[2009] CCJ 4 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF
THE CO-OPERATIVE REPUBLIC OF GUYANA

CCJ Application No. AL 2 of 2008
GY Civil Appeal No. 27 of 2006

BETWEEN

L.O.P. INVESTMENTS LIMITED **APPELLANT**

AND

DEMERARA BANK LIMITED
GARRETT WARD
RAMON GASKIN **RESPONDENTS**

Before The Rt. Honourable **Mr Justice de la Bastide, President**
And The Honourables **Mr Justice Nelson**
Mr Justice Pollard
Madame Justice Bernard
Mr Justice Wit

Appearances

Mr Sanjeev Datadin for the Appellant

Mr Vidyanand Persaud and Mr Parmanand Mohanlall for the 1st and 2nd Respondents

JUDGMENT OF THE COURT

Delivered by The President
The Right Honourable Mr. Justice Michael de la Bastide
on the 1st day of May 2009

JUDGMENT

The Application

[1] This was an application for special leave to appeal to the Caribbean Court of Justice from a judgment of the Court of Appeal of Guyana (Ramson, Roy and Cummings-Edwards JJA) which dismissed the applicant's appeal from a decision of Moore J. On the 24th November, 2008, after a hearing conducted by means of a teleconference, we granted the applicant special leave to appeal the Court of Appeal's decision on the condition that the applicant provide security for the respondents' costs in the sum of GY$1,000,000 by a deposit of cash, within 14 days. What follows is the written reasons for our decision.

The Background

[2] At the centre of the factual background to this case are two debentures issued by the applicant in favour of the respondent bank to secure advances by the respondent bank to the applicant totaling GY$100 million. The applicant defaulted in repayment of the moneys lent and the respondent bank in exercise of the power in that belief conferred on it by the debentures, appointed first the second respondent, and then when he withdrew, the third respondent, to be receiver of the applicant's assets (which consisted mainly of a rice mill). These proceedings were initiated by a writ filed by the applicant on the 9th September, 2005, challenging the validity of the appointment of the receivers and the lawfulness of the actions taken by the third respondent in pursuance of his appointment. In that action the applicant claimed declaratory and injunctive relief as well as damages. The respondent bank countered by filing a writ of its own on the 3rd November, 2005, by which it complained of the allegedly unlawful interference by the applicant in the conduct of the receivership and sought an injunction and damages. These two actions were by consent consolidated.

[3] Moore J. gave judgment for the respondents and ordered the applicant to pay damages to the third respondent in the sum of GY$350,000 and costs to the respondents in the sum of GY$300,000. As already stated, the applicant's appeal to the Court of Appeal was dismissed. In a judgment delivered by Ramson J.A. the objections of the applicant to the validity of the debentures and the appointment of the receivers were treated as manifestly unsound but there was no reasoned refutation of them.

[4] The applicant then applied to the Court of Appeal for leave to appeal to this Court on two grounds. The first was that an appeal lay as of right under section 6(a) of the Caribbean Court of Justice Act ("the CCJ Act") as the matter in dispute was of the value of more than GY$1,000,000 or the appeal involved a claim or question respecting property of equivalent value. Secondly, it was contended that the question involved in the appeal

was one that by reason of its great general or public importance or otherwise, ought to be submitted to this Court pursuant to section 7(a) of the CCJ Act.

The judgment of the Court of Appeal

[5] In a judgment delivered by Ramson J.A., the Court of Appeal (Ramson, Roy and Cummings-Edwards JJA) refused leave to appeal on the ground that the appeal did not raise a genuinely disputable issue of law or fact. We hold that this decision was wrong for two reasons. Firstly, the Court of Appeal having found that the case fell within the ambit of section 6(a) of the CCJ Act since the value of the property in dispute was more than GY$1million, the applicant was entitled to appeal to this Court as of right and the Court of Appeal was not entitled to refuse leave to appeal on the ground that the applicant's case was so weak that it could not be said to raise any issue of law or fact that was "genuinely disputable". Secondly, although the issue did not properly arise, we do not share the Court of Appeal's view that it is "overwhelmingly obvious" that the applicant's case must be rejected.

