JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2020CV00082

MOTION NO COA 2020MT00027

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

BETWEEN	**HASHEBA DEVELOPMENT COMPANY LIMITED**	**APPLICANT**
AND	**PETROLEUM COMPANY OF JAMAICA LIMITED**	**1ST RESPONDENT**
AND	**SEAN KINGHORN**	**2ND RESPONDENT**
AND	**JUDY-ANN KINGHORN**	**3RD RESPONDENT**
AND	**KINGHORN & KINGHORN (A PARTNERSHIP LAW FIRM)**	**4TH RESPONDENT**

Abraham Dabdoub and Christopher Dunkley instructed by Dabdoub Dabdoub & Co for the applicant

B St Michael Hylton QC and Garth A McBean QC instructed by Garth McBean & Co for the 1st respondent

2 , 3 February and 7 May 2021

P WILLIAMS JA

[1] I have read in draft the reasons for judgment of Dunbar-Green JA (Ag) and they accord with my own reasons for concurring with the order made.

SIMMONS JA

[2] I too have read the draft reasons for judgment of Dunbar-Green JA (Ag) and they accord with my reasons for concurring with the order made.

DUNBAR-GREEN JA (AG)

Introduction

[3] On 27 July 2020, an order for specific performance, along with certain consequential orders, was made by Laing J in favour of the applicant (the claimant below). On 5 October 2020, on an *ex parte* application by the applicant, Batts J imposed a freezing order on the assets of the 1st respondent (the 1st defendant in the court below), to the extent of $513,000,000.00 and set a date for an *inter partes* hearing. The relevant parts of Batts J's order are as follows:

> "3. The 1st Defendant by itself, its servants or agents or otherwise howsoever is hereby restrained except in the ordinary course of business from transferring, assigning, charging or otherwise dealing with any property and assets of the 1st Defendant to the extent of $513,000,000.00 until the Order dated 27th July 2020 has been complied with or until further Order of the Court.
>
> 4. *Inter partes* hearing is fixed for the 13th October 2020 in Open court."

[4] On 2 November 2020, this court heard an application by the 1st respondent for leave to appeal the order for specific performance and a stay of execution of the said order. The application was granted. The execution of orders 3-6 of Laing J's orders which were incidental to the order for specific performance were also stayed.

[5] On 3 December 2020, an application, by the 1st respondent to discharge the *ex parte* freezing order, came up for hearing before Laing J. The applicant raised a preliminary objection to the effect that the Supreme Court had no jurisdiction to hear any matter incidental to the substantive judgment on appeal and in circumstances where a stay of execution had been granted.

[6] For its part, the 1st respondent contended that as the freezing order had been obtained *ex parte*, the Supreme Court retained jurisdiction to discharge or vary it. Furthermore, the stay was inapplicable to that issue.

[7] In a judgment handed down on 14 December 2020, Laing J agreed with the 1st respondent that the Supreme Court retained jurisdiction to hear the application to discharge or vary its own *ex parte* order. It is that decision which has occasioned this motion before us.

[8] By amended notice of motion and supporting affidavit, filed 24 December 2020, the applicant sought to move this court to make the following declarations:

> "1. A declaration that the Supreme Court of Judicature of Jamaica has no jurisdiction to hear an application to set aside a freezing order obtained on an ex parte application made in a matter where the

substantive matter was pending appeal before and under the jurisdiction of the Court of Appeal which granted a stay of execution.

2. A declaration that the Judgment and Order made by Justice Kissock Laing in Claim No. SU 2020 CD 00095 that the Supreme Court still retained jurisdiction to hear an application to set aside an exparte [sic] order is a nullity or/ alternatively of no legal effect as Mr Justice Kissock Laing had no jurisdiction to consider an application to set aside an exparte [sic] order made after an appeal had been lodged in this honourable court and a stay of execution issued in the said appeal."

[9] At the commencement of the hearing, on 2 February 2021, a preliminary objection was made by Mr McBean QC. It is not necessary to set out Queen's Counsel's submissions as the essence of his contention is contained in the grounds of his application which are reproduced below. They read:

1. "Pursuant to Rule 1.11(1) of the Court of Appeal Rules, the Applicant [had] failed to comply with the established procedure to challenge the jurisdiction of Laing J which was delivered on 14 December 2020, the effect of which [did] not directly decide the substantive issues in the claim and would therefore properly constitute a procedural appeal;

2. Further to the above, the applicant [had] failed to seek and/or obtain either from the court below or from this court the requisite leave to appeal from the interlocutory judgment of Laing J in contravention of section 11.1(f) of the Judicature (Appellate Jurisdiction) Act; and

3. The applicant by filing a Notice of Motion to challenge the Judgment of Laing J [was] seeking to circumvent the established and mandatory

> procedure outlined in the governing Court of Appeal Rules and Judicature (Appellate Jurisdiction) Act."

