[2014] CCJ 20 (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 GYCV2014/005
GY Civil Appeal No 26 of 2012

BETWEEN

MALWEG DARNLEY **APPLICANT**

AND

(1) JOY REID &
(2) ANTHONY REID **RESPONDENTS**

Before The Honourables **Mr Justice Saunders**
Mr Justice Wit
Mr Justice Hayton

Appearances

Mr Roopnarine Satram C V Satram and M Satram for the Applicant

Mr Roysdale Forde for the Respondents

JUDGMENT
of
Justices Saunders, Wit and Hayton
Delivered by
The Honourable Mr Justice Hayton
on the 17th day of December, 2014

JUDGMENT

Introduction

[1] This is an application made directly to this Court by the Applicant, Mr Malweg Darnley, for special leave to appeal against the judgment of the Court of Appeal delivered on 7th May 2014 dealing with the relationship between subsections (2) and (4) of section 6 of the Court of Appeal Act, Cap 3:01. These key provisions provide two independent pathways for appeals to reach the Court of Appeal, an as of right route under section 6(2) and, if that route is unavailable, a discretionary route under section 6(4) with the consent of the Full Court or of the Court of Appeal. These routes were recently explored by this Court in *Gayadin v Republic Bank (Guyana) Ltd.*[1] That case concerned an appeal from the High Court to the Full Court which, *on an appeal* to it, made an interlocutory order for a fresh trial so that s 6(4) applied and, with the leave of the Full Court or of the Court of Appeal, an appeal lay from the Full Court to the Court of Appeal.

[2] The issue in the present case concerns the position where there is an appeal from the High Court *pending* before the Full Court and the trial judge refused to grant a stay of his order but, on a fresh application by way of motion to the Full Court, the Full Court exercised its independent jurisdiction to grant an interlocutory stay of execution of the judge's order until the hearing and determination of the appeal.[2] Does the proper construction of subsections (2) and (4) lead to such an interlocutory order of the Full Court not being appealable, though interlocutory orders made by it in the course of hearing an appeal are appealable? The Full Court did not consider such order to be incapable of appeal and granted leave to appeal (without giving reasons) but the Respondents filed a motion on 8th May 2012 to strike out the Applicant's Notice of Appeal.

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[1] [2014] CCJ 13 (AJ).

[2] See Order 46 rules 18, 20 and 21 and Order 40. Also see *Sankar v Sankar* [2003] GLR 155, 159 and 161; *Bibby v Partap* [1996] UKPC 13, (1996) 48 WIR 371, [1996] 1 WLR 931 [5].

[3] The Court of Appeal heard the motion on 28th November 2012 but did not deliver judgment until 7th May 2014 which stated "IT IS HEREBY ORDERED that the Notice of Appeal does not lie to the Court of Appeal." No written reasons have been provided. The lengthy seventeen months delay in delivering judgment on a short point of law clearly contravened section 5 of the Time Limit for Decisions Act 2009 requiring delivery of a judgment within 30 days (or such extended period under section 8 as may be applied for in writing and granted by the Chancellor, of which there is no evidence and which, anyhow, could not possibly extend to seventeen months) and significantly prejudiced the Applicant, now aged 87 years, in the enforcement of his rights.

The Statutory Provisions on Appeals

[4] Section 6(2) of the Court of Appeal Act provides for a right of appeal as follows:

> Subject as otherwise provided in this section, an appeal shall lie to the Court of Appeal in any cause or matter from any order of the Full Court or of a Judge of the High Court where such order is
>
> (a) final and is not
>
> (i) an order of a judge of the High Court made in chambers or in a summary proceeding;
> (ii) an order made with the consent of the parties;
> (iii) an order as to costs;
> (iv) an order referred to in paragraph (d);
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> (b) a decree nisi in a matrimonial cause or an order in an admiralty action determining liability;
>
> (c) declared by the Rules to be of the nature of a final order;
>
> (d) an order upon appeal from any other court, tribunal, body or person.

