COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 111 of 2018

IN THE MATTER of The Bankruptcy Act, Chap. 69 of the Statute Laws of The Bahamas

Re: Colin Wright

Ex parte The Bahamas Communications and Public Officers Union Plan & Trust Fund

B E T W E E N

Colin Wright

Appellant

AND

The Bahamas Communications and Public Officers Union Plan & Trust Fund (By Avril Clarke, Andrea Culmer, and Steve Hepburn in their capacities as trustees) (A Judgment Creditor)

Respondent

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SCCivApp. No. 128 of 2018

IN THE MATTER of The Bankruptcy Act, Chap. 69 of the Statute Laws of The Bahamas

Re: Bernard Evans

Ex parte The Bahamas Communications and Public Officers Union Plan & Trust Fund

B E T W E E N

Bernard Evans

Appellant

AND

The Bahamas Communications and Public Officers Union Plan & Trust Fund (By Avril Clarke, Andrea Culmer, and Steve Hepburn in their capacities as trustees) (A Judgment Creditor)

Respondent

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SCCivApp. No. 157 of 2018

IN THE MATTER of The Bankruptcy Act, Chap. 69 of the Statute Laws of The Bahamas

Re: Ray Nairn

Ex parte The Bahamas Communications and Public Officers Union Plan & Trust Fund

B E T W E E N

Ray Nairn

Appellant

AND

The Bahamas Communications and Public Officers Union Plan & Trust Fund (By Avril Clarke, Andrea Culmer, and Steve Hepburn in their capacities as trustees) (A Judgment Creditor)

Respondent

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SCCivApp. No. 158 of 2018

IN THE MATTER of The Bankruptcy Act, Chap. 69 of the Statute Laws of The Bahamas

Re: Shawn Bowe

Ex parte The Bahamas Communications and Public Officers Union Plan & Trust Fund

B E T W E E N

Shawn Bowe

Appellant

AND

The Bahamas Communications and Public Officers Union Plan & Trust Fund (By Avril Clarke, Andrea Culmer, and Steve Hepburn in their capacities as trustees) (A Judgment Creditor)

Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**
The Honourable Madam Justice Crane-Scott, JA
The Honourable Mr. Justice Roy Jones, JA

APPEARANCES: **Mr. Maurice Glinton, QC, with Ms. Meryl Glinton for the Appellants**
Mr. Kahlil Parker, with Ms. Roberta Quant, for the Respondent

DATES: **26 August 2020; 17 February 2021**

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Civil Appeal – Bankruptcy proceedings – Application for leave to appeal to the Privy Council – Whether the applicant has an arguable case – Whether the intended appeal involves a point of general public importance

The appellants are all former trustees of the BCPOU Pension Plan & Trust Fund who were sued by two of the Fund's trustees for the recovery of the total amount of two unauthorized loans made to a construction company. The respondent (judgment creditor) initiated and succeeded in bankruptcy proceedings against all four appellants (judgment debtors) in the Supreme Court. In June 2020 this Court dismissed the applicant's appeal against the judge's decision not to recuse herself as well as their appeals against adjudications of bankruptcy. The applicants now seek leave to appeal that dismissal to the Privy Council, averring that their constitutional rights were breach by the Court's failure to deliver a more timely judgment.

Held: leave refused; application for stay pending appeal is also refused.

There has been no deprivation of the appellants' right of access to the courts. The fact that they are presently before this Court is a pellucid affirmation of the right they claim has been denied to them. Moreover, they have failed to demonstrate any possible prejudice they may have suffered as a result of these alleged breaches. The intended appellants seek by artifice to shoehorn their appeals into that category of an appeal which would enable them to appeal as of right. Were we to allow such a stratagem to succeed, an aggrieved litigant in a civil case would only have to invoke an Article of the Constitution to ensure his appeal is sent on to the Privy Council, notwithstanding that his appeal does not otherwise qualify for such consideration.

The appellants' appeals are against adjudications of bankruptcy and the delay by the Judge in the delivery of her judgment. Neither of these complaints bring the appellants within section 23 of the Rules. Moreover, they do not engage Articles 20 and 28 of the Constitution for our consideration at this juncture in the proceedings, viz, such constitutional complaints ought to have been raised in the Supreme Court because the Constitution invests in that court the original jurisdiction to hear matters involving alleged breaches of the fundamental rights found in Articles 16 to 27. In such a hearing, evidence would have had to be led before the court to demonstrate any breach that may have occurred. It is not appropriate for the appellants at this stage to seek to litigate these alleged constitutional breaches.

The intended appellants' applications based on breaches of their constitutional rights are wholly devoid of merit and are intended solely to delay the consequences of the adjudication orders; thereby rendering the applications an abuse of the processes of the court. The Judge was functus officio once final judgment had been entered and, even if she had been minded to entertain a summons questioning the propriety of the result in the case, she would have fallen into error had she so done.

