[2020] JMCA App 34

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS 63/2012 & 128/2015

APPLICATION NOS 128/2012, 161/2016, 149/2017 and 32/2018

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**DEMETRI JOBSON**	**1ST APPLICANT**
AND	**GILBERT MAX JOBSON**	**2ND APPLICANT**
AND	**THE ADMINISTRATOR GENERAL FOR JAMACA Administrator of the Estate of Gilbert Baron Jobson**	**1ST RESPONDENT**
AND	**NEW FALMOUTH RESORTS LIMITED**	**2ND RESPONDENT**

Mrs Symone Mayhew and Mrs Denise Senior-Smith instructed by Oswest Senior-Smith and Company for the applicants

The Administrator General of Jamaica did not appear and was not represented

Mrs Julliet Mair Rose instructed by Riam Esor and Company for the 2nd respondent

27, 28 February 2018 and 10 July 2020

MORRISON P

[1] I have had the great advantage of reading, in draft, the reasons for judgment written by my brother Brooks JA. I agree with them and there is nothing that I can possibly add.

PHILLIPS JA

[2] I too have read the draft reasons for judgment written by Brooks JA and agree with his reasoning and conclusion. I have nothing further to add.

BROOKS JA

[3] Messrs Demetri Jobson and Gilbert Max Jobson (the applicants) are sons of Gilbert Baron Jobson, deceased, of whom more will be said shortly. The respondents to both appeals are The Administrator General for Jamaica (the Administrator General) and New Falmouth Resorts Limited (the company). The Administrator General is the administrator of the estate of Gilbert Baron Johnson.

[4] There are two appeals involved in this case, namely Supreme Court Civil Appeal No 63/2012 (the 2012 appeal) and Supreme Court Civil Appeal No 128/2015 (the 2015 appeal). Only the 2015 appeal is properly before this court, the applicants did not secure the required permission before filing the 2012 appeal.

[5] On 27 and 28 February 2018, three applications came on for hearing before this court, namely applications 161/2016, 149/2017 and 32/2018. Applications 161/2016 and 32/2018 are both for extension of time in which to file a record of appeal in the 2015 appeal, which is an appeal from the decision of Simmons J in the Supreme Court

(**Demetri Jobson and Another v Administrator General of Jamaica and Another** [2015] JMSC Civ 253). Application 32/2018 therefore supersedes application 161/2016. Application 149/2017, which has been filed by the company, seeks orders to strike out both appeals.

[6] We commenced the hearing of the applications by first considering the application for extension of time to file the record of appeal, and, on 28 February 2018, made the following orders:

> "1. Mrs Mayhew to file amended application for extension of time to incorporate an application for extension of time to apply for permission to appeal and/or to appeal in the 2012 appeal no 63/2012.
>
> 2. Amended application to be filed on or before 2 March 2018.
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> 3. Applicant to file and serve written submissions in support of amended application on or before 16 March 2018.
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> 4. Respondent to file and serve written submissions in reply on or before 3 April 2018.
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> 5. All submissions to be filed and served by hard copy and by e-mail.
>
> 6. The court will endeavour to give a decision on the amended application and all related matters within 30 days of the date of filing of the respondent's submissions."

[7] In response to the orders of the court, the applicants filed an amended notice of application for court orders. It is numbered 128/2012 and seeks the following orders:

> "1. That time in which to file <u>and serve</u> Notice and Grounds of Appeal be extended and that the Notice

and Grounds of Appeal filed on May 09, 2012 and Amended Notice and Grounds of Appeal filed on May 15, 2012 be allowed to stand.

2. The Appeal be consolidated with Appeal No 128 of 2015.

3. The Record of Appeal filed in Appeal no 128 of 2015 do stand as the Record of Appeal in this Appeal.

4. The consolidated appeals be set down for a case management conference.

5. Costs of the application be costs in the appeal.

6. Such further orders as this Honourable Court deems just in the circumstances." (Underlining as in original)

[8] The result is that the applications to be considered are:

a. the applicants' amended application for extension of time to file notice and grounds of appeal in the 2012 appeal, and for consolidation of the appeals (application 128/2012);

b. the company's application to strike out both appeals (application 149/2017); and

c. the applicants' amended application for extension of time to file the record of appeal in the 2015 appeal (application 32/2018).

[9] The underlying claims to these applications arise from a land transaction, which was initiated in 1967.

Background to the claims

[10] Gilbert Baron Jobson was the owner of lands (the property) located at Orange Grove in the parish of Trelawny. The property was formerly comprised in certificate of title registered at volume 29 folio 7 of the register book of titles, but is now registered at volume 1389 folio 427. The company contends that the property was the subject of an option to purchase, dated 15 September 1967, between the deceased and J Cecil Abrahams. The option to purchase provided as follows:

> "15th September 1967
>
> In consideration of the sum of £100 (receipt of which is herein acknowledged) paid to Gilbert Jobson of 10 Red Hills Road, Kingston 10 by J. Cecil Abrahams of 24 Sunrise Crescent Kingston 8 acting as agent for the proposed purchaser I hereby give you sixty days option to be exercised in writing on or before the thirteenth day of November One thousand nine hundred and sixty-seven to purchase at the price of Ninety Pounds per acre land known as Orange Grove believed to be between 300 and 350 acres more or less in the [p]arish of Trelawny with Registered title in the name of Gilbert Jobson at Volume 29 Folio 7 bounded on the North by main road from Duncans to Falmouth between the 78th and 79th mile post on the East by Springfield on the South by Clarmont [sic] on the West by Florence Hall. West & North by parochial Rd to Florence Hall, Less Old Works Area with cemetery but with rights to well.
>
> The following conditions shall apply to this option:-
>
> (a) In the event of this option being exercised the sum of £100 shall form part of the purchase price for the said land.
>
> (b) The option shall be exercised by notice in writing to that effect addressed to me at 10

Red Hills Road Kingston 10 accompanied by balance of full purchase price.