[10] We considered the oral submissions of Queen's Counsel and the case of **Phyllis Mae Mitchell v Abraham Joseph Dabdoub** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 95/2001, judgment delivered 25 October 2001, relied on by the applicant, in which this court had heard a motion incidental to a matter on appeal. On 3 February 2021, we indicated that Mr McBean was technically correct. However, based on our reading of the written submissions and having considered the likely outcome of the matter and the efficient use of judicial time, it was decided to hear the motion.

[11] On 3 February 2021, having heard the motion, we made the following orders:

> "1. Motion for declarations as set out in amended notice of motion filed on 24 December 2020 is refused.
>
> 2. No order as to costs."

[12] It was indicated then that our reasons would follow. I now fulfil that promise.

Background

[13] Since neither party provided us with the statement of the case which had formed the genesis of the matter in the Supreme Court, the background information, as set out below, was extracted from documents filed in relation to the *ex parte* application which was before Batts J and also from the judgment of Laing J.

[14] The applicant was a limited liability company having its registered office at 10 Altamont Crescent, Kingston 5, in the parish of Saint Andrew. It was engaged in the development of lands, part of Curatoe Hill in the parish of Clarendon, registered at Volume 1361 Folio 492 in the Register Book of Titles ("the property"). The 1st respondent was a limited liability company having its registered office at 695 Spanish Town Road, Kingston 11, in the parish of Saint Andrew. It was this respondent against whom the order for specific performance was made. The other respondents have functioned in various roles in relation to the 1st respondent and have been parties in this case.

[15] On or about 15 October 2018, the applicant and the 1st respondent entered into three agreements for sale in respect of three lots, part of the said land described above. Apparently, the terms and conditions of the agreements required payment by the 1st respondent of sums of money in discharge of mortgages and caveats lodged against the land. A dispute arose and, on 27 February 2020, the applicant filed a claim for specific performance of the agreements.

[16] On 27 July 2020, Laing J ordered specific performance of the agreements and made various consequential orders. An application for leave to appeal was made and Laing J refused to grant leave.

[17] On 24 August 2020, the 1st respondent filed an application in this court for leave to appeal the judgment of Laing J and a stay of execution of the order for specific performance and other incidental orders. On 3 November 2020, the application was granted. The relevant portions of that order are reproduced below:

> "2. Permission to appeal against the judgment and orders of the Honourable Mr. Justice Laing made on the 22nd and 27th July 2020 is granted to the Applicant.
>
> 3. Orders numbered 2, 3, 4, 5 and 6 made by the Honourable Mr. Justice Laing on the 27th day of July 2020 are hereby stayed until the hearing and determination of the appeal or until further order of the Court."

[18] As already indicated, it was the decision of Laing J that he had jurisdiction to hear the application to vary the *ex parte* freezing order, granted by Batts J, which led to the motion before us.

Applicant's submissions

[19] Mr Dunkley, on the applicant's behalf, contended that once a matter had been appealed and a stay of execution granted, there should be no further applications or orders in the Supreme Court, on any issue incidental to the hearing of that appeal. He submitted that it was beyond a doubt that the application for the discharge of the freezing order raised a matter incidental to the hearing of the appeal, and accordingly, Laing J the lacked jurisdiction to consider the application or make any order in relation to the *ex parte* freezing order, while the appeal subsisted.

[20] For that submission, the applicant relied on the judgment of this court in the case of **Paul Chen Young and Others v The Eagle Merchant Bank of Jamaica Limited and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 137/2007, judgment delivered 2 November 2010. In that case, the issue for consideration was whether Rattray J had the jurisdiction to revoke an order for a stay of execution of

a judgment which a judge of coordinate jurisdiction had ordered, pending the hearing of an appeal in the matter. On a notice of application for a declaration that the order of Rattray J was a nullity or alternatively, of no effect, this court made the following orders:

> "1. A Declaration that the Order dated the 11th day of May, 2007 granted by the Honourable Mr. Justice Rattray in the Supreme Court… revoking the earlier Order made by Mr. Justice Anderson on the 15th day of June, 2006m [sic] is a nullity or, alternatively, of no legal effect as:
>
> (a) Mr. Justice Rattray had no jurisdiction to consider the application or make the said Order as the substantive matter was pending appeal and under the jurisdiction of this Honourable Court.
>
> (b) Mr. Justice Rattray, being the a [sic] judge of concurrent or coordinate jurisdiction, had no jurisdiction to act as a Court of Appeal in revoking Mr. Justice Anderson's said Order."

