

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.36 OF 2004

BETWEEN:

WILLIAM MARTIN

Appellant

and

URSIL PETERS

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins

Justice of Appeal

The Hon. Mrs. Dancia Penn-Sallah, QC

Justice of Appeal [Ag.]

The Hon. Ms. Ola Mae Edwards

Justice of Appeal [Ag.]

Appearances:

Mrs. Georgice Mendes-Blackman for the Appellant

Mrs. Mary B. E. White for the Respondent

2007: July 17;
September 17.

JUDGMENT

[1] **RAWLINS, J.A.:** This is the judgment of the court. On 4th April 2007, Solicitors for the appellant, Mr. Martin, applied for an order for conditional leave to appeal to Her Majesty in Council against a decision of this court that was delivered orally on 14th March 2007. The decision of this court dismissed Mr. Martin's appeal against a judgment delivered by Joseph Olivetti J on 27th August 2004. In her judgment the learned judge gave judgment for Mr. Peters on a claim against Mr. Martin for damages for assault, battery and trespass to the person and to goods.

[2] The brief background is that the parties had a dispute over a right of way over a strip of land. In about June 1998 Mr. Martin sent someone with a backhoe to cut a

road on the disputed strip of land. Mrs. Peters stopped the person. In December 1998 Mr. Peters, who was then 71 years old, was in his yard when he saw someone about to enter the strip of land in a backhoe. The driver complied with Mr. Peters' direction to stop. However, Mr. Martin arrived on the scene shortly thereafter and took control of the backhoe. Mr. Peters sat on a workbench which blocked the entrance of the backhoe to the disputed land. Mr. Martin nevertheless proceeded with the backhoe onto the strip of land, and, as the trial judge found, in the process, picked up the workbench with Mr. Peters on it and dumped them to the ground thereby injuring Mr. Peters.

[3] Joseph-Olivetti J found Mr. Martin liable and awarded damages to Mr. Peters to be assessed. She also awarded prescribed costs on the assessed damages. This court dismissed Mr. Martin's appeal, affirmed the decision of the learned trial judge and awarded Mr. Peters prescribed costs in the appeal proceedings.

[4] Thomas J assessed damages in the sum of \$45, 315.00. He thereupon awarded \$11,328.80 prescribed costs to Mr. Peters. Prescribed costs in the appeal proceedings would be two-thirds of this sum or \$7,552.53. Mr. Martin appealed against the decision of Thomas J by Notice dated 28th June 2006. He also applied for a stay of the orders pending the appeal to Her Majesty in Council. I shall first determine whether this court could deny Mr. Martin conditional leave to appeal to Her Majesty in Council.

Leave to appeal as of right

[5] Mr. Martin's application for conditional leave to appeal to the Privy Council was made pursuant to section 122 of the constitution of Antigua and Barbuda.¹ Section 122(1)(a) of the Constitution permits a person to appeal to the Privy Council, as of right, from a final decision of this court. It states:

¹ Statutory Instrument 1981 No. 1106, made on 31st July 1981 coming into operation 31st October 1981.

“122(1). An appeal shall lie from a decision of the Court of Appeal to Her Majesty in Council as of right in the following cases –

- (a) final decisions in any civil proceedings where the matter in dispute on the appeal to Her Majesty in Council is of the prescribed value or upwards ...”

The prescribed value is provided for in section 122(5) of the Constitution. It states:

“122(5). In this section the prescribed value means the value of fifteen hundred dollars or such other value as may be prescribed by Parliament.”

The Parliament of Antigua and Barbuda has not prescribed any other value. It is common ground that the value of the present case exceeds fifteen hundred dollars. The provision of section 122(5) of the Constitution is therefore satisfied.

[6] The parties agree that the decision which Mr. Martin seeks leave to appeal is within the contemplation of section 122(1)(a) and section 122(5) of the Constitution. Mrs. Mendes-Blackman, learned counsel for Mr. Martin, submitted that this means that the necessary requirements for the grant of conditional leave have been fulfilled and this court is duty bound to grant conditional leave to appeal to Mr. Martin. She cited **Electrotec Services Ltd v Issa Nicholas (Grenada) Ltd.**² as authority for the proposition that once a litigant satisfies the constitutional requirements for leave to appeal as of right this court has no discretion to refuse conditional leave to appeal in any circumstance.

