[2013] JMCA App 9

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 16/2012

APPLICATION NO 58/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN	**WILLIAM CLARKE**	**APPLICANT**
A N D	**THE BANK OF NOVA SCOTIA JAMAICA LIMITED**	**RESPONDENT**

Mrs M Georgia Gibson-Henlin, Marc Jones and Kamau Ruddock instructed by Henlin Gibson Henlin for the applicant

Michael Hylton QC and Sundiata Gibbs instructed by Michael Hylton & Associates for the respondent

Mrs Nicole Foster-Pusey, Solicitor General, Miss Carlene Larmond and Miss Lorraine Patterson instructed by the Director of State Proceedings for the Attorney General

28, 29 January, 8 March and 26 April 2013

HARRIS JA

[1] The applicant was a former president and chief executive officer of the respondent. On 19 October 2011, he brought a claim against the respondent seeking

an order for the payment of £41,181.06 as monies held in the respondent bank in trust for him, or alternatively, damages for breach of contract. On 17 November 2011 the respondent filed a notice of application for court orders seeking a declaratory order that the court was without jurisdiction to hear the claim and that the claim form be struck out, or alternatively, that the proceedings should be stayed. On 27 January 2012 the claim was struck out by Sinclair-Haynes J for want of jurisdiction.

[2] The applicant's dissatisfaction with Sinclair-Haynes J's ruling led to his filing a notice of appeal to which the respondent filed a counter notice of appeal. These were considered by Brooks JA, who, on 13 March 2012 made the following orders:

> "(1) The order of Sinclair-Haynes J, made on 27 January 2012 is set aside;
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> (2) Claim No 201 CD 00075 is hereby stayed pending the parties proceeding to arbitration pursuant to a settlement agreement made between them on 7 June 2011 and until further order of the court;
>
> (3) The costs of the procedural appeal and the costs of the application in the Supreme Court are to be borne by the appellant. Such costs are to be taxed if not agreed."

[3] On 20 March 2012, the applicant, by way of an application for court orders, sought an order to discharge or vary the orders of Brooks JA. On 12 June 2012, the application came on for hearing, at which time the respondent made a preliminary point challenging the court's jurisdiction to hear the matter on the ground that the court was *functus officio* and an appeal from Brooks JA's orders would lie to the Privy Council. This objection was upheld by the court. On the following day, the applicant's counsel

wrote to the court seeking to have the matter revisited. Both parties appeared before the court on 14 June 2012 and on the court's invitation, made submissions, following which, the court reversed its decision and ruled that the application should be heard by the full court of five judges. Mr Hylton QC, by a letter of 18 June 2012, informed the court that in order to avoid costs and delay in proceeding with the hearing of the application to discharge or vary the learned judge's orders, he would not be pursuing the preliminary objection. Despite this, it was the opinion of the court that the objection raised was an extremely important point of law which ought to be considered and determined.

[4] Orders on a case management conference were subsequently made, in which, among other things, the Attorney General was requested to intervene and make submissions on the question of the constitutionality of the hearing and determination of procedural appeals by a single judge.

[5] Mrs Gibson-Henlin's submissions were advanced on two bases, namely: the unconstitutionality of the procedure laid down in rule 2.4 of the Court of Appeal Rules (CAR) giving jurisdiction to a single judge in the hearing and determination of procedural appeals as well as the creation of the rule in contravention of statutory authority. She argued that the provisions of the CAR, so far as they confer jurisdiction on a single judge to hear and determine a procedural appeal, are void and unconstitutional to the extent that the Rules Committee (the Committee), in making the

rules, acted ultra vires the powers bestowed upon it by the Judicature (Rules of Court) Act and the Constitution.

[6] It was further submitted by her that procedural appeals do not proceed to the court for determination unless the judge so directs, and by this, jurisdiction is effectively assigned to the judge to dispose of an appeal, or to determine whether an appeal should be heard by the court. This procedure, she argued, is inconsistent with the jurisdiction conferred on the court by the Judicature (Appellate Jurisdiction) Act which creates a distinction between the court and a judge.

[7] Jurisdiction is entrenched in the Constitution and the provisions as to any alterations to the Constitution must be followed, she argued. In support of this submission, she cited the cases of ***Hinds and Others v R*** [1976] 1 All ER 353 and ***Independent Jamaica Council for Human Rights (1998) Limited and Others v Hon Syringa Marshall Burnett***, Privy Council Appeal No 41/2004, delivered on 3 February 2005.

[8] Section 5 of the Judicature (Appellate Jurisdiction) Act, she submitted, refers to the composition of the court as being not less than three but it makes no reference to a single judge, and therefore it would be incorrect to contend that a single judge constitutes the court. As a consequence, she submitted, an appeal cannot be properly heard by a single judge.

[9] Counsel further submitted that section 5 of the Judicature (Appellate Jurisdiction) Act empowers the court to sit in more than one division and therefore the jurisdiction to

hear appeals, is vested in the Court of Appeal and not a judge. It follows that the Committee only had the authority to regulate the existing jurisdiction of the Court of Appeal by making such rules as permitted by the Judicature (Rule of Court) Act, she submitted.

[10] Acknowledging that section 10 of the Judicature (Appellate Jurisdiction) Act provides that, in civil actions, jurisdiction is conferred on the court subject to the rules of court, she argued that a rule of court could not be employed to alter or create jurisdiction, it being procedural in nature. Citing a dictum of Lord Diplock in the case of ***Hinds and Others v R*** in support of this submission, she went on to argue that the impugned rules of court are a threat to the fundamental rights entrenched in the Constitution which protect litigants.

[11] It was her further submission that, in Part 2 of Chapter VII of the Constitution, the references to the Court of Appeal and the judges of the court, show that they are separate and distinct.

[12] The case of ***Hinds and Others v R***, it was submitted, demonstrates that section 103 of the Constitution provides the Court of Appeal with jurisdiction and powers as may be conferred on it by the Constitution "or any other law". The phrase "any other law" should be read against the "supreme law clause of the Constitution" to mean that any other law which is inconsistent with the Constitution is void.

[13] Section 109 of the Constitution is entrenched, she argued, and it makes a distinction between the composition of the court for interlocutory matters and other matters, which undoubtedly shows that it was the intention of the drafters of the Constitution that appeals should be heard by the court as, under the Constitution, a single judge is only empowered to hear interlocutory matters. Appeals must be heard by the Court of Appeal which, as properly constituted, is composed of an uneven number of at least three judges and therefore a single judge cannot hear and determine an appeal, she submitted.

[14] It was also submitted that rule 2.4 does not only deprive the court of a fundamental part of its jurisdiction but also deprives a litigant of the right of appeal to Her Majesty in Council. The Committee, she argued, having made rules to confer jurisdiction on a single judge to hear appeals, acted outside the scope of its authority and such conferment on a single judge to hear appeals, renders rule 2.4 unconstitutional, it being inconsistent with sections 109 and 110 of the Constitution. In the circumstances, she submitted, the order of Brooks JA lacks jurisdiction. Accordingly, the preliminary objection should fail.

[15] In her written submissions, the Solicitor General made reference to certain sections of the Constitution, several statutory provisions and provisions of the CAR, namely: sections 2, 49, 103(1) and 109 of the Constitution; the Judicature (Rules of Court Act) 1961; sections 1, 9, 10, 11, 30 and 32(1) of the Judicature (Appellate Jurisdiction) Act, and rules 1.1(8), 2.4(3), and 2.11 of the Court of Appeal Rules. She

submitted that, as contemplated by the Constitution, the matters described in section 32(1) of the Judicature (Appellate Jurisdiction) Act, can be regarded as falling within the purview of interlocutory matters: and can be dealt with by a single judge**.** In her written submission it was further submitted that the scheme outlined in that section, is analogous to the contents of the now repealed rule 33 of the 1962 Court of Appeal Rules and rule 2.11(2) of the CAR. These are concerned with a single judge's powers in procedural applications and such applications are not determinative of the substantive appeal.

