JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2020CV000096

MOTION NO COA2021MT00021

BETWEEN	**STEWART BROWN INVESTMENTS LIMITED**	**APPLICANT**
AND	**NATIONAL EXPORT-IMPORT BANK OF JAMAICA LIMITED (T/A) AS EXIM BANK JAMAICA)**	**RESPONDENT**

Conrad E George and Andre K Sheckleford instructed by Hart Muirhead Fatta for the applicant

Ms Kashina Moore instructed by Nigel Jones & Co for the respondent

12, 13 January and 4 March 2022

STRAW JA

Introduction

[1] This is an application for conditional leave to appeal to Her Majesty in Council ('the Privy Council') from a decision of this court given on 24 September 2021 and reported at [2021] JMCA Civ 40. The applicant, Stewart Brown Investments Limited ('SBIL') invoked section 110(2)(a) of the Constitution of Jamaica ('the Constitution'), which provides that an appeal shall lie to the Privy Council from decisions of the Court of Appeal in any civil proceedings, with the leave of the Court of Appeal, "where in the opinion of the [court] the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty

in Council ...". The sole ground on which SBIL relied is that its proposed questions are of great general or public importance.

[2] In opposing SBIL's application, the respondent ('EXIM') contended that the proposed appeal involves no question of either great general or public importance and accordingly, the application ought to be refused.

[3] Therefore, the single issue which arose on this application was whether the criterion of "great general or public importance or otherwise" has been made out in this case. For the reasons which will follow, I am of the considered view that the questions posed by SBIL are not of general public importance, and more specifically, the questions did not meet the pre-requite that any such question must arise from the decision of this court, and must be a question in which the answer is determinative of the appeal. In the premise, I propose that the application be dismissed with costs to EXIM.

The background

[4] The decision of this court, from which conditional leave is being sought, was in respect of EXIM's appeal against the order of a judge of the Supreme Court, that it was in contempt of court for deliberately disobeying an order made by a single judge of this court, which is contained in the judgment delivered on 23 June 2020 (reported at [2020] JMCA App 30). EXIM's defence to the contempt proceedings was that its actions resulted from the directions by the single judge of this court contained in a notification delivered on 12 October 2020, which sought to clarify that judge's earlier order.

[5] The long and winding history of the proceedings was concisely summarised by Brooks P at paragraphs [3] to [12] of the substantive appeal. There has been no dispute of the learned president's recapitulation, and, as such, I will adopt his summary, which was as follows:

"**Background**

[3] The genesis of the litigation is SBIL's attempt to prevent the Bank from taking property (realty and personalty) that SBIL had pledged to the Bank as security for a loan. The Bank claimed that SBIL was in arrears in its repayment of the loan. It threatened to exercise its powers of sale contained in a mortgage of the realty, and to take equipment, which was the subject of the bills of sale. SBIL asserted that the Bank's proposed action was in breach of a settlement agreement between the parties. The Bank countered that SBIL had not satisfied the pre-conditions for that agreement.

[4] SBIL's application for an injunction, pending the trial of its claim, was granted by Batts J in the Supreme Court on 20 December 2019. Batts J's orders, however, also had conditions. The condition for restraining the Bank from action in respect of the bills of sale on the equipment was that SBIL should pay $3,500,000.00 monthly on the 30th day of each month commencing on 30 December 2019. The condition ('the Marbella condition') for the restraint order in respect of the realty was that SBIL should pay into court a sum in excess of $170,000,000.00.

[5] SBIL was dissatisfied with those conditions. It initially succeeded in having Batts J grant a variation of the condition concerning the injunction in respect of the personalty. SBIL later applied for a variation of the Marbella condition. Batts J refused that application on 21 May 2020.

[6] On 27 May 2020, SBIL filed an appeal from that refusal. The grounds of appeal were restricted to the issue of the Marbella condition, but one of the orders sought on appeal was, ostensibly, not restricted to the injunction in respect of the realty. SBIL sought 'an interim injunction restraining the [Bank] from **enforcing any security with respect to the Loan Facility** until the determination of the proceedings in the court below' (emphasis supplied [as in original]). SBIL also applied to a single judge of this court to grant an injunction pending the hearing of the appeal. Its application was also, ostensibly, not restricted to the realty.

[7] On 23 June 2020, Phillips JA, after hearing submissions from both sides, granted an injunction in terms that were very similar to those contained in SBIL's application. The injunction restrained the Bank 'from taking **any steps pursuant to its purported calling of the loan** and/or exercising its power of sale as mortgagee until the determination of the appeal…' (emphasis supplied [as in original]). The formal order ('the first order') was perfected by the court's registry.

