



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014 No: 390

BETWEEN:

BERMUDA LIFE INSURANCE COMPANY LIMITED

Plaintiff

And

JUNE SANDRA LOUISE ROBINSON

First Defendant

RALPH ROBINSON

Second Defendant

CHAMBERS RULING

*Ex parte Application (with Notice) for Leave to Appeal (s. 12(2) of the Court of Appeal Act 1964)
Appeal against refusal to adjourn and refusal to admit evidence - Mortgage Action (RSC O.88)*

Date of Hearing: 25 February 2019

Date of Ruling: 10 July 2019

Representation:

Applicant (First Defendant) Mr. Michael Scott (Browne Scott)

Respondent (Plaintiff) Mr. Matthew Godfrey (Appleby (Bermuda) Limited)

Shade Subair Williams J

Introductory and Summary

1. The underlying facts of this case are set out in both of my previous judgments in favour of the Plaintiff for the repossession of mortgaged property and the repayment of a loan made under a mortgage agreement. The judgment granting the possession order (1 June 2017) as prayed in the generally indorsed writ of summons filed on 12 November 2014 was made prior to and separately from the judgment for financial relief made on 28 February 2018.
2. Following the possession order, the Plaintiff filed a writ of possession and obtained its 12 month renewal on 27 December 2018 without execution. By the Order of Ms. Acting Justice Kiernan Bell made on 18 April 2019, the writ of possession was stayed for a 30 day period.
3. The grounds of this ex parte application (with notice) for leave to appeal are set out in a Notice of Motion filed on 22 June 2018. The Notice of Motion is supported by affidavit evidence sworn by the Applicant, Ms. June Robinson, on 21 June 2018. Originally, a Notice of Appeal was prematurely filed on 9 April 2018.
4. The filing of the Notice of Appeal improperly preceded Ms. Robinson's application for an order of extension of time within which to appeal and a Notice of Motion application and supporting evidence. The application for a time extension was heard before Mr. Justice Stephen Hellman on 14 June 2018. On 15 June 2018 the learned judge enlarged the time for the Applicant's filing of a Notice of Motion and granted leave to the Respondent bank (the Plaintiff) to file evidence in the course of the application for leave to appeal insofar as it addressed the entries for "Additional Liability" in the Loan Amortisation Table exhibited at "GNHJ5" to the Affidavit of George N. Jones, dated 10 February 2017.
5. On 27 November 2018, the Plaintiff filed a summons for an Order that the application for leave to appeal be dismissed for want of prosecution. Alternative relief for an Unless Order and directions were also sought in the same summons. Directions for the filing of a listing form for the hearing of an application for leave to appeal were issued by me on 10 January 2019.
6. The leave to appeal application was heard before me on 25 February 2019. I reserved my ruling in anticipation of delivering these written reasons prior to the start of my maternity leave which urgently and unexpectedly commenced the following week. Having returned to office on Monday 8 July, I now provided my ruling and the below reasons.

SUMMARY AND ANALYSIS OF THE GROUNDS PLEADED

7. The Notice of Motion contains five numbered points for consideration. Save perhaps for the final sub-paragraph of point 2, the Notice of Motion is drafted in the form of a narrative or submissions in support of an appeal against the final judgment on the financial orders rather than grounds of appeal against an interlocutory decision. Leave of the Court is not required where the grounds or narrative is in complaint of a final judgment. If, however, leave was required, I would have refused it for the reasons relied on in my written judgment of 28 February 2018.
8. The Applicant pleaded at point 2: “...however what would have been more satisfactory as a Direction by the Learned Judge is and was for Discovery of not only the Defendants accounts but the Plaintiffs Accounts as well which in turn when audited would put the court in the position of making a proportionate judgment.”
9. Any complaint by the Applicant that the Court did not make any orders for discovery is woefully undermined by the Applicant’s own omission to seek any discovery orders during the case management hearings prior to the final hearing. The accounting evidence sought by the applicant was to be presented at trial as expert evidence in rebuttal or in defence to the Plaintiff’s case. The Applicant was afforded ample opportunity to gather and present such expert evidence in accordance with the Court’s pre-trial directions. Alas, the Applicant’s failures to comply with the Court’s directions ought not to now be treated as an appealable grievance. Equally, the Applicant’s non-compliance with the Court’s pre-trial directions did not somehow create an entitlement to adjourn the long awaited trial or to unfairly ambush the Plaintiff with never-before seen expert evidence on the very day of trial. I stand by my reasons for refusing the admission of the evidence and for refusing the Applicant’s request to adjourn the trial. These reasons are set out in my written judgment of 28 February 2018. In my judgment, it is not reasonably arguable that I should have further adjourned the trial or admitted the belated and irrelevant expert accounting evidence which was presented to me on the day of the trial.
10. The drafted grounds of appeal stated in the affidavit of June Robinson from paragraph 10 onwards have not been considered. Prior to the hearing of this application, Counsel for the Applicant was directed to clarify the grounds he would be arguing. Accordingly, he committed to the grounds pleaded in the Notice of Motion.

