BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.2 OF 2006

BVIHCV2004/0162

BETWEEN:

BETTITO FRETT

Appellant

and

[1] ALLEN WHEATLEY dba WHEATLEY CONSULTING
[2] WESLEY PENN dba ACCURATE CONSTRUCTION
[3] NATIONAL EDUCATION SERVICES CO. LIMITED
[4] JOHN SCHULTHEIS

Respondents

BVIHCV2004/0163

BETWEEN:

BETTITO FRETT

Appellant

and

[1] JOHN SCHULTHEIS
[2] PEARLINE WILLIAMS-VERGEER

Respondents

BVIHCV2004/0167

BETWEEN:

BETTITO FRETT

Appellant

and

[1] JOHN SCHULTHEIS
[2] MALCOLM MADURO

Respondents

Before:

The Hon. Denys Barrow, SC — Justice of Appeal

Representation:

Messrs Maples and Calder for Mr. John Schulteis
Messrs McW. Todman and Co for the Claimants

2006: June 1.

JUDGMENT

[1] BARROW, J.A.: The present application is made on behalf of Mr. John Schulteis to strike out the counter notice of appeal filed by Mr. Allen Wheatley, Mr. Wesley Penn, National Education Services Co. Ltd, Ms. Pearline Williams –Verger and Mr. Malcolm Maduro, who were the claimants in the High Court proceedings.

[2] The claimants had brought separate claims, which were consolidated, arising out of damage caused by a fire that originated in a building owned by Mr. Bettito Frett. The claims were made against both Mr. Frett and Mr. Schulteis because the claimants did not know if the fire started in an area of the building that was occupied by Mr. Schulteis or in an area that was occupied by, or for which, Mr. Frett was responsible. Judgment was given allowing the claim against Mr. Frett and dismissing the claim against Mr. Schulteis. The judge ordered that Mr. Frett should pay the costs to the claimants of their claims against him but that the claimants should pay the costs of Mr. Schulteis of the claimants' claim against Mr. Schulteis. Mr. Frett filed a notice of appeal against the decision, as of right, and that appeal should come on for hearing in the usual course. The claimants filed a counter notice of appeal in which they contend that the judge should have ordered that Mr. Frett and not they must bear the costs of their claim against Mr. Schulteis. It is that counter notice that Mr. Schulteis applies to strike out.

[3] Three bases are urged for striking out the counter notice. The solicitors for Mr. Schulteis say that the claimants needed leave to appeal an order as to costs only, that it is not proper for the claimants to raise an entirely new appeal by way of a

counter notice, and that because leave is always required when a party wishes to appeal a costs order the counter notice is a nullity because no leave was obtained.

[4] The contention that leave is needed to appeal an order as to costs only is based on section 30 (3) (b) of the West Indies Associated States Supreme Court (Virgin Islands) Act[1] (the Supreme Court Act) which reads as follows:

> "(3) No appeal shall lie except by leave of the judge making the order or of the Court of Appeal from –
> (a) …;
> (b) an order as to costs only where such costs are left to the discretion of the court."

[5] It is submitted on behalf of Mr. Schulteis that the claimants "cannot enter the appellate arena without the court's permission" and that "the claimants cannot under a counter-notice succeed to greater rights than they would have on an ordinary appeal against costs."

[6] In opposition, the solicitors for the claimants submit that the rule is not as absolute as the solicitors for the applicant interpret it. The solicitors for the claimants point to the exceptions to the rule that were identified in Donald Campbell and Company v Pollack[2] in which a successful party was not awarded costs because of the view that the judge took of the conduct of that party as established by the judgment in another action. The successful party appealed to the Court of Appeal on the ground that the judge wrongly exercised his discretion by taking into account the other proceedings. The appeal was successful and the other party appealed to the House of Lords whereupon the successful party took the preliminary objection "the appeal was incompetent as being an appeal as to costs only." The House dismissed the preliminary point on the principle that:

> "Notwithstanding the general rule of practice of the House of Lords, that no appeal lies for costs only, the House will entertain an appeal from an order of the Court of Appeal as to costs, where it is alleged that the order is founded upon an error of law."[3]

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[1] Chapter 80, Laws of The Virgin Islands 1991 Revised Edition
[2] [1927] A.C. 732
[3] At p. 732

[7] The claimants rely in particular on the following statement by Viscount Cave[4] L.C.:

> "My Lords if the authorities are carefully examined, I think it will appear that there is no rule of the House which prevents a party from asking to have a decision reviewed on the ground that it is wrong in law, even though the only result of a reversal of the decision would be to alter the incidence of costs. In my opinion, the true rule is that, while this House will not review an exercise of discretion as to costs, it will not refuse to entertain an argument that an order as to costs is founded on an error of law."

