[2017] JMCA App 20

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 199/2016

BETWEEN	**LIJYASU M KANDEKORE**	**APPELLANT**
AND	**COK SODALITY CO-OPERATIVE CREDIT UNION LIMITED**	**1ST RESPONDENT**
AND	**DEIDRE DALEY**	**2ND RESPONDENT**
AND	**DONNOVON WARD**	**3RD RESPONDENT**

Appellant in person

Miss Coleasia Edmondson instructed by Henlin Gibson Henlin for the respondents

27 June, 18 July and 21 September 2017

IN CHAMBERS

BROOKS JA

[1] This is an appeal by Mr Lijyasu Kandekore from a refusal by the registrar of this court to set aside a default costs certificate. The certificate was issued by the registrar against Mr Kandekore on 21 October 2016. It was in favour of COK Sodality Co-operative Credit Union Limited (COK). COK was entitled to costs by virtue of an order made when this court dismissed two appeals by Mr Kandekore. The appeals had been consolidated.

[2] COK filed its bill of costs in pursuance of this court's order. The default costs certificate was issued because Mr Kandekore failed to file and serve points of dispute within the time specified by rule 65.20(3) of the Civil Procedure Rules (CPR). He applied to the registrar of this court to set aside the certificate. On 27 March 2017, the learned registrar refused the application and communicated her decision to Mr Kandekore. On 7 April 2017, Mr Kandekore filed his notice of appeal from the registrar's decision. His appeal has been placed before a single judge of this court.

[3] The essence of Mr Kandekore's complaint is that the learned registrar erred in her refusal, because she failed to recognize that he did make an effort to file his points of dispute in a timely manner. He contended that errors in the heading of the notices to serve points of dispute, with which he was served, caused him to file his points of dispute in the Supreme Court, rather than in this court.

[4] His appeal has been resisted by COK. The issues raised concern the proper procedure for contesting the refusal by the learned registrar and whether it may be considered by a single judge of this court.

Background

[5] The record shows that three versions of a bill of costs were filed in this case in this court in June 2016. A fourth bill of costs, in respect of a related matter in the Supreme Court, was filed in that court during the same period of time.

[6] Of the three bills of costs filed in this court, the first two were filed on 21 June 2016. The heading on those erroneously indicated that the bill of costs related to a case

in the Supreme Court of Judicature. The second purported to amend the first. The nature of the amendment is immaterial. The third bill, which was filed on 23 June 2016, indicated that it was a "Further Amended Defendants' Bill of Costs". It corrected the error in the heading on the first two, and stated that the bill of costs related to proceedings in this court. All three were served on Mr Kandekore. The notice to serve points of dispute, which was served on him on 23 June 2016, stated that it related to proceedings in this court.

[7] The bill of costs and notice to file points of dispute that were filed in the Supreme Court were also served on Mr Kandekore on 21 and 23 June 2016 respectively. There is no issue of error in respect of those documents.

[8] Mr Kandekore filed his document containing his points of dispute on 5 July 2016. Although the document was headed, "In the Court of Appeal", he filed it in the Supreme Court, rather than in this court. His error may have been due to inattention at the time of filing, but there is no indication that he filed separate points of dispute which were properly intended for the proceedings in that court. He served the document on COK's attorneys-at-law on 6 July 2016.

[9] Apparently, COK's attorneys-at-law did not immediately notice that the points of dispute, headed "In the Court of Appeal", had been filed in the wrong court. They filed a notice of taxation in this court on the basis that the issues joined by the further amended bill of costs and the points of dispute would have been resolved on taxation before the registrar of this court.

[10] Sometime later, they noticed that the points of dispute had been filed in the wrong court. They then withdrew the notice of taxation and explained in the notice of withdrawal that the points of dispute had been filed in the wrong court.

[11] Mr Kandekore, although served on 20 July 2016 with that notice of withdrawal, failed to correct his error. He did not file fresh points of dispute in this court. In the absence of points of dispute, the registrar issued the default costs certificate on 21 October 2016.

[12] In early November 2016, Mr Kandekore sought to correct the situation. On 2 November 2016, he filed points of dispute in the Supreme Court and on 3 November 2016, he filed points of dispute in this court. The latter were, however, filed too late, as the certificate had already been issued.

[13] The former went on to be considered, for the purposes of taxation, by the registrar of the Supreme Court on 2 February 2017. That registrar then had before her two documents headed up "Points of Dispute", one filed on 5 July 2016 and the other filed on 2 November 2016, but only the later one referred to proceedings in that court. The taxation proceedings before that registrar are immaterial for these purposes.

[14] When Mr Kandekore filed his points of dispute in this court, he also filed, at the same time, an application to set aside the default costs certificate. His application was supported by an affidavit sworn to by him. It is to be noted that the bases he advanced for his points of dispute merely stated:

"1. [COK's] bill of costs does not comply with [the] relevant law;

2. [Mr Kandekore] disputes each and every item in [COK's] bill of costs and [he] says that [COK's] bill of costs does not comply with the relevant court orders and the amounts claimed have no legal basis."

The decision of the registrar

[15] His application to set aside the default costs certificate was refused by the registrar of this court. The learned registrar's reasons for refusing Mr Kandekore's application were communicated to the parties by way of a letter dated 27 March 2017. Her reasons may be summarised as follows:

(1) This was not a case where COK was not entitled to the certificate. Mr Kandekore was therefore not entitled as of right to have the certificate set aside.

