JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P
THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA

APPLICATION NO COA2024APP00224

BETWEEN	**JISCO ALPART JAMAICA (formerly Alumina Partners of Jamaica)**	**APPLICANT**
AND	**GARNETT NEWMAN (Administratrix of the Estate of Claris Crawford-Thomas, deceased, and Administratrix of the Estate of Cedric Crawford, deceased)**	**1ST RESPONDENT**
AND	**CONSIE CRAWFORD (aka Consy Crawford and Consey Crawford)**	**2ND RESPONDENT**

APPLICATION NO COA2024APP00263

BETWEEN	**CONSIE CRAWFORD (aka Consy Crawford and Consey Crawford)**	**APPLICANT**
AND	**GARNETT NEWMAN (Administratrix of the Estate of Claris Crawford-Thomas, deceased, and Administratrix of the Estate of Cedric Crawford, deceased)**	**1ST RESPONDENT**
AND	**JISCO ALPART JAMAICA (formerly Alumina Partners of Jamaica)**	**2ND RESPONDENT**

Walter Scott KC and Miss Anna Gracie instructed by Miss Michalene Lattore for JISCO Alpart Jamaica

Kevin Williams and Miss Regina Wong instructed by Grant, Stewart, Phillips & Co. for Garnett Newman

Stuart Stimpson, Miss Camille Shields, and Trevor Cameron instructed by ShieldsLaw for Consie Crawford

12, 15 May and 6 June 2025

Civil Procedure – Applications for extension of time to appeal – Separate trial of liability and damages – Whether judge's decision on liability was an interlocutory judgment or order – Applications for extension of time dismissed on the basis that permission to appeal was required – Court erred in dismissing the applications – Power of the court to revoke its orders before the formal order was issued – Judicature (Appellate Jurisdiction) Act, s 11(1)(f) – Court of Appeal Rules 2002, r 1.7(7)

MCDONALD-BISHOP P

[1] The applicants, JISCO Alpart Jamaica and Consie Crawford, filed two separate applications seeking an extension of time to appeal the decision of Nembhard J ('the learned judge') made in the Supreme Court on 24 November 2023. The learned judge granted the orders sought in a claim for recovery of possession of property and trespass brought by Garnett Newman (the 1st respondent in these proceedings). The orders granted include finding Consie Crawford (the 1st defendant in the court below) liable for trespass. The learned judge did not assess the damages due to the 1st respondent but ordered that the hearing of the assessment of damages should be set for a case management conference. For various reasons, including an application to the Supreme Court for clarification of the judge's decision on liability, the assessment of damages has not yet been completed.

[2] On 12 May 2025, we orally dismissed the applications for an extension of time on the basis that permission to appeal was first required. In deciding to do so, we considered and applied section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act ('JAJA'), which provides, in so far as is material, that:

> "(1) No appeal shall lie —… (f) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge…".

[3] The court formed the view that because the assessment of damages had not yet taken place in the court below, those proceedings were not yet complete. Therefore, the learned judge's decision on liability was an interlocutory judgment or order within the meaning of section 11(1)(f) of the JAJA and, as such, could not be appealed without the permission of the court. It followed from this that in accordance with rule 1.8(1) and (2) of the Court of Appeal Rules 2002 ('CAR'), the applicants ought to have sought permission to appeal in the court below within 14 days of the learned judge's decision. Permission to appeal was not sought in the court below as required. In these premises, therefore, this court, in its oral reasons for its decision, opined that it lacked jurisdiction to hear the applications for an extension of time without permission to appeal having first been sought from the Supreme Court.

[4] On 13 May 2025, one day after the court dismissed the applications but before the formal orders were signed, the court discovered a line of compelling legal authority emanating from the English Court of Appeal decision of **White v Brunton** [1984] QB 57, which revealed that the court had fallen into error in dismissing the applications. The **White v Brunton** line of authority compelled the conclusion that the learned judge's decision was to be regarded as a final judgment or order and not an interlocutory one for the purposes of section 11(1)(f) of the JAJA. Therefore, the applicants were not required to seek permission to appeal. Against this background, and having given due consideration to the relevant question of the court's power to revoke its orders, we formed the view that it was in the interests of justice to set aside the orders made on 12 May 2025 after the appropriate notification was given to the parties.

[5] Accordingly, on 15 May 2025, the court reconvened with counsel for the parties in attendance and made the following orders:

> "1. The orders made by this court on 12 May 2025 on applications COA2024APP00224 and COA2024APP00263 declining jurisdiction and dismissing the applications on the basis that permission to appeal was required are set aside.
>
> 2. No order as to costs."

3. The hearing of both applications is fixed for the week commencing 6 October 2025."

[6] Given what we believe to be the importance of the question regarding whether a judgment or order is final or interlocutory for the purpose of bringing an appeal to this court, we promised to reduce to writing our reasons for setting aside our order and making provision for the hearing of the applications. We do so now.

