Neutral Citation Number: [2022] CA (Bda) Civ 1

Case No: Civ/2021/3

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION**
**THE HON. CHIEF JUSTICE HARGUN**
**CASE NUMBER 2015: No. 430**

Sessions House
Hamilton, Bermuda HM 12

Date: 14 February 2022

**Before:**

**JUSTICE OF APPEAL GEOFFREY BELL**

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**Between:**

**GAYLE ANN VENTURES**

**Intended Appellant**

**- v -**

**CLARIEN BANK LIMITED**

**Intended Respondent**

Mr Cameron Hill (Westwater Hill & Co.) for the Intended Appellant
Mr Kevin Taylor (Walkers (Bermuda) Limited) for the Intended Respondent

Hearing date: 10 February 2022

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**RULING**

**BELL JA:**

## Background

1. This ruling arises from an application made on behalf of the intended appellant, Ms Ventures, who seeks to re-open her appeal, which was dealt with in the judgment of this court given on 3 September 2021. That judgment declined to restore Ms Ventures' appeal from the judgment of the Chief Justice given on 22 January 2021. The appeal had been dismissed administratively on 30 April 2021 because Ms Ventures had failed to comply with the orders of the Registrar concerning the prosecution of the appeal.

2. In his judgment, the Chief Justice had ordered that the intended respondent ("Clarien") was entitled to possession of a property at Blue Hole Hill in Hamilton Parish ("the Property"), which Ms Ventures had mortgaged, originally to a lending institution named First Bermuda Group Limited ("FBG"), which mortgage had been transferred to Clarien when Clarien had taken over FBG's mortgage portfolio. The documentation by which that transaction was effected is at the heart of Ms Ventures' complaints, and in particular the alleged late disclosure of one of the three documents which accomplished such transfer, an asset transfer agreement dated 30 September 2011 ("the Asset Transfer Agreement"), made between FBG and Clarien. Ms Ventures, through her counsel, now maintains that this document was not disclosed until shortly before the start of the trial, and so the complaint is one concerning the adequacy of discovery. But it is further said that counsel for Clarien at the trial and on the appeal, Benjamin McCosker of Walkers, misrepresented to the Court of Appeal the evidence which had been given at trial in relation to the late disclosure of the Asset Transfer Agreement, and that there were apparent efforts by Clarien to keep the document from Ms Ventures.

3. It is to be noted that Ms Ventures was not a party to this agreement, and neither of the parties to it has ever suggested that it did not have the legal effect of transferring Ms Ventures' mortgage from FBG to Clarien. The second point to be made is that Ms Ventures' case, that she remained indebted to FBG and not Clarien, did not lead her to make, or attempt to make, mortgage payments to FBG rather than to Clarien. In his judgment the Chief Justice noted that Ms Ventures' indebtedness to Clarien under the mortgage as at 1 July 2020 amounted to $1,338,493.59, and that she had not made any payments in reduction of her debt since January 2014.

4. It is necessary to set out more of the history of these proceedings, because Ms Ventures has made any number of efforts to negate the effect of the Chief Justice's judgment. After her appeal was dismissed administratively (by me, on 30 April 2021, and after the Registrar had signed an order certifying that Ms Ventures had failed to comply with her orders), Ms Ventures sought to re-open the appeal, and at the same time to have the provisions of the Registrar's orders waived, and to be able to proceed as a poor person under the rules, which would have the effect of waiving fees and avoiding the need to provide security for costs. In a judgment dated 3 September 2021, this court declined to restore the appeal, in consequence of which the other two applications became moot. It is important to note that that judgment dealt fully with the merits of the appeal, including the complaint regarding the alleged failure on the part of Clarien to disclose the Asset Transfer Agreement in its pre-trial discovery, which complaint was made to the Court of Appeal as it had been to the Chief Justice. It should also be noted that when Mr Hill, counsel for Ms Ventures, first complained about Clarien's failure to give discovery

of the Asset Transfer Agreement, during the opening speech of Clarien's counsel, the Chief Justice advised that he had read the document as part of his pre-trial reading.

