[2021] JMCA Civ 30

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS MCDONALD-BISHOP JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2020CV00029

BETWEEN	**CONRAD MORRIS**	**APPELLANT**
AND	**TROY CAMPBELL**	**RESPONDENT**

John Graham QC and Miss Peta-Gaye Manderson instructed by John G Graham & Company for the appellant

Andre Earle and Miss Coleasia Edmondson instructed by Earle & Wilson for the respondent

20 January and 4 June 2021

MCDONALD-BISHOP JA

[1] I have read, in draft, the comprehensive judgment of my learned sister, V Harris JA. I agree with her reasoning and conclusion and have nothing useful to add.

V HARRIS JA

Introduction

[2] The appellant, Dr Conrad Morris ('Dr Morris') has sought, by way of an appeal, to challenge the judgment of Y Brown J ('the learned judge'), delivered on 27 February 2020. The learned judge directed, amongst other things, that there should be no order as to costs following the discontinuance of a claim brought by the respondent, Mr Troy Campbell ('Mr Campbell') against Dr Morris.

[3] This appeal is, therefore, primarily concerned with the approach of the court in determining liability for the costs of a claim where a claimant has discontinued proceedings. Specifically, the main issue is what are the principles that are to guide the court when departing from the standard rule or "presumption" in rule 37.6(1) of the Civil Procedure Rules 2002 ('CPR'), which states:

> "37.6 (1) Unless –
>
> (a) the parties agree; or
> (b) the court orders otherwise,
> a claimant who discontinues is liable for the costs of the defendant against whom the claim is discontinued incurred on or before the date on which notice of discontinuance was served."

Background

[4] Before addressing the principles to be applied and the learned judge's reasons for her decision, it is necessary to summarise the history of the litigation which led to the discontinuance of the claim against Dr Morris.

[5] On 24 September 2008, Mr Campbell, who was the claimant in the court below, underwent surgery at the May Pen Public Hospital in the parish of Clarendon. Dr Morris (the 1st defendant in the court below), along with Dr Percival Duke (another medical doctor) and Ms Audia Elliston (the operating theatre nurse who was responsible for counting the instruments that were used during the procedure), were the members of his surgical team. Post surgery, it was discovered that a crile artery forceps was left inside Mr Campbell's abdominal cavity. As a result, he experienced several serious complications. A second surgery was done on 2 October 2008 to remove the offending instrument.

[6] Not surprisingly, Mr Campbell initiated proceedings in the Supreme Court on 21 July 2014 (claim no 2014HCV03490) ('the initial claim'), seeking damages for negligence against Dr Morris, Dr Duke, Ms Elliston, the Southern Regional Health Authority ('SRHA') and the Attorney General of Jamaica ('AG') (collectively referred to below as 'the

defendants'). The doctors and nurse were employed by SHRA, the statutory public authority responsible for the management and employment of staff at the May Pen Public Hospital. The AG was sued pursuant to the Crown Proceedings Act ('the Act').

[7] On 30 July 2014 and 10 October 2014, Dr Morris filed an acknowledgement of service and defence, respectively. He was represented by learned Queen's Counsel, Mr John Graham. Dr Morris did not admit liability and stated that he intended to defend the initial claim. On 20 August 2014, an acknowledgement of service was filed by the Director of State Proceedings ('DSP') on behalf of the AG. The DSP also acknowledged service on behalf of Dr Duke, Ms Elliston and SRHA on 2 October 2014. The defendants on whose behalf the DSP acknowledged service denied liability and indicated that they too intended to defend the initial claim. The DSP did not file a notice of change of attorney in respect of Dr Morris. Therefore, for the entirety of the proceedings in the court below, Mr Graham remained as counsel on the record for him.

[8] Prior to, and after the commencement of the initial claim, there were several pieces of correspondence between Mr Graham and learned counsel for Mr Campbell, Mr Andre Earle. On 3 July 2014 (before the initial claim was filed), Mr Graham wrote to Mr Earle informing him that Dr Morris worked at the May Pen Public Hospital. In that letter, Mr Graham also referred to Ms Elliston, stating that it was her responsibility to count the instruments that were used in the surgery to ensure that they were all accounted for at the end of the procedure. Mr Graham asserted, on Dr Morris' behalf, that SRHA, as Ms Elliston's employer, was the appropriate entity responsible for her acts and/or omissions. It would be reasonable to infer, in light of that letter, that Dr Morris was ascribing liability for any alleged negligence to Ms Elliston. Mr Earle replied on 9 July 2014, enquiring whether Mr Graham was instructed to accept service of process on behalf of Dr Morris. Mr Graham, on 14 July 2014, responded in the affirmative and Dr Morris was served with the claim form and accompanying documents on 25 July 2014.

[9] It was not in dispute, therefore, that before the commencement of the initial claim, Mr Earle was aware of the status of Dr Morris' employment. However, as the pleadings show, Dr Morris, as well as the other parties, were sued jointly and severally.

[10] Mr Graham's subsequent letters, up until 1 April 2015, concerned whether the other parties had been served with the claim, if they had filed a defence and whether Mr Campbell would consent to the matter proceeding to mediation.

[11] On 7 April 2015, Mr Earle wrote to Mr Graham informing him that Mr Campbell was engaged in "negotiations with the AG with a view to the settlement of this matter". What followed thereafter were several letters between Mr Graham and Mr Earle about the progress of those negotiations.

[12] The initial claim was settled on 5 June 2015. On 13 August 2015, Mr Earle wrote to Mr Graham informing him of the settlement and that Mr Campbell had signed a release and discharge, but had not yet received payment of the settlement sum. The release and discharge was in the following terms:

"**RELEASE AND DISCHARGE**

> I, **TROY CAMPBELL** of [address] **DO HEREBY ACKNOWLEDGE RECEIPT OF THE SUM OF THREE MILLION SIX HUNDRED AND TWENTY THREE THOUSAND ONE HUNDRED AND NINETY ONE DOLLARS AND NINE CENTS ($3,623,191.09)** paid to me by the Government of Jamaica including interest and costs in full and final settlement and satisfaction of all claims of any nature whatsoever which I may now have or which may hereafter manifest itself whether arising directly or indirectly out of injury sustained when an instrument was left inside my abdominal cavity following surgery performed at the May Pen Hospital on the 24th day of September, 2008 and the 2nd day of October, 2008, respectively, and in full and final settlement of all claims, damages, expenses and costs incurred by me in respect of and consequence thereon **AND IN CONSIDERATION** of the said payment, **I DO FREE, RELEASE AND DISCHARGE** the Government of Jamaica and its servants or agents from all liabilities in respect of any claim which I may now have or which may hereinafter accrue to me from any matter arising from the said accident.

