JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

SUPREME COURT CIVIL APPEAL NO COA2021CV00108

APPLICATION COA2023APP00139

BETWEEN	**WEST INDIES PETROLEUM LIMITED**	**APPLICANT**
AND	**COURTNEY WILKINSON**	**1ST RESPONDENT**
AND	**JOHN LEVY**	**2ND RESPONDENT**
AND	**SCANBOX LIMITED**	**1ST INTERESTED PARTY**
AND	**WINSTON HENRY**	**2ND INTERESTED PARTY**

Mrs Georgia Gibson-Henlin KC, Ms Keisha Spence and Ms Ariana Mills instructed by Henlin Gibson Henlin for the appellant

Mrs Symone Mayhew KC instructed by Mayhew Law for the respondents

Lemar Neale and Miss Chris-Ann Campbell instructed by NEA|Lex for the interested parties

29, 30 May and 3 July 2023 and 20 December 2024.

Civil procedure – Application to rehear appeal – Application made before orders on the appeal were perfected – Whether it is in the interests of justice to rehear the appeal

MCDONALD-BISHOP JA

[1] These proceedings emanate from two claims in the Supreme Court. The first claim (claim no SU2021CD00268) was filed by West Indies Petroleum Limited ('West Indies Petroleum') and Island Lubes Distributors Limited ('Island Lubes') against John Levy,

Donna Levy, Sprint Fuels & Lubricants Limited ('Sprint Fuels'), Courtney Wilkinson, Eco Marine Energy Petroleum Company Limited ('Eco Marine') and Eco Petroleum Limited ('Eco Petroleum'). The second claim (claim no SU2021CD00281) was filed by West Indies Petroleum, as the sole claimant, against Scanbox Limited ('Scanbox'), Winston Henry, Courtney Wilkinson and John Levy.

[2] On 23 November 2021, Batts J ('the learned judge') struck out several paragraphs of an amended particulars of claim filed by West Indies Petroleum in the second claim on the basis that the pleadings were substantially duplicative of the causes of action pleaded in the first claim. West Indies Petroleum appealed to this court from the learned judge's decision. On 20 January 2023, this court (P Williams, Edwards JJA and G Fraser JA (Ag)), dismissed the appeal with reasons reduced to writing in judgment bearing neutral citation [2023] JMCA Civ 2.

[3] The registrar of this court issued the certificate of result of the appeal containing the court's formal orders on 31 January 2023. However, on 25 January 2023, six days before the certificate of result was issued, West Indies Petroleum filed the notice of application with which this judgment is concerned, seeking to have the court's decision set aside and the appeal against the learned judge's decision reheard. The basis of the application is that the court's decision is premised on a misapprehension of the facts underpinning the appeal and, therefore, constitutes a gross miscarriage of justice.

[4] Against that background, the sole issue for this court's determination is whether it is appropriate for the court to exercise the discretion to rehear the appeal in the circumstances of this case.

[5] The relevant factual and procedural background leading up to the application will now be provided.

The relevant background

A. The claims in the Supreme Court

(i) The first claim

[6] The first claim was filed on 11 June 2021 and subsequently amended several times. It revolves around alleged breaches by John Levy and Donna Levy ('the Levys') of an agreement for sale dated 14 October 2019 ('the October 2019 Agreement') between West Indies Petroleum, on the one hand, and the Levys, on the other hand. The October 2019 Agreement formalised the sale of the Levys' shares in West Indies Petroleum and their separation from the company as two of its officers.

[7] The central allegations in the claim related to the Levys' involvement in business which competed with West Indies Petroleum, allegations surrounding misappropriation of funds, detaining and/or converting a motor vehicle owned by Island Lubes, failing to safeguard and account for Island Lubes' property, the fraudulent use and conversion of the property in breach of their fiduciary duties, and breaches of confidence.

[8] On the footing of those allegations, West Indies Petroleum and Island Lubes sought damages, injunctions, and other related relief for breach of contract, breach of confidence, defamation, causing loss by unlawful means, breach of fiduciary duty and/or conflict of interest or interference with contractual relations, detinue, fraud, and fraudulent conversion.

(ii) The second claim

[9] The second claim was filed on 23 June 2021. Scanbox and Winston Henry are parties only to the second claim.

