IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No GYCV2018/007
GY Civil Appeal No 43 of 2012

BETWEEN

GUYANA NATIONAL CO-OPERATIVE BANK	**APPELLANT**

AND

R N PERSAUD COMPANY LIMITED	**FIRST RESPONDENT**
LEGUAN RICE MILLING INCORPORATED	**SECOND RESPONDENT**
THE REGISTRAR OF DEEDS	**THIRD RESPONDENT**

Before The Honourables **Mr Justice D Hayton, JCCJ**
Mr Justice W Anderson, JCCJ
Mme Justice M Rajnauth-Lee, JCCJ
Mr Justice D Barrow, JCCJ
Mr Justice A Burgess, JCCJ

Appearances

Mr Timothy Jonas for the Appellant

Mr Sanjeev Datadin for the First and Second Respondents

Mr Nigel Hawke and Ms Debra Kumar for the Third Respondent

REASONS FOR DECISION
of
The Honourable Justices Hayton, Anderson, Rajnauth-Lee, Barrow and Burgess

Delivered by
The Honourable Mr Justice Anderson on
the 29th day of May 2019

Introduction

[1] By Notice of Application filed with this Court on 24 August 2018, the Guyana National Cooperative Bank, ('the Bank'), sought special leave to appeal the decision of the Court of Appeal given on 23 July 2018 allowing an appeal from the Full Court. The Full Court had decided that the Bank's action, begun almost twenty years earlier, had been abandoned and could not be further prosecuted, whereas the Court of Appeal had decided to remit the matter to the Full Court to consider whether it had jurisdiction to decide on the issue of abandonment.

[2] In order to secure special leave, the Bank had to demonstrate to us that the grounds of appeal had good prospects of success. Special leave was granted at a Case Management Conference held on 21 January 2019, this Court being satisfied that the proposed appeal has a realistic chance of success, so that there might be a miscarriage of justice if special leave were not granted. A hearing was then held to determine whether or not the orders of the Court of Appeal and the Full Court should be set aside.

[3] At the conclusion of the hearing on 26 March 2019, this Court allowed the appeal by the Bank and ordered that the orders of the courts below be set aside and that the case be remitted to the High Court for the expeditious hearing of the substantive matter of the determination of the Bank's action. We also made certain costs orders. We promised then that we would give reasons for our decision and we do so now.

Background

[4] The action which lies at the root of this appeal stems from an agreement made in February 1996 between the Bank and R.N. Persaud Company Limited, the First Named Respondent. It was agreed that the Bank would make available lines of credit to R.N. Persaud Company Limited, with overdraft facilities, in return for the company agreeing to observe and comply with all the terms and conditions

contained in the agreement as they pertained to the overdraft facilities. Pursuant to the agreement, R.N. Persaud Company Limited executed in favour of the Bank an irrevocable Power of Attorney for the purpose of, *inter alia*, registering a debenture or charge on its properties in favour of the Appellant in the sum of $340,000,000.00. On the 21 March 1996, the debenture or charge was duly executed by the Director and Secretary/Director of R.N. Persaud Company Limited and subsequently registered thereby creating both a fixed and floating charge on its present and future assets. On 24 August 1998, the Bank, upon request by R.N. Persaud Company Limited, agreed to reschedule the loan by way of Promissory Note. As a result of the continued failure by R.N. Persaud Company Limited to uphold its obligations under the loan and satisfy the debt, the Bank, by letter dated 5 May 1999, demanded the full payment of the sum of $585,842,466.00 which had by that time become due, owing and payable.

[5] The Bank alleges that on 8 May 1999, R.N. Persaud Company Limited fraudulently caused to be advertised in the Official Gazette, the sale, by way of transport, of property which formed part of the mortgaged assets situate in the County of Essequibo, to Leguan Rice Milling Incorporated, the Second Named Respondent. The Bank claimed that it did not become aware of the sale until after the time for opposition had elapsed. Prior to filing the Writ of Summons on 25 May 1999, the Bank applied, on 24 May 1999, for and was granted an interim injunction which was entered on 31 May 1999, restraining R.N. Persaud Company Limited from selling or disposing of the property and further restraining Leguan Rice Milling Incorporated from accepting Transport in relation to the said property and further restraining the Registrar of Deeds, the Third Named Respondent, or its officers from proceeding with the passing of Transport to Leguan Rice Milling Incorporated. The Order of the court was served on all the Respondents. Notwithstanding this judicial injunction, on the 25 June 1999, R.N. Persaud Company Limited purported to pass Transport of the said property which was accepted by Leguan Rice Milling Incorporated.

[6] The Bank caused its Attorneys, on 8 July 1999, to file a Notice of Motion to have Mr. R.N. Persaud, Managing Director of the First Named Respondent, and Mr. Pooran Ram, Director/Secretary of the Second Named Respondent, committed to prison for contempt of court. By Affidavit dated 24 August 1999, Mr. Pooran Ram, answered the Motion on behalf of the Leguan Rice Milling Incorporated. The hearing was adjourned on several occasions during the period July 1999 - September 2000. During this period on 8 June 2000, an Affidavit of Service sworn to by Mr. Marshal Walcott was filed attesting to his service of the Writ of Summons, an ex parte Application for an interim injunction and a certified copy of the Order dated 24 May 1999 on Leguan Rice Milling Incorporated by handing the document to Mr. Pooran Ram. There were additional adjournments and on 28 May 2001, a Subpoena Duces Tecum was issued in the action for Mr Marshal Walcott to attend court to give evidence. Eventually, on 12 November 2001, leave was granted to the Bank to withdraw and discontinue the Motion. Six months later, on 23 May 2002, the Bank filed a Request for Hearing in its original application which, it will be recalled, had been initiated on 24 May 1999.

