COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 145 of 2023

B E T W E E N

SUMMIT INSURANCE LIMITED
Appellant

AND

INSURANCE MANAGEMENT (BAHAMAS) LIMITED
Second Appellant

AND

ISLAND HERITAGE INSURANCE CO.
Third Appellant

AND

BOLINGBROKE LIMITED
Respondent

BEFORE: **The Honourable Madam Justice Crane-Scott, JA**
The Honourable Mr. Justice Evans, JA
The Honourable Mr. Justice Smith, JA

APPEARANCES: **Mrs. Viola Major with Ms. Camille Cleare, Counsel for the Appellants**

Mrs. Vanessa Smith with Ms. Alicia Gibson, Counsel for the Respondent

DATES: **4 March 2024; 23 April 2024**

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Civil appeal – Appeal against costs order – Costs – General rule is that costs follow the event – Discretion as to costs – Who was the successful party – Calderbank letter – Payment into court - Order 59 of the Rules of the Supreme Court - Rule 71.6 of the Civil Procedure Rules

The Respondent filed an action against the Appellants claiming a true and correct accounting of fees due under an insurance policy and/or an indemnity under the said policy between it and the Appellants. There was no issue as to liability. The parties could not agree, however, on the appropriate sum to be paid to settle the claim. Attempts by the Appellants to settle the claim proved futile. Those attempts to settle include the issuance of two Calderbank letters ($450,000.00 – 23 October 2017 and $500,000.00 – 3 April 2018) and a payment into court ($550,000.00 – 30 April 2018).

On 25 February 2021, the court below dismissed the action as against the Second Appellant and awarded it its costs of the action to be determined at the end of the trial.

At the conclusion of the trial, the learned judge delivered judgment for the Respondent in the amount of $182,015.48, but ordered each party to bear their own costs. This is an appeal, pursuant to the leave of the court below, against the costs order.

The Appellants submit that the judge erred in awarding each party to bear their own costs for the following reasons: i) liability was not in issue, only quantum; ii) none of the various applications made by the parties throughout the litigation resulted in the Appellants having to pay costs to the Respondents, rather, the Appellants were awarded their costs, only to be available if they succeeded in the action; iii) the sum awarded was significantly less than the payment into Court; iv) the issuance of two Calderbank letters; v) the costs award to the Second Appellant on 25 February 2021 had the effect of making it entirely successful on all causes of action pleaded.

For reasons outlined in the judgment, following the Order Settling the Record, the Appellants applied for an extension of time to comply with the Order. They sought a further extension of time to serve the Notice of Appeal.

Held (Smith, JA concurring on the Extension of Time applications, dissenting in part on the substantive appeal): extension of time granted to permit compliance with the Order Settling the Record and to permit the service of the Notice of Appeal out of time; the Appellants are to pay the costs of both applications. The substantive appeal is allowed and the Order for costs made by the court below is set aside. The costs incurred in the trial below are to be paid by the Respondent, to be taxed if not agreed. The costs of the appeal are awarded to the Appellants, to be taxed if not agreed.

per Evans, JA: The basis of the Appellants' appeal is that the trial judge, in making his Order for costs, did not reasonably exercise his discretion.

The general rule is that at the conclusion of a hearing, costs follow the event with the result being that a successful party is awarded his costs of the proceedings, unless there are special circumstances which may militate against the usual order being made**.**

The award of costs depends on the exercise of the court's discretion. That discretion is an unlimited discretion to make what order as to costs the court considers that the justice of the case requires but it is to be exercised judicially, not arbitrarily; that is to say in accordance with established principles and in relation to the facts of the case.

It is not unusual in cases where, after considering the circumstances of a case, a court may find that there was no clear winner in a trial. It is also not unusual to find that the order made in such cases is likely to be that both parties will bear their own costs. This is not such a case.

In the present case, the facts point clearly to the Appellants being the successful parties as they succeeded on every material issue which was raised. There is merit in all of the grounds of appeal.

Bernard Schulte Shipmangement (Cyprus) Ltd. v. Ritchie and another [2015] 3 BHS J. No. 152 mentioned
Douglas Ngumi v The Hon. Carl Bethel et. al. SCCivApp. No. 6 of 2021 considered
F & C Alternative Investments (Holdings) Ltd and others v Barthelemy and another [2012] EWCA 843 considered
Findlay v Railway Executive [1950] 2 All ER 929 considered
Painting v University of Oxford [2005] EWCA Civ 161 considered
Straker v Tudor Rose (a firm) [2007] EWCA Civ 368 considered
Volpi and another v Volpi [2022] 4 WLR 48 considered

per Smith, JA: The usual order under the modern practice is that where in an action for unliquidated damages the Plaintiff is awarded damages which are less than the sum paid into court, "the plaintiff should have his costs up to the time of payment in and the Defendant should have his costs thereafter".

It was only the payment into court which effectively gave rise to the discretion to vary the usual order that costs follow the event, not the issuance of the Calderbank letters.

The appropriate Order on the facts of this case is that the Respondent should have been awarded its costs in the court below against the First Appellant and the Third Appellant up to the date of the payment into court, namely 30 April 2018. The First and Third Appellants should have been awarded their costs in the court below from after the date of this payment into court, namely 1 May 2018. The Second Appellant should receive all its costs of the action below.

