[2026] JMCA App 21

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE G FRASER JA (AG)

APPLICATION NO COA2023APP00100

BETWEEN	**JANET RAMSAY**	**1ST APPLICANT**
AND	**PAULETTE HIGGINS**	**2ND APPLICANT**
AND	**THE ASSETS RECOVERY AGENCY**	**RESPONDENT**

Lenroy Stewart instructed by Wilkinson Law for the applicants

Mrs Caroline P Hay KC and Zurie O Johnson for the respondent

21, 23 November 2023 and 31 July 2026

Civil procedure – Application for extension of time to apply for leave to appeal – Application for leave to appeal interlocutory order – Refusal of application to vary restraint order for provision of legal fees – Whether proposed appeal has a real chance of success – Proceeds of Crime Act – Effect of civil recovery order – Whether restraint order remained capable of variation after judgment – Case management discretion – Order in which applications heard – Constitutional right to legal representation – Judicature (Appellate Jurisdiction) Act, section 11(1)(f) – Court of Appeal Rules, rules 1.7(2)(b) and 1.8(7)

F WILLIAMS JA

[1] I have read, in draft, the reasons for judgment of D Fraser JA and they accord with my own reasons for concurring with the order of the court.

D FRASER JA

Introduction

[2] This is an application by Janet Ramsay and Paulette Higgins ('the applicants') for an extension of time within which to apply for leave to appeal against an order of S Jackson-Haisley J ('the learned judge') made on 8 July 2022. By that order, the learned judge refused the applicants' notice of application for court orders filed on 30 November 2021, by which they sought the variation of a restraint order to permit the payment of legal fees to their attorneys-at-law. The learned judge also refused leave to appeal. The application before this court was dated and filed 19 May 2023.

[3] On 23 November 2023, after hearing counsel for the parties, this court made the following orders:

> (1) The application for extension of time to apply for leave to appeal dated and filed 19 May 2023 is refused.
>
> (2) Costs to the respondent to be agreed or taxed.

[4] With apologies for the delay in their provision, these are the promised reasons for our decision.

Background

[5] The respondent, the Assets Recovery Agency ('the ARA'), brought proceedings in the Supreme Court under the Proceeds of Crime Act ('POCA') seeking civil recovery orders in respect of real and personal property alleged to be recoverable property. The ARA's case was that Andrew Hamilton had been involved in unlawful conduct, including drug trafficking and money laundering in the United States of America. Further, the ARA alleged that property registered in the names of connected persons, including the applicants, both sisters of Mr Hamilton, had been acquired from the proceeds of that unlawful conduct. The civil recovery claim was undefended.

[6] The relevant proceedings (Claim No 2013 HCV03440) began in 2013 ('the 2013 claim'). The claim form and particulars of claim were filed on 6 June 2013, with amended versions later filed on 25 June 2013. An interim restraint order made by

Sykes J (as he then was) was filed on 11 June 2013. On 30 September 2013, Sykes J dismissed applications to strike out the claim and discharge the restraint order, while the application to extend the restraint order was granted.

[7] The applicants' complaint arises from the fact that, although the restraint order preserved the property, it made no ongoing provision for their legal expenses. As a result, from time to time they had to apply to the court for orders permitting legal fees to be paid from restrained assets. Previous orders varying the restraint order to enable such payments were made in 2017 by Straw J (as she then was) and by Batts J.

[8] Since 2017, however, no legal fees had been paid by the applicants to their attorneys-at-law despite their continued involvement in the matters. The attorneys-at-law eventually advised that they could not continue to represent the applicants without being paid.

[9] On 23 November 2020, the ARA filed a notice of application to enter judgment in the 2013 claim. On 30 November 2021, the applicants filed their application seeking provision for legal fees. It was set to be heard on 8 December 2021, but it was short served. The application was rolled to the case management date of 3 February 2022 and the parties entered into discussions to arrive at consent orders. On 3 February 2022, at the case management conference, the applicants' application for a stay of proceedings was set for 1 March 2022.

[10] On 1 March 2022, the applicants' application for a stay of proceedings was heard. Judgment denying that application was handed down on 20 April 2022 (**The Assets Recovery Agency v Andrew Hamilton et al** [2022] JMSC Civ 45). In the learned judge's written reasons on the stay application, she referred to the application for provision of legal fees, indicating that it was a separate and distinct matter which had not been advanced as one of the filed grounds supporting the stay application.

[11] On 2 May 2022, the learned judge heard the ARA's application to enter judgment in the 2013 claim. Judgment was reserved to 8 July 2022. Also, on 2 May 2022, the applicants' application for provision of legal fees was set for hearing on 4 May 2022 and, thereafter, on 8 July 2022. On 4 May 2022, the applicants' attorneys-

at-law advised that they could no longer agree to the consent order for legal fees as framed.

[12] On 12 May 2022, the ARA filed an application asking the Supreme Court to defer delivery of judgment in the 2013 claim pending the hearing of the related 2019 claim. That application was supported by the affidavit of Courtney Smith. On 8 July 2022, the learned judge refused to hear that application, on the basis that it had not been brought to her attention in sufficient time and that she had already arrived at her decision in the 2013 claim, which she was about to deliver.

