[2021] JMCA App 19

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE FRASER JA (AG)

SUPREME COURT CIVIL APPEAL NO 97/2018

APPLICATION NOS 258 & 283/2018

BETWEEN	**CABLE & WIRELESS JAMAICA LIMITED**	**APPLICANT**
AND	**ERIC JASON ABRAHAMS**	**RESPONDENT**

Mrs Denise Kitson QC, Kevin Williams and Miss Anna-Kay Brown instructed by Grant Stewart Phillips & Co for the applicant

Conrad George and Andre Sheckleford instructed by Hart Muirhead Fatta for the respondent

28, 29 January, 8 February 2019 and 9 July 2021

MCDONALD-BISHOP JA

[1] These proceedings concern two applications brought by Cable and Wireless Jamaica Limited ('CWJ') for this court to vary or discharge the order of a single judge of this court ('the single judge'), made in chambers on 13 December 2018, and for stay of proceedings in the Commercial Division of the Supreme Court, pending appeal. The single judge had before him, for his consideration, an application for stay of proceedings pending appeal, which was brought by CWJ from the decision of Batts J, made in the Commercial Division of the Supreme Court on 3 October 2018.

[2] The single judge declined to consider the application for stay on the basis that he did not have the jurisdiction to do so and awarded costs in favour of the respondent, Mr Eric Jason Abrahams ('Mr Abrahams'), to be agreed or taxed.

[3] Upon the refusal of the single judge to consider CWJ's application for stay of the proceedings in the court below, CWJ made an application for the court to discharge and/or vary that order of the single judge and for, among other consequential orders, a stay of the proceedings in the Supreme Court before Batts J, pending the determination of the appeal.

[4] Three distinct, but related issues arose for the court's consideration on the notice of application. They were as follows:

> (1) whether the single judge erred in declining jurisdiction on the basis that a single judge cannot grant a stay of proceedings;
>
> (2) whether the single judge erred in making the adverse costs order against CWJ; and
>
> (3) whether the circumstances of the case favoured a stay of proceedings in the court below, pending appeal.

[5] On 8 February 2019, after hearing submissions from counsel for the parties, the court decided all three issues in favour of CWJ and granted the orders sought by CWJ in terms of the notice of application. Accordingly, the court discharged the order of the single judge, granted the stay of proceedings in the Supreme Court until the determination of the appeal, and ordered that the costs of the application shall be costs in the appeal.

[6] The court also made some necessary case management orders in preparation for the expeditious hearing of the appeal. We promised then to put the reasons for the decision in writing. With sincerest apologies for the delay, we now fulfil that promise.

[7] At this juncture, it is important to note that by virtue of amendments made to the Court of Appeal Rules ('the CAR') in September 2015, rule 2.8, as it existed at the time, was deleted because of its inconsistency with sections 256 and 258 of the Judicature (Parish Court) Act. Accordingly, the numbering of the subsequent rules under section 2 of the CAR was also affected so that rules 2.9 through to 2.20 were amended to become rules 2.8 through to 2.19, respectively. We highlight this because the parties, in their submissions in this court, and the single judge, in considering the matter based on the grounds of the application and the submissions that were before him, made reference to the rules as they would have been prior to the 2015 amendments. The reliance on the pre-2015 amended CAR would have been erroneous because the application under consideration was filed in 2018. Therefore, it is considered proper to correct the error in this judgment by referencing the relevant rules that would have been applicable at the time the application was filed and considered by the single judge. Those are the relevant rules of the CAR as they stood following the 2015 amendment.

Background

Proceedings in the Supreme Court

[8] Mr Abrahams, at all material times, was a minority shareholder in CWJ. On 29 November 2017, he filed an application (relisted) in the Supreme Court, seeking permission to bring derivative proceedings in the State of Florida in the United States of America for, and on behalf of, CWJ ('the proposed derivative action'). He was desirous of instituting the proposed derivative action against CWJ's parent company, Cable & Wireless Plc, and against some "past, present and shadow directors" of CWJ, who he said had caused CWJ to suffer loss and damage during the period 2010–2017. The allegation grounding this proposed derivative action was that the directors and shadow directors had breached their fiduciary duties to CWJ.

[9] Mr Abrahams averred that the court in Florida is the convenient forum to hear the proposed derivative action because Cable & Wireless Plc has its operational

headquarters in Miami, Florida, he is domiciled in Florida, and two shadow directors are also in that state.

[10] When Mr Abrahams' application came up for hearing before Batts J, CWJ opposed the application on the basis of two preliminary objections. The first objection was that the application for leave to bring the derivative action ought to have been commenced by a fixed date claim form, instead of a notice of application; and the second, that the Supreme Court had no jurisdiction to issue an order for a derivative action to be commenced outside the jurisdiction.

[11] Batts J did not uphold the preliminary objections. In disposing of the first objection, he opined that in the absence of an express provision in the Companies Act, and the Civil Procedure Rules, 2002 ('CPR'), as to the mode or method of application, the matter should continue as if it was commenced by way of a fixed date claim form. With regard to the second objection, Batts J, relying on sections 212(1)-(2) and 213 of the Companies Act, held that the "court has jurisdiction to give permission to bring a derivative action in the name of and on behalf of the company in a jurisdiction other than Jamaica" (see para. [15] of the judgment **Eric Jason Abrahams v Cable & Wireless Jamaica Limited** [2018] JMSC Comm 29). He reasoned that he was persuaded by, and accepted, the purposive approach to statutory interpretation adopted by the courts, which considered similar legislation, in the British Virgin Islands. He concluded that there was no inconsistency between the Judicature (Supreme Court) Act and the grant of permission to bring or defend an action in a foreign jurisdiction and that there is nothing to compel a construction that section 212 of the Companies Act is limited to claims in Jamaica.

[12] Based on that reasoning, Batts J made the following orders:

"1. Preliminary point as to jurisdiction dismissed.
2. Costs to [Mr Abrahams] to be agreed or taxed.
3. Leave to Appeal is granted.

4. The relisted Notice of Application for Court Orders filed on the 29th November 2017 is adjourned to the 18th and 19th December 2018, commencing at 11 am."

