

IN THE COMMONWEALTH OF THE BAHAMAS

In the Supreme Court

Common Law and Equity Division

Claim No. CLE/gen/00122 of 2023

BETWEEN:

DENISE THURSTON

Claimant

AND

SHANTELL RODGERS

Defendant

BEFORE: The Honourable Madam Justice C.V. Hope Strachan

Appearances: Mrs. Tanya N. Wright along with Miss Erin C. Adderley for the Claimant
Mrs. Tanya N. Wright holding Brief for Mrs. Alicia A. Bowe for the Defendant

Mr. Khalil Parker and Ms. Roberta Quant for the Interested Party, Nagico Insurance (Bahamas) Ltd.

Hearing Date: 1st May, 2024

RULING

Costs thrown away – Service of document on person who is not a party- Judge able to change his/her mind after ruling

BACKGROUND

[1] This ruling emanates from this Court's decision made on 1st May, 2024 granting costs thrown away in the sum of Seven Hundred and Fifty (\$750.00) to the Claimant and the sum of Seven Hundred and Fifty (\$750.00) Dollars to the Defendant respectively from "the interested party". The Court's ruling was delivered verbally and reasons for that decision are set out herein together with reasons for the reversal of that decision.

[2.] The action herein involves a collision between the Claimant and the Defendant which occurred on 19th December, 2021 on Carmichael Road, New Providence, The Bahamas. The Claimant has brought the action claiming that the Defendant was negligent in her driving and caused the collision resulting in injury to her person, loss and damage.

[3.] The Defendant in reliance on a policy of insurance with Nagico Insurances (Bahamas) Limited ("*Nagico*"), "the interested party" sought indemnity from them to compensate the Claimant for her injury loss and damage. *Nagico* in reliance upon a term in the policy denied the Defendant coverage for the liability.

[4.] The Defendant sought and obtained legal advice and representation from the firm of Cedric Parker and Co., to represent her in the action brought by the Claimant. They filed and served a Notice and Memorandum of Appearance. However, at the hearing on 8th June, 2023 Cedric Parker and Co., made application to the Court to withdraw as Counsel for the Defendant. Their position was that they had only filed documents on behalf of the Defendant under instructions from *Nagico*. However, *Nagico* had since refused to indemnify the Defendant for the damages which flowed from the accident hence their need to withdraw as that the Defendant's Counsels. The Defendant resisted the withdrawal, however Cedric Parker and Co. were granted leave to withdraw as Counsel for the Defendant and the order was perfected and filed on 1st September, 2023.

[5.] Notwithstanding that *Nagico* had filed an Acknowledgment of Service on behalf of the Defendant, Judgment in Default of Defence was occasioned and filed dated 5 April 2023. However, since *Nagico* had denied indemnification of the Defendant under her policy, Counsel Wright applied to the Court for a hearing on a preliminary issue as set out hereunder. The essence of the application was that in light of the Default Judgment and the Insurance policy, *Nagico* could not deny the Defendant's coverage under the policy.

[6.] After, the hearing of the application for the preliminary issue was heard and determined and *Nagico*, the Interested Party, was found liable to pay the Defendant's claim under her insurance contract with the Claimant, in consideration of the overriding objectives of the CPR, to deal with cases justly and at proportionate costs, ensuring that the parties are on equal footing; and in ways which are proportionate to the financial position of each party. The ruling is dated 24th July, 2023. There was no appearance of *Nagico* (Rashad Storr) or their Counsel at that hearing, despite service on him of the Notice of Application dated and filed 4th August, 2023 together with the Affidavit of Vanria Greene dated and filed 4th August, 2023 and a Witness Summons for him to appear at

the hearing. This was evidenced by an Affidavit sworn by Dion Miller and filed 29th August, 2023 exhibiting a Service Confirmation sheet signed by representative of “*the interested party*”. The signature is illegible. Mr. Storr had filed an Affidavit earlier on behalf of “the interested party” stating why they had denied the claim.

[7.] The ruling on the preliminary issue dated 24th July, 2024 was delivered on 27th July, 2023 in draft but embargoed until 3rd August 2023 when the finalized version was to be disseminated. Instructions were given to Counsel not to use the draft until issued with the finalized version.

[8.] Notwithstanding that the Draft was not finalized on 3rd August, 2023 as anticipated, Counsel Wright for the Claimant filed a Notice of Application (for an order for costs against a person not a party to these proceedings herein) on 31st July, 2023 supported by an Affidavit of Denise Thurston filed even date. Counsel Serville for the Defendant also filed a Notice of Application (for an order for costs against a person not a party to these proceedings herein) on 4th August, 2023. An Affidavit in support of the application sworn by Vanria Greene filed on 4th August, 2023 accompanied their Notice. Dion Miller’s Affidavit attesting to service of those documents on Nagico was also filed 29th August 2023. In order to put it in perspective the filing of both of Mr. Miller’s Affidavits were filed on the same day of the hearing which precipitated the application for costs thrown away which this ruling is now addressing. More to the point the affidavits were filed only after the Court hearing in which Counsel Quant had disputed the service of the above mentioned Notice and affidavits in both cases.