[21] Counsel also referred us to the case of **Phyllis Mitchell**, particularly the following passage from the dictum of Forte P (as he then was) found at page 5:

> "The power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations 1958 in so far as is relevant to this issue is to be found in Section 8(2):
>
> > 'For the purposes of this section, there shall be vested in the Court of Appeal all jurisdiction and powers formally vested in the Supreme Court, or Full Court, when exercising appellate jurisdiction, and for all the purposes of and incidental to the hearing and determination of any appeal and the amendment, execution and enforcement of any judgment or order made thereon the Court of Appeal shall have all the power, authority and jurisdiction of the Supreme Court or Full Court.'

> This section in my view makes it very clear that the Court of Appeal has the jurisdiction to hear matters which are incidental to the hearing of an appeal. In my judgment, the question whether the mere filing of an appeal amounts to an automatic stay, particularly given the history and circumstances of this case, is a question of law incidental to the hearing of the appeal. Section 10 of the Judicature (Appellate Jurisdiction) Act speaks to such matters and I would therefore conclude that by virtue of that section this Court has jurisdiction to hear the Motion."

[22] Mr Dunkley sought to distinguish the case of **Bardi Limited v Millingen** [2018] JMCA Civ 33, on the basis that, unlike in the present case, there was no substantive appeal pending before this court. It was also submitted that the Court of Appeal had an inherent jurisdiction to consider issues which arise while a matter is on appeal and those incidental to the appeal. It was the proper forum, he argued.

Respondent's submissions

[23] In response, Mr Hylton QC indicated that the 1st respondent did not file any written submissions because it was content in relying on the judgment of Laing J, in the application to set aside the *ex parte* order. In his oral submissions, he posited that the sole issue before this court was whether a judge of the Supreme Court had the jurisdiction to vary or discharge an *ex parte* order made in that court, in circumstances where there was to be an *inter partes* hearing.

[24] Mr Hylton pointed out that although Laing J had made 12 orders on 27 July 2020, including the order for specific performance which was granted against the 1st respondent, aspects of the case were still pending in the Supreme Court against the 2nd, 3rd and 4th respondents. He also observed that the stay which was granted by this court,

pursuant to the order granting leave to appeal, did not include Batts J's order or, indeed, all of the orders made by Laing J. Therefore, any suggestion that the stay applied to all orders was wrong. Furthermore, the case against the other respondents could proceed to trial.

[25] In that context, Queen's Counsel contended that the Supreme Court retained jurisdiction to discharge or vary the *ex parte* order. Further, as the order of Batts J had been made without notice to the 1st respondent, the same judge or another judge of the Supreme Court had the jurisdiction to vary or set it aside. In support of that submission, he relied on **Bardi Limited**. It was also argued that neither **Phyllis Mitchell** nor **Paul Chen Young** was authority for a broad principle that once a matter was before this court, the Supreme Court no longer had jurisdiction.

Discussion

[26] The stay of execution in this court pertained to paragraphs 2, 3, 4, 5, and 6 of the orders of Laing J made on 27 July 2020. The *ex parte* order of Batts J granted on 5 October 2020 was not included. The latter order was not meant to be final. It was a temporary measure by the Supreme Court and as such that court retained the power to hold a further hearing at which the other affected parties would have the opportunity to be heard and a decision taken whether to vary or discharge the order. It was not necessary or prudent to refer that question to the Court of Appeal.

