[2023] JMCA App 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2022CV00106

APPLICATION NO COA2023APP00026

BETWEEN AIRLIFT HANDLERS LIMITED 1ST APPLICANT

AND MICHAEL ANGELO DALEY 2ND APPLICANT

AND THE ADMINISTRATOR GENERAL FOR JAMAICA RESPONDENT

Miss Catherine Minto instructed by Nunes Scholefield DeLeon & Co for the applicants

Ms Jacqueline Cummings instructed by Archer Cummings & Co for the respondent

22 May and 15 June 2023

IN CHAMBERS

SIMMONS JA

[1] This is an application for an order for security for costs by Airlift Handlers Limited and Michael Angelo Daley ('the applicants'). The application is supported by the affidavit of Catherine Minto sworn to on 26 January 2023. The orders sought are as follows:

> "1. That the [Administrator General] be ordered to give security for Airlift Handlers costs of the appeal in the amount of $3,000,000.00 within 30 days of the date hereof.
>
> 2. That the [Administrator General] pays this sum of $3,000,000.00 into an interest bearing account in the joint names of the Attorneys-at-Law for the respective parties at a financial institution to be agreed upon by the parties within 7 days of the date of the order.

3. If the security for costs is not paid within 30 days as provided by the order then the appeal shall stand struck out with costs to [Airlift Handlers Limited].

4. Costs of the application to be taxed if not agreed."

[2] The grounds on which the applicants rely are as set out below:

> "1. Pursuant to Part 2.11 (2) and 2.12 of the Court of Appeal Rules.
>
> 2. There was no delay on the part of [Airlift Handlers Limited] in applying for security for costs, as:
>
> (a) A written request has been made for security of costs. And [sic] the [Administrator General for Jamaica] has indicated they have no funds to pay Costs.
>
> (b) That accordingly, if the Appeal fails, there is no likelihood that [the applicants] will recover the Costs of the Appeal.
>
> (c) This is an Appeal where the [Administrator General for Jamaica] had no witness as to negligence before the Court, and sought to rely on Res Ipsa, based on the bare evidence that Weston Wilson was a passenger in a vehicle. That was all the evidence advanced by the [Administrator General for Jamaica].
>
> (d) No time period has been set down in the Rules for filing an Application for Security for Costs
>
> (e) All applications ought properly to be made at a Case Management Conference and no Case Management Conference date has been scheduled in this matter.
>
> (f) No appeal date has been scheduled in this matter.
>
> 3. The Application for Security for Costs is necessary."

[3] The application was opposed by the Administrator General for Jamaica ('the Administrator General') who relied on the affidavit of Geraldine Bradford sworn to on 27 March 2023 and the further affidavit of Geraldine Bradford sworn to on 29 May 2023.

Background

[4] On 5 October 2005, Mr Weston Wilson, an employee of the 1st respondent, Airlift Handlers Limited ('Airlift Handlers'), was travelling in a staff bus *en route* to his home. The bus was owned by Airlift Handlers and was being driven by Michael Angelo Daley, the 2nd respondent, who was the servant and/or agent of Airlift Handlers. Whilst travelling along Waltham Park Road, the bus was involved in a collision with a vehicle that was being operated by Nicole Dwyer, who was the servant and/or agent of Merrick Myrie. Several persons, including Weston Wilson ('the deceased'), suffered fatal injuries.

[5] The deceased died intestate leaving four children. Letters of Administration were granted to the Administrator General who commenced proceedings on behalf of the deceased's estate against the applicants in the Supreme Court, pursuant to the Fatal Accidents and the Law Reform (Miscellaneous Provisions) Act. That claim was consolidated with claim no 2011HCV05998 which was brought by the Administrator General against Merrick Myrie and Nicole Dwyer.

[6] Airlift Handlers' defence was that the accident was caused solely by the negligence of Nicole Dwyer. The Administrator General and Airlift Handlers Limited obtained a judgment in default of defence against Merrick Myrie and Nicole Dwyer.

[7] At the trial before Wint-Blair J ('the learned judge'), the only witnesses who gave evidence on behalf of the Administrator General were children of the deceased who were not present at the accident. The Administrator General relied on the doctrine of *res ipsa loquitur* and submitted to the learned judge that the fact that the accident occurred was evidence of negligence on the part of the applicants.