[13] The learned judge then delivered judgment on the ARA's application to enter judgment in the 2013 claim and granted civil recovery orders. The restraint order made by Sykes J was discharged. Thereafter, the learned judge heard the applicants' application for legal fees and refused it. Her essential reason was that, following the making of the civil recovery orders and the discharge of the restraint order, there was nothing left to vary.

[14] The order refusing the application for legal fees stated:

> "(1) The orders sought on the Notice of Application for Court Orders filed 30 November 2021 are denied.
>
> (2) Application for leave to appeal refused.
>
> (3) Costs to the claimant/respondent to be agreed or taxed.
>
> (4) Counsel for the applicants to prepare, file and serve these orders."

That is the order from which the applicants wished to appeal.

The proposed appeal

[15] The applicants sought to challenge the learned judge's refusal of the application for legal fees. The proposed grounds of appeal were, in substance, that the learned judge erred in:

a) hearing the ARA's application for judgment and civil recovery orders before hearing the applicants' application for provision of legal fees;

b) granting civil recovery orders and then refusing the application for legal fees on the basis that the civil recovery orders had already been made and there were no assets from which provision for legal fees could be made;

c) failing to appreciate that the applicants faced greater prejudice than the ARA, which was protected by the restraint orders; and

d) failing to hear the application for legal fees before the civil recovery application, thereby breaching the applicants' constitutional rights, causing a miscarriage of justice and denying them a fair hearing.

[16] The orders ultimately sought on the proposed appeal included that the appeal be allowed; the learned judge's refusal of the application for legal fees be set aside; this court either grant the application for legal fees or remit it to be heard by another judge of the Supreme Court; and the costs of the instant appeal and the costs below, be awarded to the applicants to be taxed if not agreed.

[17] The proposed appeal could, however, only have proceeded if the application for an extension of time within which to apply for leave to appeal had been successful.

Grounds in support of the application

[18] The applicants' grounds in support of the application were as follows:

> "1. On July 8, 2022, the Hon. Mrs. Stephane Jackson-Haisley ('the learned judge') dismissed an application dated the 26th day of November, 2021 which was filed by the Applicants seeking, inter alia, an order for the provision of legal fees to the Applicants' Attorneys-at-Law, regarding the Applicants' legal representation;

2. The Applicants' Attorneys-at-Law sought leave to appeal from the learned Judge, but the learned Judge refused to grant the Applicants leave to appeal her decision;

3. Section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act provides that no appeal shall lie without the leave of the Judge or of the Court of Appeal from any or any interlocutory judgment or any interlocutory order given or made by a Judge;

4. Rule 1.8(1) of the Court of Appeal Rules provides that 'Where an appeal may be made only with the permission of the Court a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is being sought';

5. The instant Application was filed in this Honourable Court outside of the required fourteen (14)-day period, however, the Applicants have an explanation for the delay and the Respondent will not be prejudiced by the delay;

6. Rule 1.7(2)(b) of the Court of Appeal Rules provides 'the court may extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for extension of time is made after the time for compliance has passed'.

7. The Applicants have a good prospect of success on appeal as the learned Judge erred in refusing to grant the application for the provision of legal fees for, inter alia, the following reasons:

> i. Pursuant to restraint orders issued by [sic] Supreme Court the Respondent is holding significant assets from which the provision of legal fees can be made for the Applicants' benefit;
>
> ii. The Applicants have a constitutional right to a fair hearing of all legal proceedings in which they are involved;
>
> iii. The issuance of an order providing for the Applicants' legal fees is consistent with upholding the Applicants' said constitutional right;
>
> iv. The Supreme Court had previously issued two orders, in 2013 and 2017 respectively, making provision for the Applicants' legal fees;

v. The learned Judge chose to hear the Respondent's application for Judgment and for civil recovery orders against the Applicants before the Applicants' application for the provision of legal fees;

vi. The learned Judge granted the Respondent's said application for Judgment and civil recovery orders and then refused the Applicants' application for the provision of legal fees on the basis that she had already granted the civil recovery orders and there were no assets from which provision for legal fees could be made;

vii. The learned Judge's approach failed to appreciate the Applicants faced great prejudice vis-à-vis the Respondent which had protection via the said restraint orders;

viii. The learned judge's failure to hear the Applicant's application for the provision of legal fees before hearing the Respondent's application for the civil recovery orders breached the Applicants' constitutional rights, contributed to a miscarriage of justice and denied them a fair hearing.

8. The draft/intended Notice of Appeal cannot be filed until, and unless leave is granted."

The evidence

<u>The applicants' evidence</u>

[19] The applicants relied on affidavits filed by Paulette Higgins and Janet Ramsay. The essential complaints in those affidavits were that:

a) the ARA's multiple proceedings against them and the restraint orders had adversely affected the applicants' ability to instruct and pay their attorneys-at-law (exacerbated in the case of Ms Ramsay by her interdiction from her job as a postal worker as a result of those proceedings and the concomitant reduction in salary);

b) there is no generally available legal aid scheme for civil proceedings;

c) they needed legal representation in complex POCA proceedings; and

d) the failure of the learned judge to hear the application and make provision for their legal fees prior to delivering her ruling granting the respondent civil recovery orders breached their constitutional rights under section 16(6)(c) of the Constitution.

