

[2008] 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 Appeal No. CV 13 of 2007
GY Civil Appeal No. 46 of 2003**

Between

ELIZABETH ROSS

Appellant

And

COREEN SINCLAIR

Respondent

**Before the Right Honourable Mr Justice de la Bastide, President
and the Honourables Mr Justice Nelson
Mr Justice Saunders
Madame Justice Bernard
Mr Justice Wit**

On Written Submissions

**Mr Stephen G N Fraser for the Appellant
Mr Timothy M. Jonas for the Respondent**

**JUDGMENT
of**

the Court delivered by

**The Honourable Mr Justice de la Bastide, President
on the 16th day of May, 2008**

- [1] On the 30th October, 2007, the Court of Appeal granted the appellant leave to appeal to this Court against the decision of the Court of Appeal handed down on the 14th November, 2006, but refused the appellant leave to appeal as a poor person. Instead the Court of Appeal ordered that security for costs in the sum of \$100,000 be lodged with the Registrar of the Supreme Court by the appellant within 90 days and added the rider that “failing which the appeal stands dismissed”. The appellant filed her notice of appeal on the 20th November, 2007, and on the following day applied by notice to this Court for leave to appeal as a poor person. We received written submissions from both parties with respect to this application and held a hearing by teleconference on the 16th January, 2008, at which we heard oral argument from counsel on both sides. At the conclusion of that hearing we announced our decision. We granted leave to the appellant to appeal as a poor person and accordingly quashed the part of the order of the Court of Appeal that required the provision of security for costs by the appellant. We promised at that time to give our reasons in writing and we now do so.
- [2] The appellant, Ms. Elizabeth Ross, is blind and virtually penniless. She lives in a small condominium unit at 95 Laing Avenue in Georgetown. She originally moved in to that unit with the permission of the tenant, Ms. Sybille Foster (‘Sybille’), who also resided there. The property was owned by the Central Housing and Planning Authority (the Authority). Sybille died on the 2nd September, 1996. The respondent, Ms. Coreen Sinclair (‘Coreen’) is Sybille’s daughter and the administratrix of her estate. It would appear that she is no better off financially than the appellant. Sybille at her death was still living in the unit with the appellant. Not long before her death, Sybille entered into an agreement with the Authority to purchase the unit for the price of \$25,000.00, of which she paid \$23,000.00 on the 2nd August, 1996. Very shortly after Sybille’s death, that is, on the 19th September, 1996, the outstanding balance of \$2,000 was paid to the Authority by Coreen.
- [3] The sale of units in a registered condominium like the one of which the unit in dispute forms part, is subject to a statutory regime imposed by the Condominium (Regulation and Miscellaneous Provisions) Act Cap. 36:22 (‘the Act’). Four features of this regime are worthy of note.
- [4] Firstly, a unit may only be sold to a person approved by the public authority or State agency which owns the condominium (in this case the

Authority). Secondly, there is provision for the issue of a certificate of sale to the purchaser after an authorised employee of the condominium owner has satisfied himself that payment of the purchase price has been fully made and that other conditions of sale have been satisfied (Section 50(1)). Thirdly, the Act prescribes that in selling any unit in a registered condominium the condominium owner shall give preference to a tenant of the unit “who has been residing in the unit immediately before the sale” (Section 50(2)). Fourthly, in Section 50(7) it is provided that a certificate of sale “shall be treated for all purposes as if it were a transport or other document effecting the conveyance of the unit mentioned therein and on the presentation of the certificate and on being satisfied of its genuineness the Registrar shall make such annotations on the records as may be necessary”.

- [5] At some point in time, presumably after accepting the balance of the purchase price from Coreen, the Authority decided to sell the unit to the appellant. Before this happened, the appellant paid rent to Coreen for her occupation of the unit over a period of months. On the 1st December, 1997, however, the appellant was herself registered as tenant of the unit. This was followed within days by a sale of the unit to the appellant. She paid the purchase price on 3rd December, 1997, and was issued a certificate of sale on the 9th November, 1998. The Authority forced Coreen to return to the appellant the rent which the latter had paid to her. The last in the sequence of relevant events was the grant to Coreen of letters of administration of Sybille’s estate on the 2nd February, 2000. It was following this that Coreen, on the 15th March, 2000, launched these proceedings in which she claimed possession and ownership of the unit.
- [6] Coreen was successful both in the High Court and the Court of Appeal. The judgment at first instance proceeded on the basis that she was entitled to an order for specific performance of the agreement for sale entered into by Sybille with the Authority. The Court of Appeal, however, reached its decision on different grounds. In fact, it based its decision on two alternative grounds. The first was that ownership of the unit passed to Sybille’s estate upon payment of the balance of the purchase price and that accordingly there was no need for any further action on the part of the Authority in order to transfer ownership to Coreen as personal representative of Sybille. The order for specific performance made by the trial Judge was therefore unnecessary, and was struck out.

