SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.14 OF 2006

BETWEEN:

[1] JN.MARIE and SONS LTD.
[2] RICHARD JN. MARIE

Appellants/Respondents

and

Jamie St. Louis the Claimant who is a dependant minor acting by her next friend Joycelyn St. Louis of Castries, Saint Lucia but presently of 645 Vermont Street, Brooklyn 11207, New York, U.S.A.

Respondent/Applicant

Before:

The Hon. Mr. Brian Alleyne, SC — Chief Justice [Ag.]
The Hon. Denys Barrow, SC — Justice of Appeal
The Hon. Hugh A. Rawlins — Justice of Appeal

Appearances:

Mr. Mark Maragh for the Applicant
Mr. Horace Fraser for the Respondent

2007: March 1;
April 16.

JUDGMENT

[1] ALLEYNE, C.J. [AG.]: On 27th August 2000, Anthony Gilbert, the father of the infant claimant/applicant Jamie St. Louis, was shot and killed as he participated in a mock raid on the gas station owned and operated by the first named respondent. The second named respondent, the servant and agent of the first named respondent (hereinafter together called the respondents) fired the fatal shot. The mock raid was organized and mounted by the deceased's employer, a security company, to test the security arrangements concerning the gas station.

[2] The applicant, by her next friend, filed a claim in negligence against the security company and the first and second respondents on 27th August 2003. On 18th and 19th March 2004 respectively, Marcus-Peter Foster, legal practitioner for the first and second respondents, filed defenses denying the claim, and in particular denying negligence. On 24th February 2005 the applicant filed an amended claim form which differed from the original only in respect of the capacity in which Joycelyn St. Louis, purported to be acting, that is to say as next friend of the infant claimant/applicant, rather than 'for and on behalf of the minor Jamie St. Louis and as Administratrix of the estate of the deceased.'

[3] In due course it appears that the applicant applied to enter summary judgment against the respondents on the claim. The respondents resisted the application on the grounds that the action was prescribed by virtue of Article 2122 of the Civil Code of St. Lucia, Chapter 242 of the Revised Laws of St. Lucia, which provides a prescription of three years in the case of damages resulting from delicts.

[4] Article 2129 of the Code provides that in such cases 'the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired.'

[5] In their written submissions in opposition to the application for summary judgment, the respondents relied on the case of Walcott v Serieux[1] in which it was held that under Article 2129:

> both the right and the true remedy are extinguished and therefore there is no question of a party being called upon to choose whether he would plead the defence of limitation. As long as the evidence in the case discloses that the period of limitation has expired, the judge has no discretion.

[6] The respondents argued that the claimants/appellants were prescribed from attempting to alter the 'nomenclature' of the claimant and the representative action

[1] (1975) Civil Appeal No. 2 of 1975.

was 'born dead' as letters of administration had not been obtained when the writ was filed.

[7] It appears that trial dates were set for 20th and 21st March 2006, and the matter was set down for 3rd May 2006. On that occasion, counsel appeared for the claimant, the applicant in this present application. Counsel also appeared for the third named defendant, the security company. The order records, in relation to the respondents;

> No appearance for the First and Second named Defendants, Mr. Jeanot Walters holding papers for Marcus Peter Foster of counsel for the First and Second named Defendants.

[8] At the hearing of the application for summary judgment on 3rd May 2006, the learned judge had before her the written submissions of counsel for the respondents, Marcus–Peter Foster, filed on 22nd March 2006 in response to the application for summary judgment. These written submissions relied on the issue of prescription and cited Articles 2122 and 2129 of the Civil Code as well as the case of Walcott v Serieux *supra.* The judge also had the written submissions in response to Mr. Foster's submissions, filed by the claimant's legal practitioner on 27th April 2006.

