**IN THE CARIBBEAN COURT OF JUSTICE**
**APPELLATE JURISDICTION**

**ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS**

**CCJ Appeal No BBCV2022/002**
**BB Civil Appeal No 15 of 2008**

**BETWEEN**

**APSARA RESTAURANTS (BARBADOS) LIMITED** **APPELLANT**

**AND**

**GUARDIAN GENERAL INSURANCE LIMITED** **RESPONDENT**

**Before:** **Mr Justice Saunders, President**
**Mr Justice Wit**
**Mr Justice Anderson**
**Mme Justice Rajnauth-Lee**
**Mr Justice Barrow**
**Mr Justice Burgess**
**Mr Justice Jamadar**

**Date of Reasons:** **19 April 2024**

**Appearances**

Mr Douglas Mendes, SC and Mr Clay Hackett for the Appellant

Mr Christopher Audain, KC and Mr Roger Forde, KC for the Respondent

*Costs – Quantification of costs – Natural justice – Procedural fairness – Treatment of Advance copy of court judgment – Res judicata – Finality of judicial decisions.*

## SUMMARY

Judgment was delivered in this case on 22 January 2024. Prior to delivering judgment, this Court, in keeping with its practice, sent to counsel for the parties an advance and

confidential copy of the judgment it would deliver in the matter. In the advance copy of the judgment shared with counsel, an award of 60 per cent costs in all three courts was reserved to the respondent, who was the successful party in the matter.

Upon having sight of the cost order in the advance copy of the judgment, counsel for the appellant indicated via email that they wished to be heard on costs. Counsel pursued the matter during the judgment delivery with an oral application seeking permission to file written submissions on the percentage of costs that the Court had decided to award to the respondent. Written submissions on costs were subsequently filed by the parties, and the same were considered by this Court.

It was held by the Court, that the principle of finality of judicial decisions requires that there be certainty that a court's pronouncement marks, apart from an appeal, the definite end of litigation. The Court expressed the view that this was important in the interest of public and professional confidence in judicial decision making. The Court found that the principle of finality applies equally to judgments already delivered as to a judgment which is about to be delivered. The point is that the judges have adjudged the case and litigation has thus ended.

The Court accepted that in a proper case, and while closely patrolling the jurisdiction to do so, it may deem it appropriate to reopen a decision. The Court made it clear that there was no such case before it. Accordingly, the application for a modification of the Court's proposed award was dismissed.

Nonetheless, the Court went on to explain the reasoning which underpinned its apportionment of costs as indicated in the advance copy of the judgment. The Court explained that this apportionment was determined by success on the broad issues of damages for breach of indemnity, and the allegation that the principal of the appellant committed arson and fraudulently made a claim to the respondent for loss. According to the Court, the appellant's success in rescuing its own and its principal's reputation by

succeeding on the arson point, merited significant recognition in apportioning the award of costs, ranking not much lower than the respondent's success on damages.

In view of the foregoing, the Court concluded that the respective successes were justly reflected in the award issued in the advance judgment copy, being 60 per cent costs to the respondent.

**Cases referred to:**

*AIC Ltd v Federal Airports Authority of Nigeria* [2020] EWCA Civ 1585, [2021] 4 All ER 163; *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409; *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191; *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20, [2019] AC 649; *Tasker v United States of America* [2023] CCJ 14 (AJ) BB, BB 2023 CCJ 7 (CARILAW); *Watson, Laidlaw & Co Ltd v Pott, Cassels & Williamson* 1914 SC (HL) 18.

**Other Sources referred to:**

Caribbean Court of Justice (Appellate Jurisdiction) Rules 2021.

## REASONS FOR DECISION

**Barrow J (Saunders P, Anderson, Rajnauth-Lee, Burgess and Jamadar JJ concurring)**

**BARROW J:**

**Introduction**

[1] When the Court delivered its reserved judgment in this appeal on 22 January 2024, the Court withheld its decision on the award of costs so as to give the appellant, on their in-court application, the opportunity of making written submissions on the

percentage of costs the Court had decided to award to the respondent, who had been the successful party.

[2] The appellant obtained the opportunity to make the application because, in keeping with its practice, the Court had sent to counsel for the parties in advance of the delivery of the judgment, an advance, confidential copy of the judgment it would deliver. The practice is now the subject of *Practice Direction No 3 of 2024* contained in the forthcoming *Caribbean Court of Justice (Appellate Jurisdiction) Rules 2024*.