The respondent's evidence

[20] The respondent relied on the affidavit of Philishea Garnett, a paralegal at the firm of the respondent's attorneys-at-law. It also relied on the affidavit of Pretania Edwards, legal officer at the Financial Investigations Division ('the FID'), in response to the affidavit of Andrew Hamilton, both filed in application COA2023APP00028, that arose within the appeal in Claim No SU 2019 CV 04077 Andrew Paul Hamilton, Samar Davis and Webster Campbell v The Assets Recovery Agency. Both Ms Garnett and Ms Edwards indicated that their evidence was based partly on their personal knowledge and partly on information obtained from the ARA's files, or its counsel.

[21] Ms Garnett deponed that the respondent's position, communicated to the applicants' attorneys-at-law, was that POCA prevented consent to costs being awarded in criminal matters, and that some aspects of the application were excessive such as £150,000.00 for Privy Council fees. It was also outlined that the fund from which the variation was being sought consisted of net sale proceeds of properties that were in the name of Paulette Higgins and Andrew Hamilton Construction Limited. She further averred that there was no sum under restraint in the 2013 claim in the name of Janet Ramsay.

[22] Ms Garnett's affidavit additionally stated that the undefended 2013 claim averred a constructive or resulting trust in the applicants for the benefit of Andrew Hamilton, and that the respondent's position was that neither applicant had any beneficial interest in the assets recovered.

[23] She also gave detailed evidence of what transpired over time concerning the application for legal fees. In that regard, she stated that between December 2021 and

May 2022, the parties were in discussion in an attempt to settle the costs. On 3 February 2022, at the case management conference, the applicants did not mention the application for legal fees, and no case management orders were made at that hearing. The court instead acceded to the applicants' request that their application for a stay of proceedings be heard first on 1 March 2022. On 1 March 2022, the applicants also did not mention the application for legal fees, and there was no request that it be heard next.

[24] In March 2022, £16,000.00 was proposed by the respondent and accepted by the parties to be the subject of a consent order. The agreement, however, recognised that some aspects of the costs claim were not amenable to consent. On 20 April 2022 the parties announced their agreement to the court and the date of 2 May 2022 was set to hear the application for judgment in the 2013 claim. Judgment was reserved to 8 July 2022, and the applicants' application for provision of legal fees was set for hearing on 4 May 2022, for half an hour, and thereafter on 8 July 2022 for two hours. On 4 May 2022, the applicants' attorneys-at-law advised that they were withdrawing their consent to the order for legal fees.

[25] On 12 May 2022, the respondent filed an application in the 2013 claim that the court defer delivery of its judgment in that matter until it heard the second claim numbered SU 2019 CV 04077. That application was supported by the affidavit of Courtney Smith, the FID's Director of Legal Services, filed on 13 May 2022. There was no application filed or served by the applicants requesting that the application for variation be heard next.

[26] On 8 July 2022 the learned judge refused to hear the 12 May application as it had not been brought to her attention in sufficient time and she had already come to a decision in the 2013 claim, which she was about to deliver. There was no request at that time that the court hear the variation application before delivery of the decision.

[27] On 8 July 2022, after judgment was handed down in the 2013 claim, the application for legal fees was heard. It was refused with brief reasons delivered orally. The court found among other things, that there was then, nothing to vary given the

effect of the POCA, consequent upon entry of the civil recovery order and the discharge of the restraint order.

[28] The affidavit of Ms Edwards materially supported the affidavit of Ms Garnett in relation to the central procedural events concerning the legal-fees application. As did Ms Garnett, Ms Edwards also spoke to the discussions that took place seeking to resolve the application by consent, that an agreement in principle was reached for part of the sum claimed, and that the matter was listed for 4 May 2022 for the entry of a consent order. She indicated that the proposed consent order was not entered because the applicants' attorneys indicated that they would no longer proceed with it.

[29] Ms Edwards supported Ms Garnett's evidence that, on 12 May 2022, the ARA filed an application supported by the affidavit of Courtney Smith to defer delivery of judgment in the 2013 claim until the 2019 claim was heard, which application the learned judge declined to hear, the decision in the 2013 claim being ready for delivery.

[30] Critically, Ms Edwards also supported Ms Garnett's account that: (i) no request was made for the legal-fees application to be heard before judgment in the 2013 claim was delivered, (ii) the legal-fees application was heard after judgment, and (iii) it was refused on the basis that, following the granting of the civil recovery order and the operation of POCA, there was nothing left to vary and no legal basis to compel the ARA to release the funds.

<u>The applicants' evidence in response</u>

[31] In Paulette Higgins' affidavit in response to the affidavit of Philishea Garnett, she disputed the assertion that the application for legal fees had not been mentioned at the case management conference of 3 February 2022, or at the stay application on 1 March 2022. She relied on counsel's notes, including notes indicating that the court had been told, on 3 February 2022, that the application for legal fees was in bundle 6 and had not yet been heard, but they were still in discussions, and the instructions were to consent to what they could consent to. Further that, on 1 March 2022, counsel's notes revealed that the court was asked to "take into consideration in arriving at its ruling, and that is namely my lady that the Defendants have also filed

an application for the provision of legal fees so that they can continue to be represented".

[32] She stated that the respondent's offer to fund the applicants' legal fees only for the Privy Council hearing showed an acceptance, in principle, that provision for legal fees was appropriate. However, the respondent refused to fund fees for the other related matters. Although the applicants initially considered accepting the limited sum "as it was better than nothing", they ultimately declined to do so when it became clear that no provision was being made for the lawyers representing the other parties before the Privy Council.

