JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS MCDONALD-BISHOP P
THE HON MR JUSTICE LAING JA
THE HON MRS JUSTICE TIE POWELL JA (AG)

APPLICATION NO COA2023APP00139

MOTION NO COA2024MT00014

BETWEEN	**THE ADMINISTRATOR GENERAL FOR JAMAICA (Administrator of the Estate of Weston Wilson, Deceased)**	**APPLICANT**
AND	**AIRLIFT HANDLERS LIMITED**	**1ST RESPONDENT**
AND	**MICHAEL ANGELO DALEY**	**2ND RESPONDENT**

Ms Jacqueline Cummings instructed by Archer Cummings & Co for the appellant

Mark-Paul Cowan instructed by Nunes, Scholefield, DeLeon & Co for the respondent

11 January and 13 February 2026

Motion for conditional leave to appeal to His Majesty in Council – Single judge granting unless order for security for costs – non-compliance with unless order – Application to court for variation or discharge of single judge's order refused Whether requirements for conditional leave to appeal satisfied – Constitution of Jamaica, section 110(2)(a)

MCDONALD-BISHOP, P

[1] I have read the draft judgment of Laing JA and agree with his reasoning and conclusion. There is nothing I could usefully add.

LAING JA

Introduction

[2] The Administrator General for Jamaica (Administrator of the Estate of Weston Wilson, Deceased) ('the applicant'), by a notice of motion filed on 25 October 2024, seeks conditional leave to appeal to the Judicial Committee of the Privy Council ('the Privy Council'), in respect of the judgment of this court given on 4 October 2024, which bears neutral citation [2024] JMCA App 29 ('the judgment'). The factual underpinning and procedural history of this matter are set out in the judgment, which provides the necessary context. For convenience, a brief synopsis is hereby provided.

The background

[3] On 5 October 2025, there was a collision between two motor vehicles, one of which was a staff bus owned by the 1st respondent and being driven by its servant or agent, the 2nd respondent. Weston Wilson ('the deceased'), who was a lawful passenger in the bus, suffered fatal injuries as a result of the collision.

[4] The deceased died intestate leaving four minor children and no assets. Accordingly, the applicant, as she was entitled to do under the Administrator-General's Act, applied for and was granted Letters of Administration of his estate in 2008. In 2009, the applicant filed a claim against the respondents under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act, for the benefit of the deceased's four minor children. In 2011, the applicant also filed a claim against Merrick Myrie and Nicole Dwyer, the owner and driver, respectively, of the other vehicle involved in the collision. Both claims were consolidated in 2012.

[5] Merrick Myrie and Nicole Dwyer did not defend the claim, and a judgment in default was entered against them with damages to be assessed. The gravamen of the

respondents' defence was that the 2nd respondent was not negligent and that the collision was due wholly to the negligence of Nicola Dwyer, the driver of the other vehicle. The respondents also filed a witness statement of an eyewitness, Leon Stephenson. At the trial of the claim before Wint-Blair J ('the trial judge'), the applicant did not call any witnesses on her case in relation to the way the accident occurred and consequently, adduced no evidence on the issue of liability. At the close of the applicant's case, the respondents made a no-case submission on the basis that the applicant had not adduced any evidence to support a finding of negligence against the respondents.

[6] The applicant advanced the position that the doctrine of *res ipsa loquitur* (the thing speaks for itself) applied. In essence, the applicant posited that two vehicles collided, and, in the absence of evidence of which driver was responsible, or in the absence of an exculpatory explanation by the respondents, the proper inference was that the bus was being negligently driven by the 2nd respondent. The trial judge found that the principle of *res ipsa loquitur* did not apply and that there was no evidence to support the respondents' liability, accordingly, judgment was entered in their favour. The trial judge's reasons for her decision are contained in her written judgment bearing neutral citation [2022] JMSC Civ 177 ('the trial judge's judgment'). The assessment of damages, which was also fixed before the trial judge, was conducted, and damages were awarded against Merrick Myrie and Nicola Dyer.

[7] On 21 October 2022, the applicant filed a notice and grounds of appeal to this court against the decision of the trial judge, asserting that the trial judge erred in concluding that the doctrine of *res ipsa loquitur* did not apply and in relying on Leon Stephenson's witness statement, when he had not been called to give evidence.

[8] On 26 January 2023, the 1st respondent filed an application for security for costs of the appeal. The applicant, by her affidavit opposing this application, admitted the impecuniosity of the deceased's estate. Simmons JA ('the single judge') heard the application on 22 May 2023 and on 15 June 2023, made the following orders:

"(1) The application for security for costs, filed herein on 26 January 2023, is granted.

