[2011] CCJ 14 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Application No AL 7 of 2011
BB Civil Appeal No 25 of 2007

BETWEEN

BARBADOS TURF CLUB **APPLICANT**

AND

EUGENE MELNYK **RESPONDENT**

Before The Honourables **Mr Justice Rolston Nelson**
Mr Justice David Hayton
Mr Justice Winston Anderson

Appearances

Mr Vernon O Smith QC and Mr Hal Mcl Gollop for the Applicant

Mr Alair Shepherd QC and Mr Phillip McWatt for the Respondent

JUDGMENT
of Justices Nelson, Hayton and Anderson
Delivered by
The Honourable Mr Justice Anderson
on the 11th day of November 2011

[1] This is an application by the Barbados Turf Club, ("the Applicant"), which was styled as an application for special leave to appeal the decision of the Court of Appeal in *Barbados Turf Club* v *Eugene Melnyk* ("the procedural decision"[1]) whereby that court refused to grant leave to appeal from its earlier decision in *Barbados Turf Club v Eugene Melnyk* ("the substantive decision"[2]) to the Caribbean Court of Justice ("this Court"). In its written submissions the Applicant contended that the procedural decision of the Court of Appeal to refuse the grant of leave was erroneous in law because the appeal fell within section 6 (a) of the Caribbean Court of Justice Act[3] ("the CCJ Act") and was therefore "an appeal as of right". The Applicant also contended that the substantive decision of the Court of Appeal was erroneous in points of law of general importance for the reasons set out in its application.

[2] This Court heard the application by audio and video conference on 20th October 2011 and indicated certain procedural defects in the application. There is no appeal from the Court of Appeal's refusal to grant leave to appeal against its substantive decision. There is, instead, a fresh application under section 8 of the CCJ Act in which the Applicant seeks special leave from this Court to appeal the substantive decision of the Court of Appeal. It was agreed that the application would proceed on this basis but then because the application was found to be inadequate in other particulars the matter was adjourned until 31st October. That day, following submissions by counsel for the Applicant and for Eugene Melnyk, ("the Respondent"), we made an order dismissing the application for leave and awarding costs to the Respondent. The perfected reasons for that order are now presented.

---

[1] Civil Appeal No. 25 of 2007 dated 11th July 2011 (comprising The Hon. Sherman Moore, Chief Justice (Ag.), and The Hon. Sandra Mason, and The Hon. Andrew Burgess, Justices of Appeal).
[2] Civil Appeal No. 25 of 2007, dated 31st March 2011 (comprising The Hon. Sherman Moore, Chief Justice (Ag.), The Hon. Sandra Mason, Justice of Appeal, and The Hon. Kaye Goodridge, Justice of Appeal (Ag.)).
[3] Cap. 117.

[3] The application for special leave arose from the following circumstances. On 6th March 2004, as part of its first season of horse racing, the Applicant sponsored an event commonly known in Barbados as the Sandy Lane Gold Cup. The Respondent's horse Kathir competed in the race and was declared the winner. Following what the Applicant contends was routine testing in accordance with its Rules of Racing, the Horse Racing Forensic Laboratory ("the HRFL") situated in Newmarket, England, and which had been engaged by the Applicant for the testing procedure, informed the Applicant that the sample taken from the winner Kathir had tested positive for a prohibited substance, to wit, "methylprednisolone". A disciplinary committee of stewards of the Applicant named the Prohibited Substances Body, ("the PSB" or "the Disciplinary Committee"), held an enquiry to investigate and adjudicate upon the report of the HRFL. During the lengthy hearing, lawyers for the Applicant examined witnesses called by the Applicant and cross-examined witnesses called by Mr Naz Issa, who was the trainer of Kathir. Also at the hearing, counsel for the Applicant argued that under the rules of The Turf Club the trainer was the only person properly summoned and that the Respondent, as owner of the horse, had no *locus standi*. This argument was accepted by the Chairman of the PSB. At the conclusion of the hearing, and in the face of contradictory evidence from certain witnesses, the Disciplinary Committee upheld the finding from the HRFL that Kathir had raced with a prohibited substance in its body. The Disciplinary Committee disqualified the horse, fined the trainer the sum of $500, and ordered the trainer to pay all reasonable costs and expenses of the enquiry and such reasonable compensation as may be determined by the stewards of The Turf Club.