[8] The Bank, by a formal application for court orders, sought clarification of the first order. It applied for an adjustment of the order to make it clear that the first order only applied to the Bank's exercise of its power of sale contained in the mortgage. In other words, that the first order did not prevent the Bank from collecting on the bills of sale, if it wished to do so. In response to that application, the registrar of this court issued a notice ('the notification') to the parties that Phillips JA had, on 28 July 2020, considered the Bank's application and had directed that the term, 'calling of the loan', was not applicable to the 'monthly obligation due from [SBIL] in the sum of J$3.5 million'. The notification went on to state:

> 'For the avoidance of doubt, the restraint of the calling of the loan and taking steps to exercise the powers of sale of the mortgage did not restrain payment of the monthly sum due in the amount of J$3.5 million, as to condition of payment, or non-payment of the J$3.5 million, and the consequences thereof not having being [sic] appealed, was not argued before me." (Emphasis supplied [as in original])

[9] The next significant event, for these purposes, was that, according to SBIL, on 26 August 2020, a representative of the Bank, along with a bailiff and police officers forcibly entered SBIL's property, drove out one of its trucks and disabled another. The Bank was acting on the advice of its attorneys-at-law that the Notification clarified that the first order did not prevent the enforcement of the bills of sale. The Bank took similar action on 8 September 2020, taking other trucks and equipment.

> [10] On 2 September 2020, SBIL applied to the Supreme Court to have the Bank, and the various parties involved in the incursion of SBIL's property, committed for contempt
>
> of court.
>
> [11] Before SBIL's application was heard, the registry of this court, on 10 September 2020, issued a formal order by Phillips JA ('the second order'), in terms very similar to the notification. On 16 October 2020, the Full Court made an order ('the Full Court's order') varying the first order, by restricting the injunction to the exercise of the power of sale of the realty.
>
> [12] The first order, the notification, the second order and the Full Court's order were all before the learned judge when he heard SBIL's application, and made the order that the Bank now seeks to have set aside."

[6] Further, Brooks P summarised the decision of the learned judge of the Supreme Court and identified the issues on appeal thus:

> "**The decision by the learned judge**
>
> [13] The learned judge used a structured approach to SBIL's committal application. He found that:
>
> > a. Phillips JA had the authority to hear applications that were incidental to SBIL's appeal (see paragraph [26] of the learned judge's judgment);
> >
> > b. Phillips JA, therefore had the jurisdiction to grant an injunction binding the Bank in relation to its dispute with SBIL;
> >
> > c. Phillips JA could properly have ordered an injunction 'in respect of [the Bank's] enforcement against the equipment, notwithstanding the fact that that element of the injunction as granted by Batts J was not the subject of an appeal' (see paragraph [27] of the learned judge's judgment);
> >
> > d. the first order 'is clear on its face in restricting…the enforcement against realty and

personalty' (see paragraph [44] of the learned judge's judgment);

e. orders of the court are to be obeyed until they are set aside and the first order was not set aside up to the time that the Bank entered SBIL's property and interfered with the equipment;

f. the notification issued by the registry of the Court of Appeal did 'not have the legal effect of amending or modifying the clear terms of the [first order]' (see paragraph [47] of the learned judge's judgment);

g. disobedience of orders of the court should be treated as strict liability offences and thus 'the motive for disobedience is irrelevant for the purposes of establishing a case of contempt' (see paragraph [59] of the learned judge's judgment); and

h. the Bank's actions constituted a contempt of court and deserved a punitive response to demonstrate that orders of the court are to be obeyed.

[14] The learned judge ordered as follows:

'1. The Court having found that [the Bank] has committed a civil contempt of court by its disobedience of the order of Honourable Ms Justice of Appeal Phillips made on 23rd June 2020 hereby orders that [the Bank] pays a fine of Two Hundred and Fifty Thousand Dollars ($250,000.00) within 7 days of this order.

2. Costs of this application are awarded to [SBIL] to be taxed if not agreed.

3. Leave to appeal granted.'

The appeal

[15] The Bank contends that the learned judge, erred in his assessment of the method used to clarify this court's order and, accordingly, his order that it had committed a civil contempt should be set aside ...

