

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

**CCJ Application No AL 9 of 2010
BB Civil Appeal No 20 of 2007**

BETWEEN

SEAN GASKIN

INTENDED APPELLANT/APPLICANT

AND

**THE ATTORNEY GENERAL
CLYDE NICHOLLS**

**FIRST RESPONDENT
SECOND RESPONDENT**

Before The Honourables:

**Mr Justice Nelson
Mr Justice Saunders
Mr Justice Wit
Mr Justice Hayton
Mr Justice Anderson**

Appearances

Mr Ralph Thorne QC for the Intended Appellant/Applicant

Mr Leslie Haynes QC with Ms Donna Brathwaite and Mr McWatt for the First Respondent

Ms Roslind Jordan for the Second Respondent

JUDGMENT

of

The Honourable Justices Nelson, Saunders, Wit, Hayton and Anderson

Delivered by

The Honourable Mr Justice Adrian Saunders

on the 17th day of February, 2011

- [1] Separate applications were made to the Caribbean Court of Justice (“this Court”) by the Intended Appellants/Applicants, namely, Sean Gaskin, Frederick Christopher Hawkesworth and John Wayne Scantlebury (together referred to as “the Applicants”) for a) an extension of time within which to seek special leave to appeal to this Court, b) special leave to appeal; and c) leave to appeal to this Court as a poor person. These respective applications were not formally consolidated but they were heard together. Given that the circumstances surrounding each of them are almost identical it is accepted that they would either all succeed or all be denied.
- [2] This Court heard the applications by audio conference on 28th January, 2011. We made an order in each of them immediately after receiving the oral submissions of counsel. We dismissed the applications. We undertook then to give in due course written reasons for our decision and we do so now. This judgment is given ostensibly in the applications of Sean Gaskin (“the Applicant”) but it follows that all that is stated here would also be applicable to Hawkesworth and to Scantlebury. Since the matter giving rise to our orders raises exclusively questions of procedure, in this, our reasoned judgment, we have naturally concentrated on those questions and have to a large extent ignored the underlying substantive issues.
- [3] The applicant was arrested on 31st May, 2004 in connection with extradition proceedings initiated by the Government of the United States of America. The extradition proceedings were commenced before the Second Respondent, the Chief Magistrate of Barbados. At the close of the case for the prosecution, during the proceedings before the Chief Magistrate, the Applicant made certain submissions which the Chief Magistrate overruled. The Applicant then immediately sought judicial review of the Chief Magistrate’s ruling. The proceedings before the Chief Magistrate were then stayed.
- [4] In the course of their respective judicial review applications the Applicant raised certain constitutional issues. It is not necessary to refer to them in this judgment but on 31st July, 2007 the Barbados High Court ruled on these applications---. The Applicant was

dissatisfied with that ruling as well. He appealed to the Court of Appeal. On the 8th June, 2009 the Court of Appeal dismissed his appeal.

- [5] On the 22nd July, 2009 the Court of Appeal granted leave to the Applicant to appeal to this Court under section 6(c) of the Caribbean Court of Justice Act. Section 6(c) gives an appeal **as of right** to an intended appellant in any civil or criminal proceedings which involve a question as to the interpretation of the Constitution. The Court of Appeal imposed two conditions in granting leave to appeal to the Caribbean Court of Justice (“the CCJ”). The court ordered the Applicant to a) provide security for costs in the amount of \$15,000.00 within sixty days from the date of the making of that court’s order and b) provide to the proper officer (i.e. the Registrar of the Supreme Court of Barbados) within a period not exceeding ninety days, a list of documents to be included in the record of appeal.
- [6] The Applicant did not comply with the Court of Appeal’s order. No security for costs was provided. Instead, the Applicant purported to file a notice of appeal on the 18th December, 2009. On the 30th December, 2009, the proper officer issued a certificate of non-compliance in relation to Applicant’s intended appeal. The certificate was served on the Applicant on 4th January, 2010.
- [7] The Applicant took no further step until 16th June, 2010 when he filed an application to the Court of Appeal for leave to appeal *in forma pauperis* in relation to what he considered to be his pending appeal. On 21st July, 2010, the Court of Appeal dismissed this application for failure to comply with the rules.
- [8] In December, 2010 the applicant filed the applications that were heard by this Court. In his affidavit in support of his applications, only two real grounds are discernible. The Applicant states that firstly, he is impoverished and was and remains unable to provide security and secondly, that the matters raised by his appeal involve a question as to the interpretation of the Constitution.