[8] In my view it makes no difference to the application of the principle that the rule that prohibits appeals as to costs only is differently formulated in the House of Lords and in the Court of Appeal. In the House there is a general prohibition against such an appeal while in the Court of Appeal there is a prohibition against such an appeal except by leave. Viscount Cave L.C. did not draw any distinction between the different formulation of the rule[5] and the exceptions to the rule that he identified do not give rise to any distinction.

[9] On the counter notice, the claimants submit, their grounds of appeal allege that the judge erred in law and so they fall within the exception to the rule. The grounds set out in the counter notice include:

> "a. The learned judge failed to exercise her discretion in relation to costs and merely held that the case "against Mr. Schulteis is therefore dismissed with costs on a prescribed basis pursuant to CPR 2000 part 65.5"
>
> …
>
> "c. The learned judge having found that the [claimants] did not know the cause of the fire or in what precise part of the building the fire originated" [para 24 of judgment] and that they had "properly raised the inference that the fire which they allege caused damage to them was caused by the negligence of either Mr. Frett or Mr. Schulteis or on the part of someone for whom either or both was responsible" [para. 25 of Judgment] and that the Appellant was liable for the fire should not have found the [claimants] liable for the costs of John Schulteis."

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[4] At p.741
[5] At p. 739

[10] The claimants submit that "where a judge has a discretion and failed to exercise his discretion or has exercised it improperly then this is an error of law which is subject to the correction of the court on the principle laid down in Donald Campbell and Company v Pollack [supra] where the learned judge exercised his discretion on the basis of wrong material and such correction is by way of an appeal without the necessity for leave." The claimants argue that their case on their counter notice is that the judge did not consider the significance of her findings but merely held that because the case against Mr. Schulteis was dismissed the claimants were liable for prescribed costs. In particular, the claimants urge, the judge did not consider the fact that the fire originated in an area of the premises that included the portion occupied by Mr. Schulteis and that upon her own findings there was no way that the claimants could have known who was responsible for the fire. The claimants submit that the judge misdirected herself in proceeding on the premise that it followed that because the claim against Mr. Schulteis was dismissed that the claimants ought to pay his costs.[6]

[11] In their submissions in reply the solicitors for Mr. Schulteis argue that the principle that was established by the Donald Campbell and Company case, namely, that the House would entertain an appeal against an order as to costs only if that order was founded on a wrong view of the law, is simply not relevant to the present issue. The present issue, they say, is "whether an appeal against a discretionary costs order advanced in a counter notice is capable of being reviewed by this court without its permission …"

[12] I do not accept that framing of the issue as accurate. As I see it, the issue is whether the claimants need leave to counter appeal on costs. I would accept for present purposes only, without considering whether there are exceptions to it, the proposition that had the claimants been appealing as to costs only they would have needed leave, according to section 30 (3) (b) of the Supreme Court Act. In

[6] Instead, the claimants submit, the proper order should have been and the usual order would have been that the negligent party was to pay all costs.

this case the claimants are not appealing. The claimants are counter appealing. It makes a difference.

[13] In the case of an appeal as to costs only there is no other issue before the court of appeal. In such a case leave is required so as to enable the court to decide, as a matter of discretion, whether to permit such an appeal to be brought. However, in the case of an appeal that is not as to costs only there is necessarily another issue before the court. In such a case no leave is required to include, as part of the composite appeal, an appeal as to costs. The rule is clear: leave to appeal on costs is only required when it is an order as to *costs only* that is being appealed. In other words, when an order as to costs is being appealed along with orders as to other things (for instance, liability and damages) no leave is required to appeal against the order as to costs.