CWJ's appeal and application for stay of proceedings before the single judge

[13] On 16 October 2018, CWJ filed an appeal from the decision of Batts J dismissing the preliminary objection as to jurisdiction with costs to the respondent. There was no appeal against the dismissal of the preliminary objection regarding the process that had commenced the proceedings. CWJ also filed the application in this court seeking a stay of the proceedings in the court below, pending the determination of the appeal. In making the application for stay of proceedings, CWJ relied on, what it contended was, the merit in the grounds of appeal filed, in particular, the following grounds, among others:

"i) The Court of Appeal was empowered to make the orders pursuant to rules 1.1, 1.7 and [2.14] of the Court of Appeal Rules ('the CAR'); rules 1.1, 1.2, 1.3 and 26.1(2)(e) of the CPR and section 10 of the Judicature (Appellate Jurisdiction) Act;

ii) The appeal has a real prospect of success; and

iii) If the proceedings in the court below were allowed to continue simultaneously with the appeal, the appeal could be rendered nugatory."

[14] During the hearing of the application in chambers before the single judge, counsel for the respondent at the time, Mr Andre Sheckleford, submitted that neither the court nor a single judge of the court had jurisdiction to grant a stay of proceedings in the Supreme Court pending appeal. The single judge did not accept that the court had no jurisdiction to grant an order for stay of proceedings but agreed with Mr Sheckleford that a single judge of the court did not have the jurisdiction to do so. Consequently, he made the following orders:

> "1. A single judge of this court has no jurisdiction to grant the order sought in the notice of application for court orders filed on 19 November 2018.
>
> 2. Costs to the respondent to be agreed or taxed."

[15] The basis of that order as detailed in judgment recorded as **Cable and Wireless Jamaica Limited v Eric Jason Abrahams** [2018] JMCA App 44, was as follows:

> "a. Batts J's order is not capable of being stayed. It only brought the matter of the preliminary point to an end.
>
> b. Rule [2.10(1)(b)] of the Court of Appeal Rules (CAR) cannot apply. A single judge is therefore not given any jurisdiction over the order of Batts J.
>
> c. Rule [2.10(1)(e)] of the CAR does not seem to apply to proceedings in the court below. Given that rule [2.10(1)(b)] of the CAR expressly speaks to non-procedural matters, rule [2.10(1)(e)] would seem to refer to proceedings of this court.
>
> d. Rule [2.13] of the CAR seems to suggest that a single judge could stay proceedings, but nowhere in the rules is that authority actually bestowed.
>
> e. Whereas the court may be said to have the authority, by rule [2.14(a)] of the CAR, to stay the proceedings pending appeal, a single judge of the court is not given that power."

Issue (1): Whether the single judge erred in declining jurisdiction on the basis that a single judge cannot grant a stay of proceedings

[16] In declining jurisdiction to grant the stay of proceedings, the single judge considered several rules of the CAR that, he found, do not allow a single judge to grant a stay of proceedings in the court below. He demonstrably had regard to rules 2.10(1)(b), 2.10(1)(e), 2.13, and 2.14(a). CWJ had, however, relied on other provisions before him, namely, section 10 of the Judicature (Appellate Jurisdiction) Act ('JAJA'); rules 1.1 and 1.7 of the CAR and rules 1.1, 1.2, 1.3 and 26.1(2)(e) of the CPR.

[17] In the end, the single judge's decision was, in effect, that none of the provisions stated above, or indeed, any combination of them, allows for a single judge to grant an order for stay of proceedings in the Supreme Court while an appeal that has emanated from it is pending in this court.

The submissions on behalf of CWJ

[18] Mrs Denise Kitson QC, in challenging the single judge's decision, submitted on behalf of CWJ, that CWJ had filed a procedural appeal in respect of Batts J's order, while the substantive application for permission to bring a derivative action overseas remained pending in the Supreme Court. The application before this court, she submitted, was for a stay of those proceedings in the Supreme Court to which the pending appeal related, and a single judge of this court has the jurisdiction to grant that order. She cited the relevant provisions of the CAR, in particular, rules 2.9(1); 2.10(1)(e) and 2.13, and sections 9 and 10 of the JAJA, which, according to her, clearly allow for a single judge of the court to hear procedural applications, including one for stay of proceedings.

[19] In the instant case, she said, the application for a stay of proceedings is a procedural application. She relied on the decision of this court in **William Clarke v Bank of Nova Scotia** [2013] JMCA App 9 ('**William Clarke**'), where it was determined that a single judge of appeal can hear interlocutory applications such as this one for stay of proceedings (see paras. [32]–[34], [44] and [102]–[106] of **William Clarke**).

[20] According to Mrs Kitson, on the strength of that authority, an application for stay of proceedings is an interlocutory or procedural application, which falls within the jurisdiction of a single judge, and not an interlocutory or procedural appeal, which is solely reserved for the court sitting with three or more judges. She maintained that the postponement of the hearing in the Supreme Court to April 2019, was an indication that there were proceedings pending in the court below that were capable of being stayed.

[21] Mrs Kitson relied on the definition of "stay of proceedings" given by Lord Oliver of Aylmerton in **The Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd and Northern Industrial and Garage Co (Jamaica)** [1991] UKPC 19 ('**Vehicles and Supplies**'). His Lordship, speaking on behalf of the Judicial Committee of the Privy Council, defined a stay of proceedings as, "an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage which they have reached, the object being to avoid the hearing or trial taking place". In that regard, Queen's Counsel sought to distinguish the instant case from the case of **Robert Rainford v His Excellency the Most Honourable Sir Patrick Allen and others** [2014] JMCA App 26 ('**Robert Rainford**'), where McIntosh JA stated that the making of declaratory orders by the judge below in that case, meant that there were no proceedings pending or remaining in that court to be stayed and so there were no proceedings amenable to a stay in this court.

[22] Reference was also made to the decisions in **Jade Hollis v The Disciplinary Committee of the General Legal Council** [2015] JMCA App 42 and [2017] JMCA Civ 11 as examples of cases in which a single judge granted an order for stay of proceedings in the tribunal below, pending the determination of the appeal.

[23] Mrs Kitson additionally prayed in aid dicta from **Paul Chen-Young & ors v Eagle Merchant Bank Jamaica Limited and anor** [2018] JMCA App 7 ('**Paul Chen-Young**'), to support the argument that it is within the court's implied, inherent, or residuary jurisdiction to make an order for stay of proceedings and that a single judge has that power, when properly exercising the jurisdiction of the court.

