IN THE CARIBBEAN COURT OF JUSTICE

Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Application No BBCV2015/001

BB Civil Appeal No 10 of 2006

BETWEEN

SYSTEM SALES LTD

APPLICANT

AND

ARLETTA O. BROWN-OXLEY
(EXECUTRIX OF THE ESTATE OF
GLENFIELD DACOSTA SUTTLE, DECEASED) &
SONJA PATSENA SUTTLE

RESPONDENTS

Before The Right Honourable:	**Mr Justice Byron, President**
and the Honourables	**Mr. Justice Nelson**
	Mr. Justice Saunders

Appearances

Mr Vernon O Smith QC, Mr Hal McL Gollop QC and Mr Steve Gollop for the Applicant

Mr Alair Shepherd QC and Ms Wendy Maraj for the Respondents

JUDGMENT

The President and Justices Nelson and Saunders

Delivered by the President

The Right Honourable Mr. Justice Dennis Byron

on the 12th day of February, 2015

JUDGMENT OF THE RT. HONOURABLE MR JUSTICE D BYRON, PRESIDENT

Publication of judgments

[1] Before going into the merits I should make a comment on the publication of judgments. Much to my surprise counsel for the applicant continued to complain, even in open court that the Court published its judgment of 25th November 2014 in the media before it had been communicated to the litigants and their legal representatives. The allegation is not accurate. It was also in my view inconsistent with the courtesy, respect and civility that should characterise the relations between senior members of the Bar and the Bench.

[2] Since July, 2012, consistent with its vision to provide the Caribbean Community with a judiciary which is "accessible, fair, efficient and innovative" the Court has been adopting measures in keeping with the spirit of promoting access to justice.

[3] Currently, there are four different publications from a hearing; namely: a reasoned judgment, a Judgment Summary, a Media Release and a Popular Press Summary for the CCJ Corner project. It is a pity that counsel should be wedded to ancient practices which do not give the public adequate information about the work of the Court in a timely manner.

[4] What actually occurred is that on the 25th November 2014 the parties appeared by video conference before the Court in response to a summons to attend for the delivery of judgment. The judgment was delivered in open court in the presence of the party's representatives who had formally entered their appearance. In accordance with the time saving practice which has developed, the Court pronounced the order and indicated that the parties would get the reasons soon if they had not already received them. The practice which was followed is that the judgment had been sent to the Registrar in Barbados by email with the expectation that a hard copy would have been delivered immediately after judgment was pronounced. This did not occur until two days' later by which time the Court had already sent the judgment by email to the litigants. Since then the Court has

modified its protocols on judgment issuance to ensure that in future the litigant's legal representatives will receive an electronic copy of the judgment under confidential cover prior to its delivery in open court.

[5] The judgment and executive summary were uploaded on the Court's website on the same day of delivery and the press release was also issued on the same day. All of this occurred after the pronouncement of the judgment in open court in the presence of the litigants' attorneys. The administrative error which resulted in the failure of the counsel for the applicants to receive the hard copy immediately on delivery in Court is regretted. It is unfortunate that this matter has been raised in open court, because as soon as he found out that the complaint had been made, the President of the CCJ telephoned Mr Steve Gollop to tender apologies and explained the process and indicated that measures were being adopted to ensure that this did not reoccur. Mr Gollop at the time graciously accepted the apology and indicated that the fact of the telephone call satisfactorily closed the matter.

Introduction

[6] This is another episode in a sad story of delay. On 12th January, 2015 the applicant applied for leave to extend the time to appeal against a judgment of the Court of Appeal of Barbados which had been delivered approximately 241 days previously, on 15th May 2014.

[7] It was on 15 April 1999, some 16 years ago that the case was commenced. Some seven years elapsed before the high court delivered its judgment in favour of the respondent on 26th April 2006. Another eight years elapsed before the Court of Appeal delivered its judgment affirming the judgment of the trial court. The applicant then applied to the Caribbean Court of Justice (CCJ) for special leave to appeal. Within 6 months judgment was delivered dismissing the application on the ground that that there was no realistic chance that the appeal would be successful. That should have been an end to the litigation.