[9] In the presence of all counsel appearing, summary judgment was entered for the claimant 'due to non compliance of Case Management Orders'. Costs were awarded and the matter was adjourned to a fixed date, 8th June 2006, for hearing on damages and costs. On that date, counsel for the claimant and the third defendant appearing, counsel for the first and second defendants (the respondents herein) being absent, an order was made for the first and second named defendants to pay to the claimant damages assessed at $61,751.20, and costs of $15,625, and costs to the third named defendant of $5,000.00.

[10] The claimant had filed an affidavit on 31st May 2006 affirming four abortive attempts to serve the order of 3rd May on Mr. Foster, legal practitioner for the

applicants, and that service was effected on the applicants personally. The learned judge could not be faulted for proceeding in the absence of the respondents and their counsel.

[11] On 16th June 2006 the first and second named defendants filed a notice of appeal against the order for summary judgment dated 3rd May 2006. The notice of appeal was filed without leave. The claimant on 1st November 2006 filed an application supported by affidavit seeking an order to strike out the notice of appeal on the ground that the purported appeal is a procedural appeal requiring leave of the court, and that leave had not been sought or obtained. The matter came before Rawlins J.A. on a single judge hearing, and by his order dated 8th February 2007, Justice of Appeal Rawlins held that the order appealed against was not a final order, that leave to appeal was needed in compliance with the provisions of the Eastern Caribbean Supreme Court (St. Lucia) Act section 26 which provides that no appeal shall lie without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a judge, with certain specified exceptions, none of which appear to be germane in this case. The present proceedings result from an application by the applicant to strike out a notice of appeal filed by the respondents without leave, which application was heard by a single judge pursuant Part 62.15 of the Civil Procedure Rules 2000, and an application to the court pursuant to Part 62.16(4) by the respondents to discharge the order of the single judge that the notice of appeal be struck out as a nullity.

[12] Subsection (2)(g)(iv) of section 26 of the Supreme Court Act [2]provides for the authority having power to make rules to prescribe for additional exceptions to the requirement for leave to appeal in such other cases as are in its opinion of the nature of final decisions.

[2] Eastern Caribbean Supreme Court (Saint Lucia) Act Chap. 2.01, Laws of Saint Lucia 2001 edition.

[13] The application to strike out the appeal proceeds on the basis that the appeal is a procedural appeal within the definition of Part 62.1(2) of the Civil Procedure Rules 2000 and as such is not a final judgment, and therefore requires leave to appeal. Learned counsel for the intended appellants/respondents counter that this is not a procedural appeal, and that the order in contention is a final order.

Whether the appeal is a procedural appeal

[14] Part 62.1(2) of CPR 2000 defines "procedural appeal" to mean an appeal from a decision of a judge, master or registrar which does not directly decide the substantive issues in a claim, with certain exceptions which do not appear relevant in the context of this case. Thus, the first question to be determined is whether the order decided the substantive issues in this case.

[15] The claimant's amended statement of claim in the case alleged that the first defendant by its servant or agent the second defendant negligently used and fired a firearm and thereby shot and killed Anthony Gilbert, the father of the infant claimant, who, in his lifetime, was the sole supporter of the infant claimant. Particulars of negligence were pleaded. Damages resulting from the alleged negligence were also claimed. Thus the substantive issues in the case were the questions of negligence, and the quantum of damages.

[16] The learned judge's decision from which the appellant/respondent seeks to appeal was not based on a determination of these issues. The order itself declares that it is made 'due to non compliance of Case Management Orders'. It appears on the record, therefore, that the order was made pursuant to the Court's powers under Part 26.7 of CPR 2000. The order was a sanction for non compliance with case management orders, and was not a decision on the merits of the claim. Thus it cannot properly be said that the order directly decided the substantive issues in the case. The appeal is clearly a procedural appeal within the provisions of Part 62.1(2) of CPR 2000.

