[2012] CCJ 8 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF
THE CO-OPERATIVE REPUBLIC OF GUYANA

CCJ Application No. AL 4 of 2012
GY Civil Appeal No. 61 of 2011

BETWEEN

KAMPTA NARINE CALLED MOHAN **APPLICANT**

AND

GUPRAJ PERSAUD **RESPONDENT**

Before the Honourables **Mr Justice Nelson**
Mr Justice Wit
Mr Justice Hayton

Appearances

Mr Basil Williams for the Applicant

Mrs Prabha Persaud-Kissoon for the Respondent

JUDGMENT
of
Justices Nelson, Wit and Hayton
Delivered by
The Honourable Mr Justice Rolston Nelson
on the 29th day of October, 2012

[1] By an application dated May 30, 2012, Kampta Narine, also called Mohan (hereinafter called "the Applicant"), purports to seek special leave of this Court to appeal against the refusal on May 17, 2012 of the Court of Appeal (Acting Chancellor Singh, Cummings-Edwards J.A. and Bovell-Drakes, Additional Judge) to grant him leave to appeal to this Court.

[2] The Applicant had by a summons dated July 19, 2011 sought from Roy J.A., a single justice of appeal, an extension of time for appealing against a judgment of Rishi Persaud J. dated February 18, 2011. Roy J.A. dismissed the summons, but the Applicant made a fresh application by motion to a three-judge panel of the Court of Appeal for an extension of time to file an appeal. The court, surprisingly presided over by Roy J.A., again dismissed the application. Roy J.A. detailed his reasons in a judgment delivered on December 12, 2011.

Brief Facts

[3] Gupraj Persaud (hereinafter called "the Respondent"), filed a specially indorsed writ of summons dated July 15, 2009 in which he claimed $5,700,000, interest and costs from the Applicant, the Defendant on that writ.

[4] The Respondent pleaded that in November 2008, at Lethem, the Applicant sold and delivered to the Respondent one Toyota Land Cruiser (1994) registered as PHH 8147 for the sum of $5,000,000.

[5] The Respondent alleged that he paid that sum and took possession of the vehicle, agreeing to take delivery in Georgetown, within a month of the transaction, of a new certificate of ownership in the Respondent's wife's name, to wit, a Certificate of Registration, insurance documents (presumably in the name of the new owner), a certificate of fitness and a road licence.

[6] The Respondent alleged that shortly after the sale, the vehicle developed engine problems and he expended $700,000 to effect the necessary repairs.

[7] Eventually in January 2009, the Applicant delivered the vehicle documentation promised, but in May 2009 when the Respondent went to purchase a current road licence at the Licensing Department of the Guyana Revenue Authority "he was informed that the said Certificate of Registration was a forgery and that import duties and taxes were never paid in respect of the said vehicle and that the same was smuggled into Guyana." The vehicle, he pleaded, was confiscated by the Guyana Revenue Authority.

[8] The Respondent therefore claimed "a refund" of $5,700,000 from the Applicant.

[9] The Applicant in his Defence denied that he sold the vehicle in question to the Respondent as alleged or at all but pleaded that he became aware of a written agreement of sale and purchase between the Respondent and an unknown Venezuelan since he had witnessed that agreement.

[10] After various adjourned hearings when Rishi Persaud J came to deliver judgment on February 18, 2011, the Applicant did not attend, as he was in Brazil undergoing eye tests and his counsel, Mr. G. Hanoman, was also not present but Mr. R. Jackson, of counsel, held his brief. The learned trial judge in his notes for judgment recorded that he was giving "judgment for the plaintiff in the sum of $5m. Additional claim for $700,000 not established…" However, the office copy of the order records judgment for the Respondent in the sum of $5,700,000. The office copy stated as follows:

> "… IT IS ORDERED that the Plaintiff do recover against the Defendant the sum of five million, seven hundred thousand dollars ($5,700,000.00) together with costs fixed in the sum of fifty thousand dollars ($50,000.00)."

[11] It is to be noted that neither the Court of Appeal nor this Court has heard an appeal from the trial judge's judgment. All the proceedings since the trial judge's judgment have been mainly concerned with whether the Applicant should be granted an extension of time to appeal the judgment of Rishi Persaud J. The first issue is whether the Applicant was rightly refused leave to appeal to this Court.

The Court of Appeal's Refusal of Leave to Appeal to the CCJ

[12] It must be remembered that an application for special leave in this Court is not an appeal against the refusal of leave by the Court of Appeal: see *Barbados Rediffusion Service Limited v Mirchandani and others.*[1] However, in deciding an application for special leave where the Court of Appeal has refused leave to appeal to this Court, the Court will give careful scrutiny to the Court of Appeal's reasons for its decision. The practice of the Court has been that it will grant special leave if there has been either an egregious error of law or a substantial miscarriage of justice.

[13] The Court of Appeal in its ruling of May 17, 2012 held that section 6(a) of the Caribbean Court of Justice Act 2004 (No. 16) ("the CCJ Act") had no relevance to the application because the proposed appeal was from a decision of the Court of Appeal refusing leave to appeal out of time.

[14] The Court of Appeal based this ruling on a principle established by *Lane v Esdaile.*[2] That case decided that no appeal lay to the House of Lords from a refusal of the Court of Appeal to grant special leave to appeal from a judgment of the High Court in a case where the time limited by Order LVIII rule 15 for appealing had expired. By necessary implication such a refusal was not an order or judgment within section 3 of the Appellate Jurisdiction Act 1876, which provided that "an appeal shall lie to the House of Lords from any order or

[1] (No. 1) (2005) 69 WIR 35 at [36].
[2] [1891] AC 201 (H.L.)

judgment" of the Court of Appeal. It was the clear intention of Order LVIII rule 15 "to make the judgments, after the lapse of a year, practically final:" per Lord Herschell. That rule stated: "No appeal to the Court of Appeal from any interlocutory order … shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year …." We agree with the Court of Appeal that by necessary implication section 6(a) is not applicable to a refusal of the Court of Appeal to give leave to appeal to it out of time.

[15] We also agree with the Court of Appeal that section 7 of the CCJ Act is not relevant. That, however, is not the end of the matter since it may be possible for the CCJ, in a proper case, to hear an application for special leave in the exercise of the Court's broad jurisdiction under section 8 of the CCJ Act to hear applications for special leave where section 6 or 7 does not apply, whether or not so held by the Court of Appeal. We did so in *Roseal Services Limited v Challis and others*[3] and *Brent Griffith v Guyana Revenue Authority*.[4]

[16] A Section 8 application will lie even where an application under section 6 would be defeated by the principle in *Lane v Esdaile* (supra). A similar point arose in connection with a special leave application to the Judicial Committee of the Privy Council from the Jamaican Court of Appeal.

[17] In *Campbell v The Queen*,[5] the Judicial Committee had to consider whether the Board had jurisdiction to grant special leave in the light of the Jamaican Court of Appeal's refusal of leave to appeal from the High Court to itself. The Board held that the power to entertain special leave applications originated in section 3 of the Judicial Committee Act 1843 and section 1 of the Judicial Committee Act 1844. Those sections were restatements of the prerogative power to grant special leave

[3] [2012] CCJ 7 (AJ)
[4] (2006) 69 WIR 320
[5] [2011] 2 AC 79 (P.C.)

and were in broad terms intended, it seems, to reserve an unlimited residual discretion to cater for exceptional circumstances to prevent a miscarriage of justice. Thus *Lane v Esdaile* was distinguished.

[18] Section 8 of the CCJ Act, giving effect to Art. XXV.4 of the Agreement Establishing the CCJ, in equally broad terms reserves an unlimited residual discretion to prevent miscarriages of justice. It permits applications for special leave to the CCJ from "any decision of the Court of Appeal" even if it is not possible for such a decision to proceed on appeal to the CCJ via sections 6 or 7, whether based on earlier rulings or a ruling in the case in question. The words "any decision" comfortably embrace a refusal by the Court of Appeal of leave to appeal to itself out of time. We, therefore, hold that this Court has jurisdiction to hear this application and proceed to treat this hearing as the hearing of the appeal to this Court.

The Court of Appeal's Refusal to Enlarge the Time for Appealing to the Court of Appeal

[19] As indicated above, the Applicant made two applications in the Court of Appeal for an enlargement of time pursuant to Order II rule 3(5) of the Court of Appeal Rules. Order II rule 3(5) provides:

> (5) Every application for enlargement of time when made to a judge of the Court shall be made by summons, and when made to the Court shall be by motion. Every summons or notice of motion filed shall be supported by an affidavit setting forth good and substantial reasons for the application and by grounds of appeal which *prima facie* show good cause therefor.

[20] In the judgment of the Court of Appeal delivered by Roy J.A., the learned Justice of Appeal concluded that the Applicant had not discharged the burden of placing before the court cogent and compelling reasons for his failure to file his appeal within six weeks after the judgment of February 18, 2011. The court held that the facts and matters relied on for an enlargement of time were "neither good and

substantial nor … exceptional or extraordinary." We would respectfully adopt Roy J.A.'s conclusion on the delay in filing an appeal. We respectfully part company with the learned Justice of Appeal, however, when he states at [14]:

> "Having regard to all that was said earlier I do not propose to deal with the merits of the proposed appeal."

[21] The public interest in the swift administration of justice is of great importance, but the length of and the reasons for the delay should be weighed against the possible merits of any appeal. Therefore, despite the absence of any plausible explanation for the delay in filing an appeal, the Court of Appeal should have proceeded to assess whether, and to what extent, refusal of an extension of time might result in a miscarriage of justice: compare the somewhat lower threshold in *Quillen and others v Harney, Westwood & Riegels*[6] per Satrohan Singh J.A.

[22] The discrepancy between the sum awarded the Respondent in the office copy of the trial judge's order ($5.7 million) and the sum of $5 million stated in the learned judge's notes for judgment, or draft judgment as Roy J.A. described it, clearly indicated that there had probably been a miscarriage of justice, especially since execution had been levied upon the Applicant.

[23] Further, the judge's notes revealed that no proper consideration had been given to a significant illegality issue. The Respondent, as indicated in [7] above, pleaded that the vehicle purchased was confiscated by the Guyana Revenue Authority as uncustomed goods but pleaded no absence of knowledge of that fact at the time of the alleged oral contract. The Respondent alleged in his Statement of Claim that in November 2008 he took possession of the vehicle after the change of ownership without a proper Certificate of Registration and, it would seem, insurance documents, an apparent breach of the Motor Vehicles and Road Traffic Act. These allegations are repeated in a Witness Statement of the Respondent in November 2009.

[6] (No. 1) (1999) 58 WIR 143, 146

[24] The confiscation of the vehicle and its agreed use without proper documentation should have prompted an investigation as to whether the transaction was tainted with illegality and the respective states of mind of the parties to the transaction. The learned judge appears not to have considered these issues. In *Snell v Unity Finance Co. Ltd.*[7] Diplock LJ said: "It is a clear rule of public policy that such points [sc. as to illegality] should be taken by the court irrespective of the wishes of the parties; and if not taken by the judge at trial, should be taken of its own initiative by an appellate court."[8]

[25] Therefore, notwithstanding the inordinate delay in filing an appeal, the Court of Appeal should have weighed in the balance the possible merits of the appeal in deciding whether to extend the time for filing an appeal. Certainly, there appears to be an error of $700,000 in respect of the sum for which judgment was taken up, and possibly the transaction is not enforceable in a court of law.

Conclusion

[26] In the result, this Court will set aside the order of the Court of Appeal dated December 12, 2011 refusing an extension of time for appealing to the Court of Appeal and grant an extension of time for filing such appeal to November 9, 2012. The Respondent will pay the costs of this application to the Applicant.

The Hon Mr Justice Nelson

The Hon Mr Justice Wit **The Hon Mr Justice Hayton**

[7] [1964] 2 QB 203, 223

[8] See also *Universal Caribbean Establishment v Egg-Hill Holding Co. Ltd.* (1992) 41 WIR 125 and *Birkett v Acorn Business Machines Ltd.* [1992] 2 All ER (Comm.) 429 (CA)