IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2024CD00458

BETWEEN	**ADAM STEWART**	**CLAIMANT**
AND	**ROBERT STEWART**	**1ST DEFENDANT**
	DMITRI SINGH	**2ND DEFENDANT**
	ELIZABETH DESNOES	**3RD DEFENDANT**
	LAURENCE McDONALD	**4TH DEFENDANT**
	GORSTEW LIMITED	**5TH DEFENDANT**

Costs - CPR Rules 64 and 65 – Interlocutory injunction refused – Whether costs should be reserved – Whether there is a general or "normal" rule – Whether decision of English Court of Appeal binding – Whether taxation should be immediate.

W. Scott KC, I. Wilkinson KC, C. George, L. Stewart and G. Chin instructed by Hart Muirhead Fatta for the Claimant

S. Mayhew KC, and A. Myrie instructed by Mayhew Law for the 1st Defendant

M. Hylton KC, K. Powell and T. Mason instructed by Hylton Powell for the 2nd Defendant

D. Gentles KC, K. Williams and S. Nelson instructed by Livingston Alexander & Levy for the 3rd Defendant

D. Kitson KC, and D. Streete instructed by Grant Stewart Phillips for the 4th Defendant

J. Graham KC, and P. Manderson instructed by John G. Graham & Co. for the 5th Defendant

Heard: 14th and 18th March 2025.

In Chambers (by Zoom).

Cor: Batts J.

[1] On the 14th March 2025, having heard further submissions, I reserved my decision on the question of costs. I am very grateful to all parties for their respective submissions which I will not restate but which, counsel can rest assured, informed my decision.

[2] The Civil Procedure Rules 64.6 (1) and 65.8 (2) state the general rule as to costs, which is, that the court "*must order the unsuccessful party to pay the costs of the successful party".* Both rules expressly permit the court to deviate from that principle and provide guidance as to the factors to consider when doing so. The court should consider *"all the circumstances"* and it "*must*" have regard to items listed at rule 64.6 (4) (a) to (g). Rule 64 applies to any "*proceedings*" and rule 65 to applications. Rule 65.8 (1) stipulates that on any application other than a "*case management conference, pre-trial review or the trial"* the court "*must*" decide which party should pay the costs and "*may*" summarily assess the amount and say when such costs should be paid.

[3] In this matter I decided that the Claimant was unsuccessful in his application for interlocutory injunctive relief. I found that there was no serious issue to be tried and

that, in any event, the justice of the case required that the injunction not be granted, see my written judgment in **Adam Stewart v Robert Stewart et al [2025] JMCC Comm 11**. It would seem therefore that, absent some exceptional circumstances, applying rules 64, and/or 65.8 costs should be awarded to the Defendants.

[4] The Claimant says this is not so. They argue that the Court of Appeal of Jamaica decided, insofar as applications for interlocutory injunctions are concerned, the proper order is that costs be in the claim and/or should be reserved for the judge at trial. Reliance was placed on dictum of the Honourable Miss Justice Straw JA, in **Tara Estates Limited v Milton Arthurs [2019] JMCA Civ 10**. In that case at paragraph 51 the learned judge, without reference to authority, stated:

> *"Batts J awarded costs to the respondent to be taxed if not agreed. He gave no reasons for not abiding by the usual order on applications for interim injunctions that costs shall be in the claim. Given that there are various issues to be ventilated and resolved at trial, we formed the view, in concurrence with the appellants' arguments in respect of this ground, that the costs awarded ought to have awaited the outcome of the claim. The costs order made against the appellant was therefore varied to be costs in the claim."*

The approach, in the **Tara Estates** case, was endorsed and applied in **Sheldon Gordon et al v Arlean Mcbean et al (2023) JMCA 44.**

[5] I am of course bound by decisions of the Court of Appeal, see **A1 Limited v Mary Grace Abrahams [2019] JMSC Civ 3 (unreported judgment dated 25th January 2019)** for an explanation of why that is so. However, the Jamaican Court of Appeal had a rethink of its position insofar as *"the usual order",* on applications for interlocutory injunctions, is concerned. Justice of Appeal Straw, delivering the leading judgment in **Vinayaka Management Limited v Genesis Distribution Network Limited and others [2024] JMCA Civ 11A,** disavowed the general proposition previously stated. In that case, on an appeal against an interlocutory

injunctive order, the court stated the general rule to be the one outlined in Orders 64 and 65. The decision of Morrison JA (as he then was) in **Capital & Credit Merchant Bank Limited v Real Estate Board [2013] JMCA Civ 48** was applied. Justice Straw explained her contrary proposition, stated in **Tara Estates,** as follows:

> *"Contrary to the submissions made on behalf of the appellant, there is no general rule that the appropriate award in the case at bar should be that costs be costs in the claim. In **Tara Estates**, the substantive claim lay in the tort of nuisance and the interim injunction granted by the judge below in relation to specific construction activities was affirmed by this court pending the trial. However, certain supplemental orders of the judge were varied. The order made was those costs be in the claim."*

[6] Mr. Scott KC, for the Claimant, suggested that considering the dichotomy in approach by the Court of Appeal I should not pronounce one way or the other but should leave the matter for resolution by that court. That is, I suppose, the safe option to adopt. However, this court would be abdicating its responsibility if it did not pronounce the law as it sees it. Neither the public interest, nor the interest of the parties before me, is served by uncertainty while a decision of a higher court is awaited.

[7] In this regard I respectfully suggest that the principle stated in **Tara Estates,** as it relates to applications for interlocutory relief, is inaccurate. There is no general rule that costs ought to be costs in the claim on applications for interlocutory (or interim) injunctive relief. The general rule is as stated in Rules 64 and 65 of our Civil Procedure Rules and summarized in paragraph two above. The Defendants suggested that the decisions can be reconciled on the basis that whenever the injunction is granted the order should be costs in the claim or costs reserved but when it is refused it should be allowed to follow the event. This may be a convenient reconciliation of the diverging Court of Appeal decisions but does not reflect a

principled distinction. In the first place Justice of Appeal Straw did not seek to distinguish the two cases on that basis. Furthermore, whether the injunction is granted or refused, the ultimate issue still remains to be resolved (save in a case where the decision at the interlocutory stage brings the matter to an end, as in **Miller v Cruickshank (1986) 44 WIR 319**). In either situation a party who is successful at the interlocutory stage may ultimately be unsuccessful at the trial. Why then only award costs when an injunction is refused at the interlocutory stage. I therefore do not accept this as a valid distinction.

[8] The Claimant also relied on a decision of the English Court of Appeal in **Frederick John Wingfield Digby v Melford Capital Partners (Holdings) LLP and others [2020] EWCA Civ 1647 (**decided on the 4th December 2020). A two-member panel set aside the judge's order that costs were to be paid by the party against whom the injunctive order was made. The court regarded as binding, its own earlier decision in **Desquenne et Giral UK Ltd v Richardson [2001] F.S.R. 1**, and approved the following statement of the law in the 2020 "White Book" at paragraph 44.6.1:

> *"Where an interim injunction is granted the court will normally reserve the cost of the application until the determination of the substantive issue (Desquenne…) However, the court's hands are not tied and if special factors are present an order for costs may be made and those costs summarily assessed (Picnic at Ascot…)"*

The judges in the **Digby** case conducted a detailed review of all the circumstances and set aside the order for costs principally because the merits of the matter were equally balanced. The decision to grant injunctive relief was based on a consideration of the balance of convenience, see per Lord Justices Lewison and McCombe at paragraph 38 of **Digby**:

"On the contrary the Desquenne case is an authority of this court as to the normal approach to the question of costs of an application for an interim injunction ***where the grant of the injunction turns on the balance of convenience.****"* [emphasis added]

The court, in coming to this conclusion, rejected a submission that their Civil Procedure Rules compelled another approach and decided that those rules could not be directly applied in "*proceedings*" of this type. For completeness the passage, in the 2023 edition of the **"White Book**" at paragraph 44.2.15.1, reads:

"Where the purpose of an interim injunction is to "hold the ring" until trial, the costs of the application will usually be reserved: Richardson v Des quenne…[1999]CPIR 744;[2001] FSR 1; Picnic at Ascot v Kalus …[2001] FSR 2. The Desquenne principle overrides the usual rule that the unsuccessful party bears the costs because, in a case where the injunction is granted on the balance of convenience, at that stage there is no winner or loser: Wingfield Digby v Melford…[2020] EWCA Civ 1647. Where however the injunction is granted not merely on the balance of convenience and the issues considered on the application will not be revisited in the substantive proceedings, if there is a winner and a loser on those issues, the loser should pay the winner's costs: Kaza Ltd v Kaza…[2020]EWCA Civ

1263."

