JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2020CV0043

APPLICATION NO COA2020APP00213

BETWEEN	**ALAN DEANS**	**APPLICANT**
AND	**PATRICIA DEANS**	**RESPONDENT**

APPLICATION NO COA2021APP00001

BETWEEN	**PATRICIA DEANS**	**APPLICANT**
AND	**ALAN DEANS**	**RESPONDENT**

Mrs Symone Mayhew QC and Ms Ashley Mair instructed by HeywoodBlake for Mr Alan Deans

Mrs Caroline Hay QC and Ms Christan-Marc Matthis instructed by Caroline P. Hay for Ms Patricia Deans

23 March and 22 April 2021

IN CHAMBERS

STRAW JA

[1] There are two applications before me for consideration. Firstly, there is the application for security for costs filed by the respondent to the appeal, Alan Deans ("Mr Deans") on 1 December 2020 which was assigned application number COA2020APP00213. Secondly, there is the application for a stay of taxation proceedings which was commenced by Mr Deans in the Supreme Court, pending the determination of

the appeal. This application, assigned application number COA2021APP00001, was filed 5 January 2021 and is supported by an affidavit sworn to by the appellant, Ms Patricia Deans ("Ms Deans") filed on the same day.

Background

[2] By way of background, the appeal (filed 16 June 2020) arises from a judgment entered in favour of Mr Deans on 6 May 2020 along with the customary order for costs. The following undisputed facts can be gleaned from the written reasons for judgment of J Pusey J:

> (i) The parties are siblings, two of six children born to their mother ("the deceased") who died on 24 December 2014;
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> (ii) The deceased acquired two properties in the parish of Saint Andrew, the only one which is relevant is the Gilmour property;
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> (iii) Prior to the deceased's death, a will was prepared by Mr Deans (an attorney-at-law) which provided that Ms Deans would receive the Gilmour property absolutely; and
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> (iv) The will was never signed and as such the deceased died intestate and, accordingly, her estate fell to be distributed among her six children pursuant to the Intestates' Estates and Property Charges Act.

[3] The competing contentions may be summarised thus. Ms Deans filed a claim in the Supreme Court seeking to recover damages for negligence against Mr Deans for failing to have the will promptly executed by their mother before her death, bearing in mind that the deceased was diagnosed with a terminal illness. The learned judge described Ms Deans as an "intended disappointed beneficiary".

[4] Mr Deans denied being negligent, rather he contended that he prepared the will and took it to his mother several times for execution and that she gave excuses as to why she did not sign it. Further, he denied that a lawyer-client relationship existed between himself and his mother and that there was an implied retainer. He asserted that there was only a domestic arrangement.

[5] The learned judge ultimately found that there were no circumstances in which she could infer that an implied contract of retainer existed, thereby giving rise to any liability. It was held that a domestic relation was evident of a "good son" assisting his ageing mother and there was no evidence of any act or omission that amounted to negligence (see paragraphs [88] of the reasons for judgment).

The application for security for costs – COA2020CV0043

[6] Mr Deans seeks the following orders:

> "1. The Appellant/Respondent [Ms Deans] give security for the Respondent/Applicant's [Mr Dean's] costs of defending the appeal in the amount of Three Million Dollars ($3,000,000.00) plus General Consumption Tax within thirty (30) days of the Order hereof.

2. That the said sum be paid into an interest-bearing account in the names of Heywood Blake and Caroline P. Hay to be held until trial of this action or further order of the Court.

3. The Appeal be stayed until the payment of the amount ordered in paragraph one.

4. That if security for costs is not provided within the said thirty (30) days in the manner specified in this Order, the Appeal be struck out.

5. Costs be costs in the Appeal.

6. Such further and other order(s) and/or directions as this Honorable Court deem(s) just."

[7] The grounds on which Mr Deans is seeking the above orders are as follows:

"1. Pursuant to Rule 2.11(1)(a) of the Court of Appeal Rules 2002 ('the CAR'), a single judge of appeal is empowered to make orders 'for the giving of security for any costs occasioned by an appeal'.

2. Additionally, Rule 2.12(3) of the CAR states that in deciding whether to order a party to give security for the costs of the appeal, the court must consider –

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

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

3. In accordance with Rule 2.12(2) of the CAR, a written request for security for costs has been made to the Appellant/Respondent [Ms Deans] but she has not given such security.

4. The Appellant/Respondent [Ms Deans] is unlikely to be able to pay the costs of the appeal if ordered to do so.

5. The Application has been made promptly as a date for the appeal has not yet been set.

6.The Respondent/Applicant [Mr Deans] has a good prospect of successfully defending this appeal.

7. The above orders are necessary for the just, fair and effective disposal of these proceedings."

[8] In his supporting affidavit filed on 1 December 2020, Mr Deans also contended that:

(i) the grounds of appeal largely relate to the factual findings of the learned judge and are unlikely to be overturned on appeal (paragraph 6);

(ii) Ms Deans' attorney-at-law admitted (in a letter dated 10 September 2020, which was exhibited) that Ms Deans would be unable to provide the costs of the appeal and contended that the payment of security would stifle the appeal (paragraph 8);

(iii) He has incurred significant expenses (stated as $14,308,790.00 in the bill of costs filed) in defending the claim and estimated that it was likely that he would incur no less than $3,442,375.00 to defend the appeal (a draft bill of costs was exhibited) (paragraphs 10 and 12); and

(iv) Ms Deans has no assets in the jurisdiction of which he is aware, save for her one-sixth interest in the Gilmour property which would not exceed $1,700,000.00 in value (paragraph 15).