I, **TROY CAMPBELL** have read this document in its entirety, sought legal advice, fully understand the terms and implications of same and have signed it freely, voluntarily and **I HEREBY AGREE** to be bound by the terms and conditions stated herein.

DATED THE 5th DAY OF JUNE 2015

SIGNED by the said

SIGNED: TROY CAMPBELL

TROY CAMPBELL
In the presence of [name of Justice of the Peace]
This 5th day of June 2015

Before me
JUSTICE OF THE PEACE FOR THE PARISH OF CLARENDON"

[13] After the initial claim was settled, Mr Graham again wrote several letters to Mr Earle (the first was written on 20 August 2015), to find out if a notice of discontinuance had been filed. Mr Earle replied on 28 January 2016, stating that Mr Campbell had not yet been paid the sum agreed under the settlement and as such, no notice of discontinuance was filed. Mr Graham continued those enquiries until 13 October 2017. There was no evidence, from the record, that Mr Earle responded to those queries. It was pellucid from the mentioned correspondence that while Mr Graham was aware of the settlement negotiations, neither he nor Dr Morris directly participated in them. There was no request made by Dr Morris to participate in the settlement discussions or any complaint that they were being conducted in his absence. He also did not indicate in any of the letters written by Mr Graham, over the two-year period, that he was desirous of proceeding to trial, and had no interest in the settlement of the proceedings on his behalf.

[14] On 11 September 2018, Mr Campbell filed a notice of discontinuance which effectively ended the initial claim against all the parties. Dr Morris was served with the notice on the same day. On 18 October 2018, Dr Morris filed a bill of costs seeking to recover the sum of $778,141.20 from Mr Campbell. This figure represented his costs up to the date that he was served with the notice of discontinuance. Mr Campbell, being

displeased with this unexpected turn of events, filed an action (claim no 2018HCV04394) ('the second claim'), on 9 November 2018, seeking a declaration that he was not liable for those costs.

[15] In answer, on 5 July 2019, Dr Morris filed a notice of application for court orders asking the court to stay the second claim until Mr Campbell had paid the costs arising from the initial claim.

[16] The second claim and the notice of application for court orders were heard together on 3 February 2020. On 27 February 2020, after providing written reasons for her decision, the learned judge made the following orders:

> "1. The Claimant is not liable for costs to the Defendant arising from Claim No. 2014 HCV 03490 – Troy Campbell v Conrad Morris, Percival Duke, Audia Elliston, Southern Regional Health Authority and the Attorney General of Jamaica.
>
> 2. Taxation of the Defendant's bill of costs filed and dated October 18, 2018 is no longer material in light of the ruling.
>
> 3. Costs to the Claimant to be taxed if not agreed.
>
> (i) Notice of Application for Court Orders filed July 05, 2019 is refused.
>
> (ii) Claimant to prepare and file and serve the Orders herein."

The appeal

[17] On 8 April 2020, Dr Morris filed a notice of appeal relying on the following grounds:

> "i. The learned judge erred in the finding that the Claimant's joining of the defendants including Dr. Morris was not improper.
>
> ii. That the learned judge erred in finding that the Attorney General acted on behalf of the Appellant.

iii. The learned judge erred in finding that the Appellant was an agent of the state in circumstances where the Attorney General filed no pleadings to that effect;

iv. The learned judge erred in finding that the Attorney General was the Appellant's 'statutorily appointed' legal representative in the circumstances of this case.

v. The learned judge erred in finding that because the Appellant was aware of settlement discussions between the Respondent and the Attorney General, the Appellant should have requested to be a part of those discussions and by extension assumed that such a request would have been entertained;

vi. The learned judge erred in finding that there was an additional duty on the part of the Appellant to inform the Attorney General of his position in circumstances where a Defence setting out the Appellant's position had been filed and served.

vii. The learned judge erred in finding that there was a material change in circumstances that warrant the court from departing from the normal position, that is, unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant.

viii. The learned judge erred in finding that the Appellant should have sought the court's intervention in setting aside the Notice of Discontinuance.

ix. The learned judge erred in finding as a matter of fact or concluding as a matter of law that 'the claim including Dr Morris was one without merit which could have qualified as a failure [sic]'."

[18] The orders sought on the appeal are:

"(i) That the judgement of the Honourable Ms. Justice Y Brown made on the 27 February, 2020 be set aside

(ii) Costs of the appeal and costs of the court below be the Appellant's to be taxed if not agreed.

(iii) Alternatively, if the court were to decide not to set aside the judgement, that there be no order as to costs in the appeal and in the court below."

[19] The issues raised by the grounds of appeal will now be considered.

Discussion

Issue I - The conduct of the parties to the initial claim and the refusal of the learned judge to award costs following discontinuance in accordance with rule 37.6(1) of the CPR (Grounds ii to ix)

[20] The learned judge took the view that in the circumstances of the case:

i) While it was "unusual" for Dr Morris to have been sued in his personal capacity, since he was an employee of SHRA at the time of the surgery, it was not improper;

ii) Although Dr Morris had retained independent counsel, as a servant of the Crown, the AG was his "statutorily appointed legal representative" who acted on his behalf during the settlement discussions;

iii) Dr Morris was aware of the settlement discussions between Mr Campbell and the AG and could have requested to participate in them;

iv) Had Dr Morris wanted to contest liability, he could have informed the AG of this fact and approach the court to have the notice of discontinuance set aside;

v) The initial claim against Dr Morris was not discontinued because it lacked merit; and

vi) The settlement of the initial claim constituted a material change of circumstances that entitled the court to depart from the presumption stated in rule 37.6(1), and that it was just and fair to do so.

[21] Those findings, in my view, have a direct bearing on the learned judge's decision to deprive Dr Morris of his costs when the proceedings were discontinued, which, as indicated earlier, is the core issue that has emerged on this appeal. Following extensive research, I have been unable to locate any cases from within the jurisdiction which could provide guidance on the subject of the dispute. Therefore, it would appear, that this matter is being addressed for the first time by this court. As a result, the authorities that have been cited and others that will be discussed emanate from the United Kingdom. I wish to take the opportunity, at this stage, to thank counsel for the parties for their helpful submissions.

