COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 94 of 2017

BETWEEN

RAWSON MCDONALD
First Applicant/Appellant

AND

RAWSON MCDONALD & COMPANY
Second Applicant/Appellant

AND

PAUL R. MAJOR
Respondent

BEFORE: **The Honourable Madam Justice Crane-Scott, JA**
The Honourable Mr Justice Jones, JA
The Honourable Sir Brian Moree, JA

APPEARANCES: **Mr Charles Mackay for the Applicants/Appellants**
Mrs Hope Strachan for the Respondent

DATES: **8 March 2023**

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Civil Appeal – Costs – Rule 24(5) Court of Appeal Rules, 2005 – Exercise of discretion to award costs – Order 59, r. 3 Rules of the Supreme Court – Usual rule – Costs to follow the event – Applicant to bear costs of and occasioned by an application to extend time – Principles guiding exercise of discretion to dispense with application of usual costs rule – Costs in the cause

The Applicants/Appellants (now referred to as "the Applicants") filed an appeal against the Judgment of a Supreme Court judge who found them liable to the Respondent in breach of contract. The appeal was subsequently struck-out for non-compliance with the Registrar's Settling Orders in relation to the filing of the record of appeal. They applied to the Court to restore the appeal and for an extension of time for filing the record of appeal. Both applications were granted by the Court in a written Decision handed down on 31 October 2022. The Court invited written submissions on costs to be filed within 14 days and indicated that the issue of costs would be dealt with on the papers.

Held: In the exercise of its wide discretion to award costs, the Court makes the following orders: (i) Costs of the restoration application shall be costs in the cause; and (ii) the Applicants shall bear the Respondent's costs in relation to the application to extend the time, such costs to be taxed, if not agreed.

The jurisdiction in relation to costs in the Court of Appeal derives from **rule 24(5)** of the Court of Appeal Rules, 2005. However, the considerations applicable to the exercise of this Court's discretion to grant costs are guided by Order 59 of the Rules of the Supreme Court (now referred to as "the RSC").

The general rule enshrined **in Order 59, r. 3(2)** of the RSC is that costs should *"follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."*

As for the costs of and incidental to an extension of time application, the rule in **Order 59 r. 3(4)** of the RSC is that such costs *"shall be borne by the party making the application, unless the Court otherwise orders."*

However, a successful litigant's reasonable expectation of obtaining an order for costs in keeping with the rule, still depends on the exercise of the Court's discretion. Appropriate circumstances may warrant departing from the usual rule. The Court must exercise its discretion judicially by considering the facts of the case, including any matter related to the parties' conduct and the circumstances leading to the proceedings. The Court must ultimately consider whether there are any grounds to properly exercise its discretion so as to order a party who is successful in a matter to pay the costs of the party who failed.

Having given this matter our anxious consideration, we agree with counsel for the Respondent that in the particular circumstances of this case, justice between the parties to this case will be served by dispensing with the usual rule in **O.59, r. 3(2)** and instead making an order that the costs of the restoration application shall be *"costs in the cause".*

Having also considered the appropriate costs order on the extension of time application, we have found no reason to depart from the rule governing the award of costs in such applications which is set out in **O. 59, r. 3(4).** In the result, the Applicants shall bear the Respondent's costs of the extension of time application, such costs to be taxed, if not agreed.

Cable Bahamas Limited v. Rubis Bahamas Limited and another [2017] 1 BHS J. No. 143; mentioned

Elizabeth Collie v. Lady Henrietta St. George SCCivApp. No. 133 of 2021; mentioned

Gaydamak and Another v. USB Bahamas and another [2006] UKPC 8; distinguished

Keithrell Hanna v. Wendy Willis Johnson SCCivApp. No. 61 of 2022; mentioned

Kelly v. Albury [1998] BHS J. No. 64; mentioned

Navette Broadcasting & Entertainment Co Ltd v. Utilities Regulation & Competition Authority SCCivApp. No. 117 of 2019; mentioned

Polymers International Limited v. Philip Hepburn SCCivApp. No. 8 of 2021; mentioned

