[2019] JMCA App 30

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO COA2019APP00082

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA

BETWEEN	**MARILYN HAMILTON**	**APPLICANT**
AND	**ADVANTAGE GENERAL INSURANCE COMPANY LIMITED (Formerly United General Insurance Company Limited)**	**RESPONDENT**

Ms Terri-Ann Guyah and Ms Gina Chang instructed by Ballantyne, Beswick & Company for the applicant

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

14 October and 20 December 2019

PHILLIPS JA

[1] The application before us is for permission to appeal the decision of Simmons J given on 29 March 2019. It was filed on behalf of the applicant, Marilyn Hamilton (MH), against orders made by the learned judge that, *inter alia*, set aside an order for seizure and sale that had been issued against the respondent, Advantage General Insurance Company Limited (AGI).

Background facts

[2] The procedural background facts to this application are quite extraordinary, and in the main, have been taken from the chronology of relevant events filed by AGI, as this matter continues to sprout several offshoots of myriad hearings before the court. This particular application has its genesis in a bill of costs relating to two applications before the Court of Appeal, namely application nos 143 and 144/2017, filed by MH to strike out AGI's appeal due to non-compliance with the rules and several directions from this court. The court granted AGI some reprieve but ordered costs to MH. MH filed and served her bill of costs on 8 February 2018. As no points of dispute, which ought to have been filed by 8 March 2018, had been filed, MH sought, obtained and served a default costs certificate (the certificate) in the amount of $11,484,070.00 on 12 March 2018.

[3] On 12 March 2018, the attorneys-at-law representing MH, Ballantyne Beswick & Company (BB&Co), wrote a letter to the attorneys-at-law representing AGI, Hart Muirhead Fatta (HMF), informing them that they had, on that day, served the original default costs certificate which they had obtained in the matter that same day. In BB&Co's letter to HMF, BB&Co also reminded them that pursuant to rule 65.12 of the Civil Procedure Rules 2002 (CPR), a party must comply with the order for the payment of costs within 14 days of the date of the certificate, and as a consequence thereof, BB&Co provided their banking details.

[4] AGI filed an application to set aside the default costs certificate on 13 March 2018. In that application, they also sought an extension of time to file points of dispute

to the bill of costs filed on 8 February 2018. The grounds relied on were, in essence, that: (i) the application was being made pursuant to rule 2.11 of the Court of Appeal Rules (CAR) and rule 65.22 of the CPR; (ii) there was a serious dispute as to the costs claimed, and so there was a realistic prospect of successfully disputing the bill of costs; (iii) the failure to file the points of dispute was said to be unintentional, and the default in doing so could be readily remedied within a reasonable time; and (iv) MH would not have suffered any prejudice as the date for taxation would not normally have been fixed by then.

[5] The affidavit of Andre Sheckleford in support of the application, sworn to on 13 March 2018, deponed to the matters set out in the grounds of the application. He exhibited the proposed points of dispute. He maintained that the costs had been ordered in respect of an application with no complexity as it related to the non-filing of skeleton submissions. He said that the proposed points of dispute, if accepted, would reduce the amount certified in the default costs certificate from $11,484,070.00 to $475,230.00. The challenge to the costs, he stated, was to the rates claimed by the BB&Co, the hours stated for certain tasks, and the involvement of senior counsel in matters which should not ordinarily have involved senior counsel, such as the preparation of indices to bundles.

[6] On 13 March 2018, the registrar of the Supreme Court signed an order for seizure and sale on the basis of the default costs certificate in the sum of $11,484,070.00 with interest accruing at a rate of $1,887.79 per day. The order stated that it appeared to the satisfaction of the court that the said default costs certificate

remained wholly unsatisfied. The bailiff was therefore ordered to "seize and sell such of the goods and chattels of [AGI]" for execution, the proceeds of which could be used in satisfaction of the said certificate.

[7] On 13 March 2018, AGI also filed an application for stay of execution of the default costs certificate until the determination of the hearing to set aside the said certificate. The grounds were similar to the earlier application to set aside the certificate, namely, that there was a realistic prospect of successfully disputing the bill of costs, and that there was a great risk of injustice to AGI in facing a bill of costs, which contained such a "perversely high quantum, given the nature of the application to which the costs relates".