Cutts v Head and anor. [1984] 1 ALL ER 597 considered
Hultquist v Universal Pattern and Precision Engineering Co. Ltd. [1960] 2 ALL ER 266 mentioned

J U D G M E N T

Judgment delivered by the Honourable Mr. Justice Evans, JA:

Background

1. The matter before us relates to a dispute between the Intended Respondent (Bolingbroke) and the Intended Appellants (the Insurers) who were at all material times the Insurers of the Intended Respondent.

2. On 14 June 2017, Bolingbroke filed a Writ of Summons concerning claims arising out of and connected with an insurance policy (HOM10-159951-U) it entered into with the Insurers concerning property known as Jacaranda in Lyford Cay, New Providence, The Bahamas and the damages sustained to the property as a result of Hurricane Matthew. Bolingbroke claimed, inter alia, a true and correct accounting of fees due under the insurance policy and/or an indemnity under the said policy to compensate [Bolingbroke] for damages sustained to the property and recovery of monies due under the insurance policy of $1,465,428.00 or alternatively damages.

3. It is important to note that there was no issue as to liability as the parties made attempts to settle the claim but could not agree on the appropriate sum to be paid. In March 2017, the loss adjuster, Nick Croon, offered Bolingbroke $150,000.00 to settle the building claim, which offer was not accepted. The Insurers also offered $189,123.00 to settle the contents claim, so the total offer made to Bolingbroke Limited, prior to the litigation commencing was $339,123.00.

4. The demand before action dated 21 May 2017 claimed $1,610,428.00. In a further attempt to settle the claim on 23 October 2017, the Insurers issued a Calderbank letter in the amount of $450,000.00. This was increased on 3 April 2018, to $500,000.00. When the offer of $500,000.00 was rejected the Insurers, on 30 April 2018, paid the sum of $550,000.00 into Court.

5. Bolingbroke made an application for Judgment on admissions which was made by Summons dated 14 May 2018. The matter was heard by the Hon. Chief Justice Sir Ian Winder who, in a judgment dated 28 September 2018, ordered that:

> **"8) …(1) judgment be given against the Defendants on the issue of liability under the policy for damages sustained to its property as a result of Hurricane Matthew such damages to be assessed. Such assessment to include a**

determination as to whether the plaintiff is to be compensated on an indemnity basis or on a valuation basis.

(2) all other claims alleged in the Statement of Claim to be held over to trial."

6. On 18 February 2021 the Second Intended Appellant (IMB) applied by Summons to strike out the action as against it because Bolingbroke indicated it was no longer pursuing its claims against it. On 25 February 2021 the Supreme Court ordered, inter alia, that the action was dismissed as against IMB and that IMB is "**entitled to its costs of the Action to be determined by the Court at the end of the Trial".**

7. The trial was heard over the period of 12 - 13 October 2021, 29 March 2022, 8 April 2022 and 6 - 8 May 2022. On 1 March 2023, the Hon. Chief Justice Sir Ian Winder delivered judgment for Bolingbroke Ltd. in the amount of $352,052.00 and invited the parties to make submissions as to the appropriate costs order. After hearing further submissions on 27 June 2023, the learned Chief Justice amended the judgment sum to $182,015.48 and ordered that each party bear their own costs of the action.

8. Both sides, feeling aggrieved by the decision, filed appeals. By a Notice of Appeal filed on 12 April 2023, Bolingbroke Ltd. appealed the decision of 1 March 2023 (i.e. Civil Appeal No. 78 of 2023); and by Notice of Appeal filed on 1 August 2023, the Insurers appealed the costs order of 27 June 2023 (i.e. Civil Appeal No. 145 of 2023).

9. The matters progressed to the stage of the Settling of the Record, where it was agreed that the appeals would be heard together, and directions were given relative to the preparation of the Record. However, on 11 October 2023, Bolingbroke filed a Notice of Withdrawal of Civil Appeal No. 78 of 2023. This left only the Intended Appellants' appeal against the costs order.

THE APPLICATIONS BEFORE THIS COURT

10. When the parties appeared before us on 4 March 2024 two applications were heard. The first was made by Summons dated 23 November 2023 pursuant to Rule 9 (1) (a) of the Court of Appeal Rules, seeking leave to extend the period within which to file the Record of Appeal, deposit the Bond in the amount of Two Thousand Five Hundred Dollars ($2,500.00), and file the Affidavit of Compliance.

11. The second application was made by Summons pursuant to Rule 9 (1) (a) of the Court of Appeal Rules, seeking leave to extend the period within which to serve the Notice of Appeal in Civil Appeal No. 145 of 2023. This Summons was dated 27 February 2024.

12. It was also intimated by Counsel that if we were minded to grant the two extensions sought, we should consider proceeding with the substantive appeal, based on the Notice of Motion which had been filed on 1 August 2023.

13. We heard from Mrs. Major on the applications for extension. It was not disputed that the Notice of Appeal Motion was filed within time, but by inadvertence was not served within the prescribed time frame. Mrs. Major acknowledged that it ought to have been served on or before 8 August 2023. It was not served until 26 February 2024, a period of 202 days, just shy of 29 weeks.

14. In the face of the long delay, Mrs. Major relied on the prospects of success and the absence of prejudice. She contended that the Insurer's intended appeal relates to the trial judge's decision on costs and had been the subject of a Summons for leave to appeal in the court below. Leave was granted, and attached to that said Summons was a copy of the draft Notice of Appeal. Those grounds which were contained in the draft Notice are the same grounds that were then filed by the Insurers. The said filed Notice was used in preparing the appeal without realizing that although filed, it had not been served. Mrs. Major contends that in these circumstances the Respondent was aware of the document and its contents and had not been taken by surprise.

