SAINT CHRISTOPHER AND NEVIS

NEVIS CIRCUIT

IN THE COURT OF APPEAL

CIVIL APPEAL NO.07 OF 2005

BETWEEN:

NEVIS ISLAND ADMINISTRATION

Intended Appellant/Respondent

and

1. LA COPPROPRETE DU NAVIRE J31
2. AUXILIAIRE MARITIME J31 S.A.
3. SAINT NICHOLAS DE BARRY 1 S.A.S.
4. SAINT NICHOLAS DE BARRY 2 S.A.S.
5. SAINT NICHOLAS DE BARRY 3 S.A.S.
6. SELNIC S.A.
7. SAINT NICHOLAS DE BARRY IV S.A.S.

(formerly known as QUIRATS + S.A.)

8. EURIMOB S.A.

Intended Respondents/Applicants

Before:

The Hon. Mr. Hugh A. Rawlins — Justice of Appeal

Appearances:

Dr. Henry Browne for the Intended Appellant/Respondent

Mr. Michael Fay and Mr. Mark Brantley for the Intended Respondents/Applicants

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2005: October 18

December 29

JUDGMENT

[1] RAWLINS, J.A.: On 25th April 2005, the Intended Appellant/Respondent, the Nevis Island Administration ("the Administration) filed a Notice of Appeal in these proceedings, appealing against a Judgment, which Baptiste J delivered on 12th April 2005. On 23rd September 2005, the Intended Respondents/Applicants ("the companies") applied to strike out the Notice of Appeal on the basis that it is a nullity. The application to strike out came before me on 18th October 2005, sitting as a Single Judge of this Court, pursuant to rule 62.4 of the Civil Procedure Rules 2000 ("CPR 2000"). The legal practitioners for the parties were directed to file, serve and submit written submissions in relation to the application by 25th October 2005, and the matter was set for determination by a Single Judge on the written submissions.

[2] The legal practitioners for the Administration filed their written submissions on 24th October 2005, and an affidavit deposed by Mr. Theodore Hobson in opposition to the strike out application. On that same date, they also filed an application seeking an extension of time within which to serve an application for leave to appeal against the said Judgment of Baptiste J. They also filed an affidavit deposed by Ms. Heidi-Lynn Sutton. A part of the affidavit supported this application. The other part was in opposition to the strike out application. It is noteworthy that although the Administration filed the application for extension of time, they did not withdraw or discontinue the Notice of Appeal.

[3] In fact, the written submissions address the application to strike out as well as the application for extension of time. The issue whether the Notice of Appeal should be struck out therefore remains for determination pursuant to the directions of 18th October 2005. The application for extension of time does not arise for consideration in this Judgment because it has not been canvassed. As far as the application for extension of time is concerned, the attention of Counsel is drawn to rules 26.1(k), 26.3 and 26.8, as well as to the learning in Sayers v Clarke Walker (a firm)[1].

[1] [2002] EWCA Civ 645; [2002] 1 WLR 3095.

[4] In the proceedings in the High Court, the Administration issued a claim against the companies for damages for negligence. The Administration alleged that the companies are liable for physical damage and erosion, which the ship "Mistral" caused to the reefs, the sea floor and to the coastline, when it ran aground on the south eastern coast of the Island of Nevis on 20th February 2001. In his Judgment of 12th April 2005, the learned Judge struck out the claim (claim form and statement of claim) on the ground that the Administration lacked the necessary *locus standi* to institute the proceedings. It was against this decision that the Administration sought to appeal, by way of the Notice of Appeal that the companies applied to strike out.

[5] The companies contend that the Judgment from which the Administration seeks to appeal is an interlocutory or procedural Judgment. They submit, therefore, that the Administration was required to obtain leave to appeal before it filed the Notice of Appeal, and, having not obtained leave, renders the Notice a nullity, which should therefore be struck out. They cited as authority for these submissions Othniel Sylvester v Satrohan Singh[2]; Pirate Cove Resorts Limited and Another v Euphemia Stephens and Others[3]; Maria Hughes v The Attorney General of Antigua and Barbuda,[4] and Astian Group Limited and Another v TNK Industrial Holdings Limited.[5]

[6] On the other hand, the Administration contends that the Judgment of 12th April 2005 was a final, rather than a procedural or interlocutory Judgment. They say that it finally disposed of the claim because it entirely struck out the claim.