[8] The dispute was about the sale of land. The applicant is a professional firm in the development business. The respondents are inexperienced lay people living in a chattel house who wanted to convert their land into money. They must have had plans. But Mr Suttle did not survive the litigation which has been dragging on and on, and his executrix has been substituted in his place. On 15th July 1998 the parties had signed a contract for the sale of eighteen plots of land situate at Hopewell in the parish of Christ Church, Barbados for BB $181,007.53. The dispute arose when Mr Suttle insisted that the land the applicant was demanding that he convey was different to the land he had agreed to sell. The high court and Court of Appeal eventually rejected the claims of the applicant and vindicated the position that the respondents courageously adopted. The CCJ in a carefully reasoned judgment found that there was no realistic chance of the applicant's appeal succeeding.

Does the CCJ have jurisdiction to entertain the application?

[9] In a series of cases, *LOP Investments*[1], *Brent Griffith*[2] and *Clyde Browne*[3] the Court has clarified how civil appeals are to reach the Court from Barbados. The standard approach is by leave being granted by the Court of Appeal of Barbados.

[10] As far as the Court of Appeal is concerned, there are two categories, appeals that are 'as of right' and appeals where there is discretion in the Court of Appeal. Section 6 of Caribbean Court of Justice Act, Cap. 117 ("the Act") identifies the cases in which there is a right of appeal to the CCJ from decisions of the Court of Appeal. In so far as it relates to this case s.6(a) of the Act specifies that 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. The CCJ has explained that once the proceedings meet the requirement of s.6 leave to appeal must be granted. The jurisdiction of the Court of Appeal is to ensure that no one who does not properly qualify takes advantage of this means of access. The Court of Appeal does not have any discretion to refuse leave to appeal on the ground

[1] [2009] CCJ 4 (AJ)
[2] 69 WIR 320
[3] [2014] CCJ 4 (AJ)

that the appeal lacks merit. Section 7 of the Act unequivocally prescribes that it is the Court of Appeal which has the discretion to grant leave in civil proceedings where in the opinion of the Court of Appeal the question is one of great general or public importance, and in other cases specified by law.

[11] The law also permits appellants to make a direct approach to the CCJ. Section 8 allows a litigant to seek special leave directly from the CCJ to appeal from any decision of the Court of Appeal in any civil or criminal matter. The court has already clarified that it is open to a litigant to apply for special leave after the Court of Appeal has refused leave to appeal. The CCJ will only grant leave if there is a realistic possibility of the appeal succeeding. In general there will be no such possibility where concurrent fact-findings in the courts below are against the applicant. It is also possible to by-pass the Court of Appeal by seeking leave directly from the CCJ but then, even in an 'as of right' case if the matter were before the Court of Appeal, the CCJ can refuse leave if there is no realistic possibility of the appeal succeeding.

[12] This application relates to an appeal as of right under s.6 and in the alternative for a discretionary appeal under s.7. In both cases the Court of Appeal has exclusive jurisdiction. Bringing the application before the CCJ is completely misconceived. During the hearing counsel for the applicant conceded that the CCJ does not have jurisdiction to grant leave to appeal as of right. He complained that the CCJ did not advise him of his error earlier.

[13] It is unnecessary to do more than reject the complaint as being frivolous. The applicant must know that this Court cannot grant an extension of time in relation to an application which another court has exclusive jurisdiction to hear. This is reinforced by the fact that counsel admitted during argument that there is no jurisdiction for the Court of Appeal to extend the time for applying to appeal under ss.6 and 7. Bringing these proceedings can only be categorised as improper, unreasonable and negligent.

Extension of time and delay

[14] Although the fact that the proceedings were brought under circumstances when there is no jurisdiction for the Court to entertain them is sufficient to dismiss the claim, it is necessary to address other issues that are implicit in the application for extension of time, to prevent that possibility of anyone assuming that this Court is suggesting that the applicant is at liberty to re-file this application before the Court of Appeal.

