JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL NO COA2019CV00126

APPLICATION NO COA2022APP00022

BETWEEN JULIE RIETTIE ATHERTON APPLICANT

AND GREGORY MAYNE RESPONDENT

Conrad E George and Andre K Sheckleford instructed by Nigel Jones & Company for the applicant

Ms Peta-Gaye Manderson instructed by John G Graham & Co for the respondent

15 February and 4 March 2022

STRAW JA

[1] On 4 February 2022, this court gave its decision in this matter (neutral citation [2022] JMCA Civ 6). However, on that same day, the appellant, now applicant ('Mrs Atherthon'), filed an application seeking various orders (set out below), including an order that the court revisits its decision as it related to the factual significance of Mrs Atherton's passport and alter its decision. The precise orders sought were:

> "1. The Honourable Court not perfect any Order submitted by the Respondent in relation to Civil Appeal No. 2019 CV 00126 until this application has been considered by the court;
>
> 2. The Honourable Court revisit its decision contained in the judgment of Atherton v Mayne delivered on February 4,

> 2022 and reported at 2021 JMCA Civ 6 as it relates to the factually [sic] significance of the passport.
>
> 3. The Honourable Court alter its decision to find that the Appellant was not served with the Claim Form and Particulars of Claim in this claim.
>
> 4. The costs of this Application, the appeal and the costs below be awarded to the Appellant [.]
>
> 5. Such further and other relief as this honourable Court deems fit [.]

[2] This application was supported by the affidavit of Ms Kashina Moore (filed 4 February 2022). A further affidavit sworn to by Mrs Atherton was filed on 14 February 2022, which attached a copy of an e-ticket with the departure date of 10 April 2011 from Montreal to Fort Lauderdale, United States of America.

[3] On 15 February 2022, Mr George, who filed written submissions, also made oral submissions in relation to the court revisiting its decision. The complaint was that this court examined Mrs Atherton's passport in a manner which had not been done previously by anyone, including the learned judge below. Consequently, the conclusions arrived at were without the benefit of input by any of the parties. He relied on **Re L and B (children) (care proceedings: power to revise judgment)** [2013] 2 All ER 294 in support of the discretion to revisit matters.

[4] Ms Manderson, counsel for the respondent ('Mr Mayne'), was permitted to respond by way of written submissions. These submissions were filed on 17 February 2022, opposing the application. It was pointed out that the e-ticket was not adduced in evidence in the court below and would have been within Mrs Atherton's knowledge and control. The application was characterised as an application to adduce fresh evidence, and this was not sought before the appeal or even in the present application. In any event, such an application would have been inappropriate for the court to entertain. Ms Manderson also distinguished **Re L and B** from the circumstances of this case. She

pointed out that the above authority dealt with fact-finding hearings and not an appeal.

[5] The court is of the view that this application must be refused. In examining the authority relied on by Mr George, a judgment of the United Kingdom Supreme Court, **Re L and B**, I note that Lady Hale referred to **Re Blenheim Leisure (Restaurants Ltd (No 3)** (1999) Times, 9 November, where Neuberger J gave some examples of cases where it might be just to revisit an earlier decision. These included (1) a plain mistake by the court, (2) the parties' failure to draw to the court's attention a plainly relevant fact or point of law and (3) the discovery of new facts after judgment was given. It was also observed that every case depended on its own particular circumstances (see paragraphs 24 and 27).

[6] With due respect to the industry of Mr George, this application discloses no basis for the exercise of such discretion, particularly within an appeal process. As Ms Manderson has indicated, this court is not engaged in any fact-finding mission, and there have been no factual errors relied upon by this court in concluding as it did.

[7] This court was asked to review the decision of the learned judge to determine whether she was correct in refusing to set aside a default judgement as of right or whether she failed to exercise her discretion correctly in determining that the applicant had no real prospect of successfully defending the claim. Mrs Atherton relied on her passport as documentary proof to support her claim in the court below that she was not present in Jamaica on 23 March 2011. She complained, on appeal, that the learned judge erred in stating that she did not consider the passport to be cogent evidence and failed to state a basis for that conclusion.

[8] The court refers the applicant to paragraphs [50] and [51] of the judgment, which demonstrates quite clearly how this ground of appeal (complaining of how the learned judge treated with the evidence of the passport) was dealt with. These paragraphs are set out for the sake of expediency:

> "[50] The relevant dates indicate that the appellant travelled on 9 March 2011, when she was admitted to the USA, then on 10 April 2011, when she was again admitted to the USA. The next date of landing in Jamaica is 17 April 2011. There is no landing date in Jamaica for March seen in the pages exhibited. The appellant furnished this as support for her contention (at paragraph 5 of her affidavit filed 13 February 2018) that she 'landed in Miami on March 9, 2011, and did not return to Jamaica until April 17, 2011'.
>
> [51] However, the date of 10 April 2011 (which speaks to her admittance to the USA) creates some uncertainty. While it does not directly contradict the appellant, so as to provide cogent proof that she was in the island on the date of service (23 March 2011), it certainly does not provide any conclusive proof that she was in the USA for an unbroken period between 9 March 2011 and 17 April 2011. She clearly left the USA sometime before 10 April 2011, when she was again readmitted on that date. The possibility exists that the appellant left the USA and went to another jurisdiction (besides Jamaica), but she has not said so. Thus, the passport does not assist in the determination of this issue."

[9] Mrs Atherton is now requesting that this court revisit the appeal in order to allow her the opportunity to fill gaps in her evidence (that was not presented to the learned judge below or to this court) and has exhibited an e-ticket with an itinerary ostensibly showing that she travelled from Canada to the USA on 10 April 2011.

[10] I consider this application to be misguided. Nothing more needs to be said on this point. Accordingly, the court is firmly of the view that the application should be refused with costs.

SIMMONS JA

[11] I have read in draft the judgment of my sister Straw JA. I agree with her reasoning and conclusion, and there is nothing I can usefully add.

V HARRIS JA

[12] I, too, have read the draft judgment of my sister Straw JA. I fully agree with her reasoning and decision. There is nothing useful that I could add.

STRAW JA

ORDER

1) The application filed 4 February 2022 is refused.

2) Costs to the respondent to be agreed or taxed.