(2) Mr Kandekore's inattention to detail and failure to seek clarification of what he viewed as a confusing situation did not favour him.

(3) Although his application had been made promptly there was no good reason provided for the default. (In essence, a repeat of (2) above).

(4) The points of dispute failed to clearly articulate the nature of the dispute. Rule 65.20(2) of the CPR,

requiring particularity in respect of each item disputed, had not been complied with.

The appeal

[16] Mr Kandekore did not agree with the learned registrar's decision. In his opposition to that decision, Mr Kandekore filed a document intituled, "Appeal Notice (Costs)", purporting to be an appeal from the decision. Mr Kandekore's appeal notice stated that he was appealing "against the decision of the Registrar on taxation on the 27th March, 2017".

[17] In his appeal notice, Mr Kandekore set out his grounds for contesting the learned registrar's views. Among the grounds set out by Mr Kandekore was his insistence that his notice of points of dispute did not flout rule 65.20(2) of the CPR. He asserted that the terms of the notice meant that each and every item of the bill of costs was being disputed.

[18] The registry did not give his "Appeal Notice" a separate numerical designation. The appeal was given the same number as his original application that was decided by the learned registrar. The correct approach will be considered below.

[19] Before analysing Mr Kandekore' complaints, it is first necessary to consider whether the proper procedure for advancing the complaint is by way of an appeal from the decision of the registrar, or by way of a renewal of his application to set aside the certificate. It will also be necessary to decide whether a single judge has any jurisdiction to consider either of such approaches. Unfortunately, although submissions

were made by both sides in respect of the merits of Mr Kandekore's appeal, it appears that the merits should not be considered by a single judge.

The correct response to the registrar's decision

[20] In deciding on what is the correct response to the registrar's decision, it is first necessary to examine the relevant rules concerning default costs certificates and how they may be set aside. As the issues involve costs, it is to be noted that rule 1.18(1) of the Court of Appeal Rules (CAR) stipulates that parts 64 and 65 of the CPR "apply to the award and quantification of costs of an appeal" in this court, "subject to any necessary modifications". It is by that route that reference may be made, and analysis conducted, in respect of the rules in part 65.

[21] Mr Kandekore's appeal notice was said to have been filed pursuant to rule 65.28(1) of the CPR. Rule 65.28, however, deals with appeals from the decision of the registrar on a taxation. The registrar conducts a taxation by assessing objections (previously referred to herein as the "points of dispute"), to a bill of costs that has been laid by the party claiming those costs. That party is named, "the receiving party". The rule states:

> "(1) The appellant must file an appeal notice in form 29 within 14 days after the date of the decision the appellant wishes to appeal against.
>
> (2) The appeal notice must -
> (a) specify each item **in the taxation** which is appealed; and
> (b) state the grounds of the appeal in respect of each item

(2) [sic] On receipt of the appeal notice, the registry must fix a date, time and place for the hearing of the appeal.

(3) The appellant must forthwith serve a copy of the appeal notice showing the date, time and place of the hearing of the appeal on all other **parties to the taxation**.

(4) At least 14 days [sic] notice of the hearing of the appeal must be given." (Emphasis supplied)

[22] Form 29, referred to in the rule, itself confirms that interpretation. It states, in part, that the "appeal [is] against the decision of the Registrar on taxation".

[23] Such an appeal may be made to a single judge of this court. The appeal is allowed by rule 65.26, which states:

"The –

(a) receiving party; and

(b) any paying party who has served points of dispute,

may appeal against a decision of a registrar in the taxation proceedings."

[24] An appeal would, however, not lie in cases where a default costs certificate has been issued, as the certificate cannot be said to have been issued as a result of a taxation. It is true that rule 65.26 speaks to an appeal against "a decision of a registrar in the taxation proceedings" and that the issue of the certificate is part of what part 65 terms "taxation proceedings", but the exercise in which points of dispute are aired before the registrar is given a more precise name. It is termed a "taxation hearing", and

it is fair to say that the rules, particularly rules 65.23, 65.27 and 65.28, contemplate that the taxation hearing is what is termed a "taxation".

[25] Rule 65.23(1) of the CPR speaks to a receiving party applying for a taxation hearing by filing "a notice of taxation". Rule 65.23, in its entirety, states:

> "**Taxation hearing**
>
> 65.23 (1) Where points of dispute are served, the receiving party **may apply for a taxation hearing by filing a notice of taxation**.
>
> (2) The receiving party must do so within three months of the service of the points of dispute.
>
> (3) Where the receiving party fails to do so -
> (a) the paying party may apply for an order that unless the receiving party applies for a taxation hearing by a specified date the registrar may disallow all or part of the costs which the receiving party would otherwise be entitled to receive; and
> (b) in any event the registrar may disallow all or part of -
> (i) the costs of taxation; and
> (ii) any interest that the receiving party would otherwise have been entitled to receive on the costs.
>
> (4) **The receiving party must serve notice of the taxation hearing** on each paying party who has served points of dispute under rule 65.21 not less than 14 days before the taxation hearing.
>
> (5) No person other than -
> (a) the receiving party; and

(b) a party who has served points of dispute under rule 65.21,

may be heard at the taxation hearing unless the registrar gives permission.