[27] In **WEA Records Ltd v Visions Channel 4 Ltd and Others** [1983] 2 ALL ER 589, at page 593, referenced by Phillips JA in **Bardi Limited** at paragraph [24], Sir John

Donaldson MR, who was dealing with the alternative jurisdictions of the Court of Appeal and the Supreme Court in relation to an *ex parte* order, made the following observations:

> "In terms of jurisdiction, there can be no doubt that this court can hear an appeal from an order made by the High Court on an ex parte application. This jurisdiction is conferred by s 16(1) of the Supreme Court Act 1981. Equally there is no doubt that the High Court has power to review and to discharge or vary any order which has been made ex parte. This jurisdiction is inherent in the provisional nature of any order made ex parte and is reflected in RSC Ord 32, r 6. Whilst on the subject of jurisdiction, it should also be said that there is no power enabling a judge of the High Court to adjourn a dispute to the Court of Appeal which, in effect, is what Peter Gibson J seems to have done. The Court of Appeal hears appeals from orders and judgments. Apart from the jurisdiction (under RSC Ord 59, r 14 (3)) to entertain a renewed ex parte application, it does not hear original applications save to the extent that they are ancillary to an appeal.
>
> As I have said, ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side, and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.
>
> This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without first giving the judge who made it or, if he was not available, another High Court judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision."

[28] In applying that dictum, Laing J correctly opined at paragraph [20] of his decision:

> "…[The] case of **Bardi** clearly acknowledges that *ex parte* applications made before the judge in the High Court require a different approach from that which obtains where an order made *inter partes* is being challenged. The reason this is so is quite clearly explained by Sir John Donaldson MR in the case of **WEA Records**….The reason seen to be demonstrably sensible especially in the case of *ex parte* freezing orders and other interim relief."

[29] The provisions which govern interim remedies, are set out in Part 17 of the Civil Procedure Rules (CPR). Rules 17.4(4) and 17.4(5) provide:

> "(4) The court may grant an interim order for a period of not more than 28 days (unless any of these Rules permit a longer period) under this rule on an application made without notice if it is satisfied that-
>
> (a) in a case of urgency, no notice is possible; or
>
> (b) that to give notice would defeat the purpose of the application.
>
> (5) On granting an order under paragraph (4) the court must-
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> (a) fix a date for further consideration of the application; and
>
> (b) fix a date (which may be later than the date under paragraph (a)) on which the injunction or order will terminate unless a further order is made on the further consideration of the application."

[30] Laing J made the following observation at paragraph [22] of his decision, with which I concur:

> "These provisions of the CPR exemplify and illustrate the explanation by Sir John Donaldson MR as to the basis for the Judge of the Supreme Court maintaining the jurisdiction to hear challenges to *ex parte* orders issued by that Court. This is rooted in the, somewhat – "temporary" nature of these orders. The Judge at the *inter partes* hearing, is not conducting an appeal, and where the original order which was granted *ex parte* is being challenged, that Judge, or a Judge of coordinate jurisdiction in the Supreme Court ought to have the opportunity to hear and determine that challenge, change, modify or correct the initial conclusion without the necessity for the intervention of the Court of Appeal."

[31] Counsel for the applicant placed great reliance on **Phyllis Mitchell**. However, the issue in that case was whether the Court of Appeal (not the Supreme Court) could deal with a matter incidental to the substantive appeal. Forte P answered in the affirmative on the basis of section 10 of the Judicature (Appellate Jurisdiction) Act which, for purposes of an appeal, confers on the Court of Appeal all the powers of the Supreme Court (as circumscribed by section 11).

[32] The case before us had nothing to do with powers that could be exercised by the Court of Appeal but rather the powers of a Supreme Court judge. **Phyllis Mitchell** was therefore of no assistance in resolving the matter.

[33] **Paul Chen Young** dealt with the question of whether a Supreme Court judge had the power to set aside an order, to stay execution of a judgment until the hearing of an appeal, which was granted by a judge of coordinate jurisdiction. This court found that there was no such power and declared that the impugned order was a nullity and of no legal effect. That point did not arise in this case where the interim order, being of a

temporary nature, remained open to finalization by the judge who granted it or one with coordinate jurisdiction.

[34] There was no merit in the applicant's submission that the Supreme Court should have refused to hear an application from a party who was aggrieved by a freezing order, which was made *ex parte* and intended to be temporary, simply on the basis that the substantive matter was on appeal. As soon as the aggrieved party was given notice that the *ex parte* freezing order had been issued, it was entitled to apply for the order to be varied or discharged by the same court.

Conclusion

[35] The stay granted by this court and the fact of a subsisting appeal did not affect the jurisdiction of the Supreme Court to hear an application in relation to an interim order which was made *ex parte*. The Supreme Court had and retained jurisdiction, under rule 17.4 of the CPR, to hear and determine the application to discharge the *ex parte* freezing order made by Batts J on 5 October 2020. In the result, there was no basis on which to disturb Laing J's findings.

[36] For the foregoing reasons, I concurred in making the orders at paragraph [11].