[10] The second claim alleges that Scanbox was hired as a consultant to perform information technology services on behalf of West Indies Petroleum. Winston Henry was the managing director of Scanbox and a consultant for Scanbox. Courtney Wilkinson and John Levy were two directors of West Indies Petroleum. West Indies Petroleum and Scanbox entered into two non-disclosure agreements on 21 January 2019 and 1 February

2020 ('the non-disclosure agreements'). West Indies Petroleum alleges that Scanbox and Winston Henry acted in breach of the non-disclosure agreements and Courtney Wilkinson and John Levy acted in breach of their duties as directors of West Indies Petroleum, primarily by (i) participating in a data breach of West Indies Petroleum's email servers and exchange platforms; and (ii) by disclosing defamatory and confidential information to West Indies Petroleum's stakeholders.

[11] On the foregoing bases, West Indies Petroleum seeks damages and other relief for breach of contract, breach of confidence (paras. 9 – 26 of the amended particulars of claim), breach of fiduciary duty/conflict of interest (paras. 27 – 31 of the amended particulars of claim), malicious falsehood and defamation (paras. 32 – 36 of the amended particulars of claim). The claim also sought a declaration and damages against all the defendants for breach of West Indies Petroleum's constitutional rights to privacy of communication enshrined in sections 13(3)(j)(ii) and 13(3)(j)(iii) of the Constitution (paras. 37, 39(1) and 39(9) of the amended particulars of claim).

B. The application to strike out and the learned judge's decision

[12] The respondents applied under rule 26.3(1)(b) of the Civil Procedure Rules, 2002 ('CPR') to strike out the second claim, in its entirety, on the basis that it was an abuse of process. They contended that the second claim addresses the same subject matter, raises the same issues which fall for determination under the first claim, and relates to injunctive relief already obtained in other interlocutory proceedings.

[13] In a written judgment delivered on 23 November 2021 (**West Indies Petroleum v Scanbox Limited and others** [2021] JMCC Comm 43), the learned judge compared the claims (paras. [9] and [10] of the judgment) and observed that while West Indies Petroleum is a claimant in both claims, Scanbox and Winston Henry are parties in the second claim but not in the first claim. The learned judge found that the second claim concerns an alleged breach by Scanbox and Winston Henry of the non-disclosure agreements but that neither the non-disclosure agreements nor the allegations pertaining to their breach are pleaded in the first claim. The learned judge also found that the first

and second claims both allege breaches of fiduciary duties by Courtney Wilkinson and John Levy, supported by much of the same particulars. Further, the causes of action in the second claim that were not contained in the first claim were malicious falsehood, defamation and breach of constitutional rights.

[14] Having made those comparisons, the learned judge opined that the "new" causes of action ought to have been made a part of the first claim, and that it would be unfair to put the defendants in the second claim to the expense of responding to the same allegation more than once (para. [11] of the judgment).

[15] The learned judge, accordingly, struck out the portions of the second claim, which did not relate to the alleged breach of the non-disclosure agreements, and made the following orders:

> "(1) Paragraphs 27, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 39 (1) and the words 'and *Constitutional Damage'* in paragraph 39(9), of the Amended Particulars of Claim in SU2021 CD00281 are struck out.
>
> (2) The Claimant is, on or about the 30th November 2021, to file and serve a Further Amended Particulars of Claim reflecting the effect of this order.
>
> (3) Permission is granted for the Defendants to, on or about the 17th December 2021, file amendments to their respective defences if so advised."

The proceedings on appeal

[16] West Indies Petroleum was dissatisfied with aspects of the learned judge's decision and appealed to this court, seeking the following orders:

> "a. The order of the Honourable Mr Justice David Batts is set aside as regards paragraphs 27, 29, 30, 31, 37 and 39(1) of the Amended Particulars of Claim filed on the 5th October 2021.
>
> b. The Judgment of The Honourable Mr. Justice David Batts be varied to exclude paragraphs 27, 29, 30, 31, 37, 39(1) and the words, 'and constitutional damages' in paragraph 39(9) of the Amended particulars of Claim from the strike out order."

[17] West Indies Petroleum accepted the learned judge's decision to strike out paras. 32 – 36 of its amended particulars of claim, and amended its pleadings in the first claim to include them. Those paragraphs contained its claims for malicious falsehood and defamation against Courtney Wilkinson and John Levy. Therefore, there was no challenge on appeal concerning paras. 32 – 36.

