IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No CV 5 of 2011
BB Civil Appeal No 2 of 2009

BETWEEN

ROSEAL SERVICES LIMITED	**APPELLANT**
AND	
MICHAEL L CHALLIS	**1ST RESPONDENT**
MARCUS J F CLARKE	**2ND RESPONDENT**
ANTHONY REID	**3RD RESPONDENT**

Before The Honourables	**Mr Justice Nelson**
	Mme Justice Bernard
	Mr Justice Wit
	Mr Justice Hayton
	Mr Justice Anderson

Appearances

Mr Barry L V Gale QC and Mrs Leodean Worrell for the Appellant

Mr Randall D Belgrave QC, Mr J Damian Edghill and Mr Naeem A E Patel for the Respondents

JUDGMENT
of
Justices Nelson, Bernard, Wit, Hayton and Anderson
Delivered by
The Honourable Mr Justice Nelson
on the 3rd day of October 2012

JUDGMENT

Introduction

[1] The Appellant, Roseal Services Limited, (hereinafter also referred to as "Roseal") was at all material times the fifth mortgagee or chargee of King's Beach Hotel, Road View, in the parish of St. Peter (hereinafter referred to as "the hotel property"). On May 30, 2008 Roseal agreed to sell the hotel property to the Respondents for $64,900,000 pursuant to its statutory power of sale under Section 112 of the Property Act Cap. 236 and its power of sale under a debenture mortgage dated June 11, 2004.

[2] The hotel property was owned by King's Beach Hotels Limited, which had mortgaged it to other lenders, the first mortgagee being the Bank of Nova Scotia.

[3] By letter dated September 8, 2008 the Respondents' attorney-at-law purported to rescind the agreement for sale on several grounds, which, broadly stated, asserted that Roseal, the vendor, had failed to show a good marketable title to the hotel property. Attorney-at-law for the Appellant, Roseal, vigorously denied that the Respondents were entitled to rescind the agreement for sale on the ground alleged.

[4] On October 29, 2008 the Appellant commenced proceedings against the Respondents by writ in the High Court claiming specific performance of the agreement for sale and, in the alternative, damages for breach of contract. On the same date the Appellant applied to the High Court by summons for summary judgment for specific performance pursuant to Order 81 of the Rules of the Supreme Court of Barbados (now replaced by the Supreme Court of Barbados Civil Procedure Rules 2008, which came into force on October 1, 2009).

[5] Order 81 rule 1, so far as is material, provides as follows:

"1.

(1) In any action begun by writ endorsed with a claim

(a) for specific performance of an agreement whether in writing or not for the sale, purchase or exchange of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages,

(b) for rescission of such an agreement, or

(c) for the forfeiture or return of any deposit made under such an agreement,

the plaintiff may, on the ground that the defendant has no defence to the action, apply to the court for judgment.

(2) An application may be made against a defendant under this rule whether or not he has acknowledged service of the writ in the action …

(3) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action, the Court may give judgment for the plaintiff in the action ….”

[6] The application for summary judgment was heard on November 14, 2008 and on December 19, 2008. Kentish J. dismissed the application and made the following order:

“(1) that the matter proceed to a speedy trial and the affidavits filed to date in the action stand as pleadings.

(2) that there be liberty to all parties to cross-examine the deponents of the affidavits.”

[7] The Appellant appealed the order of Kentish J. The appeal came on for hearing on February 16, 2009 before Simmons CJ, Moore and Mason JJA. The Court of Appeal reserved judgment, and handed down its written decision on June 11, 2010, some 16 months later at a time when Simmons CJ had demitted office.

[8] The Court of Appeal made the following order:

> "The appeal is dismissed. The respondents are granted unconditional leave to defend the action. The directions which we give in accordance with O.81 R.5 are as follows:
>
> i. The appellant shall file and deliver a Statement of Claim within 14 days of the date of this judgment.
>
> ii. The respondents shall file and serve a Defence and Counterclaim within 14 days of service on them of the Statement of Claim.
>
> iii. The appellant shall be at liberty to file and serve a Reply and Defence to Counterclaim within 10 days of service on it of the Defence and Counterclaim.
>
> iv. The affidavits of Messrs. Abrahams and Patel shall stand as their evidence in chief.
>
> v. The case shall be set down for hearing before Kentish J. at dates convenient to the court and the parties in the month of September 2010.
>
> The respondents shall have the costs of this appeal paid by the appellant certified fit for two attorneys-at-law and to be taxed if not agreed."

We shall refer to this order as "the June order".

[9] On June 11, 2010 after handing down the reserved judgment of the Court of Appeal prepared by Simmons CJ, the Court of Appeal (Moore, CJ (Ag.), Mason JA and Goodridge JA (Ag.)) made an order on the oral application of counsel for the Appellant for a stay of proceedings in order to allow his client time to consider filing an application for leave to appeal to the Caribbean Court of Justice. The Court of Appeal granted a stay of proceedings for that purpose until July 23, 2010.

