[2014] JMCA App 1

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 33/2013

MOTION NO 10/2013

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE BROOKS JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

BETWEEN	**JOHN LEDGISTER**	**1st APPLICANT**
AND	**TREVOR LEDGISTER**	**2ND APPLICANT**
AND	**KARLENE LEDGISTER**	**3RD APPLICANT**
AND	**SELENA LEDGISTER**	**4TH APPLICANT**
AND	**HUGH LEDGISTER**	**5TH APPLICANT**
AND	**SUNNYCREST ENTERPRISES LIMITED**	**6TH APPLICANT**
AND	**BANK OF NOVA SCOTIA JAMAICA LIMITED**	**RESPONDENT**

1ST applicant in person and on behalf of the 6th applicant

William Panton and Miss Cindy Lightbourne instructed by DunnCox for the respondent

7 October 2013 and 13 January 2014

HARRIS JA

[1] I have read, in draft, the reasons given by my brother Brooks JA for the decision handed down in this matter on 7 October 2013. I agree with the reasons and have nothing to add.

BROOKS JA

[2] On 7 October 2013, we made the following orders in this matter:

> "(1) The application for leave to appeal to the Privy Council is refused;
>
> (2) Costs to the respondent to be taxed if not agreed."

We promised at that time to put our reasons in writing. We now fulfil that promise.

[3] On 5 June 2013, this court refused an application made by Messrs John, Trevor and Hugh Ledgister, Mesdames Karlene and Selena Ledgister and Sunnycrest Enterprises Ltd (collectively referred to hereafter as 'the applicants') to extend the time within which to appeal a decision of the Supreme Court. The applicants are aggrieved by the refusal and on 27 June 2013, filed the present motion seeking permission to appeal to Her Majesty in Council.

[4] The applicants assert that there is an appeal as of right under section 110(1) of the Constitution. Additionally, they state that the issues raised are of such public and general importance that they also qualify for permission under section 110(2). The respondent to the application, the Bank of Nova Scotia Jamaica Limited (the bank), opposes the motion on the basis that the issues involved in the litigation raise no genuine points of law and have no general or public importance.

[5] A clear summary of the facts involved in this case is set out in the judgment of Harris JA, which explains the reasons for the refusal of the application to extend time. It may be noted for these purposes, however, that the essential aspects of the case turn on the judgments in the court below of Pusey J and Mangatal J.

Background to the motion

[6] On 11 June 2008, in ruling on the bank's application for summary judgment, Pusey J granted the applicants permission to defend provided that they paid to the bank the sum of $5,000,000.00 on or before 1 September 2008, "**FAILING** which the [bank] will be granted Summary Judgment against the [applicants] on the Claim" (Emphasis as in original). It should be noted that the sum stipulated was slightly less than the sum of $5,200,000.00, which the applicants had stipulated would have been the indebtedness, at a particular point in time, had the bank not committed and persisted, according to them, in what could be described as egregious deception and misrepresentation. The applicants were, nonetheless, contesting liability on other bases and also had a counter-claim that they wished to pursue.

[7] The applicants failed to pay the sum ordered by Pusey J. As a result, the bank made another application to the court for summary judgment. It came before Mangatal J, on 19 September 2008. Having heard the application the learned judge ordered, in part, as follows:

> "The [applicants], not having complied with the proviso to the Order made by Pusey J. on June 11, 2008, there will be summary judgment for the [bank] on the Claim as filed."

The application for extension of time to appeal against those orders was filed on 19 April 2013, a delay of over three years. The reasons for failing to observe the time limit imposed by the Court of Appeal Rules included accusations of negligence, and worse, levelled against the applicants' former legal representative. As mentioned above, that application was refused by this court.