Ritter v. Godfrey [1920] 2 K.B. 47; mentioned

Rosina Smith v. Fidelity Bank (Bahamas) Ltd SCCivApp. No. 94 of 2021; mentioned

Scherer and another v. Counting instruments Ltd and another [1986] 2 All ER 529; applied

SkyBahamas Airlines Limited v. Southern Air Charter Company Limited SCCivApp. No. 221 of 2021; mentioned

Sterling Asset Management Ltd v. Sunset Equities Ltd SCCivApp. No. 152 of 2021; mentioned

Swart et al v. Appollon Metaxides Silver Point Condominium SCCivApp. No. 78 of 2012; considered

Wolsey and others v. Bahamas Electricity Corporation [2012] 1 BHS J. No. 86; mentioned

DECISION ON COSTS

Delivered by the Honourable Madam Justice Crane-Scott, JA:

Background

1. In a written Decision handed down on 31 October 2022, this Court (similarly constituted) acceded to the Applicants' two interlocutory applications contained in their Amended Motion of 15 September 2022. In acceding to the Amended Motion, we firstly restored the Applicants' liability appeal which had been struck-out for non-compliance with the Registrar's Settling Order in relation to the filing of the record of appeal and, secondly, extended the time for filing the record of appeal.

2. We invited the parties to file written submissions on costs within 14 days and indicated then that the issue of costs would be dealt with on the papers.

3. What follows is our written decision in relation to the outstanding issue of the costs of both applications.

The Governing Rules

4. As is well known, this Court's broad jurisdiction in relation to the award of costs is located in **rule 24(5)** of the Court of Appeal Rules, 2005 (now referred to as "the COA Rules")., which provides:

> **"24. (5) The court may make such order as to the whole or any part of the costs of an appeal as may be just, and may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just."**

5. Notwithstanding **rule 24(5**), in the exercise of its discretion, the Court generally has regard to the practice that obtains in the Supreme Court and to the rules governing the discretion to award costs located in **Order 59** of the Rules of the Supreme Court (now referred to as "the RSC"). This was explained in a decision of the Court of Appeal in **Swart et al v. Appollon Metaxides Silver Point Condominium,** SCCivApp. No. 78 of 2012 (delivered on 22 October 2018).

6. At paragraphs [7] and [8] Isaacs JA, writing on behalf of the Court (differently constituted), explained:

> **"7. In the Supreme Court the issue of who should bear the costs of an action and/or application falls to be considered in light of Order 59 of the Rules of the Supreme Court. Moreover, section 30(1) of the Supreme Court Act provides:**
>
> > **"30. (1) 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 or judge shall have full power to determine by whom and to what extent the costs are to be paid."**
>
> **8. <u>We generally have regard to the practice that obtains in the Supreme Court</u>. In my view this makes estimably good sense." [Emphasis added]**

7. The starting point is **Order 59, r. 3(1)** which provides that subject to the Order, *"no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of the Court."*

8. The practice of the Court is that **Order 59** applies *mutatis mutandis* to an award of costs to be made following the disposition of a substantive appeal, as well as to cost orders of, and incidental to, an interlocutory application heard and disposed of during appellate proceedings.

9. The usual rule is located in **Order 59, r. 3(2)** which provides that where a Court considers that it should make any order as to the *'costs of or incidental to any proceedings'*, such costs are *"to follow the event"* unless the Court is satisfied that, in the circumstances of the case, *"some other order"* should be made. **O. 59, r. 3(2)** states:

> **"(2) If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, <u>the Court *shall*</u>, subject to this Order, "order *the costs to follow the event*, <u>except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs</u>."** [Emphasis added]

10. The usual rule that *"costs follow the event"* is applied in numerous decisions of the Court. [See for example the decisions in **SkyBahamas Airlines v. Southern Air Charter Company Limited** SCCivApp. No. 221 of 2021 delivered on 2 December 2021 per Evans JA., at para [9]; **Polymers International Company Limited** SCCivApp. No. 8 of 2021 delivered on 23 February 2022 per Barnett P., at paras [5] and [6]; and **Sterling Asset Management Ltd v. Sunset Equities Ltd** SCCivApp. No. 152 of 2021 delivered on 24 March 2022 per Barnett P., at paras [5]-[8] to name only a few.]