[9] In response, Ms Deans filed an affidavit on 5 January 2021. In this affidavit, she detailed the merits of her appeal. Her position is that the issues raised on appeal have a

real prospect of success on appeal. To that end, she noted that the learned judge failed to demonstrate why she accepted Mr Dean's evidence in relation to whether the will was read to the deceased over that of the caregiver, who had no interest to serve. There was no explanation as to why Mr Deans was accepted as a credible witness. There is also a complaint that the fairness of the trial was compromised insofar that, the learned judge unreasonably interfered and prevented her attorneys-at-law from adducing evidence critical to the issue of whether there was an implied contract of retainer and whether the conflict of interest Mr Deans found himself in, explained why he did not present the will to the deceased for signing before her death.

[10] There was also a complaint that the learned judge has yet to confirm the verbatim notes of trial taken by her attorneys-at-law, which was sent to the Registrar of the Supreme Court and Mr Deans' attorneys-at-law have not responded to a request to agree on same.

[11] Ms Deans also asserted that her complaint in tort was not addressed; that another issue that was not resolved was whether Mr Deans dispelled the presumption of undue influence and discharged the obligation on himself to advise the deceased to get independent advice, as he stood to personally gain under her will.

[12] On the issue of her assets within the jurisdiction, Ms Deans made reference to her one-sixth interest in the Gilmour property as well as the other property located at Roehampton Close, to which she was entitled under the deceased's estate. She also noted

that the latter property was sold by Mr Deans in 2018 and he has refused to disburse the net proceeds of sale to her or any of the other beneficiaries.

[13] Ms Deans admitted that an order for her to pay security for costs, will likely have the effect of preventing her from pursuing the appeal. She characterised this request as "oppressive conduct" from Mr Deans, since this would have the effect of forcing her to face costs totalling more than $17,000,000.00 in respect of the proceedings at the Supreme Court and the Court of Appeal at the same time. She also admitted that she is presently indebted to her own attorneys-at-law who have permitted her to make small payments on account over long periods and that this is the only way for her to pursue, what she believes to be, the proper outcome.

Submissions on behalf of Mr Deans

[14] Mrs Mayhew QC, made her submissions by reference to rules 2.11(1)(a) and 2.12 of the Court of Appeal Rules ("CAR") as well as the principles from **Cablemax Limited and Others v Logic One Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 91/2009, Application No 203/2009, judgment delivered 21 January 2010, which were adopted by Brooks JA (as he then was) in **Continental Baking Co Ltd v Super Plus Stores Ltd and Tikal Ltd** [2014] JMCA App 30 and approved of by Morrison P in **Jamaica Edible Oils & Fats Co Ltd v MSA Tire (Jamaica) Limited and anor** [2018] JMCA App 8.

[15] Reference was also made to three of the principles from **Cablemax**, namely that (1) the possibility that a party from whom security for costs is sought, such as Ms Deans,

will be deterred from pursuing her appeal by an order for security for costs is not without more a sufficient reason for not ordering security; (2) in considering an application for security for costs, the court must carry out a balancing exercise – weighing the possibility of injustice to the appellant and respondent; and (3) before the court refuses to order security on the ground that it would unduly stifle a valid appeal, it must be satisfied that in all the circumstances, it is probable that the appeal would be stifled.

[16] It was pointed out that there was compliance with rule 2.12(2) of the CAR, in that there was a written request made to Ms Deans for security for costs and that letter, together with the response, were exhibited. In respect of the timing of the application, it was submitted that the application for security for costs was made promptly as no date has been set for the hearing of the appeal.

[17] Specific reference was made to rule 2.12(3)(a), which provides that the court must consider the likely ability of Ms Deans to pay the costs of the appeal, if ordered to do so. Mrs Mayhew contended that by virtue of this rule, impecuniosity is an issue that the court is required to consider. She commended the dictum of Brooks JA (as he then was) at paragraph [21] of **Disciplinary Committee of the General Legal Council v Oswald James** [2014] JMCA App 3, in support of her contention that at the appellate stage, impecuniosity is not sufficient to resist an order for security. Rather, it confirms the risk that the respondent will not be able to recover his costs and as a general rule, the appellate court will grant an order for security for costs of an appeal in circumstances where the appellant is impecunious and it seems likely that if he fails in his appeal, the

respondent would experience considerable delay and be put to unnecessary expense, to recover his costs of the appeal.

[18] Further, it was submitted by reference to **Oswald James**, that since this is the appeal, the court should be more stringent, as Ms Deans has had the benefit of a judicial pronouncement and that this court has wider powers than the Supreme Court (under part 24 of the Civil Procedure Rules).

