ANGUILLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.3 OF 2005

BETWEEN:

OLIVER MCDONNA

Appellant

and

BENJAMIN WILSON RICHARDSON

Respondent

Before:
The Hon. Mr. Denys Barrow, SC — Justice of Appeal

Appearances:
Hodge's Law Office for the Appellant
Joyce Kentish and Associates for the Respondent

2007: June 29.

DECISION

[1] BARROW, J.A.: This application by the respondent to strike out this appeal for having been brought out of time is another litigation event concerning the ownership of land which has been disputed up to the Court of Appeal and, thereafter, was disputed in a new round of litigation all the way up to the Privy Council, when a new claimant took up the cudgel. The High Court claim from which yet another claimant brought this appeal was, therefore, the sixth litigation event regarding ownership of the land and this appeal is the seventh.

Strike out of the claim

[2] In the High Court Edwards J. acceded to an application by the respondent to strike out the claim as an abuse of process, indicating that the issue of the ownership of

the land had been conclusively determined in earlier proceedings, based on a deed of 1890 as the root of title. She held that the latest attempt before her, by another member of the same family that had previously claimed ownership of the land as against the registered owner, a member of a different branch of the family, this time based on a newly discovered deed of 1826, was an abuse of process. She therefore struck out the claim on the respondent's application at an interlocutory stage.

Application to strike out the appeal

[3] The judge gave her decision on 29 December 2004. The claimant in the court below appealed on 17th February 2005. The appellant filed skeleton arguments and applied for case management directions in October 2006. Then on 29th November 2006 the respondent took the point, in an application filed in this court, that the appeal was filed 7 days after the 42 days for appealing had expired. The respondent asked that the appeal be struck out. The appellant resisted that application and submitted that in any event this was an appropriate case for the court to either waive his non-compliance with the time deadline or extend time, which he asked in his affidavit that the court should do.

[4] In the course of considering the written submissions of the parties on the respondent's application to strike out the appeal because it was filed out of time the question arose whether this was an appeal from an interlocutory order and I requested submissions from the appellant on the issue. If the appellant appealed from an interlocutory order he needed leave to appeal. Section 29 (4) of the Eastern Caribbean Supreme Court (Anguilla) Act[1] provides:

> "No appeal shall lie without leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given except in the following cases –
>
> (a) Where the liberty of the subject or the custody of infants is concerned;
>
> (b) Where an injunction or the appointment of a receiver is granted or refused;

[1] Chapter E 15, Revised Statutes of Anguilla

(c) In the case of a decree nisi in a matrimonial cause or a judgement or order in an admiralty action determining liablility;

(d) in such other cases to be prescribed by the rules of court, as may … be of the nature of final decisions."

The appellant did not obtain leave to appeal.

[5] However, counsel for the appellant contended the appeal fell within the exception in subsection (4) (d). Counsel submitted that the Order from which the appellant appealed was a final and not an interlocutory order within the meaning of the section. Counsel submitted it is clear from the terms of the exception and from the provisions of CPR 2000 that, for appeal purposes, an order is not an interlocutory order if it determined substantive issues in the case.

Not a procedural and so not an interlocutory appeal

[6] The provision of the rules to which counsel referred was rule 62.1 which states that "procedural appeal" means an appeal from a decision which does not directly decide the substantive issues in a claim. Counsel relied on the observations in Maria Hughes v The Attorney General of Antigua and Barbuda[2] and Nevis Island Administration v La Copropriete Du Navire J31[3] to assert that it is settled that the term "procedural appeal" is equivalent for the purposes of the prohibition in s 29(4) of the Act to an appeal from an interlocutory order.

[7] Counsel's core submission, flowing from the definition that an appeal from an order that decided a substantive issue in a claim was not a procedural appeal, was that if an appeal was not a procedural appeal it was not an interlocutory appeal[4], because the latter is the equivalent of the former. Therefore, according to this reasoning, the present appeal which was not a procedural appeal, and hence was not an interlocutory appeal, did not need leave to be brought.

