[2014] JMCA App 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 2/2014

APPLICATION NOS 38 & 39/2014

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCINTOSH JA

BETWEEN	**ROBERT LLOYD YEE**	**1ST APPLICANT**
AND	**GARY LLOYD YEE**	**2ND APPLICANT**
AND	**CRYSTAL BAKERY LTD**	**3RD APPLICANT**
AND	**GARY LLOYD YEE T/A CRYSTAL HARDWARE**	**4TH APPLICANT**
AND	**SONIA STANIGAR-REID**	**RESPONDENT**

Nieoker Junor instructed by Knight Junor and Samuels for the 1st and 3rd applicants

Abraham Dabdoub and Mrs Laurel Gregg Levy instructed by Hugh Abel Levy and Company for the 2nd and 4th applicants

Norman Hill QC and Raymond Samuels instructed by Samuels Samuels for the respondent

21 May and 27 June 2014

PANTON P

[1] On 10 January 2014, Morrison J on an application for an injunction, refused to grant same, but ordered the applicants herein to give certain undertakings within a specified time frame. The applicants have complied with the order of the learned judge, who also gave leave to appeal.

[2] Morrison J's order emanated from a suit filed by the respondent in which she is claiming an entitlement to beneficial interests in certain properties and businesses. Being dissatisfied with the judge's order, she has appealed.

[3] The 2nd and 4th applicants have applied to strike out the appeal on the basis that the Court of Appeal Rules, particularly rule 2.4 (1), have not been complied with. Alternatively, the applicants seek leave to file a cross appeal and submissions. At the commencement of the hearing before us, the 1st and 3rd applicants withdrew their application to strike out the appeal but pursued their alternative application to be allowed to file a cross appeal and submissions in support.

[4] The basis for the applicants' application to strike out is that the appeal is a procedural appeal which requires the filing and serving of written submissions along with the notice of appeal, within seven days of the making of the order being appealed.

[5] The first question to be decided is whether this is a procedural appeal. That form of appeal is defined by rule 1.1(8) as one that is "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;"

[6] There is no doubt that the decision of Morrison J has not decided the substantive issues. So, on the face of it, this would normally be a procedural appeal, unless one of the exclusions applies to the situation. Mr Dabdoub for the applicants contended that rule 1.1(8)(c) does not apply. He submitted that "the Rules intended that procedural appeal applies where there has been a refusal of an injunction". I cannot agree with Mr Dabdoub as I see no basis for the construction that he wishes the court to put on the words of the provision. There is no good reason to say that the provision applies in respect of a refusal, but not the granting, of an injunction. I agree with Mr Norman Hill, QC that Mr Dabdoub's construction is flawed. In my judgment, a proper construction of 1.1(8)(c) results in the exclusion of any order made on an application

for an interim injunction from the definition of "procedural appeal". The construction that has been urged by Mr Dabdoub is, with respect, illogical and not in keeping with the plain language of the rule.

[7] In the circumstances, I would refuse the application to strike out the notice and amended notice of appeal. As an alternative, the applicants have sought leave to file a cross-appeal and submissions. The necessary formalities for the making of such an application have not been complied with. It seems to me that the applicants are simply saying that if the notice of appeal is allowed to stand then they would like to appeal also. This is unacceptable. It amounts to a tit-for-tat, and should be discouraged. The courts are being unnecessarily burdened with matters of this nature. It is as if some parties do not wish for their matters to be tried speedily. The learned judge ordered a speedy trial. It is important that the valid appeal be heard and disposed of quickly, so that the trial may be proceeded with in keeping with the judge's order. Accordingly, I would also refuse this application.

[8] I have read the draft judgment of my learned sister Phillips JA, who has given full details surrounding the claim in this matter. I agree with her that the applications should be refused.

PHILLIPS JA

[9] The applications before the court, numbered 39 and 38/2014 were filed on 7 and 6 March 2014 on behalf of the 1st and 3rd, and 2nd and 4th applicants, respectively and sought the following orders:

> In respect of the 1st and 3rd applicants: that the notice of appeal dated 31 January 2014 served on them on even date and the amended notice of appeal dated 5th February 2014 and served on them on 6 February be struck out for non compliance with the Court of Appeal Rules 2002 ('CAR'). Alternatively, these applicants asked that they be permitted to file a cross appeal and skeleton submissions in opposition and in support of the cross appeal within seven days of the date of the order of the court.
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> In respect of the 2nd and 4th applicants, the notice of appeal and the amended notice of appeal had been served on them on 6 February 2014. These applicants also asked for the notice of appeal to be struck out and, in the alternative that permission be granted for them to file and serve a cross appeal and submissions in support and in opposition of the cross appeal within seven days of the date of the order of the court.