[6] Mr. Justice Ramson took exception to the description of the Court of Appeal's function in determining claims to appeal as of right under section 6 of CCJ Act as a 'gate-keeping' exercise. We do not consider that this metaphor has a pejorative connotation or that its use diminishes the Court of Appeal in any way. Sub-paragraphs (a) to (d) of section 6 provide access to this Court for would-be appellants and the Court of Appeal has the responsibility when dealing with applications for leave to appeal, of ensuring that no one who does not properly qualify, takes advantage of these means of access. It is not the only function which the Court of Appeal performs in relation to such applications. The Court of Appeal also hears and determines applications for leave to appeal as a poor person and fixes the amount of security (if any) to be provided by the applicant and the form in which, and the time within which, such security is to be provided: see in this connection Rules 10.6(2), 10.7 and 10.17 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules as amended.

[7] The Court of Appeal adverted to the possibility that an application for leave to appeal (even where there was an appeal as of right) might be refused if the application constituted an abuse of the process of the court. The Court of Appeal, however, correctly recognised that it was only in exceptional cases that such a course would be justified and that the apparent hopelessness of the proposed appeal would not provide such justification. In any event the Court of Appeal did not seek to justify its refusal of leave on the ground that the application for leave constituted an abuse of process. We consider that it was right not to have done so.

"Disputable Issue"

[8] We turn now to explain why the concept of a genuinely disputable issue had no relevance in the instant case and following that we will identify what we conceive in any event to be a 'genuinely disputable' issue of law raised by the applicant.

[9] It was common ground that this case fell within the ambit of section 6(a) of the CCJ Act and that the applicant was therefore entitled to appeal as of right to this Court. This was accepted by the Court of Appeal and was expressly conceded before us by counsel for the respondents. In those circumstances we hold that the Court of Appeal was wrong to believe that it had a residual discretion to refuse leave to appeal on the ground that in its view the applicant's case did not raise a 'genuinely disputable issue' of fact or law.

[10] The Court of Appeal in support of its decision to refuse leave cited a passage from the judgment delivered by Mr. Justice Nelson in *Griffith v The Guyana Revenue Authority*[1] in which the expression "genuinely disputable issue" is to be found. It is important, however, to put this expression in context by quoting the whole of the relevant paragraph in Mr. Justice Nelson's judgment. It reads as follows:

> "[19] Even where the local statute or the Constitution (as the case may be) grants an appeal "as of right", leave must still be obtained from the local court from which the appeal lies: see rule 10.2(a) of the CCJ Rules, which have the force of law in Guyana. The local Court of Appeal must then form a view as to whether "the proposed appeal raises a genuinely disputable issue in the prescribed category of case": see per Lord Nicholls in ***Alleyne-Forte v Attorney-General*** [1997] 4 LRC 338, 343; (1997) 52 WIR 480, 486E. However, this is little more than a gate-keeping exercise since the appeal is as of right. <u>There is no discretion in the Court of Appeal to withhold leave in an as-of-right case on the ground that the appeal lacks merit</u>: see ***Lopes v Chettiar*** [1968] AC 887 (PC). Similarly, where the appeal is as of right the local Court of Appeal may not in its inherent jurisdiction impose terms and conditions not contained in the legislative instrument granting the right of appeal: see ***Crawford v Financial Institutions Services Limited*** (2003) 63 WIR 169." (emphasis added).

[11] It is to be noted that Mr. Justice Nelson stated quite unambiguously that in an as of right case the Court of Appeal is not entitled to refuse leave because it considers the appeal to be without merit. But this is exactly what the Court of Appeal did in this case. We wish to reaffirm Mr. Justice Nelson's clear and simple statement and to emphasise that nothing contained in the rest of the passage quoted serves to derogate from it in any way.

