

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE G FRASER JA (AG)**

SUPREME COURT CIVIL APPEAL NO COA2022CV00070

BETWEEN	THE PUBLIC SERVICE COMMISSION	1ST APPELLANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND APPELLANT
AND	DALE AUSTIN	RESPONDENT

Garth McBean KC instructed by Garth McBean & Co for the appellants

Dale Austin in person and Mrs Deborah Patrick-Gardner instructed by Hugh Wildman & Company for the respondent

31 October, 1 November 2023 and 28 November 2025

Judicial Review – Application for leave to apply for judicial review – Exercise of discretion in awarding costs – Whether the learned judge erred in declining to defer the award of costs at preliminary stage – Whether exceptional circumstances existed justifying costs orders – Whether costs award of 80% was proportional in a mixed outcome – Application of protective costs discretion – Civil Procedure Rules, (2002), rules 56.15(5) and 64.6.

STRAW JA

[1] I have read, in draft, the judgment of G Fraser JA (Ag). I agree with her reasoning and conclusion and have nothing further to add.

V HARRIS JA

[2] I, too, have read the draft judgment of G Fraser JA (Ag) and agree with her reasoning and conclusion.

G FRASER JA (AG)

Introduction

[3] Mr Dale Austin ('the respondent'), on 19 August 2021, filed in the Supreme Court an application seeking leave for judicial review and a constitutional motion relative to the failure of the 1st appellant, the Public Service Commission ('the PSC'), to promote him to a higher office within the chambers of the 2nd appellant, the Attorney General of Jamaica ('the AG').

[4] On 29 April 2022, Pettigrew-Collins J ('the learned judge') granted leave to the respondent to pursue judicial review, and, on 3 June 2022, judgment on costs was delivered, wherein the learned judge awarded costs in favour of the respondent.

[5] The appellants unsuccessfully advanced the argument before the learned judge that an order for costs should not be made following the application hearing for leave to pursue judicial review. The appellants had contended that an order for costs should instead be deferred until the conclusion of the review hearing itself. Although those submissions did not find favour with the learned judge, she nonetheless granted the appellants permission to appeal her order as to costs. Accordingly, the appellants moved this court by way of a notice of appeal filed on 16 June 2022 to set aside the costs order made by the learned judge. The details of the order appealed are: "[t]he [respondent] will recover 80% of his costs against the first as well as the second [appellant]. Such costs are to be taxed if not sooner agreed".

[6] The appellants also challenged the following findings of fact and law:

“(a) Findings of fact

- i. The finding at paragraph 28 of the judgment that an explanation to the Respondent could potentially have averted litigation.
- ii. The finding at paragraph 29 of the judgment that this is a case when the Court should consider making an award of costs to the Applicant (now Respondent in the Appeal herein).

(b) Findings of law

- i. The finding at paragraphs 29 and 39 of the judgment that this is an exceptional case in which costs should be awarded to the Applicant, (now Respondent in the Appeal herein)”

[7] The grounds of appeal are:

- “(a) The Learned Judge, while recognizing at paragraphs 24 and 39 of her judgment that it is only in exceptional cases that costs are awarded against a respondent in an application for leave to apply for Judicial Review, erred in finding as she did that this was an exceptional case particularly having regard to the fact that the issues in the application for leave were not clear and simple requiring any concession on the part of the [appellants] and required full argument.
- (b) The Learned Judge in making the award for costs against the Appellants erred in taking into account as a fact at paragraph 28 of her judgment that an explanation by the [1st appellant] for refusing the appeal could potentially have averted litigation. The Learned Judge so erred having regard to the circumstances of the instant case.
- (c) The Learned Judge erred in failing to take into account, for the purposes of Rule 64.6 (4) of the Civil Procedure Rules, the fact that the [respondent], had not succeeded on all issues/grounds.
- (d) The learned Judge erred in taking into account as she did at paragraph 27 of her judgment the fact that there was a deployment of full argument and documentary evidence. The Learned Judge so erred having regard to the fact that in the pursuit and opposition of certain grounds the [respondent] and the [appellants] were successful.”

[8] The orders sought in this court are as follows:

- “(i) An order that the Appeal herein be allowed.
- (ii) An order that the order awarding to the Respondent 80% of his costs against the [appellants] be set aside.
- (iii) Suh [sic] further or other order as this Honourable Court deems just.”

Background

[9] The respondent was employed in his capacity as an attorney-at-law assigned to the AG’s Chambers in 2011 and was substantively appointed to the post of Assistant Crown Counsel on 1 September 2012. He asserted that he had not been promoted despite having served for over a decade. He further stated that he had been assigned the “largest” caseload within the litigation department and had undergone five performance evaluations between 2011 and 2019, all of which indicated that he met or exceeded expectations.

[10] The respondent claimed that the PSC had failed in its statutory duty to consider him for promotion as vacancies arose. He asserted that between 2011 and 2021, approximately 63 promotional opportunities arose within the AG’s Chambers, yet he was not considered for any. Efforts to raise the issue with the Solicitor General, according to him, were met with no response. He further asserted that he was the only legal officer in the public service since 1962 to have remained at the LO-2 level for more than 10 years without receiving a promotion, while his junior colleagues had advanced on a non-competitive basis.

[11] He alleged that victimisation, punitive action, threats, reprisals, and sustained bias have been the treatment meted out to him over the past decade. He specifically identified the Solicitor General and the Director of State Proceedings as having demonstrated bias against him; notwithstanding such bias, they continued to be involved in the decision-making process regarding his promotion. He asserted that he was defamed and subjected to constitutional breaches by the appellants. He stated that the Supreme Court had found both appellants liable in respect of those allegations.

[12] As a further indication of bias, the respondent pointed to the refusal by the Solicitor General and the Director of State Proceedings to facilitate payment of judgment debts and costs due to him over an extended period, as well as their failure to communicate with his legal representatives regarding the same. He also raised concerns about the impartiality of the selection process for the post of Assistant Attorney General, for which he was interviewed on 14 January 2021. The panel included the Solicitor General and three other officers who, he contended, reported to her. In April 2021, he was informed by a letter from the Solicitor General that he had been unsuccessful in the selection process, having scored lower than other candidates in a written test conducted on 2 November 2020.

[13] The respondent indicated that he was advised of the right of appeal to the PSC. He utilised this avenue of redress, but his appeal was summarily dismissed when the PSC met on 20 May 2021. He was further aggrieved by the fact that no reasons were provided for the decision to dismiss his appeal.

The learned judge's reasons in the court below

[14] Having reviewed the plethora of complaints and issues raised by the respondent, on 29 April 2022, the learned judge delivered a written judgment on the application for leave to apply for judicial review in this matter, recorded as **Dale Austin v The Public Service Commission, The Attorney General of Jamaica and Marlene Aldred** [2022] JMSC Civ 55 ('the substantive judgment'). The learned judge at paras. [125] and [126] of the substantive judgment stated that:

"[125] In the final analysis, although I am not of the view that the [respondent] has arguable grounds with a realistic prospect of success with regard to all the declarations he wishes to seek, he has raised sufficient doubt in relation to the validity of the Accountability Agreement and the constitutionality of the present arrangement for employment and promotion for public servants. The present arrangement arguably, has divested the Public Service Commission of its intended role and purpose as well as bestowed upon it a role that is within the purview of the Privy Council. There are also

concerns as to whether the Public Service Commission ought to have considered the applicant's eligibility for promotion from time to time as vacancies occurred, taking into account all the factors enumerated in Regulation 17(1), notwithstanding the extant litigation regarding the propriety of the purported dismissal. Further it is arguable that he should have been given a reason for the decision not to promote him.

[126] On the above analysis, the [respondent] has made out his case for a grant of leave to apply for judicial review. In the circumstances, I make the following orders:

1. Leave to apply for judicial review is granted to the [respondent].
2. Leave is conditional on the [respondent] making a claim for Judicial Review within 14 days of the receipt of this Order granting leave.
3. The first hearing of the Fixed Date Claim Form for Judicial Review is scheduled for June 28, 2022, at 10:00 am for 30 minutes.
4. The parties will be heard on the question of costs on Friday, May 6, 2022, at 10:00 am."

[15] In her costs judgment which followed, bearing neutral citation, **Dale Austin v The Public Service Commission, The Attorney General of Jamaica and Marlene Aldred** [2022] JMSC Civ 73, the learned judge pointed out that the respondent contended that he had succeeded on the only issue raised in the proceedings. The learned judge rejected this characterisation, noting that while the respondent may have identified an overarching issue, the claim involved multiple sub-issues that required individual consideration and extensive legal argument. These included matters such as the prematurity of the application, the alleged unconstitutionality of specific instruments, irrationality in the promotion process, procedural unfairness, bias, and legitimate expectation.

