SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.14 OF 2006

BETWEEN:

[1] JN MARIE & SONS LIMITED
[2] RICHARD JN MARIE

Intended Appellants

and

JAMIE ST. LOUIS the Claimant who is a dependent minor acting by her next friend JOYCELYN ST. LOUIS of Castries, Saint Lucia but presently of 645 Vermont Street, Brooklyn 11207 N.Y., USA.

Intended Respondent

Before:

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

Appearances:

Mr. Mark D. Maragh for the Intended Appellants
Mr. Horace Fraser for the Intended Respondent

2007: January 23;
February 20.

JUDGMENT

[1] RAWLINS, J.A.: On 3rd May 2006 a judge of the High Court made an order in the case from which the present proceedings came. The order states as follows:

> "(1) That summary judgment be entered for the Claimant due to non-compliance of Case Management Orders.
> (2) Costs to be prescribed.
> (3) Adjourned to 8th June 2006 for hearing on damages and costs."

[2] The claim was instituted by the intended respondent, who sought damages for negligence on behalf of the minor against the intended appellants and Sentinel Security Company Limited. The minor was the child of one Anthony Gilbert, who

was killed by the alleged negligence of the 2nd named intended appellant when the latter discharged a firearm during a security exercise at the 1st intended appellant's petrol station.

The applications

[3] On 16th June 2006, the intended appellants[1] filed a notice of appeal from the order of 3rd May 2006. On 1st November 2006, the intended respondent[2] applied to strike out the notice of appeal on the ground that it was a nullity because the order was not a final order inasmuch as it did not determine negligence and damages, the substantive issues that the claim raised. The respondent insisted that the appeal is a procedural appeal within the meaning of rule 62.1(2) of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000.[3] The result, he said, is that the appellants were required to apply to the court for leave to appeal and they did not do so. Rule 62.1(2) defines 'procedural appeal' as an appeal from a decision of a judge, master or registrar, which does not directly decide the substantive issues in a claim.[4]

[4] In relation to the grounds contained in the application to strike out, solicitors for the respondent noted that the notice of appeal was filed some 44 days after the order which the appellants sought to appeal. This, they said, was well outside of the 14 days within which the appellants were required to apply for such leave and even outside of the 42 days within which a notice of appeal should have been filed. They therefore suggested that, even if no leave to appeal was required, the

---

[1] Hereinafter referred to as "the appellants".

[2] Hereinafter referred to as "the respondent".

[3] Hereinafter referred to either as "the rules" or "CPR 2000".

[4] The definition excludes any decision made during the course of a trial or final hearing of the proceedings; an order for committal or sequestration of assets under Part 53 of the rules; 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; an order granting or refusing an application for the appointment of a receiver, and a freezing order, an interim declaration or injunction, an order to deliver up goods, any order made before proceedings are commenced or against a non-party; or a search order under Part 17 of the rules.

appellants should have applied for leave to appeal out of time, giving good reasons for the delay before they filed the notice of appeal.

[5] On 19th December 2006, a judge of this court issued directions for the hearing of the application to strike out the notice of appeal. On 5th January 2007, however, the appellants applied for an order to dismiss the respondent's application to strike out. They also prayed for orders for relief from sanctions for the late filing of their application to dismiss the strike out application. They urged this court to deem that the notice of appeal was validly filed by extending the time for its filing to the date on which it was filed. The appellants justified this application on three grounds. The first was that the order of 3rd May 2006 was a final order and the rules relating to procedural appeals and the requirement for leave to appeal do not apply. The second ground stated that the appellants filed the notice of appeal within the time limited for filing it. In the third place, they stated that even if this court finds that the notice was filed out of time, the delay was not inordinate or intentional; there is a good explanation of it; the respondent has suffered no prejudice, and the appeal has a good chance of success.

My order on 23rd January

[6] These applications came before me for hearing on 23rd January 2007. After further oral submissions by counsel for the parties, I was satisfied that the order of 3rd May 2006 was not a final order. Accordingly, I issued an order striking out the notice of appeal as a nullity. The order also consequentially dismissed the appellants' application of 5th January 2007, by which they prayed for the order to dismiss the respondent's strike out application. I awarded $1,200.00 costs to the respondent. This judgment contains my reasons for this decision in accordance with my undertaking to counsel.