(6) Only items specified in the points of dispute **may be raised at the taxation hearing** unless the registrar gives permission." (Emphasis supplied)

Similarly, rule 65.28, set out earlier, suggests that the term "taxation", as used therein, means the taxation hearing.

[26] Another issue which would prevent Mr Kandekore utilising rule 65.28(1) of the CPR is that he does not qualify as an appellant for the purposes of the rule. An appellant from a taxation, by rule 65.26, must have been either a receiving party or a paying party, who had served points of dispute. In this case, Mr Kandekore is not the receiving party and, although he is the paying party, he had not served points of dispute, in relation to a matter in this court, prior to the "decision" of the registrar. The status of the document that he served is for consideration at another time. That "decision" would have been the issue of the default costs certificate. Whether the issue of the certificate is in fact a "decision" of the registrar will be addressed below.

[27] Mr Kandekore's "appeal" should not, however, be deemed ineffective, merely because he has made reference in it to an inapplicable rule. Consideration must, instead, be given to the substance of his approach to the court.

[28] The other relevant rule to be considered, in deciding the nature of Mr Kandekore's approach to the court, is rule 65.22 of the CPR. Based on a 2011 amendment to that rule, it states:

> "65.22 (1) The paying party may apply to set aside the default costs certificate.
>
> (2) The registrar must set aside a default costs certificate if the receiving party was not entitled to it.
>
> (3) The court may set aside a default costs certificate for good reason.
>
> (4) An application to the court to set aside a default costs certificate must be supported by affidavit and must exhibit the proposed Points of Dispute."

As stated before, under part 65 of the CPR, Mr Kandekore is the paying party and COK is the receiving party. He was therefore entitled to apply to set aside the default costs certificate. Rule 65.22, however, does not authorise the registrar to consider setting aside a default costs certificate for any reason other than that the receiving party was not entitled to it.

[29] The juxtaposition of the registrar's power in 65.22(2) against the court's power in rule 65.22(3) is significant. It is the court which may set aside such a certificate for "good reason". A similar authority has not been given to the registrar. The registrar was, therefore, not empowered to consider whether or not Mr Kandekore had a good reason for failing to file his points of dispute within the stipulated time. It is reasonable to conclude that if the framers of the rule intended for the registrar to have had that

power, they would have said so when they amended the rule to give that power to the court.

[30] In **Rodney Ramazan and Another v Owners of Motor Vessel (CFS Pamplona)** [2012] JMCA Civ App 37, I held that rule 65.22 did not prevent the registrar from setting aside a default costs certificate for reasons other than that the receiving party was not entitled to it (see paragraphs [10] – [11]). That decision did not take into account the fact that the rule had been amended in 2011. The decision must, therefore, be considered to be wrong in that regard. On that basis, in this case, the learned registrar went beyond her jurisdiction, in seeking to go further than stating that this was not a case where COK was not entitled to the certificate. She was, no doubt, relying on the reasoning in **Rodney Ramazan and Another v Owners of Motor Vessel (CFS Pamplona)**.

[31] Another conclusion to be drawn from a reading of part 65, and in particular, rule 65.22, is that there is no provision for an appeal from the decision of the registrar, in respect of an application to set aside a default costs certificate. As has been mentioned before, rule 65.28, although broad in its terms, follows from and is dependent on rule 65.26, which gives the right to appeal from a decision of the registrar in the taxation proceedings. Although the term "taxation proceedings" apply to the point from which the receiving party files and serves its bill of costs, rule 65.26 confines the right to appeal, to either the receiving party, or a paying party, who has served points of dispute.

[32] Rule 65.27 speaks to appeals from a decision of the registrar on taxation. It is, however, doubtful whether the issue of the default costs certificate is a "decision" by the registrar on taxation. Rule 65.21 mandates the registrar to issue the certificate upon the receiving party satisfying the requirements of that rule. The rule states:

> "(1) A receiving party who is permitted by rule 65.20 to obtain a default costs certificate does so by filing -
>
> (a) an affidavit proving -
>
> (i) service of the copy bill of costs; and
>
> (ii) that no points of dispute have been received by the receiving party; and
>
> (b) a draft default costs certificate in form 26 for signature by the registrar.
>
> (2) The registrar must then sign the default costs certificate.
>
> (3) A default costs certificate will include an order to pay the costs to which it relates."

The only decision which the registrar makes is to assess whether the receiving party has complied with rule 65.21(1). Once there has been compliance, the registrar has no discretion as to whether or not to sign the default costs certificate. She must do so.

[33] The conclusion of the analysis thus far, is that part 65 of the CPR does not contemplate an appeal from a decision of the registrar in respect of an application to set aside a default costs certificate.

[34] There is, however, another part of the CPR which should be considered before concluding this analysis. Part 62 of the CPR speaks to appeals from a decision of a

registrar. Rule 62.2 of the CPR states that an appeal against the decision of a registrar is to be heard by a single judge of the court. Part 62 is, however, not expressly applicable to the procedure of this court. It has not been specifically made applicable to the processes of this court. There are, however, some cryptic references to it in the CAR.

