NHLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 20/2006

APPLICATION NO: 8/2009

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

BETWEEN	SAN SOUCI LTD.	APPELLANT/RESPONDENT
A N D	VRL SERVICES LTD.	RESPONDENT/APPLICANT

Dr. Lloyd Barnett and Weiden Daley instructed by Hart, Muirhead, Fatta for the Respondent/Applicant.

Lord Gifford Q.C., Stephen Shelton and Gavin Goffe instructed by Myers, Fletcher and Gordon for the Appellant/Respondent.

June 17 and July 2 and 10, 2009.

SMITH, J.A:

1. This is an application for the variation of the order for costs contained in a judgment of this Court (Harrison, P. McCalla JA. and Dukharan J.A. (Ag.) (as he then was)) delivered on the 12th December, 2008. The appeal which was before the Court arose from an arbitration between the parties VRL Services Ltd. (VRL) and San Souci Ltd. (SSL). In the arbitration VRL claimed damages against SSL for breach of a management agreement. SSL denied the allegation of breach of agreement and in relation to damages contended that certain expenses

which would have had to be incurred by VRL in performing the agreement constituted "unrecoverable expenses" and should be deducted from the damages claimed.

2. On the 16th July, 2004, the arbitrators found that SSL was in breach of the management agreement and that VRL was entitled to damages totalling US$6,034,793.00 with interest from the date of the award. The arbitrators directed that SSL bear and pay its own costs and VRL's costs in the arbitration. They further ordered that SSL pay the Arbitrators' and Umpire's costs in the amount of J$5,962,275.00 and US$2,465.00.

3. On the 3rd September, 2004, SSL filed proceedings in the Supreme Court challenging the Award. It sought an order that the Award be set aside on the ground of error on the face of the Award with respect to both liability and damages. It seems that the costs orders of the Award were not challenged. It might be helpful to bear in mind that by virtue of section 4(h) of the Arbitration Act, the arbitrator's award is final and binding on the parties. However, section 12 (a) empowers the court to set aside an award where an arbitrator has "misconducted himself" misconduct here includes error of law or fact.

4. On the 10th February 2006 Harris J (as she then was) dismissed SSL's claim with costs to VRL.

5. SSL appealed the judgment of Harris J. The appeal was heard during the week commencing April 30, 2007.

6. On December 12, 2008 the Court delivered a written judgment and made the following orders:

> "1. The appeal against the order of Mrs. Harris J refusing to set aside the award is dismissed, in part.
>
> 2. The appeal against the award of damages is allowed and the matter is remitted to the Arbitrators to determine the issue of damages only.
>
> 3. Half the costs of this appeal and of the costs below are to be paid by the respondent, such costs to be agreed or taxed."

7. By Notice of Application for Court Orders filed January 20, 2009 the applicant, VRL Services Ltd., sought the following orders:

> "(1) Paragraph 3 of the Orders made in this appeal on 12th December 2008, be varied or revoked, pursuant to Rule 1.7 (7) of the Court of Appeal Rules 2002, and the Court's inherent jurisdiction;
>
> (2) The Appellant is to pay the Respondent's costs, or a high percentage thereof, in this Court and the Court below;
>
> (3) Costs of this application to be costs in the appeal; and
>
> (4) Such further orders as to this Honourable Court seem just."

8. The grounds on which the applicant sought the above orders were:

> "(i) the appeal in these proceedings was heard on 30th April 1st 2nd 3rd and 4th May, 2007. Judgment was delivered, in writing, on 12th December 2008, with an order that "Half the costs of this appeal and of the costs below are to be paid by the respondent such costs to be agreed or taxed;

(ii) the said order was made against the Applicant without either party to the proceedings having been afforded an opportunity to be heard on the issue of the allocation of costs in this appeal and in the court below;

(iii) the Applicant wishes to be heard by this Court on the issue of the allocation of costs in this appeal and in the court below;

(iv) the Applicant contends that the order for costs made is unjust and unfair and does not accord with the result of the appeal, and unless the said order is varied or revoked as sought the applicant will consequently suffer a real injustice;

(v) the above orders are necessary for the just, fair and effective disposal of these proceedings.

9. **Submissions**

Dr. Barnett for the applicant submits that three questions arise for the consideration of the Court:

(i) Can the Court vary the order which is in its written judgment of the 12th December, 2008?