> [16] The issues raised by [the] grounds may be analysed as follows:
>
> > a. was Phillips JA entitled to make the first order (ground c);
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> > b. was Phillips JA entitled to adjust the first order (ground a);
> >
> > c. did the Notification adjust the first order (ground b);
> >
> > d. was the finding for contempt fair and reasonable (grounds d, f and g); and
> >
> > e. was the sanction for the contempt fair and reasonable (ground e)"

The application for leave to appeal to Her Majesty in Council

[7] With respect to the instant application, the precise orders sought by SBIL are:

> "1. The Petitioner be granted Conditional Leave to Appeal to Her Majesty in Council of [sic] the decision of the Court of Appeal, handed down on the 24th day of September 2021, which allowed the Respondent's appeal against the order of Laing J in the Supreme Court in Claim No. SU 2019 CD 00482, set aside the orders of the learned judge, ordered any fine paid by the Respondent be refunded, with costs to the Respondent, on condition that within ninety (90) days of the date [of] this order the Petitioner:
>
> (a) pays the sum of $1,000.00 as security for the prosecution of the appeal to the Judicial Committee of the Privy Council; and
>
> (b) Prepare the record for dispatch to the office of the Judicial Committee of the Privy Council in London;
>
> 2. Costs of this application to be costs in the appeal to the Judicial Committee of the Privy Council.
>
> 3. Such further and other relief as this Honourable Court may deem just."

The questions posed by the applicant (SBIL)

[8] The questions initially posed by SBIL were lettered a to d, however, in his submissions Mr Conrad George, counsel for SBIL, referred to the questions by number. To avoid confusion, the numbering will be adopted. The four questions posed were:

> "[1] whether, in light of section 34 of the Judicature (Appellate Jurisdiction) Act the Court of Appeal is permitted to hear and consider an appeal against a finding of contempt, and the imposition of a fine for such contempt, on paper;
>
> [2] whether a single judge of the Court of Appeal (or any judicial officer) is entitled to change the meaning, effect and scope of his/her order (other than in accordance with the slip rule), after the perfection of the said order, by way of a purported clarification of the said order;
>
> [3] whether a document which contains a judicial officer's comments, created after the perfection of an order and associated reasons for judgment, is of any legal effect;
>
> [4] whether between the perfection of an order made by a judicial officer and the variation of the said order in a different judicial forum, a statement of thoughts and intentions by that judicial officer has an effect on the need to comply with the extant order."

[9] Upon the court's invitation to Mr George to reflect upon the wording of the proposed questions, the following reformulation was offered as an alternative to questions 2 to 4 ('the reformulated question'):

> "whether a notification, direction or statement (collectively, a 'Notification') given by a judge after the perfection of an order can have any effect upon the enforceability of such order where:
>
> - the perceived subject-matter of the Notification had been fully argued before the judge ('the Matters Argued');

- such Notification (or the interpretation thereof) purports fundamentally to alter the effect of such Order in relation to the Matters Argued; and

- such Notification was not made by consent of the parties."

[10] It is to be noted that at the commencement of his submissions, Mr George sought permission to pose a fifth question relevant to this court's treatment of the issue of *mens rea* by the contemnor. Counsel for EXIM, Ms Kashina Moore, objected and stated that she would not be prepared to deal with this issue at this stage of the proceedings in the time allotted for submissions to be heard. This court refused Mr George's request to advance this question for our consideration.

Submissions on behalf of the applicant

[11] Mr George helpfully referred the court to several authorities relevant to leave being sought pursuant to section 110(2)(a) of the Constitution. These authorities included **Paul Chen-Young et al v Eagle Merchant Bank Jamaica Limited et al** [2018] JMCA App 31, **Harold Miller v Carlene Miller** [2019] JMCA App 28 (which referred to **Martinus Francois v The Attorney General**, Saint Lucia Civil Appeal No 37/2003, judgment delivered 7 June 2004 and **Michael Levy v Attorney General & Jamaica Redevelopment Foundation Inc** [2013] JMCA App 11), and **The General Legal Council (ex parte Elizabeth Hartley) v Janice Causwell** [2017] JMCA App 16 ('**GLC v Janice Causwell**').

Question 1 – Contempt hearings and paper appeals

[12] Mr George submitted that the fundamental nature of contempt proceedings, being quasi-criminal, made it inappropriate for appeals from a finding of civil contempt, especially where there is a penal sanction, to be heard on paper. Accordingly, the proposed question is a question of great general importance.

[13] In support of the quasi-criminal characterization of contempt proceedings, reference was made to paragraph [79] of **Navigator Equities Limited and another**

v Oleg Vladimirovich Deripaska [2021] EWCA Civ 1799, where the view was expressed that proceedings for civil contempt are sometimes described as quasi-criminal because of the penal consequences that can attend the breach of an order (or undertaking to the court). Mr George submitted that it is for this reason that the Civil Procedure Rules ('CPR'), in particular rule 53.11(1), provide that hearings concerning committal for contempt ought to be heard in open court. He also pointed out that it is within the context of such a hearing that the rule 53.9(2)(a) of the CPR provides that a contemnor can be fined, which is what the learned judge relied on in the instant case.