Callenders & Co (a firm) v The Comptroller of H. M. Customs SCCivApp. No. 63 of 2012 considered

Crawford and others v Financial Institutions Services Ltd [2003] UKPC 49, (2003) distinguished
Electrotec Services Ltd v Issa Nicholas (Grenada) Ltd [1998] 1 WLR 202 mentioned
Fisher v Minister of Public Safety and Immigration [1998] A.C. 673 considered
Kemrajh Harrikissoon v The Attorney General of Trinidad & Tobago Privy Council Appeal No. 40 of 1977 applied
Lopes v Valliappa Chettiar [1968] 2 All ER 136 mentioned
Martinus Francois v Attorney General St Lucia Civil Appeal No 37 of 2003 considered
Ramson v Barker [1986] 33 W.I.R. 183 considered
Renaissance Ventures Ltd v Comodo Holdings [2018] ECSC J1008-3 mentioned
Responsible Development for Abaco (RDA) Ltd. ex p The Queen v The Rt. Hon. Perry Christie, Prime Minister et al SCCivApp. No. 248 of 2017 mentioned
Siddiqui and others v Athene Holding Limited (2019) 95 WIR 342 Civil Appeal No. 1 of 2019 mentioned
Stubbs v Gonzales and Anor [2005] UKPC 22 distinguished
Thakur Persad Jaroo v Attorney General [2002] 5 LRC 258 considered

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J U D G M E N T

Judgment delivered by the Honourable Mr. Justice Jon Isaacs JA:

1. The intended appellants are seeking leave to appeal to the Judicial Committee of Her Majesty's Privy Council ("the Privy Council") pursuant to section 23 of the Court of Appeal Act ("the CAA") and Article 104 of the Constitution of The Bahamas ("the Constitution"). They are dissatisfied with the judgment of the Court to dismiss their appeals against adjudications of bankruptcy made by Madam Justice Indra Charles ("the Judge") on 15 January 2018; and the Court's failure to deliver a more timely judgment that has resulted – they allege – in a breach of their constitutional rights under Article 20 of the Constitution. They contend that their appeals are as of right inasmuch as they have raised complaints of breaches of their constitutional rights and the value of the property in dispute is in excess of four thousand dollars.

2. For the reasons we express below, we decline to grant the leave sought by the intended appellants to appeal to the Privy Council.

History

3. Madam Justice of Appeal Crane-Scott delivered the judgment of this Court in the intended appellants' appeals on 18 June 2020; and in it, outlined the factual matrix of the appeals. We cannot improve upon it, hence we merely reproduce paragraphs 1 through 12 of her judgment:

"1. By way of a Supreme Court Writ action 2012/CLE/Gen/No. 0573 instituted by the Bahamas Communications and Public Officers Union Pension Plan and Trust Fund (acting by two of its trustees) and filed on 27 April, 2012, the appellants were sued in their capacity as former trustees for the recovery of the amount of two unauthorized loans made to the Kendal Williams Construction Company Limited (totalling $1,350,000.00) which the appellants were alleged to have negligently disbursed to the company in breach the Trust Fund's rules and in breach of the appellants' fiduciary and other duties owed to the Trust Fund.

2. Subsequently, pursuant to a Consent Order made by Barnett CJ (as he then was) on 7 October, 2014, Final Judgment in the sum of $1,350,000.00 was entered against the appellants on 15 October, 2014 with interest and costs. When the Consent Order was made, the appellants were represented by their Counsel on record, Mr. Donovan L. Gibson. It is undisputed that following the entry of the Final Judgment, neither the Consent Order nor the Final Judgment has ever been appealed to this Court and accordingly, they remain in full force and effect to this day.

3. Following entry of Final Judgment, the respondent/judgment creditor applied pursuant to O. 48, RSC for examination of the appellants/judgment debtors; and by Order dated 1 March, 2016, they were required to appear before the Acting Assistant Registrar on 19 April, 2016 for examination.

4. Some 19 months after the entry of Final Judgment and some 4 days prior to the date fixed for their examination before the Acting Assistant Registrar, the four appellants/judgment debtors applied by Summons filed on 15 April, 2016 in Supreme Court Writ action 2012/CLE/Gen/No. 0573 ("the Impugned Action") to postpone the examination; and for further orders to strikeout the Writ of Summons and vacate the Final Judgment as it related to each of them.

5. We pause to observe that in practical terms, this essentially meant that rather than taking steps to appeal against the Consent Order and the Final Judgment, the four appellants/judgment debtors launched an attack by Summons on the validity of the Impugned Action itself, alleging it to have been a nullity ab initio. As appears on the face of the Summons, the strike-out application purported to be made pursuant to RSC, O. 18 r. 19 (1)(a) and (b) and under the inherent jurisdiction of the court on grounds, inter alia, that the Writ and Final Judgment were a nullity ab initio and further, constituted an abuse of process.