(2) The appellant shall give security for the respondent's costs of defending the appeal in the amount of $1,500,000.00 within 90 days of the date hereof.

(3) The appellant shall pay the said sum of $1,500,000.00 into an interest-bearing account in the names of Archer Cummings & Company and Nunes Scholefield DeLeon & Company at a financial institution to be agreed on by the parties within 90 days of the date hereof.

(4) In the event that the appellant fails to provide the said sum as security for costs within the manner and the time ordered, the appeal is dismissed with costs.

(5) Costs of the application to be costs in the appeal."

[9] The single judge found that the affidavit evidence in opposition to the application indicated that the applicant would likely be deterred from pursuing the appeal if the order for security for costs were made. In considering whether granting the order would result in the denial of justice to the applicant, the single judge examined the prospect of success of the appeal. She examined the leading authorities on the doctrine of *res ipsa loquitur* and concluded that the doctrine was not applicable to the circumstances in which the collision occurred. She opined that in the absence of any evidence from which it could be inferred that the 2nd respondent was negligent, the appeal had no prospect of success. The single judge's decision in writing is available under neutral citation [2023] JMCA App 20 ('the single judge's judgment').

[10] The single judge also considered that the trial judge had relied on, Leon Stephenson's witness statement at the no case submission stage, which was before it had been admitted as evidence. She found that whilst it could be said that the trial judge erred in doing so, that error was unlikely to affect the outcome of the appeal, since the applicant failed to present any evidence relating to the respondents' liability.

[11] On 29 June 2023, the applicant filed an application to vary/discharge the orders of the single judge, which was heard by the full panel of this court on 1 July 2024. By its judgment delivered on 4 October 2024, which is the subject of the present motion, this court (McDonald-Bishop, D Fraser and Dunbar-Green JJA) refused the application. The court noted that up to the time of the hearing of the application to vary/discharge the orders of the single judge, the applicant had not complied with the orders of the single judge for payment of the security for costs.

[12] The court elucidated that although the application to vary or discharge the order was filed within the time prescribed by the Court of Appeal Rules ('CAR'), it did not operate as a stay of the order. Consequently, the applicant should also have applied to stay the order pending the determination of the application but did not do so. Only an order granting a stay would have stopped the time for compliance from continuing to run. Alternatively, having not applied for a stay of the order, the applicant ought to have applied for an extension of time within which to comply with the single judge's order pending the determination of the application to vary it. This was also not done. The court concluded that the result of the failure of the applicant to comply with the single judge's orders within the time specified was the automatic dismissal of the appeal with costs to the respondents in keeping with the order of the single judge.

[13] Additionally, the court stated that since the appeal was automatically dismissed 90 days after the order, as a prequalifying gateway to making the application to vary the single judge's orders, it was necessary for the applicant to first obtain an order for relief from sanctions under rule 26.8 of the Civil Procedure Rules made applicable to this court by rule 2.19(4) of the CAR. The court concluded that the applicant's failure to do so operated as "conclusive reason to refuse the present application because pursuing the application without relief from sanction is an exercise in futility".

[14] The court further opined that even if the applicant were granted relief from sanction and there were no other bars to this court's consideration of the application to vary the single judge's orders, there would have been no basis to disturb the single

judge's order for security for costs, which was a discretionary order. That order was grounded on two fundamental bases. Firstly, it was undisputed that the deceased estate was impecunious, and secondly, the applicant's appeal was without merit. Consequently, the interests of justice required the applicant to provide security for costs as a precondition to pursuing the appeal.

The application

[15] This application was made pursuant to section 110(2)(a) of the Constitution of Jamaica ('the Constitution'), which provides as follows:

> "(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases –
>
> (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and
>
> (b) such other cases as may be prescribed by Parliament."

[16] In her notice of motion, the applicant identified three questions for the Privy Council to determine. The proposed questions seek the guidance of the Privy Council on questions or issues that, it was submitted, are of great general and public importance. These are the following:

> "a. Whether the Administrator General of Jamaica with statutory responsibility for an impecunious estate or the beneficiaries of an impecunious estate should be required to pay security for costs of an appeal by the estate.
>
> b. Whether a passenger in a vehicle can establish a prima facie case of negligence against both owners and drivers in a two vehicles [sic] collision by proving the

fact of an accident between the two vehicles thereby requiring them to give evidence to disprove liability.

c. Whether on an order for security for costs, if the payee/Applicant applies for a variation of that order before the date set for the security to be paid, and the costs are not paid, is the Applicant's appeal deem [sic to be dismissed or can the Applicant still proceed with their application for variation after the deadline for payment."

