IN THE COURT OF APPEAL
TURKS & CAICOS ISLAND

CL-AP 16/18
(Appeal from CL 118/16)

IN THE MATTER OF THE TURKS AND CAICOS ISLANDS CONSTITUTION ORDER 2011 ('THE CONSTITUTION')

AND IN THE MATTER OF THE CROWN LANDS ORDINANCE CAP 9.09 ('THE CLO')

AND IN THE MATTER OF A DEVELOPMENT AGREEMENT DATED APRIL 10th 2008, AS AMENDED AND RESTATED ON AUGUST 19 2013 BETWEEN THE PLAINTIFFS AND THE DEFENDANTS ('THE DEVELOPMENT AGREEMENT')

BETWEEN

CMK BWI LTD
BELL SOUND LIMITED
SAILROCK ESTATES LIMITED
LOWER SAILROCK ESTATES LIMITED
THE HIGHLANDS LIMITED
COCKBURN HARBOUR LIMITED
COCKBURN HARBOUR MARINA LIMITED
McCARTNEY CAY LIMITED

APPELLANTS

AND

ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS

RESPONDENT

BEFORE: **The Hon. Mr. Justice C. Dennis Morrison P**
The Hon. Mr. Justice Stanley John JA
The Hon. Mr. Justice Ian Winder JA

APPEARANCES: **Mr. Ariel Misick QC and Mrs Deborah John-Woodruffe for the Appellants**
Ms. Clemar Hippolyte for the Crown

DATE HEARD: **5 May 2021**

DATE DELIVERED: **22 June 2021**

JUDGMENT

MORRISON P

Background

[1] In a judgment given on 29 January 2021, this court dismissed the appellants' appeal from a judgment of Ramsay-Hale CJ in part, but allowed it in part. The appellants therefore had partial success in the appeal and this was reflected in the court's order for costs.

[2] The panel of the court which heard the appeal comprised Mottley P, Stollmeyer and Adderley JJA. The judgment of the court was unanimous, although by the time it came to be delivered Mottley P had retired (on 21 December 2020).

[3] In this application, the appellants moved the court to reconsider and vary the judgment dated 29 January 2021 in so far as the court had found against them ('the application to reconsider and vary the judgment'). Alternatively, the appellants sought conditional leave to appeal to Her Majesty in Council ('the Privy Council') ('the application for conditional leave').

[4] After hearing submissions from the parties on 3 May 2021, we dismissed the application to reconsider and vary the judgment. However, we granted the application for conditional leave on the following conditions[1]:

1) That the Appellants within ninety (90) days of the date of this Order deposit in the Court of Appeal of the Turks and Caicos Islands US$500.00 for the due prosecution of the appeal and the payment of all such costs as may become payable by the Respondent in the event of the Appellants not complying with the further conditions granting leave to appeal, or the appeal being dismissed for non-prosecution, or the Judicial Committee ordering the Appellants to pay costs (as the case may be).

2) That within one hundred and twenty (120) days of the date of this Order the Appellants shall take all necessary steps to procure the Record of Appeal ("the Record") ready for dispatch to England with liberty to apply for further directions either to the Registrar or the Court of Appeal with respect to the procuring of the Record, its form and content.

[1] The actual terms of the Order were very helpfully agreed and settled by counsel for the Appellants and the Respondent.

3) That upon the filing of an affidavit within no more than three (3) days after preparation and settling of the Record by or on behalf of the Appellants confirming compliance with the above requirements to the satisfaction of the Registrar there shall be final leave to appeal to Her Majesty in Council such leave to take effect from the date and filing of the said affidavit.

4) The costs of the application to be costs in the appeal.

[5] As promised, we now provide the following brief reasons for our decision and the making of this Order.

The application to reconsider and vary the judgment

[6] The issues which arose on this application were (i) whether the court has jurisdiction to revisit, reconsider and vary its own judgment; and (ii) if it does, whether it should exercise the jurisdiction in the manner proposed by the appellants in this case.

[7] In order to make this aspect of the matter intelligible, I will first give a very brief outline of the factual background (borrowing liberally from the judgment of Adderley JA, with which Mottley P and Stollmeyer JA both agreed).

[8] The litigation arises out of two agreements entered into between the appellants and the Turks and Caicos Islands Government ('TCIG'). The first was a development agreement entered into in 2008 ('the 2008 agreement'), under the terms of which the appellants agreed to carry out a mixed-use development on lands situate on South Caicos. The agreement gave the appellants the right to restore and use as part of the development certain parcels of Crown Lands situate in downtown Cockburn Harbour. Under the terms of the 2008 agreement, once the appellants had invested US$2,000,000.00 in various improvements set out in the agreement, these parcels were in due course to be comprised in a lease from TCIG to the appellants at a peppercorn rental ('the Downtown Restoration Lease').