[16] Upon review, the learned judge found that several of these grounds were unarguable. In particular, the allegations of bias and specific claims advanced against the

Solicitor General did not disclose arguable grounds. The learned judge further found that the Solicitor General had, in fact, provided the respondent with a reason for the relevant decision and that her involvement was a function of statutory delegation, not personal culpability.

[17] The learned judge further observed that, save for the claim of bias, the respondent had made out arguable grounds primarily against the 1st and 2nd appellants. However, she accepted that neither the respondent nor the appellants had acted unreasonably in the pursuit or opposition of the application. The learned judge rejected the respondent's assertion that the appellants had over-litigated or unreasonably failed to concede any issues, finding instead that the legal representation and opposition advanced by all parties were proportionate and appropriate.

[18] In the exercise of her discretion under rule 64.6 of the Civil Procedure Rules, 2002 ('the CPR'), the learned judge concluded that no costs order should be made against the Solicitor General, given the respondent's lack of success in the claims against her. While the respondent would be entitled to costs against the appellants, he would not recover the entirety of his costs, having failed on several issues. The learned judge accordingly ordered that the respondent recover the greater portion of his costs from the appellants, applying rule 64.6(4)(b) and (d) and 64.6(5)(a) and (b) of the CPR. Ultimately, the learned judge awarded 80% of the costs to the respondent, despite the application achieving only partial success. At para. [39] of her costs judgment, she determined that:

"[39] In the final analysis, the court has a discretion to award costs in an application for leave to apply for judicial review, **although the usual order is that costs be costs in the claim.** I consider that this case has exceptional features which takes [sic] it outside of the accepted general position as far as applications for leave to claim judicial review are concerned. The court takes into consideration that the [respondent] was not successful on all the grounds raised and was unsuccessful in most if not all of the grounds which required that the Solicitor General be made a party to the application." (Emphasis added)

The issues

[19] The grounds of appeal reflect challenges on both procedural and substantive bases regarding costs at the leave application stage of judicial review proceedings. The appellants contest the appropriateness of awarding costs at the application stage in the proceedings, especially where the respondent did not succeed on all issues. Furthermore, the issues for determination raise important jurisprudential considerations, particularly in comparison with the United Kingdom practice, where costs at the application stage are usually awarded as costs in the cause. Stripped of their particular formulations, the grounds of appeal distil into three broad issues as follows:

- I. Whether there exists a settled or consistent practice in Jamaica concerning the award or deferment of costs at the leave stage of judicial review proceedings;
- II. Whether, within the CPR, it is appropriate for Jamaican courts to adopt the United Kingdom practice of deferring costs at the leave stage, and to what extent such an approach aligns with the protective costs discretion provided in rule 56.15(5) of the CPR; and
- III. Whether the learned judge erred in her assessment of the factual and evidentiary context, specifically in (a) attributing significance to the absence of an explanatory response from the PSC, and (b) placing weight on the extent of arguments and materials deployed by the parties.

Summary of submissions

For the appellants

[20] Learned King's counsel, Mr Garth McBean, on behalf of the appellants, elected to argue the four grounds of appeal *en bloc*, as in the circumstances it was more convenient to advance the arguments on behalf of the appellants in that fashion, instead of trying to dissect the statements pertaining to each ground of appeal. The submissions as a whole

challenged the reasons proffered by the learned judge as justifying her decision to award costs to the respondent. King's Counsel submitted in the first instance that the learned judge acknowledged that in applications for leave for judicial review, it was only in exceptional cases that costs should be awarded against a respondent. Notwithstanding that acknowledgement, the learned judge found that the case at bar was an "exceptional case", citing as a factor the "deployment of full argument and documentary evidence" which she said was referred to in **R (Corner House Research) v Secretary of State for Trade and Industry** [2005] 1 WLR 2600 ('**Corner House**').

[21] King's Counsel further contended that in so taking that factor into account, the learned judge erred because the foregoing phrases as used in cases such as **R v Mount Cook Land Ltd and Another v Westminster City Council** [2017] PTSR 1166 ('**Mount Cook Ltd**'), in which the award of costs was made against an unsuccessful applicant. In that case, the court found that the applicant had gained the advantage of an early substantive hearing of the claim. In the instant case, it was the respondent against whom the learned judge made a costs award, signalling a reversal of the principle expounded in the two foregoing cases. Furthermore, in this case, the issues were not clear, nor were any concessions required by the appellants; in fact, the learned judge found that "[t]he [appellants] understandably utilised a very significant portion of that time" that was employed for the hearing of the application. Nonetheless, it was against that backdrop that the costs award was made.

[22] King's Counsel urged this court to consider the relevance of the CPR, specifically, rule 56.15, and the law espoused in the case of **Danville Walker v The Contractor General** [2013] JMFC Full 1(A) ('**Danville Walker**'). In particular, the admonitions of Sykes J (as he then was), at paras. [5], [12] and [19]. This court was further urged to have regard to the general rule regarding costs, which is encapsulated in rule 64.6, which the learned judge expressly set out at paras. [30] and [31] of her costs judgment, indicating that she had taken the relevant factors set forth into account. King's Counsel submitted that at the leave stage, costs are usually awarded as costs in the claim,

regardless of whether an applicant succeeded in obtaining permission to proceed to the filing of a claim and the judicial review proceedings.

[23] Finally, King's Counsel submitted that, in light of the learned judge's finding that "...the applicant was not successful on all the grounds..." nor was the conduct of the now appellants, in opposing the application, unreasonable. It was difficult to reconcile the 80% costs award in favour of the respondent with those findings and with the factors she evidently considered in rule 64.6 of the CPR. In all the circumstances of the case, "the learned judge ought not to have awarded costs against the Appellants..."

For the respondent

[24] The respondent submitted that the appellants are "inviting this Honourable Court to depart from longstanding practice and established statutory costs rules, including the general rule at CPR **Rule 64.6(1)** as well as **Rule 65.8(1)** of the Supreme Court of Jamaica *Civil Procedure Rules 2002* ('CPR')..." (bold as in the original). This, the respondent said, was asking the court to "roll-up" the consideration of costs for both the leave application and the substantive hearing on the claim and "issue only one costs order". The respondent further submitted that the appellants erroneously advanced an alternative argument to the effect that, as it concerns leave applications for judicial review, courts in Jamaica are restricted in awarding costs and that the general costs provisions in rule 64.6 of the CPR should only apply in exceptional circumstances. The appellants erred, he said, by applying principles from decided cases in England and Wales, that protect respondents at the application stage from orders of costs; such costs awards are only imposed in exceptional circumstances. The respondent entreated this court to find that the appellants' arguments did not "cohere with the specific procedure for Judicial Review in our jurisdiction and the applicable costs rules regulating the court's jurisdiction for awarding costs in our jurisdiction".

[25] The numerous distinguishing features and distinct regulatory schemes in Jamaica versus England and Wales have led to different regimes for the award of costs at various stages of the judicial review procedure. Consequently, the costs rules are tailored to meet

the distinct needs of each procedure in its respective jurisdiction. The cases on which the appellants rely are, in the circumstances, unhelpful. The authorities relevant to Jamaica are section 28E of the Judicature (Supreme Court) Act ('JSCA'), the Judicature (Rules of Court) Act, Parts 64 and 65 of the CPR and the decision of the Full Court in **Danville Walker**. The appellants are also in error when they contend that the cases of **Danville Walker** and **In the matter of an Application by Saeed Ullah for Leave to Apply for Judicial Review ('Saeed Ullah')** [2007] NIBQ 45, support their contention that for costs to be awarded at the leave stage, exceptional circumstances must attend the leave application.

[26] The respondent submitted that, based on the foregoing authorities, the learned judge was "legally empowered to consider the question of costs when she did, and further to apply the considerations that the court did when it exercised its discretion and granted the costs for the application for leave in favour of [the respondent]". In the circumstances, the appellants' grounds of appeal and arguments are "misconceived and entirely devoid of merit" and should accordingly be dismissed.

