

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 136/2010

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE HIBBERT JA (Ag)

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|---------|----------------------------------|----------------------------|
| BETWEEN | ANTHONY BENJAMIN | 1 ST APPELLANT |
| AND | LINFORD CLARKE | 2 ND APPELLANT |
| AND | AUTUAN BLACKWOOD | 3 RD APPELLANT |
| AND | PERCIVAL HUSSEY | 4 TH APPELLANT |
| AND | OCEAN CONSTRUCTION LIMITED | 1 ST RESPONDENT |
| AND | THE OWNER OF THE TUG "AFRI STAR" | 2 ND RESPONDENT |

Vincent Chen and Miss Sylvan Edwards instructed by Chen Green & Company for the appellants

Carol Davis for the 1st respondent

Emile Leiba and Miss Gillian Pottinger instructed by DunnCox for the 2nd respondent

10 and 11 February 2011

PRELIMINARY RULING

HARRIS JA

[1] On 19 November 2009, a judgment in default of acknowledgment of service, arising out of an admiralty claim in rem brought by Ocean Construction Ltd for sums due for expenses incurred by it, was entered against the owners of the Tug "Afristar". The vessel was sold and the proceeds of sale paid into court.

[2] On 20 July 2010, King J made the following order:

- “1. By consent between the Claimant and Interested Parties Anthony Benjamin, Linford Clarke and Autuan Blackwood the sum of US\$50,000.00 being J\$4,300,000 of the \$9,848,914.75 paid into Court is to be paid out to the Attorney-at-Law for the Claimant in part payment of the Claimant's judgment.
2. Balance to remain in Court pending determination of rights of interested parties.
3. ...
4. ...”

[3] The following request for caution, dated 11 November 2009, was filed on behalf of Anthony Benjamin and Antonio Blackwood:

“We, Chen Green & Co, Attorneys at Law for Anthony Benjamine (sic), Cook of Manchioneal in the parish of Portland and Antonia Blackwood, Cook of Antoseat District, Croft Hill in the parish of Clarendon request the entry of a caution against the release of the above mentioned vessel or, if

sold its proceeds of sale paid into court, pursuant to Part 70.11 (2) of the Civil Procedure Rules 2002.

The Applicants for a caution claims (sic) to have an in rem right against the above mentioned vessel or proceeds of sale of the vessel totalling the sum of Fifteen Thousand United States Dollars (\$15,000.00) and continuing, representing unpaid wages due and owing to them as Cooks serving on the abovementioned vessel."

[4] On 29 October 2010 Benjamin, Blackwood, Linford Clarke, and Percival Hussey, by way of an application for court orders, sought leave to be joined in the action as interested parties. On 17 November 2010 the application was refused. On 23 November 2010 a purported notice of appeal was filed. For convenience, reference will be made to the parties seeking leave to appeal as the applicants.

[5] In a preliminary point taken by Mr Leiba, he contended that the document entitled "notice of appeal" is a nullity for the reason that leave to appeal was refused in the court below and permission for leave to appeal ought to have been sought in this court in accordance with rule 1.8 (1) of the Court of Appeal Rules 2002. It was further contended by him that an application for leave to appeal must be in compliance with form 7 as prescribed by rule 11.8 (3) of the Civil Procedure Rules 2002 and there is no such application, nor is there an affidavit in support of it. He further submitted that the proposed grounds of appeal have no real chance of success.

[6] Mr Chen acknowledged that the requisite permission had not been obtained. He, however, argued that an application for permission to appeal is embodied in the document filed as a notice of appeal in the form of one of the orders sought therein and that he proposed to rely on an affidavit of Linford Clarke previously filed in this matter in support of an application for a stay of execution. The court, he argued, ought not to allow a mere procedural omission, namely, the failure to issue form 7, to prevent the applicants from having their appeal heard and determined. No injustice would be suffered by the owners of the Tug "Afristar" if the application proceeds, while, great injustice would work to the applicants if it did not, he argued.

[7] We are of the view that although the applicants had failed to strictly comply with the relevant rules, in the interests of justice we will treat the order sought in the purported notice of appeal for permission to appeal as an application for leave to appeal and the affidavit of Linford Clarke on behalf of all the applicants as supporting the application. We will now turn to consider the question as to whether we could safely say that the applicants have a real chance of success on appeal.

[8] Rule 70.11 (7) (b) of the Civil Procedure Rules 2002 states:

"70.11 (7) Any person-

- (a) ...
- (b) whose interests are affected by any order sought or made, may be made a party to any claim in rem against the property or proceeds of sale."

There is no dispute that the applicants are interested parties. The critical question is, however, could they be joined in the suit subsequent to the entry of the judgment in favour of Ocean Construction Ltd?

[9] The answer to the question is found in the case of **Spence and Another v Hitchins and Another** SCCA No 127/05 delivered on 16 November 2009 in which this court considered the issue as to whether intervening parties could be joined in a suit after judgment. In that case a judgment setting aside an agreement for sale of property between the defendant and third parties was given in favour of the claimant. Subsequent to the entry of the judgment, an order was made amending the claim form by joining the third parties as parties to the action in order for them to pursue an appeal. Their appeal was struck out by a single judge of this court but was reinstated by the court which held that the third parties had a clear interest in the property and they, being affected by the judgment, should be heard on appeal.

[10] We are of the view that in the matter before us, the applicants are affected by the judgment of November 2009. The vessel has been sold in

keeping with an order of the court. The applicants aver that money is due and owing to them by the owners of the Tug "Afristar". They have an obvious interest in the proceeds of sale which have been paid into court. Significantly, Benjamin, Clarke and Blackwood consented to the payment out of part of the proceeds of sale to Ocean Construction Ltd. The issues relate to the applicants' respective rights in rem. Accordingly, we are led to conclude that they have a real prospect of success in the appeal.

[11] It is ordered that the applicants be granted leave to appeal and the notice of appeal filed on 23 November 2010 shall stand.