

**SUPPLEMENTAL JUDGMENT**



**[2016] JMSC Civ 182**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2010HCV02045**

<b>BETWEEN</b>	<b>CHRISTOPHER WATSON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>TANKWELD LIMITED</b>	<b>DEFENDANT</b>

**Costs- whether costs to be apportioned- late amendment of claim- time taken to cross-examine on issues subsequently withdrawn- Special Damages agreed.**

**Ms Christine Mae Hudson and Ms. Ishia Robinson instructed by K. Churchill Neita & Co for the Claimant**

**Mr Maurice Manning, Ms Camille Wignall and Ms K. Michelle Reid instructed by Nunes Scholefield DeLeon & Co for the Defendant**

**IN CHAMBERS**

**HEARD : 20<sup>th</sup> October 2016**

**COR: BATTIS J.**

1. On the 7<sup>th</sup> October 2016 I delivered my decision on the substantive issues in this action by way of a written Judgment, see Christopher *Watson v Tankweld Limited [2016] JMSC Civ 163*. On that, date counsel for the Defendant reminded me he wished to be heard on costs. I therefore adjourned to the 20<sup>th</sup> October 2016 for a hearing in chambers on the matter of costs of the claim. I also

asked the parties to clarify for me the amount agreed as special damages as my note was unclear .They promised to do so at the hearing in chambers.

2. On the 20<sup>th</sup> October 2016, having considered submissions, both oral and written, I made the following orders:

- (a) The Claimant is allowed 80% of the costs of the Claim such costs are to be taxed or agreed
- (b) Special Damages agreed at \$1,527,196.79.

I promised then to put my reasons in writing. This Judgment is the fulfilment of that promise.

3. It is common ground that the court has a discretion as it relates to costs .Rules 64.6 (3) and 64.6 (4) make that clear. Rule 64.6(5) sets out the various types of costs orders which may be made. The Defendant wants an order in accordance with Rule 64.6 (5) (a):

*“a proportion of another party’s costs”*

4. Defendant’s counsel submitted, and I agree, that even if one party is ultimately successful overall he may be denied a proportion of costs because he lost on specific issues, see **Capital & Credit Merchant Bank v Real Estate Board** [2013] JMCA Civ 48; **Blackstone Civil Practice 2009** para 66.12; **Jamaica Observer Limited et al v Wright** [2014] JMCA 18A. See also **Budgen v Andrew Gardner Partnership** (31<sup>st</sup> July 2002) [2002] EWCA Civ 1125 per Simon Brown LJ @ para 26:.

***“For my part I have no doubt whatever that judges nowadays should be altogether readier than in times past to make costs orders which reflect not merely the overall outcome of proceedings but also the loss of particular issues. If, moreover, the “winning “ party has not merely lost on an issue but has pursued an issue when clearly he should not have done ,then there are two good reasons why that should be reflected in the costs order: first, as a sanction to deter such conduct in future ;secondly, to relieve the “losing” party***

***of at least part of his costs liability. It is one thing for the losing party to have to pay the costs of issues properly before the court, another that he should have to pay also for fighting issues which were hopeless and ought never to have been pursued.”***

5. Counsel for the Claimant took no issue with these principles. It was however submitted that the costs ought not to be reduced by a percentage. The court should look at the issues individually and, in the event the court found the Claimant acted unreasonably, then costs should be reduced at taxation. In other words, as I understand it, I should really make findings now for the guidance of the Registrar at taxation. In that regard, Counsel referenced medical reports to explain why certain aspects of the claim were abandoned. Indeed counsel in written submissions also indicated that it was on the day Dr. Mowatt was to give evidence that she indicated certain things at which time the decision was made not to call her to give evidence.
6. I have no doubt that in an appropriate case the approach suggested by Claimant’s counsel can be taken. This case is not one of those. I am not concerned with the minutiae of the Claimant’s counsel’s decisions in the conduct of the action. The question at this stage is whether having regard to the issues decided the Claimant is entitled to all the costs of the action or only a proportion.
7. Germaine to my decision is the fact, as recorded in the Judgment delivered on the 7<sup>th</sup> October 2016, that:
  - (a) The Claimant withdrew significant aspects of the claim on the 5<sup>th</sup> May 2016 in the course of the trial, see para 10 of my Judgment delivered on the 7<sup>th</sup> October 2016.
  - (b) The Claimant was unsuccessful on the question whether the lumbar back pain was a consequence of physical injury or was psychogenic. This had implications for the quantum of damages primarily as

it related to the cost of future treatment, see paras 38 and 56 of my Judgment delivered on the 7<sup>th</sup> October.

(c) The Claimant was unsuccessful on the question whether he was entitled to loss of income, that is whether he had unreasonably refused to return to work, see para 59 of my Judgment delivered on the 7<sup>th</sup> October 2016.

8. I agree that, in the exercise of a discretion as it relates to costs, it is not on every occasion that a party loses on an issue, nor on every issue on which a party loses, that costs need be apportioned. In the case at bar however a significant amount of both time and costs were expended, in preparation calling and cross-examination of witnesses, on issues which were either withdrawn late in the day, or on which the Defendant ultimately succeeded. In that regard, it is clear that, insofar as the periodontal disease was concerned, consultation with the experts ought to have made it clear those claims were unsustainable. Taken individually, the decision of the Claimant to advance other issues may not have been unreasonable, however when considered cumulatively, I think it unreasonable to ask the Defendant to bear all the costs of the Claim.
9. In the result and for the reasons stated I decided to apportion costs in the manner outlined at paragraph (1) above. I am grateful to the parties for pointing out that the hearing dates referenced in my Judgment of the 7<sup>th</sup> October 2016, were erroneous. The correct dates are 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup> May, 25<sup>th</sup>, 28<sup>th</sup> July, 7<sup>th</sup> and 20<sup>th</sup> October 2016.
10. This Judgment is supplemental to, and therefore to be read as part of, the Judgment I delivered on the 7<sup>th</sup> October 2016.

**DAVID BATTS  
PUISNE JUDGE**