[33] Ms Higgins additionally relied on the learned judge's reasons in the stay application, **The Assets Recovery Agency v Andrew Hamilton et al** [2022] JMSC Civ 45, in which the learned judge, at para. [38], referred to the application for legal fees and stated that it was a separate and distinct issue. Ms Higgins submitted that this demonstrated that the learned judge was aware of the application for legal fees before she delivered judgment on the ARA's application to enter judgment.

The submissions

<u>The applicants' submissions</u>

[34] Mr Stewart submitted that the relevant legal principles governing the application were to be found in section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act and rules 1.8(1), (2) and (7) of the Court of Appeal Rules, 2002 ('CAR').

[35] He further submitted that two issues arose for determination:

i) whether the applicants' intended/prospective appeal against the learned judge's decision has a real chance of success; and

ii) whether this court should grant an extension of time permitting the applicants to appeal the learned judge's decision.

[36] Regarding issue (i), he advanced that the intended appeal had a real chance of success. He contended that the learned judge adopted a course which rendered the

application for legal fees nugatory. She heard and determined the ARA's application for judgment first, made civil recovery orders, discharged the restraint order, and then refused the application for legal fees, because there was no longer any restraint order to vary.

[37] Counsel submitted that, where the court had before it an application for provision of legal fees in proceedings of exceptional complexity and seriousness, the learned judge ought to have arranged the order of hearing to avoid undermining the applicants' ability to secure representation. He relied on the overriding objective (rule 1.1 of the Civil Procedure Rules ('CPR')), the constitutional right to access legal representation, and authorities including **Avon Griffiths v The Attorney General of Jamaica** [2022] JMSC Civ 148 ('**Avon**'), **Dawn Satterswaite v Asset Recovery Agency and Terrence Allen v Asset Recovery Agency** [2021] JMCA Civ 28 ('**Satterswaite**'), **Caplin & Drysdale, Chartered v United States**, 491 U S 617, 646 (1989) at page 646, **National Director of Public Prosecutions v Elran** (CCT 56/12) [2013] ZACC 2; 2013(1) SACR 429 (CC); 2013 (4) BCLR 379 (CC) (19 February 2013) at para. 52, **Burgundy Royale Investments Pty Ltd v Westpac Banking Co. Ltd** (1992) 109 ALR 549, 553, and **The Asset Recovery Agency v Yowo Morle et al** [2012] JMSC Civ 137 in which the case of **Revenue and Customs Prosecutions Office v Robert William Briggs-Price** [2007] EWCA Civ 568 ('**Briggs-Price**') was reviewed by Sykes J (as he then was).

[38] Counsel further submitted that, even after making the civil recovery orders, the learned judge could have fashioned an order to meet the justice of the case, including by staying the effect of her judgment or carving out an exception for legal fees. It was submitted that the court should not allow the sequence of events to defeat an application that was pending before judgment was delivered.

[39] In relation to issue (ii), relying on the well-known authority of **Leymon Stachan v The Gleaner Company Ltd and Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered on 6 December 1999, counsel submitted that the affidavits filed supported the granting of the application for extension of time. Counsel advanced that the affidavits outlined:

a) an adequate or justifiable explanation or reasons for the delay in making this application which includes the fact that they do (did) not have the resources to instruct their attorneys-at-law;

b) that there was an arguable case for an appeal which had a real chance of success;

c) the fact that the question to be decided in this prospective appeal would provide valuable guidance in this area of the law; and

d) that there was no significant, or undue, prejudice to the respondent, if the extension sought by the applicants was granted by this court.

[40] The applicants submitted that they were prevented from accessing the restrained funds which they needed to pay for *bona fide* legal services and that the failure of the learned judge was irreparably prejudicial to them. They posited that the fact that the relevant property had been forfeited did not prevent the making of the necessary provision for legal fees even at that stage. They indicated then that they were still in need of legal representation for the matters before the courts and legal fees to cover them.

[41] They advanced that their intended appeal to this court had a real chance of success particularly having regard to how the learned judge handled their application for legal fees.

The respondent's submissions

[42] Mrs Hay KC, for the respondent, relied on rules 1.8(7) and 1.7(2)(b) of the CAR as she maintained that the application should be refused. Under rule 1.8(7) it was submitted that the proposed appeal had no real chance of success. She cited the cases of **Garbage Disposal & Sanitations Systems Ltd v Noel Green, Laurenston Lowe and Dockery Forbes** [2017] JMCA App 2 relying on **Swain v Hillman and another** [2001] 1 All ER 91; **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Wallace** [2015] JMCA App 27A; and **Beep**

Beep Tyres, Batteries and Lubes Limited v DTR Automotive Corporation [2022] JMCA App 18.

[43] King's Counsel submitted that, as the proposed appeal had no merit, there was no basis to extend time under rule 1.7(2)(b) of the CAR. She relied on the cases of **Leymon Strachan v The Gleaner Company Ltd and Stokes**, cited in **Garbage Disposal & Sanitations Systems Ltd v Noel Green and others** as well as **Silvera Adjudah v The Attorney General of Jamaica** [2021] JMSC Civ 64.

