IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No. GYCV2017/006
GY Civil Appeal No. 60 of 2016

BETWEEN

THE ATTORNEY GENERAL OF GUYANA **APPELLANT**

AND

DIPCON ENGINEERING **RESPONDENT**

Before The Right Honourable and the Honourables	**Sir Dennis Byron, President** **Mr Justice Wit** **Mr Justice Hayton** **Mme Justice Rajnauth-Lee** **Mr Justice Barrow**

Appearances
Ms. Kim Kyte, Ms. Judy Stuart-Adonis and Ms. Leslyn Noble for the Appellant

Mr. Timothy Jonas for the Respondent

JUDGMENT
of
The Right Honourable Sir Dennis Byron, President, and the Honourable Justices Wit, Hayton, Rajnauth-Lee and Barrow

Delivered by
The Honourable Mr Justice Denys Barrow
on the 15th day of November 2017

[1] The State has brought this appeal against the refusal of the Court of Appeal to extend time for appealing after more than six months had passed since judgment was given against it. The State applied for and obtained leave on 30th May 2017 to appeal to this Court against the refusal.

[2] Leave was given by the Court of Appeal for the State to appeal as of right to this Court, pursuant to section 6(a) of The Caribbean Court of Justice Act.[1] That section provides that where the matter in dispute on appeal is above a certain value an appellant has the right to appeal; it does not require the appellant to obtain permission.[2]

[3] But this appeal does not fall within section 6, because the matter in dispute on this appeal is solely a procedural issue: whether the appellant should be granted an extension of time within which to appeal. The appellant's grounds of appeal make perfectly clear that the State has purported to appeal against the alleged error of the Court of Appeal in refusing to extend time for appealing. The matter that was in dispute in the underlying case, in which judgment was given against the appellant on 21st October 2015, and which would have brought an appeal within section 6, is not any longer in dispute. That dispute merged in the un-appealed judgment of the High Court and has ceased to exist. That dispute can only revive if the appellant gets past the time bar that has operated to prevent it from appealing.

[4] The proposition that section 6 does not give a right of appeal against the Court of Appeal's refusal to enlarge time for appealing was definitively decided by this Court in *Mohan v Persaud*[3] when it concluded the section had no relevance to a proposed appeal from a decision of the Court of Appeal refusing leave to appeal out of time; at [13] and [14]. The CCJ decided that an appeal does not lie as of right and that the recourse of an intended appellant against a refusal to extend time was, pursuant to section 8 of the CCJ Act, to apply for and obtain special leave from the CCJ to appeal against the decision of the Court of Appeal refusing to extend time for appealing; at [15] and [18].

[5] It is surprising that in this case the Court of Appeal gave leave to appeal as of right, because it was the Court of Appeal which decided in *Mohan v Persaud*[4] that section 6

[1] Cap. 3:07, Laws of Guyana.
[2] See *Systems Sales Ltd v Brown-Oxley* [2015] CCJ 1 (AJ) at [10].
[3] [2012] CCJ 8 (AJ).
[4] See [2012] CCJ 8 (AJ) at [2] and [13].

did not apply to a refusal to enlarge the time for appealing and this Court confirmed that decision. No explanation appears from the Record for this departure from their precedent. The situation, therefore, is that the appellant has not filed an application to the CCJ for special leave to appeal, pursuant to section 8 of the CCJ Act.

[6] In paragraph 1 of the written submissions of the appellant, the State recognized that section 8 enabled this Court to prevent a miscarriage of justice by granting special leave to appeal from any decision of the Court of Appeal. It is more than a curiosity that, while appreciating the ability of this Court to grant special leave to prevent a miscarriage of justice and employing the language used in *Mohan v Persaud* (supra), the appellant filed no application for special leave. It is a fair inference that the appellant equally appreciated that he would also need to apply for an extension of time within which to apply for special leave, since the refusal of the Court of Appeal dates back to 19th January 2017 and Rule 10.12 of the CCJ (Appellate Jurisdiction) Rules 2017 requires an application for special leave to be made within 42 days of the date of the judgment from which leave to appeal is sought.