[14] Counsel submitted that even the exceptions to contempt proceedings being held in open court (as stated in rule 53.11(2) of the CPR) are still subjected to the elements of openness, which is provided for in rule 53.11(3). Namely, where an order for committal is made, the person's name must be stated in open court, along with the general nature of the contempt and any term of confinement.

[15] Mr George also referred to section 34 of the Judicature (Appellate Jurisdiction) Act ('JAJA'), which, he stated, underscored the quasi-criminal nature of civil contempt proceedings. He argued that section 34(3), which treats with appeals in contempt proceedings, does not make any distinction between criminal or civil contempt but treats with instances where the punishment for contempt is imprisonment or a fine (as in the instant case). In his own words, he submitted that "while this provision treats with the putative contemnor giving surety in light of his giving notice to appeal the finding of contempt within a specified time, it further underscores the quasi-criminal nature of contempt proceedings, and the concomitant requirement of "openness", even in the Court of Appeal". He also submitted that section 34(3) contemplates that appeals from contempt proceedings are to be held in open court. Emphasis was placed on the words "appellant to appear" and "the Court shall hear".

[16] In oral submissions, Mr George contended that it was impossible to "hear" a matter on paper, but even if it were possible, contempt of court matters are precluded from being heard on paper.

[17] Turning to the CAR, it was submitted that while the definition of "procedural appeals" (rule 1.1(8)(e)) could include civil contempt, it was nonetheless unsuitable to hear the matter on paper.

Questions 2, 3 ,4 and the reformulated question – changing the meaning, scope and effect of an order after an order is perfected by issuing a notification to the parties with additional thoughts

[18] In respect of questions 2, 3, 4 and the reformulated question, Mr George submitted that these questions meet the threshold for the motion to be granted. He contended that there have been multiple cases from the court in the past few years, where the slip rule has been used as a "weapon" (per McDonald-Bishop JA at paragraph [34] of **Advantage General Insurance Company Limited v Marilyn Hamilton** [2021] JMCA App 25) ('**Advantage General Insurance'**). It was argued that "it seems litigants are to have little comfort in the finality and conclusiveness of judgments which has resulted in an untenable state of affairs".

[19] Mr George submitted that the effect of this court's judgment (which is under consideration), is that a judge may change the meaning, scope and effect of his or her order after the order has been filed, sealed, perfected and served and that this may be achieved by a judge issuing a statement of his or her thoughts to the parties, *ex post facto*. In support of the principle that there is no power to amend, vary, correct or reconsider perfected orders, reliance was placed on this court's decision in **Lyndel Laing and anor v Lucille Rodney and anor** [2013] JMCA Civ 27, paragraph [12]. He contended that the effect of the impugned decision was to create a new species of quasi-order, by which a judge's "after-the-fact statements" can vary rights or obligations arising under a perfected order.

[20] Counsel indicated that it was SBIL's position that the statements of Phillips JA, as set out in the notification, in substance, went beyond the scope of the slip rule. This was especially so, having regard to the apparent issue which arose from the notification, that is, the breadth of the order sought.

[21] It was submitted that in the face of explicit argument concerning the breadth of the order, the making of the order in wide terms can hardly be a "slip". He acknowledged that the slip rule empowers a court to change its records so as to ensure that an order accurately reflects its intention as in **In re Swire** [1885] 30 Ch D 239 ('**re Swire**'), as well as **Weir v Tree** [2016] JMCA App 6. In **re Swire**, the court made it clear that the order did not extend to matters not argued before it. The question of whether the slip rule was invoked was, however, not the central question. Mr George was strident that the central question is whether a series of statements, embodied in a notification, can affect an order of the court, and the simple response to this, in his submission, is "no". He contended that Phillips JA did not amend the court's record.

[22] Mr George submitted that this court's treatment of the notification as a quasi-order, which had the effect of changing the first order, while not being an order, in and of itself, would result in tremendous violence to the principle of finality and conclusiveness of judgment, which is an essential and cardinal aspect of the judicial system; that this represented a step by this court in giving itself a broad power of "clarification", that is, the power to revisit orders it has already made and expound upon them.

[23] In the case at bar, it was argued that the scope of the clarification not only allowed a judge to "clarify" perfected orders which are said to be clear and unambiguous, but further allowed judges to clarify perfected orders by issuing statements from the registry. This, it was submitted, is highly questionable.

Submissions on behalf of the respondent

[24] In opposition to the application, counsel for EXIM, Ms Moore, submitted that SBIL had not met the requisite threshold, namely, its proposed questions did not raise any question of general or public importance. Rather, the proposed questions merely affected SBIL's rights. Reliance was placed on the judgment of Harrison JA at paragraph 9 of **Rosh Marketing Limited v Capital Solutions Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 63/2008, judgment delivered 10 December 2009, as well as **Eric Frater v The Queen** [1981] UKPC 35.