15. Mrs. Major made comprehensive submissions relative to the prospects of success. At the end of her submissions, we enquired of Mrs. Smith whether, having heard those submissions, she was still of the view that she could reasonably argue that the proposed appeal had no prospects of success. Mrs. Smith, to her credit, accepted that the position relative to IMB was indefensible as it was clear that the learned Judge had overlooked the fact that he had previously held that IMB was entitled to its costs of the action to be determined by the court at the end of the trial. Further, as I understood her, while not conceding that the other grounds of appeal would succeed, she could not contend that they were not arguable.

16. After considering the submissions from both parties, we granted the Orders permitting the filing of the Record and the Notice of Appeal notwithstanding that the prescribed time had elapsed.

17. In those circumstances as both sides had provided comprehensive submissions relative to the substantive appeal, we proceeded to hear the substantive appeal.

THE JUDGMENT APPEALED AGAINST

18. The learned Chief Justice's reasons for making the costs order that he did are contained in the following paragraphs of his decision:

> **"4. In finding for the Plaintiff in the amount of $182,015.48, the court has determined that it has a measure of success. The Plaintiff however has lost on a number of the issues fought in the action. In the English**

Court of Appeal decision in Re Elgindata Ltd [1992] 1 WLR 1207 at 1213, the applicable principles, in deciding an appropriate order for costs, were stated as follows:

> **"The principles are these. (i) Costs are in the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs."**

5. The starting point is therefore the general rule, that costs should follow the event and that the successful party ought to be paid their costs unless there are cogent reasons to depart from this rule. In my view however, the Plaintiff lost as many issues as it won. The amount awarded is a mere fraction of the sum claimed. Each party ought therefore to bear their own costs in pursuing the action. This accords with a recent decision of the Court of Appeal in the case of Douglas Ngumi v Carl Bethel [2020] 1 BHS J No 103 (confirmed on appeal to the Privy Council) where the appellant Ngumi was successful in obtaining an award of $750,950 (up from the $641,000 awarded by the trial judge). In the appeal Ngumi had contended for a sum of $11,000,000 and the Court of Appeal determined that the appropriate Order for costs would be for no order as to costs."

THE APPEAL

19. The Insurers rely on the following grounds of appeal:

> **"1. The Learned Judge misdirected himself and erred in law when he failed to consider, or give proper consideration to, the fact that prior to the commencement**

of the action, the Appellants offered to settle the Respondent's insurance claim for a reasonable sum, and that the Respondent unreasonably refused to accept the offer of settlement.

2. The Learned Judge misdirected himself when he failed to consider, or give proper consideration to, the fact that after the commencement of the action, the Appellants made two further offers to settle the action, on 23rd October 2017 and 3rd April 2018, both of which greatly exceeded the judgment amount eventually awarded to the Respondent, and that the Respondent unreasonably refused to accept either offer of settlement.

3. The Learned Judge misdirected himself when he failed to consider, or give proper consideration to, the fact that on 15th February 2018, when the Court dismissed the Respondent's application for an interim payment and the Respondent's application to strike out certain paragraphs of the Defence, it ordered that the Appellants receive their costs of the applications, to be available only if the Appellants were successful in the action.

4. The Learned Judge misdirected himself when he failed to consider, or give proper consideration to, the fact that on 30th April 2018, the Appellants made a payment into court of $550,000.00, which sum greatly exceeded the judgment amount eventually awarded to the Respondent, and that further, on 24th July 2019, when the payment into court was, by consent, ordered to be paid out to the Respondent, the Court also ordered that the payment still be taken into account as to the issue of costs upon completion of the assessment of damages.

5. The Learned Judge misdirected himself when he failed to consider, or give proper consideration to, the fact that the Appellants, by Summonses filed 20th July 2020 and 24th July 2020 respectively, made successful applications for specific discovery and for further and better particulars of the Amended Statement of Claim, and that on 1st December 2020 the Appellants were awarded their costs of the applications, to be available only if the Appellants were successful in the action.

6. The Learned Judge misdirected himself when he failed to consider, or give proper consideration to, the fact that on 25th February 2021, the action was dismissed as against the 2nd Appellant, Insurance Management (Bahamas) Limited, and that the 2nd Appellant was entitled to its costs of the Action to be determined by the court at the end of the Trial, thereby making the 2nd Appellant entirely successful on all causes of action pleaded.

7. The Learned Judge misdirected himself in law when he failed to consider, or give proper consideration to, the fact that a number of the causes of action pleaded by the Respondent in their Amended Statement of Claim were eventually abandoned by the Respondent at Trial, thereby making all three Appellants entirely successful on those causes of action.

8. The Learned Judge erred in law, and/or in fact, when he failed to find that that (sic) the Appellants were the successful parties in the action and neglected to award the Appellants their costs of the action; having disregarded the fact that the Appellants were successful on the main issues raised in their Defence, namely that the condition of average applied, that the contents claim was neither pleaded nor proved, and that, liability under the policy never having been disputed, the value of the Respondent's proven claim was much closer in value to the Appellant's valuation than the Respondent's valuation.