Requirement of leave to appeal

[17] As indicated earlier, by the Supreme Court Act leave is required to appeal from any interlocutory judgment or order of the High Court.[3]

[18] It has been authoritatively decided by this court that an order made on an application which would not necessarily bring an end to the proceedings, depending on the decision which follows the application, would be an interlocutory, and not a final, order. The locus classicus on this issue in this jurisdiction is the case of Othneil Sylvester v Satrohan Singh[4], 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."

[19] Learned counsel for the applicant drew the court's attention to the case of White v Brunton[5] as an exception to the application rule. Counsel submitted that in the case of a split trial, where the issues of liability and of damages are tried separately, a decision on liability is a final decision, and no leave to appeal therefrom is needed. However, this case is not helpful in the present context. in the present case, there was no trial of the issues of negligence establishing liability, from which an appeal without leave could be brought, thus the *ratio decidendi* in the Brunton case is of no application in this.

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[3] Eastern Caribbean Supreme Court (St. Lucia) Act CAP 2:01, S.26.
[4] St. Vincent and the Grenadines Civil Appeal No. 10 of 1992.
[5] [1984] 1Q.B. 570, 573.

[20] Learned counsel for the applicant also sought to rely on the Privy Council decision in Vehicles and Supplies Ltd. et al v Financial Institutions Services Ltd.[6] I am of the view, however, that that case is clearly distinguishable from the present, and does not support counsel's submission. Their Lordships made it clear, in paragraph 22 on which learned counsel relies, that they were addressing a situation in which 'a defendant appears and offers a defence, *but the defence is held to be wholly defective'.* Their Lordships held such a judgment to be a final judgment on the merits. This is a fundamentally different proposition from the submission that a summary judgment entered as a sanction for non compliance with orders of the court is a final judgment on the merits. I am unable to agree with learned counsel's submission.

[21] As I pointed out in paragraph 16 of this judgment, the order for judgment was made for non-compliance with court orders, pursuant to the court's powers under Part 26.7 of CPR 2000. Although the judgment was referred to as a summary judgment (which term has been consistently used in relation to the judgment), it was not made pursuant to Part 15 of the Rules. An order such as the one which is the subject of these proceedings is not such an order as is dealt with by Phipson on Evidence[7] to which learned counsel has drawn attention. Part 26.8 of CPR 2000 makes provision for an application for relief from sanctions in relation to an order such as the order made in this case, such application to be made to the court that delivered the order. Thus the order is not 'final' in the sense referred to in Phipson, or in the judgment of Lord Diplock in The Sennar (No. 2)[8], also relied on by counsel. It is misleading to refer to the judgment under discussion in this case as a summary judgment, at any rate if that expression is taken to mean a judgment obtained under Part 15 of CPR 2000.

[22] Clearly, the appellant needed leave to file an appeal in this matter.

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[6] [2005] UKPC 24 (Jamaica)
[7] Fifteenth Edition, paragraph 38-05.
[8] [1985] 1 W.L.R. 490, 494 B.

Conclusion

[23] The inescapable conclusion from the foregoing is that, notice of appeal having been filed without leave, the purported notice of appeal is a nullity and there is no appeal before the court. The application of the applicant Jamie St. Louis by her next friend Joycelyn St. Louis that the purported notice of appeal be struck out is granted, and the purported notice of appeal is accordingly struck out with costs to the said applicant Jamie St. Louis by her next friend Joycelyn St. Louis. I would award costs in relation only to the application to set aside the purported notice of appeal, but bearing in mind the fact that the matter was argued before a single judge of the court, and submitted to review by the court. This order is made pursuant to Part 64.6(3)(b). I am satisfied that an order under Part 64.6(3)(c) would not be more practicable, requiring, as it would, an assessment of the applicant's costs. Such an order would be time consuming and involve the parties incurring additional costs.

[24] The costs awarded on the judgment was $15, 625.00. Costs pursuant to Part 65.13 on a full appeal would be limited to $10,416.67. I would allow 33% of that amount, rounded off to the sum of $3470.00.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Denys Barrow, SC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal