



Easter Term
[2017] UKPC 11
Privy Council Appeal No 0071 of 2015

JUDGMENT

Cono Cono and Co Ltd (Appellant) v Veerasamy and others (Respondents and First and Third Co-Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

**Lord Mance
Lord Clarke
Lord Sumption**

JUDGMENT GIVEN ON

8 May 2017

Heard on 16 November 2016

Appellant
Antoine Domingue SC
(Instructed by Edwin Coe)

Respondent
Nilen Vencadasmy
Yudish Lutchmenarraido
(Instructed by Sheridans)

*First and Third
Co-Respondents*
James Guthrie QC
Geereesha Topsy-Sonoo
Kamlesh Domah
(Instructed by Royds
Withy King)

LORD SUMPTION:

1. The question at issue on this appeal is a narrow one. It is whether an appeal lies to the Appellate Division of the Supreme Court of Mauritius from a decision of a Supreme Court Judge in Chambers sitting on a statutory appeal from a lower tribunal.

2. In March 2006, the appellant applied to the Black River District Council for a development permit to build a restaurant on land leased from the state on the public beach of Flic-en-Flac. The application was opposed by the respondents, who were neighbouring residents, and was ultimately refused by the local authority in May 2006.

3. The appellant initially appealed against the local authority's decision under section 106 of the Local Government Act 2003. That provision conferred a right of appeal to a Judge in Chambers of the Supreme Court against the refusal of a development permit, and provided that that judge's decision should be final and conclusive. However, on 1 October 2006, shortly after the appeal was lodged, the law was changed by section 7 of the Business Facilitation (Miscellaneous Provisions) Act 2006. The new Act repealed section 106 of the Local Government Act in its entirety. As a result the appeal was automatically remitted to the Town and Country Planning Board to be decided under section 7(6) of the Town and Country Planning Act (1990). That provides:

“any person aggrieved by a decision of a local authority ... may ... appeal to the Board.”

The Town and Country Planning Board allowed the appeal in October 2008 and modified the decision of the local authority so as to grant a development permit on terms. The respondents then appealed to the Judge in Chambers.

4. Section 7(8) of the Town and Country Planning Act provided that a person aggrieved by a decision of the Town and Country Planning Board had a further right of appeal to the Judge in Chambers. The respondents exercised that right. The matter came before Cheong J in Chambers. He allowed the appeal in March 2010, in effect restoring the decision of the local authority to refuse the development permit. The appellant sought to take the matter to the Court of Civil Appeal, but was met with the contention that there was no right of appeal from the decision of the Judge in Chambers. That contention was upheld by the Court of Appeal in November 2012.

5. The appellant accepts that there is no inherent right of appeal. Some statutory basis for a right of appeal must be demonstrated. He relies on section 69(1) of the Courts Act and section 82 of the Constitution. Before turning to these provisions, it is necessary to say something about the way in which the appellate jurisdiction of the Supreme Court has developed.

6. Before 1850, there had been in Mauritius a tiered system of superior courts comprising a Tribunal de Première Instance and a Cour d'Appel, inherited from the period of French colonial government. In 1850 both of these courts were abolished and replaced by the Supreme Court, which was a single court invested with the jurisdiction and powers of the Court of Queen's Bench in England. The Court of Queen's Bench in England at the time (as now) exercised an unlimited original jurisdiction and a supervisory jurisdiction over inferior courts and tribunals.

7. In 1945, the legislation governing the court system in Mauritius was consolidated and amended by the Courts Ordinance 1945. Section 3 of the Ordinance provided that the Court was to consist of the Chief Justice and a number of Puisne Judges. Section 34(1) of the Act provided that it was to be

“the principal court of original civil jurisdiction and shall exercise general powers of supervision over all District and Industrial Courts and other special courts established or which may be established in the Colony.”

The original civil jurisdiction of the Court was exercisable by a single judge except where the Chief Justice directed that a particular case shall be heard by two or more judges: see sections 35-36.