The submissions on the motion

[8] The 1st applicant, Mr John Ledgister, who is also a director of the 6th applicant, Sunnycrest Enterprises Ltd, represented the applicants in the application to extend time as well as in the present motion. In arguing the present motion, he submitted that the applicants had satisfied the requirements of section 110(1) of the Constitution because the value of the sum in issue is in excess of $1,000.00 and the order was a final decision of the bank's claim. It was a final decision, he argued, because the bank may now proceed to sell his property based on the summary judgment that has been granted.

[9] Additionally, he argued that the applicants' case also involved breaches of their rights guaranteed by section 18 of the Constitution "whereby no one should be dispossessed of his/her property except at a fair trial when there is a disputed claim" (paragraph 12 e (i) of the notice of motion). Mr Ledgister submitted further, that this matter also raised issues of general or public importance as the misrepresentation, of which the bank was guilty, by its own admission, potentially would have affected all its customers and it is to be noted that the bank not only has a local but also an international presence.

[10] In terms of the merits of his complaints against the orders of this court and of the court below, Mr Ledgister, among other things, stated that none of the courts that had considered this case had given any fair consideration to the applicants' case. He submitted that the courts had unconscionably sided with the bank in the bank's illegal attempts to deprive the applicants of their property. He submitted that the courts' decisions were in breach of natural justice and also subject to reversal in accordance with the "[c]lear directions from **Lord Diplock** in **Council of Civil Service Unions v Minister for the Civil Service**" (paragraph 12 of the notice of motion) (emphasis as in original).

[11] Mr Panton, on behalf of the bank, submitted that the applicants had failed to satisfy the requirements of section 110 of the Constitution. Learned counsel accepted that it could be argued that this was a final judgment in a civil matter involving value in excess of $1,000.00. He argued, however, that there were no contentious issues of law involved in this case. He stressed the fact that the applicants had admitted that they owed the bank approximately $5,200,000.00. He dismissed their accusations that it was their legal representative's negligence that had resulted in their predicament. Mr Panton pointed out that it was Mr John Ledgister, himself, who had signed the certificate of truth as to the abovementioned admission.

[12] Learned counsel also argued that whereas the issues would be of importance to the applicants, they were not of public or general importance and therefore, did not

qualify under section 110(2) of the Constitution. He urged the court to refuse the motion.

Analysis

[13] Although this area has been the subject of many judgments of this court, it is necessary, in light of the fact that the applicants are self-represented, to state at least the basics of the principles involved. Firstly, an application for permission to appeal to Her Majesty in Council must satisfy one of the provisions of section 110 of the Constitution. Section 110(1) allows for appeals as of right to the Privy Council. Those provisions state:

> "110.-(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council **as of right** in the following cases-
>
> (a) Where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, **final decisions in any civil proceedings**;
>
> (b) final decisions in proceedings for dissolution or nullity of marriage;
>
> (c) final decisions in any civil, criminal or other **proceedings on questions as to the interpretation of this Constitution**; and
>
> (d) such other cases as may be prescribed by Parliament." (Emphasis supplied)

[14] Although the "appeal lies as of right, it is still necessary to get leave to appeal", from this court (see page 2 of **Chas E Ramson Ltd and Another v Harbour Cold**

Stores Ltd SCCA No 57/1978 (delivered 27 April 1982)). Upon the permission to appeal being sought, this court is obliged to satisfy itself that the case meets at least one of the requirements of section 110(1).

[15] The second basic principle is that in considering paragraph (a) above, it is to be noted that it is accepted that the value of the property in dispute is to be considered cumulatively with the decision being a final decision in civil proceedings. In other words, that the property value requirement had to be satisfied **and** the decision had to be a final decision in civil proceedings. The cumulative requirement was expressly stated in **Georgette Scott v The General Legal Council (Ex-Parte Errol Cunningham)** SCCA No 118/2008 (delivered 18 December 2009). Phillips JA, in giving the judgment of this court on an application for permission to appeal to Her Majesty in Council, stated at page 7:

> "With regard to section 110(1)(a) of the Constitution, this Court is of the view that the applicant must show the following:
>
> (1) that the decision being appealed is a final decision in a civil proceeding **and**
>
> (2) that the matter in dispute on the appeal is of the value of one thousand dollars or upwards, **or**
>
> (3) that the appeal involves directly or indirectly a claim to or question respecting property of a value of one thousand dollars or upwards; **or**
>
> (4) that the appeal involves a right of the value of one thousand dollars or upwards." (Emphasis supplied)

[16] The Court of Appeal in Grenada in **Bowen and Another v Dipcon Engineering Services Limited** Civil Appeal No 22 of 2004 (delivered 8 December 2005), seemed to have accepted the proposition of a cumulative requirement when it considered a provision expressed in very similar terms to section 110(1). In that case, it was not disputed that the value of the matter in dispute was greater than the figure stipulated in the relevant section of the constitution of that country. Counsel for the applicant in that case submitted that the provision concerning the issue of, '"final decisions in civil proceedings', should not be read in conjunction with the words [in the section] that precede them" (paragraph 8 of the judgment). Counsel for the respondent argued that the words "final decisions in civil proceedings", "must be read as qualifying the preceding word[s] [in the section]" (paragraph 9 of the judgment).

[17] Other than for noting that the drafting style used in that section may not have been as clear and as modern as similar legislation in another jurisdiction, the court did not make a specific finding on those competing submissions. Instead, it analysed the issue of whether that case concerned a final decision in civil proceedings and concluded that it did not. The court then ruled that the applicant was not entitled to leave to appeal, by virtue of that section. Implicit in the decision, therefore, is the principle that both requirements must be met.

[18] That principle is also implicit in the Privy Council decision in an appeal from the decision of this court in **Walter Fletcher v Income Tax Commissioner** [1972] AC 414. In that case, there was no issue concerning the matter being a final decision in

civil proceedings. What was in issue was whether the matter in dispute on the appeal to Her Majesty in Council was of the value of, the then equivalent of, one thousand dollars or upwards. Their Lordships found that that monetary threshold had not been achieved and decided that the appellant was, therefore, not entitled to appeal as of right. The Board, thereafter, heard the appeal by way of a special grant of leave to appeal.

[19] The third basic principle raised by the instant case concerns the determination of what constitutes a "final decision". This court has accepted that, what is known as the "application test", is the appropriate test for determining what constitutes a final decision in civil proceedings. One of the clearest explanations of the application test is contained in the judgment of Lord Esher MR in **Salaman v Warner and Others** [1891] 1 QB 734, when he stated at page 735:

> "The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

[20] That approach has been accepted, in a number of judgments of this court, as being the applicable test. The cases utilising, with approval, the above quote, include **Strachan v The Gleaner Company Ltd and Another** SCCA No 54/1997 (delivered 18 December 1998). It was also, more recently, approved in the oral judgment of Panton P in **Willowood Lakes Ltd v The Board of Trustees of The Kingston Port**

Workers Superannuation Fund SCCA No 98/2009 and Motion No 12/2009 (delivered 30 October 2009).

[21] In **Jamaica Public Service Company Limited v Rose Marie Samuels** [2010] JMCA App 23, although not dealing with a case involving section 110(1), Morrison JA considered the question of whether or not an order for summary judgment was a final decision. After having examined the various authorities on the question of what constituted a final decision, Morrison JA stated at paragraph [23] of his judgment:

> "Summary judgment in fact seems to me to provide a classic example of the operation of the application principle, since if it is refused, the judge's order would clearly be interlocutory and so, equally, where it is granted, the judge's order remains interlocutory."

[22] The fact that the summary judgment in **Jamaica Public Service** required the subsequent assessment of damages, does not affect the principle enunciated by Morrison JA, that an order for summary judgment is an interlocutory order, based on the application test set out in **Salaman v Warner and Others**. In applying that principle to the instant case, it may be concluded that although the value involved in exceeds the sum of $1,000.00, it would not qualify for an appeal as of right under section 110(1)(a) of the Constitution, as it does not concern a final decision in the claim. It is to be noted that the applicants' counter-claim, although it may be considered a separate claim, is yet to be tried.

