[2011] JMCA App 12

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 102/2009

APPLICATION NO 23/2011

BEFORE: THE HON. MRS JUSTICE HARRIS JA
THE HON. MISS JUSTICE PHILLIPS JA
THE HON. MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**JOSCELYN MASSOP**	**APPLICANT**
AND	**TEMAR MORRISON (By his mother and next friend AUDREY WHITE)**	**RESPONDENT**

Lord Anthony Gifford QC and Rudolph Francis instructed by Keith Jarrett for the applicant

Carlton Williams instructed by Williams McKoy & Palmer for the respondent

21, 23 March and 24 June 2011

HARRIS JA

[1] On 19 January 2006 the respondent was a passenger in a minibus owned and driven by one Relva Sylvester, which collided with a motor truck owned and driven by Joscelyn Massop. He sustained injuries as a result of the collision. On 8 May 2006 he brought a claim in negligence against Mr Sylvester and Mr Massop seeking to recover damages for the injuries sustained and loss suffered. On 1 June 2006 Mr Massop filed

a defence to the claim denying liability and alleging that the collision was caused by Mr Sylvester's negligence. A defence was also filed by Mr Sylvester denying liability and averring that the accident was as a result of Mr Massop's negligence.

[2] On 14 January 2008 a case management conference was held in which, among others, the following order was made:

> "Judgment in default of attendance at Case Management Conference against the 2nd defendant [the applicant] with damages to be assessed. Assessment of damages to be at the time of trial of the matter against the 1st defendant."

On 16 June 2009 the respondent filed a notice of discontinuance against Mr Sylvester.

[3] On 17 June 2009 Mr Massop filed an application seeking the following orders:

> "1. That the judgment in default of attendance at the Case Management Conference entered against him on the 14th day of January, 2008 be set aside, and that he be granted leave to defend the claim on its merits.
>
> 2. That the said Joscelyn Massop be granted leave to amend his Defence by adding a sub paragraph (f) under paragraph four (4) of his original Defence filed herein on the 1st day of June, 2006, as follows:
>
> (f) 'Driving a motor vehicle on a public road with a defective braking system.'
>
> 3. That the said Joscelyn Massop be granted relief from sanctions for failure to comply with the orders made at the Case Manage (sic) Conference on the 14th day of January, 2008."

The assessment of damages was fixed for hearing on 17 and 18 June 2009. The application was fixed for hearing on 13 July 2009. On 17 June, the application was brought to the attention of the learned judge by Mr Rudolph Francis, on behalf of Mr Massop. Mr Massop sought an adjournment of the hearing of the application to the appointed date. The learned judge adjourned the assessment of damages until 18 June when she heard and adjudicated on the application as well as the assessment of damages.

[4] The orders made by Williams J were couched in the following terms:

> "1. Notice of Discontinuance against the 1st Defendant filed on June 16, 2009.
>
> 2. Notice of Application for Court Orders dated June 17, 2009 dismissed.
>
> 3. The Statement of Case be amended by adding the words 'Joscelyn Massop otherwise called' before the words Joslyn Massop, wherever they appear.
>
> 4. Amended Particulars of Claim filed and served on June 9, 2009 (out of time) permitted to stand.
>
> 5. Damages for Claimant assessed as follows:
>
> Special Damages in the sum of $298,918.46 with interest at 5% from January 19, 2006 to today's date.
>
> General Damages:
>
> Pain and Suffering and Loss of Amenities in the sum of $4.5 million

with interest at 6% percent (sic) from May 11, 2006 to today's date.

Loss of Earning Capacity and Handicap in the Labour Market in the sum of $1.5 million

Cost of Future Medical Care in the sum of $720,000.00

Cost of Future Transportation in the sum of $158,400.00

6. Costs to the Claimant to be taxed if not agreed."

Following the judgment, a writ of seizure and sale was issued. Partial execution of the judgment was carried out and the sum of $1,539,000.00 was paid to the respondent.

[5] Mr Massop, on 28 July 2009, filed a notice of appeal challenging, in the details of the orders appealed, the orders made by the learned judge. It contained the undermentioned grounds:

"(a) The Appellant having filed Notice of Application for Court Orders for an order to set aside the judgment in default of attendance at The Case Management Conference, on the 14th day of January, 2008, and for leave to file an amended Defence to the claim out of time, and the Registrar having set the Application down for hearing on the 13th day of July, 2009, ought to have been allowed to adduce evidence from his Attorney-at-Law, Mr. Keith Jarrett, in support of his application.

