



## **FORBES, J**

### **Application by Defendant to Certify a Point of Law**

1. This is my brief decision on the application by the defendant for this Court to certify what he states is a point of law, a stay of my prior ruling pending the determination of an appeal against the ruling, further and other relief as the Court deems fit and proper and costs in the cause.
  
2. The Court rendered its ruling (“Ruling”) on the 28<sup>th</sup> January, 2022 acceding to the plaintiff’s application for interim payment pursuant to Order 29, Rule 10 of the Rules of the Supreme Court (“RSC”) by awarding the plaintiff the sum of \$66,094.23 and setting aside the ruling of then Assistant Registrar Renaldo Toote, dated the 17<sup>th</sup> June, 2021.
  
3. The defendant filed his Summons on the 7<sup>th</sup> February 2022 and makes his application pursuant to Section 21(1) of the Court of Appeal Act, Order 31A, Rule 18(2)(d) and (s), Order 45, Rule 11 of the RSC and the inherent jurisdiction of the Court. The defendant seeks the following Orders:
  - (i) that the draft Notice of Appeal annexed to the Summons and exhibited to the Affidavit of Gabriel K. Brown is certified as raising points of law of general public importance namely, whether “A Default Judgment which provides that damages are to be assessed and is determinative as to the issue of liability for the breaches of duty complained of by a Plaintiff precludes and/or is a bar to a Defendant contesting the extent to which the Plaintiff’s injuries were caused by the breaches of duty which have been admitted by virtue of the Default Judgment.”;
  - (ii) That the entirety of the Ruling and/or Order made by the Ruling and/or further proceedings herein be stayed pending a determination of an appeal against the Ruling, as certified above;
  - (iii) Further and/or other relief as the Court deems fit and proper;

(iv) Costs of the application be costs in the cause. The defendant in support of his application relies on the Affidavit of Gabriel K. Brown filed on the 8<sup>th</sup> February, 2022 and Skeleton Arguments of the Defendant filed on the 15<sup>th</sup> February, 2022.

4. The plaintiff opposes the application and relies on the Plaintiff's Skeleton Arguments filed on the 15<sup>th</sup> February, 2022.

### **Statement of Facts**

5. In her Affidavit on behalf of the defendant, Garbriel K. Brown deposes in part that the plaintiff appealed to a Judge in Chambers following the decision of then Assistant Registrar Renaldo Tooté made on the 17<sup>th</sup> June, 2021 wherein the learned Registrar denied the plaintiff's application for interim payment. That the defendant opposed the appeal on the grounds that the plaintiff had commenced but failed to complete a subsequent assessment of damages. The issue of causation was a live issue in dispute at the assessment. The conduct of the plaintiff in seeking an interim payment in the circumstances was an abuse of process.

That in its ruling the Court allowed the appeal and awarded the plaintiff an interim payment of \$66,904.23 having found "***The Defendant has already conceded liability and in following the decision of Ruffin Crystal Palace Limited v Laniccini Braithwaite (supra) it is no longer open to the Defendant to dispute causation, which in essence is an attempt to dispute liability.***"

That her firm has been instructed to seek an appeal against the Ruling and such intended appeal would be a further appeal of the Registrar's decision, and the same would need to be first certified as raising a point of law of general public importance.

That by e-mail dated the 4<sup>th</sup> February, 2022, Counsel for the plaintiff sent an email to Counsel for the defendant seeking to set the Assessment down for hearing, a prerequisite in the Ruling to payment of the interim award.

That by reply email on the 7<sup>th</sup> February, 2022, Counsel for the defendant advised that he had been instructed to seek a further appeal on an expedited basis and invited the plaintiff to agree to stay of the said Ruling pending the appeal.

That she had been advised and verily believed that at the time of swearing the Affidavit Counsel for the plaintiff had not replied to the defendant's email.

6. The defendant exhibited the draft Notice of Motion to the said Affidavit. The draft Notice of Motion provides that the defendant seeks an appeal from the whole of the judgment of Justice Andrew Forbes given on the 28<sup>th</sup> January, 2022. Additionally, the defendant seeks the following on the appeal:

- (i) An order that the Judgment be set aside in its entirety;
- (ii) That the Respondent's (Plaintiff's) application below for an interim payment be dismissed;
- (iii) that the Respondent (Plaintiff) be ordered to apply within fourteen (14) days from the date hereof to set down the extant Assessment of Damages for hearing, failing which the action shall be struck out; and
- (iv) The costs of the appeal and application below to be the Appellant's (Defendant's).