[44] King's Counsel argued that, on 8 July 2022, no party asked the learned judge to hear the application for legal fees before delivering judgment. The application for legal fees was heard after judgment as a listed application. The respondent's central submission was thus that, by the time the legal-fees application was heard, the civil recovery order had already been made, and the restraint order had been discharged. Therefore, there was no restraint order left to vary, and the applicants no longer had any legal rights in the property which had now vested in the Crown pursuant to section 58(8) of POCA. King's Counsel also relied on the fact that the Commissioner of Land Valuation, tasked with administering property vested in the Crown, pursuant to section 9 of POCA, was not a party to the proceedings and thus could not be bound by any variation order.

[45] The respondent argued that the applicants were attempting to re-characterise the appeal as a challenge to the learned judge's case management discretion in deciding to hear the application to enter judgment before the legal-fees application. King's Counsel relied on rule 26.1 of the CPR, which includes a broad power for the court to decide the order in which issues are tried. King's Counsel maintained that the applicants had not shown any error of law, misapprehension of fact, or plainly wrong exercise of discretion, justifying interference with the learned judge's approach. King's Counsel cited in support the case of **Mattino Limited v Jodi Barrow and Leiza Munn-Blakely** [2022] JMCA Civ 27 in which the cases of **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 and **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 were endorsed as establishing the applicable standard of review.

[46] The respondent argued that the applicants contributed to the sequence of events because they had earlier represented to the learned judge that the legal-fees application, or at least a part of it, would have been dealt with by consent, which they later withdrew on 4 May 2022. The respondent also submitted that the applicants had not averred that they had no other means of paying their attorneys-at-law.

[47] King's Counsel additionally sought to distinguish the following authorities relied on by the applicants: **Avon**, **The Asset Recovery Agency v Yowo Morle et al**, **Caplin & Drysdale, Chartered v United States**, **National Director of Public Prosecutions v Elran** and **Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation** (1992) 109 ALR 549.

The applicable principles

[48] There is no dispute that the order refusing the application for legal fees was interlocutory, as whatever the outcome of that application the substantive matter would not have been at an end (see **Jamaica Public Service Company Limited v Rose Marie Samuels** [2010] JMCA App 23, **John Legister and Others v Bank of Nova Scotia Jamaica Limited** [2014] JMCA App 1, both cited in **Garbage Disposal & Sanitations Systems Limited v Noel Green, Laurenston Lowe & Dockery Forbes**). Section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act provides that, subject to specified exceptions not applicable here, no appeal lies to this court from an interlocutory judgment or order without the leave of the judge below or of this court. The applicants, therefore, required leave to appeal. Having been refused leave to appeal by the learned judge, they sought leave from this court.

[49] Rule 1.8(7) of the CAR provides that the general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that the appeal will have a real chance of success, that is, there is a realistic, not a fanciful prospect of success. This principle was established in **Swain v Hillman and another** and has been followed in several cases from this court including **Garbage Disposal & Sanitations Systems Ltd v Noel Green and others**; **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Wallace**; and **Beep Beep Tyres, Batteries and Lubes Limited v DTR Automotive Corporation**.

[50] Rule 1.7(2)(b) of the CAR empowers this court to extend time for compliance with a rule, practice direction, order or direction, even where the application for extension is made after time has expired. The governing principles in an application of this kind are those identified in **Leymon Strachan v The Gleaner Company Ltd and Dudley Stokes**: the rules providing timetables for litigation must *prima facie* be obeyed; where there is non-compliance, the court has a discretion to extend time; and, in exercising that discretion, the court considers the length of delay, the reasons for delay, whether there is an arguable appeal, and the degree of prejudice to the other party, bearing in mind that the overriding principle is that justice is to be done.

[51] Where an application for extension of time to apply for leave to appeal and an application for leave to appeal are before the court together, a practical approach is to consider first whether leave to appeal could properly be granted. If the proposed appeal has no real chance of success, it would ordinarily be futile to extend time for the making of the leave application. That approach is reflected in the case of **Garbage Disposal & Sanitations Systems Ltd v Noel Green, Laurenston Lowe and Dockery Forbes,** relying on **Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited** (unreported), Court of Appeal, Supreme Court Civil Appeal No 109/2007, judgment delivered 26 September 2008.

[52] Insofar as the proposed appeal challenges the learned judge's exercise of case management discretion, the well-established principle is that this court will not interfere merely because it might have exercised the discretion differently. The applicants must show that the judge erred in principle, misunderstood the law or the evidence, acted on a demonstrably wrong inference, or made a decision so plainly aberrant that no judge properly directing herself could have reached it. That settled approach is reflected in the cases of **Hadmor Productions Ltd v Hamilton**; **The Attorney General of Jamaica v John MacKay**; **Sally Ann Fulton v Chas E Ramson Limited** [2022] JMCA Civ 21, and **Mattino Limited v Jodi Barrow and Leiza Munn-Blakely**.

Analysis

<u>Whether the proposed appeal had a real chance of success</u>

The sequence in which the applications were heard

[53] The applicants' central complaint was that the learned judge had before her an application for legal fees, knew that the application was important to their ability to be represented, and nevertheless delivered judgment first in the 2013 claim, based on which she ruled the application for legal fees could not succeed. The relevant question, however, was not whether another judge might, with hindsight, have sequenced the applications differently. It was whether the applicants had shown a realistic prospect of persuading this court that in the learned judge's sequencing of multiple applications in the exercise of her discretion, the learned judge misunderstood the law, misunderstood the facts, proceeded on a demonstrably wrong basis, or reached a decision no reasonable judge could have reached.