[18] The appeal focused on the learned judge's decision to strike out the pleadings at paras. 27, 29, 30, 31, 37, 39(1) and the words "and Constitutional Damages" in para. 39(9) of the amended particulars of claim ('the disputed pleadings'). The disputed pleadings alleged breaches of fiduciary duties and confidence by the respondents (paras. 27, 29, 30 and 31) and breaches of West Indies Petroleum's constitutional right to privacy (paras. 37 and 39(1)).

[19] On appeal, West Indies Petroleum contended that the disputed pleadings could not be properly transferred to the first claim as they are rooted in different facts, based on the unauthorised access to its email servers and the breach of non-disclosure agreements. On that basis, West Indies Petroleum submitted that the learned judge did not appreciate that while the causes of action are the same, they are grounded in different facts from those that were complained of in the first claim and concerned additional defendants. Furthermore, the learned judge's decision to strike out the disputed pleadings renderered the causes of action contained therein unactionable, and deprived West Indies Petroleum of the opportunity to assert those causes of action against persons not involved in the first claim.

[20] The respondents maintained their position that the disputed paragraphs were duplicative of the first claim. Therefore, the learned judge was correct to strike them out for the reasons articulated in his judgment.

[21] In its judgment, this court considered, in great detail, the legal principles applicable to striking out where the allegation is made that a claim is duplicative of an earlier claim. The court concluded that the learned judge was correct to find that aspects of the

amended particulars of the claim in the second claim constituted an abuse of the court's process and ought to be struck out. The court reasoned that the struck out pleadings were already encompassed in the first claim under the pleadings relating to breach of fiduciary duty, breach of contract and defamation. Those pleadings did not relate to the breach of the non-disclosure agreements, which was at the heart of the second claim. Therefore, West Indies Petroleum was seeking to argue additional particulars of the same cause of action in the same claim, contrary to their assertions that the causes of action in both claims emanated from different facts.

[22] In those premises, the court concluded that the learned judge was correct to strike out the disputed pleadings, and dismissed the appeal.

[23] On 31 January 2023, the registrar of the Court of Appeal issued a certificate of result containing the formal orders of the court.

The application to rehear the appeal

[24] By its application made on 20 January 2023, with which these instant proceedings are concerned, West Indies Petroleum seeks the following orders:

> "1. Supreme Court Civil Appeal No. COA2021CV00108 the Appeal herein which was heard on paper and judgment delivered on the 20th January 2023 be reheard.
>
> 2. The decision in Supreme Court Civil Appeal No. COA2021CV00108, the Appeal which was delivered on 20th January 2023 be set aside.
>
> 3. Costs of the Application be Costs in the Claim/Appeal.
>
> 4. Such further and other orders as the Court deems just."

[25] Citing several relevant authorities, including **Taylor v Lawrence** [2002] EWCA Civ 90, **Fiesta Jamaica Limited v National Water Commission** [2014] JMCA App 42, **Re Uddin (a child)** [2005] EWCA Civ 52 ('**Re Uddin**'), and **Re L and B (Children) (Care proceedings: power to revise judgment)** [2013] 2 All ER 294 ('**Re L and B**'), West Indies Petroleum contends, in summary, that the court failed to appreciate that the

first and second claims asserted causes of actions based on different facts. Therefore, the disputed pleadings were not duplicative of the first claim and ought not to have been struck out. Further, the court's decision has denied West Indies Petroleum the opportunity to seek relief against the interested parties, Scanbox and Winston Henry, relative to the causes of action contained in the disputed pleadings. It also contended that if the court's decision is permitted to stand, West Indies Petroleum will have no alternative remedy against the interested parties as there is no automatic right of appeal under the Constitution to His Majesty in Council from the decision of the Court of Appeal. In the premises, West Indies Petroleum submitted that it has met the threshold for judicial reconsideration in the circumstances, and the appeal should be reheard.

[26] In written submissions, the respondents submitted that the application should be refused with costs to the respondents on an indemnity basis. However, during the hearing of the application, the respondents revised their position and conceded that paras. 27, 29(a), 29(g), 29(i), 37, 39(1) and the words "and Constitutional Damage" in para. 39(9) in West Indies Petroleum's amended particulars of claim ought not to have been struck out by the learned judge. As a consequence, they conceded that the decision of this court, upholding the learned judge's decision, was erroneous. There is, however, no concession in relation to the remaining sub-paragraphs of para. 29, and paras. 30 and 31. In relation to those paragraphs, the respondents' position is that there is no legitimate basis upon which the court should reconsider its orders.