In the event of the option being exercised the sale shall be upon the following terms:-

(a) The land shall be surveyed by vendor cost to be borne by him.

(b) Title shall be under Registration of Title Law, Transfer to be prepared by vendor's solicitor and for the vendor's account but stamp duty registration and transfer fees shall be borne equally and the purchaser's share thereof paid to the vendor upon execution of the transfer.

(c) Taxes shall be apportioned at the date of possession.

(d) Purchaser shall be entitled to enter the land for the purpose of examination etc. on payment of the said £100.

(e) The purchaser shall be entitled to full possession on the exercise of the option."

[11] Gilbert Baron Jobson died intestate on 23 May 1980. He was survived by, mostly, minor children. He will, hereafter, be referred to as "the deceased". On 30 December 1980, the Administrator General was appointed administrator of his estate, which, on paper, included the property, as the certificate of title for the property was still registered in the deceased's name at the time of his death.

[12] In view of the company's assertion that it had purchased the property, the Administrator General, on 22 September 2004, filed Claim No 2004 HCV 2245 (the 2004 claim). She applied under section 39 of the Administrator General's Act (AGA) to ratify the sale of the property.

[13] In supporting the application, the Administrator General deposed that:

a. The deceased died intestate and Letters of Administration in his estate were granted to her.

b. The deceased died possessed of real estate, which included the property and was the subject of an option to purchase between the deceased and J Cecil Abrahams, acting as agent for the company.

c. The company, in 1973, lodged a caveat numbered 84833 prohibiting any dealings in relation to the property.

d. A sale to the company was put on hold between 1985 and 2002, due to a previous claim, Suit No E224/85, which was brought by, another son of the deceased, Oliver Jobson, who claimed that he was the lawful owner of the property, having purchased it from the deceased. That claim was dismissed on 8 October 2002, as having no merit.

e. The company has been in possession of the property since November 1973 and has been insistently demanding that the land be transferred to it.

f. Mr Raymond [sic] Chisholm, managing director of the company, presented her with a letter addressed to the deceased, dated 9 November 1967, indicating

that the option to purchase was exercised on that date in accordance with the terms.

g. To verify the allegations of the company, she contacted the deceased's then attorneys-at-law, Livingston, Alexander & Levy, for copy receipts confirming payment of the purchase price, however nothing was produced.

h. Mr Chisholm presented a bill of costs dated 5 September 1969 prepared by Clinton Hart & Company, solicitors representing the company, which indicated that the sum of £26,900 was paid to the deceased's attorneys-at-law.

i. In the absence of cogent evidence that the purchase price was paid in full, authorisation was being sought from the court to ratify the sale of the property to the company.

[14] The application was also supported by an affidavit of Mr James Chisholm, in which he stated:

a. he has been the managing director of the company since 1973;

b. the company exercised the option to purchase, and all the balance of the purchase monies, £26,900, being

£90 per acre for 300 acres (the option money of £100 forming part of the purchase price), pursuant to the option, were duly paid to the deceased, as confirmed by the statement of account provided by Clinton Hart & Company, attorneys-at-law;

c. the company has been in continuous possession of the property since 1967;

d. the property was to have been surveyed by the deceased, however the company did not receive the survey plan;

e. in or about September 2004, he attended the Survey Department and received a copy of the survey plan, which had existed since 1970;

f. he was informed that a copy of the pre-checked survey plan, with examination no 98935, had been provided to the deceased, but that document was not forwarded to the company;

g. the survey plan shows that the property comprises of 367 acres of land, however the company paid for only 300 acres, and so there is a shortfall of 67 acres, which, at the rate of exchange existing at the time, £1 = $2.00, amounts to a balance of $12,060.00 being due to the deceased's estate;

h. the company having paid the sum of $5,100.00 to obtain the survey plan, the sum of $6,960.00 was owed for the remaining 67 acres, and the company is willing to pay the sum.

[15] It is noted that the National Land Agency has certified that the valuation roll for the year 1974 reflects that the company is the party then believed to be the owner of the property. That bit of evidence, however, was not before Rattray J.

[16] On 25 April 2005, Rattray J granted the Administrator General's application on condition that the company pay to the Administrator General, on or before 30 June 2005 at 4:00 pm, the sum of £6,030 or the Jamaican dollar equivalent, less the sum of $5,100.00; the amount that the company paid for the survey plan. On or about 2 May 2005, the company paid $661,938.40, and on 6 May 2005, another $24,240.80. Both payments were made to the Administrator General. On 31 March 2006 the registered title for the property was transferred to the company's name.

[17] On 4 April 2012, approximately seven years after Rattray J's order, the applicants, two of several beneficiaries of the deceased's estate, filed an *ex parte* application in the 2004 claim. The application sought injunctions to restrain the company from dealing with the property. The application came on before K Anderson J, who adjourned it and ordered that:

a. a claim form and particulars of claim be filed; and

b. the application be heard *inter partes*.

[18] Despite the adjournment, the requested injunction was granted until 20 April 2012, when the application was to have been heard, upon notice having been given to the other interested parties.

[19] On the same date of the *inter partes* hearing, the applicants filed a fixed date claim form and particulars of claim, bearing Claim No 2012 HCV 02305 (the 2012 claim). The 2012 claim contests the legality of the dealings of the Administrator General and the company regarding the sale of the property and the legality of the alleged option to purchase.

[20] At the hearing on 20 April 2012, the injunction that was granted by Anderson J in the 2004 claim, was extended until the conclusion of the 2012 claim.

[21] Shortly thereafter, on 9 May 2012, the applicants filed the 2012 appeal, seeking to appeal the decision of Rattray J in the 2004 claim. The notice and grounds of appeal were later amended on 15 May 2012.

