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NOTICE TO PARTIES OF THE COURT'S MEMORANDUM OF REASONS FOR DECISION

APPLICATION NO COA2020APP00149

BETWEEN	**CATHERINE ALLEN**	**APPLICANT**
AND	**ERIC HOSIN**	**RESPONDENT**

TAKE NOTICE that this matter was heard by the Hon Mr Justice F Williams JA, the Hon Mrs Justice Foster-Pusey JA and the Hon Mrs Justice Dunbar Green JA on 5 and 9 June 2023, with Ms Stephanie Williams and Ms Arianna Mills instructed by Henlin Gibson Henlin for the applicant and Kevin Powell and Mikhail Williams instructed by Hylton Powell for the respondent.

TAKE FURTHER NOTICE that the court's memorandum of reasons as delivered orally in open court by Foster-Pusey JA is as follows:

[1] This is an amended application for permission to appeal against the decision of Simmons J (as she was then) ('the learned judge'), made on 31 July 2020, to grant summary judgment to Mr Eric Hosin, the respondent, in respect of the claims made by Ms Catherine Allen, the applicant, pursuant to the Insurance Act, section 213A of the Companies Act (authorization to release reserves and the 'oppression' action) and the award to Mr Hosin of 80% of his costs on an indemnity basis (see **Catherine Allen v Guardian Life Limited, Eric Hosin and others** [2020] JMCC Comm 26).

[2] On the same day on which the learned judge made the order, she also refused the applicant's oral application for permission to appeal.

The preliminary point

[3] Mr Powell took a preliminary point that the applicant is relying on an affidavit filed on 28 May 2023 in this court in support of her application, although the affidavit was not before the court below. He narrowed his complaint to paras. 10-34 of the affidavit even while acknowledging that the exhibits attached to the affidavit were before the court below. At the court's request, counsel for the applicant filed a table comparing paragraphs in the affidavit of 28 May 2023, with paragraphs in the affidavit that the applicant filed in support of the fixed date claim form, which was also in the papers filed for the application. We conclude that the information in the affidavit filed on 28 May 2023 did not vary from that in the affidavit filed in support of the fixed date claim form. In addition, the affidavit of 28 May 2023 included a draft notice and grounds of appeal, which was essential for a proper consideration of the application. The preliminary point therefore fails.

Submissions

<u>The applicant's submissions</u>

[4] Counsel for the applicant contended that the learned judge erred in granting the summary judgment application, as she did not have sufficient regard to the facts pleaded by the applicant which could form a proper basis for her section 213A Companies Act claim against the respondent.

[5] Counsel also submitted that the respondent, as an officer of the company (Guardian Life Limited ('GLL'), disregarded her (the applicant's) duties and responsibilities as stated by section 44 of the Insurance Act and embarked on a course of conduct that was inconsistent with the established practice. The gravamen of the applicant's claim in this regard is that, by virtue of her position as the appointed auditor of GLL, the company ought not to have released reserves without her consent or authorization. Counsel submitted that in interpreting section 44 of the Insurance Act the learned judge ought to have taken into account the established course of practice. In addition, counsel argued that the learned judge did not treat with how the reserves were valued over the years when the applicant served as actuary to GLL. Counsel

urged that the applicant had a legitimate expectation that was frustrated and this was a proper basis for the section 213A claim.

[6] Counsel submitted that a section 213A claim is concerned with the conduct of the servants, agents and/or officers of the company and not the company itself and so the case was formulated, aimed and directed at the conduct of the respondent. In the circumstances, counsel argued that the learned judge erred in finding that there was no causal connection between the respondent's conduct and the applicant's section 213A Companies Act claim. Counsel submitted that the learned judge also erred when she stated that the decision of Batts J, that the release of reserves did not require the applicant's consent and that there was no oppression or unfair prejudice caused to the applicant as a result of GLL's decision to release reserves, resulted in these issues being *res judicata*, as the interlocutory proceedings on injunctive relief did not settle issues or facts between the parties.

[7] Finally, counsel submitted that the learned judge erred in awarding costs on an indemnity basis to the respondent as there was no conduct or circumstance that took the case out of the norm. Counsel relied on **Knightsman Limited v Western Regional Health Authority et al** [2020] JMSC Civ 229.

The respondent's submissions

[8] Counsel for the respondent submitted that there was no real chance of a successful appeal against the learned judge's decision (see rule 1.8(7) of the Court of Appeal Rules). Counsel submitted that the learned judge correctly identified the law on claims pursuant to section 213A of the Companies Act and applied it to the pleadings before her. In addition, the learned judge considered the Insurance Act and concluded that she was unable to find anything in the law or the documents submitted that indicate that the applicant's authorization/consent/approval was required by GLL. Counsel submitted that the learned judge did not err in her assessment of the evidence or in her interpretation of the provisions of the Insurance Act and as a consequence, the proposed challenge to her decision in this regard has no realistic prospect of success. Counsel stated that there was no basis for the learned judge to take into

account established practice in interpreting section 44 of the Insurance Act and the applicant did not raise the issue of legitimate expectation in the court below.

