REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 90 of 2014

BETWEEN

PEARL HOPE

Appellant

V

HILLCOTE ENTERPRISES LIMITED

Respondent

PANEL: A. Mendonça, JA
J. Jones, JA
C. Pemberton, JA

APPEARANCES:

Mr. D. Mendes SC for the Appellant

Mr. A. Maraj for the Respondent

DATE: October 8th, 2018

<u>**REASONS**</u>

<u>**Delivered by A. Mendonça, JA**</u>

1. The application before the Court raises the important issue whether the Court of Appeal can reopen an appeal that has been concluded and the order of the Court perfected.

2. In 2004 the Respondent began these proceedings against the Appellant for (a) damages for breach of contract for the sale of certain leasehold premises, (b) a declaration that the Respondent is discharged from performance of the contract and is entitled to retain the deposit paid under the contract and (c) an order for possession of the leasehold premises. The Appellant counterclaimed for specific performance of the contract and damages for breach of contract in lieu of or in addition to specific performance.

3. On February 27th 2014 the trial Judge, Harris J, gave judgment for the Respondent granting the relief sought and dismissed the counterclaim of the Appellant.

4. The Appellant filed a notice of appeal. Pursuant to rule 64.8 (b) of the Civil Proceedings Rules 1998 (the CPR) upon the filing of a notice of appeal the court office must forthwith arrange for the preparation of the transcript or other record of the notes of evidence and of the Judge's reasons for giving judgment and when they are prepared to give notice to all parties that copies of the transcript or other record are available on payment of the prescribed fee. Rule 64.11 provides, however, that if within three months of the date that the notice of appeal was filed, the court office does not serve the notice referred to at rule

64.8 (b), the Appellant must apply to the court for directions as to the manner in which the evidence given in the Court below and the Judge's reasons for giving the judgment or making the order may be brought before the Court of Appeal.

5. Pursuant to rule 64.12 of the CPR the Appellant has 28 days of the receipt of the notice of the court office issued pursuant to 64.8 (b) or within such time as the Court may direct on an application under rule 64.11 to file the bundle of documents comprising copies of the documents referred to at rule 64.12 (2). We shall refer to the bundles of documents as the record of appeal as that is the name by which they are commonly referred to.

6. The court office did not, within the given period, proceed to serve the notice referred to at rule 64.8 (b). Accordingly the Appellant applied to the Court under rule 64.11 for directions.

7. The application for directions was heard on December 1st 2014 by Weekes JA (as she then was) sitting in chambers when the following order was made:

> "1. The time for filing the record of appeal is extended to 28 days from December 1st 2014 and
>
> 2. Leave is granted to file a supplemental record of appeal within 28 days after receipt of a notice of availability of the notes of evidence."

8. The order of Weekes JA in effect directed that the record of appeal be filed by the Appellant in two parts. Such an order is not uncommonly made if by the time the application for directions is heard all the documents that should comprise of the entire

record of appeal are not yet available. The Court on those occasions may direct that a record of appeal comprising the available documents be filed within a short time frame and give directions for the filing of a supplemental record of appeal containing the other documents when they become available. It is evident from the order of Weekes JA that when the application for directions was heard the notes of evidence taken before the trial Judge were not yet available. Weekes JA in those circumstances made the order set out above. The order, therefore, required the Appellant to file a record of appeal comprising the available documents on December 29th 2014 and a supplemental record of appeal comprising the notes of evidence within 28 days of the receipt of the notice from the court office indicating their availability.

9. The Appellant however did not comply with the order of Weekes JA. Accordingly the Court office pursuant to rule 64.13 of the CPR on April 14th 2014 issued a notice (hereinafter referred to as the non-compliance notice) to show cause why the notice of appeal should not be struck out by reason of the Appellant's failure, in effect to comply with the order of the Court by filing the record of appeal. The non-compliance notice came before the Court of Appeal on June 28th 2017. After hearing the parties the Court of Appeal stuck out the notice of appeal. The order of the Court was subsequently drawn up, passed and entered. That effectively brought the appeal to an end.

