IN THE CARIBBEAN COURT OF JUSTICE
(Appellate Jurisdiction)

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Application No. BBCV2016/001
BB Civil Appeal No.

BETWEEN

CHRISTOPHER SALT
ABERCONIA LIMITED
BLOOMBAY HOLDINGS INC **APPLICANTS**

AND

KAUPTHING SINGER &
FRIEDLANDER LIMITED **RESPONDENT**

Before the Honourables - **Mr Justice Saunders**
Mr. Justice Wit
Mr Justice Anderson

Appearances -

Mr Alair Shepherd QC with Ms. Sumaya Desai for the Applicants

Mr Garth St E W Patterson QC with Mr. Bartlett Morgan for the Respondent

JUDGMENT
of
Justices Saunders, Wit and Anderson
Delivered by
The Honourable Mr Justice Adrian Saunders
on the 8th day of April, 2016

[1] On 22nd March 2016 we heard and summarily dismissed this application for Special Leave to appeal. This is our considered judgment in the matter.

[2] The Applicants, who we refer to as "the borrowers", owned or had ownership interests in a property in Saint James comprising ten luxury apartments ("the property"). The respondents ("the lenders") are financiers who loaned the

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borrowers substantial sums of money. The borrowers issued a debenture and mortgaged the property to the lenders as security for the loan. We have not been provided with all the relevant information but it is clear that the borrowers must have defaulted on their loan obligations. Litigation ensued in which the borrowers contested the validity of the loan agreement. They claimed that the agreement was void and that, as a consequence, any action taken under the security clauses was invalid.

[3] We need not be detained here by the various reasons why the borrowers contest the validity of the loan agreement and hence the security taken by the lenders. Nor do we in the slightest manner suggest that their claims to this end have or do not have merit. These are matters currently before the High Court. It suffices to state that, in keeping with rights given them by the security clauses, the lenders issued a notice indicating their intention to appoint a receiver over the property. The borrowers responded by applying to the High Court for an injunction to restrain the lenders from proceeding on the notice. The lenders countered with an application for summary judgment to be granted in their favour. On 3rd July, 2015, before these two applications could be heard, the lenders went ahead and appointed the receiver.

[4] On 20th July, 2015 the trial judge adjudicated the two applications. The judge declined to grant an injunction to restrain action by the receiver and adjourned her decision on the application for summary judgment. No written reasons were given by the judge for refusing the injunction. It is possible that the judge intended that those reasons would be given simultaneously with and embodied in a reasoned decision on the application for summary judgment. Unfortunately, to date, that decision has not been delivered and, based on what we heard during the Special Leave hearing, there is no consensus among counsel on the precise reasons why the judge refused the injunction.

[5] The borrowers were dissatisfied with the decision to refuse the injunction. They appealed that decision. They also asked the Court of Appeal to grant them an

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injunction, pending the determination of the appeal, to restrain the receiver from going about the receivership. The lenders voluntarily undertook not to proceed under the receivership but only until the first date given by the Court of Appeal for the hearing of the injunction i.e. 18th August 2015. When the matter was adjourned to 21st August 2015 the lenders extended the life of their undertaking to that later date.

[6] The Court of Appeal did not hear the matter on 18th August. Nor was it heard on 21st August 2015. There were subsequent adjournments to 15th September 2015, then 1st October 2015, then to 7th December 2015. We were informed that the successive adjournments were occasioned by the fact that the members of the Court of Appeal considered that before they embarked upon the appeal it was desirable for them to have the trial judge's reasons for refusing the injunction. It does not appear, or at least we have no indication, that in repeatedly adjourning the matter after 21st August, any consideration was given to the fact that the undertaking provided by the Respondents expired on that date. This naturally created a risk that, after that date, in the absence of a conservatory order, the receiver could sell off the property thereby rendering nugatory the application pending before the Court of Appeal to restrain the receiver precisely from doing that.

[7] Mr Shepherd QC, counsel for the borrowers, states that on (or shortly before) 7th December, without any hearing, the Court of Appeal, through its clerk, informed him that it regretted that it had forgotten to ask the Trial Judge for her reasons and that his clients' pending application would be further adjourned to the 3rd February 2016. Mr Shepherd's clients were very displeased at yet another adjournment. They say that by again adjourning the hearing, and especially in the manner in which it did so, the Court of Appeal failed to act judicially and/or to exercise fairly the undoubted discretion it has to adjourn proceedings. They accordingly applied to this Court for Special Leave to appeal the decision of the Court of Appeal to adjourn the proceedings. They also wished to obtain from

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this Court an interim injunction to restrain further action by the receiver if this Court were minded to grant Special Leave.

[8] As previously indicated, we dismissed the application for Special Leave and, by extension, the consequential application to restrain the receiver. We were constrained to do so because, as it turned out, it would have been superfluous to have granted the injunction claimed by the borrowers. During the course of argument, we learned from Mr Patterson QC, counsel for the lenders, that the receiver had already disposed of the entire property; that the receivership had come to an end and that there was therefore no longer anything to restrain. In the circumstances, even if Special Leave had been granted and the appeal decided in the borrowers' favour, little point would be served even if the Court of Appeal were ordered to hear the pending appeal in the soonest possible time.

