



[2026] JMCC Comm 06

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**COMMERCIAL DIVISION**

**CLAIM NO: SU 2024 CD 00409**

**IN THE MATTER OF NEPAL  
DEVELOPMENT LIMITED, a limited  
liability company duly registered under  
the laws of Jamaica bearing Registration  
number 91,662;**

**AND**

**IN THE MATTER OF Sections 115 and  
213A of the Companies Act of Jamaica**

<b>BETWEEN</b>	<b>GAREY WHITTAKER</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>ANDREW KIDD</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>DELROY NICHOLS</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>NEPAL DEVELOPMENT LIMITED</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>AND</b>	<b>DEVON BARRETT</b>	<b>INTERESTED PARTY</b>

**Appearances: Mr David Wong Ken and Ms Melissa McLeod instructed by  
Wong Ken & Company for the Claimant**

**Mr Douglas Leys K.C and Dr Delroy Beckford instructed by Samuel Beckford  
Attorneys-at-Law for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants**

**Mr Kevin Powell K.C and Ms Timera Mason instructed by Hylton Powell  
Attorneys-at-Law for the Interested Party**

**Heard: 4 December 2025, 21 January 2026, 13 February 2026 and 27 March  
2026**

**Civil Procedure – Application to Strike Out Claim – Application for Interlocutory Injunction – Application to Extend Time To File Defence – Application for Default Judgment – Application for Immediate Taxation Of Costs – The Judicature (Supreme Court) Act s. 49(h) – The Companies Act s.10(1), Article 59 of Table A, Article 57 of Table A – Civil Procedure Rules (“CPR”) 2002 (as amended on the 3rd of August 2020) Rules 1, 1.1(2)(a), 9.3 (4), 10.3, 10.3(9), 17.1(1)(a), 17.1(1)(b), 26.3(1)(b), 64.3, 64.5(1), 64.6, 65.8, 65.15 and 65.16.**

**BROWN BECKFORD J**

**INTRODUCTION**

[1] The Claimant, Garey Whittaker, brought a claim against the Defendants, Andrew Kidd, Delroy Nichols and Nepal Development Limited, seeking declarations and injunctions with respect to the creation of 6,000 Ordinary Shares in Nepal Development Limited allotted to Andrew Kidd, based on an Ordinary Resolution purporting to increase the share capital of the company. Mr Whittaker is the holder of 600 of the issued share capital of 1,000 ordinary shares and a director in the company. Mr Andrew Kidd was the holder of the balance of 400 shares of which, by order of the court in **Claim No. SU 2022 CD 00295**, the Interested Party, Mr Devon Barrett, is the beneficial owner. There has been an appeal filed. (There appears to have been a stay of the judgment, which was later lifted)

[2] This is the latest in a series of judgments delivered in this claim. The Court previously dealt with an application by the 1st and 3rd Defendants for recusal and leave to appeal the Order refusing that application. The Court then dealt with the application of the 1st and 3rd Defendants to strike out the claim. That application being refused, the Court considered and granted the Claimant’s application, supported by the Interested Party, for an interlocutory injunction. The Court now comes to consider the 1st and 3rd Defendants’ application for an extension of time to file their Acknowledgement of Service and Defence, and, if necessary, the Claimant’s application for default judgment.

[3] The decisions in the application to strike out claim and for an interlocutory injunction were delivered orally with a promise to produce a written judgment which now forms part of this judgment. This judgment is comprised under the following headings:

APPLICATION TO STRIKE OUT CLAIM

APPLICATION FOR INTERLOCUTORY INJUNCTION

APPLICATION TO EXTEND TIME TO FILE DEFENCE

APPLICATION FOR DEFAULT JUDGMENT

APPLICATION FOR IMMEDIATE TAXATION OF COSTS

**APPLICATION TO STRIKE OUT CLAIM**

**BACKGROUND**

[4] This is an application brought by the 1st and 3rd Defendants (the Applicants or the Defendants) to strike out the claim filed on 2 May 2025, pursuant to the **Civil Procedure Rules (“CPR”) 2002 (as amended on the 3rd of August 2020)** Rule 26.3 (1)(b) and/or alternatively pursuant to the inherent jurisdiction of the court.

[5] The Applicants contend that identical declarations were granted in the Consent Order and Orders made on Default Judgment by the court in the related matter of **Claim No. SU 2022 CD 00482** where this Claimant brought an action against Andrew Kidd, Loveine Dyke and Nepal Development Limited. Default Judgment was entered against the 1st defendant Mr Kidd as follows:

2. The Court declares that:

- a. The meeting convened on 13 February 2020 and the resolutions passed or decisions taken at that meeting were in breach of the Articles of the 3rd Defendant and were null and void;
- b. The purported allotment to and subsequent forfeiture by the 1st Defendant of the 6,000 shares was in breach of the Claimant’s pre-emptive rights and void and of no effect; and
- c. The 1st Defendant breached his duty owed to the Claimant when he purported to issue 6,000 shares at an undervalue.

[6] The relevant orders made by consent against the 2nd defendant Ms Dyke were as follows:

The 2nd Defendant shall rectify the records of the 3rd Defendant to what they were immediately prior to 13 February 2020, that is to say:

- a. Cancel the newly created 6,000 ordinary shares and return the share capital to \$85,000,000, comprised of 1,000 ordinary shares valued at \$85,000 per share;
- b. Remove the 2nd Defendant as a shareholder and rectify the shareholding to 600 ordinary shares to the Claimant and 400 ordinary shares to the 1st Defendant;
- c. Remove the 2nd Defendant as a Director and return the directorship to the Claimant and the 1st Defendant; and
- d. Remove the 2nd Defendant as the Company Secretary and return Nicole Jacobs to being the Company Secretary (Ms Jacobs having agreed to said reappointment), by no later than 31 December 2023.

[7] The relevant orders made on default judgment being granted against the 3rd defendant Nepal Development Limited were as follows:

2. As against the 3rd Defendant, the Court declares and directs that:
  - a. The purported issuance of 6,000 ordinary shares in the 3rd Defendant was in breach of the Articles of the 3rd Defendant and was null and void;
  - b. Only 1,000 shares in the 3rd Defendant have been lawfully issued;
  - c. All resolutions passed or decisions taken by the 3rd Defendant in general meetings or otherwise premised on either the 1st or 2nd Defendant being the holder of 6,000 shares are null and void;
  - d. This Statement of Increase of Share Capital dated 27 March 2020 purporting to increase the share capital of the 3rd Defendant by an additional 6,000 ordinary shares is struck out;
  - e. The 3rd Defendant is to file amended Annual Returns for the years 2019, 2020 and 2021 reflecting that only 1,000 shares have been lawfully issued and allotted by the 3rd Defendant;
  - f. The 3rd Defendant shall immediately rectify the register of directors to reflect that the directors of the 3rd Defendant are the Claimant and 1st Defendant;

- g. The 3rd Defendant shall immediately rectify the register of members to reflect that the members are the Claimant and the 1st Defendant;
- h. The 3rd Defendant is to file a NOTICE OF APPOINTMENT OF/CHANGE OF DIRECTORS adding Garey Whittaker as a Director and removing Loveine Dyke as a Director; and
- i. The 3rd Defendant file a NOTICE OF APPOINTMENT OF/CHANGE OF COMPANY SECRETARY, adding Nicole Jacobs and removing Loveine Dyke.

