JAMAICA

IN THE COURT OF APPEAL

MOTIONS NO. 9&10/97

SUPREME COURT CIVIL APPEAL

SUIT NO. C.L. M 150 and B-141 OF 1996

COR: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A. (Ag)

BETWEEN	**BENROS COMPANY LIMITED**	**FIRST PLAINTIFF/APPLICANT**
AND	**BENTLEY ROSE**	**SECOND PLAINTIFF/ APPLICANT**
AND	**WORKERS SAVINGS & LOAN BANK LIMITED**	**DEFENDANT/RESPONDENT**

Messrs. C.M. Daley & Gayle Nelson for the Applicant
Dennis Goffe Q.C. and Miss Minett Palmer instructed by Myers Fletcher & Gordon for the Respondent

29th January, and 1st March, 1999

FORTE, J.A.

I have read in draft the judgment of Langrin J.A. (Ag.) and agree with the reasons and conclusion therein. I add only that the conduct of counsel in withdrawing from the Court without permission is reprehensible and demonstrates a total lack of

respect for the Court and an abandonment of the protection of the interest of his client, whom he summoned to join him in his departure. A complaint to the General Legal Council, will obviously be considered at the appropriate time.

BINGHAM, J.A.

I too have read in draft the judgment of Langrin J.A. (Ag.) and agree with the reasons and conclusion therein.

LANGRIN, J.A. (Ag).

This is an application for leave to appeal from a decision of Harrison (Paul) J. as he then was on a decision to set aside Default Judgment and giving leave to file defence. Leave to appeal having been refused by the Judge the matter came before this Court for an application to be heard seeking leave to appeal. This application gave rise to a preliminary point namely whether leave to appeal is required.

Mr. Daley had a motion to re-list the matter for hearing before the Court. However, he argued that in light of the Order made by the Board of the Privy Council on the 17th November, 1998, there was no necessity to seek leave to appeal since the Consent Order gave him that right.

The starting point is clear enough. By Section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act:

> "**11** - (1) No appeal shall lie -
>
> ...
>
> (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 ".

When the matter originally came before the Court of Appeal on the 8th of May, 1997, a preliminary objection pursuant to Section 11(1) (b) of the same Act was upheld. This gave rise to an appeal to the Privy Council, resulting in a Consent Order by the Judicial Committee of the Privy Council obtained on the 17th day of November, 1998.

It is necessary to set out the material parts of the Order:

> **WHEREAS** there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 16th day of October, 1998 in the words following viz:-
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> > "**WHEREAS** by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee the matter of an Appeal from the Court of Appeal of Jamaica between (1) Benros Company Limited (2) Macro Finance Corporation Limited and (3) Bentley Rose Appellants and Workers Savings and Loan Bank Respondent (Privy Council Appeal No. 22 of 1998) and likewise the humble Petition of the Appellants setting forth that on 8th October 1996 in the Supreme Court of Jamaica the Appellants entered Judgment in Default of Defence against the Respondent: that by Order dated 4th April, 1997 the Supreme Court set aside the Judgment in Default of Defence: that the Appellants applied for leave to appeal and the Court of Appeal of Jamaica on 6th May, 1997 dismissed the Appellants' application: that by Order in Council dated the 22nd day of July 1997 the Appellants were granted special leave to appeal to Your Majesty in Council; And humbly praying Your Majesty in Council to take this Appeal into consideration and that the Judgment of the Court of Appeal of Jamaica dated 6th May, 1997 may be reversed altered or varied and for further or other relief:
> >
> > "**THE LORDS OF THE COMMITTEE** in obedience to His late Majesty's said Order in Council have taken the Appeal and humble Petition into consideration and the Parties having consented to the terms. Their Lordships do this day agree humbly to report to Your Majesty as their opinion that this Appeal ought to be allowed and the case remitted to the Court of Appeal of Jamaica so that the Appellants may be heard on the merits of their Appeal and that the Orders for costs made by the Supreme Court of Jamaica on 4th April, 1997 and by the Court of Appeal of

> Jamaica on 6th May, 1997 be varied by making such costs follow the event of the Appellants' Appeal in Jamaica and that the costs of this Appeal incurred by the Appellants in Jamaica do also follow the event of the Appellants' Appeal in Jamaica and that there be paid by the Respondent to the Appellants their costs of this Appeal incurred in England to be taxed if not agreed."