[10] For the purpose of this introduction, it suffices to say that an early attempt by counsel for the Appellant, Mr. Gale Q.C., to agree the costs of the Court of Appeal proceedings floundered when counsel for the Respondent enclosed in a letter dated July 26, 2010 a draft of the June order for approval which stated:

> "I refer you to the Order of the Court of Appeal made on 11th June 2010 which required your client to pay costs forthwith fit for two counsel with regard to your client's failed application for summary judgment. **The said Order of the Court of Appeal is clear in that it is a condition that your client must first pay these costs before it can proceed with the action in the High Court**."

[11] In addition counsel for the Respondents made a request for payment of the costs of the applications for summary judgment in the High Court, for leave to appeal in the Court of Appeal and for summary judgment in the Court of Appeal in the total sum of $2,325,000. Mr. Gale Q.C. rejected that request and invited the Respondents' counsel, Mr. Belgrave Q.C. to proceed to taxation. Mr. Gale Q.C. indicated that "*once these costs have been taxed and finally determined my client will pay your client the cost of the proceedings in the Court of Appeal"*.

[12] The Acting Chief Justice mandated the Deputy Registrar to meet with the parties and settle the order made by himself, Mason JA and Goodridge JA (Ag.) on June 11, 2010 ("the order of the Moore panel"). The Deputy Registrar held that the settled order of the Moore panel was that payment of the fees as ordered by the Court of Appeal was NOT a condition precedent of the matter proceeding to trial.

[13] On October 22, 2010 a second meeting took place at which were present the Acting Chief Justice, Mason JA, Goodridge JA (Ag.), the Deputy Registrar, Mr. Belgrave Q.C. and his junior, Mr. Edghill, and Mrs. Worrell. The Court ruled that the payment of the Respondents' costs WAS a condition precedent of the matter being heard before Kentish J. We refer to this ruling as "the October ruling".

[14] The Registrar had fixed a date for trial of the action before Kentish J. on December 8, 9 and 10, 2010. However, the Respondents' costs had not yet been taxed. The Appellant filed an application in the Court of Appeal for an order that paragraph 2 of the order of the Moore panel made on June 11, 2010 and settled on October 22, 2010 (the October ruling) be varied to read "*that the Respondents shall have the costs of the appeal paid by the Appellant certified fit for two*

attorneys-at-law to be taxed if not agreed". That application was heard by the Moore panel on December 1, 2010. Their ruling, which we shall call "the December ruling", is as follows:

> "1. That the application on behalf of the Appellant at paragraph (1) of the Notice of Application is denied.
>
> 2. That the Order of the Court of Appeal made on the 11th June, 2010 and filed on the 28th day of October, 2010 in respect of the matter of costs (a true copy of which is appended to this Order as "Appendix A") remains in effect in all respects.
>
> 3. That the following further orders are this day made:
>
> (a) That the Appellant shall pay the sum of Six hundred and fifty thousand dollars ($650,000.00) into Court by the 6th December, 2010 as security for the Respondents' costs which were ordered to be paid by way of the said Order made on the 11th June, 2010;
>
> (b) That the Court accepts Counsel for the Appellant's professional undertaking to ensure that the sums ordered to be paid into Court under paragraph 3(a) hereof shall not be paid out of any funds held by Mr. Wilfred Abrahams, Attorney-at-law or any other person as a stakeholder deposit on the Agreement for Sale dated 30th May, 2008 in respect of the sale and purchase of the property forming the subject matter of this Appeal.
>
> (c) That the costs of and attendant to the Appellant's said Notice of Application filed on the 16th November, 2010 in the sum of Seven thousand five hundred dollars ($7,500.00) be paid by the Appellant to the Respondents by the 8th December, 2010."

In effect the October ruling was affirmed and varied by the inclusion of three further orders set out at paragraph 3 of the December ruling. The December ruling now required that the Respondents' costs be paid as a condition precedent to proceeding to trial and that the Appellant should pay into court the sum of $650,000 pending taxation.

[15] On January 11, 2011 the Appellant applied to the Court of Appeal for leave to appeal to the Caribbean Court of Justice against the December ruling. On February 14, 2011, the Respondents filed a cross notice of appeal (amended on March 18, 2011) to strike out the application for leave to appeal to the Caribbean Court of Justice.

[16] The application for leave to appeal to this Court was heard by a new panel of the Court of Appeal (Burgess JA, Chandler and Reifer JJA (Ag.)). Leave to appeal was granted by the court on May 26, 2011 in reliance on section 6(a) of the Caribbean Court of Justice Act (which permits an appeal from the Court of Appeal as a right to the CCJ in certain cases). Pursuant to the leave granted a Notice of Appeal was filed on August 31, 2011.

[17] At the case management conference prior to the hearing of the appeal, this Court of its own motion raised the question of its jurisdiction under section 6(a) of the Caribbean Court of Justice Act 2003 ("the CCJ Act") to hear this appeal and whether the Court of Appeal had jurisdiction to hear the appeal and to make the further orders it made, having regard to section 54(1)(c) of the Supreme Court of Judicature Act. The Court further invited counsel to consider what would be the appropriate order as to costs if either the Court of Appeal or this Court or both courts had no jurisdiction.

[18] At the end of the hearing on 27 July 2012 the Court, having heard that the hotel property had been sold by the first mortgagee, directed that the breach of contract action proceed to a speedy trial as directed by Kentish J, and stated it would subsequently provide its reasons in writing. These are those reasons.

