JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE FRASER JA

SUPREME COURT CIVIL APPEAL NO COA2022CV00091

APPLICATION NOS COA2022APP00188 & 202

BETWEEN	**MELROSE FINANCE COMPANY INCORPORATED**	**APPLICANT**
AND	**COAST AND LAND PROPERTIES LIMITED**	**1ST RESPONDENT**
AND	**COAST AND LAND AESTHETIC DEVELOPMENT LIMITED**	**2ND RESPONDENT**
AND	**MAURICE ANTHONY GRANNUM**	**3RD RESPONDENT**
AND	**HAROLD OSWALD WILLIAMS**	**4TH RESPONDENT**

Vincent Chen and Mrs Vanessa Reid-Pringle instructed by Chen Green & Co for the applicant

Nigel Jones and Miss Kashina Moore instructed by Nigel Jones & Co for the respondents

20 and 21 February 2023

ORAL JUDGMENT

MCDONALD-BISHOP JA

[1] These proceedings involve two applications: the first brought by the respondents by way of notice of application filed on 26 August 2022; and the second brought by the

appellant, Melrose Finance Company Incorporated ('Melrose Finance'), on 26 September 2022, in response to the respondents' application.

The respondents' application

[2] The respondents' application is for the notice and grounds of appeal filed by Melrose Finance on 8 August 2022 to be struck out with costs to the respondents.

[3] The grounds for this application, as summarized from the notice of application, are that:

1. The summary judgment order, which Melrose Finance purports to appeal, is an interlocutory order.

2. Melrose Finance has failed to comply with section 11 of the Judicature (Appellate Jurisdiction) Act ('JAJA').

3. Melrose Finance has failed to comply with rules 1.8(1), 1.8(2) and 1.11(1)(b) of the Court of Appeal Rules, 2002 ('CAR').

4. There is no application for extension of time for permission to appeal.

5. The appeal should be a procedural appeal.

[4] The application is supported by the affidavits of Chantelle Biersay filed on 26 August and 18 November 2022.

Melrose Finance's application

[5] Melrose Finance had initially applied to this court to:

1. declare that the appeal is not procedural;

2. order that the appeal proceed as a final appeal and be fixed for case management;

3. alternatively, to make orders that:

    (i) If it is a procedural appeal, permission be granted to appeal, and the documents filed in respect of the appeal be permitted to stand, and the matter proceed to be heard as an ordinary appeal;

    (ii) The time for filing the procedural appeal be extended;

    (iii) Melrose Finance is permitted to file and serve supplemental skeleton arguments (if necessary) and bundles of authority in support of the appeal within 14 days of the order.

[6] The grounds for this application are compressed for present purposes as follows:

1. Section 11(f)(vi) of the JAJA and rule 1.7(2)(b) of the CAR;

2. Melrose Finance has acted promptly, and there has been no delay;

3. There is a good explanation for the failure to file a procedural appeal;

4. The appeal is strong and likely to succeed;

5. No prejudice to the respondents;

6. Prejudice to Melrose Finance; and

7. The interests of justice.

[7] The application is supported by the affidavits of Vanessa Reid-Pringle filed on 27 September and 19 December 2022.

[8] At the hearing of the application, Mr Chen, counsel for Melrose Finance, indicated that they would not pursue the alternative orders set out at para. [5] 3(i)–(iii) above.

Therefore, Melrose Finance has confined the application to seeking a declaration that the appeal is not a procedural appeal and an order for the appeal to proceed to case management as a final appeal.

Proceedings in the Supreme Court

[9] By claim form filed in the Supreme Court on 10 November 2020, Melrose Finance, a company duly incorporated in Panama, brought a claim against six defendants to recover possession of two parcels of registered lands situated at Silver Sands, Duncans Bay, in the parish of Trelawny. The four respondents were named in the claim as 3rd, 4th, 5th and 6th defendants, and Miguel Sutherland and Kenneth Morris were named as 1st and 2nd defendants, respectively. Mr Sutherland and Mr Morris are not parties to these proceedings.

