IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF THE EASTERN CARIBBEAN SUPREME COURT (DOMINICA)

CCJ Application No. DMCV2016/001
DM Civil Appeal No. DOMHCVAP 2013/0003

BETWEEN

MARINOR ENTERPRISES LIMITED
MICHAEL ASTAPHAN **APPLICANTS**

AND

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED
formerly known as Barclays Bank Plc **RESPONDENT**

Before The Right Honourable and the Honourables

Sir Dennis Byron, President
Mr Justice Wit
Mr Justice Hayton
Mr Justice Anderson
Mme Justice Rajnauth-Lee

On Written Submissions
Hugh C. Marshall Jnr and Noelize N. Knight Didier for the Applicants
Roger Forde QC and Heather F. Felix Evans for the Respondent

JUDGMENT
of
The Right Honourable Sir Dennis Byron, President, and the Honourable Justices Wit, Hayton, Anderson and Rajnauth-Lee

Delivered by
The Right Honourable Sir Dennis Byron

on the 26th day of January 2017

Introduction

[1] This is an application for special leave to appeal on a procedural point relating to the amendment of a notice of appeal. It is the first case from the Eastern Caribbean Supreme Court before the Caribbean Court of Justice ('the CCJ'). Regrettably, we have to comment on the inordinate delay in bringing this matter to completion. This case is already 11 years old and is now before this Court on a procedural point. We need to do no more than to simply reiterate a comment made by President Sir Denis Byron in another jurisdiction:

> "We urge the judiciary to take steps to address the problem of delay in the judicial process and ensure that citizens enjoy the benefit of the constitutional promise of a fair and expeditious resolution of disputes."[1]

Procedural History

[2] On 21st February, 2006, First Caribbean Bank (Barbados) Limited formerly known as Barclays Bank Ltd. ('the Bank') filed a claim against Marinor Enterprises Ltd. ('Marinor') and Michael Astaphan ('Astaphan') for debt in the sum EC$1,238,024.34. Marinor filed a Defence on 31st October, 2006 disputing the claim on the ground that the Bank had breached the loan agreement. More than three years later, on 25th September, 2009, after failed mediation, Marinor filed an Amended Defence and Counterclaim making allegations relating to an export guarantee scheme which afforded the company a number of rights. Master Cottle, as he then was, ordered that the Defence be struck out at a Case Management Conference on 29th September, 2009. On 13th April, 2012, three years later, the Applicants filed another application to amend the Defence. Cottle J, as he had become, dismissed the application. In its judgment the Court of Appeal stated that there was no appeal from the orders striking out the defence. Cottle J proceeded to trial on 8th May, 2012. Some six months later, on 13th December, 2012, he delivered judgment for the Bank.

[3] An appeal was filed in January 2013. In March 2015, some two years later, the Notice of Appeal was amended. Six months later, on 5th October, 2015, an application to further amend

[1] Timothy Walsh v Stephen Ward, Bjorn Bjerkham and Nature's Produce Inc., Stephen Ward v Timothy Walsh, Bjorn Bjerkham and Nature's Produce Inc., Bjorn Bjerkham v Timothy Walsh, Stephen Ward and Nature's Produce Inc. [2014] CCJ 14 (AJ) at para 70

the Amended Notice of Appeal was filed, focusing upon the alleged erroneous refusals of leave to amend by Master Cottle and Cottle J. It was dismissed by a single judge of the Court of Appeal on 20th October, 2015. Marinor appealed. It was heard by a full court on 11th November, 2015, and the hearing of the substantive appeal was adjourned. Some six months later, in April 2016, the judgment of the court was delivered by Baptiste JA. The main reason for dismissing the application was the inordinate delay of Marinor in filing the amended notice of appeal only five weeks before the hearing of the appeal without any adequate explanation for the lateness of the application. But, by this time, 4 years had elapsed since the filing of the appeal.

