[2022] JMCA App 37

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

APPLICATION NO COA2022APP00059

MOTION NO COA2022MT00009

BETWEEN	**BENBECULA LIMITED**	**1ST APPLICANT**
AND	**MALCOLM MCDONALD**	**2ND APPLICANT**
AND	**PALM BEACH RUNAWAY BAY LIMITED**	**RESPONDENT**

Mrs Denise Kitson KC and Miss Regina Wong instructed by Grant, Stewart, Phillips & Co for the applicants

Michael Hylton KC, Kevin Powell and Miss Daynia Allen instructed by Hylton Powell for the respondent

25 July and 20 December 2022

MCDONALD-BISHOP JA

[1] Benbecula Limited and Mr Malcolm McDonald ('the applicants') seek to move this court to grant conditional leave to them to appeal to His Majesty in Council from a decision of this court made on 6 May 2022 refusing permission for them to file an appeal. The applicants sought to bring an appeal against the decision of Batts J, made in the Supreme Court on 1 March 2022, in favour of Palm Beach Runaway Bay Limited ('the respondent'). The applicants also seek a stay of execution pending the appeal to His Majesty in Council.

The background

[2] On 29 December 2020, the respondent filed a claim in the Commercial Division of the Supreme Court, claiming an entitlement and right to enforce a right of way over a private roadway marked "Road Reserved 26 Feet Wide", as shown on a plan annexed to the certificate of title registered at Volume 1505 Folio 947 of the Register Book of Titles.

[3] The respondent alleged that the applicants had wrongfully enjoyed sole and exclusive occupation of the said right of way by enclosing it with a wall and fence, erecting a tennis court and doghouse and landscaping the area.

[4] The applicants disputed the claim on the basis that the right of way had long been extinguished by their exclusive and undisturbed occupation of the roadway, over which the right of way existed, since in or around 1996. The applicants also asserted that the right of way had not been utilized by the respondent or its predecessors in title for a period in excess of 27 years, accompanied by a clear intention to abandon the right of way.

[5] The respondent applied for summary judgment seeking, among other things, the following orders:

> "a. The [respondent] be granted summary judgment against the [applicants] on the claim herein.
>
> b. Alternatively, the [respondent] be granted summary judgment on the issue as to whether the right of way over the reserved road has been extinguished by virtue of the [1st applicant's] alleged exclusive occupation of the reserved road."

[6] On 1 March 2022, Batts J granted summary judgment in favour of the respondent and refused the applicants' application for leave to appeal.

[7] The applicants applied to this court for permission to appeal the decision of Batts J and for a stay of execution of the summary judgment and other orders made by Batts J.

[8] On 6 May 2022, after hearing the application, the court made the following orders:

> "1. The application for permission to appeal the orders of Batts J made on 1 March 2022 is refused.
>
> 2. The application for a stay of execution of that part of the order of Batts J that, 'A case management conference for the assessment of damages and the consideration of other remedies to be fixed', is refused.
>
> 3. Unless submissions proposing a contrary order are filed and served within seven days of the date of this order, costs are awarded to the respondents to be agreed or taxed."

[9] Dissatisfied with the decision of this court, the applicants filed a notice of motion, on 26 May 2022, seeking conditional leave to appeal to Her Majesty in Council (now His Majesty in Council). The motion was brought pursuant to section 110(2)(a) of the Constitution of Jamaica ('the Constitution') and section 3 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962.

[10] The applicants' position, as stated in the supporting affidavit of Malcolm McDonald, the 2nd applicant, is that they have satisfied the provisions of section 110(2)(a) as they have questions of great general or public importance or ones which otherwise ought to be submitted to His Majesty in Council in any civil proceedings. The questions are:

> "a. Whether the Limitation of Actions Act has no application to a claim to exercise prescriptive rights and only applies to claims for ownership, possession or rent.
>
> b. Whether the right of entry referred to in section 3 in the Limitation of Action [sic] is to be confined and narrowly interpreted as applying only to suits and/or actions to recover possession of land or rent or whether the use of the word 'OR' in the statute is disjunctive and intended by the framers of the statute to apply the Limitation of Actions Act to proceedings in relation to right to entry to land generally.

c. Whether pursuant to the provisions of the Limitation of Actions Act and the Interpretation Act and the common law, an easement or right of way is an interest in land.

d. Whether an easement or right of way over land is extinguishable by operation of section 3 of the Limitation of Actions Act.

e. Whether if the applicants acquire by adverse possession title to a private reserved road, they would take title to it, subject to the easement in favour of the respondent, or whether enjoying unity of possession and ownership regarding the reserved road, the easement would, by those facts be extinguished."