9. Any other ground that the Court may deem just and equitable."

20. To my mind the two issues raised by this appeal are (1) who was the successful party? and (2) was there a basis for depriving that party of its costs? It is clear that notwithstanding the multiplicity of grounds, when considered as a whole, the grounds all point to the Insurer's contention that the trial judge, in making his order for costs, did not reasonably exercise his discretion. In considering this issue I must begin by acknowledging that as a Court of Appeal we are limited in our ability to set aside a judge's decision based on the exercise of a discretion vested in him. In **F & C Alternative Investments (Holdings) Ltd and others v Barthelemy and another** [2012] EWCA 843 it was stated at paragraph 42:

> **"[42] Decisions on costs after a trial are pre-eminently matters of discretion and evaluation. Further, it is particularly important to bear in mind that a trial judge — especially after a trial such as this one — will have a knowledge of and feel for a case which an appellate court cannot begin to replicate. The ultimate test, of course, for the purposes of an appeal of this kind is whether the decision challenged is wrong. But it is well established that an appellate court may only interfere if the decision on costs is wrong in principle; or if it involves taking into account a matter which should not have been taken into account or failing to take into account a matter which should have been taken into account; or if its plainly unsustainable."**

21. Similar sentiments were expressed by the Court of Appeal in **Straker v Tudor Rose (a firm**) [2007] EWCA Civ 368 at paragraph 2 on an appeal as follows:

> **"[2] The key issue is whether the judge misdirected himself. It is well known that this court will be loath to interfere with the discretion exercised by a judge in any area but so far as costs are concerned that principle has a special significance. The judge has the feel of the case after a trial which the Court of Appeal cannot hope to replicate and the judge must have gone seriously wrong if this court is to interfere."**

22. Prior to the introduction of the Civil Procedure Rules (CPR), Order 59 rules 2 and 3 of the Rules of the Supreme Court (RSC) provided that:

> **"59 2. (2) The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order.**
>
> **…**
>
> **3. (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 in the Supreme Court shall, subject to this**

Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made…." [Emphasis added]

23. With the introduction of the CPR the principle remains essentially the same:

"71.6 Successful party generally entitled to costs.

(1) Where the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.

(2) The court may, however, make no order as to costs or, in an exceptional case, order a successful party to pay all or part of the costs of an unsuccessful party." [Emphasis added]

24. However, based on section 4 of the CPR, since this action was commenced before the date of commencement of the CPR, the former 1978 RSC would apply. (i.e. O 59 r.3(2):

Order 59 RSC r. 3(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, the Court shall, subject to this Order, order the costs to 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."

25. It is generally accepted, and the authorities confirm, that this discretion, although wide, is not to be exercised arbitrarily but must be exercised judicially. This requires the court to act in accordance with established principles applied to the relevant facts of the case. The general rule, as I understand it, is that at the conclusion of a hearing, costs follow the event with the result being that a successful party is awarded his costs of the proceedings, unless there are special circumstances which may militate against the usual order being made: see **Bernard Schulte Shipmangement (Cyprus) Ltd. v. Ritchie and another** [2015] 3 BHS J. No. 152.

26. It follows that whereas a successful party has a reasonable expectation of obtaining an order for his costs to be paid by the opposing party he has no right to such an order, for it depends on the exercise of the court's discretion. That discretion is an unlimited discretion to make what order

as to costs the court considers that the justice of the case requires. As noted earlier this means that 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.

27. In my view, the foregoing would also require that wherever, a successful party is deprived of his costs it is expected that cogent reasons would be provided to explain why that has occurred. It would otherwise leave room for the view that the decision was arbitrary. Where reasons are provided, an appellate court can then determine whether those reasons involved matters which ought or ought not to have been considered and/or the decision is plainly wrong.

28. There were a number of factors which Mrs. Major submitted to us as being relevant to the Judge's decision. I will deal with each in turn.

(a) Liability was never in issue

29. In March 2017, the Appellants offered Bolingbroke $150,000.00 to settle the building claim, which offer was not accepted**.** Bolingbroke issued a demand before action dated 21 May 2017 claiming $1,610,428.00. The Appellants, by letter dated 27 May 2017, reiterated the fact that the insurers had always accepted liability for a claim under the Policy, but disputed the amount of $1.6M claimed.

30. On 14 June 2017, Bolingbroke commenced the Supreme Court action against one of the co-insurers (Summit) and the Agent (IMB) pleading serious claims of breach of contractual duty, material non-disclosure, and/or repudiation, conflict of interest by Cedric Saunders, a claim that the deductible was 10% of the claim and not the sum insured, pre-action legal fees in the amount of $145,000.00, and valuation of the hurricane damage sustained to Bolingbroke's property in the amount of $1,610,428.00.

31. Summit and IMB each filed a Defence to the Statement of claim on 7 July 2017. In those Defences they each admitted that Bolingbroke had sustained damages during Hurricane Matthew and that the damage to the properties were covered by a valid insurance policy with their companies. They further accepted that Bolingbroke had made claims which were accepted and that they were prepared to pay compensation.