[9] Under the 2008 agreement, TCIG also agreed to use its best efforts to acquire a certain parcel of land ('the Valhalla Parcel') and thereafter transfer it to the appellants. The Valhalla Parcel was acquired by TCIG in 2011, but was not transferred to the appellants in accordance with the agreement.

[10] In early 2013, the TCIG Parliament passed the Crown Lands Ordinance CAP 9.08 ('the CLO'). The CLO, which came into force on 1 April 2013, made various provisions as to the manner of disposition of Crown Lands. In particular, it stipulated that Crown Lands should only be disposed of after a public tender process and the publication of applications[2].

[11] When the CLO came into force, the appellants' obligation to expend US$2,000,000.00 on the various improvements in connection with the downtown restoration set out in the 2008 agreement had not yet been fulfilled.

[12] A few months later, also in 2013, as a result of ongoing disputes between the parties as regards the performance of the 2008 agreement, they entered into an "Amended and Restated Development Agreement" ('the 2013 agreement'). Among other things, the 2013 agreement recorded certain agreements concerning the Downtown Restoration Lease and the Valhalla Parcel.

[13] But yet further disputes arose as to the effect of the provisions of the CLO, with TCIG contending that certain aspects of the 2008 agreement, in particular the provisions of that agreement relating to the grant of the Downtown Restoration Lease and the transfer of the Valhalla Parcel, could not be legally performed in light of the CLO. This in turn led to the litigation, in which the appellants contended that TCIG was in breach of the 2008 agreement, claiming among other things damages for breach of contract or compensation for breach of their rights against deprivation of property under section 1(c) and 17 of the Constitution. On the other hand, TCIG contended that the 2008 agreement had been extinguished by the 2013 agreement.

[14] The Chief Justice held that, based on all the circumstances and the presumed intention of the parties, the 2013 agreement had indeed rescinded the 2008 agreement. In relation to the Downtown Restoration Lease, the Chief Justice concluded that, as a result of the CLO, the provision for payment of peppercorn rent in the 2008 agreement was unlawful and TCIG was accordingly unable to perform it. And, as regards the Valhalla Parcel, she held that, once the property was acquired by

[2] CLO, Schedule 2

TCIG and a sale price agreed, TCIG was under an immediate obligation to transfer it to the appellants. However, no agreement having been reached with respect to the sale price, the appellants were not entitled to a declaration to that effect.

[15] The principal issue on appeal was whether the Chief Justice was correct in her decision that the 2008 agreement was rescinded by the 2013 agreement. After examining both agreements and the surrounding circumstances, Adderley JA concluded that the Chief Justice had failed to apply the correct test in determining the intention of the parties in entering into the 2013 agreement; and that, had she done so, she would have concluded that the 2013 agreement did not rescind the 2008 agreement. However, as the Downtown Restaurant Lease could not be completed in light of the provisions of the CLO, there was no basis for disturbing the Chief Justice's finding that the appellants were not entitled to the declarations they sought in respect of it. But the position was different with regard to the Valhalla Parcel: ownership of that parcel having vested in TCIG before the CLO came into force, the appellants had a contractual right to the completion of the 2008 agreement in respect of it. In respect of the Valhalla Parcel, the court therefore granted a declaration that the respondent was in breach of contract and that the appellants were accordingly entitled to damages for breach of contract, or, alternatively, breach of their constitutional rights.

[16] Up to the time of filing of this application, the judgment of this court had not been perfected and the appellants invited the court to exercise its inherent jurisdiction to reconsider and vary the judgment before it is perfected. They submitted that the court erred in two respects. First, as regards the Downtown Restoration Lease, it ought to have treated the appellants' obligation to expend the sum of US$2,000,000.00 on the downtown improvements as a promissory condition for the performance of TCIG, rather than as a condition precedent to TCIG's obligation to enter into the lease. Had the court taken the correct approach, it would have been clear that the appellants' right to the Downtown Restoration Lease at a peppercorn rent arose under the 2008 agreement and not under the 2013 agreement. Accordingly, this obligation, albeit still unperformed, would not have been caught by the provisions of the CLO. In these circumstances, the appellants now ask the court to grant declarations that (i) TCIG was in breach of contract by failing to execute the Downtown Restoration Lease in the

manner provided for in the 2008 agreement; and (ii) the appellants are entitled to have the Downtown Restoration Lease executed accordingly.

[17] Second, as regards the Valhalla Parcel, the appellants asked this court to "clarify" the declaration that the appellants were in breach of contract, by making it clear that the appellants were therefore entitled to a transfer of the parcel; or, alternatively, damages for breach of contract, but not to constitutional redress.