6. Nothing in any of the four Records of Appeal indicates what actually transpired on the date originally scheduled for the examination of the appellant/judgment debtors before the Acting Assistant Registrar. It appears that the examination may not have taken place on 19 April, 2016 as scheduled as there is in all four Records of Appeal, a copy of a Notice of Adjourned Hearing filed by counsel for the respondent which indicates that the examination of the Judgment Debtors was re-scheduled for hearing on 29 September, 2016 before one of the Registrars of the Supreme Court. What, however, is undeniable is that the appellants' strike-out Summons of 15 April, 2016 has, for whatever reason, never been brought on for hearing in the court below.

7. Meanwhile, on 24 April 2017, the respondent/judgment creditor initiated bankruptcy proceedings against each of the appellant/judgment debtors. The four Bankruptcy Petitions were filed approximately 2 years and 6 months following entry of the Final Judgment and just over 1 year after the filing of the pending strike-out Summons which even at that date remained unheard.

8. Supreme Court Bankruptcy Petition 2017/COM/Bnk/No. 0004 ("the Wright proceedings") came on before Charles J., ahead of the other three. On 15 January, 2018, the learned Judge made an Order of Adjudication against Mr. Wright who had attended the hearing pro se. Following issuance of the Adjudication Order, Mr. Wright applied to the judge by Ex parte Summons filed on 12 February, 2018 for interim relief in the form of: (i) an injunction to restrain publication of the Gazette advertisement which was to issue in accordance with the Bankruptcy Act; and/or (ii) a stay of the bankruptcy proceedings pending the hearing and determination of the strike-out Summons of 15 April, 2016 filed in the Impugned Action.

9. Mr. Wright's Ex parte Summons was heard on 12 February, 2018; and in a written Judgment ("the Injunction Ruling") pronounced on 20 April, 2018, the learned judge refused the interim injunction and ancillary relief which he had sought.

10. On 14 May, 2018 Mr. Wright filed his Notice of Appeal Motion seeking, inter alia, an order from this Court setting aside the Injunction Ruling; granting him the interim and ancillary relief sought in his Summons; and a further order remitting the appellants' pending strike-out Summons to the Supreme Court for hearing. Charles J.'s Injunction Ruling located in Wright's Record of Appeal is the specific focus of Wright's appeal.

11. In the meantime, the remaining Bankruptcy Petitions against Evans, Nairn and Bowe and numbered: 2017/COM/Bnk/No.0007; 2017/COM/Bnk/No.0006 and 2017/COM/Bnk/No. 0005 respectively, came on for hearing before Charles J., on 17 April, 2018. Before substantive hearing of the Petitions commenced, counsel for appellants Evans, Nairn and Bowe, Mr. Glinton Q.C., made an oral application for the judge to recuse herself from hearing the Petitions. After hearing submissions on the matter, the learned judge handed down a written Ruling dated 24 May, 2018 ("the Recusal Ruling") dismissing the application with costs to the respondent.

12. Thereafter, the learned judge proceeded to hear the three Petitions; and on 20 June, 2018 made Orders of Adjudication against appellants Evans, Nairn and Bowe respectively.

13. All three appellants Evans, Nairn and Bowe then filed individual appeals each seeking to impugn the Recusal Ruling as well as the Adjudication Orders which had been made in relation to each of them. The judge's Recusal Ruling of 24 May, 2018 together with the Adjudication Orders of 20 June, 2018 located in their respective Records of Appeal provide the specific focus of their appeals."

Grounds of Appeal

4. Each intended appellant filed a separate application for leave to appeal but as they all allege very similar grievances we propose to focus on the case of Colin Wright ("Wright") as the exemplar of all of the intended appellants' applications.

5. Mr. Wright filed his notice of motion on 19 June 2020, wherein his stated proposed grounds of appeal are set out as follows:

"1. Inordinate and inexcusable delay of the Court in rendering Judgment after close of arguments in the case, derogated further from the Appellant's fair hearing rights in virtue of Article 20(8) of the Constitution, given the primary issue(s) founding the Appellant's appeal; namely, the first instance Judge's wrongful interference with the Appellant's exercise of the right, so as to deprive him of, access to the court for lawful determination of his civil rights and obligations under, and as relates to, Final Judgment the Respondents caused to be entered against him in Action 2012/CLE/gen. No 0573.

2. Whether or not it is inevitably the product of such delay or is attributable to some fault in transcribing the proceedings or

another cause, the Judgment of the Court contains errors of fact which taken singularly or together ultimately negatively affected the Court's perception of and approach to primary issue(s) for determination raised by the Appellant's appeal. Thus, for instance, paragraph 6 of the Judgment and its headnote state directly contradicting undisputed evidence before it about the Appellant and of the hearing at which on 15th January 2018 the Judge made the adjudication order relating to him, that he "attended the hearing pro se"; and at paragraph 10 of the Judgment, the primary issue(s) is also erroneously misstated and/or misidentified by the Court as: "Charles J's Injunction Ruling located in [the Appellant's} Record of Appeal is the specific focus of [his] appeal." Their Lordships failed to identify the primary issue(s) of appeal and devoted their analysis to the Appellant's complaint that the trial Judge wrongly refused him an interim injunction and ancillary relief, as if it were the central issue on appeal.