The applicable principles

[7] The pivotal question was whether the order of 3rd May 2006 was a final order, or whether, on the other hand, it was interlocutory or procedural. Mr. Fraser, learned counsel for the respondent, pointed out that this was also the critical question in Nevis Island Administration v La Coppropretе Du Navire J31 et al.[5] In that case I reviewed the relevant statutory provisions, to wit, section 31 of the Eastern Caribbean Supreme Court (St. Christopher and Nevis) Act[6] and Part 62 of CPR 2000. I also considered the decisions of this court in Othniel Sylvester v Satrohan Singh[7]; Pirate Cove Resorts Limited and Another v Euphemia Stephens and Others[8]; Maria Hughes v The Attorney General of Antigua and Barbuda,[9] and Astian Group Limited and Another v TNK Industrial Holdings Limited and Others.[10]

[8] I noted that under Section 31(g) of the St. Christopher and Nevis Supreme Court Act,[11] any person who wishes to appeal against an interlocutory judgment or interlocutory order must first obtain the leave of the judge or of this court, except in cases which this subsection specifically exempts from this requirement.[12] I also held that the definition of the term "procedural appeal" in rule 62.1(2) of CPR 2000 means an appeal from a decision of a judge, master or registrar, which does not directly decide the substantive issues in a claim. I further noted that the authorities revealed that this court has consistently stated a preference for the "application

---

[5] St. Christopher and Nevis (Nevis Circuit) Civil Appeal No. 7 of 2005 (29th December 2005.).
[6] No. 17 of 1975. This is identical to section 26 of the St. Lucia Supreme Court Act, Cap. 2:01 of the Revised Law of St. Lucia, 2001.
[7] St. Vincent and the Grenadines Civil Appeal No. 10 of 1992 (18th September 1995.).
[8] St. Vincent and the Grenadines Civil Appeal No. 11 of 2002 (2003).
[9] Antigua and Barbuda Civil Appeal No. 33 of 2003 (13th April 2004.).
[10] British Virgin Islands Civil Appeal No. 22 of 2003 (7th June 2004).
[11] This is in identical terms to section 26(2)(g) of the St. Lucia Supreme Court Act.
[12] These are matters in which the liberty of the subject or the custody of infants is concerned; where an injunction or the appointment of a receiver is granted or refused; in the case of a decree *nisi* in a matrimonial cause or a judgment or order in an admiralty action determining liability, and 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.

test" in order to determine whether an appeal is from an interlocutory or procedural order or from a final order.

[9] The *locus classicus* for the application test is Othniel Sylvester, in which Byron JA, as he then was, distinguished it from the "order test" as follows:

> "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.
>
> 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."

The present case

[10] Put very tersely, in the context of the present case, the order of 3rd May 2006 would be final if the application on which it was made would have determined the case even if the decision was not given for the claimant (the respondent in these proceedings). That is, the case would have been determined even if the learned judge did not enter judgment for the claimant.

[11] In this case, Mr. Fraser submitted that the order of 3rd May 2006 was not a final order because it did not substantively determine the issues of negligence or damages that the claim raised. He asked the court to note that the order specifically states that summary judgment was entered for non-compliance with case management orders of the High Court. He said that the appellants were literally out of court because the judge made the order pursuant to discretion conferred upon her by rule 15.2 of CPR 2000 and they had put forward no basis whatever to convince this court that the order was final.

[12] Mr. Fraser also asked this court to note that the appeal was out of time and the appellants must seek leave to appeal. The appellants have not done so. They have not sought relief from sanctions as they are required to do under rule 26.8(2) of CPR 2000. He said, further, that the respondent would be severely prejudiced because damages were assessed some months ago. He also indicated that the appellants did not challenge the assessment proceedings and they should not now be permitted to deny the respondent the fruits of the orders that the learned judge issued. He insisted that, in these circumstances, the notice of appeal should be struck out as a nullity.

[13] In his written submissions, Mr. Maragh noted that rule 62.1(2) of CPR 2000 defines a procedural appeal as an appeal from a decision that does not directly decide the substantive issues in a claim. He said that there were 2 issues in the claim. Quite ingeniously, I think, he stated that the first issue was liability and the second was damages. According to Mr. Maragh, liability was the substantive issue without which the issue of damages could not have been determined or assessed. He therefore concluded that the order of 3rd May 2006 was a final order because it purported to positively determine the issue of liability against the appellants.

