

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 12 of 2006

BETWEEN:

CRANE CONSTRUCTION INCORPORATED Applicant

AND

FORT DIGNITY LIMITED Respondent

BEFORE: The Hon. Sir Marston C.D. Gibson, K.A., Chief Justice, The Hon. Sherman R. Moore, CHB, and The Hon. Sandra P. Mason, Justices of Appeal

2012: June 6, 28

2013: July 24, November 21

2014: April 15, May 5, November 12

2016: January 29

**Mr. Alair P. Shepherd, Q.C., and Mr. Philip A. McWatt for the Applicant
Mr. Andrew V. Thornhill and Miss Diana Doughlin for the Respondent**

JUDGMENT

MOORE JA:

Introduction:

[1] This application has arisen out of liberty to apply reserved in the order of this Court made on 17 February 2009 in the substantive appeal.

[2] The facts are more particularly set out in the judgment of this Court given on 17 February 2009. Briefly, the appellant, a construction company, was

employed by the respondent to restore a derelict building. The respondent, dissatisfied with the work done by the appellant, terminated the contract. The appellant sued the respondent and the respondent counterclaimed.

Proceedings before Blackman J

- [3] The matter was tried by **Blackman J**. Mr. Ian Rollitt was the sole witness for the plaintiff. The defendant called three witnesses. There were submissions from both counsel concerning the nature of a certificate for interim/progress payment. The following paragraphs from the decision of **Blackman J** are relevant for the purposes of the present application:

“[8] ... Mr. Rollitt asserted that in most cases, Crane was paid a lower amount than what it claimed was in fact due to it. He further stated that Crane was never in agreement with the valuations but that the normal practice was that when a “project is finished you gather all the information on the project, you sit down with the QS and sort out all the crystallized disputes.”

[32] Mr. David Senior, a Chartered Architect and principal of RWA, the Architects on the contract, also gave evidence for Fort. ... On the issue as to the view to be taken of interim valuation certificates, it was his position that the valuations contained in the interim certificates are not conclusive as to the amount finally due to the contractor.

[36] Mr. Alair Shepherd QC attorney for Crane submitted that his client had entered into a “Cost Plus Contract” or “Prime Cost Contract.” These terms are terms of art in the construction industry and were known and understood by both parties. Under the terms of such a contract, Fort was required to pay to Crane all the costs of the material, labour costs and the cost of plant, transport of plant and

equipment which were incurred by Crane. In addition to those costs, the defendant would also pay 50% on the net labour costs, 25% on the net costs of materials and 25% on the costs of plant and equipment.

[37] ... It was Crane's contention that this model was agreed to between the parties as the procedure for payment for the work in progress, notwithstanding the oral nature of the contract. This contention is not disputed by Fort; what is in dispute is whether the QS's valuation were conclusive, final and determinative.

[38] Mr. Shepherd further contended that an implied term of the method of payment was that the total sums valued during the period of the contract would be the basis for a review and settlement of the final account between Crane and Fort and it was on the basis of this understanding that work commenced on Coral House in or around the month of October 2001.

[39] ... Mr. Rollitt in his evidence had contended that the interim certificate was inconclusive in that it had no bearing on the final certificate. In the premises, a final certificate was never issued.

[45] In response, Mr. Andrew Thornhill, Counsel for Fort submitted that the ability of a party to attack or challenge a certificate of interim/progress payment depended not only on the intention of the parties, to be derived from the contract, but on their conduct and that of the architect (see **Keating on Building Contracts, 7th Edition, para. 5 – 31A et seq.**). It was his contention that Crane could only impugn the valuation of the Quantity Surveyor if there is fraud, collusion or negligence on the part of the QS (**Keating, supra** at para 5-38).

[46] Mr. Thornhill further submitted that Crane accepted each interim certificate and never challenged any of them at the time of their issuance or subsequent thereto and that these certificates were now not open to challenge by Crane. It

was further contended that the certificates were binding and a condition precedent to payment. In addition it is submitted that the court is bound to interpret the words “pursuant to the certificates” as making each and every one of them a condition precedent to payment by the Defendant to the Plaintiff.

[49] On a consideration of the evidence in this case and the authorities which have been cited, I am of the view that the interim certificates were not binding and determinative of Crane’s claim for payment under the contract. In the circumstance that the arrangements between Crane and Fort were grounded on an oral contract, the observation by *Lord Hoffmann* in **Beaufort Developments** cited above, that:

“I think that today one should require very clear **words** (emphasis added) before construing a contract as giving an architect such powers.”

is supportive of the conclusion, *a fortiori*, that in the case of an **oral** contract similar care would need to be taken before concluding that interim certificates are conclusive.

