EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2013/0010

BETWEEN:

DAVID BRAY ET AL

Appellants

and

[1] SUNSET VILLAGE INC. (IN LIQUIDATION)
[2] FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED
[3] OLIVER JORDON (LIQUIDATOR)

Respondents

Before:
The Hon. Mr. Mario Michel — Justice of Appeal

Appearances on paper

2013: August 30

JUDGMENT

[1] **MICHEL J**: On 28th March 2013, a "notice of motion of special leave to appeal" against the decision of Justice Rosalyn E. Wilkinson made on 8th November 2012 was filed on behalf of 35 secured creditors of the first respondent, which is a company in liquidation. The notice was filed together with an affidavit in support, in which affidavit the court was asked to grant the applicants' application for an extension of time, presumably to appeal against the decision of Wilkinson J.

[2] On 2nd April 2013, another affidavit was filed on behalf of the applicants in support of the "motion of special leave to appeal". In this latter affidavit, the affiant avers

that a notice of appeal was filed on 21st February 2013 but, upon realising that it was filed out of time, an "application for leave for an extension of time to file a notice of appeal was subsequently filed on 28th March 2013". After referring in the affidavit to the applicants' application "for leave to appeal", the affidavit ends with a prayer that the court grants the application for an extension of time, presumably to appeal the decision of Wilkinson J.

[3] On 2nd April 2013, notice was given on behalf of the second respondent of its opposition to the notice of motion of special leave to appeal filed on 28th March 2013.

[4] On 5th April 2013, notice was given on behalf of the first and third respondents of their intention to oppose the notice of motion of special leave to appeal filed on 28th March 2013.

[5] The applicants - having variously referred to their application as a "motion of special leave to appeal", an "extension of time", and an "application for leave for an extension of time" - filed written submissions on 7th May 2013 in support of an application for an extension of time to appeal.

[6] In their written submissions, the applicants focussed exclusively on the provisions of Rule 26.8 of the CPR dealing with applications for relief from sanctions, without any mention of the basis on which they approached the court of appeal (as non-parties to the proceedings before the high court) to extend the time within which they can appeal the judgment of the high court in a suit in which they were not parties.

[7] The first and third respondents to the application, having given notice of their intention to oppose the application, filed written submissions in opposition on 14th May 2013. Their submissions addressed both the issue of an extension of time to appeal and the ability of the applicants to appeal the order of Wilkinson J made in proceedings in which they were not parties. They also referred to article 381 of the **Code of Civil Procedure**.

[8] On 21st May 2013, the "application for an extension of time to file a notice of appeal" came before Justice of Appeal Davidson Kelvin Baptiste as a single judge of the court of appeal, whereupon Baptiste JA gave leave to the applicants to file and serve, within 14 days, submissions in reply to the respondents' submissions.

[9] On 5th June 2013, the applicants filed submissions in reply to the submissions filed on behalf of the first and third respondents. In their reply, the applicants submitted that they were deemed to be parties to the proceedings by virtue of the fact that, upon receiving notice of the order of Wilkinson J, they filed a without notice application to set aside and/or vary the judge's order and since they were heard by the court on their application, they would have to be deemed parties to the proceedings. The applicants' reply then focussed on provisions of the CPR and dicta from the cases on addition, substitution and removal of parties. The applicants also made reference in their submissions in reply to section 407(5) of the **Companies Act** of Saint Lucia, which permits any person aggrieved by any act or decision of a liquidator to apply to the court to confirm, reverse or modify the act or decision complained of and to make such order as the court thinks fit.

[10] Despite the inconsistencies in the description of the application before the Court, it would appear that what is before me is an application by a number of investors in a property development project undertaken by a company called Sunset Village Inc. – the party named as the first respondent to the application – to extend the time within which they (the investors) can appeal against an order made by Wilkinson J on an application made to her by First Caribbean International Bank (Barbados) Limited, in which application Sunset Village Inc. was named as the respondent.

[11] Whatever may be the merits or demerits of an application by a party to proceedings before a judge for an extension of time to appeal against the judge's order, the fundamental issue which the present application raises is whether a person who was not a party to the proceedings can appeal against the judge's order, because it is only if the applicants cross that bar that the court can or should

consider the merits or demerits of the application for extension of time to appeal the order.