[27] Relying on **Dafel Weir v Beverly Tree** [2016] JMCA App 6 and other cases, counsel for the interested parties, Scanbox and Winston Henry, maintains that the slip rule provides an adequate avenue for redress, and, therefore, it is not necessary for the court to re-open the appeal and reconsider its decision.

The power to reconsider an appeal

[28] The inherent jurisdiction and discretion of the court to vary or revoke its orders is reflected in rule 1.7(7) of the Court of Appeal Rules 2002 ('CAR'), which provides that: "The power of the court to make an order includes a power to vary or revoke that order".

[29] It is now settled beyond debate that this court has the jurisdiction and discretion to set aside its orders and rehear an appeal after its orders on the appeal have been announced in court and the court's formal orders have been memorialised in a certificate of result. As will soon become evident, of particular relevance to the exercise of the court's discretion is the fact that the certificate of result containing the court's formal orders was issued after the application was filed, but before the application was set for hearing.

[30] The authorities cited by the parties demonstrate that the court's discretion is exercisable both before and after its formal orders contained in its certificate of result have been perfected and issued. The principles that regulate the court's discretion in both of those circumstances have been examined.

A. Reconsideration before the court's formal orders have been perfected

[31] Where the court's orders have been communicated to the parties, but the formal orders have not been issued by the court, the court has a broad inherent jurisdiction and discretion to rehear a matter and reconsider its orders. The position in law is that the court is deemed to be *functus officio* and devoid of jurisdiction over a matter when its formal orders have been perfected. Therefore, before the formal orders are issued, the court remains seized of jurisdiction of the matter. In **Preston Banking Co v Allsup** [1895] 1 Ch 1441, the court stated the ordinary position thusly:

> "As long as [an] order has not been perfected the judge has a power of reconsidering the matter, but, once the order has been completed, the jurisdiction of the judge over it has come to an end."

[32] Traditionally, the test for reconsideration in these circumstances was that there had to be "exceptional circumstances". In 1972, the English Court of Appeal, in **Re Barrell Enterprises** [1973] 1 WLR 19, refused to allow the re-opening of an unsuccessful appeal in which judgment had been given some months previously, but the order had not been drawn up. The court stated:

> "**When oral judgments have been given, either in a court of first instance or on appeal, the successful party ought save in the most exceptional circumstances to be able to assume that the judgment is a valid and effective one**. The cases to which we were referred in which judgments in civil courts have been varied after delivery (apart from the correction of slips) were all cases in which some most unusual element was present." (Emphasis added)

[33] However, the courts have since rejected that view. Two recent authorities on this point emanate from the United Kingdom Supreme Court: **Re L and B** and **AIC Ltd v Federal Airports Authorities of Nigeria** [2022] UKSC 16 ('**AIC Ltd**'). Those cases, in summary, have established that the court has an inherent jurisdiction and discretion, whether on the application of a party or its own motion, to revisit and reconsider its orders at any time before they are perfected.

[34] In **Re L and B**, the Supreme Court disapproved the "exceptional circumstances" rule espoused in **Re Barrell Enterprises** and determined that the power of the court to revisit its orders was controlled by the overriding objective to deal with cases justly. At para. 27, Baroness Hale helpfully explained:

> "This court is not bound by *Barrell* or by any of the previous cases to hold that there is any such limitation upon the acknowledged jurisdiction of the judge to revisit his own decision at any time up until his resulting order is perfected. I would agree with Clarke LJ in *Stewart v Engel* [2000] 1 WLR 2268, 2282 that his overriding objective must be to deal with the case justly. A relevant factor must be whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up. On the other hand, in In *re Blenheim Leisure (Restaurants) Ltd*, Neuberger J gave some examples of cases where it might be just to revisit the earlier decision. But these are only examples. A carefully considered change of mind can be sufficient. Every case is going to depend upon its particular circumstances."

[35] Examples of the circumstances which might warrant the court reconsidering its orders cited in **Re Blenheim Leisure (Restaurants Ltd (No 3)** (1999) Times, 9 November, to which Baroness Hale referred in **Re L and B**, include (i) a plain mistake by

the court, (ii) the parties' failure to draw to the court's attention a relevant fact or point of law, and (iii) the discovery of new facts after judgment was given.

[36] In the later case of **AIC Ltd**, the United Kingdom Supreme Court affirmed Baroness Hale's exposition of the principles in **Re L and B**, and espoused the following further guidance, which I have distilled and summarised as follows in the interest of brevity:

i. The task of a judge faced with an application to reconsider a judgment and/or order before the formal order has been perfected is to do justice in accordance with the overriding objective (para. 30).

ii. The overriding objective implicitly affirms and reinforces the long-standing principle of finality. The principle has historically been an objective of civil procedure and serves as a weighty matter to be considered when determining whether to grant an application for reconsideration (paras. 31, 32 and 34).

iii. On receipt of an application by a party to reconsider a final judgment and/or order before the order has been sealed, a judge "should not start from anything like neutrality or evenly-balanced scales". In keeping with the overriding principle of finality of litigation, it is appropriate for a judge to first determine whether the application for reconsideration should be entertained at all before troubling the other party with it or giving directions for a hearing (para. 32).

iv. Proceedings should not be re-opened just to allow debate on a point if it is apparent that the application for reconsideration should be refused (para. 32).

v. The question is whether the factors favouring re-opening the order are, in combination, sufficient to overcome the deadweight of the finality principle

on the other side of the scales, together with any other factors pointing towards leaving the order in place (para. 39).

[37] In light of the principles detailed above, it seems safe to pronounce that it is now established on strong persuasive judicial authority that, while the jurisdiction to re-open an appeal before the formal orders are perfected should not be lightly exercised, exceptional circumstances need not be demonstrated to warrant the reconsideration by the court of its orders. Instead, the court must take the course required to do justice between the parties in keeping with the overriding objective of the CPR. In this regard, the outcome in every case will depend on its unique facts and circumstances.

B. Reconsideration after the court orders have been perfected

[38] On the other hand, where the appellate court's orders have been formalised in a formal order, the general position is that the court is *functus officio* and has no further jurisdiction in the matter (see **Preston Banking Co v Allsup**). However, the England and Wales Court of Appeal in **Taylor v Lawrence** [2003] QB 528 established that an appellate court has a "residual" jurisdiction after its formal orders have been issued to rehear an appeal and reconsider its orders in "exceptional circumstances". This residual jurisdiction is often referred to as the "**Taylor v Lawrence** jurisdiction".

[39] Parenthetically, it is important to note that in England and Wales, the jurisdiction to re-open an appeal and the applicable principles have now been crystalised into rule 52.30 (formerly rule 52.17) of the UK Civil Procedure Rules ('UK CPR'), which provides:

> "(1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless—
>
> (a) it is necessary to do so in order to avoid real injustice;
>
> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
>
> (c) there is no alternative effective remedy."

[40] The England and Wales Court of Appeal has determined that rule 52.30 of the UK CPR, the former rule 52.17, and the decisions made under those rules, have memorialised the **Taylor v Lawrence** jurisdiction (see **Municipio de Mariana v BHP Group plc** [2021] EWCA Civ 1156 ('**Mariana**')). Therefore, cases interpreting rule 52.30 (and the former rule 52.17) of the UK CPR offer relevant guidance on understanding the court's power to reconsider its decisions after its orders have been memorialised in a formal order. We have followed the lead of those cases as providing highly persuasive guidance.

[41] The case law demonstrates that the "exceptional circumstances" threshold is exacting. Indeed, the courts have determined that the jurisdiction is "an exceptional jurisdiction, to be exercised rarely". At para. 3 of **R (Akram) v Secretary of State for the Home Department** [2020] EWCA Civ 1072, the court stated:

> "It is rightly described in the authorities as 'exceptional'. It is 'exceptional' in the sense that it will be engaged only where some obvious and egregious error has occurred in the underlying proceedings and that error has vitiated – or corrupted – the very process itself. It follows that the CPR 52.30 jurisdiction will never be engaged simply because it might plausibly or even cogently be suggested that the decision of the court in the underlying proceedings, whether it be a decision on a substantive appeal or a decision on an application for permission to appeal, was wrong."