## **SUBMISSIONS**

**[8]** The Applicants argued that the claim seeks to relitigate issues that were already conclusively determined, relief having been granted twice by way of the default judgments and consent order. They suggested that not only is the new claim an attack on orders previously made and a waste of judicial resources, but also that it is an oppressive tactic being used against the Defendants. They contended that a proper recourse ought to have been the enforcement of the orders by way of contempt proceedings.

**[9]** The Applicants did not dispute the Claimant's contention that the Defendants have, since the making of those orders, taken certain actions to increase the number of shares and their allotment to Mr Kidd. Still, they contend that, in the circumstances, the new claim constitutes a textbook example of cause of action estoppel.

**[10]** King's Counsel, on behalf of the Applicants, suggested that Counsel for the Claimant and Interested Party have mischaracterised the law and the facts. He contended that the wrongdoing complained of did not, as the Claimant suggested, constitute a new cause of action. In this regard, he suggested that the Claimant confused the act of the breach with the subject matter of the claim.

**[11]** The issue, he contended, which is the subject matter of the dispute, is the number of shares. He argued that the court had, in the cases referred to already, declared the lawful share capital of the 3rd Defendant company. The actions complained of, at the highest, constitute only a potential breach of the Orders made in that claim. This repackaging of the previous claim in a new wrapper is vexatious to the Applicants in that it forces them to re-litigate a settled issue.

**[12]** The Claimant and Interested Party reject this argument on two grounds:

Firstly, the judgments constitute declaratory judgments for which the rules relating to the enforcement of a judgment would be inapplicable.

Secondly, they say this claim goes beyond the declarations previously sought. The relief now claimed, which could not reasonably be sought in the previous action, seeks to prevent the 1st Defendant from taking steps in the future which would be inimical to the Claimant's interest. The Applicants, they contend, were wrong in focusing on the nature of the breach as the cause of action. They further argue that the facts are actually different, though similar action was taken. For a cause of action estoppel to arise, the claim would have to be premised on the same actions.

**[13]** The Claimant and Interested Party have also not taken a position that there was any breach in relation to the consent judgment. They argued that the actions to be taken by Miss Dyke, in compliance with the court's ruling, have been taken outside of her jurisdiction as company secretary by the actions of the Defendants now being complained of. Further, they said, there is no collateral attack on the previous orders as the orders now being sought were in addition to those orders, the earlier orders merely constituting a background to this claim.

## **LAW & ANALYSIS**

**[14]** There is no dispute between the parties as to the applicable law, and the Court agrees generally with the expositions set out in the submissions. The law in this area is also well traversed. The guiding principle for the court is that the power to strike out a party's case is not to be exercised lightly. It is an extreme, at times "draconian" measure, which should be used sparingly and as one of last resort. The court should exercise this power with caution and then only in the clearest of cases.

**[15]** To determine this application, the nature of the orders made in claim number **SU 2022 CD 00482** must be examined. This is because there is a difference in approach to enforcement in relation to a declaratory judgment versus an executory judgment. It must first be remembered that the nature of declaratory relief is a declaration of rights, the effect being not the creation of rights, but merely an indication of what they have always been.

[16] In **Bowen v Robinson** [2010] JMCA App 27, Morrison JA (as he then was) reiterated the distinction by reference to Zamir & Woolf 2nd edition paragraph 1.02. He said:

*[10] It will immediately be seen that the judgment is in substance declaratory, rather than executory, by which I mean that although it does make a pronouncement with regard to the 1st defendant's status as a member of the House of Representatives, it does not purport to order the 1st defendant to act in a particular way, such as to pay damages or to refrain from interfering with the claimant's rights, either of which would be enforceable by execution if disobeyed. The distinction between the two types of judgment is well expressed by Zamir & Woolf as follows (in 'The Declaratory Judgment', 2nd edn. para. 1.02):*

*"A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words, coercive judgment which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way, for example, by an order to pay damages or to refrain from interfering with the plaintiff's rights; if the order is disregarded, it can be enforced by official action, usually by levying execution against the defendant's property or by imprisoning him for contempt of court. A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant. Thus the court may, for example, declare that the plaintiff is the owner of certain property, that he is a British subject, that a contract to which he is a party has or has not been determined, or that a notice served upon him by a public body is invalid and of no effect. In other words, the declaration simply pronounces on what is the legal position."*

[17] It is readily obvious that if the orders made by the court were declaratory, the arguments by the Applicants, that the proper recourse of the Claimant would be to seek enforcement, would fall away.

[18] I do not think that it could be argued otherwise than that the default judgment entered against the 1st defendant was a declaratory judgment. There was no requirement that he take any course of action, nor was there any order stipulating that

he refrain from doing any act. The orders (a) to (d) in the default judgment against the 3rd defendant were also clearly declaratory. The other orders gave effect to the declarations. The consent orders against the 2nd defendant could be deemed executory, but no breach has been complained of in relation to these orders. It follows that there could be no enforcement proceedings where there is no breach.

[19] A critical consideration is whether the declarations covered future actions. In the first place, the declarations were not accompanied by any injunctive relief barring either the 1st or 3rd defendants from increasing the share capital in the future. The declarations were related to a specific event, the meeting of 13 February 2020, and the decisions and actions flowing therefrom. It does not follow inexorably that every subsequent meeting and action would be in contravention of those declared rights, or that the rights remained the same in perpetuity.

[20] A by-product of these orders, however, was that any act that was required to be done by the members of the company or the directors of the company would include Mr Whittaker. To the extent that the actions now complained of breached that requirement, prima facie, they were unlawfully carried out. This is the crux of the Claimant's position; that the purported increase of shares on 21 April 2024 constituted a completely different cause of action and were different factual circumstances from the first claim. This argument is unassailable. The Applicants' position that the issue was the number of shares is, to an extent, correct. The fallacy, however, lies in not recognising the separate meetings and resolutions effecting the increases in shares. The first resolution increased the shares by 6,000 shares at \$20,000.00 for each share, and the second increased the shares by 6,000 shares at \$20.00 per share. Each act of increasing the shares was done separately, on separate occasions, based on resolutions passed at different meetings.

[21] In the event that I am incorrect that the two claims are based in different causes of action, the matter of **Guthrie v Guthrie** [2022] JMCA App 5 gives some guidance. In that case a declaration was made that the parties were each entitled to a 50% share in a property. Consequential orders were made relating to the valuation, purchase, and sale of the property. The defendant was in breach of the orders, causing the claimant to bring a claim by the filing of a fixed date claim form seeking declarations pertaining to the breaches and then an order for payment.

[22] The applicant applied to strike out the second claim on the ground that it was an abuse of the process of the court as it amounted to a re-litigation of issues that were addressed in the first claim, the enforcement of which was statute-barred. The application was refused. The applicant sought to appeal those orders and prayed for a stay of proceedings pending the outcome of the appeal proceedings.