Discussion

[27] This appeal relates to the exercise of the discretion of a judge of the Supreme Court relative to a costs order made in favour of the respondent herein. The law is clear on how this court should approach the review of the exercise of the judge's discretion. Morrison JA (as he then was) has summarised and distilled the principles gleaned from Lord Diplock's dictum in **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042, in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 at para. [20], where he said:

"This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's

decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[28] So, the issue really is whether the learned judge's decision was so aberrant that no properly informed judge would have arrived at it. In reviewing what had taken place in this matter, at first blush, it would seem that the award of costs is the only issue on appeal, and in that case, the relevant rule in respect of this appeal is rule 11(1) of the Judicature (Appellate Jurisdiction) Act ('JAJA') dealing with restrictions on appeal. The section reads as follows:

"11.-(1) No appeal shall lie –

- (a) from an order allowing an extension of time for appealing from a judgment or order;
- (b) from an order of a Judge giving unconditional leave to defend an action;
- (c) from the decision of the Supreme Court or of any Judge thereof where it is provided by any law that the decision is to be final;
- (d) from an order absolute for the dissolution or nullity of a marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree, except upon some point which would not have been available to such party on such appeal;
- (e) without the leave of the Judge making the order or of the Court of Appeal from an order made with the consent of the parties **or as to costs only where such costs by law are left to the discretion of the court;**
- (f) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge except – ..." (Emphasis added)

[29] In the decision of **Ivor Walker v Ramsay Hanson** [2018] JMCA Civ 19, counsel for the respondent had contended that as the appeal was in essence only an appeal in respect of costs, such an appeal was not permitted pursuant to section 11(1)(e) of the JAJA and, therefore, the appeal was misconceived, as at the time of the appeal, the claim

had been tried, so the claim could no longer be struck out pursuant to that order, that is in respect of the non-payment of costs. Phillips JA made short thrift of this oblique objection by the respondents by indicating that:

“Even if it can be said that the issue relating to the unless order was non-existent since the trial had already been conducted, there nevertheless seems to be compliance with section 11(1)(e) of JAJA, since this court granted leave to appeal an order which included setting aside costs. As a consequence, the appeal against setting aside the costs order is therefore properly before this court.”

[30] Although there are restrictions regarding the relevant section of the JAJA, there was nevertheless compliance with section 11(1)(e) of the JAJA, since the court below granted leave to appeal to the appellants. Therefore, the appeal against setting aside the costs order is properly before this court.

[31] There is no automatic entitlement to costs. The making of any order as to costs lies within the court’s unfettered discretion, albeit one that must always be exercised judicially and in accordance with established principles. The JSCA provides in section 47(1) that “[i]n the absence of express provision to the contrary, the costs of and incident to every proceeding in the Supreme Court shall be in the discretion of the Court...”. Parts 64 and 65 of the CPR contain the general provisions relating to the ordering and quantification of costs in civil proceedings in the Supreme Court and any appeal concerning such an order. There are also many factors that the court considers when determining costs orders. They are set out in detail in part 64 of the CPR and always include consideration of the parties' conduct. The case at bar concerned an application for leave to apply for judicial review, which was successful.

Issue I

Whether there exists a settled or consistent practice in Jamaica concerning the award or deferment of costs at the leave stage of judicial review proceedings

[32] This first issue concerns the existence or absence of an established local practice for awarding of costs at the leave stage of judicial review proceedings. This enquiry emerges within the context of the general rule under the CPR that "costs follow the event," although the court retains the discretion to depart from that rule, based on principles of justice, proportionality, and fairness.

[33] Rule 64.6 of the CPR provides that the court has discretion as to whether costs are payable by one party to another, the amount of those costs, or may make no order as to costs. Subsection (4) enumerates the factors to which the court must have regard to all the circumstances, but in particular, in exercising that discretion, including the conduct of the parties, the reasonableness of pursuing or resisting issues, and the manner in which the issues were advanced. The rule codifies a balanced approach to costs, reflecting that such orders are neither punitive nor automatic, but are a part of the court's management of justice between litigants.

[34] In ordinary civil proceedings, the applicable principle, as codified in rule 64.6(1) of the CPR, is underpinned by the objective of compensating parties for the expense of litigation and discouraging unmeritorious claims or defences. Thus, the courts have an overarching duty to ensure that costs are awarded justly. This principle also encompasses the need to avoid discouraging the pursuit of legitimate claims or defences, especially in matters involving the public interest. Thus, the rule highlights the court's broad discretion to tailor costs orders to the specific circumstances of each case. The wide discretion conferred by rule 64.6 must therefore be exercised judiciously.

[35] In determining whether the costs of the application for leave to apply for judicial review should be awarded to the respondent, the learned judge in her costs judgment stated that:

"[22] It is true as the respondents advanced, that the Civil Procedure Rules do not mandate that the applicant in a case such as this one, is entitled to costs on a successful application. However, there is nothing in Rule 56 to indicate that the general rule should not apply except to the extent that it is made clear by Rule 56.15(5). This provision it is noted, is for the benefit of an unsuccessful applicant. As the respondents also observed in their submissions, the instances in which an order for costs may be made against an applicant for leave are restricted to circumstances where the applicant's conduct is considered to be unreasonable.

[23] As is clear from the rules and fully recognized by all parties to this application, an application for leave is, by virtue of our rules of court, a necessary precursor to the proper filing of a Fixed Date Claim Form seeking the relief of judicial review. There is thus no question whether an application for leave must be regarded as proceedings within the meaning of Rule 64.6. It seems clear enough as Mr McBean accepts, that it remains within the judge's discretion to decide whether an award of costs should be made in favour of the applicant, pursuant to the provisions of Rule 64.6."

[36] Based on the foregoing passage, it is evident that the learned judge had an acute appreciation of her jurisdiction as it relates to the award of costs at the leave stage and also appreciated that there was a prevailing practice of deferring costs at that stage. She was, of course, entitled to go against the prevailing practice and indeed follow the letter of the law as laid down in part 64 of the CPR.

[37] A court making an order which is contrary to the general principle must, however, have regard to the matters set out in rule 64.6(4). Lord Woolf MR explained in **AEI Rediffusion Music Ltd v Phonographic Performance Ltd** [1999] 1 WLR 1507, 1522 – 1523:

"I draw attention to the new Rules because, while they make clear that the general rule remains, that the successful party will normally be entitled to costs, they at the same time indicate the wide range of considerations which will result in the court making different orders as to costs. From 26 April 1999 the 'follow the event principle' will still play a significant

role, but it will be a starting point from which a court can readily depart. This is also the position prior to the new Rules coming into force. The most significant change of emphasis of the new Rules is to require 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. It is now clear that too robust an application of the 'follow the event principle' encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so."

[38] Similar sentiments were expressed in **Chasrose Ltd v Kingston and St Andrew Corporation** (unreported), Supreme Court, Jamaica, Claim No 2003 HCV 1026, judgment delivered 25 July 2011, by Sykes J (as he then was), who after considering the submissions advanced on behalf of the parties in relation to costs, and having taken into account rule 64.6, articulated that:

"[42] The point being made is that the costs-follow-the-event principle often times obscures the fact that a successful party may have imposed unnecessary costs on the losing party by the manner in which he conducted the claim. Under the new rules the litigants and the courts are being encouraged to look more closely at how a matter was conducted from beginning to end. Such an examination may reveal that a successful party ought to be deprived of some or all his costs. It is also expected that costs are to be part of the armoury of the courts used to police the rules. It must not be forgotten that one of the goals of the rules is to reduce unnecessary costs in litigation. This goal is supported by the power of the court to exclude issues 'from determination if it can do substantive justice between the parties on the other issues' (see rule 26.1 (k)). Rule 25.1 (c) is consistent with cost reduction. It says that the court is to manage cases actively and this includes 'deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others.' These considerations must be given full weight in this case when considering the question of costs."

[39] Now to the heart of the statement: are costs to be awarded against a respondent only at the conclusion of the entire proceedings and only in exceptional cases? The

Jamaican courts have been cautious in awarding costs against a respondent at the leave stage, regardless of whether the respondent is heard or opposes the application.

[40] If respondents were not served or had no involvement at the leave stage, it would be improper to award costs against them at that time. If, on the other hand, the respondents actively resist leave, the court may consider awarding costs either at that stage or after the judicial review hearing, depending on the outcome and conduct of the respondents.

[41] While there is limited direct appellate authority on this specific point, the practice in the Supreme Court generally supports deferring costs awards until the final hearing, unless the respondent appears and unreasonably resists leave, or the application is frivolous or abusive; in such cases, an immediate costs sanction against the applicant is justified. This is consistent with the public-interest dimension of judicial review, acknowledging that applicants should not be deterred by immediate costs risks at the permission stage unless their conduct warrants such a deterrent. Nor indeed should the respondent be saddled with a costs order if the opposition mounted was reasonable.

[42] Notably, Jamaican case law reveals no consistent or uniform practice regarding the award of costs at the leave stage. The prevailing understanding, reflected in a line of first-instance and appellate authorities, is that the leave stage is preliminary and non-determinative, designed primarily to screen out unmeritorious applications. Accordingly, the usual order has been that there be no order as to costs, or that costs be costs in the claim. Thus, the appellants' statement that costs at the permission stage are awarded only at the end of the proceedings and only in exceptional cases reflects a cautious but fairly accurate view of Jamaican judicial review practice. So, although not a rule of law, the statement aligns with practical judicial restraint and the public-interest function of judicial review in Jamaica.