8. In addition to its original jurisdiction, the court had under the Act an appellate jurisdiction, which was conferred by section 69 in the following terms:

“69. The Appellate jurisdiction of the Supreme Court

Subject to the provisions of any Ordinance or any other enactment for the time being in force and in accordance with the provisions thereof, the Supreme Court shall have full power and jurisdiction to hear and determine all appeals, whether civil or criminal, made to the said court from -

- (a) the Supreme Court of the Colony of the Seychelles;

- (b) the Court of any District Magistrate, including the Dependencies;
- (c) the Master and Registrar of the Supreme Court;
- (d) a Judge in Chambers;
- (e) a Bench of Magistrates;
- (f) the Bankruptcy Division of the Supreme Court;
- (g) any other court or body established under the provisions of any Ordinance or other enactment.”

9. It will be seen that there was no provision in section 69 of the Courts Ordinance for appeals from the decisions of judges of the Supreme Court itself, whether in the exercise of their original or appellate jurisdiction, except in the case of a Judge in Chambers. With that exception, the appellate jurisdiction of the Supreme Court was limited to the decisions of lower courts and tribunals. Indeed, even the exception for appeals from a Judge in Chambers was narrowly construed. Before the creation of a Court of Civil Appeal in 1963, it was held that the right of appeal from a Judge in Chambers extended only to those powers, generally of an administrative or procedural nature, which the Judge in Chambers performed as the delegate of the court and subject to the court’s power of review. It did not extend to decisions in respect of which a Judge in Chambers had an “original and exclusive” jurisdiction: see *Gujadhur v Reunion Ltd* [1960] MR 112. In relation to this last category he was exercising a jurisdiction co-ordinate with that of the Court itself. Appeal lay from his decision in the same way as from any other decision of the Supreme Court only to the Judicial Committee of the Privy Council under section 3 of the Judicial Committee Act 1833, an Act of the United Kingdom Parliament.

10. A significant change occurred with the creation of separate courts of appeal for criminal matters by the Criminal Appeal Act 1954 and for civil ones by the Court of Civil Appeal Act 1963. They followed broadly the same scheme, although for present purposes only the Act of 1963 is relevant. This provided for the creation of a Court of Civil Appeal, which was to be a division of the Supreme Court comprising the same judges. Section 3(1) of the 1963 Act provided:

“(1) Subject to this Act and to any rules of Court made under it, any party aggrieved by any judgment or order of a judge sitting

alone in the exercise in Court of his original civil jurisdiction may appeal from such judgment or order to the Court of Civil Appeal.”

The Court of Civil Appeal was to be constituted by two or three judges of the Supreme Court, other than the judge from whose decision the appeal was brought: section 2(3).

11. The Courts Ordinance remains in force, subject to a number of amendments, as the Courts Act. In its current form, section 69 reads:

“69. Appellate jurisdiction of the Supreme Court

(1) Subject to any other enactment, the Supreme Court shall have full power and jurisdiction to hear and determine all appeals, whether civil or criminal, made to the court from -

- (a) a judge in the exercise of his original jurisdiction;
- (b) -
- (c) the Bankruptcy Division;
- (d) the Registrar;
- (e) the Intermediate Court;
- (f) the Industrial Court;
- (g) a Magistrate;
- (h) any other court or body established under any other enactment ...”

The creation of an appellate division was reflected in the amended section 69 by (i) the introduction of a new sub-paragraph (a) extending the jurisdiction of the Court to a decision of a judge in the exercise of his original jurisdiction; and (ii) the deletion of the old sub-paragraph (d), with the result that appeal lay from the decisions of a Judge in Chambers only where he was exercising an original

jurisdiction within sub-paragraph (a). Both of these changes were made by Ordinance 9 of 1963 at the time of the creation of the Court of Civil Appeal. Their effect was described by the Court of Civil Appeal in *Ujoodha v Gopy* [1991] MR 253, as being “to confer on the Supreme Court a jurisdiction which did not previously exist, namely that of hearing ... appeals from decisions of the Supreme Court in the exercise of its original civil jurisdiction ...”.

