[2025] JMCA Civ 33

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE DUNBAR GREEN JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CIVIL APPEAL NO COA2022CV00023

BETWEEN BRANCH DEVELOPMENT LIMITED (T/A IBEROSTAR ROSE HALL BEACH AND SPA RESORT) APPELLANT

AND KIERON THOMAS RESPONDENT

Joerio Scott instructed by Samuda & Johnson for the appellant

Mrs Symone Mayhew KC instructed by K Churchill Neita & Co for the respondent

31 October 2023 and 21 November 2025

Civil procedure – Witness statement filed day before trial commenced – Appellant's application for relief from sanction and permission to rely on witness statement heard and refused on morning of trial – Preliminary point taken in appeal – Whether trial judge's order of refusal interlocutory in nature – Whether leave required to appeal from judge's order of refusal – Whether trial judge failed to consider relevant factors in refusing application for relief from sanction

Civil procedure – Personal injury – Occupier's liability – Whether trial judge erred in finding that the appellant owed a statutory duty of care to the respondent – Whether respondent failed to satisfy the evidentiary burden of proof – Whether trial judge failed to assess evidence adduced on behalf of the appellant – Occupier's Liability Act, s 3

Civil procedure – Assessment of damages – Special Damages agreed – Whether proof of Special Damages necessary – Loss of future earning capacity and handicap on the labour market – Whether award unreasonable and against weight of evidence – General Damages – Whether excessive

EDWARDS JA

[1] I have read the judgment of my sister, Dunbar Green JA and agree with her reasoning and conclusion. I have nothing further to add.

DUNBAR GREEN JA

Introduction

[2] The respondent, Mr Kieron Thomas ('Mr Thomas'), who was the claimant in the court below, worked as an entertainment coordinator at the appellant's hotel, Iberostar Rose Hall Beach and Spa Resort ('the hotel'). He alleged that while performing a dance routine as part of his professional duties at the hotel, he sustained an injury to his right foot. Legal proceedings were instituted against the hotel, premised on allegations of negligence and/or breach of statutory duty.

[3] The case was heard by Carr J ('the learned judge') on 21 October 2021 and 28 January 2022. Prior to the commencement of the substantive hearing, both parties advanced preliminary applications. The hotel sought relief from sanction in respect of the late filing of a witness statement for an intended witness, and additionally, leave to rely on an amended defence.

[4] The learned judge allowed the hotel's amended defence, filed on 20 October 2021, to stand as filed, but declined to grant relief from sanction regarding the late witness statement filed on even date.

[5] Mr Thomas' application, the particulars of which need not be recounted here, was granted, as recorded in the learned judge's notes of evidence ('the notes').

[6] Following the trial and her assessment of the evidence and submissions, the learned judge concluded that the hotel had breached its statutory duty of care to Mr Thomas and entered judgment in his favour, awarding damages accordingly.

[7] Aggrieved by the decision, the hotel filed this appeal on 18 February 2022. It asserts, among other grounds, that the learned judge erred by refusing permission for

the appellant to rely on the intended witness statement and holding the hotel liable for Mr Thomas' injury and awarding damages against it.

Background

Claim in the Supreme Court

[8] This is a summary of Mr Thomas' claim. He was a member of the entertainment group known as "Star Friend," which was managed by Mr Rafael Murguia, an employee of the hotel. However, Mr Thomas contended that he was employed not by the hotel, but by Employ Limited, a company incorporated under the laws of Jamaica and based in Montego Bay. He was, however, assigned to the hotel as entertainment coordinator. His responsibilities involved orchestrating and performing various entertainment activities for the hotel's guests.

[9] Among the entertainment group's regular engagements was the "Beach Party," an outdoor event typically held on Saturday mornings. If inclement weather precluded this event, it was substituted with an indoor performance known as "Mr. Tropical," staged in the hotel's theatre.

[10] On Saturday, 18 January 2014, heavy rains forced the cancellation of the beach party. The entertainment group began preparing for "Mr. Tropical," but was subsequently directed by Mr Murguia to, instead, perform a show entitled "Mr Tuiti Fruiti".

[11] The "Mr Tuiti Fruiti" performance involved complex choreography, including acrobatic manoeuvres, splits, and flips. It required specialised footwear known as "Jazz Shoes," various props, and a stage that was thoroughly cleaned in advance. It was also customary for the group to rehearse prior to the performance.

[12] Concerned about the suitability of the conditions, the entertainment group, including Mr Thomas, objected to staging the show. Nevertheless, Mr Murguia insisted that it proceed and allegedly threatened dismissal for non-compliance.

[13] During the performance of "Mr Tuiti Fruiti", Mr Thomas executed a move known as the "Robot Jump," at which point he slipped and sustained an injury to his right knee. He asserted that the slip was caused by residual kerosene oil on the stage from a prior "Fire Man" performance. He claimed to have suffered loss and incurred expenses because of the injury.

The defence

[14] In its amended defence, the hotel denied liability. It maintained that the theatre premises were safe and suitable for Mr Thomas' use and specifically rejected the claim that kerosene oil on the stage caused the incident. The hotel also denied that the "Fire Man" performance had been conducted indoors and stated that such shows were never held in the theatre due to fire safety concerns.

[15] Alternatively, the hotel contended that Mr Thomas contributed to his injury by failing to maintain a proper balance during his performance. Additionally, it argued that, even if the stage had been slippery, Mr Thomas voluntarily assumed the risk by performing despite being aware of the condition.

[16] It was not disputed that Mr Thomas performed as part of the "Star Friend" group, which was managed by Mr Murguia, a "past" hotel employee. However, the precise terms of Mr Thomas' employment, whether with the hotel or a third party, remained unclear.

Case management and procedural chronology

[17] The parties are agreed that a case management conference ('CMC') was held on 3 October 2018, at which standard case management orders were made. Although the orders do not form part of the record of appeal ('the record'), it is accepted that they included a direction for the filing and exchange of witness statements by 21 September 2020. The hotel did not file its witness statement within that timeframe; instead, it filed the witness statement of Dr Anthony Garfield Ferguson, its human resource officer, on 9 June 2021.

[18] A pre-trial review ('PTR') was conducted on 14 June 2021. At that hearing, relief from sanction was granted to the parties generally, and all case management documents filed out of time were permitted to stand. Additional orders were made concerning the filing of submissions and the core bundle; the appointment and reporting obligations of expert witnesses; and the exchange of written questions and answers related to those reports. The latest date fixed for compliance with the orders (the filing and service of submissions and trial bundles) was 15 October 2021.

[19] On 24 September 2021, Mr Thomas applied for an extension of time to comply with the PTR orders, specifically to file his experts' responses to written questions and to allow his supplemental witness statement, filed on 22 September 2021, to stand as filed. The application was supported by affidavit evidence from his attorney-at-law, setting out the reasons for the delay.

[20] On 20 October 2021, the eve of trial, the hotel filed its application seeking relief from sanction for the late filing of a witness statement for an intended witness, Alix Rose, and permission for its amended defence (also filed that day) to stand. The affidavit in support, sworn by the hotel's attorney-at-law in the case, cited disruptions arising from the COVID-19 pandemic as having materially affected the conduct of the matter, including the availability of staff and witnesses. It was disclosed that a recently re-hired employee had come forward as a potential witness to the incident, and her interview revealed discrepancies in the pleaded defence that necessitated an amendment.

[21] Both applications were heard by the learned judge on the first day of trial. With the respondent's consent, the hotel's amended defence was allowed to stand. However, the application for relief from sanction was refused. The learned judge found that the hotel's application had not been made promptly and that no satisfactory explanation had been offered for the delay. She also considered that Mr Thomas might suffer prejudice, if she permitted reliance on the intended witness statement, especially since it altered the original defence. Additionally, the learned judge noted that the hotel was previously limited to a single witness and had already filed the witness statement of Dr Ferguson.

[22] Mr Thomas succeeded in his application and was granted an extension of time to file both his supplemental witness statement and his experts' responses to opposing counsel's written questions.

[23] Following these rulings/orders, the trial commenced. Upon its conclusion, the learned judge held the hotel liable to Mr Thomas in damages for breach of its statutory duty of care to provide a safe working environment for the entertainment group, including Mr Thomas.

[24] Notably, neither of the parties' pre-trial applications was addressed in the written judgment (or orders) delivered by the learned judge.

Grounds of appeal

[25] The appellant challenges the judgment of the learned judge on the following grounds:

> "(1) The Learned Trial Judge fell into error when she refused to admit the Witness Statement of Alix Rose into evidence and thereby placed no weight or insufficient weight on the overriding objectives of the court to deal with cases justly and to permit the Defendant/Appellant to present its best case at trial.
>
> (2) The Learned Trial Judge failed to exercise or to exercise properly her discretion in view of the fact that the content of the aforesaid statement was consistent with the Defendant/Appellant's case and introduced no new fact or cause of action.
>
> (3) The Learned Trial Judge failed to exercise or to exercise her discretion properly when an order for costs in the circumstances would have been sufficient and compensatory.
>
> (4) The Learned Trial Judge failed to exercise or exercise properly her discretion when there was no evidence whatever before her that could have made her conclude that the Claimant/Respondent would suffer prejudice in the event the Witness Statement was admitted.

