[2023] JMCA Civ 43

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE LAING JA (AG)

APPLICATION NO COA2022APP00173

BETWEEN	**GREGORY DUNCAN**	**APPELLANT**
AND	**GLOBAL DESIGNS & BUILDERS LTD**	**APPELLANT**
AND	**YUALANDE CHRISTOPHER (t/a Yualande Christopher & Associates)**	**RESPONDENT**

Mr Gregory Duncan in person

Miss Yualande Christopher instructed by Yualande Christopher & Associates for the respondent

14 December 2022 and 29 September 2023

Civil Procedure - Application for a stay of execution pending appeal.

Civil Procedure - Taxation of costs between attorney and own client – application to set aside a default costs certificate - Whether a charging order can be issued in the absence of a claim -The Legal Profession Act-section 22- The Civil Procedure Rules-rules 65.18, 65.20 and 65.22.

BROOKS P

[1] I have had the privilege of reading, in draft, the judgment of my learned sister, Simmons JA. I agree with her reasoning and conclusions.

SIMMONS JA

[2] The appellants, Mr Gregory Duncan and Global Designs & Builders Ltd, seek a stay of execution of the judgment of Brown Beckford J ('the learned judge'), who on 27 July

2022, refused their application to set aside a default costs certificate granted in favour of Miss Yualande Christopher t/a Yualande Christopher & Associates ('the respondent'). They also seek leave to appeal the decision of the learned judge.

[3] The application is supported by the affidavits of Gregory Duncan sworn to on 9 August 2022 and 13 December 2022 respectively. The respondent, who is opposed to the granting of the application, has relied on her affidavits sworn to on 25 August 2022 and 13 December 2022.

[4] At the conclusion of the hearing the court indicated that, in light of the fulsome submissions made by the parties, the hearing of the application for leave to appeal would be treated as the hearing of the appeal.

Background

[5] This matter stems from a dispute between the parties regarding fees that were said to be due and payable to the respondent who acted as the appellants' attorney-at-law for the period 2016-2018.

[6] The facts in this case are set out in the judgment of the court below (see **Yulande Christopher (t/a Yulande Christopher & Associates and Then Thomas and Christopher Law Partners) v Gregory Duncan and anor** [2022] JMCC Comm 23). At paras. [6] and [7] of the said judgment, which I have adopted with gratitude, the learned judge stated as follows:

> "[6] The [respondent] served as [the] Attorney-at-Law for the [appellants] for the years spanning 2016-2018. The principal representatives of the parties were Ms. Yualande Christopher for the [respondent] and Mr. Gregory Duncan for the [appellants]. Mr. Duncan is the sole shareholder of Global Designs and Builders Limited. Following the termination of their relationship in 2018, the [respondent] submitted its invoices for work carried out to Mr. Duncan and Global Designs and Builders on the 14th and 19th December 2019. Pursuant to the [appellants'] instructions, the invoices were also sent to

> the [appellants'] new Attorneys-at-Law, Chen Green and Company by letter on the 8th January 2019. On the 12th February 2020, the [respondent] filed and served on the [appellants] the Bill of Costs, submitted pursuant to **S. 21 and 22 of The Legal Profession Act**, with Notice to serve Points of Dispute within 28 days after the date of service and Notice of Taxation.
>
> [7] The [appellants] failed to file their Points of Dispute, and a Default Cost Certificate in the sum of Sixteen Million Seven Hundred and Seventy Thousand Dollars and Thirteen Dollars and Ninety-Three cents (**$16,770,013.93**) was granted against both [appellants] on the 7th December 2020. On February 3, 2022, the [respondent] filed an Application for the Sale of Land belonging to the [Global Designs & Builders Ltd] on the basis that no payment had been made by the [appellants] in satisfaction of the judgment sum with interest and costs. On the 21st February 2022, the [appellants] filed an objection to the Application. By an order of Batts J on the 24th February 2022, a Final Charging Order was granted to the [respondent]. On 1st March 2022, the [appellants] filed a Notice of Application to Set Aside Default Cost Certificate & Discharge of Final Charging Orders. At the time of [the] hearing there was no proposed Points of Dispute exhibited by the [appellants]." (Emphasis as in the original)

[7] The learned judge stated that the following issues arose for her determination:

> "(i) Whether the [respondent] in failing to comply with rule 65.18 of the Civil Procedure Rules ('CPR') 2000 (as amended on the 3rd of August 2020) [was] barred from commencing taxation proceedings; and
>
> (ii) Whether the default costs certificate obtained by the [respondent] ought to be set aside pursuant to rule 65.22 of the CPR."