[9.] The Notice of Application (for an order for costs against a person not a party to these proceedings herein) together with the Affidavit of Denise Thurston both filed 31st July, 2023 filed on behalf of the Claimant was served on the Interested Party, Nagico on 2nd August, 2023 at 10:39 A.M. at their Registered offices located at Mackey Street and Ivanhoe Road, Nassau The Bahamas. The service of the mentioned documents were attested to by an affidavit of service sworn by one Tara Mackey (Ms. Mackey), Administrative Assistant of Tanya Wright of Counsel for the Claimant filed 30th August, 2023. Exhibited to the said affidavit is a copy of the confirmation of service indicating the signature of one Antonello Bain at the offices of Nagico.

[10.] Ms. Mackey’s Affidavit states also that upon obtaining a date for the hearing of the Notice she served the said Nagico on 15th August, 2023 with another copy of the said Notice with the date place and time of the Notice being 29th August, 2023. The Notice was accompanied by Skeleton Arguments and Submissions. She exhibits to that affidavit a Confirmation of Service Form of World Legal Services, signed by an individual at Nagico (signature illegible).

[11.] Exhibited to Ms. Mackey’s Affidavit also is a letter dated 18th August 2023 from Cedric L. Parker and Co., signed by Attorney Roberta Quant and addressed to the attention of Counsel Erin Adderley wherein she requests a copy of the Order made by the Court on 27th July, 2023 and a copy of Counsel’s notes for the hearing held on 27th July, 2023.

[12.] Pursuant to the application by the Claimant and Defendant for costs in the preliminary application, the hearing of the application for costs was scheduled to be heard on 29th August, 2024. Counsel Wright submitted that the Interested Party had been served the Notice for the hearing since 2nd August, 2023. Counsel Serville for the Defendant concurred that service of the documents had been timely. Counsel Quant for Nagico insisted that service of the Notice did not occur until 16th August, 2023 and in addition requested copies of the Transcripts of the hearing held on 27th July, 2023, the same request previously made in the letter exhibited in the Tara Mackey Affidavit filed 30th August, 2023. There was contention regarding when actual service of the Notice to attend the 29th August hearing occurred. The Court ordered that affidavits of service be filed, and submissions on the Costs thrown away application be filed for the hearing which was adjourned to 30th October, 2023.

[13.] At the hearing on 30th October Counsel Wright on behalf of the Claimant objected to that hearing proceeding on the basis that just that same day she had been served by Counsel Quant with Interested Party Submissions filed 29th October 2024, together with an Affidavit of Rushea Stuart, relative to the application being heard. She sought an adjournment to consider the submissions and to take instructions from her client. She also sought an order for costs thrown away against the interested party for that days hearing. This was now a second application for costs thrown away now purportedly based on Counsel Quant's late service of documents and was a repeat of the circumstances of the first application. Counsel Serville concurred with Counsel Wright and also sought an order for costs thrown away of the day's appearance from the interested party. Counsel Quant indicated her readiness to proceed with the application. Counsel Wright insisted that they were not in a position to proceed.

[14.] The Court accepting that "*costs thrown away*" was due to the Claimant and Defendant, in the circumstances, asked the Claimant's attorney to propose an amount, for their respective appearances at this 30th October hearing. Counsel Wright proposed the sum of One Thousand Dollars (\$1,000.00) for the Claimant and Counsel Serville proposed the sum of Seven Hundred and Fifty Dollars (\$750.00) for the Defendant. Counsel Quant objected to both amounts and countered that the sums be reduced to Six Hundred and Fifty (\$650.00). Upon the Court's enquiry of Counsels Wright and Serville offered their hourly rates. Taking note too of Counsel's years at the bar and their respective roles at the hearing, and considering Counsel Quants agreement to the sum proposed the Court summarily grated cost thrown away in sum of One Thousand Dollars (\$1,000.00) to the Claimant and the sum of Seven Hundred and Fifty Dollars (\$750.00), pursuant to Part 71.2(5) CPR. This was with respect to the hearing on 30 October 2023 and the late service of the Interested Party's Submissions effected on the Claimant and the Defendant that very day. The case was then adjourned to 5th and 6th March, 2024. It is relevant to note that these 30th October costs were separate and apart from the costs sought for the 29th August 2023 hearing. This order for costs dated 30th October 2023 was perfected and filed on 5th November, 2023.

[15.] Due to an agreement of the parties the Hearing for the 5th and 6th March 2024 was adjourned by the Court to 1st May, 2024.

[16.] On 1st May 2024 the hearing of the application for costs thrown away made by Counsel Wright and Serville for the aborted hearing on 29th August, 2024 commenced. The Claimant's Attorney Counsel Wright referred to submissions filed on behalf of the Claimant. Counsel Serville adopted the same arguments for the Defendant.