[11] The applicants are of the opinion, these are important and difficult questions of law which go beyond the rights of these particular litigants and are apt to guide and bind others in their proprietary relations. Therefore, they contend that the questions are of great general importance concerning the practice of conveyancing and land law in Jamaica and in other jurisdictions with similar statutes and are a matter of public interest, which ought to be submitted for the consideration of His Majesty in Council.

[12] The respondent's position is that the proposed appeal to His Majesty in Council would not involve the resolution of any issues that could be considered to be of great general or public importance or otherwise fit for an appeal to His Majesty in Council. Therefore, the court should refuse the orders sought in the applicants' motion for conditional leave to appeal and stay of execution.

Preliminary issue of law

Whether the court has jurisdiction to grant conditional leave for an appeal to His Majesty in Council from a decision of this court refusing leave to appeal

[13] During the course of the hearing of the notice of motion, the court raised the question of whether it is permissible for it to grant leave to appeal to His Majesty in Council from a decision of this court refusing permission to appeal. The court recognised that there was no appeal in this court from which a decision would have arisen and so

invited the parties to submit on this issue as no known authority was brought to the court's attention, which dealt specifically with this issue.

[14] The parties were allowed the opportunity to make additional submissions in this regard, which they utilised.

The respondent's supplemental submissions on the preliminary issue

[15] The respondent was the first to accept the court's invitation to be heard on the issue. Counsel filed written supplemental submissions on behalf of the respondent on 19 August 2022, in which they contended that the motion should be denied on the ground that it falls outside of the court's jurisdiction under section 110(2)(a) of the Constitution.

[16] Counsel submitted that section 110(2)(a) of the Constitution allows appeals to His Majesty in Council "from decisions of the Court of Appeal" where the question involved "in the appeal" is of great general or public importance. Section 110(5) of the Constitution then states that a decision of the Court of Appeal means "a decision of that Court on appeal from a Court of Jamaica".

[17] Counsel argued that the decision which the applicants are seeking permission to appeal is not a decision of the Court of Appeal "on appeal from a Court of Jamaica". Instead, it is a decision which prevented the applicants from appealing to the Court of Appeal and as such, there is no decision from the Court of Appeal to which section 110(2)(a) of the Constitution could apply.

[18] In addition to section 110(2)(a) of the Constitution, counsel for the respondent also rely on the principle in **Lane v Esdaile** [1891] AC 210, as another basis on which the court should refuse the application for leave to appeal to His Majesty in Council. They argued that entertaining the present application would run contrary to the principle in **Lane v Esdaile** and would result in absurdity, which the principle is intended to avoid. They noted further that the principle was more recently explained by the English Court of Appeal in **Sarfraz v Disclosure and Barring Service** [2015] EWCA Civ 544 and has

been recognised by this court as still being applicable. See, in this regard, **Eduardo Anderson v National Water Commission** [2015] JMCA App 15 and **National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Peter Jennings** [2016] JMCA App 27), albeit that the principle was not applied in the circumstances of those cases.

The applicants' supplemental submissions on the preliminary issue

[19] The applicants, for their part, filed written supplemental submissions on 26 August 2022, responding to the respondent's submissions. They do not agree with the respondent's position that section 110(2)(a) of the Constitution and the principle in **Lane v Esdaile** operate to bar the grant of leave to appeal to His Majesty in Council.

[20] In so far as section 110(2)(a) is concerned, counsel submitted that the respondent's limited interpretation of the provision cannot avail it. According to counsel, the plain language of the Constitution permits an appeal from the decision of this court. Counsel contended that the decision of the court in this matter, refusing permission to appeal, clearly falls within that definition. They argue that the limited interpretation, advanced by the respondent as being supported by the authorities, is not sustainable.

