Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd [2009] SGHC 234

Case Number : OS 875/2009

Decision Date : 20 October 2009

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Sundaresh Menon SC, Edwin Lee Peng Khoon and Looi Ming Ming (Rajah & Tann LLP) for the plaintiff; Tan Cheng Han SC and Ernest Balasubramaniam (Arfat Selvam Alliance LLC) for the defendant

Parties : Management Corporation Strata Title Plan No 301 — Lee Tat Development Pte Ltd

Civil Procedure

20 October 2009 Judgment reserved.

Choo Han Teck J:

1 The plaintiff and the defendant have waged a 30-years war over a small strip of land known as Lot 111-31 ("the servient tenement") over which the plaintiff's predecessor in title (Hong Leong Holdings Ltd) as well as the defendant's predecessor in title (Collin Development Pte Ltd) had a common right of way. The plaintiff is the management corporation of the property known as Grange Heights which was built on the land now consolidated as Lot 687 but previously registered separately as Lots 111-30 and 111-34. The right of way was recognised by the court in the first action more than 30 years ago when Collin Development Pte Ltd sued Hong Leong Holdings Ltd to restrain it from using the easement during the construction of Grange Heights. The judgments by FA Chua J at first instance, and on appeal, by Wee Chong Jin CJ, Kulasekaram, and Choor Singh JJ were reported in [1975-1977] SLR 457 and [1975-1977] SLR 202 respectively. In the second action [1990] SLR 1193 the plaintiff (by this time the construction of Grange Heights had been completed) obtained an order for a permanent injunction against the defendant. The order was part of the judgment handed down by Coomaraswamy J where he held:

> Plainly, the plaintiffs' right of way is derived from or based on the right of way given to them as owners of lot 111-34. The number 111-34 is no longer the lot number for that parcel of land; that number has been extinguished and the parcel of land has become and is a part of a larger parcel of land known as lot 687. However, the land is still there and the right of way which runs with the land remains intact. The amalgamation of lots 111-34 and 561 into one lot known as lot 687 is only for the purposes of survey and issue of documents of title. It does not destroy or extinguish the right of way which runs with the land and enure to the benefit of the owners for the time being of the land. Accordingly, in my judgment, the plaintiffs as owners of the land, formerly known as lot 111-34 but now a part of lot 687, still have the right of way over the servient tenement, and the defendants in erecting the gate and the fence have interfered with the plaintiffs' right of way. [p1195]

The defendant's appeal was dismissed by Yong Pung How CJ, LP Thean and Goh Joon Seng JJ forming the coram in the Court of Appeal whose judgment was reported in [1992] 2 SLR 865. 1n 1997, however, the defendant acquired the servient tenement, and in 2004, the parties were back in court. This time, counsel for the defendant, Mr Tan Cheng Han SC argued that "as the right of way was originally granted to lot 111-34, the right of way did not extend to lot 561". This argument was rejected by Woo Bih Li J ("Woo J"), after considering, in his usual meticulous way, the history of the

previous litigation, the issues in those actions as well as what the courts there held. Woo J noted that one of the defendant's directors had been fined for contempt of court for failing to comply with the injunction order in Coomaraswamy J's judgment. Woo J further noted that the same director, Mdm Ching Mun Fong, had given "an undertaking to the court that [the defendant] would strictly and unconditionally abide by the said order and would not make or publish any statement to the effect that the residents of Grange Heights have no right of way over the servient tenement" (reported in [2004] 4 SLR 828, at 839 at [47]). The defendant appealed against Woo J's decision and in 2005 the Court of Appeal dismissed the appeal by a majority consisting of Yong Pung How CJ and Belinda Ang Saw Ean J (Chao Hick Tin JA dissenting). I shall refer to this judgment, reported in [2005] 3 SLR 157, as the "2005 judgment" and the court as the "2005 court" for convenience. Before the 2005 court Mr Tan Cheng Han SC argued that the rule in *Harris v Flower and Sons* (1904) 91 LT 816 still prevailed thus, the previous courts were wrong to allow an extension of the dominant tenement beyond the original grant, and after lot 111-34 had merged with lot 561. Ang J delivering the majority decision held at [25] that:

> The real point is that for the purposes of this appeal, the correctness of the judgments relied on for issue estoppel is completely irrelevant: see *Spencer Bower, Turner and Handley on The Doctrine of Res Judicata* (Butterworths, 3rd Ed, 1996) at para 15. Moreover it was not argued and indeed no "special circumstances exception" exists, in the present appeal such as to prevent the operation of issue estoppel: see *Arnold v National Westminster Bank Plc* [14] *supra* at 109 *per* Lord Keith of Kinkel (at p167)

Chao JA was of the view that there was no issue estoppel concerning the previous action before Coomaraswamy J. It is not necessary to refer to Chao JA's reasons here because the relevant point was that the decision of Woo J was upheld by the majority — a point that becomes clearer when the narrative of the history leading to the present application is complete. The plaintiff and defendant were back before Woo J in 2007. It seemed that the defendant had let the servient tenement lapse into disrepair after having acquired the land. The plaintiff thus applied to Woo J for an order granting leave for it to repair the servient tenement at its own expense. The application succeeded and in the last paragraph of his judgment reported in [2007] 2 SLR 554, 567 at [50] Woo J rejected Mdm Ching Mun Fong's assertion that had the defendant known that a road could have been built on the servient tenement it would not have purchased it:

> I found this to be an unmeritorious assertion. Lee Tat was aware of the various court decisions in the First Action/1974 [Chua J's judgment] and the Second Action/1989 [Coomaraswamy J's judgment] before it purchased lot 111-31 on 17 January 1997.

The defendant appealed once again to the Court of Appeal, this time to reverse Woo J's decision granting the plaintiff the right to repair the servient tenement. An unanimous decision of Chan Sek Keong CJ, Andrew Phang Boon Leong, and V K Rajah JJA allowed the defendant's appeal and further held that the residents of Grange Heights would no longer have the right of way to gain access to and egress from lot 561 and vice versa. The judgment of Chan CJ was handed down on 1 December 2008 on behalf of the Court of Appeal was reported in [2009] 1 SLR 875). I shall refer to the judgment of this court as "the 2008 judgment" and the court as the "2008 court" for convenience.

2 The present application before me began with the plaintiff's application in Summons No 3446 of 2009 dated 29 June 2009 to the Court of Appeal praying for an order to reconstitute the Court of Appeal to set aside the 2008 judgment. The plaintiff's unusual application was based on the argument that the 2008 court was wrong to overturn the ruling that the residents of Grange Heights did not

have the right of way over the servient tenement. The plaintiff was, however, directed by the Registrar of the Supreme Court to file an application to the High Court first to determine the preliminary question of whether the Court of Appeal can be reconstituted to hear an application to set aside its own judgment. The plaintiff duly filed Originating Summons No 875 of 2009 on 3 August 2009, which was the summons before me. In this summons, the plaintiff sought a "declaration that pursuant to s 29A of the Supreme Court of Judicature Act (Cap 322) and/or the inherent jurisdiction of the courts, the Court of Appeal, as the court of last resort in the Republic of Singapore, has the jurisdiction and power to reopen and set aside an earlier decision of its own and to reconstitute itself to rehear and/or reconsider the matters arising therefrom; [and that consequently], the Court of Appeal does therefore have the jurisdiction and power to grant the reliefs sought" by the plaintiff in Summons No. 3446 of 2009/Y filed on 29 June 2009. Mr Sundaresh Menon SC appeared with Miss Looi Ming Ming, Mr Edwin Lee and Mr Paul Tan for the plaintiff. Mr Tan Cheng Han SC appeared with Mr Ernest Subramaniam for the defendant.

3 The gravamen of the plaintiff's application in Summons No 3446 was that the 2008 court was wrong to have overturned the 2005 judgment which had upheld the decisions of the previous courts recognising that the residents of Grange Heights had a right of way over the servient tenement. Mr Menon SC argued that the issue of the right of way was *res judicata* and the 2008 court was wrong to have overturned that ruling. The 2008 court's decision on issue of *res judicata* was addressed in the 2008 judgment. The 2008 court at [70] held:

> Specifically, we have to consider when exceptions may be made to the operation of *res judicata*. In our view, the proper approach in deciding this question is to begin by considering the policy reasons underlying the doctrine of *res judicata* as a substantive principle of law.