[17.] **THE CLAIMANT'S SKELETON ARGUMENTS dated 30th August, 2023** are lifted and quoted exactly as set out hereunder:

1. *The Claimant will rely on the Affidavit of Service of Tara Mackey filed on 30th August, 2023 in support of an application made to the Court for an Order for Costs thrown away by the adjournment of the hearing from 29th August, 2023 to 30th October 2023.*
2. *The Claimant duly served the Nagico with notice to the 29th August 2023 hearing once Counsel was instructed on behalf of Nagico, they wrote to us requesting documents and information for the preliminary hearing.*
3. *At no point did Counsel raise any objections or concerns regarding service on Nagico. Had Counsel done so at its earliest possible opportunity we could have addressed the same as we did before the Court well in advance of the 29th instead of at the 9th hour.*
4. *Nagico's conduct in preserving what it perceived to be a technical objection from Counsel for the Claimant is inconsistent with the overriding objective of the Court to enable the Court to deal with cases justly and at proportionate cost.*
5. *It also offends the provisions of Pt. 1.3 and the duty it places on parties to the proceedings (1)to help the Court to further the overriding objective. Further in considering whether to award costs thrown away the Court is referred to Pt. 1.3 (2) which states that "applying the Rules to give effect to the overriding objective the Court may take into account a party's failure keep his duty under paragraph (1).*
6. *Had Nagico raised its objections in advance of the Hearing the issue could have been addressed promptly giving Counsel sufficient opportunity to prepare for the singular issue of whether or not Nagico should be made to pay the Claimants costs of the preliminary point.*
7. *The nature of the application for 3rd party costs does not contemplate or permit any form of rehearing of the proceedings already ventilated before the Court.*
8. *Finally, If Counsel in good faith required additional time to prepare, a simple request could have been made to Counsel for the Claimant who would have given*

due consideration to the Court's overriding objectives hereinbefore stated, and an appearance would not have been necessary.

9. *Instead, we not only attended Court but we were also made to argue the technical point raised by Nagico regarding service and Notice hereby wasting even more of the Court's time.*
10. *It is submitted that the Claimant should have costs thrown away in the sum of \$2,500.00 for the appearance on 29th August, having to successfully defend Nagico's technical objection to service and notice, preparing filing and serving an affidavit of service, and preparing these arguments herein.*
11. *Evidence intended to be relied on at trial; Affidavit of Service of Tara Mackey filed 30th August 2023.*

The submissions referred to by Counsel Wright were augmented by verbal submissions in keeping with the substance of those written.

[18.] THE INTERESTED PARTY'S PREPARED SUBMISSIONS AS FOLLOWS: which again are lifted verbatim hereunder.

1. *Nagico Insurance (Bahamas) Limited (hereinafter referred to as "the Interested Party") was served with a Notice of Application (for an Order for costs against a person not a party to these proceedings herein) filed on 31st day of July A.D. 2023 on behalf of the Claimant and on 4th day of August A.D., 2023 on behalf of the Defendant.*
2. *The Order for costs related to a hearing that occurred on the 20th day of June A.D., between the Claimant and the Defendant (hereinafter referred to as "the parties") to the exclusion of the interested party.*
3. *Counsel for the Interested Party wrote to the Clerk of Her Ladyship Madam Justice Strachan on 17th day of August requesting a copy of the Order/Judgment made by her Ladyship Madam Justice Strachan and a copy of the transcript from the said hearing.*
4. *Counsel for the Interested Party wrote to Counsel of the Parties on the 18th day of August requesting a copy of the Order/Judgment made by her Ladyship Madam Justice Strachan (hereinafter referred to as "the Judgment") and a copy of their notes from the said hearing To-date the Parties have not furnished the requested notes, neither have they served a copy of the Judgment endorsed with a notice in Form G22.*

5. *Counsel for the Interested Party was only furnished with the Judgment during the schedule hearing for Costs on the 29th day of August A.D. 2023 by Her Ladyship. Therefore, it was unreasonable and a breach of natural justice for the Parties to expect the Interested Party to defend its position when the central document, the judgment, upon which the Parties application was based was not furnished prior to the Hearing date.*
6. *Rule 1.1 of the SCCPR 2022, exhibited hereto at TAB-1, provide that:
(1) The overriding objective of these rules is to enable the Court to deal with cases justly and at proportionate cost..... (2)(d) ensuring that it is dealt with expeditiously and fairly. (emphasis ours”.*
7. *Costs thrown away should be awarded to the Interested Party as the parties application for Costs based on the preliminary hearing on the 20th day of June A.D., 2023 was premature since the Court had not furnished its judgment prior to the hearing on the 29th day of August A.D. 2023 and because the Interested Party was never served with the judgment, the transcript, nor Counsel’s notes before the hearing date.*
8. *Further, the Court had admonished the Parties that they were not to disseminate or leak the draft judgment until it was perfected by the Court. The Parties blatant defiance of the Court instructions was concretized in the affidavits filed before the Court. In the Affidavit of Denise Thurston filed herein on 31st day of July A.D., 2023 at paragraph 3 and in the Affidavit of Vanria Greene filed herein on the 4th day of August A.D., 2023 at paragraph 2 states;*

“having explored the arguments put forward by Counsel through the legislation and authorities and having regard to the decision arrived at on each question the Court finds the Defendant is insured with respect to this claim for the purposes of an interim payment being made by the third party pursuant to Pt. 17.15(2) (b) of the Supreme Court and the overriding objective of the said rules to deal with cases justly and at proportionate costs, ensuring that the parties are on equal footing; and in ways which are proportionate to the financial position of each party

The above passage is identical to paragraph 41 of the judgment which was only officially published on the 29th day of August, A.D. 2023.