- [7] The alternative ground was that the action of the Authority in reneging on the agreement it had made with Sybille, and turning round and selling the unit instead to the appellant, was in the absence of any justification offered by the Authority both unreasonable and a breach of the legitimate expectation created by the Authority's dealings with Sybille. The purported sale of the unit to the appellant was therefore invalid on these public law grounds.
- [8] I should mention here two points. One is that the value of the unit though not great, is above one million Guyanese dollars and as a result the appellant has an appeal as of right to this Court under Section 6 (a) of the Caribbean Court of Justice Act ('the CCJ Act'). Secondly, the 90 days within which the appellant had been ordered to provide security, expired on the 29th January, 2008, so that when we heard this application on the 16th January, 2008, the leave to appeal which had been granted by the Court of Appeal (and the appeal itself) were still alive. In fact, we thought it important that the appellant should know the fate of her application before the time for providing security expired.
- [9] This application was the first time that we were being asked to grant a person leave to appeal as a poor person after such leave had been refused by the Court of Appeal when granting leave to appeal. It raised the novel issue whether we have jurisdiction in such circumstances to grant leave to appeal as a poor person, effectively reversing the decision of the Court of Appeal on this point. It was strongly argued for the respondent that we had no such jurisdiction as the appellant could not take advantage of leave to appeal granted by the Court of Appeal and then make a "stand alone" application for leave to appeal as a poor person to this Court. Counsel for the respondent contended that an application for leave to appeal as a poor person could only be made to this Court if it were coupled with an application for special leave to appeal.
- [10] Applications for leave to appeal as a poor person are dealt with in Rule 10.6 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules ('the CCJ Rules'). It is important, however, to look at this rule both before and after it was amended in June 2006. Prior to its amendment it read as follows:

"Application for special leave to appeal as a poor person

10.6 (1) *An applicant who seeks special leave to appeal as a*

poor person shall file together with his application –

(a) ..., and

(b) ...

(2) A person who has been granted special leave to appeal as a poor person shall not be required to provide security for costs or to pay any of the Court fees set out in Schedule 1.”

[11] The description in the heading of this rule, and twice in the rule itself, of leave to appeal as a poor person as “special” led some to the conclusion that this leave, like ‘special’ leave to appeal, could only be granted by this Court, and never by the Court of Appeal. This view appeared to have been prevalent in Guyana. It is unnecessary for us to decide whether that was a correct interpretation of the rules in their original form for the amendments of the relevant rules have made it quite clear that leave to appeal as a poor person can be granted either by the Court of Appeal or by this Court.

[12] The amendments consisted of the deletion of the word ‘special’ from the heading of rule 10.6 and from the first lines of sub-rules (1) and (2) of that rule respectively, and by the insertion of the words “either by the Court or by the court below” after the words “poor person” in sub-rule (2).

[13] Rule 10.8(a) requires that the question whether the appellant should be required to provide security for costs must be addressed by the Court of Appeal when it is granting leave to appeal or by this Court when it is granting special leave to appeal. The relevant part of the rule as amended reads as follows:

“Where either the Court or the court below grants special leave to appeal or leave to appeal, as the case may be, it –

(a) shall subject to Rule 10.6(2) determine whether the applicant should provide security for costs and if so, shall specify the amount of such security and the form in which and the time by which it should be provided;
...”

Since the grant of leave to appeal as a poor person necessarily involves a decision not to require the appellant to provide security for costs, it is obvious that the application for such leave should be made to the Court of Appeal and heard by that court together with the application for leave to appeal, as indeed happened in this case. None of this is controversial. The question we have to decide is whether when the Court of Appeal grants leave to appeal but refuses leave to appeal as a poor person, this Court can entertain a fresh application from the appellant for the leave which the Court of Appeal has refused. Or is it that this Court can only grant leave to appeal as a poor person in conjunction with the grant of special leave to appeal?

- [14] The first point to be noted is there is nothing in the CCJ Rules which expressly bars an appellant from approaching either the Court of Appeal or this Court for leave to appeal as a poor person without at the same time asking for leave or special leave to appeal. Admittedly that does not preclude such a result being reached by necessary implication. Certainly leave or special leave to appeal would have to be obtained before an application for leave to appeal as a poor person could be entertained. Further, as already stated, when leave has to be obtained from the court below, the applicant would be expected to apply in the first instance at least to the same court for leave to appeal as a poor person. In the absence of such an application the Court of Appeal in granting leave to appeal would ordinarily order security for costs to be provided by the applicant. As a result an application to this Court for leave to appeal as a poor person, whether or not a similar application has been previously made to, and been refused by, the Court of Appeal, looks very much like an appeal from the decision of the Court of Appeal
- [15] If an application for leave to appeal as a poor person could not be made to the Court of Appeal under rule 10.6 in its original form, and if no application for such leave could have been made to this Court unless coupled with an application for special leave to appeal, then an appellant who was required to and did obtain leave to appeal from the Court of Appeal, could never have obtained leave to appeal as a poor person. That could hardly have been a result that was intended.
- [16] It should be pointed out here that in the appeal of *Ramdass v Loki and others CV 3 of 2006*, in which leave to appeal was granted by the Court of