[8] At the close of the Administrator General's case, a no case submission was made on behalf of the applicants on the basis that the Administrator General had not adduced

any evidence to establish a claim in negligence against them. The learned judge, in upholding the no case submission, held that the doctrine of *res ipsa loquitur* did not apply. She stated thus at para. [63]:

> "[63] … the evidence adduced by the [applicants] has discharged their evidential burden of proof and rebuts the prima facie case of negligence. I also find that the [Administrator General has] therefore failed to prove that the death of [the deceased] was caused by the negligence of the either [Airlift Handlers] or Michael Daley jointly and/or severally. The balance of probabilities favours these defendants. The [Administrator General's] action in negligence therefore fails."

[9] The learned judge made the following orders

> "1. Judgment entered for Airlift Handlers Limited and Michael Daley
>
> 2. The following awards are made by the court:
>
> Special Damages
>
> a. Funeral expenses of $200,000.00 awarded to the claimant to [sic] against Merrick Myrie and Nicole Dwyer.
>
> b. Administration expenses of $91,439.20 awarded to the claimant against Merrick Myrie and Nicole Dwyer.
>
> General Damages
>
> 2. Damages under the Law Reform (Miscellaneous Provisions) Act of $3,939,219.33 awarded to the claimant against Merrick Myrie and Nicole Dwyer.
>
> 3. Costs awarded to the claimant against Merrick Myrie and Nicole Dwyer to be taxed if not agreed.
>
> 4. Costs awarded to Airlift Handlers Limited and Michael Daley to be taxed if not agreed."

[10] The Administrator General, who was dissatisfied with the learned judge's decision, filed notice and grounds of appeal on 21 October 2022. The grounds of appeal are as follows:

> "i. The Learned Judge erred when she refused to allow the [Administrator General] to amend the pleading to correct the error therein and bring it in line with the documentary evidence showing the deceased's earning with Airlift Handlers Limited were not paid monthly but fortnightly.
>
> ii. The Learned Trial Judge erred when she stated that Leon Stephenson was called as a witness by Counsel for Airlift Handlers Limited and failed to realized [sic] that the [applicants] made a no case submission at the end of the Claimant's case and called no evidence but elected to stand on their submissions.
>
> iii. The Learned Trial Judge erred when she relied on the statement given by a person who did not attend the trial and gave no evidence at the trial.
>
> iv. The Learned Trial Judge erred when she held that the fact that the deceased was a passenger does not cause a shifting of both legal and evidential burden to the [applicants].
>
> v. The Learned Trial Judge erred when she held that the Court of Appeal [in] Igol Coke adopted the decision of Hummerstone and Another v Leary and Another.
>
> vi. The Learned Trial Judge erred when she held that the doctrine of *res ispa loquitur* does not apply.
>
> vii. The Learned Trial Judge erred when she held that the [applicants] has [sic] discharged their evidential burden of proof and rebutted the prima facie case of negligence.
>
> Viiii. The Learned trial [sic] Judge ought to have computed the general damages based on the earning[s] of the deceased as being the gross sum of $24,432.69 for fortnight or net earnings of $14, 902.97 per fortnight."

[11] The applicants have filed a counter notice of appeal, on 17 April 2023, seeking an order for the decision of the learned judge to be affirmed.

The affidavit evidence

[12] Miss Minto, in her affidavit filed 26 January 2023, stated that the estimated costs that were likely to be incurred in the appeal amounted to $3,654,700.00. She stated further, that her firm had requested security for costs from the Administrator General in the sum of $3,000,000.00 and was advised that there were no funds in the estate from which that sum could be paid. Miss Minto averred that if the applicants are successful in the appeal, the Administrator General will not be in a position to pay the costs of the appeal.

[13] Miss Bradford, in response, by affidavit filed 28 March 2023, agreed that the deceased's estate was impecunious but stated that the Administrator General should not be called upon to give security for costs as such an order would stifle the appeal, which she described as strong. In her further affidavit, she stated that the Administrator General was only able to contact one of the beneficiaries who indicated that he could not assist in offering security.