10. The Appellant now applies for an order that, a) the order of the Court of Appeal made on June 28th2017 be set aside; b) the appeal be reinstated; c) the time for the filing of the

record of appeal be extended; d) there be no order as to costs; and e) such further or other relief that this Court deems fit in the circumstances of the present case.

11. The immediate challenge faced by the Appellant related to the jurisdiction of the Court of Appeal to set aside an order of the Court of Appeal made after the hearing at which the parties were present and after the order had been perfected. Under the previous rules of Court, the Rules of the Supreme Court 1975 (the RSC), there was a similar rule as rule 64.13 of the CPR that provided for the striking out of a notice of appeal by reason of the failure to, inter-alia, file a record of appeal within the time provided for in the rules or any extended time (see O.59 rule 19). The RSC, however, contained a provision at O. 59 rule 19 (3) which provided that an appellant whose appeal was dismissed under O.59 rule 19 may apply for the restoration of the appeal and enabled the Court of Appeal in its discretion for good and sufficient cause to order that the appeal be restored upon such terms as it may think fit. The CPR however does not contain a similar provision that permits an appeal that has been struck out pursuant to 64.13 to be restored.

12. The Appellant in her application stated that the application was made pursuant to the inherent jurisdiction of the Court and to rules 64.21 and 26.7 of the CPR. So far as the rules of the CPR referred to in the application are concerned, rule 64.21 refers to a case where an order is made in the absence of a party. Rule 64.21 (1) provides that a party who was not present at an appeal at which a decision was made or the appeal struck out may apply to set aside the order. This rule is in our view inapplicable for the simple reason that the Appellant was represented at the hearing of the non-compliance notice. This is

therefore not a case where the order of the Court of Appeal striking out the notice of appeal was made in the absence of the party applying to set aside the order.

13. Rule 26.7 is also not applicable. That rule refers to an application for relief from any sanction imposed for a failure to comply with any rule, Court order or direction. The Court of Appeal, however, did not impose any sanction by its order of June 28th 2017. It struck out the notice of appeal. That rule has nothing to do with the setting aside of the order.

14. In our judgment, therefore, both rules on which the application is expressed to be made are not applicable. In fairness to Mr. Mendes, counsel for the Appellant, he made no attempt to persuade the Court that they were applicable. No other rule of Court was identified that would enable the making of an application for this Court to set aside its order of June 28th 2017. In the end Mr. Mendes indicated that he was relying on the residual jurisdiction of the Court of Appeal to reopen a determined appeal as explained in the English Court of Appeal decision in ***Taylor v Lawrence [2003] QB 528.***

15. In ***Taylor v Lawrence*** the facts were that the claimant commenced county court proceedings against the defendants in trespass. Judgment was given against the defendants and they appealed. One of the grounds of appeal was founded on an allegation of apparent bias. The appeal was dismissed. Subsequent to the dismissal of the appeal further evidence emerged, which was said to support the claim of apparent bias more clearly than the evidence relied on at the hearing of the appeal. Armed with that information the defendants made an application for permission to appeal again to the Court of Appeal and to introduce additional evidence as to bias.

16. The defendant’s application raised the important point as to the jurisdiction of the Court of Appeal to reopen an appeal after it had given the final judgment and that judgment had been drawn up. A five member panel of the Court of Appeal was assembled to deal with the issue of jurisdiction.

17. Lord Woolf CJ who give the unanimous judgment of the Court, noted that in effect what the applicant was attempting to do was to rely on further evidence as to the partiality of the trial judge. The Court was of the view that the principles enunciated in ***Ladd v Marshall [1954] 3 ALL ER 745*** relating to the admissibility of fresh evidence on an appeal would not allow the evidence, which the defendant now sought to rely on, to be adduced as it was reasonably accessible at the time of the original appeal. The Court, however, proceeded on the basis that at the time of the original appeal the information which the defendant was relying on could not reasonably have been obtained at the time of the original appeal and addressed the jurisdiction issue.