[4] On 6 June 2006 **Blackman J** made the following order:

“[68] In light of the conclusions which I have reached, Crane’s action is dismissed, and judgment is given in favour of Fort on its counter-claim. During the course of the trial, Fort modified its claim of \$370,013.27 to remedy the defective work to \$290,595.74. No evidence was led by Crane to contradict Fort’s claim and I accordingly accept the modified figure. From that sum should be deducted, by way of set off the outstanding 12th Certificate of \$83,584.01 and VAT of \$12,537.60. Accordingly, there is judgment for Fort on its counterclaim in the sum of \$194,474.13. Interest shall run on that amount at the rate of 4% from the 14th day of January 2002 (the date on which the Defence and Counter-claim was filed) to June 5th, 2006 and thereafter at the rate of 8% until payment.

[69] A great deal of energy and time was expended by Mr. Thornhill counsel for Fort in seeking to establish the binding nature of an interim certificate, an issue on which he was unsuccessful. In the circumstances, I award to Fort two-thirds of its costs certified fit for two counsel, to be taxed or agreed. In addition, in the circumstance that for a variety of reasons the trial was spread over eleven (11) days, including adjournments for documentation to be retrieved and/or collated and that some trial “days” were less than or three hours duration, I adopt the approach of **Douglas CJ** in **Barrow v. Caribbean Publishing Co. Limited et al** [1971] 6 Barb. L.R. 74 at page 85 and certify that costs are to be calculated on the basis of 8 trial days”.

Proceedings on Appeal

[5] The appellant, dissatisfied with the outcome of the action, appealed to this Court. On the appeal, this Court recognised that the absence of final accounts posed a difficulty for the justice of the case and gave some consideration thereto at paragraphs 23 to 29 of its decision:

“[23] However, there is merit in the appellant’s third contention that the judge did not deal with the retention money and it is unclear from the documents how this was treated. Certificate number 12 stated a figure for retention of \$83,351.44. It was not clear that the retention money had been properly taken into account. Further, no account was taken in the judgment of the work done after certificate number 12 was issued covering the uncertified period from 12 to 19 October. The plaintiff would have been entitled to a review of the invoices and a valuation of the work up to the date of termination as the valuations contained in the interim certificates were not final.

[24] The defendant acknowledged its liability to the plaintiff in its termination letter dated 19 October 2001, as follows:

“Messrs. Cooper Kauffman and Robertson Ward Associates have been instructed to carry out an immediate detailed inspection and produce a **valuation of works to date**. Any payment due to Crane Construction or claims against Crane Construction will be made **in accordance with that valuation and report.**” (Emphasis added.)

On 21 October 2001, the defendant responded to the plaintiff’s letter as follows:

“It is our intention to fully co-operate with yourself and your Consultants Robertson Ward Associates and Cooper Kauffman. Please prepare a further valuation for work up to 19/10/2001 ... We are also insisting on release of all retention monies at this time.”

In a further letter dated 22 October 2001, the defendant stated that Cooper Kauffman Ltd:

“will prepare, within the next few days, a detailed report on the works to date and will prepare a final valuation as at 19th October.”

[25] Based on the evidence from the exchange between Mr. Colin Cooper (“CC”) and Mr. Andrew Thornhill (“AT”) at 2:264 it is clear that a final valuation was never done:

“AT: Was a final valuation ever performed by Cooper Kauffman.

CC: No, it wasn’t.

AT: Would you be so kind as to tell the Court why?

CC: The purpose of an interim valuation is for payment on account, and to use the words generically the agreement of the final account which will result in a final agreement of course, once agreed and during that agreement any points of disagreement are normally worked out, negotiated and agreed, and then a final account would be issued together with a final valuation of the architect.

AT: Was that process carried through in this particular instance?

CC: The process was started but it wasn't able to be finalised.

AT: Are you able to say why?

CC: No doubt I will be stopped. The process we underwent to arrive at an agreed figure, we did arrive at an agreed figure, but it was without prejudice.”

[28] However, it seems to us that Cooper Kauffman Ltd., the quantity surveyors appointed with the consent of both parties, should have been instructed to determine what further sum was due to the contractor as the parties had agreed in their correspondence. The figure was to be obtained not for the purpose of the respondent negotiating a settlement, but for ascertaining the amount that was properly due to the contractor. We therefore hold that the appellant is entitled to have that figure ascertained. Based on the figure available of the value of the work executed, the appellant would be entitled to an amount for loss and damage of at least \$24,965.17, subject to what we say in paragraph [29] below.

