

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA  
THE HON MISS JUSTICE STRAW JA  
THE HON MRS JUSTICE FOSTER-PUSEY JA**

**SUPREME COURT CIVIL APPEAL NO COA2021CV00041**

<b>BETWEEN</b>	<b>TRUDY-ANNE SILENT-HYATT</b>	<b>APPELLANT</b>
<b>AND</b>	<b>ROHAN MARLEY</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>JASON WALTERS</b>	<b>2<sup>ND</sup> RESPONDENT</b>

**Written submissions filed by Yualande Christopher & Associates, attorneys-at-law for the appellant**

**Written submissions filed by Samuda & Johnson, attorneys-at-law for the respondents**

**14 July 2023**

**(Ruling on Costs)**

**MCDONALD-BISHOP JA**

[1] I have read, in draft, the judgment of Straw JA and I agree with her reasoning, conclusion and proposed orders and have nothing to add.

**STRAW JA**

[2] On 28 April 2023, this court made the following orders with respect to this appeal:

“1. The appeal is allowed, in part.

2. The judgment of Lindo J dated 19 February 2021 is varied to add the following award of damages to the appellant:

US\$75,800.00 for future medical care.

3. The award of special damages in the sum of \$218,094.36 with interest at 3% per annum from 15 April 2016 to the date of judgment (the subject matter of this appeal) is affirmed.

4. All the other orders of Lindo J are affirmed.

**5. Any party who is of the view that a different order should be made as to costs of the appeal, is to file its submissions within 14 days of the date of this order, failing which, the order of the court shall be no order as to costs.**

**6. If submissions are filed by either party seeking an order for costs, the opposing party shall file and serve written submissions, in response, within 14 days of the date of service of the submissions.**

**7. The court shall consider the question regarding costs, on paper.”** (Emphasis supplied)

[3] In accordance with the orders relative to costs, submissions were filed on behalf of the appellant on 12 May 2023 and, on 26 May 2023 submissions were filed in response, on behalf of the respondents.

### **Submissions**

[4] It was submitted on behalf of the appellant that as she was successful in establishing that the learned trial judge erred in not awarding damages for future medical care, she demonstrated that the pursuit of her appeal was necessary, reasonable and justified. Therefore, she should be awarded costs in keeping with the enshrined principles of law, that costs should go to the victor. Reliance was placed on the case of **VRL Operations Limited v National Water Commission and others** [2014] JMSC Civ 84.

[5] To bolster the submission that the appellant should be awarded her full costs, counsel for the appellant pointed to the fact that no counter-appeal was filed and asserted that the court should consider “the financial disparity between the parties”. Counsel cited rule 64.6 of the Civil Procedure Rules, 2002 (‘CPR’), in order to support the contention that, as the respondents conducted themselves unreasonably in the court below, took an

unreasonable position in respect of their defence, in refusing to make any concessions on appeal, and failed to make any offers to settle, an award of full costs to the appellant is merited.

[6] Alternatively, it was submitted that if the court is not minded to grant an order for the appellant to recover her full costs, then the appellant should be awarded a significant portion of her costs, in the amount of 90%. Counsel submitted that the following factors should be taken into account:

1. The appellant's relative success on the issues appealed;
2. The overall conduct of the respondents throughout the proceedings; and
3. The absence of an offer to settle by the respondents throughout the entire life of the claim.

[7] Reliance was placed on the case of **Tomlinson v TVJ and others** [2020] JMCA Civ 52 in positing that the apportionment of the costs award should reflect the degree of success achieved by each party. Counsel sought to highlight the fact that the sum of US\$75,800.00 awarded for future medical care constitutes a substantial portion of the relief that was sought, being approximately 70% of the relief sought. It was submitted that this percentage, considered alongside the aforementioned factors, justifies an apportionment to the appellant of no less than 90% of her costs.

[8] On behalf of the respondents, it was submitted that the circumstances as set out in the appellant's submissions do not merit an award of costs to the appellant. Counsel for the respondents submitted that the issue for determination is whether the appellant should be awarded costs in respect of the appeal only, given the costs order of the court below has been affirmed. As such, the events and occurrences of the court below are irrelevant.

