[2021] JMCA App 25

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

SUPREME COURT CIVIL APPEAL NO 7/2014

APPLICATION NOS 284/2018 & COA2019APP00001

BETWEEN	**ADVANTAGE GENERAL INSURANCE COMPANY LIMITED** **(FORMALLY UNITED GENERAL INSURANCE COMPANY LIMITED)**	**APPLICANT**
AND	**MARILYN HAMILTON**	**RESPONDENT**

Conrad George and Andre Sheckleford instructed by Hart Muirhead Fatta for the applicant

Paul Beswick, Miss Terri-Ann Guyah and Miss Gina Chang instructed by Ballantyne Beswick & Co for the respondent

29 April 2019, 4 June 2020 and 8 October 2021

MCDONALD-BISHOP JA

[1] This is the latest in a series of satellite applications filed in this court in the now well-known litigation saga between Advantage General Insurance Company Limited (formally United General Insurance Company) ('AGIC') and its former employee, Mrs Marilyn Hamilton ('Mrs Hamilton'). The parties have been entangled in litigation proceedings since 2007, when Mrs Hamilton filed a claim in the Supreme Court against AGIC for breach of contract and wrongful dismissal, arising out of the termination of her

employment ('the claim'). It could easily claim the unenviable distinction as being the most contentious case in the recent, if not the entire, history of this court, and I dare venture to add, unnecessarily so.

[2] The substantive appeal has since been determined, but it has left in its wake over one dozen written judgments from this court in respect of the one claim. This, I anticipate, is the last in the series.

[3] Before the court, now, are two applications: the first is brought by AGIC to set aside orders made by Brooks JA (as he then was), sitting as a single judge in chambers ('the single judge'), on 18 December 2018; and the second, by Mrs Hamilton seeking to strike out the application brought by AGIC as an abuse of the process of the court.

[4] The court heard the matter on 29 April 2019, and at the end of the hearing, the parties were invited to make further submissions on or before 24 May 2019. They were advised then that judgment would have been reserved after the last submissions were received. The further submissions were not filed until June and July 2019, but due to some administrative oversight in the court's registry, they were not brought to the attention of the court until 4 June 2020 after enquiries were made of counsel. The parties were advised that judgment would have been reserved as of 4 June 2020, when the hearing would have been officially completed with the filing of the further submissions. Unfortunately, due to the need to attend to other pressing matters that were, by then, under the consideration of the court, the expeditious delivery of this judgment was frustrated. The delay is sincerely regretted.

Background

[5] On 13 December 2013, following the trial of the claim, Sinclair-Haynes J (as she then was) entered judgment in favour of Mrs Hamilton on the claim. She made several consequential orders, including, awarding the costs of the proceedings to Mrs Hamilton to be agreed or taxed (order no 5) ('the costs order').

[6] Pursuant to the costs order, Mrs Hamilton filed a bill of costs in the Supreme Court in the sum of $205,405,895.00. In response to this, AGIC filed points of dispute suggesting costs in the sum of $1,832,215.00.

[7] Mrs Hamilton sought and obtained an interim costs certificate in the sum of $1,832,215 as suggested by AGIC. This triggered AGIC to file an application before this court for a stay of execution of the costs order of Sinclair-Haynes J, pending the appeal from the substantive decision.

[8] This application was heard by the single judge who, on 15 November 2018, made the following orders ('the stay orders'):

> "1. The execution of order number 5, of the orders handed down herein by Sinclair-Haynes J (as she then was), on 13 December 2013, is partially stayed until the determination of the appeal.
>
> 2. There is no stay of the execution of the interim costs certificate granted by the Registrar of the Commercial Division of the Supreme Court in the sum of $1,832,215.00.
>
> 3. There is no stay of the taxation of the bill of costs filed on 11 June 2018, on behalf of the respondent [Mrs Hamilton].
>
> 4. Execution of the payment of the costs arising from the taxation of the said bill of costs, is stayed pending the outcome of the appeal or further or other order of this court.
>
> 5. No order as to costs."

[9] Following on the stay orders, Mrs Hamilton sought to enforce the interim costs certificate by way of a charging order. On 7 December 2018, the parties appeared before Simmons J (as she then was) in the Commercial Division of the Supreme Court, on an application by Mrs Hamilton to make final a provisional charging order, issued against property owned by AGIC. AGIC's counsel objected to this application based on the wording of the stay orders. They contended, basically, that the execution of the

interim costs certificate was stayed by order no 4 of the stay orders, and that order no 2, which stated that there is no stay of the execution of the interim costs certificate, was merely the "musings" of the single judge. The essence of the argument, therefore, was that the stay orders meant that enforcement of taxation was stayed, and that 'taxation' has a wide meaning, which encapsulates the interim costs certificate. Simmons J reserved her decision on the matter. This prompted Mrs Hamilton to file an application in this court seeking, what she described as, 'clarification' of the stay orders or 'directions' regarding them. The matter was listed before the single judge for consideration.

[10] On 18 December 2018, the single judge, again, sitting in chambers, made the following orders on that application ('the clarification orders'):

> "1. The time for service of this present application is abridged to the date of actual service thereof.
>
> 2. The order made herein on 15 November 2018 is clarified as follows:
>
> (a) none of the orders contained therein are musings of the court;
>
> (b) the term 'taxation of the said bill of costs' used in order # 4 of the said order was restricted in reference to the term 'taxation of the bill of costs' as appears in order # 3 of the said order, and was not meant to restrict in any way the execution of the interim costs certificate referred to in order # 2 of the said order;
>
> (c) the applicant Marilyn Hamilton is at liberty to execute the interim costs certificate in order # 2 of the said order and secure the payment of the sum of $1,832,215.00 as stipulated in the said interim costs certificate without any need to await the outcome of the taxation of the bill of costs referred to in orders numbered 3 and 4 of the said order.

3. Costs of this application shall be paid by the respondent [AGIC] on an indemnity basis as per the practice direction dated 1 February, 2018 issued by the Chief Justice of Jamaica."

Mrs Hamilton's application to strike out

[11] Though AGIC's application, challenging order nos 2 and 3 of the clarification orders was first in time, it is considered convenient to treat with Mrs Hamilton's application first, because if it finds favour with the court, it would be unnecessary for the court to consider AGIC's application in substance.

[12] Mrs Hamilton listed seven grounds on which the application to strike out AGIC's application is brought and pursued. However, when the grounds are stripped of the non-essential details in which they have been formulated, there is, in substance, only one ground, which undergirds the application. The simple basis is that AGIC's application to set aside the order of the single judge amounts to an abuse of process of the court because it is frivolous, vexatious and prejudicial.

[13] It must be said from the very outset that there is no power given to the court to strike out an application. The application either succeeds or it fails and so the court will either grant, refuse it or dismiss it. Under the Court of Appeal Rules 2002 ('CAR'), the court's power to strike out is limited to striking out the whole or part of a notice of appeal or counter-notice (see rule 1.13(a) of the CAR), and an appeal or counter appeal (see rule 2.15(1) of the CAR). Similarly, pursuant to rule 2.14(a) of the CAR, this court also has all the powers set out in Part 26 of the Civil Procedure Rules 2002 ('CPR'), which includes the powers to strike out a "statement of case". It may also strike out portions of affidavits filed in support of an application in accordance with rule 30.3(3) of the CPR (applicable by virtue of rule 1.1(10)(i) of the CAR). The notice of application filed by AGIC does not qualify as a statement of case or an affidavit.

[14] Furthermore, AGIC's application is brought pursuant to rule 2.10(3) of the CAR, which gives the court the power (exercising its jurisdiction through a panel of three or

more judges) to vary or discharge the order of a single judge. The court does not sit as an appellate court over its own decisions but is given the oversight responsibility over the decisions of a single judge in specified procedural matters, as an internal mechanism, to ensure that the interests of justice are served. The court exercises this power by way of an application brought to it for that purpose. AGIC's application, therefore, is for the court to review the order made by the single judge; it is not an appeal, strictly speaking, and so we see no basis to treat it as such for the purposes of a striking out application.

[15] In any event, even if the court may properly strike out an application, the making of a striking out order on any ground or for any reason, can lead to injustice. Therefore, the exercise of the jurisdiction would have to be in keeping with the tenets of the overriding objective of the new procedural code. This may especially be so where a litigant, like in the instant case, is seeking the exercise of the court's oversight responsibility over the order of a single judge of the court. The court, therefore, must exercise caution in considering striking out as a course of action in treating with these applications. The authorities are clear that the power to strike out a party's case must be exercised sparingly, and only in plain and obvious cases.

[16] AGIC has asked for a review of the orders made by the single judge, clarifying his previous orders, on the basis (rightly or wrongly) that he lacked the jurisdiction to do so and that he varied the orders. Also, it wishes for the court to review the order made by the single judge that it pays costs to Mrs Hamilton on an indemnity basis. In my view, AGIC's application for the court to revisit the orders of the single judge should be investigated on the merits in the interests of justice and in adhering to the dictates of the overriding objective of the procedural rules.

[17] Moreover, the argument of Mrs Hamilton that the application be struck out could properly have been subsumed within her response to the application that the court should refuse or dismiss it. This is exactly what her submissions in response amounted to saying. A separate and distinct application to strike out AGIC's application as an

abuse of the process of the court with a consequential costs order in favour of Mrs Hamilton on her application was not required.

[18] Therefore, in my view, Mrs Hamilton's application is improperly brought or, alternatively, is wholly unnecessary and inappropriate in the light of the oversight jurisdiction the court is being called upon to exercise over the decision of a single judge.

[19] Accordingly, Mrs Hamilton's application is dismissed, and the issue of costs connected to it will be addressed at the conclusion of the judgment. Until then, the focus from here onwards will be on AGIC's application for a review of the single judge's ruling.

AGIC's application to set aside the orders of the single judge

[20] The application by AGIC, like that of Mrs Hamilton, outlines seven grounds on which it is seeking to have the court set aside the orders of the single judge. However, essentially, there are only three grounds for the court's consideration; they are:

> (1) There is no wide power for a court to "clarify" its orders, once perfected.
>
> (2) The orders of the single judge made on 18 December 2018, amount to a variation of his orders of 15 November 2018, such variation being beyond the powers of a single judge of appeal.
>
> (3) The single judge wrongfully exercised his discretion in (i) awarding costs against AGIC, and (ii) requiring that such sums be paid on an indemnity basis.