[8] Mr Sheckleford also swore to an affidavit on 13 March 2018 in support of this application to stay the order for seizure and sale. He stated that the application was filed as it sought emergency relief. He referred to rule 65.12 of the CPR, which states that an applicant is required to comply with an order to pay costs within 14 days of the relevant certificate being issued, and on that basis contended that BB&Co would be empowered to enforce the costs award in 13 days hence. He stated further that the quantum suggested by the proposed points of dispute represented 4% of the significant amount claimed in the default costs certificate and so, with such an exorbitant amount in the bill of costs, the risk of injustice to AGI was high. He therefore prayed for urgent relief.

[9] On 15 March 2018, HMF filed a notice of appeal to a judge of the Supreme Court, in chambers, against the decision of the acting registrar, which was contained in the order for seizure and sale of AGI's goods dated 13 March 2018. AGI challenged the order for seizure and sale on two bases, firstly, that the learned acting registrar had erred in finding that the order could be made on a default costs certificate, which was not pursuant to basic costs, or concomitant with the execution of a money judgment from the court, and secondly, that she had also erred in finding that a default costs certificate may be enforced by coercive means before the expiration of 14 days from the service of the said default costs certificate. AGI sought an order that the order of the acting registrar be reversed.

[10] Mr Sheckleford swore to a further affidavit on 15 March 2018 in support of the applications referred to previously. He attempted to explain why the points of dispute had not been filed in time, which resulted in the issuance of the default costs certificate. He stated that the bill of costs had not come to the attention of HMF until receipt of MH's default costs certificate. He pointed out that AGI had then filed the applications to set aside and to stay the default costs certificate. He complained that despite the applications and the letter sent by BB&Co, which in his view, had intimated that no steps would have been taken by BB&Co for 14 days, they had, nonetheless, proceeded to extract the order for seizure and sale. Consequently, AGI felt constrained to file a notice of appeal of that order, and had done so timeously. He indicated that he was relying on rules 46.4, 65.12 and 65.22 of the CPR to support the applications that had been filed on behalf of AGI.

[11] Mrs Angel Beswick-Reid, an associate at BB&Co, responded to Mr Sheckleford's affidavit, in a supplemental affidavit filed 20 March 2018. She stated that she was relying on section 51 of the Judicature (Supreme Court) Act (JSCA) which states that an order for costs is a money judgment and can be enforced accordingly. She further relied on rules 45.2(a), 64.2(3) 43.1(2) and 43.4 of the CPR to state that MH had utilised the correct procedures to enforce the order for costs. She further stated that the rules do not require that the enforcement of the default costs certificate must wait until 14 days after its issue. She indicated that the prejudice to MH was greater than that to AGI as BB&Co was in possession of an order for seizure and sale, and the bailiff had already been directed to seize AGI's goods. Mrs Beswick-Reid also deponed that MH opposed the stay of execution as the order had not only been delivered to the bailiff, but had already been partially executed, and so there was no realistic prospect of successfully disputing the bill of costs. She also stated that the deputy registrar had already refused to set aside the default costs certificate, holding that it had been validly granted, and that AGI had been advised of this position taken by the deputy registrar.

[12] Mrs Beswick-Reid insisted that there was no possible appeal, as no points of dispute had been filed, and so the only option open to AGI was to have that application renewed before the full Court of Appeal, and the application has been filed in the Court of Appeal. However, she maintained that AGI was unlikely to meet the test for having the default costs certificate set aside. She said that given the history of the litigation, the court, in all the circumstances, should be hesitant to stay the order for seizure and sale, it having been validly obtained. She referred to the recalcitrant manner in which

HMF had been conducting this particular litigation between the parties, over a protracted period, in flagrant disobedience of the rules and orders of the court. She urged the court not to give AGI any further indulgence, as this had been occasioning continued injustice to MH. She noted that HMF had not indicated any willingness on the part of AGI to pay any sums at all toward the settlement of the bill of costs.

[13] On 15 March 2018, HMF's ex parte application for a stay of execution of the order for seizure and sale was heard in the commercial division of the Supreme Court and granted by Batts J until an inter partes hearing could take place. This hearing was scheduled for the following day and service was ordered to be effected on BB&Co.

[14] On 16 March 2018, at the inter partes hearing of the application for stay of the order for seizure and sale, Batts J adjourned the hearing of the application until 20 March 2018, at 2:00 pm, and extended the stay of execution granted on 15 March 2018.