[7] In *Blackman v Gittens-Blackman*[5] the application for special leave to appeal was made more than a year late when it should have been made within 42 days. There was no application for an extension of time to seek special leave. The CCJ held that absent such an application the Court had no jurisdiction to entertain the special leave application; see [5].

[8] The Court stated at [6] "While this Court may in a proper case grant an extension of time for compliance with the Rules or excuse delay, it does so in order to avert a clear miscarriage of justice. Litigants are not free to ignore time limits and then seek refuge behind the 'overriding objective.'"

[9] This principle was recently reiterated in *Mitchell v Wilson*[6] at [4] when the CCJ held it is "settled" that failure to apply for an extension of time to file a special leave application is a sufficient reason to dismiss the out-of-time application for special leave, for want of jurisdiction.

[5] [2014] CCJ 17 (AJ).
[6] [2017] CCJ 5 (AJ).

[10] As noted at paragraph [5] above, the State appreciated that it needed to have applied for special leave to appeal and needed, first, to have applied for an extension of time within which to make that application and deliberately chose not to file those applications. Instead, the State thought fit to make an oral application to this Court, at the hearing of this purported section 6 appeal, for special leave to appeal pursuant to section 8. The State offered no justification for failing to file the necessary applications and it is disappointing that it was thought appropriate to venture the oral application, which we reject. The result is necessarily that this Court has no jurisdiction to allow the State to appeal to this Court against the Court of Appeal's refusal to grant an extension of time for appealing the High Court decision.

[11] However, instead of simply dismissing this appeal on that clear basis, we refer to our decision in *Mohan v Persaud*[7] which established that the CCJ may, in a proper case, grant an extension of time to comply with the rules in order to avert a clear miscarriage of justice. It is a serious question whether, as a matter of justice, this Court may or should consider granting an extension of time when there is not even an out-of-time application for special leave, for which we are asked to extend time. If the appellant had made the proper applications for special leave and for an extension of time it would have borne the burden of persuading this Court that this is a proper case for extending time for compliance with the rules and to address the factors which make it so, which will include the reasons for delay, length of delay, and prejudice to the parties, among other factors.

[12] It is noted, for clarity, that on his purported as-of-right, section 6 appeal the appellant submitted both as to the reasons why he failed to appeal to the Court of Appeal in time and as to the merits of the desired appeal, and urged that it would result in a miscarriage of justice if the Court of Appeal did not enlarge time. This Court, therefore, has the benefit of those submissions from the appellant, even though they were not directed to the distinctly more stringent requirements of an application for enlargement of time to apply for special leave to appeal.

[13] Before turning to the merits of the proposed appeal, it should be mentioned that the reason the State gave for failing to appeal in time was that the State's case in the

[7] [2012] CCJ 8 (AJ) at [15] and [21]; and see *Blackman v Gittens-Blackman* [2014] CCJ 17 (AJ) at [6].

Supreme Court had been conducted by outside counsel; that following a change in Government (in May 2015) the new Attorney General was unaware of the existence of this pending case and, as a matter of inference, neither was anyone else within the Attorney General's or Solicitor General's offices; that judgment was given against the State some 5 months or so (October 2015) after the change in Government; that it took some 3 months (until January 2016) for the Attorney General to learn of the judgment and file an application (February 2016) to extend time for appealing. In her oral submissions, counsel for the State laboured the point that a lot of money was at stake and the case was of great public importance. These very factors highlight how unacceptable are the reasons for the State's failure to be aware of this pending litigation and the award of judgment, and its failure to apply urgently for an extension of time within which to appeal. To say, regardless of who was in Government, that the State failed to satisfy the most basic standard of care is an understatement.

[14] As to the merits of the proposed appeal, on an application for extension of time to make an application for special leave an applicant must show more than a realistic prospect of success; he must show that there would be a miscarriage of justice if the appeal were not heard; *Mitchell v Wilson* at [4].[8] A clear instance of an applicant making out miscarriage of justice is by showing that an appeal is bound to be decided in his favour, as in *Somrah v AG of Guyana*[9] where, based on concessions made, it was clear that the appeal "must succeed" on the hearing.[10] In the context of this case, the appellant would have to show some egregious error in the decision; see *Mohan v Persaud* at [12]. In that case, at [21] – [22] this Court extended time for appealing because the judge's records showed that he gave judgment for one sum of money and the office copy of the judge's order stated a larger sum, indicating there had probably been a miscarriage of justice.

