IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No AL 008 of 2012
BB Civil Appeal No 16 of 2009

BETWEEN

CLYDE BROWNE **APPLICANT**

AND

MICHELLE MOORE GRIFFITH
ROBIN REGINALD MOORE
BASIL ROY MOORE **RESPONDENTS**

Before The Honourables **Mr Justice R Nelson**
Mr Justice J Wit
Mr Justice D Hayton

Appearances

Mr Lalu Hanuman for the Applicant

Mr Clement E Lashley QC and Ms Honor Chase for the Respondents

JUDGMENT
of
Justices Nelson, Wit and Hayton
Delivered by
The Honourable Mr Justice Nelson
on the 17th day of July 2013

[1] This is an application dated November 2, 2012 by the Intended Appellant, Clyde Browne, for (a) special leave to appeal as a poor person and (b) a stay of

execution of the order made on September 25, 2009 by Kentish J and affirmed by the Court of Appeal on July 2, 2012. The underlying claim of the Applicant is for possession of a parcel of land ("the disputed land") at Pasture Land, Haggatt Hall, St. Michael based on adverse possession for a period in excess of ten (10) years pursuant to section 25(1) of the Limitation of Actions Act, Cap. 231. On July 17, 2013 we heard the application and rejected it giving brief reasons. In this judgment, we give our reasons in more detail.

[2] Prior to this application, the Intended Appellant applied to the Court of Appeal for leave to appeal to this Court. This application which was dated August 13, 2012 sought (a) leave to appeal as of right pursuant to Rule 10.3(1), (b) leave to appeal as a poor person pursuant to Rule 10.17(1) of the Caribbean Court of Justice ("CCJ") Appellate Jurisdiction Rules and (c) a stay of execution of the Order of Kentish J dated September 25, 2009. On October 23, 2012 the Court of Appeal (Moore, Mason and Burgess JJA) dismissed the application for leave on the ground that Rule 10.3(2)(b) had not been satisfied because he had not succinctly set out the facts upon which his claim was based.

[3] An application for special leave to this Court is not an appeal against the refusal by the Court of Appeal of leave to appeal to this Court. We pointed that out in *Barbados Rediffusion Service Ltd. v Mirchandani*[1], and again in *Narine v Gupraj*

[1] (2005) 69 WIR 35 at [36].

Persaud[2]. This Court has no power to overrule the decisions of the Court of Appeal on an application in the Court of Appeal for leave to appeal to this Court, but a dissatisfied litigant is entitled to approach this Court for special leave to appeal. In the instant case, we agree with the Court of Appeal that leave should be refused to appeal to this Court but for very different reasons. Before we embark on our reasons, we would nonetheless proffer some guidelines that might assist courts of appeal in deciding whether to grant leave to appeal to the CCJ.

[4] The principles have been stated in *Brent Griffith v Guyana Revenue Authority* (2006)[3] and *L.O.P. Investments Limited v Demerara Bank Limited*[4].

[5] In *L.O.P. Investments* de la Bastide P explained that the Court of Appeal's role in applications for leave to appeal pursuant to section 6(a) of the CCJ Act was one of "ensuring that no one who does not properly qualify, takes advantage of these means of access."[5] In addition, the Court of Appeal will hear and determine ancillary applications for leave to appeal as a poor person and will fix the amount of security, the form and time within which it is to be provided.

[6] Nelson J in *Brent Griffith v Guyana Revenue Authority* stated that in the case of applications for leave to appeal pursuant to section 6(a) of the CCJ Act to the

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[2] [2012] CCJ 8 (AJ) at [12].
[3] 69 WIR 320.
[4] [2009] CCJ 4 (AJ).
[5] Supra at [6].

local Court of Appeal: "There is no discretion in the Court of Appeal to withhold leave in an as-of-right case on the ground that the appeal lacks merit."[6] In *L.O.P. Investments* De la Bastide P affirmed that:

> "We do not accept that the [requirement of a genuinely disputable question] can be used in any category of case to deny leave to appeal to an applicant on the ground that in the view of the Court of Appeal there is no merit in the proposed appeal."[7]

Indeed this Court stated that in respect of the first of the as-of-right categories (section 6(a) of the CCJ Act):

> "once the proceedings are civil in nature and the matter in dispute is of the value of the prescribed amount or the appeal involves a claim or a question respecting property or a right of equivalent value, leave to appeal must be granted. In this category of case, there is no requirement that the applicant for leave to appeal must demonstrate 'a genuinely disputable issue of fact or law'."[8]

Thus the Court of Appeal erred in insisting that to comply with Rule 10.3(2)(b) an applicant in claiming to satisfy s 6(a) had to state succinctly the issues of fact of his particular case that allegedly justified the granting of leave to appeal. The only facts that need to be stated succinctly are those facts that demonstrate that the applicant is entitled to invoke s 6(a), namely the matter in dispute in a civil

[6] Supra at [19].
[7] Supra at [16].
[8] Supra at [17].

proceeding is of the prescribed amount or involves a claim or question respecting property or a right of equivalent value.