[54] They did not do so. The order in which applications are heard is a matter of case management. Rule 26.1(2)(f) of the CPR provides as follows:

> "Except where these Rules provide otherwise, the court may –
>
> (a) …
>
> (f) decide the order in which issues are to be tried;"

[55] It is accepted that the learned judge was aware of the application for legal fees. That is clear from her earlier reasons in the stay application and from the procedural history. But awareness of the application does not, without more, establish that the learned judge was required as a matter of law to hear it before delivering judgment on the ARA's application. The learned judge's earlier view, in the stay ruling, was that the application for legal fees was a separate matter. That was a view she was entitled to take.

[56] The learned judge was dealing with multiple applications in long-running POCA proceedings. The ARA's application to enter judgment had been filed on 23 November 2020. The applicants' application for legal fees was filed on 30 November 2021 (more

than a year later). The hearing of the ARA's application to enter judgment took place on 2 May 2022. Judgment was reserved to 8 July 2022, and the application for legal fees was set for 4 May 2022 and, thereafter, 8 July 2022.

[57] The context is important. On 2 May 2022, after submissions had been made on the application to enter judgment, the parties asked the learned judge for a fixture to enter a consent order on the application for legal fees. The formal order records that the application for legal fees was set for 4 May 2022 for that purpose. The evidence shows that it was the applicants' attorneys-at-law who, on the morning fixed for entry of the consent order, indicated that they could no longer agree to the proposed order.

[58] We noted that this account was not entirely uncontested. Ms Higgins, in her affidavit in response to Ms Garnett, disputed the assertion that the application for legal fees went unmentioned at the case management conference of 3 February 2022 and at the hearing of the stay application on 1 March 2022, relying on counsel's contemporaneous notes to the effect that the court was told, on the first occasion, that the application was filed and awaiting hearing, and, on the second, that the court was asked to have regard to it in arriving at its ruling. We did not consider this conflict material to the outcome. Even accepting Ms Higgins' account at its highest, informing the court of the application's existence and pendency is not equivalent to a request that it be heard in priority to, or in advance of, the ARA's application to enter judgment. Further, there was no suggestion, in counsel's notes or otherwise, that such a request was made on either occasion. The formal record of the orders made on 3 February and 1 March 2022, which is undisputed, confirmed that no directions were sought or given as to the sequencing of the two applications at those hearings. The conflict in the affidavit evidence, therefore, did not affect our conclusion that the applicants did not, at the material times, press for the legal-fees application to be heard first.

[59] In those circumstances, it cannot realistically be said that the learned judge acted contrary to the parties' presentation of the matter by proceeding to reserve judgment on the ARA's application and by permitting the parties an opportunity to resolve the application for legal fees by consent. Nor was there evidence that, on 8

July 2022, before judgment was delivered, the applicants insisted that the application for legal fees be heard first. The respondent’s evidence was that no party so insisted.

[60] The case of **Avon**, relied on by the applicants, does not support their contention that the learned judge wrongfully exercised her discretion. One clear point of distinction is that in **Avon** the application for the extension of time to file defence was first in time, preceding the application for interlocutory judgment to be entered in default of defence. Further, the court was mindful of rule 12.5(e) of the CPR which indicates that a pending application for extension of time to file a defence will forestall the registry entering judgment in default of defence on the request of a claimant. Ultimately the court examined the reason for delay, looked at the merits of the defence and concluded that the proposed defence did not raise any triable issue, nor did it foreshadow a reasonable prospect of succeeding at trial.

[61] By contrast, in the instant case, the respondent's notice to enter judgment was first in time by over a year. Regarding the application for legal fees, the parties entered into discussions and the learned judge was notified of the parties' intention to enter consent orders. Consequently, the learned judge fixed a date for the consent order to be entered. In those circumstances the applicants have failed to demonstrate how the learned judge's exercise of her case management powers to determine the order in which the matters were heard compromised the principles of fairness.

[62] The applicants’ reliance on the overriding objective did not alter the analysis. The overriding objective required the court to deal with the proceedings justly. It did not compel a particular sequencing of applications, especially where the parties themselves had indicated that the legal fees issue was being resolved by consent and where the applicants later withdrew from that consent position.

[63] The applicants separately contended that the learned judge failed to appreciate that they faced greater prejudice than the respondent, which was already protected by the restraint order, in proceeding to determine the ARA's application first. This ground added nothing to the sequencing complaint already addressed above. The prejudice of which the applicants spoke, the risk of being left without funded representation, was simply the consequence of the sequencing they say was wrongly

adopted, and the reasons given at paras. [53] to [62] for concluding that the learned judge was entitled to proceed as she did apply equally here. We would only add that the respondent was not, in any event, without its own legitimate interest in the timely determination of proceedings that had by then been pending for close to a decade, and the learned judge was entitled to weigh that interest as part of the ordinary exercise of case-management discretion. This ground did not disclose a realistic prospect of success independent of the sequencing ground already rejected.