3. It not rightly identifying or adjudicating upon the Appellant's primary issue(s) of appeal before their Lordships of Appeal for determination, the Court asked itself the wrong question, whether issues the trial Judge identified and adjudicated upon in the Injunction Ruling were rightly decided and to be confirmed. Such approach inexorably resulted in the Court's Judgment being misdirected.

4. Consequently, the Court fundamentally erred in point of law and procedure, giving little or no weight to submissions and argument of the Appellant's counsel (as the trial Judge did), directed at establishing a prima facie case for the Appellant, that, given his pending application to impeach the Action in which Final Judgment, upon which the bankruptcy action is predicated, was entered against him, the trial Judge should not then have ventured into making an adjudication order. In brief, the argument for which submissions were made to show that the pending application had first to be determined was that the Action itself, in which he was sued collectively with other persons in the capacity of trustees of a trust fund (not in individual capacities, as former trustees), was fatally flawed in point of law and procedure and a nullity. However the Appellant was deprived of opportunity to have this and other issues properly heard and determined by the Court.

5. The Court further erred (repeating the trial Judge's error), at paragraph 21 of the Judgment, in not only misdirecting itself

as to counsel's "core complaint" as an interlocutory appeal by way of renewed application by the Appellant for interim injunctive and ancillary relief. It also (as did the trial Judge) ignored and failed to identify the actual complaint, namely, the Appellant's legal right to a pending application in Action 2012/CLE/gen. No 0573 in which the Respondents entered the Final Judgment against him, being finally determined in proper course of procedure, with a view to that Action and all subsequent proceedings therein being declared a nullity and set aside upon proper trial. In the premises, there was miscarriage of jurisdiction by the Court and the Appellant's pending application still extant.

6. The Court did not accept, but should have, that applying the correct test, which it did not, the effect of the trial Judge's making the adjudication order against the Appellant who was not at the hearing (nor his attorney with no notice of it) and who pre-empted the hearing of his pending application that she assigned hearing of to herself only to dismiss it for reasons given in her Judgment, required her recusal from further participation in the case in the circumstances.

7. In the premises, it follows from the above reasons that the Judgment of the Court affirming the decision of the Judge below is not responsive to or dispositive of primary issue(s) raised by the Appellant's appeal. It is therefore unsound, unsafe, and unfair, and ought not to be allowed to stand."

6. The intended appellants ask that we make an order suspending or staying the Judge's judgment and "all proceedings in virtue thereof under or in execution of or in relation to the provisions of The Bankruptcy Act".

7. They also contend that their appeal involves the intended appellants' right of personal liberty under Article 19(1) of the Constitution; and that it raises a substantial point of law of general public importance.

The Law

8. Section 23(1) and (2) of the CAA states:

"23. (1) An appeal shall lie to Her Majesty in Council from any judgment or order of the court upon appeal from the Supreme Court in a civil action in which the amount sought to be recovered by any party or the value of the property in dispute is of the amount of four thousand dollars or upwards, and with the leave of the court but subject nevertheless to such restrictions, limitations and conditions as may be prescribed in relation

> **thereto by Her Majesty in Council, in any other proceedings on the Common Law, Equity, Admiralty or Divorce and Matrimonial sides of the jurisdiction of the Supreme Court.**
>
> **(2) Save as is provided in this section the decision of the court in any civil proceedings brought before it on appeal shall be final. "**

9. It is evident that in order for the intended appellants to utilize section 23 of the CCA they must fall within the terms of the provision, that is, the appeal must arise from a civil action in which the amount sought to be recovered is four thousand dollars or more. Further, the proceedings must be on the Common Law, Equity, Admiralty or Divorce and Matrimonial sides of the jurisdiction of the Supreme Court.

10. Order 1 rule 2 of the Rules of the Supreme Court provides, inter alia, as follows:

> **"(2) These Rules shall not have effect in relation to proceedings of the kinds specified in the first column of the following Table (being proceedings in respect of which rules may be made under enactments specified in the second column of that Table) —**
>
> **TABLE**
>
> | **Proceedings** | **Enactments** |
> |---|---|
> | **1. Bankruptcy proceedings** | **Bankruptcy Act, s. 102."** |

Bankruptcy proceedings are exempted from the Supreme Court Rules; and are subject to their own set of rules.

Does the Court Exercise a Discretion in Appeals as of Right

11. We begin by addressing Mr. Glinton's submission that the Court has no discretion to exercise because the intended appellants' appeals are as of right. He makes reference to Article 28 of the Constitution and to the Guyanese case of **Ramson v Barker** [1986] 33 W.I.R. 183 that considered an article of their Constitution similar to our Article 28. At page 227 Bishop, J (as he then was) said:

> **"The article makes provision for an actual or apprehended contravention of an applicant's fundamental rights and creates a new and special jurisdiction. It recognizes that fundamental rights transcend common law ones, and that the hearing and determination of a constitutional motion for relief should proceed forthwith, once the affidavits in support of it disclose facts that, ex facie, are well founded and meritorious. There is no condition precedent that the applicant has to submit himself or his allegations for investigation by another court or tribunal."**(Emphasis added)