[23] Simmons JA first considered whether the orders made in the first claim were declaratory or executory. After repeating the oft-cited text from **Zamir and Woolf** and referring to the judgment of Morrison JA in **Bowen v Robinson**, among other cases, she concluded that the orders were primarily declaratory in nature, not requiring any course of action or stipulating that the applicant should refrain from doing any acts prejudicial to the interests of the respondent. The other orders were considered as part of the working out of the declaratory orders in accordance with the parties' respective interests. She went on to indicate that the declaratory order was not capable of enforcement.

[24] In that case, there had been a breach of the consequential or working out orders, and it was necessary to initiate new proceedings to seek executory orders, the breach of which could then be the subject of the enforcement processes of the court. With respect to whether the second claim amounted to an abuse of process, Simmons JA pointed out that the relief being sought had to be scrutinised. In that case, the relief was distinguishable as the applicant was not seeking to address the issues which arose on the earlier claim but was seeking the grant of coercive orders capable of enforcement. As the claimant there was seeking to enforce the declaratory orders, bringing a claim for executory orders was necessary.

[25] In the instant claim, the remedies now being pursued by the Claimant seek declarations, wider in scope than the first claim, as it relates to the meeting convened on 21 April 2024 and the resolutions and decisions taken there, and also include an application for injunctions to prevent the Defendants from taking similar steps in the future. The claims are grounded in separate causes of action and are not particulars or breaches of the original orders. Issue estoppel does not arise.

[26] For the reasons given under **APPLICATION FOR INJUNCTION** below, the claim should not be struck out for nondisclosure.

[27] The Court concludes, consequently, that bringing this claim does not constitute an abuse of the court's processes by which the Court should exercise its discretion to strike out the Claimant's case, either under the Civil Procedure Rules or its inherent jurisdiction. The 1st and 3rd Defendants' application is refused.

## **APPLICATION FOR INJUNCTION**

### **LAW & ANALYSIS**

[28] The law is set out generally in the submissions, and I agree and adopt them. The Court has jurisdiction to grant the interim relief pending a final decision to be made by the Court pursuant to its inherent jurisdiction, and to **S.49(h) of The Judicature (Supreme Court) Act** which, confers the relevant powers as follows:

*A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that such order should be made and any such order may be made either unconditionally or upon such terms and conditions as the court thinks just...*

[29] **Rules 17.1(1)(a) and 17.1(1)(b) of the Civil Procedure Rules ("CPR") 2002 (as amended on the 3rd of August 2020)** also provide that the court may grant interim remedies, including interim injunctions, prohibitive or mandatory, and interim declarations. The guiding principles are from the seminal cases of **American Cyanamid Co. v. Ethicon Ltd.** [1975] 1 All E.R. 504 and **NCB v Olint** [2009] J.C.P.C. 16, were restated by Mangatal J in **Williams, Ralph and Williams Marc et al v The Commissioner of Lands and Times Square West Holdings Limited** [2012] JMISC CIV 118 as:

### **GUIDELINES FOR THE GRANT OF AN INTERIM INJUNCTION**

*[34] The guidelines for the grant of an interim injunction until trial (or interlocutory injunction), are set out in the oft-cited case of **American Cyanamid Co. v. Ethicon Ltd.** [1975] 1 All E.R. 504, and more recently in the decision of the Judicial Committee of the Privy Council in **NCB v Olint** [2009] J.C.P.C. 16. Basically, the following considerations arise:*

*(a) Is there a serious issue to be tried? If there is a serious question to be tried, and the claim is neither frivolous nor*

vexatious, the court should then go on to consider the balance of convenience generally.

- (b) As part of that consideration, the court will contemplate whether damages are an adequate remedy for the Claimants, and if so, whether the Defendants are in a position to pay those damages.
- (c) If on the other hand, damages would not provide an adequate remedy for the Claimants, the court should then consider whether, if the injunction were to be granted, the Defendants would be adequately compensated by the Claimants' cross-undertaking in damages.
- (d) If there is doubt as to the adequacy of the respective remedies in damages, then other aspects of the balance of convenience should be considered.
- (e) Where other factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are designed to preserve the status quo.
- (f) If the extent of the uncompensatable damages does not differ greatly, it may become appropriate to take into account the relative strength of each party's case. However, this should only be done where on the facts upon which there can be no reasonable or credible dispute, the strength of one party's case markedly outweighs that of the other party.
- (g) Further, where the case largely involves construction of legal documents or points of law, depending on their degree of difficulty or need for further exploration, the court may take into account the relative strength of the parties' case and their respective prospects of success. This is so even if all the court can form is a provisional view-see **NCB v Olint**, and the well-known case of **Fellows v Fisher** [1975] 2 All E.R. 829. This is of course completely different from a case involving mainly issues of fact, or from deciding difficult points of law, since, as Lord Diplock points out at page 407 G-H of **American Cyanamid**, "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult points of law which call for detailed argument and mature considerations".
- (h) There may also be other special factors to be taken into account, depending on the particular facts and circumstances of the case.

*[35] At the end of the day, in principle, what the court must try to do at this interlocutory stage is to adopt the course which seems likely to cause the least irremediable harm or prejudice, this exercise of necessity having to take place at a time when the court cannot be certain as to the final outcome of the matter.*

I adopt these views.

**[30]** It is clear from the decision and reasons given in the application above that the Court is of the view that, as the orders previously made are declaratory only, they do not operate to prevent actions by the Defendants that may be harmful to the Claimant and Interested Party.

**[31]** There is no doubt that there is a serious issue to be tried. That issue is whether the admitted attempt to increase the company's shares was lawfully carried out. This would require a court to hear and determine the factual circumstances of the Extraordinary General Meeting held on 21 April 2024.

**[32]** Damages are not an adequate remedy, as there is a potential diminution in the value of the shares by the issuance, or continued issuance, of additional shares. The value of the asset, land, does not guarantee its sale or its sale in a timely manner. While damages, from lost share value, may ultimately be calculable, the risk of uncertainty means the company may not be in a position to pay them or to do so within a reasonable time. An investor or businessman's lost business opportunities may be incalculable.

**[33]** Whether there was material non-disclosure turns on the fact that it was not disclosed in the application for interim injunction that a caveat has been placed on the title to the land owned by the company. The 1st and 3rd Defendants contend that this caveat sufficiently protects the interest of the Claimant so as not to warrant an injunction. It must be said that a caveat would not prevent activities or agreements concerning the said land.

**[34]** A caveat operates to prevent the Registrar of Titles from giving effect to any such agreement without notice to the caveator. The caveator then has the opportunity to bring an action to prevent the Registrar from acting. In that event, the action brought by the caveator would be the same action now being brought by the Claimant, which

is to establish his interest. There is no rule of law or practice that demands that the caveator await the warning of the caveat to institute proceedings. To the extent, therefore, that there may have been a failure to disclose or signify the importance of the caveat, the Court is satisfied that it is not material to the application for injunction.

[35] In determining where the balance of convenience lies, the Court takes into account the provisions of the Companies Act in relation to section 213A, which provides remedies for the claimant in an oppression claim. The options open to the court include restraining the conduct complained of, as well as compensation.

[36] One cannot consider the balance of convenience without considering the interests of the Interested Party. By order of the court in **Claim No. SU 2022 CD 00295**, the Interested Party was declared to be the beneficial owner of 400 shares in the Company. As stated before, the information differs as to whether there is a stay of proceedings pending the hearing of an appeal. However, as a general rule, a stay of execution is usually inapplicable to a declaratory judgment. (See **Robert Rainford v His Excellency the Most Honourable Sir Patrick Allen and others** [2014] JMCA App 26.) I make no findings in that regard. A central plank of the 1st and 3rd Defendants' objection to the application for an injunction is that the Claimant had expressed an interest in disposing of his shares. There is no evidence that this is a position of the Interested Party.

[37] The argument that the balance of convenience favours continuing the status quo is generally true. The contention, however, that the status quo means the state of the shareholding being 6,000 is not accepted. The status quo is the state of affairs that existed before the impugned increase which had been declared by the court to be 1,000 shares. As the Claimant and Interested Party have maintained, allowing the increase to stand, with no fetter on the actions of the Defendants, can be nothing more than a recipe for disaster for them, given that they were at the material time the only two shareholders in the company (the Interested Party beneficially). That would mean that decisions affecting them and the company could be taken by strangers to the company.

[38] Finally, the 1st and 3rd Defendants contended that the three-month delay in bringing the claim and the application for injunction suggests that there is no need for

the injunction sought to be granted. The injunction sought to prevent future similar actions by the Defendants, which would ultimately be prejudicial to the Claimant and Interested Party. The nature of the action is not one where the harm or potential for harm would have been immediate or obviated by the time passed. In the circumstances, I do not find that the delay should operate as a bar to the Claimant's application.

**[39]** The Court is satisfied that it is just and convenient that the Application for Interim Injunction be granted.

### **ORDERS (Made 21 January 2026)**

#### **On Application for Striking Out:**

1. 1st and 3rd Defendants' Notice of Application to Strike Out Claim is refused.
2. Costs of the Application to the Claimant and to the Interested Party to be taxed if not sooner agreed.

#### **On Application for Interim Injunction:**

1. 1st and 2nd Defendants or either of them, is restrained whether by themselves, their servants and/or agents from taking any steps and/or dealing with the affairs of the 3rd Defendant ("the Company"), including, but not limited to, disposing, transferring, charging, pledging, diminishing the value of or otherwise dealing with the shares of the Company, calling any shareholders or Directors' meetings or taking any steps to remove the Claimant as director of the Company until the trial of this claim or sooner determination of the claim.
2. The 1st, 2nd and 3rd Defendants or any of them are restrained from selling, transferring or parting with the whole or any part of the land registered at Volume 617 Folio 48 of the Register Book of Titles until the trial of this claim or sooner determination of the claim.
3. The Claimant and the Interested Party, through their attorneys-at-law, gives the usual undertaking as to damages.
4. Costs to be costs in the claim.

5. The ruling on the application for Immediate Taxation of Costs, and hearing of Applications for Default Judgment and Extension of Time to file Defence are adjourned to February 13, 2026 at 10:00am for 3 hours.

6. Claimant's Attorneys-at-Law to prepare file and serve this order.

### **APPLICATION FOR EXTENSION OF TIME**

[40] By **Claim No. SU 2022 CD 00482** the Claimant brought an action against Andrew Kidd, Loveine Dyke and Nepal Development Limited. Default Judgment was entered against Mr Kidd and Nepal Development Limited, and a Consent Judgment against Ms Dyke. The orders were reproduced above under **APPLICATION TO STRIKE OUT CLAIM**. This action was based on the purported increase of the shares of the company to 6,000 shares, which Mr Kidd had allotted to himself pursuant to resolutions passed at a meeting held on 13 February 2020, subsequently forfeited by him.

[41] At an Extraordinary General Meeting convened on 21 April 2024, a resolution was passed, again increasing the share capital of the Company from 1,000 to 7,000 by the creation of 6,000 Ordinary Shares of \$20.00 each to rank pari passu with existing Ordinary Shares of the Company. The 6,000 shares were allotted to Mr Kidd. By this action, the Claimant avers that this second purported increase in shares was invalid as:

1. Neither the Claimant nor Interested Party were notified of an extraordinary general meeting
2. Neither attended any meeting of shareholders at which any decision was taken to increase the share capital of the company, the required quorum being 2 shareholders.
3. Neither was present at any meeting appointing Delroy Nichols as a Director and Company Secretary
4. The Claimant, one of the two Directors of the company, needed to constitute a quorum, was at no time invited to or made aware of or attended any meeting of the Board of Directors at which it was agreed to convene an extraordinary general meeting, nor was he advised of any request for such a meeting.

5. In breach of the Articles of Association, none of the additional shares had been offered to the Claimant as a shareholder of the Company

**[42]** As a result, the Claimant has sought the following orders:

I. A Declaration that the 1st Defendant has exercised his powers as a director in a manner that is oppressive and/or unfairly prejudicial and/or unfairly disregards the interest of the Claimant;

II. A Declaration that the issued share capital in Nepal Development Limited is 1,000 ordinary shares;

III. A Declaration that the two shareholders in Nepal Development Limited are Garey Whittaker and Devon Barrett whose shareholding is 600 ordinary shares and 400 ordinary shares respectively;

IV. A Declaration that the meeting purportedly convened on 21 April 2024 and the resolutions passed or decisions taken at that meeting were in breach of the Articles of Incorporation of the 3rd Defendant ("the Articles") and are null and void;

V. A Declaration that the purported issuance of 6,000 ordinary shares in the 3rd Defendant was in breach of the Articles of the 3rd Defendant and are null and void;

VI. A Declaration that all resolutions passed or decisions taken by the 3rd Defendant in general meetings or otherwise, premised on either the 1st Defendant or his assignee or transferee being the holder of 6,000 shares or any portion thereof are null and void;

VII. An Order that the Statement of Increase of Share Capital dated 31 July 2024 purporting to increase the share capital of the 3rd Defendant by an additional 6,000 ordinary shares be cancelled;

VIII. An Order that the Ordinary Resolution dated 21 April 2024 purporting to increase the share capital of the 3rd Defendant by an additional 6,000 ordinary shares be cancelled;

IX. A Declaration that the 2nd Defendant, Delroy Nichols, has never been a director or company secretary of the 3rd Defendant and any decision purporting to appoint him as same is null and void;

X. An Injunction preventing the 1st and 2nd Defendants, Andrew Kidd and Delroy Nichols, from acting together as a board of directors to effect business on behalf of 3rd Defendant;

XI. An injunction to restrain the 1st Defendant whether by himself or by his servants or agents or otherwise howsoever from increasing the share capital of Nepal Development Limited and issuing and allotting shares in the said company until further order of this court;

XII. An Injunction preventing the 1st Defendant, Andrew Kidd, from calling or transacting any business of the 3rd Defendant at general meetings or otherwise;

XIII. An injunction restraining the 1st and 2nd Defendants from selling, transferring or parting with the whole or any part of the land registered at Volume 617 Folio 48 of the Register Book of Titles;

XIV. A Direction that the 3rd Defendant rectify the register of members to reflect that the members of the 3rd Defendant as at 31 July 2024 are Garey Whittaker and Devon Barrett;

XV. A Direction that the 3rd Defendant shall file with the Registrar of Companies a Return of Allotment and Form 20 reflecting the rectified shareholdings and the rectified Company Secretary within ten (10) days of this Order;

