[2020] JMCA App 49

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NOS COA2019APP00045, COA2019APP00083 & COA2019APP00173

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**CHRISTOPHER EDWARDS**	**APPLICANT**
AND	**KEVIN BROOKS**	**1st RESPONDENT**
AND	**DAILIA BYFIELD**	**2nd RESPONDENT**

Kwame Gordon and Matthew Ricketts instructed by Samuda & Johnson for the applicant

Richard Reitzin instructed by Messrs Reitzin & Hernandez for the respondents

24 September 2019 and 27 November 2020

MORRISON P

[1] I have had the privilege of reading in draft the judgment prepared by my sister P Williams JA in this matter. I agree with her reasoning and her conclusions. There is nothing that I can possibly add to her comprehensive review of the issues which were before the court on these applications.

MCDONALD-BISHOP JA

[2] I, too, have read in draft the reasons for judgment of P Williams JA. I endorse them as reflecting my own reasons for joining in the decision of the court and there is nothing I could usefully add.

P WILLIAMS JA

[3] On 8 February 2019, Mr Christopher Edwards ('the applicant') filed a notice and grounds of appeal seeking to challenge the decision of Thomas J ('the judge') made on 20 December 2018, with reasons given in her written judgment in **Kevin Brooks v Christopher Edwards consolidated with Dailia Byfield v Christopher Edwards** [2018] JMSC Civ 167. On 11 February 2019 the applicant filed a notice of application seeking a stay of execution of that judgment, namely application no COA2019APP00045. On 12 April 2019, he filed another notice of application, application no COA2019APP00083, seeking (i) an order that the notice and grounds of appeal filed on 8 February 2019 be permitted to stand or, alternatively, that the time for filing be extended to 8 February 2019; and (ii) permission for the application for the stay of execution filed on 11 February 2019 to be heard by this court.

[4] On 19 August 2019, Kevin Brooks and Dailia Byfield ('the respondents') filed a notice of application that these applications be refused, namely application no COA2019000173.

[5] We heard the applications on 24 September 2019 and, at that time, made the following orders:

> "1. Application No COA 2019APP00045 filed 11 February 2019 and application No COA2019APP00083 filed 12 April 2019 are refused.
>
> 2. Costs on both applications to the respondents to be taxed if not agreed.
>
> 3. Respondents' application no COA 2019APP00173 filed on 19 August 2019 is withdrawn."

We promised to put our reasons in writing; we now fulfil that promise with apologies for the delay.

Background

[6] Kevin Brooks was the rider and Dailia Byfield his pillion passenger on a motorcycle which was involved in a collision with the applicant's Toyota Corolla motor car registered 2970 FT, on 6 November 2010, along Constant Spring Road in Saint Andrew. The respondents filed separate claims but, on 24 October 2016, an order was made that they be tried together. They claimed that they suffered personal injury and incurred expenses as a result of the accident, which occurred when the applicant, who was travelling in the opposite direction, negligently overtook a stationary bus and another motor car that was itself at that time overtaking the bus, causing a head-on collision with the motorcycle on which the respondents were riding.

[7] The applicant, in the defence filed to the claim brought by Mr Brooks, denied any negligence on his part and stated that the accident was caused by Mr Brooks negligently overtaking a line of traffic and riding his motor cycle in the path of the applicant's motor car and attempting to ride between the stationary bus and his motor

car. From the records, and some observations made by the judge it is apparent that the applicant did not attend or participate in the trial, nor was there any witness statement or witness summary from him.

[8] The matter was heard on 7 November 2018. Subsequently, in the final judgment, the judge in giving judgment for the respondents ordered:

> "The [respondent] Kevin Brooks is awarded-
>
> 1. Special damages in the sum of $297,628.30;
> 2. Interest on special damages at the rate of 3% per annum from the date of the accident (6 November, 2010) to the date of judgment (21 December, 2018);
> 3. General damages for loss of earning capacity in the sum of $3 million;
> 4. General damages for pain, suffering and loss of amenities of life in the sum of $2.75 million;
> 5. Interest on general damages at the rate of 3% per annum from the date of service of the claim form (10 July, 2012) to date of judgment (21 December, 2018);
> 6. Cost to the [respondent] to be agreed or taxed.
>
> The [respondent] Dailia Byfield is awarded-
>
> 1. Special damages in the sum of $19,500.00;
> 2. Interest on special damages at the rate of 3% per annum from the date of the accident (6 November, 2010) to the date of judgment (21 December, 2018);
> 3. General damages for pain, suffering and loss of amenities of life in the sum of $900,000.00;

4. Interest on general damages at the rate of 3% per annum from the date of service of the claim form (17 October, 2012) to the date filed on judgment;

5. Cost to the [respondent] to be agreed or taxed."

The application for an extension of time

[9] The only affidavit filed in support of the application for an extension of time was from Matthew Ricketts, an attorney-at-law with the firm of lawyers who appeared for the applicant at trial. In it, he set out an explanation for the need for the extension of time as follows:

> "3. I have been advised by Mr Kwame Gordon who had conduct of the trial in the proceedings in the Court below and do verily believe that the trial was heard on the 7th of November, 2018 and on the 20th day of December, 2018 the judge delivered an oral ruling in favour of the Claimant. On this date the Learned Trial Judge indicated that she had commenced preparing a written judgment and would ensure that Counsel received same within three weeks.
>
> 4. The Learned Trial Judge's written reasons for judgment were received on or about the latter part of March, 2019....
>
> 5. Mr Gordon has advised me and I do verily believe that prior to the filing of the Appeal he checked the Court of Appeal Rules, 2002, in particular Rule 1.11(1)(c) (the 'Rule') and the amended Court of Appeal Rules (Jamaica Gazette No 49, dated September 10, 2015) (the 'Gazette') and it was his view that once the Formal Order was served then the time for filing of the appeal would start to run. It is now accepted that this was a mistaken view.
>
> 6. On 30th of January, 2019 the Respondents' Attorneys served on us a Formal Order and in furtherance of his mistaken belief Mr Gordon filed the required Notice and Grounds of Appeal on 8th of February, 2019 which is shortly after the Final Judgment was served on my firm....
>
> …

> 8. On 25th March, 2019 my firm received a letter dated the 18 February, 2019 from the Deputy Registrar of the Court of Appeal, Miss Althea Edwards. In this letter Miss Edwards alluded to the fact that the Notice and Grounds of Appeal may have been filed out of time....
>
> 9. I have been advised by Mr Gordon and do verily believe that having received the said letter from the Deputy Registrar of the Court of Appeal he again examined the Gazette but did not see any provision which amended what he believed was the time by which the Notice and Grounds could be filed.
>
> 10. By letter dated the 28th March, 2019 my firm wrote to the Deputy Registrar and indicated inter alia, our understanding of what we believed was the current Rule viz, that the time for the filing of an Appeal started to run from the date when the Final Judgment was served on us....
>
> 11. I have been advised by Mr. Gordon and do verily believe that on the 10th of April, 2019 Miss Edwards discussed the status of the appeal with him. Miss Edwards referred to an amendment to the Rule which states time starts to run when the oral judgment was handed down.
>
> 12. Mr Gordon has advised me and I do verily believe that he again checked his copy of the Gazette in his possession and then realized that a page (i.e. page 2024) was missing from his copy and that this missing page contained the amendment to the Rule. The said copy of the Gazette had been previously photocopied within the firm and given to him as a complete copy of the original document.
>
> 13. In light of the amended Rule it became apparent to Mr. Gordon that the Notice and Grounds of Appeal should have been filed before or by the 1st day February 2019 but was instead filed on the 8th of February, 2019 which is a difference of one week."

[10] In the notice of application, the grounds upon which the extension of time and a stay of execution were sought were as follows:

"1. Rule 1.7(2)(b) of the Court of Appeal Rules and Rule 42.13 of the Civil Procedure Rules, 2002.

2. The delay in filing the Notice and Grounds of Appeal and the Application herein is not inordinate.

3. The failure to file the Notice and Grounds of Appeal within the prescribed time was not intentional and is due to a genuine error on the part of Counsel for the Applicant.

4. The Application herein was filed as soon as Counsel's error was discovered.

5. If the Stay is not granted the appeal would be rendered nugatory.

6. The Applicant's appeal has a reasonable chance of success.

7. The Respondents will not be prejudiced if the time for filing of the Notice and Grounds of Appeal is extended.

8. It is in the interest of justice that the Orders being sought be made."

The applicant's submissions

[11] Mr Gordon commenced the submissions by referring to the case of **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes**, (unreported), Court of Appeal, Motion No 12/1999, judgment delivered 6 December 1999 which he said is instructive, as it relates to the issues to be considered by the court on an application for an extension of time within which to appeal.

[12] He noted that the court, in exercising its discretion, would have to consider (i) whether or not the delay in filing the notice and grounds of appeal was lengthy; (ii) whether the reason for failing to file the notice of appeal within time was a good one;

(iii) whether there was an arguable case on appeal; and (iv) the degree of prejudice accruing to the respondents if the application was granted.

[13] Regarding the failure to file the notice and grounds of appeal in time, counsel accepted that there had been a mistaken understanding as to the stipulated time period for filing. Counsel noted that the delay in filing the notice of appeal amounted to eight days and he submitted that this delay of eight days could not be considered as lengthy in the circumstances.

[14] In relation to the applicant's reason for failing to file the notice of appeal on time, counsel submitted that the delay was attributable to the fact that his counsel reasonably held the view that time began to run from the service of the formal order. The applicant, therefore, had a good reason for failing to file the notice of appeal within time.

[15] It was counsel's submission that the case of **Jamaica Public Service Company Limited v Rose Marie Samuels** [2010] JMCA App 23 is instructive as to how the court should treat applications to extend time for filing an appeal in circumstances where the delay is not lengthy and is attributable to counsel. He referred to paragraph [30], where it was said:

> "[30] As far as the other factors that should inform the court's exercise of its discretion in this matter are concerned, the length of the delay in this case (one month) cannot be said by any measure to be inordinate and, as regards the reason given for the delay, I find it difficult to see why, notwithstanding Mr Kinghorn's stinging criticism of the reasons set out in Miss Dunn's affidavit, Lord Denning's

> comment in ***Salter Rex & Co v Ghosh*** ('We never like a litigant to suffer by the mistake of his lawyers') should not be applied in this case, particularly as absolutely no prejudice has been shown or even alleged by the respondent to have resulted from the delay."

[16] It was submitted that when compared to the delay of one month in **Jamaica Public Service v Rose Marie Samuels**, a delay of eight days cannot be seen as inordinate in the circumstances and given that the reason for the delay is attributable to counsel, the applicant should not be penalised.