**The proposed award**

[3] In the advance copy of the judgment shared with counsel, the Court stated that it was a percentage of their costs it would award to the respondent. Thereby, it indicated that it was not making the standard award as provided by r 17.4(1), which is that the unsuccessful party shall pay the costs of the successful party. Rather, it exercised the discretion conferred by r 17.4(4)(c), which allows the Court to apportion costs. The Court awarded a substantially reduced percentage of costs to the respondent, who was the successful party.

[4] The discretion to award reduced costs was exercised after considering the significant number of factors stated in r 17.4(3)(a) to (f), which state as follows:

> (3) In deciding who should be liable to pay costs, the Court shall have regard to all the circumstances and in particular the Court shall have regard to –
>
> (a) the conduct of the parties both before and during the proceedings;
>
> (b) whether a party has succeeded on particular issues, even if that party has not been wholly successful in the appeal or proceedings;
>
> (c) any offer to settle made by a party drawn to the Court's attention;

(d) whether it was reasonable for a party

(i) to pursue a ground of appeal;

(ii) to raise a particular issue;

(e) the manner in which a party has pursued –

(i) the appeal;

(ii) a ground of appeal;

(iii) a particular issue;

(f) whether an appellant who has succeeded in their appeal, exaggerated their claim.

[5] It is important to keep focus on the range of factors which the Court considered in making its decision. In making that decision the Court gave consideration, as the rule mandated, not only or principally to what issues were contested in the appeal and which party succeeded on which issues, r 17.4(3)(b). This emphasis is necessary because the appellant seeks to parlay its success on the majority of issues, according to the appellant's conception of what were the issues, into a denial to the respondent of the major portion of their costs. The rules make clear, however, that success on issues is only one factor to consider. Early in the life of the modern civil procedure rules, it was recognised that an issue-based order for costs often will not sufficiently reflect the justice of the case.[1]

**The opening to reopen**

[6] Because of the new practice of sending an advance copy of the judgment, the appellant saw the Court's decision on costs before it was delivered and got into the position to challenge and pre-empt the formal delivery of the decision. This certainly is not what was intended by the new practice, which was not intended to provide an opening to challenge any part of the substance of the decision the Court

[1] *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409 at [115].

has already made and is about to deliver: this was an extraordinary step. As will be stated in the forthcoming Practice Direction, the very limited purpose of sending an advance copy is to enable counsel to assist the Court by drawing to its attention errors and omissions in the judgment. This principle is not qualified in a case where the Court leaves open, in the advance copy of the judgment, the incidence or quantum or proportion of costs, to enable it to obtain the input from counsel on those aspects before making its decision. In this case, the Court did not leave it open but had made its decision on the proportion of costs and the matter should have been treated as *res judicata* -- not to be pursued further.

[7] Counsel has a duty to the Court to prevent abuse in the operation of the new practice. Counsel must be vigilant to ensure that they use advance sight of a judgment to do no more than the practice intended, ie, to draw the Court's attention to errors such as, for instance, in language, calculation or expression. Perhaps counsel is not to be criticised if they misperceive a breach of natural justice where a court has decided some aspect of a matter without having first heard counsel on the point. But it is not a conclusion to rush into. There should be great hesitation in so concluding because counsel must remind themselves that it is not on every point or at every stage that a court needs to hear submissions.

**Assistance from counsel**

[8] The statement merits elaboration. A court may be confident that it does not need to hear submissions on an aspect or at a stage of a case when it is satisfied the relevant factors to consider are all readily discernible and may be assessed without the assistance of counsel. Indeed, this is commonplace for the judicial exercise when there is involved no consideration of questions of law or fact. There are many areas of the law where this obtains and one example, purely for perspective, should suffice to demonstrate the point.

[9] Thus, there will be no room for submissions from counsel when a court comes to decide, at the end of a hearing for example, on the measure of general damages to award. After the lawyers have presented on all relevant points of law and facts the determination of quantum of general damages comes down to the exercise of the judicial function. As the House of Lords recently stated in *One Step (Support) Ltd v Morris-Garner*[2].

> 37. The quantification of economic loss is often relatively straight forward. There are, however, cases in which its precise measurement is inherently impossible. … The assessment of damages in such circumstances often involves what Lord Shaw described in the *Watson, Laidlaw* case 1914 SC (HL) 18, 29–30 as 'the exercise of a sound imagination and the practice of the broad axe'.

[10] The forensic tradition is that counsel do not participate in that judicial process of exercising sound imagination or wielding of the broad axe, to borrow the metaphor. This is the stage where judgment at its final stage takes place – among the judges.

