

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANGUILLA

AXAHCVAP2017/0001

BETWEEN:

**[1] WEBSTER DYRUD MITCHELL (A PARTNERSHIP)
[2] JOHN DYRUD
[3] PALMAVON WEBSTER**

Appellants

and

JENNY LINDSAY

Respondent

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Paul Webster
The Hon. Mr. Dexter Theodore

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. John Carrington, QC, with him Ms. Rayana Dowden for the Appellants
Ms. Jenny Lindsay, in person

2021: July 27;
September 20.

Civil appeal – Breach of contract – Repudiatory breach – Findings of facts – Whether judge erred in findings on counterclaim – Approach of appellate court to challenges of findings by judge – Breach of natural justice – Right to be heard on the hearing of costs – Exercise of judicial discretion – Whether judge erred in ordering that each party should bear their own costs without hearing – Exercise of discretion afresh by appellate court – Whether in the circumstances Court should exercise its discretion afresh – General principle costs follow the event – Rule 64.6 of the Civil Procedure Rules 2000 – Circumstances in which costs follow the event principle is disapplied – Misconduct – Denying successful party’s costs where there is misconduct – Costs – Prescribed costs – Rule 65.5(2) of Civil Procedure Rules – Value of claim – Whether it is open to this Court to determine the value of the claim

Ms. Jenny Lindsay (Ms. Lindsay), an attorney-at-law, was hired by the partnership Webster Dyrud Mitchell (a Partnership) (“WDM”), as the head of the Litigation Department, by virtue of a contract of employment (“the Contract”). At that time, Mr. John Dyrud and Ms. Palmavon

Webster were partners of WDM (collectively the “Employers”). Less than a year and a half later, the employment relationship between the Employers and Ms. Lindsay deteriorated and she left WDM.

Following this, Ms. Lindsay sued WDM and alleged, among other things, that WDM had engaged in repudiatory conduct; which included, WDM’s breach of express terms within the Contract, WDM’s breach of the implied term of good faith, mutual respect and confidence and WDM’s unilateral changes to the Contract. She contended that this conduct was sufficiently serious to justify her resignation and therefore she considered herself constructively dismissed. She claimed, among other things, for payment for three months’ notice, damages for unfair dismissal, compensation for loss of reputation, interests and costs. WDM counterclaimed that Ms. Lindsay was in breach of her implied duties towards it; failing to observe the lawful and reasonable orders of her employers and that she had also breached several express terms of the Contract. WDM also contended that it had suffered loss and damage and therefore sought various declarations, compensation for overpayment of salary and vacation leave, damages for breach of contract and costs.

The learned judge dismissed Ms. Lindsay’s claim and found that the Employers had succeeded in prosecuting the majority of their counterclaim and ordered, among other things, that each party bear their own costs, given the conduct of the parties before and during proceedings. Importantly, the learned judge held that, there was no evidence to substantiate the Employers’ claim that Ms. Lindsay owed them monies flowing from the excess vacation leave that she had allegedly taken, as the evidence provided by the Employers was inadequate.

Being dissatisfied, the Employers filed two grounds of appeal challenging both the learned judge’s conclusions in relation to the excess vacation leave and the judge’s exercise of discretion in relation to the costs order. Ms. Lindsay was also dissatisfied with the learned judge’s costs order, however she did not file a counter appeal. Three main issues arise for this Court’s determination based on the written submissions and oral arguments, namely: (i) whether the learned judge erred in her finding that the Employers had failed to prove their counterclaim for the reimbursement of excess vacation leave taken by Ms. Lindsay; (ii) whether the learned judge erred in the exercise of her discretion by determining that each party should bear their own costs; and (iii) if so, whether this Court should exercise its discretion afresh to award the Employers costs.

Held: dismissing the appeal in part; allowing the appeal against the costs order; awarding the Employers prescribed costs on the claim valued at \$50,000.00 XCD and the counterclaim in the court below; and on the appeal, half of two-thirds of the prescribed costs awarded in the court below; and making the orders set out at paragraph 75 of the judgment, that:

1. It is settled law that an appellate court must show fidelity to the well-settled principles governing the appellate review of a trial judge’s findings of facts, the evaluation of those facts and the inferences drawn from them by the trial judge. Importantly, the appellate court is enjoined to exercise restraint in its review of the findings of the lower court that was immersed in all aspects of the trial and has advantages that

the appellate court does not possess. Therefore, in order to successfully challenge findings of fact and inferences, the appellant must demonstrate to this Court that the judge made findings or came to conclusions which cannot be supported by the evidence or which were not open to her. In the High Court, the Employers' contention that Ms. Lindsay had taken excess vacation leave was resisted. While the Employers provided oral evidence in relation to excess vacation leave, this was vigorously disputed by Ms. Lindsay. However, the Employers provided no documentary evidence to the learned judge on the issue of excess vacation leave. The judge quite properly expressed her dissatisfaction with the quality of evidence provided and was simply unable to conclude that the Employers had proven that aspect of its case. It follows therefore, that it was open to the judge to make the conclusions that she did as it related to the claim for excess vacation leave allegedly taken by Ms. Lindsay. There is no basis upon which this Court can impugn the judge's conclusions on the cogency of the evidence. The decision of the judge on the excess vacation leave is therefore affirmed.

Watt (or Thomas) v Thomas [1947] A.C. 484 followed; **Yates Associates Construction Company Ltd v Blue Sands Investments Limited** [2016] ECSCJ No. 63 (delivered 20th April 2016) followed; **Ming Siu Hung and others v J F Ming Inc and another** [2021] UKPC 1 applied; **Shaista Trading Company Limited v First Caribbean International Bank (Barbados) Ltd** [2021] ECSCJ No. 534 (delivered 26th April 2021) followed; **Shankar Khushalani et al v Lindsay Mason** GDAHCVAP2016/0017 (delivered 11th June 2021, unreported) followed.

2. It is settled law that in order to challenge a judge's exercise of discretion, a party must demonstrate, to the appellate court, that the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and that, as a result of the error or the degree of the error in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. Indeed, the appellate court must exercise judicial restraint in its review of the exercise of discretion by the judge, save in these very limited circumstances.

Michel Dufour and Others v Helenair Corporation Limited and Others (1996) 52 WIR 188 followed.

3. In making a costs order, basic procedural fairness demands that the judge hears from the parties. A party whose interests or rights may be affected by a decision should be given adequate notice to apprise himself of the case that he has to meet and a fair and reasonable opportunity to be heard and to defend himself. In the case at bar, natural justice or procedural fairness required the trial judge to invite either oral or written submissions from the parties on the issue of costs. Accordingly, this Court must set aside the judge's cost order insofar as the judge's order was made without giving the parties an opportunity to be heard on the question of costs. It therefore falls to this Court to exercise its discretion afresh.

Patricia Anne Huggins v Lloyd Browne SVGHCVAP2018/0007 (delivered 14th June 2021, unreported) followed; **Novel Blaze Limited (In Liquidation) v Chance Talent Management Limited** BVIHCVAP2020/0006 (delivered 16th April 2021, unreported) followed.