XVI. Damages;

XVII. Costs; and

XVIII. Any such order deemed just by the Honourable Court.

**[43]** After an inter-partes hearing, the Claimant secured an interlocutory injunction in the following terms:

*1. 1st and 2nd Defendants or either of them, is restrained whether by themselves, their servants and/or agents from taking any steps and/or dealing with the affairs of the 3rd Defendant ("the Company"), including, but not limited to, disposing, transferring, charging, pledging, diminishing the value of or otherwise dealing with the shares of the Company, calling any shareholders or directors' meetings or taking any steps to remove the Claimant as director of the Company until the trial of this claim or sooner determination of the claim.*

*The 1st, 2nd and 3rd Defendants or any of them are restrained from selling, transferring or parting with the whole or any part of the land registered at Volume 617 Folio 48 of the Register Book of Titles until the trial of this claim or sooner determination of the claim.*

*The Claimant and the Interested Party, through their Attorneys-at-Law, give the usual undertaking as to damages.*

**[44]** In a Notice of Application for Court Orders filed on 2 May 2025, the 1st and 3rd Defendants sought to have the Claim struck out. The 1st and 3rd Defendants in the same application also sought:

2. An extension of time for the filing of the Acknowledgment of Service herein and/or alternatively that the Acknowledgement of Service filed herein on February 3rd, 2025, do stand as filed.

3. An extension of time to file the defence within 42 days from the date of the scheduled upcoming inter parties hearing on June 5, 2025.

4. The 1st and 3rd Defendants be relieved from any sanctions to which they may become subject under the Civil Procedure Rules or any other rules, practice directions or applicable legislation, due to any default in filing its Defence within forty-two (42) days after the service of the claim form.

**[45]** The 1st Defendant, Mr Kidd, who is also the representative of the Company, explained, in his affidavit filed in support of the Application, that the delay in filing a defence was due to being advised by his Attorney to await the outcome of his application to strike out the claim and so as not to incur unnecessary cost. This, he posited, aligns with the Denton principles. The Denton principles are:

- a. Identify and assess the seriousness and significance of the breach of the relevant rule, practice direction or court order;
- b. Consider the reasons why the default occurred; and
- c. Evaluate all the circumstances of the case.

## **PARTIES SUBMISSIONS**

**[46]** The Claimant contended that the 1st and 3rd Defendants permitted a period of approximately five months to elapse following service of the Claim Form, Particulars of Claim and Prescribed Notes on 2 December 2024 before making the present application, and only after the Claimant had applied for default judgment on 4 March 2025. It was further submitted that service cannot credibly be disputed, as Attorneys-at-Law acting on behalf of the 1st and 3rd Defendants appeared before the court on various occasions, including in December 2024, to oppose the application for interim injunctive relief.

[47] The Claimant also relied on the fact that the 1st and 3rd Defendants filed an Acknowledgment of Service on 3 February 2025, which, although not served, demonstrated clear knowledge of the proceedings and its contents. That document was subsequently exhibited to the affidavit of Andrew Kidd filed on 5 May 2025, further evidencing receipt of the claim.

[48] Moreover, they argued, the mere existence of a pending application does not constitute a reasonable explanation for the failure to file a defence. More than a year has elapsed since the claim commenced yet the 1st and 3rd Defendants have taken no steps to file a defence. In addition, no draft defence has been put forward on which the court could exercise its discretion.

[49] The Interested Party contended that the delay in filing the Acknowledgment of Service and subsequent application was both inordinate and inexcusable. It was submitted that the Acknowledgment of Service was filed more than 44 days after service of the claim, exceeding the prescribed 14-day period under the CPR. Further, the 1st and 3rd Defendants have failed to provide clarity as to the precise date of service, merely indicating that the claim was served on their office but brought to their attention “days later,” without specification. The Interested Party argued that this lack of candour, coupled with the fact that the application was filed over 100 days after service, and during a period in which the 1st and 3rd Defendants were actively engaged in the proceedings, aggravates the delay.

[50] In addressing the reasons advanced for the delay, the Interested Party submitted that the 1st and 3rd Defendants made a deliberate and strategic decision not to file a defence. King’s Counsel on behalf of the Interested Party emphasised that, unless and until an application to strike out is determined, the procedural rules remain binding and must be complied with.

[51] Counsel for the Interested Party further argued that the proposed defence has no real prospect of success. In particular, the 1st and 3rd Defendants’ contention that they lawfully increased the company’s share capital and allotted additional shares to themselves was said to be untenable. The Articles of Association limit the authorised share capital to 1,000 ordinary shares, and any increase beyond that limit would require an amendment of the Articles by special resolution pursuant to **section 10(1)**

**of the Companies Act.** No evidence has been adduced to demonstrate that such a resolution was passed prior to the commencement of proceedings.

[52] Additionally, reliance was placed on **Article 59 of Table A of the Companies Act**, which requires a quorum of two members, present in person, for the valid transaction of business at a general meeting. It is common ground that the Claimant was not present at the relevant meeting; indeed, had he attended, he would have been the sole member present. Accordingly, no quorum existed, rendering any purported resolution to increase share capital invalid.

[53] The Interested Party also rejected any potential reliance on **Article 57 of Table A**, which preserves the validity of proceedings where there has been an accidental omission to give notice. Counsel argued that the omission in the present case was deliberate and alleged that the 1st Defendant consciously chose not to give notice of the annual general meeting. Support was drawn from **Buckley on the Companies Act (p. 39, para. A39.1)**, which distinguishes accidental omissions from deliberate or careless ones.

[54] The Interested Party also relied on **Musselwhite and another v G.H. Musselwhite & Son Ltd. and others** [1962] Ch. 964, where the court held that failure to give notice of a meeting rendered it a nullity and that such omission could not be characterised as “accidental” where it arose from a mistaken belief. The Interested Party adopted the reasoning of Russell J that an omission founded on an error of law or fact does not fall within the scope of an “accidental omission”.

[55] Finally, the Interested Party submitted that the balance of prejudice weighs against granting an extension of time. It is argued that significant costs have already been incurred and time expended in pursuing related claims against the Defendants. To permit an extension would undermine the overriding objective and erode the importance of adherence to procedural time limits.

## **LAW & ANALYSIS**

[56] The court has a discretion to extend time for complying with the time for filing a defence under **CPR 10.3(9)**. In the case of **Attorney General of Jamaica & Western Regional Health Authority v Rashaka Brooks Jnr (a minor) (by his father**

**and next friend Rashaka Brooks Snr**) [2013] JMCA Civ 16, (**'AG v Brooks'**) Brooks JA (as he then was) confirmed that where specific guidance is not given in a particular rule, as in **CPR 10.3(9)**, the court must have regard to the overriding objective which is to ensure that cases are dealt with justly. He noted that to give effect to the overriding objective when interpreting the rules or exercising any discretion given under the rules, the court cannot be inflexible or adopt an inflexible stance. He confirmed the approach approved by the court in **Fiesta Jamaica Ltd v National Water Commission** [2010] JMCA Civ 4. adopting the statement of Harris JA at paragraph 15 of her judgment, which is as follows:

*[15] The result of applying that principle is that there should not be an inflexible stance where the court is given a discretion. Generally, each case is to be decided on its own facts. This court has recognised this principle in previous decisions dealing with applications for extension of time within which to file a defence. In Fiesta Jamaica Limited v National Water Commission, the court approved an approach to assessing such applications. Harris JA, with whom the rest of the court agreed, said at paragraph [15] of her judgment:*

*“The first issue to be addressed is whether the appellant ought to have been granted an extension of time to file the proposed defence. The principle governing the court’s approach in determining whether leave ought to be granted on an application for extension of time was summarized by Lightman J., in an application for extension of time to appeal in the case of Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Ors. [All England Official Transcripts (1997-2008) (delivered 18 January 2000)].”*

*In his judgment, Lightman J said at paragraphs 8 and 9:*

*“8. The position, however, it seems to me, has been fundamentally changed, in this regard, as it has in so many areas, by the new rules laid down in the CPR which are a new procedural code. The overriding objective of the new rules is now set out in Pt 1, namely, to enable the court to deal with cases justly, and there are set out there after a series of factors which are to be borne in mind in construing the rules, and exercising any power given by the rules. It seems to me that it is no longer sufficient to apply some rigid formula in deciding whether an extension is to be granted. The position today is that each application must be viewed by reference to the criterion of justice and in applying that criterion there are a number of other factors*

*(some specified in the rules and some not) which must be taken into account. In particular, regard must be given, firstly, to the length of the delay; secondly, the explanation for the delay; thirdly, the prejudice occasioned by the delay to the other party; fourthly, the merits of the appeal; fifthly, the effect of the delay on public administration; sixthly, the importance of compliance with time limits, bearing in mind that they are there to be observed; seventhly, (in particular when prejudice is alleged) the resources of the parties.*

*9. I am in no ways setting out all the relevant factors, but all the factors I have set out appear to me to be relevant and require to be taken into account in deciding what justice requires in respect of the particular application. I should add that the existence of this broad approach, which decides the case by reference to justice, is not to be treated as a passport to the parties to ignore time limits because, as I say, one of the important features in deciding what justice requires is to bear in mind that time limits are there to be observed and that justice may be seriously defeated if there is any laxity in that regard.” (Emphasis supplied) Although Lightman J did mention the matter of merit, the point to be noted for these purposes, is that it “is no longer sufficient to apply some rigid formula in deciding whether an extension [of time] is to be granted”.*

[57] This approach was recently confirmed in **Barrington Green and another v Christopher Williams and others** [2023] JMCA Civ 5. (**Green v Williams**). Dunbar-Green JA neatly sums up the position in the conclusion at paragraph 101:

*[101] It is well-established that in considering whether to grant an extension of time in which to file a defence, the court should be guided by the overriding objective to deal with cases justly, in the context of settled factors among which are the length of the delay, the explanation for the delay, the merits of the defence, the prejudice occasioned by the delay to the other party, the effect of the delay on public administration and the importance of compliance with time limits. Dealing with cases justly involves having regard to the appropriate allocation of the court’s resources, saving expenses and ensuring that cases are dealt with expeditiously and fairly (rule 1 of the CPR). The general rule is that a defendant who has been dilatory in the filing of a defence must provide an acceptable explanation for that conduct as well as evidence of a viable challenge to the claim.*

[58] For convenience, the factors a court should consider when exercising its discretion are reproduced in list form:

- a. The length of the delay
- b. Explanation for the delay
- c. The prejudice to the party occasioned by the delay
- d. The merits of the proposed defence
- e. The effect of the delay on public administration
- f. The importance of compliance with time limits
- g. The resources of the parties

**[59]** This list is not exhaustive and may not all apply in a particular matter under consideration. Accordingly, in determining an application for an extension of time to file a defence, the court must balance all relevant factors, ensuring that any extension granted is consistent with the overriding objective and the interests of justice, and must be satisfied, on sworn evidence, that the defence has a real prospect of success.

### **THE DELAY**

**[60]** **Russell Holdings Limited v L & W Enterprises Inc** [2016] JMCA Civ 39 confirms that delay, even egregious delay, is not always fatal to an application for extension of time. The court is required to consider all relevant factors and make a determination. This position encompasses the requirement to have a flexible approach to the application of the rules. Up to the time of filing this application, the Defence had been outstanding for 44 days. The Claimant and Interested Party contended that this period was inordinate as the 1st and 3rd Defendants were well aware of the claim, with Mr Kidd participating in the application then before the court. In this case, the Court agrees that the delay was inordinate, in the sense that it was unreasonable, and that this militates against granting an extension of time to file the Defence.

**[61]** The 1st and 3rd Defendants maintained that the failure to file the Defence was due to their awaiting the outcome of their application to strike out the claim, in an effort to avoid unnecessary costs if the claim was struck out. In his affidavit filed in support of the application, Mr Kidd indicated that he was informed by his Attorney-at-Law that the filing of a defence should reasonably await the court's determination on the application to strike out the claim.

[62] The Court is not of the view that this constitutes a good reason. In **AG v Brooks** (supra), Brooks JA pointed out that a deserving litigant ought not to be shut out because of an error by his Attorney-at-Law but that when the Attorney's behaviour is grossly negligent, the litigant's position may be imperilled. This Court, however, certainly cannot countenance the Attorney's flagrant disregard of the **Civil Procedure Rules**. The overriding objectives require a party, defined in the **Rules** as including any Attorney-at-Law on record for that party, to '*help the court to further the overriding objective*'. **CPR 10.3** indicates certain categories where the filing of a defence may await the outcome of an application being:

*Where there is an application under the Arbitration Act to stay the claim on the grounds there is a binding agreement to arbitrate.*

*Where the defendant makes an application disputing the court's jurisdiction.*

*Where the court is required to specify the period for responding to the particulars of claim*

*Where the claimant seeks summary judgement.*

*Where the court makes an order for service on an agent of a principal outside of the jurisdiction.*

[63] Expressly not included is where there is an application to strike out claim. Attorneys must appreciate the importance of complying with the time limits and are obliged to see to it that the parties also have that appreciation. In the circumstances, this Court is loath to endorse the Attorney's actions lest such an excuse takes hold in either Counsels' or parties' minds. Excusing delay occasioned in this way would have a negative effect on public administration.

[64] Further, the explanation is lacking credibility, as pointed out by the Claimant and Interested Party, since the application was not filed within the period for filing the Defence. Edwards JA in **Jamaica Public Service Co Ltd v Francis (Charles Vernon) and anor** [2017] JMCA Civ 2 makes the point that though the period of delay starts after the last day for doing the act, a party who waits until the last minute does so at his peril.

[65] The 1st and 3rd Defendants waited some 82 days from the date a defence should have been filed, to file the application to strike out claim. In all these

circumstances the Court is not of the view that the explanation for the delay is a good one. The absence of a good explanation is not necessarily fatal, however. If the 1st and 3rd Defendants have a good prospect of successfully defending the claim, the application may yet be granted.

### **THE MERITS OF THE DEFENCE**

[66] Morrison JA (as he then was) in **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2 at paragraph 44 referenced **Evans v Bartlam** [1937] AC 473 where Lord Atkin stated that the applicant must adduce evidence, by way of an affidavit of merit, demonstrating a *'prima facie defence'*.