[7] On 30 April 2012, a month shy of ten years from the date of the Bank's filing of the Request to be heard, R.N. Persaud Company Limited applied to the Court to have the Bank's claim dismissed for abandonment. The parties swore Affidavits in response and reply to the Summons and thereafter written submissions were filed. On 2 October 2014, Justice Gregory, sitting in the High Court, granted the relief sought and dismissed the action as abandoned.

[8] The Bank alleged that the Order was not entered in the Court's records and was not served on the Bank or its counsel, who informed the Bank that he did not become aware of the decision and Order of Justice Gregory until in or around 13 October 2017, some three years afterwards. As a result, on 16 October 2017, the Bank appealed the decision of Justice Gregory to the Full Court as of right, even though

it was three years after the decision in the High Court, on the basis that it did not become aware of the Order until on or around 13 October 2017.

[9] During the hearing of the appeal by the Full Court (comprising Justices Singh and Younge) the First and Second Named Respondents referred to the Civil Proceedings Rules which provide that an appeal must be filed within 28 days from the date of a decision. They argued that the appeal was filed almost three years after the decision was pronounced, it had been filed out of time and the court had no jurisdiction to entertain it. The Bank opposed on the basis that it did not have knowledge of the decision and Order of the Court until October 2017. The Full Court heard arguments on the issue of jurisdiction and on 19 April 2018 dismissed the appeal on the sole ground that the Contempt proceedings initiated by the Appellant on 9 July 1999, were not interlocutory in nature but were free-standing and, as a consequence, did not interrupt the running of time for the purposes of abandonment, or prevent the action filed in May 1999 from becoming ripe for hearing after the Notice of Default of Defence was filed in the action on 16 November 1999. It is noteworthy that no written decision of the Full Court was given.

[10] The Bank contended that this decision of the Full Court was erroneous in law and that dismissal of the action for abandonment represented a miscarriage of justice. The Bank appealed to the Court of Appeal and that court agreed to hear the application as the substantive appeal. During the hearing before it, the Court of Appeal enquired, whether the Full Court had entertained arguments and considered the issue of its jurisdiction to hear the appeal given the lapse of the near-three years between the decision of Justice Gregory, and the filing of the appeal. The Court was informed that the issue was, indeed, argued before the Full Court but notwithstanding being so informed, the Court of Appeal remitted the matter to the Full Court for a determination whether it had jurisdiction to entertain the appeal.

[11] The Bank now appeals to this Court, arguing that the Court of Appeal did not determine the grounds of appeal advanced before it and did not pronounce on the merits of the decision by Justice Gregory which had also been appealed to the Full Court. The Bank contends that, after being informed that the Full Court had indeed heard arguments on the issue of jurisdiction, the Court of Appeal ought not to have remitted the matter to the Full Court to determine jurisdiction, especially since the Court of Appeal was also equally placed to determine the issue of jurisdiction. It also argued that the Court of Appeal wrongly exercised its jurisdiction to remit the appeal to the Full Court for its determination.

Decisions of the courts below

[12] An unfortunate and unsatisfactory aspect of this appeal is the absence of written judgments given in the courts below in respect of a case that has been ongoing since 1999 and which has involved a great multiplicity of proceedings and procedural disputes. Notwithstanding the extensive submissions made before both the High Court and the Full Court, no written judgments or decisions of those courts have been made available to this Court. The only transcript which forms part of the record of appeal is the decision of the Court of Appeal given on 23 July 2018.

[13] The unavailability of a written decision of the High Court means that that decision does not form part of the record before this Court. However, it is not disputed that in the High Court, Justice Dawn Gregory, gave a decision in Chambers on 2 October 2014 whereby she agreed with the First and Second Named Respondents in the Summons filed by them, seeking a declaration that the matter had been abandoned. Justice Gregory held that the action had been deserted as at 23 May 2002, the date of the filing of the Request for Hearing.

[14] The Full Court did not give a written decision after completion of the proceedings before it, and this Court was left to garner the nature of the Full Court's decision from a copy of the handwritten note of Justice D. Younge, one of the two judges

sitting in the Full Court, submitted by the Appellant. From this it may be taken that the decision was delivered on 19 April 2018. The Judge's note stated,

> "Motion for Contempt of Court filed on 8 July 1999 is an originating and not an interlocutory process, even though filed in the same Action. As such, the Contempt Motion could not stop time from running for the purposes of O.32 of the High Court Rules. Therefore, the Notice of Default of Defence filed on the 15th November 1999 was the last step taken in the matter and would have been abandoned and incapable of being revived after 16th November 2000. Court finds that matter is abandoned and incapable of revival. Costs to the Respondents in the sum of $50,000.00."