The jurisdictional question

[19] The immediate impact of the issues raised by the Court is to question whether the appeal filed on August 31, 2011 is properly before the Court. The narrow issue is whether an appeal lay as of right to the CCJ pursuant to section 6(a) of the CCJ Act against the June order as amended by the October and December rulings. For the reasons mentioned later in this judgment, we hold there is no such appeal as of right against this interlocutory order.

Even in a case like this, however, the Court may entertain an appeal if it considered that special leave would have been granted under section 8 of the CCJ Act had it been applied for. In *Brent Griffith v Guyana Revenue Authority*[1] (with reference to a similarly worded CCJ Act in Guyana) this Court stated:

> "[Section 8] … 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 appeal cannot be obtained from the Court of Appeal."

[20] The Court also adverted in the same case to its inherent jurisdiction to grant special leave when the Court of Appeal has wrongly refused leave in an as-of-right case or a section 7 case. Where the Court of Appeal grants leave to appeal in error, the Court can nonetheless hear an appeal in the interests of justice. Such an occasion might arise, as it does here, where an issue is raised as to the jurisdiction of the Court of Appeal to hear the appeal or where it is necessary to correct an egregious error of law in the Court of Appeal. To that extent and for that purpose therefore the appeal will be entertained.

[21] If the order of Kentish J. granted unconditional leave to defend, was there any jurisdiction in the Court of Appeal to hear an appeal from her judgment? If there was not, it would follow that the June order, the October ruling and the December ruling would be voidable. This Court would have jurisdiction to set aside the

[1] (2006) 69 WIR 320

orders in the Court of Appeal in order to correct the error of jurisdiction in the Court of Appeal. The Court will deal with this issue first.

The first issue

Whether there was any jurisdiction in the Court of Appeal to hear an appeal from the order of Kentish J. granting unconditional leave

[22] Counsel for the Appellant contended that the first issue assumed that the order of Kentish J. was an order for unconditional leave. Nowhere in her ruling does the learned judge use the phrase "unconditional leave to defend". The terms of the learned judge's ruling are set out in paragraph [6] of this judgment. Counsel for the Appellant further argued that the terms of the ruling which directed the affidavits already filed to stand as pleadings and gave leave to cross-examine the deponents corresponded to Order 81 Rule 4 which empowered a court to give leave to defend "on such terms as to giving security or time or mode of trial or otherwise as it thinks fit".

[23] The main contention of counsel for the Appellant was that in the course of the application for leave to appeal on February 16, 2009 the parties fully argued the issue of whether the order of Kentish J. was an order for unconditional leave to defend, and if it was, whether Roseal had any right of appeal to the Court of Appeal. Simmons CJ accepted similar arguments of the Appellant, concluding thus: "We therefore are of the view that the judge did not in turn grant unconditional leave to defend, but rather made an order consonant with the provisions of Order 81, Rule 4, sub-rule 2 … We hold that Mr. Gale and the applicant are entitled to leave to appeal …" Mr. Gale Q.C. contended that Simmons CJ contradicted himself in holding in the judgment on the substantive appeal on June 11, 2010 at [1], [7], [10], [42] and [43] that the order of Kentish J. was an order for unconditional leave to defend. The court was therefore invited to accept the earlier conclusion of the learned Chief Justice that the order of Kentish J. was not an order granting unconditional leave to defend.

[24] Mr. Belgrave Q.C., for the Respondents repeated the arguments he made to the Court of Appeal at the application for leave to appeal. His view was that no special words were required to constitute an order granting unconditional leave to defend. He contended that stripped to its bare essentials, the order of Kentish J. refused summary judgment and permitted the Respondents to defend without conditions.

[25] The main issue is whether leave to defend was given with conditions. We do not think it is necessary for judges to chant the magic words "unconditional leave to defend" in giving unconditional leave to defend. The order must be examined to see whether conditions are being imposed on the grant of leave or whether directions are given pursuant to Order 81 rule 5 as to the further conduct of the proceedings. The usual form of conditions requires the payment into court of the whole or part of a claim. On the other hand, a judge might give directions as to filing of witness statements, discovery and as to the place and mode of trial. In our judgment, the order of Kentish J. was an order for unconditional leave to defend, as Simmons CJ correctly held in the Court of Appeal's judgment of June 11, 2010. As to the Court of Appeal's order of February 2009, it is clear that rulings made on granting or refusing leave to appeal are interlocutory, and as such remain subject to review in the judgment on the substantive appeal: see *Sanofi v Parke Davis Pty Ltd.*[2]

[26] Counsel for the Appellant conceded that if the Court construed the order of Kentish J. as an order granting unconditional leave to defend, the Appellant had no right of appeal having regard to section 54(1)(c) of the Supreme Court of Judicature Act.

[27] However, the Court of Appeal in its judgment of June 11, 2010 overlooked that point. The Court of Appeal, although it held that Kentish J. had granted unconditional leave to defend, granted leave to appeal to the Court of Appeal.

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[2] *(No. 1)* (1982) 149 CLR 147 at [6].