The Learned trial Judge's refusal to allow the hearing to take place on the date set by the Registrar and her refusal to grant an adjournment to enable the Appellant to adduce evidence from his Attorney-at-Law, Mr. Keith

Jarrett, deprived the Appellant of the opportunity to have the issues raised in his Amended Defence ventilated at a trial, and therefore prejudiced him, in his attempt to present his Defence.

(b) The order made on The Case Management Conference on the 14th day of January, 2008, was made in the absence of the Appellant's Attorney-at-Law. There is no evidence that Mr. Keith Jarrett was served with a copy of the Notice of hearing.

(c) The dismissal of the Appellant's application for an order to set aside the judgment in default of attendance at The Case Management Conference, and to grant leave to file his amended Defence to the claim out of time, 'drove the Appellant from the judgment seat without a determination of the issues, as a punishment for his conduct, however, deplorable, when there was no real risk that, that conduct would render further conduct of the proceedings unsatisfactory. The Court must always guard itself against the temptation of allowing its indignation to lead to a miscarriage of justice.' ***Logicrose Limited vs Southend United Football Club*** **Limited** (1988) 1 WLR 1256."

On 30 March 2010 a single judge of this court refused an application by Mr Massop for a stay of execution of the default judgment.

[6] On 4 February 2011 he filed an application seeking the following orders:

"1. An order granting him relief from the sanctions imposed by the Case Management Order of the Master in Chambers, made on the

14th day of January, 2008, for his failure to attend The Case Management Conference, on that date.

2. An order extending the time within which he may apply for leave to file Notice of Appeal against the judgment of the learned trial Judge, and an order granting him such leave.

3. An order setting aside the Judgment in Default of Attendance which was entered against him for failure to attend at the Case Management Conference, on the 14th day of January, 2008, and granting him leave to file his amended Defence to the Claimant's (sic) out of time.

4. An order reviewing the order made by The Honourable Mr. Justice Dukharan, Judge of Appeal, in Chambers on the 30th day of March 2010, whereby he refused an application by the Defendant/Applicant for an order for a stay of execution of the judgment of the learned trial judge, pending the hearing of the appeal.

5. An order that the Notice of Appeal filed by the Defendant/Applicant on the 28th day of July, 2009, stands."

I must at the outset state that, at this stage of the proceedings this court is not entitled to consider paragraphs 1 or 3 of the notice of application.

[7] Lord Gifford QC submitted that the order was in part a final judgment in that an award of damages had been made against Mr Massop and in part, procedural in relation to the dismissal of the application for court orders on 18 June 2009. The decision of the learned judge refusing the application for relief from sanctions, he argued, was

made during the course of the assessment of damages which would give rise to an appeal falling within rule 1.1(8)(a) of the Court of Appeal Rules (COAR). In these circumstances, the time for appealing would be 42 days and the appeal would have been filed in time, he argued. In the alternative, he submitted that if the foregoing is incorrect, then he seeks an extension of time to appeal.

[8] Mr Williams argued that the critical question is whether the appeal was filed in time and it was not. The notice of appeal is one which falls within rule 1.1(8) of the COAR and it not having been filed within 14 days as required by the rules, it is out of time. The applicable provisions in this matter, he argued, are section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act and rules 1.8(1) and 1.11(1) of the COAR. He further argued that the procedure laid down for the setting aside of a judgment had not been complied with. The learned judge was correct in embarking upon the assessment of damages, as the application for relief from sanction was not an issue which arose during the assessment, he argued. There being no application for leave to appeal, he submitted, the learned single judge of appeal was correct to have dismissed the application for a stay of execution of the judgment.

[9] There is no dispute that Mr Massop seeks to invoke the jurisdiction of this court. If successful, he also seeks a stay of the order of 18 June 2009 dismissing his application. No reasons were given by the learned judge for the dismissal of the application. This court is therefore empowered to embark on a review of the matter by way of a rehearing. The first question is whether the "notice of appeal", on the date of

filing, was properly before this court. This requires the court to direct its attention to the question as to whether the order dismissing the application falls within the purview of section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act and the requisite rules, as contended for by Mr Williams.

[10] It is appropriate at this stage to make reference to the law and such rules as are relevant for the purpose of deciding the status of the notice of appeal. Section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act provides as follows:

> "No appeal shall lie –
>
> (a) … (e)"
>
> (f) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge except:-
>
> (i) … (vi)"

The instant case is not one which falls within any of the exceptions prescribed by the Act.

[11] Rule 1.1(8) of the COAR defines a procedural appeal as set out hereunder:

> "Procedural appeal" means an appeal from a decision of the court below which does not directly decide the substantive issues in a claim but excludes-
>
> (a) any such decision made during the course of the trial or final hearing of the proceedings;
>
> (b) …
>
> (e) …"

[12] Rule 1.8 (1) and (2) governs the procedure in obtaining leave to appeal in instances where leave is a prerequisite for an appeal. It reads:

> "(1) Where an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought.
>
> (2) Where the application for permission may be made to either court, the application must first be made to the court below."

