JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 7/2014

MOTION NO COA2020MT00001

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE V HARRIS JA (AG)

BETWEEN	**MARILYN HAMILTON**	**APPLICANT**
AND	**ADVANTAGE GENERAL INSURANCE COMPANY LIMITED (FORMERLY UNITED GENERAL INSURANCE COMPANY LIMITED)**	**RESPONDENT**

Captain Paul Beswick and Ms Aisha Thomas instructed by Ballantyne, Beswick & Co for the applicant

Conrad George and Andre Sheckleford instructed by Hart Muirhead & Fatta for the respondent

1 June & 25 September 2020

F WILLIAMS JA

[1] I have read in draft the judgment of my sister V Harris JA (Ag). I agree with her reasoning and conclusion and have nothing to add.

P WILLIAMS JA

[2] I too have read the draft judgment of my sister V Harris JA (Ag) and agree with her reasoning and conclusion.

V HARRIS JA (AG)

[3] On 20 December 2019, this court, on the application of the respondent, Advantage General Insurance Company Limited, set aside a default costs certificate that was obtained by the applicant Marilyn Hamilton, and allowed the respondent to file points of dispute. The applicant desires to challenge this decision and has filed a notice of motion for conditional leave to appeal to Her Majesty in Council.

Background

[4] This case has its genesis in a claim, filed by the applicant in the Supreme Court as far back as 2007, for the wrongful termination of her employment contract with the respondent company (then United General Insurance Company Limited). Following a protracted period of delay, the matter was tried and a decision made in favour of the applicant in December of 2013.

[5] On 12 February 2014, the respondent filed a notice of appeal challenging that decision. The applicant responded by filing a counter-notice of appeal on 25 April 2014.

[6] There was, however, a lull in the matter, and on 3 August 2017, the applicant filed an application for the appeal to be dismissed for want of prosecution, due to the respondent's failure to file skeleton arguments, chronology of events and record of appeal in order to advance the appeal in accordance with the Court of Appeal Rules ('CAR'). The respondent, in turn, filed an application for extension of time to file the relevant documents.

[7] The applications were heard together in June of 2017. The court refused to dismiss the appeal and granted an extension of time for the respondent to file the relevant documents. Those orders were made subject to an unless order.

[8] The respondent, although filing and serving the record of appeal and chronology of events within time, yet again failed to file its skeleton arguments. The applicant once more filed a notice of application seeking, *inter alia*, that the appeal be dismissed for non-compliance with the CAR. The respondent sought relief from sanctions by way of an application filed on 3 August 2017.

[9] The respondent's application was successful whilst that of the applicant was refused. However, the court ordered that the respondent was to pay the costs of both applications, which were to be taxed, if not agreed. The court also directed that the taxation of those costs could proceed.

[10] On 8 February 2018, the applicant filed a bill of costs in the amount of $11,484,070.00. The respondent having failed to file points of dispute within the 28 days provided by rule 65.20(3) of the Civil Procedure Rules 2002 ('CPR'), the applicant, on 12 March 2018, obtained a default costs certificate for the amount claimed in the bill of costs.

[11] The default costs certificate was served on the respondent on the same date it was granted. On the following day, 13 March 2018, the respondent filed an application to set it aside, and also sought an extension of time to allow for the filing of its points of dispute. The learned registrar of this court, having considered the application, ruled on

14 March 2018 that the applicant was entitled to the default costs certificate. The matter was then referred to the court for consideration.

[12] In the meantime, the respondent sought a stay of the default costs certificate on the condition that it paid the sum of $475,230.00 on or before 10 August 2018. The application was granted. However, the respondent failed to comply. The respondent then sought to vary the order, or alternatively, extend time for the payment of the sum. An extension of time was granted.

[13] The respondent's application to set aside the default costs certificate was heard on 27 May 2019, and on 20 December 2019, the court granted the application, with costs to the applicant.

[14] It is in respect of that decision that the applicant seeks leave to appeal to Her Majesty in Council.

The application

[15] The applicant initially filed its motion for conditional leave to appeal to Her Majesty in Council on 3 January 2020, but at the hearing of this matter, learned counsel for the applicant, Captain Beswick, sought and was granted permission to amend the notice of motion to argue the following grounds:

> 1. "Section 110(1)(a) of the Constitution of Jamaica provides that an appeal shall lie from decisions of the Court of Appeal to [H]er Majesty in Council as of right, where the matter in dispute on the appeal to [H]er Majesty in Council is of the value of one thousand dollars or upwards. The Default Costs

Certificate in question in this appeal is for the $11,484,070.00 which is upwards of the value of one thousand dollars.

2. The appeal herein falls within the remit of Section 110(1)(a) of the Constitution of Jamaica as it is a final decision in this civil proceeding concerning this Default Costs Certificate wherein the Court of Appeal upon an application by the Respondent on December 20, 2019 set aside the Default Costs Certificate and allowed the Respondent to file points of dispute.

3. Section 110(2)(a) of the Constitution of Jamaica provides that an appeal shall lie from the decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal wherein the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings;

4. The appeal involves a question of great general and public importance as there is a serious issue of law, and a legal question the resolution of this matter concerning what qualifies as a 'good reason' for settling aside a Default Costs Certificate which has been properly obtained, and one which the Applicant herein requires to be assessed by the Privy Council.