5. But the court's judgment refusing to restore the appeal was not the end of matters. Ms Ventures next sought to restore the appeal on the basis that she was then in a position to provide the security for costs which the Registrar had ordered, and to pay for the cost of making up the record of appeal. That application was dealt with on paper, and the judgment of this court was given on 26 November 2021, in which the application was refused, on the basis that the court was *functus officio*.

6. When Clarien then sought to enforce its judgment by writ of possession, Ms Ventures made a number of efforts to thwart that process. She first made an application for a stay to the Supreme Court, and on an *ex parte* basis Mussenden J granted a stay, only to set that aside when the matter came to be argued before him on an *inter partes* basis. Ms Ventures then made an application to this court, which I refused on 24 December 2021, on the basis that there was no extant appeal in support of which a stay could be ordered. So it is against that background that Ms Ventures now seeks to be able to re-open argument on her appeal, dismissed on the merits by this court on 3 September 2021, on the basis of a complaint that counsel for Clarien misrepresented the position in relation to the discovery process in the original action.

**The present application**

7. Mr Hill's filings on behalf of his client in support of this application were made on the misconceived basis that Ms Ventures could proceed to make such an application without this court first having granted permission for such a course to be followed. Although Mr Hill indicated to the court's administrative office that his main reliance would be on the case of *Taylor v Lawrence* [2003] QB 528, he failed to have regard to the appropriate procedure laid down in that case for making such applications, bearing in mind that there is nothing in Bermuda statute law or in the rules which say anything about re-opening appeals. Accordingly, the route by which the court's jurisdiction is invoked must of necessity rely upon the provisions of Order 2 rule 35 of the Rules of the Court of Appeal for Bermuda, and the need to follow the procedure and practice for the time being in force in the English Court of Appeal. That procedure has now been incorporated into the relevant Civil Procedure Rules in England and Wales.

8. Mr Hill had been directed to file his written submissions by 31 January 2022. He did not do so. When the court's administrative officer pressed matters, Mr Hill relied upon draft submissions sent by email which were prolix, and which appeared to mirror those filed on his client's original application seeking to persuade the court to allow the dismissed appeal to be restored. They did not address the jurisdiction to re-open appeals. When pressed further he caused a "Core Bundle" to be delivered to the court on Friday 4 February, which contained some 17 authorities, none of which was referred to in the draft submissions previously sent by email, and which had still not been put in final form and delivered to the court in hard copy. A further, almost identical, bundle was delivered to the court on 7 February, still without any submissions. The submissions themselves were delivered to the court in hard copy only at mid-day on 9 February, the day before the hearing.

**The hearing of 10 February**

9. In relation to the court's concern as to the late filing of submissions, and the apparent misrepresentation that the submissions eventually filed had involved a "slight adjustment" to the original submissions, Mr Hill advised that originally, the wrong submissions had been forwarded in error. That was unfortunate and confusing to all concerned. Mr Hill accepted that the Provost Marshall General had taken possession of the Property on 28 January 2022, and advised that no application seeking leave to appeal from the Privy Council had been filed. Instead, his client was pursuing the present application to re-open the appeal. When Mr Hill was asked what information he now had which he had not had following the delivery of the Court of Appeal's judgment dated 3 September 2021, his answer was that he now had the transcript of the proceedings before the Chief Justice.

10. Following discussion with counsel (and that included Mr Taylor, who had been served with the application by Mr Hill), it was agreed that the appropriate procedure was to invoke the provisions of Order 2 rule 35 of the Rules for the Court of Appeal for Bermuda, and thereby follow the procedure laid down in *Taylor v Lawrence*, now memorialised in Order 52 rule 30 of the English Civil Procedure Rules. Given the extent of the material filed, counsel agreed that there was no need for further filings and that the application to re-open the appeal should be dealt with by me as a single judge on paper. While Mr Hill did initially seek an oral hearing, he could offer no justification for such a course, and accepted that the matter should be dealt with on paper. I confirmed to Mr Taylor that permission to re-open would not be given without his client being given an opportunity to make representations. Although Mr Hill had initially sought a stay in his written filings, ultimately he did not pursue that application, accepting that there was no extant appeal. And while Mr Hill said that his client was now homeless, any sympathy the court might feel for her situation has to be tempered by the fact that she has made no attempt to meet her mortgage obligations for many years.

