COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2013/CLE/gen/01945

IN THE MATTER of the Fatal Accidents Act Chapter 71, Statute Laws of the Commonwealth of The Bahamas

B E T W E E N

CHEERENE GREEN
(As Administratrix of the Estate of Jacinda Jasmine Colebrook, (deceased) and on behalf of all dependants of Jacinda Jasmine Colebrook)

Claimant

AND

~~**ARSENE DIEUGSTE**~~
~~**As Personal Representative of the Estate of MAURE NOEL, deceased**~~
~~**(And by Order to carry on)**~~

~~First Defendant~~

PETER COREY BOWE

Second Defendant

AND

GOLD ROCK CORP. LTD

Third Defendant

Before: The Honourable Chief Justice Sir Ian R. Winder

Appearances: Norwood Rolle for the Claimant
Genell Sands for the Second and Third Defendants

Hearing date(s): On the papers

DECISION ON COSTS

WINDER, CJ

[1.] On 15 May 2024, I handed down judgment allowing the Claimant's **Fatal Accidents Act** claim arising out of a road traffic accident which occurred in Grand Bahama involving the Claimant's daughter, Jacinda Jasmine Colebrook, her passenger, and the Second Defendant, Peter Corey Bowe. I granted judgment against the Defendants in the amount of $16,380 with pre-judgment interest at the rate of 3% per annum for a period of 7 years.

[2.] At para [109] of my written judgment, I invited the parties to make submissions as to the appropriate order for costs by written submissions to be lodged and served within 21 days. In an effort to save time and costs, I also directed that any party seeking costs should lodge and serve a statement of costs with their submissions to enable a summary assessment of costs to be made. I granted liberty for representations on the amount of costs to be awarded to be lodged within 14 days thereafter.

[3.] Each of the parties lodged submissions as to the appropriate order for costs. The Claimant filed a statement of costs on 19 June 2024 seeking costs in the amount of $128,414.80. The Second and Third Defendants lodged a statement of costs together with their submissions seeking (i) $96,037.39 in costs for the period 12 January 2014 to 28 December 2024 and (ii) $77, 066.66 in costs for the period between 29 December 2023 to 3 June 2024. The Defendants filed representations addressing the Claimant's statement of costs. I received no similar representations on the amount of the Defendants' costs from the Claimant.

[4.] This is my decision on the issue of costs. For consistency, in what follows, I adopt the abbreviations and definitions used in my substantive judgment dated 15 May 2024.

Background

[5.] The Claimant commenced this action seeking to obtain compensation under the **FAA** for the benefit of Colebrook's dependants by a Writ of Summons filed on 13 December 2013 with the assistance of the Eugene Dupuch Law School. The Writ of Summons was amended on 17 September 2015, 7 February 2020 and 12 June 2023.

[6.] In the final form of her claim, as re-amended on 12 June 2023, the Claimant sought damages under the **FAA** for the benefit of Colebrook's dependants (including herself), funeral expenses, further and other relief, interest pursuant to the **Civil Procedure (Award of Interest) Act** and costs.

[7.] The Defendants filed defences on 17 February 2014 and 3 March 2020 denying both liability and quantum. Their defences were amended on 20 June 2023.

[8.] The Defendants made an offer to settle the matter on a without prejudice basis by letter dated 6 September 2022. That letter was not marked "without prejudice save as to costs" but subsequent letters dated 19 October 2022 and 16 January 2023 were. Those letters indicate that the Defendants offered the Claimant the sum of $20,000 in full, final and immediate settlement of the Claimant's claim for damages and legal costs as against the Defendants.

[9.] The Defendants made a purported **Part 35** offer by letter dated 7 December 2023 shortly before the scheduled pre-trial review. The letter was marked "without prejudice save as to costs" and "Part 35 Offer to Settle". The terms of the offer were as follows:

(a) This offer to settle is made pursuant to Part 35 of the Supreme Court Civil Procedure Rules, 2022.

(b) The Defendants offer, in full and final settlement of all claims made or to be made in this action by the Plaintiff, all claims previously notified or to be notified or pleaded in this action by the Plaintiff and all present and future claims by the Plaintiff whatsoever and howsoever arising out of or connected with a motor vehicle accident which occurred on or about January 12, 2011 on the Grand Bahama Highway, Grand Bahama, The Bahamas and/or out of the death of Jacinda Jasmine Colebrook, the sum of B$80,000.00 (Eighty Thousand Dollars) inclusive of the sum of B$14,490.00 for interest on pre-trial dependency and funeral and related expenses up to twenty-one (21 days) after the date of service of this letter and inclusive of the sum of B$13,250.00 for the Plaintiff's legal costs ("the Settlement Amount").

(c) This offer is open for acceptance in writing for a period of twenty-one days from the date of service of this letter.