The jurisdiction to reconsider a judgment

[18] Mr Misick QC submitted that the court has an inherent jurisdiction to correct the errors which the appellants have identified in this case, because no order giving effect to the judgment has been drawn up or perfected. For this submission, Mr Misick relied on the decision of the United Kingdom Supreme Court in **Re L and B (Children)**[3]. That was a case in which, in proceedings concerning the care of an infant child who had been injured, the judge gave a judgment in December 2011 in which she found that the father was the perpetrator of the child's injuries. However, before the judgment was perfected, the judge appears to have had a change of mind. She then delivered a second judgment ('the February 2012 judgment), in which she concluded that she was unable to find to the requisite standard which of the parents caused the child's injuries.

[19] The wife's appeal was allowed by the Court of Appeal, but the Supreme Court restored the February 2012 judgment, Lady Hale observing that, "[i]t has long been the law that a judge is entitled to reverse his decision at any time before his order is drawn up and perfected". However, as Lady Hale went on to explain[4], a judge has no jurisdiction to change his mind once the order has been perfected and sealed by the court, unless the court has an express power to vary its own previous order. Once the order has been drawn up and perfected, "[t]he proper route of challenge is by appeal".

[3] [2013] UKSC 8, para [16]
[4] Per Lady Hale, at para [19]

[20] Mr Misick also relied on **Re L and B (Children)** in relation to the question whether there are any limits to the exercise of the jurisdiction. Before the decision in that case, there was some authority to say that the jurisdiction to revisit an order already made ought only to be exercised in "the most exceptional circumstances"[5]. However, in **Re L and B (Children)**, the Supreme Court expressly disavowed any such limitation on the jurisdiction. While recognising the consideration whether a party has acted upon the decision to his detriment as a relevant factor militating against the exercise of the jurisdiction, "especially in a case where it is expected that they may do so before the order is formally drawn up". It was held that every case must be decided in accordance with its own particular circumstances and the judge's overriding objective must be to decide the case justly. In this regard, Lady Hale observed[6], "[a] carefully considered change of mind can be sufficient".

[21] Ms Hippolyte did not dissent from the general proposition that the court has an inherent jurisdiction to correct an error in a judgment at any point before the order is drawn up and perfected. However, she contended that the jurisdiction was essentially focussed on points on which the parties were in agreement that an error had been made, which was not the position in this case.

[22] In support of this submission, Ms Hippolyte referred us to the 2012 decision of the Court of Appeal of England and Wales in **Space Air-conditioning plc v Mr Adrian Guy and Another**[7], in which the trial judge made a finding of fact in her judgment (which had not been circulated in draft to counsel for identification of typographical and other errors) which both sides agreed was erroneous. At the end of the day, the appeal from the judge's decision was allowed because, in light of the uncorrected error in the judgment, the court considered that the judge may have proceeded on a mistaken view of the evidence and this may well have had an impact on her ultimate conclusions.

[5] Per Russell LJ in **In re Barrell Enterprises** [1973] 1 WLR 19, 22; **Stewart v Engel & Anor** [2000] EWCA Civ 362, [2000] 1 WLR 2268, (Clarke LJ dissenting on this point)
[6] At para [27]
[7] [2012] EWCA Civ 1664

[23] In the course of his judgment, Mummery LJ observed that[8]:

> "With the benefit of hindsight the positive advantages of circulating the judgment in draft confidentially to counsel can be appreciated: obvious errors in the writing of the judgment and typographical mistakes can be picked up, pointed out and corrected close to and preferably before the formal hand down and the entry of the order of the court."

[24] It is against this background that, at a later stage of the judgment, Mummery LJ added the further statement upon which Ms Hippolyte heavily relied:[9]:

> "I start from the elementary proposition that, if a judgment contains what the judge acknowledges is an error when it is pointed out, the judgment should be corrected, unless there is some very good reason for not doing so. A judgment should be an accurate record of the judge's findings and of the reasons for the decision. It should not normally be necessary for a party to bring an appeal to correct an error, if it turns out that the parties and the judge agree that there is an error and that a correction should be made. This applies to a handed down judgment before the order is entered, though the occasion for correction will be rarer if the parties' representatives have been given a prior opportunity to suggest corrections of typing mistakes and obvious errors in the writing of the judgment. Before the correction is made the judge should obviously give both sides an opportunity to make submissions on whether there is a valid objection to a proposed amendment of the judgment."

[25] I agree with Mr Misick that **Space Air-conditioning plc v Mr Adrian Guy and Another** is no authority for saying that the court's jurisdiction to correct errors is limited to cases in which the parties are in agreement that the court had made a mistake.