18. Lord Woolf noted that it was a fundamental principle of the common law that the outcome of litigation should be final. He referred to remarks of Lord Wilberforce in ***The Ampthill Peerage [1977] AC 547*** “that English law, and all comparable legal systems place high in the category of essential principles that which requires that limits be placed upon the rights of citizens to open or reopen disputes” and that "the law knows,... that sometimes fresh evidence may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further enquiry”. This means that “there are cases where the certainty of justice prevails over the possibility of truth and these are cases where the law insists on finality. For a policy of closure to be

compatible with justice, it must be attended with safeguards: so the law allows appeals; so the law exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved". The question raised in the case was whether the Court of Appeal has the jurisdiction to reopen an appeal if an appearance of bias can be demonstrated on the part of the court below.

19. Lord Woolf noted that the Court of Appeal was established with two principle objectives. "The first is a private objective of correcting wrong decisions so as to ensure justice between the litigants involved. The second is a public objective to ensure public confidence in the administration of justice not only be remedying wrong decisions but also by clarifying and developing the law and setting precedents".

20. Although the Court of Appeal is a creature of statute and has no inherent jurisdiction, Lord Woolf stated, that it is wrong to say that it has no implicit or implied jurisdiction arising out of the fact that it is an appellate Court. It has the implicit power to do that which is necessary to achieve the dual objectives of an appellate court referred to above. Or in other words the appellate court must have the power to do the acts which it needs to do to maintain its character as a court of justice.

21. The Court concluded that such power included the power to reopen a concluded appeal to avoid real injustice in exceptional circumstances. Lord Woolf then noted there was a difference between having a jurisdiction and how that jurisdiction is to be exercised. He

then made the following observations on the exercise of the jurisdiction (at paras 54 and 55):

> *"54... It is very easy to confuse questions as to what is the jurisdiction of a court and how that jurisdiction should be exercised. The residual jurisdiction which we are satisfied is vested in a court of appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised. There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice. They therefore needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for this to happen.*
>
> *55 One situation where this can occur is a situation where it is alleged, as here, that a decision is invalid because the court which made it was biased. If bias is established there has been a breach of natural justice. The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and there is no alternative effective remedy. The effect of the reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations. Where the alternative remedy would be an appeal to the House of Lords this Court will only give permission to reopen an appeal which it has already determined if it is satisfied that an appeal from this court is one which the House of Lords would not give leave"*

22. The Court then reviewed the new evidence that the defendants wished to rely on and concluded that it showed no possibility of bias on the part of the trial Judge. The application of the defendants to reopen the appeal was in all the circumstances dismissed.

23. We agree with Lord Woolf's reasoning. In our judgment this Court of Appeal should have a similar jurisdiction as decided in ***Taylor v Lawrence*** to maintain its character as an appellate Court. We therefore hold that this Court has a residual jurisdiction to reopen a

concluded appeal to avoid real injustice in exceptional circumstances. It must be established by the applicant seeking to reopen the appeal that a significant injustice has probably occurred, the circumstances are exceptional that make it appropriate to overbear the pressing claims of finality and that there is no alternative remedy. We think it apparent from ***Taylor v Lawrence*** that "a significant injustice" is used in the sense of a wrong result that should not have occurred.

24. Since ***Taylor v Lawrence*** the English have made a new rule of Court relating to the reopening of appeals. The rule was first introduced in 2003 as rule 52.17 but is now rule 52.30 of the Civil Procedure Rules and is under the rubric "Reopening of Appeals". The rule is in these terms:

REOPENING OF APPEALS

"(1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless—

(a) it is necessary to do so in order to avoid real injustice;
(b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
(c) there is no alternative effective remedy.

(2) In paragraphs (1), (3), (4) and (6), "appeal" includes an application for permission to appeal.

(3) This rule does not apply to appeals to the County Court.

(4) Permission is needed to make an application under this rule to reopen a final determination of an appeal even in cases where under rule 52.3(1) permission was not needed for the original appeal.

(5) There is no right to an oral hearing of an application for permission unless, exceptionally, the judge so directs.

(6) The judge must not grant permission without directing the application to

be served on the other party to the original appeal and giving that party an opportunity to make representations.

(7) There is no right of appeal or review from the decision of the judge on the application for permission, which is final.

(8) The procedure for making an application for permission is set out in Practice Direction 52A."

