JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MR JUSTICE BROWN JA (AG)

APPLICATION NO COA 2021APP00073

BETWEEN	**SILVERA ADJUDAH**	**APPLICANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**RESPONDENT**

Applicant in person

Louis Jean Hacker instructed by the Director of State Proceedings for the respondent

13 December 2021 and 29 July 2022

F WILLIAMS JA

[1] I have read in draft the reasons for judgment of my brother Brown JA (Ag) and they accord with my reasons for concurring with the orders made as set out in para. [4] herein.

DUNBAR-GREEN JA

[2] I too have read the draft reasons for judgment of my brother Brown JA (Ag) and agree with his reasoning and conclusion. There is nothing that I wish to add.

BROWN JA (AG)

[3] The applicant, Mr Silvera Adjudah, is seeking permission to appeal from the decision of Master Mason ('the learned master'), made on 22 May 2019 (cited at [2019] JMSC Civ 142), striking out his claim seeking redress for the termination of his employment as Hospital Administrator at the Bellevue Hospital.

[4] On 13 December 2021 we heard this application and made the following orders:

> "Application for permission to appeal is refused; and
>
> Costs to the respondent to be agreed or taxed."

We promised then to put our reasons in writing. This is a fulfilment of that promise. To give context to our decision, I will first provide a background to the application.

Background

[5] The applicant represented himself at the hearing in the court below and at the hearing in this court. The information in relation to the background is as gleaned from the learned master's judgment and the application filed in this court.

[6] On 15 November 2010 his employment as the hospital's administrator was terminated by the South East Regional Health Authority ('SERHA'). He filed a claim form and particulars of claim "for unfair and unlawful termination of his employment contract" on 31 March 2017. The respondent was served but failed to file a defence in the time stipulated in the Civil Procedure Rules ('CPR').

[7] The applicant made an application for default judgment on 27 June 2017. The respondent filed a notice of application on 4 May 2018 to strike out the claim as the limitation period had elapsed before the claim was filed; and, in the alternative, for an extension of time to file its defence.

[8] As was said earlier, having heard the matter, the learned master struck out the applicant's statement of case and, at the same time, refused leave to appeal on 22 May 2019.

[9] On 23 July 2019 the applicant filed an application for stay of execution and for permission to appeal. These applications were heard by Hutchinson J and, in a judgment (cited at [2021] JMSC Civ 64) delivered on 9 April 2021, that judge refused both applications. Following on that, the applicant filed this application for permission to appeal the decision of the learned master on 22 April 2021.

[10] The proper course was for the applicant to have filed in this court a fresh application for leave to appeal, rather than an application to a judge of the Supreme Court, and within 14 days of the order being appealed (see section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act; rule 1.8 of the Court of Appeal Rules 2002 ('CAR'); **Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited** Consolidated Appeals (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/2007, Application 166/2007 judgment delivered 26 September 2008. Consequently, with all due deference, the decision of Hutchinson J does not fall for consideration. The relevant date is the date the order being appealed was made.

Proceedings in the court below

[11] The learned master reviewed and applied the relevant law. At para. [2] of her judgment she stated that:

> "The limitation period for a claim for a breach of contract is six years. This is confirmed in the United Kingdom Statute 21 James 1 Cap. 16, an old law which is received and accepted as good law in Jamaica. The date of the cause of action in this claim is November 15, 2010. The latest date on which the claim should have been filed is November 14, 2016. The claim was filed some four months later on March 31, 2017, which would have the Claimant's claim being statute barred."

[12] In the determination of the learned master, the application before her raised this issue: "whether the Claimant can successfully apply to extend the limitation period pursuant to Section 32 of the UK Limitation Act 1980".