[10] The grounds on which the applications were made were similar and are set out below:

(i) That the notice of appeal filed on 31 January 2014 failed to comply with rule 2.4(1) of the CAR.

(ii) That the notice of appeal dated 31 January 2014 was served on the 1st and 3rd applicants on 6 February 2014.

(iii) That the amended notice of appeal filed on 5 February 2014 also failed to comply with rule 2.4(1) of CAR as the original notice of appeal filed on 31 January 2014 was null and void. As a result of which, there was no notice of appeal properly before the court which could be amended.

(iv) That there were no written submissions in support of the appeal filed with the notice of appeal and such written submissions as were filed on 25 February 2014 were served on the applicants on 26 February 2014.

(v) That as a result of the failure to file and serve the notice of appeal within seven days of the date of the decision appealed against, in accordance with rule 1.11(1)(a) of the CAR and to comply with rule 2.4(1) to serve written submissions in support of and with the notice of appeal, there was no proper appeal before the court.

[11] The applications were supported by affidavits of Michael G Howell and Hugh Abel Levy, attorneys-at-law for the 1st and 3rd and 2nd and 4th applicants respectively, which stated that on 10 January 2014, on the hearing of an application for interim injunction and for an interim payment, B Morrison J had ordered that instead of an injunction, an undertaking in damages ought to be given by the applicants. Other than that statement, the information in the affidavit merely mirrored the grounds of the application, stating that the notice of appeal was not in compliance with the rules of the CAR and ought to be struck out.

The proceedings in the court below

The order of B Morrison J

[12] The order of B Morrison J made on 10 January 2014 indicated that, having read the claim form and particulars of claim and the further amended notice for court orders of application and affidavits in support with the exhibits attached thereto, and the defence of the 1st and 3rd applicants, damages were an adequate remedy. The learned judge ordered further that the 1st, 2nd and 3rd applicants give an undertaking in damages which was to be filed within seven days of the date of the order, with the 1st and 3rd applicants doing the same, but being permitted to file the undertaking three days later, on 20 January 2014 by 1:00 pm failing which injunctive relief would be granted against the applicants as follows: The 1st and 2nd applicants would be restrained from transferring or otherwise dealing with certain properties namely 62 Main Street and 57 Main Street without the leave of the court, and the 1st, 2nd and 3rd applicants are restrained from transferring or dealing with the shares of Crystal Bakery Limited, and or from transferring the ownership of the business of Crystal Hardware until the trial. The applicants would be ordered to pay the sum claimed by way of an interim payment , and would also be ordered to produce financial statements of Crystal Bakery and Crystal Hardware to provide a list of assets in the jurisdiction and elsewhere within 14 days of the order. The applicants, their servants or agents, family members, relatives or friends would additionally be restrained from selling or transferring any of the movable assets of the several businesses, bakery equipment, motor vehicles and would be prohibited from destroying any or all of the books of

accounts and records of the company and the business respectively. The learned trial judge made an order for a speedy trial and granted to the applicant leave to appeal.

[13] The format of the undertaking required of all the applicants was set out in the order to exist until after the trial of the action, or until further order of the court. It was clearly stated that the applicants should pay any damages that the respondent had sustained as a result of the transfer of the relevant properties, or of the shares, or of the profits of the business, or in the diminution of the value of the assets and any loss occasioned by the said undertaking.

The affidavit evidence

[14] Before B Morrison J, the application asked for the applicants to be restrained from transferring the properties and the shares of the company and the interest in the business and from acting in a manner which could result in a diminution of the assets. The application also asked for the financial accounting of the company and the business and for an interim payment.

[15] The affidavits before the court were sworn by the respondent and by Gary Lloyd Yee, the 2nd applicant. I will give a summary of the same, as the issues before us on the application to strike out the appeal have little to do with the substantive matters in controversy between the parties.