[16] It was her submission that section 103 of the Constitution is entrenched but section 109 is not, as it can be altered by an amendment. The impact of section 2 of the Constitution is that, even if there is a provision for another law to confer jurisdiction on the Court of Appeal, that other law cannot be inconsistent with section 109, she argued. Under section 10 of the Judicature (Appellate Jurisdiction) Act, an "interlocutory matter" could be seen as a matter incidental to the hearing and determination of an appeal.

[17] Appeals from interlocutory orders are substantive appeals, and neither the Judicature (Appellate Jurisdiction) Act nor the Judicature (Rules of Court) Act provides for the disposal of an appeal by a single judge, she submitted. Where rules are promulgated in breach of the Constitution in pursuance of statutory powers conferred by Acts, such rules would be void to the extent of the inconsistency, she argued. It was her further submission that an interlocutory matter is one which relates to something

pending before the court, which would not be an interlocutory appeal. An interlocutory matter, she submitted, is the same as an interlocutory application which does not bring an appeal to an end. Before the court is an appeal arising from an interlocutory order of the Supreme Court and a single judge, in hearing the appeal, would have acted ultra vires.

[18] The critical question, she argued, is the meaning to be given to the term "interlocutory matter" in section 109 of the Constitution. There are a vast number of authorities defining the term "interlocutory matter" to mean an ancillary matter in the determination of litigation and not one in which litigation is finally determined, she argued. It was further submitted by her that although a procedural appeal is against an interlocutory order of the Supreme Court, it does not rank as an "interlocutory matter" in proceedings in the Court of Appeal and therefore should be heard by a panel of three judges.

[19] In assisting the court, Mr Hylton made submissions in which he s expressed agreement with Mrs Gibson-Henlin and the Solicitor General that an interlocutory matter means an interlocutory appeal and that a single judge is not empowered to hear procedural appeals.

[20] He submitted that the cases of ***Hinds and Others v R*** and ***Independent Jamaica Council for Human Rights (1998) Ltd and Others v Hon Syringa Marshall Burnett and the Attorney General*** are not relevant to the issue in this

case. The issue, he argued, relates to the interpretation of section 109 of the Constitution and not to the removal of jurisdiction as in those cases.

The law

[21] Section 2 of the Constitution provides:

> "**2**. - Subject to the provision of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

Section 49 provides for the alteration of certain sections of the Constitution. Section 50 makes provision for an Act of Parliament, passed by two thirds majority of both Houses, to be rendered valid notwithstanding its inconsistency with sections 13 to 26 of the Constitution.

[22] Section 103(1) of the Constitution makes provision regarding the jurisdiction and powers of the Court of Appeal. It reads:

> "**103**.- (1) There shall be a Court of Appeal for Jamaica which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law."

[23] Section 109 of the Constitution provides:

> "**109**.-The Court of Appeal shall, when determining any matter other than an interlocutory matter, be composed of an uneven number of Judges, not being less than three"

[24] Section 110 of the Constitution makes provision for appeals to Her Majesty in Council. It states:

> "**110**. (1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases-
>
> (a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, final decisions in any civil proceedings;
>
> (b) final decisions in proceedings for dissolution or nullity of marriage;
>
> (c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution; and
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> (d) such other cases as may be prescribed by Parliament.
>
> (2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases –
>
> (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and
>
> (b) such other cases as may be prescribed by Parliament.
>
> (3) Nothing in this section shall affect any right of Her Majesty to grant special leave to appeal from decisions of the Court of Appeal to Her Majesty in Council in any civil or criminal matter.
>
> (4) The provisions of this section shall be subject to the provisions of subsection (1) of section 44 of this Constitution.

(5) A decision of the Court of Appeal such as is referred to in this section means a decision of that Court on appeal from a Court of Jamaica."

[25] Section 1 of the Judicature (Appellate Jurisdiction) Act (the Act) defines the court, as the Court of Appeal, a judge, as the judge of the Court of Appeal and states that an enactment includes any regulation or instrument issued pursuant to a statutory power.

[26] Section 5 of the Act makes provision for the sittings of the court. It reads:

"**5**. - The Court may, if the President of the Court so directs, sit in more than one division of three Judges at the same time."

[27] Section 9 of the Act vests, in the Court of Appeal, jurisdiction. It states:

"**9**. - There shall be vested in the Court of Appeal -

(a) subject to the provisions of this Act the jurisdiction and powers of the former Court of Appeal immediately prior to the appointed day;

(b) such other jurisdiction and powers as may be conferred upon them by this or any other enactment."

[28] Section 10 provides for the hearing and determination of appeals as well as matters incidental to the hearing and disposal of appeals. It reads:

"**10**.- Subject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings, and for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court shall subject as aforesaid have all the power, authority and jurisdiction of the former Supreme Court prior to

the commencement of the Federal Supreme Court Regulations, 1958."

[29] The Judicature (Rules of Court) Act 1961 empowers the Committee to make rules of court. Section 4 (2) reads:

> "**4**.- (2) Rules of court may make provision for all or any of the following matters:
>
> (a)… (d)
>
> (e) for providing that any interlocutory application in relation to any matter, or to any appeal or proposed appeal, may be heard and disposed of by a single Judge;
>
> (f…j)"

[30] Rule 1.1(8) of the CAR creates a class of appeals under the nomenclature procedural appeals. It states:

> **"procedural appeal**" means an appeal from a decision of the court below which does not directly decide the substantive issues in a claim but excludes –
>
> (a) any such decision made during the course of the trial or final hearing of the proceedings;
>
> (b) an order granting any relief made on an application for judicial review (including an application for leave to make the application) or under the Constitution;
>
> (c) the following orders under CPR Part 17 –
>
> (i) an interim injunction or declaration;
> (ii) a freezing order as there defined;
> (iii) a search order as there defined;
> (iv) an order to deliver up goods; and
> (v) any order made before proceedings are commenced or against a non-party;

(d) an order granting or refusing an application for the appointment of a receiver; and

(e) an order for committal or confiscation of assets under CPR Part 53."

[31] Rule 2.4 sets out the parameters for the consideration and the determination of a procedural appeal. It reads:

"2.4 (1) On a procedural appeal the appellant must file and serve written submissions in support of the appeal with the notice of appeal.

2) The respondent may within 7 days of receipt of the notice of appeal file and serve on the appellant any written submissions in opposition to the appeal or in support of any cross appeal.

(3) The general rule is that a procedural appeal is to be considered on paper by a single judge of the court.

(4) The general rule is that consideration of the appeal must take place not less than 14 days nor more than 28 days after filing of the notice of appeal.

(5) The judge may, however, direct that the parties be entitled to make oral submissions and may direct that the appeal be heard by the court.

(6) The general rule is that any oral hearing must take place within 42 days of the filing of the notice of appeal.

(7) The judge may exercise any power of the court whether or not any party has filed or served a counter-notice."

[32] Under rule 2.11, the single judge is authorized to hear and determine certain procedural applications and the court may vary or discharge orders made by the judge. The rule provides:

> "2.11 (1) A single judge may make orders –
>
> (a) for the giving of security for any costs occasioned by an appeal;
>
> (b) for a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal;
>
> (c) for an injunction restraining any party from dealing, disposing or parting with possession of the subject matter of an appeal pending the determination of the appeal;
>
> (d) as to the documents to be included in the record in the event that rule 1.7(9)applies; and
>
> (e) on any other procedural application.
>
> (2) Any order made by a single judge may be varied or discharged by the court."