- [9] At the outset of the hearing before us, we indicated firstly that we were prepared to assume, without necessarily acknowledging, that the applicant had arguable grounds of appeal. Accordingly, we asked his counsel to persuade us, if he could, on the question whether we should exercise our discretion to extend the time for applying for special leave to appeal.
- [10] In an attempt so to do the Applicant put forward the two grounds in his affidavit to which reference has previously been made. In the course of oral argument he added a third. Counsel claimed that he was somewhat confused by the requirements of the CCJ's Appellate Jurisdiction Rules ("the AJR") and the Applicant was unsure of how he should have proceeded in light of his impoverishment and the Court of Appeal's order for security for costs.
- [11] We are wholly unimpressed by these submissions. We are surprised that the Applicant or his counsel could have claimed to have been misled or confused by the AJR. As Nelson J was careful to point out in *Griffith v Guyana Revenue Authority*¹, although a person may be entitled to an appeal *as of right*, the intended appellant must still obtain leave to appeal from the local court from which the appeal lies. In such a case, the local Court of Appeal is vested with a narrow and clearly defined discretion which it must exercise. There are two respects in which this discretion must be exercised. First of all, the local Court of Appeal has to satisfy itself that the appeal is indeed one that falls into the category prescribed to be as of right². But once the intended appellant has so satisfied the Court of Appeal, the latter is not entitled to decline leave.
- [12] Secondly, in granting leave the Court of Appeal must impose, in line with the provisions of Part 10.6(2) of the AJR, the conditions alluded to above at [5]. In order to ensure that the figure in which security may be ordered does not unduly fetter the right to appeal of an intended appellant, Schedule 5 of the AJR places a ceiling on the amount in which security may be ordered. The security so ordered is for the due prosecution of the appeal.

¹ [2006] CCJ 1

² See also *Alleyne-Forte v Attorney-General* [1997] 4 LRC 338, 343

In Barbados the limit is \$15,000 but this does not mean that the Court of Appeal lacks the discretion to fix a lesser sum. The rule clearly states that security must be ordered “in an amount not exceeding that specified in Schedule 5”³.

[13] If an intended appellant is unable to provide security for costs, it is always open to that person to seek leave to appeal as a poor person⁴. The Applicant should therefore have made an application to appeal as a poor person when his application for leave to appeal to the CCJ was made to the court below⁵. A party to whom leave has been granted to appeal as a poor person is not required to provide security for costs or to pay any Court fees.⁶ In this case it is difficult to imagine that the Applicant had catastrophically become impoverished after filing his application to the Court of Appeal for leave to appeal. He certainly made no such allegation.

[14] When the Applicant presumed to file a notice of appeal on the 18th December, 2009, this was a serious breach of Part 10.2(a)(ii) of the AJR. The reason for that rule is precisely to avoid what was done by the Applicant here. Prior to the creation of this rule, which was only introduced in April, 2008, there were occasions when a litigant would file a notice of appeal before complying fully with conditions imposed by the Court of Appeal in granting leave to appeal. This would occasion great inconvenience to everyone and generate uncertainty as to the status of such a notice of appeal. It was necessary to put an end to this practice. The rule now clearly states that no notice of appeal may be filed unless an applicant has obtained from the proper officer a certificate of compliance.

[15] When leave to appeal is granted by the Court of Appeal, the proper officer has the responsibility of ensuring that all the conditions upon which such leave was granted have been fulfilled following which the proper officer issues a certificate of compliance. Only this certificate can give the green light to an intended litigant to proceed with the

³ Part 10.6(2)(a)

⁴ See Part 10.17 of the AJR

⁵ See Part 10.17(1) of the AJR

⁶ See Part 10.17(3) of the AJR

proposed appeal. Without it no valid notice of appeal can be filed unless of course a person has obtained special leave to appeal from the CCJ itself.

[16] In this case, the proper officer issued a certificate of non-compliance. If the Applicant was dissatisfied with this he was entitled to apply to the Court of Appeal to have it set aside. But there is a time limit within which to make such an application. The clock began ticking from the moment he had been served with the certificate of non-compliance. Within seven days of such service he was entitled to apply to the court below to set aside the certificate of non-compliance issued by the proper officer⁷. Given the importance of the date of service of a certificate of non-compliance, proper officers are advised, although the AJR do not specifically so require, that they should indicate to the Registrar of the CCJ as soon as possible when a certificate of non-compliance has been issued and when it was served.

[17] At any rate, the Applicant neglected to apply to set aside the certificate of the proper officer. Again, he did nothing for several months until 16th June, 2010 when he filed an application with the court below to have his appeal treated in the manner reserved for a poor person. That application ought never to have been entertained. Part 10.10(4) of the AJR stipulates that if no application within seven days of service is made to set aside a certificate of non-compliance then the leave originally granted is deemed to have been rescinded and the respondent is entitled to have his costs taxed and paid by the intended appellant. As at 16th June, 2010 therefore, there was no proceeding pending before the Court of Appeal in which that court could have entertained any application of the sort that was made. The intended appeal that once was pending had by then effectively been abandoned. The rationale behind Part 10.10(4) is to avoid the Court of Appeal and the proper officer having to expend further time and energy on an abandoned appeal.

[18] Technically, it was possible for the Applicant, dissatisfied as he was with the fate of his application to the court below, to seek from the CCJ itself special leave to appeal. The Applicant actually did this but his application was never made until December, 2010.

⁷ See Part 10.10(3)

Here again the Applicant was in flagrant breach of the rules. The application to the CCJ for special leave should have been made within 21 days of the deemed rescission of the leave to appeal granted by the court below. This would have occurred in late January, 2010. But even if the Applicant was under some misapprehension and he genuinely considered his appeal to be still alive when the application was made to the Court of Appeal in June, 2010, his applications to this Court for special leave and an extension of time were made in December 2010, over four months after the Court of Appeal dismissed his application for leave to appeal as a poor person.

[19] Impoverishment and misunderstanding of the rules cannot justify the delays that are apparent in this case. By Part 5.3(1) of the AJR the Court is empowered to extend any time-limit prescribed by the rules but by the very next paragraph of the AJR⁸ an onus is cast upon the party in default to establish that “his default was due to the existence of unforeseeable circumstances”. No attempt has been made here to establish any such circumstances.

[20] In the course of the hearing before us, counsel advanced two further submissions neither of which found favour with this Court. The first was that, as the Applicant was pursuing a constitutional right, the Court of Appeal was wrong to order security for costs; that no fetter should have been placed on his ability to have his constitutional rights vindicated before the CCJ. In the first place, it is too late in the day to make this argument. The CCJ is not concerned with whether the court below was right to impose conditions on the grant of leave to appeal. The CCJ is considering afresh the applications before it.

[21] Secondly, and in any event, the conditions under which a litigant must be guaranteed access to a court of first instance are not to be compared with those on which a final court will hear the litigant. In this case the Applicant has already been heard by the High Court and by the Court of Appeal. The imposition of reasonable conditions on his right of

⁸ Part 5.3(2)

further appeal cannot be regarded as an infringement of the right of access to justice even if his further appeal is stated in the Constitution to be *as of right*.

[22] Counsel linked this last submission with a plea to the Court, in light of the fact that the liberty of the subject is involved, to have recourse to the overriding objective of the AJR. That objective, set out at Part 1.3, is “to enable the Court to deal with cases fairly and expeditiously so as to ensure a just result”. This is a case where repeated and egregious breaches of the rules have served only to prolong the final disposition of a hearing before the Chief Magistrate that is still to be completed. There is no cogent explanation for the several breaches. Since the liberty of the subject was at stake the Applicant himself should not have been as dilatory as he was. In any event it is a profound error to believe that a litigant can flout the rules, thus rendering them utterly meaningless and then take shelter under cover of the overriding objective. In all these circumstances we had no choice but to dismiss this application and to order costs to the Respondents.

/s/

The Hon. Mr. Justice Rolston Nelson

/s/

The Hon. Mr. Justice A. Saunders

/s/

The Hon. Mr. Justice Wit

/s/

The Hon. Mr. Justice D. Hayton

/s/

The Hon. Mr. Justice W. Anderson