[43] The Court of Appeal commented on this inconsistent practice in the decision of **Kingsley Chin v Andrews Memorial Hospital Limited** [2021] JMCA App 3, per Brooks P at para. [24]:

“The issue of an award of costs at the leave stage has been the source of some disagreement in the court below. The cases of **Danville Walker v The Contractor General** [2013] JMFC Full 1A and **Gorstew Limited v Her Hon Mrs Lorna Shelly-Williams and Others** [2016] JMSC Full 8 demonstrate the disagreements. That disagreement was recognised, but not resolved, by this court in **Gorstew Limited v Her Hon Mrs Lorna Shelly-Williams and Others** [2017] JMCA App 34. This case gives an opportunity for resolution of the issue.”

[44] In accordance with their undertaking in the above application, this court, in the subsequent appeal with neutral citation **Kingsley Chin v Andrews Memorial Hospital Limited** [2022] JMCA Civ 26, made pronouncements as to the appropriate approach in such circumstances. Brown JA (Ag) (as he then was), at para. [116], enunciated as follows:

“Rule 64.6 is subtitled, ‘successful party generally entitled to costs’. Rule 64.6(1) says:

‘If the court decides to make an order about costs of any proceedings, the general rule is it must order the unsuccessful party to pay the costs of the successful party.’

By virtue of rule 64.6(1), in an ordinary claim, as Stuart Sime in *A Practical Approach to Civil Procedure* 11th edition, at para. 43.02, says, ‘it is usual for the successful party in a claim to be awarded an order for costs against the unsuccessful party’. In contradistinction, to what obtains under rule 56.15, the victor is entitled to all his costs unless the circumstances warrant otherwise. The unsuccessful party on an application for leave to apply for judicial review, stands in the shoes of the ordinary unsuccessful litigant, to whom rule 64.6 would apply.”

[45] Accordingly, while it remains open to a Jamaican court, in the exercise of its discretion under rule 64.6, to defer or reserve costs at the leave stage where the justice

of the case so requires, such deferral is not a procedural entitlement nor a necessary corollary of the English approach. It is instead a measure to be applied only where fairness and the particular circumstances justify it.

Issue II

Whether, within the CPR, it is appropriate for Jamaican courts to adopt the English practice of deferring costs at the leave stage, and to what extent such an approach aligns with the protective costs discretion provided in rule 56.15(5) of the CPR

Differences in the procedural framework between the Jamaican and the English jurisdictions

[46] Having addressed the first issue concerning whether there exists an established practice in Jamaica regarding costs awards at the leave stage of judicial review proceedings, I now turn to the second issue, which arises from the appellant's contention that the learned judge erred in declining to defer the question of costs at that preliminary stage.

[47] This second issue also concerns whether the English practice of deferring costs determinations at the leave stage, developed primarily through the jurisprudence on protective costs orders ('PCOs'), should properly be regarded as applicable within the Jamaican procedural framework. This inquiry necessarily entails an examination of whether, given the procedural and statutory distinctions between the United Kingdom and Jamaica, such a practice accords with the language, purpose, and underlying policy of the Jamaican CPR. In particular, it requires consideration of whether the discretion conferred by rule 56.15(5), which governs the treatment of costs in judicial review proceedings and rule 64, which regulates civil litigation more generally, accommodates or precludes the wholesale adoption of the English approach to costs deferral at the leave stage.

[48] Judicial review in both the Jamaican and the English jurisdictions is a public law mechanism that allows individuals to challenge the lawfulness of decisions made by public authorities. Both systems share a common law heritage and similar administrative law

structures. Therefore, judicial review in both jurisdictions typically begins with an application for permission to apply for judicial review. This aspect of the process is designed to filter out unarguable or frivolous claims; therefore, in both jurisdictions, leave to pursue judicial review is a gatekeeping stage. However, the procedural structure differs significantly, particularly in terms of how and when leave is granted and how costs are addressed.

[49] In England and Wales, the judicial review process is governed by Part 54 of their Civil Procedure Rules ('UK CPR'). Under that regime, permission to apply is usually determined on the papers and often without an *inter partes* engagement, unless the judge invites or the applicant requests a renewal hearing. A single-tiered structure facilitates judicial review practice in that jurisdiction. In the single-tiered process, an application for leave and the substantive hearing are treated as part of the same proceeding. The process begins with a claimant filing a single claim form under Part 54 of the UK CPR. The court first considers whether to grant permission to proceed. If leave is granted, the matter proceeds directly to a full substantive hearing without the need to file a new claim or restart the process. If permission is refused, the claim will end there, unless it is reconsidered at an oral hearing.

[50] In the English courts, the general approach to costs in judicial review proceedings remains governed by the overarching principle that costs are within the court's discretion; furthermore, there is express procedural restraint in the UK CPR that limits the court's ability to award costs against or in favour of a party at the leave stage. **The Practice Statement (Judicial Review: Costs)** [2004] 1 WLR 1760, formulated by Collins J, addresses rule 44.13 of the UK's CPR, which provides that, as a general rule, where a court order is silent on costs, then no party is entitled to obtain costs relative to that order. Furthermore, it was explicitly stated that:

"... It has never been the practice in the Administrative Court or its predecessor, the Crown Office, to make any costs order in granting permission because it was assumed that costs would be costs in the case.

To avoid any arguments, a grant of permission to pursue a claim for judicial review, whether made on papers or after oral arguments, will be deemed to contain an order that costs be costs in the case.

Any different order made by a judge must be reflected in the court order granting permission.”

[51] In the English jurisdiction, the evolution of the costs regime in public law cases has been shaped by case law, most notably the **Corner House** case.

[52] The applicant, in **Corner House**, was a non-governmental organisation that sought judicial review of the United Kingdom ('UK') government's support for a defence contract. The applicant had no private interest in the matter and argued that, in the absence of a PCO, it would be unable to proceed. The PCO was granted, and the Court of Appeal also upheld the grant of the PCO, formulating a structured framework governing the exercise of judicial discretion in such cases. Lord Phillips MR set out five key criteria, summarised as follows:

“...(i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.”

[53] Lord Phillips' analysis reflected a fundamental recognition that the costs regime in judicial review should not discourage litigants from bringing forward claims that serve a broader public interest. That case also highlights some of the distinctions between a regular civil claim and a public law claim. Reference was made to the public interest in the elucidation of a public law claim and to the fact that the principles governing such a claim may be different in areas such as the award of costs. The judgment thus demonstrates an attempt to balance access to justice with the need to preserve judicial discretion and to prevent abuse by opportunistic or privately motivated litigants.

[54] The English Court of Appeal thus recognised that the threat of adverse costs could deter public interest claimants from pursuing meritorious challenges. The court, therefore, developed a framework under which a claimant could obtain a PCO at an early stage, thereby limiting their potential liability for the defendant's costs if the claim were to fail. English courts also began deferring costs decisions at the permission stage, particularly in public interest litigation, to avoid premature costs determinations.

[55] The earlier case of **Mount Cook Ltd** also addressed the issue of costs award at the leave stage. In that case, the applicant (Mount Cook Land Ltd) had been refused permission for judicial review. Westminster City Council (the defendant) wanted its costs of resisting permission. The Court of Appeal noted that costs incurred in the permission stage are real and may be awarded. Still, it confirmed that the default position at the leave stage was no order for costs and ruled against awarding costs to the Council, the rationale being that, typically, costs should not be awarded at the permission stage because the court is only deciding whether the claim is arguable, not resolving the merits. The court said costs orders at the permission stage should be "exceptional", for example, if one party behaves unreasonably. Conduct constituting unreasonableness would include inordinate delay, misrepresentation, or failure to comply with the duty of candour.

[56] Jamaica's legal framework, though rooted in English common law, establishes a more prescriptive and structured process. Under Part 56 of the CPR, judicial review is a two-tiered procedure: applicants must first obtain leave to apply (rule 56.3), which serves as a procedural filter, before the substantive claim may proceed (rule 56.4 onwards). This feature distinguishes Jamaica's model from the UK approach and highlights its unique approach to judicial review.

[57] Moreover, the procedural structures differ significantly in other ways. Under the Jamaican CPR, while applications may be heard on paper or *ex parte*, the leave stage typically involves a formal application supported by affidavit evidence and, more often than not, includes *inter partes* hearings. Depending on the issues being pursued by the applicant, complete documentation may need to be filed, relevant parties may need to

be notified, and they may decide to participate and oppose the leave application, particularly when extensive submissions are made. Often, such applications result in a written judgment by the judge who hears the application. Therefore, in this jurisdiction, the leave application process can be robust and involved, requiring a significant use of judicial resources. At the end of the proceedings, there may well be a basis for a costs award.

