THE COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 6 of 2003

BETWEEN:

[1] BERNADETTE HECTOR
[2] VIVIAN HECTOR

Appellants

and

NEVILLE JOSEPH

Respondent

Before:

The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Adrian D. Saunders — Justice of Appeal
The Hon. Mr. Michael Gordon, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Lennox Lawrence for the Appellant
Mrs. Z. Dyer for the Respondent

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2003: November 12;
2004: January 26.

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AND

THE COMMONWEALTH OF DOMINICA

CIVIL APPEAL NO. 8 of 2003

BETWEEN:

CHRISTABEL ANTOINE

Appellant

and

BERNARD ANTOINE

Respondent

Before:

The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Adrian D. Saunders — Justice of Appeal
The Hon. Mr. Michael Gordon, QC — Justice of Appeal [Ag.]

Appearances:

Ms. Singoalla Blomqvist-Williams for the Appellant
Ms. Hazel Johnson for the Respondent

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2003: November 14;
2004: January 26.

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JUDGMENT

[1] SAUNDERS, J.A.: These matters came before us on different days. Each is an appeal from a decision of the learned Master. Both appeals were allowed. As the cases raise some common issues we thought that it was right that we should set out our views in writing.

Hector v. Joseph

[2] This was a claim for damages for personal injuries arising out of a traffic accident. Mr. Joseph alleged that he was the pinion (*sic)* rider on a motor cycle; that Bernadette Hector so negligently drove a motor car owned by Vivian Hector that there was a collision between the car and his cycle; and that he, Mr. Joseph, thereby sustained damage and personal injury. By their Defence, the Hectors admitted the accident. They pleaded however that Ms. Hector was not negligent. They claimed that the collision ensued because the car's braking system suddenly and without any warning failed to operate. They alleged that there was no way she could have avoided the collision. They pleaded further, and in the alternative, that Mr. Joseph was contributorily negligent. They cited, as particulars of the contributory negligence, the allegations that Mr. Joseph was driving too fast and that he failed to avoid the collision.

[3] The matter came on for hearing before the Master at a case management conference. The learned Master thereupon struck out the defence as disclosing no reasonable grounds to defend the claim. He entered judgment for Mr. Joseph for

damages to be assessed and costs. The Hectors appealed. Upon the matter coming on before us, Mr. Joseph's counsel readily appreciated that the Master's decision could not be sustained. Counsel consented to the appeal being allowed with costs to the appellants.

Antoine v. Antoine

[4] The parties to this matter had been married and divorced. An application for ancillary relief was pending. The outstanding issues appeared to be custody, maintenance of the minor child, and division of property. The property in question had been acquired in the joint names of the parties. Each of the former spouses swore an affidavit. Mrs. Antoine deposed as to the manner in which the house was acquired. She alleged that the loans were obtained to build the house and that these loans were repaid by her. She asked the court to grant her a 4/5 share in the property. Mr. Antoine, on the other hand, stated in his affidavit that upon completion, the house was valued at some $200,000.00; that in the main it was built by his efforts; and that while Mrs. Antoine repaid certain loans, he took care of all the household expenses. It was Mr. Antoine's view that he should be accorded a 2/3 share in the house.

[5] The matter came before the Master. The order before us states that it came on for a case management conference but it is common knowledge that CPR 2000, that introduces case management, does not apply to matrimonial causes. Notwithstanding, it is my view that it was not inappropriate for the matter to be placed before the Master so that he could give directions as to the most effective and efficient manner of disposing of it.

[6] Upon the matter coming on for hearing before him, the learned Master declared the property to be owned by the parties equally. He ordered that it should be sold, the encumbrances satisfied and the proceeds equally divided between the parties. Mrs. Antoine appealed this order and we had no doubt in determining that the Master's order should be set aside.

Failure to provide reasons for the decision

[7] It is rather regrettable that in neither of these matters, as was also the case in MPG Construction v. Dominica Social Security[1], have we been favoured with any reasons for the Master's decisions. It hardly needs to be said that this circumstance places this court at a disadvantage. We have no way of knowing from the record the basis upon which the learned Master arrived at his decisions and the totality of the matters that he considered in so doing. This is unfortunate. When an appeal has been lodged against a decision of a judicial officer, that fact should forthwith be communicated to the officer who will then be in a position to give reasons in writing for the decision as well as make available any relevant notes of the proceedings including submissions made all of which could then form part of the Record.