<u>The submissions on behalf of Mr Abrahams</u>

[24] Mr Conrad George, in his response on behalf of Mr Abrahams, accepted that the court has the power to stay proceedings. He, however, submitted that the power is limited to staying proceedings that are before this court. He pointed out that rule 2.10 of the CAR sets out specifically what the single judge can do. He submitted that rule 2.10(1)(e) of the CAR, in particular, enables the single judge to make any interlocutory

order and so the question for the court is what is 'interlocutory'. It is, he contended, a matter that is in the course of proceedings. Counsel argued that the current proceedings before this court concerned a preliminary point on jurisdiction, but the proceedings in relation to the application for leave to bring the proposed derivative action are not before it.

[25] He noted that rule 2.10 of the CAR is restrictive as it relates to interlocutory applications in proceedings before the Court of Appeal and not to proceedings in the Supreme Court. A procedural application, he said, "cannot be made in a vacuum" and must relate to the proceedings before this court. The proceedings in the Supreme Court, which concerned the application for leave to bring the proposed derivative action, was not before this court and so CWJ was asking the court to do something that is not procedural. For that reason, counsel contended, rule 2.10 of the CAR was inapplicable.

[26] He also maintained that the phrase "any proceedings" in rule 26.1(2)(e) of the CPR, on which CWJ partially relied before the single judge, do not extend to any and all related proceedings, as confirmed in **Robert Rainford**. Mr George further highlighted that in the cases of **Charmin Blake (Administratrix of the Estate of Ernest Blake, deceased)** [2010] JMCA Civ 31 and **Robert Rainford**, it was held, by the single judges in those matters, that as the proceedings which the applicants in those cases were seeking to have stayed in this court were not before the court, they had no power to stay those proceedings.

[27] Having additionally placed reliance on the Australian case of **Austrim Nylex Ltd v Kroll & others** [2001] VSC 168 ('**Austrim Nylex**'), Mr George submitted that the appropriate course of action in seeking to stay proceedings in the lower court, during the currency of the appeal, was by an application in the lower court.

Discussion and findings

[28] Having considered the arguments of counsel on both sides within the framework of the applicable law, I found the submissions on behalf of CWJ more convincing for reasons which will now be outlined.

[29] I begin with an examination of some pertinent aspects of the legislative scheme from which the court derives its jurisdiction and powers particularly, those relied on by CWJ to contend that the single judge erred. The jurisdictional foundation of the Court of Appeal is to be found in section 103(1) of the Constitution, which states:

> "103.- (1) There shall be a Court of Appeal for Jamaica which shall have such jurisdiction and powers as may be conferred upon it **by this Constitution or any other law**." (Emphasis added)

[30] Section 103 of the Constitution has established, therefore, that the source of the court's jurisdiction and powers is not only the Constitution but also "any other law".

[31] Section 109 of the Constitution provides for the number of judges, which should exercise the jurisdiction of the court in, what I would call, 'non-interlocutory' matters. It reads:

> "109. – The Court of Appeal shall, when determining **any matter other than an interlocutory matter**, be composed of an uneven number of Judges, not being less than three." (Emphasis added)

[32] The Constitution makes no further provision regarding the exercise of the jurisdiction of the court. Statute, however, has done so, which would be the 'other law' provided for by section 103. Within this context, section 5 of the JAJA is worthy of brief attention. It provides that:

> "5. The Court may, if the President of the Court so directs, sit in more than one division of three Judges at the same time."

[33] This section is what accounts for the normal sitting of the court comprising three judges and in separate divisions of the court, simultaneously. In **William Clarke**, H Harris JA gave her view of the interaction between section 109 of the Constitution and section 5 of JAJA in these terms:

> "[41]...section 109 of the Constitution distinguishes between the hearing and determination of matters and interlocutory matters. By section 5 of the Judicature (Appellate Jurisdiction) Act the sittings of the court may be controlled or administered by three judges. As a rule, appeals are heard and disposed of by a panel of three judges. **Section 109 must be construed to mean that <u>save and except for interlocutory matters</u>, all matters must be adjudicated upon by a panel of not less than three judges. Therefore, it must be taken that the drafters of the Constitution sought to safeguard and protect the jurisdiction of the court in the determination of appeals by specifically providing that <u>save and except for interlocutory matters</u>, the requisite composition of the appellate court should be a minimum of three judges**..." (Emphasis added)

[34] Sections 9 and 10 of the JAJA are other statutory provisions that are of relevance in examining the jurisdiction and power of the court. Section 9 reads:

> "9. There shall be vested in the Court of Appeal –
>
> (a) subject to the provisions of this Act the jurisdiction and powers of the former Court of Appeal immediately prior to the appointed day;
>
> (b) such other jurisdiction and powers as may be conferred upon them by this or any other enactment."

[35] Section 10 of the JAJA speaks to the jurisdiction of the court in civil appeals from the Supreme Court. It reads:

> "10. Subject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in

> all civil proceedings, and for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court shall subject as aforesaid have all the power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958."

[36] By virtue of the JAJA, the jurisdiction of the court is also as provided for by that statute, other enactments and rules of court made pursuant to the Judicature (Rules of Court) Act, 1962 ('JRCA'). This latter statute also merits specific consideration.

[37] The JRCA empowers the Rules Committee of the Supreme Court to make rules and to regulate the practice and procedure of the Supreme Court and Court of Appeal. Section 4(2)(e) of the JRCA, provides that:

> "4. – (2) Rules of court may make provision for all or any of the following matters –
>
> ...
>
> (e) for providing that **any interlocutory application in relation to any matter, or to any appeal or proposed appeal, may be heard and disposed of by a single Judge**." (Emphasis added)

[38] The JRCA reflects the intention of the framers of the Constitution, as inferred from section 109 of the Constitution, that interlocutory matters can be heard by less than three judges – meaning even a single judge. In keeping with the Constitution, Parliament, through the JAJA, expressly authorises the Rules Committee to provide for the hearing and disposal of interlocutory applications by a single judge. This, the Rules Committee has done through the CAR.