[17] Counsel submitted that an examination of the notice and grounds of appeal showed that the appellant had an arguable case on appeal, both on the issues of liability and quantum of damages. He outlined that by its appeal, the applicant sought to challenge the following:

> "(i) The judge's finding of sole liability against the [applicant], despite evidence which clearly demonstrated that such a finding was erroneous;
>
> (ii) The findings of fact which were inconsistent with the evidence adduced at trial;
>
> (iii) The award for special damages for certain items claimed by [Mr Brooks] despite lack of evidence to prove the same;
>
> (iv) The award made in favour of [Mr Brooks] for loss of earning capacity which was excessive and unreasonable in the circumstances; and
>
> (v) The reasonableness of the sum awarded for General Damages on the basis that it is inordinately high."

[18] The submissions which were made in support of these challenges to the judge's decision will be dealt with below, when the issue of whether there is an arguable appeal is examined.

[19] Counsel also submitted that it was unlikely that the respondents would have suffered any undue prejudice from a delay of only eight days and there was no mention in the affidavit filed on behalf of the respondents of what prejudice, if any, would be experienced by them, should the court grant the application for an extension of time.

Submissions for the respondents

[20] Mr Reitzin, for the respondents, began his submissions by complaining that the applicant's notice of appeal was not in the form required by rules 1.2(1) and (3), 1.10(a)(i) and (ii) and 2.2(1) and (5) of the Court of Appeal Rules ('the CAR') in that it did not:

> "i) set out the parts of the decision which are being appealed;
>
> ii) identify any of the findings of fact or findings (holdings) of law which the appellant seeks to challenge; and
>
> iii) set out the grounds of appeal concisely or under distinct heads."

[21] It was counsel's submission that the court should not give its imprimatur to a defective notice of appeal especially where a stay of execution, as is the case in this application, is sought upon the basis of it having been filed. The court's reasons for its decision were known since the learned judge delivered oral judgment in December 2018 and the court's detailed written judgment had been available to the applicant

since March 2019, yet the applicant had taken no steps to cure the known defects in the notice of appeal.

[22] Further, counsel submitted, since the availability of the judge's written reasons in March 2019, the applicant had filed two affidavits as well as written submissions and none of those documents made reference to any findings of fact neither was there any reference made to any specific paragraph of the judge's judgment. All that has been placed before this court was therefore a set of sweeping generalisations. Counsel contended that despite his many assertions, the applicant had not demonstrated that he has a real prospect of success on the appeal he was seeking permission to bring.

[23] Mr Reitzin went on to respond to the challenges to the judge's decision that had been raised in the submissions made on behalf of the applicant. The submissions made in relation to the specific challenges made to the judge's findings on liability and damages will be detailed, as necessary, when the issue of whether the applicant had an arguable case on appeal is considered below.

The approach of this court to an application for extension of time

[24] The issues for consideration by this court, when faced with an application for an extension of time within which to appeal, remain as enunciated by Panton JA (as he then was) in **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** at page [20]:

> "The legal position may therefore be summarised thus:

> (1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
>
> (2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.
>
> (3) In exercising its discretion, the Court will consider-
>
> (i) the length of the delay;
>
> (ii) the reasons for the delay;
>
> (iii) whether there is an arguable case for an appeal and;
>
> (iv) the degree of prejudice to the other parties if time is extended.
>
> (4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."

[25] The application will, therefore, be considered in keeping with this guideline.

The length of the delay and the reason for the delay

[26] It was appropriately acknowledged that the attorneys-at–law for the applicant had been unaware that, pursuant to rule 1.11(1) (c) of the CAR as amended, the notice of appeal should have been filed within 42 days of the date on which the order was made and not as of the date that the order was served. This meant that, having agreed that the oral judgement had been given on 20 December, the notice and grounds of appeal should have been filed by 31 January 2019. The appeal not having been filed until 8 February 2019 meant there was a period of delay amounting to some eight days. This delay can hardly be regarded as inordinate and the respondents are not contending that it was.

[27] The reason for the delay in the filing of the notice and grounds of appeal is the same one proffered for the length of the delay - the inadvertence of counsel due to his not being aware of the amendment of the rule governing the filing of such a notice.

[28] Generally, the court does not recognise a distinction between a litigant and his attorney-at-law (see **Hytec Information Systems Ltd v Coventry City Council** [1997] 1 WLR 1666 at page 1675). However, in certain circumstances, this court will endeavour not to appear to be penalising a litigant for the errors of his or her attorney-at-law.

[29] In **Merlene Murray-Brown v Dunstan Harper and Winsome Harper** [2010] JMCA App 1, Phillips JA explained the approach of this court to this issue as follows:

> "[30]...The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorneys errors made inadvertently, which the court must review. In the interests of justice, and based on the overriding objective, the peculiar facts of a particular case and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed him, although it was not intended."

[30] This certainly was one of those cases in which the applicant's attorney-at-law failed him, although it was not intended. It would not be appropriate to see the applicant suffer as a result of this error on the part of his attorney and it is for that reason that the explanation will be accepted as good in the circumstances.

[31] But the fact that the length of the delay was not inordinate and the reason for the delay is acceptable in these circumstances was not determinative of the application. There must be shown to be some merit in the grounds on which the applicant sought to appeal the decision.