The applicant's submissions

[17] In accordance with the court's directions, Ms Cummings first addressed the third question, which, for convenience, can be termed 'the procedural question'. Counsel challenged the correctness of this court's finding that the appeal had been dismissed after 90 days by operation of the single judge's order, in respect of which there had been non-compliance by the applicant. Counsel also challenged the ruling of the court that it was necessary for the applicant to have applied for a stay of execution of the single judge's orders, or for relief from sanctions. Counsel submitted that she was not advancing the position that the filing of the application to vary or discharge the single judge's order operated as an automatic stay of the orders. What she was positing was that, despite the fact that, by the terms of order (4), the appeal was dismissed with costs, due to the applicant's failure to provide security for costs within the manner and time ordered, this court retained the jurisdiction to nullify the striking out order by hearing the application and if it was so inclined, to make orders to amend or discharge the order for security for costs. In other words, this court had the power to retrospectively undo or reverse the effects of that order.

[18] Counsel sought to draw an analogy with an order striking out a statement of case. She argued that a subsequent decision that strikes out that order revives the statement of case. Similarly, she asserted that this court, exercising its own jurisdiction, could revive the appeal that had been struck out by the single judge's order.

[19] Regarding question 'a', Ms Cummings clarified that she was not seeking to assert that special considerations applied in an application for security for costs against the Administrator-General. The applicant's position is encapsulated in para. 22 of the applicant's skeleton submissions as follows:

> "22. Firstly, requiring impecunious estates to give security for costs of an appeal goes against the interests of justice and acts as a deterrent for estates from seeking to appeal Judgments which may be erroneous as they may not be able to afford to give security and may render them unable to seek justice owing to the estate's financial position."

[20] Counsel submitted that the single judge, having evidence before her that the estate represented by the applicant was impecunious, erred in considering alternative sources from which the applicant might have been able to obtain the funds necessary to provide the security for costs.

[21] With respect to question 'b', counsel submitted that the doctrine of *res ipsa loquitur* applied because there is a general principle that in a two-car collision where there is no evidence of how the collision occurred, both drivers are deemed to be negligent. Counsel sought to rely on two main cases in support of this position, namely **Baker v Market Harborough Industrial Co-Operative Society**; **Wallace v Richards (Leicester) Ltd** [1953] 1 WLR 1472 ('**Baker**') and **Ng Chun Pui and Ng Wang King Administrators of the Estate of Ng Wai Yee and Attornies of Choi Yuen Fun and Ng Wan Hoi and Others v Lee Chuen Tat (also spelt as Lee Tsuen Tat) and Another (Hong Kong)** [1988] UKPC 7 ('**Ng Chun Pui**')

[22] On the foundation of this premise, counsel submitted that despite the applicant not leading any evidence of how the collision occurred, there was evidence that the deceased was travelling in the 1st respondent's bus and died because of injuries sustained in the collision between the bus and another vehicle. Accordingly, there was a presumption that the 2nd respondent, as the bus driver, was negligent, and an evidential burden was placed on him to rebut it. Therefore, the trial judge erred in finding that the

principle of *res ipsa loquitur* did not apply and in deciding the trial on the respondents' no-case submission. Further, both the single judge and this court also erred in concluding that the principle did not apply and that the trial judge was correct.

[23] Counsel also submitted that this court may have considered the fact that *res ipsa loquitur* was not expressly pleaded, and if it did, it was wrong in that regard, as made clear in the case of **Sandy Lane Hotel Co Ltd v Sonia Eversley** [2025] CCJ 5 (AJ) BB.

The respondent's submissions

[24] Mr Cowan, for the respondents, addressed the proposed questions in a similar sequence in accordance with the court's directive. In first addressing question c, he argued that although the application to vary or discharge the single judge's orders was made in compliance with the 14-day period provided by the CAR, the filing did not operate as an automatic stay of the orders and time continued to run. Therefore, the court was correct to conclude that there was no extant appeal, and, since none existed, there was no valid application in respect of an appeal before the court. Further, the sanction having taken effect, the available route of applying for relief from the sanction ought to have been pursued.