Applicants' submissions

[14] Counsel for the applicants, Miss Catherine Minto, submitted that an order for security for costs on an appeal is to ensure that there is a fund available to a successful respondent to recover the costs he has incurred in defending the appeal. She stated that as a general rule, an appellate court will grant an order for security for costs if the appellant is impecunious, and it seems likely that if his appeal is unsuccessful, the respondent may experience difficulty in recovering his costs. Reference was made to **Speedways Jamaica Ltd v Shell Company (WI) and another** (unreported), Court of Appeal, Supreme Court Civil Appeal No 66/2001, judgment delivered 20 December 2004 ('**Speedways Jamaica Ltd**'), in support of that submission.

[15] Miss Minto submitted that it is now well settled that the court will not refuse to make an order for security for costs solely on the ground that to do so would unfairly stifle a valid appeal. Reference was made to **Speedways Jamaica Ltd** and **Cablemax Limited et al v Logic One Limited** (unreported), Court of Appeal, Supreme Court Civil

Appeal No 91/2009, judgment delivered 21 January 2010 ('**Cablemax Limited**'), in support of that submission. She stated that the court was required to balance the possibility of injustice and prejudice if the appellant is prevented from pursuing his appeal against the possibility of injustice to the respondent if no order for security for costs is made. Miss Minto stated that, in the present case, there is a legitimate concern that as there are no funds in the deceased's estate. The Administrator General will be unable to meet any costs order made against her if the applicants are successful in their defence of the appeal.

[16] It was submitted further that it has not been clearly demonstrated that the appeal has a high degree of probability of success as no witnesses as to fact were called by the Administrator General. As such, there is no evidence of how the collision occurred. Additionally, the applicants have not delayed in making the application. Counsel stated that the request for security for costs was made within 30 days of the appeal having been filed. Further, the application for security for costs was filed within 30 days after the appellant became aware that the estate could not provide this security. She also made the point that no date has yet been scheduled for the hearing of the appeal, and the parties are still awaiting the notes of the evidence.

[17] Miss Minto stated that the Administrator General ought not to be treated any differently because she is the administrator of an estate. Counsel submitted that the capacity in which the Administrator General acts is a reason favouring the grant of the order as the applicant cannot pursue the beneficiaries of the estate to enforce any order for costs. She also posited that whilst there is no money in the estate, there is evidence of the deceased having at least four adult children against whom the court could order costs. It was submitted that at the trial, these individuals gave evidence that they were employed and, in any event, it ought to be for the Administrator General to prove that these persons are unable to pay the amount for security for costs. In any event, counsel submitted that the award would be appropriate and the sum requested by the applicants is "quite low".

Respondent's submissions

[18] Counsel for the Administrator General, Ms Jacqueline Cummings, submitted that the decision whether to make an order for security for costs is a discretionary one. In this regard she relied on the dicta of Phillips JA in **The Shell Company (WI) Ltd v Fun Snax Ltd and Midel Distributors Ltd** [2011] JMCA App 6 ('**Shell Company**'). Counsel stated that the overriding factor is whether such an order would result in a denial of justice.

[19] Ms Cummings submitted further that the deceased estate's alleged impecuniosity is not the sole factor to be considered by the court in its determination of whether the order should be made in favour of the applicants. The court may also consider the factors of oppression and public interest and whether an order for security for costs would stifle the proceedings. Counsel cited the case of **Pioneer Park Pty Ltd and others v Australia and New Zealand Banking Group Limited** [2007] NSWCA 344), in which the court explained that oppression most commonly manifests itself where the grant of the order would stifle the appeal. Additionally, a party's conduct in seeking an award may be oppressive where an application is commenced with the intention of denying an impecunious party from the right to litigate. Ultimately, the court must consider whether the award would stifle the litigation where the claim has potential merit and the quantum of costs would be relatively insignificant to Airlift Handlers, which is a well-established company, but beyond the capacity of the Administrator General as the deceased's estate has no funds from which it could be paid. In the matter before the court, counsel submitted that the applicants' intention was to stifle the appeal rather than seeking to secure their costs.

[20] Counsel asserted that the deceased's estate is impecunious. She submitted that the beneficiaries of the estate should not be required to satisfy an order for security for costs as their involvement is limited to their capacity as beneficiaries of the deceased's estate. In such circumstances, to compel a third party (not a party to the action) to raise

funds for a litigant would amount to a "stretching" of the court's jurisdiction. She stated that such a course would be outside of the Administrator General's remit as the administrator of the deceased's estate.