[15] On 20 March 2018, the hearing of the application was adjourned until 25 April 2018, and the stay of execution was further extended on condition that AGI paid into court, on or before 6 April 2018, the amount of $1,600,000.00. That amount was stated to be without reference to any amount claimed or to be assessed as costs in the matter. Other procedural orders were also made.

[16] Batts J heard the application fully on 14 May 2018, and extended the stay of the order of seizure and sale until the determination of the appeal against the grant of the order.

[17] On 25 July 2018, Pusey JA (Ag) granted a stay of execution of the default costs certificate until the determination of the application to set aside the said certificate. That stay of execution remains in place. The application has since been heard by this court and a decision is pending.

[18] On 29 March 2019, the appeal against the decision to grant the order for seizure and sale was determined by Simmons J, wherein she made the following orders:

> "(1) The Order for Seizure and Sale is set aside.
>
> (2) Costs are awarded to [AGI], such costs to be taxed if not agreed.
>
> (3) Application for special costs certificate is refused.
>
> (4) Leave to appeal is refused."

The decision of Simmons J

[19] Simmons J, after setting out a short summary of the background facts already detailed above, and having examined the documentation before her, made it clear in her reasons for judgment that there were three issues which had arisen for the court's consideration. She set them out thus:

> "(i) Whether the Default Costs Certificate could be enforced by an Order for Seizure and Sale unless associated with a money judgment;
>
> (ii) Whether an Order for Seizure and Sale can be issued before the expiration of fourteen (14) days after the issue of the Default Costs Certificate by the Registrar; and

(iii) Whether the Order for Seizure and Sale can be set aside after its execution."

[20] The learned judge analysed AGI's submissions in respect of issue (1). She also referenced counsel for MH's submissions, in reliance on rule 64.2(3) of the CPR, which refers to rule 45.2, that costs may be enforced on a writ of execution. In her analysis of this issue, she referred to Part 62 of the CPR, which governs the procedure for appealing the registrar's decision to a judge of appeal, and specifically referenced rules 62.9(1) and 62.8, stating that the appeal is by way of a rehearing. She then set out the powers given to the judge in that rehearing, and confirmed that AGI had complied with the procedure. When the learned judge examined the relevant provisions in the JSCA, the rules of the CPR, and the relevant authorities, namely, **Marilyn Hamilton v United General Insurance Company Ltd** [2018] JMCC Comm 21; **Branch Developments Limited t/a Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited** [2014] JMSC Civ 40; and **Hunt v RM Douglas (Roofing) Ltd** [1990] 1 AC 398, she concluded that the default costs certificate may be enforced by an order for seizure and sale.

[21] In relation to issue 2, Simmons J referenced the competing contentions with regard to whether the order for seizure and sale had been made prematurely. Having analysed the submissions and several rules of the CPR, she concluded that the order for seizure and sale had been issued before the expiration of the time for compliance. She referred to the dicta of Willes J in **Cruickshank v Moss** [1861-73] All ER Rep Ext 1558 and that of Bramwell B in **Smith v Smith** (1874 LR 9 Exch 121, and stated that:

> "[35] In our jurisdiction, the receiving party in my opinion is required to wait until the fourteen (14) days have elapsed before attempting to enforce the order for payment in the default costs certificate. Rule 65.12 of the **CPR** is mandatory. In the event that the paying party does not comply, he or she will have to face the proverbial music.
>
> [36] In the circumstances, I agree with counsel for [AGI] that the issue of the Order for Seizure and sale was premature."

[22] With regard to issue (3), as to whether the seizure and sale can be set aside after execution, the learned judge referred to the ratio decidendi in **Henzel Clarke v David Vincent** [2013] JMSC Civ 15. In that case, George J had ordered the return of a boat which had been seized using an expired order for seizure and sale. Simmons J stated that the fact that the order for seizure and sale had been issued prematurely could not be ignored. She found that where the execution of the order was irregular due to non-compliance with the CPR, the order of seizure and sale could be set aside. She commented, however, that non-compliance did not nullify the proceedings as, in certain circumstances, rule 26.9 of the CPR permitted her to put matters right. She mentioned the fact that when Batts J ordered the stay on 14 May 2018, he had done so on condition of the payment of $1,600,000.00 into court. That had been done. She thereafter made the orders as stated at paragraph [8] herein.