[29] We raised with counsel the matter of VAT and whether the VAT implications of the figures had been properly taken into account. However, we did not receive any

helpful response. It could be that this matter needs to be revisited. Further, as pointed out in paragraph [23] above, there is no explanation of how the retention money was treated. A proper computation of the loss and damage claim was not presented; it therefore appears that the claim will have to be reviewed by the parties with the quantity surveyors in the light of our judgment to take account of (i) any revised quantification of the invoices and certificates in order to arrive at a final account or valuation of the works up to the date of termination, (ii) the retention money, and (iii) any VAT payable. The parties should avoid further delay and expense in this matter by agreeing with the help of their professional advisers the appropriate figure for the loss and damage claim to be inserted in the Order.”

[6] On 17 February 2009 this Court made the following order:

- “(i) The appeal is allowed in part in respect of the appellant’s loss and damage claim up to 19 October 2001; otherwise the judgment of the High Court dated 6 June 2006 is affirmed.
- (ii) Judgment is given in favour of the respondent against the appellant on the claim and the counterclaim and the appellant is ordered to pay the respondent the balance of \$194,473.13 less the sum of \$24,965.17 [or such sum as is agreed by the parties to be taken into account in relation to (i) a valuation of the works, (ii) the retention money and (iii) any VAT payable, in accordance with paragraph [29] of this judgment] and interest and costs thereon as ordered by the High Court.
- (iii) Costs are awarded in this Court to the appellant against the respondent, certified fit for two attorneys-at-law;
- (iv) Liberty is granted to each party to apply to this Court for directions, if necessary”.

The Application

[7] Notwithstanding that the parties had agreed in correspondence to settle the final accounts and that this Court had held that the final accounts should be settled, the parties failed so to do and Mr. Shepherd QC returned to this court for directions. He proposed that Mr. David Ferdinand be appointed at the expense of the appellant, if necessary, to settle the final accounts. Mr. Thornhill objected to Mr. Shepherd's proposal and proposed Cooper Kauffman Consultancy Ltd. (Cooper Kauffman) quantity surveyors for the project whose appointment the parties had previously agreed. Mr. Shepherd had no objection and on 28 June 2012 they again agreed that Cooper Kauffman be appointed to settle the final accounts.

[8] On 30 May 2013, the respondent filed the final accounts supported by the affidavit of Mr. Mark Roger Pearson, Chartered Quantity Surveyor, of Cooper Kauffman. Those accounts revealed that at the termination of the building contract by the respondent, the amount of \$50,832.88 was due and owing to the appellant. Both sides have agreed the final accounts.

Submissions of Counsel on the Application

[9] Mr. Shepherd QC for the applicant submitted that under the liberty to apply provision reserved in the order of this court, this Court had the power to work out the order. In support of his submission Mr. Shepherd QC cited **Bristol-Myers Squibb Company (Claimant /Appellant) v Baker Norton**

Pharmaceuticals Inc. Napro Biotherapeutics Inc.
(Defendants/Respondents) [2001] E.W.C.A Civ 414 which this Court did not find helpful.

[10] Mr. Thornhill for the respondent resisted the application and contended that this Court (i) had no power to vary the order; and (ii) was *functus officio*. In respect of ground (i) Mr. Thornhill relied on: **Cristel v Cristel [1951] 2 KB 725 (Cristel); Joseph v Hajarysingh TT 1979 HC 87(Joseph); FiveCourts Ltd. v J.R. Leisure Development Co. Ltd. [2001] L & T.R.5 (FiveCourts); and Community Care North East (a partnership) v Durham County Council [2012] 1 WLR 338 (Community Care)**. Mr. Thornhill cited no authority for the second contention.

[11] The cases cited by Mr. Thornhill though arising out of liberty to apply are distinguished from the present case as we demonstrate in the following paragraphs.

(i) In **Cristel** the court ordered **H** to give **W** a house or bungalow. **H** returned to court seeking to have the order varied by inserting the words “or flat” after the word “bungalow”. The court held that the words ‘or flat’ would amount to a variation of the order and that the judge had no power to vary the order. In that case the words “or bungalow” following the word “house” created a genus, bungalow

being a single unit dwelling whereas a flat is one unit in a multiple unit dwelling.

- (ii) **Community Care** concerned an application to vary a Tomlin order under the liberty to apply. The schedule to a Tomlin order is a contract between the parties which is not enforceable as a judgment. The liberty to apply is given to enforce the terms of a Tomlin order not to vary it. Ramsey J said at paragraph 23 to 25:

“[23] In this case the March 2009 order contains, in the schedule, a binding contract between the parties compromising the proceedings. It is not a consent order made at an interlocutory stage by which a particular application is compromised on terms, including terms as to time for compliance. Nor is it a consent order which incorporates the binding contract as terms of the order. It is in the form of a Tomlin order. In the commentary to *CPR 40.6 at pp 108/1082 at (para. 40.6.2] of Civil Procedure (2009) the White Book*) vol 1 it is stated:

Essentially, a Tomlin order records terms of settlement agreed between the parties but those terms are not ordered by the court and are not enforceable as a judgment, at least not without a further order. The terms contained in the schedule are not something for approval by a judge. The judge will, however, approve the order itself. If it is intended to embody terms of settlement which can be enforced as an order the terms need to be in the order itself (not the schedule) and set out clearly. Such an order should not include provision for a stay of the proceedings as there would be no point in such a stay.

[24] As set out in that passage, the schedule to a Tomlin order sets out an agreement which has been made between the parties as to the terms on which the proceedings have been settled. In general once the parties have entered into an agreement the ability to set aside or vary that agreement depends on there being a remedy in relation to that contract. Otherwise the court is only concerned with the meaning of the agreement in the schedule and this depends on normal principles. As Lord Steyn said in *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd* [2004] UKHL 52 at [18], [2005] 1 All ER 191 at [18], [204] 1WLR 3251: The settlement contained in the Tomlin order must be construed as a commercial instrument.

[25] In my judgment where the terms are contained in a schedule to the Tomlin order the position is different from the terms being incorporated as part of a consent order. As set out in the commentary to the White Book a party can settle a case and seek a court order in one of two ways. First it can seek to incorporate the terms of the settlement within the body of the order so that those terms are part of the court order. The alternative way is by way of a Tomlin order under which the parties seek a stay of the proceedings on terms that the parties will comply with the agreement in the schedule, with liberty to apply to enforce those terms. The court approves and orders the consent order in the first case but only approves and orders the terms of the order but not the terms of the schedule in the second case.”

(iii) **Fivecourts** concerned a liberty to apply provision contained in a consent order. The court held that the question whether liberty to apply entitled the court to interfere in that case did not arise for decision. The court said:

“If it had arisen, I should have held that the inclusion of a provision for liberty to apply at least in the present case permits only applications which are necessary to supervise the execution of the consent order and does not permit applications which alter the substantive rights established by the terms of the consent order”.

It is clear from the above extract that the terms of that consent order amounted to a contract between the parties the execution of which the court could only supervise and not vary – similar to a Tomlin Order.

(iv) In **Joseph**, planning permission changed the layout of the subdivision and therefore the subject matter of the agreement was so altered that the court could not enforce the order for specific performance.

[12] In spite of Mr. Thornhill’s admission at paragraph 5 of his written submissions that: “The Final Account has been settled by Cooper Kaufman, and shows the sum of \$50,832.88 as being the amount due to the appellant/respondent...” he submitted that the terms of the original order (which are set out at para 6 above) were clear, and required no ‘working out’. He contended that on “a straight reading of the order of this court the appellant” has to pay the Respondent \$194,473.13 less \$24,965.17 or such sum as is agreed by the parties after taking certain specified elements into account”. He concluded that it therefore follows that in the absence of agreement between the parties as to an alternative figure, the sum of \$169,507.96 together with interest thereon and costs as ordered by the High

Court has to be paid by the appellant to the respondent. He insisted: “There is nothing to be worked out”.

[13] That submission, taken to its logical conclusion, would mean that one party need only be uncooperative, and refuse to agree on the final accounts thereby visiting an injustice upon the other party.

[14] The respondent also contended that this Court is *functus officio* and cannot entertain this application. This very ground was raised in similar circumstances in **Kanawagi S/O Seperumaniam v Penang Port Commission [2001] 5 MLJ 433 (Kanawagi S/O)** in which the court said at paragraphs 33, 73, 74 and 76:

“[33] In my mind, this is not an application by the plaintiff to reopen the original case and vary, alter or amend the order made by the court on 18 July 1994. This present action arises as a result of the defendant’s obstinate disobedience to give effect to that order made on 18 July 1994 that the plaintiff is compelled to seek consequential orders to give effect to it. Therefore, this case is not to reopen and/or vary, alter or amend the order made by the court on 18 July 1994 to attract the rule of *res judicata* and corollary to it, the rule of issue of *estoppel* and *functus officio*.