(5) The Learned Trial Judge failed to give any or any due regard to the burden of proof which the Claimant/Respondent has, as a matter of Law, to discharge on the facts in prosecuting the claim.

(6) The Learned Trial Judge failed to give any or any due regard to the inconsistencies and improbabilities in the Claimant/ Respondent's case particularly as to where the accident occurred, which would have lead [sic] inevitably to a rejection of same as highly improbable and not credible respecting the issue of liability as well as that of damages.

(7) The Learned Trial Judge failed to give weight or due regard to the fact that the 'Fire Dancer's Show' could not have taken took place [sic] on a wooden floor and in circumstances that would necessarily render the Claimant/Respondent's case respectfully untenable.

(8) The Learned Trial Judge failed to assess or properly assess the evidence adduced on behalf of the Defendant/Appellant which was consistent, probable and in keeping with the general evidence.

(9) The Learned Trial Judge failed to give any or any due consideration to the fact that special damages must be specifically proved and that the evidence of the Claimant/Respondent did not satisfy the required standard of proof.

(10) The Learned Trial Judge failed to provide any or any proper basis for making an award for loss of future earning capacity/handicap on the labour market and in any event the evidence did not satisfy the required standard of proof.

(11) The quantum of the award for pain and suffering and loss of amenities is inordinate, not supported by the evidence and at variance with Case Law."

Preliminary point: jurisdiction of this court to consider grounds 1- 4

Submissions for the respondent

[26] King's Counsel, Mrs Symone Mayhew, appearing for the respondent, initially raised a procedural objection to grounds 1-4 of the appeal. She submitted that the hotel required leave to appeal the learned judge's refusal to grant relief from sanction, as the ruling was

made prior to trial, was not addressed in the written judgment or resulting orders and was an interlocutory order. As no leave to appeal was sought or granted, she contended that grounds 1–4, which relate directly to that refusal, are not properly before this court.

[27] In support of her position, King's Counsel distinguished the circumstances from those in **Doyen Arthur Williams v First Global Bank Limited** [2017] JMCC Comm 39, where the trial judge had expressly addressed the relief-from-sanction application in the written reasons for judgment, after the trial, thereby integrating it into the judgment. That, she argued, was not the case here. Further, the mere designation of the order as a "ruling" by the learned judge, King's Counsel argued, made no material difference to the procedural requirements. A separate appeal, with leave, would have been necessary, King's Counsel urged.

Submissions for the appellant

[28] Counsel for the hotel, Mr Joerio Scott, submitted that the absence of the learned judge's ruling from her written judgment and orders was a matter of style. She having mentioned it in the notes, counsel argued, was "conclusive on the fact that it was a ruling within the trial". Consequently, permission to appeal that ruling was not required.

Discussion and decision on the preliminary point

[29] It is necessary to address the preliminary point raised on behalf of Mr Thomas, namely, whether this court has jurisdiction to entertain grounds 1–4 of the appeal. This turns on the character of the learned judge's ruling on the application for relief from sanction, specifically, whether it was an interlocutory order falling within section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act ('the Act'). I agree with Mrs Mayhew that although the learned judge referred to her decision as a "ruling", it clearly amounted to the court's order of refusal on the application.

[30] Section 11(1)(f) of the Act stipulates that no appeal may be brought from an interlocutory judgment or interlocutory order except with the leave of the judge or the Court of Appeal. While certain exceptions exist, none apply in the instant matter.

[31] As articulated by Lord Esher MR in **Salaman v Warner and Others** [1891] 1 QB 734, a useful guide to determining whether an order is interlocutory or final lies in the consequence of the ruling. If the ruling, regardless of which party it favours, disposes of the matter in dispute entirely, it will be regarded as final. However, if a ruling in one direction ends the dispute while a ruling in the opposite direction allows the proceedings to continue, the order is considered interlocutory. This functional approach has been consistently applied by this court in subsequent cases, including **John Ledgister and Others v Bank of Nova Scotia Jamaica Limited** [2014] JMCA App 1, which applies the application test, at paras. [19] – [20].

[32] As a general principle, an order granting relief from sanction does not result in a final disposition of a matter and is, therefore, interlocutory in nature. Conversely, the application for relief from sanction having been refused, in the instant case, that would not have finally disposed of the matter as the trial could and did proceed, not only on the issue of damages, but also on liability. Any challenge to the learned judge's order of refusal must, therefore, have been made with leave. This position was affirmed in **Garbage Disposal & Sanitations Systems Ltd v Noel Green and Others** [2017] JMCA App 2, among several other cases from this court.

[33] Nothing in the notes justifies a departure from that settled approach. The learned judge dealt with the hotel's application for relief from sanction at the commencement of trial and ruled against it. Her ruling on the application did not bring the action to an end. The hotel had the opportunity to apply then for leave to appeal but chose not to do so. As expected, in the circumstances, the learned judge proceeded with the hearing of evidence in the trial. Also, as argued by learned King's Counsel, her ruling, which included the order of refusal, was not integrated into her final judgment and orders. Accordingly, it constituted an interlocutory order for which leave to appeal was required.

[34] In the circumstances, this court has no jurisdiction to entertain grounds 1–4 of the appeal. Nonetheless, for completeness, I will briefly outline why those grounds would not have succeeded even if jurisdiction had been established.

Grounds of appeal 1 - 4

[35] The issue in these grounds is whether the learned judge fell into error when she refused permission for the appellant to rely on the witness statement of Alix Rose at trial, having regard to the overriding objective and the absence of demonstrated prejudice to the respondent, among other reasons.

Submissions for the appellant

[36] Mr Scott submitted that the application for relief from sanction was made promptly and in compliance with rule 26.8 of the Civil Procedure Rules ('CPR'). He relied on **Methuen Morgan v Sherece Gordon and Another** [2022] JMSC Civ 79, contending that the unchallenged affidavit evidence demonstrated that new circumstances regarding the availability of a witness had emerged late in the proceedings. This, he argued, constituted a compelling explanation for the delay and was comparable to the factual matrix in **Doyen Arthur Williams v First Global Bank Limited**, where permission was granted for a new witness statement, filed on the day of trial, because the witness had previously been unavailable.

[37] Mr Scott also cited **Rupert Brown v DR Foote Construction Company** [2022] JMSC Civ 158, where the court of first instance acknowledged the widespread disruptions caused by the COVID-19 pandemic to both commercial and judicial operations. In that case, the claimant's late witness statement was allowed, and similar deference, he submitted, should have been extended in the instant matter.

[38] Turning to the relevance of the intended witness statement, Mr Scott asserted that the evidence of Alix Rose was material, consistent with the hotel's pleaded defence, and introduced no new facts or causes of action. He maintained that Mr Thomas provided no evidential basis to substantiate claims of prejudice arising from the timing of the filing. Considering these, the refusal to permit the appellant to rely on the witness statement failed to uphold the overriding objective. He relied on **Caricom Investments Limited and Others v National Commercial Bank Jamaica Limited and Others** [2020]

JMCA Civ 15, arguing that applications to admit evidence and to amend pleadings are governed by similar considerations rooted in the principle of procedural fairness.

[39] Mr Scott further cited **CW Nyholt and Another v Bish Limited** [1971] 17 FLR 18, and **Civil Aviation Authority of Fiji v Summat Deo** [2004] FJHC 187, to support the principle that parties in civil litigation must be afforded the opportunity to present relevant evidence in defence of their case.

[40] Additionally, Mr Scott argued against, what he described, as the unreasonable opposition by the respondent to the hotel's application, which he said contravened the spirit of cooperation expected under the CPR. He relied on **Denton and Others v TH White Ltd and Another** [2014] EWCA Civ 906, underscoring the need for proportionality in responses to procedural breaches. He also referred to **Charlesworth v Relay Roads Ltd (in liquidation) and Others** [1999] 4 All ER 397, to support the proposition that late amendments may be allowed where any prejudice can be remedied by an award of costs.

[41] Based on these submissions, Mr Scott contended that the learned judge's refusal to "admit" the witness statement constituted a material error. He invited the court to allow the appeal on these grounds and to order a retrial.

Submissions for the respondent

[42] Alternative to her preliminary objection, Mrs Mayhew submitted that even if the ruling by the learned judge, on the application for relief from sanction, could properly be reviewed within the context of this appeal, her refusal was well-founded. King's Counsel argued that the learned judge had correctly applied the legal principles governing such applications, beginning with the first requirement under rule 26.8(1) of the CPR—namely, that the application must be made promptly.

