

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVP2023/0023

BETWEEN:

SHAHEEL JAGROOP
by his next friend FABIAN JAGROOP

Appellant

and

LUCRETIA JOHNNY
Administratrix of the estate of GREGORY JOHNNY
and VELINA JOHNNY

Respondent

Before:

The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Trevor M. Ward
The Hon. Mde. Esco L. Henry

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Shaheel Jagroop the appellant appearing in person
Mr. Dexter Theodore, KC for the respondent

2024: July 2;
2025: October 15.

Civil appeal – Administration of estates – Appeal against findings of fact – Concurrent findings of fact – Res judicata – Setting aside of order of judge of concurrent jurisdiction – Discretion to award costs – Costs in estate proceedings – Appeal against costs order

The litigation background to this appeal involves no less than three different but related legal proceedings which have resulted in judgments which are critical to the outcome of the

appeal. The first is the judgment in Claim No. SLUHCV2010/0066 (the “First Claim”) brought by the appellant against the respondent in her capacity as administratrix of the succession of Mr Gregory Johnny. By that claim, the appellant sought a declaration that the grant of administration dated 16th August 2009 is null and void, that the grant of administration be improbated or alternatively, that the grant of administration be rectified so that the appellant is reflected therein as having a 1/5 share in the estate of Gregory and Velina Johnny. In her judgment dated 26th February 2014, Wilkinson J declared the appellant an heir by representation and a beneficiary in equal degree with the siblings of Mrs Greta Johnny-Jagroop of the estate of Gregory and Velina Johnny and ordered an amendment of the grant in such terms. Wilkinson J also declared that Royal Bank of Trinidad and Tobago (“RBTT”) life insurance proceeds received by Mr Gregory Johnny formed part of his estate for distribution in equal shares to his heirs. Wilkinson J also awarded prescribed costs to the appellant to be paid by the estate of Mr Gregory Johnny.

On 16th April 2014, the appellant filed another Claim No. SLUHCV2014/0256 (the “Second Claim”) in which he sought a full accounting of all the assets and liabilities of the estates of Gregory and Velina Johnny. In her oral decision delivered on 8th August 2019, Wilkinson J ordered, inter alia, that the respondent file the necessary documents to amend the letters of administration so as to reflect the appellant as a beneficiary under the estates of Gregory and Velina Johnny, and that the respondent prepare separate accounts of assets and liabilities for the estates of Gregory and Velina Johnny within 30 days. The costs of the suit were to be borne by the estates of Gregory and Velina Johnny and were to be fixed after the account of the estate of Mrs Velina Johnny was settled by the court.

The appellant (by his next friend) then commenced further proceedings (the “Third Claim”), seeking orders for full accounting of the estates of Gregory and Velina Johnny, for all sums found due and owing to him from the estate as a result of such accounting, and costs.

These latter proceedings came on for hearing before Innocent J (or the “learned judge”) who, on 21st August 2023, ordered that there were no further assets forming part of the estate of Gregory and Velina Johnny available for distribution to the appellant, that costs in the First Claim shall be prescribed costs in the sum of \$7,500.00 payable out of the estate of Mr Gregory Johnny, and that costs in the Third Claim be prescribed costs calculated at \$24,623.95 in accordance with the amount paid out to the appellant. The learned judge also ruled that the appellant shall only recover 50% of the costs to which he would have been entitled.

Dissatisfied with the learned judge’s decision, the appellant filed his notice of appeal on 8th September 2023 in which he advanced the grounds of appeal outlined at paragraph 9 of this judgment.

Held: allowing the appeal in part, setting aside the order of the learned judge that the costs payable to the appellant in Claim No. SLUHCV2010/0066 (the First Claim) be prescribed costs in the sum of \$7,500.00 and shall be payable out of the estate of Mr Gregory Johnny, dismissing the other grounds of appeal and affirming the other orders of the learned judge, and awarding the respondent 90% of her costs in the appeal to be paid by the appellant to be assessed if not agreed within 21 days of the date of this order, that:

1. An appellate court will only interfere with a finding of fact made by a trial judge if it is satisfied that the conclusion is plainly wrong. It must either be possible to identify a material error in the judge's process of reasoning such as a material error of law, or the making of a critical finding of fact which has no basis on the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence. If the question is simply one of judgment as to the appropriate weight to be given to the relevant evidence, the appellate court must be satisfied that the judge's conclusion cannot reasonably be explained or justified.

Group Seven Limited v Notable Services LLP [2019] EWCA Civ 614 applied; **DB v Chief Constable of Police Service of Northern Ireland** [2017] UKSC 7 applied; **Yates Associates Construction Company Ltd v Blue Sand Investments Ltd.** BVIHCVAP2012/0028 (delivered 20th April 2016, unreported) applied; **Flat Point Development Limited v Mary Dooley** ANUHCVP2015/0029 (delivered 13th March 2019, unreported) applied.

2. In this case, the appellant took no issue with the amount which the respondent claimed to have received by way of insurance proceeds but rather contends that he did not receive the full entitlement (1/5) share of those proceeds. The respondent's statement of account however asserts that these proceeds were distributed to the heirs (i.e., 1/5 shares after the expenses of the estate of Gregory Johnny were deducted). Apart from his bare assertion that the distribution of the assets of the estates is incomplete, the appellant advanced no cogent basis upon which the learned judge could deliberate. The appellant did not identify any material error in the judge's process of reasoning, and it cannot be said that the learned judge made a critical finding of fact which has no basis in the evidence, or that he demonstrably misunderstood relevant evidence, or failed to consider relevant evidence.
3. The learned judge's findings in respect of the purported failure to account for funds contained in a BOSL Account No. 421819347; Bank of Nova Scotia Account No.10296, and RBTT Account No. 1107600117 cannot be impugned. The learned judge was seised of the relevant factual background and chronology, and it would not have been lost upon him that at the time of Velina Johnny's death in January 2007, Greta Johnny-Jagroop, the other account holder of the BOSL account, would have been alive and responsible for the closing of the account; and thus not forming part of the estate of Velina Johnny. The appellant did not argue below that the respondent failed to verify the authenticity of the document from RBTT Bank which indicated a savings Account No. 1107600117 with a balance of \$10,712.01, nor did the appellant argue the issue of a delay on the part of the respondent in requesting information from RBTT in respect to this purported account. In any event, the relevant document was relied on by the appellant in his statement of account and the onus was therefore on him to verify its authenticity. It is therefore not open to him to raise these points on appeal. More conclusively, 1st National Bank (formerly RBTT Bank) by letter dated 21st June 2021 informed that there were no accounts in the name of Gregory Johnny and Velina Johnny and no sums due and owing to the bank in respect of mortgages and other facilities. The learned judge categorically determined that the proceeds of Bank of Nova Scotia Account No. 10296 had

already been distributed and the claimant\appellant had received his share of the proceeds. The appellant has failed to identify any errors in the learned judge's reasoning or conclusion. Therefore, there is no basis to interfere with the learned judge's findings of fact in respect of these accounts.

4. As a matter of settled practice, an appellate court will also decline to interfere with concurrent findings of fact, save in very limited circumstances. The question of the weight of the evidence is not a sufficient reason to depart from this established practice. No serious violation of legal principle or procedure has been identified as it relates to the liabilities and expenses of the estates in this case. Further, it has not been proved that the learned judge deviated from definitive findings made by Wilkinson J. It is clear that Wilkinson J did not consider her judgment and order to be a final one and made clear that she was unable to close off the accounts by way of the final order and gave a number of further directions for further accounting. To the extent that there were further legal costs associated with this Second Claim which arose, it would therefore fall to the judicial officer considering the final account to make any determination. It therefore follows that it was open to Innocent J to consider and determine the same.

Collins Richardson et al v Benjamin W Richardson et al AXAHCVP2016/0002 (delivered 24th May 2014, unreported) applied.

5. The doctrine of res judicata prescribes that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. The court, however, has the discretionary power to revoke or vary any order that it has power to make in appropriate circumstances. Having reviewed the relevant authorities and the circumstances which obtained in this case, Wilkinson J did not have the requisite jurisdiction to vary or amend her costs order made in the First Claim. Moreover, an order made by a high court judge without jurisdiction can only be set aside on appeal to the Court of Appeal. It follows that the learned judge could not purport to set aside the judgment of Wilkinson J who was a judge of coordinate jurisdiction with him, and that the judgment could only be set aside by the Court of Appeal on an appeal. No such appeal having been instituted in this case, the judgment and costs order of Wilkinson J in the Second Claim stands.

Strachan v The Gleaner Company and another [2005] 1 WLR 3204 applied;
Vodafone Group Plc v IPcom GmbH and Co KG [2023] EWCA Civ 113 applied.

6. The learned judge did not overrule the order of Wilkinson J as her order clearly left the issue of the quantum of costs to be determined. It is trite law that a court has discretion as to whether costs are payable by one party to another, the amount of those costs and when they are paid. The appellate court will not interfere with the exercise of the trial judge's discretion unless the judge's decision exceeded the generous ambit within which reasonable disagreement is possible and, accordingly, the decision may be said to be clearly or blatantly wrong. In this case, the learned

judge was seised with the litigation and would have observed the parties' conduct and formed an unfavourable view of the appellant's conduct. The appellant did not identify any mistake in the learned judge's evaluation as a whole that is sufficiently material to undermine the learned judge's conclusions.

Strachan v The Gleaner Company and another [2005] 1 WLR 3204 applied; **Dufour and Others v Helenair Corporation Ltd and Others** (1996) 52 WIR 188 applied; **Straker v Tudor Rose** [2007] EWCA 368 (CA) applied; Rule 65.4 of the Civil Procedure Rules (Revised Edition) 2023 applied.

JUDGMENT

Introduction

[1] **ELLIS JA:** In this appeal, the appellant (the claimant in the court below) challenges the decision of the learned judge in the court below in which he declared:

- (i) that there are no further assets forming part of the estate of Gregory Johnny and Velina Johnny available for distribution to the appellant;
- (ii) that the respondent (the defendant in the court below) is entitled to pass the accounts of the estate; and that the respondent is not required to conduct further accounting;
- (iii) that the costs payable to the appellant in Claim No. SLUHCV2010/0066 shall be prescribed costs in the sum of \$7,500.00 and shall be payable out of the estate of Gregory Johnny;
- (iv) that the costs of the present claim, Claim No. SLUHCV2014/0256 shall be prescribed costs calculated at \$24,623.95 in accordance with the amount paid to the appellant as his share of the respective estates and that such costs shall be payable out of the estates of Gregory and Velina Johnny;
- (v) that the appellant shall only be entitled to recover 50% of the cost to which he would have been entitled in Claim No. SLUHCV2014/0256; and

(vi) that there be no order with respect to interest claimed by the appellant.