(d) Thereafter, unless notified to the contrary, it remains open for acceptance in writing until either its withdrawal or the conclusion of the action on the additional terms that:

    (i) The Plaintiff will be entitled to costs to the end of twenty-one (21) days from the date of service of this letter.
    (ii) The Plaintiff will pay her own costs from the expiry of twenty-one (21) days from the date of service of this letter.
    (iii) The Plaintiff will pay to the Defendants, all costs incurred by the Defendants from the expiry of twenty-one (21) days from the date of service of this letter up to the date of acceptance of this offer.

(e) This offer is not capable of acceptance by the Plaintiff, after a period of twenty-one (21) days from the date of service of this letter if the Plaintiff does not agree to the cost provisions set out in paragraph (d) above.

(f) Unless this offer is accepted, neither the fact nor the amount of this offer must be communicated to the Court before all of liability and the amount of money to be awarded, other than costs and interest, have been decided. The Defendants reserve the right to make the terms of this offer known to the Court after judgment is given on liability and the amount of money to be awarded, other than costs and interest, with regard to the allocation of the costs of the proceedings and request an award of costs in favour of the Defendants from the expiry of twenty-one (21) days from the date of service of this letter.

[10.] The calculation underpinning the offered sum of $80,000 was explained as follows:

Pre-Trial Dependency	$99,143.41 (deceased's annual salary of $13,900.00 in January 2011 x 66.66% = $9,265.74 x 10.70 multiplier to August 26, 2022 when the deceased's youngest child Vaughn Colebrook turned 18 years old)
Funeral Expenses (Cremation)	$4,000.00
Deceased's Medical record	$25.00
Airline tickets to Freeport	$310.00
Sub-Total Damages	$103,478.41
Less 50% Contributory Negligence to the deceased	($51,739.20)
Total Damages	$51,739.21
Interest at 4% per annum from Date of the Writ (Dec 4. 2013) on past losses for 7 years	$14,486.97 (rounded up to $14,490.00)
Total Damages and Interest	$66,229.21 (rounded up to $66,230.00)
Legal Costs at 20%	$13,246.00 (rounded up to $13,250.00)
Total Settlement Amount	$79, 480.00 (rounded up to $80,000.00)

[11.] The pre-trial review in this matter took place on 4 January 2024.

[12.] Trial took place on 13 February 2024. There were five issues for the Court to determine at trial (see para [6] of my written judgment dated 15 May 2024). They were resolved as follows:

(i) The Court found that Bowe was negligent in failing to keep any proper lookout, in failing to see Colebrook's vehicle in sufficient time to avoid the accident, in failing to stop or swerve so as to avoid the accident, and in failing to exercise due care and attention to avoid the accident.

(ii) The Third Defendant was held to be vicariously liable for the negligent driving of Bowe.

(iii) The Court found that Colebrook died in the fire caused by the accident.

(iv) The Court found that Colebrook had been contributorily negligent and assessed her contribution at 75%. The Defendant established the majority of the grounds of contributory negligence pleaded.

(v) Colebrook's dependants were awarded dependency in the amount of $16,380 after taking into account contributory negligence. 3% simple interest was awarded on the

sum of $16,380 for a period of 7 years from the date the Writ of Summons was filed. Further pre-judgment interest was disallowed because of the Claimant's unreasonable delay in moving the matter to trial. The Claimant's claim for special damages failed entirely, for technical reasons.

The Claimant's Submissions

[13.] Mr. Rolle for the Claimant submitted that the Court has a general discretion in relation to costs and the aim always has to be to make an order that reflects the overall justice of the case. Mr. Rolle sought the Claimant's costs of the action as the successful party.

[14.] Counsel for the Claimant relied on the decision of Stephen Jourdan KC sitting as a High Court judge in **Pigot v Environment Agency** [2020] EWHC 1444 (Ch) for the following propositions, which were stated at para [6] of the decision:

> (1) The mere fact that the successful party was not successful on every issue does not, of itself, justify an issue-based cost order. In any litigation, there are likely to be issues which involve reviewing the same, or overlapping, sets of facts, and where it is therefore difficult to disentangle the costs of one issue from another. The mere fact that the successful party has lost on one or more issues does not by itself normally make it appropriate to deprive them of their costs.
> (2) Such an order may be appropriate if there is a discrete or distinct issue, the raising of which caused additional costs to be incurred. Such an order may also be appropriate if the overall costs were materially increased by the unreasonable raising of one or more issues on which the successful party failed.
> (3) Where there is a discrete issue which caused additional costs to be incurred, if the issue was raised reasonably, the successful party is likely to be deprived of its costs of the issue. If the issue was raised unreasonably, the successful party is likely also to be ordered to pay the costs of the issue incurred by the unsuccessful party. An issue may be treated as having been raised unreasonably if it is hopeless and ought never to have been pursued.
> (4) Where an issue based costs order is appropriate, the court should attempt to reflect it by ordering payment of a proportion of the receiving party's costs if that is practicable.
> (5) An issue based costs order should reflect the extent to which the costs were increased by the raising of the issue; costs which would have been incurred even if the issue had not been raised should be paid by the unsuccessful party.
> (6) Before making an issue-based costs order, it is important to stand back and ask whether, applying the principles set out in CPR r.44.2, it is in all the circumstances of the case the right result. The aim must always be to make an order that reflects the overall justice of the case.