Question 1 – Contempt hearings and paper appeals

[25] Ms Moore submitted that this court had the power to hear the appeal on paper. She argued that section 34 of the JAJA does not mandate that the appeal be heard in public, nor does it expressly prohibit a paper appeal. Reliance was placed on this court's decision in **William Clarke v The Bank of Nova Scotia Jamaica Limited** [2013] JMCA App 9, for the submission that this court can determine whether to depart from hearing an appeal in open court in order to promote economy and efficiency in having matters heard.

[26] In oral submissions, Ms Moore contended that even if the matter could not be determined by way of a procedural appeal (on the basis that part 53 matters - committal proceedings - as set out in the CPR were exempted), the CAR provides for hearings without the presence of the parties (rule 1.7(i)); and this court's general powers of management allowed for dealing with matters on written representations submitted by parties instead of holding an oral hearing (rule 1.7(j)).

Question 2 – Whether a single judge of the Court of Appeal (or any judicial officer) is entitled to change the meaning, effect and scope of his/her order (other than in accordance with the slip rule), after the perfection of the said order, by way of a purported clarification of the said order

[27] Ms Moore submitted that this question also did not meet the requisite threshold. She contended that question 2 does not arise as a question which, if answered, would determine the appeal.

[28] In any event, she submitted that the power of a judge to clarify his or her order is settled law. Reference was made to a number of authorities wherein the court's power to clarify was recognized. These authorities included: **American Jewellery Company Limited and Others v Commercial Corporation Jamaica Limited and Others** [2014] JMCA App 16 ('**American Jewellery Company**'), as well as the related Privy Council decision at [2013] UKPC 5; **Advantage General Insurance**, **Ainsworth v Wilding** [1896] 1 Ch 673, 677; **In re Swire**, **Preston Banking Company v William Allsup & Sons** [1895] 1 Ch 141, 143; **MacCarthy v Agard** [1933] 2 KB 417, 423 to 424; and **The Firm of R M K R M v The Firm of M R M V L** [1926] UKPC 62.

Question 3 – Whether a document which contains a judicial officer's comments, created after the perfection of an order and associated reasons for judgment is of any legal effect

[29] In respect of question 3, Ms Moore's submission was again that it did not raise any question of general importance and that the issue was settled.

[30] The case of **re Swire** was commended for consideration, insofar as it provided insight as to a means by which a court, in using its power to amend an order, can communicate the amendment to the parties. Ms Moore submitted that the English Court of Appeal, having found that it had the power to correct the order, made the amendment to the record to ensure that the order reflected its thoughts and what it decided and intended to pronounce upon. The court did not limit or prescribe the approach to be adopted where the court exercises the jurisdiction. She conceded that

there was a distinction, namely, that the course of action adopted by the court in **re Swire**, was to amend the records, as opposed to adjusting the first issued order or issuing a new order to reflect the clarification.

[31] Ms Moore submitted that it is open to the court to determine how it will make known its intention and the effect and meaning of its order, as there is no prescribed way in the CPR or CAR. Therefore, by issuing a notification of the single judge's directions that expressed the intention of the court, it was clear that it would affect the interpretation of the order and could not be ignored. It was submitted that this court was correct in its finding at paragraphs [35] to [37].

Question 4 – Whether between the perfection of an order made by a judicial officer and the variation of the said order in a different judicial forum, a statement of thoughts and intentions by that judicial officer has an effect on the need to comply with the extant order

[32] Ms Moore contended that the reason a court would clarify an order made is to ensure it is properly understood or interpreted so that it can be complied with. She submitted that in **re Swire**, the court was cognizant of the fact that someone might argue that the effect of the order was greater than it was and, that issues were decided upon which were not even argued before the court and it was for this reason that the amendment was necessary. No adjustment was necessary to the order itself, as the court, by amending the record, was making clear to the parties what its intention was, so that no argument could be made that the court had decided something it did not. It is for this reason the court's record had to be amended to accord with what was decided.

[33] Ms Moore submitted that, in the instant case, the notification would impact how the order is to be interpreted and carried out. The question as framed by SBIL, insofar as it says whether the statement affected the need to comply with the order, presupposed that the notification had no bearing on the order or record of the court and is, therefore, inaccurate. It was further submitted that the notification clearly affected the interpretation of the order and, since a party must comply with the order

and be so guided, then regard must be had to the notification outlining the intention of the court in making that order. As such, it was argued that this issue also failed to satisfy the test of raising an important question of law.

[34] In relation to the reformulated question (which was offered as an alternative to questions 2, 3 and 4), Ms Moore rested on the above submissions.

Discussion and analysis

[35] The orders are sought pursuant to section 110(2)(a) of the Constitution, which provides:

> "(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases –
>
> (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; ..."

[36] This constitutional requirement has been considered in numerous cases before this court, and the relevant principles were concisely stated by McDonald-Bishop JA at paragraph [27] of **GLC v Janice Causwell**. It is in keeping with these principles, which are set out below, that the instant application was considered:

> "i. Section 110(2) involves the exercise of the court's discretion. For the section to be triggered, the court must be of the opinion that the questions, by reason of their great general or public importance or otherwise, ought to be submitted to Her Majesty in Council.
>
> ii. **There must first be the identification of the question involved. The question identified must arise from the decision of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal.**

> iii. **Secondly, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue, which requires debate before Her Majesty in Council. If the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general or public importance.**
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> iv. Thirdly, it is for the applicant to persuade the court that the question identified is of great general or public importance or otherwise.
>
> v. It is not enough for the question to give rise to a difficult question of law; it must be an important question of law or involve a serious issue of law.
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> vi. The question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations.
>
> vii. The question should be one of general importance to some aspect of the practice, procedure or administration of the law and the public interest.
>
> viii. Leave ought not be granted merely for a matter to be taken to the Privy Council to see if it is going to agree with the court.
>
> ix. ..." (Emphasis supplied)

Question 1 – Contempt hearings and paper appeals

[37] In relation to question 1, it is evident that the matter was treated as a procedural appeal and, as such, was considered on paper, albeit the decision was given in open court (see **William Clarke**). The CAR (rule 1.1 (8) (e)) do provide that committal proceedings are not included in procedural appeals. However, there is some debate as to whether the imposition of a fine upon the contemnor would be considered committal proceedings under Part 53 of the CPR. In any event, the rules provide that the court and/or a single judge can make orders for appeals to be considered by way of written submissions only. In this instance, both parties did so without raising any objection (see rules 1.7 (2) (j) and 2.8 (2) (f) of the CAR).

[38] Further and most importantly, the issue of any incorrect procedure was never raised or posited for this court to consider. Both parties submitted to the jurisdiction of the court. Therefore, it is neither a question arising from the decision of this court, nor is it determinative of the appeal (see the principles for consideration as set out in **GLC v Janice Causwell** at paragraph [46] above).

[39] In addition, this question could not be considered to give rise to an important question of law or involve a serious issue of law.

Question 2 – Whether a single judge of the Court of Appeal (or any judicial officer) is entitled to change the meaning, effect and scope of his/her order (other than in accordance with the slip rule), after the perfection of the said order, by way of a purported clarification of the said order

[40] What this court considered whether Phillips JA was entitled to clarify an order that she had made. The law in that regard is well settled and includes the authorities of **Advantage General Insurance** and **American Jewellery Company** from this court. In **American Jewellery Company**, Morrison JA (as he then was) referred to Lord Wilson's observation in the related Privy Council judgment (**American Jewellery Company Limited and others v Commercial Corporation Jamaica Limited and others** [2013] UKPC 5), that if there is any inconsistency between the judgments of the Court of Appeal and its orders as drawn, an application can be made for an amendment of its orders under the slip rule, namely, rule 42.10 of the CPR. Morrison JA, at paragraph [22] of the judgment, also made reference to **Adam & Harvey Ltd v International Maritime Supplies Co Ltd** [1967] 1 All ER 533, wherein the court allowed an amendment to an order by virtue of the slip rule. He also referred to and quoted Harman LJ's rationale for the decision in that case:

> "As far as I am concerned, I did not intend that there should be this exceptional order for payment of costs at once, but that costs should be in any event those of the successful appellant. That was the order which I intended to pronounce, and I thought that I had done so. I see, however, that there is some room for mistake owing to the fact that after I had made the observation which showed

> that I did not intend an immediate taxation, an application was made which could have had that result and was so interpreted by the learned associate. That is a slip which can be amended under RSC, Ord 20, r 11, because inadvertently the order as drawn did not express the intention of the court owing to a misunderstanding between the associate and the court which pronounced it. I am not blaming anybody for it, except perhaps myself for not being more vigilant in the matter. I am sure of what I intended and I think that we have jurisdiction to give effect to that intention, and I would so hold."

[41] Additionally, in **re Swire**, Cotton J, in amending the records to make it conform to what the court had decided, stated that if the order as passed and entered could be considered to have decided questions that the court did not decide, then "I think we have jurisdiction to alter the record so as to make it conformable to what we did decide".