9. *Additionally, in the Affidavit of Vanria Greene at paragraph 4 states: “I am also persuaded Clause 2(e) is therefore unenforceable.” Which is identical to the last sentence in paragraph 29 of the judgment. It is clearly demonstrated that the Parties disseminated portions of the draft judgment prior to publication in contravention of the Court’s instructions.*

10. The dissemination of the draft judgment offends the provisions of Rule 1.3 of the SCCPR 2022, exhibited hereto at Tab-1 which provides that;

“(1) It is the duty of the parties to help the Court to further the overriding objective (2) In applying the Rules to give effect to the overriding objective the Court may take into account a party’s failure to keep his duty under paragraph (1).

11. It is submitted that the Interested Party should be awarded its costs thrown away in the amount of \$2500.00 plus VAT as the application made by the Parties were premature, the time was wasted to come to Court on the 29th day of August A.D., 2023, the parties defiance of the Court’s instructions not to disseminate the draft judgment, the time required to prepare, and file these submissions and supporting Affidavit.

[19.] It is important to note that at 1st May 2024 hearing of the application for costs thrown away the Interested Party did not refer at all to the written submissions set out above nor did Counsel commend them to the Court for consideration Instead Counsel Khalil Parker K.C. spoke extemporaneously and submitted the following which I have condensed as follows:

- i. The frame is simple.
- ii. My Learned friend talks about what we could’ve done, we had not seen the judgment to respond.
- iii. We asked her for it.
- iv. We say poor communication and object to the term “costs thrown away.” We say at best each party should bear their own costs.
- v. We had no knowledge of the ruling at the time.
- vi. We think the justice of the case rises to the extent that each party should bear their own costs.
- vii. Once we did receive the Order we have now made the application to set aside.

[20.] Rebuttal Submissions by Counsel Wright for the Claimant and holding brief for the Defendant’s attorney were made orally. Her answer to Mr. Parker’s submissions was mainly that Mrs. Quant’s argument on the 29th August hearing was to dispute the date that Counsel Wright had spoken to as the correct date of service being 2nd August 2023 as opposed to the 16th August, 2023 which Ms. Quant was suggesting. She also expressed vehemently that there would’ve been no need for the parties to waste time at Court that day had Ms. Quant communicated with her earlier that she had any difficulties with service of any documents and/or appearing at trial.

[21.] Upon Counsel Mrs. Wright having mistakenly offered that she had filed a draft Bill of costs for the costs thrown away, it was discovered that the only bill on file with the Court was for costs relative to the substantive hearing was in relation to application on the ruling of 24th July, 2023.

[22.] The Court enquired of Counsel the hourly rate of herself (Counsel Wright) and Counsel Serville. The response was that both Counsel’s hourly rate was \$750.00 per hour. This was not far afield from the earlier contentions made with respect to the costs awarded on 30th October, 2023.

[23.] In consideration of the hourly rate stated by Counsel Wright the Court ordered that “*the interested party*” pay the Claimant’s and Defendant’s costs thrown away in the sum of Seven Hundred and Fifty Dollars respectively. Counsel Parker requested a written ruling which is set out hereunder.

THE LAW

[24.] **THE SUPREME COURT CIVIL PROCEDURE RULES 2022 (“SCCPR” or “CPR”)
COMPUTATION OF TIME**

- (1) **This rule shall apply to the calculation of any period of time for doing any act which is fixed by –**
 - (a) **judgment or order of the court;**
 - (b) **a practice direction; or**
 - (c) **these rules**
- (2) **All periods of time expressed as a number of days are to be computed as clear days;**
- (3) **In this rule “clear days” means that in computing the number of days the day on which the period begins, and the day on which the period ends are not included.**

[25.] **SERVICE OF OTHER DOCUMENTS**

PART 6.5 – Service of documents on person who is not a party.

If the court or a party is to serve documents on a person who is not a party, such documents must be served by one of the methods specified in Part 5 or as the court shall direct.

When the method of Service employed is Leaving the document at a permitted address the deemed date of service is the day after leaving the documents.

[26.] **COSTS**

Part 71.2

Costs includes attorney fees, charges, disbursements, assessed costs, expenses, fixed costs, prescribed costs and remuneration.

- [27.] **Part 71.2**
The Costs to which this part applies include costs –
- (a) Of proceedings in the court
 - (b)
 - (c)
 - (d)
- [28] **Part 71.2 (5) – Definition of Summary assessment means the procedure by which the court, when making an order about cost, orders payment of a sum of money instead of fixed costs.**
- [29.] **Part 71.3**
The court may make an order requiring a party to pay the costs of another party arising out of, or related to all, or any part of any proceedings.
- [30.] **Part 71.5**
A person may not recover the costs of proceedings from any other party or person except by virtue of –
- (a) –an agreement between the parties
 - (b) An order of the court; or
 - (c) A provision of these rules
- [31.] **Part 71.6**
(1) Where the court decides to make an order about the costs of any proceedings, the general rule is that it must order the successful party to pay the costs of the successful party.
- [32.] **Part 71.8**
(1) This rule applies where –
- (a) An application is made for; or
 - (b) The court is considering whether to make;
 - (c) An order that a person who is not a party to the proceedings nor the attorney to a party should pay the costs of some other person.
- (2) An application for an order under Paragraph (1) must be on Notice to the person against whom the costs order is sought and must be supported by evidence on affidavit.
- (3) If the court is considering making an order against a person the court must give that person notice of the fact that it is minded to make such an order.
- (4) A Notice under Paragraph (3) must state the grounds of the application on which the court is minded to make the order.
- (5) A notice under Paragraph (2) or (3) must state a date, time and place at which that person may attend to show cause why the order should not be made.
- (6) The person against whom the costs order is sought and all parties to the proceedings must be given fourteen days' Notice of the hearing.
- [33.] **Part 71.9 – court's discretion to order costs**
(1) The court has discretion as to –
- (a) Whether costs are payable by one party or another
 - (b) When to assess those costs; and

- (c) When they are to be paid
- (2) Without limiting the court's discretion or the range of orders open to it, the court may order a person to pay –
 - (a) Costs from or up to a certain date only;
 - (b) Costs relating only to a certain date only;
 - (c) Only a specified proportion of another's person's costs
- (3) In deciding who or if any person should be liable to pay costs, the court must have regard to all the circumstances.
- (4) Without limiting the factors which may be considered, the court must have regard to
 - (a) The conduct of the parties both before and during proceedings
 - (b) Whether a party has succeeded on particular issues, even if not ultimately successful in the case, although success on an issue that is not conclusive of the case confers no entitlement to a costs order;
 - (c) The manner in which a party has pursued
 - (i) A particular allegation;
 - (ii) A particular issue; or
 - (iii) The case
 - (d) Whether the manner in which the party has pursued a particular allegation, issue or the case has increased the costs of the proceedings;
 - (e) Whether it was reasonable for a party to
 - (i) Pursue a particular allegation; or
 - (ii) Raise a particular issue;
 - (iii) Whether the successful party increased the costs of the proceedings by the unreasonable pursuit of issues; and
 - (f) Whether the claimant gave reasonable notice of an intention to pursue the issue raised by the application.

The Costs to which this Part applies include costs

[34.] **Part 71.11 Factors to be taken into account in deciding the amount of costs**

(1) The court is to have regard to all of the circumstances in deciding whether costs were:

- (a) Proportionately and reasonably incurred; or
- (b) Were proportionate and reasonable in amount.

71.11 (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)
- (c)
- (d)
- (f)

[35.] **Part 71.12 General Rule: summary assessment.**

(1) As a general rule, a judge hearing an application will summarily assess the costs of that application immediately or as soon as practicable after the same is disposed of.

DISCUSSION AND ANALYSIS

[36.] Having been given leave to withdraw as the Claimant's attorneys there was no obligation the part of the Claimant to serve Cedric Parker & Co. with Notice of Hearing for the preliminary application, made by the Claimant. Although it fair to say they had knowledge of the hearing as they were in Court when the hearing date was fixed.

[37.] Based on the evidence of service Rashad Storr was served and given the opportunity to be heard at the hearing of the preliminary application but did not appear. The attorney for Nagico having knowledge of the hearing of the application also failed to appear. Once the ruling dated 24th July, 2024 was made on 27th July 2023, Nagico was served the Notice and Affidavit of Denise Thurston, for the costs applied for as a result of the hearing on the preliminary issue, Nagico and their Counsel were galvanized into action and wrote to the Claimant's attorney requesting a copy of the Court's order issued on 27th July, 2023. (This was obviously an error in the date as the Court ruling was dated 24th July, 2023). It is now apparent that the Order was never perfected, so Counsel for Nagico never received the said order. There was also a letter written to this Court dated 17th August, 2023 requesting a copy of the said order and a transcript of the proceedings. The Court could not provide the same. As for the transcript, through some inadvertence the request was overlooked.

[38.] As directed by the Court, Counsel Wright and Serville, in order to address the contentions over service of documents made at the 29th August 2023 hearing, caused Affidavits of service by Tara Mackey on 30th August 2023 and Dion Miller on 29 August 2023 to be filed. The contents of those affidavits were not controverted by Counsel Quant at the hearing or otherwise, and I accepted the contents of those affidavits as true and found that the Claimant and the Defendant are in compliance with the CPR Part 3.2 (3) for the service of the Notice of the hearing of the Costs applicable to my ruling dated 24th July 2023.

[39.] Based on the Affidavits of Tara Mackey and Dion Miller, which included attachments of Confirmation of Service Forms duly executed by staff of Nagico which again was not refuted by Counsel Quant, I also accepted that the Notices for the hearing on 29th August 2023 was duly served on the Interested Party and therefore was in compliance with Part 6.5 of the CPR. My findings on both of these issues meant that Counsel's request for costs thrown away was not unusual and seemingly warranted in the circumstances.

[40.] In deciding the amount of costs to be granted to Counsels Wright and Serville this Court considered the wide discretion empowering the Court by CPR Part 71 and applying that discretion

made the order for costs against the Interested Party for the adjournment on 29th August, 2023 in keeping with SCCPR Part 71.2 (5).