[16] It was the position of the respondent that from the early age of seven years, her uncle Donald Yee and his wife Rose Yee prevailed upon her mother to permit her to leave her home at Colbeck to reside with them in their home at 62 Main Street, Ewarton

in the parish of Saint Catherine. The Yees at that time had no children and she was assured that she would become a member of the family. The Yees began operating a bakery which later became the Crystal Bakery. Later Robert Yee, Mr Yee's nephew, came to live with them at the age of two years old, as did Gary Yee who came two years later at the age of 18 months old. He was Mr Yee's son. The respondent deposed that during her school years she assisted as a member of the family doing her chores as the business grew. She attended the Jamaica Commercial Institute and worked at the Citrus Growers Association and commuted daily from Ewarton to Kingston. It was in 1975, she said, that Mr Yee made the proposal to her at 62 Main Street, in the presence of her aunt Rose, which went as follows:

> "'We are one family', he said 'and you and the boys are our children. The bakery business is now doing good, give up your job at Citrus Growers Association Ltd and come to work with us fulltime. The business now needs an office and you know the baking business already, you can help us out in both places.'"

The proposal, she said, was further clarified by Mr Yee in this way:

> "You will not be paid a regular salary.. for the profit will be used back in the business-right now as we are expanding the building but you will be entitled to a part of everything that we own fifty-fifty- with us, the building, the bakery business, the motor vehicles, the equipment in the bakery, the profits and everything."

[17] The respondent tried to obtain the promise in writing but that did not happen as Mr Yee told her that it was unnecessary. But Mr Yee showed her the certificate of title relating to 62 Main Street, as well as a document representing the shareholding in

Crystal Bakery Ltd, and he promised he would eventually transfer the title and the shares in the company into the names of the three children in equal shares. The respondent claimed that in agreeing to do as Mr Yee requested she had suffered losses, such as giving up a good weekly salary and permanent job, an academic career, all prospects of obtaining a university education and the ambition of establishing her own business among other things. The respondent thereafter joined the company and worked with the hope that being a beneficial owner she would reap the benefits as the business became more profitable. She was not placed on the payroll and never received a salary, but was paid an allowance over the several years that she worked to develop the business.

[18] She said that she worked continuously without taking vacation. She got married in 1987. Mr Yee fell ill with a brain tumor in the late 1990's and she was left alone in Jamaica to run the businesses while Mrs Yee and the nephew and son went with him to Canada to oversee his medical care. In 2004, her husband became ill and she had to accompany him to the United States to supervise his return to good health. She was away from the business for approximately two years. Her aunt Rose died in 2008. In 2011, Mr Yee met in a very bad motor vehicle accident and suffered severe injuries from which he never really recovered and he died in 2012.

[19] The respondent maintained that the Hardware business (4th applicant) was established at 62 Main Street in an extended part of the premises which Mr Yee had purchased previously. It was her contention that funds from the bakery were invested heavily in the hardware business which eventually expanded into 57 Main Street which

had also been purchased with funds from the bakery. She deposed that she also assisted with the operations of Crystal Hardware. She handled the money for the businesses, made lodgments, and noticed that cheques paid to her were less than those paid to employees. It was obvious, she said, that she was not "an ordinary employee" and the businesses in which she had worked very hard over several years had doubled and improved between 1975 and 2001 and had become profitable. Over that period the company had purchased properties overseas, expanded its baked products significantly, purchased baking equipment, utilized new baking technology, increased its motor vehicle fleet and expanded its distribution network exponentially. The 3rd applicant, she verily believed, is worth approximately $500,000,000.00. Over the 34 years in which she had worked with the company there had been lodgments of about $2,000,000.00 in a week, sometimes four times a month. The applicants, she deposed, were denying her interests in the company, the business and all the assets associated therewith, and the application for the injunction before the court was to restrain the disposal of the assets until the matter could be determined by the court.

[20] The position of the applicants is of course decidedly different. Mr Gary Yee deposed that he knew nothing of the conversations alleged by the respondent to have taken place between herself and Mr Yee, his biological father. He maintained that Mr Yee and his wife Rose were philanthropists who fostered several children of their "less well off relatives". Many of these children had resided with the Yees and had been educated and cared for by them. Once these children found their feet they branched off to live and operate businesses on their own. He mentioned several relatives who

had been the recipients of the largesse of the Yees. The respondent, he said, was a foster child whom the Yees had educated and cared for. He said that the respondent had moved to Kingston as a young adult in the 1970's and returned several years later with a child born in 1975 and her partner whom she later married. It was his position that the respondent had worked at the 3rd applicant mainly preparing bank lodgments. He said that the respondent had her own business with her husband on Main Street and then she had migrated to the United States, had remained there for several years and had not resurfaced until many years later in 2008, the year that Rose Yee died. He deposed that Mr Yee had maintained good health until he met in the motor vehicle accident and despite that, he had continued to run the bakery business, until his death in 2012, only taking time out to undergo medical treatment. He stated though, that Mr Yee had been assisted in running the business by his aunt Merlene and the respondent.