The effect of the civil recovery order and discharge of the restraint order

[64] The application for legal fees sought a variation of the restraint order. It is, therefore, of vital importance that, by the time the application was heard, the civil recovery order had been made, and the restraint order had been discharged. So far as relevant, in part or in full, the heading above section 57 and sections 57, 2, 58 and 9 of POCA are set out below:

> *"Civil recovery in the Supreme Court"*
>
> Section 57
>
> "The enforcing authority may take proceedings in the Court against any person who the enforcing authority believes holds recoverable property."
>
> Section 2
>
> "In this Act—
>
> …
>
> 'enforcing authority' means—
>
> (a) the [ARA], where it makes an application under section 5(1) or takes proceedings under section 57;
>
> (b) …"
>
> Section 58 (1), (2) and (8)
>
> "(1) If in proceedings under this Part the Court is satisfied that any property is recoverable, the Court shall make an order under this section (hereinafter called a recovery order).

(2) Subject to subsection (8), **the recovery order shall vest the recoverable property in the [ARA].”**

….

(8) **Where property which is the subject of a recovery order includes real property—**

(a) the order shall vest that real property in the Crown;

and

(b) the provisions of section 9(3) to (5) shall apply, with the necessary modifications, to that real property, so however that the directions given pursuant to section 9(4) shall provide for the realized proceeds to be paid over to the [ARA].” (Emphasis supplied)

Section 9(3)

“(3) Where property against which a forfeiture order has been made is subject to the Registration of Titles Act-

(a) the property vests in the Crown in equity but not at law until the applicable registration requirements have been complied with;

(b) the Crown is entitled to be registered as owner of the property;

(c) **the Commissioner of Land Valuation has power on behalf of the Crown to do, or to authorize the doing of anything necessary or convenient to obtain the registration of the Crown as owner**, including the execution of any instrument required to be executed by a person transferring an interest in that kind of property.” (Emphases supplied)

[65] The effect of the sections outlined is that where the ARA commences civil proceedings under section 57, if the court is satisfied that property is recoverable, it makes a recovery order. The effect of such an order is that recoverable property vests in the ARA, and, where the property includes real property, that real property vests in the Crown. The Commissioner of Land Valuation is empowered to do what is necessary or convenient to have registered land transferred to the Crown as owner.

[66] It is also important to outline the relevant parts of sections 32 and 34 of POCA that deal with restraint orders.

> Section 32
>
> "(1) The Court may make a restraint order if any of the following conditions are satisfied—
>
> (a) …
>
> (d) where the enforcing authority **has made an application under section 58 (recovery orders), which has not been determined** or the Court believes that such an application is to be made."
>
> Section 34
>
> "(1) An application to vary or discharge a restraint order may be made to the Court by—
>
> > (a) the person who applied for the order; or
> >
> > (b) any person affected by the order.
>
> (2) Where an application is made under subsection (1), the Court may vary or discharge the order:
>
> Provided that if the condition that was satisfied under section 32(1) was that—
>
> > (a) proceedings were started or an application was made, the Court **shall discharge the order on the conclusion of the proceedings or the determination of the application**, as the case may be; or
> >
> > (b)…." (Emphases supplied)

[67] As section 34(2)(a) mandates, once the learned judge had determined the 2013 claim, the restraint order had to be discharged. The restraint order having been discharged, there was no subsisting restraint order for the learned judge to vary. This was not merely a technicality. The legal basis of the application for legal fees before the learned judge was the variation of an existing restraint order. The learned judge's conclusion that there was nothing left to vary was, therefore, palpably correct.

[68] The applicants submitted that the learned judge could nevertheless have fashioned an order to meet the justice of the case. However, they did not identify a legal basis on which the learned judge could, after the discharge of the restraint order and the vesting of the property under POCA, compel the ARA or the Crown to release property to them under an application framed as one to vary the restraint order. The respondent also pointed out that the Commissioner of Land Valuation, who has statutory functions in relation to vested real property, was not before the court in the application for legal fees.

[69] The authorities relied on by the applicants do not establish that a discharged restraint order can be varied. In **The Asset Recovery Agency v Yowo Morle et al**, the issue concerned the variation of a restraint order while there was still an order in being capable of variation. The foreign authorities of **Caplin & Drysdale, Chartered v United States**, **National Director of Public Prosecutions v Elran**, and **Burgundy Royale Investments Pty Ltd v Westpac Banking Co Ltd** all concerned whether restrained assets could be used for legal fees, but did not address the present situation where the restraint order had already been discharged.

[70] The applicants' reliance on post-judgment authorities such as **Briggs-Price**, does not answer the difficulty posed in the circumstances of this case. In **Briggs-Price**, the English Court of Appeal upheld the exercise of discretion where, after a criminal confiscation order had been made, a judge allowed funds to be released to fund the defendant's appeal against the confiscation order. Several points of distinction between that case and the instant case need to be made. Firstly, a restraint order was still in place restraining funds that could be released. It did not have to be and was not discharged on the making of the confiscation order. Secondly, the parties had previously agreed that an exception should be made to the restraint order for legal expenses which were "actually, reasonably and properly incurred'" in the criminal proceedings. If the defendant was successful in his appeal, it would affect the amount of his benefit; and, possibly, the length of the additional term of imprisonment to be served, if he did not pay the confiscation order. That was, therefore, a legitimate purpose. Thirdly, the case did not fall under the English version of POCA which, by sections 40 and 41(3) to (5), provide that any provision in a restraint order for

reasonable legal expenses must exclude provision for any legal expenses relating to the offences. It instead fell under the Drug Trafficking Act 1994 and Criminal Justice Act 1988 which allowed such provision.