11. As **Order 59** provides, the usual rule that costs *"follow the event"*, does <u>not</u> apply to *"costs of and occasioned by extension of time applications."* In such applications, the relevant rule

(located in **O. 59, r. 3(4)**) is that such costs "*shall* be borne *by the party making the application*, unless the Court otherwise orders." **O. 59, r. 3(4)** states:

> **"3(4) The costs of and occasioned by any application to extend the time fixed by these Rules, or any direction or order thereunder, for serving or filing any document or doing of any other act (including the costs of any order made on the application) *shall* be borne by the party making the application, *unless* the Court otherwise orders."** [Emphasis added]

Discussion

12. Against the background of the foregoing rules which govern the exercise of our discretion to award costs in respect of both applications, we turn now to consider the justice of the case and specifically, how this Court's discretion to award costs ought to be exercised in respect of (i) the restoration application; and (ii) the extension of time application.

Costs of the application to restore

13. Based on the foregoing discussion, it is obvious that the applicable rule governing an award of costs in relation to the restoration application is the usual rule located in O**. 59, r. 3(2).** This means that costs shall *"follow the event"* unless, in the circumstances of this case, the justice of the case requires that *"some other order"* should be made as to the whole or part of such costs.

14. In their respective written submissions, Counsel for the parties surprisingly made no reference to **O. 59** and also failed to identify the applicable rules of court governing each application. They each proceeded on the premise that the applicable rule for both applications is that costs usually *"follow the event."* While they are correct that the usual rule governs the costs of the application to restore, it should be evident from the foregoing discussion that it does not apply in the case of an extension of time application which is governed by its own rule. [See **O. 59, r. 3(4)**.]

15. On the one hand, at paragraph 3 of the Applicants' written Submissions filed on 11 November 2022, Counsel for the Applicants, Mr Charles Mackay, submits that the usual rule should apply and that costs of ***both*** applications should follow the Court's Decision of 31 October 2022. He says that the appropriate order should be for the Applicants (as the successful party) to be awarded their costs in respect of ***both*** applications with such costs being taxed, if not agreed.

16. In support, Mr Mackay relies on the authorities of **Scherer and another v. Counting instruments Ltd and another** [1986] 2 All ER 529; **Sterling Asset Management Ltd v. Sunset Equities Ltd** *(above);* and the Privy Council authority of **Gaydamak and Another**

v. USB Bahamas and another [2006] UKPC 8, where the costs of re-entering a struck-out appeal were awarded to the successful applicants.

17. On the other hand, in her written Submissions filed on 14 November 2022, Counsel for the Respondent, Mrs Hope Strachan, cited the Bahamas Supreme Court case of **Wolsey and others v. Bahamas Electricity Corporation** [2012] 1 BHS J. No. 86 in which, after dismissing the defendant's strike-out application, Evans J dispensed with the usual rule and ordered the plaintiff to pay the costs of the application. Evans J reasoned that, notwithstanding that the plaintiff was successful, it was the plaintiff's inaction in advancing the proceedings that led the defendant to file the application to strike out.

18. Relying on **Wolsey**, Mrs Strachan, while acknowledging that the appropriate costs order lies in our discretion, urged us to do justice between the parties by dispensing with the usual rule and instead ordering that costs be *'costs in the cause'*.

19. Mrs Strachan, also relied on two other Bahamian Supreme Court authorities. These were firstly, **Cable Bahamas Limited v. Rubis Bahamas Limited and another** [2017] 1 BHS J. No. 143 (where an award of costs to the first defendant consequent on the plaintiff's unsuccessful Summary Judgment application was reduced by 25% because of the delays occasioned by the first defendant during the hearing of the application), and secondly, **Kelly v. Albury** [1998] BHS J. No. 84 (in which Strachan J accepted the principles laid down in **Scherer** *(above)* as "wholly applicable" to the exercise of his discretion in relation to costs.).