[13] Rule 1.11(1) makes provision for the filing and service of a notice of appeal. It states:

> "1.11(1) The notice of appeal must be filed at the registry and served in accordance with rule 1.15 –
>
> (a) in the case of a procedural appeal, within 7 days of the date the decision appealed against was made;
>
> (b) where permission is required, within 14 days of the date when such permission was granted; or
>
> (c) in the case of any other appeal within 42 days of the date when the order or judgment appealed against was served on the appellant."

[14] I will now advert my attention to the status of the notice of appeal. The starting point is the nature of the order dismissing the application. There is no difficulty in determining that, *prima facie*, the order dismissing the application is interlocutory by

nature and that the order could give rise to a procedural appeal. Nor is there any difficulty in deciding that if an order falls within the purview of a procedural appeal, section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act and rules 1.8(1) and (2) and 1.11(1) of the COAR would be applicable. As ordained by the Act, a party who wishes to appeal against an interlocutory judgment or order must first obtain leave of the judge or the Court of Appeal. Under rule 1.8(1) permission to appeal must be sought within 14 days of the order against which the appeal is sought. Where permission to appeal may be sought either from the court below or this court, in obedience to rule 1.8(2), the application must be first made to the court below. By rule 1.11(1) (b), the notice of appeal must be filed and served within 14 days of the grant of permission. No leave to appeal was obtained in this matter. It is perfectly true, as (rightly) submitted by Mr Williams that a notice of appeal from an interlocutory order filed prior to the grant of leave is ineffective and invalid. The cases of ***Patrick v Walker*** (1966) 10 WIR 110 and ***Salmon v Hinds*** (1982) 19 JLR 471 cited by him clearly support this proposition. However, this is not determinative of the issue.

[15] The circumstances of this case, being somewhat unusual, give rise to the further question as to whether the order dismissing the appellant's application, although interlocutory in nature, was made during the course of the trial. An assessment of damages is a trial. This requires me to consider the meaning of the words "during the course of" within the context of rule 1.1(8) (a) of the COAR. In construing a rule, one is required to ascertain the intention of the drafters of the rules. In the ordinary course of interpretation of a rule, the intention reasonably to be attributed to that rule is that

which was contemplated by the draftsman. The authorities show that the intention of the framers of rules is drawn from the primary meaning of the words to be interpreted, with such modifications of those meanings as may be essential to make them consistent with the context or concept of a particular rule. In my view, the evident intent of rule 1.1(8)(a) is to encompass all acts done and decisions made, not only during the course of a trial but also at the time of a trial. Hence, the words "during the course" as used in the rule would have been contemplated by the draughtsman to be construed as meaning "at the time of" trial.

[16] I am constrained to disagree with Mr Williams that the order could not be said to have been made during the course of the trial. Importantly, the assessment of damages was the only part of the proceedings which was listed before the court for hearing on 18 June 2009. The application to set aside the default judgment was scheduled for hearing on 13 July 2009. It was short served. Surely, it could not be said that it was properly before the learned judge on 18 June. In the circumstances, it was incumbent upon the learned judge to have adjourned not only the application for it to be heard on its appointed date but also the assessment of damages. The fact that she proceeded to hear the application and made a determination on it, her decision must be treated as having been made during the course of or at the time of the assessment of damages.

[17] Consequently, the notice of appeal must be treated as falling outside the scope of rule 1.1(8) and clearly within the prescription of rule 1.1(8)(a) and on that basis would not have required permission to appeal. The order on the application, having

been made during the assessment of damages and the damages having been assessed, would fall within the scope of rule 1.11(1)(c). It follows that Mr Massop's notice of appeal against the order dismissing the application had been filed within the time limited for so doing. In light of this finding, it will be unnecessary to give consideration to the application for an extension of time to appeal. It is necessary to state that although the assessment of damages was challenged and an order to set aside is sought, no ground has been filed with respect to the setting aside of the assessment of damages, this would not prevent Mr Massop from amending his grounds of appeal, he having challenged the assessment of damages in the notice of appeal.

[18] I will now turn my attention to the question as to whether a stay of further execution of the default judgment should be granted. As a rule, a successful litigant ought not to be deprived of the fruits of his judgment during the pendency of an appeal. However, being endowed, by rule 2.11(1) of the COAR, with discretionary power to grant or refuse a stay of execution of a judgment or order, this court will, in appropriate circumstances, suspend the execution of a judgment or order. This power remains untrammeled.

[19] For a number of years, the test for the grant of a stay of execution as propounded by Lord Staughton in ***Linotype-Hell Finance Limited v Baker*** [1992] 4 All ER 887 was one in which an applicant had to show that he had some realistic prospect of success in his appeal and that without a stay he would be ruined. It has however been seen that, in recent years, the courts have adopted a liberal approach in

considering a stay of execution. This approach appears to be, that once it is shown that there is some merit in an appeal, then any order which the court makes should be in keeping with the interests of justice.

[20] In granting or refusing a stay of execution, Clarke LJ, in ***Hammond Suddard Solicitors v Agrichem International Holdings Ltd*** [2001] EWCA 1915, proposed the approach of applying a balancing exercise within the scales of the interests of justice. At paragraph 22 he said:

> "Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted an (sic) the appeal fails, what are the risks that the respondent will be unable (sic) 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?"

[21] Phillips L J, in ***Combi (Singapore Pte Limited v Ramnath Sriram and Sun Limited FC*** [1997] EWCA Civ 2164, stated the approach in the following way:

> "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."

[22] Lord Gifford submitted that the appellant was never advised of the entry of judgment against him, accordingly, the failure to attend the case management conference was not his fault, nor should the delay in seeking the relief be ascribed to him. He argued that Mr Massop has good grounds for successfully defending the claim on the objective evidence that the minibus' brakes were faulty. He, however, was not unmindful that if the judgment is set aside, there would be further delay in the respondent receiving compensation for his injuries but submitted that Mr Massop will not seek to recover the amount already paid to the respondent.

[23] Mr Williams submitted that the case management order was served on 23 January 2008 and over a year and a half had elapsed before steps were taken to set aside the default judgment. Despite the fact that Mr Jarrett said that the order did not come to his attention, he was served and an application to set aside the default judgment should have been made from the time of service of the case management order, he contended. He also argued that Mr Massop stated that the order was not brought to his attention, but no explanation was given by him for not attending the case management conference. Further, he had obtained information from Mr Francis who attended the pretrial review on 19 March 2009 that a default judgment had been

entered against him but it was not until 17 June 2009 when the matter came on for assessment that he sought to make the application to set it aside.

[24] The question to be answered is whether in the circumstances of this case, a stay would be justified. In his affidavit in support of his application of 4 February 2011, at paragraphs 5 to 12, Mr Massop said:

> "5. That after the accident both vehicles were examined at The Gordon Town Police Station, by Mr. Patrick Ricketts – Government's Motor Vehicle Certifying Officer from the Island (sic) Traffic Authority, Saint Andrew, in the presence of the Police Sub-Officer in charge of the Gordon Town Police Station, other police personnel at the Station, Relva Sylvester and myself.
>
> 6. That my Leyland Freighter Motor Truck registered 1873 CC which I was driving at the time of the accident was found to be in sound mechanical condition. The Minibus bearing Registration Number PC 0179 owned and driven by Relva Sylvester at the time of the accident was found to have a faulty braking system, both service brakes and parking brakes.
>
> 7. That I exhibit hereto a photocopy of the Certificate of Defects issued by Mr. Patrick Ricketts, the Government's Motor Vehicle Certifying Officer, which he issued after he examined the Toyota Hiace Minibus bearing Registration Number PC 0179, dated the 19th day of January, 2006, marked with the letters **J.M. – I.**
>
> 8. That I also exhibit hereto a Statement made by the name Certifying Officer as to the condition of the two motor vehicles when he examined

them on the 19th day of January, 2006, marked with the letters **J.M. – 2.**

9. That after I was served with the Claim Form and Particulars of Claim, I retained Mr. Keith Jarrett, Attorney-at-Law of No 20 Duke Street, Kingston, to represent me. I gave him a statement, and asked him to file my Defence to the Claimant's claim.

10. That I enquired of him about two (2) weeks after I gave him the statement whether he had put in my Defence, and he assured me that he had done so. I gave him my home telephone number and also my Cellular telephone number, and told him that if I had to travel overseas I would inform him, in case any issue came up in the case that required my presence in court.

11. That I left the conduct of my Defence to Mr. Jarrett and would telephone him from time to time to ask him how the case was progressing.

12. That I learnt on the 19th day of March 2009, for the first time that a judgment in default of attendance at the Case Management Conference was entered against me on the 14th day of January, 2008. I was never informed of the hearing on that date, and could not have attended court. I was also not made aware of the orders made at the Case Management Conference."