[8] The learned judge, having referred to the decision of this court in **Henlin Gibson Henlin (A Firm) and Calvin Green v Lilieth Turnquest** [2015] JMCA App 54 ('**Henlin**'), concluded that the respondent was not barred from commencing taxation proceedings after the expiry of the three-month period as prescribed by rule 65.18(2) of

the Civil Procedure Rules ('CPR'). In this regard, she noted that the appellants had not applied to the court for an order to compel the respondent to commence taxation proceedings pursuant to rule 65.19 of the CPR.

[9] In dealing with the second issue, the learned judge noted that the appellants had failed to file their points of dispute and, as such, the registrar did not have the jurisdiction to set aside the default costs certificate. She stated that the decision to set aside the default costs certificate was a discretionary one and that the court should be guided by the factors set out by F Williams JA in **Kandekore (Lijyasu) v COK Sodality Co-operative Credit Union Ltd et al** [2018] JMCA App 2 ('**Kandekore**').

[10] The learned judge stated that no reason had been proffered by the appellants for their failure to file their points of dispute. Instead, the affidavit in support of the application focused on whether the bill of costs was correct. She did not end there. The learned judge proceeded to consider whether the application was made promptly and concluded that it satisfied that requirement.

[11] The issues of whether there was a clearly articulated dispute about the costs sought and whether the appellants had a realistic prospect of successfully disputing the bill of costs were also considered. The learned judge noted that no proposed points of dispute were exhibited to Mr Duncan's affidavit in support of the application as required by rule 65.22(4) of the CPR. This she said was "fatal to the application".

[12] Mr Duncan made an oral application for an extension of time to file the applicants' points of dispute. That application was opposed by the respondent on the basis that over two years had elapsed since they were required to do so. The learned judge refused the application.

[13] The issue of prejudice was also addressed. The learned judge stated at para. [36]:

> "[36] In the present case the [respondent]has obtained a final Charging Order and has applied for the sale of the property. Setting aside the Default Cost Certificate

> would mean [that] the fruits of the judgment would be snatched from the [respondent]. On the other hand, the [respondent] seeks the sale of the [appellants'] property to settle the debt. The submissions of Counsel Ms. Christopher in which she set out how each payment received from the [the appellants] was applied, has not been successfully challenged. The [appellants'] assertion that the [respondent's] Bill of Cost was based on 'fictitious' invoices did not persuade the Court. The [respondent's] explanation of the invoices and allocation of monies received from and on behalf of the [appellants] are more persuasive than the [appellants'] averments. The one particular challenge by Mr. Duncan as to the date of paying the cheque and the date of receipt is clearly erroneous as an examination of the receipt shows the date could only be construed as the 15th or the 16th May. It [is] my view that the [respondent] would suffer the greater prejudice if the Default Costs Certificate were set aside by the delay in realizing the fruits of the judgment."

[14] It was for the above reasons that the learned judge refused the application made by the appellants to set aside the default costs certificate and discharge the final charging order. Permission to appeal was also refused.

[15] The appellants, aggrieved by this outcome, filed their notice and grounds of appeal on 9 August 2022. This was followed by amended notice and grounds of appeal that were filed on 11 August 2022, seeking orders that:

i. The appeal be allowed.
ii. The final judgment be set aside.
iii. Any other orders that the court deems fit.

The grounds of appeal are as follows:

> "(1) That there is no reward for breaching the Rules of the [Civil Procedure Rules] and [Canons of the Legal profession].

(2) That the Rules provide for and recommend for next step consequences to the breach of rule 65.18(2).

(3) That [the respondent has failed in proving that it is entitled to the sum claimed under the Canons of the Legal profession as a practicing attorney-at-law and by evidence as required by the court of law.

(4) The respondent failed to prove any evidence to substantiate its entitlement to sums claimed in the said invoices.

(5) The respondent has not denied that the sums collected by it, which was paid by the [appellants] that exceed the sums agreed to on the original invoices."

[16] The notice of application for a stay of the execution of the judgment of the learned judge and for permission to file notice and grounds of appeal was filed on 9 August 2022. The grounds on which the application is based are as follows:

(1) The appellants have a real prospect of succeeding in the appeal.

(2) Rule 2.15 of the Court of Appeal Rules empower the court to grant a stay of the judgment.

(3) The appellants could not pay any invoice that was never served or was unknowingly incurred.

(4) The appellants undertake to pay any damages occasioned by the grant of the stay of execution.

The affidavits

[17] Mr Duncan, in his affidavit in support of the application, alleged that the respondent's claim for fees was false and based on a "fictitious" bill of costs. He stated that the firm Thomas & Christopher Law Partners, in whose name the invoices were issued, had never been retained by the appellants. He also asserted that the charges were inflated, and that payment was already made in respect of certain items. An interim invoice issued by the respondent dated 28 July 2017 as well as a final invoice dated 7

November 2018 were exhibited to that affidavit. A copy of the further affidavit of Gregory Duncan in support of the application for court orders filed in the court below, as well as copies of email messages between Mr Duncan and Miss Christopher, were also exhibited.

[18] Miss Christopher, in her affidavit in response sworn to on 25 August 2022, asserted that the fees claimed in claim no SU2020CD00050 are the subject of the default costs certificate issued on 7 December 2020. She denied Mr Duncan's allegations of any "false claim" or "fictitious bill of costs". It was also stated that the appellants ought to have filed points of dispute and failed to comply with this requirement.

[19] Miss Christopher further stated that having been served with the default costs certificate, the appellants failed to take the necessary steps to set it aside.

[20] In justifying her fees, Miss Christopher detailed the involved nature of the matters in which she represented the appellants. It was her opinion that, in light of the paucity of evidence, there is no likelihood that the appeal would succeed and that the application for a stay should be refused.

[21] Miss Christopher, in her affidavit filed 13 December 2022, exhibited a copy of the bill of costs dated 10 February 2020 as well as the affidavit of service of the bill of costs and notice of taxation.

Appellants' submissions

[22] Mr Duncan submitted that the invoices on which the claim was based were issued by Thomas & Christopher Law Partners who had not been retained by the appellants and, as such, the judgment was "illegally obtained" and "unenforceable". He also stated that the respondent had breached sections 21 and 22(1) of the Legal Profession Act ('LPA') and Canons I(b), III(f & k), IV(f)(iii), VI(d) & (cc) of the Legal Profession (Canons of Professional Ethics) Rules ('the Canons') in bringing her claim. It was also submitted that the respondent "failed to fulfil her undertaking, given to the court on February 24, 2022" and that she disobeyed the order of Batts J to register a final charging order on certificates of title registered at volume 1390 folio 739 and volume 1540 folio 569. This was to be

done upon the respondent's withdrawal of a caveat lodged against the title to property registered at volume 1520 folio 494 of the Register Book of Titles.

[23] Reference was made to Canon IV(e) of the Canons which prohibits an attorney from "entering into an agreement for or charge or collect an illegal fee". In this regard, Mr Duncan submitted that Miss Christopher "generated an illegal incentive by filing a Default Costs Certificate…". In all the circumstances, it was submitted that the appellants have suffered prejudice at the hands of the respondent.

Respondent's submissions

[24] Miss Christopher submitted that the issue of the six cheques to which Mr Duncan referred as having been paid in settlement of the legal fees owed was disposed of by the learned judge at para. [10] of her judgment. She pointed out that no points of dispute were filed by the appellants and no draft points of dispute had been presented to the court below when the appellants made their application to set aside the default costs certificate.

[25] Additionally, it was submitted that the appellants have failed to provide any evidence by way of receipts issued by the respondent or cheques drawn in favour of the respondent which demonstrate that the invoices presented by the respondent have been settled.