[7] The Court envisages that the Court of Appeal will consider whether a particular appeal falls within the boundaries of each of the four as-of-right categories. The test of the existence of a genuinely disputable issue in the three other categories could be used to detect a claim dressed up in constitutional garb, or appeals otherwise amounting to an abuse of process. Thus, the Court has delegated to the Court of Appeal the important task of keeping as-of-right applications within bounds, so that the Court of Appeal's role is not mechanical. It does involve some deliberation, though not adjudication on the merits.

[8] As indicated above, on an application for special leave after a refusal of leave to appeal to the CCJ, this Court is not hearing an appeal but a fresh application: see paragraph 3 above. Therefore, on such an application, the Court examines the application to see whether the applicant has a good arguable case or any realistic chance of success – even where the appeal is being made as-of-right.

[9] Questions relating to adverse possession turn on the facts accepted by the trial judge. Where the trial judge saw and heard the witnesses and observed their demeanour, an appeal court would only in exceptional cases differ from the trial judge's assessment of the credibility and reliability of such witnesses. Reluctance

to differ from such as assessment is increased where the trial judge's assessment is affirmed by the Court of Appeal, although this Court does not apply a hard and fast rule of not reversing concurrent findings of courts below: see *Lachana v Arjune*[9].

[10] With these principles in mind, we proceed to examine the proposed grounds of appeal identified in the Applicant's application to see whether the Applicant has a realistic chance of success.

[11] Grounds (a), (b) and (f) are completely lacking in particulars and cannot be allowed as grounds of appeal: see Rule 11.3(2). As to Ground (c), inability of the Applicant to read or to read and understand the intended Respondents' site or sketch plan is not a proper ground since the Applicant was at all times represented by counsel. The Applicant would also have to demonstrate that the issue of illiteracy was raised in the courts below. Counsel admitted that illiteracy was not raised as a ground at first instance: see transcript of Court of Appeal proceedings at p. 57.

[12] At the hearing of this application for special leave, Mr. Hanuman applied for leave to amend the proposed grounds of appeal. We rejected this application because it was too late and may have further delayed this matter. In any event, having heard the proposed amendments of Mr. Hanuman and looking at all the

[9] [2008] CCJ 12 (AJ).

facts before us, the amended grounds could not dislodge the crucial finding of fact by Kentish J that the Applicant was not in possession of the disputed land.

[13] Ground (d) raises a plea of denial of natural justice caused by what was alleged to be an adjournment of "some five months" from May 6, 2008 to September 30, 2008, at which counsel was present and as to which he made no objection prior to the end of the trial. Indeed, the actual trial dates were May 5, 6, 21, 23, 24 and 30 and October 1 and 30, 2008.

[14] Ground (e) deals with failure adequately to address the Second Ground in the appeal to the Court of Appeal, which relates to the court's refusal to admit into evidence a site plan prepared by the BADMC which was said to have shown irrigation pipes placed on the disputed land in the 1980's on behalf of the Applicant. The Applicant never sought to place that evidence before us or the Court of Appeal by way of affidavit. It is not suggested that there was any error of law in the exclusion of that evidence.

[15] However, the trial judge at [67] of her judgment rejected the evidence of Alleyne of BADMC who was responsible for laying irrigation pipes for the appellant. The judge held that it could not be accepted that the pipes had been laid on the disputed land. The judge further stated that even if the pipes were on the disputed land, they were not sufficiently visible and observable to the public to be relied on as an item of adverse possession.