The appeal

[23] Permission to appeal having been sought before Simmons J below and refused, MH, as indicated, sought permission to appeal that decision to this court. The grounds

of her application are that, *inter alia*: (i) pursuant to rule 42.8 of the CPR, the order could have been immediately enforced despite the period given to the paying party under rule 65.12; (ii) having accepted evidence that the relevant payment information was provided to AGI, the learned judge erred in finding that the order for seizure and sale was premature and improperly granted; and (iii) it was improper to set aside an order for seizure and sale that had already been enforced.

Submissions of BB&Co for MH

[24] Counsel for MH, Ms Terri-Ann Guyah, submitted that the order made by Simmons J was an interlocutory one and required permission to appeal pursuant to section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act (JAJA). But as permission to appeal was refused by Simmons J, pursuant to rule 1.8 of CAR, MH had proceeded to apply for permission from this court. Counsel said that MH was required to show that she had a real chance of success, and that had been interpreted to mean not a fanciful chance, but one that had a realistic prospect of success (see **Swain v Hillman and Another** [2001] 1 All ER 91, as approved by this court in **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Another** [2015] JMCA App 27A). Counsel therefore endeavoured to demonstrate that the proposed appeal had merit.

[25] Counsel referred to the relevant rules as set out in the judgment of Simmons J submitting that she had erred in her interpretation of them. Additionally, counsel stated that reliance by the learned trial judge on the authorities of **Cruickshank v Moss** and **Smith v Smith** was also wrong, and she had misdirected herself. Counsel challenged the ruling that MH had to wait for 14 days before seeking to execute the judgment of

the court. She said that the reliance placed on rule 65.12 was not sufficient grounds to prevent a judgment creditor from obtaining a writ of execution, and a registrar should not be stymied from issuing the writ before that period of time. Additionally, she relied on **Moulton v Kavana** Albany, October, 1839, a case from the Supreme Court of the United States of America, to support her proposition that if the framers of the Rules had intended that there should be a specific waiting period, they would have stated so specifically in that rule, or there would have been a rule dealing with that specifically.

[26] Ms Guyah also relied on the statement by Morrison JA (as he then was) in **Calvin Green v Wynlee Trading Ltd** [2010] JMCA App 3, that the CPR did not appear to prescribe the time within which an application for an enforcement order was to be made. He said that rule 65.12 of the CPR could just be giving the judgment debtor a 14 day grace period to pay.

[27] Counsel also referred to Simmons J's reliance on **Henzel Clarke v David Vincent** and submitted, in support of the statement made by George J in paragraph [18] of that case, that once the writ and warrant of execution had been levied, the judgment debtor is divested of control of the seized chattel, as control passes to the bailiff. That confirmed, for counsel, that the seizure of the goods and the undergirding writ could only be set aside if found to be unlawful. She also pointed out that in that case, the writ had expired, unlike in the instant case, where there was no such defect, either in the order for seizure and sale, and/or the default costs certificate.

[28] Counsel also submitted that there was no provision in the rules to set aside an order for seizure and sale and/or a writ of execution. In fact, she argued that Part 47 envisages suspension of the writ but not otherwise. Counsel accepted that there are provisions for appeal against the decisions of the registrar (see Part 62 and rule 65.26 of the CPR), but contended that the use of any other procedure would be an incorrect procedure, and Simmons J, therefore, ought not to have acted on it.

[29] On those grounds, counsel submitted "that the appeal had a good chance of success", and in all the circumstances the court ought to grant permission to appeal.

Submissions of HMF on behalf of AGI

[30] Counsel for AGI canvassed the chronology of relevant events filed by HMF and referred to herein. Counsel submitted that the arguments of BB&Co were inherently flawed. He submitted that it was for this court to decide whether MH had a reasonable prospect of success on appeal by examining three issues, namely: (i) whether coercive enforcement of the order for seizure and sale could commence before the expiration of 14 days after the issue of the certificate, given the wording of rule 65.12; (ii) whether, based on the letter of 13 March 2018, MH was further estopped from doing so; and (iii) whether the affidavit filed in support of the order, which did not make full and frank disclosure, could be effective.

