BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL
(CIVIL)

CIVIL APPEAL NO. BVI 27 OF 2006

BETWEEN:

LYRA FARRINGTON
(Administratrix of the Estate of
Relston Chauvington Farrington, deceased)

Appellant/Claimant/Respondent

and

THE ESTATE OF ALEC MATHAVIOUS (deceased)

First defendant

and

THE BRITISH VIRGIN ISLANDS ELECTRICITY CORPORATION

Second defendant/Applicant

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Ms. Tana'ania Small-Davis for the Respondent/Applicant
Ms. Cheryl Richards for the Appellant/Respondent

2007: January 15;
May 14.

JUDGMENT

[1] GORDON, J.A.: This application to strike out an appeal raises yet again the issue of whether an order is a final order or an interlocutory order. If the former, then an appeal may be launched as of right, if the latter leave is required.

[2] The background facts can be briefly stated. Relston Farrington, the deceased, was an employee of the second defendant/applicant (hereafter "the applicant") and, during the course of his employment was a passenger in a motor vehicle owned by the applicant and driven by Alec Mathavious who was also in the employ of the applicant. As a result of the negligence of Mathavious there was an accident in which both the deceased and Mathavious died. The issue of liability was settled by way of a judgment in default of defence in favour of the appellant/claimant/respondent (hereafter 'the respondent') and the quantum of damages was well on the way of being settled when an issue arose as between the respondent and the applicant as to whether the proceeds of an insurance policy carried by the applicant to cover employer's liability which were paid to the respondent should be deducted from the agreed damages.

[3] An application was made by the applicant seeking direction on the issue. By an order dated October 11, 2006 the learned Master ruled as follows:

> "(A) Insurance payments to be deducted from payment to the Claimant;
>
> (B) Costs to the Second Defendant [applicant herein] of $1,750.00 for the application"

It is from that order the respondent has sought to appeal by filing a notice of appeal dated and filed October 20, 2006. No leave to appeal was applied for nor was any given.

[4] Rawlins JA in Nevis Island Administration v La Coppropretе Du Navire J31 et al[1] at paragraph 5 set out a number of cases in which this court has considered the issue of interlocutory as against final judgments. I think it would be superfluous to recite the learning in the various cases, save to remark that this court has, in the past, preferred the application test rather than the order test. In this case, both tests would result in the conclusion that the order being appealed is

[1] Civil Appeal No. 7 of 2005 delivered December 2005

interlocutory. As the order does not fall within the exceptions set out in section 30 (4) of the West Indies Associated States Supreme Court (Virgin Islands) Ordinance Cap 80, then leave to appeal is required.

[5] As decided in Sylvester v Singh[2], a notice of appeal filed without leave in a matter requiring leave is a nullity. The applicant is awarded the costs of the application in the sum of $1,500.00.

Michael Gordon, QC
Justice of Appeal

I concur.

Denys Barrow, SC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal

[2] Civil Appeal No. 10 of 1992 SVG