[73] Further, there is authority to state that when a given court order is not of final character and something more has to be done, that court can give further order or orders under the ‘liberty to apply rule’. *Penrice v Williams (1883) 23 Ch D 353*.

[74] In the instant case, since the defendant has not given effect to the declaratory order given by

the High Court on 18 July 1994, the plaintiff is entitled to apply to the court under the ‘liberty to apply rule’ for the purpose of implementing and give effect to the order dated 18 July 1994, for the rule of the court is *lex non deficit in justitia exhibenda* which in simple English means that the law does not fail in dispensing justice.

[76] I am bound by this view that not only an appellate court has powers to grant the appropriate remedy on appeal but also add that the court of first instance hearing an application for consequential relief also have powers to dispense appropriate remedies under the heading of ‘other relief the honourable court deems fit’. Since the plaintiff in the main case has asked for ‘any other relief that this honourable court thinks fit’, I hold that the consequential relief sought by the plaintiff in this originating summons in substance emanates from the plaintiff’s prayers of ‘further or other relief that this honourable court deems fit’ in the main action.”

[15] In our view this is not an application by the appellant to re-open the appeal and vary, alter or amend the order made on 17 February 2009 but rather, an application that falls squarely within the terms of **Kanawagi S/O**. Accordingly we hold that this is an application to work out the order made on 17 February 2009.

Liberty to Apply: Its Ambit and Scope

[16] It is now for this Court to examine the ambit and scope of liberty to apply.

[17] If a party contends that a decision is unworkable without assistance from the court, the party should invoke the liberty to apply provision. In the instant case this Court had granted the parties liberty to apply. What then is liberty to apply?

[18] Lord MacKay of Clashfern in Halsbury's Laws of England 4th Ed, Reissue, Vol 37, 2001, para 1230 had this to say about the 'liberty to apply' provision:

“The circumstances or the nature of a judgment or order often render necessary subsequent applications to the court for assistance in working out the rights declared. All orders of the court carry with them inherent liberty to apply to the court, and there is no need to reserve expressly such liberty in the case of orders which are not final. Where in the case of a final judgment the necessity for subsequent application is foreseen, it is usual to insert in the judgment words expressly reserving liberty to any party to apply to the court as he may be advised. The judgment is not thereby rendered any the less final; the only effect of the declaration is to permit persons having an interest under the judgment to apply to the court touching their interest in a summary way without again setting the case down. It does not enable the court to deal with matters which do not arise in the course of working out the judgment, or to vary the terms of the order except possibly on proof of change of circumstances. Should the declaration be omitted, application may be made to have the judgment rectified by inserting it. It will not, however, be made or implied in favour of a defendant as against whom the claim has been dismissed for any other purpose than for enforcing the terms of the order, nor in favour of a claimant whose cause of action disappeared before trial but who fears that the circumstances giving rise to the cause of action may recur.”

[19] **Cristel** is said to be the *locus classicus* for the proposition that the liberty to apply provision in an order of court is for the purpose of working out the order and not of varying it.

[20] In the Malaysian case of **Public Bank BHD v Chan Tak Kow [1988] 3 MLJ 330** it was held:

“Prima facie, the words ‘liberty to apply’ refer to the working out of the actual terms of the order. It should be confined to the problems relating to enforcing or executing the order, such as difficulty in its enforcement because of the terms of the order later found to be unclear or doubtful when faced with the actual situation on the ground, so that the party which obtained the order may approach the court again for its indulgence to seek clarification.”

[21] Similarly in the Australian case of **Abigroup Ltd v Abignano (1992) 112**

A.L.R 497 it was said that:

“Historically the reservation by the Court of Chancery of further consideration of a decree was intended to cover the circumstance where following the pronouncement of the decree (a final decree) a further hearing was necessary for the court to deal with some outstanding issue sometimes requiring taking further evidence and making further declarations or orders. But this did not detract from the initial orders as being final orders. Rather it was a mechanism designed by the Court of Chancery to obviate the necessity of a further suit being instituted to deal with matters that were essentially consequential upon the making of the initial final decree. This demonstrates that there is no inconsistency between the making of final decrees, judgments or orders or declarations and subsequent orders of the court. It all depends upon the circumstances of the case and the particular orders or decrees formulated by the court.”