[31] Counsel stated that on a strict interpretation of rule 65.12 of the CPR, the paying party has 14 days after an order specifying the quantum of costs within which to comply with the said order. The CPR, he submitted, places an obligation on the

receiving party not to cause any enforcement process to be utilised before the expiration of 14 days after such an order. Counsel argued that it could not be that the rules would give the debtor time to pay, and yet, at the same time, order immediate payment. If that were the case, he argued the rule giving time would then be otiose. Before promulgation of the CPR, he submitted, a reasonable time was expected to elapse from the issue of the certificate until execution (see **Perkins v The National Assurance and Investment Association** (1857) 157 ER 30; 2 H&N 72 and **Cruickshank v Moss**). Any attempt to coerce payment before a reasonable time had elapsed was considered irregular. This, counsel argued, was the common law standard (without interpreting the 14 day period given in the CPR). He therefore submitted that laying before the registrar for signature an order for seizure and sale, on the same day of the making of the order for a default costs certificate, was an abuse of the powers of the court.

[32] With specific reference to the grounds of appeal that rules 42.8 and 65.12 of the CPR should be read together, counsel stated that rule 65.12 is dealing specifically with the time for complying with an order for costs, whereas rule 42.8 has general application. He submitted that the principle "lex specialis derogat legi generali" was applicable; the specific provision would override the more general one.

[33] With regard to the proposed ground of appeal suggesting that the execution levy having commenced, the order for seizure and sale had been spent, and could not be interfered with, counsel submitted that that position was erroneous. He relied on the maxim, "ex turpi causa non oritur actio", which translated to mean that "from a

dishonourable cause an action does not arise". So, the argument ran, as the original order was flawed, any order flowing there from would also be flawed.

[34] Counsel submitted that that once the order was found to be invalid, it could not be made to be valid. He submitted that as the order for the seizure and sale was invalid and ineffective, having been issued before the 14 day period had elapsed, it was proper to set aside the order made by Simmons J. It was clear, he said, that there was no realistic prospect of succeeding on appeal in respect of the learned judge's ruling.

[35] Counsel also argued that there was a failure to provide full and frank disclosure, on an ex parte application, as at the time of presentation of material to the registrar for the issue of the order of seizure and sale, neither the letter of 13 March 2018, nor the possible alternate interpretation of rule 65.12 was disclosed. Counsel referred to the decision of Sykes J (as he then was) in the case of **North American Holdings Company Ltd v Androcles Limited** [2015] JMSC Civ 151 at paragraph [4], the well known and oft-cited speech of Lord Denning in **Bank Mellat v Nikpour** [1985] FSR 87, and that of Lord Cozens-Hardy MR in **R v The General Commissioners for the Purposes of Income Tax Acts for the District of Kensington, Ex parte Princess Edmond de Polignac** [1917] 1 KB 486, for the principles relevant to the duty of disclosure in the hearing of applications in the absence of the opposing party.

[36] Counsel argued further that on the basis of the well known and accepted legal position, the letter of 13 March 2018 gave rise to an estoppel as: (i) it set out that MH knew and acknowledged the particular rule in the CPR; and (ii) MH had misled AGI to

believe that she would adhere to BB&Co's clear statement giving 14 days to pay. This, he stated, is evidenced by the understanding of AGI demonstrated through its attorneys, HMF, upon receipt of the letter, indicating by way of affidavit in support of the application for stay and urgency, that since MH had indicated the date of service of the default certificate, MH would be able to act in 13 days from the receipt of the certificate referred to in the letter. However, to the contrary, it was immediately after the said affidavit had been served on BB&Co that the bailiff had been directed to AGI's place of business for execution of the order for seizure and sale. This, counsel said, was a clear case of estoppel by representation. He conceded, however, that these submissions had not been argued before Simmons J.

[37] Counsel closed by asserting that MH's proposed appeal had no chance of success on appeal, and urged this court to dismiss the application with costs to AGI.

Discussion and analysis

[38] The issue for determination in this application is whether, in the circumstances of the case, we should grant permission to appeal. I agree with counsel that the order setting aside a writ of seizure and sale is clearly an interlocutory order. It is also dealing with costs ordered while the substantive matter is still in train in this court. I also agree with counsel that pursuant to section 11(1)(f) of JAJA, that order requires the permission of the court in order to appeal the same. Permission to appeal the same was refused in the court below, but was pursued pursuant to rule 1.8(7) of the CAR. It was filed within the requisite time period, 14 days of the order from which permission to

appeal is being sought, viz, the order of Simmons J, which was given on 29 March 2019; and the application for permission to appeal was filed on 12 April 2019.