[35] Rule 1.1(10) of the CAR, which itemises the rules of the CPR which apply to appeals to this court, does not list part 62 in the body of the rule. It is only in a footnote that the rule mentions part 62. The rule states:

> "The following Parts and rules of the Civil Procedure Rules 2002 apply to appeals to the Court subject to any necessary modifications –
>
> (a) Part 1 (the overriding objective);
> (b) Rule 2.3 (application of Interpretation Act);
> (c) Rule 2.4 (definitions);
> (d) Rule 2.6 (court staff);
> (e) Rule 2.7 (court's discretion as to where, when and how it deals with cases);
> (f) Part 3 (time, documents);
> (g) Part 6 (service);
> (h) Part 11 (applications);
> (i) Parts 30 - 33 (evidence);
> (j) Part 35 (offers to settle); and
> (k) Part 36 (payments into court)
>
> (Part 60 of the Civil Procedure Rules, 2002 deals with appeals to the Supreme Court, Part 61 deals with appeals to the Supreme Court by way of case stated and **Part 62 with appeals against administrative decisions of a registrar including appeals in non-contentious probate matters**, CPR 65.26 - 29 deal with appeals against decisions of a registrar on a taxation of costs.)" (Emphasis supplied)

[36] Part 62 is mentioned in another rule in the CAR; again in a footnote. Rule 2.1(1)(c) of the CAR excludes from the operation of section 2 of the CAR, appeals to

and for determination by, the Supreme Court and appeals from a decision by a registrar. In that list of proscribed proceedings is "a taxation of costs, by a registrar" (rule 2.1(1)(c)(iii)). The rule then proceeds to direct, by way of the footnote, where the procedure for the forbidden matters may be found. Rule 2.1(1) states:

> "This Section sets out special rules which, together with the rules in Section 1 govern civil appeals to the Court of Appeal from –
>
> (a) the Supreme Court;
> (b) Resident Magistrates' Courts; or
> (c) tribunals,
>
> not being –
>
> (i) appeals or applications to the Supreme Court for which other provision is made by the CPR;
> (CPR Part 60 deals with appeals to the Supreme Court.)
>
> (ii) appeals by way of case stated on a question of law for determination by the Supreme Court; or
> (Such appeals are dealt with in CPR Part 61.)
>
> (iii) appeals from an administrative decision (namely a decision made other than on an application under CPR 11 or on case management under CPR 27), a decision in non-contentious probate business under Part 68 Section 1, of, or a taxation of costs, **by a registrar**.
> (**Such appeals are dealt with in CPR Part 62** and CPR rule 65.27-30.)" (Emphasis supplied)

[37] It must be noted that the term "registrar" as used in the rule, as indeed in the CAR as a whole, has a specific meaning. Rule 1.1(8) stipulates that the term, when used without qualification, "means the Registrar of the court". "Court" is defined in the rule as meaning, "the Court of Appeal".

[38] Although not raised by either party in this aspect of the case, an argument could conceivably be raised that rule 2.1(1)(c)(iii), when read along with the footnote, allows an incorporation of part 62 of the CPR into the process of this court. Why else, the argument would continue, did the framers of the rules point to part 62 as dealing with administrative decisions of the registrar? On that premise, the argument would run, the decision of the registrar of this court, in respect of the application to set aside the certificate, is an administrative decision, and part 62 would guide any appeal from such a decision. The conclusion of the argument would be that since part 62 allows such appeals to be heard by a single judge of the court, then a decision of the registrar of this court, pursuant to rule 65.22(2), could be appealed and the appeal heard by a single judge of this court.

[39] The question that arises from those footnote references in the CAR is, "why did the framers of the CAR insert them in those rules". Was it just by way of being helpful to the reader, or, especially in the case of rule 2.1(1)(c)(iii), was it an attempt at incorporating part 62 of the CPR into this court's procedure? In other words, is rule 2.1(1)(c)(iii) stating that appeals from an administrative decision of the registrar of this court are dealt with by part 62 of the CPR and it is that part that applies to such matters in this court?

[40] What rule 2.1(1)(c)(iii) must be interpreted to say, when read along with the footnote, is, "It is not these rules in section 2 that deal with those issues, it is the CPR". What is absolutely clear is that section 2 of the CAR does not deal with an appeal from

a taxation of costs by a registrar, whether that registrar is a registrar of this court or of the Supreme Court.

[41] Based on the context, the footnote states that it is part 62 of the CPR that deals with appeals from the administrative decisions of the registrar and it is part 65, rules 27-30 that deal with appeals from taxations by the registrar.

[42] It has already been pointed out that rule 1.18 of the CAR specifically incorporates part 65 into the process of this court. There is however no provision which incorporates part 62 of the CPR into the process of this court.

[43] It may be that the framers of the rules were of the view that part 62 should have been similarly incorporated. Indeed, there would be otherwise no guidance in the CAR as to a review of the decisions of the registrar of this court. The framers, however, have not so stipulated. The incorporation cannot be done by way of a footnote. The footnote can have no greater significance than a side-note, or marginal note, to a statutory provision. It may assist in interpreting the statutory provision but it can have no operative effect. The learned author of Cross on Statutory Interpretation, third edition, explains the use to be made of "other parts" of a statute. He states, at page 123:

> "A distinction is usually drawn between enacting parts of the statute (those which create operative rules of law) and other parts of the Act which surround or introduce them. Items falling within this second head are the long title, the preamble (if any) and the short title on the one hand, and cross-headings, side-notes (or marginal notes) and punctuation on the other. Nowadays it is probably true to say that each one of the above items has some value as an aid to construction in some circumstances, but they all have

> less value than [the enacting parts of the same statute] simply because they do not enact anything…."