[25] Counsel noted that the sanction imposed by the single judge was not discretionary but is integrated in rule 2.11(4) of the CAR, and this fact is even more reason why its effect should not be circumvented. Counsel submitted that what this court did was to perform a straightforward application of this rule, considering the applicant's procedural choices, which were injudicious. Therefore, the applicant was not shut out of the appeal process to her prejudice, but, by her own decision, chose not to utilise the options available to her.

[26] In concluding, counsel submitted that there was no genuine debatable issue as to how the applicable rules relating to striking out operate, and the threshold test has not been met for leave to appeal to the Privy Council to be granted.

[27] Regarding question 'a', Mr Cowan argued that the applicant was seeking special treatment. He posited that, as framed, the Privy Council was being asked to consider whether a special rule applies to the applicant. Counsel objected to the question as framed on the basis that the issue of there being a special rule which applies to the applicant, given her statutory position, was never advanced before the single judge or this court and cannot, therefore, form the basis for the question being presented to the Privy Council for its consideration. Counsel bolstered his argument by asking the court to note that section 35 of the Administrator-General's Act makes the applicant subject to the usual obligations that arise within the fray of litigation as are imposed on individual private litigants in a position of the applicant. Consequently, he argued that section 36 of the Act imposes a duty on the applicant to comply with any orders issued by the court in any proceedings.

[28] In his conclusion, Mr Cowan submitted that the single judge and the court exercised their discretion in accordance with settled law and principles, and there is no basis for a referral to the Privy Council. The applicant has a duty to comply with the court's orders in all proceedings, and there is no basis on which she should not have to satisfy the obligation imposed by the court as any other litigant.

[29] In relation to question 'b', Mr Cowan argued that the case law establishes that a claimant alleging negligence bears the burden of proof throughout the matter, and that the mere fact that a collision occurred between two vehicles without more will not suffice to discharge this burden. He rejected the argument advanced by Miss Cummings that, because it was a two-vehicle accident, the applicant could rely on that fact alone and did not have to adduce any additional evidence to fix the respondents with liability. He submitted that the case of **Ng Chun Pui** did not support the applicant's position, because in that case the negligence was not based on the fact of the collision alone, but there was evidence, including a police sketch, that showed that the accident occurred on the defendant's wrong side of the road. Counsel argued that the case of **Beatrice Webster v Paragon Bus Company Limited and Frederick McKeever** [1934] IR 448 also did not support the applicant's statement of the law.

[30] Mr Cowan concluded that there is no merit in the applicant's formulation of question 'b', and it does not warrant a submission to the Privy Council since that issue has already been determined by it in other cases.

The law

[31] The law in this area has been frequently traversed, and a fortunate consequence is an extensive body of case law that offers guidance. In **The General Legal Council (ex parte Elizabeth Hartley) v Janice Causwell** [2017] JMCA App 16 ('**Causwell**'), McDonald Bishop JA (as she then was) conducted a comprehensive review of the earlier authorities on the requirements to be satisfied before leave to apply to the Privy Council should be granted in a civil case and extracted the following principles:

> "[27] The principles distilled from the relevant authorities may be summarised thus:
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> i. Section 110(2) involves the exercise of the court's discretion. For the section to be triggered, the court must be of the opinion that the questions, by reason of their great general or public importance or otherwise, ought to be submitted to Her Majesty in Council.
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> ii. There must first be the identification of the question involved. The question identified must arise from the decision of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal.
>
> iii. Secondly, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue, which requires debate before Her Majesty in Council. If the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general or public importance.
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> iv. Thirdly, it is for the applicant to persuade the court that the question identified is of great general or public importance or otherwise.

v. It is not enough for the question to give rise to a difficult question of law; it must be an important question of law or involve a serious issue of law.

vi. The question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations.

vii. The question should be one of general importance to some aspect of the practice, procedure or administration of the law and the public interest.

viii. Leave ought not be granted merely for a matter to be taken to the Privy Council to see if it is going to agree with the court.

ix. It is for the applicant to persuade the court that the question is of great general or public importance or otherwise."

[32] Although reference has been made to many other authorities, there is no benefit in citing them extensively, as the principles contained therein are consistent with those identified by the court above and would only result in unnecessary replication.