The proposed grounds of appeal

[32] In the notice of appeal and grounds filed on 8 February 2019, the following are the grounds of appeal which were listed:

> "1) The learned trial Judge erred in making a finding of sole liability against the Appellant, despite the evidence adduced at trial which demonstrated that the Respondent Kevin Brooks was either solely responsible for or contributed to, the collision in question.
>
> 2) The learned trial Judge erred in making findings of fact which were inconsistent with the evidence adduced at the trial.
>
> 3) The learned trial Judge erred in making an award of special damages for certain items of claim advanced by the Respondent Kevin Brooks, despite the lack of evidence to prove said claims.
>
> 4) The learned trial Judge erred in making an award for loss of earning capacity for the Respondent Kevin Brooks which was excessive in all the circumstances."

The proposed grounds 1 and 2 will be considered together, following which I will consider grounds 3 and 4 together.

Discussion and analysis

Proposed grounds 1 and 2

[33] The applicant in advancing these grounds was seeking to challenge the findings of facts made by the judge. The approach of this court in considering such challenges is well settled. In **Watt v Thomas** [1947] 1 All ER 582, Viscount Simon outlined the approach to be taken at pages 583-584 of the judgment :

> "… an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide, but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

[34] The judge's findings can only be interfered with if it can be demonstrated that she failed to properly analyse the entirety of the evidence and made a mistake in her evaluation of the evidence that is sufficiently material to undermine her conclusions. (See **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21.)

[35] In the first ground proposed by the applicant, there was a challenge to the judge ascribing sole liability for the collision to the applicant.

[36] After a detailed rehearsal of the evidence, followed by a consideration of the submissions made by counsel on behalf of the parties, the judge carried out a careful analysis of that evidence. She reminded herself of the "but for" causation test as laid out in the case of **Wilsher v Essex Area Health Authority** [1988] AC 1074 (HL). At paragraph [39], she stated:

> "[39] In the case of the **Wilsher v Essex Area Health Authority**; [1988] A.C. 1074 (H.L.), at p.1090 it is stated that:
>
> > 'The 'but for' causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury."

[37] She went on to find that the accident would not have occurred had the applicant not entered the lane designated for traffic travelling in the opposite direction when it was unsafe to do so. She said at paragraph [40]:

> "[40] Therefore in relation to the issue of causation I find that if the [applicant] had not entered the lane designated for traffic coming in the opposite direction, that is the lane to his right, at a time when there was oncoming traffic the accident would not have occurred. Therefore, the blame and responsibility for the accident is that of the [applicant]. I find that the accident occurred as result of the [applicant] not ensuring that the way was clear before venturing into the right lane. His concern and attention should not have been limited to traffic in close proximity to the bus. He should have been paying attention to all motor vehicles approaching

> him from the opposite direction even if they were not at a close distance, paying attention to the speed they were travelling in order to ensure he could overtake safely."

[38] The judge then considered whether Mr Brooks was in any way to blame for his injuries and loss. At paragraph [45]:

> "[45] Therefore in order to establish contributory negligence the [applicant] must prove on a balance of probability that [Mr Brooks] is partially to be blamed for his own injuries. That is, that he failed to take actions that he could reasonably have taken, acting as a wise and prudent road user to avoid injury to himself. The failure of the [applicant] to give evidence at the trial does not automatically result in him failing on this issue. Where he participates in the trial through his attorney at law by cross examination of the [respondents] the court must examine the evidence to see whether there is admission on the part of the [respondents] either by direct evidence or inescapable inference of contributory negligence. Once [Mr Brooks] is found to be contributory [sic] negligent, the award in damages should be reduced based on his percentage of contribution as determined by the court."

[39] Continuing her analysis, she noted at paragraphs [48] to [50]:

> "[48] The fact that the burden of establishing contributory negligence rest [sic] on the [applicant], I will examine the options that were available to [Mr Brooks] as suggested by the defence. I will conduct this examination in light of the proven facts. I will commence with the positions of the motor vehicles prior to the collision. [Mr Brooks'] motor bike was on his left side of the road 4 feet from a gutter that is at the edge of the road. The Toyota coaster bus was to the right of Mr Brooks. [The applicant's] vehicle was approaching Mr Brooks in his left lane. It is in fact Mr Brooks' evidence that he saw the [applicant's] motor vehicle overtaking from a distance of 35 feet. He also said that he did not swerve his motor cycle. I have accepted these assertions as evidence of fact. The issue for me to determine

at this juncture is whether by swerving his motor cycle as suggested by Mr. Gordon [Mr Brooks] could have avoided the collision. However when one examines the evidence as it relates to the description of the locus and the position of the vehicles at the time of the accident, to swerve to the right would put Mr Brooks in danger of colliding with the bus. In light of the fact that he was 4 feet from the gutter to swerve to the left could have caused him to, end up in gutter, the very place where the [applicant's] motor vehicle came to rest. Essentially, the [applicant's] motor vehicle would still be in his path. Therefore, in my view there is no evidence to establish that by swerving to the right or to the left [Mr Brooks] could have avoided a collision.