Analysis

[33] Three of the new CAR directly touch and concern the matter before the court. These are rules: 1.1(8), 2.4(3), and 2.4(7). As can be observed; rule 1.1(8) creates a procedural appeal which is defined as one which does not directly decide the substantive issue in the claim. It excludes certain other matters which, for the purpose of these proceedings, are not relevant. Rule 2.4 outlines the process by which a procedural appeal is pursued. Rule 2.4(3) assigns to a single judge the power to hear a

procedural appeal while rule 2.4(7) expressly confers on the single judge the right to exercise the powers of the court in hearing a procedural appeal.

[34] The Committee of the Supreme Court derives its authority to make rules and to regulate the practice and procedure of the Supreme Court and the Court of Appeal from the Judicature (Rules of Court) Act 1962. Section 4 of the Act outlines a wide range of matters empowering the Committee to make rules. Section 4(2)(e) expressly authorizes a single judge to hear and dispose of interlocutory applications in respect of any matter relating to any appeal or proposed appeal.

[35] Section 103(1) of the Constitution, which is an entrenched provision, in specifying that the court's jurisdiction is restricted to the Constitution and any other law, clearly shows that the powers of the court can only be exercised by such authority as given by the Constitution or such laws govern the court's powers. Section 9 of the Judicature (Appellate Jurisdiction) Act, in vesting jurisdiction in the Court of Appeal accords with section 103 of the Constitution. By section 10 of the Act, the court is authorized to consider and dispose of appeals.

[36] Section 109 of the Constitution, which is not entrenched, in providing that the court shall be composed of an uneven number of judges, of not less than three, in determining matters, other than interlocutory matters, is highly significant in the determination of the issue before the court. Does the section contemplate that a procedural appeal falls within the scope of an interlocutory matter which a single judge is empowered to hear and determine? I think not.

[37] In determining this matter, some assistance is afforded by the case of ***Hinds and Others v R***. Although that case turned on the unconstitutional enactment of a piece of legislation and the question for determination in this matter relates to the validity of rules of court, reliance can be placed on the case as rules of court possess a compelling force which carries the characteristics of an enactment. In ***Hinds and Others v R*** although the question was whether a law could operate to divest the court of an intrinsic part of its jurisdiction there is a principle pronounced therein which could be extracted as being relevant to the matter under review. In that case, the Board held, among other things, that the legislature was devoid of the power to introduce an enactment which is incompatible with the Constitution.

[38] In ***Hinds and Others v R***, the passage of the Gun Court Act by ordinary legislation was found by the Privy Council to have been in breach of the Constitution. In holding that the legislature could not enact laws which are inconsistent with the Constitution and in speaking to the issue, Lord Diplock, said, at page 366:

> "The jurisdiction that was characteristic of judges of a court to which the description of a 'Supreme Court' was appropriate in a hierarchy of courts which included, in addition, inferior courts and a 'Court of Appeal', was well known to the makers of the Constitution in 1962. So was the jurisdiction that was characteristic of judges of a court to which the description of 'a Court of Appeal' was appropriate.
>
> In their Lordships' view s110 of the Constitution makes it apparent that in providing in s103(1) that: 'There shall be a Court of Appeal for Jamaica…' the draftsman treated this form of words as carrying with it by necessary implication that the judges of the court required to be established under s.103 should exercise an appellate jurisdiction in all substantial civil

> cases and in all serious criminal cases; and that the words that follow, viz 'which shall have such jurisdiction and powers as may be conferred upon it by the Constitution or any other law.', do not entitle Parliament by an ordinary law to deprive the Court of Appeal of a significant part of such appellate jurisdiction or to confer it on judges who do not enjoy the security of tenure which the Constitution guarantees to judges of the Court of Appeal. Section 110(1) of the Constitution which grants to litigants wide rights of appeal to Her Majesty in Council but only from 'decisions of the Court of Appeal', clearly proceeds on the assumption as to the effect of s103. Section 110 would be rendered nugatory if its wide appellate jurisdiction could be removed from the Court of Appeal by an ordinary law without amendment of the Constitution."

As Mrs Gibson-Henlin rightly stated, that case is demonstrative of the fact that the procedural scheme introduced should not be one which undermines the established procedure for altering the Constitution.

[39] The case of ***Independent Jamaica Council for Human Rights (1998) Ltd*** **and** ***Others v Hon Syringa Marshall-Burnett and the Attorney General*** also confirms the principle that Parliament cannot, by ordinary legislation, breach the Constitution.

[40] The Solicitor General brought to our attention several rules of the Eastern Caribbean Court Civil Procedure Rules including rule 62.1(2) which is identical to rule 1.1(8) of the CAR, and rule 2.5(2) which expressly permits a single judge to hear a procedural appeal. Unfortunately, she was unable to locate any decision in which the constitutionality of rule 2.5(2) had been tested. Counsel also drew our attention to section 100 of the Constitution of Belize, which is similar to section 103 of our

Constitution, and also to rules 16 and 22 of their Court of Appeal Rules. Rule 16 outlines the powers of a single judge "in any cause or matter pending before the court". Rule 22 makes provision for an appeal against an interlocutory order to be heard by not less than three judges. Counsel pointed out that the provision of the Belizean rule 22 is identical to rule 33 of our Court of Appeal Rules 1962 which has since been revoked by the CAR but that, the approach in rule 33 is similar to rules 2.11(1) and rule 2.11(2) of the CAR. Under rule 2.11, the single judge has jurisdiction to hear procedural applications, the orders from which, the court may vary or discharge. She submitted that the scheme of rule 2.11 being similar to rule 33 of 1962, makes it fair to conclude that interlocutory applications in the revoked rules are now "procedural applications", and that the provision by the CAR for appeals to be heard by a single judge is void, it being inconsistent with the Constitution. This submission is attractive.

[41] As rightly pointed out by Mrs Gibson-Henlin, section 109 of the Constitution distinguishes between the hearing and determination of matters and interlocutory matters. By section 5 of the Judicature (Appellate Jurisdiction) Act the sittings of the court may be controlled or administered by three judges. As a rule, appeals are heard and disposed of by a panel of three judges. Section 109 must be construed to mean that save and except for interlocutory matters, all matters must be adjudicated upon by a panel of not less than three judges. Therefore, it must be taken that the drafters of the Constitution sought to safeguard and protect the jurisdiction of the court in the determination of appeals by specifically providing that save and except for interlocutory matters, the requisite composition of the appellate court should be a minimum of three

judges. Further, by section 2 of the Constitution, which is subject to sections 49 and 50 of the Constitution, neither of which is relevant to the matter under consideration, any other law which is at variance with the Constitution, such other law is incapable of acquiring validity. As a consequence, the Constitution prevails. Rules 2.4(3) and 2.4(7) of the CAR, in empowering the single judge to hear and dispose of a procedural appeal, are inconsistent with the Constitution.

[42] It is necessary to mention that section 110 of the Constitution provides for an appeal to Her Majesty in Council from a decision of the Court of Appeal. The section does not provide for appeals from a single judge's decision so that in circumstances where a single judge makes an order by virtue of the invalid rules, a dissatisfied party has no right of redress. Therefore, in arming the single judge with a right to hear and dispose of an appeal, the Committee undoubtedly dispossesses a party of the right of an appeal to the Privy Council.

