[2025] JMSC Civ 109

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE PROBATE AND ADMINISTRATION DIVISION
CLAIM NO. SU2024 ES 00350

BETWEEN	**KADIAN MCLEOD**	**1ST CLAIMANT**
AND	**ATTANIA EDWARDS**	**2ND CLAIMANT**
AND	**DELON HAMILTON**	**3RD CLAIMANT**
AND	**KESSION WALKER ELLIS**	**DEFENDANT**

IN CHAMBERS

Kimberlee S. Dobson, Attorney-at-law for the Claimant

Cammesha Harrison instructed by Harrison Law for the Defendant

Heard: 26th June and 19th September, 2025

Civil Procedure- Part 37 and 64 Civil Procedure Rules 2002 - Whether it would be just and fair to make no order as to costs- Whether the Claimant should pay the Defendant's costs

A. SWABY, J (AG.)

Introduction

[1] The Claimants, who are all security guards, were injured during a motor vehicle accident which occurred on the 18th November, 2022. It is not in dispute that Mr. Walwayne Smith, now deceased, caused this accident. At the material time, he was driving a Toyota Wish motor car along the Llandovery Main Road, Saint Ann.

Unfortunately, this vehicle swerved in the path of the vehicle in which the Claimants were travelling and collided therewith. Seeking compensation for their personal injuries, the Claimants sought orders for the Defendant, a surviving sister of Walwayne Smith, to be appointed as Administrator Ad Litem in his estate. The purpose of such claim was to facilitate a suit being initiated against Mr. Smith's estate.

[2] When this matter was last before the Court on the 26th June, 2025, Ms. Dobson indicated that the Claimants would be filing a Notice of Discontinuance as settlement discussions were far advanced with a third party, the Advantage General Insurance Company. So soon as this indication was made, the Defendant sought an order that the Claimants pay her cost.

[3] Unfortunately, the parties are not in agreement regarding the issue of cost. Consequently, the sole issue to be determined in this matter is whether an order should be made for the Claimants to pay the costs which have been incurred by the Defendant in seeking to defend this Claim.

[4] Having considered the oral and written submissions which were filed by both parties in respect of this issue, I am firmly of the view that the Claimants ought to cover the Defendant's cost.

The Background –

[5] By an Amended Fixed Date Claim Form filed on the 10th May, 2024, the Claimants, Kadian McLeod, Attania Edwards and Delon Hamilton, sought the following orders:

1. A declaration that Kession Walker Ellis is appointed Administrator Ad Litem in the Estate of Walwayne Smith for the sole purpose of protecting the interest of the Estate of Walwayne Smith in respect of the personal

injury claim that the Claimants will commence against estate Walwayne Smith in respect of accident on November 18, 2022.

2. Alternatively, such other person as this Honourable Court deems just be appointed as Administrator Ad Litem in the Estate of Walwayne Smith for the sole purpose of defending pending lawsuit for personal injury claim.
3. Such further and other orders as this Honourable Court deems fit.
4. Costs of this Claim are to be awarded to the Claimants, to be taxed if not agreed.

[6] In support of this Claim, each Claimant filed an Affidavit. The evidence given in each Affidavit is quite similar. The Affiants, who are security guards, deposed that on the 18th November, 2022, they were passengers in a white Nissan Caravan which was travelling along Llandovery Main Road, Saint Ann heading in the direction of Runaway Bay. Whilst travelling, a black 2008 Toyota Wish motor car bearing registration number 8426KA, which was travelling in the opposite direction, entered into the path of the Nissan Caravan. Unfortunately, both vehicles collided. The driver of the Toyota Wish, Walwayne Smith died as a result of the collision, whereas the three (3) Claimants suffered serious injuries. The Toyota Wish was insured with Advantage General Insurance Company.

[7] This claim was initially brought in February 2024 against the Advantage General Insurance Company seeking the same reliefs as are sought under the Amended Fixed Date Claim Form. However, at the first hearing of the Fixed Date Claim Form, Counsel sought and obtained permission to remove Advantage General Insurance Company as a Defendant and to substitute the Administrator General's Department. Having obtained this order, the Claimants filed an Amended Fixed Date Claim Form naming Mrs. Walker Ellis as Defendant. Permission was then sought to amend the order previously obtained to facilitate Mrs. Walker Ellis being substituted. This order was granted.

