SAINT VINCENT and the GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.11 OF 2002

BETWEEN:

[1] PIRATE COVE RESORTS LIMITED
[2] ROBERT BRISBANE

Appellants

and

[1] EUPHEMIA STEPHENS

1st Respondent

[2] ROBERT WILLIAMS
Administrator of the Estate of Eardley Stephens

2nd Respondent

[3] ST.VINCENT TEACHERS UNION

3rd Respondent

Before:

The Hon. Sir Dennis Byron	Chief Justice
The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Ephraim Georges	Justice of Appeal [Ag.]

Appearances:

Mr. Carlisle Dougan QC; Mr. Vernon Smith and Mrs. Kay Bacchus-Brown with him for the Appellant
Mr. Hansraj Matadial for the 1st and 2nd Respondents
Mr. Ronald Jack for the 3rd Respondent

2003: March 4; 5.

JUDGMENT

[1] BYRON, C.J.: At the commencement of the hearing the 1st and 2nd Respondents applied *in limine* for the appeal to be dismissed for non-compliance with section 32(2)(g) of the Supreme Court Act Chapter 18, by failing to obtain leave to appeal, and the 3rd Respondent applied to be struck off the appeal for non compliance with Part 19 of CPR 2000 for being improperly joined as a party to the appeal.

[2] The background to this appeal is that on 14th March, 2000, in proceedings brought by the 1st and 2nd Respondent against the Appellants judgment was entered by consent for the payment of *inter alia* the sum of $604,845.00 to be paid within 12 months. On 3rd May 2002, another consent order was entered for the enforcement of the judgment by sale of 8 acres of land on the Brighton Estate by Joseph Lewis a real estate agent. A reserve price of $8.00 per square foot was fixed with ancillary directions. The right of the judgment debtor to sell was also reserved. On 5th July 2002, the estate agent having failed to carry out the sale or receive any offer at the reserved price, the court fixed a new reserve price at $100,000.00 per acre.

[3] The problem leading to this appeal was explained in the written judgment of Alleyne J. On 26th July 2002, Mrs. Kay Bacchus-Browne, of counsel, appeared before the learned judge on behalf of the 1st and 2nd Respondents on an application without notice. She told the judge that Mr. Matadial, of counsel for the appellants had authorized her to attend court in his absence and obtain an order to discontinue the order authorizing Joseph Lewis to sell the land, and instead direct the said respondents to pay the judgment debt by 31st August 2002, because they had found a purchaser at a favourable price. The judge made the order accordingly. After court had adjourned, later that day, the Registrar informed the judge that Mr. Lewis had entered into a contract for the sale of the land at a sum in excess of the reserved price and had presented a cheque representing the deposit in accordance with the Court's order. The judge directed the Registrar to require attendance of Mrs. Bacchus-Browne, Mr. Matadial and Mr. Lewis before him.

[4] On 29th July the said parties appeared before the judge. On 2nd August 2002 the judge delivered a written judgment. He was satisfied that Mr. Lewis had advertised the sale as directed by the court, received and evaluated offers, entered into a formal written agreement on the basis of the best offer, and received a 10%

deposit from the proposed purchaser, which was paid into court. He further stated that it was clear that no agreement had been made between Mr. Matadial and Mrs. Bacchus-Browne nor had Mr. Lewis been informed that the respondents had received an acceptable offer, before he entered the agreement.

[5] The judge discharged the order made on 26th July 2002. The appellants have appealed against the order discharging the order of 26th July, on the basis that it was a final judgment and not an interlocutory judgment requiring leave of the court. They also joined the 3rd Respondent, who was the purchaser, and had not been a party to the proceedings, without obtaining the leave of the court to do so.

[6] The powers of the Court of Appeal to determine Civil Appeals from the High Court are set out in section 32 of the Supreme Court Act Chapter 18 of the Laws of St.Vincent and the Grenadines. In section 32 (2) (g) it is prescribed:

> "No appeal shall lie under this section without leave of the judge or the Court of Appeal, from any interlocutory judgment or any interlocutory order given or made by a judge except –
> (i) where the liberty of the subject or the custody of infants is concerned;
> (ii) where an injunction or the appointment of a receiver is granted or refused;
> (iii) in the case of a decree nisi in a matrimonial cause or a judgment or order in an admiralty action determining liability;

None of the exceptions apply in this case.

[7] Counsel for the appellant urged that the nature of the proceedings, and the effect of the order made it a final order. However, it could not be denied that the order was one setting aside the order made on the 26th of July, 2002. The order appealed against was not filed, but we were invited to infer it from the reasons given by the judge on 2nd August 2002. In the order the learned judge after setting aside his order of 26th July commented "that the agreement for sale entered into by the court appointed agent for sale is confirmed". We have considered this and have concluded that comment was not part of the order. We think that the judge must have been referring to the consent order which appointed Mr. Lewis as agent

because that is the only thing it could have meant. The agreement for sale was not in issue and it is inconceivable that it could have been the subject of a court order. It must be obiter. The fact that it existed when the judge made his order may been part of his rationale for discharging the order of 26th July, but in my view that could be no more than a comment. However, I do not think that it would have any effect on the determination of the question whether the order is interlocutory or final.