[22] While that appeal subsisted in this court, the company applied, in the Supreme Court, to strike out the 2012 claim, on the basis that it failed to allege fraud. The company contended that only fraud could defeat a registered title.

[23] On 12 August 2013, the applicants filed a claim form in the 2012 claim, in accordance with Anderson J's orders, alleging fraud and/or mis-description. This claim form was supported by a second further amended particulars of claim.

[24] The Administrator General filed an amended defence to the new allegations raised in the amended claim. The company filed a defence, and an amended counterclaim. On 14 July 2014 the applicants filed a defence to the company's counterclaim.

[25] The applicants also filed applications to be added as parties to the 2004 claim in order to challenge the order of Rattray J and to set aside his order.

[26] On 28 May 2014, King J heard both the company's application to strike out the 2012 claim as well as the applicants' application to be added as parties to the 2004 claim. He dismissed the company's application to strike out the 2012 claim, but he permitted the amendment of the 2004 claim so that the applicants were added as parties. King J also ruled that the application to set aside Rattray J's order was "reserved to be heard at the trial of" the 2012 claim (see **Demetri Jobson and Another v Administrator General for Jamaica and Another** [2014] JMSC Civ 144).

[27] On 21 September 2015, the applicants filed an application in the 2004 claim to set aside the order of Rattray J. This application was heard by Simmons J, who, on 18 December 2015, handed down her judgment. She dismissed the application. She ordered that there was no basis upon which the court should exercise its jurisdiction to set aside the order. Her judgment is the subject of the 2015 appeal.

[28] The trial of the 2012 claim was set for September 2016 but was adjourned, pending the hearing of the 2015 appeal, to 1-5 July 2019.

[29] The Administrator General applied to have the 2012 claim dismissed, as against her. Anderson J granted that application on 9 December 2016 (see **Demetri Jobson and Another v Administrator General for Jamaica and Another** [2016] JMSC Civ 242). He ruled that the applicants could succeed against the Administrator General in neither a claim in negligence, nor one for breach of statutory duty. There has been no appeal from that order.

The 2012 appeal

[30] As mentioned above, the 2012 appeal was not filed with permission. Permission was required, due to the time that had elapsed since Rattray J's judgment. Apparently, due to an error in this court's registry, the notice and grounds of appeal were accepted and assigned an appeal number. Unless permission to appeal has been granted, the court has no jurisdiction to hear the matter (see the well-established decision of **Leymon Strachan v The Gleaner Company Ltd and Stokes** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 54/97, judgment delivered 18 December 1998, at page 10).

[31] In considering an application for permission to appeal, a major issue in this case is whether the applicants may properly pursue the 2012 appeal, as they were not parties to the 2004 claim, at the time that Rattray J made the order that they seek to impugn. That issue will be assessed before considering the application for permission to appeal.

[32] There are decided cases that provide assistance on this issue. **In re Markham** (1880) 16 Ch D 1 is authority for the principle that where an interested person is not a party to the proceedings, an application can be made to the Court of Appeal for leave to intervene in order to appeal. In that case, the deceased, by his will, directed that certain persons were to benefit under his will after the death of his wife, provided that they survived the wife, and that when those persons died, the benefit would transfer to their children. Upon application to the court, an interpretation of the will was decreed. One of the beneficiaries' interest was assigned to Joseph Buckton, but he was never served with the notice of the decree, nor was the interest of the beneficiary represented at the hearing. The interpretation, as decreed, excluded the beneficiary from participating in the estate. Mr Buckton applied for leave to appeal. Despite the fact that he was not a party to the proceedings in the court below, the court granted him leave, upon condition that he proved that he had title to the beneficiary's interest.

[33] **In re Markham** was cited with approval in **Senior and others v Holdsworth** [1975] 2 All ER 1009. In that case, leave was granted to a company to appeal from an order made in proceedings to which it was not a party. The order was that it should produce a film. It was therefore directly affected by the order that had been made at first instance.

[34] In the present case, the applicants have applied for leave to appeal and an extension of time to file notice and grounds of appeal. The notice of application was first filed 12 June 2012. It was supported by an affidavit sworn to by Gilbert Max Jobson. The application to enlarge time in which to file notice and grounds of appeal

was filed pursuant to part 19.3(2)(b) of the CPR. Rule 19.3(2)(b) provides that an application for permission to add, substitute or remove a party may be made by a person who wishes to become a party. It is not, however, one of the rules of the CPR that automatically applies to this court (see rule 1.1(10) of the Court of Appeal Rules (CAR)).

[35] Gilbert Max Jobson, at paragraph 1 of the notice of application for court orders, sought the court's permission to intervene in the matter so as to appeal Rattray J's order. In view of the decision in **In re Markham**, this court does have the jurisdiction to grant the applicants' application to intervene for the purposes of filing an appeal.

[36] The application will be considered below.

Application for extension of time in which to file appeal

[37] The order of Rattray J is a final order. Accordingly, the appeal was to have been brought within 42 days of the date on which the order or judgment appealed against was served, according to rule 1.11(1)(c) of the CAR as it was then formulated (the rule was changed in 2015). The appeal having been brought in May 2012 means that it was brought approximately seven years out of time. Nevertheless, this court has discretion to extend the time for compliance (see rule 1.7(2)(b) of the CAR).