[21] In this regard, counsel relied on the affidavit of Geraldine Bradford, filed on 29 May 2023, in which the affiant stated that is not the practice of the Administrator General to request monies from the beneficiaries of the estate to settle costs in respect of an order for security for costs. Moreover, the Administrator General as a statutory body cannot bear these costs as each estate must bear its own costs. The affiant also stated that the Administrator General was only able to contact one of the beneficiaries of the estate who stated that he is unable to contribute to any security for costs and the other beneficiary is now deceased. Miss Bradford stated that the estate has no assets and is impecunious.

[22] Counsel asked the court to consider the position of the Administrator General *vis à vis* that of Airlift Handlers, which is a well-established company that has provided no evidence that it would be unlikely to cover its legal fees in the absence of an award of security for costs. To grant an award in such circumstances, it was submitted, would stifle the appeal thereby denying justice to the beneficiaries of the deceased's estate especially where the appeal has a real prospect of success.

[23] It was submitted that the learned judge erred in finding that the applicants through their witness provided evidence as to how the accident occurred. To the contrary, the applicants made a no case submission. In any event, the alleged witness did not attend the trial in keeping with rule 29.8 of the Civil Procedure Rules.

[24] The learned judge also erred in finding that the doctrine of *res ispa loquitur* did not apply as it was clear that, were it not for the negligence of Mr Daley or the other defendants, Mr Wilson would not have died. Moreover, the learned judge erred in her finding that the Administrator General did not discharge the evidential burden of proof.

[25] It was submitted to be trite law that once there are two vehicles involved in a collision, and there is no evidence to prove who caused the accident, then liability is to be shared equally. In the present case, the fact that death occurred whilst the deceased was a passenger in a motor vehicle accident, the duty shifted to the driver to prove the cause of the death. This is because, the driver has a duty of care to transport his passenger safely.

Analysis

[26] Rule 2.11(1)(a) of the Court of Appeal Rules 2002 ('the CAR'), empowers a single judge of appeal to make orders "for the giving of security for the costs occasioned by an appeal". Rule 2.11(3), which sets out the factors that are to be taken into account in the consideration of such an application, states:

> "(3) In deciding whether to order a party to give security for the costs of the appeal, the court must consider –
>
> (a) the likely ability of that party to pay the costs of the appeal if ordered to do so; and
>
> (b) whether in all the circumstances it is just to make the order."

[27] Rule 2.11(4) states that, where an order for security for costs is made, the court or the single judge "must order that the appeal be dismissed with costs if the security is not provided in the amount, in the manner and by the time ordered".

[28] The decision of whether or not to grant an order for security for costs is a discretionary one that is dependent on the circumstances of the case. Morrison P in **Jamaica Edible Oils & Fats Co Ltd v MSA Tire (Jamaica) Limited and Jeane Lavan** [2018] JMCA App 8 at para. [27] relied on the decision of **Cablemax Limited**, which set out the principles relevant to an application for security for costs as follows:

> "(i) The court has a complete discretion whether to order security and accordingly it will act in the light of all the relevant circumstances.

(ii) The possibility or probability that the party from whom security for costs is sought will be deterred from pursuing its appeal by an order for security is not without more a sufficient reason for not ordering security.

(iii) In considering an application for security for costs, the court must carry out a balancing exercise. That is, it must weigh the possibility of injustice to the appellant if prevented from pursuing a proper appeal by an order for security against the possibility of injustice to the respondent if no security is ordered and the appeal ultimately fails and the respondent finds himself unable to recover from the appellant the costs which have been incurred by him in resisting the appeal.

(iv) In considering all the circumstances, the court will have regard to the appellant's chances of success, though it is not required to go into the merits in detail unless it can be clearly demonstrated that there is a high degree of probability of success or failure.

(v) Before the court refuses to order security on the ground that it would unduly stifle a valid appeal, it must be satisfied that, in all the circumstances, it is probable that the appeal would be stifled.

(vi) In considering the amount of security that might be ordered the court will bear in mind that it can order any amount up to the full amount claimed, but it is not bound to order a substantial amount, provided that it should not be a simply nominal amount.

(vii) The lateness of the application for security is a factor to be taken into account, but what weight is to be given to this factor will depend upon all the circumstances of the case."

[29] In accordance with the principles in **Cablemax Limited**, the following issues arose for my consideration:

(i) Whether the Administrator General will possibly be deterred from pursuing the appeal if the order for security for costs is granted?