[42] Therefore, no issue of any general or great importance arises as to whether the court or a single judge has the jurisdiction to clarify an order that is inconsistent with the judgment or could be considered to have decided questions that the court did not decide.

Questions 3, 4 and the reformulated question

Question 3 - Whether a document which contains a judicial officer's comments, created after the perfection of an order and associated reasons for judgment is of any legal effect

Question 4 - Whether between the perfection of an order made by a judicial officer and the variation of the said order in a different judicial forum, a statement of thoughts and intentions by that judicial officer has an effect on the need to comply with the extant order

[43] These questions will be considered jointly along with the reformulated question, as the issue is whether the notification given by Philips JA had any legal effect in relation to the first order. To my mind, this is covered by the issue identified by Brooks P as "c. did the Notification adjust the first order (ground b);" (see paragraph [6] above).

[44] On the issue of the "notification", it is observed that although it is being referred to as the "notification", the notification is the notice from the registry informing the parties of Phillips JA's directions. As was agreed by counsel during oral arguments, what is effectively being considered is the legal effect of the learned judge's directions, issued by notice from the Court of Appeal's registry.

[45] In that regard, the question to be determined is whether the issue of the legal effect of the "notification" is determinative of the appeal. I am of the view that it was not. Rather, the issue in the substantive appeal was whether EXIM ought to have been found in contempt of the court. Ultimately, this court found that the learned judge was wrong to find that EXIM was in contempt of court.

[46] The decision of the learned judge below was predicated on his declaration that the first order made by Phillips JA was clear and unambiguous and as a result, she was precluded from having second thoughts and adjusting it. However, this court found that such a determination was not one for the learned judge to make. Phillips JA gave the directions as a single judge of the Court of Appeal. Therefore, the judge below could not act as an appellate court over her decisions. The learned judge, in his judgment, had quite correctly pointed out the principle that an order of the court is to be obeyed until it is set aside. This principle equally applied to the directions given by Phillips JA and the learned judge had no authority or jurisdiction to set it aside. Even if Phillips JA had no jurisdiction to do as she did, it was not open to the learned judge to question it or ignore it, neither was it so open to the litigant without firstly challenging its propriety or integrity before this court.

[47] In reference to the learned judge below, this court found that it was beyond his "authority to challenge an order of this court". The correctness of this finding on principle is not being questioned by SBIL. This court said of the learned judge at paragraph [29]:

> "As he had correctly stated as part of his reasoning, an order of the court must be respected until it is set aside.

> The learned judge had no authority to pronounce on the integrity of an order of this court."

The undesirability of such a course being open to a court of inferior jurisdiction was pronounced upon by the Privy Council in **Cassell & Company Limited v Broome and Another** [1972] 2 WLR 645.

[48] This court also found that the learned judge, in attempting to interpret the directions contained in the notification, found it was unclear and did not affect the first order. However, he considered that one interpretation of the notification was that "it was indicating that the [first order] was wider than [Phillips JA] had intended". This court found that the learned judge, having made such an indication, ought to have given effect to this interpretation (in determining what Phillips JA intended).

[49] This court's only reference to the effect of the notification was at paragraph [37] of the judgment, where it stated that:

> "The effect of the notification is that the first order did not affect Batts J's order for SBIL to make monthly payments in respect of the personality and importantly of 'the consequences thereof'."

[50] That was simply a statement of the obvious interpretation of the contents of the direction in the notification and was not a statement on the validity of the notification. If the notification was capable of that interpretation, as was found by the learned judge, then the question of its impact on the applicant was a relevant issue before the learned judge.

[51] Therefore, up to this point, three principles could be gleaned from the judgment of this court, none of which are affected by the proposed questions to the Privy Council. These are as follows:

> (i) an order of the court is to be obeyed until it is set aside;

(ii) a judge of a court of inferior jurisdiction cannot properly ignore decisions of a superior court or overrule such decisions; and

(iii) decisions of a superior court, properly interpreted should be given effect.

[52] Those are settled principles from which no question of general or public importance arises in this case.

The issue of contempt

[53] Having determined those settled principles which ought to have guided the learned judge, this court went on to determine whether the finding of contempt was fair and reasonable in those circumstances.

[54] The learned judge found EXIM in contempt of court based on the fact that, in effect, he applied those principles only to the first order of Phillips JA but not her directions in the notification. He found that her first order was clear, that there was no need for it to be clarified and that the directions in the notification could not clarify it, not because the contents were incapable of doing so, but because he declared that the single judge's directions were of no legal effect. He found in those circumstances that EXIM ought to, in effect, have ignored the directions and obeyed the first order. It was, therefore, in contempt for relying on Phillips JA's directions.