[38] Guidance as to the consideration of applications for extension of time may be obtained from **Leymon Strachan v The Gleaner Company Ltd and Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999. In that case, Panton JA, as he then was, outlined the court's

considerations when determining whether to grant an application for extension of time to file an appeal. He said at page 20 that:

> "(1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
>
> (2) Where there has been a non-compliance with a timetable the Court has a discretion to extend time.
>
> (3) In exercising its discretion the court will consider-
>
> (i) the length of the delay;
>
> (ii) the reasons for the delay;
>
> (iii) whether there is an arguable case for an appeal and; [sic]
>
> (iv) the degree of prejudice to the other parties if time is extended.
>
> (4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for extension of time, as **the overriding principle is that justice has to be done**." (Emphasis supplied)

[39] This court also gave guidance in **Flickenger v David Preble & Anor** [2013] JMCA App 1 in treating with the matter of an extension of time to appeal. It distilled the principles outlined in **Haddad v Silvera** (unreported), Court of Appeal, Jamaica, Motion 1/2007, judgment delivered 31 July 2007 in the following terms:

> "a. in the absence of specific provisions in the rules, the court, in exercising its discretion should do so in accordance with the overriding objective;
>
> b. generally speaking, the rules of the court must be obeyed and litigants and their legal representative ignore the rules at their peril;
>
> c. a successful party is entitled to the fruits of its judgment and so the party aggrieved by that

judgement [sic] must act promptly in pursuing its appeal;

d. the interests of the parties and the public in certainty and finality of legal proceedings, make the court more strict about time limits on appeals;

e. in order to justify the court extending the time limited for carrying out a procedural step in the appellate process, there **must be some material on which the court can exercise its discretion**;

f. normally, if no excuse is offered for the default, no indulgence should be granted;

g. an indulgence may be granted even if the excuse does not amount to a good reason but generally speaking, the weaker the reason the more likely the court will be to refuse to grant the extension of time;

h. the application should address the length of the delay, the reason for the delay, the merits of the appeal and the likely prejudice, or absence thereof, to the respective parties;

i. strict guidelines as to the consideration of these applications should be avoided." (Emphasis supplied)

Consideration of the applicants' application will be made along the lines of the guidance provided by **Leymon Strachan v The Gleaner Company Ltd**.

(i) Length of delay

[40] At first appearance it may be deemed that bringing an appeal approximately seven years out of time is an inordinate delay. However, Lawrence-Beswick JA (Ag), as she then was, noted at paragraph [27] of **Flickenger v Preble & Anor** [2013] JMCA App 13 that "[t]he determination of what amounts to inordinate delay must depend not only on a stated period of time but also, on surrounding circumstances relevant to such

a determination”. The application would therefore not automatically fail on the basis of the length of time that elapsed.

(ii) Reason for delay

[41] The reason for the delay is gleaned from the Affidavit of Gilbert Max Jobson where, at paragraph 5, he deposed that the applicants were served with neither the Administrator General’s application nor Rattray J’s order thereon, and so were not aware of either, at the relevant time. He explained that Demetri Jobson employed a Commissioned Land Surveyor, Roosevelt Thompson, to carry out enquiries as to the lands owned by the deceased, and, towards the end of March 2012, became aware of the application by the Administrator General. He also stated that further inquiries were made which revealed that the 2004 claim was brought by the Administrator General and the property was registered in the company’s name. The applicants thereafter filed the injunction application, the fixed date claim form and later, the appeal. It is the applicants’ position that the Administrator General, having failed to serve the beneficiaries with the court’s order, deprived them of the opportunity to appeal within the prescribed time.

[42] An affidavit of Mrs Arlene Harrison Henry, the then attorney-at-law for the applicants, stated at paragraph 8 that knowledge of Rattray J’s order came to the attention of the applicants on 25 March 2012.

[43] It is arguable that the applicants, even if they were minors at the time of their father’s death in 1980 (it is said that Gilbert Max Jobson was an adult at the time), must

eventually have become aware of the Administrator General's administration of the estate. They should have taken some active interest in that administration before, but failed to do so until March 2012, approximately 30 years after their father's death. If, however, as proposed by the applicants, the time for filing the appeal started running from the date of knowledge of Rattray J's order, the notice of appeal was filed out of time by only two days. The reason for the delay may said to be plausible.

(iii) Arguable case for an appeal

[44] The amended grounds of appeal in the 2012 appeal are as follows:

> "a. The Learned Trial Judge made no order that the beneficiaries of the estate of GILBERT BARON JOBSON, who were then adults ought to have been served with process of the Administrator General's application 'to ratify' the sale of land which meant disposing of approximately 400 acres of land held in the name of the deceased to New Falmouth Resorts Limited.
>
> b. That the Learned Trial Judge erred in not requiring proof from the Administrator General that she had served the beneficiaries with her application.
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> c. The learned Trial Judge erred in not ordering that the formal order dated 25th April 2005 containing his orders allowing for the disposal of the said land be served on the beneficiaries.
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> d. The Learned Trial Judge erred in granting the orders sought by the Administrator General without proof or without establishing the identities of the parties to the option and in particular without identifying that New Falmouth Resorts Limited was a party to the option dated 15th September 1967.
>
> e. The learned Trial Judge erred in authorizing the Administrator for Jamaica '**to ratify**' the sale of the said land on the presentation of a bill of costs or statement of account and a caveat lodged 6 years against the registered title after the expiry of the said option and without proof or evidence that the land

was paid for at any time or during the period allowed in the option or at all.

f. The Learned Trial Judge erred in authorizing the Administrator General 'to ratify' the sale of the land in the face of the Administrator General's unambiguous admission that there was an absence of 'cogent evidence of payment of the purchase price in full……'

g. The Learned Trial Judge erred [in failing] to consider alternatives 'to ratify' in the face of the paucity, absence or lack of evidence as it related to the payment for the land and failed to offer advice, an opinion or directions to the Administrator General though not sought by her.

h. The Learned Trial Judge erred in authorizing the Administrator General 'to ratify' the sale without a description of the said land subject to the option and by so doing the orders allowed the inclusion of land which was never included in any option and this material was concealed from the Court. Such land which was always excluded from the option consisted of the 'old works area and cemetery' the area of which was to be determined by a survey. The 'old works area and cemetery' specifically excluded from the option of September 15, 1967 is now owned by New Falmouth Resorts Limited by virtue of the orders made by Mr. Justice Rattray and applied for by the Administrator General for Jamaica.