[8] The definition of what is an interlocutory judgment or order was explained in a judgment of this court in the case of Othniel R. Sylvester v Satrohan Singh Civil Appeal No.10 Of 1992 – St. Vincent & The Grenadines. In that case White v Brunton (1984) 2 All E.R. 606 was approved and followed. Is the order appealed against interlocutory or final?

[9] In Sylvester v Singh, I delivered the judgment of the court and found that there was only one question to be answered and that was whether the order appeal against was interlocutory. In that case, the Appellant had lodged a notice of appeal against the order setting aside the writ in the action and orders extending its validity and granting substituted service and ordering instead that service of the writ be discharged. This required consideration of the appropriate test to be employed in making a determination on the issue. Courts throughout the Commonwealth had employed either the application test or the order test in such matters. I stated that:

> "Under the application test, an order would be final if it was made on an application which would have determined the matter in litigation for whichever side the decision was given. It is conceded that if the application test was applied the order of Georges J. would be interlocutory, because if he had not set aside the writ and discharged its service, the proceedings would have continued.
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> Under the order test an order is final if it finally determines the issue in litigation, or disposed of the rights of the parties. It seems to me that although the order, having adjudged the writ and its service to be invalid, effectively determined the proceedings, it did not determine any issue in litigation between the parties nor dispose of their rights, and therefore was not a final judgment or order."

[10] Prior to the introduction of the new rules about appeals in the England in 2000 which made it necessary for leave to be obtained to appeal in most cases, the rules were the same as those set out in section 32 of our act. The English White Book interpreted the rules to facilitate recognition of what was an interlocutory judgment or order by specifying same in Order 59/1A of the English Rules of the Civil Procedure, and quoting from the 1998 White Book, at 59/1A (6) (bb) an order setting aside or refusing to set aside another judgment or order (whether such other judgment or order is final or interlocutory) is stated to be an interlocutory judgment or order. This accords with the application test which governs the issue because this was not related to settling the matters in litigation between the parties.

[11] I would venture to opine as in Sylvester v Singh that whatever test is used this order would be an interlocutory order because the litigation had already reached a stage where the issues in dispute between the parties had already been settled. This proceedings related to enforcement of payment of a money judgment and the court orders giving effect to it.

[12] In the circumstances we are satisfied that this was a case which required leave in order for the appeal to be prosecuted. The appellants have failed to comply with this statutory provision.

[13] The appellants during their argument as an alternative asked for leave to appeal. What do the interests of justice require? There has been nothing put before us. No evidence on which we can consider the relevant matters. The questions we would have to consider in granting leave to appeal as so much time has elapsed are the extent of delay, the reason for delay, the chance of success and the prejudice to the other parties involved. The length of delay in this case is between 6 to 7 months and we have often ruled that this period of delay is inordinate. The reason for delay so far as we surmise in the absence of any evidence, is that there was a mistake of law in that the appellants acted on the assumption that this was a final

order which did not require leave. This court has repeatedly ruled that that is not an acceptable reason for delay. On the merits, the appellant seems to be saying that the order of the judge deprived the judgment debtor of the opportunity of selling his land at a higher price. In the absence of evidence we have serious doubts about this. The court appointed agent was appointed on an order to which they consented and the reserve price was fixed with their consent and they have indicated that it was sold at a price higher than the reserve price. If it is true that the judgment debtor did have a purchaser at a higher price we are not persuaded that is a good enough reason to order the abortion of a sale that was already completed in accordance with a court order. The appellants have made some suggestions from the Bar table that there was some illegality with the sale, but no evidence was adduced from which we could evaluate those comments. There could be no doubt that the respondents would be prejudiced by the delays in the completion of the sale and the release of the money, and third party rights would be adversely affected.

[14] I have not been persuaded that this is a proper case for granting leave. I would dismiss the appeal with costs. With regard to the 3rd Respondent it is unnecessary to make specific adjudication on their application because the entire appeal is dismissed.

[15] The costs to the 1st and 2nd Respondents are ordered in the sum of $9,333.00 and to the 3rd Respondent in the sum of $9,333.00. We order that the costs to the 3rd Respondent be paid out of the funds paid into court under the sale agreement if there are sufficient funds.

Sir Dennis Byron
Chief Justice

I concur.

Albert Redhead
Justice of Appeal

I concur.

Ephraim Georges
Justice of Appeal