[22] Liberty to apply is an effective tool for dispensing justice, especially where all that is necessary is the working out of the order. That is particularly relevant to the instant case which has striking similarities with the Singapore case of **Tan Yeow Khoon & Anor v Tan Yeow Tat & Anor (No.2) [2000] 3 SLR 323 (Tan Yeow)**, a case involving accounts. By way of comparison and illustration we set out in some detail the important features of that case.

The headnote reads, *inter alia*:

“ Facts

Pursuant to an order of court dated 21 February 1998, an expert, one Mr. Ong Yew Huat, was appointed to examine the accounts of three family companies owned by the parties. Following his appointment, Ong forwarded his draft terms of reference to the parties. The plaintiffs had no problems with the draft and reportedly signified their acceptance of them. The defendants, on the other hand, desired some modifications to the draft, following which a situation of deadlock was reached. To break the impasse, one Mr. Gea, the company secretary to one of the three companies suggested the addition of the following clause to the draft: ‘And for the avoidance of doubt, any issue arising out of the amounts owing by [the defendants] as set out in the audited accounts of the Companies shall be determined by us’. In response, the defendants suggested that a further modification to the draft proposal by Gea be made by inserting the words ‘or to’ after the words ‘amount owing by’ appearing in the second line of the latter’s proposal, saying that the proposed addition would put the accounting perspective between the parties on a correct footing. The plaintiffs objected and applied to court under the ‘liberty to apply’ clause contained in the order of court to resolve the matter.

Held, *inter alia*, allowing the modification proposed by the defendants:

- (1) ...
- (2) To the court's mind, what was being put forward by the defendants was not so much as to re-write or vary the order of court but to sustain and work out the order earlier made.
...
- (3) ...
- (4) The court was further of the view that the plaintiffs' attempts to forestall Ong from inquiring into the amounts owing to the defendants, whilst he was expected to carry out an exercise as to what was owing from them, were founded on plain unreason and obduracy."

[23] The court's findings as expressed in the headnote are amplified in paras 10, 11 and 14 where it is stated:

- "10 To my mind, what was being put forward by the defendants at the hearing of the plaintiffs' application was not so much as to re-write or vary the order of court but to sustain and work out the order earlier made. In the premises, the suggestion by plaintiffs' counsel that further directions given to resolve the continuing deadlock between the parties would constitute re-writing the court's earlier order had no substance.
- 11 By any measure, even if the further direction issued by me were to be regarded as a variation, such a direction was intended only to succour the original order. ...
- 14 It was regrettable that the letter and spirit of the order as well as the directions given by the court on 21 February 1998 had been entirely lost on the plaintiffs. In my view, the plaintiffs' attempts to forestall the expert from inquiring into the amounts *owing to the defendants*, whilst he was expected to carry out an exercise as to what

was *owing from them*, were founded on plain unreason and obduracy”.

Relevant Statutory Provisions

[24] We consider it appropriate to set out here the relevant provisions namely **section 61 (1) and (2) of the Supreme Court of Judicature Act Cap. 117A (Cap. 117A) and rule 1 of the Supreme Court (Civil Procedure Rules) 2008 (CPR). Section 61 (1) and (2) provide:**

“61. (1) Subject to subsection (5), for all the purposes of and incidental to the hearing or determination of any appeal against any decision or determination of a court, tribunal, authority or person, in this section referred to as “the original court”, and the amendment or enforcement of any judgment or order made thereon, the Court of Appeal has, in addition to all other powers exercisable by it, all the jurisdiction of the original court and may

- (a) confirm, reverse or vary the decision or determination of the original court;
- (b) ;
- (c) ;
- (d) ...;
- (e) draw any inference of fact that might have been drawn, or give any judgment or make any order that might have been given or made by the original court, and make such further or other order as the case requires;
- (f) ;
- (g) make such order as to the costs and expenses incurred in the appeal and in the proceedings in

the original court as the Court of Appeal thinks fit;

- (h) ;
- (i) make such other order as is necessary for the due determination of the appeal.
- (2) The powers of the Court of Appeal in respect of an appeal to which subsection (1) applies
 - (a) are not restricted by reason of any interlocutory order from which there has been no appeal; and
 - (b) may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the original court, or by any particular party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice,

and the Court of Appeal may make any order, on such terms as the court thinks just, to ensure the determination on the merits of the real question in controversy between the parties.