12. The statutory constitution of the Supreme Court as it stood immediately before independence was substantially reproduced in the Constitution of 1968. Section 80 of the Constitution provided:

“80. Courts of Appeal

(1) There shall be a Court of Civil Appeal and a Court of Criminal Appeal for Mauritius, each of which shall be a division of the Supreme Court.

(2) The Court of Civil Appeal shall have such jurisdiction and powers to hear and determine appeals in civil matters and the Court of Criminal Appeal shall have such jurisdiction and powers to hear and determine appeals in criminal matters as may be conferred upon them respectively by this Constitution or any other law.

(3) The Judges of the Court of Civil Appeal and the Court of Criminal Appeal shall be the Judges for the time being of the Supreme Court.”

Section 82 provided:

“82. Supreme Court and subordinate courts

(1) The Supreme Court shall have jurisdiction to supervise any civil or criminal proceedings before any subordinate court and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court.

(2) An appeal shall lie to the Supreme Court from decisions of subordinate courts in the following cases -

(a) as of right from any final decision in any civil proceedings;

(b) as of right from any final decision in criminal proceedings whereby any person is adjudged to pay a fine of or exceeding such amount as may be prescribed or to be imprisoned with or without the option of a fine;

(c) by way of case stated, from any final decision in criminal proceedings on the ground that it is erroneous in point of law or in excess of jurisdiction; and

(d) in such other cases as may be prescribed ...”

13. Mr Guthrie QC, who appeared for the Town and Country Planning Board and the Minister who were joined as co-respondents to the proceedings, submitted that neither of these provisions was enough to confer a right of appeal to the Court of Civil Appeal, even in cases within them. This, he said, was because they merely conferred jurisdiction on the Court of Appeal without conferring any right of appeal. A right of appeal had to be found in some other enactment, containing some such words as “an appeal shall lie ...”. The result was that the only cases in which an appeal lay were (i) appeals from the exercise by a judge sitting alone in the exercise of his original jurisdiction, authorised by section 3 of the Court of Civil Appeal Act; and (ii) other cases where a right of appeal from other courts or bodies was conferred by specific legislation. A similar submission was accepted by the Court of Appeal in *Gujadhur v Reunion Ltd* [1960] MR 112. For reasons that will become apparent, it is unnecessary for the Board to determine this question. The real question on this appeal is to what cases do section 82 of the Constitution and section 69 of the Courts Act apply.

14. Section 82 of the Constitution can be shortly dealt with. Sections 82(1) and 82(2) apply only to appeals from “subordinate courts”. Each of the four sub-paragraphs (a) to (d) of section 82(2) is governed by that limitation. The effect is to give the force of the Constitution to the long-standing appellate jurisdiction of the Supreme Court over inferior tribunals. A Judge in Chambers acts as a judge of the Supreme Court, albeit in Chambers. When he hears an appeal under section 7(8) of the Town and Country Planning Act, he is exercising a statutory jurisdiction over an inferior tribunal, namely the Town and Country Planning Board. But he is not himself a “subordinate” tribunal in relation to the rest of the Court.

15. Section 69(1) of the Courts Act (as amended) is the only possible basis for any right of appeal in civil matters from a judge of the Supreme Court to the Court of Civil Appeal. The only sub-paragraph of that sub-section which authorises such an appeal is

(a), which is limited to an exercise by the judge of his original jurisdiction. The appellant sought to rely on “(h) any other court or body established under any other enactment”. But both the historical and the linguistic context show that that sub-paragraph is concerned with inferior courts and tribunals “established” under an “other” enactment than the Courts Act. The Judge in Chambers derived his appellate jurisdiction over development permits from the Town and Country Planning Act, but he is not a court or body “established” by that Act.

16. Accordingly, the present appeal must be dismissed. It is the Board’s provisional view that the appellant pay the respondents’ costs of the appeal, but parties are invited to make written submissions on costs within 21 days of the delivery of this judgment.