[10] A Mr Martin Boston signed the claim form and particulars of claim on behalf of Melrose Finance purportedly in his capacity as agent of "the claimant company".

[11] Melrose Finance sought declarations that it was the absolute owner of the two lots and that certificates of title issued in the names of Mr Sutherland and Mr Morris were fraudulently induced by false declarations made by agents of the respondents. It sought an order that the certificates of title in the names of the 1st and 2nd respondents be cancelled, and its absolute ownership of the lots be restored. Melrose Finance also sought injunctive relief to bar the respondents' entry on and dealings with the lots, as well as mesne profits, damages for trespass, interests and costs.

[12] The respondents defended the claim. As part of their defence, they denied the right to ownership and possession claimed by Melrose Finance and knowledge of fraud on the basis that they are *bona fide* purchasers for value without notice of fraud. They also challenged the legal standing of Mr Martin Boston to conduct the proceedings on behalf of Melrose Finance. They averred that he was not reflected as a director, manager or secretary in the documents of Melrose Finance as required by the Companies Act of Jamaica and so he had no lawful authority to bring the claim.

[13] Melrose Finance filed its reply to the defence on 4 January 2021. Among its averments, challenging the defence, it filed a power of attorney as an attachment to the reply. This power of attorney states that the director and president of Melrose Finance, Manuel De Jesus Rodriguez, had granted the power of attorney to Mr Martin Boston to, among other things, initiate and conduct proceedings on the company's behalf. Melrose Finance also alleged in its reply that no rights or obligations could be created by the nomination of the 1st respondent, Coast and Land Properties Limited, as owner of the lots as it was not a genuine nomination but a fraud on the revenue to avoid tax and, as such, was *void ab initio*.

[14] On 8 March 2021, Coast and Land Properties Limited filed an amended ancillary claim form against Melrose Finance. It sought declarations that it was the absolute owner of the lots and that Melrose Finance has no legal or equitable interest in them. It sought injunctive relief, removal of caveats, damages and aggravated damages for trespass, interests and costs.

[15] Melrose Finance challenged the ancillary claim by filing a defence to it on 4 January 2021.

[16] In so far as is relevant to these proceedings, on 22 January 2021, the respondents filed a notice of application for summary judgment or, alternatively, for striking out of the defence to the ancillary claim. The grounds were that:

(1) pursuant to rule 15.2 of the Civil Procedure Rules ('CPR'), Melrose Finance had no real prospect of succeeding on its claim and no real prospect of successfully defending the ancillary claim; and

(2) pursuant to rule 26.3(1)(c) of the CPR, Melrose Finance's statement of case discloses no reasonable grounds for bringing the claim against the respondents and defending the ancillary claim.

[17] The application was supported by the affidavit of Maurice Grannum, in his capacity as director of the 1st and 2nd respondents.

[18] Melrose Finance filed no affidavit evidence in response to the summary judgment application, but it filed written submissions.

[19] The summary judgment application was heard by Henry-McKenzie J ('the application judge'). On 11 July 2022, she granted summary judgment on the claim in favour of the respondents with costs. Nothing was said about the ancillary claim or the defence to the ancillary claim.

[20] In granting summary judgment, the application judge concluded that:

(i) In all the circumstances, the unchallenged evidence in the respondents' affidavit was adequate to prove, on a balance of the probabilities, that they were *bona fide* purchasers for value without notice of fraud.

(ii) The failure of Melrose Finance to particularize the alleged fraud; bring evidence to show actual fraud; and prove that the 1st respondent was registered, as a proprietor, other than as a *bona fide* purchaser for valuable consideration without notice, was sufficient to dispose of the matter. It shows that Melrose Finance has no real prospect of succeeding on the claim.

(iii) If the nomination of the 1st respondent as a nominee in whose name title should be issued required the payment of duties, that could be dealt with otherwise and does not justify the matter going to trial in circumstances where it does not prove that the respondents have committed actual fraud or any fraud, at all.

(iv) Mr Martin Boston, who brought the claim, had no legal standing as he was not named in any company documents to be a director or officer of the company and his relationship to Melrose Finance is not established on the pleadings.