Striking out at a Case Management Conference

[8] Under the old rules, courts proceeded cautiously in exercising the power to summarily strike out pleadings. The reasons for this are not difficult to fathom. The unsuccessful litigant was wholly deprived of the right to a trial and of its ability to strengthen its case through the process of disclosure and other court procedures such as requests for further information. Striking out was limited to plain and obvious cases where there was no point in having a trial. The power was usually exercised at the instance of one of the parties.

[9] The new rules require the court actively to manage cases. Part 26.3(1)b specifically addresses the court's striking out powers. It is tempting to believe that under these new rules the court will be more willing to exercise the power to strike out. This is not necessarily the case. Blackstone's Civil Practice, 2001[2] has this to say on the subject:

[1] *Dominica Civil Appeal No. 3 of 2003*
[2] *Chapter 33.5*

> "…a dramatic change is not expected. In *Swain v Hillman* [1999] CPLR 779 (a summary judgment case), Lord Woolf MR said that Part 24 applications had to be kept within their proper limits, and were not meant to be used to dispense with the need for a trial where there were issues which should be considered at trial. The same could be said in relation to striking out under r. 3.4. In the same vein, before using r. 3.4 to dispose of 'side issues', care should be taken to ensure that a party is not deprived of the right to trial on issues essential to its case".

[10] In my view the Master erred in striking out the Defence of the Hectors. There were substantial areas of dispute, to be resolved at trial, between the Hectors and Mr. Joseph. There is a defence of inevitable accident known to the law. A plea of this kind casts certain burdens on the defendant[3]. A trial was required to determine whether the defendant could discharge those burdens. Further, the Hectors had also pleaded contributory negligence. They had every right to have determined by way of trial their allegation that Mr. Joseph was, in any event, partly to blame for the accident.

[11] There is another circumstance to be mentioned. No application had been made by Mr. Joseph to the Master for the striking out of the Defence. The Master apparently took it upon himself to do so upon a perusal of the statements of case. The parties would have attended the case management conference with no forewarning that the Master intended to adopt such a drastic course of action. Part 26.2(1) does give the Master the jurisdiction to exercise the power to strike out on his own initiative. However, if the court intends to do so, it should give any party likely to be affected a reasonable opportunity to make representations[4]. As much as 7 days' notice, at least, is required to be given by the court office if the court decides to hold a hearing before making an order of its own initiative[5].

[3] *See Bain v. Mohammed (1963) 7 W.I.R. 213@ 214H*
[4] *See Part 26.2(2)*
[5] *See Part 26.2(4)b*

## Summary Determination of Litigious Issues

[12] In the *Antoine* case, the learned Master determined, without the benefit of cross-examination, matters that were hotly contested on affidavit. One party swore that she was entitled to a four-fifths share in the property. The other party felt that he was entitled to a two-thirds share. Each party advanced their view on the strength of the contributions they alleged they had made to the acquisition of the property. For the Master simply to order a 50/50 division of the property might have seemed quite arbitrary to the litigants. This is not to say that such a result is in itself perverse. It may well be that after careful consideration of the relevant law and the strengths and weaknesses of each party's case when tested by cross-examination, the fair and just outcome may have been as determined by the Master. I believe however that the litigants should not have been deprived of any opportunity they desired to test and to probe the evidence of each other. It would be extremely unfortunate if litigants ever arrived at the view that the new culture of litigation spawned by CPR 2000 is wont to sacrifice due deliberation and a sense of fairness and justice for expedition in the hearing of cases. The truth is that the overriding objective of these new rules is precisely to enable the court to deal with each case justly.

## Result of the Appeals

[13] By consent the appeal of the Hectors is allowed with agreed costs to them of $1500.00. The appeal of Mrs. Antoine is also allowed with costs agreed at $3,000.00.

Adrian Saunders
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]