[21] Counsel for the applicants also contended that the authorities relied on by the respondent do not negate this court's jurisdiction to grant leave to appeal to His Majesty in Council as those authorities are entirely distinguishable from the present case. Counsel argued that contrary to the submissions of the respondent, the facts of **Lane v Esdaile** are different from the present case and that what was critical to that decision was that the Court of Appeal had refused the application for permission to appeal and had made no order. The action of the court making no order, counsel argued, "is the foundation of their Lordships' decision [in the House of Lords] to affirm the preliminary objection".

[22] In relation to the other cases relied on by the respondent, counsel submitted that those cases are inapplicable as they are limited in scope based on their governing

statutory provisions. Accordingly, there is no legislative provision that limits the power of this court to grant leave in this case.

[23] The applicants rely on the case of **Winston Finzi v Jamaica Redevelopment Foundation, Inc** [2022] JMCA App 10 ('**Winston Finzi v JRF**') to argue that this court has jurisdiction to grant leave to appeal to His Majesty in Council from a decision refusing leave to appeal to the court. Counsel highlighted that although Mr Finzi had filed an application for leave to appeal to Her Majesty in Council (as it then was), which was refused by this court, this court did not find that it had no jurisdiction to grant leave in such circumstances where permission to appeal the decision from the court below was refused. Furthermore, and even more importantly, counsel noted that Mr Finzi had gone ahead and applied to Her Majesty in Council for special leave to appeal the decision of this court and had obtained leave to do so. This, counsel contended, "has settled the question of jurisdiction". Accordingly, the court should grant the orders as sought in the notice of motion.

Discussion

[24] Section 110(2)(a) of the Constitution states:

> "(2) An appeal shall lie from decisions of the Court of Appeal to [His] 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 [His] Majesty in Council, decisions in any civil proceedings; …"

[25] Note is also made of section 110(5) of the Constitution which states that:

> "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."

[26] Section 110 of the Constitution is clear and unambiguous that the court's jurisdiction in granting leave to appeal to His Majesty in Council is with respect to "**decisions of the Court of Appeal**" where the question involved "**in the appeal**" is of great general or public importance or which otherwise should be submitted. Subsection 110(5) is similarly beyond debate that a decision of this court for the purpose of the grant of leave to the applicants to appeal to His Majesty in Council must be a decision "**on appeal**" to this court from a decision of the court below.

[27] The decision of this court in the instant case is a refusal of the applicants' application for permission to appeal to it. The applicants were, therefore, not permitted to file an appeal against the decision of the court below. The court's power to restrict the right to appeal, in the instant case, would have been derived from section 11(1) of the Judicature (Appellate Jurisdiction) Act ('JAJA'). This subsection enumerates the circumstances where no appeal shall lie to the Court of Appeal and those where an appeal may lie but only with the leave of the court. Section 11(1)(f), in so far as immediately relevant, states:

> "**No appeal shall lie 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…" (Emphasis added)

[28] This case would have fallen within subsection 11(1)(f) of the JAJA since the judgment from which the appeal was sought to be brought was an interlocutory judgment or order of a judge of the Supreme Court and none of the exceptions listed under that subsection applies to the applicants' case. Therefore, the leave of either a judge of the Supreme Court or of this court was required by statute for the applicants to approach this court to entertain their appeal. The right to appeal is, therefore, one restricted by statute and not merely by rules of court. This distinction is critical in examining the circumstances of this case as demonstrated by the authorities cited by the respondent, to which I will shortly turn.

[29] It suffices to say at this point that with there being no appeal to this court from the decision of Batts J, there was also no decision of this court on an appeal from the Supreme Court, which would trigger the provisions of section 110(2)(a) of the Constitution.

[30] Consequently, there could have been no question arising from the decision of this court, which is amenable to a further appeal through the gateway of the Constitution. The applicants' position that the court should grant them leave to appeal to His Majesty in Council by virtue of section 110(2)(a) is unsustainable on a literal reading of the Constitution and section 11(1)(f) of the JAJA. For all intents and purposes, therefore, the decision of Batts J must be taken, at this point, as final and conclusive given the refusal of leave to appeal from it by this court.

[31] This analysis logically leads to a consideration of the **Lane v Esdaile** principle on which the respondent relies. In that case, judgment was given at first instance against certain defendants. Those defendants applied, out of time, for permission to appeal to the Court of Appeal of England. Their application was refused. The defendants then applied for permission to appeal to the House of Lords against that refusal of the Court of Appeal. The House of Lords considered a preliminary objection on the basis that there could be no appeal to that body against such a refusal. Having so considered, their Lordships unanimously upheld the preliminary objection. Lord Halsbury, in delivering the leading judgment, opined, in part (pages 211 -212 of the report):

> "...I am of opinion that this preliminary objection ought to prevail. An appeal is not to be presumed but must be given. I do not mean to say it must be given by express words, but it must be given in some form or other in which it can be said that it is affirmatively given and not presumed. In the particular case before your Lordships the appeal is certainly not given in express words... It is to be something that is done by the order of the court… although a thing might be called an order, or might be called a judgment, or might be called a rule, or might be called a decree, it might well be that nevertheless by reason of the context it would come within

the obvious meaning and purpose of the statute; so that although it was no [sic] one of those things in name it might be one of those things in substance, and therefore would come within the general provision that an appeal should lie.

But when I look not only at the language used, but at the substance and meaning of the provision, it seems to me that to give an appeal in this case would defeat the whole object and purview of the order or rule itself, because it is obvious that what was there intended by the Legislature was that there should be in some form or other a power to stop an appeal – that there should not be an appeal unless some particular body pointed out by the statute... should permit that an appeal should be given. **Now just let us consider what that means, that an appeal shall not be given unless some particular body consents to its being given. Surely if that is intended as a check to unnecessary or frivolous appeals it becomes absolutely illusory if you can appeal from that decision or leave, or whatever it is to be called itself**. How could any Court of Review determine whether leave ought to be given or not without hearing and determining upon the hearing whether it was a fit case for an appeal? And if the intermediate Court could enter and must enter into that question, then the Court which is the ultimate Court of Appeal must do so also. The result of that would be that in construing this order, which as I have said is obviously intended to prevent frivolous and unnecessary appeals, you might in truth have two appeals in every case in which, following the ordinary course of things, there would be only one; because if there is a power to appeal when the order has been refused, it would seem to follow as a necessary consequence that you must have a right to appeal when leave has been granted, the result of which is that the person against whom the leave has been granted might appeal from that, and inasmuch as this is no stay of proceeding the Court of Appeal might be entertaining an appeal upon the very same question when this House was entertaining the question whether the Court of Appeal ought ever to have granted the appeal. **My Lords, it seems to me that that would reduce the provision to such an absurdity that even if the language were more clear than is contended on the other side one really**

> **ought to give it a reasonable construction**." (Emphasis added)

[32] In **Sarfraz v Disclosure and Barring Service**, Dyson MR, in explaining the principle in **Lane v Esdaile**, stated that:

> "26. **The essence of the principle is that, in the absence of express statutory language to the contrary, a provision giving a court the power to grant or refuse permission to appeal should be construed as not extending to an appeal against a refusal of permission to appeal. That is not because the word used to describe the decision in respect of which permission to appeal is sought bears a special or narrow meaning. It is because, as Lord Esher put it in *Stevenson*, the decision which it is sought to appeal is, '*from the very nature of the thing*, final and conclusive, and is without appeal, unless an appeal from it is expressly given'**.
>
> …
>
> 35. …**in the absence of clear contrary statutory language, the *Lane v Esdaile* principle applies to any provision which requires permission as a condition of the right to appeal**. The rationale which underlies the principle applies with equal force to any provision which imposes a requirement of permission to appeal. The use of broad words, such as 'the right to appeal' and 'decision' is not sufficient to indicate a Parliamentary intention to disapply the principle. In *Lane v Esdaile* itself, the relevant statutory provision stated that "an appeal shall lie to the House of Lords from any order or judgment" of the Court of Appeal. Those broad words were insufficient to disapply the principle." (Emphasis added)