[41.] Costs were awarded at \$750.00 for each of the Claimant and the Defendant respectively based on the hourly rate proclaimed by Counsel Wright at the hearing. The Court considered the written and verbal submissions of Counsel Wright on behalf of her client and also holding brief for the Defendant's Attorney now Alecia Bowe of BowePartners & Associates. Only the oral submissions of the Interested Party made by Counsel Parker were considered as he failed to refer to or commend his written submissions to the Court at the hearing. The Court was of the view that both Counsel respectively would have put in at least an hour of taking instructions, preparing arguments whether written submissions or verbal, travel to Court and the time taken dealing with what transpired between Counsel and the Court on the morning of 29th August 2023 was at the barest minimum and in the absence of the Bill of costs, the Court summarily awarded both Counsel respectively \$750.00.

[42.] Counsel Parker immediately sought leave to appeal the order and since no objection was taken by Counsel Wright the leave to appeal was granted. He also requested that this Court provide a written ruling of the Court's verbal decision.

[43.] This Court hereby provides the written ruling which includes reasons for the position the Court now makes relative to the costs thrown away Order of 29th August 2023 application. The Court in providing this written ruling had the opportunity to properly review and consider the documents filed in the application, the written and extemporaneous submissions made by Counsel Wright, and also the written submissions which Counsel Parker failed to refer to at the hearing, together with his extemporaneous submissions. I have reconsidered my position and reversed my decision for the following reasons:

- (1) On checking the Court's records I have determined that the request made by Counsel Quant in her letter to this Court's clerk dated 17th August, 2023 wherein she sought a copy of the transcript of the hearing of 29th August 2023, and a copy of the Court order dated 24th July, 2023 was never acted upon.
- (2) On checking the Court's records I have determined also that the transcript of 27th July, 2023 has not been located in the Courts recording device. That was also requested by Counsels Quant and Parker prior to the hearing on 29th August, 2023. The Judges notes of the hearing can be made available to Counsel in the future.
- (3) According to Counsel Quant and Parker they were never served with a copy of the Order/Judgment dated 24th July, 2024 and the requested copy of Counsel Wright's notes, of 27th July, 2024, notwithstanding requests made to her by letter dated 18th August, 2023 to provide it. I note that all Counsels only received a copy of the ruling from the Court at the hearing on 29th August, 2023.

- (4) Counsel Wright's application for costs preceded publication of the Court's ruling in defiance of the Court's order to embargo the draft until it had been perfected. Counsels for the Interested party has offered that this offends Rule 1.3 (1) and (2) SCCPR, 2022 which provides; (1) *It is the duty of the parties to help the Court to further the overriding objective*, (2) *"In applying the Rules to give effect to the overriding objective the Court may take into account a party's failure to keep his duty under paragraph (1)*. A premise which I accept without more. While the Court acknowledges and accepted Counsel Wright's apology that the action was not mala fide, nonetheless it has precipitated much of the argued positions of Counsels Quant and Parker.
- (5) SCCPR 2022, Part 71, does not specifically provide for "*cost's thrown away*". An examination of the definition of Costs at part 71.2 states "includes attorney fees, charges, disbursements, assessed costs, expenses, fixed costs, prescribed costs, and remuneration. To fix the Claimants and Defendants costs based solely on their hourly rate without regard to the full inventory of costs attendant upon the application may not do justice to the applicant. Moreover there is a clear distinction in the term "costs thrown away" and the costs which the Claimant and the Defendant were actually seeking. I note that the term "costs thrown away" has its genesis under the Rules of the Supreme Court (RSC) now repealed. I sought a definition using the United Kingdom RSC, White Book, 1982 Edition: RSC 62/3/5.

"Costs thrown away is an order frequently made on an application to set aside a judgment. It is one of the penalties imposed upon a defendant who, having failed to observe the rules as to appearance or delivery of defence, has allowed judgment to be entered by default. The words "costs thrown away" include all costs reasonably incurred in enforcing the judgment such as execution and garnishee proceedings, but do include bankruptcy proceedings which are outside the action." I would use of the word "**squandered**" to convey the true meaning (emphasis mine).

It is obvious to me that the Claimant and the Defendant were seeking costs for the adjournment, whatever the outcome of the case. This is more in line with costs of the day meaning "*all costs incurred and which will be squandered in consequence of the postponement of the cause....(emphasis mine)* or alternatively costs in any event which is explained as being commonly *made in interlocutory proceedings when the Court is of the opinion that the action taken by one or other of the parties was unnecessary or improper or when owing to the fault of his opponent a litigant has been forced to make or resist an application to the Court*. It is usually made on summonses where Claimant or defendant is asking for time. It means that whatever the result of the litigation the party who is at fault will get costs.

It has become commonplace by Counsel to equate “costs thrown way” with “costs in any event” and one may opine that these are simply terms of art used in a manner which is now generally understood by litigants and judges. They are used interchangeably but the fact is in certain contexts they may be misconstrued and effect an outcome not intended.