(ii) On what grounds can the Court of Appeal vary the order?

(iii) Are the circumstances of this case such that the order should be varied?

10. With reference to questions (i) and (ii) Dr. Barnett contends that there is a general principle, namely, that an order which is made affecting rights, liabilities and/or obligations of a party can only be legally and validly made if the party affected has been given a fair opportunity to be heard on the issue. This fundamental principle, he submits, is illustrated by

the rule that an order which is made ex parte may be set aside by the court which made it on the application of the party against whom it is made; and the clear reason for that is because the absent party did not have an opportunity to be heard.

11. Another illustration of the principle, he submits, is the enshrinment of the fundamental rights provisions in the Constitution which provides in section 20 (2) that a person whose rights and obligations are being determined by a Court must be given a fair hearing.

12. Dr. Barnett submits that if a real opportunity was not given to make submissions on the question of costs, then there would not be a fair hearing on that issue. In this regard, learned counsel for the applicant points out that the attorneys-at-law for the applicant were advised by the Registrar that judgment would be delivered on the following day. Neither he nor Mr. Mahfood Q.C. who represented the applicant in the appeal was present, but Mr. Daley, a junior counsel was present when the written judgment was handed down. Those circumstances, he submits, did not give a fair opportunity to the party to read, analyse and consider the judgment and the implication of the order in the last paragraph on the last page. Until a party is seised of the matters in respect of which the Court of Appeal has decided in favour of the rival contention, no rational or meaningful submission can be addressed to the Court in respect of

costs and especially in this case where the matter was not straightforward, he argues.

13. In his written submission in support of his contention that the Court of Appeal has jurisdiction to vary or revoke its own orders even after it has been perfected, counsel for the applicant cited the decision of the English Court of Appeal in ***Taylor v. Lawrence*** (2002) 2 All E.R. 353. Other cases cited by counsel for the applicant are ***Re Harrison's Settlement*** (1955) 2 WLR 256 at 266; ***Stewart v Engel*** (2000)1 All ER 518; ***Cassell & Co. Ltd. v. Broome*** (No. 2) (1972) 2 All ER 849 and ***Phyllis Mitchell v Dabdoub et al*** (2005) App. No. 5 of 2001 unreported.

14. As to question (iii) Dr. Barnett submits that the circumstances of this case are such that the Court should vary the order as to costs because (1) the applicant VRL is the overall successful party; and (2) the issue on which SSL succeeded was a relatively minor part of the appeal both in relation to the number of issues raised and the relatively short time spent on it. Reference was made to Rule 64. 6 (1) of the Civil Procedure Rules 2002 (CPR) which is incorporated into R. 1.18 (1) of the Court of Appeal Rules 2002 (CAR).

15. Lord Gifford, Q.C. for SSL, for the respondent/appellant, submits that for the purposes of this application there are three (3) important dates, viz.,

(a) December 12, 2008 when the judgment was handed down in the presence of counsel;

(b) January 2, 2009 when the order was drawn and perfected by the Registrar; and

(c) January 20, 2009 when the application, now before Court, was filed.

16. Lord Gifford's submissions are twofold:

(1) The applicant had a fair opportunity both on the 12th December, 2008 and thereafter until the 2nd January, 2009 to raise the matter before the Court.

(2) The authorities show that until an order is perfected the Court will entertain an application to vary.

After it is perfected the jurisdiction of the Court to re-open any part of an appeal is limited in very exceptional circumstances to fundamental irregularities such as bias or the corruption of the integrity of the court process.

17. In support of his submissions learned Queen's Counsel relied on: **Practice Direction for the Court of Appeal and Supreme Court** dated 30th July, 1969; **Re Harrison's Settlement** (supra), ***Taylor v Lawrence*** (supra); ***Hardy v Pembrokeshire* County Council** (2006) All ER (D) 252 (Jul) and ***re Uddin*** (a child) (2005) 1 WLR 2398.

18. Lord Gifford contends that in the present case the applicant knew of the alleged injustice and failed to take the steps which were open to him on or immediately after the judgment was delivered. The exceptional jurisdiction, he submits, is intended to address a situation where subsequent to the judgment there comes to light something that is likely to have deprived the applicant of a fair hearing. In this case, he says, there

is no corruption of justice as described in the cases cited. The applicant, he claims, was not deprived of the right to be heard. The applicant, he argues, did not act promptly. Only if the Court had refused to hear him, could he complain that the course of justice had been corrupted.