Background

- [2] The litigation background to this appeal is extensive and it is essential to the resolution of this appeal that this background be chronologically detailed. There are no less than three different but related legal proceedings which have resulted in judgments which are critical to the outcome of this appeal. First is the judgment of Wilkinson J in **Claim No. SLUHCV2010/0066** (hereafter referred to as the “**First Claim**”). The First Claim was brought by the appellant against the respondent in her capacity of administratrix of the succession of Mr Gregory Johnny. In that claim, the appellant sought a declaration that the grant of administration dated 16th August 2009 is null and void, that the grant of administration be improbated or alternatively, that the grant of administration be rectified so that the appellant is reflected therein as having a 1/5 share in the estate of Gregory and Velina Johnny.
- [3] On 26th February 2014, Wilkinson J rendered judgment in the First Claim in which she declared that the appellant was an heir by representation and a beneficiary in equal degree with the siblings of Greta Johnny of the estate of Gregory and Velina Johnny and that the grant be amended to include the appellant as a beneficiary by representation in the same degree as the siblings of Greta Johnny. Wilkinson J further declared that the RBTT life insurance proceeds received by Mr Gregory Johnny formed part of the estate of Mr Gregory Johnny for distribution in equal shares to his heirs. Wilkinson J also awarded prescribed costs to the appellant to be paid by the estate of Mr Gregory Johnny.
- [4] By letter dated 20th March 2014, the appellant demanded an account of the estate of Gregory and Velina Johnny within 8 days. Thereafter, the appellant filed another fixed date claim form, **Claim No. SLUHCV2014/0256** on 16th April 2014 (or the “**Second Claim**”) in which he sought a full accounting of all the assets and liabilities of the estates of Velina and Gregory Johnny including an account of all monies spent with respect to the said estates and thereafter the payment of his just entitlement. The central issue in

this claim was whether the respondent provided a satisfactory account of the assets and liabilities of the estates of Gregory and Velina Johnny. In his Statement of Claim, the appellant alleged that funds held at the Bank of Nova Scotia, the Laborie Credit Union and the proceeds of insurance policies held with RBTT Bank were included in the assets of Velina and Gregory Johnny. He did not mention any other bank accounts. In her defence, the respondent accepted that Gregory Johnny's assets included \$53,000.00 in Account No. 10296 at Bank of Nova Scotia, \$34.02 at the Laborie Credit Union and insurance policies totalling \$471,000.00.

[5] In an oral decision delivered on 8th August 2019 Wilkinson J made the following relevant orders:

- (i) Ms. Johnny is to within 30 days, file the necessary documents for amendment of the Letters of Administration and so have Mr. Shaheel Jagroop reflected as a beneficiary under the estates of Mr. Gregory Johnny and Mrs. Velina Johnny.
- (ii) Ms. Johnny is to prepare separate accounts of assets and liabilities for the estates of Mr. Gregory Johnny and Mrs. Velina Johnny. Same is to be filed within 90 days. Thereafter, closely for the estate of Mrs. Velina Johnny, the matter is to be fixed before the Court for determination of what claims listed would be allowed or denied payment from the said estate. Ms. Johnny is to support the account of Mrs. Velina Johnny's Banker/s showing the position of her accounts from date of death until the date of letter/s and/or bank statements.
- (iii) The legal costs associated with **SLUHCV2010/0066** Shaheel Givanni Jagroop by his next friend Fabian Jagroop v Lucretia Johnny Administratrix of the Estate of Gregory Johnny are not to be borne by the estates of Mr. Gregory Johnny and Mrs. Velina Johnny. They are for the personal account of Ms. Johnny.

- (iv) A date for the payout of money due to Mr. Shaheel Jagroop from the estates of Mr. Gregory Johnny and Mrs. Velina Johnny is to be fixed by the Court which will make a final order on the account of the estate of Mrs. Velina Johnny.
- (v) Costs of this suit are to be borne by the estates of Mr. Gregory Johnny and Mrs. Velina Johnny and are to be fixed after the account of the estate of Mrs. Velina Johnny is settled by the court.

[6] In an affidavit filed 8th February 2022, the appellant (purporting to assist the respondent in her accounting obligations) claimed to be entitled to \$128,304.60 including a share of RBTT Account No. 1107600117 which he alleged held \$10,712.01. He also alleged that Velina Johnny held an Account No. 421819347 at Bank of Saint Lucia ("BOSL"). He further claimed entitlement to \$33,750.00 by way of costs in the First Claim and \$24,623.95 by way of costs in the Second Claim and demanded payment within 15 days. The appellant however admitted that he received \$102,542.38 on 17th July 2020.

[7] The appellant (by his next-friend) commenced further proceedings (the "**Third Claim**") against the respondent in which he sought orders directing the respondent to provide a full accounting of the assets and liabilities of the estates of Gregory Johnny and Velina Johnny; that a full accounting of all money expended out of the estates be provided; that the respondent pay to the appellant, all sums found due and owing to him from the estate as a result of such accounting; and costs.

[8] By his judgment delivered on 21st August 2023, Innocent J made the following relevant orders:

- (i) Declaring that there were no further assets forming part of the estate of Gregory Johnny and Velina Johnny available for distribution to the appellant.
- (ii) That the respondent is entitled to pass the accounts of the estate; and that there is no further accounting required to be conducted by the respondent.

- (iii) That the costs payable to the appellant in Claim no. SLUHCV2010/0066 shall be prescribed costs in the sum of \$7500.00 and shall be payable out of the estate of Gregory Johnny.
- (iv) The costs of the present claim shall be prescribed costs calculated at \$24,623.95 in accordance with the amount paid out or distributed to the appellant as his share of respective estates; and such costs shall be payable out of the estates of Gregory Johnny and Velina Johnny.
- (v) With respect to the costs order made at paragraph 4 above, and for the reasons already stated by the court in this decision, the appellant shall only be entitled to recover 50% of the costs to which he would have been entitled.

[9] Dissatisfied with the said judgment, the appellant filed his Notice of Appeal on 8th September 2023 in which he advanced the following grounds of appeal:

- (i) The decision is against the weight of the evidence.
- (ii) The decision is against the weight of the legal argument and conclusions advanced and made by the learned judge.
- (iii) The learned judge erred in failing to properly assess the factual matrix of the case and so failed to take into consideration and or to give due and/or sufficient regard to fundamental aspects of the facts presented and so wrongly concluded that the appellant has received full payment from the insurance monies and the monies at Bank of Nova Scotia. The appellant has confirmed that based on the learned judge's Court Order page 5 paragraph 16 that he received an interim payment of \$102,542.38.
- (iv) The respondent confirmed as receiving from the various insurances and Bank of Nova Scotia a total amount of \$630,151.19. This figure represents \$471,000.00 from RBTT for life insurance, Bank of Nova Scotia \$53,000.00 and \$106,151.19 from United Insurance. The appellant can confirm that he has not received the balance of \$23,487.86.

- (v) The appellant is entitled to 1/5th share of the estate of Gregory and Velina Johnny based on Justice Wilkinson's Court Order in SLUHCV2010/0066 page 16 paragraphs 1 and 2.
- (vi) The learned judge erred in failing to make reference and give due recognition to specific documents received from Bank of St Lucia with reference to Account # 42181937 belonging to Velina Johnny with a balance of \$34,713.51 as at 14th February 2007. This balance has not been accounted for, although the Court Order from Justice Rosalyn Wilkinson in SLUHCV2014/0256 page 20 paragraph 2 indicated full accounting to be done for Velina Johnny.
- (vii) The learned judge erred by failing to request from the respondent as to why it is only now they are writing to RBTT/ 1st National Bank letter dated 12th May 2022 approximately fourteen (14) years later requesting information on account # 1107600117.
- (viii) The learned judge erred in failing to address that the document received from RBTT Bank, was stamped and signed by a representative of RBTT Bank and the respondent should have verified the authenticity of the signature on the said document.
- (ix) The learned judge erred in having failed to refer to page 3 paragraph 7 Claim No. SLUHCV2014/0256 which makes reference to the letter from Alvin St Clair Chambers dated 20th March 2014. The respondent was requested to produce the accounts for the estate of Velina and George Johnny based on the Court Order from Justice Wilkinson Claim No. SLUHCV2010/0066 page 16 paragraphs 1 and 2.
- (x) The learned judge erred in having wrongly concluded that the appellant did not provide sufficient time to the respondent to review the judgment of SLUHCV2010/0066. The judgment for Claim # SLUHCV2010/0066 was received on 26th February 2014. The appellant wrote to the respondent on 20th March 2014. The appellant filed the new claim SLUHCV2014/0256 on 16th April 2014 which is 49 days after the judgment. The respondent had sufficient time to appeal Justice Wilkinson's decision. The respondent also had sufficient time to review and respond to the appellant's letter dated 19th March 2014; however, no response or acknowledgement was given by the respondent. A copy of the letter from Alvin St Clair and Associates to the respondent dated 20th March 2014 was available requesting the respondent to follow the instructions of Justice Wilkinson in Claim No. SLUHCV2010/0066.
- (xi) The learned judge erred by his failure to give due recognition to and uphold the court order of Justice Wilkinson SLUHCV2014/0256 page 20 paragraph 5 which reads; "The legal cost associated with SLUHCV2010/0066 Shaheel Givanni Jagroop by his next friend Fabian

Jagroop v. Lucretia Johnny administratrix of the Estate of Gregory Johnny are not to be borne by the estate of Mr Gregory Johnny and Mrs Velina Johnny. They are for the personal account of Ms Lucretia Johnny”.