- (6) SCCPR 71.8 deals with costs against a person who is not a party. As demonstrated above this provides and mandates that the interested party must be notified by the Court of the fact that it is minded to make an order for costs against them. The person is required to be notified of the grounds of the application, the date time and place at which the person may attend to show cause why the order should not be made. This Court did not notify the Interested Party at all. Their appearance came about as a result of the Notices filed by Counsels Wright for the Claimant and Counsel Serville for the Defendant.
- (7) The Court before issuing its verbal ruling did not consider the *written* submissions of Counsel Quant and Parker as the Court was not specifically asked to consider them in making its ruling notwithstanding that they had been submitted and listed in the relevant documents at the beginning of the hearing. The Court having had the opportunity to consider those submissions find that there are compelling reasons to arrive at a different conclusion on the application for “*costs thrown away*”.
- (8) Counsels Quant and Parker submits that it is unreasonable and a breach of natural justice for the costs application to have been made and proceeded to hearing in the absence of them or their client being served with a copy of the Judgment prior to their appearance on the application. I am inclined to agree with Counsel’s view on that matter.
- (9) Notwithstanding the provision in Part 71. To assess costs summarily, Counsel is still required to present a draft bill of costs for the Courts consideration of the amount of costs the party is entitled to. Upon reflection I am of the view, that a verbal exhortation as to the hourly rate of Counsel’s fees does not properly or adequately reflect the myriad of costs incurred by a client in litigation and consequently and such an approach may cause an injustice tithe client. Commentary on the procedure for assessing costs as found in The White Book, Civil procedure Volume 1, 2002 – Rule 44.7.1 “*The court will make a summary assessment of the costs unless it is not practicable to do so. At the conclusion of the trial of a case which has been dealt with on the fast track or at the conclusion of any other hearing which has lasted not more than one day. The parties are required to prepare and serve upon each other a statement of costs in the form of a statement. The statement must be filed at the court and served*

on the other parties as early as possible and in any event not less than 24 hours before the hearing at which the assessment will take place. Although the failure to file is not fatal to the whole of the costs sought and an adjournment or further direction can be given the failure in this instance compounds the other situational failures listed supra.

- (10) When the court inquired of Counsel Wright her hourly rate she offered that it was \$750.00 per hour. A review of a draft bill submitted in contemplation of the hearing for costs which was applied for pursuant to the court's ruling dated 24th July 2023 was reviewed, it revealed that Counsel's hourly rate was \$650.00 substantive court hearing on costs indicates it is \$650.00 per hour. Given this discrepancy the Court is disquieted in maintaining the current ruling.

[44.] Serious consideration is warranted in deciding whether this court is empowered to revisit its verbal ruling delivered on 1st May, 2024 in connection with the costs thrown away sought by the Claimant and the Defendant. There is a wealth of authorities in support of the proposition that a judge may in fact deal with a matter for which a ruling has already been delivered, even to the extent of changing his/her mind before the order is perfected:

In Richard Anthony Hayward and another v Striker Trustees Limited and another [2019] 1 BHS J. No. 73 Bahamas Supreme Court, Common Law and Equity Division, 2010/CLE/gen/01137 The Honourable Madam Justice Indra H. Charles held as follows:

i. *As a matter of principle, a judge retains a residual jurisdiction to control a case to the extent of being able to reconsider the matter of his own motion or to hear further argument on a point which has been decided even after judgment had been handed down (but before it has been perfected). There must be exceptional circumstances warranting its exercise. See Re Barrell Enterprises and others [1972] 3 All ER 631(CA), Compagnie Noga D'Importation et D'exportation SA v Abacha (No 2) [2001] 3 All ER 513, The Queen v Gilbert Henry [2018] CCJ 21 (AJ) and RTL v ALD and others [2015] 1 BHS J. No. 82.*

ii. *The Claimants' Counsel did not make a request or application to reopen the Judgment such that the procedure set out per curiam in Taylor and Another v Lawrence and Another [2002] All ER 353, 354 was not necessary.*

iii. *All Counsel have a responsibility, whether or not invited to do so by the judge, to raise with the judge and draw to his/her attention to any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process: See In re A (Children) (Judgment; Adequacy of Reasoning) (Practice Note), [2001] EWCA Civ, 1205. Good lawyers normally assist the judge rather than resorting to the appellate process.*

iv. *The Court, of its own motion, realized that there was an obvious inadvertence in not adding "as Counsel" or "as Advocate" to paragraph 92 to maintain consistency with previous paragraphs of the Judgment. Further, the Court*

realized that it should have given a further opportunity to Mr. Ginton QC to be heard on the issue of his withdrawal as Advocate for the Defendant. This was a genuine mistake by the Court.

v. *There was no indication that Mr. Ginton QC acted on anything to his detriment see The Queen v Gilbert Henry [2018] CCJ 21 (AJ).*

vi. *The Court cannot be functus officio as even now it has to finalize its Order.*

[45.] Again the principle is borne out in:

Philip Hepburn v Polymers International Limited [2021] 1 BHS J. No. 82
“While no authority was given by Ms. Tynes in support of her submission, as I understand it the doctrine of functus officio applies when a justice has discharged all of his/her judicial functions in a case. See Halsbury’s Laws of England, 4th Edition, Volume 29, Magistrates; The doctrine of functus officio, para 390.