[16] Kentish J found that the disputed land did not form part of the land claimed by Browne through adverse possession. She relied on the evidence of the first Respondent, which she accepted and, *inter alia*, on Eugene Carrington, then 82 years old, who had lived near the disputed land since 1964. He identified the disputed land and averred that there were three tenanted houses on that land when the Applicant took up residence in the neighbourhood. The learned judge also accepted the uncontroverted evidence of Carrington that Browne bought the house he was living in from Owen Allder and that his house was always situated on land belonging to one Cutting (who resided in America) and not on the disputed land, which belonged to the respondents' father. Carrington testified that Browne remained on the same land belonging to Cutting. The only activities he carried out on the disputed land were the building of the house and "galvanize structure" in 2006-2007. The Applicant, he said, never lived on the disputed land.

[17] The trial judge, Kentish J, also accepted the evidence of another elderly witness, James Stewart, aged 90 at the date of the hearing, a resident of that area since 1947. Both Carrington and Stewart stated that Browne remained in the same place from the time he purchased the house and that the house was not on the disputed land.

[18] The Applicant, Browne, stated that he lived on the disputed land and that he had six houses on the same land. However, a sketch plan of the disputed land

admitted in evidence without objection, showed only two houses on the disputed land. One of the houses was occupied by tenants of the Respondents, while the other was an unfinished structure, which both Carrington and Stewart stated was erected in March 2007. Indeed, the land surveyor who prepared the sketch plan noted that the structure was "under construction". Based on these considerations, the Court and the trial judge held that:

> *"[47] ... since the exhibited sketch plan is of the disputed land and the appellant's residence is not on the plan, then it stands to reason that the appellant cannot* ***in those circumstances*** *lay claim to the disputed land."*

[19] The Court of Appeal's conclusion and the learned judge's decision are amply supported by the evidence. That should have been the end of the matter but the Court of Appeal went on to test its conclusion by applying the test of Slade J in *Powell v McFarlane*[10] as to whether the Applicant, Browne, had factual possession and an intention to possess the disputed land.

[20] The Court of Appeal carefully examined and rejected the Applicant's claims of (1) taking up residence in the area in the 1980s and (2) carrying on a number of activities on the land – planting coconut trees, erecting houses; parking of cars and laying of irrigation pipes. The Court of Appeal considered the Applicant's claim that a "without prejudice" letter from his lawyer in which he offered to purchase the disputed land from the Respondents was wrongly admitted. The Court rightly held that apart from any question of privilege, an acknowledgement

[10] (1977) 38 P&CR 452, 470.

in writing of the title of the paper owner could negative an intention to possess adversely to the paper owner. The Court of Appeal therefore concluded, in summary, that there was no evidence of possession for the requisite period of 10 years.

[21] Nothing advanced by counsel therefore under Ground (e) has any real prospect of success.

[22] As regards Ground (g), Rule 10.3(2)(b) is relevant only to applications for leave to appeal made to the Court of Appeal. Applications for special leave to appeal made to CCJ are not appeals but fresh applications governed by Rule 10.13.

[23] In any event, even if the Applicant were entitled to appeal, the appeal on the facts and the law is doomed to fail. Ground (g) is therefore irrelevant.

[24] As to Ground (h), it was proposed to argue that reliance on the judge's notes rather than on an audio generated transcript potentially undermines justice. In the absence of any particulars relevant to the present case, this ground is also bound to fail. In any event, both parties laboured under the same disability.

[25] The proposed appeal being essentially one of fact, we did not find that the proposed grounds of appeal had a realistic prospect of success on appeal.

[26] The application dated November 2, 2012 did not apply separately for special leave to appeal but fused it in a single application for special leave to appeal as a poor person. Nevertheless, giving effect to our overriding objective in Rule 1.3, we were prepared to deal with the application as if it were two distinct applications: one under Rule 10.3 and one under Rule 10.17. The importance of the distinction is reflected in the requirement in Rule 10.17 that the Applicant for leave to appeal as a poor person, even at the Court of Appeal level, must show that he has an arguable ground of appeal. *A fortiori*, the Applicant cannot succeed on the poor person application before this Court if he has not presented a good arguable case for special leave to appeal.[11] Indeed, if the Applicant had succeeded in his application for leave to appeal as-of-right before the Court of Appeal, as he should have done, he would still have failed on the poor person application because of Rule 10.17. For the reasons set out above, the applications contained in the Notice of Application dated November 2, 2012 were dismissed with costs.

/s/ R F Nelson

The Hon Mr Justice Nelson

/s/ D Hayton

The Hon. Mr. Justice Hayton

/s/ J Wit

The Hon Mr. Justice Wit

[11] See *Brent Griffith v Guyana Revenue Authority* (supra) at [57].