

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Application No. BBCV2017/001
BB Civil Appeal No. 31 of 2016

BETWEEN

JJ

APPLICANT

AND

**CHILD CARE BOARD
SW**

**FIRST RESPONDENT
SECOND RESPONDENT**

JUDGMENT SUMMARY

This summary is not intended to be a substitute for the reasons of the Caribbean Court of Justice or to be used in any later consideration of the Court's reasons.

- [1] In this case the Court delivered judgment on a special leave application dealing with some important procedural points. The dispute arose out of the substantive care and control proceedings between a father (“SW”) and a mother (“JJ”) over their son. The father filed his claim in the High Court under the Minors Act¹ in March 2014 alleging that the child, who was then 13 years old, was being abused while in the mother’s care. During the proceedings, the trial judge ordered the officer of the Child Care Board (“the Board”) to investigate and report on the living circumstances of the parties and, subsequently, the parental, educational and other circumstances of the child.
- [2] The first report, dated the 23rd May 2014, recommended that the mother should continue to have care and control of the child while the second report, dated the 1st October 2014 (“the October Report”), recommended that both parents should continue to have joint custody but that care and control of the child should be granted to the father with liberal access to the mother. The October Report was based on the officer’s interviews with the child, the child’s

¹ CAP 215.

former primary school principal, his current secondary school principal and his former class teacher (“the teachers”). The sources and nature of the information were noted in the report.

- [3] Trial began on the 9th July 2015, almost 9 months after the completion of the October Report. The officer gave evidence which, once again, disclosed the identities of the informants and the events reported to her. The trial was adjourned to the 13th July 2015 for continuation of the officer’s evidence. At this point, counsel for the mother wrote to the Board requesting all the officer’s notes, statements and other related material garnered in relation to the case. The Board and counsel for the father opposed the request.
- [4] The Board filed an Affidavit claiming privilege from disclosure on the ground of public interest immunity and confidentiality. It claimed automatic privilege from disclosure over its files and workings on the basis that it receives confidential information which is critical in its function of child protection. It argued that disclosure would adversely affect its ability to receive such information. On the other hand, counsel for the mother contended that he would not be able to effectively cross-examine the officer without the notes and, as such, the mother’s right to a fair trial would be prejudiced. This was particularly so since the mother claimed that the officer’s evidence of what transpired during the interview with her differed from what happened and that the observations attributed to the teachers were either inaccurate or taken out of context. The trial judge delivered her judgment on the 29th November 2016, some fourteen months after hearing submissions, and ordered the officer to produce to counsel for the mother true copies of all the file notes relating to the interviews with the mother and the teachers.
- [5] The Board appealed this judgment to the Court of Appeal which rendered an oral judgment on the 19th January 2017. The Court of Appeal allowed the appeal and reversed the High Court’s disclosure order made in the mother’s favour, without providing reasons. Not long thereafter, on the 2nd February 2017 the mother filed an application for special leave to appeal to the CCJ, seeking to challenge the Court of Appeal’s interlocutory decision. The application was accompanied by an Affidavit of Urgency and a request to appeal as a poor person.
- [6] The Court wasted no time, convened a hearing on the 10th February 2017 and made several orders with a view to expediting the disposal of the application. Among these were that (1)

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the hearing of the application is to be treated as the hearing of the substantive appeal, should special leave be granted (2) if necessary, the submissions of the parties made in relation to the application are to be treated as the submissions in the appeal, with the parties having the option to rely on the submissions made before the Court of Appeal (3) judgment be delivered on the written submissions of the parties without the need for an oral hearing. The Board opted to rely on its written submissions filed before the Court of Appeal while the mother filed fresh submissions before the Court. The father declined to file submissions as his view was that the contention solely concerned the mother and the Board. The Court also dispensed with the usual requirement for the Court of Appeal's written judgment to be available. Noting the availability of the Board's and the mother's submissions below, the Court held that the measures being taken to expedite the proceedings would not prejudice any of the parties. In fact, it was required in the interests of justice given the necessity for the case's urgent treatment.