“The Court of Appeal in Rosina Smith v Fidelity Bank (Bahamas) Limited SCCivApp No. 122 of 2020 at paragraphs 34 to 41 also considered whether the Trial judge in that case was correct when she ruled that she was functus officio and did not have the jurisdiction to set aside the perfected order in that matter. At paragraph 34 the Justices stated that it is a well settled principle at common law that a judge has jurisdiction to reverse his decision at any time before it is perfected, but not afterwards. Additionally at paragraph 37 they refer to Sir John Donaldson, MR in Regina v. Cripps, ex parte Muldoon et al [1984] QB 686 where he stated “It is well settled that any judge is fully entitled to reconsider and vary any decision at any time before the order embodying or based upon that decision has been perfected (In re Suffield and Watts, ex parte Brown 12 (1888) 20 QBD 693, 697, per Fry LJ) although in some circumstances he may be under an obligation to give the parties a further opportunity to be heard. At that stage, no slip rule power is needed. However, once the order has been perfected, the trial judge is functus officio and, in his capacity as the judge, has no further power to reconsider or vary his decision whether under the authority of the slip rule or otherwise” Furthermore, they affirmed then Chief Justice Sir Michael Barnett’s decision that he was functus in Palms of Love Beach Building B Management Company et al v. Love Beach Properties Ltd et al 2010/CLE/gen/001673 following the Second Defendant’s filing of two Summonses seeking various orders, such as a stay of all further proceedings, an order setting aside all previous proceedings and the dismissal of the Originating Summons; and an order vacating, dismissing and discharging the Writ of Possession and all other orders affecting the condominiums after the Order granted in the matter was perfected on February 14, 2013. Therefore, after considering the well settled principle the Justices concluded in their Ruling that once the Order obtained in the Supreme Court had been perfected, there was no way for it to be set aside or discharged as the trial

Judge was functus. They further stated that no judge of the Supreme Court had the jurisdiction to grant the relief the intended appellant sought in her Re-Amended Summons.”

[46.] Confirmation can also be found in **Re Morrison [2004] BHS J. No. 473**. *“In considering the acts done in pursuance of the entering of the order, the fact that it was initialed by the Judge, a copy was impressed with the court's seal and filed in the Supreme Court Registry, I am satisfied that the order was perfected in accordance with O. 43. In the circumstances I am satisfied that the Judges of first instance were deprived of any control and had no jurisdiction over the same. As stated by Counsel for the Adverse Claimants the judge found correctly on page 3 of his ruling of March 30, 1999 that the order had been perfected but wrongly decided to recall the same because, as he stated, the copy retained by the Registrar had not been sealed. The court file does show a copy of the order impressed with the Supreme Court's seal.”*

[47.] Authority for the ability to change one’s mind can also be found in **Re L and B (children) (care proceedings: power to revise judgment) [2013] 2 All ER 294** where it was held:

“A judge was entitled to reverse her decision at any time before her order was drawn up and perfected. In exercising that jurisdiction, the judge was not bound to look for exceptional circumstances. A carefully considered change of mind could be sufficient. Every case was going to depend upon its particular circumstance. The starting point was the overriding objective in the CPR to deal with cases justly. A relevant factor had to be whether any party had acted upon the decision to his detriment, especially in a case where it was expected that they might do so before the order was formally drawn up. The discretion had to be exercised judicially and not capriciously. That might entail offering the parties the opportunity of addressing the judge on whether she should or should not change her decision.....it has long been the law that a judge is entitled to reverse his decision at any time before his order is drawn up and perfected.”

CONCLUSION

[48.] I am of the view that since the Order of 1st May 2024, granting costs to both the Claimant and the Defendant to be paid by the Interested Party has not been perfected this Court is not “functus officio” and therefore retains control and continues to have jurisdiction over the proceedings and order. In all the premises stated above and in exercise of the court’s discretion and in consideration of and in adherence to the overriding objectives of the Part 1 (1) SCCPR 2022 to deal with cases justly and at proportionate cost I was minded to reverse my decision made 1st May 2024 wherein I ordered the interested Party to pay the costs thrown away on 29th August, 2023 to the Claimant and the Defendant. Costs of the application to be costs in the cause.

[49.] Pursuant thereto I offered the parties through their respective Counsels the opportunity to address me on whether I should or should not change my decision on “costs thrown away” of 1st May, 2024. The hearing took place on 13th May, 2024. Counsels Wright and Quant made the appearances as before. While Counsel Quant concurred with the courts’ anticipated reversal of the costs thrown away decision and expressed the same, Counsel Wright disagreed and submitted that the costs thrown away order was not only warranted but reflected her true hourly rate. Among other arguments she disagreed with the premise that Nagico and Cedric Parker and Co. as the Interested Party’s attorneys, were not properly and adequately served to appear and to proceed with the hearing on 29th August 2023. She submitted that the overriding objective mandated that the court consider the financial inequity of the parties i.e. an ordinary litigant against a commercial entity (emphasis mine). Further that when the court grants a summary order for costs pursuant to S. 71 there is no necessity for a detailed bill of costs. I have already indicated my reservations with adopting that approach.

[50.] In all the circumstances of the case, having afforded Counsel the opportunity to address me on the issue of reversing my decision and after consideration of the arguments made by Counsel I am also convinced that for the Ten (10) reasons stated supra, it is more than likely that the decision to grant the costs thrown away for the 29th August hearing, granted on 1st May, 2024 will be overturned on an appeal. I therefore confirm that the decision dated 1st May, 2024, to grant the Claimant and Defendant costs thrown away against the Interested Party is set aside. Any costs associated with that hearing shall be costs in the cause.

Dated the 30th Day of May, A.D. 2024



C.V. Hope Strachan

Justice