[15.] Counsel for the Claimant also relied on para [42] of the decision of Coulson J (as he then was) in **Brit Inns Ltd (in Liquidation) v BDW Trading Ltd** [2012] EWHC 2489 (TCC), [2012] All ER (D) 56 (Sep) for the following additional principles:

> (1) In a commercial case, the successful party will usually be the party that recovers money from the other;
> (2) The only certain way for a defendant to shift its potential costs liability is to make a Part 36 offer which it then betters at trial;

(3) The pursuit of exaggerated claims may deprive the claimant of some or all of its costs, but it is usually only where the exaggeration is deliberate that the claimant has been ordered to pay the defendant's costs;
(4) In general terms, for costs to be shifted as a result of conduct, so that the claimant who recovers something at trial still has to pay the defendant's costs, there needs to be more or less total failure on the issues that went to trial or a failure to accept a Part 44 offer that would have put the claimant in a better position than going on.

[16.] Mr. Rolle submitted that the central issues in this case were the cause of the accident and the cause of Colebrook's death and both issues were reasonably raised by the Claimant. Mr. Rolle submitted that, while a **Part 35** offer was made by the Defendants, and it was not beaten, it was made on 12 February 2024, one day before trial, and the Claimant ought not to be deprived of her costs.

[17.] Mr. Rolle made no attempt to substantiate the bare claim in his submissions that a **Part 35** offer was only made on 12 February 2024. On the contrary, item 124 of the Claimant's statement of costs is for "Attending to receive, peruse and consider letter of offer from GKS to NAR" on 7 December 2023.

The Defendants' Submissions

[18.] Ms. Sands for the Defendants submitted that a **Part 35** offer was served on Counsel for the Claimant on December 7 2023 as evidenced by a confirmation of service form and it was not accepted or beaten by the Claimant. Ms. Sands submitted that the Court's award of damages in the sum of $16,380 and pre-judgment interest was less than 90% of the amount of the Defendants' **Part 35** offer and, therefore, pursuant to **CPR 35.15**, the Court ought to order that the Claimant must pay the assessed costs of the Defendants from 29 December 2023.

[19.] Counsel for the Defendants submitted that, apart from the consequences under **Part 35** of the **CPR**, the Court has a discretion as to the award of costs of the action. Referring to **CPR 71.6**, Counsel submitted that the general rule is that the Court must order the unsuccessful party to pay the costs of the successful party, however, the award of costs is ultimately in the Court's discretion and the Court may depart from this general rule. Counsel submitted that the Court can make no order as to costs and, in exceptional circumstances, can order a successful party to pay all or part of the costs of an unsuccessful party.

[20.] Relying on **Roache v Newsgroup Newspapers Limited** [1998] EMLR 161, **Islam v Ali** [2003] EWCA Civ 612, **Medway Primary Care Trust v Marcus** [2011] EWCA Civ 750, **Magical Marking Ltd v Ware Kay LLP** [2013] EWHC 636 (Ch), **Palliser Ltd v Fate Limited** [2019] EWHC 389 (QB) and **Summit Insurance Limited v Bolingbroke Limited** SCCivApp No. 145 of 2023, the Defendants submitted that they were the "real winners" and the successful party in the action. They pointed out that the damages awarded to the Claimant were substantially less than

(and only 5% of) the amount of $357,093.60 that was claimed by the Claimant. The damages awarded to the Claimant were also significantly less than the amount offered by them, and they succeeded in establishing that Colebrook was 75% responsible for the accident.

[21.] Referring to **CPR 71.10**, Ms. Sands also made submissions with respect to the circumstances the Court is enjoined to consider by **CPR 71.10(1)** when exercising its discretion as to costs:

(1) The conduct of the parties both before and during the proceedings

Counsel submitted that the Defendants acted reasonably throughout the conduct of the matter. Bowe always believed Colebrook was at fault for the accident. Bowe was not charged or convicted for the accident, and so it was reasonable for him to believe he was not at fault and to defend the action. Furthermore, Bowe was aware of rumours in Freeport that Colebrook and her passenger were already dead prior to the accident. Bowe did not have a copy of the Autopsy Report when the action was commenced and the Toxicology Report had not been provided. When it was received, the Toxicology Report contained findings from which it could have been concluded that Colebrook was not alive at the time of the fire. Furthermore, the Defendants had to defend themselves as settlement attempts failed.

(2) Whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue

Counsel submitted that, having regard to the evidence and case law, it was reasonable for the Defendants to contest/defend the issues of liability and damages. Following a full Police investigation, Bowe was not charged, case law showed a stationary and unlit vehicle on a highway could be found wholly responsible for a collision which ensued, and the Autopsy Report and Toxicology Report both contained findings from which it could have been concluded that Colebrook was not alive at the time of the fire. In addition, the Claimant's claim for damages and interest in the sum of $357,093.60 was grossly exaggerated and out of line with the authorities and, therefore, rightly challenged.

(3) Whether a party has succeeded on particular issues or part of his case, even if not ultimately successful or wholly successful in the case

Counsel submitted that, on the issue of liability, the Defendants succeeded in establishing contributory negligence and Colebrook was held to bear the majority of the liability for the accident, i.e., 75%. On the issue of damages, the Claimant was awarded merely 5.55% of the sum of $357,093.60 that she claimed.

(4) Whether a claimant who has succeeded in his claim, in whole or in part, or exaggerated his claim

Counsel submitted that the Claimant grossly exaggerated her claim for damages. Counsel submitted that the Claimant failed to adduce any evidence of Colebrook's earnings at the date of her death, used a multiplier in calculating her award for damages which was unwarranted, claimed damages for future losses which were unwarranted and claimed special damages, none of which were awarded. Had the Claimant and/or her legal advisors conducted a proper and reasonable assessment of her claim, it is likely that the Claimant would have settled.

[22.] Counsel for the Defendants invited the Court to apply **Summit Insurance Limited v Bolingbroke Limited** SCCivApp No. 145 of 2023 and find the Defendants are the successful party and, therefore, be awarded costs to be summarily assessed.

[23.] Counsel for the Defendants invited the Court in the alternative to make costs orders for two separate periods: (i) from 12 January 2014 to 28 December 2023 and (ii) from 29 December 2023 to the date of the costs order. Counsel submitted that:

(i) the Defendants should be awarded their costs from 29 December 2023 onward to be paid by the Claimant, as the Claimant did not beat the Defendants' **Part 35** offer; and

(ii) the Defendants should be awarded either all, 75%, or some other percentage, of their costs up to 28 December 2023.

[24.] Counsel also canvassed, albeit with no enthusiasm or endorsement, that the Court might make no order as to costs up to 28 December 2023.

Discussion and analysis

[25.] In deciding what order to make about costs, the usual starting point is **CPR 71.6(1)**, which provides 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.

[26.] However, in deciding what order to make as to costs, if any, the Court must have regard to all of the circumstances including the conduct of the parties, whether a party has succeeded on his case even if he has not been wholly successful, and any payment into court or admissible offer to settle which is drawn to the Court's attention which is not an offer to which costs consequences attach under **Part 35** or **Part 36**: **CPR 71.10(1)**.

[27.] Where a **Part 35** offer has been made, it seems to me that in many cases the most coherent approach to the issue of costs will be to deal with the effect of the **Part 35** offer first and then to consider the costs relating to the period before the latest date on which the **Part 35** offer could have been accepted without the court's permission. That is at any rate how I propose to deal with the costs of this matter.

[28.] **Part 35** of the **CPR** establishes a regime aimed at encouraging settlement by prescribing potential adverse costs consequences in the event that an offer to settle proceedings falling within its provisions is refused. The effect (and attraction) of a **Part 35** offer is that it shifts the incidence of the risk of costs on the offeree.

[29.] The relevant parts of **Part 35** provide:

> 35.1 Scope of this Part.
> (1) This Part contains Rules about —
> (a) offers to settle which a party may make to another party; and
> (b) the consequences of such offers.
> (2) This Part does not limit a party's right to make an offer to settle otherwise than in accordance with this Part.
> (3) The Rules in this Part are subject to rule 23.12.9
> 35.2 Introductory.
> (1) An offer to settle may be made in any proceedings whether or not there is a claim for money.
> (2) The party who makes the offer is called the "offeror".
> (3) The party to whom the offer is made is called the "offeree".
> (4) An offer to settle is made when it is served on the offeree.
> 35.3 Making offer to settle.
> (1) A party may make an offer to another party which is expressed to be "without prejudice" and in which the offeror reserves the right to make the terms of the offer known to the Court after judgment is given with regard to —
> (a) the allocation of the costs of the proceedings; and
> (b) (in the case of an offer by the claimant) the question of interest on damages.
> (2) The offer may relate to the whole of the proceedings or to part of them or to any issue that arises in them.
> 35.4 Time when offer to settle may be made.
> A party may make an offer to settle under this Part at any time before the beginning of the trial.
> 35.5 Procedure for making offer to settle.
> (1) An offer to settle must be in writing.
> (2) The offeror must serve the offer on the offeree and a copy on all other parties.
> (3) Neither the fact nor the amount of the offer or any payment into Court in support of the offer must be communicated to the Court before all of the liability and the amount of money to be awarded, other than and interest, have been decided.
> (4) Paragraph (3) does not apply to an offer which has been accepted or where a defence of tender before claim has been pleaded.
> 35.6 Extent to which offer to settle covers interest, costs or counterclaim.

(1) An offer to settle a claim for damages must state whether or not the amount offered includes interest or costs.
(2) If the offer covers interest or costs it must state the amount which is included for each.
(3) If there is a counterclaim as well as a claim, the offer must state in the case of an offer by the — (a) claimant, whether or not it takes into account the counterclaim; or (b) defendant, whether or not it takes into account the claim and in each case in what amount.
35.8 Offer to settle part of claim.
(1) An offer to settle must state whether or not it covers the whole or part of the claim.
(2) If it does not state that it covers part of the claim, it is to be taken to cover the whole claim.
(3) If the offer covers only part or parts of the claim it must —
(a) identify the part or parts of the claim in respect of which it is made; and
(b) if more than one, state what is offered in respect of each part covered by the offer.
35.9 Time limit for accepting offer to settle.
(1) The offeror may state in the offer that it is open for acceptance until a specified date.
(2) The offer shall have no effect on any decision that the Court makes as to the consequences of the offer unless it is made at least twenty-two days prior to the commencement of the trial and that it is open for acceptance for at least twenty-one days.
(3) Acceptance of the offer after the commencement of the trial shall have no effect on any decision that the Court makes as to the consequences of such acceptance.
(4) The Court may permit an offeree to accept an offer after the specified date on such terms as the Court considers just
...
35.15 Costs where offer not accepted – general rules
(1) The general rule for defendants' offers is that, if the defendant makes an offer to settle which is not accepted and in — (a) the case of an offer to settle a claim for damages, the Court awards less than 90% of the amount of the defendant's offer; (b) any other case, the Court considers that the claimant acted unreasonably in not accepting the defendant's offer, the claimant must pay any assessed costs incurred by the defendant after the latest date on which the offer could have been accepted without the court's permission.
...
(3) The Court may decide that the general rule under paragraph (1) is not to apply in a particular case.
(4) In deciding whether the rule in paragraph (1) above should not apply and in considering the exercise of its discretion the Court may take into account the — (a) conduct of the offeror and the offeree with regard to giving or refusing information for the purposes of enabling the offer to be made or evaluated; (b) information available to the offeror and the offeree at the time that the offer was made; (c) stage in the proceedings at which the offer was made; and (d) terms of any offer.
(5) This rule applies to offers to settle at any time, including before proceedings were started.

[30.] As no local authority was cited to me dealing with the effect of a **Part 35** offer, I ought to make some brief observations about **Part 35**:

(i) Where there has been no **Part 35** offer, the Court has a broad discretion to deal with the costs of the proceedings under **Part 71**, as described above. However, where there has been a valid **Part 35** offer, the discretion of the Court is more circumscribed.

(ii) As **CPR 35.1(2)** makes clear, parties are not bound to attempt to settle proceedings through the mechanism provided by **Part 35**. However, if a party wishes to make a **Part 35** offer, they ought to comply with the provisions of **Part 35**.

(iii) **Part 35** is drafted as a self-contained code. It contains a carefully structured and highly prescriptive set of rules: compare **Gibbon v Manchester City Council; LG Blower Specialist Bricklayer Ltd v Reeves** [2010] 5 Costs LR 828 per *Moore-Bick LJ* at paras [4] to [6] in relation to **Part 36** of the UK's **Civil Procedure Rules 1998**.

(iv) If an offer fails to comply with the requirements of **Part 35**, it will normally not have the consequences of a **Part 35** offer: compare **F&C Alternative Investments (Holdings) Limited v Barthelemy** [2012] EWCA Civ 843 per *Davis LJ* at para [63] in relation to **Part 36** of the UK's **Civil Procedure Rules 1998**.

(v) Parties cannot agree that an offer or acceptance is in accordance with the requirements of **Part 35** if, on analysis, it is not: compare **Hertel and another v Saunders and another** [2018] 1 WLR 5852 per *Coulson LJ* at para [23] in relation to Part 36 of the UK's **Civil Procedure Rules 1998**.

(vi) The "general rule" in **CPR 35.15(1)** must be applied unless it would be inappropriate in the particular case, taking into account the relevant circumstances. **CPR 35.15(3)** acknowledges that the Court may decide that the general rule under **CPR 35.15(1)** should not be applied in a particular case. It is, however, implicit in the fact that **CPR 35.15(1)** prescribes a "general rule" that it will normally be applied.

(vii) In deciding whether to apply the general rule under **CPR 35.15(1)** in a particular case, the Court may take into account (a) the conduct of the offeror and the offeree with regard to giving or refusing information for the purposes of enabling the offer to be made or evaluated; (b) information available to the offeror and the offeree at the time that the offer was made; (c) stage in the proceedings at which the offer was made; and (d) terms of any offer.

[31.] Turning to the Defendants' purported **Part 35** offer, while I do not perceive any real issue about whether the purported **Part 35** offer was received or served, I am not satisfied that the Defendants' letter dated 7 December 2023 is, on analysis, a **Part 35** offer. I therefore decline to apply **CPR 35.15(1)**.

[32.] To elaborate, as was set out in the Defendants' letter dated 7 December 2023, the Defendants' offer of $80,000 was made:

> ...in full and final settlement of all claims made or to be made in this action by the Plaintiff, all claims previously notified or to be notified or pleaded in this action by the Plaintiff and all present and future claims by the Plaintiff whatsoever and howsoever arising out of or connected with a motor vehicle accident which occurred on or about January 12, 2011 on the Grand Bahama Highway, Grand Bahama, The Bahamas and/or out of the death of Jacinda Jasmine Colebrook, the sum of B$80,000.00 (Eighty Thousand Dollars) inclusive of the sum of B$14,490.00 for interest on pre-trial dependency and funeral and related expenses up to twenty-one (21 days) after the date of service of this letter and inclusive of the sum of B$13,250.00 for the Plaintiff's legal costs ("the Settlement Amount").
>
> [Emphasis added]

[33.] **CPR 35.3(2)** ("*The offer may relate to the whole of the proceedings or to part of them or to any issue that arises in them*") and **CPR 35.8(1)** ("*An offer to settle must state whether or not it covers the whole or part of the claim.*") suggest that a **Part 35** offer must relate to the issues, claims and proceedings actually before the Court at the time that the offer is made. That cannot be said of the offer made in this case, which sought to settle "all claims made or to be made in this action by the Plaintiff, all claims previously notified or to be notified or to be notified or pleaded in this action by the Plaintiff and all present and future claims by the Plaintiff whatsoever and howsoever arising out of or connected with a motor vehicle accident". It is therefore not a **Part 35** offer.

[34.] Consequently, I begin with the usual rule that, when 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. To see whether this rule should be applied, and to apply it, I must determine who the "successful party" is.

[35.] Although Ms. Sands provided several authorities which provide guidance on the identification of the "successful party" in civil litigation, I think it necessary to refer only to **Medway Primary Care Trust v Marcus** [2011] EWCA Civ 750 and **Summit Insurance Limited v Bolingbroke Limited** SCCivApp No. 145 of 2023.

[36.] In **Medway Primary Care Trust v Marcus** [2011] EWCA Civ 750, the claimant had his leg amputated below the knee on 20 June 2005. This was necessary because the arteries in his left lower leg became blocked with embolisms driving from elsewhere which caused painful ischaemia in his foot (which resulted in the death of the tissue there). The claimant brought proceedings in negligence on the basis that a doctor employed by the first defendant diagnosed his ischaemia but failed to take appropriate steps to see it treated and the second defendant, a general practitioner, failed to take any steps to diagnose ischaemia on the several occasions that the claimant saw him. The claimant's case was that, if he had been appropriately treated, his leg would have been saved. The defendants admitted breach of duty before trial but disputed causation. The claimant recovered only 0.25% of the amount claimed by him, on a basis that was only peripherally developed in his pleadings. The deputy judge at first instance awarded the claimant 50% of his costs. The English

Court of Appeal held that this was wrong. The President of the King's Bench Division, *Sir Anthony May,* said at paras [17] to [19]:

> [17] In my judgment, the deputy judge was wrong in principle to conclude that the respondent was the successful party. The award of £2,000 was insignificant in the context of the claim and the action as a whole, and, although it was technically within the pleaded claim, it was in truth a last minute addition to salvage something (0.25%) from an action which the respondent lost. The whole action was about the cause of the need for the respondent to undergo a leg amputation, and, for all that the first defendants did not admit breach until a late stage, the second defendant's early admission would have carried the entire claim, if the respondent had succeeded on causation. The causation issue was squarely advanced in the original defences. Mr Brearley's opinion on the causation issue was the second defendant's case from the start and it carried the day. I have already indicated my view that such vindication as the action achieved was scant consolation for a claimant whose £525,000 claim had failed entirely. This is not a case in which identification of the party who has to write the eventual (very small) cheque is persuasive as to the costs order. There is little, if any, material distinction between this case and Oksuzoglu. The essential relevant considerations which applied in 1998 have not materially changed with the advent of the Civil Procedure Rules. The fact that the costs order in Oksuzoglu was for the costs of the liability and causation issue does not directly apply to the present case, because the deputy judge decided the action, not a preliminary issue, and the costs of the action in truth related to the causation issue. The fact that the appellants did not make a Part 36 offer or write a Calderbank letter is no more relevant to the costs issue than it was in Oksuzoglu. If the defendants had made a Part 36 offer of (say) £3,000 at the outset, that would have carried a costs payment of some £100,000 which would have been disproportionate and unjust. More importantly, however, an award of £2,000 on an afterthought claim for a short period of extra pain is insignificant in the context of the action as a whole and the nominal failure to make a Part 36 offer is of no consequence and a technical triviality. As the deputy judge himself said, no rational person would issue or defend proceedings such as these, if the recovery was only £2,000. The subject matter of the £2,000 was simply not what the action was about, and, other than technically, that claim was not advanced until the respondent's closing submissions. The action was about the cause of the leg amputation and the costs were spent in advancing and defending that. I accept that the damages awarded were not technically nominal, but they were so small as to be insignificant.
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> [18] Mr Mansfield, in addition to urging upon us points which we have already addressed, submits that, as in some other cases, the Respondent could not have got his damages without going to court, and no offer was made at any time. The Appellants had to write the cheque and the First Defendant contested breach until a very late stage when the case that Dr Thom had felt a pulse on 6 April 2005 was withdrawn. Mr Mansfield says that the Appellants are trying to achieve a more favourable result than if they had made an offer. He stresses that there is no criticism of the conduct of the Claimant. He also stresses that in Oksuzoglu the Defendant did not get the costs of the action.
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> [19] Although some of these points are persuasive to a result that the Respondent should not be ordered to pay all the Appellants' costs, they are not persuasive on the question of who was the successful party. I am in no doubt but that it was the Appellants, and the starting point should therefore be a costs order in their favour. The question is whether it should be reduced and, if so, by what proportion.

[37.] In **Summit Insurance Limited v Bolingbroke Limited** SCCivApp No. 145 of 2023, the claimants filed an action against the defendants claiming a true and correct accounting of the fees due under an insurance policy and/or an indemnity under the insurance policy. Liability under the policy was not disputed. On 25 February 2021 the action against Insurance Management

(Bahamas) Limited was dismissed and they were awarded the costs of the action, to be determined at the end of trial. At the end of trial, judgment was given for Bolingbroke Limited in the amount of $182,015.48 but the Court ordered that each party bear their own costs. In relation to that order, the Court of Appeal held that the Court erred in making no order as to costs because the defendants had succeeded on the material issues in the case. *Evans JA* said at paras [46] to [49], para [55] and paras [63] and [64]:

> 46. Secondly, the cumulative effect of the letters of offer to settle, the letter dated 27 May 2017, reiterating the acceptance of liability for a claim under the Policy, but disputing the amount claimed, and the admission of liability in the Defences filed show that the only issue between the parties was quantum. In the circumstances, where Bolingbroke claimed $1.6M but was awarded only $182,015.48 it is difficult to rationalize the finding by the learned Judge that Bolingbroke had "a measure of success."
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> ...
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> 48. In my view, the learned Chief Justice fell into error in not focusing on the success of the Appellants. They were successful on the main issue which was before the court i.e. the quantum of damages. This ought to have been the starting point and the factors identified above would then be relevant in determining to what extent the general rule would apply.
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> 49. The Appellants were vindicated on the issue as to quantum. They were successful on interlocutory applications and four of the Summonses resulted in orders that the Insurers receive their costs of the applications, to be available only if the Insurers were successful in the action. They also failed on the claims that the Insurers breached their respective duties to carry out the proper assessment of the claim; that the Insurers were guilty of intentionally delaying and/or frustrating the claims process or otherwise acting in bad faith and in breach of duty; the claims in relation to conflict of interest; and in relation to claims made by Bolingbroke that the Insurers did not properly explain how the deductible worked. Those are all issues which were held over to trial and ultimately Bolingbroke did not succeed on any of those additional claims that were made.
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> ...
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> 55. It is not unusual in cases where, after considering the circumstances of a case, a court may find that there was no clear winner in a trial. It is also not unusual to find that the order made in such cases is likely to be that both parties will bear their own costs. This is not such a case. In my respectful view, the facts point clearly to the Appellants being the successful parties. I am satisfied that there is merit in all of the grounds of appeal and Mrs. Smith properly conceded that the extension of time should be granted. I am further satisfied that having heard full submissions from the parties the appeal should be allowed.
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> ...
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> 63. I am further satisfied that on the totality of the evidence The Insurers were the successful parties at trial. They succeeded before the court on every material issue which was raised. The learned Chief Justice provided no reasons as to why they were deprived of their costs in this matter. From our own review, the evidence shows that the Insurers did everything possible to settle the claim. Offers of settlements were made beginning prior to trial and a payment was made into court. Liability was not contested paving the way for a speedy resolution.
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> 64. In considering the payment into court and the offers to settle, I have taken them into consideration only to the extent that they show the Insurers good faith efforts to settle the claim and avoid a trial. I am satisfied that although Bolingbroke may have had a genuine belief that they were entitled to a greater compensation that does not provide a valid reason for depriving the Insurers of their costs due to them as the successful party.

[38.] In **Summit Insurance Limited**, *Evans JA* explained at paras [25] to [27] and [61], in the context of the **Rules of the Supreme Court**, that the Court's discretion as to costs, although wide and unlimited, is not to be exercised arbitrarily but must be exercised judicially. This requires the Court to act in accordance with established principles applied to the relevant facts of the case. The general rule is that, at the conclusion of a hearing, costs follow the event unless there are special circumstances. The duty of the judge is to make an order which meets the justice of the case. If a judge deprives a successful party of his costs, cogent reasons are required to explain why.

[39.] Returning to the present case, when I ask the question "which party, as a matter of substance and reality, has been successful in these proceedings?", I am driven to the conclusion that the Claimant is the "successful party". In **Roache v News Group Newspapers Ltd** [1998] EMLR 161, *Sir Thomas Bingham MR* spoke of asking whether "...the plaintiff won anything of value which he could not have won without fighting the action through to finish" and whether "...the defendant has substantially denied the plaintiff the prize which the plaintiff fought the action to win". The central issues in this case were the cause of the accident and the cause of Colebrook's death. The Claimant succeeded on those issues, as the Defendants denied all liability for the accident or Colebrook's death. I am not prepared to hold that a representative of the dependants of a deceased person wins nothing of value by establishing liability after a highly contested trial.

[40.] However, it is plain to me that the Claimant should not recover the entirety of her costs. A claim for dependency and funeral expenses under the **FAA** is primarily a claim for compensation. The Claimant only recovered 5.55% of the amount she claimed in the closing submissions that were lodged on her behalf including none of the special damages (funeral expenses) claimed in her Statement of Claim. This was the Claimant's own fault (stemming as it did from the preparation and/or presentation of her case) and it is significant even though quantum was not the most important issue in the litigation and did not occupy the lion's share of the parties' attentions. Additionally, the Defendants' purported **Part 35** offer dated 7 December 2023, which offered the Claimant $66,229.21 to cover damages and interest was reasonable, and the Claimant fell short of beating it. Balancing these matters, in my view, the Claimant ought to recover only 50% of her costs.

[41.] As mentioned, the Claimant filed a statement of costs on 19 June 2024 seeking costs in the amount of $128,414.80. The hourly rates claimed were $506 for work done by Arthur Dion Hanna Jr., 35 years' call, $404.90 for work done by Ellsworth Johnson, 12 years' call, and $506 for work done by Mr. Rolle, 27 years' call.

[42.] Ms. Sands for the Defendants submitted in her "Representations by the Second and Third Defendants on the Amount of the Plaintiff's Statement of Costs" that the Court ought not to consider the Claimant's costs of (i) the Claimant's three applications for leave to amend her Writ of Summons and the costs occasioned thereby; (ii) the Claimant's application for an order that Arsene Dieugste, Noel's brother, be appointed to represent Noel's estate, and for substituted service and (iii) the Claimant's costs of preparing witness summonses for ASP Farquharson, ASP

Ellie Ariscar and Jessica Cartwright who were not identified and approved as witnesses in the Order on Case Management. I accept these submissions and therefore disregard Items 9-12, 21-24, 31-32, 50, 51-55, 64-65, 67-71, 94 and 126-128 of the Claimant's statement of costs.

[43.] Ms. Sands for the Defendants further submitted that the amount of costs claimed by the Claimant for many items is excessive and appears to be inflated. Ms. Sands drew the Court's attention to the following matters: (i) the minimum time spent charged for any task in the statement of costs is a half hour regardless of the task; (ii) in some instances one hour is charged for receiving a letter; (iii) one hour is charged for receiving a memorandum and notice of appearance; (iv) two hours are charged for reviewing a defence and an additional five hours are charged on the same date for meeting with the Claimant to discuss the defence; and (v) the amount of $10,120 was charged for reviewing the Defendants' closing submissions in addition to $12,650 charged for preparing the Claimant's closing submissions. I concur that the amount of costs claimed by the Claimant for many items in her statement of costs is excessive.

[44.] I refer to the discussion and analysis in **Robert Forbes v Ministry of Tourism and Attorney General of the Commonwealth of The Bahamas** 2021/COM/lab/00038 as to the applicable law relative to the summary assessment of the Claimant's costs. Having reviewed the Claimant's statement of costs, taking into account the relevant consideration set forth in **CPR 71.11, CPR 71.13(2)** and **CPR 72.21**, and what I consider to be reasonable and fair to allow for the work done on behalf of the Claimant, I summarily assess the Claimant's costs of the action (inclusive of disbursements) in the sum of $49,500.

Conclusion

[45.] In the premises, the Claimant is entitled to 50% of her assessed costs of the action. I have assessed those costs in the sum of $49,500. Therefore, the Defendants are to pay the Claimant the sum of $24,750. As there has been no request for time to pay, in accordance with **CPR 71.14(a)**, the costs are to be paid within 21 days of the date of this decision.

Dated the 18th day of July, 2024

Sir Ian R. Winder
Chief Justice