[13] In treating with the issue of the law governing the limitation period the learned master set out section 32 of the UK Limitation Act, on which the applicant relied, as well as section 46 of the Jamaican Limitation of Actions Act ('the Act') and section 41 of the Interpretation Act explaining the applicability of the United Kingdom Statute 21 James 1 Cap 16. The learned master found that the applicant's claim failed as he could not rely

on section 32 of the UK Limitation Act of 1980, as it is not applicable in Jamaica and there is no similar provision in the Act. She stated, at para. [10], that:

> "The issue of the limitation period is a matter that is governed by the United Kingdom Statute 21 James Cap 16 1623. Both Sections [sic] 46 of the Limitation of Actions Act of Jamaica and Section [sic] 41 of the Interpretation Act of Jamaica recognize the United Kingdom Statute 21 James 1 Cap 16 1623 as being the accepted law to address the issue of [the] limitation period in Jamaica. The UK Statute 21 James 1 cap [sic] 16 1623 allows for a limitation of six (6) years for a breach of contract matters."

At para. [14] she summarized the applicant's position in the following terms:

> "In the instant case, the Claimant has placed reliance on the construction of Section 32 of the UK Limitation Act 1980 to direct the court to extend the limitation period in cases of fraud, concealment or mistake. His argument is that Section 32 of the UK Limitation Act is applicable and can be utilized to showcase his position that the performance evaluation done on his behalf for the period May to October 2010 dated October 28, 2010 is a fraudulent document that does not bear a name and signature of any Assessment Officer. He further submits that undesirable things were inserted into his work file and used as reasons for his termination of employment ..."

The learned master then went on to hold, in the same paragraph that:

> "... In my opinion, the Act is not applicable law in Jamaica as there is no equivalent law to Section 32 of the Act here in this jurisdiction. In addition, the Claimant cannot benefit from the equitable doctrine of fraudulent concealment because his matter concerns a breach of contract and not one for the recovery of land or rent. This view was stated by Rowe, JA in **Muir v Morris** [1979] 16 J.L.R. 398 at 399 where it was held that the equitable doctrine of fraudulent concealment is only applied to actions for the recovery of land or rent."

[14] A further finding of the learned master was that the applicant's employment was terminated in accordance with the terms of his contract. Furthermore, in the learned

master's opinion, "matters involving unfairness or wrongful termination of employment are dealt with by Judicial Review. An application for Judicial Review must be made within three (3) months of termination …".

[15] The learned master held, at para. [20]:

> "In conclusion, therefore, I find that there is no basis for prolonging a claim that is statute barred, additionally, there are no reasonable grounds disclosed in the statement of case to defend [sic] this claim. In the circumstances, I am of the view that the instant claim is an exercise in futility and must be struck out. The claim was filed outside the required limitation period and as such should be struck out pursuant to rule 26 3(1) (b) [sic] of the CPR for an abuse of process."

The application for permission to appeal

[16] As has already been said, the applicant filed this application for permission to appeal on 22 April 2021. The judgment was delivered on 22 May 2019. On that date, the learned master made her orders, she also refused the applicant leave to appeal.

Applicant's submissions

[17] The applicant did not file any written submissions. However, his oral submissions at the hearing were based on the grounds set out in the application. He contended that his employment was terminated because he had written a letter of complaint and had not been given any reason for his termination.

[18] He told the court that upon being advised that the claim was statute barred, he applied to the court for an extension of time within which to file the claim. This application he complained was never given a date for hearing. The claim he pointed out was thrown out on 22 May 2019.

[19] The applicant argued that the learned master had no jurisdiction to enter "summary judgment" as it was not an interlocutory matter. He asserted that a master cannot make any final decision. Consequently, he argued, the learned master had no jurisdiction to strike out his statement of case since it was not an interlocutory matter. In

support of this submission, the applicant referred to rule 2.5 of the CPR, which sets out the categories of judicial officers, including a master, who may exercise the functions of the court. The applicant also argued that the learned master failed to mention what he referred to as the fraudulent appraisal documents.