(v) The Power of Attorney that was being relied on was unenforceable as it was not registered or recorded in the Island's Record Office as required by the Records of Deeds, Wills and Letters Patent Act.

(vi) For all the preceding reasons, Melrose Finance had no prospect of succeeding on the claim.

Proceedings in the Court of Appeal

a. The appeal

[21] By notice and grounds of appeal filed on 8 August 2022, Melrose Finance challenged various findings of law and facts of the application judge in 18 detailed grounds of appeal. It sought orders that, among other things, the appeal be allowed, the summary judgment be set aside, and the matter be ordered to proceed to trial in the Supreme Court.

[22] It is the procedure by which Melrose Finance has sought to access this court that is the reason for the respondents' application for the notice and grounds of appeal to be struck out.

b. The respondents' application to strike out the notice and grounds of appeal

[23] The contention of the respondents in its application to strike out the notice and grounds of appeal is simple. It stands on two limbs. The primary argument is that the appeal is from an interlocutory proceeding in the Supreme Court, which requires leave of the court for the appeal to be brought. The appeal cannot be brought without the leave of either the Supreme Court or this court. In any event, permission must first be sought in the court below within 14 days of the date of the decision being appealed, failing which an extension of time to bring the application in the Supreme Court must be applied for. Melrose Finance has not followed those requisite procedural steps. It has filed its notice and grounds of appeal without the leave of either the Supreme Court or this court, and it cannot seek an extension of time to do so in this court.

[24] The second related argument is that the appeal is a procedural appeal, which requires permission for it to be filed.

[25] In buttressing these arguments, counsel for the respondents maintained that the grant of the summary judgment emanated from interlocutory proceedings, and even though the order made by the application judge might have had the effect of disposing of the claim, the proceedings, nevertheless, remained interlocutory. This, they said, is in keeping with the "application test" established by the authorities. Therefore, unless the summary judgment falls within an exception set out under section 11(1)(f) of the JAJA, which it does not, Melrose Finance required permission to appeal before the notice and grounds of appeal could be filed.

[26] Reliance was placed on **Jamaica Public Service Company Limited v Rose Marie Samuels** [2010] JMCA App 23 ('**JPS v Samuels**'); **City of Kingston Co-operative Credit Union Ltd v Bentley Rose** [2010] JMCA App 29; and various cases cited in those authorities.

c. Melrose Finance's response and application for appeal to stand

[27] In response, counsel for Melrose Finance contends on its behalf that the notice and grounds of appeal should not be struck out because it is not "every application for summary judgment that is interlocutory, but it depends on the circumstances". According to counsel, the summary judgment has disposed of substantive issues on the claim. Therefore, it was a final judgment, and the appeal from it is not a procedural appeal.

[28] Counsel argued further that while it is accepted that in **JPS v Samuels**, this court had established that in summary judgment applications, the correct approach is the "application test" and not the "order test", that seems to be the general rule. He said the application judge had gone beyond the application for summary judgment and dealt with every aspect of the matters in the claim, the amended defence and the ancillary claim without restricting her judgment to the application before her. She treated the matter as if it was argued at trial and Melrose Finance had lost on every issue. Therefore, given

that the judgment is entered in "this wide manner", the court should consider whether it is elevated to being an exception to the general rule recognized in **JPS v Samuels** so that the application test is not appropriate.

[29] Counsel submitted that resort should be had, instead, to the order test. As counsel puts it, since the judgment "overreaches the application made and dispose of all the issues in the action, it is inappropriate to proceed by way of a procedural appeal". He maintained that **JPS v Samuels** clearly contemplates exceptions to the general rule and this judgment falls within the exceptions to the general rule. Accordingly, the court should apply the order test and declare that the appeal is not a procedural appeal and make an order for it to proceed in keeping with the terms of the orders sought in para. 1 of Melrose Finance's notice of application.

Whether Melrose Finance requires permission to appeal

[30] The resolution of one primary question is determinative of the application given that it is indisputable that Melrose Finance had not obtained permission to appeal before filing the notice and grounds of appeal. The crucial question is whether the summary judgment is an interlocutory judgment, which requires permission before the appeal may be brought, or a final judgment in respect of which permission to appeal is not required.

