



The Court of Appeal for Bermuda

CIVIL APPEAL No. 7B of 2009

Between:

**CONSOLIDATED CONTRACTORS INTERNATIONAL COMPANY SAL
(CCIC)**

Appellant

-v-

MR. MUNIB MASRI

Respondent

**Before: Zacca, President
 Evans, JA
 Stuart-Smith, JA**

**Date of Hearing: Thursday, 4 March 2010
Date of Decision: Thursday, 18 March 2010**

Appearances: D. Duncan of Trott & Duncan for the Appellant
 Jeff Elkinson and Ben Adamson of Conyers Dill &
 Pearman for the Respondent

Decision on Application for Leave to Appeal to Privy Council

EVANS, JA

1. This is an application for leave to appeal to the Judicial Committee of the Privy Council from the judgment of this Court handed down on 19 November 2009.

2. The Applicants were the Appellants in this Court, against a judgment of The Hon. Mr. Justice Kawaley dated 11 February 2009 in which he rejected their application to set aside registration in this jurisdiction of three judgments of the High Court in England and Wales dated 15 June and 5 October 2007 and 11 February 2008. The judgments, previously certified by the High Court, were for sums totalling US\$49,964,644, together with interest which is still accruing. All were in favour of the Respondent, Munib Masri.
3. Mr. Masri acknowledges that the Appellants are entitled to appeal “as of right” under section 2(1)(a) of the Appeals Act, 1911, but he contends through Jeffrey Elkinson, his counsel, that the leave granted should be made conditional upon the Applicants paying into Court, or otherwise securing, the total amount of the judgment debts.
4. Mr. Elkinson accepts “that this Court has not imposed such conditions before and that this application raises novel issues of jurisdiction, but this”, he rightly continues, “is an extraordinary case”.
5. It is necessary, therefore, to look closely at the provisions of the Appeals Act 1911. Although certain appeals lie “as of right” from judgments of the Court Of Appeal for Bermuda, it is necessary to obtain leave from the Court in every case, first conditional under section 4, then final. Section 4 provides that leave may only be granted by the Court upon two specified conditions. These are that the appellant (a) provides security up to \$12,000 for the costs of the appeal, and (b) takes steps to procure the Record of the proceedings in Bermuda and to forward it to London. Section 4 reads –

“Conditions

4. Leave to appeal under section 2 shall only be granted in the first instance [upon the stated conditions]”.

6. Section 2 reads as follows –

“When appeal lies

2. Subject to this Act, an appeal shall lie –

(a) as of right, from any final judgment of the Court, where the matter in dispute on the appeal amounts to or is of the value of \$12,000 or upwards.....

(b)

(c) at the discretion of the Court [in cases of general or public interest].”

7. Section 5 should also be quoted –

“Payment of money or performance of duty; direction

5. Where the judgment appealed from requires the appellant to pay any money or perform any duty, the Court shall have power when granting leave to appeal, either to direct that the said judgment shall be carried into execution, or that the execution thereof shall be suspended pending the appeal, as to the Court seems just;

8. Three issues arise –

- (1) does the Court have power to grant conditional leave;
- (2) does the Appeals Act 1911 permit the exercise of that power, if it exists; and
- (3) what condition, if any, should be imposed in the present case?

Does the Court have power to grant conditional leave?

9. The Judicial Committee ruled recently on the extent of the Court’s jurisdiction to make an ancillary order, in that case a holding injunction pending the appeal: *Commissioner of Police and Attorney General v. Bermuda Broadcasting Co. Ltd. and others* (23 January 2008 Privy Council Appeal No.48 of 2007).

The Court does not have any inherent jurisdiction: judgment para.14. However, it has the same powers as the Supreme Court (under section 8(1) of the Court of Appeal Act 1964), and under

section 13 of that Act it “may make such order as the Court may consider just”. Further, under Rule 2/25 of the Court of Appeal Rules the Court has power “...to make such further or other order as the case may require”. The Judicial Committee held on these and other grounds that the Court had “the requisite jurisdiction to [continue] the holding injunction”, although in fact it had not done so.