[4] On 6th July, 2016 the Court of Appeal refused leave to apply to the CCJ. On 29th July, 2016 this application for special leave to appeal was filed in the High Court registry in Dominica. It did not reach the CCJ until 22nd December 2016. This was a severe breach of the rules of procedure. The application could also have been filed directly with the CCJ by email. This is a simple cost and time effective method, aimed at improving the accessibility of the Court. In addition, it was out of time. Part 10.12 of the CCJ Appellate Jurisdiction Rules ('the Rules') requires that it should have been filed within 21 days of the refusal of leave by the court below. Since this is the first case from the Eastern Caribbean, we have decided to make orders to forgive the breach of our rules. We should note that our filing processes have been further upgraded with higher levels of accessibility, through the e-filing portal on the Court's website.

[5] On 13th January, 2017 we issued case management orders and directions for filing written submissions, and an order dispensing with a hearing. Pursuant to that order, this judgment is delivered. Hopefully, it will facilitate the hearing of the substantive hearing of the appeal in the February sitting of the Court of Appeal.

The Issue in this Application

[6] The application was wrongly headed "Originating Notice of Application for Leave to Appeal" and described the sole issue on appeal in this way: "*The Applicants seek the Courts opinion on the ability of the Court of Appeal to allow section 32 of the Eastern Caribbean*

Supreme Court (Dominica) Act (Cap 4.02) of the Revised Laws of Dominica 199 to permit the Applicants to Amend a Notice of Appeal so as to foreshadow an argument that the Court's moving on its own initiative to strike out an Amended Defence on the First Case Management after failed mediation was erroneous in law and practice and effectively denied the Applicants a fair hearing and effectively removed them from the seat of justice."

The Background

[7] To clarify, this application is addressing the refusal of leave to amend a notice of appeal filed three years ago, to include as a ground of appeal a point relative to a procedural decision made in 2009, some three years prior to the trial in 2012. The impression of frivolity and abuse of the court's process is compounded by the facts disclosed in Astaphan's own affidavit supporting the application. The affidavit revealed that prior to the trial in 2012, a further application to amend the defence was rejected by the court to facilitate moving to trial. In paragraph 8m of the affidavit he deposed that:

> "The matter proceeded to trial, wherein upon a substantial preliminary debate as to whether the evidence that we proposed to put before the court consisted of matters pleaded in our defence, the Honourable Mr. Justice Cottle decided that he would allow evidence on all issues raised in the Witness Statements."[2]

[8] The deposition implied that he was allowed to adduce all the evidence desired to prove the points in what would have been the amended defence. Having read the judgment of Cottle J, it is apparent that he considered and ruled on these issues, albeit not in favour of Marinor. This would allow the Court of Appeal to consider the judge's factual findings and his application of the law to the facts that were found.

The overriding objective of our rules

[9] Part 1.3 of the Rules states that the 'overriding objective of the rules is to ensure that the Court is accessible, fair, and efficient and that unnecessary disputes over procedural matters

[2] Affidavit in Support of Application, Record of Appeal p 12

are discouraged'. The dispute disclosed in the application must fall within the category of unnecessary for the following reasons.

[10] In the first place the request is for an advisory opinion. That is not an appellate function. Advisory opinions are a feature of the court's original jurisdiction for which provision is made in the Treaty of Chaguaramas. Article 212 provides that the:

> "1. The Court shall have exclusive jurisdiction to deliver advisory opinions concerning the interpretation and application of the Treaty;
> 2. Advisory opinions shall be delivered only at the request of the member States parties to a dispute or the Community".

[11] However, we do not take the technical point approach. We would interpret this as an application to rule on the decision of the Court of Appeal not to allow Marinor to make the amendment for which it had applied.

