apply in a commercial claim under this Part". The prescribed costs regime is found in CPR 65.5 to CPR 65.7. The plain meaning of CPR 71.13(1) is that the prescribed costs regime does not apply to a claim in the Commercial Division. It is not disputed that the CPR 2023 (Revised Edition) applies to a claim in the Commercial Division pursuant to CPR 71.2(3), but it applies "unless this Part or a practice direction provides otherwise".

- [16] The respondent is of the view that, first, CPR 37.7 is not modified or qualified by words such as “subject to rule 71.13(1)”, thereby limiting the applicability of the prescribed costs regime in Commercial Court matters; second, CPR 71.13(1) does not carve out CPR 37.7; third, the drafters of CPR 2023 have meticulously identified instances within the CPR 2023 where they intended to restrict or carve out the application of a particular rule, but that no such provision is found regarding the application of CPR 37.7 in the context of the Commercial Court. I do not agree. There was no need for CPR 37.7 to be modified because the general words of CPR 71.13(1) would disapply the prescribed costs regime in respect of a claim in the Commercial Division. There would be no need to qualify CPR 37.7 because the inapplicability of the prescribed costs regime was already achieved in CPR 71.13(1).
- [17] As mentioned above, CPR 71.2(3) makes clear that the CPR 2023 and the practice direction relating to any rule apply to a claim on the commercial list unless Part 71 or a practice direction provides otherwise. If, for example, apart from the reference to prescribed costs in CPR 37.7(1), there were many other references to prescribed costs in the CPR 2023 (Revised Edition), would the drafters of the CPR have to qualify each one by stating that it is subject to CPR 71.13(1)? That would plainly be unnecessary since the effect of CPR 71.13(1) is to disapply the prescribed costs regime to commercial claims in the Commercial Division. By virtue of CPR 71.13(1) the prescribed costs regime found in CPR 37.7(1) relating to discontinuance of claims does not apply to a discontinuance of a claim in the Commercial Division. Such costs are to be assessed.
- [18] In my view, the learned trial judge was correct in her initial order dated 20th April 2023 which stated that costs on discontinuance were awarded to the respondent to be assessed, if not agreed within 21 days of the date of the order. Consequently, the learned trial judge fell into error when she quantified the costs on the discontinuance of the Second Claim based on the prescribed costs regime pursuant to CPR 37.7(1). The applicable costs regime for discontinuance of a claim in the Commercial Division

is for such costs to be assessed as the learned trial judge had stated during the hearing on 20th April 2023.

[19] The respondent quantified the assessed costs on the discontinuance in the sum of US\$13,223.87 as stated in para [2] of the Costs Assessment Application. The appellants countered that the respondent's hourly rate for attorneys was too high based on the **Revised Tariff of Fees of the Saint Lucia Bar Association** that was effective until January 2021 (the "**Revised Tariff**"). The **Revised Tariff** has legal force in Saint Lucia because in Schedule 3, Part B of the **Legal Profession Act**, Rule 13(2) states that in determining the fairness and reasonableness of a fee the following factors may be taken into account: (h) any scale of fees or recommended guide as to charges prescribed by law or by the Bar Association. In any event, the effective period of operation appears to have lapsed so the most that can be said is that the **Revised Tariff** affords a guide as to the applicable fees. The appellant has not shown that the sum of US\$13,223.87 claimed by the respondent is unreasonable or disproportionate in all the circumstances. Consequently, the costs of the discontinuance is assessed in the sum of US\$13,223.87.

[20] Given this finding, it is not strictly necessary to opine on the two other issues which occupied much of the hearing of the appeal. However, these can be dealt with briefly. There can be no doubt that since the decision of the Privy Council in **Rollin Clifton Bertrand and others v Anthony Elias**,¹ following its decision in **Phyllis Rampersad and another v Deo Ramlal and 3 others**,² that where the prescribed costs regime applies in respect of a discontinuance of a claim, the court retains a power to order that costs be assessed for good reason and in exceptional cases. Consequently, even if CPR 37.7(1) were applicable (which it is not), the learned trial judge was wrong to conclude that CPR 37.7(1) "leaves no room for discretion" to order costs to be assessed. The submissions of the respondent that the court has no

¹ 2023] UKPC 34.

² [2022] UKPC 50 at para 63.

discretion in ordering costs to be assessed when the rules allow prescribed costs are therefore rejected.

- [21] At the hearing on 20th April 2023, the learned trial judge intended to leave the issue of the correct regime to be argued at the next hearing date. No doubt the parties in their submissions filed were also under that impression. This explains why the respondent in the Cost Assessment Application provided a quantification of costs on the discontinuance based on the prescribed costs regime and alternatively the assessed costs regime. Given her statements at the hearing, the learned trial judge should not have made the order that she did. Having made that order at the hearing and the order having been perfected; that order became the final order of the court. Therefore, the learned trial judge was *functus officio*. This Court in **C. O. Williams Construction (Antigua) Ltd v Jennings Building Products Ltd**³ stated that:

“[8] I am satisfied that the submissions of the appellant in this case are correct. If a party to litigation does not obtain an order for costs at the time of the making of an interlocutory order by the judge, then the party is not entitled to make a later application for costs in relation to the earlier application. Once an order is settled and issued by the court, the judge become *functus officio*. In the words of Gordon J.A. in the case of Attorney General of Grenada v Peter Charles David et al, any other opinion would result in litigation never being final or certain.”