[49] Mr. Gordon suggested that Mr Brooks could have stopped in order to avoid the collision. Mr Brooks' evidence is that he applied his brake before the collision. I have accepted his evidence that he did. It is common knowledge that the purpose of brakes on any motor vehicle is to slow the speed or ultimately bring it to a stop. Therefore I infer that Mr Brooks applied his brakes in an attempt to stop. There is no evidence that he did not apply his brakes the moment he saw the [applicant's] motor vehicle overtaking. In pronouncing upon this issue it is not only the speed of the Mr Brooks that is relevant but also that of the [applicant]. Whereas the evidence was elicited that Mr Brooks was travelling at a moderate speed, the avoidance of the accident would also depend on whether or not the [applicant] was driving at a high speed while overtaking. No evidence of [the applicant's] speed was elicited. Mr. Gordon has invited me to infer from the evidence that there was a distance of 35 feet between [Mr Brooks] and the [applicant's] motor vehicle when the [applicant] commence his overtaking, that the [applicant] was overtaking slowly. However, I take the view that such an inference without more would be unreasonable. Additionally, Mr Brooks' evidence is that the coaster bus was three (3) to four (4) feet from the curb. There is no evidence as to the width of the coaster bus or the [applicant's] motor vehicle. There is no evidence as to what distance the [sic] in terms of width [the applicant's] car was from the coaster while passing it. Consequently, there is no material before me on which I can conclude that the road would have been wide enough for

> [the applicant] to pass safely even with Mr Brooks stopping his motor cycle.
>
> [50] It is my view that braking in an attempt to stop was the only prudent choice available to Mr Brooks in order to try to avoid the collision. He has established that despite taking this action he was unable to avoid the collision. I find that Mr Brooks did all that he could do to avoid injury to himself. Therefore I find that the [applicant] is solely responsible for the collision and the resulting injuries and damages to Mr Brooks."

[40] It is clear from the above that the judge embarked on a careful and proper assessment of the evidence and properly related her findings to the question of whether Mr Brooks contributed in any way to the collision. To my mind, the conclusion she arrived at could not be faulted and the applicant could not offer any arguments to successfully challenge her findings on this issue.

[41] In further challenging the judge's finding on liability, Mr Gordon submitted that the judge failed to properly assess the evidence which indicated that, given the width of the road way, the speed which the parties' vehicles were travelling at the material time, and the distance between the two vehicles, when Mr Brooks first observed the applicant's motorcar, Mr Brooks' version of the collision was highly improbable.

[42] In response, Mr Reitzin noted that only the witness statements from the respondents stood as evidence-in-chief and neither spoke to the physical dimensions of the roadway. He also noted that in cross-examination, Mr Brooks was invited to give his estimate of the width of the road. Counsel pointed out that the judge noted all the evidence that was presented by Mr Brooks relating to the speed of the vehicles and the

distance between the vehicles. There was no other evidence to challenge this. Counsel contended that the judge did properly assess the evidence and ultimately there was no finding of fact to support a conclusion that there was negligence on the part of Mr Brooks or that his version was improbable.

[43] From the passages of the judgment reviewed above, it was clear that, contrary to the assertion by the applicant, the judge did, in fact, properly assess the evidence in regards to these areas. As she correctly recognised, much of the evidence came from what was presented by Mr Brooks since there was no contending evidence presented on behalf of the applicant. She still fairly assessed the evidence in light of the way in which Mr Brooks was tested in cross-examination. Her acceptance of the version presented by Mr Brooks in these circumstances was to my mind unassailable.

[44] Counsel for the applicant further submitted that the judge failed to consider the significance of the fact that the respondents gave materially different versions of how the collision occurred from the versions contained in their respective pleadings. Also, it was contended that the judge failed to properly assess the evidence which revealed that the respondents' versions of the collision were materially different from each other.

[45] In response, Mr Reitzin submitted that the judge recognised that there was an inconsistency between the evidence given by Mr Brooks and what he asserted in his particulars of claim and demonstrated how she resolved it. Counsel noted that the judge dealt extensively with the perceived discrepancies between the evidence of the respondents. He submitted that even if there was a perceived difference it was a

distinction without any material difference insofar as liability was concerned. Accordingly, counsel contented the applicant did not have a real prospect of success on this point.

[46] The judge considered the different versions of how the collision occurred at paragraph [25]:

> "[25] Mr Brooks has admitted that the version in his particulars of claim differs from that in his evidence in chief. He agrees that he did not mention in his particulars of claim that the [applicant] drove around another car. He insists that the evidence in paragraph twelve (12) of his witness statement is the correct version. He also indicates that the first one in his particulars of claim is not true. The only explanation he gave for this inconsistency is that when he signed the witness statement he did not know that the first statement is not true."

[47] The judge then went on to demonstrate an appreciation of the significance of this inconsistency and its implication for her decision; at paragraph [26] she stated:

> "[26] However this court is well aware that the purpose of the pleadings is to outline in short form the claimant's case before the court. (See ***Rule 8.9 (2)***). The purpose of the witness statement is to expound in details what is alleged in the pleadings. Therefore, details which are not necessarily found in the pleadings can be found in the witness statement. However if on the face of it the statement seems to introduce new facts for which no explanation is offered it becomes and remains a contradiction on the party's case. It may be a genuine oversight and omission. Perhaps it is a deliberate addition calculated to magnify liability on [sic] part of the defendant. However, the question to be resolved is whether the inconsistency is so material is [sic] nature that it destroys the root of [Mr Brooks'] case. In order for me to resolve this issue I need to examine the gravamen of [Mr Brooks'] case."

[48] The judge then expressly stated how she resolved the inconsistency in paragraph [27] of her reasons:

> "[27] Mr Brooks' case is that the collision occurred because the [applicant] was overtaking another motor vehicle and came on his side of the road. The bus is a common feature in both his particulars of claim and his statement. The difference is that the statement introduces the car. That is, that the [applicant] was over taking the car that was overtaking a bus. Therefore the only significant departure from the particulars of claim is the introduction of the car. The fact is, there is no denial on the defence as pleaded that the [applicant] was overtaking a bus. Therefore even if I were to find that the [applicant] was not overtaking a car, the fact is the [applicant] in his pleadings admitted that he was in the process of overtaking when the collision occurred. It is evident that in spite of the apparent inconsistency Mr Brooks' evidence has not departed from this significant fact. Consequently, despite the presence of the afore-mentioned inconsistency. [sic] I don't believe it changes the [Mr Brooks'] case in any material way. I find that the root of [Mr Brooks'] case remains intact."