We are of the opinion that the true construction of the Consent Order is that the application for leave to appeal which was the subject of the appeal to the Board of the Privy Council was remitted for hearing on its merits by the Court of Appeal in Jamaica. The question which came before the Board of the Privy Council was a determination as to whether this Court had jurisdiction to hear the application having regard to Section 11 (1) (b) of the Judicature (Appellate Jurisdiction) Act. Since it was decided that the Court of Appeal had jurisdiction this Court should now hear the application for leave to appeal which was originally before the court on 8th May, 1997 when the application was dismissed. A fortiori , there was no notice and grounds of appeal before this Court at any time.

A similar situation arose in Privy Council Appeal No. 69/97 ***R.B. Manderson Jones v Societe Internationale De Telecommunications Aeronautiques*** (SITA) delivered 27th July, 1998 in which the Privy Council held that the Court of Appeal erred in upholding the preliminary objection that the Court had no jurisdiction to hear an appeal by virtue of section 11 (1) (b) of the Judicature (Appellate Jurisdiction) Act. The appeal was allowed and the case returned to the Court of Appeal so that the appellant may be heard on the merits of his appeal. However, it should be pointed out that the ***Manderson-Jones*** appeal went before the Board at the level of an appeal and not at the level of a preliminary objection to an application for leave to appeal.

Leave to appeal is required against interlocutory orders and interlocutory judgments save for certain exceptions which are irrelevant here. Where leave to

appeal to the Court of Appeal is required as in this case that leave must be obtained before notice of appeal is given. The Notice of Appeal cannot incorporate an application for leave. If it does, it is not a valid notice of appeal . See ***Cumber v Robinson*** [1951] 2 K.B. 831.

In ***White v Brunton*** [1984] 2 All E.R. 606 the Court of Appeal decided in somewhat similar circumstances that the question of leave to appeal goes to jurisdiction and so the point must be taken. This Court has no jurisdiction to hear the appeal otherwise than with leave, consequently the question of the necessity for leave to appeal may be raised by the Court's own motion.

Mr. Goffe, Q.C. rightly raised the point by a preliminary objection and the Court unanimously decided that leave to appeal must first be obtained. The jurisdiction of the Privy Council to enter upon the question will only arise after it has been considered and adjudicated upon by the Court of Appeal of Jamaica. It is against that background and for the reasons stated that we embarked upon the hearing of the application for leave to appeal.

Mr. Daley for the applicant conceded that he did not have a Notice of Appeal before the Court, but requested that the court should treat his Motion to re-list the matter for hearing filed on 15th January, 1999 as the Notice and Grounds of Appeal. This we refused to do. It was then that he applied to the Court for leave to withdraw. Leave having been refused, he and his junior counsel nevertheless withdrew. We embarked upon the hearing of the application for leave to appeal which was before the Court.

HEARING OF THE APPLICATION

Benros Company Ltd. is owned by Mr. Bentley Rose. Mr. Winston McKenzie is a Bank Officer employed to Workers Bank. The company opened an account with the bank and certain corporate documents had to be signed on behalf of the Company. Mr. Rose deponed an affidavit that he left everything to Mr. McKenzie and he would sign cheques and give to Mr. McKenzie with the expectation that he would add his own signature before tendering the cheques for negotiation by the bank. There is a clause in the mandate to the Bank stating that cheques of $5,000 or more should have the signature of both Rose and McKenzie. Rose would give cheques to McKenzie expecting him to add his signature. Cheques with only one signature were dishonoured. McKenzie is now facing criminal charges arising out of these transactions. Some of the issues include: whether McKenzie was a servant or agent of the Bank, as also whether Rose was negligent in giving McKenzie the tool to do what he did. A determination of the mandate which was given to the bank is required.

The reliefs sought are clearly stated in the writ, that the defendant has wrongfully debited the first plaintiff's company account totalling $89,958,586.80 and for payment of the said sum as money due and owing to the first plaintiff and for repayment of the said sum of $89,958,586.80 as money had and received to the use of the plaintiff.