[43] Referring to **HB Ramsay and Associates Ltd and Others v Jamaica Redevelopment Foundation Inc and Another** [2013] JMCA Civ 1, King's Counsel emphasised that the court must first assess promptness before considering the

discretionary factors outlined in rule 26.8(2). She noted that the hotel's application was filed on 20 October 2021, the day before the trial, despite the deadline for filing witness statements having passed more than a year earlier. Further, she pointed out that the learned judge found that the hotel must have been long aware of the information relevant to the intended witness and had made no earlier attempt to locate or rely on that individual's evidence. In the absence of a satisfactory explanation for the delay, the application was deficient both procedurally and substantively.

[44] King's Counsel also invoked rule 29.11 of the CPR, submitting that in the absence of an order for relief from sanction, the hotel could only call the witness if a compelling reason was shown. In her view, no such reason had been advanced.

[45] As an ancillary point, King's Counsel argued that the conduct relevant to the delay was that of the hotel itself and not of its counsel and, therefore, the hotel's conduct in trying to secure relevant evidence was not before the learned judge, only the hearsay evidence of counsel.

[46] Finally, King's Counsel submitted that the issue of costs could only be considered if the hotel had first satisfied the procedural requirements under rule 29.11(2), which it had failed to do.

Discussion and disposal of grounds 1-4

Did the learned judge apply the law correctly?

[47] This court will not interfere with a judge's refusal to grant relief from sanction unless it is satisfied that her discretion was exercised on a wrong principle of law or was otherwise improperly exercised: **Attorney General v McKay** [2012] JMCA App 1.

[48] Rule 29.11 of the CPR states that where a witness statement is not served within the time specified by the court, the witness may not be called unless the court permits. Crucially, the rule further provides that permission to call a witness at trial will not be

granted unless the party seeking that permission offers a good reason for not previously applying for relief under rule 26.8 of the CPR.

[49] Rule 26.8(1) sets out the first set of requirements for obtaining relief from sanction. As relevant, an application must be:

> (a) made promptly; and
>
> (b) supported by evidence on affidavit.

[50] Under rule 26.8(2), relief may be granted only if the court is satisfied that:

> (a) the failure to comply was not intentional;
>
> (b) there is a good explanation for the failure; and
>
> (c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.

[51] Rule 26.8(3) outlines additional factors that the court must have regard to "in considering whether to grant relief".

[52] In the instant case, the hotel's application for relief from sanction and the intended witness statement were both filed and served on 20 October 2021, the day before trial commenced. On the morning of trial, the application was still pending. The timing, therefore, necessarily triggered the operation of rule 29.11. As recognised in **Oneil Carter and Others v Trevor South and Others** [2020] JMCA Civ 54, at para. [34], this meant that the hotel was required to not only meet the requirements of rule 26.8 but also to offer a good reason for failing to seek relief earlier. Notably, the learned judge only considered the requirements under rule 26.8. However, as will be seen, that omission is not fatal.

[53] It is well established that if an application does not satisfy the requirement of promptitude under rule 26.8(1), there is no need for a court to proceed to the other elements under rule 26.8. The word "must" in rule 26.8(1)(a) has been interpreted as

requiring strict application. As D Fraser JA observed in **Norman Washington Burton v The Director of Public Prosecutions** [2023] JMCA Civ 30, at para. [54]: "[i]t is thus accepted and beyond doubt that under rule 26.8(1) the establishment of promptitude is a sine qua non, a condition precedent to the court being able to grant relief." See also **HB Ramsay & Associates Ltd and Others v Jamaica Redevelopment Foundation Inc and Another**, where, at para. [31], Brooks JA (as he then was) stated that "[a]n applicant who seeks relief from sanction, imposed by his failure to obey an order of the court, must comply with the provisions of CPR 26.8(1), in order to have the application considered". Several authorities from this court, including **Deputy Superintendent John Morris and Others v Desmond Blair and Another** [2023] JMCA 2023), have affirmed this position.

[54] At para. [31] of **HB Ramsay & Associates Ltd & Others v Jamaica Redevelopment Foundation Inc & Another**, Brooks JA also stated that "promptitude does… allow some degree of flexibility" in its application. Hence, why in considering whether a relief from sanction application is made promptly, the court should consider the explanation given based on the circumstances of the case under consideration. There is no question that the learned judge gave due to regard to that guidance.

[55] The hotel's filing of its intended witness statement the day before trial, long after the original September 2020 deadline, was a clear instance of dilatory conduct. So too was the filing of Dr Ferguson's witness statement on 9 June 2021. Moreover, the explanation for the delay of the intended witness statement focused on internal matters at the hotel; yet the affidavit relied upon was sworn by counsel representing the hotel in the litigation rather than by any member of the hotel's management. In **Crown Motors Limited and Others v First Trade International Bank & Trust Limited (In Liquidation)** [2016] JMCA Civ 6, at para. [79], this court stressed the impropriety of counsel giving evidence in cases where they appear. No justification was advanced for departing from that principle.

[56] The affidavit offered hearsay material relayed to counsel by a colleague who had attended a meeting with hotel staff. That evidence, apart from being second-hand, failed to address the core issue of why the intended witness statement had not been obtained between 3 October 2018 (the date of the relevant case management order) and the onset of the pandemic in late 2019. It seems there was adequate time during that period to identify any relevant witnesses (including the intended one) and secure their evidence. Further, there is nothing in the evidence to explain why, even after the pandemic began and before the eve of the trial, no effort was made to secure a relevant witness. The bare explanation, that the witness was "recently re-hired", falls short of a cogent justification.

[57] Considering the evidentiary deficiencies, the length of time that was given for compliance, and the timing of the application, the learned judge's finding that no good reason had been provided is amply supported by the record. The CPR and the overarching imperative of effective case management warrant a strict approach to late applications that are grounded in inadequate evidence. The decision in **Rupert Brown v DR Foote Construction Company Limited** does not mitigate that standard. In that case, although the application for relief was filed four months after the sanction was imposed, the court deemed it prompt, considering the case's peculiar circumstances. The affidavit evidence, filed by the applicant and his counsel, was also found to satisfactorily explain the delay. By contrast, the hotel's application in the instance appeal was filed seven years after the claim commenced, one year after the sanction took effect, and on the eve of trial. Crucially, the hotel failed to provide any affidavit evidence accounting for the delay. In these circumstances, **Rupert Brown v DR Foote Construction Company Limited** offers no support for the hotel's position.

[58] The question before the learned trial judge involved both legal and factual considerations. It has not been shown that she failed to properly engage with either.

Did the learned judge err in not considering the overriding objective?

[59] As indicated earlier, rule 26.8(1) establishes the first consideration for applications seeking relief from sanction. Specifically, the application must be made promptly and supported by affidavit evidence. It is only if this initial requirement is satisfied that the court proceeds to consider the discretionary factors in rules 26.8(2) and (3), including the interests of the administration of justice and, therefore, the overriding objective.

[60] In the instant case, the learned judge found that the hotel had failed to act promptly and had not sufficiently explained the delay. Those findings, which on the evidence she was entitled to make, would have been sufficient to dispose of the issue, as the requirement for promptitude was not a discretionary bar but one to be satisfied as a matter of law before relief from sanction could be granted. Consequently, they rendered the invocation of the overriding objective unnecessary.

[61] The authorities relied upon by the hotel in that context were, therefore, inapplicable.

Was the learned judge's exercise of discretion improper, given the purported consistency of the witness statement with the defence?

[62] Purported alignment of an intended witness statement with a party's defence does not constitute a relevant consideration under either rule 29.11(2) or rule 26.8 of the CPR. The governing framework focuses on procedural compliance and whether the application meets the prescribed criteria. As earlier stated, the learned judge found that the application was not made promptly, and no compelling reason was offered for the delay. Consistency with the defence, without more, does not remedy that deficiency.

Can the learned judge be faulted for refusing the application in the absence of evidence of prejudice to the respondent?

[63] The learned judge did address the question of prejudice, although there was no direct evidence of it before her. She observed that permitting reliance on the intended witness statement would alter the nature of the case faced by Mr Thomas. Specifically,

the purported shift in position from the assertion that the floor had been cleaned to a denial of any kerosene being present would have introduced a material change to the defence. It was her view that this late revision would require adjournment of the trial, a conclusion well within the scope of judicial discretion.

[64] While prejudice is a factor contemplated under rules 26.8(2) and (3), it is not one that needs to be considered if the promptness requirement under rule 26.8(1) is not satisfied (see **HB Ramsay & Associates Ltd and Others v Jamaica Redevelopment Foundation Inc and Another**, **Norman Washington Burton v The Director of Public Prosecutions** [2023] JMCA Civ 30 and the **Deputy Superintendent John Morris and Others v Desmond Blair and Another** [2023] JMCA 2023). Therefore, even if Mr Scott is correct that the learned judge erred in considering the question of prejudice in the absence of direct evidence, any such error could not vitiate the learned judge's order of refusal for relief from sanction, there being no need for her to have considered the issue of prejudice at all.

[65] In the premise, there is no need to consider whether an adverse costs order could have ameliorated any prejudice to the respondent.

Was there an unnecessary imbalance in how the applications were treated?

[66] One of the allegations advanced by the hotel is that the learned judge demonstrated an imbalance in her treatment of the parties' respective applications. Specifically, it was argued that Mr Thomas' application was granted without reasons, whereas the hotel's similar application was refused.

[67] Mr Thomas' application, filed on 24 September 2021, sought an extension of time to comply with PTR Order 5, which required his expert witnesses to provide written answers to questions posed by the hotel by 31 August 2021. Though his notice of application, filed on 13 October 2021, is not included in the record, the affidavit filed in support of a September 2021 application set out material facts to explain the delay. There was no contest, before us, regarding the relevance of that affidavit.

[68] The affidavit explained that counsel for Mr Thomas received the questions on 30 July 2021 and had forwarded them to the experts on 4 August 2021. One expert, Dr Dundas, was unavailable due to the temporary closure of his office, from 2 to 23 August 2021, but had undertaken to address the questions promptly thereafter. The other expert, Dr Miller, had left his post at the University Hospital and could not be located. The affiant further explained that a supplemental witness statement from Mr Thomas could address the questions raised, particularly clarifying inaccuracies in Dr Miller's report concerning injuries allegedly sustained by him, Mr Thomas, prior to the material incident.

[69] While the learned judge did not provide written reasons for granting Mr Thomas' application, the surrounding circumstances show that she was not faced with equivalent applications. The applications did not involve "apples and apples". Mr Thomas' application was supported by affidavit evidence outlining specific facts and good cause. The hotel's application, by contrast, relied on generalised assertions and hearsay from counsel and failed to meet the threshold requirements under rule 26.8 of the CPR.

[70] In the circumstances, the learned judge seemed to have had before her sufficient factual material to justify the exercise of discretion in favour of Mr Thomas. Conversely, the hotel's application seemed deficient in both substance and timeliness. The record, therefore, does not support the contention that her approach was procedurally imbalanced or unfair.

[71] It has not been demonstrated that the learned judge acted on wrong principles, misapplied the facts, or otherwise exercised her discretion improperly. Accordingly, there would have been no justifiable basis to interfere with her refusal to grant relief from sanction or permit the appellant to rely on the witness statement of Alix Rose at trial. Grounds 1–4 of the appeal would, therefore, fail.

Grounds of appeal 5-11

Issues arising for determination

[72] From grounds 5-11, the following six issues arise for determination:

(i) Did Mr Thomas discharge the evidentiary burden required to establish that the hotel breached its statutory duty of care under the Occupiers' Liability Act, thereby causing him harm and loss? (Grounds 5 and 7)

(ii) Did the learned judge fail to address material inconsistencies and improbabilities in Mr Thomas' account, which undermined the credibility of his case on both liability and quantum of damages? (Ground 6)

(iii) Was there a failure by the learned judge to properly assess the hotel's evidence, said to be consistent and credible within the wider evidentiary context? (Ground 8)

(iv) Was Mr Thomas required to satisfy the legal requirement - to specifically prove special damages to the requisite standard given that special damages were agreed? (Ground 9)

(v) Was the award for loss of future earning capacity and/or handicap on the labour market supported by a sufficient evidentiary basis and proper reasoning? (Ground 10)

(vi) Was the award for pain and suffering and loss of amenities excessive and inconsistent with the medical evidence and comparative authorities? (Ground 11)

[73] Issues (i) and (ii) will be considered together.

Issue (i): Did Mr Thomas discharge the evidentiary burden required to establish that the hotel breached its statutory duty of care under the Occupiers' Liability Act, thereby causing harm to him and loss? (Grounds 5 and 7)

Issue (ii): Did the learned judge fail to address material inconsistencies and improbabilities in Mr Thomas' account which undermined the credibility of his case on both liability and quantum of damages (Ground 6)

Submissions for the appellant

[74] Mr Scott submitted that the learned judge's finding of liability under the Occupiers' Liability Act was conceptually flawed. It was argued that although the learned judge found that the staging and presentation of the dance were not, in themselves, negligent acts attributable to the hotel, she nevertheless imposed liability. This, counsel contended, was incongruent with the judge's other finding that the hotel did not manage or control the production in question.

[75] It was further submitted that the learned judge's findings of fact were unsustainable in light of perceived inconsistencies in Mr Thomas' evidence. Emphasis was placed on Mr Thomas' oral testimony expressing surprise at the "Fire Man" show being staged indoors, which, counsel argued, lent support to the hotel's policy that "fire performances" were prohibited in the enclosed theatre. That reaction was said to contradict earlier statements and thereby undermined Mr Thomas' credibility.

[76] Counsel posited that Mr Thomas' evidence permitted only one of two conclusions: either he was being untruthful about the occurrence of the fire dance in the theatre, in which case the claim should fail; or Mr Murguia, the entertainment group's director, had unilaterally instructed the dancers to perform, contrary to established hotel practices. In the latter scenario, it was argued, liability could not fairly attach to the hotel since it could not reasonably have anticipated or prevented such an act.

[77] Expounding on the first scenario, counsel submitted that Mr Thomas' claim lacked plausibility due to three key factors: (i) the enclosed nature of the theatre, which was outfitted with curtains, a wooden floor, and a sprinkler system; (ii) Mr Thomas' own awareness that fire dancing was prohibited indoors because of the attendant hazards; and (iii) his acknowledgement that kerosene oil was present on the stage.

[78] On the scope of occupier's liability, it was submitted that the learned judge's finding regarding Mr Murguia's independence should have led to the conclusion that the theatre was not under the hotel's control for the purposes of that performance. Counsel argued that, based on the judge's finding that members of the entertainment group were not employees of the hotel, they could not be considered under its direction or control. The hotel, it was said, merely provided the venue and infrastructure. Accordingly, Mr Thomas had not satisfied the legal and evidentiary burden required under the Occupiers' Liability Act. Reference was made to **Bolton and Others v Stone** [1951] 1 All ER 1078*,* **McLoughlin v O'Brian and Others** [1983] 1 AC 410 and **Pamela Minor v Sandals Resort International Ltd (t/a Beaches Negril Resort and Spa) and Others** [2015] JMSC Civ 256, in support of submissions on foreseeability and control in relation to an occupier's liability.

[79] Alternatively, Mr Scott contended that the evidence established that Mr Thomas knew or ought to have known of the risks inherent in performing immediately after a fire dance in the theatre. It was argued that he voluntarily assumed that risk. Therefore, the learned judge ought to have found him contributorily negligent to the extent of 60%, based on the following: (a) his awareness that the theatre was enclosed and surrounded by curtains; (b) his knowledge that kerosene oil was used in the preceding act; and (c) his stated surprise at seeing a fire performance take place on that stage.

Submissions for the respondent

[80] Mrs Mayhew directed the court's attention to para. [4] of the written judgment, where the learned judge set out the elements necessary to establish liability under the Occupiers' Liability Act. King's Counsel noted that the applicable burden of proof was clearly identified at para. [6], and the reasons for finding that Mr Thomas had discharged that burden were outlined in detail between paras. [21] and [31].

[81] With respect to credibility and the nature of the incident, King's Counsel submitted that Mr Thomas' astonishment upon witnessing the fire dancer perform inside the theatre was probative. That reaction, she argued, pointed to a deviation from standard practice

and reflected Mr Thomas' awareness of the fire hazards associated with indoor performance. The hotel's contention that such shows were prohibited indoors did not, she argued, render Mr Thomas' account implausible. Instead, the explanation provided, namely, that the original outdoor event had to be relocated due to rainfall, offered a cogent basis for the change in performance and supported Mr Thomas' credibility and the reliability of his evidence.

[82] King's Counsel further submitted that the inconsistencies alleged by the hotel did not undermine Mr Thomas' claim, as the hotel presented no direct evidence to rebut his account. Its sole witness was not present in the theatre at the material time and was, therefore, unable to speak to the conditions or sequence of events leading to the incident. His evidence was confined to general hotel policies and standard operating procedures.

[83] In any event, it was argued that the learned judge was entitled to draw reasonable inferences from the evidence. The hotel's assertion, that the sprinkler system would have activated automatically, was speculative, King's Counsel argued, since there was no evidence on its functionality or on the severity of the fire elements used. The fact that the "Fireman" show was not typically held indoors did not preclude the possibility that it was, exceptionally, staged in the theatre on that occasion, King's Counsel reiterated. She submitted, finally, that the learned judge's conclusion that rain led to the relocation of the performance indoors was entirely reasonable in the context of the case.