[5] After section 6(3) restrictively deals with appeals within section 6(2) (d), section 6(4) is as follows:

> With the leave of the Full Court or the Court of Appeal, an appeal shall lie under this section from a decision of the Full Court upon appeal from a judge of the High Court in respect of an order referred to in subsection (2)(a)(i), (a)(ii) or (a)(iii), or in respect of an order of a judge of the High Court not referred to in the said subsection.

[6] Section 6(5) and (6) then itemise specific orders against which no appeal to the Court of Appeal is possible.

[7] To complete the background picture, it is necessary to appreciate that under section 79 of the High Court Act, Cap 3:02 an appeal lies to the Full Court from any judgment or order (including interlocutory orders) of a single judge of the High Court in the exercise of its civil jurisdiction in respect of which there is no appeal to the Court of Appeal, but no appeal lies in matters covered by section 6(5) and (6) above. It is also the case, as appears from [2] above, that no appeal lies to the Full Court from an order of a High Court judge refusing a stay of execution because a litigant displeased by such order has the right to make a fresh application by way of motion to the Full Court for it to grant a stay of execution.

Construction of the Provisions

[8] Counsel for the Respondents referred to *Gayadin*[3] where this Court had stated (with words emphasised by Counsel):

> Notwithstanding the provisions of section 6(2), a litigant who wishes to appeal from an interlocutory order that falls within section 6 (2)(a) (i), (ii), (iii) or (iv) is not shut out from appealing to the Court of Appeal but such a litigant has no right of appeal from any such interlocutory order. *A litigant who is dissatisfied with the Full Court's decision reviewing*

[3] [2014] CCJ 13 (AJ) [9].

> *an interlocutory order of a judge* must look to subsection (4) which references appeals to the Court of Appeal from the Full Court. Subsection (4) groups the matters giving rise to such appeals into two categories, namely those in which, on the one hand, *the Full Court has adjudicated an appeal from a judge of the High Court in respect of orders referred to in subsection (2)(a)(i), (a)(ii) and (a)(iii)* and, on the other hand, those in which *the Full Court has adjudicated an appeal in respect of an order of a Judge of the High Court* not referred to in subsection (2).

[9] In *Gayadin* this Court was considering a situation where the Full Court had been *reviewing* and *adjudicating upon* a substantive appeal from a judge of the High Court. In such context the CCJ naturally endorsed[4] the statement of Chang JA[5] in *Sankar v Sankar*[6] referring to "decisions of the Full Court sitting on appeal [in respect of orders made under section 6(2) (a)(i), (ii) and (iii) or in matters outside those provisions] to be further appealable to the Court of Appeal either with the leave of the Full Court or the Court of Appeal."

[10] The key issue in this case is whether to take a narrow or a broader construction of the words "*upon appeal*" in section 6(4) when it states "an appeal shall lie from a decision of the Full Court *upon appeal* from a judge of the High Court in respect of …." Do the italicised words only embrace a situation where the Full Court is deciding a substantive appeal from the High Court judge? Do they therefore exclude interlocutory decisions made by the Full Court during the pendency of an appeal to it from the judge? Counsel for the Respondents proposed a very literal construction and submitted that the phrase "upon appeal" must exclude a decision given on an application for a stay of execution pending appeal. On a broader

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[4] See *Gayadin v Republic Bank (Guyana) Ltd* [2014] CCJ 13 (AJ) [10].
[5] As acting Chief Justice he, indeed, presided over the Full Court granting leave in this case.
[6] [2003] GLR 155, 159. The appeal to the Court of Appeal had been made without the leave of the Full Court (which had refused a stay of execution) or the Court of Appeal, but the Court considered it would have had no jurisdiction even if leave had been given.

purposive construction proposed by the Applicant the Full Court's decision must be one made *concerning* an appeal from the judge or, in other words, one made during the course of an appeal from the judge, such appeal commencing from the filing of the appeal. The statement in *Sankar*, we note in passing, is capable of both constructions.