[49] The judge specifically addressed the issue of the discrepancy between the evidence of Mr Brooks and Miss Byfield at paragraphs [28] and [29]:

> "[28] Counsel for the [applicant] has also invited me [sic] examine the contradiction between the evidence of [Mr Brooks] and the evidence of [Miss Byfield]. I approach this with caution bearing in mind that the matters were not consolidated but ordered tried together. Therefore I must examine and determine each claim on his [sic] own merit. As far as I am able to compare I will say that there appears to be some differences in the accounts as to how Mr Brooks sustained the injuries to his leg. However, they are consistent in their accounts as to how the collision occurred. Both Mr Brooks and Ms Byfield testify on each of their case that Mr Brooks did not ride between the coaster bus and the [applicant's] motor vehicle. Both also testify that the

> [applicant] drove his motor car on their side of the road. However Ms. Byfield states that Mr Brooks' left foot was injured when his left foot hit on the [applicant's] motor car, on the left side of it. Mr Brooks states that he was thrown over the [applicant's] vehicle on the ground. His motor cycle dropped close to him. The rear tyre of his bike dug out his foot. Ms Byfield states that Mr Brooks swerved left just before the collision while Mr Brooks said he did not swerve he only applied his brake.
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> [29] It is my view that Mr Brooks as the driver of the motor cycle is better able to say what he did with the motor cycle. Ms Byfield may very well have misinterpreted the driver's action based on the impact she felt. In this regard I find Mr Brooks truthful. Additionally, it is equally my view that Mr Brooks is placed in a better position to speak to what particular object his body came in contact with. Ms Byfield states in her evidence in chief that she does not recall being thrown in the air. She recalls being on the ground. No evidence was elicited from her as to exactly where on the ground she fell. That is whether it was on the same side that Mr Brooks fell. However I am not convinced that she was able to see all the details of what was happening to Mr Brooks while she was on the ground. In the circumstances her primary concern and focus would have been her own well-being, bearing in mind and said [sic] she also suffered injuries and was feeling pain. Therefore her focus on Mr Brooks [sic] some point must have been distracted and geared towards herself. I find that it is likely that she would have missed some of the details of what was happening to Mr Brooks while focusing on her own experiences and the impact of the accident."

[50] Contrary to the complaints made of the manner in which she dealt with this issue, the judge not only identified the discrepancies but clearly demonstrated how she resolved them. The manner in which she carried out this exercise, to my mind, did not support the complaint that she erred in any way.

[51] Counsel for the applicant further submitted that despite finding that the Mr Brooks' injuries were of such a serious nature that speed played a part, the judge failed

to properly assess the evidence which indicated that it was highly improbable that he was not speeding at the material time.

[52] In response, Mr Reitzin noted that it was never put to Mr Brooks that he was speeding and there was no evidence that he was. Counsel submitted that the assertion that it was improbable that Mr Brooks was not speeding had no foundation in fact.

[53] In these submissions made on behalf of the applicant, there seemed to be a suggestion that the judge made a finding that Mr Brooks' injury was of such a serious nature that speed must have played a part. In her careful analysis of the evidence, the mention made by the judge to the nature of Mr Brooks' injury is found at paragraph [30] where she had this to say:

> "Additionally, when I examine the evidence as it relates to the nature of Mr Brooks [sic] injuries I do not believe they could have been sustained in the manner, indicated by Ms Byfield, or suggested by the defence. The act of squeezing generally takes place where there is limited space between two objects. The act normally involves slow movement, trying to edge one's way through a small space. Therefore I draw the inference that the defence is suggesting that there was limited space between the coaster bus and the [applicant's] car. Inevitably they would have to be intimating that Mr Brooks slowed the speed of the motor cycle in order to squeeze through this space. In fact, when one examines the severity of the injuries to Mr Brooks it is highly improbable that these injuries could have occurred while he was "[sic] squeezing or attempting to squeeze between the coaster bus and the [applicant's] motor car."

[54] The judge considered the medical evidence and used that to assist her in ultimately concluding that Mr Brooks' account as to how he sustained his injuries was more probable. In her review of the evidence, the judge noted that in cross-

examination Mr Brooks had maintained that he had been driving at a speed of about 45-50 km and that he was not speeding at the time. There was nothing from the evidence and the judge's analysis of it to support the complaint that she failed to properly assess it. As such, her finding on this issue was also unassailable.

[55] The applicant submitted further that the judge failed to take into consideration the 'notorious fact' that Constant Spring Road is a busy roadway, especially in the direction in which Mr Brooks was travelling, and as such fell into error in not assessing the significance of this 'notorious fact'.

[56] In response, Mr Reitzin first noted that this was a fresh point which the applicant intended to raise in the proposed appeal. In any event, it was contended that it would be more accurate to say that the Constant Spring Road was notoriously busy at times. Ultimately, counsel urged that nothing turns on this since Mr Brooks was not cross-examined on his evidence as to the general state of the traffic at the time of the accident and there was no evidence from the applicant.

