

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 97/2015**

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA  
THE HON MR JUSTICE BROOKS JA  
THE HON MISS JUSTICE WILLIAMS JA (AG)**

<b>BETWEEN</b>	<b>NEW FALMOUTH RESORTS LTD</b>	<b>APPELLANT</b>
<b>AND</b>	<b>DEMETRI JOBSON</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>MAX GILBERT JOBSON</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>AND</b>	<b>ADMINISTRATOR GENERAL FOR JAMAICA</b>	<b>3<sup>RD</sup> RESPONDENT</b>
	<b>(Administrator of the Estate of Gilbert Baron Jobson)</b>	

**Written submissions filed by Riam Esor and Company for the appellant**

**Written submissions filed by Oswest Senior-Smith and Company for the 1<sup>st</sup>  
and 2<sup>nd</sup> respondents**

**29 July 2016**

**PROCEDURAL APPEAL**

**(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules  
2002)**

## **PHILLIPS JA**

[1] I have read in draft the judgment of my sister P Williams JA (Ag). I agree with her reasoning and conclusion and have nothing useful to add.

## **BROOKS JA**

[2] I too have read the draft judgment of my sister P Williams JA (Ag) and agree with her reasoning and conclusion.

## **P WILLIAMS JA (AG)**

[3] On 18 September 2015, New Falmouth Resorts Limited, the appellant, filed a notice of (procedural) appeal seeking to set aside an order by Lindo J (Ag) (as she then was) made on 28 August 2015, whereby she refused its application for security for costs against Demetri Jobson, the 1<sup>st</sup> respondent, and Max Gilbert Jobson, the 2<sup>nd</sup> respondent.

## **Background**

[4] Gilbert Baron Jobson, who died on 23 May 1980, is the father of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. At the time of his death, he owned over 300 acres of land situated in Orange Grove in the parish of Trelawny, comprised in certificate of title registered at Volume 29 Folio 7 of the register book of titles. These lands were purportedly subject to an option to purchase which was dated 15 September 1967 and made between Gilbert Baron Jobson and an agent for the appellant.

[5] The Administrator General was appointed administrator for the estate of Gilbert Baron Jobson on 30 December 1980 and in 2004 approached the Supreme Court for an order to ratify the sale of the lands to the appellant. Upon receipt of the order sought, the Administrator General transferred the title to the lands to the appellant and it became the registered proprietor thereof.

[6] The 1<sup>st</sup> and 2<sup>nd</sup> respondents subsequently became aware of the transfer of the lands and commenced proceeding by way of claim number 2012 HCV 02305, seeking, among other things, to have the order ratifying the sale of lands set aside and to have themselves, along with the other children of Gilbert Baron Jobson, declared beneficial owners of the lands. The Administrator General was named as the 1<sup>st</sup> defendant and the appellant as the 2<sup>nd</sup> defendant to the claim. Several applications have been made arising from this claim.

[7] The appellant's application for security for costs of the legal proceedings, arising from claim number 2012 HCV 02305, was filed in September 2014. The application was heard and refused by Lindo J (Ag) on 28 August 2015.

### **The documents filed in this court**

[8] The notice of procedural appeal filed 18 September 2015 by the appellant referred to the decision of the learned judge "contained in the draft order, which is attached hereto". However, no such order was in fact attached. The appellant gave the details of the order appealed as being:

"a. Application refused.

- b. Leave to appeal to the 2<sup>nd</sup> Defendant refused.
- c. Costs to the claimant to be taxed, if not agreed."

[9] The checks which were made with the Supreme Court revealed that there was a minute of order signed by the learned judge. The order was however not drawn up and filed and is therefore not perfected. The orders which were made as seen from the minute of order are:

- "1. The application for security for costs is refused.
- 2. Leave to appeal is refused.
- 3. The matter is adjourned to September 3, 2015 at 9:30 am for further PTR."

[10] The next step apparently taken by the appellant was to file the notice of appeal on 18 September 2015. It is not indicated anywhere, however, that the appellant applied for and was granted permission to pursue this appeal.

### **Analysis**

[11] The first matter that therefore has to necessarily detain this court is whether the matter is properly before us. It has to be considered whether in light of the refusal of the learned judge to give permission to appeal, such permission is necessary. There can be no dispute that this is a matter which falls within the definition of "procedural appeal" as set out in rule 1.1(8) of the Court of Appeal Rules (CAR), 2002, which provides:

"...

'procedural appeal' means an appeal from a decision of the court below which does not directly decide the substantive issues in a claim but excludes -

- (a) any such decision made during the course of the trial or final hearing of the proceedings;
- (b) an order granting any relief made on an application for judicial review (including an application for leave to make the application) or under the Constitution;
- (c) the following orders under CPR Part 17 -
  - (i) an interim injunction or declaration;
  - (ii) a freezing order as there defined;
  - (iii) a search order as there defined;
  - (iv) an order to deliver up goods; and
  - (v) any order made before proceedings are commenced or against a non-party;
- (d) an order granting or refusing an application for the appointment of a receiver; and
- (e) an order for committal or confiscation of assets under CPR Part 53.