[2] Civil Appeal No. 33 of 2003
[3] Civil Appeal No. 7 of 2005
[4] For convenience I will refer to an appeal from an interlocutory order or judgment as an interlocutory appeal

[8] It is true that in both of the cases to which counsel referred the single judges of this court who decided them treated the term procedural appeal as equivalent to an appeal from an interlocutory order. But in both cases the judges decided, as expressed by Rawlins JA in the Nevis Island case summarising the decision of Gordon JA in the Maria Hughes case, that:

> "the term "procedural appeal" … is equivalent to an appeal from an interlocutory order, and similarly requires leave as a prerequisite to the filing of a Notice of Appeal."[5] (Emphasis added.)

As that observation shows, these decisions both rested on the premise that a procedural appeal was equivalent to an interlocutory appeal in needing leave to be brought. Counsel's way of dealing with that statement by Rawlins JA was to argue that it was not necessary for the decision in the Nevis Island case and, for that reason, was not binding. Counsel, therefore, persisted in his submission to the effect that an interlocutory appeal is equivalent to a procedural appeal and since a procedural appeal is definitionally one from a decision that does not decide substantive issues, an order that decides substantive issues, for the purposes of the section that requires leave, is not an interlocutory order.

The nature of procedural appeals

[9] These submissions call for a closer examination of the rules in Part 62 dealing with procedural appeals to identify the true nature of procedural appeals and the purpose for creating this category of appeals. The first reference is in the definition section, r 62.1 (2), and it reads:

> "procedural appeal" means an appeal from a decision of a judge, master or registrar which does not directly decide the substantive issues in a claim but excludes –
>
> (a) any such decision made during the course of the 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;

[5] Nevis Island Administration v La Copropriete Du Navire J31(Civil Appeal No.7 of 2005) at p.11

(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."

[10] The next reference is in r 62.5, which deals with "Time for filing notice of appeal". This rule states that in the case of a procedural appeal the time for filing the notice of appeal is within 7 days of the date the decision was made, or if leave is required within 14 days of the grant of leave or, in the case of any other appeal, within 42 days of the date when the order or judgment appealed against was served on the appellant. This rule creates three time limits for the three categories of appeal of which this particular rule speaks: procedural appeals, appeals for which leave is required, and other appeals.

[11] Rule 62.9, which is headed "Action by court on receipt of notice of appeal", contains the next reference. This rule states that upon the notice of appeal being filed the court office must forthwith, if it is a procedural appeal appoint a date, time and place for the appeal and give notice to all parties. In contrast, if the appeal is from a High Court judgment the court office must arrange for the High Court to prepare a transcript of the notes of evidence and of the judgment and notify all parties when these are prepared. A broadly similar provision for the preparation of the appeal papers is made for appeals from the Magistrate's Court. It will be seen that a clear difference is established for procedural appeals, which are sent for hearing immediately upon the notice of appeal being filed, and other appeals, which must go through the extended procedure of preparation of transcripts, record of appeal and skeleton arguments.

[12] A comparison of the last two rules shows that appeals are not consistently categorised even within Part 62 but are variably categorised according to the purpose for which the categorisation is made. Thus, for the purpose of stating time

limits for filing notices of appeal, rule 62.5 refers to procedural, interlocutory and other appeals. In contrast, for the purpose of stating what action the court office must take on receipt of notices of appeal, rule 62.9 refers to procedural appeals, appeals from High Court judgments and appeals from the Magistrate's Court. Other categorisations of appeals that appear in the rule are appeals from a tribunal, appeals by way of case stated, appeals for which other provision is made by the rules[6] and summary appeals[7]. It would be a mistake, in my view, to think that discrete rather than sometimes overlapping categories are created. Thus, procedural and interlocutory appeals may be overlapping categories in the same way that both these categories overlap the category of High Court appeals.

[13] To continue, the next references are contained in a dedicated rule (r. 62.10), headed "Procedural appeal. That rule provides that in the case of a procedural appeal the appellant must file and serve written submissions in support of the appeal with the notice of appeal, that the respondent may within 7 days of receipt of the notice of appeal file and serve his submissions and that the general rule is that a procedural appeal is to be considered on paper by a single appeal judge. Consideration of a procedural appeal must take place not less than 14 days nor more than 28 days after the filing of the notice of appeal. The rule provides that the single judge may permit parties to make oral submissions and may direct the appeal to be heard by the court. In the event of an oral hearing it must take place within 42 days of the filing of the notice of appeal.