[23] The fourth basic principle is that paragraph (c) of section 110(1) is not generally aimed at addressing breaches of constitutional rights. Section 110(1)(c) speaks to

"questions as to the interpretation of this Constitution". Mr Ledgister's submission that the case involves breaches of his constitutional rights must, therefore, fail. There are, despite the force with which those submissions were made, no questions of interpretation of the Constitution involved in this matter.

[24] Their Lordships in the Privy Council decision of **Alleyne-Forte v Attorney-General and Another** (1997) 52 WIR 480 stipulated a restriction to granting permission to appeal to Her Majesty in Council. They pointed out that before granting permission, the appellate court must ascertain "that the proposed appeal raises a genuinely disputable issue in the prescribed category of case". Their Lordships, although then dealing with a case involving the constitutionality of a statutory provision in Trinidad and Tobago, did not restrict that injunction to constitutional cases, but apparently applied it to all the categories of appeals by way of right. The relevant provisions of the Constitution of that country are not identical to section 110 but the differences are not material for the purpose of applying their Lordships' injunction.

[25] Mr Panton's submission that there are no genuinely disputable issues of law raised by this case is correct. The principle, as set out by their Lordships in the previous paragraph, would therefore, be applicable to the instant case.

[26] The fifth basic principle is that where there is no entitlement to an appeal as of right, an applicant must satisfy this court that it qualifies under section 110(2). Section 110(2) states:

> "(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases-
>
> (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of **its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council**, decisions in any civil proceedings; and
>
> (b) such other cases as may be prescribed by Parliament." (Emphasis supplied)

Guidance as to the standard raised by this section may be found in the judgment of Morrison JA in **Michael Levy v Attorney General of Jamaica and Another** [2013] JMCA App 11 at paragraphs [27] through [35].

[27] In **Michael Levy**, Morrison JA approved the principle that the phrase, "'general or public importance', must perforce connote importance through the eyes of the law" (paragraph [34]). The learned judge of appeal pointed out that whereas an issue may have "critical importance and concern to [an applicant] personally", and may be even of importance to others, it may not even come "close to satisfying the criterion of general or public importance from a legal standpoint" (see paragraph [35]).

[28] Those comments are appropriate to the instant case, which involves a loan by a bank to the applicants and a dispute as to whether the applicants had failed to repay the loan. Additionally, the question of the procedure for securing summary judgment in that situation is raised. Despite the effect on the applicants in the instant case and the fact that there may be many other similar situations involving other persons, there are no issues of great general or public importance raised by these circumstances. Mr

Ledgister's submissions that the issues raised in this case qualify for permission under section 110(2) must also fail.

Conclusion

[29] Based on all the above, it must be found that the applicants have failed to satisfy the court that the issues raised by the instant case qualify under either subsection of section 110 of the Constitution. The application does not satisfy the requirements of being an appeal from a final decision in civil proceedings, it does not involve any questions as to the interpretation of the Constitution and it does not involve any issue of great general or public importance, warranting reference to Her Majesty in Council. Their application for permission to appeal to Her Majesty in Council must, therefore, fail. It is for those reasons that I agreed that the orders, set out at paragraph [2] hereof, should have been made.

Lawrence-Beswick JA (Ag)

[30] On 5 June 2013, this court refused an application by the applicants to extend the time within which to appeal a decision of the Supreme Court. On 7 October 2013, we refused leave to appeal that decision to Her Majesty in Council. I have had the privilege of reading the judgment in draft of my learned brother. I agree with the reasons therein in all regards except that in my view, in considering whether an appeal from a decision shall lie as of right under section 110(1)(a) of the Constitution, the value of the property in dispute should not be considered conjunctively with the decision being a final decision in civil proceedings.