[9] Reference was made to rule 64.6(2) of the CPR as well as the cases of **William Clarke v The Bank of Nova Scotia Jamaica Limited** [2013] JMCA App 9 and **The Attorney General v Derrick Pinnock** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 93/2004, judgment delivered 10 November 2006, to support the submission that the court may make no order as to costs, even if a party is wholly or partially successful in its appeal.

[10] Counsel for the respondent reiterated that in making an order for costs, the court is concerned to make an order that is just and should have regard to the wide range of factors set out in the CPR. They cited the cases of **Scherer and Another v Counting Instruments Ltd and Another** [1986] 1 WLR 615 and **AEI Rediffusion Music Ltd v Phonographic Performance Ltd** [1999] 1 WLR 1507.

[11] In the final analysis, counsel submitted that the case at bar requires a departure from the general rule, since the appeal was only allowed in part and the appellant only succeeded on five out of the 11 grounds of appeal. Further, the appellant did not succeed in proving the entirety of the damages that she claimed for future medical care and completely failed on the grounds relating to special damages. On the other hand, the respondents were able to successfully argue that the learned trial judge's findings in respect of special damages should remain undisturbed.

[12] With respect to the conduct of the parties, counsel argued that the appellant acted unreasonably by bombarding the court and opposing counsel with unnecessary correspondence; whereas the respondents were reasonable in their conduct. Counsel has asked this court to make no order as to costs on the basis that such an order would take account of the overall outcome of the appeal, and would ensure that costs are proportionate.

## Analysis

[13] The award of costs is a matter for the discretion of the court. However, certain guiding principles are set out in rule 64.6 of the CPR, which applies to this court by virtue of rule 1.18(1) of the Court of Appeal Rules ('CAR').

[14] Rules 64.6(1), (2), (3) and (4) are relevant. Rule 64.6(1) sets out the general rule that:

"If 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."

[15] However, rule 64.6(2) provides that:

"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."

[16] Rule 64.6(3) further indicates that a court, in deciding which party should be liable to pay costs, "must have regard to all the circumstances", including the factors set out in rule 64.6(4) as follows:

- "64.6(4)
- (a) the conduct of the parties both before and during proceedings;
  - (b) whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;
  - (c) any payment into court or offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Parts 35 and 36);
  - (d) whether it was reasonable for a party –
    - (i) to pursue a particular allegation; and/or
    - (ii) to raise a particular issue;

–

(e) the manner in which a party has pursued

(i) that party's case;

(ii) a particular allegation; or

(iii) a particular issue;

(f) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his or her claim; and

(g) whether the claimant gave reasonable notice of intention to issue a claim.”

[17] The only issue relevant to our consideration, in the circumstances of this case, is the fact that the appellant was partially successful in the appeal. She had appealed against the decision of the learned trial judge refusing to grant her the entire sum claimed for special damages and her claim for future medical expenses. I would accept counsel's contention that since the appellant was partially successful, some award of costs should be made in her favour. The appeal against the learned trial judge's decision as regards future medical care was justified. I do not accept her contention that it should be full costs, as the appeal in relation to special damages was vigorously contested and the court found that the respondents were correct in their legal submissions. The appellant's pursuit of the appeal in relation to special damages could be considered to be somewhat unreasonable, based on the existing law.

[18] There is no evidence of any unreasonable conduct of the respondents throughout the proceedings before this court. They had contested liability below and the learned trial judge found that the respondents were liable and ordered general damages as well as the special damages that were pleaded and proved. It is not apparent that the respondents were guilty of any improper conduct in their contest of the appeal. The issue of the respondent's failure to attend mediation and other conduct complained of in the court below would have been for the consideration of the learned trial judge who had conducted the matter. In any event, a full costs award was made by the learned trial

judge to the appellant. That award has not been disturbed by this court. In light of the outcome, the respondents had a reasonable basis to resist the appeal and should not be liable for the full costs of the appeal.

[19] However, the appellant did receive a significant award for future medical care on appeal. The learned trial judge had refused to make an award under this head. In all the circumstances, I would consider it just and reasonable to award costs of 50% to the appellant.

**FOSTER-PUSEY JA**

[20] I, too, have read, in draft, the judgment of Straw JA and I agree and have nothing else to add.

**MCDONALD-BISHOP JA**

**ORDER**

50% of the costs of the appeal to the appellant, to be taxed if not agreed.