[31] Having considered all the circumstances of the case and the submissions of the parties against the background of the applicable law, it is clear that the legal arguments deployed by the respondents in challenging the appeal are unanswerable. They are correct that the notice and grounds of appeal filed by Melrose Finance cannot lawfully stand. The reasons for this conclusion are simple and incontrovertible as will be demonstrated.

(i) Is the summary judgment interlocutory or final?

[32] In **JPS v Samuels**, this court authoritatively settled the question regarding the status of a summary judgment for the purposes of bringing an appeal. After an analysis of the history regarding the court's treatment of the "application test" and the "order test"

that had been the subject of much judicial discourse over the decades, the court concluded that a summary judgment application provides "a classic example of the operation of the application principle" (see paras. [12] to [23] of that judgment). At para. [12], Morrison JA, as he then was, explained the significance, for an appeal, of the question of whether a judgment is interlocutory or final in this way:

> "[12] It is common ground that if the order granting summary judgment to the respondent was interlocutory, then the appeal was required by the rules to be filed within 14 days of the date of the order giving permission to appeal (CAR, rule 1.11(1)(b)). If on the other hand, it was a final order, the time for appealing would be within 42 days of the date when the order was served on the applicant (CAR, rule 1.1 (1)(c)) (sic)."
>
> [Rule 1.11(1)(c) of the CAR has since been amended to read "…within 42 days of the date on which the order or judgment appealed against was made."]

[33] Mr Chen's argument that the court should view the judgment in this case as a final judgment cannot be accepted. With the summary judgment having been entered on an application, which, had it been refused, would have led to the claim proceeding to trial, it means that the judgment was interlocutory in keeping with the application test. In other words, had the application judge refused to grant summary judgment, her order would clearly have been interlocutory. It follows, therefore, that granting the order would also have been interlocutory (see **Salter Rex & Co v Ghosh** [1971] 2 All ER 865 ('**Salter Rex v Ghosh**'), and **JPS v Samuels** at paras. [22] and [23]).

[34] At para. [22] in **JPS v Samuels**, Morrison JA referenced Lord Denning's observations in **Salter Rex v Ghosh** that an appeal from a judgment under RSC Ord 14 (the old summary judgment provision) "has always been regarded as interlocutory". There is no proper basis for this court to depart from this well-considered pronouncement.

[35] Furthermore, and even more crucially, the fact that the application judge found that the person who brought the claim, Mr Martin Boston, had no legal standing to do so in the absence of a recorded power of attorney would also have rendered the order

interlocutory. This is because the finding as to legal standing would not have disposed of the substantive issues between the parties. This finding would have been a sufficiently legitimate basis to strike out the claim. Had this been done, the order striking out the claim would also have been interlocutory (see **Salter Rex v Ghosh**).

[36] There are no exceptional circumstances that would justify the use of the order test as was argued for by counsel for Melrose Finance. The circumstances of this case do not fall into any recognized exception for the order test to be applied to render the judgment a final judgment for the purposes of the appeal. The summary judgment is interlocutory.

(ii) Does an appeal lie from the application judge's order?

[37] Section 11(1)(f) of the JAJA now becomes relevant. Essentially, the section provides that no appeal lies without the leave of the judge (meaning judge of the Supreme Court) or of the Court of Appeal from any interlocutory judgment given by a judge except in certain specified circumstances. This case does not fall within the excepted circumstances delineated in the subsection. Therefore, unless the judge of the Supreme Court or the Court of Appeal grants leave to Melrose Finance to appeal, no appeal lies.

[38] As already established, Melrose Finance was not granted leave in accordance with section 11(1)(f) of the JAJA before the notice of appeal was filed. Therefore, no appeal lies to this court by virtue of section 11(1)(f) of the JAJA.