[33] In **Eduardo Anderson v National Water Commission**, at para. [32], this court recognised the "longstanding" decision of the House of Lords in **Lane v Esdaile** and referenced the explanation of the principle by Lord Hoffman in **Kemper Reinsurance Company v The Minister of Finance and others** [1998] UKPC 22 ('**Kemper**'). Lord

Hoffman, on behalf of the Judicial Committee of the Privy Council, explained the principle in this way:

> "…**that a provision requiring the leave of a court to appeal will by necessary intendment exclude an appeal against the grant or refusal of leave, notwithstanding the general language of a statutory right of appeal against decisions of that court.** This construction is based upon the 'nature of the thing' and the absurdity of allowing an appeal against a decision under a provision designed to limit the right of appeal." (Emphasis added)

[34] As Morrison JA (as he then was) explained by reference to Lord Hoffman's dicta at paras. 17 to 19 in **Kemper**, a requirement of leave to appeal is what attracts the reasoning in **Lane v Esdaile**. The authorities have distinguished between the requirement for leave by rules of court (such as leave to apply for judicial review) and the statutory requirement for leave to appeal as required by section 11(1)(f) of the JAJA. The decision from the Supreme Court, in this case, was excluded from the general right of appeal granted by statute (the JAJA) and so the leave of this court to bring the appeal from the decision of Batts J was a statutory and crucial pre-requisite.

[35] The court had given its reasons for refusing leave in writing. Although strictly speaking, it was a decision with written reasons and, therefore, may properly be regarded as a judgment of the court, it was, nevertheless, in substance, a decision on an application for permission to appeal. It was not a decision **on an appeal** brought under the general jurisdiction of the court as conferred by section 10 of the JAJA. Therefore, permission to appeal having been denied by this court, meant, in effect, that the applicants were denied access to the court to appeal the decision of Batts J. The court was empowered to restrict the applicants' right to appeal in accordance with the power conferred by Parliament. Therefore, in keeping with section 11(1)(f) of the JAJA, no appeal lies to this court from the decision of Batts J. It follows then that the gateway, through this court, to His Majesty in Council is closed.

[36] In my view, the case of **Winston Finzi v JRF**, relied on by the applicants, is wholly unhelpful. The point regarding the jurisdiction of the court to grant leave in circumstances, where it had refused permission to appeal, was never raised or ventilated in those proceedings and so was not the subject of deliberations and decision by the court. Also, the fact that special leave was granted by the Privy Council for the appeal to be brought does not assist with the issues to be determined on this application.

[37] It is always open to a litigant, denied leave to appeal by this court, to apply for special leave to the Privy Council. The power of the Privy Council to grant special leave is not coterminous with the jurisdiction or power of this court to grant leave pursuant to section 110(2) of the Constitution. Section 110(3) of the Constitution clearly reflects this fact; it states:

> "Nothing in this section shall affect any right of [His] Majesty to grant special leave to appeal from decisions of the Court of Appeal to [His] Majesty in Council in any civil or criminal matter."

[38] In **Campbell v R** [2011] 2 AC 79, a case from this jurisdiction (cited in **Sarfraz v Disclosure and Barring Service**), the unique jurisdiction of the Privy Council to grant special leave was extensively examined. The applicant was convicted of murder and his applications for leave to appeal against conviction were refused. He applied to the Privy Council for special leave to appeal from the decision of this court. His application for special leave was granted. It was held that special leave could be granted where this court had refused to entertain any appeal against the decision or conviction in respect of which special leave was sought. Their Lordships opined that there was no evidence of the principle in **Lane v Esdaile** or any such rule being applied to the statutory provisions, which governed the grant of special leave to appeal (section 3 of the Judicial Committee Act 1833 and section 1 of the Judicial Committee Act 1844). After having regard to the language of those statutory provisions their Lordships observed that they reflect the royal prerogative power to grant special leave and concluded that the "rule in *Lane v Esdaile* is not applicable **on any application made for special leave to the Privy Council**

itself" (emphasis added). In firmly establishing the position that the special jurisdiction of the Privy Council does not attract the restriction in **Lane v Esdaile**, their Lordships noted that sections 1 and 3 of the Judicial Committee Acts of 1833 and 1844, respectively,

> "'…affirmed and regulated' in statutory form the former royal prerogative, which itself 'cannot be restricted or qualified save by express words or by necessary intendment': *British Coal Corpn v The King* [1935] AC 500, 512, 519; *Renton, The Conditions of Appeal from the Colonies to the Privy Council* (1888), p 11, proposition 2" (para 21 of the judgment).