[21] Having regard to the circumstances of the case, the three grounds, identified in the preceding paragraph, have given rise to three corresponding issues which have been isolated for the determination of the court, namely:

> (1) whether the single judge had the power to clarify the stay orders after they were perfected;
>
> (2) whether the clarification orders amount to a variation of the stay orders, and if so whether he had the jurisdiction to vary his orders; and
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> (3) whether the single judge erred in ordering that costs be paid by AGIC to Mrs Hamilton and that it be paid on an indemnity basis.

Issue (1): Whether the single judge had the power to clarify the stay orders after they were perfected

[22] In providing reasons for his decision to clarify the stay orders, the single judge stated at para. [6] a. of his judgment (recorded as **United General Insurance Limited v Marilyn Hamilton** [2018] JMCA App 47):

> "a. A court may clarify orders made by it, even after the order has been perfected (see **Dalfel Weir v Beverly Tree** [2016] JMCA App 6). This is preferable to another judge, especially of an inferior court, attempting to decipher what the order means (see **Mainteck Services Pty Limited v Stein Heurtey SA and Stein Heurey** [sic] **Australia Pty Ltd** [2013] NSWSC 1563)."

[23] Mr Conrad George, counsel who made oral submissions on behalf of AGIC, contended that the legal basis relied upon by the single judge, in justification of his clarification orders, were premised on two cases, **Dalfel Weir v Beverly Tree** [2016] JMCA App 6 ('**Weir v Tree**') and **Mainteck Services Pty Limited v Stein Heurtey SA and another** [2013] NSWSC 1563 ('**Mainteck**'), both of which concerned the slip rule. Counsel admitted that this court may apply the slip rule by virtue of its inherent

jurisdiction, which has been established in various decisions of this court, including **Weir v Tree, Sarah Brown v Alfred Chambers** [2011] JMCA App 16 ('**Brown v Chambers**'), and **American Jewellery Company Limited and others v Commercial Corporation Jamaica Limited and others** [2014] JMCA App 16 ('**American Jewellery**'). He, however, argued that a single judge of appeal has no such inherent jurisdiction.

[24] Mr George further submitted that the application by Mrs Hamilton seeking clarification was not, in substance or form, an application under an implied liberty to apply, nor was it an application to correct an error or a slip under the slip rule as the application was predicated on the basis that the stay orders were unambiguous. Counsel maintained that the single judge acted beyond his jurisdiction as a court (including a single judge of this court) does not have the power to amend or correct any defect in its judgment or order after it has been perfected, except under the slip rule.

[25] He argued that the jurisdictional grounds for the application, as well as for the clarification orders, were never made clear. By reference to case law, counsel submitted that an error must be established in order to invoke the slip rule. In support of these submissions, Mr George relied on the pronouncements of Harris JA in **Lyndel Laing and anor v Lucille Rodney (Executor of estate Sandra McLeod deceased) and anor** [2013] JMCA Civ 27 ('**Lyndel Laing**'), at para. [12]. There, Harris JA stated:

> "[12] It is a well established principle that a court or a judge is devoid of the power to amend or correct any defect in its judgment or order after it has been perfected. In ***R v Cripps, Ex parte Muldoon and Others***, Sir John Donaldson MR, speaking to the rule, at page 695, said:
>
> > ' …once the order has been perfected, the trial judge is functus officio and, in his capacity as the trial judge, has no further power to reconsider or vary his decisions whether under the authority of the slip rule or otherwise. The slip rule power is not a power granted to the

> trial judge as such. It is one of the powers of the court, exercisable by a judge of the court who may or may not be the judge who was in fact the trial judge.'"

[26] Accordingly, Mr George complained that the single judge did not find any error in his orders and thus was wrong to have invoked the slip rule. He argued that if a court has a wide power to "clarify" its order, rather than "correct slips", the very existence of the slip rule is "completely otiose". He pointed out that it has never been a principle of our courts, that if an issue of the interpretation of a court order is raised in another forum, a court has a wide power to clarify the meaning of its orders. Such a principle, he said, would be a "tremendous inroad into the concept of finality of judgments". In his view, the single judge ought to have dismissed Mrs Hamilton's application seeking clarification and leave it for Simmons J, in the Supreme Court, to determine the meaning of the stay orders. Then, if either party was of the view that Simmons J had misconstrued the orders, there would have been a right of appeal.

[27] Responding for Mrs Hamilton, Mr Beswick relied on rules 1.7(2)(n), 2.9(1) and 2.10(1)(e) of the CAR as well as two authorities emanating from the Republic of South Africa in submitting that the single judge had the power to clarify and give directions concerning his own order. Counsel also placed reliance on paras. [49] and [50] of **Jade Hollis v Gregory Duncan and anor** [2018] JMCA Civ 32 ('**Jade Hollis**') which, he argued, justifies the position that the court possesses an inherent jurisdiction to clarify its own orders. He maintained that the single judge is empowered to exercise the power of the court in treating with the orders he made.