20. Mrs Strachan also laid over for our consideration the old English Court of Appeal decision in **Ritter v. Godfrey** [1920] 2 K.B. 47 where the English Court of Appeal unanimously reversed the decision of a trial judge who had refused to award costs to a defendant in a negligence action which the judge had decided in his favour. In **Ritter**, the English Court of Appeal allowed the defendant's appeal and awarded him costs of the action as well as costs of the appeal. The English Court of Appeal found that the judge's refusal to award costs to the defendant was mainly due to the view he took of the insulting tone and language disclosed in certain correspondence which the defendant had written to the plaintiff prior to the action being brought.

21. Although based on Order LXV., r. 1 of the former 1883 English Supreme Court Rules, **Ritter** contains a useful discussion of the usual rule (still in place in this jurisdiction in **Order 59, r. 3(2)**) which mandates that that costs shall *"follow the event"* except when it appears that, in the circumstances of the case, *"some other order"* should be made.

22. As we see it, while of considerable vintage, **Ritter** provides useful insights into how a court's discretion to dispense with the usual rule in order to deprive a successful litigant of his costs is to be exercised.

23. Between pages 52-54, Lord Stearndale M.R. explained:

> **"…<u>there is such a settled practice of the Courts that *in the absence of special circumstances* a successful litigant should receive his costs</u>,**

> **that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. *The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial.* If, however, there be any grounds, the question whether they are sufficient is entirely for the judge at the trial, and this Court cannot interfere with his discretion …**
> **I cannot say that those doubts are entirely removed but, as both the other members of the Court are clearly of opinion that the letter affords no such grounds, I concur in the decision to which they have come. The result is that the appeal must be allowed, the order of the learned judge set aside, and judgment entered in the action for the defendant with costs. The appellant is also entitled to the costs of the appeal."** [Emphasis added]

24. In a similar vein, between pages 60 through 63, Atkin L.J. reviewed relevant costs authorities and said:

> **"It is not easy to deduce from these authorities what the precise principles are that are to guide a judge in exercising his discretion over costs. And yet as the discretion is only to be exercised where there are materials upon which to exercise it, it seems important to ascertain the principles upon which a judge is to discern whether the necessary materials exist. In the case of a wholly successful defendant, in my opinion the judge must give the defendant his costs *unless* there is evidence that the defendant (1.) brought about the litigation, or (2.) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3.) has done some wrongful act in the course of the transaction of which the plaintiff complains.**
> **…**
> **In the present case … I think that the appeal should be allowed, and the order made as proposed by the Master of the Rolls. "** [Emphasis added]

25. In his contribution to the judgment at page 68, Eve J (after examining the correspondence on which the judge relied to deprive the defendant of his costs) said:

> **"I do not feel called upon to express any opinion as to the taste or want of good taste exhibited in the letter. It was written under difficulties by an overworked man smarting under a sense of unjust accusations. What I am concerned in is [sic] to find any material in it for holding the defendant guilty of misconduct of the nature necessary to be found before any foundation could be laid for exercising against him a discretion which, in depriving him of his costs, has imposed upon him a grievous penalty in vindication his professional reputation.**
> **I have read and re-read the letter carefully, and I can find no such material. I think there was no evidence on which the learned judge's decision as to costs could properly be founded, and in my opinion this appeal ought to be allowed - the defendant ought to be awarded**

his costs of the action, and he will also be entitled to his costs of this appeal." [Emphasis added]

26. Apart from **Ritter**, we have found the 1986 authority of **Scherer** (laid over by Mr Mackay and referred to in the case of **Kelley v. Albury**, on which Mrs Strachan relied) extremely helpful. At page 536 (paras (b) through (h)) of **Scherer**, the English Court of Appeal held, *inter alia,* that a successful party's reasonable expectation of obtaining an order for costs is not a right, but nonetheless depends on the exercise of the court's discretion. The English Court of Appeal explained that a court's discretion is not well exercised unless there are grounds for its exercise. In exercising the discretion regarding costs, a court must act judicially. It must consider grounds which are connected with the case, which may extend to any matter relating to the litigation and the parties' conduct in it, including the circumstances which led to the proceedings.