[31] This judgment involves an interpretation of section 110(1) (a) of the Constitution which provides:

> "110. (1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases-
>
> (a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards**,** final decisions in any civil proceedings;
> (b) ....
> (c) .....
> (d) …".

I am of the view that section 110(1)(a) of the Constitution should be read as allowing each of the categories there listed to have the right to appeal to Her Majesty in Council:- 1) where the matter in dispute is of the value of one thousand dollars or upwards, 2) where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards or 3) final decisions in any civil proceedings.

[32] It is my opinion that in this subsection the comma replaces the word "or" and that the legislators intended the categories to be read disjunctively, that is, each of the categories in subsection (a) having the right to appeal as of right to Her Majesty in Council. I am unable to conclude that the categories should be read conjunctively or that the words "final decisions" must be read as qualifying the preceding words.

[33] In **Administrator-General for Jamaica v Neville Sewell and Jamaica Omnibus Services Ltd** (1969) 11 JLR 310, this court considered the interpretation of section 110(1)(a) of the Constitution and refused leave to appeal an order to Her Majesty in Council. That decision was based on the determination that the order being appealed was not a final order, but was interlocutory and therefore, could not be appealed as of right.

[34] In **Gregory Bowen and Attorney General of Grenada v Dipcon Engineering Services Limited** (Grenada Civil Appeal No 22 of 2004, delivered 8 December 2005), the Court of Appeal of Grenada considered section 72 of the Grenadian Constitution which itself is similar to section 110 of the Jamaican Constitution. It adopted the approach of this court and dismissed Dipcon's application for leave to appeal to Her Majesty in Council from a judgment which it regarded as not being final.

[35] However, it cannot be overlooked that in the **Neville Sewell** case, the test which was applied to determine that the judgment being appealed was interlocutory and not final (**Bozson v Altrinchan UDC** [1903] 1 KB 547), is no longer being used in this court and has been replaced by the application test. The criteria as to what constituted an interlocutory judgment when **Neville Sewell** was decided are now different. In **Jamaica Public Service Company Limited v Rosemarie Samuels** [2010] JMCA App 23 Morrison JA reviewed the history of the application test up until the current position where this court has now accepted that summary judgments are to be regarded as being interlocutory.

[36] In **Georgette Scott v the General Legal Council** (**ex parte Errol Cunningham**) [SCCA 118/2008 delivered 18 December 2009], this court stated that an applicant under section 110(1)(a) of the Constitution must show that the decision being appealed is a final decision in a civil proceeding and that it satisfies another criterion of the section. However, the court had not had the benefit of any submissions on, or references to, any effect that **Neville Sewell** and **Rosemarie Samuels**, may have had on the interpretation of the section.

[37] If it is interpreted that an appeal as of right to Her Majesty in Council lies in the case of final decisions only, then all interlocutory judgments, of whatever type, would be denied an appeal as of right to Her Majesty in Council. This includes many and varied applications, but of particular interest perhaps, would now include summary judgments. It appears to me that even though summary judgments must be regarded as being interlocutory, they do in fact regularly result in final determination of matters, and yet they could not be appealed as of right to Her Majesty in Council. A summary judgment which in fact terminated a matter would thus be treated in a manner inferior to a judgment obtained at a trial and which also terminated a matter.

[38] If section 110(1)(a) of the Constitution is interpreted to apply only to final decisions, that results in the exclusion of what may be a sizeable number of litigants from having access as of right to the final appellate court. At the same time, it is clear that unlimited access of all matters to Her Majesty in Council would be impractical and may also be viewed as being both undesirable and unreasonable. Ready access of all

interlocutory matters to an appeal as of right to Her Majesty in Council could conceivably result in severe delays to the litigation process. There is no gainsaying that an appeal to Her Majesty in Council ought to involve an issue of some great moment, either as it concerns individuals or the public in general. However, in my view, the drafting of section 110(1)(a) has restricted its interpretation.