[26] It seems to me, firstly, that the point which Mummery LJ was seeking to make by referring to the principle that the judge retained a jurisdiction to correct the judgment before it was perfected was that, had the judge followed the usual course of circulating a draft judgment to the parties for the correction of typing mistakes and obvious errors, the necessity for an appeal might not have arisen. Secondly, there is

[8] At para 28
[9] At para 53

no indication in Mummery LJ's judgment that he considered the jurisdiction to be limited in the manner contended for by Miss Hippolyte. **Re L and B (Children)**, which must now be taken to be the leading authority, is in fact an example of a case in which the judge's correction of what she considered to be an error in her original judgment took place of her own motion and ultimately gave rise to an appeal by the wife, who was the aggrieved party the second time around. In other words, there was no question of agreement between the parties that an error had been made in the first judgment.

[27] **Re L and B (Children)** was, of course, as Mr Misick pointed out, decided in the context of the English Civil Procedure Rules 1998 ('CPR'), rule 1.1(1) of which provides that "[This is] a new procedural code with the overriding objective of enabling the court to deal with cases justly". Mr Misick nevertheless submitted that the court should adopt the law as stated in that case and, again, I agree with him. I doubt very much that anyone would dissent from the proposition that judges in the Turks & Caicos Islands are equally bound by an overriding obligation to deal with cases justly.

[28] It is therefore clear from the authorities that the court has an inherent jurisdiction to correct errors in its judgment, provided that (i) it has not yet been perfected; and (ii) neither party has yet acted upon the decision to his or her detriment. In this regard, there is no rule requiring exceptional circumstances as a precondition to the exercise of the jurisdiction, nor is the exercise of the jurisdiction limited to cases in which the parties are agreed that the judgment contains an error. The overriding objective in every case must be to decide the case justly, taking into account all relevant factors and surrounding circumstances. However, I would expect the court to be guided by Lady Hale's further observation in **Re L and B (Children)**[10], albeit in reference to the analogous power in the CPR to revisit a judgment even after it has been perfected, that the power "does not enable a free-for-all in which pervious orders may be revisited at will … [i]t must be exercised 'judicially and not capriciously'".

[10] At para 38

Should the court exercise the jurisdiction in this case?

[29] If this is right, then it would be a matter for the court's discretion whether to exercise its jurisdiction to reconsider its judgment in this case. We accept that, as Mr Misick submitted, the court would first have to satisfy itself that the judgment was erroneous in some respect. Mr Misick did not flinch from this challenge, making spirited submissions for the purpose of demonstrating the court's error in relation to both the Downtown Restoration Lease and the Valhalla Parcel. In respect of the former, it was submitted that the court erred in treating "… the Applicants' expenditure obligation under the 2008 Agreement as a condition precedent to the Applicants having a vested interest in the Downtown Restoration Lease, instead of a promissory condition under which the expenditure obligation was no more than part of the consideration for obtaining the Downtown Restoration Lease"[11]. And, in respect of the latter, Mr Misick, in a distinctly less far-reaching challenge to the court's judgment, directed us to section 21(2) of the Constitution, which provides that the Supreme Court shall not exercise its powers to grant constitutional redress, "if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law". In light of this provision, it was submitted, the court's award of damages in this case for breach of contract or compensation for breach of the appellants' rights under the Constitution was erroneous, in that the court ought to have limited its award to damages for breach of contract.

[30] Miss Hippolyte for her part resisted the application, contending that the court should not exercise the jurisdiction lightly and that this was not an appropriate case in which to do so. She submitted that the jurisdiction to reconsider a decision before it has been perfected should not be treated as "a back door for re-arguing the case"[12].

[31] It immediately became clear from these competing submissions that there were substantial arguments on both sides. Further, irrespective of which side was right, what was required from this court was a substantial rehearing of the appeal, particularly so in relation to the Downtown Restoration Lease. This in turn gave rise

[11] Applicants/Appellants Written Submissions, filed on 16 February 2021, para 18
the[12] Respondent's Written Submissions filed 9 April 2021

to the question of whether it would be possible to reconstitute the court which heard the appeal, given the retirement of Mottley P. While Mr Misick quite properly acknowledged that this might undoubtedly pose a difficulty, we were given no clear indication as to how the matter should then proceed in the light of this development.

[32] In all these circumstances, bearing in mind the fact that the court which heard the appeal was no longer available to reconsider it, and bearing in mind that, subject to the question of conditional leave to appeal to the Privy Council, the avenue of appeal was still open to the appellants, we came to the conclusion that this was not an appropriate case in which to make the order sought. We therefore declined to do so.

The application for conditional leave

[33] As I have indicated, the appellants filed this application as an alternative to their application to reconsider the judgment. Miss Hippolyte very properly offered no objection to the application, given the fact that the criteria for an appeal as of right to the Privy Council were fully made out. It is in these circumstances that we made the order set out at paragraph [4] above.

C. Dennis Morrison, P

I agree

Stanley John, JA

I also agree

Ian Winder, JA