[19] In circumstances where Ms Deans has offered no rebuttal, by way of affidavit, to the essential assertion that if her appeal is unsuccessful, she will be unable to pay the costs of the appeal, it was submitted that this is an appropriate case for the award of security for costs.

[20] In addressing whether Ms Deans' appeal will be stifled, it was submitted that it is highly likely that Ms Deans will be unable to satisfy the bulk of the costs which have already been incurred. Mr Deans has already incurred significant expenses in defending the claim ($14,308,790.00) and will incur further expenses in resisting the appeal (estimated at $3,441,375.00). Despite the pending appeal, it was contended that Mr Deans is entitled to his costs in the Supreme Court and the probability that Ms Deans will be deterred from pursuing her appeal as a result of an order for security, is not without more, a sufficient reason for not making the order. It was submitted that the court has complete discretion and should assess the relevant circumstances, including that the risk of injustice to Mr Deans significantly outweighs any potential injustice to Ms Deans. Lastly, it was submitted that the amount of $3,000,000.00 was considered, in all the

circumstances, to be a relatively modest requirement in **Jamaica Edible Oils & Fats Co Ltd**.

[21] Turning to the merits of the appeal, it was submitted that Ms Deans has not demonstrated that she has a meritorious appeal, as the bulk of the grounds of appeal do not raise any points of law, but rather seek to attack the factual findings made by the learned trial judge in respect of every aspect of the evidence and also, the conclusion she drew from those findings. It was submitted that the appellate court will rarely attempt to interfere with the findings of fact from trial judges. Reliance was placed on **Dr Veon Wilson v Victor Thomas** [2020] JMCA Civ 28 which referred to the principle from **Watt Thomas v Thomas** [1947] AC 484.

[22] Mrs Mayhew contended that the learned judge correctly distilled the issues based on Ms Deans' statement of case. Her claim was for breach of professional negligence arising from a contract of retainer and as such the learned judge was correct to firstly settle whether there was a contract of retainer. Having found that there was no implied retainer, that could have been the end of the matter, however, the learned judge proceeded to consider whether there was any negligence in the execution of such a contract of retainer (if one had existed). There was no conflation of the issues and the learned judge duly considered Ms Deans' complaint in tort.

[23] Although not an express requirement under the CAR, it was submitted that the court should consider that Ms Deans is ordinarily resident outside the jurisdiction. This is relevant insofar that, if no order for security for costs is made and Mr Deans is successful

in defending the appeal, it will be very difficult and expensive for him to enforce any costs order against Ms Deans who resides in the USA. This is particularly so, since Ms Deans has no assets in the jurisdiction, save for her one-sixth interest in the properties which form part of the deceased's estate, which in any event, is substantially less than the costs incurred in defending the claim in the Supreme Court.

Submissions on behalf of Ms Deans

[24] Mrs Hay QC generally agreed with the applicable rules and law cited by Mrs Mayhew and in particular the principles from **Cablemax**. It was submitted that reliance was being placed on the application of discretion of the court, in light of all relevant circumstances. These relevant circumstances included the fact there is an active pursuit of taxation proceedings in the Supreme Court as well as an application for security for costs in this court, which would require Ms Deans to pay $17,000,000.00 in total. Further, Mrs Hay contended that if Ms Deans were to prevail in her appeal, it is unlikely she would be able to recover those sums ordered to be paid in the court below. She made reference to the caveat which was lodged by Ms Deans and contended that, if the caveat against the Gilmour property is warned, that property can be sold and net proceeds distributed amongst the six beneficiary children. She contended that there would be no way to recover and return those funds to her.

[25] On the issue of impecuniosity, it was submitted that the candour of Ms Deans, a non-corporate party, admitting embarrassing financial circumstances, ought not by itself, to be used against her. The application for security for costs can be refused even for a poor person, as the court is concerned to do justice. Reference was made to **Elita**

Flickenger v David Preble et al [2012] JMCA App 3 and in particular, the dictum of Morrison JA (as he then was) wherein it was expressed that in the exercise of its powers under rule 2.12(3) of the CAR, there are no words restricting the generality of the discretion exercised by the court. It was submitted that despite inadequate affidavit evidence, the court considered the hardship to the appellant in that case and reduced the sum awarded.

[26] Mrs Hay submitted that the ability of any court to consider the effect of hardship on a party, who needs relief, straddles other jurisdictions without the need for specific reference to procedural rules. By way of example, she referred to freezing order cases, where a party is too poor to offer the required undertaking as to damages and the court still granted the relief. Reference was made to the Supreme Court decision of **Doris Lightbody et al v Howard Lightbody et al** (unreported), Supreme Court, Jamaica Suit No 2005 HCV 2305, judgment delivered 27 January 2006, as well as the English Court of Appeal case of **Allen v Jambo Holdings Limited** [1980] 1 WLR 1252, which was applied in **Sun Fish Hatcheries Jamaica Limited v Paradise Plum Limited** (1990) 27 JLR 348. It was contended that these cases provide examples, where discretion takes into account the need for relief, without the party being able to pay for it and that there seems to be no reason why the principle ought not to apply to cases such as the instant one.

