[2022] JMCC COMM 40

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2016CD00019

BETWEEN	**JENNIFER MESSADO**	**CLAIMANT**
AND	**PLANTATION HOLDINGS LIMITED**	**1ST DEFENDANT**
AND	**PLANTATION DEVELOPMENT CO. LIMITED**	**2ND DEFENDANT**
AND	**CHRISTOPHER KERR**	**3RD DEFENDANT**

IN CHAMBERS

Ms. Gina Chang of counsel on behalf of the Defendants/Applicants

Mr. Neco Pagon instructed by Aligned Law on behalf of the Claimant/Respondent

Date Heard: November 3, and December 20, 2022

Civil Practice & Procedure – Application for Leave to Appeal – Considerations on application for leave to appeal – Realistic Prospect of Success – Case Management Powers of the Court – Part 26 of the Civil Procedure Rules

PALMER HAMILTON J

THE APPLICATION

[1] The Defendants/Applicants filed a Notice of Application for Leave to Appeal on the 9th day of December, 2021 seeking the following Orders:

> 1. *Time for service of this Application to be abridged to the date and time of service hereof;*

2. *That Permission to Appeal the judgment of the Honourable Mrs. Justice Palmer Hamilton, handed down on the 2nd of December, 2021 be granted;*

3. *That Order 4 of the 2nd of December, 2021 Orders of Palmer Hamilton J be set aside;*

4. *There be a stay of proceedings of the Application pending the hearing of the appeal; and*

5. *Such further and other relief as this Honourable Court may deem just.*

[2] The grounds on which the Defendants/Applicants are seeking the Orders are:

(1) This application is being made pursuant to:

(a) 11(1)(f) of the Judicature (Appellate Jurisdiction) Act which stipulates that leave is required to appeal against an interlocutory judgment or order;

(b) CPR rule 11.11(3) which permits the court to direct that sufficient notice has been given and accordingly deal with the application.

(2) Permission to appeal the following orders of Honourable Mrs. Justice Palmer Hamilton is being sought:

> *"Monies amounting to $20,500,000.00 to be paid into Court by the Defendants on or before the 2nd of February, 2022."*

(3) The proposed appeal has a real prospect of success.

(4) The proposed grounds of appeal are:

(a) The Order for payment into Court granted on the 2nd of December, 2021 was improperly issued and ought to be set aside.

(b) The Learned Judge failed to appreciate that there was [sic] no findings that the Defendants were liable to the Claimant for a specific sum and therefore no fixed dispute over monies payable and therefore misapplied the exercise of the powers under Part 17.1(k).

(c) The Learned Judge misdirected herself with regard to the implying a payment burden on the part of the Defendants in Clause 3 of the Settlement Agreement.

(d) The Learned Judge misdirected herself with regard to the remedy used to replace the unclear and unenforceable Clause 3 of the Settlement Agreement between the parties.

(5) The Applicants reserve the right to add to or amend this Notice of Application.

(6) It is in the interests of justice that Order 2 of the 2nd of December,2021 Orders of Palmer Hamilton J be set aside.

BACKGROUND

[3] I see it fit at this point to set out a brief summary of the claim and the circumstances leading up to the Defendant's application.

[4] This matter was commenced by way of a Claim Form filed the 22nd day of February, 2016. The Claimant sought declarations and an order for specific performance. Sykes J, as he then was, granted the Orders to the Claimant. The Defendants appealed the judgment of Sykes J after his refusal to set aside the judgment which he had previously ordered to be entered in default of a defence being filed. The Court of Appeal allowed the appeal in part and varied the default judgment that was entered by Sykes J.

[5] I wish to adopt the background as set out by Phillips JA in **Plantation Holdings Limited, Plantation Developments Company Limited and Christopher Kerr v Jennifer Messado and Lanza Turner Bowen** [2019] JMCA Civ 37. Phillips JA outlined it as follows:

> *"[2] The respondents (Mrs Jennifer Messado (JM) and Ms Lanza Turner Bowen (LTB)), in their capacity as attorneys-at-law, practising as Jennifer Messado & Co (JM&Co), represented the appellants (Plantation Holdings Limited, Plantation Developments Company Limited and Mr Christopher Kerr) in various matters, including real estate development and other conveyancing matters. That work included the development which is the subject of this litigation, namely, No 54 Norbrook Drive, Kingston 8. These lands were being developed as multi-family dwelling homes.*
>
> *[3] A dispute arose between the parties. JM&Co claimed that certain sums were due for work done. They presented statements in respect of fees and disbursements. At the time, JM&Co represented the appellants (the developers and purchasers) and the vender [sic], Mr Lloyd Pommells, owner of the subject land.*
>
> *[4] In an effort to settle the dispute, the parties arrived at a settlement agreement entered into on 10 March 2015.*

[6] Subsequently, on the 9th day of September, 2020, the Defendants filed a Notice of Application for Court Orders seeking the following Orders:

> *(1) The time for service of this Application be abridged to the time of actual service thereof;*
>
> *(2) That the Court gives 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) That the Claimant be 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 to9 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) Costs of the application to the Defendants' herein; and*
>
> *(5) Such further and other relief as to this Honourable Court may seem just.*

[7] The grounds on which the Defendants sought the Orders were:

> *(1) This instant matter concerns an appeal from the judgment of the Honourable Mr. Justice Sykes (as he then was) made refused an application to set aside a default judgment against the Defendants on 8th January, 2018.*
>
> *(2) The decision of the learned judge was appealed in the Court of Appeal and judgment delivered in the matter of Plantation Holdings Limited et al v. Jennifer Messado et al [2019] JMCA Civ 37 on the 19th of November, 2019. The orders of the Court were as follows:*
>
> > *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.

(3) Pursuant to Order number 3, the Supreme Court has oversight of the completion of the agreement and an application may be made for directions thereof.

(4) The Defendants' Attorneys-at-Law and BDO have been in communication with regards to the preparation of a proposal in pursuant of the performance of the Settlement Agreement dated the 10th of March, 2015 and has tried on several occasions to make contact with the Claimant through her Attorneys-at-Law in order to supply the fees, bills and disbursements necessary for the determination of the fees payable, if any and to this date no response has been forthcoming.

(5) The non-compliance of the Court Orders has caused the matter to languish and has resulted in an extensive delay in the process and the performance of the Settlement Agreement, which the Defendants wish to complete in compliance of the Order of the Court and in an effort to settle any outstanding debts they may possess and to progress beyond this matter.

(6) The Applicants seek the Court's intervention to compel the Respondents to comply with the orders of the Court so that the matter can be laid to rest.

[8] Upon the hearing of this Application I made several Orders. Order 4, which is the Order that the Defendants/Applicants are seeking permission for leave to appeal. Order 4 states that:

"Monies amounting to $20,500,000.00 are to be paid into Court by the Defendants on or before 2 February, 2022."

SUBMISSIONS ON BEHALF OF THE DEFENDANTS/APPLICANTS

[9] The Application is being made pursuant to section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act which stipulates that leave is required to appeal against an interlocutory judgment or order. It is also being made pursuant to Rule 1.8 of the Court of Appeal Rules. Learned Counsel Ms. Chang submitted that the application for leave to appeal is properly before the Court as the relevant rules have been complied with.

[10] Learned Counsel Ms. Chang relied on the case of **L-3 Communications Corporation v Go Tel Communications Limited** [2021] JMCA App 1, in which the Court assessed the requirement under Rule 1.8(7) of the Court of Appeal Rules regarding realistic prospect of success of the appeal. Learned Counsel relied on paragraph 17 which is dealt with in more detail below.

[11] Learned Counsel Ms. Chang contended that the order of events which led to the order for payment into Court was not an appropriate course of action in respect of an application for payment into Court. This, she further contends is obvious from Rule 17.3 of the Civil Procedure Rules. Learned Counsel Ms. Chang further contended that it appears that the learned judge relied on the dissenting judgment of the Court of Appeal which stated that an application could be laid in respect of the escrow account with a specific sum called for in the settlement agreement. However, no such application was laid before the Court and the only application for payment came from a mere oral suggestion from the Claimant's Counsel. This is the basis upon which said payment into Court was considered and ordered.