5. Section 3 of the Jamaica (Procedures in Appeals to Privy Council) Order in Council 1962 states that appeals are to be made within 21 days of the date of the judgment, so this motion is within time.

6. This issue of law is not settled as the Court has dealt with the issue of what constitutes 'good reason' for the setting aside of a default costs certificate in an unstructured way and therefore requires debate from Her Majesty in Council."

The law and analysis

[16] There is no dispute between the parties as to the applicable law in applications of this nature.

[17] Section 110(1) of the Constitution of Jamaica provides:

> "110 – (1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council **as of right** in the following cases –
>
> (a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, final decisions in any civil proceedings;
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> (b) final decisions in proceedings for dissolution or nullity of marriage;
>
> (c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution; and
>
> (d) such other cases as may be prescribed by Parliament."
>
> (Emphasis added)

[18] Section 110(2) provides:

> "(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases-
>
> (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and
>
> (b) such other cases as may be prescribed by Parliament."

[19] An applicant is, therefore, entitled to appeal to Her Majesty in Council as of right, with the leave of the court, where that applicant satisfies one of the factors in subsection (a), (b), (c) or (d) of section 110(1). In all cases, the decision being appealed must be a

final decision. In respect of subsection (a), the only applicable subsection in the circumstances of this case, the property value requirement must be satisfied along with the requirement that the decision being appealed is a final one. In **Georgette Scott v The General Legal Council (Ex-Parte Errol Cunningham)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 118/2008, Motion No 15/2009, judgment delivered 18 December 2009, Phillips JA, at page 7, outlined the cumulative requirement an applicant must fulfil as follows:

> "With regard to section 110(1)(a) of the constitution, this Court is of the view that the applicant must show the following:
>
> (1) that the decision being appealed is a final decision in a civil proceeding **and**
>
> (2) that the matter in dispute on the appeal is of the value of one thousand dollars or upwards, **or**
>
> (3) that the appeal involves directly or indirectly a claim to or question respecting properly of a value of one thousand dollars or upwards, **or**
>
> (4) that the appeal involves a right of the value of one thousand dollars or upwards." (Emphasis added)

[20] This interpretation of section 110(1)(a) has since been reaffirmed in subsequent decisions of this court (see, for example, **John Ledgister & Ors v Bank of Nova Scotia Jamaica Limited** [2014] JMCA App 1, paragraph [15]).

[21] Further, even where an appeal lies as of right, the court must determine whether the proposed appeal raises a "genuinely disputable issue". If it does not, the court may dismiss the application notwithstanding that the value requirement has been met and the

decision is a final one (see **Patrick Allen v Theresa Allen** [2019] JMCA App 5, paragraph [20]).

[22] Where no appeal lies as of right, an applicant may obtain leave based on the discretion of this court under section 110(2), where the court is satisfied that the matter involves one of great general or public importance or 'otherwise'.

[23] In the instant case, the applicant has argued that leave should be granted both 'as of right', and based on the discretion of this court.

[24] Whilst there is no disagreement that the matter in dispute is of the value of $1,000.00 or upwards, the default costs certificate having been issued for the amount of $11,484,070.00, what is disputed is whether the decision the applicant seeks to appeal is a final decision of this court.

[25] Also, in respect of section 110(2), the respondent has rejected the notion that the matter involves any issue of great general or public importance, or that it ought to 'otherwise' be submitted to Her Majesty in Council.

[26] The issues that arise for consideration, therefore, are:

1) whether the decision being appealed is a final decision;

2) whether the matter is one that involves great general or public importance; and

3) whether the matter ought to 'otherwise' be submitted to Her Majesty in Council.

ISSUE 1: Is the decision a final decision?

A. *The applicant's submissions*

[27] In respect of this issue, Captain Beswick, relying on the espousal of the 'application test' in the authorities of **Ronham & Associates Ltd v Gayle & Wright; Gayle v Ronham Associates & Wright** [2010] JMCA App 17 and **John Ledgister**, submitted that the question is whether the relevant decision given by the panel hearing the application to set aside the default costs certificate would have finally disposed of the matter whichever way it went.

[28] To that question, the applicant has answered yes. It was argued that the relevant proceedings are the 'default costs certificate proceedings', and that the court's order setting aside the default costs certificate terminated the substantive appeal in relation to the certificate. If the panel had decided to refuse to set aside the certificate, it was submitted, the matter would have still come to an end. It makes no difference, it was argued, that the costs still have to be taxed, as "the issue in the appeal [was] not about taxation proceedings but the default costs certificate". No order could have been made that could have resuscitated the applicant's application. The fact that the application can no longer continue, according to the applicant, is what makes the decision final. It was submitted that, a taxation procedure was created by the decision of the court that did not exist when the application for the default costs certificate was made, and that procedure is not a continuation or determination of the issues in the application for the default costs certificate.

[29] The applicant concluded, therefore, that once it is recognized that the original proceeding was not taxation, there was no order the court could have made that would have allowed the proceedings to continue.

B. *The respondent's submissions*

[30] The respondent also relied on the authorities of **John Ledgister** and **Ronham & Associates Ltd** as cited in **Paul Chen-Young & Ors v Eagle Merchant Bank Ja Ltd Anor** [2018] JMCA App 31, in agreement with the applicant that the relevant test is the 'application test'.