The defendant states that the ground(s) of the appeal is that the learned Judge erred in law finding that a Default Judgment which provides that damages are to be assessed is determinative as to the issue of liability for the breaches of duty complained of by a plaintiff and therefore precludes and/or is a bar to a Defendant contesting the extent to which the Plaintiff's injuries were caused by the breaches of duty which have been admitted by virtue of the Default Judgment.

## Issues

7. The issues to be determined on this application are:-
- a. whether any or all of the grounds of appeal disclose a point of law alone, and if so;
  - b. whether the point(s) of law identified is/are of general public importance;
  - c. whether justice requires that a stay be granted; and
  - d. whether the appeal has some prospect of success which would justify a stay of the proceedings.

## Certification of Point(s) of Law

### The Law

8. Section 21(1) of the Court of Appeal Act states:-

*“(1) Any person aggrieved by any judgment, order or sentence given or made by the Supreme Court in its appellate or revisional jurisdiction, whether such judgment, order or sentence has been given or made upon appeal or revision from a magistrate or any other court, board, committee or authority exercising judicial powers, and whether or not the proceedings are civil or criminal in nature may, subject to the provisions of the Constitution and of this Act, appeal to the court on any ground of appeal which involves a point of law alone but not upon any question of fact, nor of mixed fact and law nor against severity of sentence:*

*Provided that no such appeal shall be heard by the court unless a Justice of the Supreme Court or of the court shall certify that the point of law is one of general public importance.”*

9. The point of law which the defendant submits to be certified is found at paragraph 4 of the defendant's submissions and is reproduced as follows *“A Default Judgment which provides that damages are to be assessed and is determinative as to the issue of liability for the breaches of duty complained of by a Plaintiff precludes and/or is a bar to a Defendant contesting the extent to which the Plaintiff's injuries were caused by the breaches of duty which have been admitted by virtue of the Default Judgment.”*

10. Counsel for the defendant and the plaintiff both laid over Written Skeleton Submissions which the Court considers on this application. However, the Court will summarize the relevant portions of the submissions below.

11. Counsel for the defendant makes the following submissions in support of the application to certify the point of law:-

- a. That the decision in **American Life Insurance Co. v National Insurance Board [1984]** BHS J. No. 26 while on the facts of that case the Court refused to certify the point of law, the Court outlined the approach it should take in weighing whether to grant the certification. The Court must be satisfied that the grounds of appeal involve or any one of them involves a point or points of law alone; these points are of public importance; and they are of general public importance.
- b. That the Intended Appeal has crystallized a distinct point of law only and therefore the Court only needs to consider whether that point is one of general public importance.
- c. That the factors to consider in weighing what constitutes a point of law of general public importance was reflected at paragraph 11 by Adams J in **American Life Insurance Co. v National Insurance Board (supra)** whereby he stated that the point raised should involve a new principle of law or require the elucidation of some new aspect of established and familiar principles of law; or where the point raised discloses that the due and orderly administration of justice has been diverted into a new course which might create a precedent for future, the point of law has to be not only one of public importance but it needs also to be exceptionally so.
- d. That the case of **Hermanus Phillipus Steyn v Giovanni Gniecchi-Ruscione** underscored the need for the point of law to transcend the interests of a particular litigant.
- e. That the point of law raised by the Intended Appeal is of general public importance.

- f. That the Court misdirected itself as to the effect of **Ruffin Crystal Palace Limited v Laniccini Braithwaite [2013] 1 BHS J. No. 65**, which was concerned with whether contributory negligence could be raised for the first time on an Assessment of Damages and subsequently compared the appellate's court's finding on the failure to plead contributory negligence which is required to the instant matter as there is no requirement to plead causation.
- g. That causation remains an issue that can be raised on an assessment as it is not inconsistent with or an attempt to dispute liability; that causation does not disrupt liability but serves to acknowledge that loss has occurred and instead focuses the enquiry on the extent of the loss. Reference is made to **Symes v St. Georges Healthcare NHS Trust [2014] All ER (D) 292**.
- h. That the Ruling sets a precedent that dictates that future litigants could not challenge the issue of causation following a default judgment, which could result in parties being reluctant to concede liability when acts in question are not in dispute.
- i. That the Court would be facilitating one party unjustly receiving from another sums for which there may be no justifiable entitlement.