[7] On the other hand, Mrs. White, learned counsel for Mr. Peters insisted that notwithstanding that Mr. Martin has satisfied the provisions of section 122 of the Constitution this court should not grant him conditional leave to appeal to the Privy Council because the trial judge and this court have found in favour of Mr. Peters on the facts. According to Mrs. White, an appeal from concurrent fact-finding by these courts will amount to an exercise in time wasting and an abuse of the process of the Privy Council. She pointed out that the trial judge's decision in favour of Mr. Peters was based primarily upon her acceptance of the evidence

² [1998] 1 WLR 202.

presented on behalf of Mr. Peters and her rejection of the evidence of Mr. Martin. She further asked this court to note that it dismissed Mr. Martin's appeal, unanimously, because Mr. Martin raised no ground that permitted this court to impeach the trial judge's finding of the facts. She relied particularly on **Ebanks v Borden**³ and **Kwasi Bekoe v Broomes**.⁴

- [8] Mrs. White submitted that, in the second place, this court must also be satisfied that there is a genuinely disputable issue to warrant the consideration of the Privy Council before conditional leave is granted. She relied particularly on **Alleyne-Forte (Learie) v Attorney General and Another**.⁵

- [9] I shall first consider **Electrotec Services Ltd.** upon which Mrs. Mendes-Blackman relied.

Electrotec Services Ltd.

- [10] This case, which was on appeal from Grenada to the Privy Council, was primarily concerned with the question whether a person who is entitled to appeal to the Privy Council as of right could also be required to pay a substantial sum (£130,000 sterling) into court as security for the respondent's costs. Section 584 of the Grenada Companies Act permitted a judge to require a claimant to give sufficient security for the costs of a defendant where there is credible evidence that the claimant company would be unable to pay the costs of a successful defendant. The first instance judge ordered Electrotec to give \$80,000.00 security for Issa's costs. However, this was repaid to Electrotec after Electrotec prevailed at the trial. The court of appeal reversed the decision of the trial judge and ruled in favour of Issa. Electrotec was entitled to appeal to the Privy Council as of right pursuant to section 104(1) of the Constitution of Grenada, as Mr. Martin is entitled to do under section 122(1) of the Constitution of Antigua and Barbuda. Electrotec's application

³ (1989) 37 WIR 157 (P.C.).

⁴ [2005] 67 WIR 301 (P.C.).

⁵ [1997] 52 WIR 480 (P.C.).

for leave to appeal drew a cross-motion from Issa for an order that Electrotec should give substantial security for Issa's costs.

- [11] The reasoning by their lordships in **Electrotec Ltd.** is instructive because they reminded us that the procedure for appeals to the Privy Council is governed by the West Indies Order⁶ and the Judicial Committee Rules,⁷ which must be construed as a coherent code.⁸ Their lordships stated that even where an appeal lies as of right, an applicant must yet apply to the Court of Appeal for leave. This, they said, is because rule 2 of the Judicial Committee Rules states that an appeal shall be either with the leave of the court appealed from or with the special leave of the Privy Council. It is significant that their Lordships continued as follows:⁹

“It follows that notwithstanding that the case may be one in which an appeal lies as of right, the leave of the Court of Appeal must be obtained. **Such leave is not, however, a matter of discretion for that court.** Article 3 of the West Indies Order provides:

‘An appeal shall lie to Her Majesty in Council from decisions of the court given in any proceedings originating in a state in such cases as may be prescribed by or in pursuance of the constitution of that state.’ (Emphasis added).

- [12] Their lordships further noted, in **Electrotec Services Ltd.**, that article 4 of the West Indies Order provides for applications to the court of appeal for leave to appeal to the Privy Council. They further noted that article 5 of the said Order provides the only conditions that may be imposed where conditional leave is granted. This article requires the court to set the date (not exceeding 90 days from the date of the hearing) within which the applicant must enter security, not exceeding £500 sterling, for the prosecution of the appeal; for the payment of any costs occasioned by the applicant's failure to obtain final leave to appeal, as well as for the non-prosecution of the appeal or towards any costs order made by the Privy Council. Article 5 also empowers this court to state any condition relating to

⁶ The Eastern Caribbean (Appeals to Privy Council) Order 1967.

⁷ The Judicial Committee (General Appellate Jurisdiction) Rules Order 1982.

⁸ See page 204 C-D of the judgment.

⁹ At page 304 E-F.

the time within which the applicant should prepare and dispatch the Record of Appeal to the Privy Council.