25. Applications to reopen an already determined appeal are now made in England under that rule. It has been established, however, that the rule is to be construed in accordance with the principles laid down in ***Taylor v Lawrence*** and that it is not intended to give the Court a more general discretion in reopening appeals (see ***Circle 33 Housing Trust v Lawal [2014] EWCA Civ 1514*** para 65 and ***Guy v Barclays Bank Plc [2010] EWCA Civ 1396***). English cases, therefore, decided prior to the introduction of the rule and those decided under the rule are of assistance to the understanding of the ***Taylor v Lawrence*** jurisdiction and how the jurisdiction should be exercised. We shall refer to some of those cases, which we think provide more useful guidance in relation to this appeal.

26. ***Matlaszek and anor v Bloom Camillin [2003] EWCA Civ 154*** is a case that was decided before the introduction of the English rule. In that case the claimants recovered judgment for damages to be assessed against their solicitors who were acting for them in a transaction for the sale of shares in the claimants' company. The damages were to be assessed on the basis of the value of the shares. The defendants appealed.

27. The advisors to the Solicitor's Indemnity Fund, insurers for the defendants, which had conduct of the proceedings on behalf of the defendants, however took the view, on the basis of the claimants' expert report which had been disclosed, that the claimants'

valuation of the shares was unlikely to be accepted by the Court and that the defendants' quantification was likely to be preferred. In those circumstances the defendants would be able to show that the claimants suffered no loss or very minimal loss. In those circumstances the defendants made an application to dismiss their appeal and the appeal was accordingly dismissed. Subsequent to the dismissal of the appeal, the claimants filed a further report on the issue of damages detailing a different evidential approach to the value of the shares and the trial judge permitted additional evidence by the claimants in relation to the assessment. If that different approach found favour with the Court it would mean that the damages for which the defendants would be liable would be substantial. In those circumstances the defendants applied to reopen its appeal.

28. The defendants submitted that in applying to dismiss its appeal it had made and acted upon the reasonable assumption that all the cards were on the table and that the evidence in relation to the assessment of damages would be limited to that which had already been produced. It would therefore be unfair if the defendants were not permitted to revive its appeal. The Court of Appeal refused the application.

29. The Court considered the issue whether to reopen the appeal in the light of the decision in ***Taylor v Lawrence.*** The Court held that it has an inherent power to allow an appeal to be reopened after the order had been perfected whether that order is made after a hearing or after an order dismissing the appeal without a hearing. The Court further stated that in either case the exercise of the discretion to do so would be rare. The Court further stated that the fact that an appellant had consented to the dismissal of an appeal on a misapprehension as to the relevant law is a not a valid reason to permit the reopening of

the appeal, even if the misapprehension may be based on a binding decision of the Court of Appeal that is subsequently overruled by the House of Lords. It followed that the fact that the defendants had sought the dismissal of the appeal on the assumption that all the cards were on the table and had overlooked the possibility that the claimants could be permitted to adduce additional evidence in relation to the assessment of damages provided no basis on which to reopen the appeal. The Court accordingly concluded that a "significant injustice" had not occurred. Further the Court was of the view that the defendants had an alternative remedy in that they could have sought permission to appeal from the order of the trial judge allowing the further evidence.

30. ***Re Uddin (A Child) [2005] 1 WLR 2398*** was decided after the implementation of the rule in 2003. In that case the High Court determined that the mother of a child had attempted to cause serious injury to the child. The mother applied for permission to appeal which was refused and subsequently applied for permission to reopen the appeal under the English rule 52.17 (which defines an appeal to include an application for permission to appeal) on the ground that fresh medical evidence and newly published research cast doubt on the expert evidence on which the Court had relied. Dame Butler-Sloss P who gave the judgment of the Court noted that it is clear that whenever the ***Taylor v Lawrence*** jurisdiction is sought to be invoked the Court must be satisfied that the case falls within the exceptional category there described; that the probability of the significant injustice must be clearly established and that there is no effective alternative remedy. She then stated (at para 18):

> "18…. But the ***Taylor v Lawrence*** jurisdiction can in our judgment only be properly invoked where it is demonstrated that the integrity of the earlier litigation