Discussion and disposal of issues (i) and (ii) (grounds 5, 6 and 7)

[84] In these grounds, the appellant's primary challenge is to the learned judge's findings of mixed law and fact, as regards liability. The role of an appellate court in reviewing findings of fact made by a judge at first instance is well established. In **Watt v Thomas** [1947] AC 484, at pages 487–488, Lord Thankerton stated that where a trial judge has seen and heard the witnesses and there is no misdirection in law, an appellate court should not disturb findings of fact unless it is satisfied that the advantage enjoyed by the judge cannot reasonably justify the conclusion reached. He identified three guiding propositions for appellate review, namely that: (i) a judge's advantage in seeing and

hearing witnesses may justify their conclusion even if the appellate court might have reached a different one; (ii) in some instances, without seeing and hearing the witnesses, an appellate court may be unable to form a reliable view; and (iii) if the reasons for the judgment are unsatisfactory or the evaluation of evidence demonstrably flawed, the appellate court may intervene and substitute its own findings.

[85] This approach was reiterated in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, where Lord Hodge, at para. [12], emphasised that an appellate court must be satisfied that the trial judge was "plainly wrong". This phrase, he explained, does not require the appellate court to be convinced it would have reached a different conclusion. Rather, it must determine whether it was permissible for the judge to make the findings based on the evidence wholly, having regard to the court's limited access to the live testimony. Mistakes in the trial judge's evaluation must be sufficiently material to undermine the conclusion. At para. 17, Lord Hodge underscored the caution required when reviewing findings grounded in credibility and reliability, noting that such assessments fall peculiarly within the province of the trial judge. The decision in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** was adopted by this court in several cases, including **Gasoline Retailers of Jamaica Limited v Jamaica Gasoline Retailers Association** [2015] JMCA Civ 23, and, most recently, **Donald Gittens v The General Legal Council** [2025] JMCA Misc 5.

[86] This court adopts that analytical framework in its assessment of the learned judge's treatment of the issues raised in grounds 5, 6 and 7.

[87] At the outset, it is accepted that the learned judge was correct in rejecting Mr Thomas' claim that the hotel was liable pursuant to the tort of negligence. As outlined, at paras. [17] – [19] of her written judgment, it was accepted that the choreography and presentation of the show were not matters under the hotel's direction, and that Mr Murguia's decision to proceed with it without the usual props or rehearsals was not attributable to the hotel, without more.

[88] There were submissions before this court in relation to Mr Thomas' employment status and who paid him. While reference was made to a letter issued to the United States Embassy under the signature of the hotel's human resource manager, purportedly indicating that Mr Thomas was employed by the hotel, and outlining his salary, it is unclear from the record whether that document was admitted into evidence. A notice of objection was filed on behalf of the hotel, and the notes are silent as to whether it was upheld. A brief reference was made in the notes to several exhibits, but the letter was not one of the named exhibits. I will return to this matter later in this judgment.

[89] In any event, Mr Thomas gave uncontradicted evidence that he was employed by Employ Limited. Further, although there was an acknowledgment by the hotel that Mr Murguia was a "past employee" and that Mr Thomas was a part of the entertainment group "Star friend" which was managed by Mr Murguia and performed at the hotel, there was no admission or evidence from the hotel establishing what, if any, legal connection existed among the hotel, Employ Limited, and the dance group.

[90] Accordingly, the learned judge cannot be said to have been plainly wrong in finding that liability in the tort of negligence was not established.

[91] Turning to occupiers' liability, the learned judge, at para. [4] of her written judgment, correctly identified the essential elements of a claim under the Occupiers' Liability Act. Section 3(1) provides that an occupier owes all visitors a "common duty of care," which, under section 3(2), is the duty "to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises" for the permitted purpose. Section 2(2) defines "occupier" as a person having occupation or control of premises.

[92] The evidence indicates that the hotel exercised control over the premises and acknowledged that Mr Thomas was a lawful visitor, performing as part of the entertainment group "Star Friend," which was managed by Mr Murguia. Although the amended defence acknowledged that Mr Murguia was formerly employed by the hotel, it

did not concede that Mr Thomas was employed by Employ Limited or was assigned to the hotel. Liability under the Occupier's Liability Act, however, does not depend on employment status but on the extent of control exercised over premises and by whom.

[93] It was admitted in the hotel's pleadings that cleaning the stage, on which the incident occurred, fell within the hotel's domain. The hotel also asserted that the stage was, in fact, cleaned for Mr Thomas' performance. These are critical assertions as they address the level of control that the hotel had over its premises where the incident occurred, as well as the nature and extent of the duty which devolved upon it, the hotel. In all the circumstances, the learned judge was not plainly wrong in finding that the hotel was the occupier, and, therefore, owed Mr Thomas, an invitee, a common duty of care to provide a reasonably safe stage for his performance.

[94] As regards Mr Thomas' credibility, some merit exists in the hotel's contention that the learned judge did not refer to contemporaneous documentary evidence, specifically, the staff accident report and nurse's report, which the hotel alleges were inconsistent with Mr Thomas' version of events. This court must, therefore, weigh the significance of that omission against the pleadings and the broader evidentiary context, including the hotel's assertion that the stage was cleaned for Mr Thomas' performance [see para. 7 of the amended defence], its denial that the "Fire Man" show occurred indoors, and its contention that no kerosene oil was present on the stage at the material time.

[95] The notes indicate that the agreed documents included Exhibits 11 and 12, namely: (i) the staff accident report dated 18 January 2014; and (ii) the nurse's report of the same date.

[96] In the staff accident report, under the heading "Description of injury and how it happened," Mr Thomas stated: "Wile Doing the Tutty Fruity Show I twis my Foot". The form also listed "Hermitte V.I.P" under the heading, "Name and address of witness".

[97] The nurse's report reads in part: "On January 18, 2014, at approximately 11:25 pm staff reported that in the event of playing the game, thooty fruity (tutty fruity) he

twisted his right knee during the dance. O/A received in painful distress. R knee swollen & painful to touch…".

[98] While it appears that a form was completed and ought to have contained a description of how the injury occurred, there is no indication that such a statement was recorded or that the nurse's attention was drawn to its absence. As will become apparent, the lack of detail may be relevant, but does not, on its own, negate the claim.

[99] It is noted that the nurse's report recorded that Mr Thomas presented in "painful distress" following the incident. The incidence of pain was also referred to by him at the point of proffering a reason for not telling the nurse about the fire dance. This takes me to his testimony. The issue arose in cross-examination, and the following exchange is recorded in the notes, at pages 5–6:

> "Q: January 18, 2014 when you were injured did you tell anyone at the resort what happened
>
> A: I didn't have to all my co-workers were there.
>
> Q: Did you report the accident?
>
> A: I went to the nurse.
>
> Q: Similar to report you said you just filled out another report for January 18, 2014?
>
> A: Yes.
>
> [Shown exhibit 11]
>
> A: I signed to it. I said while doing Tuiti Fruiti show I hurt my foot.
>
> Q: This was your opportunity to tell staff what happened that day, correct?
>
> A: Yes.
>
> Q: You would agree with me you failed to make mention of slipping correct

A: Yes

Q: Would you also agree with me you failed to mention anything about the fireman performing?

A: I did not know that it was necessary.

Q: Did you put in report anything about the fireman?

A: No I did not.

Q: Did you put anything in there about kerosene oil?

A: No.

Q. You failed to put these things in this report because it never happened.

A: I disagree."

[100] In re-examination, Mr Thomas was asked why he omitted any reference to the fire dancer's performance when speaking to the nurse. He responded: "Because all of my co-workers were there. I was in such pain. I see my life flash before me; my right side couldn't move. Me a think whether me a go dance again".

[101] This explanation, however emotive, was part of the evidentiary record and was available to the learned judge for consideration in assessing the credibility of the witness and reliability of his evidence. By contrast, the hotel provided no factual evidence to rebut Mr Thomas' assertion that kerosene oil was on the stage. Its sole witness was not present in the theatre at the material time, and Mr Murguia, who should have been able to clarify events, was not a witness in the matter. Although the amended defence pleaded that the stage was cleaned before Mr Thomas' performance, that claim was unsupported by any evidence.

[102] Upon reviewing the record, I am of the view that the learned judge ought to have expressly considered whether Mr Thomas' omission, of any reference to the fire dancer and/or the presence of kerosene oil on the stage, in those contemporaneous reports, constituted an inconsistency, and if so, say how she treated with it. That omission was

relevant to the reliability of Mr Thomas' account and whether he was truthful about the circumstances leading to his injury. Notwithstanding, that omission, on a balance, in my view, it was not sufficiently material to undermine the integrity of the learned judge's factual findings on liability, given (a) Mr Thomas' answers under cross-examination and re-examination, including his explanation for the omission, and (b) the learned judge's finding at para. [27] of her written judgment. In the latter, the learned judge stated: "…the determination as to the facts, rests entirely on the evidence of Mr Thomas, and there is nothing which was raised in cross-examination that would render him an untruthful witness".

