

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MR JUSTICE BROOKS P  
THE HON MISS JUSTICE EDWARDS JA  
THE HON MR JUSTICE LAING JA (AG)**

**APPLICATION NO COA2023APP00302**

<b>BETWEEN</b>	<b>TYSON WINT</b>	<b>APPLICANT</b>
<b>AND</b>	<b>LASCELLES PALMER</b>	<b>RESPONDENT</b>

**Clifton Campbell instructed by Archer, Cummings & Co for the applicant**

**The respondent is self-represented**

**8 and 12 April 2024**

**Application to extend time within which to appeal - Application for leave to appeal - Consent order - Interpretation or variation of consent order - Whether application for variation of consent order can be made directly to the court of appeal**

**BROOKS P**

[1] I have read, in draft, the judgment of Laing JA (Ag) and I agree with his reasoning and conclusion.

**EDWARDS JA**

[2] I too have read, in draft, the judgment of Laing JA (Ag). I agree with his reasoning and conclusion and have nothing to add.

## **LAING JA (AG)**

[3] The applicant, Tyson Wint, the claimant in the court below ('the applicant'), filed a notice of application on 21 December 2023 seeking the following orders:

- "1. That there be an extension of time within which to file the Notice and Grounds of Appeal in the matter herein.
2. That the hearing of this application be merged and heard as the appeal herein.
3. Such further and/or other relief as may be just."

[4] On 5 April 2024, he filed an amended notice of application ('the notice of application') which in addition to these orders, sought the following order:

"The Applicant do have leave to appeal the Consent Judgment made on 28 October 2011, to seek clarification and or correct an error in same".

[5] The grounds in support of the notice of application are:

- i. The perfected Consent Order from which the Applicant is appealing was delivered in the Supreme Court on the 8th day of December 2011 and served on the Respondent on the 16th of April 2012.
- ii. Attorney-at-Law for the Defendant incorrectly (sic) the Applicant's Attorneys-at-Law that the Defendant was covered by a policy of insurance in the sum of Three Million Dollars when in fact it was only Two Million Dollars.
- iii. The Applicant's Attorneys-at-Law in good faith agreed the terms of the consent order requiring Advantage General Insurance Co. Ltd to pay part of the judgment to the Applicant of Three Million Dollars whilst the Defendant would pay Seven Hundred and Fifty Thousand Dollars.
- iv. The Applicants [sic] thereafter were contacted by Advantage General Insurance Co Ltd and discovered

that the policy limit of the Defendant was in fact only Two Million Dollars.

- v. An Attempt [sic] was made to have the order varied to no success in the Supreme Court.
- vi. That the Applicants [sic] have a reasonable prospect of succeeding in this appeal.
- vii. The Respondent would not be prejudiced by the granting of this Order.
- viii. That the Court is empowered to grant the orders sought under Rule 1.7 (2)(e) and Rule 1.11(2) of the Court of Appeal Rules.
- ix. That the hearing of the application be merged into the hearing of the appeal to save costs."

[6] The application had its origins in a claim filed by the applicant against the respondent, on 29 July 2006, for personal injuries sustained in an incident in which the applicant was hit from his bicycle by a motor vehicle which was being driven by the respondent. The applicant obtained an interlocutory judgment in default of defence on 20 January 2010 and at the hearing of the assessment of damages, the parties agreed to the consent judgment made on 28 October 2011 ('the consent judgment'), which was entered in the following terms:

"BY CONSENT, Judgment for the Claimant against the Defendant in the sum of \$3,750,000.00 inclusive of interest and costs, being \$3,000,000.00 to be paid by the Insurers Advantage General Insurance Company Limited and the balance of \$750,000.00 to be paid by the Defendant to the Claimant's Attorneys-at-Law at the rate of not less than \$5,000.00 per month until fully paid."