[39] Undoubtedly, pursuant to section 4(2)(e) of the JRCA, rules 2.9 and 2.10 of the CAR make provisions for the exercise of the powers of a single judge to deal with procedural applications. Rule 2.9(1) of the CAR, which was not expressly cited by the single judge, but which is relevant to the exercise of the power of a single judge, and

which was relied on by Queen's Counsel for CWJ before this court, states, in so far as is relevant:

> "**Procedural applications to court**
>
> 2.9 (1) **Any application (other than an application for permission to appeal) to the court must be made in writing in the first instance and <u>be considered by a single judge.</u>**
>
> (2) …
>
> (3) Where the record has been referred to a single judge under rule [2.8] the application is wherever practicable to be considered by that judge.
>
> (4) So far as practicable a procedural application is to be dealt with on paper or by telephonic or other means of communication other than an oral hearing.
>
> (5) ..." (Emphasis added)

[40] Rule 2.10 of the CAR states:

> "**Powers of a single judge**
>
> 2.10 (1) **A single judge may make orders –**
>
> (a) for the giving of security for any costs occasioned by an appeal; and
>
> (b) for a stay of execution on any judgment or order against which an appeal has been made pending the determination of the appeal;
>
> (c) for an injunction restraining any party from dealing disposing or parting with the possession of the subject matter of an appeal pending the determination of the appeal;

(d) as to the documents to be included in the record in the event that rule 1.7(9) applies; and

(e) on any other procedural application including an application for extension of time to file skeleton submissions and records of appeal.

(2) Paragraph 1(e) does not include an application for extension of time to file an appeal.

(3) Any order made by a single judge may be varied or discharged by the court on an application made within 14 days of that order." (Emphasis added)

[41] It seemed clear and unambiguous, on a reading of rules 2.9(1), 2.10(1) and 2.10(2) of the CAR, that except for an application for permission to appeal and for extension of time to file an appeal, all other procedural applications must first be considered by a single judge. It is expected that if the procedural application can properly and lawfully be dealt with by the single judge, he is empowered so to do but if he cannot or chooses not to do so for any legitimate reasons (such as a potential conflict of interest), then it is expected that he will give the appropriate directions for the progress or disposal of the application by another single judge or the court sitting with a panel of three judges.

[42] It follows from this that if the application is considered as one for hearing by a sitting of the division of the court comprising not less than three judges, then such directions ought to be given to the registrar for the matter to be dealt with by the court. In the instant case, the single judge, having formed the view (rightly or wrongly) that this was a matter for consideration by the court, ought properly to have set the matter for hearing in court instead of declining jurisdiction and leaving CWJ to file a fresh application to the court with an attendant adverse costs order against it. It was not wrong for the application to have been placed before him for his consideration, as

provided for by rule 2.9(1) of the CAR. Therefore, in his declining jurisdiction with costs, the single judge failed to exercise his discretion judicially, which would merit the intervention of the court.

[43] Quite apart from the power to consider the application and give appropriate directions for the disposal of the matter, pursuant to rule 2.9(1) of the CAR, the single judge also had the power to consider the application for stay of proceedings on a more compelling basis. This basis was by virtue of rule 2.10(1)(e) of the CAR. In my respectful view, the application would have fallen within the description of "any other procedural application" within the meaning of that rule, as well as within the meaning of "interlocutory matters" referred to in section 109 of the Constitution. It would also have been a matter incidental to and for the purpose of the determination of the appeal within section 10 of the JAJA. I say this for the following reasons.

[44] There was no question that the substantive appeal was a procedural appeal. This is in contradistinction to the application before the single judge, which was not only a procedural but also an interlocutory application. It is noted that the CAR does not speak to "interlocutory" applications or appeals, but instead to "procedural" applications or appeals in the relevant provisions.

[45] H Harris JA, in **William Clarke** found "attractive" the submission that, among other things, interlocutory applications under the former rules of court are the same as procedural applications provided for under rule 2.10(1) and 2.10(2) of the CAR. She stated at para. [40]:

> "[40] …Counsel pointed out that the provision of the Belizean rule 22 is identical to rule 33 of our Court of Appeal Rules 1962 which has since been revoked by the CAR but that, the approach in rule 33 is similar to rules [2.10(1)] and rule [2.10(2)] of the CAR. **Under rule [2.10], the single judge has jurisdiction to hear procedural applications, the orders from which, the court may vary or discharge. She submitted that the scheme of rule [2.10] being similar to rule 33 of 1962, makes it**

> **fair to conclude that interlocutory applications in the revoked rules are now 'procedural applications'**, and that the provision by the CAR for appeals to be heard by a single judge is void, it being inconsistent with the Constitution. **This submission is attractive.**" (Emphasis added)

[46] I share H Harris JA's view that rule 2.10, and I would add, rule 2.9 of the CAR, apply to the same applications that were formerly known as interlocutory applications under the old procedural regime, and which would fall within the definition of interlocutory matters spoken of in section 109 of the Constitution.

[47] In **William Clarke**, Morrison JA, as he then was, explained the nature of interlocutory matters in the Court of Appeal, by reference to the definition of "interlocutory applications" coined by Cotton LJ in **Gilbert v Endean** (1878) 2 Ch D 259, at pages 268-269 as:

> "…those applications...which do not decide the rights of parties, but are made for the purpose of keeping things in *status quo* till the rights can be decided, or for the purpose of obtaining some direction of the Court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the Court ultimately to decide upon the rights of the parties."

[48] Following on this definition, Morrison JA then stated at paragraph [102] that:

> "[102] Although procedural appeals will by definition invariably be from decisions made in the Supreme Court in interlocutory matters, it does not follow that, in the Court of Appeal, an appeal from such a decision is itself an interlocutory matter. Examples of interlocutory matters in this court are, it seems to me, applications to preserve the status quo pending the hearing of an appeal (such as applications for stays of execution or for interim injunctions) or applications to determine the manner in which an appeal is to be conducted (such as a case management conference). In short, as all three counsel accepted, the phrase 'interlocutory matter' in section 109 must relate to a matter that is interlocutory in the Court of Appeal, which a

> procedural appeal, such as the one heard and determined by Brooks JA in the instant case, is not." (Emphasis supplied)

[49] I also endorse Morrison JA's view of what would comprise interlocutory (procedural) applications as distinct from interlocutory (procedural) appeals. What the single judge had for his consideration was a procedural application and not a procedural appeal. The application for a stay of proceedings was an application for the court to stay the *status quo* in relation to the matter in the Supreme Court pending the hearing of the appeal for the rights of the parties to be decided. Alternatively, it was brought for the purpose of having the court direct what was to be done in the progress of the case in the Supreme Court for enabling this court to ultimately decide on the rights of the parties on the appeal. It was, in my view, a kindred application to an application for an injunction or stay of execution pending the determination of an appeal. As such, the application for stay of proceedings was no less interlocutory or procedural than those other applications expressly singled out by Morrison JA at para. [102] of **William Clarke**, and by the Rules Committee in rules 2.10(1)(a)-(d) of the CAR.