12. Counsel for the plaintiff makes the following submissions opposing the application.

- a. That the Plaintiff particularized her injuries thoroughly and extensively and the Judgment in Default of Defence is in respect of the particularized claim.
- b. That the Plaintiff relies on the case of **Dipcon Engineering Services Ltd. v Grefory Bowen et al [2004] UKPC 18** whereby the Court, at paragraph 21 considered the authorities **Lunnun v Singh [1999]** unreported and **Pugh v Cantor Fitzgerald International [2001] EWCA Civ 307**. Parker, LJ in *Lunnun* stated:- *“The underlying principle...that on an assessment of damages all issues are open to a Defendant save to the extent that they are inconsistent with the earlier determination of the issue of liability, whether such determination takes the form of a judgment following a full hearing on the facts, or a default judgment”* and Gibson, LJ in *Lunnun (supra)* also

*stated "It is not in dispute that when judgment in default is entered for damages to be assessed the question of liability is thereby determined and cannot be challenged while the unappealed judgment still stands."* Clarke, LJ in **Lunnun (supra)** held that on an assessment of damages the Defendant may not take any point which is inconsistent with the liability alleged in the Statement of Claim but subject thereto, the Claimant could take any point relevant to the assessment of damages including failure to take reasonable steps to mitigate. Gibson, LJ in **Lunnun (supra)** further stated that "The true principle is that on an assessment of damages any point which goes to quantification of the damage can be raised by the Defendant, provided that it is not inconsistent with any issue settled by the judgment."

- c. That the Defendant had ample opportunity to file a Defence as there was an initial Judgment in Default that was set aside and having failed to file a Defence the Defendant cannot now come and ask the Court to re-open the issue of liability. See **Kingsley A. Thomas v Blues & Blues Ltd. [2020] ECSC** (Claim No. NEVHCV 2018/0078) and **Symes v St. George's Healthcare NHS Trust (supra)**.
- d. That the Statement of Claim, medical reports, receipts, vouchers and the evidence of the Plaintiff to date before the Registrar during the assessment of damages hearing show that the plaintiff suffered very serious injuries as a result of the defendant's negligent driving. That the defendant failed to plead contributory negligence or any pre-existing conditions as he failed to enter a Defence and failed to adduce any evidence of the same at a trial as there was none.

### **Analysis & Disposition**

13. The defendant's application for certification is borne out of the Court's finding made at paragraph 35 of its Ruling on the plaintiff's application for an interim payment.



14. Section 21(1) of the Court of Appeal Act provides that a person aggrieved by any decision, judgment, or order made by the Supreme Court in its appellate or revisional jurisdiction can appeal to the Court of Appeal on any ground of appeal provided that it is a point of law alone but not upon any question of fact, nor of mixed law and fact. Further, such an appeal will only be heard following the certification of the ground of appeal on a point of law alone by a Justice of the Supreme Court.

15. Counsel for the defendant has relied on the case of **American Life Insurance Co. v National Insurance Board (supra)** which this Court finds to be instructive on the approach it is to take when considering an application to grant certification.

#### **Ground of Appeal Involves a Point of Law Alone**

16. The defendant by virtue of its intended appeal seeks to set aside the entirety of the Court's ruling granting the plaintiff's application for an interim payment. It is important to note that while the defendant in his Summons has identified the point of law he wishes to be certified, Section 21(1) of the Court of Appeal Act requires the Court to look at the ground(s) of appeal. The defendant's ground of appeal contained in its draft Notice of Motion is that "***the learned Judge erred in law finding that a Default Judgment which provides that damages are to be assessed is determinative as to the issue of liability for the breaches of duty complained of by a plaintiff and therefore precludes and/or is a bar to a Defendant contesting the extent to which the Plaintiff's injuries were caused by the breaches of duty which have been admitted by virtue of the Default Judgment.***"

17. It is also noted that the defendant in its Affidavit in support refers to a portion of paragraph 35 of the Court's ruling, however the Court provides the entirety of paragraph 35 of its ruling below:-

*"35. In its determination of a grant of an order for interim payment, the Court also takes into account any set-off, cross-claim or counterclaim or any allegation of*

*contributory negligence. As I understand Mr. Hunt's submission, the Defendant while accepting liability disputes causation and seeks to challenge the Plaintiff's injuries. The filing of the Default Judgment and the Defendant's decision not to make an application to set aside the same, I find bars the Defendant from now disputing the issue of causation. The Defendant has already conceded liability and in following the decision of **Ruffin Crystal Palace Limited v Laniccini Brathwaite (supra)** it is no longer open to the Defendant to dispute causation which in essence is an attempt to dispute liability. "*

18. The Court's Ruling on the plaintiff's application for an interim payment was subsequent to the filing of the Judgment in Default of Defence on the 28<sup>th</sup> March, 2011, the concession on the issue of liability by the Defendant in his skeleton arguments dated the 2<sup>nd</sup> December, 2021 and during the hearing of the application on the 2<sup>nd</sup> December, 2021.