[25] As shown, there is evidence explaining Mr Massop's absence from the case management conference in that he was not advised of the hearing by his attorney-at-law. On 19 March 2009 he became aware, for the first time, that the judgment in default had been made. There is also evidence which speaks to his failure to attend the pretrial review. He was unable to return to the island on time due to his absence in

attending his brother's funeral. He exhibited his passport as well as his airline ticket to show that he was away on the date of the pretrial review. Importantly, there is also evidence showing that his motor vehicle, as well as Mr Sylvester's, was examined by the motor vehicle examiner. Mr Sylvester's vehicle was found to have had defective brakes. His motor vehicle had no defects. These assertions are supported by the relevant certificates, from the motor vehicle examiner, which he has exhibited.

[26] He has denied liability. He averred that it was not a head-on collision between the two vehicles. The accident, he has asserted, was essentially due to the defective brakes of Mr Sylvester's minibus in the act of passing his truck. It cannot be said that he has not raised a good and arguable defence.

[27] If he is successful in the appeal, the matter would proceed to trial, obviously after a trial date is fixed by way of a case management order. If he succeeds at trial, he will suffer some loss as he will be unable to recover the $1,539,000.00 paid to the respondent. It is undeniable that there have been delays caused by Mr Massop's failure to act with due diligence and expedition in the pursuit of his defence. However, the delay in applying to set aside the default judgment is not inordinate. It cannot be denied that the delay prevents the respondent from recovering the fruits of his judgment. Ultimately, the question is whether the overriding objective of dealing with cases justly favours a grant of or calls for a refusal of a stay. It is clearly the negligence of Mr Massop's attorney at law which accounts for the unfortunate state of affairs.

[28] Should Mr Massop succeed on appeal, surely, he would be entitled to defend the claim. It is of significance, however, that rule 37.3(1) of the Civil Procedure Rules (CPR) provides for the service of a notice of discontinuance on every other party to the claim. Rule 37.3(2) requires that a filed copy of the notice should contain a certificate in proof of service. Rule 37.5(1) stipulates that the notice of discontinuance takes effect upon service upon every other party. The notice of discontinuance was not in compliance with rule 37.3(2). It could be argued that there was no proof of service of the notice before the court. This raises the question as to whether or not Mr Sylvester is still a party to the proceedings and if he is, whether the assessment of damages should be done at the time of the trial of the action in obedience to the case management order, if Mr Massop fails in his bid to set aside the default judgment.

[29] However, I cannot ignore the fact that any further delay will result in some amount of prejudice to the respondent. Despite this, the mischief occasioned by the delay could be cured by way of costs and the fact that he has already received $1,539,000.00 from Mr Massop, which he, Mr Massop, will not seek to recover. In the circumstances of this case, the balance weighs in favour of Mr Massop. The interests of justice demand intervention by the court. Accordingly, it would only be just and fair to grant a stay of further execution of the default judgment, pending the hearing of the appeal.

[30] Before departing from this matter it is necessary to state that this is an exceptional case, particularly in view of the fact that there is some uncertainty as to whether, at this stage, Mr Sylvester is still a party to the proceedings.

[31] I would award costs to the respondent to be agreed or taxed.

PHILLIPS JA

[32] I have had the benefit of reading the draft judgments of my sister Harris JA, and my brother Hibbert JA (Ag) and am constrained to add a few words of my own as the opinions of the members of the court differ.

[33] I must state at the outset that I agree with the opinion of my sister Harris JA for the reasons set out below. I also adopt the facts and the chronology of events as stated in her draft judgment.

[34] I accept that the paragraphs in the notice of application for court orders filed in this court on 4 February 2011, and which was before us on 21 and 23 March this year, which we are not entitled to consider at this stage, are paragraphs 1 and 3. The remaining paragraphs request orders: for an extension of time within which Mr Massop may apply for leave to file notice of appeal against the judgment of P. Williams J made on 18 June 2009, and an order granting leave (paragraph 2); for a review of the order made by Dukharan JA in chambers on 30 March 2010, whereby he refused an application for a stay of execution of the said judgment (paragraph 4); and that the notice of appeal filed on 28 July 2009 stands (paragraph 5).

[35] One of the main issues in the application is whether the appeal is a procedural appeal for which permission is required, and which has not yet been obtained, and in respect of which, such permission and the filing of the appeal itself would now be woefully out of time (see section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act and rule 1.1(8), 1.8(1), 1.11(1)(a), and 2.4(1) of the Court of Appeal Rules (COAR)). I however accept the reasoning of Harris JA that the order made by P. Williams J on the application to set aside the default judgment (which had been entered against Mr Massop at the case management conference on 14 January 2008, due to the absence of Mr Massop and his attorney), for leave to amend his defence, and for relief from sanctions, was made during the course of the trial or final hearing of the proceedings, being the assessment of damages, as that was the matter fixed for hearing before her on that day. That order would therefore be excluded from the definition of a "procedural appeal" in the COAR.