[33] It is perhaps worth noting that the meaning of "or otherwise", in the context of the section, has been repeatedly pronounced upon, and enlarges the category of appeals within the discretion of the court to include, for consideration, matters not covered by the phrase "by reason of its great general or public importance", but which may nevertheless be considered to be of a very substantial character (see **Emanuel Olasemo v Barnett Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 103 of 1994, judgment delivered 20 December 1995 ('**Emanuel Olasemo**') and **Georgette Scott v The General Legal Council (Ex Parte Errol Cunningham)** (unreported), Court of Appeal, Jamaica, Motion No 15 of 2009, judgment delivered 18 December 2009). In **Emanuel Olasemo** at page 7 Downer JA stated:

> "So the ample phrase 'or otherwise' must be given a generous construction as to accord the court['s] discretion to grant leave to appeal in interlocutory matters not covered by the

> specific phrase 'by reason of its great general or public importance'."

[34] It is against these settled principles that each of the questions advanced by the applicant must be examined.

Question 'c'

[35] The primary basis on which this court refused the application to vary or discharge the single judge's orders was on a matter of procedure, which is grounded in the fact that the applicant did not give security for costs in keeping with the order. It is within this procedural framework that question 'c' must be assessed.

[36] The court's finding in this regard is summarised in para. [27] of the judgment which is reproduced hereunder:

> "[27] Although the application to vary or discharge the order was filed within the time prescribed by the CAR, the application did not operate as a stay of the order. Therefore, the Administrator General should have applied to stay the single judge's order, pending the determination of the application, to stop the time for compliance from running. However, no application for a stay was made. Given that failing, the Administrator General would have had to apply for an extension of time to comply with the single judge's order, pending the determination of the application. Inexplicably, this course was also not pursued. The upshot of all this is that the Administrator General's failure to comply with the single judge's order within the time specified has resulted in the automatic dismissal of the appeal with costs to the respondents, regardless of the reasons for the non-compliance."

[37] The court also indicated that the appeal, having been automatically dismissed by the terms of the single judge's order, the applicant could nevertheless have sought to obtain an order for relief of sanctions under rule 26.8 of the CPR, and if successful in that application, would have been entitled to pursue the application to vary or discharge the single judge's order. The court therefore expressly acknowledged that the applicant's non-compliance was not necessarily the end of the applicant's appeal.

[38] An application for relief from sanction is provided for under rule 26.8 of the CPR, which sets out the procedure and prerequisites. The effect of rule 2.19(4) of the CAR is that it applies to proceedings in this court. Rule 26.8 of the CPR provides as follows:

> "1. An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be-
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> (a) made promptly; and
>
> (b) supported by evidence on affidavit.
>
> 2. The court may grant relief only if it is satisfied that-
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> (a) the failure to comply was not intentional;
>
> (b) there is a good explanation for the failure; and
>
> (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.
>
> …"

[39] One tool available to courts when litigants fail to comply with an order for which no sanction is provided is an "unless order," by which the non-complying party is given a further opportunity to comply with the order or face the sanction of their statement of case or appeal being struck out. Unless orders are similarly subject to the court's jurisdiction to grant relief from sanction (see **H.B. Ramsay & Associates Ltd et al v Jamaica Redevelopment Foundation Inc et al** [2013] JMCA Civ 1). It is notable that, as Mr Cowan has highlighted, rule 2.11(4) of the CAR integrates the sanction for non-compliance in an order for security for costs granted by the single judge, and as a result, the imposition of a sanction by the single judge was not discretionary. I agree with Mr Cowan's submission that the inclusion of this mechanism with an automatic penalty suggests that the need for compliance is elevated and bolsters the position of this court that once the appeal had been struck out by operation of the single judge's order, it was essential for the applicant to seek relief from sanction to be able to access this court's jurisdiction thereafter.

[40] In my opinion, another factor that does not support Ms Cummings' argument that this court still had the authority to revive the appeal, even though it had been dismissed and no application for relief from sanction obtained, is that the single judge in making the order "for the giving of security for any costs occasioned by an appeal" was exercising a power granted by rule 2.11(1)(a) of the CAR. Rule 2.10(3) of CAR provides that any order made by a single judge may be varied or discharged by the court. The jurisdiction of the court in this respect is by way of review of the single judge's decision as distinct from the hearing of an appeal, since the order of the single judge is not an order of a subordinate court. Accordingly, the order of the single judge is to be accorded the same force and effect as an order of the court unless reviewed, varied or discharged by the court. This, in my opinion, fortifies the position that in the instant case, the striking out of the appeal by the order of the single judge stands, since this court did not grant relief against that sanction. This court, therefore, lacked jurisdiction to entertain the application to vary or discharge the single judge's order absent relief from sanction.