[13] In **Electrotec Services Ltd.**, learned counsel withdrew the cross-motion when the application for conditional leave to appeal was heard by the Court of Appeal. He did so because he accepted that this court's jurisdiction to order security was limited to the £500 under article 5 of the West Indies Order. However, learned counsel moved a similar motion for substantial security for costs before the Privy Council. Their lordships dismissed the motion. In so doing, they held that section 548 of the Companies Act is only referable to proceedings at first instance.¹⁰ Their lordships also held that they had no inherent power to require an appellant to give security for costs because the only conditions which may be imposed where an applicant has an appeal to the Privy Council, as of right, are those provided in article 5 of the West Indies Order.¹¹ We have seen that this article provides a maximum security of £500.

[14] On the basis of the foregoing analysis, the Privy Council succinctly stated the function of the Court of Appeal in a case in which an applicant for leave to appeal has a right of appeal to the Privy Council, as follows:

“It would therefore appear that the function of the Court of Appeal upon an application for leave is to satisfy itself that the case is one in which, under the Constitution of Grenada, a right of appeal exists and, if so satisfied, to consider the exercise of the power to impose conditions conferred by article 5. Leave is granted “in the first instance” subject to compliance with those conditions and final leave is granted when the conditions have been complied with.”

Leave “in the first instance” refers to conditional leave.

¹⁰ See pages 205 H to 206 A of the judgment.

¹¹ See pages 206 D-G of the judgment.

Concurrent judgments on factual bases

- [15] This aspect of this judgment is intended to determine whether there is any merit in Mrs. White submissions that the notion of concurrent judgments on the facts by the trial court and by this court means that this court may be entitled to deny Mr. Martin conditional leave to appeal to the Privy Council. This requires a consideration of **Ebanks** and **Kwasi Bekoe** upon which Mrs. White relied.

The Ebanks case

- [16] Mrs. White referred to the headnote in **Ebanks**, which states:
- “Where a trial judge has thoroughly investigated all the material issues in a case, reached a decision which essentially dealt with matters of fact and which was amply supported by the evidence, and his decision had been upheld unanimously by the Court of Appeal after another examination of the evidence, the Privy Council will not interfere with their decisions”.
- [17] The **Ebanks** case was concerned with a dispute over 2 parcels of land. The appellant claimed that he was absolutely entitled to them because they were the subject of an informal family arrangement. Alternatively, he claimed title to them by adverse possession. The trial judge, Sir John Summerfield CJ, did not believe his evidence. The Chief Justice issued an order that the appellant and the respondent should both be registered as proprietors of the 2 parcels of land in their capacity as administrators of the estate. The Court of Appeal upheld that decision.
- [18] On appeal to the Privy Council, their lordships put the appeal before them into perspective in the following words:¹²
- “The appellant, who now appeals to the Board, is faced with concurrent findings of Sir John Summerfield CJ and the Court of Appeal and, in accordance with the principles set forth in the advice of the Board given by Lord Thankerton in *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy* [1946] AC 508, must satisfy the Board that there was no evidence on

¹² See page 158g of the judgment.

which the court below could arrive at their findings which essentially dealt with matters of fact”.

[19] Their lordships then concluded in the following words:¹³

“From the very full notes of evidence kept by Sir John Summerfield CJ it is clear that both the issues of title and adverse possession were thoroughly investigated. The appellant failed to make out his case on either issue to the satisfaction of Sir John Summerfield CJ and there was ample evidence from which he was entitled to reach his conclusion. The Court of Appeal took that view after another examination of the evidence and this appeal must therefore fail. Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed”.

Kwasi Bekoe

[20] The appeal to the Privy Council in **Kwasi Bekoe** was brought as of right. The trial judge had awarded damages to the respondent for libel and slander against the appellant. The Court of Appeal of Trinidad and Tobago upheld that decision, agreeing with the fact finding of the trial judge. Before the Board, learned counsel for the appellant sought to rely on a number of considerations in his attempt to urge their lordships to find that the trial judge and the Court of Appeal did not sufficiently or adequately analyze or give sufficient weight to the evidence. Their lordships took the opportunity to reiterate the principles on which they act in cases of concurrent judgments on issues of fact. They reminded us that the principles constituted a rule of conduct, which they laid down for their lordships themselves, that they will decline to review the evidence a third time unless there are special circumstances to justify departure from the practice.¹⁴ The Board then re-stated the practice and the nature of the special circumstances.¹⁵

[21] It is noteworthy that their lordships stated that they had laid down the principles for themselves. They did not state that they had laid them down for the guidance of courts of appeal to decide whether to grant conditional leave to appeal. Acting on

¹³ At page 159f-g of the judgment.