Law on Appeals against Interlocutory Decisions

Requirement for Leave to Appeal against Interlocutory matters

11. Section 12(2) of the Court of Appeal Act 1964 provides as follows:

“No appeal shall lie to the Court of Appeal –
(a) against a decision in respect of any interlocutory matter; or
(b) against an order for costs,
except with leave of the Supreme Court or the Court of Appeal.”

Application Procedure

12. Order 2/3 of the Rules of the Court of Appeal outlines the application procedure in respect of leave to appeal:

“3(1) Where an appeal lies only by leave of the Court or of the Supreme Court, any application to either Court shall be made by notice of motion ex parte in the first instance and the following provisions shall apply:

- (a) where the application is made to the Supreme Court, the notice of motion shall be filed with the Registrar of that Court not late(r) than fourteen days after the date of the decision of the Supreme Court;*
- (b) if the application is refused by the Supreme Court and the intending appellant desires to apply to the Court for leave to appeal, he shall file his notice of motion with the Registrar not later than seven days after such refusal;*
- (c) unless the application (whether to the Court or to the Supreme Court) is dismissed or it appears to the Court to which the application is made that undue hardship would be caused by an adjournment, that Court shall adjourn the application and give directions for the service of notice thereof upon the party or parties affected;*
- (d) if leave to appeal is granted by the Supreme Court, the appellant shall file a notice of appeal;*
- (e) where leave to appeal is granted by the Court, the time, prescribed by Rule 2 of this Order, within which notice of appeal must be filed shall run from the date when such leave is granted.*

(2) Every notice of motion filed in pursuance of paragraph (1) of this Rule shall set out the grounds of the application and shall be accompanied by an affidavit in support thereof and by a statement of the grounds of the intended appeal formulated in accordance with Rule 2 of this Order.”

Applicable test in determining Application for Leave

13. In *Avicola Villalobos SA v Lisa SA and Leamington Reinsurance Co Ltd [2007] Bda LR 81* this Court cited the case of *The Iran Nabuvat [1990] 1 WLR 1115*, in which Lord Donaldson of Lyvington stated “*no one should be turned away from the Court of Appeal if he had **an arguable case** by way of appeal*” and “*That is really what leave to appeal is directed at, screening out appeals which will fail.*”

14. I have previously and continue to accept this to be a correct statement of the applicable test for determining whether to grant leave to appeal.

Single Justice of Appeal may determine Interlocutory matters

15. Section 14 of the 1964 Act reads:

“To the extent prescribed by Rules the powers of the Court of Appeal to hear and determine any interlocutory matter may be exercised by any Justice of Appeal in the same manner as they may be exercised by the Court of Appeal and subject to the same provisions:

Provided that every order made by a Justice of Appeal in pursuance of this section may, on application by the aggrieved party and subject to any Rules, be discharged or varied by the Court of Appeal.”

16. Order 2/38 of the Rules of the Court of Appeal provides:

“38 (1) In any cause or matter pending before the Court, a single Judge may hear, determine and make orders on any interlocutory application.

(2) Any order made by a single Judge in pursuance of this rule may be discharged or varied by the Court on the application of any person aggrieved by such order.”

Conclusion

17. Leave to appeal in respect of Point 2 of the Notice of Motion is refused.
18. Leave to appeal is not required for the remaining points pleaded in the Notice of Motion. Alternatively, leave is also refused in respect of the remainder of the narrative pleaded in the Notice of Motion.
19. The additional grounds stated in the Applicant's supporting affidavit are struck out of these proceedings for leave to appeal.
20. Costs in the appeal.

Dated this 10th day of July 2019

**HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT**