

**IN THE COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law and Equity Division**

**2022/CLE/gen/00890**

**B E T W E E N**

**BENJAMIN MCKENZIE**

**(as Personal Representative of the Estate of John McKenzie)**

Claimant

**AND**

**ELVIS ROLLE**

First Defendant

**AND**

**PERSONS UNKNOWN**

2<sup>nd</sup> Defendant

**Before:** The Honorable Madam Justice Carla Card-Stubbs  
**Appearances:** Ms. Darell Taylor, Counsel for the Claimant  
Mr. Carlton Martin/Mr. Gary Russell, Counsel for the Defendant  
**Hearing date:** Hearing on written representations submitted by the parties.

*Civil Procedure and Practice- Basis for costs – Discretion of Court – Section 30 the Supreme Court Act – Rules 71.6 and 71.11, Part 71 of The Supreme Court Civil Procedure Rules, 2022 - Rule 37.6, Part 37 of The Supreme Court Civil Procedure Rules, 2022*

*Whether non-parties entitled to costs – Whether Defendant entitled to costs of application abandoned because of Notice of Discontinuance filed by Claimant – Costs on Discontinuance*

*Held: Defendant entitled to cost of abandoned strike out application but not costs for parties not on the record nor for costs associated with related matter.*

*Recoverable costs should be confined to those properly recoverable by the First Defendant only and therefore costs incurred as a result of taking instructions from non-parties who never appeared on the record will be disallowed. Recoverable Costs will be limited to costs incurred in this Action and to work reasonably incurred up to the date of service of the filed Notice of Discontinuance, with an allowance for the subsequent preparation of the submissions in relation to costs. The recoverable costs will include costs of the abandoned strike-out application, and reduced, on summary assessment, to reflect reasonableness and proportionality.*

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## **RULING ON COSTS**

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### **CARD-STUBBS J.**

#### **Introduction**

1. This ruling on costs follows this Court’s orders for costs in favour of the First Defendant.
2. The parties were directed to make written submissions on costs.
3. The Court is in receipt of the submissions of both parties.

#### **Background**

4. The Claimant brought an action against Elvis Rolle and Persons unknown by way of Writ of Summons, initiating this action, Action No. 2022/GEN/CLE/00890 (‘First Action’). The claim was in trespass. The Claimant also filed an *ex parte* application for an interim injunction. This Court directed the Claimant to serve the parties and the First Defendant was served with the Notice of Application. The First Defendant appeared by counsel and filed an application seeking leave to enter a conditional appearance. This Court granted the injunction sought by the Claimant.

5. The First Defendant, along with unnamed parties, presumably members of the class “persons unknown”, were also said to be served with the Writ of Summons, but no proof of service was forthcoming. Counsel for the First Defendant filed an application to strike out the action. On 6th May, 2024, the first mention date of that application, the parties consented to the lifting of the injunction and the Court made an order discharging the injunction, with costs to the First Defendant. The Claimant also informed the court that another action, Action No. 2024/CLE/GEN/00384 (‘Second Action’), had been instituted by the Claimant against several defendants, including the First Defendant. At that time, the parties contemplated, in open court, a possible termination of Action No. 2022/CLE/GEN/00890.
6. On the next return date of the Defendant’s strike-out application, 22nd July, 2024 the parties had not yet come to an agreement. A costs order was made in favour of the First Defendant. The hearing of the application was adjourned to 30th October, 2024.
7. Subsequently, and prior to the adjourned hearing date, the Claimant discontinued Action No. 2022/CLE/GEN/00890 by filing a Notice of Discontinuance on August 1, 2024.
8. The parties were directed to agree costs, failing which the court would assess costs on their written submissions.

