COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 123 of 2020

B E T W E E N

(1) THE ATTORNEY-GENERAL OF THE BAHAMAS
(2) THE MINISTER OF IMMIGRATION
(3) THE COMMISSIONER OF POLICE
(4) SUPERINTENDENT OF THE BAHAMAS DEPARTMENT OF CORRECTIONAL SERVICES
(5) DIRECTOR OF IMMIGRATION
(6) OFFICER IN CHARGE OF THE CARMICHAEL ROAD DETENTION CENTRE
Intended Appellants

AND

MATTHEW SEWELL
Intended Respondent

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Mr. Justice Isaacs, JA
The Honourable Mr. Justice Evans, JA

APPEARANCES: **Mr. Kirkland Mackey with Mr. Shaka Serville, Ms. Raquel Whyms and Mr. Audirio Sears, Counsel for the Intended Appellants**

Mr. Frederick Smith, QC with Mr. Martin Lundy II and Ms. Raven Rolle, Counsel for the Intended Respondent

DATES: **15 December 2020; 14 January 2021**

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Civil appeal – Leave to appeal - Striking out of Defence – Effect of striking out of Defence – Sections 10 & 11 of the Court of Appeal Act – Rule 11 of the Court of Appeal Rules - Rules of the Supreme Court Order 18 Rule 13

The intended respondent/plaintiff filed an action against the intended appellants/defendants in the court below alleging, inter alia, breaches of his constitutional rights. The intended appellants filed a Defence to the claim but, on 19 August 2020, the Defence was struck out by the judge as a sanction for noncompliance with various orders previously imposed. The intended appellants did not appeal that order and the matter proceeded to trial. At the end of the trial, on 7 September 2020, judgment was entered for the intended respondent, with damages to be assessed on 28 October 2020. Two days before the date fixed for assessment, on 26 October 2020, the intended appellants filed a Notice of Appeal and sought an extension of time within which to appeal the 19 August 2020 and 7 September 2020 orders.

Held: application for extension of time refused; appeal filed on 26 October 2020 struck out. Costs of the application and of the appeal to the intended respondent to be taxed it not agreed.

The 19 August 2020 order was an interlocutory order and the 7 September 2020 judgment was an interlocutory judgment; both require leave to appeal as per section 11(f) of the Court of Appeal Act. As leave has not been sought and/or granted by the court below this Court cannot accede to the intended appellants' extension of time application.

Junkanoo Estates Ltd et al v UBS (Bahamas) Ltd (in voluntary liquidation) [2017] UKPC 8 applied
Thomas v Bunn [1991] 1 A.C. 362 applied

J U D G M E N T

Judgment delivered by the Honourable Sir Michael Barnett, P:

1. This appeal, filed on 26 October 2020, seeks to set aside two orders made by Bowe-Darville, J. The first order was made on 19 August 2020. The second order was made on 7 September 2020.

2. This was an action by the intended respondent against the intended appellants seeking damages in tort and for breach of constitutional rights.

3. The intended appellants filed a Defence to the claim by the intended respondent but was in breach of other orders made by the trial judge for the progress of the claim including discovery orders.

4. The intended appellants were in breach of the orders; and on 19 August 2020 the trial judge, as a sanction for noncompliance, struck out the intended appellants' Defence that had been filed. The judge said:

> **"19. The Court finds that the Defendants (by their counsel) were negligent in their conduct of this matter. They are guilty of contumelious delay in the prosecution of their Defence.**
>
> **20. The chronology on the file shows that the Defendants delayed from inception. The file shows no further action by the Defendants from the filing of the Defence. The history of non-compliance is unacceptable.**
>
> **21. In the exercise of the powers set out in Orders 31A/20/1/a and 24/16 (both striking out provisions) the Defence filed herein on 17th June, 2018 is struck out."**

The intended appellants did not seek to appeal that order, notwithstanding that the effect of that ruling was to leave the intended appellants without a pleaded Defence. The effect of the absence of a pleaded Defence was that pursuant to Order 18 rule 13 the facts alleged in the Statement of Claim are deemed to be admitted.

5. The matter proceeded to trial on 26 August 2020. The intended appellants participated in that trial notwithstanding that it had no pleaded Defence. At the end of the trial on 7 September 2020 the judge made the following ruling:

> **"25. The Defence having been struck out the Plaintiff's pleadings and evidence are deemed to have been admitted.**
>
> **26. The Court is satisfied that the Plaintiff has proven his case.**
>
> **27. The Plaintiff's submissions present many decided like cases in The Bahamas. It was the Plaintiff's firm position that "despite repeated judicial pronouncements and educational exposition of what the law is in relation to police and immigration powers of arrest and detention, the Defendants, their servants and/or agents continue to brazenly flout the Fundamental Rights and Freedoms and Chapter 3 of the Constitution with impunity and without executive censure…"**
>
> **28. Therefore, Judgment is entered for the Plaintiff with damages to be assessed as claimed as reliefs in the Writ of Summons."**

6. The matter was adjourned to 28 October 2020 (some seven weeks later) to deal with the issue of quantum.

7. The intended appellants filed this Notice of Appeal on 26 October 2020, two days prior to the date fixed for assessment. The assessment has taken place and the parties are awaiting the judge's judgement on the quantum of damages.

8. The intended appellants have also filed an application for the extension of time within which to appeal the two orders.

9. Sections 10 and 11 of the Court of Appeal Act provide:

> **"10. Subject to the provisions of this Part of this Act and to the rules of court, the court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court given or made in civil proceedings, and for all purposes of and incidental to the hearing and**

determination of any such appeal and the amendment, execution and enforcement of any judgment or order made thereon, the court shall, subject as aforesaid, have all the powers authority and jurisdiction of the Supreme Court.