[12] Learned Counsel submitted Rule 17.3 of the Civil Procedure Rules is clear that an application for interim remedy must be on paper with affidavit evidence in support. Ms. Chang further submitted that this may be considered an error in the law surrounding the exercise of the judge's discretion and it is therefore a valid basis for setting aside an order made under the discretionary power of Part 17 of the Civil Procedure Rules.

[13] It was also submitted that pursuant to Rule 17.1(k) and (l) of the Civil Procedure Rules, where payment into Court is being requested, other security ought to be considered. Due to the oral and impromptu nature of the "application" by the Claimant's Counsel, there was no avenue for the Defendants to put in proper evidence of alternate security. Nevertheless, alternate security was orally proposed and it was rejected by the Court on the sole basis of the staunch refusal of the Claimant. This, Learned Counsel Ms. Chang contended, is a fatally flawed decision and constitutes an improper exercise of judicial discretion.

[14] The alternate security offered to the Court was the titles for the properties located at Norbrook. It was Learned Counsel Ms. Chang's submission that the value of one of those properties is well above the sum to be paid into Court. Therefore, the Court was incorrect to refuse to consider holding the title(s) as security as permitted under Rule 17 of the Civil Procedure Rules.

[15] Learned Counsel Ms. Chang made it clear that her clients are not seeking to escape their responsibility to pay the security. The sum of money to be paid into Court is significant and is a strain given the pandemic and newly unfolding events. The size of the sum of the money requires financing using an asset as security however, several of her clients' main assets are still held by the Claimant/Respondent.

[16] The case of **Vinayaka Management Limited v Genesis Distribution Network Limited et al** [2022] JMCA App 32 was also relied upon by Learned Counsel Ms. Chang. She submitted that while there are differences, it is similar to the present case in terms of a disputed contract agreed between the parties and the application for payment into Court as a form of security for the disputed contract. Ms. Chang contended that the finding of the Court of Appeal in the **Vinayaka case** that a claim for specific performance of an executed contract did not qualify for an order for payment into Court is squarely applicable in the instant matter where the orders were made to enact specific performance of a contract, that is, the settlement

agreement. The circumstances of the instant matter are not exceptional and therefore do not qualify for order of payment to be into Court.

[17] Ms. Chang further contended that it is in the interests of justice and the overriding objective for the orders sought to be granted.

SUBMISSIONS ON BEHALF OF THE CLAIMANT/RESPONDENT

[18] Learned Counsel Mr. Pagon submitted that the permission to appeal the consequential order made by me on the 2nd day of December, 2021 ought to be refused. The learned judge's exercise of her discretion to order payment into court consistent with the case management powers cannot be faulted. The powers exercised by the Court is in keeping with the Court of Appeal decision and the orders sought by the Defendants/Applicants for the Supreme Court to have oversight of the completion of the settlement agreement. The Order gives effect to the intentions of the parties.

[19] Learned Counsel relied on Rule 1.8 of the Court of Appeal Rules, 2002 and submitted that the instant matter falls within the category of an interlocutory appeal and involves an appeal from the exercise of a judge's discretion. Learned Counsel also placed reliance on the case of **Garbage Disposal and Sanitations Systems Ltd v Green (Noel) et** al [2017] JMCA App 2 paragraphs 27 to 29 to show that the applicant must demonstrate that he has a real prospect of success on the appeal.

[20] Learned Counsel Mr. Pagon contended that the Application must fail for the following reasons:

i. *In having oversight of the contract and to give directions for the completion of it, the court may in its discretion exercise its case management powers. See CPR rule 26.1(3) and (4) and CPR rule 26.2. The case management powers were exercised on the Defendant's application for the court to give directions and to have oversight of the completion of the contract.*

ii. *The evidence before the court justified the exercise of the learned judge's discretion. In respect of the order made the learned judge gave effect to the intention of the parties to have the Defendants provide security in contemplation of the contract.*

iii. *The exercise of the Court's discretion is otherwise supported by legal principles governing contract law. That is, the Court has the power to give effect to the intentions of the parties to a contract either by way of interpretation or implication. See* ***Everoy Chin v Silver Star Motors Limited*** *[2021] JMCC Comm 31, specifically 34 to 40; and* ***Arnold v Britton and Others*** *[2015] UKSC 36, paragraph 22.*