**The merits of the application to re-open**

11. I now turn to consider the merits of the application. The gravamen of Mr Hill's complaints are that Clarien failed to give timely discovery of the Asset Transfer Agreement, despite requests being made, and that Mr McCosker, counsel for Clarien at trial and on the application to restore the appeal before the Court of Appeal, had misrepresented the position in relation to some manuscript appearing on the document, written by an earlier general counsel for Clarien, Brian Myrie, indicating that the document … "is not to be copied to Ms Ventures". Geoffrey Faiella, general counsel at the time of the trial, and who did give evidence, could not say why Mr Myrie had written what he did, as is borne out by the transcript exhibited to Mr Hill's affidavit. And Mr Hill submitted that Mr McCosker had told the Chief Justice that the reason that Mr Myrie's manuscript had been written was because Ms Ventures had been in the habit of attending at Clarien, unannounced, for the purpose of examining documents. Mr Hill also submitted that Mr McCosker had submitted to this court, when the application to restore the appeal was made to this court, that this was the evidence before the Chief Justice. For my part, I do not recall that statement having been made, although it appears from paragraph 28 of this court's judgment of 3 September 2021 that the President had understood from what we were told that this was Mr Faiella's evidence. However, that makes no sense, because unlike the Court of Appeal, the Chief Justice had heard Mr Faiella's evidence, and so would have known that he could not speak to Mr Myrie's reasons for writing what he did. It does seem to me to be likely that what Mr McCosker

did was to give an account of the reason for Mr Myrie's note which was not backed up by any evidence. And this seems to be the high water mark of Mr Hill's complaint regarding the circumstances under which the words in question came to be written by Mr Myrie. But it is important to note, as the President did in his judgment of 3 September 2021, that Mr Myrie's words were written something like two years before the discovery exercise was undertaken.

12. Similarly, there is a dispute between counsel as to the reason for Clarien's failure to disclose the Asset Transfer Agreement in its list of documents. I pause to note that the transcript of proceedings before the Chief Justice does show that Mr McCosker had said that the Asset Transfer Agreement was in Clarien's list of documents, and that list of documents has never been shown to us. It seems unlikely that this statement was accurate. However, Clarien maintained that the reason for the late disclosure of the document was because Ms Ventures had failed to comply with her obligation to provide a witness statement, and for this reason, Mr Faiella's witness statement, which had exhibited the Asset Transfer Agreement, had not been exchanged as otherwise it no doubt would have been. The implication to be drawn from this was that if Ms Ventures had provided a witness statement as had been ordered, Mr Hill would have had sight of the Asset Transfer Agreement at an earlier stage.

13. But what is clear is that the Chief Justice had read the document before trial, and Mr Hill had made submissions to him regarding the alleged deficiencies of the document to the Chief Justice, as he did to the Court of Appeal. Nevertheless, Mr Hill maintains that the alleged failures on the part of Clarien in regard to discovery, and the manner in which Mr McCosker represented what had happened during the discovery process, are sufficient to enable this court to order that the appeal which led to the 3 September 2021 judgment should be re-opened.

**The authorities**

14. No doubt this is a convenient time to refer to the two principal authorities upon which Mr Hill relied, *Taylor v Lawrence* and *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet (No 2)* [2000] 1 AC 119. In the *Pinochet* case, Senator Pinochet had been arrested under warrants issued pursuant to the Extradition Act of 1989, following receipt of international warrants of arrest issued by a Spanish court alleging various crimes against humanity. The human rights organisation Amnesty International ("AI") had intervened in the proceedings and had been represented by counsel. Subsequently, it transpired that one of the judges who had been part of the majority in the House of Lords had close links to AI and was an unpaid director and the chair of a charity wholly controlled by AI. On a petition to set aside the previous decision on the grounds of apparent bias on the part of the judge, the House of Lords held that it had the power to correct any injustice caused by one of its earlier orders, and the earlier decision of their Lordships was set aside.