[21] He deposed that he returned to Jamaica in 1991, and commenced working at the bakery where he assisted until the death of Mrs Yee. It was he, he said, who started Crystal Hardware, and the respondent had never worked there. He said that Mr Yee had added Robert Yee and himself to the title for 62 Main Street and also to the shareholding of the company and Mr Yee was entitled to distribute his assets and organize his affairs as he saw fit. He denied that the respondent had either occupied a room at 62 Main Street or worked at Crystal Bakery for 54 years. In any event, he stated, her occupancy at 62 Main Street was in her capacity as an employee. In his view, the respondent had no evidence and had not demonstrated in any way whatsoever, that she had any beneficial interests in the businesses.

The appeal

[22] The amended notice of appeal contained eight grounds of appeal claiming inter alia that the learned judge erred when he found that damages were an adequate remedy, and, by denying injunctive relief, in particular restraining the applicants from inter alia, transferring 62 Main Street, the shares in Crystal Bakery Ltd, or the interest in Crystal Hardware, or any other movable assets or in failing to grant an interim payment as requested.

The applications to strike out the appeal

[23] The applications on behalf of the 1st and 3rd and 2nd and 4th applicants were before the court for hearing on 21 May 2014. Counsel for the 1st and 3rd applicants informed the court that those applicants were not proceeding with the application to strike out the notice and grounds of appeal but were proceeding with the application to extend time to file the counter notice of appeal and with submissions.

[24] There are several rules of the CAR which are relevant to the determination of these applications. These are set out hereunder for clarity and for ease of reference in respect of the comprehensive arguments of counsel, but before doing that I will set out relevant portions of section 11 of the Judicature (Appellate Jurisdiction) Act ("JAJA") which have significance in respect of the interpretation to be accorded the rules which address procedural protection of the rights relating to appeals governed by the statute:

> "11--(1) No appeal shall lie—
>
> (a)… (e)

(f) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge except ---

(i) …

(ii) where an injunction or the appointment of a receiver is granted or refused;.."

The relevant rules in Parts 1 and 2 of the CAR read:

"1.1 (8) In these Rules -

'**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;"

Time for filing and serving notice of appeal

"1.11 (1) The notice of appeal must be filed at the registry and served in accordance with rule 1.15 –

(a) in the case of a procedural appeal, within 7 days of the date of the decision appealed against was made;
(b) where permission is required, within 14 days of the date when such permission was granted; or
(c) in the case of any other appeal within 42 days of the date when the order or judgment appealed against was served on the appellant.

(2) The court below may extend the times set out in paragraph (1)."

Procedural appeal

"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."

The submissions

[25] Counsel representing the 2nd and 4th applicants, submitted that there were two issues to be determined on the application namely-

"(A) Is the appeal from an order refusing an interim injunction a procedural appeal?

(B) Is the appeal filed in accordance with the rules 1.11(1) and 2.4 of the Court of Appeal Rules, 2002?"

[26] Counsel asserted that although the learned judge in the court below had granted leave to appeal, leave was not required from an order refusing an interim injunction pursuant to section 11(1) (f) (ii) of the JAJA which provides that no leave is required inter alia, where an injunction or the appointment of a receiver is granted or refused. Counsel referred to and relied on a case out of this court, namely **Vincent Gaynair et al v Negril Beach Club Ltd et al** [2012] JMCA Civ 25 for this legal proposition. Counsel submitted that the decision refusing to grant an interim injunction was a procedural appeal and this conclusion was not inconsistent with JAJA. Counsel also referred to Part 1 of the CPR indicating that the rules have been promulgated to ensure that the overriding objective is achieved which includes, he stated, dealing with cases expeditiously and fairly. He made specific reference to rule 1.2 which provides that the court must give effect to the overriding objective when interpreting the rules or exercising any power under the rules.

[27] Counsel analysed rules 1.1(8)(c) (i), rules 1.11(1)(a) and (b) and 1.11(2) of the CAR submitting that the rules were not inconsistent, as they do not require that permission to appeal be obtained in every case, and there are different time frames within which to appeal if the order is one that requires permission for the appeal to be effective or is one that does not. Counsel submitted further that a procedural appeal must be filed within seven days, and in circumstances where permission is required the appeal must be filed within 14 days of the grant of the permission to appeal. The rules permit that the court below may extend the times for the filing of the appeal.

