BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 2 of 2004

BETWEEN:

HARRY SAMUEL

Appellant

and

COMMISSIONER OF POLICE
ATTORNEY GENERAL

Respondent

Before:

The Hon. Mr. Adrian D. Saunders — Chief Justice (Ag.)

Appearances:

Mrs. Lorna Shelley-Williams for the Appellant
Mr. Baba Aziz for the Respondents

2004: July 12, 13

JUDGMENT

[1] SAUNDERS, J.A. : Harry Samuel was arrested on 19th April, 2003 and charged for possession of crack/cocaine allegedly found at his home. The police also seized Samuel's motor vehicle claiming that it was important to the continuation of their investigations. Samuel alleges that at the time of seizure, the vehicle contained valuables of his. Some three or so weeks after his arrest, the vehicle was mysteriously destroyed by fire while in the custody of the police. Approximately four months later Samuel filed a civil claim in negligence against the Commissioner of Police and the Attorney General for the loss of his vehicle. For his particulars of negligence he relied on the Latin maxim *res ipsa loquitor.*

[2] The police admitted the destruction of the vehicle while in their custody. Their defence to the suit was that Samuel had no right to possession of the vehicle because they had not yet completed their criminal investigations. They claimed that if indeed Samuel had a cause of action, it had become "suspended" and could

not "be revived unless and until the defendants' right to possess the vehicle had come to an end". The statement of defence also alleged that "the vehicle was set on fire by the criminal activity of an unknown person or persons. The action of the person or persons who set fire to the vehicle was unpredictable and unforeseeable".

[3] Importantly, the defence did not set out any other circumstance to indicate that any measures were taken by the defendants to safeguard the vehicle from loss of the type that was actually occasioned. Nor did the defence point to anything that the defendants had done to safeguard the vehicle while it was in their custody. I think this failure to point to any positive act done by them to keep the vehicle in reasonable condition is extremely significant because, on the pleadings, there was effectively no defence to Samuel's allegation of negligence. The obligation of a defendant against whom the maxim of *res ipsa* is pleaded is clear. When the maxim applies, and there is no doubt in my view that it does apply here, "it is insufficient for the defendant merely to say that he had acted carefully but he can rebut that case by proving that he was not negligent, even though he cannot prove how the accident occurred"[1]. Here the police have not even alleged that they exercised any care.

[4] After the statements of case were filed, the defendants applied to the court for an order that the claim be struck out on the ground that it did not disclose any reasonable grounds for bringing or defending the claim. The entire basis of the application was that the vehicle, at the time of its destruction, was in the lawful custody of the police and that Samuel, at the time of the filing of his claim, had no right of possession to it.

[5] The application put forward by the defendants found favour with the trial judge. The judge held that the action filed was premature. The claim was struck out. Curiously, the learned judge referred in her judgment to the provisions of the

[1] *See: Charlesworth & Percy on Negligence, 9th Edn. Para 5-103*

Public Authorities Protection Act Cap. 62 of the Laws of the Virgin Islands. Those provisions prescribe a time limit of six months for the institution of an action of this nature.

[6] Samuel's counsel filed and served a notice of appeal against the judgment of the learned trial judge. A few days later, counsel took the view that this might have been an appeal in which leave was first required. Counsel therefore sought and obtained leave to appeal. The order granting that leave did not specifically deem the purported notice of appeal already filed to have been validly filed and Counsel neglected to file or serve a fresh notice of appeal after leave had been obtained.

[7] The defendants have now applied to strike out the appeal on the ground that the purported notice of appeal that had been filed and served was a nullity and therefore there is no extant appeal before the court. The defendants have cited the case of *Patrick v. Walker*[2]

[8] Counsel for Samuel argued that the failure to file a fresh notice of appeal was a mere irregularity and that the justice of the case requires that the original notice should be regarded as having been validly filed. In the absence of authority to this effect I do not agree. It seems to me that where leave to appeal is required, until such leave is obtained there is no appeal in existence and the mere obtaining of leave cannot bring into existence that which was a nullity. I believe *Patrick v. Walker* correctly sets out the principle and I will respectfully follow the Jamaican Court of Appeal on the issue.

[9] Counsel also suggested that the court should use its powers under CPR 26.9(2) and hold that the failure to re-file and re-serve the notice of appeal did not invalidate the appeal process. Again, I have grave doubts as to whether it would be appropriate to so hold.

[2] (1967) 10 WIR 110

[10] I think counsel's strongest point is that in the peculiar circumstances here, no leave to appeal was required. At the base of this submission is the question as to whether this appeal was or was not to be regarded as an interlocutory appeal.

[11] It is trite that if the order of the learned trial judge were interlocutory, then leave to appeal would be required. It is also settled that as between the result test and the application test, the latter is the appropriate one to be applied in determining whether an order is final or interlocutory[3]. The issue to be decided here is whether the order of the learned judge, on its true construction, was an interlocutory order?

[12] Mr. Aziz for the defendants submitted that the appeal was a procedural appeal. He drew the court's attention to CPR 62.1(2) which defines a procedural appeal as an appeal from a decision of a Judge which does not directly decide the substantive issues in the claim. He also cited the case of *Hunt v. Allied Bakeries Ltd*[4], the headnote of which states "as a general rule, an order for striking out a statement of claim….on the ground that it disclosed no reasonable cause of action…….was an interlocutory order, and, accordingly no appeal lay without leave". Notwithstanding the apparent impressiveness of the authorities cited I regret that I do not agree with Mr. Aziz. It seems to me that, whether one uses the application test or one has regard to the definition of a procedural appeal, this order was a final order.

[13] Earlier on, I went to some lengths to outline how the pleadings stood at the time the application to strike out was made. I did so for this reason. The sole effectual defence to Samuel's action was in fact the issue of whether the action was maintainable. The real defence pleaded and the grounds upon which the striking out action were based were one and the same. When the striking out application was heard therefore, if it had been decided in favour of Samuel, then there was no defence left to proceed to trial because in fact, no defence or no sufficient defence

[3] *See Sylvester v. Singh, St. Vincent High Court Civil Appeal No. 10 of 1992*
[4] *(1956) 3 A.E.R. 513*

to the allegation of negligence had been pleaded. Whether the parties appreciated it at the time or not, the fact is that the striking out application effectively decided all the substantive issues in the claim. As to the case of *Hunt v. Allied Bakeries Ltd* Lord Evershed, the learned Master of the Rolls, did grant in his judgment in that case that "It is possible that there may be cases (though no example now occurs to me, and the present case is certainly not one) in which the facts would be of so special a character as to create an exception to the rule". In my view this case suggests such an exception. It is my view that where the entire defence is encompassed in an application to strike out as disclosing no reasonable cause of action, then that application is in effect a trial of the case. I agree that such circumstances would indeed be rare but they have occurred here.

[14] In my view therefore the appellant here did not need leave to pursue his appeal and I would disallow the application to dismiss the appeal. Samuel will have his costs of this application which I fix in the sum of $2,000.00.

Adrian Saunders
Chief Justice (Ag.)