COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCiv App. No. 118 of 2022

B E T W E E N

RAMON LOP

Appellant

AND

THE ATTORNEY-GENERAL OF THE COMMONWEALTH

OF THE BAHAMAS

THE MINISTER OF IMMIGRATION

DIRECTOR OF IMMIGRATION

Respondents

BEFORE: **The Honourable Sir. Michael Barnett, P**
The Honourable Mr. Justice Isaacs, JA
The Honourable Madam Justice Crane- Scott, JA

APPEARANCES: **Mr. Frederick Smith KC, with Ms. Raven Rolle and Mrs. Doneth Cartwright for the Appellant**

Mr. Kirkland Mackey with Mr. Randolph Dames for the Respondents

DATES: **13 February 2024; 13 March 2024; 20 June 2024**

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Civil Appeal- Costs- Costs follow the event- Rule 24(5) of the Court of Appeal Rules-Appellant largely successful- Courts discretion to order costs

On 13 March 2024, the Court issued a judgment where the appellant, Raymond Lop, was partially successful. The appellant's appeal was allowed on grounds 1, 2, 4(2) and 7 and grounds 3, 5 and 6 were dismissed. The appellant was granted a global award of $396,200 for both periods of unlawful detention, pre-judgment interests at a rate of 2.5% and post-judgment interests at a rate of 6.25% per annum of the global award. The parties were invited make submissions on costs to the court. In his representations, the respondent contended that as both parties had some success, the costs should be divided equally, while the appellant claimed that, as the party who had been more successful overall, he should have been awarded full costs.

Held *(Crane-Scott, JA dissenting)*: The Respondent is to bear 80% of the appellant's costs, to be taxed if not agreed.

Costs is at the discretion of the Court, although this discretion is wide, this discretion should not be used arbitrarily, but must be exercised judicially. In cases of partial success on appeal, the court has discretion to apportion costs based on the relative degree of success, taking into account factors such as abandoned or unsuccessful claims that increased costs. While the successful party typically receives costs, the court may reduce the amount to reflect unsuccessful aspects of the case. Relevant considerations include the importance of the unsuccessful claims, their impact on costs and hearing time, and whether the successful party fell short of their sought relief. Ultimately, the court exercised its discretion to require the respondent to bear 80% of the appellant's costs, reflecting that the appellant was largely but not entirely successful.

Day v Day (Costs) [2006] EWCA Civ 415, [2006] C.P. Rep. 35 considered
Polymers International Limited v Philip Hepburn SCCiv App. No. 8 of 2021 considered
Rubis Bahamas Limited v Lillian Antoinette Russell SCCiv App. No. 86 of 2022 followed
Seepersad v Persad et al [2004] UKPC 19 [Trinidad] considered
Swart et al v Appollon Metaxides, Silver Point Condominium Apt SCCiv App. No.78 of 2012 considered
Wildlake v BAA Ltd. [2009] EWCA Cw 1256, [2010] 3 Costs LR 353 considered

Per Crane Scott, JA (dissenting):

It is evident that in the purported exercise of the Court's discretion to award costs the majority has elected to employ what the authorities refer to as the issue-based approach. When a court exercises discretion to reduce a successful party's costs using an "issue-based approach," it must rigorously analyze how the unsuccessful issues genuinely increased the hearing time or resulted in significant additional expense. Merely failing on some grounds or receiving less than the full amount sought is insufficient justification for costs reduction. There is inadequate analysis of the issues which arose in the proceedings or any indication of how (if at all) Mr. Lop's pursuit of the issues led to an *"increase in hearing time"* or "*resulted in increased expense"* to justify the proposed reduction of costs which Mr. Lop should ordinarily receive. Simply stating that Mr. Lop has been successful on *"half of his grounds and received a significant increase in the global sum awarded"* are not

matters which ought properly to be taken into account in reducing the full award of costs which Mr. Lop would otherwise receive.

In this regard, the types of matters and circumstances which may be considered by the court in the exercise of the Court's discretion to make *"some other order as to the whole or any part"* of the successful party's costs, are now expressly laid out in rules 71.9, 71.10 and 71. 11 respectively of CPR 2022. None of these factors or circumstances remotely envisages the fact that the successful party has received a significant *increase* in the global award following the appeal.