[67] The Claimant and Interested Party made the point that the 1st and 3rd Defendants have not exhibited a draft defence nor provided affidavit evidence outlining the factual basis of the proposed defence. The 1st and 3rd Defendants responded that exhibiting a draft defence or the requirement to do so is more strictly applied when the application is to set aside a default judgment already granted. The 1st and 3rd Defendants relied on **Evans v Bartlam** (supra) for this position. The 1st and 3rd Defendants further argued that, as the application for default judgment has not been granted and the affidavits of the 1st and 3rd Defendants opposing the application for injunction contain the substance of the defence, they should not be shut out of the corridors of the court.

[68] In **AG v Brooks** (supra) Brooks JA made the point that there may be exceptional circumstances where an application to extend time could be granted where there was no affidavit of merit. He added that this was not intended to open the 'flood gates or cure the sloth of Attorneys or litigants'. In **Green v Williams Green** (supra), Dunbar Green JA points out that **AG v Brooks** was an unusual and exceptional case and not of general application. **AG v Brooks** concerned the failure of the Attorney-General, an organ of the state, to file his defence in circumstances where the Chambers were unable to obtain instructions from third parties. Dunbar-Green JA at paragraph 73 noted that **AG v Brooks** is clearly an exception to the general rule that an application to extend time to file a defence cannot succeed without evidence of merit, demonstrating, among other things, that there is merit in the defence, save in a narrow set of special circumstances.

[69] In the instant case though no Affidavit of Merit has been filed, the outlines of a defence can be gleaned from the affidavits filed by and on behalf of the 1st and 3rd Defendants in the various applications that have been made in this claim. In this instance, therefore, the absence of an Affidavit of Merit is not fatal to the application.

[70] In his Affidavit in Opposition to the Application for Injunction, Mr Kidd claims to be the only director of the Company, the Claimant having resigned about February 2020. This position is not tenable, having regard to the Default Judgments, which have not been set aside and to the Consent Judgment. His contention that he was the holder of 7,000 ordinary shares prior to July 31 2024 is not sustainable for the same reason. His purported defence is bound to fail as the meetings at which the resolution was passed, increasing the Company's shares, were plainly unlawful, Mr Whittaker not having been given notice. The same goes for the Directors' meeting.

[71] The 1st and 3rd Defendants' acceptance that no notice was given to the Claimant of the Extraordinary General Meeting and of a Directors' meeting is fatal to this case as no lawful increase in the share capital and amount of shares could be taken in his absence in the first instance as one of two Shareholders, and in the second, one of two Directors, where the quorum in each instance was two. For the reasons submitted by the Interested Party, this was no inadvertence or accidental omission but a deliberate choice.

[72] There being no merit to the proposed defence, the application by the 1st and 3rd Defendants for an extension of time to file a defence must be refused.

[73] The 1st and 3rd Defendants have been participating in the claim, being present and represented by Counsel at the various hearings. No prejudice is occasioned by allowing the Acknowledgement of Service to stand. Further, the Acknowledgment of Service was filed before the request for Default Judgment. **CPR 9.3 (4)** allows for the Acknowledgement of Service to be filed at any time before a request for default judgment is received at the registry.

#### **APPLICATION FOR DEFAULT JUDGMENT**

[74] There being no defence filed, and service being proved, the Claimant is entitled to default judgment in his favour. The Court is required to determine whether the orders

sought are supported by the pleadings. Based on the pleadings and affidavit evidence, the Court makes the orders set out below.

## **ORDERS**

[75] It is hereby ordered and declared as follows:

### **ON APPLICATION FOR EXTENSION OF TIME**

1. The 1st and 3rd Defendants' application for an extension of time to file a defence is refused.
2. Cost of the application to be the Claimant's and Interested Party's to be taxed if not sooner agreed.

### **ON CLAIM**

Default Judgment is given against the 1st and 3rd Defendants on the following terms:

1. A Declaration that the 1st Defendant has exercised his powers as a director in a manner that is oppressive and/or unfairly prejudicial and/or unfairly disregards the interest of the Claimant;
2. A Declaration that the issued share capital in Nepal Development Limited is 1,000 ordinary shares;
3. A Declaration that the meeting purportedly convened on 21 April 2024 and the resolutions passed or decisions taken at that meeting were in breach of the Articles of Incorporation of the 3rd Defendant ("the Articles") and are null and void;
4. A Declaration that the purported issuance of 6,000 ordinary shares in the 3rd Defendant was in breach of the Articles of the 3rd Defendant and are null and void;
5. A Declaration that all resolutions passed or decisions taken by the 3rd Defendant in general meetings or otherwise, premised on either the 1st Defendant or his assignee or transferee being the holder of 6,000 shares or any portion thereof are null and void;

6. An Order that the Statement of Increase of Share Capital dated 31 July 2024 purporting to increase the share capital of the 3rd Defendant by an additional 6,000 ordinary shares be cancelled;
7. An Order that the Ordinary Resolution dated 21 April 2024 purporting to increase the share capital of the 3rd Defendant by an additional 6,000 ordinary shares be cancelled;
8. A Declaration that the 2nd Defendant, Delroy Nichols, has never been a director or company secretary of the 3rd Defendant and any decision purporting to appoint him as same is null and void;
9. An Injunction preventing the 1st and 2nd Defendants, Andrew Kidd and Delroy Nichols, from acting together as a board of directors to effect business on behalf of 3rd Defendant;
10. An Injunction to restrain the 1st Defendant whether by himself or by his servants or agents or otherwise howsoever from increasing the share capital of Nepal Development Limited and issuing and allotting shares in the said company until further order of this court;
11. An Injunction preventing the 1st Defendant, Andrew Kidd, by himself, from calling or transacting any business of the 3rd Defendant at general meetings or otherwise;
12. An Injunction restraining the 1st and 2nd Defendants from selling, transferring or parting with the whole or any part of the land registered at Volume 617 Folio 48 of the Register Book of Titles;
13. A Direction that the 3rd Defendant shall file with the Registrar of Companies a Return of Allotment and Form 20 reflecting the rectified shareholdings and the rectified Company Secretary within ten (10) days of this Order;
14. Costs of the claim to be the Claimant's to be taxed if not sooner agreed.
15. Application for stay of proceedings is refused.

16. Costs in the application for stay of proceedings to be the Claimant's and Interested Party's against the 1st and 3rd Defendants.

## **APPLICATION FOR IMMEDIATE TAXATION OF COSTS**

[76] The Court had reserved the decision on the application for immediate taxation of costs in respect of the 1st and 3rd Defendants' unsuccessful applications for the Court as presently constituted to recuse herself and for leave to appeal that refusal. That issue is now moot. However, on the basis that the 1st and 3rd Defendants may exercise the options open to them, the decision the Court would have made and the reasons therefore follow. The application also included that the Court allow costs for two Counsel.

## **LAW & ANALYSIS**

[77] The **Civil Procedure Rules 2002 as amended (CPR)** deals with the question of costs in Parts 64 and 65. For this application CPR Rules 64.3, 64.5(1), 64.6, 65.8, 65.15, 65.16 were considered.