- (xii) The learned judge erred when by his failure to give recognition that Claim No. SLUHCV2010/0066 is not merely declaratory relief which the appellant sort (sic). Based on Justice Wilkinson’ judgement in Claim # SLUHCV2010/0066 page 16 paragraph 2 it reads; “it is declared that the RBTT life insurance money received by the sole surviving beneficiary, Mr Gregory Johnny are part of the estate of Mr Gregory Johnny for distribution in equal shares for all of his heirs and beneficiaries and who include Mr Shaheel Jagroop”. This claim is for monetary relief as the value of the claim which was known at the time is \$630,151.19 based on the information presented by the respondent in Claim No. SLUHCV2010/0066.
- (xiii) The learned judge erred when by his failure to give recognition to the document from Dexter Theodore's Chamber to the appellant indicating the calculation of prescribed costs and the scale of prescribed costs. The value of the insurance monies and Bank of Nova Scotia monies is \$630,151.19 which was confirmed by the learned judge in his Court Order dated 21st August 2023, page 5 paragraph 16. An interim payment of \$102,542.38 was made to the appellant on 14th December 2014. The appellant is requesting that CPR 65.5 (2) (a) be used in the calculation the prescribed cost for Claim No. SLUHCV2010/006 since the actual insurance value and Bank of Nova Scotia amount were available at the time of filing the case and at the time of judgment.
- (xiv) The learned judge erred in failing to mention that Mr Dexter Theodore KC filed a skeleton argument on behalf of the respondent dated 7th July 2022 and indicated that based on the case Strachan v Gleaner Co that a judge was not empowered to set aside the decision made by another judge unless it is taken to the Court of Appeal. In the case Strachan v Gleaner Co, the Privy Council made it clear that when a judge makes an order: “As between the parties however and unless and until reversed by the Court of Appeal, his decision (both as to the Jurisdiction and on the merits) was res judicata. As a judge of co-ordinate jurisdiction Smith had no power to set it aside”.
- (xv) The learned judge erred in applying a subjective reasoning by overruling Justice Wilkinson’s Court Order in Claim No. SLUHCV2014/0256 page 21 paragraph 7 rather than an objective test as the law and legal precedent stipulate and so wrongly concluded that the appellant is entitled to only 50% of the cost in Claim SLUHCV2014/0256.

- (xvi) The respondent confirmed and also disclosed bills based on Claim SLUHCV2010/0066 page 6 paragraph 19 that the expenses for Velina Johnny is \$34,525.33, Gregory Johnny \$3,899.50 and Greta Johnny Jagroop \$3,637.00, total \$42,061.83. The appellant requested that only these figures are considered as the rightful expenses incurred for Greogry and Velina Johnny and these figures are the figures to be used in the preparation of the account for Gregory and Velina Johnny.
- (xvii) The learned judge erred by failing to caution or fine the respondent for not following the court orders SLUHCV2010/0066 page 16 paragraph 3. The respondent was requested to amend the Letter of Administration and this decision was made on 26th February 2014. Also, based on Court Order SLUHCV2014/0256 page 20 paragraph 1 Justice Wilkinson provided specific date (sic) to amend the Letter of Administration which is 30 days within which to file. The date of this court order was 8th August 2019. The respondent filed the application to amend the Letter of Administration on 3rd February 2020 without providing any reasonable explanation to the Court, in writing, for not following the court order.
- (xviii) The learned judge has erred by failing to award cost of this claim to the appellant. This Claim to enforce the judgment of Justice Wilkinson in Claim No. SLUHCV2014/0256 and the judgment received on 21st August 2023. The appellant requested cost of the claim upon filing this case.

The Parties' Submissions

- [10] In written legal submissions filed in support of this appeal, the appellant essentially regurgitated the contents of his notice of appeal. I do not consider it helpful or necessary to repeat these here.
- [11] Turning therefore to the respondent's submission, I note that in response to the **Ground 1** of the appeal, counsel for the respondent reiterated the well-known principles which limit the circumstances in which the appellate court can interfere with findings of the lower court and the extent to which such interference may occur.¹ Counsel submitted that there was ample evidence upon which the learned judge based his conclusions to which he arrived. Further, he argued that the appellant has not suggested that the

¹ FAGE UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5 [114]; Re b (a child) (care order: proportionality: criterion for review) [2013] 2 FCR 525.

learned judge misunderstood the evidence or reached a decision that no reasonable judge could have reached.

[12] In response to **Ground 2**, counsel argued that in keeping with **Yates Associates Construction Company Ltd v Blue Sand Investments Limited**², ‘the critical question...is whether there was evidence before the learned trial judge from which she could properly have reached the conclusions that she did or whether, on the evidence, the reliability of which it was for her to assess, she was plainly wrong.’ He submitted that this Court should dismiss this ground as there was ample evidence upon which the learned judge based the conclusions to which she arrived, and the appellant has not suggested that the learned judge misunderstood the evidence or reached a decision that no reasonable judge could have reached.

[13] In reply to the respondent’s submissions as to **Grounds 1 and 2**, the appellant reproduced several parts of the judgment of Wilkinson J in the First and Second Claims. He contended that on the strength of **Strachan v The Gleaner Co. Ltd and another**³, Innocent J could not set aside the decision of Wilkinson J in the absence of an appeal. He stated that the matters decided by Wilkinson J were subject to the *res judicata* doctrine, and so it was not possible for Innocent J to fail to fine or otherwise penalize the respondent who had breached the order which directed her to place the money from the estate into an escrow account and refrain from distributing the same. It was similarly not open to Innocent J to find that there were no other assets forming part of the estate available for distribution because on the face of the affidavit duly filed by him on 31st March 2022, there was a remaining balance to be paid to him. Finally, it was not open to Innocent J to find that he was only entitled to 50% of his legal costs.

[14] Counsel for the respondent addressed **Grounds 2, 3 and 4** together, noting that in paragraph 13 of her affidavit of 31st March 2022, the respondent confirmed that the total value of her parents’ assets was \$630,185.21 and their liabilities totaled \$113,273.25,

² BVIHCVAP2014/0005 (delivered 5th May 2015, unreported).

³ [2005] 1 WLR 3204.

making the estate worth \$516,911.96. The appellant's 1/5 entitlement is therefore \$103,382.92. As it is not in dispute that the appellant has received a total sum of \$102,542.38, the balance remaining due to the appellant is therefore \$840.01.

[15] In replying to this rather succinct submission, the appellant took issue with the account filed by the respondent on 31st March 2022 contending that there were glaring omissions in the listed assets and liabilities of Velina Johnny, he further submitted that there were medical expenses reflected in the statement of account which would have been settled (or paid off) when Velina Johnny was still alive. He asserts that Innocent J was wrong to order that the respondent was entitled to pass the accounts when it is clear that these accounts were incorrect or misleading. With regard to the estate of Gregory Johnny, he submitted that the total liabilities and expenses filed on 31st March 2022 were grossly overstated and misleading and do not represent the same figures which would have been presented to Wilkinson J in the earlier proceedings. The appellant submitted that Innocent J should not have relied on new evidence after a decision had been taken.

[16] With respect to **Ground 5**, which raises the issue of whether the appellant is entitled to one-fifth share of the estate of Gregory and Velina Johnny, counsel for the respondent submitted that this does not present as a ground of appeal. Rather, it is simply a restatement of the decision of Wilkinson J, which settled the appellant's entitlement in the estate of Gregory and Velina Johnny in the First Claim.

[17] Counsel for the respondent further contended in respect to **Ground 6** (which requires the court to determine whether the respondent accounted for Velina Johnny's BOSL Account No. 421819347 which allegedly held a balance of \$34,713.51 on 14th February 2007) that at paragraph 30 of his judgment the learned judge determined that the appellant's contention that the respondent held several accounts at BOSL one of which contained \$170,153.62 as at 10th March 2009, (which allegedly did not include the proceeds of the insurance monies) was not relevant. The learned judge explained at paragraph [36] of his judgment that the issue regarding accounts held at 1st National Bank had been dealt with at paragraph [36] of the decision of Wilkinson J of 8th August 2019 where it was stated that the Court had no doubt that RBTT had paid the money to

BOSL for Greta Johnny's mortgage and that the appellant did not dispute that the mortgage was at BOSL. At paragraph [37], the learned judge found that these were joint accounts that did not form part of the respective estates because the appellant would have been able to deal with her accounts. At paragraph [38], the learned judge found as a fact that the BOSL accounts did not form part of the estates of Gregory Johnny and Velina Johnny and in particular that Account No. 421819347 at BOSL was a savings account held jointly by Greta Johnny and Velina Johnny which had been closed on 14th February 2007.

[18] In replying to the submissions made in respect of grounds 4 - 6, the appellant again took issue with the accuracy of the statement of account dated 31st March 2022 which were presented to the court below. He contended that the judge wrongly relied on it when it is inaccurate. He submitted that there are unaccounted funds (\$34,713.51 as at February 2007) standing to the credit of Velina Johnny at BOSL account No. 421819347. According to the appellant, this was confirmed in correspondence received from BOSL on 20th April 2022. He further submitted that Greta Johnny and Lucretia Johnny held an Account No. 422219276 with a balance of \$170,153.62 as at 4th March 2009 which showed a withdrawal dated 12th April 2007 to pay for funeral expenses when Velina Johnny passed away in January 2007. Although he conceded that he received an interim payment of \$102,543.38 on 2014, the appellant maintains that he is still owed the sum of \$23,487.86 plus interest.

[19] Counsel for the respondent argued that **Ground 7** is not a tenable ground of appeal as the contention that the learned judge should have required the respondent to explain why it was only in May 2022 that she wrote to 1st National Bank requesting information on Account No. 1107600117 was not pleaded and was not an issue in the court below. Counsel argued that the learned judge had a discretion whether to raise an issue with the date. He stated that the fact that the learned judge had not done so was an act done in the exercise of the judge's discretion. Relying on **Dufour and Others v Helenair Corporation Ltd and Others**⁴, counsel argued that the case at bar is not a case in

⁴ (1996) 52 WIR 188.

which interference with the exercise of the learned judge's discretion is warranted, as the criteria set out for interference by the Court of Appeal has not been established by the appellant.

[20] In reply, the appellant contends that he should have been paid 1/5 share of the funds in that account and he demanded disclosure of the copies of the relevant bank statements for that account.

[21] **Grounds 8 and 9** were addressed together and again counsel for the respondent submitted that they do not afford viable grounds of appeal as they essentially take issue with the purported failure of the judge to address aspects of the evidence in his judgment. Relying on **Correia v University Hospital of the North Staffordshire NHS Trust**,⁵ counsel for the respondent submitted that unless there is compelling reason to the contrary, an appellate court must assume that the trial judge has taken the whole of the evidence into consideration. If his conclusion is inconsistent with the evidence of certain witnesses, it is not the proper or necessary inference that he has forgotten or ignored them.

[22] Counsel for the respondent further contended that **Ground 10** addresses the exercise of the learned judge's discretion. His submission was that it is not for the appellant or the appellate court to criticise the learned judge's exercise of discretion unless it can be shown that the judge's decision exceeded the generous ambit within which reasonable disagreement is possible and could be regarded as clearly or blatantly wrong. Citing **Beacon Insurance Company Limited v Maharaj Bookstore Limited**⁶, Counsel submitted that the appellant did not identify any mistake in the learned judge's evaluation of the evidence as a whole that sufficiently material to undermine his conclusion that the appellant had not given the respondent sufficient time.

[23] The appellant replied to Grounds 9 –10 jointly. The specific piece of evidence which the appellant contends was wrongly ignored by the learned judge is that pre action letter

⁵ [2017] EWCA Civ 356.