27. After reviewing relevant authorities, on page 537 Buckley LJ (who wrote that Court's decision), derived ten (10) guiding principles which may be usefully reproduced. That Court said:

> **"From the cases which we have cited and from *Ottway v Jones* [1955] 2 All ER 585, [1955] 1 WLR 706, *Baylis Baxter Ltd v Sabath* [1958] 2 All ER 209, [1958] 1 WLR 529 and *William C Parker Ltd v F J Ham & Son Ltd* [1972] 3 All ER 1051, [1972] 1 WLR 1583, which were also referred to by counsel, we derive the following propositions. (1) The normal rule is that costs follow the event. That party who turns out to have unjustifiably either brought another party before the court or given another party cause to have recourse to the court to obtain his rights is required to recompense that other party in costs. But, (2) the judge has under s 50 of the 1925 Act an unlimited discretion to make what order as to costs he considers that the justice of the case requires. (3) Consequently, a successful party has a reasonable expectation of obtaining an order for his costs to be paid by the opposing party but has no right to such an order, for it depends on the exercise of the court's discretion. (4) This discretion is not one to be exercised arbitrarily: *it must be exercised judicially*, that is to say *in accordance with established principles and in relation to the facts of the case*. (5) The discretion cannot be well exercised unless there are relevant grounds for its exercise, for its exercise without grounds cannot be a proper exercise of the judge's function. (6) The grounds must be connected with the case. This may extend to any matter relating to the litigation and the parties' conduct in it, and also to the circumstances leading to the litigation, but no further. (7) If no such ground exists for departing from the normal rule, or if, although such grounds exist, the judge is known to have acted not on any such ground but on some extraneous ground, there has effectively been no exercise of the discretion. (8) If a party invokes the jurisdiction of the court to grant him some discretionary relief and establishes the basic grounds therefor but the relief sought is denied in the exercise of the discretion … the opposing party may properly be**

> **ordered to pay his costs. But where the party who invokes the court's jurisdiction wholly fails to establish one or more of the ingredients necessary to entitle him to the relief claimed, whether discretionary or not, it is difficult to envisage a ground on which the opposing party could properly be ordered to pay his costs … (9) If a judge, having relevant grounds on which to do so, has on those grounds, or some of them, made an order as to costs in the exercise of his discretion, his decision is final unless he gives leave to a dissatisfied party to appeal. (10) If, however, he has made his order having no relevant grounds available or having in fact acted on extraneous grounds, this court can entertain an appeal without leave and can make what order it thinks fit."** [Emphasis added]

28. We are satisfied that the principles in **Scherer** are not limited to the award of costs in proceedings before the Supreme Court. Indeed, they provide useful guidance when the Court of Appeal *itself* is called upon to exercise a discretion in relation to an award of costs.

29. Furthermore, the **Scherer** principles have been applied to the exercise of this Court's discretion to award costs irrespective of whether the discretion arises following the disposal of a substantive appeal, or (as in this case) following the disposition of an interlocutory application filed in connection with an appeal. [See the decisions of **Polymers International Limited** and **Sterling Asset Management Ltd** referenced earlier.]

30. The **Scherer** principles, which distill the guidance of earlier authorities, clearly reflect the rationale behind **O. 59, r. 3(2)** with which we are here concerned. The principles establish, in line with the rule, that the Applicants as the successful party have a reasonable expectation of obtaining an order for the costs of the restoration application to be paid by the Respondent who opposed it, but have no right to such an order. **Scherer** reminds us that the discretion in **O.59, r.3(2)** which gives a court the power to dispense with the usual rule must be exercised judicially, that is to say in accordance with established principles and in relation to the facts of the case and that there must be grounds for doing so.

31. We have considered the parties submissions. It is evident that what we are being asked to decide is whether the usual rule in **O.59, r. 3(2)** should apply as the Applicants contend or whether as Counsel for the Respondent submits, an order for *"costs in the cause"* should be made which would, at this interlocutory stage of the proceedings, deny the Applicants' costs which they would otherwise expect to receive as the successful party. Such an order would operate to deprive the Applicants of such costs at this stage and essentially postpone or reserve the costs issue until *after* the substantive appeal is heard.

32. We have considered the further guidance in **Scherer** regarding how the discretion to award costs may be exercised in interlocutory applications at a time when it may not then be possible for a court to fully appreciate on which side justice would require that the decision as to who should bear the costs of that step should ultimately fall.