[44] Section 56 of the Interpretation Act does not assist an argument that the footnote has operative effect. The section states:

> "(1) The preamble of any Act may be referred to for assistance in explaining the scope and object of the Act.
>
> (2) Every Schedule or Table to any Act, or part of any Act, shall, together with any notes thereto, be construed and have effect as part of the Act."

A footnote would not fall under any of the categories mentioned in the section.

[45] Based on the above reasoning, the footnotes in rules 1.1(10) and 2.1(c)(iii) could not be a backhanded way of incorporating part 62 of the CPR into this court's procedure. The context does not allow it.

[46] Even if, therefore, it could be said that the registrar's decision, in respect of an application to set aside a default costs certificate, is an "administrative decision" for the purposes of rule 2.1(1)(c)(iii), that decision could not be made the subject of an appeal to a single judge of this court, by virtue of part 62.

[47] The conclusion to the analysis, therefore, is that neither part 65 nor part 62 of the CPR provides for an appeal from a decision of the registrar in respect of an application to set aside a default costs certificate. Such an appeal is not provided for in either the CAR or the CPR.

What approach should be used toward Mr Kandekore's appeal?

[48] If there is a lacuna in part 65, can some other process be used to fill the void? The question will be addressed below as restricted to the operation of this court. It will be for a judge of the Supreme Court to consider the point if it arises in that court.

[49] The answer to the question, for this court, would seem to be that, since neither the CPR nor the CAR apply, there is no basis on which to appeal from the decision of the registrar in respect of an application to set aside a default costs certificate. The fact is that where a party is dissatisfied with such a decision, there does not seem to be an inherent jurisdiction in this court that could be invoked in order to review the registrar's decision.

[50] Unlike the Supreme Court, this court does not possess an inherent jurisdiction, in the sense of an original jurisdiction. Its jurisdiction is wholly statutory, the main enabling statute being The Judicature (Appellate Jurisdiction) Act. Other statutes also give it jurisdiction. Among them is the Judicature (Parish Courts) Act. Rules of Court, such as the CAR and CPR also authorise the exercise of its jurisdiction.

[51] The general position concerning the absence of an inherent jurisdiction in courts of appeal was tersely set out by Waller LJ in **R v Horsman** [1998] QB 531 at pages 536-7. Lord Woolf CJ, in **Taylor and Another v Lawrence and Another** [2002] EWCA Civ 90; [2002] 2 All ER 353, expressed a similar view, but was more expansive. Although speaking in respect of the Court of Appeal of England and Wales, he said at paragraphs [16] and [17] of his judgment:

"[16]

Accordingly, it is accepted that the Court of Appeal [of England and Wales] does not have any inherent jurisdiction in respect of appeals from the county court but only that which is given by statute. However, the use of the word 'inherent' in this context means no more than that the Court of Appeal's jurisdiction depends on statute and it has no originating jurisdiction. The position is very much the same in relation to other appeals to the Court of Appeal. Its jurisdiction is to be determined solely by reference to the relevant statutory provisions.

[17]

We here emphasise that there is a distinction between the question whether a court has jurisdiction and how it exercises the jurisdiction which it is undoubtedly given by statute. So, for example, a court does not need to be given express power to decide upon the procedure which it wishes to adopt. Such a power is implicit in it being required to determine appeals. It is also important when considering authorities which, it is suggested, are laying down principles as to the jurisdiction of a court, to ascertain whether they are doing more than setting out statements of the current practice of the court, which can be changed as the requirements of practice change. These powers to determine its own procedure and practice which a court possesses are also referred to as being within the inherent jurisdiction of the court, and when the term 'inherent jurisdiction' is used in this sense (as to which see 'The Inherent Jurisdiction of the Court' by Master Sir Jack Jacob, (1970) 23 CLP 23 at 32 et seq), the Court of Appeal, as with other courts, has an inherent or implicit jurisdiction."

[52] In this court, there have been differing views expressed in respect of the point. In **Re D C, An infant** [1966] 9 JLR 568, which was an appeal from an adoption order made under section 9 of the Adoption Act, a preliminary objection was taken as to whether this court had jurisdiction to hear such an appeal. The court found that the

right to appeal (pursuant to section 293 of the Judicature (Resident Magistrate's) Act) against the magistrate's judgment did not extend to an adoption order made under section 9 of the Adoption Act. Duffus P delivering the judgment stated thus at page 569:

> "...On the other hand, **the Court of Appeal which is a creature of statute cannot go outside of the law and clothe itself with a jurisdiction which it may not have**. No person has an automatic right of appeal from a court. **The right of appeal must be given by the legislature and it is usual to set out in the relevant statute in clear language the right of appeal and the powers vested in the appellate court**." (Emphasis supplied)

[53] In **Mr and Mrs Valerie Edwards v Mr and Mrs Douglas Garel** (1994) 31 JLR 217. Rattray P, with whom the rest of the panel agreed, spoke to this court having a restricted jurisdiction. He said, in part, at page 220:

> "Both the Resident Magistrate's Court [now Parish Court] and the Court of Appeal are creatures of statute. It is therefore within statutory enactments including Rules of Court that we must search to find any authority for the exercise of our jurisdiction. We are invited to interpret provisions of the Act liberally to support the contention that such an inherent jurisdiction [to stay the execution of a decision in the Resident Magistrate's Court] resides in the Court [of Appeal], but first there must be provisions which we have to construe and no provisions have been pointed out to us on which we can place a construction which will result in our having the jurisdiction [to grant such a stay] to be vested in us.
>
> Our researches into the powers and jurisdiction of the predecessors of the Court of Appeal have not unearthed any provisions which would also confer those powers and jurisdiction on those Courts, so that we could have been statutorily authorised to utilise them."