[31] The respondent, however, submitted that the decision being appealed is interlocutory and not final, as the decision did not finally dispose of the matters in litigation. Instead, it was argued, since the dispute related to the question of the quantum of costs the applicant was entitled to, the decision allowed the matters concerning costs to continue within the taxation process. On the one hand, the decision would have allowed the matter to continue, as it has, and on the other, it would have disposed of the matter if the application had been denied, with the respondent being required to pay the sum claimed in the default costs certificate.

[32] Consequently, it was submitted, section 110(1)(a) cannot avail the applicant.

C. *Discussion*

[33] It is accepted by this court that what is to be considered a 'final decision' for the purposes of section 110(1)(a) is to be determined using what is known as the 'application test'.

[34] In that regard, Brooks JA in **John Ledgister**, opined as follows:

> "[19]...This court has accepted that, what is known as the 'application test', is the appropriate test for determining what constitutes a final decision in civil proceedings. One of the clearest explanations of the application test is contained in the judgment of Lord Esher MR in **Salaman v Warner and Others** [1891] 1 QB 734, when he stated at page 735:
>
> > 'The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory.'
>
> [20] That approach has been accepted, in a number of judgments of this court, as being the applicable test."

[35] In **Chen-Young & Ors**, a case which also involved a motion for leave to appeal to Her Majesty in Council, McDonald-Bishop JA reaffirmed this court's acceptance of the application test as set out in **Ronham & Associates** for determining whether a decision is interlocutory or final. At paragraph [27], she said:

> "With regards to the requirement that the decision must be a final decision in proceedings, the dicta of Morrison JA (as he then was) in **Ronham & Associates v Gayle & Wright; Gayle v Ronham Associates & Wright** [2010] JMCA App 17 proves quite instructive. Morrison JA opined at paragraph [21]:
>
> > '[21]...The question whether an appeal is from an interlocutory or final order is one of those old controversies which, happily, may now be considered to be settled, it having been held in **White v Brunton** [1984] 2 All ER 606 that, in considering whether an order or judgment is interlocutory or final for the purposes of leave to appeal under the equivalent

> English statutory provisions, regard should be had to the nature of the application or proceedings giving rise to the order or judgment and not to the nature of the order or judgment itself. Accordingly, **where the nature of an application is such that any order made will finally determine the matters in litigation, the order or judgment is final**, thereby giving rise to an unfettered right of appeal. **However, if the nature of the application that is before the court is such that the decision on that application, if given one way, will finally dispose of the matter in dispute, but if given the other way, will allow the action to go on, the matter is interlocutory**; irrespective of the actual outcome. This approach, known as the 'application approach' (to be contrasted with the 'order approach'), was approved and applied by this court in **Leymon Strachan v The Gleaner Company Ltd and Dudley Stokes** (SCCA No. 54/97, judgment delivered 18 December 1998)'." (Emphasis added)

[36] The relevant question, therefore, is whether the nature of the application that led to the order being appealed was such that any decision made by the court would have determined the matter or proceedings one way or the other.

[37] By virtue of rule 1.18 of the CAR, the provisions of Parts 64 and 65 of the CPR apply to the award and quantification of costs of an appeal, subject to any necessary modifications and amendments.

[38] The application that is the subject of this matter is an application by the respondent pursuant to rule 65.22 of the CPR (as amended, 15 November 2011), to set aside a default costs certificate.

[39] However, the matter must be considered within the broader context of the 'proceedings' within which the application was made. Counsel for the respondent, Mr

George argued that the application was made within the course of 'taxation proceedings', which, having regard to the order of the court to set aside the default costs certificate, are to continue, and are therefore interlocutory. Captain Beswick, on the other hand, argued that the application was not made within taxation proceedings, but rather, "proceedings for a default costs certificate". The outcome, he submitted, would end those proceedings either way.

[40] Having perused the rules, I cannot agree with Captain Beswick's submissions. The respondent's argument found favour with me for the following reasons.

[41] Rule 65.18(1) provides that taxation proceedings are commenced when the receiving party (the applicant in this case) files a bill of costs and serves it on the paying party (the respondent). It provides:

> "65.18 (1) **Taxation proceedings are commenced by the receiving party –**
>
> **(a) Filing the bill of costs at the registry; and**
>
> **(b) Serving a copy of the bill on the paying party**."
> (Emphasis added)

[42] By filing its bill of costs and serving it on the respondent in accordance with rule 65.18(1), the applicant commenced 'taxation proceedings'. Rule 65.20(1) shows clearly that the option to file points of dispute in response to a bill of costs, is a step to be taken within 'taxation proceedings'. So too is the option given to the receiving party to apply for a default costs certificate. Rule 65.20 provides:

"65.20 (1) The paying party and any other party to **the taxation proceedings** may dispute any item in the bill of costs by filing points of dispute and serving a copy on –

(a) the receiving party; and

(b) every other party to the **taxation proceedings**.

(2) Points of dispute must –

(a) identify each item in the bill of costs which is disputed;

(b) state the reasons for the objection; and

(c) state the amount (if any) which the party serving the points of dispute considers should be allowed on taxation in respect of that item.

(3) The period for filing and serving points of dispute is 28 days after the date of service of the copy bill in accordance with paragraph (1).