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[1] [2006] CCJ 2 (AJ)

[12] Mr. Justice Nelson adopted a passage from the judgment of Lord Nicholls in *Alleyne-Forte* which points to the need for the Court of Appeal to find that the appeal raises a "genuinely disputable issue in the prescribed category of case" before it grants leave to appeal, even in cases where the appeal is claimed to lie as of right. In order properly to interpret and apply this dictum it is important not to separate the expression "genuinely disputable issue" from the words which immediately follow it i.e. "in the prescribed category of case", and also to be conscious of the context in which the whole phrase was used by Lord Nicholls and by Lord Diplock before him.

[13] In *Eric Frater v. R*[2] Lord Diplock said:

> "In their Lordships' view similar vigilance should be observed to see that claims made by appellants to be entitled to appeal as of right under section 110 (1)(c) are not granted unless they do involve a genuinely disputable question of <u>interpretation</u> [his emphasis] of the Constitution and not one which has merely been contrived for the purpose of obtaining leave to appeal to Her Majesty in Council as of right."

In *Alleyne-Forte (supra)* the relevant part of Lord Nicholls' judgment comes at the end when having found that there had been no breach of the appellant's fundamental rights, he turned to deal 'obiter' with a matter raised by the respondent in its written case. This is how he introduced the matter:

> "Their Lordships mention one further point. Under section 109 (1)(c) of the Constitution an appeal lies as of right to the Judicial Committee from final decisions of the Court of Appeal 'in any civil, criminal or other proceedings which involve a question as to the interpretation of this Constitution'. In their written case the respondents submitted that there was here no genuinely disputable question of interpretation of the Constitution, as distinct from its application to a particular set of facts, and that the appellant was not entitled to appeal as of right."

After quoting from the judgment of Lord Diplock in *Frater* a passage which includes the one that has been quoted above, Lord Nicholls continued:

> "Had this been an appeal under section 109 (1)(c) (the equivalent of section 110 (1)(c) in the Jamaica Constitution) there might have been force in this submission ... . <u>An appeal as of right, by definition means that the Court of Appeal has no discretion to exercise</u>. All that is required, but this is required, is that the proposed appeal raises a genuinely disputable issue in the prescribed category of case; here, a claim under section 14 to redress a contravention of a provision for the protection of a fundamental right. Contrary to the submission of Mr. Mendes, that principle is as much

[2] [1981] 1 WLR 1468 at 1470

> applicable to an appeal under section 109 (1)(d) as it is to an appeal under section 109 (1)(c). It is unnecessary however for their Lordships to express any opinion on the application of that principle in this case; that is not an issue which is before them" (emphasis added).

[14] It is striking that in speaking of the need to find a genuinely disputable issue, Lord Diplock was dealing only, and Lord Nicholls initially, with a claim to appeal as of right on the ground that the appeal involved a question of 'interpretation' of the Constitution within the meaning of provisions that correspond with section 6 (c) of the CCJ Act. Claims of this kind are not infrequently made when what is involved is not truly a question of interpretation, but a question of application of some constitutional provision. Even in the relatively short life of this Court we have had occasion to deal with such a claim: see *The Queen v Mitchell Lewis*[3]. The question in that case was whether the accused was deprived of a fair trial as a result of certain prejudicial statements made by counsel in the presence of persons who subsequently became jurors in the case. It was held by this Court that the question involved was not one of interpretation of the constitutional provision which guarantees the right to a far trial, but rather its application to the particular facts of the case. In delivering the majority judgment in that case, I said:

> "We would respectfully adopt the remarks of Lord Diplock [in *Frater*] and Lord Keith [in *Joseph v the State of Dominica*][4] with regard to the need for vigilance by the Court of Appeal when dealing with claims to appeal as of right on the ground that the case involves a question of interpretation of the Constitution".