19. It is also the contention of learned Queen's Counsel that the award of costs is well within the discretion of the court and was one which the Court could properly make. This court which, as constituted, has not had the advantage of familiarity with all the facts, should be slow to interfere. He points out that even though the appellant SSL had succeeded in part and the arbitrators found to have committed an error in respect of damages, nevertheless the appellant would be required to pay the entire costs of the arbitration since the arbitrators' award as to costs was not disturbed. Thus the order of the Court that the applicant VRL pay half the costs of the appeal and of the costs below is sound and reasonable.

Analysis of the Submissions and Authorities

20. I will start with the jurisdiction of the Court to vary or revoke its own orders. In its written submission, the applicant states that the jurisdiction of the Court as enunciated in ***Taylor v Lawrence*** has been codified by Rule 1.7 (7) of the CPR which provides:

> "The power of the court to make an order includes a power to vary or revoke that order".

This contention in my view is untenable. I agree with the submissions on behalf of SSL, that Rule 1.7 sets out the Court's general powers of case management. The Court's powers of case management come to an end when the final judgment of the Court is delivered and the order perfected. Rule 1.7 (7) does not, in my view, give the court the jurisdiction to vary or revoke its final order.

21. Both parties seem to agree that until an order is perfected the Court may entertain an application to vary its order. The Practice Directions referred to in para 17 (supra) provides that when the Court delivers a reserved written judgment, the judgment will not be read out in extenso except where the Court considers it necessary; the Court will simply announce its decision and copies of the written judgment will be made available. Significantly, these Practice Directions provide that "Any applications consequent upon the decision of the Court should be made before the Court rises". However, I do understand Lord Gifford to be saying that if the application is not made before the Court rises, the Court would have no jurisdiction thereafter to entertain any application.

22. Indeed Lord Gifford takes no issue with the English Court of Appeal's decision in **re Harrison's Settlement.** In that case an application was made to the Chancery Division of the English High Court for approval of a scheme varying the trusts of a settlement on behalf of infants, unborn and unascertained persons. Following the decision of the Court of Appeal in a

similar case, a judge in chambers made an Order approving the scheme. Before the Order was perfected, the House of Lords reversed the decision of the Court of Appeal and held that a judge had no jurisdiction to make an Order sanctioning variations in trusts in such cases. The judge thereupon recalled his Order, adjourned the case into court for further argument and there dismissed the summons. The decision of the judge was appealed.

23. The judgment of the Court of Appeal (England) dismissing the appeal was read by Jenkins, L.J. At p 188 B-C the Court stated:

> "... although the judgment dates from the day of its pronouncement, it is not perfected until drawn up, passed and entered, and anyone who acts on it before hand must take such risk as there is that it will not be drawn in the form in which it was heard to be pronounced.
>
> We think that an Order pronounced by the judge can always be withdrawn, or altered or modified by him until it is drawn up, passed and entered. In the meantime it is provisionally effective, and can be treated as a subsisting Order in cases where the justice of the case requires it, and the right of withdrawal would not be thereby prevented or prejudiced".

24. After examining a long list of authorities, the Court quoted with approval the following statement of Farwell, J. in ***Millensted v Grosvenor House Ltd.*** (1937) 1 All ER 736 at 740:

> "it is now well settled that, until an Order made by a judge has been perfected, by being passed and entered there is no final Order, and, consequently, the judge may, at any time until

> the Order is perfected, vary or alter the Order which he had intended to make".

In my judgment this is a correct statement of the law.

25. This statement of principle is consistent with the CPR's overriding objective which is applicable to appeals, see R1.1 (10) (a) CAR. In ***Stewart v Engel and Another*** (2000) 3 All ER 518 it was held that the jurisdiction to reopen until the Court's Order has been perfected, if "exercised very cautiously and sparingly, served, as a useful purpose fully in accord with the CPR's overriding objective of enabling the Court to deal with cases justly. Thus the jurisdiction might justifiably be invoked for example, where there was a plain mistake on the part of the Court ... or where a party could argue that he had not been given fair opportunity to consider an application which had taken him by surprise."