[50] In my view, the single judge, evidently, overlooked rule 2.9 of the CAR and, at the same time, ascribed a narrow construction to the words "any other procedural application', in rule 2.10(1)(e). That led him to opine that the rule "does not seem to apply to proceedings in the court below". In my view, the phraseology "[a]ny other procedural application", used in that rule, takes its colour and meaning from the preceding provisions, which include applications for, among other things, stay of execution and injunction pending appeal. The fact that the words "any other" are used to modify "procedural applications" in rule 2.10(1)(e), following the preceding sub-rules, tends to show that the matters listed in the preceding sub-rules are, themselves, procedural applications. It also conveys the Rules Committee's intention that the matters expressly listed must not be taken as being exhaustive of the types of procedural applications that may be considered by a single judge. So, in effect, the rule has provided for a single judge to exercise jurisdiction over all those listed matters and "any other" such applications unless there is an enactment to the contrary.

[51] Against this background, the single judge's opinion at para. [5]c of his judgment that rule 2.10(1)(b) of the CAR speaks to "non-procedural matters", and that for that reason, rule 2.10(1)(e) would seem to refer to proceedings in this court, is not supported based on a consideration of all the relevant enactments and case law. Rule 2.10 of the CAR covers procedural applications to this court that are incidental to a pending appeal as distinct from the substantive appeal.

[52] H Harris JA in **William Clarke** also recognised that under rule 2.10, "a single judge is authorized to hear and determine certain procedural applications" (see para. [32] of **William Clarke**). She then proceeded to set out the entire rule, consistently with my view that the entire section deals with procedural applications.

[53] In this regard, provisions by way of exception to what may be regarded as a general 'sweep-up' provision in rule 2.10(1)(e) regarding "any other procedural application", have been expressly stated in rules 2.9(1) and 2.10(2) of the CAR. These rules expressly indicate that applications for permission to appeal (rule 2.9(1)), and for extension of time to file an appeal (rule 2.10(2)), are exempt from the consideration of a single judge. These restrictions are, of course, understandable because those types of applications are not interlocutory, in the true sense of the word; there being no subsisting appeal to which they would relate. So, while they may be procedural, they are not, necessarily, interlocutory within the contemplation of section 109 of the Constitution.

[54] In my view, and one which I share with Queen's Counsel for CWJ, had the Rules Committee intended to restrict the power of a single judge in granting an order for stay of proceedings or an order on "any other procedural application", it could have easily done so when it amended the rules in 2015 to make it clear that the term "any other procedural application" in rule 2.10(1)(e) excludes an application for extension of time to file an appeal.

[55] In the light of the legislative scheme governing the jurisdiction and powers of the court, I am not prepared to impute to the Rules Committee an intention to exclude from the jurisdiction of a single judge, an application for stay of proceedings pending appeal. The Rules Committee has not, by express words, limited the power of a single judge to exercise the jurisdiction of the court in interlocutory matters and there is nothing to indicate that it has attempted to do so by necessary implication. In the absence of express words, prohibiting the exercise of the jurisdiction of the court through a single judge in interlocutory matters, I can discern no utility in reading restrictions into the rules to establish such a prohibition. That approach of the Rules Committee to permit a single judge to deal with interlocutory matters, as distinct from procedural non-interlocutory matters, is not only consistent with the Constitution but accords with the ethos of the new procedural regime introduced by the CPR, which is geared towards achieving the overriding objective of dealing with cases justly. This includes saving expenses, ensuring that the case is dealt with expeditiously and allotting to it the appropriate share of the court's resources, while taking into account the need to allot resources to other cases (see rules 1.1 of the CPR and 1.1(10) of the CAR).

[56] The deployment of single judges to exercise one aspect of the jurisdiction of the court, which is in relation to procedural matters, is part of the new dispensation to achieve efficiency, economy, and expedition in the dispensation of justice in civil proceedings. It will always be easier to deploy a single judge than three judges, especially in urgent matters (which interlocutory matters often are) and so there is wisdom in permitting the court's jurisdiction to be exercised through a single judge, rather than three or more, in procedural matters.

[57] In **William Clarke**, at para. [92], Morrison JA, quoting from dicta of Panton JA (as he then was), in **Ken Sales & Marketing Ltd v Beverley Levy** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 81/2005, Motion No 45/2005, judgment delivered 19 September 2005, restated this point, which I have endorsed as follows:

> "…appellate procedures, especially in civil proceedings, have undergone radical legislative changes since 2002. There can be no question that several matters that used to occupy the attention of [three] judges sitting together in open court no longer do so. They may now be disposed of by a single judge in Chambers, and even without an oral hearing. The fact of the matter is that there are many matters which may now be disposed of speedily, comfortably, fairly and justly on the basis of written submissions. And the Rules have made adequate provision for this to happen."

[58] There is, therefore, no discernible need for this court to interpret the rules in a way that would constrict the exercise of the jurisdiction and power of the court through and by a single judge in interlocutory matters.

[59] Indeed, this necessity to give a more generous interpretation to rule 2.10(1)(e) of the CAR, than the single judge was prepared to do, does not only accord with the evident intendment of Parliament (in the JRCA) that the jurisdiction of the court in interlocutory matters can be exercised through a single judge, but also the intendment of the Rules Committee. In this regard, attention is directed to rule 2.10(3) of the CAR, which gives the court the power to vary or discharge any order made by a single judge in a procedural application. This is an important safeguard provided for in rule 2.10 for the court to have and maintain oversight responsibilities over the decisions of a single judge. The single judge's decision is always amenable to the review of the court. There is thus a viable procedural mechanism, within the court itself, to provide relief for litigants concerning the exercise of its jurisdiction by a single judge in interlocutory or procedural matters.

[60] The Court of Appeal of the Eastern Caribbean helpfully speaks of this internal safeguard of reviewability by the court of a single judge's decision in the British Virgin Island case of **KMG International NV and DP Holding SA (a company incorporated under the laws of Switzerland)** (unreported), Court of Appeal, Territory of the Virgin Islands, No BVIHCMAP2017/0013, judgment delivered 18 April 2018. The headnote reads at paragraph 2:

> "The power of jurisdiction given in relation to an appeal is that of the Court, and not of a single judge, and which power may, in certain circumstances, in essence be delegated to a single judge of the Court, with the Court retaining the overarching power of reviewability in the circumstances. It is now well settled that a single judge of the Court has no power to hear and determine an appeal. A single judge's jurisdiction can only arise in the context of a pending appeal either through the avenue of rule 27 of the Court of Appeal Rules, or through CPR 62.16. Although the Court may permit certain of its powers to be exercised by a single judge, that permission does not thereby operate to deprive the Full Court of the power vested in it by statute or its inherent jurisdiction to review the single judge's exercise of that power..."