4. In the exercise of the court's discretion, the general costs rule is that the unsuccessful party will be ordered to pay the costs of the proceedings to the successful party. The court is, however, given very wide discretionary powers to vary the application of the general rule. These include the power to order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to costs or to pay only certain portions of another person's costs. Importantly, the judge, in the exercise of his or her discretion, must give real weight to the principle that costs follow the event. It follows therefore that it is incumbent on a judge to give reasons for departing from the usual rule that costs follow the event. Further, in exercising this discretion as to costs, the court is required to have regard to all the circumstances and to act judicially.

Rule 64.6 of the **Civil Procedure Rules 2000** considered; **The Hon. Attorney General et al v D. Gisele Isaac** [2016] ECSCJ No. 35 (delivered 11th March 2016) followed; **Aspin v Metric Group Ltd** [2007] EWCA Civ 922 followed; **AEI Rediffusion Music Ltd v Phonographic Performance Ltd** [1999] 1 W.L.R. 1507 applied; **Rochamel Construction Limited v National Insurance Corporation** [2003] ECSCJ No. 83 (delivered 24th November 2003) followed; **Adamson v Halifax Plc** [2003] 1 WLR 60 followed; **Donald Campbell and Company Limited v Pollak** [1927] AC 732 followed; **Throne Capable Investment Limited v Agile Star Group Limited** [2021] ECSCJ No. 433 (delivered 14th January 2021) followed; **Delta Petroleum (Nevis) Limited v OOJJ's Ltd (Doing business as OOJJ's Service Station) and another** [2016] ECSCJ No. 154, (delivered 10th October 2016) followed.

5. There are a number of factors that can lead to a court disapplying the general rule on costs so as to deprive a successful party of its costs. These include misconduct by the parties. Misconduct before the proceedings and during the proceedings can impact the court's exercise of discretion and can result in the court depriving the successful party of its costs. Indeed, while CPR 64.6(6) states that the court must have particular regard to the conduct of the parties before and during the proceedings, conduct is not the only factor that the court must consider in arriving at its decision whether to award costs. In this case, it cannot be said that because numerous applications were filed and canvassed, with the court's permission, that this amounted to misconduct without more.

Rule 64.6 of the **Civil Procedure Rules 2000** considered; **Bostock v Ramsey Urban District Council** [1900] 1 QB 357 considered; **Dunnett v Railtrack Plc** [2000] Lexis Citation 1491 considered; **Texaco Ltd v Arco Technology Inc** [1989] Lexis Citation 1193 distinguished; **Earl of Malmesbury and others v Strutt and Parker** [2008] EWHC 424 (QB) distinguished.

6. In the circumstances of this appeal there is no proper basis upon which this Court can disapply the general rule to deny the Employers their costs in successfully defending Ms. Lindsay's claim and being largely successful in prosecuting the counterclaim in the court below. Also, insofar as the Employers have successfully prosecuted part of their appeal, they are entitled to their costs.

Bostock v Ramsey Urban District Council [1900] 1 QB 357 considered; **Dunnett v Railtrack Plc** [2000] Lexis Citation 1491 considered; **Texaco Ltd v Arco Technology Inc** [1989] Lexis Citation 1193 distinguished; **Earl of Malmesbury and others v Strutt and Parker** [2008] EWHC 424 (QB) distinguished.

JUDGMENT

Introduction

- [1] **BLENNAN JA:** This is an appeal by Webster Dyrud Mitchell (a Partnership) ("WDM"), Mr. John Dyrud ("Mr. Dyrud") and Ms. Palmavon Webster ("Ms. Webster") (collectively "the Employers") against part of the order and decision of a learned judge, insofar as the learned judge held that, WDM had failed to prove its counterclaim for the reimbursement of excess vacation leave allegedly taken by Ms. Jenny Lindsay ("Ms. Lindsay") and that 'each party bear their own costs' in the proceedings.
- [2] The Employers are dissatisfied with the learned judge's decision and have appealed. The appeal is strenuously resisted by Ms. Lindsay, who contends that the learned judge was correct in holding that WDM did not prove the counterclaim in relation to the reimbursement of excess vacation leave. However, as it relates to the learned judge's costs order, Ms. Lindsay argues that it was blatantly wrong and should be set aside and that it be remitted to the High Court. This, is so, even though she did not file a counter-appeal. She nevertheless asked this Court to award her costs in the court below, despite being unsuccessful in prosecuting her claim and largely unsuccessful in resisting WDM's counterclaim.
- [3] It is necessary to set out the relevant background in some detail in order to provide the requisite context. I do so now.

Background

[4] In 2002, Ms. Lindsay, who is an attorney-at-law, was hired by the partnership WDM as the Head of its Litigation Department by virtue of a contract of employment (the "Contract"). However, less than a year and a half later, the employment relationship between the parties deteriorated and she left WDM. At that time, both Mr. Dyrud and Ms. Webster were the partners of WDM. Having left the employ of WDM, Ms. Lindsay sued WDM and alleged that WDM had engaged in repudiatory conduct, which included; WDM's breach of express terms within the Contract, WDM's breach of the implied term of good faith, mutual respect and confidence and WDM's unilateral changes to the Contract. Ms. Lindsay also contended that this conduct was sufficiently serious to justify her resignation, and therefore she considered herself constructively dismissed. She claimed, among other things, for payment for three (3) months' notice, damages for unfair dismissal, compensation for loss of reputation, interests and costs.

[5] In turn, WDM counter-claimed that, Ms. Lindsay was in breach of her implied duties towards it; failing to obey the lawful and reasonable orders of her employers. WDM also claimed that Ms. Lindsay had breached several express terms of the Contract. In addition, WDM contended that it had suffered loss and damage, which included, loss of services of Ms. Lindsay for three (3) months; overpayment of vacation leave in the sum of US\$2000.00 and overpayment of salary for September 2003 in the sum of US\$4,667.00. WDM therefore sought various declarations, compensation in the sum of US\$6,667.00, damages for breach of contract and costs.

Issues in the court below

[6] The court below considered the following issues:

- (i) whether Ms. Lindsay was constructively dismissed by the Employers;
- (ii) whether Ms. Lindsay was owed bonus and/or overtime payments;

(iii) whether Ms. Lindsay's summary resignation amounted to a repudiation of the Contract; and

(iv) whether damages should be awarded to either Ms. Lindsay or the Employers.

Judgment in the court below

[7] On 20th December 2016, the learned judge, delivered her written judgment and order and dismissed Ms. Lindsay's claim. The judge also ordered on the counterclaim that: (i) Ms. Lindsay reimburse WDM in the sum of US\$4,667.00 with statutory interest from the date of the judgment; (ii) that Ms. Lindsay pay nominal damages in the sum of US\$500.00 to WDM for breach of contract and; (iii) that each party bear their own costs, given the conduct of the parties before and during proceedings. The learned judge, in sum, held that WDM had succeeded in their defence of Ms. Lindsay's claim and that they had succeeded in prosecuting the majority of their counterclaim.

[8] However, and importantly, the learned judge held that as it related to the Employers' claim that Ms. Lindsay owed monies flowing from excess vacation leave allegedly taken, there was no evidence to substantiate this, as the evidence provided by Ms. Webster and WDM's finance director, Ms. Pollyanna Kumara ("Ms. Kumara") was inadequate. The learned judge therefore dismissed this aspect of the counterclaim.

[9] In this appeal, as alluded to earlier, the Employers' primary challenges are against the decision of the learned judge in relation to reimbursement for the excess vacation leave and the refusal to award the Employers their costs.