26. The next matter to be considered is whether this Court has the power at common law to reopen an appeal after it has given a final judgment and the Order made in respect of that judgment has been perfected. Two fundamental principles of our common law are involved here. One is the need to have finality in litigation. The other is the need to ensure public confidence in the administration of justice. The decision of the English Court of Appeal in ***Taylor v Lawrence*** is instructive. In that case it was held that the Court of Appeal had a residual jurisdiction to reopen

an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. At page 369 para 54 the Court, per Lord Woolf C.J., said:

> "The residual jurisdiction which we are satisfied is vested in a court of appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised. There is a tension between a court having a residual jurisdiction of the type to which we are referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice. There therefore needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for this to happen".

27. What are the exceptional circumstances in which an appellate court will exercise its residual jurisdiction to reopen an appeal which has been finally determined?

Lord Woolf, C.J. in ***Taylor v Lawrence*** said at p. 369 d-e:

> "What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening that appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations".

28. In **Re Uddin** (supra) Dame Elizabeth Butler-Sloss P. emphasised the importance of distinguishing the kind of case in which the residual jurisdiction **(Taylor v Lawrence)** might properly be invoked from one in

which the court may admit fresh evidence pursuant to ***Ladd v. Marshall*** (1954) 3 All ER 745. After stating that the ***Ladd v Marshall*** rules may promote the admission of fresh evidence where there is no more than a possibility that an injustice has been perpetrated, continued (p 556 b-c):

> "But the ***Taylor v Lawrence*** jurisdiction can in our judgment only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or the first appeal, has been critically undermined".

The learned President of the English Court of Appeal, Civil Division, said that the ***Taylor v Lawrence*** jurisdiction is concerned, at least primarily with special circumstances where the litigation process itself has been corrupted. She said at 556d:

> "The instances variously discussed in ***Taylor v Lawrence*** or in other learning there cited are instructive. Fraud (where relied on to re-open a concluded appeal rather than to found a fresh cause of action - ***Wood v Gahlings***); bias; the eccentric case where the judge had read the wrong papers; the vice in all these cases is not, or not necessarily, that the decision was factually incorrect but that it was arrived at by a corrupted process. Such circumstances are so far from the norm that they will inevitably be exceptional. And it is the corruption of justice that as a matter of policy is most likely to validate an exceptional recourse; a recourse which relegates the high importance of finality in litigation to second place."

As Lord Gifford pointed out the decision in ***Re Uddin*** indicates a refining of the criteria for the exercise of the ***Taylor v Lawrence*** jurisdiction.

29. In ***Hardy v Pembrokeshire County Council*** (2006) All ER D 252 (Jul) at para 4 Keene L.J repeated the above passage with the comment that it gives "helpful guidance as to the approach to be adopted towards the exercise of this jurisdiction . And at para. 6 Keene L.J. said:

> "As had been repeatedly emphasised in the authorities, the hurdle to be surmounted by an applicant seeking to invoke this jurisdiction has to be a very high one, since it is a jurisdiction which if exercised undermines the important principle that there has to be finality in litigation. Moreover, as was made clear in ***Taylor v Lawrence*** at paragraph 55, the effect on others of re-opening the appeal is an important consideration on any such application."

Earlier at paragraph 3 the learned Lord Justice had emphasised that this is a residual jurisdiction to correct a real injustice in exceptional circumstances and the categories of such circumstances cannot be predicted in advance for all time. Accordingly "the jurisdiction cannot be entirely confined to cases where the process of justice has been corrupted."

30. I accept the submission of learned Queen's Counsel for the appellant/respondent, SSL, that the authorities establish that among the factors to be taken into account in the exercise of the jurisdiction are:

(a) The need to avoid real injustice in exceptional circumstances.

(b) Whether there is an alternative effective remedy.

(c) The effect on others of re-opening the appeal.

(d) whether the applicant is the author of his own misfortune.

Factor (a) is of course, the **sine qua non** for the exercise of this residual jurisdiction.