[61] When rule 2.10(1)(e) of the CAR was construed against the backdrop of the relevant provisions of the Constitution, the JAJA, the JRCA, rule 2.9 of the CAR, the other sub-rules of rule 2.10 of the CAR, and the overriding objective, I came to the irresistible conclusion that a single judge has the jurisdiction and the power to order a stay of proceedings, pending the determination of an appeal. The decision of a single judge is amenable to review by the court, itself, exercising jurisdiction through at least three judges. This ensures the court's ultimate control over all matters pertaining to and incidental to an appeal.

[62] Furthermore, in looking at the specific circumstances that obtained in this case, it is indisputable that Mr Abrahams' application for leave to file the proposed derivative action, remained pending in the Supreme Court at the time the appeal was filed, and the application was made for the stay. This means, therefore, that there were proceedings, in train, in the court below from which this appeal emanated and to which the application related. The challenge to jurisdiction went to the core of those proceedings. Therefore, by virtue of the appeal, this court would have assumed jurisdiction over those proceedings. As a result, the proceedings were amenable to a stay pending the determination of the appeal.

[63] This distinguishes the instant case from what obtained in **Robert Rainford**, in which the orders forming the subject matter of the appeal were declaratory orders which brought the proceedings in the Supreme Court to an end. In such circumstances, McIntosh JA rightly concluded that there were no proceedings in this court from the Supreme Court that were amenable to a stay.

[64] In my respectful view, there was merit in CWJ's complaint that the single judge erred when he held that rule 2.10(1)(e) of the CAR "does not seem to be applicable" to the application for stay of proceedings. The rule was applicable and provided an avenue through which he was empowered to exercise the jurisdiction of the court in respect of the procedural application, but subject to the right and power of the court to review his decision.

[65] It is on the basis of this construction of rule 2.10(1)(e) that rule 2.13 of the CAR would then assume some relevance to the application, as contended for by Queen's Counsel for CWJ. That rule, while not itself conferring jurisdiction, implicitly shows the recognition that a single judge, like the court, can make orders for stay of execution and stay of proceedings. It provides:

> **"Stay of execution**
>
> 2.13 Except so far as the court below or the court or a **single judge may otherwise direct –**
>
> (a) an appeal does not operate as **a stay of execution or of proceedings under the decision of the court below**; and
>
> (b) no intermediate act or proceeding is invalidated by an appeal." (Emphasis added)

[66] In my view, an interpretation of the rules that would have the effect of depriving a single judge of the court of the power to consider and determine an interlocutory application, which is not expressly excluded by the Constitution or any law, would be inimical to the power, authority, and effectiveness of the court in carrying out its mandate as an appellate court. It would also unjustifiably obstruct the court in the

administration of justice in civil proceedings in ensuring that it does what needs to be done in order to achieve the overriding objective of the new procedural rules, and to "maintain its character as a court of justice" (see **Paul Chen-Young** at para. [40]).

[67] Any restriction on the authority of a single judge in dealing with interlocutory applications that is not expressly provided for by any law, cannot reasonably be required for the proper administration of justice, having regard to the overriding objective and the provision of the CAR, which empowers the court to vary or discharge any order made by a single judge (rule 2.10(3)).

[68] The review conducted has disclosed that rule 2.10 of the CAR should not be construed in a manner that would curtail the power of a single judge in dealing with procedural applications in civil appeals, which are, unmistakably, interlocutory. In my view, the literal rule, the mischief rule and the purposive approach to statutory interpretation all favour the conclusion that the CAR has made provision for a single judge to exercise the jurisdiction of the court, in respect of procedural interlocutory applications pending appeal, in the absence of any express provision to the contrary. Ultimately, therefore, the provisions of the CAR did not dictate or support a conclusion that the application for stay of proceedings, pending appeal, did not fall within the jurisdiction of a single judge.

[69] In the end, I was satisfied on my analysis of the relevant provisions of the Constitution, the JAJA, the JRCA, the CAR as well as the authorities that were examined, that the single judge had the jurisdiction, power and authority to hear and determine the application filed by CWJ for a stay of proceedings pending appeal. Accordingly, I could not accept the views of counsel for Mr Abrahams that the single judge was correct when he declined jurisdiction to consider the application for stay of proceedings pending appeal.

Issue (2): Whether the single judge erred in awarding costs in favour of Mr Abrahams

[70] As already indicated, by virtue of rule 2.9(1) of the CAR, the application for stay of proceedings was properly before the single judge for consideration. Once he formed the view that he could not grant the order being sought, the proper course was for him to have given the necessary directions for the matter to proceed for hearing by the court comprised of three judges. This would have been consonant with the powers conferred on him by rule 2.9(1) of the CAR and the overriding objective to deal with the case justly. There was nothing in the circumstances to warrant or justify the making of an adverse costs order against CWJ, without a hearing of the application on the merits.

[71] Furthermore, and in any event, I formed the view that the single judge had the jurisdiction to consider the application for stay of proceedings, pending the determination of the appeal. Therefore, he would have erred when he awarded costs in favour of Mr Abrahams, having erroneously declined jurisdiction to consider the application on the merits.

Conclusion on the single judge's decision

[72] For all the foregoing reasons, I concluded that the order made by the single judge, declining jurisdiction to consider the application for stay of proceedings, ought not to have been allowed to stand, especially as an unjustifiable costs order was pegged to it. I formed the view that it was only just to relieve CWJ of the burden of the costs imposed on it without a consideration of the application on the merits. The only practical way of doing so was to discharge the orders made by the single judge and to consider the merits of the application as he ought properly to have done.

[73] In coming to my decision on this issue, I was guided by the standard of review adopted by this court in **Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 at para. [20]. I was satisfied that the circumstances existed for this court to justifiably interfere with the exercise of the discretion of the single judge because in my

view, there was an error in the interpretation of the law, governing the powers of a single judge of this court concerning procedural or interlocutory applications.

[74] I will now turn to the issue concerning the application for stay of the proceedings in the Supreme Court pending appeal.