[9] In the case at bar my decision to refuse injunctive relief turned primarily on a finding that the Claimant has no arguable case to support such a remedy at this stage. This suffices to distinguish the **Digby** case, as well as the authorities relied on, from the one before me. The '*normal*" rule according to those authorities, that the question of costs should be reserved for the trial judge, applies only if the decision at the interlocutory stage is based on the balance of convenience. Arguably also, that "*normal*" rule stated in **Desquenne** applies only where the injunction is granted. For

these reasons, in the case before me, those decisions of the English Court of Appeal pose no impediment to an order for costs in favour of the successful party.

[10] However, I will go further. Decisions of an English court are not binding on the courts of Jamaica at least not since 1962. That year we gained political independence, and as such Jamaican courts are entitled to develop the common law of Jamaica, see **Peter Persaud et al v Plantation Versailles & Schoon Ord. Limited (1970) 17 WIR 107,** per Boller C at page 118D and Crane JA at pages 131G to 132. The Judicial Committee of the Privy Council (Privy Council), when advising His Majesty the King of Jamaica, is jurisdictionally separate from the English House of Lords (now its Supreme Court). English judgments are however accorded great respect and indeed are, and always will be, of high persuasive authority. This is not only because the same individuals sit in both the Supreme Court and the Privy Council, but because of the calibre of its jurisprudence consequent on the institutional knowledge and experience of its judiciary. However, it is apparent to me that the authorities of **Desquenne** and **Digby** ought not to be followed. They do not reflect the law of Jamaica, insofar as they purport to establish a general rule, that on applications for interlocutory injunctive relief the appropriate order is for "*the costs to be reserved until trial*". This is so even if a caveat is inserted to the effect that the rule applies only where the decision on interlocutory relief turns on the balance of convenience. There are two reasons why these decisions should not be followed.

[11] In the first place they were decided in the context, of similar but differently worded rules of court and, of practice directions which, as far as I know, we do not have in Jamaica, see **Desquenne** at pages 5 to 6 of the report**,** where the rules and practice directions are quoted. Given that our rules expressly apply to proceedings and applications the emphasis, placed by the English judges**,** on the ultimate result is not entirely appropriate here. It is also somewhat artificial to say there is no successful party when, after a contest, one side has satisfied the court that the justice of the case (in other words the balance of convenience) rests in their favour.

[12] The other reason, for departing from the English decisions, is that injustice may result. The two-member court in **Desanne,** (one member of which was a judge of the High Court) was considering an appeal against an order for costs made by the judge below. It is relevant to note that the trial of the ultimate issue was only weeks away and the judge's list was such that the trial could in short order be accommodated, see per Lord Neuberger in **Picnic At Ascot v Kalus Derigs [2001] FSR 2** at page 13 lines 14 to 15. This is not the situation in the case at bar and will not be for the vast majority of cases in the commercial and civil jurisdictions of this court. A trial is at best twelve months away and often litigants wait much longer. Furthermore, in our civil division, the trial is very likely to be before a judge other than the one who heard the interlocutory application. Both factors, time and personnel, render it doubly difficult for the court to accurately assess at the end of the trial the appropriate order for costs of the interlocutory hearing.

[13] The fact that the party, who was successful at the interim stage, loses at trial does not mean that he was not entitled to succeed on the interlocutory application and therefore entitled to those costs, see **Bushbury Land Rover Limited v Bushbury Limited [1990] FSR 709** per Auld LJ at page 712. If the matter of costs is reserved until trial the trial judge will have to consider, among other things, the circumstances of the interlocutory application, its reasonableness and the basis of his judgment at trial. There are many reasons a trial court may refuse equitable relief to a party who was entitled to such relief at the interim stage. The intervention of a third-party interest which was unknown or not apparent before trial, for example, or issues of laches. Also, parties may never go to trial because the matter is settled or due to a change in circumstance e.g. destruction of the "*res"*. In such circumstances is a party who was successful, at the interim stage, to lose the costs or be forced to further expense to have an order for costs obtained? These scenarios, and for a reference to others see the judgment of Lord Neuberger in the **Picnic At Ascot** case (cited above) at page 12 line 13, demonstrate there are very good reasons, in the Jamaican context, to have costs orders made at the end of interlocutory injunctive proceedings. Furthermore, such orders can assist parties who wish to negotiate a compromise. A

court has the power to stay the assessment of costs or the execution of costs after taxation. The flexibility and possibilities are many. What is clear however is that a rule, that on an application for interlocutory injunctive relief the usual order should be to reserve the order for costs until trial, is inappropriate and does not reflect the law of Jamaica.