31. I will now proceed to consider the application to vary in the light of the foregoing.

Real Injustice in exceptional circumstances

32. The ultimate rationale of ***Taylor v Lawrence*** is the correction of injustice. The applicant in the instant case complains that his rights, liabilities and/or obligations have been affected by the costs order of the Court without him being given a fair opportunity to be heard. The applicant is claiming that this breach of the rule of natural justice has given rise to a real injustice. Now, the issue of costs is always within the discretion of the Court. However, the general rule is that costs follow the event. As I undersand it, in practice there is no general rule that the costs should be shared 50/50 where the parties are partially successful. In such an event it is entirely a matter for the exercise of the Court's discretion based on the facts of the particular case. Rule 64.6 of the CPR lists some of the circumstances the court ought to consider in the exercise of its discretion. There is no duty on the court to invite counsel to be heard on the issue of costs. However, counsel may seek to be heard and only if the Court refuses to hear him can he complain that his right to be heard has been breached. Counsel for the applicant had three weeks, from the date the judgment was delivered to the date when the order was

perfected, to be heard on an application to vary the order. There was ample opportunity for counsel for the applicant to read the judgment and to make an application to be heard on the issue of costs before the order was perfected. The applicant relies on the case of ***Cassell & Co. Ltd v. Broome*** (No. 2) (supra). In that case the House of Lords varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on that point. It would appear that what happened in the case is exactly what happened in the instant case. However, there are important differences. Firstly, unlike the instant case the judgment in the ***Cassell*** case was in draft and had not been perfected. The House was therefore not acting under the limited residual jurisdiction since it retained seisin of the matter. Secondly, there were exceptional circumstances in the ***Cassell*** case related to doubts cast on the correctness of the decision in ***Rookes v Bernard***. It was the view of the Court of Appeal as well as two of their Lordships in the House that ***Rookes v Bernard*** was incorrectly decided, but the case was upheld by a majority of the House. Thirdly, the House of Lords is the final appellate court. Thus, there was no alternative effective remedy.

33. The case of ***Phyllis Mitchell v Dabdoub and Others*** was also relied on by the applicant VRL. In that case Mrs. Mitchell filed an appeal against the decision of the court below. Mr. Dabdoub filed a counter-

notice in which he sought to uphold the decision on other grounds and also challenged the order made by the court in relation to costs. Mrs. Mitchell did not diligently prosecute her appeal and it eventually appeared on the Registrar's Report for the 29th July, 2005. On July 20, 2005, Mr. Dabdoub filed a Notice of Application for Court Orders in which he sought to have Mrs. Mitchell's appeal dismissed for want of prosecution and to have his cross appeal in relation to the order as to costs allowed and the order as to costs varied. This application was not listed on the Court's list for hearing. On the 29th July when the Court was examining the Registrar's Report, the Court heard Mr. Dabdoub's application and made the orders sought. This order was perfected on the 8th day of August, 2005. By Notice of Motion filed on the 17th August, 2005 the 2nd and 3rd respondents successfully sought an order setting aside the order made on 29th July. The ground on which the applicants sought to set aside the Court's order was that the Court erred in allowing Mr. Dabdoub's cross appeal on the hearing of an interlocutory application, without the transcript of the proceedings in the court below and without compliance with or consideration of the rules of the court for the hearing of such appeals.

34. The ***Mitchell v Dabdoub*** case cannot assist the applicant in the present case. It can easily be distinguished from the present one. In the first place the Application was not listed for hearing on the 29th July or at

all. Further the hearing of the cross appeal and allowing it were irregular as there was no compliance with any of the rules relating to the procedure for hearing an appeal – see Rules 2.6, 2.7 and 2.9. The substantive cross- appeal as to costs was not determined in accordance with the Rules of the Court. The cross appeal was allowed in the context of the court examining the Registrar's Report pursuant to Rule 2.20 (2).

35. The applicants clearly demonstrated that they were subjected to an unfair and irregular procedure. They demonstrated that the Court's order varying the order of the judge below in relation to costs was arrived at by means of a corrupted process. In those circumstances it was clearly permissible for the Court to exercise its residual jurisdiction to re-open the appeal in order to avoid real injustice in exceptional circumstances following ***Taylor v Lawrence*** case.

36. In the instant case the applicant, in my opinion, has not demonstrated that the order for costs was arrived at by a corrupted process. The applicant has not shown that he had been subjected to an unfair procedure. The hurdle to be surmounted by an applicant who seeks to have a final order, which has been perfected, varied or revoked is a very high one. In my view, the very demanding test for re-opening the appeal set out in ***Taylor v Lawrence*** and subsequent authorities, has not been met. I accept the submission of Lord Gifford Q.C. that the complaint of the applicant falls far short of the corruption of justice

necessary to trigger this exceptional jurisdiction. The words of Keene L.J at paragraph 25 of his judgment in ***Hardy v Pembrokeshire County Council*** aptly describe this case:

> "There has been no corruption of the judicial process and no critical undermining of the integrity of the appeal as determined by this court."

