ANGUILLA

IN THE COURT OF APPEAL
ANGUILLA CIRCUIT
(Civil)

CIVIL APPEAL NO.9 OF 2004

BETWEEN:

LEEWARD ISLES RESORTS LIMNITED

Appellant

and

CHARLES HICKOX

Respondent

Appearances:

(1) Mr. Courtney Abel with Ms Eustella Fontaine, Miss Navine Bahadinsingh
(2) Mr. William Rodger with Miss Pam Webster for Respondent

2004: December 06, 22.

JUDGMENT

[1] d'AUVERGNE, J.A.[Ag.]: On 3rd November 2004 the Appellant filed a notice of Appeal against the Order contained in a written Ruling of Master Cheryl Mathurin dated 25th day of October, 2004. The background to that ruling is that on the 26th March 2004 the Respondent applied for an order that the Appellant's further re-amended Defence and Counterclaim be struck out and summary judgment be entered for the Respondent. The Appellant opposed the application. On 25th October 2004 Master Mathurin gave copies of her decision to the Attorneys for the parties. The following day the parties again appeared before the Master and she handed down her amended written judgment.

[2] On the 11th November 2004 the Respondent filed a notice of Appeal to strike out the Notice of Appeal filed on behalf of the Appellant on the 3rd of November, 2004.

[3] The reasons given are that firstly that Appeal is a procedural appeal pursuant to Part 62.5(a) of CPR 2000. That a procedural appeal is equivalent to an appeal from an interlocutory order.

[4] Secondly, that leave to file such an appeal is a necessary prerequisite which must be done within seven days from the date of the Order and that failure to obtain leave to appeal makes the Notice of Appeal a nullity.

[5] On the 26th November 2004 the Appellant applied for leave to appeal for time to be extended and from relief from sanctions.

[6] The Appellant's case is that leave to appeal is not required under the laws of Anguilla or Rules of Court, CPR 2000 to appeal the ruling of the Master since leave is not required from a Master's decision. Moreover certain matters contained in the Appellant's Further Re-Amended Defence and Counterclaim are Res Judicata and that ruling is a final decision not requiring leave to appeal.

[7] At the hearing in Chambers, Counsel for the Appellant submitted that Civil Appeal No.33 of 2003 Antigua and Barbuda Circuit, Maria Hughes and the Attorney General of Antigua and Barbuda was not to be followed and urged that the matter be determined by the full Court and not a single judge. By paragraph 6 of Maria Hughes' case Gordon JA (Ag.) states:

> "Though CPR has introduced a different turn, to wit, `procedural appeal' it is in my view equivalent to an appeal from an interlocutory order. Hence if the present Notice of Appeal is a procedural appeal, leave to file the appeal is a necessary prerequisite to a filing of a Notice of Appeal."

[8] Counsel told the Court that after the reading of the Master's ruling Counsel for the Appellant made a valid oral application for leave to appeal and that Counsel for the Respondent, Miss Palmovan Webster, was present yet did not object when the Appellant was directed by the Master that the Appellant was entitled to file a Notice of Appeal and submissions forthwith without first seeking the leave of the

Court. Based on that direction, the Appellant filed a notice of Appeal within seven (7) days.

[9] The Appellant's contend that the Respondent's Notice of Application to strike out the Appellant's Notice of Appeal is defective in that the Respondent did not file an Affidavit in support with the Notice of Application contrary to Part 11.9 of CPR 2000 which provides that "evidence in support of an application must be contained in an affidavit unless a Court Order, practice direction or rule otherwise provides."

[10] It was further submitted that the Ruling of the Master on the question of Res Judicata was a final order since it would have determined the Res Judicata question between the parties.

[11] It was submitted that this argument, Res Judicata point is in conformity with the so called "Application test" enunciated in the cases of the White v Brunton and Othniel[1] Sylvester v Satrohan Singh[2] which renders the strike out paragraphs of the Appellant's pleading a final order.

[12] In White v Brunton Sir John Donaldson M.R. delivering the judgment with which the other members of the Court of Appeal concurred, contrasted the two competing approaches taken by previous Courts of Appeal in determining the question whether a decision was final or interlocutory.

[13] The "order approach" depended upon the nature and effect of the order made whereas the "application approach" held that a final order was one made on such an application or proceeding that for whichever side the decision is given, it will, if it stands, finally determine the matter of the litigation. This "application approach" depended upon the nature of the application or proceeding giving rise to the order and not upon the order itself.

[1] 1984 2 AER page 606
[2] Eastern Caribbean Supreme Court, St. Vincent and the Grenadines Civil Appeal No.10 of 1992

[14] At page 607 Sir John Donaldson opined: "that the English Courts are clearly committed to the application approach as a general rule".