[14] I must respectfully disagree with this submission because liability is not an issue but the result which flows from the determination of an issue or issues that arise in a claim. Negligence was the main issue in the case and there is no evidence that this was decided by the learned judge.

[15] In the second place, Mr. Maragh submitted that the Privy Council's decision in Vehicles and Supplies Limited and Another v Financial Institutions Services Limited[13] is good authority for the proposition that a summary judgment is a final

[13] [2005] UKPC 24 (28th June 2005), on appeal to the Privy Council from the Court of Appeal of Jamaica.

order. He relied on the following statement which Lord Walker of Gestingthorpe made at paragraph 22 of the judgment in that case:

> "22 Mr. Codlin submitted that an order for summary judgment was not a final order adjudicating on the merits of the proceedings. That submission involves a basic misconception. No estoppel per rem judicatam arises from an interlocutory order, or an order dismissing an action for want of jurisdiction. A judgment in default of appearance, or in default of defence, is also lacking in finality so long as it is liable to be set aside. But summary judgment in proceedings in which a defendant appears and offers a defence, but the defence is held to be wholly defective, is a final judgment on the merits."

[16] Mr. Maragh submitted that this statement is applicable in the present proceedings because the order of 3rd May 2006 was a summary judgment. However, the order does not show that summary judgment was entered on the merits of an application in which it was found that the appellants (the defendants to the claim) had no prospect of successfully defending the claim.

[17] The order specifically states that summary judgment was entered because of the appellants' non-compliance with case management orders. The appellants did not appear at that hearing. Mr. Jeannott Walters appeared holding papers for the appellants' counsel. The file shows that the appellants were absent and unrepresented at the hearing on 19th December 2005, the date on which the judge gave directions for preparation for the trial. Those directions required solicitors for the parties to file written submissions by 13th March 2005. The case was set down for trial on the 20th and 21st March 2005.[14]

[18] Mr. Maragh insisted that the affidavit, which Ms. Isabella Shillingford deposed in support of the respondent's application to strike out, appears to indicate that the learned judge considered an application by the respondent for summary judgment on its merits. He said, in effect, that it was the respondent's duty to file the notes of the proceedings before the judge.

---

[14] It is also noteworthy that the appellants did not appear in person or by counsel for the assessment of damages on 8th June 2006.

[19] It is noteworthy that the directions for the present hearing were issued on 19th November 2006. Mr. Maragh was present. Paragraph 3 of those directions required the appellants to file any application by 4th January 2007. When the appellants filed their application to dismiss the respondent's strike out application on 5th January 2007, they filed the statement of claim and other documents but not the notes of the proceedings. They made no application to bring in these Notes.

[20] I was satisfied that, as the order of 3rd May 2006 states, summary judgment was entered because the appellants failed to comply with case management orders and the order was not therefore a final order. Since the basic principle in Othniel Sylvester is that, under the application test, an order would be final only where it is made on an application which would have determined the matter in litigation for whichever side the decision was given, the statements in paragraph 22 of Vehicles and Supplies Limited[15] on the effect of summary judgment do not apply in the present case.

[21] I venture to state, further, that even if the order of 3rd May 2006 came after a substantive hearing on the application for summary judgment, it would not have been a final order under the application test. This is because had the appellants prevailed on that application, instead of the respondent, and the application was dismissed, the case would not have been determined since the court would not have entered judgment for the appellants. The case would have continued to trial. It follows that the order of 3rd May 2006 would not have been a final order, whether it was made because of non-compliance with case management orders or because summary judgment was entered after a hearing on the merits of the application.

[22] In the foregoing premises, the appellants were required to seek leave to appeal against the order. Since they did not do so but filed a notice of appeal beyond the

[15] Which are reproduced in paragraph 15 of this judgment.

time limited for seeking leave, that notice was a nullity. I struck it out as such; dismissed the appellants' application of 5th January 2006 and awarded the respondent $1,200.00 costs.

Hugh A. Rawlins
Justice of Appeal