19. Following questions from the Court Counsel for the defendant contended that the Default Judgment in the instant case speaks to a blanket assertion that damages are to be assessed and does not speak to special damages nor the liquidated damages that the plaintiff is claiming. He further asserted that had the plaintiff identified the same in the Default Judgment then the Court could say that the defendant was precluded from raising causation.

20. After a careful review of the submissions of Counsel for the defendant and plaintiff, I find that the point of law for certification is not a point of law alone but imports points of law and fact.

### **Public Importance**

21. Considering the submissions of Counsel, in particular Counsel for the plaintiff who provided numerous authorities regarding the application of Default Judgments before the Courts, I am of the opinion that the point of law to which the defendant seeks certification is not of public importance and general public importance.

Further, the nature and application of Default Judgments are not new principles of law or require some elucidation of some new aspect of established and familiar principles of law nor a point which might create a precedent for the future. More so, I do not find that such a point goes beyond anything exceptional to which the Court would be minded to grant such a certification.

### **Application for a Stay**

22. Counsel for the defendant has submitted that the defendant's application for a stay of the Ruling is critical to prevent the defendant from suffering any prejudice by virtue of any inability to recover any sums paid to the plaintiff pursuant to the Ruling. He also submitted that if, as contended by the Intended Appeal that the ruling is in error in law, the Court could not have properly exercised its discretion to award an interim payment as the extent of the losses for which the defendant is liable is unclear and as such presents a clear risk of overpayment to the plaintiff which the defendant may be unable to recover if successful on the intended appeal.

23. He referred the Court to the decision of then Chief Justice, Sir Michael Barnett in **The Incorporated Trustees of St. John's Particular Church of Native Baptist in the Bahamas v Stewart and others [2010] 3 BHS J. No. 81** and submits that the plaintiff's own evidence is that she has financial difficulties. He further submitted that the Court should not be prevented from carrying out its overriding objective to determine matters justly and fairly, having regard to the rights of the respective parties and that the risk of the defendant being unable to recover any sums paid to the plaintiff ought to lead the Court to grant the stay pursuant to Orders 31A, Rule 18(2) and Order 45, Rule 11 of the RSC and that the Defendant intends to proceed with the intended appeal on an expedited basis.

### **The Law**

24. **Order 45, Rule 11 of the RSC** states "*Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground*

*of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.”*

25. According to **Halsbury’s Laws of England, 4th Edition**, under the rubric Stay of Proceedings Generally at paragraph 437;

*“A stay of proceedings usually arises under an order of the court which puts a stop on the further conduct of the proceedings in that court at the stage which they have then reached, so that parties are precluded thereafter from taking any further step in the proceedings.”*

26. Additionally, the effect of a stay of proceedings is not permanent meaning that the action still subsists and the stay may be removed if proper grounds are shown to do so. See **Halsbury’s Laws of England, 4th Edition, Volume 37, Stay of Proceedings, Effect of stay proceedings, para 438**

27. According to **Halsbury’s Laws of England, 4th Edition**, under the rubric Stay of execution generally at paragraph 451;

*“..., the court’s inherent jurisdiction to stay the execution of a judgment or order is limited in its extent, and can only be exercised on grounds that are relevant to a stay of the enforcement proceedings themselves, and not to matters which may operate as a defence in law or relief in equity, for such matters must be specifically raised by way of defence in the action itself.”*

28. The applicable principles on stay pending appeal applications is dealt with in Odgers On Civil Court Actions at page 460 which states:

*“Although the court will not without good reason delay a successful plaintiff in obtaining the fruits of his judgment, it has power to stay execution if justice requires that the defendant should have this protection[...] [The] court has wide powers under the Rules of the Supreme Court.”*

29. Justice Indira Charles in **In the Matter of Contempt of Court of Donna Dorsett-Major 2020/CLE/gen/0000** and again in **Robert Adams (as beneficiary of the**

**estate of Raymond Adams) and Gregory Cottis (as executor of the estate of Raymond Adams) 2018/PRO/cpr/00035** sets out the principles relating to an application before the Court for a stay of proceedings pending an appeal as follows. In accepting that the Court has wide powers under the Rules of the Supreme Court when determining whether to grant a stay, as to how that discretion ought to be exercised in these circumstances I refer to Brett, LJ in the case of **Wilson v Church No. 2 [1879]** 12 Ch.D. 454 at 459 where he states:

*"This is an application to the discretion of the Court, but I think that Mr. Benjamin has laid down the proper rule of conduct for the exercise of discretion, that where the right of appeal exists, and the question is whether the fund shall be paid out of Court, the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory."*

30. Justice Charles also referred to the case of **Linotype-Hell Finance Ltd. v Baker [1993]** 1 WLR 321 in which Staughton L.J. opined at page 323:

*"It seems to me that, if the defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success that is a legitimate ground for granting a stay of execution."*

31. As I understand L.J. Staughton above, a Court may grant the application of an unsuccessful party if he is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success. This however requires evidence and not bare assertions.