What is clear from the rules is that in exercising its discretion to depart from the usual rule, a court must, *inter alia*, have regard to all the circumstances, including, *inter alia*, the conduct of *all* the parties. As I see it, the majority opinion has, quite simply, failed to address the conduct of the Respondents in relation to Mr. Lop's claim.

In the end, having considered the reasons (such as they are) provided in the majority opinion, and having examined all the circumstances of the case, I can see no reason to depart from the usual rule set out in **O. 59 r. 3 (2)** which mandates that costs *shall* follow the event unless it appears that some other order should be made.

A.L. Barnes Ltd v. Time Talk (UK) Ltd [2003] EWCA Civ 402 mentioned
Atlasjet Havacilik Anonim Sirketi v. Kupelli [2018] EWCA Civ. 1264 mentioned
Budgen v. Andrea Gardner Partnership [2012] EWCA 1125 mentioned
Day v Day [2006] EWCA Civ 415 mentioned
Fox v. Foundation Piling Ltd [2011] EWCA Civ. 277 mentioned
Kastor Navigation v. Global Risks [2004] EWCA Civ. 27 mentioned
Medway Primary Care Trust v. Marcus [2011] EWCA Civ. 750 mentioned
Oksuzoglu v. Kay [1998] 2 All ER 631 mentioned
Phonographic Performance Ltd v. AEI Rediffusion Music Ltd, [1999] 2 All ER 299 considered
Seepersad v Persad et al [2004] UKPC 19 [Trinidad] considered
Stena v. Irish Ferries Ltd [2003] EWCA Civ. 214 mentioned
Summit Insurance Ltd and others v. Bolingbroke Ltd, SCCivApp. No. 145 of 2023 mentioned
Summit Property Ltd v. Pitmans [2001] EWCA Civ, 2020 considered

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DECISION ON COSTS

Decision delivered by the Honourable Sir Michael Barnett, P

1. On 13 March 2024, in a written judgment authored by Crane-Scott JA, this Court allowed the Appellant's appeal on grounds 1, 2, 4(2) and 7. Grounds 3, 5 and 6 of the Appeal were dismissed.

2. The Court made no order as to costs and both parties were invited to file written submissions on or before 27 February 2024. We have received those submissions and now render our decision.

3. In his submissions, the Appellant contends that he was the successful party in the appeal, as the Court allowed the appeal on grounds 1, 2. 4(2) and 7 and increased the global sum awarded for damages from $272,115 to $480,334.72 (both sums include pre-judgment interests of 2.4% and post- judgment interests of 6.25%). As such, he should be allowed costs in the appeal.

4. In support of his argument, the Appellant relied on the case of **Day v Day (Costs)** [2006] EWCA Civ 415 [2006] C.P. Rep. 35 where Ward LJ held (at [17]):

> **"…in a case like this, the question of who is the unsuccessful party can easily be determined by deciding who has to write the cheque at the end of the case."**

5. The Appellant also cited the case of **Wildlake v BAA Ltd.** [2009] EWCA Civ 1256, [2010] 3 Costs LR 353 where Ward LJ similarly arrived at the same conclusion. He stated,

> **"… the most important thing is to identify the party who is to pay money to the other even in a case of personal injury."**

6. Additionally, the Appellant relied on the case of **Seepersad v Persad** [2004] UKPC 19 where it was determined that the successful party should be awarded their entire costs. Costs should not be reduced unless there is an issue in which the party was unsuccessful that led to an increase in hearing time or incurred a significant expense.

7. The Respondents submit that both parties were successful on half of the grounds of the appeal and that costs follow the event. Accordingly, the parties should be awarded 50% of their costs.

8. The Respondent supports this claim by citing the case of **Polymers International Limited v Philip Hepburn** SCCiv. App. No. 8 of 2021 where Sir Michael Barnett, P quoted Buckley LJ in the case **Scherer v Counting Instruments Ltd.** [1986] 2 ALL ER 529

> **"(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."

9. As both parties were partly successful in this appeal, the Appellant was the most successful party. This court must now decide how much of his costs should be paid by the Respondent, as the Appellant was not wholly successful.