[22] This court is required to determine whether the learned judge erred when she exercised her discretion to deviate from the default principle enunciated in rule 37.6(1). The presumption, as provided by that rule, is that Mr Campbell, having discontinued the initial claim against Dr Morris, was liable for the costs he incurred up to 11 September 2018, unless the parties agreed (there was no such agreement) or the court ordered otherwise.

[23] To succeed, Dr Morris must demonstrate that the learned judge either misdirected herself on the applicable legal principles or misinterpreted the facts, or that her decision was "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" (see **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042 and **Attorney General of Jamaica v John McKay** [2012] JMCA App 1).

[24] Mr Graham submitted that the exercise of the discretion carried out by the learned judge was flawed because she misdirected herself on the law and failed to take into

account all the relevant considerations. In particular, it was submitted that her assessment of the settlement of the initial claim as constituting a material change of circumstances that merited a departure from the presumption in rule 37.6(1) was erroneous. The authority of **Erica Brookes v HSBC Bank PLC and Gerard Anthony Jemitus v Bank of Scotland PLC** [2011] EWCA Civ 354 ('**Brookes**') was relied on in support of this submission.

[25] Mr Earle, on the other hand, submitted that, given the factual matrix of the case, the learned judge was correct in finding that the settlement established good or sufficient reason to deprive Dr Morris of his costs, and that it was fair and just to do so. The case of **Dover Harbour Board v ISS and Others** [2007] EWHC 2015 (TCC) ('**Dover Board'**) was cited in support of this proposition.

[26] I will commence the discussion by referring to the two cases cited by counsel for the parties and then conduct a review of other relevant authorities on this topic.

[27] In **Brookes**, a decision of the England and Wales Court of Appeal, Moore-Bick LJ, who delivered the judgment of the court, approved the following principles that were formulated by HHJ Waksman QC in **Teasdale v HSBC Bank PLC** [2010] EWHC 612 (QB), as being the correct approach for the court to take when dealing with the issue of costs on discontinuance as provided by rule 38.6(1) of the Civil Procedure Rules of the United Kingdom ('UK CPR'), which is similar in terms to rule 37.6(1) of the CPR:

> "6 …
>
> (1) when a claimant discontinues the proceedings, there is a presumption by reason of CPR 38.6 that the defendant should recover his costs; the burden is on the claimant to show a good reason for departing from that position;
>
> (2) the fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so;

(3) however, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption;

(4) the mere fact that the claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption;

(5) if the claimant is to succeed in displacing the presumption he will usually need to show a change in circumstances to which he has not himself contributed;

(6) however, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule."

[28] The learned judge of appeal also observed that even in cases where it could be said that a defendant had brought the litigation on himself (as in the instant case), it was unlikely to justify a departure from the rule if the claimant discontinued in circumstances that amounted to a failure of the claim.

[29] In **Dover Board**, the claimant applied under rule 38.6 of the UK CPR to discontinue its claim to recover damages for fraud against a Mr Dobson, who was one of four defendants. One of the three remaining defendants was no longer an effective party to the claim and the claimant had received a substantial settlement from the other two defendants. The reason for the discontinuance was that the claimant did not think it was either proportionate or economic to continue the claim against Mr Dobson in circumstances where it appeared that he had little financial resources of his own. The claimant advanced that there had been a substantial change of circumstances as a result of the settlement on the basis that the costs of pursuing the claim in addition to the

recovery it had already made, would be wholly disproportionate to the likely recovery from Mr Dobson who was the only remaining party in the claim. Mr Dobson did not object to the discontinuance order, but contended that he was entitled to recover his costs. The court granted the order for discontinuance and directed that there should be no order as to costs. To justify the departure from the presumption in rule 38.6(1) the court found:

(1) "that the burden was on the claimant to show that the normal order for costs following a discontinuance should not be applicable;

(2) the court was satisfied that the claimant had met this burden because:

a. it was reasonable, in the circumstances, for the claimant to have commenced the claim against Mr Dobson who was alleged to have been a principal participant in 'a very serious, long-running and complicated conspiracy to defraud the claimant' and had he not been sued it would have been difficult to present the case against the other defendants;

b. the allegations against Mr Dobson were very grave and had they been made the subject of a criminal trial, and he was convicted, he would have received substantial sentences of imprisonment;

c. the costs of continuing with the claim against Mr Dobson would have been enormous and would have further negatively impacted his financial position even if the matter had gone to trial and he had succeeded; and

d. the changed circumstances that resulted from the settlement were substantial and in terms of proportionality, the advantage and public interest in there being a discontinuance of the proceedings were significant."

[30] It would be fair to say that in **Dover Board** the judge considered the alleged conduct of the defendant in light of the nature of the allegations that were made against him, as well as the issue of proportionality, and decided that it was advantageous and in the public interest to discontinue the claim. It was in those exceptional circumstances that the court departed from the normal order on discontinuance as prescribed by 38.6(1) of the UK CPR.

[31] Further guidance can also be found in the case of **In re Walker Wingsail Systems plc Walker v Walker** [2005] EWCA Civ 247 ('**Walker v Walker**'), a decision from the England and Wales Court of Appeal. The facts of that case were that in October 1999, a liquidator of a company sued the defendants, who were former directors of the company, to recover monies that allegedly were misappropriated or misapplied by them (the misfeasance proceedings). A second claim was commenced against the defendants by the Secretary of State and the defendants were successful in obtaining an order for both claims to be heard together. The assets of the defendants, who were husband and wife, were frozen, but they were permitted by the court to use some of their frozen assets to fund the costs of their defence. Before the date of trial, one of the defendants committed suicide and the proceedings were postponed. By June 2004 the defendants' costs had risen to a significant figure and the liquidator applied to the court to discontinue the misfeasance proceedings because the proceedings had become commercially worthless.

[32] The judge granted permission to discontinue, but refused to make the usual costs order under rule 38.6(1) of the UK CPR which would have made the liquidator liable for

the defendants' costs in the discontinued claim, directing instead that there be no order as to costs. The court allowed the appeal of the defendants on the bases that:

> "(1) under rule 38.6(1), the normal order on discontinuance was that the claimant bore the defendants' costs up to the date when the notice of discontinuance was served, and it was for the claimant to show some good reason to depart from the normal order;
>
> (2) justice would normally require that a claimant who changed his mind in the middle of an action for no good reason, other than that he had re-evaluated factors which had remained unchanged, should compensate the defendant for his costs;
>
> (3) the assets of the defendants that were available to meet the claim, which had been commercially worthless from the outset (in the sense that the costs outweighed any possible return for the creditors of the company), remained substantially unchanged from the initiation of the claim;
>
> (4) the learned judge in the court below had been wrong to assume otherwise; and
>
> (5) the liquidator's subsequent realisation of the true position, which resulted in the discontinuance of the claim, was not a change of circumstances that justified departing from the normal rule that the party discontinuing the action should pay the defendant's costs."