> process, whether at trial or at the first appeal, has been critically undermined. We think this language appropriate because the jurisdiction is by no means solely concerned with the case where the earlier process has or may have produced a wrong result (which must be the whole scope of a fresh evidence case), but rather at least primarily, with special circumstances where the process itself has been corrupted. The instances variously discussed in ***Taylor v Lawrence*** or in other learning there cited are instructive. Fraud (where relied on to reopen a concluded appeal rather than found a fresh cause of action: ***Wood v Galhlings*** **The Times 29th November 1966**); bias; the eccentric case where the judge had read the wrong papers; the vice in all these cases is not, or not necessarily, that the decision was factually incorrect but that it was arrived at by a corrupted process. Such instances are so far from the norm that they will inevitably be exceptional. And it is the *corruption* of justice that as a matter of policy is most likely to validate an exceptional recourse; a recourse which relegates the high importance of finality in litigation to second place

31. In relation to an application to reopen an appeal on the basis of fresh evidence, the Court stated that where the applicant sought to reopen an appeal on the basis that fresh evidence had been discovered, it was necessary that the fresh evidence satisfy the criteria for admissibility as explained in ***Ladd v Marshall***. But that alone was not sufficient to achieve the reopening of the appeal. The Court recognised that a fresh evidence case may disclose nothing to suggest that the earlier litigation process had been corrupted. But this did not mean that the discovery of fresh evidence could never justify the reopening of an appeal. Corruption of the process "was the paradigm case: not necessarily the only case". If a fresh evidence case was ever to justify reopening a concluded appeal "the case must at least have this in common with the instances of corrupted process: the injustice must be so grave as to overbear the pressing claims of finality in litigation". To succeed the applicant must also show that the fresh evidence demonstrates a powerful probability that an erroneous result was obtained. The Court therefore noted that in a fresh evidence that the test of the critical undermining of the integrity of the litigation process will be met "where

the process has been corrupted. It may be met where it is shown that a wrong result was earlier arrived at. It will not be met where it is shown that a wrong result may have been arrived at".

32. The Court concluded that the case was not one where the integrity of the previous litigation process had been critically undermined and it had not been demonstrated that a wrong result had been arrived at. The Court therefore dismissed the application.

33. In ***Jaffray and ors v Society of Lloyds [2007] EWCA Civ 586*** an application was made to reopen an appeal on the basis that further evidence had come to light that would show the evidence before the trial judge was perjured and so he was misled and so too the Court of Appeal, which based its decision on the same evidence. The Court of Appeal noted that the application was essentially based on an allegation that fraud had been committed. In so far as the ***Taylor v Lawrence*** jurisdiction should be exercised only in exceptional circumstances and where there is no alternative remedy, the Court doubted whether the jurisdiction could properly be exercised in cases of fraud as the appropriate remedy in such cases is to commence a fresh action. There is therefore in cases of fraud an alternative remedy. Nevertheless the Court, for reasons that it expressed (and which I need say nothing about), felt unable to rest its decision on that basis. The Court then referred to ***Uddin*** and summarised the steps that had to be taken if the appeal is to be reopened on the basis that arguably fresh evidence demonstrated the evidence at the trial was perjured. These were that the fresh evidence had to be admissible under the rule in ***Ladd v Marshall***. But that in itself will not justify a second appeal under ***Taylor v***

Lawrence, that for the ***Taylor v Lawrence*** test to be passed there is usually, but not necessarily always to be shown corruption of the judicial process, that absent corruption merely to demonstrate that the wrong result was reached below may justify reopening the early appeal; the early appeal however will not be reopened simply on claims that the first decision may have been wrong.

34. The Court then reviewed the fresh evidence and concluded that it did not establish the evidence before the trial judge was perjured and that a wrong result was probably arrived at.

35. The Court further noted in relation to an argument advanced on the application to reopen the appeal that what the applicants were in effect seeking to do was to reopen the appeal to put forward an argument that was always available to them but which no one thought or wished to pursue. The Court however said that, that was "miles away from the proper ambit of ***Taylor v Lawrence***".

36. In ***Guy v Barclays Bank Plc***, (***supra)***, the applicants applied for permission to appeal. That application was refused on the basis that there was no reasonable prospect of success. The applicant then made a further application for permission to appeal. As I mentioned earlier under the English rule an appeal includes an application for permission to appeal so the further application for permission to appeal was considered in the light of the principles in ***Taylor v Lawrence.*** The Court remarked the further application ultimately rested on the proposition that the decision to refuse the first application was plainly wrong and the Court ought to revisit the application and grant permission.