[28] Counsel relied on the particular wording of rule 1.1(8)(c)(i) to submit that an order for an interim injunction was specifically excluded from the definition of "procedural appeal", which would be consistent with the provisions set out in JAJA, namely section 11(1)(f)(ii). However he submitted that the refusal of an injunction was not excluded from the definition of "procedural appeal", and he argued that had the legislature intended that the refusal of an injunction was to have been so excluded it would have so stated. Counsel said the omission was deliberate and intentional. The significance, he stated, of this being intentional is clear from the wording in section 11(1)(f)(ii) of JAJA which speaks specifically to an injunction or the appointment of a receiver being granted or refused being excluded from those appeals which require the leave of the court, and rule 1.1(8)(d) which he argued, literally followed the wording of JAJA when dealing with the appointment of a receiver, but did not do so in respect of the refusal of the injunction. Counsel therefore concluded that in those circumstances it

must have been clearly intended that the refusal of an injunction was meant to be a procedural appeal.

[29] Counsel submitted that this was so as an appeal from the refusal of an injunction ought to be considered within the shortest time possible, that is, not less than 14 days or more than 28 days since the filing thereof, and if being heard in open court within 42 days of having been filed.

[30] Counsel maintained that the fact that no permission is required from an order refusing an injunction does not prohibit it from being a procedural appeal . The rules just make it clear, how the right to appeal should, he said, be exercised, and the procedure to be followed. Counsel referred to the Judicature (Rules of Court) Act , particularly section 4(2)(a) which empowers the rules committee to inter alia, make rules in respect of matters being filed and heard in the Court of Appeal.

[31] In respect of the second issue identified by counsel, he submitted that as the order of B Morrison J refusing the application for an injunction, and his finding that damages were an adequate remedy was made on 10 January 2014, the procedural appeal ought to have been filed no later than 17 January 2014. The notice of appeal was filed on 31 January 2014, which was therefore, he argued, 21 days after the order had been made, and 12 days after the formal order had been filed. Additionally, as the notice of appeal was served on 6 February 2014, counsel stated that this would have been 27 days after the order of B Morrison J. Counsel made the point that the skeleton submissions had not been filed with the notice of appeal nor served with them, as

required by the rules, but were filed on 25 February and served on 26 February 2014. In the light of the above recalcitrance, in that the respondent had failed to comply with the specific requirements of the rules, namely rules 1.1(8) and 1.11(1)(a) and 2.4, counsel boldly submitted that there was no appeal before the court and the applicants were entitled to the order prayed for, namely that the appeal be struck out. Indeed, counsel relied on the ruling of a single judge of this court, Brooks JA in **National Commercial Bank Jamaica Limited v International Asset Services Limited** [2013] JMCA Civ 9, for the proposition that if there is no appeal filed in time, then there can be no extension to do so unless an application for the same has been filed, failing which the appeal must be struck out.

[32] Counsel therefore asked the court to find that the refusal of the interim injunction was a procedural appeal; that the appeal had not been filed in accordance with the rules; and that the court ought not to read words into rule 1.8 that were not there. The appeal, he said, was therefore irregular and ought to be struck out.

[33] Counsel then posited his argument in the alternative, which was that, if the court held that the appeal had been regularly filed and served that permission be granted for the applicants to file a counter notice with submissions within seven days of the grant of the order to do so. Counsel conceded that there was no affidavit before the court in support of that application, nor any draft of the counter notice, that the applicants hoped to file before the court, to indicate what the terms of the counter notice would be. Counsel told the court that the issue raised on the counter notice would be that no order ought to have been made by the court with regard to the undertaking as to

damages. Counsel for the 1st and 3rd respondents endorsed and relied on these submissions.

[34] Counsel for the respondent submitted that the application to strike out the appeal should be dismissed for three reasons in the main: (1) the provisions in the rules in relation to "procedural appeals", were unconstitutional; (2) the said provisions were ultra vires; and (3) given their literal interpretation would produce an absurd result.

[35] Counsel relied on the decision of this court sitting in banc in **William Clarke v The Bank of Nova Scotia Jamaica Limited** [2013] JMCA App 9, submitting that the court struck down as unconstitutional rules 2.4(3), (7) and 2.5(1) of the CAR which give the single judge of appeal jurisdiction to hear procedural appeals, Counsel therefore questioned whether rules 1.1 (8) (definition of procedural appeals); 1.11(1)(a) (time periods for the filing of appeals); 2.4(1), (2), (4), (5) and (6) (procedural appeals) could stand in the light of the **William Clarke v BNS** decision. It was counsel's position that the entire regime had been struck down and for the court, and not the single judge of appeal to hear a procedural appeal, the rules would require amendment.

