

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE BROWN JA
THE HON MR JUSTICE LAING JA**

APPLICATION NOS COA2025APP00018 & COA2025APP00019

BETWEEN	PLANTATION HOLDINGS LTD	1ST APPLICANT
AND	PLANTATION DEVELOPMENT CO LTD	2ND APPLICANT
AND	CHRISTOPHER KERR	3RD APPLICANT
AND	JENNIFER MESSADO	RESPONDENT

Ms Gina Chang for the applicant

Neco Pagon instructed by Aligned Law for the respondent

5, 6 February and 30 May 2025

Civil practice and procedure – Application for leave to appeal – Application for stay of execution of judgment – Oversight of settlement agreement – Court of Appeal Rules, 2002, rules 1.8(1) and (2)

STRAW JA

[1] We heard these two applications filed on 27 January 2025 on behalf of Plantation Holdings Limited, Plantation Development Company Limited and Christopher Kerr (‘the applicants’) against the respondent, Ms Jennifer Messado, on 5 and 6 February 2025 and made the following orders:

- “1. The application for leave to appeal is granted.
2. The hearing of the application is treated as the hearing of the appeal with the consent of the parties.
3. The appeal is allowed.

4. The orders of the Honourable Mrs Justice Jackson Haisley made on 22 January 2025 are set aside.

5. Within seven days of the date hereof, the parties are to agree and advise the Registrar of the Supreme Court of an accountant or firm of accountants to replace and exercise the functions of BDO pursuant to the settlement agreement and the orders of this court made on 5 November 2019.

6. Failing the agreement of the parties, each party is to submit a list of three accountants or firm of accountants to the Registrar of the Supreme Court on or before 20 February 2025 from which the Registrar will select one and advise the parties within seven days of receiving the list.

7. The Registrar is to set the matter for hearing before a judge of the Supreme Court for directions to be given and to have oversight of the completion of the settlement agreement and to give effect to the order of Palmer Hamilton J made on 2 December 2021 within 14 days of the selection by the parties or the Registrar.

8. There shall be no order as to costs in the appeal.

9. The applicants' attorney at law is to draft, file and serve the above orders on or before 12 February 2025."

[2] We promised to give brief reasons for our decision and this is a fulfillment of that promise.

Background

[3] The applicants, by the notice of application numbered COA2025APP00018, sought leave to appeal the orders of a judge of the Supreme Court ('the learned judge') made on 22 January 2025 and, by the second notice of application numbered COA2025APP00019, sought a stay of execution of the said orders. The orders of the learned judge were as follows:

"1. Unless the 3rd Defendant complies with the orders made by Justice Lisa Palmer-Hamilton made on 2 December 2021 that is order number four 'to pay into court by February 2, 2022 the sum of \$20,500,000', by February 7, 2025, he is

required to attend court on February 17, 2025 at 10 AM to answer to contempt proceedings.

2. An interim payment to be made as follows. The Defendant is required to pay \$5 million to the Claimant on or before 16 February 2025, pending the determination of accounts by BDO or another accounting firm.

3. A penal notice is to be attached to the order.

4. The application for leave to appeal and the application for stay of execution are denied.

5. Costs to the applicant to be agreed or taxed.

...”

Discussion

[4] This court can grant permission to appeal in relation to an interlocutory appeal (see rules 1.8(1) and (2) of the Court of Appeal Rules (CAR)) where the application for leave to appeal was refused by the court below. The court below refused leave to appeal on 22 January 2025.

[5] It is accepted that the common issue on both applications is whether the applicants can demonstrate a real prospect of success on the appeal (application for leave to appeal) or with some prospect of success (application for stay of execution). The risk of injustice must also be shown in any application for a stay. The court can grant a stay of execution where it has granted permission to appeal (see **Jennifer Clarke v Icolyn Anderson** [2020] JMCA App 43). The learned judge’s exercise of her discretion must be shown to have been wrongly exercised due to the misapplication or non-application of proper principles (see **Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited** (unreported), Court of Appeal, Jamaica, Application No 166/2007, judgment delivered 26 September 2008; **Garbage Disposal & Sanitations Systems Ltd v Noel Green and others** [2017] JMCA App 2; and **Sagicor Bank Jamaica Limited v Taylor-Wright** (2018) 93 WIR 573).

Prospects of success

[6] Our consideration of this issue arose from the decision of this court in **Plantation Holdings Limited and others v Jennifer Messado and another** [2019] JMCA Civ 37 ('the 2019 judgment') given on 15 November 2019, and the consequential orders of Palmer Hamilton J made in the Supreme Court on 2 December 2021.