[11] It may assist further to recall that the issue of costs that is the object of the present application is not a quantification of costs upon an assessment of summary costs, which occurs pursuant to r 17.14, or an assessment of standard costs, which occurs pursuant to r 17.15. In those exercises, hearing counsel for the parties before deciding upon an award may be desirable or indispensable because there may be matters of fact to bring to the attention of a court making an assessment, such as whether there was need for making a disbursement or the rate of fees in the jurisdiction. In contrast, in this case, what the appellant seeks to reopen is the determination by the Court, under r 17.4(4)(c), of the portion or percentage of total costs the Court is awarding to the successful party. It is not an exercise of quantification of the <u>amount</u> of costs under r 17.10, to which counsel mistakenly directed themselves in the written submissions.

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[2] [2018] UKSC 20, [2019] AC 649.

[12] The written submissions confirm that counsel's desired participation could have presented nothing the Court failed to consider. The stated award of costs that counsel wished to modify, by a further 35 per cent reduction on top of the substantial reduction the Court had already made, disclosed by its very terms that the Court had already done what counsel wished to be done, which was to apportion costs, under r 17.4 (4)(c). Therefore, counsel's desired intervention was purely a case of counsel wishing to substitute their own judgment as to proportion for that of the Court.

**No failure to consider**

[13] In recent proceedings in *Tasker v United States of America*[3], counsel persuaded this Court, well after it had delivered a decision, to withdraw the order it had made against Mr Tasker. The decision had been made without an oral hearing and counsel satisfied the Court that the applicant had intended to bring legal authority to the Court's attention but had not done so because, in light of the specific terms of the applicable Rule, they had anticipated, not unreasonably, that counsel would have been given the opportunity to do so on an oral hearing. In that case, therefore, it could have been said that fundamental points of law had been overlooked.[4] In [16] below, it will be seen by reference to recent English authority, that this is considered a classical case for reopening a judgment.

[14] The present case is altogether different. The Court has considered and decided upon the very matters counsel proposes to argue. Substantially, all the matters that the Court was obliged to consider are stated in r 17.4(3), reproduced at [4] above. There has been no failure to consider relevant legal authority, in this case. It does not matter that counsel would argue some aspects (of one particular factor) more fulsomely or with greater emphasis or for them to be given greater weight (or that

[3] [2023] CCJ 14 (AJ) BB, BB 2023 CCJ 7 (CARILAW).

[4] There was a gap in the (Appellate Jurisdiction) Rules 2021 which failed to provide for an applicant to file along with their application a summary of the arguments and authorities on which they intended to rely. This has been corrected by a new rule 10.14(c) in the (Appellate Jurisdiction) Rules 2024.

opposing counsel would do similarly, for a contrary result). So satisfied, the Court must reject the revisionism now being attempted by the firm application of a principle that is of fundamental importance in our system of justice, which is the principle of finality.

**The principle of Finality**

[15] The principle of finality of judicial decisions is that public (and professional) confidence in the effectiveness and authority of a judgment requires the certainty that its pronouncement marks the definite end of the litigation, according to our conception of the rule of law. The rule is that, apart from an appeal, there can be no reopening of the matters decided. While the principle is usually applied to a judgment already delivered, this Court has no hesitation in declaring that the principle should be applied to a judgment that is about to be delivered: the litigation has ended, because the judges have adjudged the case. At this point judges, court staff, lawyers and litigants deserve that certainty.

[16] In *AIC Ltd v Federal Airports Authority of Nigeria*[5] the English Court of appeal affirmed the principle of finality of judgments and provided good guidance on relevant considerations. The following appears in the case summary:

> There are two distinct questions which the court must ask itself if it is asked by one of the parties to reconsider an order which has been pronounced but not yet been sealed. The first is whether the application to reconsider should be entertained *in principle*: is there a reasonably arguable basis for the application? If the court answers that question in the negative, that is the end of the matter. If on the other hand the court concludes that reconsideration is appropriate in principle, then it becomes an open-ended matter of discretion, to be exercised in accordance with the overriding objective, as to whether the order should be changed, or not. At the first stage, the court should be looking for a sufficiently compelling reason that may justify reconsideration; something which might outweigh the importance of finality and justify the opening up of a question or questions which, following the pronouncement of the order in open court, appeared to have been finally answered. Those categories of case are not closed but,

[5] [2020] EWCA Civ 1585, [2021] 4 All ER 163.