Rule 1 of CPR provides:

- “1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly.
- (2) Dealing justly with a case includes, so far as is practicable,
 - (a) ensuring that the parties are on an equal footing;

- (b) saving expense;
- (c) dealing with the case in ways which are proportionate to
 - (i) the amount of money involved;
 - (ii) the importance of the case;
 - (iii) the complexity of the issues; and
 - (iv) the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

Application of the overriding objective by the court

"1.2 The court must seek to give effect to the overriding objective when interpreting these Rules or exercising any powers under these Rules.

Duty of the parties

1.3 The parties are required to help the court to further the overriding objective."

Discussion

[25] Stripped of all semantics, the real question in controversy between the parties was in whose favour the balance of accounts lay. Had that been known before the trial there might well not have been a trial or had there been a trial the outcome would have been very different. The appellant would have been successful.

[26] **Section 61 of Cap. 117A and rule 1 of CPR** bear some similarities to section 56 of the Civil Procedure Act 2005 of New South Wales, Australia and in the circumstances of the instant case paragraphs 56, 58, 69 and 96 of **Australian HardBoards Ltd v Hudson Investment Group Ltd 40570/06, 2007 NSWCA104** are instructive.

“[56] Rather, what can be done under a reservation of liberty to apply depends on what needs to be done, in the particular case, to work out the particular orders that have been made. ...

[58] There is no difficulty about exercising a liberty to apply for the purpose of dealing with facts that have arisen only since the original order was made. Mahoney JA, in *Wentworth v Woollahra Municipal Council (unreported, NSWCA, 31 March 1983)* at 5 expressly so recognised, saying:

In some cases, orders have been made which alter the effect of an existing order because of facts which were not before the court which made the original order. It may be that such a supplemental order can be made because of facts which had occurred before the making of the original order but were not brought to the court’s attention: see *Re Scowby; Scowby v Scowby [1897] 1 Ch 741*. It has been held that supplemental orders can be made because of facts occurring after the making of the original order: *Bailey v Marinoff 125 CLR* at p 540, per Gibbs J; see also *Ford-Hunt v Raghbir Singh (1973) 1 WLR 738*; *Northern Counties Securities Ltd v Jackson & Steeple Ltd (1974) 1 WLR 1133* at 1138; *cf Easton v Brown (1981) 3 All ER 278* at 284(e). This jurisdiction has been long recognised in the practice books: Seton on Judgments and Orders (1912) p 126, 816; Daniell’s

Chancery Practice (8th edition) p 710, 1139. See also the Annual Practice (1982), Notes to Order 20, r 11/5; Halsbury's Laws of England 4th Edition, Volume 37, par 329(n). There has been no finally authoritative examination of the nature of the supplemental orders which can be made.

[69] A reservation of liberty to apply, by a 21st century judge of the New South Wales Supreme Court, needs to be understood in the context of the particular practices and procedures that this court has now. Section 56 Civil Procedure Act 2005 must be taken into account. It says:

(1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

(2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.

[96] ... Decisions in England where the “overriding purpose” formula was introduced before its introduction into NSW law show that these words are no platitude, or what in the 16th century might be described as “comfortable words”, but have real meaning. As Professor Zuckerman says in his *Civil Procedure* (LexisNexis UK, 2003) the words mean that the court is to be proactive and take the initiative to direct the intensity and pace of the litigation process in order to facilitate the just, quick and cheap resolution of the real issues in the proceedings. This means, inter alia, that the courts’ approach must be to adapt process to the resolution of the dispute (Zuckerman, 1.83 et seq).

...”

[27] Mr. Thornhill having acknowledged and admitted that those accounts show a balance of indebtedness of \$50,838.38 in favour of the appellant/applicant, still holds fast to his position that “there is nothing to be worked out”. He is relying on **Cristel** and the other authorities cited by him to resist the application and thereby avert justice. We have already distinguished them.

[28] In the instant case the financial liability of the parties to each other had not been definitively ascertained: no final accounts had been prepared. Throughout the trial before **Blackman J** and in the substantive appeal, the accounts on which the proceedings and hence the decisions hinged were the interim certificates. It was established at the trial and **Blackman J** found that they were not conclusive.

[29] In giving judgment for the defendant, **Blackman J** said:

“No evidence was given by Crane to contradict Fort’s claim and I accordingly accept the modified figure”.

That Crane did not contradict Fort’s figure should not have surprised **Blackman J** and we are certainly not surprised because Fort had reneged on its agreement with Crane to settle the accounts. That failure by Fort to honour its agreement with Crane scuttled Crane’s case and it went to the bottom. Had Fort honoured its agreement with Crane there would have been no need for a long and expensive trial before **Blackman J** and certainly not

a possibly more expensive appeal and undoubtedly this application would have been unheard of.