[15] The Court of Appeal, comprising the Learned Justices of Appeal Rishi Persaud, Rafiq Khan and Christopher Arif Bulkan, delivered its decision on 23 July 2018. The court did not produce a written judgment. However, the transcript of the decision was provided as part of the record in these proceedings. From the transcript it appears that the court considered that the appeal was lodged in the Full Court approximately three years out of time and was filed notwithstanding that no extension of time was granted within which the appeal ought to have been filed. The Court of Appeal opined that the Full Court, in determination of the matter, did not consider the issue of its jurisdiction to hear the said appeal in the first place which was filed some three years out of time. The Court noted that even if the jurisdiction issue was not raised by the parties, the Full Court on its own volition ought to have raised it. The Court of Appeal decided to refer the matter back to the Full Court for that court to consider the sole issue of whether it had jurisdiction to entertain the appeal given that the appeal had been filed some three years beyond the time limited by the Rules and the High Court Act for filing appeals to the Full Court.

Appeal to the CCJ

[16] At the Case Management Conference called by this Court on 21 January 2019 to consider the Bank's application for special leave, the Registrar of Deeds brought to the Court's attention that the property which is the subject of the proceedings was

now vested in one, Jai Krishna Singh. In light of this, the Court directed the Registrar of Deeds to file and serve an Affidavit setting out the particulars since 1999 of the transfer of the property which is the subject matter of this appeal as well as the High Court proceedings relating thereto, including the Court Order dated the 3 May 2018 leading to the particular property being transferred to Jai Krishna Singh and any available record of the legal proceedings leading to such Order. The Court thereafter set a timetable for filing of written submissions in preparation for the hearing of the appeal.

[17] As developed in its submissions before this Court, the Bank focussed on two main issues. First, it argued that the Court of Appeal erred in concluding that the Full Court had not considered the issue of its jurisdiction and consequently in remitting the matter to that court for consideration of jurisdiction. Second, it argued that the Full Court had wrongly decided that the contempt proceedings filed in the action were not interlocutory and did not prevent the action at first instance from becoming abandoned for want of prosecution. These issues are considered in turn.

Jurisdiction of the Full Court

[18] The Bank relied on the case of *Re: Barakat's Application,*[1] where the Hon. Madame Justice Cummings JA (as she then was) considered the jurisdiction of the court to hear the appeal before it and before embarking on any consideration of the merits of the substantive appeal. The learned judge there stated:[2]

> "The right of appeal is created by statute. Accordingly, it behoves a court to satisfy itself that as a matter of jurisdiction it can properly hear and determine a matter. Jurisdiction therefore, is of such fundamental importance in the adjudication of any given case that it ought to be determined beforehand. Accordingly, this court has to decide a preliminary issue which it raised *suo motu* on its jurisdiction to hear the present appeal, having invited counsel on both sides to address us on the issue. The rationale behind such invitation stemmed from the provisions of the Court of Appeal

[1] CA No. 3/2005, decision given on 23 May 2011
[2] Ibid., at p. 1

> Act, Cap 3:02 and the nature or form of the proceedings in the lower court. We bore in mind also some important observations made by Richards, C.J. in *Dhajoo v. Thom* (1939) L.R.B.G. 262 at 265, as follows: "It is the first duty of every court whether of first instance or appeal, before adjudicating upon any given cause or matter, to satisfy itself on its jurisdiction and, if the court is of opinion that it does not possess jurisdiction, in whatever manner any given matter may be brought before it, it is the duty of the Court, whether the question of jurisdiction is the subject of formal appeal or not,of its motion to pronounce accordingly..."

[19] The Bank contended that in the instant case, the question of jurisdiction of the Full Court was specifically raised and argued in that court. The only possible inference to be drawn was that the Full Court determined that it had jurisdiction and therefore embarked on an examination of the merits of the appeal. In the circumstances, the decision by the Court of Appeal avoiding the consideration of those merits and assuming that the Full Court did not consider its jurisdiction was erroneous and against the sequence of events as disclosed on the face of the record, and the Court of Appeal erred when it sent the appeal back to the Full Court for a determination of its jurisdiction.

[20] To their credit, the Respondents did not contest this issue. The written submissions of the First and Second Named Respondents dated 9 April 2018 indicated that the issue of jurisdiction was raised and argued under the heading, 'Jurisdiction of Court to Hear Appeal'. The Respondents agreed with the Appellant that the Court of Appeal was equally well placed to determine whether the Full Court had jurisdiction to hear the appeal which it heard, and to make effective Orders if it concluded that the Full Court had no such jurisdiction. Further, had the Court of Appeal, in considering the issues, found that the Full Court had no jurisdiction to hear the appeal, they could have then simply dismissed the appeal before them, essentially treating the dismissal of the appeal by the Full Court as achieving the correct result. Assuming that the Court of Appeal correctly concluded that the Full Court had not ascertained the question of its jurisdiction, the Court of Appeal further erred in remitting the appeal back to the Full Court for that determination instead of

pronouncing on the question of law and making the appropriate orders which they had authority or jurisdiction to do on the appeal before them.