[36] Counsel also submitted that alternatively, the provisions in the CAR relating to the procedural appeals were ultra vires, as there was no statutory jurisdiction set out in JAJA enabling the promulgation of the procedural rules relative to procedural appeals, as set out in the CAR. Counsel referred to **Verma Dayes v The Ritz Carlton Hotel Company of Jamaica Limited (Trading in Jamaica as The Ritz Carlton Golf and**

Spa Resort Rose Hall Jamaica) 2008 HCV 03251 delivered 13 December 2011 and **Best Buds Limited v Garfield Dennis** [2012] JMCA Civ 1, in support of this submission.

[37] Counsel submitted that the interpretation accorded the definition section of the rule by counsel for the applicants, was flawed. Counsel said that the rule 1.1(8)(c)(i) does not speak to either the "grant" or the "refusal" of the interim injunction. There are two words omitted from the exception stated in the rule, which are clearly stated in JAJA, but to give the rule the interpretation asked for by the applicants, he submitted, one would have to read words into the provision, which one should not do. Additionally, counsel argued, the rule refers to exclusions from procedural appeals as including, "an interim injunction or declaration", which could include, he said, either the grant or refusal of either relief. Counsel submitted that the powers that the court has under Part 17 of the CPR which are referred to in the rule, include the grant and refusal of injunctions, undertakings and declarations, which should therefore be read into the specific rule. That being so, the appeal could not, he submitted, be considered a procedural appeal. Additionally, counsel said if the applicants' interpretation was given to rule 1.1(8)(c)(i) then had the court made orders granting in part or refusing in part the orders prayed for against the different applicants, then there would be two different situations, in which one would be the subject of a procedural appeal, requiring seven days in which to appeal, but not so in respect of the other, which would be 42 days and that, he said, would produce an absurd result.

[38] In the instant case the court made an order that the applicants give undertakings within seven days, failing which the injunctive relief would follow. The undertakings were given so the injunctions did not come into play. However, the respondent had also asked for an interim payment which was not granted. Counsel submitted that permission to appeal was required in respect of that order and was granted. The appeal in relation thereto should have been filed within 14 days of obtaining permission to appeal, but counsel said that as the undertakings had been given the respondent did not necessarily have to file an appeal. He also submitted that had the undertakings, or in the alternative, the injunction not been granted, then as permission was not required for the refusal of an interim injunction, the respondent would have had 42 days within which to file her appeal, all in relation to the one application before the court.

[39] Counsel indicated that once the undertakings had been fulfilled, the respondent ought to have filed the appeal on or before 24 January 2014, that is within 14 days of the order of B Morrison J. Having not done so, and having filed on 31 January 2014, the respondent was desirous of obtaining an extension of time to file the appeal out of time, and although a formal application had not been made, the court had the general power to do so pursuant to rule 1.7(7) of the CAR. Additionally, there was sufficient information before the court for the court to exercise its discretion in favour of the respondent, as there were serious issues to be determined on appeal, there being substantial assets in dispute, between the parties, which had been left in the custody of the applicants and which were likely to be dissipated. The court ought to have granted an injunction simpliciter restraining the applicants, he argued.

[40] Counsel however indicated that the respondent opposed the filing of the counter notice by the applicants out of time, as they ought to have filed their respective counter notices even if they were of the view that the appeal lacked efficacy.

[41] In reply counsel for the applicants submitted that Part 17 of the CPR had been misquoted, by counsel for the respondent, as that part only dealt with orders made by the judge, and not refusals, in similar vein to rule 1.1(8) (c). Counsel also said that **William Clarke v BNS** was inapplicable to the instant case as the decision did not prevent the court hearing procedural appeals which in any event, the rules already provided for. Counsel referred to rule 2.4(5) to support this submission.

Analysis

[42] In **William Clarke v BNS**, the Court of Appeal stated that section 109 of the Constitution of Jamaica provides that when determining any matter (other than an interlocutory matter), the court shall comprise an uneven number of judges, not being less than three. It further states that as procedural appeals do not fall within the phrase "interlocutory matter" within the meaning of section 109, (which the court found must of necessity mean a matter which is interlocutory in the Court of Appeal, which the procedural appeal is not), then rule 2.4 (3) of CAR was inconsistent with section 109.