[36] On 18 June 2009 the learned trial judge assessed damages payable by Mr Massop to the respondent as follows: special damages in the sum of $298,918.46, with interest at 5% from 19 January 2006 to 18 June 2009; general damages in the sum of $6,878,400.00 in respect of pain and suffering and loss of amenities, loss of earning capacity and handicap in the labour market and cost of future medical care and transportation. Interest at 6% was awarded on the sum of $4.5 million (pain and suffering and loss of amenities) from 11 May 2006 to 18 June 2009. Mr Massop has appealed that assessment and has asked this court to set it aside. The order in respect of the assessment of damages was a final order made after a hearing. The notice of

appeal was filed on 28 July 2009 within 42 days of the judgment of P. Williams J pursuant to rule 1.11(1)(c) of the COAR. The notice also asks that the order dismissing the application referred to above be set aside, and that the orders prayed for therein be made by this court, which may appear interlocutory in nature, but as the dismissal of the application was made during the course of the hearing of the assessment of damages, and the order on the assessment is a final order, I would order that the notice of appeal should stand. Additionally, even if I am wrong in that interpretation of the definition in the rule, or the nature of the orders made, pursuant to the "application approach" which has been applied in England and adopted by this court in the past (see ***White v Brunton,*** [1984] 2 All ER 606, and ***Rayton Manufacturing Ltd & Ors v Workers Savings and Loan Bank*** SCCA No. 20/2009 App. No. 35/2009, judgment delivered 30 July 2009) the judgment in respect of the assessment of damages would be final whether by way of "application" or in effect, and on that basis alone, I would order that the notice of appeal filed by Mr Massop should stand. In the light of that ruling, no order need be made on the application to extend the time for the filing of the notice of appeal.

[37] In respect of the notice of discontinuance, I agree with Harris JA that as no certification in respect of service of the same on the defendants had been filed by the claimant, rule 37.3 (2) of the Civil Procedure Rules (CPR) had not been complied with, and, it is arguable whether there had been effective service of the notice on Relva Sylvester, as required by rule 37.5 of the CPR. A finding on this by the Court of Appeal will no doubt determine whether Relva Sylvester remains a party in the suit.

[38] I also agree with the order and reasoning of Harris JA, with regard to whether a further stay of execution of the default judgment should be granted. Mr Massop has already paid $1,539,000.00 to the respondent, which he has indicated he would not seek to recover, and rightly so, as so much of the delay experienced in this matter has been caused by those representing him in the proceedings. In the circumstances of this case, I agree with Harris JA that the balance weighs in favor of Mr Massop in respect of the further stay of execution of the judgment. "The interests of justice demand intervention by the court" and I would therefore order that a further stay of the execution of the judgment be granted until the hearing of the appeal. Costs, taxed if not agreed, should be the respondent's.

HIBBERT JA (Ag) (DISSENTING)

[39] Temar Morrison, a minor, was on 19 January 2006 seriously injured as a result of a collision between the bus he was travelling in and a motor truck. The bus was being driven by Mr Relva Sylvester and the truck by Mr Joscelyn Massop.

[40] Consequent on the injuries to Temar Morrison, a claim was filed in the Supreme Court on his behalf by his mother and next friend, Miss Audrey White, naming Relva Sylvester and Mr Massop as defendants.

[41] At an adjourned case management conference held on 14 January 2008, Mr Massop did not attend, nor was he represented, and judgment in default of attendance at the case management conference was entered against him with damages to be

assessed. The assessment of damages was set to be at the time of the trial of the matter against Relva Sylvester.

[42] A copy of the order made at the case management conference indicating that a pre-trial review was to be held on 9 February 2009 and that the trial was fixed for 17 and 18 June 2009, was on 23 January 2008 served on Mr Keith Jarrett, attorney-at-law, who was the attorney on record for and on behalf of Mr Massop.

[43] The pre-trial review was adjourned to 4 June 2009 and was attended by Mr Rudolph Francis, attorney-at-law, instructed by Mr Keith Jarrett on behalf of Mr Massop.

[44] On 16 June 2009 the claimant, by notice filed in the registry of the Supreme Court, discontinued the action against Relva Sylvester.

[45] On 17 June 2009 Mr Massop filed a notice of application for court orders seeking to set aside the default judgment, leave to amend his defence and relief from sanctions. This application was set to be heard in Chambers on 13 July 2009.