- [22] Similarly, in **The Attorney General of Grenada v Peter Charles David et al**,⁴ this Court stated that:

“[3] Learned counsel for the appellant, who signed the submissions made on behalf of the appellant, made the telling point that regardless of the underlying thinking of a judge in arriving at his conclusion, only the written order of the court is relevant. In that context he points out that the single judge (myself) “ruled that Justice Benjamin [sic] decision was a final order therefore no leave was required.” Learned counsel is absolutely correct in the point that he makes, that is, once an order is settled and issued by the court, the judge or panel of judges become *functus officio*. Any other opinion would result in litigation never being final or certain – an untenable position.”

³ ANUHCVP2010/009 (delivered 21st February 2012, unreported).

⁴ GDAHCVP2006/034 (delivered 2nd June 2008, unreported).

[23] In my view, the appellants are correct in submitting that, having made her order dated 20th April 2023 for costs on the discontinuance to be assessed, and that order having been perfected, the learned trial judge erred when she applied the prescribed costs regime as she was bound by her order for the assessment of costs which fell squarely within the ambit of CPR 71.13(1), which expressly exclude the application of prescribed costs for claims in the Commercial Division. The learned trial judge contemplated that the issue of which regime (prescribed costs or assessed) would be argued before her so she could make that determination at the next hearing date. Since this was in her contemplation, the learned trial judge should have adjourned the hearing for a determination of the applicable costs' regime for the notice of discontinuance of the Second Claim at the hearing on 12th July 2023. However, the order that the judge made repeatedly and was reflected in the sealed order of the court was that costs on discontinuance is awarded to the respondent to be assessed, if not agreed within 21 days of the date of the order.

[24] I do not agree with the submission of the respondent that the sealed order was not a final order because the learned trial judge left open the question of which regime was applicable. That might be so, but the effect of making such an order despite her contemplating that the issue would be ventilated at the next hearing date, meant that the learned judge had indeed foreclosed the very issue on which she intended to hear the parties. In my view, the learned trial judge was *functus officio* when this order was sealed. It was not open to her to reopen the issue on 12th July 2023 even though this had been foreshadowed at the hearing on 20th April 2023. Only an appeal to this Court could correct that error made by the learned trial judge in making the order for assessed costs on the discontinuance of the Second Claim. The learned trial judge therefore erred in quantifying the costs on the discontinuance using the prescribed costs regime contrary to the unappealed order dated 20th April 2023 stating that the costs were to be assessed.

[25] At the hearing on 20th April 2023, as noted above, the learned trial judge ordered that the Consolidation Application is struck out and cost is awarded to the respondent to

be assessed if not agreed within 21 days of the date of this order. In her Order dated 3rd August 2023, the learned trial judge ordered that the appellants pay the respondent's costs in the sum of US\$5,000.00 in relation to the Consolidation Application. The learned trial judge did not comply with the requirement of CPR 71.13(4) which provides that if the hearing of an application has occupied the time of the court for one hearing day or less, the court shall immediately summarily assess the quantum. This rule contemplates that the court would assess the sum at the end of that same hearing, not at any other time.

[26] The appellants' objection was that the learned trial judge's summary award of assessed costs of US\$5,000.00 on the Consolidation Application was unreasonable and disproportionate because the respondent did not file any document in response to the Consolidation Application but rather chose to file the Strike Out Application. The respondent submits that the appellants have failed to establish that the costs awarded in respect of the Consolidation Application were unreasonable or disproportionate and that there is no reason to interfere with the learned trial judge's decision to summarily assess the costs of the Consolidation Application.

[27] This Court in **Dion Weekes v Providence Estate Limited**⁵ stated at para [58] that an appellate court should be reluctant to interfere with the exercise of discretion by first instance judges on costs matters and should only interfere if the conclusion of the costs judge was not open to him. The appellants have not shown that: (1) the award was not open to the learned trial judge; (2) or that the award is unreasonable or disproportionate; or (3) that the learned trial judge did not adopt the proper approach in arriving at her decision, to justify appellate interference. The appellants have also not shown any error in the exercise of her discretion or the application of the relevant legal principles such that the decision of the learned trial judge to summarily assess the costs of the Consolidation Application in the sum of US\$5,000.00 to warrant the interference by this Court.

⁵ MNIHCVAP2023/0007 (delivered 10th June 2024, unreported).

Disposition

[28] Accordingly, I would allow the appeal in part and make the following orders:

- (1) The award of prescribed costs made by the learned judge to the respondent in the sum of US\$122,485.00 for the discontinuance of the Second Claim is set aside.
- (2) The appellants shall pay the sum of US\$13,223.87 to the respondent for the discontinuance of the Second Claim.
- (3) The award of costs made by the learned judge in the sum of US \$5,000.00 on the Consolidation Application is affirmed.
- (4) The appellants shall have two thirds of their costs in the appeal, to be assessed by the judge of the Commercial Division if not agreed within 21 days of the date of this order.

[29] I am grateful for the assistance provided by learned counsel.

I concur.
Vicki Ann Ellis
Justice of Appeal

I concur.
Trevor M. Ward
Justice of Appeal

By the Court

Chief Registrar