i. The Learned Trial Judge erred in giving authorization 'to ratify' without proof that the option was exercised at all or within the time allowed by the terms of the option.

j. The Learned Trial Judge erred in law in failing to appreciate that the Administrator General was a trustee over the land and had a statutory and fiduciary duty to discharge with care, good faith and in the interest of the estate and the beneficiaries.

k. The Learned Trial Judge having affidavit evidence [sic] of the Administrator General admitting that there was an absence of 'cogent evidence of payment of the purchase in full, ... ' allowed New Falmouth Resorts Limited to pay for a further 67 acres of land in 2005 by the order of Mr. Justice Rattray at the rate of the 1967 price contained in the option dated September 15, 1967.

l. The Learned Trial Judge was inconsistent in that he allowed New Falmouth Resorts Limited a deduction as it related to the cost of procuring the surveyor's report yet approved ratification at the purchase price of 1967.

m. The Learned Trial Judge erred when he found that the land was paid [sic] by relying on a statement of account as described by James Chisholm and a bill of costs as described by the Administrator General for Jamaica and he failed to appreciate that the alleged payment related to 300 acres and not the total acreage now owned by New Falmouth Resorts Limited consequent of the order of Mr. Justice Rattray.

n. Having found evidence to support the Administrator General's request 'to ratify' failed to consider the need for a valuation of the land admittedly not paid for and relating to 67 acres.

o. The Learned Trial Judge erred by not demanding a valuation of the land at the date of death and at the time of making his orders.

p. Despite the absence of any evidence of payment or at all the Learned Trial Judge in making a finding in the Administrator General's favour failed to appreciate that what was before him was trust property.

q. The learned Trial Judge failed to consider the consequences of New Falmouth Resorts Limited failure to take action to secure registered title in its name.

r. The learned trial judge failed to consider and appreciate that he did not have sufficient material on which to make the orders which he did.

s. The Appellants/ Interveners are the children of the deceased who towards the end of March 2012 discovered the existence of the orders of Mr. Justice Rattray and seek leave to appeal and to intervene.

t. The Learned trial judge erred in not appreciating that the exclusion of the old works area and cemetery required a survey and subdivision to exclude those areas from the registered land purportedly in the option and that the option was a subdivision option or an option requiring a subdivision.

u. The learned trial judge erred in not appreciating that such an option was contrary to statute, void and illegal and that the remedy if any, was the return of

any money, if any paid by the optionee at the statutory rate of interest after proof of payment.

v. The Learned Trial Judge failed to appreciate that New Falmouth Resorts Limited was not privy to any arrangement between the deceased and J. Cecil Abrahams and none established in Administrator General's application.

w. The learned Trial Judge erred in not appreciating that the area of the old works and cemetery was left for determination by the deceased or surveyor and that there was no intention for anyone whether J. Cecil Abrahams or otherwise to own the old works area or the cemetery." (Underlining removed)

[45] Learned counsel for the applicants, in submissions filed 16 March 2018, have helpfully summarised the amended grounds of appeal as follows:

"a. Whether the learned Judge erred in failing to direct that the beneficiaries of the estate, who were then adults, should have been served with the application 'to ratify' the sale of the land.

b. Whether the learned judge erred in granting the orders sought by the Administrator General having regard to the quality of the evidence that was presented."

[46] The issues arising from the further amended grounds of appeal are:

1. Whether the beneficiaries were to be served;

2. Whether there was evidence of a proper exercise of the option;

Those issues will be briefly assessed below.

Whether the beneficiaries should have been served

[47] Learned counsel on behalf of the applicants, argued that the beneficiaries should have been served with notice of the Administrator General's application, especially given there was no evidence that there was consensus among the adult beneficiaries. Learned counsel contended that although the Administrator General made her application pursuant to section 39 of the AGA, Rattray J should have ordered that the application be served on the beneficiaries pursuant to section 41 of the Trustee Act, which states:

> "Any trustee, executor, or administrator shall be at liberty without the institution of a suit, to apply to the Court for an opinion, advice or direction on any question **respecting the management or administration of the trust money or the assets of any testator or intestate**, **such application to be served upon, or the hearing thereof to be attended by all persons interested in such application, or such of them as the court shall think expedient**: and the trustee, executor or administrator acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator in the subject matter of the said application:
>
> Provided nevertheless, that this Act shall not extend to indemnify any trustee, executor, or administrator in respect of any act done in accordance with such opinion, advice, or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction, and the costs of such application as aforesaid shall be in the discretion of the Court." (Emphasis supplied)

[48] That submission is flawed. Section 39 of the AGA is the obvious section for the Administrator General to have used in seeking the "opinion, advice or direction of the Court or Judge ... with regard to any matters arising out of the management or conduct of any such estate". Section 39 of the AGA states:

> "The Administrator-General may at any time apply to the Supreme Court for the opinion, advice, or direction of the Court or Judge respecting his rights or duties with regard to applying for, or obtaining administration of any estate, or trust, or probate of any will, or assuming the management of any estate, or trust, or with regard to any estate or trust vested in or administered by him under this Act, or with regard to any matters arising out of the management or conduct of any such estate or trust."

There is no basis, in the circumstances of this case, for Rattray J to have had resort to a statutory provision outside of the statute, which governs the execution of the Administrator General's duties. In the instant case, since the company had alleged that it owns the property, section 39 permitted the Administrator General to seek the guidance of the court as to the way to proceed.

[49] Even if there was some deficiency in section 39 for these purposes, which there is not, section 41 of the Trustee Act would not have assisted. The latter section would only have become applicable where the asset has been confirmed to be that of the deceased. As has been pointed out before, there was a contest as to whether the property did form part of the deceased's estate.