[54] That case concerned the power of a single judge of this court to grant a stay of execution of a judgment handed down in the Resident Magistrate's Court. This court found that it had no jurisdiction to grant such a stay. It necessarily followed that the single judge did not have the power so to do. The single judge's order granting the stay was therefore discharged.

[55] In **Charles Stewart v Glennis Rose** (unreported), Court of Appeal, Jamaica, Motion No 15/1997, judgment delivered 17 June 1997, Walker JA (Ag) (as he then was), accepted as a matter of fact that this court had no inherent jurisdiction. He, however, went on to find that this court had a broad statutory jurisdiction based on section 9 of the Judicature (Appellate Jurisdiction) Act. Section 9, he found, preserved for this court the jurisdiction which was possessed by the previous Court of Appeal. The section states:

> "9. There shall be vested in the Court of Appeal–
>
> (a) subject to the provisions of this Act the jurisdiction and powers of the former Court of Appeal immediately prior to the appointed day;
>
> (b) such other jurisdiction and powers as may be conferred upon them by this or any other enactment."

He expressed the view that **Edwards v Garel** may have been decided without reference to an important statutory provision, namely, section 9 of the Judicature (Appellate Jurisdiction) Act.

[56] Downer JA, in his judgment in **Stewart v Rose**, noted that this court was conferred by section 9 of the Judicature (Appellate Jurisdiction) Act, with the entire jurisdiction of the former Court of Appeal, which existed until 5 August 1962, when this court was created. He found that since the former Court of Appeal was a part of the Supreme Court, and as that the Supreme Court had an inherent jurisdiction, the former Court of Appeal also had an inherent jurisdiction, with which this court was conferred. He found, at page 9 of his judgment, that this court was "a superior court of record with inherent jurisdiction". Downer JA cited **Berry and Morris v Kingston and St. Andrew Corporation** (1972) 18 WIR 351 in support of his reasoning in this regard.

[57] What both Downer JA and Walker JA (AG) did agree on was that **Edwards v Garel** was distinguishable because the court was considering the restricted power of a single judge of this court. Regardless, therefore, of whether or not this court has an inherent jurisdiction in respect of an appeal from the registrar's decision on an application to set aside a default costs certificate, it is apparent, from the decided cases, that a single judge of the court does not have the power to hear any such appeal.

[58] Although not definitively deciding the point as to whether this court does have the inherent jurisdiction to hear such appeals, there is an indicator which suggests that it does not. The framework of the rules dealing with default costs certificate is a concept created by the CAR. It did not exist prior to 2002. There could therefore be no decisions prior to 5 August 1962 dealing with such issues. This factor militates against

the existence of an inherent jurisdiction in the sense that the term is used by Downer JA in **Stewart v Rose** in reference to section 9 of the Judicature (Appellate Jurisdiction) Act.

[59] There has also been nothing brought to light during submissions in this case which indicates any jurisdiction to allow an appeal from a decision from the registrar in respect of an application to set aside a default costs certificate. Rule 2.15 of the CAR sets out some of the powers of the court, but it will be recalled that section 2 does not apply to certain decisions of the registrar. Nonetheless, it should be said that those powers of the court do not contemplate an appeal from the registrar's decision. It states:

> "2.15 In relation to a civil appeal the court has the powers set out in rule 1.7 and in addition -
>
> (a) all the powers and duties of the Supreme Court including in particular the powers set out in CPR Part 26; and
>
> (b) power to -
>
> (a) affirm, set aside or vary any judgment made or given by the court below;
>
> (b) give any judgment or make any order which, in its opinion, ought to have been made by the court below;
>
> (c) remit the matter for determination by the court below;
>
> (d) order a new trial or hearing by the same or a different court or tribunal;

(e) order the payment of interest for any period during which the recovery of money is delayed by the appeal;

(f) make an order for the costs of the appeal and the proceedings in the court below;

(g) make any incidental decision pending the determination of an appeal or an application for permission to appeal; and

(h) make any order or give any direction which is necessary to determine the real question in issue between the parties to the appeal.

(3) [sic] The court may reduce or increase the amount of any damages awarded by a jury.

(4) [sic] The court may exercise its powers in relation to the whole or any part of an order of the court below."

[60] Rule 1.7, referred to in rule 2.15, does not assist either. It is, for completeness, set out below:

"**The court's general powers of management**

1.7 (1) The list of powers in this rule is in addition to any powers given to the court by the Act or any other rule.