Grounds of Appeal

[10] As foreshadowed, the Employers have filed two (2) grounds of appeal, challenging both the learned judge's conclusions of fact, in relation to the excess vacation leave and the exercise of discretion in relation to the costs order. Ms. Lindsay was also dissatisfied with the learned trial judge's order that each party bear their own costs

in the proceedings, however as indicated earlier she has not counter-appealed. In her written submissions, she indicated that the learned judge had erred in the exercise of her discretion.

Issues on Appeal

- [11] The following three main issues arise for this Court's determination:
- (i) whether the learned judge erred in her finding that the Employers had failed to prove their counterclaim for reimbursement of excess vacation leave taken by Ms. Lindsay ("Reimbursement for the excess vacation leave");
 - (ii) whether the learned judge erred in the exercise of her discretion by determining that each party should bear their own costs ("Costs"); and
 - (iii) if so, whether this Court should exercise its discretion afresh to award the Employers costs.

Submissions on behalf of The Employers Reimbursement for the excess vacation leave

- [12] The gravamen of the Employers' complaint, in relation to excess vacation leave, rests on the judge's findings of fact that WDM did not lead adequate evidence to support the claim for the reimbursement of excess vacation leave allegedly taken by Ms. Lindsay. Learned Queen's Counsel, Mr. Carrington, argued that the judge, in making this finding, failed to give any or proper consideration to the uncontroverted evidence of Ms. Webster; the lack of evidence put forward by Ms. Lindsay to support her defence to the counterclaim; and the learned judge herself, ordering that the issue of the assessment of damages be bifurcated from the main trial. In seeking to buttress this argument, Mr. Carrington adverted this Court's attention to the witness statement of Ms. Webster, in which, she stated that Ms. Lindsay, under the Contract, was only entitled, at that time, to twenty-five (25) paid vacation days. However, at the time of the termination of her employment, she had taken thirty-three (33) paid vacation days, eight (8) paid vacation days in excess of

her allotment. He posited that this evidence, given by Ms. Webster, had not been contradicted by Ms. Lindsay in either her evidence-in-chief or in her cross-examination of Ms. Webster.

[13] He further said that there was no need for Ms. Kumara to corroborate the above evidence. Mr. Carrington also submitted that it merely required a simple arithmetical exercise in order to arrive at the finding that Ms. Lindsay took 8 paid vacation days in excess of her allotment, and therefore the learned judge should have been satisfied, on this evidence, that WDM had proven its counterclaim in relation to the excess vacation leave, on a balance of probabilities. He sought to rely on **Jugnauth v Raj Direvium Nagaya Ringadoo**¹ in support of this submission.

[14] Mr. Carrington further complained that the learned judge, at paragraph 78 of her judgment, dismissed WDM's counterclaim on the basis that WDM had not proved the quantum of damages. He submitted that the learned judge erred in this regard, as proof of quantum of damages should have been heard during the assessment of damages which, by the judge's order, was bifurcated. He stated that it would have been at the assessment stage, that WDM would have been entitled to demonstrate how the sum of US\$2000.00 was calculated. Mr. Carrington argued that it was because of the judge's premature and incorrect dismissal of the counterclaim, that WDM were unable to do so. He was adamant that WDM had proven its case on the balance of probabilities and therefore, this aspect of the judge's order should be impugned and set aside.

Costs

[15] On the issue of costs, Mr. Carrington strongly complained that the judge exercised her discretion incorrectly to deny the Employers of their costs, even though they had succeeded in defending the claim and were largely successful in prosecuting the counterclaim. He disagreed with the learned judge's decision that each party bear their own costs in the proceedings. He stated that the Employers did not accept the

¹ [2008] UKPC 50.

judge's reasons for departing from the general rule and making the costs order as detailed above. Instead, the Employers were of the view that the general rule as to the award of costs should have been applied. Mr. Carrington reminded this Court that the general rule as provided in 64.6(1) of the **Civil Procedure Rules, 2000** (the "CPR"), prescribes that where the court decides to make a costs order, it must order that the unsuccessful party pay the costs to the successful party. While Mr. Carrington accepted that this was the general rule, he acknowledged that the court, may, in the exercise of its discretion, depart from this rule while giving real weight to the overall success of the winning party. He reminded this Court that this principle was judicially recognised in **Delta Petroleum (Nevis) Limited v OOJJ's Ltd (Doing business as OOJJ's Service Station) and another**.² He said that when departing from the general rule that costs follow the event, the court had an obligation to act on a principled basis to ensure that there was adherence to settled principles and avoidance of a miscarriage of justice. Mr. Carrington maintained that in accordance with the principles laid down in **Michel Dufour and Others v Helenair Corporation Limited and Others**,³ the learned judge had failed on both counts. since she did not properly exercise her discretion and was plainly wrong. In those circumstances, he urged this Court to set aside the aspect of the order relating to costs and to award costs to the Employers both in the court below and on appeal.

- [16] In support of his argument, Mr. Carrington also highlighted the fact that, in relation to the costs order, the Employers deemed there to be, three manifest errors of principle committed by the learned judge, which rendered the exercise of her discretion plainly wrong and outside the ambit within which reasonable disagreement is possible. Firstly, that the learned judge failed to give the required 'real weight' or indeed, any weight at all, to the overall success of WDM on both the claim and the counterclaim. Secondly, that the reasons given by the learned judge in the exercise of her discretion, were not conclusions drawn from the evidence before her. Mr. Carrington argued that the learned judge improperly took into

² [2016] ECSCJ No. 154, (delivered 10th October 2016).

³ (1996) 52 WIR 188.

consideration the 'previous conduct' by the Employers in relation to the issue of costs. However, he posited that there was no evidence of previous conduct of the Employers that could be relevant to the issue of costs. As it relates to the third manifest error, Mr. Carrington argued that the judge breached the basic principles of natural justice when she took into consideration the costs awarded in previous interlocutory applications made before the court; when she failed to consider that it was the court's responsibility to manage the proceedings and therefore the parties could not be blamed for the overall length of the proceedings; when she stated that there was lack of cooperation from counsel, thereby making an unparticularised finding without giving counsel an opportunity to respond; when she failed to consider rule 39 of the CPR; and when she, in effect, painted the counterclaim with the same brush, although none of the matters alluded to by the learned judge touched the counterclaim.

[17] Critically, Mr. Carrington pointed out that both sides had agreed that the judge did not hear either side on the issue of costs before making the costs order. Indeed, Mr. Carrington's strident criticism was that the learned judge had not entertained submissions from either party at the end of the trial on the issue of costs and its award. He said that this was an egregious error which violated basic principles of procedural fairness. He relied on the decisions of **Patricia Anne Huggins v Lloyd Browne**⁴ and **Novel Blaze Limited (In Liquidation) v Chance Talent Management Limited**⁵ in support of his submissions. He was adamant that had the judge afforded the parties a hearing on costs, she would never have made that costs order. He also underscored the fact that the judge disappplied the general rule that costs follow the event on her own volition.

[18] It is for the above reasons that Mr. Carrington urged this Court to set aside the judge's decision on costs and exercise its discretion afresh and award the Employers their costs, on a prescribed basis, utilising the sum of \$300,000.00 that

⁴ SVGHCVAP2018/0007 (delivered 14th June 2021, unreported).