[58] Further, the Jamaican CPR embeds the overriding objective of enabling the court to deal with cases justly, which includes saving expense and ensuring proportionality between costs and outcomes. Rule 64.6 provides the necessary flexibility to tailor costs orders to the particular circumstances of each case. Hence, the adoption of an inflexible English rule of costs deferral would risk undermining the discretion expressly granted to Jamaican judges.

[59] The absence of a corollary regime in the UK jurisdiction means that costs awards at the permission stage are less readily granted there and may not be directly translatable into Jamaica's framework. While the Jamaican courts have recognised the persuasive value of English jurisprudence, our courts are not bound to adopt English procedural innovations where the Jamaican CPR provides a different or more specific approach, particularly when both parties are represented. Thus, unlike the English system, where permission applications are determined on the papers, the English rationale for deferring costs, namely, that costs cannot be fairly assessed on a brief paper determination, does not translate seamlessly to the Jamaican context.

[60] Therefore, while the common law policy rationale of **Corner House** may guide Jamaican courts, the exercise of discretion must occur within the structure of the CPR and not in disregard of its express language.

[61] Upon a close examination of the regimes that prevail in the English and Jamaican jurisdictions, it appears to me that the practices regarding costs awards at the permission application stage are not dissimilar. The English courts do not routinely award costs at

the permission stage; likewise, the Jamaican courts also adopt a more restrained approach, even with our two-stage model, because costs are usually deferred to be included in the claim. This reflects a general practice in Jamaica. However, this should not be mistaken for a strict rule. Judicial discretion remains paramount.

[62] Accordingly, while Jamaican courts may be guided by the policy considerations underlying the English practice, they are not bound to replicate it. The Jamaican context requires that the discretion conferred under rule 56.15(5) be exercised on a case-by-case basis, informed by fairness, proportionality, and the specific conduct of the parties. The adoption of a blanket rule deferring costs at the leave stage would be inconsistent with both the letter and spirit of the CPR. In any event, rule 64 applies at the leave stage.

[63] To the extent that the **Corner House** principles align with the local regime, the Jamaican courts may properly be inspired by the protective costs principles developed in the English jurisdiction. Still, the Jamaican courts cannot adopt the English regime wholesale, given the CPR's express language and the procedural realities of judicial review in Jamaica. Any development of the practice must be incremental, case-specific, and rooted in the legal framework.

[64] It follows that the English practice may serve as a persuasive influence, but cannot supplant the indigenous procedural framework. The Jamaican system achieves the same balance, protecting access to justice while preserving judicial discretion through the careful application of its own rules.

Protective costs orders under rule 56.15(5) of the Jamaican CPR

[65] Judicial review, being a species of public law claim, engages broader constitutional and public interest considerations. As such, Part 56 of the CPR, which governs applications for administrative orders, introduces a different costs regime. Specifically, rule 56.15(4) and (5) of the CPR codifies the court's power to make what is functionally a protective costs order. It states:

“(4) The court may, however, make such orders as to costs as appear to the court to be just including a wasted costs order.

(5) The general rule is that no order as to costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.”

[66] This provision grants the Jamaican courts express discretion to address and allows for a proactive assessment of whether a claimant should bear costs even where his claim fails. Importantly, it provides Jamaican courts with a legal basis to manage costs awards in a manner consistent with fairness and proportionality. This provision applies across the administrative law landscape, including judicial review, constitutional motions, and other public law claims under Part 56 of the CPR. Crucially, rule 56.15(5) of the CPR introduces a restraint on costs orders against claimants at the substantive hearing stage. This provision recognises the unique nature of public law proceedings. The existence of this provision reflects a deliberate policy choice to safeguard access to justice in public law matters by insulating claimants from adverse costs consequences, except in cases where they acted unreasonably (see **Louis Smith v Director of Public Prosecutions and Anor** [2021] JMFC Full 3 (**‘Louis Smith v DPP’**)).

[67] In **Danville Walker** Sykes J, correctly underscored the special considerations that apply in public law litigation. He specifically indicated that rule 56.15 did not address costs concerning applications for leave in judicial review proceedings. Nonetheless, he acknowledged that applicants raising serious legal questions should not be deterred from doing so by the prospect of adverse costs orders. He cautioned that courts should move away from a rigid application of the principle that costs follow the event, as is the position under rule 64. He commended that, in applications such as those seeking leave for judicial review, the court should adopt a more nuanced approach that accounts for the public interest, the complexity of the legal issues, and the reasonableness of each party’s conduct, rather than applying the rigid principle that costs follow the event.

[68] Furthermore, when assessing whether the principles eschewed in **Corner House** can be applied in the Jamaican jurisdiction, it is crucial to compare them with the framework set out in rule 56.15(5). This provision already reflects a protective ethos toward claimants in judicial review proceedings. However, it operates from a different posture. Rather than granting pre-emptive costs immunity, it limits the court's ability to award costs against a claimant unless unreasonable conduct is shown, including whether the claim is frivolous or abusive, whether it raises novel or important legal issues, and whether the claimant has any improper motive.

[69] Accordingly, while the structured "Corner House" test has not been expressly adopted in Jamaica, nor expressly codified the protective costs order principle articulated in that case, its spirit aligns with existing Jamaican legal principles. It has, in appropriate circumstances, been judicially adopted. The underlying rationale that costs rules should not deter genuine public interest litigation remains consistent with Jamaican judicial practice. In **Jamaica Public Service Company Ltd v Dennis Meadows and Others** [2012] JMCA Civ 35, the Court of Appeal confirmed that judicial review engages sensitive public law considerations and that the traditional rule of "costs follow the event" is not automatically applicable.

[70] A court in this jurisdiction, guided by rule 56.15(4), is permitted to properly consider whether the justice of the case warrants costs protection where a claimant demonstrates financial vulnerability and a claim of significant public importance, even where their claim proves unsuccessful.

[71] Notably, the rule in 56.15(5) pertains to costs awards against claimants. Still, it is equally clear that the rule does not confer an automatic right to costs in favour of successful claimants (see **Steven Sykes & Or v Kingston and St Andrew Municipal Corporation et al** [2023] JMCA Civ 176). That rule is also silent about costs being made against respondents. I note, however, that no rule of law prohibits the award of costs against public officers and agencies that appear as respondents in judicial review

proceedings against successful applicants or claimants. Nor indeed is there any rule that precludes the award of costs in favour of such officers and agencies.

[72] The question of whether Jamaican courts should formally adopt the English approach to deferring costs at the permission stage of judicial review necessitates careful consideration of the procedural divergence between the two jurisdictions and the statutory and procedural framework underpinning Jamaica's CPR. Perhaps, the English practice cannot be adopted wholesale in the Jamaican context. The procedural architecture, judicial philosophy, and costs protections embedded in Jamaica's rules require a more nuanced approach, one that will continue to uphold the integrity of judicial review while safeguarding access to justice.

[73] While the principles from **Corner House** and **Mount Cook Ltd** have exerted persuasive influence in Commonwealth jurisdictions, their application in Jamaica must be approached with caution. The Jamaican CPR, and in particular Parts 56 and 64, comprise a self-contained code governing judicial review and costs. The Jamaican framework already confers on the court an express discretion to make costs orders. Unlike the English system, where costs protection evolved through common law innovation, the Jamaican CPR already confer on the court explicit discretionary powers to deal with costs at any stage, including the leave stage, without the need for a separate protective regime. There is thus no lacuna requiring the judicial creation of a parallel protective-costs regime.

Issue III

Whether the learned judge erred in her assessment of the factual and evidentiary context, specifically in (a) attributing significance to the absence of an explanatory response from the PSC, and (b) placing weight on the extent of arguments and materials deployed by the parties

The governing principles

[74] It is well established that the discretion to award costs is a judicial one, to be exercised in accordance with recognised principles and the guidance provided by rule 64.6(4) of the CPR. The rule mandates that the court, in exercising its discretion, must

have regard to all the circumstances of the case, including the factors listed in sub-paras. (a)–(g), which will be more fully discussed at para. [91] below. The proportionality principle set out in rule 64.6(4)(b) further directs that costs must be proportionate to the matters in dispute, the complexity of the case, and the parties’ respective conduct.

[75] The House of Lords in **R (Ullah) v Special Adjudicator; Do v Secretary of State for the Home Department** [2004] UKHL 26, underscored that a discretion, however broad, must be exercised judicially, meaning on proper grounds, for good reason, and in a manner consistent with principle and fairness. Costs should not be used punitively but must reflect an evaluation of success, responsibility, and reasonableness.

The learned judge’s approach

[76] In the instant matter, the learned judge awarded the respondent 80% of his costs, despite the respondent having achieved only partial success on his leave application. Her reasons were that the matter was “exceptional”, that it involved “complex and important issues”, and that the failure of the PSC to provide reasons might have contributed to the decision to seek judicial review. While these considerations, if indeed they existed, are relevant, the discretion granted under rule 64.6 requires a careful balancing of all relevant factors.

[77] The learned judge’s invocation of “exceptional circumstances” appears to have been derived from the Northern Ireland High Court decision in **Saeed Ullah**, where Gillen J held that an order for costs against a respondent at the leave stage should be made only in “exceptional cases”. In that case, the Home Department had failed to concede a plainly well-founded claim, despite clear pre-action correspondence setting out the applicant’s entitlement. Gillen J concluded that the respondent’s inaction forced unnecessary proceedings, thereby justifying a departure from the general rule.

[78] However, it is important to note that **Saeed Ullah** turned on a very specific factual matrix, that is, a respondent’s clear and unreasonable failure to concede an obviously

meritorious claim. It does not stand for the proposition that complexity, novelty, or the absence of reasons automatically renders a case “exceptional”.

[79] In the instant case, the learned judge specifically acknowledged that at the leave stage, costs should be costs in the claim. The learned judge also reviewed several cases cited by the appellants, adhering to the practice that costs at the leave application stage should be costs in the claim. One such case was **Natalia Psaras v Marie Lue, The Minister of National Security and The Attorney General** [2016] JMSC Civ 22 (**Natalia Psaras**), which was a successful application for leave to apply for judicial review, where Wint-Blair J (Ag) (as she then was) ordered that costs should be costs in the claim.

[80] Other cases were also reviewed by this court, including **Kenya Robinson v Her Honour Ms Sasha Ashley** [2024] JMSC Civ 78. In that case, although the applicant was successful in obtaining leave for judicial review, the court nonetheless made “[n]o order as to costs”. At para. [69] of the judgment, Wint-Blair J rationalised that the general rule is that costs are not awarded in applications for judicial review, and should only be awarded where a party has behaved egregiously. In **ATL Group Pension Trustees Nominee Ltd v IDT and Catherine Barber** [2015] JMSC Civ 211, there was a full deployment of arguments, and although the applicant was successful, the “[c]ost [sic] of this application to be costs in the claim” was the order of the court.

[81] Notably, in **Danville Walker v The Contractor General of Jamaica** [2012] JMSC Civ 31, the application for leave was refused and “No Order as to costs” was made at the leave stage by D Fraser J (as he then was), consistent with this principle; however, D Fraser J also ordered that “[p]ursuant to rule 56.5 (1) of the Civil Procedure Rules, the applicant may renew his application before the appropriate court”.

[82] The Court of Appeal reaffirmed in **Independent Commission of Investigations v Everton Tabannah and another** [2019] JMCA Civ 15 that “[t]he general rule is that costs are not awarded in applications for judicial review, albeit that

the protection is mainly for the applicant... It is also unusual for costs to be awarded in an application for leave to apply for judicial review, in that it is in the actual application that the merits of the case would be determined" (see also **Robert Ivey v Firearm Licensing Authority** [2021] JMCA App 26). Hence, the appellate court has fostered the approach that although courts retain discretion in awarding costs, this discretion is to be exercised in a manner that reflects the special character of judicial review as a public law remedy.

[83] On the renewal of the leave application in the Full Court (**Danville Walker v The Contractor General** [2013] JMFC Full 1), the application was refused. In the costs judgment (**Danville Walker**), Sykes J pointed out that it should also be appreciated that the question of costs in judicial review proceedings, at the leave stage, must be approached with due regard to the distinct nature of public law litigation, which differs significantly from private law claims. The court further held at para. [29] that, "...there is good reason for not awarding costs against the applicant unless there are exceptional circumstances. Even if exceptional circumstances exist, the court should still examine the matter carefully to determine whether costs should be awarded and if so, for what". Straw J (as she then was), at paras. [32] and [33], stated that:

"[32] The general rule under Part 56.15 (5) is that no order should be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application. It is my opinion that costs for the application at the leave stage can be determined within parameters of the above-mentioned sections.

[33] At any rate, I agree with Sykes J that the principle of 'exceptional circumstances' as enunciated in **Mount Cook Land v Westminster City Council** [2004] 2 Costs LR 211 which have been set out in his judgment (paragraph 18) can be considered as helpful in the determination as to what may be unreasonable conduct of an applicant."

[84] In **Danville Walker**, Sykes J found that there were "exceptional circumstances... [t]hese circumstances are that factually and legally Mr Walker's case was hopeless. The

weakness of the case was brought home to him by the judgment of D Fraser J". Costs were accordingly awarded against the applicant.

[85] In **Louis Smith v DPP and Another** [2020] JMSC Civ 15, an application for leave for judicial review was refused by Wolfe-Reece J, who commented on the conduct of the applicant thus:

"[51] This Court adopts this view and concludes that the Applicant has not placed before this Court any exceptional or special circumstances that warrant the Supreme Court intervening. It appears that this is an exercise to use the Supreme Courts' supervisory powers as an 'appellate Court' whilst the matter is in the middle of the trial that is before the Parish Court and this Court deems this approach to be an [sic] inappropriate."

[86] Wolfe-Reece J also found that the 2nd respondent was not a proper party to the application, "and is struck out as a Respondent herein". Based on his egregious conduct, the applicant was ordered to pay costs to the 1st respondent. Mr Smith was dissatisfied with Wolfe-Reece's J decision and renewed his application to the Full Court. He met with no better results. The case against the 2nd respondent was struck out, and he was ordered to pay costs to both respondents (see **Louis Smith v DPP**). Mr Smith's appeal against the refusal of the Full Court also ended in defeat, and a further costs order was made by this court against him (**Louis Smith v Director of Public Prosecution [2023] JMCA Civ 33**).

[87] Therefore, the foregoing cases have demonstrated that where an applicant acts unreasonably, proceeds on a plainly unmeritorious basis, or seeks to use judicial review for collateral or improper purposes, the court is entitled, and indeed obligated, to mark its disapproval by way of an appropriate costs order.

[88] Based on my review of the relevant case law in this jurisdiction, while there is some variance in the approach of individual judges, the deferral of costs more often than not suggests the normative position in our jurisprudence regarding the award of costs at the leave stage, whether for or against the applicant. Thus, while Jamaican courts have

awarded costs at the leave stage, these have tended to be exceptional cases, typically, where a party's conduct was unreasonable, dilatory, or otherwise responsible for the proceedings becoming necessary. In the absence of such exceptional circumstances, the settled and sound practice in Jamaica has been that the question of costs should ordinarily be deferred until the substantive claim is heard. This approach accords with the principle that preliminary proceedings should not generate disproportionate costs consequences for either side.

[89] Against this backdrop, it is evident that the imposition of costs in applications for leave for judicial review must be approached with circumspection. The overarching consideration remains fairness, both to the applicant, who may be seeking to vindicate a public interest right, and to the respondent, who may have been put to considerable and unwarranted expense in defending an application that lacked foundation.

[90] The learned judge in the instant case recognised that normative approach. At para. [39] of the costs judgment, she acknowledged that " [i]n the final analysis, the court has a discretion to award costs in an application for leave to apply for judicial review, although the usual order is that costs be costs in the claim". That said, courts are not barred from making earlier costs orders where circumstances justify it.

[91] While Part 64 of the CPR grants the court broad discretion in awarding costs, that discretion must be exercised to balance the deterrence of unmeritorious claims with recognition of the public interest in judicial review. The authorities confirm that costs should reflect both the parties' conduct and the degree of success. Partial success neither mandates nor precludes a partial costs award; the court must assess all relevant factors, including the importance and complexity of the issues raised.

The exercise of discretion under rule 64.6 of the CPR

[92] Under the CPR, the discretion to award costs, on an application for leave to bring an application for judicial review, must be informed by a principled balancing of factors, including:

- (i) The degree of success: Partial success warrants proportionate costs, not full indemnity;
- (ii) The complexity of the case: Complexity may justify higher costs, but not an automatic departure from ordinary practice;
- (iii) The conduct of the parties: Only unreasonable or obstructive conduct should trigger adverse costs consequences; and
- (iv) Proportionality: Costs must reflect the extent to which the issues advanced justified the resources expended.

[93] While the court should not make definitive findings of fact or law, it may (i) assess whether the application was appropriately initiated, or was misconceived or procedurally improper; (ii) comment on the conduct of the parties, for example, whether the applicant misrepresented facts, failed to disclose material information, or pursued litigation without any factual or legal foundation and (iii) determine whether the case was so plainly unarguable that it amounted to a waste of court time and public resources. In short, the court may make observations sufficient to refuse leave with reasons and which may inform costs awards (see **Sharma v Browne-Antoine** [2007] 1 WLR 780 (Privy Council) (**'Sharma'**)).