[39] The applicant, MH, is required to demonstrate that the appeal will have a real chance of success. The general rule is that permission will only be given if the court considers that to be so. There have been several cases from this court indicating that that means a realistic and not a fanciful chance of success (see **Swain v Hillman** and **Mechanical Services Company Limited v Clinton Ellis** [2015] JMCA App 20).

[40] It is of significance to emphasize that the court's role at this stage is to briefly consider whether there is any merit in the proposed appeal, which limits the discussion only to matters that are necessary to properly dispose of this application (see **Garbage Disposal and Sanitations Systems Ltd v Noel Green and others** [2017] JMCA App 2).

[41] It is clear to me that at the heart of this application is the true and proper interpretation of the JSCA, certain rules of the CPR, and the question of whether MH has demonstrated that the position taken by the learned judge, on the law, and her application of the law thereof to the material before her, was palpably wrong. This is the examination this court must conduct in order to ascertain whether there is any real chance of success on appeal.

[42] The learned trial judge apparently assessed the issues which required determination before her, and so I will treat with them accordingly when endeavouring

to assess whether MH has demonstrated that she has a real chance of success on appeal.

[43] With regard to issue (1), namely, whether the default costs certificate can be enforced by an order for seizure and sale unless associated with a money judgment, that requires an examination of section 51 of the JSCA and rules 45.2, 46.4(1)(a) and 65.21 of the CPR .

[44] In respect of rule 65.21 of the CPR, MH obtained a default costs certificate pursuant to the rules. It contains the signature of the deputy registrar of the Court of Appeal.

[45] Section 51(1) and (2) of the JSCA, states as follows:

> "(1) Every judgment debt shall in the Supreme Court carry interest at the rate of six per centum per annum or such other rate per annum as the Minister may by order from time to time prescribe in lieu thereof, from the time of entering up the judgment, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment.
>
> (2) In this section the expression 'judgment' shall include decree and order."

[46] Rule 43.2 reads:

> "(1) The general rule is that, once a judgment or order has become enforceable, the court must issue an enforcement order if the judgment creditor files the appropriate form of request.

(2) Where any of these Rules requires permission to begin enforcement proceedings the judgment creditor must first obtain that permission.

(3) The judgment creditor must produce with the request -

(a) the judgment or order which the judgment creditor seeks to enforce; and

(b) where required, the order giving permission to begin enforcement proceedings."

[47] Rule 46.4(1)(a) states that:

"Any judgment creditor may recover on a writ of execution -

(a) the balance of any money judgment (including costs)."

[48] As indicated previously, Simmons J had referred to those relevant provisions, and concluded that although there was no definition of the term "money judgment" in rule 46 of the CPR, in her opinion, it was "beyond dispute that costs are a sum of money". She noted that rule 46.4(1)(a) of the CPR permitted the enforcement of a "money judgment" by way of a writ of execution. Additionally, she pointed out that rule 45.2 of the CPR states that an order for payment of money may be enforced by an order for sale. In fact, on this point, the learned judge made her ruling with clarity, and I think I should set out paragraphs [24] to [27] of her reasons which are without doubt, determinative of issue (1):

"[24] An order for costs would therefore in my view, fall within the meaning of a '*money judgment*'. To my

mind, the purpose of the inclusion of the words '*including costs*' in rule 46.4(1)(a) of the CPR is to make it abundantly clear that an order for costs is included in the definition of a '*money judgment*'. Any other interpretation would be absurd and contrary to the overriding objective of dealing with cases fairly.

[25] In this regard, reference is made to the judgment of Batts J in ***Marilyn Hamilton v United General Insurance Company Ltd*** [2018] JMCC Comm 21 where in speaking to this issue, he said: -

> '*The rules are to be construed in accordance with the overriding objectives. These objectives are in no way advanced by a construction which bars enforcement by seizure and sale of a default costs certificate which is independent of a money judgment...*
>
> *It is apparent that the rule is indicating that a money judgment is to be seen as meaning a judgment for money as well as one for costs* [paragraph 8]'.