[15] Rule 10.3(1) requires that an application to the court below for leave to appeal must be made within 42 days of the date of judgment from which leave to appeal is sought. The application was filed approximately 241 days after the date of the judgment. The applicant contends that by virtue of Rule 5.3(1) of the Caribbean Court of Justice (Appellate) Rules which declares that "any time limit prescribed under these Rules may be extended" the Court has a discretion to extend the time for filing a Notice of Appeal with respect to the decision of the Court of Appeal of Barbados in the matter at caption.

[16] The legal principles for the exercise of a discretion to grant an extension of time was outlined by Nelson J in *Somrah v The Attorney General of Guyana and The Police Service Commission*[4]**.** In order to succeed on an application for an extension of time an applicant must give a cogent explanation for not complying with the Rules, demonstrate that the appeal has a realistic chance of success and seek to persuade the Court that it would be in the interests of justice to grant an extension of time.

[17] During oral submissions the applicant provided the reasons for bringing this application for an extension of time for leave to appeal as of right out of time. It seemed that there were two reasons. The first was that it was only when they appeared before the CCJ on the application for special leave, that the remarks of the bench made them aware that they had made a strategic error of law in by-passing the Court of Appeal under s.6 and using the s.8 procedure for special leave, because if they had used the former they would not have had to show that the appeal had a realistic chance of success, and they now intend to seek the aid of the CCJ to correct that error. The other reason is even more serious.

[4] [2009] CCJ 5 AJ

Counsel for the applicant was aware that there is no provision for the Court of Appeal to grant any extensions of time to apply for leave under ss.6 and 7. He knew that the method of applying for leave out of time is to apply for special leave under s.8. However, the applicants made this application even though they had already applied for special leave under s.8 and the application was dismissed.

[18] The applicants initially chose to by-pass the Court of Appeal and apply to the CCJ directly for special leave to appeal. However, that approach was unsuccessful because the Court in a carefully reasoned judgment concluded that there was no realistic chance of success. It is not open to the applicant to re-litigate that issue. Therefore the applicant could not satisfy the second requirement on an application for the extension of time of showing that there is a realistic chance of success, because ancient principles of justice prohibit the re-litigation of issues that have already been finally decided between the same parties before a court of competent authority. Bringing this issue before the CCJ again, is abusive of the Court's process.

[19] Counsel complained that the appellant suffered grave injustice because the Courts did not address the fact that the vendor retained the deposit which had been paid, and no compensation was ordered for improvements put on the land by the applicant, and he needed to ventilate this issue before the CCJ to obtain corrective relief. We conclude that it was not accurate that matters complained of had not been considered by the courts. Without going into great detail I need only refer to the fact that during argument it was pointed out that the trial judge in her 2006 judgement specifically stated that the question of retention of the deposit and ancillary relief is to be raised at a later date and liberty to apply is given to either party in that regard. The applicant never applied to the court for any relief, because as counsel contended, it was for the court to initiate a further hearing if it wished. This contention is inconsistent with the basic premise that courts adjudicate on the claims that parties make, and it is not for the courts to make fresh claims for the parties if they had not done so themselves. In addition, the CCJ in its November judgement did address the discretion of the Court to make compensatory orders when it

refused to make an order for specific performance as could be seen in this section of its judgement:

> "The Purchaser in the Court of Appeal raised the issue whether it could obtain damages in substitution for specific performance" under section 46 of the Supreme Court of Judicature Act, Cap 117A, even though it had not pleaded damages flowing from wasted expenditure or loss of profits and whether such "damages" could extend to restitutionary compensation payable for the unjust enrichment of a defendant. The Court of Appeal took the view that special damages needed to be pleaded before they could be claimed and that the object of "damages" in s.46 is to compensate for financial losses resulting from breach of contract not to prevent a defendant's unjust enrichment. We see no reasons for differing from those views, though, in any event, it would appear that because it was the Purchaser who was the wrongdoer who occasioned its own losses it cannot take advantage of its own wrong to claim damages. It would similarly seem that this would preclude a claim based upon the defendant having been enriched unjustly."

