BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.5 OF 2007

BETWEEN:

EMPLOYERS INTERNATIONAL AND OTHERS

Applicants/Defendants

and

BOSTON LIFE AND ANNUITY COMPANY LTD.

Respondent/Claimant

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal
The Hon. Mde. Ola Mae Edwards	Justice of Appeal [Ag.]

Appearances:

Mr. Martin Kenny with Ms. Anthea Smith for the Appellant
Mr. Michael J. Fay for the Respondent

2007: June 6;
July 4.

JUDGMENT

[1] EDWARDS, J.A. [AG.]: By application for leave to appeal filed on the 10th April, 2007 the applicants seek permission to appeal the case management order of the master made on the 28th March, 2007.

[2] There were 3 applications before the master on this date:

(i) An application filed on the 7th March 2007 by the applicants' lawyers seeking an extension of time to the 15th March 2007, to file and serve their affidavit evidence and skeleton argument for the summary hearing on the 3rd April 2007;

(ii) An application by the respondent's lawyers filed on the 9th March 2007 for an order debarring the applicants from filing evidence and/or skeleton argument in response to the respondent's claim;

(iii) An application for an adjournment of the hearing of the application (i) and (ii), filed by the applicants' lawyers on the 22nd March, 2007."

[3] The master heard these applications in the absence of the 2 Queen's Counsel Dr. J.S. Archibald and Mr. Sydney Bennet, who have personal conduct of the applicants' case. Ms Anthea Smith a junior counsel in their chambers was present at the hearing. The following order was made by the master.

[4] It is ordered that:

1. The defendants' application for an extension of time to file their evidence and submissions is dismissed;
2. The defendants are to file and serve submissions with authorities by close of business on 27th March, 2007;
3. It the defendants fail to file and serve their submissions at the close of business on 27th March, 2007, the defendants are debarred from making oral submissions at the hearing on 3rd April 2007;
4. The hearing date of the substantive matter on 3rd April 2007 is retained."

[5] On the basis of the above the applicants seek leave to challenge this order of the master on the following grounds:

> "(1) The learned master was wrong in refusing the request of counsel for the applicants at the hearing on 26th March 2007 to forthwith file the applicants' affidavit evidence which was in the possession of counsel for the applicants;
>
> (2) The learned master was wrong in law in refusing counsel's oral request before him for an extension of time to file and serve the applicants' evidence and skeleton arguments forthwith or by the next day when he considered that such extension would necessarily have resulted in an adjournment of the date 3rd April 2007, already fixed for hearing of the application for summary judgment. The master ordered that the skeleton argument be filed the next day (which was done) but he refused to order filing of the available evidence forthwith even though the claimant's counsel admitted having some of the defendant's evidence in hand from another source;

(3) The learned master's refusals mentioned at (1) and (2) above denied the applicants the opportunity to file evidence, including the evidence of Brad Barros which Counsel, Mr. Michael Fay for the respondent admitted at the hearing on 26th March 2007, that he had in his possession; and such refusal severely handicapped and prejudiced the applicants in opposing the claimant's application for Summary Judgment.

(4) The learned master was unreasonable to find that Dr. J.S. Archibald, QC one of the senior counsel for the applicants need not have left the BVI from Sunday 25th March 2007 in order to be in the Privy Council on 29th March 2007 and that he could have left the Territory on the afternoon of Monday 26th March 2007 in the same way as Mr. Michael Fay, Counsel for the opposing party in the Privy Council, without himself being in a position to know the difficulties attendant in obtaining airline tickets for Dr. Archibald to reach London in sufficient time for prehearing conferences with U.K Solicitors;

(5) The learned master was wrong in law to speculate on this matter of Dr. Archibald's flight schedule to London after junior counsel indicated to the master that she was unable to say why Dr Archibald had to leave the BVI on Sunday 25th March 2007

(6) The learned master's order was a clear injustice against the applicants and was contrary to the CPR overriding objective to deal justly with the case."