Conclusion

37. For the reasons given, I , for my part, would dismiss the application to vary the order of the Court made on the 12th December, 2008 with costs to the appellant, SSL, to be taxed if not agreed.

COOKE, J.A.

38. The judgment of Smith, J.A. sufficiently sets out the background of this appeal, thus relieving me of that task.

39. By Notice of Application for court orders dated January 20, 2008, the applicant sought the following orders:

> "(1) paragraph 3 of the orders made in this appeal on 12th December 2008 be varied or revoked, pursuant to Rule 1.7(7) of the Court of Appeal Rules, 2002, and the Court's inherent jurisdiction;
>
> (2) the Appellant is to pay the Respondent's costs, or a high percentage thereof, in this Court and in the court below;
>
> (3) costs of this application be costs in the appeal;

(4) such further order(s) as to the Honourable Court seems just."

Paragraph 3 (supra) stated that:

> *"Half the costs of this appeal and of the costs below are to be paid by the respondent. Such costs to be agreed or taxed".*

40. The basis of the application before the court as set out in the applicant's written submissions were: -

> "9. The costs order this Court's made on 12th December 2008 that the Respondent is to pay half the Appellant's costs or the appeal and of the court below, was made against the Respondent without either the Respondent of the Appellant having had an opportunity to be heard on the issue of the allocation of costs. The Respondent wishes to be heard by the Court on this issue.
>
> 10. The Respondent contends that the order for costs made is unjust and unfair, given the fact that the issue on which the Appellant succeeded was a relatively minor part of the appeal both in relation to the number of issues raised and the relatively short time spent on it, and therefore the appropriate costs order is for the Appellant to pay the Respondent's costs, or a high percentage thereof, in this Court and in the court below."

41. The Applicant founded the jurisdiction of the court to "vary or revoke its order", on the English Court of Appeal judgment in **Taylor v. Lawrence** [2002] 2 All ER 353. This jurisdiction, it was submitted, had been

codified by Rule 1.7(7) of the Court of Appeal Rules 2002 which provides that:

> "The power of the Court to make an order includes a power to vary or revoke that order"

I do not accept that Rule 1.7(7) is of relevance to this application as that Rule is pertinent to orders made in respect of the court's general powers of management and not to orders made consequent upon the determination of an appeal. Further, the jurisdiction with which **Taylor v. Lawrence** was concerned, is with the residual jurisdiction to reopen an appeal which had already been determined to avoid real injustice in exceptional circumstances.

42. In paragraphs 54 and 55 of the judgment in **Taylor v Lawrence** Lord Woolf said:-

> "[54] It is very easy to confuse questions as to what is the jurisdiction of a court and how that jurisdiction should be exercised. The residual jurisdiction which we are satisfied is vested in a court of appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised. There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also

> create injustice. There therefore needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for this to happen.
>
> [55] One situation where this can occur is a situation where it is alleged, as here, that a decision is invalid because the court which made it was biased. If bias is established, there has been a breach of natural justice. The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations."

43. In **Re Uddin (a child) (Serious Injury: Standard of Proof)** [2005] 3 All ER 550 at paragraph 18 Dame Elizabeth Butler- Sloss P, in delivering the judgment of the English Court of Appeal said:

> "... But the *Taylor v Lawrence* jurisdiction can in our judgment only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically underminded. We think this language appropriate because the jurisdiction is by no means solely

> concerned with the case where the earlier process has or may have produced a wrong result (which must be the whole scope of a fresh evidence case), but rather, at least primarily, with special circumstances where the process itself has been corrupted. The instances variously discussed in *Taylor v Lawrence* or in other learning there cited are instructive. Fraud (where relied on to reopen a concluded appeal rather than found a fresh cause of action – *Wood v Gahlings*); bias; the eccentric case where the judge had read the wrong papers; the vice in all these cases is not, or not necessarily, that the decision was factually incorrect but that it was arrived at by a corrupted process. Such instances are so far from the norm that they will inevitably be exceptional. And it is the *corruption* of justice that as a matter of policy is most likely to validate an exceptional recourse; a recourse which relegates the high importance of finality in litigation to second place."