[71] By contrast, in the instant case, the application for legal fees before the learned judge was not a fresh application directed at property still lawfully within the court's control, but an application to vary a restraint order that had ceased to exist.

The constitutional argument

[72] The applicants placed considerable reliance on their constitutional right to legal representation and in this regard on the case of **Satterswaite**. They were correct to submit that a court considering an application to vary a restraint order for legal fees should not ignore constitutional considerations merely because the application is not brought by originating motion for constitutional redress. The court in **Satterswaite** made clear that the Supreme Court may, where necessary, consider constitutional rights that arise in the course of ordinary proceedings.

[73] That proposition, however, does not mean that applicants are entitled as of right to payment of legal fees from restrained or recovered property. Nor does it mean that constitutional concerns override the statutory consequences of a civil recovery order once the court has found the property to be recoverable and the property has vested in the Crown under POCA.

[74] The respondent's evidence was that the fund from which the variation was sought contained net proceeds of sale for property in the name of Paulette Higgins and Andrew Hamilton Construction Limited, and that there was no sum under restraint in these proceedings in Janet Ramsay's name. The respondent's position was also that the claim, which was undefended, averred a constructive or resulting trust in the applicants for Andrew Hamilton, and that neither applicant had any beneficial interest in the recovered assets.

[75] For the reasons already given in rejecting the applicants' complaint as to the sequencing of the two applications (paras. [53] to [63]), we did not accept that the sequencing itself gave rise to a breach of the applicants' constitutional rights. The

learned judge's judgment in the substantive civil recovery matter proceeded on the basis that the claim was undefended and that the ARA had established that the properties were recoverable. The civil recovery order itself was not the order directly under consideration on this application. Against that background, the applicants did not demonstrate a realistic prospect of establishing that the refusal to vary the restraint order after its discharge (which was impossible) amounted to a breach of their constitutional rights.

[76] Therefore, the proposed constitutional ground did not convert an otherwise unmeritorious proposed appeal into one with a real chance of success. The applicants were represented by counsel in the proceedings before the learned judge and before this court. They undoubtedly wished to have additional or continuing legal fees paid, but they did not establish that the learned judge's refusal of the particular application before her, at the time it was heard, denied them a fair hearing.

Conclusion

[77] Having assessed the way the learned judge handled the sequencing of the applications, the effect of the civil recovery order/discharge of the restraint order and the constitutional argument advanced by the applicants, the applicants did not establish that the learned judge's approach displayed a flawed exercise of her discretion under the principles outlined in **Hadmor Productions Ltd v Hamilton**; **The Attorney General of Jamaica v John MacKay**, and other cases or otherwise resulted in a miscarriage of justice.

[78] The inevitable conclusion was, therefore, that the proposed appeal had no real chance of success, yielding no basis for the grant of the application for leave to appeal.

<u>Extension of time</u>

[79] The order sought to be appealed was made on 8 July 2022. The application to this court was filed on 19 May 2023, just over 10 months later. The applicants, therefore, required a substantial extension of time.

[80] The explanation advanced by the applicants, included the assertion of financial difficulties that affected their ability to instruct counsel. The respondent's countering

submission was that the delay was substantial and that the applicants had not demonstrated a meritorious proposed appeal.

[81] As discussed in **Garbage Disposal & Sanitations Systems Limited v Noel Green, Laurenston Lowe & Dockery Forbes** relying on **Evanscourt Estate Company Limited v National Commercial Bank** "if permission to appeal ought not to be given, it would be futile to enlarge the time within which to apply for permission". Therefore, even if the court were prepared to treat the explanation for the delay with some indulgence, it would serve no useful purpose to extend time for an application for leave to appeal where leave would inevitably be refused because the proposed appeal had no real chance of success.

[82] We did not find it necessary to reach a concluded view on whether the applicants' explanation for the delay, financial difficulty in instructing counsel, would, on its own, have been regarded as adequate under the **Leymon Strachan** factors, nor on the degree of prejudice the respondent would have suffered had time been extended. Those questions matter only where a proposed appeal has sufficient merit to make the grant of an extension a live question. Having concluded that the proposed appeal had no real chance of success, the application for an extension of time could serve no useful purpose, whatever view might be taken of the length of, and reasons for, the delay, or of the prejudice to the respondent.

[83] The application for extension of time was, therefore, refused.

Costs

[84] After the court announced its decision, counsel for the applicants asked that each party bear its own costs, relying in part on the applicants' asserted financial difficulty. Counsel for the respondent submitted that there was no basis to depart from the ordinary rule that costs follow the event, and referred to the respondent's position that the applicants had been invited to withdraw the application.

[85] There was no sufficient basis to depart from the usual order. The respondent was the successful party. Costs were, therefore, awarded to the respondent, to be agreed or taxed.

G FRASER JA (AG)

[86] I, too, have read the draft reasons for judgment of D Fraser JA. They accord with my own reasons for concurring with the order of the court.