[43] Although the foregoing is sufficient to dispose of the matter, the question as to whether the impugned rules offend the relevant provisions of the Judicature (Appellate Jurisdiction) Act has been raised. It will be addressed briefly. Section 10 states, among other things, that jurisdiction in the hearing and determination of civil appeals is subject to the provisions of the Act and the rules of court. This, as Mrs Gibson-Henlin rightly stated, does not mean that the rules can create, confer or alter jurisdiction. Rules of court can only give effect to subsisting jurisdiction. Rules, being regulatory, are restricted within the machinery of the exercise of existing jurisdiction; see ***Beverley***

Levy v Ken Sales & Marketing Ltd Privy Council appeal No 87/2006, delivered on 24 January 2008.

[44] Neither the Judicature (Appellate Jurisdiction) Act nor the Judicature (Rules of Court) Act makes provision for a single judge to hear an appeal. Section 2 of the Judicature (Appellate Jurisdiction) Act makes a clear demarcation between a judge and the court. Section 4(2)(e) of the Judicature (Rules of Court) Act empowers a single judge to hear and dispose of interlocutory applications only. An interlocutory application is not, and does not rank as a procedural appeal. The procedural path pursued by the Committee, in making the impugned rules, offends the Judicature (Appellate Jurisdiction) Act. This being so, rules 2.4(3) and 2.4(7) are invalid and void for want of statutory force.

[45] The hearing of an appeal, procedural or otherwise, must be in obedience to, and in conformity with the Constitution as well as the Judicature (Appellate Jurisdiction) Act and therefore an appeal must be determined by a court. Undoubtedly, the Committee, in empowering a single judge to hear a procedural appeal, acted ultra vires. It follows that Brooks JA acted outside of the scope of his powers in making the orders. The orders must be set aside.

Further submissions and analysis

[46] In her written submissions, the Solicitor General, after making reference to rule 2.9(2)(f) of the CAR, proposed, (in the event that this court pronounces that the

impugned rules are unconstitutional) among other things, that the CAR rules contemplate the consideration of an appeal on paper.

[47] Subsequent to the hearing of the matter, Mrs Gibson-Henlin brought to the court's attention sections 16(3) and 16(4) of the Charter of Fundamental Rights and Freedoms. Section 16(3) of the Constitution states:

> "(3) All proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority, including the announcement of the decision of the court or authority, shall be held in public."

Section 16(4) reads:

> "**16**. - (4) Nothing in subsection (3) shall prevent any court or any authority such as is mentioned in that subsection from excluding from the proceedings, persons other than the parties thereto and their legal representatives-
>
> (a) in interlocutory proceedings;
>
> (b) in appeal proceedings under any law relating to income tax; or
>
> (c) to such extent as –
>
> (i) the court or other authority may consider necessary or expedient, in circumstances where publicity would prejudice the interests of justice; or
>
> (ii) the court may decide to do so or, as the case may be, the authority may be empowered or required by law to do so, in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of eighteen years, or the protection of

> the private lives of persons concerned in the proceedings."

At the court's invitation, additional submissions were made by the parties as to the effect of these statutory provisions.

[48] Mr Jones submitted that the procedure proposed by the Solicitor General would be inconsistent with section 16(3) and therefore unconstitutional in that that section is entrenched and would apply to procedural appeals. Article 6(1)of the European Convention on Human Rights relied on by the Solicitor General is inapplicable as it does not contain the wording of section 16(3), and as stated in ***Hinds and Others v R***, care must be taken in resorting to other constructions, he argued. The words "every court" in section 16(3) relates to the Supreme Court and the Court of Appeal and Section 16 (3) requires a hearing in public. The constitutional character of the court being significant, the question is whether the sittings of the court should be subject to public scrutiny, he submitted. Section 5 of the Judicature (Appellate Jurisdiction) Act and section 16(3) of the Constitution, when taken together, require the sitting of the court to be in public, he submitted.

[49] In written submissions, it was submitted that a citizen has a fundamental right to observe the determination of a matter, in particular, one which affects a person's civil rights as the open justice principle is entrenched in section 16(3). The cases of ***Scott v Scott*** [1913] AC 417, ***Russell v Russell*** [1976] 134 CLR 495 and ***Hogan v Hinch***

[2011] 4 LRC 245 were cited to show that open justice is an essential feature of the courts.

[50] The applicant, appreciating that the open justice principle is not absolute, made reference to the exceptions under section 16(4) of the Charter and went on to submit that procedural appeals do not fall within those exceptions. It was also submitted in the written submissions, that where the exceptions are applicable a closed hearing or a hearing on paper may be employed.

[51] Alluding to the principle regarding balancing justice to which the respondent referred, it was contended that it is likely that such a principle was adopted by the English Court because it is without a written Constitution. In citing the case of ***Riepan v Austria*** [2000] ECHR 35115/97, Mr Jones contended that the case shows that aspects of the proceedings are made public and documents filed in the public registry. In dealing with a right or an obligation, he argued that section 16(3) shows that a hearing should be in public and the Constitution does not permit any application of any broad principle. It was further submitted in the applicant's written submissions that the Solicitor General's proposal presents the danger of depriving the court of an "essential entrenched feature of open justice".

[52] It was Mr Hylton's submission that section 16(3) does not preclude the hearing of a procedural appeal or any proceedings on paper as that section is simply a codification of the common law. He expressed consternation at the applicant's submission in which he seeks to make a distinction between constitutional and common

law rights. Recognizing the existence of the principle of open justice, he argued that justice must be effectively administered and this requires striking a balance between the open justice principle and that of effective administration. It is for the court to make a decision as to the requirements to be met, he argued. Where the court directs the filing of written submissions and allows the public access to them, such requirements would be accomplished, he submitted. The constitutional requirements would be satisfied by the court hearing procedural appeals on paper and pronouncing the decisions in open court. Supporting these submissions, he placed reliance on the principles distilled in the cases of ***SmithKline Beecham Biologicals SA v Connaught Laboratories Inc*** [1999] 4 All ER 498, ***GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd Intervening***) [1999] 1 WLR 984 and ***Guardian News and Media Ltd v City of Westminster Magistrates' Court (United States Government, interested party)*** [2012] 3 All ER 551.

[53] In written submissions, he submitted that the interpretation placed on section 16(3) by the applicant is preposterous in that taken to its logical conclusion, it would mean that evidence should be given orally in court and written submissions read out and where section 16(4) is applicable the process should at least be done in the presence of the parties.

[54] It was submitted by the Solicitor General, in her written submissions, that the applicant's interpretation of section 16(3) of the Charter is misconceived in the limited

interpretation being advanced that the consideration of procedural appeals on paper by three judges is unconstitutional. The issue is, save and except for the provisions of section 16(4), whether in every circumstance a public and/or an oral hearing is to be held.

[55] The Solicitor General made reference to article 6(1) of the European Convention on Human Rights which reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice to the interest of justice."

She submitted that section 16(3) of the Charter relates to all proceedings and it is clear that article 6(1) is intended to relate to all proceedings.

[56] She cited the case of ***Regina v Secretary of State for the Home Department (respondent) ex parte Dudson (FC) and One Other Action*** [2005] 3 WLR 422 to show that although article 6(1) speaks to a fair hearing it shows that an oral hearing is not necessary at all stages of the proceedings. That case clearly shows that account must be taken of the entire proceedings and the open court principle is not absolute as the publication of the decision satisfies the publicity element, she

submitted. ***Dudson's*** case, which treats with the development of the law, is later in time and more likely to be regarded in preference to ***Hogan v Hinch***, she submitted.