⁵ BVIHCVAP2020/0006 (delivered 16th April 2021, unreported).

was stated by Ms. Lindsay in her witness statement. He acknowledged that the claim form did not specify the amount claimed and the claim had not been valued by order of the court, or otherwise, yet he felt able to assert quite confidently, during his oral arguments, that this Court should utilise a value of \$300,000.00.

Submissions by Ms. Lindsay
Reimbursement of excess vacation leave

[19] Ms. Lindsay, appearing as a litigant in person, defended the judge's findings that WDM had not proved the aspect of the counterclaim that addressed excess vacation leave. She strenuously rejected the Employers' submissions as it related to the judge's decision on the issue of excess vacation leave at paragraph 78 of her judgment. Ms. Lindsay argued that the learned judge was entitled to make the finding that she did because the Employers did not substantiate their claims either by providing documentary evidence or in written or oral testimony. She stated that the learned judge was therefore entitled to require that the Employers prove the essential foundations of their claim that she took 33 paid vacation days, 8 days in excess of what was allotted to her. She said that it was not simply an arithmetical exercise, as suggested by the Employers; and therefore, this ground of appeal should be dismissed, since the judge made findings that were clearly open to her on the evidence.

[20] Ms. Lindsay highlighted the fact that, in her defence, she had denied that she took any excess vacation leave and that she provided evidence consistent with her defence. Ms. Lindsay agreed with the judge that the quality of evidence that WDM had deployed was insufficient to satisfy the judge, on a balance of probabilities, that she [Ms. Lindsay] had taken excess vacation leave. She therefore urged this Court not to interfere with this aspect of the judge's findings and to affirm the learned judge's decision.

Costs

[21] In relation to the issue of costs, Ms. Lindsay posited that the learned judge erred in the exercise of her discretion and was wholly wrong. She advanced the position

that she was entitled to costs even though she had lost the claim and was largely unsuccessful in resisting WDM's counterclaim. Ms. Lindsay argued that the learned judge was obligated to consider all the factors surrounding the case pursuant to rule 65.2(1) of the CPR, in arriving at her decision. However, she complained that the learned judge failed to take into account several relevant factors and gave no weight to very serious factors such as, the Employers' failure to disclose documents that were required by orders of the court, which had compounded the delay before the court.

[22] Further, Ms. Lindsay had initially agreed, in her written submissions, with Mr. Carrington that this Court should set aside the judge's costs order and remit this aspect of the order to the High Court since the learned judge had not given either party the opportunity to make submissions on costs. However, upon being told by this Court, during her oral submissions, that she did not in fact file a counter-appeal in accordance with the CPR, as such, she could not be entertained on this point, Ms. Lindsay, quite interestingly resiled from her original position and suggested that the learned judge did not in fact err in making the costs order. She then argued that the judge exercised her discretion correctly in denying the Employers their costs even though it had prevailed in defending her claim and was largely successful in prosecuting its counterclaim.

[23] In all of the circumstances, she urged this Court to dismiss the Employers' appeal and affirm the aspects of the decision of the learned judge that are under review.

Discussion and Conclusion

[24] I will now deal with the first issue.

Issue 1

Reimbursement of excess vacation leave

[25] In the main, the Employers' appeal challenges the judge's findings on the counterclaim for reimbursement of excess vacation leave allegedly taken by Ms. Lindsay. As it relates to the challenges mounted against the judge's findings, it is settled law that an appellate court must show fidelity to the well-settled principles governing the appellate review of a trial judge's findings of facts, the evaluation of those facts and the inferences drawn from them by the trial judge. These principles have been enunciated in **Watt (or Thomas) v Thomas**.⁶ In **Watt v Thomas**, Viscount Simon stated that: 'the decision of an appellate court whether or not to reverse conclusions of fact reached by the judge at the trial must naturally be affected by the nature and circumstances of the case under consideration'. Importantly, the appellate court is enjoined to exercise restraint in its review of the findings of the lower court that was immersed in all aspects of the trial and has advantages that the appellate court does not possess.

[26] In **Yates Associates Construction Company Ltd v Blue Sands Investments Limited**⁷ it was held that:

"1. An appellate court reviewing the findings of a trial judge on the printed evidence in relation to a question of fact tried by the judge without a jury and where there is no question of the judge misdirecting himself, should not interfere with the trial judge's decision unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the judge's conclusion. In the circumstances, the appellate court may consider that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. However, either because the reasons given by the trial judge are unsatisfactory, or because it is clearly appears so from the evidence, an appellate court may be satisfied that the trial judge has not taken proper advantage of his having seen and heard the witnesses and the matter will then become at large for the appellate court.

...

2. Appellate court restraint against interfering with findings of fact, unless compelled to do so, applies not only to findings of primary fact, but also to the evaluation of those facts and inferences to be drawn from them. Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or

⁶ [1947] A.C. 484 at p. 487.

⁷ [2016] ECSCJ No. 63 (delivered 20th April 2016).

reliability of witnesses who have given oral evidence, and of the weight to be attached to their evidence, an appellate court has to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. It is only in exceptional circumstances that an appeal court is entitled to take a different view on credibility from that of the judge who has seen the witness, particularly when the judge has referred favourably to the demeanour of the witness concerned.

...

3. Where the trial judge fails to make proper use of the advantage he or she possesses in analyzing and carrying out an evaluation of the evidence, the judge's decision cannot stand if the decision does not comport with the evidence that was adduced. The critical question before an appellate court is whether there was evidence before the trial judge from which the judge could properly have reached the conclusions that he or she did or whether, on the evidence, the reliability of which it was for the judge to assess, that the judge was plainly wrong."

[27] Recently, similar principles were enunciated by the Privy Council in **Ming Siu Hung and others v J F Ming Inc and another**.⁸ In **Ming Siu Hung**, Lord Briggs, in delivering the judgment of the Board stated, at paragraph 20, as follows:

"It is necessary at this point to bear in mind the well-settled constraints upon the appellate jurisdiction, when asked to re-exercise a discretion conferred upon the first instance judge. These constraints form part of a package, developed over many years, which ensure that the benefit of finality which should normally follow from the judicial determination of the parties' dispute is not rendered ineffective by undue appellate activism. The general reasons for appellate restraint are well summarised by Lewison LJ in his well-known judgment in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29, para 114, as follows:

"114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC 1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Dattec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 WLR 1325; *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013]

⁸ [2021] UKPC 1 at para. 20.

UKSC 58; [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court.”

[28] It is clear that there is a consistent stream of jurisprudence in which this Court has applied the well-known principles of appellate restraint in its review of a trial judge’s findings. Indeed, this Court has also adopted the principles as set out in **Ming Siu Hung** in recent decisions of this Court, in particular; **Shaista Trading Company Limited d.b.a. Diamond Republic v First Caribbean International Bank (Barbados) Ltd**⁹ and **Shankar Khushalani et al v Lindsay Mason**.¹⁰

[29] In **Shaista Trading Company Limited**, the learned Pereira CJ, authoring the judgment of the Court, restated and adopted the principles of **Ming Siu Hung** as follows:

“As Lord Briggs stated quite recently in the decision of the Privy Council in **Ming Siu Hung and others v J F Ming Inc and another**:⁶ [2021] UKPC 1 at para. 20.