[6] The application for leave to appeal came before a single judge on the 29th May 2007, who ordered that it be listed for the sitting of the Court in the British Virgin Islands during the week of 4th June 2007 for hearing by the FULL COURT OF APPEAL in accordance with CPR 62.2. On the 6th June 2007 we heard the arguments of counsel for the parties. The application was robustly opposed by learned counsel, Mr. Fay. We reserved our decision, and promised to deliver our decision in writing. As promised we now deliver our decision.

[7] The applicants are 57 of the 63 defendants in claim No. BVIHCV 2006/0076 filed by the respondents, seeking declarations: (i) that a policy of Insurance has been terminated by the respondent; (ii) that the respondent is not liable to repay to any of the defendants any part of the premium, further or other relief; costs. The majority of the defendants are residents overseas and/overseas companies. The

law firm of J.S. Archibald & Co. acknowledged service on behalf of 57 of the defendants (the JSA defendants) who are the applicants herein, excluding numbers 1,2,28,31,33 and 52. On the 26th July 2006 the applicants filed a defence to the claim. On the 24th November 2006, the respondent filed an application for summary judgment against the applicants and 5 of the other defendants numbers 1,2,28,31 and 52.

[8] The summary judgment application was listed before the master at the case management conference on the 24th November 2006. On this day the Master fixed a timetable for the progress of the case. On the 9th January 2007 the applicants excluding JSA defendant No. 3, filed a counterclaim, seeking relief which included declarations: (i) that the respondent has breached the contract of Life Insurance; (ii) that the applicants are creditors in equity of the respondent; (iii) that all the premiums paid constitute money had and received by the respondent to the applicants' use; an account of all premiums received by the respondent from the applicants estimated to be in the region of US$10 million; an order for the payment to the defendants of all sums found to have been so paid as premiums, upon the taking of the account, and/or damages for breach of contract.

[9] Both the applicants and the respondent were non-compliant with the master's order made on the 24th November. While the respondent filed and served its affidavit evidence and skeleton argument for the summary judgment out of time, the applicants did not comply with the order at all Instead, the applicants filed an amended counterclaim on the 18th January, and on the 24th January 2007 the respondent filed its reply and defence to this counterclaim.

[10] It was against this background that the master on the 1st February 2007 made an order which had no sanction, directing:

> "(1) The defendants' evidence in response and skeleton argument to be filed and served on or before 6th March 2007;
> (2) The claimant's evidence in response (if necessary) to be filed and served on, or before 21st March 2007;

(3) The matter is listed for hearing by the Honourable Mrs. Justice Indra Hariprashad-Charles on 3rd April 2007."

[11] The affidavit opposing the application is from Ms. Claire-Louise Whiley, an associate of the respondent's counsel, Mr. Fay. In the absence of the master's notes or reasons for his decision, Ms. Whiley has deposed as to what transpired at the hearing prior to the making of the order by the master.

Submissions

[12] Learned counsel, Mr. Kenny has urged the Court to order that the master's notes be produced. He contends that since the master was exercising his discretion in making the order, the Rules mandate that the master ought to have applied the overriding objective. He submitted before us that based on the nature of the defence of the applicants, whereby they are challenging the policy relied on by the respondent in its claim, the fact that the matter concerned the sum of US$10 million premiums paid, the voluminous affidavits and exhibits that were in their possession, and counsel's preparedness and undertaking to file and serve the affidavit evidence by the following day, the master ought to have and did not give effect to the overriding objective in deciding on the application for adjournment and extension of time. The other submissions of counsel for the applicants seek to establish the merits of the intended grounds of appeal. Mr. Kenny maintained that the effect of the master's order was disproportionate, giving the Respondent unfair advantage, while depriving the applicants of the opportunity to present their evidence at the summary judgment hearing which took place on the 3rd April 2007. The applicants were therefore deprived of a chance to oppose the evidence of the respondent in a claim covering the issue of premiums up to approximately US$10 million, he argued.