[46] Mr Rudolph Francis, in his affidavit sworn to on 18 February 2011, stated that on 17 June 2009 he appeared on behalf of Mr Massop before Miss Paulette Williams J before whom the matter was listed for assessment of damages. He stated that he informed the learned judge of the application which was filed that morning, whereupon the learned judge adjourned the matter to 18 June 2009.

[47] Mr Francis further stated in his affidavit that he attended court on 18 June 2009 when counsel for the claimant informed the court of the notice of discontinuance filed in respect of Relva Sylvester and indicated that she was ready to proceed with the assessment of damages against Mr Massop.

[48] At paragraph 18 of his affidavit Mr Francis stated:

> "That I thereafter made Mr. Massop's application to the Court in asking for the orders on the Notice of Application for Court Orders. The learned trial Judge having heard me said she did not see anything in the application, or heard me say anything that would justify her granting the relief from the sanctions imposed by the Master on the 14th January, 2008, and making the consequential orders sought. She dismissed the application, and proceeded to assess the damages against the Secondnamed defendant."

The record of proceedings and minutes of order reads as follows:

> "Notice of Discontinuance against 1st Defendant filed on June 16, 2009
>
> Notice of Application dated June 17, 2009 dismissed.
>
> Order in terms of paragraph (1) of Notice of Application dated June 16, 2009
>
> Amended particulars of Claim filed and served on June 9, 2009 (out of time) permitted to stand.
>
> Damages for Claimant assessed as follows –
>
> Special Damages in the sum of $298,918.46 with interest at 5% from January 19, 2006 to today's date.

General Damages

Pain suffering and loss of amenities in the sum of $4.5 million with interest at 6% from May 11, 2006 to today's date.

Loss of earning capacity and handicap on the labour market in the sum of $1.5 million.

Cost of future medical care in the sum of $720,000.00

Cost of future transportation in the sum of $158,400.00

Cost to the Claimant to be taxed if not agreed."

[49] On 28 July 2009, Mr Massop filed a notice of appeal challenging the decisions made by Williams J on 18 June 2009. The grounds of appeal relied on are as follows:

"(a) The Appellant having filed Notice of Application for Court Orders for an order to set aside the judgment in default of attendance at The Case Management Conference, on the 14th day of January, 2008, and for leave to file an amended Defence to the claim out of time, and the Registrar having set the Application down for hearing on the 13th day of July, 2009, ought to have been allowed to adduce evidence from his Attorney-at-Law, Mr. Keith Jarrett, in support of his application.

The learned trial Judge's refusal to allow the hearing to take place on the date set by the Registrar and her refusal to grant an adjournment to enable the Appellant to adduce evidence from his Attorney-at-Law, Mr. Keith Jarrett, deprived the Appellant of the opportunity to have the issues raised in his Amended Defence ventilated at a trial, and therefore prejudiced him, in his attempt to present his Defence.

(b) The order made on The Case Management Conference on the 14th day of January, 2008, was made in the absence of the Appellant's Attorney-at-

Law. There is no evidence that Mr. Keith Jarrett was served with a copy of the Notice of hearing.

(c) The dismissal of the Appellant's application for an order to set aside the judgment in default of attendance at The Case Management Conference, and to grant leave to file his amended Defence to the claim out of time, 'drove the Appellant from the judgment seat without a determination of the issues, as a punishment for his conduct, however deplorable, when there was no real risk that, that conduct would render further conduct of the proceedings unsatisfactory. The Court must always guard itself against the temptation of allowing its indignation to lead to a miscarriage of justice.' **Logicrose Limited vs. Southend United Football Club Limited** (1988) 1 WLR 1256."

[50] On 5 February 2010, Mr Massop by way of notice of application for court orders, applied for a stay of execution of the judgment of Williams J.

[51] This application was heard in chambers on 30 March 2010 by Dukharan JA who refused it. The refusal was on the grounds that no proper appeal was filed as the appeal was a procedural appeal for which leave should have been first obtained.

[52] Mr Massop now seeks to have the order of Dukharan JA discharged.

[53] Before this court, Lord Gifford QC argued that the decision of Williams J in refusing to grant the orders sought in the notice of application for court orders, filed on 17 June 2009 was made during the course of the trial or final hearing of the proceedings and submitted that an appeal from that decision would not be a procedural

appeal as it was made during the assessment of damages which was the final hearing of the proceedings.

[54] Mr Williams, on the other hand, submitted that the application for court orders was made prior to and not during the course of the assessment of damages; hence the appeal would be a procedural appeal.

[55] Section 11 (1) (f) of the Judicature (Appellate Jurisdiction) Act states:

> "11 (1) No appeal shall lie -
>
> (f) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge except -..."