> assuming that the request to reconsider comes from the parties and not the court, the court should instinctively be looking for something which has been missed or otherwise gone awry: a mistake or a fundamental misapprehension; a fundamental piece of evidence or a point of law that was overlooked. The court's undoubted jurisdiction to reconsider its earlier order cannot be permitted to become a gateway for a second round of wide-ranging debate. In principle, a significant change of circumstances occurring between the handing down of the judgment and the sealing of the order could justify an application for reconsideration.

**No reason in principle**

[17] In the present application there are none of the 'compelling reasons' that the English court, without purporting to be exhaustive, thought would justify a reconsideration. This is not a case where something was missed in the judgment or otherwise went awry; or there was a mistake or fundamental misapprehension; or a fundamental piece of evidence or a point of law was overlooked; or there has been a significant change of circumstances since the hearing. This was not a reprise of the *Tasker*[6] situation where fundamental points of law had not been presented to the Court. As the English Court of Appeal stated in *AIC Ltd*[7], the jurisdiction to reopen a hearing is one that must be closely patrolled, and the court must be astute to answer and not elide the first question: whether the application to reconsider should be entertained *in principle*. Is there a reasonably arguable basis for the application?

[18] The benefit of adhering to the principle of finality of decisions and excluding uncertainty as to outcome is demonstrated by what could occur in this very appeal, were it otherwise. On a reopened consideration of the decision on costs, the Court would need to consider the appellant's contention that costs should be awarded at 25 per cent and the respondent's contention that costs should be awarded at 70 per cent. The Court would also need to now consider that there may be members of the panel who, on a revision, would substitute their own figure of, say, 40, 50 and 70

[6] *Tasker* (n 3).
[7] *AIC Ltd* (n 5) at [50]-[60], [67]–[69], [104], [105].

per cent respectively and others who would go with 60 per cent. The entire decision on costs would be rubbished for no good reason.

[19] Further confusion would be added with the consideration that if a request for revision of judgment were permitted to be made at the moment of its actual delivery there would be no reason in principle why such revision should not be permitted after judgment is delivered.

[20] There is every reason, in principle and in justice, for the Court to refuse to interfere with the award of costs it had proposed in the advance copy. There is no breach of natural justice, disappointment of reasonable expectations, failure to consider relevant matters of fact or law, or unfairness to justify a departure from principle and from standard practice.

[21] It will be evident from the consideration given to the application that this Court accepts that in a proper case, while closely patrolling the jurisdiction to do so, it will reopen its decision. In this case, however, for the reasons given, the Court is satisfied that there was no reason for doing so. Accordingly, the application for a modification of the Court's proposed award must be dismissed. In so concluding, it is reiterated that in all cases, before it makes a decision on a matter such as costs, the Court will first consider whether it is appropriate to afford counsel the opportunity to make submissions. That is exactly what the Court did in this appeal. And that should have been the end of it. There should have been no need for this reiteration that the decision on whether to hear counsel or not is eminently a matter for the discretion of the Court and will not be reviewed.

[22] It is to be hoped for future reference, that before invoking breach of natural justice, counsel will remind themselves that some matters must be left for the internal deliberation of the court and natural justice does not require that counsel be heard on them.

**Summary of reasons**

[23] The foregoing should suffice to dispose of this application, but the Court considers that having received submissions on reopening and reviewed the matter, it may provide guidance generally to address, albeit very briefly, the substance of the arguments of the parties and provide an insight into its reasons for arriving at a reduction of costs to the respondent to 60 per cent.

**(a) The appellant's submissions**

[24] The essence of the appellant's submissions on costs is that it succeeded on appeal on three out of five issues and partially succeeded on a fourth. The issues were (i) interfering with concurrent findings of fact by a lower court, (ii) arson, (iii) – (iv) non-disclosure of several matters and (v) failure to file in time particulars of loss. If consideration were given to the amount of time spent on the issues, the appellant submits, about 75 per cent of the time was spent on the issues on which they succeeded. The issue of arson advocated by the respondent, on which the appellant succeeded overall, produced the preponderance of evidence at trial and the transcript showed it occupied 50 pages in contrast to 17 pages occupied by the other four issues.

[25] Before this Court, counsel submitted, far more time must have been spent by Counsel for the respondent dealing with the issues on which the respondent was the loser than on the issues which brought the appeal home. The appellant estimated that 75 per cent of the respondent's time would have been spent on the matters on which the appellant was the winner. On these bases the appellant submits the award to the respondent should be 25 per cent of their costs *in all courts*. Two cases were cited by the appellant, but these were mere statements confirming that costs may be apportioned according to success on particular issues.