[9] During the course of the proceedings, we also drew Mr Shepherd's attention to an independent ground on which, in any event, we might have felt disposed to refuse the application for an interim injunction. Any such application requires full and frank disclosure on the part of the applicant. We were not satisfied that in this case enough information was furnished to the Court about the circumstances giving rise to the borrowers' application to restrain the receiver so as to entitle this Court properly to exercise its discretion to grant the injunction requested. For example, there was inadequate or no information given about the size of the loan(s) made available by the lenders, the nature and content of the security documents and the event(s) that triggered the appointment of the receiver.

[10] We agree fully with Mr Shepherd and find nothing remarkable in the notion that the grant of an adjournment to one side over the objections of the other side is a procedural decision capable of being appealed. It is quite another thing, however, if the challenged decision to adjourn was made when both sides were ready and willing to proceed but the justice system unreasonably failed to accommodate a timely hearing. The latter scenario could conceivably implicate the state in a

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violation of the constitutional guarantee of a fair hearing within a reasonable time.[1] It was never quite clear to us which of these two scenarios was being urged upon us. If it was the former, then the application lacked a clear statement from the borrowers alleging that the lenders were repeatedly seeking and obtaining or actively supporting adjournments as a strategy, perhaps, to facilitate the selling off of the property by the receiver. We hasten to state that there is no evidence that the lenders were acting in this fashion. If, on the other hand, it was the intention to cite the state for a suspected breach of a constitutional guarantee then it would seem that a constitutional motion before the High Court and not an appeal to us would have been the more appropriate approach. In either case, we did not think that a grant of Special Leave was justified on the documents filed. We must, however, draw attention to the obvious point that courts should as far as possible strive to avoid the possibility that a litigant may be prejudiced irreparably by their inability or failure to adjudicate and conclude proceedings in a timely manner. This case had earlier been certified by the Chief Justice as one justifying urgent treatment and the manner in which it has been dealt with belies such certification.

[11] On a procedural note, we observed that the application for Special Leave was ostensibly brought under section 7 of the Caribbean Court of Justice Act on the ground that it raised a point of great general or public importance and was therefore fit to be submitted to this Court for its determination. The point of grave importance was, presumably, the ability or appropriateness of this Court to entertain an appeal against a Court of Appeal's decision to grant an adjournment or successive adjournments of a matter.

[12] It was an error for the borrowers to cite section 7 as the basis for their application. That section, unlike section 8, addresses itself to the exercise of discretion *by the Court of Appeal*. In the very first case tried by this Court[2], de la Bastide P clarified the relationship between sections 7 and 8 in this fashion:

[1] See Barbados Constitution s 18.
[2] *Barbados Rediffusion Service Limited v Mirchandani* (2005) CCJ 1(AJ), (2005) 69 WIR 35 at [29].

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> … [sections] 7 and 8 provide different routes by which a party aggrieved by a decision of the Court of Appeal may reach this court. The route via s 7 involves the obtaining of leave from the Court of Appeal on certain grounds which are specified in that section. The route via s 8 involves obtaining special leave from this court on grounds which are unspecified but are left to be determined by us. Notwithstanding the use of the words 'Subject to section 7' in s 8, these two routes are separate and independent of each other and do not intersect. The limitations imposed by s 7 on the grant of leave by the Court of Appeal do not apply to the grant of special leave by this court under s 8. Clearly the words 'Subject to section 7' do not have that effect. Similarly, it would be reading far too much into those words to construe them as requiring that every application made to this court for special leave under s 8 must be preceded by an (unsuccessful) application for leave under s 7.

[13] The borrowers' error was well-spotted by Mr Patterson but we waved aside his vigorous objection to the application on this ground. We were prepared to and did treat the filed application as having been made under section 8 which provides an independent basis for seeking Special Leave from this Court. We will not be quick to strike out an application for Special Leave to appeal to us merely because the wrong section of the relevant Act is invoked. It must be stressed, however, that irrespective of how much public or general importance such an appeal may have, to be successful the Special Leave application would have to demonstrate an arguable case. Special Leave will not be given where an appeal is wholly devoid of merit.[3] In similar fashion, if a litigant chooses to eschew his/her statutory appeal as of right, obtainable from the Court of Appeal, and instead chooses directly to seek Special Leave from this Court, there is no guarantee that such an application will be successful as, again, it will have to be

[3] See for example *Griffith v Guyana Revenue Authority* [2006] CCJ 1 (AJ) at [27]

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shown that if there is a realistic possibility of the appeal succeeding as was demonstrated in *System Sales Ltd v Brown-Oxley*.[4]

[14] We conclude by expressing the hope that the trial judge will give her reasoned decision on the summary judgment application as soon as possible so that the parties can then take any steps they deem reasonable and necessary for bringing this matter to an end. We considered the matter of the costs of this application and took the view that, as the lenders did not file any material opposing the application for Special Leave we would order each party to bear their own costs.

/ s / A. Saunders

The Hon Mr Justice A Saunders

/ s / J. Wit

The Hon Mr Justice J. Wit

s / W. Anderson

The Hon Mr Justice W Anderson

[4] See *System Sales Ltd v Brown-Oxley* [2015] CCJ 1 (AJ), (2015) 86 WIR 30 at [11].

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