(4) **If a party files and serves points of dispute after the period** set out in paragraph (3), **that party may not be heard further in the taxation proceedings** unless the registrar gives permission.

(5) The receiving party may file a request for a default costs certificate if –

(a) the period set out in paragraph (3) for serving points of dispute has expired; and

(b) no points of dispute have been served on the receiving party.

(6) If any party (including the paying party) serves points of dispute before the issue of a default costs certificate the registrar may not issue the default costs certificate." (Emphasis added)

[43] The applicant, therefore, being faced with the respondent's failure to file and serve points of dispute within the time specified under rule 65.20(3), was entitled, as it did, to

apply for and obtain a default costs certificate as the next possible step within the 'taxation proceedings'. The issue of the default costs certificate by the registrar meant that the respondent would have been obliged to pay the amount stated in the bill of costs (65.21(3)). Had there been no challenge to this certificate, the 'taxation proceedings' would have been at an end.

[44] However, the mechanism in rule 65.22 by which the respondent applied to challenge this default cost certificate was yet another avenue within the 'taxation proceedings' that allowed them to continue. Rule 65.22 provides as follows:

> "65.22 (1) The paying party may apply to set aside the default costs certificate.
>
> (2) The registrar must set aside a default costs certificate if the receiving party was not entitled to it.
>
> (3) The court may set aside a default costs certificate for good reason.
>
> (4) An application to the court to set aside a default costs certificate must be supported by affidavit and must exhibit the proposed Points of Dispute."

[45] It follows from this that, where the default costs certificate is set aside by either the registrar or the court, the paying party would be placed in good stead. Their points of dispute would be properly before the court, as in this case, and a taxation hearing would proceed upon the filing of a notice of taxation by the receiving party. Thus, the taxation proceedings would continue. An application to set aside a default costs certificate under this rule does not create a new or different set of proceedings.

[46] I, therefore, find no basis for Captain Beswick's assertion that the "court's order setting aside that default costs certificate terminated the substantive appeal in relation to the certificate". The application for the default costs certificate and the subsequent application to set it aside, were not 'proceedings' by themselves, but rather, were steps, part and parcel of the taxation proceedings.

[47] It is important to note that the rules clearly distinguish between 'taxation proceedings' and a 'taxation hearing'. The former commence as already stated, when the receiving party files and serves its bill of costs. The latter is an actual hearing between the parties before the registrar, following the filing and serving of points of dispute, as well as a notice of taxation, whereby the issues joined between the parties are canvassed and costs are actually assessed. The 'taxation proceedings' encapsulate all the different steps in the process by which a receiving party recovers its costs, from the filing and serving of the bill of costs, to the grant of a final costs certificate. This includes the 'taxation hearing'.

[48] So that, in the case at bar, whilst a refusal to set aside the default costs certificate would have effectively ended the 'taxation proceedings', the court having decided to set it aside means that the 'taxation proceedings' could continue with a 'taxation hearing'. The matter is, not at an end, and therefore, not a final decision of this court.

[49] Consequently, notwithstanding that the applicant has met the minimum value requirement, the applicant is not entitled to leave to appeal to Her Majesty in Council as

of right pursuant to section 110(1)(a) of the Constitution, as the relevant decision is not a final decision of this court.

ISSUES 2 & 3: Does the appeal involve a matter of great general or public importance? Should the matter, for any other reason, be submitted to Her Majesty in Council?

A. *The applicant's submissions*

[50] The applicant relied on the authorities of **John Ledgister**, **Viralee Bailey-Latibeaudiere v The Minister of Finance and Planning and the Public Service and others** [2015] JMCA App 7 as cited in **Sagicor Bank Jamaica Ltd v Taylor-Wright** [2016] JMCA App 34, and **The Commissioner of the Independent Commission of Investigations v The Police Federation** [2018] JMCA App 43 for the principles as to the correct interpretation of section 110(2)(a) of the Constitution and how the court should determine what is of 'great general or public importance'. Based on the authorities, it was submitted that, in order to obtain leave under section 110(2)(a), the court must consider whether:

a. there is an important question of law arising from a decision of the Court of Appeal;

b. that question is applicable beyond the rights of the particular litigants so as to bind others;

c. that question is of general importance to some aspect of the practice, procedure or administration of the law and public interest; or

d. in the instance of the otherwise catchall; whether the court may require some definitive statement of the law from the highest judicial authority of the land.

[51] In that regard, the applicant firstly submitted that the appeal concerns a 'serious issue of law' and legal question, being the question of "what qualifies as a 'good reason' for setting aside a default cost [sic] certificate which has been properly obtained".

[52] Secondly, it was argued that the effect on not just this litigant, but every litigant, is obvious, as the ruling of this court has highlighted the need for greater clarity on the guidelines or considerations to be applied when setting aside a default costs certificate.

[53] Thirdly, it was submitted that the fact that the proposed appeal involves a rule of procedure, satisfies the requirement that the issue be of importance to some aspect of practice, procedure or administration, as it is directly linked to all three.