12. In **Fisher v Minister of Public Safety and Immigration** [1998] A.C. 673, Lord Goff of Chieveley while discussing Article 17(1) of the Constitution made the following observation:

> **"First, Article 3 of the European Convention is an unqualified and absolute guarantee of the human rights it protects: *Republic of Ireland v. United Kingdom* (A25) (1978) 2 EHRR 25 para. 163. In order to filter out insubstantial complaints the only qualification is that in order for conduct to be covered by the prohibition it must "attain a minimum level of severity"".** (Emphasis added)

The Grounds of the Applications

Ground 1

13. The issue of delay in the delivery of the judgments of the courts may in some circumstances involve a breach of an individual's right to a trial within a reasonable time. However, this ground alleges that the effect of the inordinate delay was to **"deprive him of access to the court for lawful determination of his civil rights and obligations".** There has been no deprivation of the appellants' right of access to the courts. The fact that they are presently before this Court is a pellucid affirmation of the right they claim that has been denied to them. Moreover, they have failed to demonstrate any possible prejudice they may have suffered as a result of these alleged breaches.

14. In **Harrikissoon v The Attorney General of Trinidad & Tobago** Privy Council Appeal No. 40 of 1977, Lord Diplock said the following:

> **"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate**

> **judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.'**

15. We pay regard to the intended appellants' invocation of the Articles of the Constitution in these circumstances; and we bear in mind the exhortation of Lord Hope of Craighead in **Thakur Persad Jaroo v Attorney General** [2002] 5 LRC 258.

16. The brief facts in **Jaroo** were that Mr. Jaroo had his vehicle detained by the police for some fourteen years ostensibly because they believed it had been stolen. He applied for constitutional relief via a declaration on the basis that he had been deprived of the enjoyment of his property without due process of law. Although the Privy Council found the police had acted arbitrarily in detaining the vehicle so long, they found Mr. Jaroo was not entitled to a declaration because he could have brought an action in detinue. At paragraph 39 Lord Hope said:

> **"Their Lordship respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statue might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motions from the High Court as its continued use in such circumstances will also be an abuse."**

17. In the premises, there is no substance to this allegation and the intended appellants' recourse to the Constitution is misplaced. In our view, the intended appellants seek by artifice to shoehorn their appeals into that category of an appeal which would enable them to appeal as of right. Were we to allow such a stratagem to succeed, an aggrieved litigant in a civil case would only have to invoke an Article of the Constitution to ensure his appeal is sent on to the Privy Council, notwithstanding that his appeal does not otherwise qualify for such consideration.

18. We had regard to the authorities cited by Mr. Glinton, but we hold the view that they do not assist the intended appellants in their quest for leave to appeal on this ground.

19. We are not inclined to grant the intended appellants leave to appeal on the basis of a constitutional breach of a fundamental right because, unlike in, **Crawford and others v Financial Institutions Services Ltd** [2003] UKPC 49, (2003) 63 WIR 169 where the Privy

Council considered "issues as to the powers of the Court of Appeal to stay proceedings in an appeal as of right to the Judicial Committee of the Privy Council and to rescind an order granting conditional leave to appeal", this case does not involve a claim for money in excess of four thousand dollars. In the course of their Lordships' judgment in **Crawford**, the following appears at paragraphs 16 and 17:

> **"[16] Mr Hylton argued that whilst the Petitioners wished to exercise their right of appeal to the Judicial Committee, they had made no effort to comply with the orders for costs made against them by the Chief Justice and the Court of Appeal. Therefore the Petitioners were abusing the process of the court by utilising it in so far as it assisted them whilst flouting orders which operated to their disadvantage, and the Court of Appeal was entitled to stop this abuse. Moreover the Court of Appeal had struck an appropriate balance between the rights of the Petitioners and the rights of the Respondent by giving the Petitioners a lengthy period in which to comply with the costs orders before rescinding the conditional leave to appeal. Mr Hylton further submitted that it was clear from the procedure, whereby an appellant had to apply to the Court of Appeal for final leave to appeal after he had been granted conditional leave, that the appeal process was still within the jurisdiction of the Court of Appeal before final leave was granted.**
>
> **[17] Their Lordships are unable to accept these submissions. Section 110(1)(a) of the Constitution gives the Petitioners an appeal as of right to the Judicial Committee and the Jamaica Appeals Procedure Order lays down a code whereby leave to appeal is given by the Court of Appeal, and which gives power to the Court of Appeal in granting conditional leave to impose certain conditions, to grant a stay of execution of the judgment appealed from, and to rescind conditional leave to appeal on failure by the appellant to apply with due diligence for final leave to appeal. Their Lordships are of opinion that the Court of Appeal is not entitled to exercise its inherent power to impose further conditions or to make further orders which restrict the right of appeal given by s 110(1)(a). The observation of Lord Hoffmann in the *Electrotec Services case* [1998] 1 WLR 202, 206H in relation to the Constitution of Grenada is equally applicable in the present case:**
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> > **"The recoverability of costs by a successful litigant is not a universal requirement of justice and, as Sir Vincent Floissac CJ observed in the Court of Appeal, the Constitution appears to give priority to the free availability, in the designated**

cases, of the right to appeal to Her Majesty in Council.""