[21] This Court agrees with the common view of the parties on this issue and likewise considers that Court of Appeal ought not to have remitted the matter to the Full Court on the issue of jurisdiction. We agree that the issue of jurisdiction having been clearly raised in the proceedings before the Full Court, the only logical inference was that that court considered it had jurisdiction and then proceeded to determine the merits of the appeal. Further, the issues underlying the question of jurisdiction were exclusively issues of law. Any finding by the Full Court on those issues of law necessarily availed an aggrieved party a right of appeal straight to the Court of Appeal. That court ought to have decided the question of law rather than remitting the matter to the Full Court with an inevitable appeal back to the Court of Appeal.

[22] An unfortunate aspect of the decision by the Court of Appeal is its contribution to further delays in this matter which has been in the court system long enough. In the case of *Andrews v Moore*,[3] this Court stated that "it approaches its own Appellate Jurisdiction Rules, the Court of Appeal Rules and the High Court Rules in the light of the principle enshrined in Rule 1.3 of the Appellate Jurisdiction Rules i.e. to enable this Court or the relevant court to deal with cases fairly and expeditiously so as to produce a just result. Gone are the days of arid technicalities." The words of former President, Sir Dennis Byron in *Mitchell v Wilson*[4] are also instructive:

> "The overriding objective of the Rules set out in part 1.3 requires us to discourage unnecessary disputes over procedural matters. This is a procedural dispute and in considering the requirements of a just result we should also consider that the resources to be allocated to the case should be proportionate to its complexity…"

[3] [2013] CCJ 7 (AJ) at [8]
[4] [2017] CCJ 5 (AJ) at [5]

[23] These principles apply to the present issue. This Court has a duty to ensure that cases are dealt with fairly and expeditiously to produce a just result. Sending the matter back to the Full Court to determine an issue which the Court of Appeal could itself have determined does not conduce to the doing of justice. But neither would the interests of justice be served if this Court were simply to allow the appeal on the jurisdiction issue and remit the matter to the Court of Appeal to determine whether the Full Court was right on the abandonment issue. Again, to the credit of the parties, they all agreed that in the circumstances of this case, particularly bearing in mind that it has been in the system for virtually twenty years and that the point of dispute is solely a point of law, it would be appropriate for this Court itself to consider and pronounce on the issue of abandonment. Accordingly, we proceed to do so.

Abandonment

[24] Relying on its submissions made in the First Instance proceedings, which were also relied upon in the Full Court and Court of Appeal, the Bank argued that the contempt proceedings it commenced on 8 July 1999 were ancillary to the main action and therefore interlocutory. Accordingly, the action did not become ripe for hearing under Order 32 until the Motion was withdrawn on 12 November 2001. The Bank submitted that the action taken in the contempt proceedings was within the substantive action to attack the defendant/respondents for breach of an interlocutory order which preserved the status quo so that the trial of the substantive action would not be frustrated. Those proceedings were therefore ancillary to the main action and interlocutory in nature. In support of its argument, the Bank relied on the case of *Gilbert v Endean*,[5] and on Halsbury's Laws of England,[6] with respect to the meaning of interlocutory orders.

[5] [1875] 9 CHD 259
[6] (3rd edn.) Vol. 22 at para. 1608

[25] The First and Second Named Respondents conceded that documents had been filed in the contempt proceedings but argued that Order 32 was intended to apply to 'core' proceedings in the substantive litigation itself that advanced the matter towards the closing of pleadings and the conduct of a trial. Contempt proceedings could not be regarded as being such 'core' proceedings and they were stand-alone proceedings for the purposes of Order 32. Citing Order 32, rule 8(2) the First and Second Named Respondents contended that Order 32 desertion occurred if the litigant was obliged to file a Request for Hearing and failed to do so for six months. Once deserted a matter could only be revived by consent or an order of the Court.[7] Failure to remedy a desertion would mean that in a further six months the matter would become abandoned and incapable of revival.[8] There was no need to have a court pronounce upon the abandonment since the Rules were tailored to cater for such an eventuality although judges, in the interest of good administration, would sometimes make a declaration to that effect.[9]

[26] The First and Second Named Respondents argued that on the 16 November 1999, the Bank filed a Notice of Default of Defence thereafter requiring the Respondents to remedy their default to file a Statement of Defence within 14 days failing which the Bank was then obliged to file a Request for Hearing in accordance with Order 25, rule 1. However, the Bank did not file a Request for Hearing until 23 May 2002 despite the fact that it was due on or about 30 November 1999. Further, it was argued, even if the motion for contempt prevented time from running, when that motion was withdrawn on 12 November 2001, the Request for Hearing was immediately due. Failure to compile with this timeframe resulted in the claim being deserted after six months after the 12 November 2001, that being by the 12 May 2002. Therefore, when the Request for Hearing was filed on 23 May 2002, the claim

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[7] Order 32, Rule 8 (2). (Order 32, rule 8 (2)). Order 32 rule 8 provides that,

"8. (1) A cause or matter shall be deemed deserted if no request for hearing shall be filed within six months after the expiration of the period fixed for the filing of such request.

(2) When an action has been deemed deserted, no further proceedings may be taken therein, unless and until an order for revivor has been made by the Court or a judge on the application of any party or a consent to revivor and a request for hearing signed by all parties thereto have been filed."

[8] Order 32, Rule 9 (1) (b).