The object of creating the category

[14] Save for one other reference, which says that the rule relating to the preparation of the record of appeal does not apply to procedural appeals, those are all the references to procedural appeals. The purpose of those provisions, it seems to me, is to create a category of appeals from decisions that do not directly decide the substantive issues in a claim and to provide for a very short time – a mere 7

[6] These three categories appear in rule 62.1 (1)
[7] rule 62.6

days -- for filing a notice of appeal against such decisions. The key provision is that “forthwith” - meaning without delay or immediately - upon receipt of the notice of appeal the court office must set a date for the hearing of a procedural appeal and notify the parties. The reason for creating a category of procedural appeals, it seems to me, is to create a fast track for these appeals to be heard not later than 28 days after they are filed. The provision for such an appeal to be heard by a single judge greatly facilitates early hearing since it should be easier to deploy a single judge as opposed to three judges.

[15] The short time within which these appeals are to be heard and the limited amount of preparation that is possible in that time make it appropriate to limit the type of matters that are to be given this speedy hearing. Thus, decisions that directly decide the substantive issues between the parties are excluded. So too are decisions made during the course of trial, which recognizes that if an issue survived the course to trial it was because it was a substantive issue. The other excluded decisions all possess sufficient gravity to make them unsuitable for the speedy procedure: orders for committal or sequestration of assets, an order granting relief in judicial review proceedings, an order granting or refusing an application to appoint a receiver and orders under Part 17 granting interim remedies such as a freezing order, an interim declaration or injunction, an order to deliver up goods, an order made before proceedings are commenced or against a non-party, and a search order.

[16] On that analysis the object of creating a category called procedural appeals is to channel certain matters on to a fast track for early disposal at the appellate level and not to create an equivalent category to interlocutory appeals. I can see in the rules no purpose for doing the latter. In contrast, a significant purpose is served by placing appeals that are likely to be uncomplicated on a fast track for early determination, on paper, by a single judge. Consistent with the overriding objective such a course is proportional and uses the court’s principal resources of time and judicial personnel appropriately. The concept of fast track trials is fully developed

in the English CPR[8], although the term is used for lower court and not appellate proceedings. However, the same purpose is served in relation to appeals in the English practice by establishing an elaborate system that provides for the destination of appeals,[9] in many instances to a single judge and in some instances to two judges, rather than to a full, three-judge panel.

Not equivalent

[17] Decisions from which a procedural appeal lies include only interlocutory and not final orders. However, this still does not make the two categories equivalent, far less synonymous, as is seen from the fact that it is not all interlocutory orders that would be orders from which a procedural appeal lies. Thus, an interim injunction is a classical interlocutory order but an appeal from a decision granting an interim injunction under Part 17 is expressly stated to be excluded from the meaning of a "procedural appeal". Other examples of interlocutory orders from which interlocutory appeals but not procedural appeals lie are a freezing order (formerly a 'Mareva" injunction) and a search order (the former Anton Piller order). Therefore, even if all orders from which procedural appeals lie are interlocutory orders[10] not all appeals from interlocutory orders are procedural appeals. Expressed another way, procedural appeals are a subset of interlocutory appeals. This, because the number of orders comprehended in the category "procedural appeals" is not the same as the (greater) number of orders comprehended in the category "interlocutory appeals".

[18] I would conclude on this aspect by observing that counsel's submission that a procedural appeal is equivalent to (and, implicitly, that that term qualifies the meaning of what is) an interlocutory appeal does not withstand close scrutiny. In any case, as Rawlins JA stated in the Nevis Island case[11], a procedural appeal needs leave to be brought. In my view this is confirmed by the absence of any

[8] See the English Part 28.
[9] Practice Direction 52, paragraph 2A.1 and Table 1
[10] This is only a hypothesis since the matter has not been canvassed in the submissions of counsel.
[11] See paragraph 8, above.

provision in Part 62 that exempts procedural appeals from the requirement in s. 29 (4) of the Act that interlocutory appeals can only be brought with leave. That conclusion renders irrelevant to the consideration of whether leave was needed in this appeal the provisions in the rules concerning procedural appeals.