Issue (3): Whether CWJ was entitled to a stay of proceedings pending appeal

[75] The issue of jurisdiction of the Supreme Court to entertain Mr Abrahams' claim struck at the very heart of those proceedings and formed the subject matter of the procedural appeal brought by CWJ. The objective of the application for stay of proceedings was for the proceedings before Batts J to be halted until this court has had the opportunity to determine the appeal.

[76] The underlying rationale for a stay pending appeal is that it would aid the appellate process and make it more effective. It would ensure, as far as possible, that if the appealing party, is ultimately, successful in its challenge, it will not be denied the full benefit of its success (see **R (H) v Ashworth Special Hospital Authority** [2002] EWCA Civ 923, (albeit, that the primary principles were stated in the context of judicial review proceedings). So, the whole aim was to prevent the appeal being rendered nugatory as well as to avoid an unnecessary waste of time, costs and resources. This would be the result if the hearing below were to proceed to completion and was then adjudged to be a nullity for want of jurisdiction.

[77] Further considerations for the court on an application for stay of execution were helpfully outlined in the Australian case of **Austrim Nylex**. The following has been extrapolated from that authority as some relevant considerations:

> (i) it is a fundamental principle that a claimant is entitled to have a proceeding tried in the ordinary course of the procedure and business of the court, subject only to an exercise of the jurisdiction to grant a stay on proper grounds;

(ii) the power to grant a stay is an "extraordinary jurisdiction" and it will only be exercised in exceptional circumstances;

(iii) the applicant must show by evidence that the proceeding is frivolous and vexatious or that for some other reason it should be stayed;

(iv) even where an appeal is pending in the primary proceedings, a stay will not ordinarily be ordered or ordered as a matter of course;

(v) the applicant must show that he has some prospect of success on the appeal; and

(vi) there are other matters to be taken into consideration in the exercise of the discretion to grant a stay.

[78] The thrust of the CWJ's case on the application for a stay was that the appeal would be rendered nugatory if the stay was not granted, it had a realistic prospect of success on the appeal, and the stay was likely to cause the least risk of injustice to the parties.

[79] Mr George strenuously opposed the application on behalf of Mr Abrahams. He argued that none of the considerations, which would favour a stay, existed in the circumstances of the case. Therefore, the application should be denied.

[80] I could not accept the arguments advanced on behalf of Mr Abrahams for the following reasons.

(a) Whether the appeal would have been rendered nugatory

[81] Queen's Counsel for CWJ relied on dicta of Phillips JA in **Charmin Blake** to advance the argument that the appeal could be rendered nugatory in the absence of a stay of the proceedings below. Phillips JA had formed the view in that case that the

grant of a stay of proceedings in the face of an application to set aside a default judgment aligned with common sense and economy with the use of judicial time. Mrs Kitson submitted that the 'common sense' approach should be applied to the instant case. In so doing, she said, the court should have regard to the best use of its time and resources in order to produce the best practical results in the management of the case.

[82] Mr George countered in response, that the appeal is on a point of jurisdiction and because a jurisdictional point can be raised at any time, the continuation of the proceedings concerning whether leave should be granted to Mr Abrahams will not render the appeal nugatory. According to counsel, if leave were granted and derivative proceedings were filed and commenced in Florida, the appeal would not be rendered nugatory.

[83] I accepted the submissions of Queen's Counsel for CWJ. I acknowledged that the power to grant a stay pending appeal is a power that should be exercised cautiously and only for good and compelling reason. The question in controversy between the parties in this matter was a novel one in this jurisdiction and raised a question of law which was of prime importance. It brought into focus the construction of the Companies Act in so far as it relates to derivative claims and whether the Supreme Court has the power to grant permission for proceedings to be initiated in the court of a foreign state, regarding a Jamaican company. It involved questions relating to the principles of conflict of laws.

[84] The challenge to the proceedings below by CWJ went to the core of the proceedings. If the proceedings were to be allowed to proceed to completion and the appeal succeeded, that would have amounted to an unnecessary waste of scarce judicial time and resources as well as expenses both in this court and in the court below. Also, CWJ, if successful, could have been deprived of the benefit of that success as Mr Abrahams, with leave erroneously granted, could have proceeded to pursue the derivative action outside the jurisdiction with no possibility of rectification by the courts

in the jurisdiction. I, therefore, shared the view that, in the circumstances, the appeal could be rendered nugatory if a stay was not granted.

[85] That finding, however, was not the end of the enquiry. Regard had to be had to the prospect of success of the pending appeal because if it was bound to fail, then it would not be in the interests of the proper administration of justice to halt the proceedings in the court below. The prospect of success of the appeal was, therefore, considered.

(b) The prospect of success

[86] Mrs Kitson placed some reliance on the fact that Batts J had granted leave to appeal as an indication that the appeal had some prospect of success. I did not find the fact that Batts J had granted leave to have been determinative of the matter or, even, relevant to the consideration of this court. Batts J had not indicated his reasons for granting leave, but, in any event, even if he had done so, the independent assessment of this court would still be warranted.

[87] CWJ filed four grounds of appeal. In considering whether the appeal had some prospect of success, it was recognised that on an interlocutory application such as this, it was not desirable for the court to conduct an in-depth enquiry into all the grounds of appeal with a view to declare the likely outcome of the appeal. It was considered sufficient for the court to form a provisional view of the likelihood of success of even one ground that could adversely affect, in a fundamental way, the decision of the court below, thereby resulting in CWJ succeeding on the appeal.

[88] When the grounds were examined, they revealed that the crux of the challenge of CWJ was to Batts J's construction and application of sections 212 and 213 of the Companies Act and his analysis of the authorities, which led him to the conclusion that the preliminary objection as to jurisdiction was unsustainable.

[89] The parties have cited authorities from outside this jurisdiction on which they would rely on the appeal. CWJ sought to rely on, among others, **Top Jet Enterprises**

Limited v Sino Jet Holding Limited and anor (unreported) Grand Court, Cayman Islands, Cause No FSD 106 of 2017 (NSJ), judgment delivered 19 January 2018, in advancing its case that the Supreme Court does not have the jurisdiction to grant leave for the derivative action to be pursued overseas. Queen's Counsel for CWJ advanced the argument that the relevant sections of the Companies Act contemplate a continuing supervisory jurisdiction over derivative claims. Therefore, as a Jamaican court cannot have any control over an action brought outside Jamaica, the law clearly does not allow for permission to be given by the court for an action to be brought outside of Jamaica. Accordingly, Batts J erred in his construction of the Companies Act as there is a presumption against extra-territoriality, it was submitted.