32. The Insurers' position is best set-out at paragraph 14 of each of the the Defences in the following terms:

> **"14. … Summit [insurers] admitted liability for the claim immediately and, in an effort to resolve the matter, has accepted the gross estimated building repair costs proffered by Bolingbroke by email, dated 22nd December 2016, in the amount of "maximum $600,000.00". It**

> **[Insurers] then applied the catastrophe deductible of $450,000.00, with no average penalty for underinsurance, and offered the net amount of $150,000.00 to Bolingbroke. Likewise, the contents claim was accepted in full as presented to Summit and Island Heritage, less the deductible under the policy, resulting in a net offer of $189,123.00."**

33. This paragraph which was essentially the same in both of the defences clearly showed that liability was accepted, and the only issue was that of quantum. Further, it was clear that the learned Chief Justice was aware of this fact as gleaned from the opening paragraph of his Judgment (1 March 2023) where he stated as follows:

> **"This is essentially the assessment of damages with respect to an insurance claim brought against the First and Third Defendants (the Defendants) by its insured, the Plaintiff (Bolingbroke). The Defendants, by judgment entered on 28 September 2018, have admitted liability for the claim of Bolingbroke."**

(b) The various applications during the preparation for trial

34. Mrs. Major submitted that throughout this litigation, various interim applications were made by the parties. None of the interim applications resulted in any order that the Insurers pay costs to Bolingbroke. Conversely however, four of the Summonses resulted in orders that the Insurers receive their costs of the applications, to be available only if the Insurers were successful in the action. This position was not challenged by Mrs. Smith in her response.

(c) The payment into court

35. The undisputed evidence is that the Appellants paid the sum of $550,000.00 into Court. Bolingbroke, at trial, was awarded the sum of $182,015.48 which fell far short of the sum paid into court. Mrs. Major referred us to the White Book at Note 22/5/3:7 where the general rule is stated as follows:

> **"Subject to the provisions of section 50 of the Judicature Act, 1925, and to O. 62, r. 2(4), infra, the Court has a complete discretion as to costs. Rule 5(b) of O. 62 provides that in exercising its discretion as to costs the Court shall, to such extent, if any, as may be appropriate in the circumstances, take into account any payment of money into Court and the amount of such payment. The discretion, however, must be exercised judicially, so that a defendant who pays money into Court which exceeds**

> **the sum awarded to the plaintiff is the successful party, and as such is entitled to be paid his costs from the date of the payment in (Findlay v Railway Executive, [1950] 2 ALL E. R. 969, C.A.). He can only be deprived of such costs by the proper exercise of judicial discretion upon proper materials arising out of the instant litigation or the conduct of it; he cannot be deprived of his costs for no reason (Findlay v. Railway Executive, supra), or upon no or insufficient materials, e.g., because the Judge had considered giving a larger sum than he had eventually awarded (Wagman v. Vale Motors, Ltd., [1959] 1 W.L.R. 853, C.A.).”**

(d) Calderbank Letters

36. Another factor identified by Mrs. Major is the fact that the Appellants issued Calderbank letters with a view to resolving the dispute between the parties. The first was issued on 23 October 2017 for the sum of $450,000.00, and the second on 3 April 2018 in the sum of $500,000.00. As is well known a Calderbank Letter is a letter containing a settlement offer and written **"without prejudice save as to costs"**, that is with the express reservation of the right to refer the letter to the court on the question of costs if the offer is not accepted. She contended that these letters cannot be ignored when considering the issue of costs.

(e) The costs awarded to IMB on 25 February 2021

37. On 25 February 2021, the action was dismissed as against IMB, and the court ordered that IMB was entitled to its costs of the action to be determined by the court at the end of the trial. Mrs. Major argued that this had the effect of making IMB entirely successful on all causes of action pleaded.

DISCUSSION/ANALYSIS OF THE GROUNDS

38. In considering the submissions of Mrs. Major and the grounds upon which she relies, I glean that her position is that the learned Chief Justice failed to consider the factors which she has identified as being relevant for his consideration. The result, she contends, is that he arrived at a decision which was plainly wrong. Grounds 1-7 set out the complaints relative to the factors which Counsel contends were not considered by the learned Chief Justice. She contends that the fact that his Decision is devoid of any reference is sufficient to show that those factors were not considered. Ground 8 challenges the decision as being plainly wrong.

39. Mrs. Smith, in response, contends that having considered that the Respondent was the successful party, His Lordship departed from the usual order that costs should follow the event for what are described as “cogent reasons”. In support of this submission she noted that at paragraph 14 of her written submissions:

"14. …At paragraph 5 of the Cost Decision His Lordship held as follows:

> **'The starting point is therefore the general rule, that cost should follow the event and that the successful party ought to be paid their costs unless there are cogent reasons to depart from this rule. In my view however, the Plaintiff lost as many issues as it won. The amount awarded is a mere fraction of the sum claimed. Each party ought therefore to bear their own costs in pursuing the action… (emphasis added)'"**

40. Mrs. Smith in her written submissions further contends that:

> **"20 … the Court took all of the factors into consideration, including the Calderbank offers, the interim decisions on costs, the payment into court and whether IMB should be paid costs. While His Lordship did not specifically set out all of his "cogent reasons" for departing from the usual cost order it cannot be said that he would not have considered all of the factors as the parties made substantive submissions on the abovementioned factors and all of the relevant facts were before the judge for his consideration in determining the appropriate order for costs.**
>
> **21. While the Respondent accepts that where a Calderbank offer is made and/or a payment is made into court, the court would usually order costs to the party making the offer or payment into court from the time that the offer or payment was made if the final award is less than the offer or payment, we humbly submit that the Court properly exercised its discretion to depart from this order.**
>
> **22. His Lordship ultimately found that the Respondent was not completely successful in the pursuit of its action but had some degree of success exercised his judicial discretion in departing from the usual costs order by requiring that both parties bear its own costs of the action. This rationale is clearly within the ambit of reasonable decisions open to the judge based on the facts of the case. This accords with the decision of this Court in**