Judgment in default of defence on each suit was made on 8th October, 1996. Final judgment was entered in favour of the plaintiff (Macro Finance Corporation Ltd.) in the sum of $89,958,586.80 and costs.

On 9th October, 1996 summons for leave to file defence out of time was filed supported by affidavit and proposed defence. This summons was dismissed by Smith

J. on 18th October, 1996 and that order was confirmed by this Court who was asked to decide if the default judgments were regularly entered and not whether there was a defence on the merits. It was then that the defendant went before Harrison ,J who made this order on 4th April, 1997:

> "(a) The Default Judgment entered herein was bad and irregularly entered and are set aside (written judgment delivered).
>
> (b) Leave to appeal refused based on Court of Appeal Judgment in ***Manderson Jones v Societe Internationale De Telecommunications Aeronautiques (SITA).***
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> (c) 1st defendant to file defence within twenty one (21) days from the date hereof.
>
> (d) There shall be costs to the 1st defendant to be agreed or taxed, certificate, granted to two counsel".

It is from this Order that the current application for leave to appeal has been made.

The general test applied by the Court for leave to appeal is that leave will be given unless an appeal would have no realistic prospect of success.

The only significant point of law raised by the applicant is that the decision that the Default Judgments were irregularly entered , disagreed with a previous decision on the same matter by this Court. However, an examination of the previous judgment disclosed that the Court of Appeal was asked to decide if the judgments were regularly entered, not whether there was a defence on the merits. Hence this issue was not then before the Court.

This Court will not interfere with the exercise of a discretion of a Judge unless the Court is satisfied that the Judge was wrong. The burden cast on the applicant is therefore a heavy one.

In setting aside the Default Judgments the Learned Trial Judge decided inter alia, that:

> (a) the Default Judgments were irregularly entered because as the claims were based on a breach of the mandate given to the Bank the remedy was a declaration or an order for an account to be taken; and
>
> (b) the Default Judgments were irregularly entered because they were for sums in excess of that to which the plaintiff was entitled.

However, Harrison J, held in the alternative that even if the judgments were regularly entered, the Bank had a defence on the merits. He had this to say:

> "The submission of Counsel for the plaintiffs that there are no triable issues is unsupported by the affidavit evidence and the law. A trial Court is the appropriate forum to examine the evidence of the effect of the history and signature cards along with the corporate resolution and the issue of vicarious liability if fraud is proven, and not this court at this interlocutory stage; equally inappropriate is the invitation to examine at this stage the competing evidence of the deponent Bentley Rose that the cheques bearing his signature only and relied on by the 1st defendant to ground the defence of estoppel, were in fact sent on by him to the 2nd defendant for the latter to add a second signature... It is no business of this court at this stage to resolve conflicts of evidence or to make findings of facts... A defence on the merits exists in respect of each suit".

When the Defence and Counterclaim in each of the two suits are examined they clearly show that the Bank has a good defence on the merits in each suit.

It is settled law that a party to an action is prima facie entitled to have his day in Court by presenting his side of his case for consideration and give his own evidence in Court. If he were precluded by a chance from exercising this right and an order was made in his absence then providing no injustice was done to the other side, he should be allowed to exercise his right on terms in relation to costs.

In ***Morris v Taylor*** S.C.C.A No. 39/83 delivered November 22, 1984 Campbell J.A. quoted with approval from ***Evans V Bartlam*** [1937] 2 All E.R. 646 the following statement:

> "... The primary consideration is whether he has merits to which the court should pay heed. If merits are shown the Court will not prima facie desire to let pass a judgment on which there has been no proper adjudication".(p.14)

The Default Judgments having been set aside not just for irregularity but on the merits there should be a proper adjudication on all the issues as early as possible. The fact that the pleadings have been closed in the suits demonstrate that the issues to be determined are clearly stated and ready to be tried. The applicant has not shown that he has an arguable case on appeal. We concluded that no useful purpose would be served by granting leave to appeal.

At the conclusion of the hearing, for the foregoing reasons we refused the application, ordered a speedy trial and awarded costs of this application to the respondent to be agreed or taxed.