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[2] St. Vincent and the Grenadines Civil Appeal No. 10 of 1992 (18th September 1995.).
[3] St. Vincent and the Grenadines Civil Appeal No. 11 of 2002 (2003).
[4] Antigua and Barbuda Civil Appeal No. 33 of 2003 (13th April 2004.).
[5] British Virgin Islands Civil Appeal No. 22 of 2003 (7th June 2004).

[7] Against this background, the applicable law will be considered. That law will then be applied to the issue that arises for the determination of the application.

The applicable law

[8] The relevant provisions are those that relate to appeals to this Court from decisions of the High Court. These are The Eastern Caribbean Supreme Court (St. Christopher and Nevis) Act,[6] as amended ("the Supreme Court Act"), and Part 62 of CPR 2000.

[9] Under Section 31(g) of the Supreme Court Act, any person who wishes to appeal against an interlocutory judgment or interlocutory order of a Judge of the High Court must first obtain the leave of the Judge or of this Court. However, the subsection specifically exempts from the leave requirement the following interlocutory judgments or interlocutory orders:

(i) Where the liberty of the subject or the custody of infants is concerned;

(ii) Where an injunction or the appointment of a receiver is granted or refused;

(iii) in the case of a decree *nisi* in a matrimonial cause or a judgment or order in an admiralty action determining liability;

(iv) in such other cases, to be prescribed as are in the opinion of the authority having power to make rules of court of the nature of final decisions.

[10] The authority that has the power to make rules introduced the term "procedural appeal" in rule 62.1(2) of CPR 2000. In this rule, this term is defined to mean an appeal from a decision of a judge, master or registrar, which does not directly decide the substantive issues in a claim. The definition excludes the following:

[6] No. 17 of 1975.

(a) any decision made during the course of a trial or final hearing of the proceedings;

(b) an order for committal or sequestration of assets under Part 53;

(c) an order granting any relief made on an application for judicial review (including an application for leave to make the application) under the relevant Constitution;

(d) an order granting or refusing an application for the appointment of a receiver; and

(e) the following orders under Part 17 –

(i) a freezing order;

(ii) an interim declaration or injunction;

(iii) an order to deliver up goods;

(iv) any order made before proceedings are commenced or against a non-party; and

(v) a search order.

[11] In Maria Hughes, Ms. Hughes applied to strike out a Notice of Appeal, which the Attorney General filed some 42 days after a Judgment. Ms. Hughes contended that that the appeal was a procedural appeal, and that it was therefore bad on 2 grounds. One was that it was out of time. The second was that the Attorney General was required to obtain leave before filing it. Gordon JA, sitting as a Single Judge, stated that although CPR 2000 introduced the term "procedural appeal", this term is equivalent to an appeal from an interlocutory order, and similarly requires leave as a prerequisite to the filing of a Notice of Appeal.[7]

[12] The issue that arises for consideration on the present application is the same as the issue that arose on the application in Maria Hughes. Gordon JA stated it quite succinctly as follows:

> "The primary issue raised by this application to strike out the Notice of Appeal is whether the appeal is a procedural appeal (an appeal from

[7] See paragraph 6 of the Judgment.

> an order which does not directly decide the substantive issues in the claim) or an appeal from an order that does so decide the substantive issues."[8]

He made this statement on the authority of our full Court of Appeal under the old 1970 Rules of the Supreme Court in the Othniel Sylvester case. He noted that the full Court followed and applied this case and the same principles in Pirate Cove Resorts Limited, which came under CPR 2000.

[13] In these cases, as well as in Astian Group Limited and Another v TNK Industrial Holdings Limited, in which Gordon JA also sat as a Single Judge, this Court stated a preference for the "application test" in order to determine whether an appeal is from an interlocutory or procedural order or from a final order.

[14] In Othniel Sylvester, Byron JA, distinguished the "application test" from the "order test", at page 4 of the Judgment. He repeated it as the applicable principle, in Pirate Cove Resorts Limited,[9] in the following terms:

> "Under the application test, an order would be final if it was made on an application which would have determined the matter in litigation for whichever side the decision was given. It is conceded that if the application test was applied the order of Georges J would be interlocutory, because if he had not set aside the writ and discharged its service, the proceedings would have continued.
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> Under the order test an order is final if it finally determines the issue in litigation, or disposed of the rights of the parties. It seems to me that although the order, having adjudged the writ and its service to be invalid, effectively determined the proceedings, it did not determine any issues in litigation between the parties nor dispose of their rights, and therefore was not a final judgment or order."