33. At page 536, the English Court in **Scherer** explained:

> **"When these principles fall to be applied to an <u>interlocutory step</u> in an action, the circumstances may be such that it is not then possible to see on which side justice requires that the decision who should bear the costs of that step should ultimately fall. <u>This may depend on how the issues in the action are eventually decided. Consequently, costs in interlocutory matters are often made *costs in the cause or reserved.*</u> "** [Emphasis added]

34. We are keenly aware that the need to apply to the Court to restore the liability appeal was occasioned by the Applicants who, having filed their appeal within the time prescribed in the COA Rules, failed to file the record of appeal within the deadline fixed in the Registrar's settling Order. As we pointed out in our written Decision of 31 October 2022, it was the Applicants' failure to comply with the Registrar's Order, which in turn led to their appeal being struck out in accordance with Rule 14(1) of the COA Rules. It was the dismissal which ultimately necessitated the Applicants having no alternative but to file two interlocutory applications before the Court to, firstly, restore the appeal and, secondly, to extend the time for filing the record.

35. The detailed reasons why this Court acceded to the Applicants' Motion to restore their appeal are set out between paragraphs [17] through [90] of our written Decision handed down on 31 October 2022. We expressly found that the Applicants had, on being notified of the fact that their appeal had been dismissed, moved promptly and filed their Motion of 7 August 2018 to restore it within 12 days of their being served with the Registrar's Notice. This we found to be *"not unduly dilatory"*.

36. Additionally, we found that the Applicants' supporting affidavit had provided *"a good and sufficient explanation"* for their failure to comply with the Registrar's settling Order and further, that the explanation *"excused"* the 1-day delay which had transpired in their filing the record of appeal.

37. At paragraph [76] of our Decision, we found that while the Applicants also bore some of the responsibility for their application to restore not having been progressed to an earlier hearing before the Court, *"the lion's share of the blame"* for the delay lay with the Registry of the Court which took no steps to list it for hearing by the Court until *after* the Applicants filed an Amended Motion on 15 September 2022.

38. More importantly, at paragraph [88], after considering the prospects of success of the liability appeal, we found that given the state of the Respondent's pleadings at trial, which had ostensibly been based on professional negligence as opposed to breach of contract, the Applicants' prospects of success of the appeal are neither hopeless or frivolous.

39. We are mindful of the fact that the application to restore was in essence an interlocutory step in the appellate proceedings which appeal, having now been restored, is still to be substantively heard by the Court. Though the Applicants were successful in having their appeal restored, whether they will ultimately be vindicated following the appeal remains an open question.

40. Rules of court invariably provide a mechanism whereby litigants whose appeals have been dismissed or struck-out (whether for non-appearance or for non-compliance) may approach the court on application to have their appeals reinstated or restored. Except in the case of an application to extend time, which as we have seen is governed by its own costs rule, the usual rule is that costs shall follow "the event."

41. **Order 59, r. 3(2)** therefore anticipates that a successful applicant is entitled to expect that he will obtain an order for his costs unless the Court otherwise orders. The mere fact that an appeal has been dismissed for want of prosecution or for non-compliance with a court order and necessitated an application to the Court to have the appeal restored or reinstated, does not *ipso facto* deprive the successful applicant of the benefit of the usual rule. Indeed, where (as here) *"the event"* is the successful outcome of an application which is provided for in the COA Rules themselves, the successful party has a reasonable expectation of obtaining an order for his costs to be paid by the opposing party. However, the question whether a successful litigant ought to be deprived of the costs of his application is entirely a matter for the exercise of judicial discretion, given the circumstances of each individual case.

42. It cannot be denied that (quite unlike the applicants in **Gaydamak**) the Applicants in this case are not blameless. They obviously missed the Registrar's deadline for filing the record by 1 day. Additionally, as we also found, they failed to take any steps to follow-up or take any steps to prompt the Registrar to list the restoration application for hearing or to apply for a stay of the assessment proceedings in the court below.

43. That said, we do not think that an award of costs to the Applicants or to the Respondent at this interlocutory stage of the proceedings will do justice between the parties in this case. This is because we are completely satisfied that <u>both</u> parties have contributed to the unnecessary litigation and expense which has obviously occurred in this case.