Analysis

[57] The issue in this case is whether section 16(3) prohibits the hearing of proceedings on paper. There can be no dispute that the words "all proceedings in every court" in that section, are with reference to proceedings in the Court of Appeal and in the court below and show that a public hearing is contemplated. However, the real question is whether in every case the hearing of proceedings must be held publicly. There is no room for a debate that the requirement of a public hearing is founded upon the principle of open justice. Open justice, is an important characteristic guaranteed by the constitutional rights of citizens. This has been espoused in ***Scott v Scott***, ***Russell v Russell*** and ***Hogan v Hinch.***

[58] In the Australian case of ***Hogan v Hinch***, French CJ, speaking to the open justice principle, at page 257, said:

> "An essential characteristic of courts is that they sit in public (see ***Daubney v Cooper*** (1829) 10 B & C 237 at 240, ***Dickason v Dickason*** (1913) 17 CLR 50, ***Scott v Scott*** [1913] AC 417 and ***Russell v Russell*** (1976) 134 CLR 495 at 520 per Gibbs J). That principle is a means to an end and not an end in itself. Its rationale is the benefit that flows from subjecting court proceedings to public and professional scrutiny (see ***Russell v Russell*** 1976) 134 CLR 495 at 520 per Gibbs J). It is also critical to the maintenance of public confidence in the courts. Under the Constitution courts capable of exercising the judicial power of the Commonwealth must at all times be and appear to be independent and impartial tribunals. The

> open court principle serves to maintain that standard (see ***Forge v Australian Securities and Investments Commission*** (2006) 228 CLR 45 at [64], [78] per Gummow, Hayne and Crennan JJ). However, it is not absolute (see ***Bass v Permanent Trustee Co Ltd*** (1999) 198 CLR 334 at [56] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, adopting the remarks of Gaudron J in ***Harris v Caladine*** [1992] LRC (Const) 323 at 372, referring to 'limited exceptions' to the open and public inquiry involved in the exercise of judicial power."

[59] Although the open justice principle is endorsed by the cases mentioned in paragraph [55], that principle, not being absolute, has its limitations. It cannot be denied that the principle has its genesis in the common law and has been enshrined in the Constitution, but does it mean that any matter which falls outside the purview of section 16(4) must be heard in open court? Would the prohibition of the hearing of proceedings on paper delimit the proper exercise of judicial power? Ought the courts to be fettered by the exceptions laid down in section 16(4)? Although section 16(4) expressly excludes certain matters from falling within the provisions of section 16(3) and although the issue before the court is not concerned with interlocutory proceedings, in dealing with proceedings generally, a departure from the open court principle, may be justified in some instances. Such a departure may be permissible, depending on the nature of the proceedings and the type of function conferred upon the court.

[60] In the cases cited by Mr Hylton, the principles to be extracted from them are of great assistance as they reveal that in the interests of expediency, good governance

and good administration, open justice may be achieved in circumstances where the court decides that a hearing in open court is unnecessary, provided that the judgment of the court is delivered in open court. In ***Smithline*** Lord Bingham, at page 512, said:

> "Since the date when Lord Scarman expressed doubt in ***Home Office v Harman*** as to whether expedition would always be consistent with open justice, the practices of counsel preparing skeleton arguments, chronologies and reading guides, and of judges pre-reading documents (including witness statements) out of court, have become much more common. These means of saving time in court are now not merely permitted, but are positively required, by practice directions. The result is that a case may be heard in such a way that even an intelligent and well-informed member of the public, present throughout every hearing in open court, would be unable to obtain a full understanding of the documentary evidence and the arguments on which the case was to be decided.
>
> In such circumstances there may be some degree of unreality in the proposition that the material documents in the case have (in practice as well as in theory) passed into the public domain. That is a matter which gives rise to concern. In some cases (especially cases of obvious and genuine public interest) the judge may in the interests of open justice permit or even require a fuller oral opening, and fuller reading of crucial documents, than would be necessary if economy and efficiency were the only considerations. In all cases the judge's judgment (delivered orally in open court, or handed down in open court in written form with copies available for the press and public) should provide a coherent summary of the issues, the evidence and the reasons for the decision.
>
> Nevertheless the tension between efficient justice and open justice is bound to give rise to problems which go wider than Ord 24, r 14A. Some of those problems were explored in the judgment of Potter LJ in ***GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd intervening)*** [1999] 1 WLR 984. As the court's practice develops it will be necessary to give appropriate weight to both efficiency

> and openness of justice, with Lord Scarman's warning in mind. Public access to documents referred to in open court (but not in fact read aloud and comprehensibly in open court) may be necessary, with suitable safeguards, to avoid too wide a gap between what has in theory, and what has in practice, passed into the public domain."

The approach in ***SmithKline*** was adopted in ***GIO Personal Investment and Services*** and ***Guardian News.*** These cases epitomize the principle that the court is seized of jurisdiction to make the choice as to whether a hearing should be in open court. Contrary to the contention of the applicant, the case of ***Riepan v Austria***, supports the view that a public hearing is not required at all stages of all proceedings.

[61] In **Guardian News** Toulson LJ, speaking to the question as to how the principle of open justice should be applied, said at paragraph [69]:

> "The open justice principle is a constitutional principle found not in a written text but in the common law. It is for the courts to determine its requirements subject to any statutory provision. It follows that the court have an inherent jurisdiction to determine how the principle should be applied**.**"

[62] It is true that article 6(1) is not in pari materia with section 16(3), however, its force and effectiveness accord with that of section 16(3). The case of ***Dyson*** also supports the view that there is no absolute right to a public hearing at every stage of any proceedings. That case demonstrates that, depending on the facts of the case, the fundamental question is whether the issues to be considered at a particular stage of the proceedings are such that, in fairness, they could be decided in the absence of a litigant.

[63] The authorities clearly show that it is for the court to determine what open justice requires. The court is the administrator of the open justice system, all proceedings being under its control. In the interests of expediency and good administration, it is for the court to determine the appropriate procedure to adopt in a particular case. It follows therefore that the court may depart from the strictures of a public hearing where in a particular case, economy and efficiency so dictate.

[64] In my view, the consideration of proceedings, including procedural appeals on paper by three judges would not be in conflict with the open justice principle provided the decision of the court is read in open court. As a consequence, considering appeals on paper would not offend section 16(3) of the Charter of Rights and Freedoms.

Costs

[65] I now move to the question of costs. Mrs Gibson-Henlin submitted that the jurisdictional point was raised by the respondent from which the respondent wanted to secure a benefit and it should not be permitted to approbate and reprobate. Accordingly, costs should be awarded to the applicants against the respondent, or costs should be reserved, or should be in the claim. She also argued that the respondent acted contumaciously in raising the preliminary objection.

[66] It was Mr Hylton's submission that there should be no order as to costs. In speaking to the respondent's position in this matter, he submitted that, at the hearing before the learned judge, the matter proceeded on the basis that the learned judge was

clothed with jurisdiction to hear the appeal. It was Mrs Gibson-Henlin, who, by her letter of 13 June sought to have the matter revisited, he argued, she having stated that she had to look at the constitutionality of the matter. When the constitutional point was raised by the applicant, he stated that he took a decision against having the preliminary objection considered.

[67] At the time the matter came before the court on 14 June 2012, he argued, the court, having vacated its earlier order in respect of the preliminary objection was of the view that in light of the importance of the issue, a special panel ought to be convened to give consideration to the issue. Should the court conclude that the rules are constitutional or unconstitutional, this does not mean that the hearing was contested, he contended. Further, he argued, the question as to whether costs should be reserved or costs should be in the claim would be inappropriate, as the panel as constituted, would be best able to deal with the matter of costs.

[68] The normal order for costs is that they should follow the event. The question of recoverability of costs is governed by rule 64 .6 of the Civil Procedure Rules. Under rule 64.6(1) the successful party must pay the costs of the unsuccessful party. By rule 64.6(2), the successful party may be ordered to pay all or part of the costs or the court may make no order as to costs. In making a decision as to the liability for costs rule 64.6 3) provides that the court should have regard to all the circumstances.