> **Douglas Ngumi where the court, using its discretion, departed from the usual costs order and made no order as to costs in circumstances where there was no clear winner."**

41. After taking us through various authorities on the principles relative to how this Court should deal with a trial Judge's exercise of the discretion to award costs, Mrs. Smith concluded as follows:

> **"29. As the trial judge with carriage of the entirety of the action from inception, His Lordship is best placed to make the decision on costs. His Lordship had before him substantive costs submissions made by both parties and accordingly considered all of the factors when making the Cost Decision. This Honourable Court ought not to interfere with the Cost Decision as the reasoning given is based entirely on the way the case was presented and pursued before the Supreme Court".**

42. I am aware of the English decision of **Volpi and another v Volpi** [2022] 4 WLR 48 where the court observed that:

> **"2 … (iii) an appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.'**

However, in my view, there are compelling reasons which lead to the conclusion that the learned Chief Justice did not consider the whole of the evidence in arriving at his decision in this matter.

43. As noted earlier, notwithstanding the wide discretion which is vested in a trial judge to award costs, the general rule, as I understand it, is that at the conclusion of a hearing, costs follow the event with the result being that a successful party is awarded his costs of the proceedings, unless there are special circumstances which may militate against the usual order being made. It follows that to properly exercise his discretion the learned Chief Justice was required to begin by determining who the successful party was.

44. I agree with Mrs. Major that the factors identified by her were relevant considerations. The decision is unhelpful in that it fails to address any of the factors, save for the interlocutory applications. Counsel contends that if the learned Chief Justice had considered those factors his decision would have been different.

WHO WAS THE SUCCESSFUL PARTY?

45. It is common ground between the parties that as between Bolingbroke and IMB, IMB was the successful party and that the learned Chief Justice fell into error by overlooking the fact that he had previously made that determination and awarded costs to IMB. It follows that Ground 6 of the Notice of Appeal must succeed.

46. Secondly, the cumulative effect of the letters of offer to settle, the letter dated 27 May 2017, reiterating the acceptance of liability for a claim under the Policy, but disputing the amount claimed, and the admission of liability in the Defences filed show that the only issue between the parties was quantum. In the circumstances, where Bolingbroke claimed $1.6M but was awarded only $182,015.48 it is difficult to rationalize the finding by the learned Judge that Bolingbroke had "**a measure of success."**

47. However, it is clear that the learned Chief Justice operated on the basis that Bolingbroke was the successful party. He then proceeded to deviate from the general rule on the basis that there were special circumstances which militated against the usual order being made. He identified those circumstances as follows:

> **"5. …In my view however, the Plaintiff lost as many issues as it won. The amount awarded is a mere fraction of the sum claimed. Each party ought therefore to bear their own costs in pursuing the action…".**

48. In my view, the learned Chief Justice fell into error in not focusing on the success of the Appellants. They were successful on the main issue which was before the court i.e. the quantum of damages. This ought to have been the starting point and the factors identified above would then be relevant in determining to what extent the general rule would apply.

49. The Appellants were vindicated on the issue as to quantum. They were successful on interlocutory applications and four of the Summonses resulted in orders that the Insurers receive their costs of the applications, to be available only if the Insurers were successful in the action. They also failed on the claims that the Insurers breached their respective duties to carry out the proper assessment of the claim; that the Insurers were guilty of intentionally delaying and/or frustrating the claims process or otherwise acting in bad faith and in breach of duty; the claims in relation to conflict of interest; and in relation to claims made by Bolingbroke that the Insurers did not properly explain how the deductible worked. Those are all issues which were held over to trial and ultimately Bolingbroke did not succeed on any of those additional claims that were made.

50. Mrs. Major contends that the fact that there were these claims made by Bolingbroke on which they were not successful, separate and apart from the issue of valuing the damage under the policy is a factor that ought to have been referred to and ought to have weighed in the Insurers' favour when it came to the court's determination on costs and it does not appear as though this was done. It follows, she concludes, that the failure to recognize that the appellants were the successful parties in the trial deprived them of these costs.

51. The other two factors not dealt with in the Decision were the Calderbank letters and the payment into court. Both of these had implications for costs which were required to be addressed in determining the award of costs. Mrs. Major submitted that by ordering each party to bear their own costs, the learned Chief Justice ordered that the costs burden be shared equally. Such a position, she contends, does not appropriately reflect the reality that all, or the vast bulk, of the litigation would have been avoided, had Bolingbroke accepted the early settlement offers made by the Insurers. Effectively, in ordering the Insurers to bear their own costs, they have been heavily penalized, despite the fact that they bear no fault.

52. Mrs. Major further submits that the learned Chief Justice also failed to consider, or give proper consideration to, the payment into court made by the Insurers on 30 April 2018. Counsel argues that in considering the award of costs a court is required to have regard to any payment made into court. Relying on the case of **Findlay v Railway Executive** [1950] 2 All ER 929, she noted that the general rule is that a Defendant who pays money into court which exceeds the sum awarded to the Plaintiff is the successful party, and as such is entitled to be paid his costs from the date of the payment in. He can only be deprived of such costs by the proper exercise of judicial discretion, upon proper materials arising out of the instant litigation or the conduct of it; he cannot be deprived of his costs without a good reason for doing so.