44. In this case, it cannot be said that the order in respect of costs was arrived at "by a corrupted process". Certainly, counsel for the applicant was not prevented before the conclusion of the hearing of the appeal from addressing the court on the award of costs. Admittedly, since counsel would not have known at that stage what would have been the eventual outcome of the appeal, it would have been impossible to make any submissions as to the issue of costs. However, the fact that counsel was not heard prior to the order as to costs does not mean that the hearing of the appeal "has been critically undermined".

45. It is my view that the applicant's application does not fall within the **Taylor v Lawrence** jurisdiction as explained in **Re Uddin.** However, this does not preclude the applicant from moving the court to reconsider the order in respect of costs after the judgment has been handed down. In **Cassell & Co. Ltd v Broome and another** (No. 2) [1972] 2 All ER 849, their Lordships in the House of Lords varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address on the point. This distinction between the **Taylor v Lawrence** jurisdiction and the jurisdiction to hear submissions as to the award of costs, is significant, to my resolution of this application.

46. In the **Taylor v Lawrence** jurisdiction, the fact that the judgment has been drawn up is no bar to the exercise of that jurisdiction. This is quite understandable in that there is a "corruption of justice" in the sense of how that description is used. Promptitude in moving the court to reopen an appeal is not necessarily a prerequisite in advancing such an application. The reason for this is that there would be (if successful) good reason for departing from the fundamental principle of the common law that the outcome of litigation should be final - see **Ladd v Marshall** [1954] 3 All ER 745. In my view promptitude is a relevant consideration in respect of this application.

47. The judgment was handed down on the 12th December 2008. At that time, there was counsel representing the applicant albeit, he had not appeared at the hearing of the appeal. It is now convenient to reproduce a Practice Direction of this court dated 30th July 1969: -

DELIVERY OF WRITTEN JUDGMENTS TO THE COURT

Waddington P. (Ag.)

> "In future, in cases in which the court has reserved its decision and subsequently delivers a written judgment or judgments such judgment or judgments will not be read out in extenso in court except in such cases as the court considers it necessary to do so, the court will simply announce its decision in accordance with the written judgment or, in the case of dissenting judgments, with the majority judgments, copies of which will be in the hands of the registrar from whom they may be obtained on the usual terms.
>
> Any applications consequent upon the decision of the court should be made before the Court rises."

48. This Practice Direction is set out to demonstrate that there is a provision for making applications such as the one before this court. I am prepared to accept that the substance of the judgment could not there and then be digested – hence an application to vary the costs order could not there and then be made. The Certificate of Leave to Appeal was signed by the Registrar of this court on the 2nd January 2009. The Notice of Application for Court Orders, as earlier said, was filed on 20th

January 2009. The passage of time between the handing down of the decision and the application, in the circumstances of this case, is inordinate. There was no such complexity in the judgment as to warrant this delay – nor has any reason(s) been put forward to explain this unacceptable tardiness. If the applicant had bestirred itself before the 2nd January 2009, the date of the perfection of the order of the court, then the application would have been in good order. In **Re Harrison's Settlement**, [1955] 1 All ER 185 at page 188 c, Jenkins L.J. in delivering the judgment of the English Court of Appeal said:

> "We think that an order pronounced by the judge can always be withdrawn, or altered or modified, by him until it is drawn up, passed and entered. In the meantime it is provisionally effective, and can be treated as a subsisting order in cases where the justice of the case requires it, and the right of withdrawal would not be thereby prevented or prejudiced."

49. In **Cassell & Co. v Broome**, it is to be noted that the costs order which was revisited by the House had been incorporated in the draft judgment. In **Taylor v Lawrence,** Lord Woolf cited a passage from the speech of Lord Wilberforce in **Ampthill Peerage Case** [1976] 2 All ER 411. I will content myself with reproducing the first sentence of the cited passage which reads:

> "English Law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that

> which requires that limits must be placed on the right of citizens to open or to reopen disputes."

