

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 120/2010

**BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE HIBBERT JA (Ag)**

BETWEEN BEST BUDS LIMITED APPELLANT

AND GARFIELD DENNIS RESPONDENT

Written submissions received from John Graham & Co for the appellant

No submissions received from the respondent

20 January 2012

MORRISON JA

[1] On 16 March 2011, McIntosh JA directed that this matter be placed before the court for consideration on paper, pursuant to rule 2.9(2)(f) of the Court of Appeal Rules 2002. In compliance with the judge's order, written submissions were received from the attorneys-at-law acting for the appellant, but no submissions were received from the respondent.

[2] The single question that arises on this appeal is a pure question of law, that is whether Simmons J (Ag) had jurisdiction in pending litigation to make the order, which she made on 16 September 2010, for an interim payment to be made by the appellant (a defendant in the court below) to the respondent (the claimant).

[3] The appellant contends that the learned judge had no such jurisdiction and the basis of its position is fully set out in its amended notice and grounds of appeal dated 26 October 2010:

“(a) That the learned judge had no jurisdiction to grant an interim payment order for the following reasons:

(i) That section 441A of the Judicature (Civil Procedure Code) Law, by an amendment to that Act, which amendment came into force on October 28, 1997, gave judges of the Supreme Court the jurisdiction to make an order granting interim payment.

(ii) That the said Judicature (Civil Procedure Code) Law has been repealed by Act No. 4 of 2003 The Judicature (Civil Procedure Code) Law (Repeal) Act 2003.

(iii) That there is no other statutory provision in Jamaican law that empowers a judge of the Supreme Court to order an interim payment.

(iv) That the court has no inherent jurisdiction to make an order for interim payment.

(v) That the Civil Procedure Rules 2002 is subsidiary legislation and they do not confer on the court the power to make an order for interim payment.

(vi) That the Civil Procedure Rules 2002 merely sets out the procedure by which such an application can be made.”

[4] In their very helpful written submissions, counsel for the appellant submitted that the court has no inherent power to make interim payment orders and that the jurisdictional basis on which judges of the Supreme Court made orders for interim payments before the coming into force of the Civil Procedure Rules 2002 (the CPR) was provided by section 441A of the Judicature (Civil Procedure Code) (Amendment) Act 1997. That basis was removed, it was submitted, by section 2 of the Judicature (Civil Procedure Code) Law (Repeal) Act 2003, which provided that "The Judicature (Civil Procedure Code) Law is hereby repealed". Although a procedure for applications for interim payment orders is set out in Part 17 of the CPR, the appellant contends that the CPR, as subsidiary legislation, cannot by itself confer jurisdiction in the absence of an enabling statutory provision.

[5] In my view, this argument is completely irresistible. That the Supreme Court has no inherent jurisdiction to make interim payment orders is plain. It is a well established principle of the common law that a defendant has a right not to be held liable to pay until his liability has been established by a final judgment (Civil Procedure 2008, volume 2, para. 15-94; see also *Moore v Assignment Courier Ltd* [1977] 2 All ER 842, per Sir John Pennycuik at pages 846 – 7 and Megaw LJ at page 848). In England, that incapacity was first remedied by section 20 of the Administration of Justice Act 1969 and the relevant provision is now to be found in section 32 of the Supreme Court Act 1981.

[6] Before the coming into force of the CPR on 1 January 2003, the rules for the conduct of civil proceedings in Jamaica were contained in a statute, the Judicature (Civil

Procedure Code) Law ('the CPC') and before 1997 there was no provision in the CPC that enabled a judge of the Supreme Court to make interim payment orders in pending civil proceedings (as to which, see *Jamculture Ltd v Black River Upper Morass Co. Ltd et al* (1989) 26 JLR 5). In that year, the CPC was amended by section 2 of the Judicature (Civil Procedure Code) (Amendment) Act, which inserted a new Title 36A (headed "Interim Payments") in the CPC. Thereafter (when the amending section was actually brought into force), section 441A of the CPC empowered the court in pending proceedings, "and in such circumstances as may be specified by Rules of Court", to make interim payment orders. In that same year, the Judicature (Rules of Court) Act was also amended to add a new sub-paragraph (4(2)(j)), empowering the Rules Committee of the Supreme Court to make provision "for specifying the circumstances in which the Supreme Court may make an order for an interim payment".

[7] The CPR was made by the Rules Committee, pursuant to the powers given to it by section 4(1) and (2) of the Judicature (Rules of Court) Act. Part 17 of the CPR purported to make provision for interim payment orders (rules 17.5 – 17.9), presumably pursuant to the authority given to the Rules Committee by section 4(2)(j) of the Judicature (Rules of Court) Act. However, it is clear that section 4(2)(j) itself plainly begs the question, whence the power of the court to make an interim payment order, and that the answer to that question is equally plainly to be found in section 441A of the CPC, as amended. But Parliament's next step, no doubt intended as purely consequential to the replacement of the CPC by the CPR at the beginning of January 2003, was to enact the Judicature (Civil Procedure Code) Law (Repeal) Act 2003,

section 2 of which provided that “The Judicature (Civil Procedure Code) Law is hereby repealed”. Therewith went, it seems to me to be clear, the statutory jurisdictional basis of the power of a judge of the Supreme Court to make an interim payment order and it has not since been replaced by any subsequent statutory provision.

[8] As regards the CPR, there remains, of course, the provisions of Part 17 as to the circumstances in which interim payment orders may be made, but the appellant naturally rely on a dictum of Lord Scott in *Beverley Levy v Ken Sales & Marketing Ltd* [2008] UKPC 6, para. 19, to make a point that hardly needs any authority, that is, that “while Rules can regulate the exercise of an existing jurisdiction they cannot by themselves confer jurisdiction”. While in that case the Board was concerned with the question whether there was any statutory authority for the making of charging orders provided for by the CPR (the answer to which was that there was none), identical considerations apply, it seems to me, to the instant case and I would therefore hold that, in the absence of a statutory jurisdictional basis for the making of interim payment orders, Part 17 of the CPR cannot be relied on to supply such a basis.

[9] It follows from the foregoing that, in my view, this appeal must be allowed, on the ground that Simmons J (Ag) had no jurisdiction to make an interim payment order in this matter. The judge’s order made on 16 September 2010 must accordingly be set aside and the respondent must pay the appellant’s costs of the appeal, to be taxed if not agreed.

[10] Since preparing a draft of this judgment, I have had the good fortune to read the characteristically erudite judgment delivered on 13 December 2011 by Sykes J in *Verma Dayes v Ritz Carlton Hotel of Jamaica Ltd* (Claim No 2008 HCV 03251), in which he also concludes that a judge of the Supreme Court has no jurisdiction at the present time to make an interim payment order. Given the real need that the power to make an interim payment order was first introduced to meet, I am bound to say that I share Sykes J's reluctance in having to reach the conclusion that I have reached on this appeal. It is to be hoped that the legislature will address this obvious gap in the present arrangements as a matter of urgency.

PHILLIPS JA

[11] I have read in draft the judgment of my brother Morrison JA and agree with his reasoning and conclusion. There is nothing that I wish to add.

HIBBERT JA (Ag.)

[12] I too agree with the reasoning and conclusion of Morrison JA and have nothing to add.

MORRISON JA

ORDER

Appeal allowed. Order made on 16 September 2010 set aside. Costs to the appellant to be taxed if not agreed.