[26] I have also found the judgment of McDonald-Bishop J (as she then was) in **Branch Developments Limited t/a Iberostar Rose-Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited** [2014] JMSC Civ 40, to be quite helpful. The learned judge said: -

> '[31] It is settled on good and accepted authority that an order for payment of costs to be taxed is a judgment debt within the meaning of section 51(1) of the Act. In **Hunt v R.M. Douglas (Roofing) Ltd** [1990] 1 AC 398, the House of Lords made it abundantly clear that a judgment for costs to be agreed or taxed is to be treated in the same way as judgment for damages to be assessed, where the amount ultimately ascertained is treated as if it was mentioned in the judgment, no further order being required. According to their Lordships, a judgment debt can be construed for the purpose of section 17 of the 1838 Judgment Act (UK) [our section 51 (1)]

> as covering an order for the payment of costs to be taxed. It follows from this line of reasoning, therefore, that interest is payable on costs ultimately ascertained from date of judgment until payment.
>
> [32] It means too that the award of costs to the defendant in this case, even without more, would have stood as a judgment debt to be satisfied by the claimant....'

[27] In **Hunt v R.M. Douglas (Roofing) Ltd** (supra), Lord Ackner stated the position in the following way: -

> "For the sake of completeness I should add that [counsel for the respondents] strongly argued that an order for payment of costs to be taxed cannot be a judgment debt within section 17 of the Act of 1838 because until taxation has been completed, there is no sum for which execution can be levied. This point appears to have been raised in the *Erven Warnink* case [[1982] 3 All E.R. 312] and disposed of at the end of the judgment on the basis that the courts have accepted since its enactment, that section 17 does apply to such a judgment and accordingly the law has gone too far for that argument. I agree. This acceptance is because a judgment for costs to be taxed is to be treated in the same way as a judgment for damages to be assessed, where the amount ultimately ascertained is treated as if it was mentioned in the judgment - no further order being required. A judgment debt can therefore in my judgment be construed for the purpose of section 17, as covering an order for the payment of costs to be taxed."

[49] In paragraph [28] Simmons J ruled that, in all the circumstances, the default costs certificate may be enforced by an order for seizure and sale. There does not seem, in the light of the foregoing, that this ruling can be faulted.

[50] It is necessary therefore to examine issue (2), as to whether the order for seizure and sale can be issued before the expiration of 14 days after the issuance of the default costs certificate by the registrar.

[51] In my opinion, this only requires one to address the ordinary and literal meaning of the provision. I recognise that at the hearing in chambers of the application for stay of execution of the judgment in **Calvin Green v Wynlee Trading Ltd**, Morrison JA, at paragraphs [17] and [18], examined the interpretation to be accorded rules 43.2 and 65.12 of the CPR. He indicated that rule 43.2(1) states that the general rule is that "once a judgment or order has become enforceable, the court must issue an enforcement order if the judgment creditor files the appropriate form of request". The rule also states, which was not relevant there, that if permission is required, then evidence of that permission must be given, and that the judgment or order which is sought to be enforced must also be produced.

[52] Morison JA referred to rule 65.12 which he indicated provides "that a party must comply within an order for the payment of costs within 14 days ... if the amount of those costs ... is determined [by taxation] the date of the certificate which states the amount". The submission before him in that case was that the application for the provisional attachment of debts having been filed on the same day that the registrar's

certification of the Supreme Court's costs had been issued, was premature, as the judgment did not become crystallised until the registrar's certificate was issued, and the application had been made less than 14 days after that date.

[53] Morrison JA indicated that, on his perusal of both those provisions, there did not seem to be anything prescribing the time within which an application for an enforcement order can be made. He therefore viewed rule 65.12 as giving the judgment debtor a 14 day grace period within which to pay the costs certified by the registrar's certificate. In that case, by the time the final charging order was made, the time allotted for compliance had "long passed". Morrison JA, however, cautioned in his judgment that he had not had the benefit of detailed arguments before him on this question, and therefore, bearing in mind the position he had taken on the first ground of appeal in that case, that is, that the appellant had reached the threshold of demonstrating that the ground had, some prospect of success, he had decided to say "nothing more on [the] point."

[54] With the greatest respect to the learned President, even if the application for enforcement could be made the following day, after the registrar's certificate had been issued (which is unclear, as rule 43.2 speaks to when the judgment has become enforceable), it is very clear that the judgment/order for the payment of costs could not be enforceable until 14 days after the date of the issuance of the certificate which stated the amount. So, the order is not enforceable and could not issue before that 14 day period had elapsed. If the enforcement order could issue before then, rule 65.12

would have no efficacy whatsoever, and the "14 day grace period" would equally be ineffectual.