[103] What the latter statement purports is that the learned judge considered all the evidence, which must mean that she also considered Mr Thomas' explanation for the omission. As was observed in **Beacon Insurance Company Ltd v Maharaj Bookstore Ltd**, at para. [12], appellate intervention requires a material error in the judge's evaluation of the evidence. In the instant case, the learned judge's conclusion, that Mr Thomas slipped on a substance on the stage and sustained a knee injury, represents a primary finding of fact based, as she said, on the totality of the evidence. The oversight to expressly consider the absence of detail about the presence of a fire dancer or kerosene oil on the stage from Mr Thomas' report to the nurse does not, therefore, render her conclusions plainly wrong.

[104] Counsel for the hotel argued that inconsistencies in Mr Thomas' evidence undermined his credibility. It was submitted that his expression of shock at seeing the fire dancer perform indoors conflicted with statements made during cross-examination, where he acknowledged that such performances were typically avoided due to fire hazards, including kerosene oil use, flammable curtains, and the wooden flooring in the theatre. The relevant exchange between defence counsel and Mr Thomas, as recorded at pages 3,4, and 6 in the judge's notes, unfolded as follows:

> "Q: 18/1/2014 incident happened?

A: Yes

…..

Q: Would you agree that there was no fire performance done inside of the theatre?

A: No. I would not agree.

Q: Do you ever recall saying to anyone the reason the fire dancer didn't perform inside the theatre is because of the risk of fire from the use of kerosene oil?

A: Yes

Q: Remember saying inside the theatre has many curtains and a wooden floor?

A: Yes

Q: The fire performer doesn't perform in the theatre for those reasons?

A: Agree I am not going to agree with you.

Q: Would you agree curtain can catch fire easily?

A: Yes

Q: Would you agree wood can also catch fire?

A: Yes

…….

Sugg: On January 18, 2014 the fireman did not perform in the theatre?

A: I disagree

Sugg: You are aware that the fireman could never perform in the theatre

A: I disagree

Sugg: The only performance done on that day was the Tutti Frutti performance?

A: I disagree

….

Q: When you were on stage performing Tutti Fuiti would you agree with me you fell after doing a flip

A: I slip in the kerosene oil and fell."

[105] The learned judge acknowledged the inconsistency at para. [25] of her written judgment. However, she concluded that it did not significantly impugn Mr Thomas' overall credibility. That conclusion cannot be said to be plainly wrong, as, notwithstanding contradictions in phrasing or recollection, Mr Thomas consistently maintained throughout the proceedings that the fire dancer did perform inside the theatre on the date in question.

[106] On the broader question of liability, the hotel admitted that Mr Thomas was a lawful visitor on the premises, present to perform in accordance with its scheduled entertainment offerings. The learned judge was, therefore, entitled to find that he was owed a duty of care under the provisions of the Occupier's Liability Act.

[107] Having reviewed the oral testimony, contemporaneous documents, and the written judgment, it is my view that the learned judge undertook a careful assessment of Mr Thomas' repeated denial that the "Fire Man" performance did not take place, and she duly considered his explanation for why the event was relocated indoors. The learned judge also accepted Mr Thomas' evidence that the stage was not cleaned prior to his performance, but he did not notice the presence of kerosene oil before performing his routine. In contrast, she found that the hotel's sole witness was not present during the relevant events and was unable to speak to anything beyond general hotel policy. As such, the learned judge was entitled to give greater weight to Mr Thomas' first-hand account of the conditions in the theatre.

[108] The learned judge addressed the issue of contributory negligence and, at para. [30] of her written judgment, concluded that Mr Thomas bore no contributory fault for

the incident. This conclusion was based on her finding that the danger identified by Mr Thomas in relation to the fire dancer's performance centred on the risk of fire, and that there was no evidence indicating he executed his routine incorrectly or unsafely in the circumstances.

[109] Counsel for the hotel, in support of his alternative defence based on contributory negligence, contended that Mr Thomas was, or ought to have been, aware of kerosene oil on the stage surface before commencing his routine, based on his acknowledgment that the fire dancer's act typically involved the use of kerosene oil. At para. 15 of his witness statement, Mr Thomas clarified that he did not observe any kerosene oil on the stage prior to performing the "Tuitti Fruitti" routine. He explained that he only became aware of its presence after the fall, stating: "I knew after I was injured that there was kerosene oil on the ground because I could smell it on me when I was on the floor".

[110] Counsel's submission, therefore, does not accurately reflect the evidentiary record, considering Mr Thomas' unequivocal statement that he had no knowledge of any hazardous substance on the stage until after the incident. Furthermore, even if it could be accepted that the "Fire Man" performance typically involved the use of kerosene oil, that fact alone does not necessarily (or possibly reasonably) support the inference that Mr Thomas knew, or ought to have known, that kerosene oil was or remained on the floor prior to his routine. The learned judge, therefore, having accepted Mr Thomas' account that he became aware of the kerosene oil only after falling, could not, without further evidence, speculate about the mechanics of the fire dance, that was said to have occurred on the date in question, or what Mr Thomas ought to have known about its aftermath. In the absence of evidence of fault on Mr Thomas' part , it was not open to the learned judge to find contributory negligence on his part.

[111] In the circumstances, I am unable to find that the learned judge's conclusions were unsupported by the evidence or inconsistent with applicable legal principles. Accordingly, grounds 5, 6 and 7 that gave rise to issues (i) and (ii), fail.

Issue (iii): Was there a failure by the learned judge to properly assess the evidence adduced by the appellant, said to be consistent and credible within the wider evidentiary context? (Ground 8)

Discussion and disposal of issue (iii) (ground 8)

[112] It is not necessary to restate the submissions in full, as they largely reiterate arguments previously advanced in relation to the hotel's alleged lack of control over the performance, its role as occupier, and the scope of the duty owed to Mr Thomas as a lawful visitor. These points were addressed under issues (ii) and (iii).

[113] For the reasons already outlined at paras. [86] to [110], the learned judge's assessment of the evidence adduced by the hotel was not flawed. She considered the relevant evidence, weighed its probative value, and made findings that were open to her on the evidence. The hotel's sole witness, she found, was unable to speak to the material events. For that reason, she was entitled to prefer Mr Thomas' direct account. Accordingly, the challenge in ground 8, considered within the ambit of issue (iii), fails.

Issue (iv): Was Mr Thomas required to satisfy the legal requirement to specifically prove special damages to the requisite standard given that special damages were agreed? (Ground 9)

Submissions for the appellant

[114] Counsel for the hotel submitted that the learned judge erred by failing to apply the principle that special damages must be specifically pleaded and strictly proved. He argued that Mr Thomas did not satisfy the requisite evidentiary standard.

Submissions for the respondent

[115] In response, Mrs Mayhew contended that the submission was without merit as the parties had agreed to special damages in the sum of $195,554.40.

Discussion and disposal of issue (iv) (ground 9)

[116] This is a case in which special damages were specifically pleaded, in accordance with the principle articulated in **Ratcliffe v Evans** [1892] 2 QB 524.

[117] The record reveals that special damages were also agreed subject to liability. King's Counsel's assertion is consistent with para. [32] of the written judgment which records the agreed figure. Although the final order did not expressly state that the award was made "by consent" or "with consent," the notes of evidence, included in the record by counsel for the hotel, confirm that the agreement was reached during the proceedings.

[118] There has been no indication that the agreement was improperly obtained or inaccurately recorded. So, the parties' agreement on the quantum of Special Damages obviated the need for Mr Thomas to adduce further proof.

[119] In the circumstances, there is no basis upon which the order for Special Damages should be disturbed. Issue (iv) (ground 9), therefore, fails.

Issue (v): Was the award for loss of future earning capacity and handicap on the labour market supported by a sufficient evidentiary basis and proper reasoning? (Ground 10)

Submissions for the appellant

[120] Counsel for the hotel contended that the learned judge erred in accepting Mr Thomas' testimony regarding his earnings. There was no documentary evidence before the court, counsel contended, except payslips issued by the hotel, even though Mr Thomas was not employed by the hotel. Consequently, Mr Thomas failed to strictly prove his loss, as required by law, and did not produce evidence of income from his actual employer, Employ Limited. In support of this submission, counsel relied on **Garfield Segree v Jamaica Wells and Services Limited and Another** [2017] JMCA Civ 25.

[121] Counsel further submitted that no inference should be drawn regarding any employment relationship between the hotel and Employ Limited based solely on the payslips. He argued that if this court were to overturn the learned judge's finding that Mr Thomas was employed by Employ Limited and, instead, allow reliance on the payslips issued by the hotel, the principles of justice would require a retrial.