[50] Learned counsel on behalf of the applicants also submit that, having made his order, Rattray J ought to have ordered that it be served on the beneficiaries of the estate. Learned counsel rely on rule 42.12(1) and (5) of the CPR which state:

> "(1) where in a claim an order is made which may affect the rights of persons who are not parties to the claim, **the court may** at any time direct that a copy of any judgment or order be served on any such person.
>
> ...
>
> (5) Any person so served, or on whom service is dispensed with,-
>
> (a) is bound by the terms of the judgment or order; but
>
> (b) may apply within 28 days of being served to discharge, vary or add to the judgment or order; and
>
> (c) may take part in any proceedings under the judgment or order." (Emphasis supplied)

[51] The submission cannot be accepted. The rule on which learned counsel rely, makes it plain, as is evidenced by the use of the word 'may', that an order to serve other persons, is in the discretion of the judge. This court will not disturb the exercise of a discretion by a judge unless in exceptional circumstances (see paragraph [20] of **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1). There is no basis to do so in this case. Rattray J had the appropriate party before him, namely the administrator of the deceased's estate. It is the administrator whose interests are affected by the order. The rights of the beneficiaries at that time were and are restricted to seeing to the proper administration of the estate (see **George Mobray v Andrew Joel Williams** [2012] JMCA Civ 26 at paragraphs [23] and [24]).

[52] Rattray J, therefore, did not err when he did not order service of either the application or his order, on the beneficiaries. There is nothing arguable in this issue.

Whether there was evidence of a proper exercise of the option

[53] The applicants have raised a number of questions under this broad heading. They are:

1. whether the parties to the option to purchase were identified;
2. If not, should a sale be authorised in the absence of identity of the parties;
3. whether the company was involved in the arrangement between the deceased and J Cecil Abrahams;
4. whether there was adequate proof of payment of the purchase price; and
5. whether the option was exercised within the time specified.

[54] Learned counsel for the applicants argued that the option to purchase did not satisfy the requirements of the Statute of Frauds for a memorandum in writing or a sufficient note or memorandum of an oral agreement. It was further argued on behalf of the applicants that the memorandum must state the names of the vendor and purchaser or describe them in a sufficient manner that they can be identified but the option to purchase did not identify the company as the purchaser.

[55] The issues raised in respect of the option are without merit. The option to purchase outlines that J Cecil Abrahams was acting as agent for the "proposed

purchaser". This suggests that the deceased knew that the sale was not to Mr Abrahams but to another party. In any event, caveat no 84833, by which the company claimed an interest in the property, was addressed to the deceased on 10 December 1973, and therefore during his lifetime. This is despite the fact that it was lodged after the date for exercise of the option to purchase. The caveat recorded the full identity of the party claiming the interest and the circumstances under which it did so. It states:

> "New Falmouth Resorts Limited, a company incorporated under the Laws of Jamaica with registered office at 58 Duke Street in the parish of Kingston, claim an estate or interest **as purchasers by virtue of the option to purchase dated 15 September, 1967 and Exercise of Option dated 9th November, 1967**, (copies of which are attached hereto) between Gilbert Jobson and J. Cecil Abrahams acting as Agent for New Falmouth Resorts Limited..." (Emphasis supplied)

[56] It alleges a concluded agreement. The option was, by then, a spent issue. There is no evidence of any step taken by the deceased to have the caveat warned or removed.

[57] Similarly, the submissions concerning lack of compliance with the Statute of Frauds are without merit. The essence of section 4 of that statute, for these purposes, is that no agreement, not in writing and not duly signed shall be sufficient to assign an interest in land. The agreement may, however, be proved by part performance. The relevant principles were explained by Downer JA, writing for this court in **Arthur George McCook and Others v Holden Hammond and Another** (1988) 25 JLR 296. He said, in part, at pages 297-298:

> "Equity permits part-performance to be a substitute for a written note or memorandum if the acts of part-performance are only intelligible if there was some prior agreement. The relevant section of the Statute of Frauds refers to a contract for sale or other disposition of land and the most frequent act of part-performance is where the purchaser is allowed to enter into possession of the land. The equitable remedy available to such a purchaser is specific performance so that a vendor is compelled to convey the land and deliver up the title or a purchaser is compelled to carry out the undertaking to purchase. See *Rawlinson v. Ames* [1925] 1 Ch. 96 where a defendant who had given instructions to have alterations carried out on the plaintiff's flat was ordered to take up the lease; and *Broughton v. Snook* (1938) 1 Ch. 505 where an executor was compelled to convey an inn to a purchaser who had spent money on alterations."

[58] Based on that learning, the submissions, in this regard, of learned counsel in the present case, falter in the face of the evidence that the contract was performed in part, in light of the assertions of a payment of the purchase price and an entry into possession. The next issue is whether that evidence of performance, or part performance, is sufficient, despite the fact that the Administrator General did not regard it as being "cogent".

[59] Learned counsel for the applicants assert that there is insufficient evidence as to payment of the purchase price. They place great emphasis upon the Administrator General's concern that the evidence provided by the company was not "cogent".

[60] The evidence of payment that was provided is as follows:

a. a copy letter dated 9 November 1967 addressed to the deceased and copied to the deceased's attorneys-at-law, Livingston Alexander & Levy which outlines

that Mr Abrahams has exercised, within the stipulated time, the option to purchase and that a cheque in the sum of £26,900 has been forwarded to the deceased's solicitors which together with the £100 represents the full option money payable;

b. a statement of account dated 5 September 1969 that the sum of £26,900 was paid to the deceased's attorneys on 9 November 1967;

c. the option to purchase outlined that a survey was to be conducted by the vendor and there was a survey plan completed in 1970 albeit it had not been forwarded to the company although it had been provided to the vendor.

d. caveat number 84833 was lodged on 23 November 1973, which was during the lifetime of the deceased, and which asserts that the value of the company's interest is $54,000.00, which represents the £27,000.00 allegedly paid by the company;

e. there is no evidence of any step having been taken by the deceased to warn the caveat or have it removed; and

f. Mr Chisolm's evidence that the company has been in continuous possession of the property since 1967.