(See also **Lopes v Valliappa Chettiar** [1968] 2 All ER 136 and **Electrotec Services Ltd v Issa Nicholas (Grenada) Ltd** [1998] 1 WLR 202).

20. At the time of the decision in **Crawford**, section 110(1)(a) of the Constitution of Jamaica provided as follows:

> **"An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases – (a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of $1000 or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of $1000 or upwards, final decisions in any civil proceedings."**

The similarity of section 110(1)(a) to section 23 of our Court of Appeal Rules ("the Rules") is readily apparent. Section 23 states as follows:

> **"23. (1) An appeal shall lie to Her Majesty in Council from any judgment or order of the court upon appeal from the Supreme Court in a civil action in which the amount sought to be recovered by any party or the value of the property in dispute is of the amount of four thousand dollars or upwards, and with the leave of the court but subject nevertheless to such restrictions, limitations and conditions as may be prescribed in relation thereto by Her Majesty in Council, in any other proceedings on the Common Law, Equity, Admiralty or Divorce and Matrimonial sides of the jurisdiction of the Supreme Court.**
>
> **(2) Save as is provided in this section the decision of the court in any civil proceedings brought before it on appeal shall be final.**
>
> **(3) Nothing in this section contained shall be deemed to restrict or derogate from the right of Her Majesty in Council in any case to grant special leave to appeal from the decision of the court in any cause or matter."**

20. The appellants' appeals are against adjudications of bankruptcy and the delay by the Judge in the delivery of her judgment. Neither of these complaints in our view, bring the appellants within section 23 of the Rules. Moreover, they do not engage Articles 20 and 28 of the Constitution for our consideration at this juncture in the proceedings, viz, such constitutional complaints ought to have been raised in the Supreme Court because the Constitution invests in that court the original jurisdiction to hear matters involving alleged breaches of the fundamental rights found in Articles 16 to 27. In such a hearing, evidence would have had to be led before the court to demonstrate any breach that may have occurred. It is not appropriate for the appellants at this stage to seek to litigate these alleged constitutional breaches.

21. As an aside, it is notable that an argument was proffered in the **Electrotec Services** case to the effect that notwithstanding the fact that an appeal may lay as of right to the Privy Council, the Privy Council retained an inherent jurisdiction even on such appeals to impose additional conditions.

22. At p 206 of the judgment Lord Hoffman stated:

> **"It is not however necessary to decide whether the inherent jurisdiction has been altogether excluded because their Lordships are satisfied that if it exists, it should be exercised only in exceptional cases; for example, when it appears likely that the bringing of the appeal is an abuse of process. It is not suggested that this is such a case."**

23. We are satisfied that the intended appellants' applications based on breaches of their constitutional rights are wholly devoid of merit and are intended solely to delay the consequences of the adjudication orders; thereby rendering the applications an abuse of the processes of the court.

24. We decline to grant leave to appeal on an alleged breach of a constitutional right.

Ground 2

25. The errors of fact identified by the intended appellants in the Judge's judgment do not rise to the level of constitutional breaches and are no more than the run of the mill mistakes sometimes made by judges in the recounting of the evidence. Moreover, there is nothing shown that suggests the Judge, or indeed this Court, used mistaken facts that resulted in any constitutional breach.

26. We find that there is no substance in this ground sufficient to warrant transmission onward for their Lordships' consideration.

Ground 3

27. When Wright appealed to this Court against the decision of the Judge, his Notice of Appeal Motion set out six grounds of appeal. They are as follows:

> **"1. The said Judge erred fundamentally in law and in fact when she found refusing the said injunctive and ancillary relief, that, inter alia: (i) no substantial injustice was caused to the Applicant as the judgment debt remains wholly unsatisfied pursuant to the Final Judgment which has not been appealed to the Court of Appeal; (ii) "the argument that the Writ of Summons and Statement of Claim in the impugned action is a legal nullity is not only frivolous and nonsensical.... but it is illogical and**

inexplicable" particularly since it is clear from Mr. Wright's own affidavit (paragraph 3) that he and the other Defendants were sued "as former trustees of the Trust Fund and named as Second Defendants in that Action"; and (iii) "the fact that Mr. Wright and the other Defendants were identified in the heading of the substantive action as having been liable to the Trust Fund for their unlawful conduct while serving as its trustees by no means suggests that the Trust Fund was suing itself."

