IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Application No AL 8 of 2012
BB Civil Appeal No 16 of 2009

BETWEEN

CLYDE BROWN	**INTENDED APPELLANT**

AND

MICHELLE MOORE-GRIFFITH	**FIRST INTENDED RESPONDENT**
ROBIN REGINALD MOORE	**SECOND INTENDED RESPONDENT**
BASIL ROY MOORE	**THIRD INTENDED RESPONDENT**

Before The Right Honourable	**Mr Justice Byron, President**
and the Honourables	**Mr Justice Saunders**
	Mr Justice Anderson

On Written Submissions

Mr Lalu Hanuman for the Appellant

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

JUDGMENT
of
The President and Justices Saunders and Anderson
Delivered by
The Rt Hon Mr Justice Dennis Byron
on the 2nd day of December 2013

Introduction

[1] This application by Clyde Brown raises the important issue as to whether the CCJ has jurisdiction to set aside an order it has previously made. He contended that an Order dated the 17th day of July 2013 should be set aside on the grounds of a breach of natural justice, and that there should be a rehearing by a different panel. The Order had dismissed

an application for special leave to appeal to the CCJ against a judgment of the Barbados Court of Appeal.

The Background

[2] Mr Brown claimed to have acquired title to a parcel of land in Haggatt Hall, St Michael, Barbados by adverse possession on the ground of his undisturbed occupation since 1985. Both the High Court[1] and the Court of Appeal[2] found against him. He was also unsuccessful in his application to the Court of Appeal of Barbados for leave to appeal as of right to the CCJ.[3]

[3] On 2nd November 2012 he applied to the CCJ for special leave to appeal and for leave to appeal as a poor person. On 17th July 2013, a Panel of this Court comprised of Justices Nelson, Wit and Hayton (the "panel"), dismissed both applications with costs. A written judgment was subsequently issued.[4] The judgment carefully considered the jurisdiction of a Court of Appeal when considering applications for leave to appeal to the CCJ as of right and provided guidelines on the treatment of such applications. The decision clarified that although the Court of Appeal was not required to mechanically grant leave to appeal, it does not have jurisdiction to consider the merits of the appeal.[5] This approach was contrasted with the procedure and jurisdiction of the CCJ on applications for special leave to appeal. The hearing before the CCJ is not an appeal against the Court of Appeal's refusal to grant leave. Instead the CCJ will examine the application to see whether the applicant has a good arguable case or any realistic chance of success. That is the basis on which special leave would be granted.

[4] The judgment explained that there was neither a good arguable case nor any realistic chance of success on appeal to the CCJ. It concluded that the finding of fact by the trial

[1] Decision of Kentish J dated 25th September 2009.
[2] Civil Appeal No 16 of 2009, decision of Mason JA dated 23rd February 2012 and 2nd July 2012
[3] Decision of Court of Appeal (Moore, Mason and Burgess JJA) dated October 23, 2012.
[4] See [2013] CCJ 6 (AJ).
[5] *Brent Griffith v Guyana Revenue Authority* [2006] CCJ 2 (AJ), 69 WIR 320 and *LOP Investments Limited v Demerara Bank Limited* [2009] CCJ 4 (AJ), (2007) 79 WIR 312.

judge, and confirmed by the Court of Appeal, that the applicant was not in possession of the land could not be easily overturned. The judgment reviewed the evidence which the trial judge had considered, in detail. The panel, while acknowledging that in appropriate cases a finding of fact could be overturned, concluded that there was no realistic prospect that the applicant could succeed on the evidence presented in this case. The panel therefore ordered that the applications seeking special leave to appeal and leave to appeal as a poor person be dismissed with costs.

[5] This would normally bring finality to the dispute between the parties. However, Mr Brown filed the present application on 15th September 2013, asking for that decision to be set aside and for a rehearing of his earlier applications. On 8th October 2013, the respondents indicated their opposition to the application. By Order dated 17th October 2013, this Court directed that the application be disposed of without oral hearing pursuant to the rules of court[6] and gave parties leave to file further written submissions. Mr Brown filed further submissions on 1st November 2013 and 5th November 2013.

The Power to Set Aside an Order of the Court

[6] Mr Brown submitted that courts of final appeal have an inherent power to correct any breach of natural justice caused by an earlier hearing of the same final court of appeal, where a party through no fault of their own, has been subjected to an unfair procedure. This proposition is beyond dispute. The concept of an inherent power by a superior court to control its own procedure so as to prevent it being used to achieve injustice is an underlying common law principle.[7] This has been described, by Lord Diplock (in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp*)[8] as the

[6] See Rule 8.1 and Rule 9.6(c) of the *Caribbean Court of Justice (Appellate Jurisdiction) Rules.*

[7] See Jacob, I.H., *The Inherent Jurisdiction of the Court*, 23 Current Legal Problems 23 – 52 (1970) where inherent jurisdiction is defined as "the jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner." See also *West v. West*, 2001 Can LII 28216 (ON SC), 2001 Can LII 28216, 18 R.F.L. (5th) 440, [2001] O.J. No. 2149, [2001] O.T.C. 422, 2001 Carswell Ont 1936 (Ont. Fam. Ct.) "The jurisdiction to set aside or change an order to prevent a miscarriage of justice is ancient. It goes back to the old common law writ of audita querela." (per Justice Craig Perkins at [23]), *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528 and *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp* [1981] AC 909 at 977 per Lord Diplock.

[8] *Bremer Vulkan*, supra.

doing by the court of acts which it must have power to do in order to maintain its character as a court of justice. The exercise of this jurisdiction is necessary to ensure justice between litigants and public confidence in the administration of justice. The power, however, will only be used in exceptional circumstances for the important principle of finality in litigation must be fully respected (*Taylor v Lawrence*).[9] This power must be contrasted with a power to set aside an order just because it is thought to be wrong. That can be no part of the exercise of this jurisdcition. The intervention of the court to correct an injustice is not an appellate process. The court will only exercise this jurisdiction to address concerns that a party may have suffered a procedural unfairness.