[42] In a case from this court, **Fiesta Jamaica Limited v National Water Commission**, Brooks JA (as he then was), citing **Taylor v Lawrence** and the later case of **Re Uddin**, similarly explained:

> "[15] Although this court is allowed, by virtue of rule 1.7(7) of the Court of Appeal Rules (CAR), to vary or revoke any of its orders, the decided cases have demonstrated that it will only do so in rare and exceptional circumstances. The principle behind that approach is an overriding requirement for there to be an end to litigation and for certainty in the court's process (see **Taylor v Lawrence** [2002] EWCA Civ 90). **The power to re-open judgments in order to vary or revoke the orders made therein will only be exercised to avoid real injustice. It is to be noted that error alone will not be sufficient to allow for an exercise of the power. The party seeking that relief is not permitted to**

merely challenge the merits of this court's decision (see paragraph [40] of the judgment of Woolf CJ in **Taylor v Lawrence**). That party must satisfy strict criteria in order to succeed.

[16] The principles involved in an application to re-open a judgment were extensively assessed by the Court of Appeal of England in **Re Uddin (a child)** [2005] EWCA Civ 52; [2005] 3 All ER 550. Dame Butler-Sloss P identified the hurdles that the applicant for re-opening would be obliged to clear. They include proof that:

a. an erroneous result in the earlier proceedings was perpetrated, most likely by bias, fraud or corruption of the process;

b. the result was without the fault of the applicant;

c. there would be real injustice caused by the result; and

d. there is no alternative remedy." (Emphasis added)

[43] In **Re Uddin (a child)**, the court explained that the "exceptional circumstances" test will not be met unless the integrity of the process has been critically undermined:

"…**the Taylor v Lawrence jurisdiction can only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined**. That test will generally be met where the process has been corrupted. It may be met where it is shown that a wrong result was earlier arrived at. It will not be met where it is shown only that a wrong result may have been arrived at." (Emphasis added)

[44] At para. 3 of **R (Akram) v Secretary of State for the Home Department**, the court explained in equally illuminating language:

"[The *Taylor v Lawrence* jurisdiction] will not be exercised simply because an earlier determination was (let alone, may have been) wrong, but only where there is a 'powerful probability' that the decision in question would have been different if the integrity of the earlier proceedings has not been critically undermined. **The injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claim of finality in litigation**." (Emphasis added)

[45] Lastly, in **R (Goring-on-Thames Parish Council) v South Oxfordshire District Council** [2018] EWCA Civ 1860 at paras. 10 – 14, the court explained that the failure of a party to advance a point or to argue a point competently would not, without more, justify re-opening a court's decision. Further, the fact that there is fresh evidence, the amounts in issue in the proceedings are very large, or that the point in issue is very important to one or more of the parties or is of general importance is not, of itself, sufficient to displace the fundamental public importance of the need for finality in litigation.

[46] The instant application is considered against the background of the foregoing principles.

Analysis and conclusions

[47] As alluded to at the commencement of this judgment, the timing of West Indies Petroleum's application for rehearing is an important starting point for determining its application for rehearing. The application was filed six days before the court's certificate of result containing its formal orders was issued. Based on the legal principles discussed above, had the application been considered and determined at that time, a lower threshold than that expressed in **Taylor v Lawrence** would have applied to the determination of the application. However, the mere fact of the issuance of the certificate of result would suggest, on the face of it, that the higher and more exacting threshold of the **Taylor v Lawrence jurisdiction** would apply.

[48] The circumstances surrounding this application, therefore, raise an important question concerning the relevant legal standard to be applied in a case such as this. That question is whether the application for a rehearing should be adjudged according to the lower threshold set out in **Re L and B**, given that the application was filed before the certificate of result was issued, or whether the higher and more exacting threshold under the **Taylor v Lawrence** jurisdiction should apply given that the certificate of result has been issued.

[49] Having considered the matter in the round, I am of the view that it is not in the interests of justice and fairness that West Indies Petroleum's application be subject to the more stringent test under the **Taylor v Lawrence** jurisdiction simply because the certificate of result was issued. It would be unfair and contrary to the interests of justice to penalise West Indies Petroleum by imposing a higher threshold for the determination of the application for a rehearing simply because the application was not heard and determined before the certificate of result was issued. West Indies Petroleum did what it was required to do by placing its application for a rehearing before the court without delay. It initiated the mechanism for reconsideration of the court's decision five days after the appeal was determined. The fact that the application was not forthwith set for hearing by the court ought not to operate to West Indies Petroleum's disadvantage or detriment. It should have been recognised by the registry of the court that there was a pending application that touched and concerned the terms of the order that was subsequently perfected and dispatched. It should have been promptly brought to the attention of the court. This was an administrative failure on the part of the court that should not be laid at the feet of West Indies Petroleum so as to operate to its detriment.

