JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 19/2009

APPLICATION NOS 124/2013 and 173/2014

BEFORE: **THE HON MISS JUSTICE PHILLIPS JA**
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (Ag)

BETWEEN	**FIESTA JAMAICA LIMITED**	**APPLICANT**
AND	**NATIONAL WATER COMMISSION**	**RESPONDENT**

Christopher Dunkley, Miss Yualande Christopher-Walker and Miss Amina Whiteley instructed by Phillipson Partners for the applicant

Kevin Williams and Colin Alcott instructed by Williams Alcott Williams for the respondent

21 October, 3, 5 and 7 November 2014

ORAL JUDGMENT

BROOKS JA

[1] It is only in exceptional circumstances that this court will re-open a judgment that it has handed down. That, however, is what Fiesta Jamaica Limited ('Fiesta') has applied to have done in this case. The relevant judgment was handed down on 26 February 2010. Fiesta filed its application over three years later, on 15 October 2013. It asserts that a subsequent judgment handed down in the Supreme Court, in a

connected matter, has resulted in a situation likely to cause "real injustice and an abuse of the Court's process". A re-opening of this court's judgment, Fiesta asserts, is required to avoid that injustice. Before assessing the application, it is necessary to give the factual background to the issues raised.

Background

[2] On 13 November 2007, a 500mm pipeline, used by National Water Commission ('NWC') to deliver potable water to several areas in the town of Lucea in the parish of Hanover, ruptured, causing major dislocation to the supply. NWC identified the cause of the rupture to be work done in connection with a diversion of the pipeline. That diversion had been done some weeks before, that is, on or about 16 October 2007.

[3] NWC blamed Fiesta for having caused the rupture. Fiesta had wanted the diversion done to facilitate a tunnel that it was building on its hotel property. Mr Nigel Harding, who traded under the name Nigel Harding Mechanical and Civil Engineers Services, had executed the diversion work. NWC asserted that, although there were discussions about having the work done, it did not give Fiesta any permission or authority to carry out the diversion.

[4] In light of the inconvenience to the town and institutions there, including schools and a public hospital, NWC acted swiftly. On 14 November 2007, it filed a claim against Fiesta in the Supreme Court claiming damages for trespass. It also, on that day, secured, without prior notice to Fiesta, an interim mandatory injunction ordering Fiesta to restore the pipeline within seven days.

[5] When Fiesta was served with the court documents, its response, in the acknowledgment of service that it filed, was significant. It stated that it admitted the claim in part and indicated that it would "pay for the required work". Thereafter, in a series of consent orders, Fiesta agreed to pay significant sums, calculated in United States Dollars, for NWC to carry out the restorative work. The necessary work was done, restoring the water supply.

[6] On the litigation front, Fiesta failed to file a defence in time and when, in July 2008, it filed an application for an extension of time in which to file its defence, NWC responded with an application for summary judgment. By that time, Fiesta had filed an ancillary claim against Mr Harding alleging negligence against him and seeking an indemnity for the money that it had paid to NWC for the restorative work.

[7] D O McIntosh J heard the applications and despite Fiesta's assertions that Mr Harding should have been made a party to those hearings, the learned judge struck out Fiesta's application and, on 12 January 2009, granted summary judgment to NWC with damages to be assessed.

[8] Fiesta appealed against the decision. Its appeal was heard by this court and, on 26 February 2010, was dismissed. Harris JA, with whom the rest of the court agreed, rejected Fiesta's contention that Mr Harding was a necessary party to the dispute between NWC and itself. The learned judge of appeal ruled that whereas NWC's claim against Fiesta was in trespass, that is, that Fiesta had interfered with its pipeline

without its permission, the ancillary claim by Fiesta against Mr Harding was in negligence, that is, that he carried out the work without proper care. She stressed the difference in the claims and stressed the fact that Fiesta had consented to the restorative work and had made payments in that regard (see **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4 at paragraphs [40]-[42]).

[9] Fiesta thereafter pursued its ancillary claim against Mr Harding. The ancillary claim was tried before Batts J. On 23 April 2013, the learned judge delivered a written judgment in which he found that Fiesta had failed to prove that Mr Harding was negligent in his execution of the diversion work. The learned judge was impressed by the fact that Fiesta had relied, in its ancillary pleadings, on an alleged statement by Mr O'Neil Shand, NWC's representative, in which he had expressed complete satisfaction with the work, which statement would have negatived negligence on the part of Mr Harding. He dismissed the ancillary claim and awarded costs to Mr Harding.

The applications

[10] The situation resulting from that decision has aggrieved Fiesta. It has had, in the primary claim, to pay NWC for the damage caused by the diversion but has not been able, in the ancillary claim, to recover that cost from the person who executed the diversion. That situation has prompted Fiesta to make the unusual application mentioned at the beginning of this judgment.

[11] To add insult to injury, it has, since it filed the application to re-open, received from NWC a copy of a letter written by Mr Harding on 26 October 2007. In that letter,

Mr Harding admitted to having done the work without NWC's permission and without Fiesta's knowledge. He apologised for his actions and promised NWC that there would be no repetition of such behaviour by him. That letter was penned before the rupture of the pipeline occurred. Upon receiving that letter, Fiesta also filed an application to allow fresh evidence to be admitted for the court's consideration in the re-opened appeal. The fresh evidence sought to be adduced included the letter mentioned above.