[20] The applicant submitted that the Act did not arise. Rather, it was the "Statute of Repose", under which time started to run from the termination, that is, 2010. The Act, in the applicant's submission, would start to run from the date he got the letter from SERHA in 2016, therefore the claim is not statute barred. The applicant also complained that the learned master's approach was inappropriate.

Respondent's submissions

[21] The respondent, after outlining the history of the matter, submitted that a predicate finding for this court, before deciding whether permission to appeal should be granted, is whether the learned master's order was made in final or interlocutory proceedings. The applicable test, it was argued, was that applied in **Garbage Disposal & Sanitations Systems Ltd v Noel Green and Others** [2017] JMCA App 2 ('**Garbage Disposal v Green**').

[22] It was submitted that the decision made by the learned master in 2019 was interlocutory based on the fact that if the application to strike out was not granted the matter would not have been finally disposed of. Also, that none of the exceptions outlined in the Judicature (Appellate Jurisdiction) Act ('JAJA') was relevant.

[23] The respondent pointed out that rule 1.8 of the CAR outlines the parameters for obtaining permission to appeal as well as the considerations that the court ought to bear in mind when determining whether to grant an application for permission to appeal. It was submitted that this application for permission to appeal should fail as, like the applications for permission to appeal made in the Supreme Court, it was filed outside of the 14-day period stipulated by the rules.

[24] The respondent also argued that, pursuant to rule 1.8(7) of the CAR, permission to appeal is only granted where the court is of the view that the appeal has a real chance of success. The decision in **Garbage Disposal v Green** was also cited in support of this submission. In determining the prospect of success, the court should briefly consider the merits of the proposed appeal. The respondent went on to observe that the applicant had not exhibited any proposed notice and grounds of appeal.

[25] The respondent, however, identified the following three areas as arising based on the application for permission to appeal filed:

> a. The learned master had no jurisdiction to hear interlocutory applications;
>
> b. The learned master improperly exercised her discretion; and
>
> c. The interpretation and application of the statute of limitations by the learned master was incorrect.

a. <u>The learned master had no jurisdiction to hear interlocutory applications</u>

[26] In addressing this issue the respondent referred to sections 8(1) and 9(1) of the Judicature (Supreme Court) Act ('JSCA'), as well as rule 2 of The Master in Chambers Rules, 1966 outlining the jurisdiction and authority of the Master in Chambers. Based on these provisions, the respondent argued that the learned master had jurisdiction to hear the interlocutory applications that were before her.

b. <u>Improper exercise of the learned master's discretion</u>

[27] The respondent submitted that the applicant complained that the learned master improperly exercised her discretion when she struck out his statement of case and denied his application for permission to appeal. The respondent then adverted to the approach of this court when reviewing a decision arising from the exercise of a discretion by a judge or master. In this regard, the respondent referred to the decision of this court in

The Attorney General of Jamaica v John MacKay [2012] JMCA App 1 ('**AG v John McKay**'), in which the well-known principle in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 was cited and applied.

[28] The respondent argued that the learned master considered the applicant's application for extension of time to extend the limitation period and the application for default judgment. It was also argued that the learned master having found that section 32 of the United Kingdom's Limitation Act, 1980 did not apply to Jamaica and ruled that the applicant's case failed, she could not then properly consider the application for default judgment as that would be an exercise in futility.

c. <u>The interpretation and application of the statute of limitations by the learned master was incorrect</u>

[29] The respondent maintained that the learned master was correct in finding that the United Kingdom's Limitation Act, 1980 did not have force in Jamaica and that the applicant could not rely on it. Further, that the learned master properly exercised her discretion and gave sufficient weight and consideration to the applications of both parties.

[30] Consequently, the respondent submitted, the court ought to deny the application for permission to appeal on the basis that the application is out of time and further that the appeal has no real chance of success.

Analysis

[31] The applicant filed an application for permission to appeal the decision of the learned master striking out his statement of case in the Supreme Court. Section 11 of JAJA sets out the restrictions in relation to civil appeals and the requirement for leave in certain circumstances. In particular, section 11(1) provides:

> "No appeal shall lie–
>
> (a) …

> (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–
>
> …"

The section lists six exceptions which do not apply to this case.

[32] Rule 1.8 of the CAR governs the procedure by which leave, or permission, to appeal may be obtained. It reads:

> "(1) Where an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought.
>
> (2) Where the application for permission may be made to either court, the application must first be made to the court below.
>
> (3) An application to the court below may be made orally but otherwise the application for permission to appeal must be made in writing and set out concisely the grounds of the proposed appeal.
>
> (4) Notice need not be given to any proposed respondent unless the court below, the court or a single judge so directs.
>
> (5) An application for permission to appeal must be made to the court.
>
> (6) The court may direct that notice of the application for permission be given to any party to the proceedings in the court below who may be affected by the application for permission to appeal and that a hearing be fixed.
>
> (7) The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success.
>
> (8) An order giving permission to appeal may –
>
> (a) limit the issues to be heard on the appeal;
>
> (b) be made subject to conditions; and

(c) direct that the hearing of the application for permission to appeal be treated as the hearing of the appeal."

[33] In order to determine this matter, the following issues must be resolved:

1. Whether the order made by the learned master was an interlocutory order; and

2. Whether the appeal has a real chance of success.

Issue 1- Whether the order made by the learned master was an interlocutory order

[34] Section 11(1)(f) of JAJA requires leave to be given before an appeal can be lodged against any interlocutory judgment or order. It is therefore necessary to first determine whether the order made by the learned master is an interlocutory order. In considering whether an order is interlocutory or final, this court has accepted the "application test" as the means by which to make this assessment.

[35] The application test focuses on the effect of the decision on the proceedings if made in favour of either party. This principle was reiterated in **Garbage Disposal v Green** which cited with approval **Salaman v Warner and others** [1891] 1 QB 734, where Lord Esher said, at page 735:

> "… The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory …"

An order to strike out is an example of an interlocutory order. This is because if the order had been refused, the matter would have proceeded to trial. Whilst the granting of the application would be a final disposition of the matter.

[36] Based on the application test, the order made by the learned master is an interlocutory order as, if she had refused the application to strike out the statement of case, the matter would have proceeded to trial. As a result, permission to appeal the order is required in accordance with section 11(1)(f) of JAJA.

[37] In passing, I observe that the applicant did not file an application for an extension of time within which to apply for permission to appeal before this court, despite the expiration of the 14 days' period in which he should have applied for permission. However, the applicant in the grounds filed in support of his application for permission to appeal stated that he did not know that he had to file the application within 14 days. No issue was taken by the respondent in relation to this procedural omission. Accordingly, the applicant being self-represented, I will go on to examine the application on the more substantive basis.

Issue 2 – Whether the appeal has a real chance of success

[38] The test to be applied in order to determine whether leave should be granted is laid down in rule 1.8(7) of CAR, which states:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

The phrase "real chance of success" has been treated as synonymous with "real prospect of success". In **Swain v Hillman** [2001] 1 All ER 91, Lord Woolf examined the phrase 'real prospect of success' and opined:

> "… The word 'real' distinguishes fanciful prospects of success or … they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

[39] In interpreting rule 1.8(7) of the CAR, Morrison JA (as he then was), in **Duke St John Paul Foote v University of Technology Jamaica** (**UTECH**) **and another** [2015] JMCA App 27A, made the following observation, at para. [21]:

> "This court has on more than one occasion accepted that the words 'a real chance of success' in rule [1.8(7)] of the [Court of Appeal Rules] are to be interpreted to mean that the applicant for leave must show that, in the language of Lord Woolf MR in **Swain v Hillman and another** [2001] 1 All ER 91, at page 92, 'there is a 'realistic' as opposed to a 'fanciful' prospect of success'. Although that statement was made in the context of an application for summary judgment, in respect of which rule 15.2 of the Civil Procedure Rules 2002 ('the CPR') requires the applicant to show that there is 'no real prospect' of success on either the claim or the defence, Lord Woolf's formulation has been held by this court to be equally applicable to rule [1.8(7)] of the CAR (see, for instance, **William Clarke v Gwenetta Clarke** [2012] JMCA App 2, paras [26]-[27]). So, for the applicant to succeed on this application, it is necessary for him to show that, should leave be granted, he will have a realistic chance of success in his substantive appeal."

