

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2021/CLE/gen/001115

IN THE MATTER of an engagement as counsel and attorneys of record for and in relation to various and sundry civil court proceedings designated 2018/Cle.gen/No. 0252 and 2018/SCCiv. App. No. 0182, respectively;

AND IN THE MATTER of two Certificates of Taxation made in 2018/SCCiv.App.No. 0182, dated the 22nd October 2019 and 14th November 2019, respectively;

AND IN THE MATTER of a demand letter dated 14th January 2020.

BETWEEN

MAURICE O. GLINTON & CO. (a Firm)
(by the principal and sole proprietor of the Firm)

Claimant

AND

ROBERT K. ADAMS
(as counsel and attorney and a member and partner of Graham Thompson & Co.)

First Defendant

AND

GRAHAM, THOMPSON & CO. (a Firm)
(as attorneys of record for parties to proceedings in each of the intituled actions)

Second Defendants

Before: The Honourable Chief Justice Sir Ian R. Winder

Appearances: Maurice Glinton KC with Meryl Glinton for the Claimant
Dawson Malone with Ebonesse Bain for the First Defendant
Leif Farquharson KC with Gabriel Brown for the Second Defendants

Hearing date(s): 24 May 2024

RULING

WINDER, CJ

[1.] This is my ruling on an application of the Claimant for leave to appeal and for a stay of my decision dated 16 February 2024 (the Decision).

[2.] The Claimant's application is made by Amended Notice of Application dated 22 March 2024 and annexed a copy of a draft notice of appeal challenging the Decision. The application was supported by the affidavit of V. Stephanie Cox filed on 10 April 2024.

[3.] The decision dismissed both the Claimant's Summary Judgment Application as well as the 1st Defendant's (Adams) Strike Out Application. Paragraph [107] of the Decision provided as follows:

[107] the principles relevant to the discretion to grant an extension of time for the service of a defence were helpfully discussed in the Jamaican Court of Appeal in *Hoip Gregory v Vincent Armstrong [2103] JMCA Civ 36* Applying those principles, as both Defendants have a realistic proposed of successfully defending the claim and there were good reasons for their delay in filing a defence, namely, the Summary Judgement Summons filed under the RSC, I grant both Defendants and extension of time to file and serve their defences by 7 March 2024. The reasons in favor of granting the Defendants' extension of time outweigh those weighing against doing so.

[4.] The Defendants oppose the application on the preliminary ground that there is no jurisdiction to entertain the application for leave to appeal a decision refusing summary judgment as there is no jurisdiction in the Court of Appeal to hear such appeals. They contend that leave to appeal should be refused and consequently, the application for a stay should likewise be dismissed with costs.

[5.] I accept the preliminary submission of the Defendants

[6.] Section 11 (b) of the Court of Appeal Act provides that:

“11. No appeal shall lie —

(b) from an order of a Justice of the Supreme Court giving unconditional leave to defend an action;”

[7.] It is accepted by both parties that the Decision granted unconditional leave to the defendants to defend.

[8.] In the English case of *Customs & Excise Commissioners v. Anco Plant and Machinery Co. Ltd. [1956] 3 ALL ER 59* the defendant challenged an application for leave to appeal from an order of a judge giving unconditional leave to defend relying on section 31 (1) (c) of the Supreme

Court of Judicature (Consolidation) Act, 1925. Section 31(1)(c) of the Supreme Court of Judicature (Consolidation) Act, 1925 stated that:

“No appeal shall lie... (c) from an order of a judge giving unconditional leave to defend an action.”

The English Court of Appeal found that there was no right of appeal. The Court of Appeal stated at page 61F that:

The order which came before Collingwood J, being an order granting conditional leave to defend under an application purporting to have been made under RSC, Ord 14, Collingwood J allowed the appeal and gave the appropriate directions under RSC, Ord 14B. It seems to me that, by allowing the defendants' appeal from an order giving conditional leave, what the learned judge did was to grant unconditional leave to defend; and, if that is right there is an end of the application, because of the prohibition against any appeal from such an order contained in s 31(1)(c) of the Act of 1925.