[28] Harris JA, in analyzing the operation of the slip rule in **Lyndel Laing**, stated that:

> "[14] [The slip] rule only comes into operation where, in a judgment or an order a clerical mistake, or an error emanating from an accidental slip or omission, is manifested. **The purport and spirit of the rule is to bring a judgment or an order in which an error,**

> **omission or mistake arises in harmony with that which a judge intended to pronounce.** Therefore, a judge is not competent to alter a judgment or an order once it has been drawn up and perfected, if it accurately expresses the intention of the court or the judge. **To qualify under the rule, an applicant must show that the error, omission or mistake is one in expressing the manifest intention or the judge**." (Emphasis added)

[29] Similarly, in **American Jewellery**, Morrison JA (as he then was) considered the court's power to apply the slip rule. In considering this matter, Morrison JA, applying the court's previous decision in **Brown v Chambers** [2011] JMCA App 16, accepted (at para. [2]), that "this court may, by virtue of its inherent jurisdiction to control its process, 'correct a clerical error, or an error arising from an accidental slip or omission … in its judgment or order'". Morrison JA went on to further state:

> "[21] In his judgment in **Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc & Anor** [2001] EWCA Civ 414, a decision of the English Court of Appeal … Aldous LJ restated (at para. 25) the well-established principle that '…**the slip rule cannot enable a court to have second or additional thoughts**…**Once the order is drawn up any mistakes must be corrected by an appellate court'**. However, as the learned editors of the White Book 2009 … make clear (at para. 40.12), '**the Court has an inherent jurisdiction to vary its own order to make the meaning and intention of the Court clear and can use the slip rule to amend an order to give effect to the intention of the Court**'…" (Emphasis added)

[30] It is, therefore, clear that the court does have an inherent jurisdiction to use the slip rule to amend an order of the court to make its intention clear to ensure that its orders are accurately carried out as intended. This power, of necessity, would involve the power to clarify its orders after they have been perfected. This, of course, would be subject to the caveat that the orders should remain unchanged in sense, substance and effect.

[31] I accept the submissions of Mr Beswick that the single judge had the inherent jurisdiction to clarify his orders. The single judge had the powers of the court in making the stay orders under rule 2.10(1) of the CAR. Therefore, for all intents and purposes, he was properly exercising jurisdiction as the Court of Appeal or, in other words, the jurisdiction of the court was being exercised through him. Therefore, as a single judge presiding over a matter, which could properly have been determined by him by virtue of the Constitution, the Judicature (Appellate Jurisdiction) Act ('JAJA') and the rules of court, he possessed the same powers of the court (sitting with a panel of three or more judges) to apply the slip rule to amend orders made by him within the permissible bounds of the law. This power to amend would necessarily include clarifying his orders to ensure that the meaning and intendment of the court's decision are manifest. This is an essential power to give effect to the orders of the court. It would defy logic and commonsense to deprive a single judge, through whom the court is exercising a part of its jurisdiction, of the inherent power that resides in the court to revisit its orders when it is necessary in the interests of justice to do so.

[32] The powers of a single judge of this court were recently explored in **Cable & Wireless Jamaica Limited v Eric Jason Abrahams** [2021] JMCA App 19, as a result of similar arguments advanced in that case by the same counsel for AGIC in the instant case. There, the court was obliged to restate the constitutional and statutory authority of the court to exercise its jurisdiction through a single judge in interlocutory or procedural matters. The court, in that case, also expressly stated that the power of a single judge to grant orders under rule 2.10(1) of the CAR (which was engaged by the grant of the stay orders in this case) is, in effect, the court exercising a part of its jurisdiction. As Sir John Donaldson MR in **R v Cripps, ex parte Muldoon** [1984] QB 686 at page 695 B, similarly noted:

> "The slip rule power is not a power granted to the trial judge as such. It is one of the **powers of the court, exercisable by a judge of the court** who may or may not be the judge who was in fact the trial judge." (Emphasis added) (see also **Lynden Laing** at para. 12 quoted above at para. [25]).

[33] It follows then that the single judge in this case was empowered to exercise the inherent jurisdiction of the court to apply the slip rule in matters over which he was lawfully exercising the jurisdiction of the court.

[34] In that regard, the court, whether sitting as a single judge in chambers, or as a bench of three or more judges in open court, can correct its perfected orders by use of the slip rule. The fact that the court is empowered by virtue of rule 2.10(3) to vary or discharge the order of a single judge, with which a party may be dissatisfied, does not affect the power of the single judge to revisit an order made and perfected by him within the parameters and spirit of the slip rule. The court must bear in mind the purport and spirit of the slip rule, that is, to give effect to that which the court (including a single judge) intended to pronounce. This power to apply the slip rule to clarify judgments should be viewed as an essential weapon in the arsenal of the court for the proper and effective administration of justice. However, it is accepted that the power should not be exercised indiscriminately and without good cause.

[35] Regarding the instant case: though it is true that Mrs Hamilton argued that the stay orders were clear and unambiguous, AGIC, by raising the objection that it did before Simmons J, had called into question the intention of the single judge as to whether order no 4 was meant to restrict in any way the execution of the interim costs certificate pursuant to order no 2. AGIC had also called into question whether order no 2, with which the proceedings before Simmons J were specifically concerned, emanated from the musings of the single judge and was not intended to be an order of the court.