[41] It follows that question 'c' raises no genuinely disputable issue of law. The relevant procedural rules are clear and settled beyond debate. The question seeks, in substance, to challenge the consequences of non-compliance with an order the effect of which is expressly prescribed by the CAR and does not disclose any matter of great general or public importance or otherwise warranting consideration by the Privy Council.

Question 'a'

[42] Although the procedural issue was the primary reason for this court refusing the applicant's appeal, the court also considered, whether there was any merit in the appeal had the appeal been properly before the court. Question 'a' is based on the applicant's assertion that the single judge erred in ordering security for costs. In my opinion, when reduced to its core, question 'a' seeks a review of the court's discretion to order that an impecunious litigant pay security for the costs of its appeal. Tangentially, the reference to the Administrator-General, although not expressly stated or advanced, can be interpreted to imply that, because of her statutory responsibilities, there may be greater

flexibility in applying the established law to her. Ms Cummings has distanced herself from that position; however, to the extent that this question can be so construed, it is necessary to state that such an assertion would be misconceived. Parliament, in its wisdom, has not determined that it was necessary to carve out an exception for the Administrator-General, and has made it explicit by section 35 of the Administrator-General's Act that, as far as orders of court are concerned, they apply to the Administrator-General as they would to a private person. Section 35 is in the following terms:

> "35. All judgments, decrees, or orders, recovered or made in any legal proceeding by or against the Administrator- General, shall be in the same form and subject to this Act, shall have the same effect as such judgments, decrees, or orders would have had under similar circumstances, if this Act had not been passed, against a private person occupying, in relation to such proceedings, a position similar to that of the Administrator-General."

[43] There is, therefore, a sound basis for concluding that in the assessment of whether an order for security for costs should be made against the applicant, the same general principles apply as would apply to a private individual, and I understood Ms Cummings to accept that position as correct.

[44] The crux of Ms Cummings' submissions was that the order for security should not have been made, given the deceased's estate's impecuniosity and the likelihood of success of the appeal.

[45] The principles applicable to the granting of an order for security for costs are well settled. Rule 2.11 of the CAR provides as follows:

> "(1) The court or the single judge may order-
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> (a) an appellant; or
>
> (b) a respondent who files a counter-notice asking the court to vary or set aside an order of a lower court,

to give security for the costs of the appeal.

(2) No application for security may be made unless the applicant has made a prior written request for such security.

(3) In deciding whether to order a party to give security for the costs of the appeal, the court or the single judge must consider –

(a) the likely ability of that party to pay the costs of the appeal if ordered to do so; and

(b) whether in all the circumstances it is just to make the order.

(4) On making an order for security for costs the court or the single judge must order that the appeal be dismissed with costs if the security is not provided in the amount, in the manner and by the time ordered."

[46] The question of whether security for costs should be ordered and, if so, in what sum, is therefore entirely within the discretion of the single judge. The main purpose of security for costs in appellate proceedings is to protect a litigant who could face significant prejudice, inconvenience and expense in recovering their appeal costs, or risk not recovering them at all. Accordingly, the court will use its discretion based on the specific circumstances of each case.

[47] In considering "the likely ability of that party to pay the costs of the appeal if ordered to do so", the impecuniosity of the estate represented by the Administrator-General is relevant. In addressing the issue of impecuniosity, the court at para. [30] of the judgment acknowledged that it is uncontroversial that the deceased's estate was impecunious, and referring to **Speedways Jamaica Ltd v Shell Company (W.I.) Limited and anor** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 66/2001, judgment delivered 20 December 2004 ('**Speedways**') stated that this is a case in which the court will ordinarily grant security for costs. In **Speedways** at page 6, Harrison JA, in delivering the judgment of the court, opined as follows:

> "As a general rule an appellate court will grant an order for security for costs of an appeal in circumstances where an appellant is impecunious and it seems likely that if he fails in his appeal the respondent would experience considerable delay and would be put to unnecessary expense to recover his costs of the appeal. The court will exercise its discretion depending on all the circumstances of the case."

[48] The court noted and agreed with the comprehensive reasons given by the single judge for granting the application for security for costs. These reasons included an acknowledgement that the deceased's estate was impecunious and therefore likely to be deterred from pursuing the appeal. The single judge found that whereas the impecuniosity of the deceased's estate was not an automatic bar to the making of an order for security for costs, it was a relevant consideration. She further found that the appeal was not likely to succeed because the applicant was relying on the principle of *res ipsa loquitur* to establish that the death of the deceased was caused by the negligence of the applicant, and it was not applicable to the evidence.

[49] Accordingly, the interests of justice favoured the grant of the order for security for costs since the deceased's estate being impecunious meant that it would be unfair to require the respondents to proceed without such protection, given the risk that they might not be able to recover their costs in a timely manner or at all.

[50] Properly analysed, question 'a' does not raise a question of law. It seeks appellate review of a discretionary decision to order security for costs, exercised by the single judge and affirmed by this court in accordance with well-established principles. The challenge is also fact-specific and therefore engages no issue of general or public importance or otherwise and does not satisfy section 110(2)(a) of the Constitution.

Question 'b'

[51] Turning then to question 'b', the applicant's challenge to the exercise of the single judge's discretion to order security for costs and this court's support of her decision is rooted in part in the position that the doctrine of *res ipsa loquitur* is applicable to the facts of this case, such that the appeal had a real prospect of success. In analysing the

applicant's position, it is helpful to examine the two main authorities on which Ms Cummings relied, **Baker and Ng Chun Pui**.

[52] In **Baker**, there was a collision between two vehicles, a motor-lorry driven by Mr Baker and an Austin van driven by Mr Wallace. The vehicles that were travelling along a straight road in opposite directions collided, and both drivers were killed as a result. The vehicles collided near the center of the road, with conflicting evidence regarding their positions before the accident.

[53] Mrs Baker brought an action against the owner of the Austin Van and Mrs Wallace brought a separate action against the owner of the lorry, each alleging negligence. In the case brought by Mrs Baker, which was heard first, Ormerod J. ruled in favour of the defendants on the basis that she failed to prove negligence on the part of Mr Wallace, the driver of the van.

[54] In the case brought by Mrs Wallace, which involved similar evidence, Sellers J found that there was conflicting evidence as to the van's relative position after the accident in relation to the cats' eyes (reflectors) that demarcated the center of the road. He opined at page 1476 of the report that both vehicles were descending hills in opposite directions and met at the bottom, and that:

> "… the inference is that they were both to blame because, in the absence of other evidence that anything ill befell either vehicle or driver, it would appear that they were both committing almost the same negligent acts, failing to keep a proper look out, failing to drive their respective vehicles on the correct side of the road so that they would each pass the other in safety. It seems to me that they were both hugging the centre of the road and failing to give way to the other. In those circumstances I would hold, and I do hold that the responsibility for this accident lies with the drivers of both vehicles equally, they both having, by proper inference, committed the same negligent acts of driving."

[55] The appeals were heard together. The Court of Appeal noted that both Ormerod J. and Sellers J. had similar findings of fact but differed in their conclusions regarding

negligence. Their lordships affirmed Sellers J.'s decision that both drivers were negligent and that, in the absence of any evidence indicating that one driver was more to blame than the other, the trial judge was entitled to conclude that both were equally liable.

[56] The observations of Denning LJ on the evidence are also pertinent, and he stated that on proof of the collision in the centre of the road, the natural inference would be that one or other or both were to blame. He further observed at page 1477 that:

> "So much seems so clear on principle that it is unnecessary to go further; but I would like to say that the evidence to my mind makes it much more likely that both were to blame than that one only was to blame. It shows that each driver kept his course, with his off-side wheels on or over the centre line of the road. There was room for each of them to pull in to his near-side of the road, but neither did so. There was not the slightest trace of any avoiding action taken by either — no brake marks; no swerve; no hooter; nothing. Assume that one of the vehicles was over the centre line a few inches, and thus to blame, why did not the other one pull in more to its near side? The absence of any avoiding action makes that vehicle also to blame. And once both are to blame, and there are no means of distinguishing between them, then the blame should be cast equally on each."

[57] This case illustrates the principle that, in appropriate cases where there is no clear evidence distinguishing the negligence of the two parties involved in a collision, liability can be apportioned equally. It does not establish a general principle, as Mrs Cummings argued, that once there is a two-vehicle collision and there is no evidence of how the collision occurred, the default position is that liability is equally apportioned because both drivers are deemed to be negligent.

[58] The flaw in the position advanced by Ms Cummings is exposed by the observations of Somervell LJ, where he stated at page 1475:

> "It is, of course, possible that a plaintiff injured by negligence may fail because he is unable to establish whether the negligence was 'A's' or 'B's'. If his difficulties are [d]ue to any failure of 'A' or 'B' or both to call available evidence, adverse

> inferences may be drawn. Here all available evidence was called, and the question, as it seems to me, is one of probable inference from the facts as established. It seems plain that there must have been negligence. If the natural inference was that the accident was due to negligence on the part of one or other of the drivers but not to both I would have thought that the plaintiff would fail.