[4] In an action brought by the Respondent in the High Court, Kentish J: (1) rejected the Applicant's objection that the Respondent lacked standing to bring the action in the High Court; and (2) found that PSB's enquiry was tainted with bias in that the Applicant's lawyers had retired with the PSB during their deliberations. The learned judge declared the decision of the Disciplinary Committee to be null and void, and granted a permanent injunction restraining the Applicant from enforcing

the said decision. The Applicant's appeal to the Court of Appeal was dismissed. That court agreed with counsel for the Respondent that the "finding of the trial judge that the principles of natural justice were breached by the PSB was not challenged in this appeal" and that this ruling "*ipso jure* rendered the proceedings a nullity and any decision made by it invalid".[4]

[5] During the application to the Court of Appeal for leave to appeal to this Court much was made of whether the amount in dispute was of a value of not less than $18,250 or involved "directly or indirectly" a claim or a question respecting property of this value so that the Applicant was entitled to claim an appeal to this Court "as of right" under section 6 (a) of the CCJ Act. There is no need to pursue a resolution of this matter in the present circumstances. In *Brent Griffith v Guyana Revenue Authority and Attorney-General of Guyana*[5] Nelson JCCJ, speaking for this Court, outlined the circumstances in which special leave will be granted:

> "Special leave may be granted under section 8 of the CCJ Act in civil and criminal cases. This is intended to apply to cases which do not fall within either section 6 or section 7 of that Act i.e. cases where the appeal does not lie as of right and leave to bring the appeal cannot be obtained from the Court of Appeal. If the case falls within either of those sections, an application for leave should be made to the Court of Appeal.
>
> But this court may also in the exercise of its inherent jurisdiction grant special leave when the Court of Appeal has wrongly refused leave (either in an as-of-right case or one where the conditions for leave under section 7 are satisfied) or has granted leave subject to conditions which it had no power to impose. The same inherent jurisdiction is in our view also exercisable when no application for leave has been made to the Court of Appeal. The court however always has the option of refusing special leave, even in as-of-right cases, if it finds that the appeal has no realistic chance of success."[6]

---

[4] *Barbados Turf Club v Eugene Melnyk*, Barbados Court of Appeal, CV No. 25 of 2007, at para. 25.

[5] CCJ Application No. 1 of 2006.

[6] Ibid., at [22]-[23]. See also Judgment by Mr Justice de la Bastide, PCCJ, in *Barbados Rediffusion Service Ltd v Asha Mirchandani, Ram Mirchandani, and McDonald Farms Ltd*, CCJ Application No. AL 0001 of 2005, BB Civil Appeal No. 18 of 2000, dated the 26th October 2005 at paragraph 29: "The route via section 7 involves the obtaining of leave from the Court of Appeal on certain grounds which are specified in that section. The route via section 8 involves obtaining special leave from this Court on grounds which are unspecified but are left to be determined by us. Notwithstanding the use of the words "subject to section 7" in section 8, these two routes are separate and independent of each other and do not intersect. The limitations imposed by section 7 on the grant of leave by the Court of Appeal do not apply to the grant of

[6] It follows therefore that in applications for special leave this Court is not concerned with whether the appeal is properly categorized as one "as of right"; or as involving the imposition of unreasonable or impermissible conditions; or as having been improperly refused as not involving points of law of general importance. Undoubtedly proper categorization of the application is important in the court below and a determination on this question also has import in proceedings before this Court. Thus, it will normally be advantageous for an applicant to obtain leave from the court below. For example, where the appeal comes before us "as of right" this Court would in the normal course of events proceed to hear the appeal subject to the normal case management procedures and the inherent safeguards relating to its residual discretion to dismiss for abuse of process upon the objection of the Respondent. Where an applicant comes armed with leave from below there is no question of this Court exercising its inherent discretion to grant special leave and therefore no requirement or opportunity to consider the chances of success as a prelude to the granting of special leave.

[7] Where, however, the application for special leave is directly made under section 8 of the CCJ Act, the applicant is obliged to show that the application has a real prospect of success. The application will be rejected if this Court, to repeat the words used by Nelson JCCJ in *Brent Griffith v Guyana Revenue Authority and Attorney-General of Guyana*[7], "finds that the appeal has no realistic chance of success". For this reason, applications for special leave, regardless of their proper categorization in the court below, are properly fresh applications to this Court under section 8 of the CCJ Act rather than appeals from a decision of the Court of Appeal to refuse leave.

