

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 121/2018

MOTION NO COA2019MT00015

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MRS JUSTICE FOSTER-PUSEY JA**

BETWEEN	HAROLD MILLER	APPLICANT
AND	CARLENE MILLER	RESPONDENT

Ms Lisamae Gordon and Ms Rayhnah Spence instructed by Malcolm Gordon for the applicant

Michael Hylton QC and Ms Melissa McLeod instructed by Hylton Powell for the respondent

2 December 2019

MORRISON P

[1] This is an application for conditional leave to appeal to Her Majesty in Council against a decision given by this court on 24 September 2019. The court refused the applicant's application for an extension of time within which to file notice of appeal and acceded to an application by the respondent to strike out the notice of appeal filed on 12 December 2018. It is common ground between the parties that, that notice of appeal was filed out of time and in breach of the Court of Appeal Rules, 2002.

[2] This application was originally moved under section 110(1)(a) of the Constitution, which provides that an appeal shall lie from the decisions of the Court of Appeal to Her Majesty in Council as of right -

“where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, final decisions in any civil proceedings;”

[3] In a notice filed on 29 November 2019, the applicant sought leave to amend the application and to add in the alternative an application for leave to appeal to Her Majesty in Council under section 110(2)(a) of the Constitution, which provides that an appeal shall lie to the Privy Council with the leave of the court -

“where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings;”

[4] Before us this morning, Miss Gordon has moved the application on a number of grounds. She appeared to concede at an early stage that what was involved in this case was not a final decision in a civil proceeding within the meaning of section 110(1)(a) of the Constitution. We think this concession was quite properly made. Miss Gordon therefore concentrated in her submissions on the question whether the case fell within the criterion set out in section 110(2)(a) for the grant of leave: that is, whether the proposed appeal involved a question of great general or public importance or otherwise which ought therefore to be submitted to Her Majesty in Council.

[5] Miss Gordon has put forward a number of matters which, she says, enable this appeal to satisfy this criterion. She speaks, firstly, and more than once, to the fact that the decision of the court made on 24 September 2019 was draconian, particularly because there were other options for disposal of the matter open to the court which it might have taken in the circumstances. She questions whether it was open to the court to treat the appeal as not being one with a realistic prospect of success, given that this court had previously granted permission to appeal from the decision in the court below. She questions the status of that permission to appeal now that the court has refused to grant the extension of time and has ordered that the appeal is struck out. She says that there are important issues of law and procedure which remain unsettled in the lower court and in the practice of this court. In the light of the decision, she puts into the mix the prejudice to the applicant, who, she says, will be left a pauper if the decision from which he is seeking to appeal is carried into effect.

[7] In all these circumstances, Miss Gordon reminds us that the law is always reluctant to allow a client to suffer for an error made by his attorney-at-law. For all these reasons and others, which were put forward with great force, Miss Gordon submits that this is a case falling within section 110(2)(a) of the Constitution.

[8] In response to these submissions, Mr Hylton QC refers us to the decision of this court in **Michael Levy v Attorney General & Jamaica Redevelopment Foundation Inc** [2013] JMCA App 11. He refers us in particular to paragraph [28] of that judgment, where the court refers to a notable judgment in the case of **Martinus Francois v The Attorney General** (Saint Lucia Civil Appeal No 37/2003, judgment delivered 7 June

2004), a case from Saint Lucia in which the judgment was delivered by Saunders JA, as he then was. That very learned judge said this (at paragraph [13]):

“Leave under this ground is normally granted when there is a difficult question of law involved. In construing the phrase ‘general or public importance’, the Court usually looks for matters that involve a serious issue of law; a constitutional provision that has not been settled; an area of law in dispute, or, a legal question the resolution of which poses dire consequences for the public.”

[9] Mr Hylton submits on the basis of this dictum that the criterion in section 110(2)(a) has not been met and that leave should not be granted in this case. He points out that the proposed appeal does not raise any difficult or unsettled issues of law, the only issue being whether, on these facts, the court was correct to refuse to extend time to file the notice of appeal. There is no dispute, Mr Hylton submits, as to the law that should be applied on such an application.

[10] We agree with Mr Hylton. We consider that in this case, notwithstanding how strongly the applicant may feel about the outcome which he now has to face, the constitutional criterion of great general or public importance has not been met and that, as a consequence, this is not a fit case to be sent to Her Majesty in Council.

[11] We therefore refuse the application for conditional leave to appeal. We order that the respondent must have the costs of the application, such costs to agreed or taxed.