[57] Notorious facts are recognised to be facts that are so well known, obvious and indisputable that every ordinary person may be reasonably presumed to know them and such matters generally do not require specific proof. It seems to me that the amount of traffic on a roadway at the time of an accident ought to be proved if a party is seeking to raise it as a factor that contributed to the accident.

[58] It does not appear that the judge was invited to consider whether the roadway was in fact busy and the extent to which the busyness could have contributed to the

accident. In her careful review of the evidence the judge noted that under cross-examination Mr Brooks testified that he "was not in a long line of traffic on Constant Spring road"; that "[b]efore the collision the way ahead was clear as far as he could see"; and that "[h]e did not overtake a line of motor vehicles" (at paragraph [17]). Under cross-examination Ms Byfield maintained that she saw the applicant's "vehicle overtaking a line of traffic" (at paragraph [20].

[59] In his defence, the applicant asserted that "after looking past the stationary bus in the direction in which he was travelling, he commenced passing the same as there were no motor vehicle travelling in the opposite direction in close proximity to the motor bus". He stated that "[w]hen he had reached approximately half way past the stationary motor bus a motorcyclist proceeding in the opposite direction commenced overtaking several motor vehicles and in the process rode into [his] path....".

[60] The actual state of the traffic thus became a matter to be resolved by the judge in deciding whether she accepted Mr Brooks' version of how the collision occurred. She demonstrated how and why she did. There was no merit in this complaint that could impugn the decision of the judge.

[61] Another complaint made about the findings of the judge is that she erroneously rejected Miss Byfield's evidence, which placed the motorcycle to the left of the applicant's motor vehicle prior to the collision, and which evidence was consistent with the applicant's assertion that at the material time Mr Brooks tried to ride between his motor car and the stationary bus.

[62] In response, Mr Reitzin submitted that the judge had analysed the relevant evidence. He contended that the judge had concluded that there was no glaring inconsistency between this portion of Miss Byfield's evidence and that of Mr Brooks.

[63] The judge outlined her reasons for rejecting Ms Byfield's evidence on this issue and at paragraphs [53] to [54], she said:

> "[53] I will first address some of the points raised by Mr. Gordon in his submissions. I do not share the view that it is an inescapable inference that Mr. Brooks could only have been injured in the manner expressed by Miss Byfield, if he had in fact ridden to the left of the [applicant's] vehicle and rode between the [applicant's] motor vehicle and the coaster bus. It is common knowledge that in, many head on collisions people and vehicles are, involuntarily pushed and thrown in different and opposite directions. It was in fact indicated in Doctor Webb's report that Ms. Byfield stated that the accident was a head on collision. There is no evidence that she has or is currently re-siling [sic] from that position. She rejected the suggestion that Mr. Brooks rode between the coaster bus and [the applicant's] motor car. Miss Byfield did in fact indicate that Mr. Brooks received the injury to his left leg because his leg hit the left side of the defendant's motor vehicle. As I have already found on Mr. Brooks' case, based on the nature and gravity of his injuries, I do not believe they were caused by his leg hitting in the left door of the defendant's motor car. However in rejecting this aspect of Ms. Byfield's evidence, I am still obligated to examine her case in totality to decide whether or not her credibility has been completely eroded.
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> [54] Having assessed Ms. Byfield's demeanour and her evidence I do not believe that there was any deliberate intention on her part to lie. The plain fact is, different witnesses will have different recollection of an incident. One witness may pay keen attention to one set of details while another may not. Whereas it is expected that a driver, being the person manoeuvring the vehicle will keep his eyes on the road at all times, there is no such expectation in relation to a passenger. Therefore it is not unusual that a passenger

> will shift his or her attention not being able to recall or pay careful attention to specific details. In the 'agony of the moment' (see **Sayers v. Harlow** [1958] 1 W.L.R. 623, applied in **Neil Lewis V Astley Baker** [2014] JMSC Civ. 623 which I apply in a slightly different context) it is possible that Ms. Byfield was not able to focus on all that was happening to Mr. Brooks while being concerned with herself and her own injuries. For this she cannot be faulted."

[64] From this it was clear that the judge assessed the evidence and demonstrated in a reasoned way why she accepted the evidence that Mr Brooks was not attempting to ride between the applicant's car and the stationary bus. There was no basis for the assertion that she erroneously rejected Miss Byfield's evidence. There was, accordingly, no merit in the complaint to support any ground of appeal.

[65] The applicant failed to demonstrate that he had an arguable case for an appeal based on any of these challenges.

Proposed grounds 3 and 4

[66] These proposed grounds challenge the judge's award of damages. In **Cadet's Car Rentals and another v Pinder** [2019] UKPC 4 the Privy Council re-visited and reiterated the proper approach of an appellate court when considering an appeal from an assessment of damages. Lord Lloyd-Jones, writing on behalf of the Board, restated the guidance given in **Flint v Lovell** [1935] 1 KB 354 and **Nance v British Columbia Electric Railway Co Ltd** [1951] AC 601. At paragraph 7, he had this to say:

> "An appellate court will not, in general, interfere with an award of damages unless the award is shown to be a result of an error of law or so inordinately disproportionate as to be plainly wrong."

[67] Although the proposed ground 3 challenged the judge's award of special damages, there was no corresponding submissions supporting the assertion that the judge had erred in making an award for certain items claimed by Mr Brooks despite the lack of evidence. In fact, the judge had declined to make any award for loss of earnings or loss of future earning because she found that Mr Brooks had "failed to provide satisfactory evidence on which [she] could arrive at a determination in his favour" for those items (at paragraph [84]).