[33] In **Maini v Maini** [2009] EWHC 3036 (Ch), Proudman J remarked that where a claimant commenced proceedings, he/she took on the risk of the litigation. If successful, a claimant can expect to recover their costs, but if unsuccessful or the claim is abandoned at whatever stage of the proceedings, "it is normally unjust to allow the defendant to bear the costs of proceedings that were forced upon him and which the claimant is unwilling to carry through to judgment".

[34] The claimant in **Messih v MacMillan Williams** [2010] EWCA Civ 844 ('**Messih**'), brought proceedings against two firms of solicitors seeking damages for the loss of a

commercial lease, which, he alleged, had been caused by their separate failure to give him proper advice. He settled the claim with one firm of solicitors on terms that it paid him the whole of the amount that he claimed. Having obtained all that he could reasonably hope to achieve by the proceedings, and notwithstanding that the second firm of solicitors had made it quite clear that they wished to contest liability for the reasons that the claim was unmeritorious and had no realistic prospect of success, the claimant, nevertheless, discontinued the claim and sought an order from the court that he was not to be liable for their costs. The claimant argued, firstly, that the settlement of the claim with the first firm of solicitors had rendered the claim against the second firm of solicitors academic; and secondly, that by settling the claim with the first firm of solicitors he had obtained all that he had been seeking and that by discontinuing against the second firm of solicitors he had acted reasonably and responsibly by avoiding the need for a trial with its attendant costs and court time. Notwithstanding, the court did not accept that there was sufficient justification for departing from the presumption in rule 38.6(1) of the UK CPR for the following reasons:

(a) "the avoidance of the costs of a trial is the necessary consequence of any discontinuance and could not of itself justify a departure from the presumption. There had to be something more than that to justify a departure, otherwise the normal rule would be displaced in every case;

(b) the claimant knew the position of the second firm of solicitors to be that it wished to contest its liability for the claim and notwithstanding this decided to discontinue knowing that the settlement of the claim with the first firm of solicitors made no provision for the payment of costs to the second firm of solicitors. The circumstances of the discontinuance were the usual consequences of a decision to discontinue which did not merit a departure from the normal rule;

(c) the costs consequences of a discontinuance against one firm of solicitors ought in principle to be the same where the claimant chose to join as defendants in the same action, two separate firms of solicitors against

whom he pleads separate causes of action based on different breaches of their respective retainers; and

(d) the claimant's natural desire to settle the claim against the first firm of solicitors on the basis that they paid the claim in full should not be allowed to override the entitlement of the second firm of solicitors to be paid their costs."

[35] In this case, Mr Graham, in answer to a question posed by this court, submitted that rule 37.6(1) was a discrete provision and that Part 64 of the CPR, and in particular, rule 64.6 was inapplicable to the exercise of the judicial discretion to apply, or depart from the standard rule. However, in the highest traditions of the bar, learned Queen's Counsel provided two authorities, **Nelson's Yard Management Company, Christopher Leverick, Susan Leverick and Alastair Munroe v Nicholas Eziefula** [2013] EWCA Civ 235 ('**Nelson's Yard Management**') and **Re Smart-Tel (UK) Plc Official Receiver v Ketan Doshi** [2007] BCC 896[1] ('**Doshi**'), which seem to suggest otherwise. The court is grateful to him for his assistance in this regard.

[36] In **Nelson's Yard Management**, the claimants commenced proceedings against the defendant in January 2008, concerning excavation work he had done in January 2007, without obtaining planning permission and serving them with the required notice before starting the work. In March 2012, the claimants applied for permission to discontinue the proceedings and for the defendant to pay their costs based on his "obstructive and truculent behaviour throughout". The claimants' application for discontinuance was successful, but the learned judge in the court below rejected their application for costs and ordered that they were to pay the defendant's cost. The claimants' appeal to the England and Wales Court of Appeal was allowed. The court found that the merits of the claim while being irrelevant to the consideration of a departure from the standard rule, the conduct of the defendant, although not determinative, was pertinent. Having

[1] Also cited as The Official Receiver v Doshi [2007] Lexis Citation 7, Chancery Division, Companies Court, judgment delivered on 24 April 2007.

considered the conduct of the defendant before the proceedings, the court found that the claimants had little choice but to commence the claim. The defendant was ordered to pay the costs of the claimants up to the date that the defence was served. The court also ordered that there would be no order as to costs thereafter.

[37] Beatson LJ, writing for the court, also opined that rules 44.3(4) and 44.3(5) of the UK CPR, which are similar in terms to rule 64.6(4) of the CPR, apply to the determination of whether there is good reason to depart from the standard rule. At paragraphs 15 to 17 of the judgment, the learned judge observed:

> "15. It is also necessary to refer to CPR Part 44.3 which sets out the circumstances the court is to consider when making an order about costs, and the relationship between it and CPR 38.6. Moore-Bick LJ's summary of the principles [in **Brookes**] does not expressly refer to CPR Part 44.3 but his approval of HHJ Waksman's formulation must have encompassed the Deputy Judge's eighth principle [those eight principles were reduced to six by Moore-Bick LJ]. That is, that 'the context for the Court's mandatory consideration of all the circumstances under CPR 44.3 is the determination of whether there is a good reason to depart from the presumption imposed by CPR 38.6'.
>
> 16. CPR Part 44.3(4) provides that 'in deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including (a) the conduct of all the parties … (c) any admissible offer to settle made by a party which is drawn to the court's attention'.
>
> 17. CPR Part 44.3(5) provides that 'conduct' includes '(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed the Practice Direction (Pre-Action Conduct) or any relevant pre-action protocol; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended his case or a particular allegation or issue'."