The Court of Appeal relied on *European Asian Bank AG v Punjab and Sind Bank*[3] where Robert Goff LJ stated that no special principles applied to an appeal to the Court of Appeal against an order giving unconditional leave to defend. Such an appeal was in form an interlocutory appeal. Reliance on the *European Asian Bank* case was misplaced for the following reasons set out by Robert Goff LJ at p. 648:

> "Until recently, it was not possible for a plaintiff to appeal against such a decision. As a matter of history, such an appeal was possible until 1894, when it was abolished by statute; that abolition was subsequently incorporated in the Judicature Act 1925. However, when the Supreme Court Act was enacted in 1981, the provision abolishing the right to appeal in such a case (section 31(1)(c) of the Supreme Court of Judicature (Consolidation) Act 1925) was not re-enacted with the effect that, under the ordinary rules of procedure relating to interlocutory matters, an appeal now lies to the Court of Appeal with leave either of the judge or of the Court of Appeal. We shall have more to say about appeals of this kind when we come to consider the substance of the present appeal."

Robert Goff LJ was there referring to section 31 of the Supreme Court of Judicature (Consolidation) Act 1925 (U.K.). The wording of section 31 of the 1925 U.K. Act is virtually identical to sections 54(1)(c), 54(1)(g) and 54(2) of the Barbados Supreme Court of Judicature Act:

> "54 (1) No appeal lies to the Court of Appeal
>
> (c) from an order of a judge of the High Court giving unconditional leave to defend an action;
>
> (g) without the leave of the judge or of the Court of Appeal, from any interlocutory order or judgment made or given by a judge of the High Court, except in the following cases, namely
>
> (i) where the liberty of the subject or the custody of minors is concerned

[3] [1983] 1 WLR 642, 653

(ii) where an injunction or the appointment of a receiver is granted or refused;

…

(2) An order refusing unconditional leave to defend an action shall be deemed not to be an interlocutory order within the meaning of this section.

(3) Subject to subsection (2), any doubt that arises about what orders or judgments are final and what are interlocutory shall be determined by the Court of Appeal."

[28] The Supreme Court of Judicature (Consolidation) Act 1925 of the U.K., on which the Barbados Supreme Court of Judicature Act is based, had provided as follows so far as is material:

"Restrictions on appeals –

31. (1) No appeal shall lie …

(c) from an order of a Judge giving unconditional leave to defend an action; …

(i) without the leave of the Judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a Judge …

(2) An order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory order within the meaning of this section."

[29] We think the effect of section 31 is correctly stated in The Supreme Court Practice 1979 at 14/3-4/26:

"If the Judge confirms or himself makes an order, giving unconditional leave to defend, the plaintiff cannot appeal, and no leave to appeal can be obtained (J.A., 1925, s.31(1)(c) …

An order refusing unconditional leave to defend may be appealed against without leave since by the Jud. Act, 1925, s. 31(2) it is deemed not to be an interlocutory order; and an order giving conditional leave to defend is the equivalent of an order "refusing unconditional leave to defend," so that both plaintiff and defendant may appeal against such order without leave (Gordon v Cradock,

> [1964] 1 Q.B. 503, C.A.). Otherwise there is no appeal without leave from any interlocutory order or judgment made or given by a Judge (Jud. Act, 1925, s. 31(1)(i)."

[30] Therefore, although interlocutory orders or judgments can generally be appealed only *with leave* of either the first instance court or the Court of Appeal, a party appealing an order *refusing* unconditional leave to defend has an "absolute" right of appeal *without leave* because such an order is deemed **not** to be an interlocutory order under section 31(2) of the U.K. Act and section 54(2) of the Barbados Act. No appeal lies, however, from an order *granting* unconditional leave despite its interlocutory nature because the general right of appeal in respect of interlocutory orders in section 31(1)(g)(UK) or section 54(1)(g) (Barbados) must be read subject to section 31(1)(c)[4](UK) or section 54(1)(c) (Barbados). Accordingly, it was not sufficient to label the order of Kentish J. as interlocutory and on that account conclude there was a right of appeal to the Court of Appeal.

The second issue

Whether there is a right of appeal to the CCJ under section 6 (a) of the CCJ Act 2003 in respect of interlocutory civil orders

[31] Since the Court holds that the Court of Appeal had no jurisdiction to hear an appeal from the order of Kentish J. granting unconditional leave to defend, it is not strictly necessary to rule on the second issue. However, we do so because the substantive appeal before the Court is founded on section 6 (a) of the CCJ Act.

At the hearing before the Court of Appeal of the application for leave to appeal to the CCJ on May 12, 2011 counsel for the Respondents contended that the Appellant was not entitled to leave to appeal as of right pursuant to section 6 (a) of the CCJ Act. Counsel for the Appellant took the opposite view and was successful in persuading the Court of Appeal to grant leave. Hence these proceedings.