[12] It cannot conceivably be the case that anyone who is unhappy with the decision of a judge, in a case in which the person is not a party, may appeal against the judge's order, no matter what is the person's connection to the subject matter of the case. That would be a source of confusion. On the other hand, it cannot be that a person whose interests are directly and substantially affected by an order of a court, in a case in which the person is not a party, can do nothing to challenge the validity of that order. That would be a travesty of justice. To be sure though, a person who is not a party to the suit in which a judgment is given or an order made, cannot simply file an appeal against the judgment or order without having been joined as a party to the proceedings or without having otherwise obtained a judicial fiat that entitled him to be heard in the proceedings leading up to the appeal.

[13] In the present case, there has been no joinder of the applicants as parties to the suit and the submission by the applicants that they were deemed to be parties to the proceedings by virtue of the fact that they filed a without notice application to set aside or vary the judge's order, and since they were heard by the court on their application, they would have to be deemed parties to the proceedings, is simply untenable. In fact, if they had filed and pursued such an application and it was decided against them, then they could have gotten to the court of appeal by appealing against that decision. The fact is that the applicants have never been joined in the proceedings leading to the order of Wilkinson J and they are not therefore parties to the proceedings. It is also a fact that the applicants did not pursue to judgment any application to set aside or vary the order of Wilkinson J so as to have given them a right of appeal against any adverse judgment. The applicants have not therefore earned for themselves the right to appeal against Wilkinson J's order of 8th November 2012.

[14] There are two other issues raised in the written submissions of the parties which should be addressed before concluding this judgment. The first one, raised by the applicants, is section 407(5) of the **Companies Act** of Saint Lucia, which permits a person aggrieved by any act or decision of a liquidator to apply to the court, which can confirm, reverse or modify the act or decision complained of and make such order as it thinks fit. But the application before the court is not one seeking to confirm, reverse or modify an act or decision of a liquidator, but for an extension of time to appeal a decision of a judge, so this provision is of no assistance to the applicants. The second issue was raised by the first and third respondents to the effect that article 381 of the **Code of Civil Procedure** of Saint Lucia is the gateway through which a person not a party to the proceedings could get to the court of appeal. In paragraph (y) of their submissions filed on 14th May 2013, they submit that "under the Laws of Saint Lucia the Court of Appeal is not permitted to assist third parties aggrieved by the orders of the High Court who have not first availed themselves of article 381 of the **Code of Civil Procedure**." They go on to say further that the case of **Prospere v Prospere**[1] "mandates that any third party seeking to challenge an order of high court must use Article 381."

[15] I believe that Counsel for the first and third respondents carried Article 381 of the **Code of Civil Procedure** to heights that it was never intended to reach. I believe too that Counsel stretched the words of Lord Bingham of Cornhill (who delivered the judgment of the Privy Council in **Prospere v Prospere**) much further than the learned lord justice intended them to go. But this is of no moment in this appeal.

[16] As it now stands, the applicants have no locus standi to appeal the judgment of Wilkinson J and cannot therefore be given an extension of time to file the appeal.

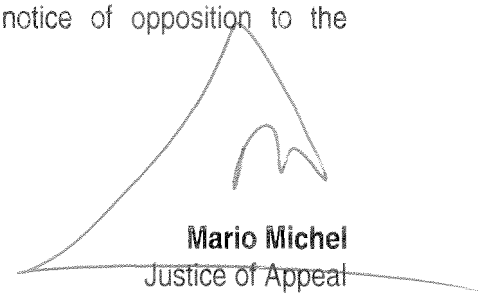
[17] It may well be that the door to the applicants obtaining redress from whatever injustice they consider that they might have suffered from the judgment may not necessarily be locked from them, but only that they have not positioned themselves to open it.

---

[1] 1 (2007) 69 WIR 278.

[18] There is another potential barrier that the applicants may have to overcome in their desire to seek redress by means of having the order of Wilkinson J reversed, and that is that the order has already been executed and is, to that extent, irreversible. This too suggests that the applicants may have to find another avenue to obtain the redress that they desire and possibly deserve.

[19] The application for an extension of time to file an appeal against the order of Wilkinson J dated 8th November 2012 is hereby declined, with costs of $1,000.00 payable to the first and third respondents by the applicants. No order is made for the costs of the second respondent who gave notice of opposition to the application but filed no submissions in opposition.



Mario Michel
Justice of Appeal