[38] It is necessary, at this point, to refer to rule 64.6 of our CPR which provides in part:

> "64.6 (1) If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.
>
> (2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to the costs.
>
> (3) In deciding who should be liable to pay costs the court must have regard to all the circumstances.
>
> (4) In particular it must have regard to –
>
> (a) the conduct of the parties both before and during the proceedings;
>
> (b) whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;
>
> (c) any payment into court or offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Parts 35 and 36);
>
> (d) whether it was reasonable for a party –
>
> (i) to pursue a particular allegation; and/or
> (ii) to raise a particular issue;
>
> (e) the manner in which a party has pursued -
>
> (i) that party's case;
> (ii) a particular allegation; or
> (iii) a particular issue;

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

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

(5) …

(6) …

(7) …

(8) …"

[39] The Court of Appeal in **Nelson's Yard Management** also approved the decision of Norris J in **Dhillon & Bachmann Trust Co. Ltd v Siddiqui** [2010] EWHC 1400 (Ch) ('**Dhillon and Bachmann**') regarding how to approach the issue of costs following discontinuance by reference to the general considerations imposed by Part 44.3 of the UK CPR and not within the "constraints imposed by [UK] CPR 38.6(1)".

[40] Similarly, in **Doshi** at paragraph 16 of his judgment, Mr Registrar Baister observed:

> "16. Furthermore, it would appear that in the exercise of its discretion in the context of discontinuance the court is entitled to take into account the general factors going to the exercise of the discretion set out in [UK] CPR 44.3 (*RGB Resources Ltd v Rastogi*). It would be surprising if it were otherwise, since the overriding objective ([UK] CPR 1.1(1)) requires the court to deal with matters justly when exercising any of its power under the [UK] CPR. It follows, it would seem to me, that in exercising the discretion the court must, therefore, have regard to all the circumstances whilst recognising that a claimant has a heavy burden to discharge (however that might be framed in the authorities) in overcoming the usual presumption as to where the costs should lie when he discontinues the action."

[41] Finally, on this point, Lightman J in **RBG Resources plc (in Liquidation) v Rastogi and Others** [2005] EWCH 994 (Ch) ('**Rastogi**') considered the conduct of the

defendant by applying rule 44.3 of the UK CPR as a basis to discount, by 40%, the costs that were payable by the claimant to the defendant on discontinuance. In paragraph 53 of his judgment the learned judge said:

> "53. The question however arises whether the conduct of the [fourth defendant] and the attitude which he adopted in negotiations for settlement affords a good reason to depart (in whole or in part) from the normal rule [38.6(1)]. [UK] CPR 44.3 requires the court in exercising its discretion as to costs to have regard to the conduct of the parties and admissible offers to settle made by the parties … His [the fourth defendant] unnecessary aggressive approach in the litigation has been calculated to increase costs … It seems to me that the totally unreasonable and unjustified stance adopted by the [the fourth defendant] is a good reason to order that [he] should be deprived of a proportion of his costs."

[42] It is clear, taking into account the provisions of rule 64.6 and the tenets stated in the authorities of **Rastogi**, **Nelson's Yard Management**, **Dhillon and Bachmann** and **Doshi**, that a judge is given a wide margin when exercising a discretion in relation to costs following discontinuance. Those authorities all establish that the court is allowed to consider the general factors set out in rule 64.6, rather than being slavishly bound by the "constraints imposed by" the default principle in rule 37.6(1). This general principle concerning the court's discretion when considering costs orders has been reaffirmed in several decisions of this court including **Ivor Walker v Ramsay Hanson** [2018] JMCA Civ 19. At paragraph [42] of that judgment Phillips JA opined:

> "…There is no entitlement to costs. The order for costs always remains within the complete unfettered discretion of the court, although of course the discretion must be exercised judicially. There are so many factors that are open to the consideration of the court when the order of costs is being contemplated. They are set out in detail in parts 64 and 65 of the CPR and they always include a consideration of the conduct of the parties."

The applicable principles

[43] Obviously, when the court is considering an application under rule 37.6(1), the starting point has to be the recognition that the default principle or presumption embodied in that rule is that the party who discontinues should ordinarily pay the defendant's costs up to the date of discontinuance. From the authorities cited and discussed, certain other broad principles can also be discerned. These are that:

> (1) it is for the party discontinuing to justify some other order;
>
> (2) the party who is seeking to convince the court to depart from the presumption is required to provide cogent reasons for doing so;
>
> (3) the court must consider if the reasons advanced, justify departing from the default principle;
>
> (4) the court has to be persuaded that, in all the circumstances, it is fair and just to depart from "the normal consequences of discontinuance" having regard to the overriding objective to deal with the case justly in accordance with rules 1.1(1) and 1.2 of the CPR;
>
> (5) the presumption should only be displaced in limited or exceptional circumstances; and
>
> (6) in the exercise of its discretion, in the context of discontinuance, the court is entitled to take into account the general factors set out in rule 64.6 of the CPR.

[44] Furthermore, to inform its decision to apply or depart from the standard rule or presumption, the court may consider:

> (i) whether it was reasonable for the claimant to have pursued the case against the defendant. That is, the court is to determine whether the claim was a serious one deserving of argument at

trial and it could not be dealt with on a summary basis or struck out as having no real prospect of success. However, it was not the function of the court to attempt to decide whether the claim would succeed and neither was this fact, if it existed, relevant; and

(ii) whether there had been a substantial or material change in the circumstances between the date when the proceedings commenced and the date when the notice of discontinuance was served.

Analysis

[45] The learned judge, in arriving at her decision whether or not to award costs on discontinuance, was required to have regard to all the circumstances, including the conduct of the parties both before and during the proceedings (see rule 64.6(3) and (4)(a) of the CPR), which in the present case included the following:

a) Before the initial claim was filed, Dr Morris, by letter, indicated that he had performed the surgical procedure on Mr Campbell whilst being employed at the May Pen Public Hospital.

b) Dr Morris was sued for medical negligence jointly and severally with the other parties in the court below. He retained independent counsel to represent him. Having retained his own counsel who filed an acknowledgement of service on his behalf, the DSP did not file an acknowledgement of service or a notice of change of attorney on his behalf.

c) In his defence filed on 10 October 2014, Dr Morris averred that he was employed by SRHA and performed duties at the May Pen Public Hospital, which was a clear assertion, on his part, that he was a servant of the Crown.

d) By letter dated 17 December 2014, before the settlement discussions commenced between Mr Campbell and the AG, Mr Graham wrote to Mr Earle enquiring whether Mr Campbell would consent to the matter proceeding to mediation. Mr Earle responded on 16 January 2015 that his client was willing to do so but he was in the process of contacting the AG to ascertain their position.

e) Mr Graham was informed of the ongoing settlement discussions between Mr Campbell and the AG. He wrote several letters enquiring about the progress of those negotiations and whether a notice of discontinuance had been filed.

f) There was no evidence presented that Dr Morris wanted to participate in the settlement discussions and that Mr Graham had communicated to either Mr Campbell or the AG that he wanted to contest liability.

g) The settlement sum was $3,623,191.09 inclusive of interest and costs. Based on the terms of the release and discharge, the Government of Jamaica and all its agents and servants were released from liability (including any future claims) arising from the surgeries that took place on 24 September and 2 October 2008.

h) The settlement made no provision for Dr Morris' costs.