[56] Rule 1.8 (2) of the Court of Appeal Rules states:

> "Where the application for permission may be made to either court, the application must first be made to the court below."

[57] In rule 1.1 (8) the following definition is given:

> " 'procedural appeal' means an appeal from a decision of the court below which does not directly decide the substantive issues in a claim but excludes -
>
> (a) any such decision made during the course of the trial or final hearing of the proceedings;"

[58] In the normal course of proceedings where an application to set aside a default judgment is filed before an assessment of damages is made, the application is heard

before the court proceeds to assessment. If the application to set aside the judgment is refused, then the court would proceed to assessment.

[59] If the application to set aside the judgment was made and refused seven days before damages were assessed, could it be said that the application was heard during the assessment of damages? I would think not. Neither, in my view, could it be so held whether the application was refused one day or five minutes before the assessment was embarked upon. The words "during the course of" ought to be given their ordinary meaning which in my view would be "after the commencement and before the conclusion". The refusal of the application to set aside the judgment must therefore be antecedent to the court proceeding to assess damages.

[60] No doubt, Williams J being mindful of this and the circumstances of the case, brought forward, heard and dismissed the application and thereafter proceeded to assess damages. This sequence of events is borne out in paragraph 18 of Mr Francis' affidavit as well as the minute of order exhibited to it.

[61] In addition to the argument that the assessment of damages should have been adjourned to allow for the hearing of the notice of application for court orders on 13 July 2009, it was also argued that the assessment of damages should not have taken place on 18 June 2009 as there was no proof that the notice of discontinuance filed in relation to Relva Sylvester was served on the other parties to the claim as is required by rule 37.3(1), and certified in accordance with rule 37.3(2) of the Civil Procedure Rules

(CPR). Hence, it was said that the trial of Relva Sylvester could still have been pending. Rule 37.5(1) of the CPR, however, states:

> "Discontinuance against any defendant takes effect on the date when the notice of discontinuance is served on that defendant under rule 37.3(1) (a)."

Rule 37.5(2) states:

> "The claim or the relevant part of the claim is brought to an end as against that defendant on that date."

If, therefore, Relva Sylvester was served with a notice of discontinuance before 18 June 2009, there would have been then, no claim pending against him.

[62] It is quite clear from the grounds of appeal filed that there was no challenge to the quantum of damages awarded or to any other order made by Williams J except the challenge to her refusal to grant the orders sought in the notice of application for court orders filed on 17 June 2009. This view is supported by what is contained in the notice of appeal as the findings of fact and law which are challenged. They read as follows:

> "(a) Findings of fact:
>
> (i) The learned trial Judge's finding that what was before her, so far as the Appellant was concerned was an assessment of damages, yet went on to hear the Appellant's Notice of Application for Court Orders, which was set by the Registrar, for hearing (in Chambers), on the 13th day of July, 2009, at 11:30 a.m., seeking an order to set aside the judgment in default of

attendance at The Case Management Conference, on the 14th day of January, 2008, and to grant him relief from sanctions.

(ii) The learned trial Judge erred in finding that the delay has been intentional.

(iii) There being no evidence that the delay was contumacious, the learned trial Judge wrongly exercised her discretion against allowing the Appellant the opportunity to defend the claim, although there were other sanctions which could have been imposed against him.

(b) Findings of law:

(i) The learned trial Judge erred in law, in proceeding to hear the Appellant's Notice of Application for Court Orders which was set for hearing, in Chambers, on the 13th day of July, 2009, for an order to set aside the judgment in default of attendance at The Case Management Conference on the 14th day of January, 2008.

(ii) The learned trial Judge erred in law in refusing to grant the Appellant relief from sanctions, by setting aside the judgment in default of attendance at The Case Management Conference, and granting him leave to file his amended Defence to the claim out of time.

(iii) The learned trial Judge erred in law in failing to apply the principles laid down in Part 1, Rule 1 of The Civil Procedure Rules, which require that in exercising any discretion the Court should give effect to the overriding objective of the

> Rules, which is to deal with cases justly."

Even though one of the orders sought in the notice of appeal is "That the judgment entered for the Claimant, and the assessment of damages be set aside", in my view, this would be an order consequential to the grant of the order to set aside the default judgment.

[63] I agree, therefore, with the submission made by Mr Williams that the appeal is procedural and that leave of the court should first have been obtained. As no leave was obtained, I agree with Dukharan JA that no proper appeal was before this court, and consequently the application for a stay of execution of the judgment of Williams J should be refused. I would therefore dismiss this application and award cost to the respondent.

HARRIS JA

ORDER

By a majority (Hibbert JA (Ag) dissenting) application for stay of execution granted. Costs to the respondent to be agreed or taxed.