10. It is generally accepted that the Court has the discretion to order costs. Even though the discretion is wide, it must not be done arbitrarily but judicially. When deciding the outcome of this case, this Court must consider the facts of this case. In the case of **Swart et al v Appollon Metaxides, Silver Point Condominium Apt** SCCiv App. No.78 of 2012, Issacs JA stated as follows:

"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."**
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> **8. We generally have regard to the practice that obtains in the Supreme Court. In my view this makes estimably good sense."**

11. Rule 24(5) of the Rules of the Court of Appeal prescribes:

> **"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."**

12. Generally, costs will follow the event, and the successful party will be awarded costs. In this appeal, the Appellant was partly successful. However, the Appellant was largely successful in the appeal.

13. In the case of **Rubis Bahamas Limited v Lillian Antoinette Russell** SCCiv App. No. 86 of 2022, the Respondent, who was largely successful in the appeal, was awarded 80% of their costs by this Court. To reflect that fact the Appellant was not wholly successful in the appeal, costs was reduced by 20%.

14. Given the circumstances of this case, the Appellant was successful on half of their grounds and received a significant increase in the global sum awarded, this should be reflected in the costs.

15. However, in my judgement the appellant should not recover all of their costs. I do so for the following reasons. Firstly, at the beginning of the hearing the appellant abandoned two of their grounds. They were grounds 4(1) and 4(3). Secondly, the appellant lost entirely on their challenge to the failure to award damages for breach of Article 17 (1) rights. That attack was a major plank in his attempt to substantially increase the award of damages. Thirdly, the appellant failed in his attempt to receive both aggravated damages and exemplary damages as well as he failed in his attempt to increase the award for exemplary damages. In short, although successful in increasing the award, the appellant did not receive and fell far short of the amounts that he sought in this appeal. The respondent in my judgment should not be required to pay the appellants costs in pursuing those abandoned and unsuccessful claims.

DISPOSITION

16. In the exercise of the courts undoubted wide discretion and consistent with the manner in which it exercised its discretion in the case of **Rubis Bahamas Limited v Lillian Antoinette Russell** SCCiv App. No. 86 of 2022, I would require the Respondent to bear only 80% of the Appellant's costs.

The Honourable Sir Michael Barnett, P

17. I agree.

The Honourable Mr. Justice Isaacs, JA

Dissenting opinion delivered by The Hon. Madam Justice Crane-Scott, JA

18. I have had sight of the Costs Decision prepared by the learned President with which my brother Isaacs JA ("the majority") agrees. Regrettably, I am unable to agree with the majority's proposal that our discretion[1] to award costs of the appeal should be exercised by reducing Mr. Lop's costs of the appeal.

19. My reasons follow.

20. There is no dispute that Mr. Lop's proceedings were both heard and decided in the Supreme Court prior to 1 March 2023 (on which date the Supreme Court Civil Proceedings Rules ("CPR 2022) were commenced[2]). In view of this, the Rules of the Supreme Court, 1978 (now repealed) continue to apply. [See rule 4 CPR 2022 "Savings and Transitional".]

21. In the circumstances, the usual rule in **O. 59 r. 3(2)** that *"costs shall follow the event"* continues to govern the award of costs in this matter **unless** in the exercise of our discretion *"it appears to us that in the circumstances of the case some other order should be made as to the whole or any part of the costs."*

22. In **Phonographic Performance Ltd v. AEI Rediffusion Music Ltd,** [1999] 2 All ER 299, Lord Woolf MR (the architect of the new civil procedure rules) had this to say concerning the application of the usual rule both *prior to* and *after* the introduction of the 'new' costs' regime set out in the Supreme Court Civil Procedure Rules 1998 of England and Wales:

> **"From 26 April 1999 the "follow the event principle" will still play a significant point from which the Court can readily depart. This is also the position prior to the new rules coming**

[1] Rule 24(5) of the Court of Appeal Rules, 2005.
[2] Supreme Court Civil Procedure Rules, 2022 (Appointed Day) Notice, 2023 (S.I. No. 13 of 2023).

into force. The most significant change of emphasis of the new rules is to require the courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new rules are reflecting a change of practice which has already started."