[55] Indeed, this is what happened in this case. The order for seizure and sale having been taken out on the day following the issue of the default costs certificate, and directed to the bailiff, the bailiff attended on the offices of AGI the day after that to execute the writ. Therefore, the "14 day grace period" referred to by the learned President would have been otiose and redundant, as the debtor would not have had the benefit of the time accorded it under the rule. The rule stated that the company had a specific time within which to comply, which must mean before enforcement of the order can be effected. This is what the learned judge found. In my opinion there does not seem to be any merit in any other interpretation.

[56] Rule 42.8 of the CPR states that the judgment or order takes effect from the day it is given or made unless the court specifies that it is to take effect on a different date. This rule is saying clearly that the judgment/order takes effect on the day that it is made. With regard to the payment of costs, the order to enforce the same becomes enforceable, subject to rule 65.12, which deals with the time for compliance with an order for costs. The time specified is within 14 days of the cost order stating the amount of such costs, or upon the certification of the amount by taxation. That provision therefore does not affect the earlier interpretation of the rules found by the learned judge and which in my view cannot be faulted. There is no chance of success on this proposed ground of appeal.

[57] Issue (3) raises the question of whether the order of seizure of sale can be set aside if it has already been executed. The argument of BB&Co was that, since there is an order from the Court of Appeal in place in respect of costs in the appeal, whether MH is successful or not in the substantive appeal, these costs can ultimately be set off against those costs. This is an argument that I do not find attractive, and I do not accept that as a reasonable proposition.

[58] The authorities make it clear that if execution of process has proceeded on a flawed basis it ceases to have effect. Once the basis for the enforcement falls away, the enforcement becomes irregular and the general rule is that it must be set aside. The learned editors of Halsbury's Laws of England, Volume 17(1), Fourth Edition, at paragraph 215, accurately state the position. There they state, in part:

> "In the High Court, if the writ of execution is irregular or ought not to have issued, the master or district judge will, in general, set it aside, and, if goods or money have been levied under it, order them to be restored, or if the party is in custody under it, order him to be discharged. Similarly, when an execution has been irregularly executed he will, as a rule, order such restoration or discharge."

Authority for that principle can be found in **Rhodes v Hull** (1857) 26 LJ Ex 265.

[59] The CPR also stipulates for such a result. Rule 43.5 states:

> "(1) The general rule is that if the court sets aside a judgment or order, any order made for the purpose of enforcing it ceases to have effect.
>
> (2) The court may however direct that an order remains in force."

[60] Accordingly, it is clear that if the order for seizure and sale is not valid, then it must be set aside. What is also clear, is that the order requiring the payment of $1,600,000.00, on condition of the grant of the stay of execution, must be discharged, and the monies paid into court by AGI must be refunded to them.

[61] The default costs certificate has been challenged by way of application to set it aside in the Court of Appeal. There is a stay of execution of that order until the determination of the application to set it aside. If that certificate is set aside, then the costs, the subject of the order for seizure and sale, would not be payable at this time, and perhaps that sum may not be payable at all, as a different amount may be determined on taxation by the registrar as due by MH, if that action is undertaken. In my view, this ground of appeal also has no merit.

[62] In the light of all of the above, the application for permission, in my view, must be refused. Costs were awarded by Simmons J to AGI on the application to set aside the order of seizure and sale, which included the costs for the application for a stay of execution by Batts J, as he had ordered that the costs of the application before him ought to abide the order of Simmons J. Those orders should not be disturbed. I would also order costs to AGI on this application to be agreed or taxed.

BROOKS JA

[63] I have had the privilege of reading, in draft, the judgment of Phillips JA. I fully agree with her reasoning and conclusion. I would only wish to add that, in my view, the

proposed appeal stood no chance of success, as rule 65.12 of the CPR is determinative of the matter.

McDONALD-BISHOP JA

[64] I have read in draft the judgment of my learned sister, Phillips JA. I agree with her reasoning and conclusion and there is nothing useful that I could add.

PHILLIPS JA

ORDER

1. The application for permission to appeal is refused.
2. Costs of the application to the respondent, Advantage General Insurance Company Limited, to be agreed or taxed.