[26] Where the breach of rule 65.18(2) of the CPR is concerned, Miss Christopher submitted that the respondent's failure to file the bill of costs within three months was not fatal. Reference was made to **Henlin** and **Canute Sadler & anor v Derrick Michael Thompson & anor** [2019] JMSC Civ 11, in support of that submission.

[27] In the circumstances, it was submitted that the appeal has no real prospect of success, and as such the application for permission to appeal ought to be refused.

Analysis

Principles relevant to applications for leave to appeal and for a stay of execution

[28] The general rule is that this court will only grant leave to appeal where the appeal has a "real chance of success" (see the judgment of Morrison JA (as he then was) in **Donovan Foote v Capital and Credit Merchant Bank Limited** [2012] JMCA App 14). Where applications for a stay of execution are concerned, the overarching consideration is the interest of justice. In this regard, the court in the exercise of its discretion is cognizant of the principle that a successful litigant ought not to be lightly deprived of the fruits of his judgment.

[29] In **Calvin Green v Wynlee Trading Ltd and Naylor & Turnquest** [2010] JMCA App 3 ('**Calvin Green**'), Morrison JA (as he then was) set out the relevant factors that are to be considered by the court. At para. [12] he stated thus:

> "[12] …The threshold question on any such application is, of course, whether the material provided by the parties discloses at this stage an appeal with 'some prospect of success' (per Harrison JA in **Watersports Enterprises**, supra para. 8). Once that criterion has been met, the next step is for the court to consider whether, as a matter of discretion, the case is a [sic] fit one for the granting of a stay. In this regard, the overriding consideration is well expressed in the judgment of Clarke LJ (as he then was) in **Hammond Suddard** (at para. 22):
>
> > '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 the 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?'." (Emphasis supplied)

[30] In **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited and Another** [2011] JMCA App 1 at para. [23], Harris JA observed that "this court has given approval and support to the proposition that the interests of justice is an essential element in a decision to grant or refuse a stay". In that case the learned judge of appeal, at para. [22], referred to **Combi (Singapore) Pte Limited v Ramnath Sriram and Another** [1997] EWCA 2164, where Phillips LJ stated the principle in the following terms:

> "In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice."

[31] This approach was endorsed by this court in **Sagicor Bank Jamaica Limited v YP Seaton and others** [2015] JMCA App 18, where McDonald-Bishop JA stated at para. [50]:

> "[50]…It is now accepted, on later authorities, that whether the court should exercise its discretion to grant a stay of execution of a judgment pending the hearing of an appeal against the judgment depends upon all the circumstances of the case, but the essential factor is the risk of injustice (see **Hammond Suddard Solicitors v Agrichem International Holdings** [2001] All ER (D) 258). The essential question is according to the authorities, whether

> there is a risk of injustice to one or other or both parties if it grants or refuses a stay."

[32] Once an appeal with some prospect of success has been shown, it will be a matter for the court to decide, as a matter of discretion, where the greater risk of injustice will lie if a stay is or is not granted. This is a balancing exercise as the court must be cognizant of "…the right of a successful claimant to collect his judgment, while at the same time giving effect to the important consideration that an appellant with some prospect of success on appeal should not have his appeal rendered nugatory by the refusal of a stay". (see **Channus Block and Marl Quarry Limited v Curlon Orlando Lawrence** [2013] JMCA App 16, at para. [10], per Morrison P).

Whether the appeal has some prospect of success

[33] A real chance of success has been decided by the authorities to mean a realistic as opposed to a fanciful prospect of success (see **Swain v Hillman** [2001] 1 ALL ER 91). In **Calvin Green** where the court was asked to stay the execution of a judgment the prospect of success of the appeal was described by Morrison JA as the "threshold question". In **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Elaine Wallace** [2015] JMCA App 27A, Morrison JA (as he then was), referring to the dictum of Lord Woolf in **Swain v Hillman**, stated thus:

> "[21] This court has on more than one occasion accepted that the words 'a real chance of success' in rule 1.8(9) of the CAR are to be interpreted to mean that the applicant for leave must show that, in the language of Lord Woolf MR in **Swain v Hillman and another** [2001] 1 All ER 91, at page 92, 'there is a 'realistic' as opposed to a 'fanciful' prospect of success'… So, for the applicant to succeed on this application, it is necessary for him to show that, should leave be granted, he will have a realistic chance of success in his substantive appeal."