“It is necessary...to bear in mind the well-settled constraints upon the appellate jurisdiction, when asked to re-exercise a discretion conferred upon the first instance judge. These constraints form part of a package, developed over many years, which ensure that the benefit of finality which should normally follow from the judicial determination of the parties’ dispute is not rendered ineffective by undue appellate activism.”

[30] In writing on behalf of this Court, in **Shankar Khushalani**, I stated at paragraph 35, that:

“...it is not open to the appellate court to overturn the learned trial judge’s findings of facts and evaluations of those facts, unless those facts were not open to the judge on the evidence. An appellant must show that the trial judge fundamentally misunderstood the issue or the evidence or that he plainly failed to take the evidence into account or that he arrived at a conclusion which the evidence could not support. This is because the trial judge, as the initial fact finder, would have been exposed to a wider range of impressions that influenced a decision on factual matters than would not be available to an appellate court. These impressions cannot be replicated by an analysis of the transcript of the evidence. It is for this reason that the appellate court exercises restraint and gives some measure of deference to the conclusions reached by the trial judge.”

⁹ [2021] ECSCJ No. 534 (delivered 26th April 2021).

¹⁰ GDAHCVAP2016/0017 (delivered 11th June 2021, unreported).

[31] Having set out the principles relevant to this aspect of the appeal, I will now turn to evaluating the learned judge's judgment, with the requisite caution imposed by the above-mentioned authorities firmly in mind. It is pellucid, that in order for the Employers to succeed on this issue, they must demonstrate to this Court that the learned judge made findings or came to conclusions which cannot be supported by the evidence or which were not open to her. Having perused the evidence provided and applied the above principles to the case at bar, I am of the considered view, that it was open to the judge to arrive at the conclusions that she did, as it related to the claim for excess vacation leave allegedly taken by Ms. Lindsay.

[32] For the sake of convenience, I will reproduce the main findings of the learned judge. At paragraph 78 of the judgment, the learned judge reasoned as follows:

“WDM claims that Ms. Lindsay took an excess of 8 days' vacation leave over her entitlement of 25 days for the period she worked. Ms. Lindsay denies this is so. The contract at clause 8 states that;

“The Employee will be entitled to annual paid holiday leave of 20 working days exclusive of Saturday, Sunday and public holidays, to be taken in full in each calendar year without carry-forward and at times to be agreed in advance. The Employee will become entitled to annual paid holiday after working for the Firm for an aggregate of at least 238 days during a period of 12 months.”

WDM has not led evidence to support how many days Ms. Lindsay worked for after her first year of employment which would be the basis of assessing how many days she would have been entitled to at the time of her departure. WDM has not referred to any record of vacation or given the court any indication as to when the alleged 33 days of vacation was taken. This information Ms. Webster claims was given to her by the accounts department but Ms. Pollyanna Kumara who is the finance director of WDM did not substantiate this. WDM baldly claims US\$2000 for this excess without any basis and as such the Court is not satisfied that WDM has established this claim and it is accordingly refused.” (emphasis mine)

[33] I am fortified in the view, that the above extract from the learned judge's decision, clearly indicates that the learned judge was questioning the cogency of the evidence that WDM had deployed. The judge expressed her dissatisfaction with the quality

of evidence provided and indicated that she was simply unable to conclude that WDM had proven that aspect of its counterclaim as it relates to the excess vacation leave.

[34] By way of emphasis, the Employers, in their arguments above, asserted that the learned judge, at paragraph 78, dismissed this aspect of their counterclaim on the basis that they failed to prove the quantum of damages. In my judgment, the above paragraph reveals no such reason for the dismissal of the counterclaim as it relates to the excess vacation leave allegedly taken. The learned judge clearly stated that she dismissed this aspect of WDM's counterclaim because there had been no cogent evidence provided to substantiate their allegation that Ms. Lindsay took vacation days in excess of those that she had been allotted. Contrary to what has been argued, the above quoted paragraph reveals that the learned judge took into consideration the limited evidence she had before her on this point and then made a determination on liability. In my view, this had nothing to do with quantification, but all to do with the lack of cogency of the evidence in relation to the counterclaim based on the allegation of excess vacation leave.

[35] To support this aspect of the counterclaim, WDM in the court below, and in this Court, relied on the witness statement of Ms. Webster, particularly paragraph 69. Paragraph 69 states:

"The Claimant was entitled to 20 days paid vacation per year. At the time the Claimant left us she would have been entitled to take 25 days for the entire period she was employed. The Claimant had taken 33 days paid vacation being 8 days in excess of her entitlement, not including 3 days of special leave granted to her to allow her to visit a sick parent in February 2003. The First Defendant therefore claims the sum of \$2000. This information has been provided to me by our accounts department."¹¹

[36] In the above paragraph, Ms. Webster made three (3) main assertions; namely, that: (i) Ms. Lindsay was entitled to 25 paid vacation days at the time of the termination of her employment; (ii) Ms. Lindsay took 8 days in excess of the vacation leave she

¹¹ Record of appeal Vol.1, electronic page 1146.

had accrued; and (iii) Ms. Lindsay owed the Employers for the vacation days taken in excess of her allotment. Each of these assertions made by Ms. Webster were required to be proved to the court's satisfaction. However, to support the claims made, Ms. Webster merely stated that she received this information from WDM's accounts department. This may well be in the realm of hearsay but, I make no further comment thereon. Upon reading this last statement made by Ms. Webster, it would have been reasonable, in my view, and like the judge's, to expect that proof to support these assertions would have been found in either the witness statement or affidavit of Ms. Kumara, in her capacity as finance director of WDM and as an accountant. However, Ms. Kumara's witness statement and affidavit remain silent on this point, without any proof of the record keeping process or documentary evidence in relation to Ms. Lindsay's allotted days and those taken by her. Indeed, there was no documentary evidence provided to the judge and Ms. Lindsay adverted this Court's attention to the fact that WDM kept records of vacation leave. This lack of documentary evidence therefore resulted in Ms. Webster's bare assertion being tested against Ms. Lindsay's denial that she took any excess vacation leave. In my view, it would have been therefore difficult for the learned judge to determine if the assertions made by Ms. Webster were of the quality to prove WDM's counterclaim. This is in contradistinction to any matter of credibility. The judge was clearly indicating that the quality of evidence did not reach the required evidential threshold. Consequently, the learned judge made the unassailable conclusion to dismiss WDM'S counterclaim for the reimbursement of excess vacation leave as it was, in fact, based on 'bald assertions'. The judge was entitled to so conclude. I repeat, for emphasis, that this was a finding that was clearly open to the learned judge. For the sake of completeness, it is clear that the court only sought to ascertain liability and found that there was no cogency of the evidence that the Employers had adduced.

- [37] Based on what I have foreshadowed, this aspect of the learned judge's order on the counterclaim for reimbursement of excess vacation leave cannot be impugned, given the totality of circumstances. There is no basis upon which this Court can

interfere with the judge's decision. Accordingly, the Employers' appeal on the first issue fails.

Issue 2

[38] I turn now to the issue of costs.

Costs

[39] By way of emphasis, the main criticism shared by both parties at the beginning of the hearing of this appeal was that the learned judge erred in the exercise of her discretion and was plainly wrong in making the costs order. Each party invited this Court to interfere with the learned judge's decision. Both parties accepted that there is a high threshold to be satisfied, in this regard. In our Court, **Dufour** stands as the leading authority on this principle. In **Dufour**, Sir Vincent Floissac CJ stated that the appellate court could only interfere if it is satisfied:

“(1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

[40] Those principles remain of great force and are applicable to this appeal. It is settled law that in order to succeed on this issue, the Employers must demonstrate to this Court that the learned judge's decision not to award costs, exceeded the generous ambit within which reasonable disagreement is possible and was therefore blatantly wrong.