⁶ [2014] 4 All ER 418.

issued by Alvin St. Clair's Chambers and dated 20th March 2014. This letter formed part of the exhibits and so he argued that it was not open to the respondent to contend that the appellant failed to give reasonable notice of his intention to issue the Second Claim. He denied that there was no pre-action protocol letter sent to the respondent and he submitted the learned judge erred when he relied on this untruth to support his decision to reduce the appellant's costs recovery. He submitted that the respondent had sufficient notice of the intended action and would have had enough time to address his complaints.

- [24] **Grounds 11 and 14** of the appeal address the costs order made by the learned judge. Counsel for the respondent argued that to suggest that the learned judge erred because he failed to mention a submission or authority of counsel is not a meritorious ground of appeal. Counsel for the respondent further submitted that once Wilkinson J delivered her judgment on costs on the First Claim, that decision was *res judicata* and she would not be able to revisit that decision, set aside her own costs order and substitute a new one. The learned judge was therefore correct to rule that this was impermissible.
- [25] In replying to **Grounds 11 and 14**, the appellant commended to this Court the orders of Wilkinson J in the First and Second Claim. He argued that a judge cannot set aside a decision of a judge of coordinate jurisdiction - instead, a challenge to this decision must be taken up on appeal: **Strachan v The Gleaner Co. Ltd and another**. He then placed a value of \$630,185.21 on the claim. Applying the prescribed costs regime, he suggested that the sum of \$44,112.96 is due. He further requested that this Court considers ordering that interest be paid in respect of these outstanding costs from 26th February 2014 when the original order was made by Wilkinson J.
- [26] In regard to **Ground 13**, the respondent argued that the appellant's reliance on the respondent's counsel's letter of 4th April 2022 is misplaced. He submitted that while the appellant exhibited the letter to his notice of appeal, the letter does not assist him as the letter explains why the First Claim was not a claim for a monetary sum. Despite this, the appellant maintains that he is entitled to have prescribed costs calculated on the basis that the estate is valued at \$630,151.19.

- [27] With regards to **Grounds 15 and 18**, counsel for the respondent submitted that the learned judge did not overrule the order of Wilkinson J who left the issue of the quantum of costs to be determined. He argued that the learned judge struggled to explain why he was exercising his discretion to award 50% of costs to the appellant. Counsel submitted that as with all exercises of discretion, the learned judge's exercise of discretion ought not to be lightly interfered with unless the judge's decision exceeded the generous ambit within which reasonable disagreement is possible and, was thus plainly wrong. Counsel stated that in his estimation, the learned judge gave an impeccable reasoning as to the specific reasons why he was exercising his discretion not to award full costs to the appellant. The appellant's reply reiterated his claim to his full costs in the Second Claim.
- [28] In response to **Ground 16** of the appeal, counsel argued that although the respondent confirmed the value of the assets of her parents totaled \$630,185.21 and their liabilities totaled \$113,273.25, the learned judge was within his rights to believe any part of the evidence before him. He submitted that the learned judge cannot be taken to task for accepting one piece of evidence and rejecting another. The appellant, however, reiterated that that learned judge was wrong rely on new evidence after a decision has been taken. He submitted that the total figure for liabilities and expenses in respect of the estates was wrongly summed up because a number of expenses which would not have been taken into account by Wilkinson J would have been reflected in the erroneous statement of accounts issued on 31st March 2022 and relied upon by the learned judge.
- [29] In regards to **Ground 17** of the appeal in which the appellant takes issue with the learned judge's failure to caution or fine the respondent in respect of her noncompliance with the previous court orders, the respondent noted that there was no such application before the court and that in any event the learned judge found the appellant to be the one guilty of pursuing spurious and at times vexatious allegations.
- [30] In reply, the appellant argued that all court orders should be adhered to and he reiterated his belief that there should be fines imposed where there is non-compliance and he urged this Court to advise what fines are to be enforced against the respondent. He again pointed out that had the respondent safeguarded the insurance money of

\$630,151.19, then there would have been interest earned on these monies at a rate usually of 3%. He therefore contends that he is entitled to his 1/5 share of interest from the insurance monies in the sum of \$3780.90. ($\$630,151.19 \times 3\% = \$18,904.53$. 1/5 of $\$18,904.53 = \3780.90).

Analysis and Conclusion

General - Appellate Approach

- [31] Notwithstanding the 18 grounds of appeal listed in the appellant's notice of appeal, it is immediately apparent that the appeal is primarily concerned with challenges to the learned judge's findings of fact. It is therefore critical that this Court first considers the well-established principles guiding the approach which an appellate court should adopt on an appeal from the findings of facts of a trial judge. This approach (which can be summarised as exercising "appellate restraint") has been extensively examined in numerous judicial authorities. Perhaps the most comprehensive statement is set out in judgment in **Group Seven Limited v Notable Services LLP**⁷ where the English Court of Appeal put the position the following terms:

"21. Before turning to the issues themselves, it is important to bear in mind the proper approach of an appeal court. First-instance decisions will contain judicial conclusions that fall on a spectrum ranging from pure findings of primary fact at one end to pure questions of law at the other. In between are multifactorial assessments, evaluations and inferences drawn from primary facts, exercises of judicial discretion and mixed questions of fact and law. At one end of the spectrum, the appeal court will rarely even contemplate reversing a trial judge's primary findings of fact. This appellate restraint extends also to the trial judge's evaluation of the significance of factual findings or the inferences to be drawn from them. The degree to which this restraint should be exercised in the individual case may, however, be influenced by the nature of the conclusion and the extent to which it depended upon an advantage possessed by the trial judge, whether from a thorough immersion in all angles of the case or from first-hand experience of the testing of the evidence. In the end, however, no first-instance judicial conclusion is altogether immune from appeal and where a decision is shown to be wrong or to result from a serious procedural error, it is the duty of the appeal court to say so.

22. These long-standing principles, based on a combination of practical and policy considerations, have been thoroughly analysed by the House of Lords and by the Supreme Court in decisions such as:

⁷ [2019] EWCA Civ 614.

Biogen Inc v Medeva plc [1977] RPC1; Piglowska v Piglowski [1999] 1 WLR 1360; Twinsectra v Yardley [2002] UKHL 12; Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23; Re B (A Child) [2013] UKSC 33; McGraddie v McGraddie [2013] UKSC 58; and Henderson v Foxworth Investments Ltd [2014] UKSC 41

and by this court in, for example:

Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5; Smech Properties Ltd v Runnymede BC [2016] EWCA Civ 42; JSC Bank v Ablyazov [2018] EWCA Civ 1176; and British Council v Jeffery [2018] EWCA Civ 2253.

23. Extensive citation from these authorities is not necessary. For their general effect, it is sufficient to recall one extract, concerning the approach to findings of primary fact and resulting evaluations, from the recent judgment of Leggatt LJ in Ablyazov at [40-43]:

'40. It is convenient to distinguish – although the difference is really one of degree – between findings of primary fact and factual findings which involve evaluating and drawing inferences from such primary facts. The reasons for the reluctance of appellate courts to interfere with findings of fact made following a trial apply in both cases: indeed, the reasons for restraint are often stronger where the finding involves an evaluation of primary facts.

41. Those reasons are by no means limited to the advantage enjoyed by the trial judge in a case in which oral testimony plays a significant part of having seen and heard the witnesses give evidence. The reasons also include recognition that the judge who presides over the trial is immersed in the evidence in a way that an appeal court cannot replicate. As it was put in the majority judgment of the Supreme Court of Canada in *Housen v Nikolaisen* 2002 SCC 33; [2002] 2 SCR 235, para 14 (quoted by Lord Reed JSC in *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 at para 33): "appeals are telescopic in nature, focusing narrowly on particular issues as opposed to viewing the case as a whole." In elaborating this point, the Canadian Supreme Court adopted the observations of a commentator that:

"The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and

narrow, often being shaped and distorted by the various orders or rulings being challenged."

See *Housen v Nikolaisen* 2002 SCC 33; [2002] 2 SCR 235, para 14 (quoted in *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 at para 4). Furthermore, not every detail of the relevant evidence need or can be captured in the reasons given by the judge. As Lord Hoffmann said in *Pigłowska v Pigłowski* [1999] 1 WLR 1360, 1372:

"[The judge's] expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualifications and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

42. Even where it could in principle be done, for an appellate court in a case involving a substantial body of evidence to attempt to acquire the same absorption in the detail of the case as the judge of first instance would be a disproportionate use of judicial resources and would hugely increase the length, cost and delay of litigation in return for little likely improvement in decision-making. Unlike conclusions of law, findings of fact have no status as precedent in future cases and are therefore only capable of affecting the result of the case at hand. Considerations not only of efficiency in time and cost but also of fairness dictate that the judge's conclusions on such points should generally be treated as final. In the words of White J giving the opinion of the United States Supreme Court in *Anderson v City of Bessemer* [1985] 470 US 564, 575 (quoted with approval by the UK Supreme Court in the *McGraddie* case at para 3):

"... the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be 'the 'main event' ... rather than a 'tryout on the road' ..."

The same point has been made using a different metaphor by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, para 114(ii), when he said:

"The trial is not a dress rehearsal. It is the first and last night of the show."

43. For these reasons the principle is firmly established that an appellate court should only interfere with a finding of fact made by the trial judge if satisfied that the conclusion is "plainly wrong": see e.g. *McGraddie v McGraddie*, [2013] UKSC 58; [2013] 1 WLR 2477; *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600. As Lord Reed explained in the latter case, what this amounts to is that it must either be possible to identify a material error in the judge's process of reasoning – such as "a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence" (para 67); or, if there is no such identifiable error and the question is simply one of judgment as to the appropriate weight to be given to the relevant evidence, the appellate court must be satisfied that the judge's conclusion "cannot reasonably be explained or justified" (*ibid*). As Lord Reed also stated in the *Henderson* case (at para 62):

"It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge would have reached."

Another formulation of the test, which has also been approved at the highest level, is that the appellate court ought not to interfere "unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement is possible": *Todd v Adams & Chope* (trading as *Trelawney Fishing Co*) [2002] 2 Lloyd's Rep 293, para 129 (Mance LJ) approved in *Assicurazioni Generali SvA v Arab Insurance Group* [2002] EWCA Civ 1642; [2003] 1 WLR 577, para 17 (Clarke LJ) and by the House of Lords in *Datec Electronics Holdings Ltd v UPS Ltd* [2007] UKHL 23; [2007] 1 WLR 1325, para 46." (emphasis added)

- [32] Moreover, in *DB v Chief Constable of Police Service of Northern Ireland*⁸, Lord Kerr emphasised that the first instance trial was the "main event" and even where findings are based on affidavit evidence and consideration of contemporaneous documents caution should be exercised at the appellate level. Lord Kerr added:

⁸ [2017] UKSC 7 at paragraph 80 and see: *Petroleum Company of Trinidad and Tobago Limited v Ryan* [2017] UKPC 30.

“Impressions formed by a judge approaching the matter for the first time may be more reliable than a concentration on the inevitable attack on the validity of conclusions that he or she has reached which is a feature of an appeal founded on a challenge to factual findings. The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent. In the present appeal, I consider that the Court of Appeal should have evinced a greater reluctance in reversing the judge’s findings than they appear to have done.”

- [33] This approach has been adopted in numerous judgments of this Court including **Yates Associates Construction Company Ltd v Blue Sand Investments Ltd**.⁹ and **Flat Point Development Limited v Mary Dooley**.¹⁰ In the latter case, this Court also made clear that it is not the function of an appellate court to go trawling through the evidence in order to determine whether the findings of fact by the judge were correct. At paragraphs 38-39 of the judgment, the Court stated:

“...It is not open to this Court to seek to have a re-run of the trial and to determine who is to be believed. The appellate court ought not to second guess the trial judge who has been immersed in the case and has had a unique opportunity of hearing and seeing the witnesses and testing their evidence and gaining a feel of the case, an opportunity which is denied to the appellate court.

It is the function of the appellate court to make sure that the judge has correctly directed himself to and applied the relevant law and has properly approached his task in deciding disputed facts and has not erred in principle. After this has been determined, the appellate court has to stand back and determine whether the findings of fact were open to the judge to make. If they were, the appellate court should not interfere.”

- [34] I am unable to improve upon these statements of principle, and I am guided by them.

Challenge to Findings of Facts and Weight accorded to evidence

- [35] Turning then to the grounds of appeal, I propose to examine the aspect of the appeal challenging the learned judge’s findings of fact and the weight accorded to the evidence cumulatively. In his notice of appeal filed on 8th September 2023, the appellant distilled the contentious findings of fact as follows:

- (i) “That the [respondent] has not accounted for all the assets belonging to the estates of Gregory and Velina Johnny.

⁹ BVIHCVP2012/0028 (delivered 20th April 2016, unreported).

¹⁰ ANUHCVP2015/0029 (delivered 13th March 2019, unreported).

- (ii) That Velina Johnny held account #421819347 at Bank of St Lucia and this was closed on 14th February 2007 and this amount has not been accounted for in the statement of accounts for Velina Johnny.
- (iii) That claim #SLUHCV2010/0066 is for monetary value and not merely a declaratory relief as indicated by the learned judge. The [appellant] received from Claim # SLUHCV2010/0066 an interim payment of \$102,542.19 dated 14th December 2014 and this payment was based on value of the estate at \$630,151.19.
- (iv) There is no proof from the respondent that they have paid the [appellant] the complete 1/5 share of all the insurance monies and monies from Bank of Nova Scotia.
- (v) That although Wilkinson J ordered that the insurance monies be held and not distributed as per court order from Wilkinson J dated 14th December 2014, that the [respondent] distributed the monies prior to the court order of 21st August 2023.
- (vi) The [respondent] has failed to request from RBTT Bank/ 1st National Bank to verify the authenticity of the document received from Agatha Ramontal-Riviere of RBTT Bank showing that Greta Johnny held an account #1107600117.
- (vii) That the [respondent] has indicated that they only received the insurance monies from RBTT Bank and not the monies from account #1107600117. However, the [respondent] has not shown proof of the deposits made from the monies received from RBTT Bank."

[36] At paragraph [28] of his judgment, Innocent J, succinctly and correctly summarised the case before him in the following terms:

"[28] The dispute between the parties resided in the actual **value of the proceeds of the policies of insurance and the bank accounts** which inevitably affected the final amount available for distribution. The claimant had placed the value of the estates at \$641,523.01 and the defendant at \$630,151.19."

[37] This reflected the appellant's contention that the respondent has not accounted for all the assets belonging to the estates of Gregory and Velina Johnny and that there is a substantial balance which remains due and owing to him. The appellant was principally concerned with the purported failure to account for the proceeds of insurance policies (RBTT insurance and United Insurance) as well as several bank accounts.

Insurance proceeds

- [38] With respect to the insurance policies, it is clear that Wilkinson J would have found the First Claim that the insurance proceeds formed part of the estates and that the appellant was entitled to 1/5 share in the proceeds of these policies. In the court below, at paragraph 11 of her affidavit filed on 21st February 2022, the respondent would have averred that she had distributed the insurance proceeds in accordance with the order of Wilkinson J. That affidavit annexed a Statement of Account dated 20th February 2022 which lists 4 separate insurance policies and their respective values.
- [39] Paragraphs 9 – 12 of the affidavit of Fabian Jagroop filed on 4th March 2022, sets out the appellant's response to the respondent's contention. The response like much of the appellant's submissions is puzzling, vacillating between assertions that distribution should not have taken place and constituted a contempt of court and a complete denial in which he represents that the proceeds have not been completely distributed and that the sum of \$25,762.22 is still owed to him. In reply, at paragraph 28 of the respondent's affidavit filed on 31st March 2022 she again averred that the proceeds of the insurance policies had been paid to the appellant. However, in his affidavit filed in June 2022, the appellant demanded that the respondent provide documentary receipts proving that the sums claimed has been paid out him.
- [40] The learned judge's analysis on this issue is set out at paragraphs [45] – [46] of the judgment:
- “[45] Having read the several affidavits filed herein the court has formed the view that the defendant had made a concerted effort to comply with the court's order to provide an accounting with respect to the estates. The defendant prepared a statement of account dated 20th February 2022 which was annexed to her affidavit and made pursuant to the order of Wilkinson J dated August 2019.
- [46] It was apparent from this statement of account that all the proceeds of insurance had been distributed and that indeed the claimant had already received his 1/5 share.”
- [41] Having reviewed the grounds of appeal and the legal submissions advanced in support thereof, I am not satisfied that the appellant has discharged his burden to demonstrate

or satisfy this Court that the learned Judge's conclusion is plainly wrong. Applying the appropriate appellate restraint in this case, I am not satisfied that the appellant has afforded any basis upon which this Court could interfere with the learned judge's reasoning.

[42] The appellant takes no issue with the amount which the respondent claims to have been received by way of insurance proceeds. Rather, he contends that he did not receive his full entitlement (1/5 share) of these proceeds. The respondent's statement of account however asserts that these proceeds would have been distributed to the heirs (i.e. 1/5 shares after the expenses of the estate of Gregory Johnny would have been deducted). In the event that the appellant had a genuine issue with this statement, the Civil Procedure Rules ("CPR") contains provisions which regulate making objections to an account. It is clear that any party who claims that there are omissions or challenges any item in the account must give notice to the accounting party with the best particulars that the party who so claims can give of the omission or error; and the precise grounds for alleging it.

[43] In my judgment, the case advanced by the respondent was woefully inadequate in this regard. Other than the bare assertion that the distribution of the assets of the estates is incomplete, the appellant has advanced no cogent basis upon which the learned judge could deliberate. The learned judge was clearly well immersed in the relevant litigation history and the evidence in this matter and it is clear that he formed a view about the reliability and credibility of the respondent and her accounting of the estates of Gregory and Velina Johnny. It seems to me that given the respective averments of the parties, it was clearly open to the learned judge to have arrived his finding. The appellant has not identified any material error in the judge's process of reasoning. It cannot be said that the learned judge made a critical finding of fact which has no basis in the evidence, or demonstrably misunderstood of relevant evidence, or failed to consider relevant evidence.

Bank accounts

[44] The appellant's notice and grounds of appeal take issue with the respondent's purported failure to account for funds contained in a BOSL Account No. 421819347; Bank of Nova Scotia Account No. 10296; RBTT Account No. 1107600117. With respect of the BOSL Account No. 421819347, the appellant contends that the respondent's statement of account does not list this account (\$34,713.51) as an asset in the estate of Velina Johnny notwithstanding that there is correspondence from the Bank confirming the existence of this account.

[45] The correspondence referenced by the appellant is that dated 12th March 2009 addressed to Mr Fabian Jagroop by the BOSL Manager of Administration and Retail Services in which she represents that the bank's record reveal a savings Account No. 421819347 in the names Greta Johnny/ Mary V Johnny which was opened on 3rd January 1999 and closed on 14th February 2007. As at the date of closing the balance in that account was \$34,713.82.

[46] At paragraphs [37] – [38] of his judgment, the learned judge sets out his reasoning on this issue:

“[37] In any event, the claimant appeared to have taken the position that the accounts held at BOSL by Greta Johnny and at times jointly with the defendant and other persons ought to be debited so that the expenses of the estate of Gregory Johnny be deducted therefrom. The court has taken the view that the claimant appeared to be conflating these accounts with assets belonging to the estate. It is the court's considered view that these accounts did not form part of the estates. Accordingly, they did not factor into any accounting required to be made by the defendant”.

[38] The court was not inclined to accept that there were any sums to be distributed out of any accounts held at BOSL. Mr. Jagroop was the administrator of his deceased wife Greta Johnny's estate. Clearly, he would have had the ability to deal with these accounts. Mr. Jagroop did not indicate whether the joint accounts were subject to a right of survivorship or otherwise fell to be administered as part of the estate of Velina Johnny. It would not be surprising that the proceeds of these BOSL accounts had already been converted or distributed prior to the commencement of SLUHCV2010/0066. Assuming that this might very well be the case, then clearly there would be no sums available for distribution from those BOSL accounts. In any case, the court was not satisfied that they formed part of the estates of Gregory Johnny and Velina Johnny. The claimant had made

particular reference to account number 421819347 held at BOSL. This account was a savings account held by Greta Johnny and Velina Johnny. This account was a savings account held by Greta Johnny and Velina Johnny. This account was closed on 14th February 2007.”

[47] I am satisfied that this reasoning is clear and unassailable and that there is no basis to interfere with the same. Being well seised of the relevant factual background and chronology, it would not have been lost on the learned judge that Velina Johnny would have passed away in January 2007 and that at the time of her death, Greta Johnny, the other account holder, would have been alive and would no doubt have been responsible of the closure of that account in February 2007. It would also not have been lost on the judge that in any event, the respondent would only have been issued letters of administration in the estate of Velina Jonny in 2009 well after that account would have been closed. It is therefore not surprising that the judge arrived at the conclusions that the proceeds of that account would not form part of the estate of Velina Johnny.

[48] With respect to the RBTT Account No. 1107600117, the crux of the appellant's contention is that he exhibited a document purporting to be from RBTT intituled:

List of Statement of Benefits Due
To the Estate of – Greta Johnny-Jagroop
Date of Death – August 20, 2008.

which included an item described as “Savings Account Number 1107600117” with a balance of \$10,712.01. Endorsed on the documents is what purports to be a stamp of the RBTT Caribbean Bank. The author of that document is not clear. The appellant contends that the sums in that account have not been accounted for and that he is entitled to a 1/5 share of the same.