[7] By the 2019 judgment, this court partially allowed an appeal by the applicants by which they sought to set aside a default judgment that had been entered against them by Sykes J (as he then was), due to their failure to file a defence in a claim brought by the respondent and another attorney, Ms Lanza Turner Bowen. The fulcrum of the respondent's claim was based on a settlement agreement dated 10 March 2015 that had been entered into by the parties. The respondent had asserted that the sum of \$33,000,000.00 was owed to her law firm but the applicants disputed that amount. An initial sum of \$12,500,000.00 was paid by the applicants as part of the settlement agreement. Thereafter, the sum of \$20,500,000.00 was to be paid by the applicants and held in escrow. The balance of fees and disbursements as determined by a firm of accountants, BDO, would be paid from this amount.

[8] The 2019 judgment expressly determined that both parties had not fulfilled some of the terms of the settlement agreement made on 10 March 2015. Phillips JA stated at para. [40] of that judgment:

"... the parties agreed on certain terms. Subsequent to the payment of \$12,500,000.00, which was duly paid ... no more funds were due to be paid to the respondents, until, pursuant to the settlement agreement, the accountants determined it to be so."

[9] Further at para. [44]:

"... The agreement itself does not acknowledge any specific amount of sums due to the respondents but provides the mechanism to ascertain the amount due and owing to the law firm."

[10] Accordingly, the court, varied the default judgment that had been obtained by the respondents and made the following orders:

"1. Appeal allowed in part.

2. The default judgment entered on the 27 September 2016 is therefore varied to read as follows:

'IT IS HEREBY DECLARED AS FOLLOWS:

1. The [appellants] owe the [respondents] such money for fees and disbursements as shall be determined by BDO pursuant to the settlement Agreement dated 10 March 2015.

IT IS HEREBY ORDERED AS FOLLOWS:

2. There shall be Specific Performance of the Settlement Agreement dated March 10, 2015.

3. Costs to the [respondents] to be taxed if not agreed.'

3. The Court shall give directions and have oversight of the completion of the settlement agreement.

4. The order of Sykes J made on 8 January 2018 is varied to read as follows:

'The application succeeds in part. The default judgment entered on 27 September 2016 is varied to read [as set out above].'

5. There shall be no order as to costs in this appeal."
(Underline and square brackets as in the original)

[11] Subsequently, on an application by the applicants filed on 9 December 2020 in the Supreme Court, the following orders (so far as relevant) were made by Palmer Hamilton J on 2 December 2021:

"(1) ...

(2) This Court shall give directions in relation to the completion of the Settlement Agreement dated the 10th of

March, 2015 in light of the judgment of the Court of Appeal in Plantation Holdings Limited et al v Jennifer Messado et al [2019] JMCA Civ 37, in which this Court has oversight.

(3) The Claimant is compelled to produce the fees, bills and disbursements either through her former law firm, Jennifer Messado & Co, or her current Attorneys-at-Law, to BDO firm of accountants, in order to determine the amount owing to Jennifer Messado & Co pursuant to the Settlement Agreement dated the 10th day of March, 2015 and in compliance with order numbered 2 of the judgment of the Court of Appeal delivered on November 15, 2019.

(4) Monies amounting to \$20,500,000.00 to be paid into Court by the Defendants on or before the 2nd of February 2022.

(5) The Source documents must be made ready and available by both the Claimant and Defendants to the firm of BDO Accountants of 28 Beechwood Avenue, Kingston 5 in the parish of Saint Andrew on or before the 31st of March 2022.

(6) Objections to the Source documents, if any, are to be filed and served on or before April 29, 2022.

(7) The parties are to pay the shared costs to BDO, that is in equal share, on or before March 25, 2022 pursuant to an updated retainer fee.

(8) The report of BDO accounting firm is to be prepared and filed at [sic] the Registrar of the Commercial Division on or before July 22, 2022. Copies of this report are to be provided to the parties by July 22, 2022.

(9) The matter is to be reviewed by the Court on September 21, 2022 at 10 am for ½ hour.

(10) Each party is to bear their own costs in relation to the application and directions made herein.

(11) Liberty to apply.

..."

[12] Following these orders, the applicants sought leave to appeal the above orders of Palmer Hamilton J. This was refused by her on 20 December 2022. An attempt was made

to obtain leave from this court, as permitted by the CAR, but was not pursued. In the meantime, attempts were made to secure BDO to do the accounting of the records as ordered by Palmer Hamilton J. However, by letter dated 17 August 2022, BDO informed the Registrar of the Supreme Court that they were unable to take on the assignment due to resource constraints. The matter appears to have been stalled at that point between the parties. The respondent, however, filed a notice of application for court orders on 21 June 2024 seeking certain orders from the court. It is this application that was heard and determined by the learned judge that formed the basis of the application for leave to appeal and for a stay of execution.

[13] It was important for this court to examine the orders that were sought on this application in order to assist in determining the merits, if any, of any potential appeal. The following orders were sought:

“1. That an Unless Order be made by this Honourable Court pursuant to Supreme Court Civil Procedure Rules (‘CPR’) Part 26 to the effect that *unless* the defendants comply with the Orders of the Court made on the 2nd day of December, 2021 by the Honourable Mrs Justice L. Palmer-Hamilton, to pay into court the sum of \$20,500,000.00 within 7 days from the date of an order made herein, then the defendants statement of case shall stand struck out and judgment be entered for the claimant in the said sum of \$20,5000,000.00 [sic] with interest and costs.

2. Further and in the alternative, an order pursuant to CPR rule 17.7(1) that the defendants pay the claimant the sum of \$5,000,000.00 as interim payment.

3. Costs to the claimant in any event. ...” (Italics as in the original)

[14] It was the submission of counsel Ms Chang that the learned judge misunderstood the 2019 judgment and ought not to have made the orders she did (as set out at para. [3] above), as it was clear that any amount owing to the respondent would have to be first determined by BDO, which was no longer available to do the accounting as required.

[15] On the other hand, Mr Pagon contended that the applicants have been frustrating the progress of the settlement agreement and that this precipitated the respondent's application made on 21 June 2024 for the unless order.

[16] Having considered that there was merit in the submissions of Ms Chang, I formed the view that the factual circumstances demonstrated that the applicants had a real prospect of success on appeal.

[17] The settlement agreement provided that the sum of \$20,500,000.00 was to be paid into an escrow account pending the determination as to any outstanding payments to be made by the applicants to the respondent. Palmer Hamilton J's orders made on 2 December 2021 were a consequence of the orders made by this court in the 2019 judgment. However, after those orders were made by Palmer Hamilton J and prior to the learned judge's orders, it was known to both parties, as well as to the learned judge, that BDO would not be undertaking the accounting as required by the settlement agreement. Also, on a perusal of the orders made by Palmer Hamilton J, various actions were to be undertaken by the parties within stipulated timelines, and the report of BDO was to be prepared and filed with the Registrar of the Commercial Division.

[18] All these outstanding issues were not properly considered by the learned judge when she made the orders that the payment of \$20,500,000.00 was to be paid by the applicants into court by 7 February 2025 and for the interim payment of \$5,000,000.00 to be paid on or before 16 February 2025. No proper regard was given to all the consequential orders that were to follow the payment of \$20,500,000.00 into court and no timelines were made as to the other orders to be fulfilled. The parties received insufficient directions to enable them to fulfil these requirements, including agreeing on a replacement for BDO.

[19] Ms Chang sought to argue that the orders of Palmer Hamilton J and the learned judge ought not to have been made as order number three of the 2019 judgment was to the effect that "[t]he court shall give directions and have oversight of the completion of

the settlement agreement". She submitted that the CAR defines "court" as the Court of Appeal (see rule 1.1(8)). Mr Pagon contended, however, that both counsel understood the court in that context to be the Supreme Court, as the notice of application for directions filed on 9 December 2020, which was ultimately heard by Palmer Hamilton J, was filed by the attorneys for the applicants.

[20] It was not considered desirable to rule on this issue as to whether the judge, in making the order, intended that the court that was to give directions and oversight was the Court of Appeal. It did not appear that the parties at the time understood this to be so. In any event, Palmer Hamilton J's judgment was never appealed.

[21] I formed the view that the learned judge, in granting the unless order in the circumstances which she did, erred in the application of her discretion for the reasons expressed above.

[22] The error is even more palpable when it was considered that the order that \$5,000,000.00 was to be paid as an interim payment was made in circumstances where \$12,500,000.00 had already been paid by the applicants under the settlement agreement and no determination had yet been made as to what else may be owed by the applicants. There was a real risk of injustice to Mr Christopher Kerr, the 3rd applicant, because he had potential contempt proceedings hanging over his head if the amount of \$20,500,000.00 was not paid into court by 7 February 2025.

[23] It is for these reasons that I agreed with the orders set out at para. [1] above.

BROWN JA

[24] I have read the draft reasons for judgment of my learned sister Straw JA and I agree and have nothing else to add.

LAING JA

[25] I, too, have read, in draft, the reasons for judgment of my learned sister Straw JA. They accord with my own reasons for concurring in the decision of the court. I have nothing else to add.