[15] The application test accepts that a claim could be totally and effectively disposed of on an interlocutory application, without there being a determination on any of the issues which arise on that claim. The case could thus be disposed of, and yet the order is not a final order because none of the issues on the claim has been

[8] See paragraph 7 of the Judgment.
[9] At paragraph 9 of the Judgment.

determined. Under the application test the resulting order is an interlocutory order. An appeal from such a decision is also a "procedural appeal" within the definition of that term in rule 62.1(2) of CPR 2000, because it is a decision, "… which does not directly decide the substantive issues in a claim".

[16] Under the order test, on the other hand, the decision is final if it is made on a substantive determination of the issues that arise on the claim. However, quite the contrary to what obtains on an interlocutory decision, the order will also be final even if it were made on an interlocutory application, if it totally and effectively disposes of the case and decides the rights of the parties, without a determination of the substantive issues that arise on the claim.

[17] As far as the time within which a Notice of Appeal must be filed, rule 62.5(a) provides that a procedural appeal for which no leave is required[10] must be filed within 7 days of the date of the decision that is appealed was given. Where there is a procedural appeal for which leave is required, rule 62.2(1) provides that the application for leave must be filed within 14 days of the decision appealed and 62.5(b) provides that the Notice of Appeal must be filed within 14 days of the date on which the court granted leave to appeal. For other appeals, which would be appeals from final decisions, under rule 62.5(c), there is no leave requirement. The Notice of Appeal must be filed within 42 days of the date when the decision appealed was served on the appellant. The Administration would have been well within time if its appeal was against a final decision because its Notice was filed within 14 days from the date when the judgment or order that is appealed was served on the Administration.[11] The question though is whether its appeal in the present case was from a final decision which requires no leave, or whether it was an interlocutory or procedural appeal which requires leave.

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[10] Thus one which falls within the excluded categories of section 31(g) of the Supreme Court Act or in the definition of "procedural appeal".

[11] I think that it could be helpful if for procedural appeals under rule 62.5(a) for which no leave is required, could be filed within the time required, also from the date of service of the decision or order, rather than from the date of the decision. This would obviate the need of an intended appellant who for good reasons was not in court when the order was made, and who did not become aware of it in time, to apply for an extension of time within which to appeal.

The present case

[18] The Administration's Notice of Appeal seeks to appeal the decision of 12th April 2005, which struck out the claim on the ground that the Administration lacks the relevant *locus standi* or nexus to the claim to permit it to litigate the claim. *Locus standi* arose on a preliminary objection. It is an issue that is by its very essence a procedural consideration. A claimant who does not have the relevant nexus to the claim that would move the court is simply not permitted to litigate it. There is no determination of any of the substantive issues in the case. This is borne out in the Judgment from which the Administration purports to appeal.

[19] In the Judgment, the leaned Judge struck out the claim on the ground that the Administration lacks *locus standi* because the areas which were allegedly damaged by the "Mistral" are neither owned by, nor are they in the possession or control of the Administration. According to the Judge, those areas are owned and are in the possession and control of the Government of the Federation of St. Christopher and Nevis.

[20] A reading of the Judgment against the statement of claim shows that none of the issues in the claim, which revolve around liability for negligence and consequential damages were either canvassed or determined. It is clear, therefore, on the application test, that although the striking out of the claim potentially disposes of the claim, the Judgment was a procedural or interlocutory Judgment. It did not determinate any of the substantive issues that arise on the claim. It is not a matter that is exempted from the leave requirement under Section 31(g) of the Supreme Court Act. It does not fall within any of the exception under the definition of "procedural appeal" in rule 62.1(2) of CPR 2000. The Administration should therefore have applied for leave to appeal in accordance with rule 62.5(b) of CPR 2000.

[21] In Maria Hughes, Gordon JA held that an order for interim payment was not a final order, but an interlocutory or procedural order because there was no final determination. He gave 3 reasons. The first was that the issue of the quantum of damages was yet to be decided. The second was that the question of liability was still at large. The third was that rule 17.7(2) gives the court the power to order a recipient of an interim payment to repay it. He held,[12] following Othniel Sylvester and Pirate Cove Resorts Limited, that the failure to obtain leave made the Notice of Appeal a nullity. On that ground, he struck out the Notice of Appeal and ordered the respondent to meet the costs of the applicant.

[22] Similarly, I hereby strike the Notice of Appeal that was filed in the present case by the Intended Appellant/Respondent on 25th April 2005 on the ground that it is a nullity. The Intended Appellant/Respondent shall pay the costs of the Applicants on the application to strike the Notice, in a sum to be assessed if not agreed.

Hugh A. Rawlins
Justice of Appeal

[12] At paragraph 15 of the Judgment.