[61] These documents, when considered cumulatively, provide sufficient evidence for Rattray J to hold that there was proof of payment and that the option to purchase should be ratified. In any event, the company had been, by the time of the Administrator General's application, in continuous possession of the property for in excess of 12 years. The applicants suggest that Mr Chisolm's evidence to that effect is a bare assertion, but it is supported by the copy of the valuation roll, which shows that the company was regarded as the person in possession of the property from at least 1974. On that evidence, the company would have already acquired a possessory title to the property. Rattray J's order merely allowed for the formalisation of the title.

[62] It cannot be ignored that the Administrator General is the only party that could properly contest the company's claim to continuous possession to the property. Far from contesting that claim, the Administrator General relied upon it in making the 2004 claim. Apart from seeking to poke holes in the company's case, the applicants have produced no evidence to contest the company's assertion that it was in continuous possession of the property since 1967.

[63] It should also be noted that the company was not a party to Oliver Jobson's claim, which subsisted between 1985 and 2004. Its rights, emanating from actual possession were not, therefore, affected by the existence of that claim.

[64] Having concluded that the company is entitled to the property, it must be determined what portion of the property it is entitled to.

Whether the size of the land was appropriately addressed

[65] The applicants have also raised a number of questions under this broad heading. They are:

1. whether the subject land was adequately identified;
2. whether it was the agreed acreage that was transferred;
3. whether the additional price paid was appropriate; and
4. whether the treatment of the excluded lands was appropriate.

[66] In this aspect of the analysis the applicants also meet the insuperable hurdle that the company has been in possession of the property for over 12 years prior to the date of the application before Rattray J. It had already acquired title to the entire property. Rattray J secured a payment for the estate, for the additional 67 acres, which, had the company proceeded by way of an application for a possessory title, it would not have been obliged to make. An attempt to set aside Rattray J's order, by way of an appeal could not succeed.

[67] It is noted that learned counsel for the company, in submissions, stated that the company did not take possession of the excluded lands and is prepared to transfer those lands. There, however, is no evidence in support of those submissions.

Prejudice to the company

[68] Learned counsel on behalf of the applicants, submitted that there is no prejudice to the company, as it relies on documentary evidence, and that the evidence of nonagenarian, Mr Chisholm, was not critical to the company's case. Additionally, it was submitted, parol evidence is not admissible to prove the sale and/or payment of the sale of land.

[69] While it is appreciated that the company relies, to an extent, on documentary evidence, it must also be recognised that Rattray J's order was pronounced approximately seven years prior to the applicants' challenge, and so for the seven years the company believed that the order was final and that the matter was finally resolved. It is prejudicial in having litigation hanging over a defendant's head, even if that head is a corporate one (see **Biss v Lambeth, Southwark and Lewisham Area Health Authority (Teaching)** [1978] 1 WLR 382). No doubt, the company expected to enjoy the fruits of its judgment.

[70] The prejudice to the company, if an extension of time were to be granted, would greatly exceed the prejudice to the applicants if the extension were refused. The company has been unable, by virtue of the injunction granted in the court below, to treat with the property as it wishes. On the contrary, the preponderance of the evidence is that the property no longer belonged to the deceased's estate at the time of Rattray J's order and therefore the estate had already received its benefit from the 1967 transaction, with the exception (ignoring for the moment the possessory title) of payment for the 67 acres that had not yet been made at the time.

The overriding principle is that justice should be done

[71] The overriding principle that justice should be done is in favour of the company. The company and the administration of justice should not be made to endure an appeal that is without merit and doomed to fail. Their Lordships in the Privy Council set out, succinctly, the principle that is relevant in these circumstances. They said, at paragraph 17 of **Sagicor Bank Jamaica Limited v Taylor-Wright** [2018] UKPC 12:

> "There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense."

[72] Based on all the above, there is no arguable appeal, and therefore the application for extension of time in respect of the 2012 appeal should be refused. The consequence is that the judgment of Rattray J stands and the injunction granted by Anderson J must be set aside.

[73] The company has stated that it has no interest in the cemetery on the property. That issue has to be dealt with between the parties.

The 2015 appeal

[74] The applicants' application in the 2004 claim to set aside the order of Rattray J, as mentioned above, was heard by Simmons J. She decided that she had the jurisdiction to set aside Rattray J's order, but that it would have been inappropriate to

exercise that discretion in favour of the applicants. She arrived at that conclusion after examining:

a. the court's entitlement, in the 2004 claim, to order ratification of the sale;

b. the question of whether the court's order in the 2004 claim was obtained by fraud; and

c. the question of procedural irregularity in the method used to initiate the 2004 claim.

Simmons J found that the applicants' submissions in regard to these issues were without merit.

[75] The 2015 appeal challenges that decision. The decision was not a final order and therefore needed leave to appeal. Simmons J granted that leave. The applicants' application in respect of the 2015 appeal is for an extension of time in which to file a record of appeal. There is no issue that this court has the authority to extend the time within which the record of appeal may be filed. The question is whether it should be done in this case.