iv. *The doctrine of frustration is inapplicable as the Court has already ordered specific performance of the contract. To hold otherwise would defeat the judgment of the Court of Appeal. See Halsbury's Laws of England – 264. Causes of Frustration and 265. Death or Incapacity of Party. The contract is capable of performance as is demonstrated by the condition stipulated by the Court for payment into Court to allow for the Defendant's to provide good security.*

v. *The submissions of Counsel for the Defendants are misguided.*

[21] Learned Counsel Mr. Pagon contended that the **Vinayaka Case** is wholly different from the case at bar for the following reasons:

i. *The Application before the Court of Appeal is more akin to an application for "interim payment" which is governed by a completely separate part of the Civil Procedure Rules.*

ii. *At the case at bar, the order made for payment into court was made pursuant to the case management powers of the Court. The case management powers of the Court were in fact invoked by the Defendants/Applicants who made an application for the Court to have oversight and give directions in respect of a settlement agreement between the parties.*

iii. *In addition to the case management powers of the court, there were sufficient factual bases on which the order for the Defendants/Applicants to make payment into court was granted. This is supported by extracting from the settlement agreement the intention of the parties to have security provided by the Defendants/Applicants as a mechanism for the Claimant/Respondent to recover her fees and expenses owed to her by the Defendants/Applicants.*

iv. *Unlike the Court of Appeal decision, in the case at bar, the Claimant/Respondent is already the recipient of a judgment of the courts. It is already determined that the Defendants/Applicants owe the Claimant/Respondent monies.*

ISSUE

[22] The main issue for my determination is whether leave to appeal ought to be granted to the Defendants/Applicants to appeal my order made on the 2nd day of December, 2021.

LAW & ANALYSIS

[23] The Defendants/Applicants are applying for leave to appeal pursuant to section 11 (1)(f) of the Judicature (Appellate Jurisdiction) Act. Section 11 (1)(f) states:

> *"11-(1) No Appeal shall lie—*
>
> > *(f) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a judge except-'*

The restriction on appeals in the section goes on to list certain exceptions which are not applicable to this case.

[24] The Application is also being made pursuant to Rule 1.8 of the Court of Appeal Rules, 2002 (hereinafter referred to as 'the CAR"). Rule 1.8 allows the court to grant leave to apply for notice of appeal. The application for leave to appeal must be filed within fourteen days of the order against which permission to appeal is sought. Rule 1.8 (2) provides that this application must first be made to the Court below.

[25] Rule 1.8(7) of the CAR sets out the considerations for the Court in determining whether it should grant an application for permission to appeal. Rule 1.8(9) states 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 an appeal will have a real chance of success."*

[26] I found the case **of L-3 Communications Corporation v Go Tel Communications Limited** to be useful. Brooks P stated at paragraphs 16 and 17 that:

> *"16. The law with regard to applications for permission to appeal is now well settled. In order to be allowed leave to appeal, L-3 must show that its prospective appeal has a realistic prospect of success. Morrison JA, as he then was, set out in* ***Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and another*** *[2015] JMCA App 27A, the way in which the threshold should be interpreted. He said at paragraph [21]:*
>
> > *"This court has on more than one occasion accepted that the words 'a real chance of success' in rule [1.8(7)] of the CAR are to be interpreted to mean that the applicant for leave must show that, in the language of Lord Woolf MR in* ***Swain v Hillman and another*** *[2001] 1 All ER 91, at page 92, 'there is a 'realistic' as opposed to a 'fanciful' prospect of success'. Although that statement was made in the context of an application for summary judgment, in respect of which rule 15.2 of the Civil Procedure Rules 2002 ('the CPR') requires the applicant to show that there is 'no real prospect' of success on either the claim or the defence, Lord Woolf's formulation has been held by this court to be equally applicable to rule [1.8(7)] of the CAR (see, for instance,* ***William Clarke v Gwenetta*** *Clarke [2012] JMCA App 2 #, paras [26]–[27]).* ***So, for the applicant to succeed on this application, it is necessary for him to show that, should leave be granted, he will have a realistic chance of success in his substantive appeal." (Emphasis supplied)***
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> *17. In deciding whether to grant permission to appeal, it is also necessary to refer to another well-known principle, that is, that this court will not disturb a decision based on the exercise of a judge's discretion, unless it is shown that that judge has plainly erred. The cases of* ***Hadmor Productions Ltd and others v Hamilton and others*** *[1982] 1 All ER 1042 and* ***The Attorney General of Jamaica v John Mackay*** *[2012] JMCA App 1 are authorities for that principle. In the latter case, Morrison JA, as he then was, stated, in part, at paragraph [20]:*
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> > *"This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference — that particular facts existed or did not exist — which can be shown to be demonstrably wrong, or where*