Appeal of Guyana, an application for leave to appeal as a poor person was made to this Court and on the 27th December, 2007, I made an order granting the appellant leave to appeal as a poor person. In that case, no application for leave to appeal as a poor person was made to the Court of Appeal. The application to the Court of Appeal for leave to appeal was dated 31st May, 2006, shortly before the June 2006 amendment of the CCJ Rules. The order of the Court of Appeal granting leave to appeal was made on the 31st October, 2006, and did not require the applicant to provide security for costs. In fact, there was nothing on the record to indicate that the Court of Appeal addressed the question whether or not to order such security.

- [17] In the instant case there has been a refusal of leave to appeal as a poor person by the Court of Appeal and so the application to us for the same leave that was refused, has the flavour of an appeal from the decision of the Court of Appeal. Indeed, the application was presented both in the written notice filed and in counsel's submissions as both a fresh application made de novo to this Court and, in the alternative, as a challenge of the decision of the Court of Appeal. There is no basis on which we can deal with this application as an appeal from the decision of the Court of Appeal. There is nothing in the Agreement Establishing this Court or in the CCJ Act or in the CCJ Rules that creates or recognises a right of appeal to this Court from a refusal of leave to appeal as a poor person by the Court of Appeal. But the question still remains: can an appellant who has been refused leave to appeal as a poor person by the Court of Appeal, obtain that leave from this Court by invoking its original and independent jurisdiction to grant it?
- [18] It is important to consider here the power of this Court to grant special leave to appeal. Special leave to appeal may be granted in cases in which leave to appeal has been refused by the Court of Appeal or in which leave to appeal has been granted subject to some condition that has not been fulfilled but is claimed to have been wrongly imposed. This was pointed out by Mr. Justice Nelson in delivering this Court's judgment in *Brent Griffith v. Guyana Revenue Authority and the Attorney General of Guyana* CCJ App. No. AL 1 of 2006, when he said:
- “But this court may also in the exercise of its inherent jurisdiction grant special leave when the Court of Appeal has wrongly refused leave (either in an as-of-right case or one where the conditions for leave under section 7 are satisfied) or*

has granted leave subject to conditions which it had no power to impose. The same inherent jurisdiction is in our view also exercisable when no application for leave has been made to the Court of Appeal.”

In such cases although the application for special leave is not an appeal against the refusal of leave to appeal by the Court of Appeal or the imposition of the challenged condition, the result of the application succeeding is sometimes tantamount to the correction of a wrong decision made by the Court of Appeal. What is at the heart of the matter is that this Court has the inherent jurisdiction to permit access to it to an applicant who has been denied such access by an order of the Court of Appeal. In the instant case the appellant might have waited until the time for providing security expired on the 29th January, 2008, when the leave to appeal granted by the Court of Appeal would have been nullified by the dismissal of her appeal, and then have applied to us for special leave to appeal. Indeed, that may well have been the more orthodox course for the appellant to have followed. Instead, however, the appellant has made the application which is before us and has sought to invoke our jurisdiction (if it exists) to grant leave to appeal as a poor person, while still relying on the leave to appeal granted by the Court of Appeal. In our view, if this Court has, as it undoubtedly does, the power to open its doors to a would-be appellant who has been denied entry by the Court of Appeal, by granting her special leave to appeal, this Court can also do so by making its own order granting leave to appeal as a poor person to an impecunious party who would otherwise be shut out as a result of her inability to provide security for costs as required by the Court of Appeal.

- [19] At the time when this application was filed and also when it was heard, the leave to appeal granted by the Court of Appeal was still effective and the appeal was still on foot. It would not have been possible in those circumstances for the applicant to have applied to us for special leave to appeal. Furthermore, we have a situation here in which both parties are impecunious and to have required the applicant to make a fresh application for special leave to appeal after the time for providing security had expired, would have been to place on the parties (and their attorneys) an additional burden which they were singularly ill-equipped to bear.
- [20] The fact that the CCJ Rules have conferred on the Court of Appeal the power to grant leave to appeal as a poor person, does not in our view

mean that a refusal of such leave by the Court of Appeal disables this Court, if it considers that the interest of justice so requires, from making an order of its own granting such leave. We are mindful in this connection of the overriding objective of the CCJ Rules which as defined in rule 1.3, is “to enable the Court to deal with cases fairly and expeditiously so as to ensure a just result.”

