REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P-133 of 2016

Claim No. CV2010-01393

BETWEEN

ROLLIN CLIFTON BERTRAND

Appellant

AND

ANTHONY ELIAS

First Respondent/First Defendant

AND

TRINIDAD AND CEMENT LIMITED

Second Respondent/Second Claimant

AND

CARIBBEAN CEMENT COMPANY LIMITED

Third Respondent/Third Claimant

AND

Civil Appeal No. P-139 of 2016

Claim No. CV2010-01393

BETWEEN

TRINIDAD AND CEMENT LIMITED

CARIBBEAN CEMENT COMPANY LIMITED

Appellant/Second and Third Claimants

AND

ANTHONY ELIAS

First Respondent/First Defendant

AND

ROLLIN CLIFTON BERTRAND

Second Respondent/Claimant

PANEL:

I. Archie CJ

G. Smith JA

M. Dean-Armorer JA

Appearances:

Mr. Ian Benjamin SC leads Ms. Sadhna Lutchman instructed by Nalini Jagnarine

Mr. R. Maharaj SC leads Ms. T. Tuitt instructed by Ms. K Warner on behalf of Anthony Elias

Mr. J Mootoo instructed by Ms. G. Gopeesingh on behalf of Trinidad Cement Limited and Caribbean Cement Company Limited

DATE OF DELIVERY: February 02, 2021

I have read the judgment of Dean-Armorer JA and I agree with it.

I. Archie

Chief Justice

I have read the judgment of Dean-Armorer JA and I agree with it.

G. Smith

Justice of Appeal

/s/ M. Dean-Armorer

Justice of Appeal

JUDGMENT

Delivered by Dean-Armorer J.A.

Executive Summary

1. The single issue, which engages our attention in this Application, is whether the Respondent Applicant, Anthony Elias, ought to be granted conditional leave to appeal against the order which had been made by the Court of Appeal on July 1, 2020.
2. The Court of Appeal, on that day, held that the trial Judge was plainly wrong in her decision to direct that costs be assessed by a Master in Chambers, following the discontinuance of a claim in defamation.
3. As will be apparent in the course of this decision, it was our view that the Applicant satisfied all of the elements of s. 109(1) (a) of ***the Constitution.*** We held that there was a genuinely disputable issue to be appealed and that the decision of the Court of Appeal was a final order in so far as it was caught by the exception to the application test. The Applicant was therefore entitled as of right to conditional leave to appeal.

Procedural Background

4. On April 14, 2010, the Appellants, Rollin Clifton Bertrand, Trinidad Cement Ltd (TCL) and Caribbean Cement Company Ltd. (CCC) instituted proceedings against the Respondent/Applicant, seeking damages for slander for words spoken and published on May 12, 2009.
5. After having issued pre-trial directions, the trial Judge set the matter down for trial on January 20, 21, 22 and 23, 2015.
6. On the eve of the trial however, the Appellant, Rollin Bertrand, the then Claimant, filed and served a Notice of Discontinuance. On the following day, January 20, 2015, the 2nd and 3rd Claimants, TCL and CCC, made a *viva voce* application to discontinue the claim.
7. The trial Judge granted permission as requested and ordered that the Claimants pay the Defendant's costs. The trial Judge gave directions for the filing of the submissions on the issue of costs.
8. On April 26, 2016, the trial Judge delivered her decision, holding that the Claimants were jointly liable to pay costs. Her Ladyship ordered further that costs be assessed by a Master in Chambers. In so deciding, the trial Judge considered the provisions of ***CPR*** 38.6, 38.7 and 67.5(2). She took into account the requirement of Part 67.5 (2) (b) (ii), which required her to stipulate a figure for the imposition of a prescribed costs order.

Her Ladyship, however, departed from Part 67.5 (2) (b) (ii) on the ground that she would have been required to speculate as to the extent of the damage suffered and that she could not do so without having heard cross-examination.