(2) Except where these Rules provide otherwise, the court may-

(a) consolidate appeals;

(b) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension

is made after the time for compliance has passed;

(c) adjourn or bring forward a hearing to a specific date;

(d) decide the order in which issues are to be heard;

(e) direct a separate appeal of any issue;

(f) hear two or more appeals on the same occasion;

(g) dismiss or give judgment on an appeal after a decision on a preliminary issue;

(h) exclude an issue from determination if it can do substantive justice between the parties on the other issues and determining it would therefore serve no worthwhile purpose;

(i) deal with a matter without the attendance of any parties;

(j) instead of holding an oral hearing, deal with a matter on written representations submitted by the parties;

(k) direct that any evidence be given in written form;

(l) where two or more parties are represented by the same legal practitioner –

(i) direct that they be separately represented; and

(ii) if necessary, adjourn any hearing to a fixed date to enable separate representation to be arranged and make any consequential order as to costs thrown away;

(m) direct that notice of any appeal or application be given to any person; or

(n) take any other step, give any other direction or make any other order for the purpose of managing the appeal and furthering the overriding objective.

(3) When the court makes an order or gives a direction, it may -
  (a) make it subject to conditions; and
  (b) specify the consequence of failure to comply with the order or condition.

(4) The conditions which the court may impose include requiring -
  (a) a party to give security;
  (b) a party to give an undertaking;
  (c) the payment of money into court or as the court may direct;
  (d) a party to pay all or part of the costs of the proceedings; and
  (e) that a party permit entry to property...

(5) Where a party pays money into court following an order under paragraphs (3) and (4)(c)...

(6) In considering whether to make an order, the court may take into account whether a party is prepared to give an undertaking.

(7) The power of the court to make an order includes a power to vary or revoke that order.

(8) In special circumstances on the application of a party the court may dispense with compliance with any of these Rules.

(9) Where there is no transcript of the evidence given in the court below..."

[61] The absence of a relevant rule or, possibly, an inherent jurisdiction, does not, however, mean that, in the case of a refusal by the registrar to set aside a default costs certificate, an applicant, who is a paying party, is left without a remedy. The rules allow that applicant to renew his application to set aside the default costs certificate before the court. The relevant rule is rule 65.22(3) of the CPR. His application would be that the certificate ought to be set aside "for good reason". Where the registrar grants an

application to set aside a default costs certificate, a receiving party, would however, have no recourse by way of an appeal. He would be obliged to proceed to a taxation of his bill of costs.

[62] Consequently, in the case of the registrar granting the application to set aside a certificate, she would set the matter for taxation. There are two methods of dealing with a refusal by the registrar to set aside a certificate. The first would be for the registrar to refer the matter to the court, and set a date for hearing before the court. The second method would be for the registrar to communicate her decision to the applicant and to the receiving party. The applicant, upon receiving the registrar's refusal, would, if so minded, make a fresh application to the court, pursuant to rule 65.22(3) of the CPR.

[63] The first method would perhaps be the more efficient and cost-effective for an applicant. An automatic referral by the registrar would, however, force the applicant into a position where he runs the risk of incurring the further costs of a court hearing, unless he, before the hearing date, withdraws his application.

[64] The result of this analysis is that Mr Kandekore may elect to have his notice of appeal treated as an application under rule 65.22(3) of the CPR. The registrar would be able to set a date for the hearing of his application.

[65] The next task is to explain why a single judge of the court may not exercise the power given under rule 65.22(3) of the CPR.

The jurisdiction of a single judge in these circumstances

[66] The decision in **Rodney Ramazan and Another v Owners of Motor Vessel (CFS Pamplona)** was also incorrect in holding that a single judge may consider an application under rule 65.22. Since the introduction, in November 2011, of rule 65.22(3), only the registrar or the court may consider applications to set aside a default costs certificate. The term "court" as used in the rule can only mean a panel of at least three judges sitting as the court.

[67] Rule 1.18 of the CAR clarifies the matter. As mentioned above, the rule stipulates that the provisions of parts 64 and 65 of the CPR apply, with necessary modifications, to the award and quantification of costs on an appeal. A reading of rule 1.18(3) requires the term "court", as used in part 65, to be interpreted to mean "the Court of Appeal". Where the term "Court of Appeal" is used, without qualification, a single judge of the court cannot exercise the authority of the court. That principle was firmly established by Phillips JA in **The Attorney General of Jamaica v John McKay** [2011] JMCA App 26 and by the decision of this court in **William Clarke v Bank of Nova Scotia Jamaica Limited** [2013] JMCA App 9.

[68] In **William Clarke v Bank of Nova Scotia Jamaica Limited**, this court considered section 2 of the Judicature (Appellate) Jurisdiction Act, which draws the distinction between the court and a single judge of the court. It is also to be noted that section 5 of that Act stipulates that the court sits in divisions of three judges.

[69] Whereas a single judge of the court may, by rule 2.11 of the CAR, make orders on procedural applications, the context of that rule draws a distinction between the powers of a single judge and that of the court. In that regard, rule 2.11(3) states:

> "Any order made **by a single judge** may be varied or discharged **by the court** on an application made within 14 days of that order." (Emphasis supplied)

[70] **Harold Brady v The General Legal Council (Ex parte, Alva Langley and Rarane Langley)** [2012] JMCA App 40, which followed **Rodney Ramazan and Another v Owners of Motor Vessel (CFS Pamplona)**, on the point of the jurisdiction of a single judge, in this context, would also be incorrect. In **Brady**, I again failed to consider that rule 65.22 of the CPR had been amended in 2011.