(ii) Whether the appeal is likely to succeed?

(iii) Whether the interests of justice favour the grant or the refusal of the application?

(iv) Whether the applicants delayed in making the application?

Whether the Administrator General will possibly be deterred from pursuing the appeal if the order for security for costs is granted?

[30] The Administrator General has indicated that the deceased's estate is impecunious. The applicants are understandably concerned about this state of affairs. Whilst the deceased's estate's impecuniosity is clearly relevant, it is not an automatic bar to making an order for security for costs. The entire circumstances of the case must be assessed to determine what course best accords with the interests of justice. In **Speedways Jamaica,** Harrison JA at page 6 stated:

> "As a general rule an appellate court **will grant an order for security for costs of an appeal in circumstances where an appellant is impecunious and it seems likely that if he fails in his appeal the respondent would experience considerable delay and would be put to unnecessary expense to recover his costs of the appeal**. The court will exercise its discretion depending on all the circumstances of the case." (Emphasis supplied)

[31] The court must balance the other considerations and determine whether the grant of the order would amount to a denial of justice to the Administrator General. The court at pages 9 to 10 indicated that the applicable principles that are to be taken into account in this balancing exercise were "comprehensively summarized" in the headnote of **Keary Development Limited v Tarmac Construction Ltd and another** [1995] 3 ALL E.R. 574. Reference was also made to Halsbury's Law of England, 4th ed at para. 59/10/33, where learned editors stated that:

> "It is the settled practice to require security for costs to be given by an appellant who would be unable through impecuniosity to pay the costs of the appeal, if successful, without proof of any other special circumstance…The Court

> has a discretion. The question is whether awarding security would amount to a denial of justice to the appellant (see **Farrer v Lacy Hartland & Co**). **In assessing that issue the Court takes into account the merits of the appeal**." (Emphasis added)

[32] In the instant case, it appears on the affidavit evidence that the Administrator General is likely to be deterred from pursuing the appeal if the order is made. In considering whether the granting of the order would result in the denial of justice to Administrator General, a relevant factor is the appeal's prospect of success. This is, however, subject to the caveat in **Cablemax Limited**, that an in-depth assessment of the merits of the appeal is unnecessary unless it can be clearly demonstrated that the appeal has either a high probability of success or failure.

Whether the appeal is likely to succeed

[33] Based on the grounds of appeal, the overarching issue is whether the learned judge erred in upholding the no case submission. This requires an examination of the following two issues:

> (1) Whether the learned judge erred when she found that the doctrine of *res ipsa loquitur* was inapplicable in the circumstances of this case.
>
> (2) Whether the learned judge erred when she relied on the 'evidence' of Leon Stephenson.

(1) *Res ipsa loquitur*

[34] The respondent relied on the doctrine of *res ipsa loquitur* in order to establish that the accident that led to the death of the deceased was caused by the negligence of the applicants. The learned judge held that the doctrine was inapplicable. The basis of her decision was that the applicants, through their witness Leon Stephenson, had provided sufficient details to negate any allegation of negligence in the claim. In determining

whether the learned judge may have erred in her assessment, this court relies on the dicta of Megaw LJ, in **Lloyde v West Midlands Gas Board** [1971] 2 All ER 1246:

> "I doubt whether it is right to describe res ipsa loquitur as a 'doctrine'. I think it is no more than an exotic, though convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It means that **a plaintiff prima facie establishes negligence where: (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident**; **but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety**. I have used the words 'evidence as it stands at the relevant time'. I think this can most conveniently be taken as being at the close of the plaintiff's case. On the assumption that a submission of no case is then made, would the evidence, as it then stands, enable the plaintiff to succeed because, although the precise cause of the accident cannot be established the proper inference on a balance of probability is that that cause, whatever it may have been, involved a failure by the defendant to take due care for the plaintiff's safety. If so, res ipsa loquitur. If not, the plaintiff fails. Of course, if the defendant does not make a submission of no case, the question still falls to be tested by the same criterion, but evidence for the defendant, given thereafter, may rebut the inference. The res, which previously spoke for itself, may be silenced, or its voice may, on the whole of the evidence, become too weak or muted." (Emphasis supplied)

[35] The practical effects of the application of this doctrine were explored by the Privy Council in **Ng Chun Pui and Ng Wang King Administrators of the Estate of Ng Wai Yee and Attornies of Choi Yuen Fun and Ng Wan Hoi and Others v Lee Chun Tat (also spelt as Lee Tsuen Tat) and Another** Privy Council Appeal No 01 of 1988 ('**Ng Chun Pui**'), where the court emphasized that the duty to prove negligence is a

burden which rests on the claimant throughout the case. It is, therefore, misleading to "talk of the burden of proof shifting to the defendant in a res ispa loquitur situation".