[94] In **Attorney General of Jamaica v Phillip Paulwell and Others** [2025] JMCA Civ 21, the Court of Appeal noted that to do justice between the parties and so as not to discourage parties from pursuing reasonable challenges to the constitutionality of legislation, costs would not be awarded against the respondents who lost the appeal and counter appeal, accordingly each party was ordered to "bear its own costs incurred in the appeal and in the court below". Where, however, an application is manifestly unmeritorious, costs may be awarded against the applicant even at the leave stage. In **Mount Cook Land Ltd**, the court recognised that in "wholly unmeritorious" claims, even a pre-permission application can justify a costs sanction, especially where the respondent is put to trouble and expense. These principles are consistent with the *ratio decidendi* in decisions such as **Louis Smith v Director of Public Prosecutions** and with

Commonwealth jurisprudence, which emphasises the importance of proportionality and reasoned discretion.

(A) The absence of reasons from the PSC

[95] It is well recognised that the failure of an administrative decision-maker to provide reasons, although not invariably unlawful, may undermine transparency and procedural fairness. The common law has long held that good administration generally requires decisions affecting rights or legitimate expectations to be accompanied by some explanation. In **R v Secretary of State for the Home Department, ex parte Doody** [1994] 1 AC 531 at 563, Lord Mustill explained that the giving of reasons not only aids fairness but serves as a safeguard against arbitrariness by compelling the decision-maker to justify its conclusions (see also **R v Civil Service Appeal Board, ex parte Cunningham** [1991] 4 All ER 310, recognising that failure to give reasons may amount to procedural unfairness in some contexts).

[96] Likewise, in **Ghandi Nawaf Mallak v The Minister for Justice, Equality and Law Reform** [2012] IESC 59, the Irish Supreme Court observed that a failure to provide reasons can render judicial review rights illusory, since the affected party cannot assess whether there is a ground of challenge. Closer to home, in **Linton C Allen v His Excellency the Right Hon Sir Patrick Allen and another** [2020] JMCA Civ 63, McDonald-Bishop JA (as she then was) recognised that procedural fairness may require reasons to be given. At paras. [96] and [97], she expressed the following:

“[96] ...I would say instead that the time has already come for the court to determine whether fairness is manifestly eroded by the absence of reasons so that an impugned decision ought not to be allowed to stand. Therefore, the mere fact that there is no legal requirement for reasons to be provided should not preclude the court from determining whether the decision should stand in the absence of reasons.

[97] ...In my view, the court should exercise its supervisory powers, if without reasons, a decision, in the light of all the facts and circumstances disclosed to the court, is found to be irrational, aberrant or perverse.”

[97] At the leave stage of a judicial review application, the judge's task is to determine whether the applicant has met the threshold test, not to conduct a full trial of the issues. The analysis of the evidence should be limited, focused, and preliminary. The court is not expected to resolve disputed facts or assess the full merits of the case at this stage. The appropriate scope of evidence reviewed at the leave stage is to determine whether the facts as pleaded support an arguable claim in law, and the judge should examine documentary evidence only to the extent necessary to assess whether a serious issue arises. The court must avoid weighing conflicting evidence, assessing credibility, or resolving factual disputes, which are matters for the substantive hearing. What the learned judge should have determined was whether the respondent had an arguable case with a realistic prospect of success. This standard has been affirmed in **Sharma**, the judge must not conduct a mini-trial at the leave stage.

[98] Granted that, even at the leave stage, a court may, in limited circumstances, make findings sufficient to support a costs order; however, any findings or conclusions should be narrow, procedural, and not determinative of the contested issues. Where an applicant can show that the absence of reasons was a significant factor in his or her decision to seek leave, and that the dispute might reasonably have been resolved or averted without court intervention, the court may consider whether the applicant was driven to litigation by a failure in administrative fairness or transparency. In such circumstances, such a factor may inform the court's award of costs against the respondent (see **R v Secretary of State for the Home Department and another, Ex parte Tarrant** [1985] 1 QB 251).

[99] Nonetheless, the question here is not whether reasons were required as a matter of administrative law, but whether the absence of reasons was a proper ground for an award of costs at the leave stage. Such a finding must be supported by evidence that the failure to give reasons materially caused or contributed to the initiation of proceedings.

[100] In those circumstances, the learned judge was required to assess the conduct of the decision-maker (the PSC) and determine whether the absence of reasons was likely

to generate confusion, suspicion, or doubt as to legality. She was then to consider proportionality, namely, whether the resulting litigation was a disproportionate consequence of inadequate communication. Only if she reached that conclusion would it have been appropriate to exercise discretion on costs, using costs awards (or refusals) to promote sound administrative practice, since such orders can incentivise reasoned decision-making even where statutes are silent. Without that nexus, the absence of reasons cannot properly be treated as a basis for awarding costs.

[101] Whereas, the respondent averred that the PSC failed to give reasons for dismissing his appeal, the appellants on the other hand, contended that there was no need for reasons to be proffered by the 1st appellant given: (i) the limited scope of the appeal conducted by the PSC, which was to assess the appellant's performance in the selection process and (ii) there was ample evidence in the correspondence from the 2nd appellant as to the respondent's performance. King's Counsel submitted that the learned judge, by taking the stance that she did, indulged in pure speculation as the evidence did not support her finding.

[102] I agree with the appellant's submission above. I found no evidence that the respondent would have refrained from pursuing judicial review had reasons been given. His primary grievances concerned the validity of the Accountability Agreement, the constitutionality of the system governing promotion of public officers, and the alleged failure of the PSC to consider his eligibility for promotion in a timely manner. The complaint about the lack of reasons was ancillary, not central.

[103] The learned judge's rationale that some reason from the PSC might have obviated the need for litigation is not on a firm footing. At para. [125] of the substantive judgment, the learned judge articulated that the basis for granting leave to the respondent was that the respondent had raised sufficient doubt regarding the validity of the Accountability Agreement and the constitutionality of the existing arrangement for employment and promotion of public servants. Additionally, she said, there were concerns as to whether the PSC ought to have considered the applicant's eligibility for promotion periodically as

vacancies arose. Nowhere in her narrative was there a finding that the respondent was compelled to pursue litigation because he received no reasons from the PSC.

[104] Moreover, the learned judge herself, in para. [41] of her substantive judgment, acknowledged that:

“[41] For practical purposes though, the Solicitor General was the one who effectively decided the question of whether or not the applicant was to be promoted. Although her functions are coined as making recommendations in this regard. Her letter dated April 13, 2021 advising the applicant that he was not recommended for promotion was for all practical purposes, conveying to him the decision that he would not be promoted to the position he had applied for... **it is a recommendation which barring some wholly out of the norm occurrence, would have been followed...** The communication from the PSC made it quite apparent that the decision was that of the Solicitor General.” (Emphasis supplied)

[105] Having made the above determination that the decision not to promote the respondent was, in fact, the decision of the Solicitor General, the learned judge also considered at paras. [121] through [123] the conduct of the PSC in the appeal process, and made the following observations:

“[121] After the fact (for the purposes of these proceedings), much information was disclosed which makes it apparent on the face of it that the decision not to promote was not an irrational one but was based on what appeared to be a comprehensive process of evaluation which seemed to have taken into consideration the various criteria or at least, most of those set out in Regulation 17...

[122] Ultimately, the question also arises as to whether the failure of the PSC to give reasons for its decision necessarily means that the process of making the decision was irrational or was in any way illegal. In paragraphs 17, 20 and 22 of her affidavit Ms Mendez explained that the Public Service Commission requested an explanation from the Solicitor General and that the Solicitor General provided the report and other documents to include the interview score sheet with the

comments of the panellists, the applicant's educational qualifications, the job description and the advertisement for the post. It was her evidence that the Public Service Commission gave due consideration to the documents received from the Solicitor General and the grounds of appeal filed by the applicant. **It is also noteworthy that the Commission confined itself to reassessing the applicant's performance in the selection process as it was mandated to do based on the Accountability Agreement.**

[123] The response from the Chief Personnel Officer of the Public Service Commission was a terse one merely advising him [respondent] that his appeal was considered by the Commission at its meeting held on the 21st July 2021 and that the decision of the Solicitor General stands. In light of the detailed reasons and bases the applicant placed on the table as to why he was seeking a review of the decision, notwithstanding the reasons given by the Solicitor General, the applicant deserved a fuller understanding as to the process of consideration that was engaged and some reason why the Commission was of the view that the Solicitor General's decision was reasonable and or correct in the circumstances... In the interest of transparency, it might have been prudent that the applicant be afforded reasons." (Emphasis supplied)

[106] Having acknowledged that the Solicitor General was the effective decision-maker and that the PSC reassessed that decision in the manner that it was "mandated to do". It was, therefore, curious that the learned judge criticised the PSC for failing to provide reasons for upholding the Solicitor General's decision. In those circumstances, there was consequently no factual or evidential basis for concluding that the absence of reasons by the PSC compelled the litigation or rendered the case exceptional.