¹⁴ See [2005] WLR 301, at page 305 f-g.

¹⁵ See also paragraph 12 of the judgment from pages 305g-306g as summarized by Lord Thankerton in *Devi v Roy* [1946] AC 508, at pages 521-522.

those principles, their lordships considered the submissions and the multifarious points which learned counsel for the appellant raised. They found that there were no special circumstances to aid the appellant and concluded:¹⁶

“Their lordships have examined with care the evidence given at the trial; the judgments of both courts and the submissions advanced on behalf of the appellant, and are satisfied that no fundamentally erroneous error of law has been established. Nor in their judgment can it possibly be said that there has been a miscarriage of justice in the sense defined by Lord Thankerton in *Devi v Roy*. There are no factors of an unusual nature which might give the Board grounds to make an exception from its customary practice. That being the position, their lordships do not find it necessary to set out in further detail the individual submissions contained in the appellant’s printed case and oral argument.”

Findings

- [22] It is noteworthy that there are no statements in **Ebanks** that confer discretion upon a court of appeal to refuse to grant conditional leave to appeal to an applicant who is entitled to appeal as of right to the Privy Council. It is clear from **Kwasi Bekoe** that this court has no purview to deny conditional leave to such an applicant, because of concurrent fact-finding judgments in favour of a respondent. The principles which the Privy Council enunciated in **Devi v Roy**, and reiterated in **Ebanks** and **Kwasi Bekoe**, are to guide the Privy Council, and no doubt appellants, in such cases. It is for the Privy Council to determine, for example, whether the appellant has made a case for exemption from the practice stated in these cases by the Privy Council by establishing special circumstances. These are not matters for the assessment or determination of a Court of Appeal.

Genuinely disputable issue

- [23] This aspect of the judgment will consider the merits of Mrs. White’s submission, that before granting Mr. Martin conditional leave to appeal, this court must be

¹⁶ At paragraph 15 of the judgment from page 307j – 308a.

satisfied that the case will bring a genuinely disputable issue before the Privy Council. This requires a look at the **Alleyne- Forte** case.

Alleyne-Forte

[24] With respect, I do not think that this case affords any assistance to Mrs. White. When the Privy Council dismissed the appeal in **Alleyne-Forte** their lordships thereby denied the appellant the constitutional redress that he sought because his motorcar was towed away and held by the police. The police had alleged at the trial that the car was unlawfully parked in contravention of traffic regulations. Statute required the appellant to pay removal and custody charges in order to secure the release of the vehicle. Their lordships held that this statutory provision under which the car was towed away did not infringe the appellant's enjoyment of his property and his right not to be deprived of it except by due process of law. However, the respondents raised the question whether the appellant was entitled to appeal as of right to the Privy Council during the course of the hearing before the Board.

[25] Section 109(1)(c) of the Constitution of Trinidad and Tobago entitles an appellant to appeal as of right to the Privy Council from final decisions of the Court of Appeal involving a question of the interpretation of the Constitution. Before the Privy Council, the respondents contended that the appellant was not entitled to appeal as of right to the Privy Council because there was no genuinely disputable question of interpretation of the Constitution. They relied on a concern voiced by their lordships in **Harrikissoon v Attorney General of Trinidad and Tobago**,¹⁷ which they repeated in **Frater v R**.¹⁸ Their lordships had there stated, *inter alia*, that vigilance should be observed to ensure that where an appellant claims to be entitled to appeal as of right under section 109(1)(c) of the Constitution, the claim is not contrived for the purpose of obtaining leave to appeal to the Privy Council as

¹⁷ [1980] AC 265.

¹⁸ [1981] 1 WLR 1468, at page 1470.

of right. By this statement, the Privy Council merely afforded a reminder that when faced with an application for leave to appeal as of right under a section 109(1)(c) type provision, a Court of Appeal must ensure that the case really falls within the category of appeals that the provision prescribes.

- [26] The essence of the foregoing statements by the Privy Council in **Alleyne-Forte** is that where an applicant for conditional leave states that he is entitled to leave as of right on the ground that the appeal raises a genuinely disputable issue that involves a question of constitutional interpretation, a court of appeal should ensure that the appeal really raises such a question so that it genuinely falls under a section 109(1)(c) type provision. To this end, the words of their lordships in the final paragraph of the judgment in **Alleyne-Forte** quite neatly illustrate the manner in which the principle is to be applied. Their lordships stated:¹⁹

“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: here, a claim under section 14 to redress a contravention of a provision for the protection of a fundamental right.”