[41] It is common ground between the parties that the learned judge did not hear from either side, prior to the court's award that each party shall bear their own costs. Interestingly, in their respective written submissions, both parties complained and quite properly so, that this was in clear breach of natural justice. The Employers further sought to impugn the judge's exercise of discretion on this basis, while

underscoring their contentions that several of the factors that the judge took into account were erroneous. As alluded to earlier, they assert that, as a consequence, the learned judge's decision was flawed. I reiterate that, Mr. Carrington, during oral arguments, maintained that the Employers were entitled to their costs on a prescribed basis utilising the figure that Ms. Lindsay had indicated in her witness statement, as distinct from the claim form which did not stipulate the value of the claim.

[42] By way of emphasis, it is noteworthy that during oral arguments Ms. Lindsay quite surprisingly resiled from her contention that the learned judge had breached natural justice by not affording the parties a hearing. Further, she sought to advance the argument before this Court, that even though she had lost her claim in the lower court, and was largely unsuccessful in defending the counterclaim, she was somehow entitled to be awarded costs, as an exception. When this Court pointed out that she had not counter-appealed against the judge's order, she did not forcefully nor strenuously maintain that position. Moving along, Ms. Lindsay in her oral arguments endeavoured to persuade this Court that the findings of the judge were well-founded and that she should be awarded costs on appeal.

[43] I reiterate that both parties in their oral and written submissions agreed that the judge did not give them an opportunity to be heard on the issue of costs. In my view, natural justice or procedural fairness required the judge to have invited either oral or written submissions from the parties on this issue. It is quite usual for this Court, to invite written or oral submissions from the parties on the question of costs. This Court must therefore set aside the learned judge's costs order, insofar as the judge's order was made without giving the parties an opportunity to be heard on the question of costs. Basic procedural fairness demanded the judge to have heard the parties before making the costs order. Authority for this proposition is also found in the decision of this Court in **Patricia Anne Huggins** in which Webster JA [Ag.] , in addressing the issue of wasted costs, stated: '[i]t is evident that a party whose interests or rights may be affected by the decision should be given adequate notice

to apprise himself of the case that he has to meet and a fair and reasonable opportunity to be heard and to defend himself’.

[44] Analogously, in **Novel Blaze Limited**, I stated that the basic principles of natural justice would require a non-party to a claim against whom costs are sought, to be given an opportunity to be heard. At paragraph 54, I stated thusly:

“Critically, the basic principles of natural justice would require the party ... to give notice of its application and the evidence in support, to the person against whom the order is being sought. In other words, before any such order can be properly made, fairness dictates that the non-party must be apprised of the basis upon which the applicant is seeking costs against them, and be given an opportunity to be heard.”

[45] I have no doubt that, in the appeal at bar, the exercise of the judge's discretion to order that each party bear their own costs, without hearing the parties, violated the settled principles established by Sir Vincent Floissac CJ in **Dufour**, as being plainly wrong. As I have already stated, at the minimum, the learned judge ought to have observed basic rules of natural justice and heard from both parties before making any costs order. The judge's exercise of discretion on costs is therefore impugned.

[46] I would therefore set aside the judge's costs order. Having done so, it falls to this Court to exercise its discretion afresh.

Issue 3

Exercise of discretion afresh

[47] In the exercise of the Court's discretion, regard is paid to the procedural rules on costs. Indeed, rules 64.6(1) and (2) of the CPR state as follows:

“(1) Where 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.

(2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.”

[48] Rule 65.2(1) provides for the court's discretion as it pertains to the basis of quantification of costs:

"65.2 (1) If the court has a discretion as to the amount of costs to be allowed to a party, the sum to be allowed is –

- (a) the amount that the court deems to be reasonable were the work to be carried out by a legal practitioner of reasonable competence; and
- (b) which appears to the court to be fair both to the person paying and the person receiving such costs"

[49] Rule 65.3 of the CPR addresses the quantification of costs:

"65.3 Costs of proceedings under these Rules are to be quantified as follows –

- (a) where rule 65.4 applies – in accordance with the provisions of that rule; and
- (b) in all other cases if, having regard to rule 64.6, the court orders a party to pay all or any part of the costs of another party – in one of the following ways –
 - (i) costs determined in accordance with rule 65.5 ("prescribed costs");"

[50] The full text of rule 65.5 stipulates that:

"65.5 (1) The general rule is that where rule 65.4 does not apply and a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Appendices B and C to this Part and paragraphs (2) to (4) of this rule.

(2) The "value" of the claim, whether or not the claim is one for a specified or unspecified or unspecified sum, coupled with a claim for other remedies is to be decided in the case of the claimant or defendant –

(a) by the amount agreed or ordered to be paid; or if the claim is for damages and the claim form does not specify an amount that is claimed, such sum as may be agreed between the party entitled to, and the party liable to, such costs or, if not agreed, a sum stipulated by the court as the value of the claim; or

(b) if the claim is not for a monetary sum it is to be treated as a claim for \$50,000 unless the court makes an order under Rule 65.6(1)(a).

- (3) The general rule is that the amount of costs to be paid is to be calculated in accordance with the percentages specified in column 3 of Appendix B against the appropriate value.
- (4) The court may – (a) award a proportion only of such sum having taken into account the matters set out in rule 64.6(4) and (5); and (b) order a party to pay costs –
 - (i) from or to a certain date; or
 - (ii) relating only to a certain distinct part of the proceedings, in which case it must specify the proportion of the fixed costs which is to be paid by the party liable to pay such costs and in so doing may take into account the table set out in Appendix C."

[51] It is apparent that in order to assist the Court to further the overriding objective of dealing with cases justly, the Court is clothed with wide discretionary powers. Indeed, the court has complete discretion over the costs of the proceedings, subject to the express provisions of the CPR or of any relevant statute. I reiterate that the court has a discretion whether to order one party to pay another's costs and the amount of those costs and the time and method of payment. It is settled law that costs may be dealt with at any stage of or after the proceedings. Specifically, rules 64.6(2), (3) and (4) of the CPR provide that the court may order that a successful party may not be entitled to all or some of its costs. The court may order the party to pay some of the costs of the unsuccessful party. The court may also order that costs be paid from or up to a certain date only and not over the course of the entire litigation.

General costs rule

[52] As alluded to earlier, the general rule is that the unsuccessful parties will be ordered to pay the costs of the proceedings to the successful party. In **AEI Rediffusion Music Ltd v Phonographic Performance Ltd**,¹² Lord Woolf MR stated that: '[t]he 'follow the event principle' ... [is the] starting point from which a court can readily depart.' This rule also applies even if there are issues on which the successful party had been unsuccessful. Authority for this proposition is found in **Aspin v Metric**

¹² [1999] 1 W.L.R. 1507.

Group Ltd.¹³ However, it is incumbent on a judge to give reasons for departing from the usual rule that costs follow the event.