[54] Lastly, the applicant, has contended that the issue requires a definitive statement of law from the highest judicial authority, as the court has dealt with the issue of what constitutes 'good reason' in a "haphazard manner", and that "there are conflicting views in the application of what constitutes a good reason for the setting aside of a default costs certificate". The case of **Lijyasu M Kandekore v COK Sodality Co-operative Credit Union Limited et al** [2018] JMCA App 2, was relied on by the applicant to illustrate this point. The applicant asserted that, in **Kandekore,** this court found that the erroneous filing of points of dispute in the wrong court did not constitute a "good

explanation", and compared it to this case, where, the applicant asserted, this court found that "administrative inefficiency" was a good one.

[55] Consequently, it was asserted that leave ought to be granted as this area of law is not settled, and "there is a serious issue of law, an area of law in dispute and, a legal question the resolution of which pose dire consequences for the public".

B. *The respondent's submissions*

[56] The respondent has relied on the authorities of **Chen Young & Ors v Eagle Merchant Bank Ja Ltd & Anor**, **Miller v Miller** [2019] JMCA App 28, and **General Legal Council (ex parte Elizabeth Hartley) v Janice Causwell** [2017] JMCA App 16, for the principles to be applied by this court in considering the criteria in section 110(2)(a) of the Constitution, which are essentially the same as those submitted by the applicant.

[57] Based on the authorities, the respondent has submitted that the appeal is not one of 'great general or public importance' or otherwise, and ought not to be submitted to Her Majesty in Council.

[58] According to the respondent, the applicant's submissions do not accurately reflect the position of the court, and the allegation of a "haphazard" approach by the court is blatantly incorrect. In respect of the impugned decision in this case, the respondent highlighted the approach of P Williams JA in assessing what constituted 'good reason' under rule 65.22(3), particularly, that the learned judge of appeal examined four different criteria which she noted emanated from several recent judgments of this court. These

criteria included (1) the circumstances leading to the default, (2) whether the application to set aside was made promptly, (3) whether there was a clearly articulated dispute about the costs sought, and (4) whether there was a realistic prospect of successfully disputing the bill of costs.

[59] In assessing the circumstances leading to the default, it was noted that P Williams JA agreed with counsel for the respondent that the circumstances were "unfortunate and embarrassing", and stated that the explanation fell "into the category of one that may not be good but is not to be viewed as fatal to the application". The following dictum of Her Ladyship was also highlighted:

> "Were this the only factor for consideration, it may have proved difficult for the applicant to convince this court that it was deserving of further indulgence. Nevertheless, the entire circumstances must be borne in mind, so I feel compelled to resist the temptation to shut out the applicant solely because of its history."

[60] The respondent contended, therefore, that it was incorrect for the applicant to say that the court viewed 'administrative inefficiency' as a 'good reason'. It was only one of the factors considered by the learned judge of appeal, which weighed against the respondent rather than in its favour. In setting aside the default costs certificate, the court considered that the other three factors weighed in favour of the respondent.

[61] In respect of the applicant's reliance on the case of **Kandekore** in support of the assertion that the court has been "haphazard" in its approach, the respondent has submitted that this is erroneous. In that regard, the respondent asserted that the same factors considered by P Williams JA were considered in **Kandekore**, but led to a different

outcome. It was noted that the circumstances in that case were that, despite notification to the applicant's attorney that the points of dispute had been filed in the wrong court, no corrective steps had been taken. Further, it was noted, the points of dispute did not comply with the CPR. The circumstances in that case, therefore, it was submitted, were materially different from those in this case.

[62] The respondent asserted, therefore, that the application should be dismissed.

C. *Discussion*

[63] As already indicated, where an applicant is not entitled to leave as of right, that applicant may obtain leave under section 110(2)(a) of the Constitution where this court is satisfied that:

> "...the question involved in the appeal is one that, by reason if its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings..."

[64] How the court is to treat with this requirement was set out by Phillips JA in the authority of **Georgette Scott**. At paragraph 9, she stated:

> "In construing this section there are three steps. Firstly, there must be the identification of the question(s) involved: **the question identified must arise from the judgment of the Court of Appeal**, and **must be a question, the answer to which is determinative of the appeal**. Secondly, it **must be demonstrated that the identified question is one of which it can be properly said, raises an issue(s) which require(s) debate before Her Majesty in Council**. Thirdly, it is for the applicant to persuade the Court that that **question is of great general or public importance or otherwise**. Obviously, if the question involved cannot be regarded as subject to serious debate,

> it cannot be considered one of great general or public importance." (Emphasis added)

[65] These principles were applied in the decisions of **Viralee Bailey-Latibeaudiere** and **Sagicor Bank** cited by applicant.

[66] In **National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Peter Jennings** [2016] JMCA App 27, the court, per Morrison P, expounded on how this court is to determine what is to be considered a question 'of great general or public importance'. At paragraph [33], he said:

> "...in order to be considered one of great general or public importance, the question involved **must, firstly, be one that is subject to serious debate**. But it is not enough for it to give rise to a difficult question of law: it **must be an important question of law**. Further, the question **must be one which goes beyond the rights of the particular litigants** and is apt to guide and bind others in their commercial, domestic and other relations; and **is of general importance to some aspect of the practice, procedure or administration of the law and public interest**..." (Emphasis added)

[67] Further, in the decision of **The General Legal Council v Janice Causwell**[1], McDonald-Bishop JA, in great detail, summed up the principles, at paragraph [27], as follows:

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[1] The General Legal Council was granted special leave to appeal to Her Majesty in Council (see **Causwell v The General Legal Council (*ex parte* Elizabeth Hartley)** [2019] UKPC 9). On 11 March 2019, the Board allowed the appeal on the basis that this court erred when it found that disciplinary proceedings that were commenced under section 12 of the Legal Profession Act by Elizabeth Hartley, as an agent for the complainant Lester DeCordova, without his authority, were a complete nullity incapable of being made good by ratification by the complainant. The general statement of the applicable principles, made by McDonald-Bishop JA in paragraph [27] of the judgment of the Court of Appeal, is referred to because it is not erroneous, in my view.