[8] Mrs. Walker Ellis filed an Affidavit in this matter expressing opposition to her appointment as Administrator Ad Litem.

Claimants' Submissions

[9] Ms. Dobson submitted that initiating this claim was an important procedural step in securing compensation for the personal injuries of the Claimants in this matter. She stated that shortly after the motor vehicle accident and sometime in January 2023, the Claimants issued a demand letter to Advantage General Insurance Company inviting them to settle a claim for personal injuries. No offer or position on settlement having been received, this claim was brought in February 2024, initially against Advantage General Insurance Company seeking the same reliefs as being sought under the Amended Fixed Date Claim Form. After filing the Fixed Date Claim Form, the insurance company notified Counsel of its inability to act on behalf of the estate of the deceased as the contract of insurance ends with the death of the insured. Counsel then sought and obtained the permission of the Court to substitute the Administrator General's Department. However, based on further research and the inability to identify that there was a minority interest in the estate, Counsel identified Mrs. Kession Walker Ellis as a sister of the deceased who had identified his body and filed an Amended Fixed Date Claim Form naming her as a Defendant.

[10] Counsel stated that this procedural step was necessary to secure compensation for the Claimants as there were some twenty-one (21) individuals who were injured in this accident who could potentially compete for the limited indemnity provided by the deceased's insurers. She stated that this Claim was pursued in good faith to further the personal injuries claims of the Claimants.

[11] Counsel invited the Court to consider the case of **Re Joseph, Kelly (deceased)** 2024 IEHC 87. She argued that this decision offers useful guidance to courts

where applications are brought for grants of administration which are limited in nature. In that case, the application for a grant of administration was brought under section 27(4) of the Succession Act 1965 seeking the appointment of a solicitor as administrator in the estate for the purpose of receiving letters of demand and notices of appointment of receivers, and for the purpose of being served with any proceedings which related to the recovery of monies owed by the deceased on three (3) loans. It must be noted that in the case of **Re Joseph,** the solicitor consented to the application.

[12] In granting the application, the learned Judge indicated that in matters of this nature, reasonable steps should be taken to identify family members who would be entitled to take out a grant, or at the very least writing to those entitled to take out a grant at the last known address for the deceased.

[13] In the case at bar, Counsel argued that the Defendant, being a sibling of the deceased, and having attended the postmortem could be considered a suitable person to represent his estate.

[14] Counsel argued that no order as to cost should be made in the circumstances of this case. She contended that an order compelling the Claimants to pay the cost of the Defendant would operate to penalize the Claimants in circumstances where they have sought to recover damages for their personal injuries.

Defendant's Submissions –

[15] Counsel submitted that the Court should award cost in favour of her client on the basis of the default position created in Rule 64.6(1) of the Civil Procedure Rules 2002 (CPR). Whilst acknowledging that the Court has a discretion to depart from the default position, she invited the Court to apply the default position in Rule 64.6(1) on the basis that the Defendant was improperly named in these proceedings and has incurred expenses and suffered great inconvenience.

Counsel urged that the Defendant having been placed before this Court without any legal basis and the case having been discontinued against her, results in her being considered the successful party in this litigation.

[16] Counsel also advanced that the fact that this matter was being resolved without the input of the Defendant means that this claim was unnecessary and premature. Counsel contended that the manner in which these proceedings were conducted is such that an award should be made in favour of the Defendant.

Issues:

1. Whether the Claimants, in discontinuing this claim, should bear the Defendant's costs in these proceedings?
2. Whether it would be fair and just in the circumstances of this case to make no order as to costs?

Law & Analysis:

[17] Regarding the issue of cost, Rules 37.6(1) and 64.6 CPR are applicable to the case at bar. The former specifically addresses the approach to be taken where a Claimant discontinues a claim, whereas the latter lists the general factors which are to be considered where a Judge seeks to make a determination whether an order should be made for cost.