[11] We consider that the broader construction is the one to take. We can see no rationale for a construction that implicitly exempts from any possibility of appeal to the Court of Appeal an interlocutory order made by the Full Court to stay execution of an order made concerning a case under appeal to it. The general rule is that there must be an as of right route and a discretionary route to the Court of Appeal unless there are special instances where no appeal at all is allowed as prescribed by section 6(5) and section 6(6) of the Court of Appeal Act. If an interlocutory order of a High Court judge can be appealed to the Full Court and its interlocutory order made during the hearing of any appeal to it can be appealed to the Court of Appeal with leave of the Full Court or the Court of Appeal under section 6(4), what sensible rationale can there be for no such appeal being possible in respect of an interlocutory order as to a stay of execution in an appeal pending before it? We can find none and so consider such an order for a stay of execution made by the Full Court during the course of an appeal pending before it to be "a decision of the Full Court upon appeal from a judge of the High Court" within section 6(4).

[12] We would, however, expect the Full Court rarely to grant leave to the Court of Appeal, considering its own views as to staying execution or not (taking account of the prima facie strength of an applicant's pending substantive appeal) to be final in the absence of special circumstances. The Full Court did grant a stay but, in giving leave to appeal, must have considered that there were special circumstances to create some doubts. Indeed, support for such doubts arises from the Respondents' discontinuance on 27th February 2013 of their appeal in action No 534-W of 2006 where Persaud J had held the Applicant to be the owner of the property that is the subject of the substantive appeal of the Applicant to the Full Court.

[13] Since the Court of Appeal does have jurisdiction to determine whether the Full Court's stay of execution should continue until the hearing and determination of the Applicant's substantive case before the Full Court, a question arises as to the powers of a single judge of the Court of Appeal under rule 16 of the Court of Appeal Rules in any matter pending before the Court of Appeal to hear, determine and make its independent orders in respect of interlocutory applications. Indeed, paragraph (c) of rule 16(1) refers to applications for orders for "a stay of execution on any judgment appealed from pending the determination of such appeal." What is envisaged, however, by the rule is the making of interlocutory orders concerning substantive appeals pending before the Court of Appeal. In the case before us the substantive appeal is before the Full Court and it is only the Full Court's grant of a stay of execution of the trial judge's order that is under appeal to the Court of Appeal. Before the Court of Appeal hears that appeal, no single judge of it can have jurisdiction in interlocutory proceedings to determine the very sole issue to be determined by the Court of Appeal.

[14] In examining the issues to ascertain whether the Applicant's intended appeal has a realistic chance of success so that special leave should be granted[7], we have determined that the appeal will succeed. We had made directions for the parties to make written submissions and, if we decided to grant special leave upon the basis of those submissions, we made it clear that we would proceed to determine the appeal and deliver our judgment on the basis of the submissions without further argument from counsel.

The Orders of the Court

[15] The application for special leave to appeal to this Court is granted and the Court treats that application as the hearing of the appeal itself. The appeal is allowed because the Court of Appeal did have jurisdiction to hear an appeal from the

[7] See *System Sales Ltd v Browne-Oxley* [2014] CCJ 16 (AJ) [2].

judgment of the Full Court when that Court had given leave to appeal to the Court of Appeal.

[16] It is ordered that

(i) the judgment of the Court of Appeal delivered on 7th May 2014 in Civil Appeal No 26 of 2012 be set aside;

(ii) the Court of Appeal proceed to hear the Notice of Appeal to it filed by the Applicant in such Appeal on 8th April 2012 as Civil Appeal No 26 of 2012;

(iii) in view of the significant prejudice already suffered by the Applicant, the Court of Appeal take steps to fix a date for such a hearing as soon as practicable;

(iv) costs in this appeal and in the Court of Appeal to be paid by the Respondents, to be taxed if not agreed.

/s/ A. Saunders
The Hon Mr Justice A Saunders

/s/ J. Wit
The Hon Mr Justice J Wit

/s/ D. Hayton
The Hon Mr Justice D Hayton