[40] It is therefore recognised and accepted that this court has to consider the merits of the appeal whilst bearing in mind the standard of review for these matters on appeal. That is, this court is not entitled to interfere with the exercise of the learned master's discretion, unless it can be shown that in arriving at her decision, the learned master was plainly wrong (see **AG v John McKay**). The applicant did not file any proposed grounds of appeal, however the two main complaints made by him are that the master did not have jurisdiction to deal with this matter and that the court had the power to extend the time within which the claim could be filed, pursuant to the UK Limitation Act 1980. These will be examined below.

Jurisdiction of the master

[41] The jurisdiction of the learned master is governed by the Judicature (Supreme Court) Act and the Master in Chambers Rules 1966 ('the 1966 Rules') which were in force at the time the order was made. (These rules have now been replaced by the Judicature (Rules of Court) (Master in Chambers) Rules 2021.)

[42] The 1966 Rules set out the limitations on the jurisdiction of the learned master. Rule 2 sets out a number of exceptions or restrictions on the jurisdiction of the master in chambers as opposed to a judge of the Supreme Court. One of the exceptions (see Rule 2(c)), to which it seems the applicant was referring, states that the learned master would not be competent to deal with matters where an Act gives jurisdiction specifically to a Judge in Chambers and the decision made would be final. Rule 2(c) states:

> "All proceedings in respect of which jurisdiction is given by any Act specifically to a Judge in Chambers and in which the decision of the Judge is **final**." (Emphasis added)

[43] Irrespective of the meaning ascribed to 'final' in relation to Rule 2(c) (that is, whether it is final as opposed to interlocutory or final in the sense that there can be no appeal from the decision) it would not be applicable to this case. The learned master's decision is interlocutory, as discussed above, and the jurisdiction to strike out was not given by any specific Act but by Part 26 of the CPR and so, the learned master had the powers of a Supreme Court judge in dealing with the matter. Since the exceptions or limitations in the 1966 Rules were not applicable, the learned master therefore had the jurisdiction to hear and determine the application to strike out.

Limitation Period

[44] The claim in this matter arose when the applicant's employment contract was terminated, that is, when he was dismissed. This occurred on 15 November 2010 and so the applicant had until 14 November 2016 to file the claim. The applicant did not deny that the limitation period had expired, however, he argued in essence that the court had the power to extend the time within which the claim could be filed.

The relevant law

[45] The appellant is contending that the 1980 UK Statute allows for the extension of time within which to file the claim. This statute does not form part of the laws of Jamaica

and is therefore not applicable to this jurisdiction. The law governing the limitation period is the Act.

[46] Section 41 of the Interpretation Act incorporated into the laws of Jamaica all the statutes of the United Kingdom prior to the commencement of 1 George II Cap. 1. Section 41 is in the following terms:

> "All such laws and Statutes of England as were, prior to the commencement of 1 George II Cap 1, esteemed, introduced, used, accepted, or received, as laws in the island shall continue to be laws in the Island save in so far as any such laws or statute have been, or may be, repealed or amended by any Act of the Island."