[34] This appeal arose from the learned judge's exercise of her discretion. It is settled that this court will not disturb such a decision unless, in the exercise of that discretion, the learned judge erred on a point of law or her interpretation of the facts (see **Hadmor**

Productions Ltd and others v Hamilton and others [1982] 1 All ER 1042). This principle was applied by this court in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, in which Morrison JA (as he then was) opined at para. [20]:

> "[20] This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular 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'."

[35] Two issues arise in the assessment of whether this appeal has some prospect of success. They are:

A. Whether the learned judge erred when she refused to set aside the default costs certificate.

B. Whether the final charging order was properly granted.

A. Whether the learned judge erred when she refused to set aside the default costs certificate

[36] Where a client has failed to pay the fees charged by his attorney-at-law, the said attorney-at-law may seek to recover same by utilizing the regime under section 22 of the LPA. The section states:

> "(1) An attorney shall not be entitled to commence any suit for the recovery of any fees for any legal business done by him until the expiration of one month after he has served on the party to be charged a bill of those fees, the bill either being signed by the attorney (or in the case of a partnership by any one of the partners either in his own name or in the name of the partnership) or being enclosed in or accompanied by a letter signed in like manner referring to the bill:
>
> Provided that if there is probable cause for believing that the party chargeable with the fees is about to leave Jamaica, or to become bankrupt, or compound with his creditors or to do

> any act which would tend to prevent or delay the attorney obtaining payment, the Court may, notwithstanding that one month has not expired from the delivery of the bill, order that the attorney be at liberty to commence an action to recover his fees and may order those fees to be taxed.
>
> (2) Subject to the provisions of this Part, any party chargeable with an attorney's bill of fees may refer it to the taxing officer for taxation within one month after the date on which the bill was served on him.
>
> (3) If [an] application is not made within the period of one month aforesaid a reference for taxation may be ordered by the Court either on the application of the attorney or on the application of the party chargeable with the fees, and may be ordered with such directions and subject to such conditions as the Court thinks fit.
>
> (4) An attorney may without making an application to the Court under subsection (3) have the bill of his fees taxed by the taxing master after notice to the party intended to be charged thereby and the provisions of this Part shall apply as if a reference for such taxation has been ordered by the Court."

[37] In reliance on this provision, the respondent laid a bill of costs for taxation in the Supreme Court (claim no SU2020CD000050). Rule 65.18(1) of the CPR states that taxation proceedings are commenced by the filing and service of a bill of costs. That bill of costs is required to contain or have attached to it a notice advising the paying party (the appellants in this case) of the requirement to serve points of dispute under rule 65.20 of the CPR and the consequences of a failure to do so.

[38] Rule 65.20(1) indicates that where a party wishes to dispute any item in a bill of costs that party is required to file and serve points of dispute. Rule 65.20(3) states that points of dispute are to be filed and served within 28 days of the service of the bill of costs. In the event that the paying party fails to do so the receiving party (the respondent in this case) may file a request for a default costs certificate. It is to be noted that, even if the period has expired, a default costs certificate is not to be issued if points of dispute have been filed before its issue. Rule 65.20(6)) states:

> "If any party (including the paying party) files points of dispute before the issue of a default costs certificate the registrar **may not** issue the default costs certificate." (Emphasis supplied)

In my view, the use of the term "may not" prohibits the registrar from issuing a default costs certificate if points of dispute are filed before its issue.