[27] It was submitted that Ms Deans has candidly set out her circumstances, that she is without the means to pay what is being aggressively sought against her in two different

courts. Therefore, an order for security would likely prevent a proper appeal. Counsel stated that there is no evidence to contradict her assertions on this score and it is probable that in all the circumstances, her appeal would be stifled. On the other hand, Mr Deans has not said that he cannot meet his costs. He has not set out his means or demonstrated any similar challenge, were the orders to be refused. He has also not indicated, why he could not seek orders for the satisfaction of his costs, from Ms Dean's share in the estate under his management. Counsel stated that this was how he responded to the failed application filed against him by another sister, Mrs Carole Deans Campbell.

[28] It was accepted that this application is made by a party who succeeded at trial. However, it was submitted that the exercise of discretion remains a balancing act, firmly within the purview of the court and that there must be some nuanced differences in approach between corporate and non-corporate persons. She submitted that this is recognised by the Companies Act and the cases have often shown stricter approaches for corporate persons. She referred the court to the case of **Speedaways Jamaica Ltd v Shell Company (WI) Ltd and another** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 66/2001, judgment delivered 20 December 2004 cited in **Oswald James** as one such.

[29] It was acknowledged that in **Oswald James**, the court found the approach in **Speedaways** to be correct, that once a party has concluded a trial, it ought to be more difficult to prevail at appeal against such an order. However, the application for security for costs failed because the GLC had not satisfied the first hurdle, which was to establish

that Mr James could not pay the costs. Having found that, the court did not need to press further to balance anything and, as such, did not need to demonstrate any approach to impecunious parties, which could offer assistance here.

[30] In relation to the merits of the appeal, it was submitted that Ms Deans' appeal has a realistic prospect of success and it is not accurate to "train" the appeal along the lines of primarily complaining of findings of fact. Mrs Hay provided the following summary/characterisation of the grounds of appeal:

> "a) Grounds A-C complain about the issues relating to implied contract and the **Hedley Byrne** duties in tort;
>
> b) Grounds D, G and H complain about the improper way the Court went about arriving at its findings along with misdirections and their effect on the findings – by taking extraneous matters into consideration, misquoting evidence and thus misdirecting itself, occasioning substantial miscarriage of justice;
>
> c) Grounds E and F complain of the manner in which the Court handled the all-important issue of credit, its failure to warn itself when treating with the evidence of witnesses with interest to serve and its omission to explain the basis of rejecting the evidence of a witness with no interest to serve whose evidence is given on the same issue;
>
> d) Grounds I and J complain about the way in which the Court treated with important evidence (either by according insufficient weight or failing to identify weaknesses) on which certain critical presumptions arise. If not rebutted, the presumptions stand and the appeal complains of the Court's failure to detect or treat with those matters of law;
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> e) Ground K complains about the failure of the Court to treat with the issues of law that arise when the Attorney assumes the responsibility to offer a testamentary service and the duty on him to displace the suspicion of impropriety when he stands to benefit from the terms of the Will;

> f) Ground L is a classic complaint of unfairness by way of descent into the arena. On questions concerning the issues of conflict of interest, Ground L(v) of the appeal complains that the learned trial Judge so excessively interfered in the Respondent's cross examination that she blocked the adducing of the evidence on the very issues discussed in **Wintle v Nye**, those obligations arising **by operation of law** on the facts of the case before the Court."

[31] It was submitted that, having deprived herself of the opportunity to receive relevant evidence, the learned judge then went on to make adverse findings on some of those very points. Given that the notes of the proceedings have not been finalized, Ms Deans is in the invidious position of not being yet able to place before this court, what happened at the trial. Mr Deans has refused to participate in this effort, while complaining about the fact that he is facing an appeal. Queen's Counsel submitted also, that this means there is possibly still much to be done to settle the basis of the appeal and in his own submissions in the appeal, Mr Deans indicates his need for the notes of evidence to complete his response to the appeal.

[32] It was further submitted that a party cannot repel the review of a court's handling of a trial by simply waving the "facts found flag". The way in which those facts are approached and the basis on which they are distilled, would be critical to any consideration as to whether the advantage of seeing and hearing the witnesses is, in fact, determinative.

[33] It was contended that, while some findings of fact are challenged, it is not accurate to suggest that Ms Deans has not properly challenged the basis on which the learned judge arrived at the findings. Queen's Counsel conceded that factual findings are difficult to overcome, but submitted that an appellate court cannot ignore misdirections,

mistreatment of evidence or failure to apply warnings, which had the court done, it might have come to a different conclusion.

[34] Mrs Hay stated that one question of fact of critical importance, was whether Mr Deans could be believed that he brought the will to his mother whilst she was in the hospital. The learned judge rejected the evidence of the caregiver on this point, without warning herself, at any stage, that Mr Deans had an interest to serve. He admitted in evidence that he would fare better if his mother had no will. It was submitted, therefore, that it was critical for the learned judge, not only to warn herself on the treatment of his evidence, but also to explain why she rejected the other witness, who had no interest to serve, It was contended that, a trial judge sitting alone, is not permitted to simply declare whom she believes without more, on all important issues in the case; that she is required to demonstrate how she arrived at the position that she did.