[15] In this case, the appellant's arguments as to the merits are basically that the judge failed to advert or give proper weight to various aspects of the evidence. The case concerned the respondent's, Dipcon's, entitlement to be paid two sums of money; one for extra works and the other for escalations in the price of the materials for doing the work. The

[8] Relying on *Blackman v Gittens-Blackman* at [6]. See also *Mohan v Persaud* at [12] for the factor of averting a miscarriage of justice in the context of a special leave application following a refusal by the Court of Appeal of leave to appeal.
[9] [2009] CCJ 5 (AJ) at [21].
[10] See also the observation referred to, of the Court of Appeal, that a miscarriage of justice could be indicated as having occurred in the court below based on sufficient undisputed allegations in the grounds of appeal or an affidavit; at [21].

real issue was whether the terms of the contract entitled Dipcon to recover the sums it claimed on these accounts and which the judge awarded.

[16] The main grounds of the appellant's proposed appeal, which counsel argued at length, may be condensed into the following propositions, namely that the judge failed to: (a) appreciate or give significance to the fact that it was a lump sum contract, that no balance was due for extra works and no agreement was made to pay for escalations; (b) find there was no agreement to pay increased costs; (c) properly attribute the basis on which payments had been made to Dipcon; and (d) properly interpret the provisions of the contract.

[17] It readily appears from this rough summary, and from the supporting arguments in the appellant's written submissions and from the ample oral submissions, that the case the appellant would put forward on its desired appeal is that the judge was wrong in his conclusions. For that case to succeed, it would require a court of appeal to agree with the appellant's argument as to the relevance and weight of evidence, and the interpretation to be given to contract documents. It would be only if the Court of Appeal were to hear an appeal and decide that the judge was wrong, which would be most unlikely on our assessment of the appellant's arguments, that the appellant would be able to point to a miscarriage of justice because there is nothing to which the appellant can now point to support a claim that there has been a miscarriage of justice.

[18] At this stage the most the appellant can say is, if I could appeal I expect to win and if I do then it would be a miscarriage of justice to allow the High Court judgment to stand. That is not good enough. It is a far cry from an appeal that "must succeed" or where there are undisputed allegations that indicate a miscarriage of justice probably occurred or where judgment was entered for the wrong sum or the like. The miscarriage of justice must be established or clearly appear at this stage; it must not be speculative.

[19] The material before this Court does not disclose material indicating there is any miscarriage of justice to be averted. Therefore, even if the appellant could have persuaded this Court to begin to consider enlarging time and granting it special leave to appeal, the Court's consideration would end with the conclusion that special leave should not be granted because there is no apparent miscarriage of justice to be averted.

[20] In the result, we dismiss the appeal against the refusal of the Court of Appeal to enlarge the time for appealing to that court against the Supreme Court judgment. We award costs to Dipcon at the rate agreed by the parties of basic costs.

[21] It follows that the application for a stay of enforcement of the judgment, which counsel for Dipcon said was impermissibly referred by the Court of Appeal for determination by a single judge, and which has had the effect of staying enforcement although no stay has been granted, falls away. The judgment, delivered more than two years ago, may now be enforced. In *Selby v Smith*[11] this Court observed that judgments must be carried into effect unless a court orders a stay and the court must act expeditiously in deciding whether to grant or refuse a stay. It can be ruinous for the holder of a money judgment, especially of a significant amount, to be kept out of his money and, worse, by default.

/s/ CMD Byron

The Rt Hon Sir Dennis Byron (President)

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ D. Hayton

The Hon Mr Justice D Hayton

/s/ M. Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ D. Barrow

The Hon Mr Justice D Barrow

[11] [2017] CCJ 13 (AJ) at [35].