37. The Court noted that, this was not a case where the Court in refusing the first application proceeded in ignorance of any relevant cases, articles or textbooks, nor was there any subsequent decision of the Court of Appeal or of the Supreme Court which may suggest that the conclusion reached in the first application was wrong. The Court however added that even if those points were made out that did not mean the application would succeed.

38. The Court accepted that there were points which could have been advanced by the applicant on the first application but were not. In relation to that the Court had this to say:

> "36. Neither of these points can be said to be exceptional in their character; nor can they be characterised as "corrupting the judicial process", or even near to doing so. If a party fails to advance a point, or argues a point ineptly, that would not, at least without more justify reopening a Court decision. If it could be shown that the judge had completely failed to understand a clearly articulated point, it is possible that his decision might be susceptible to being re-opened (particularly if the facts were as extreme in their nature as a judge failing to read the right papers for the case and never realising it). As to the notion that a decision can be reopened to enable an unsuccessful applicant to put one of his arguments better than he had done at the original trial, that seems wrong in principle.…"

39. One of the submissions made by counsel for the applicant was that the point in issue was of sufficient importance, both to the applicant and more generally, to justify the reopening of the appeal. The Court addressed this submission in this way (at para 21):

> " 21…The fact that the point at issue is important to Mr. Guy cannot be doubted: the land appears to have been worth some thirty million pounds. However the majority of cases are important to at least one of the parties sometimes financially and sometimes more personally; and this case is important to the Bank although not of course to the same degree as to Mr. Guy. The fact that the point at issues of some general interest and importance in the field of land registration law also cannot be disputed,

> but if it is an important point in other cases, it will presumable be determined in another case. Further, there is an issue of importance to the Bank and of fundamental public interest namely the need for finality, as discussed below.

In all the circumstances the Court dismissed the application to reopen the appeal.

40. The Court also stated that even if the Court went wrong in law when the first application for permission to appeal was refused that was not enough to justify invoking the ***Taylor v Lawrence*** jurisdiction (see para 37).

41. In ***R (on the application of Nicholas) v Upper Tribunal(Administrative Appeals Chamber) [2013] EWCA 799*** the applicant before the Court sought the reopening of refusal to grant permission to appeal on a particular ground when permission to appeal had been given on other grounds. The Court characterised the application as one that was based on the mistakes of lawyers made in relation to the first application for permission to appeal. The Court was of the view that the ***Taylor v Lawrence*** jurisdiction was not intended to cater for such mistakes. It stated at (at para 20):

> " [20] One cannot get away from the fact this application is based on lawyers' mistakes and the ***Taylor v Lawrence*** jurisdiction(only invented by this Court in 2002 to cater for glaring injustice) is not intended to cater for such mistakes, however reasonable and understandable they may be. Law is a complicated business and mistakes will inevitably be made. Usually they will not matter because mistakes by lawyers can often be corrected or minimised by judges and mistakes by judges will be corrected by this Court and this Court can be corrected by the Supreme Court but once a decision becomes final, at whatever level, it must be accepted as final in the absence of exceptional circumstances. Mistakes are, regrettably, not exceptional at all."

42. In view of the above decisions which we have reviewed, the following principles, which we view as relevant to this appeal, emerge:

1. The Court of Appeal has a residual jurisdiction to reopen an appeal which has already been heard and determined and where the order of the Court has been perfected if it is clearly established that a significant injustice has probably occurred (in the sense that a wrong result has occurred that should not have occurred), that there is no effective alternative remedy and the circumstances are exceptional that make it appropriate to reopen the appeal and overbear the pressing claims of finality in litigation.

2. The effect of reopening the appeal on others and the extent to which the applicant is the author of his own misfortune are also important considerations.

3. The jurisdiction is not concerned solely with the whether the earlier process has or may have produced a wrong result but primarily with whether the process has been critically undermined. Accordingly the jurisdiction to reopen an appeal can only be properly invoked where it is demonstrated that the integrity of the earlier litigation process has been critically been undermined. The paradigm case is where the process has been corrupted.