[18] Rule 37.6(1) provides that:

"Unless - -

a. The parties agree; or

b. The Court orders, otherwise a claimant who discontinues is liable for the costs of the defendant against whom the claim is discontinued incurred on or before the date on which notice of discontinuance was served."

[19] In the case of **Maini v Maini** [2009] EWHC 3036 (Ch), Proudman J remarked that where a claimant commenced proceedings, he/she took on the risk of the litigation. If successful, a claimant can expect to recover their costs, but if unsuccessful or the claim is abandoned at whatever stage of the proceedings, "*it is normally unjust to allow the defendant to bear the costs of proceedings that were forced upon him and which the claimant is unwilling to carry through to judgment*". The principles outlined by Proudman J were considered and applied in the Court of Appeal decision of **Morris (Conrad) v Campbell (Troy)** [2021] JMCA Civ 30.

[20] In applying this principle to the case at bar, I must consider that the Claimants, in advancing this claim against the Defendant have taken on the risk of litigation and further that the prima facie position is that where such a claim is abandoned, the starting point is that it would be unjust to allow the Defendant to bear the cost of the proceedings.

[21] However, I bear in mind that Rule 64.6 CPR must also be considered which provides that:

> *"(1) If 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 order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to the costs.*
>
> *(3) In deciding who should be liable to pay costs the court must have regard to all the circumstances.*
>
> *(4) In particular it must have regard to –*
>
> *(a) the conduct of the parties both before and during the proceedings;*
>
> *(b) whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;*

(c) any payment into court or offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Parts 35 and 36);

(d) whether it was reasonable for a party –

(i) to pursue a particular allegation; and/or

(ii) to raise a particular issue;

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

(i) that party's case;

(ii) a particular allegation; or

(iii) a particular issue;

(f) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his or her claim; and

(g) whether the claimant gave reasonable notice of intention to issue a claim.

[22] An important question is the relationship between Rules 37.6(1) and 64.6. This was specifically discussed in the decision of **Morris (Conrad)**. McDonald Bishop JA (as she then was) stated the following at paragraph 42 of the judgment:

> *"It is clear, taking into account the provisions of rule 64.6 and the tenets stated in the authorities of Rastogi, Nelson's Yard Management, Dhillon and Bachmann and Doshi, that a judge is given a wide margin when exercising a discretion in relation to costs following discontinuance. Those authorities all establish that the court is allowed to consider the general factors set out in rule 64.6, rather than being slavishly bound by the "constraints imposed by" the default principle in rule 37.6(1). This general principle concerning the court's discretion when considering costs orders has been reaffirmed in several decisions of this court including Ivor Walker v Ramsay Hanson [2018] JMCA Civ 19. At paragraph [42] of that judgment Phillips JA opined:*
>
> *"…There is no entitlement to costs. The order for costs always remains within the complete unfettered discretion of the court, although of course the discretion must be exercised judicially. There are so many factors that are open to the consideration of the court when the order of costs is being contemplated. They are set out in*

detail in parts 64 and 65 of the CPR and they always include a consideration of the conduct of the parties."

[23] In applying the authorities to the case at bar, I consider carefully the provisions of Rule 37.6(1) which specifically addresses the discontinuance of a matter. It is my understanding that in the absence of an agreement between the parties or the exercise of the Court's discretion, the Claimant should bear the cost of the Defendant. This has been described as the default position. Therefore, my starting point is that the Claimants in this case should bear the cost of Mrs. Kession Walker Ellis.

[24] However, notwithstanding this default position, Rule 64.6(3) confers a wide in discretion in respect of determining the issue of costs. Therefore, I must consider the factors listed therein together with all the circumstances of this case.

[25] In approaching the matter in this manner, I bear in mind the caution issued in **Morris (Conrad)**. The Court of Appeal reasoned that a Court should not lightly resile from the default position. In fact, McDonald Bishop JA (as she then was) indicated that it is for the Claimants to provide cogent reasons to justify a departure from the prima facie position that a person who discontinues should ordinarily pay the defendant's costs "the default position". Additionally, the ultimate consideration must be whether it is fair and just in the circumstances of the case to resile from this default position.