> *the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."*

[27] I also found the case of **Garbage Disposal & Sanitation Systems Ltd v Noel Green** to be useful. In that case, the Court of Appeal considered an application for leave to appeal orders made by Campbell J. Williams JA stated at paragraphs 28 and 29 that:

> *"28. The terms 'real' and 'realistic' were defined in Swain v Hillman and another [2001] 1 All ER 9, per Lord Woolf, at page 92 where he addressed the meaning of the phrase 'no real prospect' in the context of an application for a summary judgement. He opined that:*
>
> > *"The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success…they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."*
>
> *29. Morrison JA (as he then was) in **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Wallace** [2015] JMCA App 27A, observed at paragraph [21] of that judgment that this court has long accepted that the words "real chance of success" in rule 1.8(9) of the CAR were synonymous with the words "realistic prospect of success" used by Lord Woolf in the case of **Swain v Hillman** and so Lord Woolf's formulation was therefore applicable to the said rule 1.8(9)."*

[28] I am guided by Harrison JA, at page 94 of the case of **Gordon Stewart et al v Merrick Samuels** SCCA no. 2/2005, where it was stated that: -

> *"The prime test being "no real prospect of success" requires that the learned trial judge do an assessment of the party's case to determine its probable ultimate success or failure. Hence it must be a real prospect not a "fanciful one". The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party. "Real prospect of success" is a straightforward term that needs no refinement of meaning"*

[29] I must therefore consider, what merit, if any, exists in the proposed appeal. The crux of Ms. Chang's submissions is that there have been errors of procedure, law and fact which have led to a demonstrably wrong conclusion and thus misunderstanding by the learned judge in the exercise of her discretion.

[30] Learned Counsel Ms. Chang's submissions focused on the Order being made pursuant to Part 17 of the Civil Procedure Rules, 2002 as amended (hereinafter referred to as 'the CPR'). Respectfully, I disagree with those submissions. Order number 4 of the Orders made by me on the 2nd day of December, 2021 was not made pursuant to Part 17 of the CPR. The order sought in the Notice of Application filed the 9th day of December, 2020 was seeking directions in relation to the completion of the Settlement Agreement dated the 10th of March, 2015. That Settlement Agreement stated that a letter of undertaking will be given by Gordon|McGrath, secured by $20,500,000.00 held in a joint account between Clough, Long & Co and Gordon|McGrath in National Commercial Bank Jamaica Limited, to pay the balance of fees, bills and disbursements as shall be determined, by the procedure suggested by the Attorneys-at-Law, that the fees, bills and disbursements with Clients' objections and disputes be reviewed by the firm of Accountants BDO of 28 Beechwood Avenue, Kingston 5, in the parish of Saint Andrew.

[31] Therefore, in order to give effect to the intention of the parties the case management powers pursuant to Part 26 of the CPR were exercised by me. I agree with Learned Counsel Mr. Pagon's submissions that the evidence before the Court justified the exercise of the Learned Judge's discretion and the order made gave effect to the intention of the parties to have the Defendants/Applicants provide security in contemplation of the Settlement Agreement dated the 10th day of March, 2015.

[32] Part 26 of the CPR gives the Court the powers of Case Management. The Court may, pursuant to Rules 26.1(3) and (4), make an order and impose conditions such as requiring a party to give security and requiring the payment of money into Court. Therefore, in order to give effect to the Settlement Agreement, I exercised the Case Management powers vested to me and made an order requiring the payment of money into court.