[39] In **Auburn Court Limited & Delbert Perrier v National Commercial Bank Jamaica Ltd & anor** (unreported), Court of Appeal, Jamaica, Application No 7/2009, judgment delivered 18 March 2009, H Harris JA appears to have expressed a different view. The learned judge of appeal, at paras. 17 and 18 of her judgment, stated:

> "17 On the issue of the bill of costs on the applicants on April 18, 2008, they would have been under a duty to file points of dispute within 28 days from that date. They did not do so until July 21, 2008. The document containing their points of dispute was accompanied by a letter addressed to the registrar seeking permission to file the points of dispute out of time. This letter to the registrar would in no way have availed them. In fact, the transmission of the letter requesting the registrar's permission to file the requisite document was misconceived. The rules do not empower the registrar to make an order for an extension of time to file points of dispute. On the expiration of the time for filing points of dispute, the applicants ought to have made an application to the court for an order for an extension of the time within which to comply with rule 65.20 (3).
>
> 18 The default costs certificate was filed on June 13, 2008. However, it was perfected on January 7, 2009. The fact that it was perfected on that date would in no way affect its validity as it must be taken to have been filed on June 13, 2008. In the case of **Workers Savings and Loan Bank** v **Winston McKenzie et al** (supra) it was held that once the documents in support of the entry of a default judgment are in proper order, the judgment, on filing, is to be taken as entered on the date of filing. The principles are applicable to this case. The default costs certificate had been filed and accordingly, perfected on

> June 13, 2008. There is nothing to show that its integrity has been impugned. Its validity remains intact."

[40] Based on the above, the learned judge of appeal does not appear to have considered the effect of rule 65.20(6) of the CPR. However, the resolution of this issue is not determinative of this appeal.

[41] There is no dispute that up to the time when the application was being heard by the learned judge the notice of taxation and bill of costs were properly served on the appellants. It has also not been disputed that the requisite notice to the appellants pertaining to the filing of points of dispute and the consequences of not doing so was contained in the bill of costs. It is also evident based on his further affidavit that Mr Duncan was informed prior to that date of the sums that were being claimed and was disputing those amounts. The appellants failed to file points of dispute and a default costs certificate in the sum of $16,770,013.93 was issued in favour of the respondent on 7 December 2020.

[42] In **Kandekore**, on which the learned judge relied, F Williams JA, stated at paras. [14] and [15]:

> "[14] …Brooks JA's judgment in the case of **Rodney Ramazan and Another v Owners of Motor Vessel (CFS Pamplona)** gives useful guidance in respect of the matters a court might examine in considering whether to set aside a default costs certificate for "good reason".
>
> [15] This was the guidance that he gave at paragraph [14] of **Rodney Ramazan and Another v Owners of Motor Vessel (CFS Pamplona)** after referring to a quotation from the case of **Dr Adu Aezick Seray-Wurie v The Mayor and Burgess of the London Borough of Hackney** [2002] EWCA Civ 909, at paragraphs 10, 11 and 12:
>
> > '[14] The above quotation identifies specific issues, which should be considered in deciding whether a good reason existed for setting aside a default costs certificate. Without attempting to stipulate mandatory

requirements it would seem that those issues would include:

(1) the circumstances leading to the default;

(2) consideration of whether the application to set aside was made promptly;

(3) consideration of whether there was a clearly articulated dispute about the costs sought;

(4) consideration of whether there was a realistic prospect of successfully disputing the bill of costs;'

..."

[43] Brooks JA (as he then was) in **Rodney Ramazan and Another v Owners of Motor Vessel (CFS Pamplona)** [2012] JMCA App 37, also found that rule 26.8 of the CPR, which deals with relief from sanctions, is applicable where a party is seeking to set aside a default costs certificate. He stated:

> "[14] It would seem that an application to set aside a default costs certificate easily qualifies as an application for relief."

(i) Circumstances leading to the default

[44] The learned judge began dealing with this issue at para. [22] where she stated:

> "[22] The authorities make it clear that the circumstances leading to default require that the Applicant provide a good explanation for the delay in serving the Points of Dispute."

[45] At para. [25] the learned judge stated that no reason had been given by the appellants in their affidavit in support of the application before her, for their failure to file points of dispute. She stated that Mr Duncan's affidavit was focussed on whether the bill of costs was correct. The learned judge also opined:

> "[25] ...The Defendants, and Mr. Duncan in particular, cannot rely on ignorance as a layman. Mr. Duncan is self-represented on his own behalf and on behalf of the Second Defendant in

> a number of matters before the Court. He has demonstrated that he is well versed and familiar with the Civil Procedure Rules."