Interlocutory or final?

[19] With the matter of procedural appeals out of the way I turn to the question whether the present appeal was against an interlocutory order and could only have been brought with leave, or was against a final order for which no leave was required. This court has repeatedly pronounced that this question is to be decided by applying the application test as opposed to the order test.[12] The application test says that the court considering the question whether an order was interlocutory or final must look at the application pursuant to which the order was made. If, whichever way the application was decided that decision would have brought an end to the issue in litigation, the decision given on that application is a final order. If, on the other hand, the proceedings would not have ended if one side as opposed to the other side won, the order is not a final order but is an interlocutory order.

[20] In this case, **if** Edwards J had decided the application to strike out the claim in favour of the appellant (the claimant below) – that is, if she had refused to strike out the claim – the proceedings would **not** have ended. Therefore, because the case would not have ended if one side but not the other had won on this application, the order pronounced on the hearing of this application to strike out the claim was an interlocutory order. It does not matter that the effect of the Order that Edwards J made was in fact to bring an end to the proceedings. The effect matters only under the order test.[13] Under the application test it is recognized that

[12] See Othneil Sylvester v Satrohan Singh St. Vincent and the Grenadines Civil Appeal No. 10 of 1992 (judgment delivered 18th September 1995); Pirate Cove resorts Limited v Euphemia Stephens, St. Vincent and the Grenadines Civil Appeal No. 11 of 2002 (judgment delivered 2003); and JnMarie & Sons Ltd v Jamie St. Louis, St. Lucia Civil Appeal No. 14 of 2006 (judgment delivered 2007)

[13] According to the order test, an order is final if it finally determines the issue in litigation or disposes of the rights of the parties; per Byron CJ (as he became) in Othneil Sylvester v Satrohan Singh (supra).

it will often be the effect of an order to bring an end to the proceedings. The application test does not look at the effect of the order; the application test looks at the outcomes that were possible on the application. To repeat, the test is whether a decision of the application, whichever way it went, would have finally determined the issue between the parties. As I have said, for the reason that if the application had been decided in favour of the appellant it would not have brought an end to the proceedings, the Order given in this case was an interlocutory order. The present appeal that was brought against that order, without leave, is a nullity, as Rawlins JA decided in the Nevis Island case[14], following a long line of authority.[15]

Application for relief from sanctions

[21] Counsel for the appellant submitted that, if the appellant needed leave to appeal then the court ought to grant the appellant relief from sanction under r 26.8 or, alternatively, extend the time for the appellant to seek leave to appeal under rule 26.1(2)(k). Counsel pointed to the decision of the English Court of Appeal in Keen Phillips (a firm) v Field[16] that the court may extend time or grant relief from sanction notwithstanding that no formal application has been made for relief.

[22] In that case the intending appellant sought permission to appeal and the judge directed that the intending appellant lodge a transcript in court by a stated day and in default permission was refused. Through no fault of the appellant the transcript was received and lodged one day late. At the hearing of the permission application before the judge, as counsel for the appellant was about to apply for an extension of time and relief from sanction the judge stopped her and heard opposing counsel who took the objection that the judge's order that the application for leave stood dismissed had taken effect. After hearing counsel the judge extended time for lodging the transcript, gave permission to appeal and went on and allowed the appeal. The respondent appealed on the ground that the judge had no jurisdiction

[14] At [21] and [22]
[15] Cited at [5]
[16] [2006] EWCA Civ 1524

to extend time without an application for an extension of time or for relief from sanction first having been made.