[7] The wording of section 11(1)(f) of the JAJA makes it plain that determining whether a judgment or order is interlocutory is central to determining whether a party must seek permission to appeal. The decision of **White v Brunton** is instructive regarding both the general principles to be applied in determining whether a judgment or order is interlocutory and the relevance of those principles in a case where questions of liability and damages are decided separately in a final proceeding. A somewhat detailed examination of the case is deemed necessary.

[8] **White v Brunton** was an appeal from a judge's decision following the trial of a preliminary issue. The underlying claim was for reimbursement by the defendant of money spent by the plaintiff on the construction of a private road. The district registrar ordered the question of whether the defendant was contractually liable for construction and maintenance costs for the private road to be tried as a preliminary issue to the determination of the question of reimbursement. The order for a trial of the preliminary issue had the effect of dividing the final hearing of the action into two parts – first, the determination of liability for damages, and second, if liability had been found, the determination of what damages, if any, would be payable. Following the trial on the preliminary issue, the judge (McCullough J) decided that the defendant was not contractually obligated to repay the costs incurred. The plaintiff appealed. The question for the Court of Appeal was whether, given section 18(1)(h) of the Supreme Court Act 1981 (which is equivalent to section 11(1)(f) of the JAJA), the judge's decision on the preliminary issue was an interlocutory judgment for which permission to appeal was required.

[9] In answering that question, the Court of Appeal first considered the test to be applied in determining whether the judge's decision was an interlocutory judgment or order. Donaldson MR, delivering the judgment of the court, stated that "[t]he court is now clearly committed to the application approach as a general rule". The court explained that approach by reference to the reasoning in the earlier case of **Salaman v Warner** [1891] 1 QB 734 in the following way at page 572C of the report:

> "[A] final order is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. Thus the issue of final or interlocutory depend[s] upon the nature of the application or proceedings giving rise to the order and not upon the order itself."

[10] The court then established what has been regarded as an exception to the application test in cases concerning preliminary points or split trials, for example, where the issue of liability is tried and determined separately from the issue of damages. We refer to the exception as the "split trial exception" for convenience. The court explained the split trial exception in this way:

> "If the two parts of the final hearing of the case had been tried together, there would have been an unfettered right of appeal, even if the judgment had been that there was no liability and that accordingly no question arose as to damages. It is plainly in the interests of the more efficient administration of justice that there should be split trials in appropriate cases, as even where the decision on the first part of a split trial is such that there will have to be a second part, it may be desirable that the decision shall be appealed before incurring the possibly unnecessary expense of the second part. If we were to hold that the division of a final hearing into parts deprived the parties of an unfettered right of appeal, we should be placing an indirect fetter upon the ability of the court to order split trials. I would therefore hold that where there is a split trial or more accurately, in relation to a non-jury case, a split hearing, any party may appeal without leave against an order made at the end of one part if he could have appealed against such an order without leave if both parts had been heard together and the order had been made at the end of the complete hearing." (page 573B-E of the report)

[11] In applying this reasoning to the facts before it, the court said at page 573F:

> "… in directing a preliminary issue on a point of construction, the district registrar was seeking to divide the final hearing into two parts".

[12] In the court's view, the preliminary issue was not "an issue preliminary to a final hearing" but "the first part of a final hearing" (page 573F of the report). Accordingly, the judge's decision on the preliminary point was not interlocutory, and the plaintiff did not need leave to appeal against it.

[13] In so far as is relevant to the instant case, the impact of the foregoing judicial pronouncements is that where there was a bifurcated trial of what would have been a final proceeding, the decision on each part of the bifurcated proceeding is to be treated as final and not as an interlocutory judgment or order. The application approach would not apply to automatically render the decision on each part of the proceeding an interlocutory judgment or order. Instead, in the words of Bingham LJ in **Holmes v Bangladesh Biman** [1988] 2 Lloyd's LR 120 at page 124, the court should apply a "broad common sense test" and ask whether "if not tried separately the issue would have formed a substantive part of the final trial".

[14] The split trial exception was later approved and adopted by the Judicial Committee of the Privy Council in **Strathmore Group Ltd v A M Fraser** [1992] 2 AC 172, an appeal from the Court of Appeal of New Zealand. In applying the exception to the facts before it, the Privy Council stated: "[i]t seems to their Lordships that the Petitioner cannot be deprived of a right to appeal solely because a trial was divided into two parts…" (page 178G-H).