Although Lord Wilberforce did not specifically advert to time limits, there is no reason why this should not be a relevant consideration in the particular circumstances of this case. Between the 12th December 2008 and 2nd January 2009, there was more than ample time in which to file the present application. As such, it may be said that the applicant's tardiness is of its own making. I do not think that in the circumstances of this case there is sufficient cause to qualify the fundamental principle in **Ladd v Marshall** that the outcome of litigation should be final. Of course, if on the face of it, the costs order was absurd or patently wrong, then my view as to the requisite promptitude may well be tempered. This was not so in this case.

50. The applicant sought to rely on **Phyllis Mitchell v. Dabdoub and others** (SCCA 95/2001). Briefly, the circumstances of this case were as follows: The appellant Phyllis Mitchell had lodged an appeal against a decision of the court below. Apparently the appellant experienced difficulty in obtaining the transcript of the proceedings and thus was not able to proceed in accordance with the provisions of the Court of Appeal Rules 2002. The Registrar accordingly put before the court in her Registrar's Report the failings of the appellant pursuant to Rule 2.20(2). This was to enable the court to examine the status of the appeal and after

hearing the respective parties, to make orders pertaining to the status of that appeal. There was also in existence at that time an application for court order filed by the 1st respondent Dabdoub which sought:

> "(1) that the Mitchell Appeal be dismissed for want of prosecution, and
>
> (2) that his cross appeal in respect of the order for costs in the court below be allowed."

The date for this application to be heard was the same as that of the Registrar's Report on 29th July 2005. However this matter was not included on the hearing list for that day. Apparently, the Dabdoub application was dealt with and in a document headed **"NOTICE OF RESULTS OF REGISTRAR'S REPORT"** it is recorded that:

The court made an order re – the abovementioned appeal (Mitchell

Appeal) on the following terms:

> "1 Appeal dismissed for want of prosecution. Costs of the court below varied so that costs awarded to the 1st respondent against the 2nd and 3rd respondents to be taxed if not agreed. This report is dated 5th August, 2005."

51. By Notice of Motion dated 17th August 2005, the 2nd and 3rd respondents sought to set aside the order of the court as is recorded in the Results of Registrar's Report in the following terms:

> "A The decision of this Honourable Court made on a Notice of Application heard on July 29, 2005, wherein it was decided that the cross appeal of the 1st Respondent

> would be allowed, be set aside and the cross appeal of the 1st Respondent be set down for hearing in accordance with the rules of this Court."

52. The Rules which had been disregarded were set out in an affidavit of Brian Moodie, an Attorney-At-Law. This affidavit dated 11th August 2005 in support of the motion to set aside stated the following:

> "8. None of the provisions of the Court of Appeal Rules 2002, relating to the hearing of appeals and cross appeals had been complied with for the hearing on July 29, in particular:
>
> a) there were no skeleton arguments pursuant to rule 2.6;
>
> b) there was no Record of Appeal pursuant to rule 2.7. Indeed the Court did not have the benefit of a transcript of the proceedings in the court below;
>
> c) There were no directions or Case Management Conference pursuant to rule 2.9. In particular, there were no directions fixing a date for the hearing of the cross appeal, as required by rule 2.9(3).
>
> 9. No application was made pursuant to rule 1.14 or otherwise, for any of the above requirements to be dispensed with, and no such order was made."

53. On the 20th October 2008, the court set aside the order as prayed. There is no written judgment, but I understand that there was an oral one. It would appear that the motion to set aside succeeded, because there was a fundamental breach of the procedure mandated by the rules. In effect, there had been no hearing of the cross appeal. Since this is so, it follows that to say that the hearing of the motion to set aside was a reopening of the cross-appeal, would be quite inaccurate. For this reason, the case of **Mitchell v Dabdoub and Others,** does not assist the applicant in the present case.

54. I would dismiss this application and say that the appellant/respondent should have its costs of this hearing.

DUKHARAN, J.A.

I agree with my brothers Smith and Cooke, JJA that the application should be dismissed with costs to the appellant. In particular, I am in agreement with my brother Smith J.A. that the applicant has not demonstrated that the order for costs was arrived at by a corrupted process, and that he had been subjected to an unfair procedure.

Consequently, the test for re-opening the appeal set out in ***Taylor v Lawrence*** has not been met.

ORDER

SMITH, J.A.

The application to vary the order of the court made on the 12th December 2008 is dismissed with costs to the appellant to be taxed if not agreed.