15. The case of *Taylor v Lawrence* concerned an action in the County Court for trespass in respect of a wall built on land to which the claimants claimed they had title. The judge had informed the parties that the claimants' solicitors had drafted his will, and there was no objection made to his continuing to hear the trial. It was then discovered that the judge and his wife had used the services of the same solicitors to amend their wills, the night before judgment was given. An appeal based in part on the appearance of bias failed in the Court of Appeal. It was only subsequently (through a stratagem which Lord Woolf CJ described as disgraceful) that the defendants learned that the judge had not paid for the services of the solicitors, and so had received a financial benefit from them. Lord Woolf, giving

the judgment of a strong court, described the firm rule of practice that the Court of Appeal will not allow fresh evidence to be adduced in support of an appeal if that evidence was reasonably accessible at the time of the original hearing – see *Ladd v Marshall* [1954] 1 WLR 1489. However, the court decided to proceed on the basis that the defendants could not reasonably have become aware of the fact that the judge had not paid for the solicitors' services at the time of the original appeal.

16. The parameters within which such a jurisdiction should be exercised were set out at paragraphs 55 and 56 of Lord Woolf's judgment, in the following terms:

> *"[55] One situation where this can occur is a situation where it is alleged, as here, that a decision is invalid because the court which made it was biased. If bias is established, there has been a breach of natural justice. The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need to an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations. Where the alternative remedy would be an appeal to the House of Lords this court will only give permission to reopen an appeal which it has already determined if it is satisfied that an appeal from this court is one for which the House of Lords would not give leave.*
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> *[56] Today, except in a few special cases, there is no right of appeal without permission. The residual jurisdiction which we have been considering, is one which should only be exercised with the permission of this court. Accordingly a party seeking to reopen a decision of this court, whether refusing permission to appeal or dismissing a substantive appeal, must apply in writing for permission to do so. The application will then be considered on paper and only allowed to proceed if after the paper application is considered this court so directs. Unless the court so directs, there will be no right to an oral hearing of the application the court should exercise strong control over any such application, so as to protect those who are entitled reasonably to believe that the litigation is already at an end."*

**Application of the law to the facts of this case**

17. It can, I think, immediately be seen that the complaint in this case is of a totally different dimension to the appearance of bias on the part of the judges in both *Taylor v Lawrence* and *Pinochet.* The facts of those cases clearly show that a significant injustice probably occurred. Mr Hill was critical in his submissions of my characterisation during an earlier hearing of the failure to disclose a relevant document as being a case management matter, given that the Chief Justice had declined to impose any form of sanction for the failure to disclose the document in question, had heard submissions on the document, and had dealt with its terms and effect fully in his judgment. But the reality is that for one reason or another, it is not unusual for documents not to be disclosed when they should be. Of course, when the failure to disclose is motivated by fraud, that is an entirely different matter. But that is not this case. The document had been exhibited to Mr Faiella's affidavit. It was in the bundle of

documents which the Chief Justice had read in preparation for hearing, and was available to Mr Hill before trial. If he had needed an adjournment, he could have sought one. The facts do not support Mr Hill's contention that the document had been intentionally withheld until the last minute.

18. Neither do I regard the fact that Mr Hill now has a transcript of what was said at trial as being in the category of new information, like the intelligence which became known to the parties in the two cases cited. Mr Hill was present while the words of which he now complains were spoken, and could and should have made a note if there was any statement made to the judge or to the Court of Appeal which needed to be corrected.

**Conclusion**

19. In the circumstances which are described above, it does not seem to me that Ms Ventures has established that a significant injustice has probably occurred. Neither do I find that the circumstances are exceptional and make it appropriate to re-open the appeal. No doubt it can now be maintained that Ms Ventures has no alternative effective remedy, although that could be said to be because she failed to make a prompt application for leave to appeal to the Privy Council. Had a prompt application been made, this court might in theory have granted leave because the financial threshold had been met. In any event that issue is moot. It does not seem to me that this case comes remotely close to reaching the high threshold required to persuade a court that an appeal should be re-opened. The fundamental principle is that the outcome of litigation should be final, and it is for that reason that for the discretion to re-open to be exercised, the case must involve real injustice where the circumstances are exceptional. This is not such a case, and I would therefore dismiss the application.