[7] The applicant contends that the respondent did not honour the terms of the consent judgment and the applicant took out a judgment summons against the respondent to effect its enforcement. The hearing of the judgment summons came up for hearing before the master in chambers ('the master') in December 2023.

[8] The applicant asserts in para. 5 of his written submissions, that at the hearing of the judgment summons, “the master raised the issue of the wording of the consent order and whether the Respondent is only to pay the sum of Seven Hundred and Fifty Thousand Dollars or One Million Seven Hundred and Fifty Thousand Dollars”.

[9] The applicant further states in para. 6 of his written submissions that “Consequently, to avoid all doubt the Applicant has made this application to the Court of Appeal for correction and clarification of the judgment”.

[10] Although ground v in support of the application, states that “An Attempt was made to have the [consent] order varied to no success”. It is unclear what was the precise nature of those proceedings, but it is to be noted that this assertion is not of any significance for the purposes of considering the notice of application, as there is no expressed challenge to any order which embodies the failure of that attempt.

[11] Implicit in the fact that the applicant has now included an application for leave to appeal the consent judgment, is a recognition that leave to appeal is required.

[12] However, it appears to me that the applicant is not seeking to appeal the consent judgment per se, nor is he seeking to impugn its validity, but it appears that what is being sought is this court’s assistance in clarifying the consent judgment and/or “correcting” what he submits is an error in its contents. The applicant’s position is captured in the conclusion of his written submissions which state:

“17. Therefore, we ask that this Honourable court do clarify the judgement and order that the Defendant is responsible to pay the sum of Three Million Seven Hundred and Fifty Thousand Dollars less the sum of Two Million Dollars already paid by his insurers and the sums already paid by himself to date.”

The applicant wishes to avoid the plain and ordinary meaning of the words used in the consent judgment and to have it amended to reflect his proposed construction, which is that the respondent is liable to pay the difference between the judgment sum of

\$3,750,000.00 (inclusive of interest and costs), and the limit payable by Advantage General Insurance Company Limited ('the insurance company'). The applicant asserted that he was unaware that the limit of the policy was \$2,000,000.00 until after the consent judgment was entered. If the consent judgment is amended or interpreted in accordance with the applicant's wishes, the liability of the respondent will increase by at least \$1,000,000.00.

[13] To the extent that this is relevant, it is advanced in ground viii in support of the notice of application, that this court is entitled to grant the orders sought by exercise of its powers under rule 1.7(2)(e) of the Court of Appeal Rules. This rule provides that except where these rules provide otherwise, the court may direct a separate appeal on any issue. However, for reasons which will become apparent from the analysis below, this rule cannot avail the applicant.

### **Analysis and conclusion**

[14] Section 11(1)(e) of the Judicature (Appellate Jurisdiction) Act stipulates that no appeal shall lie:

"... without the leave of the Judge [of the Supreme Court] making the order or of the Court of Appeal from an order made with the consent of the parties or as to costs only where such costs by law are left to the discretion of the court;"

Therefore, the applicant requires leave to appeal before the filing of a notice of grounds of appeal to challenge the consent judgment (see **George Brown (sued in his capacity as the Referee of Titles) v Roy Dinham (executor of estate Imogene Walker, deceased)** (unreported), Court of Appeal, Jamaica, Motion No 9/2007, judgment delivered 20 December 2007). The principles applicable to an application for leave to appeal a consent judgment have been addressed at length by this court in **Leslie Dacosta Williams v Teleith Evelyn Williams** [2022] JMCA Civ 30 ('**Williams v Williams**') and **Beverley Simms and Donovan Simms v Lionel Johnson** [2019] JMCA Civ 19.