[36] At page 3, the court further explained that the claimant's burden may be discharged where he can show that he,

> "has suffered injuries as a result of an accident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on the balance of probabilities, the defendant must have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred."

[37] In circumstances where the defendant adduces evidence, that evidence must be evaluated to see if it is still reasonable to draw an inference of negligence from the mere fact that the accident occurred. Notwithstanding, the court underscored the principle that the burden of proof rests on the claimant throughout the case and as such, there is no legal obligation on a defendant to disprove negligence.

[38] In **Ng Chun Pui**, a coach skidded and collided into a public bus in which the deceased was travelling as a passenger. The defendant gave evidence that the driver of the coach, in seeking to avert an accident that would have been caused by a third party, braked and swerved to its right. The judge found in favour of the plaintiff. The Board agreed with the approach adopted by the appellate court which found that the defendant's actions were consistent with seeking to avert a situation of extreme danger. The Board also agreed that it was not for the defendant to disprove negligence and that once he had given evidence of how the accident occurred, his actions had to be judged in light of the emergency situation in which he had been placed.

[39] In the present case, the Administrator General has sought to rely on **Baker v Market Harborough Industrial Co-Operative Society Ld; Wallace v Richards (Leicester) Ld** [1953] 1 WLR 1472 ('**Baker**'), in its submission that where a collision occurs and there is no evidence pointing to who is at fault, both drivers are to be held

liable. I do not agree that any such pronouncement was made in that case. The court clearly started from the premise that there was proof that the accident occurred in the centre of the road. Lord Denning stated at page 1476:

> "On proof of the collision in the centre of the road, the natural inference would be that one or other or both were to blame. If there was no other evidence given in the case, because both drivers were killed, would the court, simply because it could not say whether it was only one vehicle that was to blame or both of them, refuse to give the passenger any compensation? The practice of the courts is to the contrary. Every day, proof of the collision is held to be sufficient to call on the two defendants for an answer. Never do they both escape liability. One or other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them. So, also, if they are both dead and cannot give evidence, the result must be the same. In the absence of any evidence enabling the court to draw a distinction between them, they must be held both to blame, and equally to blame."

[40] It was, therefore, not the mere fact of the collision, which lead the court to determine that liability could be apportioned equally. Lord Denning stated further at page 1477:

> "I would like to say that the evidence to my mind makes it much more likely that both were to blame than that one only was to blame. It shows that each driver kept his course, with his off-side wheels on or over the centre line of the road. There was room for each of them to pull in to his near-side of the road, but neither did so. There was not the slightest trace of any avoiding action taken by either — no brake marks; no swerve; no hooter; nothing. Assume that one of the vehicles was over the centre line a few inches, and thus to blame, why did not the other one pull in more to its near side? The absence of any avoiding action makes that vehicle also to blame. And once both are to blame, and there are no means of distinguishing between them, then the blame should be cast equally on each."

[41] In **Ng Chun Pui**, the plaintiff called no oral evidence and relied on the doctrine of *res ipsa loquitor*. There was, however, agreed documentary evidence, including a police sketch plan, which showed the position of the vehicles after the accident. The defendant's vehicle was shown in the sketch plan to have been on the wrong side of the road. Lord Griffiths, who delivered the decision of the Board, stated at page 2 of the judgment:

> "In ordinary circumstances if a well maintained coach is being properly driven it will not cross the central reservation of a dual carriageway and collide with on-coming traffic in the other carriageway. In the absence of any explanation of the behaviour of the coach the proper inference to draw is that it was not being driven with the standard of care required by the law and that the driver was therefore negligent. If the defendants had called no evidence the plaintiffs would undoubtedly have been entitled to judgment."