- [21] With regard to the objection that this Court ought not to reverse an order of the Court of Appeal requiring the applicant to provide security for costs except by way of an appeal from that decision, I would point out that under rule 10.8 (a) as amended, the power of the court below to determine whether the applicant should provide security for costs when that Court is granting leave to appeal, is expressly made “subject to rule 10.6 (2). Rule 10.6 (2) reads as follows:

“A person who has been granted leave to appeal as a poor person either by the Court or by the court below, shall not be required to provide security for costs ...”.

It would seem to follow therefore that an order granting leave to appeal as a poor person, whenever made, has the capacity not only to preclude but to abrogate (if already made) an order for the provision of security for costs.

- [22] For these reasons, therefore, we are satisfied that this Court has the power to make the order sought by this application. This, however, is a residual power which we will only exercise when necessary to eliminate a real risk of a miscarriage of justice occurring.
- [23] The next question, therefore, is whether the circumstances of this case justify our exercising this power in order to permit the appellant to prosecute her appeal pursuant to the leave to appeal granted by the Court of Appeal, without having to provide security for costs. We answer that question affirmatively for the following reasons.
- [24] We have no doubt that if the appellant, having lost the benefit of the conditional leave to appeal granted by the Court of Appeal as a result of her failure to provide security for costs within the time prescribed, had applied to this Court for special leave to appeal, we would have granted it. On the basis of the value of the property in dispute, the applicant has an

appeal as of right to this Court. This case moreover raises a number of legal questions, the answers to which are neither easy nor obvious. These questions have to do with the interpretation and application of the provisions of the Act, with particular reference e.g. to the function and effect of the certificate of sale, and with the applicability and application of the public law principles of irrationality and breach of legitimate expectation to the facts of this case. The resolution of these issues has an importance which extends well beyond the limits of this case. The judgment of the Court of Appeal raises some interesting points of law which are certainly worthy of consideration by the final Court. Naturally, we make no prediction of what the result of our consideration of those issues will be. For present purposes it is sufficient to say that we consider the applicant's case to be a long way from being doomed to fail.

- [25] We are also satisfied that the applicant is genuinely unable to provide security for costs and, therefore, if required to do so as a condition of her appeal proceeding, her right of appeal will have been rendered nugatory. We appreciate that the respondent is similarly circumstanced and in all probability cannot afford to pay for legal representation at the hearing of this appeal. Fortunately, both parties have had the benefit of the services of competent and public-spirited attorneys who have no doubt provided them on a pro bono basis. Hopefully, their generosity will not be exhausted before the final determination of this matter.
- [26] The Court of Appeal did not give written reasons for refusing the appellant leave to appeal as a poor person, but counsel on both sides have helpfully agreed a short note of the ruling of the Court of Appeal which was delivered by Chang J.A. This reads as follows:

“Both parties are poor, the issue of the monetary value of the subject matter of the appeal vis a vis the cost of the appeal and the issue of merit have tilted the balance against the grant.”

While we agree that the respondent's lack of means is a matter properly to be taken into account in determining whether or not to order the applicant to provide security for costs, we cannot adopt the Court of Appeal's reasons insofar as the “monetary value of the subject-matter” or the “issue of merit” are concerned. With regard to the former, while the monetary value of the unit is very small as compared with the cost of a further

appeal, the fact is that the unit was of great value to the applicant because if she lost it, she would be in the street, lacking, as she does, the means to secure alternative accommodation. With regard to the merits of the case, we agree that an apparent lack of merit in an appeal may be weighed in the balance against an applicant who seeks to avoid providing security for costs, but I have said enough already to indicate that there is no such obvious lack of merit in the instant appeal.

[27] Accordingly, had we been faced with an application for leave to appeal as a poor person coupled with an application for special leave to appeal, we would have granted both applications. In the special circumstances of this case mentioned in [19] above, we did not consider it necessary to force the applicant to make a further application for special leave to appeal but chose to exercise the residual power which we are satisfied we have to grant her leave to appeal as a poor person, and thus make it possible for her to take advantage of the leave to appeal which was granted by the Court of Appeal. In the result at the conclusion of the hearing we made the following orders:

1. That leave be granted to the appellant to appeal as a poor person.
2. That so much of the order of the Court of Appeal dated the 31st October, 2007, as requires the appellant to provide security for costs be quashed.
3. That there be no order as to the costs of this application.

_____/s/_____
Mr Justice Michael de la Bastide (President)

_____/s/_____
Mr Justice Rolston Nelson

_____/s/_____
Mr Justice Adrian Saunders

_____/s/_____
Madame Justice Désirée Bernard

_____/s/_____
Mr Justice Jacob Wit