[76] The 2015 appeal was originally filed 24 December 2015. An amended notice of appeal was filed on 9 March 2016, and a further amended notice of appeal, on 22 April 2016. The latter document contained the following grounds of appeal:

"a. The Learned Judge erred in law/or [sic] wrongly exercised her discretion in refusing the Appellants' Application to set aside the Orders made by the

Honourable Mr. Justice Rattray in the absence of the Appellants.

b. The Learned Judge erred in law/ wrongly exercised her discretion in finding that the Appellants failed to satisfy that had they attended some other Order would have been made.

c. The Learned Judge erred in fact and law when she failed to consider that the [company] was not duly incorporated at the time that the Option to Purchase came into existence and could not have exercised the option.

d. The Learned Judge erred in fact in finding that the [company] through Cecil Abraham entered into an Option to purchase Orange Grove Estate with the then registered proprietor Gilbert Jobson.

e. The Learned Judge erred in fact and law in finding that there was sufficient evidence before the Honourable Mr. Justice Rattray when he made the relevant orders on the 25th day of April, 2005, albeit stating that the [Administrator General] stated that the evidence they had regarding the Option to Purchase was scant.

f. The Learned Judge erred in fact and law in finding that the deceased was properly represented at the date of the Option and that representation was sufficient to show that the Option would have been deemed valid.

g. The Learned Judge erred in fact in finding that the [company's] Bill of Costs was sufficient evidence to prove that the Option could lawfully be exercised.

h. The Learned Judge erred in law in finding that Cecil Abraham was a lawful agent of the [company].

i. The Learned Judge erred in law when she concluded that the existence of the caveat lodged by the [company] is evidence of the exercise of the option.

j. The Learned Judge erred in law in finding that the attendance of the Appellants at the hearing would not have changed the Orders made by the Honourable Mr. Justice Rattray.

k. The Learned Judge erred in law in applying the wrong principles in arriving at her conclusion in refusing to set aside the Orders of the Honourable Mr. Justice Rattray." (Underlining removed)

[77] Learned counsel for the applicants cited authorities in an attempt to demonstrate that since the company had not yet been incorporated at the time of granting of the option, the exercise of the option, even though the company was then incorporated, was flawed. Learned counsel submitted that the flaw should have been brought to the attention of Rattray J. The failure to do so, learned counsel submitted, amounted to fraud and allowed Rattray J's order, and the company's title, to be set aside. Learned counsel relied on the case of **Harold Morrison et al v Hatfield Developers Limited** [2012] JMSC Civ 122 in support of those submissions.

[78] By way of parenthesis only, it must be stated that **Harold Morrison v Hatfield Developers** does not assist the applicants. It is true that the facts of that case bear some resemblance to the present case, as in both cases, the agent acted for a principal that did not exist at the time of the agreement (in this case the option to purchase). In arriving at the decision in **Harold Morrison v Hatfield Developers**, F Williams J (as he then was) considered **Kelner v Baxter** (1866) LR 2 CP 174; [1861-1873] All ER Rep Ext 2009. It was held in **Kelner** that where a contract is signed by a person who professes to be signing as an agent, but who has no principal existing at the time, and the contract would be wholly inoperative unless binding on the person who signed it, it is the purported agent who is personally liable on it and a stranger cannot, by

subsequent ratification, relieve him from that liability. The case further states that the agreement can only be ratified by way of a new agreement.

[79] The distinguishing feature between the instant case on the one hand, and **Harold Morrison v Hatfield Developers** and **Kelner**, on the other, is that at the time the option was exercised, the company was in existence and could properly take title, having paid the purchase price. The option to purchase indicates that the proposed purchaser had 60 days from the date of the option to exercise the option in writing, that is, on or before the 13 November 1967. The company was incorporated on 23 October 1967, which was within the 60-day period.

[80] Apart from the inapplicability of **Harold Morrison v Hatfield Developers**, the various grounds of appeal, and the submissions that the applicants seek to use to develop them, do not address the issues of:

a. the company's possession of the property since at least 1973; and

b. the fact that that possession subsisted during time that the Administrator General was the holder of the paper title for the property, that is between 1980, when she was registered as proprietor, and 2004, when she filed the 2004 claim.

The company's possessory title, even prior to the 2004 claim being filed, is a complete answer to any challenge of the order made by Rattray J.

[81] It would be an exercise in futility to allow the hearing of an appeal from the decision of Simmons J. For the relevant reasons set out in respect of the 2012 appeal, this application should also fail.

[82] Based on the above reasoning, the orders that should be made are:

1. Application for extension of time to file notice and grounds of appeal, in respect of appeal, improperly intituled Supreme Court Civil Appeal No 63/2012, is refused.
2. Supreme Court Civil Appeal No 63/2012 is hereby struck out.
3. Application for extension of time to file the record of appeal in appeal intituled Supreme Court Civil Appeal No 128/2015, is refused.
4. Application to strike out appeal Supreme Court Civil Appeal No 128/2015 is granted.
5. Costs of the application for extension of time to file notice and grounds of appeal, in respect of appeal improperly intituled Supreme Court Civil Appeal No 63/2012, to New Falmouth Resorts Ltd to be agreed or taxed.
6. Costs of the application for extension of time to file the record of appeal in appeal intituled Supreme Court Civil Appeal No 128/2015 and the application to strike our Supreme Court Civil Appeal No 128/2015 to New Falmouth Resorts Ltd to be agreed or taxed.

[83] The advancing age of this case added to its complexity. Unfortunately, this court has inadvertently added to the age by the regrettable delay in delivering this judgment. We sincerely apologise for the delay and its consequences.

MORRISON P

ORDER

1. Application for extension of time to file notice and grounds of appeal, in respect of appeal improperly intituled Supreme Court Civil Appeal No 63/2012, is refused.
2. Supreme Court Civil Appeal No 63/2012 is hereby struck out.
3. Application for extension of time to file the record of appeal in appeal intituled Supreme Court Civil Appeal No 128/2015, is refused.
4. Application to strike out appeal Supreme Court Civil Appeal No 128/2015 is granted.
5. Costs of the application for extension of time to file notice and grounds of appeal, in respect of appeal improperly intituled Supreme Court Civil Appeal No 63/2012, to New Falmouth Resorts Ltd to be agreed or taxed.
6. Costs of the application for extension of time to file the record of appeal in appeal intituled Supreme Court Civil Appeal No 128/2015 and the application to strike out Supreme Court Civil Appeal No 128/2015 to New Falmouth Resorts Ltd to be agreed or taxed.