[71] It is recognized that, based on the reasoning in the instant case, there would be a difference in approach between a response to the registrar's decision in respect of an application to set aside default costs certificate and a response to the registrar's decision on a taxation. In the case of the latter decision, an appeal would lie to a single judge of this court. That is the effect of rule 65.27(1) of the CPR. Despite the difference, it is not for this court to resolve what may be considered an inconsistency.

[72] It is also noted that Harris JA, in **Auburn Court Limited and Another v National Commercial Bank Jamaica Ltd and Another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 27/2004, Application No 7/2009, judgment delivered 18 March 2009, did consider, as a single judge, an application to set aside a default costs certificate. That judgment was not only delivered before the

promulgation of rule 65.22(3), but the question of the jurisdiction of a single judge to conduct that exercise did not seem to have arisen as an issue. Rule 65.22(3) did not exist at the time and so the CPR was then silent on the point. It is therefore, reasonable to conclude that the learned judge of appeal considered herself as having a jurisdiction similar to the registrar.

[73] It is further noted that F Williams JA (Ag), as he then was, ruled, in **Henlin Gibson Henlin (A Firm) and Another v Lilieth Turnquest** [2015] JMCA App 54, that a single judge of this court did have the jurisdiction to set aside a default costs certificate. That case did not concern a review of the registrar's decision in respect of setting aside a default costs certificate, but it is clear that Williams JA (Ag) arrived at a different conclusion from that made in this judgment, on this point.

[74] Williams JA (Ag) based his ruling on the jurisdiction of a single judge, given by rule 2.11(1)(e) of the CAR, to hear "any other procedural application including an application for extension of time to file skeleton submissions and records of appeal". He supported his findings with references to two provisions of the CAR. The first was rule 2.10(1) which states that "[a]ny application (other than an application for permission to appeal) to the court must be made in writing in the first instance and be considered by a single judge". The second provision was rule 1.7, dealing with the general powers of management of the court. The learned judge of appeal noted in that context, that although the rule spoke to the powers of "the court", many of those powers were in fact "routinely exercised by a single judge" of the court (paragraph [8] of the judgment).

[75] The reason for respectfully arriving at a different conclusion from Williams JA (Ag) is that, apart from the possible inapplicability of section 2 of the CAR, it is not accepted in this judgment that an application to set aside a default costs certificate is a procedural application. The stage of the proceedings involving a default costs certificate means that the appeal would, most likely, have already been concluded. All the previous provisions in the rule speak to issues before the appeal is heard. Rule 2.11 states:

> "(1) A single judge may make orders -
>
> (a) for the giving of security for any costs occasioned by an appeal; and
>
> (b) for a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal;
>
> (c) for an injunction restraining any party from dealing, disposing or parting with possession of the subject matter of an appeal pending the determination of the appeal;
>
> (d) as to the documents to be included in the record in the event that rule 1.7(9) applies; and
>
> (e) on any other procedural application including an application for extension of time to file skeleton submissions and records of appeal.
>
> (2) Paragraph (1)(e) does not include an application for extension of time to file an appeal.
>
> (3) Any order made by a single judge may be varied or discharged by the court on an application made within 14 days of that order."

[76] The difference between the reasoning in this judgment and that of Williams JA (Ag) will have to be settled at a different level. It cannot be said, however, that there is an established trend in this regard that his reasoning must be followed at this time.

Summary and Conclusion

[77] The findings reached in this judgment may be summarised as are as follows:

1. the registrar of this court has no jurisdiction to set aside a default costs certificate other than for the reason that the receiving party was not entitled to it (rule 65.22(2) of the CPR);

2. there is no legislative framework allowing an appeal from the registrar's decision in respect of an application to set aside a default costs certificate;

3. whether or not this court has an inherent jurisdiction in respect of an appeal from the registrar's decision on an application to set aside a default costs certificate, a single judge of the court does not have the power to hear any such appeal;

4. after a refusal by the registrar to set aside a default costs certificate, the application to set aside may be renewed and considered by the court pursuant to rule 65.22(3) of the CPR;

5. the renewed application may be by referral by the registrar upon her refusal of the original application;

6. the renewed application may not be considered by a single judge of this court, only a panel of judges may do so; and

7. it is the court which is empowered to consider whether there is any "good reason" on which the certificate may be set aside.

[78] Based on those findings, the registrar having refused Mr Kandekore's application to set aside the default costs certificate, his appeal from her refusal, if one lies at all, would have to be considered by the full court. As an alternative to an appeal, he is entitled to renew, before the full court, his application to set aside the default costs certificate. The alternative method would be pursued by way of either the registrar referring his application to the court, or by a fresh application. In either case, the application would be made pursuant to rule 65.22(3) of the CPR. In the present circumstances, Mr Kandekore would be entitled to choose the method he prefers. It is therefore ordered that:

1. Mr Kandekore's appeal to set aside the registrar's decision is, at his election, either to be referred for hearing by the court or set for hearing by the court as an application under rule 65.22(3) of the CPR.

2. Mr Kandekore shall inform the registrar of his election on or before 9 October 2017, failing which it shall be

deemed that he has elected to have his appeal referred for hearing by the court.

3. The registrar shall set a date for the hearing of the appeal, or application, as the case may be, and inform the parties of that date.

4. No order as to costs.