[46] The learned judge noted, that the default costs certificate was granted on 7 December 2020, which was "some nine months after the Notice to file and serve the Points of Dispute was served on [the applicants]". She found that the appellants' failure to give a reason for failing to file their points of dispute within the stipulated time meant that they failed to pass "the threshold for the Court to consider whether the Application should be granted".

[47] The learned judge's reasoning and conclusion cannot be faulted.

(ii) Whether the Application was made promptly

[48] Although the learned judge found that the appellants had failed to satisfy the threshold test, she proceeded to consider whether the application had been made promptly. Based on the evidence that was before her she found that the appellants satisfied the requirement to be prompt. I am in agreement with her conclusion pertaining to this issue.

(iii) Whether there was a clearly articulated dispute about the costs sought and whether the applicants had a realistic prospect of successfully disputing the bill of costs

[49] Rule 65.22 of the CPR, which gives the court the discretion to set aside a default costs certificate, states:

> "(1) the paying party may apply to set aside the default costs certificate.
>
> (2) …
>
> (3) The court **may** set aside a default costs certificate for good reason.
>
> (4) An application to the court to set aside a default costs certificate must be supported by affidavit and **must**

> exhibit the proposed points of dispute." (Emphasis supplied)

[50] The appellants were clearly in breach of the above rule as no affidavit exhibiting the proposed points of dispute was filed. The requirement to do so was mandatory.

[51] It is, however, noted that Mr Duncan has stated in his affidavit filed on 7 December 2022, that the firm Thomas & Christopher Law Partners was never retained by the appellants and as such the invoices issued by that firm were "fictitious". In his submissions, Mr Duncan posited that as a result any judgment that was based on those invoices was "illegally obtained and hence unenforceable". In this regard, I have noted that the invoice that was issued by that firm relates to a claim in the supreme court to which Mr Duncan was a party and he has not asserted that Miss Christopher did not represent him as indicated. That point, in my view, is a non-issue.

[52] Mr Duncan in his affidavit also stated that there are instances in which the sums claimed in the bill of costs are "double compensation". He has not, however, sought to identify those items as required by 65.20(2) of the CPR which states:

> "(2) Points of dispute must –
>
> (a) identify each item in the bill of costs which is disputed;
>
> (b) state the reasons for the objection; and
>
> (c) state the amount (if any) which the party serving the points of dispute considers should be allowed on taxation in respect of that item."

[53] The learned judge in dealing with this issue referred to para. [21] of **Kandekore** in which F Williams JA stated thus in relation to the above issues:

> "[21]…They should be considered against the background of: (a) what is stated in the applicant's points of dispute; and (b) what the rules require points of dispute to state."

[54] The points of dispute in that case stated:

> "[21] The Appellant disputes each and every item in the Respondents' bill of costs and the Appellant says that the Respondents Bill of Costs does not comply with the relevant court orders and the amounts claimed have no legal basis."

F Williams JA stated that rule 65.20(2)(c) requires "far more specificity".

[55] In light of the fact that in the instant case no points of dispute were filed, it appears that the applicants may have hoped to rely on the affidavit filed in support of their application to set aside the default costs certificate and to discharge the final charging order. However, even if the learned judge was at liberty to consider that affidavit in lieu of the required points of dispute, the said affidavit, in my view, lacked the specificity required by rule 65.20(2)(c) of the CPR.

[56] In the circumstances, the learned judge's refusal of the application to set aside the default costs certificate cannot be faulted.

The appellants' oral application or extension of time to file the points of dispute

[57] The learned judge addressed this application at paras. [33] and [34] of her judgment. She found that approximately two years had elapsed since the points of dispute were due to be filed and served on the respondent. She found that since it would not be in the "interests of the administration of justice" to grant the appellants' application for an adjournment, the court ought not to exercise its discretion in their favour by allowing additional time for them to file points in dispute.

[58] The learned judge dealt with the issue of prejudice at para. [36] of the judgment, which was set out at para. [12] of this judgment. Having assessed the circumstances of the case the learned judge indicated her preference for the evidence of the respondent and exercised her discretion accordingly. As stated above at para. [33], this court will not disturb such a decision unless the learned judge erred on a point of law or her interpretation of the facts. Based on the circumstances of the case, I find no fault with

the manner in which the learned judge exercised her discretion. There is, therefore, no basis on for this court to disturb her decision on this point.