- [7] The CCJ found that the application before it raised two issues: firstly, having regard to the fact that this is a proposed appeal from a purely interlocutory order, whether the mother had met the required threshold to obtain special leave to appeal and, secondly, if she had, and the Court agrees to grant her special leave, whether the trial judge's ordering disclosure by the Board should be reversed (as the Court of Appeal had done).
- [8] In resolving the first issue, the Court took cognizance of Rule 1.3 of the Appellate Jurisdiction Rules,² which discourages "unnecessary disputes over procedural matters", before pointing out that the appellate process is more suited after final judgment as unnecessary interruptions thwarts the "effective, expeditious, and fair disposition of cases". This is not a ban. However, the overriding objection coupled with the undesirability of having interlocutory orders appealed right up to this Court, especially where the substantive matter must continue regardless of the outcome of the appeal, required a high threshold.
- [9] The Court found that there was no explicit legislative provision for a distinct threshold for obtaining special leave in proposed interlocutory appeals but reasoned that there were criteria to be met in such cases. These included, the need to avert a miscarriage of justice; the necessity to clarify a point of law of great importance; the necessity to ventilate the

² The Caribbean Court of Justice (Appellate Jurisdiction) Rules, 2015.

dispute before the Court at the interlocutory stage of proceedings; the extent to which the appeal will materially advance termination of the litigation, clarify further proceedings in litigation or protect the applicant from substantial of irreparable injury.

[10] The Court acknowledged that the matter of resolving the tension between public interest immunity and the right to a fair trial has never been addressed by it and, therefore, the proposed appeal raised a matter of exceptional public importance. Further, the mother's grounds of appeal precipitated matters concerning the constitutional right to a fair trial and judicial determination of where the best interests of the child lie. The Court was also satisfied that the mother's submissions in support of upholding the trial judge's judgment suggest "a more than negligible risk of a miscarriage of justice. Accordingly, special leave to appeal was granted. The mother was also granted leave to appeal as a poor person.

[11] The Court then moved to consider the second issue: whether the trial judge's order should be reversed. The CCJ affirmed the judgment after careful examination and lauded it as a "well-researched statement of the applicable law...a carefully crafted exercise of judicial discretion...and...a useful guide on the relevant legal principles governing the privilege against, and immunity from, disclosure". The Court agreed that the Board's role in these proceedings did not form part of its core functions but was ancillary to the court's judicial process.

[12] The trial judge was commended for her treatment of the balancing exercise required by law in cases involving the welfare of children as well as her examination of the relevant case law and the international and domestic statutory framework. The CCJ noted that what attracted the immunity was the public interest in encouraging open and frank discourse between the Board and the public to secure the protection of children and not the fact that the information was communicated in confidence. However, the immunity is not absolute and must be balanced against the public interest in a fair trial.

[13] The CCJ found that in cases such as this where the fundamental question of how best to reconcile the protection of the Board's mandate as well as litigants' right to obtain relevant information to have effective access to justice all in the context of what is in the best interests of the child, the solution did not rest in laying down strict prescriptions. Instead, each case

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must be assessed on its unique facts and the precise nature of what is to be disclosed must be clear.

- [14] In allowing the appeal, the Court held that the purpose of the disclosure requested was more concerned with the mother's ability to test the officer's credibility than with the public interest in protecting the Board's informants. The CCJ held that the trial judge had properly and judiciously exercised her discretion with sensitivity to the peculiarities of the case when she ordered production of the file notes. It found no proper basis on which the Court of Appeal could have set aside the judgment.
- [15] The CCJ also noted, however, the need for expedition when treating with cases involving the custody of children as is mandated by the Convention on the Rights of the Child, which was ratified by Barbados. It noted the inordinate length of time taken by the judge to deliver her judgment and that this delay was further compounded by the suspension of the trial during the period in which the appellate process was engaged. The Court stated that delay is never in the best interests of the child, the less so when there is an allegation of abuse, and that judicial practice should reflect that. The Court therefore sought to encourage the parties to find an amicable resolution of the matter but noted that if this could not be done, then the trial should be concluded as quickly as possible.

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