

COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp. No. 61 of 2022

B E T W E E N

KEITHRELL HANNA

Applicant/Intended Appellant

AND

WENDY WILLIS JOHNSON

Intended Respondent

BEFORE: **The Honourable Mr. Justice Jones, JA**
 The Honourable Mr. Justice Evans, JA
 The Honourable Madam Justice Bethell, JA

APPEARANCES: **Mr. Adrian Hunt for the Applicant/Intended Appellant**
 Mr. Paul Wallace-Whitfield for the Intended Respondent

DATES: **23 June 2022; 22 September 2022**

Application for Certification of a Point of Law- Public Importance- Application for Extension of Time- Second Appeal- Section 21(1) of the Court of Appeal Act

On 28 March 2011, the respondent applied for a judgment in default of defence against the applicant. Following the default judgment, the parties sought an assessment of damages. The applicant later applied for an interim payment of \$750,000.00. Assistant Registrar Toote heard and refused the interim payment application. The applicant appealed the decision. On 28th January 2022, Justice Forbes overturned the decision of Assistant Registrar Toote and awarded

an interim payment of \$66,904.23. The applicant sought to appeal to this Court, which the judge refused on 25 March 2022. The applicant now brings an application before the Court of Appeal for certification on a point of law and an application for an extension of time for leave to appeal. The respondent filed a preliminary objection. On 23 June 2022, after hearing the arguments, the Court reserved its decision.

Held: The application is dismissed with costs for the respondent to be taxed if not agreed.

The applicant contends that the judge’s departure from the principles in the Court of Appeal decision in **Ruffin** and the English Court of Appeal decision in **Pugh** reflected in the judgment marks a troubling precedent that ought to be clarified by this Court. It is trite that the departure, by a Supreme Court Judge, from clear authority emanating from this Court cannot create a precedent. The learned judge fell into error in that he failed to appreciate that the causation which results in liability is different to that which leads to recoverable damages. He, in our view, misconstrued the binding authority which emanated from this Court on the issue.

The judge’s departure from the decisions in **Pugh** and **Ruffin** on causation in an assessment of damages after a default judgment (which has not been set aside) is clearly an error and cannot make the point a matter of general public importance. The issue is clear, and in our view, requires no clarification other than what is contained in this ruling. We, therefore, agree with the judge that the point of law to which the applicant seeks certification is not of general public importance and decline to certify the question raised by the applicant. Having regard to our conclusion on this issue, the applicant has failed to satisfy the proviso to Section 21 (1) of the Court of Appeal Act, so there can be no appeal. For that reason, it is unnecessary to consider an application for the extension of time to appeal.

American Life Insurance Co. v. National Insurance Board [1984] BHS J. No. 26 considered
Fund Haven Limited et anor v. The Executive Director of the Securities Commission of The Bahamas, [2021] UKPC 11 considered
Pugh v Cantor Fitzgerald International [2001] EWCA Civ 307 considered
Ruffin Crystal Palace Limited v. Laniccini Brathwaite [2013] 1 BHS J. No. 65 considered
Turner and others v. Turner and others [2013] 2 BHS J. No. 52 considered

JUDGMENT

Judgment delivered by the Honourable Mr. Justice Jones, JA

1. This is an application by Keithrell Hanna, (“the applicant”) for certification of a second appeal from the judgment of Forbes J, (“the judge”) in the Supreme Court and for an extension of time for leave to appeal the judgment. The judge allowed an appeal against the decision of Assistant Registrar Renaldo Toote (“the assistant registrar”) and awarded an interim payment of \$66,904.23 (“the interim payment”) to Wendy Johnson (“the respondent”). The judge found that causation was no longer a live issue as there was; a judgment in default of defence; no application to set it aside; and the assessment of damages had already begun.

BACKGROUND

2. The respondent entered judgment in default of defence against the applicant on 28 March 2011. Following the default judgment, the parties entered an assessment of damages. The applicant made no request to set aside the default judgment. At the last hearing of the assessment, Dr Edward Lazzarin (the respondent's medical expert) was being cross-examined by counsel for the applicant. The applicant applied for an interim payment of \$750,000.00 as the assessment had to be adjourned. The assistant registrar who heard the application refused the interim payment application.
3. On appeal, the judge overturned the assistant registrar's ruling and awarded the respondent an interim payment of \$66,904.23. The essence of the applicant's argument before the assistant registrar and the judge was that causation was still to be decided before any award for interim payment. Further, the applicant argued the application for interim payment amounted to an abuse of process by the respondent for two reasons. First, the parties were still engaged in the assessment of damages. Second, the respondent's medical expert, who examined the respondent, said the accident did not cause the respondents' injuries. The judge ruled the default judgment settled liability and causation, so the applicant could not properly argue about causation during the assessment of damages.
4. The applicant sought certification for a further appeal to this Court, which the judge refused on 25 March 2022. The applicant now brings this application before this Court for certification. But first, the respondent filed a preliminary objection to the certification application.