[33] One of the firms named in the Settlement Agreement no longer exists and one of the main submissions for the Defendant in relation to the Notice of Application filed the 9th day of December, 2020 was that because the firm no longer existed due to death, the names of the parties' current Attorneys-at-Law could not be substituted because that would be a novation of the contract. While I agree that there could not be a substitution of the names, I don't agree that this would frustrate the contract. The Court of Appeal has ordered that there be specific performance of the contract. The order made by me simply gives effect to what the parties agreed to in the Settlement Agreement. The ordering of the payment of the monies into Court provides the security intended by the parties in the Settlement Agreement.

[34] It is not in dispute that the Settlement Agreement is a binding contract. Further, I must note that in the case of **Everoy Chin v Silver Star Motors Limited** [2021] JMCC Comm 31, I was of the view that settlement agreements are by their very nature, contracts between the parties and I relied on the case of **Cordell Green v Kingsley Stewart** [2014] JMSC Civ 26. I still remain of this view. This is bolstered by the decision of the Court of Appeal in 2019. The Court of Appeal, in ordering that the appeal be allowed in part, said that an examination of the provisions of the agreement, ought to impel the Court, to enforce the performance of the agreement by the parties through their compliance with the specific obligations that they had agreed to do, and had undertaken to satisfy. The Court of Appeal held that the default judgment should have included an order that the Appellants should have paid over that sum so that it could have been placed in a bank account set up for that purpose.

[35] I agree with Learned Counsel Mr. Pagon's submissions that the **Vinayaka Case** is not applicable to the instant case. In that case, the Applicant in their Application to discharge or vary the orders of the single judge sought an Order that the Respondents give an appropriate, written undertaking as to damages to this Honourable Court so that there be the necessary protection for the Applicant regarding the subject matter of the instant appeal and payment into court for a specific sum. The Court of Appeal agreed with the submissions put forward by the

Respondent's Attorneys that the remedy being sought is not one known to law. There is no legal authority to support the position that where a court has refused an application for a stay the court should impose the obligation of a payment into court by the Respondents. Counsel on both sides in the instant matter relied on paragraph 84 of the said judgment which states that:

> *"Whereas there may be appropriate cases in which the court would make an order requiring the respondent to make a payment into court, these cases would arise from exceptional circumstances. We are not of the view that the facts of this case qualifies. This was at its core a fairly common claim by a party that had executed an AFS, asserting that it had been wrongly terminated and seeking specific performance. For that reason, the applicant's application for the respondents to provide security or an undertaking in damages is refused."*

[36] I find it useful to outline the submissions of the Respondents which the Court of Appeal agreed with. Counsel for the 2nd and 3rd Respondents submitted that his clients cannot be required to give an undertaking or payment in circumstances where there can be no viable claim against them for damages. The claim for the declaration and the injunction no longer exists, and this means that there is no remedy or relief which can be obtained against the second or third respondents and consequently, no basis to demand an undertaking from them as to damages. The **Vinayaka Case** does not assist me in any way in making a determination in the matter before me. The Court of Appeal had before it an application comparable to that of an interim payment which, Learned Counsel Mr. Pagon rightly submitted, is governed by a separate part of the CPR.

[37] The Court of Appeal has already determined the instant matter and ordered specific performance. The Settlement Agreement is what outlined the circumstances in which monies were to be paid. I exercised my discretion pursuant to Part 26 of the CPR and not Part 17 as submitted by the Defendants/Applicants. I therefore see no errors of procedure, law and fact which could have led to a demonstrably wrong conclusion and misunderstanding in the exercise of my discretion. Since Part 17 of the CPR does not apply in the instant case, the errors

in procedure and law as submitted by Learned Counsel Ms. Chang would also not apply.

[38] I am of the view that the appeal has no realistic prospect of success and therefore it is my judgment that permission for leave to appeal the decision is refused.

[39] The general rule relating to costs is contained in Part 64 of the Civil Procedure Rule 2002, as amended (the CPR). Rule 64.6(1) states: *"If the Court decides to make an order about the cost of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party".* I see no need to depart from the general rule and it is my judgment that costs be awarded to the successful party.

ORDERS & DISPOSITION

[40] Having regard to the forgoing these are my Orders:

(1) Notice of Application for Leave to Appeal dated and filed the 9th day of December, 2021 is refused and dismissed.

(2) Costs awarded to the Claimant/Respondent, to be taxed if not agreed.

(3) Claimant's/Respondent's Attorneys-at-Law to prepare, file and serve Orders made herein.