- [27] The respondents in *Alleyne-Forte* did not prevail in their contention that the appellant was not entitled to appeal as of right because the appellant had not brought the appeal under the category which section 109(1)(c) of the Constitution provided. The appellant had properly brought it under the category which entitled him to appeal as of right pursuant to the constitutional redress under section 14 of the Constitution. In the present case the prescribed category under which Mr. Martin is entitled to appeal as of right is that created by section 122(1)(a) of the Constitution of Antigua and Barbuda. His entitlement to appeal as of right arises because the decision which he appeals against is a final decision in civil proceedings where the matter in dispute on the appeal to Her Majesty in Council is over \$1,500.

¹⁹ See (1997) 52 WIR 480, at page 486e.

[28] In the foregoing premises, I see no ground on which this court could exercise any discretion to deny Mr. Martin's application for conditional leave to appeal to the Privy Council. I would therefore granted leave to appeal to Her Majesty in Council on the relevant conditions.

[29] The question then is whether this court should grant a stay of the orders against Mr. Martin.

Stay of execution

[30] The application for the stay of the orders can be dealt with quite shortly. This court has always had an inherent jurisdiction to grant a stay of proceedings while an appeal is pursued to the Privy Council. It is trite principle that the court is likely to grant a stay pending an appeal if the appeal would otherwise be rendered nugatory or the appellant would suffer loss which could not be compensated in damages.²⁰ The court will not usually grant a stay, for example, where an intended respondent in whose favour an order for damages was made could repay any damages he received by way of enforcement if the intended appellant prevails in the appeal. The affidavit in support of the application for conditional leave and for the stay in execution, states²¹ that the appellant seeks the stay in order to avoid the payment of the damages assessed and due on the ground that should the appellant be successful he may not be able to recover the sums paid because Mr. Peters is a person of limited means.

[31] No evidence has been presented as to the means of Mr. Peters. I am however minded to note that the sum of money which Mr. Peters has been awarded in damages is relatively small. The incident occurred almost 9 years ago and Mr. Peters will be 80 years old this year. I will not speculate on the prospects of Mr. Martin's appeal to the Privy Council. However, I take notice of the statements

²⁰ See, for example, *Wilson v Church* (No. 2) [1879] 12 Ch. 454, at page 459.

²¹ At paragraph 6.

which the Privy Council made on the approach which their lordships will take in cases where there are concurrent judgments on the facts by the trial court and the Court of Appeal, as in the present case. These are not circumstances which would move me to order a stay of execution of the orders pending the appeal to the Privy Council. Accordingly, I would dismiss the application to stay the proceedings.

The Order

[32] In the foregoing premises, the order that I would make is as follows:

- (1) The application by the intended appellant, Mr. Martin, for Conditional Leave to appeal to Her Majesty in Council against the decision of the Court of Appeal of the Eastern Caribbean Supreme Court, which was delivered, orally, on the 14th day of March 2007 is hereby granted upon the following terms and conditions:
 - (a) The appellant shall within 90 days of the date on which this judgment is delivered enter into good and sufficient security to the satisfaction of the Registrar in the sum of £500 sterling for the due prosecution of the appeal to Her Majesty in Council.
 - (b) Solicitors for the appellant shall take the necessary steps to procure the preparation of the records of proceedings and the dispatch thereof to the Registrar of the Privy Council, in accordance with article 10(2) of the West Indies Order, within 90 days of the date on which this judgment is delivered. The said records, which are to be settled with Solicitors for the respondent and transmitted to the Registrar of the Privy Council, shall be comprised of the Record used at the hearing of the appeal, save documents of a formal nature and omitted by the consent of the parties; the judgments; the Orders of the Court of Appeal, and the

Orders granting conditional and final leave to appeal to Her Majesty in Council.

- (c) The appellant shall bring before this Court an application for final leave to appeal to Her Majesty in Council, supported by the Certificate of the Registrar that the security for costs ordered herein had been given within the time prescribed by this Order to the satisfaction of the Registrar and that the appellant has otherwise complied with this Order.
- (2) The application by Mr. Martin for a stay of the said judgment of this court and the orders issued against him in this case is dismissed.
- (3) The parties will meet their own costs in these applications.