[49] The respondent, on the other hand, claimed to have had no knowledge of the plight and destination of the sum of \$10,712.01 held in Account No. 1107600117 at RBTT Bank. In his notice of appeal, the appellant asserts that the learned judge should have taken into account the fact that the respondent failed to verify the authenticity of that document which he alleges was received from Agatha Ramontal-Riviere of RBTT Bank. He further

contends that the learned judge erred when he failed to request an explanation for the respondent's delay (some 14 years) before requesting any information in regards to this specific account.

[50] Having reviewed the record of appeal, I am satisfied that neither of these issues were raised or argued by the appellant in the court below. This Court has repeatedly held that a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below. It is beyond question that if a new matter is raised and evidence could have been given which by any possibility could have prevented the point from succeeding, the point cannot and should not be taken. The roles of the trial and the appeal need to be kept distinct. The appeal is not a reworking of the trial taking account of such impediments as are thrown up by the judge's findings which alter the landscape.

[51] I cannot ignore that the document in question would have been produced and relied upon by the appellant in support of his claim for an account. The burden therefore rested on him to authenticate and prove that document. It is also clear that the estates which were the subject of the proceedings in the court below were that of Gregory and Velina Johnny and not Greta Johnny. Even assuming the document is authentic, I have some difficulty in discerning the relevance of statement of benefits due to Greta Johnny who passed away in 2008.

[52] Finally, I also cannot ignore that pursuant to a court order (8th August 2019), the respondent's attorney would have written to 1st National Bank St. Lucia Limited formerly RBTT Bank on 9th June 2021 inquiring about any accounts which may have been held in the names of Gregory Johnny and Velina Johnny. 1st National Bank responded by letter dated 21st June 2021 informing that there were no accounts in the name of Gregory Johnny and Velina Johnny and no sums due and owing to the bank in respect of mortgages and other facilities. Perhaps most importantly, I cannot ignore the appellant's own affidavit evidence of 20th June 2022 in which he readily accepted the response from 1st National Bank St. Lucia Limited and applied the same by amending his statement of account.

- [53] In light of these critical factors, I am satisfied that there is no basis to interfere with the judge's findings. It was clearly open to him to accept that the respondent's evidence and her statement of account which does not reflect this account.
- [54] The appellant further contends that the learned judge erred because there is no proof that the respondent paid a 1/5 share in the monies at Bank of Nova Scotia. The appellant cites an excerpt from the respondent's evidence in which she averred that at the death of her father, Gregory Johnny he held (in his sole name) Account No. 10296 at the Bank of Nova Scotia showing a balance of \$53,000.00. In the court below, the respondent contended that the funds in that account have been distributed to the appellant. The appellant while conceding that he has received a part of his payment contends that there is an outstanding balance still owed to him. The actual amount owned however vacillates. At one point he claims an outstanding balance of \$25,762.22, however, in Ground 4 of his notice of appeal, the appellant contends that the sum of \$23,487.86 remains due and owing to him.
- [55] The learned judge categorically determined that the proceeds of Bank of Nova Scotia Account No. 10296 had already been distributed and the appellant had received his share of the proceeds.
- [56] Given that the arguments advanced by the appellant in respect of the account at the Bank of Nova Scotia are lumped together with those made in respect of the insurance proceeds, I am satisfied that the reasoning applied at paragraphs [38] – [43] will be equally applicable here. The appellant has failed to identify any errors in the learned judge's reasoning or conclusion, despite several invitations from this Court to specifically point out the alleged errors. Therefore, there is no basis to interfere with the learned judge's findings of fact.

Liabilities and Expenses

- [57] The appellant contends that liabilities and expenses set out in the respondent's Statement of Account of 31st March 2022 is incorrect. He contended that the respondent

included expenses which would have been incurred and paid by Velina Johnny prior to her death in January 2007. These expenses should therefore have been disregarded by the learned judge.

[58] The appellant further argued that consequent upon earlier court orders directing that the accounts in respect of the estate of Gregory Johnny be separated from that of Velina Johnny, the total liabilities / expenses of Gregory Johnny which was filed on 31st March 2022 were grossly/ deliberately overstated and misleading as these figures do not represent the same figures which would have been presented to Wilkinson J in the First Claim. He takes issue with all expenses incurred for the construction of the house in Augier as well as the amounts claimed in legal fees incurred in respect of the estate. He contended that the legal fees would have been presented or approved by Wilkinson J and that it is wrong for the respondent to include such expenses after a decision would have been taken in the First Claim. He further argued that the funeral expenses of Greta Johnny (\$3637.00) also should not fall as an expense of either Gregory or Velina Johnny.

[59] The learned judge's reasoning in regard to expenses/ liabilities of the estates is set out in paragraphs [40] – [42] of the judgment. His observations are instructive. First, he points out that in her original draft statement of account (filed on 21st February 2022) the respondent provided no information about the liabilities incurred in respect of either estate. In fact, this failure was actually noted by the appellant and precipitated the respondent's further evidence filed on 31st March 2022 attaching a further draft Statement of Account rendered as at 31st March 2022.

[60] At paragraphs [14] – [20] of that affidavit, the respondent provided details of the expenses and liabilities in respect of each estate as well as her rationale for their application. At paragraph [41] – [45] the learned judge observed:

“[41] According to the defendant, the liabilities referred to had been largely settled in that most of the expenses are no longer outstanding. She referred to the liabilities of the estate as being inclusive of the medical and funeral expenses of her deceased parents. These expenses she stated were largely incurred and paid off between 2004 and 2014 and were included in

her statement of account in 2014. The defendant also accounted for legal and accounting expenses incurred during that period.

[42] Notwithstanding the accounting provided by the defendant in the statement of account dated 31st March 2022 wherein she set out the expenses of the estate of Gregory Johnny and Velina Johnny separately, the claimant continued to insist that the defendant had somehow inflated these expenses. As far as the court is concerned the expenses in relation to Gregory Johnny were already allowed in the previous proceedings as appeared by the decision of Wilkinson J dated 8th August 2019. At paragraph [34] of the decision Wilkinson J said:

‘Also, for the account of the estate of Mr. Gregory Johnny are all expenses supported by receipts/bills in relation to his medical attention, care and his funeral expenses. The Court is prepared having had sight of documentary evidence in this regard, notwithstanding the sum cited by Ms. Johnny in any earlier proceedings, to allow these bills.’

The vehement challenge mounted by the claimant with respect to the expenses of the estate of Mr. Gregory Johnny appeared to be another attempt by the claimant to re-litigate issues that were already determined in previous proceedings.

[43] The defendant stated that she excluded the legal expenses in her updated statement of account. She maintained on the basis of the decision of Wilkinson J that the legal costs are to be borne by the estates.

[44] In any event the defendant prepared an updated statement of account which included the liabilities and expenses of the two estates. The defendant maintained that she intended to rely on this statement of account until such time as she received the letters from the banks.

[45] Having read the several affidavits filed herein the court has formed the view that the defendant had made a concerted effort to comply with the court’s order to provide an accounting with respect to the estates. The defendant prepared a statement of account dated 20th February 2022 which was annexed to her affidavit and made pursuant to the order of Wilkinson J dated August 2019.”

[61] Having reviewed the litigation history of this matter, particularly the judgment of Wilkinson J in the First Claim as well as the evidence filed by the Parties and draft Statements of Account, I am not satisfied that judge’s reasoning can be faulted. The Administration of Estate Statement of Account is a financial document detailing all assets, income, liabilities, and expenses of a deceased person’s estate to ensure

accurate distribution to beneficiaries. Liabilities incurred during administration must be listed, including funeral expenses, professional fees, and other costs, to determine the net estate available for distribution after all lawful debts, taxes, and administration costs are paid. It is therefore important that during the course of the administration that the personal representative keeps detailed records of all the estate's income, expenditure, debt and interest. This should be an on-going process which persists throughout the course of the administration and until it is completed and a **final** statement of account is rendered.

[62] It follows that the appellant's suggestion that the judgment of Wilkinson J afforded some "cut off point" following which no further liabilities or expenses could be incurred or recorded is erroneous.

[63] Moreover, it is clear that Wilkinson J was tasked in earlier proceedings with determining whether the respondent had provided a satisfactory account of the assets and liabilities for the estates of Gregory Johnny and Velina Johnny. In her oral judgment delivered on 8th August 2019 Wilkinson J arrived at a number of critical findings relative to the issue of allowable liabilities and expenses. At paragraph [27] of her reasons, Wilkinson J acknowledged that given the lapse of time between the death of Gregory and Velina and the issuance of the grant of representation, certain bills including medical bill and funeral costs would have already been paid. At paragraph [33], she made clear that the main focus of her ruling was the estate of Gregory Johnny and she accepted all the expenses claimed in relation to the funeral of Greta Johnny. At paragraph [34] she also accepted all expenses which would have been supported by receipts and bills relative to medical attention, care and funeral expenses and she allowed those bills which would have been supported by documentary evidence. At paragraphs [38] – [40] she would have dealt with the litigation triggered from the estates and she noted that it was difficult to make an assessment as to whether or not legal costs should be allowed or disallowed. Nevertheless, at paragraph [41] she disallowed all legal costs incurred to declare the appellant a beneficiary and at paragraph [42], she allowed all legal costs associated with this Second Claim which related solely to the accounting for the estates. Finally, in

regard to the other law suits, she acknowledged that without appropriate details she could make no definitive findings.

- [64] In the case at bar, it is clear that Wilkinson J made definitive findings of fact, in respect of which Innocent J did not deviate. In this appeal, the appellant therefore faces an even higher threshold where he seeks to have this appellate court interfere with concurrent findings of fact. In **Collins Richardson et al v Benjamin W Richardson et al**¹¹ Blenman JA writing for this Court applied the judgments in **Philomen Dean v Chanka Bhim**¹² and **Desir and Another v Alcide**¹³ in holding that:

“Where the Court is being asked to overturn the concurrent findings of fact of two tribunals, each of whom had the benefit of seeing and hearing the witnesses and assessing their demeanour, the burden on the appellant to identify a serious violation of legal principle or procedure is at a higher standard. As a matter of settled practice, an appellate court will decline to interfere with concurrent findings of fact, save in very limited circumstances. The question of the weight of the evidence is not sufficient reason to depart from this established practice to decline to interfere with concurrent findings of fact.”