[15] Furthermore, the split trial exception has been the subject of widespread application in courts across the Commonwealth, including Hong Kong (**Shell Hong Kong Ltd v Yeung Wai Man Kiu Yip** [2003] HKCU 757); Trinidad and Tobago (**The Attorney General of Trinidad and Tobago v Lennox Phillip and others** (unreported), Court of Appeal, Trinidad and Tobago, Civil Appeal No 155 of 2006, delivered 6 June 2007); the Commonwealth of the Bahamas (**Crawford & Company International Inc v**

Crawford (Bahamas) Limited (unreported), Court of Appeal, the Commonwealth of the Bahamas, SCCivApp No 97 of 2010, delivered 16 June 2011); Jersey (**Her Majesty's Attorney General v Arne Rosenlund and another** [2015] JRC 190); and the Eastern Caribbean Supreme Court (**Eastern Caribbean Collective Organisation For Music Rights (ECCO) Inc v Mega-Plex Entertainment Corporation** (unreported), Court of Appeal, Saint Lucia, SLUHCVAP2017/0032, delivered 4 July 2019).

[16] Therefore, a well-established stream of jurisprudence now holds that the split trial exception should be applied in cases such as this one, where liability is determined in one part of the proceeding and damages are to be assessed in the other part.

[17] It is also considered helpful to note that this court had already endorsed the application approach and the existence and applicability of the split trial exception in the determination of whether permission to appeal to this court is required pursuant to section 11(1)(f) of the JAJA (see, for example, **Leymon Strachan v Jamaica Gleaner Company Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 54/97, delivered 18 December 1998 and **Ronham & Associates Ltd v Christopher Gayle and another** [2010] JMCA App 17). On at least one occasion, the court has also considered the application approach and the **White v Brunton** approach within the context of an application for leave to appeal to the Privy Council (see **Olasemo v Barnett Ltd** (1995) 51 WIR 191 at 195 and 197). These cases, however, concern orders made in interlocutory proceedings in the Supreme Court, rather than in the final trial or split trial of a claim, as in this case.

[18] On the strength of the prevailing line of authority affirming the **White v Brunton** principle as good law, we formed the view that, notwithstanding the learned judge's decision to separate the trial of the assessment of damages from the trial of the issue of liability, her decision on liability was a final and not an interlocutory judgment or order for the purposes of section 11(1)(f) of the JAJA. This designation of the decision as a final and not an interlocutory one is explicable on the premise that had the judge not bifurcated the final hearing of the claim, her decision on both liability and damages would have been

a final judgment or order in respect of which no permission to appeal would have been required for an appeal to be brought.

[19] Applying **White v Brunton**, therefore, the learned judge's decision on liability was a final decision for the purposes of section 11(1)(f) of the JAJA, and so permission was not required to appeal against it. This meant that the court's earlier decision to decline jurisdiction because permission to appeal was required was, regrettably, *per incuriam*.

[20] Having arrived at the foregoing conclusion, the court, of its own motion, considered whether this was an appropriate case in which to invoke its inherent power to revoke its earlier orders that have been proved to be erroneous as a matter of law.

[21] The court's power to revoke its orders before its formal orders are signed was discussed extensively by the United Kingdom Supreme Court in **Re L and B (Children) (Care proceedings: power to revise judgment)** [2013] UKSC 8 and **AIC Ltd v Federal Airports Authorities of Nigeria** [2022] UKSC 16, and more recently by this court in **West Indies Petroleum Limited v Courtney Wilkinson and others** [2024] JMCA App 33 ('**West Indies Petroleum**'). The adoption and restatement of the relevant principles distilled from the earlier authorities by **West Indies Petroleum** are as follows:

a) Where the court's order had been communicated to the parties, but the court has not yet issued the formal order, it has the inherent jurisdiction and broad discretion to rehear the matter and reconsider its orders. That power is also reflected in rule 1.7(7) of the CAR, which provides that "[t]he power of the court to make an order includes a power to vary or revoke that order" (paras. [28] and [31]).

b) The court's power is controlled by the overriding objective of the Civil Procedure Rules, 2002 (and, by extension, the CAR), which is to deal with cases justly. Each case must be decided on its unique facts and circumstances (paras. [34] and [37]).

c) The power of the court is exercisable either upon the application of a party or on the court's motion and has been deemed to be warranted, for example, where the court has made a plain mistake (paras. [33] and [35]).

[22] Having been guided by the statements of principle in **West Indies Petroleum**, we came to the unanimous view that the erroneous legal basis upon which we dismissed the applications for extension of time rendered this an appropriate case for the court to revoke its orders. This approach aligns with the principles of justice. Accordingly, we set aside the orders made on 12 May 2025, with no order as to costs.

[23] It is necessary to state that the court was prepared to hear the applications for an extension of time on their merits on 15 May 2025, when the orders were revoked. However, given the court's unexpected request for the parties to attend the reconvening of the court, all counsel on record were not available to proceed on that date. Therefore, the hearing of the applications was adjourned to a date convenient to all counsel involved.

[24] It was for these reasons that we made the orders set out in para. [5] above.

EDWARDS JA

[25] I agree and have nothing useful to add.

SIMMONS JA

[26] I, too agree, and have nothing useful to have.