23. In my view, Lord Woolf's observations (made following the adoption of the English CPR on 26 April 1999) are relevant to us here in The Bahamas since the *"follow the event principle"* of the former RSC 1978 **O. 59 r. 3(2)** has been retained in The Bahamas (albeit in a differently worded formulation) in rule 71.6(1) of CPR 2022. This point was recently made by this Court (differently constituted) in **Summit Insurance Ltd and others v. Bolingbroke Ltd**, SCCivApp. No. 145 of 2023.[3]

24. Notwithstanding that Mr. Lop's proceedings continue to be governed by **O.59 r. 3(2),** rule 2(3) of CPR 2022 expressly permits a Court, which has to exercise its discretion in relation, *inter alia*, to costs, to take into account the principles set out in the CPR and, in particular Part 1 *(Overriding Objective)* and Part 25 *(Case Management)*.

25. Since the introduction of the CPR on 26 April 1999, an impressive body of costs decisions has emerged in England and Wales as courts and tribunals at various levels have endeavoured to exercise their discretion to award costs with goal of achieving a just result between the parties in furtherance of the overriding objective.

26. Based on my review of the costs' decisions emanating from the England and Wales Court of Appeal after 26 April 1999, two lines of authorities, may clearly be discerned.

27. In one line of cases, the English Court of Appeal has held that there are cases where the successful party can easily be determined by *'following the money'*; and further, *'the unsuccessful party is the one who writes the cheque at the end of the day'*. See for example: **A.L. Barnes Ltd v. Time Talk (UK) Ltd** [2003] EWCA Civ 402; **Kastor Navigation v. Global Risks** [2004] EWCA Civ. 277; **Day v Day** [2006] EWCA Civ 415; **Fox v. Foundation Piling Ltd** *[2011] EWCA Civ. 277;* **Budgen v. Andrea Gardner Partnership** *[2012] EWCA 1125 among others.*

28. The second line of cases involves situations (more usually in cases of complexity) where the exercise of the costs' discretion warrants the use of an issue-based approach. Where the issue-based approach is employed, the England and Wales Court of Appeal has suggested that in the exercise of the costs discretion the court must look closely at the facts of the case and consider issue-by-issue who as a matter of substance and reality has won. See for example the following authorities which exemplify the use of issue-based approach:

[3] At paragraph 23 of *Summit Insurance Ltd v. Bolingbroke Ltd*, after examining the new and old costs provisions, Evans JA (who authored the Court's majority decision) observed: "*With the introduction of the CPR the principle remains essentially the same."*

Oksuzoglu v. Kay [1998] 2 All ER 631; **Summit Property Ltd v. Pitmans** [2001] EWCA Civ, 2020; **Stena v. Irish Ferries Ltd** [2003] EWCA Civ. 214; **Medway Primary Care Trust v. Marcus** [2011] EWCA Civ. 750 and **Atlasjet Havacilik Anonim Sirketi v. Kupelli** [2018] EWCA Civ. 1264 among others.

29. As I see it, these authorities illustrate the rigorous analysis of the issues which is required to justify a reduced costs award in cases where a court has decided (in the exercise of its discretion) to adopt an issue-based approach thereby depriving an otherwise successful litigant of the whole or any part of his costs. The following extract lifted from paragraph 27 of Chadwick LJ's decision in **Summit Property Ltd v. Pitmans** *(above)* speaks for itself:

> **"An issue-based approach requires a judge to consider, issue-by-issue in relation to which that approach is to be applied, where the costs on each distinct or discreet issue should fall. If, in relation to any issue in the case before it the court considers that it should adopt an *issue-based approach to costs*, the court must ask itself which party has been successful *on that issue*. Then, if the costs are to follow the event *on that issue*, the party who has been unsuccessful *on that issue* must expect to pay the costs of that issue to the party who has succeeded *on that issue*. That is the effect of applying the general principle on an issue by issue-based approach to costs...."** [Emphasis mine]

30. The specific reasons for the majority's decision to reduce Mr. Lop's costs appear at paragraphs [12] through [15] of the majority's revised draft Costs Decision. For convenience, I reproduce them below:

> **"[12] Generally, costs will follow the event, and the successful party will be awarded costs. In this appeal, the Appellant was partly successful. However, the Appellant was largely successful in the appeal.**
>
> **[13] In the case of *Rubis Bahamas Limited v. Lillian Antoinette Russell SCCivApp. No. 86 of 2022*, the Respondent, who was largely successful in the appeal, was awarded 80% of their *(sic)* costs by this Court. To reflect the fact that the Appellant was not wholly successful in the appeal, costs was *(sic)* reduced by 20%.**
>
> **[14] Given the circumstances of this case, the Appellant was successful on half of their *(sic)* grounds and received a**

significant increase in the global sum awarded, this should be reflected in the costs.