THE PRELIMINARY OBJECTION APPLICATION FOR CERTIFICATION, AND EXTENSION OF TIME

5. Mr Paul Wallace-Whitfield, ("Counsel for Intended Respondent") filed a preliminary objection in the following terms.

1. The question which the Intended Appellant/Defendant would have the Court certify as being of public importance is not a question of law solely, nor is it of public importance;

2. The Intended Appellant's Notice of Appeal Motion has been filed and served in breach of Rule 11 (1), The Court of Appeal Rules inasmuch as the Order being appealed from is an interlocutory one and that Appeal ought to have been filed and served within 14 days of the date of that Order;

3. The Intended Appellant/Defendant's approach to his application is to treat it as the substantive appeal and not as an Extension of Time application, which it ought to be in the circumstances of the case,

6. The applicant's notice of motion before this Court appears below.

TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above-named Intended Appellant (Defendant) on an application pursuant to section 21(1) of the Court of Appeal Act for certification for a further appeal from the whole of the judgment of His Lordship, the Honourable, Mr. Justice Andrew Forbes, given on the 28" day of

January, A.D., 2022 (“the Judgment”), wherein the learned Judge: (1) allowed the Respondent’s Notice of Appeal filed 24 June 2021 against the decision of Assistant Registrar Renaldo Toote denying the Respondent’s application for an interim payment and (2) awarded an interim payment of \$66,904.23 (“the Interim Payment”, having found that a Judgment in Default entered by the Intended Respondent (Plaintiff) precluded and/or was a bar to causation being a live issue in dispute in a subsequent Assessment of Damages (“the Assessment”), which had been commenced but not pursued to completion, or at all by the Respondent

AND FURTHER AND/OR ALTERNATIVELY on an application pursuant to Rules 9 and 12(1) of the Court of Appeal Rules for an extension of time to appeal against the Judgment, and a stay of the Judgment pending the determination of this application and any appeal, subject to their Lordships acceding to this application for certification.

7. Then the point of law for certification is in the following terms.

AND FURTHER TAKE NOTICE that the point of law for which the Intended Appellant seeks certification is whether:

“A Default Judgment which provides that damages are to be assessed and is determinative as to the issue of liability for the breaches of duty complained of by a Plaintiff precludes and/or is a bar to a Defendant contesting the extent to which the Plaintiff’s injuries were caused by the breaches of duty which have been admitted by virtue of the Default Judgment.”

8. Counsel for intended respondent contended that the application for certification is in breach of Section 21 (1) of The Court of Appeal Act, Ch. 52 for two reasons. The point of law to be certified is not a question of pure law but a question of fact or a question of mixed fact and law. Second, it is not a point of public importance. This, however, is not a preliminary point. It is simply the respondent’s rejection of the certification application before the Court. What this Court has to determine is whether there is an issue of law to be determined, and if so, whether it is of public importance. In order to do this, we have to hear the certification application and make that determination.
9. Counsel for the respondent also contends that the application is in breach of the Court of Appeal, Rule 11(1) which requires that a Notice of Appeal should be filed and served by the appellant upon the parties. He says that this was not done. Frankly, this is irrelevant to the issue. There is no Notice of Appeal filed in this case. The application is for certification under section 21 (1). Order 11 (1) deals with issues relating to leave to appeal, which is not the application before this Court. The third point raised by counsel for the respondent is that the applicant has treated the application as the substantive appeal, and not as an application for an extension of time. There is no merit here either, as the submissions filed are regarding an application for certification.
10. We have considered the preliminary objection by the respondent and are of the view that the arguments are substantively objections to the certification application. They are

without merit as preliminary objections and therefore dismissed. We now move to the issues raised in this application for certification.

(a) Certification Of a Point of Law of Public Importance

11. Section 21 (1) of the Court of Appeal Act provides.

Any person aggrieved by any judgment, order or sentence given or made by the Supreme Court in its appellate or revisional jurisdiction, whether such judgment, order or sentence has been given or made upon appeal or revision from a magistrate or any other court, board, committee or authority exercising judicial powers, and whether or not the proceedings are civil or criminal in nature may, subject to the provisions of the Constitution and of this Act appeal to the court on any ground of appeal which involves a point of law alone but not upon any question of fact, nor of mixed fact and law nor against severity of sentence:

Provided that no such appeal shall be heard by the court unless a Justice of the Supreme Court or of the court shall certify that the point of law is one of general public importance.

12. In **American Life Insurance Co. v. National Insurance Board** [1984] BHS J. No. 26 the Court refused an application for certification notwithstanding the judge's wish to have his ruling ventilated on appeal. In reaching its conclusion, the Court said the approach on whether to grant certification should be.