[13] Learned counsel, Mr. Fay first contended that the application for leave to appeal is out of time. His submission has been fuelled by the following judicial statement

appearing in the unreported judgment of Gordon J.A. [Ag.] in Maria Hughes and The Attorney General of Antigua and Barbuda:[1]

> "There is no specific rule stating within what period an application for leave must be filed, but interpreting Part 61 and 62 as a whole it is clear that an application for leave in a procedural appeal must be made within the same period as the notice of appeal must be filed where no leave is required, i.e. 7 days."

[14] In light of this statement, Mr. Fay submitted that the time for filing the application for leave to appeal had expired on the 4th April 2007. CPR 62.1(2) defines a "procedural appeal" to mean "an appeal from a decision of a judge, master or registrar which does not directly decide the substantial issues in a claim." This definition excludes the particular decisions and orders listed in paragraphs (a) to (e) of CPR 62.1(2).

[15] Apart from being a procedural order, the master's order is also an interlocutory order because it arose from interlocutory applications which did not finally determine the claim before the Court. While interlocutory orders include procedural decisions and other types of interlocutory decisions, interlocutory orders are not the equivalent of procedural orders. Section 30(4) of the West Indies Associated States Supreme Court (Virgin Islands) Ordinance Cap. 80 states that:

> "No appeal shall lie without the leave of the judge or of the Court of Appeal from any Interlocutory Order or Interlocutory Judgment made or given by a Judge."

[16] It follows therefore, that a procedural appeal requires the leave of the Court; and that CPR 62.2(1) governs procedural appeals where it states:

> "If an appeal may be made only with leave of the Court below or the Court, a party wishing to appeal may apply for leave within 14 days of the Order against which leave to appeal is sought."

[1] [Civil Appeal No 33 of 2003 Re-issued 13/4/04

[17] CPR 3.2(2) states that "all periods of time expressed as a number of days are to be computed as clear days." CPR 3.2(3) explains that "clear days" means that in computing the number of days the day on which the period beings and the day on which the period ends are not included."

[18] CPR 3.2(5) states that:

> "if the period specified for doing any act at the Court office ends on a day on which the Court is closed, the act is in time if done before close of business on the next day on which the Court is open."

[19] CPR 3.2(6) regulates the time of day for doing an out of Court act where the specified period for doing the act ends on a Saturday, Sunday or any public holiday: It states that "in such circumstances, "the act must be done before 4.00pm on the next ordinary business day."

[20] In the absence of any Rule in CPR regulating the time of day for filing an application for leave to appeal, and taking into account that the period of 14 days means 14 clear days, the deadline for filing this application would be the 10th April 2007 according to my computation.

[21] The application for leave to appeal having been filed on the 10th April, 2007 is in my view timely filed in these circumstances.

[22] Counsel, Mr. Fay examined the relevant circumstances disclosed in the supporting affidavits which the master took into account before making the order. He submitted that there was no satisfactory explanation tendered by the applicants as to why it was necessary for leading counsel to appear before the master for applications that were not complex, or why leading counsel had to be absent for the hearing. He argued that since the existing evidence for the applicants was voluminous, in witness statement form, was never filed or disclosed, and the applicants had not informed the master that they intended to apply for an adjournment of the summary judgment hearing, the master was unable to make an

informed decision as to whether the evidence would give rise to the need for an adjournment. Counsel maintained that in such circumstances the master correctly distinguished between the prejudice caused by late filing of evidence and the mere inconvenience caused by late filing of skeleton arguments; and the master was entitled to conclude that service of the voluminous evidence 6 days before the 3rd April 2007, was likely to jeopardise the summary judgment hearing. Mr. Fay submitted that it would be an injustice to allow the applicants to file such evidence so close to the hearing since both parties were desirous that the summary judgment hearing proceed on the 3rd April 2007. Mr. Fay also focused on the relevant principles for granting leave to appeal a case management order. He concluded that none of the applicants' intended grounds of appeal make out a real prospect of the master's order being set aside.