[30] The final accounts revealed that on the termination of the contract, Fort was the debtor and Crane the creditor. The question now arises whether this Court can in all conscience allow a clear injustice to stand. We think not.

[31] Paragraph 29 of the decision of the Court of Appeal required the parties to settle the final account upon which completion of paragraph (ii) of the order of the Court of Appeal depends. Paragraph (ii) also provides for interest and costs as ordered by the High Court. However, the final accounts revealed that the appellant was in credit on the date of termination of the contract, therefore, the respondent had a nil claim and is entitled to nil interest. Also, had the final accounts been known in the High Court, judgment would have been given for the plaintiff/appellant and not in favour of the defendant/respondent and costs would have likewise been awarded in favour of the plaintiff/appellant and not the defendant/respondent.

[32] The instant case was concerned with a matter of accounts. Those accounts were not settled during the course of the trial or appeal. **Blackman J** awarded the respondent two thirds of its costs for wasting time trying to contradict the clear evidence of its own witness, causing the Court of Appeal to hold “that the appellant is entitled to have that figure ascertained” and to

say “The parties should avoid further delay and expense in this matter by agreeing with the help of their professional advisers, the appropriate figure for the loss and damage claim to be inserted in the Order.”

[33] This Court delivered its judgment in the appeal on 17 February 2009. The parties could not settle the final accounts and Mr. Shepherd QC invoked liberty to apply and filed his application on 22 June 2012. The matter came on for hearing on 28 June 2012 but was adjourned because even though correspondence between the parties revealed that they had chosen Kauffman to ascertain the final accounts the respondent had failed to honour that undertaking. On 24 July 2013 this Court made an order appointing Kauffman. Final accounts were filed in court and the matter was again adjourned. On 21 November 2013 the Court suggested an order to settle the application and at the request of Mr. Thornhill the matter was again adjourned for him to take instructions from his client. On 15 April 2014, the adjourned date, Mr. Thornhill did not appear. Mr. McWatt appeared on behalf of the appellant/applicant. He informed the Court that he had received a letter from Mr. Thornhill rejecting the suggested order. The matter was further adjourned. Mr. Thornhill then appeared on 5 May, 2014 and stated his objection to the Court’s suggestion. The Court then summoned Mr. Pearson in order to hear his explanation of the accounts. On

two occasions he was unable to attend court because he was visiting his sick mother in England. She later died and the matter was again adjourned for him to attend her funeral. Finally on 12 November 2014 Mr. Pearson gave his evidence.

[34] That justice must not only be done but must be seen to be done is most apt in the instant case. Had the final accounts been ascertained pursuant to the agreement between the parties, it is most unlikely that any legal proceedings would have been necessary. We are inclined to the view that had the final accounts been available, the appellant could have relied on the prayer “such further or other relief as this honourable court deems fit” in the writ and the appellant would have been successful on an application for consequential relief. We are of the view that this Court, pursuant to **section 61 (1) and (2) of Cap. 117A** and **rule 1 of CPR** and consistent with the authorities, can work out the order and grant appropriate relief to the applicant.

[35] In **Kanawagi S/O** the court said: “Although a decision of the House of Lords is not binding on this court, this court can take cognisance of their judgments for justice and good sense know no national boundaries”. We endorse the sentiment expressed in that statement and say similarly, this court can do likewise and take cognizance of judgments even though not binding on this court.

[36] The final accounts were not new. They were based on facts that existed before the trial commenced but the accounts were not ascertained until sometime after the decision on the appeal. That does not affect the working out of the order because the facts on which the final accounts were based occurred before the making of the order in the High Court and the Court of Appeal: See **Re Scowby; Scowby v Scowby [1897] 1 Ch. 741**.

Disposal

[37] In light of the foregoing we make the following order:

- (i) The application is allowed.
- (ii) The order of **Blackman J** is set aside.
- (iii) The respondent is ordered to pay the applicant \$50,832.88 plus VAT. Interest shall be paid on that amount at the rate of 4% per annum from the date of the issue of the writ to 5 June 2006 and thereafter at 8% per annum until payment;
- (iv) The appellant shall have its costs in this Court and in the court below to be taxed if not agreed certified fit for two counsel.

[38] The applicant shall have the costs of this application to be assessed if not agreed.

Chief Justice

Justice of Appeal

Justice of Appeal