[55] This court found the learned judge was wrong to find EXIM in contempt for two reasons:

(i) his error in ignoring the interpretation of the notification; and

(ii) his disregard for the effect this interpretation of the notification would have had on EXIM's intention to disobey the first order.

[56] As already shown, with regard to (i), this court did not pronounce on the validity of the notification, only on its effect with regard to the first order when the interpretation given to it by the learned judge was applied. With regard to (ii) the court found that the judge was wrong to find that *mens rea* was irrelevant to determine whether contempt was committed. The learned judge said, "...the reasons, motives and state of mind of contemnors are not relevant to the issue of whether a contempt has been committed...". In so doing, he found that the act of disobedience of the first order was sufficient and that motive was irrelevant.

[57] He found that EXIM ought not to have taken comfort from the directions in the notification. This court found that the learned judge was wrong to so find. It found that contrary to the judge's finding, contempt requires an *actus reus* and a *mens rea*. The learned judge himself found that EXIM did not intend to breach the order but nevertheless treated with contempt as a strict liability offence. The court found that there was an inconsistency in the judge's reasoning, for if EXIM had no intention to disobey the order, then *mens rea* had not been established. The *mens rea* for contempt is deliberate wilfulness or recklessness, in the sense of contumaciousness.

[58] This court found that an interpretation that could have been properly placed on the "notification" was that it "blurred the clarity" of the first order, so that the actions of EXIM, who acted in reliance on it, could not be said to be wilful.

[59] Ultimately, this was the basis of the decision of this court in the substantive appeal.

[60] As stated previously, this court did not pronounce upon the lawfulness or validity of the notification and its decision was not based on the lawfulness or validity of the notification. The decision was based on the effect the interpretation of the

notification had on the clarity of the first order and the interpretation placed on it by the learned judge, and whether EXIM ought to have been held in contempt of court as a result.

[61] In light of that, I find that the proposed questions do not address any issues determined by this court, and even more so, no answers to the proposed questions could finally determine the appeal. Even if the Privy Council were to find that the notification was invalid, it would still have to consider its effect on the state of mind of EXIM at the time it was issued, how it could be interpreted or how it blurred the clarity of the first order, as a direction emanating from a single judge of a court with higher jurisdiction which had to be obeyed by both the learned judge and litigants. It would then have to determine whether contempt proceedings were proper in these circumstances.

[62] For these reasons, I concluded that questions 3 and 4 and the reformulated question are not of great general or public importance, they do not arise from the decision of this court and the answers to them are not determinative of the appeal.

Whether the questions ought 'otherwise' to be submitted to Her Majesty in Council

[63] Although I have concluded that the questions cannot be said to be of great general or public importance, I will consider whether they could be submitted for consideration of Her Majesty in Council under the rubric of "or otherwise" contained in section 110(2)(a) of the Constitution.

[64] In **Olasemo v Barnett Limited** (1995) 51 WIR 191, this court set out an explanation of the term "or otherwise". At page 476 (B-D), Wolfe JA stated:

> "Is the question involved in this appeal one of great general or public importance or otherwise? The matter of a contract between private citizens cannot be regarded as one of great general or public importance. If Mr Olasemo is to bring himself within the ambit of section 110(2)(a) he must therefore do so under the rubric 'or otherwise'.

> Clearly, the phrase 'or otherwise' was added by the legislature to enlarge the discretion of the court to include matters which were not necessarily of great general or public importance, but which in the opinion of the court might require some definitive statement of the law from the highest judicial authority of the land. The phrase 'or otherwise' does not per se refer to interlocutory matters. The phrase 'or otherwise' is a means whereby the Court of Appeal can in effect refer a matter to their lordships' Board for guidance on the law."

[65] Having regard to the decision of this court, I am of the opinion that no issue has been raised which ought to be considered by the highest court under the rubric of "or otherwise ought to be submitted" under section 110(2)(a).

Conclusion

[66] I have found that none of the proposed questions are of great general or public importance, nor have I seen any other legitimate basis for any of them to be otherwise submitted for the opinion of the Privy Council. Therefore, I would propose the following orders:

(1) Motion for conditional leave to appeal to Her Majesty in Council is refused.

(2) Costs of this application to the respondent to be agreed or taxed.

EDWARDS JA

[67] I have read, in draft, the judgment of Straw JA and agree with her reasoning and conclusion. I have nothing further to add.

G FRASER JA (AG)

[68] I, too, have read the draft judgment of Straw JA. I agree with her reasoning and conclusion.

STRAW JA

ORDER

(1) Motion for conditional leave to appeal to Her Majesty in Council is refused.

(2) Costs of this application to the respondent to be agreed or taxed.