[46] Whilst it was no part of the court's function, where a claim was discontinued, to attempt to decide whether or not the claim would succeed, the court can consider whether or not it was reasonable for the claimant to have initiated or pursued the claim as provided by rule 64.6(4)(d) of the CPR. This factor is one of several that is used to evaluate the conduct of a claimant, to determine if justification exists to depart from the standard rule. Given the background of the present case, I am satisfied, as the learned judge was, that Mr Campbell acted reasonably to raise and pursue the allegations he

made against Dr Morris. The initial claim was not misconceived or one without merit because Dr Morris was one of the medical doctors who performed the surgical procedure and it was more probable than not that he could have been partly responsible for the instrument being left in Mr Campbell's abdominal cavity. Therefore, it cannot be said, as the learned judge found, that the proceedings were discontinued because they amounted to a failure as in **Brookes**, **Walker v Walker** and **Maini v Maini**. Those authorities confirm that where a claim was discontinued because it was bound to fail, this was a factor that favoured the application of the presumption in rule 37.6(1). This particular feature did not apply to the case at bar. As a result, I am persuaded to the view that the learned judge was not plainly wrong in arriving at that conclusion. It was also within her discretion to consider that factor when deciding whether or not there was justification to depart from the standard rule.

[47] It was the opinion of the learned judge that the information that was exchanged between Messrs Graham and Earle about the settlement negotiations weakened Dr Morris' argument that he was not bound by the settlement because he did not participate in the discussions. She was also of the view that Dr Morris, being aware of the negotiations, could have taken steps to participate in them, and he also could have taken the opportunity to inform Mr Campbell and the AG that he wanted to contest liability, if that were the case. The learned judge indicated that any "disgruntlement" Dr Morris felt, could have been brought to the attention of the AG, who was his "statutorily appointed legal representative". She acknowledged that the AG's failure to include Dr Morris in the settlement negotiations may have been a "flouting of procedural norms" but that Mr Campbell ought not to be penalised because of the AG's "action or inaction".

[48] It is clear that when the learned judge made those observations she was evaluating the conduct of Mr Campbell, Dr Morris and the AG during the initial claim. As the authorities illustrate, this was a factor that could significantly influence the determination of the court to apply or deviate from the standard rule (see **Rastogi**, **Nelson's Yard Management** and rule 64.6(4)(a) of the CPR). Mr Graham objected to

the learned judge's findings that Dr Morris could have taken steps to participate in the settlement and that he could have related to his "statutorily appointed legal representative" his desire to contest liability.

[49] The phrase 'statutorily appointed legal representative' was used by the learned judge in that specific context, which was not objectionable, in my view. It is an undisputed fact that the AG, by virtue of section 13 of the Act, is the 'statutorily appointed legal representative' of the Government of Jamaica and all its servants and/or agents in civil proceedings. Other facts that were considered by the judge and which correctly informed her decision on this issue included (1) Dr Morris by his own admission, was a servant of the Crown at the time of the surgery. This was neither admitted nor denied by the AG; (2) Dr Morris could not lose that designation simply because he was sued in his personal capacity and had hired independent counsel; and (3) Dr Morris never complained at any time before the proceedings were discontinued that he was interested in participating in the settlement discussions and was prevented from doing so. In the end, the learned judge viewed those facts in the overall circumstances of how Dr Morris (and to some extent, the AG) approached the settlement negotiations to decide whether she should apply or depart from the standard rule, which she was entitled to do.

[50] The learned judge also considered that Dr Morris' failure to unequivocally communicate his position to Mr Campbell and the AG that he had no interest in the initial claim being settled in relation to him, and that he wished to proceed to trial, was a factor that could influence the departure from the standard rule. She took the view (inferred from the letters exchanged between Messrs Graham and Earle) that Mr Graham was well aware that settlement negotiations were being pursued by the AG "on behalf of the defendants named in the suit". However, Dr Morris never objected to being "represented" by the AG in those negotiations and, in those circumstances, it would have been "incumbent upon independent counsel for [Dr Morris] to have informed the Attorney General of his client's stance regarding the matter". I agree. My reasons for doing so are as follows.

[51] The application of the principle in **Messih** is most apt for considering and disposing of this issue. In **Messih**, the second firm of solicitors, which was one of two defendants in the claim, made it clear to the claimant, before he discontinued, that it wished to contest liability. It was always their unequivocal position, which was known to the claimant, that the claim lacked merit and had no realistic prospect of succeeding. This was one of the main reasons why the England and Wales Court of Appeal found that the learned Recorder had erred when he refused to award the defendant their costs on discontinuance, and allowed their appeal.

[52] The contrast between **Messih** and the present case is stark. Firstly, the claimant in **Messih** chose to join as defendants in the same action, two separate firms of solicitors against whom he pleaded separate causes of action based on different breaches of their respective retainers. In the case at bar there was one cause of action, that of medical negligence, pleaded against Dr Morris and the other parties, as servants of the Crown, arising out of a single incident. Secondly, the defendant (the second firm of solicitors) in **Messih** made it known to the claimant before discontinuance, in unequivocal terms, that it wished to contest liability because the claim against them lacked merit and had no prospect of succeeding. Dr Morris, however, did not explicitly inform Mr Campbell or the AG, at any time before the initial claim was discontinued, that he had no interest in the matter being settled against him because he wished to contest liability at trial. On the contrary, the letters from Mr Graham, in my view, displayed a keen interest in and urgency about the pace of the settlement and when a notice of discontinuance would be filed. There was also no argument, from Dr Morris, like in **Messih**, that he wished to contest liability because the initial claim lacked merit and was hopeless.

