SAINT LUCIA

IN THE COURT OF APPEAL

HIGH COURT CIVIL APPEAL NO. 35 OF 2003

BETWEEN:

CLAUDIUS SOUDINE

Appellant

and

SEPTIMUS JEFFREY

Respondent

Appearances:

Ms. Beverley Downes for the appellant.
Ms. Wauneen Louis-Harris for the respondent.

2003: December 9;
2004: January 20.

JUDGMENT

ALLEYNE J.A.

[1] This is an application for extension of time to file a notice of appeal heard pursuant to Part 62.16(1)(c) of the Civil Procedure Rules 2000 (CPR). The proposed appeal is against an order of the Master dated 24th January 2003 striking out the applicant's claim and entering judgment in default of defence on the counterclaim for the sum of $41,975.00, interest thereon from 19th September 1999, the day before the accident which gave rise to the counterclaim, general damages, and costs fixed at $5,771.56. In making the order striking out the claimant's statement of case, the learned Master was exercising a discretion conferred upon him by Part 26.3(1)(a) due to the failure of the applicant and his counsel to attend court,

even after the applicant's counsel had been contacted and required to attend later on the day fixed for hearing.

[2] The grounds of the application are that (a) the learned Master erred in entering judgment in the terms of a specific amount; (b) the learned Maser erred in awarding general damages to the defendant; (c) the learned Master had no legal authority to strike out the claimant's case; (d) the learned Master's actions were in breach of Part 11.3 and 26.2 of the CPR 2000.

[3] In his affidavit in support of his application the applicant says that in or around May 2003 he was served with an order made by the Master by which his claim in Suit No. 859/2002 was struck out and judgment was entered against him on the defendant's counterclaim as stated in paragraph 1 hereof. The applicant claims to have been unaware up to that time that the matter had come up for case management, having not been informed by anyone of that event. He contacted his Solicitor, a very senior practitioner in this jurisdiction, who informed him that he would lodge an appeal, as he too was unaware that the matter had been set down for hearing on the day in question. He says he checked with his Solicitor on several occasions and was assured that the appeal was in progress. He was therefore surprised when he was served with a Judgment Summons. He thereupon contacted another Solicitor, who, after much difficulty, was apparently able to recover a copy of the file from the former Solicitor and advised the applicant that the time limited for filing an appeal had passed, and no appeal or application had been filed. He was also then informed that in fact no defence to the defendant's counterclaim had been filed, thus the judgment in default of defence to counterclaim.

[4] The applicant says that he suffered grave injuries in the accident which is the subject matter of the action and is as a result severely physically handicapped and unable to move around without assistance. He was present at the hearing and my observations of him confirmed this claim. He says he was totally dependent on his Solicitor and trusted him to do all that was necessary to represent his interests.

[5] If what the applicant says is true, he is the unfortunate victim of a comedy of errors and a pattern of professional neglect which have seriously jeopardised his access to a fair hearing of his case, both in terms of his claim, and of defending the counterclaim against him, with potentially tragic consequences for him.

[6] The delay in this case is extreme, even since the applicant has secured the services of, first one, and then another new Solicitor to represent him. The delay is clearly inordinate. However, I propose to consider the other issues which arise in connection with this application. The relevant factors were considered and applied in the case of *Saint Lucia Furnishings Limited v Saint Lucia Cooperative Bank Limited and Frank Myers of KPMG*[1], a decision of the Court of Appeal of the Eastern Caribbean States.

Reasons for the delay:

[7] As indicated earlier, the applicant appears from his affidavit to have been very ill served by his Solicitors. He relied fully on his original Solicitor, a reliance which was enforced by his severe disabilities which he claimed resulted from the accident. He accepted the assurance, first, that the matter would be dealt with professionally, with the implied undertaking to file all necessary pleadings timeously. He expected to be informed of any hearings at which he was expected to be present. Important and prejudicial steps were taken in his absence and without notice to him, leading to the entry of judgment against him on both the claim and the couterclaim. He only came to know of this when enforcement proceedings on the judgment were served on him. Having contacted his Solicitor concerning these enforcement proceedings, he was assured that an appeal would be filed. He discovered much later that no appeal had been filed. He approached a new Solicitor, who apparently had great difficulty obtaining the files from his former Solicitor. This new Solicitor appears to have done little about the matter after having obtained the file from the first Solicitor, and it was left to a third Solicitor to take action, belatedly, to seek permission to file an appeal out of time.

[1] Saint Lucia Civil Appeal No. 15 of 2003, November 24, 2003.

[8] None of this delay can properly be attributed to the applicant himself, in view of his severe disability and his enforced reliance on his legal representatives.

[9] I have read the pleadings in this action, as well as the order which the applicant seeks to appeal, and the grounds for appeal which form part of the notice of application. I have also read the affidavit of the respondent relating to the proceedings before the learned Master. However, Par5t 13 of the CPR 2000 makes provision for the procedure to be followed where a party against whom a default judgment has been obtained seeks to set aside such judgment. An appeal to the Court of Appeal is not the appropriate procedure.

[10] In any event, the function of an appellate court in an appeal against the exercise of a judicial discretion is strictly limited. In *Hadmore Productions v Hamilton*[2] Lord Diplock declared that the appellate court's function is not to exercise an independent discretion of its own. His Lordship emphasised that the function of the appellate court is one of review. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.

[11] The applicant has also appealed against the order of the court entering default judgment on the counterclaim for failure to file and serve a defence to counterclaim within the time provided by the Rules. In particular, the applicant complains that the judgment, being judgment in a claim for an unspecified sum of money, does not comply with the provisions of rule 12.10(1)(b). The judgment of the court was in fact in form of a judgment for a specified sum of money and is therefore in that respect erroneous.

[12] An application to set aside or vary such an order should properly be made under Part 13, rather than by way of appeal. However, in the interests of ensuring that the matter is dealt with expeditiously, allotting to it an appropriate share of the court's resources, and saving expense, bearing in mind the overriding objective of

the Rules, and exercising the court's case management powers under rule 62.14, I order that the judgment in default of defence to counterclaim be varied, and be entered as judgment for the payment of an amount to be decided by the court.

Conclusion:

[13] In light of my findings above, the application for extension of time to appeal is dismissed, and the judgment in default of defence to counterclaim is varied, with costs of this application in the sum of $1000.00 to be paid by the applicant to the respondent.

Brian G.K. Alleyne
Justice of Appeal

[2] [1982] 1 All ER 1042