[23] Jonathan Parker LJ, with whom Moore-Bick LJ fully concurred, treated the exchange between counsel for the appellant and the judge as a clear indication that counsel wished to make an application. The Lord Justice decided that an application did not need to be made in writing. But he did this on the specific basis that the Practice Direction supplementing Part 23 of the English CPR, at paragraph 3 (4), expressly gave the court power to dispense with the rule that an application must be made in writing.[17] That paragraph actually supports the general rule by emphasising that an application must be made in writing save in excepted cases, one of which is "with the permission of the court". In that case counsel were before the judge and the judge decided to proceed on the basis that there was an oral application before him and decided he would permit it to be heard. The judge heard counsel for the respondent in opposition to the application and thereafter granted the application.

No proper application

[24] Those are far different facts from those that exist in the instant case. Alerted to the court's concern that this appeal may have needed leave before it could be brought and knowing that no leave had been obtained, the appellant chose not to make (a) an application for an extension of time for applying for leave to appeal and (b) an application for leave to appeal. Instead, counsel submitted "the Appellant is entitled to relief from sanction under CPR, r.26.8, or alternatively the Appellant is entitled to the Court's indulgence under CPR, r.26.1 (2)(k) in extending the time for compliance with that requirement."

[25] With respect, this is a misguided approach. It is not for counsel to tell the court in his submissions what the appellant is entitled to. The appellant needed to make a proper application for the extension and leave he needs. That meant making an

[17] At paragraph 23

application in writing, stating grounds for the application, and supporting it by evidence on affidavit. The notice of application needed to be served on the other side to give them an opportunity of contesting the application. Where there is an oral hearing, such as was conducted in Keen Phillips, depending on the facts and the material before him a judge may properly permit an application to be made orally. On a paper hearing that course is not available. In any event, even if fairness and the proper conduct of the proceedings allowed this court to permit the application to be made in counsel's submissions (which would be an extraordinary course, in my view), it is for the court to so permit as a matter of the exercise of a judicial discretion. It is not for counsel to decide that this is how the application will be made.

[26] In this case, even if the "application" in the submissions could be treated as properly made the crucial application has still not been made. The appellant needed to apply for leave to appeal. This is not a mere formality or a requirement that needs only perfunctory treatment. On an application for leave to appeal the applicant needs to show that he has a real prospect of success. It is sufficient for me to say that such a prospect does not obviously appear and I would need to be persuaded of its existence.

Relief in a case of nullity

[27] But there is an even more fundamental problem with the "application" for relief from sanction. As I have found, the appeal is a nullity. There can be no relief from that consequence. The position may be better appreciated by contrast with the position of an appeal filed out of time. As counsel for the appellant submitted, such an appeal is an irregularity which the court has jurisdiction to cure, as the English Court of Appeal pronounced in Southern and District Finance v Turner.[18] The critical difference between filing an appeal out of time and filing an appeal without leave is that in the one case the right of appeal exists and an appellant's failure to appeal in time is an irregularity. The court can extend time and cure the

[18] [2003] EWCA Civ. 1574

irregularity.[19] In the Southern case counsel who opposed the grant of the extension of time properly conceded that the court had the power to extend time[20].

[28] In the other case no right of appeal exists. The "appellant's" failure to obtain leave to appeal leaves him debarred by the language of s 29 (4) of the Act: "no appeal shall lie". The Court of Appeal is a creature of statute and an appeal to this court may be made only where statute confers the right to appeal. An appeal cannot exist unless a statute permits it to be brought. It is for this reason that the notice of appeal filed in this case is a nullity. A nullity cannot be cured or retrospectively validated. The Belize Court of Appeal in Henderson v Archila[21] expressed the proposition thus:

> "… no appeal proceedings can be commenced until leave is granted. Any notice which may have been filed without leave being first obtained is of no effect and is completely valueless and void. It cannot be revived by the subsequent granting of leave."

Accordingly, there can be no relief from sanctions. The appeal must be struck out.

[29] I award the costs of the application to strike out to the respondent in the sum of $1,000.00.

Denys Barrow, SC
Justice of Appeal

[19] Under the English rule 3.10. The equivalent in CPR 2000 is r. 26.9, which gives the court a general power to rectify matters where there has been a procedural error.
[20] Paragraph [30]
[21] (1983) 1 Bz. LR 374 at 377