[90] Mrs Kitson argued that the appeal was not frivolous and there was no precedent in the jurisdiction to provide guidance. There were serious issues to be determined on which CWJ stood a realistic and not a fanciful chance of success, she maintained.

[91] Mr George, for Mr Abrahams, maintained that the appeal did not have a good prospect of success. He relied on, among others, the BVI case of **Microsoft Corporation v Vadem Ltd** (unreported), The Eastern Caribbean Supreme Court, British Virgin Islands, Claim No BVI HC (Com) 2012/0048 delivered 9 November 2012; the Hong Kong case of **Wong Ming Bun v Wang Ming Fan** [2014] 1 HKLRD 1108; and the English case of **Novatrust Ltd v Kea Investments Ltd and others** [2014] EWHC 4061, in support of this argument. Counsel maintained that the derivative action Mr Abrahams was seeking to bring in Florida did not raise issues of extra-territorial application of the Companies Act. Instead, it was the utilisation of Jamaican companies' legislation in a forum which Mr Abrahams was contending was the convenient one.

[92] Mr George submitted that it is common ground that the common law in Jamaica, unlike in the Cayman Islands, was replaced and overtaken by section 212 of the Companies Act. He noted that it is a rule of statutory interpretation that a right under the common law cannot be taken away by statute unless the statute is plain and deliberate in its language in doing so, or the right should be taken away by necessary

implication. There is nothing in our Companies Act which takes away the pre-existing common law right to bring actions overseas. According to counsel, the Companies Act cannot take away the right to bring derivative proceedings overseas and that it had to be read into the statute as a subsisting right. He argued that there is no way, under the current Companies Act, for derivative proceedings to be brought in Jamaica or anywhere else without the Supreme Court allowing it.

[93] In Mr George's view, Batts J explained with clarity his reasons for holding that the Companies Act allows the court to grant leave to an applicant to bring derivative proceedings in another jurisdiction. Batts J's reasoning, he said, has left no room for reproach as his decision was an accurate reflection of the law.

[94] Having considered the case being advanced on appeal by CWJ, it seemed plausible to accept that there was no binding precedent or any authority in our jurisdiction that could guide the court in resolving the issue for consideration on appeal. All the authorities relied on were, at best, persuasive and most emanated from first instance decisions in jurisdictions, which have no statute identical to our Companies Act. In my view, the state of the law in the area under consideration and the novelty of the question warranted investigation by this court before it could confidently be declared that CWJ had no prospect of success. Given that the resolution of the issue would necessitate an examination and construction of the relevant statutory provisions and the principles applied by Batts J, it was considered only fitting that such an in-depth enquiry be reserved for the hearing of the substantive appeal.

[95] On a consideration of the arguments and the authorities cited, the wording of the Companies Act and the judgment of Batts J, I formed the view that there were serious issues to be examined on the substantive appeal, which could have been resolved in favour of CWJ. It could not safely be said then that CWJ had no realistic prospect of success on the appeal.

[96] I was satisfied that the grounds of appeal were arguable with some prospect of success. This finding was, therefore, in favour of the grant of the stay.

(c) The risk of prejudice or injustice

[97] Consideration was also given to the risk of prejudice or injustice to either party if the stay was granted or refused. This is a consideration usually taken into account as a matter of law in applications for stay of execution of an order or judgment of the court. Since it was a factor raised by the parties, and given the principles cited at para. [77] of this judgment, this also seemed to have been a pertinent consideration. Mr George contended that the fact that the appeal had no prospect of success would have meant that the relative risk of injustice to CWJ was low. In the alternative, he argued that the risk of injustice favoured the dismissal of the application as the parent company was attempting a forced takeover of CWJ as detailed in the affidavit opposing the application for stay. He noted that the derivative action could be prejudiced by a cancellation of the entirety of the minority shareholding. He also raised concerns regarding the limitation period, which he contended apply to the commencement of a derivative claim.

[98] Having considered the issue to be resolved on the substantive appeal, which went to the fundamental question of jurisdiction, as well as the stage at which the proceedings had reached in the court below, I concluded that the grant of the stay was likely to cause the least prejudice or injustice to the parties. The applicant's concern regarding a takeover by the parent company was shown by affidavit evidence and on the submissions of Queen's Counsel for CWJ to have been unfounded.

[99] Also, the contention of Mr Abraham's counsel, regarding prejudice that they contended could result from the expiration of the limitation period, was not accepted as a proper basis to deny the application for a stay. Queen's Counsel for CWJ relied on the cases of **Konamaneni & Ors v Roll- Royce Industrial Power (India) Ltd & Ors** [2003] BCC 790, and **Deloris Scott-Carlington & anor v Ideal Betting Company Limited** [2017] JMSC Comm 40 [168] to advance the argument that no

limitation period applies to actions under the Companies Act. Counsel for Mr Abrahams did not rebut this argument by any authority to the contrary. I could perceive no discernible prejudice or injustice to Mr Abrahams if the stay was granted. This conclusion also favoured the grant of the stay pending the hearing of the appeal.

Conclusion on the application for stay of proceedings

[100] Having regard to the central issue in dispute between the parties, which went to the important question of jurisdiction, and the unsettled state of the applicable law, I concluded that it was in the interests of the administration of justice for the court to be afforded the opportunity to fully hear this matter so that its effort would not ultimately be in vain and scarce judicial time and resources unnecessarily wasted, if the appeal succeeded.

[101] I formed the view, therefore, that CWJ was entitled to a stay of proceedings in the court below, pending the appeal on the basis that there was a possibility that the appeal could have been rendered nugatory without a stay; there was some prospect of success in the grounds of appeal; the risk of prejudice or injustice would have been greater if the stay were refused, and it was in keeping with the overriding objective that the stay be granted.

[102] It was for all the preceding reasons that I concurred in the decision of the court that the stay be granted, with the necessary consequential orders that were made on the application.

F WILLIAMS JA

[103] I have read in draft the judgment of McDonald-Bishop JA in this matter. I agree that it was for the reasons set out therein, that I concurred in disposing of this application in the manner indicated in para. [5] of this judgment.

FRASER JA (AG)

[104] I, too, have read in draft the judgment of McDonald-Bishop JA. I agree that I concurred in disposing of this application as indicated in para. [5] of this judgment, for the reasons outlined therein.