[69] The applicant has been successful in having the order of Brooks JA discharged on the preliminary point. It follows that, ordinarily, he would be entitled to his costs.

The decision of the court creates a risk that the respondent could be condemned in costs. However, it is entitled to resist an order for costs being made against it. The question therefore, is whether, in the circumstances of this case an order for costs should be imposed on it. There can be no dispute that, despite its withdrawal, the objection raised originated with the respondent and would have given rise to the question as to the constitutionality of the impugned rules. It was the central catalyst of the event which led the court to give consideration to the validity of the rules.

[70] However, the fact that the issue raised ended favourably for the applicant, this, in itself, does not mean that the respondent should be made liable for costs. The matter proceeded at the instance of the court. The questions as to the constitutionality and validity of the rules permitting a single judge to hear and dispose of an appeal have been a concern for the court and in its opinion, the issue, being a matter of law and of great public importance ought to have been resolved. The resolution of the matter is not merely one which inures for the benefit of the applicant but for all litigants. In the circumstances, it would be just that each party bears his own costs. Consequently, there shall be no order as to costs.

MORRISON JA

The issue

[71] This application calls into question the constitutionality of the category of appeals described in the Court of Appeal Rules 2002 ('the CAR') as a procedural appeal,

which is "an appeal from a decision of the court below which does not directly decide the substantive issues in a claim" (rule 1.1(8)).

[72] Rule 1.11(1)(a) provides that a procedural appeal must be filed within seven days of the date of the decision appealed against, and rule 2.4 provides as follows:

> "(1) On a procedural appeal the appellant must file and serve written submissions in support of the appeal with the notice of appeal.
>
> (2) The respondent may within 7 days of receipt of the notice of appeal file and serve on the appellant any written submissions in opposition to the appeal or in support of any cross appeal.
>
> (3) The general rule is that a procedural appeal is to be considered on paper by a single judge of the court.
>
> (4) The general rule is that consideration of the appeal must take place not less than 14 days nor more than 28 days after filing of the notice of appeal.
>
> (5) The judge may, however, direct that the parties be entitled to make oral submissions and may direct that the appeal be heard by the court.
>
> (6) The general rule is that any oral hearing must take place within 42 days of the filing of the notice of appeal.
>
> (7) The judge may exercise any power of the court whether or not any party has filed or served a counter-notice."

[73] The narrow issue for the court's determination is whether rule 2.4(3), which provides for the consideration of a procedural appeal on paper by a single judge of the court, precludes any further application to the court to set aside the single judge's order. The broader issue, which effectively subsumes the narrow issue, is whether the

rule is consistent with section 109 of the Constitution of Jamaica ('the Constitution'), which provides as follows:

> "The Court of Appeal shall, when determining any matter other than an interlocutory matter, be composed of an uneven number of judges, not being less than three."

How the matter arises

[74] On 27 January 2012, Sinclair-Haynes J declined jurisdiction to try the applicant's claim in the court below, struck out his fixed date claim form and particulars of claim and awarded costs to the respondent, to be agreed or taxed. The learned judge did, however, give the applicant permission to appeal to this court.

[75] By notice of appeal filed on 3 February 2012, the applicant filed a procedural appeal, pursuant to rule 2.2 of the CAR, challenging the judge's decision on a number of grounds, which it is not necessary to state for present purposes.

[76] Submissions on the procedural appeal having been filed by the parties, the appeal was in due course considered on paper by Brooks JA, pursuant to rule 2.4(3) of the CAR. On 13 March 2012, Brooks JA delivered a written judgment (***William Clarke v Bank of Nova Scotia Jamaica Limited*** [2012] JMCA Civ 8), the conclusion of which was that Sinclair-Haynes J's decision to strike out the action was wrong and that the appropriate order should have been an order staying the proceedings. The learned judge's order was therefore set aside and an order staying the proceedings in the Supreme Court substituted accordingly.

[77] By a notice of application for court orders filed on 20 March 2012, the applicant sought an order from the court to discharge and/or vary aspects of Brooks JA's order. When this application came on for hearing on 12 June 2012, the respondent took a preliminary objection to the court's jurisdiction, on the ground that the appeal, being a procedural appeal, having already been disposed of by the order of Brooks JA, the court was accordingly *functus officio*. The objection was upheld and the application was therefore dismissed.

[78] On 14 June 2012, on the application of the applicant, and without objection from the respondent, the court reconvened. After hearing counsel, the court's earlier ruling was withdrawn and it was ordered that the matter should be heard by a panel of five judges of the court assigned by the President for the purpose.

[79] By letter to the Registrar dated 18 June 2012, the respondent indicated through its counsel that it wished to withdraw the preliminary objection and to allow the application to proceed on its merits. However, by letter dated 19 June 2012, the applicant, also through his counsel, questioned whether the respondent could "unilaterally remove a jurisdictional impediment" to the application proceeding and insisted that the matter should proceed as ordered by the court.

[80] On 25 July 2012, a single judge of the court gave directions as to the hearing of the matter. The hearing of the matter was fixed for 28 January 2013 and, among other things, it was ordered that (i) the Attorney General should be served with all the documents already filed in the proceedings; and (ii) a notice of objection on the

preliminary point should be filed by the respondent and served on or before 28 September 2012.

The argument

[81] Albeit arrived at by somewhat different routes, the unanimous conclusion at the Bar was that rule 2.4(3) is inconsistent with section 109 of the Constitution and is therefore, in accordance with section 2, void to the extent of the inconsistency.

[82] Mrs Gibson-Henlin for the applicant submitted, firstly, that rule 2.4(3) is inconsistent with the provisions of the Judicature (Appellate Jurisdiction) Act ('the Act'), pursuant to which appeals lie to the court and not to a judge of the court. Secondly, it is in breach of section 109 of the Constitution, which provides for the hearing of appeals by a panel of not less than three judges: the hearing of an appeal by a single judge would in effect abrogate the right of appeal to the Privy Council provided for by section 110 of the Constitution, which relates to appeals from decisions of the Court of Appeal, properly constituted. Accordingly, by introducing rule 2.4(3), the Rules Committee of the Supreme Court ('the Rules Committee'), which is empowered to regulate the existing jurisdiction of the court, exceeded its powers by purporting to confer a new jurisdiction on a single judge of appeal to hear and determine a procedural appeal.

[83] Mrs Gibson-Henlin placed great reliance on the well known decisions of the Privy Council on appeal from this court in ***Hinds and Others v R*** [1976] 1 All ER 353 and ***Independent Jamaica Council for Human Rights (1998) Limited and Others v Hon Syringa Marshall-Burnett and the Attorney General*** [2005] UKPC 3, [2005]

2 LRC 840. The former established that Parliament is not entitled to deprive the Court of Appeal of a significant part of its appellate jurisdiction by ordinary legislation and without amendment to the Constitution, while the latter decided that Parliament could not, consistently with the constitutionally entrenched scheme for the preservation of the independence of the judiciary, legislate for appeals to the Caribbean Court of Justice ('the CCJ'), in substitution for appeals to the Privy Council, without engaging the mechanism for constitutional amendment.

[84] At the invitation of the court, the learned Solicitor General made her submissions ahead of counsel for the respondent. She considered in some detail the question whether a procedural appeal might in fact be construed as an "interlocutory matter", and by that means attract the exemption in section 109 of such matters from the general rule that the Court of Appeal shall comprise not less than three judges. Her conclusion, after an illuminating review of the comparable provisions in the legislation and rules of the Eastern Caribbean Supreme Court and Belize, was that the phrase 'interlocutory matter' basically carries the same connotation as an interlocutory application; that is, it relates to something that is already before the court. It is therefore distinct from an appeal against an interlocutory order, which must be heard by the Court of Appeal comprising not less than three judges. The Solicitor General therefore concluded that rule 2.4(3) is inconsistent with section 109 and therefore void.