[15] In the Othniel R. Sylvester v Satrohan Singh case, Byron J.A. adopted the "Application Test".

[16] Counsel for the appellant submitted that neither the Eastern Caribbean Supreme Court (Anguilla) Ordinance 1982 nor the Eastern Caribbean Supreme Court (Anguilla) Act RSA E 15 requires that leave be obtained from a Master's interlocutory decision.

[17] It was submitted on behalf of the Appellant that the Civil Procedure Rules 2000 of the Eastern Caribbean Supreme Court does not contain any requirement for leave to appeal from an interlocutory decision or order of Masters.

[18] As stated earlier Counsel for the Respondent relied on the judgment in Maria Hughes which followed the decision in Sylvester v Singh.

Conclusion

[19] At first blush it would appear that the issue under review falls on all fours with the decision in Maria Hughes where Gordon J.A. stated that a "procedural appeal" is equivalent to an appeal from an interlocutory order."

[20] In that case there was no doubt that the appeal was against a judge's decision on an interlocutory matter. In this case it concerns a decision from a Master of the High Court. The Eastern Caribbean Supreme Court (Anguilla) Ordinance 1982 section 30(4) which gives the authority to appeal from an interlocutory judgment makes no mention of the Master and this is understandable since the post of Master in the Eastern Caribbean Supreme Court is of recent origin.

[21] In Tobago House of Assembly v Selwyn Vidal and Associates Ltd[3] it was held that no appeal lies from a final order of a judge of the High Court in summary proceedings except by leave of the judge or leave of the Court of Appeal but that provision does not, however, apply to an order made by a Master of the Supreme Court.

[22] The Appellant after being served with the Respondent's application to strike out the Appellant's Notice of Appeal, filed an application for leave to appeal supported by an affidavit of Eustella Fontaine setting out the reason.

[23] The Court is empowered to hear applications for an extension of time by CPR 26.1(2) K where it states that the Court may: "extend or shorten the time for compliance with any rule, practice direction, order or direction of the Court even if the application for an extension is made after the time for compliance has passed".

[24] In Quillen v Harney Westwood and Riegels[4] the Court of Appeal laid down the issues to be considered by the Court when exercising its discretion. They are as follows:

(1) the length of the delay
(2) reasons for the delay
(3) the chances of the appeal succeeding if the application is granted; and
(4) the degree of prejudice to the Respondent if the application is granted.

[25] Learned Counsel for the Appellant submitted that the oral application was made promptly and the Appellant acted on the advice of the Master and served Notice of

[3] [1988] 42 WIR 372
[4] No.1 (2000) 58 WIR Page 143

Appeal without first seeking leave and after the Respondent's application for striking out, applied within 23 days of service, for leave and relief from sanctions.

[26] It is the Appellant's contention that Counsel for the Respondent was present throughout the appearance on the 26th October 2004 and made no comment or objected in any manner to the Master's statement that the Appellant was entitled to file Notice of Appeal and submissions forthwith without first seeking the leave of the Court and that the Appellant had some seven (7) days to file same.

[27] In the case of Treasure Island Company et al v Audubon Holdings Ltd et al[5] Saunders C.J. (Acting) said at paragraph 16:

> "There was no way that we could allow skilful advocacy to drive a dagger through the heart of fundamental precepts of the Civil Procedure Rules."

[28] In that case solicitors for the Appellants never raised any objection to the late filing of Respondents' witness statements which took place three months before the date for trial. On the trial date as the Respondent, then the Claimant, began to open his case Counsel for the Appellant, then the Defendant, made submissions that the Claimant had not adhered to the time set for the filing of the witness statements.

[29] It is my view that the same can be said concerning what took place before Master Mathurin on the 26th October 2004 and the subsequent application by the Respondent to strike out the Notice of Appeal by the Appellant.

[30] Moreover, I have also taken cognizant of the fact that the strike out application was not accompanied by an affidavit in support of the application as CPR 11.9 mandates and is therefore not a proper application before the Court.

[31] Based on the decision in Tobago House of Assembly v Selwyn Vidal and Associates Ltd that no leave is required for an appeal of a Master, I should

[5] British Virgin Islands Civil Appeal No.22 of 2003

therefore dismiss the strike out application of the Respondent and that the Appellant be allowed to proceed with its appeal filed on the 3rd of November, 2004.

[32] Respondent to pay costs in the sum of $1,000.00 to the Appellants.

Suzie d'Auvergne
Justice of Appeal [Ag.]