[27] The principles distilled from the relevant authorities may be summarised thus:

i. Section 110(2) involves the exercise of the court's discretion. For the section to be triggered, the court must be of the opinion that the questions, by reason of their great general or public importance or otherwise, ought to be submitted to Her Majesty in Council.

ii. There must first be the identification of the question involved. The question identified must arise from the decision of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal.

iii. Secondly, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue, which requires debate before Her Majesty in Council. If the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general or public importance.

iv. Thirdly, it is for the applicant to persuade the court that the question identified is of great general or public importance or otherwise.

v. It is not enough for the question to give rise to a difficult question of law; it must be an important question of law or involve a serious issue of law.

vi. The question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations.

vii. The question should be one of general importance to some aspect of the practice, procedure or administration of the law and the public interest.

viii. Leave ought not to be granted merely for a matter to be taken to the Privy Council to see if it is going to agree with the court.

ix. It is for the applicant to persuade the court that the question is of great general or public importance or otherwise."

[68] It has also been accepted by this court that where the matter does not involve a question of great general or public importance, the court may still grant leave under the rubric of 'or otherwise' in section 110(2), if the court is of the view that guidance on the particular matter is required (see **Sagicor Bank**, paragraph [37]).

[69] The court may, therefore, grant leave under this section where it considers that the relevant question:

1) involves an important question of law arising from a decision of this court that is subject to serious debate; and

2) is one which goes beyond the rights of the particular litigants involved; and

3) is of general importance to some aspect of the practice, procedure or administration of the law and public interest; or

4) is one which, under the rubric of 'or otherwise', for some other reason requires the guidance of Her Majesty in Council.

[70] In the instant case, the question put forward by the applicant is essentially the question of "what qualifies as a 'good reason' for setting aside a default costs certificate which has been properly obtained".

[71] Rule 65.22(3) of the CPR provides that the "court may set aside a default costs certificate for good reason". The rules do not set out what amounts to 'good reason' or

what the court should consider in determining whether that threshold has been met. That determination is left to the discretion of the court. I am of the view, however, that it is not accurate to say that the court has treated with this discretion in a 'haphazard' way, as asserted by the applicant.

[72] Since rule 65.22 was amended in 2011, to include the relevant provision, this court has identified and outlined the factors to be considered and applied in a judicious exercise of the discretion.

[73] From the authorities, it has been clearly illustrated that, this court is to resolve or determine what is 'good reason' by considering the circumstances of each case and what would best serve the interests of justice.

[74] In **Henlin Gibson Henlin and Calvin Green v Lilieth Turnquest** [2015] JMCA App 54, F Williams JA (Ag) (as he then was), having considered several authorities, opined that the authorities show that the question of whether there is good reason or not depended on the particular facts of each case and was to be left to the discretion of the judge. At paragraphs [34] and [35], he said:

> "[34] The words 'good reason', (which are used in rule 65.22(3) of the CPR), have been judicially considered in several cases. One such case is **Kleinwort Benson Ltd v Barbrak ltd and other appeals; The Myrto (No 3)** [1987] 2 All ER 289. This is how the words were discussed at page 300 c, of the report:
>
> > 'The question then arises as to what kind of matters can properly be regarded as amounting to 'good reason'. The answer is, I think, that it is not possible to define or circumscribe the scope of that expression. Whether there is or is not good reason

> in any particular case must depend on all the circumstances of that case, and must therefore be left to the judgment of the judge...'
>
> [35] Many of the other cases that discuss the phrase 'good reason' cite the **Kleinwort Benson** case. What all these cases confirm is that whether good reason exists or not is a matter that is left to the individual judge's discretion and is dependent on the particular facts and circumstances of each case."

[75] This was underscored by P Williams JA in her decision at paragraph [57], having cited with approval the above passage.

[76] Notwithstanding this, as noted by the learned judge of appeal in her decision, at paragraph [57], the court, over the years, has identified various factors that it considers to be useful in determining what amounts to 'good reason' for setting aside a default costs certificate.

[77] Indeed, in **Henlin Gibson Henlin** at paragraph [39], although he did not outline the factors in a systematic way, F Williams JA, in determining whether 'good reason' had been shown to set aside the default costs certificate, considered the circumstances of the case in light of the overriding objective. In that regard, he considered that the circumstances of the default were that the points of dispute were filed on time but served on the wrong law firm, and having accepted that the applicants had made a genuine error, found that they should not be deprived of their opportunity to challenge the bill of costs. This decision he came to, having also contemplated that the proposed points of dispute raised a clearly articulated and bona fide dispute as to costs. He further considered that, the fact that rule 65.22(4) required that points of dispute be exhibited to an affidavit in support of an application to set aside a default costs certificate,

suggested that it must have been intended that the contents of the points of dispute be considered when assessing whether good reason existed for setting aside the certificate. He then went on to consider (at paragraph [40]) that, on the face of the points of dispute, there were arguable points with some prospect of success. He, thus, concluded that "a clearly articulated and bona fide dispute as to costs [existed]; and that it would be just and fair to set the default certificate aside and have these issues aired at a taxation of costs".

[78] These factors are not at all different from those set out in the very case of **Kandekore** relied on by the applicant, in this application and the one before P Williams JA. At paragraph [15] of **Kandekore**, F Williams JA cited with approval the factors outlined by Brooks JA in the case of **Rodney Ramazan and Another v Owners of Motor Vessel (CFS Pamplona)** [2012] JMCA App 37 that he considered useful in guiding the court in determining whether an applicant had shown 'good reason' for a default costs certificate to be set aside. Relying on the authority of **Dr Adu Aezick Seray-Wurie v The Mayor and Burgess of the London Borough of Hackney** [2002] EWCA Civ 909, Brooks JA outlined the following factors in **Ramazan**:

> "[14] The above quotation identifies specific issues, which should be considered in deciding whether a good reason existed for setting aside a default costs certificate. Without attempting to stipulate mandatory requirements it would seem that those issues would include:
>
> (1) the circumstances leading to the default;
>
> (2) consideration of whether the application to set aside was made promptly;

(3) consideration of whether there was a clearly articulated dispute about the costs sought;

(4) consideration of whether there was a realistic prospect of successfully disputing the bill of costs;"

[79] Although some aspects of the decision in **Rodney Ramazan** were later found to be made *per incuriam*, these factors have been found by this court to remain useful in coming to a just result in applications of this nature. These factors were considered and applied by P Williams JA in assessing whether there existed 'good reason' to set aside the default costs certificate against the instant respondent.

[80] Admittedly, this court was once of the view, as was pronounced in **Rodney Ramazan**, that an application to set aside a default costs certificate was to involve a consideration of the provisions in rule 26.8 of the CPR regarding an application for relief from sanctions. That view has been firmly laid to rest, with the pronouncement on more than one occasion that that conclusion was wrong, and that rule 26.8 does not apply to an application under rule 65.22(3) to set aside a default costs certificate. This was reiterated by both McDonald-Bishop JA and P Williams JA in their decisions in the instant matter, at paragraphs [8], [13], and [61].

[81] At paragraph [8] of the decision, McDonald-Bishop JA stated:

"Regrettably, this court must depart from the pronouncement of Brooks JA in **Rodney Ramazan and Ocean Faith NV v Owners of Motor Vessel (CFS PAMPLONA)** that rule 2.20(4) of the CAR applies to applications for the setting aside of default costs certificates, thereby rendering rule 26.8 of the CPR, applicable to rule 65.22(3). An examination of the relevant provisions reveals that Brooks JA's dictum was, with the greatest of respect, *per incuriam*, and as such, ought not to be followed by the Supreme Court (as was

done in **Canute Sadler and Michelle Sadler v Derrick Michael Thompson**) or by this court, in the instant case."

[82] She then went on to say the following, in respect of the criterion to set aside a default costs certificate pursuant to rule 65.22(3), which this court fully endorses:

> "[14]…**there is only one criterion to be satisfied for the setting aside of default costs certificates** under rule 65.22(3), **and that is, that 'good reason' exists for so doing. Neither the CPR nor the relevant authorities has provided an exhaustive list or closed category of factors that may constitute 'good reason'**. It may very well be that some of the matters that are required in the consideration of an application for relief from sanctions may be relevant considerations in determining whether good reason exists for the setting aside of a default costs certificate. The requirement for the application to be made promptly may be one such consideration.
>
> [15] There cannot be, however, any hard and fast rule that the requirements under rule 26.8 of the CPR, must be applied, be it strictly or modified, to applications brought under rule 65.22(3). **The question of what constitutes good reason for the purposes of the rule, falls to be determined upon an objective consideration of the particular facts and circumstances of each case, with the application of sound judgment and the overriding objective to deal with the case justly**." (Emphasis added)

[83] In the recent authority of **Fredrica Crooks & Ors v Michael Johnson (By his attorney Roland Fitzgerald Barrett)** [2020] JMCA Civ 20, in an appeal from a decision of a judge of the Supreme Court, the court again considered the applicable criteria in assessing whether 'good reason' exists to set aside a default costs certificate pursuant to rule 65.22(3). The court, per P Williams JA, acknowledged that at the time the impugned decision was considered by the judge in the court below, the procedure under rule 65.22(3) involved a consideration of the principles regarding relief from sanctions, but that this court had since determined that that approach was inappropriate. In that regard,

she cited with approval, the dictum of McDonald-Bishop JA (see paragraph [81] above). P Williams JA then noted that there was no need to delve into whether the requirements for relief from sanctions were applicable based on the circumstances. She then proceeded to consider all the circumstances of the case, including that the context of the default was such that the relevant order in respect of costs had a time limit which had not yet passed to entitle the receiving party to file a bill of costs for taxation. Notwithstanding this, she found that the paying party ought to have responded to the bill of costs, and that the stated reason for not doing so, that essentially the applicants were unable to determine if an agreement could still be reached or if they should spend resources on preparing points of dispute, was not a good explanation. Despite this, she considered that the application had been made promptly, and the draft points of dispute had merit and raised the question of whether the bill of costs was reasonable and required closer assessment. All things considered, she decided that the interests of justice would be best served by setting aside the default costs certificate and giving the appellants the opportunity to participate in the taxation process.

