

**GRENADA**

**IN THE COURT OF APPEAL**

**Civil Appeal No. 8 of 2000**

**BETWEEN:**

- 1. GRENADA GENERAL INSURANCE COMPANY LIMITED**
- 2. JONAS BROWN & HUBBARD (GRENADA) LIMITED**
- 3. CHARLES FREDERICK TOPPIN**
- 4. ALLAN BIERZYNSKI**

Appellants

and

**GRENADA INSURANCE SERVICES LIMITED**

Respondent

**Before:**

The Honourable Mr. Justice Satrohan Singh	Justice of Appeal
The Honourable Mr. Justice Albert Redhead	Justice of Appeal
The Honourable Mr. Justice Albert N.J. Matthew	Justice of Appeal

**Appearances:**

Mr. D. Knight Q.C. for the Appellants  
Mr. J. Bristol for the Respondent

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**2000: November 22;**  
**2001: January 15.**  
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**JUDGMENT**

[1] **MATTHEW J.A.:** The genesis of these proceedings was a judgment of *Alleyne J.* between the Parties delivered on March 5, 1999 in which the learned Judge concluded that the Respondent was entitled to relief for unfair treatment handed to him by the majority of directors in the first Appellant company.

[2] *Alleyne J.* ordered that the second Appellant do purchase the shares of the Respondent in the first Appellant at a valuation determined by the auditors of the first Appellant as at the date of the removal of Evelyn

Gresham as Chairman of the Board of Directors of the first Appellant, that is to say, December 14, 1995.

- [3] On appeal of the decision by the Appellants, the Court of Appeal on January 24, 2000 affirmed the judgment of *Alleyne J.* but went on to perfect the judgment by making the following orders:
- (1) The first Appellant is ordered to cause the valuation which the learned Trial Judge ordered to carry out.
  - (2) The first Appellant is ordered to cause the valuation to be carried out not later than April 15, 2000.
  - (3) The shares are to be purchased and paid for within six months of the valuation of shares.
  - (4) The statutory rate of interest shall apply to the said valuation from December 14, 1995 to the date of payment.
  - (5) The Parties shall have liberty to apply to the High Court to resolve any issue that may arise out of the terms of the order.

Costs of the appeal and cross appeal were ordered in favour of the Respondent.

- [4] Between the dates of the judgments of *Alleyne J.* and the Court of Appeal, the Parliament of Grenada enacted the Property Transfer Tax. Act No. 37 of 1998 which was assented to by the Governor-General on December 15, 1998. Section 22 of that Act stated that the Act would come into operation on such date as the Governor-General appoints by proclamation.

- [5] It is not disputed that the Act came into effect on June 2, 1999 after an amendment was made in April 1999 to Act 37 of 1998. It is also not disputed that section 5 of the principal Act as amended throws the tax burden on the Respondent. The particular section is 5(1)(c) which states:
- “Subject to this section and section 6, the rate of tax payable on the transfer of property shall be as follows:
- .....
- where any property, other than land, is to be transferred and the vendor is not a citizen, such a vendor shall pay 10% of the market value of such property.”

There is also no dispute that the Respondent is not a citizen.

- [6] On March 23, 2000 the Respondent took out a summons seemingly under the “liberty to apply” order seeking orders that :
- (1) the second Appellant do pay or cause to be paid the property transfer tax (if any) due on the transfer of shares ordered.
  - (2) the second Appellant do pay interest on the valuation ordered up and until the time of the said transfer.
- [7] The summons was heard by *Alleyne J.* who, on April 19, 2000 declined to make the second order requested by the Respondent on the ground that to do so would amount to a variation of the judgment of the Court of Appeal. But the learned Judge ordered that:
- (1) the payment money into Court was not payment to the Respondent and ordered that the Respondent is entitled to interest until payment;
  - (2) any liability to tax under the Property Transfer Tax Act be that of the second Appellant.

### **The Appeal**

- [8] The Appellants filed their appeal on May 26, 2000 alleging three grounds of appeal:
- (1) The learned Trial Judge erred in law and misdirected himself in holding that the payment into Court by the Defendants is of no effect.
  - (2) The learned Trial Judge erred in law in holding that the question of the tax liability of the parties was an issue arising out of the terms of the order of the Court of Appeal.
  - (3) There was a miscarriage of justice in that the learned Trial Judge erred in law in holding that the Plaintiff is entitled to the value of the judgment without deduction related to the tax payable thereon.

[9] On November 14, 2000 the Respondent filed a notice under *Order 64 Rule 8(2) of the Rules of the Supreme Court* stating that the Respondent will contend on the hearing of the Appeal that the Judgment of the learned Trial Judge should be affirmed on the following additional grounds:

- (1) That the judgment of the learned Trial Judge carried with it an implied liberty to apply to work out the terms of the Order.
- (2) The High Court has an inherent jurisdiction to vary the judgment where there has been a change of circumstances since the judgment was handed down.
- (3) In the circumstances of this case the second Appellant's conduct amounts to an abuse of the process of the Court which can only be remedied by the judgment of the Court being varied by ordering that the second Appellant do meet any liability to tax under the Property Transfer Tax Act 1998 on the transfer of the Respondent's shares as ordered.