[36] It could be argued that what the judge was asked to clarify was a purported ambiguity between orders no 2 and 4 of the stay orders and/or a purported error in the recording of order no 2, which AGIC suggested was the musing of the single judge. It could also be argued that the position taken by AGIC, regarding the meaning of the relevant orders, a position not shared by Mrs Hamilton, showed that there was, at least, uncertainty regarding the meaning of the orders of the single judge. Therefore, the objections that were raised by AGIC before Simmons J would, in my opinion, take the

matter within the ambit of the application of the slip rule in order to eliminate the risk of injustice due to a possible failure of the court below to give effect to the true intention of the single judge.

[37] In **Jade Hollis**, P Williams JA, in considering the circumstances in which a judicial order may be open to question, cited the opinion of the Privy Council in **Sans Souci Limited v VRL Services Limited** [[2012] UKPC 6] ('**Sans Souci v VRL**') at para. 14. Speaking on behalf of the Board, Lord Sumption opined:

> "14. It is generally unhelpful to look for an 'ambiguity', if by that is meant an expression capable of more than one meaning simply as a matter of language. **True linguistic ambiguities are comparatively rare**. **The real issue is whether the meaning of the language is open to question. There are many reasons why it may be open to question, which are not limited to cases of ambiguity**." (Emphasis added)

[38] I, too, am guided by the learning from Lord Sumption in **Sans Souci v VRL** and the reasoning of P Williams JA concerning the circumstances in which the court may reopen its orders and what is the best forum to do so. As the cases have established, there are many reasons why an order may be open to question or clarification, which are not limited to the presence of an ambiguity. The real issue for the court's consideration, as was helpfully stated by Lord Sumption, is whether the meaning of the language of the order is open to question.

[39] Additionally, though the cases emanating from the Republic of South Africa are not binding on the courts in our jurisdiction, nonetheless, I have found as equally helpful, the pronouncements of Matojane J in **Blue Cell (Pty) Ltd (in liquidation) v Blue Financial Services Limited and others** (unreported), Republic of South Africa, In the High Court of South Africa, Case No: 8456/07, delivered 16 May 2014, which was relied on by counsel for Mrs Hamilton. Matojane J addressed four exceptions to the rule that once a court has duly pronounced a final judgment or order, it has itself no

authority to correct, alter or supplement it. At para. [5] of the judgment, Matojane J stated:

> "[5] In **Firestone South Africa (Pty) Ltd v Genticuro AG** 1977(4) SA 298 (A) at 306H - 308A four exceptions to the rule that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it is set out. The exceptions are clearly set out in the headnote and I quote them for convenience:
>
> > 'Once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased. There are, however, a few exceptions to that rule. Thus, provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following case: (1) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, that the court overlooked or inadvertently omitted to grant. **(2) The court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter 'the sense and substance' of the judgment or order.** (3) The court may correct a clerical, arithmetical, or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance. (4) Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may

> depend upon the ultimate decision on the merits), but the court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order.
>
> **The above list is not exhaustive**: the question whether the court has an inherent general discretionary power to correct any other error in its own judgment or order in appropriate circumstances, especially as to costs, raised but not decided. On the assumption that the court has a discretionary power this should be sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded - interest reipublicae ut sit finis litium.'" (Emphasis added)

[40] As was submitted by Mr Beswick, the clarification orders would fall squarely in line with exception (2) emphasized (in bold) above.

[41] In this case, AGIC had raised controversial questions before Simmons J, as to whether the execution of the interim costs certificate was stayed by order no 4 of the stay orders, and whether order no 2 of the stay orders was a musing of the single judge. If it were that order no 2 was a musing and was subject to order no 4, then Mrs Hamilton would not have been entitled to the benefit of the order regarding the interim costs certificate and so could not enforced it against AGIC before the determination of the appeal. The fact that arguments as to the meaning and intent of the single judge were raised before Simmons J, who considered it necessary to reserve her decision in resolving the dispute, demonstrates that the language of the order was open to question and was, in fact, being questioned. So, Mrs Hamilton's insistence that the orders were unambiguous would not have been a bar for an application to be made for clarification as there are other bases on which the court may be called upon to exercise this jurisdiction.

[42] The question now arises: which forum was the most appropriate to revisit the order and to explain or clarify its meaning? In this regard, I adopt the view expressed by P Williams JA in **Jade Hollis**, that:

> "[50] It would, to my mind, first be the best course when a judicial order is to be construed, **that the judge who made it be asked to construe it, if that judge is available**…" (Emphasis added)

[43] My opinion, therefore, is that the single judge was the best forum to clarify his orders. It was not a purported challenge to his orders that was being made by AGIC, which would have warranted the intervention of the court under rule 2.10(3) of the CAR. Additionally, I cannot accept as correct the argument of counsel for AGIC that the Supreme Court was the proper forum to clarify the orders of the single judge. It would defy logic that the judge of the Supreme Court should be tasked to pronounce on whether the order of the single judge of appeal was a "musing", and particularly so, within the context of an appeal that was still extant and, therefore, under the management of the court. In my view, it seems more prudent that such clarification, as far as was reasonably practicable, should have been obtained from the single judge himself who could explain his true intention and the meaning of the orders he purported to make. He was available. In the end, he sought to express exactly what he meant by the orders made. He made it clear that none of them was a musing as was contended by counsel for AGIC and established that the stay orders meant what they conveyed from the very outset, which was the interpretation placed on them by Mrs Hamilton. I can see no flaw in this approach as a matter of law and common sense.

[44] In my view, it is beyond question that the single judge had an inherent jurisdiction to clarify the order, which was consistent with the same power of the court, sitting with a bench of not less than three judges, to clarify orders of the court. Contrary to the views of Mr George, as the authorities have established, it was not necessary that there should have been any error or ambiguity in the orders for the

single judge to exercise the jurisdiction and, ultimately, his discretion in clarifying the orders he had made.

[45] There was controversy surrounding the meaning of the orders as well as the intention of the single judge, having regard to the fact that it was suggested that he might have included his musings as part of the orders. That controversy carried with it the risk of misinterpretation by the court below, which, in turn, carried the added risk of a resultant failure on the part of the court below to give effect to the true intention of this court in making the orders it did. The exercise of the jurisdiction of this court for interpretation, clarification or explanation of the order was definitely triggered. That jurisdiction was exercisable by the single judge and not three or more judges exercising the jurisdiction of the court.

[46] While it is accepted that the power to revisit perfected final orders of the court ought to be exercised sparingly, the single judge considered it necessary to exercise the inherent power of the court to clarify the stay orders and make his intention clear and certain, in the light of the arguments of counsel for AGIC in the Supreme Court. He cannot be faulted.

[47] Therefore, for all the foregoing reasons, I find no merit in AGIC's contention that the single judge should have dismissed Mrs Hamilton's application for clarification or further directions.

Issue (2): Whether the clarification orders amount to a variation of the stay orders

[48] Mr George contended that order no 4 of the stay orders was varied by order no 2 of the clarification orders. He submitted that the necessary inference from the stay orders is that there was to be no execution of the interim costs certificate until the determination of the appeal or another order of the court. Therefore, the clarification order, which allows for the execution of the interim costs certificate before the determination of the appeal, was a variation of the stay orders. Counsel argued that

variation of the stay orders was beyond the powers of the single judge. According to him, that power resides in the court sitting with a bench of not less than three judges.

[49] On this issue, Mr Beswick submitted that the orders of the single judge could not be deemed to be a variation as he made no new orders. Counsel pointed out that the single judge "merely clarified and explained" what the stay orders meant so as to resolve any perceived ambiguity - an ambiguity which was created by AGIC and the preliminary objection which was raised by counsel on its behalf that part of the stay orders was the "musings" of the single judge. Counsel further argued that the clarification orders did not result in a modification of the original judgment or any prior order. Accordingly, the clarification was necessary because of AGIC's own doing and Mrs Hamilton would have had no other recourse to enforce the court's orders given the conduct of AGIC.

[50] I agree with the submissions of counsel for Mrs Hamilton and, consequently, reject Mr George's proposition and interpretation of the stay orders and his argument that the matter was one for the court comprised of a bench of three judges.

[51] The single judge was properly called upon to explain or clarify the stay orders to make his intention clear, and this he did when he made the now impugned clarification orders. These orders were strictly a clarification (or explanation, if you will) of the stay orders, which AGIC had called into question. He did not vary them "through the backdoor", as alleged by Mr George, or otherwise. The stay orders, in sense, substance, and effect, remained the same after the clarification orders as the single judge originally intended. The complaint that the single judge varied the stay orders is, therefore, unjustified and cannot be countenanced as a basis to interfere with his decision.

[52] It is important to note that the case was still before this court awaiting the hearing of the substantive appeal; thus, the court's case management powers still subsisted in treating with issues pertinent to the appeal. The clarification of orders granting a stay pending appeal – being interlocutory in nature – must be viewed as part

and parcel of the court's case management powers in the furtherance of the overriding objective to deal with the appeal justly. The court, in properly exercising its jurisdiction through a single judge, has the same power as sitting with a bench of three or more judges to exercise the case management powers conferred on it by the rules of court as well as its inherent powers recognized at law. This is necessary for the effective execution of the court's function as a court of justice. It was, accordingly, within the remit of the single judge "to take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective" (see rule 1.7(2)(n) of the CAR). By making further orders with the sole purpose of clarifying the stay orders or removing uncertainty, the single judge did nothing that he was not authorized by law to do.

[53] In the result, there is no justifiable basis in law for this court to disturb the orders made by the single judge on Mrs Hamilton's application for clarification or further directions concerning the stay orders.

Issue (3): Whether the single judge erred in ordering that costs be paid by AGIC to Mrs Hamilton and that it be paid on an indemnity basis

[54] In providing the reasons for his decision in ordering AGIC to pay costs to Mrs Hamilton on an indemnity basis, the single judge stated:

> "[11] It is apparent to me that the submissions before Simmons J was a desperate attempt by [AGIC] to avoid execution of the interim costs certificate and thereby to thwart the order of this court. It is therefore my view that it ought to be required to pay the costs of this application on an indemnity basis…"

[55] In relation to this issue concerning the costs of the application before the single judge, Mr George submitted, on behalf of AGIC, that the single judge was wrong in his decision to order that AGIC pay costs to Mrs Hamilton on an indemnity basis in circumstances where AGIC "did what every litigant must, as a matter of policy, be

entitled to do, namely, to advance a reading of legal text which favours that litigant". AGIC, he said, was raising "a genuine question of interpretation".