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[4] See *Customs & Excise Commissioners v. Anco Plant and Machinery Co. Ltd.* [1956] 3 ALL ER 59, 61.
See also under the Jamaican Judicature (Appellate Jurisdiction) Act: *Manderson-Jones v. SITA* [1981] 1 WLR 1486, 1488

[32] Section 6 (a) of the CCJ Act reads as follows:

> "6. An appeal shall lie to the Court from decisions of the Court of Appeal as of right
>
> (a) in civil proceedings where the matter in dispute on appeal to the Court is of the value of not less than $18 250, or where the appeal involves directly or indirectly a claim or a question respecting property or a right of the aforesaid value;…"

Counsel for the Appellant and for the Respondents made extensive submissions regarding the import of this provision, which we shall summarize as concisely as possible.

[33] Counsel for the Respondents pointed out that section 6 (a) of the CCJ Act 2003 is worded differently from Article XXV paragraph 2 of the Agreement Establishing the Caribbean Court of Justice ("the Agreement"). The Agreement provides for appeals as of right to the CCJ from decisions of the Court of Appeal that are "final decisions": see paragraph 2 (a) of Article XXV of the Agreement. On the other hand, section 6 (a) of the CCJ Act is not so limited. It is ambiguous in that it does not expressly state whether an as of right appeal lies in relation to "final" and/or "interlocutory" decisions of the Court of Appeal though section 3 of the CCJ Act states "The Agreement shall have the force of law".

Since section 6 (a) of the CCJ Act was ambiguous, it was argued, it should be interpreted so as to give effect to the Agreement and not to breach it. The Court should apply the presumption that Parliament does not intend to breach its treaty obligations under international law. Accordingly, section 6(a) should be construed to exclude a right of appeal in relation to interlocutory matters such as an order for unconditional leave to defend, whether or not the interlocutory matters exceed the monetary threshold of $18,250.

[34] Counsel for the Appellant, Mr. Gale Q.C., contended that section 6(a) of the CCJ Act was not ambiguous, and its meaning was pellucidly clear. No distinction was

made in section 6(a) as to whether the matter in dispute was final or interlocutory. That distinction had been made by the Parliament of Barbados in the repealed section 64 of the Supreme Court of Judicature Act in respect of appeals from the Court of Appeal to Her Majesty in Council, but was pointedly absent from the CCJ Act.

[35] Counsel for the Appellant submitted that since section 6 (a) was unambiguous, the Court should construe that section according to its plain meaning and not in a manner that would deprive a party of a right of appeal. Courts would not do so in the absence of clear language in an enactment.

There was nothing in the CCJ Act that pointed away from the plain meaning in section 6 (a). Indeed Article XXV (1) and (2) gave every Contracting Party the right to confer on its citizens the right to appeal "as of right in such other cases as may be prescribed by the law of the Contracting Party", a provision that envisaged "as of right" appeals against interlocutory decisions.

[36] Counsel for the Appellant denied there was any conflict between the CCJ Act and the Agreement. Reliance was placed on the dicta of Diplock L J in *Salomon v. Commissioners of Customs and Excise*[5]: "if the terms of the legislation are clear and unambiguous then they must be given effect to, whether or not they carry out Her Majesty's treaty obligations …"

[37] The Court of Appeal (Burgess JA, Chandler and Reifer JJA (Ag.)) accepted counsel for the Appellant's submissions, stating at [42] of the judgment of the court:

> "In light of the foregoing, the fundamental question in this case therefore becomes whether the word "decisions" in **section 6 (a)** occasions any uncertainty or ambiguity. In our view, it does not. Counsel for the Respondents' submission that the word "decisions" is unclear and ambiguous because that noun, "decisions", is not preceded by either the adjective "final" or "interlocutory" is as baleful as it is unpersuasive. It threatens ambiguity

[5] [1967] 2 QB 116, 143

whenever a noun is not qualified by an adjective! Given that the word "decisions" in **section 6(a)** is clear and unambiguous, effect must be given to it whether or not it is at variance with obligation under the Agreement."

[38] With great respect, the Court of Appeal overlooked section 3 and section 4(1)(b) of the CCJ Act.

Section 3 states:

"The Agreement shall have the force of law."

Section 4(1)(b) provides:

"4(1) The Court shall have …

(b) appellate jurisdiction provided for in this Act as is conferred on it in accordance with the provisions of Part III of the Agreement;"

The Agreement is defined in section 2 as "the Agreement Establishing the Caribbean Court of Justice … the text of which is set out in the Schedule". Therefore if one reads section 6(a) alongside the Agreement incorporated in the Schedule to the CCJ Act there is manifest ambiguity caused by the divergence between the wording of section 6(a) and Article XXV paragraph 2(a) of the Agreement.

[39] If we leave aside this point for the moment, stripped to the bare essentials, the debate between the Appellant and the Respondents comes down to this: whether it is possible to reconcile section 6 (a) of the CCJ Act with paragraph 2 (a) of Article XXV of the Agreement or whether one should apply a robust doctrine of national and parliamentary sovereignty and treat section 6 (a) of the CCJ Act as supreme. For ease of comparison we set out the competing provisions.