[12] Mr Dunkley, with his characteristic tenacity, made a valiant attempt to advance these applications. Learned counsel, in the course of his submissions, argued that there were fatal errors in the judgment of this court handed down in 2010. He submitted that the court was wrong in finding that there were fundamental differences between the primary and the ancillary claims. He argued that, contrary to what Harris JA had ruled, NWC's claim against Fiesta did include assertions of negligence. Learned counsel also argued that not only did Fiesta's draft defence reveal a meritorious defence to NWC's claim for trespass, but that the situation required an order for consolidation of the primary and the ancillary claims.

[13] Learned counsel submitted that injustice resulted from the fact that there was a judgment against Fiesta in trespass when Mr Harding had admitted doing the diversion without authority, which diversion amounted to a trespass on NWC's works. The situation, he submitted, has resulted in real injustice.

The analysis

[14] The application to re-open is, however, completely without merit and fails on a number of bases. These were carefully pointed out by Mr Williams in his very thorough submissions on behalf of NWC. They will be addressed below.

[15] Although this court is allowed, by virtue of rule 1.7(7) of the Court of Appeal Rules (CAR), to vary or revoke any of its orders, the decided cases have demonstrated that it will only do so in rare and exceptional circumstances. The principle behind that approach is an overriding requirement for there to be an end to litigation and for certainty in the court's process (see **Taylor v Lawrence** [2002] EWCA Civ 90). The power to re-open judgments in order to vary or revoke the orders made therein will only be exercised to avoid real injustice. It is to be noted that error alone will not be sufficient to allow for an exercise of the power. The party seeking that relief is not permitted to merely challenge the merits of this court's decision (see paragraph [40] of the judgment of Woolf CJ in **Taylor v Lawrence**). That party must satisfy strict criteria in order to succeed.

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

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

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

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

d. there is no alternative remedy.

The majority of those principles may be found at paragraphs 16 through 22 of her judgment.

[17] An examination of Fiesta's application to re-open reveals that it fails to satisfy almost all of these criteria. Firstly, there has been no proof of bias, fraud or corruption of the process as defined in **Taylor v Lawrence** and **Re Uddin**. The judgment of Harris JA reveals that this court dealt with all the issues concerning the difference between NWC's claim and Fiesta's ancillary claim. Fiesta participated fully in every aspect of the claim subsequent to the grant of the interim injunction.

[18] Secondly, Fiesta cannot properly say that the result has come about without its being at fault. As mentioned above, it was intimately involved at every stage of the litigation. In its acknowledgment of service it admitted part of the claim and offered to pay the cost of the repair, it consented to the various orders for payment and made no application to set aside the interim injunction. In addition, Fiesta failed to file its defence within the allotted time. Critically, it also failed to file any affidavit in response

to NWC's application for summary judgment. It apparently relied on the contents of the affidavit filed in support of its application for extension of time to file its defence.

[19] Thirdly, there has been no real injustice caused by the process. Fiesta, given its participation in the consent orders and its payments to NWC to have the restorative work done, had no defence to NWC's claim. Mr Dunkley submitted that that participation should be viewed in the context of the mandatory injunction. The submission is, however, not supported by the facts. At no point did Fiesta make it clear that it was only making these payments out of compulsion. It did not do so in its acknowledgment of service and none of the consent orders reflects such a position.

[20] The other aspect of this criterion is that the judgment of Batts J reveals that Fiesta's failure against Mr Harding was partly, if not primarily, due to the fact that Fiesta had failed to adduce any technical evidence to challenge Mr Harding's case that he was not negligent in his execution of the diversion. Mr Williams submitted that Fiesta could have secured witnesses from NWC, either voluntarily or by compulsion, to assert the complaints that NWC had of the manner in which the diversion had been done. Fiesta's failure to do so, learned counsel submitted, is another basis for stating that Fiesta is the author of its own misfortune. We agree.

[21] Although Fiesta has not pursued an appeal against the decision of Batts J, the issue of whether or not it has an alternative remedy need not be assessed.

[22] We also agree with Mr Williams that, in examining the concept of the restriction to exceptional circumstances, the circumstances of this case have not been proved to be of the exceptional nature envisaged by the decided cases. Nothing in this case raises issues "so grave as to overbear the pressing claims of finality in litigation – especially pressing where what is contemplated is a second appeal" (see paragraph 21 of **Re Uddin**).

[23] Fiesta's application to re-open the judgment of this court founders hopelessly on the criteria already assessed.

[24] Based on that finding, there is really no need to assess in any detail the application to adduce the fresh evidence. That application was for Mr Harding's letter, and another document, to be adduced in the event that the appeal was re-opened. It is, however, necessary to note that that application would also have failed. **Taylor v Lawrence** is authority for the principle that fresh evidence is, by itself, not a basis for re-opening a judgment (see paragraph [9] of the judgment of Woolf CJ).

[25] The decided cases show that, in considering the extent of the jurisdiction and the issue of re-opening a judgment in order to consider fresh evidence, a perfected judgment exhausts the jurisdiction of the court. This result accords with the fundamental principle that the outcome of litigation should be final.

[26] In addition, it must be noted that the letter from Mr Harding had been mentioned in one of the affidavits filed in support of NWC's application for the summary

judgment. The letter was therefore available at the time of the hearing of the application for summary judgment, and of the appeal from that judgment. It would have been accessible with reasonable diligence. Fiesta would have, therefore, failed on the first limb of the test established in **Ladd v Marshall** [1954] 1 WLR 1489, for assessing applications for fresh evidence. That limb prevents the admission of fresh evidence if it was available, with reasonable diligence, at the time of the original proceedings.

[27] For the reasons set out above, these applications are refused with costs to the respondent to be taxed if not agreed.