2. The said Judge also erred procedurally in not addressing the critical matter that the Applicant was fearful of happening to seek interim injunctive relief against the event, and making instead the said findings and conclusions, namely, that:

> **(i) (para. [52]) - "In my opinion, Mr. Wright should have appealed to the Court of Appeal if he was/is unhappy with the Final Judgment. That being said, I am in agreement with learned Counsel Mr. Parker that the Supreme Court is functus."**
>
> **(ii) (para. [66]) - "[T]hat, consistent with the decision of Sir Michael Barnett CJ (as he then was) in Palms of Love Beach (supra), "any summons" before the Supreme Court issued after final judgment has been entered in a matter seeking to challenge the said final judgment would have no reasonable prospect of success. The chances of Mr. Wright's Summons in the impugned action are even weaker in light of the Consent Order."**
>
> **(iii) (para. [67]) - "[T]his Court was not misled. At all material times, this Court was fully aware of the existence of the Summons to strike-out. In fact, at the hearing of this application, the Court handed a copy of the judgment delivered on 24 November 2016 to Mr. Glinton... Also, at paragraph 39 of the judgment in the 2014 action, this Court intimated that "Any Summons, particularly the Summons to set aside the judgment by consent filed almost two years later seems to be nothing more than a delaying tactic."**
>
> **(iv) (para. [69]) - "(Mr. Wright), having been personally served with the Debtor's Summons on 27 February 2017, has waited until 12 February 2018, nearly a year later, to seek to**

challenge the judgment debt. There is no good reason for this Court to accede to his late application."

(v) (para. [71]) - "in the face of uncontroverted evidence that Mr. Wright was personally served with both the Debtor's Summons and the Petition, it cannot reasonably be suggested that substantial injustice has been caused or that there was in fact any irregularity of which Mr. Wright could reasonably complain. Even when the Judgment Debtor's summons issued in this action is considered in light of the "substantial injustice" test, it cannot be reasonably suggested that the Bankruptcy Order ought to be stayed or that Mr. Wright is entitled to the relief for an interim injunction."

(vi) (para. [72]) - "the Bankruptcy Order which I made on 15 January 2018 is sound and unassailable."

3. The learned Judge misconceived the application before her as well as Applicant counsel's submissions and argument (despite appearing to have taken them into consideration). As a result she did not apply the law counsel cited correctly or at all to the factual circumstances of the Applicant's case; for example, in that she failed to differentiate the capacity in which Mr. Wright and the other trustees were being sued, as indorsed on the Writ, from the nature of the relief claimed.

4. The said Ruling works grave injustice upon the Applicant in that the learned Judge did not approach his application for interim injunctive relief with an open mind, borne out in the transcripts of hearings therein and evident by her findings and conclusions made in the Ruling, which demonstrate that she was unconsciously biased by predetermination.

5. Further, as also appears from her Ruling, the learned Judge by certain of her said findings and conclusions, and despite the Applicant's Summons to set aside the Final Judgment in the Principal Action not being before her for determination, nevertheless determined (or appear to have determined) it collaterally notwithstanding Applicant counsel's efforts to avoid such outcome. Thus Mr. Wright was deprived of his legal right to a fair and impartial hearing and denied access to Court for

proper adjudication of his rights and obligations to which he is constitutionally entitled.

6. In the premises, it follows from grounds 1 to 3 that the said Judge fundamentally erred in law and procedure the effect of which, barring this Court setting aside or varying the said Ruling, is that the Applicant suffers irremediably personal loss of civic rights and damage to his character for which he cannot be compensated in damages.""

28. The Court rightly determined the issues placed before it on the intended appellants' appeals and there has been no misdirection on what those issues were.

Grounds 4 and 5

29. The intended appellants were before the Judge on applications relating to orders of bankruptcy. These applications resulted from judgments having been entered by consent against them on 7 October 2014; and which judgments were not discharged on appeal. The Consent Order and the Final Judgment have never been appealed to this Court and accordingly, they remain in full force and effect.

30. Further, it was not until nineteen months after the entry of Final Judgment and some four days prior to the date fixed for their examination before the Acting Assistant Registrar, that the four appellants/judgment debtors applied by Summons filed on 15 April, 2016, to postpone the examination; and for further orders to strikeout the Writ of Summons and vacate the Final Judgment as it related to each of them.

31. The Judge did not err when she focused on the applications that were before her and did not allow herself to be distracted by an application to impeach the action in which the final judgments had been given. We are satisfied that the Judge was functus officio once final judgment had been entered and, even if she had been minded to entertain a summons questioning the propriety of the result in the case, she would have fallen into error had she so done. Thus, we hold the view that there is little prospect of success in this ground; and it is not of sufficient moment to warrant their Lordships' attention; and the exercise of our discretion to grant leave on this ground.

32. In that same vein, the complaint that this Court fell into the same error as the Judge, suffers from the same infirmity, to wit, we concerned ourselves with the issues raised on appeal.

Ground 6

33. This ground alleges that there was a "correct test" that ought to have been applied by the Judge and the Court to determine whether the Judge ought to have recused herself from any further

participation in the case after she had made the adjudication order against Wright; and even more so after she had pre-empted the hearing of his Summons and dismissed it.

34. We are satisfied that in the circumstances of these cases, to wit, the issues in each of the intended appellants' cases were largely identical and arose out of the same set of facts, the Judge did not err when she determined to hear the last three matters; nor do we find that there was any pre-determination of any issues in Wright's case. The identical result of the three decisions of the Judge as in Wright's case, in our view represented nothing more than a finding of the Judge that they all suffered the fatal flaws identified in Wright's case; and so, must have come to the same fate.