Submissions for the respondent

[122] Mrs Mayhew submitted that the learned judge correctly applied the principles set out in **Moeliker v A Reyrolle & Co Ltd** [1977] 1 WLR 132, particularly in paras. [48] and [49] of her written judgment. She noted that Mr Thomas had been rendered medically redundant and was unemployed at the time of trial, having been unable to continue in his role as an entertainment coordinator due to the injury sustained. Given those findings, the case was appropriate for an award under the head of handicap on the labour market, assessed using the multiplicand/multiplier method.

[123] King's Counsel argued that there was sufficient evidence before the learned judge regarding Mr Thomas' income, in his role as an entertainment coordinator. This included payslips and a job letter issued by the hotel, which outlined his duties and earnings. The job letter was signed by the hotel's sole witness, and its contents were not challenged during the proceedings. Further, although Mr Thomas was not directly employed by the hotel, King's Counsel submitted that the hotel benefitted from his services through its arrangement with Employ Limited and was, therefore, able to verify his earnings. She contended that while the learned judge did not formally advert to the documentary evidence, it nonetheless supported her ultimate award, which was based on Mr Thomas' unchallenged oral testimony.

[124] In addition, King's Counsel urged that Mr Thomas' oral evidence should not be assessed in isolation. She pointed to the medical evidence, which, she argued, supported the conclusion that Mr Thomas had suffered a handicap on the labour market. In support of this submission, she relied on **Jamalco (Clarendon Alumina Works) v Lunette Dennie** [2014] JMCA Civ 29 and **Garfield Segree v Jamaica Wells and Services Limited and Another**.

Discussion and disposal of issue (v) (ground 10)

Standard of review regarding the award of damages generally

[125] In **Jamalco (Clarendon Alumina Works) v Lunette Dennie**, among other grounds, the appellant contended that there was insufficient evidence to justify the award of general damages by the trial judge. After reviewing relevant authorities, Phillips JA (as she then was) at para. [60] of the judgment, articulated three key principles: "(1) The Court of Appeal is hesitant to interfere with an award of damages made in the lower court and will only do so in specific circumstances. (2) A person claiming damage must be prepared to prove their damage. (3) If the damage sustained is clear and substantial, but the assessment of the same is difficult, the court must do the best it can in the circumstances".

[126] As regards the quantum of an award of damages, the standard of review which this court accepts (see **Desmond Walters v Carlene Mitchell** (1992) 29 JLR 173, at page 178), was enunciated by Geer LJ, in **Flint v Lovell** [1935] 1 KB 354, at page 360, thus:

> "I think it right to say that this court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum.
>
> To justify reversing the trial judge on the question of the amount of damages it will be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled…."

[127] In **Garfield Segree v Jamaica Wells and Services Ltd and National Irrigation Commission Ltd**, drawing on the authorities of **Jamalco (Clarendon Alumina Works) v Lunette Dennie** and **Chaplin v Hicks** [1911] 2 KB 786, this court re-affirmed that where actual loss is evident but difficult to quantify with precision, the court must nonetheless do its best to assess damages in a fair and reasonable manner.

[128] In that case, the appellant brought a claim in negligence and/or breach of statutory duty arising from damage to his farm caused by flooding, which he attributed to the respondents' actions during a well-testing exercise. At first instance, the trial judge dismissed the claim, finding that the appellant had failed to adduce sufficient and cogent evidence to establish liability or to prove the extent of his loss. The court allowed the claimant's appeal. In addressing the issue of damages, the court acknowledged the deficiencies in the appellant's evidence regarding the quantification of his losses. However, it held that such evidentiary shortcomings should not preclude recovery, given the clear evidence of physical damage to the appellant's farm and the disruption of his contractual obligations.

Loss of future earning capacity and handicap on the labour market

[129] In **Monex Limited and Another v Camille Grimes** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 83/1996, judgment delivered 15 December 1998, at page 12, Rattray P, in explaining the meaning of handicap on the labour market, made the observation that: "[l]oss on the labour market, handicap on the labour market, loss of earning capacity, in my view are synonymous terms. They represent a specific categorisation…".

[130] **Moeliker v A Reyrolle & Co Ltd** concerned the issue of an award under the head of loss of earning capacity. In that case, Browne LJ outlined a useful framework for assessing damages under that head of damages. It has not been contested that those principles, with necessary adaptation, are also applicable in the court's determination of an award under the head of future loss of earnings or handicap on the labour market, even where, as the instant case, a claimant has lost his job before an assessment.

[131] At page 142, His Lordship stated the following considerations:

> "1. Is there a 'substantial' or 'real' risk that a plaintiff will lose his present job at some time before the estimated end of his working life? 2. If there is (but not otherwise), the court must assess and quantify the present value of the risk of the

> financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chances of getting a job at all, or an equally well-paid job."

[132] This passage underscores the evaluative and prospective nature of the inquiry, requiring the court to balance the likelihood of risk against the anticipated economic impact on a claimant.

[133] The principle was further clarified in **Cook v Consolidated Fisheries Ltd** [1977] ICR 635, where Browne LJ corrected a prior misstatement that a claimant must be employed at the time of trial to claim under this category of damages. He acknowledged that while employment status is relevant, it is not determinative. The court must instead assess the claimant's vulnerability in the labour market based on all the surrounding circumstances.

[134] In the instant case, Mr Thomas stated, at para. 32 of his witness statement, that he had been rendered medically redundant due to the injury sustained. In paras. 33 through 52, he provided a detailed account of the impact of the injury on his personal and professional life. At para. 49, he indicated that his income ranged between $33,000 and $35,000 per fortnight.

[135] At paras. [48]-[54] of her written judgment, the learned judge accepted that Mr Thomas had been rendered medically redundant from his role as an entertainment coordinator and was effectively precluded from returning to a physically demanding employment, including construction. His evidence of unsuccessful job applications and the visible nature of his injury were assessed as credible. The learned judge found that he had suffered a loss of ability to compete in the open labour market, particularly in industries where physicality and presentation are valued. The learned judge's conclusions are entirely supported by the evidence.

[136] The record shows that, on 5 October 2021, Mr Thomas filed an application pursuant to section 31E of the Evidence Act to adduce payslips and a job letter from the hotel, referencing his compensation, including gratuity. Although the hotel filed a notice of objection, on 20 October 2021, it appears that the documents were admitted into evidence because, before us, neither party suggested otherwise. In fact, the appellant's complaint, in that regard, is that the information in the payslips should not be used to arrive at Mr Thomas' income, it having not been established that any relationship existed between Mr Thomas' employer, Employ Limited, and the hotel.

[137] The payslips and job letter were not expressly referenced by the learned judge in her assessment under this head of damages. She accepted Mr Thomas as a credible witness and relied on his oral evidence regarding his income.

[138] I agree with the submissions of Mrs Mayhew that both the job letter and payslips formed part of the evidentiary material relied upon at trial, that they reinforced the reliability of Mr Thomas' account regarding his income and employment relationship, and could have been used by the learned judge in support of his viva voce evidence in establishing his income. The job letter confirms that Mr Thomas' wages were subject to an arrangement between the hotel and his direct employer, although it did not so state but purports him to be its employee. Its contents were not challenged, and the author, who was also the hotel's sole witness, did not dispute its accuracy. The oral evidence of Mr Thomas also aligned with the contents of that document as well as the pay slips.

[139] Whilst the learned judge was correct, in my view, in not relying on those documents to determine whether there was an employment contract between the hotel and Mr Thomas, she was, nevertheless, entitled to use them to establish what income he received in relation to the job he performed at and for the hotel since it was not contested that Mr Thomas was assigned to the hotel, worked for the hotel as an entertainment coordinator, was performing services at the hotel at the time of the injury and was paid by the hotel.

[140] Although the documentary material was evidence that the learned judge could have used, in support of Mr Thomas' oral evidence about his income, the omission to use it was not fatal. The reasoning of this court in **Jay-Ann O'Connor v Delsha Hyman** [2025] JMCA Civ 14 (citing Rattray P's observations in **Monex Ltd and Another v Camille** at page 12), reiterates the position that even in cases of a trial court's inability to precisely ascertain the victim's income, this head of damages can be awarded. McDonald-Bishop P, writing on behalf of the court, at para. [61] stated:

> "On the strength of Rattray P's pronouncements, the respondent could have resumed her employment, following her injury, without any loss of earnings or even a higher rate of earnings, but still be entitled to damages for loss of earning capacity. Therefore, the fact that her exact income before and after the injury could not be precisely ascertained does not preclude her from recovering damages for loss of earning capacity. The learned judge accepted the respondent as a witness of truth regarding her vocation, business operations, and income-earning capacity. The medical evidence substantiated the claim of loss of earning capacity, which the learned judge also accepted…"

[141] Further, this court is not precluded from considering relevant evidence that was placed before the learned judge which she omitted to consider (see rule 1.16 of the Court of Appeal Rules – "An appeal shall be by way of a re- hearing"). Having considered that evidence, I find that it supports the accuracy of Mr Thomas' oral evidence as regards his income. The absence of formal payslip attachments to the pleadings would not, in the circumstances, undermine the reliability of the income information presented, particularly where it was corroborated and seemingly unchallenged.