[43] Additionally, the court also held that section 110 of the Constitution enables appeals to the Privy Council from the Court of Appeal. As the decision of the single judge was not a decision of the Court of Appeal the right to appeal to the Privy Council would be lost, and so rule 2.4(3) would have the effect of depriving the litigant of that

right in respect of procedural appeals. The court therefore held that rule 2.4(3) was inconsistent with sections 109 and 110 of the Constitution and would therefore be treated as void.

[44] That, however did not prevent the court hearing procedural appeals on paper by three judges. Harris JA in her judgment made it clear in paragraph [64], that consideration of proceedings in that way would not be in conflict with "the open justice principle" provided the decision of the court was read in open court. Considering appeals on paper by the court would not therefore offend section 16(3) of the Charter of Fundamental Rights and Freedoms of the Constitution.

[45] Additionally, the rules already empower the court to deal with matters without the attendance of the parties ((rule 1.7(2)(i)), or instead of holding an oral hearing on written representations submitted by the parties (rule 1.7(2)) (j), the court having directed the time that the submissions are to be filed (rule 2.9(2)(f)).

[46] As a consequence the arguments of counsel for the respondent that the entire regime relating to the legality of procedural appeals has been struck down by the decision in **William Clarke v BNS** is inaccurate and the court continues to determine procedural appeals within the provisions of the Constitution and the rules.

[47] Although counsel for the 2nd and 4th applicants relied heavily on **Vincent Gaynair v Negril Beach,** the specific dictum, of Harris JA on behalf of the court, as referred to by counsel, reads as follows (para [14]):

> "A comparative review of rule 1.1(8)(c)(i) and 1.1(8)(d) shows that rule 1.1(8)(c)(i) merely speaks to the exclusion of an order on an interim injunction from being a procedural appeal, while, rule 1.1(8)(d) unequivocally eliminates an order granting or refusing an appointment of a receiver as ranking as a procedural appeal. Possibly, rule 1.1(8)(c)(i), not having expressly spoken in clear terms as to the refusal of an injunction, it may be taken that the rule does not embrace an order refusing an injunction and such order could be classified as a procedural appeal. However, section 11(1)(f)(ii) of the Act is explicit. It excludes an order granting or refusing an injunction from the requirement of obtaining permission to appeal. Rule 1.1(8)(c)(i) could not render ineffective the clear intent of section 11(1)(f)(ii) of the statute, and it is not admitted that there is, the rule cannot operate to defeat the intent of the legislature. If there is a conflict, the statutory provision must prevail. It is clear that an order for refusal of an injunction falls within the purview of section 11(1)(f)(ii) of the Act. The language of the Act compels the conclusion that permission to appeal is not required where the order from which an appeal lies is grounded in an injunction."

[48] It is clear to me that the court was saying two things: (1) the provisions of the JAJA are pellucid in that permission of the court is not required in circumstances where an injunction or the appointment of a receiver is granted or refused; and (ii) the position in relation to whether the refusal of an injunction was excluded from the definition of "procedural appeal" in the CAR was not decided but reserved for consideration at another time. I also accept the dictum of Brooks JA in **NCB Jamaica Ltd v International Asset Services Ltd**, that if the appeal is filed out of time, an application for extension of time within which to do so must be filed to be considered by the court, and if that is not done, then no appeal exists. It is invalid.

[49] The issues on this appeal therefore appear to me to be the following:

(i) Is the appeal a procedural appeal?

(ii) Was the appeal filed in time in compliance with the rules?

(iii) If not, ought the court to extend the time for the proper filing of the same?

(iv) Ought the court to grant the applicants permission to file the counter notice of appeal out of time?

Issue (i) Is the appeal a procedural appeal?

[50] It is clear that section 11(1)(a)-(e) of JAJA sets out the instances where no appeal shall lie; section 11(1)(f), where an appeal will lie from an interlocutory judgment or order given or made by a Supreme Court Judge, once permission is first obtained from a single judge of the Supreme Court or the Court of appeal; save in certain instances which are exempt from the requirement of first obtaining the permission as aforesaid. The grant or refusal of an injunction and the appointment of a receiver are two such instances. There is no dispute about that in this case. The definition section in respect of "procedural appeal" in the CAR sets out what the procedural appeal is, which in the main is a decision which does not decide the substantive issues in the claim, and that is so in the instant case. However, there are certain matters which are excluded therefrom. There is a specific reference to orders under Part 17 of the CPR being excluded. An interim injunction, declaration, freezing and search orders, inter alia, are stated as being excluded. It is clear, and I accept the submissions of Queen's Counsel for the respondent, that the words "grant" and "refusal" are not set out with reference to the interim injunction or declaration. In my

view, the word "grant" alone cannot be read into the provision. I have also noted well the submission of counsel for the 2nd and 4th applicants that rule 1.1(8)(d) mirrors the words in 11(1)(f)(ii) of JAJA with regard to the appointment of a receiver where both the grant and the refusal of the appointment are mentioned, which could be an aid to the true and proper construction of the definition.