... "

[12] The application for security for costs, since it did not decide the claim, was also an interlocutory application. Being an appeal from an interlocutory application, this appeal from Lindo J's decision is governed by Section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act, which provides:

"(1) No appeal shall lie -

...

- (f) without the leave of the Judge or the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a judge except:
  - (i) where the liberty of the subject or the custody of infants is concerned;
  - (ii) where an injunction or the appointment of a receiver is granted or refused;
  - (iii) in the case of a decree nisi in a matrimonial cause or a judgment or order in an admiralty action determining liability;
  - (iv) in the case of an order on a special case stated under the Arbitration Act;
  - (v) in the case of a decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the Companies Act in respect of misfeasance or otherwise;
  - (vi) in such other cases, to be prescribed, as are in the opinion of the authority having power to make rules of court of the nature of final decisions.

(2) In this section 'Judge' means Judge of the Supreme Court."

[13] It is beyond dispute that this present matter does not fall within any of the exceptions. Despite being a procedural appeal, permission to appeal was therefore nonetheless required. The appellant would then have had to comply with rule 1.8 of the CAR which provides, inter alia:

- "1.8 (1) Where an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought.
- (2) Where the application for permission may be made to either court, the application must first be made to the court below.
- ..."

[14] Thus having failed to obtain the leave to appeal from the learned judge or any other judge of the Supreme Court, the appellant was obligated to apply for leave from this court. It is noted that although the respondents did make mention of the fact that leave had been refused by the learned judge, they did not raise any challenge to the matter proceeding in this court.

[15] In several decisions of this court the need to determine the jurisdiction to entertain an appeal has been discussed. It is now well established that where leave is required but is not obtained, this court has no jurisdiction to hear the matter. In **Leymon Strachan v the Gleaner Company Limited and Another** SCCA No 54/1997, delivered on 18 December 1998, Patterson JA said at page 10:

"The jurisdiction of this court to hear and determine appeals is conferred by the Judicature (Appellate Jurisdiction) Act. This court cannot entertain an appeal, where leave is required unless such leave has been obtained. Even if the respondents had not taken the preliminary objection, it seems clear to me that the court would be obliged to consider on its own motion, the question whether leave to appeal was necessary in this case. It goes to the jurisdiction of the court."

On the basis of that authority, this court has no jurisdiction to hear this matter.

[16] It is to be noted further, that the appellant filed the notice of appeal on 18 September 2015, which would have been outside of the time for filing such an appeal pursuant to rule 1.11(1) of the CAR which provides, inter alia:

"The notice of appeal must be filed at the registry and served in accordance with rule 1.15 -

- (a) in the case of an interlocutory appeal where permission is not required, within 14 days of the date on which the decision appealed against was made.
- (b) where permission is required, within 14 days of the date when such permission was granted; or
- (c) in the case of any other appeal within 42 days of the date when the order or judgment appealed against was made."

It is useful to note that this rule is the result of an amendment made on 10 September 2015, eight days before the notice in this appeal was filed. Previously, the rule had provided that, in the case of procedural appeals, the notice was to be filed within seven days of the date of the decision appealed against was made.

[17] The order the appellant is seeking to have set aside was made on 28 August 2015, which was during the long vacation. In calculating the time within which the appellant had to file a notice of appeal, rule 3.5(1) of the Civil Procedure Rules (CPR) becomes relevant. The rule provides:

"(1) During the long vacation, the time prescribed for filing and serving any statement of case other than the claim form, or the particulars of claim contained in or served with the claim form, does not run."

[18] In **RBC Royal Bank (Jamaica) Limited et al v Ocean Chimo Limited** [2016]

JMCA App 22, this rule was considered by this court and Brooks JA said at paragraph

[27]:

"In applying the changed rule 3.5 of the CPR to the inference to be drawn that a notice of appeal is the equivalent of a claim form for these purposes, it necessarily follows that the long vacation does not prevent time from running for the purposes of filing and serving a notice of appeal."

[19] The appellant would have therefore firstly, failed to apply for permission to appeal within the time prescribed for so doing, and then, even if it had received permission from Lindo J, it would have failed to comply with the time provided for filing the notice of appeal. Ultimately, the appellant has filed a notice of appeal without leave where leave is first required which makes the notice "ineffective" (see **Evanscourt Estate Company Limited v National Commercial Bank** SCCA No 109/2007 Application No 166/2007 per Smith JA at page 9).

[20] A valid notice of appeal not having been filed, there is no appeal before this court. The notice of (procedural) appeal filed by the appellant on 18 September 2015 should be struck out. There should be no order as to costs.

**PHILLIPS JA**

**ORDER**

The notice of (procedural) appeal filed by the appellant on 18 September 2015 is struck out.

No order as to costs.