## **Costs**

### *Parties submissions on quantum of costs*

9. I have before me a Defendants’ bill of costs for total claimed costs of \$39,750.00, including costs of \$9,000.00 for at least two appearances in the First Action and \$2,000.00 for appearances relating to costs. It also includes itemized entries such as review of the Claimant’s 17-11-2023 Notice of Application seeking, among other things, an interim injunction, drafting strikeout materials and affidavits, drafting submissions in support of the strikeout application, appearances in court, and preparation of the bill itself.
10. The Claimant contests the quantum and the basis of some of the costs claimed. The Claimant argues that he should pay the reasonable costs of the First Action to the First Defendant, Elvis Rolle, only up to 1 August 2024 (date of Notice of Continuance) and that all claims for costs by non-parties should be dismissed. The Claimant also argues that the Defendant should bear his own costs of the abandoned strike-out applications, and costs should be taxed if not agreed.
11. The Claimant submits that the total sum claimed is excessive and contends that any recoverable costs in the First Action should be limited to the First Defendant only, and

only up to 1 August 2024, the date of filing of the Notice of Discontinuance. Specifically, the Claimant objects to

- (i) claims for costs by six ‘non-parties’;
- (ii) costs of abandoned strike-out applications;
- (iii) duplicated work and multiple fee earners;
- (iv) work said to be post-discontinuance; and
- (v) work not clearly allocated between the two actions identified in the materials as Action No. 2022/CLE/GEN/00890 and Action No. 2024/CLE/GEN/00384.

12. The parties dispute the proper quantum of costs following the discontinuance or withdrawal of proceedings and in the context of the Defendant’s strike-out application.

## **AWARD OF COSTS**

13. The matter of costs is within the discretion of the Court. Section 30 of the Supreme Court Act provides as follows:

Section 30: Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court shall have full power to determine by whom and to what extent the costs are to be paid.

### *Incidence of Costs*

14. As a general rule, a successful party is entitled to its costs. Rule 71.6, Part 71 of The Supreme Court Civil Procedure Rules, 2022, as amended (‘CPR 2022’), provides:

#### *71.6 Successful party generally entitled to costs.*

- (1) 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.
- (2) The Court may, however, make no order as to costs or, in an exceptional case, order a successful party to pay all or part of the costs of an unsuccessful party.

### *Quantum - Level of Costs*

15. The applicable legal principles are reasonably clear. Under Rule 71.6, the general rule is that the unsuccessful party pays the successful party's costs concerning the incidence of costs. In this case, the court's orders were costs orders in favour of the First Defendant. This Court's order was that the parties were to agree the quantum, failing which the court would make a summary assessment of costs.

16. Rule 71.11 CPR 2022 deals with factors to be taken into account in deciding quantum. That rule requires the Court to consider all the circumstances and to determine whether the costs claimed were reasonably and proportionately incurred and are reasonable in amount.

#### *71.11 Factors to be taken into account in deciding the amount of costs.*

(1) The Court is to have regard to all the circumstances in deciding whether costs were —

(a) proportionately and reasonably incurred; or

(b) were proportionate and reasonable in amount.

(2) In particular, the Court must give effect to any orders which have already been made.

(3) The Court must also have regard to —

(a) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case;

(g) the place where and the circumstances in which work or any part of it was done;

(h) the care, speed and economy with which the case was prepared; and

(i) in the case of costs charged by an attorney to his or her client —

(i) any agreement about what grade of attorney should carry out the work;

(ii) any agreement that may have been made as to the basis of charging; and

(iii) whether the attorney advised the client and took the client's instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the case.

## **Determination and Conclusion**

17. I accept the submission of Counsel for the Claimant that costs are “ordinarily confined to parties to the proceedings.” It is apparent from a perusal of the Bill of costs submitted by the Defendant that there are items that involve costs associated with persons not named in the relevant suit i.e. the First Action. For example, there are claims for “completing acknowledgement of service” and filing same of Defendants when no such acknowledgement of service was filed in the First Action. Nor was there a Notice of Application filed on behalf of several Defendants.
18. It is apparent that there has been, understandably, some overlap and resulting confusion between the First Action and the Second Action. However, costs are to be assessed only in relation to costs reasonably incurred in the First Action.
19. I do not accept the Claimant's proposition that, in this case, where an application is abandoned, it is to be treated as unsuccessful. It may be that, generally and where a matter continues to trial, that in relation to an application that was not pursued, the normal outcome would be no order on that application. However, I think that the principle is different in the case of a discontinuance. It is the Claimant that initiated the action and where the Claimant discontinues the action, he is liable for the reasonable costs taken by the Defendant to meet the action.
20. Where a Claimant discontinues, the normal rule is that the Claimant must pay the Defendant's costs incurred up to the date when the notice of discontinuance is served, unless the court orders otherwise. Part 37 CPR deals with Discontinuance. Rule 37.6 provides:
- 37.6 Liability for costs.
- (1) Unless —
- (a) the parties agree; or
- (b) the Court orders otherwise,
- a claimant who discontinues is liable for the costs incurred by the defendant against whom the claim is discontinued, up to the date on which notice of discontinuance was served.
- (2) If a claim is only partly discontinued —
- (a) the claimant is only liable for the costs relating to that part of the claim which is discontinued; and
- (b) unless the Court orders otherwise, the costs which the claimant is liable to pay are not to be quantified until the conclusion of the rest of the claim.

21. When a Claimant discontinues, the Claimant is ordinarily liable for the Defendant's costs incurred up to the date the notice of discontinuance is served. On that footing, costs incurred in filing or preparing an interlocutory application, including a strike-out application, generally fall within the recoverable costs of the proceedings if they were incurred before discontinuance.
22. Applied to a strike-out application, the point is relatively clear. If the Defendant incurs costs in drafting the application, issuing it, assembling evidence, or preparing for a hearing, and the Claimant then discontinues before the application is determined, those costs were still incurred in defending the proceedings before discontinuance. The reason is not that the abandoned application independently generates an automatic costs order in favour of its maker. It is because such expenditure ordinarily forms part of the Defendant's overall costs of the proceedings up to discontinuance, which Rule 37.6 presumptively places on the discontinuing Claimant.
23. In this case, costs of steps taken before discontinuance would include the application to strike out the action. There is no factor before me that would cause a departure, in this case, from the normal rule.
24. Concerning temporal scope, I accept that recoverable costs in the First Action should be limited to costs reasonably incurred up to the date of service of the filed Notice of Discontinuance which I accept is 1 August 2024, in the absence of evidence to the contrary. Therefore the items post that date which appear on the Defendant's Bill of Costs are not recoverable. Again, those items appear to emanate from confusion subsequent to the filing of the Second Action. I note for the record, that the First Action was mentioned when the Second Action was subsequently called. It was there ascertained that the parties had not come to any agreement on costs on the First Action. However, the appearance in the Second Action where the First Action was mentioned does not transform that appearance into an appearance in the First Action. Notwithstanding Defence counsel's note that the sum on the bill should "be divided in half because of the fact that I also appeared on the other action", there was no appearance to be recorded in this action.
25. This Court must determine whether the amounts claimed by the Defendant represent costs that were proportionately and reasonably incurred or which were proportionate and reasonable in the amounts. On review of the billing advanced by the Defendant, I am satisfied that the amounts claimed should be reduced to reflect reasonableness and proportionality. In particular, they should exclude or reduce duplicated work, work on behalf of non-parties, work not properly allocated between the two actions, and any charges that are disproportionate to the procedural nature of the matter.

## ***Conclusion***

26. Recoverable costs should be confined to those properly recoverable by the First Defendant only and therefore costs incurred as a result of taking instructions from non-parties who never appeared on the record will be disallowed. Recoverable Costs will be limited to costs incurred in the First Action and to work reasonably incurred up to August 1, 2024 (service of filed Notice of Discontinuance) with an allowance for the subsequent preparation of the submissions in relation to costs. The recoverable costs will include costs of the abandoned strike-out application and reduced, on summary assessment, to reflect reasonableness and proportionality.
27. I also consider that the First Action was discontinued without any complex application, or application as to the substance of the claim, being heard and determined. This was a simple matter. The court appearances were, for the most part, truncated. The costs claimed must reasonably reflect this.
28. Based on the foregoing and having regard to the relevant principles, I summarily assess an award of \$12,500.00 for the First Defendant's costs as an appropriate award in the circumstances, and I so order.

## **ORDER**

1. The order of this Court in relation to costs is as follows.

IT IS HEREBY ORDERED THAT:

The Claimant do pay costs to the First Defendant, fixed in the sum of \$12,500.

Dated this 1<sup>st</sup> day of June 2026

A handwritten signature in black ink, appearing to read 'Carla D. Card-Stubbs', with a stylized flourish at the end.

Carla D. Card-Stubbs, J  
Justice