53. Counsel contends that notwithstanding this well-known provision, the learned Chief Justice made no mention of the payment into court in his decision on costs. It followed, she submits, that in these circumstances there was nothing identified by the learned Chief Justice which caused him to deviate from the general rule.

54. As is noted from his decision, the learned Chief Justice relied on the case of **Douglas Ngumi v The Hon. Carl Bethel et. al.** SCCivApp. No. 6 of 2021 and that position was adopted by Mrs. Smith before us. However, in my respectful view, that case does not assist Bolingbroke in this matter. In **Ngumi** the issue before the Court was an appeal from an award given in the Supreme Court. **Ngumi** was successful on his appeal in that he was able to have his award increased under one head of damages. His other claims for adjustments all failed and he was deprived of his costs because his unsuccessful efforts to have the award increased from $641,000.00 to $11,000,000.00 occupied the majority of the time spent on the appeal.

55. It is not unusual in cases where, after considering the circumstances of a case, a court may find that there was no clear winner in a trial. It is also not unusual to find that the order made in such cases is likely to be that both parties will bear their own costs. This is not such a case. In my

respectful view, the facts point clearly to the Appellants being the successful parties. I am satisfied that there is merit in all of the grounds of appeal and Mrs. Smith properly conceded that the extension of time should be granted. I am further satisfied that having heard full submissions from the parties the appeal should be allowed.

56. Mrs. Major contends that if the learned Chief Justice had given proper consideration to the various settlement offers made by the Insurers, a different costs order would have been made, allowing the Insurers their costs from as early as the date of the initial settlement offer, or from the date of the second settlement offer, which did in fact exceed the judgment sum.

57. In reference to the payment into court, she contends that had the learned Chief Justice given proper consideration to the payment into court, he would have ordered that, at the very least, the Insurers receive their costs from the date of the payment in.

58. It is important to note, however, that having regard to the wide discretion granted to trial Judges to award costs, the principles relative to Calderbank offers and payments into court can extend no further than being general principles. Section 30 of the Supreme Court Act provides that:

> **"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." [Emphasis added]**

59. Order 59.5 (2) of the RSC provides as follows:

> **"59. 5. The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account —**
>
> **(a) …**
>
> **(b) any payment of money, into court and the amount of such payment." [Emphasis added]**

This provision makes it clear that the fact that a payment has been made into court it is a valid and required consideration but is not conclusive.

60. This point is evidenced from the decision in the English Court of Appeal case of **Painting v University of Oxford** [2005] EWCA Civ 161 which related to a claim for damages for personal

injuries. The Defendant made a payment into court and, even though the Plaintiff beat the payment into court, the Court of Appeal still held that the Defendant was the true winner of the action, and the Plaintiff only got her costs up to the date of the payment in and the Defendant got its costs thereafter. The court was of the view that the Plaintiff had greatly exaggerated her claim and there was the strong likelihood that, but for exaggeration, the claim would have been settled at an early stage and with modest costs.

61. In my view, a trial Judge in considering the proper order for costs must give consideration to all of the circumstances of the case including the conduct of the parties. It is clear that there are guiding principles to which a judge must give consideration. Yet, after the judge has taken all the factors into consideration as a guide, he must arrive at an Order which in his view properly meets the justice of the case. This in my view is the ultimate principle which he is bound by. He must be fair to the parties.

62. I accept that in the normal course of these matters a trial Judge will have the knowledge of and feel for a case which an appellate court cannot begin to replicate. However, as shown by the authorities where, as an appellate court, we are satisfied that the trial Judge has not taken advantage of this unique position and has not given consideration to important evidence placed before him, this Court can intervene and reverse an Order for costs. I am satisfied that this is such a case.

63. I am further satisfied that on the totality of the evidence The Insurers were the successful parties at trial. They succeeded before the court on every material issue which was raised. The learned Chief Justice provided no reasons as to why they were deprived of their costs in this matter. From our own review, the evidence shows that the Insurers did everything possible to settle the claim. Offers of settlements were made beginning prior to trial and a payment was made into court. Liability was not contested paving the way for a speedy resolution.

64. In considering the payment into court and the offers to settle, I have taken them into consideration only to the extent that they show the Insurers good faith efforts to settle the claim and avoid a trial. I am satisfied that although Bolingbroke may have had a genuine belief that they were entitled to a greater compensation that does not provide a valid reason for depriving the Insurers of their costs due to them as the successful party.

DISPOSITIONS AND ORDERS

65. An Order permitting an extension of time to comply with the Order Settling the Record is granted and the Appellants are to pay the costs incurred by the necessary application.

66. An Order is also granted permitting the service of the Notice of Appeal notwithstanding that the prescribed time had elapsed. The Appellants are to pay the costs of that application.

67. The substantive appeal is allowed and the Order for costs made by the learned Chief Justice is set aside. The costs incurred in the trial below are to be paid by Bolingbroke, such costs to be taxed if not agreed.

68. The costs of this appeal will be that of the Insurers to be taxed if not agreed.

69. For clarity, the applications for extension were granted based on my view that the appeal had good prospects of success.