10. It was suggested by counsel for the Respondent that that was a case where the order sought was for the purpose of facilitating the intended appeal. Without it, the appeal might have been nugatory. In our judgment, however, that distinction does not alter the fact that the jurisdiction exists, although it would undoubtedly be relevant to the question whether the discretionary power should be exercised in a particular case.

Does the Appeals Act 1911 permit the power to be exercised?

11. At first sight, the provision that the Appellant is entitled to appeal “as of right” appears to preclude any suggestion that conditions may be attached to the grant of leave. The Act itself states in section 4 that two conditions must be imposed, and in section 5 that conditions may be imposed regarding enforcement or suspension of the judgment, pending the appeal. But section 2 is “Subject to this Act” and therefore to the conditions required or permitted by the following provisions.
12. It is possible to give the words “as of right” a narrow meaning; leave to appeal cannot be refused on the ground that the appeal has no prospect of success, and the Court of Appeal is not entitled to take account of its merits or lack of them. However, this argument has to be considered in the context of the Act as a whole, and we are not persuaded that it permits the Court to impose a condition that the disputed amount must be brought into Court or otherwise secured,

pending the appeal. That would be an unwarranted extension of the Court's powers under section 5.

13. Under section 5, the judgment creditor can be permitted to proceed with execution of the judgment, subject to providing security against the outcome of the pending appeal; or the Court may order that execution be stayed pending the appeal. We have little doubt that the Court could order payment into Court as a condition of granting the stay. But there is no application under section 5 by either party in the present case. The Respondent does not seek to proceed to execution (of the British judgments which are registered in Bermuda) though Mr. Elkinson told us that a dispute as to the ownership of certain assets in Bermuda is currently before the Supreme Court. The Applicants contend that section 5 does not apply in the present case, because the judgment being appealed from does not require either the payment of money or the performance of a duty; and there is no application for a stay.
14. If there were undisputed assets in Bermuda, no doubt the Respondent would seek an order permitting execution to proceed, and the outcome might well be an order requiring the amount of the judgment debts to be paid into Court. The Applicants have not contended that they would be unable to comply with the condition, if one were imposed, though Mr. Duncan made it clear that he had no instructions as to their ability to do so. Unlikely though it may seem, when the amount in question is more than US\$50 million, the Applicants accepted before the British Courts in 2008 that they would be able to comply with the same condition when it was imposed by the House of Lords, though in the event they did not do so and abandoned that appeal.
15. Even if we assume that the Applicants would be able to comply with the condition, if it were imposed, and if there are no assets in Bermuda, the inference must be that the payment into Court would

have to be funded from outside Bermuda, and presumably not from the United Kingdom where the original judgments could be enforced. That would not prevent a Court with jurisdiction to do so from imposing it as a condition of leave to appeal, as the House of Lords has held in the present case. But that was not contemplated by section 5 of the Appeals Act 1911, and in the view of this Court such an order should not be made.

Should the condition be imposed?

16. This question does not arise; but the Court should perhaps indicate that it would have had little hesitation in requiring the Applicants to pay the amount of the judgments into Court as a condition of granting leave to appeal, if it had power to do so. The long history of the litigation and the circumstances of the present proceedings in Bermuda make it clear that the Applicants have no intention of satisfying the judgments voluntarily, in any country or at any time. That is not a formal contempt of court, but it would justify requiring the Applicants to demonstrate that, contrary to the clear impression they have given, they are prepared to comply with the Court's orders if and when they are finally required to do so.
17. The position would be different, of course, if the Court was not satisfied that the Applicants could comply with the condition, if they were required to do so. In such circumstances the condition might deprive them of their right of appeal, something which the Court clearly would not do.

Application to the Privy Council

18. Finally, we note that section 27 of the Appeals Act 1911 expressly reserves the power "to admit [the appeal] upon such conditions as Her Majesty in Council may think fit to impose". The Judicial Committee therefore may impose a condition not specified in section 5 of the Act, regarding the subject matter of the appeal,

although in our view this Court does not have discretionary power to do so.

Evans, JA

I agree

Zacca, President

I agree

Stuart-Smith, JA