9. On May 5, 2016 Rollin Clifton Bertrand filed a Notice of Appeal against the decision of the trial judge.[1] This was followed by the Notice of Appeal on May 6, 2016, on behalf TCL and CCC. [2]

10. The Appeal was heard on July 1, 2020.

11. In a viva voce decision, the Court of Appeal allowed the appeal and made these orders:

> *"1. The appeal is allowed.*
>
> *2. The matter is remitted to the trial judge for the stipulation of the value of the claim.*
>
> *3. The Respondents shall pay to the Appellant the cost of the Appeal in the amount of two-thirds (2/3) of such cost the trial court eventually determines."*

The Decision of the Court of Appeal

12. The decision of the Court of Appeal was delivered by Rajkumar JA, who identified two issues for the panel's considerations. The first issue was whether the trial judge was plainly wrong in determining that all the Claimants were jointly liable to pay the Defendant's Cost.

13. On this issue, the Court of Appeal, held that it had not been demonstrated that the trial judge was plainly wrong.

14. The second issue was whether the judge was plainly wrong in determining that costs should be assessed by a Master in Chambers. Rajkumar JA examined provisions of the CPR at Part 38.7 and 67.5 (2) (b) (ii). These provisions are set out below :

> *"Quantification of costs*
>
> *38.7 (1) The general rule is that, unless an order has been made for budgeted costs under rule 67.8 the costs shall be determined in accordance with the scale of prescribed costs contained in Appendix B and Appendix C to Part 67.*
>
> *(2) Where the claimant discontinues only part of the case the amount of costs must be assessed by the court.*

[1] Civil Appeal No. P. 133 of 2016
[2] Civil Appeal No. P 139 of 2016

(3) In determining the appropriate amount of costs to be paid where an order has been made under rule 67.8 (budgeted costs), the court may take into account any written information provided by either party when the costs budget was made.

Prescribed costs

67.5 (2) In determining such costs the "value" of the claim shall be decided—

(a) in the case of a claimant, by the amount agreed or ordered to be paid;

(b) in the case of a defendant—

(i) by the amount claimed by the claimant in his claim form; or

(ii) if the claim is for damages and the claim form does not specify an amount that is claimed, by such sum as may be agreed between the party entitled to, and the party liable for, such costs or if not agreed, a sum stipulated by the court as the value of the claim…."

Rajkumar, JA held that the trial judge erred in considering that part 67.5 (2) (b) (ii) did not apply to the proceedings before her. [3]

Issues

15. In deciding whether the Defendant is entitled to conditional leave to appeal to the Privy Council, we considered whether the decision of the Court of Appeal was a final decision for the purpose of section 109 (1) of the Constitution; whether the appeal was caught by section 109 (2); and whether conditional leave ought to be refused on the ground that the intended appeal related to an order for costs.

Discussion

16. Where an applicant applies for conditional leave to appeal to the Privy Council as of right, he must satisfy the requirements of Section 109 (1), which provides as follows :

"109. (1) 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

[3] See page 33 of the transcript.

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;

17. The Applicant for conditional leave must therefore satisfy the Court that the intended appeal is from a final decision in civil proceedings in respect of a matter in excess of $1500.00.[4]

18. There was no dispute that the intended appeal related to civil proceedings and that it related to the vindication of a right valued in excess of fifteen hundred dollars.

19. The questions which fell to be considered were whether there was a genuinely disputable issue and whether the intended appeal related to a final decision.

20. An applicant for conditional leave is required to satisfy the Court that the proposed appeal raises a genuinely disputable issue. This requirement was expressed by their Lordships in ***Alleyne-Forte (Learie) v. Attorney- General and Another***[5]. It was applied by the Court of Appeal in numerous decisions notably in ***Attorney General v Lennox Phillip and Another***[6] and ***Motor and General Insurance Co. Ltd v Gail Sanguinette***.[7]

21. The elements of "a genuinely disputable issue" were recently considered in ***LOP* Investments** by President de la Bastide in the CCJ. The learned President referred to ***Alleyne-Forte (Learie) v. Attorney- General and Another*** in the context of section 6(a) of the ***CCJ Act***[8] and expressed the view that test of the genuinely disputable issue was little more than a gate-keeping exercise since the appeal is as of right. Holding that the Court of Appeal was wrong to refuse leave de la Bastide had this to say :

"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…"

22. The apparent narrowing of the Court's discretion in ***LOP*** was the subject of submissions before this court. It was our view, however, that there was a genuinely disputable issue in the intended appeal and that it was not necessary, in this Application, to consider

[4] Jurisdiction to hear and determine appeals from the Court of Appeal is vested in the Judicial Committee of the Privy Council by section 2 ***Trinidad and Tobago Appeals to Judicial Committee Order 1976***
[5] Alleyne-Forte (Learie) v. Attorney-General and Another (1997) 52 WIR 480
[6] Attorney General v Lennox Phillip and Another Civil Appeal No 155 of 2006
[7] Motor and General Insurance Co. Ltd v Gail Sanguinette Civil Appeal No. 158 of 2003
[8] Caribbean Court of Justice Act Ch 4:02

whether the formulation of de la Bastide, was applicable to our jurisdiction. In our view, it was genuinely disputable whether the trial Judge was correct in relying on the criteria of fairness in deciding to avoid speculation or whether she was wrong simply to avoid the application of Part 67 .

Finality of the Decision

The Application Test

23. It is well settled that in order to determine whether a decision is final or not, the Court applies the application test. See **Lennox Phillip**[9] where Mendonça JA set out the test as articulated by Fry L. J. in ***Salaman v Warner***:[10]

> *"I conceive that an order is "final" only where it is made upon an application or other proceedings which must whether such application or proceedings fail or succeed determine the action…."*

24. At paragraph 17 of his judgement Mendonça JA summarised the test in this way:

> "The application test therefore dictates that an order is final if it is made on such an application….that for whichever side the decision was given it would, if it stood, finally determine the matter in litigation"

25. It is our view that the decision, which engaged our attention fell short of the benchmark of finality. The question which the Court of Appeal decided was whether the trial Judge was plainly wrong in deciding to depart from ***Part 38.7***.
26. The decision in respect of which conditional leave is sought was a decision to remit the claim to the trial Judge, so that she could apply Part 67.5(2)(b)(ii) of the ***CPR*** by stipulating the value of the Claim and eventually conducting an assessment of costs.
27. Even if the Court of Appeal decided to dismiss the appeal, the matter would not have achieved finality.
28. In those circumstances, the assessment of costs would have been placed before a Master for the final determination of the quantum of costs. Accordingly, when these proceedings are seen in the in the light of the application test, it is clear that the decision of the Court of Appeal on July 1, 2020 was not final.

[9] Attorney General v Lennox Phillip and Another Civil Appeal No 155 of 2006
[10] Salaman v Warner (1891) 1 QB 734)

The Exception to the Application Test

29. We hold the view however that this matter was caught by the exception to the application test. In ***Lennox Phillips***, Mendonça JA , after formulating the application test, identified the single exception to it .

30. He referred to ***White v Brunton***[11], and to the cases, which followed and applied ***White v Brunton.*** That is to say, ***Strathmore Group Ltd v Fraser*** [12] and locally ***Motor and General Insurance Co. Ltd v Gail Sanguinette***[13]***.***

31. Mendonça JA distilled the essence of the exception in these words:

> *"The decisive factor as was said in White v. Brunton is that when analysed, the issue may properly be regarded as* the *first part of final hearing and not preliminary to a final hearing ."*[14]

32. Mendonça JA further illuminated the principle by quoting these words of Anderson J in ***Scottwood Charitable Trust v R.F.Murray Family Trust and Others***[15]***:***

> *"There seems to be an appreciation that a judgment is final where it is finally determinative of the substantive merits or part of the substantive merits of a proceeding "*

33. In considering for relevance of the exception, we were mindful that the intended appeal is exclusively on the issue of costs.

34. As a matter of principle, an order for costs cannot be determinative of the substantive merits. In fact, the issue of costs is external to and consequential upon the merits of a claim, and begins where the merits have ended.

35. Nonetheless, when the essence of the exception is distilled, one finds that the issue of costs itself may occasionally be presented to the court in different segments.