11. No appeal shall lie —

…

(f) without the leave of the Supreme Court or of the court from any interlocutory order or interlocutory judgment made or given by a Justice of the Supreme Court except —

(i) where the liberty of the subject or the custody of infants is in question;

(ii) where an injunction or the appointment of a receiver is granted or refused;

(iii) in the case of a decree nisi in a matrimonial cause or a judgment or order in an Admiralty action determining liability;

(iv) in the case of an order in a special case stated under the Arbitration Act; (v) in the case of a decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the Companies Act in respect of misfeasance or otherwise; or

(vi) in such other cases to be prescribed as are in the opinion of the authority having power to make rules of court, of the nature of final decisions."

10. The order of 19 August 2020 is an interlocutory order, and the judgment of 7 September 2020 is an interlocutory judgment (see **Thomas v Bunn** [1991] 1 A.C. 362). No appeal can be made against either without the leave of the court.

11. Rule 11 of the Court of Appeal Rules provides:

"11. (1) Every notice of appeal shall be filed and a copy thereof served by the appellant upon all parties to the proceedings in the court below who are directly affected by the appeal —

(a) in the case of an appeal from an interlocutory order, fourteen days;

(b) in any other case, six weeks,

calculated from the date on which the judgment or order of the court below was pronounced or made."

12. The intended appellants had two weeks to appeal each order. They are clearly out of time.

13. They now seek leave to appeal out of time. The problem is that they have not sought, much less obtained, the leave of the trial judge to appeal these interlocutory orders.

14. There would be no basis for this Court to extend the time unless and until the court below grants them leave to appeal those interlocutory orders.

15. This procedure with respect to an appeal against an interlocutory order was dealt with by the Privy Council in **Junkanoo Estates Ltd et al v UBS (Bahamas) Ltd (in voluntary liquidation)** [2017] UKPC 8 where the appellant sought to appeal a judgment made on an Order 14 application. The appellants did not obtain the leave of the trial judge to appeal.

16. The relevant parts of the advice of the Board written by Lord Sumption are as follows:

> **"5. Under section 11(f) of the Court of Appeal Act, an appeal to the Court of Appeal from an interlocutory order lies only with the leave of the Supreme Court or that of the Court of Appeal. Rule 27(5) of the Court of Appeal Rules provides:**
>
> > **"Wherever under the provisions of the Act or of these Rules an application may be made either to the court below or to the court, it shall be made in the first instance to the court below."**
>
> **It is common ground that for this purpose an order giving summary judgment is an interlocutory order. The English rule to this effect was stated in White v Brunton [1984] QB 570 and has been applied for many years in the Bahamas.**
>
> **6. On 20 April 2015, the defendants filed a notice of appeal against the order of Evans J, together with an application for a stay of execution of the judgment. They had not, however, sought leave to appeal from Evans J. <u>Because of Rule 27(5), they were not therefore in a position to seek it from the Court of Appeal, unless the Court exercised its general power to dispense with compliance, which they had no reason to do.</u> The matter was heard in the Court of Appeal over four days, on 20 May, 29 July, 14 September and 2 November 2015. Junkanoo and Mr Starostenko were each represented by Counsel. Mrs Starostenko appeared in person. UBS took**

the preliminary point that no leave had been sought or obtained, and in a judgment delivered on 2 November, the applications were dismissed and the Notice of Appeal struck out on that ground.

7. There followed a period of some months in which the defendants, and in particular Mrs Starostenko, attempted to make further applications in the Supreme Court, including an application for a stay of execution of the possession order. According to Mrs Starostenko, the Supreme Court registry refused to accept any applications from her on the ground that the Supreme Court was functus and the matter had gone to the Court of Appeal. The Board is unable to determine exactly what happened between Mrs Starostenko and the court administration. She was apparently acting in person and seems to have made personal approaches to the court office rather than lodging applications in proper form. What seems, however, to be the position on the presently available evidence, including Mrs Starostenko's affidavit sworn 8 August 2016, is that the applications which she wished to make in the Supreme Court did not include an application for leave to appeal from Evans J's judgment of March 2015. Mrs Starostenko told the Board that this was because she had been given to understand that until an extension of time had been obtained, she would not be in a position to seek leave to appeal.

8. If so, this was an error. The proper course would have been to apply first to Evans J, on notice to the plaintiff bank, for leave to appeal. … If leave had been given, the next step would have been to apply to the Court of Appeal for an extension of time for the appeal. If leave to appeal had been refused, application could then have been made to the Court of Appeal for leave to appeal and an extension of time. An application for a stay of execution could have been made at the same time as these applications." [Emphasis added]

17. As no leave to appeal has been obtained, we are unable to accede to the intended appellants' request to extend the period of time to appeal. There is no basis for us to dispense with the requirement to satisfy the Rule requiring the prior leave of the court below.

18. If the intended appellants obtain the leave to appeal these two interlocutory orders (notwithstanding that the assessment of damages has already taken place) then they are at liberty to apply for an extension of time. But unless and until that has been done, there is no basis for us to grant the application for an extension of time.

19. The application for an extension of time is refused and the appeal, filed on 26 October 2020, is struck out. The costs of the application to extend time and the costs of the appeal are to be paid by the intended appellants to the intended respondent, to be taxed if not agreed.

The Honourable Sir Michael Barnett, P

The Honourable Mr. Justice Isaacs, JA

The Honourable Mr. Justice Evans, JA