[68] It was submitted that the award for loss of earning capacity/handicap on the labour market made by the judge was excessive. It was contended that the judge failed to take into account the decisions in **Omar Wilson v VCG Holdings Limited** (unreported), Supreme Court, Jamaica, Claim No HCV 04996 of 2010, judgment delivered on 21 November 2011 and **Robert Minott v South East Regional Health Authority & the Attorney General of Jamaica** [2017] JMSC Civ 218, which were recent awards for far more serious injuries, but which were sums significantly less than the sum awarded by the judge for this item.

[69] Mr Reitzin, in response, noted that neither of these authorities was relied on by the applicant in the submissions made to the judge. Counsel submitted that as a matter of pure logic, there could not be any correlation between how serious an injury is and the level of an award for loss or reduction of earning capacity but everything depends on the circumstances of the individual case. He noted that the judge had dealt with the question of reduction of earning capacity at length and in detail.

[70] In addressing this issue, the judge reminded herself of the two approaches a court can take with regard to making an award for loss of earning capacity/handicap on the labour market, namely "applying the multiplicand/multiplier method or awarding a lump sum" (at paragraph [97]). She considered the guidance given by Sykes J (as he then was) in the case of **Icilda Osbourne v George Barnes and Others** (unreported), Supreme Court, Jamaica, Claim No HCV 294 of 2004, judgment delivered on 17 February 2006 as well as by this court in **Patrick Thompson and Anor v Dean Thompson and Ors** [2013] JMCA Civ 42 and **Jamaica (Clarendon Alumina Works) v Lunette Dennie** [2014] JMCA 29.

[71] There is no doubt that given the manner in which the judge reviewed the submissions that were made to her, if the authorities now being urged as relevant had been relied on, she would have noted them. She acknowledged that in relation to the award under this heading, Mr Gordon had submitted that this claim should be rejected in light of Mr Brooks' failure to provide the court with any credible evidence of his occupation and earnings and also that none of the doctors who had seen Mr Brooks said he would be unable to return to work as a plumber.

[72] The judge was satisfied that Mr Brooks was a plumber and that there was a risk that Mr Brooks would lose his then employment sometime in the future. She was also satisfied that given his injuries, there would be a resulting reduction in his ability to work as efficiently as his pre-accident capacity. Further, she was satisfied that should he become unemployed, he would be less likely to obtain fresh employment in his chosen profession at an equivalent pay.

[73] The judge accepted that Mr Brooks had failed to produce reliable data concerning his income and thus that she adopted the approach of awarding a lump sum for this award. She then went on to detail how she determined the lump sum to be awarded at paragraphs [103] and [104]:

> "[103] Mr. Brooks says that he lost one job due to injuries. However, in spite of his disability he returned to one job two (2) years later. He is currently working in a different job. Therefore, in spite of his disability his risk of unemployment does not seem to be very high. However, as I have already noted there is a reduction in his capacity to perform, which will evidently translate in a reduction in his earning capacity. I considered the fact that he states that he supplies labour. That is, he employs others, including a plumber to work. I also take into consideration the possibility of him directing the work while others perform the actual tasks. However, this will necessitate him employing others to do the actual manual task he would normally perform himself. The culmination of this would be a reduction in his income as he would have an increased number of persons to pay.
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> [104] While I am not conducting a precise mathematical calculation in making this award I take the afore-mentioned factors as also [sic] following factors into consideration: Mr. Brooks says he works seven (7) days per week, fifty-two (52) weeks per year based on his contract. I have no evidence of the duration of his present contract. I don't believe it is humanly possible for anyone to work seven (7) days per week fifty-two (52) weeks per year for any extended period of time without getting tired. In order to function in the society Mr. Brooks will have social and domestic matters to attended [sic] to where he must of necessity take time off from working. In the event that there was no collision, there would be times when in between contract he would not be earning an income. He states that the other plumber worked for $4000, per day. This rate at 6 days per week amount to $96000 per month and $1,152,000 per year. It is possible that Mr. Brooks may have been earning more than this plumber. I can't make a finding as to how much. Mr. Brooks' indication is that the reduction in his

> earning is 25% I believe a lump sum award of $3,000,000 is reasonable in all the circumstances."

[74] It seems to me that it would be unfair and improper for the applicant to seek to advance an argument that the learned trial judge failed to take into consideration decisions which were not relied on before her. Ultimately, she applied the correct principles in law and arrived at an award that has not been proven to be so inordinately high as to be plainly wrong.

[75] There were no further submissions advanced in support of the proposed ground challenging the reasonableness of the award for general damages on the basis that it is inordinately high. It was noted that there were two separate awards made under this heading to both of the respondents. The general nature of this complaint failed to indicate whether it was both or just one of the two awards that was the subject of the complaint. In any event, the judge applied the correct principles and considered all the evidence, including the medical evidence. She reviewed and analysed the cases relied on and thus demonstrated clearly how she arrived at the awards. I found that the judge was not demonstrably wrong in making the awards based on the evidence before her. There would be no reason to disturb the judge's award and it was my view that there was no arguable case for an appeal against the award of damages based on these grounds.

[76] Having refused the application to extend time to appeal, there was obviously no pending appeal to which a stay of execution would be applicable. There was, therefore,

no need to consider that application. In the circumstances, the respondents were content to withdraw their application.

[77] It was, therefore, for these reasons that I concurred with the orders made at paragraph [5] above.