[10] Two main issues arise for the consideration of the Court as follows:

- (1) The period for which interest is payable; and
- (2) The tax liability under the Property Transfer Act, 1998 as amended.

I shall deal with these issues seriatim.

### **The Period for which Interest Available**

[11] There seems to be no dispute that the valuation ordered to be made by the Court of Appeal, on January 24, 2000, was made as early as February 24, 2000 and on March 1, 2000 the Appellants caused the valuation sum together with interest up to that time to be paid into Court.

[12] If, instead of paying that money into Court, it was paid to the Respondent, there would have been no dispute as to interest. In considering this aspect of the case the learned Judge considered **Order 22 of the Rules of the Supreme Court** which deals with "Payment Into and Out of Court".

- [13] He held that the Rules do not permit payment into court after judgment and the Appellants' action in doing so was of no effect. He went on to order that the Respondent was entitled to interest until payment to the Respondent.
- [14] At the hearing I perceived that learned Queen's Counsel for the Appellants conceded that Order 22 did not apply and the payment into Court was not payment to the Respondent.
- [15] Counsel, it seems to me, was relying on the aid of equity when he submitted that it was unfair of the Respondent to sit by and rely on technical reasons for not taking out the money paid into Court. Learned Counsel submitted that this Court in exercise of its equitable jurisdiction should order that the interest be calculated up to the date of the payment into Court.
- [16] There is no good reason why the Appellants could not pay the money to the Respondent as the Court of Appeal's judgment implied. Instead, they chose to do something unauthorised by the Rules of Court. I agree with the views expressed by the learned Trial Judge in this respect and endorse the view that the Respondent is entitled to interest up to the date of payment.
- [17] We were told by learned Counsel for the Respondent that the money was in fact paid although he could not, in Court, state the exact date of payment. So the mechanics of calculating the additional interest should not be insurmountable.

## Tax Liability under the Property Transfer Act

- [18] The legislation discussed above placed the liability for tax on the Vendor alone. Why should the purchaser be held responsible? The situation is quite different to those in the cases of **Diligenti v RWMD** (1977) 4B.B. L.R. 134 and **Re Abraham and Inter Wide Investments Ltd** 66 O.R. 684 (1988) where both Parties were liable to tax and the Court was engaged in adjusting the equities between the Parties.
- [19] Learned Counsel for the Appellants rightly submitted before the Trial Judge that the Respondent made the application pursuant to the order of the Court of Appeal granting the parties liberty to apply to the High Court to resolve any issue that may arise out of the terms of the order.
- [20] In Volume 2 of the 1993 edition of the White Book it is stated:  
*“Liberty to apply may be given in every order of the Court to enable matters to be dealt with in the working out of an order, but not when the order is final.  
When it is expressly given, it does not enable the Court to deal with matters which do not arise in the working out of the judgment, nor does it necessarily keep the action alive for all purposes. It does not confer a right to ask the Court to vary an order, **Cristel v Cristel** 1951 2 KB 725 C.A.”*
- [21] **Cristel v Christel** dealt with a dispute between a married couple where the Court had ordered the husband to provide suitable alternative accommodation for the wife and the two children by providing a two or three bedroom house or bungalow. The husband sought to get the Court to insert the words “*or flat*” after bungalow. The Court of Appeal held, *prima facie*, the words “*liberty to apply*” in an order meant that when the order was drawn up its working out might involve matters on which it might be necessary to obtain a decision of the Court; they did not confer any

right to ask the Court to vary the order: and, therefore, the summons must be dismissed.

[22] I am not convinced that the liberty to apply provision, meant to enable the Court to deal with matters in the working out of an order, entitles the tax implications brought about by the legislation to be dealt with by the court in this case.

[23] In **Cristel**, *Sommervell and Denning L.JJ.* held that if the husband could have proved a change of circumstances the Court must have allowed the variation sought. I cannot discern whether this change of circumstances relate only to that in the case of matrimonial proceedings, but even if the wider approach is taken, I see no change of circumstances between the Parties in this case to warrant interference with the order of the Court of Appeal.

[24] But even assuming the Court has jurisdiction to entertain the application why should the purchaser bear the tax burden. Learned Counsel for the Respondent emphasized the oppressive conduct of the Appellants which gave rise to the judgment of *Alleyne J.* on March 5, 1999 and submitted a presumption that equity will assist the Respondent.

[25] I am of the view that the oppressive conduct complained of was fully compensated in the said judgment. At page 167 of **Diligenti** a quotation from *Lord Denning* states:

*“One of the most useful orders mentioned in the section which will enable the Court to do justice to the injured shareholders is to order the oppressor to buy their shares at a fair price; and a fair price would be, I think, the value which the shares would have had at the date of the petition, if there had been no oppression”.*

The Appellants cannot be in the position of having committed “*the unpardonable sin*”.