[50] For this reason, I consider it prudent and fair to deploy the **Re L and B** standard in determining whether the application should be granted. In this regard, the crucial question to be asked and answered is whether it is in the interest of the overriding objective that the appeal be reheard.

[51] Having considered the parties' submissions against the background of the judgment of this court on West Indies Petroleum's appeal, and the judgment of the court below, I am satisfied that the application for rehearing should be granted for the reasons briefly outlined below.

(i) Different parties and different causes of action

[52] The parties are not the same in the two claims. Scanbox and Winston Henry are parties to the second claim and not parties to the first claim. The causes of action in the disputed pleadings flow from the alleged breach of the non-disclosure agreements, which

is the subject of the second claim, and not the first claim. The aspects of the disputed pleadings that claim relief against Scanbox and Winston Henry under the Constitution (paras. 37, 39(1) and 39(9)), relate to the breach of the non-disclosure agreements. None of those pleadings can properly be subsumed under the first claim as that claim does not concern the release of confidential information flowing from the alleged authorised access to West Indies Petroleum's servers.

[53] Given that Scanbox and Winston Henry are not parties to the first claim, and the causes of action against them arise from facts that are not pleaded in that claim, the orders of the learned judge and this court upon the appeal may have effectively denied West Indies Petroleum the opportunity to pursue relief against Scanbox and Winston Henry, without a hearing on the merits of the claim against them. This could amount to a grave injustice if, as contended on behalf of West Indies Petroleum, the claim has been rendered unactionable against the interested parties.

[54] Therefore, on its face, the court's dismissal of the appeal on the basis that the disputed pleadings were duplicative of the first claim, appears to have been based on a misapprehension of the scope and purport of both claims and the factual genesis from which they emanated as contended by counsel for West Indies Petroleum.

(ii) Error of the court regarding the appeal

[55] The court found, at para. [41] of its judgment, that the appeal excluded a challenge to the learned judge's decision to strike out the words "and Constitutional Damages" contained in para. 39(9) of the amended particulars of claim. However, West Indies Petroleum's notice of appeal discloses that its appeal also sought to challenge the learned judge's decision in that regard. Therefore, it appears that there was further misapprehension by the court of the extent and scope of the appeal.

(iii) The respondents' partial concession

[56] Although the respondents initially resisted the orders sought by West Indies Petroleum on the appeal and this application, they now agree that the court was wrong to dismiss the appeal from the learned judge's decision to strike out paras. 27, 29(a), 29(g), 29(h), 29(i), 37, 39(1) and the words "and Constitutional Damage" in para. 39(9) of the amended particulars of claim. This concession, though not determinative of the question of whether the court should grant the order for a rehearing and/or that different orders should be made on the rehearing, if permitted, has nevertheless fortified my view that there is a cogent basis for judicial reconsideration of the appeal in the interests of justice.

(iv) The availability of further avenues for redress

[57] It is noted that the appeal is a procedural one, brought pursuant to rule 2.4 of the CAR, and was considered on paper by the court without an oral hearing in keeping with the relevant rules of court. Although the availability of further avenues for redress is not determinative of the application, the assessment of any such avenues is instructive in the court's assessment of whether it is in the interests of justice for the appeal to be reheard. In my view, West Indies Petroleum does not appear to have any indisputably clear avenue to obtain redress if the appeal is not reheard. Firstly, I am not persuaded to the viewpoint of the interested parties that the slip rule can adequately address West Indies Petroleum's complaints. The decision by the learned judge to strike out the disputed pleadings cannot conscientiously be said to have amounted to an accidental slip, error or omission so as to engage the slip rule.

[58] Secondly, and critically too, is the fact that the appeal emanates from an interlocutory order by the learned judge, in relation to which there is no automatic right of appeal to His Majesty in Council. Accordingly, there is no certainty that West Indies Petroleum would be able to successfully obtain leave to bring an appeal from the decision of this court to His Majesty in Council pursuant to the relevant provisions of the Constitution. Thus, the refusal of reconsideration in this circumstance may be detrimental

to the rights of West Indies Petroleum to access the courts to have its separate grievances disclosed in the second claim sufficiently ventilated. The doubt that prevails regarding the availability of an alternative avenue for West Indies Petroleum to obtain the remedy it seeks on this application favours the grant of a rehearing by this court on all the disputed pleadings.