The Honourable Mr. Justice Evans, JA

70. I agree.

The Honourable Madam Justice Crane-Scott, JA

Judgment delivered by the Honourable Mr. Justice Smith, JA:

71. I have read the draft judgment of the majority in this matter and do not propose to repeat the factual matrix as set out in that judgment.

72. I also accept most of the reasoning of the majority, however, with all due respect, there is one area on which I disagree with the majority. This is with respect to the date of the orders for costs made against the Respondent (Bolingbroke).

73. I agree that the Order for costs made by Winder C.J. is to be set aside, however, I do not agree that the Appellants should be paid all the costs of the action.

74. I am of the view that Bolingbroke should have been awarded its costs in the court below against the first Appellant (Summit) and the Third Appellant (Island Heritage) up to the date of the payment into court of the sum of $ 550,000.00 namely 30 April 2018. Summit and Island Heritage should have been awarded their costs from after the date of this payment into court, namely 1 May 2018.

75. With respect to the second Appellant (IMB), I agree with the majority that IMB should receive all its costs of the action.

ANALYSIS

76. The usual order under the modern practice is that where in an action for unliquidated damages (as in this matter) the Plaintiff is awarded damages which are less than the sum paid into court, **"the plaintiff should have his costs up to the time of payment in and the defendant should have his costs thereafter"** (see the 1999 White Book at 22/5/7, and 62/9/4 and see the decision of Sellers L.J. in **Hultquist v Universal Pattern and Precision Engineering Co. Ltd.** [1960] 2 ALL ER 266 at page 272 d.)

77. Therefore, an application of the usual order to this case would result in the order that I have suggested at paragraph 74 above.

78. The majority have ordered that the Appellants should have all the costs of this action and may have been persuaded to do so because of the Calderbank letters.

79. In summary, the Calderbank Letters are the 'without prejudice' letters referred to in the majority decision at paragraph 4. These letters are dated 23 October 2017 and 3 April 2018. In these letters, the Appellants made offers to settle the action by the payment of a sum of money with a caveat that the letters are not to be revealed to the trial judge except on the question of costs. The sum of money offered in these letters ($450,000.00 and $500,000.00) exceeded the amount eventually recovered by Bolingbroke ($182,015.48).

80. The Appellants have argued that as a result, the court should vary the normal order that costs should be given to the party who received an award of damages in his favour (Bolingbroke) and to make a different order for costs (See generally the 1999 White Book at 22/14).

81. However, I am of the view that the proper order for costs in the court below in this case is the usual order as suggested at paragraphs 74, 76 and 77 above, namely that Bolingbroke should have its costs up to the date of the payment into court of $550,000.00 (30 April 2018) and that Summit and Island Heritage should have their costs from 1 May 2018.

82. It is my opinion that the Calderbank letters should not, in this case, cause a variation from the usual order that I suggest at paragraph 74 above. I say this for the following 3 reasons.

83. First, as has been accepted since the decision in **Cutts v Head and anor.** [1984] 1 ALL ER 597, a Calderbank letter:

> **"…should not be used as a substitute for payment into court, where a payment in is appropriate, and if so used should not be treated as carrying the same consequences as a payment in." (see the headnote and see also page 610 d-e of the decision).**

84. In the present matter, a payment into court was the appropriate means to vary the usual order as to costs (see Order 59. 5(2) of the Rules of the Supreme Court, cited at paragraph 59 of the decision of the majority), and the Calderbank letters should not, on the accepted practice, be treated as having the same effect as a payment into court in this case.

85. Second, the order on the judgment on admissions which was made by Winder C.J. on 28 September 2018, did not resolve the issues between the parties as it left outstanding the issue of **"a determination as to whether the Plaintiff (Bolingbroke) is to be compensated on an indemnity basis or on a valuation basis."** (see paragraph 5 of the decision of the majority). This meant that even after the date of the last Calderbank Letter (3 April 2018) the issue of the basis of compensation was a triable issue that could have necessitated a substantial hearing. As such, the Calderbank letters did not compromise Bolingbroke's claim.

86. Third, even though the appellants admitted liability for the claim but left the question of quantum unresolved, this did not obviate the need for a trial. It was only after Bolingbroke obtained judgment on admissions on 20 September 2018, that there was no longer a need for them to prove their claim at a trial (even if only as a formality). Once again, the Calderbank letters pre-dated this judgment on admissions and did not compromise Bolingbroke's claim.

87. In the circumstances, it was only the payment into court which effectively gave rise to the discretion to vary the usual order that costs follow the event. Further, in keeping with the usual order which is made in cases of payment into court, Bolingbroke should have its costs up to the date of the payment into court (30 April 2018) and Summit and Island Heritage should have their costs from 1 May 2018.

88. With respect to the IMB, on 25 February 2021 the court made a specific order that IMB was to have its costs of the action against Bolingbroke, with the reservation that such costs were to be determined at the end of the trial.

89. Given the very specific order that was made in favour of IMB there was, in my view, no valid reason for the trial judge to depart from the previous order made and to order that, IMB bear its own costs in the action.

90. I agree with the majority that IMB should have all its costs of the action.

91. For the sake of clarity, I also state that I agree with the orders of the majority that the Appellants are to pay Bolingbroke's costs in respect of the 2 applications for Extension of Time, filed in the Court of Appeal, and that the Appellants are to be awarded the costs of the appeal.

The Honourable Mr. Justice Smith, JA