[15] What Lord Diplock in *Frater* said about the need for a genuinely disputable question of interpretation as a precondition for granting leave to appeal, was said with reference to cases in which it is claimed that there is an appeal as of right because the case involves a question of interpretation of the Constitution, and has to do with the correct classification of the question raised, rather than with the merits of the applicant's case. Lord Diplock's observations were adopted by Lord Keith in *Joseph (supra)* and by Lord Nicholls in *Alleyne-Forte (supra).* Lord Nicholls appears to have extended them to <u>all</u> the categories of case in which an appeal lies as of right when he said: "All that is required, but this is required, is that the proposed appeal raises a genuinely disputable issue <u>in the prescribed category of case...</u>". (emphasis added). The particular category of case with which Lord Nicholls was dealing in <u>*Alleyne-Forte*</u> and to which he expressly held that the requirement did extend, was that in which the jurisdiction of the High Court to grant redress for breach of fundamental rights has been invoked. This corresponds with the category of case covered by section 6 (d) of the CCJ Act. In *Alleyne-Forte* it was held that there had been no contravention of constitutionally protected rights but because the

[3] [2007] CCJ 3 (AJ)
[4] (1988) 36 WIR 216

issue did not arise, the Privy Council expressly refrained from ruling as to whether the appeal before them did raise a genuinely disputable issue in that category of case. Presumably if the Privy Council had had to rule, then if they adopted Lord Diplock's approach, they would have concerned themselves with whether the case fell fairly within the boundaries of the category of case to which it was being assigned rather than with the appellant's chances of success.

[16] In any event, in this case we are not concerned with a claim to appeal as of right in the category of case prescribed by section 6 (d) of the CCJ Act. That sub-paragraph confers a right of appeal to this Court

> "in any proceedings that are concerned with the exercise of the jurisdiction conferred upon the High Court relating to redress for the contravention of the provisions of the Constitution for the protection of fundamental rights."

It is not necessary, therefore, for us to decide finally whether the requirement of a "genuinely disputable question" applies (as Lord Nicholls held that it did) to cases in which a right to appeal is claimed under section 6 (d) or its equivalent. We do not accept that it can be used in any category of case to deny leave to appeal to an applicant on the ground that in the view of the Court of Appeal there is no merit in the proposed appeal. It may be, however, that the test of 'a genuinely disputable issue in the prescribed category of case' may be used to unmask an attempt to dress up some other type of claim as a claim for contravention of fundamental human rights.

[17] With regard to the category of case with which we are concerned here, that is, that prescribed by section 6 (a) of the CCJ Act, we have no hesitation in holding that once the proceedings are civil in nature and the matter in dispute is of the value of the prescribed amount or the appeal involves a claim or a question respecting property or a right of equivalent value, leave to appeal must be granted. In this category of case there is no requirement that the applicant for leave to appeal must demonstrate "a genuinely disputable issue of fact or law".

[18] We do not exclude the possibility that the Court of Appeal may in rare cases take action to prevent an abuse of the process of the Court by striking out an application for leave to appeal, even in as of right cases. But to justify such a step, something more than a perceived lack of merit in the proposed appeal would have to be demonstrated. In addition to that there would have to be an element of oppression, perversity or pure malice. In this context I would regard as perverse a claim which warranted the description 'frivolous and vexatious'. As already mentioned, however, the Court of Appeal did not purport to refuse leave to appeal in exercise of its jurisdiction to prevent an abuse of process.

Entitlement to Leave

[19] For these reasons therefore we hold that the Court of Appeal having found that the value of what was in dispute exceeded GY$1,000,000, ought to have granted the leave to appeal to which the applicant was entitled.

[20] It is unnecessary to decide whether in the alternative the applicant should have been granted leave to appeal under section 7 (a) of the CCJ Act on the ground that the appeal raised a question which by reason of its great general or public importance or otherwise ought to be submitted to the CCJ. Having regard to the need for an authoritative statement by a final court of how debentures fit into the mixed system of Roman Dutch law, common law and statute law in Guyana (as explained more fully below), we are inclined to think that the Court of Appeal might well have granted leave to appeal under this section, if it had been necessary. In saying so we have in mind particularly the widening of the Court of Appeal's discretion effected by the inclusion of the words "or otherwise" in section 7 (a).