[39] Their Lordships' reasoning in **Campbell v R** plainly reflects the position that the Privy Council's jurisdiction to grant special leave to appeal, pursuant to the Judicial Committee statutes, is *sui generis* and, therefore, distinct from other appellate jurisdictions, including that of the House of Lords (as it then was) and now the Supreme Court (see paras. 16, 17 and 18 of the judgment). However, their Lordships noted:

> "18 Nevertheless, it is necessary to recognise that **apparently general statutory language has been restricted in the parallel contexts of the jurisdiction** of the House of Lords and now Supreme Court, **as well as other appeal courts. The rule of restriction in such contexts originates in *Lane v Esdaile*....**" (Emphasis added)

[40] It is clear that their Lordships have recognised the restriction in the language of the enabling provisions of other appellate courts, which would impact the right to appeal from a decision refusing permission to appeal. As they noted, in such a context, the restriction emanates from the **Lane v Esdaile** principle. Therefore, the Board has affirmed that **Lane v Esdaile** principle remains good law, even though its applicability to the jurisdiction of the Privy Council to grant special leave is excluded by the language of the statutes that have conferred on it the power to do so. The grant of special leave by the Privy Council in **Winston Finzi v JRF** must, therefore, be viewed against the background of the unique jurisdiction of the Privy Council to grant special leave to appeal to it by virtue of its enabling statutes and not within the framework of section 110(2)(a) of the Constitution, through which the applicants are seeking to access the Privy Council

from this court. The applicants are, therefore, not correct to say that **Winston Finzi v JRF** had settled the jurisdictional point raised for consideration in this motion.

[41] Accordingly, the fact that this court entertained the motion for conditional leave to appeal to the Privy Council in similar circumstances in **Winston Finzi v JRF**, or that the Privy Council granted special leave in that case, is not considered binding or of sufficient persuasive weight to accept the applicants' position that they be permitted to appeal to His Majesty in Council pursuant to section 110(2)(a) of the Constitution.

Disposition

[42] In conclusion, I would hold that having regard to the applicable law discussed above, this court should not accept the applicants' arguments that the **Lane v Esdaile** principle does not apply in the circumstances of this case and that section 110(2)(a) of the Constitution should be construed broadly to allow them to bring an appeal to the Privy Council. The weight of the authorities is against this position. Therefore, the notice of motion for conditional leave to appeal to His Majesty in Council from the decision of this court, made on 6 May 2022, refusing the applicants' application for permission to appeal the judgment and orders of Batts J, should be dismissed with costs to the respondent. Consequently, there is no basis to grant the applicants' request for a stay of execution pending the appeal to His Majesty in Council. It follows then that the application for a stay of execution should, likewise, be refused.

[43] The resolution of the preliminary issue of law against the applicants is dispositive of the motion, and so there is no need to consider whether the proposed questions the applicants wished to submit to His Majesty in Council would have satisfied the requirements of section 110(2)(a) of the Constitution. Accordingly, I would propose that an order in the terms suggested in para. [42] above be made by this court.

EDWARDS JA

[44] I have read the draft judgment of McDonald-Bishop JA and agree with her reasoning and conclusion. There is nothing I could usefully add.

FOSTER-PUSEY JA

[45] I, too, have read the draft judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion and have nothing useful to add.

MCDONALD-BISHOP JA

ORDER

1. The notice of motion for conditional leave to appeal to His Majesty in Council from the decision of this court, made on 6 May 2022, and for a stay of execution, filed on 26 May 2022, is refused.

2. Costs of the motion to the respondent to be agreed or taxed.