[107] In light of those findings, there is merit in the appellants' submission that the learned judge's saying that she "also accepts the applicant's position that an explanation could potentially have averted litigation" was, indeed, spurious and speculative. While the respondent may have advanced a complaint that he had received no reasons from the appellants, he had not shown that the absence of reasons was a significant factor in his

decision to seek leave, and that the dispute might reasonably have been resolved without court intervention.

[108] In light of the primary complaints raised in the leave application, it is fair to say that, whether or not reasons were given, the underlying basis of the respondent's complaints would still exist, and the respondent would still have pursued his application for leave. The learned judge's assertion that "in the interests of transparency it might have been prudent that the appellant be given reasons" was in no way supported by any evidence that the giving of reasons would have obviated the need for the respondent's application for leave to pursue judicial review. There was, therefore, no basis for the learned judge to find that the respondent had been driven to litigation because the PSC had proffered no reasons. This was, thus, not a proper basis for awarding costs to the respondent.

[109] A judicial finding based on speculation rather than evidence cannot sustain an award of costs. The learned judge was required to assess whether the absence of reasons created confusion or unfairness sufficient to justify judicial intervention. Having expressly found that the appellants' opposition was reasonable, she could not consistently hold that their conduct warranted an adverse 80% costs order.

(B) The extent of arguments and materials deployed

[110] The learned judge also placed weight on the "deployment of full argument and documentary evidence" at the leave stage as supporting her view that the case was exceptional. This reasoning is unpersuasive. In the Jamaican procedural context, while the CPR allows for *ex parte* hearings and paper determinations in applications for judicial review, it is common for applications for leave to be argued extensively and for full affidavits and documentary evidence to be presented before the court. Given the two-stage structure of judicial review, much of this material is often reused at the substantive stage. The extent of argument, therefore, is not indicative of exceptional circumstances but rather reflective of ordinary practice.

[111] In England, the leave stage is frequently determined on the papers without a hearing, and where a hearing is convened, it is often brief. That procedural distinction may explain why the deployment of extensive materials at the leave stage in English cases has occasionally been treated as a marker of exceptionality. However, that rationale has limited relevance under the Jamaican CPR, which contemplates oral hearings and fuller evidential preparation even at the leave stage.

(C) The mixed outcome and proportionality

[112] The respondent achieved only partial success, as leave was granted against two of three respondents, and on four of six grounds. The learned judge expressly found that the appellants' opposition was reasonable and that the respondent's pursuit of his grounds was not vexatious. At para. [35] of the costs judgment, the learned judge found as follows:

"The first and second respondents made the point that the fact that the applicant was not successful on all the grounds advanced is demonstrative of the reasonable and appropriate conduct of the respondents. The position is also that where an applicant unreasonably pursues a point, such conduct may lead to a cost order adverse to him. That is also true of a respondent, although not by virtue of any provision in rule 56. I would also make the observation that the view is not taken that the applicant was unreasonable in pursuing any of the grounds raised. **Neither am I necessarily of the view that the respondents unreasonably opposed the application or any aspect of it.** The only issue that seemed reasonably clear to me was the question of the entitlement of the applicant to reasons when his appeal was denied. Even so, one can fully appreciate that a different view could well be taken of the matter..." (Emphasis supplied).

Those findings, properly applied, militate against any substantial costs order.

[113] The awarding of costs against a party to an application for leave for judicial review whose conduct has been found to be reasonable risks undermining the integrity of the leave process and could have a chilling effect on the proper engagement of public authorities in judicial review proceedings. Moreover, such a costs order is inconsistent

with the judicial restraint typically exercised at the permission stage, as reflected in both local and Commonwealth jurisprudence.

[114] Where an applicant achieves only partial success in leave applications for judicial review proceedings, the court's discretion in awarding costs becomes even more finely balanced. The general rule that "costs follow the event" must be approached with caution in the context of public law, where litigation often serves broader purposes beyond the individual interests of the parties. As the English Court of Appeal observed in **R (M) v Croydon London Borough Council** [2012] EWCA Civ 595, in public law proceedings where issues of general importance are raised, costs should reflect the real measure of success, the conduct of the parties, and the extent to which each contributed to clarifying the law. Partial success does not necessarily entitle an applicant to full costs; the court may properly award partial or no costs, depending on the overall justice of the case.

[115] What constitutes an exceptional case? It appears to equate with what Part 64 of the CPR refers to as conduct, and judges in various decisions term egregious behaviour (see **Louis v DPP** and **Danville Walker**). In the present case, the respondent opposed the application for leave. However, the learned judge expressly found that the respondent's opposition, though ultimately unsuccessful, was reasonable. That finding is of critical importance. It suggests that the respondent's participation was not frivolous, obstructive, or designed to delay proceedings, but instead based on arguable grounds warranting the court's consideration. It, therefore, cannot be said that the appellants acted unreasonably in opposing the application, as they, too, were partially successful in their opposition.

[116] The emphasis of the courts in the reviewed cases appears to be that costs should reflect the parties' success and conduct, with discretion vested in the court. That partial success does not preclude partial costs, and the court must consider the importance and complexity of the issues involved. Here, the outcome was mixed. The respondent succeeded only in part. The appellants advanced the attractive argument that a successful applicant who had secured leave to proceed to judicial review could decide not to pursue

it. Yet would be allowed to retain the monetary gains of the costs order awarded in their favour on the application. The appellants contended that such a state of affairs would be undesirable, unfair and unjust, as no declaratory or substantive relief had yet been granted.

[117] It is my view that the learned judge's order awarding 80% of the respondent's costs, notwithstanding her own finding of reasonable conduct by the appellant, was inconsistent with the principles of proportionality and fairness underpinning rule 64.6.

(D) The appropriate order in the circumstances

[118] The learned judge noted that, at the leave stage of judicial review, the proceedings do not finally determine the parties' substantive rights. Further, she commented that "the position was stated as an accepted and recognised one, that it was only in exceptional cases that cost is awarded against a respondent in applications for leave". She also acknowledged that, "this position is borne out in other cases cited", such as "**Nerine Small v Director of Public Prosecution**" and **Natalia Psaras**, that the usual order is either no order as to costs or that costs be costs in the claim. Given the learned judge's acknowledgement of this established practice and given that it accords with the principle that leave proceedings are preliminary and not determinative of substantive rights, it was, therefore, surprising that she made the order that she did.

[119] In the circumstances, neither the absence of reasons nor the extent of argument justified treating this as an "exceptional case". The learned judge's order awarding 80% of the respondent's costs represented an erroneous exercise of discretion. The appropriate order should have been that there be no order as to costs on the application for leave, or that costs be costs in the claim, reserving any question of costs to be addressed upon the final determination of the substantive claim.

Conclusion

[117] The cumulative effect of the foregoing analysis may be summarised as follows:

(i) There is no established practice mandating the award or deferral of costs at the leave

stage of judicial review; (ii) the English practice of costs deferral derives from a different procedural and legal framework and is not automatically applicable in Jamaica; and (iii) for the avoidance of any doubt, this judgment is not to be taken as saying that the discretion afforded to a judge of the Supreme Court by virtue of rule 64.6 is in any way fettered or eroded, but the learned judge's finding of "exceptional circumstances" justifying an 80% costs award was unsupported by the evidentiary record and constituted an erroneous exercise of discretion.

[118] In the circumstances, I propose that the appeal be allowed on the issue of costs; the order of the court below awarding 80% of the respondent's costs against the appellants be set aside and that there be no order as to costs on the application for leave to apply for judicial review.

STRAW JA

ORDER

1. The appeal is allowed.
2. The order of Pettigrew-Collins J, made on 3 June 2022, awarding 80% of the respondent's costs against the appellants, is set aside.
3. No order as to costs on the application for leave to apply for judicial review.
4. There shall be no order as to costs of the appeal unless the appellants, within 14 days of the date of this order, file and serve written submissions for a different order to be made. The respondent shall file written submissions in response to the appellants' submissions within seven days of service upon them of the appellants' submissions. The court will thereafter consider and rule on the written submissions.

5. If no submissions are filed and served within the stipulated time as provided for herein at paragraph 4 of this order, the court's order on costs will stand as the final order of the court.