Special Leave

[21] Although the Court of Appeal wrongly refused leave to appeal we nevertheless had a discretion to grant or refuse special leave to appeal. As stated by Mr. Justice Nelson in *Griffith v Guyana Revenue Authority (supra)* at paragraph [23], "the Court [i.e. the CCJ] however always has the option of refusing special leave, even in as of right cases, if it finds that the appeal has no realistic chance of success". We did not however, exercise the discretion we have to refuse special leave in this case, partly because in our provisional view the applicant's case is not as hopeless as the Court of Appeal thought, but also because there does not appear to have been to date any authoritative and reasoned exposition by any court in Guyana of the impact of the Civil Law of Guyana Act and the Companies Act on those provisions of a debenture which create, and provide for the enforcement of, a security interest. It seems to us that regardless of the outcome of the appeal, it would be of benefit both to the legal profession and the commercial sector in Guyana to have definitive answers to some of the questions raised by the applicant in this case.

[22] The argument for the applicant is that the provisions in the debentures which create a fixed charge over the fixed assets of the company and a floating charge over its other property and provide for the realisation of the security interest thus created by the appointment of a receiver and the exercise by the receiver so appointed of a power of sale, amount in effect to a hypothecation of the company's property. Therefore, it is argued, the Roman Dutch law provisions which govern the creation and enforcement of a

conventional mortgage and hypothec and have been expressly preserved by section 3 (d) (ii) of the Civil Law of Guyana Act, are inconsistent with this aspect of the debentures and render them '*pro tanto'* invalid. The requirements in the law of Guyana for the creation of a conventional mortgage or hypothec involve the passing of transport before the Registrar of the Supreme Court. Notice of the proposed transport must be published in the Gazette and there is a right given to other creditors of the proposed mortgagor or other persons interested in the property, to oppose the transaction. The enforcement of a mortgage or hypothec in the law of Guyana involves the bringing of foreclosure proceedings by the mortgagee and the obtaining from the court of an order for sale. It was argued that in so far as a debenture purports to create a charge over land, which may be enforced by an out of court receiver exercising a power of sale conferred on him by the debenture, it does not comply either in respect of its creation or its enforcement, with the requirements of Guyana law and therefore is void, notwithstanding section 234 of the Companies Act 1991. This section provides as follows:

> "234. A debenture not secured by a separate mortgage or charge but which has been duly registered after a notice of the intended registration has been published in the Gazette and one local newspaper not less than seven days previous to the registration, shall be valid and shall rank as a mortgage notwithstanding that it has not been secured by any separate mortgage or charge."

It is noteworthy that while the section requires advance publication of the intended registration of a debenture, there appears to be no right given to anyone to oppose its registration.

[23] It is submitted for the applicant that this section contains nothing which exempts the debenture from compliance with the usual requirements for the creation and enforcement of a conventional mortgage or hypothec. The suggestion is that the validity conferred is limited to the contracted aspects of the debenture.

Just as it was held to be impossible to evade the procedural requirements for creating and enforcing a legal mortgage by creating an equitable mortgage by a deposit of title deeds (see *In re Samson;ex parte Official Receiver*[5]*)* so too it is argued that equity cannot be invoked in order to enable a debenture to be used to achieve the same result.

[24] It would not be appropriate for us at this stage to express any opinion as to the strength or weakness of this argument. It is sufficient for us to say that we are not prepared at this stage to deem the applicant's case to be unarguable. In these circumstances, we found no justification for not granting him special leave to appeal, given that he had wrongly been

[5] [1922] LRBG 133

refused leave to appeal by the Court of Appeal. Accordingly, we made the order mentioned in paragraph [1] above.

_____/s/_____
The Rt. Hon. Mr. Justice Michael A. de la Bastide (President)

_____/s/_____
The Hon. Mr. Justice R. Nelson

_____/s/_____
The Hon. Mr. Justice D. Pollard

_____/s/_____
The Hon. Madame Justice D. Bernard

_____/s/_____
The Hon. Mr. Justice J. Wit