Ground 7

35. The complaint in this ground was addressed in our treatment of Ground 3. We find no merit in it and decline to grant leave on this ground.

Discussion

36. In the absence of any element of a constitutional issue being raised in this case except for Ground 1, we are satisfied that the intended appellants' applications rest solely upon the discretion of the Court in the usual manner. Thus, the ordinary principles that guide the Court in such matters apply in the instant cases.

37. In **Callenders & Co (a firm) v The Comptroller of H. M. Customs** SCCivApp. No. 63 of 2012, Conteh JA said at paragraph 20:

> **"20. The question therefore is: Does the applicant have an arguable case on the intended appeal, and does it raise an important issue of general and public importance on which the Privy Council ought to pronounce?"**

38. In **Martinus Francois v Attorney General St Lucia** Civil Appeal No 37 of 2003, Saunders, JA (as he then was) said at paragraph 13:

> **"[13] …In construing the phrase "great general or public importance" the Court usually looks for matters that involve a serious issue of law; a constitutional provision that has not been settled; an area of law in dispute, or, a legal question the resolution of which poses dire consequences for the public…"**

See also **Siddiqui and others v Athene Holding Limited** (2019) 95 WIR 342 Civil Appeal No. 1 of 2019; **Renaissance Ventures Ltd v Comodo Holdings** [2018] ECSC J1008-3 (decided on 8 October 2018); and **Responsible Development for Abaco (RDA) Ltd. ex p The Queen v The Rt. Hon. Perry Christie, Prime Minister, Minister of Finance, and Minister Responsible for Crown Lands, et al** SCCivApp. No. 248 of 2017.

Application for a Stay

39. In the course of his submissions on the issue of the grant of a stay, Mr. Glinton touched on Rule 56 of The Bankruptcy Rules 1871 which relates to the service of a Debtor's Summons. He argued that there had been a failure by the intended respondents to comply with the Rule. He relied on the Privy Council's decision in **Stubbs v Gonzales and Anor** [2005] UKPC 22 to submit that non-compliance with rule 56 in the intended appellants' cases deprived the Judge of any discretion to make adjudication orders. Thus, they were entitled to apply ex debito justitiae.

40. We note, as did Mr. Parker in his submissions, that this rule 56 argument is being raised for the first time on this application for leave to appeal. It did not feature in the hearings before the Judge nor before us. On that point alone we would have had no regard to this argument this late in the day. However, there may be other impediments facing the intended appellants on this issue.

41. At paragraph 10 of the judgment of Lord Hoffman in **Stubbs v Gonzales** (Supra), his Lordship stated

> **"[10] Rule 56 of the Bankruptcy Rules 1871 prescribes that a debtor's summons shall be personally served within twenty-one days from the date of the summons. In the present case, the summons was dated 1 December 2003 and, according to the affidavit of the process server, was served on 24 December 2003. It was therefore served outside the period prescribed by r56. It is well established that the ingredients of an act of bankruptcy must be strictly proved. In this case it appears from the petitioning creditor's own documents that service was defective and that there was no valid act of bankruptcy to support the making of an adjudication order."**

42. Mr. Parker brought section 64 of the Bankruptcy Act to our attention in reading **Stubbs v Gonzales** (Supra). It does not appear that section 64 was brought to the attention of their Lordships. Section 64 of the Bankruptcy Act states:

> **"64. No proceedings in bankruptcy shall be invalidated by any formal defect or by any irregularity unless the court before which an objection is made to such proceedings is of opinion that substantial injustice has been caused by such defect or irregularity, and that such injustice cannot be remedied by any order of such court."**

43. Mr. Parker also posited that there is no merit in this submission because **"the Affidavits of Service filed before the Court below with respect to service of the said Debtor's Summonses on each of the Appellants, wherein it is stated that the Debtor's Summonses**

were "dated and filed on the 23rd day of February A.D. 2017."" demonstrated that when the summonses were served on the intended appellants such service was within the statutory period of twenty-one days. Whether that is true or not, we are satisfied that the intended appellants ought not to be allowed to rely on this Rule 56 argument in their quest to convince us that we ought to exercise our discretion to grant a stay in these matters pending a decision of the Privy Council; and to demonstrate that they have good prospects of success.

44. We are satisfied that none of the grounds relied upon to support the applications for leave to appeal has merit; and none raises any point of law of general public importance that requires the consideration of their Lordships.

45. In the premises, we do not grant leave to appeal pursuant to Article 104(1) of the Constitution and we decline to grant leave on the other grounds upon which the applications for leave to appeal to the Privy Council are based.

46. In respect of the applications to suspend the effects of our decision pending the appeals to the Privy Council, we refuse to grant the stays requested.

The Honourable Mr. Justice Isaacs, JA

The Honourable Madam Justice Crane-Scott, JA

The Honourable Mr. Justice Jones, JA