[9.] The issue was also considered in the Privy Council case of **R. B. Manderson-Jones v Société Internationale de Télécommunications Aéronautiques PC Appeal No. 69 of 1997**, on appeal from the Court of Appeal of Jamaica. In that case the Board found that section 11(1)(b) of the Judicature (Appellate Jurisdiction) Act, which provided that no appeal should lie from an order of a judge giving unconditional leave to defend an action prevented an appeal where the court granted unconditional leave to defend on a summary judgment application. The Jamaican Court of Appeal had determined that Section 11(1)(b) precluded an appeal from a decision refusing to set aside a default judgment where the Court granted unconditional leave to defend. According to Lord Hope, in delivering the decision of the Board,

5. Their Lordships consider, with respect, that the Court of Appeal were in error in taking this view, for two reasons. The first reason is that the order which Cooke J. made was not in terms an order giving unconditional leave to defend an action. The issue which he had to decide was whether the default judgment should be set aside on the ground that it was not regularly entered. The question whether the respondents had a good defence to the claim was not before him. The question was whether the appellant's claim was only for a debt or a liquidated demand. The second reason is that section 11(1)(b) as to the granting of “unconditional leave to defend” applies only to a case where leave to defend has been given under section 83 of the consolidated Judicature (Civil Procedure Code) Law.

6. Section 83 deals, and deals only, with cases which have been brought before the court for summary judgment under the procedure which is set out in title 13 of the Code, which is derived from R.S.C. Ord. 14. It is a prerequisite in such cases that the plaintiff has stated his belief that there is no defence to the action except as to the amount of the damages claimed, if any: see section 79(1). If this requirement is satisfied, the next question for the judge under section 79 is whether the defendant has satisfied him that he has a good defence to the action on the merits or discloses

sufficient facts to entitle him to defend the action generally. The following sections set out the procedure to be followed thereafter in various circumstances, such as where part of the claim is not contested or where another defendant to the action has no defence. Section 83 deals with the giving of leave to defend where the judge is satisfied that a defendant has a good defence. It enables him, among other things, to give unconditional leave to defend

[10.] In the case of **National Commercial Bank Jamaica Limited et al v Scotiabank Jamaica Trust and Merchant Bank Limited, Supreme Court Civil Appeal No:80/4** the Jamaican Court of Appeal sought to distinguish **R. B. Manderson-Jones v Société Internationale de Télécommunications Aéronautiques** and dismissed a preliminary objection that there was no appeal from an order granting unconditional leave to a defendant upon a summary judgment application. At paragraph 9 of the decision, *Cooke JA* sums up the position of the Court of Appeal:

9. This question before the court is not without difficulty. Section 11(1)(b) of the Act has not been repealed. The Rules cannot in any way derogate from a statutory enactment. At the same time the enactment 11(1)(b) derives its effect from the Rules. Thus in *Manderson-Jones* it was section 83 of the Code which made 11(1)(b) of the Act relevant. If therefore the Rules do not provide for the exercise of 11(1)(b) then that statutory enactment would not be relevant. It is my view that not least taking into consideration the overriding objective of dealing with cases justly, the preliminary objection should be rejected. I hold that the erstwhile concepts of “unconditional and/or” conditional leave” are no longer part of the procedural regime pertaining to summary judgments. In rule 15.6(1)(d) of the Rules the Court is entitled to make a “conditional order” however this provision has nothing to do with leave. It is merely an order which the court may make in its adjudication on an application for summary judgment before it.

10. As indicated earlier, the preliminary objection fails.

This view that the changes in the civil procedure rules could lead to a re-interpretation of the Court of Appeal Act was also confirmed in the concurrent judgments of Harrison P. and Harris JA (Ag).

[11.] The Bahamas Court of Appeal has recently considered section 11(b) of the Court of Appeal Act in the case of **Kim Monique Moss v Freeport Insurance Agents & Brokers Limited and Bahamas First General Insurance Company Limited SCCivApp No. 192 of 2022**. The Court of Appeal accepted that Section 11(b) of the Court of Appeal Act related to summary judgment cases under Order 14 of the RSC and as such did not find any assistance in the decision in the Jamaican case of **National Commercial Bank Jamaica Limited et al v Scotiabank Jamaica Trust and Merchant Bank Limited**. For this reason, and because it was not argued by the Appellant, the Court did not express any view of the case in the Bahamian context. At paragraph 22 of the decision in **Kim Monique Moss v Freeport Insurance Agents & Brokers Limited and Bahamas First General Insurance Company Limited** Evans JA stated:

22. For completeness I note that the Court of Appeal of Jamaica in the case of *NCB Ja. Ltd. et al v. ScotiaBank Ja. Trust Ltd SCCapp 80 of 2004* has determined that with the

introduction of their new Civil Procedure Rules the position is now different. They took the view that the effect of the new Rules is that the concept of the defendant being allowed to defend or being granted leave to defend in considering the application for summary Judgment has been omitted from these Rules. However, as I have found that the 1978 Rules apply that issue in my view does not arise nor has Mr. Duncanson raised that as an issue.