Principles Applicable

[23] There are 2 central principles governing the application for leave to appeal, since it is the master's exercise of his discretion in making the order that is being challenged. The first is that permission to appeal may be given only where the appeal appears to have a realistic prospect of succeeding on appeal; or there is some other compelling reason why the appeal should be heard. A fanciful prospect is not sufficient. Lord Woolf MR. in Smith v Cosworth Casting Process[2] provides guidance in his statement that:

> "There can be many reasons for granting leave even if the Court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the Court considers should in the public interest be examined by this Court or, to be more specific, this Court may take the view that the case raises an issue where the law requires clarifying."

[24] The second well established principle as to the conditions upon which an appellate Court may interfere with the exercise of such discretion was explained by Sir

[2] [1967] 4 All ER. 840-841

Vincent Floissac, CJ. in Michel Dufour and Others v Helenair Corportion Ltd.[3] thus:

> " We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong"

[25] The learned Chief Justice pointed out that the first condition was explained by Viscount Simon LC in Charles Osenton & Co. v Johnston[4] who stated that an appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. The appellant tribunal should not reverse the order of the judge merely because that tribunal would have exercised the original discretion in a different way. However, if the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations, then the reversal of the order on appeal may be justified. The Chief Justice further noted that the second condition was explained by Asquith LJ, in Bellenden (formerly Satterthwaite v Satterthwaite)[5] in language which was approved and adopted by the House of Lords in G v G[6] Asquith LJ stated that it is of the essence of judicial discretion that on the same evidence 2 different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible and is plainly wrong, that an appellate body is entitled to interfere.[7]

---

[3] Civil Appeal No. 4 of 1995 (12th February 1996.) At pages 3-4 of the judgment
[4] [1941] 2 All ER 245 at 250
[5] [1948] 1 All ER. 343 at 345
[6] [1985] 2 All ER. 225
[7] See page 4 of the judgment. See also David Shineld and Others v Doubloon Beach Club Ltd. Civ. App. No. 33 of 2006 (St. Lucia) delivered by Rawlins J.A. 23/3/2007 at paras 14-15.

[26] More recently, since the introduction of the CPR regime, the English Court of Appeal in Royal & Sun Alliance v T & N Limited[8] has emphasised that the "….Court should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account the matters which should be taken into account, and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

[27] The master was exercising a general discretion under CPR 26.1(2)(k) which states that:

> "Except where these rules provide otherwise, the court may-
> (a) to (j)…
> (k) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed."

[28] CPR 1.2 mandates that:

> "The court must seek to give effect to the overriding objective when it-
> (a) exercises any direction given to it by the Rules; or
> (b) interprets any rule."

[29] CPR1.1(1) explains that: "The overriding objective of these Rules is to enable the court to deal with cases justly." CPR.1(2) states: "Dealing justly with the case includes-

(a) ensuring, so far as is practicable, that the parties are on an equal footing;

(b) saving expense;

(c) dealing with cases in ways which are proportionate to the-

(i) amount of money involved;

(ii) importance of the case;

(iii) complexity of the issues; and

[8] [2002] EWCA Civ. Para. 47. See also Note 52.3.8 to the UKCPR which states that "permission will be granted more sparingly to appeal against case management decisions…..The Court should also bear in mind at the [Leave] stage the high threshold which an appellant seeking to overturn a case management decision within the judge's discretion must cross."

(d) ensuring that it is dealt with expeditiously; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Conclusion

[30] Applying these relevant principles to the present case, we are of the view that this application for leave to appeal raises an important question of general application under the CPR, as to the matters which a Judge or Master should consider and weigh when deciding an application for extension of time. Consequently we grant leave to the applicants to file a procedural appeal against the order of the master, and order that the Notes of the master be produced for the hearing of the appeal. The summary judgment delivered by Charles J. dated 14th May 2007 is also stayed until the appeal is determined. The question of costs for this application is reserved.

Ola Mae Edwards
Justice of Appeal [Ag.]

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Hugh A. Rawlins
Justice of Appeal