B. Whether the learned judge erred when she refused to discharge the final charging order

[59] Based on the judgment, the final charging order was granted in respect of sums found to be due and payable by the appellants upon the issue of the default costs certificate. Ms Christopher has relied on rule 64.2(3) of the CPR which states that a default costs certificate can be enforced as a judgment. That is generally true. Taxation proceedings are usually commenced after the determination of a claim and, as such, the amount found to be due at the conclusion of those proceedings must naturally be recoverable by way of enforcement. The order for costs is a part of the judgment.

[60] The taxation of a bill of costs in matters between an attorney and his or her own client is a precursor to the filing of a claim for the recovery of fees, in the event that the taxed costs are not paid by the client. In **Dian Watson v Camille Feanny and others** [2021] JMCA Civ 21 ('**Dian Watson**') at para. [122] reference was made to para. [14] of the judgment of this court in **Dian Watson v Estate of Headley Feanny (Deceased) and others** [2019] JMCA Civ 32 ('**Dian Watson 2019**'), where Phillips JA stated:

> "[14] However, as indicated, in this appeal, the main issue is whether the bill of costs can be considered equivalent to a claim form. It was the position of Mr Clive Munroe, counsel for the respondents, that section 22 of the LPA was applicable to the instant case, but there was no connection whatsoever between that section and the regime set out in Parts 64 and 65 of the CPR. **In my view, on the face of it, taxation obtained by way of section 22 of the LPA may only certify the figure that is being claimed by an attorney. Prima facie, it does not allow for collection of the fees as it is not a judgment. Moreover, since no claim has been filed based on any known cause of action, even if a default costs certificate was obtained thereafter (allegedly pursuant to section 29 of the LPA and Parts 64 and 65 of the CPR), the issue would still arise as to**

> **whether a claim ought to have been filed in order to obtain recovery of outstanding fees, and to get enforcement of the same**, particularly, if a [sic] injunction is being requested, and an undertaking as to damages may have to be ordered (as was done in this case by Thomas J)." (Emphasis supplied)

[61] In **Dian Watson** the court stated at para. [166] "that in the absence of a claim there is no basis on which the provisions of rule 45.2 of the CPR can be invoked". It, therefore, follows that execution cannot not be pursued based on the issue of a default costs certificate where no claim had been commenced for the recovery of the fees found to be due to an attorney-at-law. It does not appear that judgments of this court in **Dian Watson 2019** and **Dian Watson** were brought to the learned judge's attention.

[62] In this matter, the respondent has not filed a claim for the costs which are the subject of the default costs certificate. The learned judge, therefore, erred when she refused to discharge the final charging order.

[63] In light of the foregoing, I propose the following orders:

(1) Application for permission to appeal is granted.

(2) The hearing of the application is treated as the hearing of the appeal.

(3) The appeal against the judgment of Brown-Beckford J made on 27 July 2022 is allowed in part.

(4) The learned judge's order refusing the appellants' oral application for an extension of time to file points of dispute is affirmed.

(5) The learned judge's order refusing to set aside the default costs certificate is affirmed.

(6) The final charging order granted on 24 February 2022 is discharged.

(7) The learned judge's order as to costs is set aside.

(8) The respondent is awarded 50% of her costs in respect of the application resulting in the order made on 27 July 2022.

(9) Each party is to bear its own costs of the appeal.

LAING JA (AG)

[64] I, too, have had the privilege of reading in draft the judgment of my sister Simmons JA. I agree with her reasoning and conclusion, and there is nothing I wish to add.

BROOKS P

ORDER

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(2) The hearing of the application is treated as the hearing of the appeal.

(3) The appeal against the judgment of Brown-Beckford J made on 27 July 2022 is allowed in part.

(4) The learned judge's order refusing the appellants' oral application for an extension of time to file points of dispute is affirmed.

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(8) The respondent is awarded 50% of her costs in respect of the application resulting in the order made on 27 July 2022.

(9) Each party is to bear its own costs of the appeal.