(iv) The overriding objective

[59] All the preceding considerations collectively impact the crucial question of what is warranted to do justice between the parties in all the circumstances of the case. Given all the matters discussed above, particularly (i) the promptitude of the application and the stage at which it was made; (b) the admitted and established misapprehension or error of the court on hearing the appeal, which was enough to invoke a concession from the respondents; and (c) the absence of a readily available and guaranteed alternative avenue for West Indies Petroleum to obtain redress for the court's treatment of its appeal, it seems overwhelmingly to be in keeping with the overriding objective, and the overall interests of justice, that the appeal be re-opened.

Conclusion

[60] In conclusion, I find that West Indies Petroleum stands on legally solid ground to ask for a rehearing given the time it had filed its application (before the certificate of result had been issued by the registry) and the demonstrable misapprehension/error on the part of this court regarding the extent and scope of the appeal. I am also satisfied, on the material placed before the court and having regard to the overriding objective, that the application for the appeal to be reheard should be granted in its entirety. There is no compelling reason to limit the rehearing only to the disputed pleadings, which attracted the respondents' concession.

[61] I am of the considered view that regardless of which standard of review is deployed, West Indies Petroleum has successfully advanced a cogent case for the court to exercise its discretion to revoke its previous orders and to consider the learned judge's orders afresh in light of the grounds of appeal. The application for a rehearing succeeds.

[62] Further, I would also note that in the ordinary course, judicial reconsideration of its orders should be considered by the panel that originally made the decision. This, in my view, is the most usual course, especially in circumstances where the application is made before a certificate of result is issued. Such a course was adopted in **Julie Riettie Atherton v Gregory Mayne** [2022] JMCA App 9. Unfortunately, the application had not been referred to the panel that considered the appeal before the certificate of result was issued, which was not due to any fault of West Indies Petroleum. Therefore, I would recommend as an order of this court that, barring any unforeseen intervening circumstance, the rehearing should take place before the same panel that heard the original appeal.

[63] It is also my view that an open court hearing would be appropriate so the court could more effectively investigate the issues arising on the appeal with the assistance of counsel present at the hearing. Accordingly, the necessary steps should be taken to have the matter prepared for an open court hearing through the convening of a case management conference, as soon as is reasonably practicable.

Disposition of the application

[64] For the preceding reasons, I would propose, in broad terms, the necessary orders that should be included in the final orders of the court, namely (1) granting the application for a rehearing of the appeal; (2) setting aside the orders of the court made on the appeal; (3) providing for the fixing of a case management conference to chart the way forward for the appeal to be reheard in open court as soon as is reasonably practicable during the Hilary Term 2025; and (4) stipulating that the rehearing of the appeal be conducted before the same panel of judges unless it is not possible to do so, in which case, it may proceed before a differently constituted panel.

[65] Finally, on the question of the costs of the application, I would suggest that the question of costs of this application be reserved until the determination of the appeal.

[66] It remains for me to apologise on behalf of the court for the delay in the delivery of this judgment. The effort to dispose of the application more expeditiously was frustrated by some pressing supervening matters.

SIMMONS JA

[67] I have read the draft judgment of my sister, McDonald-Bishop JA. I agree with her reasoning and conclusion and have nothing useful to add.

DUNBAR-GREEN JA

[68] I, too, have read the draft judgment of my sister, McDonald-Bishop JA. I agree with her reasoning and conclusion and have nothing useful to add.

MCDONALD-BISHOP JA

ORDER

1. The application for there to be a rehearing of Supreme Court Civil Appeal No COA2021CV00108, which was considered on paper and judgment delivered on 20 January 2023, is granted.

2. The orders made by this court (P Williams, Edwards JJA and G Fraser JA(Ag)) on 20 January 2023 are set aside.

3. As soon as is reasonably practicable, the appeal shall be set down for a case management conference and for rehearing in open court during the Hilary Term, 2025 after consultation with counsel for the parties.

4. The rehearing should be conducted by the same panel of judges (P Williams, Edwards JJA and G Fraser JA (Ag)), unless it is not possible to do so (in which case, a differently constituted court may rehear the appeal, preferably with at least one of the original panel present).

5. The question of costs of the application is reserved until the determination of the appeal when submissions may be invited from the parties.