**(b) The respondent's submissions**

[26] For its part the respondent relied heavily on r 17.4 of the Caribbean Court of Justice's (Appellate Jurisdiction) Rules 2021 ('the Rules') which states that the successful party is generally entitled to costs. The respondent also relied on the factors stated in r 17.4(3), which is reproduced at [4], above.

[27] The respondent submitted that there was no basis upon which the Court could make a finding adverse to the respondent in respect of any of the facts and matters stated in the said rule. In addition, they relied for support on the judgment of Anderson J for the further submission that the appellant had been prolix in their submissions. The respondent brought this point home by observing that the appellant had advanced 39 grounds of appeal and it was clear these were excessive.

[28] The respondent also submitted that the appellant had provided no legal or evidential basis for the claim that the Court should review its Order for costs and make an order that the respondent should receive only 25 per cent of its costs. The question was why not 15, 20, 25, or 30 per cent. The answer to this question suggested that it appeared to be 'guess work'. The respondent submitted that what was being sought by the appellant was a review of the exercise of a discretion by a lower court and that, even for an appellate court, it was a valuable principle enunciated in *Hadmor Productions Ltd v Hamilton*[8] that there should be no easy interfering with discretion. The principle is that an appellate court should not set aside nor change the exercise of a discretion unless:

> it was based upon a misunderstanding of the law or of the evidence before [it] or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of appeal.

[8] [1983] 1 AC 191 at 220 (Lord Diplock).

[29] Notwithstanding the fact that this Court is an Apex Court the principle for review of its decision should be the same, the respondent submitted. In this light, it submitted, the appellant had not pointed out in its written submissions any facts or matters which could support a finding that this Court misunderstood the law or the particular facts in arriving at its decision to award the respondent 60 per cent of its costs and that as such the exercise of the discretion was unreasonable and/or unfair.

[30] No doubt wryly offered, the respondent submitted that if the appellant was correct that the exercise of discretion by this Honourable Court was wrongful, then the respondent should be awarded 80 per cent of its costs on the grounds that the appellant lost more than 80 per cent of the 39 grounds of appeal.

**(c) This Court's reasons**

[31] It should have been obvious to the appellant, even when they were crafting their submissions, that the approach that was the core of their application, of considering success on the issues that were litigated, was necessarily a basis upon which, or by reference to which, this Court considered that it would have awarded only a portion of costs to the respondent. It would have been conceptually impossible for it to have been otherwise. The Court inevitably considered, whether more or less broadly, the matter of how issues were litigated including time spent. It is disappointing that counsel could think otherwise.

[32] Beyond the issue-by-issue analysis on which the appellant built its submissions, the Court naturally also considered some of the matters urged by the respondent, such as excess of grounds and prolixity. It would have considered also the fact that a major part of the respondent's averment of arson was that the fire was not fortuitous but deliberately set. This required significant time and effort and evidence to prove, including refuting the contention advanced by the appellant that the fire may have been electrical in origin. Put simply, if the appellant had not resisted the allegation of arson, as the cause of the fire, and had taken the position simply that it knew

nothing of the alleged arson and had no part in it, the trial and appeals would have been considerably shortened.

[33] This Court also gave due consideration to the fact that on the trial and in the Court of Appeal the respondent achieved 100 per cent success on the issues, as identified by the appellant. These earlier successes are mentioned not to gainsay that the partial reversals represent the ultimate judicial determination that the respondent should not have succeeded on all issues. They are mentioned by way of advertence to the factor stated in r 17.4(3)(d) – whether it was reasonable for a party to pursue a ground of appeal or raise a particular issue. The respondent's successes in the two lower courts are a measure of the credibility of the defence the respondent mounted and the reasonableness of the position they took on the issues. Therefore, although the respondent lost on these issues, that loss should not detract from their overall costs award as much as if it had been wholly unreasonable to pursue the issues on which they lost.

[34] Another factor that engaged the consideration of the Court was the overall sense of justice that a court must bring in arriving at its judgment. In this case it was a significant factor that the respondent succeeded in totally resisting the claim for BDS6 million; the appellant was not awarded even a dollar. This was a factor the respondent properly raised. The recovery of a sum of money was what this case was about; it was not about succeeding on issues. Apart from a major exception, to be discussed below, there was no monetary value or enduring benefit to any of the issues beyond being simply barriers of disentitlement to the recovery of damages. This Court had to be conscious of how disproportionate and contrary it would appear to a reasonable person if this totally successful[9] respondent, guilty of no misconduct or unreasonable behaviour in the conduct of its defence in achieving that success, were to be awarded a paltry 25 per cent of its costs. That would appear as manifestly unfair.