[78] The effect of these provisions was handily summed up by Morrison P in **Brady (Harold) v General Legal Council (The) and anor** [2022] JMCA App 26 as follows:

*[15] Accordingly, the general rule is that taxation is to be carried out at the conclusion of the proceedings, which, in this case, would be at the end of the appeal. However, this rule is not inflexible, and the court has the discretion to order costs to be taxed immediately. However, as is well known in principle, the general rule is not to be departed from without good reason.*

With respect to the consideration to be given to whether there should be immediate taxation he went on to say:

*It would also be most practical, reasonable and just, given all the circumstances, that costs in favour of the GLC are also assessed with the same expedition as that of the FCJ. In considering this point in favour of the GLC, its submissions at para. [6] above are accepted as a proper basis to order the immediate taxation of costs. In short, Mr Brady's applications in respect of which costs orders are now being considered lacked a credible and reasonable ground for bringing them. Therefore, the defending parties should not be deprived, for too long, of the fruits of their success in these proceedings.*

[79] Paragraph 6 repeated is below.

*[6] Concerning whether this court should make an order for immediate taxation, counsel for the GLC relied on paras. [52] – [55] of the case of VRL Operators Limited v National Water Commission and others [2015] JMCA Civ 69, and contended that: “[H]aving regard to this Court’s findings as to the abject lack of credibility in the assertions which underpinned the allegations as to bias and the debts allegedly owed to [Mr Brady]...; the resultant lack of any bases whatsoever for permitting an amendment to the Grounds of Appeal or a renewed application for a stay, or any basis in law to strike out paragraphs of Mrs. Gentles-Silvera’s affidavit, it is open to this Court to depart from the general rule that taxation of costs should abide the conclusion of the proceedings and instead find that [Mr Brady] pursued wholly unmeritorious applications which entitle the [GLC] to recover costs to be taxed and paid immediately.”*

**[80]** This issue was also considered by F. Williams JA at about the same time in **West Indies Petroleum v Scanbox Limited et al** [2022] JMCA App 28A where in considering an application for the immediate taxation of costs he stated:

*[18] As it relates to the time that taxation is to be carried out, rule 65.15 stipulates: “The general rule is that the costs of any proceedings or any part of the proceedings are not to be taxed until the conclusion of the proceedings but the court may order them to be taxed immediately.” (Emphasis added) [19] Notably, the rule does not provide any guidance as to the circumstances that may give rise to an order for immediate taxation, with the result that the court’s obligation to apply the overriding objective, to deal with cases justly, would be paramount, in any case in which immediate taxation is sought. In the case of Pan Caribbean Financial Services Limited v Robert Cartade and others, Harrison JA stated that, “a court faced with this situation [a request for immediate taxation] ought to consider if special circumstances had existed”. [20] Having considered the circumstances highlighted by counsel for the respondents, it seems to me that an order for immediate taxation is warranted in this case, given the fact that three of the respondents are individuals, whereas the applicant is a company, which, it is reasonable to conclude, has greater financial means. Further, having regard to the fact that the appeal and application have arisen before the trial of the matter in the Supreme Court has even commenced. Therefore, in order to give effect to rule 1.1(2)(a) of the CPR of “ensuring, so far as practicable, that the parties are on an equal footing and are not prejudiced by their financial position” (emphasis added), in what is likely expensive litigation, it is my considered view that the respondents should be able to recover the costs of this application, immediately.*

[81] The question for this Court is whether it is just in the circumstances of this case to make an order for immediate taxation. In so doing the Court is to consider whether there were any special circumstances that existed.

### **RESPONDENT'S SUBMISSIONS**

[82] King's Counsel on behalf of the Interested Party submitted that the circumstances of this case warrant the court ordering the immediate taxation of costs for both applications. Counsel contended that the applications were premised on a very weak basis and that given the factual background to the applications, the Applicants could never have been of the view that they would be successful. The Applicants' pursuit of these applications only served to delay the determination of the matter. Counsel also requested that the court allow costs for the attendance of two Attorneys-at-Law at the hearing of the application, having regard to the importance of the matter to the parties, the time reasonably spent on the matter, whether the matter was appropriate for a senior Attorney-at-Law and the care, speed and economy in which the matter was prepared.

### **APPLICANTS SUBMISSIONS**

[83] Counsel for the 1st and 3rd Defendants submitted that the application for immediate taxation is "... premature, inappropriate, and contrary to the interests of justice, particularly in circumstances where the Applicants intend to file an application for leave to appeal to the Court of Appeal". They contended that the Court of Appeal's guidance is necessary on the issues of apparent bias and procedural fairness raised in the applications and that there are strong prospects of success in the appeal. It would therefore be premature to order that the costs be taxed immediately. The applications, though ultimately unsuccessful, were neither frivolous nor vexatious as they raise serious and arguable points of law. They also argued that the applications were not an abuse of process but were legitimate attempts to vindicate the Applicants' constitutional right to a fair hearing and would be so disproportionate as to constitute a penalty.

[84] They further contended that an order for immediate taxation would be oppressive and would risk creating an injustice because if the applicant were successful in the Court of Appeal, they would have been forced to pay costs which

were not properly due. They suggested that an order for security for costs would be the more appropriate order in all the circumstances. They relied on the cases of **Raziel Ofer v Thomas & Ors** [2012] JMCA Civ 22, **Sans Souci Limited v VRL Services Limited** (Civil Appeal No. 108 of 2004), and **West Indies Petroleum Limited v Courtney Wilkinson & John Levy** [2023] JMCA Civ 2 to set the legal framework. They extracted these principles from the cases:

The purpose of immediate taxation is to assist litigants to recoup expenses in circumstances where it would have been difficult or inconvenient for the litigant to wait until the proceedings have been culminated.

Where the litigant is delinquent or dilatory or the application is found to be frivolous and vexatious or an abuse of the process of the court.

Where an appeal is pending or contemplated, the court should be slow to order immediate taxation of costs.

## **DISCUSSION**

[85] The principle in **Marilyn Hamilton v United General Insurance Limited** [2010] JMCA App 32 that a default costs certificate should not be signed on to the conclusion of the substantive matter is not relevant here.

[86] In this matter, it has not been shown that any party in particular has deeper pockets or significantly greater means than any other party. The Claim is at a relatively early stage in that a Defence has not been filed. (There are pending applications for an extension of time to file the Defence and for Default Judgment.) However, the Claimant and Interested Party have been put to the additional expense of defending an application not arising in the normal course of prosecution or defending a claim. In the Court's view, given the facts known to Counsel for the Applicants, as evidenced by the email thread, the applications were far-fetched, reaching and appear to have little or no prospect of success on appeal. There is certainly an argument that the applications were unreasonably made. I would not go so far, however, to say that there was an 'abject lack of credibility' in the allegations underpinning the allegations of bias.

**[87]** The hopelessness of the applications is a sufficient basis to restore the parties to an equal footing financially until the proceedings are brought to a close. In the Court's view, it is just in the circumstances of this case to order that the Respondents may recover their costs immediately. The Court notes that all the parties were represented by at least 2 Counsel one senior and one junior (the Claimant in the earlier stages) and will in the circumstances allow costs for two Attorneys-at-Law.

## **ORDERS**

**[88]** Costs of the Notice of Application for Recusal and Application for Leave to Appeal granted to the Claimant and Interested Party to be taxed immediately, if not agreed.

**[89]** Special Cost Certificate fit for two Counsel is granted.