“Before I can so certify the Board has to satisfy me that:-

(1) the grounds of appeal involve or any one of them involves a point or points of law alone;

(2) these points are of public importance; and

(3) they are of general public importance.”

13. Here, the applicant set out the proposed ground of appeal that requires certification in the draft Notice of Motion attached to the affidavit of Gabriel Brown. It is this.

“The learned judge erred in law in finding that a default judgment which provides that damages are to be assessed is determinative as to the issue of liability for the breaches of duty complained of by a Plaintiff and therefore precludes and/or is a bar to a Defendant contesting the extent to which the Plaintiff's injuries were caused by the breaches of duty which have been admitted”

14. The UK Privy Council in **Fund Haven Limited et Anor v. The Executive Director of the Securities Commission of The Bahamas**, [2021] UKPC 11, considered second appeals from the Supreme Court in a case arising from The Bahamas. This is what they had to say in paragraph 40.

“40. It is the view of the Board that a certificate purportedly issued under section 21(1) must identify and state what the point

or points of law of general public importance are. The process of certification enables the point of law to be identified without the need for further inquiry. All the appeal court should need to consider is the certificate. It should not be necessary and it is not appropriate for the Court of Appeal to trawl through the transcripts and the parties' written and oral submissions seeking to "find" the point of law. The point of law must be stated in the certificate itself."

(b) Is there a point of law as opposed to a point of law and fact raised in the certification application?

15. Counsel for the respondent contends that there is no point of pure law for certification. He argues the applicant has already conceded liability, by the fact of the default judgment. It is no longer open to the applicant to dispute causation. He submits that the Court ought not to award certification given that it is not solely on a point of law.
16. The judge dealt with the issue this way.

"17. It is also noted that the defendant in its Affidavit in support refers to a portion of paragraph 35 of the Court's ruling, however the Court provides the entirety of paragraph 35 of its ruling below:-

"35. In its determination of a grant of an order for interim payment, the Court also takes into account any set-off, cross-claim or counterclaim or any allegation of contributory negligence. As I understand Mr. Hunt's submission, the Defendant while accepting liability disputes causation and seeks to challenge the Plaintiff's injuries. The filing of the Default Judgment and the Defendant's decision not to make an application to set aside the same, I find bars the Defendant from now disputing the issue of causation. The Defendant has already conceded liability and in following the decision of *Ruffin Crystal Palace Limited v Laniccini Brathwaite* (supra) it is no longer open to the Defendant to dispute causation which in essence is an attempt to dispute liability."

18. The Court's Ruling on the plaintiff's application for an interim payment was subsequent to the filing of the Judgment in Default of Defence on the 28 March, 2011, the concession on the issue of liability by the Defendant in his skeleton arguments dated the 2nd December, 2021 and during the hearing of the application on the 2nd December, 2021.

19. Following questions from the Court Counsel for the defendant contended that the Default Judgment in the instant case speaks to a blanket assertion that damages are to be assessed and does not speak to special damages nor the liquidated damages that the

plaintiff is claiming. He further asserted that had the plaintiff identified the same in the Default Judgment then the Court could say that the defendant was precluded from raising causation.

20. After a careful review of the submissions of Counsel for the defendant and plaintiff, I find that the point of law for certification is not a point of law alone but imports points of law and fact.”

17. We agree with the applicant that the judge failed to determine the points of fact as opposed to the points of law raised in the certification application before him. We also agree with counsel for the applicant that the issue raised in the certification application is an issue of law alone and not an issue of law and fact. That, however, is not the end of the matter. We now move to consider whether the point is of general public importance.

(c) Is the point of law raised in the certification application of public importance?

18. In considering whether the question raised in the draft notice of motion is of public importance, here is what the judge said.

21. Considering the submissions of Counsel, in particular Counsel for the plaintiff who provided numerous authorities regarding the application of Default Judgments before the Courts, I am of the opinion that the point of law to which the defendant seeks certification is not of public importance and general public importance. Further, the nature and application of Default Judgments are not new principles of law or require some elucidation of some new aspect of established and familiar principles of law nor a point which might create a precedent for the future. More so, I do not find that such a point goes beyond anything exceptional to which the Court would be minded to grant such a certification.

19. Counsel for the respondent argues that the certification application is an abuse of process and a cynical attempt to provide a pathway to have the default judgment set aside. Counsel for the applicant, on the other hand, contends that the issue is a matter of public interest, as there needs to be clarity whether causation is an issue after a default judgment which is not set aside. Counsel for the applicant relied on the case of **Ruffin Crystal Palace Limited v. Laniccini Brathwaite** [2013] 1 BHS J. No. 65. That case concerned raising contributory negligence for the first time on an assessment of damages. The Court in that case left no doubt that causation can remain a live issue on an assessment of damages. The Court said in paragraph 13-15.