[15] However, in my judgement the appellant should not recover all of their costs. I do so for the following reasons. Firstly, at the beginning of the hearing the appellant abandoned two of their grounds. They were grounds 4(1) and 4(3). Secondly, the appellant lost entirely on their challenge to the failure to award damages for breach of Article 17 (1) rights. That attack was a major plank in his attempt to substantially increase the award of damages. Thirdly, the appellant failed in his attempt to receive both aggravated damages and exemplary damages as well as he failed in his attempt to increase the award for exemplary damages. In short, although successful in increasing the award, the appellant did not receive and fell far short of the amounts that he sought in this appeal. The respondent in my judgment should not be required to pay the appellants costs in pursuing those abandoned and unsuccessful claims."

31. It is evident from the foregoing portions of the majority opinion that in purported exercise of the Court's discretion to award costs, the majority has elected to employ what the authorities refer to as the issue-based approach. Regrettably, there is inadequate analysis of the issues which arose in the proceedings or any indication of how (if at all) Mr. Lop's pursuit of the issues led to an *"increase in hearing time"* or "*resulted in increased expense"* to justify the proposed reduction of costs which Mr. Lop should ordinarily receive.[4]

32. At paragraph [15] of their opinion, the majority now suggest that because Mr. Lop abandoned two of its proposed grounds at the start of the hearing, his costs should be reduced. Respectfully, I fail to see how the fact that a successful appellant abandoned two of its intended grounds prior to the start of the hearing, can reasonably be taken into account in reducing the full award of costs he would otherwise be entitled to receive from the unsuccessful party. If anything, the abandonment of grounds 4(1) and 4(3) would have *reduced* and not increased the hearing time for the appeal.

33. Regarding the issue-based approach to the award of costs employed by the majority, I have also considered the case of **Seepersad v. Persad** [2004] UKPC 19 *(*referenced at paragraph [6] of the majority's draft). The Board's guidance with respect to the exercise of the court' discretion to reduce a costs award where the party who has been successful overall has failed on one or more issues is instructive. At paragraph 24 of the Board's decision under the heading *"Measure of Costs"*, Lord Carswell, who delivered their Lordships' decision, had this to say:

[4] See per Lord Carswell at paragraph 24 of *Seepersad v. Persad [2004] UKPC 19* extracted below.

> **"24....The award of costs in Trinidad and Tobago is in the discretion of the court, as is usual in most common law jurisdictions. The general rule which should be observed unless there is sufficient reason to the contrary is that costs will follow the event. Where the party who has been successful overall *has failed on one or more issues*, particularly where consideration of those issues has *occupied a material amount of hearing time* or *otherwise led to the incurring of significant expense*, the court *may* in its discretion order a reduction in the award of costs to him, either by a separate assessment of costs attributable to that issue or, as is now preferred, making a percentage reduction in the award of costs: see, eg. *In re Elgindata (No. 2)* [1992] 1 WLR 1207...*An issue for these purposes must be something so distinct and separate in itself* that the decision of it constitutes an "event". The "event" was the quantum of damages to which the appellant was entitled, and he succeeded on his appeal in obtaining a higher award than the judge had given him: even though one head was decreased, another was increased and one which the judge had omitted was added to the total. Their Lordships accordingly consider that *the Court of Appeal had insufficient ground for reducing the award of costs made to the appellant and that he should have been awarded full costs in that court*, without separating out any element attributable to the cross-appeal, which was only a means of putting in issue the quantum of all items of damage in the judge's award."** [Emphasis mine]

34. In my view, simply stating that Mr. Lop has been successful on *"half of his grounds and received a significant increase in the global sum awarded"* are not matters which ought properly to be taken into account in reducing the full award of costs which Mr. Lop would otherwise receive. In this regard, the types of matters and circumstances which may be considered by the court in the exercise of the Court's discretion to make *"some other order as to the whole or any part"* of the successful party's costs,[5] are now expressly laid out in rules 71.9, 71.10 and 71. 11 respectively of CPR 2022. None of these factors or circumstances remotely envisages the fact that the successful party has received a significant *increase* in the global award following the appeal.