[9] Andrews v Moore [2013] CCJ 7 (AJ); Ogle Co. Ltd v Douglas (1972) WIR 201

was deserted and with no consent to revivor or order of court to revive same it was therefore filed out of time and by the further passage of time the matter became abandoned.

[27] These submissions suggest that the outstanding abandonment issue may be broken down into the following interlocking questions:

i. Were the contempt proceedings in the Action before the High Court 'freestanding' or 'interlocutory' in nature?

ii. Was the High Court correct in deeming the Action had been abandoned pursuant to Order 32 of the High Court Rules?

iii. What is the legal consequence of the property allegedly being now vested in Jai Krishna Singh?

Were the contempt proceedings 'free-standing' or interlocutory in nature?

[28] In the present case, the substantive action was instituted by the Bank to secure property as the basis for recovery of a debt due and owing. The property formed part of the assets which were mortgaged by the First Named Respondent to the Bank and as such the Bank claimed that they could not sell it. When the Bank became aware of the First Respondent's intended sale of the said property, the Bank applied *ex parte* and was granted an injunction restraining all three Respondents from dealing with, selling or disposing of the property "until after the hearing and determination of a Summons in this case returnable for the 8th day of June, 1999…"

[29] The wording of the injunction granted by Justice Burch-Smith on 24 May 1999 was as follows:

> "**IT IS ORDERED AND DIRECTED THAT** the First-Named Defendant and its officers be restrained and an Injunction is hereby granted restraining the First-Named Defendant from selling or otherwise disposing of the property situate at "L" part of Doorhag, Leguan, in the county of Essequibo the property which is the subject of a first fixed and floating charge in favour of the Plaintiff **AND IT IS FURTHER ORDERED THAT** the Second-

> Named Defendant be restrained from accepting the transport of the property situate at "L" part of Doorhag, Leguan, in the county of Essequibo from the First-Named Defendant as the property which is subject to a Debenture Charge **AND IT IS FURTHER ORDERED THAT** the Third-Named Defendant or its officers be restrained from proceeding with the passing of the Transport to the Second-Named Defendant of the property situate at "L" part of Doorhag, Leguan, in the county of Essequibo since the property is subject to a first fixed and floating charge in favour of the Plaintiff until after the hearing and determination of a Summons in this cause returnable for the 8th day of June, 1999…"

[30] During the pleadings stage in the substantive matter, when the Bank became aware that the terms of the injunction were breached, it instituted contempt proceedings in July 1999 by way of Notice of Motion for Contempt to have the directors of the two companies imprisoned. Proceedings for contempt of court are criminal in nature. Salmon LJ in *Jennison v. Baker*[10] in considering the issue of contempt of court stated,

> "The power exists to ensure that justice shall be done. And solely to this end, it prohibits acts and words tending to obstruct the administration of justice. The public at large no less than the individual litigant have an interest and a very real interest in justice being effectively administered. Unless it is so administered, the rights, and indeed the liberty, of the individual will perish. Contempt of court may take many forms. It may consist of what is somewhat archaically called contempt in the face of the court, for example, by disrupting the proceedings of a court in session or by improperly refusing to answer questions when giving evidence. It may, in a criminal case, consist of prejudicing a fair trial by publishing material likely to influence a jury. It may, as in the present case, consist of refusing to obey an order of the court. These are only a few of the many examples that could be given of contempt. Contempts have sometimes been classified as criminal and civil contempts."

[31] In *Attorney General v Punch Ltd.*,[11] Lord Nichols of Birkenhead said:

> "Contempt of court is the established, if unfortunate, name given to the species of wrongful conduct which consists of interference with the administration of justice. It is an essential adjunct of the rule of law. Interference with the administration of justice can take many forms. In civil proceedings one obvious form is a willful failure by a party to the

[10] [1972] 2 Q.B. 52
[11] [2002] UKHL 50

> proceedings to comply with a court order made against him. By such a breach a party may frustrate, to greater or lesser extent, the purpose the court sought to achieve in making the order against him".

[32] As to whether the Motion for contempt is an interlocutory or a final proceeding, the law is clear. Purchas LJ in *Saving & Investment Bank Ltd.,*[12] a case whose facts are very much on par with those in the present proceedings, had this to say about the contempt proceedings in that case,

> "In the present case the undertakings which were offered and accepted to preserve the assets in this country clearly fell within the concept of interlocutory proceedings to protect what would be the fruits of victory in the main suit if not the property which was the subject matter of the action itself. I think that here lies the crucial distinction between interlocutory and final proceedings. The fact that such an order can be enforced by a motion to commit for contempt of court …, if its true purpose is to enable the proper conduct of the trial and the final resolution of the issues between the parties, then it is nonetheless an interlocutory proceeding"

[33] Purchas LJ further outlined that in determining whether it was interlocutory one must consider if,

> "(a) the application was ancillary to the issue raised in the action and arose out of an order already made in the action; or (b) if its true purpose was to enable the proper conduct of the trial and the final resolution of the issues between the parties; and that the fact that an order made in committal proceedings might have penal consequences was irrelevant in determining whether the committal proceedings themselves were interlocutory or final. There can be no doubt that the instant application falls into the first category and, possibly, into the second."