[53] Based on the evidence that was before her, the learned judge would also have considered that from as early as 17 December 2014 (ahead of any court-directed mediation) Dr Morris communicated his interest in having the matter proceed to mediation. This would have been suggestive, at the very least, that he was open to the possibility of the proceedings being settled by this means. There was nothing to indicate

that Dr Morris had expressly or impliedly disassociated himself from any possible benefit that would accrue to him upon a settlement of the initial claim by the AG.

[54] Moreover, in light of the terms of the settlement, Mr Campbell would have been prohibited from continuing the initial claim against Dr Morris, even if he wanted to (see paragraph [11]). The terms of the release and discharge **unconditionally freed the Government of Jamaica and all its servants and/or agents** (which included Dr Morris) of any further liability (including future claims) arising from the surgeries of 24 September and 2 October 2008.

[55] Mr Graham's remarkable contention that Dr Morris' position was known to the AG (and by implication to Mr Campbell as well) because it was clearly stated in his defence, is dubious for the simple, but obvious reason that such an indication in preliminary pleadings is not necessarily conclusive of that fact. In this matter, for example, when the acknowledgements of service were filed on behalf of all the other parties, they denied the initial claim and stated their intention to defend it, yet the AG went on to settle the matter before it proceeded to court-appointed mediation.

[56] It seems to me that Dr Morris' attitude to the settlement was irreconcilable with his purported stance that he wanted to challenge liability. He chose not to explicitly indicate this to the other parties. He failed to register any objections to being "excluded" from the settlement discussions, but on the other hand, all the enquiries he made showed an ardent concern about the alacrity of the settlement and discontinuance of the proceedings. However, having gained the benefit of being unconditionally released from all liability in the initial claim, as well as all future claims, the main planks of his submissions that he is entitled to his costs upon discontinuance, were that he did nothing wrong by retaining independent counsel, and his staunch position was that he wanted to dispute liability at trial. It appears unreasonable to me, as it did to the learned judge, that having adopted the approach that he did, Dr Morris could now seriously contend that he was not bound by the settlement because "the Attorney General, in the settlement of the

claim, could not have properly acted for and on his behalf, notwithstanding that he was an agent of the state at the material time".

[57] The learned judge was entitled, as she did, to consider Dr Morris' conduct in deciding whether or not he should be deprived of his costs. As a result, I am compelled to the view that she cannot be faulted for finding, in all the circumstances, that the AG, "acted on behalf of all the agents of the state" and "procured a settlement on behalf of the medical team including [Dr Morris]", and that in return Mr Campbell was expected to, and did file a notice of discontinuance.

[58] Finally, on this issue, the authorities disclose that a substantial or material change in circumstances between the date when the proceedings were commenced and the date when the notice of discontinuance was served, may constitute good reason for departing from the costs consequence prescribed by rule 37.6(1). However, it will all depend on what those circumstances are. Mr Earle described the settlement in this case as being 'unusual' and that as a result, Mr Campbell had presented cogent reasons which merited the displacement of the standard rule on discontinuance. He also submitted that the learned judge was correct in finding that it was fair and just in all the circumstances to do so.

[59] The learned judge began her analysis of this specific point by correctly observing that rule 37.6(1) "affords the court the latitude to depart from the position of awarding costs to the defendant against whom the claim had been discontinued". She found that the settlement represented a material change of circumstances that provided good or cogent reason for deviating from the usual costs order on discontinuance. She concluded that "the approach that was taken by the Attorneys in the settlement of the subject claim, as well as any perceived omissions, would not have been authored by the Claimant. Thus an award of costs to the defendant against the claimant, would prove not only unfair, but offensive to the overriding objective to deal with matters justly."

[60] The learned judge demonstrated clearly how she arrived at this decision, and there was more than enough evidence to support her finding. She considered that the circumstances that existed at the time, when the initial claim was commenced, were not the same at the time of discontinuance. She formed the view that the change was substantial after carefully assessing the context in which the settlement was arrived at (negotiated and concluded by the AG on behalf of the Government of Jamaica and all its servants and/or agents), the approach and attitude of Dr Morris to the settlement negotiations (who seemed to me to have acquiesced to the AG negotiating and settling the matter on his behalf) and the nuances of the release and discharge, which led to the discontinuance of the proceedings against all the parties. The learned judge regarded all those matters, along with the need to give effect to the overriding objective, as decisive in relation to the exercise of her discretion to depart from the default principle in rule 37.6(1). I am satisfied, as she was, that the justice of the case merited the displacement of the presumption.

[61] Before addressing the final issue, I wish to say for completeness that note is taken of Dr Morris' complaint that the learned judge erred when she found that he should have sought the intervention of the court to set aside the notice of discontinuance under rule 37.4(1) of the CPR. Even if I were inclined to agree that the learned judge erred in arriving at this conclusion, it would not be an error of such weighty proportion as to affect her core decision that Dr Morris was not entitled to costs. In my view, this ground cannot advance the appeal.

Issue II – Whether Dr Morris was entitled to costs because it was improper for Mr Campbell to have sued him in his personal capacity (Ground i)

[62] Mr Graham submitted that pursuant to section 13(2) of the Act, Mr Campbell ought to have initiated proceedings only against the AG, and that he acted improperly when he commenced the initial claim against Dr Morris and the other parties jointly and severally. The case of **The Attorney General v Gladstone Miller** (unreported), Court of Appeal Jamaica Supreme Court Civil Appeal No 95/1997, judgment delivered 24 May 2000) ('**Gladstone Miller**') was relied on for this submission.

[63] One of the intended effects of this submission was to underscore the point that it was as a result of the decision by Mr Campbell to bring an action against Dr Morris in the manner he did, that prompted Dr Morris to retain independent counsel, and therefore, Dr Morris ought not to have been denied his costs.

[64] Mr Earle submitted that it was not improper for Mr Campbell to have commenced the initial claim against Dr Morris in his personal capacity and join the AG because Mr Campbell was not in a position to determine the status of Dr Morris' employment with the May Pen Public Hospital and was unaware of the extent to which Dr Morris was liable for the instrument being left inside of his abdominal cavity.

[65] I have formed the view that this ground of appeal does not advance the appeal in any meaningful way that could lead this court to find that the learned judge erred in the exercise of her discretion.