36. We conceive that an order, determinative of one segment may properly fall within the exception to the application test. It may correctly be viewed as the determination of the first part of the hearing on costs or in the words of Mendonça JA, not as preliminary to the final hearing but the end of the first part of the final hearing.[16]

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[11] White v. Brunton [1984] QB 570
[12] [1992] 2 AC 172
[13] Motor and General Insurance Co. Ltd v Gail Sanguinette Civil Appeal No. 158 of 2003
[14] AG v Lennox Phillip Civ App 155 of 2006 at paragraph 21
[15] Scottwood Charitable Trust v. R. F. Murray Family Trust and Others [2001] N.Z. C.A. 287 at paragraph 19
[16] A.G. v Lennox Phillips Civil Appeal 155 of 2006

37. Such an order, not being the end, or the beginning of the end, is the end of the beginning.

38. Turning to the Application before us, it is clear that the trial Judge decided the method by which costs should be assessed. The Court of Appeal, disagreeing with the trial Judge, also resolved the method by which costs should be assessed. This brought to finality the first part of the issue of costs.

39. There was however, another leg of the journey, a remaining segment, which was the stipulation of damages and the application of the prescribed costs regime, an arithmetical exercise. The first part was finally concluded and in the absence of a reversal on appeal, there could be no variation or deviation from the method of assessment as decided by Rajkumar JA.

40. It is therefore our view that the decision on the method of assessing costs was a final decision on the first part of the costs hearing. It fell within the ***White v Brunton***[17] exception and ought to be treated as a final order for the purpose of s. 109(1) .

Section 109(2)

41. Our finding (supra) renders it unnecessary to rule on the arguments as to whether the Applicant could or should have obtained the Court's leave under s. 109(2).

42. Nonetheless we proceed to offer our thoughts on the issue, in deference to the extensive submissions, which were placed before us.

43. Under section 109 (2) an applicant may obtain conditional leave in these circumstances:

> *"An appeal shall lie from decisions of the Court of Appeal to the Judicial Committee with the leave of the Court of Appeal in the following cases:*
>
> *(a) decisions in any civil proceedings; 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..."*

44. There was no contention that the question involved in the appeal was not of great general or public importance. This phrase was defined by Bereaux JA in ***Jacqueline Hilton-Clarke v. RBC Royal Bank Ltd***[18] where he said at paragraph 15:

[17] White v. Brunton [1984] QB 570

[18] Jacqueline Hilton-Clarke v. RBC Royal Bank Ltd. Civil Appeal No. P095 of 2019

> *"Great general importance or great public importance will normally be applicable to some issue of law, constitutional or otherwise affecting the public in general or which is of such general application and of such a nature as to require pronouncement upon it by the Judicial Committee as our highest court.* [19]

45. We reckon that the Applicant was correct to refrain from attempting to fit a decision on costs into the above formula.

46. It was also our view that the decision in question could not be placed under the classification of "otherwise' in the context of section 109 (2).

47. Of the term "otherwise", Bereaux JA had this to say in ***Hilton-Clarke*** at paragraph 16 of his judgment:

> *"16. The term "or otherwise" is to be considered in the overall context of the phrase "great general or public importance or otherwise". That is to say, it must be a question, though not of great general or public importance, which is still "otherwise" important. In my judgment, the issue must have some special feature or the facts which give rise to it, constitute such special circumstances, as to render it important that the issue be considered and determined by the Judicial Committee of the Privy Council. That is to say, by virtue of its special features or special circumstances, it is a case or class of case which should be heard by our highest court. We expect that such cases will be rare."*

It is our view that no special features or circumstances have been demonstrated in this case. Accordingly, we find ***section 109 (2)*** to be inapplicable.