[53] It is therefore clear that, if the judge makes an order as to costs, the general rule is that he shall order the costs to follow the event, except when it appears to him that, in the circumstances of the case, some other order should be made as to the whole or any part of the costs. Rule 64.6 of the CPR prescribes this. By way of emphasis, the court is, however, given very wide discretionary powers to vary the application of the general rule. These include the power to order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to costs or to pay only certain portions of another person's costs. In exercising this discretion as to costs, the court is required to have regard to all the circumstances and to act judicially. This principle was given judicial recognition by Sir Dennis Byron CJ (as he then was) in **Rochamel Construction Limited v National Insurance Corporation**.¹⁴ At paragraph 8 of the judgment, Sir Dennis Byron CJ stated that:

"CPR part 64.6 prescribes that where the Court 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. The Court is, however, given very wide discretionary powers to vary the application of the general rule. These include the power to order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to costs or to pay only certain portions of another person's cost. In exercising these discretions as to costs the Court is required to have regard to all the circumstances. Particular consideration must be given to the conduct of the parties both before and during the proceedings and the manner in which a party has pursued the case in general and particular issues within the case. Thus the order can be affected by whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings. The Court is also required to consider whether it was reasonable for a party to pursue a particular allegation or raise a particular issue and whether the claimant gave reasonable notice of intention to pursue a claim. The Court also has power to order costs against a person who is not a party, but only on giving prior notice and an opportunity to be heard."

¹³ [2007] EWCA Civ 922.

¹⁴ [2003] ECSCJ No. 83 (delivered 24th November 2003).

[54] In furtherance of the established principles stated above, the court is constrained not to apply the general rule in such a way as to exclude the exercise of discretion entrusted to it. The general rule principle that costs follow the event is a strong principle and, despite the fact that costs orders are discretionary, an appellate court will only intervene where a judge fails to give the principle sufficient weight. This principle was given judicial acknowledgment in the well-known case of **Adamson v Halifax Plc**¹⁵ in which it was stated:

“16 Costs are in the discretion of the trial judge and this court will only interfere with the exercise of that discretion on well-defined principles. As I said in *Roache v News Group Newspapers Ltd* [1998] EMLR , 161, 172:

“Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale.”

That statement was approved in *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507, 1523, per Lord Woolf MR. Although that decision was before the CPR came into force, it is clear that the court applied the same principle in relation to interfering with the trial judge's discretion.”

[55] In **Donald Campbell and Company Limited v Pollak**¹⁶ Viscount Cave L.C. pronounced that a judge's discretion must be exercised judicially, and the judge ought not to exercise the discretion against the successful party except for some reason connected with the case. In **Hall and others v Stone**¹⁷ it was held that merely failing to recover as much as had been claimed does not give grounds for reducing the successful party's costs. In my view, these principles apply to the appeal at bar with great force.

[56] In **The Hon. Attorney General et al v D. Gisele Isaac**,¹⁸ writing on behalf of this Court, I stated at paragraph 21, in relation to an award of cost, that: “[t]he exercise

¹⁵ [2003] 1 WLR 60.

¹⁶ [1927] AC 732.

¹⁷ [2007] EWCA Civ 1354.

¹⁸ [2016] ECSCJ No. 35 (delivered 11th March 2016).

of a judicial discretion must be on a principled basis failing which an appellate court may interfere so as to ensure adherence to settled principles and/or to avoid a miscarriage of justice’.

[57] Further, the principles enunciated by Pereira CJ, in **Delta Petroleum (Nevis) Limited** are applicable to the appeal at bar in relation to the exercise of discretion in awarding costs. Indeed, the learned Chief Justice’s pronouncements are very instructive and are relevant to the appeal at bar; namely:

“If a court decides to award costs it must order the “unsuccessful party to pay the costs of the successful party.” Notwithstanding this... “the Court may, of course, depart from the general rule but it remains appropriate to give ‘real weight’ to the overall success of the winning party: *Scholes Windows v Magnet (No.2)* [2000] ECDR 266 at paragraph 268.” The question to be determined, then, is who is the successful or winning party, as only then is likely to approach costs from the right perspective.”

She continued at paragraph 42:

“This order as to costs is not, on the face of it, consistent with the general rule found in CPR 64.6(1) that the successful party must be awarded costs ... While I accept that this general rule could very well be displaced in light of all the circumstances of a case, the discretion of the learned judge in this regard had to be exercised judiciously.”

[58] More recently, in **Throne Capable Investment Limited v Agile Star Group Limited**,¹⁹ I stated, on behalf of this Court, that:

“It is beyond doubt that a judge can exercise his discretion to deprive a successful party of its costs. However, in doing so, it is incumbent upon the judge to give reasons for departing from the general rule that costs follow the event. The principle that ‘costs follow the event’ is a strong principle, and this is so despite the fact that costs orders are discretionary. In exercising this discretion, which must be judicially exercised and on the basis of reasons connected with the case, the judge is required to have regard to all of the circumstances of the case. It is well-established that an appellate court will intervene where a judge fails to give the principle that costs follow the event proper and careful consideration.”

[59] The above decisions remain of considerable force and effect.

¹⁹ [2021] ECSCJ No. 433 (delivered 14th January 2021).

[60] In determining the question of who is the successful party, for the purposes of the general rule, this Court, in **Rosalind Nicholls et al v Richard Rowe and Mark Secrist et al**,²⁰ held that the entire litigation must be looked at as a whole.

[61] In **A L Barnes Ltd v Time Talk (UK) Ltd**,²¹ Longmore LJ stated that 'it is important to identify at the outset who is the successful party, as only then is the court likely to approach costs from the right perspective'. He stated that the most important thing in deciding who the successful party is, is to identify the party who is to pay money to the other as that is the truest indication of success and failure. Further, Lightman J in **Bank of Credit and Commerce International SA v Ali and others (No.4)**²² stated that the question of who is the successful party is a matter for the exercise of common sense.

[62] In determining which party should pay costs, CPR 64.6(6) provides that the court must have regard to all the circumstances of the case. It states that:

"In particular, the court must have regard to –

- (a) the conduct of the parties both before and during the proceedings;
- (b) the manner in which a party has pursued –
 - (i) a particular allegation;
 - (ii) a particular issue; or
 - (iii) the case;
- (c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings;
- (d) whether it was reasonable for a party to –
 - (i) pursue a particular allegation; and/or
 - (ii) raise a particular issue; and
- (e) whether the claimant gave reasonable notice of intention to issue a claim."

²⁰ [2018] ECSCJ No. 255 (delivered 21st September 2018).

²¹ [2003] EWCA Civ 402.

²² [2000] ICR 1410 (CA); [1999] All ER (D) 1222.

- [63] It is therefore clear that, the conduct of the parties both before the proceedings and during the proceedings can impact costs. Even though there is no such detailed provisions in our rules, helpful guidance is provided in the United Kingdom Civil Procedure Rules; rule 44.2(5) defines the conduct of the parties widely to include: (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.
- [64] With the above principles firmly in mind, and having reviewed the totality of the circumstances, I agree with the further arguments of the Employers that the learned judge was in fact plainly wrong in the exercise of her discretion in relation to the award of costs, this is by way of emphasis. The Employers succeeded in defending Ms. Lindsay's claim and were largely successful in prosecuting their counterclaim in the court below. Accordingly, application of the general rule contained in rule 64.6(1) of the CPR requires that they be awarded costs.
- [65] While rule 64.6(6) of the CPR states that the court must have particular regard to the conduct of the parties before and during the proceedings, conduct is not the only factor that the court must consider in arriving at its decision whether to award costs. En passant, it is noteworthy that, the learned judge seemed to have made the alleged conduct of the parties the basis of her refusal to award costs to either party. In **Bostock v Ramsey Urban District Council**,²³ the court stated that the judge in the determination of costs is not confined to the consideration of the parties' conduct in the actual litigation itself, but may also take into account matters which lead up to

²³ [1900] 1 QB 357.

or occasioned the litigation.²⁴ CPR 64.6(6) also requires that the court also pay due regard to the case itself, the issues raised and the success of the parties.