The court approved (at [71]) the academic opinion of K R Handley in *Spencer Bower, Turner & Hanley: The Doctrine of Res Judicata* (Butterworths, 3rd edition 1996 at [9]–[10] that:

> estoppel by *res judicata* is a rule of substantive law founded on policy. The policy reasons underlying the rule are, first, "the interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions" and second, "the rights of the individual to be protected from vexatious multiplication of suits and prosecutions".

The 2008 judgment held at [73] that:

> [T]he courts have never accepted *res judicata* as an absolute principle of law which applies rigidly in all circumstances irrespective of the injustice of the case. There is one established exception to this doctrine, and that is where the court itself has made such an egregious mistake that grave injustice to one or more of the parties concerned would result if the court's erroneous decision were to form the basis of an estoppel against the aggrieved party… In such a case, the tension between the justice principle and the finality principle is resolved in favour of the former.

It was on the basis of this statement that the 2008 court went on to find that the 2005 court had committed an "egregious error" and thus justified its decision in holding that *res judicata* did not apply in the circumstances. The passage cited above was therefore an important part of the 2008 judgment in the context of this case. However, another important passage was the one preceding that, where the court held that (at [72]):

> The general rule is that where a litigant seeks to reopen in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation ("the finality principle") outweighs the public interest in achieving justice between the parties ("the justice principle"), and therefore, the doctrine of *res judicata* applies. In such cases, it is usually immaterial that the decision which gives rise to the estoppel is wrong because 'a competent tribunal has jurisdiction to decide wrongly, as well as correctly, and if it makes a mistake its decision is binding unless corrected on appeal.

After restating the general rule establishing the supremacy of the finality principle over the justice principle, the 2008 judgment held that "the courts have never accepted *res judicata* as an absolute principle which applies rigidly in all circumstances irrespective of the injustice of the case" The 2008 court relied on the authority of *Arnold v National Westminster Bank Plc* [1991] 2 AC 93 ("*Arnold*") to justify its reversal of the 2005 judgment.

4 I shall return to *Arnold*, but first, it might be asked, what is the predominant rule? If there is finality (*res judicata*) then there is no question of achieving individual justice for the parties because the finality principle outweighs the justice principle. If that were the case, it does not matter that the previous court had committed a simple error or, as the 2008 judgment, and Lord Keith in *Arnold*, described it - an "egregious error". The point is not whether the Court of Appeal may correct an egregious error but whether it can correct an egregious error at all when the matter is *res judicata*. An outrageous or notorious (a dictionary meaning of "egregious") error ought to be corrected but only when the court has the jurisdiction to do it. The doctrine of *res judicata* serves to mark the point of finality; and the point of finality in litigation is that one does not envisage eventuality after finality. That would mean that after a matter is *res judicata* any egregious error, or, as alleged in this case, decision made in breach of natural justice must be left to lie in respect of the same matter between the same parties. If challenges such as the present one sought by the plaintiff were to go on, the correction of the breach of natural justice might itself be challenged on the ground of the Court having made an egregious error or another breach of natural injustice (for example, if the same coram were to rehear the appeal) or some other inventive ground importing similarly emotive, but vague sentiments. It is an important aspect of the function of law to be clear and not vague; to be precise and consistent so that it can be understood and followed. Even if the 2008 judgment was wrong because it was itself made in egregious error, the case had ended with the final judgment of the final court of appeal; and I therefore need only repeat what was cited above — "the public interest in the finality of litigation ('the finality principle') outweighs the public interest in achieving justice between the parties ('the justice principle')".

5 Reverting to *Arnold*, it seems to me to be distinguishable from this case. In *Arnold* Walton J made a decision (on the issue of rent) that was adverse to the tenant. The Court of Appeal in two subsequent cases held that Walton J erred in law. The tenant in *Arnold* then appeared before the rent review board for a review of the rent in the light of the later Court of Appeal decisions. The landlord applied to strike out the tenant's application. The matter went up to the House of Lords in which Lord Keith delivered the judgment that was cited in the 2008 judgment in this case. *Arnold* is important to Mr Menon SC because there were, counsel submitted, no arguments before the 2008 court as to whether the 2005 judgment had rendered the issue of the right of way *res judicata*, and *Arnold* was not cited by either party in the 2008 appeal. Mr Menon SC submitted that the 2008 judgment would not have been decided the way it did had the plaintiff been given the opportunity of addressing the court on *Arnold* and *res judicata*. The failure to hear counsel was a breach of natural justice. Mr Menon SC asked, rhetorically, that if *res judicata* does not apply when the Court of Appeal had committed an "egregious error" should it not follow all the more that it should not apply when the

Court of Appeal made a decision in breach of natural justice? The 2008 court held that an "egregious" error renders the doctrine of *res judicata* inapplicable. The 2008 judgment is binding on the High Court, but what an egregious error is depends on the facts of the individual case.