44. Based on what we were told during the hearing of the restoration application, we are satisfied that the Respondent, in full knowledge of the fact that an appeal against liability had been filed in the Court of Appeal, pressed ahead with an assessment of damages in the court below, despite having been apprised of the fact that a Motion to restore had been filed and was awaiting a date to be fixed. It seems to us that the Respondent took a calculated decision to press on with the assessment proceedings in the court below which he must have known would ultimately lead to additional litigation and expense.

45. The result is that both parties must share some responsibility for the fact that, quite apart from the Motion to restore and its associated costs application, there is also pending before this Court two separate but related appeals relating to what was once a single matter in the court below. There has also been unnecessary duplication in that both time and effort have thus far been expended with the parties appearing before the Registrar for the settling of two separate records of appeal for two aspects of what ought to have been one appeal before this Court.

46. Having given this matter our anxious consideration, we agree with Mrs Strachan that in the circumstances of this particular case, justice between the parties will be served by dispensing with the usual rule in **O.59, r. 3(2)** and instead making an order that the costs of the restoration application shall be *"costs in the cause"*. This means that the costs of the interlocutory proceedings (in this case, the restoration application) are to be awarded according to the final award of costs to be made following determination of the substantive appeals.

47. We turn now to the extension of time application.

Costs of the extension of time application

48. Despite the submissions of both Counsel to the contrary, there is no doubt that our discretion to award costs in respect of the Applicants' extension of time application is to be exercised against the background of **O. 59, r. 3(4).** Applying the rule, this means that the Respondent's costs of and occasioned by the application are to be borne by the Applicants as the party making the extension of time application, unless the Court is convinced that there are good reasons why they ought not to bear such costs.

49. In the face of **O. 59, r. 3(4)**, Mr Mackay's submission that costs should *"follow the event"* and that the Applicants be thereby awarded the costs of and occasioned by their extension of time application is clearly misguided.

50. Equally misguided is Mrs Strachan's submission that the usual rule be dispensed with and that costs of the extension of time application be *"costs be in the cause."* It need hardly be said that if such an order were to be made, it would not only be contrary to **O. 59, r. 3(4)** but it would deprive the Respondent of costs which he ought ordinarily to receive under the rule.

51. We have examined a number of previous costs decisions emanating from this Court which appear to show that in the exercise of its broad discretion under **rule 24(5)** of the COA Rules, the Court has in some cases, evidently in keeping with the mandate of **O. 59, r. 3(4),** ordered the costs of and occasioned by an extension of time application to be borne by the applicant. [See for example: **Elizabeth Collie v. Lady Henrietta St. George** SCCivApp. No. 133 of 2021 decided on 27 January 2022; **Keithrell Hanna v. Wendy Willis Johnson** SCCivApp. No. 61 of 2022 decided on 22 September 2022; and **Rosina Smith v. Fidelity Bank (Bahamas) Ltd** SCCivApp. No. 94 of 2021 decided 14 November 2022, where the respective applicants were all ordered to pay the respondents' costs of and occasioned by their respective extension of time applications.]

52. In other cases, the Court appears to have exercised its discretion to dispense with the rule and has made no order as to costs at all. In **Navette Broadcasting & Entertainment Co Ltd v. Utilities Regulation & Competition Authority** SCCivApp. No. 117 of 2019, the

Court appears to have dispensed with the rule and to have exercised its discretion to make no order as to costs.

53. Having considered the matter, we have found no reason to depart from the rule governing the award of costs in extension of time applications which is set out in **O. 59, r. 3(4).** In the result, the Applicants shall bear the Respondent's costs of the extension of time application, such costs to be taxed, if not agreed.

Disposition

54. In summary, we make the following costs orders in respect of the Applicants' Amended Notice of Motion: (i) costs of the restoration application shall be costs in the cause; and (ii) the Applicants shall bear the Respondent's costs of and occasioned by the application to extend the time, such costs to be taxed, if not agreed.

The Honourable Madam Justice Crane-Scott, JA

55. I agree with this Decision on costs.

The Honourable Mr Justice Jones, JA

56. I also agree with this Decision on costs.

The Honourable Sir Brian Moree, JA