[14] I am fortified in this view of the law by the analysis of Lord Neuberger in the **Picnic at Ascot** case cited above. He was at the time a judge of first instance and hence bound by the decision of the Court of Appeal in **Desquenne**. Having summarized the ratio of **Desquenne** Justice Neuberger went on to say, at page 12 of his judgment:

> *"As this present issue concerns the question of costs, it would be plainly wrong to treat **Richardson*** [meaning the Desquenne case], *even bearing in mind that it is a recent decision of the Court of Appeal, as authority which ties the hands of the court in a case such as this."*

It is apparent that Lord Neuberger did not regard the decision in **Desquenne** as establishing an inflexible rule of practice.

[15] I am also fortified by the decisions of our own Court of Appeal in **Vinayaka** and

Capital & Credit, cited at paragraph 5 above, which are binding on me. Morrison JA (later President of the Court of Appeal) set out the correct and appropriate rule applicable, see paragraph 10 of his judgment. Essentially it is that the general rule, that the successful party should be awarded costs, applies. However, the court always has a discretion and, when exercising that discretion, all the circumstances must be considered. It seems to me one circumstance is the nature of the proceedings. Applications for interlocutory injunctive relief, in which no facts are found, are to be carefully considered. If the decision, at that interim stage, turns solely on the balance of convenience it may be appropriate to reserve the question of costs for the judge at trial but, before doing so, one must consider the amount of time which may elapse before trial and, importantly, whether the trial judge will

be in as good or a better position to decide who should bear the costs of the application. In this regard the reasonableness or otherwise of the application, whether offers of undertakings were proffered or rejected, the strength or otherwise of each party's case, and any other relevant factor, must be considered. Each case will turn on its peculiar circumstances when deciding whether the general rule, that costs follow the event, should be applied.

[16] I hold therefore that there is no general rule applicable only to orders for costs on applications for interlocutory (or interim) injunctive relief. The general rule, that costs should follow the event, applies but a court, when considering the appropriate order for costs, must consider all the circumstances including, but not exclusively, the matters listed at rule 64 (4) (a) to (g). The circumstances include, inter alia, the nature of the application and, on an application for interlocutory injunctive relief, the matters discussed in paragraph 15 above.

[17] Applying the law to the matter at bar I order costs to the Defendants against the Claimant to be taxed if not agreed. Having found that there is no serious issue to be tried, sufficient to support the grant of injunctive relief at this stage, the general rule should apply unless there are countervailing factors. In this case there are none. What might those have been one may ask? The rules give us some guidance. So, for example, the general conduct of a successful party may move a court to refuse costs or, in all the circumstances, the justice of the case may warrant another order. The possibilities in this area for a court of equity, and injunctive relief is equitable, are endless. Suffice it to say there is nothing, on the facts before me, which would not allow costs to go to the party who was successful on this hotly contested application for interim relief.

[18] Having decided that costs should go to the Defendants the other point to consider is whether an order for immediate taxation ought to be made. The argument in support of such an order, on the facts of this case, I found to be persuasive. In the first place

some of the Defendants are ordinary persons called to serve as executors and directors of the deceased's company. In a sense victims of circumstance. In resisting this application they have been put to expense perhaps quite unexpectedly. When regard is had to my finding, that there is no issue for

trial sufficient to support the application, I can safely add the word "*unnecessary*" expense. There is no good reason why they should be asked to wait for a trial to recover their costs. Had the Claimant been a person, whose ability to continue the claim would be stymied by the order for immediate costs, I would have decided otherwise. However, there is no suggestion of an inability to pay. I will therefore give permission for costs to be taxed immediately.

[19] On the question of whether to grant a certificate for two counsel there was no

contest. The parties all felt the need for King's Counsel to represent their interests. Given the issues at stake and the value of the assets involved I cannot fault them. Certificate for two counsel is granted. As the matter is on appeal I will however stay execution of costs after taxation until the termination of the appeal or a further order of the court.

[20] My orders on the question of costs are therefore:

a) Costs to the Defendants against the Claimant to be taxed or agreed
b) Special Costs Certificate for two counsel is granted
c) Permission granted for the immediate taxation of such costs
d) Execution, after taxation, is stayed until a decision of the Court of Appeal on this application or further order of the court
e) These orders form, and are to be treated as, part of my judgment delivered on the 3rd March 2025 in this matter.
f) Formal order to be prepared, filed and served by Claimant's attorneysat-law.

David Batts

Puisne Judge.