[34] The present case clearly falls within both categories as outlined by Purchas LJ. The committal proceedings were only a procedure to get something done in the substantive action.[13] Noteworthy are the dicta of Nicholls LJ in *Saving & Investment Bank Ltd*, when he stated that,

> "Such an application is not brought to decide the ultimate rights of the parties. It is brought to enforce an order already made. Of course, what is

[12] *Saving & Investment Bank Ltd. v. Gasco Investments*, (1988) 1 All E. R. 975
[13] per Cotton LJ, *O'Shea v. O'Shea* (1890) 15 P.D. 59, 62

> decided on a committal application is a list of a very serious nature: whether the respondent is guilty of contempt of court by committing a breach of an order of the court, and if so what action the court should take. There is a final adjudication upon that issue. But that issue is ancillary to the issues raised in the action, and it arises out of an order already made in that action. It is a step in that action. Furthermore, applications of an interlocutory nature often do raise issues which are determined once and for all on those applications."

[35] Accordingly, this Court finds that, by the Notice of Motion for Contempt instituted in this type of case, the Bank was attempting to enforce an order, made by the court in the course of the litigation between the parties, concerning either the conduct of the litigation or the parties' activities pending the trial. The contempt proceedings were therefore interlocutory in nature and not 'stand-alone' as argued by the First and Second Named Respondents.

Was the matter abandoned pursuant to Order 32?

[36] The effect of Order 32 was considered by this Court in the case of *Andrews v Moore.*[14] Justice Nelson, JCCJ stated,

> "[1] This application is about the interpretation of rules of procedure designed to reduce the law's delays. The relevant rules for interpretation are contained in Order 32 of the Rules of the High Court…especially Order 32 rule 9. These rules have no counterpart in the English Rules of the Supreme Court or the current Civil Procedure Rules.
> [2] Order 32 rules 1, 3, 8 and 9 provide an opportunity for a vigilant defendant to give the quietus to proceedings against him or her where the plaintiff repeatedly defaults in progressing the proceedings."

[37] The Guyanese cases of *Cunningham v Lee*[15] and *Gillette v Rie*[16] in the 1960s, affirmed that interlocutory proceedings, not entirely unlike those in the present case, stopped time from running and thereby prevent the substantive matter from becoming ripe for trial. The cases of *Barbuda Enterprises Ltd v Attorney-General*

[14] [2013] CCJ 7 (AJ)
[15] [1960] LRBG
[16] [1968] LRBG

of Antigua and Barbuda[17] and *Lewis v St. Hillaire and Another*[18] are also instructive as to the effect of Order 32. In the case of *Lewis,* which also considered *Barbuda Enterprises Ltd,* the Court of Appeal of the Eastern Caribbean States and the Privy Council analysed Order 34 of the Rules of the Supreme Court 1970 of the Eastern Caribbean, which is almost identical to Order 32 of the High Court Rules. The Privy Council concluded that the cause or matter could not be deemed to have been deserted and subsequently deemed to have been abandoned under Order 34, rule 11(1)(b), because no order as to the place or mode of trial was ever made and consequently the action never became ripe for hearing. Lord Bridge said:[19]

> "…a defendant who seeks to rely on the strict provisions of Order 34 to defeat the plaintiff's action against him must be in a position to show that the requirements necessary to bring those provisions into operation have themselves been strictly complied with…"
>
> "Rule 11(1)(b) and rule 11(1)(c) of Order 34 relate to abandonment consequential and conditional upon desertion which arises when the plaintiff has failed to file a request for trial within the prescribed time after the cause or matter has become ripe for hearing. The concept of ripeness … is evidently intended to be relevant only to the concept of desertion…"

[38] The Privy Council went on to consider the construction of the provision in determining its effect and stated that,

> "Attention has been drawn to the prefatory words of Order 34, rule 11(1). The suggestion is that the words 'if prior to the filing of a request for hearing or consent to judgment or the obtaining of judgment' signify that there can be no abandonment of a cause or matter unless the cause or matter became ripe for hearing, with the result that the plaintiff was under a duty to file a request for hearing. This suggestion overlooks the fact that the operative word is the word 'prior', the significance of which is purely temporal. In my judgment, the prefatory words simply mean that, as between a plaintiff and a particular defendant, a cause or matter cannot be deemed to have been abandoned by reason of any of the defaults specified in Order 34, rule 11(1), if at the time of the default, a valid request for hearing had already been filed or judgment had already been obtained against or consented to by that defendant."

[17] (1993) 42 WIR 183
[18] (1995) 48 WIR 134
[19] Ibid., at p. 191

[39] As to the procedural history in the present case, the Respondents state that the Bank filed a Notice of Default of Defence on 16 November 1999 thereafter requiring the Respondents to remedy their default to file a Statement of Defence within 14 days, failing which the Bank was then obliged to file a Request for Hearing in accordance with Order 25, rule 1. However, the Bank did not file a Request for Hearing until 23 May 2002 despite the fact that the Request was due on or about 30 November 1999. It was further argued that even if the motion for contempt prevented time from running, when that motion was withdrawn on 12 November 2001, the Request for Hearing was immediately due. Failure to comply with this timeframe resulted in the claim being deserted after six months, from the 12 November 2001, that being by the 12 May 2002. Therefore, when the Request for Hearing was filed on 23 May 2002, the claim was deserted and with no consent to revivor or order of court to revive same it was therefore filed out of time (and in the incorrect matter) and by the further passage of time the matter became abandoned.