[12] In the second place, the question whether the court has power to amend a Notice of Appeal does not follow from the judgment in the Court of Appeal which considered the application for amendment on the basis that it did have the power to amend. It decided to exercise its discretion to deny the application on grounds of inordinate delay, and reluctance to interfere with the discretion exercised in interlocutory orders.[3]

[13] Finally, it is clear that Marinor would suffer no detriment to a fair appellate hearing if the amendments were not allowed. Section 32 (2) and (3) of the Eastern Caribbean Supreme Court (Dominica) Act (Cap 4.02 ('the Act') give the court wide powers to do justice between the parties, even when they omit to present their appeal in the most effective manner.

[14] Section 32 (2) and (3) of the Act state that:

> "(2) The powers of the Court of Appeal under this section may be exercised not withstanding that no notice of appeal or respondent's notice has been given in respect

[3] [2014] EWCA Civ 1106

of any particular part of the decision of the High Court by any particular party to the proceedings in Court or that any ground for allowing the appeal or for affirming or varying the decision of that Court is not specified in the notice; and the Court of Appeal may make any order in such terms as the Court of Appeal thinks just to ensure the determination on the merits of the real question in controversy between the parties.

(3) The powers of the Court of Appeal in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal."

[15] In relation to this case, the Court of Appeal is given the power to determine the merits of the real questions in controversy between the parties even where the notice of appeal omits to specify such ground for allowing the appeal. In other words, whether the amendment is granted or not, it would have no impact on the outcome of the appeal, the less so given the fact that Cottle J considered and ruled on all the issues raised in the Witness Statements filed by Marinor and Astaphan.

[16] This power exists at the CCJ as well, and as we have just explained in *Eugene Leacock v Lorna Griffith.*[4] Part 11.3(4) of the Rules provides, that the Court in deciding the appeal, shall not be confined to the grounds set forth by the Appellant once the party affected has had sufficient opportunity to respond to any ground on which the decision is based. This also implies that the Court is not obliged to address every point raised by the parties to the appeal.

[17] We may essay a word of guidance. Good case management practices encourage courts to deal with as many aspects of a case at the same time as practicable. The nature of the application, the powers of the courts conferred by section 32, and the history of delay were all factors which should have inclined the Court of Appeal to hear the substantive appeal at the same time as it heard the application for the amendment. That approach would have benefitted the parties in this case and the administration of justice in general, by facilitating a significantly more efficient, expeditious and fair disposition of the entirety of this case.

[4] [2017] CCJ 1 (AJ) at para 12

Costs

[18] We invited Counsel to agree on costs. They were unable to do so and instead made submissions, which we have considered. Part 18.10 (1) of the Rules prescribes that "where the Court has a discretion as to the amount of costs to be allowed to a party, the sum to be allowed is the amount that the Court deems to be reasonable and which appears to the Court to be fair, both to the person paying and the person receiving such costs". This implies that the costs awarded may be different to the costs between counsel and their own clients. This is such a case. We have considered that Marinor raised a simple procedural issue. We managed it to ensure that appropriate resources were devoted to the nature of the issue and adjudicated on written submissions without a hearing. We also took into account the comparative costs chart for basis costs prepared by Mr. Jeffery L. Douglas, Treasurer of the Dominica Bar Association which he kindly shared with the court. While the figures recommended for basic costs have not been approved by the CCJ, it is noted that the amount stated for an appearance in court on Application for Special Leave to Appeal is EC$3,780.00. In that context, we have assessed that the sum of EC$8,000.00 is reasonable and fair to both parties.

Disposal

[19] In the circumstances we make the following orders:

i. The time needed to file an application for special leave to appeal is hereby extended to enable full consideration of the application;

ii. The application for special leave to appeal is dismissed; and

iii. Marinor and Astaphan are ordered to pay the costs of the Bank in the sum of EC$8000.00

/s/ D Byron

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The Rt. Hon Sir Dennis Byron (President)

/s/ J Wit

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The Hon Mr Justice J Wit

/s/ D Hayton

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The Hon Mr Justice D Hayton

/s/ W Anderson

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The Hon Mr Justice W Anderson

/s/ M Rajnauth-Lee

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The Hon Mme Justice M Rajnauth-Lee