[56] Mr George noted that where there is a slip or error on the part of the court, which the court is called upon to correct, this cannot be the fault of either party and the authorities have shown that the appropriate costs order ought to be no order as to costs. He relied upon the cases of **Weir v Tree** and **American Jewellery** to support this submission. Mr George, however, further submitted that if it is to be accepted that the single judge had jurisdiction to hear the application and make the clarification orders, then the appropriate costs order was one in favour of AGIC. He took this stance on the basis that where a party approaches a court to clarify an order, which that party itself says is clear, as in the instant case, costs should go against the party making the application. In effect then, his argument is that Mrs Hamilton should bear the costs burden.

[57] In countering the arguments of AGIC, Mr Beswick, on behalf of Mrs Hamilton, submitted that Mrs Hamilton "is entitled to indemnity costs as AGIC have pursued this appeal which is, to put it most charitably, thin and, is entirely far-fetched". Mr Beswick argued that it was the "frivolous objections" of AGIC and the "unjustified and underhanded classification" of the judge's orders as musings, which caused the application for clarification to be made. He submitted that the actions by AGIC are so "patently unreasonable", and the orders of the single judge were so "obviously clear", that the objections by AGIC taken in the Supreme Court were "to a high degree unreasonable", and, therefore, the single judge was correct in awarding indemnity costs against AGIC. In support of these submissions, counsel relied on the cases of **Fitzpatrick Contractors Ltd v Tyco Fire & Integrated Solutions (UK) Ltd** [2008] EWHC 1391 (TCC), and **Three Rivers District Council and others v Bank of England** [2006] EWHC 816 (Comm) ('**Three Rivers**').

[58] I have found the argument advanced by AGIC very difficult to rationalize. Though Mrs Hamilton has always maintained that the stay orders were unambiguous,

AGIC, by raising the objections that it did and by taking the stance that it took before Simmons J, had left Mrs Hamilton no choice but to seek clarification or direction from the single judge who made the orders, the interpretation of which was in issue. It is, therefore, quite odd that counsel for AGIC, in the face of the strong challenge they pose to the meaning of the judge's orders and his intention, are now arguing that Mrs Hamilton's application was a waste of time and ought to have been dismissed with costs awarded against her. For them to maintain that the single judge had included as an order of the court what was, to them mere musings, would have necessitated some action on the part of Mrs Hamilton to safeguard the benefit to her of the order regarding the interim costs certificate. She succeeded in securing the single judge's ruling, which accorded with the meaning she had ascribed to the orders from the very start. Therefore, it was the action of AGIC, which led to the application before the single judge, and, in the end, it failed in its contention that the execution of the interim costs certificate was stayed pending the determination of the appeal.

[59] Therefore, even though the court in previous cases in which clarification of orders was sought might have considered making no order as to costs of those applications, it was open to the single judge to exercise his discretion to award costs in favour of Mrs Hamilton in the particular circumstances of the case as he deemed just. There is nothing to indicate that he failed to exercise his discretion judiciously as he was required to do. There is thus no basis for this court to interfere with the order that AGIC should pay Mrs Hamilton's costs of the application.

[60] The final but related question that now arises for determination is whether the single judge erred in awarding costs against AGIC on an indemnity basis. The single judge had exercised his power pursuant to what he referred to as "Practice Direction dated 1 February 2018 issued by the Chief Justice of Jamaica" ('the 2018 Practice Direction') This Practice Direction was promulgated by The Jamaica Gazette Extraordinary dated 1 February 2018 under the title "Practice Direction on the Assessment of Costs". Paragraphs 10 to 12 make provision for the assessment of costs on an indemnity basis.

[61] Paragraph 10 of the 2018 Practice Direction states that where the court assesses costs on an indemnity basis, it will not allow costs which have been unreasonably incurred or are unreasonable in amount and will only allow costs which are reasonable having regard to the matters in issue. It then provides in para. 11 that where costs are to be assessed on the indemnity basis, the paying party has the burden of establishing that the costs claimed were unreasonably incurred or were unreasonable in amount. It also directs attention to rule 65.17(3) of the CPR, which sets out factors the court must consider when assessing costs (para. 12). Those factors include the conduct of the parties before as well as during the proceedings. Accordingly, the single judge was not in error when he invoked the provisions of the 2018 Practice Direction as he saw fit.

[62] Additionally, in **Three Rivers**, Tomlinson J at para. 25, in summarising the principles to be applied in awarding costs on an indemnity basis, stated, in so far as is relevant:

> "25. …I have already referred to the guidance given by Lord Woolf in the Excelsior case as to the circumstances in which an indemnity order may be appropriate - where there is some conduct or some circumstance which takes the case out of the norm. I agree with the Bank that the authorities, including *IPC Media Ltd v. Highbury Leisure Publishing Ltd* [2005] EWHC 283 (Ch)(Laddie J), *Cambridge Antibody Technology Ltd v. Abbot Biotechnology Ltd* [2005] EWHC 357 (Ch)(Laddie J), *Amoco (UK) Exploration Co v. British American Offshore Ltd* [2002] BLR 135 (Langley J) and *Cepheus Shipping Corporation v. Guardian Royal Exchange Plc* [1995] 1 LL Rep. 647 (Mance J) demonstrate that the following principles should guide the Court's determination whether the Claimants should be required to pay the bank's costs of the action on an indemnity basis: -
>
> (1) **The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.**
>
> (2) **The critical requirement before an indemnity order can be made in the successful defendant's favour is that there must be**

some conduct or some circumstance which takes the case out of the norm.