“13. Lunnun v Singh and others concerned a judgment in default in an action in which there was an alleged leakage onto the plaintiff’s land of an unspecified quantity of effluent from a sewer on the defendants’ premises which adjoined the plaintiff’s land, as a result of which the plaintiff claimed loss and damage. Judgment in default was entered for the plaintiff, and on the assessment of damages, the defendants sought to reduce the damages claimed on the ground that some part of the damage was

as a consequence of the influx of water and sewage onto the premises attributable to some source other than the defendants' sewer. In essence, they disputed that all of the water flowing from the pipe onto the plaintiff's property was causative of all of the heads of damage claimed.

14 The Court held that inherent in the default judgment was the finding that the defendants must be liable for some damage resulting from the leak, but that was the full extent of the issues concluded or settled; that all questions going to quantification, including the question of causation in relation to particular heads of loss claimed was open to the defendants at the assessment hearing.

15 Lord Justice Jonathan Parker set out the relevant principle in these words: "In my Judgment, the underlying principle is that on an assessment of damages all issues are open to a defendant save to the extent that they are inconsistent with the earlier determination of the issue of liability, whether such determination takes the form of a full hearing on the facts or a default judgment."

20. In **Pugh v Cantor Fitzgerald International** [2001] EWCA Civ 307 [Delivered 07 March 2001] Lord Justice Ward in delivering the judgment of the Court said at paragraphs 26-29.

26. The first question is what issues may be raised on an assessment of damages which is undertaken after there has been a judgment on liability. The answer is given by the unreported judgment in this Court in **Lunnun v Singh & Ors.** dated 1st July 1999. There a default judgment for damages to be assessed was entered by the claimant seeking those damages in respect of a leakage onto his land of water and sewage from a sewer on the adjoining premises owned by the defendant. On the assessment of damages the defendant sought to dispute that any water flowing from the cracked sewer was causative of any of the particular heads of damage claimed. Jonathan Parker J., as he then was, stated the "underlying principle" in these terms, namely: -

"That on an assessment of damages all issues are open to a defendant save to the extent that they are inconsistent with the earlier determination of the issue of liability, whether such determination takes the form of a judgment following a full hearing on the facts or a default judgment."

27 Clarke L.J. held that on the assessment of damages the defendant may not take any point which was inconsistent with the liability alleged in the statement of claim but subject thereto, the claimant could take any point relevant to the assessment of damages including failure to take reasonable steps to mitigate. Peter Gibson L.J. was of the view that: -

“the true principle is that on an assessment of damages any point which goes to quantification of the damage can be raised by the defendant, provided that it is not inconsistent with any issue settled by the judgment.”

28...

29 Thus the second question is what issues are determined by a judgment entered in default of defence. I accept the principle as it was expressed by Viscount Radcliffe in the Privy Council in *Kok Hong v Leong Cheong Kweng Mines Ltd.* [1964] A.C. 993, 1012: -

“ default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and, to use the words of Lord Maugham L.C. (in *New Brunswick Railway Co. v British & French Trust Corporation Ltd.* [1939] A.C. 1, 21), they can estop only for what must “necessarily and with complete precision have been thereby determined.”

21. The applicant contends that the judge’s departure from the principles in the Court of Appeal decision in **Ruffin** and the English Court of Appeal decision in **Pugh** reflected in the judgment therefore marks a troubling precedent that ought to be clarified by this Court. It is trite that the departure by a Supreme Court Judge from clear authority emanating from this Court cannot create a precedent. The learned judge fell into error in that he failed to appreciate that the causation which results in liability is different to that which leads to recoverable damages. He, in our view, misconstrued the binding authority which emanated from this Court on the issue.
22. The applicant further argued that the determination of this issue will provide clarification by removing any doubt whether the judge’s approach and findings were correct. However, the judge’s departure from the decisions in **Pugh** and **Ruffin** on causation in an assessment of damages after a default judgment (which has not been set aside) is clearly an error and cannot make the point a matter of general public importance. The issue is clear and in our view requires no clarification other than what is contained in this ruling. We, therefore, agree with the judge that the point of law to which the applicant seeks certification is not of general public importance and decline to certify the question raised by the applicant. Having regard to our conclusion on this issue, the applicant has failed to satisfy the proviso to Section 21 (1) of the Court of Appeal Act, so there can be no appeal. For that reason, it is unnecessary to consider an extension of time to appeal.

DISPOSITION

23. For the reasons set out above, we dismiss the application with costs for the respondent to be taxed if not agreed.

The Honourable Mr. Justice Jones, JA

The Honourable Mr. Justice Evans, JA

The Honourable Madam Justice Bethell, JA