[14] In the case of a counter notice there is already before the court of appeal the other issue or issues raised by the notice of appeal. Therefore, a counter notice as to costs only is not equivalent to an appeal as to costs only. This is because it is not costs only that are being appealed in the appellate proceedings. In this particular appeal, before there was the counter notice, there was first Mr. Frett's appeal against liability and damages. It seems to me right on principle that if the appellant needs no leave to appeal against an order as to costs, when costs are but one aspect of the order that is being appealed, then a counter appellant similarly needs no leave since costs are but one aspect of the order that is being appealed. The requirement for leave to appeal is imposed to restrict appeals being brought on the sole issue of costs.[7] Once costs are not the sole issue no leave is required. I see no reason why it should matter, in the case of a counter notice, that it is the counter appellant and not the appellant who has placed the other issues before the court of appeal.

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[7] See in particular the rationale for the rule that is stated in the cases discussed in the Donald Campbell& Co. case at p. 742.

[15] This reasoning, I believe, underlies the view that was expressed in the Donald Campbell and Company case by Viscount Cave L.C. who stated that there was no universal rule that the courts will not allow appeals as to costs only. Instead, his Lordship stated, the true position was that "an appeal from a discretionary order as to costs will not be received, except, perhaps in cases where there is also a bona fide appeal on merits ..."[8] On that reasoning I would hold that the counter notice is not caught by the rule laid down by Section 30 (3) (b) of the Supreme Court Act that prohibits the bringing of an appeal from an order as to costs only, without first obtaining leave.

[16] The second basis on which the solicitors for Mr. Schulteis seek to strike out the counter notice is that it is not permissible for the claimants to raise an entirely new appeal by way of counter notice. The solicitors for Mr. Schulteis point to the comparable English CPR 25.2 that provides that a respondent to an appeal can file a respondent's notice if (a) he seeks to uphold the order of the court below for additional or different reasons or (b) where he seeks to vary the order of the court below. The solicitors submit there is no similar indication of scope in CPR 2000 therefore it is left to the court's inherent jurisdiction to decide when it is appropriate for a counter notice to be filed in an extant appeal. They argue that it is inappropriate in the present case for a counter notice to be filed because the claimants do not seek to uphold the order in the extant appeal nor do they seek to vary that order.

[17] I cannot accept that latter contention as correct. The judgment of the High Court that is currently under appeal comprises (so far as is relevant to the present application) two parts: one part is the determination against Mr. Frett of the claims that were made against him including an order for costs against him; and the other part is the determination against the claimants of the claim that they made against Mr. Schulteis including an order for costs in his favour. Mr. Frett has appealed the entire decision that was given against him. The claimants have not appealed the

[8] At p 747 – 748 ; emphasis added.

decision that was given against them and in favour of Mr. Schulteis. Instead, the claimants accept the decision against them and in favour of Mr. Schulteis but seek to vary that decision so far as it relates to who should bear the costs awarded to Mr. Schulteis. I can find nothing inappropriate in the claimants filing a counter notice that has as its object the variation of that aspect of the order.

[18] In addition, if there is no limitation in CPR 2000 on the scope of a counter notice, as the solicitors for Mr. Schulteis submit, then I am at a loss as to the basis on which the solicitors can ask the court to impose the limitation that they seek to impose. I see no merit in this aspect of the application to strike out the counter notice.

[19] The remaining basis of the application to strike out the counter notice is that the counter notice is a nullity because where an appeal lies only with leave an appeal that is filed without leave is a nullity, as Rawlins JA recently confirmed in Nevis Island Administration v La Coppropreté Du Navire.[9] That principle applies equally to a counter notice of appeal, the solicitors for Mr. Schulteis submit.

[20] It seems to me that the premise that leave to counter appeal was required in this case is wrong. This is the precise point that I have determined in relation to the first basis of the application to strike out the counter notice.[10] Accordingly, I would reject as well this basis for the strike out application.

[21] As a result, I dismiss the application brought on behalf of Mr. Schulteis to strike out the counter notice with costs of US$ 2,000.00 to the claimants.

Denys Barrow, SC
Justice of Appeal

[9] St. Christopher and Nevis Civil Appeal No. 07 of 2005, judgment delivered 29 December 2005.
[10] See paragraph [15] above.