32. Justice Charles also referred to the case of **Hammond Suddards Solicitors v Agrichem International Holdings Ltd [2001]** EWCA Civ 2065 at para 22 (per Clarke JL and Wall J) which sets out additional principles that the Court should be guided by in considering an application for a stay pending an appeal:

*"By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the*

*circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"*

33. Finally, Justice Charles referred to the guidance given by the English Court of Appeal in **Leicester Circuits Ltd v Coates Brothers plc [2002]** EWCA Civ 474 where at para 13, Potter LJ said:

*"The proper approach is to make the order which best accords with the interests of justice. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is for no stay, but where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the appeal."*

### **Analysis & Disposition**

34. Having regard to the evidence before the Court on this application, since the date of the Ruling correspondence between Counsel has been exchanged to set the matter down for assessment (which was a requirement of the plaintiff to receive the interim payment) and Counsel for the defendant advising of his intention to seek a further appeal of the matter. The Court in using its discretionary power must be satisfied by the defendant that without a stay of execution he will be ruined and his appeal has some prospect of success.

More so, this must be shown by way of evidence and not just bare assertions. The defendant's Affidavit however does not provide any evidence as to the way in

which he will suffer any ruin or the prospect of success on appeal. Therefore, I am not minded to grant a stay pursuant to Order 45, Rule 11 of the RSC.

35. Counsel for the defendant has also submitted that the defendant seeks a stay of the ruling pending an appeal. Section 12(1)(a) of the Court of Appeal Rules states that an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below.
36. Considering the principles to be applied on an application for a stay pending an appeal, the Court must look at whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. The defendant has failed to adduce any evidence to satisfy the Court of any special circumstances or that the defendant will face financial ruin in the absence of the grant of a stay.
37. I have also considered the sole ground of appeal to which the defendant seeks to have heard to set aside the Ruling in its entirety. At paragraph 35 of the Ruling, the Court in its determination of granting the interim award considered and took into account any set-off, cross-claim, counter-claim or any allegation of contributory negligence.

The defendant while admitting liability also submitted that causation remained a live issue and as such the plaintiff should not be entitled to any interim award. The Court did not agree with the defendant's submission as the Court was satisfied that the plaintiff met the requirements as found in Order 29, Rule 12 of the RSC.

The Court's consideration of set-off, cross-claim, counter-claim or any allegation of contributory negligence is in essence related to the total sum to be awarded to a plaintiff who meets the requirements and not as a means to prevent a plaintiff who satisfies the Court from receiving an interim award. Further, the Court's power to order an interim payment/award under Order 29, Rule 12 of the RSC is

discretionary. Thus, I find that the said ground of appeal does not have a realistic prospect of success.

38. In light of all the circumstances of this case, the Court must conclude that no harm or injustice would befall the Defendant should a stay be refused and as such, a stay of the Ruling pending appeal is hereby refused.

### **Conclusion**

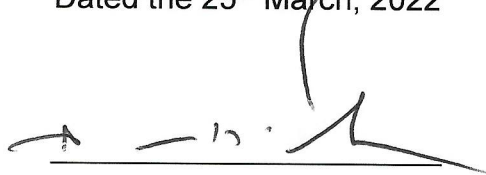
39. Therefore, having heard and considered the submissions of Counsel, considered the relevant authorities and principles, considered the evidence before the Court on this application, the defendant's application for certification of a point of law to be appealed on a further appeal is hereby dismissed and the defendant's application for a stay is hereby dismissed.

40. While Counsel for the Defendant seeks the costs of this application to be in the cause, costs are usually in the discretion of the Court and I see no reason to depart from the usual costs order.

Therefore, the Plaintiff is awarded the costs of this application to be paid by the Defendant to be taxed if not agreed.

41. Leave is hereby granted to the parties to appeal this Ruling.

Dated the 25<sup>th</sup> March, 2022

A handwritten signature in black ink, appearing to read 'A. Forbes', is written over a horizontal line. A vertical line extends upwards from the signature to the date above.

Justice Andrew Forbes