[9] Insofar as the proposed ground of appeal concerning the learned judge erroneously finding that Batts J's decision on the applicant's application for an injunction resulted in *res judicata* on the particular issues is concerned, counsel argued that the learned judge was correct in her ruling. He highlighted that the applicant had not appealed Batts J's ruling, and relied on **Administrator General of Jamaica v Rudyard Stephens and others** (1992) 41 WIR 238.

[10] On the question of the award of costs on an indemnity basis, counsel submitted that the learned judge's approach was unimpeachable as she relied on the relevant provisions of the rules and authorities on the approach to applications for indemnity costs orders and identified the circumstances that justified the grant of the order. He also relied on **Knightsman Limited v Western Regional Health Authority et al**.

Discussion

[11] Both sides agree that this is an application for permission to appeal against an order made in the exercise of the learned judge's discretion. The rule of this court, in such circumstances is well-settled. An appeal against the exercise of a judge's discretion on an interlocutory application will generally only succeed if it can be shown that the judge misunderstood the law or the evidence before him/her, or made an inference that facts existed or did not exist, which can be shown to be demonstrably wrong, or where the judge's decision "is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it" (see **Hadmor Productions Ltd v Hamilton and others** [1982] 1 All ER 1042 and **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1).

[12] No issue was taken concerning the legal principles outlined by the learned judge concerning the test to be applied in determining whether to grant summary judgment. Pursuant to rule 15.2 of the Civil Procedure Rules, the court may give summary judgment on a claim or particular issue if it considers that the claimant has no real prospect of succeeding on the claim or the issue.

[13] On the question concerning the authorization of the release of the reserves, the learned judge stated that, like Batts J, she was "unable to find anything in law or in the documents submitted which indicate that Ms Allen's authorisation/consent/approval was required by GLL. Whether given the appointed actuary's role it would be good practice or courteous to do so, is a different matter altogether. The valuation of the actuarial reserves, which is clearly within the ambit of her responsibilities, is an entirely separate matter from the authorisation for its release". We examined section 44 of the Insurance Act and have not identified any error of law in the learned judge's interpretation of the section. On the evidence before this court, nothing has been identified that supports the applicant's contention that her authorization/consent/approval was required by GLL before actuarial reserves were released. The issue of legitimate expectation is not reflected in the judgment of the learned judge in respect of this aspect of the claim against the respondent and does not appear to have been raised. As such, we will not consider it.

[14] The learned judge examined the law on the oppression remedy and noted that it is directed at wrongs done to the individual and so is a personal claim. The learned judge stated "what seems [to] be absent from the pleadings for the application of section 213A is a causal relationship between Mr Hosin's conduct and any harm suffered by Ms. Allen as a result of the 'oppressive conduct'". In our view, this conclusion is supported by the evidence before the learned judge as well as the law concerning the oppression remedy.

[15] The learned judge conducted her independent analysis of section 44 of the Insurance Act as well as the documents before her, but also stated that the issue in question was *res judicata* in light of Batts J's ruling in **Catherine Allen v Guardian Life Limited and others** [2018] JMSC Comm 32. See relevant excerpts from Batts J's judgment at para. [104] in the judgment giving rise to this application.

[16] The applicant has submitted that Batts J only refused to grant the injunction that the applicant sought, and did not make a determination on the merits. Implicit in this submission was the belief that *res judicata* would not have arisen from an interlocutory proceeding. We examined **Administrator General of Jamaica v**

Rudyard Stephens and others which makes it clear that *res judicata* can arise from rulings made at the interlocutory stage of proceedings. From the excerpt of Batts J's ruling, it is clear that, in the same claim, Batts J refused to grant an injunction against GLL on the basis that the applicant did not have an arguable case that her consent/authorization/approval was required before GLL could release actuarial reserves. The applicant did not appeal Batts J's ruling on that issue. In the circumstances, the applicant has not shown that the learned judge erred in stating that the matter was *res judicata*. In any event, this point is not of great weight in this matter as the learned judge conducted her own analysis of the issues.

[17] On the question of indemnity costs, the applicant has submitted that nothing in the application took it outside the norm so as to justify an award of costs on an indemnity basis. On the contrary, the learned judge referred to various authorities on the point, none of which was questioned before us, and specifically stated that indemnity costs were justified for a number of reasons including that the applicant's claim against the respondent could be described as "thin", and based on the extensive nature of the pleadings, considerable time and resources would have been spent in the preparation for the application. It was, therefore, a matter within her discretion as to the nature of the costs award that she saw fit.

[18] Having considered the material provided by both parties, as well as the helpful submissions of counsel, the court came to the clear conclusion that the high threshold required to successfully challenge the learned judge's exercise of her discretion was not met in this case and that the application for permission to appeal should accordingly be refused. In light of the time spent by the court and counsel addressing the preliminary point that failed, we award 75% of the costs of the application to the respondent to be agreed or taxed.