6 The above argument may suggest that the term "egregious error" is used whenever a court wishes to overturn a decision when it could not otherwise have done because of the doctrine of *res judicata*. When a lower court makes an error that is material to the verdict, that verdict can be corrected on appeal, but when the final court had makes such an error, there is no avenue for appeal. Many such errors by the final court might be described as egregious errors, however, that does not mean that the Court should review its own judgment in the same case. The Court of Appeal is at full liberty to reverse its position and depart from the law if it thinks that the law was made as a result of an egregious (or any) error, but it can only do so in a different case. Final must be final - not almost final or conditionally final. To see some small justice done in an individual case may be at the cost of greater injustice unseen. The notion of doing "justice" may itself be a moot as a result. The overruling of the 2005 judgment was done with the noble intention of doing justice, but some, such as the plaintiff, may not agree that justice was done. They may think that it was not just to deprive them of a right of way after having had that right acknowledged by the same final court for 30 years. I express no view as to whether justice was in fact done since the 2008 judgment is final and binding on this court though the academic arguments may go on; the point I make here is that the overturning of a case when the matter is *res judicata* may not mean that justice was necessarily done. When two different coram of the Court of Appeal had reached opposing conclusions, who is to say which was right? And so, without finality, when would it end? In my view, if the complaint concerned only an error made by the Court of Appeal, egregious or otherwise the matter ends there. Convening a Court of Appeal to rule that the 2008 judgment was wrong in overturning its 2005 judgment would be to compound an error by repeating it.

7 Mr Menon SC, however, was advocating a different point. He argued that an error arising from a breach of natural justice transcends an egregious error. It is an attractive idea, but is it tenable? If it is, then it follows that it would be relevant to ask whether there exists the juridical means for an aggrieved party to get the Court of Appeal to hear its case a second time. The Court of Appeal is the final court of judgment, and as a final court, its decision in a case is final. It is entitled to depart from its own previous decision, but not in the same case. The role and function of the Court of Appeal as the final court are much more than to rectify an individual error in any one case. It has a wider and more important role of interpreting the law, and law, in order that it will be respected and obeyed, must be clear and consistent. Consistency begets predictability and that, in turn, produces stability. Each time a litigant files a challenge against the validity of the final judgment of the final court of law, the stability of law and court is by that additional effort, corroded and undermined. Although no court can always be right — the two opposite conclusions in the 2005 and the 2008 judgments in this case exemplify my point — but it can be final. The final judgment seems to be the 2008 judgment in the case. In Mr Menon SC's bundle of authorities tendered as part of his submissions but not specifically referred to was the fascinating article, *Limits to the Power of the Ultimate Appellate Courts*, by J D Heydon, LQR Vol.122, p399 in which is found this passage:

> Overruling existing decisions attracts more criticism than the development of new law in fields which are not the subject of any binding authority. And the overruling by a final appellate court of one of its own earlier decisions attracts more criticism than its overruling of the decisions of lower courts. To overrule the earlier decisions of a final appellate court is antithetical to the goals of certainty and predictability in the law, and more likely to upset the expectations of those who relied upon them. [p406]

Counsel stressed that the plaintiff's application exacted a higher sense of justice because its

complaint was not about the merits but of the lack of procedural fairness.

8 Mr Menon SC referred me to *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No.2)* [2000] AC 119 ("*Pinochet (No 2)*"). There the House of Lords sitting as the final court of appeal upheld, by a majority decision, the extradition order by a magistrate against the former head of state of Chile, Pinochet Ugarte ("Pinochet"). It was subsequently discovered that Lord Hoffman, making up one of the members of the majority judges was an unpaid director and chairman of a charity organisation that was wholly controlled by Amnesty International. Amnesty International was strongly opposed Pinochet's efforts to resist extradition. It was granted leave to intervene in the appeal and was there represented by counsel in argument. Pinochet then petitioned the House of Lords to set aside its previous decision on ground of apparent bias. The judgment was set aside. The crucial argument before the House of Lords was that it had to have the jurisdiction to set aside its previous order if that order had been improperly made, otherwise there would be no other court to correct such impropriety. The relevant passage cited by Mr Menon SC from *Pinochet (No 2)* was from Lord Browne-Wilkinson's speech at p132:

> As I have said, the respondents to the petition do not dispute that your Lordships have jurisdiction in appropriate cases to rescind or vary an earlier order of this House. In my judgment, the concession was rightly made both in principle and authority.
>
> In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Broome v Cassell & Co Ltd (No 2)* [1972] AC 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.
>
> However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same *case just because it is thought that the first order was wrong*. [emphasis added]

The difficulty for Mr Menon SC was that the emphasized phrase seemed not to refer to the appellate court being wrong in law, and not "procedurally wrong". There was also the case of *Taylor v Lawrence* [2003] QB 528 ("*Taylor*"). There the defendants discovered that the judge hearing the claimant's case against them had used the claimant's solicitors to amend his own will as well as his wife's will. This was done on the eve of the judge delivering judgment. The judgment went against the defendants and was subsequently dismissed on appeal in the Court of Appeal. Subsequent to the Court of Appeal's judgement the defendants discovered that the trial judge did not pay for the legal services rendered, and was thus deemed to have obtained a pecuniary benefit. The Court of Appeal was asked to reopen the appeal. Lord Woolf CJ delivered the judgment of the Court of Appeal, noting first that although the Court of Appeal was established to exercise appellate and not original jurisdiction it did not, in that sense, have inherent jurisdiction, but it had an "implied jurisdiction arising out of the fact that it is an appellate court" and, relying on Lord Diplock in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1981] AC 909 at 977 ("*Bermer Vulkan*"), held that the court had an inherent power "to control its own procedure so as to prevent it being used to achieve injustice." *Taylor* at 546. We ought to be ever mindful that unless the word "justice" is defined, instead of doing right, many a wrong might be committed in its name. However, the "justice" in *Bremer Vulkan* was concerned with the inherent power of a High Court to strike out a claim for want of prosecution. It was quite a different kind of "justice" that was actually

contemplated in *Taylor, Pinochet (No 2)*, and also the present case before me. It is necessary to make a note of this because however wide the court's inherent powers might be, they would have no application when the court's jurisdiction has ended and its judgment delivered. In *Godfrey Gerald QC v UBS AG* [2004] 4 SLR 411, at para 18, VK Rajah JA concluded that the court's inherent power after it becomes *functus officio* consisted of "a residual inherent jurisdiction even after an order is pronounced to clarify the terms of the order and/or to give consequential directions" — nothing more. This was to ensure that the substantive judgment was not upset by a minor oversight that could easily be corrected without unfairness to the parties.

9 The inherent powers that Mr Menon SC wants to urge the Court of Appeal to exercise were much wider, and similar to that in *Taylor* and *Pinochet (No 2)* where the respective courts held that even after final judgment had been delivered the court had an inherent power to reopen the case. These two cases were clearly decided on policy grounds since the phrases "inherent power" and "doing justice" have no clearly defined limits. "Inherent power" should not be used as though it were the joker in a pack of cards, possessed of no specific designation and used only when one did not have the specific card required. The same might be said of "doing justice" because one man's justice can be another man's injustice. "Inherent power" does not mean unlimited power, and if a substantive power to reopen a case on merits is to be given, it must come expressly from the legislature. A court's "inherent power" is a useful residual power to overcome minor hitches or errors so as to give effect to the main judgment. Although the two English authorities support Mr Menon SC's submission that the Court of Appeal has the inherent power to correct a procedural wrong, I hesitate to hold that the same policy grounds should apply in our courts. First, the policy grounds in both *Taylor* and *Pinochet (No 2)* were not seriously questioned in those cases themselves. Whether it is policy or idiosyncrasy, a ruling will transcend its origin and become law when applied over time. Secondly, in *Pinochet (No 2)* the House of Lords was moved by the apprehension that if the perception of apparent bias was not corrected there would be a loss of public confidence in the administration of justice. As Lord Hutton stated at 146:

> I have already stated that there was no allegation made against Lord Hoffman that he was actually guilty of bias in coming to his decision, and I wish to make it clear that I am making no finding of actual bias against him. But I consider that the links, described in the judgment of Lord Browne-Wilkinson, between Lord Hoffman and Amnesty International, which had campaigned strongly against General Pinochet and which intervened in the earlier hearing to support the case that he should be extradited to face trial for his alleged crimes, were so strong that public confidence in the integrity of the administration of justice would be shaken if his decision were allowed to stand.