[51] However, what makes the proper interpretation very clear to me is the fact that in rule 1.1(8)(c) the umbrella clause refers to Part 17 of the CPR, and it could never be said on any comprehensive perusal and review of Part 17, that the court when exercising its unfettered discretion, and considering applications in respect of the matters set out therein, could not either grant or refuse the various orders open to the court, pursuant to those provisions. As indicated above, those orders include injunctions, declarations, and undertakings to abide by any order as to damages caused by the grant or extension of an injunction, inter alia. As a consequence, I do not see the wording in rule 1.1(8)(c)(i) as excluding the refusal of injunction. I see the provision as embracing both the grant and refusals of injunctions and declarations. That being so, the appeal is not a procedural appeal and therefore it would not have had to comply with rule 1.11(1)(a); that is, to have been filed within seven days of the date when the decision appealed against was made, in this case, 17 January 2014; nor did it have to comply with rule 2.4 for written submissions to have been filed and served with the appeal. In fact skeleton arguments and the record of appeal are respectively governed by rules 2.6 and 2.7 of the CAR. That would dispose of a significant part of the appeal, certainly issue (i).

Issues (ii) and (iii) - Was the appeal filed in time in compliance with the rules? If not, is an order for extension of time required?

[52] The order of B Morrison J was made on 10 January 2014. As the undertakings were filed, the injunctive relief did not operate. As indicated, no permission to file the appeal was required, so rule 1.11(1)(b) would not be applicable. Therefore, the time limited for filing the appeal would be within 42 days of the date when the order or judgment appealed against was served on the respondent (rule 1.11(1)(c)). The appeal filed on 31 January 2014, on whatever counting of the days, would therefore have been in time and in compliance with the rules. No order for extension of time to file the appeal would therefore have been required. The appeal would be a valid appeal. The application to strike out the appeal would therefore be without any merit and must fail.

Issue (iv) - Ought permission to be granted for the counter notice to be filed?

[53] With regard to the counter notice of appeal, the application before the court in relation thereto was deficient. There was no affidavit filed in support of this aspect of the application, and there was no draft counter notice annexed for the court to consider its terms. We ought not to have to rely on counsel's mere ipse dixit. Additionally, pursuant to the well known case of **Leymon Strachan v The Gleaner** SCCA No 133/1999 delivered 6 April 2001, there should be some explanation placed before the court for the delay in the filing of the cross appeal, which would now be about five months late, and the merits of the appeal ought to be stated. Also, is the respondent

likely to suffer any prejudice if the matter is further delayed due to the failure to file the counter notice, as the date of the hearing of the appeal has not yet been set? The delay may not be considered inordinate in the circumstances of this case, particularly as the applicants were of the view that the appeal did not exist. But, as we were told by counsel that the counter notice was going to challenge the order made in respect of the undertakings imposed, as in their view the judge had erred in making such an order, in my opinion, the efficacy of the appeal would not have affected that position. The counter notice of appeal should have been filed many months ago, and, as the order of B Morrison J is an interlocutory order, the applicants would have required the permission of the court to do so as well as an extension of time. Additionally, as can be seen from paras [14] – [21] herein, it is the respondent's position that she has a beneficial interest in the assets held by the applicants, and the court could ultimately find that to be so. As a consequence, it would appear at this stage, at least prima facie arguable that any dissipation of the assets in the interim, ought to be protected by an undertaking in damages, which would suggest that there is no merit to the proposed counter notice of appeal. I would therefore refuse the applications as filed before us.

Conclusion

[54] In the light of all of the above, I find that the appeal was not a procedural appeal and had been filed in time in compliance with the rules. I would dismiss the applications filed by the applicants with costs to the respondent to be taxed, if not agreed.

McINTOSH JA

[55] In this matter all that remains is for me to add that I agree that these applications must be refused for the reasons given in the draft judgments of the Honourable President and my sister Phillips, JA which I have had the opportunity to peruse.

PANTON P

ORDER

Applications refused.

Costs of the applications to the respondent to be agreed or taxed.