[40] We do not agree with this argument of the Respondents. Order 32, rule 1 (1) which deals with 'Request for Hearing by Plaintiff' states that, "When a cause or matter has become ripe for hearing, it shall be the duty of the Plaintiff or other party in the position of the Plaintiff to file a request for hearing within six weeks thereafter." Further, Order 32, rule 3 addresses when a cause or matter becomes ripe for hearing. Instructive is Order 32, rule 3(2) which states, "if there are any interlocutory proceedings pending, a cause or matter shall not become ripe for hearing until the determination of such proceedings unless the Court or a Judge otherwise orders."

[41] Having determined that in the circumstances of this case, the contempt proceedings were interlocutory in nature, it follows that for the purposes of Order 32, rule 3(2), the contempt proceedings prevented the substantive action from becoming ripe for hearing pending determination of those proceedings. Those proceedings were not determined until they were withdrawn by the Bank on 12 November 2001. Accordingly, the substantive matter became ripe for hearing on this date. Pursuant

to Order 32, rule 1(1), the Bank was required to file the Request for Hearing within six weeks from the date of withdrawal, that being on or before 24 December 2001. Noteworthy is Order 32, rule 2, which provides for the Request for Hearing being 'filed by the Defendant if not filed by the Plaintiff within the stipulated time'; the Defendant could also make an application to have the matter dismissed for want of prosecution. No Request for Hearing was filed by the Bank within the six weeks period nor was any application for dismissal for want of prosecution filed by the Respondents. The Bank eventually filed the Request for Hearing on 23 May 2002.

[42] Order 32, rule 8, which provides for the circumstances when a cause or matter will be deemed to be deserted, is instructive. The rule states that, "A cause or matter shall be deemed deserted *if no request for hearing shall be filed within six months after the expiration of the period fixed for the filing of such request*." It is the case, therefore, that after expiration of the six weeks period provided for in Order 32, rule 1(1), the Plaintiff or Appellant in an action has a further six months within which to file the Request for Hearing. Accordingly, in the present case, the Bank had until 24 June 2002 to file the Request for Hearing but did so on 23 May 2002, rendering it filed within the period and therefore not deserted.

[43] For the purposes of abandonment, Order 32, rule 9 states that,

> "A cause or matter shall be deemed altogether abandoned and incapable of being revived if prior to the filing of a request for hearing or consent to judgment or the obtaining of judgment – (a) any party has failed to take any proceedings or file any document therein for one year from the date of the last proceeding had or the filing of the last document therein…"

We consider that the Bank is correct in stating that under Order 32, rule 9, a matter becomes abandoned if no proceedings or step is taken for one year before the Request for Hearing is filed. This was not the case in the present matter since the Request for Hearing was filed within the timeframe provided for in the Rules.

[44] However, after the filing of the Request for Hearing, from the Record it does not appear that any subsequent action was taken in these proceedings. The next step after the filing of the Request for Hearing was for the Registrar in accordance with Order 32, rule 10, to fix a date for hearing. There is no information on the record as to if this was done or what date was indeed fixed. The Bank, however, did state in their submissions in reply that, litigants do not control the time by which the Registrar fixes a trial date. As such, the passage of ten years between the filing of proceedings and the time fixed for trial is not unusual in Guyana.

[45] The next action which took place in the substantive proceedings was taken by the First Named Respondent on 30 April 2012 when it filed a Summons with Affidavit in Support to have the matter deemed abandoned. One can assume that by this time, there was no trial date fixed by the Registrar. Notwithstanding this, the learned Justice Gregory agreed with the Respondents that the matter was abandoned in accordance with Order 32 and incapable of being revived.

[46] The learned Judge was clearly wrong to have found that the matter had been abandoned. The decision of Justice Gregory was appealed to the Full Court approximately three years after the date of delivery. In relation to this issue, the instructive rules are Order 46, rule 5[20] and Part 62[21] of the CPR, 2017. The Appellant submitted that the language of Order 46, rule 5 (2) (a), operating prior to 2017, when the CPR came into effect where its successor is Part 62 CPR, is unambiguous. They argued that in determining the requisite period for calculating the time within which an appeal ought to be filed to the Full Court, Parliament

[20] **Order 46, rule 5** – "(1) Subject and without prejudice to any power of the Full Court or the Court to enlarge or abridge the time appointed by these rules or fixed by any order of the Court enlarging time for doing any act or taking any proceeding, every appeal to the Full Court from an interlocutory order, or from any order (whether final or interlocutory) in any matter not commenced by writ of summons or originating summons shall be brought within fourteen days, and every other appeal to the Full Court shall be brought within six weeks, unless the Court at the time of making the order or at any time subsequently, or the Full Court, enlarged the time. (2) The said respective periods shall be calculated – (a) in the case of an appeal from an order in chambers from the time when the order was pronounced or when the appellant first had notice thereof…"

[21] **PART 62.01** – "(1) Where an appeal lies to the Full Court under an enactment, any person may appeal to the Full Court by issuing a Notice of Appeal to the Full Court (Form 62A), which must,
(a) be issued, (i) within 28 days of the date of the decision that is the subject of the appeal; or (ii) where the Appellant was not present or represented when the decision was handed down, within 28 days of the decision that is the subject of the appeal having been served on the Appellant…"

specifically contemplated the eventuality that a party may not be present when the decision is given. Therefore, the sections required that the Appellant must have notice of the order and must be aware of the order and its terms before time began to run. Part 62 CPR further states that the Order must be entered and served on the Appellant before time begins to run.