[15] In **Williams v Williams**, at para. [35] Edwards JA identified the proper procedure to be adopted to set aside a consent order as follows:

“[35] An application to set aside a consent order cannot be made in the original action or by way of an appeal where no evidence of the vitiating factors had been ventilated in the court below in fresh proceedings (see 3rd edition Halsbury volume 22 paragraph 1672 page 792 and the case of **Re Affairs of Elstein** [1945] 1 ALL ER 272, cited therein. That case was considered and applied recently in this court in **Beverley Simms and anor v Lionel Johnson**). A court may also refuse to set aside a consent order that it could otherwise have set aside, on the basis of delay in the making of the application to set aside.”

Edwards JA also observed that the principles are the same where the application is to vary a consent order and referred to the case of **Michael Causwell and Anor v Dwight Clacken and Anor** (unreported) Court of Appeal, Jamaica, Appeal No 129/2002, judgment delivered 18 February 2004 (**Causwell v Clacken**).

[16] In the case of **Causewell v Clacken**, Smith JA considered the scope of the court’s jurisdiction to vary a consent order and made the following observation at page 15 of the judgment:

“A Consent Order has all the attributes of an order made after a contest save that the parties cannot appeal without leave. It is not in dispute that generally a judge may not change a final order once it is perfected and entered. There are, of course, a few exceptions, for example the correction of a clerical error, or the clarification of the judgment, or a variation to facilitate the working out of the order. The authorities show that where a consent order evidences or embodies a real contract between the parties the court will only interfere with it on the same grounds as it would with any other contract, for example misrepresentation, mistake or fraud.”

[17] The applicant’s primary ground for seeking the variation of the consent judgment, in this case, is based on the allegation that there may have been a misrepresentation to

the applicant, by counsel for the respondent, concerning the monetary limit of the applicant's protection under his insurance coverage with the insurance company. These allegations, if proven, could arguably provide a basis for the amendment of the consent judgment. It is patently clear that any interrogation of this issue would involve evidence related to the circumstances under which the consent order was made. However, the applicant has not met an essential procedural and jurisdictional hurdle and has erred in directly approaching this court by filing the present notice of application. This is a fatal error that makes a detailed analysis of whether the applicant has an arguable appeal otiose.

[18] Where there is a dispute touching and concerning the interpretation of a consent order, this should be resolved by the usual operation of the hierarchical structure of the courts. Whereas the assistance of the courts is available to litigants to settle issues related to the interpretation or variation of a consent order, so as to give effect to the intention of the parties, these are not issues that are to be considered by a direct reference to an appellate court as a first step. In this case, this is demonstrably so having regard to the reasons advanced by the applicant for seeking the court's assistance in amending the consent judgment. Recourse to this court may be had only after there has been a decision by a court of first instance refusing to amend, or improperly exercising the jurisdiction to amend the consent judgment, or conceivably, after there has been a decision that amounts to an incorrect interpretation of the consent order, although no formal amendment is done thereto.

[19] Authority for the conclusion that the notice of application for leave to appeal to this court is not the appropriate route to amend the consent judgment can be found in the fact that in all the cases brought to the court's attention in which an appellate court has considered the issue of an application to vary a consent order or an application arising from a dispute as to its proper construction, these were appeals from a decision of a lower tribunal and not cases in which the appellate court was the direct forum for the resolution of the substantive dispute relating to the consent judgment (see for example

**Siebe Gorman & Company Ltd v Pneupac Limited** [1982] 1 All ER 377; **Causewell v Clacken; Williams v Williams**).

### **Conclusion**

[20] The general rule is that this court will only grant leave to appeal where the appeal has a “real chance of success” (see **Donovan Foote v Capital and Credit Merchant Bank Limited** [2012] JMCA App 14). However, in these circumstances in which the applicant has failed to adopt the correct procedure to achieve his desired objective of effecting an amendment of the consent judgment, it is unnecessary to consider the merits of the application for leave to appeal and whether the appeal would have a real prospect of success. The proposed appeal is bound to fail, and the court must refuse the notice of application. Accordingly, I propose that the notice of application be refused.

### **BROOKS P**

#### **ORDER**

1. The application for an extension of time within which to file a notice and grounds of appeal is refused.