[35] Had the required warnings been given, it was submitted, the result could have been different, because it would have been clear that there was no reliable evidence of Mr Deans acting in the manner that has been asserted. Considering that he knew his mother was terminally ill, the question of law would then have been, what duty did he have, to act promptly to secure the signature of his mother, who was still able to sign her name up to two weeks before her passing. Further, if the appeal reveals an entirely undermined process at trial, this court could order a retrial before a different judge or make its own determination, if appropriate.

[36] On the issue of Ms Deans being resident outside of the jurisdiction, it was submitted that she should not be treated as if she has no assets within the jurisdiction. It was argued that Mr Deans is the cause of Ms Deans' conundrum. Were it not for his refusal to honour their mother's wishes and present her with the will before her demise, Ms Deans would have 100% of the interest in the Gilmour property. As it now stands, she has one-sixth interest and is entitled to one-sixth share also in the Roehampton property which has been sold. As such, she is not without assets within the jurisdiction, despite the fact that Mr Deans has refused to account to her for the benefit.

[37] For this and the other reasons advanced, it was submitted that the application for security for costs should be refused.

Principles relevant to security for costs

[38] In addition to rule 2.11(1)(a) of the CAR which empowers a single judge of this court to make orders for the giving of security for any costs of, or occasioned by an appeal; rule 2.12 provides:

> "**Security for costs of appeal**
>
> 2.12 (1) The court may order -
>
> (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 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 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."

[39] It is noted that Mr Deans made a prior written request as required by rule 2.12(2).

[40] In **Jamaica Edible Oils & Fats Co Ltd**, Morrison P, at paragraph [27], referred to the adoption by Brooks JA in **Continental Baking Co Ltd v Super Plus Stores Ltd and Tikal Ltd**, of the following principles relevant to this application set out at paragraph [14] in the earlier decision of **Cablemax Limited and Others v Logic One Limited**:

"(i) The court has a complete discretion whether to order security and accordingly it will act in the light of all the relevant circumstances.

(ii) The possibility or probability that the party from whom security for costs is sought will be deterred from pursuing its appeal by an order for security is not without more a sufficient reason for not ordering security.

(iii) In considering an application for security for costs, the court must carry out a balancing exercise. That is, it must weigh the possibility of injustice to the appellant if prevented from pursuing a proper appeal by an order for security against the possibility of injustice to the respondent if no security is ordered and the appeal ultimately fails and the respondent finds himself unable to recover from the appellant the costs which have been incurred by him in resisting the appeal.

(iv) In considering all the circumstances, the court will have regard to the appellant's chances of success, though it is not required to go

> into the merits in detail unless it can be clearly demonstrated that there is a high degree of probability of success or failure.
>
> (v) Before the court refuses to order security on the ground that it would unduly stifle a valid appeal, it must be satisfied that, in all the circumstances, it is probable that the appeal would be stifled.
>
> (vi) In considering the amount of security that might be ordered the court will bear in mind that it can order any amount up to the full amount claimed, but it is not bound to order a substantial amount, provided that it should not be a simply nominal amount.
>
> (vii) The lateness of the application for security is a factor to be taken into account, but what weight is to be given to this factor will depend upon all the circumstances of the case."

[41] I must, therefore, consider the ability of Ms Deans to pay the costs of the appeal and whether the factual circumstances support such an order being made. This, of course, will be conducted within the framework of the propositions adopted by Brooks JA in **Continental Baking Co Ltd**. There is no issue as to the timing of the application, as a date for the case management hearing has not yet been set (see paragraphs [17] and [22] of **Pearnel Charles Jnr and anor v Snively Junior Barrett** [2020] JMCA App 1 and principle (vii) of **Cablemax**, set out at paragraph [40]).

[42] In this process, a balancing exercise will be conducted as to the possibility of injustice to either side and an essential issue will be the consideration as to Ms Dean's likelihood of success on appeal.

[43] Mr Deans has exhibited an estimated bill of costs for the defence of this appeal in the amount of $3,441,375.00. Ms Deans has conceded that she is unable to pay this sum at this time; and that this is exacerbated by the bill of costs filed against her in the court below in the amount of $14,308,790.00. Mrs Hay has asked that, in my unfettered

discretion, I approach this issue by (i) having regard to the fact that Ms Deans is a non-corporate person; and (ii) adopting the approach of the courts in dealing with injunctions as in **Allen v Jambo Holdings Limited** which was applied in **Sun Fish Hatcheries Jamaica Limited v Paradise Plum Limited**.

[44] In **Sun Fish**, Orr J, in considering whether to take an undertaking as to damages from a plaintiff applying for an interlocutory injunction, stated, at page 351, that the authorities suggest that in general, a court will not deny a plaintiff an interlocutory injunction to which he would otherwise be entitled, simply because his undertaking as to damages would be of limited value.

[45] There are some points of differences, however, to be considered between the case at bar and **Sun Fish** as well as **Allen v Jambo** (which related to an application for a mareva injunction). The two latter cases were matters of first instance proceedings. Mr Deans, in this case, has been successful in the trial in the Supreme Court. Secondly, in the assessment as to whether an injunction ought to be granted, the court is weighing whether the applicant would otherwise be entitled to such an injunction. I am placing emphasis on the words used by Orr J to that effect. The issue of any undertaking as to damages would be determined subsequent to such a consideration. I am of the opinion that this would be similar to my assessment as to whether there is an arguable appeal. It is to be noted, in any event, that in **Sun Fish**, Orr J regarded it as a proper case to ask the plaintiff to fortify his undertaking, by paying a certain sum into court.