[47] Accordingly, notwithstanding that the Order of Justice Gregory was handed down on 2 October 2014, neither the Appellant nor their Attorneys were present or represented in Court. Therefore, the Appellant did not have notice of the Order within the language of Order 46 and time did not begin to run under those Rules for the purpose of filing an appeal. Further, when the new CPR was implemented in 2017, the status quo remained the same and as such the Order not having been served, the Appellant remained in ignorance of it being made. The Appellant stated that Counsel was only made aware of the Order when inquiries were made with the Registry to ascertain the status of the matter (the judge having been appointed to the Court of Appeal) and to ask whether a decision could be expected shortly. The Respondent argued that the inability to become aware of the said order for a period in excess of three years is unacceptable and may be relevant to a dismissal for want of prosecution or other actionable delay.

[48] We agree with the argument of the Appellant on this point. Under Order 46 rule 5 and Part 62 of the CPR time did not begin to run until the Appellant became aware or had notice of the order. The appeal to the Full Court was therefore properly filed, notwithstanding three years from the date of the decision, since the Appellant upon becoming aware of the order immediately lodged their appeal. The Full Court therefore had jurisdiction to embark upon a consideration of the appeal, as it did.

[49] As already held at [35] above, the conclusion of the Full Court was erroneous when it determined that the Motion for Contempt of Court filed on 8 July 1999 was an originating and not an interlocutory process, even though filed in the same Action.

The Contempt proceedings were interlocutory proceedings. Accordingly, for the purposes of Order 32, the contempt proceedings prevented the substantive action from becoming ripe for hearing pending determination of those proceedings. As the Contempt proceedings were interlocutory and stopped time from running there was no basis for the Full Court to conclude that the substantive matter had been abandoned and was incapable of revival.

The legal consequences of the property now being vested in Jai Krishna Singh.

[50] In its Notice of Appeal to this Court, the Bank sought, among other things, an Order setting aside the decision and order of the Court of Appeal, granting the orders sought in the Notice of Appeal to the Full Court and such other order as the Court deems just. In the Notice of Appeal to the Full Court, the Bank had sought an order that the "Summons filed by the First Named Respondent made in Action Number 706-SA of 1999 be dismissed and that Orders be made directing the hearing of the trial of the action at first instance."

[51] As stated in *Zarida v Misir*,[22] this Court has the inherent power (recognised in Rule 1.4(2) of the Appellate Jurisdiction Rules) "to make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the Court in order to achieve its Rule 1(3) overriding objective 'to ensure that the Court is accessible, fair and efficient and that unnecessary disputes over procedural matters are discouraged.'" In consequence, and considering that the case before us has been in the judicial system for some two decades, we consider it appropriate to grant the orders sought by the Bank in the Full Court, that is, to deem the lower court's decision erroneous in law, since the contempt proceedings were interlocutory and as such the substantive matter was not deserted or abandoned having regard to the fact that the Request for Hearing was filed within time.

[22] [2016] CCJ 19 (AJ)

[52] The Bank's substantive claim for the recovery of the debt owed is yet to be adjudicated upon. This Court is hindered in determining the issues arising in the substantive matter by virtue of the fact that Jai Krishna Singh to whom the property has allegedly passed, is not a party to these proceedings, and evidence may be required to assist in the judicial determination with respect to the debt owed to the Bank by the First and Second Named Respondents, and with respect to how this debt may be recovered if in fact the Transport passed to Jai Krishna Singh was legitimate and cannot be reversed. It is not appropriate for this Court to make orders which can potentially affect the interests of third parties who are not party to the proceedings before it. In consequence, the interests of justice dictate that this Court makes an order that the substantive matter be remitted for trial in the High Court. Bearing in mind the time that has already passed it is recommended that this trial be held not later than within the next six months.

Orders

[53] It is hereby ordered that:

(i) The Appeal is allowed.

(ii) The Order of the High Court dated 2nd day of October 2014 is set aside.

(iii) The Order of the Full Court dated the 19th day of April 2018 is set aside.

(iv) The Order of the Court of Appeal dated the 23rd day of July 2018 is set aside.

(v) The case be remitted to the High Court for the hearing of the substantive matter to be dealt with expeditiously.

(vi) The First and Second Respondents shall pay to the Appellant the costs in this Court, on the basis of basic costs, and also costs in the courts below.

(vii) There is no order as to costs in respect of the Third Respondent.

/s/ D. Hayton

The Hon Mr Justice D Hayton

/s/ W. Anderson

The Hon Mr Justice W Anderson

/s/ M. Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ D. Barrow

The Hon Mr Justice D Barrow

/s/ A. Burgess

The Hon Mr Justice A Burgess