[39] The drafting of sections 110(1)(b) and 110(1)(c) of the Constitution differs from that in section 110(1)(a) by clearly providing for "final decisions" at the start of the paragraphs. This contributes to my view that the difference in the drafting of section 110(1)(a) should be considered as being deliberate and it is to be construed differently from section 110(1)(b) and (c). The entire section provides:

> "110. (1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases-
>
> (a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards**, final decisions** in any civil proceedings;
>
> (b) **final decisions** in proceedings for dissolution or nullity of marriage;
>
> (c) **final decisions** in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution;
>
> (d) ……"(emphasis supplied)

[40] It is of no small interest that the Court of Appeal of Grenada in **Gregory Bowen** commented on the "clear and modern drafting style" of the equivalent provision of the Anguillan Constitution which provides:

> "**final decisions** in any civil proceedings where the matter in dispute on the appeal is of the value of EC$2,500 or upwards or where the appeal involves directly or indirectly a claim to or a question respecting property or a right of the value of EC$2,500 or upwards." (emphasis supplied)

[41] Further, section 109 (1) of the Constitution of Trinidad and Tobago provides that an appeal shall lie from decisions of the Court of Appeal to the Judicial Committee as of right in the following cases:

> "(a) **final** decisions in civil proceedings where the matter in dispute on the appeal to the Judicial Committee is of the value of fifteen hundred dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of fifteen hundred dollars or upwards;
>
> (b) ……
>
> (c) ……" (Emphasis supplied)

This provides clearly that the judgment being appealed must be final.

[42] It is therefore my view that section 110(1)(a) of the Jamaican Constitution as currently framed, having the words "final decisions" towards the end of the sub-section, permits of only one interpretation. It must be construed to allow for three separate categories of case, including interlocutory matters which meet certain specified criteria, to appeal as of right to Her Majesty in Council (see para [2]). That is the natural effect

of the comma which separates "final decisions" from the previous words in section 110 (1)(a) of the Constitution.

[43] I am therefore of the view that an appeal from the issues raised in this case would lie as of right under section 110(1)(a) of the Constitution because the appeal concerns a question respecting property of the value of one thousand dollars or upwards.

[44] However in **Alleyne-Forte (Learie) v Attorney-General and Another** (1997) 52 WIR 480, at page 486 the Judicial Committee of the Privy Council stated:

> "An Appeal as of right, by definition, means that the Court of Appeal has no discretion to exercise. All that is required, but this *is* required, is that the proposed appeal raises a genuinely disputable issue in the prescribed category of case;" (Lord Nicholls) (Emphasis as in original)

[45] The Caribbean Court of Justice (CCJ) in **Brent Griffith v Guyana Revenue Authority and Attorney General of Guyana** [2006] CCJ 1 at para 19 referred to **Alleyne-Forte**. There the court stated that in granting leave to appeal as of right to the CCJ, the local Guyanese Court of Appeal must form the view that the proposed appeal raises a genuinely disputable issue in the category of case although "this is little more than a gate-keeping exercise since the appeal is as of right….."

[46] This appeal raises no genuinely disputable issue, involving as it does, primarily an issue of accounting between the parties. Therefore I would refuse leave to appeal as of right to Her Majesty in Council under section 110(1)(a) of the Constitution. Further,

I agree with my learned brother's reasons and conclusion that the instant case ought not to qualify to be granted leave to appeal to Her Majesty in Council under section 110(1)(c) and 110(2) of the Constitution which are concerned with cases about the interpretation of the Constitution and cases about matters of great general or public importance respectively. I therefore respectfully differ from my learned brother in the interpretation of section 110(1)(a) of the Constitution but agree with his other reasons and conclusion that the application for leave to appeal to Her Majesty in Council should be refused.