- [65] Having reviewed the submissions advanced by the appellant in support of his grounds of appeal, I am not satisfied that he has discharged his burden. No serious violation of legal principle or procedure has been identified. As it relates to the liabilities and expenses of the estates, it has not been proved that Innocent J deviated from definitive findings made by Wilkinson J indeed, the learned judge made clear that he was not prepared to engage the appellant in a re-litigation of issues which had already been determined in previous proceedings.
- [66] Finally, it is clear that Wilkinson J did not consider her judgment and order to be a final one. Having repeatedly acknowledged that in many respects she did not have sufficient details to make a ruling, at paragraph [45] of her judgment, she made clear that she was unable to close off the accounts by way of the final order and gave a number of further directions for further accounting. To the extent that there were further legal costs

¹¹ AXAHCVP2016/0002 (delivered 24th May 2019, unreported).

¹² [2019] UKPC 10.

¹³ [2015] UKPC 24.

associated with this Second Claim which arose, it would therefore fall to the judicial officer considering the final account to make any determination. It therefore follows that it was open to Innocent J to consider and determine the same.

Findings of Law Costs

[67] The appellant raises a number of challenges centred on the issue of costs. First, he contends that the learned judge erred when he failed to uphold the finding of Wilkinson J in her judgment and order of 8th August 2019 where she held that the respondent is to personally bear the costs of the First Claim. The starting point of this complaint is the order dated 26th February 2014 made by Wilkinson J in the First Claim. In that claim, the appellant challenged the letters of administration for both estates on the grounds that (a) he was not named as a beneficiary by representation of the estate of his grandfather, Gregory Johnny; (b) the grant failed to list all of the assets of Gregory Johnny, in particular benefits of insurance policies and real property, (c) he, as the son of Mrs. Greta Johnny-Jagroop, was entitled on representation to his mother's share in his grandmother, Velina Johnny's estate. The appellant was successful in that litigation and after making orders inter alia declaring that the appellant is an heir by representation and beneficiary in equal degree with the siblings of Greta Johnny-Jagroop of the estate of Velina Johnny and of the estate of Gregory Johnny, Wilkinson J awarded prescribed costs to the appellant payable by the estate of Gregory Johnny.

[68] However, when she came to consider the Second Claim, Wilkinson J made the following order at paragraph [5] which essentially reversed or varied her earlier costs order in the First Claim. She ordered that:

“The legal costs associated with SLUHCv2010/0066 Shaheel Givanni Jagroop by his next friend Fabian Jagroop v. Lucretia Johnny Administratrix of the Estate of Gregory Johnny are not to be borne by the estates of Mr. Gregory Johnny and Mrs. Velina Johnny. They are for the personal account of Ms. Johnny.”

[69] The respondent submitted that Wilkinson J could not have purported to vary or set aside a costs order which she previously made in the earlier First Claim. Counsel for the

respondent contended that Wilkinson J after she made the first order, would have been *functus officio* and unable to revisit her earlier order.

[70] Innocent J appears to have accepted that argument and at paragraph [74] – [75] of the judgment he held as follows:

“[74] Firstly, the learned judge appeared to have changed the previous order that she made in Claim No. SLUHCV2010/0066 wherein she stated that prescribed costs is awarded to Mr. Shaheel Jagroop and the same was payable by the estate of Mr. Gregory Johnny. The learned trial judge could not have presumed to change her costs order subsequently in substantially different proceedings notwithstanding that it involved the same parties and the same subject matter.

[75] There was no appeal against the decision of the learned judge. Therefore, the original costs order must stand the same not having been set aside on appeal. In the premises, the court finds that the costs payable to the claimant in Claim No. SLUHCV2010/0066 is prescribed costs payable out of the estate of Mr. Gregory Johnny.”

[71] Counsel for the respondent maintained that the learned judge was entitled to arrive at this conclusion because having delivered her judgment in the First Claim, Wilkinson J was *res judicata* and could not in another case set aside her previous costs order. He cited the judgment in **Strachan v The Gleaner Co Ltd and another** in support. Remarkably, the appellant also relies on this judgment. He contends that on the strength of this authority, Innocent J was not empowered to set aside the decision made by Wilkinson J who was a judge of coordinate jurisdiction. He submitted that the judgment of Innocent J should be considered *res judicata* such that the judgment or order of Wilkinson J could not be set aside other than through an appeal process.

[72] **Strachan** involved an appeal brought by the claimant in the action from a judgment of the Court of Appeal of Jamaica dismissing his appeal from the refusal of Smith J to set aside an earlier order of Walker J as being made without jurisdiction. By his order, Walker J had purported to set aside a default judgment for damages to be assessed after the damages had already been assessed and a final judgment entered in the plaintiff's favour. The Privy Council held that the court does have power to set aside a default judgment, even after damages have been assessed, as the default judgment

remained the source of the plaintiff's right to enforce the award. More importantly the Board also held a judge of co-ordinate jurisdiction does not have power to reverse another judge's decision regarding their own jurisdiction, as that can only be done by an appeals court. In paragraph [28] of the judgment, Lord Millett stated that:

“[28] An order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside and ... it provides a sufficient basis for the Court of Appeal to set it aside.”

[73] Later, at paragraph [32] of the judgment, Lord Millett went on to make the following key statements:

“[32] The Supreme Court of Jamaica, like the High Court in England, is a superior court or court of unlimited jurisdiction, that is to say, it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally ... his jurisdiction will have been challenged and he will have decided after argument that he has jurisdiction; more often ... he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of coordinate jurisdiction have power to correct it.”

[74] The doctrine of *res judicata* prescribes that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies and, as to them constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. The purpose of the doctrine is to provide finality to litigation and to protect parties from being vexed by the same matter twice. For all intents and purposes, the judgment in the First Claim was a final judgment and it follows that the consequential orders made (including the costs order) would also be final orders.

[75] Two distinct questions therefore arise from that fact: (1) whether Wilkinson J had jurisdiction to revisit her judgment in the First Claim and make the order which effectively reversed and varied the costs which she had made and; (2) if she did not, whether Innocent J had jurisdiction to set it aside. In regards to the first question, there can be no doubt that a court has the power to vary or revoke any order that it has power to

make in appropriate circumstances. The general power needs to be read in conjunction with rules dealing with the varying or revocation of orders. However, these rules should not be construed as allowing a court simply to reverse itself if it happens to change its mind.¹⁴ Even where the order in question is a final one, it is a matter of discretion to be exercised according to the particular circumstances of the case. Considerations such as material change of circumstances and the judge being misled would generally be displaced by the much larger and overriding public interest in finality.¹⁵ Similarly, where it is alleged that a judgment has been obtained by fraud, it may be set aside where a party can show that there had been conscious and deliberate dishonesty in relation to the relevant evidence given (or action taken, statement made or matter concealed) which was relevant to the judgment sought to be set aside. Otherwise, if all that is sought is a reconsideration of the order on the basis of the same material, the correct way of challenging an order is by appeal.

- [76] The only premise revealed in Wilkinson's J reasoning in the Second Claim which discloses the basis upon which she elected to review and revise her earlier order is set out in paragraph [41] of her judgement. There, she states:

"[41] In relation to SLUHCV2010/0066 Shaheel Givanni Jagroop by his next friend Fabian Jagroop v. Lucretia Johnny Administratrix of the Estate of Gregory Johnny, the Court ordered rectification of the Letters of Administration of the estate of Mr. Gregory Johnny to show Mr. Shaheel Jagroop as an heir by representation in the same degree as the siblings of Mrs. Greta Johnny Jagroop. This was a position arising from interpretation of the respective provisions of the Civil Code. The issue for the Court is whether the legal fees in connection with this suit should be allowed or be deemed to be an improper bill for the account. As the Court stated prior, the law on distribution under intestacy is prescribed. It therefore appears to the Court that such being the case, then any legal costs incurred to declare Mr. Shaheel Jagroop as a beneficiary should be disallowed. The Court will so order."

¹⁴ Lloyd's Investment (Scandinavia) Ltd Ager-Hanssen [2003] EWHC 1740 (Ch), [2003] All ER (D) 258, (July).

¹⁵ Such a case would include, for example, a case of material non-disclosure on an application for an injunction: Lloyds Investment (Scandinavia) Ltd v Ager-Nanssen [2003] EWHC 1740 (Ch), [2003] All ER (D) 258 (Jul), at paragraph [7]; See also Edwards v Golding [2007] EWCA Civ 416, [2007] All ER (D) 36 (Apr); Forcelux Ltd v Binnie [2009] EWCA Civ 854, [2010] HLR 340 (possession order which had already been made as a final order was set aside); Paragon Finance plc (formerly the National Home Loans Corp'n plc) v Pender [2003] EWHC 2834 (Ch), [2003] All ER (D) 346 (Nov); R S & M Engineering Co Ltd, Re Mond v Hammond Suddards (a firm) [2000] Ch 40, [1999] 3 WLR 697.

- [77] In my judgment, it appears that the learned judge simply changed her mind on the issue of costs having reconsidered the position and having compared and concluded that the Second Claim (which involved a contest between the Parties on accounts) was not a waste of the estates' funds and therefore those costs should be borne by the estates. Having reviewed the relevant authorities, I do not believe that in the circumstances which obtained in this case, that Wilkinson J had the requisite jurisdiction to vary or amend her costs order made in the First Claim.
- [78] In this regard, I find that the recent English Court of Appeal decision in **Vodafone Group Plc v IPcom GmbH and Co KG**¹⁶ to be instructive. In that case, the Court of Appeal ruled that it would not re-visit a costs order of nearly £1 million following the European Patent Office ("EPO") subsequently revoking the patent which underpinned the original action. The Court of Appeal had been invited to exercise its power under the English CPR rule 3.1(7) to vary or revoke the earlier costs order. However, after reviewing several relevant judicial authorities, their Lordships noted that the overwhelming thrust of the authorities was that the court's power under CPR rule 3.1(7) to vary or revoke orders either could not or should not be used to discharge a sealed final order. The only limited exception thus far even contemplated in civil proceedings was the case of a continuing order (such as a final injunction). Vodafone's only available route to challenging the final order made by the Court of Appeal was either through CPR rule 52.30 or by an appeal to the Supreme Court.¹⁷
- [79] Having come to the conclusion that Wilkinson J lacked to jurisdiction to revisit the costs order made in the First Claim, I am compelled to consider whether Innocent J had the jurisdiction to set her order aside. Having reviewed the authorities it is clear to me that he did not.

¹⁶ [2023] EWCA Civ 113.

¹⁷ In one of the judgments referenced in Vodafone Group was AIC Ltd v Federal Airports Authority of Nigeria [2022] 1 WLR 3223 which cited the strong public interest in the finality of litigation in this context under the overriding objective in the CPR as a critical factor.