35. What is clear from the rules is that in exercising its discretion to depart from the usual rule, a court must, *inter alia*, have regard to all the circumstances, including, *inter alia*, the conduct of *all* the parties.[6] As I see it, the majority opinion has, quite simply, failed to address the conduct of the Respondents in relation to Mr. Lop's claim; and in particular,

[5] O. 59 r. 3(2) RSC 1978.
[6] Part 71.9 and 71.10 CPR 2022.

the Respondents' fundamental failure as the losing party to protect themselves in relation to costs by making a settlement offer or a payment into court which may have met the true entitlement of Mr. Lop for the unlawful detention which as the Judge found had occurred on two occasions.

36. This was a straightforward claim for damages in which Mr. Lop had brought parallel claim seeking damages in tort and under the Constitution for his unlawful detention by the immigration authorities on two distinct occasions. As part of his claim, Mr. Lop sought, as was his undoubted right, to challenge the unsatisfactory conditions he claimed to have endured at the Carmichael Detention Centre which he said were inhuman and degrading.

37. It is clear from the appellate record that rather than protecting themselves in relation to costs by making a payment into Court;[7] or making an offer to settle the whole or any part of Mr. Lop's claim[8], the Respondents in this case chose to defend the indefensible. This naturally left Mr. Lop with no alternative but to pursue his claim both in the Supreme Court and on appeal. In my view, although Mr. Lop lost on grounds 3, 5 and 6 of his appeal and may not have received the award of damages he had sought, the Respondents' conduct in defending every aspect of Mr. Lop's claim cannot be ignored or left out of account. As I see it, denying a successful party his full costs simply because he has not succeeded on all his grounds and has received a significant *increase* in damages is not only unjust but grossly unfair to Mr. Lop.

38. Given the learned Judge's findings in the court below, all of Mr. Lop's grounds raised issues and identified alleged errors of law by the Judge which could properly be raised on his appeal in pursuit of his ultimate objective of increasing his global award (which he has now done.) Furthermore, even though Mr. Lop failed on 3 of his 7 grounds, none of the grounds can reasonably be said to have increased the amount of hearing time or otherwise led to the incurring of significant expense such that a reduction of the award can reasonably be justified. It need hardly be said that Mr. Lop's abandonment of grounds 4(1) and 4(3) at the start of the hearing, would have reduced rather than increased the hearing time of the appeal.

39. What is more as the England and Wales Court of Appeal has consistently said,[9] in awarding costs, the court could properly have regard to the fact that in almost every case the winner is likely to fail on some issues and that the court should be less ready to reflect that sort of failure in the eventual costs order than *"the more fundamental failure of the* ***losing party*** *to make an offer sufficient to meet the true entitlement of the winner."* [Emphasis mine]

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[7] See O.22 RSC 1978 and Part 36 CPR 2022.
[8] See Part 35 CPR 2022.
[9] See para 35 *Budgen v. Andrew Gardner Partnership [2012] EWCA Civ. 1125* per Simon Brown LJ. Also, para 12 *Sycamore Bidco Ltd v. Breslin and another [2013] EWHC 583 (Ch)* per Mann J; and *Comberg v. Vivopower International Services Ltd and another [2020] EWHC (QB) 2438* per Mostyn J.

40. In the end, having considered the reasons (such as they are) provided in the majority opinion, and having examined all the circumstances of the case, I can see no reason to depart from the usual rule set out in **O. 59 r. 3 (2)** which mandates that costs *shall* follow the event unless it appears that some other order should be made. The Respondents are clearly the unsuccessful parties in the proceedings who will have to pay the cheque at the end of the day.

41. It is for all the above reasons that I have declined to agree with the majority that this is a proper case in which the Court should depart from the usual rule and to exercise its undoubted discretion to reduce Mr. Lop's costs of the appeal.

42. I would have awarded Mr. Lop the full costs of the appeal.

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The Hon Madam Justice Maureen Crane-Scott, JA