[142] In keeping with the guidance from **Moeliker v A Reyrolle & Co Ltd** and **Cook v Consolidated Fisheries Ltd**, Mr Thomas' employment status, injury-related redundancy, and income evidence collectively would have formed a sufficient foundation for assessing the impact on his future earning capacity and handicap on the labour market. The learned judge adopted a principled approach in evaluating the claim under this head, consistent with that guidance (see also **Andrew Ebanks v Jephther**

McClymouth (unreported), Supreme Court, Jamaica, Claim No 2004 HCV 2172, judgment delivered 8 March 2007).

[143] In those cases, the courts emphasised the need to identify a substantial risk of diminished employability and to quantify such loss using accepted methods, including the multiplier/multiplicand approach. In **Patrick Thompson and others v Dean Thompson and others** [2013] JMCA Civ 42, Morrison JA (as he then was), at para. [80], indicated that the choice of a suitable method of calculation for this head of damages is a matter for the court. He continued thus:

> "Among the factors to be taken into account are the actual circumstances of the claimant, including the nature of the injuries…Although the decided cases can offer important and helpful guidance as to the correct approach, the individual circumstances must be taken into account…"

[144] The use of the multiplier/multiplicand method was justified by Mr Thomas' unemployment at trial and the improbability of securing comparable employment, especially given his limited educational qualifications and the nature of his prior roles. The learned judge contextualised the assessment by considering relevant actuarial and economic factors, including the average retirement age, occupational longevity in the entertainment sector, the implications of the COVID-19 pandemic, and general contingencies of life. Browne LJ in **Moeliker v Reyrolle & Co Ltd**, at page 141, pointed to the inherent difficulty in assessing this head of damages when he observed: "No mathematical calculation is possible in assessing and quantifying the risk in damages…".

[145] The learned judge's reliance on a base salary of $33,000.00 per fortnight, excluding gratuity, reflects a conservative and balanced assessment. Her application of a multiplier of eight, accounting for 15 years of lost employment, was reasoned and proportionate. Her evaluation of Mr Thomas' handicap on the labour market was neither speculative nor excessive, but a judicious application of settled law to the circumstances of the case.

[146] As regards the evidentiary material, it cannot be reasonably argued that there was insufficient evidence to justify the award or that the award is inordinately high "to the extent of being a wholly erroneous estimate of [Mr Thomas' loss] under that head" (see **Jay-Ann O'Connor v Delsha Hyman**, at para. [70]. In sum, the learned judge's evidentiary findings, analytical framework, and method of quantification demonstrate fidelity to legal principles and careful regard for the factual matrix.

[147] I find, therefore, no compelling basis on which to disturb the award of $6,336,000.00. As Greer LJ stated in **Flint v Lovell**, an appellate court should not interfere with an award unless it is demonstrably excessive or founded upon an incorrect principle. The appeal consequently fails on issue (v) as raised by ground 10.

Issue (vi) – Was the award for pain and suffering and loss of amenities excessive and inconsistent with the medical evidence and comparative authorities? (Ground 11)

Appellant's submissions

[148] Mr Scott contended that the award under this head was excessive and unsupported, particularly given what was described as conflicting aspects of Mr Thomas' testimony and an alleged insufficiency of medical evidence. It was argued that any uncertainty surrounding credibility ought to have impacted his assertions regarding the extent and persistence of his injury.

Respondent's submissions

[149] In response, Mrs Mayhew submitted that the injury was substantiated by multiple medical reports. These revealed ligament tears, bone bruises, muscle atrophy, and a lower extremity impairment assessed at 18%, equating to 7% of whole-person impairment. Further, the medical assessments were provided by specialists, including Dr Dundas, a consultant orthopaedic surgeon. King's Counsel, therefore, argued that Mr Thomas' condition was adequately supported by expert evidence.

Discussion and disposal of issue (vi) (ground 11)

[150] At paras. [33]-[[37] of her written judgment, the learned judge examined the medical evidence as follows:

> "[33] The medical report of Dr Douglas Street formed part of the evidence before this court. The report indicated that Mr Thomas was seen on 20th January 2014. On examination there was tenderness and swelling of the right knee with reduction in the range of movement. He was not expected to have any significant long term complications from his injuries. An x-ray was requested but was not done. He was reviewed on the 24th of January 2014 after complaining of continued pain. He was found on that date to have right calf swelling and he was referred to the Cornwall Regional Hospital for further assessment.
>
> [34] The report of Dr Dane Miller was presented to the court. He outlined the injuries suffered by Mr Thomas as follows:
>
> a) Complete right anterior cruciate ligament tear
>
> b) Lateral meniscus radial tear of the posterior horn (white on white zone)
>
> c) Medial meniscal cyst
>
> d) Positive pivot shift test
>
> The diagnosis was as follows:
>
> a) Lateral meniscus tear
>
> b) Right anterior cruciate ligament tear
>
> c) Bone bruises in medial and lateral tibial and femoral condyles.
>
> [35] In 2016 Dr Grantel Dundas prepared a report. His diagnoses were:
>
> a) Status post ACL reconstruction right knee with bone-patellar tendon-bone graft

b) By history medial meniscal tear with debridement.

> It was observed that Mr Thomas had not yet reached his maximum medical improvement, and he was recommended for further physical therapy to enhance his quadriceps strength and range of motion."

[151] At para. [43] of her written judgment, the learned judge correctly outlined the principles relevant to the award of damages in the instant case. And at paras. [45]-[47], she reviewed the relevant authorities, including **Patrice Brown v Kingston Wharves Limited and Another** [2014] JMSC Civ 231 *,* **Raymond Harvey v Sports & Divers Club Limited** [2014] JMSC Civ 205*,* and **Marcia Golding v Jamaica Urban Transit Company Limited** (unreported), Supreme Court, Jamaica, Claim No 2005 HCV 2391 judgment delivered 12 October 2007 and entered in Binder 742 Folio 309, and considered the updated awards therein based on the Consumer Price Index.

[152] In **Marcia Golding v Jamaica Urban Transit Company Limited**, the updated award was $3,667,536.23; in **Raymond Harvey v Sports & Divers Club Limited,** the updated award was $4,018,344.00; and in **Patrice Brown v Kingston Wharves Limited and Another,** the updated award was $3,693,103.00. The learned judge, nevertheless, found that Mr Thomas' injuries and his assigned 18% lower extremity impairment (7 % of whole person) were more in line with the claimant's circumstances in **Patrice Brown v Kingston Wharves Limited and Another**. In that case, the claimant, who also sustained an injury to the knee, was diagnosed as having a posterior cruciate ligament repair with residual insufficiency, anterior cruciate ligament insufficiency, lateral collateral insufficiency and permanent impairment of 37% of the left lower extremity (15% of the whole person).

[153] Finding Mr Thomas' injuries comparable but less severe than those in **Patrice Brown***,* the learned judge placed the quantum below the award in **Patrice Brown** and the uppermost range in the three cases she found relevant, awarding $3,400,000.00. This figure, therefore, fell squarely within the spectrum established by precedent and reflected a calibrated approach tied to the medical assessment of 7% whole person

disability. Contrary to the hotel's submission that Mr Thomas had not mitigated his loss, the learned judge found that he attended several physiotherapy sessions and continued the exercises at home.

[154] There is no indication that the learned judge relied on a wrong principle of law or made an assessment so aberrant as to justify appellate intervention. Issue (vi), raised in ground 11, is, therefore, without merit.

Conclusion

[155] After a comprehensive review of the record, the grounds of appeal, and the submissions of both parties, I am satisfied that the learned judge acted within the bounds of established legal principles and properly exercised judicial discretion in relation to each impugned finding and award. The evidentiary foundation was sound, the methodology for assessing damages was appropriate, and the comparative authorities cited were relevant and correctly applied.

[156] The hotel has failed to demonstrate that the learned judge erred in law, misapprehended the facts, or awarded sums that were plainly unreasonable. In the circumstances, I would dismiss the appeal with costs to Mr Thomas.

BROWN JA

[157] I have read the draft judgment of Dunbar-Green JA and agree with her reasoning and conclusion.

EDWARDS JA

ORDER

1. The appeal is dismissed.

2. The orders made by Carr J, on 28 January 2022, are affirmed.

3. Costs to the respondent to be agreed or taxed.