Costs

48. Should it have become necessary for the Applicant to have had recourse to s. 109(2), he would have been hard pressed to convince the Court to grant leave where the intended appeal was exclusively on costs. In ***Singh v Public Service Commission***[20], their Lordships expressed their reluctance to consider appeals on the issue of cost. Lord Briggs, delivering judgment on behalf of Board said:

[19] See Hilton-Clarke paragraph 15

[20] Singh v Public Service Commission [2019] UKPC 18

"2. This is an appeal purely about costs. In Fourie v Le Roux [2007] 1 WLR 320, at 338, Lord Carswell said, in relation to appeals about costs, that:

> *"This is peculiarly an area in which the principles should be developed and applied by the judges at first instance, with the oversight of the Court of Appeal, and that the House should not reverse a costs order without a strong reason in principle."*

That observation, although made in the House of Lords, is fully applicable to the practice of the Board. Even where (as here) the appeal about costs is brought as of right, it will be a rare case where the Board will think it appropriate to intervene. Not only will issues as to costs generally fall within the discretion of the first instance judge, but the local circumstances (including the implementation of procedural reform) will generally be better adjudicated upon by the local courts, rather than by the Board. Nonetheless the Board cannot simply dismiss the appeal because it is merely an appeal about costs, since this would render the statutory right of appeal, conferred in this case by sections 23(1) and (2) of the Judicial Review Act, nugatory."

On this ground, Mr. Mootoo, for the Second and Third Respondents, invited this Court to take the expressed disinclination of the Board into account in deciding whether these proceedings were caught by the phrase "otherwise" in section 109 (2).

49. Learned Senior Counsel, Maharaj also relied on ***Singh*** and submitted that notwithstanding their reluctance to interfere with the discretion of the Judge on an order for costs, their Lordships would nonetheless do so where there is an error of law. Learned Senior argued that in the case of an error of law, the Court has a duty to interfere otherwise it will render the appeal nugatory.

50. ***Singh v Public Service Commission*** was an appeal from an order for costs, following the discontinuance of an application for leave to apply for judicial review under the ***Freedom of Information Act***[21]. Mr. Singh, having obtained the permission of the High Court to withdraw his application for leave to apply for judicial review, also obtained an

[21] Freedom of Information Act Ch 22:02

order that the PSC pay him costs in the sum of $7500.00. Charles J subsequently heard and granted an application to set aside the order for costs. Mr. Singh appealed against the order of Charles J. The appeal was dismissed and Singh appealed to the Privy Council. Their Lordships allowed the appeal and restored the trial Judge's original order.

51. In ***Singh,*** the Privy Council not only entertained an appeal exclusively on the issue of costs, but considered and allowed the appeal. We considered whether the effect of ***Singh*** was to preclude decisions, which are purely on the issue of costs from proceeding to the Privy Council.

52. The answer is to be found at paragraph 2 of the judgment of Lord Briggs. The general rule is that the highest court will only entertain an appeal of a purely costs order in rare cases. Two underlying reasons are identified by Lord Briggs. The first is that the issue of costs falls within the discretion of the first instance Judge. The second is that costs are better adjudicated upon by local courts.

53. Lord Briggs then proceeded to identify the factors, which led their Lordships in ***Singh***, nonetheless to entertain the appeal.

54. It was that to refuse to entertain the appeal would render nugatory the statutory right of appeal, as conferred by ***sections 23(1) and (2)*** of the ***Judicial Review Act***[22]:

> *"23. (1) A person aggrieved by a decision of the Court, including an interlocutory order, under this Act is entitled to appeal that decision as of right to the Court of Appeal.*
> *(2) An appeal shall lie from a decision of the Court of Appeal referred to in subsection (1), as of right to the Judicial Committee of the Privy Council."*

55. There was no analogous statutory right of appeal in the proceedings before this Court. No other circumstances exist to warrant a classification of this case as "rare". It was simply the trial Judge's interpretation of the ***CPR*** as to the appropriate cost order following the discontinuance of proceedings. In our view therefore, the decision under appeal is not rare and would be best determined by the local courts without the intervention of the Privy Council.

[22] Judicial Review Act Ch 7:08

56. Accordingly, had we not decided that the Applicant was entitled to conditional leave as of right under ***section 109(1),*** the Applicant would not have been successful in obtaining the Court's permission under ***section 109(2)***.

Disposition and Order

57. For reasons stated above the Applicant is entitled as of right, under s.109(1) to conditional leave to appeal the order of the Court of Appeal on July, 1,2020.

Date of Delivery: February 03, 2021