4. It is not a sufficient reason to reopen an appeal that the Court of Appeal erred in law in arriving at its decision.

5. Where the application to reopen the appeal is based on the discovery of fresh evidence, for it to succeed that evidence must satisfy the general principles for the admissibility of fresh evidence on an appeal. That alone however would not suffice. It is also necessary to show a corruption of the process or absent corruption a powerful probability that a wrong result was reached.

6. The jurisdiction to reopen an appeal applies whether the appeal has been dismissed after a full hearing on the merits or without a hearing. It follows that the ***Taylor v Lawrence*** jurisdiction could apply to an appeal that is dismissed for non-compliance as this appeal was.

7. It is not a sufficient reason to permit an appeal to be reopened that the appellant’s advisor or attorney-at-law misunderstood the law, or failed to advance an argument that was available to them at the hearing of the appeal, or had argued a point ineptly or may have put the argument differently or perhaps more persuasively.

8. The mistakes of the applicant's lawyers are not a sufficient basis to reopen an appeal.

9. The fact that the issue on the appeal is of importance to the appellant or generally, is not a basis to invoke the jurisdiction.

43. Counsel for the applicant submitted that this is an appropriate case for the Court to exercise its jurisdiction to reopen the appeal. The appellant, he submits, was "ill served" by her attorney-at-law and as a consequence has suffered serious injustice in exceptional circumstances. The Court should reopen the appeal to avoid that injustice.

44. The circumstances on which counsel relied are contained in the affidavit primarily of the applicants' previous attorney, Mr. Blaize, in which he sought to explain the circumstances in which the order of Weekes JA was not complied with and the notice of appeal struck out. Essentially the circumstances are these.

45. After the three month period had passed from the date of the filing of the notice of appeal and there was no notification by the Court office pursuant to rule 64.8 (b) of the CPR that the notes of evidence were available, Mr. Blaize, as he was required to do, made an application under rule 64.11 of the CPR for directions as to the manner in which the evidence given in the court below may be brought before the Court of Appeal. There was annexed to that application a draft order which provided that the record of Appeal is to be filed within forty-two (42) days of the notes of evidence becoming available. Mr. Blaize was unable to attend the hearing of the application and according to him he made arrangements for someone to hold for him on behalf of the appellant. Mr. Blaize says he was subsequently informed by that person that an order was made in terms of the draft

order. According to the record, however, no one appeared at the hearing of the application on behalf of the appellant. But based on the information Mr. Blaize said he received, there was no need for the filing of the record of Appeal until the notes of evidence became available. According to Mr. Blaize he never received any notification that the notes of evidence were available and in fact according to his inquiry on the day prior to the hearing of the non-compliance notice, the notes were not yet available. It was in those circumstances that Mr. Blaize did not file the record of Appeal.

46. As to the non-compliance notice there was no dispute that it was served on an employee of Mr. Blaize at his address for service in the month of April 2017. Mr. Blaize, however, stated that the employee did not bring the non-compliance notice to his attention or to the attention of any attorney in his office. He only became aware that the Court of Appeal had issued the non-compliance notice the day before it was listed for hearing. He gave an explanation of the circumstances in which he came to that awareness.

47. Mr. Blaize appeared at the non compliance notice and explained from the Bar table the circumstances as mentioned above for his failure to file the record of appeal and the circumstances in which he only became aware of the non-compliance notice the day before. He, however, made no application for an adjournment of the hearing or for permission to file an affidavit. The Court of Appeal took the position that there was no evidence by way of a sworn and filed affidavit to show cause why the notice of appeal should not be struck out and proceeded to order that the notice of appeal be struck out.

48. The appellant says that she was always keen in pursuing the appeal but that she was not kept abreast of developments in the matter and was only told that the notice of appeal was struck out about two (2) weeks after the order of the Court of Appeal at a meeting with Mr. Blaize in his office. On being told she sought the advice of other attorneys and the present application was filed.

49. The appellant says that she has lost her right of appeal and consequently the ability to challenge the order for the possession of the premises. The said premises, she says, are her only home and she has no other place in which to live and will have to depend of the charity of friends and family to take her in.