[9] Total success is used here with reference to resisting the claim for the recovery of damages and not on the decision of issues.

[35] A view that informed the Court's consideration, which arises for mention at this juncture, was that it could treat the respondent's total success on the damages as entitling them to a minimum of, say, 50 per cent costs, without more. This would be an instance of the operation of the vaunted 'sound imagination and practice of the broad axe.'[10] Even on the appellant's submissions, their success on 3.5 out of 5 issues amounts to less than 80 per cent success on the issues. That is, less than 40 per cent success, if 50 per cent of costs were carved out for total success on damages. On this reckoning, the respondent would be entitled to at least 10 per cent costs for its success on the issues and 50 per cent costs for its success in totally defeating the claim for damages.

[36] An unstated (and perhaps overlooked) premise of the appellant's submissions appears to be that the issues should be treated as being of equal weight or value. The Court was satisfied there was good reason not to treat them so. To recapitulate, the issues were interference with concurrent findings of fact by a lower court, arson, non-disclosure, and failure timeously to furnish full particulars of the loss. Apart from arson, all issues relate to compliance with conditions of the contract of insurance and the requirement of good faith. Arson is different because it is an allegation not only that it was no accident that caused the loss but a wilful act. Moreover, it is an allegation of fraud, the gravity of which is manifest.

[37] There is even greater gravity in the allegation because it was not an allegation of arson by persons unknown; it was an allegation that the principal of the appellant set the fire and dishonestly made a claim for accidental loss. This was a most serious attack upon the reputation of the principal. The reason why courts regularly award significant sums in defamation cases as damages for injury to reputation is because the law recognises there is a dollar value on reputation.

[38] This Court took the view that the appellant's success in rescuing its own and its principal's reputation, merited significant recognition in apportioning the award of

[10] See the passage quoted from *One Step* case at [9] above.

costs. This, substantially, was the real litigation success of the appellant, ranking not much lower than the respondent's success on damages.

[39] It follows that the Court took a broader view of the issues in this appeal which was that there were two main issues, and these were what the Court should consider in determining apportionment of costs. One issue was, of course, the appellant's claim for the indemnity and the other issue was the allegation of fraud. On that broader view, the issues apart from arson, as identified by the appellant were secondary (although, of course, very important) issues. The primary or principal issues were the two stated above, entitlement to indemnity and fraud.

[40] The overriding objective of our civil procedure rules as stated at r 1.3 is to ensure that the Court is fair and efficient and to discourage unnecessary disputes over procedural matters. That objective required the Court to appreciate that what it was called upon to do in this appeal was to resolve the two stated, primary issues in the appeal. While the issue-by-issue success of the parties was one of the factors to consider this had to be treated as of far lesser importance in the decision on costs than success and failure on the primary issues in the litigation.

[41] Having regard to all the circumstances, as the Court is required to do by r 17.4(3), the Court took the broad view that the respective successes, on the issues of damages for breach of indemnity and for vindication of reputation, should determine the apportionment of costs. This was after the Court considered the stated factors such as the conduct of the parties, success on particular issues, reasonableness of grounds of appeal and raising of issues, the manner of pursuing grounds and issues, and proportionality of behaviour. Most of these factors attracted a neutral view which, in itself, helped to inform the decision on the award.

**The award of costs**

[42] Satisfied that there was no reasonable basis for reopening its judgment, and satisfied also that even if the exercise of discretion were to be reviewed there was no sound ground for challenge, the Court affirms the award of 60 per cent of costs to the respondent, the successful party, that it had proposed to make in the advance copy of the judgment.

/s/ A Saunders

**Mr Justice A Saunders (President)**

/s/ W Anderson

**Mr Justice J Wit** [11]

**Mr Justice W Anderson**

/s/ M Rajnauth-Lee

**Mme Justice M Rajnauth-Lee**

/s/ D Barrow

**Mr Justice D Barrow**

/s/ A Burgess

**Mr Justice A Burgess**

/s/ P Jamadar

**Mr Justice P Jamadar**

[11] The case was heard by all seven judges of the CCJ but, regrettably, before the judgment could be delivered, Wit J retired from the Court on the ground of ill health and passed away shortly thereafter. Despite the absence of Wit J from deliberations on Counsel's submissions on costs, the decision was unaffected, as the six remaining judges are in unanimous agreement.