

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 10/89

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

BETWEEN VEHICLES AND SUPPLIES LIMITED - RESPONDENTS

A N D

NORTHERN INDUSTRIAL GARAGE
LIMITED

A N D THE MINISTER OF FOREIGN AFFAIRS, TRADE AND INDUSTRY - APPELLANT

Wendell Wilkins for the Appellant

Enos Grant and Miss Jacqueline Hall
for Respondents

July 19, 21 and September 25, 1989

ROWE P.:

At the conclusion of the hearing of the motion for leave to appeal to Her Majesty in Council and for a stay of execution of part of the order of Clarke J. as confirmed and restored by this court, we ordered that conditional leave be granted to the appellant to appeal to Her Majesty in Council and certified that the following questions involved in the appeal ought by reason of their general public importance to be submitted to Her Majesty in Council:

1. Whether the stay of proceedings granted pursuant to Section 564 (B) (4) of the Judicature (Civil Procedure) Code Law is in the circumstances of the case in the nature of injunctive relief?
2. If the answer to question 1 is yes, then whether any relief which is in the nature of an injunctive relief can be granted against the Crown and/or its officers in these proceedings having regard to the provisions of the Crown Proceedings Act and the unavailability of such relief on the Crown side of the Queen's Bench Division or otherwise?
3. Whether or in what circumstances a High Court judge can review and set aside an ex-parte order of another High Court judge made on an application for leave to issue a prerogative order?
4. Should the Attorney-General be named as the Respondent in these proceedings instead of the Minister of Foreign Affairs, Trade and Industry?"

The appellant was ordered to enter into recognizance for the due prosecution of the appeal within thirty days and to prepare the record for transmission to Her Majesty in Council in the said period. A third condition was that:

"The execution of that part of the judgment [of Clarke J.] which imposed a stay of proceedings in relation to the importation and allocation of motor vehicles be suspended pending the appeal."

We promised to put our reasons in writing for making these orders.

The appellant has a statutory duty to determine the quantities and types of motor vehicles to be imported into the Island and to whom these vehicles should be allocated for distribution to the public. The respondents are motor

vehicle dealers. They objected to the allocations made by the respondents to them in respect of the year 1988-89 and sought leave of the court to apply for an Order of Certiorari to quash the respondents said allocation. To ensure that their purpose was efficacious, the respondents sought an order that:

"All allocations of quotas and/or proceedings consequent on the said allocations be stayed pending a final determination of this matter."

Clarke J., ex-parte, granted the requested stay in the exercise of a discretion prima facie conferred by Section 564 (B) (4) of the Judicature (Civil Procedure) Code. Within weeks Ellis J. in an inter-partes hearing, set aside the order granting the stay of proceedings.

The practical effect of the order granting the stay was that no steps could be taken to import any motor vehicles into Jamaica. When that order for a stay was lifted, the effect was that the appellant could authorise the relevant authorities to continue the process of importation of motor vehicles and to allocate them in conformity with the directive of the respondent. This stop and go procedure was further complicated when on June 16, 1989, this court confirmed and restored the order of Clarke J. on the basis that Ellis J. had no jurisdiction to vary the order of Clarke J. in the circumstances of the case.

Mr. Grant opposed the motion for leave to appeal on the ground that it was most unlikely that the judgment of the Court of Appeal would be reversed by Her Majesty in Council. In Daily Telegraph Newspaper Company, Limited vs. McLaughlin (1904) A.C. 776 the Privy Council set out the

principles which guided them in granting special leave to appeal. That was the first application for special leave to appeal to come to them from the High Court of Australia. Lord Macnaughten in delivering the judgment of the Board said at page 773:

"A case may be of substantial character, may involve matter of great public interest, and may raise an important question of law, and yet the judgment from which leave is sought may appear to be plainly right, or at least to be unattended with sufficient doubt to justify their Lordships in advising Her Majesty to grant leave to appeal."

This court applied that principle in Danculture Ltd. v. Black River Upper Horass Development Company Limited and Others, C.A. 79/88 - February 13, 1989 (unreported) and held that it was unlikely that the judgment concerned would be reversed by the Privy Council and that it would be an act in futility to let the appeal proceed, notwithstanding that the point raised was of great importance.

Serious questions of law were raised in the course of this appeal. It is a matter of the utmost importance for the practice and procedure of the court to be settled as to whether the special procedure laid down in Section 564 (3) of the Judicature (Civil Procedure) Code, whereby an application for leave to apply for an Order of Certiorari must be made ex-parte, is subject to the procedure which exists for granting ex-parte injunctions in actions begun by writ and exemplified in W.E.A. Records Ltd. v. Visions Channel 4 Ltd. and Others (1983) 2 All E.R. 589.

We think too, that Section 564 (b) (4) which has been judicially interpreted for the first time, is such an important

provision in the judicial armoury that there should be no doubt as to the ambit of its applicability in relation to the Crown or officers of the Crown.

These two paramount considerations were sufficient to enable us to reject the submissions of Mr. Grant in opposition to the application for the grant of leave to appeal.

The appellant submitted that the stay of all proceedings involving the importation and allocation of motor vehicles should be suspended pending the hearing of the appeal on the ground that there would be the most dire consequences to the national economy and to the tourist trade in particular if this were not done. The respondents opposed the application on the ground that there was no power in this court to grant such a stay of execution pending the hearing of the appeal to Her Majesty in Council.

Our starting point is The Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 (Privy Council Rules). Rule 5 sets out the powers of a single judge of appeal in respect of appeals to Her Majesty in Council. He is given full power to consider applications for leave to appeal where the appellant has an appeal as of right. The single judge is further empowered in Rule 5 (b):

"Generally, in respect of any appeal pending before Her Majesty in Council, to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require."

A proviso to Rule 5 enables the Full Court to review, reverse, vary or discharge any order of the single judge.

Mr. Wilkins submitted that Rule 5(b) would empower

the single judge, and a fortiori, the court itself to grant a stay of execution if the interests of justice so require.

In Lorraine Marie Issa v. John David Stannard, C.A. 51/83 judgment was entered for the appellant that the modifications of the covenants restricting the user of several parcels of land be granted. These proceedings were brought under the Restrictive Covenants (Discharge and Modification) Act. The respondents requested a stay of execution pending the hearing of the appeal to Her Majesty in Council and argued that if the appellants were allowed to erect buildings and obtain and dispose of separate titles thereto, any successful appeal to Her Majesty in Council would be wholly without value. They sought the assistance of Rule 5(b) of the Privy Council Rules. White J.A. held that a stay of execution where there is an appeal to Her Majesty in Council is governed not by Rule 5(b) but by Rule 6. His decision was affirmed by the Full Court.

Rule 6 is in these terms:

"Where the judgment appealed from requires the appellant to pay money or do any act, 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 shall seem just, and in case the Court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as Her Majesty in Council shall think fit to make thereon."

In Issa v. Stannard (supra) White J.A. was firmly of the view that Rule 6 enabled only an applicant who had been ordered to do an act or pay money to apply for a stay of execution and none other. He went on to say:

"The decision of the Court of Appeal being appealed from does not in any way impose upon them any duty which they must fulfil for the benefit of the successful party."

When McLaughlin v. Daily Telegraph Newspaper Company Ltd. (1904) 1 C.L.R. 243 was before the High Court of Australia, the Court refused to grant a stay of execution. Griffith C.J. said:

"There is no doubt that the Court has power to stay execution of its judgments, but in this case the Constitution has provided that the Court's decision shall be final and conclusive. It is true that the Judicial Committee may give leave to appeal from our judgment. Under the system of appeals from State Courts to the Privy Council the appeal lay as of right, but it is absolutely unheard of to stay proceedings upon the judgment of a Court from which there is no appeal as of right. To stay execution because the Court doubted whether it had given a proper judgment would be unworthy of a Court of Appeal."

Rule 6 of the Privy Council Rules quoted above has liberalized the position as it exists in Jamaica as compared to what existed in Australia in 1904 and this Court has the discretion to grant a stay of execution whether the appeal is as of right or by leave of the court.

The East African (Appeal to the Privy Council) Order in Council, 1951 was applicable to the Court of Appeal at Nairobi. Sir Newham Worley P., giving the judgment of the

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court in G. R. Mandavia v. Commissioner of Income Tax (1957) East African Law Reports p. 1 referred to Rule 7 of the relevant Order in Council which is in identical terms with Rule 6 of the Order in Council applicable to Jamaica. Of this rule he said:

"We think that this phrase [where the judgment appealed from requires the appellant to pay money or do any act] is intended to apply to what may be termed the substantive order or orders of the court, i.e. the order or orders embodying the determination on the issue or issues raised in the appeal to the court."

He held that the mere order to pay costs did not fall within the rule.

The court disposed of the appellant's answer to the respondent's arguments in this manner:

"The applicant's answer to these arguments amounted to little more than a plea of ad misericordiam. He asserted that this court had an inherent jurisdiction to grant a stay which was not limited by s. 7 of the Order in Council, that the Commissioner was sufficiently secured by the deposit of title-deeds and that a forced sale of his properties in the present conditions, whether as a consequence of further proceedings or to enable him voluntarily to discharge the assessments would involve him in heavy losses.

We found ourselves unable to accept the view that we have any wider jurisdiction to order a stay than is conferred upon us by s. 7 of the Order in Council."

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An appeal against the decision of a court does not ipso facto act as a stay of execution of the judgment or order pronounced. Where the statute which confers the right of appeal intends to provide for a stay of execution pending the determination of the appeal, it expressly so provides and the court is bound by the limitations imposed by the statute. Rule 5(b) of the Privy Council Rules does not in terms refer to stay of execution and its generality does not contain language from which it can be confidently inferred that there was a clear intention to confer upon the single judge and ultimately upon the court itself, the power to grant a stay of execution whenever the interests of justice so demand.

This is made clearer by the express provision of Section 6 which deals exclusively with the grant by the court itself of a stay of execution. White J.A. in construing Rule 6 in Issa v. Stannard, drew attention to the fact that the judgment of the Court of Appeal being appealed from did not impose upon the appellant any duty which they must fulfil for the benefit of the successful party.

Mr. Wilkins argued that in the instant case although the order for stay granted by Clarke J. in January 1989 was negative in form, so much had happened since then, that it would not be enough for the appellant to remain inactive if the respondent was to receive the protection which the court's order sought to confer on him. On Mr. Wilkins' submissions, it would be incumbent upon the appellant to take positive steps to countermand instructions previously given and acted upon, which instructions could be consummated by the actual distribution of the motor vehicles.

We are persuaded by this submission.

It seems to us as Mr. Wilkins says that to effectuate the substantive order of Clarke J. the appellant would be required "to do an act" within the meaning of Rule 6 of the Privy Council Rules and that the court would have jurisdiction to grant a suspension of the order pending the determination of the appeal before Her Majesty in Council. For these reasons, we ordered that the stay granted by Clarke J. be suspended pending the determination of the appeal by Her Majesty in Council.

CAREY J.A.:

I agree.

MORGAN J.A.:

I agree.