1. <u>Article XXV paragraph 2 (a) of the Agreement</u>

"2. Appeals shall lie to the Court from decisions of the Court of Appeal of a Contracting Party as of right in the following cases:

(a) final decisions in civil proceedings where the matter in dispute on appeal to the Court is of the value of not less

than twenty-five thousand dollars Eastern Caribbean currency (EC$25,000) or where the appeal involves directly or indirectly a claim or a question respecting property or a right of the aforesaid value; …"

2.<u>Section 6 (a) of the CCJ Act</u>

"6. An appeal shall lie to the Court from decisions of the Court of Appeal as of right

(a) In civil proceedings where the matter in dispute on appeal to the Court is of the value of not less than $18,250, or where the appeal involves directly or indirectly a claim or a question respecting property or a right of the aforesaid value; …"

Should section 6(a) of the CCJ Act be understood as only applying to "final decisions in civil proceedings" as expressly stated in Article XXV paragraph 2(a) of the Agreement? Further, should the phrase "final decisions" in Article XXV paragraph 3(a) of the Agreement equally be read into section 7(a) of the CCJ Act before "in any civil proceedings"? And what, for that matter, is the relevance of section 6(f) of the CCJ Act and its equivalent in Article XXV paragraph 2 (f) of the Agreement in this particular context?

1. **<u>Section 6 (f) of the CCJ Act</u>**

"(f) in respect of any other matter as may be prescribed by any law."

2. **<u>Article XXV paragraph 2 (f) of the Agreement</u>**

"(f) such other cases as may be prescribed by any law of the Contracting Party."

3. **<u>Section 7 (a) of the CCJ Act</u>**

"(a) in any civil proceedings where, in the opinion of the Court of Appeal, the question is one that by reason of its great general or public importance or otherwise, ought to be submitted to the Court;…"

4. **Article XXV paragraph 3 (a) of the Agreement**

> "(a) final decisions in any civil proceedings where, in the opinion of the Court of Appeal, the question involved in the appeal is one that by reason of its great general or public importance or otherwise, ought to be submitted to the Court;…"

We shall return to this point later in this judgment.

The content of the modern plain meaning rule

[40] Ultimately, the question is what does the plain meaning rule mean in its present state of evolution. Counsel for the Appellant referred to and relied on the statement of the plain meaning rule in *Bennion on Statutory Interpretation 5th Ed.* at page 548:

> **Section 195. The plain meaning rule**
>
> "It is a rule of law (in this Code called the plain meaning rule) that where, in relation to the facts of the instant case:
>
> (a) the enactment under inquiry is grammatically capable of one meaning only, and
>
> (b) on an **informed** interpretation of that enactment the interpretative criteria raise no real doubt as to whether that grammatical meaning is the one intended by the legislator,
>
> the legal meaning of the enactment corresponds to that grammatical meaning, and is to be applied accordingly."

[41] Counsel for the Appellant failed to accord any appreciable significance to the "informed interpretation" rule of Code s. 195. Bennion states the rule in Code s. 201 in a manner with which the Court agrees:

> **Section 201. Statement of the informed interpretation rule**
>
> "(1) It is a rule of law (in this Code called the informed interpretation rule) that the person who construes an enactment must infer that the legislator, when settling its wording, intended it to be given a fully informed, rather than a purely literal, interpretation (though the two usually produce the same result).

(2) Accordingly, the court does not decide whether or not any real doubt exists as to the meaning of an enactment (and if so how to resolve it) until the court has first discerned and considered, in light of the guides to legislative intention, the context of the enactment, including all such matters as may illumine the text and make clear the meaning intended by the legislator in the factual situation of the instant case.

(3) For this purpose Parliament intends the court to permit the citation of any publicly available material which, in accordance with the interpretative criteria, the court considers it proper to admit (whether unconditionally or **de bene esse**)."

The meaning is only plain after a court has construed the enactment in its context. The context comprises its legislative history and the purpose of the Act.

[42] On the facts of this case the Agreement needs to be taken into account in construing the CCJ Act for the following reasons:

(1) The Preamble of the CCJ Act describes it as "An Act to provide for matters relating to the establishment of the Caribbean Court of Justice".

(2) Section 3 of the CCJ Act gives the Agreement the force of law in Barbados.

(3) Section 4(1) (b) provides:

"4 (1) The Court shall have

(b) appellate jurisdiction provided for in this Act as is conferred on it in accordance with the provisions of Part III of the Agreement;"

(4) Article XXXVIII of the Agreement states:

"The Contracting Parties shall take all necessary action, whether of a legislative, executive or administrative nature, for the purpose of giving effect to this Agreement …"

[43] These provisions put together make it clear that the CCJ Act should be construed so as to be in harmony with the Agreement. In *Barbados Rediffusion Services Limited v Mirchandani*[6] this Court applied the principle that the CCJ Act of Barbados must be construed so as to be in conformity with the Agreement. This Court rejected an interpretation of the phrase "subject to section 7" in section 8 of the CCJ Act which "would have the effect of significantly altering the appellate jurisdiction conferred on the court in accordance with the provisions of Part III of the Agreement".