[84] It can, therefore be seen that, in all the cases, the circumstances involved in applications to set aside default costs certificates, that have come before the court pursuant to rule 65.22(3) have been varied, and the court has had to determine whether 'good reason' existed on the peculiar facts of each case.

[85] The applicant's assertion that "there are conflicting views in the application of what constitutes a good reason for the setting aside of a default costs certificate" is, in my

view, incorrect, and the use of the **Kandekore** decision to support this submission is ill-conceived. I accept the respondent's submissions in this regard. It is clear that P Williams JA thoroughly weighed the same factors as those applied in **Kandekore** and **Rodney Ramazan**, in assessing whether there was good reason to set aside the default costs certificate. Those same principles were applied by her, in the later decision of **Frederica Crooks**, a decision with which the rest of that panel agreed.

[86] In the instant matter, in finding that there was 'good reason' to set aside the default costs certificate, the learned judge of appeal considered that although the explanation given was not a good one, it was not fatal to the application, particularly because the application was made promptly, there was a clearly articulated dispute about the costs sought, and there were sufficient questions raised which gave the applicant a reasonable prospect of successfully disputing the bill of costs. It is simply inaccurate for the applicant to assert that, in this matter, the court viewed 'administrative inefficiency' as a 'good reason' to set aside the default costs certificate. In this regard, it bears repeating the dictum of P Williams JA in relation to the circumstances leading to the default:

> "[68] **The bearer who works for the applicant's attorneys-at-law has accepted full blame for the circumstances leading to the default**. It is endorsed on the respondent's bill of costs that she accepted service of it on 8 February 2018. She admits to failing to bring the bill of costs to the attention of the attorneys-at-law. She describes it as 'a most unfortunate oversight on [her] part'. **Mr George is correct to have said that these circumstances are unfortunate and embarrassing. This is especially so in light of the other defaults that have been committed during the history of this matter before this court**, which have led to strong

> comments from the court about the applicant's abysmal record of compliance. It is against this background that it is hard to imagine that the applicant would have received the bill of costs and failed to comply with the requirements for responding to them in a timely manner.
>
> [69] **Were this the only factor for consideration, it may have proved difficult for the applicant to convince this court that it was deserving of further indulgence**. **Nevertheless, the entire circumstances must be borne in mind**, so I feel compelled to resist the temptation to shut out the applicant solely because of its history. **This explanation falls into the category of one that may not be good but is not to be viewed as fatal to the application**." (Emphasis added)

[87] In **Kandekore**, not only was the explanation found to not be a good one, the court found that the applicant having been given notice of its error months before the default costs certificate was issued, the application had not been made promptly. Further, the court was of the view that the proposed points of dispute, owing to its lack of specificity, did not conform with the rules and did not disclose a 'clearly-articulated dispute' or a realistic prospect of success. It cannot, therefore, be accurately posited that in **Kandekore** the court found that there was no 'good reason' to set aside the default costs certificate based on the 'administrative inefficiency' that led to the default. The court, on a consideration of that factor, compounded by all the other factors that did not lie in favour of the applicant, found that "it would not be in the interests of the administration of justice to grant the application" (paragraph [25]).

[88] Suffice it to say, I am of the view that, in the relatively short time since the amendment of the rule, this court's approach to exercising its discretion pursuant to rule 65.22(3) has not been haphazard as has been advanced by the applicant. The court, from the outset, has been of the view that in an application under the rule, each case must be

assessed on its own facts to determine what course would be in the best interests of justice. The misstep in relation to the applicability of rule 26.8 has been acknowledged by this court, and the court has categorically stated that the provisions of that rule do not apply as a matter of course. There is no conflict in the law, and the applicant has indeed identified no occasion on which this court has given conflicting decisions based on the same or a materially similar set of facts. It cannot, therefore, be said that the court's exercise of discretion under that rule has occasioned any question of law in need of any serious debate, let alone an important question of general importance to some aspect of practice, procedure or administration of the law and public interest. There is no issue to be resolved, much less one that goes beyond the rights of the particular litigants in this case.

[89] Consequently, the proposed appeal raises no issue of great general or public importance, and I can see no other reason that the question proposed should be submitted to Her Majesty in Council.

Conclusion

[90] In these circumstances, the applicant is not entitled as of right to appeal to Her Majesty in Council, as, although the value of the disputed amount exceeds the requirement under section 110(1)(a), the other requirement, that the decision being appealed is a final one, has not been met.

[91] Further, there is no reason to grant leave under section 110(2)(a), since, the matter does not involve one of 'great or general public importance', nor is there any other

reason, falling under the rubric of 'or otherwise', that the matter requires the guidance of Her Majesty in Council.

[92] The motion must therefore be refused with costs to the respondent to be agreed or taxed.

F WILLIAMS JA

ORDER

Motion for conditional leave to appeal to Her Majesty in Council refused. Costs to the respondent to be agreed or taxed.