[46] Reliance on these authorities are not really helpful therefore to Ms Deans, neither is the fact that her appeal may be stifled if costs were ordered. However, I must take that fact into account in the balancing exercise of where the greater injustice would lie.

Likelihood/chance of success on appeal

[47] As previously mentioned, in considering whether it is just in all the circumstances to make the order, I must give sufficient weight to the likelihood/chance of success of the appeal. This assessment does not require that I go into the merits in detail (see principle (iv) of **Cablemax**, set out at paragraph [40] above).

[48] I commence by observing that the learned judge gave a very detailed judgment, considering the facts as well as the law. Mrs Hay has raised a multiplicity of grounds challenging this judgment. Her challenge in law, appears to be focused on the issue of the implied contract of retainer and whether Mr Deans was negligent in any duty of care in tort. The learned judge dealt with both these issues at paragraphs [52], [53], [56] to [58] and [77] of her judgment. She stated, at paragraph [53], that in relation to the issue of an implied retainer, an examination of the facts and circumstances were necessary. At paragraphs [59] to [71] she did so extensively.

[49] In relation to the issue as to whether Mr Deans owed a duty of care to both the deceased and Ms Deans, the learned judge did consider this, separately and apart from the issue of the implied retainer. This is evident at paragraph [77] of her judgment where she stated:

> "Even if I am wrong in finding that there is no retainer contract between the deceased and the defendant, the issue of whether the defendant was negligent has to be examined…"

[50] At paragraphs [78] to [85], the learned judge examined the factual circumstances and concluded at paragraph [88] that circumstances did not subsist from which she could infer that an implied contract of retainer existed. She also stated that "[a]bove all else there is no evidence of any act or omission that amounts to negligence".

[51] Mrs Mayhew is correct, therefore, that the issues which could give rise to any liability on Mr Deans' part are fact sensitive. She is also correct in her submission as to the applicable principles which govern the approach of this court in treating with the decision of the learned judge pertaining to her finding of facts (see **Watt Thomas v Thomas**, which has been referred to by a number of decisions of this court including **Dr Veon Wilson v Victor Thomas**). The court, at the hearing of the appeal, would be required to identify a mistake in the judge's evaluation of the evidence, that is sufficiently material to undermine her conclusions (see **D & LH Services Limited et al v The Attorney General and anor** [2015] JMCA Civ 65, and **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21).

[52] The other complaints in the grounds of appeal are mostly relevant to (i) the judge's assessment of the credibility of witnesses, (ii) misdirections and their effects on the findings, (iii) critical presumptions and (iv) whether the learned judge ought to have specifically warned herself that Mr Deans may have an interest to serve, as well as (v) complaints of the learned judge interfering with cross-examination being carried out by counsel for Mr Deans.

[53] For the most part, these issues can only be resolved by a perusal of the notes of evidence, which are not available at this time. In further consideration of the issues being advanced, however, I will make a brief observation regarding the complaint that the learned judge ought to have warned herself that Mr Deans was a party with an interest to serve. Based on paragraphs [82] to [85] of the judgment, it is clear that the learned judge did grapple with the issue, as to whether Mr Deans could have had any devious motives relevant to the failure of the deceased to sign the will. She concluded that the evidence did not support any such finding. It is not very apparent, therefore, whether a failure to warn herself, that Mr Deans may be a party to an interest to serve, would be sufficient to challenge the trajectory of the learned judge's findings.

[54] Further, there is another complaint that the learned judge accepted Mr Deans in preference to the caregiver, as the more credible witness but failed to state why she came to such a conclusion. This assessment related to whether or not Mr Deans had ever read the will to the deceased in the hospital. At paragraph [46] of the judgment, the learned judge noted, that counsel for Mr Deans had submitted that this particular aspect of the caregiver's evidence was never averred in the particulars of claim, neither was it in the witness statement and that it "seems concocted". If this was indeed omitted from the witness statement of the caregiver, it may have provided some basis for the trial judge, having seen and heard all the witnesses, to come to a conclusion as to who she found to be more credible in relation to this point.

[55] Further, the learned judge stated at paragraph [81] that she rejected the evidence of the caregiver that she was "present at all times" when Mr Deans visited the deceased and would have witnessed the will being read. The emphasis appears to be on whether the caregiver was always present on every opportunity Mr Deans would have had with the deceased. I also note that in the learned judge's assessment of the cases of both parties she made reference, at paragraph [78] of her judgment, to the fact that it was the evidence of Ms Deans that Mr Deans tried to leave the will with her, for signing by the deceased, on the day that she died. Certainly, it would have been open to the learned judge also to weigh the credibility of the witnesses in light of all the evidence that was before her.

[56] What is the end result of these deliberations? It is not my intention to, nor can I conduct any detailed review of the grounds of appeal. However, it seems to me that Ms Deans has not demonstrated that there are specific features of the evidence or conclusions arrived at by the learned judge that would cause me to conclude that there is any route to sustain an arguable appeal.