(3) **Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an a fortiori ground, but rather unreasonableness**.

(4) The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, **as well as whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations**…" (Emphasis added)

[63] His Lordship proceeded to enumerate some circumstances that he said would take a case out of the norm and justify an order for indemnity costs. He identified one such circumstance that could be applied loosely to this case. The circumstance identified by his Lordship is that where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails. The single judge evidently formed the view that AGIC's claim in the court below regarding the meaning of the stay orders, that led to the application before him, was opportunistic – it being, in his words, "a desperate attempt to avoid the execution of the interim costs certificate and thwart the orders of the court". This must be taken to mean that he found unreasonableness in the stance taken by AGIC and the objection it pursued. Evidently, this is an inference he drew from the conduct of AGIC or other primary facts. The drawing of an inference is tantamount to a finding of fact. This court is constrained to accept his conclusion unless it can be shown that he was plainly wrong. This has not been established by AGIC.

[64] Therefore, in reviewing the orders of the single judge, which was based on the exercise of his discretion, the court must apply the standard of review laid down by the well-known authorities of **Hadmor Productions Limited v Hamilton** [1982] 1 All ER

1042 and **The Attorney General of Jamaica v John Mckay** [2012] JMCA App 1. On the basis of those authorities, it is not open to the court to interfere with the exercise of the single judge's discretion regarding the award of costs on the mere basis that the court would have exercised its discretion differently. To interfere with the exercise of his discretion, the court must be satisfied that he made an error of law; misunderstood the facts or inferences from those facts, which have been proved to be demonstrably wrong; or his decision is wholly irrational. Again, AGIC has failed to demonstrate that this is the case.

[65] When the applicable standard of review is applied to the single judge's decision, I see no reason to hold that the single judge was demonstrably wrong in his observations and conclusions relating to the conduct of AGIC in the court below that led to the filing of Mrs Hamilton's application before him. Having chosen to take that route to interpret the orders in the way it did, which include suggesting that a critical order of the court was the judge's 'musings', AGIC was taking a high risk and should not be complaining now about an adverse indemnity costs order.

[66] In my opinion, there is no justifiable basis to interfere with the single judge's order that costs be paid by AIGC on an indemnity basis. Accordingly, the costs order should be upheld.

Conclusion on AGIC's application

[67] I would conclude as follows: the single judge had the power to clarify the stay orders he made, pending appeal; the clarification orders did not amount to a variation of the stay orders; and he did not err in awarding indemnity costs to Mrs Hamilton.

[68] In the premises, I would hold that AGIC's application for the setting aside of the single judge's clarification orders should be refused.

Costs of the applications

[69] It is noted that both AGIC and Mrs Hamilton failed to move the court to grant the orders sought by them on their respective applications. However, it must be admitted that Mrs Hamilton's application to strike out AGIC's application, although improperly and unnecessarily made, had not detained the court or AGIC to any appreciable extent.

[70] I find, on the other hand, that at the end of the day, AGIC has turned out to be the bigger loser in these proceedings, as it has not succeeded in its substantial challenge brought against the relevant orders of the single judge. Whether or not Mrs Hamilton had made an application for striking out, the outcome for AGIC would have been the same. The application to this court to set aside the clarification orders of the single judge was hopeless. Although, I would not go as far as to say the same of the complaint regarding the issue of the award of costs on an indemnity basis, AGIC was, nevertheless, unsuccessful as it could point to nothing in the exercise of the single judge's discretion that was improper in law to warrant the intervention of the court.

[71] Looking at the proceedings in the round, including the relative complexity of the issues raised on the applications, the substance of the submissions made in relation to them, and the relative success of the parties, I form the view that AGIC should pay Mrs Hamilton's costs of its application to this court (Application No 284/2018).

[72] I would refuse to grant the order sought at para. 3 of Mrs Hamilton's application (Application No COA2019APP00001) that costs be assessed on an indemnity basis. I would also refuse the application that special costs certificates be issued for two counsel and one instructing counsel on this application. Having regard to rule 65.17 of the CPR, I see no basis to make such an order.

[73] I would also hold that there should be no order as to costs regarding Mrs Hamilton's application to strike out. The two applications substantially overlap and so nothing new was raised by AGIC in responding to that application and, in any event, it failed in its application to set aside the orders of the single judge.

[74] I would propose that my findings and recommendations above as to the disposal of the two applications and the award of costs be expressed in the final orders of this court.

STRAW JA

[75] I have read the draft judgment of McDonald-Bishop, JA. I agree with her reasoning and conclusion and have nothing to add.

FOSTER-PUSEY JA

[76] I, too, have read in draft the judgment of McDonald-Bishop JA and agree with her reasoning and conclusion. There is nothing I could usefully add.

MCDONALD-BISHOP JA

ORDER

1. The application by Advantage General Insurance Company (AGIC), to set aside order nos 2 and 3 of the order of Brooks JA made on 18 December 2018 (Application No 284/2018), is refused with costs to Mrs Hamilton to be agreed or taxed.

2. Mrs Hamilton's application for AIGC's application to be struck out as an abuse of the process of the court, for indemnity costs and special costs certificates (Application No COA2019APP00001) is refused with no order as to costs.