

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE LAING JA**

SUPREME COURT CIVIL APPEAL NO COA2024CV00002

BETWEEN SAMUEL DIXON APPELLANT

**AND CLIVE FAIRWEATHER RESPONDENT
(In his capacity as named Executor
in the Estate of Dudley Harris)**

Written submissions filed by Lenroy Stewart instructed by Wilkinson Law for the appellant

Written submissions filed by Mikael Lorne for the respondent

17 October 2025

Civil Procedure – Costs – Appeal arising from the denial of an application for default judgment – Provisional costs ruling – Should the court depart further from the general rule that costs follow the event – Civil Procedure Rules, rules 64.6(1), (2), (3) and (4)

F WILLIAMS JA

[1] I have read the draft judgment of my sister Foster-Pusey JA, and I agree with her reasoning and conclusion. There is nothing that I wish to add.

FOSTER-PUSEY JA

[2] This costs ruling arises from an appeal brought by the appellant against a decision, made on 29 March 2023, by M Jackson J (Ag) (as she was then) ('the learned judge'). The learned judge denied the appellant's application for default judgment after Mr Dudley

Harris, now deceased ('the respondent'), failed to file a defence to the appellant's claim. At the hearing of the appeal, Mr Clive Fairweather, Mr Harris' executor, appeared.

[3] We heard the appeal and also received additional written submissions. On 11 July 2025, we dismissed the appeal. See **Samuel Dixon v Clive Fairweather (In his capacity as named Executor in the Estate of Dudley Harris)** [2025] JMCA Civ 22 for the relevant facts and background to the appeal. The complete outline of the orders made is:

- i. The appeal is dismissed.
- ii. The matter is remitted to the Supreme Court for a case management conference to be held.
- iii. 90% of the costs of the appeal to the respondent to be agreed or taxed.
- iv. If the appellant opposes the above costs order, he may file and serve submissions regarding costs on or before 25 July 2025 and the respondent may file submissions in response on or before 8 August 2025.
- v. If submissions on costs are filed, the court will consider the written submissions and provide its ruling. If no submissions on costs are filed, the order made at para. iii above stands as the final order of the court."

[4] In accordance with order iv in para. [3] above, albeit late, the appellant and respondent filed their respective submissions on costs on 4 August 2025 and 11 August 2025, respectively.

Submissions on behalf of the appellant

[5] Counsel for the appellant, Mr Stewart, in seeking to persuade this court to vary its provisional costs ruling, relied on section 30 of the Judicature (Appellate Jurisdiction) Act, which stipulates that the costs of civil proceedings at this level are in the discretion of this court. He argued that the appeal was not frivolous, as it raised a legitimate legal issue with limited local precedent. Counsel acknowledged that the appeal was not

successful overall, but argued that the appellant succeeded on some grounds and identified factual errors made by the learned judge. For instance, the learned judge incorrectly stated the number of vendors.

[6] Counsel emphasised that this court also agreed with the appellant that the contract had been breached, which was a significant finding, as the learned judge had not addressed this issue. It was submitted that the appellant reasonably believed that the registered proprietor was the appropriate party against whom to pursue specific performance, given that the same attorneys-at-law represented both the original vendors and the registered proprietor. He invited the court to consider rule 64.6(4)(d) of the Civil Procedure Rules ('CPR') and submitted that it was reasonable for the appellant to pursue the appeal.

[7] Counsel also drew the court's attention to the respondent's conduct, noting that the respondent failed to file a defence or provide any affidavit evidence, despite having ample opportunity to do so. He submitted that this lack of engagement contributed to the need for the appeal. Furthermore, the respondent's submissions were filed late, both during the appeal and in earlier proceedings. In the circumstances, it was submitted that the respondent should not be rewarded with costs due to his conduct. He relied on the maxim, "He who seeks equity must do equity". Counsel also requested that the court have regard to rule 64.6(4)(a) of the CPR, which allows the court to consider the conduct of the parties both before and during the proceedings when determining the appropriate costs order.

[8] In light of these factors, counsel urged that any order for costs against the appellant was inappropriate in this case. Alternatively, he proposed three approaches to the costs order: (a) each party should bear their own costs; (b) the costs of the appeal should be treated as costs in the Supreme Court claim; or (c) the appellant should pay no more than 50% of the respondent's costs, with taxation deferred until the conclusion of the Supreme Court proceedings.

Submissions on behalf of the respondent

[9] Counsel for the respondent, Mr Lorne, in opposition to the appellant's submissions, and in explanation for the time when he filed submissions on behalf of the respondent, highlighted that the appellant's submissions on costs were filed after the time set by this court. When the filing deadline had passed, he had concluded that no submissions would be made. In addition, the submissions were served while he was outside the jurisdiction.

[10] Counsel submitted that the appeal concerned the refusal of an application for default judgment, but the appellant's submissions on costs focused on broader issues unrelated to that specific decision. He emphasised that the general rule is for a successful respondent to be awarded costs, especially when forced to defend an appeal that lacked merit and caused delays in the Supreme Court proceedings. He also submitted that the appeal did not reveal any new legal insights and was essentially frivolous.

[11] Counsel, therefore, urged the court to uphold its original order awarding 90% of the appeal costs to the respondent, as, in his view, it reflects the appellant's conduct and the meritless nature of the appeal.

Discussion

[12] It is well understood that the award of costs is within the court's discretion. Part 64 of the CPR outlines the general principles relating to costs. Pursuant to rule 1.18(1) of the Court of Appeal Rules ('CAR'), the provisions of Parts 64 and 65 apply to the award and quantification of costs of an appeal, subject to any necessary modifications and amendments.

[13] The general rule is that where a court decides to order costs, it must order the unsuccessful party to pay the costs of the successful party, see rule 64.6(1) of the CPR. However, the court may, pursuant to rule 64.6(2) of the CPR, order a successful party to pay all or part of the costs of an unsuccessful party and even make no order as to costs. In deciding who should be liable to pay costs, the court must consider all the relevant circumstances, see rule 64.6(3) of the CPR.

[14] Rule 64.6(4) of the CPR is instructive. It outlines particular factors that the court should consider in exercising its discretion. The court 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 the 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.”

[15] The primary issue that arose in this appeal concerned whether the learned judge erred in exercising her discretion to refuse to grant default judgment for specific performance or another remedy. Since the issue involved a default judgment, it would not be helpful to use the failure to file a defence as a punitive element in determining the issue of costs.

[16] While a few of the appellant's grounds of appeal had some merit, those grounds failed to address the central issue the court was required to determine. Ultimately, he did not succeed on that core issue.

[17] None of the points raised by the appellant in his argument against the proposed award of costs is persuasive. What the appellant highlighted as errors made by the learned judge did not go to the heart of the appeal. Contrary to the appellant's submissions, the court did not find any support for his argument that there was a reasonable basis for believing that the registered proprietor was the appropriate party to be sued. The appellant was fully aware that he had entered into a sale agreement with four trustee vendors.

[18] The appellant has complained of the respondent's lack of engagement in the court below; however, in my view, the main issue is the appellant's response to the ruling of the learned judge. While I would not describe the appeal as frivolous, time could have been better utilised if the appellant had taken steps to join the other trustee vendors to the claim or had provided an explanation if that was not possible.

[19] In all the circumstances, I would suggest that the court maintain and finalise its provisional ruling on costs.

LAING JA

[20] I have read the draft judgment of my sister Foster-Pusey JA and I agree with her reasoning and conclusion.

F WILLIAMS JA

ORDER

The final order of the court on costs is 90% of the costs of the appeal to the respondent to be agreed or taxed.