[26] In the case at bar, I have considered the conduct of the parties before and during the proceedings. The evidence is that prior to pursuing this Claim, the Claimants sought to engage the Advantage General Insurance Company within months of the incident. The purpose of such engagement was to secure a settlement in respect of the personal injuries suffered. Having received no satisfactory response from the Insurance Company at that time, Counsel initiated this Claim seeking orders that the Insurance Company be appointed as Administrator Ad Litem. Subsequently, on the 22nd April, 2024, orders were made

granting the Claimants' application to remove the Insurance Company from the proceedings and for the substitution of the Administrator General's Department as Defendant. It appears that this was an oral application which was made pursuant to Rule 19.3(1). The Claimants were then ordered to file an Amended Fixed Date Claim Form reflecting the substituted party.

[27] On this occasion when the matter came before the Court, the first hearing of the Fixed Date Claim Form was further adjourned to the 27th June, 2024.

[28] However, on the 10th May, 2024, some three (3) weeks after the orders were made allowing for the substitution of the Administrator General's Department, an Amended Fixed Date Claim Form was filed reflecting the substitution of Mrs. Kession Walker Ellis as the Defendant and not the Administrator General's Department. Additionally, the Amended Fixed Date Claim Form was served on Mrs. Walker Ellis on the 25th June, 2024, two (2) days before the adjourned hearing. At the adjourned hearing, the Claimants' sought and obtained an order amending the order made on the 22nd April, 2024 to facilitate the further substitution of Mrs. Kession Walker Ellis.

[29] I have also assessed certain timelines in this matter. The amended claim was filed three (3) weeks after the order was made allowing for the substitution of the Administrator General's Department. I have therefore considered whether the Claimants gave reasonable notice to the Defendant of their intention to issue a claim. My considered view is that this would not have been possible given the sequence of events. I also consider further that the Defendant was short served having been served only two (2) days before the further adjourned hearing.

[30] All these circumstances demonstrate the manner in which this matter has been handled by the Claimants. Whereas the Court sympathizes with the Claimants in circumstances where they are pursuing damages for their personal injuries, and it is evident that Counsel made valiant efforts to secure relief, the handling of this

claim seeking the appointment of an Administrator ad litem may be viewed as untidy in these circumstances.

[31] A further issue which I must consider is whether it was necessary to bring this claim. Ms. Dobson argued that the initiation of these proceedings was a strategic step taken to facilitate an expeditious resolution of the personal injuries claim. However, I must consider that the peculiar circumstances of this matter is that the resolution of this matter has been achieved without the appointment of an Administrator ad litem. The fact that it has been resolved without such an appointment supports the Defendant's argument that this claim was unnecessary and perhaps premature. Whereas Counsel argued that time was of the essence as there were several persons who were injured during the accident and voiced the possibility that several claims could potentially be brought, I do not find that this is a sufficient reason to depart from the default position in the circumstances of the present case. Mrs. Walker Ellis has incurred cost in seeking to defend a Claim which has now been abandoned and one which it may not have been necessary to pursue.

[32] I bear in mind Rule 64.6 (4)(d) which states that I must consider whether it was reasonable for a party to pursue a particular claim or raise a particular issue. I am of the view that it was unreasonable to pursue a claim seeking the appointment of an administrator ad litem in circumstances where the Claimants were engaged in the pursuit of settlement with an insurance company, and further where such an appointment was not necessary to advance these discussions or to resolve the matter.

[33] As such, I do not believe that cogent reasons have been advanced which justify a departure from the presumptive position that ordinarily the party who discontinues pays the costs of the Defendant. In fact, I believe it is only fair and just that the Claimants pay the costs of the Defendant as the latter has incurred

costs in seeking to defend this claim and it would be unfair in circumstances where the claim is being abandoned, to make an alternate order as to cost.

Orders:

1. The Claimants are to pay the Costs of the Defendant prior to the date of the filing of the Notice of Discontinuance in this matter.
2. Leave to appeal granted**.**
3. Claimants' Attorney-at-Law is to prepare, file and serve this order