[85] However, in a very helpful further submission, the learned Solicitor General invited the court to not, in effect, throw out the baby with the bathwater (my language, not counsel's), by jettisoning the procedural appeals procedure altogether, given its

laudable objective of expediting the hearing of purely interlocutory appeals. She therefore suggested a modification of the rules, in the event that the court agreed that the present rule 2.4 is offensive in some respects, which would preserve (i) the requirement that the parties file written submissions; (ii) a preliminary consideration by a single judge of whether an oral hearing is necessary; and (iii) the consideration of the appeal on paper only, if an oral hearing is not considered necessary, provided that in such cases the consideration should be by three judges instead of one.

[86] For the respondent, Mr Hylton QC took the position at the outset that neither of the cases cited by Mrs Gibson-Henlin was relevant to the instant case: ***Hinds and Others v R***, because, unlike in that case, the issue in the instant case is not one of removing an aspect of the existing jurisdiction of the Court of Appeal, but rather a question of the composition of the court; and ***Independent Jamaica Council for Human Rights (1998) Limited and Others v Hon Syringa Marshall-Burnett and the Attorney General***, because, unlike in that case, the particular constitutional provision engaged in the instant case (section 109) is not an entrenched provision of the Constitution.

[87] In common with the Solicitor General, Mr Hylton accepted that the phrase "interlocutory matter" in section 109 must relate to a matter that is interlocutory in the Court of Appeal, that is, an interlocutory application, and cannot therefore be extended to include a procedural appeal. Regretfully, he accordingly joined Mrs Gibson-Henlin and the Solicitor General in the conclusion that rule 2.4 is not in conformity with section 109. Turning to the consequence of this conclusion, Mr Hylton explicitly associated

himself with the Solicitor General's suggestions aimed at giving effect to the desirable objective of procedural appeals.

The constitutional and legislative framework

[88] I have already set out the full text of section 109 of the Constitution (see para. [73] above). But I must also refer to section 110(1), which gives a right of appeal to Her Majesty in Council from "decisions of the Court of Appeal", and to section 2, which provides that "if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void".

[89] In section 2 of the Act, 'Judge' is defined as "Judge of the Court of Appeal", while 'Court' is defined as "Court of Appeal". Part II of the Act provides for the composition, jurisdiction and powers of the Court of Appeal. Of relevance in the present context are sections 3(1) and 5. The former provides that, in addition to the President (section 3(1)(a)) and, in the specified circumstances, the Chief Justice (section 3(1)(b)), the judges of the Court of Appeal shall be "not less than three nor more than twelve other Judges" (section 3(1)(c)). The latter provides that, "The Court may, if the President of the Court so directs, sit in more than one division of three Judges at the same time." Section 10 provides that, subject to the provisions of the Act and to rules of court, "the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings".

[90] The Rules Committee is a creature of section 3(1) of the Judicature (Rules of Court) Act. Section 4(1) empowers the Rules Committee to make rules of court for the purposes of the Act and section 4(2) provides that it may make provision –

> "(a) for regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the Court of Appeal…[and]
>
> (e) for providing that any interlocutory application in relation to any matter, or to any appeal or proposed appeal, may be heard and disposed of by a single Judge;"

[91] The CAR were made by the Rules Committee in exercise of the powers conferred upon it by section 4 (replacing the Court of Appeal Rules 1962).

The thinking behind the procedural appeal

[92] The procedural appeal was introduced for the first time in 2002 by the CAR. In ***Ken Sales & Marketing Ltd v Beverley Levy*** (SCCA No 81/2005, Motion No 45/2005, judgment delivered 19 September 2005), this court rejected a submission that a decision arrived at by a single judge on a procedural appeal could be discharged or varied by the court itself. In a judgment with which Forte P and McCalla JA (Ag) (as she then was) agreed, Panton JA (as he then was) said this (at pages 2-3):

> "So far as a procedural appeal is concerned, the general rule is that it is considered on paper by a single judge of the Court. The single judge is clothed with the authority to exercise any power of the Court. However, the single judge may refer the appeal to the Court. There is no provision in the Rules for varying or discharging the order of a single judge in these circumstances… appellate procedures,

> especially in civil proceedings, have undergone radical legislative changes since 2002. There can be no question that several matters that used to occupy the attention of 3 judges sitting together in open court no longer do so. They may now be disposed of by a single judge in Chambers, and even without an oral hearing. The fact of the matter is that there are many matters which may now be disposed of speedily, comfortably, fairly and justly on the basis of written submissions. And the Rules have made adequate provision for this to happen."

[93] Procedural appeals are also provided for, in terms generally similar to rule 2.4 of the CAR, in the Trinidad and Tobago Civil Proceedings Rules 1998 (TT CPR 64.9), the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (pursuant to which they are now known as 'Interlocutory Appeals' – EC CPR 62.10) and the Barbados Supreme Court (Civil Procedure) Rules 2006 (Barb CPR 62.10). In Trinidad and Tobago, procedural appeals are heard in chambers by two judges of the Court of Appeal (TT CPR 64.9(2) and (3)), while in Barbados, they are heard by the court itself (Barb CPR 62.10(3)). However, in the Eastern Caribbean, interlocutory appeals are generally considered on paper or heard by a single judge of the court (EC CPR 62.10(5)).

[94] In ***Oliver McDonna v Benjamin Wilson Richardson*** (Anguilla Civil Appeal No. 3/2005, judgment delivered 29 June 2007), Barrow JA, after outlining the provisions relating to procedural appeals, observed (at para. [14]), that "[t]he provision for such an appeal to be heard by a single judge greatly facilitates early hearing since it should be easier to deploy a single judge as opposed to three judges". Thus, he concluded (at para. [16]), "the object of creating a category called procedural appeals is to channel certain matters on a fast track for early disposal at the appellate level…"

[95] I would respectfully adopt the sentiments of both Panton JA and Barrow JA as regards the laudable objectives and practical utility of rule 2.4 and the procedural appeal regime.

Is rule 2.4(3) a valid rule?

[96] In ***Independent Jamaica Council for Human Rights (1998) Limited and Others v Hon Syringa Marshall-Burnett and the Attorney General***, in which the Privy Council held that Parliament could not validly provide for the CCJ to take the place of the Privy Council as the ultimate court of appeal for Jamaica by ordinary legislation, Lord Bingham of Cornhill said this (at para. 21):

> "The Board has no difficulty in accepting, and does not doubt, that the CCJ Agreement represents a serious and conscientious endeavour to create a new regional court of high quality and complete independence, enjoying all the advantages which a regional court could hope to enjoy."

[97] A similar observation, in a not entirely dissimilar context, had been made 30 years before by Lord Diplock in ***Hinds and Others v R*** (at page 370):

> "A breach of a constitutional restriction is not excused by the good intentions with which the legislative power has been exceeded by the particular law."

[98] It is therefore necessary to approach the issue posed by this case independently of the laudable intentions which obviously informed the thinking of the Rules Committee in providing for procedural appeals in the CAR. In contending that rule 2.4(3) is in

breach of the Constitution, Mrs Gibson-Henlin drew our attention to the following statement by Lord Diplock in ***Hinds v R*** (at page 366):

> "The jurisdiction that was characteristic of judges of a court to which the description of 'a Supreme Court' was appropriate in a hierarchy of courts which included, in addition, inferior courts and 'a Court of Appeal', was well known to the makers of the Constitution in 1962. So was the jurisdiction that was characteristic of judges of a court to which the description of 'a Court of Appeal' was appropriate.
>
> In their Lordships' view s 110 of the Constitution makes it apparent that in providing in s 103(1) that: 'There shall be a Court of Appeal for Jamaica … ' the draftsman treated this form of words as carrying with it by necessary implication that the judges of the court required to be established under s 103 should exercise an appellate jurisdiction in all substantial civil cases and in all serious criminal cases; and that the words that follow, viz 'which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law', **do not entitle Parliament by an ordinary law to deprive the Court of Appeal of a significant part of such appellate jurisdiction** or to confer it on judges who do not enjoy the security of tenure which the Constitution guarantees to judges of the Court of Appeal. Section 110(1) of the Constitution which grants to litigants wide rights of appeal to Her Majesty in Council **but only from 'decisions of the Court of Appeal'**, clearly proceeds on this assumption as to the effect of s 103. **Section 110 would be rendered nugatory if its wide appellate jurisdiction could be removed from the Court of Appeal by an ordinary law without amendment of the Constitution.**" [Mrs Gibson-Henlin's emphases]

[99] Mrs Gibson-Henlin submitted that this dictum applied with even greater force in the instant case, in which it is a rule of court and not an Act of Parliament "that was used to oust the jurisdiction of the Court of Appeal". This submission may to a certain extent put the matter higher than can be justified in the circumstances, since, unlike in

Hinds and Others v R (as Mr Hylton pointed out), what rule 2.4(3) purports to do is not to oust the jurisdiction of the Court of Appeal, but rather to provide that it is to be exercised in a certain way, that is, by a single judge of the court. Having said that, however, it seems to me to be impossible to dispute the main thrust of the submission, which is that, as Lord Scott said in the Privy Council in ***Beverley Levy v Ken Sales & Marketing Ltd*** [2008] UKPC 6, para. 19, "while Rules can regulate the exercise of an existing jurisdiction they cannot by themselves confer jurisdiction" (see also ***Best Buds Ltd v Garfield Dennis*** [2012] JMCA Civ 1, para. [8]).

[100] The "existing jurisdiction" in the instant case is that of the Court of Appeal to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings. Therefore, in the light of the fact that section 109 provides that, when determining any matter other than an interlocutory matter, the court "**shall**…be composed of an uneven number of Judges, not being less than three" (emphasis mine), it seems to me that, unless it can be said that procedural appeals fall within the exception in respect of interlocutory matters, rule 2.4(3) is inconsistent with section 109.

[101] The editors of 'Words and Phrases Legally Defined' (2nd edn, vol 3, page 82) adopt the following definition of 'interlocutory' given by Cotton LJ in ***Gilbert v Endean*** (1878) 9 Ch D 259, 268-269:

> "…those applications only are considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in *statu quo* till the rights can be decided, or for the purpose of obtaining some direction of

> the Court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the Court ultimately to decide upon the rights of the parties."

[102] Although procedural appeals will by definition invariably be from decisions made in the Supreme Court in interlocutory matters, it does not follow that, in the Court of Appeal, an appeal from such a decision is itself an interlocutory matter. Examples of interlocutory matters in this court are, it seems to me, applications to preserve the status quo pending the hearing of an appeal (such as applications for stays of execution or for interim injunctions) or applications to determine the manner in which an appeal is to be conducted (such as a case management conference). In short, as all three counsel accepted, the phrase 'interlocutory matter' in section 109 must relate to a matter that is interlocutory in the Court of Appeal, which a procedural appeal, such as the one heard and determined by Brooks JA in the instant case, is not.

[103] Further, to the extent that section 110 of the Constitution enables appeals to the Privy Council from decisions of the Court of Appeal, a disgruntled party to a procedural appeal would be without further recourse, since the decision of the single judge on such an appeal would not be a decision of the Court of Appeal. It being the clear intendment of the framers of the Constitution that parties to civil cases should in certain circumstances have a right of appeal to the Privy Council, the effect of rule 2.4(3) is to deprive the litigant of that right in relation to procedural appeals.

[104] It follows from the foregoing, in my view, that rule 2.4(3) is irreconcilable with sections 109 and 110 of the Constitution and must therefore be treated as void.

[105] In the light of this conclusion, it is not necessary to address the question whether rule 2.4(3) is also in breach of the Act. It is sufficient to say, I think, that had section 5 of the Act, which provides that the court "may…sit in more than one division of three Judges at the same time", stood alone, I might have considered it difficult to conclude on this basis alone that the procedural appeal regime is contrary to law, since the section appears to be purely permissive (contrast "may" in section 5 with "shall" in section 109).

[106] But more to the point, in my view, is section 10, which provides that, subject to the provisions of the Act and to rules of court, "the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings". It seems to me that rule 2.4(3) also falls afoul of this section, by allowing a single judge, rather than "the Court", to hear and determine an appeal from an order made by a judge of the Supreme Court. In so far as the Rules Committee purported, in the exercise of the power given to it by section 4(2) of the Judicature (Rules of Court) Act, to provide by rules of court that a procedural appeal might be heard and determined by a single judge of the Court of Appeal, it seems to me that it also exceeded its authority under that section to regulate and prescribe "the procedure (including the method of pleading) and the practice to be followed in the Court of Appeal" and to provide "that any interlocutory application in relation to any matter, or to any appeal or proposed appeal, may be heard and disposed of by a single Judge".

Disposal of the application

[107] It follows from all of the above that I would allow the application and set aside the judgment and order of Brooks JA given and made on 13 March 2012. I would also order that the appeal from the judgment of Sinclair-Haynes J, which was filed on 3 February 2012, is to be fixed for hearing before a panel of three judges of this court at the earliest convenient date. Finally, I would make no order as to the costs of this application.

Next steps

[108] In common with counsel who appeared in this case, I regret having had to come to the conclusion that I have in this matter. The procedural appeal was, in my view, among the most salutary of the innovations introduced by the CAR. Accordingly, the Rules Committee should be encouraged, as a matter of urgent necessity, to revisit rule 2.4 with a view to securing its compliance with the Constitution and the legislation, as well as to preserving those elements of the procedure which can promote early disposal of appeals in purely procedural matters.

[109] At the conclusion of the hearing of this application on 26 January 2013, it appeared to me that Mrs Foster-Pusey's thoughtful proposals as to how to reform and revamp the procedural appeal procedure so as to make it compliant (see para. [85]) were eminently workable. However, the court was subsequently invited to hear further submissions on the viability of these proposals, particularly in the light of section 16(3) of the Constitution and the well known principle of 'open justice'. Having considered

those submissions, I have now had the great advantage of reading in draft Harris JA's comprehensive discussion on the issues to which they have given rise (see paras [46]-[64] above) and I am in complete agreement with her conclusion (at para. [64]) that the consideration of procedural appeals on paper by three judges would not be in conflict with the open justice principle, provided that the decision of the court is read in open court. I would accordingly commend Mrs Foster-Pusey's proposals to the Rules Committee for urgent and careful study.

DUKHARAN JA

[110] I have read in draft the judgments of Harris and Morrison JJA. I agree with their reasoning and conclusion and have nothing to add.

PHILLIPS JA

[111] I have had the privilege of reading the draft judgments of my sister Harris JA and my brother Morrison JA and I agree with their reasoning and conclusion. There is nothing that I usefully can add.

McINTOSH JA

[112] I have had the privilege of reading in draft the judgments of Harris and Morrison JJA and find them to embody my own thinking on the issues raised in this matter. I too would allow the applicant's application to set aside the orders of Brooks

JA and have the appeal set for hearing before a court comprising three judges of appeal. I also agree that there should be no order as to costs.

HARRIS JA

ORDER:

A single judge is not empowered to hear a procedural appeal. The orders of Brooks JA are set aside. It is ordered that the appeal be fixed for hearing before the Court. There shall be no order as to costs.