[12.] Respectfully, I was not persuaded by the decision in **National Commercial Bank Jamaica Limited et al v Scotiabank Jamaica Trust and Merchant Bank Limited**, that the decision in **R. B. Manderson-Jones v Société Internationale de Télécommunications Aéronautiques** does not continue to reflect the law in The Bahamas as a result of the introduction of new civil procedure rules. The language in Part 15 of the Jamaican CPR rules do not completely mirror what is contained in the Bahamas' Part 15 of the Supreme Court (Civil Procedure) Rules 2022. Part 15 in the Bahamian Context has not changed so considerably. I struggle to accept that the Rules Committee of the Supreme Court could vary, by a change in the Rules, what parliament intended by Section 11(b) as it related to Summary Judgment. Firstly, there is no power to do so and secondly there is nothing to indicate that this was the intent. In my view such a change required legislative intervention as was done by the English Supreme Court Act, 1981 which legislated away the jurisdictional prohibition.

[13.] I prefer to adopt the reasoning of the Caribbean Court of Justice on this issue, which arose in the more recent cases of **Roseal Services Ltd v Challiss and others [2012] CCJ 7 (AJ)** and **Aaron Truss v Windsor Plaza Limited [2016] CCJ 18 (AJ)**, both on appeal from the Court of Appeal of Barbados. Those cases found that there was no appeal to the Court of Appeal arising from the grant of unconditional leave to appeal upon the dismissal of an application for summary judgment. The learning in those authorities were conveniently set out in the **Caribbean Civil Court Practice, 3rd edition** at page 194:

RIGHT TO APPEAL

Section 54(1)(c) of the Supreme Court of Judicature Act Barbados provides that no appeal lies to the Court of Appeal from an order of a judge of the High Court giving unconditional leave to defend an action. This section was evaluated by the Caribbean Court of Justice ('CCJ') in **Roseal v Challis [2012] CCJ 7(AJ)**. In the Barbadian case of **Aaron Truss v Windsor Plaza Ltd [2016] CCJ 10 (AJ)** this was tested. In this case, Windsor Plaza sued Mr Truss in trespass seeking, inter alia, damages and injunctive relief alleging that Mr. Truss wrongfully entered upon its property. An interim injunction was granted, and Mr Truss subsequently filed a re-amended Defence and Counterclaim asserting a right of way over Windsor's property. Mr Truss made an application inter alia to dismiss the re-amended Defence to the Counterclaim on the basis that there was no reasonable prospect of successfully defending the claim. The trial judge treated the issue as an application for a summary remedy under Part 15 of Barbados' CPR 2008 and dismissed the application, on the basis that the matter should proceed to trial. The matter was appealed to the CCJ which held that once the judge makes an unconditional order on a Part 15 application to go to trial on an issue, it matters not that

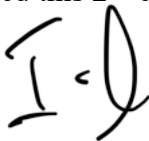
the issue arises as part of a claim or a defence to a claim. Pursuant to Section 54(1)(c) of the Supreme Court Judicature Act, no appeal lay to the Court of Appeal and consequently to the CCJ in respect of an order of a High Court judge giving unconditional leave to defend an action. Accordingly, the CCJ held that there was no jurisdiction to entertain an appeal against the decision and order of the trial judge.

[14.] Whilst the appellant in **Roseal v Challis** had applied for summary judgment pursuant to the Rules of the Supreme Court of Barbados, the case of **Aaron Truss v Windsor Plaza Limited** was considered under the Supreme Court of Barbados Civil Procedure Rules 2008, which came into force on October 1, 2009. The position of the CCJ was not affected by the rule changes, unlike what was determined by the Jamaican Court of Appeal under its new Part 15. Further, unlike Jamaica, Part 15 of the Barbados Rules of the Supreme Court are in almost identical terms as The Bahamas' Part 15.

[15.] In all the circumstances, I am satisfied that Section 11(b) of the Court of Appeal Act precludes the Claimant's proposed appeal and therefore the application for leave to appeal and for a stay must fail, with costs to be assessed.

[16.] I will set the matter down for case management at a date convenient to Counsel within the next 60 days.

Dated this 2nd day of August 2024.

A handwritten signature in black ink, appearing to read 'I. Winder', written over a horizontal line.

Sir Ian Winder
Chief Justice