[66] As indicated earlier, Mr. Carrington during his oral arguments complained, among other things, that the learned judge, at paragraph 82 of the judgment, stated that both parties were uncooperative and therefore, this conduct warranted the denial of costs. In **Dunnett v Railtrack Plc**,²⁵ the court held that parties who fail to conduct litigation in accordance with the new ethos of the civil procedure rules can be deprived of their costs. Indeed, in the United Kingdom this poor conduct includes failure of parties to consider or participate in alternative dispute resolution and other types of misconduct of the parties.

[67] It is apparent that misconduct by the successful party may result in costs not following the event. To be clear, misconduct can impact the court's exercise of discretion and can result in the court depriving the successful party of its costs. However, in disallowing the successful party its costs the factors which should be considered include the following: the result of the action itself; the conduct of the parties to see whether either of them had in any way involved the other unnecessarily in the expense of litigation; whether either party's conduct has resulted in the litigation being protracted; the manner in which the parties pursued or defended the claim or participant allegations; and the efficiency of litigants in proceedings. Dishonesty by a successful party is also a serious factor that the court can utilise to deny a successful party its costs.

[68] In **Texaco Ltd v Arco Technology Inc**²⁶ it was held that a claimant who has claimed substantial damages but has only recovered nominal damages will normally be ordered to pay the defendant's costs. While in **Earl of Malmesbury and others**

²⁴ [1900] 2 Q.B. 616.

²⁵ [2000] Lexis Citation 1491.

²⁶ [1989] Lexis Citation 1193.

v Strutt and Parker,²⁷ the court held that taking an unreasonable stance in a mediation is treated in the same way as unreasonably refusing to mediate at all.

[69] While the above authorities establish that unreasonable conduct is a relevant consideration in the award of costs and can be used against a party who fails to conduct litigation in accordance with the new ethos, there must be a proper and clear evidential basis upon which the court can so conclude. As alluded to earlier, being unreasonably uncooperative, the exaggeration of claims, and the filing of unnecessary applications, in a proper case, can be the bases upon which a court can deprive a successful party of its costs. In the particular circumstances of this case, this Court does not have any evidential basis upon which it can properly conclude that WDM has misconducted itself in defending Ms. Lindsay's claim or in prosecuting its counterclaim. By way of reminder, the burden is on the unsuccessful party to satisfy the court that the successful party's costs should be disallowed.

[70] Indeed, the care, speed and economy with which the case is presented are important. It is noteworthy to emphasise that the parties are required to assist the court to further the overriding objective of the CPR. In the appeal at bar, by way of emphasis, it is evident that the claim and counterclaim had a very checkered and protracted history. There may well be enough blame to go around between the litigants for this, in large measure. However, in my opinion there is no evidential basis upon which this Court can conclude that the Employers had misconducted themselves either before, during or after the proceedings, so as to warrant this Court's departure from the general rule on costs. I am far from persuaded by Ms. Lindsay's submissions, without more, that WDM had misconducted itself or filed unnecessary applications thereby protracting the claim and the counterclaim. In my view, there is no proper basis upon which this Court, considering the very scant information that it has before it and the entirely unpersuasive submissions that were advanced by Ms. Lindsay, can disapply the general rule that costs follow the event. Indeed, there is no proper basis to deny the Employers their costs in successfully

²⁷ [2008] EWHC 424 (QB).

defending Ms. Lindsay's claim and being largely successful in prosecuting their counterclaim in the court below.

- [71] In the exercise of this Court's discretion, by way of underscoring this ruling, the Employers are entitled to have the general rule as to costs apply and there is nothing upon which this Court could undergird any contrary position. The fact that numerous applications were filed and canvassed, with the court's permission, seem to undermine the possibility of this Court concluding that there was misconduct without more.

Costs regime

- [72] A related matter for this Court's consideration, is what costs regime is applicable. In my view, the costs in the court below, and on appeal, are governed by the prescribed costs regime. Rule 65.5(2) stipulates that prescribed costs in favour of the successful party is based on the value of the claim. Rules 65.5(2)(a) and (b) provides specifically:

"(2) The "value" of the claim, whether or not the claim is one for a specified or unspecified or unspecified sum, coupled with a claim for other remedies is to be decided in the case of the claimant or defendant –

(a) by the amount agreed or ordered to be paid; or if the claim is for damages and the claim form does not specify an amount that is claimed, such sum as may be agreed between the party entitled to, and the party liable to, such costs or, if not agreed, a sum stipulated by the court as the value of the claim; or

(b) if the claim is not for a monetary sum it is to be treated as a claim for \$50,000 unless the court makes an order under Rule 65.6(1)(a)."

- [73] It is apparent therefore that the court is clothed with the jurisdiction to value a claim during the proceedings. It follows therefore that this Court has to ascertain the value of the claim in order to determine the appropriate costs order. A perusal of Ms. Lindsay's claim indicates that there was no specific value or amount of money provided for in the claim. Neither was there any determination of the value by the High Court. I do not, for one moment, accept Mr. Carrington's argument that this

Court should utilise the figure that was asserted by Ms. Lindsay in her witness statement as the value of a claim for the purpose of our determination of the prescribed costs. The oral submissions advanced to this Court, that it should determine the value of the claim based on statements within a witness statement, are therefore wholly unacceptable. In all the circumstances of this case, it is my view that the appropriate value to ascribe to the claim below is fifty thousand Eastern Caribbean Dollars (\$50,000.00 XCD).

- [74] Given the totality of circumstances of this particular case, I am of the considered view that the Employers are entitled to prescribed costs in the court below on the claim, valued at \$50,000.00 XCD and counterclaim, pursuant to rule 65.5(2)(a) of the CPR. On the appeal, the Employers have prevailed in prosecuting one of the two grounds of appeal that have been filed and are therefore entitled to half of two-thirds of the prescribed costs on the claim and counterclaim in the court below.

Conclusion

- [75] For the reasons given above, I make the following orders:
- (1) The Employers' appeal against the judge's decision on the payment of excess vacation leave is dismissed and that part of the judge's decision is affirmed.
 - (2) The Employers' appeal against the judge's costs order is allowed.
 - (3) The Employers shall have prescribed costs on the claim valued at \$50,000.00 XCD and counterclaim in the court below pursuant to rule 65.5(2)(a).

- (4) The Employers, having prevailed in prosecuting one of the two grounds of appeal, on this appeal, shall have half of two-thirds of the prescribed costs on the claim valued at \$50,000.00 XCD and the counterclaim in the court below.

I concur.

Paul Webster

Justice of Appeal [Ag.]

I concur.

Dexter Theodore

Justice of Appeal [Ag.]

By the Court

Chief Registrar