[42] The circumstances in **Baker** and **Ng Chun Pui** are clearly distinguishable from those in the case at bar where there is no evidence pertaining to the position of the vehicles from which it could be inferred that either one driver or both were negligent. The Administrator General, in the present case, relied on the evidence of three witnesses who are not witnesses as to fact and, as such, could not speak to the circumstances in which the collision occurred. They are the children of the deceased and only spoke to the impact their father's death had on them.

[43] In the circumstances, the appeal in relation to this issue has no prospect of success.

(2) *Whether the learned judge erred when she relied on the 'evidence' of Leon Stephenson*

[44] It is agreed between the parties that Mr Stephenson did not give evidence at the trial. Whilst it could be said that the learned judge erred, that error is unlikely to affect the outcome of the appeal as the Administrator General failed to present any evidence pertaining to liability.

[45] The appeal in relation to this issue has no prospect of success.

Whether an order for security for costs would have the effect of stifling a genuine claim or be of oppressive effect

[46] In dealing with this issue, I am guided by the decision of **Cybervale Limited v Cable & Wireless Jamaica Limited** [2013] JMCC Comm. 13 where, at para. [15], the court stated:

> "[15] **No claim that is genuine should be chased away from the judgment seat, consequently where the making of an order for security for costs will force a claimant to abandon his reasonable claim the Court may be minded to refuse making the order**. In any event, it is a very important factor to be weighed in the balance. In ***E.Phil and Sons A/s v West Indies Contractor Limited and Maritime and Transport Services Limited*** [2012] JMSC Civ No. 83 and ***C&H Property Development Company Limited v Capital and Credit Merchant Bank Limited*** **[2012] JMCC Comm. No. 6** I held that **there must be evidence from which a conclusion can be drawn or inferred that the claim will be stifled if an order for security for costs is made**. Whilst in ***Keary*** it was pointed out (at page 540 g) that there may be cases where this may properly be inferred without any direct evidence, there must be an evidential basis upon which such an inference can be raised." (Emphasis supplied)

[47] The Administrator General has asserted that there are no funds from which an order for security for costs could be satisfied. Ms Geraldine Bradford, in her affidavit opposing the application, described the estate of the deceased as "impecunious". She, however, stated that in the interests of justice, the application ought to be refused as the appeal, which she asserted is based on "strong, meritorious grounds", will be stifled. The interests of justice must, however, be considered in the context of the merits of the appeal. As expressed above, it is my view that the appeal does not have any real likelihood of success. Therefore, the grant of an order for security for costs would not have the effect of stifling a genuine claim.

Whether the interests of justice favour the grant or the refusal of the application

[48] Where, as in this case, the Administrator General's appeal is not likely to succeed, the interests of justice favour the grant of an order for security for costs. The deceased's estate, is from all indications, impecunious and, based on the further affidavit of Geraldine Bradford, it is not part of the Administrator General's remit to seek the assistance of the beneficiaries of the estate in order to satisfy an order for security for costs. Miss Minto, in her affidavit sworn to on 26 January 2023, has asserted that the costs associated with the appeal are likely to exceed $4,000,000.00. That is not a small sum by any measure. In the event that the appeal is unsuccessful, the applicants would, in accordance with the general rule, be entitled to their costs. It would, therefore, be unfair to them if the costs incurred in defending the appeal could not be recovered in a timely fashion or at all.

[49] In the circumstances, it is in the interests of justice to grant the application for security for costs.

Whether the applicants delayed in making the application

[50] There is no issue of delay in this matter.

Conclusion

[51] The evidence is that the deceased's estate is impecunious and the Administrator General has indicated that she would be unable to provide security for costs. In the circumstances of this case, where the appeal is unlikely to succeed, it is in the interests of justice that the application for security for costs be granted. The applicants should not be placed in the position of being unable to recover their costs if they are successful in their defence of the appeal.

Order

(1) The application for security for costs, filed herein on 26 January 2023, is granted.

(2) The appellant shall give security for the respondent's costs of defending the appeal in the amount of $1,500,000.00 within 90 days of the date hereof.

(3) The appellant shall pay the said sum of $1,500,000.00 into an interest-bearing account in the names of Archer Cummings & Company and Nunes Scholefield DeLeon & Company at a financial institution to be agreed on by the parties within 90 days of the date hereof.

(4) In the event that the appellant fails to provide the said sum as security for costs within the manner and the time ordered, the appeal is dismissed with costs.

(5) Costs of the application to be costs in the appeal.