---

special leave by this Court under section 8. Clearly the words "subject to section 7" do not have that effect. Similarly, it would be reading far too much into those words to construe them as requiring that every application made to this Court for special leave under section 8, must be preceded by an (unsuccessful) application for leave under section 7."

[7] CCJ Application No. 1 of 2006, at [22]-[23].

[8] In the circumstances we must therefore consider whether the Applicant has any real prospect that its appeal from the substantive decision of the Court of Appeal would succeed before this Court. We do not think that there is any such prospect. In our view it is not arguable that the Respondent had no *locus standi* to complain to the High Court that the Disciplinary Committee proceedings were tainted with bias or that those proceedings had not observed the rules of natural justice. We agree fully with the trial judge and the Court of Appeal that it is very clear from the Rules of Racing of The Barbados Turf Club 2001 that the Respondent as a member of the Club had standing in judicial proceedings related to obligations arising out of his membership contract which required the Club to ensure that the enquiry was conducted without bias, actual or apparent, and in accordance with the rules of natural justice. And this is particularly so here because the Respondent was the owner of the horse which was the subject of the enquiry: *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan*[8].

[9] Similarly, we do not consider that there is any real chance of successfully arguing that the rules of natural justice were not breached in the conduct of the Disciplinary Committee. The finding by the forensic laboratory in England that the horse Kathir had raced with a prohibited substance in its body remained provisional until tested and confirmed in the appropriate judicial or quasi-judicial proceedings, here the disciplinary enquiry convened by the PSB. Indeed under the Rules of Racing of the Barbados Turf Club this finding was considered only "prima-facie evidence" (see Rule 142 (h)). The findings of the PSB, as the relevant tribunal, represented the conclusive findings of fact (subject to any residual discretion of review in the courts) provided those findings were arrived at in a hearing in which the principles of natural justice (including the rules against bias) were observed.

[10] Where, as in this case, the Respondent contends that the decision of the tribunal was tainted by apparent bias, the appropriate test is "whether the fair-minded and

[8] [1993] 2 All ER 853

informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased": *In re Medicaments and Related Classes of Goods (No. 2*[9]*).* In our view a reasonably well informed fair-minded observer seeing the PSB huddled in its one and a quarter hours of deliberations with the two lawyers for the Applicant, knowing that those lawyers had earlier performed a quasi-prosecutorial function in the cross-examining of witnesses for the trainer, could reasonably come to the view that the deck was stacked against the trainer. There was no opportunity for whatever the Applicant's lawyers might have said or intimated to have been contradicted by the lawyers for Mr Issa. There was no balancing of interests in this regard and any argument to the contrary is doomed to fail.

[11] We hasten to add that there was no allegation of improper conduct by the Applicant's lawyers and our judgment is not to be read as in any way suggesting that they behaved improperly. However, upholding the principles of natural justice is sacrosanct. To quote an age-old adage: "justice should not only be done, but must manifestly and undoubtedly be seen to be done"[10]. We therefore reject the contention of the Applicant that there was on the facts no breach of the principles of natural justice because there was no actual bias.

[12] Finally, it is incorrect to suggest that the effect of setting aside the decision of the Disciplinary Committee is to reward a "doped" horse for its performance in the Sandy Lane Gold Cup. We wish to stress that the laboratory finding that a horse had raced with a prohibited substance in its body remained provisional until displaced by the conclusive findings of a disciplinary hearing held in accordance with the rules of natural justice. The trial judge decided that the PSB proceedings did not measure up to these standards and therefore that its decisions were null and void. The Court of Appeal upheld this decision. We entirely agree. The proceedings of the Disciplinary Committee were irretrievably infected with

[9] [2001] 1 WLR 700 at pp. 726-727
[10] *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, at p. 259, per Lord Hewart CJ.

procedural impropriety and therefore could not produce legally acceptable findings of fact.

[13] In all these circumstances we had no choice but to dismiss this application and to order costs to the Respondent.

/s/ R Nelson

The Hon. Mr. Justice R. Nelson

/s/ D Hayton

The Hon. Mr. Justice D. Hayton

/s/ Winston Anderson

The Hon. Mr. Justice W. Anderson