Thus it seems to me that the ground for invoking the inherent jurisdiction of the court to rehear a substantive matter that was otherwise *res judicata* was one founded on the overriding need to uphold public confidence in the judiciary and the administration of justice. If that were so, as I think it is, then we cannot ignore the different grades of procedural wrongs. The apparent bias of the judge seemed to be the only one. Both *Taylor* and *Pinochet (No 2)* stand as direct authority for the principle that the apparent bias of the judge may justify the setting aside of a final judgment. There are different grades of procedural wrongs. Not all of them would justify setting aside a final judgment. The plaintiff's complaint before me on the improper procedure ground was a different from that in *Taylor* and *Pinochet (No 2)*. It was based on the complaint that the plaintiff was not given the chance to advance his argument on a point which he now says was a crucial in the court's decision.

10 A court may not be able to hear every argument made by counsel, and sometimes arguments are summarily dismissed because they were absurd or outrageous. Sometimes a court might come to a conclusion for a reason that had little to do with the arguments of counsel, and if counsel should

have the right to address the court on every thread of its reasoning, the act of judgment will become a long and tedious debate between court and counsel. That is not the process of law in a common law system and, would instead bring the administration of justice into disrepute. Decorum is an important part of the authority of the court. It is not every case that the decision of the court made on reasons not addressed by counsel would be appealed against, or, if appealed would be held to be wrong. The only difference in the present case is that there is no further appeal. The question therefore is whether the Court of Appeal should rehear the appeal when at best, it would reverse itself. The court would go against established principles for the possibility of correcting one case. The argument of public confidence in the administration of justice employed in *Taylor* and *Pinochet (No 2)* in fact supports the view that in cases other than cases of alleged bias of the judge, finality in a decision outweighs the individual interests of a particular litigant.

11 Mr Tan SC's answer to *Taylor* and *Pinochet (No 2)* was based on the argument that the Singapore Court of Appeal was a statutory creation. It thus derives its jurisdiction and power strictly from the enabling words of the statute and no more. It is a strong argument. The relevant statutory provision was s 29A of the Supreme Court of Judicature Act, (Cap 322) which provides as follows:

> 29A. — (1) The civil jurisdiction of the Court of Appeal shall consist of appeals from any judgment or order of the High Court in any civil cause or matter whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to the provisions of this Act or any other written law regulating the terms and conditions upon which such appeals may be brought.
>
> (2) The criminal jurisdiction of the Court of Appeal shall consist of appeals against any decision made by the High Court in the exercise of its original criminal jurisdiction, subject nevertheless to the provisions of this Act or any other written law regulating the terms and conditions upon which such appeals may be brought.
>
> (3) For the purposes of and incidental to —
>
> (a) the hearing and determination of any appeal to the Court of Appeal; and
>
> (b) the amendment, execution and enforcement of any judgment or order made on such an appeal,
>
> the Court of Appeal shall have all the authority and jurisdiction of the court or tribunal from which the appeal was brought.
>
> (4) The Court of Appeal shall, for the purposes of and subject to the provisions of this Act, have full power to determine any question necessary to be determined for the purpose of doing justice in any case before the Court.

Lawyers often have difficulty with the words "and subject to the provisions of this Act". Does it mean that the Court of Appeal cannot arrogate to itself "inherent powers" since strictly, Parliament had not reserved that power which it could have done very simply and in a single line? *Taylor* and *Pinochet (No 2)* too, were decided the way they were because there were no statutory provisions. I had already expressed my doubts as to the applicability of *Taylor* and *Pinochet (No 2)*, but in any event, even if they represent an exception, the exception occupies a very narrow space and would be limited to the implicit power to set aside a final judgment and rehear the case only on the ground that otherwise it would seriously diminish public confidence in the integrity of the courts and the administration of justice. It will not apply to a case such as this where the only charge was that the

judgment might well have been wrong on the merits, whether because of an egregious error or the failure to hear counsel's arguments.

12 For the reasons above, the plaintiff's application is dismissed but I would like to hear submissions on costs. This I shall do on a later date.