

ANGUILLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.6 OF 2004

BETWEEN:

JOHN PAUL DEFORIA
and
THE ISLAND COMPANY LIMITED

Appellants/Respondents

and

GIGI OSCO-GINGEMANN
VADIM FRIDMAN
(Executors of the Estate of Martin Crowley, deceased)
and

PENDRAGON INTERNATIONAL LIMITED

Respondents/Applicants

Appearances:

Mr. Kenneth McClean with Jenny Lindsay for the Appellants

Mr. James Corbett with Keithley Lake, Mark Bradley and Cora Richardson-Hodge
for the Respondent

In attendance were Mr. John Reynolds on behalf of the Appellant and

Mr. Mark Forte on behalf of the Respondents

2004: December 6, 23.

JUDGMENT

[1] **d'Auvergne, J.A. [Ag.]:** On the 20th September, 2004 the Appellants (then the Respondents in the Court below) filed a notice of Appeal against the decision of Madam Justice Janice George-Creque contained in an Order dated 13th September, 2004.

[2] On the 27th September the said Appellants filed a notice of Application under Civil Procedure Rules 2000 (herein after referred to as C P R 2000) Part 62.10; 62.5; 62.20; seeking the following:

Leave be granted to amend the Notice of Appeal dated and filed 20th September, 2004 in the form of draft attached.

The Court extend the time for filing of Written submissions in support of the Notice of Appeal to 27th September, 2004 so as to be in compliance with C P R Part 42.10.

The Court exercise its discretion to allow the Appellants to make oral submissions and for the Appeal to be heard by the Court of Appeal.

The Court grant a stay by the proceedings until after the hearing of this Appeal.

- [3] On the 1st of October, 2004 the Respondents filed a notice of Application seeking the following:

The purported Notice of Appeal by the Appellants on the 20th day of September 2004 be struck out.

The Costs of and occasioned by this Application be paid by the Appellants.

Such further or other Order as the Court deems fit.

- [4] On the 18th October, 2004 the Appellants, filed another Notice of Application requesting that the Notice of Appeal filed on the 20th September 2004 shall stand as the Notice of Appeal and that the Appellants be granted leave to amend the Notice of Appeal in the form of the draft amended Notice of Appeal.

Background

- [5] On the 13th September, 2004 George-Creque J, delivered judgments on two (2) applications one of which was judgment on an application of the Respondents/Claimants to strike out substantially all of an affidavit of the 1st named Appellant made on behalf of the 2nd named Appellant dated 16th August, 2004. The learned Judge granted the application and ordered paragraphs 18 – 30

of the Affidavit to be struck out on the basis that those paragraphs contained expressions of opinion or legal argument.

[6] The substantive Case was then set down for the 16th and 17th September, 2004 and the Appellants closed their case on the 16th September, 2004; and during the closing submissions attempted to refer to the struck out paragraphs in the Order of the 13th September, 2004. They were not allowed to do so and filed first Notice of Appeal on the 20th September, 2004 a mere three (3) days later.

[7] It is significant to note that the Case has concluded and judgment is reserved.

Submissions

[8] The Appellants contention is that the Appeal from that decision is in the nature of the procedural appeal and in accordance with C P R 2000 Part 62.5 the Appeal must be filed within seven (7) days of the date of the decision appealed against. They argue that the time was too short to file written submissions and sought the opportunity to present oral arguments.

[9] It was submitted on behalf of the Appellants that the nature and importance of the material which the Appellants sought to reinstate into the trial, concerned substantial assets.

[10] It was further submitted that permission to appeal out of time had been made promptly and no prejudice has been caused to the Respondents by the failure to seek leave by 27th September, 2004, fourteen days of the decision in accordance with C P R 2000 Part 62.2.

[11] That the delay was due to the interpretation of the Appellants legal advisors of Part 62 of C P R 2000. That they had just been made aware of the decision of Gordon

J.A.(Ag.) in **Maria Hughes and The Attorney General**¹ Antigua and Barbuda Circuit delivered on 18th February, 2004.

- [12] It was submitted on behalf of the Respondents that the appeal is one which requires leave and therefore the party needing leave must apply for leave with 14 days of the date of the order and the Appellants have not done so and the time for doing so has now expired. Part 62.5 of the C P R 2000 sets out the time for filing a Notice of Appeal. Part 62.5(b) makes it clear that time for filing is within fourteen (14) days of the date when leave was granted.
- [13] It was further submitted that the purported appeal was one which fell within the parameters of Section 29(4) of the Eastern Caribbean Supreme Court (Anguillan) Act Chapter R.S.A.C.E. 15.
- [14] It was submitted on behalf of the Respondents that the Appellants purported Appeal was a frivolous, vexatious event and an abuse of the process of the Court. That the Appellants' purported appeal was one with no merit since the trial Judge had reserved judgment on the substantial merits of the claim and that there was no indication as to how she will rule.

Conclusion

- [15] Section 29(4) of the Eastern Caribbean Supreme Court (Anguilla) Act, R.S.A.C.E 15 provides: "No appeal shall lie without leave of the Judge or of the Court of Appeal from any interlocutory Order or interlocutory judgment made or given by a judge." There are a number of exceptions which are not relevant in this case.
- [16] There is no dispute that this is an interlocutory appeal since it is from an order given before the substantive issues were heard three days later.

¹ Antigua and Barbuda in Civil Appeal No.33 of 2003

- [17] Section 29(4) noted earlier specifically states that no appeal shall lie without leave. The granting of leave is therefore a prerequisite for the proper filing of a Notice of Appeal falling within that Section of the Act.
- [18] It is therefore pellucid that failure to get leave makes the notice of appeal a nullity.
- [19] The trial judge has heard all the evidence and therefore upon the delivering of her judgment the Appellants if they are unsuccessful are free to file an appeal on all issues which may have arisen out of the trial.
- [20] The application to strike out the notice of Appeal filed on 20th September, 2004 is granted.
- [21] The Appellants are ordered to pay the Costs of this application in the sum of \$1,000.00

Suzie d'Auvergne
Justice of Appeal [Ag.]