[47] As it relates to the limitation of actions in relation to debt and contract section 46 of the Act states:

> "In actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence in any of the Courts of this Island, of a new or continuing contract, whereby to take any case out of the operation of the United Kingdom Statute 21 James I. Cap. 16, which has been recognized and is now esteemed, used, accepted and received as one of the statutes of this Island, or to deprive any party of any benefit thereof unless such acknowledgment or promise shall be made or contained by or in some writing …"

The English Statute of Limitation, Statute 21 James 1, Cap 16 of 1623, section 3, in so far as is relevant reads:

> "… all actions of debt grounded upon any lending or contract without specialty … which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after; (that is to say;) … within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, and not after …"

A contract of specialty is one made by deed, whereas a contract made 'without specialty' is a simple contract. The applicant did not assert that his contract of employment was anything more than a simple contract. Therefore, the applicable limitation period is six years (see **International Asset Services Limited v Edgar Watson** [2014] JMCA Civ 42 paras. [19] and [24]).

[48] While the English limitation law has been the subject of modernization through a number of amendments, those amendments have not been made a part of Jamaican law. In **Bartholomew Brown and Bridgette Brown v Jamaica National Building Society** [2010] JMCA Civ 7 ('**Brown v JNBS**'), this court was called upon to consider the applicability of section 32 of the UK Limitation Act 1980, as amended in 1986 and 1987 in this jurisdiction. In that case, as in this case, the claim had been struck out for being statute barred. It was argued that the respondents had been guilty of fraud which had been concealed so, time did not start to run until the discovery of the fraud. The appellants relied on two decisions of the House of Lords that had been decided under section 32 of the UK Limitation Act 1980.

[49] Phillips JA reviewed the limitation law in this jurisdiction and summarised section 32(1) of the English legislation then made two pertinent observations, in so far as this appeal is concerned. Firstly, the learned judge of appeal confirmed that in claims based on contract and tort, the limitation period is six years. At para. [40] Phillips JA said:

> "… actions based on contract and tort (the latter falling within the category of 'actions on the case') are barred by section III, subsections (1) and (2) respectively of the 1623 statute after six years (see **Muir v Morris** (1979) 16 JLR 398, 399 per Rowe JA)."

Secondly, the learned judge of appeal declared that section 32(1) and, consequently, the House of Lords decisions upon which the appellants relied, were not applicable in this jurisdiction. At para. [43] Phillips JA pronounced as follows:

> "This section has no equivalent in Jamaican law and it therefore follows, in our view, that neither of the decisions of

> the House of Lords upon which Mr Brown relied has any application to this case …"

[50] Therefore, on the authority of **Brown v JNBS**, this court has no power to extend the limitation period. The limitation period of six years having expired, the applicant's claim was hopeless with no chance of succeeding, once the respondent raised this defence.

[51] Rule 26.3(1)(b) of the CPR gives the court the power to strike out a statement of case "… if it appears to the court that the statement of case or the part to be struck out is an abuse of the process of the court …". In **International Asset Services Limited v Edgar Watson**, Dukharan JA, at para. [15], said:

> "… Under the [Limitation of Actions Act], a matter that is statute barred will have no prospect of success at trial and is therefore an abuse of the process."

[52] P Williams JA expressed a similar view in **Attorney General of Jamaica v Arlene Martin** [2017] JMCA Civ 24, in which **International Asset Services Limited v Edgar Watson** was cited. At para. [36] the learned judge of appeal opined:

> "Although the defence that a limitation period has expired is a procedural defence, it is one that usually has to be raised as such and be resolved at trial. However, it is permissible for the defendant to apply to have the claim, or the relevant parts of it struck out as being an abuse of process …"

[53] The law on this issue is clear. The applicant's claim was statute barred. Further, the applicant's reliance on section 32(1) of the UK Limitation Act 1980 could not avail him because that Act is not a part of the laws of Jamaica and there is no equivalent provision in the Act. Therefore, the learned master, having been seized of jurisdiction to hear and determine the application to strike out the applicant's statement of case, was correct in finding that his claim was irremediably statute barred. Accordingly, it was a correct exercise of her discretion to strike out the statement of case as an abuse of the process of the court. Based on the forgoing the appeal would have had no chance of success. It was for the above reasons that the orders at para. [4] were made.