[20] It is possible to discuss the jurisprudence of what do the interests of justice require. In this case such a discussion is not necessary because it is patently obvious that the interests of justice require that this case be finally brought to an end, and the litigants be relieved of the distress that they must have been experiencing for a decade and a half. There has been full consideration of the issues by three levels of court and the applicants failed at each level, and there is no benefit to the litigants from protracting this case any longer. It would be unconscionable and inconsistent with the overriding objective of the rules to facilitate the extension of the inordinate and excessive time that this case has been in the system. The case was filed more than 16 years ago. This Court has previously expressed disapproval of excessive delay in the resolution of cases in Barbados, in the cases of *Mirchandani (No.1)*[5], *Yoland Reid v Jerome Reid*[6] and *Sea Havens Inc v Dyrud*[7]**.** The Court deplores the fact that parties are denied justice in a timely manner, and recalls that this must bring the administration of justice into disrepute and undermine public confidence. In this case the truism that justice delayed is justice denied was fatally exemplified. Mr and Mrs Suttle who wanted to convert their land into

[5] [2005] CCJ 1 (AJ)
[6] [2008] CCJ 8 (AJ)
[7] [2011] CCJ 13 (AJ)

money by sale in 1998 were tied up in the courts for all these years. It takes little imagination to understand how the dreams and expectations of these litigants were frustrated. One must empathise with the fact that the delay in the resolution of this litigation must have prejudiced the parties considerably. In fact Mr Suttle never lived to see the end to this dispute, and experience the vindication of the position he courageously adopted so long ago.

[21] Something must be done to correct this harm to litigants. The Court has usually commented on the judicial default in this area. And in this case the judiciary has to accept responsibility for the inordinate delay in bringing this case to justice. The case was not complex, yet it took seven years from filing to judgment, and eight years from trial judgment to appellate judgment. This is a process which should take no more than two and a half years. It is time that the judiciary in Barbados adopt practices that prevent this type of denial of justice. Now counsel has joined the activity to deny the litigants an end to the litigation. Counsel for the applicant admitted that counsel too are obligated by rule 1.3 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules to so conduct themselves to enable the court to deal with matters fairly and expeditiously so as to ensure a just result. In this case all parties including the applicant are being prejudiced. In this case where the CCJ has already ruled that there is no merit in the appeal, it is unconscionable that the litigant should be burdened with expenses when there is no reasonable expectation of any benefit accruing. It would not be fair to the applicant for the court to allow expenses to accrue when it is already known that there is no realistic chance of success.

[22] The conduct in bringing this case utilising a wrong process, and where there is no realistic prospect of success falls into the category of improper, unreasonable and negligent conduct. Counsel for the applicant conceded that the rules of court allow that the client be protected from bearing the costs thrown away and wasted by this type of conduct. The Court will engage in process to determine whether such an order should be made in this case.

[23] Application is dismissed with costs pursuant to rule 18.8 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules permitting the Court to make orders in relation to wasted costs.

[24] Indeed as counsel for the respondent contended this is an abuse of process. The Court must also take steps to prevent further abuse and hereby orders that no further proceedings be brought in this case without leave of the Court.

The Orders of the Court

[25] It is ordered that

(i) The application filed herein on behalf of the Applicant on the 12th day of January 2015, to the Caribbean Court of Justice, for an extension of time to file a notice of appeal, be dismissed with costs of this application to be paid by the attorneys-at-law for the Applicant to the Respondents to be taxed if not agreed.

(ii) The applicant shall not institute any further proceedings in this case without leave of the Court.

/s/ Dennis Byron

The Rt Hon Sir Dennis Byron (President)

/s/R F Nelson

The Hon Mr Justice R Nelson

/s/ A Saunders

The Hon Mr Justice A Saunders