50. In the light of that evidence the main thrust of the Appellant's argument was focussed on the negligent handling of the matter by her previous attorneys-at-law. As Mr. Mendes puts it, the Appellant was "ill served" by her attorney. It is the consequence of that ill service that the appeal was dismissed. However, if that is the correct focus it is difficult to see that the evidence of the attorney's conduct can be brought before the Court of Appeal since it would be in the nature of fresh evidence that would not meet the criteria for admissibility as it was available at the date of hearing of the appeal. In any event in our judgment that is not where the focus should be. In an application to invoke the ***Taylor v Lawrence*** jurisdiction, the focus has to be on the earlier litigation. What led to the issue of the non-compliance notice by the Court office is not in my judgment material. What is material in this case is whether it can be said that as a consequence of the earlier appeal a significant injustice has properly occurred, there is no alternative remedy and the circumstances are exceptional which make it appropriate to reopen the appeal and

overbear the pressing claims or finality in litigation. As was said in ***Uddin*** the question is whether the integrity of that process has been critically undermined. The focus should be therefore on the non-compliance hearing.

51. There was no attempt by Mr. Mendes to suggest that the Court of Appeal erred when it made the order striking out the notice of appeal. Indeed he accepted that there were no grounds on which the order may be appealed. We hasten to add that even if the contention is that the Court of Appeal may have come to the wrong decision that in itself would not be sufficient to reopen the appeal. But the fact that it was conceded that the Court of Appeal made no error in arriving at its decision when it struck out the notice of appeal begs the question what is the significant injustice that has occurred.

52. As I mentioned Mr. Mendes' criticism was directed to Mr. Blaize's handling of the matter. When the focus is directed to the non-compliance hearing there is justification for criticism. For whatever reason Mr. Blaize apparently did not attempt to file an affidavit to show cause before the hearing of the non-compliance notice. If time to do so was against him he did not apply for permission to file an affidavit and seek an adjournment to allow him to prepare the affidavit. It may be that he assessed the chances of such an application succeeding to be remote in the circumstances or may be that he was negligent in failing to do so, or it may be that he made a strategic decision (as the Respondent contends) not to file an affidavit. But whether his failure to do any of these things is as a result of his negligence or deliberate decision that does not amount to an undermining of the integrity of the litigation process. Nor does it amount to exceptional circumstances. Negligence of an attorney is unfortunately not an exceptional occurrence. As I mentioned above the

cases show that it is not a sufficient reason to invoke the ***Taylor v Lawrence*** jurisdiction because of a misunderstanding of the law or because an argument was ineptly put or because an available point was not taken. I see no material difference in the exercise of the ***Taylor v Lawrence*** jurisdiction between those situations and the circumstances of this case. If Mr. Blaize's decision was a deliberate decision one then it can be said that Mr. Blaize erred certainly in not filing an affidavit but that does not advance the Appellant's case. As was noted earlier, mistakes are not exceptional.

53. In view of the above the application is without merit. There is no basis on which this Court can exercise its residual jurisdiction to reopen the appeal. The Appellant's application must therefore be refused.

54. In the circumstances, it is not in necessary that we say anything in relation to whether there was an effective alternative remedy but, if it came to that, we would be prepared to hold that in the circumstances of this case, the fact that the Appellant may have a claim against her former attorney in negligence is not an effective alternative remedy.

55. In so far as it is necessary in applications to reopen an appeal for the applicant to establish that there is no effective alternative remedy, one cannot lose sight of the fact that the Court of Appeal is an intermediary court. Appeals lie as of right in very many cases from the Court of Appeal to the Privy Council or with leave of the Court of Appeal or with leave of the Privy Council itself. It will therefore be necessary, where the applicant satisfies all else, to interrogate very carefully whether there is an effective alternative

remedy. In this case it was submitted by the Respondent that there was an alternative remedy in that the Appellant has a claim against her former attorney. We have commented on that above but in view of the decision we have come to on the grounds that we have sought to explain above, it is not necessary that we say any more of the existence of an effective alternative remedy in this case.

56. The application must be refused. We will hear the parties on the question of costs.

A. Mendonça
Justice of Appeal

J. Jones
Justice of Appeal

C. Pemberton
Justice of Appeal