Possibility of injustice

[57] Having considered all the above, I now go on to consider the possibility of injustice between both parties in order to conclude the balancing exercise that is to precede any conclusion on this application. It would seem to me that the balance of injustice lies with Mr Deans. Ms Deans, as such, has potential costs of over $14,000,000.00 to face in the court below. If she loses this appeal there may be additional costs in the region of $3,000,000.00. She has not indicated how she would be able to meet these costs, except

that she does have a potential value of $1,700,000.00 in the Gilmour property, and, based on the oral submissions by Mrs Mayhew, she would have a further $2,000,000.00 (which was a roughly estimated value) due to her interest in the Roehampton property. Mr Deans would still be at risk to recover the substantial part of the costs stated above. Therefore, it is my conclusion, bearing in mind also my assessment as to the arguability of the appeal, that the application must be granted.

[58] However, in assessing what amount of costs she should be ordered to pay, I would have regard to her interest in the Gilmour property, which is the subject of the appeal. Mr Deans, as the administrator of the estate of the deceased, would have control in accessing these funds by legal redress at the appropriate time, therefore he is not left totally exposed. I would therefore order that Ms Deans pay the sum of $1,500,000.00 as security for the costs of the appeal.

The application for a stay of taxation proceedings - COA2021APP00001

[59] Ms Deans is seeking the following orders:

> "1. That all taxation proceedings commenced by the Respondent [Mr Deans] in the Supreme Court Claim Number 3013 [sic] HCV 04088 Patricia Deans v Alan Deans be stayed pending the determination of this appeal.
>
> 2. Costs to be costs in the Appeal.
>
> 3. Such further and other Order that this Honourable Court deem(s) just."

[60] The grounds on which Ms Deans is seeking the above orders are as follows:

> "1. Rule 2.14 of the Court of Appeal Rules, 2002 ('CAR') provides that unless so ordered by the Court below, or in this Court or a single Judge of this Court the filing of the appeal does not automatically operate as a stay of execution or of proceedings under the decision of the Court below.
>
> 2. Rule 65.16 of the Supreme Court Civil Procedure Rules ('CPR') provides that 'Taxation is not stayed pending an appeal unless the Court of [sic] the Court of Appeal so orders.'
>
> 3. That irremediable harm may be caused to the Appellant [Ms Deans] if no stay of taxation is ordered and there will be no similar detriment to the Respondent [Mr Deans] if a stay is not ordered.
>
> 4. That the Appellant [Ms Deans] will face undue hardship and oppression if the Order for a stay of the taxation proceedings is not granted.
>
> 5. The Appellant's [Ms Deans'] appeal has a realistic prospect of success."

[61] In support of her application, Ms Deans relies on much of what she has stated in her affidavit in response to Mr Deans' application for security for costs. This has been set out at paragraphs [9] to [13] above. She reiterates that if the taxation proceedings are not stayed and Mr Deans' application is granted, she would be required to pay the sum of $17,308,709.00, subject to allowances which may be afforded in consideration of the points of dispute filed.

[62] Ms Deans makes reference to her reasons set out in her previous affidavit for contending that she has an appeal with a realistic prospect of success, as well as the basis on which she says Mr Deans is acting unconscionably towards her. She states that she would be unfairly disadvantaged by Mr Deans' attempt to have her pay costs in two separate courts simultaneously and further states that this will cause her irremediable harm if the proceedings below are not stayed. Ms Deans doubts whether she will be able

to recover the taxation costs from Mr Deans, if she prevails in the appeal, because he has yet to remit her one-sixth share of the proceeds of sale from the Roehampton property, despite her request for same.

[63] Finally, Ms Deans stated that it is due to Mr Deans' conduct that she is left without 100% interest in the Gilmour property which would be an asset in the jurisdiction.

[64] On the other hand, Mr Deans opposes the stay of taxation proceedings. He states that there is no merit in Ms Deans' appeal and there will be greater prejudice to him if the order is granted than if it is refused.

[65] In relation to the appeal, Mr Deans repeats that Ms Deans' appeal largely relates to factual findings of the learned judge, which are not often overturned by this court. He states that the complaints of the learned judge's management of the trial are disputed and even if true, would not without more, result in any miscarriage so as to warrant the reversal of the judgment by this court.

[66] Mr Deans also repeats his entitlement to costs in the court below and states that he has already incurred significant expense in defending the claim ($14,308,790.00) and predicts that he will incur no less than $3,441,375.00 in responding to the appeal.

[67] Reference is made to the fact that Ms Deans disputed the bill of costs. As such, Mr Deans is of the view that her liability for costs should be determined, so that it can be settled or he can take steps to enforce the order. He also refers to Ms Deans' admission that she is unable to pay for the costs of the proceedings in the court below as well as

the current proceedings, if unsuccessful. Yet she continues to engage him in costly litigation.