[44] The appellate jurisdiction conferred on the Court by Article XXV paragraph 2(a) of the Agreement is expressly limited to "final decisions". Therefore section 6(a) of the CCJ Act must be read as if prefaced by the phrase "final decisions". Similarly, if section 7(a) of the CCJ Act is to be reconciled with Article XXV paragraph 3 (a) of the Agreement, section 7(a) of the CCJ Act must be construed as applying only to "final" decisions of the Court of Appeal. Thus, leave to appeal to the CCJ might be sought from the Court of Appeal in respect of "final decisions" of the Court of Appeal where in the opinion of that Court a point of law or of mixed fact and law of "great general or public importance or otherwise" was involved. Interlocutory appeals would lie to the CCJ only by special leave of the CCJ pursuant to section 8 of the CCJ Act but the sustainability or the importance of the point of law relied on would be a matter for the CCJ.

[45] The argument has been advanced that section 6(a) of the CCJ Act must be read against the provision of section 6(f) of that Act which states that there can (also) be an appeal as of right in "respect of any other matter as may be prescribed by any law". Counsel for the Appellant seems to argue here that Parliament is at liberty to add new categories of appeals as of right to those already prescribed in the Agreement. Having broadened these appeals from "final decisions" in certain civil proceedings to "decisions" (embracing both interlocutory and final decisions) in these proceedings, Parliament, the argument goes, has simply made use of its authority under the latter section which conforms to Article XXV

[6] (2005) 69 WIR 35

paragraph 2(f) of the Agreement. It is not now necessary for this Court to pronounce on the question whether "decisions" in relation to "other cases" to be prescribed by law must, coming at the end of a list of "final decisions", relate to "final decisions" in accordance with the *ejusdem generis* rule and the availability of interlocutory appeals under section 8 of the CCJ Act. Even if section 6(f) and section 7 of the CCJ Act and Article XXV paragraph (f) of the Agreement could extend to interlocutory matters, it cannot be assumed, given the clear appellate jurisdiction of this Court as circumscribed in section 4(1)(b) of the Act, that Parliament intended to broaden the categories mentioned in Article XXV paragraph 2(a)-(e) of the Agreement without a clear and unequivocal indication to that effect in sections 6 and 7 of the CCJ Act. No such indication, however, has been brought to our attention and none (expressions like "notwithstanding section 4(1)(b)" or "subject to sections 6 and 7") can be found in the text of the CCJ Act.

We therefore conclude that as-of-right appeals to the CCJ in section 6(a) of the CCJ Act do not extend to interlocutory orders of the Court of Appeal in civil proceedings.

Applicable interpretative criteria

[46] Interpretative criteria or guides to legislative intention to be applied in arriving at the legal meaning of an enactment include "principles derived by the courts from judicial decisions as to the nature and content of legal policy, presumptions laid down by the courts based on the nature of the legislation": see *96 Halsbury's Laws of England 5th Edition* paragraph 1084.

[47] An important principle of construction derived from judicial decisions is the rule that municipal law should conform to international law: see *Bennion* (supra) Code s.270.

[48] In the instant case we have established that the CCJ Act was passed in order to fulfil a treaty obligation. The rule is that where domestic legislation is passed

to comply with obligations in international law, there is a presumption that Parliament intended to fulfil the international obligations: *Salomon v Commissioners of Customs and Excise*[7].

[49] It is true, as counsel for the Appellant was at pains to point out, that Diplock L J in *Salomon* (*supra*) stated that if the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out the State's obligations. Diplock L J, however, went on in that case to state two conditions for resorting to the text of a treaty to assist in interpreting domestic legislation: (a) that the terms of the legislation are not clear and are reasonably capable of more than one meaning, (b) that there be cogent extrinsic evidence of the effect that the enactment was intended to fulfil obligations under a particular convention.

[50] While the view of Diplock L J represents the classic approach, it would seem that if there is a presumption that Parliament intends to conform to the nation's treaty obligations, the treaty becomes an aid to interpretation even in the absence of any ambiguity. Support for this view can be found in the Canadian case (not cited to us) of *National Corn Growers Association v. Canada Import Tribunal*[8]. In that case one of the issues was whether the Tribunal was right to refer to the GATT Subsidies Code for the purpose of interpreting the Special Measures Import Act. Gonthier J. citing a passage from Brownlie's Principles of Public International Law in our respectful view correctly stated the law:

> "… and more specifically, it is reasonable to make reference to an international agreement at the very outset of the inquiry to determine if there is any ambiguity, even latent, in the domestic legislation. The Court of Appeal's suggestion that recourse to an international treaty is only available where the provision of the domestic legislation is ambiguous on its face is to be rejected. As I. Brownlie has stated at p. 51 of **Principles of Public International Law** (3rd ed. 1979):

[7] [1967] 2 QB 116, 141, 143.
[8] [1990] 2 SCR 1324

> If the convention may be used on the correct principle that the statute is intended to implement the convention then, it follows, the latter becomes a proper aid to interpretation, and, more especially, may reveal a latent ambiguity in the text of the statute even if this was 'clear in itself'. Moreover, the principle or presumption that the Crown does not intend to break an international treaty must have the corollary that the text of the international instrument is a primary source of meaning or 'interpretation'. The courts have lately accepted the need to refer to the relevant treaty even in the absence of ambiguity in the legislative text when taken in isolation."

[51] We therefore conclude that the Agreement is a necessary aid to the construction of section 6 (a) of the CCJ Act. Although section 6 (a) is unambiguous on its face, recourse to sections 3 and 4(1)(b) reveals a clear ambiguity. However, even in the absence of those sections, recourse could have been had to the Agreement to reveal a latent ambiguity. Such clear or latent ambiguity is resolved by applying the principle that the Parliament of Barbados intended to fulfil its treaty obligations and that section 6 (a) should be construed so as to conform with the Agreement. Accordingly there was no right of appeal to the CCJ under the as-of-right provision in section 6(a) of the CCJ Act in respect of an interlocutory civil order of the Court of Appeal.

The third issue: costs

[52] The proceedings in the Court of Appeal must be struck out in the light of the foregoing. What then is the appropriate order as to costs?

The principal bone of contention between the parties since the order of Kentish J has been the issue of the quantum of the Respondents' costs. We are concerned here only with the costs of the Court of Appeal proceedings and of the proceedings before this Court.

[53] Mr. Gale QC for the Appellant has urged us to find that the conduct of the Respondents was choreographed to produce delay and to obstruct the Appellant's desire to have the High Court proceedings heard expeditiously

and determined finally. He refers to the impasse after the Court of Appeal's order of June 11, 2010 during which the Moore panel appears to introduce a condition that all costs had to be paid before trial of the action could commence. Counsel referred also to the December ruling (see [14] above). Mr. Gale QC invited this Court to conclude "that the Respondents are seeking unfairly to take advantage of the Appellant, to extort unfairly costs out of the Appellant and moreover preventing the Appellant from having his day in court …"

[54] Mr. Belgrave QC invited the Court to find that the Appellant "has gambled over and over again in the knowledge and comfort that it is judgment proof" as a foreign corporation without significant assets in Barbados. He submitted that this Court should accept the finding by the Moore panel that "the delay in this case was caused entirely by the actions of the appellant who had already caused the Respondents to incur substantial costs before the High Court and Court of Appeal". Mr. Belgrave QC described the Appellant as overzealous and urged the Court to divine the motivation of the Appellant in refusing to go to trial on a speedy basis.

[55] On the other hand, Mr. Gale QC pointed to the ruling of the Burgess panel that the Respondents were solely responsible for the delay in having the costs taxed: see [14] of the judgment of that panel.

[56] We respectfully decline to be drawn into an apportionment of blame between the parties for the conduct of the Court of Appeal proceedings which we are about to set aside. In the first place, any assessment of blameworthiness would be based on the printed transcript without having seen and heard Counsel. Secondly, the decision to strike out the Court of Appeal's proceedings is not founded on the conduct of the parties, but on points of law.

[57] In *Isaacs v Robertson*[9] (not cited to us) a judge dismissed a motion for contempt on the ground that the order disobeyed was a nullity. The Court of Appeal reversed the dismissal. The Privy Council affirmed the Court of Appeal's dismissal of the motion. Their Lordships held that an order made by a court of unlimited jurisdiction, even though irregular, must be obeyed unless and until it is set aside.

[58] Lord Diplock emphasized that it was misleading to attempt to draw a distinction between orders that are void in the sense that they can be ignored with impunity and orders that are voidable in the sense that they can be enforced until they are set aside. In *Isaacs v Robertson (supra)* the Privy Council held that an interlocutory injunction obtained after an action had lapsed for inactivity did not render the interlocutory injunction an order which the court was compelled of its own motion to treat as never having been made. A court is not wedded to the fiction that the aborted proceedings never took place. Thus, a reviewing court must declare the legal consequences of an invalid order. In doing so a court may allow an order as to costs to stand. This Court therefore makes the following orders.

ORDERS

1. The Notice of Appeal filed on February 20, 2009 is hereby struck out.

2. The orders of the Court of Appeal contained in the written judgment dated June 11, 2010 are hereby set aside save as to the order as to costs contained therein.

3. (a) The orders of the Court of Appeal (Moore CJ (Ag.)), Mason JA and Goodridge JA (Ag.)) made on June 11, 2010 and settled on October 22, 2010 as well as the orders of December 1, 2010 are hereby quashed save that the sum of Bds $650,000 already paid

[9] [1985] AC 92 (P.C.)

into court on account of the Respondents' costs in the Court of Appeal shall remain deposited into court until further order.

(b) The order that the Appellant shall pay the costs of the applications at 3 (a) hereof quantified at Bds $7,500 shall stand.

4. The proceedings before the Registrar and the Registrar's Certificate dated March 18, 2011 are hereby treated as valid provided that the Appellant shall be at liberty to proceed upon the Notice of Appeal filed on March 25, 2011 challenging that Certificate.

5. The Notice of Appeal to this Court filed on August 31, 2011 is hereby struck out.

6. The Appellant's application filed on June 26, 2012 and the Respondents' application filed on June 20, 2012 are hereby struck out with no order as to costs.

7. The Appellant shall pay the Respondents' costs in this Court, including the costs of the application filed on January 11, 2011 for leave to appeal to this Court, certified fit for two attorneys-at-law, to be assessed in default of agreement.

/s/

The Hon Mr Justice R Nelson

/s/

The Hon Mme Justice D Bernard

/s/

The Hon Mr Justice Wit

/s/

The Hon Mr Justice Hayton

/s/

The Hon Mr Justice Anderson