- [80] As indicated earlier, the Board in **Strachan v The Gleaner Co Ltd** and another determined that an order made by a judge without jurisdiction to make the order stands until it is set aside by the Court of Appeal.
- [81] This position dovetails with the general principle which accords judges of the High Court equal powers and coordinate jurisdiction. However, a court of coordinate jurisdiction has no constitutional power to sit as an appellate court in another case and review and/or adjudicate on a decision or order made by another court of the same hierarchy. When a High Court judge makes an order without jurisdiction it can only be set aside on appeal to the Court of Appeal.
- [82] It follows that Innocent J could not purport to set aside the judgment of Wilkinson J who was a judge of coordinate jurisdiction with him, and that the judgment could only be set aside by the Court of Appeal on an appeal. No such appeal having been instituted in this case, the judgment and costs order of Wilkinson J in the Second Claim stands.
- [83] Secondly, the appellant maintains that the prescribed costs ordered in the order of 26th February 2014 should be calculated on the basis on CPR Part 65.5 (2) based on the amount payable to him from the respective estates of Gregory and Velina Johnny (applying and calculating the value of the claim on the basis of the value of the actual insurance proceeds and the sum of money in the Bank of Nova Scotia Account) rather than on the basis of an unvalued claim. He insisted that the First Claim was for a monetary sum and he relied on the Wilkinson's J order in the First Claim in which she made orders for the payment to the appellant of his share of the proceeds of the RBTT life insurance. On this basis he disputed that he would only be entitled to prescribed costs in the sum of \$7500.00.
- [84] Not surprisingly, the respondent contends that the legal proceedings in the First Claim were essentially an administration action in which the appellant sought declaratory relief, rectification or improbation of a grant of administration. It was not a claim for a monetary sum. Prescribed costs therefore fell to be quantified in accordance with CPR Part 65.5 (2) (d) which prescribes that in determining the costs the value of the claim "...if the

claim is not for a monetary sum, it is to be treated as a claim for \$50,000 unless the court makes an order under rule 65.6(1)(a).”

[85] I find much force in the respondent’s argument. A monetary claim is a legal action where a claimant seeks to recover a specific sum of money from a defendant, such as for damages or a debt. The fact that in her judgment Wilkinson J would have referenced monetary assets in the respective estates in which the appellant was entitled to and did in fact share, does not make the claim a monetary one.

[86] In the event that the appellant wished to determine the value of claim for the purpose of prescribed costs, it was open to him to file an application under CPR Part 65.6 at any time before pre-trial review seeking to have the court (a) determine the value to be placed on a case which has no monetary value; or (b) where the likely value is known, to direct that the prescribed costs be calculated on the basis of some higher or lower value. He elected not to do so and cannot now complain about the basis of quantification applied. Accordingly costs to be awarded in the First Claim fell to be determined in accordance with CPR 65.5(2) (d) and CPR 65.5(3). Therefore, the appellant was entitled to costs in the sum of \$7,500.00 as calculated in accordance with Appendix B.

[87] In less robust submissions, the appellant also contended that the learned judge erred when he failed to specifically acknowledge the correspondence from Mr. Dexter Theodore KC dated 4th April 2022, in which he calculated the prescribed costs. I find no merit in this submission.

[88] Appellate courts are generally “entitled and bound, unless there is a compelling reason to the contrary, to assume that he [a trial judge] has taken the whole of the evidence into consideration.” In this appeal the appellant has advanced no basis which would warrant this Court’s concern. Moreover, having reviewed the relevant correspondence I am not satisfied that it carried the import commended by the appellant. Instead, the letter merely explains that the First Claim was not a monetary claim.

[89] The appellant's third basis of challenge rests on the learned judge's exercise of discretion to award 50% of the costs in the Second Claim. He contends that this effectively overruled the order of Wilkinson J in which she determined that:

“Costs of this suit are to be borne by the estates of Mr. Gregory Johnny and Mrs. Velina Johnny and are to be fixed after the account for the estate of Mrs. Velina Johnny is settled by the Court.”

[90] The cursory reading of this order makes plain that the learned judge did not overrule the order of Wilkinson J as her order clearly left the issue of the quantum of costs to be determined. Moreover, it is now trite law that a Court has discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid.

[91] This Court in **Dufour and Others v Helenair Corporation Ltd and Others**¹⁸ firmly established the circumstances in which an appellate court should intervene to set aside a judge's exercise of discretion. It bears repeating that:

“An appeal against the exercise of judicial discretion will not be allowed unless the appellate court is satisfied (1) that in the exercise of the discretion the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of error, in principle the judge's decision exceeded the generous ambit within which reasonable disagreement is possible and, accordingly, the decision may be said to be clearly or blatantly wrong.”

[92] In considering whether this threshold has been met in this appeal, I have applied the relevant parts of CPR Part 64.6 which provide:

“(1) Where the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, **the general rule is that it must order the unsuccessful party to pay the costs of the successful party.**

(2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs but the court must state the reasons for its decision.

(3) This rule gives the court power in particular to order a person to pay –

¹⁸ (1996) 52 WIR 188

- (a) costs from or up to a certain date only;
- (b) costs relating only to a certain distinct part of the proceedings; or
- (c) **only a specified proportion of another person's costs.**

(4) The court may not make an order under paragraph 3(a) or 3(b) unless it is satisfied that an order under paragraph 3(c) would not be more practicable.

(5) In deciding who should be liable to pay costs the court must have regard to all the circumstances.

(6) In particular it must have regard to –

(a) the conduct of the parties both before and during the proceedings, including whether a party unreasonably refused to participate in a form of alternative dispute resolution approved by the court;

(b) the manner in which a party has pursued –

- (i) a particular allegation;**
- (ii) a particular issue; or**
- (iii) the case;**

(c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings;

(d) whether it was reasonable for a party to –

- (i) pursue a particular allegation; and/or**
- (ii) raise a particular issue; and**

(e) whether the claimant gave reasonable notice of intention to issue a claim

[93] I have also had regard to the dictum in the English judgment in **Straker v Tudor Rose**¹⁹ in which Waller LJ reiterated the approach to be adopted by a court in the following terms:

“[11] ...The court must first decide whether it is case where it should make an order as to costs, and have at the forefront of its mind that the general rule is that the unsuccessful party will pay the costs of the successful party. In deciding what order to make it must take into account all the circumstances including (a) the parties' conduct, (b) whether a party has succeeded on part even if not the whole, and (c) any payment into court.

¹⁹ [2007] EWCA 368 (CA).

[12] Having regard to the general rule, the first task must be to decide who is the successful party. The court should then apply the general rule unless there are circumstances which lead to a different result. The circumstances which may lead to a different result include (a) a failure to follow a pre-action protocol; (b) whether a party has unreasonably pursued or contested an allegation or an issue; (c) the manner in which someone has pursued an allegation or an issue; and (d) whether a successful party has exaggerated his claim in whole or in part.”

[94] The appellant contends that the learned judge appears to have ignored the fact that there was a pre-action letter issued by then counsel for the appellant Mr. Alvin St. Clair dated 20th March 2014, that counsel for the respondent had been in discussions with Mr. St. Clair regarding the respondent’s non-compliance with the court’s order, and the fact that the timeline disclosed that the respondent would have had sufficient time to review, comply with or appeal Wilkinson J’s judgment and yet failed to do so. Unfortunately, even if all of the matters highlighted by the appellant are accepted, it is clear that while they may have formed part of the parties’ argument in the court below, they did not inform the learned judge’s reasoning.

[95] The learned judge in the case at bar was at pains to explain why he was exercising his discretion to award 50% of costs to the appellant. At paragraphs [87] – [93] of his judgment, he analysed the rules of the CPR relating to costs and gave the specific reasons why he was exercising his discretion not to award full costs to the appellant. He concluded:

“[93] In the present case, the claimant pursued allegations which could clearly be seen as spurious and at times vexatious. There were copious affidavits filed which had to be answered by the defendant. Many of these affidavits were repetitive in substance, and were not based on any identifiable factual basis but rather on the assumptions and suspicions of the claimant. In many instances, the allegations raised by the claimant not only had a tendency to prolong the proceedings, but also caused the court to embark on a fishing expedition particularly by making disclosure orders against third parties which turned out to be entirely superfluous. Needless to say that all of the above resulted in the incurring of unnecessary and unwarranted costs by the defendant. Therefore, the court is inclined to uphold Mr. Theodore KC’s submissions on this point and will order that the claimant is not entitled to an award of all of the costs recoverable in the present claim.”

[96] On a whole, I am satisfied that the learned judge's reasoning is clear and unassailable. He was clearly seised of the litigation and would have observed the parties' conduct during the course of the litigation and formed an unfavourable view of the appellant's conduct. The appellant has not identified any mistake in the judge's evaluation as a whole that is sufficiently material to undermine the learned judge's conclusions. It cannot be said that his decision exceeded the generous ambit within which reasonable disagreement is possible or, was plainly wrong.

Miscellaneous Grounds

[97] Finally, the appellant has also raised a number of miscellaneous grounds all of which lack cogency. Ground 5 is a statement of fact (settled in the judgment of Wilkinson J) rather than a maintainable ground of appeal. Ground 17 contends that the judge erred in failing to caution or fine the respondent for not following the court orders paragraph 3 of the judgment in SLUHCV2010/0066 and SLUHCV2014/0256. To the extent that such relief is possible or appropriate (which is not accepted), it is clear that it was not sought in the court below and therefore cannot be advanced on appeal.

Conclusion

[98] I have given deliberate and respectful consideration to the numerous grounds of appeal advanced by the appellant and the submissions advanced by both sides and save for the judge's decision to set aside the order made by Wilkinson J, for the reasons which are set out above, I find the case advanced on behalf of the respondent to be more cogent and persuasive.

[99] The parties have each enjoyed some level of success. Given the partial success of the appellant in these proceedings I believe that this should be reflected in an appropriate apportionment of the costs order. Given that he would essentially have succeeded in only one of the several challenges advanced (Grounds 11 and 14), I believe that the respondent who has enjoyed the greater success should be entitled to recover 90% of his costs.

[100] Based on the foregoing my orders are as follows:

- (1) The appeal against the decision of the learned judge is partially allowed.
- (2) The order of the learned judge to the effect that the costs payable to the appellant in the Claim No. SLUHCV2010/0066 be prescribed costs in the sum of \$7,500.00 and shall be payable out of the estate of Gregory Johnny is set aside.
- (3) The remaining grounds of appeal are dismissed and all other orders of the learned Judge are affirmed.
- (4) The respondent shall have 90% of her costs in the appeal to be paid by the appellant to be assessed if not agreed within 21 days of the date of this judgment.

I concur.
Trevor M. Ward
Justice of Appeal

I concur.
Esco L. Henry
Justice of Appeal

By the Court

Chief Registrar