[39] Even without the operability of section 11(1)(f) of the JAJA, Melrose Finance would still face an insurmountable hurdle given the provisions of rules 1.8(1) and (2) of the CAR. This much has been rightly conceded by counsel for Melrose Finance. Rule 1.8(1) of the CAR provides that where an appeal may be made only with the permission of the court below or this court, the party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought. Melrose Finance is out of time as no permission to appeal was filed in the Supreme Court within the requisite 14 day period.

[40] Additionally, due to rule 1.8(2) of the CAR, this court cannot lawfully entertain an application for an extension of time to bring the application for permission to appeal or the application for permission to appeal. This rule prescribes that while the application for permission to appeal may be made to either court, the application must first be made to the court below. It means then that an application for an extension of time to seek permission to appeal must also be first brought in the court below. No application at all was first made to the court below.

[41] In these circumstances, this court cannot entertain the purported appeal that has been filed without leave having been granted by the Supreme Court or this court. Consequently, the notice and grounds of appeal filed by Melrose Finance in this court must be struck out.

[42] Quite apart from the issue relating to non-compliance with section 11(1)(f) of the JAJA and rules 1.8 and 1.11 of the CAR, Melrose Finance has another insurmountable hurdle presented by the finding of the application judge and stressed by the respondents that the claim was filed without authority. Up to the date the purported appeal was filed, the purported power of attorney on which Mr Martin Boston relied to initiate the proceedings had not been registered in compliance with the law. It has not escaped attention that Melrose Finance, in its application, had also asked the court to permit it to regularize the power of attorney. This means that up to the time of the filing of the application, the standing of the person who initiated the claim was not established. It follows that if Mr Martin Boston is not a proper party to the claim, then he cannot be a proper party to bring the appeal.

[43] Accordingly, in the absence of a properly constituted claimant, the legal standing of Melrose Finance to bring the appeal to this court is a live question, as raised by counsel for the respondents. This has not been satisfactorily answered by counsel for Melrose Finance who, to date, has not produced the registered power of attorney. On this alternative point alone, the notice and grounds of appeal filed by Melrose Finance stands to be struck out as it is without authority, as argued by the respondents.

Conclusion on the respondents' application

[44] Melrose Finance had failed to obtain the requisite permission to appeal from the judge of the Supreme Court in accordance with section 11(1)(f) of the JAJA and rules 1.8 and 1.11 of the CAR. Furthermore, the legal standing of Melrose Finance to bring an appeal is not established to the satisfaction of the court as Mr Martin Boston, who initiated the claim in the Supreme Court on its behalf, was not authorized by law to do so in the absence of a duly registered Power of Attorney. Given all the circumstances of this case, there is nothing this court can do to validate the appeal purportedly commenced by notice and grounds of appeal filed on 8 August 2022.

[45] The respondents' application that the notice and grounds of appeal be struck out, therefore, succeeds.

Melrose Finance's application

[46] Having granted the order sought by the respondents on their notice of application for the notice of appeal to be struck out, and given the court's observation regarding the dubious standing of Mr Martin Boston, who instituted the proceedings below, Melrose Finance's notice of application filed on 26 September 2022 must, inevitably, be dismissed.

Costs

[47] The respondents are successful on both applications. In keeping with the general rule that costs follow the event and with there being no exceptional circumstances that would persuade the court to depart from the general rule, the respondents are entitled to the costs of both applications.

[48] Accordingly, it is appropriate to order that Melrose Finance pays the costs of both applications to the respondents.

FOSTER-PUSEY JA

[49] I agree.

FRASER JA

[50] I agree.

MCDONALD-BISHOP JA

ORDER

1. **<u>On Application No COA2022APP00188</u>**

   (i) The respondents' notice of application filed on 26 August 2022 is granted.

   (ii) The notice and grounds of appeal filed on 8 August 2022, by which Appeal No COA2022CV00091 was purportedly commenced, is struck out.

   (iii) Costs of the application to the respondents to be taxed if not agreed.

2. **<u>On Application No COA2022APP00202</u>**

   (i) The notice of application filed by Melrose Finance Company Incorporated on 26 September 2022 is dismissed.

   (ii) Costs of the application to the respondents to be taxed if not agreed.