[26] The Appellants had already deposited the money for the shares on March 1, 2000 even before the schedule suggested by the Court of Appeal. The Court had allowed April 15, 2000 by which the valuation had to be made and purchase within six months of the date of the valuation. The Appellants were by no means tardy in obeying the order of the Court of Appeal.

[27] In his submissions learned Counsel for the Respondent cited the case of **Diligenti** on the valuation of shares in light of the tax position. In **Diligenti**, *Fulton J.* stated:

*“The result is that the dispute before me is now confined to two main questions: first, the price to be paid for Mr. Diligenti’s shares; and second, whether they should be purchased by the individual respondents or by the respective corporate respondents.”*

In my judgment this case is not relevant to the issue before us.

[28] The imposition of the tax by the Legislature is out of the control of the Appellants and confers no collateral advantage to them as was suggested by learned Counsel for the Respondent in his skeleton arguments before us. As learned Counsel for the Appellants submit, by December 15, 1998 assent to the legislation was given by the Governor General and the Parties should have been aware that at any time the legislation came into force by the Governor’s proclamation the tax liability was always solely on the Vendor.

[29] In **Abraham**, *Griffiths J.* stated at page 687:-

*“While I have sympathy for the position of the applicant, I do not consider it appropriate to now amend the original judgment on the sole basis of the tax consequences to the applicant of selling his shares to Inter Wide. These consequences were ascertainable at the time of the original application. No new facts have arisen.”*

I would adopt these words and apply it to the present case.

[30] I agree with *Alleyne J.* that the tax consequences in **Abraham** are fundamentally different in character to the tax consequences arising in this case and as far as adjusting equities are concerned I have already stated that whereas in **Abraham and Diligenti** both Parties were liable to tax, in our case there is no tax liability by the Appellants to adjust equities between the Parties.

[31] In coming to his conclusion on the tax liability the learned Judge referred to the case of **Diligenti** when *Fulton J* was considering the question of interest where one party has been found to be liable to pay another a sum of money and he has failed or refused to pay, and states he has come to the same conclusion in relation to the matter before him. I regret not being able to agree with this line of reasoning.

[32] There is no good reason why this Court should, in effect, sanction the variation of the intention of the Legislature which was to make the Vendor pay the tax imposed by the **Property Transfer Act 1998** as amended.

[33] I hold that the tax burden should lay where the Legislature placed it, that is, on the Vendor, the Respondent in this case. I would vary the judgment of *Alleyne J.* to this effect. I do so order.

[34] I also order the Appellants to pay interest on the value of the shares in accordance with the judgment of the Court of Appeal, that is, until payment, not in Court, but to the Respondent.

[35]...../10

[35] The Appellants are to have fifty percent of their costs both here and in the Court below to be agreed or otherwise taxed. The costs order made by the Trial Judge is accordingly set aside.

**A.N.J. MATTHEW**  
Justice of Appeal

I concur.

**SATROHAN SINGH**  
Justice of Appeal

I concur.

**ALBERT J. REDHEAD**  
Justice of Appeal.

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**Appearances:**

Mr. D. Knight Q.C. for the Appellants  
Mr. J. Bristol for the Respondent

**SYNOPSIS**

- [1] This case arose from a judgment of *Alleyne J.* delivered on March 5, 1999 whereby he ordered the second Appellant to purchase the shares of the Respondent in the first Appellant.
- [2] The Court of Appeal on January 24, 2000 affirmed the order of *Alleyne J.* but went on to perfect the order by stipulating time limits within which the Appellants should comply with the Judge's Order. The Court of Appeal gave the Parties liberty to apply.
- [3] Under that order the Respondent took out a summons on March 23, 2000 asking for orders in respect of the period of time during which interest on the shares should apply and asking for the Appellants to pay the tax burden imposed by the Property Transfer Act 1998 as amended upon the Respondent.
- [4] On April 19, 2000 *Alleyne J.* ordered that payment of interest should apply up to the time of payment of the shares to the Respondent and not upon

- the time of payment to Court. He also held that the Appellants should pay the tax payable by the Vendor.
- [5] On May 25, 2000 the Appellants appealed to this Court on the two issues decided by *Alleyne J.* in favour of the Respondents. The Respondents filed a notice under Order 64 Rule 8(2) of the Rules of the Supreme Court.
- [6] On the first issue this Court agreed with *Alleyne J.* that Order 22 did not deal with payment into Court after judgment and the payment into Court was of no effect and that the Appellants were liable to pay interest to the Respondent until payment to the Respondent.
- [7] On the other issue the Court found there was no good reason why the tax liability imposed by Parliament on the Vendor, that is, the Respondent should be borne by the Appellants.
- [8] The Court disagreed with *Alleyne J.* on that issue and varied his judgment of April 19, 2000 to this effect.
- [9] The Court ordered the costs order made by *Alleyne J.* on April 19, 2000 to be set aside and ordered the Respondent to pay 50 percent of the Appellants' costs here and in the Court below to be agreed or otherwise taxed.

ALBERT N.J. MATTHEW  
Justice of Appeal