[7] Rule 1.4(2) of the CCJ appellate rules gives effect to that doctrine as it prescribes that nothing in these rules shall limit the power of the Court to make any orders which may be necessary to meet the ends of justice or to prevent an abuse of the process of the court. As a matter of principle, the CCJ as a final court of appeal must have unfettered power to correct any injustice caused by an earlier order it has made. This principle has been applied by the House of Lords in the well known case of *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others , Ex parte Pinochet Ugarte (No. 2*) [10] per Lord Browne Wilkinson at 132:

> "In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Broome v. Cassell & Co. Ltd. (No. 2)* [1972] A.C. 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.
>
> However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a

[9] *Taylor*, supra.
[10] [2000] 1 AC 119 at 132.

> party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong."

Objective Basis for Complaints of Unfairness

[8] Mr Brown complained that the panel that heard his matter had not read his written submissions that had been filed before the hearing commenced and that his right to a fair hearing was thereby prejudiced. The right to a fair hearing is an intrinsic part of the common law. It is commonly defined as the entitlement to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In addressing complaints of unfairness in judicial proceedings, appearances matter. However, the view of a party cannot be decisive. There must be an objective basis to support the conclusion that is being sought. In addressing the complaint made by Mr Brown, we accept that attention to and knowledge of the content of an application is important. But there can be no inflexible rule as to the extent of this knowledge that must precede the hearing. This point was emphasied in the case on which Mr Brown relied. He cited *Kraska v Switzerland*,[11] a case from the European Court of Human Rights (ECtHR). Kraska had complained that his hearing before the Swiss Federal Court was not fair based on the fact that one of the judges indicated his inability to thoroughly read the voluminous submissions or to study the appellate file which was tardily received owing to internal administrative difficulties. The ECtHR rejected the notion that he had not had a fair trial. They said:

> "The Court has already stressed on numerous occasions the importance of appearances in the administration of justice, but it has at the same time made clear that the standpoint of the persons concerned is not in itself decisive. The misgivings of the

[11] [1994] 18 EHRR 188.

> individuals before the courts, for instance with regard to the fairness of the proceedings, must in addition be capable of being held to be objectively justified (see, among other authorities, mutatis mutandis, *Hauschildt v Denmark* [1989] ECtHR 10486/83 at para. 48).
>
> In the present case Judge Y took an active part in the deliberations; he went so far as to propose a solution contrary to that recommended by the rapporteur and showed that he was familiar with the case. Ultimately the Federal Court adopted neither of these two opinions; it chose a third possibility, put forward by one of the other three judges (see paras 13-14 above). All things considered, there is no evidence to suggest that its members failed to examine the appeal with due care before taking their decision. One fact, to which the Government rightly drew attention, appears significant in this respect: neither Judge Y, nor any of his four colleagues, requested the adjournment of the deliberations, although they could have done so, in accordance with the practice of the Federal Court, if they had felt the need to acquaint themselves further with the file."[12]

[9] On the particular facts of this case, Mr Brown, who was represented by counsel at all stages of the proceedings, exhibited a portion of the transcript of the proceedings to support his complaint. Reliance was placed on the statement of the Presiding Judge:

> "What we have before us is an application dated the 2nd November 2012, supported by an affidavit of Mr Hanuman, sworn and filed I believe on the same date, and we have before us also, the affidavit in response by Mr Lashley. Those are the documents that we propose to deal with. Can you proceed Mr Hanuman?"

[12] Supra at [32].

The transcript then showed that Counsel for Mr Brown then referred to the fact that submissions were filed and the Presiding Judge stated that he could take it that the panel had read the written submissions.

[10] The transcript also reflected a discussion between the Bench and counsel with specific questions arising from the written submissions. The applicant's counsel was invited to present his arguments orally, and when he did so was engaged in discussion by the Bench on those submissions. Subsequently, a detailed written judgement was issued. This addressed all the points raised by the applicant and explained fully the conclusion of the Court and the reasons for that conclusion.

[11] The facts of this case do not provide any support for the allegation that the panel had not read the submisions before the hearing commenced. The contention that a statement by the Presiding Judge, that the Bench was dealing with the pleadings in the case, could mean that the Bench had not read the submissions is frivolous. In any event, the judges fully engaged counsel during the oral argument and the written considered judgment addressed all relevant matters. There is every indication that due care was exercised in the discharge of the judicial responsibility in this case. This ground of application therefore has to be dismissed.

[12] Mr Brown's alternative argument also cannot stand. He contended that the respondents had no standing at the hearing before the CCJ. He argued that the documents in opposition to his application had been filed out of time, and the filing fees had been paid out of time.[13] This, he contended, meant that the respondents should not have been considered as parties to the proceedings and the orders made by the CCJ in their favour should be vitiated. However this point had been specifically addressed during the oral hearing before the panel. Counsel for Mr Brown made his submissions, counsel for the respondents made his submissions and the court ruled that none of the points raised went to locus, and that in any event the court was satisfied that the documents were filed within the required times. In adjudicating on the instant application, we are not engaged

[13] As set out in Rules 6.1 and 10.14 of the *Caribbean Court of Justice (Appellate Jurisdiction) Rules.*

in an appellate review and we, like the parties, are bound by those rulings. It follows that this ground is therefore dismissed.

[13] In short, we must dismiss the application in its entirety with costs to be taxed, in default of agreement.

The Rt Hon Sir Dennis Byron (President)

The Hon Mr Justice A Saunders

The Hon Mr Justice W Anderson