[66] The learned judge, in the present case, found that a Crown agent or servant may be sued in his or her personal capacity and whilst it was "unusual" for Mr Campbell to have commenced the initial claim against the parties in their personal capacities and join the AG, it was not improper. In resolving this issue, she relied on the case of **Roe v Ministry of Health and Others; Woolley v Same** [1954] 2 All ER 131 ('**Roe v Ministry of Health**'). In that case, the plaintiffs had been given an anaesthetic by the anaesthetist, Dr Graham, for minor operations at a hospital managed by the Ministry of Health. The anaesthetic had been contaminated by a sterilising fluid during storage, which resulted in the plaintiffs becoming permanently paralysed. The anaesthetic was stored at the time, in the normal way, and it was not known, at the time, that it could have been contaminated because of the method of storage. The plaintiffs instituted an action against the anaesthetist, the manufacturer of the anaesthetic and the Ministry of Health. On appeal, the court held that there was no breach of duty because the risk of contamination of the anaesthetic as a result of the way it was stored, was unknown at the time, and therefore unforeseeable.

[67] In arriving at her decision, the learned judge placed reliance on the following dictum of Lord Denning in **Roe v Ministry of Health**:

> "… I do not think that the hospital authorities and Dr Graham can both avoid giving an explanation by the simple expedient of each throwing responsibility on the other. If an injured person shows that one or other or both of two persons injured him, but cannot say which of them it was, then he is not defeated altogether. He can call on each of them for an explanation: see *Baker v Market Harborough Industrial Co-operartive Society*.
>
> I approach this case, therefore, on the footing that the hospital authorities and Dr Graham were called on to give an explanation of what has happened…"

[68] This court in **Brady & Chen Limited v Devon House Development Limited** [2010] JMCA Civ 33 ('**Brady & Chen**'), arrived at a similar conclusion. In that matter, the respondent was a limited liability company that was owned by the Government of Jamaica and was sued by the appellant in its private capacity. The main issue was whether a letter that was written by the appellant to the respondent was an offer to surrender a lease, and if it were, whether the respondent had accepted it. The property, which was the subject matter of the lease, had been vested in the Commissioner of Lands in trust for Her Majesty in right of the Government of Jamaica. Smith JA writing for the court made the following observations at paragraphs [14], [16] and [22] of the judgment:

> "[14] … I am of the view that the respondent is a Crown entity. As such, it seems to me that any proceedings against the respondent should be instituted against the Attorney General pursuant to section 13(2) of the Crown Proceedings Act which reads:
>
> '13 (1) …
>
> (2) Civil proceedings against the Crown shall be instituted against the Attorney-General."
>
> Accordingly, I agree with [counsel for the respondent] that the Attorney General should have been joined since the appellant was going against a government entity.

…

> [16] … A pleader should in my view, if in doubt, go against all three – the Attorney General, the Commissioner of Lands and the respondent.
>
> …
>
> [22] … I should also state that where an agent or servant of the Crown commits a tort while acting in his official capacity the actual wrong doer or the person who ordered the wrong doing may be sued personally… (applying **M v Home Office** [1993] 3 All ER 537)." (Emphasis added)

[69] Likewise, in **Gladstone Miller** Bingham JA, with whom the rest of the court agreed, opined at pages 9 and 10 of the judgment:

> "… Although claims in tort could still be brought against the Crown-servant or employee alone, once it was established that he was acting within the course or the scope of his employment, the proper defendant to be sued was the Attorney General, he being the official representative of the Crown by virtue of his office. A suit against the servant or employee alone therefore would be meaningless, as the Attorney General could enter an appearance and take over the defence of the suit. It is in this vein that section 13(2) of the Crown Proceedings Act mandates that 'Civil Proceedings against the Crown shall be instituted against the Attorney General'." (Emphasis added)

Analysis

[70] The distinguishing feature in **Brady & Chen** from the case at bar is that the AG was not joined as a party to the claim in the former. Mr Campbell, however, commenced action against the two doctors and nurse who made up the surgical team, their employer SRHA and the AG for the tort of medical negligence. It is clear from the authorities that there is no rule of law that prevents a servant or agent of the Crown, who commits a tort in the course of his employment or official duties, from being sued personally and jointly with the AG. This may well be the recommended approach where a "pleader is in doubt"

(see **Brady & Chen**) or where there are several alleged tortfeasors and a claimant is unable to say which of them it was that injured him or her (see **Roe v Ministry of Health**). As a result, Mr Campbell could, as he did, institute the initial claim against the parties jointly and severally. Therefore, the learned judge was not palpably wrong when she found that it was not improper for Mr Campbell to have commenced the proceedings against Dr Morris in his personal capacity.

[71] The learned judge was not influenced to apply the standard rule following discontinuance based on Mr Campbell's decision to sue Dr Morris in his personal capacity. This was a matter entirely within her discretion. Having considered that particular element of the case, along with all the other factors (which have been discussed earlier), as well as the relevant authorities, I am not of the view that she was demonstrably wrong for doing so.

Disposal

[72] Having reviewed the authorities and the judgment of the learned judge, I am convinced that she adopted the proper approach in arriving at her decision. She exhibited a clear understanding of the relevant legal principles which she correctly applied to the facts of the case. She articulated proper reasons why Mr Campbell should not pay Dr Morris' costs, which were entirely within her discretion to allow or not, having regard to the overriding objective to deal with the case justly. Her finding that it was not improper for Mr Campbell to have sued Dr Morris and the other parties jointly and severally is incontrovertible. Her discretion, in all the circumstances, in my view, was "exercised judicially" and there is nothing to warrant the interference of this court with her decision.

[73] In light of the foregoing, I would dismiss the appeal and affirm the order of the learned judge. It is also my view that Mr Campbell, having succeeded in this court, ought to have his costs in the appeal either agreed or taxed, in keeping with the general rule that costs follow the event (rule 64.6(1)). However, it is proposed that an order should be made that unless the appellant files and serves written submissions requesting that a different order be made within 14 days of the delivery of this judgment, the costs order

suggested should stand. The respondent should be given an opportunity to respond to those submissions within 14 days of being served.

DUNBAR-GREEN JA (AG)

[74] I, too, have had the opportunity of reading, in draft, the judgment of my sister V Harris JA. I agree with her reasoning and conclusion and have nothing to add.

MCDONALD-BISHOP JA

ORDER

1. The appeal is dismissed.

2. The order of Y Brown J made on 27 February 2020 is affirmed.

3. Costs of the appeal to the respondent, Mr Troy Campbell, to be taxed, if not agreed unless the appellant files and serves written submissions within 14 days of the date hereof that another order as to costs is to be made. The respondent is permitted to file written submissions in response within 14 days of being served with the appellant's submissions.