The applicant in the instant case was unable to establish whether the accident which led to the death of the deceased was due to the negligence of the bus driver, the 2nd respondent, or Nicole Dwyer, the driver of the other vehicle. Critically, there was no evidence of the circumstances that led to the accident, for example, whether one or both vehicles may have crossed over "cats eyes" reflective dividers (if they existed) or an imaginary line in the center of the road at the point of impact. Consequently, there is no "natural inference" that the collision was due to both drivers.

[59] The case of **Ng Chun Pui** also does not assist the applicant. In **Ng Chun Pui**, a motor coach owned by the second defendant and driven by the first defendant left the westbound carriageway of a road, crossed the grass central reserved area between the carriageways, and collided with a public bus being driven in the opposite direction. The first plaintiffs are the personal representatives of a passenger in the bus who was killed in the collision. At the trial, the plaintiffs put in evidence without objection several documents, including the police sketch. The sketch indicated the dimensions of the road and the positions of the vehicles after the accident. This showed that the accident had occurred on the defendant's wrong side of the road after the motor coach had crossed the central reserved area. The plaintiffs called no oral evidence. They relied upon the doctrine of *res ipsa loquitur*, and on the evidence that the motor coach was in good working order immediately prior to the collision.

[60] The defendants called evidence and gave an explanation why the first defendant lost control of the coach, which in summary was that a blue car that was traveling in the same direction as the coach but in the slow lane, suddenly switched into the fast lane in front of the coach, and the first defendant reacted to this by breaking and swerving a

little to his right when the coach skidded across the reservation area and collided with the bus. The trial judge formed the view that because the plaintiff had relied on the doctrine of *res ipsa loquitur*, the burden of disproving negligence remained upon the defendants, and they had failed to discharge it.

[61] The Privy Council found that this was a misunderstanding of the doctrine of *res ipsa loquitur,* which it described at page 3 as follows:

> "… no more than the use of a latin maxim to describe a state of the evidence from which it is proper to draw an inference of negligence. Although it has been said in a number of cases, it is misleading to talk of the burden of proof shifting to the defendant in a *res ipsa loquitur* situation. The burden of proving negligence rests throughout the case on the plaintiff." (Italics as in the original)

The Privy Council held that the Court of Appeal had rightly rejected the judge's approach because once the first defendant's explanation of the accident was accepted, his driving had to be judged considering the emergency, which was the result of the blue car swerving into his lane. Accordingly, the Court of Appeal held that the first defendant did what any careful driver would instinctively have done in the circumstances, and even if he reacted slightly more than was strictly necessary, the court was not of the view that a lesser reaction would not have produced the same result.

[62] **Ng Chun Pui** illustrates the incidence of the legal burden of proof where the doctrine of *res ipsa loquitur* is being relied on and is distinguishable from the instant case. It is not helpful to the applicant, because in that case there was no debate over the applicability of the *res ipsa loquitur* principle. The doctrine was found to be applicable, but not merely because the plaintiff was relying on the collision between the two vehicles. The Plaintiff was also relying on the additional evidence of the police sketch and the fact that the coach had crossed the reserved area and collided with the bus travelling in its correct lane. The combined effect of all the evidence was capable of leading to the natural inference that the coach's driver was negligent.

[63] The cases of **Baker** and **Ng Chun Pui** are sufficient to demonstrate that the principles relating to the assessment of liability in the tort of negligence in a two-vehicle collision where there is no eyewitness account are well settled. These principles were identified and applied by the single judge in her assessment that the applicant's appeal had no merit. This court found that the single judge was correct in that regard. Consequently, question 'b' does not constitute a question of great general or public importance or otherwise.

Conclusion and disposition

In my view, for the reasons expressed herein, none of the three questions proposed for determination by the Privy Council that have been identified raises any serious issues of law, involving matters of public importance within the meaning of section 110(2)(a) of the Constitution, nor does there exist any other basis upon which leave ought otherwise to be granted. In my opinion, none of the proposed questions is worthy of consideration or debate before the Privy Council. Accordingly, I would recommend that conditional leave to appeal to the Privy Council should be refused.

TIE-POWELL, JA (AG)

[64] I, too, have read in draft the judgment of Laing JA. I agree with his reasoning and conclusions and have nothing to add.

MCDONALD-BISHOP, P

ORDER

1. The motion for conditional leave to appeal to His Majesty in Council is refused.

2. Costs to the respondents to be agreed or taxed.