[68] In relation to Ms Deans' ability to recover costs paid to him, Mr Deans states that he resides in the jurisdiction and has assets here, whereas Ms Deans does not and has no significant assets in the jurisdiction. He also responds to the allegations in relation to the distribution of the deceased's estate. He states that the estate has not yet been administered. This is in part due to issues relating to litigation. He reveals that in 2018, another sibling brought a separate claim against him in his capacity as administrator of the estate, for his removal as administrator. This action did not succeed but the court made orders, including that that claimant was to pay costs from her share in the estate and no distribution of the estate was to take place until all the assets were in, and the costs have not yet been taxed and paid. These costs were to be taxed on 11 March 2021. It is noted that no court order was exhibited in support.

[69] Mr Deans also referred to the fact that a caveat was lodged by Ms Deans on the Gilmour property, which he is seeking to discharge before any distribution can take place.

Submissions on behalf of Ms Deans

[70] It was submitted that irremediable harm would flow to Ms Deans and there is no equivalent prejudice to Mr Deans and the balance favours stay of taxation pending the appeal.

[71] Reference was made to **Raju Khemlani v Suresh Khemlani** [2019] JMCA App 17, where this court affirmed that the principal questions for consideration were whether

there was merit in the appeal and which order would create the least injustice (applying **Kenneth Boswell v Selnor Developments Company Limited** [2017] JMCA App 30 per Phillips JA). The three relevant questions to be asked being:

i) Is there a risk that irremediable harm may be caused to the respondent if a stay is ordered but no similar detriment to the appellant - if it is not, then no stay should be ordered;

ii) Is there a risk that irremediable harm may be caused to the appellant if no stay is ordered but no similar detriment to the respondent if a stay is not ordered then a stay should normally be ordered; and

iii) Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice.

Submissions on behalf of Mr Deans

[72] The essence of Mrs Mayhew's submissions is that, while Ms Deans has a right to appeal, Mr Deans is entitled to his costs. Although the evidence of his means was not before the court, this was not relevant. She contended that even if he were "the richest person", his exposure to costs is prejudicial to him and it would indeed be prejudicial, if he suffers an economic expense that he would be unable to recover.

[73] It was emphasised that sympathy for Ms Deans (or any party) could not be a determining factor, the court would have to weigh the injustice and when the reasons for

judgment is perused, it is clear that Ms Deans' prospects of success on appeal are quite slim. Accordingly, there will be greater prejudice to Mr Deans, if the order for a stay of taxation is granted, than if it is refused.

Principles relevant to a stay of execution

[74] Rule 2.11(1)(b) of the CAR states:

> "A single judge may make orders –
>
> ....
>
> (b) for a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal."

[75] The principles relevant to a grant of stay of execution was expressed by Morrison JA (as he then was) in **Channus Block and Marl Quarry Limited v Curlon Orlando Lawrence** [2013] JMCA App 16, at paragraph [10]:

> "[10] The jurisdiction of a single judge of appeal to grant a stay of execution is, as Phillips JA observed in **Reliant Enterprise Communications Ltd v Twomey Group and Another** (SCCA 99/2009, App 144 and 181/2009, judgment delivered 2 December 2003, para [43]) 'absolute and unfettered'. The starting point is, in my view, the well established principle that there must be a good reason for depriving a claimant from obtaining the points of a judgment. In deciding whether or not to grant a stay, this court has in recent times consistently applied the test formulated in **Hammond Suddard** and it is now well established that the applicant must show that he has an appeal with some prospect of success, and that he is likely to be exposed to ruin if called upon to pay the judgment. It is, in my view, essentially a balancing exercise, in which the courts seek to recognise the right of a successful claimant to collect his judgment, while at the same time giving effect to the important consideration that an appellant with some prospect of success on appeal should not have his appeal rendered nugatory by the refusal of a stay."

Discussion and findings

[76] In my consideration of whether it is just in all the circumstances to grant an order for security for costs, I took into account Ms Deans' likelihood of success on the appeal. This consideration is also relevant to this second application for a stay of taxation proceedings. In light of my conclusion, that I see no route to sustain an arguable appeal at this time, there is nothing which would cause me to conclude that Mr Deans should be deprived of the fruit of his judgment (see paragraph [15] of **Channus Block and Marl Quarry**). My assessment as to the risk of injustice being greater to Mr Deans, as determined in the application for security for costs, is also fortified by the fact that Ms Deans has no discernible source of income or assets in Jamaica, save for her interest in the estate of the deceased. This was estimated as $1,700,000.00 in the Gilmour property and $2,000,000.00 in the Roehampton property. I have already taken into consideration, the value of her interest in the Gilmour property in the application for security for costs.

[77] On the other hand, if Mr Deans were to lose the appeal, he is an attorney-at-law in this jurisdiction and there is nothing to indicate that Ms Deans would suffer irredeemable ruin in any attempt to recover her costs in the court below.

[78] The application for stay of execution relevant to the taxation proceedings is refused.

Order

The application for security for costs – COA2020CV0043

1) The application for security for costs filed on 1 December 2020 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 30 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 Heywood Blake and Caroline P Hay at a financial institution to be agreed on by the parties.

4) Upon the failure of the appellant 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.

The application for a stay of taxation proceedings - COA2021APP00001

1) The application for stay of taxation proceedings filed 5 January 2021 is refused.

2) Costs of the application to be costs in the appeal.